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

AND

PURSUANT TO THE ENERGY CHARTER TREATY

NORD STREAM 2 AG

(Claimant)

vs

EUROPEAN UNION

(Respondent)

RESPONDENT'S SUPPLEMENTARY COUNTER - MEMORIAL ON ECT ARTICLE 24(3) AND THE 2024 CJEU DECISION

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9 July 2025

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1. INTRODUCTION

1. This Supplementary Counter-Memorial provides the response of the European Union ("EU") to the Claimant's Supplementary Memorial of 16 April 2025.

2. In accordance with Procedural Order No. 14, the scope of this Supplementary Counter-Memorial submission is strictly limited to the Judgement of the General Court of the European Union of 14 April 2024 (section 2) and the EU's defence under Article 24(3) of the ECT (section 3).

3. Together with this Supplementary Counter-Memorial, the European Union submits a third expert report by Ms. Serena Hesmondgalgh and Mr. Carlos Lapuerta, of the Brattle Group (the "Third Brattle report").

2. THE GC JUDGMENT OF 27 NOVEMBER 2024 MAKES A CORRECT FACTUAL AND LEGAL ASSESSMENT OF THE AMENDING DIRECTIVE

2.1. Introduction

4. On 27 November 2024, the Fifth Chamber of the General Court ("GC") of the Court of Justice of the European Union ("CJEU") (in extended composition) issued its Judgement in Case T-526/19 RENV ("Second GC Judgment").[1] This Judgment dismisses, on the merits, the entire action of the Claimant. In paragraphs 88 to 122 of its Memorial of 15 September 2020, the EU set out how exactly each of the claims in the present arbitration corresponds to the parallel pleas in the CJEU case. In the Second GC Judgment, the General Court has now addressed each of the pleas raised by the Claimant. In each instance, the General Court concluded that the pleas must be rejected on the merits. The GC's analysis of the claims was well founded in fact and in law and the GC reached sound and principled conclusions. The EU therefore invites the Tribunal to follow the GC's reasoning, dismissing all claims in the present arbitration.

5. The Claimant alleges that the Second GC Judgment was "in some key aspects manifestly and seriously wrong"[2] and has appealed the Second GC Judgment before the Court of Justice. However, the Claimant is unable to demonstrate any legal or factual errors in the Second GC Judgment. The European Union (EU) is confident that the Court of Justice will confirm the Second GC Judgment on appeal.

6. The Claimant's characterisation of the Second GC Judgment as "essentially … saying that Claimant could have expected a lex-Nord Stream 2 and that it should have accepted that by adapting its project"[3] is a gross misrepresentation of the Second GC Judgment. Nowhere does the Second GC Judgment suggest that the Amending Directive ("AD") constitutes a "lex-Nord Stream 2".

[1] See Exhibit RLA-416, Judgment of the General Court of 27 November 2024, Case T-526/19 RENV, *Nord Stream 2 AG v. European Parliament and Council of the European Union* ("Second GC Judgment").
[2] Claimant's Supplementary Memorial of 16 April 2025, para. 6.
[3] Claimant's Supplementary Memorial of 16 April 2025, para. 8.

7. To the contrary, the Second GC Judgment examines the Claimant's argument that the AD specifically target Nord Stream 2 under the fourth plea on alleged "misuse of powers", concluding that the "mere fact that the contested directive adversely affects the Nord Stream 2 pipeline cannot, in itself, be interpreted as meaning that the legislature's intention was to pursue an objective different from those referred to in Article 194(1) TFEU"[4] or "objectives other than those referred to in [the] contested directive".[5] What the Claimant calls the "real objectives" [6] of the AD is in fact its own perception of the objectives of the AD. This perception is influenced by the Claimant's apparent belief that it had a right to operate its pipeline outside the EU's legal framework when deploying activities in the EU territory, including its territorial sea. Based on a detailed and objective assessment of the facts, the General Court rejected this and dismissed all of Claimant's pleas in law as unfounded. The General Court has examined, step by step, the objectives stated in the AD,[7] also putting them in the detailed context preceding its adoption.[8] On the basis of this detailed evidentiary review, the GC in particular found the Claimant's claim of alleged breach of «legitimate expectations» to be unfounded.

2.2. <u>The Second GC Judgment is relevant because it confirms the EU's factual and legal arguments, including regarding the triggering of the fork-in-the-road clause</u>

8. The Second GC Judgment confirms the correctness of the EU's factual and legal arguments in response to the Claimant's allegations in the arbitration dispute.

9. The Claimant asks the Tribunal "to rely on the findings of the ECJ, rather than on the findings in the appealed Second GC Judgment", arguing that the ECJ Judgment of 12 July 2022 is "final and binding".[9] In doing so, the Claimant ignores the fact that the ECJ Judgment of 12 July 2022 is a judgment limited to admissibility of the Claimant's dispute before the CJEU and did not pronounce itself on the substance of the dispute.[10] The Claimant also alleges that the findings in the Second GC Judgment are "mere preliminary findings, which are subject to reconsideration by the ECJ on appeal".[11] It was wrong to do so. As the Claimant knows,[12] an appeal to the Court of Justice must be limited to points of law.[13] According to established case-law of the Court of Justice, the assessment of facts and evidence by the General Court is to be regarded as definitive.[14] The Claimant wrongly alleges that the GC made a "manifest wrong finding of facts"[15]. According to well-established

[4] Exhibit RLA-416, Second GC Judgment, para. 270.
[5] *Ibid.*, para. 271.
[6] Claimant's Supplementary Memorial of 16 April 2025, para. 7.
[7] Exhibit RLA-416, Second GC Judgment, paras. 54-75, 151, 177-180, 269-278.
[8] Exhibit RLA-416, Second GC Judgment, paras. 54-75.
[9] Claimant's Supplementary Memorial of 16 April 2025, para. 11.
[10] See EU Supplementary Reply of 4 November 2024, Section 5.1.
[11] Claimant's Supplementary Memorial of 16 April 2025, para. 12.
[12] Claimant's Supplementary Memorial of 16 April 2025, para. 17.
[13] See Exhibit RLA-422, Article 256(1) TFEU. Article 58 of the Statute of the Court of Justice (Exhibit RLA-423) provides that "*[a]n appeal to the Court of Justice shall be limited to points of law*".
[14] Exhibit RLA-421, Judgment of 20 January 2016, *Toshiba Corporation* v *Commission*, C-373/14 P, EU:C:2016:26, para. 40; Exhibit RLA-424, Judgment of 21 December 2021, *PlasticsEurope AISBL v European Chemicals Agency*, Case C-876/19 ECLI:EU:C:2021:1047 para. 69.
[15] Claimant's Supplementary Memorial of 16 April 2025, para. 17.

case-law, in order to appeal the assessment of facts, the appellant must show that the GC has manifestly exceeded the limits of a reasonable assessment of the evidence, thereby distorting the evidence. It does not suffice for the appellant to suggest an assessment of that evidence different from that adopted by the GC.[16] In the present case, the Claimant simply does not agree with the General Court's final assessment of these facts and evidence. But this is not an issue for an appeal before the Court of Justice.

10. The Claimant's extensive reliance on the Second GC Judgment also undisputably demonstrates that the fork-in-the-road clause in Article 26(3)(b)(i) ECT was triggered. The EU showed in its Memorial on Jurisdiction of 15 September 2020 that the present Tribunal lacks jurisdiction because of lack of consent:[17] the EU's consent to international arbitration under the ECT is conditional upon compliance with the fork-in-the-road clause in Article 26(3)(b)(i) ECT. Yet, at the time of fling of the ECT claim, Nord Stream 2 AG had already launched court proceedings before the CJEU challenging the AD. Accordingly, the Claimant was barred from bringing a parallel dispute before the present Arbitral Tribunal under the ECT. The Tribunal in turn lacks jurisdiction to hear this claim.

11. In its Memorial of 15 September 2020, the EU explained in detail how, irrespective of whether one applies the "same substantive basis"[18] or the "triple identity test",[19] at the time the Claimant filed its Notice of Arbitration, the Claimant had already elected to pursue the same dispute before the CJEU. Simultaneous pursuit of the same dispute in multiple fora violates the ECT fork-in-the-road clause. In those circumstances, there is no EU consent to arbitrate this dispute in an ECT arbitration.

12. It has been the EU's consistent submission that the present circumstances concern an example "par excellence" of parallel proceedings concerning the same dispute, giving rise to potentially conflicting outcomes, enabling the Claimant to have 'two bites at the apple'. It subjects the EU to a double effort to defend itself against essentially the same claims in multiple fora, contrary to the express requirements of the ECT.[20] While the Claimant has denied this to be the case, in practice, it has extensively relied on the Second GC Judgment in the present proceedings.

13. Indeed, in its emails of 2 and 18 September, 12, 19, 20, 21 and 27 November, 9 and 13 December 2024[21] the Claimant repeatedly confirmed that in its view the CJEU proceedings would determine the outcome of the present arbitration dispute, and that the Tribunal should adjust its own calendar to the pace of the CJEU

[16]Exhibit RLA-425, Judgment of 10 February 2011, *Activision Blizzard Germany v Commission*, C-260/09 P, EU:C:2011:62, para. 57, and Exhibit RLA-426, Judgment of 4 July 2013, *Commission v Aalberts Industries and Others*, C-287/11 P, EU:C:2013:445, para. 52.
[17] See Memorial on Jurisdiction of 15 September 2020, Section 2.1.
[18] See Memorial on Jurisdiction of 15 September 2020, Section 2.1.4.
[19] See Memorial on Jurisdiction of 15 September 2020, Section 2.1.6.
[20] EU Supplementary Counter-Memorial on Jurisdiction and Merits of 4 July 2024, para. 343; EU Memorial on Jurisdiction of 15 September 2020, Section 2.1.
[21] The sequence of emails, with explanation of their content (in particular the requests to comment on the Second GC Judgment), is set out in the Tribunal's Procedural Order No. 13, paras. 1-20.

proceedings. On 9 December 2024, the Claimant even asked to postpone the hearing that was planned for February 2025, arguing that the Claimant needed to develop its observations on the Second GC Judgment. The Tribunal granted the Claimant this opportunity. The Claimant's supplementary submission of 16 April 2025 on the Second GC Judgment once again confirmed that the Claimant considers the parallel CJEU proceedings to be determinative for the present arbitration, asking the Tribunal "to rely on the findings of the ECJ".[22] In short, the Claimant's own behaviour amounts to an admission that the two proceedings concern the same dispute.

2.3. The objectives of the AD are its stated objectives

14. The EU has explained[23] that the AD aims to clarify the legal framework applicable to interconnectors with third countries. It addresses the legal uncertainty that persisted previously in this regard confirming that the rules of the Gas Directive apply equally to onshore and offshore connections with third countries. The explanatory memorandum also underlines that it is best for a well-functioning gas market and to enhance security of supply to ensure that transparency and competitiveness are also applied to pipelines from third countries.[24] The EU has also explained in detail how the AD achieves these objectives.[25]

15. The Claimant once again disputes that the objectives of the AD are as set out by the EU legislators and alleges that the "GC did not question these official statements"[26] and "did not analyse the real objectives of the AD".[27] This is incorrect. The GC examined, step by step, the objectives stated in the AD,[28] putting them in the detailed context preceding its adoption.[29] The GC concluded that the aim of the AD is to "address wider problems which the applicant's project, amongst other circumstances, had helped to bring to light".[30] The fact that the Claimant's project was part of the context in which the AD was adopted does not does not bely the stated intentions of the EU legislator.[31] The GC accordingly dismissed the Claimant's allegations that the "real aim of the AD is completely

[22] Claimant's Supplementary Memorial of 16 April 2025, paras. 11 and 14.
[23] EU Counter-Memorial on the Merits of 3 May 2021, paras. 19-21, 48, 89, 93, 96-97, 111, 270-271, 298, 301, 318, 326, 330-332.
[24] See Recital (3) to the AD and the explanatory memorandum: *"The internal gas market is considered to function well when gas can flow freely between Member States to where it is needed most and at a fair price. A functioning gas market is a prerequisite for enhancing security of gas supply in the Union. Since gas is transported mainly through pipelines, the interconnection of gas networks between Member States and non-discriminatory access to these networks are the basis for the market to function efficiently. It is also a prerequisite for gas deliveries during emergencies, both between Member States and with neighbouring third countries. The EU is to large extent dependent on gas imports from third countries and it is in the best interest of the EU and gas customers to have as much transparency and competitiveness also on pipelines from those countries."*
[25] See EU Supplementary Reply of 4 November 2024, Section 6.
[26] Claimant's Supplementary Memorial of 16 April 2025, para. 20.
[27] Claimant's Supplementary Memorial of 16 April 2025, para. 22.
[28] Exhibit RLA-416, Second GC Judgment, paras. 54-75, 151, 177-180, 269-278.
[29] Exhibit RLA-416, Second GC Judgment, paras. 54-75.
[30] Exhibit RLA-416, Second GC Judgment, para. 272.
[31] Exhibit RLA-416, Second GC Judgment, paras. 270-271. See also paras. 213-218, where some particular problems that the Nord Stream 2 pipeline raises are discussed by the General Court. However, the General Court places these in the broader context of, and links them to, the objectives of the amending directive that covers all existing and future gas pipelines, whether onshore or offshore. See paras. 183-211 and 219-235.

different from the officially stated aim" or that the "AD is simply a legal fig leaf".[32] There is no reason why the Tribunal should reach a different conclusion here on the basis of highly subjective "witness statement and expert reports"[33] speculating on the alleged true intent of the AD. The EU has rebutted these statements explaining the objectives of the AD and showing how the rules of the Gas Directive achieve these objectives.[34]

2.4. It was foreseeable that the requirements of unbundling, tariff regulation and third-party access would be applied to Nord Stream 2

16. The Claimant has argued throughout these proceedings that it was not foreseeable, when it took its final investment decision and made its substantial investments in 2015, 2016 and 2017, that a profound legal change in the form of the AD would be forthcoming.

17. The evidence put forward in the Second GC Judgment proves this assertion wrong. Based on documents confirming positions publicly adopted by the Commission, the European Council, the EU Council and the European Parliament as of 2010, the General Court concluded that a duly diligent investor would easily have foreseen the application of the obligations in Directive 2009/73 to offshore pipelines entering the EU's territory, including Nord Stream 2.

18. Before addressing the individual pieces of evidence in question, it is expedient to recall the strict standard applied in the arbitral jurisprudence when it comes to the question of whether general legislation could engender a legitimate expectation that the regulatory framework will remain unchanged in the absence of specific assurances. This strict standard was already explained in detail in section 3.5.1 of the EU Counter-Memorial on the Merits of 3 May 2021.

19. In particular, the Respondent recalled that, even if legitimate expectations are protected without specific assurances inducing investments (a point the EU denies), an investor's expectations must be assessed based on the information the investor knew or reasonably ought to have known at the time of investment. As the tribunal in *Renergy SARL v.* Spain that "[…] it is not the subjective belief of the investor in question that counts. *Spain* concluded: "[…] it is not the subjective belief of the investor in question that counts. Rather, legitimate expectations are those that a prudent investor would have held. Accordingly, in principle, the assessment of legitimate expectations must be made based on the information that a prudent investor would have held at the time the investment was made, without appraising the investor's expectations with the benefit of hindsight. However, if the individual investor in question was privy to additional information

[32] Claimant's Supplementary Memorial of 16 April 2025, para. 22.
[33] Claimant's Supplementary Memorial of 16 April 2025, para. 18
[34] See EU Supplementary Counter-Memorial of 4 July 2024, Section 4.3.3 and EU Supplementary Reply of 4 November 2024, Sections 6 and 7.

not available to others, this personal information will likewise be taken into account."[35]

20. The EU demonstrated that strong indications existed at the time of the Claimant's alleged investment decision regarding the applicability of unbundling, tariff regulation, and Third-Party Access requirements—now purportedly frustrating the investment—to offshore import pipelines like Nord Stream 2. This was evident due to both the Gas Directive's applicability and EU competition law.[36]

21. Furthermore, direct evidence from that period, notably a Prospectus published by Gazprom itself in October 2015 that explicitly addresses the Nord Stream 2 Pipeline Project,[37] demonstrates the Claimant's full awareness that the Third Gas Directive would likely apply to Nord Stream 2.[38]

22. In this Prospectus, the Claimant's parent Gazprom informs investors "that the implementation of the Third Gas Directive could negatively affect the timing and prospects of [Gazprom's] gas transportation projects". The Prospectus acknowledges that "in the absence of a special permission granted in accordance with the EU laws, it may not be possible for [Gazprom] to own and control gas transportation assets in Europe." This admission flatly belies the Claimant's assertion 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".[39]

23. The Prospectus reveals that lessons had been drawn from publicly available information regarding the Third Gas Directive's applicability to the offshore section of the South Stream Pipeline project, which, as the Claimant accepts, would have been an offshore pipeline to the same extent as Nord Stream 2,[40] with "a subsea pipeline from Russia under the Black Sea making landfall on the Bulgarian coast".[41] Concerns as to the applicability of the original Gas Directive to South Stream in its entirety were one of the reasons for the cancellation of the project in 2014 and its substitution for an alternative project, the Turkish Stream pipeline. Indeed, the Prospectus informs the reader that the expectation that the Third Gas Directive would apply to the South Stream Project contributed to the latter's cancellation.[42]

24. Evidence suggests that when it came to the Nord Stream 2 pipeline, the Claimant pursued a different strategy than cancelling the project, again in full knowledge of the likelihood that the Third Gas Directive would apply.

[35] Exhibit RLA-427, RENERGY S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/14/18, para 638.
[36] See EU Counter-Memorial on the Merits of 2 May 2021, sections 2.2.2 – 2.2.4.
[37] See Public Joint Stock Company Gazprom Programme for the Issuance of Loan Participation Notes. Base Prospectus of October 1, 2015. The Irish Stock Exchange, p. 14; https://www.ise.ie/debt_documents/Base%20Prospectus_df7bcf97-61df-490e-a492-6e7ba158cb35.pdf. Exhibit R-206.
[38] See EU Rejoinder on the Merits & Reply Memorial on Jurisdiction of 22 February 2022, section 3.4.
[39] Claimant's Supplementary Memorial of 16 April 2025, para. 36.
[40] According to the Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 93, South Stream and Nord Stream 1 are "both offshore pipelines".
[41] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 81 point i.
[42] See EU Rejoinder of 22 February 2022, para 138.

25. [redacted] None of this makes the EU measure compensable under the ECT. To the contrary, it confirms that the Claimant lacked any legitimate expectations.[43]

26. [redacted]

27. This interpretation is flawed on multiple grounds.

28. Primarily, an investor would not typically adjust contractual relations specifically to account for a regulatory event perceived as unlikely. [redacted]

29. Secondly, Gazprom and its wholly-owned subsidiary, NSP2AG, possessed congruent, rather than divergent, financial interests in this scenario. [redacted]

30. [redacted] demonstrates its awareness, at the time of the FID, that the Directive was likely to apply. On this basis alone, the Claimant's claim of alleged legitimate expectations stands to be rejected.

31. The remainder of this section examines the evidence that the General Court relied upon to conclude that a diligent investor would have anticipated the application of unbundling, tariff regulation, and third-party access requirements to offshore

[43] See EU Supplementary Reply on the Merits of 4 November 2024, Point 3.4.

import pipelines, such as Nord Stream 2. It further explains why the Claimant's Supplementary Memorial fails to cast doubt on these findings. (The relevant paragraphs of the Second GC Judgment are referenced in in bold).

32. **Paragraph 56**: The General Court points out that Recital 22 of Directive 2009/73 already explained that security of energy supply was an essential element of public security and inferred from this that persons from third countries should be allowed to exercise control over a transmission system or a transmission system operator only if they complied with the unbundling requirements applicable inside the European Union. In the same recital, the Commission was also encouraged, where appropriate, to submit recommendations with a view to negotiating relevant agreements with third countries addressing the security of energy supply in the European Union.

33. The Claimant's contention[44] that the reference in Recital 22 "is to internal EU pipeline networks" is contradicted by a literal reading of the Recital, which refers to "persons from third countries" and "agreements […] with third countries".

34. It is further refuted by its purpose. No recital in the Gas Directive would have been required to clarify that EU law applies to internal EU pipelines. It goes without saying that EU law applies within the EU. Rather, to make sense of the security of supply concerns expressed, the recital must be read as pointing to the applicability of the Directive to pipeline networks entering the Union from a third country and being controlled by third country operators. It is with regard to such pipeline networks that security of supply concerns may arise.

35. **Paragraph 57**: The General Court notes that already in 2010, the Commission, in response to questions put by the Russian Minister for Energy, made it known, in essence, that gas pipelines between a Member State and a third country were subject to the obligations laid down by Directive 2009/73 in the territory of that Member State, unless there was a modification of the legal framework by an international agreement.[45]

36. The Claimant asserts that this 2010 Commission statement is contradicted by the Commission's answer to "question 7, Annex B 6"[46].

37. The Respondent cannot adequately respond to this claim until the Claimant clarifies which Annex B 6 it refers to.

38. [redacted]

[44] Claimant's Supplementary Memorial of 16 April 2025, fn. 17.
[45] Commission 2010 statements in response to questions put by the Russian Minister for Energy referred to in the Second GC Judgment, Exhibit R-474, Commissioner Guenther H. Oettinger's Letter to Minister Shmatko, 30 June 2010. Exhibit R-475, Reply to Questions from Mr Shmatko on the third Package 29 June 2010.
[46] Claimant's Supplementary Memorial of 16 April 2025, fn. 16.

39. This is contradicted by the legal assessment that the Claimant's parent Gazprom made of the South Stream Pipeline project, which, as the Claimant itself accepts, would have been an offshore pipeline like Nord Stream 2.[47] The project was abandoned after the Commission clarified that the Gas Directive would apply to it, including its offshore parts (see above, para. 23).

40. **Paragraph 58**: The General Court points out that the Parliament and the Council, in recital 3 of their Decision No 994/2012/EU of 25 October 2012 establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy, explained in its 3rd recital that "[t]he proper functioning of the internal energy market requires that the energy imported into the Union be fully governed by the rules establishing the internal energy market."[48]

41. The Claimant contends[49] that this reference does not suggest extending the Gas Directive to offshore sections of import pipelines. [redacted]

42. These interpretations are directly contradicted by the wording in recital 3 of Decision No 994/2012/EU, which explicitly governs all energy imported into the Union and makes no distinction between onshore and offshore pipeline sections. The Decision's third recital further underscores that the comprehensive applicability of EU rules to import pipelines arises from fundamental security of energy supply concerns. Such concerns are intrinsically unaffected by whether the energy-transporting pipelines into the EU are offshore or onshore. Both EU law and most other regulatory jurisdictions[50] address these very concerns by requiring the unbundling of gas sales (import) from the associated pipeline infrastructure.

43. **Paragraph 59**: The General Court points out that in December 2013, a Commission representative publicly expressed the Commission's view that the intergovernmental agreements concluded by several Member States with the Russian Federation concerning a project for a gas pipeline called 'South Stream', which was to link Russia to Italy and Austria via the Black Sea and for which certain construction work had started, did not comply with the obligations laid down in Directive 2009/73, in this way confirming the Commission's position that the project fell within the scope of application of the Directive.[51]

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[47] According to the Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 93, South Stream and Nord Stream 1 are "both offshore pipelines".
[48] Exhibit R-101, Decision No 994/2012/EU of the European Parliament and of the Council of 25 October 2012 establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy, OJ L 299, 27.10.2012.
[49] Claimant's Supplementary Memorial of 16 April 2025, fn. 18.
[50] The Respondent already explained that unbundling has become a cross-sectoral and global policy approach to address the anti-competitive practices to which all network-bound industries are prone. As with the European Union, many other countries around the world, including Russia, have adopted unbundling measures. See EU Counter Memorial on the Merits of 3 May 2021, para. 690 and the evidence cited.
[51] Exhibit R-23, Statement by the Commissioner for Energy of 31 March 2014 in reply to a question by the European Parliament related to the applicability of Directive 2009/73 to the South Stream project, published in the OJ 5.9.2014, C 300/290.

44. The assertions made by the Claimant[52] [redacted] that the December 2013 Commission statement pertained solely to the onshore sections of the envisioned South Stream Pipeline lacks any substantiation. As with Nord Stream 2, the proposed South Stream Pipeline, as a subsea pipeline from Russia under the Black Sea making landfall on the Bulgarian coast, would have comprised offshore sections (see above, para 23). From a legal standpoint, distinguishing between onshore and offshore sections is moot, as offshore sections, being constructed within the territorial waters of EU Member States, are equally situated on EU territory as onshore sections.[53] Gazprom initiated the Nord Stream 2 project immediately thereafter. It is impossible to conclude that the Claimant had no basis to expect to be regulated.

45. The strong reaction of the Russian deputy minister for energy Anatoly Yankovski[54] would also be difficult to explain if he had interpreted the December 2013 Commission Statement as relating only to pipeline segments as from the Bulgarian coastal terminal. [55] Rather, concerns as to the applicability of the original Gas Directive to South Stream in its entirety were a reason for the cancellation of the project in 2014 and its substitution for an alternative project, the Turkish Stream pipeline.[56]

46. **Paragraph 60**: The General Court recalls that in response to a parliamentary question, the Commissioner for Energy stated on 31 March 2014 that the Commission would examine the decisions of the national regulatory authorities adopted following a request for exemption under Article 36 of Directive 2009/73 made by the promoters of the South Stream project.[57]

47. The Claimant[58] [redacted] posit that the reference to the South Stream project, despite its onshore and offshore sections, should be interpreted as applying solely to onshore interconnectors between two Member States. This claim is as misplaced as the one concerning the December 2013

[52] Claimant's Supplementary Memorial of 16 April 2025, fn. 21.
[53] The Claimant does not contest that the territorial sea is an integral part of the territory of a State, in which a State's jurisdiction is fully applicable in accordance with basic principles of international law. See, in this regard, European Union Counter-Memorial on the Merits, 3 May 2021, para. 139. In this regard, the Claimant solely questions the number of km of the Nord Stream 2 pipeline that are in German territorial waters (53 km according to the Claimant). See Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 83.
[54] According to press reports, Mr Yankovksi delivered a prepared speech shortly after Mr Borchardt's 2013 Statements stating that Russia would not accept that EU rules should apply to transboundary projects such as pipelines. See, for instance, South Stream bilateral deals breach EU law, Commission says https://www.euractiv.com/section/competition/news/south-stream-bilateral-deals-breach-eu-law-commission-says/ (Exhibit R-21).
[55] According to the Claimant's account, such an applicability as of the coastal terminal of an EU Member State was the EU's steady practice regarding other pipelines; see Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 87, 88.
[56] See Public Joint Stock Company Gazprom Programme for the Issuance of Loan Participation Notes. Base Prospectus of October 1, 2015. The Irish Stock Exchange, p. 14; https://www.ise.ie/debt_documents/Base%20Prospectus_df7bcf97-61df-490e-a492-6e7ba158cb35.pdf.
[57] Exhibit R-23, Statement by the Commissioner for Energy of 31 March 2014 in reply to a question by the European Parliament related to the applicability of Directive 2009/73 to the South Stream project, published in the OJ 5.9.2014, C 300/290.
[58] Claimant's Supplementary Memorial of 16 April 2025, fn. 21.

Commission statement discussed in the preceding paragraph. Nothing in the statement suggested application merely to onshore interconnectors.

48. **Paragraph 61:** The General Court notes that in its Communication to the Parliament and the Council of 28 May 2014, entitled 'European Energy Security Strategy', the Commission stressed that, in the short term, new infrastructure investments, encouraged by dominant suppliers, must comply with all internal market and competition rules. In particular, the Commission stated that the South Stream project should be suspended until full compliance with EU legislation was ensured and re-evaluated in the light of the EU's energy security priorities.[59]

49. [redacted] This contention has been refuted as unsubstantiated and unconvincing above (see above, paras 42 and 44).

50. **Paragraph 62:** The General Court points out that in its Communication to other EU institutions of 25 February 2015, entitled 'A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy'[60], the Commission stated that an important element in ensuring energy security is full compliance with EU law of agreements related to the purchase of energy from third countries.

51. The Claimant[61] [redacted] assert that this Communication pertains solely to gas supply/purchase agreements rather than specifically to the regulation of gas import pipelines.

52. These assertions are incorrect. The Communication's focus is the application of EU energy rules to ensure security of supply, which inherently includes gas transmission networks. The Communication of 25 February 2015 concerns all agreements (between private operators and IGAs) regarding the import of gas, which includes agreements about the building and operation of import pipelines, given that EU energy law concerns essentially the regulation of infrastructure (ie. pipelines).

53. **Paragraph 63:** The General Court points out that on 15 March 2015, the Commission expressed its intention to make the operator of the Polish section of the Yamal-Europe pipeline, which transports gas from Russia, subject to the obligations laid down in Directive 2009/73.[62]

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[59] Exhibit R-315, Communication from the Commission to the European Parliament and the Council, "European Energy Security Strategy", 28 May 2014, 5WD(2014)330 final.
[60] Exhibit R-98, Commission Communication of 25 February 2015 to other EU institutions entitled A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy.
[61] Claimant's Supplementary Memorial of 16 April 2025, fn. 19.
[62] Exhibit R-28, Commission Statement of March 2015 relating to the applicability of Directive 2009/73 to the Polish section of the Yamal-Europe pipeline referred to in the Second GC Judgment, Governance of the internal energy market

54. The Claimant contends[63] that this reference applies exclusively to the onshore section of the Yamal pipeline located in Poland and has no bearing on offshore import pipelines. Similarly, [redacted]

55. These arguments are flawed as they offer no justification for subjecting onshore and offshore pipeline segments to disparate regulatory regimes, particularly when both are situated within areas where Member States exercise sovereign rights (see above, para. 44) Furthermore, Yamal Europe is an import pipeline whose first connection to the domestic Polish gas transmission network is in the centre of Poland (south of Warsaw).[64] Hence, the several 100 km of this pipeline between the point where Yamal Europe crosses the border between Belarus and Poland and the first connection point with the Polish gas network are in the exact same situation as the stretch of Nord Stream 2 within the German territorial sea.

56. **Paragraph 64:** In its resolution 2015/2113(INI) of 15 December 2015, entitled 'Towards a European Energy Union', the European Parliament noted that the European Union was heavily dependent on imports of energy from Russia, which had proven to be an unreliable partner and had used its energy supplies as a political weapon. It added that the 2006 and 2009 gas disputes between Russia and Ukraine, a transit country, had resulted in severe shortages in many EU countries. According to the Parliament, those disruptions showed that the measures taken so far had been insufficient to eliminate the reliance on Russian gas. It therefore called on the Commission to enforce EU law in order to avoid distortions of the internal market.

57. The Claimant[65] argues that this reference pertains to gas supply, not the regulation of offshore pipelines. Similarly, [redacted]

58. The distinction between gas supply and the regulation of offshore pipelines appears nowhere in the Parliament's resolution 2015/2113(INI) of 15 December 2015. At the time, gas from third countries was predominantly supplied via import pipelines. The heavy dependence on Russian energy imports, which the Resolution lamented, would have been significantly exacerbated by the Nord Stream 2 Pipeline project, to which the Resolution refers. It was evident to any duly diligent investor that the regulation of gas imports required regulating gas import infrastructure.

[63] Claimant's Supplementary Memorial of 16 April 2025, fn. 20.
[64] See, EU Rejoinder on the Merits & Reply Memorial on Jurisdiction of 22 February 2022, para 95.
[65] Claimant's Supplementary Memorial of 16 April 2025, para 15.

59. **Paragraph 65:** The General Court points out that in its conclusions of 18 December 2015 (EUCO 28/15),[66] the European Council indicated that any new infrastructure should be fully in line with the 'Third Energy Package' and other legislative provisions applicable in the European Union, as well as with the European Union's energy objectives.

60. The Claimant[67] contends that this was merely a "very general discussion" that in no way suggested the foreseeability of the AD, much less that the Claimant would be targeted by legislative change. According to the [redacted]

61. These assertions disregard the institutional character of the European Council and the nature of the acts it adopts. As the body comprising EU Member States' heads of state or government, alongside the Presidents of the European Council and Commission, it decides unanimously, and its conclusions reflect the *results* of discussions, not the discussions themselves. As to their content, the European Council conclusions of 18 December 2015 explicitly required any new energy infrastructure to comply with EU energy rules, particularly the Third Energy Package. This decision, taken at the highest level of EU Member States' representation, unequivocally indicated that the Nord Stream 2 Pipeline, then planned as new energy infrastructure, would be subject to the Third Energy Package.

62. In light of the foregoing, the General Court correctly concluded in **paragraph 66** that, between 2009 and 2015, several EU institutions had consistently advocated for applying internal energy market rules to all pipelines connecting a Member State with a third country. Given their direct relevance to gas pipeline imports from Russia, the associated security of supply concerns, and the necessity of subjecting such pipelines to the Third Energy Package rules, any claim that these statements were unrelated to the Nord Stream 2 pipeline is demonstrably incorrect.

63. Consequently, no investor exercising the 'rigorous due diligence' required by case law[68] could have reasonably expected in 2015 that their Nord Stream 2 pipeline investment would escape the application of these EU rules.

64. **Paragraph 69**: The General Court points out that on 15 December 2015, the Commissioner for Energy publicly explained that the applicant's project was required fully to comply with EU competition law. He added that the European Union would support only infrastructure projects which comply with the European Union's fundamental principles on energy. That Commissioner made a similar

[66] Exhibit R-458.
[67] Claimant's Supplementary Memorial of 16 April 2025, para 26.
[68] See EU Memorial on the Merits of 3 May 2021, para 516.

public statement on behalf of the Commission on 21 January 2016.[69] **Paragraph 71**: The General Court points out that on 6 April 2016 at a conference which took place in Parliament and which concerned 'Nord Stream II – Energy Union at the crossroads', the Vice-President of the Commission stated that the construction of an infrastructure project as important as the Nord Stream 2 pipeline could not be carried out in a legal vacuum, nor could it be operated exclusively in accordance with Russian law.[70] In that regard, it stated that, if it were constructed, the Nord Stream 2 pipeline would have to be operated within a legal framework which took into account the key principles of the EU energy market. **Paragraph 72:** The General Court points out that at the beginning of 2017 Members of the European Parliament asked the Commission to take urgent measures concerning the Nord Stream 2 project.[71]

65. Rather than addressing the implications of the above discussed pieces of evidence, the Claimant[72] simply dismisses them as "political discussions" occurring after its FID was supposedly irreversible. Yet, the Claimant offers no proof whatsoever that its September 2015 investment decision was truly irreversible by December 2015 or April 2016 (see below, section 2.5). Furthermore, the assertion that these were mere "political discussions" that offered no hint of the legal situation or impending legal change is false. The statements in question reflect official legal views from within the European Commission, the body specifically tasked with ensuring EU rules are applied or made applicable to the Claimant's project.

66. Public statements by the European Commissioner for Energy, who oversees compliance with EU Energy rules, that Nord Stream 2 must fully comply with EU competition law and principles of EU energy law can hardly be dismissed as mere "political discussion". This is particularly true when those statements were preceded by analogous statements by the European Parliament and the European Council and echoed shortly thereafter by the Commission's Vice-President and members of the European Parliament, which acts as a co-legislator in the field of energy. Against this backdrop, the Claimant's assertion that there were no suggestions "that a change in law was being planned or contemplated"[73] in the context in which it took its FID is demonstrably false.

67. The Claimant fails to explain why the allegedly numerous expert commentaries expressing surprise at the Third Gas Directive's application to Nord Stream 2 (of which the Claimant only managed to find the two cited in para 34, fn. 29 of its Supplementary Memorial of 16 April 2025) should possess greater evidential weight than official statements from EU institutions indicating this applicability well before the AD was adopted. In reality, these official statements were referenced

[69] Exhibit R–459.
[70] Exhibit R-147, Speech by Vice-President Maroš Šefčovič on "Nord Stream II – Energy Union at the crossroads" Brussels, 6 April 2016.
[71] Exhibit R-468, Request by Members of the European Parliament of 2017 that the Commission take urgent measures concerning the Nord Stream 2 project.
[72] Claimant's Supplementary Memorial of 16 April 2025, paras 30-32.
[73] Claimant's Supplementary Memorial of 16 April 2025, para 32.

in expert commentaries, which anticipated the legislative change long before it occurred.[74]

68. **Paragraph 77:** The General Court notes that at the end of March 2017, the Commission recalled that there were difficulties with the Nord Stream 2 pipeline and announced that it was in the process of drawing up a draft mandate for the attention of the Council with a view to it being authorised to negotiate with the Russian Federation on the operation of that pipeline. On 15 May 2017, the Commissioner in charge of energy publicly stated on behalf of the Commission that "the Commission will seek a mandate from the Council to negotiate an agreement with Russia that will apply key principles of the European Union energy acquis to Nord Stream 2".[75] **Paragraph 78:** The General Court points out that on 9 June 2017, the Commission publicly announced, by press release, that it had requested a mandate from the Member States to negotiate an IGA on the Nord Stream 2 pipeline with the Russian Federation.[76]

69. The Claimant alleges that the Commission's proposal to negotiate an IGA was no sign of a forthcoming legislative change as it is a different measure than the AD.[77] This is unconvincing. The Claimant's alleged legitimate expectations are premised on an unforeseeable "profound legal change"[78] of the rules applicable to its investment. No such legitimate expectations can exist where, as here, a duly diligent investor could have known that the requirements of unbundling, tariff regulation and third-party access would be applied to offshore import pipelines such as Nord Stream 2. Whether the investor could have expected such requirements to result from the AD or apply by virtue of intergovernmental agreements (or any other means) is irrelevant. Regardless of the means, the outcome would be the same and entirely foreseeable.

70. It was clear to the Claimant that the IGA proposed by the Commission would result in comparable obligations on the Nord Stream 2 project as the AD. When taking the FID regarding NS2, the Claimant was well aware that the bilateral intergovernmental agreements signed between Russia and several EU transit countries (like Bulgaria, Hungary, Greece, Slovenia, Croatia, and Austria) concerning South Stream 2 had been found to be in breach of EU law, as they did not adhere to the Third Energy Package. In an article published by Politico.eu on December 5, 2013 ("South Stream must be renegotiated – Commission") a spokeswoman for EU Energy Commissioner Gunther Oettinger was quoted stating, "It's very clear that every pipeline project has to respect European legislation...

[74] Exhibit R-470, Marek Szydło, 'Disputes over the pipelines importing Russian gas to the EU: how to ensure consistency in EU Energy Law and Policy?' Baltic Journal of Law & Politics, 11:2 (2018): 95– 126; and Exhibit R-471, Alan Riley, 'A Pipeline Too Far? EU Law Obstacles to Nordstream 2', Forthcoming in International Energy Law Review, March 2018.
[75] Exhibit R-460.
[76] Exhibit C-89, Commission press release of 9 June 2017 regarding a mandate requested from the Member States to negotiate an agreement on the Nord Stream 2 pipeline with the Russian Federation.
[77] Claimant's Supplementary Memorial of 16 April 2025 para 33.
[78] Claimant's Supplementary Memorial of 16 April 2025 para 23.

we have advised these member states to renegotiate these IGAs."[79] It explicitly lists the three following violations: Gazprom managing pipelines and providing gas, Gazprom being the only one using pipelines, and an unfair tariff structure.

71. In an attempt to counter the evidence presented by the General Court, the Claimant points to its own investment decision and the decisions of the five EU financial investors in the NS2 project.[80] These investment decisions, it argues, should itself serve as proof of legitimate expectations, as no rational investor would commit to a multi-billion dollar undertaking if confronted with the prospect of unbundling, third-party access, and tariff regulation requirements. Concurrently, the [redacted]

72. This reasoning is circular. It would allow investors to claim protection for any investment merely by asserting a prior expectation of profitability, which was, in turn, proven by a costly investment decision. Such a proposition is clearly inconsistent with the necessary limitations of investment protection under the ECT.

73. Rather, alternative more likely explanations elucidate cast light on why the Claimant and co-investors elected to proceed with the Nord Stream 2 Project despite clear indications that it would be subjected to EU energy rules: first, the strategic gamble that a completed pipeline would establish a fait accompli, thereby exerting political leverage to preclude regulatory intervention; second, an internal assessment indicating the project's financial viability despite the high probability of unbundling, third-party access, and tariff regulation requirements applying to it;[81] and thir, an element of imprudence.

74. Finally, the [redacted]

75. The contrary is true. The exchange shows that the highest official in charge of Energy at the European Commission took the view that the Gas Directive did apply to Nord Stream 2. More precisely, in its letter to Mr Homann of 24 February 2017,[82] Dominique Ristori states: "The Nord Stream 2 project concerns an offshore pipeline that enters EU jurisdiction when crossing the jurisdictional border of the respective Member State. In order to ensure a coherent and practicable framework along the entire route, some key principles should therefore be agreed, such as:

[79] Exhibit R-472, Commission statement of 5 December 2013 as reported in Politico on December 5, 2013.
[80] Claimant's Supplementary Memorial of 16 April 2025, para 37.
[81] e.g., a reorganization of the Gazprom group in accordance with Article 9(6) of the Gas Directive, such as conferring control over the gas producer and the transmission system operator to distinct public entities within the Russian Government.
[82] Exhibit C-97.

• appropriate transparency in pipeline operation; • non-discriminatory tariff-setting; • an appropriate level of non-discriminatory third party access; • a degree of legal separation between activities of supply and transmission."

2.5. The Claimant could have reversed its project after the FID or bears the responsibility for rendering it irreversible

76. The Second GC Judgment states in paragraph 96 that "on the date of the proposal for [the AD], 8 November 2017, the actual construction of the Nord Stream 2 gas pipeline, namely, inter alia, the laying of pipes on the bottom of the Baltic Sea, had not yet begun."

77. This finding is not disputed by the Claimant, whose alleged "substantial economic investments into developing Nord Stream 2" (second Roberts Report, Point 21) prior to its construction remain wholly unsubstantiated.[83]

78. However, the Claimant contends that in November 2017 and even already as of 2016, when the Commission announced that the Nord Stream 2 project would be subjected to the rules and principles of the EU energy market, it would have been impossible for the Claimant to pause, terminate or amend the agreements concluded to implement its Nord Stream 2 investment. Similarly, [redacted]

79. These contentions, which have already been refuted in the EU's previous submissions,[84] are based on the following arguments: [redacted]

80. These arguments are unconvincing.

81. First, concerning the timeline, the General Court has established that, despite the Claimant's claim that the FID was made in September 2015, "other evidence in the case file suggests that that decision was taken, not in September 2015, but in 2016, and then implemented from spring 2017".[85] [redacted]

[83] It is implausible that major economic investments into developing Nord Stream 2 were made prior to its construction because the physical design and capacity of Nord Stream 2 was similar to Nord Stream 1, which had already been built when the FID regarding Nord Stream 2 was taken.
[84] See, in particular EU Counter memorial paras 242 et seq. and paras 257 et seq. EU Rejoinder paras 399 et seq and para. 416; EU Supplementary Counter-Memorial para. 153 and EU Supplementary Reply paras 83 et seq. para 130; paras 137 et seq. paras 143 et seq.
[85] Second GC Judgment, para. 52.

[redacted]

82. The aforementioned dates demonstrate that the Claimant could reasonably have taken into account public indications regarding the applicability of EU energy rules to Nord Stream 2 at least until mid-2017. Consequently, the Claimant's assertion[86] that public statements made between December 2015 and April 2016, indicating the applicability of the AD to Nord Stream 2 should be deemed irrelevant because they occurred after the FID is untenable.

83. Second, the [redacted] As with NSP2AG, Gazprom Export is owned and controlled by Gazprom. All these entities are part of the same corporate group, which is ultimately controlled by the Russian Government; and all of them constitute effectively a single economic and decisional unit.[87] Any failure by Gazprom to agree with the Claimant on any necessary modifications to the existing contractual arrangements would, therefore, be entirely attributable to the Claimant.

84. Third, the Claimant's argument that no mechanism for interruption, suspension, or renegotiation was included in [redacted] operates against its own case. Even granting, for argument's sake, that the Third Gas Directive's application to Nord Stream 2 seemed improbable at the time of the FID—a point that was refuted above —it is indisputable that the Claimant possessed knowledge of indications suggesting its applicability. As previously explained, [redacted]

85. [redacted]

[86] Claimant's Supplementary Memorial of 16 April 2025, para 30.
[87] See Respondent's Supplementary Reply on Merits of 4 November 2024, section 2.2; EU Rejoinder, section 6.3.
[88] See the case law referred to in EU Rejoinder of 2 February 2022, paras 516 and 522.

[redacted]

86. Fourth, the Claimant has provided no evidence that NSP2AG [redacted]. Such amendments would have been necessary to adapt the Nord Stream 2 investment project to the announced applicability of the Gas Directive or, subsequently, to comply with the Amending Directive's requirements as transposed and implemented by Germany. [redacted] This absence of evidence strongly suggests the assertion that renegotiating the finance agreements was impossible is a self-serving argument.

87. On the contrary, the available evidence points to the opposite conclusion. [redacted]

88. As the EU has already pointed out in its Counter-Memorial[90] it bears emphasising that the Financial Investors are not financial entities. They are energy companies. Their interest in the NS2 pipeline goes well beyond obtaining an adequate financial remuneration on the funds supplied to NSP2AG. They became Financial Investors because, as energy companies, they had a major strategic interest in the success of the NS2 pipeline, so as to gain additional access to supplies of Russian gas. Indeed, the initial expectation was that the Financial Investors would become shareholders in NSP2AG.[91]

89. It is uncontested that the Financing Investors would be open to modifying contracts if it aligned with their commercial interests. Triggering the Claimant's bankruptcy would be far less commercially appealing to these investors than agreeing to adjustments that would enable the pipeline to operate in compliance with the Gas Directive.

90. Recent evidence, specifically the "composition agreement" reached with the Claimant, demonstrates the Financing Investors' readiness to adapt. This agreement, which prevented the Claimant's liquidation, clearly indicates their preference for modifying terms to accommodate evolving circumstances and facilitate the pipeline's operation, rather than forcing its closure.

[89] Filed as Exhibit C-190 by the Claimant.
[90] See EU Supplementary Counter-Memorial of 4 July 2024, para. 247.
[91] See [redacted] Statement, para. 37.

2.6. The AD contributes to security of energy supply and competition in the EU

91. The EU has explained in detail the contribution the AD makes to the objectives stated in the AD.[92] In the Second GC Judgment of 27 November 2024, the General Court examined this question and concluded, after a careful examination of the evidence before it, that the AD is indeed an appropriate and proportionate means to achieve these objectives.

92. The Second GC Judgment first rejects the allegation that the AD was disproportionate.[93] According to the GC, while the AD has a general objective to ensure the functioning of the internal market of the EU, it also has more specific objectives which include preventing distortions of competition and negative impacts on the security of supply, establishing consistency of the legal framework, and providing legal certainty to market participants.[94] The GC found that these "are clearly legitimate objectives".[95] The GC also found that the AD is appropriate to achieve all these objectives.

93. The Second GC Judgment notably held that the AD is appropriate for attaining the objectives of legal certainty and consistency of the EU legal framework, by confirming that the obligations laid down by Directive 2009/73 apply to the section of offshore gas pipelines between a Member State and a third country passing though the territorial waters of a Member State, such as the section of the Nord Stream 2 gas pipeline passing through German waters. The AD therefore filled a legal vacuum,[96] as the EU explained in the present proceedings.[97] The AD is also appropriate for ensuring consistency by ensuring a uniform application of the obligations in the Directive.[98]

94. The Second GC Judgment also found that, as explained by the EU in the present proceedings,[99] the AD is appropriate for preventing distortions of competition and negative impacts on security of supply.[100] The Judgment stresses that this is "irrespective of the length of the section of the pipeline or pipelines between a Member State and a third country covered by the obligations laid down by Directive 2009/73".[101] The application of such obligations to pipelines between a Member State and a third country, and to the Nord Stream 2 pipeline in particular, appropriately achieves the "objective of completing the internal market in natural

[92] See EU Supplementary Counter-Memorial of 4 July 2024, Section 4.3.3 and EU Supplementary Reply of 4 November 2024, Sections 6 and 7.
[93] Exhibit RLA-416, Second GC Judgment, Section IV.B.4.
[94] Exhibit RLA-416, Second GC Judgment, paras. 178-179.
[95] Exhibit RLA-416, Second GC Judgment, para. 180.
[96] Exhibit RLA-416, Second GC Judgment, para. 188.
[97] EU Rejoinder of 2 February 2022, paras. 207, 222, 289, 581; EU Supplementary Reply of 4 November 2024, para. 179.
[98] Exhibit RLA-416, Second GC Judgment, paras. 189-194.
[99] EU Memorial on the Merits of 3 May 2021, Section 2.1; EU Rejoinder of 4 February 2022, Section 2; EU Supplementary Memorial of 4 July 2024, Sections 4.3.3 and 4.4; EU Supplementary Reply of 4 November 2024, Sections 6, 7 and 8.
[100] Exhibit RLA-416, Second GC Judgment, paras. 196-235.
[101] Exhibit RLA-416, Second GC Judgment, para. 199.

gas by avoiding distortions of competition and negative impacts on security of supply".[102]

95. The Second GC Judgment in this way rejects unambiguously the Claimant's argument that the AD serves no purpose. In fact, the GC reviews in detail how the obligations imposed by the AD, in particular those concerning unbundling, certification under Articles 10 and 11 of the Gas Directive, third party access, and tariff and non-tariff transparency serve a necessary purpose in this context.[103] In doing so, the GC confirms the submissions of the EU in the present proceedings.[104]

96. The GC also considers the particular context in which the Nord Stream 2 pipeline project was launched (where Member States faced gas shortages due to disputes involving the Russian Federation)[105] and finds that the Claimant's project was likely to result in a concentration of gas sources and entry points, not contributing to security of supply.[106] The EU's arguments, also based on the Brattle expert reports, are thus, once again, confirmed.[107] The Second GC Judgment repeats that the AD applies not only to existing pipelines, but also to future ones, whether onshore or offshore and that there is no automaticity in obtaining a derogation or exemption.[108]

97. The GC concludes by examining whether the AD exceeds the limits of what is necessary. It rejects the arguments by the Claimant, also made in the present proceedings,[109] that it would be sufficient to regulate the first point of entry into the EU.[110] The GC also explains that the fact that the Claimant did not benefit either from an Article 36 exemption or from an Article 49a derogation does not lead to the conclusion that the AD exceeds the limits of what is necessary in order to attain the objectives which it pursues.[111] The Claimant continued to make investments in a context when the application of the EU rules was foreseeable – in essence deliberately undermining its own ability to seek an Article 36 exemption[112] - and that, in any event, any difference in treatment is objectively justified.[113]

98. The fact that the Claimant cannot operate the Nord Stream 2 pipeline as it had initially envisaged does not demonstrate that the AD imposes disproportionate

[102] Exhibit RLA-416, Second GC Judgment, para. 199.
[103] Exhibit RLA-416, Second GC Judgment, paras. 201-211.
[104] EU Memorial on the Merits of 3 May 2021, Section 2.1; EU Rejoinder of 4 February 2022, Section 2; EU Supplementary Memorial of 4 July 2024, Section 4.3.3 and Annex II; EU Supplementary Reply of 4 November 2024, Sections 6.1 and 6.2.
[105] Exhibit RLA-416, Second GC Judgment, paras. 212-213.
[106] Exhibit RLA-416, Second GC Judgment, paras. 214-118.
[107] EU Supplementary Memorial of 4 July 2024, Section 4.3.3 and Section 4.4; EU Supplementary Reply of 4 November 2024, Sections 7 and 8.
[108] Exhibit RLA-416, Second GC Judgment, paras. 219-235.
[109] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 258.
[110] Exhibit RLA-416, Second GC Judgment, paras. 237-241.
[111] Exhibit RLA-416, Second GC Judgment, paras. 243-263.
[112] Exhibit RLA-416, Second GC Judgment, paras. 244.
[113] Exhibit RLA-416, Second GC Judgment, paras. 245.

constraints on it.[114] The GC refers to, inter alia, the three unbundling models;[115] the fact that there is still a significant capacity that the Claimant can reserve on the Nord Stream 2 pipeline under the applicable rules;[116] the fact that tariff regulation does not prevent an appropriate return on investments;[117] and the Claimant's failure to demonstrate that it is impossible to renegotiate the gas transportation agreement, especially given that it was concluded with a subsidiary of the Claimant's sole shareholder[118]. All these findings, and the supporting reasoning, confirm the EU's position in the present proceedings.[119]

99. The Claimant asserts that these findings and reasoning are "irrelevant and wrong".[120] To this end, the Claimant turns again to its argument that the "Claimant is not involved in supply tasks of gas"[121] and that the EU confuses the "gas supplier with the gas transporter".[122]

100. The EU has already explained that an essential competition problem that the Gas Directive seeks to address is the possibility that the owner of a gas transport network who is also controlling gas production and supply activities abuses this position to distort competition.[123] Independent and non-discriminatory operation of networks contributes to efficient market functioning and to security of supply in the EU as a whole.[124] There is no reason to assume that this problem may not arise in relation to third country interconnectors. Contrary to what the Claimant suggests,[125] the AD does impact the owner of the NS2 pipeline – Gazprom – and in particular restricts ways in which Gazprom could rely on this pipeline to distort competition and security of supply in the EU.[126] The Claimant's denial of the links between itself and Gazprom is simply not credible.[127]

101. The Claimant further argues that the GC incorrectly referred to the Judgment in Case C-718/18 because that case, allegedly, concerns "internal EU pipelines".[128] The Claimant errs. The Court of Justice in that case pointed to the risks to

[114] Exhibit RLA-416, Second GC Judgment, paras. 246-263.
[115] Exhibit RLA-416, Second GC Judgment, para. 247. See also EU Supplementary Memorial of 4 July 2024, paras. 46, 237 and 316; EU Supplementary Reply of 4 November 2024, para. 197; EU's Memorial on the Merits of 3 May 2021, paras. 202-205.
[116] Exhibit RLA-416, Second GC Judgment, para. 249. See also EU Supplementary Reply of 4 November 2024, para. 281.
[117] Exhibit RLA-416, Second GC Judgment, paras. 251-252. See also EU Supplementary Reply of 4 November 2024, para. 281.
[118] Exhibit RLA-416, Second GC Judgment, paras. 253-255. See also EU Memorial on the Merits of 3 May 2021, Section 2.3.6; EU Rejoinder of 22 February 2022, paras. 400-412, 465.
[119] See the references to the EU Memorials in the preceding footnotes.
[120] Claimant's Supplementary Memorial of 16 April 2025, para. 49.
[121] Claimant's Supplementary Memorial of 16 April 2025, para. 48.
[122] Claimant's Supplementary Memorial of 16 April 2025, para. 50.
[123] See also the European Commission's decision practice and jurisprudence of the Court of Justice cited in para. 304 of the European Union's Supplementary Counter-Memorial on Jurisdiction and Merits of 4 July 2024.
[124] See Section 6.2 of the EU's Supplementary Reply of 4 November 2024.
[125] Claimant's Supplementary Memorial of 16 April 2025, para. 50.
[126] See the examples discussed in Section 4.3.3.1 of the EU Supplementary Memorial of 4 July 2024 as well as Section 6.2 of the EU Supplementary Reply of 4 November 2024.
[127] The European Union recalls that, as explained in Section 6.5 of the EU Rejoinder on the Merits and again in Section 3.4 of the EU Supplementary Memorial of 4 July 2024, that the Claimant is de facto indissociable from both Gazprom (and other subsidiaries of Gazprom such as GIP and Gazprom Export) and the Russian Government.
[128] Claimant's Supplementary Memorial of 16 April 2025, para. 53.

undistorted competition resulting from the same undertaking owning the production and transmission facilities. The Court of Justice did refer to the effects that anti-competitive behaviour by undertakings outside the European Union may have within the European Union.[129]

102. The Claimant further argues that third-party access is "highly theoretical" and that "underwater connections to offshore import pipelines" are not economically feasible.[130] The GC did not, however, refer to "underwater connections". Rather, the GC explained that the current situation is not static and may change: the application of the unbundling requirement together with the obligation of third-party access guarantees the possibility of third country access.[131] Because of these obligations, Gazprom will not necessarily remain the only gas supplier shipping through the Claimant's pipeline. Indeed, from now on, a third party must be permitted to obtain a connection to the section of the pipeline that is subject to EU rules[132]. Moreover, the GC also explains that compliance with the unbundling obligation must be verified as part of the certification procedure for TSOs, under Article 10 of Directive 2009/73, and the examination (in the context of certification), under Article 11 of the Directive, of the risks that the pipeline may pose to security of supply in the EU.[133]

2.7. Swiss Economics' analysis is deeply flawed and the Third Brattle Report demonstrates that NS2 pipeline provides a risk to security of supply and competition

103. The Claimant submits an expert report by Swiss Economics ("Fourth SE Report"), arguing that the AD has "no impact on security supply nor on competition".[134] The European Union has already demonstrated in detail how the AD contributes to the stated objectives and refers to its earlier submissions.[135] In response to this Fourth SE Report, the European Union also submits a third expert report by Brattle ("Third Brattle Report"). The conclusions of this Third Brattle Report are summarised hereafter.

104. On the basis of the Fourth SE Report, the Claimant argues that the "focus on gas supply and Gazprom in this case is misplaced".[136] The EU has again addressed this argument in paragraph 100 above, with references to its earlier submissions. The Third Brattle Report also explains, with examples, that Gazprom had incentives and the ability to abuse an unregulated NS 2 pipeline.[137]

[129] See Exhibit RLA-417, Judgment of 2 September 2021, *Commission v Germany*, C-718/18, EU:C:2021:662, paras. 37-39.
[130] Claimant's Supplementary Memorial of 16 April 2025, para. 54.
[131] Exhibit RLA-416, Second GC Judgment, paras. 201-205 and 205-206.
[132] Exhibit RLA-416, Second GC Judgment, para. 207.
[133] Exhibit RLA-416, Second GC Judgment, paras. 203-205.
[134] Claimant's Supplementary Memorial of 16 April 2025, Section II.7.
[135] See EU Supplementary Counter-Memorial of 4 July 2024, Section 4.3.3 and EU Supplementary Reply of 4 November 2024, Sections 6 and 7.
[136] Claimant's Supplementary Memorial of 16 April 2025, para. 64.
[137] Third Brattle Report, Section I.

105. [redacted] Brattle explains that this is illogical and unrealistic. There was no signed agreement as of May 2019. In September 2019, Naftogaz assumed no future transit, and in late October 2019 the Vice-President of the European Commission noted a lack of progress in negotiations regarding future transit.[139] Brattle also explains, with reference to the First Brattle Report, that it was not true that LNG imports in the EU increased quickly in response to supply curtailments by Gazprom.[140]

106. The Third Brattle Report also addresses the arguments in the Fourth SE Report purporting to show that the NS 2 pipeline would not harm competition in the EU internal market. More specifically, [redacted]

107. The Third Brattle Report confirms that the Fourth SE Report's assessment of Gazprom's market share is incorrect. SE has defined the market inappropriately and used data from the wrong years. The result is an understatement of Gazprom's market shares.[143]

108. Further, the Third Brattle Report provides concrete examples of how Gazprom has abused its dominance.[144] Brattle explains that possible abuse by Gazprom involves the use of the NS 2 pipeline to raise the risk of US LNG and points to a study showing how the costs for US LNG projects would increase as a result of NS 2.[145] Brattle also points out that the actual abuse that Gazprom made of its position showed that it attracted entry by LNG, which did not arrive sufficiently quickly to bring prices back to previous levels. Gazprom's more severe abuse confirms the possibility of the lesser abuse involving NS 2.[146] Brattle also explains, on the basis of factual data, that Gazprom found it highly profitable to curtail European gas supplies.[147]

109. The Fourth SE Report then turns again to the Claimant's argument that the AD does not contribute to security of supply and competition.[148] The EU refers again

[138] Claimant's Supplementary Memorial of 16 April 2025, paras. 65-66.
[139] Third Brattle Report, Section II.
[140] Ibid.
[141] Claimant's Supplementary Memorial of 16 April 2025, paras. 67-68.
[142] Claimant's Supplementary Memorial of 16 April 2025, paras. 69-70.
[143] See Third Brattle Report, paras. 14-16 and 20-23.
[144] Third Brattle Report, Section III.
[145] Ibid.
[146] Ibid.
[147] Third Brattle Report, paras. 17-19.
[148] Claimant's Supplementary Memorial of 16 April 2025, paras. 72-76.

to its rebuttal in this regard.[149] The Third Brattle Report also explains that, in order to address security of supply and competition concerns, it was reasonable to apply the Gas Directive to the NS 2 pipeline. It was also reasonable to apply the AD to the portion of NS 2 pipeline in German waters. Doing so would require NS2 to charge cost-reflective tariffs just like the UGTS. Those tariffs would give transparency to the costs of the entire pipeline. Tariffs and unbundling requirements would deter the abuse of NS 2 by facilitating its detection.[150] Further, applying the AD to NS 2 made its construction conditional on unbundling and transparency measures, which were not "drastic" as claimed by SE. Rather, they would facilitate monitoring, detecting and preventing the abuse of the NS 2 pipeline.[151]

2.8. The General Court did not "circumvent" conclusions of the ECJ

110. The Claimant alleges that the Second GC Judgment was "detached from the clear interpretation of the AD by the ECJ".[152] According to the Claimant, "Art 36 and Art 49a of the AD must not be assessed separately".[153]

111. The Second GC Judgment in fact set out a combined analysis of Articles 36 and 49a. The GC examined the alleged discriminatory treatment granted to the Claimant's pipeline project under Article 49a,[154] concluding that gas pipelines completed before 23 May 2019, on the one hand, and pipelines not completed before that date, including the Claimant's pipeline project, were not in a comparable situation,[155] and that, in any event, any difference in treatment was justified.[156]

112. However, the GC did not stop there: immediately thereafter it continued examining whether the "*contested directive is appropriate for achieving the objectives it pursues and does not exceed the limits of what is necessary to attain them,* ***in that the Nord Stream 2 gas pipeline is the only gas pipeline between a Member State and a third country which cannot benefit either from the exemption provided for in Article 36, as amended, or from the derogation provided for in Article 49a***".[157] The General Court then examined in detail whether the AD was appropriate for attaining the objectives pursued in so far as the Claimant cannot benefit from either an exemption or a derogation,[158] as well as whether the limits of what is necessary are not exceeded in that the Claimant cannot benefit from either an exemption or a derogation.[159]

[149] See EU Supplementary Counter-Memorial of 4 July 2024, Section 4.3.3 and EU Supplementary Reply of 4 November 2024, Sections 6 and 7.
[150] Third Brattle Report, para. 4.
[151] Third Brattle Report, para. 13.
[152] Claimant's Supplementary Memorial of 16 April 2025, para. 77.
[153] Ibid., para. 78.
[154] Exhibit RLA-416, Second GC Judgment, Section IV.B.3.
[155] Ibid., para. 142.
[156] Ibid., paras. 153, 154 and 164-167.
[157] Ibid., para. 181 (emphasis added).
[158] Ibid., Section IV.B.4(a).
[159] Ibid., Section IV.B.4(b).

3. THE AMENDING DIRECTIVE MEETS THE REQUIREMENTS OF ARTICLE 24(3) ECT

3.1. Introduction

113. In its Supplementary Memorial and Supplementary Rejoinder, the European Union submitted, in the alternative, that, were the Tribunal to find that the Amending Directive is inconsistent, in principle, with Articles 10(1) or 10(7) of the ECT, *quod non*, the Amending Directive meets the requirements of the general exceptions for "public order" and/or for "essential security" measures in Article 24(3)(a)(ii) and (c) ECT, respectively.

114. In in its Supplementary Memorial of 15 April 2025, the Claimant argues that "Art. 24(3) is not applicable"[160]. Here below, the European Union sets out its rebuttal to the Claimant's various objections to the EU's invocation, in the alternative, of Article 24(3) ECT.

3.2. Article 24(3) ECT does provide an exception to *inter alia* Articles 10(1) and 10(7) of the ECT

115. The Claimant argues that "Article 24(3) ECT does not apply to the investment protection obligations of the ECT"[161]. According to the Claimant, Article 24(3) ECT "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"[162].

116. The Claimant's position is plainly contradicted by the explicit and unequivocal wording of Article 24(3) ECT.

117. Article 24(3) ECT is part of Article 24 ("Exceptions"). By its own terms, Article 24(3) ECT is an exception to all the provisions of the ECT, other than those specifically mentioned in Article 24(1) ECT. This is made clear by the *chapeau* of Article 24(3) ECT, which refers to "the provisions of this Treaty other than those referred to in paragraph (1)". Paragraph (1) of Article 24 in turn states that "this Article shall not apply to Articles 12, 13 and 29".

118. Thus, in accordance with its *chapeau*, Article 24(3) ECT does not apply to Articles 12 and 13. On the other hand, Article 24(3) ECT does apply to all the provisions of Part III not mentioned in Article 24(1) ECT, including, therefore, with regard to NSP2AG's claims under Articles 10(1) and 10(7) ECT.

3.3. The Claimant's contention that Article 24(3) ECT must be interpreted in a "narrow and restrictive manner" is baseless

119. The Claimant alleges that Article 24(3) ECT "must be interpreted in a narrow and restrictive manner"[163]. According to the Claimant, this "follows from the reference in Art. 31 of the Vienna Convention to the 'object and purpose' of the treaty". The Claimant invokes an alleged "general principle that exceptions to treaty obligations

[160] Claimant's Supplementary Memorial on ECT Article 24(3) and the 2024 CJEU Decision, heading of section III.
[161] Ibid., heading of section III.2.
[162] Ibid., para. 93
[163] Ibid., para. 96

should be interpreted narrowly"[164] and refers to the award in *Enron v Argentina*[165] as supporting this allegation[166].

120. Contrary to the Claimant's assertion, there is no "general principle" of international law whereby exceptions should be "interpreted narrowly". The Claimant relies on only one authority in support of this proposition, which upon examination makes no reference to the alleged general principle (an excerpt from an article by Schill and Briesse, Exhibit CLA-349[167]).

121. Article 24(3) ECT stands to be interpreted in accordance with the general rules of interpretation in Articles 31 and 32 VCLT, as with any other provision of the ECT.

122. There is nothing in the text of Article 24(3) ECT, or in its context, which may suggest that Article 24(3) ECT must be interpreted "in a narrow and restrictive manner". To the contrary, the use of explicit self-judging language in the *chapeau* of Article 24(3) ECT ("…which it considers necessary…") attests to the parties' intention to accord ample deference to the invoking party. This reflects the overriding importance of the specific interests protected by that exception ("essential security" and "public order"), which are at the core of each party's sovereignty. No similar language is found in any of the other exceptions under Article 24 ECT.

123. The Claimant observes that one of the objects and purposes of the ECT is "to protect investments"[168]. However, as explained in detail by the European Union[169], the ECT pursues a plurality of objects and purposes which must be reconciled and interpreted in a harmonious manner, including the objective to ensure security of supply[170]. Moreover, all the ECT's objects and purposes, including the objective to protect investors, must be pursued "within the framework of State sovereignty and sovereign rights over energy resources"[171], which include the right to regulate for legitimate policy purposes[172].

124. The Claimant's reliance on the award in *Enron v Argentina* is misplaced. That award concerned Article XI of the Argentina-United States BIT, a provision which does not include any self-judging language, unlike the *chapeau* of Article 24(3) ECT. Moreover, as will be recalled below, the ICSID *Ad Hoc* Committee in *Enron v Argentina* found that the tribunal in that case had misapplied that provision by unduly conflating its requirements with those of the customary international law defence of state of necessity[173].

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[164] Ibid., para. 99. See also para 105.
[165] Exhibit CLA-97.
[166] Claimant's Supplementary Memorial on ECT Article 24(3) and the 2024 CJEU Decision, para. 97.
[167] Ibid., para. 97 and footnote 99.
[168] Ibid., para. 96.
[169] EU's Supplementary Reply on Merits, paras. 288-294.
[170] Ibid., para. 293, referring to European Energy Charter, Preamble, recital 12.
[171] Ibid., para. 294, referring to European Energy Charter, Preamble, recital 14; Title II, para. 2.
[172] Ibid., para. 294.
[173] Exhibit RLA-418, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic (30 July 2010), para. 405.

3.4. WTO jurisprudence is relevant for the interpretation of Article 24(3) of the ECT. That jurisprudence clearly contradicts the Claimant's interpretations

125. The Claimant concedes that Article 24(3) ECT is "clearly inspired" by the security exceptions of the WTO Agreements[174]. Nevertheless, the Claimant goes on to argue that the jurisprudence relating to those exceptions is irrelevant. The Claimant suggests that this is so because, allegedly, the WTO Agreements pursue a different objective and provides for a different remedy[175].

126. The ECT's subject matter, and its objectives, overlap with those of the WTO Agreements. Moreover, the Claimant overlooks that Article 24(3) ECT applies to both Part II ("Commerce") and Part III ("Investment Promotion and Protection") of the ECT and that Part III provides for both State-to-State dispute settlement (SSDS) and Investor-to-State dispute Settlement (ISDS). Therefore, the distinctions which the Claimant purports to make would require interpreting the exceptions in Article 24(3) ECT very differently depending on whether, in each dispute, that provision is invoked in relation to Part II or Part III, and on whether it is raised under SSDS or ISDS.

127. The Claimant observes that some of the WTO panel reports cited by the European Union have been appealed "into the void" and, consequently, have not been adopted by the WTO Dispute Settlement Body[176]. Unadopted panel reports carry less authority than adopted ones. It is for this reason that the European Union focused on the adopted panel report in *Russia-Traffic in Transit*[177]. But this does not mean that unadopted reports are irrelevant. In any event, all the WTO panel reports cited by the European Union support the EU's position.

128. The Claimant further argues that the WTO panel reports cited by the European Union support the Claimant's own interpretation of Article 24(3) ECT[178]. As will be discussed below, this is simply not true. Those WTO panel reports clearly contradict the Claimant's core contentions, such as, for example, that the terms "essential security interests" or "public order" must be narrowly construed, or that the invoking party must show that the measures are "necessary" within the meaning of Article 25 of the ILC Articles on State Responsibility, despite the self-judging language of the *chapeau* ("… which it considers necessary…").

129. Lastly, the Claimant stresses that "the relevant comparators" are decisions by investment tribunals dealing with similar provisions[179]. However, as discussed below, the Claimant then seeks to rely on awards relating to Article 25 of the ILC Articles on State Responsibility and/or to security exceptions such as Article XI of the Argentina-United States BIT, which differ fundamentally from Article 24(3) ECT because they do not include any self-judging language. The most "relevant

[174] Claimant's Supplementary Memorial on ECT Article 24(3) and the 2024 CJEU Decision, paras. 91 and 94.
[175] Ibid., paras. 94-95.
[176] Ibid., paras. 155-156.
[177] Exhibit RLA-380, Panel report, *Russia – Traffic in Transit*.
[178] Claimant's Supplementary Memorial on ECT Article 24(3) and the 2024 CJEU Decision, para. 157 ff.
[179] Ibid., para. 95.

comparator" is the award in *Seda v Colombia*[180] because it concerns a security exception that is very similar to Article 24(3) ECT. As explained by the European Union[181], the tribunal in *Seda v Columbia* acknowledged this similarity and relied largely on the interpretation of Article XXI of the GATT made by the panel in *Russia-Traffic in Transit*.

3.5. The European Union has exercised good faith when "considering" that the measure is "necessary"

130. The Claimant alleges that the European Union "has not observed good faith"[182] when "considering" that the measures at issue are "necessary" for the protection of its essential security interests and public order.

131. In essence, the Claimant puts forward three arguments. First, according to the Claimant, the European Union's invocation of Article 24(3) ECT "came late"[183]. Second, the Claimant asserts that the European Union breached the obligation of good faith by "targeting" the Claimant[184]. Third, the Claimant alleges that, at the time of its adoption, the Amending Directive did not meet the requirements of Article 25 of the ILC Articles on State Responsibility[185]. In particular, the Claimant asserts that, between 2014 and 2019, "the threat of weaponization of energy supplies by Russia was purely hypothetical"[186].

132. As regards the first argument, the European Union recalls that it invoked Article 24(3) ECT in response to allegations made by the Claimant following the CJEU Judgment of 12 July 2022. The European Union has shown that the Claimant misunderstands the meaning and relevance of that Judgment[187]. The European Union has further demonstrated, in the alternative, that even if that CJEU Judgment supported the Claimant's own reading of the Amending Directive (*quod non*), it would remain that the Claimant's claims of discrimination are unfounded, as confirmed by subsequent developments[188]. In the further alternative, the European Union has argued that, in any event, the Amending Directive meets the requirements under Article 24(3) ECT. Therefore, the EU's invocation of Article 24(3) ECT did not "come late". In any event, the Claimant has had ample opportunity to respond to this alternative defence both in its Supplementary Rejoinder of 2 September 2024 and in its Supplementary Memorial of 16 April 2025.

133. As regards the second argument, the European Union has shown that the Amending Directive does not "target" or otherwise discriminate against the

[180] Exhibit RLA-379, *Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Award, 27 June 2024.
[181] EU's Supplementary Reply on Merits, paras. 300, 305, 309-310.
[182] Claimant's Supplementary Memorial on ECT Article 24(3) and the 2024 CJEU Decision, heading of section III.4.
[183] Ibid., para. 108.
[184] Ibid., para. 110.
[185] Ibid., paras. 113-114, 117, 119, 122.
[186] Ibid., para. 95.
[187] See EU's Supplementary Reply on Merits, Section 5; EU' Supplementary Counter-Memorial, Section 4.1.
[188] EU's Supplementary Counter-Memorial, Sections 4.2-4.4; EU's Supplementary Reply on Merits, Section 7.

Claimant[189]. In any event, the evidence of alleged "targeting" adduced by the Claimant clearly shows that the objections to the NS 2 project expressed by the Commission, the European Parliament and many Member States were prompted by legitimate concerns about the threats to competition and security of supply posed by the NS 2 project. Therefore, the evidence of alleged "targeting" invoked by the Claimant contradicts, rather than supports, the Claimant's allegations that the EU's invocation of Article 24(3) ECT is not in good faith.

134. Lastly, the Claimant's reliance on Article 25 of the ILC Articles on State Responsibility is wholly inapposite. The European Union has not invoked the customary international law defence of state of necessity. Instead, the European Union has invoked exclusively the specific treaty exception set out in Article 24(3) ECT. That exception is very different in content and operation from the defence of state of necessity. Article 24(3) ECT is subject to specific requirements, which are very different from those of the defence of state of necessity. Therefore, the requirements of Article 25 of the ILC Articles on State Responsibility do not apply under Article 24(3) ECT[190].

135. The Claimant is making the same mistake as the arbitration tribunals in several investment arbitration cases of the early 2000s against Argentina. Those tribunals read the stringent requirements of the plea of necessity under customary international law into the essential security exception (Article XI) of the BIT between Argentina and United States. By doing so they unduly conflated two distinct legal norms, despite the *lex specialis* nature of the treaty-based provision.

136. The awards in three of those cases (*CMS v. Argentina, Enron v. Argentina, and Sempra v. Argentina*, all of which have been relied upon by the Claimant in this arbitration) were subsequently annulled by ICSID *Ad hoc* committees on the basis of, *inter alia*, the tribunal's failure to distinguish the two legal standards[191].

137. In CMS v. Argentina, the *Ad hoc* Committee elaborated on the difference between the pleas of necessity under customary international law and a treaty-based essential security exception as follows:

> […] Article XI specifies the conditions under which the Treaty may be applied, whereas Article 25 is drafted in a negative way: it excludes the application of the state of necessity on the merits, unless certain stringent conditions are met. Moreover, Article XI is a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply. By contrast, Article 25 is an excuse

[189] European Union's Counter Memorial, section 2.4; European Union's Rejoinder, section 4.
[190] Exhibit R-459, Jorge Vinuales, 'Defence Arguments in Investment Arbitration' (2020) ICSID Reports, 18, pp. 9–108. doi:10.1017/9781107447455.002, at p. 26.
[191] Exhibit RLA-419, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Ad hoc Committee on Argentina's Application for Annulment of the Award, 25 September 2007; Exhibit RLA-420, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Argentine's Application for Annulment of the Award, 29 June 2010; Exhibit RLA-418, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Argentine's Application for Annulment of the Award, 30 July 2010.

> which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations.
>
> Furthermore, Article XI and Article 25 are substantively different. The first covers measures necessary for the maintenance of public order or the protection of each Party's own essential security interests, without qualifying such measures. The second subordinates the state of necessity to four conditions. It requires for instance that the action taken "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", a condition which is foreign to Article XI. In other terms the requirements under Article XI are not the same as those under customary international law as codified by Article 25, as the Parties in fact recognized during the hearing before the Committee. On that point, the Tribunal made a manifest error of law[192.]

138. The differences observed by the *Ad Hoc* committee in *CMS v Argentina* are even greater in the present case because, unlike Article XI of the Argentina-United States BIT, the *chapeau* of Article 24(3) ECT includes the wording "which it considers necessary".

139. As explained by the European Union, by virtue of that wording, a party invoking Article 24(3) ECT is not required to show that a measure is objectively "necessary"[193], let alone that it meets what the Claimant itself describes as the "very high threshold"[194] of Article 25 of the ILC Articles on State Responsibility. Instead, as confirmed by previous investment arbitration awards and WTO panel reports, all that the invoking party is required to show is that that the measures at issue "meet a minimum requirement of plausibility in relation to the proffered … interests, i.e. that they are not implausible as measures protective of these interests".[195]

140. The European Union has explained how the Amending Directive contributes to protecting the essential security and public order interests which it has identified[196]. The Claimant has failed to engage with that explanation, let alone shown that the nexus described by the European Union is "implausible". Instead, the Claimant seeks to read into Article 24(3) ECT the "very high threshold" of Article 25 of the ILC Articles on State Responsibility for establishing the necessity of a measure, thereby rendering the self-judging language of the *chapeau* of Article 24(3) ECT a complete nullity.

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[192] Exhibit RLA-419, *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Ad hoc Committee on Argentina's Application for Annulment of the Award, 25 September 2007, paras. 129- 30. See also Exhibit RLA-420, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Argentina's Application for Annulment of the Award, 29 June 2010, para. 200; and Exhibit RLA-379, *Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Award, 27 June 2024, paras. 674-682.

[193] EU's Supplementary Reply on Merits, paras. 298-301 and 307-310.

[194] Claimant's Supplementary Memorial on ECT Article 24(3) and the 2024 CJEU Decision, para. 113.

[195] Exhibit RLA-380, Panel report, *Russia – Traffic in Transit*, para. 7.138. See also, Exhibit RLA-379, *Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Award, 27 June 2024, paras. 652-655

[196] EU's Supplementary Reply on Merits, paras. 327-335 and 355-358.

141. The Claimant's allegation that the "there is no contemporaneous evidence before the Tribunal showing that Respondents had such considerations in mind when the AD was developed"[197] is incorrect and disingenuous. As explained by the European Union[198] both the recitals and the Explanatory Memorandum of the Amending Directive make it very clear that the Amending Directive was aimed at promoting security of supply and competition, in line with the general objectives of Article 194(1) TFEU[199]. The recitals and the Explanatory Memorandum do not refer to the threats posed specifically by the NS 2 pipeline because the Amending Directive is a generally applicable legislative act that creates a general framework for assessing any possible threats to competition and security of supply from each and every interconnector, whether existent or future, and not just from the NS 2 pipeline. Those threats must be assessed on a case-by-case basis by the competent authorities of the Member State concerned. The European Union has raised the Article 24(3) ECT defence in the alternative, i.e. in case the Tribunal were to agree with the Claimant's allegation that, *de facto*, the Amending Directive "targeted" the NS 2 pipeline. As mentioned above, the evidence of alleged "targeting" invoked by the Claimant shows that, prior to the adoption of the Amending Directive, the EU institutions and many Member States were legitimately concerned about the threats to competition and security of supply posed by the NS 2 project. The Claimant cannot have it both ways: it is contradictory for the Claimant to allege that the NS 2 pipeline was "targeted" *de facto* based on that evidence and, at the same time, that considerations relating to the threats to competition and security of supply posed by the NS 2 project played no role in the adoption of the Amending Directive.

142. Lastly, the Claimant's unsupported assertion that, between 2014 and 2019, "the threat of weaponization of energy supplies by Russia was purely hypothetical"[200] is manifestly wrong. As shown by the European Union[201], there is ample evidence that the Russian Government has a long history of using Gazprom as an instrument to advance its foreign policy objectives. Prior to 2014 Gazprom had interrupted supplies of gas due to disagreements with Ukraine in 2006[202] and again in 2009[203]. Following Russia's illegal annexation of Crimea and incursion in the Donbass region in 2014, supplies were disrupted again and the risk of further weaponization became even greater.

143. More specifically, in 2006, several European countries reported a cutback of gas deliveries due to reduced feeding-in from Russia. The drop was considerable: Hungary was reported to have lost up to 40% of its Russian supplies; Austrian,

[197] Claimant's Supplementary Memorial on ECT Article 24(3) and the 2024 CJEU Decision, para. 112.
[198] European Union's Counter-Memorial, Section 2.1; EU's Supplementary Counter-Memorial, Section 4.3.3; EU's Supplementary Reply on Merits, Sections 6.1.5, 6.2 and 7.
[199] EU's Supplementary Reply on Merits, para. 328 and European Union's Supplementary Counter-Memorial, Section 4.3.3.1.
[200] Clamant's Supplementary Memorial on ECT Article 24(3) and the 2024 CJEU Decision, para. 116.
[201] EU's Rejoinder, para. 486 ff, and evidence cited therein.
[202] EU's Supplementary Counter-Memorial, para. 283 and footnote 241, and evidence cited therein.
[203] Ibid.

Slovakian and Romania supplies were down by one third, France and Italy by 25-30% and Poland by 14%[204]. The International Energy Agency observed that "the dispute and consequent interruptions did cause serious concerns over security of supply and gas dependence on Russia in many European countries"[205].

144. In January 2009, Russia cut off all gas supplies transiting through Ukraine for two weeks, leading to the largest interruption of gas supply in EU history. This came at a time of very high peak gas demand in Western and Central Europe, with the coldest weather in two decades. The gas disruptions resulted in the most serious gas supply crisis to hit the EU in its history until 2022, depriving EU Member States of 20% of their gas supplies (30% of imports). A total of 12 Member States and Member Countries of the Energy Community were affected, and there were significant economic repercussions in a number of EU Member States[206].

145. After 2014, the risk of weaponization of supplies was exacerbated by the open conflict between Russia and Ukraine, which would eventually lead to Russia's full-scale invasion of Ukraine in February of 2022.

146. In April 2014, President Putin declared in an open letter that Europe faced an increasing risk of a new gas supply crisis and threatened to halt gas supplies to Ukraine[207]. Gazprom then increased prices for Ukraine and another dispute between Gazprom and Naftogaz led to the disruption of supplies to Ukraine on 16 June 2014. Some EU Member States tried to supply Ukraine by reselling gas purchased from Russia, but Russia, as a retaliation measure, cut supplies to Poland, Slovakia, Romania and Austria, which eventually reduced or halted the reverse flow towards Ukraine.[208]

147. In May 2014 the European Commission adopted a Communication on Energy Security Strategy, which noted that "the most pressing energy security of supply issue is the strong dependence from a single external supplier"[209] (i.e. Russia) and that "in view of current events in Ukraine and the potential for disruption to energy supplies, short term action must focus on those countries that are dependent on one single gas supplier"[210] (i.e. Russia). Following that communication, the European Commission launched a stress-test exercise with the purpose of assessing the resilience of the European gas system to cope with a severe disruption of gas supply to the EU "against the background of the situation in Ukraine and the possible related risk of a disruption in gas supplies to the EU"[211].

[204] Exhibit R-460, Stern, J. (2006), "Natural Gas Security Problems in Europe: The Russian-Ukrainian Crisis of 2006", Asia-Pacific Review 13, 32-59
[205] Exhibit R-461, International Energy Agency, 2006, Towards a Global Gas Market, p. 25.
[206] Exhibit R-462, European Commission, 16.7.2009, SEC(2009) 977, "The January 2009 Gas Supply disruption to the EU: an assessment {COM(2009) 363}
[207] Exhibit R-464, "Message from the President of Russia to the leaders of several European countries".
[208] Exhibit R-458, De Micco (2014): "A cold winter to come? The EU seeks alternatives to Russian gas", European Parliament, Directorate-General for External Policies, Policy Department
[209] Exhibit R –315, Communication from the Commission to the European Parliament and the Council, "European Energy Security Strategy", 28 May 2014, 5WD(2014)330 final, p. 2.
[210] EU's Supplementary Counter-Memorial, para. 283 and footnote 241, and evidence cited therein.
[211] Exhibit R – 8, Communication from the Commission to the European Parliament and the0 Council of 16 October 2014 on the short term resilience of the European gas system, "Preparedness for a possible disruption of supplies from the East during the fall and winter of 2014/2015", COM (2014) 654 final.

The covered scenarios were the disruption of the Ukrainian gas transit route, as well as the disruption of all Russian gas flows to Europe[212].

3.6. The European Union has identified its "essential security interests" in good faith

148. The Claimant alleges that "no essential security interests were at risk" when the Amending Directive was adopted"[213]. According to the Claimant, the term "essential security interests" must be interpreted "narrowly"[214] because Article 24(3) ECT is an exception and because those terms are not part of the *chapeau* of Article 24(3) ECT[215]. The Claimant suggests that the "essential security interests" covered by Article 24(3) are exclusively of "military nature"[216]and argues that there was no situation of war, armed conflict or emergency in international relations "affecting the EU" when the Amending Directive was adopted[217]. The Claimant further argues that it must be shown that the concerns invoked by the European Union "reflected the unanimous position of the EU Member States"[218].

149. The Claimant's assertion that the term "essential security interests" must be interpreted "narrowly" has no basis whatsoever in the text of Article 24(3) ECT, or in its context, and is not supported by any relevant authority. As explained above, the mere fact that Article 24(3) ECT is an exception does not imply that it must be interpreted "narrowly."

150. The Claimant makes much of the fact that the terms "essential security interests" are not located within the text of the *chapeau* of Article 24(3) ECT, unlike in the case of Article XXI(b) of the GATT, but in the sub-paragraphs that follow the *chapeau*. However, the obvious explanation for this is that the former provision is broader and covers two other grounds, in addition to the protection of essential security interests, which are not addressed by the latter (cf. letters b) and c) of Article 24 (3)(a) ECT). Cramming all three grounds within the *chapeau* would have rendered the text of Article 24(3) ECT far too dense and difficult to read. Hence the listing of each of those grounds in a separate sub-paragraph as a matter of simple clear legal drafting. But the syntactical and logical connection between the *chapeau* of Article 24(3) and the terms "essential security interests" is the same as in Article XXI(b) of the GATT.

151. The Claimant's suggestion that the "essential security interests" covered by Article 24(3)(a) are exclusively of "military nature"[219] overlooks that, as explained by the European Union[220], the circumstances described under items i) and ii) of Article 24.3 (a) are preceded by the term "including". That term confirms that

[212] Ibid.
[213] Claimant's Supplementary Memorial on ECT Article 24(3) and the 2024 CJEU Decision, heading of section III.5.
[214] Ibid., para. 134.
[215] Ibid., para.124.
[216] Ibid., para. 127.
[217] Ibid., para. 133.
[218] Ibid., para. 129.
[219] Ibid., para. 127.
[220] EU's Supplementary Counter-Memorial, para. 312.

those circumstances do not purport to be exhaustive and that a Contracting Party may, therefore, consider it necessary to protect "essential security interests" arising from other situations.

152. The term "including" does not appear in Article XXI(b) of the GATT. Therefore, the scope of "essential security interests" in Article 24(3)(a) ECT is broader, and not narrower, than in Article XXI(b) of the GATT. For that reason, the Claimant's attempt[221] to distinguish *Seda v Colombia* from the present case fails. Indeed, the observation made by the tribunal in *Seda v Colombia,* on the basis of certain textual differences between Article 22.2 (b) of the US-Colombia Trade Promotion Agreement and Article XXI(b) of the GATT,[222] cannot be extrapolated to Article 24(3)(a) ECT, which, by virtue of the term "including", has a broader coverage.

153. As explained by the European Union[223], when interpreting similarly worded security exceptions, previous investment arbitration awards and WTO panel reports have accorded a broad margin of deference to the invoking party for defining its essential security interests. Of course, as observed by the panel in *Russia-Traffic in Transit*, this does not mean that a party "is free to elevate any concern to that of an essential security interest"[224]. Rather, as noted by the same panel, "the discretion of a Member to designate particular concerns as 'essential security interests' is limited by its obligation to interpret and apply [the security exception] in good faith"[225]. The Claimant has failed to show that the European Union has not exercised that discretion in good faith.

154. The Claimant cannot contest the obvious fact that there was a situation of war or armed conflict, or at least an international emergency in international relations, between Russia and Ukraine since at least 2014, following Russia's illegal annexation of Crimea and incursion in the Donbass region. The Claimant, nevertheless, suggests that this situation cannot be invoked by the European Union, but only and exclusively by Russia or Ukraine[226]. The only reason given by the Claimant in support of this restrictive reading of the terms "essential security interest" is, once again, the flawed argument that Article 24(3) ECT must be interpreted "narrowly" merely because it is an exception[227].

155. The Claimant's position has no basis on the text of Article 24(3) ECT, or in its relevant context, and would undermine the object and purpose of that exception. It is obvious that a Contracting Party's essential security interests may be significantly affected by a war, armed conflict or emergency in international relations between other parties. The narrow interpretation of "essential security interests" proffered by the Claimant would unduly interfere with the sovereign

[221] Claimant's Supplementary Memorial on ECT Article 24(3) and the 2024 CJEU Decision, paras. 166-167.
[222] Exhibit RLA-379, *Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Award, 27 June 2024, paras. 687.
[223] EU's Supplementary Counter-Memorial, para. 302-310.
[224] Exhibit RLA-380, Panel report, *Russia – Traffic in Transit*, para. 7.132.
[225] Ibid., para. 7.1.32.
[226] Claimant's Supplementary Memorial on ECT Article 24(3) and the 2024 CJEU Decision, paras. 134.
[227] Ibid.

right of each party to the ECT to protect its essential security interests and lead to a result that is manifestly unreasonable and wholly unacceptable to all parties to the ECT.

156. A party to the ECT is entitled to invoke Article 24(3) ECT whenever its essential security interests are affected by a situation of war, armed conflict or emergency in international relations, regardless of whether it participates directly in such situation. All that is required is that, as observed by the Panel in *Russia- Traffic in Transit*, the invoking party "articulate[s] the essential security interests said to arise from [those circumstances] sufficiently enough to demonstrate their veracity"[228].

157. In the case at hand, Russia's illegal annexation of Crimea and the subsequent conflict with Ukraine threatened the "essential security interests" of the European Union at several levels.

158. First, the European Union has an essential security interest in supporting Ukraine's independence, sovereignty and territorial integrity against Russia's unprovoked and unjustified aggression. The European Union and its Member States are close allies of Ukraine. In 2014, the European Union and its Member States signed with Ukraine an Association Agreement, including a Deep and Comprehensive Free Trade Area ("DCFTA"), which was one of the main factors leading to Russia's illegal annexation of Crimea[229]. The close links between Ukraine and the European Union and its Member States extend to the defence sphere. Relations between the North Atlantic Treaty Organization ("NATO"), to which most EU Member States belong, and Ukraine date back to the early 1990s and have since developed into one of the most substantial of NATO's partnerships[230]. Since 2014, in the wake of Russia's illegal annexation of Crimea, cooperation was intensified in critical areas[231].

159. Second, given its close geographical proximity to Russia and the zone of conflict, the European Union has an essential security interest in preventing further Russian expansionism and interference[232], as well as collateral damages to its citizens[233].

160. Third, the European Union and its Member States have an essential security interest in ensuring compliance by any other States with the United Nations Charter.

161. For the above reasons, the illegal annexation of Crimea and incursion in the Donbass region in 2014 triggered an immediate response from the European Union. On 6 March 2014, the European Council strongly condemned the unprovoked violation of Ukrainian sovereignty and territorial integrity by the

[228] Exhibit RLA-380, Panel report, *Russia – Traffic in Transit*, para. 7.1.34.
[229] EU's Supplementary Counter-Memorial, para. 347 and evidence cited therein.
[230] Ibid.
[231] Ibid.
[232] Ibid., para. 346 and evidence cited therein.
[233] This risk was tragically illustrated by the downing of Flight MH17 by pro-Russian separatists over eastern Ukraine on July 17, 2014. All 298 people on board, including 196 Dutch nationals and 38 Australians, were killed. The Russian Federation has been held responsible for the incident by ICAO. These are well-known and undisputable facts. If necessary, supporting documentary evidence can be provided upon request.

Russian Federation234. This was followed by the imposition of sanctions, which remain in place until today[235].

162. The EU's security concerns were shared by NATO. At its Warsaw Summit of 2016, NATO's heads of state and government declared that "Russia's aggressive actions, including provocative military activities in the periphery of NATO territory and its demonstrated willingness to attain political goals by the threat and use of force, are a source of regional instability, fundamentally challenge the Alliance, [and] have damaged Euro-Atlantic security"[236]. In the same statement, NATO's heads of state and government underscored the security implications of energy supply: "energy developments can have significant political and security implications for Allies and the Alliance, as demonstrated by the crises to NATO's east […]. A stable and reliable energy supply, the diversification of import routes, suppliers and energy resources, and the interconnectivity of energy networks are of critical importance and increase our resilience against political and economic pressure.[237]"

163. The open, strong and persistent support given by the European Union and its Member States to Ukraine following Russia's illegal annexation of Crimea and incursion in the Donbass region in 2014 left the European Union exposed to countermeasures from Russia, including in particular in the form of restrictions on gas supplies, given the EU's large dependency on such supplies and Russia's history of restricting gas supplies for political purposes. After 2014, the risk of weaponization of gas supplies was exacerbated by the conflict between Russia and Ukraine and the EU's open support for Ukraine. That risk, in turn, threatened the security of energy supply of the European Union and, if left unaddressed, could have forced the European Union to choose between preserving its security of energy supply and protecting the other essential security interests identified above.

164. The Claimant further contends that the security interests invoked by the European Union must "reflect the unanimous position of the EU Member States"[238]. This is incorrect as a matter of EU law. The European Union, like any other party to the ECT, is entitled to define its security interests in accordance with its own internal procedures. The measures at issue are based on Article 194(1) TFEU, which includes among the objectives of the EU's energy policy that of "ensuring security of energy supply in the Union" (see Article 194(1) b)). Measures based on Article 194(1) TFEU do not require unanimity. They may be adopted by qualified majority voting. The Claimant suggests[239] that unanimity would be required pursuant to Article 194(2) TFEU because the measure allegedly "affect[s] a Member State's choice between different energy sources and the general structure of its energy supply". However, the Amending Directive has neither the objective nor the effect

[234] Ibid., para. 347 and evidence cited therein.
[235] Ibid.
[236] Exhibit R–463, NATO, Warsaw Summit Communique, 8-9 July 2016, para. 5.
[237] Ibid., para. 136.
[238] Claimant's Supplementary Memorial on ECT Article 24(3) and the 2024 CJEU Decision, para. 129.
[239] Ibid.

of depriving the Member States from that choice. Where, in accordance with the Amending Directive, the certification of a particular gas transmission system operator must be refused by a Member State on security of supply grounds, that Member State remains free to source gas through a different, certified, transmission system.

3.7. The European Union has identified its "public order" interests in good faith

165. The Claimant contends that the concerns with regard to the protection of competition and security of energy supply articulated by the European Union are not matters of "public order" within the meaning of Article 24(3)(c) ECT. The Claimant alleges that the term "public order" "must be given a restrictive interpretation"[240]. According to the Claimant, "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"[241]. The Claimant cites the awards in *Continental Casualty v Argentina*[242] and *Union Fenosa v Egypt*[243] as supporting its position[244]. The Claimant further alleges that "WTO cases support Claimant's interpretation of the maintenance of public order"[245].

166. Once again, the Claimant's contention that the term "public order" must be given a "restrictive interpretation" is based exclusively on the mere fact that Article 24(3) ECT is an exception. As explained above, that argument is baseless.

167. The European Union has explained in detail why, in the European Union, both competition and security of energy supply are "fundamental interests of society" and, therefore, matters of "public order" within the meaning of Article 24.3(c) ECT[246]. The Claimant has never engaged with that explanation. The European Union has further demonstrated why the NS 2 project poses a "genuine and serious threat" to those fundamental interests[247].

168. The award in *Continental Casualty v Argentina* does not support the Claimant's position. The Claimant misrepresents the tribunal's findings. The tribunal did not purport to offer an exhaustive interpretation of the notion of "public order". The claimant in that case had argued that the term "public order" in Article XI of the Argentina-United States BIT referred exclusively "to measures necessary to maintain the public policies, laws and morals that define the country's society"[248]

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[240] Claimant's Supplementary Memorial on ECT Article 24(3) and the 2024 CJEU Decision, para. 137.
[241] Ibid., para138.
[242] Exhibit CLA-353, *Continental Casualty Company v The Argentine Republic* (ICSID Case No. ARB/03/9, Award of 5 September 2008
[243] Exhibit CLA-354, *Union Fenosa Gas, S.A. v. Arab Republic of Egypt* (ICSID Case No. ASRB/14/4, Award of 31 August 2018).
[244] Claimant's Supplementary Memorial on ECT Article 24(3) and the 2024 CJEU Decision, paras. 138-139.
[245] Ibid., para. 172 ff.
[246]See European Union's Supplementary Counter-Memorial, paras. 300-316. European Union's Supplementary Counter-Memorial, paras. 252-280.
[247] EU's Supplementary Counter-Memorial, Section 4.4, referring back to Sections 2 and 4.3.3.2; EU's Supplementary Reply on Merits, Sections 7 and 8.2,
[248] Exhibit CLA-353, *Continental Casualty Company v The Argentine Republic* (ICSID Case No. ARB/03/9, Award of 5 September 2008, para. 171.

and did not include measures to address the consequences of a situation of economic crisis, however serious. The tribunal disagreed and concluded that the notion of public order may include as well measures aimed at preserving or restoring "civil peace and the normal life of society"[249], even when these are threatened by "significant economic and social difficulties", such as those invoked by Argentina[250]. From this, however, it does not follow *a contrario* that public order can be invoked only and exclusively in response to the same type of economic difficulties invoked by Argentina in that case.

169. The Claimant's reliance on the award in *Union Fenosa v Egypt* is likewise misplaced. In that case, Egypt attempted to justify the non-supply of gas to the claimant's plant by invoking the state of necessity arising from the Egyptian revolution and the ensuing social unrest. The tribunal, however, found that, as a matter of fact, the non-supply of gas was "not attributable"[251] to those circumstances; and that, in any event, the requirements of Article 25 of the ILC Articles were not met. As explained above, however, the requirements of that provision are not applicable to the EU's defence, which is not based on the customary international law plea of state of necessity, but instead on Article 24(3)(c) ECT.

170. Nor do the WTO cases cited by the Claimant support its position. The European Union has referred to *US – Gambling*[252] and *EU – Energy Package*[253] in support of its interpretation of the term "public order". The interpretation made by those panel reports of other requirements included in Article XIV of the GATS, on which the Claimant seeks to rely[254], is not relevant for this dispute because those other requirements are not part of Article 24(3)(c) ECT. In particular, the *chapeau* of Article 24(3) ECT is worded differently from the *chapeau* of Article XIV GATS and includes the crucial language "…which it considers necessary…".

171. The European Union reiterates that, contrary to the Claimant's persistent assertions[255], the WTO panel in *EC – Energy Package* did find that the "unbundling measure" was <u>not</u> inconsistent with the WTO Agreement[256]. The WTO panel in *EU – Energy Package* found that a different measure, the "third country certification measure" in Article 11 of the Gas Directive, was inconsistent with the EU's GATS national treatment obligations, because the security of supply certification requirement included in that provision did not apply to domestic operators, and could not be justified under the public order exception in Article XIV a) of the GATS, as it failed to meet the requirements of the *chapeau* of that provision. The European Union, however, has appealed the latter finding. In any event, the panel

[249] Ibid., para. 174
[250] Ibid., para. 174.
[251] Exhibit CLA-354, *Union Fenosa Gas, S.A. v. Arab Republic of Egypt* (ICSID Case No. ASRB/14/4, Award of 31 August 2018), para. 8.48.
[252] Exhibit RLA-385, Panel Report, *US – Gambling*.
[253] Exhibit RLA-386, Panel Report, *EU — Energy Package*.
[254] Claimant's Supplementary Memorial on ECT Article 24(3) and the 2024 CJEU Decision, para. 172 ff.
[255] Ibid., para. 177.
[256] Exhibit RLA-386, Panel Report, *EU – Energy Package*, section 7.5 and para. 8.1 a).

drew a crucial distinction between foreign private operators and foreign operators controlled by foreign governments (such as the Claimant). The panel agreed with the European Union that the latter may pose greater risks to security of energy supply, which could therefore justify differential treatment.[257]

3.8. Article 24(3) ECT does release the respondent of responsibility

172. The Claimant contends that "even if Art. 24(3) were found to be applicable, it does not relieve Respondent from its obligation to compensate for the damage caused by its violation of the ECT"[258]. In support of this proposition, the Claimant invokes Article 27(b) and Article 36(1) of the ILC Articles on State Responsibility[259], as well as the judgement of the International Court of Justice ("ICJ") in the Gabčikovo- -*Nagymaros Project* case[260], and the awards in *CMS v Argentina*[261] and *EDFF v Argentina*[262] .

173. The Claimant's position is misguided because, once again, it fails to distinguish between the customary international law defence of state of necessity and treaty-based security and public order exceptions. The European Union has not invoked the necessity defence but the treaty exceptions for essential security and public order measures included in Article 24(3) ECT. A measure that meets the requirements of those exceptions does not breach any of the provisions of the ECT from which Article 24(3) ECT is an exception. Therefore, that measure cannot be considered a "wrongful" act within the meaning of Articles 27(b) and Article 36(1) of the ILC Articles on State Responsibility and does not trigger any obligation to provide compensation. 173. T

174. This is confirmed by WTO law and jurisprudence. The Claimant has conceded that Article 24(3) ECT is "clearly inspired" by the security exceptions of the WTO Agreements[263]. Yet, it is well established that a measure which meets the requirements of a WTO security exception (or of a "general exception", such as Article XX of the GATT) is not WTO inconsistent and, therefore, the responding Member is under no obligation to provide compensation or to suffer the suspension of equivalent concessions

175. The passages in the ICJ judgement in the Gabčikovo-*Nagymaros Project* case invoked by the Claimant address specifically Hungary's invocation of the customary international law defence of state of necessity, rather than a treaty-based security or public order exception[264].

[257] Ibid., para. 7.1186 ("In our view, it would indeed appear that a foreign government can require or induce TSOs to undermine the European Union's security of energy supply when that foreign government itself controls the TSOs"). See also paras. 7.1247-7.1248.
[258] Claimant's Supplementary Memorial on ECT Article 24(3) and the 2024 CJEU Decision, para. 147.
[259] Ibid., paras. 145-146.
[260] Ibid., para. 148
[261] Ibid., para. 149.
[262] Ibid., para. 150.
[263] Ibid., paras. 91 and 94.
[264] Exhibit CLA-355, Gabčikovo-*Nagymaros (Hungary/Slovakia)*, Judgement ICJ, Reports 1997, p. 38, para. 483.

176. In turn, as explained above, the tribunal in *CMS v Argentina* made the mistake of conflating the customary necessity defence with the treaty-based security and public order exception in Article XI of the Argentina-United States BIT, for which it was rightly and severely criticised by the ICSID *Ad hoc* Committee.

177. Lastly, the statement by the tribunal in *EDF v Argentina* quoted by the Claimant addresses the invocation by Argentina of the state of necessity defence, rather than a treaty-based exception for security or public order measures, which was not available under the applicable BIT[265].

4. CONCLUSION

178. For the above reasons, the European Union reiterates the requests for relief made in previous submissions to the Tribunal[266].

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

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[265] Exhibit CLA-356, *EDF International S.A., SAUR International S.A. and Leon Participaciones Argentinas S.A. v Argentine Republic* (ICSID Case No. ARB/03/23, Award of 11 June 2012), paras. 1170 and 1177.
[266] See, most recently, EU's Supplementary Counter-memorial, para. 371.