

**AN AD HOC ARBITRATION UNDER THE RULES OF ARBITRATION OF THE UNITED  
NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, 1976  
AND  
PURSUANT TO THE ENERGY CHARTER TREATY  
PCA CASE NO. 2020-07**

**BETWEEN**

**NORD STREAM 2 AG**

**(Claimant)**

- and -

**THE EUROPEAN UNION**

**(Respondent)**

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**CLAIMANT'S MEMORIAL**

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## I. INTRODUCTION

1. This Memorial (the "**Memorial**") is filed by the Claimant, Nord Stream 2 AG (the "**Claimant**" or "**NSP2AG**"). This Memorial is being submitted pursuant to the procedural timetable set out in Procedural Order No. 1 dated 24 April 2020. It is accompanied by two witness statements, submitted by [REDACTED] and [REDACTED], one expert report submitted by Professor Peter Cameron, 162 factual exhibits (**Exhibits C-21 to C-182**) and 141 legal exhibits (**Exhibits CLA-16 to CLA-156**).
2. Factual and legal exhibits are referred to using the same numbering as in the Claimant's Notice of Arbitration dated 26 September 2019 (the "**Notice**"), in the form C-\* for factual exhibits, with additional factual exhibits starting at C-21, and in the form CLA-\* for legal exhibits, with additional legal exhibits starting at CLA-16. Unless otherwise defined, the capitalised terms used herein bear the meaning defined in the Notice.
3. This Memorial contains ten sections in addition to this Introduction, and three Appendices:
  - i. Section II sets out a summary of the Claimant's claim.
  - ii. Section III sets out an overview of the key protections guaranteed by the EU under the Energy Charter Treaty (the "**ECT**").
  - iii. Section IV explains the key features of the EU Third Gas Directive (or the "**Gas Directive**") and the concept of the EU's internal market for gas.
  - iv. Section V describes the background to the Nord Stream 2 project and sets out NSP2AG's investment in the EU, including the process by which this investment was made.
  - v. Section VI describes the EU's concerted attempts to obstruct and frustrate the Nord Stream 2 project, including through the drafting and adoption of the Amending Directive and the flawed, unfair and discriminatory process by which this occurred, also explaining that the Amending Directive cannot contribute to its stated policy objectives in any event.
  - vi. Section VII sets out the catastrophic impact of the Amending Directive on the Nord Stream 2 project.
  - vii. Section VIII explains how the EU's adoption of the Amending Directive, and its actions connected therewith, constitute breaches of the ECT.
  - viii. Section IX explains the restitutionary relief requested by the Claimant and why the Tribunal is entitled to and justified in granting the relief sought.
  - ix. Section X explains that the Claimant's claim fulfils the relevant jurisdictional requirements under the ECT.
  - x. Section XI addresses the relief claimed by the Claimant in this arbitration.

- xi. Appendix 1 contains a chronology of the key events relating to this dispute.
- xii. Appendix 2 contains a glossary of key terms used in this Memorial.
- xiii. Appendix 3 contains maps showing the European gas infrastructure, including offshore import pipelines into the EU.

## II. SUMMARY OF CLAIM

4. NSP2AG brings this claim against the European Union (the "EU") in respect of the EU's discriminatory adoption of the Directive (EU) 2019/692 (the "**Amending Directive**"), amending Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas (the "**Gas Directive**" or the "**Third Gas Directive**"). The Amending Directive fundamentally undermines NSP2AG's investment in the Nord Stream 2 pipeline project (an investment made in large part in the EU), and threatens its very future as a company.
5. In particular, the adoption of the Amending Directive, and the EU's conduct in connection with it, constitute violations of the EU's obligations under the ECT, the purpose of which, as described in its Article 2, is to promote long-term co-operation in the energy field in accordance with the objectives and principles of the European Energy Charter. As is set out in this Memorial, the EU has in particular breached Article 10(1) of the ECT, including the duty to accord fair and equitable treatment and the prohibition against unreasonable and discriminatory measures, Article 10(7) on national and most favoured nation treatment, as well as Article 13 prohibiting expropriation and equivalent measures. In this Memorial, NSP2AG therefore requests that the arbitral tribunal right the wrongs committed by the EU, and order the EU to place NSP2AG in the same situation that existed before the Amending Directive was adopted, by removing the application to NSP2AG and Nord Stream 2 of specifically identified articles of the Third Gas Directive.
6. NSP2AG was incorporated in Zug, Switzerland in July 2015 to plan, construct, and in due course to operate, a major gas pipeline - Nord Stream 2 - transporting natural gas from Russia into the EU.
7. Nord Stream 2 consists of two individual pipelines of approximately 1,235km in length each, with a total capacity of 55 bcm per year. Its route passes through the Baltic Sea from Ust-Luga in Russia, making landfall at Lubmin in Germany, where it connects into the German gas transportation system through upgraded and newly-built downstream transport pipelines (in particular, the North European Natural Gas Pipeline (NEL) and the European Gas Pipeline Link (EUGAL)).<sup>1</sup>

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<sup>1</sup> Map of the Nord Stream 2 Route below, accessible at <https://www.nord-stream2.com/en/pdf/document/125/>.





Map of the Nord Stream 2 route

8. The inception of Nord Stream 2 followed the successful construction and entry into operation of the first Nord Stream pipeline, built with a similar capacity and along a similar route ("**Nord Stream 1**"). Nord Stream 1 began operation in November 2011 and was hailed by the EU as a "*priority project*", and "*very important for [...] the security of energy supply*" in Europe.<sup>2</sup>
9. The plan for Nord Stream 2 was to repeat this success, a success intended also to have very substantial benefits for the EU. Nord Stream 2 was assessed as at the end of 2018 to have added a total of EUR 4.74 billion to the GDP of over 10 EU Member States and created work equivalent to 57,450 year-long full-time jobs over a five-year period.<sup>3</sup>
10. In the two years following its incorporation, NSP2AG achieved a number of important milestones essential for the implementation of the Nord Stream 2 project, notably the conclusion and execution of the necessary major contracts. These included the key construction contracts for the supply of line pipes, their weight coating, and pipelay, which formed the foundation of NSP2AG's very considerable investment in the EU. By April 2017, NSP2AG had concluded key construction contracts and made contractual commitments of over ██████████ out of an expected total capital expenditure of ██████████, many of which were with EU companies or for works within the EU.

<sup>2</sup> **Exhibit CLA-16**, Decision 1364/2006/EC of the European Parliament and of the Council of 6 September 2006 laying down guidelines for trans-European energy networks and repealing Decision 96/391/EC and Decision No 1229/2003/EC, OJ L262/1, 22 September 2006, Recital (8) and Annex I point NG.1.

<sup>3</sup> **Exhibit C-21**, Arthur D Little report, "Nord Stream 2 Economic Impact on Europe: Follow-up analysis of effects on job creation and GDP during the construction phase", May 2019. This study was commissioned by NSP2AG.

11. In early 2017, NSP2AG concluded the long-term Gas Transportation Agreement (or "**GTA**") with Gazprom Export LLC ("**Gazprom Export**"), [REDACTED] [REDACTED] providing NSP2AG with a secure revenue stream upon which it could rely in securing financing and making the necessary investment.
12. This financing was secured in 2017, after challenging, lengthy and complex negotiations. Of the over [REDACTED] project cost, [REDACTED] has been financed by PJSC Gazprom ("**Gazprom**"), with the remaining [REDACTED] financed in equal proportions by five multinational energy companies: Engie, OMV, Shell, Uniper and Wintershall (the "**Financial Investors**").<sup>4</sup> Crucially, [REDACTED] of the project cost is financed by loans which are to be serviced and repaid from the tariffs under the GTA, [REDACTED].
13. As at 23 May 2019, when the Amending Directive came into force, a total of 1,323 km of pipeline had been laid in the territorial waters and / or exclusive economic zones of Finland, Germany, Russia and Sweden (amounting to over 50% of Nord Stream 2), and the construction of the German territorial waters' section of Nord Stream 2 and the onshore facilities was substantially complete. In particular, works of the value of [REDACTED] had already been completed out of a total expenditure of approximately [REDACTED], [REDACTED] of which had been carried out in Germany.
14. Throughout most of its planning, development and construction, there was no reason to expect that Nord Stream 2 would be treated by the EU any differently from Nord Stream 1. It was clear that the Third Gas Directive, and its requirements of unbundling, third party access, and tariff regulation, did not apply to third country offshore import pipelines such as Nord Stream 1 and 2, and deliberately so.<sup>5</sup>
15. Despite the clarity of the legal position, parts of the European Commission – one of the institutions of the EU - had nevertheless sought to argue that the Third Gas Directive did apply to Nord Stream 2, a position that became untenable as the Council and Commission Legal Services (among others) confirmed that it did not.<sup>6</sup> Encouraged by a group of Member States, the European Commission then sought other ways of targeting Nord Stream 2: first, in the summer of 2017, by seeking a mandate to negotiate an international agreement with Russia to seek to define Nord Stream 2's legal framework in accordance with EU priorities, and second, when that was ruled outside the EU's competence by the Council Legal Service, to introduce the proposal for the Amending Directive, put forward on 8 November 2017.

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<sup>4</sup> As further defined in paragraph 133.ii. Further detail of the financing arrangements is provided in Section V.3.

<sup>5</sup> See further Section IV.5.

<sup>6</sup> See further Sections VI.4 and VI.6.

16. The underlying reasons for this are set out in more detail in Section VI.<sup>7</sup> But they can only be described as political and discriminatory: a combination of political hostility towards the Russian Federation, which is identified with the Nord Stream 2 project, and support for Ukraine, of which a key aspect was the objective of maintaining the transit of Russian gas through Ukraine (for commercial reasons, as the pipelines through Ukraine also cross certain East European Member States resulting in the receipt of transit fees by the companies owning and operating the transportation networks in those countries, several of which are state owned, as well as geopolitical reasons). NSP2AG however is a Swiss company, protected by the Energy Charter Treaty, a treaty designed to protect investors such as NSP2AG from precisely this form of political interference with investments it has made.
17. To avoid scrutiny over its intention and motivations, the proposal for the Amending Directive was introduced summarily and without an impact assessment<sup>8</sup> - a decision described by the EU's own European Economic and Social Committee as "*regrettable*",<sup>9</sup> and contrary to the view of the EU's European Committee of the Regions that such an assessment was "*necessary [...] in accordance with the Interinstitutional Agreement on Better Law-Making*".<sup>10</sup>
18. There was nevertheless considerable support for the Nord Stream 2 project among EU Member States within the EU Council, and NSP2AG remained confident that the Amending Directive would not pass. That changed on February 2019, when a France-Germany compromise removed the blocking minority in the Council that had existed since the proposal was introduced. Adoption swiftly followed, with the Amending Directive entering into force on 23 May 2019.
19. This hurried adoption was quite deliberately consistent with the EU's targeting of Nord Stream 2, a fact explicitly noted by the European Parliamentary Research Service.<sup>11</sup> Indeed, Director-General Ristori of the Commission's Directorate General for Energy (or "**DG Energy**") emphasised in the context of a March 2019 meeting of EU energy ministers that

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<sup>7</sup> See, in particular, Section VI.3.

<sup>8</sup> See further paragraph 250.i.

<sup>9</sup> **Exhibit C-22**, Opinion of the European Economic and Social Committee on the proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, OJ C 262/64, 25 July 2018, pp 64 – 68, para 1.7.

<sup>10</sup> **Exhibit C-23**, Opinion of the European Committee of the Regions — Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, OJ C 361/72, 5 October 2018, pp 72 – 77, para 13.

<sup>11</sup> The briefings prepared by the European Parliamentary Research Service explain that: "*The urgency for the European Commission to adopt this legislative proposal can largely be attributed to political controversy surrounding the Gazprom-led project to double the capacity of the Nord Stream underwater pipelines delivering natural gas from Russia to Germany. This project is known as 'Nord Stream 2', to differentiate it from the two original Nord Stream pipelines (in operation since 2011-2012)*". See **Exhibit C-24**, European Parliamentary Research Service, "Common rules for gas pipelines entering the EU internal market", Briefing: EU Legislation in Progress (editions 1 to 4), PE 614.673, 23 January 2018, 3 July 2018, 27 March 2019, 27 May 2019.

the Amending Directive would hopefully enter into force "*quickly, i.e. in any case before the completion of Nord Stream 2*".<sup>12</sup>

20. The reason for this haste is explained by the two principal changes introduced by the Amending Directive. The first was that the Amending Directive amended the definition of "*interconnector*" contained in Article 2(17) of the Gas Directive, to extend that definition beyond only transmission lines that connected the systems of two Member States, to those between a Member State and a third country (up to the territorial limit of the Member State including its territorial sea). The effect was to extend the application of the Third Gas Directive to third country offshore import pipelines such as Nord Stream 2.
21. The second was the inclusion in the Amending Directive of a device, inserted into the Third Gas Directive in the form of new Article 49a, to ensure that in practice only Nord Stream 2 would be negatively affected, and not other offshore import pipelines. Article 49a introduced a new derogation mechanism, available only to offshore import pipelines "*completed before 23 May 2019*". While some five other offshore import pipelines existed,<sup>13</sup> Nord Stream 2 was the only such pipeline that had not completed construction (and was not scheduled to have done so) by that date.
22. Accordingly, although the Amending Directive is dressed up as a measure of general application applying EU internal market rules to offshore import pipelines, in fact this does not bear the slightest scrutiny. Nord Stream 1 has been granted a derogation and, as described in Section VI.11, all other offshore import pipelines will also receive a derogation in due course. As was specifically intended by the EU, therefore, Nord Stream 2 is the only pipeline upon which the Amending Directive has practical effect.
23. As set out in Section VII below, as matters stand the impact of the application of the Amending Directive to Nord Stream 2 is catastrophic. Without a derogation, the Amending Directive applies the Gas Directive's requirements of unbundling of pipeline ownership/operatorship from gas supply functions, third party access and tariff regulation, to Nord Stream 2. These requirements will prevent NSP2AG from operating Nord Stream 2 as intended, fundamentally undermining the basis on which NSP2AG made its investment, and the economic and financial value thereof.
24. In particular, NSP2AG is part of a vertically integrated undertaking (i.e. an operator of transmission infrastructure whose shares are owned by Gazprom which also, primarily through its subsidiaries, supplies gas to the EU). The unbundling requirement of the Gas Directive, as now amended by the Amending Directive, requires separation of the operation

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<sup>12</sup> As reported in **Exhibit CLA-17**, Bundesnetzagentur decision on NSP2AG's Derogation Application (German original and English translation), 15 May 2020, p 29. The relevant passage has been translated from the German original: "*schnell, das heißt auf jeden Fall vor der Fertigstellung von Nord Stream 2*".

<sup>13</sup> See further Section VI.11.

of transmission infrastructure from supply, and so precludes NSP2AG being the operator of the whole Nord Stream 2 pipeline.

25. Further, the requirements of third party access and regulated tariffs are fundamentally incompatible with the GTA - the agreement on which the entire financing structure of the project is based. [REDACTED]

26. [REDACTED]

27. As is fully set out in this Memorial and argued in detail in Section VIII, the adoption by the EU of the Amending Directive and the EU's actions in connection therewith amount to breaches of the EU's obligations under the Energy Charter Treaty, in particular its obligations under Article 10(1), Article 10(7) and Article 13.

28. These breaches, and their political motivation, are summarised in the following Section III. It will only be added here that it is difficult to think of a clearer form of discrimination cloaked in legislation of general application than that contained in the Amending Directive. Since the project was initiated the EU has made little effort to hide its targeting of Nord Stream 2 – this Memorial contains many examples of clear, public statements from EU representatives to this effect.<sup>14</sup> And the purported objectives included in the Amending Directive, around completion of the internal market and so on, are mere legislative fig leaves, readily exposed as specious and self-serving.<sup>15</sup>

29. Compounding its breaches, the EU has refused to explain in pre-action correspondence or discussions the proper interpretation and application of its own legislation, in particular in relation to the Article 49a derogation. In recent days, its own courts have similarly declined to hear NSP2AG's application seeking annulment on grounds of illegality under EU law of the Amending Directive, declaring the application inadmissible and thereby raising serious questions of access to, and denial of, justice.<sup>16</sup>

30. NSP2AG seeks relief from this arbitral tribunal in respect of these breaches of the ECT. In particular, NSP2AG requests that the Tribunal order that the EU, by means of its own choosing, remove the application of Articles 9, 10, 11, 32, 41(6), 41(8) and 41(10) of the Third Gas Directive (i.e. those provisions which became applicable to Nord Stream 2 as a

<sup>14</sup> See, for example, in Section VI.3, paras 190, 194, 196 and 199 to 201.

<sup>15</sup> See further Section VI.12, and the First Expert Report of Professor Cameron, paras 1.9 and 6.32-6.61.

<sup>16</sup> See further paras 388 to 393.

result of the Amending Directive and from which derogations are permissible pursuant to Article 49a) to NSP2AG and Nord Stream 2, thus restoring the position that would have existed but for the EU's breaches of the ECT.

31. As NSP2AG sets out in Section IX below, the granting of such relief is entirely warranted in the circumstances, and indeed is the most appropriate form of relief. Given that the practical impact of the Amending Directive lies on NSP2AG alone, it cannot be disproportionate to require the EU to remove that impact. The granting of such relief is also clearly permitted under the ECT.
32. Fundamentally, NSP2AG should not, as a result of the EU's breach of the ECT, be required to undertake the irreversible and highly prejudicial actions necessary to comply with the Amending Directive, even if this were possible which is highly uncertain, and in circumstances where even the best outcome would be substantially different from that which would apply in the absence of the breach. While NSP2AG reserves its right to seek damages as necessary in due course, the relief requested by NSP2AG can prevent the application of the unbundling, third party access and tariff regulation requirements to it, and thereby provide it with the full reparation required under international law.

### III. OVERVIEW OF ECT PROTECTIONS BREACHED BY THE EU

33. This section provides an overview of the protections of the ECT which the EU has breached, which are more fully developed in Section VIII below. These breaches are addressed in the order in which their corresponding protections are codified in the ECT. These breaches must be seen in the context of the ECT's historical context, aims and significance, as described below.

#### III.1 The EU's politically-motivated targeting of Nord Stream 2 undermines the very purpose of the ECT and its protection of the rule of law in the energy sector

34. To understand fully the requirements of the ECT protections engaged by the EU's actions and the severity of the EU's breaches, it is instructive to consider the background to the ECT. In 1990, following a tumultuous historical period, the European Energy Charter (the "**Charter**") was conceived by the EU itself, with the European Council developing a proposal to create a European Energy Community with Eastern Europe and the then-Soviet Union. The Charter, whose first draft was prepared by the European Commission,<sup>17</sup> was signed in 1991 to enhance cooperation in the energy sector by enshrining the principles of open, competitive and efficient markets<sup>18</sup> and non-discrimination among market players,<sup>19</sup> creating conditions to stimulate private investment flows, while protecting national sovereignty over natural resources and respecting the environment.<sup>20</sup>

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<sup>17</sup> **Exhibit CLA-18**, R. Leal-Arcas, "Introduction", in R. Leal-Arcas (ed.), *Commentary on the Energy Charter Treaty* (Cheltenham: Edward Elgar, 2018), p 1; **Exhibit C-25**, ECT website, "The Energy Charter Process" (last accessed on 2 June 2020 at <https://www.energycharter.org/process/overview/>); **Exhibit CLA-19**, A. Konoplyanik and T. Walde, "Energy Charter Treaty and Its Role in International Energy", (2006) 24(4) *Journal of Energy & Natural Resources Law* 523, p 524.

<sup>18</sup> **Exhibit CLA-1**, ECT, Article 3: "*The Contracting Parties shall work to promote access to international markets on commercial terms, and generally to develop an open and competitive market, for Energy Materials and Products and Energy-Related Equipment*". See also **Exhibit CLA-20**, T. Roe and M. Happold, "Chapter 1 – Introduction: International Treaty Arbitration and the Energy Charter Treaty", in T. Roe and M. Happold (ed.), *Settlement of Investment Disputes under the Energy Charter Treaty* (New York: Cambridge University Press, 2011), p 9: "*More specifically, the signatories commit to work together to facilitate access to and the development of energy resources; to promote access to markets for energy products; to liberalise trade in energy [...]; and to cooperate on energy efficiency and environmental protection*".

<sup>19</sup> **Exhibit CLA-20**, T. Roe and M. Happold, "Chapter 1 – Introduction: International Treaty Arbitration and the Energy Charter Treaty", in T. Roe and M. Happold (ed.), *Settlement of Investment Disputes under the Energy Charter Treaty*, p 10: "*A major objective of the negotiations was to ensure that foreign investors in the energy sector did not suffer discrimination, in comparison either to nationals of the host state (national treatment) or to nationals of other states (most-favoured nation treatment)*".

<sup>20</sup> **Exhibit CLA-2**, International Energy Charter, Preamble: "*Recognising State sovereignty and sovereign rights over energy resources*" and "*Recognising the global challenge posed by the trilemma between energy security, economic development and environmental protection, and efforts by all countries to achieve sustainable development*". See also **Exhibit CLA-20**, T. Roe and M. Happold, "Chapter 1 – Introduction: International Treaty Arbitration and the Energy Charter Treaty", in T. Roe and M. Happold (ed.), *Settlement of Investment Disputes under the Energy Charter Treaty*, p 9.

35. The Charter paved the way for the eventual negotiation and adoption of the ECT,<sup>21</sup> a project which the EU again supported from its earliest inception.<sup>22</sup> The objective of the ECT, as stated in Article 2 of the ECT, is to promote long-term cooperation in the energy field in accordance with the objectives and principles of the Charter.<sup>23</sup> In addition to Article 2, the ECT's introductory note refers to the treaty as having a fundamental aim "*to strengthen the rule of law on energy issues*".<sup>24</sup>
36. Commentators have noted that "*the [ECT] is today regarded as a vitally important multilateral instrument for the promotion and protection of foreign investment in the energy sector*".<sup>25</sup> Similarly, the FAQs on the Energy Charter Treaty website state that:
- "The Treaty's provisions focus on [...]: the protection of foreign investments, based on the extension of national treatment, or most-favoured nation treatment (whichever is more favourable) and protection against key non-commercial risks; [...]"* (emphasis added).
- [...] once an energy investment is made, the Treaty is designed to provide a stable interface between the foreign investor and the host government. This stability is particularly important in the global energy sector, where projects are highly strategic and capital-intensive, and where risks have to be assessed over the long-term".*<sup>26</sup>
37. Given the immutable importance of the energy sector and its central role in the global economy and society,<sup>27</sup> and the significance of the ECT's investor protections in this context, the rationale behind the ECT's aim to uphold the rule of law in the energy sector, as one of its fundamental objectives, becomes abundantly clear.
38. Against this background, the EU's politically-motivated conduct against Nord Stream 2, unconvincingly masquerading as legitimate legislative enhancement of the EU internal energy market, is even more regrettable. As Section VI will explain in more detail, and as concluded also by others, the EU is, in fact, using regulation as a "political weapon" against Nord Stream 2.<sup>28</sup>

<sup>21</sup> **Exhibit CLA-18**, R. Leal-Arcas, "Introduction", in R. Leal-Arcas (ed.), *Commentary on the Energy Charter Treaty*, pp 1 – 2.

<sup>22</sup> **Exhibit CLA-21**, Final Act of the European Energy Charter Conference, 17 December 1994, p 4.

<sup>23</sup> **Exhibit CLA-1**, ECT, Article 2: "*This Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the [European Energy] Charter*".

<sup>24</sup> **Exhibit C-25**, ECT website, "The Energy Charter Process" (last accessed on 2 June 2020 at <https://www.energycharter.org/process/overview/>).

<sup>25</sup> **Exhibit CLA-22**, E. Gaillard and M. McNeill, "Chapter 2 – The Energy Charter Treaty", in K. Yannaca-Small (ed.), *Arbitration Under International Investment Agreements - A Guide To The Key Issues*, 2nd Ed. (Oxford: OUP: 2018).

<sup>26</sup> **Exhibit C-26**, ECT website, "The Energy Charter Treaty" (last accessed on 2 June 2020 at <https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/>).

<sup>27</sup> **Exhibit CLA-23**, M. Scherer, "Chapter 1 – Introduction", in M. Scherer (ed.), *International Arbitration in the Energy Sector* (Oxford: OUP, 2018), para 1.01.

<sup>28</sup> **Exhibit C-27**, W. Peters, "Nord Stream 2 caught between politicization, hypocrisy and ignorance: a few inconvenient truths", April 2020, pp 2, 5, 8, 9 and 34.



39. This type of conduct starkly contrasts with the obligations which the EU has assumed through its accession to the ECT. Among other things, the EU has committed to encouraging and creating certain investment conditions, and to act fairly and equitably, including with regard to due process. It has undertaken not to impair the investments of investors through unreasonable or discriminatory measures. The EU's design and adoption of the Amending Directive, with the specific intention of regulating a single investment, is the antithesis of these obligations and the stable conditions which the EU has committed to creating for investments and investors in its Member States' territory. By the Amending Directive, the EU has changed the legal framework in which NSP2AG made its investment dramatically and without regard to reasonable and rational policy, with a catastrophic impact on Nord Stream 2. As described in detail in this Memorial, the EU's actions violate multiple protections which lie at the heart of the ECT's investment protection regime.

### **III.2 Breach of Article 10(1) – Fair and Equitable Treatment**

40. The EU has breached Article 10(1) of the ECT by failing to accord fair and equitable treatment ("**FET**") to NSP2AG in connection with its investment. In particular, the EU has failed to apply due process, has acted in an arbitrary and discriminatory way, has failed to act in good faith, proportionately and transparently, and has failed to protect NSP2AG's reasonable and legitimate expectations.
41. The EU has amended the legal framework applicable to Nord Stream 2 in a way such as to deliberately target Nord Stream 2, with the effect of fundamentally undermining the basis of NSP2AG's investment. When asked for clarification on the interpretation of the Amending Directive, the EU has unjustifiably withheld information and refused to provide meaningful clarifications.

### **III.3 Breach of Article 10(1) – Impairment by Unreasonable or Discriminatory Measures**

42. The EU has breached Article 10(1) of the ECT by impairing Nord Stream 2 by unreasonable or discriminatory measures through the imposition of the Amending Directive. The Amending Directive clearly constitutes an unreasonable measure in that (i) whilst masquerading as a measure to contribute to the EU's internal market goals, its true (and illegitimate) aim is to have the effect of obstructing, and disrupting the use of, Nord Stream 2; (ii) it cannot achieve its stated objectives of removing undefined "obstacles" to the completion of the internal market in gas; and (iii) it lacks proportionality, as it imposes a huge burden on Nord Stream 2, but (by design) it applies to only Nord Stream 2, which makes up merely 16% of third country pipeline import capacity in the EU,<sup>29</sup> and as such the Amending Directive cannot have a meaningful effect on the EU's purported energy policy aims.

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<sup>29</sup> As further described in paragraph 269.iii.

43. The discriminatory nature of the Amending Directive is obvious: the EU has made no secret of its intention to regulate Nord Stream 2 alone and, based on a plain reading of the Amending Directive, has achieved its purpose by the exclusion of Nord Stream 2 from the derogation regime in the Amending Directive. In pursuit of this objective, the EU passed the Amending Directive with undue haste and a marked failure to observe due process, including by ignoring hallmarks of good decision-making recognised by its own institutional bodies.

#### **III.4 Breach of Article 10(1) of the ECT – Most Constant Protection and Security**

44. The EU has breached Article 10(1) by failing to provide most constant protection and security ("CPS"). Through the adoption of the Amending Directive, the EU has not provided the legal framework necessary to protect Nord Stream 2 from wrongful interference, and has failed to provide the guarantee of stability in a secure environment which the CPS standard encompasses. On the contrary, and well aware of the significant investments made by NSP2AG under the previous legal regime, the EU has legislated in such a way so as to expose Nord Stream 2 to the internal market rules of the Third Gas Directive. At the same time it has explicitly put in place a derogation regime which takes into account "*the lack of specific Union rules applicable to gas transmission lines to and from third countries before the date of entry into force*" of the Amending Directive,<sup>30</sup> designing such regime in order that Nord Stream 2 is excluded from it.

#### **III.5 Breach of Article 10(7) of the ECT – National Treatment and Most Favoured Nation Treatment**

45. The EU has breached Article 10(7) by failing to accord treatment no less favourable than that which it accords to investments of its own investors or of the investors of any other Contracting Party or any third states. The intentional drafting of the Amending Directive leads to the substantive effect that Nord Stream 2 is the only offshore import pipeline which is not *prima facie* eligible for a derogation under Article 49a of the Amending Directive due to its date of physical completion, whilst all the other third country offshore import pipelines, being investments of national and other foreign investors, were eligible for, and have already received or will receive, a derogation.<sup>31</sup>

#### **III.6 Breach of Article 13 of the ECT – Expropriation**

46. The EU has breached Article 13 by implementing measures which expropriate Nord Stream 2's investment. The adoption of the Amending Directive forces NSP2AG, among other things, to apply the unbundling obligations contained in the Third Gas Directive. NSP2AG will therefore be prevented from owning and operating the stretch of the Nord Stream 2

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<sup>30</sup> Exhibit CLA-3, Amending Directive, Recital (4).

<sup>31</sup> See further para 269.

pipeline between Lubmin, Germany, where it makes landfall and connects to the European gas pipeline network, and the limit of the German territorial sea (the "**German Section**").

47. Moreover, NSP2AG's investment is fundamentally undermined by the third party access requirements and tariff regulation imposed on the German Section by the Amending Directive. As matters stand, due to the requirements of third party access, tariff regulation and unbundling imposed on NSP2AG by the Amending Directive, NSP2AG will be unable to perform its obligations under the GTA which underpins its financing. The Amending Directive has the effect of wholly depriving NSP2AG of the use of the German Section of the Pipeline, and undermining and substantially depriving NSP2AG of the value of its investments.
48. NSP2AG brings this claim at a time at which the factual background to its claims continues to develop and the conduct of EU institutions continues to affect NSP2AG's rights. NSP2AG reserves its rights to amend or supplement this Memorial, including by reference to other protections guaranteed by the ECT.

#### IV. THE EU GAS DIRECTIVE AND THE INTERNAL MARKET FOR GAS: LEGAL AND FACTUAL BACKGROUND

##### IV.1 Introduction

49. The following section sets out part of the factual and regulatory background to this dispute, namely the so-called "**Third Energy Package**" (or "**TEP**") and its lack of application to offshore gas import pipelines before the Amending Directive. Offshore gas import pipelines are a subset of the overall pipeline infrastructure for the importation of gas in the EU.
50. As explained in more detail in the First Expert Report of Professor Cameron, the development of the EU internal market for gas and electricity has taken place over a number of years, during which time the EU has taken legislative steps to transition from closed national markets generally dominated by a single vertically integrated energy company, to an EU-wide liberalised internal market for electricity and gas.
51. This section first describes the EU's gas import infrastructure, identifying the five existing offshore pipelines importing gas into the EU (**Section IV.2**). It then explains the key features of EU internal market regulation, including the concepts of unbundling, third party access and tariff regulation, and the underlying policy objective, the so-called "Gas Target Model" (**Section IV.3**). It also describes the disincentivising impact of the regulatory regime on investment in new energy infrastructure (**Section IV.4**). Finally, this section sets out the incontrovertible evidence that, consistent with its objective of developing the EU internal market, prior to the Amending Directive the EU had not sought to regulate third country import pipelines within the EU's territorial jurisdiction (**Section IV.5**).
52. In the area of gas, the Third Energy Package comprises two measures adopted by the EU legislator: (i) Directive 2009/73/EC concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (the "**Gas Directive**" or "**Third Gas Directive**"); and (ii) Regulation (EC) No 715/2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 (the "**Gas Regulation**"). Both were adopted on 13 July 2009. A directive is an EU legal measure that is binding on Member States and must be transposed in national law. It is defined by Article 288 of the Treaty on the Functioning of the EU ("**TFEU**")<sup>32</sup> as follows: "*A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods*". A regulation is an EU law measure that is binding and directly applicable in all Member States without the need for such transposition in national law. Both the Gas Directive and the Gas Regulation repeal and replace their predecessor that was part of the Second Energy Package. Since their adoption in July 2009 by the EU legislator, the rules of the Gas Directive and Gas Regulation

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<sup>32</sup> See further on the TFEU at paragraph 178.

have been supplemented by additional measures adopted as delegated legislation by the European Commission (exercising its executive power).<sup>33</sup> These additional measures are generally referred to as "Network Codes", and have the form of a legally binding and directly applicable regulation.<sup>34</sup> Their content is discussed further at paragraph 88 below.

## **IV.2 EU gas import infrastructure**

53. The EU imports most of its natural gas from non-EU supplier countries. According to EU figures, in 2019, the EU's total gas consumption amounted to 482 billion cubic metres (bcm).<sup>35</sup> Net imports of gas into the EU in 2019 amounted to 398 bcm.<sup>36</sup> 73% of imported gas (290 bcm) was transported to the EU via large pipelines terminating at the EU borders. The remaining 27% (108 bcm) was imported via LNG infrastructure.<sup>37</sup> Pipelines that connect to the EU via land borders are known as "*onshore*" import pipelines, and those that connect to the EU from the sea as "*offshore*" import pipelines.<sup>38</sup>

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<sup>33</sup> Paras 88-89.

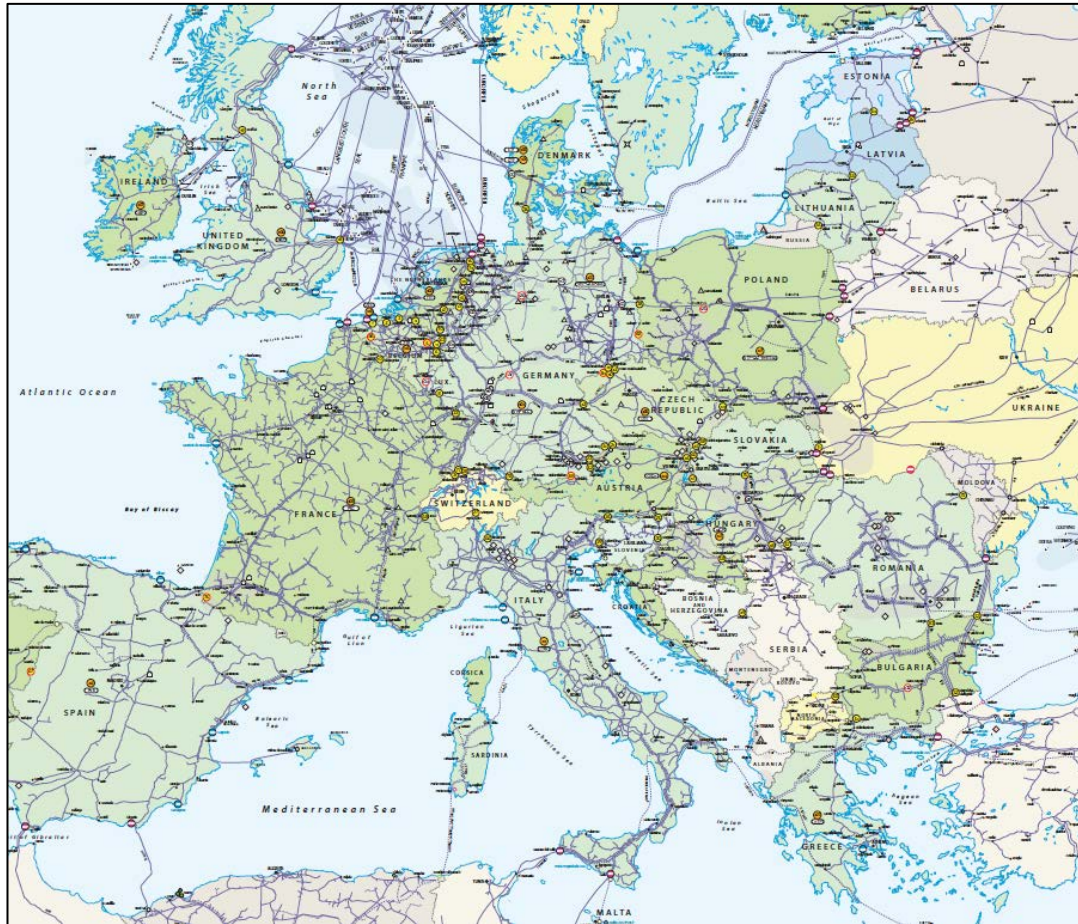
<sup>34</sup> The procedure for the establishment of network codes is laid out in Article 6 of the Gas Regulation and takes place in cooperation and consultation between the Commission, ACER and ENTSOG. In a first step, the Commission (after consulting ACER and ENTSOG as well as other relevant stakeholders) establishes an annual priority list in which it identifies areas to be included in the development of network codes. ACER then submits to the Commission (after formal consultation of ENTSOG and other relevant stakeholders) a non-binding framework guideline setting out principles for the development of network codes relating to the areas identified in the priority list. ENTSOG is subsequently charged with preparing a network code in line with ACER's framework guidelines. Pursuant to Article 6(7) of the Gas Regulation, ACER is required to provide a reasoned opinion to ENTSOG on the network code. Once ACER is satisfied that the network code is in line with the relevant framework guideline, ACER submits the network code to the Commission who may adopt the relevant network code.

<sup>35</sup> **Exhibit C-28**, European Commission (DG Energy Market Observatory for Energy) report, "Quarterly Report on European Gas Markets", Volume 12, Issue 4, Fourth Quarter of 2019, 2020, p 3.

<sup>36</sup> **Exhibit C-28**, European Commission (DG Energy Market Observatory for Energy) report, "Quarterly Report on European Gas Markets", Volume 12, Issue 4, Fourth Quarter of 2019, 2020, p 3.

<sup>37</sup> **Exhibit C-28**, European Commission (DG Energy Market Observatory for Energy) report, "Quarterly Report on European Gas Markets", Volume 12, Issue 4, Fourth Quarter of 2019, 2020, p 3.

<sup>38</sup> The map of EU gas infrastructure and third country offshore import pipelines below is accessible, in full-size and interactive format, at <https://transparency.entsog.eu/#/map?loadBalancingZones=true>, and as **Exhibit C-29**, ENTSOG map, "The European Natural Gas Network 2019". For convenience, a larger version of the map below, as well as three excerpts showing the offshore import pipelines into Germany, Italy and Spain, are included in Appendix 3.



*Map of European gas infrastructure, showing offshore import pipelines into the EU*

54. According to EU figures, EU gas imports from countries connected by pipeline to the EU were as follows (2019 figures): Russia (46% - pipeline and LNG,<sup>39</sup> 41% pipeline only), Norway (29%), Algeria (7%) and Libya (1%).<sup>40</sup> Each of these producing countries is connected to the EU via large pipelines terminating at the EU's land borders. Prior to the Amending Directive, the pipelines from Norway were already within the scope of EU internal market gas rules but, as explained below, the other pipelines were not since they are located outside the EU's "internal market" (see paragraph 103 below).
55. Russian pipeline gas is currently imported into the EU on three main pipeline routes:<sup>41</sup>

<sup>39</sup> Other LNG sources accounted for 17% of EU gas imports.

<sup>40</sup> **Exhibit C-28**, European Commission (DG Energy Market Observatory for Energy) report, "Quarterly Report on European Gas Markets", Volume 12, Issue 4, Fourth Quarter of 2019, 2020, p 13.

<sup>41</sup> For completeness, Russian gas is also transported to the Baltic countries via a number of much smaller onshore pipelines. For technical capacity of pipelines, please see **Exhibit C-135**, Document prepared by Herbert Smith Freehills LLP, "Offshore and onshore pipelines from third countries - Capacity".

- i. Nord Stream 1: as discussed in Section V.2 below, Nord Stream 1 is an offshore import pipeline transporting gas from Vyborg in Russia to Greifswald in Germany via the Baltic Sea. The pipeline has a technical capacity of 55 bcm/y.
  - ii. Yamal: an onshore import pipeline transporting gas from Russia through Belarus to the border of Poland. The pipeline has a technical capacity of 33 bcm/y.
  - iii. The Ukrainian transport system: an onshore import pipeline system transporting gas from Russia through Ukraine to the borders of Slovakia, Hungary, Romania and Poland. The Ukrainian transport system has a technical capacity of approximately 142 bcm/y.
56. As of this year, Russian gas is also being transported to the EU via the Turkish pipeline system taking gas from the TurkStream pipeline from Russia to Turkey through the Black Sea. The TurkStream pipeline consists of two lines with a total technical capacity of 31.5 bcm/y (15.75 bcm/y each). The first line is intended for gas supplies to Turkey whereas the second line is intended for gas to be delivered to the Turkish/Bulgarian border and onward to the EU. Commercial supplies on the TurkStream pipeline commenced in January 2020.<sup>42</sup>
57. Among the import routes from Russia, the Ukraine transit route represented 74 bcm (46%) of the Russian pipeline gas imports by volume of gas in 2019, followed by Nord Stream 1 53 bcm (33%) and the Belarus transit (mainly Yamal) 36 bcm (21%).<sup>43</sup>
58. Natural gas from Norway is imported to the EU via offshore pipelines which are connected to Norway's gas fields in the North Sea and are considered as an "*upstream pipeline network*",<sup>44</sup> a category of infrastructure that receives special and favourable regulatory treatment under the Gas Directive, which applies in Norway by virtue of its membership of the European Economic Area.<sup>45</sup>
59. The North African import corridor to Spain and Italy includes four offshore import pipelines:<sup>46</sup>

<sup>42</sup> **Exhibit C-30**, TurkStream Press Release, "Launch ceremony for the TurkStream Pipeline held in Istanbul", 8 January 2020 (last accessed on 29 June 2020 at <http://turkstream.info/press/news/2020/211/>) and **Exhibit C-31**, TurkStream Press Release, "First billion cubic meters of gas delivered through TurkStream", 27 January 2020 (last accessed on 22 June 2020 at <http://turkstream.info/press/news/2020/214/>).

<sup>43</sup> **Exhibit C-28**, European Commission (DG Energy Market Observatory for Energy) report, "Quarterly Report on European Gas Markets", Volume 12, Issue 4, Fourth Quarter of 2019, 2020, p 4. NSP2AG notes that Nord Stream 1 AG's own press release gives a higher figure for 2019 of 58.5 bcm (**Exhibit C-32**, Nord Stream 1 AG Press Release, "A Volume of 58.5 Billion Cubic Metres of Natural Gas Was Transported Through the Nord Stream Pipeline in 2019", 29 January 2020).

<sup>44</sup> An "*upstream pipeline network*" is defined under Article 2(2) of the Gas Directive as "*any pipeline or network of pipelines operated and / or constructed as part of an oil or gas production project, or used to convey natural gas from one or more such projects to a processing plant or terminal or final coastal landing terminal*" (see **Exhibit CLA-4**, Gas Directive, Article 2(2)).

<sup>45</sup> The members of the European Economic Area (EEA) are Norway, Iceland, Liechtenstein and the EU and its Member States. As an EEA member, Norway applies most EU internal market legislation, including the Gas Directive.

<sup>46</sup> For technical capacity of pipelines, please see **Exhibit C-135**, Document prepared by Herbert Smith Freehills LLP, "Offshore and onshore pipelines from third countries – Capacity".



- i. The Maghreb Europe (MEG) pipeline which transports gas from Algeria through Morocco to Tarifa in Spain. The pipeline has a technical capacity of 12 bcm/y.
  - ii. The Medgaz pipeline which transports gas from Algeria directly to Almeria in Spain. The pipeline has a technical capacity of 8 bcm/y.
  - iii. The Transmed pipeline which transports gas from Algeria through Tunisia to Mazara del Vallo in Italy. The pipeline has a technical capacity of 33 bcm/y.
  - iv. The Greenstream pipeline which transports gas from Libya to Gela in Italy. The pipeline has a technical capacity of 8 bcm/y.
60. In the near future, natural gas will also be imported into the EU via the Trans-Anatolian Natural Gas Pipeline ("**TANAP**") which is an onshore import pipeline transporting gas from Azerbaijan and Georgia through Turkey to the Greek border where it will connect to the Trans Adriatic Pipeline ("**TAP**"), which is currently under construction. The TANAP pipeline has a capacity to deliver 10 bcm/y to the EU border.<sup>47</sup> Commercial operation of TAP is planned to start in October 2020.
61. Leaving aside the Norwegian "*upstream*" pipelines, each of the existing five offshore import pipelines bringing gas to the EU, namely Greenstream, Transmed, Medgaz, MEG and Nord Stream 1, have owners that are gas suppliers (and in most cases are exclusively or primarily owned by gas suppliers including the upstream producer/supplier). Consequently they do not comply with the "*unbundling*" rules of the Third Gas Directive.
- i. Greenstream: the Greenstream pipeline is owned by Greenstream B.V., a 50/50 Joint Venture between the National Oil Corporation of Libya (the Libyan state-owned oil and gas producer/supplier) and ENI North Africa B.V (which is part of the ENI group, the Italian gas producer/supplier).
  - ii. Transmed: the offshore section of the Transmed pipeline is owned by the Transmediterranean Pipeline Company Ltd., which in turn is jointly owned 50/50 by the ENI Group (the Italian gas producer/supplier) and Sonatrach (the Algerian state-owned vertically integrated oil and gas producer/supplier).
  - iii. Medgaz: the current shareholders of Medgaz are Sonatrach (51%), and Naturgy (49%). Naturgy is a gas and electricity supplier with significant activities in Spain. Naturgy is in the process of selling part of its shareholding in Medgaz to BlackRock, a US investment management firm. After completion of the planned transaction, the

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<sup>47</sup> NSP2AG understands that TANAP's technical capacity is 16 bcm/y of which 10 bcm/y is destined for transportation of gas to the EU (it is also understood that the Trans-Adriatic Pipeline (TAP) which connects with TANAP at the Turkish-Greek border will have a capacity of 10 bcm/y).



shareholders in Medgaz would be Sonatrach (51%), Naturgy (24.5%) and BlackRock (24.5%).<sup>48</sup>

- iv. MEG: NSP2AG understands that the offshore section of the MEG pipeline is split and that the part of the offshore section in the Spanish territorial sea and continental shelf is owned by Gasoducto Al-Andalus (which is jointly owned by Enagas Transporte<sup>49</sup> (67%) and Transgas<sup>50</sup> (33%)). Europe Maghreb Pipeline Ltd (EMPL) is responsible for commercial gas transportation through the Moroccan section of the pipeline, including the section in Moroccan territorial waters. The shareholders of EMPL are Naturgy (77.2%) and Galp Energia<sup>51</sup> (22.8%). Operation and maintenance of the Moroccan section of the MEG pipeline is undertaken by Metragaz S.A. whose shareholders are Naturgy (76.68%), Galp Energia (22.64%) and Office National des Hydrocarbures et des Mines (0.68%).
  - v. Nord Stream 1: the shareholders of Nord Stream 1 are PJSC Gazprom ("**Gazprom**")<sup>52</sup> (51%), Wintershall Dea Schweiz AG<sup>53</sup> (15.5%), PEG Infrastruktur AG (a subsidiary of E.ON Beteiligungen<sup>54</sup>) (15.5%), Gasunie Infrastruktur AG (a subsidiary of Nederlandse Gasunie<sup>55</sup>) (9%) and ENGIE S.A.<sup>56</sup> (9%). With the exception of Gasunie Infrastruktur AG, each of these companies is a gas supplier or is part of a vertically integrated undertaking that supplies gas. Nederlandse Gasunie, by contrast, does not supply gas and is purely a network and infrastructure company.
62. The development of a large international pipeline will usually involve the setting up of a project company by a consortium of gas supply companies (most often including the upstream gas producer in the exporting country and the downstream suppliers in the importing country – as is the case for all the offshore import pipelines between the EU and North Africa and Russia respectively (i.e. the five pipelines discussed in paragraph 61 above)). The gas supply companies will conclude a long term gas transportation agreement with the project company, providing it with long term revenue certainty that makes the project commercially viable and financeable. This is because these arrangements remove the risk

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<sup>48</sup> The transaction was cleared by the European Commission under EU merger control rules. See **Exhibit CLA-24**, European Commission (DG Competition) Decision, "Case M.9851 – Naturgy / Sonatrach / Blackrock / Medgaz: Article 6(1)(b) Non-Opposition", 17 June 2020.

<sup>49</sup> Enagas Transporte S.A.U. has been certified and designated as Transmission System Operator and Independent System Operator in Spain.

<sup>50</sup> Transgas is a subsidiary of Portuguese company Galp Energia, whose activities include the production and supply of natural gas.

<sup>51</sup> Galp Energia is a Portuguese energy company whose activities include *inter alia* exploration, trading, distribution and supply of natural gas.

<sup>52</sup> PJSC Gazprom's activities include the production and supply of natural gas.

<sup>53</sup> Wintershall DEA Schweiz AG is a subsidiary of Wintershall DEA, whose activities include the exploration and production of oil and gas. The companies are part of the German BASF group.

<sup>54</sup> E.ON Beteiligungen GmbH is a subsidiary of E.ON, a German energy company that is active in the production, transportation, distribution and supply of electricity and gas.

<sup>55</sup> Gasunie is a gas network operator.

<sup>56</sup> Engie is active across the entire energy chain, in electricity and natural gas, including gas supply.

of a very high upfront capital investment that ultimately does not generate sufficient revenue to recover the investment made and generate a reasonable profit.

### **IV.3 The role and regulation of transmission infrastructure in the EU's internal gas market**

#### **Focus on the internal market**

63. As set out more fully in the First Expert Report of Professor Cameron,<sup>57</sup> the Gas Directive and associated rules are focused on the creation of an integrated EU gas market, starting from a situation of national or regional monopolies in each individual Member State without any meaningful possibility for competition (between Member States or even within a Member State).
64. In this respect it should be noted that the EU can only adopt legal measures to the extent the EU Treaties specifically grant it the power to do so. EU measures must, therefore, identify their "*legal basis*", which is the treaty provision on the basis of which they are adopted. The content of a measure adopted on a particular legal basis must be in line with the power granted by that provision (see further paragraph 178 below). When the First Gas Directive was proposed and adopted, it was explicitly discussed that the Gas Directive was exclusively concerned with the EU's internal market and that it did not seek to regulate imports from third States.<sup>58</sup> This was reflected in the legal basis used for the adoption of the First Gas Directive which is concerned with the internal market only and not with trade with third countries. The legal basis of the Second and Third Gas Directive has essentially remained the same as that of the First Gas Directive and each of these Directives is, therefore, focused on the internal market, not on trade with third countries.
65. Until the proposal for the Amending Directive, no proposals were ever made (or as far as is known even seriously considered) for the EU to adapt the Gas Directive in a way that widens its scope to pipelines bringing gas from exporting third countries to the borders of the EU.<sup>59</sup>

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<sup>57</sup> First Expert Report of Professor Cameron, Sections 2 and 3.

<sup>58</sup> **Exhibit C-33**, European Council Legal Service, "Contribution of the Legal Service to the Proceedings of the Energy Working Party", 8757/97, JUR 201 ENER 72 CODEC 323, 3 June 1997. The Legal Service concluded that the import of natural gas from third countries was covered by Regulation (EC) 3284/94 and that "*specific rules on gas imports should be adopted by way of an amendment to that Regulation and not through the proposed Directive, whose aim is to lay down rules for the internal market*".

<sup>59</sup> This is based on a review of the major EU policy documents in the three years leading up to the Commission's proposal for the Amending Directive, each of which is extensive and detailed. These include, *inter alia*, the European Commission's proposal for a revised Security of Supply Regulation of 16 February 2016 (accessible at <https://ec.europa.eu/transparency/regdoc/rep/10102/2016/EN/SWD-2016-25-F1-EN-MAIN-PART-1.PDF>) and the accompanying impact assessment (accessible at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0026&from=EN>); the European Commission Communication of 28 May 2014 "European Energy Security Strategy" (accessible at <https://www.eesc.europa.eu/resources/docs/european-energy-security-strategy.pdf>) and the accompanying in-depth study of European Energy Security (accessible at [https://ec.europa.eu/energy/sites/ener/files/documents/20140528\\_energy\\_security\\_study.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/20140528_energy_security_study.pdf)); the European Commission's single (energy) market progress report 2014 of 13 October 2014 (accessible at <https://eur-lex.europa.eu/legal->

Furthermore, Professor Cameron confirms that "*there is no evidence of which [he is] aware that the EU has more generally (i.e. outside the context of Nord Stream 2 and the Amending Directive) identified the extension of the Gas Directive to third country import pipelines as necessary or helpful to ensure (i) security of supply and/or (ii) effective competition in the internal market*".<sup>60</sup>

66. While steps have been taken to integrate within the EU internal gas market certain non-EU countries that wished for such integration,<sup>61</sup> logically, this required them to accept the EU's market integration rules. This is the case for Norway, which as a member of the European Economic Area applies most EU internal market legislation, including the Gas Directive. It is also the case for the Energy Community, which aims to create a "*single energy market*" between the EU and its South Eastern European contracting parties,<sup>62</sup> and which, in principle, requires its contracting parties to apply the Gas Directive rules.
67. There have been no proposals, however, to extend the rules unilaterally to pipelines from gas exporting third countries that do not seek to become part of the EU's integrated gas market (in particular Russia and Algeria). The absence of such proposals was entirely logical, as market integration rules cannot be meaningfully applied if there is no intention of integration. Clearly, the EU, Russia, Algeria, Libya, Tunisia and Morocco have no plans to create an integrated gas market spanning different continents.

### Regulatory concepts

68. The Gas Directive regulates a number of activities including the ones defined as follows:

*"transmission' means the transport of natural gas through a network, which mainly contains high-pressure pipelines, other than an upstream pipeline network and other than the part of high-pressure pipelines primarily used in the context of local distribution of natural gas, with a view to its delivery to customers, but not including supply";*

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[content/EN/TXT/PDF/?uri=CELEX:52014DC0634&qid=1558357809501&from=EN](https://eur-lex.europa.eu/resource.html?uri=cellar:1bd46c90-bdd4-11e4-bbe1-01aa75ed71a1.0001.03/DOC_1&format=PDF)); the European Commission's Communication "A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy" of 25 February 2015 (accessible at [https://eur-lex.europa.eu/resource.html?uri=cellar:1bd46c90-bdd4-11e4-bbe1-01aa75ed71a1.0001.03/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:1bd46c90-bdd4-11e4-bbe1-01aa75ed71a1.0001.03/DOC_1&format=PDF)) and the subsequent European Commission reports on the State of the Energy Union and the Clean Energy for All Europeans Package of 18 November 2015 (accessible at <https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-572-EN-F1-1.PDF>), 1 February 2017 (accessible at [https://ec.europa.eu/commission/sites/beta-political/files/2nd-report-state-energy-union\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/2nd-report-state-energy-union_en.pdf)) and 23 November 2017 (accessible at [https://ec.europa.eu/commission/sites/beta-political/files/third-report-state-energy-union\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/third-report-state-energy-union_en.pdf)).

<sup>60</sup> First Expert Report of Professor Cameron, para 6.36.

<sup>61</sup> **Exhibit CLA-25**, E. Grigorovic, "Chapter 16 – The internal energy market and neighbouring countries", in C. Jones (ed.), *EU Energy Law: Volume I: The Internal Energy Market*, 4th Ed. (Leuven: Claeys and Casteels, 2016), paras 16.1 – 16.22.

<sup>62</sup> The contracting parties to the Energy Community Treaty are Albania, Bosnia and Herzegovina, Kosovo, North Macedonia, Georgia, Moldova, Montenegro, Serbia, Ukraine and the EU.

*"'distribution' means the transport of natural gas through local or regional pipeline networks with a view to its delivery to customers, but not including supply";*

*"'supply' means the sale, including resale, of natural gas, including LNG, to customers".<sup>63</sup>*

69. NSP2AG is considered to perform the activity of "transmission". NSP2AG does not perform the activity of "supply" of gas (i.e. it does not sell gas), but its shareholder Gazprom does (primarily via its subsidiary Gazprom Export).

70. A company that operates network infrastructure for transmission is referred to as a "transmission system operator" or "**TSO**". The Gas Directive defines the concept as follows:

*"'transmission system operator' means a natural or legal person who carries out the function of transmission and is responsible for operating, ensuring the maintenance of, and, if necessary, developing the transmission system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long-term ability of the system to meet reasonable demands for the transport of gas".<sup>64</sup>*

71. The transmission of gas is further regulated by the Gas Regulation, which explains that, by regulating access to transmission networks the EU seeks to:

*"facilitat[e] the emergence of a well-functioning and transparent wholesale market with a high level of security of supply in gas and providing mechanisms to harmonise the network access rules for cross-border exchanges in gas".<sup>65</sup>*

72. The key regulatory concepts that the Gas Directive uses to achieve its objectives of liberalisation and integration are "*unbundling*", "*third party access*" and "*tariff regulation*". These concepts are the basic building blocks of the "pro-competitive" rules of the Third Energy Package, which were considered necessary in order to allow competition, trade and market integration to develop in the context of the specific features of the energy sector, whereby gas and electricity was historically exclusively supplied by often State-owned monopolies that were vertically integrated and it was legally and practically impossible or economically unfeasible for any new market entrant to duplicate existing network infrastructure.<sup>66</sup>

73. Unbundling is concerned with the ownership of and control over transmission infrastructure and is explained in paragraphs 75 to 84 below.

74. Third party access and tariff regulation are discussed together in paragraphs 85 to 89 as these concepts determine how the transport capacity of a transmission infrastructure must

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<sup>63</sup> **Exhibit CLA-4**, Gas Directive, Articles 2(3), 2(5) and 2(8).

<sup>64</sup> **Exhibit CLA-4**, Gas Directive, Article 2(4).

<sup>65</sup> **Exhibit CLA-6**, Gas Regulation, Article 1(c).

<sup>66</sup> See also First Expert Report of Professor Cameron, paras 2.10-2.14.

be offered to and accessed by market participants, i.e. gas suppliers selling and buying gas on the wholesale market that need access to the transmission system. The concepts of third party access and tariff regulation are further regulated (together) by the Gas Regulation (which does not address the issue of unbundling). Most of the regulatory concepts covered by the Gas Regulation are in turn further regulated in significant detail by Network Codes.

## Unbundling

75. The separation of the network business and the supply of gas are considered necessary to avoid the network owner and operator from advantaging its own gas supply arm (and disadvantaging competing gas supply businesses).<sup>67</sup>
76. The basic unbundling obligation in the Gas Directive – "full ownership unbundling" – is set out in Article 9 and requires separation of: (i) the ownership of and control over gas transmission infrastructure; and (ii) gas production or supply. The Gas Directive further allows Member States to introduce two alternative unbundling regimes, namely (i) the independent system operator ("**ISO**") model; and (ii) the independent transmission system operator ("**ITO**") model.
77. The two alternative unbundling regimes are optional for Member States and only available for transmission infrastructure that belonged to a vertically integrated undertaking (i.e. including a gas supplier and a TSO) or "VIU" on 3 September 2009, the date of entry into force of the Third Gas Directive. As explained by the Commission, the logic of providing for these alternative regimes was to "prevent a situation in which VIUs would have no choice but to sell off their transmission assets", i.e. to protect existing investors' legitimate expectations.<sup>68</sup>
78. For the purposes of applying the unbundling rules, the concept of a vertically integrated undertaking is defined widely by the Gas Directive.<sup>69</sup> NSP2AG would qualify as being part of a vertically integrated undertaking for the purposes of the Gas Directive because its shareholder is Gazprom, which is a gas supplier in the EU, primarily via its subsidiary Gazprom Export.
79. Each of the three unbundling models is explained in more detail below.

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<sup>67</sup> **Exhibit CLA-4**, Gas Directive, Recital (9) provides that: "Any system for unbundling should be effective in removing any conflict of interests between producers, suppliers and transmission system operators, in order to create incentives for the necessary investments and guarantee the access of new market entrants under a transparent and efficient regulatory regime".

<sup>68</sup> **Exhibit C-34**, European Commission Opinion, "Certification of the Operators of the Nordeuropäischen Erdgasleitung (NEL)", C(2013) 7019 final, 18 October 2013, pp 4-5, which further explains that: "To future TSOs [transmission system operators] however, the legal framework is clear: they have to comply with the ownership unbundling rules".

<sup>69</sup> **Exhibit CLA-4**, Gas Directive, Article 2(20): "a natural gas undertaking or a group of natural gas undertakings where the same person or the same persons are entitled, directly or indirectly, to exercise control, and where the undertaking or group of undertakings perform at least one of the functions of transmission, distribution, LNG or storage, and at least one of the functions of production or supply of natural gas".

### ***Full ownership Unbundling***

80. Article 9 of the Gas Directive bans a gas supplier from having an ownership interest in a transmission system operator unless (i) the shareholding does not constitute a majority share; (ii) the gas supplier does not exercise any voting rights; (iii) the gas supplier does not exercise any power to appoint members of the organs of the company; and (iv) the gas supplier does not otherwise directly or indirectly have any form of control over the transmission system operator. The concept of control "*encompasses both de iure and de facto control, and also includes both direct and indirect control, through an intermediate subsidiary for example*".<sup>70</sup> In essence, Article 9 allows a gas supplier to have a non-majority shareholding in a TSO but the gas supplier is banned from exercising any influence whatsoever, thus making it highly unattractive for any gas supplier to have a significant shareholding.

### ***The Independent System Operator Model (ISO)***

81. Under the ISO model, a vertically integrated undertaking can remain the owner of transmission infrastructure (while continuing activities in gas supply) but must appoint an independent third party to operate it, the so-called "independent system operator" (or ISO). Article 14 of the Gas Directive imposes a number of specific requirements to ensure the independence of the ISO.

### ***The Independent Transmission Operator Model (ITO)***

82. Under the ITO model, a vertically integrated undertaking owns a legally separate entity that owns and operates the transmission system. This legally separate entity is referred to as the "independent transmission operator" (or ITO). Chapter IV of the Gas Directive imposes a series of detailed requirements aimed at ensuring the independence of the ITO from its parent company including rules aimed at: (i) ensuring that the ITO has the necessary assets, financial resources, equipment and independent staff and corporate services (such as legal and IT) (Article 17); (ii) independent decision making (Article 18); and (iii) independence of staff and management (Article 19).

### ***Certification***

83. Pursuant to Article 10 of the Gas Directive and Article 3 of the Gas Regulation, any company operating a transmission infrastructure must be certified by the relevant Member State's regulatory authority as being compliant with the unbundling rules (irrespective of the unbundling model applied). These two provisions also set out the applicable procedure, which involves the European Commission.

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<sup>70</sup> **Exhibit C-35**, European Commission Staff Working Paper, "The Unbundling Regime: Interpretative Note on Directive 2009/72/EC concerning Common Rules for the Internal Market in Electricity and Directive 2009/73/EC concerning Common Rules for the Internal Market in Natural Gas", 22 January 2010, p 8.

84. Article 11 imposes additional requirements on transmission system operators and owners that are "*controlled by a person or persons from a third country or third countries*". In such a case the national regulatory authority "*shall refuse certification*" unless it has been demonstrated that "*granting certification will not put at risk the security of energy supply of the Member State and the [Union]*" (Article 11(3)(b)). Article 11 essentially seeks to prevent foreign investment in transmission infrastructure in certain circumstances. In the WTO claim brought by Russia against the EU, the Panel found that this provision is discriminatory and not justified by the EU's "public order" argument that non-EU companies were more susceptible to pressure from foreign governments than EU companies.<sup>71</sup>

### Third party access and tariff regulation

85. Recital 19 of the Gas Regulation sets out the following "*vital*" objective of regulated third party access:

*"To enhance competition through liquid wholesale markets for gas, it is vital that gas can be traded independently of its location in the system. The only way to do this is to give network users the freedom to book entry and exit capacity independently, thereby creating gas transport through zones instead of along contractual paths. The preference for entry-exit systems to facilitate the development of competition was already expressed by most stakeholders at the 6th Madrid Forum on 30 and 31 October 2002. Tariffs should not be dependent on the transport route. The tariff set for one or more entry points should therefore not be related to the tariff set for one or more exit points, and vice versa".<sup>72</sup>*

86. This describes the so-called "entry-exit system", which is a "*fundamental design component of the Third Package to foster the accomplishment of the EU internal gas market*".<sup>73</sup> The principal idea of such a system is that users of a transmission network covering a wide geographic area (often an entire Member State) can book entry and exit capacity on that network separately and that gas entered on that network at one point can be withdrawn from the system at any other point.<sup>74</sup> This removes the need to book transport capacity from one specific physical network point to another specific physical network point.<sup>75</sup> This also means

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<sup>71</sup> **Exhibit C-36**, World Trade Organisation panel report, "European Union and its Member States – Certain Measures relating to the energy sector", WT/DS476/R, 10 August 2018, section 7.10.2.

<sup>72</sup> **Exhibit CLA-6**, Gas Regulation, Recital (19).

<sup>73</sup> **Exhibit C-37**, European Commission, EY and Regional Centre for Energy Policy Research, "Quo vadis EU gas market regulatory framework – Study on a Gas Market Design for Europe", EUR 2017.3462, February 2018, p 49.

<sup>74</sup> See **Exhibit C-38**, CEER Position Paper, "Guidelines for tariff structure pertaining to intrastate and cross border transport and transit", 28 January 2002, para 20: "*The key attribute of 'entry-exit' tariffs and capacity is that entry and exit locations are independent. Gas can be sold 'entry paid' without there being any restriction as to its final destination. This facilitates the development of 'trading hubs' and stimulates gas-to-gas competition*".

<sup>75</sup> The CEER Position Paper explains that in case of a point-to-point tariff: "*distance is the main determinant of costs. Obviously, longer distances require a greater capital cost (longer pipes) and greater use of compression. Under a distance-related tariff, where there are multiple entry and exits, there is an incentive*

that all gas physically placed on the network is effectively pooled and allows the creation of a "virtual market place" (or virtual hub).<sup>76</sup>

87. This facilitates trading, increases liquidity and, consequently, encourages competition. It also removes a competitive advantage for the larger companies that supply sufficient gas in the area to have access to a gas volume that is sufficiently large to enable "pooling" of different locations within its own volume, which is not possible for a company with smaller volumes.<sup>77</sup> The key objective pursued by the rules on third party access and tariff regulation, therefore, is not to regulate transportation but to create, on the basis of a transmission network in a specific geographic area (a so-called "entry-exit zone"), a virtual wholesale market place where sellers and buyers can transact without concerns about the physical location of "their" gas. These different entry-exit zones must interconnect so that gas can freely flow between them, ultimately covering the entire EU.
88. In order to make this entry-exit system function additional technical matters need to be regulated. Therefore, the Gas Regulation contains basic rules on matters such as the calculation of tariffs,<sup>78</sup> different types of network access services,<sup>79</sup> methods for allocation of capacity to market participants<sup>80</sup> and so-called "balancing" (which is the technical service

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*for network users to swap gas scheduled to flow in opposite directions and hence save the associated transport costs, both capacity and any volume charges. This is obvious a commercial advantage to market players who have a portfolio of gas supply contracts at a variety of input points. This is one of the main reasons why, as already stated in the Strategy Paper, that contractual flows in a well-interconnected gas grid do not reflect the actual gas flows. [...] A point to point tariff does not promote trade, except in the case of full coincidence between real physical flows and contractual distance. It is the view of the Working Group that 'Entry-exit' tariff are more adapt to the increasing complexity of the market and of contractual relationships that will result under a liberalised European market". See **Exhibit C-38**, *ibid.*, paras 27 – 30.*

<sup>76</sup> See also First Expert Report of Professor Cameron, paras 3.13-3.15.

<sup>77</sup> **Exhibit CLA-26**, F. Gräper, "Chapter 9 – The gas regulation: substantive access rules", in C. Jones (ed.), *EU Energy Law: Volume I: The Internal Energy Market*, 4th Ed. (Leuven: Claeys and Casteels, 2016), paras 9.10 – 9.13: "It is submitted that entry-exit tariffs have a considerable advantage in the promotion of trade, liquidity and gas-to-gas competition, by limiting the disadvantage small shippers would have in a point-to-point tariff system.

*The discriminatory element in point-to-point systems occurs where network users with large transportation portfolios take advantage of the "portfolio effect". Most national markets were dominated by one or a few gas companies with large geographically balanced customer portfolios. These companies could optimise their overall transportation portfolio by creating internal swaps ("pooling" contractual paths), thus saving on overall capacity costs. New market entrants, with a limited number of clients could not do this.*

*Especially where entry-exit regimes allow for separate booking of entry and exit capacities, they create the most flexibility for shippers, fostering efficient trade, market liquidity and secondary trading of capacity. This is because under those circumstances shippers and new entrants may book capacity without specifying beforehand where this gas should go".*

<sup>78</sup> **Exhibit CLA-6**, Gas Regulation, Article 13(1) provides that tariffs or the methodologies used to calculate them must be: (i) non-discriminatory; (ii) approved by the regulatory authorities (also pursuant to Article 41(6) of the Gas Directive); (iii) transparent and "reflect the actual costs incurred, insofar as such costs correspond to those of an efficient and structurally comparable network operator and are transparent, whilst including an appropriate return on investments"; and (iv) "set separately for every entry point into or exit point out of the transmission system" and shall "not be calculated on the basis of contract paths".

<sup>79</sup> **Exhibit CLA-6**, Gas Regulation, Article 14(1) requires that TSOs must provide different types of "capacity", i.e. types of pipeline transport contracts namely "interruptible" as well as "firm" (i.e. uninterruptible) and long term (one year) or short term (less than one year). Additional requirements are included in Annex I to the Gas Regulation and the Network Code on Capacity Allocation Mechanisms.

<sup>80</sup> The rules on capacity allocation and congestion management are intended to remedy the problem of contractual congestion which arises when the transmission system operator cannot make capacity



that is required to ensure that a gas supplier's input to and offtake from the gas transmission network is balanced – which of course is required for the entry-exit system to work). The regulation of these technical matters has been further developed in considerable detail in the following five Network Codes:

- i. Commission Regulation (EU) 2015/703 of 30 April 2015 establishing a Network Code on interoperability and data exchange rules;<sup>81</sup>
- ii. Commission Regulation (EU) 2017/459 of 16 March 2017 establishing a Network Code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013;<sup>82</sup>
- iii. Commission Decision 2012/490/EU of 24 August 2012 on amending Annex I to Regulation (EC) No 715/2009 of the European Parliament and of the Council on conditions for access to the natural gas transmission networks.<sup>83</sup> This Decision contains so-called congestion management rules that were originally planned for inclusion in the Network Code on capacity allocation mechanisms (point (ii) above). However, as this took too much time it was instead decided to use the mechanism of introducing the relevant rules in Annex I to the Gas Regulation via a different institutional procedure.<sup>84</sup> For ease of reference it is referred to in this Memorial as one of the five Network Codes;
- iv. Commission Regulation (EU) 2017/460 of 16 March 2017 establishing a Network Code on harmonised transmission tariff structures for gas;<sup>85</sup> and
- v. Commission Regulation (EU) No 312/2014 of 26 March 2014 establishing a Network Code on Gas Balancing of Transmission Networks.<sup>86</sup>

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available, even if capacity is not actually used, because all capacity has been booked long term on a firm basis (usually by incumbent gas suppliers). An example of such a rule is the "use-it-or-lose-it" principle contained in Article 16(3)(b) and Section 2.2.5 of Annex I of the Gas Regulation. Pursuant to this principle, transport capacity that has been contractually booked by market participants but that is not used in practice, must be made available again to other market participants. Market participants that have booked capacity must also be allowed to sell capacity they do not plan to use to other market participants on a so-called "secondary market". Significant additional detailed regulation is imposed in the Network Code on Capacity Allocation Mechanisms.

<sup>81</sup> **Exhibit CLA-27**, European Commission Regulation (EU) 2015/703 of 30 April 2015 establishing a network code on interoperability and data exchange rules, OJ L 113/13, 1 May 2015.

<sup>82</sup> **Exhibit CLA-28**, European Commission Regulation (EU) 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013, OJ L 72/1, 17 March 2017.

<sup>83</sup> **Exhibit CLA-29**, European Commission Decision of 24 August 2012 on amending Annex I to Regulation (EC) No 715/2009 of the European Parliament and of the Council on conditions for access to the natural gas transmission networks, OJ L 231/16, 28 August 2012.

<sup>84</sup> **Exhibit CLA-30**, F. Gräper and W. Webster, "Chapter 12 – The establishment of common network rules", in C. Jones (ed.), *EU Energy Law: Volume I: The Internal Energy Market*, 4th Ed. (Leuven: Claeys and Casteels, 2016), para 12.89.

<sup>85</sup> **Exhibit CLA-31**, European Commission Regulation (EU) 2017/460 of 16 March 2017 establishing a network code on harmonised transmission tariff structures for gas, OJ L 72/29, 17 March 2017.

<sup>86</sup> **Exhibit CLA-32**, European Commission Regulation (EU) No 312/2014 of 26 March 2014 establishing a Network Code on Gas Balancing of Transmission Networks, OJ L 91/15, 27 March 2014.

89. While there is no need for this Memorial to discuss the rules of the Network Codes in detail, it is important to note that the gas trading system that the EU's rules seek to create (also referred to as the "Gas Target Model" discussed hereafter) cannot function in practice without the rules provided in the Network Codes. Indeed, Professor Cameron comments that the Network Codes are *"essential to achieve, in practical reality, the internal market objectives pursued by the Third Gas Directive and the Gas Regulation"*.<sup>87</sup>

### The EU's Gas Target Model

90. The overall policy underlying the approach adopted in the Gas Directive and the Gas Regulation and the detailed rules provided in the Network Codes is well explained in the so-called "European Gas Target Model" collectively developed by all energy regulators of the Member States and the EU. First agreed in 2011,<sup>88</sup> and updated in 2014,<sup>89</sup> the model pursued by the regulators via the instruments provided through the Third Energy Package is the co-existence of a number of national or regional entry-exit zones, also referred to as "gas market areas",<sup>90</sup> which should operate as *"functioning wholesale markets"*.<sup>91</sup> These zones/market areas must be *"interconnected"* with each other to allow gas to move freely between them.<sup>92</sup>

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<sup>87</sup> First Expert Report of Professor Cameron, para 6.47.

<sup>88</sup> **Exhibit C-40**, CEER, "Conclusions Paper – Vision for a European Gas Target Model Conclusions Paper", C11-GWG-82-03, 1 December 2011.

<sup>89</sup> **Exhibit C-41**, ACER, "European Gas Target Model – review and update", January 2015.

<sup>90</sup> **Exhibit C-39**, ACER, "European Gas Target Model – review and update: Annex 6 – Tools for gas market integration and connection", January 2015.

<sup>91</sup> **Exhibit C-40**, CEER, "Conclusions Paper – Vision for a European Gas Target Model Conclusions Paper", C11-GWG-82-03, 1 December 2011, p 8.

<sup>92</sup> **Exhibit C-41**, ACER, "European Gas Target Model – review and update", January 2015, p 4; **Exhibit C-40**, CEER, "Conclusions Paper – Vision for a European Gas Target Model Conclusions Paper", C11-GWG-82-03, 1 December 2011, pp 5 and 10. While the 2011 Gas Target Model was developed by the Council of European Energy Regulators (CEER), the update was carried out by the European Energy Regulators under the umbrella of ACER, supported by CEER. In the 2011 Gas Target Model, the vision of the EU gas market was set out as follows: *"In their approach, regulators see a competitive European gas market as a combination of entry-exit zones with virtual hubs. Their vision suggests that the development of competition should be based on the development of liquid hubs across Europe at which gas can be traded (these may be national or cross-border). Market integration should be served by efficient use of infrastructures, allowing market players to freely ship gas between market areas and respond to price signals to help gas flowing to where it is valued most. The target model has to allow for sufficient and efficient levels of infrastructure investment, in particular where physical congestions hinder market integration"*. (**Exhibit C-40**, CEER, "Conclusions Paper – Vision for a European Gas Target Model Conclusions Paper", C11-GWG-82-03, 1 December 2011, p 5; **Exhibit C-41**, ACER, "European Gas Target Model – review and update", January 2015, p 8).

91. There are currently 31 entry-exit zones / market areas / wholesale markets in the EU.<sup>93</sup> In most Member States there is a single zone/area/market covering the entire territory. The exceptions are Germany (two zones), Poland, Bulgaria and Romania.<sup>94</sup>

92. In a 2014 report, the EU's Agency for the Cooperation of Energy Regulators (referred to as "**ACER**" and explained further below) stated:

*"The realisation of the Gas Target Model is a major step towards the achievement of the [internal energy market] and it will remain a top priority for the Agency in the short term. The Gas Target Model will continue to be implemented through the adoption and implementation of Network Codes and Commission Guidelines".<sup>95</sup>*

93. ACER further stated that:

*"The Gas Regulation anticipates the development of Network Codes for cross-border and market integration issues. These technical rules, which turn regulatory policies (Framework Guidelines) into operational rules, follow the principles and objectives of the Gas Regulation and are aimed at improving access arrangements in the internal market in specific areas (CMP Guidelines, Network Codes on CAM, Gas Balancing, Interoperability and Data Exchange Rules, and Harmonised Transmission Tariff Structures)".<sup>96</sup>*

## Regulatory bodies

94. The EU's complex system of rules concerning transmission is administered by a number of regulatory bodies, without which the rules could not function. These bodies cooperate closely and they are considered as being a key feature of the Third Energy Package.<sup>97</sup> By contrast,

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<sup>93</sup> See ENTSOG Transparency website (accessible at <https://transparency.entsog.eu/#/map?loadBalancingZones=true>); see also **Exhibit C-42**, ENTSOG, "Balancing Network Code: Implementation and Effect Monitoring Report, 2017: Annex II – Overview of countries with their balancing zones", April 2018, p 31. This includes the UK, which although no longer a member of the EU, remains subject to the EU's energy internal market regime during the present Brexit transitional period.

<sup>94</sup> See ENTSOG Transparency website. The UK has one balancing zone for Great Britain and one for Northern Ireland. See **Exhibit C-42**, ENTSOG, "Balancing Network Code Implementation and Effect Monitoring Report, 2017: Annex II – Overview of countries with their balancing zones", April 2018, p 31.

<sup>95</sup> **Exhibit C-43**, ACER, "Conclusions Paper – Energy Regulation: A Bridge to 2025 Conclusions Paper", 19 September 2014, para 28.

<sup>96</sup> **Exhibit C-41**, ACER, "European Gas Target Model – review and update", January 2015, p 14.

<sup>97</sup> See to this effect the First Expert Report of Professor Cameron, para 3.16. Professor Cameron also comments that: "*It is implicit in the complex design of the regulatory regime, that significant intervention from the [National Regulatory Authorities] is required if the regime is to achieve the goal of integrating the internal energy market*" (*ibid.*, para. 3.17); see also **Exhibit CLA-33**, F. Ermacora, "Chapter 7 – The Agency for the Cooperation of Energy Regulators (ACER)" in C. Jones (ed.), *EU Energy Law, Volume I, The Internal Energy Market*, 4th Ed. (Leuven: Claeyss and Casteels, 2016), para 7.2. The EU Court of Justice, in the *Baltic Cable* case, also noted in relation to the electricity market that: "*the national regulatory authorities — which, as recital 24 of Regulation No 714/2009 shows, play an essential role in the proper functioning of the internal market in electricity [...]*". **Exhibit CLA-34**, *Baltic Cable*, Case C-454/18, EU:C:2020:189, Judgement, 11 March 2020, para 78. See also Recital 10 of the Agency Regulation which provides that "*ACER was established to fill the regulatory gap at Union level and to contribute towards the effective functioning of the internal markets for electricity and natural gas*" (see **Exhibit CLA-35**, Regulation

the Amending Directive does not provide for any meaningful cooperation between the EU regulatory bodies and authorities from the third countries in which the newly covered third country import pipelines originate.<sup>98</sup>

95. The European Commission has the general role of overseeing and monitoring the functioning of the rules. It is in charge of general policy setting and also fulfils a number of specific regulatory tasks. Pursuant to Article 39 of the Gas Directive each Member State must also designate an independent national regulatory authority.
96. The Agency for the Cooperation of Energy Regulators ("**ACER**") was set up as part of the Third Energy Package and is currently governed by Regulation (EU) 2019/942<sup>99</sup> (the "**Agency Regulation**"), which provides in Recital 10 that:

*"Member States should cooperate closely, eliminating obstacles to cross-border exchanges of electricity and natural gas with a view to achieving the objectives of the Union energy policy. ACER was established to fill the regulatory gap at Union level and to contribute towards the effective functioning of the internal markets for electricity and natural gas. ACER enables regulatory authorities to enhance their cooperation at Union level and participate, on a mutual basis, in the exercise of Union-related functions".<sup>100</sup>*

97. The Gas Regulation provides that TSOs in the EU need to establish a "*European network for transmission system operators for gas*" ("**ENTSOG**").<sup>101</sup> Article 4 provides that all transmission system operators shall cooperate at EU level through ENTSOG in order to promote the completion and functioning of the internal gas market and cross-border trade. Commentators have explained that: "*The enhanced cooperation of transmission system operators is a key part of the third package, and is expected to give new impetus to the development of a truly integrated internal electricity and gas market*".<sup>102</sup>
98. ENTSOG currently has: (i) 44 TSO members from EU Member States (and the UK); (ii) three "*Associated Partners*" from EU Member States; and (iii) nine "*Observers*" from non-EU States.<sup>103</sup> According to Article 9d of ENTSOG's Articles of Association: "*An observer may only be an undertaking which is a natural or legal person that is acting as a transmission*

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(EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators, OJ L 158, 14 June 2019, Recital (10)).

<sup>98</sup> While the Amending Directive envisages a degree of possible consultation and cooperation with the relevant third country authority in relation to the application of the Gas Directive rules in the EU, this is not comparable to the institutional mechanisms in the Gas Directive providing for deep levels of consultation and cooperation between EU and Member States authorities, as described below. See also, the First Expert Report of Professor Cameron, para 6.26.

<sup>99</sup> **Exhibit CLA-35**, Agency Regulation.

<sup>100</sup> **Exhibit CLA-35**, Agency Regulation, Recital (10).

<sup>101</sup> **Exhibit CLA-6**, Gas Regulation, Article 5.

<sup>102</sup> **Exhibit CLA-30**, F. Gräper and W. Webster, "Chapter 12 – The establishment of common network rules", in C. Jones (ed.), *EU Energy Law: Volume I: The Internal Energy Market*, 4th Ed. (Leuven: Claeys and Casteels, 2016), para 12.32.

<sup>103</sup> See ENTSOG website (last accessed on 2 July at <https://www.entsog.eu/members>).

system operator for natural gas in a state that is a candidate for accession to the EU, a party to the treaty establishing the Energy Community or a party to the convention establishing the European Free Trade Association". ENTSOG is not open, therefore, to participation by pipeline operators from the third country pipelines potentially affected by the Amending Directive (Russia, Algeria, Libya, Tunisia and Morocco).

#### **IV.4 The Gas Directive and EU practice recognise that the EU's regulatory framework described above undermines the ability to finance major new gas infrastructure**

99. As explained above, the key objective pursued by the Gas Directive (and associated legal instruments) is to liberalise and integrate the originally separate gas markets of the individual Member States that were dominated by national or regional vertically integrated monopolists. The Gas Directive (and associated legal instruments) do this in particular by removing the competitive advantage that such monopolists enjoyed from owning and operating a pre-existing transmission network (by imposing, as has been described above: (i) a structural and operational separation of the gas supply business from the transmission network; and (ii) detailed pro-competitive regulation of the way transmission capacity is made available to market participants).
100. Simultaneously, however, these rules have made investment in major new gas infrastructure more difficult by reducing the predictability of the recovery of these investments. A vertically integrated monopolist can be reasonably certain that it will be able to recover the cost of investment in new gas transport infrastructure from its gas supply customers. Furthermore, a project company set up to develop a large international pipeline will, as discussed in paragraph 62 above, usually comprise a number of gas supply companies that will conclude a long term gas transportation agreement with the pipeline project company, providing it with long term revenue certainty that makes the project commercially viable and financeable.
101. By contrast, a company that operates transmission infrastructure under the rules of the Third Energy Package faces a range of uncertainties including, primarily, that: (i) there may not be sufficient third party customers that book capacity on the pipeline; and (ii) the tariffs which will be approved by the regulator are uncertain at the time of investment. As a result, the operator of regulated transmission infrastructure (and the candidate investor or investors) run the risk that a significant investment in major new infrastructure would turn into a "*white elephant*", which does not generate enough revenue to recover the investment made, let alone generate a profit. In this way, the requirements of the Gas Directive therefore undermine the incentive to invest in new infrastructure or to expand existing infrastructure.
102. The legal framework of the Gas Directive and the EU's practice recognise this problem by providing for the possibility of exempting three types of "*major new gas infrastructure*" from the requirements of unbundling and regulated third party access (Article 36 Gas Directive). The three types of infrastructure are (i) interconnectors (i.e. cross-border transmission

pipelines), (ii) LNG facilities and (iii) gas storage facilities. EU law provides for a similar exemption in the electricity sector. There exists an extensive practice of granting such exemptions, which clearly recognises the negative impact of the rules on unbundling and regulated third party access on investors.<sup>104</sup>

#### **IV.5 Before the adoption of the Amending Directive, third country import pipelines were outside the scope of the EU rules**

103. The discussion above shows that third country import pipelines were clearly and deliberately outside the scope of EU rules on transmission prior to the Amending Directive. This view was shared by the Commission Legal Service,<sup>105</sup> the Council Legal Service,<sup>106</sup> the German energy regulator,<sup>107</sup> and ultimately the EU legislature which adopted the Amending Directive with the aim and effect of extending the rules to the section of offshore import pipelines in the territorial sea of the Member States.<sup>108</sup>
104. It should further be noted that each of the five Network Codes explicitly addresses its territorial application and clearly excludes offshore pipelines from their scope. Four of the Network Codes provide that national authorities can decide whether or not to apply the detailed rules to "*entry points from and exit points to third countries*".<sup>109</sup> This is a reference

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<sup>104</sup> By way of example, European Commission exemption Decisions regarding the Nabucco pipeline explain that: "[...] *shareholders and lenders invest in a project of this scale only after they have been assured that the potential risks have been covered to a maximum degree which is usually guaranteed by the expected future revenues. The underlying reason is that the investment must be regarded largely as sunk costs. Returns can only be made predictable if the prices and terms in the initial contracts, which are fixed in accordance with the approved method, remain unchanged*". (see **Exhibit CLA-36**, European Commission Exemption Decision on the Romanian section of the Nabucco pipeline, C(2009) 5135, SG-Greffe (2009) D/3563, 23 June 2009, para 61; **Exhibit CLA-37**, European Commission Exemption Decision on the Bulgarian section of the Nabucco pipeline, C(2009) 3037, SG-Greffe (2009) D/2299, 20 April 2009, para 52; **Exhibit CLA-38**, European Commission Exemption Decision on the Austrian section of the Nabucco pipeline, CAB D(2008)142, 8 February 2018, para 50. See also **Exhibit C-44**, European Commission Staff Working Paper, "New Infrastructure Exemptions: Commission staff working document on Article 22 of Directive 2003/55/EC concerning common rules for the internal market in natural gas and Article 7 of Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity", SEC(2009)642 final, 6 May 2009, Box 5, setting out guidance for the use of the exemption possibility, which provides that: "*The construction of new major pieces of infrastructure is often linked to the conclusion of long term contracts for upstream supply and/or transport capacity. Such contracts are in principle a legitimate way for project promoters to reduce the economic risk of their investment*".

<sup>105</sup> **Exhibit C-24**, European Parliamentary Research Service, "Common rules for gas pipelines entering the EU internal market", Briefing: EU Legislation in Progress (editions 1 to 4), PE 614.673, 23 January 2018, 3 July 2018, 27 March 2019, 27 May 2019, in which it is stated that: "*the legal services of the Commission and the Council arrived at the shared conclusion that the 2009 Gas Directive, as currently worded, does not fully apply to gas pipelines between the EU and third countries*".

<sup>106</sup> See further paragraph 214 below.

<sup>107</sup> **Exhibit C-45**, Letter from J. Homann (President of the Bundesnetzagentur) to D. Ristori (Director-General DG Energy), 3 March 2017, in which the president of the German energy regulator stated that he shared the view set out in a legal opinion of the Federal Government that offshore interconnectors from third countries to the EU are not subject to the provisions of the third internal energy market package. He also stated that: "*it is long-standing regulatory practice of the European Commission not to regard such pipeline projects under the regime of the internal market*".

<sup>108</sup> **Exhibit C-46**, European Commission Proposal for the Amending Directive, COM(2017) 660 final, 2017/0294 (COD), 8 November 2017, Explanatory Memorandum, p 2.

<sup>109</sup> **Exhibit CLA-28**, Commission Regulation (EU) 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No

to a point that is part of a Member State transmission network. It is not a reference to the entry-exit point of the pipeline infrastructure connecting with a third country. By way of practical example, it refers to the entry point to the Spanish transmission network in Almeria connected to the Medgaz pipeline from Algeria. It does not refer to the exit point of the Medgaz pipeline. Of course, if Member State authorities can decide whether or not to apply these rules to the entry point to a Member State network, this inevitably implies that, as a matter of EU law, these rules do not apply to the third country import pipeline connecting to it. The fifth Network Code, the Network code on Balancing, is even clearer and simply provides that: "*This Regulation shall apply to balancing zones within the borders of the Union*" (Article 2(1)).

105. In light of all the above it is incontestable that, prior to the Amending Directive, EU rules did not apply to the third country import pipelines.

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984/2013, OJ L 72/1, 17 March 2017, Article 2(1); **Exhibit CLA-27**, Commission Regulation (EU) 2015/703 of 30 April 2015 establishing a network code on interoperability and data exchange rules, OJ L 113/13, 1 May 2015, Article 1(2); **Exhibit CLA-31**, Commission Regulation (EU) 2017/460 of 16 March 2017 establishing a network code on harmonised transmission tariff structures for gas, OJ L 72/29, 17 March 2017, Article 2(1); **Exhibit CLA-6**, Gas Regulation, Annex I, point 2.2.1.1.

## V. THE NORD STREAM 2 PROJECT AND NSP2AG'S INVESTMENT IN THE EU

### V.1 Introduction

106. This section explains the background to, and development of, the Nord Stream 2 project and the significance and scale of NSP2AG's investment in the EU. It addresses:
- i. The intention behind the project and its origins in the Nord Stream 1 project, the project's early development between 2011 and 2015, and the incorporation of NSP2AG in 2015 (**Section V.2**).
  - ii. The key contractual and financial milestones of the Nord Stream 2 project from 2015 onwards. In particular, the key contracts for the supply of line pipes, their weight coating & logistics, and pipelay; the financing of the project; and the long-term gas transportation agreement that underpins that financing (**Section V.3**).
  - iii. The construction of the pipeline (**Section V.4**).
  - iv. The Amending Directive and its impact in preventing the replacement, in 2019, of the majority of NSP2AG's early financing with cheaper project finance (**Section V.5**).
  - v. The status of the project as at 23 May 2019, when the Amending Directive entered into force (**Section V.6**).
  - vi. The current status of the Nord Stream 2 project (**Section V.7**).
107. This Section demonstrates the very valuable and sizeable investment NSP2AG has made in the EU, which is summarised in **Section V.8**.

### V.2 The Nord Stream 1 project and the background to Nord Stream 2

108. Nord Stream 2 was originally conceived as a second iteration of the highly successful Nord Stream 1 project. The first Nord Stream pipeline was an offshore import pipeline built to transport natural gas from Vyborg in Russia through the Baltic Sea to Greifswald in Germany. Nord Stream 1 was very similar in design and scale to Nord Stream 2, comprising two individual pipelines of approximately 1,224 km in length with a total capacity of 55 bcm per year.
109. Nord Stream AG ("**Nord Stream 1 AG**") is the company responsible for the planning, construction and operation of Nord Stream 1. Its shareholders are detailed at paragraph 61.v above.
110. Nord Stream 1 was a high-profile project which received considerable support from the EU and its Member States during its development. In 2006, when the Nord Stream 1 project was in its early development, the European Parliament and European Council accorded it the status of being a "*priority project*" of "*European interest*", with such projects attaining "*the*



*highest priority*".<sup>110</sup> Nord Stream 1 was among a select group of energy projects described by the European Parliament as being "very important for the operation of the internal energy market or the security of energy supply" in the European energy market.<sup>111</sup>

111. Pipe laying for Nord Stream 1 began in April 2010. The first of the twin lines was completed in May 2011 and started operating in November 2011; the second line was completed in April 2012 and became operational in October 2012. By October 2015, Nord Stream 1 had transported 100 bcm of natural gas to the EU.<sup>112</sup> By the end of 2019, over 322 bcm of gas had been transported by Nord Stream 1. In 2019, the pipeline operated without interruption and transported 58.5 bcm (which, like the 57 bcm transported in 2018,<sup>113</sup> is above the nameplate capacity<sup>114</sup> of 55 bcm).<sup>115</sup> As [REDACTED] explains in [REDACTED] First Witness Statement, the operation of Nord Stream 1 at (and, at times, above) nameplate capacity has been particularly important for the security of supply in Europe, for example when a number of supply routes were interrupted during the 2017/2018 European winter period.<sup>116</sup>

#### Planning begins for Nord Stream 2 in 2011

112. In 2011, as a result of the success of Nord Stream 1, Nord Stream 1 AG began planning in relation to a second pipeline project to allow natural gas to be imported from Russia to the EU. This was the pipeline project which was initially known as the Nord Stream Extension (or NEXT) project and would later become known as Nord Stream 2.<sup>117</sup>
113. The Nord Stream 1 AG shareholders decided to conduct a feasibility study on the possibility of a second pipeline project (the "**NEXT Feasibility Study**"). The study was conducted and finalised on 14 September 2012.<sup>118</sup>

<sup>110</sup> **Exhibit CLA-16**, Decision 1364/2006/EC of the European Parliament and of the Council of 6 September 2006 laying down guidelines for trans-European energy networks and repealing Decision 96/391/EC and Decision No 1229/2003/EC, OJ L262/1, 22 September 2006, Recital 8 and Annex I point NG.1. Note that Nord Stream 1 was referred to as the "*North European gas pipeline*" at this time.

<sup>111</sup> **Exhibit CLA-16**, *ibid.*, Recital 8 and Annex I point NG.1.

<sup>112</sup> **Exhibit C-47**, Nord Stream 1 AG Fact Sheet, "The Nord Stream Pipeline Project", October 2017.

<sup>113</sup> [REDACTED]

<sup>114</sup> Nord Stream 1's nameplate or 'design' capacity is 55 bcm/year. The pipeline is designed on an assumption of 90% utilisation each year, in the expectation that the pipeline will usually be out of commission for maintenance or other reasons for some parts of the year, even though the pipeline is capable of delivering higher volumes if availability was uninterrupted. [REDACTED]

<sup>115</sup> **Exhibit C-32**, Nord Stream 1 AG Press Release, "A Volume of 58.5 Billion Cubic Metres of Natural Gas Was Transported Through the Nord Stream Pipeline in 2019", 29 January 2020. NSP2AG notes that a different figure for 2019 of 53 bcm is given in **Exhibit C-28**, European Commission (DG Energy Market Observatory for Energy) report, "Quarterly Report on European Gas Markets", Volume 12, Issue 4, Fourth Quarter of 2019, 2020, p 4.

<sup>116</sup> [REDACTED]

<sup>117</sup> [REDACTED]

<sup>118</sup> **Exhibit C-48**, Nord Stream 1 AG, "NEXT Feasibility Study", N-GE-COM-REP-000-FeasStud, Rev. A, 14 September 2012.

114. The NEXT Feasibility Study reached a positive view of the prospects for the Nord Stream 2 project, relying upon the "*experience gained from the [Nord Stream 1] project*".<sup>119</sup> The study refers to Nord Stream 1's "*positive reputation, the good contacts and the trust established [in the] countries involved*"<sup>120</sup> and to the European Commission's acknowledgement of Nord Stream 1 as "*an energy project of European interest*".<sup>121</sup>
115. Following the positive assessment of the Nord Stream 2 project in the NEXT Feasibility Study, in 2013, Nord Stream 1 AG published a project information document ("**PID**") setting out the anticipated key features of the Nord Stream 2 project.<sup>122</sup> As [REDACTED] explains, the purpose of this document, which was translated into the nine languages of the Baltic Sea region, was to:
- i. describe the proposed project and to thereby enable authorities to determine their role in the environmental and social impact assessment and associated permitting processes; and
  - ii. provide all stakeholders with an overview of the project, enabling them to determine their level of interest.<sup>123</sup>
116. The PID was prepared in close consultation with the states in the Baltic Sea region and in line with the Convention on Environmental Impact Assessment in a Transboundary Context ("**Espoo Convention**"). A draft version of the PID was submitted in November 2012 to the five countries through whose territory or EEZ the Nord Stream 2 would pass, namely Russia, Finland, Sweden, Denmark and Germany. Following a discussion with those countries in February 2013, the final PID was prepared by Nord Stream 1 AG in March 2013 and submitted to the remaining Baltic Sea states, Estonia, Latvia, Lithuania and Poland in April 2013.
117. During the following public consultation phase, Nord Stream 1 AG conducted over 200 meetings with governmental authorities, non-governmental organisations and other stakeholders.<sup>124</sup>
118. In parallel to the consultations under the Espoo Convention, preparations were made to apply for the relevant permits in the countries through whose territory or EEZ the pipeline would be laid.

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<sup>119</sup> **Exhibit C-48**, *ibid.*, section 3.2.

<sup>120</sup> **Exhibit C-48**, *ibid.*, section 3.1.

<sup>121</sup> **Exhibit C-48**, *ibid.*, section 5.4.1.

<sup>122</sup> **Exhibit R-17**, Nord Stream Extension Project Information Document (PID), Nord Stream 1 AG, March 2013.

<sup>123</sup> [REDACTED]

<sup>124</sup> **Exhibit C-49**, NSP2AG, Nord Stream 2: Espoo Report – Non-Technical Summary", March 2017, p 11. This non-technical summary was published by NSP2AG in April 2017, together with the environmental impact assessment (EIA) report under the Espoo Convention (the "**Espoo Report**").



119. As described in the following sections, the culmination of this planning was the incorporation of NSP2AG and its development of Nord Stream 2. Like Nord Stream 1, Nord Stream 2 is an offshore import pipeline which will transport natural gas from Russia to Germany. Nord Stream 2 consists of two individual pipelines of approximately 1,235km in length each, of which approximately 54km is within German territory (including its territorial waters). The pipelines will have a total capacity of 55 bcm per year.
120. Nord Stream 2's entry and exit points are different to Nord Stream 1, being at Ust-Luga in Russia and Lubmin in Germany, where the pipeline connects into the regulated German transmission system through upgraded and newly-built downstream transport pipelines; in particular, the North European Natural Gas Pipeline (NEL) and the European Gas Pipeline Link (EUGAL). These pipelines will transport the gas not only to Germany and north-western Europe but also to central and south-eastern Europe via the gas hub in Baumgarten, Austria.

#### **NSP2AG is incorporated in 2015**

121. In July 2015, NSP2AG was incorporated in Zug, Switzerland as the company which would be responsible for the planning, construction and operation of Nord Stream 2.<sup>125</sup> As explained at paragraphs 15 to 16 of the Notice, as a company constituted under the law of Switzerland, NSP2AG qualifies as a Swiss Investor for the purposes of the ECT. NSP2AG's sole shareholder is Gazprom.
122. NSP2AG was designated as, and remains to this day, the direct owner of all infrastructure associated with Nord Stream 2. It is also intended that NSP2AG will be the operator of the entire Nord Stream 2 pipeline, operating from the control room in the canton of Zug, Switzerland.
123. [REDACTED]  
[REDACTED]  
[REDACTED] Key personnel involved in the Nord Stream 1 project, including the CEO, the Chief Commercial Officer, the Chief Financial Officer, the Chief Project Officer, the Chief Technical Officer, the Head of Legal, the Head of Communications, the Head of Permitting, the Head of CEO Office, and the Deputy Project Officer, also transferred to or joined NSP2AG so that their experience with the successful Nord Stream 1 project could be incorporated into the planning process for Nord Stream 2.

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<sup>125</sup> **Exhibit C-2**, Extract of the Register of Commerce of the Canton of Zug for Nord Stream 2 AG dated 24 September 2019.

<sup>126</sup> [REDACTED]

### V.3 Key milestones of the Nord Stream 2 project

124. In the two years following its incorporation, NSP2AG achieved a number of important milestones essential for the implementation of the Nord Stream 2 project, notably the conclusion of (i) the key construction contracts, (ii) the long-term Gas Transportation Agreement, and (iii) the key finance agreements with the financial investors.

#### **NSP2AG concludes key contracts for the construction of Nord Stream 2**

125. While short sections of the pipeline are onshore in both Germany and Russia, most of the pipelines' over 200,000 pipe joints have to be installed offshore. Key steps in the construction of Nord Stream 2 include (i) the production of the pipes at pipe mills in Russia and Germany, (ii) their concrete weight coating at plants in Finland and Germany, a process which doubles the weight of each pipe joint in order to increase their stability and protect them from external damage, and (iii) the offshore pipe-laying by specialised vessels. From early 2016 onwards, NSP2AG entered into the key contracts essential for these processes, many of which were with and to be fulfilled by companies within the EU. These include the following:

- i. On [REDACTED] 2016, NSP2AG entered into contracts for the delivery of the line pipes with [REDACTED] [REDACTED] [REDACTED] (the "Line Pipes Contracts").<sup>127</sup> Including subsequent changes to the scope of work, the total capital expenditure by NSP2AG in relation to the Line Pipes Contracts is around [REDACTED], with [REDACTED] % ([REDACTED]) of the expenditure on the [REDACTED] contract.
- ii. On [REDACTED] 2016, NSP2AG entered into a contract for the concrete weight coating of the pipes and their transportation (logistics) with [REDACTED] [REDACTED] [REDACTED] on [REDACTED]

<sup>127</sup> [REDACTED]



██████████ 2016.<sup>128</sup> Following subsequent amendment,<sup>129</sup> the estimated value of the contract (the "Coating & Logistics Contract") is ██████████.

- iii. On ██████████ 2017, NSP2AG entered into a pipe lay and associated works agreement with ██████████, which was amended on ██████████ 2018 and ██████████ 2019 (the "Pipelay Contract").<sup>130</sup> The value of the original Pipelay Contract was approximately ██████████, and the amended value is approximately ██████████. Pipelaying works in Russian territorial waters (approximately 13 km) and German territorial waters (approximately 30 km) were contracted to ██████████ and ██████████ in ██████████ and ██████████ 2017, respectively. The value of these contracts is ██████████ and ██████████, respectively.
- iv. NSP2AG also entered into a number of smaller contracts, including contracts for dredging and backfilling in the German section, tunnelling, piping and mechanical works, soil management and electrical works.

126. By April 2017, NSP2AG had concluded the key contracts for the construction of Nord Stream 2 and committed a total of ██████████<sup>131</sup> out of an expected total capital expenditure of ██████████.

#### Conclusion of the Gas Transportation Agreement

- 127. On ██████████ 2017, NSP2AG entered into a long-term gas transportation agreement with Gazprom Export LLC. On ██████████ 2017, the parties entered into an amendment and restatement agreement relating to the gas transportation agreement (the "Gas Transportation Agreement" or "GTA").<sup>132</sup>
- 128. The GTA mitigates the significant risk involved in the construction of a project with substantial upfront expenditure such as the Nord Stream 2 pipeline by ensuring a long-term guaranteed

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128 ██████████  
129 ██████████  
130 ██████████

131 This figures includes, notably, the value of the Line Pipes Contracts, the Coating & Logistics Contract and the Pipelay Contract, as well as a number of smaller contracts entered into with various contractors.  
132 Exhibit C-63, Extract from Amendment and Restatement Agreement relating to the Gas Transportation Agreement made on ██████████ 2017 between Gazprom Export and NSP2AG, ██████████ 2017.

and secure revenue stream.<sup>133</sup> [REDACTED] explains that this security was a key reason for the financial investors to invest in the Nord Stream 2 project.<sup>134</sup>

129. [REDACTED]

130. [REDACTED]

131. The existence of the GTA and the robustness of its terms are of fundamental importance not only to NSP2AG itself but also to attract financial investors. The GTA contains a number of features which make the Nord Stream 2 project attractive to investors and compensate them for the inherent risks of a construction project of Nord Stream 2's scale. In particular, it contains the following features:

- [REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]

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133 [REDACTED]  
134 [REDACTED]  
135 [REDACTED]  
136 [REDACTED]  
137 [REDACTED]  
138 [REDACTED]

[REDACTED]

### Financing of the Nord Stream 2 project

132. Securing financing for the project was NSP2AG's most important - and most difficult - achievement as part of implementing the project. As [REDACTED] explains in [REDACTED] First Witness Statement,<sup>140</sup> the project is financed via a combination of:

i. shareholder equity;

[REDACTED]

133. This funding is shared between Gazprom (NSP2AG's sole shareholder) and five west European investors (all major energy companies), in the following proportions and by the following means:

i. [REDACTED] by way of equity invested by Gazprom.

ii. [REDACTED] (the "**Financial Investors**", which term where appropriate also refers to their subsidiaries listed below), comprising:

- (a) Engie Energy Management Holding Switzerland AG (a subsidiary of ENGIE S.A. (France) ("**Engie**"));
- (b) OMV Gas Marketing Trading & Finance B.V. (a subsidiary of OMV AG (Austria) ("**OMV**"));
- (c) Shell Exploration and Production (LXXI) B.V (a subsidiary of Royal Dutch Shell plc (Netherlands/UK) ("**Shell**"));
- (d) Uniper Gas Transportation & Finance B.V. (a subsidiary of Uniper SE (Germany) ("**Uniper**")); and
- (e) Wintershall Nederland Transport and Trading B.V. (a subsidiary of Wintershall Dea GmbH (Germany) ("**Wintershall**")).

iii. [REDACTED]

139  
140

[REDACTED]

134. In total, each of the Financial Investors has agreed to fund the project up to [REDACTED] on a long-term basis.

***The key finance agreements***

135. As [REDACTED] explains in [REDACTED] First Witness Statement, [REDACTED]  
[REDACTED]  
[REDACTED], it was expected that the Senior Debt element of their contribution would ultimately be replaced by external project finance funding obtained from the market. [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

136. Consequently, the financing agreements were negotiated around the expectation that the funding would adopt the following structure:

- i. Gazprom, as 100% shareholder of NSP2AG, funded the company from its inception in 2015 with its [REDACTED] equity capital and shareholder loans. This enabled NSP2AG to make immediate progress and engage with suppliers. Gazprom's equity contribution was approximately [REDACTED].

[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

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141 [REDACTED]  
142 [REDACTED]  
143 [REDACTED]



iv. This [REDACTED] [REDACTED] would provide funds up to [REDACTED], which was the maximum estimated project cost.

v. As [REDACTED] explains, NSP2AG's intention was that the [REDACTED] [REDACTED] would be replaced before construction completion by project finance from the banking market of up to [REDACTED] of the project cost. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

137. The total financial commitment of Gazprom under these arrangements amounts to a maximum of [REDACTED]. The total financial commitment of the five Financial Investors under these arrangements is a maximum of [REDACTED]. Together, this financing covers the maximum project cost expectation of [REDACTED].

***The process of negotiating the financing agreements***

138. [REDACTED] explains in [REDACTED] First Witness Statement that the process of negotiating the [REDACTED] [REDACTED] was extremely difficult and contentious. This was due to the complexity of the arrangements, the value of the funding to be provided, the number of parties (all of whom

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144 [REDACTED]

145 [REDACTED]

had distinct, and at times competing, interests) and the high-risk nature of the project.<sup>146</sup> This is addressed further in Section VII below.

***The relationship between the financing agreements and the GTA***

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

- [REDACTED]  
[REDACTED]
- [REDACTED]  
[REDACTED]  
[REDACTED]
- [REDACTED]  
[REDACTED]

140. [REDACTED]  
[REDACTED]  
[REDACTED]

141. [REDACTED] was directly involved in the negotiations of both the GTA and the financing agreements. As he explains in [REDACTED] First Witness Statement, the stability and predictability of the revenue stream was essential to NSP2AG's ability to secure financing given the size of the commitments and long-term nature of the funding. [REDACTED]  
[REDACTED]

[REDACTED] As already noted in paragraph 131 above, the importance of the terms of the GTA to the Financial Investors is illustrated by the provisions in the financing agreement relating to it.

142. Additional comfort and protection for the Financial Investors was provided by [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

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146 [REDACTED]  
147 [REDACTED]  
148 [REDACTED]  
149 [REDACTED]  
150 [REDACTED]



control room, as well as various buildings for maintenance equipment and electric installations.

146. Key steps in the offshore construction of the Nord Stream 2 pipeline include (i) the production of the pipes at pipe mills in Russia and Germany, (ii) their concrete weight coating at plants in Finland and Germany, and (iii) the offshore pipe-laying by specialised vessels.

#### **Production and coating of the pipes**

147. Production of the pipes for the Nord Stream 2 started in August 2016, shortly after NSP2AG entered into the Line Pipes Contracts with three contractors in April 2016.
148. The first pipes were delivered to the concrete weight coating plants in Mukran, Germany and Kotka, Finland in October 2016. In March 2017, the contractor commenced the concrete weight coating of the line pipes. Coated pipes were stored at the coating plants in Mukran and Kotka, as well as in the harbours of Karlshamn, Sweden and Hanko, Finland which are located in closer proximity to the middle section of Nord Stream 2.<sup>156</sup>
149. The final delivery of line pipes took place on 28 September 2018, with a small number of additional pipes ordered and delivered by July 2019. Concrete weight coating works were completed in August 2019.

#### **Permitting process**

150. While the production and coating of pipes was ongoing, NSP2AG applied for the required permits and approvals from regulatory bodies in Russia, Finland, Sweden, Denmark and Germany.
151. The majority of the permits were received in the first half of 2018, and by 14 August 2018, NSP2AG had received all the required permits to construct the pipeline, with the exception of that from the Danish Energy Agency.
152. With respect to the required permit from the Danish Energy Agency, three alternative applications were made over a two year period,<sup>157</sup> and on 30 October 2019, NSP2AG

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<sup>156</sup> A small number of pipes were coated at the ██████████ production facility in ██████████ and transported directly to storage facilities in Hanko, Finland.

<sup>157</sup> The first application was made in April 2017 in relation to NSP2AG's preferred route through the Danish exclusive economic zone and territorial waters. On 10 August 2018, NSP2AG submitted a second application in relation to an alternative route not traversing Danish territorial waters, as Danish legislation that came into force in January 2018 stipulated that pipelines in territorial waters also required the Danish Ministry of Foreign Affairs' approval, and such approval had been outstanding since January 2018. On 15 April 2019, having not received the Ministry's approval or the permit from the Danish Energy Agency, NSP2AG submitted a third application for an alternative route through the Danish exclusive economic zone south of the island of Bornholm. This route became available for the construction of pipelines following an agreement between Denmark and Poland regarding the previously disputed border of the two countries' exclusive economic zones. **Exhibit C-71**, NSP2AG Press Release, "Nord Stream 2 Submits Third Application in Denmark – Despite Legal Reservations", 15 April 2019.

received the construction permit from Denmark in line with its third application regarding a route through the Danish exclusive economic zone south-east of Bornholm.<sup>158</sup>

153. By that stage, NSP2AG had received all the permits required for the construction of Nord Stream 2.

#### **Progress of the construction works**

154. Having received a permit for the construction of the German landfall facilities and the section of the pipeline in the German territorial waters on 31 January 2018, the onshore construction works began on the same day with the clearance of the site and other preparatory works for the construction of the landfall facilities near Lubmin in Germany. A key part of these construction works, the drilling of the microtunnels connecting the offshore pipelines with the onshore facilities, was completed in May 2018. The mechanical onshore works in Germany were completed in December 2019.
155. Offshore pipe-laying works began on 5 September 2018 in Finland.
156. The offshore works in German territorial waters were completed by December 2018 (with an outstanding above-water tie-in connection completed in August 2019).

#### **NSP2AG made its investment on the understanding that the Third Energy Package did not apply to Nord Stream 2, and the expectation that this would not change**

157. NSP2AG was aware when embarking on the investments detailed above that there was a degree of opposition to the Nord Stream 2 project by some factions within the EU. This opposition is detailed in Section VI below, and in the relevant period largely focused on the possibility of making the pipeline subject to the already existing EU regulation in the form of the Third Energy Package (TEP). However, as explained by ██████████ in ██████ First Witness Statement, NSP2AG did not consider that this opposition presented any form of serious risk to the project, chiefly because:

- i. The Nord Stream 1 project, with its similar structure, was not subject to the TEP.
- ii. As matters stood prior to the Amending Directive, the TEP would not apply to Nord Stream 2.
- iii. Even following the first proposal to amend the TEP in autumn 2017, NSP2AG believed that there was insufficient political support among the EU Member States for such a regulatory change, taking into account also the impact this would have on other existing offshore import pipelines in Spain and Italy.

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<sup>158</sup> **Exhibit C-72**, NSP2AG Press Release, "Nord Stream 2 Granted a Construction Permit by Denmark", 30 October 2019.



iv. Importantly, there was no reason to believe that the EU would adopt a discriminatory change in law that would target just one company.<sup>159</sup>

158. This view remained notwithstanding the introduction of the Amending Directive proposal by the European Commission in November 2017. However, it changed in February 2019, when NSP2AG became aware that France and Germany had reached an agreement to support an amendment to the Gas Directive so as to expand its application to cover offshore import pipelines like Nord Stream 2. ██████████ expressed his surprise in an email to those involved in the potential project finance of the project in February 2019, in which he stated that the prospect of an amendment to the TEP had changed within the space of a week "*from an unlikely possibility to a reportedly agreed position*".<sup>160</sup>

**V.5 Amending Directive prevents the raising of project finance** ██████████  
██████████

159. As set out at paragraphs 135 and 136 above and in ██████████ First Witness Statement,<sup>161</sup> NSP2AG expected that ██████████ would ultimately be replaced by project finance funding from commercial banks, backed by export credit agencies (the "ECAs"). ██████████  
██████████

160. NSP2AG held a kick-off meeting with the ECAs in March 2018 and negotiations of the project financing documents continued through 2018.<sup>162</sup> However, as ██████████ explains, the discussions with the ECAs were terminated as a consequence of the adoption of the Amending Directive when the ECAs were unwilling to accept any risks relating to the application of the Third Gas Directive to the Nord Stream 2 project.<sup>163</sup>

161. As a result of NSP2AG's inability to obtain project financing, ██████████  
██████████  
██████████  
██████████ Since ██████████, the inability, as a result of the Amending Directive, to obtain project financing results in a loss to NSP2AG. ██████████  
██████████  
██████████

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<sup>159</sup> ██████████  
<sup>160</sup> Exhibit C-73, Email from ██████████ (NSP2AG) to ██████████ (representative of the ECAs) and others, "RE: NS2: ECA Meetings", 13 February 2019. On the France-Germany compromise see further paragraph 233 below.

<sup>161</sup> ██████████  
<sup>162</sup> ██████████  
<sup>163</sup> ██████████

## V.6 Status of the project as at 23 May 2019

162. At the time the Amending Directive came into force, on 23 May 2019, all major investment decisions had been taken and a substantial proportion of Nord Stream 2 had already been constructed, with the remaining works well advanced.
163. In particular, [REDACTED] explains in [REDACTED] First Witness Statement<sup>164</sup> that, as at 23 May 2019:
- i. A total of 1,323 km (725 km of Line A and 598 km of Line B) had been laid on the seabed in the territorial waters and / or exclusive economic zones of Finland, Germany, Russia and Sweden (amounting to over 50% of Nord Stream 2).<sup>165</sup>
  - ii. Works in the value of [REDACTED] had already been completed out of a total expected expenditure of approximately [REDACTED]. This includes the production of nearly all the line pipes as well as the coating of 93% of the pipes and, as explained above, the laying of over 50% of the pipes.
  - iii. NSP2AG had made [REDACTED] in contractual commitments, involving a large number of companies from a number of countries, including notably Germany, the Netherlands, Austria, Italy, Denmark, Sweden and Finland. In particular, it had concluded all major construction contracts in relation to Nord Stream 2 and those contracts were all either entirely or partially completed by this point.
  - iv. NSP2AG had received all permits and approvals from national authorities that are required for the construction of Nord Stream 2, with the exception of the Danish permit which was received in October 2019.
164. Specifically in Germany, as at 23 May 2019, the construction of the German territorial waters section of the Nord Stream 2 pipeline (approximately 54 km) and the onshore facilities was substantially complete. By way of illustration, the following photo shows the onshore facilities in Lubmin, Germany in May 2019.<sup>166</sup>

<sup>164</sup> [REDACTED]

<sup>165</sup> **Exhibit C-74**, NSP2AG, Daily Pipelay Report for 23 May 2019, Document W-PJ-CON-GEN-DPR-800-190524EN-01, 24 May 2019.

<sup>166</sup> **Exhibit C-3**, Photograph showing NSP2AG installations in Germany on 14 May 2019.



*Photograph showing NSP2AG installations in Germany on 14 May 2019*

165. In particular:
- i. Pipe laying was virtually completed both onshore and offshore in the German territorial waters and EEZ (with the exception of a short section to be completed in conjunction with the Danish section of the pipeline). This included complex works in relation to the laying of submerged pipes offshore as well as the connection of the offshore pipeline with the onshore PIG receiver through a microtunnel system. These works were completed between October and December 2018.<sup>167</sup> An outstanding above-water tie-in for one of the twin pipes (Line B) - to connect two offshore sections of Nord Stream 2 laid by different contractors - was completed in August 2019.
  - ii. Onshore works had been completed to a significant extent, with the main valves installed in August 2018, the main building erected at the end of November 2018 and

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<sup>167</sup>





the anchor blocks erected in December 2018. Only subordinated works were outstanding in May 2019: the PIG traps were installed in August 2019 with technical pressure and leak tests being conducted between September and November 2019.<sup>168</sup> All mechanical works (i.e. works directly linked to the operation of the pipeline) were completed by December 2019 and only ancillary works remain outstanding and are expected to be completed in the second half of 2020.

166. The total budget for the German Section of Nord Stream 2 and the onshore facilities is [REDACTED] [REDACTED] ( [REDACTED] , plus [REDACTED] financing costs). As at 23 May 2019, over 98% of this budget ( [REDACTED] ) had already been contractually committed to third parties, and works in the value of [REDACTED] had been completed.

#### **V.7 Current status of the Nord Stream 2 project**

167. On 20 December 2019, the United States National Defense Authorization Act for Fiscal Year 2020 (the "NDAA") was passed, imposing additional sanctions associated with the Nord Stream 2 project. These new sanctions targeted the ships used in pipe-laying on the project. As a consequence, [REDACTED] – the company contracted under the Pipelay Contract to conduct the pipe-laying work for Nord Stream 2 – announced on 21 December 2019 that it had stopped work,<sup>169</sup> with only around 150 kilometres of pipe left to lay (approximately 6% of the total length). This remains the position at the date of this Memorial.

#### **V.8 Conclusion: NSP2AG has made a very valuable and sizeable investment in the EU**

168. As the details set out above make clear, NSP2AG has made a very valuable and sizeable investment in the EU since its incorporation in 2015.
169. By April 2017, NSP2AG had concluded key construction contracts and made contractual commitments of over [REDACTED] out of an expected total capital expenditure of [REDACTED] [REDACTED] , many of which were with EU companies or for works within the EU.
170. The Nord Stream 2 project has had a positive effect on the EU economy. By the end of 2018, the EU had received 58% of the investments made by NSP2AG. In particular, NSP2AG had made capital expenditures of EUR 4.68 billion in the EU, adding a total of EUR 4.74 billion to the GDP of over 10 EU Member States and creating work equivalent to 57,450 year-long full-time jobs over a five-year period.<sup>170</sup> The size of the investment in the EU has further increased since December 2018.

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<sup>168</sup> **Exhibit C-80**, NSP2AG infographic, "Construction progress at German Landfall and EEZ", undated.

<sup>169</sup> [REDACTED]

<sup>170</sup> **Exhibit C-21**, Arthur D Little report, "Nord Stream 2 Economic Impact on Europe: Follow-up analysis of effects on job creation and GDP during the construction phase", May 2019. This study was commissioned by NSP2AG.

171. As at 23 May 2019, when the Amending Directive came into force, works in the value of [REDACTED] had already been completed out of a total expenditure of [REDACTED], [REDACTED] of which had been carried out in Germany.
172. As is further explained at paragraphs 17 to 27 of the Notice, the construction of Nord Stream 2 and related activities constitute an Investment for the purposes of the ECT.

VI. **THE AMENDING DIRECTIVE IS TARGETED AT, AND DESIGNED TO OBSTRUCT, NORD STREAM 2**

VI.1 **Introduction**

173. Having set out the relevant legal and factual background in relation to the regulatory framework and the Nord Stream 2 project, this section now moves to address the EU measure at issue in these proceedings, the Amending Directive. In this section, the inception, development and ultimate adoption of the Amending Directive is charted. This section further demonstrates that the Amending Directive was targeted at, and designed to obstruct, Nord Stream 2 and cannot achieve the stated general objectives that it allegedly pursues. As fully described in Section VIII, the EU's adoption of the Amending Directive, and its actions in connection therewith as set out in this Section VI, constitute multiple breaches of the EU's obligations under the ECT.
174. First, this section will set out an overview of the EU's specific institutional structure and law-making process, which provides important context for the events leading up to the enactment of the Amending Directive (**Section VI.2**). It will then describe the political stances of the key EU actors involved in the adoption of the Amending Directive, namely the Member States in the Council and the European Parliament, the two EU Institutions that were the co-legislators, as well as the European Commission which was responsible for the proposal that led to the Amending Directive (**Section VI.3**). This section will then set out the circumstances in which the Amending Directive was conceived, beginning with the attempt of certain EU actors to advance the erroneous position that the existing Gas Directive applied to Nord Stream 2 (**Section VI.4**), the European Commission's subsequent plan to seek to negotiate an international agreement between the EU and the Russian Federation specifically in relation to Nord Stream 2 (**Section VI.5**) and the legal competence concerns raised by the Council Legal Service in relation to that plan (**Section VI.6**). It will then explain how this led to the introduction by the European Commission of the Amending Directive (**Section VI.7**), and finally, its adoption, amending the definition of "interconnector" in the Third Gas Directive to apply to offshore import pipelines, with the effect of applying EU rules to Nord Stream 2 (**Section VI.8**).
175. The section will then proceed to explain the other main element of the Amending Directive, the introduction of the Article 49a derogation, made available by its terms to all existing pipelines except Nord Stream 2 (**Section VI.9**), and why the EU's haste to adopt the Amending Directive further illustrates its targeting of Nord Stream 2 (**Section VI.10**), with the deliberate result that Nord Stream 2 is the only pipeline impacted (**Section VI.11**).
176. The section will then set out the EU's stated objectives for the Amending Directive and explain that they are entirely specious, not least because the Amending Directive, as it is

formulated, is simply incapable of achieving them (**Section VI.12**). Finally, and for completeness, it will be explained that the existing Article 36 exemption regime is fundamentally different to and is no substitute for the Article 49a derogation regime (**Section VI.13**).

## **VI.2 The EU's specific institutional structure and law-making process**

177. To understand how an instrument as unusual and discriminatory as the Amending Directive was able to come about, it is helpful to have an appreciation of the EU's specific institutional structure and law-making process as well as the political stances of the key EU actors towards Nord Stream 2. Ultimately, as NSP2AG will go on to demonstrate, the key EU actors opposed to Nord Stream 2 on political grounds were able to use the EU's law-making process to pass a measure that was designed to obstruct Nord Stream 2 while masquerading as a general legislative measure aimed at completing the internal market.
178. The EU is not a State but a *sui generis* union of States "on which the Member States confer competences to attain objectives they have in common".<sup>171</sup> Importantly, the EU does not have general legislative capacity but operates under powers conferred on it by its founding treaties, namely the Treaty on European Union ("**TEU**") and the Treaty on the Functioning of the European Union ("**TFEU**").<sup>172</sup> Accordingly, legal acts of the EU need to indicate the provision of the treaties conferring the power to act (legal basis) and the procedure followed for the adoption of the legal act.<sup>173</sup> If the relevant substantive and procedural conditions for acting have not been followed, the act is invalid. EU legal acts therefore contain recitals that specify the legal basis relied on, the procedure followed, and the reasons motivating the act in question.
179. The reasoning contained in EU acts is designed to explain the objectives pursued and how these comply with the requirements of the legal basis and superior norms of law. Since the objectives pursued must correspond to the legal basis used, these are the objectives referred to even though the legislature (or some members of it) may have certain other objectives in

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<sup>171</sup> **Exhibit CLA-41**, Consolidated version of the Treaty on European Union, C 326/13, 26 October 2012 (TEU), Article 1.

<sup>172</sup> See **Exhibit CLA-41**, TEU, Article 5: "*The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.*" (Article 5(1) TEU), "*Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.*" (Article 5(2) TEU).

<sup>173</sup> See **Exhibit CLA-42**, Consolidated version of the Treaty on the Functioning of the European Union, C 326/47, 26 October 2012 (TFEU), Article 296: "*Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties.*" According to the EU Courts, the statement of reasons "*must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the court having jurisdiction to exercise its power of review*" (**Exhibit CLA-43**, *Versalis v. Commission*, C-511/11 P, EU:C:2013:386, Judgment, 13 June 2013, para 139).

mind that are not acknowledged since they would undermine the legitimacy of the act. As NSP2AG will demonstrate below, this is precisely the case for the Amending Directive.

180. Most EU legislation, including the Amending Directive, is adopted pursuant to the "*ordinary legislative procedure*" by the two "*co-legislators*", the Council and the European Parliament, upon a proposal from the European Commission:<sup>174</sup>
- i. The *Council* represents the Member States' governments and is composed of national ministers from each Member State. The Council generally decides on the adoption of legislative acts by qualified majority i.e. 55% of Member States representing at least 65% of the EU population.<sup>175</sup>
  - ii. The *European Parliament* is composed of directly-elected representatives from each Member State who are grouped by political affiliation. Prior to voting in plenary, which is by majority voting, legislative acts are negotiated in one of a number of subject-matter specific committees. In addition to passing legislative acts, the European Parliament may also pass resolutions which represent non-binding statements of policy positions. These resolutions are, again, passed by a majority.
  - iii. The *European Commission* is steered by a group of 27 Commissioners (one from each Member State), who together take decisions on the European Commission's political and strategic direction.<sup>176</sup> Each Commissioner also has specific responsibility for one or more policy areas, such as energy policy. The European Commission is further organised according to policy departments (Directorates-General or "**DG**"s) which are responsible for different policy areas and develop, implement and manage EU policy, law and funding programmes.
181. The European Commission holds the so-called "right of initiative" and is responsible for planning, preparing and proposing new European legislation under the ordinary legislative procedure, which applied to the Amending Directive. The adoption of legislative proposals is decided upon by the full "College" of Commissioners, which votes by majority. Where the relevant portfolio Commissioner tables a proposal, it is normally adopted by the College, unless there are specific and significant concerns raised by other Commissioners (which is relatively rare). In this regard, as NSP2AG will explain below, the political opposition of the

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<sup>174</sup> Under Article 289(1) TFEU, the ordinary legislative procedure "*shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission*" (see **Exhibit CLA-42**, TFEU, Article 289(1)).

<sup>175</sup> **Exhibit CLA-41**, TEU, Article 16. In certain specific areas, which are considered as sensitive e.g. harmonisation of national legislation on indirect taxation, the Council decides by unanimity. These areas are not relevant to the Amending Directive which was subject to the normal threshold of a qualified majority in the Council.

<sup>176</sup> **Exhibit CLA-41**, TEU, Article 17. Pursuant to Article 17 TEU, the European Commission shall promote the general interest of the EU and take appropriate initiatives to that end. The European Commission needs to be completely independent in carrying out its responsibilities and the members of the European Commission may not seek nor take instructions from any government or other institution body, office or entity.

Commission's Directorate General for Energy (DG Energy) to Nord Stream 2 was a crucial factor in the adoption of the proposal for the Amending Directive.

182. Once the European Commission has adopted a legislative proposal, it is submitted to the Council and Parliament. Those two bodies then need to reach an agreement on the proposal and any amendments, both internally i.e. within the Institution itself, and between each other, which can require up to three so-called "*readings*".
183. At the Council level, the proposal goes through a number of levels, including that of the "*working party*" and the "*permanent representatives committee*" (Coreper), in which representatives of the Member States will conduct detailed discussions and negotiations in relation to legislative proposals. Ultimately, and in light of the qualified majority threshold, the focus of these discussions and negotiations is on identifying and eliminating any "blocking minority" i.e. where there are at least four Member States representing more than 35% of the EU population.<sup>177</sup> Due to this dynamic, Member States that do not have a specific and material interest in a legislative act will tend simply to join and form the qualified majority where there are a significant number of Member States in favour of adopting the measure. Moreover, due to the consensual nature of law-making in the Council and the desire not to be seen publicly as failing in negotiations, even in circumstances where a Member State objects to a measure, they would not ultimately register their opposition if there is no "blocking minority". Indeed, the great majority of EU measures are passed in the Council by so-called informal "consensus", whereby, if there is no "blocking minority", the measure is effectively passed without any formal vote being called and with no opposition publicly expressed.<sup>178</sup> This means that the publicly recorded level of support in the Council for EU measures is often overstated.
184. At the Parliament level, the work on the European Commission's proposal is done in the responsible committee, which nominates a "*rapporteur*" who leads the proposal through the procedure and draws up the committee report on which the Parliament votes in plenary.
185. In practice, legislative proposals rarely follow the full legislative procedure since the Parliament and the Council seek, with the aid of the European Commission, to reach an informal agreement on a text which they can then jointly adopt, preferably at first reading. These negotiations are known as "*trilogues*" and are informal meetings between representatives of the Parliament, the Council and the European Commission who have been given a mandate by their respective institution. Trilogue meetings are essentially political negotiations and their frequency and number varies from file to file.<sup>179</sup> The Amending

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<sup>177</sup> **Exhibit CLA-41**, TEU, Article 16.

<sup>178</sup> See generally, **Exhibit C-81**, S. Novak, "The Silence of Ministers: Consensus and Blame Avoidance in the Council of the European Union" (2013) 51(6) *Journal of Common Market Studies* 1091.

<sup>179</sup> See generally, **Exhibit C-82**, European Parliament website, "Interinstitutional negotiations for the adoption of EU legislation" (last accessed on 22 June 2020 at <https://www.europarl.europa.eu/ordinary-legislative-procedure/en/interinstitutional-negotiations.html>). The trilogue mechanism has been criticised for lacking

Directive was adopted at first reading following just a single trilogue consisting of just one meeting.

186. If agreement can be reached in the trilogue, the agreed text will be formally approved by the Parliament and the Council, after which the final act is signed and published in the Official Journal of the EU.

### **VI.3 The key EU actors involved in the adoption of the Amending Directive were politically motivated against Nord Stream 2**

187. A coalition of EU actors was opposed to Nord Stream 2 on various grounds, broadly encapsulating (i) political hostility towards the Russian Federation, which was identified with the Nord Stream 2 project, and (ii) support for Ukraine, of which a key aspect was the objective of maintaining the transit of Russian gas through the Ukrainian transit route, which was also considered as important to certain EU Member States on the basis of economic self-interest (as gas transiting through Ukraine is transported further inside the EU over the transmission networks of these Member States, which generates revenue). Certain EU actors were also motivated by a goal of reducing or at least not further increasing EU Member States' use of Russian gas more generally, seen by them as undesirable both from a geo-political perspective and also for the EU's energy security.
188. These EU actors comprised: a number of eastern and central European Member States; the European Commission and in particular, DG Energy; and a significant group of European Parliamentarians in the European Parliament, where there was a strong anti-Nord Stream 2 sentiment.

### **The EU Member States**

189. A significant number of eastern and central European Member States, including the Czech Republic, Croatia, Estonia, Greece, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia, were strongly opposed to Nord Stream 2 in its early stages.<sup>180</sup>

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transparency and ultimately, accountability – see in particular, **Exhibit CLA-44**, European Ombudsman, "Decision of the European Ombudsman setting out proposals following her strategic inquiry OI/8/2015/JAS concerning the transparency of Trilogues", Case OI/8/2015/JAS, 12 July 2016 and **Exhibit C-83**, European Economic and Social Committee and Think Tank EUROPA, "Investigation of informal trilogue negotiations since the Lisbon Treaty - Added value, lack of transparency and possible democratic deficit", Contract No. CES/CSS/13/2016 23284, July 2017.

<sup>180</sup> The composition of this group changed over time and in particular, the Czech Republic and Hungary did not maintain the same degree of hostility towards the project in its later stages.



190. Their opposition, which was voiced in letters in November 2015<sup>181</sup> and in March 2016<sup>182</sup> to European Commission Vice-President for the Energy Union Šefčovič and European Commission President Juncker respectively,<sup>183</sup> appeared primarily based on the concern that Nord Stream 2 would enable more Russian gas to bypass the Ukrainian transit route and would thereby result in the following alleged detrimental impact on their own interests:
- i. Commercial damage in terms of the loss of transit revenue for Eastern European transit countries and that "*the yet prevailing balance, between the negotiation position and ability of transit countries to preserve the set terms of commercial contracts would be disrupted [...]*".<sup>184</sup>
  - ii. Loss of gas supplies, as "*the East-West flow would be impaired and all countries in the East, South and Southeast of [Europe] (as well as reverse flows to Ukraine) would have to compete for the insufficient remaining gas volumes*", and that "*reverse capacities, are however limited*".<sup>185</sup>
  - iii. Negative impact on local political and economic stability, in that Nord Stream 2 "*may have substantial adverse impacts on the economic and political stability of Ukraine*" with broader detrimental effects on the "*stability of the Eastern European region*" as a whole and on "*economic growth*".<sup>186</sup>
191. While a number of EU Member States were strongly opposed to Nord Stream 2, this position was not shared by all, and a number of EU Member States supported the project for various reasons.
192. Germany, in particular, had long been a proponent of Nord Stream 2, fundamentally because the project contributes to its security of supply. The project was also of specific economic interest to Germany as the Member State in which the Nord Stream 2 pipeline makes landfall, while the German energy companies Uniper and Wintershall are financial investors in the project and the German TSO Gascade is the majority shareholder and project sponsor of

<sup>181</sup> **Exhibit C-84**, Draft letter from Vazil Hudák, Ministry of Economy of the Slovak Republic on behalf of the ministers responsible for the energy policies of the Slovak Republic, the Czech Republic, Hungary, Poland, Lithuania, Latvia, Estonia, Romania, Bulgaria and Greece, to European Commission Vice-President Šefčovič, November 2015. The Claimant understands that the letter was ultimately sent. But it was *not* signed by Bulgaria, as reported in the press – see **Exhibit C-85**, Euractiv article, "Seven EU countries oppose Nord Stream", 1 December 2015 (last accessed on 22 June 2020 at <https://www.euractiv.com/section/energy/news/seven-eu-countries-oppose-nord-stream/>).

<sup>182</sup> The following materials refer to the salient parts of the letter: **Exhibit C-86**, Permanent Representation of the Republic of Poland to the European Union in Brussels Press Release, "9 countries stressed objections against the Nord Stream II project", 18 March 2016 and **Exhibit C-87**, Reuters article, "EU leaders sign letter objecting to Nord Stream-2 gas link", 16 March 2016 (last accessed on 23 June 2020 at <https://www.reuters.com/article/uk-eu-energy-nordstream/eu-leaders-sign-letter-objecting-to-nord-stream-2-gas-link-idUKKCN0W11YV>).

<sup>183</sup> All Member States signed both letters, except for Croatia, which only signed the March 2016 letter and Greece, which only signed the November 2015 letter.

<sup>184</sup> **Exhibit C-84**, Draft letter from Vazil Hudák to European Commission Vice-President Šefčovič, November 2015, p 2.

<sup>185</sup> **Exhibit C-84**, *ibid.*, p 2.

<sup>186</sup> **Exhibit C-84**, *ibid.*, p 3. A similar statement was also made in the March 2016 letter.



EUGAL (the pipeline intended for the onward transport of gas from Nord Stream 2, the success of which depends on Nord Stream 2).

193. Nord Stream 2 was also of economic interest to other Member States, in particular, Austria, Belgium, the Netherlands and France. The Austrian, Dutch and French energy companies, OMV, Royal Dutch Shell<sup>187</sup> and ENGIE, are all financial investors in the project, and the Austrian and French States also hold stakes in OMV and ENGIE respectively.<sup>188</sup> The Dutch State-owned Gasunie group and the Belgian Fluxys group, which is majority owned by the Belgian State,<sup>189</sup> meanwhile hold stakes in the EUGAL pipeline.<sup>190</sup> Finally, Bulgaria ultimately supported the pro-Nord Stream 2 group in connection with a desire to resist more generally EU intervention in relation to the gas import pipelines.

### The European Commission

194. The European Commission and in particular, DG Energy which devised the proposal for the Amending Directive, held a negative view towards Nord Stream 2. This seems to have been motivated chiefly by a desire to reduce (or at least, not to increase) the EU's use of Russian gas, while at the same time, maintaining the existing gas transit through Ukraine. This is apparent from the various statements made by the European Commission in connection with its various proposals to address Nord Stream 2 (discussed in the next sections below). In particular:
- i. In its explanatory memorandum to the recommendation for a Council decision opening negotiations on a specific Nord Stream 2 treaty, the European Commission stated that Nord Stream 2 "*could hamper the process of creating an open gas market with competitive prices and diversified supplies in the EU*".<sup>191</sup>
  - ii. In the press release for the recommendation, the European Commission further stated that, "*The Commission considers that the Nord Stream 2 project does not contribute to the Energy Union objectives of giving access to new supply sources, routes or suppliers and that it could allow a single supplier to further strengthen its position on the European Union gas market and lead to a further concentration of supply routes*".<sup>192</sup>

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<sup>187</sup> Which is headquartered in the Netherlands.

<sup>188</sup> The Austrian State has a 31.5% stake in OMV, while the French State has a 23.64% stake in ENGIE.

<sup>189</sup> The Belgian State has a 77.54% stake in Fluxys.

<sup>190</sup> See shareholder structure on the website of EUGAL at <https://www.eugal.de/en/project-participants/shareholder/>.

<sup>191</sup> **Exhibit C-88**, European Commission, "Recommendation for a Council Decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline", COM(2017) 320 final, 9 June 2017 (under cover of 12 June 2017), Explanatory Memorandum, p 3.

<sup>192</sup> **Exhibit C-89**, European Commission Press Release, "Commission seeks a mandate from Member States to negotiate with Russia an agreement on Nord Stream 2", 9 June 2017. The "*Energy Union*" is a broad concept that essentially covers the political initiatives which are being pursued by the EU in the energy area and was formally launched by the European Commission's Energy Union strategy communication of

- iii. In its fact sheet accompanying its proposal for the Amending Directive itself, the European Commission stated that: "*The Commission position on Nord Stream 2 is well known. [...] The Commission is committed to all the Energy Union objectives, including energy security and in creating a well-diversified and competitive gas market. [...] the Commission sees no need for new infrastructure of the magnitude of Nord Stream 2. In addition, the EU will continue supporting Russian gas imports transiting through Ukraine*".<sup>193</sup>
- iv. In response to a European Parliamentary question concerning Nord Stream 2, the then-Energy Commissioner Cañete stated in September 2018, i.e. after the proposal for the Amending Directive had been launched in autumn 2017, that: "*The Commission considers that Nord Stream 2 does not contribute to the EU's energy policy objectives such as energy security or diversification of supplies and for that reason does not support its construction. [...] The Commission insists that Nord Stream 2, if built, should be operated in accordance with Union energy law. To this end and to clarify the legal framework, the Commission has adopted a proposal for an amendment of the Gas Directive*".<sup>194</sup>
195. The European Commission's opposition to Nord Stream 2 was also repeatedly and extensively expressed by Mr Klaus-Dieter Borchardt, now the Deputy Director-General of DG Energy, in particular in relation to the possible impact on the transit of gas through Ukraine. Mr Borchardt is currently the second-highest-ranking civil servant in DG Energy.
196. By way of notable example, in a briefing given to members of the European Parliament's Committee on Industry, Research and Energy ("**ITRE**") on 11 October 2017,<sup>195</sup> Mr Borchardt stated that the Nord Stream 2 pipeline would significantly dry out the transit to Ukraine. Only one party, Gazprom, would have unrestricted access to Germany, the biggest gas entry point in Europe, which would impact the competitiveness of the gas market. Second, Nord Stream 2 would concentrate 110 bcm in a rather small corridor, undermining the EU's security of supply. Channelling so much gas to such a small corridor would be also detrimental to the Ukraine route, which would impact Southern and Eastern member states, because of the longest transport routes and higher gas prices. He further stated that there is an investment need of about 2.3 billion US dollars in modernising the Ukraine gas network.<sup>196</sup>

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25 February 2015. The Energy Union and the political objectives underpinning it should of course be distinguished from the applicable EU energy law.

<sup>193</sup> **Exhibit C-90**, European Commission Fact Sheet, "Questions and Answers on the Commission proposal to amend the Gas Directive", 8 November 2017, answer to question 11.

<sup>194</sup> **Exhibit C-91**, European Commission Response to parliamentary question E-004084/2018, 24 September 2018.

<sup>195</sup> The Committee within the European Parliament to which the proposal for the Amending Directive had been allocated.

<sup>196</sup> **Exhibit C-92**, Transcript of Presentation by Klaus-Dieter Borchardt to a meeting of the European Parliament Committee on Industry, Research and Energy, "Negotiation mandate for Nord Stream 2: state

197. Mr Borchardt, furthermore, repeatedly referred to Nord Stream 2 in connection with Ukrainian gas transit in the context of the 2019 negotiations between Ukraine and Russia in relation to a new gas transit agreement, referring to potential delay for Nord Stream 2 as a "*trump card*" in these negotiations,<sup>197</sup> and explaining that the European Commission wanted to maintain a certain volume of Russian gas transiting through Ukraine, (and not via Nord Stream 2 or others), so that there was sufficient money to finance investment in the improvement of the Ukrainian gas transmission system.<sup>198</sup> The European Commission was also directly involved in these negotiations between Russia and Ukraine, essentially supporting Ukraine.
198. The European Commission's stance against Nord Stream 2, and its use of the Amending Directive, a targeted piece of regulation masquerading as a general measure to enhance the internal energy market, as a means to achieve its broader political aims, is the very type of behaviour against which the ECT is designed to protect. As explained in Section VIII below, these actions constitute breaches of the ECT committed by the EU.

### The European Parliament

199. A significant group in the European Parliament was opposed to Nord Stream 2 seemingly on geo-political grounds in connection with the antagonism between Russia and Ukraine as well as in the interest of reducing EU Member States' use of Russian gas.
200. During 2017 and 2018, a number of written questions were posed by individual European Parliamentarians to the European Commission expressing opposition to Nord Stream 2 on these grounds.<sup>199</sup> By way of typical examples:
- i. On 27 March 2017, a European Parliamentarian asked: "*I would like to remind the Commission that the construction of Nord Stream 2 will make it possible for Russia to cut off Ukraine completely from vital gas supplies, will be a massive geopolitical advantage for Russia, will increase Europe's dependency on Russian gas and will effectively keep Europe dependent both on fossil fuels and on energy supplies from countries with which we have strained diplomatic relations, as witnessed by Russia's current trade boycott on items, including foodstuffs, produced in Europe. This is being tabled as a priority question in view of its urgent nature.*"

*In light of the above:*

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of play", 11 October 2017 (presentation accessible at [https://multimedia.europarl.europa.eu/en/committee-on-industry-research-and-energy\\_20171011-1430-COMMITTEE-ITRE\\_vd](https://multimedia.europarl.europa.eu/en/committee-on-industry-research-and-energy_20171011-1430-COMMITTEE-ITRE_vd)).

<sup>197</sup> **Exhibit C-93**, Reuters article, "Nord Stream 2 delay 'trump card' in Russia-Ukraine gas talks: EU official", 11 April 2019 (last accessed on 23 June 2020 at <https://uk.reuters.com/article/gazprom-nordstream-2-eu-ukraine/nord-stream-2-delay-trump-card-in-russia-ukraine-gas-talks-eu-official-idUKL8N21T34U>).

<sup>198</sup> **Exhibit C-94**, Transcript of Report by Klaus-Dieter Borchardt at the Ukrainian Gas Forum in Kyiv, Ukraine, 9 October 2019.

<sup>199</sup> **Exhibit C-95**, Questions by Members of the European Parliament to the European Commission, P-002042/2017; E-002393/2017; P-003817/2018; E-003988/2018; and E-004084/2018.

1. *What measures will the Commission take to prevent this project from being realised?*
  2. *Does the Commission agree that the project has both energy and security implications which affect European cooperation as a whole and thus transcend the Member States' purely national spheres?*
  3. *Does the Commission believe that Nord Stream 2 is compatible with the Energy Union's objective of increased energy independence?" (emphasis added).<sup>200</sup>*
- ii. On 20 July 2018, a European Parliamentarian asked: *"In May this year, preparatory work officially started on construction of the Nord Stream 2 gas pipeline, which will expand the existing Nord Stream pipeline leading from Russia to Germany through the Baltic Sea. The project is controversial in several respects, for example by enabling the Russian government to put economic pressure on Eastern European countries by limiting gas supplies through Ukraine and Belarus, or by undermining the EU's long-term objectives in relation to the diversification of gas imports and the effort to remove dependency on gas coming exclusively from Russia.*
1. *What is the Commission's official opinion on the construction of the Nord Stream 2 pipeline?*
  2. *Is the Commission not concerned about the strengthening of Russia's political position vis-a-vis certain EU Member States and the EU as a whole?*
  3. *Is there a competitive alternative, in the Commission's view, involving the construction of a pipeline to the EU from another region?" (emphasis added).<sup>201</sup>*

201. The European Parliament's opposition to Nord Stream 2 appeared further to crystallise in late 2018 / early 2019, the same time that the Amending Directive was moving through its final stages, when the European Parliament, acting by majority, adopted resolutions going as far as calling for the project to be stopped altogether:

- i. On 12 December 2018, the European Parliament adopted a resolution stating that it, *inter alia*, *"condemns the construction of the Nord Stream 2 pipeline, as it is a political project that poses a threat to European energy security and the efforts to diversify energy supply; calls for the project to be cancelled" (emphasis added).<sup>202</sup>*
- ii. On 12 March 2019, the European Parliament adopted a resolution stating that it, *inter alia*, *"Underlines that the EU is currently Russia's largest trading partner and will keep its position as key economic partner for the foreseeable future, but that Nord Stream 2 reinforces EU dependency on Russian gas supplies, threatens the EU internal market and is not in line with EU energy policy or its strategic interests,*

<sup>200</sup> **Exhibit C-95**, Question P-002042/2017 to the Commission, Jeppe Kofod (S&D), 27 March 2017.

<sup>201</sup> **Exhibit C-95**, Question E-004084/2018 to the Commission, Jiří Pospíšil (PPE), 20 July 2018.

<sup>202</sup> **Exhibit CLA-45**, European Parliament Resolution of 12 December 2018 on the implementation of the EU Association Agreement with Ukraine, 2017/2283(INI), para 79.

*and therefore needs to be stopped; emphasises that the EU remains committed to completing the European Energy Union and diversifying its energy resources; underlines that no new projects should be implemented without a prior legal assessment of their legal conformity with EU law and with the agreed political priorities" (emphasis added).*<sup>203</sup>

202. The contribution of the European Parliament towards the EU's breaches of the ECT in the context of the Amending Directive and its impact on NSP2AG and Nord Stream 2 are described in Section VIII below.

#### **VI.4 Attempt by various EU actors to advance the position that the existing Gas Directive applied to Nord Stream 2**

203. The initial tactic of those EU actors opposed to Nord Stream 2 was to assert that the existing Gas Directive and its rules on unbundling, third party access and tariff regulation would be applicable to Nord Stream 2, notwithstanding that it was a third country offshore import pipeline, which, as explained in Section IV.5 above, was clearly outside the scope of the existing Gas Directive.

204. This is apparent from the November 2015 letter from certain Member States referred to above, in which they claimed that Nord Stream 2, "*does not meet the requirements of the Third Energy Package, especially those aiming at "ownership unbundling", designed to secure Third Party Access of new transport systems regarding of the shareholders and the offshore parts of the pipeline"* and in which they, "*call for detailed and transparent verification in order to ensure full compliance with this key principle of the functioning of the EU internal energy market"*.<sup>204</sup>

205. This regulatory approach was initially advanced by DG Energy of the European Commission. In October 2015, responding to European Parliamentary questions in relation to Nord Stream 2, Energy Commissioner Cañete stated, "*The Commission recalls that any gas pipeline on EU territory must be built and operated in full compliance with applicable EU legislation, including the Third Energy Package [...]. The Commission will, in cooperation with the relevant national regulatory authorities, ensure compliance with these rules"*.<sup>205</sup>

206. The matter reached a head when the Director-General of the European Commission's DG Energy, Mr Dominique Ristori, wrote to the President of the Bundesnetzagentur, the German energy regulatory authority, on 24 February 2017 setting out his views on the applicability of

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<sup>203</sup> **Exhibit CLA-46**, European Parliament Resolution of 12 March 2019 on the state of EU-Russia political relations, 2018/2158(INI), para 29.

<sup>204</sup> **Exhibit C-84**, Draft letter from Vazil Hudák to European Commission Vice-President Šefčovič, November 2015, p 2.

<sup>205</sup> **Exhibit C-96**, European Commission Responses to Questions E-012869/2015, E-012882/2015, E-012883/2015 and P-013363/2015 by Members of European Parliament, 30 October 2015.

the Gas Directive rules to Nord Stream 2.<sup>206</sup> The Director-General explained that he considered the requirements of the Third Energy Package to be "fully applicable" to the onshore section of the pipeline in Germany, and that various "key principles" should also be applied with respect to the offshore section within the territorial waters. These "key principles" comprised, *inter alia*, "non-discriminatory tariff-setting"; "an appropriate level of non-discriminatory third-party access"; and "a degree of legal separation between activities of supply and transmission" – in other words, the key principles of the Gas Directive's rules in relation to unbundling, third party access and tariff regulation. The European Commission's approach was rejected, however, by the President of the Bundesnetzagentur,<sup>207</sup> who explained in his response that Nord Stream 2 corresponded to a single offshore pipeline project from an economic and technical perspective and that there was legal consensus between the Bundesnetzagentur, the German Government and the Legal Service of the European Commission that the Gas Directive *did not apply* to an offshore import pipeline such as Nord Stream 2. He wrote that, "*it is long-standing regulatory practice of the European Commission not to regard such pipeline projects under the regime of the internal market. This applies to Nord Stream 1, but also to other import pipelines from third countries, such as Green Stream and MEDGAZ*". He further noted that, "*It would constitute a discriminatory practice if other requirements were to apply to Nord Stream 2*".

207. As noted by the President of the Bundesnetzagentur, the non-applicability of the Gas Directive rules to Nord Stream 2 was shared by the European Commission's own Legal Service,<sup>208</sup> and was reportedly confirmed in a letter sent by the European Commission to the Danish and Swedish governments on 28 March 2017, stating that it had no basis to bar the planned pipeline. It was ultimately confirmed publicly by an official spokesperson of the European Commission in March 2017 who stated as follows: "*We don't like Nord Stream-2 politically [...] This being said, there are no legal grounds for the Commission to oppose Nord Stream-2 [...] because [EU] rules do not apply to the offshore part of the pipeline*".<sup>209</sup>

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<sup>206</sup> **Exhibit C-97**, Letter from D. Ristori (Director-General DG Energy) to J. Homann (President of the *Bundesnetzagentur*), 24 February 2017.

<sup>207</sup> **Exhibit C-45**, Letter from J. Homann (President of the *Bundesnetzagentur*) to D. Ristori (Director-General DG Energy), 3 March 2017.

<sup>208</sup> **Exhibit C-90**, European Commission Fact Sheet, "Questions and Answers on the Commission proposal to amend the Gas Directive", 8 November 2017, answer to question 1.

<sup>209</sup> Statement by the European Commission spokesperson for climate action and energy Anna-Kaisa Itkonen reported in **Exhibit C-98**, Wall Street Journal article, "EU Says It Can't Block Russia-Backed Nord Stream 2 Pipeline", 30 March 2017 (last accessed on 23 June 2020 at <https://www.wsj.com/articles/eu-says-it-cant-block-russia-backed-nord-stream-2-pipeline-1490906474>); **Exhibit C-99**, RT Business News article, "EU gives up blocking Russia's Nord Stream 2 pipeline – report", 31 March 2017 (edited on 11 April 2017) (last accessed on 22 April 2020 at <https://www.rt.com/business/382934-russia-nord-stream2-eu/>); attribution confirmed by Miss Itkonen on Twitter, see **Exhibit C-100**, Twitter statement by Anna-Kaisa Itkonen, 31 March 2017 (edited on 11 April 2017) (last accessed on 22 April 2020 at [https://twitter.com/v\\_madalina/status/847804423208398848](https://twitter.com/v_madalina/status/847804423208398848)). The Wall Street Journal article also refers to Germany's aim of ensuring that Nord Stream 2 was not subject to political interference, which would be a concern if the EU had "*regulatory oversight of Nord Stream 2*".

## **VI.5 The European Commission's subsequent plan – a specific Nord Stream 2 treaty**

208. In its 28 March 2017 letter to the Danish and Swedish Governments, the European Commission reportedly stated that it would instead seek a mandate from EU governments to negotiate an international agreement that would define Nord Stream 2's legal framework and align it with the EU's priorities.<sup>210</sup> Soon thereafter, on 9 June 2017, the European Commission adopted a recommendation requesting a Council decision authorising the opening of negotiations on an international agreement between the EU and the Russian Federation on the operation of Nord Stream 2 (the "**Recommendation**").<sup>211</sup> The stated aim of the negotiations for which the Council mandate was requested, was to "*establish an appropriate regulatory regime for the operation of the pipeline, which introduces the key principles of EU energy law and moderates the expected negative market impacts*".<sup>212</sup> It is further explained that: "*there is a need to establish a specific regulatory regime for the operation of the pipeline via negotiations with the respective third countries, in this case with the Russian Federation*".<sup>213</sup>
209. In line with the earlier correspondence from certain Member States referred to above, the Recommendation also highlights the impact of Nord Stream 2 on gas transit through Ukraine and Eastern European Member States, ultimately recommending that, "*the agreement should ensure that potential negative impacts on the current gas transit routes, notably through Ukraine, and on the efforts of Central and Eastern European Member States to diversify and secure their gas supplies are mitigated*".<sup>214</sup>
210. The press release also quotes European Commission Vice-President Šefčovič as follows, "*As we have stated already several times, Nord Stream 2 does not contribute to the Energy Union's objectives. If the pipeline is nevertheless built, the least we have to do is to make sure that it will be operating in a transparent manner and in line with the main EU energy market rules*".<sup>215</sup>

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<sup>210</sup> **Exhibit C-98**, Wall Street Journal article, "EU Says It Can't Block Russia-Backed Nord Stream 2 Pipeline", 30 March 2017.

<sup>211</sup> **Exhibit C-88**, European Commission, "Recommendation for a Council Decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline", COM(2017) 320 final, 9 June 2017 (under cover of 12 June 2017), Explanatory Memorandum, p 3; **Exhibit C-89**, European Commission Press Release, "Commission seeks a mandate from Member States to negotiate with Russia an agreement on Nord Stream 2", 9 June 2017. The European Commission Recommendation was issued pursuant to the procedure under Article 218 TFEU for the EU to negotiate agreements with third countries and international organisations.

<sup>212</sup> **Exhibit C-88**, European Commission, "Recommendation for a Council Decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline", COM(2017) 320 final, 9 June 2017 (under cover of 12 June 2017), Explanatory Memorandum, p 3.

<sup>213</sup> **Exhibit C-88**, *ibid.*, p 4.

<sup>214</sup> **Exhibit C-88**, *ibid.*, p 5.

<sup>215</sup> **Exhibit C-89**, European Commission Press Release, "Commission seeks a mandate from Member States to negotiate with Russia an agreement on Nord Stream 2", 9 June 2017.

211. The Recommendation thus again demonstrates the European Commission's approach of using regulation, in this instance, to be established pursuant to a treaty with Russia, in order to stymie Nord Stream 2.
212. Finally, it may also be noted that the explanatory memorandum sets out that the alleged negative impact of Nord Stream 2 could not be addressed by applying EU rules to the section within EU jurisdiction only, as opposed to the entire Pipeline from its entry point in Russia.<sup>216</sup> The European Commission therefore proposed negotiations for a Nord Stream 2 treaty that would create a specific regulatory regime aimed at ensuring "*the application of fundamental principles of international law and EU law on energy*"<sup>217</sup> for the entire Pipeline, including the section on Russian territory.

## **VI.6 Legal concerns raised by the Council Legal Service**

213. On 27 September 2017, the Council Legal Service, i.e. the Council's legal advisers, issued a legal opinion on the European Commission Recommendation, in which it addressed the EU's competence to pursue the proposals advanced in the Recommendation.<sup>218</sup> In essence, the Council Legal Service concluded that the EU did not itself have "*exclusive competence*" to conclude such an agreement,<sup>219</sup> and that the case for so-called "*shared competence*" between the EU and its Member States could not be established on the basis of the justifications put forward by the Commission in its Recommendation. These were insufficient to demonstrate that the conclusion of the agreement was "*necessary in order to achieve the Union's energy objectives*".<sup>220</sup>

<sup>216</sup> **Exhibit C-88**, European Commission, "Recommendation for a Council Decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline", COM(2017) 320 final, 9 June 2017 (under cover of 12 June 2017), Explanatory Memorandum, p 4.

<sup>217</sup> **Exhibit C-88**, *ibid.*, p 4.

<sup>218</sup> **Exhibit C-101**, Opinion of the Council Legal Service, "Recommendation for a Council decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline — Allocation of competences and related legal issues", 12590/17, 27 September 2017.

<sup>219</sup> This was because the conclusion of the agreement did not meet the relevant bases under Article 3(2) TFEU (**Exhibit CLA-42**), which states that the Union will have exclusive competence for the conclusion of an international agreement, "*when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope*". See **Exhibit C-101**, Opinion of the Council Legal Service, "Recommendation for a Council decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline — Allocation of competences and related legal issues", 12590/17, 27 September 2017, paras 47-61.

<sup>220</sup> In accordance with **Exhibit, CLA-42**, TFEU, Article 216. See **Exhibit C-101**, Opinion of the Council Legal Service, "Recommendation for a Council decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline — Allocation of competences and related legal issues", 27 September 2017, 12590/17, paras 62-80. The Council Legal Service further considered that it could not be excluded that parts of the mandate would fall under the *exclusive competence of Member States* on the basis that the agreement may "*affect a Member State's right to determine ... its choice between different energy sources and the general structure of its energy supply*" (**Exhibit, CLA-42**, TFEU Article 194(2)). See the **Exhibit C-101**, Opinion of the Council Legal Service, "Recommendation for a Council decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream



214. As part of its assessment, the Council Legal Service considered whether the Gas Directive could be interpreted as applying to offshore import pipelines such as Nord Stream 2<sup>221</sup> and concluded that this was not the case.<sup>222</sup> This was, in particular, due to their exclusion from the existing Article 36 exemption regime under the Gas Directive, which is only applicable to interconnectors, LNG facilities and storage facilities.<sup>223</sup> An offshore import pipeline could not be considered as an "interconnector" within the meaning of the Gas Directive, since the term then only applied to a transmission line which crossed a border *between Member States*<sup>224</sup> and, therefore, an offshore import pipeline could not be eligible for an Article 36 exemption. Consequently, it had to be concluded that the Gas Directive was not intended to apply to offshore import pipelines as this would otherwise essentially lead to discrimination between offshore import pipelines from non-EU countries, that were not eligible, and pipelines within the EU, which were eligible.<sup>225</sup> The Council Legal Service further considered this was corroborated by the fact that the Gas Directive did not provide for any specific rules to address the potential conflict of laws arising from a third country applying its own laws to the part of the pipeline under its jurisdiction, not even obligations for Member States' authorities to cooperate with third-country authorities.<sup>226</sup>
215. As noted in Section VI.4 above, this conclusion was shared by the European Commission's own Legal Service<sup>227</sup> and further confirmed by an official spokesperson of the European Commission.<sup>228</sup>
216. The Claimant understands that, due to these legal objections against the proposed negotiating mandate, this has not progressed for almost three years now.

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2 pipeline — Allocation of competences and related legal issues", 12590/17, 27 September 2017, paras 84-91.

<sup>221</sup> This was relevant to the question of whether the EU had exclusive competence.

<sup>222</sup> **Exhibit C-101**, *ibid.*, paras 26-44. See also **Exhibit C-46**, European Commission Proposal for the Amending Directive, COM(2017) 660 final, 2017/0294 (COD), 8 November 2017, Explanatory Memorandum, p 2; **Exhibit C-24**, European Parliamentary Research Service, "Common rules for gas pipelines entering the EU internal market", Briefing: EU Legislation in Progress (editions 1 to 4), PE 614.673, 23 January 2018, 3 July 2018, 27 March 2019, 27 May 2019, pp 2 and 4.

<sup>223</sup> **Exhibit CLA-5**, Gas Directive (consolidated), Article 36(1).

<sup>224</sup> **Exhibit CLA-4**, Gas Directive (unamended), Article 2(17).

<sup>225</sup> **Exhibit C-101**, Opinion of the Council Legal Service, "Recommendation for a Council decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline — Allocation of competences and related legal issues", 12590/17, 27 September 2017, para 41.

<sup>226</sup> **Exhibit C-101**, *ibid.*, para 42. NSP2AG returns to this important consideration in Section VI.12 below, which demonstrates that the Amending Directive is simply incapable of achieving its stated objectives.

<sup>227</sup> **Exhibit C-90**, European Commission Fact Sheet, "Questions and Answers on the Commission proposal to amend the Gas Directive", 8 November 2017, answer to question 1.

<sup>228</sup> Statement by the Commission spokesperson for climate action and energy Anna-Kaisa Itkonen reported in **Exhibit C-98**, Wall Street Journal article, "EU Says It Can't Block Russia-Backed Nord Stream 2 Pipeline", 30 March 2017; **Exhibit C-99**, RT Business News article, "EU gives up blocking Russia's Nord Stream 2 pipeline – report", 31 March 2017 (edited on 11 April 2017); attribution confirmed by Miss Itkonen on Twitter, see **Exhibit C-100**, Twitter statement by Anna-Kaisa Itkonen, 31 March 2017: "*We don't like Nord Stream-2 politically. This being said, there are no legal grounds for the Commission to oppose Nord Stream-2...because [EU] rules do not apply to the offshore part of the pipeline.*"

## **VI.7 The European Commission's response – the proposal for the Amending Directive**

217. Following the Council Legal Service Opinion, on 8 November 2017, the European Commission issued its proposal for the Amending Directive<sup>229</sup> pursuant to Article 194(2) TFEU in relation to the European Union's energy policy, which mandates the use of the ordinary legislative procedure.
218. As confirmed by Deputy Director-General Borchardt of DG Energy,<sup>230</sup> the proposal was a reaction to the legal concerns raised in the Council Legal Service Opinion against the European Commission Recommendation to open negotiations on a Nord Stream 2 treaty, and in particular, their affirmation of the clear position that the Gas Directive rules did not apply in respect of Nord Stream 2.
219. To this end, the European Commission proposed an amendment of the definition of the term "interconnector" by adding the underlined wording and removing the wording in strikethrough:

*"interconnector" means a transmission line which crosses or spans a border between Member States ~~for the sole purpose of connecting the national transmission systems of those Member States~~ or between Member States and third countries up to the border of Union jurisdiction".*

220. This amendment to the term "interconnector" addressed the specific legal concern of the Council Legal Service regarding offshore import pipelines' eligibility for an Article 36 exemption. It furthermore specifically brought such pipelines within the scope of "transmission" as defined by Article 2(3) of the Gas Directive with the consequence that the extensive rules on transmission discussed in Section IV above would become applicable. In other words, by amending the definition of "interconnector", the proposal expanded the scope of all the Gas Directive's rules on "transmission" to offshore import pipelines from third countries (as well as the scope of the Article 36 exemption). The proposal would have, in fact, expanded the Gas Directive's rules to Member States' exclusive economic zones which

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<sup>229</sup> Commission Proposal documents: **Exhibit C-89**, European Commission Press Release, "Commission seeks a mandate from Member States to negotiate with Russia an agreement on Nord Stream 2", 9 June 2017; **Exhibit C-90**, European Commission Fact Sheet, "Questions and Answers on the Commission proposal to amend the Gas Directive", 8 November 2017; **Exhibit C-46**, European Commission Proposal for the Amending Directive, COM(2017) 660 final, 2017/0294 (COD), 8 November 2017; **Exhibit C-4**, Commission Staff Working Document Assessing the amendments to Directive 2009/73/EC setting out rules for gas pipelines connecting the European Union with third countries, SWD(2017) 368 final, 8 November 2017.

<sup>230</sup> **Exhibit C-102**, Politico article, "Q and A with Klaus-Dieter Borchardt, deputy director general at DG Energy", 29 July 2019 (last accessed on 22 April 2020 at <https://pro.politico.eu/news/103921>). According to Mr Borchardt: "*The whole problem of this saga was that the company and also the shareholder Gazprom believed they could build Nord Stream 2 under the same conditions as Nord Stream 1 [...] We have explained it to them that they cannot take the view that no law is applicable to this pipeline coming from Russia to the EU. Then there was the legal fight between the Commission and the Council. That was the moment that the Commission decided that we have to clear [up] the legal situation and we put forward our proposal of our amendment for the Gas Directive. And that was the moment when everything went, you know, a bit nuts*" (emphasis added).

would have extended EU gas regulation some 1,100 km in the Baltic sea to the borders of the Russian territorial sea, and which would have been a clear violation of international law.<sup>231</sup>

221. The European Commission was entirely open about the fact that its proposal would primarily affect Nord Stream 2, as well as its hostility to the project:
- i. When the European Commission published the proposal it issued an accompanying "Fact Sheet" containing 11 questions and answers.<sup>232</sup> Four of these explicitly discuss Nord Stream 2 (namely 8, 9, 10 and 11), while question 10 asks, "*Which other new pipeline projects would be affected by the proposal?*" with the explicit answer that Nord Stream 2 is the only "advanced" project that is affected.<sup>233</sup>
  - ii. In its response to question 11, as noted above, the European Commission further states that: "*The Commission position on Nord Stream 2 is well known. [...] If built, this pipeline would need a legal framework that takes into account the key principles of EU energy market rules. [...] the Commission sees no need for new infrastructure of the magnitude of Nord Stream 2*".<sup>234</sup>
  - iii. Furthermore and as also noted above, in response to a European Parliamentary question concerning Nord Stream 2, the then-Energy Commissioner Cañete stated in September 2018 that: "*The Commission considers that Nord Stream 2 does not contribute to the EU's energy policy objectives such as energy security or diversification of supplies and for that reason does not support its construction. [...] The Commission insists that Nord Stream 2, if built, should be operated in accordance with Union energy law. To this end and to clarify the legal framework, the Commission has adopted a proposal for an amendment of the Gas Directive*" (emphasis added).<sup>235</sup>
222. This is also corroborated by the briefings prepared by the European Parliamentary Research Service, which explain that: "*The urgency for the European Commission to adopt this legislative proposal can largely be attributed to political controversy surrounding the*

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<sup>231</sup> Namely, the UN Convention on the Law of the Sea (UNCLOS). In this regard, see **Exhibit C-103**, Opinion of the Legal Service of the Council, "[Proposal for a Directive amending] Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC – Compatibility with UNCLOS", 6738/18, 1 March 2018.

<sup>232</sup> **Exhibit C-90**, European Commission Fact Sheet, "Questions and Answers on the Commission proposal to amend the Gas Directive", 8 November 2017.

<sup>233</sup> **Exhibit C-90**, *ibid.*, answer to question 10. The answer also refers to the Trans-Adriatic pipeline (TAP) project, which it notes as being "*similarly advanced*" but explains that this pipeline "*already has an exemption pursuant to Article 36 Gas Directive, and would, hence, not be affected by this legal change*".

<sup>234</sup> **Exhibit C-91**, *ibid.*, answer to question 11.

<sup>235</sup> **Exhibit C-91**, European Commission Response to parliamentary question E-004084/2018, 24 September 2018. The statement by the then-Commissioner conflates two things that should not be confused: EU energy policy and EU energy law – the question of whether Nord Stream 2 contributes to EU energy policy objectives is of course not relevant to the (non-)applicability of the existing EU energy law to Nord Stream 2.

*Gazprom-led project to double the capacity of the Nord Stream underwater pipelines delivering natural gas from Russia to Germany. This project is known as 'Nord Stream 2', to differentiate it from the two original Nord Stream pipelines (in operation since 2011-2012)".*<sup>236</sup>

223. It may be noted that in light of the significant political animus against Nord Stream 2 held by various EU actors, some thought appears to have been given to an attempt simply to ban the project altogether. Indeed in a discussion of the proposal for the Amending Directive before the European Parliament's ITRE Committee, Deputy Director-General Borchardt of DG Energy stated that the most efficient approach would be to get a veto but this would be challenged at WTO level, and that it is worth looking at assessing whether a veto could hold in the international law arena or not as this would be the only efficient instrument that could help the European Union avoid such problems in the future.<sup>237</sup>
224. There would also seem to be other obstacles, additional to the international law concerns voiced by Mr Borchardt, which explain why this course was not taken. First, the relevant Treaty law-making basis, Article 194(2) TFEU, only empowers the European Union to adopt general legislative measures "*in the context of the establishment and functioning of the internal market*", and so was not an appropriate legal basis for the prohibition of an individual project. Such a prohibition would also likely have been inconsistent with the requirement in the second subparagraph of Article 194(2) TFEU, that: "*Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply [...]*".<sup>238</sup> It is also highly unlikely that a qualified majority in the Council would have, in any event, supported such a direct attack on a single project.<sup>239</sup>
225. Instead the European Commission tabled a proposal that was an *indirect* attack on Nord Stream 2, as explained further below, presented as a general legislative amendment to the Gas Directive aimed at completing the internal market, which is necessary to justify using Article 194(2) as a legal basis.

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<sup>236</sup> **Exhibit C-24**, European Parliamentary Research Service, "Common rules for gas pipelines entering the EU internal market", Briefing: EU Legislation in Progress (editions 1 to 4), PE 614.673, 23 January 2018, 3 July 2018, 27 March 2019, 27 May 2019.

<sup>237</sup> **Exhibit C-92**, Transcript of Presentation by Klaus-Dieter Borchardt to a meeting of the European Parliament Committee on Industry, Research and Energy (ITRE), "Negotiation mandate for Nord Stream 2: state of play", 11 October 2017 (presentation accessible at [https://multimedia.europarl.europa.eu/en/committee-on-industry-research-and-energy\\_20171011-1430-COMMITTEE-ITRE\\_vd](https://multimedia.europarl.europa.eu/en/committee-on-industry-research-and-energy_20171011-1430-COMMITTEE-ITRE_vd)).

<sup>238</sup> A fact noted in **Exhibit C-101**, Opinion of the Council Legal Service, "Recommendation for a Council decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline — Allocation of competences and related legal issues", 12590/17, 27 September 2017, para 87.

<sup>239</sup> In order to achieve the foreign policy objectives mentioned above the EU could potentially also have taken so-called "Common Foreign and Security Policy" measures pursuant to Articles 24(1) and 31(1) TEU (**Exhibit CLA-41**) but this requires unanimous approval of all Member States, which was out of the question due to the Member States that supported Nord Stream 2.

226. This hostility towards Nord Stream 2 is in stark contrast to the treatment of Nord Stream 1, a project that, as described above, is very similar to Nord Stream 2 and on which the decision to build Nord Stream 2 was based. As explained in Section V.2 above, Nord Stream 1 received considerable support from the EU and its Member States during its development and was accorded the special status of being a "*priority project*" of "*European interest*" on the basis, in particular, of its important and positive impact on the EU's security of supply.<sup>240</sup> Given the commonalities between the two projects, this would suggest that objectively, Nord Stream 2 also ought to have been considered as positive from a security of supply perspective.
227. Indeed, the positive contribution of Nord Stream 2 to the EU's security of supply is borne out by specific detailed analysis in an expert opinion prepared by the economic consultancy Frontier Economics and the Energy Economics Institute of the University of Cologne (EWI).<sup>241</sup> The expert opinion concludes that Nord Stream 2 improves the security of supply in Germany and the EU, *inter alia*, by providing an additional transport infrastructure that does not depend on transit through third countries, by connecting Germany and the EU to the Russian gas fields of the future increasingly located in northern Russia and, more generally, by creating the possibility to import additional gas volumes to balance declining domestic gas production.<sup>242</sup> Furthermore, the expert opinion determines that Nord Stream 2 would not be detrimental to the security of supply of other individual EU Member States and in particular, the traditional transit countries for Russian gas. This was due, *inter alia*, to the increased market integration of Eastern European countries that has developed in recent years and the significant expansion of import capacities, through which the traditional transit countries now have diversified import options available.
228. In light of the above, alleged concerns in relation to security of supply cannot provide an explanation for the EU's negative political animus against Nord Stream 2.
229. As further described in Section VIII, the deliberately discriminatory nature of the proposal for the Amending Directive targeted, as it undeniably was, against Nord Stream 2, leads to breaches of the EU's obligations under the ECT, including the EU's guarantee of fair and equitable treatment, the EU's promise not to impair NSP2AG's investment by unreasonable or discriminatory measures, the EU's guarantee of constant protection and security and its

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<sup>240</sup> **Exhibit CLA-16**, Decision 1364/2006/EC of the European Parliament and of the Council of 6 September 2006 laying down guidelines for trans-European energy networks and repealing Decision 96/391/EC and Decision No 1229/2003/EC, OJ L262/1, 22 September 2006, Recital 8 and Annex I point NG.1. Note that Nord Stream 1 was referred to as the "North European gas pipeline" at this time.

<sup>241</sup> **Exhibit C-104**, Frontier Economics and EWI, "Effects of Infrastructure Investments such as Nord Stream 2 Pipeline on the European Gas Market", Report on behalf of Nord Stream 2 AG, May 2020. The expert opinion was originally prepared and submitted in the context of NSP2AG's application to the Bundesnetzagentur for an Article 49a derogation. See further Section VI.11 below.

<sup>242</sup> **Exhibit C-104**, *ibid.*, section 2.

promise to accord treatment no less favourable to its own investors and investors from any other Contracting Party or any third states.

**VI.8 The Amending Directive was adopted and entered into force on 23 May 2019, making Nord Stream 2 subject to the Gas Directive**

230. The European Commission's proposal was subject to the EU's ordinary legislative procedure, pursuant to which the Council and the Parliament must agree upon a final text as co-legislators.
231. As explained above, there was a strong anti-Nord Stream 2 sentiment in the European Parliament, and ultimately, the European Parliament supported the European Commission's proposal without much discussion. The situation in the Council, however, was more complex, as certain Member States supported the Nord Stream 2 project. Furthermore, Italy and Spain, two of the most populous Member States, were concerned about the potential impact of the Amending Directive on their own existing offshore import pipelines from North Africa, i.e. Greenstream, Transmed, Medgaz and MEG. This meant that there were sufficient Member States to constitute a potential "blocking minority".
232. The objective for the European Commission and the other EU actors opposed to Nord Stream 2 was therefore to whittle down these Member States. In order to secure the support of Italy and Spain, the proposal was designed in such a manner that the impact on their existing offshore pipelines from North Africa would effectively be non-existent (and limiting the impact to Nord Stream 2 only, which was the European Commission's original aim). This was achieved by the Article 49a derogation regime for "completed" pipelines (see further below), which was very generous and was to be decided upon by the Member State itself, as opposed to the European Commission.<sup>243</sup>
233. The design of the proposal reduced the opposition in the Council, but with France and Germany continuing not to support the proposal, the potential for a "blocking minority" with Austria, Belgium, Bulgaria and the Netherlands, continued to exist. On 7 February 2019, however, France made it clear that it was no longer minded to oppose the proposal.<sup>244</sup> This

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<sup>243</sup> The aim of Italy and Spain to ensure that their existing third country offshore import pipelines would not be impacted by the Amending Directive is also apparent from the specific proposals they put forward to adapt the European Commission's text. In particular, Italy proposed essentially to limit the application of the Amending Directive to third country offshore import pipelines with total capacity exceeding 80 bcm/y from the same third country, which would have excluded all the pipelines from North Africa (see **Exhibit C-105**, Council of the European Union Working Paper, "Comments by Italy on the Amending Directive", WK 3624/2018 INIT, 23 March 2018). Spain proposed essentially to limit the scope of the Amending Directive to third country offshore import pipelines "*that have a significant impact on the internal market*" (see **Exhibit C-106**, Council of the European Union Working Paper, "Comments by Spain on the Proposal for an Amending Directive", WK 265/2018 INIT, 12 January 2018 and **Exhibit C-107**, Council of the European Union Working Paper, "Comments by Spain on the Proposal for an Amending Directive", WK 2785/2018 INIT, 6 March 2018). Ultimately, these Member States were satisfied by the generous Article 49a derogation regime.

<sup>244</sup> **Exhibit C-108**, France Ministry of Europe and Foreign Affairs press statement, "European Union – Energy - Q&A - Excerpts from the daily press briefing", 7 February 2019.

changed the situation fundamentally and greatly increased pressure on the remaining hold-out group of Member States which was now at risk of being out-voted. This in turn very quickly resulted in a "French – German compromise",<sup>245</sup> in which Germany achieved the limitation of the scope of the Amending Directive to its own territorial sea. This compromise was then formally approved as the Council's position on 8 February 2019<sup>246</sup> and was also agreed by the European Parliament with minimal changes in a particularly quick trilogue process.

234. The Amending Directive was ultimately enacted by the Council and Parliament on 17 April 2019. In the Council, the Amending Directive was passed with all Member States in favour, except for Bulgaria, which abstained. This margin should not be seen as an expression of widespread support however – it is simply a consequence of the peculiar dynamics of law-making in the Council, which, as explained in Section VI.2 above, produce results that mask dissent. The Amending Directive was published in the Official Journal of the European Union on 3 May 2019, and entered into force on 23 May 2019.<sup>247</sup>
235. The Amending Directive follows the basic approach of the European Commission's proposal in extending the scope of the Gas Directive to apply to offshore import pipelines such as Nord Stream 2 by amending the term "*interconnector*" to include "*a transmission line between a Member State and a third country up to the territory of the Member States or the territorial sea of that Member State*".<sup>248</sup> In terms of the territorial scope, the Amending Directive confirms at Recital 9 that: "*The applicability of [the Gas Directive] to gas transmission lines to and from third countries remains confined to the territory of the Member States. As regards offshore gas transmission lines, Directive 2009/73/EC should be applicable in the territorial sea of the Member State where the first interconnection point with the Member States' network is located*",<sup>249</sup> in line with the "French – German compromise".
236. As a consequence, offshore import pipelines such as Nord Stream 2 become subject to the Gas Directive rules on unbundling, third party access and tariff regulation insofar as the part of the offshore import pipeline within the territorial sea of an EU Member State is concerned.<sup>250</sup> In terms of the unbundling rules, in addition to the standard option of ownership unbundling, the Amending Directive has also made the two alternative unbundling regimes, the ISO and ITO models, available for offshore import pipelines from third countries

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<sup>245</sup> **Exhibit C-109**, Politico article, "Franco-German alliance survives Nord Stream 2 scare", 8 February 2019 (last accessed on 2 June 2020 at <https://www.politico.eu/article/france-germany-alliance-survives-nord-stream-2-scare/>).

<sup>246</sup> **Exhibit C-110**, Council of the European Union press release, "Gas directive: Council agrees negotiating mandate", 8 February 2019.

<sup>247</sup> The twentieth day following its publication in the Official Journal of the European Union, as is the normal case for EU legislation, under Article 297 TFEU (**Exhibit CLA-42**).

<sup>248</sup> **Exhibit CLA-3**, Amending Directive, Article 1(1).

<sup>249</sup> **Exhibit CLA-3**, Amending Directive, Recital (9).

<sup>250</sup> The EUGAL pipeline to which Nord Stream 2 will connect when it makes landfall in Lubmin, Germany, would already have been subject to the Gas Directive rules under the existing Gas Directive.

that belonged to a vertically integrated undertaking on 23 May 2019, the date of entry into force of the Amending Directive.

237. As a directive, the Amending Directive had to be transposed by Member States by amending their existing legislation based on the Gas Directive. The deadline for transposition was 24 February 2020. Germany transposed the Amending Directive into German law through an amendment to the German Energy Industry Act (*Energiewirtschaftsgesetz*).<sup>251</sup> The amending law entered into force on 12 December 2019 and is essentially a word for word transposition of the Amending Directive. Germany has also transposed the possibility to opt for an ITO or ISO model where on 23 May 2019 the transmission system belonged to a vertically integrated undertaking.

#### **VI.9 The Amending Directive includes the possibility of derogation under Article 49a for existing pipelines, which is drafted so as to exclude Nord Stream 2**

238. In its proposal for the Amending Directive, the European Commission recognised that existing pipelines, "*fall outside the scope of [the existing exemption scheme under] Article 36*", and so it proposed that, "*Member States will be enabled to grant derogations from the application of the main provisions of the [Gas] Directive*" (see further Section VI.11 below). Specifically, it proposed that Member States could grant derogations to import pipelines that were "*completed before*" the date of entry into force of the Amending Directive, provided that the derogation "*would not be detrimental to competition on or the effective functioning of the internal market in natural gas in the Union, or the security of supply in the Union*".<sup>252</sup>
239. By using the eligibility criterion of "completed before" the date of entry into force of the Amending Directive, the proposed derogation regime had the intention of excluding only Nord Stream 2, which was not scheduled to have finished construction and be operational until the following year. This was explicitly identified by Germany in its comments of 21 January 2019 during the legislative process in the Council, in which it noted that the proposal, "*would result in the Directive primarily consisting of exemptions and only applying to a single case*," and, "*if thought through to its logical end, is designed to regulate one infrastructure only*".<sup>253</sup>
240. The temporal scope of Article 49a and the question of "*situations where substantial investments have already been made*" proved to be a focal point of the discussion during the

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<sup>251</sup> **Exhibit CLA-47**, German law implementing the Amending Directive of 5 December 2019 (Gesetz zur Änderung des Energiewirtschaftsgesetzes zur Umsetzung der Richtlinie (EU) 2019/692 des Europäischen Parlamentes und des Rates über gemeinsame Vorschriften für den Erdgasbinnenmarkt), BGBl., Part 1, No. 45, p 2002, 11 December 2019.

<sup>252</sup> **Exhibit C-46**, European Commission Proposal for the Amending Directive, COM(2017) 660 final, 2017/0294 (COD), 8 November 2017, Explanatory Memorandum, p 2.

<sup>253</sup> **Exhibit C-111**, Council of the European Union Working Paper, "Germany's written comments on REV 3 modifying the Gas Directive proposed under the Romanian Presidency", WK 844/2019 INIT, 21 January 2019.



legislative process in the Council,<sup>254</sup> and a number of Member States, including those which supported Nord Stream 2, proposed alternatives to the eligibility criterion of "completed before" the date of the entry into force of the Amending Directive. In particular:

- i. In its 11 December 2017 comments, Germany stated, "*We therefore see the need for a clarification that cases in which the construction of the pipeline will not have been completed when the amended Gas Directive is likely or is intended to enter into force, but in which final investment decisions have been taken and initial investments made (as in the case of Nord Stream 2) would in principle be covered by the possible derogations*".<sup>255</sup>
- ii. In its 2 March 2018 comments, Belgium proposed that this eligibility criterion be supplemented with the alternatives, "*for which on [date of entry into force of Amending Directive] construction works relating to the investment have started, or the first legally binding commitment to order equipment for the construction for the pipeline has been made*".<sup>256</sup>
- iii. In its 19 October 2018 comments, Hungary proposed that, "*For the sake of equal treatment, all existing pipelines and pipelines under construction*" should be eligible for a derogation.<sup>257</sup>
- iv. On 21 November 2018, Austria, in its capacity as the holder of the Presidency of the Council, proposed a choice between the criterion of "*completed before*" the date of the entry into force of the Amending Directive that had been put forward by the European Commission and an alternative criterion of pipelines "*for which start of works took place before*" the date of the entry into force of the Amending Directive".<sup>258</sup>
- v. In its 21 January 2019 comments, the Netherlands referred to "*the possibility for Member States to grant a [...] derogation to an existing pipeline or a pipeline that is under construction*".<sup>259</sup>

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<sup>254</sup> **Exhibit C-112**, Council of the European Union Working Paper, "Discussion Paper from the Austrian EU Presidency on the Gas Directive", WK 11025/2018 INIT, 24 September 2018 (partially redacted); **Exhibit C-113**, Council of the European Union Working Paper, "Option Paper from the Austrian Presidency on the Gas Directive", WK 13455/2018 INIT, 7 November 2018 (partially redacted).

<sup>255</sup> **Exhibit C-114**, Council of the European Union Working Paper, "Written Comments by Germany on the Commission Proposal for the Amending Directive", WK 14673/2017 INIT, 11 December 2017.

<sup>256</sup> **Exhibit C-115**, Council of the European Union Working Paper, "Preliminary comments by Belgium on the proposal for the Amending Directive", WK 2677/2018 INIT, 2 March 2018 (partially redacted).

<sup>257</sup> **Exhibit C-116**, Council of the European Union Working Paper, "Hungarian written comments to the discussion paper of the Austrian EU Presidency on the Gas Directive", WK 12559/2018 INIT, 19 October 2018 (partially redacted).

<sup>258</sup> **Exhibit C-117**, Council of the European Union, "Second revised text for the Amending Directive", 2017/0294(COD), 14204/17, 21 November 2018.

<sup>259</sup> **Exhibit C-118**, Council of the European Union Working Paper, "Comments of the Netherlands on third revised text to amend the Gas Directive", WK 877/2019 INIT, 21 January 2019 (partially redacted).

241. The Claimant understands that there are up to 23 additional Council documents that discuss the temporal scope of Article 49a and its impact on Nord Stream 2. However, the Claimant only has access to versions of those documents that were publicly released and in which the relevant discussion has been redacted. The Claimant intends to seek production of the full, unredacted, versions through the disclosure process in this arbitration.
242. In the European Parliament, some parliamentarians also tabled amendments providing for alternatives to the derogation eligibility criterion of "completed before" the date of the entry into force of the Amending Directive. In particular:
- i. Two parliamentarians proposed that pipelines *"which are already in the process of planning or being built, where major investment has already been made for those purposes"* as at the date of entry into force of the Amending Directive, should also be eligible.<sup>260</sup>
  - ii. Similarly, another parliamentarian proposed that pipelines for which *"construction works relating to the investment have started, or the first legally binding commitment to order equipment for the construction of the pipeline has been made"* as at the date of entry into force of the Amending Directive, should also be eligible.<sup>261</sup> This amendment was justified on the basis that it would, *"provide the flexibility necessary to take into account legitimate expectations of infrastructure operators that have already made investments under the old regime"*.<sup>262</sup>
243. Notwithstanding these attempts of a number of Member States and European Parliamentarians to address the issue, the derogation eligibility criterion of *"completed before"* the date of the entry into force of the Amending Directive was ultimately adopted by the Council and the Parliament in the final version of the Amending Directive. The EU legislator, therefore, specifically decided to exclude Nord Stream 2 from the scope of Article 49a.
244. The final derogation regime is set out in a new Article 49a introduced by the Amending Directive, which provides as follows in paragraph (1):

*"In respect of gas transmission lines between a Member State and a third country completed before 23 May 2019, the Member State where the first connection point of such a transmission line with a Member State's network is located may decide to derogate from Articles 9, 10, 11 and 32 and Article 41(6), (8) and (10) for the sections of such gas transmission line located in its territory and territorial sea, for objective reasons such as to enable the recovery of the investment made or for reasons of*

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<sup>260</sup> **Exhibit C-119**, European Parliament, "Amendment No 27, proposed by Hermann Winkler and Sven Schulze: Proposal for a directive Recital 4", 017/0294(COD), p 13, 28 January 2018.

<sup>261</sup> **Exhibit C-119**, European Parliament, "Amendment No 111, proposed by Paul Rübig: Proposal for a directive Article 1 – paragraph 1 – point 8", 017/0294(COD), p 67, 28 January 2018.

<sup>262</sup> **Exhibit C-119**, *ibid.*

*security of supply, provided that the derogation would not be detrimental to competition on or the effective functioning of the internal market in natural gas, or to security of supply in the Union.*

*The derogation shall be limited in time up to 20 years based on objective justification, renewable if justified and may be subject to conditions which contribute to the achievement of the above conditions.*

*Such derogations shall not apply to transmission lines between a Member State and a third country which has the obligation to transpose this Directive and which effectively implements this Directive in its legal order under an agreement concluded with the Union" (emphasis added).<sup>263</sup>*

245. Recital 4 of the Amending Directive further states that the derogation possibility is provided, "[t]o take account of the lack of specific Union rules applicable to gas transmission lines to and from third countries before the date of entry into force of this Directive".
246. The stated purpose of the derogation regime is therefore to protect the legitimate expectations of investors and owners of pipelines that were completed before the entry into force of the Amending Directive. Its logic, in particular, is to protect the legitimate expectations of investors that invested in pipeline infrastructure that was simply outside the scope of the Gas Directive. This is apparent from the 24 September 2018 Discussion Paper from the Austrian Council Presidency during the legislative process in the Council,<sup>264</sup> which asked the Member States to respond to a number of questions, including the following: "Do the essential principles of legal certainty, legitimate expectations and investment protection as well as the need for a level playing field necessitate further modifications to the derogation regime? How would you suggest to deal with situations where substantial investments have already been made?"<sup>265</sup> The decision by the Bundesnetzagentur on NSP2AG's application for a derogation also confirms that the purpose of Article 49a is to protect legitimate expectations.<sup>266</sup>

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<sup>263</sup> **Exhibit CLA-3**, Amending Directive, Article 49a(1).

<sup>264</sup> **Exhibit C-112**, Council of the European Union Working Paper, "Discussion Paper from the Austrian EU Presidency on the Gas Directive", WK 11025/2018 INIT, 24 September 2018 (partially redacted).

<sup>265</sup> At least nine Member States submitted a response to the questions in the Discussion Paper – see **Exhibit C-113**, Council of the European Union Working Paper, "Option Paper from the Austrian Presidency on the Gas Directive", WK 13455/2018 INIT, 7 November 2018 (partially redacted).

<sup>266</sup> **Exhibit CLA-17**, Bundesnetzagentur decision on NSP2AG's Derogation Application (German original and English translation), 15 May 2020, p 24. Reference to the protection of legitimate expectations is also made in the legislative materials for the German law transposing the Amending Directive. In the explanatory memorandum for the legislative proposal it is stated that the derogation ensures that existing investments into transmission lines are in principle also protected under the changed regulatory requirements (see **Exhibit C-120**, Deutscher Bundestag, "Federal Government draft bill", BT-Drs. 19/13443, 23 September 2019, p 11). Similarly the recommendation by the committee of economy and energy notes that the Directive protects legitimate expectations of existing investments by means of the derogation (see **Exhibit C-121**, Deutscher Bundestag, "Decision Recommendation and Report of the Committee on the Economy and Energy", BT-Drs. 19/14878, 6 November 2019, p 6).

247. The criterion of "completed before" as the eligibility criterion for derogation on grounds of protection of legitimate expectations however, is inconsistent with the EU's practice in related contexts within the energy sector. By way of notable examples:
- i. In determining whether a transmission system "*belonged to a vertically integrated undertaking*" on 3 September 2009, the date of entry into force of the Gas Directive, and consequently whether the two alternative unbundling regimes are available,<sup>267</sup> the European Commission in its decision-making practice has referred to the criterion of whether the *final investment decision had been taken*.<sup>268</sup> As explained at paragraph 77 above, the logic of providing for these alternative unbundling regimes is, of course, analogous to that of the Article 49a derogation itself, namely to protect existing situations and reduce the impact of new rules on historical investment. Yet, the Article 49a derogation regime is based on the criterion of "completed", which cannot properly protect the legitimate expectations of parties that have invested but whose infrastructure is not yet fully finalised.
  - ii. The EU's new Electricity Regulation, *inter alia*, sets out new rules with respect to so-called energy capacity mechanisms, which are a form of public payment to electricity generators willing to invest in electricity generation infrastructure that will only function at times of peak demand (usually certain particularly cold winter periods), and which, in essence, would not be able to recover their investment without these public payments. The new EU rules in effect restrict the making of such payments to high carbon emitting generation capacity (in light of climate change concerns). However, the rules provide for derogation from the application of these rules for *capacity contracts concluded before the entry into force of the regulation*.<sup>269</sup> This "grandfathering" allows existing capacity contracts to remain in place and the protection of investments in energy infrastructure made on the back of those contracts, irrespective of whether or not the relevant infrastructure has been "completed". This "grandfathering" was required by Poland in order to protect existing investments in coal based electricity generators.<sup>270</sup>
  - iii. In the EU state aid and energy area, renewable energy installations for which *works had started* before a specified cut-off date (1 January 2017) are exempted from changes in the European Commission's relevant state aid compatibility rules which

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<sup>267</sup> See further paragraph 236 above.

<sup>268</sup> **Exhibit C-34**, European Commission Opinion, "Certification of the Operators of the Nordeuropäischen Erdgasleitung (NEL)", C(2013) 7019 final (German original and English translation), 18 October 2013, pp 4 – 5.

<sup>269</sup> **Exhibit CLA-156**, Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (recast), OJ L158/54, 14 June 2019, Article 22(5).

<sup>270</sup> **Exhibit C-122**, Euractiv article, "EU forges deal on coal phase-out, with special Polish clause", 19 December 2018 (last accessed on 22 June 2020 at <https://www.euractiv.com/section/electricity/news/eu-hammers-deal-on-coal-phase-out-with-special-polish-clause/>).

impose more onerous conditions on the grant of state aid.<sup>271</sup> The European Commission has explained that this provision is linked to *"the legal principle of 'legitimate expectations'"* and that *"this means that the granting authorities should consider [as exempt from the more onerous conditions] those producers whose project on 1 January 2017 was in such state of development that it would very likely be completed so that they should receive support under the existing support scheme (legitimate expectations)"*.<sup>272</sup>

248. This politically motivated and deliberate exclusion of Nord Stream 2 from the Article 49a regime, that indeed had been specifically provided for in order to protect legitimate expectations, constitutes a clear breach of the EU's obligations under the ECT as discussed in Section VIII below.

#### **VI.10 The EU's haste in passing the Amending Directive in order to exclude Nord Stream 2 from the temporal scope of the Article 49a derogation regime**

249. With the derogation eligibility criterion of being *"completed before"* the date of entry into force of the Amending Directive in mind, the EU Institutions proceeded to run through the legislative procedure at speed in order to enact the Amending Directive before Nord Stream 2 finished construction and became operational. The fact that the haste was attributable to Nord Stream 2 was indeed explicitly noted by the European Parliamentary Research Service,<sup>273</sup> while Director-General Ristori of DG Energy notably emphasised in the context of a March 2019 meeting of EU energy ministers that the Amending Directive would hopefully *"enter into force quickly and, in any case before the completion of Nord Stream 2"*.<sup>274</sup>

#### **No consultation and no impact assessment**

250. The proposal for the Amending Directive was tabled with extreme haste,<sup>275</sup> and the normal processes of consultation and impact assessment as required under EU law did not take place, in particular:

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<sup>271</sup> **Exhibit C-123**, European Commission Communication, "Guidelines on State aid for environmental protection and energy 2014-2020", OJ C200/1, 28 June 2014, section 3.3.2.1 and in particular, footnote 66.

<sup>272</sup> **Exhibit CLA-48**, European Commission decision in SA.47354 – Estonia – Amendments to Estonian RES and CHP support scheme, C(2017) 8456 final, 6 December 2017, Recital (42).

<sup>273</sup> As noted above, the briefings prepared by the European Parliamentary Research Service explain that: *"The urgency for the European Commission to adopt this legislative proposal can largely be attributed to political controversy surrounding the Gazprom-led project to double the capacity of the Nord Stream underwater pipelines delivering natural gas from Russia to Germany. This project is known as 'Nord Stream 2', to differentiate it from the two original Nord Stream pipelines (in operation since 2011-2012)".* See **Exhibit C-24**, European Parliamentary Research Service, "Common rules for gas pipelines entering the EU internal market", Briefing: EU Legislation in Progress (editions 1 to 4), PE 614.673, 23 January 2018, 3 July 2018, 27 March 2019, 27 May 2019.

<sup>274</sup> As reported in **Exhibit CLA-17**, Bundesnetzagentur decision on NSP2AG's Derogation Application, 15 May 2020, p 29. The relevant passage has been translated from the German original: *"schnell, das heißt auf jeden Fall vor der Fertigstellung von Nord Stream 2"*.

<sup>275</sup> Essentially, in just over one month, representing the time period between the Council Legal Service Opinion on the European Commission's Recommendation for a Nord Stream 2 treaty on 27 September

- i. Under Article 2 of Protocol 2 to the TFEU, the European Commission is required to "*consult widely*" before proposing legislative acts and consequently, the European Commission normally undertakes an *ex post* evaluation or fitness check of the existing legal framework with prior consultation of interested parties. Yet no such consultations were carried out before the European Commission issued its proposal for the Amending Directive.<sup>276</sup>
  - ii. Under the Interinstitutional Agreement on Better Law-Making between the European Commission, Council and European Parliament,<sup>277</sup> Commission proposals must be based on an impact assessment where the legislative initiative is "*expected to have significant economic, environmental or social impacts*".<sup>278</sup> Indeed, it seems that the original plan was for the Commission to carry out an impact assessment in connection with its proposal for the Amending Directive, in accordance with these requirements, as noted in its 2018 work programme.<sup>279</sup> Yet, ultimately, no impact assessment was carried out by the European Commission.
251. The pace of the legislative process for the Amending Directive was explicitly noted and questioned by the Member States. In particular, in its 11 December 2017 comments on the Proposal for the Amending Directive, Germany emphasised that it "*sees no need for haste in implementing the proposal*" and that, "*there has been no apparent reason why the changes to the Gas Directive need to be discussed and launched under time pressure*".<sup>280</sup>

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2017 (which was the spur for the proposal for the Amending Directive) and the tabling by the Commission of the proposal for the Amending Directive on 8 November 2017.

<sup>276</sup> For completeness, NSP2AG notes that the European Commission's proposal for the Amending Directive was open for "public feedback" from 6 December 2017 until 31 January 2018. This process, of course, took place after the proposal for the Amending Directive had been tabled by the European Commission on 8 November 2017 and therefore could not have had any impact in shaping the European Commission's proposal. In addition, it should be appreciated that this process is superficial compared to a formal stakeholder consultation, which, "*is a formal process of collecting input and views from stakeholders on new initiatives or evaluations / fitness checks, based on specific questions and / or consultation background documents or Commission Documents launching a consultation process or Green Papers*" and where, "*the Commission proactively seeks evidence (facts, views, opinions) on a specific issue*" (see **Exhibit C-124**, Extract from European Commission's Better Regulation Toolbox, "Tool 56: Stakeholder Feedback Mechanisms", pages 437-449, 12 May 2016).

<sup>277</sup> **Exhibit CLA-49**, Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making of 13 April 2016, OJ L 123/1, 12 May 2016.

<sup>278</sup> **Exhibit CLA-49**, *ibid.*, para 13.

<sup>279</sup> **Exhibit C-125**, European Commission, "Commission Work Programme 2018: An agenda for a more united, stronger and more democratic Europe", Annex 1, COM(2017) 650 final, 24 October 2017.

<sup>280</sup> **Exhibit C-114**, Council of the European Union Working Paper, "Written Comments by Germany on the Commission Proposal for a Directive amending Directive 2009/73/EC", WK 14673/2017 INIT, 11 December 2017. See also comments by Cyprus who noted "*Cyprus would also like to request that the necessary time is given to delegations for further technical discussions and for the opportunity to pose additional questions to the Legal Service of the Council, in an effort to clarify some important legal and technical issues that arise from the new revised text [...]*" (**Exhibit C-126**, Council of the European Union Working Paper, "Cyprus comments on Gas Directive", WK 945/2019 INIT, 22 January 2019).

## The European Commission's false justifications

252. The European Commission's justification for bypassing these essential procedural requirements was essentially that the proposal was merely a technical instrument, not raising significant policy issues. In particular:
- i. The European Commission explained the absence of any prior evaluation and consultation in the following terms: "*The content of the current proposal is limited to providing clarification in an area where applicable EU law (or the lack thereof) and applied practice diverge. The proposal builds on established practice. To take account of nevertheless existing situations created as a result of lack of explicit rules under the current framework, Member States are enabled to provide for derogations for existing operating infrastructure. In view of the above, it is considered that the amendment of the Gas Directive can be carried out without a separate evaluation process*" (emphasis added).<sup>281</sup>
  - ii. The European Commission justified the absence of any impact assessment in similar terms stating that: "*The present initiative does not require a detailed impact assessment as the changes proposed reflect the practice of applying core principles of the regulatory framework set out in the Gas Directive in relation to third countries. This is particularly evidenced by the fact that these principles are reflected in several international agreements between Member States and third countries or the EU and third countries and that they are consistently applied to onshore pipelines to and from third countries*" (emphasis added).<sup>282</sup>
  - iii. The European Commission further noted that: "*Furthermore, the proposed amendments to the Gas Directive are limited both in terms of substance and quantity and do not introduce rules for pipelines to and from third countries which differ substantially from the rules applicable to pipelines within the EU's territory. Finally, there is an established practice of applying core principles of the regulatory framework set out in the Gas Directive (in particular third party access, unbundling, tariff regulation and transparency requirements) in relation to third countries. This is particularly evidenced by the fact that these principles are incorporated in international agreements between Member States and third countries as well as between the Union and third countries and have been consistently applied to onshore pipelines to and from third countries. In these instances, the present*

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<sup>281</sup> **Exhibit C-46**, European Commission Proposal for the Amending Directive, COM(2017) 660 final, 2017/0294 (COD), 8 November 2017, Explanatory Memorandum, p 4.

<sup>282</sup> **Exhibit C-46**, *ibid.*, p 4.

*proposal provides additional transparency and legal certainty but results in limited changes to the applicable legal standard"* (emphasis added).<sup>283</sup>

253. The basis for the European Commission's position – that the Amending Directive reflects a practice of applying the core principles of the Gas Directive to import pipelines – is not supported by any concrete examples.<sup>284</sup> On the contrary, to the extent that there was an "established practice" in the words of the European Commission, it was for the opposite position. It is apparent from the European Commission's own reports concerning international agreements between individual Member States and third countries in the field of energy,<sup>285</sup> that many of these agreements do not reflect the requirements of the Gas Directive.<sup>286</sup> The Claimant is aware of the Energy Community Treaty, which in principle requires its contracting parties to apply the EU Gas Directive rules. But the only contracting party with import pipelines connecting to the EU – Ukraine – did not apply the EU Gas Directive rules in practice.<sup>287</sup> It further suffices to note that in the letter from the President of the Bundesnetzagentur to Director-General Ristori of DG Energy,<sup>288</sup> he refers to the "*long standing regulatory practice of the European Commission*" that the Gas Directive is not applied to offshore import pipelines.

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<sup>283</sup> **Exhibit C-4**, Commission Staff Working Document Assessing the amendments to Directive 2009/73/EC setting out rules for gas pipelines connecting the European Union with third countries, SWD(2017) 368 final, 8 November 2017, p 5.

<sup>284</sup> In this context Professor Cameron notes that: "*The measure was said to build on established practice (which in my view is incorrect since there was no practice, established or otherwise, that concerned offshore import pipelines)*" (First Expert Report of Professor Cameron, para 5.4).

<sup>285</sup> **Exhibit C-127**, European Commission Report to the European Parliament, the Council and the European Economic and Social Committee on the application of the Decision 994/2012/EU establishing an information exchange mechanism on intergovernmental agreements between Member States and third countries in the field of energy, COM(2016) 54 final, 16 February 2016; **Exhibit C-128**, European Commission Staff Working Document, "Impact Assessment accompanying the Proposal for a Decision of the European Parliament and of the Council on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy and repealing Decision No 994/2012/EU", SWD(2016) 27 final, 16 February 2016.

<sup>286</sup> In these documents, the European Commission identified 17 international agreements as possibly violating EU law and in particular, the provisions of the Third Energy Package or EU competition law. The European Commission has chosen not to disclose publicly which agreements and violations are at issue, but it follows from its reports that most of the agreements conflicting with the Third Energy Package would concern gas pipelines and would conflict with the Gas Directive – see in particular, **Exhibit C-127**, European Commission Report to the European Parliament, the Council and the European Economic and Social Committee on the application of the Decision 994/2012/EU establishing an information exchange mechanism on intergovernmental agreements between Member States and third countries in the field of energy, COM(2016) 54 final, 16 February 2016, p 3; **Exhibit C-128**, European Commission Staff Working Document, "Impact Assessment accompanying the Proposal for a Decision of the European Parliament and of the Council on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy and repealing Decision No 994/2012/EU", SWD(2016) 27 final, 16 February 2016, p 38.

<sup>287</sup> Ukraine's compliance with the unbundling requirements was confirmed only very recently by the Energy Community Secretariat, on 17 December 2019 and only subject to significant conditions and further reviews / assessments. Further information on this can be found in the Opinion 4/2019 which is available on the Energy Community's website at <https://energy-community.org/implementation/Ukraine.html>.

<sup>288</sup> **Exhibit C-45**, Letter from J. Homann (President of the *Bundesnetzagentur*) to D. Ristori (Director-General DG Energy), 3 March 2017.



254. The Claimant would further note Germany's views in this regard, expressed in its 11 December 2017 comments on the proposal for the Amending Directive during the Council legislative process, in which Germany explained that, "*The Commission has so far justified the failure to undertake an impact assessment by alleging that the proposed change reflects practical reality. This is incorrect: offshore pipelines from third countries have not so far been regulated in line with the provisions of the third internal market package. This means that what is at stake here is not a clarification or codification of an existing "practice", but a clear expansion of the existing scope of the Gas Directive. Such an extension cannot take place without a well-founded impact assessment, since the proposal can involve substantial economic effects, firstly due to a high level of additional administrative burden for business, and secondly due to the possibility that the economic viability of ongoing projects might be imperilled. As a consequence, a large number of other Member States have argued against dispensing with an impact assessment*" (emphasis added).<sup>289</sup>
255. This view was echoed by two EU Institution advisory bodies that are consulted on EU legislation, the European Economic and Social Committee and the European Committee of the Regions.<sup>290</sup> In its opinion of 25 July 2018, the European Economic and Social Committee noted that, "*there may be a range of legal challenges to the amendments and that there will certainly be significant political disagreements and also commercial concerns from some industry stakeholders. The absence of an impact assessment in these circumstances is therefore regrettable*",<sup>291</sup> and that it was "*concerned that the [European] Commission felt that an impact assessment was not required. It is evident that in this politically sensitive area where economic factors come into play evidence must be tabled to underpin the arguments being made for the proposed amendments*".<sup>292</sup> The Committee of the Regions pointed out in its opinion of 5 October 2018, "*the importance of the necessary impact assessment in accordance with the Interinstitutional Agreement on Better Law-Making*".<sup>293</sup>
256. The European Commission's position is also belied by its more recent statements in relation to the Amending Directive:
- i. In a press release in February 2019 following the reaching of a provisional political agreement in the Council, the European Commission called the Amending Directive

<sup>289</sup> **Exhibit C-114**, Council of the European Union Working Paper, "Written Comments by Germany on the Commission Proposal for a Directive amending Directive 2009/73/EC", WK 14673/2017 INIT, 11 December 2017.

<sup>290</sup> This is required under Article 194(2) TFEU (**Exhibit CLA-42**), which was the Treaty legal basis for the Amending Directive.

<sup>291</sup> **Exhibit C-22**, Opinion of the European Economic and Social Committee on the proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, OJ C 262/64, 25 July 2018, pp 64 – 68, para 1.7.

<sup>292</sup> **Exhibit C-22**, *ibid.*, para 4.5.

<sup>293</sup> **Exhibit C-23**, Opinion of the European Committee of the Regions — Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, OJ C 361/72, 5 October 2018, pp 72-77, para 13.

"a *major step forward* in the creation of a truly integrated internal gas market which is based on solidarity and trust with full involvement of the European Commission" (emphasis added).<sup>294</sup>

- ii. In May 2019, the European Commission describes the Amending Directive as one of the, "top 20 EU achievements 2014-2019", calling the reform "a major step towards a well-functioning, transparent and competitive EU internal gas market where all suppliers act under the same EU rules".<sup>295</sup>

257. The press releases issued by the Council and Parliament upon approving the final version of the Amending Directive further underline the significance of the measure in reality:

- i. In the Parliament's press release, Mr Jerzy Buzek, the Parliament's rapporteur for the Amending Directive is quoted as follows: "*From now on, all gas pipelines from non-EU countries, including Nord Stream 2, will have to abide by EU rules: third-party access, ownership unbundling, non-discriminatory tariffs and transparency. That translates into stronger energy security on our continent. This has always been the main goal of the European Parliament and I am delighted that we achieved it*" (emphasis added).<sup>296</sup>

- ii. In the Council's press release, the Romanian Energy Minister is quoted as follows: "*I am very happy that this important file has been adopted. We worked hard to find a compromise that would be acceptable to everyone, and I think we now have a good solution which will guarantee that we have a fair and competitive European gas market*".<sup>297</sup>

258. There are also substantive conflicts between positions defended by the European Commission elsewhere and the suggestion that the impact of its proposal was "*limited [...] in terms of substance*" and merely reflects an existing practice. If this were to be correct, there would have been no need for a derogation for existing pipelines. It may further be noted that the European Commission's original proposal was to extend EU gas regulation some 1,100 km in the Baltic sea to the borders of the Russian territorial sea, which would have been a clear violation of international law (UNCLOS). Despite the extraordinary nature of this

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<sup>294</sup> **Exhibit C-129**, European Commission Press Release, "Energy Union: Commission welcomes tonight's provisional political agreement to ensure that pipelines with third countries comply with EU gas rules", IP/19/1069, 12 February 2019.

<sup>295</sup> **Exhibit C-130**, European Commission Report, "Europe in May 2019: Preparing for a more united, stronger and more democratic Union in an increasingly uncertain world Annex III: The Top 20 EU achievements 2014-2019", 9 May 2019, p 6, forming part of the European Commission's contribution to the informal EU27 leaders' meeting in Sibiu (Romania) on 9 May 2019.

<sup>296</sup> **Exhibit C-131**, European Parliament Press Release, "Natural gas: Parliament extends EU rules to pipelines from non-EU countries", 4 April 2019.

<sup>297</sup> **Exhibit C-132**, Council of the European Union Press Release, "Council adopts gas directive amendment: EU rules extended to pipelines to and from third countries", 294/19, 15 April 2019.

proposal, the European Commission simply submits that there is a limited substantive impact.

259. In light of the above, it cannot be credibly maintained that the Amending Directive was merely a technical instrument, not raising significant policy issues and consequently, that compliance with the essential procedural requirements of prior consultation and an impact assessment was not necessary. On the contrary, these requirements were bypassed by the European Commission in order significantly to speed up the normal process.<sup>298</sup>
260. The EU's abandonment of due process, motivated by its desire to bring the Amending Directive into law before the construction of Nord Stream 2 was completed, constitutes further breaches of the EU's obligations under the ECT, as discussed in Section VIII below.

#### **VI.11 The practical effect of the Amending Directive – Nord Stream 2 is the only pipeline impacted**

261. Under the Amending Directive, Member States had until 24 May 2020 to grant any Article 49a derogations. In Germany, the power to grant this derogation was given to the independent energy regulator the *Bundesnetzagentur*. Applicants were required to submit a request for derogation, substantiated with evidence.
262. The Claimant filed such an application on 9 January 2020 (the "**Derogation Application**"), and the *Bundesnetzagentur* conducted an extensive administrative procedure in which EU Member States and other interested parties were allowed to submit observations. Ten Member States<sup>299</sup> and a Polish state-owned gas group<sup>300</sup> effectively submitted observations. Eight Member States and the Polish state-owned gas company opposed the granting of a derogation to Nord Stream 2. On 15 May 2020, the *Bundesnetzagentur* rejected the Claimant's application on the basis that Nord Stream 2 was not "*completed before 23 May 2019*" and that, consequently, the Amending Directive did not allow it to grant a derogation.

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<sup>298</sup> The European Commission's success in this regard is attributable to the political majority in the Council that was in favour of the Amending Directive. Although these essential procedural requirements are legally binding, they are not absolute in all circumstances (for instance, an impact assessment is not required where the proposal at issue would not be expected to have any significant economic, environmental or social implications – see **Exhibit CLA-50, Czech Republic v. Parliament and Council, C-482/17, EU:C:2019:321, Judgment, 2 December 2019**), and therefore the European Commission is able in practice to circumvent them when it has sufficient political cover.

<sup>299</sup> Denmark, Estonia, Italy, Croatia, Latvia, Lithuania, Poland, Romania, Sweden and Slovakia. The Netherlands stated that they did not have any comments.

<sup>300</sup> PGNiG S.A. and its 100% subsidiary PGNiG Supply & Trading GmbH were admitted as invited parties in the proceedings before the *Bundesnetzagentur* regarding the Derogation Application by Nord Stream 2. PGNiG S.A. is the biggest gas supply company in Poland, its activities including *inter alia* the import of natural gas and its supply to customers in Poland. The company also indirectly holds a stake in EuRoPol GAZ S.A., the company which owns the Yamal pipeline. PGNiG Supply & Trading GmbH is mainly active in the procurement of natural gas on the German market and subsequent export to Poland.

The *Bundesnetzagentur* further concluded that it was the specific intention of the EU legislator to exclude Nord Stream 2 from the scope of the derogation.<sup>301</sup>

263. Nord Stream 1 AG, the owner and operator of the Nord Stream 1 pipeline, submitted an application for derogation to the *Bundesnetzagentur* on 19 December 2019. Following a procedure similar to the one conducted further to the Claimant's application, the *Bundesnetzagentur* granted a derogation on 20 May 2020. At the date of filing of this Memorial this decision was not publicly available.
264. As regards Italy, the Decree of the Italian Government implementing the Amending Directive into Italian law was adopted on 1 June 2020 and entered into force on 24 June 2020.<sup>302</sup> According to the Implementing Decree, derogations pursuant to Article 49a of the Amending Directive can be granted by the Italian Minister of Economic Development by means of a Ministerial Decree, following a prior opinion of the Italian energy regulator, the Regulatory Authority for Energy, Networks and Environment (ARERA).
265. On 4 March 2020, the Italian energy regulator filed a written submission with the Italian Parliament,<sup>303</sup> recommending that derogations under Article 49a of the Amending Directive should be granted to both the Greenstream and the Transmed pipelines. In its written submission, the Italian regulator states:

*"Given the short time limit provided for exercising the power to derogate and the potential issues regarding the interconnection pipelines with Algeria and Libya, which could arise from the applicability of two different jurisdictions (the EU's and that of the third country involved) to the same infrastructure, the Authority points out that derogations should be granted to the sections of both import gas pipelines Greenstream (Libya – Italy gas pipeline) and Transmed (Algeria – Tunisia – Italy gas pipeline)".*<sup>304</sup>

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<sup>301</sup> **Exhibit CLA-17**, Bundesnetzagentur decision on NSP2AG's derogation application (German original and English translation), 15 May 2020, p 29.

<sup>302</sup> **Exhibit CLA-51**, Italian legislative decree no. 46 of 1 June 2020 implementing the Amending Directive, Official Gazette of the Republic of Italy (Decreto Legislativo 1° giugno 2020, n. 46. Attuazione della direttiva (UE) 2019/692 del Parlamento europeo e del Consiglio, del 17 aprile 2019, che modifica la direttiva 2009/73/CE del Consiglio, relativa a norme comuni per il mercato interno del gas natural), General Series No. 145, 9 June 2020.

<sup>303</sup> **Exhibit C-133**, ARERA, "Brief of the Regulatory Authority for Energy, Networks and Environment on the draft legislative decree providing for the implementation of the Amending Directive (Government Act No. 147)", 56/2020/I/GAS, 3 March 2020.

<sup>304</sup> Translation of the original Italian: *"In considerazione degli stringenti termini temporali per l'esercizio della facoltà di deroga e delle potenziali criticità relativamente ai gasdotti di interconnessione con Algeria e Libia, che potrebbero derivare dall'applicabilità di due differenti giurisdizioni (quella comunitaria e quella del paese terzo coinvolto) sulla stessa infrastruttura, l'Autorità segnala l'opportunità che sia concessa una deroga alle sezioni dei gasdotti di importazione del Greenstream (gasdotto Libia – Italia) e del Transmed (gasdotto Algeria – Tunisia – Italia)".* See **Exhibit C-133**, ARERA, "Brief of the Regulatory Authority for Energy, Networks and Environment on the draft legislative decree providing for the implementation of the Amending Directive (Government Act No. 147)", 56/2020/I/GAS, 3 March 2020, p 5.

266. NSP2AG is not aware that any administrative procedure or investigation was conducted that led to the position adopted by the Italian energy regulator. Neither was there any possibility for interested parties to provide comments on the matter.
267. While a Ministerial Decree regarding derogations for Greenstream and Transmed has not been published yet in the Italian Official Gazette, the submission by the Italian regulator indicates that derogations will be granted to Greenstream and Transmed. This seems further confirmed by the fact that, to date, there are no indications that the owners and operators of these two pipelines have taken steps to comply with the Italian Implementing Decree (and, therefore, the Amending Directive). This is despite the fact that the Italian Implementing Decree entered into force on 24 June 2020.
268. In relation to Spain, NSP2AG understands that the Amending Directive will be transposed by means of a Royal Decree-law to be adopted by the Council of Ministers. While the Royal Decree-law has not yet been published, in light of the legislative history of the Amending Directive and the developments in Germany and Italy, it can be assumed that a derogation will be granted to the import pipelines transporting gas from North Africa to Spain (Medgaz and MEG). Furthermore, NSP2AG is not aware of any indications that the owners and operators of the Medgaz and MEG pipelines intend to take the steps that would be needed to comply with the Amending Directive. On the contrary, the owners of Medgaz are in the process of completing a share transfer transaction that results in an ownership structure that is not compliant with the Gas Directive's rules on unbundling and that was approved by the European Commission (in its capacity as competition regulator) as recently as 17 June 2020.<sup>305</sup>
269. In light of the object of the Amending Directive to target Nord Stream 2 and the *Bundesnetzagentur's* decision that Nord Stream 2 was ineligible for a derogation, the impact of the Amending Directive falls fully and essentially exclusively upon Nord Stream 2. As mentioned in Section IV.2 above, the EU imports gas from non-EU countries via a number of onshore and offshore pipelines. The Amending Directive only has a significant practical impact on Nord Stream 2 and little or no impact on these other import pipelines:
- i. Pipelines from Norway: As explained above, these pipelines receive separate regulatory treatment as an "upstream pipeline network" rather than "transmission" (see also the definitions of these concepts cited in paragraphs 58 and 68 above). The Amending Directive only changes the scope of the rules concerning transmission but makes no substantive changes to the rules applying to an

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<sup>305</sup> As indicated above in footnote 48, the transaction was cleared by the European Commission under EU merger control rules. See **Exhibit CLA-24**, European Commission (DG Competition) Decision, "Case M.9851 – Naturgy / Sonatrach / Blackrock / Medgaz: Article 6(1)(b) Non-Opposition", 17 June 2020.

"upstream pipeline network". Consequently, the Amending Directive has no impact on the pipelines from Norway.

- ii. Onshore import pipelines: When making its proposal that led to the Amending Directive, the European Commission explained that onshore import pipelines would not be impacted by the extension of the Gas Directive rules to import pipelines.<sup>306</sup> NSP2AG understands that this is because these onshore import pipelines terminate at the border of a Member State and that, therefore, they do not come within the territorial scope of the Gas Directive. This is confirmed by the abovementioned written submission that the Italian energy regulator submitted to the Italian Parliament.<sup>307</sup>
- iii. Existing offshore import pipelines: As discussed above, Nord Stream 1, MEG, Medgaz, Greenstream and Transmed have received or will receive a derogation pursuant to Article 49a,<sup>308</sup> which leaves just Nord Stream 2 as a pipeline affected by the Amending Directive, which of course corresponds to the EU's intention to adopt a measure targeted at Nord Stream 2. This also implies that the practical impact of the Amending Directive will be limited to a fraction of total import capacity from third countries (excluding even the pipelines from Norway) which is estimated as approximately 16%.<sup>309</sup>

**VI.12 The stated objectives of the Amending Directive are entirely specious, not least because the Amending Directive, as it is formulated, is simply incapable of achieving them**

270. It is clear that the reasons expressed by the EU Institutions for enacting the Amending Directive, both in the context of the European Commission's original proposal and in the final text of the Amending Directive, are entirely specious as the Amending Directive is simply incapable of achieving the EU's stated objectives.

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<sup>306</sup> **Exhibit C-90**, European Commission Fact Sheet, "Questions and Answers on the Commission proposal to amend the Gas Directive", 8 November 2017, answer to question 4.

<sup>307</sup> Para 265 above. **Exhibit C-133**, ARERA, "Brief of the Regulatory Authority for Energy, Networks and Environment on the draft legislative decree providing for the implementation of the Amending Directive (Government Act No. 147)", 56/2020//GAS, 3 March 2020.

<sup>308</sup> It is possible that these pipelines may also benefit from Article 49b(1) of the Amending Directive which allows existing agreements between EU individual Member States and third countries on matters falling within the scope of the Gas Directive to remain in force until they are amended or have been superseded by a new agreement between the EU and the same third country. In other words, existing international agreements that may not be compliant with the rules of the Gas Directive are able to remain in force. Due to the lack of information in the public domain, it is not possible for the Claimant to assess the full impact of Article 49b(1), however it seems likely that this provision has the effect of providing a further exclusion from certain Gas Directive rules for some existing offshore import pipelines, otherwise it would not have been introduced.

<sup>309</sup> **Exhibit C-135**, Document prepared by Herbert Smith Freehills LLP, "Offshore and onshore pipelines from third countries - Capacity".

271. The impossibility of the Amending Directive achieving its own stated objectives further confirms that, as a regulatory measure, it is neither proportionate, reasonable, fair nor equitable and constitutes a breach of NSP2AG's legitimate expectations. Further, the mismatch between the EU's intentions and the bogus reasons advanced for the enactment of the Amending Directive illustrate a lack of transparency. These matters constitute breaches by the EU of its obligations under the ECT and are addressed fully in Section VIII.

### **The proposal for the Amending Directive**

272. In the proposal for the Amending Directive, the main purpose was expressed as being to remove obstacles to the functioning of the internal market.<sup>310</sup> Yet, as highlighted also by Professor Cameron, the explanatory memorandum to the proposal does not explain anywhere which obstacles third country import pipelines create to the functioning of the internal market and how the proposal would achieve the purpose of removing those alleged (but unspecified) obstacles.<sup>311</sup> Under the heading "*Reasons for and objectives of the proposal*", the explanatory memorandum first summarises the objective pursued by the Gas Directive as follows, in line with the internal market functioning objective:

*"The creation of an integrated gas market is a cornerstone of the EU's project to create an Energy Union. 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".<sup>312</sup>*

273. The explanatory memorandum then simply adds in the same paragraph: "*The EU is to a 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*".<sup>313</sup>
274. While this statement is not, as such, illogical, it does not provide a rationale for unilaterally extending to import pipelines from third countries the EU's very complex regulatory regime

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<sup>310</sup> **Exhibit C-46**, European Commission Proposal for the Amending Directive, COM(2017) 660 final, 2017/0294 (COD), 8 November 2017, Recital (3) states that: "*This Directive seeks to address the remaining obstacles to the completion of the internal market in gas resulting from the non-application of Union market rules to gas pipelines to and from third countries*". A very similar statement was included in the final Amending Directive (see paragraph 283 below).

<sup>311</sup> First Expert Report of Professor Cameron, paras 6.32-6.34.

<sup>312</sup> **Exhibit C-46**, European Commission Proposal for the Amending Directive, COM(2017) 660 final, 2017/0294 (COD), 8 November 2017, Explanatory Memorandum, p 2.

<sup>313</sup> **Exhibit C-46**, *ibid.*, p 2.

that is specifically focused on using the regulation of transmission networks to bring about liberalisation and the creation of an internal market in the EU. Neither does it explain (i) why such extension was necessary at that point in time and what kinds of insights and experience with the existing third country offshore import pipelines had led the European Commission to the conclusion that such extension was required; nor (ii) how such an extension would work in practice and, therefore, how the objective of "as much transparency and competitiveness" could be achieved. Instead, the explanatory memorandum highlights the problems that are likely to emerge from its proposal by noting that:

*"Pipelines to and from third countries would thus be subject to at least two different regulatory frameworks. Where this results in legally complex situations, the appropriate instrument for ensuring a coherent regulatory framework for the entire pipeline will often be an international agreement with the third country or third countries concerned. In the absence of such an agreement, an exemption for new infrastructure or derogation for infrastructure already in operation, the pipeline may only be operated in line with the requirements of [the Gas Directive] within the borders of EU jurisdiction".<sup>314</sup>*

275. The European Commission's Staff Working Document puts forward additional justifications for the proposal, which are equally difficult to follow. It first proposes that, without the amendment, different Member States could apply different rules to import pipelines that cross several Member States once inside the EU.<sup>315</sup> This justification appears to be concerned with import pipelines such as the (abandoned) Nabucco pipeline project that would have transported gas from Azerbaijan and Iran to the Bulgarian border and then continue through Bulgaria, Romania and Hungary to terminate in Austria. The Staff Working Document appears to suggest that the amendment was needed to avoid these four EU Member States treating such a pipeline differently. However, this is clearly wrong as the EU's practice shows that the Gas Directive, which of course essentially harmonises Member States' relevant law, already applied to any pipeline on EU Member State territory, even if it is a continuation of a third country import pipeline. Consequently, there is no need for the Amending Directive to

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<sup>314</sup> **Exhibit C-46**, *ibid.*, p 2.

<sup>315</sup> **Exhibit C-4**, Commission Staff Working Document Assessing the amendments to Directive 2009/73/EC setting out rules for gas pipelines connecting the European Union with third countries, SWD(2017) 368 final, 8 November 2017, p 3, which states in significant part: "As outlined above, the Gas Directive does not expressly regulate the operation of gas pipelines connecting Member States with third countries. In the absence of applicable regulatory rules at Union level, the operation of such infrastructure could be regulated at the national level in the law of the respective Member States. For infrastructure entering the Union from a third country and thereafter crossing several Member States, this could result in the application of different rules to one and the same pipeline within the Union and thus to regulatory conflicts, legal uncertainty and distortion of competition within the Union internal energy market. Furthermore, there would be no guarantee that the respective national framework is compatible with Union rules applicable to infrastructure directly downstream of the infrastructure in question, or that the national framework prevents negative market impacts in other Member States. Absent national rules, such pipeline could de facto be operated exclusively in accordance with the law of the third country to which it connects".



address this non-existing problem.<sup>316</sup> For instance, the four sections of the Nabucco pipeline project were each granted an Article 36 exemption approved by the European Commission, which of course implies that these pipeline sections were considered to come within the scope of the Gas Directive. The same applies to the OPAL and Gazelle pipelines through North-east Germany and the Czech Republic, which also received Article 36 exemptions. In its Article 36 Decision on Gazelle, the European Commission describes both OPAL and Gazelle as pipelines that "*transport further the Russian gas delivered through Nord Stream*".<sup>317</sup>

276. The Staff Working Document further puts forward the following by way of justification for the amendment:

*"Investments in large pipelines usually require considerable investments in connected infrastructure in the EU. For this infrastructure, potentially a significant share of the costs will ultimately be borne – via regulated transmission tariffs – by EU gas customers. Certain pipelines can, because of their importance for market integration and security of supply, also benefit from direct public funding, for instance via the Connecting Europe Facility. Applying the principles of regulated third party access, unbundling and transparency to interconnectors to and from third countries is fundamental to ensure that competition is effective, security of supply is ensured and stranded assets and inefficient investments are avoided to the best possible extent.*

*A lack of transparency in the operation of pipelines to and from third countries can be a risk factor from a security of supply perspective. Therefore, it is important to ensure that information on the operation and maintenance of important infrastructure are made available to the market, and can be used by relevant national and EU authorities, including relevant competent authorities in the meaning of the Gas SoS Regulation 994/2010".<sup>318</sup>*

277. This contains a number of points and claims, each of which is entirely questionable. The first claim that EU gas customers would have to bear the cost of connecting infrastructure in the EU (such as for instance the EUGAL pipeline) via regulated tariffs, is not addressed by extending the rules of the Gas Directive to offshore import pipelines, as the Amending Directive does. Since such connecting infrastructure is on EU Member State territory and

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<sup>316</sup> Unlike, of course, the situation resulting from the Amending Directive, where potentially conflicting rules now apply to third country offshore import pipelines in the form of the relevant third country's regulatory rules and the rules of the Gas Directive.

<sup>317</sup> **Exhibit CLA-52**, European Commission Decision on the Exemption of the 'Gazelle' interconnector from ownership unbundling within the meaning of Article 9 of Directive 2009/73/EC", C(2011) 8777, 1 December 2011, para 10.

<sup>318</sup> **Exhibit C-4**, Commission Staff Working Document Assessing the amendments to Directive 2009/73/EC setting out rules for gas pipelines connecting the European Union with third countries, SWD(2017) 368 final, 8 November 2017, pp 3 – 4.

part of a Member State's transmission network, all the rules of the Third Energy Package apply to it. This is and was obviously the case with or without the Amending Directive.

278. Next, the Staff Working Document claims that the amendment is "*fundamental [...] to ensure that competition is effective, security of supply is ensured*". This is merely a repetition of the general objective pursued by the Gas Directive (and the European Commission proposal) but does not explain how the unilateral extension of these rules to third country import pipelines would contribute to that objective.
279. It is further claimed that the amendment is "*fundamental to ensure that [...] stranded assets and inefficient investments are avoided to the best possible extent*".<sup>319</sup> This is not further explained either, while the European Commission elsewhere points out that its proposed amendment will primarily affect the Nord Stream 2 project. Of course it is not credible to claim that a proposal that knowingly makes fundamental changes to the regulatory framework of a major investment in the position of Nord Stream 2, with catastrophic impact (see Section VII below), is intended to avoid stranded assets and inefficient investments.
280. The final claim relates to an alleged lack of transparency in the absence of the proposed amendment. All gas from third country import pipelines must pass through an entry point to a Member State transmission network. The most straightforward way to address any transparency concerns would be to ensure that the EU rules apply in full to these entry points. As explained above at paragraph 104 and below at paragraph 288, however, this is not the case (as the Network Codes do not apply). The Staff Working Document does not even attempt to explain why the preferred option is to unilaterally extend some of the rules to third country import pipelines that are not part of a Member State's EU's transmission network, instead of applying the rules fully to a transmission network that is clearly within a Member State.
281. Simultaneously, the Staff Working Document contains a section entitled "*Contradicting Legal Frameworks*", in which the Staff Working Document notes that, "*The proposed explicit application of the rules of the Gas Directive as well as of the Gas Regulation to a pipeline to and from third countries can result in conflicts between different legal regimes*".<sup>320</sup> It does not explain, however, how, in a context of conflicting legal regimes applicable to the same pipeline, the proposed amendment could still achieve its alleged objectives (which are highly questionable in any event). Remarkably, the European Commission justified its Recommendation for a Nord Stream 2 treaty on the basis that contradicting legal regimes for the same pipeline should be avoided.<sup>321</sup> With its proposal tabled five months later, it

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<sup>319</sup> **Exhibit C-4**, *ibid.*, p 4.

<sup>320</sup> **Exhibit C-4**, *ibid.*, p 8.

<sup>321</sup> **Exhibit C-46**, European Commission Proposal for the Amending Directive, COM(2017) 660 final, 2017/0294 (COD), 8 November 2017, Explanatory Memorandum, p 4, quoted at paragraph 252.i above.

advocated for knowingly adopting a measure that would create such a conflict that would otherwise not exist.

282. Overall, the lack of clarity and significant contradictions in the European Commission's discussion of the objectives pursued strongly suggest that these objectives were simply not real, and were fabricated.

### **The final Amending Directive**

283. The objectives enunciated in the final text of the Amending Directive are largely consistent with those expressed in the original proposal documents. In particular, Recital (3) of the Amending Directive sets out the purported reasons for extending the Gas Directive to import pipelines as follows:

*"This Directive seeks to address obstacles to the completion of the internal market in natural gas which result from the non-application of Union market rules to gas transmission lines to and from third countries. The amendments introduced by this Directive are intended to ensure that the rules applicable to gas transmission lines connecting two or more Member States are also applicable, within the Union, to gas transmission lines to and from third countries. This will establish consistency of the legal framework within the Union while avoiding distortion of competition in the internal energy market in the Union and negative impacts on the security of supply. It will also enhance transparency and provide legal certainty to market participants, in particular investors in gas infrastructure and system users, as regards the applicable legal regime".*

284. The main stated objective of the Amending Directive is therefore to address obstacles to the completion of the internal market, while avoiding distortion of competition and negative impacts on security of supply.

### **Even in the absence of any derogations, the Amending Directive would not contribute to the internal market objective**

285. In Section IV above and the First Expert Report of Professor Cameron,<sup>322</sup> it was explained that the Gas Directive and associated instruments are focused on the liberalisation and integration of the EU gas market. It is complex and sophisticated economic regulation that is administered by a number of administrative bodies that cooperate and coordinate with each other. It is so-called "pro-competitive" regulation that seeks to stimulate competition in an economic sector in which, due to a range of historical and practical circumstances, the market mechanism cannot play its normal role and competition will not develop to the desired level without extensive regulatory intervention.

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<sup>322</sup> First Expert Report of Professor Cameron, Section 6, and in particular, paras 6.37-6.44.

286. Even at a general level it is unclear what EU internal market policy objective could be achieved by extending such rules to the section of a third country import pipeline in the territorial sea of a Member State, without any objective of integrating that third country in the EU's internal gas market and without foreseeing meaningful cooperation with the third country concerned,<sup>323</sup> a fact effectively noted by the European Commission in its Recommendation for a Nord Stream 2 treaty as well as by the Council Legal Service in its opinion on the Recommendation.<sup>324</sup>
287. This general conclusion is confirmed by more detailed considerations. As explained in Section IV above EU rules on transmission do not just regulate transmission networks as a means of transport but seek to create a "Gas Target Model" for the internal market, namely the co-existence of a number of "entry-exit systems" or "gas market areas" that are interconnected with each other.<sup>325</sup> Recital (19) of the Gas Regulation sets out that the "entry-exit" system is pursued because "*it is vital that gas can be traded independently of its location in the system*", in turn allowing the development of "virtual trading points" whereby "*the physical location of seller and buyer are no longer of importance, which stimulates trading opportunities*". The entry-exit system and the Gas Target Model is clearly not about regulating transport but about changing market structure, which is inherently related to the EU's own internal market.
288. Furthermore, the result of the Amending Directive is not that EU law treats the territorial sea section of offshore import pipelines in precisely the same way as transmission networks within the EU. Legislative history documents confirm that the Amending Directive would only result in applying "core principles of the regulatory framework set out in the Gas Directive" to transmission lines to third countries<sup>326</sup> (as opposed to all rules). In particular, the clear intention was to apply the Gas Directive and the Gas Regulation<sup>327</sup> but not the Network

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<sup>323</sup> As explained in Section IV.4 above, while the Amending Directive envisages a degree of possible consultation and cooperation with the relevant third country authority in relation to the application of the Gas Directive rules in the EU, this is not comparable to the institutional mechanisms in the Gas Directive providing for deep levels of consultation and cooperation between EU and Member States authorities.

<sup>324</sup> **Exhibit C-101**, Opinion of the Council Legal Service, "Recommendation for a Council decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline – Allocation of competences and related legal issues", 12590/17, 27 September 2017, paras 42 and 76; **Exhibit C-88**, European Commission, "Recommendation for a Council Decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline", COM(2017) 320 final, 9 June 2017 (under cover of 12 June 2017), Explanatory Memorandum, p 4.

<sup>325</sup> See in particular paras 90-93.

<sup>326</sup> **Exhibit C-46**, European Commission Proposal for the Amending Directive, COM(2017) 660 final, 2017/0294 (COD), 8 November 2017, p 4; **Exhibit C-4**, Commission Staff Working Document Assessing the amendments to Directive 2009/73/EC setting out rules for gas pipelines connecting the European Union with third countries, SWD(2017) 368 final, 8 November 2017, p 5.

<sup>327</sup> **Exhibit C-46**, European Commission Proposal for the Amending Directive, COM(2017) 660 final, 2017/0294 (COD), 8 November 2017, p 5; **Exhibit C-4**, Commission Staff Working Document Assessing the amendments to Directive 2009/73/EC setting out rules for gas pipelines connecting the European Union with third countries, SWD(2017) 368 final, 8 November 2017, pp 5 – 6.

Codes, as explicitly stated in the Commission's Staff Working Document accompanying the proposal:

*"Network codes, to a large extent, do not apply to pipelines to and from third countries. This is due to specific provisions clarifying their scope. By way of example, Article 2 (1) of the Network Code on capacity allocation mechanisms (Commission Regulation (EU) 2017/459) expressly states that entry and exit points to third countries are only subject to its requirements where this has been decided by the relevant national regulatory authority. The non-application of this Network Code automatically results in non-application of major parts of Commission Regulation (EU) 2017/460 of 16 March 2017 establishing a network code on harmonised transmission tariff structures for gas (see Article 2 (1) thereof) although certain provisions (notably Chapters I, II and IV) of this Commission Regulation do apply. The proposed amendments will therefore only have a limited impact on the applicability of network codes".*<sup>328</sup>

289. Recital (13) of the Amending Directive confirms that the geographic scope of the Network Codes remains as it was and that Member States can refrain from applying the Network Codes even to the entry points to an existing transmission network on its territory connecting to the offshore import pipeline. Referring back to the example of Medgaz used in paragraph 104 above, the Amending Directive does not oblige Spain to apply the Network Codes even to the entry point to the Enagas transmission system in Almeria that connects to the exit point of the Medgaz pipeline.
290. It follows from the above that the Amending Directive has neither the effect nor the intention of integrating the territorial sea section of an offshore import pipeline in the existing entry-exit zone or gas market area to which it connects (in Germany, Spain and Italy). If this were different, there would be no distinction anymore between a "Member State's network" and "transmission lines between a Member State and a third country", while the Amending Directive treats these as two separate categories and intended to do so.
291. It further follows that, as a matter of EU law, the rules of the Gas Directive and the Gas Regulation will apply to the territorial sea section of offshore pipelines as such, i.e. without making it part of an existing wider entry-exit zone or gas market area. This in turn implies that the application of many of the most important rules is meaningless for the internal market. For instance, Article 13(1) of the Gas Regulation requiring separate tariff setting for every entry or exit point can only be meaningful for a transmission network (serving a zone/area) with many entry and exit points. It is not meaningful for a single pipeline that only has one entry and one exit point. Likewise the requirement that network charges shall not be calculated on the basis of contractual paths (i.e. from point A to point B) (Article 13(1) Gas

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<sup>328</sup> Exhibit C-4, *ibid.*, p 6.

Regulation) is meaningless in a context in which there is only one possible path: from the single entry point A to the single exit point B. Recital (19) of the Gas Regulation describes these instruments/outcomes as "*vital*" to the objectives pursued by the EU. It is inherently impossible, however, for the Amending Directive to achieve these "*vital*" outcomes in relation to the territorial sea sections of the offshore pipelines.

292. In addition, it is instructive to consider how the EU, in its submissions before the WTO Panel in the *EU-Energy Package* dispute,<sup>329</sup> clearly explained the difference between (i) transmission networks, and (ii) upstream pipelines and LNG terminals as follows:

- i. "*Transmission pipelines concern a further sector downstream [...]. They collect gas from all possible sources*".<sup>330</sup> Transmission pipelines "*connect gas sources to customers via meshed networks covering large areas*".<sup>331</sup>
- ii. By contrast, "*Upstream pipeline networks (...) could be seen as a "one way highway" [...]. Upstream pipeline networks have the sole purpose of bringing the gas from the production site to a transmission network (and not directly to a customer), so that the gas can be transmitted further downstream*".<sup>332</sup> "*It was considered that there was no need for unbundling in case of upstream pipelines, since such need only arises when several potentially competing parties come into play, leading to a risk of discrimination against certain parties for having access to a network. In case of upstream networks, this risk only arises at the point where the gas enters the transmission network as upstream pipelines are tailored to the gas field production capacity and are shared between producers to the extent several undertakings are in such a consortium. At that point, the unbundling rules apply, and the transmission network must be managed by an unbundled TSO"* (emphasis added).<sup>333</sup>

293. Taking into account these considerations, an offshore import pipeline is clearly "upstream" from the transmission network, and bears much greater similarity to an upstream pipeline than to a transmission network. An offshore import pipeline is a "*one way highway*" that has the sole purpose of bringing gas from one source, i.e. Algeria, Libya or Russia, to EU

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<sup>329</sup> **Exhibit CLA-53**, Second Written Submission by the European Union in WTO Panel Proceedings DS476 (European Union and its Member States – Certain Measures Relating to the Energy Sector), 21 November 2016.

<sup>330</sup> **Exhibit CLA-53**, *ibid.*, para 163.

<sup>331</sup> **Exhibit CLA-54**, First Written Submission by the European Union in WTO Panel Proceedings DS476 (European Union and its Member States – Certain Measures relating to the Energy Sector), 11 July 2016, para 450.

<sup>332</sup> **Exhibit CLA-53**, Second Written Submission by the European Union in WTO Panel Proceedings DS476 (European Union and its Member States – Certain Measures Relating to the Energy Sector), 21 November 2016, para 162.

<sup>333</sup> **Exhibit CLA-54**, First Written Submission by the European Union in WTO Panel Proceedings DS476 (European Union and its Member States – Certain Measures relating to the Energy Sector), 11 July 2016, para 452.

transmission networks, meaning that there should be "*no need*" to apply the rules concerning transmission to third country offshore import pipelines.

294. Furthermore, as the EU explained in its submissions to the WTO Panel, any objectives that EU regulation of transmission networks seeks to achieve can be achieved by regulating "*at the point where the gas enters the transmission network*", (i.e. the entry point to a Member State's network, for instance in Almeria, connected to the exit point of the offshore import pipeline). As discussed above, however, the Amending Directive does not even do that as the Network Codes are not applied to such points.
295. Despite the obvious questions that arise, the EU has at no point explained with at least some precision how the Amending Directive will contribute to the objectives pursued by the Amending Directive, the Gas Directive and the Gas Regulation. Rather, the EU has violated its own principles on "Better law-Making" by making misleading statements about the proposed amendments to avoid having to provide such an explanation in an impact assessment as is normally required (see paragraphs 250 to 260 above).
296. Moreover, none of the numerous and lengthy policy documents produced by the EU regarding the regulation of the gas market have ever identified the non-application of the Gas Directive rules to offshore import pipelines as a problem.<sup>334</sup> Neither was there ever a proposal to address this (unidentified) problem via an extension of the Gas Directive to the territorial sea of the Member States. Rather the question of the (non-)application of the rules was only ever raised in relation to Nord Stream 2.

**Even in the absence of any derogations, the Amending Directive would not contribute to the security of supply objective**

297. The text of the Amending Directive and the proposal documents make a general reference to a contribution to security of supply flowing from the Amending Directive. The Claimant is not aware, however, of any explanation that has ever been given in support of these general statements.
298. On the contrary, as noted in paragraph 244 above, Article 49a provides that security of supply is one of the reasons why Member States can grant a derogation from the Gas Directive rules. This simply cannot be reconciled with the proposition that the Amending Directive and its extension of the rules to third country offshore import pipelines resolves problems from a security of supply perspective.
299. In addition, the question of extending EU energy rules to offshore import pipelines was never discussed in European Commission papers focusing on security of supply.<sup>335</sup> For instance, in the 2015 European Commission Communication "*A Framework Strategy for a Resilient*

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<sup>334</sup> See further paragraph 65 above, and in particular, footnote 59.

<sup>335</sup> Footnote 59.



*Energy Union with a Forward-Looking Climate Change Policy*" published in the context of the Energy Union Package<sup>336</sup> and in which the European Commission outlined the Energy Union strategy, there was simply no indication that the European Commission took the view that the scope of the Gas Directive should be extended to include offshore import pipelines in order to ensure security of supply. Nor was the question of extending the rules on transmission to offshore import pipelines discussed in the context of the Security of Gas Supply Regulation adopted on 25 October 2017.<sup>337</sup>

300. Simultaneously, it is incontestable that additional import pipelines, such as Nord Stream 2, can only increase the EU's security of supply, as explicitly confirmed in the European Commission Staff Working Document on New Infrastructure Exemptions: "*It is considered that a new infrastructure enhances a security of supply: [...] by merely opening a new route of supply from an existing source of supply*".<sup>338</sup> The same point was also made in the Council Legal Service opinion on the Recommendation.<sup>339</sup> If there are multiple import pipelines, the EU's gas supply should not be at risk in case of disruption to one of these for any reason. These generally applicable considerations are further confirmed by the specific detailed analysis in the expert opinion prepared by the economic consultancy Frontier Economics and the Energy Economics Institute of the University of Cologne (EWI) in relation to Nord Stream 2,<sup>340</sup> summarised at paragraph 227 above.
301. The Claimant further notes that the unsupported allegation that the non-regulation of offshore import pipelines and Nord Stream 2, in particular, negatively affects security of supply simply lacks credibility in a context in which the EU took the view that Nord Stream 1 made a very significant positive contribution to security of supply (see paragraph 111 above).

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<sup>336</sup> **Exhibit C-134**, European Commission Communication, "Energy Union Package: A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy", COM(2015) 80 final, 25 February 2015. As explained in footnote 192 above, the "Energy Union" is a broad concept that essentially covers the political initiatives which are being pursued by the EU in the energy area and was formally launched by the Commission's Energy Union strategy communication.

<sup>337</sup> **Exhibit CLA-55**, Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010, OJ L 280/1, 28 October 2017.

<sup>338</sup> **Exhibit C-44**, European Commission Staff Working Paper, "New Infrastructure Exemptions: Commission staff working document on Article 22 of Directive 2003/55/EC concerning common rules for the internal market in natural gas and Article 7 of Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity", SEC(2009)642 final, 6 May 2009, para 25.

<sup>339</sup> **Exhibit C-101**, Opinion of the Council Legal Service, "Recommendation for a Council decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline — Allocation of competences and related legal issues", 12590/17, 27 September 2017, paras 10-11.

<sup>340</sup> **Exhibit C-104**, Frontier Economics and EWI, "Effects of Infrastructure Investments such as Nord Stream 2 Pipeline on the European Gas Market", Report on behalf of Nord Stream 2 AG, May 2020.

**Due to the derogations, the limited coverage of the Amending Directive is such that it could not, in any event, contribute to its purported aims**

302. Finally, even if the application of the Gas Directive rules to import pipelines were to be a genuine solution to a genuine problem (*quod non*), it should apply equally to all import pipelines. Yet, as a result of the coverage of the Amending Directive, which effectively applies to Nord Stream 2 only, out of the 329-367 bcm/y total third country import pipeline capacity, only 55 bcm/y, or approximately 16%,<sup>341</sup> representing only the Nord Stream 2 capacity, will be subject to EU rules on transmission.
303. It is difficult to see how the foreseeable application of those rules to such a limited proportion of the total import pipeline capacity could actually achieve the purported aims of the Amending Directive. This is especially the case since it is not expected that significant additional import pipelines will be built in the future,<sup>342</sup> and even then, such new pipelines would be eligible for an exemption from the Gas Directive rules under the Article 36 regime (see next section below).

**VI.13 The existing Article 36 regime is fundamentally different to and is no substitute for the new Article 49a derogation regime**

304. As noted in paragraph 102 above, and explained in more detail in the First Expert Report of Professor Cameron,<sup>343</sup> Article 36 provides for the possibility of exempting major new gas infrastructure, including interconnectors from the requirements of unbundling, tariff regulation and third party access (if the applicable conditions are fulfilled).
305. The new Article 49a derogation regime differs fundamentally from the existing Article 36 exemption regime. An Article 36 exemption is for infrastructure that is clearly within the scope of the Gas Directive and associated rules. In such cases, it is entirely evident to the promoters of these investment projects that their proposed infrastructure is in principle subject to the Gas Directive and associated rules. If they meet the conditions of Article 36, however, they can seek an exemption before they commit to any investment. The treatment allowed for by Article 36 is exceptional and reserved for infrastructure projects that, if the investment takes place, are expected to have a particularly positive impact on competition and security of supply, i.e. one that is so beneficial that it outweighs any negative impact on the internal market that the non-application of the Gas Directive rules might possibly have. Exemptions are granted if the investment would not take place without it. In contrast, as

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<sup>341</sup> **Exhibit C-135**, Document prepared by Herbert Smith Freehills LLP, "Offshore and onshore pipelines from third countries - Capacity", referring also to **Exhibit C-136**, Arthur D Little White Paper, "Analysis of the proposed gas directive amendment", March 2018, p 12.

<sup>342</sup> **Exhibit C-90**, European Commission Fact Sheet, "Questions and Answers on the Commission proposal to amend the Gas Directive", 8 November 2017, answer to question 11, where the Commission stated that it sees "*no need for new infrastructure of the magnitude of Nord Stream 2*".

<sup>343</sup> First Expert Report of Professor Cameron, Section 7.

explained at paragraph 246 above, the stated purpose of the Article 49a derogation regime is to protect the interests of investors and owners of pipelines completed before the entry into force of the Amending Directive and therefore its logic is to safeguard the legitimate expectations of investors that invested in infrastructure that was simply outside the scope of the Gas Directive.

306. This crucial distinction was also recognised by the *Bundesnetzagentur* in its decision in relation to NSP2AG's Article 49a Derogation Application, in which it stated that: "*The exemption under Article 36 of Directive 2009/737/EC is intended to promote investment in new major infrastructure in the Community interest which would not otherwise be built*"; and: "*The difference to Article 49a of Directive 2009/73/EC lies in the fact that these are investments to be made, for the purpose of which the exemption may be granted, whereas Article 49a of Directive 2009/73/EC may concern the recovery of the investments already made*".<sup>344</sup>

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<sup>344</sup> **Exhibit CLA-17**, Bundesnetzagentur decision on NSP2AG's Derogation Application (German original and English translation), 15 May 2020, pp 27-28. The decision continues to note that recovery of investments already made is not *the only reason* for which a derogation may be granted. The relevant passage has been translated from the German original: "*Bei der Ausnahme nach Art. 36 RL 2009/737EG geht es um die Förderung von Investitionen in neue Großinfrastrukturen im Interesse der Gemeinschaft, die sonst nicht gebaut würden. [...] Der Unterschied zu Art. 49a RL 2009/73/EG liegt darin, dass es sich um vorzunehmende Investitionen handelt, zwecks deren Förderung die Ausnahme erfolgen kann, während es bei Art. 49a RL 2009/73/EG um die Amortisierung bereits getätigter Investitionen gehen kann [...]*".

VII. **THE AMENDING DIRECTIVE WILL BE CATASTROPHIC FOR NORD STREAM 2 AG'S INVESTMENT**

VII.1 **Introduction**

307. In this section of its Memorial, NSP2AG explains the catastrophic impact the Amending Directive will have on NSP2AG's investment.

308. NSP2AG first explains how the Amending Directive will prevent NSP2AG operating the Nord Stream 2 pipeline as intended, fundamentally undermining the basis on which NSP2AG made its investment of over [REDACTED] (**Section VII.2**). In particular:

- i. The application of the unbundling requirements of the Gas Directive to the stretch of the Nord Stream 2 pipeline between Lubmin, Germany, where it makes landfall and connects to the European gas pipeline network, and the limit of the German territorial sea (the German Section), will prevent NSP2AG operating the whole of the Nord Stream 2 pipeline, as had been intended.
- ii. The unbundling, third party access and tariff regulation requirements imposed on the German Section by the Amending Directive, mean that the GTA, the fundamental agreement on which the entire financing structure of the project is based, cannot operate as intended.

309. [REDACTED]

310. [REDACTED]

[REDACTED], it is not realistic for NSP2AG to defer operation of the Nord Stream 2 pipeline until the outcome of NSP2AG's request for relief in this arbitration (**Sections VII.4 – VII.5**). Further, sale of the entire pipeline is not a viable option (**Section VII.6**).

311. As a result, NSP2AG has been considering alternative options to comply with the Gas Directive's rules on unbundling by separating the operation of the German Section from the remainder of the pipeline (**Section VII.7**). However, as NSP2AG explains below, implementing such options would be both extremely challenging [REDACTED]. In particular, it would require [REDACTED]

[REDACTED]; fundamental changes to the GTA [REDACTED]  
[REDACTED]  
[REDACTED]; and approval of the eventual outcome by the Bundesnetzagentur.

312. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

313. Even if agreement could be reached on changes needed to comply with rules on unbundling, the German Section would still be required to comply with third party access and tariff regulations, fundamentally changing the structure of the project and leading to significant financial damage to NSP2AG in any event.

314. NSP2AG should not, as a result of the EU's breach of the ECT, be required to go through this time consuming, costly, difficult and uncertain process where even the best outcome would be substantially different from that which would apply in the absence of that breach. For this reason, amongst others, and as set out further in Section IX below, NSP2AG seeks an order that the EU, by means of its own choosing, remove the application of Articles 9, 10, 11, 32, 41(6), 41(8) and 41(10) of the Gas Directive (i.e. those provisions which became applicable to Nord Stream 2 as a result of the Amending Directive and from which derogations are permissible pursuant to Article 49a of the Gas Directive) to NSP2AG and Nord Stream 2, thus restoring the position that would have existed but for the EU's breaches of the ECT. NSP2AG also repeats its reservation of rights to bring an application for interim injunctive relief should this prove necessary.

**VII.2 As a result of the Amending Directive NSP2AG can no longer operate the Nord Stream 2 pipeline as intended**

315. As explained in Section IV.3 above, there are three central pillars to the Third Gas Directive: unbundling requirements, regulated third party access obligations and tariff regulation. The application of these requirements to the German Section of the Nord Stream 2 pipeline as a result of the Amending Directive is inconsistent [REDACTED]  
[REDACTED] and the technical design of the Nord Stream 2 pipeline, introduces significant

regulatory uncertainty, and will prevent NSP2AG from operating the Nord Stream 2 pipeline as intended.

**Unbundling: NSP2AG can no longer act as operator for the whole of the Nord Stream 2 pipeline**

316. Prior to the Amending Directive, it was intended that NSP2AG would be the sole operator of the entire Nord Stream 2 pipeline. However, as explained at paragraph 76 above, the basic unbundling obligation in the Gas Directive, applicable to Nord Stream 2 as a result of the Amending Directive, requires separation of the ownership and control over gas transmission infrastructure, and gas production or supply.<sup>345</sup>
317. NSP2AG does not have the necessary separation, since it is a vertically integrated undertaking, i.e. an operator of transmission infrastructure which is owned by Gazprom which also, primarily through its subsidiaries, supplies gas to the EU.<sup>346</sup> As matters stand, as a result of the Amending Directive, the unbundling requirements of the Gas Directive preclude NSP2AG being the operator of the whole Nord Stream 2 pipeline. NSP2AG will be required to comply with unbundling requirements, and it is uncertain whether NSP2AG will be able to do so, as explained in Section VII.7 below.

**Third party access and tariff regulation are not compatible with the GTA**

318. The terms of the GTA require NSP2AG to [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] Both of these obligations are incompatible with the obligations under the Gas Regulation, applicable to Nord Stream 2 as a result of the Amending Directive, requiring regulated tariffs and third party access (as described further at paragraphs 85 to 87 above). The challenges that would arise in any attempt to restructure or renegotiate the GTA to comply with these requirements are discussed in Section VII.7 below.

**VII.3** [REDACTED]  
[REDACTED]

319. [REDACTED]  
[REDACTED]  
[REDACTED]

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<sup>345</sup> Exhibit CLA-4, Gas Directive, Article 9.  
<sup>346</sup> See further paragraphs 78 and 121 above.  
<sup>347</sup> [REDACTED]  
<sup>348</sup> [REDACTED]  
<sup>349</sup> [REDACTED]

320.

[REDACTED]

321.

[REDACTED]

[REDACTED]

322.

[REDACTED]

[REDACTED]

323.

[REDACTED]

350

351

[REDACTED]



[Redacted]

324. [Redacted]

[Redacted]

[Redacted]

VII.4 [Redacted]

325. [Redacted]

326. [Redacted]

352 [Redacted]  
353 [Redacted]  
354 [Redacted]  
355 [Redacted]  
356 [Redacted]  
357 [Redacted]  
358 [Redacted]

[Redacted]

[Redacted]

[Redacted]

327. [Redacted]

VII.5 [Redacted]

328. [Redacted]

**VII.6 Sale of the entire pipeline not a viable option**

329. [Redacted] explains that NSP2AG does not consider sale of the entire pipeline to another operator in order to recover some of NSP2AG's investment to be a realistic option.<sup>364</sup> [Redacted]

330. Any purchaser would be required to apply regulated tariffs and make available capacity on at least the German Section of the Nord Stream 2 pipeline in accordance with the rules of

359 [Redacted]  
360 [Redacted]  
361 [Redacted]  
362 [Redacted]  
363 [Redacted]  
364 [Redacted]

the Gas Directive and the Gas Regulation. As such the existing GTA could not be applied in its current form.

331. If the pipeline were to be sold without the benefit of the GTA, among the considerations that a purchaser would take into account would be:

- i. That the German Section must operate in a regulated environment, i.e. subject to third party access rules and tariff regulation;
- ii. That the legal framework at the entry to the pipeline in Russia will remain unchanged. Gazprom (together with its wholly owned subsidiaries) is by law the only permitted exporter of pipeline gas from Russia; and
- iii. The resulting revenue uncertainty of the above conditions.

332. [REDACTED]

333. [REDACTED]

334. [REDACTED]

335. As discussed further in Section IX below, it would in any event be inappropriate for NSP2AG to be forced to take such a damaging and irreversible action, depriving NSP2AG of its reason for existence (NSP2AG is a project company and Nord Stream 2 its only asset), to mitigate the damage caused by the EU's unlawful actions.

**VII.7 Other solutions are outside NSP2AG's control, requiring the agreement of a number of third parties, with uncertain outcome.**

336. [REDACTED] explains in [REDACTED] First Witness Statement that, as NSP2AG does not consider either doing nothing or the sale of the entire pipeline to be viable options, it has considered other possible structures or models to comply with the Third Energy Package by separating the operation of the German Section from the remainder of the pipeline. [REDACTED]

365 [REDACTED]  
366 [REDACTED]  
367 [REDACTED]

[REDACTED]

337. Whether any of these solutions could be implemented would in any event be very uncertain. As explained further below:

- [REDACTED]
- [REDACTED]
- [REDACTED]

**Even if an unbundling solution was found, the German Section would still be subject to third party access and tariff regulation**

338. It bears emphasis that even if a solution is found whereby the Nord Stream 2 pipeline can operate notwithstanding the unbundling obligations imposed by the Amending Directive, the German Section will still be subject to third party access and tariff regulation requirements. However, there is significant uncertainty regarding their application in the context of the Nord Stream 2 pipeline, where part of the pipeline is subject to these requirements and part is not, with no physical separation between the two sections, and where as a matter of Russian law only Gazprom or its wholly owned subsidiaries are permitted to export gas through the pipeline.

**Amendments required to the GTA [REDACTED]**

339. [REDACTED]

340. Any amendment of the GTA would require the agreement of [REDACTED] Gazprom Export as the counterparty to the GTA itself.

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368 [REDACTED]  
369 [REDACTED]

341. [Redacted text block]

[Redacted text block]

342. [Redacted text block]

[Redacted text block]

343. [Redacted text block]

344. [Redacted text block]

345. [Redacted text block]

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[Redacted text block]

370 [Redacted text block]

371 [Redacted text block]

372 [Redacted text block]

373 [Redacted text block]

346. [Redacted]

347. [Redacted]

348. [Redacted]

[Redacted]

349. [Redacted]

350. [Redacted]

351. [Redacted]

374 [Redacted]  
375 [Redacted]  
376 [Redacted]

352.

[REDACTED]

353.

[REDACTED]

354.

[REDACTED]

355.

[REDACTED]

377  
378  
379

[REDACTED]



[REDACTED]

356. [REDACTED]

*Verification and certification process*

357. As [REDACTED] explains in [REDACTED] First Witness Statement, Nord Stream 2 is designed in accordance with the "DNV Code" – the Offshore Standard for Submarine Pipeline Systems DNV-OS-F101 – which is a set of international industry standards relating to matters such as safety and quality of project design and engineering.<sup>381</sup> DNV (the Det Norske Veritas), is an independent foundation which undertakes the classification, certification and verification of assets, including offshore units and installations, such as the Nord Stream 2 pipeline.<sup>382</sup> DNV has the authority to provide an internationally-recognised certificate (the "DNV Certificate") proving an offshore project's compliance with the DNV Code. Obtaining a DNV Certificate is critical in providing assurance to the relevant national permitting authorities that projects such as Nord Stream 2 are safe, giving such national authorities confidence to permit operation of the pipeline.<sup>383</sup>

358. [REDACTED] explains the complicated and time consuming process which NSP2AG is undergoing to obtain a DNV Certificate for Nord Stream 2 – the final certificate will only be issued once the pipeline is commissioned.<sup>384</sup> The DNV verification process takes place in stages, with the DNV verifying, in turn, the conceptual design, the detailed design, the

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380 [REDACTED]  
381 [REDACTED]  
382 The DNV Code is available on the DNV website at <https://rules.dnvgl.com/docs/pdf/DNV/codes/docs/2013-10/OS-F101.pdf>.  
383 [REDACTED]  
384 [REDACTED]

materials supplied, and each stage of the installation, against the requirements of the DNV Code.<sup>385</sup>

359. In Germany, a permit for operation is obtained from the Bergamt Stralsund (Mining Authority), which employs a Technical Expert to advise on compliance with German technical legislation, verifying design, fabrication and installation in a similar way to the DNV.<sup>386</sup>

[REDACTED]

360. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

361. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

**Summary of challenges of restructuring**

362. Given all the factors above, any restructuring of the project by separating the operation of the German Section to be operated by a different operator would be extremely complicated, with the following elements all taking place at the same time, but with each element dependent on the outcome of some or all of the others:

i. [REDACTED]  
[REDACTED]

ii. [REDACTED]  
[REDACTED]

iii. Negotiation with any third party involved in any solution, for example any operator that would operate the German Section.

iv. Renegotiation of the GTA with Gazprom Export. Gazprom Export's agreement to all of the solutions at i. to iii. would be required.

[REDACTED]  
[REDACTED]

<sup>385</sup> [REDACTED]  
<sup>386</sup> [REDACTED]  
<sup>387</sup> [REDACTED]

- vi. Agreement and approval of Gazprom, as NSP2AG's sole shareholder, to all of the above.
- vii. The agreement of Bundesnetzagentur that the solution adopted would enable the German Section to operate in compliance with the requirements of the Gas Directive and Gas Regulation imposed by the Amending Directive.

363.

[REDACTED]

## VIII. THE EU HAS BREACHED THE ENERGY CHARTER TREATY

### VIII.1 Introduction

364. This section describes how the EU's actions in connection with the Amending Directive breach the substantive protections and guarantees to which the EU has committed under the ECT.
365. The adoption of, and the EU's actions in connection with, the Amending Directive represented a deliberate and targeted move to obstruct and disrupt Nord Stream 2. The EU knowingly and purposefully amended its regulatory framework in a manner, and at a time, when Nord Stream 2 would be the only pipeline to be practically affected. In addition, the EU's adoption of the Amending Directive lacked due process and justifiable objectives, which, as further set out below, also amount to violations of specific Articles of the ECT.
366. As described more fully in Section VI above, the EU's actions were aimed at obstructing Nord Stream 2, and were politically motivated. A wide coalition of EU actors was opposed to Nord Stream 2 on various grounds, broadly encompassing (i) political hostility towards the Russian Federation, which was identified with Nord Stream 2, and (ii) support for Ukraine, of which a key aspect was the objective of maintaining the transit of Russian gas through the Ukrainian transit route, which was also considered as important to certain EU Member States on the basis of economic self-interest (as gas transiting through Ukraine is transported further inside the EU over the transmission networks of these Member States, which generates revenue). Certain EU actors were also motivated by a goal of reducing or at least not further increasing EU Member States' use of Russian gas more generally, seen by them as undesirable both from a geo-political perspective and also for the EU's energy security.
367. As explained in Section III above, indeed, the EU's behaviour in connection with the Amending Directive is exactly the type of politically-motivated, destabilising action which the ECT was designed to discourage. The Introductory Note to the ECT describes the fundamental aim of the treaty as being "*to strengthen the rule of law on energy issues*".<sup>388</sup> The use of the Amending Directive as a "political weapon" is directly contrary to this aim.<sup>389</sup>
368. In particular, the EU has breached Article 10(1), Article 10(7) and Article 13 of the ECT. This section begins by setting out Article 10(1), and the obligation upon the EU in its opening sentence to encourage and create stable, equitable, favourable and transparent conditions (**Section VIII.2**). It then discusses the EU's breaches as follows:

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<sup>388</sup> **Exhibit C-25**, ECT website, "The Energy Charter Process" (last accessed on 2 June 2020 at <https://www.energycharter.org/process/overview/>).

<sup>389</sup> **Exhibit C-27**, W. Peters, "Nord Stream 2 caught between politicization, hypocrisy and ignorance: a few inconvenient truths", April 2020, pp 2, 5, 8, 9 and 34.

- i. The EU's failure to accord fair and equitable treatment to NSP2AG in connection with its investment, in breach of Article 10(1) of the ECT (**Section VIII.3**);
- ii. The EU's impairment of NSP2AG's investment through unreasonable and discriminatory measures, in breach of Article 10(1) of the ECT (**Section VIII.4**);
- iii. The EU's failure to provide most constant protection and security for NSP2AG's investment, in breach of Article 10(1) of the ECT (**Section VIII.5**);
- iv. The EU's failure to provide NSP2AG with treatment no less favourable than that which it accords to Investments of its own investors or of the Investors of any other Contracting Party or any third states, in breach of Article 10(7) of the ECT (**Section VIII.6**); and
- v. The EU's unlawful expropriation of NSP2AG's investment, in breach of Article 13 of the ECT (**Section VIII.7**).

369. Many of the facts that evidence these breaches are relevant to more than one breach. These facts are set out in detail in the preceding sections of this Memorial, and for ease of reference are summarised and cross-referenced as appropriate at paragraphs 381 to 385 below. To avoid undue repetition, this section also adopts for convenience definitions of particular facts, circumstances and behaviour, which are then used in later sub-sections.

## **VIII.2 Article 10(1) of the ECT**

370. Article 10(1) of the ECT provides that:

*"Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party".*

371. Article 10(1) contains, in its first sentence, a distinct obligation upon and between its Contracting Parties to create stable, equitable, favourable and transparent conditions. It provides the general context for the conditions in which investors develop legitimate expectations of stability around their investments. In particular, the language used in the first

sentence of Article 10(1) informs and elucidates the meaning of the post-investment obligations laid down in Article 10, including the FET standard.

372. In its remaining text, Article 10(1) provides for a number of separate and self-standing obligations, as further set out below. In particular, the EU has breached these obligations contained in Article 10(1) in the way it has treated NSP2AG's investment by: (i) failing to provide fair and equitable treatment ("**FET**") to NSP2AG in connection with its investment; (ii) impairing NSP2AG's investment through unreasonable and discriminatory measures; and (iii) failing to provide most constant protection and security for NSP2AG's investment.

### **VIII.3 Breach of fair and equitable treatment standard**

#### **Introduction**

373. Article 10(1) provides that the "[stable, equitable, favourable and transparent] *conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment*" (emphasis added).
374. It is appropriate to apply Article 10(1) in accordance with the rules of treaty interpretation set out in the Vienna Convention on the Law of Treaties ("**VCLT**" or "**Vienna Convention**"). Under Article 31(1) of the VCLT, Article 10(1) of the ECT is to be interpreted in accordance with its ordinary meaning, in its context and in light of the object and purpose of the ECT.<sup>390</sup> While the EU is not a party to the VCLT, Article 31 is considered to be generally reflective of customary international law.
375. The ordinary meaning of "fair and equitable treatment" is easily understood. In *MTD Equity v. Republic of Chile* and *Siemens A.G. v. the Argentine Republic*, the tribunals stated that: "*In their ordinary meaning, the terms 'fair' and 'equitable' [...] mean 'just', 'even-handed', 'unbiased', 'legitimate'.*"<sup>391</sup>
376. Although the ordinary meaning of "fair and equitable treatment" can be regarded as open-ended, this does not deprive the ECT's words of substantive content or legal significance. As Professor Schreuer has noted, "*this lack of precision may be a virtue rather than a shortcoming*", because "*the principle of fair and equitable treatment allows for independent*

<sup>390</sup> **Exhibit CLA-56**, Vienna Convention on the Law of Treaties, signed on 23 May 1969, 1155 UNTS 331 (entered into force on 27 January 1980), Article 31(1).

<sup>391</sup> **Exhibit CLA-57**, *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7, Award of 25 May 2004), para 113; **Exhibit CLA-58**, *Siemens A.G. v. the Argentine Republic* (ICSID Case No. ARB/02/08, Award of 6 February 2007), para 290, which was confirmed in **Exhibit CLA-59**, *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia* (ICSID Case No. ARB/07/15, Award of 3 March 2010), para 430. See also **Exhibit CLA-60**, S. Vasciannie, "The Fair and Equitable Treatment Standard in International Investment Law and Practice" (2000) 70(1) *British Year Book of International Law* 99, p 103: "*Under this approach, treatment is fair when it is 'free from bias, fraud or injustice; equitable, legitimate ... not taking undue advantage; disposed to concede every reasonable claim'; and, by the same token, equitable treatment is that which is 'characterized by equity or fairness ... fair, just, reasonable'.*"

*and objective third-party determination of [a respondent's] behaviour on the basis of a flexible standard".*<sup>392</sup>

377. Consequently, the ordinary wording of the fair and equitable standard should be read as offering deliberate flexibility which allows it to be adapted to the circumstances of each case, examining the state's, and, in this case, the EU's, conduct as a whole.<sup>393</sup> At its most basic, the EU's guarantee of FET is just that: a guarantee that the treatment which investors such as NSP2AG will receive will be both fair and equitable in the ordinary sense of those words.
378. The object and purpose of the ECT is expressed in its preamble, being, among other things, "*to catalyse economic growth by means of measures to liberalize investment and trade in energy*", as well as in Article 2, which states that the ECT aims to "*promote long-term cooperation in the energy field, based on complementarities and mutual benefits*".<sup>394</sup> The ECT should therefore be read in a manner which would create favourable conditions for investment, in the spirit of the ECT's stated object and purpose. The protection of NSP2AG's reasonable and legitimate expectations of an investment framework based on fairness, equity and transparency is clearly consistent with (and, indeed, fundamental to) such favourable conditions.
379. Further context around the object and purpose of the ECT is provided by the Contracting Parties' undertaking in the ECT<sup>395</sup> to pursue the objectives and principles of the European Energy Charter.<sup>396</sup> The EU is, therefore, bound to pursue the European Energy Charter's objective stated as follows:

*"Within the framework of State sovereignty and sovereign rights over energy resources and in a spirit of political and economic co-operation, [the Contracting Parties] undertake to promote the development of an efficient energy market throughout Europe, and a better functioning global market, in both cases based on the principle of non-discrimination and on market-oriented price formation, taking*

<sup>392</sup> **Exhibit CLA-61**, C. Schreuer, "Fair and Equitable Treatment in Arbitral Practice" (2005) 6(3) *The Journal of World Investment & Trade* 357, p 365.

<sup>393</sup> See also **Exhibit CLA-62**, *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt* (ICSID Case No. ARB/05/15, Award of 1 June 2009), para 450 describing FET as a "broad requirement" and **Exhibit CLA-63**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13, Award of 6 November 2008), para 185 acknowledging FET as a "*flexible concept*". See further **Exhibit CLA-54**, *Saluka Investments B.V. (The Netherlands) v. The Czech Republic* (UNCITRAL, Partial Award of 17 March 2006), para 285, where the Tribunal noted the parties' agreement "*that the determination of the legal meaning of the "fair and equitable treatment" standard is a matter of appreciation by the Tribunal in light of all relevant circumstances*". See further *Saluka*, at para 309, where the Tribunal held that "*in applying this standard the Tribunal will have regard to all relevant circumstances*".

<sup>394</sup> **Exhibit CLA-1**, ECT.

<sup>395</sup> **Exhibit CLA-1**, ECT, Preamble.

<sup>396</sup> The European Energy Charter adopted in the Concluding Document of the Hague Conference on the European Energy Charter signed at The Hague on 17 December 1991 is "*a concise expression of the principles that should underpin international energy cooperation, based on a shared interest in secure energy supply and sustainable economic development*". See **Exhibit C-137**, ECT website, "The European Energy Charter" (last accessed on 2 June 2020 at <https://www.energycharter.org/process/european-energy-charter-1991/>).

*due account of environmental concerns. They are determined to create a climate favourable to the operation of enterprises and to the flow of investments and technologies by implementing market principles in the field of energy*" (emphasis added).<sup>397</sup>

380. The European Union must also implement the European Energy Charter by promoting and protecting investments:

*"In order to promote the international flow of investments, the signatories will at national level provide for a stable, transparent legal framework for foreign investments, in conformity with the relevant international laws and rules on investment and trade"* (emphasis added).<sup>398</sup>

### **Relevant background and evidence**

381. The EU's treatment of NSP2AG's investment has violated its obligation to provide FET under Article 10(1) of the ECT. The treatment of NSP2AG and Nord Stream 2 has patently been neither fair, nor equitable. In particular, this is evidenced by the following, developed fully in the preceding sections of this Memorial and summarised and defined for convenience below, and which will be referenced in the further sub-sections throughout this Section VIII of the Memorial:

- i. The EU has amended the legal framework in such a way as to create a dramatic change in its regulatory reach which undermines the basis of NSP2AG's investment. Such action is the antithesis of the stable conditions which the EU commits to encourage and create, and the fair and equitable treatment which the EU guarantees to afford to investments. At the time of NSP2AG's investment in the EU, it is undeniable that the requirements of unbundling, tariff regulation and third party access found in the Third Gas Directive did not apply to offshore import pipelines; the application of such requirements was introduced by the Amending Directive. For ease of reference, the regulatory changes introduced by the Amending Directive shall be referred to as the "**Dramatic and Radical Regulatory Change**" throughout this Section VIII of the Memorial.
- ii. The EU itself has acknowledged the impact of such instability in the conditions in which investments are made in the EU by way of including in the Amending Directive the availability of a derogation (under Article 49a of the amended Third Gas Directive). The Amending Directive provides, in Recital 4, that Article 49a is available "[t]o take account of the lack of specific Union rules applicable to gas transmission lines to and from third countries before the date of entry into force of this Directive".<sup>399</sup>

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<sup>397</sup> **Exhibit CLA-2**, European Energy Charter, Title I: Objectives, p 29.

<sup>398</sup> **Exhibit CLA-2**, European Energy Charter, Title II: Implementation, p 31.

<sup>399</sup> **Exhibit CLA-3**, Amending Directive, Recital (4).



However, the EU has drafted the Amending Directive and brought it into force with the aim of excluding Nord Stream 2 and NSP2AG from the temporal scope of the Article 49a derogation.<sup>400</sup> The EU's efforts to target Nord Stream 2 are apparent from the legislative process by which the Amending Directive was adopted.<sup>401</sup> There is no rational, and certainly no fair and equitable, basis on which Nord Stream 2, in which very significant investment was made before the Amending Directive was passed, should not benefit from access to the derogation regime implemented by Article 49a. On the contrary, the EU's conduct is motivated by broader political considerations of the very type from which the ECT is designed to protect foreign investors.<sup>402</sup> For ease of reference, the deliberate targeting of Nord Stream 2 in the Amending Directive and exclusion from the scope of Article 49a shall be referred to as the "**Exclusion of Nord Stream 2 from the Derogation Regime**" throughout this Section VIII of the Memorial.

iii. In order to achieve the deliberate Exclusion of Nord Stream 2 from the Derogation Regime, and in a related further effort to undermine the Nord Stream 2 project, the Amending Directive was passed with remarkable haste and a marked failure to observe due process. In particular, as set out further above:

- (a) there was no ex-post evaluation or fitness check of existing legislation;<sup>403</sup>
- (b) no impact assessment was carried out;<sup>404</sup> and
- (c) there was a failure by the EU to consult widely on the draft legislation.<sup>405</sup>

For ease of reference, this legislative process by which the Amending Directive was proposed and adopted shall be referred to as the "**Improper Legislative Process**" throughout this Section VIII of the Memorial.

iv. As further described in paragraph 419 below, the EU has acted in a wholly disproportionate way with regard to the burden created by the Amending Directive when assessed against the likelihood of the Amending Directive contributing to its stated objectives.<sup>406</sup>

v. The EU has unjustifiably withheld information about the interpretation of the Amending Directive which would enable NSP2AG to make key decisions regarding its ongoing project and related investment. In particular:

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<sup>400</sup> Article 49a provides that the derogation is available only to pipelines "*completed before 23 May 2019*". See further Section VI.9.

<sup>401</sup> See further Sections VI.9 and VI.10 above. See also, the First Expert Report of Professor Cameron, Section 5.

<sup>402</sup> See further sections III and VI above.

<sup>403</sup> Para 250.i.

<sup>404</sup> Para 250.ii.

<sup>405</sup> Para 250.i.

<sup>406</sup> See further section VI.12 below.

- (a) On 12 April 2019, NSP2AG wrote to the European Commission as representative of the EU, notifying it of possible breaches of the ECT, and requesting amicable settlement pursuant to Article 26(1) of the ECT (the "**Trigger Letter**"). In its Trigger Letter, NSP2AG sought confirmation that NSP2AG would be treated as "completed" for the purposes of Article 49a and would, therefore, be eligible for a derogation.<sup>407</sup> No substantive response was received to that letter.<sup>408</sup>
- (b) On 25 June 2019, NSP2AG met with the EU formally as part of the process under Article 26 of the ECT, and again sought confirmation regarding Nord Stream 2's eligibility for the derogation.<sup>409</sup> The EU however declined to express a view, stating only that this was a matter for Germany to decide, in accordance with the application of its own domestic legislation to implement the Amending Directive.
- (c) This meeting was followed by further correspondence from NSP2AG to the European Commission on 8 July 2019 including a similar request<sup>410</sup> and on 6 August 2019, NSP2AG wrote again to the European Commission, noting its disappointment that the EU continued to refuse to explain its own understanding of how the legislation it had recently drafted and passed into law was intended and expected to operate.<sup>411</sup> The EU has refused, even now, finally to confirm that from its perspective, Nord Stream 2 was not eligible for a derogation.

The EU's lack of responsiveness and refusal to communicate openly, fairly and effectively with NSP2AG shall be referred to as the "**EU's Lack of Transparency**" throughout this Section VIII of the Memorial.

382. The unfair and inequitable treatment of Nord Stream 2 is also apparent from the EU's own publicly available statements and resolutions,<sup>412</sup> which reflect that the EU singled out Nord Stream 2 through the Amending Directive, and evidence the EU's intention to obstruct the Nord Stream 2 project.<sup>413</sup> For ease of reference, these admissions shall be referred to as

<sup>407</sup> **Exhibit C-5**, Letter from NSP2AG to Mr Jean-Claude Juncker as President of the European Commission, 12 April 2019.

<sup>408</sup> **Exhibit C-11**, Letter from the European Commission to NSP2AG, 13 May 2019; **Exhibit C-12**, Letter from NSP2AG to the European Commission, 27 May 2019.

<sup>409</sup> **Exhibit C-6**, Note headed "Summary of NSP2AG's legal concerns regarding the Gas Directive Amendment", 14 June 2019, provided to the European Commission in advance of meeting on 25 June 2019; **Exhibit C-7**, NSP2AG presentation, "Article 26 ECT Meeting – Nord Stream 2 AG's concerns regarding the Amending Directive", 25 June 2019.

<sup>410</sup> **Exhibit C-8**, Letter from NSP2AG to the European Commission, 8 July 2019.

<sup>411</sup> **Exhibit C-10**, Letter from NSP2AG to the European Commission, 6 August, in response to **Exhibit C-9**, Letter from the European Commission to NSP2AG, 26 July 2019.

<sup>412</sup> See further Sections VI.3 and VI.7 above.

<sup>413</sup> See further paragraphs 239, 262 and 269.iii above.

the "**Admissions of Targeting Nord Stream 2**" throughout this Section VIII of the Memorial, and include the following statements made by the European Commission and the European Parliament.

383. The European Commission's Admissions of Targeting Nord Stream 2 include the following:
- i. In the context of the consideration of a specific Nord Stream 2 treaty, the European Commission stated that Nord Stream 2, "*could hamper the process of creating an open gas market with competitive prices and diversified supplies in the EU*".<sup>414</sup>
  - ii. In the same context, the European Commission further stated that: "*The Commission considers that the Nord Stream 2 project does not contribute to the Energy Union objectives of giving access to new supply sources, routes or suppliers and that it could allow a single supplier to further strengthen its position on the European Union gas market and lead to a further concentration of supply routes*".<sup>415</sup>
  - iii. When the European Commission published the proposal for the Amending Directive, in its accompanying "Fact Sheet" it stated that: "*The Commission position on Nord Stream 2 is well known. [...] If built, this pipeline would need a legal framework that takes into account the key principles of EU energy market rules. [...] the Commission sees no need for new infrastructure of the magnitude of Nord Stream 2*".<sup>416</sup>
  - iv. In the same Fact Sheet, the European Commission acknowledged that Nord Stream 2 would be the only "advanced" project that would be affected by the Amending Directive.<sup>417</sup>
  - v. The statement by then Energy Commissioner Cañete in September 2018 further emphasises this point. Commissioner Cañete stated that: "*The Commission considers that Nord Stream 2 does not contribute to the EU's energy policy objectives such as energy security or diversification of supplies and for that reason does not support its construction. [...] The Commission insists that Nord Stream 2, if built, should be operated in accordance with Union energy law. To this end and to*

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<sup>414</sup> Section VI.3; **Exhibit C-88**, European Commission, "Recommendation for a Council Decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline", COM(2017) 320 final, 9 June 2017 (under cover of 12 June 2017), Explanatory Memorandum, p 3.

<sup>415</sup> See further Section VI.3 above; **Exhibit C-89**, European Commission Press Release, "Commission seeks a mandate from Member States to negotiate with Russia an agreement on Nord Stream 2", 9 June 2017. The "Energy Union" is a broad concept that essentially covers the political initiatives which are being pursued by the EU in the energy area and was formally launched by the European Commission's Energy Union strategy communication of 25 February 2015. The Energy Union and the political objectives underpinning it should of course be distinguished from the applicable EU energy law.

<sup>416</sup> **Exhibit C-90**, European Commission Fact Sheet, "Questions and Answers on the Commission proposal to amend the Gas Directive", 8 November 2017, answer to question 11.

<sup>417</sup> **Exhibit C-90**, *ibid.*, answer to question 10.

*clarify the legal framework, the Commission has adopted a proposal for an amendment of the Gas Directive*" (emphasis added).<sup>418</sup>

- vi. The European Commission's opposition to Nord Stream 2 was also repeatedly expressed by the current Deputy Director-General within DG Energy, Mr Klaus-Dieter Borchardt. For instance, in a briefing given to members of the European Parliament's Committee on ITRE on 11 October 2017, Mr Borchardt explained that: "*The Nord Stream 2 pipeline would significantly dry out the transit to Ukraine. Only one party, Gazprom, would have unrestricted access to Germany, the biggest gas entry point in Europe, which would impact the competitiveness of the gas market. Second, Nord Stream 2 would concentrate 110 bcm in a rather small corridor, undermining the EU's security of supply. Channelling so much gas to such a small corridor would be also detrimental to the Ukraine route, which would impact Southern and Eastern member states, because of the longest transport routes and higher gas prices*".<sup>419</sup>

384. The European Parliament's Admissions of Targeting Nord Stream 2 include the following:

- i. On 12 December 2018, the European Parliament adopted a resolution stating that it, *inter alia*, "condemns the construction of the Nord Stream 2 pipeline, as it is a political project that poses a threat to European energy security and the efforts to diversify energy supply; calls for the project to be cancelled" (emphasis added);<sup>420</sup> and
- ii. On 12 March 2019, shortly before the Amending Directive was passed, the European Parliament adopted a resolution stating that it, *inter alia*: "Underlines that the EU is currently Russia's largest trading partner and will keep its position as key economic partner for the foreseeable future, but that Nord Stream 2 reinforces EU dependency on Russian gas supplies, threatens the EU internal market and is not in line with EU energy policy or its strategic interests, and therefore needs to be stopped; emphasises that the EU remains committed to completing the European Energy Union and diversifying its energy resources; underlines that no new projects should

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<sup>418</sup> **Exhibit C-91**, European Commission Response to parliamentary question E-004084/2018, 24 September 2018.

<sup>419</sup> See further Section VI.3 above; **Exhibit C-92**, Transcript of Presentation by Klaus-Dieter Borchardt to a meeting of the European Parliament Committee on Industry, Research and Energy (ITRE), "Negotiation mandate for Nord Stream 2: state of play", 11 October 2017 (presentation accessible at [https://multimedia.europarl.europa.eu/en/committee-on-industry-research-and-energy\\_20171011-1430-COMMITTEE-ITRE\\_vd](https://multimedia.europarl.europa.eu/en/committee-on-industry-research-and-energy_20171011-1430-COMMITTEE-ITRE_vd)).

<sup>420</sup> **Exhibit CLA-45**, European Parliament Resolution of 12 December 2018 on the implementation of the EU Association Agreement with Ukraine, 2017/2283(INI), para 79.

*be implemented without a prior legal assessment of their legal conformity with EU law and with the agreed political priorities" (emphasis added).*<sup>421</sup>

385. The EU's alleged purpose in progressing the Amending Directive was "*to address obstacles to the completion of the internal market in natural gas which result from the non-application of Union market rules to gas transmission lines to and from third countries*", by regulating the transport network and ensuring security of supply of the EU wholesale gas market.<sup>422</sup> Doing so would, according to the European Commission, "[avoid] *distortion of competition in the internal energy market in the Union and negative impacts on the security of supply*".<sup>423</sup> As described fully above, these stated objectives were entirely specious, and could not be achieved.<sup>424</sup> For ease of reference, the objectives of the Amending Directive, as stated and described by the EU, shall be referred to as the "**Purported Objectives of the Amending Directive**" throughout this Section VIII of the Memorial.

**Applying this relevant background and evidence, the EU has breached each of the acknowledged categories of treatment under the FET standard**

386. In a growing body of jurisprudence, tribunals have found that a number of non-exhaustive categories of treatment fall within the scope of the obligation to provide FET and can constitute a breach of a FET obligation. These categories indicate that, in order to comply with its obligation to provide FET, a host state must:

- i. apply due process and prohibit denials of justice;
- ii. act without arbitrariness or discrimination;
- iii. act in good faith;
- iv. act proportionately;
- v. protect an investor's reasonable and legitimate expectations; and
- vi. act transparently.

387. A breach of any one of these requirements is sufficient to establish a breach of the obligation to provide fair and equitable treatment. As is set out further below, the EU has breached each of them.

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<sup>421</sup> **Exhibit CLA-46**, European Parliament Resolution of 12 March 2019 on the state of EU-Russia political relations, 2018/2158(INI), para 29.

<sup>422</sup> **Exhibit CLA-3**, Amending Directive, Recital (3).

<sup>423</sup> **Exhibit CLA-3**, Amending Directive, Recital (3); see also **Exhibit C-90**, European Commission Fact Sheet, "Questions and Answers on the Commission proposal to amend the Gas Directive", 8 November 2017.

<sup>424</sup> Section VI.12. See also, the First Expert Report of Professor Cameron which highlights that (i) the "obstacles" to the completion of the internal market in natural gas which purportedly result from the non-application of Union market rules to gas transmission lines to and from third countries are not identified in the Amending Directive; (ii) the non-application of Union market rules to such transmission lines had not been identified as an obstacle to completion of the internal energy market and (iii) generally, that the Amending Directive cannot achieve its internal market objectives (First Expert Report of Professor Cameron, paras 6.32-6.34 and para 1.9).

***Failure to afford NSP2AG due process and denial of justice***

388. The application of a fair procedure and compliance with the basic principles of due process of law are together a key element of the FET standard. The Tribunal in *Tecmed v. Mexico* held that there may be a lack of due process when a decision-maker bases a decision on inappropriate or irrelevant considerations.<sup>425</sup>
389. As described in paragraph 179 above, the Amending Directive rests, for its legitimacy as a piece of EU legislation, on the objectives purportedly pursued, which must correspond to the legal basis used to pass it. However, broader objectives cited in the Amending Directive belie the EU's true motivations for passing it. The EU's reliance on internal market objectives to justify the extension of the rules of the Third Gas Directive to Nord Stream 2 is a mere fig leaf. It is not able to conceal the EU's true political motives for the legislative action it took against Nord Stream 2, more fully set out in Section VI above, and which in summary have been: (i) political hostility towards the Russian Federation, which was identified with Nord Stream 2; (ii) support for Ukraine, and maintaining the transit route through Ukraine which benefits certain of its Member States, notably Poland and other eastern and central European Member States, including to promote their commercial interests by avoiding damage in terms of the loss of transit revenue; and (iii) reducing (or at least, not increasing) the EU's use of Russian gas.<sup>426</sup>
390. As described above, and in the First Expert Report of Professor Cameron, the extension of the rules of the Third Gas Directive to offshore import pipelines (and, more specifically, to Nord Stream 2 as the only pipeline affected in substance)<sup>427</sup> cannot achieve the EU's aims and is inconsistent with previously existing energy policy.<sup>428</sup> The proposal for the Amending Directive was introduced only after the European Commission's failure to achieve its objective of applying the EU energy acquis to Nord Stream 2 specifically by way of a treaty between the EU and Russia. The EU's intention to use the Amending Directive to undermine the development of Nord Stream 2 is further confirmed by the EU's Admissions of Targeting Nord Stream 2.<sup>429</sup>
391. The introduction of the Amending Directive lacked due process, as confirmed, without limitation, by the Improper Legislative Process. In particular, and as described further above, the EU's failure to conduct an impact assessment in relation to a legislative measure such as the Amending Directive, which introduced a Dramatic and Radical Regulatory Change,

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<sup>425</sup> **Exhibit CLA-66**, *Tecnicas Medioambientales Tecmed S.A. v. Mexico* (ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003), para 154.

<sup>426</sup> See further Section VI.3 above.

<sup>427</sup> Para 269.iii.

<sup>428</sup> First Expert Report of Professor Cameron, paras 1.9, 1.11 and 6.32-6.61.

<sup>429</sup> See further paragraph 382 above.

was wholly inconsistent with the expectations of Nord Stream 2 and indeed with principles of good law-making as recognised by the EU's own advisory bodies.<sup>430</sup>

392. Further, the due process requirement clearly encompasses a requirement of transparency in terms of law-making and the legal framework itself. The lack of due process is therefore also clear from the EU's repeated failure to provide clarification as to the interpretation of the Amending Directive, where the EU repeatedly refused to provide such clarification in writing or in meetings notwithstanding NSP2AG's requests, as described more fully in paragraph 381.v above (described as the EU's Lack of Transparency).
393. NSP2AG also refers to the decision of the EU General Court on NSP2AG's application to annul the Amending Directive (the "**Annulment Application**").<sup>431</sup> The Annulment Application was declared inadmissible on 20 May 2020 on the grounds of lack of standing. NSP2AG intends to pursue an appeal and reserves all of its rights in relation to the EU's actions in connection with the Annulment Application and the General Court's decision, including to bring a claim for denial of justice and/or a claim for violation by the EU of its obligations under Article 10(12) of the ECT.

***Arbitrary or discriminatory treatment of NSP2AG's investment***

394. The FET standard requires states to refrain from arbitrary or capricious measures against an investor's investment. Conduct which is "*arbitrary, grossly unfair, unjust or idiosyncratic, [or] discriminatory*" will accordingly be a breach of a state's FET obligations.<sup>432</sup>
395. Referring to a number of prior descriptions of the concept of FET, the tribunal in *Lemire v. Ukraine* summed up that "*the underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law*".<sup>433</sup>
396. Whilst the Amending Directive breaches the EU's express obligation under Article 10(1) of the ECT not to impair NSP2AG's investment by discriminatory measures (as described further below), the discriminatory nature of the Amending Directive itself and the EU's conduct in deciding to embark on a course of regulatory action with the specific aim of impacting the Nord Stream 2 project (and not other like pipelines) also constitute a clear breach of the EU's guarantee to provide FET.

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<sup>430</sup> See further Section VI.10 above, in particular paras 249, 250 and 251.

<sup>431</sup> **Exhibit CLA-67**, General Court's Decision on Admissibility of NSP2AG's Annulment Application, 20 May 2020.

<sup>432</sup> **Exhibit CLA-68**, *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3, Award of 30 April 2004), para 98; **Exhibit CLA-69**, *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8, Award of 12 May 2005), para 290.

<sup>433</sup> **Exhibit CLA-70**, *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability of 14 January 2010), para 263.

### Arbitrary treatment

397. Arbitrariness has been confirmed by arbitral tribunals as being a violation of the FET standard.<sup>434</sup> An action may be classed as arbitrary if it is taken without proper purpose, under irrelevant circumstances, or is clearly unreasonable. The relevant case law on the unreasonableness of the EU's actions is set out in more detail in Section VIII.4 below, which addresses the EU's breach of the self-standing obligation under Article 10(1) not to impair NSP2AG's investment by unreasonable or discriminatory measures.
398. Arbitrariness may be different from unlawfulness.<sup>435</sup> A "*disregard of the due process of the law*",<sup>436</sup> for example, as evidenced by the EU's non-transparent and unreasonably fast-tracked passing of the Amendment Directive,<sup>437</sup> clearly amounts to arbitrary treatment.
399. The Amending Directive also constitutes arbitrary treatment on the basis that it lacks proper purpose. As described fully in Section VI.12 above, the Purported Objectives of the Amending Directive cannot be achieved, and the Amending Directive is therefore without proper purpose and unreasonable. As the First Expert Report of Professor Cameron also explains, the application of the requirements of the Third Gas Directive to the section of a third country import pipeline from the limit of the territorial sea of a Member State cannot achieve the purported internal market objectives of the Amending Directive.<sup>438</sup>
400. The Amending Directive lacks proportionality because, targeting as it does only Nord Stream 2, it affects only approximately 16% of all EU third country import capacity,<sup>439</sup> and is arbitrary in the sense that it targets Nord Stream 2 exclusively, as the only investment affected by the Amending Directive.<sup>440</sup> While other pipelines might, in theory, fall within the scope of the Amending Directive, in practice, all such pipelines were eligible for a derogation under Article 49a of the Amending Directive given that they were "completed before" 23 May 2019 as required by Article 49a.<sup>441</sup> Nord Stream 2 is, in practice, the only advanced pipeline to which the requirements of the Third Gas Directive will extend.<sup>442</sup>

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<sup>434</sup> **Exhibit CLA-71**, *BG Group v. The Argentine Republic* (UNCITRAL, Final award of 24 December 2007), para 292, citing approvingly **Exhibit CLA-68**, *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3, Award of 30 April 2004), para 98; **Exhibit CLA-72**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL, Partial Award of 13 November 2000), paras 262-263, cited approvingly in **Exhibit CLA-64**, *Saluka Investments BV (the Netherlands) v. Czech Republic* (UNCITRAL, Partial Award of 17 March 2006), para 297.

<sup>435</sup> **Exhibit CLA-73**, *Elettronica Sicula S.p.A. (ELSI)* Judgment of 20 July, 1989, in ICJ Reports (1989), para 124.

<sup>436</sup> **Exhibit CLA-73**, *Elettronica Sicula S.p.A. (ELSI)* Judgment of 20 July, 1989, in ICJ Reports (1989), para 128; **Exhibit CLA-74**, *Philip Morris Brands SARL and others v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7, Award of 8 July 2016), para 390; **Exhibit CLA-75**, *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia* (ICSID Case No. ARB/99/2, Award of 25 June 2001), para 371. See further Section VI.10 above.

<sup>438</sup> First Expert Report of Professor Cameron, para 1.9 and Section 6.

<sup>439</sup> See further paragraphs 302 and 303 above.

<sup>440</sup> See further Section VI.11 above.

<sup>441</sup> As described in paragraph 263, Nord Stream 1 has already received a derogation, and it is expected that the other offshore import pipelines will receive a derogation in due course.

<sup>442</sup> See further paragraph 269.iii above.



401. Further, and as discussed in paragraph 418.i below, the EU has sought improperly to rely on internal market goals in order to achieve its alternative, political motives in a manner which is not only arbitrary, but fundamentally undermines the objectives at the heart of the ECT to depoliticise law-making and to uphold the rule of law in the energy sector, as described in Section III.1 above.

#### Discriminatory treatment

402. Discrimination occurs where similar cases are treated differently without "a *rational justification of any differential treatment of a foreign investor*".<sup>443</sup> Discrimination may be on a *de jure* or *de facto* basis.<sup>444</sup>

403. These elements – the question of other investments of investors in like circumstances, the EU's differential treatment of NSP2AG and Nord Stream 2 from those investors and their respective pipelines, and the lack of rational or legitimate justification for that differentiation – are addressed in turn below.

404. Further, whilst NSP2AG is not required to demonstrate that the EU's discriminatory treatment of Nord Stream 2 was intentional, all of the evidence suggests that it was, again as further described below.

#### *Nord Stream 2 and NSP2AG are in similar or like circumstances to other offshore import pipelines and their investors*

405. According to various tribunals, in order to assess whether there has been a discrimination, the treatment afforded to an investor is to be compared to the treatment afforded to another company in similar cases or "*like circumstances*".<sup>445</sup> The determination of a suitable comparator requires an investigation of the facts in each case.<sup>446</sup> A number of tribunals have

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<sup>443</sup> **Exhibit CLA-64**, *Saluka Investments B.V. v. The Czech Republic* (UNCITRAL, Partial Award of 17 March 2006), para 460.

<sup>444</sup> *De facto* discrimination has also been recognised in the context of claims under the national treatment standard. In **Exhibit CLA-76**, *Pope & Talbot Inc. v. The Government of Canada* (NAFTA Case, Award on the Merits of Phase 2 of 10 April 2001), para 78, the tribunal explained in the context of an alleged violation of the national treatment standard in the NAFTA that if there is differential treatment between foreign and domestic companies in like circumstances, such differences would "*presumptively violate Article 1102(2) [of the NAFTA], unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or de facto, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA*".

<sup>445</sup> **Exhibit CLA-77**, *Parkerings-Compagniet AS v. Republic of Lithuania* (ICSID Case No. ARB/05/8, Award of 11 September 2007), para 369. See also **Exhibit CLA-78**, *Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11, Award of 5 October 2012), para 173; **Exhibit CLA-72**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL, Partial Award of 13 November 2000), para 250.

<sup>446</sup> **Exhibit CLA-72**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL, Partial Award of 13 November 2000), para 249; **Exhibit CLA-79**, *Cargill, Incorporated v. Republic of Poland* (ICSID Case No. ARB(AF)/04/2, Final Award of 29 February 2008), para 310.

adopted the approach that enterprises within the same economic or business sector are similar.<sup>447</sup>

406. In the present case, the appropriate comparators for NSP2AG and its investment in the Nord Stream 2 pipeline are other offshore third country import pipelines, in which investment had been made at the time when the Amending Directive was brought into force.
407. These are all materially similar projects within the same economic sector, supplying gas to the EU market. These are projects which have been commenced under the same legal framework as the Nord Stream 2 project (i.e. before the requirements of unbundling, third party access and tariff regulation were applicable to the offshore elements of those pipelines within the territorial sea of an EU Member State) and are similarly affected should these requirements apply.<sup>448</sup> It is undeniable that Nord Stream 2 and NSP2AG are in a like position to all the other offshore import pipeline projects in relation to which a decision to invest was made, significant investment committed, and substantial construction having taken place before the Gas Directive became legally applicable to offshore import pipelines. Moreover, NSP2AG is in a like position to the investors in these other pipelines in its need to be able to recoup its investment. As described in Section IV above, all other offshore import pipelines, namely the Maghreb Europe, Medgaz, Transmed, Greenstream and Nord Stream 1 pipelines, with owners that are gas suppliers (and in most cases are exclusively or primarily owned by gas suppliers including the upstream supplier/producer), are in a similar or like position to Nord Stream 2. However, as opposed to Nord Stream 2, these projects are eligible for derogations under Article 49a of the Amending Directive. Nord Stream 1 has already received a derogation and the other offshore import pipelines will receive one.

*Nord Stream 2 and NSP2AG have been treated differently from those other pipelines and their investors*

408. The differential treatment by the EU of Nord Stream 2 from these other pipelines that are in similar or like circumstances is patent. Although the Amending Directive is, on its face, of general application to all third country offshore import pipelines, implying that all such pipelines are subject to the same regulatory regime, the Amending Directive discriminates against Nord Stream 2 in fact. As the EU was well aware, in particular when incorporating the requirement that, to be entitled to an Article 49a derogation, a pipeline must be "completed before 23 May 2019", the deliberate and practical purpose and effect of the Amending Directive is to affect only the Nord Stream 2 project.<sup>449</sup>

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<sup>447</sup> **Exhibit CLA-77**, *Parkerings-Compagniet AS v. Republic of Lithuania* (ICSID Case No. ARB/05/8, Award of 11 September 2007), paras 370-371; **Exhibit CLA-72**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL, Partial Award of 13 November 2000), paras 248-250; **Exhibit CLA-76**, *Pope & Talbot Inc. v. The Government of Canada* (NAFTA Case, Award on the merits of phase 2 of 10 April 2001), para 78.

<sup>448</sup> Section IV.2.

<sup>449</sup> As stated by Heiskanen: "It could be argued that standards such as "unreasonable" or "discriminatory" are not so much something opposed to the form of the governmental measure in question as something

409. Indeed, in its Fact Sheet accompanying the proposal for the Amending Directive, the EU stated with confidence that Nord Stream 2 was the only advanced pipeline project to fall outside the scope of Article 49a,<sup>450</sup> even though Article 49a of the Amending Directive provides for the Member State of the first connection point to decide whether to grant a derogation.
410. Accordingly, the EU's targeting and treatment of Nord Stream 2 in connection with the Amending Directive, as evidenced by the deliberate Exclusion of Nord Stream 2 from the Derogation Regime and the EU's Admissions of Targeting Nord Stream 2, irrefutably shows that Nord Stream 2 was singled out and was the specific target of the Amending Directive.
411. As described in Section VI.11, Nord Stream 1 has received a derogation under Article 49a,<sup>451</sup> and Greenstream, Transmed, Medgaz and MEG will receive one. The German Bundesnetzagentur denied Nord Stream 2's application for a derogation on the basis that Nord Stream 2 was not "*completed*" before 23 May 2019 within the meaning of Article 49a of the Amending Directive.<sup>452</sup>
412. NSP2AG filed an appeal of this decision on 15 June 2020, as would be expected as it seeks to mitigate the harm caused by the Amending Directive. But in so doing, NSP2AG must argue not only against the plain and natural meaning of the words contained in the Amending Directive, but also against the clear and targeted nature of the measure made clear in the EU's Admissions of Targeting Nord Stream 2 and the Exclusion of Nord Stream 2 from the derogation regime. Indeed, the Bundesnetzagentur's decision was made expressly by reference to the spirit and purpose of Article 49a and the background against which the legislator passed the Amending Directive, upon which the Bundesnetzagentur concluded that it was the specific intention of the EU legislator to exclude Nord Stream 2 from the scope of the derogation. The significant impact of the application of the Amending Directive on Nord Stream 2 is addressed in Section VII above.

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*opposed to its substance. In other words, it is not enough that a governmental measure adversely affecting foreign investment is formally justified on the basis of the applicable law; one must also consider whether it bears any rational relationship to a legitimate governmental policy. If it lacks such a relationship to an extent that it creates the effect of "shock" or "surprise," or at least substantial dissatisfaction, a breach of the standard likely will have been established". (Exhibit CLA-80, V. Heiskanen, "'Unreasonable or discriminatory measures' as a cause of action under the Energy Charter Treaty", (2007) 10(3) *International Arbitration Law Review* 104, p 110).*

<sup>450</sup> **Exhibit C-90**, European Commission Fact Sheet, "Questions and Answers on the Commission proposal to amend the Gas Directive", 8 November 2017, answer to question 10.

<sup>451</sup> **Exhibit C-138**, Bundesnetzagentur press release, Ruling Chamber 7 proceedings: Derogation from regulation in accordance with section 28b EnWG, BK7-19-108, 20 May 2020 (last accessed on 25 June 2020 at <https://www.bundesnetzagentur.de/EN/Service-Funktionen/RulingChambers/Chamber7/BK7-19-0108EN/BK7-19-0108EN.html?nn=361064>).

<sup>452</sup> **Exhibit CLA-17**, Bundesnetzagentur decision on NSP2AG's Derogation Application, 15 May 2020, section 2.2.3.

413. As the tribunal in *Saluka* explained, "*the standard of "non-discrimination" requires a rational justification of any differential treatment of a foreign investor*" (emphasis added),<sup>453</sup> such that any measures which treat similarly situated entities differently without justification will be considered a discriminatory measure.<sup>454</sup> The EU's burden of proof in this regard is also clear from the case of *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*.<sup>455</sup> In that case, brought under the ECT and in the context of an argument that the claimant's investment was impaired by discriminatory measures, the tribunal accepted that "*in evaluating whether there is discrimination in the sense of the Treaty one should only "compare like with like"*", but went on to find that "*little if anything has been documented by the Respondent to show the criteria or methodology used in fixing the multiplier, or to what extent Latvenergo is authorized to apply multipliers other than those documented in this arbitration. On the other hand, all of the information available to the Tribunal suggests that the three companies are comparable, and subject to the same laws and regulations. [...] In such a situation, and in accordance with established international law, the burden of proof lies with the Respondent to prove that no discrimination has taken or is taking place. The Arbitral Tribunal finds that such burden of proof has not been satisfied, and therefore concludes that Windau has been subject to a discriminatory measure in violation of Article 10 (1)*" (emphasis added).<sup>456</sup> There is no legitimate, rational or objective justification for the differential treatment of Nord Stream 2 when compared to other pipelines in like circumstances.

*For discrimination to be made out, it is not necessary to show intent, however it is in any event clear that the EU intended to discriminate against Nord Stream 2 and NSP2AG*

414. Tribunals have considered that it is not necessary to prove an intention to discriminate.<sup>457</sup> The question of whether an intention to discriminate based on the nationality of the foreign investor was necessary has been considered in the context of national treatment cases under

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<sup>453</sup> **Exhibit CLA-64**, *Saluka Investments B.V. v. The Czech Republic*, Partial Award (UNCITRAL, Partial Award of 17 March 2006), para 460. This approach was also followed in the following more recent case: **Exhibit CLA-81**, *Spyridon Roussalis v. Romania* (ICSID Case No. ARB/06/1, Award of 7 December 2011), para, 324.

<sup>454</sup> **Exhibit CLA-64**, *Saluka Investments B.V. v. The Czech Republic* (UNCITRAL, Partial Award of 17 March 2006), para 313: "*State conduct is discriminatory if, (i) similar cases are (ii) treated differently (iii) and without reasonable justification*".

<sup>455</sup> **Exhibit CLA-82**, *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia* (SCC, Award of 16 Dec. 2003).

<sup>456</sup> **Exhibit CLA-82**, *ibid.*, p 34, section 4.3.3(a).

<sup>457</sup> **Exhibit CLA-64**, *Saluka Investments B.V. v. The Czech Republic* (UNCITRAL, Partial Award of 17 March 2006), para 460; **Exhibit CLA-83**, *Azurix Corporation v. The Argentine Republic* (ICSID Case No. ARB/01/12, Award of 14 July 2006), paras 391-393; **Exhibit CLA-58**, *Siemens A.G. v. The Argentine Republic* (ICSID Case No. ARB/02/8, Award of 6 February 2007), para 321. In **Exhibit CLA-84**, *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012), para 7.152, the tribunal stated that it "*does not consider that there is a separate requirement to prove discriminatory intent by Hungary*". See also **Exhibit CLA-58**, *Siemens v. The Argentine Republic* (ICSID Case No. ARB/02/8, Award of 6 February 2007), para 321. Nor is evidence of discrimination based on nationality required: see **Exhibit CLA-85**, *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL, Award of 26 January 2006), para 177.

the NAFTA: *Feldman v. Mexico* and *Pope & Talbot*. In both cases, the tribunals rejected the requirement of intent as it would be difficult or nearly impossible to prove, and would effectively limit national treatment to *de jure* claims.<sup>458</sup> Moreover, although establishing political motivation is not a necessary requirement for establishing discrimination, a number of authorities have indicated that an appearance of political motivation preferring one party over another would be persuasive in establishing a case for discrimination.<sup>459</sup>

415. In the broader factual context in which the Amending Directive was passed, and based on the EU's own statements (including, but not limited to the EU's Admissions of Targeting Nord Stream 2), it is unarguable that the different treatment of Nord Stream 2 is no accident of drafting in the Amending Directive. As set out in detail in Section VI.3 above, the political motives for discriminating against Nord Stream 2 are readily apparent from the history of the EU's attempts to regulate Nord Stream 2, and a plethora of publicly available documents. In targeting and obstructing Nord Stream 2 in such discriminatory fashion, the EU was motivated by hostility towards the Russian Federation which is associated with Nord Stream 2, a desire to reduce (or at least, not to increase) its use of Russian gas, support for Ukraine and its strong preference to maintain the existing gas transit through Ukraine, and support of certain Eastern European Member States' commercial interests in receiving transit fees.

#### ***Failure to act in good faith***

416. Good faith has been recognised as being at the heart of the FET standard. The Tribunal in *Waste Management v. Mexico* held that "*a basic obligation of the State [...] is to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means*".<sup>460</sup> The Tribunal in *Tecmed v. Mexico* reiterated this position when it found that "*the commitment of fair and equitable treatment [...] is an expression and part of the bona fide principle recognised in international law*".<sup>461</sup>

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<sup>458</sup> **Exhibit CLA-76**, *Pope & Talbot Inc. v. The Government of Canada* (NAFTA Case, Award on the merits of phase 2 of 10 April 2001), para 79; **Exhibit CLA-86**, *Feldman v. Mexico* (ICSID Case No. ARB (AF)/99/1, Final Award of 16 December 2002), para 183.

<sup>459</sup> **Exhibit CLA-70**, *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability of 14 January 2010); **Exhibit CLA-87**, *Ronald S. Lauder v. Czech Republic* (UNCITRAL, Final Award of 3 September 2001): Both of these cases concerned some form of political pressure being exerted with the result that domestic parties were treated more favourably than the foreign investors they were competing with.

<sup>460</sup> **Exhibit CLA-68**, *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3, Award of 30 April 2004), para 138. Followed in **Exhibit CLA-88**, *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan* (SCC No. V064/2008, Partial Award on Jurisdiction and Liability of 2 September 2009), para 221.

<sup>461</sup> **Exhibit CLA-66**, *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States* (ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003), paras 153-154, approved in **Exhibit CLA-89**, *Eureko v. Poland* (*ad hoc* Arbitration Rules, Partial Award of 19 August 2005), para 235. See also **Exhibit CLA-90**, *Gemplus S.A. v. Mexico* (ICSID Case No. ARB(AF)/04/3, Award of 16 June 2010), para 7-72.

417. As the Tribunal stated in *Occidental*, the FET standard "*is an objective requirement that does not depend on whether the Respondent has proceeded in good faith or not*".<sup>462</sup> Although action in bad faith is clearly a violation of the FET standard, it is certainly not a requirement for its violation.<sup>463</sup>
418. The EU's conduct in connection with the Amending Directive, and in particular the EU's Deliberate Targeting of Nord Stream 2, has patently been lacking in good faith. In particular, and as further set out in the preceding sections, the EU has:
- i. passed the Amending Directive by reference to the Purported Objectives of the Amending Directive which do not correspond to its true motivations, which are related to targeting the Nord Stream 2 project to further the EU's political interests;<sup>464</sup>
  - ii. followed an Improper Legislative Process. The EU's accelerated legislative timetable was driven by the need to pass the Amending Directive before the Nord Stream 2 pipeline was fully constructed in order to facilitate the Exclusion of Nord Stream 2 from the Derogation Regime;<sup>465</sup> and
  - iii. failed to respond in any meaningful way to the concerns of NSP2AG and has refused, without reason, in the face of NSP2AG's multiple requests, to provide any clarity as to its interpretation of key provisions of the Amending Directive, notwithstanding the EU's clear understanding of the scale of the project and therefore the significant implications of such refusal on NSP2AG (as described more fully above as the EU's Lack of Transparency).

### ***Failure to act proportionately***

419. The EU has acted in a wholly disproportionate way with regard to the burden placed upon NSP2AG by the Amending Directive, when assessed against the EU's stated objectives of the Amending Directive.<sup>466</sup>

<sup>462</sup> **Exhibit CLA-91**, *Occidental Exploration and Production Co. v. Ecuador* (LCIA Case No. UN3467, Final Award of 1 July 2004), para 186.

<sup>463</sup> **Exhibit CLA-61**, C. Schreuer, "Fair and Equitable Treatment in Arbitral Practice" (2005) *Journal of World Investment & Trade* 357, p 383 – 385; **Exhibit CLA-92**, *Mondev International LTD v. United States of America* (ICSID Case No. ARB(AF)/99/2, Award of 11 October 2002), para 116 followed in **Exhibit CLA-93**, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic* (UNCITRAL, Final Award of 23 April 2012), para 227; **Exhibit CLA-69**, *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8, Award of 25 April 2005), para 280; **Exhibit CLA-66**, *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States* (ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003), para 153; **Exhibit CLA-83**, *Azurix Corporation v. The Argentine Republic* (ICSID Case No. ARB/01/12, Award of 14 July 2006), para 372: "... To encourage and protect investment is the purpose of the BIT. It would be incoherent with such purpose and the expectations created by such a document to consider that a party to the BIT has breached the obligation of fair and equitable treatment only when it has acted in bad faith or its conduct can be qualified as outrageous or egregious".

<sup>464</sup> See further Sections VI.3 and VI.12 above.

<sup>465</sup> See further Section VI.10 above.

<sup>466</sup> See further Section VI.12 above.

420. As described further above, the practical effects of the application of the Amending Directive include that:

- i. NSP2AG would be forced to apply the requirements of unbundling, third party access and tariff regulation to the German Section, being a section of Nord Stream 2 of only approximately 54 km out of its total length of 1,235km, notwithstanding that there is no entry point at the limit of Germany's territorial sea;<sup>467</sup>
- ii. As matters stand, as a result of the Amending Directive, the requirements of the Third Gas Directive preclude NSP2AG being the operator of the whole Nord Stream 2 pipeline. NSP2AG will be required to unbundle, and it is uncertain whether NSP2AG will be able to do so;<sup>468</sup>
- iii. Unbundling, third party access and tariff regulation are all incompatible with the obligations under NSP2AG's [REDACTED] GTA with Gazprom Export. NSP2AG's inability to operate the German Section of Nord Stream 2 and to make it available to Gazprom Export, [REDACTED]  
[REDACTED]  
[REDACTED]<sup>469</sup>
- iv. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]
- v. [REDACTED]

For ease of reference, these effects shall be referred to as the "**Practical Effects of the Amending Directive**" throughout this Section VIII of the Memorial.

421. As discussed above, the Purported Objectives of the Amending Directive are specious and cannot be achieved.<sup>472</sup> However, even if extending the applicability of the Gas Directive to offshore import pipelines could have a meaningful impact on achieving the Purported Objectives of the Amending Directive (which is denied), the Amending Directive is set to apply in fact only to Nord Stream 2.<sup>473</sup> The Practical Effects of the Amending Directive and the burden imposed on NSP2AG clearly outweigh any arguable policy benefit of the Amending Directive.

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<sup>467</sup> Para 236.  
<sup>468</sup> Paras 316 and 317.  
<sup>469</sup> Para 321.  
<sup>470</sup> Section VII.3; [REDACTED]  
<sup>471</sup> Section VII.5.  
<sup>472</sup> Section VI.12.  
<sup>473</sup> As described in paragraph 263 above, Nord Stream 1 has already been granted a derogation and it is expected that the other pipelines will be granted a derogation in due course.

422. In addition, since Nord Stream 2 makes up only approximately 16% of third country import capacity the application of the Amending Directive is clearly disproportionate.

***Breach of NSP2AG's legitimate expectations***

423. In the *Saluka* case, the tribunal summarised the doctrine of investors' legitimate expectations by stating that:

*"The "fair and equitable treatment" standard in Article 3.1 of the Treaty is an autonomous Treaty standard and must be interpreted, in light of the object and purpose of the Treaty, so as to avoid conduct of the Czech Republic that clearly provides disincentives to foreign investors. The Czech Republic, without undermining its legitimate right to take measures for the protection of the public interest, has therefore assumed an obligation to treat a foreign investor's investment in a way that does not frustrate the investor's underlying legitimate and reasonable expectations. A foreign investor whose interests are protected under the Treaty is entitled to expect that the Czech Republic will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (i.e. unrelated to some rational policy), or discriminatory (i.e. based on unjustifiable distinctions). In applying this standard, the Tribunal will have due regard to all relevant circumstances"* (emphasis added).<sup>474</sup>

424. The *Tecmed* tribunal similarly expressed this requirement in clear terms, stating that the standard *"requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment"*.<sup>475</sup> The tribunal in *Biwater v. Tanzania* also acknowledged that the protection of legitimate expectations formed one aspect of the FET standard. The tribunal considered that:

*"the purpose of the fair and equitable treatment standard is to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment, as long as these expectations are reasonable and legitimate and have been relied upon by the investor to make the investment"*.<sup>476</sup>

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<sup>474</sup> **Exhibit CLA-64**, *Saluka Investments BV (the Netherlands) v. Czech Republic* (UNCITRAL, Partial Award of 17 March 2006), para 309.

<sup>475</sup> **Exhibit CLA-66**, *Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States* (ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003), para 154. See also, among numerous examples endorsing the same principle, **Exhibit CLA-94**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29, Award of 27 August 2009), para 178; **Exhibit CLA-70**, *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability of 14 January 2010), para 284; **Exhibit CLA-95**, *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon* (ICSID Case No. ARB/07/12, Award of 7 June 2012), para 152.

<sup>476</sup> **Exhibit CLA-96**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22, Award of 24 July 2008), para 602.



425. A number of cases confirm that a key element of the FET standard relates to the investor's expectation that the host state will maintain a stable legal and business environment<sup>477</sup> and moreover that the right to regulate is not unlimited:
- i. The tribunal in *LG&E v. Argentina* concluded that "*the stability of the legal and business framework in the State Party is an essential element of what is fair and equitable treatment*".<sup>478</sup>
  - ii. In *PSEG v. Turkey*, the tribunal held that investors are entitled to rely upon "*an assessment of the state of the law and the totality of the business environment at the time of the investment*".<sup>479</sup>
  - iii. In *CMS v. Argentina*, the tribunal found that Argentina breached FET standard by adopting measures that "*did in fact entirely transform and alter the legal and business environment under which the investment was decided and made*".<sup>480</sup>
  - iv. In *ADC v Hungary*, the tribunal recognised that "*while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. [...] [T]he rule of law, which includes treaty obligations, provides such boundaries. Therefore, when a State enters into a bilateral investment treaty like the one in this case, it becomes bound by it and the investment protection obligations it undertook therein must be honoured rather than be ignored by a later argument of the State's right to regulate. The related point made by the Respondent that by investing in a host State, the investor assumes the 'risk' associated with the State's regulatory regime is equally unacceptable to the Tribunal. It is one thing to say that an investor shall conduct its business in compliance with the host State's domestic laws and regulations. It is quite another to imply that the investor must also be ready to accept whatever the host State decides to do to it. In*

<sup>477</sup> **Exhibit CLA-91**, *Occidental Exploration and Production Company v. The Republic of Ecuador* (LCIA Case No. UN3467, Final Award of 1 July 2004), para 183: "*The stability of the legal and business framework is thus an essential element of fair and equitable treatment*"; **Exhibit CLA-69**, *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8, Award of 12 May 2005), para 274: "*There can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment*"; **Exhibit CLA-97**, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3, Award of 22 May 2007), para 260: "*...the Tribunal concludes that a key element of fair and equitable treatment is the requirement of a 'stable framework for the investment', which has been prescribed by a number of decisions. Indeed, this interpretation has been considered 'an emerging standard of fair and equitable treatment in international law'*".

<sup>478</sup> **Exhibit CLA-98**, *LG&E Energy Corp. and others v. The Argentine Republic* (ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2005), para 125.

<sup>479</sup> **Exhibit CLA-99**, *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5, Award of 19 January 2007), para 255 referring to *Saluka*.

<sup>480</sup> **Exhibit CLA-69**, *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8, Award of 12 May 2005), para 275. Similar conclusions were reached by subsequent tribunals in a series of other Argentine cases. See, for example, **Exhibit CLA-97**, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3, Award of 22 May 2007), para 264.

*the present case, had the Claimants ever envisaged the risk of any possible depriving measures, the Tribunal believes that they took that risk with the legitimate and reasonable expectation that they would receive fair treatment and just compensation and not otherwise" (emphasis added).<sup>481</sup>*

- v. In *Masdar Solar v. Kingdom of Spain*, the tribunal noted that the FET standard ensures "*that an investor may be confident that (i) the legal framework in which the investment has been made will not be subject to unreasonable or unjustified modification" (emphasis added).<sup>482</sup> The tribunal concluded that: "*In sum, considering the context, object and purpose of the ECT, the Tribunal concludes that the obligation under Article 10(1) of the ECT to provide FET to protected investments comprises an obligation to afford fundamental stability in the essential characteristics of the legal regime relied upon by the investors in making long-term investments. This does not mean that the legal framework cannot evolve or that a State Party to the ECT is precluded from exercising its regulatory powers to adapt the regime to the changing circumstances in the public interest. It rather means that a regulatory regime specifically created to induce investments in the energy sector cannot be radically altered- i.e., stripped of its key features – as applied to existing investments in ways that affect investors who invested in reliance on those regimes*".<sup>483</sup>*
- vi. In *Charanne v. Kingdom of Spain*, the tribunal held that: "*In fact, an investor has a legitimate expectation that, when modifying the existing regulation based on which the investment was made, the State will not act unreasonably, disproportionately or contrary to the public interest" (emphasis added).<sup>484</sup>*
- vii. In *Novenergia v. Kingdom of Spain*, the tribunal held that: "*As expressed in *Micula v. Romania*, "the fair and equitable treatment standard does not give a right to regulatory stability per se", rather, a state has a right to regulate and investors must expect that legislation may and will change. The FET standard does, nevertheless, protect investors from a radical or fundamental change to legislation or other relevant assurances by a state that do not adequately consider the interests of existing investments already made on the basis of such legislation*".<sup>485</sup> By reference to the damaging economic effects that the measures had on the claimants' investment, the

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<sup>481</sup> **Exhibit CLA-100**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary* (ICSID Case No. ARB/03/16, Award, 2 October 2006), paras 423-424.

<sup>482</sup> **Exhibit CLA-101**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain* (ICSID Case No. ARB/14/1, Award of 16 May 2018), para 484.

<sup>483</sup> **Exhibit CLA-101**, *ibid.*, para 510.

<sup>484</sup> **Exhibit CLA-102**, *Charanne and Construction Investments v. Spain* (SCC Case No. V 062/2012, Award of 21 January 2016), para 514.

<sup>485</sup> **Exhibit CLA-103**, *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Kingdom of Spain* (SCC Case No. 2015/063, Final Award of 15 February 2018), para 654.

tribunal considered Spain's actions "as drastic and unexpected in a manner that is contrary to the Kingdom of Spain's obligation to provide FET to investors".<sup>486</sup>

viii. In *Greentech v. Kingdom of Spain*, the tribunal confirmed that, when a state has not made any specific commitment with respect to legal stability, it has space reasonably to modify the legal or regulatory framework in question without breaching an investor's legitimate expectations. However, the tribunal concluded that "the FET standard in the ECT protects investors from a radical or fundamental change in the legal or regulatory framework under which the investments are made".<sup>487</sup> Drawing on previous treaty jurisprudence, the tribunal confirmed that the "the right to regulate must be subject to limitations if investor protections are not to be rendered meaningless".<sup>488</sup>

426. Having guaranteed to provide FET under the ECT, in changing its legal framework, the EU is under the obligation to treat all investments, including the Nord Stream 2 project, fairly and equitably. As part of this obligation, NSP2AG had a legitimate expectation with respect to the stability of the legal framework in which it decided to invest and in which it invested and a legitimate expectation that any changes to that legal framework would be made in a reasonable, proportionate, non-discriminatory way and would be in the public interest.<sup>489</sup> Further, such an expectation is explicit in the EU's international law commitment in the ECT "to create stable, equitable, favourable and transparent conditions".

427. These expectations have been breached by the Dramatic and Radical Regulatory Change, and in particular, the deliberate Exclusion of Nord Stream 2 from the Derogation Regime, the Improper Legislative Process by which that deliberate exclusion has been achieved, and the Practical Effects of the Amending Directive which are disproportionate to the Purported Objectives of the Amending Directive. Indeed, it is recognised that Article 49a of the Amending Directive protects legitimate expectations,<sup>490</sup> but the EU's conduct has purposefully made a derogation under Article 49a inaccessible to NSP2AG.

428. As described in Section VI.3 above, the Nord Stream 2 project was progressed against a complex political dynamic: whilst the Commission and certain Member States were hostile, a significant number of Member States supported the project, not least Germany.<sup>491</sup> NSP2AG's expectations in this context are described in [REDACTED] First Witness

<sup>486</sup> Exhibit CLA-103, *ibid.*, para 695.

<sup>487</sup> Exhibit CLA-104, *Greentech Energy System A/S. Foresight Luxembourg Solar 1 S.A.R.L., Foresight Luxembourg Solar 2 S.A.R.L., GWM Renewable Energy I S.P.A., GWM Renewable Energy II S.P.A. v Kingdom of Spain* (SCC Case No. 2015/150, Final Award of 14 November 2018), para 359.

<sup>488</sup> Exhibit CLA-104, *ibid.*, para 364.

<sup>489</sup> Exhibit CLA-95, *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon* (ICSID Case No. ARB/07/12, Award of 7 June 2012), para 244, confirming that changes in the regulatory framework would be considered as breaches of the duty to grant full protection and fair and equitable treatment in case of a drastic or discriminatory change.

<sup>490</sup> See paragraphs 245 and 246 above.

<sup>491</sup> Section VI.

Statement. When it made its investment, NSP2AG was aware that the Third Energy Package did not apply to Nord Stream 2 and that the successful Nord Stream 1 project was not subject to the Third Energy Package.<sup>492</sup> NSP2AG did not, should not and could not have anticipated that the EU, on the specious pretext of completing the internal energy market, would extend the application of the Third Gas Directive to offshore import pipelines in a manner which discriminated against, and deliberately targeted, Nord Stream 2.

### ***EU's failure to act transparently***

429. Tribunals have generally considered the obligation to create transparent conditions, imposed by the first sentence of Article 10(1) of the ECT, to be related to the FET standard,<sup>493</sup> which requires a host state to act transparently and consistently in its dealings with an investor. As explained by a leading treatise: "*Transparency means that the legal framework for the investor's operations is readily apparent and that any decisions affecting the investor can be traced to that legal framework*".<sup>494</sup>
430. In a passage frequently cited by subsequent tribunals, the *Tecmed v. Mexico* award elaborated on this principle, as follows:

*"The Arbitral Tribunal considers that this provision of the Agreement [i.e. FET], in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments [...] The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any pre-existing decisions [...] that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation"*(emphasis added).<sup>495</sup>

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<sup>493</sup> **Exhibit CLA-105**, *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24, Award of 27 August 2008), para 178.

<sup>494</sup> **Exhibit CLA-106**, "Chapter VII.1 – Fair and Equitable Treatment", in R. Dolzer and C. Schreuer, *Principles of International Investment Law*, 2nd Ed. (Oxford: OUP, 2012), p 149.

<sup>495</sup> **Exhibit CLA-66**, *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States* (ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003), para 154. See also **Exhibit CLA-93**, *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic* (UNCITRAL, Final Award of 23 April 2012), para 222; **Exhibit CLA-64**, *Saluka Investments B.V. v. The Czech Republic* (UNCITRAL, Partial Award of 17 March 2006),

431. In a recent decision made in *RWE Innogy v. Spain*,<sup>496</sup> the tribunal confirmed that: "a lack of transparency may constitute a breach of the [ECT's FET requirement] independent of any consideration of legitimate expectations or stability" (emphasis added).<sup>497</sup> As such, even if the Tribunal does not hold that there has been a breach of NSP2AG's legitimate expectations, a breach of the requirement that the EU act transparently (or indeed, any of the other elements of FET) is, in any case, sufficient to give rise to a violation of the FET standard under Article 10(1) of the ECT.
432. The EU's failure to act transparently is manifest throughout the Improper Legislative Process. Its failure to conduct an impact assessment in accordance with its standard practice,<sup>498</sup> and its acceleration of the adoption process,<sup>499</sup> are clear illustrations of this.
433. Moreover, the EU has failed to act transparently by unjustifiably withholding information about the interpretation of the Amending Directive which would enable NSP2AG to make key decisions regarding its ongoing project and related investment. In particular, and as described in more detail at paragraph 381.v above, NSP2AG has made repeated attempts to engage the EU on the interpretation of the meaning of "completed" in Article 49a of the Amending Directive, seeking to clarify whether or not Nord Stream 2 may be considered as "completed" and therefore eligible for a derogation. The EU's response to this entirely legitimate question, involving the interpretation of a piece of primary EU legislation, has been deliberate obfuscation, and when asked on multiple occasions in correspondence and in meetings, the EU has refused to provide clarity as to the interpretation of a piece of legislation which it proposed, drafted and adopted.
434. The EU's Lack of Transparency left NSP2AG in an invidious position as regards the ongoing Nord Stream 2 project. All of the above actions are demonstrably inconsistent with the EU's

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paras 307 and 309; **Exhibit CLA-59**, *Ioannis Kardassopoulos and Ron Fuchs v. Georgia* (ICSID Case No. ARB/07/15, Award of 3 March 2010), para 438.

<sup>496</sup> **Exhibit CLA-107**, *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. United Kingdom of Spain* (ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum of 30 December 2019).

<sup>497</sup> **Exhibit CLA-107**, *ibid.*, para 660.

<sup>498</sup> See further paragraphs 250 and 251 above. In particular, in its opinion of 25 July 2018, the EESC noted that, "*there may be a range of legal challenges to the amendments and that there will certainly be significant political disagreements and also commercial concerns from some industry stakeholders. The absence of an impact assessment in these circumstances is therefore regrettable*" and that it was "*concerned that the Commission felt that an impact assessment was not required. It is evident that in this politically sensitive area where economic factors come into play evidence must be tabled to underpin the arguments being made for the proposed amendments*". See **Exhibit C-22**, Opinion of the European Economic and Social Committee on the proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, OJ C 262/64, 25 July 2018, para 1.7. The ECR pointed out in its opinion of 5 October 2018, "*the importance of the necessary impact assessment in accordance with the Interinstitutional Agreement on Better Law-Making*". See **Exhibit C-23**, Opinion of the European Committee of the Regions — Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, OJ C 361/72, 5 October 2018, para 13.

<sup>499</sup> See further Section VI.10 above.

positive obligation, voluntarily assumed under the ECT, with regard to the conditions of investment which it must provide.

#### **VIII.4 Impairment by unreasonable or discriminatory measures**

435. Article 10(1) of the ECT provides, with respect to investments of investors of both Contracting Parties, that "*no Contracting Party shall in any way impair by unreasonable or discriminatory measures [the] management, maintenance, use, enjoyment or disposal*" of investments. This provision may be infringed by treatment which is either unreasonable or discriminatory, or both.<sup>500</sup> The imposition of the Amending Directive is both unreasonable and discriminatory, in breach of Article 10(1), as described below. Although this obligation raises various aspects which are also relevant in the context of arbitrary or discriminatory treatment under the FET standard, the prohibition to impair investments by unreasonable or discriminatory measures is a stand-alone obligation, in addition to the EU's obligation to afford FET to Nord Stream 2.

#### **Unreasonable Measures**

436. As stated by the *Plama v. Bulgaria* arbitral tribunal: "*Unreasonable or arbitrary measures – as they are sometimes referred to in other investment instruments – are those which are not founded in reason or fact but on caprice, prejudice or personal preference*".<sup>501</sup>

437. The test for reasonableness in international investment law requires "*a showing that the State's conduct bears a reasonable relationship to some rational policy*".<sup>502</sup> In addition, in *AES Summit v. Hungary*, the tribunal noted that "*the determination of whether the state's conduct is reasonable requires the analysis of two elements: the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy*".<sup>503</sup>

438. The Tribunal has a general discretion in determining what constitutes reasonableness of a state's conduct. One relevant consideration is whether the measure in question was proportionate. The tribunal in *Occidental v. Ecuador* referred to "*a very well-established law in a number of European countries that there is a principle of proportionality which requires that administrative measures must not be any more drastic than is necessary for achieving the desired end. The principle has been adopted and applied countless times by the*

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<sup>500</sup> **Exhibit CLA-83**, *Azurix Corp. v. The Argentine Republic* (ICSID Case No. ARB/01/12, Award of 14 July 2006); **Exhibit CLA-105**, *Plama Consortium v. Bulgaria* (ICSID Case No. ARB/03/24, Award of 27 August 2008).

<sup>501</sup> **Exhibit CLA-105**, *Plama Consortium v. Bulgaria* (ICSID Case No. ARB/03/24, Award of 27 August 2008), para 184; **Exhibit CLA-95**, *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon* (ICSID Case No. ARB/07/12, Award of 7 June 2012), para 157.

<sup>502</sup> **Exhibit CLA-64**, *Saluka Investments BV (the Netherlands) v. Czech Republic* (UNCITRAL, Partial Award of 17 March 2006), para 460.

<sup>503</sup> **Exhibit CLA-108**, *AES Summit Generation Limited and AES-Tisza Erömu Kft. v. Republic of Hungary* (ICSID Case No. ARB/07/22, Award of 23 September 2010), para 10.3.7, cited with approval in **Exhibit CLA-109**, *Micula, S.C. European Food S.A. v. Romania* (ICSID Case No. ARB/05/20, Award of 11 December 2013), para 525.

*European Court of Justice in Luxembourg, and by the European Court of Human Rights in Strasbourg*".<sup>504</sup>

439. The Amending Directive clearly constitutes an unreasonable measure in that it lacks proportionality. As discussed in Section VI.12 and in the First Expert Report of Professor Cameron, the implementation of the Amending Directive bears no reasonable relationship to a rational policy.<sup>505</sup> In particular (and without limitation):

- i. The EU has not explained how or why the Purported Objectives of the Amending Directive could be attained, and, in particular, why the application of EU market rules to gas transmission lines to and from third countries (or offshore import pipelines in particular) addresses obstacles to the completion of the internal market in natural gas, nor indeed what those obstacles are or how they result from non-application of EU law to those pipelines.<sup>506</sup> Unusually for such a measure, no impact assessment has been carried out.<sup>507</sup>
- ii. The application of the Gas Directive rules to sections of offshore import pipelines between the border of EU jurisdiction and the first Member State entry point cannot, in any case, have any meaningful impact on achieving the Purported Objectives of the Amending Directive.<sup>508</sup> Concluding that "*the Amending Directive cannot achieve its stated objective of removing "obstacles" to the completion of the internal market in natural gas*",<sup>509</sup> Professor Cameron explains in his First Expert Report, that the Amending Directive "*imposes complex internal market rules designed for a completely different purpose on offshore import pipelines in a manner which does not account for the practical impact of applying those rules to the short section of a longer pipeline which originates in a third country. At the same time, the Amending Directive does not extend the Network Codes, which contain the detailed technical rules required for the practical functioning of the gas system that the EU seeks to put in place*".<sup>510</sup>
- iii. Even if applying such rules to all offshore import pipelines could have a meaningful impact on achieving the Purported Objectives of the Amending Directive (which is denied), this is entirely undermined by the inclusion of Article 49a, which leaves all pipelines other than Nord Stream 2 eligible for a derogation. Moreover, Nord Stream 2 makes up only approximately 16% of third country import pipeline capacity, which

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<sup>504</sup> **Exhibit CLA-91**, *Occidental Exploration and Production Company v. The Republic of Ecuador* (LCIA Case No. UN346, Final Award of 1 July 2004), paras 402-403.

<sup>505</sup> First Expert Report of Professor Cameron, Section 6.

<sup>506</sup> First Expert Report of Professor Cameron, para 6.32.

<sup>507</sup> Para 250.

<sup>508</sup> Section VI.12.

<sup>509</sup> First Expert Report of Professor Cameron, paras 1.9 and 6.32-6.61.

<sup>510</sup> First Expert Report of Professor Cameron, para 6.51.

leads to a conclusion that the application of the Amending Directive is wholly disproportionate, on the basis that any arguable benefit is outweighed by the significant burden imposed on NSP2AG.

- iv. The Admissions of Targeting Nord Stream 2 make clear that the true objective of the Amending Directive is to obstruct and disrupt the use of Nord Stream 2, apparently in order to protect gas transit (and associated revenue and commercial leverage) through Ukraine and Eastern European transit Member States, and to pursue certain political concerns regarding use of gas produced in Russia.<sup>511</sup> In particular, the European Commission acknowledged that Nord Stream 2 would be the only advanced project that would be affected by the Amending Directive.<sup>512</sup> In addition, the European Parliament stated in its 12 March 2019 resolution that new projects, such as Nord Stream 2, should not be implemented without assessing their conformity with the EU's "*agreed political priorities*".<sup>513</sup> The resolution also stated that "*Nord Stream 2 reinforces EU dependency on Russian gas supplies, threatens the EU internal market and is not in line with EU energy policy or its strategic interests, and therefore needs to be stopped*".<sup>514</sup> Therefore, even if the completion of the internal energy market, in itself, was accepted to be a rational policy aim, the Amending Directive cannot be regarded as related to that rational policy nor, indeed, necessary to achieve those Purported Objectives.
- v. The EU's political concerns were not the express basis on which the Amending Directive was passed and, in any case, such considerations cannot legitimise conduct of the EU which is in violation of its international law obligations under the ECT.<sup>515</sup>

440. It is clear from the foregoing that the Amending Directive is an arbitrary measure. As described in paragraph 398 above, arbitrariness may be different from unlawfulness.<sup>516</sup> The Improper Legislative Process evidences a disregard of the due process of the law,<sup>517</sup> and clearly amounts to arbitrary and unreasonable treatment.

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<sup>511</sup> Paras 187, 194 and 199.

<sup>512</sup> Para 221.i. **Exhibit C-90**, European Commission Fact Sheet, "Questions and Answers on the Commission proposal to amend the Gas Directive", 8 November 2017, answer to question 10.

<sup>513</sup> **Exhibit CLA-46**, European Parliament Resolution of 12 March 2019 on the state of EU-Russia political relations, 2018/2158(INI), para 29.

<sup>514</sup> **Exhibit CLA-46**, *ibid.*, para 29.

<sup>515</sup> Section VI.3.

<sup>516</sup> **Exhibit CLA-73**, *Elettronica Sicula S.p.A. (ELSI)* Judgment of 20 July, 1989, in ICJ Reports (1989), para 124.

<sup>517</sup> **Exhibit CLA-73**, *Elettronica Sicula S.p.A. (ELSI)* Judgment of 20 July, 1989, in ICJ Reports (1989), para 128; **Exhibit CLA-74**, *Philip Morris Brands SARL and others v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7, Award of 8 July 2016), para 390; **Exhibit CLA-75**, *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia* (ICSID Case No. ARB/99/2, Award of 25 June 2001), para 371.



## **Discriminatory Measures**

441. Under Article 10(1), the EU guarantees that it will not "*in any way impair by [...] discriminatory measures*" the management, maintenance, use, enjoyment or disposal of Investments in its territory. Unlike Article 10(7), which concerns national treatment and most-favoured nation treatment, the prohibition on discrimination in Article 10(1) does not refer to any comparative element. As such, regardless of whether another investor or investment is factually in the same position as Nord Stream 2, the EU is capable of breaching Article 10(1) even just by singling out and targeting Nord Stream 2.
442. The EU's passing of the Amending Directive<sup>518</sup> and, in particular, the deliberate Exclusion of Nord Stream 2 from the Derogation Regime, driven by the EU's political motives,<sup>519</sup> effectively amount to the discriminatory targeting of Nord Stream 2. To test the targeted nature of and the intent behind the Amending Directive, the following question bears consideration: but for the existence of Nord Stream 2, would the Amending Directive have been passed, or even considered by the EU? The history of the Amending Directive beginning with the European Commission's request for a mandate to negotiate a Nord Stream 2 specific treaty with Russia, the Purported Objectives of the Amending Directive, and the Admissions of Targeting Nord Stream 2, and the Improper Legislative Process incontestably confirm that this question can only be answered in the negative. As detailed in Section VI above, the Amending Directive has been passed with the sole purpose of obstructing and disrupting the development of the Nord Stream 2 project.

### ***Similar cases or like circumstances***

443. In addition, as discussed at paragraphs 405 to 412 above, and notwithstanding NSP2AG's position that it has been targeted, Nord Stream 2 has clearly been discriminated against by reference to the appropriate comparators for NSP2AG and its investment in the Nord Stream 2 pipeline. Nord Stream 2 is one of six offshore pipelines, all of which bring gas from third countries into the EU and all of which investments were made when the rules of the Third Gas Directive did not apply to them.

### ***Discriminatory measures***

444. As discussed more fully at paragraphs 408 to 415 above, the EU has discriminated against Nord Stream 2, in particular, by:

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<sup>518</sup> In **Exhibit CLA-64**, *Saluka Investments B.V. v. The Czech Republic* (UNCITRAL, Partial Award of 17 March 2006), para 459, the tribunal noted that: "*The term "measures" covers any action or omission of the Czech Republic. As the ICJ has stated in the Fisheries Jurisdiction Case (Spain v. Canada) ... [I]n its ordinary sense the word is wide enough to cover any act, step or proceeding, and imposes no particular limit on their material content or on the aim pursued thereby.*" It is indisputable that the Amending Directive is a "measure".

<sup>519</sup> See further Sections VI.3 and VI.9 above.

- i. introducing the Amending Directive with the express intention of affecting and undermining Nord Stream 2 (as is apparent from the EU's Admissions of Targeting Nord Stream 2);
- ii. adopting the Amending Directive through the Improper Legislative Process; and
- iii. the deliberate Exclusion of Nord Stream 2 from the Derogation Regime.

***Impairment***

445. The *Saluka* tribunal clarified that "impairment" means, according to its ordinary meaning, any negative impact or effect caused by "measures" taken by the host state.<sup>520</sup> The negative impacts on Nord Stream 2 and NSP2AG of the onerous requirements imposed by the Amending Directive are clear and obvious. These are addressed fully in Section VII:

- i. As matters stand, the application of the Amending Directive precludes NSP2AG from acting as the operator of the whole Nord Stream 2 pipeline, as originally intended. If the Amending Directive prevents NSP2AG from operating the German Section of the Nord Stream 2 pipeline and therefore complying with its obligation under the GTA

[REDACTED]

- ii. [REDACTED]

- iii. While NSP2AG has been considering alternative options, all such options are uncertain, as they depend on the agreement of third parties. [REDACTED]

[REDACTED]

- iv. At the very least, given the application of the unbundling obligations contained in the Third Gas Directive to Nord Stream 2, NSP2AG will be precluded from owning and operating the German Section of the Nord Stream 2 pipeline.

446. Accordingly, the Amending Directive constitutes an unreasonable and discriminatory measure which impairs the management, maintenance, use or disposal of NSP2AG's investment and, therefore, a breach of Article 10 of the ECT.

**VIII.5 Breach of guarantee of most constant protection and security**

447. Article 10(1) of the ECT provides that: "*Investments shall also enjoy the most constant protection and security*" (or "**CPS**"). The CPS standard imposes an obligation on the EU to

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<sup>520</sup> **Exhibit CLA-64**, *Saluka Investments BV (the Netherlands) v. Czech Republic* (UNCITRAL, Partial Award of 17 March 2006), para 458.

establish a legal framework to protect investments from wrongful interference and to take reasonable measures to ensure that said framework is properly enforced.

448. Traditionally this standard in bilateral investment treaties is referred to as "full protection and security" ("FPS"). The variation of the terms used to describe this standard, however, has not been held to carry any substantive significance, and the terms "constant" and "full" have been used interchangeably.<sup>521</sup>
449. The FPS has been recognised by several tribunals as extending beyond a mere requirement for physical security to oblige the state to provide a stable business environment.<sup>522</sup> Professor Thomas Wälde explains that the effect of the FPS obligation is that states are required to "*ensure the foreign investment can function properly on a level playing field, unhindered and not harassed by the political and economic domestic powers that be*".<sup>523</sup>
450. In *Frontier Petroleum Services v. Czech Republic*, the tribunal held that there are authorities "*which show that the principle of full protection and security extends beyond protection against physical violence to legal protection for the investor. Contrary to Respondent's assertions, it is apparent that the duty of protection and security extends to providing a legal framework that offers legal protection to investors – including both substantive provisions to protect investments and appropriate procedures that enable investors to vindicate their rights*"<sup>524</sup> (emphasis added). As the tribunal in *Biwater v. Tanzania* also explained, the standard "*implies a State's guarantee of stability in a secure environment, both physical, commercial and legal*" (emphasis added).<sup>525</sup>

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<sup>521</sup> **Exhibit CLA-110**, *Frontier Petroleum Services Ltd. v. The Czech Republic* (UNCITRAL, Final Award of 12 November 2010), para 260; **Exhibit CLA-111**, *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka* (ICSID Case No. ARB/87/3, Final Award of 27 June 1990), para 50; **Exhibit CLA-73**, *Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, Judgment, 1989 I.C.J. Reports 15, para 108; **Exhibit CLA-105**, *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24, Award of 27 August 2008), para 181; **Exhibit CLA-84**, *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012), para 7.80.

<sup>522</sup> **Exhibit CLA-112**, *Renée Rose Levy de Levi v. the Republic of Peru* (ICSID Case No. ARB/10/17, Award of 26 February 2014), para 406; **Exhibit CLA-83**, *Azurix Corporation v. Argentine Republic* (ICSID Case No. ARB/01/12, Award of 14 July 2006), para 408; **Exhibit CLA-113**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3, Award of 20 August 2007), para 7.4.15; **Exhibit CLA-108**, *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary* (ICSID Case No. ARB/07/22, Award of 23 September 2010), para 13.3.2; **Exhibit CLA-110**, *Frontier Petroleum Services v. Czech Republic* (UNCITRAL, Award of 12 November 2010), para 263; **Exhibit CLA-58**, *Siemens v. Argentina* (ICSID Case No. ARB/02/8, Award of 6 February 2007), para 303; **Exhibit CLA-114**, *Reinhard Hans Unglaube v. Republic of Costa Rica* (ICSID Case No. ARB/09/20, Award of 16 May 2012), para 281: "*Full protection' may, in appropriate circumstances, extend beyond the traditional standard expressed by the Saluka tribunal*".

<sup>523</sup> **Exhibit CLA-115**, T. W. Wälde, "Energy Charter Treaty Based Investment Arbitration – Controversial Issues" (2004) 5 *Journal of World Investment and Trade* 373, p 391.

<sup>524</sup> **Exhibit CLA-110**, *Frontier Petroleum Services v. Czech Republic* (UNCITRAL, Award of 12 November 2010), para 263.

<sup>525</sup> **Exhibit CLA-96**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22, Award of 24 July 2008), para 729.

451. The EU has undermined the promise of legal security inherent in the CPS standard included in Article 10(1) including by:
- i. distorting the intention and objective of the Gas Directive in order to target Nord Stream 2, including by providing entirely specious explanations of the Purported Objectives of the Amending Directive;<sup>526</sup>
  - ii. bringing into effect the Amending Directive through the Improper Legislative Process to target Nord Stream 2;<sup>527</sup>
  - iii. causing the Dramatic and Radical Regulatory Change and, in particular, causing the Exclusion of Nord Stream 2 from the Derogation Regime; and/or
  - iv. the EU's Lack of Transparency, and by its failure to confirm its interpretation of the Amending Directive is unreasonable given the interests at stake in the implementation and application of the Amending Directive, and wholly inconsistent with the EU's role in monitoring the timely and correct implementation of EU directives.

#### **VIII.6 Breach of Article 10(7) of the ECT**

452. The adoption of, and its actions in connection with, the Amending Directive constitute a breach of the EU's obligation pursuant to Article 10(7) of the ECT to provide NSP2AG with treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third states.

453. Article 10(7) of the ECT provides that:

*"Each Contracting Party shall accord to Investments in its Area of Investors of the other Contracting Parties, and their related activities, including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third states and their related activities including the management, maintenance, use, enjoyment or disposal, whichever is the most favourable"* (emphasis added).

454. The treatment of investments in a manner no less favourable than the Investments of a state's own Investors is generally referred to as the "National Treatment" standard, while the treatment of Investments in a manner no less favourable than the Investments of Investors of any other Contracting Party or any third states is commonly referred to as the Most Favourite Nation standard of treatment ("**MFN**").

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<sup>526</sup> See further Section VI.12 above.

<sup>527</sup> See further Section VI.10 above.

455. Article 10(7) contains no limitation or standard of comparison on the guarantees of national treatment and MFN treatment. The treatment guaranteed by Article 10(7) is broad. The promise by a Contracting State under Article 10(7) is to grant treatment to Investments of Investors no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third state (whichever is more favourable), as well as granting treatment no less favourable to activities related to that Investment, including but not limited to the "*management, maintenance, use, enjoyment, or disposal*". The EU has therefore guaranteed treatment no less favourable than that which it accords to investments of either EU investors or third state investors, to NSP2AG's investment (which is described in Section V above), as well as the activities related to NSP2AG's investment, including but not limited to the "management, maintenance, use, enjoyment, or disposal" of the investment.
456. Where the treatment complained of as being less favourable than that afforded to investments of other third state investors constitutes domestic measures (as opposed to treatment under a third state investment treaty), the analysis of whether there is a breach is similar to the analysis as to whether there has been a breach under the national treatment standard.<sup>528</sup> In both cases, it is generally accepted that: "*The question will be whether the investors or investments in question are in like circumstances, determining the appropriate comparator and whether there are legitimate grounds for distinguishing between investors or investments*".<sup>529</sup>
457. The Tribunal must first assess "*the similarity of the situations to be compared*".<sup>530</sup> A comparator "*must be established with more specificity than simply 'nationals or companies' of the third State. The test presupposes that the activities engaged in by the comparator, and thus the effect of the host State's treatment upon those activities, are comparable*".<sup>531</sup>
458. In *Pope & Talbot*, a case concerning national treatment, the Tribunal held that: "*In evaluating the implication of the legal context, the Tribunal believes that, as a first step, the treatment accorded a foreign owned investment [...] should be compared with that accorded domestic investment in the same business or economic sector*".<sup>532</sup> Once it is established that a foreign and domestic investor are in the same business or economic sector: "*Differences in treatment will presumptively violate [the principle of national treatment] unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or*

<sup>528</sup> **Exhibit CLA-116**, "Chapter 5 - Most-Favoured-Nation Treatment", in A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (The Netherlands: Kluwer Law International, 2009), paras 5.21 and 5.25.

<sup>529</sup> **Exhibit CLA-116**, *ibid.*, para 5.21.

<sup>530</sup> **Exhibit CLA-94**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29, Award of 27 August 2009), para 416.

<sup>531</sup> **Exhibit CLA-117**, "Chapter 7 – Treatment of Investors" in L. Shore, C. McLachlan and M. Weiniger, *International Investment Law: Substantive Principles*, 2nd Ed. (Oxford: OUP, 2017), para 7.311.

<sup>532</sup> **Exhibit CLA-76**, *Pope & Talbot Inc. v. The Government of Canada* (NAFTA Case, Award on the merits of phase 2 of 10 April 2001), para 78.

*de facto, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing of NAFTA. [...] A formulation focusing on the like circumstances [...] will require addressing any difference in treatment, demanding that it be justified by showing that it bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign-owned investments".*<sup>533</sup>

459. As held in *Parkerings v. Lithuania*, for investors to be in "like circumstances": (i) in the case of treatment less favourable than that accorded to other foreign investors, the comparator investor must also be foreign; (ii) the two investors must be in the same economic or business sector; and (iii) the two investors must be treated differently due to a measure taken by the State.<sup>534</sup> In the event that these three conditions are met, the less favourable treatment constitutes a breach of the national treatment or MFN treatment standards if there is no legitimate objective that justifies such treatment with regard to the specific investment.<sup>535</sup>
460. There is no requirement of intent to discriminate for there to be a breach of the national treatment and MFN standards; simply a requirement to demonstrate that the foreign investor is being treated less favourably in like circumstances than a domestic investor or third country investor (as the case may be).<sup>536</sup>
461. The appropriate comparators for NSP2AG and Nord Stream 2 are all offshore third country import pipelines. As described above, the pipelines transporting gas from North Africa to Spain and Italy respectively and the Nord Stream 1 pipeline are all pipelines in like circumstances. They have the same function, operate for the same purpose – to import natural gas to the EU from a third country – and the investment was made therein at a time when the Third Gas Directive did not apply to offshore third country import pipelines.<sup>537</sup>
462. In the present case, and as described fully in paragraphs 406 to 411 above, NSP2AG and Nord Stream 2 have been, and continue to be, treated less favourably by the EU in comparison to treatment by the EU of the like investors in other offshore import pipelines and their respective investments, whether those investors are within or outside the EU. The drafting of the Amending Directive, and the inclusion of a 23 May 2019 deadline for pipelines

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<sup>533</sup> **Exhibit CLA-76**, *Pope & Talbot Inc. v. The Government of Canada* (NAFTA Case, Award on the merits of phase 2 of 10 April 2001), paras 78 and 79 (cited approvingly in **Exhibit CLA-77**, *Parkerings-Compagniet AS v. Republic of Lithuania* (ICSID Case No. ARB/05/8, Award of 11 September 2007), para 370).

<sup>534</sup> **Exhibit CLA-77**, *Parkerings-Compagniet AS v. Republic of Lithuania* (ICSID Case No. ARB/05/8, Award of 11 September 2007), para 371.

<sup>535</sup> **Exhibit CLA-77**, *ibid.*, para 371. In *Parkerings*, "if the tribunal were to have found that the investments in question were in like circumstances, the fact that one received government approval and the other did not would have amounted to less favourable treatment" (**Exhibit CLA-116**, "Chapter 5 - Most-Favoured-Nation Treatment", in A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (The Netherlands: Kluwer Law International, 2009), para 5.25).

<sup>536</sup> **Exhibit CLA-91**, *Occidental Exploration and Production Co. v. Ecuador* (LCIA Case No. UN3467, Final Award of 1 July 2004), para 177; **Exhibit CLA-79**, *Cargill, Incorporated v. Republic of Poland II*, UNCITRAL, Award, 5 March 2008, paras 343-345 and **Exhibit CLA-94**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para 390.

<sup>537</sup> Section IV.5.

to be "*completed*" in Article 49a, with the intention that Nord Stream 2 is the only offshore import pipeline which is not eligible for a derogation under Article 49a of the Amending Directive by virtue of its date of physical completion, makes this abundantly clear. Moreover, as noted above, this was clear to the EU from the outset, as suggested by the EU's Admissions of Targeting Nord Stream 2, in particular, by the EU having indicated in its Fact Sheet published at the time of the proposal that Nord Stream 2 would be the only offshore import pipeline unable to benefit from a derogation. All other pipelines in like circumstances were *prima facie* entitled to a derogation under Article 49a of the Amending Directive. The Nord Stream 1 pipeline has received a derogation and the other offshore import pipelines will receive a derogation in due course. Regardless of whether these pipelines are investments of EU or non-EU investors, one of the standards under Article 10(7) (i.e. National Treatment or MFN) has been breached.

463. As discussed in paragraphs 419 to 422 above, the differential treatment of NSP2AG and the Nord Stream 2 project cannot be objectively justified by reference to the aims and policy of the EU and the Purported Objectives of the Amending Directive. Application of the rules on unbundling, tariff regulation and third party access to a 54 km section of the 1,235 km long Nord Stream 2 pipeline does not, and cannot, aid the EU in completion of the internal EU energy market. Moreover, if application of such rules to all offshore import pipelines bringing gas to the EU from third countries was necessary to complete the internal EU energy market, there would be no derogation available to the other pipelines (and therefore no basis on which those pipelines were treated differently to Nord Stream 2). On the contrary, the Amending Directive has been drafted to fulfil the EU's political motives and to achieve the Exclusion of Nord Stream 2 from the Derogation Regime, and constitutes a breach of Article 10(7) of the ECT. To the extent that reference is made to the EU's political motivations for singling out Nord Stream 2 for treatment less favourable than pipelines in like circumstances, such motivations cannot be considered to be rational policy objectives such as to justify a departure from the guarantees as to national and MFN treatment which the EU has voluntarily accepted by its accession to the ECT. Indeed, to do so would wholly undermine the nature of the protections which the ECT is intended to provide to insulate foreign investors from politically-motivated and arbitrary decision-making and to uphold the rule of law in the energy sector.<sup>538</sup>

#### **VIII.7 Breach of Article 13 of the ECT**

464. As described further below, the Amending Directive also constitutes a breach by the EU of Article 13 of the ECT, being its obligation not to expropriate investments of investors. In particular, the consequential imposition on Nord Stream 2 of the obligations to unbundle, to provide third party access and to apply regulated tariffs, has the effect of wholly depriving

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<sup>538</sup> See further Section III.1 above.

NSP2AG of the use of the German Section of the Pipeline and undermining and substantially depriving NSP2AG of the value of its investments.

465. Article 13 of the ECT provides that:

*"(1) Investments [...] shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation.*

[...]

*(2) The Investor affected shall have a right to prompt review, under the law of the Contracting Party making the Expropriation, by a judicial or other competent and independent authority of that Contracting Party, of its case, of the valuation of its Investment, and of the payment of compensation, in accordance with the principles set out in paragraph (1).*

*(3) For the avoidance of doubt, Expropriation shall include situations where a Contracting Party expropriates the assets of a company or enterprise in its Area in which an Investor of any other Contracting Party has an Investment, including through the ownership of shares".<sup>539</sup>*

466. In cases in which there has not been a traditional "taking" of an investment, there may be an indirect expropriation by way of creeping expropriation or measures tantamount to or equivalent to expropriation.<sup>540</sup> Article 13(1) of the ECT refers to "*measures having an equivalent effect*", which is equivalent to the concept of indirect expropriation.<sup>541</sup> The tribunal in *Link-Trading Joint Stock Company v. Department of Customs Control of the Republic of Moldova* explained that:

*"When measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as a "creeping" or "indirect" expropriation or, as in the BIT, as measures "the effect of which is tantamount to expropriation"".<sup>542</sup>*

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<sup>539</sup> **Exhibit CLA-1**, ECT, Article 13.

<sup>540</sup> **Exhibit CLA-118**, *Link-Trading Joint Stock Company v. Department of Customs Control of the Republic of Moldova* (UNCITRAL, Award of 18 April 2002), para 87.

<sup>541</sup> **Exhibit CLA-119**, *Petrobart Limited v. The Kyrgyz Republic* (SCC Case No. 126/2003, Award of 29 March 2005), p 77.

<sup>542</sup> **Exhibit CLA-118**, *Link-Trading Joint Stock Company v. Department of Customs Control of the Republic of Moldova* (UNCITRAL, Award of 18 April 2002), para 87.



467. An indirect expropriation therefore leaves "*the investor's title untouched but deprives him of the possibility of using the investment in any meaningful way*".<sup>543</sup> An indirect expropriation can take many different forms:<sup>544</sup> providing the measure has the effect of an expropriation, an indirect expropriation has occurred. In *S.D. Myers v Canada*, the Tribunal found that the expression "tantamount to expropriation" in Article 1110(1) of the NAFTA, was understood as "equivalent to expropriation". It confirmed that: "*Both words require a tribunal to look at the substance of what has occurred and not only at form. A tribunal should not be deterred by technical or facial considerations from reaching a conclusion that an expropriation or conduct tantamount to an expropriation has occurred. It must look at the real interests involved and the purpose and effect of the government measure*".
468. In *Sempra v Argentina*, the tribunal considered that the list of measures considered in the *Pope & Talbot* case as being tantamount to expropriation was "*representative of the legal standard required to make a determination on alleged indirect expropriation*". It confirmed that: "*Substantial deprivation results [...] from depriving the investor of control over the investment, managing the day-to-day operations of the company, arresting and detaining company officials or employees, supervising the work of officials, interfering in administration, impeding the distribution of dividends, interfering in the appointment of officials or managers, or depriving the company of its property or control in whole or in part. The list of measures could be expanded significantly in the light of the findings of many other tribunals, but would still have to meet the standard of having as a result a substantial deprivation of rights*".<sup>545</sup>
469. It is clear that "regulatory takings" may amount to an expropriation or measures having an equivalent effect.<sup>546</sup> It is also clear that a regulatory requirement that gives rise to an obligation on the investor to divest, or dispose of, its investment,<sup>547</sup> or that otherwise prevents the investor from enjoying the benefit or use of its investment, can constitute a direct or indirect expropriation.

<sup>543</sup> **Exhibit CLA-120**, "Chapter VI.4 – Direct and Indirect Expropriation", in R. Dolzer and C. Schreuer, *Principles of International Investment Law*, 2nd Ed. (Oxford: OUP, 2012), p 101, cited with approval by the tribunal in **Exhibit CLA-121**, *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd v. Kazakhstan* (SCC Case No. V 116/2010, Award of 19 December 2013), para 1111.

<sup>544</sup> **Exhibit CLA-121**, *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd v. Kazakhstan* (SCC Case No. V 116/2010, Award of 19 December 2013), para 1112; **Exhibit CLA-99**, *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID No. ARB/02/5, Award of 27 August 2009), para 278.

<sup>545</sup> **Exhibit CLA-122**, *Sempra Energy International v. Argentine Republic*, (ICSID Case No. ARB/02/16, Award of 28 September 2007), para 284. This award was later annulled for manifest excess of powers on the basis of the tribunal's failure to apply the defence of necessity in the bilateral investment treaty. The award continues to be cited with approval by tribunals.

<sup>546</sup> **Exhibit CLA-82**, *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia* (SCC, Award of 16 December 2003), p 33, section 4.3.1, noting that: "*The decisive factor for drawing the border line towards expropriation must primarily be the degree of possession taking or control over the enterprise the disputed measures entail*".

<sup>547</sup> **Exhibit CLA-123**, *PL Holdings S.à.r.l. v. Republic of Poland* (SCC Case No. 2014/163) in relation to the forced sale of the investor's shares.

470. An interference with the investor's management of its investment can amount to expropriation. In *Starrett Housing Corp v Iran*, the tribunal stated that "*the right freely to select management, supervisors and subcontractors is an essential element of the right to manage a project*",<sup>548</sup> and, ultimately, found that an expropriation had taken place.

471. Moreover, for a finding of expropriation, it is not necessary for there to be a transfer of rights or economic benefit to the state – as confirmed in *Tippetts v. TAMS-AFFA Consulting Engineers of Iran*, it is not necessary for the state to acquire something of value.<sup>549</sup> In *Tecmed v. Mexico*, the tribunal stated:

*"Although formally an expropriation means a forcible taking by the Government of tangible or intangible property owned by private persons by means of administrative or legislative action to that effect, the term also covers a number of situations defined as de facto expropriation, where such actions or laws transfer assets to third parties different from the expropriating State or where such laws or actions deprive persons of their ownership over such assets, without allocating such assets to third parties or to the Government".*<sup>550</sup>

472. The tribunal in *Tecmed* above cited approvingly the tribunal in *Metalclad v. Mexico*. In *Metalclad v. Mexico*, the tribunal held:

*"Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State"*(emphasis added).<sup>551</sup>

473. More recently in *PL Holdings S.à.r.l. v. Republic of Poland* the tribunal confirmed that a "*State may be deemed to expropriate private property even if it does not itself take ownership of it*".<sup>552</sup>

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<sup>548</sup> **Exhibit CLA-124**, *Starrett Housing Corporation, Starrett Systems, Inc, and Others v. The Government of the Islamic Republic of Iran, Bank Markazi Iran and Others* (Iran-US Claims Tribunal, Award no ITL 32-24-1, Interlocutory Award of 19 December 1983), para 68.

<sup>549</sup> **Exhibit CLA-125**, *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran* (Iran-US Claims Tribunal, 6 IRAN-U.S. C.T.R., at 219 et seq, Award of 22 June 1984), para 225: "*The Tribunal prefers the term "deprivation" to the term "taking", although they are largely synonymous, because the latter may be understood to imply that the Government has acquired something of value, which is not required*".

<sup>550</sup> **Exhibit CLA-66**, *Tecnicas Medioambientales Tecmed S.A. v. Mexico* (ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003), para 113.

<sup>551</sup> **Exhibit CLA-126**, *Metalclad v. Mexico* (ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000), para 103.

<sup>552</sup> **Exhibit CLA-123**, *PL Holdings S.à.r.l. v. Republic of Poland* (SCC Case No. 2014/163, Partial Award of 28 June 2017), para 320.

474. In order to determine whether a regulatory measure has the effect of an expropriation, the Tribunal will be required to consider the factual circumstances before it, to identify whether there has been an expropriation based on the effect of the measure in dispute on the investor.<sup>553</sup> In *Plama v. Bulgaria*, the tribunal considered the decisive elements as an assessment of: "(i) substantially complete deprivation of the economic use and enjoyment of the rights to the investment, or of identifiable, distinct parts thereof (i.e., approaching total impairment); (ii) the irreversibility and permanence of the contested measures (i.e., not ephemeral or temporary); and (iii) the extent of the loss of economic value experienced by the investor".<sup>554</sup>
475. In assessing whether there has been an expropriation, the Tribunal must consider all the "measures" undertaken. As confirmed by the tribunal in *UP & C.D. Holding Internationale v Hungary*: "What is relevant is whether such measures had the effect of dispossessing Claimants, directly or indirectly, of their investment. Therefore, the test is not which measure caused which effect, but whether the "measures" taken together as a package resulted in the dispossession".<sup>555</sup>
476. To assess whether there has been an expropriation, the Tribunal will therefore need to consider both the requirements, and practical effect upon NSP2AG and its investment, of the Third Gas Directive and Gas Regulation as applied by the Amending Directive. When considering these matters it is clear that, so far as it applies to Nord Stream 2, the Amending Directive is expropriatory in character and effect.
477. As described further in Section VII above, the Amending Directive requires NSP2AG to implement the TEP. Each of the changes triggered by the Amending Directive will prevent NSP2AG operating Nord Stream 2 as intended, fundamentally undermining the basis on which NSP2AG made its investment of over ██████████ in Nord Stream 2.
478. In particular, in order to comply with the unbundling obligation in the Third Gas Directive, there will need to be separation of the ownership and control over gas transmission infrastructure, and gas production or supply. The application of the unbundling requirements of the Third Gas Directive to the German Section will therefore prevent NSP2AG from operating the whole of the Nord Stream 2 pipeline, as had been intended.
479. The very intention and purpose of the unbundling requirements is, therefore, to divorce the transmission system – i.e. the Pipeline which is at the heart of NSP2AG's investment – from NSP2AG. The requirement of full ownership unbundling would in practice oblige Nord

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<sup>553</sup> **Exhibit CLA-127**, "Chapter 8 – Expropriation" in L. Shore, C. McLachlan and M. Weiniger, *International Investment Law: Substantive Principles*, 2nd Ed. (Oxford: OUP, 2017), para 8.90.

<sup>554</sup> **Exhibit CLA-105**, *Plama Consortium v. Bulgaria* (ICSID Case No. ARB/03/24, Award of 27 August 2008), para 193; **Exhibit CLA-128**, *Quiborax S.A., Non Metallic Minerals S.A. and Kaplun v. Plurinational State of Bolivia* (ICSID Case No ARB/06/2, Award of 16 September 2015), para 238.

<sup>555</sup> **Exhibit CLA-129**, *UP and C.D Holding Internationale v. Hungary* (ICSID Case No. ARB/13/35, Award of 9 October 2018), para 331.

Stream 2 to sell at least the German Section. [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Gazprom (and its 100% owned subsidiaries) are the only permitted exporters that can use Nord Stream 2, [REDACTED]

[REDACTED]

480. If available, other permitted models of unbundling (as set out at paragraphs 81 and 82 above) would similarly leave NSP2AG unable to both own and operate the German Section, and therefore either leave NSP2AG without ownership or, even if ownership is retained, without full control, enjoyment and use of Nord Stream 2, such that continued ownership of Nord Stream 2 will be in name only.
481. Accordingly, howsoever NSP2AG complies with the unbundling requirements, it will therefore be dispossessed of its ability to both own and operate the German Section of Nord Stream 2. In addition to the unbundling requirement, NSP2AG's investment is fundamentally undermined by the third party access requirements and tariff regulation imposed on the German Section by the Amending Directive.
482. As matters stand, and again as further described in Section VII above, [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED] These catastrophic effects all flow from the effect of the Amending Directive: NSP2AG will be deprived of its investment with the effect that its investment has been expropriated.
483. The EU may seek to justify, by reference to its own powers, rules and objectives, the significant interference with private investment inherent in its internal market rules where such rules operate, so as to affect EU investors who are themselves stakeholders in the EU's internal market integration project. However, no justification can be advanced to the application of those rules to part of an offshore import pipeline outside the EU's internal market which represents the investment of a foreign investor that benefits from the protections of the ECT, including the protection against expropriation in Article 13. It is clear that, consistent with the very purpose of the internal market rules to separate the ownership and control over gas transmission infrastructure and gas production or supply, the cumulative consequences of the application of the Amending Directive to NSP2AG and Nord Stream 2 will constitute a substantial interference with NSP2AG's ability to deal with the Pipeline in the manner which was envisaged at the time the investment was made, and constitute a breach of Article 13 of the ECT.

484. Further, the Amending Directive and its application to the Nord Stream 2 project is not a lawful expropriation in accordance with Article 13(1) of the ECT, as it is (i) not in the public interest; (ii) discriminatory; (iii) not carried out under due process of law given the Improper Legislative Process; and (iv) not accompanied by the payment of prompt, adequate and effective compensation.

IX. **THE RELIEF SOUGHT BY NSP2AG IS THE MOST APPROPRIATE TO PROTECT NSP2AG'S INVESTMENT FROM THE CATASTROPHIC HARM CAUSED BY THE EU'S CONDUCT**

**IX.1 Introduction**

485. As set out in NSP2AG's Request for Relief in Section XI below, NSP2AG seeks a declaration that the actions of the EU constitute a breach of Articles 10 and 13 of the ECT.

486. Further, as the primary relief requested in this arbitration, NSP2AG requests that the Tribunal order that the EU, by means of its own choosing, remove the application of Articles 9, 10, 11, 32, 41(6), 41(8) and 41(10) of the Gas Directive (i.e. those provisions which became applicable to Nord Stream 2 as a result of the Amending Directive and from which derogations are permissible pursuant to Article 49a of the Gas Directive) to NSP2AG and Nord Stream 2, thus restoring the position that would have existed but for the EU's breaches of the ECT.

487. In support of this request, in this section of its Memorial, NSP2AG explains that:

- i. Under the applicable principles of international law, the EU's violations of the ECT give rise to a right to full reparation, with restitution (the re-establishment of the situation which would have existed if the EU's breaches of the ECT had not occurred) as the preferred approach (**Section IX.2**).
- ii. The Tribunal has the power to grant such restitution by ordering the relief requested by NSP2AG, to prevent the application of relevant parts of the Gas Directive to Nord Stream 2 (**Section IX.3**).
- iii. The grant of the relief requested by NSP2AG can provide NSP2AG with full reparation, required under international law, for the EU's violations of the ECT. The relief is necessary to prevent the catastrophic harm the Amending Directive would otherwise cause NSP2AG, as detailed in Section VII above. Damages would not be an adequate remedy, and conversely the relief requested by NSP2AG would have no material impact on the EU (**Section IX.4**).

**IX.2 Under applicable principles of international law NSP2AG is entitled to full reparation**

488. International decisions, including arbitral awards concerning breaches of the ECT,<sup>557</sup> have consistently required that insofar as possible, a wronged party should be placed in the

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<sup>557</sup> **Exhibit CLA-119**, *Petrobart Limited v. The Kyrgyz Republic* (SCC Case No. 126/2003, Award of 29 March 2005), pp 77-78; **Exhibit CLA-59**, *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia* (ICSID Case No. ARB/05/18, Award of 3 March 2010), paras 503-505; **Exhibit CLA-88**, *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan* (SCC Case No. V (061/2008), Final Award of 8 June 2010), paras 42-43; **Exhibit CLA-82**, *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia* (SCC, Award of 16 December 2003), p 38-39, section 5.1; **Exhibit CLA-130**, *Yukos Universal Limited (Isle*

position it would have been in, but for the internationally wrongful acts taken by the respondent. The basic guiding principle of reparation, for all internationally-wrongful acts, is that provided by the Permanent Court of Justice in the *Chorzów Factory* case, where it stated:

*"The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.*

*Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it [...]"<sup>558</sup>*

489. Consistent with the approach outlined in the *Chorzów Factory* case, Articles 31 to 37 of the International Law Commission ("**ILC**") Articles on State Responsibility ("**ILC Articles on State Responsibility**"),<sup>559</sup> which reflect the customary international law position,<sup>560</sup> confirm that reparation may take a number of forms, but that restitution (re-establishment of the situation that existed before the internationally wrongful act) is the primary aim and preferred outcome:

**"Article 31**

**Reparation**

- 1. The responsible State is under obligation to make full reparation for the injury caused by the internationally wrongful act.*
- 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of State."*

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*of Man*) v. *The Russian Federation* (UNCITRAL, PCA Case No. 2005-04/AA227, Final Award of 18 July 2014), para 1766.

<sup>558</sup> **Exhibit CLA-131**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, ICJ Judgment No. 13, Merits of 13 September 1928, p 47. This approach was followed by numerous tribunals, including in **Exhibit CLA-132**, *Franck Charles Arif v Republic of Moldova* (ICSID Case No. ARB/11/23, Award of 8 April 2013), paras 559 – 560; **Exhibit CLA-98**, *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006), para 31; **Exhibit CLA-133**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19, Award of 18 August 2008), para 468.

<sup>559</sup> **Exhibit CLA-134**, International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, 53 UN GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/10 (2001).

<sup>560</sup> **Exhibit CLA-135**, *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ Judgment of 20 April 2010, para 273; **Exhibit CLA-136**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v the United Mexican States* (ICSID Case No. ARB(AF)/04/05, Award of 21 November 2007), paras 116 and 275; **Exhibit CLA-96**, *Bewater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22, Award of 24 July 2008), para 776. See also: **Exhibit CLA-137**, *Corn Products International Inc., v. The United Mexican States* (ICSID Case No. ARB(AF)/04/01, Decision on Responsibility of 15 January 2008), para 76: the Tribunal referred to the ILC Articles on State Responsibility as the "*most authoritative statement*" of the rules on State responsibility.

## **Article 34**

### **Forms of Reparation**

*Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter."*

## **Article 35**

### **Restitution**

*A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.*

## **Article 36**

### **Compensation**

*1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.*

*2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established."<sup>561</sup>*

490. These underlying customary international law principles are also binding on the EU as an international organisation, as is reflected by the mirroring, in Articles 31 to 37 of the ILC Draft Articles on the Responsibility of International Organisations ("**ILC Articles on International Organisation Responsibility**"), of the abovementioned provisions.<sup>562</sup>
491. Accordingly, restitution is the primary remedy under international law, for all internationally wrongful acts. Internationally wrongful acts are those attributable to a state or international organisation, and which constitute a breach of an international obligation of that state or international organisation.<sup>563</sup> As set out in Section VIII above, the EU's action in passing the Amending Directive constitutes a breach of the international law obligations undertaken by the EU in the ECT, and is thus an internationally wrongful act.
492. As a consequence of its internationally wrongful act, the EU is under an obligation to make restitution, that is, to re-establish the situation which would have existed had the wrongful act not been committed, provided and to the extent that restitution (a) is not materially

<sup>561</sup> **Exhibit CLA-134**, International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, 53 UN GAOR Supp. (No. 10) at p 43, U.N. Doc. A/56/10 (2001).

<sup>562</sup> **Exhibit CLA-138**, International Law Commission, Draft Articles on the Responsibility of International Organisations, *Yearbook of the International Law Commission, 2011*, Vol. II, Part Two, A/66/10, 2011. This is also clearly recognised by the EU itself, for example through the adoption of **Exhibit CLA-139**, Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, OJ L 257, 28 August 2014.

<sup>563</sup> **Exhibit CLA-134**, ILC Articles on State Responsibility, Article 2; **Exhibit CLA-138**, ILC Articles on International Organisation Responsibility, Article 4.



impossible, and (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation. As explained below, NSP2AG requests that the Tribunal order the EU to make restitution by re-establishing the situation that would have existed but for its wrongful act in passing the Amending Directive and at the same time deliberately excluding Nord Stream 2 from the derogation regime at Article 49a of the Gas Directive (as amended by the Amending Directive). This is a remedy which the Tribunal has the power to grant, is not materially impossible, and does not involve a burden out of proportion to the benefit deriving from restitution instead of compensation.

### **IX.3 The Tribunal has the power to grant the relief requested**

493. The Tribunal has the power to grant the relief requested by NSP2AG. Article 26(8) of the ECT itself expressly recognises that awards in arbitrations brought pursuant to Article 26 may include remedies other than an award of damages. Article 26(8) provides that an ECT award "*concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted*". The tribunal in *Al-Bahloul v. Tajikistan* found that Article 26(8), by only limiting the power of tribunals to award non-pecuniary remedies in the case of unlawful measures of sub-national governments or authorities of Contracting States, vested arbitral tribunals instituted under the ECT with the power to grant both pecuniary and non-pecuniary remedies.<sup>564</sup>
494. The International Court of Justice held in the *Rainbow Warrior* case that arbitral tribunals have inherent powers to order the cessation or discontinuance of a wrongful act (such as the discriminatory effect of the Amending Directive) provided that: (i) the wrongful act has a continuing character; and (ii) the violated rule is in force at the time of the order:

*"The authority to issue an order for the cessation or discontinuance of a wrongful act or omission results from the inherent powers of a competent tribunal which is confronted with the continuous breach of an international obligation which is in force and continues to be in force. The delivery of such an order requires, therefore, two essential conditions intimately linked, namely that the wrongful act has a continuing*

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<sup>564</sup> **Exhibit CLA-88**, *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan* (SCC Case No. V (061/2008), Final Award of 8 June 2010), para 49. The findings of the tribunal are further supported by the travaux préparatoires for Article 26(8). During the negotiations of the ECT, Canada sought to include a provision excluding non-pecuniary remedies, raising constitutional concerns relating to the Canadian Federal Government's lack of authority to compel provincial governments to withdraw their legislative measures when found in breach of the ECT. Canada's attempt to exclude non-pecuniary remedies was rejected, with Article 26(8) adopted as a compromise position, with the right to monetary payment in lieu of non-pecuniary remedies where a breach of the ECT was occasioned by the conduct of a sub-national government or authority, addressing Canada's constitutional concerns while providing for arbitral tribunals instituted under the ECT to grant non-pecuniary remedies (see **Exhibit CLA-140**, A. De Luca. "Non-Pecuniary Remedies under the Energy Charter Treaties", *Energy Charter Secretariat Knowledge Centre*, 2015, p 1).

*character and that the violated rule is still in force at the time in which the order is issued".*<sup>565</sup>

495. In this case it is beyond doubt that (i) the EU's breach of the ECT has a continuing character in that the amendments to the Gas Directive made by the Amending Directive remain in force, and (ii) the violated rule is still in force in that the ECT is still in force.
496. The test in the *Rainbow Warrior* case was quoted by the tribunal in the *Enron* case, with the tribunal stating that:

*"An examination of the powers of international courts and tribunals to order measures concerning performance or injunction and of the ample practice that is available in this respect, leaves this Tribunal in no doubt about the fact that these powers are indeed available" (emphasis added).*

[...]

*"The Tribunal accordingly concludes that, in addition to declaratory powers, it has the power to order measures involving performance or injunction of certain acts. Jurisdiction is therefore also affirmed on this ground. What kind of measures might or might not be justified, whether the acts complained of meet the standards set out in the *Rainbow Warrior*, and how the issue of implementation that the parties have also discussed would be handled, if appropriate, are all matters that belong to the merits".*<sup>566</sup>

497. Likewise, in *Micula*, the tribunal concluded that it had the power to grant injunctive relief (injunctive relief would be one way of describing the relief sought by NSP2AG in these proceedings). The tribunal stated: *"The Tribunal concludes that it has the power to grant injunctive relief in a final award".*<sup>567</sup> The tribunal held that its power to grant final injunctive relief *"derive[d] from the nature and purpose of its mandate, which in turn is defined by the parties' consent"*. As there was nothing to the contrary in the ICSID Convention, the BIT, or the claimants' request for arbitration, the tribunal considered that it *"must conclude that its powers include all of those required to provide effective remedy"*.<sup>568</sup> Finally, the *Micula* tribunal concluded that final injunctive relief could be granted if it *"is necessary to ensure that the breach will be redressed"*.<sup>569</sup>

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<sup>565</sup> **Exhibit CLA-141**, *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986, between the two States and which related to the problems arising from the Rainbow Warrior Affair*, 30 April 1990, United Nations Reports of International Awards, Vol. XX, pp 215-284 (2006), p 270.

<sup>566</sup> **Exhibit CLA-142**, *Enron Corp. and Ponderosa Assets, LP v. Argentine Republic* (ICSID Case No. ARB/01/3, Decision on Jurisdiction of 14 January 2004, paras 79 – 81).

<sup>567</sup> **Exhibit CLA-109**, *Micula, S.C. European Food S.A. v. Romania* (ICSID Case No. ARB/05/20, Award of 11 December 2013), para 1313.

<sup>568</sup> **Exhibit CLA-109**, *ibid.*, para 1309.

<sup>569</sup> **Exhibit CLA-109**, *ibid.*, para 1311.

498. Born endorses this view that absent express language to the contrary, the parties' agreement to arbitrate contemplates that arbitrators can order injunctive relief.<sup>570</sup> Professor Schreuer also envisages the power of arbitral tribunal to order specific performance or injunctions: "*It is entirely possible that future cases will involve disputes arising from ongoing relationships in which awards providing for specific performance or injunctions are appropriate*".<sup>571</sup>

499. A significant recent example where a tribunal considered it appropriate to grant relief of a similar nature to that sought by NSP2AG in this arbitration is the case of *Chevron v. Ecuador*. In a Second Partial Award dated 30 August 2018, the tribunal held that a judgment of an Ecuadorian court against a subsidiary of Chevron ordering it to pay US\$9.5 billion in damages in respect of environmental liabilities was rendered in breach of the 1993 USA-Ecuador BIT. Having found Ecuador in breach of the USA-Ecuador BIT, the tribunal took as its starting point the principles on reparation set out in the ILC Articles on State Responsibility and *Chorzów Factory*<sup>572</sup> (as NSP2AG submits the Tribunal should do in this case) and concluded that:

*"[T]he reinstatement of the Claimants' rights under international law requires of the Respondent the immediate suspension of the enforceability of the Lago Agrio Judgment and the implementation of such other corrective measures as are necessary to "wipe out all the consequences" of the Respondent's internationally wrongful acts, so as to re-establish the situation which would have existed if those internationally wrongful acts had not been committed by the Respondent"*.<sup>573</sup>

500. The claimants in the *Chevron v Ecuador* case had requested that the tribunal declare that the relevant judgment was a nullity and devoid of effect under international law, and an order that Ecuador take all necessary steps to set aside or nullify the judgment. The tribunal however concluded these would not be an appropriate remedy under international law,<sup>574</sup> but instead adopted the approach of previous ICJ decisions in ordering the respondent to take steps of its own choosing to remove the effect of the unlawful acts. The tribunal explained:

*"A similar distinction was drawn by the ICJ in the Case Concerning the Arrest Warrant (2002). In that case, the unlawful arrest warrant engaged the respondent State's international responsibility; but the warrant continued to exist, both as a matter of the local law and also international law. The Court held: "The warrant is*

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<sup>570</sup> **Exhibit CLA-143**, "Chapter 23 – Form and Contents of International Arbitral Awards" in G. Born, *International Commercial Arbitration Volume III*, 2nd Ed. (The Netherlands: Kluwer Law International, 2014), para 3076.

<sup>571</sup> **Exhibit CLA-144**, C. Schreuer, "Non-Pecuniary Remedies in ICSID Arbitration", (2004) 20(4) *Arbitration International* 325, para 332.

<sup>572</sup> **Exhibit CLA-145**, *Chevron Corporation and Texaco Petroleum Company v. the Republic of Ecuador* (UNCITRAL, PCA Case No 2009-23, Second Partial Award on Track II of 30 August 2018), paras 9.6-9.9.

<sup>573</sup> **Exhibit CLA-145**, *ibid.*, para 9.17.

<sup>574</sup> **Exhibit CLA-145**, *ibid.*, paras 9.60-9.63, 9.78-9.81, and 9.88-9.89.

*still extant and remains unlawful ... The Court accordingly considers that Belgium must by means of its own choosing cancel the warrant in question ...". Significantly, the Court did not itself cancel the warrant. In the Case Concerning Jurisdictional Immunities (2012), the ICJ ordered the respondent State to take steps, by means of its own choosing, to ensure that decisions of its own courts "become unenforceable". Again, significantly, the ICJ did not itself annul or declare the nullity of these judicial decisions".<sup>575</sup>*

501. The tribunal followed a similar approach, ordering Ecuador to take immediate steps of its own choosing to: (a) "*remove the status of the enforceability of the Lago Agrio Judgment*"; (b) preclude any of the Ecuadorian plaintiffs from enforcing the judgment directly or indirectly; and (c) "*abstain from collecting or receiving, directly or indirectly, any proceeds from the enforcement or recognition of any part of the Lago Agrio Judgment*".<sup>576</sup>
502. NSP2AG explains in Section IX.4 below why the removal of the application of Articles 9, 10, 11, 32, 41(6), (8) and (10) of the Gas Directive (i.e. those provisions which became applicable to Nord Stream 2 as a result of the Amending Directive and from which derogations are permissible pursuant to Article 49a of the Gas Directive) to NSP2AG and Nord Stream 2 will provide appropriate reparation for the EU's breach of the ECT, and why such a remedy does not involve a burden out of proportion to the benefit deriving from restitution instead of compensation.<sup>577</sup>

#### **IX.4 The relief requested will provide adequate restitution for the EU's breaches of the ECT**

503. In this case, the relief requested by NSP2AG will allow it to obtain restitution by re-establishing the situation which would have existed had the internationally wrongful act of the EU's breach of the Energy Charter Treaty not been committed. For the reasons further explained below, the requested relief is appropriate as it is not materially impossible and does not on any view involve a burden out of all proportion to the benefit derived from granting restitution instead of compensation.
504. NSP2AG is investing over ██████████ in the Nord Stream 2 project on the basis of a carefully negotiated GTA and financing structure, in the expectation that, in accordance with the law as it stood prior to the Amending Directive and the way in which the Nord Stream 1 project has been regulated:
- i. NSP2AG would be entitled to act as the operator for the whole of the pipeline.

<sup>575</sup> Exhibit CLA-145, *ibid.*, para 9.13.

<sup>576</sup> Exhibit CLA-145, *ibid.*, para 10.13(i), (ii) and (iv).

<sup>577</sup> For the avoidance of doubt, in addition to the requested relief, NSP2AG reserves the right to claim in a subsequent phase of this arbitration reparation in the form of damages for any damage that is not prevented by the grant of such relief.

ii. NSP2AG had a guaranteed revenue stream under the GTA [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

iii. Once the Nord Stream 2 pipeline is operational, NSP2AG's position would have been, from a financial and tariff perspective, relatively straightforward [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

505. As explained in Section VII above, the impact of the Amending Directive fundamentally changes the position, preventing NSP2AG being the operator for the German Section, and mandating that the German Section is subject to third party access and regulated tariff requirements.

506. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

507. The only way of providing NSP2AG with restitution is to re-establish the situation which would have existed had the wrongful act not been committed. The grant of the relief that NSP2AG is requesting would provide this restitution. Damages would not be an adequate remedy in a scenario where NSP2AG is unable to operate the pipeline – even if the EU were to compensate NSP2AG for its full losses, it would no longer be able to fulfil the sole purpose for which it was incorporated, which was to design, build and operate the Nord Stream 2 pipeline.

508. NSP2AG has explained in Section VII above that it is exploring possible solutions that would enable the Nord Stream 2 pipeline to operate by splitting the operation of the German Section of the pipeline from the remainder of the pipeline, with the two sections operated by different operators. NSP2AG has explained in Section VII the many difficulties and uncertainties that would need to be overcome to implement such a solution, [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] This would, as explained in Section VII above, be a time consuming, expensive,

and difficult process, with an uncertain outcome. Even if a solution could be designed and agreed, the German Section would still be required to comply with third party access and tariff regulations, fundamentally changing the structure of the project and leading to significant financial damage to NSP2AG in any event.

509. NSP2AG would be left in a situation where instead of acting as the sole operator of the entire Nord Stream 2 pipeline, with the secure, transparent and certain revenue of the GTA [REDACTED], the best that NSP2AG could achieve from this difficult restructuring would be to be one of two operators over different sections of the Nord Stream 2 pipeline. This would put NSP2AG in a much more difficult situation going forward [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] Damages for the losses NSP2AG would suffer in implementing such a restructuring would not be an adequate remedy for this uncertain and challenging future.

510. As such, even if such a solution could be implemented, NSP2AG should not be required to undergo the costly, time consuming and difficult restructuring and renegotiation that would be required, with uncertain success, to achieve such a negative, disadvantageous and irreversible outcome, to comply with the unlawful Amending Directive. Such an outcome would be inconsistent with the principle, going back to *Chorzow Factory*, that as the wronged party NSP2AG should be put in the position it would have been but for the EU's internationally wrongful act.

511. The appropriate remedy therefore is the grant of the relief requested by NSP2AG, to prevent the impact of the Amending Directive on NSP2AG and to allow it to operate as it could have done but for the EU's breach of the Energy Charter Treaty.

512. While granting the relief requested would provide full reparation to NSP2AG, the grant of such relief, unusually, would have no material impact on the Respondent, given that:

- i. As explained in Section VI.12 above, the reasons expressed by the EU Institutions for enacting the Amending Directive, both in the context of the European Commission's original proposal and in the final text of the Amending Directive, are entirely spurious as the Amending Directive is simply incapable of achieving the EU's objectives. As such, granting the relief requested by NSP2AG will not undermine the EU's stated objectives.
- ii. As explained in Section VI.11 above, Nord Stream 2 is the only Pipeline impacted by the Amending Directive, granting the relief sought would not have any broader legal impact on any third parties.

513. NSP2AG reserves the right to apply for interim injunctive relief, if necessary, to preserve its position pending the outcome of its primary request for relief. As explained above, its primary request is for an order that the EU, by means of its own choosing, remove the application of Articles 9, 10, 11, 32, 41(6), 41(8) and 41(10) of the Gas Directive (i.e. those provisions which became applicable to Nord Stream 2 as a result of the Amending Directive and from which derogations are permissible pursuant to Article 49a of the Gas Directive) to NSP2AG and Nord Stream 2.
514. NSP2AG also reserves the right, in a subsequent phase of this arbitration, to claim damages in respect of the losses that have been and are being caused by the EU's breaches of the ECT, to the extent not avoided by the primary relief claimed by NSP2AG in this arbitration.

## X. **NSP2AG AND ITS INVESTMENT MEET THE JURISDICTIONAL REQUIREMENTS OF THE ECT**

### X.1 **Introduction**

515. For the reasons set out in paragraphs 12 to 28 of the Notice, the Claimant's claim set out in this Memorial fulfils each of the jurisdictional requirements under the ECT.

516. The EU has however indicated that it intends to object to the jurisdiction of the Tribunal to hear the Claimant's claim, in particular on the following grounds (the "**Objections**"):

- i. That the Claimant does not have "*substantial business activities*" in Switzerland pursuant to Article 17(1) of the ECT (the "**Business Activities Objection**").<sup>578</sup>
- ii. That the claims relate in part to investments made outside the Area of the EU (the "**Area Objection**").<sup>579</sup>
- iii. Based on Article 26(3)(b)(i) of the ECT (the "**Fork in the Road Objection**").

517. The EU has not properly explained any of its Objections, and the Claimant will respond to them, and to any other objections, in full if they are maintained by the EU in its Memorial on Jurisdiction on 15 September 2020, and once they have been properly articulated. However, even without further explanation, it is clear that the EU's Objections are without merit and must fail.

518. As this section explains, NSP2AG has "substantial business activities" in Switzerland, and in any event the EU is too late to raise its Business Activities Objection (**Section X.2**). Further, NSP2AG has made very substantial investments within the Area of the EU. The fact that NSP2AG has also made investments outside the Area of the EU cannot form the basis of a jurisdictional objection, and the EU's Area Objection must therefore fail (**Section X.3**). Finally, NSP2AG has not previously submitted its claim under the ECT to the courts or tribunals of the EU or in accordance with any other dispute settlement procedure, and the Fork in the Road Objection must also fail (**Section X.4**).

### X.2 **NSP2AG has substantial business activities in Switzerland**

519. Article 17(1) of the ECT provides that "*Each Contracting Party reserves the right to deny the advantages of this Part [of the ECT] to: (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised*". It is clear that the requirements for this article to apply are not met:

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<sup>578</sup> This objection was first raised during a meeting on 25 June 2019 between NSP2AG and the EU (para 381.v(b)). NSP2AG explained in its letter of 8 July 2019 why this objection was unfounded (**Exhibit C-8**, Letter from NSP2AG to the European Commission, 8 July 2019), but the EU maintained its objection in its letter of 26 July 2019 (**Exhibit C-9**, Letter from the European Commission to NSP2AG, 26 July 2019).

<sup>579</sup> **Exhibit C-139**, Letter from the European Commission to NSP2AG, 19 March 2020.



- i. NSP2AG does have substantial business activities in Switzerland. Since its incorporation as a Swiss company in 2015, NSP2AG has maintained a its main office in Zug, Switzerland and has employed a sizeable workforce. All of the main procurement, construction, and operating contracts for the Nord Stream 2 project have been negotiated and concluded by NSP2AG from its main office in Zug.
- ii. Since 2017, NSP2AG also leases premises in Steinhausen, also in the canton of Zug. [REDACTED]  
[REDACTED]  
[REDACTED]
- iii. NSP2AG currently has approximately 220 employees, of whom approximately 170, or 75%, work full-time from its offices in Switzerland.<sup>581</sup> These include the Claimant's factual witnesses, both of whom live and work in Switzerland.
- iv. NSP2AG is the direct owner of the infrastructure which makes up the Nord Stream 2 pipeline – a substantial and valuable asset – and will be the direct recipient of the tariff revenue generated by the pipeline under the GTA.
- v. The potential Business Activities Objection was first raised by the EU during its meeting with NSP2AG on 25 June 2019 under Article 26 of the ECT. In its letter to the European Commission on 8 July 2019, NSP2AG invited the EU delegation to visit NSP2AG's premises in Zug, to see for itself the substantial nature of the business activities conducted there.<sup>582</sup> The EU has not taken up this offer, which NSP2AG repeated in its letter of 6 August 2019.<sup>583</sup> To the extent the EU contemplates maintaining its Business Activities Objection, NSP2AG repeats its invitation, which it would be appropriate for the EU to take up prior to filing its Memorial on Jurisdiction on 15 September 2020.
- vi. In any event, in order for Article 17(1) of the ECT to be relevant to this claim, the EU was required to notify that it intended to deny the advantages of the ECT to NSP2AG at a much earlier stage.<sup>584</sup> The EU did not notify NSP2AG that it intended to deny the advantages of the ECT to NSP2AG prior to this dispute under the ECT arising, still less prior to NSP2AG's investment being made. Consistent with previous tribunals' decisions on this point, the EU cannot now rely on Article 17(1) to exclude NSP2AG's claim.

580 [REDACTED]

581 [REDACTED]

582 **Exhibit C-8**, Letter from NSP2AG to the European Commission, 8 July 2019.

583 **Exhibit C-10**, Letter from NSP2AG to the European Commission, 6 August 2019.

584 For example, **Exhibit CLA-146**, *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005), paras 145 and 159 – 165; **Exhibit CLA-121**, *Anatolie Stati and others v. Republic of Kazakhstan* (SCC Case No. V116/2010, Award of 19 December 2013), para 745.

### **X.3 NSP2AG has made substantial investments in the Area of the EU**

520. At paragraph 17 to 27 of the Notice, NSP2AG explained the qualifying investments it has made in the Area of the EU, fulfilling the jurisdictional requirements of the ECT. NSP2AG has explained these qualifying investments in more detail in Section V above.
521. In its letter of 19 March 2020, the EU stated that it "*intends to object to the Tribunal's jurisdiction based on the fact that the claims relate in part to investments made outside the Area of the EU*".<sup>585</sup> In its response of 20 March 2020, NSP2AG noted that the EU's objection itself acknowledges that NSP2AG's claims relate at least "*in part*" to investments made inside the Area of the EU. As such, the EU's Area Objection cannot form the basis of a claim that the Tribunal has no jurisdiction.<sup>586</sup>
522. The EU has made no further attempt to explain the basis of its proposed Area Objection. NSP2AG has made very substantial investments in the Area of the EU, and it is that part of the Nord Stream 2 pipeline within the Area of the EU that, as a result of the Amending Directive, is subject to the unbundling, third party access and tariff regulation provisions of the Gas Directive. Any suggestion that NSP2AG should however lose the protection of the ECT and the Tribunal should have no jurisdiction over this claim because NSP2AG has also made investment outside the Area of the EU is patently wrong.

### **X.4 NSP2AG has not previously submitted its claim under the ECT, as set out in this Memorial, to any other dispute settlement procedure**

523. In its letter of 19 March 2020, the EU stated that it "*intends to object to the Tribunal's jurisdiction based on Article 26(3)(b)(i) of the Energy Charter Treaty*".<sup>587</sup>
524. Article 26(3)(b)(i) is the ECT's "fork in the road" provision, and given its proper context within Article 26 provides as follows:

*"(1) Disputes between a Contracting Party [the EU] and an Investor [NSP2AG] of another Contracting Party [Switzerland] relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former [the EU] under Part III [of the ECT] shall, if possible, be settled amicably.*

*(2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months ... the Investor party to the dispute may choose to submit it for resolution:*

- (a) to the courts or administrative tribunals of the Contracting Party to the dispute;*
- (b) in accordance with any applicable, previously agreed dispute settlement procedure; or*
- (c) in accordance with the following paragraphs of this Article.*

*(3)(a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.*

<sup>585</sup> **Exhibit C-139**, Letter from the European Commission to NSP2AG, 19 March 2020.

<sup>586</sup> **Exhibit C-140**, Letter from NSP2AG to the European Commission, 20 March 2020.

<sup>587</sup> **Exhibit C-139**, Letter from the European Commission to NSP2AG, 19 March 2020.

*(b)(i) The Contracting Parties listed in Annex 1D [which include the EU] do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraphs 2(a) or (b)" (emphasis added).*

525. As referred to in Article 26(1) and (2) of the ECT, the dispute that NSP2AG brings in this arbitration is one concerning breaches by the EU of its obligations under Part III of the ECT, as set out in this Memorial. NSP2AG has exercised its right to submit the dispute for resolution pursuant to international arbitration pursuant to Article 26(2)(c), (3)(a) and (4)(b) of the ECT.
526. NSP2AG has not submitted its dispute concerning a breach of the ECT to the courts or administrative tribunals of the EU pursuant to Article 26(2)(a) of the ECT, or in accordance with any other dispute settlement procedure pursuant to Article 26(2)(b) of the ECT. As such, Article 26(3)(b)(i) is not engaged, and the EU's Fork in the Road Objection must fail.

**XI. RELIEF SOUGHT**

527. On the basis of the foregoing, without limitation and fully reserving its right to amend or supplement this request, NSP2AG requests the following relief:
- i. A declaration that the EU has breached Article 10(1) of the ECT by taking unreasonable or discriminatory measures that have impaired NSP2AG's management, maintenance, use, enjoyment or disposal of its investments;
  - ii. A declaration that the EU has breached Article 10(1) of the ECT by failing to ensure fair and equitable treatment of NSP2AG's investments;
  - iii. A declaration that the EU has breached Article 10(1) of the ECT by failing to ensure that NSP2AG's investments enjoy the most constant protection and security;
  - iv. A declaration that the EU has breached Article 10(7) of the ECT by failing to ensure that NSP2AG is accorded treatment no less favourable than that which the EU accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third states and their related activities;
  - v. A declaration that the EU has breached Article 13 of the ECT by expropriating the Claimant's investments or subjecting them to a measure or measures having effect equivalent to expropriation;
  - vi. An order that the EU, by means of its own choosing, remove the application of Articles 9, 10, 11, 32, 41(6), 41(8) and 41(10) of the Gas Directive to NSP2AG and Nord Stream 2;
  - vii. In the alternative to (vi) above, and in a subsequent phase of this arbitration, an order that the EU pay compensation in an amount to be assessed, being the amount of NSP2AG's losses resulting from the EU's breaches of the ECT;
  - viii. An order that the EU pay the costs of these arbitration proceedings, including the fees and expenses of the Tribunal and costs of legal representation and interest thereon;
  - ix. An order that the EU pay all other costs incurred by NSP2AG as a result of its breaches of the ECT and interest thereon in accordance with the ECT; and
  - x. Such other and further relief as the Tribunal considers appropriate, in the circumstances.
528. NSP2AG reserves the right to apply for interim injunctive relief, if necessary, to preserve its position pending the outcome of its primary request for relief at paragraph 527.vi above.
529. NSP2AG further reserves the right to supplement or amend its claims and relief sought, and to present further argument and evidence, up to the date of the Final Award or any earlier date set by the Tribunal.

Submitted for and on behalf of  
**NORD STREAM 2 AG**



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**Professor Dr Kaj Hobér**  
*and*

Herbert Smith Freehills LLP

**Herbert Smith Freehills LLP**

3 July 2020



## APPENDIX 1: CHRONOLOGY

Date	Description
22 June 1998	Directive 98/30/EC (First Gas Directive) adopted
26 June 2003	Directive 2003/55/EC (Second Gas Directive) adopted
13 July 2009	Directive 2009/73/EC (Gas Directive or Third Gas Directive) adopted
13 July 2009	Regulation 715/2009 of the European Parliament and of the Council on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 (Gas Regulation) adopted
November 2011	Start of operations of Nord Stream 1 pipeline
14 September 2012	Feasibility study for Nord Stream 2 pipeline (NEXT Feasibility Study) finalised
November 2012	Nord Stream 1 AG commences the consultation process under the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) by issuing a draft project information document to the countries through whose territory or EEZ the Nord Stream 2 pipeline passes (i.e. Russia, Finland, Sweden, Denmark and Germany)
February 2013	Russia, Finland, Sweden, Denmark and Germany discuss the draft project information document and the procedures for the project under the Espoo Convention with Nord Stream 1 AG
March 2013	Nord Stream 1 AG submits the final Project Information Document (PID) to Russia, Finland, Sweden, Denmark and Germany
April 2013	PID submitted to the remaining Baltic Sea states (i.e. Estonia, Latvia, Lithuania and Poland)
15 July 2015	Incorporation of NSP2AG
[REDACTED]	[REDACTED]
2015-2017	NSP2AG conducts environmental impact assessments in preparation for permitting applications
November 2015	Draft letter from Ministry of Economy of the Slovak Republic on behalf of the ministers responsible for the energy policies of the Slovak Republic, the Czech Republic, Hungary, Poland, Lithuania, Latvia, Estonia, Romania, Bulgaria and Greece to European Commission Vice-President Šefčovič, calling for a review and assessment of potential negative impacts associated with Nord Stream 2
March 2016	Letter from Prime Ministers of the Czech Republic, Croatia, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia to European Commission President Juncker, expressing their concerns regarding Nord Stream 2
[REDACTED] 2016	NSP2AG Extraordinary General Meeting approves award of Line Pipes Contracts
[REDACTED] 2016	NSP2AG Board Resolution approves the finalisation and execution of Line Pipes Contracts
[REDACTED] 2016	NSP2AG enters into Line Pipes Contracts with style="background-color: black; color: black;">[REDACTED]
August 2016	Start of production under Line Pipe Contracts





Date	Description
████████ 2017	NSP2AG enters into Amendment 1 of Coating & Logistics Contract with ██████████
27 September 2017	EU Council Legal Service issues opinion concluding that the EU did not itself have "exclusive competence" to conclude a treaty between the EU and Russia concerning the operation of Nord Stream 2 and that the justifications provided by the European Commission could not form the basis for a so-called "shared competence", and that the Gas Directive could not be interpreted to apply to offshore import pipelines
8 November 2017	European Commission issues Proposal for a Directive amending the Third Gas Directive (COM(2017) 660 final) and the accompanying Staff Working Document assessing the proposed amendments to the Third Gas Directive (SWD(2017) 368)
31 January 2018	Start of onshore construction of Nord Stream 2 pipeline in Germany; and NSP2AG receives permit for construction and operation in German territorial waters and the landfall area issued by Mining Agency Stralsund
21-22 March 2018	NSP2AG holds kick-off meeting with Export Credit Agencies (ECAs) relating to the provision of project financing for the Nord Stream 2 project
May 2018	Drilling of microtunnels connecting offshore pipeline with onshore facilities in Germany completed
10 August 2018	NSP2AG submits second permit application in relation to Danish exclusive economic zone to Danish Energy Agency
14 August 2018	NSP2AG has received all the required permits to construct the pipeline, with the exception of that from the Danish Energy Agency
5 September 2018	Start of offshore construction of Nord Stream 2
28 September 2018	Final delivery of line pipes order under Line Pipes Contracts in 2016 (excluding small number of additional pipes ordered in 2019)
████████	██
December 2018	Offshore pipelaying works in German territorial waters completed, subject to an outstanding above-water tie-in completed in August 2019
████████	██
12 December 2018	European Parliament adopts resolution calling for the cancellation of the Nord Stream 2 project
8 February 2019	French-German compromise regarding the Amending Directive approved as formal position of the EU Council
12 March 2019	European Parliament adopts resolution calling for the Nord Stream 2 project to be stopped
4 April 2019	European Parliament approves final text of Amending Directive
12 April 2019	NSP2AG Trigger Letter to the President of the European Commission pursuant to Article 26(1) of the ECT
15 April 2019	NSP2AG submits third permit application in relation to Danish exclusive economic zone to Danish Energy Agency



Date	Description
17 April 2019	Amending Directive adopted by European Parliament and Council of the European Union
3 May 2019	Amending Directive published as Directive (EU) 2019/692 in the Official Journal of the European Union
23 May 2019	Amending Directive enters into force
14 June 2019	NSP2AG note headed "Summary of NSP2AG's legal concerns regarding the Gas Directive Amendment" provided to the European Commission in advance of meeting on 25 June 2019
25 June 2019	Meeting between NSP2AG and EU pursuant to Article 26 of the ECT
July 2019	Final delivery of additional line pipes for amended route in the Danish EEZ under amended Line Pipes Contracts
8 July 2019	NSP2AG letter to European Commission following meeting between NSP2AG and EU pursuant to Article 26 of the ECT
25 July 2019	NSP2AG files application under Article 263 TFEU for annulment of the Amending Directive (Annulment Application)
26 July 2019	European Commission letter to NSP2AG in response to NSP2AG letter of 8 July 2019
6 August 2019	NSP2AG letter to European Commission in response to European Commission letter of 26 July 2019
16 August 2019	Concrete weight coating works completed under Coating & Logistics Contract
26 September 2019	NSP2AG files Notice of Arbitration under the ECT
30 October 2019	NSP2AG receives construction permit for Danish exclusive economic zone issued by Danish Energy Agency
December 2019	Mechanical works in relation to German onshore facilities completed
12 December 2019	German law transposing the Amending Directive comes into force
20 December 2019	US National Defense Authorization Act for Fiscal Year 2020 (NDAA) is signed into law by US President
9 January 2020	NSP2AG applies for derogation concerning the German Section of the North Stream 2 pipeline pursuant to Article 49a of Third Gas Directive (as amended) (Derogation Application)
15 May 2020	Bundesnetzagentur rejects NSP2AG's Derogation Application
20 May 2020	EU General Court finds NSP2AG's Annulment Application inadmissible

Date	Description
15 June 2020	NSP2AG appeals the Bundesnetzagentur's decision on the Derogation Application
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

## APPENDIX 2: GLOSSARY

ACER	Agency for the Cooperation of Energy Regulators, set up as part of the TEP and governed by the Agency Regulation
Agency Regulation	Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing ACER
[REDACTED]	[REDACTED]
Amending Directive	Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending the Third Gas Directive
Annulment Application	NSP2AG's application to the Court of Justice of the European Union under Article 263 TFEU for annulment of the Amending Directive
bcm	Billion cubic metres
[REDACTED]	[REDACTED]
Bundesnetzagentur	German energy regulatory authority
CEER	The Council of European Energy Regulators
Charter	European Energy Charter
[REDACTED]	[REDACTED]
Claimant	NSP2AG
Coating & Logistics Contract	Contract for the concrete weight coating of pipes and their transportation between NSP2AG and [REDACTED] dated [REDACTED] 2016, [REDACTED]
CPS	Constant protection and security, a standard of treatment under international investment law
Derogation Application	NSP2AG's application for derogation concerning the German Section of North Stream 2 pursuant to Article 49a of the Third Gas Directive (as amended by the Amending Directive) dated 9 January 2020
DG	Directorate-General of the European Commission
DG Energy	European Commission's Directorate-General for Energy
DNV	Det Norske Veritas, an international classification, certification and technical assurance and advisory company headquartered in Norway
DNV Certificate	Certificate issued by DNV for projects complying with the DNV Code
DNV Code	Offshore Standard for Submarine Pipeline Systems code, DNV-OS-F101, issued by DNV
ECAs	Export Credit Agencies
ECT	Energy Charter Treaty





IEM	Internal Energy Market
ILC	International Law Commission
█	█
ISO	Independent system operator
ITO	Independent transmission system operator
ITRE	European Parliament's Committee on Industry, Research and Energy
Line Pipes Contracts	Contracts for the delivery of line pipes between NSP2AG with █, respectively, all dated █ 2016
Memorial	NSP2AG's Memorial dated 3 July 2020
█	█
MFN	Most Favourite Nation standard, a standard of treatment under international investment law
NRAs	National Regulatory Authorities
NDAA	US National Defense Authorization Act for Fiscal Year 2020 signed into law on 20 December 2019
NEXT Feasibility Study	Feasibility study prepared by Nord Stream 1 AG on the possibility of a second pipeline project following the completion of Nord Stream 1, referred to as the Nord Stream Extension or NEXT project
Nord Stream 1	The Nord Stream 1 pipeline from Vyborg in Russia to Greifswald in Germany via the Baltic Sea operated by Nord Stream 1 AG
Nord Stream 2	The Nord Stream 2 pipeline that is to run from Ust-Luga in Russia to Lubmin in Germany via the Baltic Sea and be operated by Nord Stream 2 AG
Notice	NSP2AG's Notice of Arbitration dated 26 September 2019
NSP2AG	Nord Stream 2 AG, the Claimant
█	█
OMV	OMV AG, a multinational energy company incorporated in Austria
PAS	Pipeline Application System, a safety feature of Nord Stream 2
PCA	Permanent Court of Arbitration in the Hague, Netherlands
█	█
█	█
PID	Project Information Document published by Nord Stream 1 AG, setting out the anticipated key features of Nord Stream 2
PIG	Pipeline inspection gauge

Pipeline Contract	Pipeline lay and associated works agreement between NSP2AG and [REDACTED] dated [REDACTED] 2017, [REDACTED]
PSS	Pipeline Safety System, a safety feature of Nord Stream 2
Recommendation	European Commission recommendation of 9 June 2017 requesting a Council decision authorising the opening of negotiations on an international agreement between the EU and the Russian Federation on the operation of Nord Stream 2
Respondent	European Union
Second Gas Directive	Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC
[REDACTED]	[REDACTED]
Shell	Royal Dutch Shell plc, a multinational energy company headquartered in the Netherlands and incorporated in the United Kingdom
TANAP	Trans-Anatolian Natural Gas Pipeline, an onshore pipeline transporting gas from Azerbaijan/Georgia through Turkey to the Greek border
TAP	Trans Adriatic Pipeline, a pipeline connecting to TANAP which is currently under construction
TEP	See Third Energy Package
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
Third Energy Package	EU legislation concerning the internal gas and electricity market, including in particular the Third Gas Directive, the Gas Regulation, a regulation which was replaced by the Agency Regulation in 2019, as well as a directive and a regulation concerning the internal market in electricity
Third Gas Directive	Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC
TPA	Third Party Access
Trigger Letter	Letter from NSP2AG to the European Commission dated 12 April 2019
TSO	Transmission system operator
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law 1976
Uniper	Uniper SE, a multinational energy company incorporated in Germany
VCLT	See Vienna Convention
Vienna Convention	Vienna Convention on the Law of Treaties
[REDACTED]	[REDACTED]



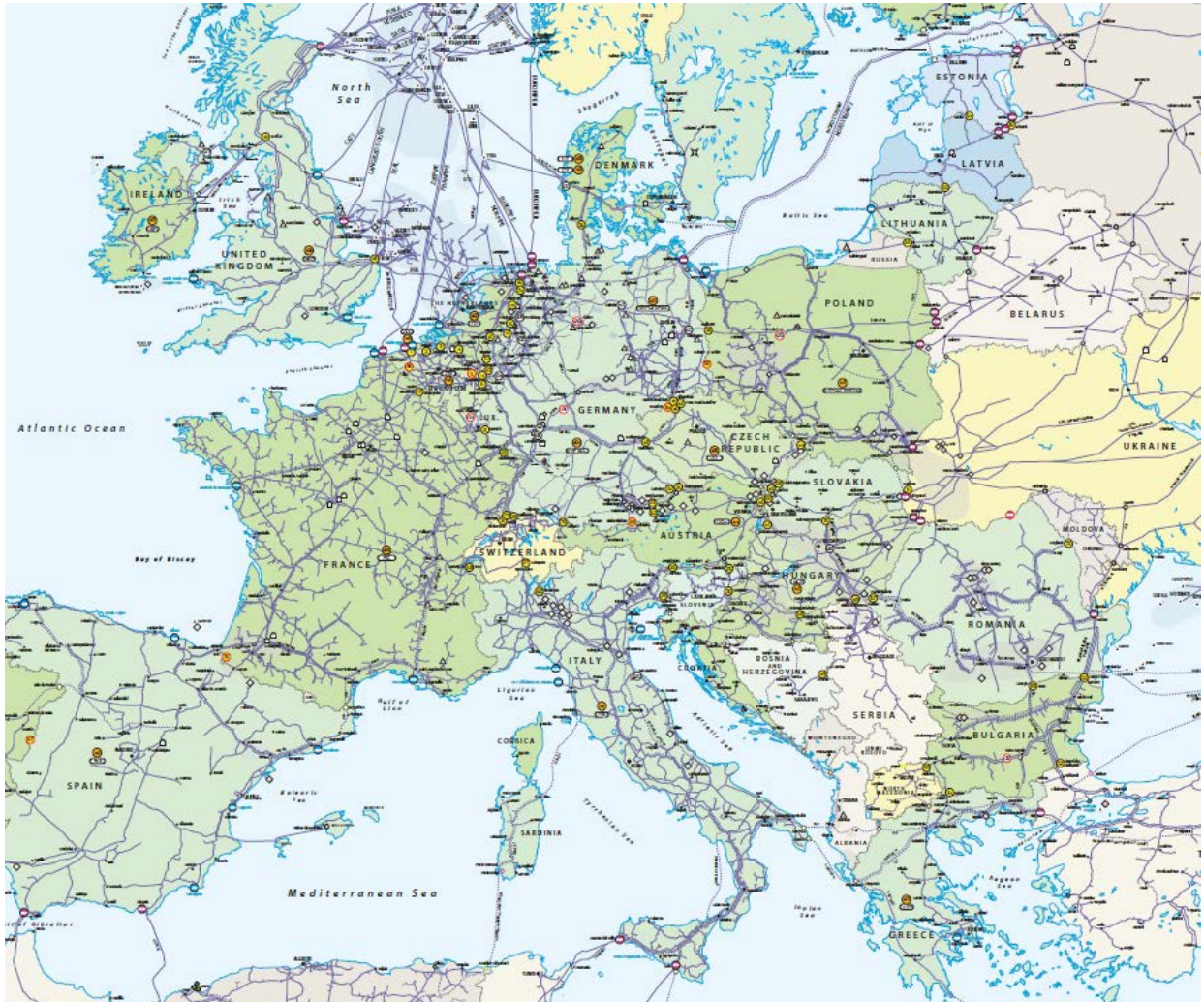
Wintershall



Wintershall Dea GmbH, a multinational energy company incorporated in Germany



**APPENDIX 3: MAP OF EUROPEAN GAS INFRASTRUCTURE, SHOWING OFFSHORE  
IMPORT PIPELINES INTO THE EU**



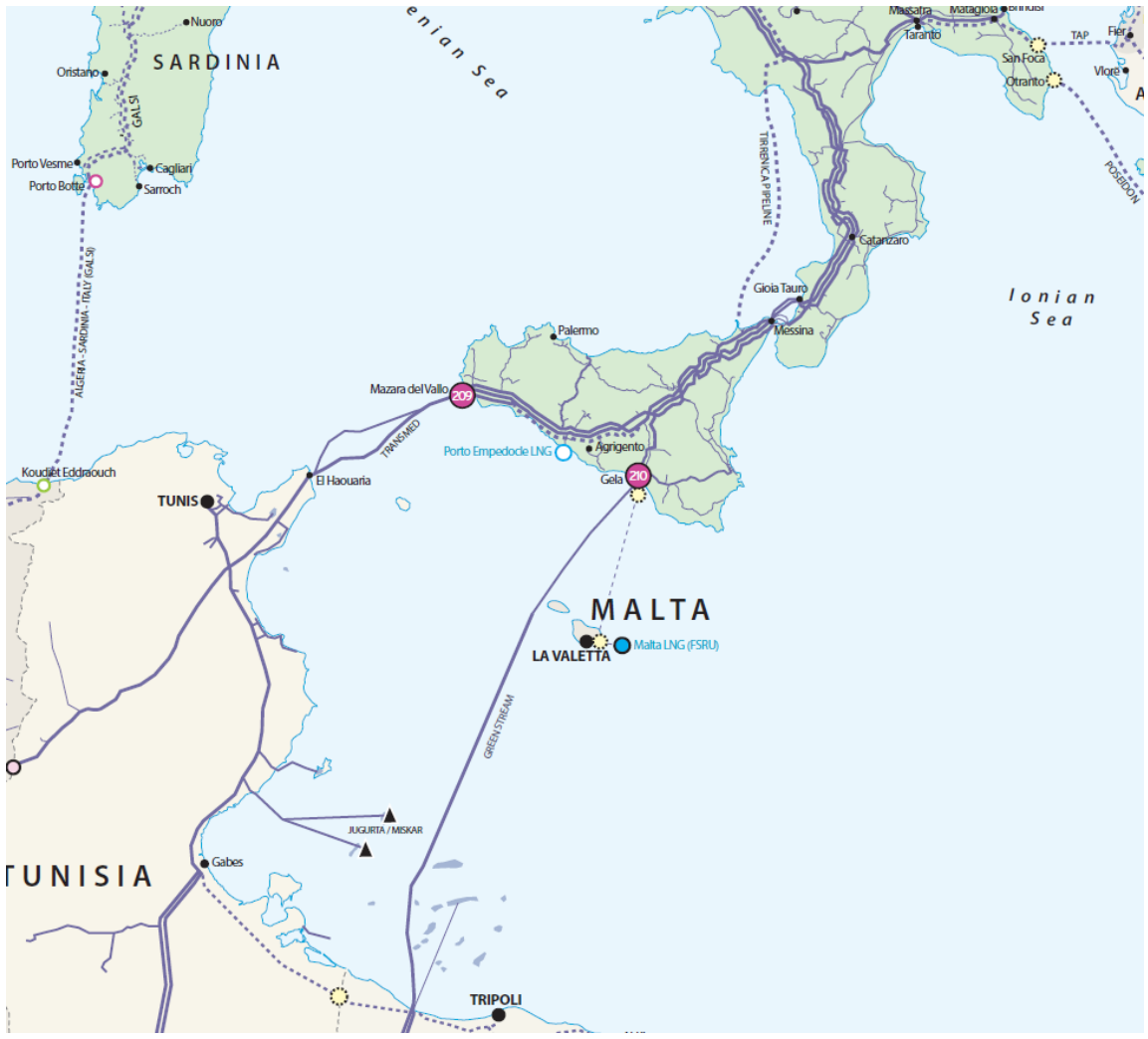
Map 1: European gas infrastructure, also showing import pipelines into the EU<sup>588</sup>

588 Exhibit C-29, ENTSOG map, "The European Natural Gas Network 2019". The full map is also accessible at <https://transparency.entsog.eu/#/map?loadBalancingZones=true>.





Map 2: Subset of Map 1, showing the offshore import pipelines into Germany: Nord Stream 1 and Nord Stream 2



Map 3: Subset of Map 1, showing the offshore import pipelines into Italy: Greenstream and Transmed



Map 4: Subset of Map 1, showing the offshore import pipelines into Spain: Medgaz and Maghreb Europe (MEG)