AN AD HOC ARBITRATION UNDER THE RULES OF ARBITRATION OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, 1976

AND

PURSUANT TO THE ENERGY CHARTER TREATY

BETWEEN

NORD STREAM 2 AG

(Claimant)

- and -

THE EUROPEAN UNION

(Respondent)

CLAIMANT'S SUPPLEMENTARY MEMORIAL ON JURISDICTION AND MERITS

The Tribunal

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I. INTRODUCTION

1. This Supplementary Memorial on Jurisdiction and Merits (the **"Supplementary Memorial"**) is filed by Claimant, Nord Stream 2 AG (the "**Claimant**" or "**NSP2AG**"). The Supplementary Memorial is based on Claimant's previous Memorial's, the latest one being the Reply Memorial & Counter-Memorial on Jurisdiction dated 25 October 2021 (the "**Reply Memorial**") and provides factual and legal updates in relation to the circumstances and developments around the pipeline project of Claimant, which led to the suspension of this arbitration, and which transpired during the suspension. It will explain what happened and the legal relevance thereof.

2. This Supplementary Memorial is also being submitted in Reply to the European Union's Rejoinder on the Merits and Reply Memorial on Jurisdiction dated 22 February 2022 (the "**EU's Rejoinder and Reply Memorial**"). It is being submitted pursuant to the procedural timetable set out in Procedural Order No. 12 dated 16 October 2023. It is accompanied by a witness statement submitted by [redacted] (the **"Second witness statement of [redacted]"**), and an expert report submitted by Swiss Economics SE AG (the "**Second expert report of Swiss Economics**") and 39 exhibits.

3. 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**") and Memorial dated 3 July 2020 (the "**Memorial**") and the Reply Memorial, in the form C-* for factual exhibits, with additional factual exhibits starting at C-288, and in the form CLA-* for legal exhibits, with additional legal exhibits starting at CLA-311. The definitions used herein are the same as those used in the Notice and the Memorial unless otherwise defined or the context so requires.

4. This Supplementary Memorial on Jurisdiction and Merits contains 11 sections in addition to this Introduction:

   i. Section II sets out a summary of Claimant's Supplementary Memorial on Jurisdiction and Merits.

   ii. Section III demonstrates that one line of Claimant's infrastructure remains operable after the incidents of September 2022, and that the other line is reparable.

   iii. Section IV explains that sanctions do not make operation of the undamaged line, nor repair and operation of the damaged line, impossible.

   iv. Section V explains the status of the composition moratorium under Swiss law, which Claimant is currently undergoing, and possible outcomes.

v. Section VI explains the European Court of Justice's interpretation of the Amending Directive and demonstrates, that this interpretation strongly supports Claimant's case in this arbitration.

vi. Section VII demonstrates that the catastrophic impact of the Amending Directive on Claimant and its investment has been confirmed by reality.

vii. Section VIII explains that the EU remains in breach of its obligations under the ECT.

viii. Section IX further supports that the fork-in-the-road provision in Article 26 of the ECT has not been triggered.

ix. Section X further supports that the Tribunal has jurisdiction *ratione personae*.

x. Section XI further supports that the Tribunal has the power to award a restitutionary remedy and that its exercise of that power is justified in this case.

xi. Section XII addresses the relief claimed by Claimant in this arbitration with some minor updates as compared to Claimant's Reply Memorial.

5. Annex 1 contains the lists of the exhibited documents.

II. SUMMARY OF CLAIMANT'S SUPPLEMENTARY MEMORIAL ON JURISDICTION AND MERITS

6. In 2019, Respondent amended the EU Gas Directive 2009[1] in a way, which on paper appears as a general act. In reality, this Amending Directive[2] is a *lex-Nord Stream 2*. It singles out Claimant and discriminates it compared to all other offshore import pipelines from third countries. It adversely impacts Claimant without practically serving any public policy ground. That conduct is unreasonable and far from being proportionate.

7. The adoption and enactment of the Amending Directive was, and is, in clear breach of the ECT. The Amending Directive is of no public benefit. It only adversely impacts Claimant. Claimant is not aware of any other case where the EU legislator has adopted a seemingly neutrally worded directive with the sole objective of complicating or preventing a single investment project. To pretend that the objective of the Amending Directive is something else is fanciful. No court or tribunal can accept such a fiction.

8. Consequently, no alleged and pretended justification of the Amending Directive should be accepted by the Tribunal. There is no justification for the Amending Directive neither during the legislative process nor at the time of the adoption in 2019, or indeed thereafter. No developments after 2019 can retroactively justify Respondent's breaches of the ECT. No development of any kind subsequent to 2019 can serve as an excuse for Respondent's misconduct by adopting the Amending Directive and thereby breaching the ECT.

9. Claimant has an unchanged and continuing interest in the outcome of these arbitral proceedings. Given the dramatic and catastrophic impact of the Amending Directive on Claimant, it is of utmost importance for Claimant, for the value of its asset and for the future of this asset to obtain an award in this arbitration.

10. Claimant has two pipelines, the first line became operable in October 2021, the second line became operable in December 2021. After the incidents in September 2022 Claimant has still one line that is intact and operable. The other line is damaged. A repair is feasible. The second line would then also be operable again.

11. Sanctions, be they US, Swiss, EU or UK sanctions, do not make operation of the undamaged line, nor repair and operation of the damaged line, impossible. As a matter of fact, the EU continues being supplied with natural gas imports from Russia. A future market for import of natural gas from Russia to the EU is possible, irrespective of the

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

[2] **Exhibit CLA-3,** Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, OJ L 117 (the Amending Directive).

criticism that such a view may currently generate. Moreover, any steps that may be undertaken to reduce gas imports from Russia may well change as the geopolitical developments unfold.

12. The timeline for any start of operation is difficult to predict at this point. Even if a start of operation may not be expected anytime soon, this option exists, and is realistic. That is what matters. Given that Claimant is technically capable to transport gas, and given the possibility that the geopolitical situation may change, Claimant's future is open. It can turn out to be negative for Claimant, but it can also turn out to be positive. Claimant's corporate objective is to transport gas. Claimant stands ready to do so, as and when required.

13. There are three possible outcomes of the composition moratorium which Claimant is currently undergoing. An ordinary composition agreement, or a composition agreement with assignment of assets, or the initiation of bankruptcy proceedings. As things stand, such initiation, if it ever comes to that, is not to be expected before January 2025. In each of the three scenarios it is very likely that Claimant will continue to be party to this arbitration beyond the conclusion of the current phase of this arbitration. It is therefore of utmost interest for Claimant, and for the Administrator, appointed by court for the composition moratorium, to obtain an arbitral award covering the current phase of the arbitration. It is particularly important since the existence of the Amending Directive has a decisive impact on the value of Claimant's assets.

14. The interpretation of the Amending Directive by the European Court of Justice (ECJ), both by the Advocate General and by the Grand Chamber, strongly supports the case of Claimant in this arbitration. This is of decisive importance for the outcome of the arbitration.

15. The ECJ Judgment made it very clear that the Amending Directive inevitably affects Claimant by changing its legal status. It made very clear, that those effects on Claimant did not exist prior to the adoption of the Amending Directive. It also made very clear, that the Amending Directive treats Claimant differently from all other pipelines. The ECJ Judgment also confirmed that this different treatment is fully attributable to Respondent and not to Member States, such as Germany.

16. The main consequence for this arbitration of the ECJ Judgment is that there is no longer any need for the Tribunal to concern itself with the correct interpretation of the Amending Directive. The Tribunal now has an excellent, well substantiated and authoritative interpretation of the Amending Directive by the ECJ, the highest court within the EU legal system. This provides the Tribunal with everything it needs for the correct understanding and interpretation of the Amending Directive. This must serve as the basis for the Tribunal in its analysis of the breaches of the ECT.

17. The catastrophic impact of the Amending Directive on Claimant and its investment, as explained in previous submissions, has been confirmed by factual developments. Claimant is not able to generate transport revenues due to the Amending Directive. The reason for that is as follows: [redacted]

18. The factual and legal developments since February 2022 have only to a limited extent altered the general dramatic economic impact of the Amending Directive on Claimant. Those developments have had only a limited, and hypothetical, impact on Claimant's entitlement to obtain transport revenues, assuming that the Amending Directive had not eliminated Claimant's revenue stream. Consequently, the Amending Directive continues to be the reason for Claimant's lost revenues. This loss of revenue translates into substantial amounts. This situation can, and will lead Claimant into bankruptcy, if no solution can be found. This is the reality.

19. [redacted]

20. Respondent remains in breach of its obligations under the ECT. Respondent has breached various categories of the FET standard laid down in Art. 10(1), of the protection standard laid down in Art. 10(7), and of the protection against expropriation laid down in Art. 13. Nothing that has transpired since the commencement of this arbitration – either from a factual or legal perspective – has changed this. No developments after 2019 can retroactively justify Respondent's misconduct. Respondent remains in breach of the ECT. Indeed, the conclusions of the ECJ confirm and reinforce the arguments previously put forward by Claimant.

21. Claimant reiterates that the Tribunal has jurisdiction. The fork-in-the road provision in Article 26 of the ECT has not been triggered. The factual developments during the suspension of the arbitration do not give rise to any re-consideration of this issue. Furthermore, the Tribunal has jurisdiction *ratione personae*. As confirmed by the ECJ, the responsibility for the impacts of the Amending Directive on Claimant must be attributed to Respondent. Consequently, the breaches of the ECT and the ensuing damage result from Respondent.

22. In summary, no factual and legal developments having occurred shortly before the suspension of this arbitration and thereafter have altered the rationale for Claimant's case as presented in previous submissions. On the contrary, the ECJ's clear interpretation of the Amending Directive strongly supports what has been - from the very beginning of this arbitration - the heart and soul of Claimant's case in this arbitration.

23. For all the reasons set out in this Supplementary Memorial and in previous submissions, Claimant continues to ask the Tribunal to apply the principle of full reparation by restitution. Claimant seeks an order (among other things) 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 Claimant and its asset.

III. ONE LINE OF CLAIMANT REMAINS OPERABLE AFTER THE INCIDENTS OF SEPTEMBER 2022, AND THE OTHER LINE OF CLAIMANT IS REPARABLE

III.1 Introduction and Claimant's previous submissions

24. Claimant's first update in this Supplementary Memorial is dedicated to the factual status of Claimant's infrastructure, which can be summarized as follows: Claimant has two pipelines, the first line became operable in October 2021 upon mechanical completion, with the actual commissioning date on 30 September 2021. The second line became operable in December 2021 upon mechanical completion, with actual commissioning date on 15 December 2021. After the incidents in September 2022 Claimant has still one line that is intact and thus operable. The other line is damaged and would need to be repaired in order to be operated. Such repair is possible.

25. With regard to the technical status of Claimant's assets as of 2021 until the end of 2022 and thereafter, Claimant explained in its letter dated 24 November 2022 as follows:[3]

> *"The Pipeline has been operable since October 2021 and in fact commercial operations could have started at that time, had it not been for the imposed certification requirements in Germany which are a direct consequence of the Amending Directive which is the focus of the arbitration. It is therefore essential for Claimant to have the application of the relevant provisions of the Amending Directive removed with respect to Claimant and the Pipeline.*
>
> *… At this point in time, the extent of the damage caused by the likely sabotage is being assessed with a view to understanding what is needed to repair on the one damaged line (of two pipelines) and to then define the way forward in that regard. There is every reason to believe that the Pipeline may be repaired and be technically operable again. Furthermore, it is quite possible that one section of the Pipeline – Section B – is unaffected by the likely sabotage and thus immediately operable."*

26. Then, in a letter dated 1 February 2023, Claimant added:[4]

> *"As mentioned therein – and in Claimant's Reply Memorial of 25 October 2021 (para 247) – Claimant was ready to start commercial operations in October 2021. The only thing that prevented Claimant from doing so was the EU certification procedure in Germany as imposed on Claimant by the Amending Directive.*
>
> *From a technical and safety point of view Claimant had obtained all required technical certificates and permissions. Claimant was ready to go.*

[3] **Exhibit C-288**, Claimant's letter dated 24 November 2022, p 5.
[4] **Exhibit C-289**, Claimant's letter dated 1 February 2023, p 5.

The operational readiness of the Pipeline is confirmed by relevant technical certificates: Certificate of Conformity for Line B, dated 11 October 2021[5] *and Certificate of Conformity for Line A, dated 15 December 2021 (with temporary pressure limit), updated 24 February 2022.*[6]

Hence, all was in place allowing Claimant to start commercial operations, but for the EU certification requirement."

27. This remains correct, with one clarification regarding the dates: The first Certificate of Conformity for line B dated 30 September 2021 and was updated on 11 October 2021. Whilst the certification situation based on the Amending Directive remains unchanged, i.e. it is still 'on hold', Claimant has assessed the possibility to start gas transportation after the incidents of September 2022. This assessment includes technical considerations, cost considerations and timing considerations. To this end, [redacted] who had delivered a first witness report accompanying Claimant's Memorial dated 3 July 2020, prepared a second witness report analysing these aspects. His statement is exhibited to this Supplementary Memorial.

III.2 Existing condition of Claimant's pipeline system

28. As further detailed by [redacted] in his second witness statement,[7] Claimant's pipeline system is currently gas filled, except for a certain length of Line A local to the leak locations which has flooded with seawater. The pipeline system includes the two offshore pipelines and the connected onshore piping in the onshore facilities. The pipeline system is isolated from upstream and downstream infrastructure by closed valves.

29. Line A was damaged in September 2022 during incidents in two locations in the Exclusive Economic Zones (EEZ) of Denmark and Sweden. Based on a survey performed by Claimant in Q1 2023 to assess the damage, the pipeline has ruptured at the two locations where gas release was witnessed. The damages are local and the pipeline either side of and in between the damage locations is intact and undamaged.

30. The open pipeline ends at both damage locations have allowed seawater to enter the pipeline up to a point where the internal gas pressure equalised with the external water pressure at the rupture location. [redacted]

[5] **Exhibit C-289**, Certificate of Conformity for Line B dated 11 October 2021, attached as Appendix No 2 to Claimant's letter dated 1 February 2023.
[6] **Exhibit C-289**, Certificates of Conformity for Line A dated 15 December 2021 and updated 24 February 2022, attached as Appendices 3 and 4 to Claimant's letter dated 1 February 2023.
[7] [redacted]

[redacted]

31. Line B is evaluated to be technically operable following completion of some technical preparations. During the damage inspection survey for Line A, an inspection of Line B was performed in the same area. The results show that minor local external damage has occurred to the Line B pipeline coatings at a point adjacent to the Line A damage location in the Danish EEZ, but not at the corresponding location in the Swedish EEZ, or elsewhere.

32. Claimant's onshore facilities in Russia and Germany, where the pipelines start and end, and where connections are made to upstream and downstream infrastructure, continue to function to isolate the offshore pipeline gas from upstream and downstream infrastructure and to allow monitoring of the pressure in the system. As described by [redacted] in further detail,[8] all hardware and software systems are in place. They are either operable, or they can be put back into operation. The same applies for the control centres in Switzerland.

III.3 **Feasibility of starting operations**

33. [redacted] explains in further detail,[9] that in order to initiate gas transportation starting from the current situation, certain preparatory activities will be required. Line A is damaged, and an offshore repair would be necessary before gas transportation can commence via this pipeline. Line B is intact and preparation for gas transportation could start immediately. Line A and Line B are physically independent and gas transportation through Line B is possible without the repair of Line A.

34. Because of the damage on Line A and the time required to repair and recommission the pipeline it is expected that gas transportation would first commence through Line B, with Line A to follow once repaired. [redacted].[10] [redacted].[11]

8 [redacted]
9 [redacted]
10 [redacted]
11 [redacted]

35. The concept and all preparatory activities for the start of operations are described in detail in [redacted].[12] Start of operations of Line B would not require repair, but some technical preparations.

36. [redacted]

37. [redacted]

The technology and methodology for such a repair is well proven in the offshore industry and is feasible to employ on Claimant's Line A. The Line A repair would be performed independently from, and would run in parallel to, activities to bring Line B into operation and being operated.

III.4 [redacted]

38. [redacted][13] [redacted].

[redacted]

III.5 [redacted]

39. [redacted]

[12] [redacted]
[13] [redacted]

[redacted]

III.6 **Conclusion**

40. [redacted]

IV. SANCTIONS DO NOT MAKE OPERATION OF CLAIMANT'S UNDAMAGED LINE, NOR REPAIR AND OPERATION OF CLAIMANT'S DAMAGED LINE, IMPOSSIBLE

IV.1 Introduction

41. Sanctions were in the past and are at present of relevance to Claimant. As Claimant described previously, it found itself in a particularly difficult and unprecedented situation because of the US sanctions launched in the wake of the developments at the end of February 2022. These measures paralyzed Claimant for a period of time, which was the reason for the temporary suspension of these arbitral proceedings.[14] More generally, US sanctions have of course created certain difficulties for Claimant, including concerns among banks and contractors.[15]

42. However, as Claimant will show below, none of the sanctions regimes at issue for Claimant, be that in Switzerland, the EU, the UK or the US, prevent Claimant from carrying out commercial activities. They may complicate Claimant's activities, but they do not make them impossible.

43. These activities include the continuation of this arbitration, which has been confirmed by the Tribunal.[16] The applicable sanctions regime would also not prevent Claimant from performing other activities, including the commercial operation of the pipeline, i.e. gas transport to the EU. This means that in the current technical circumstances the intact pipeline could start gas transportation without this being made legally impossible by any applicable sanctions regime. Also Claimant's damaged line could be repaired and thereafter operated without that being made legally prohibited by existing sanctions.

IV.2 Status of sanctions prior to February 2022 and Claimant's related submissions

44. With regard to the sanctions' situation prior to February 2022, Claimant has explained, that – and why – extraterritorial, secondary US sanctions like the Countering America's Adversaries Through Sanctions Act (CAATSA), which was enacted in August 2017, did not prevent Claimant from completing the pipeline, and that those sanctions would not prevent Claimant from starting operations of the pipeline, i.e. transporting gas to the EU. However, such sanctions complicated Claimant's commercial activities.[17]

45. The same applies with respect to the Protecting Europe's Energy Security Act (PEESA), which was enacted as part of the National Defense Authorization Act (NDAA) in December 2019 for Fiscal Year 2020, imposing additional sanctions associated with

[14] **Exhibit C-289**, Claimant's letter dated 1 February 2023, p 4.
[15] **Exhibit C-289**, Claimant's letter dated 1 February 2023, p 5.
[16] *Nord Stream 2 AG v. The European Union*, PCA Case No. 2020-07, Procedural Order No. 12 dated 16 October 2023, para 25.
[17] Claimant's Reply Memorial dated 25 October 2021, in particular paras 378-381; and **Exhibit C-289**, Claimant's letter dated 1 February 2023, p 5.

Claimant's project. As explained,[18] these sanctions targeted the vessels used in pipe-laying on the project in water depths below 100 feet. As a consequence, Allseas - the company contracted under the Pipelay Contract to conduct the pipe-laying work for Claimant – announced on 21 December 2019 that it had stopped work. At this point around 150 kilometres of pipe remained to lay. This notwithstanding, Claimant's first line was in fact completed in September 2021.

46. Finally, the Protecting Europe's Energy Security Clarification Act 2020 ("PEESCA") was enacted on 1 January 2021 as part of the NDAA for Fiscal Year 2021. PEESCA broadened PEESA's scope for the imposition of sanctions to target other activities and services, e.g. pipe laying activities, certification/inspection services and underwriting services. Again, Claimant's first line was in fact completed in September 2021. The pipeline was thereafter filled with gas and was ready for commercial operations.[19]

47. As regards this US secondary sanctions framework described above and its effect on Claimant's pipeline, Claimant has explained[20] that such statutes enacted by the U.S. Congress legally do not have extra-territorial applicability and that such sanctions have been in place since 2017, 2019 and 2021, respectively, without creating any problems for the proper conduct of this arbitration. Claimant reiterates once again,[21] as also pointed out e.g. by the President of the European Commission, Ms Ursula von der Leyen, already in 2020, that such US secondary sanctions violate both international and EU law.[22]

48. To conclude, US secondary sanctions targeting Claimant's activities have been in place since 2017, 2019, and 2021, respectively. They did not prevent completion of the project. As a matter of fact, construction of Claimant's first line was, with some delay, completed in September 2021 and thereafter filled with gas and was ready for commercial operations.[23]

IV.3 **Status of sanctions subsequent to February 2022 and Claimant's related submissions**

49. During the suspension of the arbitral proceedings, Claimant explained that US sanctions do not prevent Claimant's activities, nor do EU or Swiss sanctions apply to Claimant's activities. Claimant stated in that context, that it is irrelevant whether the sanctions regime creates additional hurdles for Claimant commercially to operate the Nord Stream 2 pipeline.[24] In the following, Claimant will explain, that whilst sanctions exist, none of

[18] [redacted]
[19] See paras 24-26 above.
[20] **Exhibit C-288**, Claimant's letter dated 24 November 2022, p 4.
[21] **Exhibit C-289**, Claimant's letter dated 1 February 2023, pp 4-5.
[22] **Exhibit C-289**, Letter from European Commission dated 3 November 2020, attached as Appendix 1 to Claimant's letter dated 1 February 2023.
[23] See paras 24-26 above.
[24] **Exhibit C-288**, Claimant's letter dated 24 November 2022, pp 3-4.

these sanctions ultimately prevent Claimant from operating and from transporting gas at some point – if only the amended Gas Directive were not applicable to Claimant.

US Sanctions

50. As already explained,[25] the US sanctions situation for Claimant since February 2022 to date is as follows: On 23 February 2022, Claimant and its former CEO Matthias Warnig were included in the OFAC's Specially Designated Nationals (SDN) List pursuant to Executive Order 14039. Consequently, assets *in the US* are blocked and transactions *with a US nexus* are prohibited (i.e. assets within US territory, assets of a US nature, transactions in US dollars, etc.). US persons are generally prohibited from dealing with an SDN (this includes US banking services, US dollar transactions and other commercial/financial dealings in or with the US) and must block any property with a US nexus in their possession or under their control in which an SDN has an interest. SDNs are denied entry into the US.

51. The above is confirmed by US government sources. In relation to the SDN list the following explanations are given: [26]

> *"As part of its enforcement efforts, OFAC publishes a list of individuals and companies owned or controlled by, or acting for or on behalf of, targeted countries. It also lists individuals, groups, and entities, such as terrorists and narcotics traffickers designated under programs that are not country-specific. Collectively, such individuals and companies are called "Specially Designated Nationals" or "SDNs." Their assets are blocked and U.S. persons are generally prohibited from dealing with them."*

52. More generally in relation to OFAC regulations, the focus on the US nexus becomes clear: [27]

> ***"11. Who must comply with OFAC regulations?***
>
> *U.S. persons must comply with OFAC regulations, including all U.S. citizens and permanent resident aliens regardless of where they are located, all persons and entities within the United States, all U.S. incorporated entities and their foreign branches. In the cases of certain programs, foreign subsidiaries owned or controlled*

[25] **Exhibit C-288**, Claimant's letter dated 24 November 2022, p 3.
[26] **Exhibit C-290**, Office of Foreign Assets Control of USA website, "Specially Designated Nationals List – Data Formats & Data Schemas" (last accessed on 26 January 2024 at https://ofac.treasury.gov/specially-designated-nationals-list-data-formats-data-schemas), last update 25 January 2024.
[27] **Exhibit C-291**, Office of Foreign Assets Control of USA website, FAQ topic page, "Basic Information on OFAC and Sanctions" (last accessed on 17 January 2024 at https://ofac.treasury.gov/faqs/topic/1501), 15 January 2015.

by U.S. companies also must comply. Certain programs also require foreign persons in possession of U.S.-origin goods to comply."

53. More specifically in the context of US sanctions in relation to certain Russian energy export pipelines, the following is set out, again demonstrating the focus on a US nexus:[28]

> *"**921. What is the purpose of Executive Order (E.O.) of August 20, 2021, "Blocking Property with Respect to Certain Russian Energy Export Pipelines"?***
>
> *… Among other things, E.O. of August 20, 2021 enables Treasury to promulgate regulations and provides for blocking of PEESA-designated persons without the exception relating to the importation of goods in Section 7503(e) of PEESA. All property and interests in property of persons designated pursuant to E.O. of August 20, 2021 that are or come within the United States or the possession or control of U.S. persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them. Additionally, entities owned 50 percent or more, individually or in the aggregate, directly or indirectly, by one or more blocked persons are also blocked."*

54. It is also confirmed in legal writing, that US sanctions apply primarily to US persons, whether operating inside or outside US territory. In extension of this rule, liability for non-US companies may only be established e.g. when the processing of US-dollar transactions involving sanctions entities is at stake:[29]

> *"US sanctions apply primarily to US persons, whether operating inside or outside US territory.[91] This includes the US branches of non-US parent companies, and can includes majority-owned foreign subsidiaries of US companies. However, OFAC has also pursued non-US entities for sanctions violations where the connection to the US is less clear. In most of these cases, liability for non-US companies is established via one of two routes: (i) where the non-US firm is found to have processed US-dollar transactions involving sanctioned entities; or (ii) where the non-US firm is found to have caused a US firm to engage in prohibited conduct (usually the processing of US-dollar transactions involving sanctions entities).*
>
> *[91] See also ch 4 for a detailed discussion of the jurisdiction and extra-territoriality of US sanctions regimes."*

55. Claimant's activities have no US nexus. Claimant could thus start gas transport without triggering any of the above-mentioned consequences. Respondent's statements, e.g.

[28] **Exhibit C-292**, Office of Foreign Assets Control of USA website, Frequently asked questions, "Russian Harmful Foreign Activities Sanctions" (last accessed on 17 January 2024 at https://ofac.treasury.gov/faqs/921), 20 August 2021.
[29] **Exhibit CLA-311**, *Gordon/Smyth/Cornell,* Sanctions Law, 2019, (extract) para 11.50.

in its letter of 16 December 2022 to the Tribunal, suggesting that US primary sanctions (the SDN listing) would affect Claimant, are simply not correct.[30]

56. No new primary or secondary sanctions have been imposed in relation to Claimant since February 2022.

EU and Swiss sanctions

57. No sanctions are imposed on Claimant under the current EU or Swiss sanctions regimes. The legal situation is as follows:

58. Under Swiss law, there is no statutory basis for US sanctions to be directly applicable or enforceable in Switzerland. The Swiss Federal Council has not enacted any ordinance based on the Swiss Embargo Law (SR 946.231) that would make the present US sanctions applicable in Switzerland, nor does Article 19 of the Swiss Private International Law[31] mandate the consideration or direct application of US secondary sanctions in Switzerland.

59. The Swiss sanctions regime follows the EU's sanctions regime.[32]

60. As regards the EU sanctions regime, Art. 5aa of EU Regulation 833/2014[33] sets out, that it is prohibited to do business directly or indirectly with legal persons, entities or bodies established in Russia that are listed in Annex XIX of the Regulation. This also applies to their subsidiaries, provided that they are established outside the European Union and are directly or indirectly owned by the entities listed in Annex XIX by more than 50%. The prohibition also applies to entities acting on behalf of or at the direction of one of the aforementioned organizations.

61. Neither Claimant nor its shareholder (including the ultimate shareholder) is listed in Annex XIX. Consequently, Art. 5aa does not apply to Claimant. It is only the company Gazprom Neft which is listed in Annex XIX of the Regulation. The business activities of that company include production of fuels, lubricants, bitumens, aircraft refuelling and filling-stations development. Gazprom Neft is not involved in the natural gas business.

[30] **Exhibit C-289**, Claimant's letter dated 1 February 2023, pp 4-5; and **Exhibit C-288,** Claimant's letter dated 24 November 2022, pp 3-4.
[31] **Exhibit CLA-312**, Federal Act on Private International Law (PILA), Art. 19 (extract).
[32] **Exhibit C-293**, Portal of the Swiss government, "Switzerland adopts EU sanctions against Russia" (press release accessible at https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-87386.html), 28 February 2022.
[33] **Exhibit CLA-313,** Council Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (document accessible at https://eur-lex.europa.eu/eli/reg/2014/833/oj/eng), 31 July 2014.

62. It can be inferred from Article 3(3) of EU Regulation 833/2014[34] that the transportation of fossil fuels, in particular natural gas, from Russia to the European Union is generally permitted. According to Art. 3m, a trade ban, i.e. a ban on the purchase, import or transfer, only applies to crude oil or petroleum products in accordance with Annex XXV of the Regulation. As a result, the transport of natural gas via Claimant's pipeline is therefore compatible with the EU sanctions regime.

63. On 9 June 2022, the Swiss State Secretariat for Economic Affairs (SECO) confirmed by email that Nord Stream 2 AG is not listed in "*Anhang 8 der Verordnung über Massnahmen im Zusammenhang mit der Situation in der Ukraine (SR 946.231.176.72)*" (Appendix 8 to Swiss Ordinance about the situation in Ukraine dated 04.03.2022).[35] SECO renewed this confirmation by email of 4 January 2024.[36]

64. No other economic or trade restrictions under Swiss or EU sanctions regimes are in place which would make Claimant's activities impossible.

IV.4 **Sanctions do not prevent Claimant from going into commercial gas transport operations**

65. As a consequence of the above, Claimant can repair and operate the damaged line without sanctions making this impossible. At this point, Claimant wishes to pre-empt the expectation expressed by the Respondent that, should Claimant attempt to repair Claimant's damaged line and/or to start commercial operations, there is little doubt that the US authorities will respond with sanctions.[37]

66. Claimant does so by referring to the Tribunal's words in its Procedural Order No. 11 dated 14 July 2023:[38]

> *"The main thrust of the Respondent's argument is that the Claimant would be unable to operate the NS2 Pipeline as a result of US sanctions, economic considerations, and damage to the NS2 Pipeline, or would choose not to operate the NS2 Pipeline for geopolitical reasons regardless of the outcome of this arbitration. The Tribunal finds that these expectations involve a significant degree of speculation, including on matters of fact, and may touch upon issues that are part of the substantive aspects of this proceeding. The geopolitical situation may change, and the NS2 Pipeline may prove to be reparable."*

[34] **Exhibit CLA-313,** Council Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (document accessible at https://eur-lex.europa.eu/eli/reg/2014/833/oj/eng), 31 July 2014.
[35] **Exhibit C-288**, Email from Swiss State Secretariat for Economic Affairs to Claimant dated 09 June 2022, attached as Appendix 3 to Claimant's letter dated 24 November 2022.
[36] **Exhibit C-294**, Email from Swiss State Secretariat for Economic Affairs to Claimant dated 4 January 2024.
[37] **Exhibit C-295**, Respondent's letter dated 16 December 2022, para 128.
[38] *Nord Stream 2 AG v. The European Union*, PCA Case No. 2020-07, Procedural Order No. 11 dated 14 July 2023, para 89.

IV.5 A future market for the import of natural gas from Russia to the EU is possible

67. A prerequisite for the transport of natural gas by Claimant is of course, that there will be a market for natural gas and corresponding pipeline gas transport from Russia to the EU in the future. Future gas transport activities will also depend on the geopolitical situation.

68. It is important to understand – and Claimant will show – that the EU continues being supplied with natural gas imports from Russia at this point in time. The ongoing natural gas import from Russia to the EU includes pipeline gas, albeit declining, as well as liquefied natural gas (LNG), which has increased.

Current natural gas pipeline imports from Russia to the EU

69. As regards natural gas **pipeline** imports from Russia to the EU, to date the following natural gas pipelines from Russia to the EU remain active, based on statistics of the Bundesnetzagentur:[39]

    (i) Ukraine via one route. The transit flows have been stable, supplying mainly Austria, Italy, Slovakia, Moldova and potentially also Poland, Slovenia, Croatia, Hungary, Romania.[40]

    (ii) TurkStream, one of its lines is feeding into its branch via Bulgaria & Serbia; the other line feeds Turkey. TurkStream has become the major route for Russian gas supplies, supplying mainly Hungary & Serbia, potentially also Bulgaria, Romania, Greece, North Macedonia and Bosnia Herzegovina.

70. The transport volumes on a weekly basis can be viewed in **Exhibit C-298**.[41]

71. Based on a forecast prepared by the International Energy Agency (IEA), the supply of Russian pipeline gas to the EU will continue from 2025 onwards.[42] However, there is no need to speculate further into the future at this point. Suffice it to note, that as a matter of fact, natural pipeline gas continues to be transported from Russia to the EU.

[39] **Exhibit C-296**, Bundesnetzagentur website, "Gasimporte in GWh/Tag" (last accessed on 17 January 2024 at https://www.bundesnetzagentur.de/DE/Gasversorgung/aktuelle_gasversorgung/_svg/Gasimporte/Gasimporte.html), last update 16 January 2024.

[40] See also in this regard, **Exhibit C-297**, Centre on Global Energy Policy at Columbia (SIPA) article, "Q&A Russian Gas Transit through Ukraine" (last accessed on 17 January 2024 at https://www.energypolicy.columbia.edu/qa-russian-gas-transit-through-ukraine/), 3 October 2023.

[41] **Exhibit C-298**, Statistic by Statista, "Natural gas import volume from Russia in the European Union (EU) and the United Kingdom (UK) from week 1, 2021 to week 36, 202, by exporting route" (last accessed on 17 January 2024 at https://www.statista.com/statistics/1331770/eu-gas-imports-from-russia-by-route/), September 2023.

[42] **Exhibit C-299**, Report by International Energy Agency, "Medium-term Gas Report 2023" (report accessible at https://www.iea.org/reports/medium-term-gas-report-2023), October 2023, p 12.

Public discussions about the option to transport gas through Claimant's operable line of NSP2AG

72. As described above, Claimant could start to transport gas through its operable pipeline on short notice, [redacted].[43] However, the Amending Directive would make that impossible. This has lately been confirmed in the context of an official information request from a member of the German Parliament (MP) to the German Government. The response to the request was that such a scenario was impossible due to the lack of certification – which, of course, is a requirement following from the Amending Directive. The MP asked:[44]

> *"In welcher Weise beabsichtigt die Bundesregierung auf das jüngste Angebot des russischen Präsidenten, die Erdgas-Lieferung durch die intakte Nord Stream-Leitung wieder aufzunehmen (www.handelsblatt.com/dpa/putin-bereit-zur-gaslieferung-durch-nord-stream-nach-deutschland/29430504.html) zu reagieren, und falls keine Reaktion erfolgt, wie begründet die Bundesregierung das Ausschlagen dieses Angebotes angesichts der Inanspruchnahme russischer Erdgas-Lieferungen durch zahlreiche andere EU-Länder, der gesteigerten Importe russischen LNGs in die EU insgesamt und des Imports regasifizierten russischen LNG-Gases über EU-Drittländer, beispielsweise Belgien, nach Deutschland?"*
>
> Claimant's English translation:
>
> *"How does the German government intend to respond to the Russian President's recent offer to resume natural gas supplies through the intact Nord Stream pipeline (www.handelsblatt.com/dpa/putin-bereit-zur-gaslieferung-durch-nord-stream-nach-deutschland/29430504.html), and if there is no response, how does the German government justify rejecting this offer in view of the use of Russian natural gas supplies by numerous other EU countries, the increased imports of Russian LNG into the EU as a whole and the import of regasified Russian LNG gas via EU third countries, for example Belgium, to Germany?"*

73. State Secretary Dr. Philipp Nimmermann replied on behalf of the German Federal Government (bold emphasis added):[45]

> *"Die Bundesregierung unternimmt derzeit alle notwendigen Schritte, um die Versorgung der Verbraucher auch ohne russisches Pipelinegas langfristig*

[43] See para 38 above.

[44] **Exhibit CLA-314**, BT-Drucksache 20/8955 by Deutscher Bundestag, "Written questions with answers received from the Federal Government in the week of 16 October 2023" (original document accessible at https://dserver.bundestag.de/btd/20/089/2008955.pdf), 20 October 2023, p 19.

[45] **Exhibit CLA-314**, BT-Drucksache 20/8955 by Deutscher Bundestag, "Written questions with answers received from the Federal Government in the week of 16 October 2023" (original document accessible at https://dserver.bundestag.de/btd/20/089/2008955.pdf), 20 October 2023, p 20.

sicherzustellen. Russland hatte bereits vor der Zerstörung der Nord Stream 1-Pipeline die Belieferung mit Erdgas über die Nord Stream 1-Pipeline eingestellt und bestehende Alternativen wie das ukrainische Gastransitsystem und die Jamal-Pipeline über Polen nicht für den Gastransport nach Deutschland bzw. Europa genutzt. ***Da die Nord Stream 2-Pipeline die für ihren Betrieb notwendige Zertifizierung nicht erhalten hat, wird sie auch weiterhin nicht in Betrieb gehen können."***

Claimant's English translation*:*

"The German government is currently taking all necessary steps to secure supplies to consumers in the long term, even without Russian pipeline gas. Russia had already stopped supplying natural gas via the Nord Stream 1 pipeline before it was destroyed and did not use existing alternatives such as the Ukrainian gas transit system and the Yamal pipeline via Poland to transport gas to Germany and Europe. ***As the Nord Stream 2 pipeline has not received the necessary certification for its operation, it will still not be able to go into operation."***

74. This refers to the certification required by the Amending Directive, the very directive that is subject of these arbitral proceedings. The answer of the German government confirms that had Claimant received the certification, or had it not needed such certification (as prescribed the Amending Directive), Claimant could operate the Nord Stream 2 Pipeline.

Current LNG imports from Russia to the EU

75. As regards current **LNG** imports from Russia to the EU, there are numerous sources with relevant information. E.g. the International Energy Agency reports a 60% increase in 2022 as compared to 2021.[46] In 2022, Russia exported more LNG to Europe compared 2021 and apparently became the third-largest LNG supplier of Europe.[47]

76. According to the International Energy Agency (IEA), LNG exports from Russia to Europe remained broadly flat in 2023. According to shipping data, 80% of Europe's total LNG imports from Russia in Q1-Q3 2023 were delivered to Belgium, France, and Spain. LNG imports were expected to remain broadly flat in 2023.[48]

[46] **Exhibit C-300**, Report by International Energy Agency, "How to Avoid Gas Shortages in the European Union in 2023" (report accessible at https://iea.blob.core.windows.net/assets/96ce64c5-1061-4e0c-998d-fd679990653b/HowtoAvoidGasShortagesintheEuropeanUnionin2023.pdf), December 2022, pp 34-35 (Chapter: "LNG supply").

[47] **Exhibit C-301**, Statistic by Statista, "Year-over-year change in the export volume of liquefied natural gas (LNG) from Russia from January to November 2022, by selected country" (last accessed on 18 January 2024 at https://www.statista.com/statistics/1362502/russia-lng-export-growth-by-country/), March 2022.

[48] **Exhibit C-299**, Report by International Energy Agency, "Medium-term Gas Report 2023" (report accessible at https://www.iea.org/reports/medium-term-gas-report-2023), October 2023, p 28.

77. Russian natural gas imports to Europe might be viewed critically by various stakeholders. However, they are a matter of fact.

78. The EU's latest 12th sanctions package against Russia, adopted in December 2023,[49] and in the meantime adapted by Switzerland,[50] contains new restrictions on imports that do not include pipeline gas or LNG. Furthermore, the 13th package of sanctions against Russia, according to information available,[51] does not impose restrictions on LNG and pipeline gas imports from Russia to Europe. The 13th package adds nearly 200 entities and individuals to the sanctions list but does not foresee sectoral measures.[52]

Future natural gas imports from Russia to the EU will remain possible

79. Looking into the foreseeable future, Claimant has of course taken note of discussions at the EU level attempting to bring import of natural gas from Russia to the EU to an end. According to a joint statement between the European Commission and the United States on European Energy Security dated 25 March 2022, the EU Commission and the US are committed to reducing Europe's dependency on Russian energy.[53] Also in March 2022, EU announced its plan called '*REPowerEU*' as a joint European action for more affordable, secure and sustainable energy, including "*a plan to make Europe independent from Russian fossil fuels well before 2030, starting with gas, in light of Russia's invasion of Ukraine*."[54]

80. These are political declarations. Any steps that may be undertaken may very well change as the geopolitical developments unfold. The future is an open book with most pages unwritten.

81. Claimant has also taken note of the latest developments at the EU level, aiming to provide Member States with power to block gas import from Russia.

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[49] **Exhibit C-302,** European Commission's Press release "EU adopts 12th package of sanctions against Russia for its continued illegal war against Russia" (press release accessible at https://ec.europa.eu/commission/presscorner/detail/en/IP_23_6566), 18 December 2023.

[50] **Exhibit C-303,** Portal of the Swiss government, "Ukraine: Switzerland implements the EU's 12th package of sanctions" (press release accessible at https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-99902.html), 31 January 2024.

[51] **Exhibit C-304,** Reuters article, "EU approves new sanctions package against Russia" (article accessible at https://www.reuters.com/world/europe/eu-approves-13th-sanctions-package-against-russia-eu-sources-2024-02-21/), 21 February 2024.

[52] **Exhibit C-305**, Council of the EU's Press release, "Russia: two years after the full-scale invasion and war of aggression against Ukraine, EU adopts 13th package of individual and economic sanctions" (press release accessible at https://www.eeas.europa.eu/eeas/13th-package-eu-sanctions-russia_en?s=173), 23 February 2024.

[53] **Exhibit C-306**, Joint Statement between the European Commission and the United States on European Energy Security (statements accessible at https://ec.europa.eu/commission/presscorner/detail/en/statement_22_2041), 25 March 2022.

[54] **Exhibit C-307**, European Commission' Press Release, "REPowerEU: Joint European action for more affordable, secure and sustainable energy" (last accessed on 18 January 2024 at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1511), 8 March 2022.

82. Article 5 of a new Regulation on the internal markets for renewable and natural gases and for hydrogen[55] provides that Member States have the possibility temporarily to limit, for a fixed term, up-front bidding for capacity by any single network user at entry points from the Russian Federation or Belarus, where this is necessary to protect their essential security interests and those of the Union, and provided that such measures do not unduly disrupt the proper functioning of the internal gas market, and cross-border flows of natural gas between Member States.

83. However, it is important to note that the regulation is not binding in the sense that no Member State is obliged to restrict gas imports from Russia. Rather Member States are allowed to use their discretion. This is so, because the structure of the Member States' energy supply is a national competence under Article 194 of the Treaty on the Functioning of the European Union.[56] The relevant provision stipulates that Member States have the right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply.

84. Consequently, it remains to be seen what Member States will do with in this respect – and, needless to say, such EU legislation, and any implementation on national level, may well change again. Moreover it is important to keep in mind that: Claimant offers transport capacity. Claimant is not the shipper and is not party to gas supply contracts concerning gas shipped through its pipeline.

85. Be that as it. The bottom line remains, i.e. that as a matter of fact Russian natural gas is being imported to the EU, also under current circumstances. Measures to prevent or decrease such import may be introduced, but as and when geopolitical circumstances change, they may also disappear.

IV.6 **Conclusion: Gas transport by Claimant is not Utopia**

86. As has been shown, Claimant has one operable line and one that is reparable and operable.[57] Sanctions do not prevent Claimant from transporting natural gas and a market for gas imports from Russia to the EU is both, existent at present, and possible in future.

87. The timeline for any start of operation is pure speculation at this point. Even if that were not to be expected anytime soon, however, this option exists. That is what matters. Given the technical situation of Claimant's pipelines, given options for a positive

[55] **Exhibit CLA-315,** Proposal for a Regulation of the European Parliament and of the Council on methane emissions reduction in the energy sector and amending Regulation (EU) 2019/942 (Regulation is accessible at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2021%3A805%3AFIN&qid=1639665806476), 15 December 2021, p 29.

[56] **Exhibit CLA-316,** Consolidated version of the Treaty on the functioning of the European Union, Official Journal of the European Union (document no. 12012E194 accessible at eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT), 26 October 2012, pp 134-135.

[57] See Section III above.

outcome of the composition moratorium,[58] and given the possibility that the geopolitical situation may change, Claimant's future is open. It can turn to the negative for Claimant, but it can also turn to the positive. Respondent speculates only on the negative side. The truth, of course is that nobody has a crystal ball with which to predict the future. There is a valid possibility for Claimant to operate the Nord Stream 2 Pipeline.

88. To conclude, Claimant's corporate objective is to transport natural gas. Claimant stands ready to do so. It is technically capable to transport gas as and when required. Nothing prevents Claimant from operating the Nord Stream 2 Pipeline. It is possible that there will be a market for gas and gas transportation in the future. Even under current circumstances Russian natural gas is coming to the EU, via pipeline and via LNG. In other words, future gas transport by Claimant is certainly a possibility. It is not Utopia.

[58] See Section V below.

V. STATUS OF THE COMPOSITION MORATORIUM UNDER SWISS LAW AND WAY FORWARD

V.1 Introduction

89. As will be explained below there are three possible outcomes of the composition moratorium currently under way. In each of the three scenarios it is very likely that the moratorium proceedings will continue beyond the conclusion of the current phase of this arbitration. It is therefore of utmost interest for Claimant to obtain an arbitral award covering the current phase of the arbitration. It is particularly important since the application of the Amending Directive to Claimant has a decisive impact on the value of Claimant's assets.

V.2 Current status

90. Claimant has previously, during the suspension phase of the arbitration, explained the status of the composition moratorium proceedings which Claimant is currently undergoing based on the Swiss Debt Enforcement and Bankruptcy Law (DEBL),[59] in the following way:[60]

i. Claimant was granted a provisional composition moratorium in two four-month periods from 10 May 2022 to 10 September 2022, and then from 10 September 2022 to 10 January 2023.

ii. Thereafter, Claimant was granted a definitive composition moratorium in six-month periods from 10 January 2023 to 10 July 2023 and from 10 July 2023 to 10 January 2024. The requirements for a definitive composition moratorium are higher than those for a provisional composition moratorium.[61]

iii. Consequently, no bankruptcy proceedings are pending with respect to Claimant. There are important differences under Swiss law between bankruptcy proceedings and composition proceedings. The latter aim at restoring the financial health of a company or at least the best possible preservation of its assets.[62] Composition proceedings are initiated only if the court in question concludes that such an outcome is possible.[63] Within the scope of bankruptcy proceedings, on the other hand, any business

[59] Swiss Debt Enforcement and Bankruptcy Law (DEBL). Hereafter, the Swiss original text of any referenced provision along with an English working translation will be exhibited as **CLA-318.**
[60] **Exhibit C-308**, Claimant's letter dated 8 June 2022, pp 1-2; **Exhibit C-309**, Claimant's letter dated 20 June 2022, p 1; **Exhibit C-310**, Claimant's letter dated 22 August 2022, p 1; and **Exhibit C-289**, Claimant's letter dated 1 February 2023, p 2.
[61] **Exhibit CLA-317**, BSK SchKG-Bauer/Luginbühl, Art. 293*a,* N 3, and Art. 294, N 3. Hereafter, the Swiss original text of this commentary along with an English working translation is exhibited as **CLA-317.**
[62] **Exhibit CLA-317**, BSK SchKG-Bauer/Luginbühl, Art. 293, N 1.
[63] **Exhibit CLA-318**, DEBL, Art. 293a, para 3.

operations are immediately shut down, all employees laid off and the company in question is liquidated with a view to paying the creditors of the company using the proceeds from such liquidation.

iv. The Court appointed an administrator under Swiss law who has the obligation to supervise the business activities of Claimant, to assess the value of the assets and revenues, to preserve the value of the assets, and to assess if a restructuring or an agreement with the creditors can be reached.[64] The Administrator appointed for the provisional composition moratorium was also appointed for the definitive composition moratorium.

91. By way of update, an extension of the definitive composition moratorium was granted from 10 January 2024 to 10 July 2024.[65] Thereafter, another extension can, and is expected to be granted until 10 January 2025, as the definitive composition moratorium can last for a maximum of 24 months.[66]

V.3 **Possible outcomes of the composition moratorium**

92. As a matter of Swiss bankruptcy law, three legal situations can occur at the end of a composition moratorium: (i) an ordinary composition agreement, (ii) a composition agreement with assignment of Claimant's assets, (iii) initiation of bankruptcy proceedings. Claimant will describe these scenarios further below.[67] Before coming to that, Claimant notes, that as things stand all three scenarios are entirely possible and realistic, i.e. a composition agreement as well as Claimant ending up in bankruptcy proceedings.

93. Claimant also notes at the outset, that – as the Tribunal is aware of – Claimant would not have had to undergo composition moratorium proceedings, had the Amending Directive not prevented Claimant from starting operations. Needless to say, negotiations with the creditors would certainly be easier without the Amending Directive.

94. Given the relevance of the outcome of these arbitral proceedings for the value, and for any future operation of Claimant's assets, as mentioned above Claimant – as well as the Administrator – has an interest to obtain an award on the merits of this case.

[64] **Exhibit CLA-318**, DEBL, Art. 293b in connection with Art. 295.
[65] **Exhibit CLA-319**, Swiss Official Gazette of Commerce (SOGC), publication No. NA04-0000000905 "Extension of stay of bankruptcy Nord Stream 2 AG" (publication accessible at https://shab.ch/#!/search/publications/detail/07fae9be-ecca-4e4d-bc88-7edc4e1e2fee), 21 December 2023.
[66] **Exhibit CLA-318**, DEBL, Art. 295b, para. 1.
[67] See further below in Section V.3.

Ordinary composition agreement

95. In case of an ordinary composition agreement, the filed privileged claims i.e. first and second-class claims, are satisfied completely[68] and all third-class creditors receive an equal percentage (dividend) of their original claim, and the remaining amount is definitively waived.[69] Claimant as a legal entity under Swiss laws continues to exist. Claimant retains ownership of its business assets and continues to conduct business operations according to its corporate documents.[70]

96. Such ordinary composition agreement must be approved by a certain quorum of non-privileged creditors with voting rights.[71] Once the composition agreement has been approved by said creditors the Administrator will file a report to the court and ask for confirmation of the composition agreement. When approved by the court it is valid and binding on all creditors, even those who have not agreed to it.[72]

97. Upon the approval of the ordinary composition agreement by the court, Claimant's obligation towards the creditors provided for therein can be fulfilled (i.e. the dividend can be paid out) and Claimant will be released from the composition proceedings and from the supervision of the Administrator. Consequently, Claimant can continue commercial operations with the liability side of the balance sheet (normally) cleared of any liabilities. The former Administrator is usually entrusted with the execution of the composition agreement, i.e. with the dividend payment. Besides that, the Administrator generally has no more functions.[73]

98. As Claimant will continue to exist as owner of the assets, the legal entity Nord Stream 2 AG will continue to be a party in this arbitration.

Composition agreement with assignment of assets

99. A second possible outcome of Claimant's composition moratorium is a composition agreement with assignment of assets. This means, in a nutshell, that Claimant's creditors would be satisfied with the proceeds from a sale of Claimant's assets, upon which Claimant would be liquidated. Claimant's assets would form part of the so-called composition estate and the liquidator would perform the liquidation. While all privileged claims must be satisfied completely,[74] third-class creditors must declare themselves to

[68] **Exhibit CLA-318**, DEBL, Art. 306, para 1, N 2.
[69] **Exhibit CLA-318**, DEBL, Art. 314.
[70] **Exhibit CLA-317,** BSK SchKG-Guggisberg/Jakob, Art. 314, N 9.
[71] **Exhibit CLA-318**, DEBL, Art. 300 in connection with Art. 305, para 1.
[72] **Exhibit CLA-318**, DEBL, Art. 310, para 1.
[73] **Exhibit CLA-317**, BSK SchKG-Guggisberg/Jakob, Art. 314, N 50.
[74] **Exhibit CLA-318**, DEBL, Art. 306, para 1, N 2.

be fully satisfied by this assignment and must waive definitively any remaining amount not covered by the proceeds of the assets.[75]

100. Like the ordinary composition agreement, a composition agreement with assignment of assets must be approved by a certain quorum of non-privileged creditors with voting rights.[76] Once the composition agreement has been approved by the said creditors the Administrator will file a report to the court and ask for confirmation of the composition agreement. When approved by the court it is valid and binding on all creditors, even those who have not agreed to it.[77]

101. Upon approval of the composition agreement with assignment of assets, the realization of the assets is done by the liquidator in accordance with decisions of the creditors' committee. Both liquidation organs, i.e. the liquidator and the creditors' committee, are elected by the creditors' meeting at which creditors are informed about the composition agreement. The former Administrator often acts as the liquidator.[78]

102. In this scenario Claimant will enter into so-called "*composition liquidation proceedings*". All assets form an "*estate*", the so-called "*composition liquidation estate*". Claimant will lose the right of disposal over its business assets but retains ownership and will continue business operations under the supervision of the liquidator in the interim phase, i.e. until the assets are being sold. At the end of the composition liquidation proceedings Claimant will be deregistered from the Commercial Register, and thus cease to exist as a legal entity.[79]

103. The liquidation phase can last for a long period of time.[80] It can last longer than the maximum 24 months stipulated for the definitive composition moratorium. In reality it may take years, until the sale of all of Claimant's assets, [redacted] has been completed.

104. The consequences of a composition agreement with assignment of assets for these arbitral proceedings would be as follows: There will be no procedural consequences as long as Claimant continues to exist as owner of the assets. As explained, the interim period after the composition agreement with assignment of assets is concluded, the assignment of the assets is executed and Claimant is liquidated, has an undefined duration and may in practice take years. It is highly likely that it would not be completed before the Tribunal renders its award in this phase of the arbitration.

[75] **Exhibit CLA-318**, DEBL, Art. 317, para 1 and Art. 318, para 1, N 1.
[76] **Exhibit CLA-318**, DEBL, Art. 300 in connection with Art. 305, para 1.
[77] **Exhibit CLA-318**, DEBL, Art. 310, para 1.
[78] **Exhibit CLA-318**, DEBL, Art. 317, para 2.
[79] **Exhibit CLA-317**, BSK SchKG-Bauer/Hari/Wüthrich, Art. 319, N 1 and 4.
[80] **Exhibit CLA-318**, DEBL, Art. 330, para 2.

105. As pointed out above, the Amending Directive has a substantial impact on the value of Claimant's assets- and importantly, this applies irrespective of the ownership of the assets. Consequently, the outcome of these arbitral proceedings in this phase, in particular the Tribunal's decision as to whether the Amending Directive should apply to Claimant's asset or not, is of central legal and commercial relevance for any owner of the assets.

Initiation of bankruptcy proceedings

106. In case no composition agreement with creditors can be concluded, neither an ordinary one nor one with assignment of assets, the Administrator will so inform the court and bankruptcy proceedings will be opened ex officio.[81] The cantonal bankruptcy office of Zug (the Bankruptcy Office) would primarily be competent to conduct the bankruptcy proceedings.[82]

107. Upon the opening of bankruptcy proceedings, Claimant as the bankrupt would remain the legal owner of his assets, in particular the owner of his properties and will remain the creditor of its claims. However, the bankrupt loses his ability to dispose of his assets. This means, that Claimant could make legally binding acquisitions and could enter into obligations. His actions would be valid vis-à-vis the contractual partner. However, they would have no effect on the bankruptcy estate and could not bind it either.[83] Under this scenario Claimant's assets will be liquidated by the Bankruptcy Office.[84]

108. However, a sale of the pipelines, and all other assets of Claimant, would be expected to take a long time. Claimant will continue to exist and will remain the owner of the assets until the end of the bankruptcy proceedings. Only thereafter, would Claimant be liquidated. It is highly likely that this would not happen before the Tribunal has rendered its award dealing with this phase of the arbitration.

109. Against this background, the consequences of bankruptcy proceedings for these arbitral proceedings are the following: In Claimant's case, Swiss laws are applicable. Whilst there is no express provision in Swiss law concerning the effect of the opening of bankruptcy proceedings on arbitral proceedings, there are recommendations in Swiss scholarly writings, including a number of options for a temporary stay of the proceedings followed by a potential continuation of the arbitral proceedings. The situation can be summarized as follows: [85]

[81] **Exhibit CLA-318**, DEBL, Art. 294, para 3.
[82] **Exhibit CLA-318**, DEBL, Art. 46, para 2 in connection with Introductory Act of the Kanton Zug to the DEBL (EG SchKG / ZG), Art. 1(A), § 2.
[83] **Exhibit C-319**, KUKO SchKG-Stöckli/Possa, Art. 204, N 9.
[84] **Exhibit CLA-318**, DEBL, Art. 256.
[85] **Exhibit CLA-320**, *Baizeau/Rodiguez/Stöckli*, National Report of Switzerland by International Bar Association, "IBA Toolkit on Insolvency and Arbitration Questionnaire" (report accessible at

110. As a starting point, Art. 207 DEBL[86] provides that, upon the opening of insolvency proceedings, all pending civil and administrative court proceedings to which the insolvent debtor is a party and which affect the insolvent debtor's estate, shall be suspended, except for urgent cases. The purpose of the stay is to ensure that the insolvency administrator and the creditors have sufficient time to consider whether or not to pursue pending court proceedings. Whilst this procedural rule does not apply directly to foreign court proceedings to which a Swiss insolvent debtor is a party, Swiss scholarly writings suggest that a limited stay of the proceedings should be granted by the arbitral tribunal in an international arbitration, as it will allow sufficient time for the insolvency administrator to decide on the position to take in the proceedings, and as such, may prevent a possible violation of the right to equal treatment and the right to be heard on the part of the insolvent debtor.[87] Furthermore, and independently of Art. 207 DEBL, Swiss scholarly writings suggest that the Swiss insolvency administrator should seek to have all foreign proceedings stayed, in the same way as pending Swiss civil and administrative court proceedings, including international arbitration proceedings seated in and outside Switzerland. This follows from the views of Swiss scholars to the effect that an arbitration agreement remains valid under Swiss law when insolvency proceedings are opened in Switzerland.[88]

111. As a consequence, the creditors' meeting would have to decide whether it wishes to accept a lawsuit brought by the bankrupt debtor (active lawsuit) and thus the litigation risk for the account of the bankrupt estate. If the creditors' meeting decides in favor of a takeover, the bankrupt estate asserts the debtor's rights in its own name; the authority to conduct the proceedings is transferred to the bankrupt estate.

112. If the creditors' meeting decides not to continue the proceedings itself (acting through the bankruptcy office on behalf of the bankrupt estate), the assignment of legal claims to one or more individual creditors must be offered in accordance with Art. 260 DEBL.[89] Pursuant to para. 1 of this provision, each creditor is entitled to demand the assignment of those legal claims of the estate with respect to which the creditors as a whole waive their rights.

113. If the creditors' meeting and the individual creditors waive assignment of claims, they thereby waive the right to claim the subject matter of the proceedings. The bankruptcy debtor, whether a natural or legal person, is now free to continue the proceedings on its

https://www.ibanet.org/MediaHandler?id=1E2B5A32-BA4C-478B-8719-6313658136D9), January 2022, pp 2-4 with further references.

[86] See above, definition of the DEBL in para 90 footnote 59, and see **Exhibit CLA-318**, DEBL, Art. 207.

[87] See **Exhibit CLA-321**, *Bernhard Berger and Franz Kellerhals*, International and Domestic Arbitration in Switzerland, 4th edition, Bern 2021, p 430, para 1188.

[88] **Exhibit CLA-322,** *Jolanta Kren Kostkiewicz and Rodrigo Rodriguez*, Internationales Insolvenzrecht, Bern 2013, p 147, para 330.

[89] **Exhibit CLA-318**, DEBL, Art 260.

own, i.e. Claimant in the case at hand. Its authority to conduct the proceedings is restored to this extent.[90]

114. Only if the bankruptcy debtor, i.e. Claimant, is not interested in continuing the proceedings, will the consequences of default (most likely) come into effect in accordance with the applicable procedural law upon notification by the bankruptcy office that the arbitration proceedings will not be entered into.[91]

V.4 **Conclusion**

115. To conclude, as already pointed out,[92] in all possible outcomes of the composition moratorium, it will in all likelihood continue beyond the Tribunal's rendering of its award in the first phase of this arbitration. Both Claimant and the Administrator therefore have a keen interest in obtaining an award on the merits.

[90] See above, para 107, where it is explained that the bankrupt loses his ability to dispose of his assets.
[91] **Exhibit CLA-317**, BSK SchKG-Wohlfart/Meyer Honegger, Art. 207, N 20.
[92] See paras 98, 104 and 108 above.

VI. THE INTERPRETATION BY THE EUROPEAN COURT OF JUSTICE OF THE AMENDING DIRECTIVE STRONGLY SUPPORTS THE CASE OF NORD STREAM 2 IN THIS ARBITRATION

VI.1 The European Court of Justice (ECJ) clarified the interpretation of the Amending Directive

116. The judgment of the European Court of Justice (the **"European Court of Justice"** or **"ECJ"**) dated 12 July 2022 in the case C-348/20 P, Nord Stream 2 AG vs. European Parliament and Council of the European Union (the **"ECJ Judgment"**) is of decisive importance for the outcome of this arbitration. The judgment was preceded by the opinion of Advocate General Bobek at the European Court of Justice delivered on 6 October 2021 (the **"ECJ Opinion"**). Both documents of the ECJ, as well as the respective press releases, are exhibited to this Supplementary Memorial.[93]

117. Substantial portions of the ECJ Judgment and the ECJ Opinion are dedicated to the interpretation of the Amending Directive. The Tribunal will remember that Claimant, during the suspension phase of this arbitration, referred to said ECJ Judgment and ECJ Opinion, namely in Claimant's letters dated 22 August 2022,[94] 24 November 2022,[95] and 1 February 2023.[96] In fact, Claimant referred to the ECJ Opinion already in its Reply Memorial dated 25 October 2021.[97]

118. In its letter dated 22 August 2022, Claimant quoted the main passages of the ECJ Judgment and the related press release.[98] In the letter Claimant explained, that the ECJ ruled on the interpretation of the Amending Directive, the very directive at issue in this arbitration, and on its effects on Claimant.[99] Claimant further explained, that the ECJ gave some critically important guidelines as to the interpretation of the Amending Directive with legally binding effect. The findings of the ECJ are indeed final and binding, as the ECJ is the highest court under EU law.

119. As Claimant will explain in further detail,[100] the ECJ Judgment made it very clear

- **that** the Amending Directive inevitably affects Claimant by changing its legal status (for details see below section VI.4);

[93] **Exhibit CLA-323**, Judgment of the European Court of Justice (Case C-348/20 P, *Nord Stream 2 AG vs. European Parliament and Council of the European Union*), 12 July 2022; and **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case 348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021.
[94] **Exhibit C-310,** Claimant's letter dated 22 August 2022, pp 2-6.
[95] **Exhibit C-288,** Claimant's letter dated 24 November 2022, pp 6-7.
[96] **Exhibit C-289,** Claimant's letter dated 1 February 2023, pp 8-10.
[97] Claimant's Reply Memorial dated 25 October 2021, in particular paras 5, 16, 25, 30, 43 and 72.
[98] **Exhibit C-310,** Claimant's letter dated 22 August 2022, pp 2-6.
[99] **Exhibit C-310,** Claimant's letter dated 22 August 2022, pp 6-7.
[100] See Sections VI.4-VI.8 below.

- **that** those effects on Claimant did not exist prior to the adoption of the Amending Directive (for details see below section VI.5);
- **that** the Amending Directive treats Claimant differently from all other pipelines (for details see below section VI.6); and
- **that** this different treatment is fully attributable to Respondent and not to Member States, such as Germany (for details see below section VI.7).[101]

120. These key conclusions of the ECJ Judgment and the ECJ Opinion are closely connected and overlap, as will be explained.[102] However, each of these conclusions deserves to be highlighted separately in order to demonstrate the content of the Amending Directive and its effects on Claimant. Before Claimant addresses the details of these ECJ conclusions, and before Claimant puts the four conclusions into context, it will first explain, in general, the importance and the relevance of the ECJ Judgment and the ECJ Opinion within the EU legal system, and the decisive importance of the ECJ Judgment and the ECJ Opinion for the outcome of this arbitration.[103]

VI.2 **The Tribunal must base its assessment of the breaches of the ECT by Respondent on the ECJ's interpretation of the Amending Directive**

121. In Procedural Order No. 11 dated 14 July 2023,[104] the Tribunal stated that "*Claimant relies heavily on the decision by the CJEU in case C-348/20P, and asserts that this recent development undercuts the Respondent's prima facie case on the merits, let alone costs*." However, for the purpose of deciding the Respondent's request for security for costs, the Tribunal refrained from assessing the ECJ Judgment and the ECJ Opinion and explained: "*To decide otherwise would require the Tribunal to pronounce itself on issues of liability, which would be inappropriate at this stage*."

122. The time has now come. The time has come for the Tribunal to take full account of the ECJ Judgment and the ECJ Opinion for the purpose of deciding the merits in this arbitration, as well as for the purpose of ruling on Respondent's *ratione personae* objection.

123. The main consequence of the ECJ Judgment and the ECJ Opinion for this arbitration is that there is no longer any need for the Tribunal to concern itself with the correct interpretation of the Amending Directive. The Tribunal now has an excellent, well

[101] See also in this regard, **Exhibit C-310**, Claimant's letter dated 22 August 2022, p 2; and **Exhibit C-289,** Claimant's letter dated 1 February 2023, pp 9-10.
[102] See Sections VI.4-VI.7 below.
[103] See Sections VI.2 and VI.3 below.
[104] *Stream 2 AG v. The European Union*, PCA Case No. 2020-07, Procedural Order No. 11 dated 14 July 2023, para 92.

substantiated and authoritative interpretation of the Amending Directive to serve as its basis for analysing the breaches of the ECT.

124. Simply put: the ECJ Judgment and the ECJ Opinion provide the Tribunal with everything it needs for the correct understanding and interpretation of the Amending Directive. This is the end of the road with respect to any debate about the correct interpretation of the Amending Directive and its effects on Claimant. The Amending Directive, as interpreted by the ECJ as the highest court within the EU legal system, must serve as the basis for the Tribunal when evaluating the guarantees provided by the ECT.

125. What remains to be decided for *EU courts* is whether the Amending Directive – with its unique effects on Claimant – is justifiable in light of the relevant EU law standards. The EU courts will decide this issue under the relevant legal standards of *EU law*. *The Tribunal*, however, must decide the present case under the relevant legal standards guaranteed in the *ECT* and on the basis of customary international law. Claimant will come back to that further below.[105]

126. In this context, Claimant refers to its letter dated 24 November 2022, where Claimant already explained:[106] "*It is now up to the EU courts to decide on the compliance of the Amending Directive, as EU secondary law, with fundamental guarantees and protections of EU primary law – based on the clear interpretation of the Amending Directive by the ECJ in its judgment of 12 July 2022. And it is up to the Tribunal to decide on the compliance of the Amending Directive with fundamental guarantees and protections of the Energy Charter Treaty – again based on the clear interpretation of the Amending Directive as delivered by the ECJ in its judgment of 12 July 2022*."

127. As regards the action for annulment, the foregoing has already been acknowledged by Advocate General Bobek in the ECJ opinion:[107]

> *"97. That does not mean that when a company makes an investment and prepares itself to enter into a market under a certain regime, regardless of how large that investment may be, the legislature is unable validly to amend that regime. Indeed, that is certainly not the case.*
>
> *98. However, whether or not the changes introduced to that regime, which create new obligations and restrictions that were not previously in existence, are reasonable, amounts to an assessment pertaining to merits of the appellant's action."*

[105] See Section VIII below.
[106] **Exhibit C-288,** Claimant's letter dated 24 November 2022, p 7.
[107] **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case 348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, paras 97, 98.

128. In a leading publication on European law the authors say the following about the outstanding assessment of the merits:[108] *"In this assessment, the discriminatory nature of the Amendment, now established by the CJEU, will play a key role, as will whether the amendment as such and the changes it created are reasonable and justifiable on strong public policy grounds."*

129. It follows from the foregoing that the Tribunal can proceed to assess the breaches of the ECT by the adoption of the Amending Directive based on the interpretation of it by the ECJ. The conclusions on the correct interpretation of the Amending Directive have now been provided by the ECJ, the highest court under EU law. The decision was rendered by the ECJ sitting in Grand Chamber, i.e. a full court of 15 judges, including the President of the ECJ (as opposed to the usual composition of Chambers consisting of 3 or 5 Judges). The court sits in Grand Chamber when a Member State or an institution which is a party to the proceedings so requests, and in particularly complex or important cases. This demonstrates and confirms that the case concerning the Amending Directive and Nord Stream 2 is extraordinary.

130. In addition, note must be taken of the high esteem and authority enjoyed by opinions of Advocates General within the EU legal system. Whilst not formally binding on judges, an opinion of an Advocate General is of outmost importance in the EU system. Court judgments make references to such opinions since they are important for the interpretation and development of EU law.

131. The Advocates General are members of the European Court of Justice, but they act independently. Pursuant to Article 252 of the Treaty on the Functioning of the European Union, the Court of Justice shall be assisted by Advocates General, acting with complete impartiality and independence, to make, in open court, reasoned submissions.[109] Pursuant to Article 253 of the Treaty on the Functioning of the European Union the Judges and Advocates General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries, or who are jurisconsults of recognised competence.[110]

132. An opinion of an Advocate General is not legally binding for the judges of the ECJ, as mentioned above. Whilst ECJ judges often follow opinions of Advocates General, they

[108] **Exhibit C-289,** *Talus and Johnston*, European Law Review: Issue 6, 2022, p 825, attached as Appendix 8 to Claimant's letter dated 1 February 2023.
[109] **Exhibit CLA-316,** Consolidated version of the Treaty on the functioning of the European Union, Official Journal of the European Union (document no. 12012E194 is accessible at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT), 26 October 2012, p 158.
[110] **Exhibit CLA-316,** Consolidated version of the Treaty on the functioning of the European Union, Official Journal of the European Union (document no. 12012E194 is accessible at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT), 26 October 2012, p 158.

can, and they do, deviate at times. In Claimant's case, however, it is clear that the ECJ Grand Chamber followed the conclusions of the Advocate General. In the light of the ECJ Judgment, the ECJ Opinion is of paramount importance for the interpretation of the ECJ Judgment and the Amending Directive.

VI.3 **Given the findings of the ECJ, the debate in this arbitration about the correct interpretation of the Amending Directive must be read in the light of the ECJ conclusions**

133. All previous, and all future submissions of Claimant and of Respondent concerning the interpretation of the Amending Directive must now be read by the Tribunal in the light of the conclusions of the ECJ Judgment and the ECJ Opinion.

134. In the following Claimant will show that its previous submissions are in full accord with the ECJ's interpretation of the Amending Directive and that Respondent's arguments to the contrary are flawed. The findings of the ECJ are clear and provide the Tribunal with everything it needs concerning the interpretation of the Amending Directive.

135. As explained in Claimant's letter dated 22 August 2022,[111] the interpretation of the Amending Directive given by the ECJ reaffirms Claimant's interpretation of the Amending Directive as repeatedly put forward by Claimant, i.e. in Claimant's Reply Memorial dated 25 October 2021[112] as well as in previous briefs, such as Claimant`s Notice of Arbitration dated 26 September 2019,[113] Claimant's Memorial dated 3 July 2020, [114] Claimant's Response to the EU's Request for a preliminary phase on Jurisdiction and Admissibility dated 16 October 2020.[115]

136. Respondent's arguments and long-winded explanations as to the alleged content and interpretation of the Amending Directive have been resolutely refuted by the ECJ. In the following, Claimant will highlight such arguments and explanations suggested by Respondent in its submissions, i.e. in its Memorial dated 15 September 2020, in its Counter Memorial dated 3 May 2021, and in its Rejoinder on Merits and Reply Memorial on Jurisdiction dated 22 February 2022. Claimant will also address arguments presented in the first and second expert report of Professor Maduro, which have been equally resolutely refuted and/or undermined by the ECJ.

137. In addition to obvious, 'direct' contradictions between, on the one hand, Respondent's arguments and the findings of the ECJ, there are numerous 'indirect' contradictions between Respondent's arguments, including the two expert reports provided by

[111] **Exhibit C-310,** Claimant's letter dated 22 August 2022, p 6.
[112] Claimant's Reply Memorial dated 25 October 2021, in particular Sections III, IV, VII.
[113] Claimant's Notice of Arbitration dated 26 September 2019, Section 3.
[114] Claimant's Memorial dated 3 July 2020, in particular Section VI.
[115] Claimant's Response to the EU's Request for a preliminary phase on Jurisdiction and Admissibility dated 16 October 2020, esp. Section V.

Professor Maduro, and, on the other hand, the findings of the ECJ. The true nature of Respondent's arguments concerning the alleged intentions and benefits of the Amending Directive have now been revealed by the ECJ Judgment and the ECJ Opinion for what they are: mere fig leaves![116]

VI.4 **The Amending Directive inevitably affects Claimant by changing its legal status**

Conclusions of the ECJ Judgment

138. As mentioned in para 119 above, the ECJ concluded without difficulty that the Amending Directive inevitably changed Claimant's legal position:[117,118]

> *"75. (…) the directive at issue, by extending the scope of application of Directive 2009/73 to interconnectors located between the Member States and third countries, such as the interconnector that the appellant intends to operate, has the consequence of subjecting the operation of that interconnector to the rules laid down in that directive, thus rendering applicable to the appellant the specific obligations that it lays down on that matter, including, inter alia, those relating to the unbundling of transmission systems and transmission system operators, pursuant to Article 9 of Directive 2009/73, and those relating to the regime of third-party access to the system based on published tariffs approved by the regulatory authority concerned or calculated on the basis of methods approved by that authority, laid down in Article 32 of Directive 2009/73.*
>
> *76. In that regard, (…) it is irrelevant, in itself, that the implementation of those obligations requires the adoption of transposing measures by the Member State concerned, in the present case the Federal Republic of Germany, to the extent that that Member State has no discretion, as regards those transposing measures, capable of preventing those obligations from being imposed on the appellant. In the absence of such discretion, those transposing measures do not call into question the direct nature of the link between the directive at issue and the imposition of those obligations."*

139. It did not take the ECJ much to conclude with respect to the ownership unbundling obligations in Article 9 of the Gas Directive and the three unbundling options set out in that provision, *"that whichever option were finally chosen (…) the legal situation of the*

[116] See Sections VI.4-VI.10 below.
[117] **Exhibit CLA-323**, Judgment of the European Court of Justice (Case C-348/20 P, *Nord Stream 2 AG vs. European Parliament and Council of the European Union*), 12 July 2022, paras 75-76.
[118] Pls. note here and hereafter: *Appellant* in the action for annulment correspondents to *Claimant* in these arbitral proceedings.

appellant will inevitably be changed" and *"that the appellant cannot avoid it, irrespective of which one of the three methods provided for by that provision is chosen".*[119]

140. The full paragraph in the ECJ Judgment reads:

> *"110. It follows that, as the Advocate General also observed, in essence, in points 80 and 81 of his Opinion, that whichever option were finally chosen from amongst those referred to in paragraph 107 of this judgment, the legal situation of the appellant will inevitably be changed, as Article 9 of Directive 2009/73 only offers Member States the choice of means by which the clearly defined result, namely that of the effective separation of the structures of transmission and those of supply and production, must be achieved. Thus, even though the Member States are not deprived of all room for manoeuvre in implementing Article 9, they do not have any discretion as regards the unbundling obligation laid down in that provision, such that the appellant cannot avoid it, irrespective of which one of the three methods provided for by that provision is chosen."*

141. The ECJ continues, that the same applies with respect to the third party access obligations and to the transport tariff obligations:[120]

> *"111. The same applies as regards the obligations flowing from Article 32 of Directive 2009/73, read together with Article 41(6), (8) and (10) thereof. Those obligations require the transmission system operators subject to that directive, inter alia, to grant third parties access to their system on the basis of a regime that is applied objectively and without discrimination, and based on published tariffs that are proportionate and approved by the competent regulatory authority. That authority must, in the context of approving those tariffs, inter alia, provide for appropriate incentive measures to encourage operators to improve their performance.*
>
> *112. While the practical realisation of those obligations requires the adoption, in particular by the national regulatory authorities, of measures of a technical nature, it remains the case that those measures cannot alter the result that those obligations entail, namely that the transmission system operators guarantee to third parties access without discrimination to that system under the conditions laid down by Directive 2009/73, with the aim of ensuring that all actors on the market have effective access to that market."*

[119] **Exhibit CLA-323**, Judgment of the European Court of Justice (Case C-348/20 P, *Nord Stream 2 AG vs. European Parliament and Council of the European Union*), 12 July 2022, para 110.
[120] **Exhibit CLA-323**, Judgment of the European Court of Justice (Case C-348/20 P, *Nord Stream 2 AG vs. European Parliament and Council of the European Union*), 12 July 2022, para 111.

Conclusions in the ECJ Opinion

142. With its conclusion that the Amending Directive *inevitably affects* Claimant,[121] the ECJ explicitly relied on the ECJ Opinion, and thereby confirmed the conclusions in the ECJ Opinion, where Advocate General Bobek concluded as follows:[122]

> *"80. In that respect, it is uncontested that, regardless of the option ultimately chosen by the national authorities, the legal position of the appellant will inevitably be altered. Indeed, the appellant will have to: (i) sell the entire Nord Stream 2 pipeline, (ii) sell the part of the pipeline falling under German jurisdiction, or (iii) transfer the ownership of the pipeline to a separate subsidiary. Regardless of the differences between those three models, each requires a transfer of ownership and/or of the running of the pipeline or part thereof, thus obliging the appellant to amend its corporate structure.*
>
> *81. In those circumstances, and in view of that unique situation, I am bound to conclude that it is the contested measure which immediately affects the position of the appellant and not merely the (subsequent) transposition measures. The manner in which the appellant is affected is exhaustively regulated in the contested measure. Member States do not have any discretion as far as the end result to be achieved is concerned. They may only oversee a (limited) choice in terms of how to achieve it, by opting for one of the three models of unbundling provided for by the EU legislature. Nevertheless, irrespective of which of the three models they choose, the appellant will be affected. In summary, Member States have no discretion over the whether and the what, as they are permitted only to choose one the three pre-determined forms of the how."*

143. In addition, with respect to third-party access and tariff regulation Advocate General Bobek explained:[123]

> *"95. In a nutshell, Article 32 of the Gas Directive requires transmission system operators to allow access to their capacity on a non-discriminatory basis to potential customers based on published tariffs. For its part, Article 41(6), (8) and (10) of the Gas Directive provides, in essence, that the tariffs charged by transmission system operators for the use of their transport capacity must be approved by the national regulatory authority of the Member State concerned.*

[121] See paras 138-141 above.
[122] **Exhibit CLA-176,** Opinion of Advocate General Bobek (Case 348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, paras 80-81.
[123] **Exhibit CLA-176,** Opinion of Advocate General Bobek (Case 348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, paras 95-96.

96. By virtue of those provisions, the appellant will, to the extent foreseen by those rules, be legally precluded from acting as a normal market operator that is free to choose its customers and pricing policy. The appellant will thus face a number of new regulatory constraints that limit its right to property and the freedom to conduct a business. Those constraints are new, in view of the fact that the legislation in force at the time of the investment, the time when building on the infrastructure began, and the time when the appellant entered into contracts for its financing and future operation,[59] did not provide for mandatory third-party access and tariff approval by the national regulator.

> *[59] I refer, in particular, to the 'Gas Transportation Agreement' concluded on 7 March 2017 with Gazprom Export LLC and the 'Long Term Debt Financing Agreements' concluded in April and June 2017 with Gazprom, ENGIE SA, OMV AG, Royal Dutch Shell plc, Uniper SE and Wintershall Dea GmbH. Relevant excerpts of those agreements have been submitted before the General Court."*

Relevance for this arbitration

144. To summarize, it is the unambiguous conclusion of the ECJ Grand Chamber's and of the ECJ Advocate General, that the Amending Directive inevitably affects Claimant by changing its legal status.

145. By way of putting it into the context of the four key conclusions of the ECJ Judgment and the ECJ Opinion as mentioned in para 119 above, the relevance of the Amending Directive for this arbitration can conveniently be summarized in one sentence as follows: The Amending Directive inevitably affects Claimant by changing its legal position, creating effects which did not exist prior to the adoption of the Amending Directive, leaving Member States with no relevant discretion, and treating Claimant differently from all the other interconnectors covered by the Amending Directive.

146. Contrary to these conclusions, which could hardly be any clearer, Respondent and its expert Professor Maduro, have persistently tried to have the Tribunal believe, that this is not the case. In particular, they sought to argue that the amended Gas Directive already applied to Claimant, and/or that Member States (here Germany) could decide as to whether Claimant would be affected by the Amending Directive or not. As the ECJ has now established, that is simply not correct. Claimant will elaborate on that below.[124]

VI.5 <u>The effects on Claimant did not exist prior to the adoption of the Amending Directive</u>

Conclusions of the ECJ Judgment

147. Just as clearly as with respect to the conclusion, that the Amending Directive inevitably affects Claimant by changing its legal position, and even with a shorter explanation, the

[124] See Section VI.5 below.

ECJ concluded, as mentioned in para 119 above, that the legal effects on Claimant did not exist prior to the enactment of the Amending Directive:[125]

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

Conclusions in the ECJ Opinion

148. As to the fact, that the effects on Claimant produced by the Amending Directive did not exist prior to its adoption,[126] Advocate General Bobek succinctly concluded (emphasis added):[127]

> "*42. In the present case, the contested measure is capable of **producing legal effects** by extending the scope of the rules of the Gas Directive to situations and addressees **which were not previously caught by those rules**. It is equally clear that, as a result of that extension, the **legal position** of the appellant is **altered**: a detailed body of rules, which governs its activities, has become applicable to its activities. The crux of the matter is really whether that alteration of the appellant's position stems directly from the contested measure or, conversely, whether it may arise only as a result of the adoption of implementing measures at national level.*
>
> …
>
> *100. … It seems to me that that pipeline – connecting a Member State (Germany) to a non-Member State (Russia) – was evidently not covered by the previous definition of 'interconnector' laid down in Article 2(17) of the Gas Directive, as originally adopted. That legislative definition referred to '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'.*
>
> *101. The contested measure thus enlarged that definition so as to cover also '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'.[61] Moreover, (…) according to recital 3, that measure sought 'to address obstacles to the completion*

[125] **Exhibit CLA-323**, Judgment of the European Court of Justice (Case C-348/20 P, *Nord Stream 2 AG vs. European Parliament and Council of the European Union*), 12 July 2022, para 79.
[126] See para 147 above.
[127] **Exhibit CLA-176,** Opinion of Advocate General Bobek (Case 348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, paras 42, 100 and 101.

*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**."*[62]

[61] *My emphasis.*
[62] *My emphasis.*"

Relevance for this arbitration

149. Here again, the last two sentences of the quote in para 42 of the ECJ Opinion show the close link between (i) the Amending Directive inevitably producing legal effects on Claimant, (ii) those effects on Claimant not being existent prior to the adoption of the Amending Directive, and (iii) the lack of discretion for the Member States in this regard.

150. The first element has already been described.[128] The third element, the lack of Member States' discretion and the logical consequence of attributing the Amending Directive to Respondent, will be addressed below.[129] The fourth key conclusion of the ECJ referred to above in para 119, i.e. that the Amending Directive treats Claimant differently from all the other interconnectors covered by the amended Gas Directive, will be covered below as well.[130]

151. As regards the second element, i.e. the legal situation prior to the adoption of the Amending Directive, Claimant has consistently submitted that the Amending Directive did not apply to Claimant before the enactment of the Amending Directive on 23 May 2019, which was also reflected by the practical reality that the Gas Directive was not applied to any of the other offshore import pipelines similar to Claimant's pipelines.[131]

152. By contrast, Respondent has attempted to make it look as if the Amending Directive would simply confirm an existing legal situation.[132] Whilst Professor Maduro at no point explicitly states that the unamended Gas Directive was applicable to similar pipelines or that it would have been applicable to Claimant without the Amending Directive, he repeatedly comments that the Amending Directive has "clarified" the position.[133] This is simply not correct. The Amending Directive is not a mere clarification; it is not of a mere declaratory nature in legal terms. Rather, the Amending Directive transforms the legal status of Claimant.

[128] See Section VI.4 above.
[129] See Section VI.7 below.
[130] See Section VI.6 below.
[131] Claimant's Memorial dated 3 July 2020, Section IV.5, paras 103-105; and Claimant's Reply Memorial dated 25 October 2021, Section III.
[132] See in this regard, Respondent's Counter-Memorial on the Merits dated 3 May 2021, in particular Section 2.5.6., paras 360 et seqq., and para 149,
[133] Professor Maduro's first expert report dated 3 May 2021, e.g. paras 164, 218, 219, 244 and 261. See also in this regard, summary in Claimant's Reply Memorial dated 25 October 2021, para 18.

153. The approach taken by Professor Maduro was further pursued in Respondent's submissions dated 22 February 2022. Thus after the Advocate General had issued his ECJ Opinion on 6 October 2021. Claimant will return to this.[134]

VI.6 <u>The Amending Directive treats Claimant differently</u>

Conclusions of the ECJ Judgment

154. In the fourth important conclusion mentioned in para 119 above, which is of utmost importance for this arbitration, the ECJ noted that the Amending Directive as adopted by the EU, is designed in such a way that Claimant becomes **the only pipeline** which is neither eligible for an exemption pursuant to Article 36 of the Amending Directive, nor for a derogation pursuant to Article 49a of the Amending Directive.

155. In the words of the ECJ Grand Chamber:[135]

> "*104. As regards the existence of such a discretion in respect of the exemptions and derogations laid down in Articles 36 and 49a of Directive 2009/73, it must be held, as the Advocate General also observed, in essence, in points 74 and 75 of his Opinion, it was not possible to apply any of the exemptions or derogations to the appellant's situation, since, first, the investments for the Nord Stream 2 gas pipeline had already been decided at the date of the adoption of the directive at issue, which excluded that pipeline from the benefit of an exemption under Article 36 of Directive 2009/73, which applies to major new gas infrastructures or to significant increases of capacity in existing infrastructure, and, second, at that date, it was clear that that pipeline could not be completed by 23 May 2019, thus preventing the grant of a derogation under Article 49a of that directive.*"

156. Consequently, the ECJ Grand Chamber came to the conclusion (bold emphasis added):[136]

> "*161. In that context, it should be observed that, amongst both existing interconnectors and interconnectors which are yet to be constructed, the Nord Stream 2 gas pipeline is **the only pipeline** which is, or which could be, in such a situation, in so far as the operators of all the other interconnectors covered by Directive 2009/73 have had or will have had the possibility of being granted an exemption or derogation under one of the provisions of that directive referred to in the preceding paragraph, as the appellant submits without being contradicted.*"

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[134] See paras 180-184 below.

[135] **Exhibit CLA-323**, Judgment of the European Court of Justice (Case C-348/20 P, *Nord Stream 2 AG vs. European Parliament and Council of the European Union*), 12 July 2022, para 104, confirmed in para 160.

[136] **Exhibit CLA-323**, Judgment of the European Court of Justice (Case C-348/20 P, *Nord Stream 2 AG vs. European Parliament and Council of the European Union*), 12 July 2022, para 161.

Conclusions in the ECJ Opinion

157. Here again, in the context of the discriminatory treatment of Claimant,[137] the ECJ explicitly relied on, and thereby confirmed, the conclusions in the ECJ Opinion, where Advocate General Bobek concluded as follows:[138]

"*74. In the present case, as far as Articles 36 and 49a of the Gas Directive are concerned, that paternity cannot but be attributed to the EU legislature. None of the options offered by those provisions appears to be applicable to the appellant. The EU legislature decided that (i) the derogation is only applicable to gas transmission lines between a Member State and a third country 'completed before 23 May 2019', and (ii) the exemption is only available to major infrastructure projects in respect of which no final investment decision has been taken.*[43] *As a matter of fact, at the time of the adoption of the contested measure (17 April 2019), the Nord Stream 2 pipeline had passed the pre-investment stage,*[44] *but was not going to be completed, let alone operational, before 23 May 2019.*[45]

75. Therefore, whereas those provisions do give some leeway to national authorities to grant an exemption or a derogation to certain operators in the future, that is not the case in respect of the appellant. In that regard, the (in)applicability of those provisions is entirely pre-determined by the EU rules, since the national authorities ***lack any room for manoeuvre*** *and must thus act as a* ***longa manus*** *of the Union. In that regard, I recall that the mere existence, in the abstract, of derogations or exceptions to the rules laid down in an EU act, cannot have any bearing on the position of an applicant if that applicant cannot manifestly avail himself of those exceptions or derogations.*

> [43] *One of the conditions for the exemption is, according to Article 36(1)(b) of the Gas Directive that 'the level of risk attached to the investment must be such that the investment would not take place unless an exemption was granted'.*
>
> [44] *That is undisputable given the very advanced stage of construction of the pipeline. According to the appellant, the final decision on the main investment was adopted in September 2015.*
>
> [45] *That is, within about one month from the adoption of the contested measure. On the latter aspect, see also the decision of 20 May 2020 BK7-19-108 of the Bundesnetzagentur (Federal Network Agency, Germany)."*

158. Simply put: in the words of Advocate General Bobek *"the appellant cannot escape the application of rules of the Gas Directive by virtue of an exemption or derogation",*[139] he

[137] See paras 154-156 above.

[138] **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case 348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, paras 74-75.

[139] **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case 348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, para 76.

is *"caught between two stools: neither the derogation nor the exemption set out in the Gas Directive were applicable."*[140]

Relevance for this arbitration

159. The fact, that the Amending Directive is designed in a manner so as to make it impossible to grant an exemption as well as a derogation to Claimant, which results in a discriminatory treatment of Claimant as compared to all other offshore import pipeline operators, has been explained by Claimant before.[141] Claimant has consistently pointed out that Art. 49a of the Amending Directive was designed to exclude Claimant from the derogation option by way of stipulating that a transmission line must be "completed before 23 May 2019" in order to be eligible for a derogation. No discretion for the Member State is foreseen *in this respect*. It is irrelevant that the Gas Directive affords Member States a margin of discretion in relation to other provisions and aspects of the Amending Directive.

160. In a hopeless attempt to exculpate itself, Respondent sought to apply a distorted meaning to Article 36 of the Gas Directive, which offers the possibility of an exemption for new pipelines. It argued, for example, that "*reading the cut-off criteria in Article 49a of the Amending Directive and Article 36 of the Gas Directive together shows that the EU legislator has set up a coherent system*",[142] asserting that *"[n]othing in Article 36 of the Gas Directive prevents NSP2AG from applying for an exemption under that article*".[143] Respondent tried to have the Tribunal believe, that Claimant could obtain a derogation or an exemption,[144] and that there is no gap between Articles 36 and 49a, thereby trying to make it look as if somehow the Amending Directive did not have the practical effect of affecting only Claimant.[145] This is simply not correct.

161. Respondent also sought to argue that other comparable infrastructures were in a similar situation. In its Reply Memorial dated 25 October 2021, Claimant summarizes this discussion and explains the correct comparison between Claimant's pipeline and the five other offshore import pipelines to the EU. Claimant also explains why numerous other pipelines referred to by Respondent are irrelevant.[146] The ECJ Judgment and the

[140] **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case 348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, para 195.
[141] Claimant's Memorial dated 3 July 2020, in particular paras 214, 220, 238-248, 304-306; and Claimant's Reply Memorial dated 25 October 2021, in particular Section IV, paras 123 et seqq., and summary in paras 23-32.
[142] Respondent's Counter-Memorial on the Merits dated 3 May 2021, para 272; and Respondent's Rejoinder on the Merits & Reply Memorial on Jurisdiction dated 22 February 2022, Section 4.4.1.
[143] Respondent's Counter-Memorial on the Merits dated 3 May 2021, para 294; and Respondent's Rejoinder on the Merits & Reply Memorial on Jurisdiction dated 22 February 2022, Section 4.4.3. See also summary in Claimant's Reply Memorial dated 25 October 2021, para 28.
[144] Respondent's Counter-Memorial on the Merits dated 3 May 2021, in particular paras 199-201.
[145] Respondent's Counter-Memorial on the Merits dated 3 May 2021, in particular para 71, and section 2.4, paras 263 et seqq.
[146] Claimant's Reply Memorial dated 25 October 2021, Section III.3, paras 73 et seqq.

ECJ Opinion make it very clear that Claimant's pipeline as compared to all other interconnectors covered by the Gas Directive is the **only** pipeline which is not eligible for an exemption nor a derogation.[147] As Advocate General Bobek explains:[148]

> *"194. First, the appellant belongs to a group of persons that was closed and identifiable at the time when the contested measure was adopted. In fact, only two pipelines were, in theory, to be immediately affected by the extension of the scope of the Gas Directive: Nord Stream 2 and the Trans-Adriatic. Nevertheless, since an extension had already been obtained for the latter pipeline, it is more appropriate to speak of the appellant as the only company belonging to that (purely theoretical) group of individuals affected by the contested measure.[136]*
>
> *195. Second, in the light of its factual situation, the appellant was in many ways in a **unique position** vis-à-vis the contested measure. At the time of the adoption of that measure and of its entry into force, the construction of its pipeline had not only started, but had reached a very advanced stage. At the same time, however, that pipeline could not be completed before the deadline set out in Article 49a of the Gas Directive. Consequently, the new regime would immediately apply to the appellant, which was caught between two stools: neither the derogation nor the exemption set out in the Gas Directive were applicable.*
>
> *196. It can hardly be disputed that only the appellant was in that position when the measure was adopted. No other company will ever be in that position in the future. Any other pipeline, whether built in the past or to be built in the future, could in principle benefit from either the derogation or the exemption.*
>
> *[136] As acknowledged, for example, by the Commission itself when it put forward its proposal for the contested measure: see European Commission Fact Sheet, 'Questions and Answers on the Commission proposal to amend the Gas Directive (2009/73/EC)', MEMO/17/4422, 8 November 2017 (answer to question 10)."*

162. Claimant can only add to this, that the Trans Adriatic Pipeline (TAP) was eligible for, and did have, an Article 36 exemption before taking the final investment decision, because, contrary to Nord Stream 2, it qualified as an interconnector within the meaning of the Gas Directive prior to the Amending Directive since it connects Greece, Italy and Energy Community member Albania.[149]

[147] See paras 154-158 above.
[148] **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case 348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, paras 184-196 and footnote 136.
[149] Claimant's Reply Memorial dated 25 October 2021, para 81.iii.

VI.7 **The discriminatory treatment of Claimant is fully attributable to Respondent**

Conclusions of the ECJ Judgment

163. As mentioned in para 119 above, the ECJ Grand Chamber clarified:[150]

> *"105. In those circumstances, while it is true that the Member States enjoy a margin of discretion in relation to the grant of such exemptions and derogations to gas undertakings that meet the conditions laid down in Articles 36 and 49a of Directive 2009/73 respectively, they do not however have any discretion as regards the possibility of granting those exemptions or derogations to the appellant, which does not satisfy those conditions. Therefore, there is a direct link between the entry into force of the directive at issue and the imposition, by the latter, on the appellant of the obligations laid down by Directive 2009/73."*

164. As mentioned above in paras 139 and 140, the consequence for Claimant is that Member States can chose amongst three unbundling options, but one of those inevitably hits Claimant, *"irrespective of which one of the three methods provided for by that provision is chosen"* by the Member States.[151] The same applies as regards third party access and tariff regulation.[152]

165. The ECJ Grand Chamber thus clarified, that the Amending Directive left no discretion to Member States with relevance for Claimant's case, i.e. neither discretion as to *whether* to grant an exemption or derogation, nor discretion as to *whether* unbundling, third party access and tariff regulation would be applied to the Claimant.

Conclusions in the ECJ Opinion

166. Likewise, in the context of the attribution to Respondent, particularly in the context of the causal link between the adoption of the Amending Directive and its effects on Claimant, Advocate General Bobek pointed out, as already quoted above:[153]

> *"81. (…) I am bound to conclude that it is the contested measure which immediately affects the position of the appellant and not merely the (subsequent) transposition measures. The manner in which the appellant is affected is exhaustively regulated in the contested measure. (…)"*

[150] **Exhibit CLA-323**, Judgment of the European Court of Justice (Case C-348/20 P, *Nord Stream 2 AG vs. European Parliament and Council of the European Union*), 12 July 2022, para 105.
[151] **Exhibit CLA-323**, Judgment of the European Court of Justice (Case C-348/20 P, *Nord Stream 2 AG vs. European Parliament and Council of the European Union*), 12 July 2022, para 110.
[152] **Exhibit CLA-323**, Judgment of the European Court of Justice (Case C-348/20 P, *Nord Stream 2 AG vs. European Parliament and Council of the European Union*), 12 July 2022, para 111. See already above, para 141.
[153] **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case 348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, para 81. See already above, para 142.

Relevance for this arbitration

167. The clear conclusions of the ECJ stand – again – in stark contrast to the assertions made by Respondent and emasculate any contrary argument. Respondent sought to argue that the impact of the Amending Directive should, as a matter of fact and of law, be seen as a consequence of decisions by Germany in the exercise of its implementing discretion, for which decisions Germany, and not the EU, is responsible.[154]

168. Already in Respondent's Memorial on Jurisdiction and Bifurcation, Respondent had heavily relied on the arguments, that the breaches of the ECT identified by Claimant result from measures of the Member States for which the EU is not responsible,[155] that Member States have a wide margin of discretion to implement the relevant provisions of the Amending Directive,[156] and that alleged breaches would result from measures which are not attributable to the EU.[157]

169. The ECJ Judgment constitutes the end of that debate: As set out by the ECJ, the Amending Directive is designed in such a way that Claimant can obtain neither an exemption nor a derogation. Hence, the Amending Directive *as such* foresees that Claimant is being treated differently from all existing interconnectors and from interconnectors yet to be constructed.

170. Consequently, there is no doubt, that this legal situation, created by the Amending Directive itself, is fully attributable to Respondent. The discriminatory treatment of Claimant is the result of the Amending Directive *as such* and thus attributable to the Respondent's conduct, and not to Germany's conduct.[158] Consequently, there is also no doubt that the Tribunal has jurisdiction *ratione personae,* as previously explained by Claimant.[159] Claimant will revert to this issue below.[160]

VI.8 **The Amending Directive is a lex-Nord Stream 2**

171. Given the clear conclusions of the ECJ, the present case is exceptional and unusual. As Advocate General Bobek pointed out, it is common knowledge that

[154] Respondent's Counter-Memorial on the Merits dated 3 May 2021, e.g. para 542; and Respondent's Rejoinder on the Merits & Reply Memorial on Jurisdiction dated 22 February 2022, Sections 8.2.2. See also in this regard, summary in Claimant's Reply Memorial dated 25 October 2021, in particular para 24, and Section VII.5, paras 364 et seqq.

[155] Respondent's Memorial on Jurisdiction and Bifurcation dated 15 September 2020, Section 2.2, paras 123 et seqq.

[156] Respondent's Memorial on Jurisdiction and Bifurcation dated 15 September 2020, Section 2.2.4, paras 154 et seqq.

[157] Respondent's Memorial on Jurisdiction and Bifurcation dated 15 September 2020, Section 2.2.5, paras 176 et seqq.

[158] Claimant's Reply Memorial dated 25 October 2021, Section VII, paras 328 et seqq.

[159] Claimant's Response to the EU's Request for a preliminary phase on Jurisdiction and Admissibility dated 16 October 2020, in particular Section 5.2; and Claimant's Reply Memorial dated 25 October 2021, Section X, paras 788 et seqq., and summary in paras 41-43.

[160] See Section X below.

*"…not only were the EU institutions **aware** that, by virtue of the contested measure, the appellant was going to be subject to the newly established legal regime, but they acted with the very **intention** of subjecting the appellant to that new regime."*[161]

172. Claimant is not aware of any other case where the EU legislator has adopted a seemingly neutrally worded directive with the sole objective of complicating or preventing a single investment project. To pretend that the objective of the Amending Directive is something else is fanciful. No court or tribunal can accept such a fiction.

173. The ECJ made very clear that Claimant is the only entity whose pipeline is neither eligible for an exemption nor for a derogation.[162] That has nothing to do with legislation of general and abstract application. The ECJ Opinion was even more explicit on this point:[163]

"*197. Third, not only were the EU institutions aware that, by virtue of the contested measure, the appellant was going to be subject to the newly established legal regime, but they acted with the very intention of subjecting the appellant to that new regime.*[137] *In addition, I note that the appellant has provided, at first instance, several documents, other than those excluded by the General Court, which suggest that the extension of the EU gas rules to the activities of the appellant was in fact one of the main reasons, if not the main reason, that prompted the EU institutions to adopt the contested measure.*[138]

198. I would add, in passing, that all of this appears to be a matter of common knowledge. A cursory look at the press and academic articles concerning the adoption of the contested measure would seem to confirm the appellant's argument on this point. In that regard, I hardly need to point out that, in order to establish the relevant facts, the Court may also rely on matters of common knowledge.[139] *Justice is often depicted as being blind. However, at least in my recollection, that allegory is not meant to be interpreted as Justice being unable to see something that is blindingly obvious to everyone else.*

199. Fourth, given the advanced stage in the construction of the project and the investment already made by the appellant at the time of adoption of the contested measure, it is evident that the adoption of the contested measure has the effect of requiring the appellant to introduce profound changes to its corporate and financial structure and to its business model – all in a relatively short time frame since the

[161] **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case 348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, para 197.
[162] See paras 154-156 above.
[163] **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case 348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, paras 197-200 and footnotes 137-141. See already above, paras 157-158.

contested measure needed to be transposed within approximately 10 months from its adoption.[140] It is thus rather clear that the contested measure does not only have the capacity, but was also intended, to affect significantly the appellant's market position. The appellant has also alleged – without being contradicted either by the defendants or the interveners – that the contested measure will require changes to be made to various agreements which it had previously entered into, thereby affecting an already established legal position.[141]

200. On the basis of all the above considerations, it is difficult to envisage a situation where, despite the contested measure being of general application, a more clear and specific connection between the appellant's situation and the contested measure could be identified. Due to certain characteristics specific to the appellant, and the particular circumstances relating to the adoption of the contested measure, the position of the appellant vis-à-vis that measure can be distinguished from the position of any other undertaking that is, or will be, subject to the rules of the Gas Directive by virtue of the contested measure.

> *[137] See, amongst other freely accessible documents, (i) European Commission Fact Sheet, 'Questions and Answers on the Commission proposal to amend the Gas Directive (2009/73/EC)', MEMO/17/4422, 8 November 2017 (answers to questions 8 to 11), (ii) European Parliament Questions, Answer given by Mr Arias Cañete on behalf of the European Commission (E-004084/2018(ASW)), 24 September 2018, and (iii) European Parliament Research Service Briefing, EU Legislation in Progress, 'Common rules for gas pipelines entering the EU internal market', 27 May 2019, p. 2.*
>
> *[138] See, especially, Answer given by Energy Commissioner Cañete, and the Parliament briefing referred to in the previous footnote. See also the decision of the Bundesnetzagentur referred to in footnote 43 above.*
>
> *[139] See, for example, judgments of 28 February 2018, Commission v Xinyi PV Products (Anhui) Holdings (C-301/16 P, EU:C:2018:132, paragraph 78), and of 20 March 2014, Commission v Lithuania (C-61/12, EU:C:2014:172, paragraph 62)."*

174. The sole objective of the Amending Directive is to complicate or prevent Claimant's project and to ensure that other pipelines would not be affected in the process, which was achieved by enacting Article 49a. This is the reality – and that is why the Amending Directive is a *lex-Nord-Stream 2*. Given this, all efforts of Respondent to present the Amending Directive as a general legal act with meaningful intentions beyond Claimant's project are misleading. The same applies to Professor Maduro's arguments, as will be demonstrated below.[164]

VI.9 **Professor Maduro's expert reports are misleading**

175. Respondent introduced two expert reports delivered by Professor Maduro in these proceedings: a 98-page document dated 3 May 2021 with the title "First Expert Report"

[164] See Section VI.9 below.

(the **"Professor Maduro's first expert report"**), and a 21-page document dated 18 February 2022 with the title "Second Expert Responsive Report" (the **"Professor Maduro's second expert report"**). Professor Maduro's first expert report was submitted before the ECJ Opinion, whereas Professor Maduro's second expert report was delivered after the ECJ Opinion. Claimant will briefly comment on those two documents separately.

176. Claimant already replied to Professor Maduro's first expert report in Claimant's Reply Memorial dated 25 October 2021, and in that Reply Memorial also explained why Professor Maduro's first expert report is not compatible with the ECJ Opinion.[165]

177. In light of the ECJ Judgment and the ECJ Opinion, and in light of what has been explained above,[166] Professor Maduro's views as to the Amending Directive are, to a large extent, academic views based on high-level, abstract considerations without engaging with the real, practical impact of the Amending Directive as set out by the ECJ in the meantime. The ECJ Judgment and the ECJ Opinion confirm that such academic views are irrelevant.

178. Professor Maduro's conclusion, that the Amending Directive "*may not, moreover, be characterized, in any way, as a sort of action, disguised as legislation, individually targeting the NS2 project and NS2AG*",[167] is in direct contradiction to the conclusions in the ECJ Opinion.[168] Whilst, in general, legislation might of course be triggered by a certain factual situation which raises awareness of certain problems, and whilst this might legally be of no relevance as long as the legislation is drafted to be of general and abstract application, [169] this is not the case with the Amending Directive; as demonstrated above.[170]

179. Given the clear intention to exclude Claimant from the derogation option as set out by the ECJ, Professor Maduro's efforts to defend a "completion" criterion as being better than a "investment decision" criterion for purposes of defining import pipelines as being eligible for a derogation pursuant to Art. 49a,[171] is unconvincing, to put it in diplomatic terms. This has nothing to do with the real reasons behind the Amending Directive and Article 49a. Professor Maduro's efforts serve as a good example of what has been described above:[172] attempts to defend a seemingly neutrally worded directive and to pretend that the legislative objective is something else than what it in reality is.

[165] Claimant's Reply Memorial dated 25 October 2021, in particular Sections III.5-III.6, IV.2-IV.3, V.1-V.2.
[166] See Sections VI.4-VI.8 above.
[167] Professor Maduro's first expert report dated 3 May 2021, para 212.
[168] See in particular para 171 above.
[169] Professor Maduro's first expert report dated 3 May 2021, paras 255, 256 and 274.
[170] See Section VI.8 above.
[171] Professor Maduro's first expert report dated 3 May 2021, paras 186–189.
[172] See Section VI.8 above.

180. As regards Professor Maduro's second expert report, Professor Maduro continues with his line of argumentation, without addressing the opinion of Advocate General Bobek which had already been issued at the time when Professor Maduro prepared his second expert report. Only at the end of the report does he address the opinion of the Advocate General, seemingly as some kind of final remarks.[173] After a general description of the position of the Advocates General and their opinions,[174] with which Claimant widely agrees,[175] Professor Maduro, who himself was an Advocate General at the ECJ, conveys two key messages:

181. First, Professor Maduro explains, that the opinion of the Advocate General is not the ECJ Judgment and that it remains to be seen what the judges say. This is correct - and moot. The judges have now spoken. The ECJ Judgment was rendered on 12 July 2022 and strongly confirms the opinion of Advocate General Bobek.

182. Secondly, Professor Maduro selectively refers to two statements by Advocate General Bobek, and argues, that the uniqueness of the Amending Directive vis-à-vis Claimant, as described by the Advocate General, does not alter the general character of the Amending Directive, as (allegedly) acknowledged by the Advocate General. Professor Maduro's concludes: "*If anything, Advocate General Bobek's opinion seems to support my view*."

183. Claimant begs to differ. The brief and selective comments made by Professor Maduro do neither accurately reflect the opinion of the Advocate General, nor can they be taken seriously in the light of the ECJ Judgment. As has been explained above, based on the many supporting findings in the ECJ Opinion and the ECJ Judgment, it is clear that the Amending Directive, while general on paper, is <u>not the least</u> general in its core element – that is precisely the heart and soul of this case. The real reason behind the Amending Directive and the "completion" criterion in Article 49a, was to capture Claimant's project as the only interconnector, which was neither eligible for an exemption pursuant to Art. 36 of the Amending Directive nor eligible for a derogation pursuant to Art. 49a of the Amending Directive.

184. Professor Maduro also states, that Advocate General Bobek's Opinion concerns only the admissibility of the challenge of the Amending Directive and not the substance. In this context, Claimant wishes to reiterate: Whilst it is true that the conclusions in the ECJ Opinion and in the ECJ Judgment have been drawn in the context of the admissibility of the action for annulment, and not concerning the merits of said action, Claimant has explained in this Supplementary Memorial, that, and why, the discriminatory and

[173] Professor Maduro's second expert report dated 18 February 2022, paras 64-72.
[174] Professor Maduro's second expert report dated 18 February 2022, paras 64-66.
[175] See Section VI.2 above.

unequal treatment of Claimant is of utmost importance for the merits of this arbitration.[176] Claimant will get back to this in the context of the breaches of the ECT.[177]

VI.10 **Remarks on Respondent's and Professor Maduro's first reactions to the ECJ Judgment and the ECJ opinion**

185. Professor Maduro's and Respondent's surprising (diplomatic language) reactions to the ECJ Opinion, and later to the ECJ Judgment, require some final remarks from Claimant. In its letter dated 26 October 2022, and again in its letter dated 16 December 2022,[178] Respondent has attempted to downplay the importance of the ECJ Judgment for this arbitration. Respondent has tried to have the Tribunal believe, that the conclusions of the ECJ are of a mere procedural nature and that Claimant misunderstands the context of the ECJ Judgment.

186. This is not correct. As can be easily understood from ECJ Judgment and the ECJ Opinion, and as the Tribunal will understand, the ECJ has delivered interpretations of the *Amending Directive*, and not only interpretations of EU procedural rules. The ECJ's interpretations of the *Amending Directive* are what matters here, not the ECJ's interpretations of EU procedural rules. The EU procedural rules are only the starting point for the ECJ's assessment of the Amending Directive.

187. Claimant refers to its letter dated 24 November 2022:[179] The procedural context of the EU Judgment does not affect the ECJ's interpretation of the history, rationale, and content of the Amending Directive, nor does it affect the ECJ's findings as to the Amending Directive's impact on Claimant. This is the crux of the matter, not the EU procedural context.

188. In its letter dated 1 February 2023 Claimant further explained the procedural context, including a reference to a publication by a judge at the ECJ. Importantly, the judge was the rapporteur in the NSP2AG annulment case. Claimant reiterates, that in the publication referred to the exceptional character of the Amending Directive in relation to Claimant was emphasized (emphasis added):[180]

> After the judgment in Nord Stream 2, it is unequivocally clear that directives may, under certain circumstances, be of direct concern to the applicant and that there exists no general or systemic objection in this respect. However, it is probable, taking into account the nature of directives, that the condition of direct concern will be met **on rare**

[176] See Section VI.2 above, and see Section VIII below.
[177] See Section VIII below.
[178] **Exhibit C-311**, Respondent's Request for security for costs dated 26 October 2022, paras 73-77; and **Exhibit C-295**, Respondent's letter dated 16 December 2022, paras 75-77.
[179] **Exhibit C-288**, Claimant's letter dated 24 November 2022, p 7.
[180] **Exhibit CLA-289**, *Prechal*, Common Market Law, Review 59, SI, 2022, p 46 and footnotes 38, 39 and 40, attached as Appendix 7 to Claimant's letter dated 1 February 2023.

occasions only. Equally – **if not even more exceptional –** will be the satisfaction of the requirement of "individual concern".

189. It is this exceptional character which made Claimant's action for annulment admissible. To be clear: This is a landmark decision. An action for annulment against a general legislative act is hardly ever admissible. The ECJ has confirmed the exceptional, close – direct and individual – link between the Amending Directive and Claimant. The exceptional content of the Amending Directive, singling out, indeed targeting Claimant and treating it differently from all other pipelines has been confirmed by the ECJ. This is of decisive importance when assessing the merits in this dispute.[181]

190. Surprisingly, Respondent continued to cling to its mantra in its submission dated 22 February 2022, i.e. after Advocate General Bobek had issued the ECJ Opinion on 6 October 2021. Consequently, Respondent and Professor Maduro had ample time adequately to take account of those conclusions in their submission of 22 February 2022. They did not.

191. Instead, the opinion of the Advocate General was widely ignored by Respondent. In its more than 300 pages long submission of 22 February 2022, Respondent only mentioned the opinion of the Advocate General in passing and very selectively:

    i. In relation to the question of whether the Gas Directive was already applicable to Claimant before the Amending Directive, Respondent continued to advocate that this was the case, i.e. "*that the original Gas Directive could apply or stood likely to be rendered applicable to Nord Stream 2*",[182] whilst briefly mentioning, that the ECJ has not yet stated whether it agrees with the contrary opinion of Advocate General Bobek, and that the ECJ might eventually leave this question unanswered.[183] The ECJ Judgment did not leave this question unanswered. The ECJ very clearly confirmed Advocate General Bobek's finding that the Gas Directive was **not** applicable to Claimant before the Amending Directive.

    ii. In relation to the question of Member States' discretion, Respondent repeated its well-rehearsed line and referred to "*multiple points at which Germany and other Member States may exercise discretion in their adoption of the Amending Directive and in its application to any specific case*", at the same time asserting that "*Claimant's arguments deliberately sidestep*" this. In this context, the Opinion of Advocate General Bobek is shortly mentioned by Respondent, not even bothering to deal with the

[181] See Section VIII below.
[182] Respondent's Rejoinder on the Merits & Reply Memorial on Jurisdiction dated 22 February 2022, para 124.
[183] Respondent's Rejoinder on the Merits & Reply Memorial on Jurisdiction dated 22 February 2022, para 129.

findings of the Advocate General,[184] despite the fact that the ECJ Opinion is very clear that the Member States have no relevant discretion when it comes to the question of whether Claimant is eligible for an exemption or derogation, as was subsequently confirmed in the ECJ Judgment.[185]

192. Other than that, in its submission dated 22 February 2022, Respondent does not even mention the ECJ Opinion concerning the other aspects discussed above, and which are of such vital importance for the correct and accurate understanding of the Amending Directive. Rather, Respondent continues its fanciful arguments – as if the ECJ Opinion did not exist – e.g. that no breaches of the ECT and no damage can result from the Amending Directive, because any breaches and damage can only flow from potential measures of EU Member States within the margin of discretion accorded to them by EU Law,[186] and that the Amending Directive is a general act with no deliberate exclusion of Claimant's pipeline from the derogation regime nor any specific targeting.[187] Such argumentation is in stark contradiction to the findings in the ECJ Opinion as later confirmed by the ECJ Judgment.

193. Likewise, Professor Maduro's comments on the ECJ Opinion are unconvincing. As explained above, they find no support in the ECJ Opinion as such, nor in the ECJ Judgment which strongly supports the ECJ Opinion.[188]

[184] Respondent's Rejoinder on the Merits & Reply Memorial on Jurisdiction dated 22 February 2022, paras 994-997.
[185] See Section VI.7 above.
[186] Respondent's Rejoinder on the Merits & Reply Memorial on Jurisdiction dated 22 February 2022, e.g. paras 966 and 968 – with reference to Respondent's Memorial on Jurisdiction and Request for Bifurcation dated 15 September 2020, para 4.
[187] Respondent's Rejoinder on the Merits & Reply Memorial on Jurisdiction dated 22 February 2022, para 206.
[188] See Sections VI.3 to VI.9 above.

VII. THE CATASTROPHIC IMPACT OF THE AMENDING DIRECTIVE ON CLAIMANT AND ITS INVESTMENT HAS BEEN CONFIRMED

VII.1 Claimant's previous submissions and the first expert report in relation to the economic impact of the Amending Directive on Claimant have been confirmed

194. Claimant has explained in previous submissions, that the economic impact of the Amending Directive on Claimant and its investment will be catastrophic, and that it already has had a significant negative impact. This has been described in Claimant's Memorial, in Claimant's Reply Memorial, [redacted] and in the first expert report provided by Swiss Economics AG, Switzerland.[189]

195. The impact described in earlier submissions is still relevant. Indeed, they have become reality. As things stand, the worst case scenario has already materialized, because Claimant is not able to generate transport revenues due to the Amending Directive. This loss of revenue translates into substantial amounts. When the certification procedure – which is required by the Amending Directive – was stopped in February 2022 for an indefinite period of time, it resulted [redacted] This situation led to the institution of bankruptcy proceedings which were soon – on 10 May 2022 – transformed into the composition proceedings which are currently underway. This development has been described by Claimant in its letter dated 1 February 2023.[190]

196. As a matter of fact, Claimant's difficult situation today is equivalent to the worst case scenario described by Swiss Economics in their expert report: Due to the Amending Directive, Claimant is unable to offer gas transport and is thus not entitled to transport revenues.[191] This situation can, and will lead Claimant into bankruptcy, if no solution can be found. This is the reality. The factual and legal developments since February 2022 have only to a limited extent altered the general dramatic economic impact of the Amending Directive on Claimant as previously explained. This will be explained in the following sections.

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[189] Claimant's Memorial dated 3 July 2020, Section VII; Claimant's Reply Memorial dated 25 October 2021, Section VI, paras 232 et seqq.; [redacted] and First expert report of Swiss Economics dated 25 October 2021, Sections 4-7.

[190] **Exhibit C-289**, Claimant's letter dated 1 February 2023, pp 5-6.

[191] First expert report of Swiss Economics dated 25 October 2021, Section V.

197. Before moving onto that, Claimant wishes to draw the Tribunal's attention to the following statements in the ECJ judgment and in the ECJ opinion in relation to Claimant's factual and economic situation. The ECJ Grand Chamber acknowledged: [192]

> *"80. (…) The appellant had, at the time of the adoption and entry into force of that directive, already made substantial investments with a view to the construction of that interconnector, which was at an advanced stage. (…)".*

198. Advocate General Bobek explained, as already quoted,[193] that the constraints resulting from the Amending were not in force "*at the time of the investment, the time when building on the infrastructure began, and the time when the appellant entered into contracts for its financing and future operation."* And the Advocate General added:[194]

> *"103. (…) as a matter of basic economic reality, pipelines are not clementines.[63] Such a major infrastructure project is not a business activity that begins overnight. In the present case, given the pipeline's advanced stage of construction and the significant investment made by the appellant over a number of years, the contested measure will have numerous consequences on the appellant's corporate structure and manner in which it can operate its business. Some of the changes required of the appellant will necessarily have to be implemented even before its commercial activities begin. Accordingly, it cannot be argued that the impact is purely hypothetical, or at any rate linked to future events.*
>
> [63] *Judgment of 15 July 1963, Plaumann v Commission (25/62, EU:C:1963:17), even if, in that case, the nature of the business activity at issue was rather relevant for the concept of individual concern."*

VII.2 [redacted]

199. [redacted] [195] [redacted]

[192] **Exhibit CLA-323**, Judgment of the European Court of Justice (Case C-348/20 P, *Nord Stream 2 AG vs. European Parliament and Council of the European Union*), 12 July 2022, para 80.
[193] See para 143 above.
[194] **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case 348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, para 103.
[195] Claimant's Memorial dated 3 July 2021, para 318.

[redacted][196] [redacted]

[redacted]

200. [redacted][197] [redacted]

201. [redacted] [98]

VII.3 **Claimant can only add to this by updating and illustrating Claimant's damage situation**

202. Claimant is of course not blind to the realities since February 2022. However, the developments since February 2022 have had only a limited, and hypothetical, impact on Claimant's entitlement to obtain transport revenues, assuming that the Amending Directive had not eliminated Claimant's revenue stream. Consequently, the Amending Directive continues to be the reason for Claimant's lost revenues.

203. Without the Amending Directive, Claimant's situation would have been as follows:

i. [redacted]

ii. [redacted]

[196] [redacted]

[197] [redacted]

[198] See in this regard, Expert report of Mr Peter Roberts dated 22 October 2021, paras 14, 25; [redacted]

[redacted][199]

iii. In September 2022 the damage incidents on Line A in the Danish and Swedish EEZ occurred. Since then the situation is as follows: Line A cannot be operated until it has been repaired. [redacted]

iv. To summarize the transport capacity situation per line:

(a) [redacted]

(b) [redacted]

204. [redacted].

[199] [redacted]

205. For the period during which the capacity of only one of Claimant's lines is available, while the other line is being repaired, [redacted], Claimant assumes the following with respect to transport revenue:

i. [redacted]

ii. [redacted]

iii. [redacted]

206. [redacted] Be that as it may, Claimant disregards these costs for the current purposes of illustrating the damage caused by the Amending Directive. Claimant reserves the right further to clarify, and expand on, this as and when Claimant will ask for compensation in the next phase of this arbitration.

207. Based on the aforementioned, Claimant updates and supplements the impact of the Amending Directive as described on 25 October 2021[200] as follows:

i. Claimant has already suffered substantial damage since its readiness for operation in October and December 2021, respectively, until the date of this submission. This will be summarized below in section VII.4.

ii. For the time thereafter, Claimant will suffer further losses month by month due to the Amending Directive. [redacted] The ongoing monthly damage as of March 2024 will be summarized below in section VII.5.

208. Depending on how long the situation of lost transport revenue continues, Claimant could, and will ultimately end up in bankruptcy, if no solution can be found. To make this very clear once again:[201] This is the worst case scenario which Claimant has described

[200] Claimant's Reply Memorial dated 25 October 2021, Section VI, paras 232 et seqq.
[201] See in this regard, already above Section VII.1.

in the submissions on 25 October 2021[202]. The Amending Directive prevents Claimant from offering transport capacity, thereby completely depriving Claimant of its revenue stream which it would otherwise be entitled to – [redacted]

209. However, at this point the future is uncertain which is why Claimant only provides impact calculations on a monthly basis for the time after February 2024. This monthly damage will continue to evolve as long as the Amending Directive, with its certification requirement, destroys Claimant's entitlement for transport revenue.

210. In order to provide further evidence to the Tribunal of the damage already suffered by Claimant and of the ongoing damage, Claimant has instructed again the technical economic expert consultancy, Swiss Economics, to provide a second independent expert report, to which reference is made below.

VII.4 [redacted]

211. [redacted][203]

212. [redacted][204]

213. [redacted]

[202] Claimant's Reply Memorial dated 25 October 2021, Section VI, in particular para 236.vi, and Section VI.5, paras 295 et seqq.
[203] Second expert report of Swiss Economics, Section 2, para 22.
[204] First expert report of Swiss Economics, Section 4.

VII.5 [redacted]

214. [redacted].[205] [redacted]

[205] Second export report of Swiss Economics, Section 3, para 40.

VIII. THE EU REMAINS IN BREACH OF ITS OBLIGATIONS UNDER THE ECT

215. In its previous submissions Claimant has explained that, and how, Respondent has breached its obligations under the ECT by adopting the Amending Directive in 2019. Claimant refers to and relies on all these submissions describing in full Respondent's breaches of various categories of the FET standard laid down in Art. 10(1), of the protection standard laid down in Art. 10(7), and of the protection against expropriation laid down in Art. 13.

216. Nothing that has transpired since the commencement of this arbitration – either from a factual or legal perspective – has changed this fact. The critical date for assessing breaches of the ECT is the date of adoption of the Amending Directive i.e. 17 April 2019. Events occurring thereafter cannot retroactively justify Respondent's breaches of the ECT. Respondent thus remains in breach of the ECT.

217. Indeed, as will be set out in the following, the ECJ Judgment and ECJ Opinion both confirm and reinforce the arguments put forward by Claimant explaining Respondent's breaches of the ECT.

218. In Claimant's Reply Memorial and Counter-Memorial on Jurisdiction,[206] Claimant explained that the Gas Directive did not apply to Nord Stream 2 before the Amending Directive was adopted. This has now been confirmed by the ECJ. As explained in Sections VI.4 and VI.5 above, the ECJ found that the Amending Directive changes the legal status of Claimant and thereby unavoidably affects Claimant and that these effects on Claimant did not exist prior to the adoption of the Amending Directive.

219. Also in Claimant's Reply Memorial,[207] Claimant established that the conduct constituting violations of the ECT is attributable to the EU and not to Germany as a Member State. In Section VI.7 above Claimant has addressed the fact that the ECJ has confirmed this. On this point the ECJ concluded:[208]

> ¨*Therefore there is a direct link between the entry into force of the directive at issue and the imposition, by the latter, on the applicant of the obligations laid down by Directive 2009/73.*¨

220. In Claimant's Reply Memorial,[209] as well as in the Memorial,[210] Claimant has explained that Respondent has failed to act in good faith, noting that good faith is a central element of the FET standard under the ECT and observing that the lack of good faith has

[206] Claimant's Reply Memorial dated 25 October 2021, Section III.
[207] Claimant's Reply Memorial dated 25 October 2021, Section VII.
[208] **Exhibit CLA-323**, Judgment of the European Court of Justice (Case C-348/20 P, *Nord Stream 2 AG vs. European Parliament and Council of the European Union*), 12 July 2022, para 105.
[209] Claimant's Reply Memorial dated 25 October 2021, Section VIII.1, paras 422 et seqq.
[210] Claimant's Memorial dated 3 July 2020, Section VIII.3, paras 416-418.

manifested itself, *inter alia,* in the deliberate targeting of Nord Stream 2. As shown in Section VI.8 above, the Amending Directive is in reality a *lex-Nord Stream 2*.

221. Advocate General Bobek concluded the following:[211]

> *¨Third, not only were the EU institutions* ***aware*** *that by virtue of the contested measures the appellant was going to be subject to the newly established legal regime, but they acted with the* ***very intention*** *of subjecting the appellant to that new regime*.¨

This is not a good faith conduct. Nor is it transparent conduct, especially against the background of Respondent's repeated attempts to portray the Amending Directive as legislation of general application. Transparency is, of course, another central element of the FET standard.

222. As discussed above in section VI.6, both the ECJ Judgment and the ECJ Opinion confirm that the Amending Directive treats Claimant differently from all other pipelines. Claimant has shown - in in Section VI.8 above - that the Amending Directive is a *lex-Nord Stream 2* targeting Claimant for separate and discriminatory treatment. Fair and equal treatment goes to the heart of the FET standard of protection in Article 10(1) of the ECT as well as to the protection standard laid down in Article 10(7) of the ECT. By singling out Claimant for separate and discriminatory treatment, Respondent violated its obligations under the ECT.

223. As noted above in Section VI.4, the ECJ has confirmed that the Amending Directive directly affects Claimant, and – as noted in Section VI.7 above – that the effects created by the Amending Directive are attributable to Respondent. In Section VII above, Claimant has explained that the effects of the Amending Directive are already, and will continue to be, significant, if not disastrous, resulting in Respondent being in breach of Articles 10(1),10(7) and 13 of the ECT.

224. In previous submissions, Claimant had reserved the right to bring a claim for denial of justice and/or for violation of Art. 10(12) of the ECT in relation to the action for annulment and the General Court's decision to dismiss Claimant's action on grounds of inadmissibility.[212] As explained, The ECJ has now overturned this decision and held Claimant's action for annulment admissible. Claimant therefore notes that this breach likely does not need to be pursued further, at least not for the time being. It remains to be seen, however, how the action for annulment will be dealt with by the General Court.

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

[212] Claimant's Memorial dated 3 July 2020, para 393; and Claimant's Reply Memorial dated 25 October 2021, para 401.

IX. THE TRIBUNAL HAS JURISDICTION: THE FORK-IN-THE-ROAD PROVISION IN ARTICLE 26 HAS NOT BEEN TRIGGERED

225. The factual developments during the suspension of the arbitration do not give rise to any comments from Claimant concerning Respondent's arguments relating to the fork-in-the-road provision in Article 26 of the ECT. Nor does Claimant see any need to comment in detail on Respondent's Reply Memorial on Jurisdiction submitted on 22 February 2022. It consists mostly of repetitions of arguments already presented and the occasional variation of well-known themes.

226. Claimant refers to and relies on its earlier submissions on jurisdiction, in particular on its Reply Memorial & Counter-Memorial on Jurisdiction submitted on 25 October 2021, Section IX.

227. In particular, Claimant wishes to emphasize that the straightforward and simple way to deal with the fork-in-the-road argument presented by Respondent is to interpret Article 26 of the ECT on the basis of the Vienna Convention on the Law of Treaties (VCLT) and apply it accordingly. Properly interpreted, the clear language of Article 26 of the ECT provides a complete answer to the question whether Respondent's unconditional consent to arbitration is vitiated in this case. The short and simple answer is no.

228. As Claimant explained in detail in its Reply Memorial & Counter-Memorial on Jurisdiction,[213] the claims which Claimant presents to the Tribunal have not been presented in any other forum. Article 26 of the ECT defines the kinds of disputes which are covered by it. Paragraph (1) of this provision refers to disputes which concern an alleged breach of an obligation of a Contracting Party under Part III of the ECT which deals with investment promotion and protection. In this arbitration Claimant alleges that Respondent has breached its obligations under Part III of the ECT.

229. The definition of ¨disputes¨ in Paragraph (1) of Article 26 determines and controls the meaning of the words ¨such dispute¨ and ¨the dispute¨ in the remainder of the text of Article 26 of the ECT. There is thus no doubt that the only kind of disputes which are covered by Article 26 of the ECT are disputes concerning an alleged breach of an obligation under Part III of the ECT. Claimant has alleged breaches of the ECT only before the Tribunal, not anywhere else.

230. There is thus no need for the Tribunal to immerse itself in the debate about the triple identity test versus the so-called fundamental basis test.[214] The same conclusion was reached by the tribunal in a recent ECT arbitration.

[213] Claimant's Reply Memorial dated 25 October 2021, Section IX, paras 672 et seqq.
[214] Lest there be any misunderstanding, Claimant's position is that if a choice is to be made, the triple identity test is the proper test to apply.

231. In SCC Case No V2019/126 – Mercuria Energy Group Limited (Cyprus) v The Republic of Poland[215] – rendered in Stockholm on 22 December 2022 the dispute arose from a financial penalty imposed on Mercuria's subsidiary, J&S Energy S.A. (JSE) by the Polish Minister of Energy. The financial penalty was ultimately overturned by the Polish administrative courts in 2009, but was never reimbursed in full by the government to Mercuria. Mercuria brought an arbitration under the ECT against Poland to recover the outstanding part of the penalty with statutory interest accrued thereon.

232. Poland objected to the jurisdiction of the tribunal and argued that Mercuria had triggered the fork-in-the-road clause in Article 26(2) of the ECT by initiating proceedings in the Polish courts. Poland supported its arguments by relying on the so-called fundamental basis test.

233. Mercuria took the position that it had not submitted any dispute to the Polish courts pursuant to Article 26(2)(a) of the ECT. In so arguing Mercuria relied on the triple identity test to distinguish its claims before the tribunal from the claims brought in the Polish courts.

234. Ruling on the jurisdictional objection the tribunal said, inter alia, the following:[216]

> *"606. The Parties are in dispute as to whether the fundamental basis test or the stricter triple identity test should be applied to determine if the Tribunal is to decline jurisdiction over the claims in this arbitration pursuant to Article 26(3)(b)(i) of the ECT. In the view of the Tribunal, however, it is not necessary to decide this issue given that neither test would be satisfied in the case at hand because the claims in the current arbitration are distinct from those brought by JSE before the Polish courts.*
>
> *607. First, the Tribunal notes that the fact that claims in this arbitration and the domestic proceedings have both arisen from the imposition of the Penalty does not mean that they are parallel proceedings that should be prevented by the fork-in-the-road provision in Article 26(3)(b)(i) of the ECT.*
>
> *608. Second, Claimant's claims in this arbitration are based on the protection provided in Part III of the ECT, whereas JSE's claims before the Polish courts are rooted in Polish law, in particular the Tax Ordinance. The Tribunal is not convinced by Respondent's contention that the relevant Polish tax law provisions are mirrored*

[215] **Exhibit CLA-324,** *Mercuria Energy Group Limited (Cyprus) v. The Republic of Poland*, SCC Case No. V2019/126, Final Award (document accessible at https://www.italaw.com/sites/default/files/case-documents/italaw171104.pdf), 29 December 2022. Annulment proceedings are currently pending at the Svea Court of Appeals; such proceedings do not concern Article 26 of the ECT.

[216] **Exhibit CLA-324,** *Mercuria Energy Group Limited (Cyprus) v. The Republic of Poland*, SCC Case No. V2019/126, Final Award (document accessible at https://www.italaw.com/sites/default/files/case-documents/italaw171104.pdf), 29 December 2022, Section D, paras 606-611.

in the Loan Agreement and are thus the normative source of the claims in this arbitration and in the domestic proceedings. The Loan Agreement concluded between Claimant and JSE is relevant to Claimant's entitlement to seek protection under the ECT, but it cannot be considered the normative source of the claims in this arbitration, which is the ECT itself.

609. Even if, as argued by Respondent, the claims sought in this arbitration derived from the same factual predicates and result in the same requested relief as the claims commenced at the domestic level, this would not change the fact that obligations under the ECT are distinct from those underlying JSE's claims in the domestic proceedings. This remains true even if the Loan Agreement were considered to have the function of elevating the Polish administrative law claim to an international public law by transferring the public law receivable to Claimant, as argued by Respondent. The Tribunal takes the same view as expressed in the MEG Award on Jurisdiction, that an identical sum being sought for a breach of a treaty obligation as under Polish domestic law does not mean that these are the same claims.[494]

> [494] *Exhibit CL-17, Mercuria Energy Group Limited vs. Minister of Economy (SCC Case No. V 096/2008), Award on Jurisdiction, made on 17 December 2009. para. 92.*

610. Third, the domestic proceedings in Poland form a significant part of the basis for the claims in this arbitration that Respondent has breached its obligations under the ECT. This is particularly the case for Claimant's claim that Respondent does not provide effective means to enforce administrative court judgements, such as those obtained by JSE in the domestic proceedings, against the administrative authorities in violation of Article 10(12) of the ECT. However, Claimant also refers to the domestic proceedings initiated by JSE in relation to its claim under the fair and equitable treatment provision in Article 10(1) of the ECT.

611. On this basis, the Tribunal takes the view that there is no basis to invoke Article 26(3)(b)(i) of the ECT to deny jurisdiction over the claims in this arbitration."

235. As a matter of fact, no ECT tribunal has ever relied on the so-called fundamental basis test to resolve issues concerning the fork-in-the-road provision in Art 26(2) of the ECT.

Consequently, the two pending court cases of Claimant in relation to the Amending Directive do not trigger the fork-in-the-road provision in Article 26, because no breaches of the ECT are being claimed there. For the Tribunal's information, however, Claimant provides a short update of the procedural status in those two cases: The action for annulment is pending at the General Court in Luxembourg for decision on the merits. The written phase has been closed. A hearing is scheduled for the 11 April 2024. In the appeal at the German Federal Court of Justice in Karlsruhe (Bundesgerichtshof), a

hearing has been postponed until after the judgment in the action for annulment in Luxembourg.

X. THE TRIBUNAL HAS JURISDICTION RATIONE PERSONAE

236. In Section X of its Reply Memorial & Counter-Memorial on Jurisdiction, submitted on 25 October 2021, Claimant explained that the Tribunal has jurisdiction *ratione personae*.

237. The two jurisdictional requirements in Art 26 of the ECT for a tribunal constituted under Art 26(4) are met in this case:

(i) This is a dispute between a Contracting Party - the EU - and an Investor - NSP2AG - of another Contracting Party, Switzerland;

(ii) The dispute relates to NSP2AG's investment in the Area of the EU concerning which NSP2AG alleges breaches of the EU under Part III of the ECT.

238. The jurisdictional objection raised by Respondent[217] is properly a question concerning the merits and not of jurisdiction. The objection is based on Respondent's suggestion that the breaches of the ECT and the resulting damage can only result from measures that Member States – in this case Germany – take within the scope of their discretion when implementing the Amending Directive and that therefore responsibility for such measures cannot be attributed to Respondent, but only to the Member State in question.

239. The theory underlying this suggestion has now been completely torn apart by the ECJ Grand Chamber when it concluded that in fact there was no discretion for Member States with respect to the specific legal situation of Claimant.

240. As already mentioned above, this is what the ECJ Grand Chamber said:[218]

> *"105. In those circumstances, while it is true that the Member States enjoy a margin of discretion in relation to the grant of such exemptions and derogations to gas undertakings that meet the conditions laid down in Articles 36 and 49a of Directive 2009/73 respectively, they do not however have any discretion as regards the possibility of granting those exemptions or derogations to the appellant, which does not satisfy those conditions. Therefore, there is a direct link between the entry into force of the directive at issue and the imposition, by the latter, on the appellant of the obligations laid down by Directive 2009/73."*

[217] See Respondent's Memorial on Jurisdiction and Request for Bifurcation dated 15 September 2020, Section 2.2; and Respondent's Rejoinder on the Merits & Reply Memorial on Jurisdiction dated 22 February 2022, Section 8.2.

[218] **Exhibit CLA-323**, Judgment of the European Court of Justice (Case C-348/20 P, *Nord Stream 2 AG vs. European Parliament and Council of the European Union*), 12 July 2022, paras 105 and 110.

XI. THE TRIBUNAL HAS THE POWER TO AWARD A RESTITUTIONARY REMEDY AND ITS EXERCISE OF THAT POWER IS JUSTIFIED IN THIS CASE

241. In Section XI of its Reply Memorial & Counter-Memorial on Jurisdiction submitted on 25 October 2021, Claimant explained that the Tribunal has the power to order the restitutionary remedy which Claimant asked for in item vii of its Prayers for Relief viz., 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 Claimant and its asset. Claimant also explained that the exercise of that power is justified in this case.

242. Claimant refers to and relies on its submissions in the Reply Memorial & Counter-Memorial on Jurisdiction.

243. In further support of the Tribunal's power to award the requested remedy, Claimant hereby submits the judgment rendered by the International Court of Justice (ICJ) on 3 February 2012 in the dispute between Germany and Italy concerning jurisdictional immunities of States.[219]

244. The relevant passage for this arbitration is the dispositive part of the judgment item (4) on page 60, where the ICJ orders Italy to enact appropriate legislation to right the wrongs that resulted from Italy's violation of its obligations with respect to the immunity of Germany.

245. The text of item (4) reads:

> *"(4) By fourteen votes to one,*
>
> *Finds that the Italian Republic must, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of other judicial authorities infringing the immunity which the Federal Republic of Germany enjoys under international law cease to have effect;"*

246. Claimant notes that the jurisdiction of the ICJ – just as that of any other international court or international tribunal – is dependent on the agreement of the parties to the dispute in question. In the dispute before the ICJ jurisdiction was based on Article 1 of the European Convention for the Peaceful Settlement of Disputes which has been signed both by Germany and Italy.[220] In addition Italy did not raise any objection concerning the jurisdiction of the ICJ.[221]

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[219] **Exhibit CLA-325,** Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening), Judgment, I.C.J. Reports 2012, p 99.

[220] The wording of Article 1 of the European Convention for the Peaceful Settlement of Disputes is reproduced in **Exhibit CLA-325,** Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening), Judgment, I.C.J. Reports 2012, para 41.

[221] See in this regard, **Exhibit CLA-325,** Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening), Judgment, I.C.J. Reports 2012, para 40.

XII. **RELIEF SOUGHT**

247. On the basis of the foregoing, Claimant respectfully reiterates its requests as set out in Claimant's Reply Memorial,[222] except for the following: At this point, Claimant refrains from requesting an interim order or an order for interim injunctive relief, but reserves its right to do so at a later point.

248. Consequently, without limitation and fully reserving its right to amend or supplement this request, NSP2AG requests the following relief:

i. A declaration that the Tribunal has jurisdiction to determine NSP2AG's claim against the EU;

ii. 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;

iii. 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;

iv. 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;

v. 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;

vi. 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;

vii. 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 Claimant and its asset;

viii. If the Tribunal declines to make the order requested in (vii) above, in a subsequent phase of this arbitration, 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 Claimant and its asset;

ix. 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;

[222] Claimant's Reply Memorial dated 25 October 2021, paras 865-867.

x. 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;

xi. 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

xii. Such other and further relief as the Tribunal considers appropriate, in the circumstances.

249. 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

Professor Dr. Kaj Hobér

27 February 2024

ANNEX 1

List of exhibits

No.	Description	Date
FACTUAL EXHIBITS		
C-288	Letter from NSP2AG to Tribunal	24 November 2022
C-289	Letter from NSP2AG to Tribunal	1 February 2023
C-290	Office of Foreign Assets Control of USA website, "Specially Designated Nationals List – Data Formats & Data Schemas" (last accessed on 26 January 2024 at https://ofac.treasury.gov/specially-designated-nationals-list-data-formats-data-schemas)	Last Updated: 25 January 2024
C-291	Office of Foreign Assets Control of USA website, FAQ topic page, "Basic Information on OFAC and Sanctions" (last accessed on 17 January 2024 at https://ofac.treasury.gov/faqs/topic/1501)	15 January 2015
C-292	Office of Foreign Assets Control of USA website, Frequently asked questions, "Russian Harmful Foreign Activities Sanctions" (last accessed on 17 January 2024 at https://ofac.treasury.gov/faqs/921)	20 August 2021
C-293	Portal of the Swiss government, "Switzerland adopts EU sanctions against Russia" (press release accessible at https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-87386.html)	28 February 2022
C-294	Email from Swiss State Secretariat for Economic Affairs to NSP2AG	4 January 2024
C-295	Letter from European Union to Tribunal	16 December 2022
C-296	Bundesnetzagentur website, "Gasimporte in GWh/Tag" (last accessed on 17 January 2024 at https://www.bundesnetzagentur.de/DE/Gasversorgung/aktuelle_gasversorgung/_svg/Gasimporte/Gasimporte.html)	Last Updated: 16 January 2024
C-297	Centre on Global Energy Policy at Columbia (SIPA) article, "Q&A Russian Gas Transit through Ukraine" (last accessed on 17 January 2024 at https://www.energypolicy.columbia.edu/qa-russian-gas-transit-through-ukraine/)	3 October 2023
C-298	Statistic by Statista, "Natural gas import volume from Russia in the European Union (EU) and the United Kingdom (UK) from week 1, 2021 to week 36, 202, by exporting route" (last accessed on 17 January 2024	September 2023

	at https://www.statista.com/statistics/1331770/eu-gas-imports-from-russia-by-route/)	
C-299	Report by International Energy Agency, "Medium-term Gas Report 2023" (report accessible at https://www.iea.org/reports/medium-term-gas-report-2023)	October 2023
C-300	Report by International Energy Agency, "How to Avoid Gas Shortages in the European Union in 2023" (report accessible at https://iea.blob.core.windows.net/assets/96ce64c5-1061-4e0c-998d-fd679990653b/HowtoAvoidGasShortagesintheEuropeanUnionin2023.pdf)	December 2022
C-301	Statistic by Statista, "Year-over-year change in the export volume of liquefied natural gas (LNG) from Russia from January to November 2022, by selected country" (last accessed on 18 January 2024 at https://www.statista.com/statistics/1362502/russia-lng-export-growth-by-country/)	March 2022
C-302	European Commission's Press release "EU adopts 12th package of sanctions against Russia for its continued illegal war against Russia" (press release accessible at https://ec.europa.eu/commission/presscorner/detail/en/IP_23_6566)	18 December 2023
C-303	Portal of the Swiss government, "Ukraine: Switzerland implements the EU's 12th package of sanctions" (press release accessible at https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-99902.html)	31 January 2024
C-304	Reuters article, "EU approves new sanctions package against Russia" (article accessible at https://www.reuters.com/world/europe/eu-approves-13th-sanctions-package-against-russia-eu-sources-2024-02-21/)	21 February 2024
C-305	Council of the EU's Press Release, "Russia: two years after the full-scale invasion and war of aggression against Ukraine, EU adopts 13th package of individual and economic sanctions" (press release accessible at https://www.eeas.europa.eu/eeas/13th-package-eu-sanctions-russia_en?s=173)	23 February 2024
C-306	Joint Statement between the European Commission and the United States on European Energy Security (statements accessible at https://ec.europa.eu/commission/presscorner/detail/en/statement_22_2041)	25 March 2022
C-307	European Commission' Press Release, "REPowerEU: Joint European action for more affordable, secure and sustainable energy" (last	8 March 2022

	accessed on 18 January 2024 at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1511)	
C-308	Letter from NSP2AG to Tribunal	8 June 2022
C-309	Letter from NSP2AG to Tribunal	20 June 2022
C-310	Letter from NSP2AG to Tribunal	22 August 2022
C-311	European Union's Request for security for costs	26 October 2022
LEGAL EXHIBITS		
CLA-311	*Gordon/Smyth/Cornell,* Sanctions Law (extract)	2019
CLA-312	Federal Act on Private International Law (PILA), Art. 19 (extract).	-
CLA-313	Council Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (document accessible at https://eur-lex.europa.eu/eli/reg/2014/833/oj/eng)	31 July 2014
CLA-314	BT-Drucksache 20/8955 by Deutscher Bundestag, "Written questions with answers received from the Federal Government in the week of 16 October 2023" (original document accessible at https://dserver.bundestag.de/btd/20/089/2008955.pdf)	20 October 2023
CLA-315	Proposal for a Regulation of the European Parliament and of the Council on methane emissions reduction in the energy sector and amending Regulation (EU) 2019/942 (Regulation is accessible at EUR-Lex - 52021PC0805 - EN - EUR-Lex (europa.eu))	15 December 2021
CLA-316	Consolidated version of the Treaty on the functioning of the European Union, Official Journal of the European Union (document no. 12012E194 accessible at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT)	26 October 2012
CLA-317	Compilation of extracts of Swiss scholarly writings on Swiss Debt Enforcement and Bankruptcy Law (DEBL) with English working translations	-
CLA-318	Compilation of extracts of Swiss provisions on Swiss Debt Enforcement and Bankruptcy Law (DEBL) with English working translations	-
CLA-319	Swiss Official Gazette of Commerce (SOGC), publication No. NA04-0000000905 "Extension of stay of bankruptcy Nord Stream 2 AG" (publication accessible at https://shab.ch/#!/search/publications/detail/07fae9be-ecca-4e4d-bc88-7edc4e1e2fee)	21 December 2023

CLA-320	*Baizeau/Rodiguez/Stöckli*, National Report of Switzerland by International Bar Association, "IBA Toolkit on Insolvency and Arbitration Questionnaire" (report accessible at https://www.ibanet.org/MediaHandler?id=1E2B5A32-BA4C-478B-8719-6313658136D9)	January 2022
CLA-321	*Bernhard Berger and Franz Kellerhals*, International and Domestic Arbitration in Switzerland, 4th edition, Bern	2021
CLA-322	*Jolanta Kren Kostkiewicz and Rodrigo Rodriguez*, Internationales Insolvenzrecht, Bern	2013
CLA-323	*Nord Stream 2 AG vs. European Parliament and Council of the European Union*, Case C-348/20 P, Judgment of the European Court of Justice	12 July 2022
CLA-324	*Mercuria Energy Group Limited (Cyprus) v. The Republic of Poland*, SCC Case No. V2019/126, Final Award (document accessible at https://www.italaw.com/sites/default/files/case-documents/italaw171104.pdf)	29 December 2022
CLA-325	*Germany v. Italy; Greece intervening*, Jurisdictional Immunities of the State, Judgment, I.C.J. Reports	2012