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

NORD STREAM 2 AG

(Claimant)

vs

EUROPEAN UNION

(Respondent)

RESPONDENT'S SUPPLEMENTARY REPLY ON MERITS

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1. INTRODUCTION

1. This Supplementary Reply on Merits ("**Supplementary Reply**") provides the response of the European Union ("**EU**") to the Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024 ("**Supplementary Rejoinder**").

2. This Supplementary Reply builds upon previous submissions made by the European Union to the Tribunal, including the EU's Memorial on Jurisdiction, of 15 September 2020 ("**Memorial on Jurisdiction**"); the EU's Counter-Memorial on the Merits, of 3 May 2021 ("**Counter-Memorial**"); the EU's Rejoinder on the Merits and Reply on Jurisdiction, of 22 February 2022 ("**Rejoinder**"); the EU's letters to the Tribunal, of 3 October 2022 and of 16 December 2022; and the EU's Supplementary Counter-Memorial on Jurisdiction and Merits, of 4 July 2024 ("**Supplementary Counter-Memorial**").

3. Together with this Supplementary Reply, the European Union submits a second expert report by Ms. Serena Hesmondgalgh and Mr. Carlos Lapuerta, of the Brattle Group (the "**Second Brattle expert report**"), which addresses the Claimant's comments to the First Brattle expert report.

4. As ordered by the Tribunal, this Supplementary Reply, like the Supplementary Counter-Memorial, briefs the Tribunal "on relevant factual developments that occurred since the beginning of the stay of the proceedings"[1], which stay had been ordered by the Tribunal on 16 March 2022, at the Claimant's request.[2]

5. Before addressing those factual developments, and their legal implications, it is appropriate to place this Supplementary Reply in the context of the EU's prior submissions to the Tribunal.

6. Contrary to the Claimant's assertions, the European Union is not seeking to justify "retroactively"[3] the adoption of the Amending Directive (the "**AD**"). The European Union has shown that the Amending Directive was fully compatible with the Energy Charter Treaty (the "**ECT**") on the date of its adoption, and it has remained so thereafter. Subsequent factual developments are highly relevant because they have confirmed beyond doubt that the Amending Directive is not, and was never, in breach of the ECT.

[1] Procedural Order No. 123, para. 26.
[2] Procedural Order No. 7.
[3] *See* e.g. Claimant's Supplementary Rejoinder on Jurisdiction and Merits, para. 44.

7. Nor has the European Union "shifted"[4] its defence following the judgment of the European Court of Justice ("**ECJ**") of 12 July 2022. The European Union has shown that the Claimant misunderstands the meaning and relevance of that judgment.[5] The European Union has further demonstrated, in the alternative, that even if the ECJ Judgment supported the Claimant's own reading of the Amending Directive (*quod non*), it would remain that the Claimant's claims of discrimination are unfounded, as confirmed by subsequent developments.[6]

8. As briefly recalled here below, the EU's case has remained fully consistent throughout these proceedings:

9. First, the European Union has explained from the outset that the Gas Directive is the centrepiece of the EU's generally applicable regulatory regime for gas.[7] That regime pursues legitimate policy objectives in the field of energy, as prescribed by Article 194 of the Treaty on the Functioning of the European Union ("**TFEU**"). Those objectives include, in particular, ensuring the functioning of a competitive internal market and ensuring security of energy supply.[8]

10. Second, the European Union has further explained that the European Union and its Member States have a sovereign right to regulate within their territory for legitimate public policy purposes, such as those stipulated in Article 194 TFEU. The European Union is fully entitled to decide, pursuant to that right and in accordance with its legislative and regulatory procedures, that the requirements of the Gas Directive must apply in a comprehensive and consistent manner throughout its entire territory, including with regard to pipelines connecting the European Union to third countries. By doing so, the Amending Directive makes a material contribution to the legitimate objectives of the Gas Directive and the TFEU.[9] Subsequent developments have confirmed beyond doubt such contribution.[10]

11. Third, the European Union has shown from its first submission that the Amending Directive did not involve a "dramatic regulatory change".[11] Prior to the adoption of the Amending Directive, there were clear indications that the Gas Directive already applied, or could be made applicable, to pipelines connecting the

[4] *See* e.g. Claimant's Supplementary Rejoinder on Jurisdiction and Merits, para. 11.
[5] European Union's Supplementary Counter-Memorial, section 4.1 *See* also section 5 of this submission.
[6] European Union's Supplementary Counter-Memorial, section 4.3. *See* also section 6.1. of this submission.
[7] European Union's Counter-Memorial, section 2.1.1; European Union's Rejoinder, section 2.
[8] *Ibid*.
[9] European Union's Counter-Memorial, section 2.1.2 and 2.1.3; European Union's Rejoinder, section 2; *see* also section 6 of this submission.
[10] *See* section 6.1.4 of this submission and European Union's Supplementary Counter-Memorial, paras. 283-291 (with references to Brattle Report, Section V). *See* also European Union's Rejoinder, paras. 222 and 223.
[11] European Union's Counter Memorial, section 2.2; European Union's Rejoinder, section 3. *See* also section 5.8 of this submission.

European Union to third countries, such as the Nord Stream 2 ("**NS 2**") pipeline. The Claimant could have entertained no reasonable expectations that, despite those indications, and in the absence of any assurances whatsoever to the contrary given by the EU authorities to the Claimant, the NS 2 pipeline would remain wholly unregulated within the EU territory during its entire lifetime. Moreover, there is unrefuted evidence that the Claimant's parent company Gazprom was well aware prior to the investment decision that the regulatory requirements of the Gas Directive would eventually apply to third country pipelines such as NS 2.[12] The Claimant not only seeks compensation for the consequences of its own negligence but actively attempts to misuse the arbitration process to overturn legitimate regulatory requirements that the Claimant expected to apply to its investment from the start.

12. Fourth, the European Union has further shown that the Amending Directive does not "target" or otherwise discriminate against the Claimant.[13] The ECJ Judgment of 12 July 2022 does not contradict the EU's position.[14] In any event, the European Union has shown, in the alternative, that it is irrelevant whether Nord Stream 2 is eligible or not to apply for an exemption under Article 36 of the Gas Directive, or for a derogation under Article 49a of the Gas Directive.[15] The formal difference in treatment alleged by the Claimant does not amount *per se* to prohibited discrimination under the ECT. Having regard to its unique characteristics, the Nord Stream 2 project could not, in any event, have obtained either an Article 36 exemption or an Article 49a derogation. It was clear, already as of the date of adoption of the Amending Directive, that the NS 2 pipeline raises significant competition and security of supply concerns. Therefore, in any event, the NS 2 pipeline would have failed to qualify for such an exemption or derogation and remained subject to the generally applicable requirements of the Gas Directive.[16] Again, this has been confirmed by subsequent developments.[17]

13. Fifth, the Amending Directive does not have, as such, the "catastrophic impact" alleged by the Claimant.[18] It was open to the Claimant to operate the NS 2 pipeline within the EU territory in accordance with the unbundling, third party access ("**TPA**") and tariff regulation requirements of the Amending Directive, just like the operators of other pipelines do. The non-operation of the NS 2 pipeline is the

[12] *See* below section 5.8 of this submission.
[13] European Union's Counter Memorial, section 2.4; European Union's Rejoinder, section 4.
[14] European Union's Supplementary Counter-Memorial, section 4.1. *See* also section 5 of this submission.
[15] European Union's Supplementary Counter-Memorial, section 4.3.3. *See* also section 7 of this submission.
[16] *Ibid*.
[17] *Ibid.*
[18] European Union's Counter-Memorial, section 2.3; European Union's Rejoinder, section 6; European Union's Supplementary Counter-Memorial, section 3. *See* also section 4 of this submission.

consequence of the Claimant's own deliberate actions and omissions (including the acts and omissions of Gazprom and the Russian Federation ("**Russia**"), which own and control the Claimant) and of other circumstances which are not attributable to the European Union.[19] Payments between Gazprom Export and NSP2AG under the General Transportation Agreement ("**GTA**") are mere intra-group transfers.[20] Therefore, the mere fact that Gazprom Export fails to make those transfers does not entail *per se* any loss for Gazprom, let alone a "catastrophic impact". In any event, to repeat, the Claimant could have entertained no reasonable expectations that the NS 2 pipeline would remain wholly unregulated within the EU territory during its entire lifetime and, therefore, failed to exercise due diligence when negotiating and concluding the GTA.[21]

14. Lastly, the Amending Directive was adopted in accordance with the usual and proper legislative process and in full transparency.[22] Despite its limited scope, the Proposal for the Amending Directive, published on 8 November 2017, was subject to intense scrutiny by all relevant actors. The legislative process followed all of the procedural steps required for a legislative act of its type. Negotiations between the European Parliament and the Council of the EU leading to its adoption took place over 18 months, which corresponds to the average length of negotiations for legislative acts adopted in first reading. The Amending Directive was accompanied by an Explanatory Memorandum, which illustrates the rationale and provides background. Overall, the legislative process that was followed for the adoption of the Amending Directive respected and exceeded the highest standards for democratic law-making. The European Union notes that the Claimant has not submitted any further argument in this regard, as part of its supplementary submissions.

15. For the above reasons, the Amending Directive does not breach any of the provisions of the ECT alleged by the Claimant.[23] In any event, the Amending Directive is justified under Article 24.3 of the ECT, as a measure which the European Union considers necessary for the protection of its public order and essential security interests.[24]

[19] European Union's Counter-Memorial, section 2.3, para. 157 ff.; European Union's Rejoinder, section 6, para. 380 ff.; European Union's Supplementary Counter-Memorial, section 3, para 144 ff. *See* also section 4.1 of this submission.
[20] *See* below section 4.2.
[21] *See* below section 4.2.
[22] European Union's Counter-Memorial, section 2.5; European Union's Rejoinder, section 5.
[23] European Union's Counter-Memorial, section 3; European Union's Rejoinder, section 7.
[24] European Union's Supplementary Counter-Memorial, section 4.4. *See* also section 8 below.

2. PRELIMINARY CROSS-CUTTING ISSUES

16. In this section, the European Union will address a series of horizontal issues raised by the Claimant at the outset of its Supplementary Rejoinder. Specifically, the European Union will explain that: i) the European Union does not "politicize" this dispute (section 2.1); ii) Gazprom and its subsidiaries, including the Claimant, act *de facto* as organs of the Russian Federation (section 2.2); and iii) factual developments since 2019 are legally relevant for this dispute (section 2.3).

2.1. Russia's illegal war of aggression against Ukraine and its weaponisation of gas supplies are legally relevant developments

17. The Claimant accuses the European Union of "politicizing"[25] the dispute by referring to "Russia's illegal war of aggression" against Ukraine and to the "weaponisation" of gas supplies by Russia/Gazprom. The Claimant describes those references as mere "political slogans"[26], which are legally "irrelevant"[27] for this dispute and cannot justify the alleged breaches of the ECT.

18. The Claimant's complaint about "politicization" is unfounded and misplaced. By raising this complaint, the Claimant is seeking to bar the Tribunal from considering highly relevant factual developments, which the Claimant cannot possibly deny. Moreover, the Claimant's complaint of "politicization" is profoundly ironical, given Russia/Gazprom's decision to weaponise its supplies of gas to the European Union through Gazprom's pipelines for political reasons.

19. As explained by the European Union, both Russia's illegal war of aggression against Ukraine and the attendant weaponisation of gas supplies are highly relevant for this dispute. In particular, they are relevant for assessing: (i) whether the "catastrophic impacts" alleged by the Claimant are attributable to the European Union (see below section 4); (ii) whether the Claimant poses a threat to competition or security of supply (see below section 7); and (iii) whether the EU's invocation, in the alternative, of the exception in Article 24.3 of the ECT is justified (see below section 8).

20. Describing Russia's war with Ukraine as "Russia's illegal war of aggression against Ukraine" is not a "political slogan".[28] It is a factually and legally accurate description of events, which the Claimant cannot possibly contest. It is beyond dispute that Russia launched a war of aggression against Ukraine in February 2022. It is equally beyond doubt that that war of aggression is illegal under

[25] Claimant's Supplementary Rejoinder on Jurisdiction and Merits, section IV.
[26] Claimant's Supplementary Rejoinder on Jurisdiction and Merits, section IV. 2.
[27] *Ibid*.
[28] Claimant's Supplementary Rejoinder on Jurisdiction and Merits, section IV. 2.

international law. Russia's invasion of Ukraine lacks both a self-defence justification and an authorization by the Security Council of the United Nations ("**UN**"). It is therefore a clear violation of the UN Charter's fundamental principle of state sovereignty set out in Article 2(4). Russia's invasion fits the definition of "aggression", which is a crime under international law, specifically defined by the Rome Statute of the International Criminal Court ("**ICC"**) and UN General Assembly Resolution 3314.[29] Furthermore, Russia has conducted its war of aggression in breach of the Geneva Conventions and other international humanitarian standards for the conduct of war. Numerous reports indicate that Russian forces have violated these laws through actions such as targeting civilians, indiscriminate bombings of civilian infrastructure, and atrocities including war crimes.

21. Whilst UN Security Council resolutions have been vetoed by Russia, the UN General Assembly has adopted numerous resolutions condemning Russia's invasion of Ukraine and demanding that Russia immediately cease its use of force and withdraw all military forces from Ukrainian territory, as well as condemning Russian attacks on civilians and civilian infrastructure.[30]

22. Unlike the Claimant, Switzerland, the country in which the Claimant is established and to which legal order it purports to conform, does not regard Russia's illegal war of aggression as a mere "political slogan". Like many other States, Switzerland has voted in favour of the above mentioned UN General Assembly resolutions. Switzerland has unequivocally condemned Russia's invasion of Ukraine, calling it a violation of international law and imposed sanctions.[31]

23. Likewise, the EU's references to the "weaponisation" of gas supplies by Russia are not "political slogans". The European Union has provided ample evidence of that weaponisation.[32] Again, the Claimant cannot, and does not, contest that Russia (acting through Gazprom) weaponised the supplies of gas to the European Union in order to prepare and assist Russia's illegal war of aggression against Ukraine.

24. The Claimant attempts to dismiss the legal relevance of Russia's illegal war of aggression against Ukraine and Russia's weaponisation of gas supplies by asserting that those events have "nothing to do"[33] with the Claimant. As explained

[29] Exhibit RLA-402, UN General Assembly Resolution 3314 (XXIX) (14 December 1974).
[30] Exhibit RLA-403, UN General Assembly Resolution ES-11/1 (2 March 2022); Exhibit RLA-404, UN General Assembly Resolution ES-11/2 (24 March 2022); Exhibit RLA-394, UN General Assembly Resolution ES-11/3 (12 October 2022); Exhibit RLA-395, UN General Assembly Resolution ES-11/4 (23 February 2023); Exhibit RLA-396, UN General Assembly Resolution ES-11/5 (26 April 2023).
[31] Exhibit C-293, Portal of the Swiss government, "Switzerland adopts EU sanctions against Russia".
[32] *See* e.g. European Union's Supplementary Counter-Memorial, section 2.5.1, and First Brattle Report, paras. 106-107.
[33] Claimant's Supplementary Rejoinder on Jurisdiction and Merits, para. 56.

below (section 2.2), that assertion is inaccurate and disingenuous because Gazprom and its subsidiaries, including the Claimant, act *de facto* as organs of Russia.

25. The Claimant further argues that those events took place after 2019 and are, for that reason alone, irrelevant. But, as will be explained below (section 2.3), subsequent factual events may be legally relevant for this dispute.

2.2. Gazprom and its subsidiaries act *de facto* as organs of the Russian Federation

26. The Claimant stresses that NSP2AG is "the only claimant in this dispute"[34] and, for that reason, the identity and activities of the Claimant's sole shareholder are "irrelevant"[35] for this dispute. The Claimant further asserts that the Claimant is not "controlled" by Gazprom and Russia[36], and suggests that Swiss company law guarantees the independence of the Claimant *vis-à-vis* Gazprom and Russia.[37]

27. NSP2AG is a separate legal entity incorporated in Switzerland. The European Union has not challenged that NSP2AG qualifies as a Swiss investor for the purposes of the ECT, with legal standing to bring this dispute. But this does not imply that the links of NSP2AG to Gazprom and Russia are legally irrelevant for this dispute.

28. As shown by the European Union in previous submissions, Gazprom and its subsidiaries (including the Claimant) act *de facto* as organs of Russia.[38]

29. It is beyond dispute that NSP2AG is wholly owned by GIP, which is wholly owned by Gazprom.[39] In turn, Gazprom is majority owned and controlled by the Russian Federation.[40] Like GIP, Gazprom Export is a fully owned subsidiary of Gazprom.[41] In view of this, the Claimant's repeated assertions that NSP2AG is not "controlled" by Gazprom and, ultimately, by Russia are manifestly incorrect.[42]

30. The Claimant's unsupported, and indeed astonishing, assertion that, under Swiss company law, "the shareholder's right are limited to information and financial rights"[43] is plainly incorrect. Under Swiss company law (like in most, if not all, other legal systems), shareholders have a fundamental right to participate and

[34] Claimant's Supplementary Rejoinder on Jurisdiction and Merits, section IV.3.
[35] Claimant's Supplementary Rejoinder on Jurisdiction and Merits, para. 63.
[36] Claimant's Supplementary Rejoinder on Jurisdiction and Merits, para. 345.
[37] Claimant's Supplementary Rejoinder on Jurisdiction and Merits, paras. 64-66.
[38] European Union's Rejoinder, section 6.3.
[39] European Union's Rejoinder, para. 469.
[40] *Ibid*.
[41] *Ibid*.
[42] *See* e.g. Claimant's Supplementary Rejoinder on Jurisdiction and Merits, para. 345.
[43] Claimant's Supplementary Rejoinder on Jurisdiction and Merits, para. 66.

vote in the shareholders' meeting. According to Swiss law, the shareholders' meeting is the "supreme governing body" of a company in the form of an *Aktiengesellschaft* (AG), such as NSP2AG.[44] The prerogatives of the shareholders' meeting include electing and discharging the members of the board of directors, as well as approving the management reports and the consolidated accounts.[45] As the sole shareholder of NSP2AG, Gazprom (and, through Gazprom, Russia) has the right to elect and discharge all the directors of NSP2AG and is, therefore, in a position to control the management of the company as it sees fit.

31. The European Union has shown that, in practice, the Russian Government exercises its control over Gazprom, and over its subsidiaries, including the Claimant, in a very direct and overtly intrusive manner.[46] As explained by the European Union, Gazprom itself has officially acknowledged that:

> as our controlling shareholder, the Russian Federation is able to determine our strategy, make policy decisions in relation to the main areas of our business (including investments, borrowings, risk management and asset allocation), and supervise the implementation of such decisions.[47]

32. Further, Gazprom has recognised that:

> the Government has previously required Russian companies, including us, to take certain actions, such as the undertaking of projects and the supply of goods and services to customers that may not be in the best interests of such companies or their investors.[48]

33. As further shown by the European Union, there is ample evidence that the Russian Government uses Gazprom as an instrument to advance its foreign policy objectives.[49] This includes recent evidence of the weaponisation of gas supplies to the European Union in order to prepare and support Russia's full-scale invasion of Ukraine.[50] Further confirmation is found in the First Brattle Expert Report.[51]

34. The European Union stresses, again, that throughout these proceedings, the Claimant has persistently failed to engage with the EU's detailed argument and evidence showing that, for the reasons summarised above, Gazprom and the Claimant act *de facto* as organs of the Russian Federation. The Claimant cannot ask the Tribunal to ignore that obvious fact by hiding behind vague, unsupported,

[44] Exhibit RLA-378, Article 698, Swiss Code of Obligations, https://www.fedlex.admin.ch/eli/cc/27/317_321_377/en#art_698
[45] *Ibid*.
[46] European Union's Rejoinder, para. 481 ff.
[47] Claimant's Supplementary Rejoinder on Jurisdiction and Merits, para. 479.
[48] Claimant's Supplementary Rejoinder on Jurisdiction and Merits, para. 480.
[49] European Union's Rejoinder, para. 486 ff.
[50] European Union's Supplementary Counter-Memorial, section 2.5.1.
[51] *See* also First Brattle Expert Report, paras. 106-107.

and indeed manifestly incorrect, references to Swiss company law, or by levelling against the European Union hypocritical accusations of "politicization".

2.3. Factual developments after 2019 are not *per se* legally irrelevant for this dispute

35. The Claimant argues that "the critical date for determining breaches of the ECT remains 17 April 2019 when the Directive was adopted"[52] and that "events occurring after this date cannot retroactively justify the Respondent's breaches of the ECT".[53]

36. The Claimant's objections are misplaced. The European Union is not seeking to justify "retroactively"[54] the adoption of the Amending Directive. The European Union has submitted that the Amending Directive was fully compatible with the ECT on the date of its adoption, and it has remained so thereafter.

37. Moreover, contrary to the Claimant's assertion, events occurring after 17 April 2019 are not legally irrelevant *per se*. As a matter of principle, developments after the adoption of the Amending Directive may be legally relevant for ruling upon the Claimant's allegations in at least three different ways.

38. In the first place, subsequent factual developments may confirm the factual assessments on which the adoption of the Amending Directive was based. Where the Claimant alleges the inadequacy of those assessments in support of its claims, subsequent factual developments may be legitimately relied upon to confirm that those factual assessments were correct and, therefore, that the Claimant's claims are baseless. For example, where the Claimant alleges that the Amending Directive is incapable of achieving its objectives and places a disproportionate burden on the Claimant, or that the Amending Directive discriminates against the Claimant, subsequent factual developments confirming that the Amended Directive has made in practice an effective contribution to its intended objectives, or that the Claimant is effectively in a different situation and poses in practice different and greater risks to security of supply and competition than other pipeline operators, are highly relevant for assessing the Claimant's allegations.

39. Second, the Amending Directive must be transposed into national law by the EU Member States. The Amending Directive leaves a margin of discretion to the Member States for doing so (for example, as regards the range of unbundling models made available to TSOs under the law of each Member State). Moreover,

[52] Claimant's Supplementary Rejoinder on Jurisdiction and Merits, para. 44.
[53] *Ibid*.
[54] *Ibid*.

both the Amending Directive and the German national law transposing it leave certain choices to the TSOs (for example, as regards the choice of unbundling model). For that reason, as openly acknowledged by the Claimant itself in previous submissions to the Tribunal, the "impacts" of the Amending Directive on the Claimant's investment remained "highly uncertain" as of 17 April 2019.[55] In so far as the Claimant's allegations purport to rely on the scale of those "impacts" (e.g. claims of unlawful expropriation or lack of proportionality), subsequent factual developments are relevant and, indeed, decisive for measuring those impacts and, therefore, for ruling upon the alleged breaches of the ECT.

40. Third, as any other piece of legislation, the Amending Directive may be open to interpretation as to the precise meaning and exact scope of some of its provisions. Subsequent developments, such as administrative decisions or judicial rulings interpreting and applying the Amending Directive, may contribute to clarify or confirm the legal interpretation of the Amending Directive. Indeed, while denying the relevance of subsequent developments, the Claimant itself purports to rely on the ECJ Judgment of 12 July 2022.

3. FACTUAL DEVELOPMENTS SINCE FEBRUARY 2022

3.1. Status of the Certification procedure

41. In its Supplementary Memorial, the Claimant alleged that the certification procedure for NS 2 was "stopped" by the German authorities in February 2022 and implied that such "stoppage" was unjustified and arbitrary.[56]

42. The European Union has shown that the Claimant's assertions are inaccurate and misleading.[57] The certification procedure for NS 2 remains open and no decision has been taken yet by Germany's National Regulatory Authority ("**NRA**"), the *Bundesnetzagentur* ("**BNetzA**"). The certification procedure was suspended on 21 November 2021 and remains suspended to date. That suspension is due to the Claimant's own deliberate inaction. Indeed, the Claimant has failed, since February 2022, to take any further step to meet the generally applicable legal requirement that applications for certification must be filed by a legal entity established within the European Union.

[55] *See* e.g. European Union's Rejoinder, section 6.2.
[56] Claimant's Supplementary Memorial on Jurisdiction and Merits, para. 195.
[57] European Union's Supplementary Counter-Memorial, section 2.1.

43. As further explained by the European Union[58], on 22 February 2022, Germany's Federal Ministry for Economic Affairs and Climate Action ("**BMWi**") withdrew its initial Security of Supply ("**SoS**") Assessment, of 26 October 2021, in order to re-evaluate the situation. The withdrawal of the SoS Assessment was a justified response to events provoked by Russia (of which the Claimant is an organ), namely Russia's launch of an illegal war of aggression against Ukraine, together with the weaponisation of gas supplies to the European Union, both prior and after the full-scale invasion of Ukraine. No new SoS Assessment has yet been issued, because the certification procedure remains suspended since 21 November 2021 due to the Claimant's own inaction.

44. In its Supplementary Rejoinder, the Claimant is forced to admit that the certification procedure for NS 2 was suspended on 21 November 2021 due to the Claimant's own deliberate inaction. The Claimant, nevertheless, changes its position and now contends that this is, after all, "irrelevant"[59] because the "Amending Directive is the root of all evil".[60] According to the Claimant, the Amending Directive, as such, rather than the lack of certification of NS 2, is "the reason why Claimant [is] not able to operate the pipeline and deprived of the value of its investment".[61]

45. As explained repeatedly by the European Union, and recalled again in section 4.1 below, this allegation is baseless: the Amending Directive does not, as such, prevent the commercially successful operation of the NS 2 pipeline by the Claimant. Rather, the non-operation of the NS 2 pipeline is the consequence of the Claimant's own actions and omissions, and of other circumstances that are not attributable to the European Union (such as the US sanctions and the acts of sabotage of 26 September 2022).

46. The Claimant further argues that the withdrawal of the SoS assessment "happened for political reasons".[62] With this assertion the Claimant suggests that the decision to withdraw the SoS was somehow arbitrary. This is untrue. As explained by the European Union[63], the German authorities properly justified their decision to re-evaluate the SoS Assessment as follows:

> The reason for this move is the situation on the German and European gas market this winter, and the deterioration of the geostrategic situation. In particular, in view of Russia's escalation in Ukraine and its breach of international law by its recognising of the

[58] *Ibid*.
[59] Claimant's Supplementary Rejoinder on Jurisdiction and Merits, para. 101.
[60] Claimant's Supplementary Rejoinder on Jurisdiction and Merits, para. 101.
[61] Claimant's Supplementary Rejoinder on Jurisdiction and Merits, para. 103.
[62] Claimant's Supplementary Rejoinder on Jurisdiction and Merits, para. 107.
[63] European Union's Supplementary Counter-Memorial, para. 55.

> two "people's republics", it is quite possible that this will impact on the security of supply of the Federal Republic of Germany and the European Union, which is to be assessed in the context of the certification of the transport system operator. A re-evaluation is therefore necessary.[64]

47. The events mentioned by the German authorities are manifestly pertinent for the assessment of whether the control of the NS 2 pipeline by the Claimant (and, through the Claimant, by Gazprom and Russia) may pose a threat to the security of supply in Germany and the European Union. The Claimant's casual assertion that the withdrawal decision was based on "political reasons" is wholly unexplained and unsupported.

48. The Claimant further argues that "the withdrawal had nothing to do with any action or inaction of the claimant".[65] This assertion is incorrect and disingenuous. The events that prompted the withdrawal of the SoS assessment are entirely attributable to Russia. As shown by the European Union[66], Gazprom and its subsidiaries (including the Claimant) act *de facto* as organs of Russia (see above section 2.2). The Claimant has persistently failed to engage with the EU's detailed argument and evidence in this regard.

3.2. <u>Impact of the acts of sabotage of September 2022 on the operability of the NS pipelines</u>

49. As explained by the European Union[67], according to independent sources, the explosions of 26 September 2022 were unprecedented in scale and the damage is likely to be very severe. Moreover, the reparation of the pipelines will be crippled by US sanctions and permit requirements.

50. In its Supplementary Memorial, the Claimant alleged that "one line of the NS 2 pipeline remains operable … and the other line … is reparable".[68]

51. As noted by the European Union[69], these assertions were not supported by any independent evidence. Instead, they were based exclusively on the views of Mr. [redacted], a long-standing senior employee of the Claimant. Mr. [redacted]

[64] Exhibit R-293, Germany's Ministry for Economic Affairs and Climate Action, press release, 22 February 2022, "Minister Habeck comments on the situation in eastern Ukraine and the discontinuation of the certification procedure for Nord Stream 2" https://www.bmwk.de/Redaktion/EN/Pressemitteilungen/2022/02/20220222-minister-habeck-commentson-the-situation-in-eastern-ukraine-and-the-discontinuation-of-the-certification-procedure-for-nordstream-2.html
[65] Claimant's Supplementary Memorial on Jurisdiction and Merits, para. 107.
[66] European Union's Rejoinder, section 6.3.
[67] European Union's Supplementary Counter-Memorial, section 2.2.
[68] Claimant's Supplementary Memorial on Jurisdiction and Merits, 27 February 2024, section III.
[69] European Union's Supplementary Counter-Memorial, para. 63

referred to unspecified "surveys" and "assessments" allegedly made by the Claimant, which were not, however, exhibited to the Tribunal.

52. Together with its Supplementary Rejoinder, the Claimant provides an expert report by Mr. Raymond John Williams, which "endorses"[70] Mr. [redacted] statement. Mr. Williams states that his report is based on a "review" of Mr. [redacted] statement and "related documents, as listed in the reference section".[71] That "reference section", however, is a mere list of documents, without any meaningful indication of the origin, content or relevance of each listed document.

53. Like Mr. [redacted] tatement, Mr. Williams' report purports to rely on unspecified "surveys", "technical reports" and "analyses" allegedly conducted by the Claimant. However, none of those "surveys", "technical reports" or "analyses" has been provided to the Tribunal and the European Union. The mere listing of certain documents in the "reference section", in a deliberately opaque manner, is clearly insufficient to meet the Claimant's burden of proof.

54. Unless the "surveys", "technical reports" and "analyses" relied upon by Mr. Williams are exhibited to the Tribunal, neither the Tribunal nor the European Union can possibly verify the existence, veracity, accuracy and pertinence of those documents and, consequently, of Mr. Williams' views. The European Union, therefore, submits that Mr. Williams' report, just like the previous statement by Mr. [redacted] which it purports to "endorse", is devoid of evidentiary value.

3.3. Impact of the US sanctions

55. The Claimant's Supplementary Rejoinder relies on a combination of false equivalencies, straw-man arguments, and counterfactual assumptions to argue that the Claimant would be able to operate the NS 2 pipeline despite the effects of US sanctions.[72] Ultimately these arguments fail to establish the likelihood of NS 2 operating on a commercial basis, in the face of US sanctions. The balance of evidence remains that US sanctions are likely to block such operations, for the foreseeable future.

56. In its critique of the EU's position, the Claimant argues the EU cannot demonstrate that US sanctions will render *impossible* all necessary technical repair activities and subsequent operation of the damaged line.[73]

[70] Mr. Williams Expert Report, section 2.1
[71] *Ibid*.
[72] See Claimant's Supplementary Rejoinder, sections VIII.1 to VIII.3.
[73] *See* Claimant's Supplementary Rejoinder, paras. 119 and 120; *see also ibid.* section VIII.1.

57. But the EU need not demonstrate the effect of US sanctions in the foreseeable future as an absolute, or beyond reasonable doubt. Instead, the Tribunal's mandate is to consider this issue in light of the standard applicable in international arbitration, i.e., on the balance of probabilities, otherwise referred to as the "preponderance of evidence".[74] In this regard, and with this standard in mind, the EU submits that (1) US primary sanctions (which require the Claimant to conduct all of its activities without any US nexus), combined with (2) the demonstrated deterrent effect of the present US secondary sanctions authorities, (3) the practical impact of future secondary sanctions designations that will, more likely than not, be adopted should the Claimant attempt to operate the NS 2 pipeline, (4) the additional deterrent effect of those likely future sanctions designations, regardless of any specific designations and finally (5) the repeated and insistent US policy position against NS 2's operation, together render it more likely than not that any future attempt by the Claimant to operate NS 2 on a commercial basis would be futile.[75] Nothing in the Claimant's Supplementary Rejoinder alters this conclusion.

3.3.1. The Claimant attempts to falsely equate the *status quo* and an operational pipeline scenario

58. The Claimant first seeks to demonstrate the likelihood it might commercially operate in future, by pointing to its current ability to carry out [redacted] According to the Claimant, the Tribunal should view such activities as evidence that the Claimant is likely to achieve commercial operation of the NS 2 pipeline, regardless of US sanctions.[77] The false leap of logic here is manifest. First, an operational

[74] *See* Exhibit RLA-397, *LSF-KEB Holdings SCA and others v. Republic of Korea* (ICSID Case No. ARB/12/37), Final Award on Jurisdiction, Merits and Damages, 30 August 2022, para. 672: "The generally-required standard is proof on the "balance of probabilities" or "preponderance of the evidence." The standard requires a showing that the factual allegation is "more likely than not true." (Some tribunals have imposed a higher standard in relation to particularly serious allegations, i.e., corruption, but no such exceptions arise in this case.)". *See* also Exhibit RLA-398, *PJSC DTEK Krymenergo v. Russia* (PCA Case No. 2018-41), Award, 1 November 2023, para. 568: "As for the standard to be applied to assess the evidence, the Tribunal perceives no reason to depart from the traditional standard of preponderance of the evidence, since neither the BIT nor the UNCITRAL Rules impose a different standard"; and Exhibit RLA-399*, Churchill Mining PLC and Planet Mining Pty Ltd. v. Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016, paras. 243-244.

[75] As the Claimant has stated, one line of the pipeline would need to be repaired before it becomes operational. (Claimant's Supplementary Rejoinder, paras. 19, 124.) The European Union's arguments with respect to the Claimant's ability to operate the pipeline apply with equal or greater force to the Claimant's ability to repair the damaged line: the repair of the damaged line would appear to require construction services similar to those that were used to build the pipeline in the first instance, such as pipe-laying activities that are specifically targeted by certain US secondary sanctions authorities, as noted by the Claimant's expert. (*See* Bechky Report, para. 86).

[76] Claimant's Supplementary Rejoinder, para. 111.

[77] *Ibid*., paras. 119-120.

pipeline would require a much wider range of goods and services than those needed merely to carry out [redacted]. Moreover, the fact the US has not sought to block such [redacted] is a far cry from assuming, in the face of all available evidence, that the US would stand by and allow the pipeline to operate commercially (*quod non*).

59. The Claimant first asserts that it has found sufficient non-US providers of goods and services to perform [redacted] Yet the impact of US sanctions on the Claimant's current, limited activities such as [redacted] is in no way equivalent to the impact of those sanctions on the Claimant's ability to operate the pipeline. In particular, such evidence has little bearing on whether the Claimant could carry out the far more extensive and complex procurement efforts required to operate the pipeline without involving the US suppliers barred from assisting NS 2 by US primary sanctions. The same logic holds true for the effect of US secondary sanctions. The deterrent effect of those sanctions in the context of [redacted] cannot reasonably be compared to circumstances of full operation: the US is unlikely to use its sanctions authorities against non-US companies that merely help [redacted] Indeed, the US may even favour such limited activities – in the interest of avoiding further environmental damage from the ruptured pipeline, if for no other reason.

60. The Claimant's further claim that its ability to continue the present arbitration is proof of its ability to operate the pipeline borders on the nonsensical.[79] As the European Union has previously noted, "operating the NS 2 pipeline would require vastly more resources (both economic and human) than the mere conduct of the current arbitration, as well as ready access to third party finance and specialized services".[80] The fact that the Claimant has managed to continue this arbitration has no rational bearing on whether it is probable that the Claimant could fully repair and operate the pipeline, in the face of US sanctions and related US policy barring any future operation of NS 2.

3.3.2. The Claimant and its Expert use straw man arguments to deflect from the impact of Secondary Sanctions

[78] *Ibid*., para. 119.
[79] *Ibid*., para. 111.
[80] European Union's letter of 16 December 2022, para. 132.

61. The Claimant proceeds with its allegations by creating a straw man, arguing that US secondary sanctions are unlikely to completely block *all* third-party actors from engaging in business with a US sanctions target. They assert in the same manner that the US should not be assumed to impose secondary sanctions on *all* eligible parties.[81] Such allegations start from a false premise, and therefore fail. In order for US sanctions to effectively bar the Claimant from operating NS 2, it is unnecessary for all third-party actors to be deterred, or for the US to impose secondary sanctions on all persons that are eligible for such sanctions. Instead, the issue is whether in light of available evidence, including the content of sanctions and the policy statements of the US Government, US sanctions are likely to frustrate any attempts at full pipeline operations.

62. Secondary sanctions would render the Claimant effectively unable to operate the pipeline in circumstances where only a finite number of persons eligible for such sanctions – those whose activities would be integral to the operation of the pipeline – were either deterred from being involved in the pipeline through the threat of secondary sanctions, or incapacitated by the actual imposition of such sanctions. The question for the Tribunal is whether it is more likely than not that such circumstances will arise, in light of the available evidence. In the EU's respectful submission, the balance of evidence clearly demonstrates this to be the case.

63. To address this question, it is important to consider both the deterrent effects of US secondary sanctions, and the instances where the US Government has actually enforced secondary sanctions, *i.e.* where it has imposed secondary sanctions on companies originally undeterred by the mere risk of a sanctions designation.[82]

3.3.2.1. Actual deterrent effects of US Secondary Sanctions

64. The available evidence regarding the sanctions' actual deterrent effect is that multiple key non-US companies have *already* declined to work on NS 2 because of the threat of US secondary sanctions. Already in December 2019, for example, Switzerland-based [redacted] withdrew from the NS 2 project, citing the risk of US sanctions.[83] In December 2020, Norway's [redacted] announced it would no longer

[81] Claimant's Supplementary Rejoinder, para. 116; Bechky Report, paras. 18, 19.
[82] *See* European Union's letter of 16 December 2022, para. 100 (describing the two components of US secondary sanctions).
[redacted]

provide services for NS 2, specifically referencing US sanctions risks under the Protecting Europe's Energy Security Act ("**PEESA"**) as the basis for its decision.[84] In January 2021, [redacted] announced plans to drop out of the NS 2 project and Germany's [redacted] declined to participate, both reportedly due to the threat of US sanctions.[85] By February 2021, the US State Department had identified 15 more suppliers (in addition to [redacted] engaged in good-faith efforts to wind down their involvement in the NS 2 project.[86] All of this took place *before* Russia's illegal invasion of Ukraine, as of which point sanctions-related sensitivities would only have increased. As the EU has noted, the President of the United States stated in February 2022 that in the event of a full-scale invasion of Ukraine, "there will no longer be Nord Stream 2. We will put an end to it."[87]

65. The Claimant's expert fails to meaningfully engage with these examples. Instead, he posits only the theoretical possibility that some other qualified non-US persons might not be similarly deterred by the risk of US secondary sanctions.[88] The Claimant has not suggested where these qualified non-US persons might be found and provides no evidence of their willingness to defy the threat of US sanctions in order to assist NS2AG in rendering NS 2 *operational*.

66. In the same sense, the Claimant strenuously argues that it is capable of operating the NS 2 pipeline,[89] but fails to address how it might do so [redacted]. The Claimant has left unchallenged the EU's evidence that the Claimant's provider of telecommunications discontinued its services after the US sanctions of designation.[90] This suggests that this key service provider has not been replaced. In the meantime, the Claimant's own witness [redacted] has confirmed that [redacted] [91]

[redacted]

[86] Exhibit R-301, US Department of State, "Certification of Good Faith Wind Down Efforts" (19 February 2021), available at https://www.scribd.com/document/495285362/Certification-of-Good-Faith-Wind-Down-Efforts

[87] EU Supplementary Counter-Memorial, para. 81; Exhibit R-302, Reuters, "If Russia Invades Ukraine, There Will Be No Nord Stream 2, Biden Says" (8 February 2022), available at https://www.reuters.com/business/energy/if-russia-invades-ukraine-there-will-be-no-nord-stream-2-biden-says-2022-02-07/

[88] *See* Bechky Report, para. 96.

[89] Claimant's Supplementary Rejoinder, paras. 111, 120.

[90] European Union's Supplementary Counter Memorial, para. 75.

[9] [redacted]

67. To the extent that the Claimant or its expert envisions that companies from other major industrial economies such as China or Japan might be willing to provide needed goods and services to NS 2 in the face of US primary and secondary sanctions,[92] recent experience indicates to the contrary.

68. Recent developments in Russia's Arctic LNG 2 project – another Russia-backed energy project that is a target of US primary and secondary sanctions[93] – illustrate the crippling impact of US sanctions on Chinese and Japanese companies' willingness to support a Russia-backed energy project. In December 2023, Japan's Mitsui announced that it was pulling its employees out of the Arctic LNG 2 project.[94] As of June 2024 China's Wison announced that it was discontinuing all of its Russian projects,[95] and Wison New Energies was reported in July 2024 to have halted the delivery of two major liquefied natural gas modules to Arctic LNG 2.[96] It is telling that Arctic LNG 2's sponsor had initially planned to use gas turbines from the US fir [redacted] for the project, and only turned to Wison after US sanctions made it impossible for [redacted] to participate.[97]

69. This example powerfully illustrates the actual combined impacts of US primary and secondary sanctions: the US supplier was not able, and the fallback Chinese supplier was not willing, to continue its work on the Arctic LNG 2 project, regardless of Russia's presumably favourable commercial terms.

70. The above represents the best available evidence of secondary sanctions' deterrent effect, revealing what is most likely to happen should the Claimant attempt to make the NS 2 pipeline operational. The Claimant has adduced no

[92] *See* Claimant's Supplementary Rejoinder, para. 122 (arguing that US secondary sanctions do not prevent all third-party actors from doing all the business which is prohibited for US persons); Bechky Report, para. 94 (concluding that some non-US companies may be willing to continue business notwithstanding the potential risks of secondary sanctions).

[93] The secondary sanctions authorities with respect to Arctic LNG 2 are not identical to the secondary sanctions framework for NS 2, but they are comparable.

[94] Exhibit R-408, "The Russian Arctic LNG 2 Project Targeted by US Sanctions," Reuters (6 December 2023), available at https://www.reuters.com/markets/commodities/russian-arctic-lng-2-project-targeted-by-us-sanctions-2023-12-26/.

[95] Exhibit R-409, Emily Chow, "China's Wison New Energies to Quit Russian Projects in Blow to Arctic LNG 2," Reuters (23 June 2024), available at https://www.reuters.com/business/energy/chinas-wison-new-energies-quit-russian-projects-blow-arctic-lng-2-2024-06-21/.

[96] Exhibit R-410, Max Meizlish, "US Sanctions Impede Russia's Arctic LNG Ambitions," Foundation for Defense of Democracies Policy Brief (12 July 2024), available at https://www.fdd.org/analysis/policy_briefs/2024/07/12/u-s-sanctions-impede-russias-arctic-lng-ambitions/. The author notes that "the decision not to deliver the two modules signals a shift in Chinese corporate behavior toward compliance with US sanctions" and "reflects growing caution among Chinese companies regarding US sanctions."

[97] Exhibit R-411, "Novatek to Order 1,500-MW Power Plant for Arctic LNG 2 from China's Wison," Interfax (16 May 2023), available at https://interfax.com/newsroom/top-stories/90530/. As the EU has noted, [redacted] also withdrew from the NS 2 project. (EU Supplementary Counter-Memorial dated 4 July 2024, para. 78.) The Claimant argues that this is irrelevant because [redacted] was a construction contractor and the pipeline has now been constructed (Claimant's Supplementary Rejoinder, para. 124), but the Claimant misses the point: the fact that the Claimant relied upon [redacted] during the construction phase illustrates the likelihood that Claimant would similarly, to some degree, need to rely on other US companies during other phases of the pipeline's activity, if the Claimant were to attempt to operate the pipeline.

reliable evidence demonstrating that the pipeline would more likely be able to operate commercially unimpeded by US sanctions, notably through reliance on pivotal non-US suppliers and service providers allegedly undeterred by the risk of US sanctions. Accordingly, the reasonable conclusion is that this outcome is unlikely.

3.3.2.2. Enforcement of US Secondary Sanctions

71. The available evidence also demonstrates that the US Government is willing to enforce secondary sanctions by designating entities or individuals that are not deterred by the threat of sanctions. With regard to NS 2 in particular, the US imposed secondary sanctions on five separate occasions between January and November 2021 - each time targeting entities and vessels involved in the NS 2 project.[98] As the EU has noted, when announcing the SDN designation of the Claimant in February 2022, the US Secretary of State warned that "individuals and entities knowingly engaged in sanctionable conduct related to Nord Stream 2 face similar sanctions risks."[99] There is a strong bipartisan consensus in the US that favors the imposition of additional sanctions to prevent NS 2 from becoming operational.[100] The Claimant has submitted no evidence that there will be a change in US policy for the foreseeable future.

72. The example of Arctic LNG 2 – reviewed above to illustrate secondary sanctions' deterrent effect - is also instructive with regard to secondary sanctions *enforcement*. Following its designation of the Arctic LNG 2 entity in November 2023, the State Department imposed multiple rounds of further sanctions on entities providing support to the project, including companies in China, Hong Kong, and the United Arab Emirates.[101] In one recent instance the US acted within

[98] Exhibit R-391, US Department of State, "Sanctions on Russian Entity and a Vessel Engaging in the Construction of Nord Stream 2" (19 January 2021), available at https://2017-2021.state.gov/sanctions-on-russian-entity-and-a-vessel-engaging-in-the-construction-of-nord-stream-2/; Exhibit R-392, OFAC, "CAATSA-Russia-related Designations Updates" (22 February 2021), available at https://ofac.treasury.gov/recent-actions/20210222; Exhibit RLA-357, OFAC, "Issuance of PEESA-related General License and Frequently Asked Questions; PEESA Designations; Ukraine-/Russia-related Designation Update" (21 May 2021), available at https://ofac.treasury.gov/recent-actions/20210521; Exhibit R-393, US Department of State, "Imposition of Sanctions in Connection with Nord Stream 2" (20 August 2021), available at https://www.state.gov/imposition-of-sanctions-in-connection-with-nord-stream-2/; Exhibit R-394, US Department of State, "Imposition of Further Sanctions in Connection with Nord Stream 2" (22 November 2021), available at https://www.state.gov/imposition-of-further-sanctions-in-connection-with-nord-stream-2/.

[99] European Union's letter of 16 December 2022, para. 118; Exhibit R-395, US Department of State, "Sanctioning NS2AG, Matthias Warnig, and NS2AG's Corporate Officers" (23 February 2022), available at https://www.state.gov/sanctioning-ns2ag-matthias-warnig-and-ns2ags-corporate-officers/.

[100] European Union's Supplementary Counter Memorial, paras. 81 – 82.

[101] Exhibit R-396, US Department of State, "Responding to Two Years of Russia's Full-Scale War on Ukraine and Navalny's Death" (23 February 2024), available at https://www.state.gov/imposing-measures-in-response-to-navalnys-death-and-two-years-of-russias-full-scale-war-against-ukraine/; Exhibit R-397, US

the space of three weeks to impose sanctions on vessels that were loading cargoes from the Arctic LNG 2 project.[102] The US Government's willingness to designate non-US companies for their support of Arctic LNG 2 is strong evidence that the US would also be willing to designate non-US companies that provide support to NS 2. This is turn renders its future operability even less likely.

3.3.3. The key conclusion from the Claimant's Expert is based on multiple counterfactual assumptions

73. The Claimant's expert report is devoted mainly to an academic discussion of abstract points that are of no real assistance to the Tribunal in determining whether, on the balance of probabilities, the Claimant will be able to operate the NS 2 pipeline. For example, Mr. Bechky observes that in the abstract, it is *conceivable* that a non-US company could make a risk-management decision to continue business despite the risks of secondary sanctions.[103] However, Mr. Behcky provides no examples of companies that have done so in the particular case of NS 2– to the contrary, he cites the numerous counterexamples of companies that chose to withdraw from doing business with NS 2, because of US sanctions risks.[104] Similarly, Mr. Bechky makes the academic observation that the US Government "will never designate as SDNs more than a small fraction of the persons that could potentially be sanctioned under all of the various secondary sanctions authorities,"[105] but fails to explain why to be effective US sanctions necessarily must designate every eligible target, or indeed to cite any entities likely to be undeterred by such targeting in the present case. As the EU has already noted, Mr. Bechky's argument is a straw man: the US need not designate every available NS 2-related sanctions target for its sanctions designations effectively to block NS 2's operation.

74. The Claimant also relies on Mr. Bechky to allege it is uncertain the US will in future impose secondary sanctions against the Claimant's non-US counterparties.[106] This more specific allegation flies in the face of all available evidence. To the contrary,

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Department of State, "Imposing New Measures on Russia for Its Full-Scale War and Use of Chemical Weapons Against Ukraine" (1 May 2024), available at https://www.state.gov/imposing-new-measures-on-russia-for-its-full-scale-war-and-use-of-chemical-weapons-against-ukraine-2/; Exhibit R-398, US Department of State, "Taking Additional Measures to Degrade Russia's Wartime Economy" (12 June 2024), available at https://www.state.gov/taking-additional-measures-to-degrade-russias-wartime-economy/; Exhibit R-399, US Department of State, "New Measures to Degrade Russia's Wartime Economy" (23 August 2024), available at https://www.state.gov/new-measures-to-degrade-russias-wartime-economy/.

[102] Exhibit R-399, US Department of State, "New Measures to Degrade Russia's Wartime Economy".

[103] Bechky Report, paras. 94-96.

[104] *Ibid*., paras. 92-93.

[105] *Ibid*., para. 146.

[106] Claimant's Supplementary Rejoinder, para. 116.

as explained above, there is ample evidence that on the balance of probabilities, the US is more likely than not to impose such sanctions should the Claimant seek to advance to operation of NS 2.

75. Mr. Bechky's further assertions regarding the likelihood of US enforcement of secondary sanctions vis-à-vis NS 2 rest on assumptions that are directly counter to the actual facts before the Tribunal. He notably assumes that Germany will revert to the position it held on NS 2 prior to Russia's illegal war of aggression in Ukraine. Building on this counter-factual, he assumes that if Germany does completely reverse its current position (which has not been demonstrated), then the US would be hesitant to impose sanctions in the face of German opposition.[107]

76. Neither of these assumptions is supported by the facts. Following Russia's illegal invasion of Ukraine, Germany has no longer any reason to oppose the imposition of further secondary sanctions on NS 2 by the United States. Russia's illegal invasion of Ukraine was regarded by the German Government as a "historical turning point" ("*Zeitenwende*").[108] The German Government condemned that invasion in the strongest terms and immediately withdrew its prior assessment of the impact of NS 2 on security of supply in the EU. Moreover, Germany has fully supported the imposition of sanctions by the European Union[109], as well as the adoption of EU measures aimed at phasing out all imports of Russian natural gas by 2027 (see EU's Supplementary Counter-Memorial, section 2.5.3). The German Government's position is fully supported by the main opposition party.[110]

77. In any event, *contra* the Claimant's position the US necessarily would cede to changing German policy regarding NS 2 (which has not been demonstrated) the US as a matter of fact unilaterally imposed secondary sanctions on parties involved in NS 2 on five separate occasions prior to February 2022. To the extent that the US may have been reluctant to impose secondary sanctions vigorously prior to 2022 – an observation on which Mr. Bechky relies heavily[111] – the more likely explanation is that the entities eligible for sanctions at the time included

[107] *See* Beckhky report, paras. 21 and 152.
[108] Exhibit R-400, Televised address by Federal Chancellor Olaf Scholz on the Russian attack against Ukraine, 24 February 2022, https://www.bundesregierung.de/breg-en/search/televised-address-by-federal-chancellor-olaf-scholz-on-the-russian-attack-against-ukraine-2007846; Exhibit R-401, Policy statement by Mr. Olaf Scholz, Chancellor of the Federal Republic of Germany and Member of the German Bundestag, 27 February 2022 in Berlin (so-called "Zeitenwende speech"), https://www.bundesregierung.de/breg-en/news/policy-statement-by-olaf-scholz-chancellor-of-the-federal-republic-of-germany-and-member-of-the-german-bundestag-27-february-2022-in-berlin-2008378
[109] *Ibid*.
[110] Exhibit R-402, Reply by Mr. Friedrich Merz to Chancellor O. Scholz, 27 February 2022, Bundestag plenary protocol https://dserver.bundestag.de/btp/20/20019.pdf). *See* also, Exhibit R-403, CDU-CSU, "Merz: A real turning point in security policy is called for", 27 February 2024, (https://www.cducsu.de/themen/merz-echte-zeitenwende-der-sicherheitspolitik-angemahnt
[111] Bechky Report, paras. 21, 114.3, 150.

[redacted] *i.e.* companies based in countries allied with the US. Given that NS 2 has already been forced to fall back to counterparties in jurisdictions that are less closely aligned with the United States, any US reluctance to impose secondary sanctions should now be greatly reduced. Moreover, as the above-cited Arctic LNG 2 examples demonstrate, the US has become more aggressive – not less – in its use of secondary sanctions since 2022.

3.3.4. The Claimant's past statements contradict its latest assertion regarding its frozen accounts

78. Regarding one specific sanctions-related fact, the Claimant claims the EU is factually incorrect in stating that Claimant's "accounts at non-US banks were frozen after the US designated the Claimant as an SDN".[112] The Claimant's assertion is unsupported by any explanation, let alone by any evidence. The only available evidence states to the contrary, and it is on this the EU relies: the Claimant's own email of 1 March refers to [redacted] and "recent geopolitical events" (a euphemism for Russia's illegal war of aggression in Ukraine), facts the Claimant reasserts in its letter of 13 March 2022. Indeed, in response to the Claimant's request for suspension, the EU repeatedly asked the Claimant to clarify the impact of the US sanctions.[113] The Claimant provided no explanation in response. Accordingly, either the Claimant was misleading the Tribunal on 1 March 2022 when it requested the suspension, or it is misleading the Tribunal now. Both cannot be true.

3.3.5. Conclusion

79. In sum, the available evidence points in only one direction: 1) the fact of US primary sanctions preventing US parties from any involvement in NS 2 for the foreseeable future, in light of consistent US policy; 2) the likelihood that the threat of US secondary sanctions will deter key non-US suppliers and service providers from supporting the operation of NS 2, and 3) the likelihood that the US will actually impose secondary sanctions on non-US parties who are not so deterred – creating 4) a virtuous loop of further deterrence, for other non-US parties who might still be considering a role in NS 2's operations. The overall effect on the basis of available evidence is that it is more likely than not, as a result of US primary and secondary sanctions (and their deterrent effect), that NS 2 will remain a white elephant, unused and unusable, for the foreseeable future.

[112] Claimant's Supplementary Rejoinder, para. 123.
[113] *See* European Union's Letters to the Tribunal of 7 March 2022 and 15 June 2022.

3.4. New developments rule out a future market for gas transported through NS 2

80. The Claimant has acknowledged that the existence of a future market for NS 2 gas in the European Union is crucial for the present arbitration proceedings.[114] However, such prospects for an EU market for gas transported through NS 2 can be ruled out, as the European Union demonstrated in its Supplementary Counter-Memorial (section 2.5).

81. In reply, the Claimant now submits that: (i) whether there is a market for gas transported through its pipeline is irrelevant for the present dispute as the Claimant's parent Gazprom would pay also for [redacted]; (ii) the repurposing of the NS 2 downstream infrastructure does not exclude a NS 2 gas market for good as it may be reversible; (iii) despite the repurposing, there are still sufficient remaining transport capacities and demand to absorb the gas that could flow through the intact line of the Claimant's pipeline; and (iv) the deterioration of relations between the Russian Federation and the European Union is irrelevant as the European Union cannot legally prevent its Member States from importing Russian gas.

82. As set out below, each of these arguments is without merit. Moreover, the Claimant has not addressed two important factors highlighted in the EU's Supplementary Counter-Memorial, which exclude in themselves a market for Russian gas transported though NS 2: the European Union is well on track to phase out Russian gas entirely by 2027 (see section 2.5.3 of the Supplementary Counter-Memorial) and commercial relations between Russia owned gas suppliers and EU customers have been irreversibly disrupted (see section 2.5.2 of the Supplementary Counter-Memorial).

3.4.1. Intra-group payments by Gazprom cannot make up for a market for gas transported through the Claimant's Pipeline

83. The Claimant submits that a market for gas transported through its pipeline is irrelevant for the present proceeding as its parent company Gazprom [redacted].[115]

84. This submission is without merit, as adhering to it would afford investment protection to an investment without profitability prospects, based solely on intra-group payments set up by the Russian Federation.

[114] Claimant's Supplementary Memorial, para 67.
[115] Claimant's Supplementary Rejoinder on Jurisdiction and Merits, paragraphs 8, 20, 38.

85. The Claimant and Gazprom Export, between whom the GTA has been concluded, are part of the same corporate group. NSP2AG is wholly owned by Gazprom, which, in turn, is controlled by the Russian Federation (see above, section 2.2).

86. If payments by Russia or its organ Gazprom within the Gazprom corporate structure were decisive for the outcome of the present arbitration, such intra-group payments could result in the protection under the ECT of "investments" whose "profits" solely stem from parent companies paying its subsidiaries. However, such "money changing pockets of the same jacket" cannot be equated to investment opportunities that deserve protection under the ECT.

87. This already follows from the limitations to the territorial scope of investment protection under the ECT, which would risk being circumvented. If the Claimant could obtain investment protection to the benefit of Gazprom due to the latter's unprofitable payments to the Claimant, the company effectively benefiting from ECT investment protection would be the Russian company Gazprom and not the Swiss-based Claimant.

88. Affording investment protection based on intra-group payments would also allow company groups knowingly to structure their affairs in a manner that leave their investment particularly vulnerable to regulation. However, such behaviour would amount to "contributory negligence", which should nullify any finding of liability or damages, all the more so where evidence indicates that the investor was perfectly aware of the prospect of regulatory intervention at the relevant time and structured their intro-group affairs, regardless.[116]

89. Furthermore, the Claimant's invocation of the clauses of the GTA contradicts its own submission according to which the alleged "catastrophic impact" suffered by its investment stems from the Amending Directive. If this alleged harm depended on payments under the GTA agreed between the Claimant and its parent company, rather than on profitability prospects that would exist in the absence of the Amending Directive, it could not be argued to be caused by the Amending Directive. Rather, such impact would then result from the GTA and could easily be remedied if Russia or Gazprom amended its clauses, for instance by providing for the payment of transport tariffs to the Claimant also if any regulatory regime prevented the latter from exploiting the pipeline in accordance with its expectations.

90. Finally, intra-group financial flows between Gazprom Export and NSP2AG would, in any event, not be sustainable. Gazprom cannot be expected to be willing or

[116] Such evidence has been adduced in the present case and stands unrefuted (*see* below, section 5.8).

able to pay in the long run if it cannot make money from the sale of gas transported through the NS 2 pipeline (see also below, section 4.2).

3.4.2. The infrastructure downstream of the Nord Stream 2 pipeline is being reconverted to other purposes for good

91. The Claimant opines that Nord Stream 2 has not become useless despite its downstream infrastructure rapidly being converted to other purposes, arguing that, as rapidly as the NS downstream infrastructure "might possibly be temporarily used for other purposes, it may be re-purposed again equally rapidly" (Claimant's Supplementary Rejoinder, § 90).

92. Depicting the Nord Stream 1 and 2 downstream infrastructure as being "temporarily" used for other purposes could not be further divorced from reality. As explained in greater detail below, following the lasting and complete halt of Russian gas, investments are being made to reconvert the Nord Stream downstream infrastructure, in particular by transforming essential parts into an integral part of a wider hydrogen network that will have a price tag of 18.9 bn Euros. It is further demonstrated below that irreversible regulatory steps are being taken to achieve this transition towards carbon-neutral energy supply. Any suggestion that the clock could be turned back by repurposing green energy infrastructure to the transport of polluting natural gas lacks credibility.

93. As to the investments being made to convert the N2 downstream infrastructure, the costs of purposing the OPAL pipeline to hydrogen alone amount to EUR 525 million.[117]

94. Further investments are made to reverse the flow direction in the German gas system following the phasing out of Russian pipeline gas. NEL's owner Gascade is about to build three compressor units of 16 MW each at Rehden, which will allow gas to flow from west to east under higher pressure as from 2026. The costs for this project are conservatively estimated at EUR 227 million.[118]

95. In view of its importance in terms of promoting green transition, the hydrogen network will benefit from significant state aid support. The pipelines concerned will benefit from State support aimed at ensuring a rewarding level of return on

[117] Exhibit R-356, Press release of 12 April 2024: „Gesetz zur Wasserstoff-Netzentwicklungsplanung und zur Kernnetz-Finanzierung im Deutschen Bundestag beschlossen".
[118] Exhibit R-445, Energate messenger of 13 May 2024, "Gascade may expand Rehden compressor station" | energate messenger english edition https://www.energate-messenger.com/news/244055/gascade-may-expand-rehden-compressor-station.

the investment.[119] No such financial guarantees would be available if OPAL were repurposed to a natural gas pipeline.

96. The OPAL hydrogen pipeline is about to become an essential part of the German hydrogen core network ("*Wasserstoff-Kernnetz*"). The latter is part of Germany's ambition to achieve climate neutrality by 2045. Investments of EUR 18.9 bn are about to be made to realise this Wasserstoff-Kernnetz.[120]

97. Contrary to the Claimant's submissions, the development of this hydrogen core network is not uncertain, but well on its way. In October 2024, the German regulator BNetzA has taken a decision on how the hydrogen core network is to be established, approving the German TSOs joint proposal.[121] Whilst the core network in its entirety is expected to be established at the latest in 2032, its main elements will be in place earlier. The repurposing of the northern part of the OPAL pipeline to hydrogen is to be completed by the end of 2025, the southern part of the OPAL pipeline will be repurposed by October 2030 and 25.8 km of the EUGAL pipeline will also be repurposed hydrogen by October 2030.[122]

98. Due to its location and importance for future flows from the north and west to the south and east of Germany, several infrastructure investments in Germany and in neighbouring countries depend on the repurposing of the OPAL pipeline to hydrogen. The OPAL hydrogen pipeline is not only an integral part of the German hydrogen core network. It also serves as a backbone of the future EU-wide hydrogen network. Transforming the OPAL pipeline from gas to hydrogen is part of the "Flow East project", which features prominently on the EU list of Projects of Common Interest ("PCI") under the Trans-European Energy Networks Regulation EU/2022/869 (TEN-E Regulation).[123] The TEN-E Regulation aims at accelerating the transition to the decarbonised and integrated energy market, prioritising projects that support integration of renewable energy, including renewable gases, as well reduction of greenhouse gas emissions. PCIs play a key role in achieving these objectives. They are key cross-border infrastructure

[119] *See* Exhibit RLA-405, decision by the European Commission of 21 June 2024 approving the State support, "State Aid SA.113565 (2024/N) – Germany, aid for the construction of the Hydrogen Core Network in Germany", available at https://ec.europa.eu/competition/state_aid/cases1/202438/SA_113565_72.pdf.
[120] *See* Exhibit R-389, website of the German Bundesnetzagentur, where the investment costs are estimated at 18.9 bn Euros in October 2024; https://www.bundesnetzagentur.de/DE/Fachthemen/ElektrizitaetundGas/Wasserstoff/Kernnetz/start.html
[121] Exhibit R-388, Bundesnetzagentur "Genehmigung eines Wasserstoff-Kernnetzes", October 2024 https://www.bundesnetzagentur.de/SharedDocs/Downloads/DE/Sachgebiete/Energie/Unternehmen_Institutionen/Wasserstoff/Genehmigung.pdf?__blob=publicationFile&v=6.
[122] Exhibit R-390, *„Anlage 4: Massnahmenliste – Umstellung*" of the *„Gemeinsamer Antrag für das Wasserstoff-Kernnetz*" of 22 July 2024, Bundesnetzagentur - Wasserstoff-Kernnetz
[123] Exhibit RLA-406, Regulation (EU) 2022/869 of the European Parliament and of the Council of 30 May 2022 on guidelines for trans-European energy infrastructure, amending Regulations (EC) No 715/2009, (EU) 2019/942 and (EU) 2019/943 and Directives 2009/73/EC and (EU) 2019/944, and repealing Regulation (EU) No 347/2013, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R0869

projects that link the energy systems of EU countries, selected based on their importance for interconnectivity, decarbonisation, energy markets integration, competition and security of supply[124] These projects are evaluated within the broader context of energy system development, where their contribution to establishing energy infrastructure corridors plays a key role in the final recognition of a project as PCI.[125]

99. The repurposing of the OPAL pipeline to hydrogen (i.e. the Flow East project) is pivotal for hydrogen production projects and hydrogen import corridors from Denmark, Finland and Sweden, which will arrive at Lubmin and directly feed into the Nord Stream downstream infrastructure in Germany. Lubmin will not only be Germany's first hydrogen import terminal but also the destination of hydrogen imports from Denmark, Finland and Sweden. This part of the hydrogen core network includes the PCI project Interconnector Bornholm-Lubmin, the PCI project Baltic Sea hydrogen collector[126] and several electrolyser projects.[127] The repurposed OPAL pipeline will also play a key role in the hydrogen corridor planned between Ukraine, Slovakia, Czechia, Austria and Germany[128] and in the extension of the Flow East project to Czechia, which also received PCI status.[129] The conversion of OPAL to hydrogen will thus also be essential for the development of the Czech and Slovak hydrogen network and future hydrogen off-take in these Member States.

100. The above illustrates that the downstream EU energy infrastructure initially destined to support the inflow of Russian gas through NS 2 has been repurposed to become a core element of the EU hydrogen network. There is no prospect that this will change. Any attempt to reconvert essential parts of the hydrogen network back to natural gas would create insurmountable obstacles for the EU's energy decarbonisation and the cross-border cooperation on infrastructure development in the EU. It would also create significant stranded assets and financial losses in the neighbouring countries whose hydrogen projects along the entire value chain rely on the OPAL repurposing.

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[124] Exhibit R-433, European Commission, "Key cross-border infrastructure projects", Key cross border infrastructure projects (europa.eu)
[125] Exhibit R-434, European Commission, "PCI and PMI selection process" PCI and PMI selection process (europa.eu)
[126] Exhibit R-389, „Gemeinsamer Antrag für das Wasserstoff-Kernnetz" of 22 July 2024, p. 55, Bundesnetzagentur - Wasserstoff-Kernnetz.
[127] Exhibit R-389 „Gemeinsamer Antrag für das Wasserstoff-Kernnetz" of 22 July 2024, p. 55, Bundesnetzagentur - Wasserstoff-Kernnetz.
[128] Exhibit R-435, European Commission, "Generic corridor aiming to transmit hydrogen from Ukraine to Slovakia, Czechia, Austria and Germany", August 2024 https://ec.europa.eu/assets/cinea/PCI/files/PCIFiche_10.4_1st_PCI_PMI_list.pdf
[129] Exhibit R-436, European Commission, "Internal hydrogen infrastructure in Czechia towards Germany", August 2024 https://ec.europa.eu/assets/cinea/PCI/files/PCIFiche_10.2.1_1st_PCI_PMI_list.pdf

101. Finally, regulatory constraints rule out repurposing the NS 2 downstream infrastructure to natural gas. Hydrogen and gas networks are heavily regulated in Europe with the objective of achieving an integrated, competitive EU internal energy market that respects the EU's energy and climate goals. The regulatory framework does not only cover elements such as access and tariffication, but also network planning. In particular, the recently adopted Hydrogen and Decarbonised Gas Markets Package[130] stipulates *inter alia* that network operators need to submit national network development plans for gas and hydrogen on a bi-annual basis, which cover a period of ten years.[131] These network plans need to be approved by the national regulatory authorities before they can be put in place by the network operators.[132] When assessing the plans the regulatory authorities check that the system helps achieve the Union's energy and climate goals. Whilst repurposing gas pipelines to hydrogen fits the network planning provisions, converting hydrogen networks into natural gas networks does not. Under German regulatory rules, infrastructure cannot be repurposed to the transport of natural gas once it has been earmarked to hydrogen and obtained the necessary authorisations.[133]

3.4.3. Already now, remaining downstream transport capacities are insufficient to absorb NS 2 gas

102. The Claimant submits that despite the transformation of the NS downstream infrastructure into a hydrogen transport network and for other purposes, it currently still holds enough capacity to accommodate gas flowing through the Claimant's Pipeline. According to the Claimant, there are still valid long term supply contracts that so far have relied on the Ukrainian transit. The Claimant describes as a "realistic possibility" that in such circumstances, there "may well be" a need to transport gas in the order of at least the 27,5 bcm capacity through the Claimant's intact pipeline (Claimant's Supplementary, § 383).

103. As explained below, these claims are without merit, as there is no longer sufficient demand or inflow capacity to render the distribution of Nord Stream 2 gas through the downstream infrastructure economically viable.

[130] The package consists of Directive (EU) 2024/1788 (Exhibit RLA – 407) and Regulation (EU) 2024/1789 (Exhibit RLA – 408).
[131] *See* Article 55 of Directive (EU) 2024/1788.
[132] *See* Article 78(1)(ee) of Directive (EU) 2024/1788.
[133] *See*, in particular, § 28q(7) of the German „Gesetz über die Elektrizitäts- und Gasversorgung (Energiewirtschaftsgesetz - EnWG)" (Exhibit RLA – 415), which legally requires undertakings having agreed to the inclusion of their infrastructure facilities in the core hydrogen network to implement their investment projects. EnWG - Gesetz über die Elektrizitäts- und Gasversorgung

104. Any suggestion that the supply contracts governing the transit of gas through Ukraine would be replaced by contracts governing the supply of gas through Nord Stream 2 is implausible. European customers that could purchase gas supplied through Nord Stream 2 are currently suing their Russian suppliers for breach of contract and are being precluded by Russian courts to have their claims adjudicated by impartial arbitration tribunals (see, in this regard, section 2.5.2 of the Supplementary Counter-Memorial). This acts as an effective deterrent for European customers against contracting with Russian gas suppliers again in the future.

105. Furthermore, EU reliance on Russian pipeline gas is coming to an end.

106. Against the backdrop of Gazprom's persistent weaponisation of gas supplies, gas flows through Ukraine have continuously decreased, from 41 bcm in 2021 to 14 bcm in 2023[134] and some major energy suppliers recently announced to phase out Russian gas phase completely by 2025.[135] Due to the EU's reduced demand for fossil gas (reduced by 18% between August 2022 and May 2024[136]), as well as the flexibility of the EU's gas infrastructure, EU Member States and their energy undertakings successfully diversified away from Russian supplies.

107. Since Russia's invasion of Ukraine triggered an unprecedented energy crisis, the EU gas infrastructure has developed various alternative routes with robust cross-border interconnection points and significant import capacities that can convey LNG and non-Russian pipeline gas towards Member States. Inter alia, over 50 bcm of new LNG import infrastructure, which were set up since 2022, have eased supply congestion and helped narrow the price gap between European gas hubs and LNG spot prices.[137] The targeted gas demand cut schedule established by REPowerEU will further shift EU's reliance on the spot LNG market, turning a 49 bcm 'under-contracted' status in 2023 to an 'over-contracted' position of 30 to 40 bcm between 2027-2030.[138] Global LNG production is expected to outpace the

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[134] Exhibit R-446, ENTSOG Transparency Platform, available at https://transparency.entsog.eu/#:~:text=No%20warranty%20is%20given%20by%20ENTSOG%20in

[135] *See* Exhibit R-447, "Wien Energie steigt 2025 aus russischem Erdgas aus", 13 September 2024, Wien Energie steigt 2025 aus russischem Erdgas aus | Wien Energie

[136] Exhibit R-448, European Commission, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, State of the Energy Union Report 2024 (pursuant to Regulation (EU)2018/1999 on the Governance of the Energy Union and Climate Action), 11 September 2024 bd3e3460-2406-47a1-aa2e-c0a0ba52a75a_en

[137] Exhibit R-437, Analysis of the European LNG market developments, available at https://www.acer.europa.eu/monitoring/MMR/LNG_market_developments_2024.

[138] Exhibit R-437, Analysis of the European LNG market developments, available at https://www.acer.europa.eu/monitoring/MMR/LNG_market_developments_2024.

27.5 bcm per year of the Claimant's pipeline, as around 51 bcma is expected to become available by 2025 according to IEEFA.[139]

108. Even in case of a complete disruption of Russian pipeline gas (a much more severe scenario than the end of transit through Ukraine envisioned by the Claimant), there would be no shortage of supply in the EU given the current levels of reduced demand. This is supported by ENTSOG's most recent Supply Outlook, which concluded that "Considering the high level of storage in the beginning of summer with given infrastructure, as well as assuming availability of other sources of gas supply, it is possible to satisfy demand and fill storages at the end of the injection season to the desirable level without using Russian pipeline gas."[140]

109. As to gas absorption capacities downstream of the Nord Stream 2 pipeline, considering that NEL flows eastward and OPAL is being repurposed for hydrogen, the only transmission pipeline that could accommodate natural gas from Nord Stream 2 would be EUGAL with a capacity of 55 bcm per year.[141] However, the EUGAL pipeline will henceforth be devoted to LNG coming through NEL. The LNG terminal at Mukran will have a capacity of 13.5 bcm per year and will directly feed into the EUGAL pipeline, together with NEL, which transports 20 bcm per year.[142] Accordingly, as a result of a combined 33.5 bcma flowing into the EUGAL pipeline from other sources, only 21.5 bcma of its capacity would be left, which is less than the capacity even of one of the Nord Stream 2 strings and less than 25% share of the 110 bcma that could be transported through both Nord Stream pipelines.

110. The Claimant will find it difficult to explain how operating its Pipeline well below its capacity would be economically viable when customers are no longer willing to contract with Russian suppliers and when the demand for Russian pipeline gas is running out.

3.4.4. Russia's invasion of Ukraine rendered the phasing out of Russian gas irreversible

111. In section 2.5.5 of its Supplementary Counter-Memorial, the Respondent explained that the deterioration of relations between EU Member States and

[139] Exhibit R-438, "Global LNG Outlook 2024-2028," April 2024 https://ieefa.org/sites/default/files/2024-04/Global%20LNG%20Outlook%202024-2028_April%202024%20%28Final%29.pdf
[140] Exhibit R-439, Entsog, "Summer Supply Outlook 2024 with winter 2024/25 overview", April 2024 SSO 2024 (entsog.eu)
[141] Exhibit R-440, Fluxys, NEL, EUGAL and OAL, "Security of supply for Germany and Europe" NEL, EUGAL and OAL (fluxys.com).
[142] Exhibit R-440, Fluxys, NEL, EUGAL and OAL, "Security of supply for Germany and Europe" NEL, EUGAL and OAL (fluxys.com). *See* also paragraph 129 of the European Union's Supplementary Counter-Memorial.

Russia resulting from Russia's full-scale invasion of Ukraine rule out a market for gas transported through NS 2 in the foreseeable future. In the same section, the Respondent explained that even if the EU later decided to reverse its phasing-out of Russian gas, which is a highly improbable scenario, the EU's decision to decarbonise its economy would render it impossible for NS 2 to resume its pipeline business.

112. The EU's commitment to phase out Russian gas by 2027 has just been renewed. Ursula von der Leyen, who has recently been confirmed as Commission President for a second term until 2029, has asked the incoming Energy Commissioner, Dan Jørgensen, to issue a roadmap towards ending Russian gas imports to ensure the timely implementation of REPowerEU.[143]

113. Significant progress toward the REPowerEU objective of reducing dependence on Russian gas has been made over the last years by reducing gas consumption, replacing Russian gas and renewing the EU's energy mix.[144]

114. First, between August 2022 and April 2024, the EU successfully reduced its gas demand by 18%, saving 138 bcm of gas. At the same time, record levels of gas storage have been achieved, reaching the 90% target introduced by Regulation (EU) 2022/1032 on gas storage by mid-August 2023 and maintaining this level into August 2024. Additionally, final energy consumption decreased by 2.8% from 2021 to 2022, highlighting the commitment to energy efficiency.[145]

115. Second, the share of Russian gas imports fell from 45% in 2021 (150 bcm) to just 18% in 2024, with Norway and the US having become the EU's main suppliers in the first half of 2024, supplying 18% and 35% of gas volumes respectively.[146] In accordance with Council Regulation (EU) 2022/2576,[147] which enhanced coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders, European buyers were matched with external suppliers for more than 75 bcm of natural gas between 2023 and 2024,[148] proving the EU's capacity to diversify energy sources effectively.

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[143] Exhibit R-449, Mission letter from Ursula von der Leyen, President of the European Commission to Dan Jorgensen, Commissioner-designate for Energy and Housing, 17 September 2024. Available at: 1c203799-0137-482e-bd18-4f6813535986_en

[144] Exhibit R-456, State of the Energy Union Report 2024, available at https://energy.ec.europa.eu/document/download/bd3e3460-2406-47a1-aa2e-c0a0ba52a75a_en?filename=State%20of%20the%20Energy%20Union%20Report%202024.pdf.

[145] Exhibit R-456, State of the Energy Union Report 2024, p. 4 and 5.

[146] Exhibit R – 456, State of the Energy Union Report 2024, p. 4 and 9.

[147] Exhibit RLA-409, Council Regulation (EU) 2022/2576 of 19 December 2022 enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders Regulation - 2022/2576 - EN - EUR-Lex.

[148] Exhibit R – 456, State of the Energy Union Report 2024, p. 9.

116. Third, the EU has accelerated the deployment of renewable energy sources. Between 2021 and 2023, wind and solar capacity increased by 36%, adding 24 bcm of equivalent energy capacity. By 2023, wind became the second-largest source of electricity, due to the installation of 56 GW of new solar energy capacity in 2022 and an additional 73 GW in 2023. The total renewable energy capacity in the EU is close to 480 GW and contributes to saving an estimated 13 bcm of natural gas.[149]

117. Furthermore, in reaction to the unreliability of Russian gas pipeline deliveries, the German government and private operators have invested in the LNG infrastructure. Three terminals are in operation today with a capacity of around 20 bcma. One floating storage and regasification unit (FSRU) is situated at Wilhelmshaven and another one at Brunsbüttel operated by (Deutsche Energy Terminal DET). A third terminal is situated at Mukran. Ultimately, Germany expects to have three fixed terminals (Brunsbüttel with 10 bcma, Stade with 13.3 bcma, Wilhelmshaven with 15 bcma)[150] and at least the floating terminal at Mukran with 13.5 bcma.[151] Additional FSRUs operated by DET remain available. The German government expects that by 2027 Germany will have an LNG import capacity of over 50 bcma.[152]

118. Investments in such terminals are usually backed by capacity bookings. For the fixed terminal at Brunsbüttel, it has been decided to establish three long-term capacity holders -- RWE, the US' ConocoPhillips, and chemicals giant Ineos -- with likely sources of LNG being new projects in Qatar and the US.[153] ConocoPhillips has signed a 15-year deal for gas delivery at Brunsbüttel with QatarEnergy.[154] At the Stade terminal 90% of the capacity is booked under long-term deals with Germany's EnBW and SEFE, and Czech utility CEZ.[155]

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[149] Exhibit R-441, European Commission, "Solar and wind capacity", 16 January 2024, available at: ENERGY - Solar and wind capacity (europa.eu)

[150] Exhibit R-386, Platts News & Insights, 21 March 2024, "Germany's HEH takes final investment decision for onshore Stade LNG terminal"; Exhibit R-453, TES press release of 25 March 2024, "Wilhelmshaven Green Energy Hub receives exemption from regulation" available at: https://tes-h2.com/news/wilhelmshaven-green-energy-hub-receives-exemption-from-regulation ; and Exhibit R-451, Deutscher Bundestag, Bericht des Bundesministeriums für Wirtschaft und Klimaschutz. Planungen und Kapazitäten der schwimmenden und festen Flüssigerdgasterminals. 3 March 2023.

[151] Exhibit R-454, Enerdata, report of 5 July 2024, "A second FSRU has arrived at the 13.5 bcm/year Mukran LNG terminal (Germany)", available at https://www.enerdata.net/publications/daily-energy-news/second-fsru-has-arrived-135-bcmyear-mukran-lng-terminal-germany.html .

[152] Exhibit R-451, Deutscher Bundestag, Bericht des Bundesministeriums für Wirtschaft und Klimaschutz. Planungen und Kapazitäten der schwimmenden und festen Flüssigerdgasterminals, 3 March 2023, Ausschussdrucksache 20(25) 293 20(25)293_LNG-450Bericht.

[153] Exhibit R-450, Platts News & Insights, 20 February 2024, "GLNG to begin preparatory work for onshore Brunsbuttel LNG terminal".

[154] Exhibit R-442, ConocoPhillips, "ConocoPhillips and QatarEnergy Agree to Provide Reliable LNG Supply to Germany", 29 November 2022, available at: ConocoPhillips and QatarEnergy Agree to Provide Reliable LNG Supply to Germany | ConocoPhillips

[155] Exhibit R-386, Platts News & Insights, 21 March 2024, "Germany's HEH takes final investment decision for onshore Stade LNG terminal".

119. Finally, important clients of Russian gas, such as Uniper and BASF, are concluding contracts with other suppliers. Uniper is estimated to have had long-term contracts for the import of around 25 bcm gas per year from Gazprom until the mid-2030s.[156] On 12 June 2024 it announced that it terminated its long-term contracts with Gazprom following an arbitration ruling.[157] Since the Russian invasion of Ukraine, Uniper has diversified its supply portfolio, inter alia announcing on 19 September 2024 that it entered into an extended gas import deal with US' Conoco Phillips for 10 bcma.[158] German chemicals giant BASF has turned to LNG as an alternative to Russian pipeline gas in the past year, signing a long-term contract with US exporter Cheniere in August 2023 to purchase up to around 800,000 mt/year of LNG over a period spanning 2026-2043.[159]

120. Given that there is no more market for Russian gas delivered through Nord Stream 2, the Claimant's submission that the Union could not legally ban Russian gas imports is beside the point.

121. It is also incorrect. Under EU law, the legal possibilities of banning Russian gas imports are not limited to Article 6(7) of Regulation 2024/1789, the importance of which is acknowledged by the Claimant. The reservation in Article 194(2) TFEU according to which Member States remained entitled to determine the conditions for exploiting their energy resources and the general structure of their energy supply as well as to choose between different energy sources does not stand against EU measures banning Russian gas imports. This reservation only applies to the use of Article 194(1) TFEU and not when the EU uses other legal bases.[160] Accordingly, nothing prevents the Union from banning Russian gas imports to protect the environment, fight climate change or impose sanctions in response to Russia's unlawful aggression against Ukraine.

122. Whilst the successful phasing out of Russian gas obviates the need for banning Russian gas, the EU is thus not legally precluded from taking this measure. Given

[156] Exhibit R-455, ICIS, 12 June 2024, "Uniper arbitration award could shape future EU gas supplies", available at: ICIS VIEW: Uniper arbitration award could shape future EU gas supplies | ICIS
[157] Exhibit R-443, Uniper, "Uniper terminates Russian gas supply contracts", 12 June 2024, available at: Uniper terminates Russian gas supply contracts
[158] Exhibit R-444, Reuters, Uniper, ConocoPhillips agree to 10-year natural gas supply deal, 19 September 2024, available at: Uniper, ConocoPhillips agree to 10-year natural gas supply deal | Reuters
[159] Exhibit R-372, S&P Global, 27 October 2023, "German gas price premium expected to continue despite new FSRUs", available at: https://www.spglobal.com/commodityinsights/en/market-insights/latest-news/naturalgas/102723-feature-german-gas-price-premium-expected-to-continue-despite-new-fsrus.
[160] See Exhibit RLA-400, Case T-370/11, *Poland v Commission*, EU:T:2013:113 para 13, in which a Member State unsuccessfully invoked the second subparagraph of Article 194(2) TFEU regarding a measure taken in the area of environmental policy.

that Russia's aggression against Ukraine is spilling over to EU countries,[161] a legal ban on Russian gas is increasingly likely.

4. FACTUAL DEVELOPMENTS DO NOT "CONFIRM" THAT THE AMENDING DIRECTIVE HAS THE ALLEGED "CATASTROPHIC IMPACT" ON THE CLAIMANT'S INVESTMENT

123. In its Supplementary Memorial, the Claimant argued that the alleged "catastrophic impact" of the Amending Directive on the Claimant's investment had been "confirmed" by subsequent "factual developments".[162] Specifically, the Claimant suggested that the alleged "catastrophic impact" had been "confirmed" by the decision of the German authorities to "stop" the certification procedure on 22 February 2022.[163] As explained by the European Union in its Supplementary Counter-Memorial,[164] this assertion was inaccurate and misleading (see above section 3.1).

124. In its Supplementary Reply, the Claimant acknowledges that the certification procedure was suspended on 21 November 2021 due to the Claimant's own deliberate inaction. Having conceded this, the Claimant is forced to change its position and argues now that the Amending Directive, as such, rather than the lack of certification, is "the reason why Claimant [is] not able to operate the pipeline and deprived of the value of its investment".[165]

125. According to the Claimant, the "alleged catastrophic" impact stems from the loss of revenue that, in the absence of the Amending Directive, NSP2AG would have received from Gazprom Export [redacted]. In the Claimant's own words:

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

[161] *See* Exhibit R-452, BBC, report of 8 October 2024, from which it follows that, according to British authorities, Russia's intelligence agency has recently been on a mission to generate "sustained mayhem on British and European streets", accessible at https://www.bbc.com/news/articles/cp8e15yr1gwo.
[162] Claimant's Supplementary Memorial on Jurisdiction and Merits of 27 February 2024, Section VII.
[163] *Ibid*., para. 195.
[164] European Union's Supplementary Reply, section 3.
[165] Claimant's Supplementary Rejoinder on Jurisdiction and Merits, para. 103.
[166] Claimant's Supplementary Rejoinder on Jurisdiction and Merits, para. 9.

126. In support of its allegations, the Claimant produces yet another Swiss Economic report (the "**Third Swiss Economic Report**" or "**SE2024 II**").

127. As explained by the European Union in previous submissions,[167] and further elaborated below, the Claimant's allegations are baseless. First, the non-operation of the NS 2 pipeline is the consequence of the Claimant's own actions and omissions (including Gazprom's and Russia's actions and omissions) and other circumstances not attributable to the European Union (section 4.1). Second, payments between Gazprom Export and NSP2AG under the GTA are mere intra-group transfers within Gazprom and, in any event, it is uncertain whether Gazprom Export would have been willing and able to comply with the GTA in the current and foreseeable circumstances (section 4.2). Third, in any event, the Claimant could have entertained no reasonable expectations that the NS 2 pipeline would remain unregulated during its entire lifetime and, therefore, failed to exercise due diligence when negotiating and concluding the GTA (section 4.3). Fourth, that the alleged damage is not attributable to the Amending Directive is confirmed by the decision of all non-Russian investors in the Nord Stream 1 pipeline to write off their investments following the invasion of Ukraine (section 4.4). Lastly, the Third Swiss Economic Report, like its predecessors, is deeply flawed (section 4.5).

4.1. The non-operation of the NS 2 pipeline is the consequence of the Claimant's own actions and omissions and other circumstances not attributable to the European Union

128. The Amending Directive does not, as such, prevent the operation of the NS 2 pipeline. Rather, the non-operation of the NS 2 pipeline is the consequence of the Claimant's own actions and omissions and of other circumstances that are not attributable to the European Union.

129. In the first place, the Claimant has failed to prove that NSP2AG cannot comply with the unbundling, TPA and tariff regulation requirements of the Gas Directive, as transposed and implemented by Germany, within the EU territory, just like many other pipeline operators.[168] While compliance with those requirements may well prevent the Claimant from operating the NS 2 pipeline as originally intended

[167] *See*, in particular, European Union's Counter-Memorial, section 2.3, para. 157 ff.; European Union's Rejoinder, section 6, para. 380 ff.; European Union's Supplementary Memorial, section 3, para 144 ff.
[168] European Union's Counter-Memorial, section 2.3.4, para. 215 ff.; European Union's Rejoinder, paras. 390-398.

by Gazprom (i.e. by reserving the use of the pipeline exclusively for Gazprom), this would not entail *per se* a "catastrophic impact".

130. In particular, the Claimant is not prevented from complying with the unbundling, TPA and tariff regulation requirements by virtue of the GTA or the finance agreements. As further explained by the European Union,[169] the Claimant has failed to prove that the GTA and the finance agreements cannot be amended, as necessary, so as to allow the Claimant to operate the pipeline in accordance with the Gas Directive, as transposed and implemented by Germany.

131. That NSP2AG is not prevented from complying with those requirements is confirmed by the fact that the Claimant has applied for certification as an Independent Transmission Operator ("**ITO**"). The Claimant now seeks to dismiss the relevance of that application by describing it as a "remote [possibility] to overcome the effects of the AD".[170] However, in previous submissions to the Tribunal the Claimant was very careful not to rule out the possibility that the requested ITO certification would be granted by the German NRA and that, to borrow the Claimant's recurring terms, a "regulatory solution can be found".[171] The European Union further recalls that the Claimant has not exhibited before the Tribunal its application to the German NRA for ITO certification or, indeed, any other document or record of its discussions with the German authorities.[172] Nor has the Claimant provided the Tribunal with any assessment of the commercial feasibility of its envisaged operation as an ITO. Yet, it can be safely assumed that such an assessment must have been conducted by the Claimant before it applied for certification as ITO.

132. Second, as explained in section 3.1, and admitted now by the Claimant, the certification procedure was suspended on 21 November 2021 due to the Claimant's own deliberate inaction. It is within the Claimant's power to take the necessary steps that would allow the resumption of the certification procedure.

133. Third, under Article 11 of the Gas Directive, the assessment of whether a TSO poses a threat to security of supply is to be made by the responsible authorities of the competent Member State, on a case-by-case basis. Therefore, the Gas Directive does not, as such, prejudge whether the Claimant's control over the NS 2 pipeline poses a threat to security of supply for the purposes of its certification.

[169] European Union's Counter-Memorial, section 2.3.4; European Union's Rejoinder, paras. 399-406.
[170] Claimant's Rejoinder on Jurisdiction and Merits, para. 105.
[171] European Union's Rejoinder, section 6.2.
[172] European Union's Rejoinder, para. 396.

This is to be assessed and certified by the responsible German authorities, in accordance with the procedures prescribed by the Gas Directive.

134. As explained above in section 3.1, the decision of the German authorities to withdraw their initial assessment of security of supply in order to take into account subsequent factual developments was fully justified. Those factual developments are entirely attributable to Russia and Gazprom, which own and control the Claimant.

135. The Claimant is adamant that, despite those factual developments, its control over the NS 2 pipeline poses no threat to security of supply.[173] The European Union disagrees (see below section 7). However, if the Claimant was right, *quod non*, it would be open to the Claimant to complete the necessary steps for allowing the resumption of the certification procedure and, in the framework of that procedure, attempt to prove to the satisfaction of the German authorities that the Claimant does not pose a threat to security of supply.

136. Lastly, in any event, on the basis of the evidence before this Tribunal it is more likely that not that the Claimant would be unable to operate the NS 2 pipeline as a result of the US sanctions (section 3.3) and the damages to the pipeline caused by the acts of sabotage of 26 September 2022 (section 3.2). The Claimant duly acknowledges that these events are not attributable to the European Union. But it seeks to minimise their impact and fails to make adequate adjustment when estimating the alleged damages (see below section 4.5).

4.2. Payments pursuant to the GTA are intra-group transfers. In any event, it is uncertain whether Gazprom Export would comply with the GTA

137. The GTA was negotiated and concluded by NSP2AG and Gazprom Export. Both NSP2AG and Gazprom Export are fully owned and controlled by Gazprom, and ultimately by Russia (see above section 2.2). Therefore, any payments made pursuant to [redacted]. Therefore, the alleged "loss of revenue" for NSP2AG does not, in and of itself, entail any loss for the Gazprom group, let alone a "catastrophic impact".

138. The Claimant has made no attempt to show that the Amending Directive will have a "catastrophic impact" on the Gazprom group as a whole. In particular, the

[173] Claimant's Supplementary Rejoinder on Jurisdiction and Merits, section XI.2.

Claimant has failed to engage in a meaningful manner with the EU's extensive argument and evidence showing that subsequent developments rule out a future market for gas transported through the NS 2 pipeline (see section 3.4).

139. Awarding compensation to NSP2AG for the "loss of revenue" which is kept by Gazprom Export would lead to a manifestly unjust enrichment for the Gazprom group. That outcome would be all the more unfair given that Gazprom and Russia (which own and control both parties to the GTA) have contributed to the non-operation of the pipeline through their own deliberate actions and omissions.

140. Moreover, as recalled below (section 5.8), NSP2AG and Gazprom Export could not reasonably assume that the NS 2 pipeline would remain unregulated by the European Union through its entire lifetime. The risk of regulatory change was obvious and cannot have been ignored by Gazprom. The Claimant has nowhere explained why Gazprom decided that the risk of regulatory change should be borne by NSP2AG, rather than by Gazprom Export. The most plausible explanation, however, is that [redacted] were engineered by Gazprom so as to place the risk of regulatory change on the sole party to the GTA with standing to bring a claim against the European Union under the ECT.

141. In any event, it is most uncertain whether [redacted] in the current and foreseeable circumstances. As explained by the European Union, there is no future market for the NS 2 pipeline gas transport capacity.[174] Therefore, in the absence of the Amending Directive, the pipeline would be effectively unusable by Gazprom Export. Furthermore, Gazprom's financial situation is increasingly precarious, following the collapse of its pipeline sales to Europe.[175] This is not a temporary difficulty: Gazprom's business model relied on pipeline sales to Europe. Those sales are now lost for ever and Gazprom's business model cannot be fixed.

142. It is likewise most uncertain whether the Claimant would be able to enforce effectively the GTA *vis-a-vis* Gazprom Export, even if it wished to do so. As explained by the European Union,[176] Gazprom Export has deliberately and systematically breached its contractual obligations with many other European partners. This includes the [redacted] in contracts between

[174] European Union's Supplementary Counter-Memorial, section 2.5.
[175] Exhibit R-412, Financial Times, 2 May 2024, "Gazprom plunges to worst loss in decades as sales to Europe collapse", available at: https://www.ft.com/content/f6ba327b-5200-4deb-ba95-fba3bbd6536a
[176] European Union's Supplementary Counter-Memorial, section 2.5.2, para. 112.

Gazprom Export and independent pipeline operators.[177] Furthermore, Russia has shielded Gazprom Export from enforcement actions by enacting legislation that confers exclusive jurisdiction on Russia's own courts and allows Gazprom to request anti-arbitration injunctions against Gazprom's contractual partners. Gazprom Export has systematically applied for those injunctions and the Russian courts have duly obliged by imposing hefty payments on those Gazprom Export's contractual partners which have resorted to arbitration.[178] The balance of available evidence is therefore that Gazprom Export has not honoured its contractual commitments with third parties. There is no basis for drawing any opposite conclusion in the present case.

4.3. The Claimant failed to exercise due diligence when concluding the GTA

143. According to the Claimant, the alleged "catastrophic impact" stems from the fact that, under the GTA, [redacted][179]

144. According to the Claimant's witness Mr. [redacted] the GTA and the finance agreements "were prepared, and agreed, on the basis that Nord Stream 2 would operate as an unregulated pipeline for the duration of the GTA."[180] According to Mr. [redacted] the risk that the NS 2 pipeline would be subject to regulation was assumed by the Claimant to be "unlikely"[181] at the time of conclusion of those agreements, on the basis of the Claimant's own, home designed and conducted, so-called "risk assessments"[182] and of "a number of legal opinions from external counsel including from the law firms Freshfields Bruckhaus Deringer and Herbert Smith Freehills" in 2015 and 2016.[183]

145. In the same vein, the Claimant's expert Mr. Roberts has opined that:

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[177] Exhibit R-425, Global Arbitration Review, 13 September 2024, "Czech State entity wins claim against Gazprom"; Exhibit R-428**,** Investment Arbitration Reporter, 15 October 2024, Gazprom Round-Up: Russia's highest court declines to hear Czech company's appeal against anti-arbitration injunction, Prosecutor-General intervenes in Russian court proceedings lodged, against Polish state-owned companies, and other arbitration-related updates involving the Russian state-owned gas company, available at: https://www.iareporter.com/articles/gazprom-round-up-russias-highest-court-declines-to-hear-czech-companys-appeal-against-anti-arbitration-injunction-prosecutor-general-intervenes-in-russian-court-proceedings-lodged/

[178] *Ibid. See* also European Union's Supplementary Counter-Memorial, section 2.5.2, para. 113.

[179] Claimant's Supplementary Rejoinder on Jurisdiction and Merits, paras. 8-10.

[180] [redacted]

[181] *Ibid*., para. 20 and 33 c).

[182] *Ibid*., para. 31 ff.

[183] *Ibid*., para. 21.

[redacted]

146. As explained by the European Union,[185] however, even assuming that the GTA is relevant for assessing the Claimant's alleged damage, despite being an intra-group arrangement (*quod non*), the Claimant in this scenario failed to exercise due diligence when negotiating and concluding the GTA. In particular, the Claimant [redacted] The Amending Directive did not involve a "dramatic and radical regulatory change".[186] There were clear indications before the Claimant adopted its financial investment decision in 2015, and in any event before the conclusion of the GTA in 2017, that the requirements of unbundling, tariff regulation and TPA already applied to pipelines such as the NS 2 pipeline by virtue of the Gas Directive, or at least that those pipelines could be made subject to such requirements.[187] Therefore, it was unreasonable for the Claimant to assume, when agreeing [redacted] that the NS 2 pipeline would remain wholly unregulated during the entire life of the GTA. Any "catastrophic impacts" flowing from the Claimant's agreeing [redacted] re, therefore, entirely attributable to the Claimant's own negligence.

147. As explained by the European Union, the so-called "risk assessments" cited by Mr. [redacted] were deeply flawed and unreliable.[188] Nor can the legal opinions cited by Mr. [redacted] and Mr. Roberts (one of which was issued by the same law firm that represented the Claimant in these proceedings until February 2022) excuse the Claimants' manifest negligence, all the more so since none of those opinions have been exhibited before the Tribunal, despite their production being requested by the European Union.[189]

[redacted]

[185] European Union's Counter-Memorial, section 2.3.6; European Union's Rejoinder, section 2.3.1.
[186] European Union's Counter-Memorial, section 2.2; European Union's Rejoinder, section 3.2. *See* also section 5.8 below.
[187] *Ibid*.
[188] *See* European Union's Rejoinder, para. 702 ff.
[189] *See* Claimant's Privilege Log produced pursuant to Procedural Order No 5, 13 August 2021, items 4, 5, 6.

4.4. That the alleged damage is not attributable to the Amending Directive is confirmed by the decision of all non-Russian investors in Nord Stream 1 to write off their investments following the invasion of Ukraine

148. As explained by the European Union,[190] that the alleged damage is not attributable to the Amending Directive is confirmed by the decision of all non-Russian investors in Nord Stream 1 ("**NS 1**") to write off their investments following the invasion of Ukraine.

149. The Claimant is adamant that [redacted]

150. However, neither of these two differences can explain why all the shareholders of NSPAG, except Gazprom, decided to write off their investments in NSPAG, even though NSPAG's investment in NS 1 is not subject to certification under the Gas Directive.

151. The Claimant has strenuously argued that line B of the NS 2 pipeline can be easily repaired within a relatively short period of time and without excessive costs. The Claimant has nowhere argued that the two lines of the NS 1 pipeline, unlike line B of the NS 2 pipeline, are irreparable. Therefore, it is illogical for the Claimant to pretend that this difference may account for the non-Russian shareholders' decision to write off their investment in the NS 1 pipeline.

152. Nor does the Claimant explain how the mere fact that [redacted] could account for the unanimous decision by all non-Russian shareholders of NSPAG to write off their investments.

153. As explained by the non-Russian shareholders themselves, their decision to write off their investments in NSPAG was a response to the full-scale invasion of Ukraine and related events (including, but not limited to, the acts of sabotage of September 2022), for which the European Union cannot be held responsible.[194]

154. Unlike Gazprom,[195] the non-Russian shareholders of NSPAG are private entities guided exclusively by commercial considerations, rather than political instructions

[190] European Union's Supplementary Counter-Memorial, section 3.5.
[191] Claimant's Supplementary Rejoinder on Jurisdiction and Merits, para.132.
[192] *Ibid*., para. 128.
[193] *Ibid*., para. 129.
[194] European Union's Supplementary Counter-Memorial, para. 171.
[195] *See* above section 2.2.

from the Russian government. Therefore, their decision to write off their investments constitutes an objective and reliable indication that NS 1 has no commercial value. In view of that, there is no reason to assume that NS 2 would have better business prospects, even if it were not subject to the Gas Directive.

4.5. The Swiss Economics Reports are deeply flawed

155. In its Supplementary Reply, the European Union explained that the Second Swiss Economics Report (SE 2024) is fundamentally flawed because it is based on unreliable factual assumptions fed by the Claimant to Swiss Economics and fails to take into account the Claimant's own contribution to the alleged damage.[196]

156. For the reasons set out above, the European Union maintains that the "But For Scenario" relied upon in SE2024 is unrealistic (see sections 4.2 and 4.3), whereas the "Factual Scenario" is attributable to the Claimant's own actions or inactions or other circumstances not attributable to the European Union (section 4.1).

157. For the reasons explained in sections 3.2 and 3.3, respectively, the European Union further maintains that the impacts of the US sanctions and the acts of sabotage of September 2022 are far from "limited"[197] and call into question the operability of the NS 2 pipeline within the foreseeable future. The limited adjustments made by Swiss Economics underestimate those impacts and are clearly inadequate.

158. Lastly, as explained in the Annex to this submission, the Third Swiss Economic report still fails to address the deficiencies identified by the European Union in previous reports.

5. THE JUDGMENT OF THE EUROPEAN COURT OF JUSTICE DOES NOT SUPPORT THE CLAIMANT'S CASE

5.1. The European Union did not mischaracterise the nature or content of the ECJ Judgment or of the non-binding opinion by the Advocate General

5.1.1. The Court of Justice's judgment of 12 July 2022 is a decision on admissibility, not a decision on the substance or merits

159. The Claimant argues that the European Union "misleads the Tribunal in relation to the importance of the conclusions of the ECJ Judgment and the ECJ Opinion".[198]

[196] European Union's Supplementary Counter-Memorial, section 3.6.
[197] Claimant's Supplementary Memorial on Jurisdiction and Merits of 27 February 2024, para. 196.
[198] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 138.

The European Union has not done so. The European Union has explained in detail the nature and content of the ECJ Judgment of 12 July 2022: that judgment relates to an appeal against an Order of the General Court of 20 May 2020, dismissing the Claimant's application for annulment as inadmissible for lack of direct concern.[199] On 12 August 2020, the Claimant appealed against the Order of the General Court. On 12 July 2022, the ECJ rendered its judgment in Case C-348/20 P and ruled that the action for annulment brought by Nord Stream 2 AG against the contested Directive was

> admissible, to the extent that it is directed against the provisions of Articles 36 and 49a of 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, as amended and inserted, respectively, by Directive 2019/692.[200]

160. The ECJ referred the case back to the General Court for a decision on the merits concerning the action for annulment. That proceeding is currently pending.[201]

161. Hence, contrary to the what the Claimant suggests,[202] it is beyond dispute that:

i. The ECJ Judgment of 12 July 2022 was a judgment on **admissibility**. The substance of the dispute is still to be assessed in a definite manner by the General Court.

ii. In its Supplementary Counter-Memorial, the European Union did **not contest the conclusion of the ECJ that the action for annulment was admissible**. Rather, the European Union placed the ECJ's statements in the correct legal perspective: they were made in a judgment limited to admissibility and only made for that purpose.

iii. The ECJ **did not, in any way, confirm the alleged discriminatory intent or effect of the AD**. The Claimant's suggestions to the contrary are its own wishful thinking.

iv. The European Union does **not "confuse"[203] the difference between being *eligible* to apply for an Article 36 exemption or an Article 49a derogation and being *granted* such an exemption or derogation**. As explained by the European Union, Article 36 and Article 49a do not confer, automatically, a right to an exemption or derogation, respectively.[204] The

[199] Exhibit RLA-361, Order of the General Court of 20 May 2020, *Nord Stream 2 AG v. European Parliament and Council,* Case T-526/19.
[200] *See* paragraph 3 of the operative part of the Judgment of 12 July 2022.
[201] A hearing was held in the General Court in Luxembourg on 11 April 2024.
[202] *See* Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 141.
[203] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, paras. 27 and 141.
[204] *See* European Union's Supplementary Counter-Memorial, paras. 215, 231, 246.

granting of both Article 36 exemptions and Article 49a derogations is subject to strict conditions. It is incumbent upon the applicant TSO to prove that those conditions are met. In the present case, the Claimant has failed to prove that it meets those conditions. For that reason, as further explained by the European Union,[205] whether Nord Stream 2 is eligible or not to apply for an exemption under Article 36, or for a derogation under Article, 49a is irrelevant. The formal difference in treatment alleged by the Claimant does not amount *per se* to prohibited discrimination. Having regard to its unique characteristics, the Nord Stream 2 project could not, in any event, have obtained either an Article 36 exemption or an Article 49a derogation. It was clear, already as of the date of adoption of the Amending Directive, that the NS 2 pipeline raises significant competition and security of supply concerns.[206] Therefore, in any event, the NS 2 pipeline would have failed to qualify for such an exemption or derogation and remained subject to the generally applicable requirements of the Gas Directive. This has been confirmed by subsequent developments.[207]

v. The European Union has explained and demonstrated[208] that it was – and still is – the **understanding of the EU co-legislators that the Claimant can apply for an Article 36 exemption for Nord Stream 2**. Of course, the European Union took note of certain statements of the ECJ in its Judgment on admissibility of 12 July 2022, and explained in the alternative that, in any event, there is no discrimination of Nord Stream 2.

5.2. <u>The European Union made a correct representation of the nature or content of the ECJ Judgment and of the non-binding opinion by the Advocate General</u>

5.2.1. The Court's judgment of 22 July 2022 is a judgment on admissibility

162. The European Union did not "downplay the importance of the ECJ judgment".[209] The ECJ judgment of 22 July 2022 is an important judgment, declaring Nord Stream 2's application for annulment (and thus the same dispute before the Tribunal in the present arbitration) admissible before the General Court. However, the ECJ Judgment of 22 July 2022 is a decision solely concerning the admissibility

[205] *See* section 7.1, below.
[206] *See* section 7, below, with references to previous EU memorials.
[207] European Union's Supplementary Counter-Memorial, section 4.3. *See* also section 6.1. of this submission.
[208] European Union's Supplementary Counter-Memorial, section 4.3.1.
[209] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 142.

of the Claimant's application before the General Court. It is not a decision on the substance or merits.[210]

163. The European Union stresses again that the ECJ did not yet assess this dispute on the merits. It did not confirm any violation of EU law. The European Union takes issue with the Claimant's abuse of certain statements made in the context of a judgment on admissibility to suggest that they would support "respondent's breaches of the ECT".[211] No such conclusions were reached by the ECJ.

164. The ECJ only provided interpretations of the Amending Directive insofar as relevant for ruling on the admissibility of the Claimant's action for annulment. It issued no ruling on the substantive issue that now remains to be decided in the ongoing procedure before the General Court, i.e. whether the impact of the Amending Directive on the Claimant is unlawful as a matter of EU law.[212]

5.2.2. The Claimant mischaracterizes statements in the advisory opinion of the Advocate General, which are, moreover, not confirmed by the ECJ

165. In its Supplementary Rejoinder, the Claimant concedes that "an opinion of an Advocate General is not legally binding for the judges of ECJ".[213] Still, the Claimant keeps on elevating this Opinion to a definite "basis for the interpretation of the relevant EU laws"[214] in this dispute. This starts already with the misleading shorthand "ECJ Opinion" used by the Claimant. In fact, what the Claimant refers to is <u>not</u> an opinion of the ECJ. Rather, it is an advisory opinion of the Advocate General, who is not a judge.[215] In his Opinion, the Advocate General did not provide a definite interpretation of the legal provisions of the AD. The European Union has explained in detail that the Claimant relies on a number of statements by the Advocate General made in the course of the appeal on admissibility that the ECJ did not cite, still less to endorse, and that are therefore moot.[216]

166. The Claimant now concedes that, although the ECJ's Judgment "agreed with the conclusions" in the advisory Opinion of the Advocate General (and indeed found the action admissible), the "ECJ did not repeat or specifically confirm other parts of the opinion".[217] The Claimant's statement that the "tribunal will easily see that,

[210] *See* European Union's Supplementary Counter-Memorial, para. 185.
[211] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 147.
[212] European Union's Supplementary Counter-Memorial, paras. 184-200.
[213] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 149.
[214] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 149.
[215] *See* also European Union's Supplementary Counter-Memorial, para. 202.
[216] *See* European Union's Supplementary Counter-Memorial, paras. 204-209.
[217] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 154.

in substance and spirit, the ECJ agrees with the Advocate General on the interpretation an effects of the AD"[218] is pure speculation at a very abstract level. That the ECJ does not repeat certain statements by the Advocate General does not mean it that the ECJ "agrees" with these statements. Rather the opposite is true: the ECJ may not be presumed to agree with the statements by the Advocate General unless it repeats or otherwise endorses such statements.

5.3. There is no finding by the ECJ that there is discriminatory intent or effect

5.3.1. The ECJ did not confirm the statements in the advisory opinion of the Advocate General on which the Claimant seeks to rely

167. When claiming that there is an "intentional strategy"[219] to treat Nord Stream 2 less favourably than other pipelines, the Claimant again relies heavily on the advisory opinion of the Advocate General.[220] The Claimant euphemistically states that the ECJ "did not go into as much detail as the Advocate General".[221] In reality, the ECJ found no such evidence of "intent" and made no such statements.[222] The only ECJ finding was that the General Court erred in law in holding that the AD did not directly affect the situation of the appellant.[223] There is no mentioning of any "intentional strategy" in the ECJ Judgment of 22 July 2022.

5.3.2. There is no finding of discrimination by either ECJ or the Advocate General

168. In any event, it merits underlining that there was no finding, either by the ECJ or by the Advocate General, that the AD is discriminatory. Fearing to admit the obvious, namely that the same dispute is pending before the European courts and this arbitral tribunal, the Claimant stresses that this assessment must be made by the General Court based on EU law, and by the Tribunal based on the ECT. Still, the fact that the Claimant finds it necessary to state this clearly demonstrates that exactly the same dispute is pending before those two fora, necessarily triggering the fork-in-the-road clause.

5.4. The ECJ Judgment does not demonstrate that the European Union intended to discriminate against the Claimant

[218] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 154.
[219] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 162.
[220] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 159.
[221] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 160.
[222] *See* European Union's Supplementary Counter-Memorial, paras. 206-209.
[223] Exhibit CLA-323, Judgment of the European Court of Justice of 12 July 2022, *Nord Stream 2 AG v. European Parliament and Council*, Case C-348/20 P, para. 77.

169. The Claimant argues that there is "overwhelming evidence showing … beyond any doubt" that the AD had the intention to target Nord Stream 2.[224] The Claimant then again refers to the Advocate General's advisory opinion,[225] quoting a statement that was not made or confirmed by the ECJ.[226]

170. The European Union stresses again that the Commission and the EU co-legislators never had the intent of excluding the possibility for a non-completed project, like that of Nord Stream 2, to apply for an Article 36 exemption. Their intention was to establish a system whereby, on the one hand, existing pipelines completed before 23 May 2019 can apply for an Article 49a derogation and, on the other hand, new pipelines (including those not yet completed) can apply for an Article 36 exemption, in line with the earlier decisional practice of the Commission under the Gas Directive.[227]

171. The Claimant considers that the European Union's statement that significant pipeline investments like NSP2AG are not being made every day would support that the "intention of Respondent was to target Claimant".[228] This is a misrepresentation of the European Union's arguments. The European Union made this statement when explaining that it is inappropriate to assess the impact of the AD at one single point in time. In the future, other interconnectors with third countries may be built which, like NS 2, will be subject to the AD. Those interconnectors will not be able in any case to apply for an Article 49a derogation. On the other hand, those interconnectors will be eligible to apply for an Article 36 exemption. Nevertheless, those interconnectors may not necessarily obtain such exemption since the applicable conditions, including those concerning their impact on competition and security of supply, must be met.[229] These interconnectors will thus be in the same situation as Nord Stream 2.

172. Finally, the European Union also disagrees with the polemic and wholly inappropriate assertion by the Claimant that some "mask has fallen".[230] As just explained, the intention of the Commission and the co-legislators was that Nord Stream 2 could apply for an Article 36 exemption. This does not mean that the EU institutions were unaware of the reality and specific characteristics of the Nord Stream 2 project. In fact, as explained already in detail in the European Union's

[224] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 166.
[225] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 166.
[226] *See* European Union's Supplementary Counter-Memorial, para. 206
[227] *See* European Union's Supplementary Counter-Memorial, paras. 221-228.
[228] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 169.
[229] European Union's Supplementary Counter-Memorial, Section 4.3.
[230] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 170.

Counter-Memorial,[231] the context of the Amending Directive was the legal uncertainty that existed with regard to the legal framework applicable to transmission pipelines connecting third countries to the European Union. That a particular factual situation is part of the context in which a measure is adopted does not mean that the "intent" of the measure is to target a particular project.[232] The AD provided the legal framework for addressing, on a case-by-case basis, the legitimate concerns that all third country interconnectors (Nord Stream 2, as well as future third country interconnectors) raise.

5.5. The European Union does not mischaracterise the Claimant's claim and does not ignore the difference between being eligible to apply for an exemption or a derogation and being granted an exemption or derogation

173. The Claimant argues that the European Union mischaracterises the claims of the Claimant, by – allegedly – ignoring the difference between being eligible to apply for an exemption or derogation and being granted an exemption or derogation.[233]

174. The Claimant is mistaken. The European Union explained that, when the AD was amended, the intention of the Commission and the co-legislators was that Nord Stream 2 could, like other new pipelines that are not yet in operation, apply for an Article 36 exemption. The European Union has taken note of the subsequent ECJ statements in its Judgment of 22 July 2022 regarding eligibility under Article 36. Still, be this as it may, the European Union has argued in the alternative that, in any event, whether the Claimant is eligible or not to apply for an exemption with regard to NS 2 under Article 36 or a derogation under Article 49a, the end result is the same: the Nord Stream 2 project could not benefit from an exemption or derogation, given the competition and security of supply concerns that this particular project raises, and should be fully subject to the generally applicable rules of the Gas Directive.

175. The European Union thus strongly disagrees with the Claimant's suggestion that this "is a text book example of discriminatory treatment".[234] Different treatment does not entail necessarily discrimination. The existence of discrimination requires more than a mere formal difference in treatment: it must be shown, in addition, that the different treatment is less favourable and cannot be objectively justified on legitimate grounds. In the case at hand, even assuming that there is formally different treatment, to the extent that Nord Stream 2 was not allowed to apply for either an Article 49a derogation or an Article 36 exemption (and the European

[231] *See* European Union's Rejoinder, paras. 221-226. *See* also Section 5.8 of this memorial and previous EU submissions mentioned therein.
[232] *See* European Union's Rejoinder, paras. 221-226.
[233] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, paras. 175 and 177.
[234] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 202, para. 178.

Union repeats that this difference in treatment was not intended by the Commission and the co-legislators when the AD was adopted), that difference in treatment does not lead effectively to less favourable treatment because, in any event, NS 2 would not have obtained either an Article 49a or an Article 36 exemption, having regard to objective criteria relating to legitimate policy concerns, such as protection of competition and security of supply. For those reasons, there is no discrimination.

5.6. The European Union acknowledges the findings of the ECJ regarding Article 36

176. The Claimant argues that the European Union contradicts the findings of the ECJ regarding Article 36.[235] This is incorrect: as just explained, the European Union took note of the Court of Justice's statements in its Judgment of 22 July 2022 and explained, based on evidence, that the interpretation made by the ECJ was not the understanding of the Commission and the co-legislators at the time the AD was adopted. The European Union refers to the arguments and uncontested evidence in its Supplementary Counter-Memorial.[236] The European Union also placed these findings in the correct factual context: there was no oral hearing before the ECJ where the interpretation of Article 36 could be discussed. Further, the text of Article 36 (which does not refer to "final investment decision") or the decisional practice of the Commission are nowhere discussed in the ECJ judgment or in the advisory opinion of the Advocate General.

177. The Claimant, once again, denies the relevance of the exemption decision regarding the OPAL pipeline, arguing that the "final investment decision had not been taken in the OPAL project prior to the exemption".[237] The Claimant again relies on a criterion ("final investment decision") that does not figure anywhere in the Gas Directive.[238] Prior practice under Article 36 confirms that the grant of any request for exemption must be assessed on a case-by-case basis, to determine whether the conditions for an Article 36 exemption are fulfilled in each case. The OPAL exemption decision, obtained by the owner of Nord Stream 2, Gazprom, notably confirms that making "significant financial commitments"[239] – such as purchasing pipes for the construction[240] – does not disqualify a project's eligibility for an exemption.

[235] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, paras. 179-185.
[236] European Union's Supplementary Counter-Memorial, paras. 221-229.
[237] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 186.
[238] *See* European Union's Rejoinder, paras. 276-280.
[239] Exhibit R-67, Bundesnetzagentur Exemption Decision with respect to OPAL, 25 February 2009, p. 62.
[240] *See* Exhibit R-201, Concord Power Presentation: Slide 7 – Level of Risk – Investments already made by Wingas.

178. The same applies to the Claimant's criticism of the example of Deutsche ReGas.[241] The Claimant again relies on the non-existent criterion of "final investment decision", arguing that in that case, "the final investment decision had not been taken".[242] The Claimant points out that "it is not unusual that investors enter into substantial financial commitments already prior to the final investment decision".[243] That indeed supports the European Union's argument: the decisional practice of the Commission regarding Article 36 of the Gas Directive shows that such exemption is available even in cases where a project is well-advanced. Member States enjoy a wide margin of discretion concerning the analysis of the "risk" criterion.[244]

179. Finally, the Claimant's suggestions that the European Union ignores the "constitutional division of powers within the EU"[245] are entirely misplaced. The European Union has taken note of the ECJ Judgment and drawn the necessary consequences. Yet, it bears recalling that the Judgment of 22 July 2022 was a judgment of admissibility, in which the ECJ answered a very specific point: is the AD of direct concern and, therefore, is the application for annulment admissible? The European Union has explained in detail the context of this Judgment. This is not a question of ignoring EU constitutional law. Rather, it is a correct and faithful representation of the Judgment for what it is under EU law: a judgment on admissibility. The substantive question still needs to be answered: is the European Union prevented from regulating the transport of gas from third countries into the European Union to ensure security supply and competition or does the Claimant have a right to operate its pipeline in a regulatory vacuum in the EU? Neither the General Court nor the ECJ have answered this question and the interpretative findings of the ECJ in its Judgment of 22 July 2022 do not respond to that question.

5.7. <u>The European Union does not make incorrect comparisons with future projects or completed pipelines</u>

180. The Claimant does not disagree that interconnectors with third countries may in the future be built without an Article 36 exemption (and, therefore, be fully subject to the rules of the Gas Directive, like Nord Stream 2). Rather, the Claimant simply states that this is "of no relevance to this case" because the AD would "specifically target […] Claimant."[246]

[241] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 188.
[242] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, paras. 188-189.
[243] *Ibid*., para. 189.
[244] European Union's Supplementary Counter-Memorial, para. 228.
[245] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 190.
[246] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 192.

181. The European Union disagrees: it is highly relevant that the application of the Gas Directive rules to third country interconnectors will also apply to future pipelines. As explained by the European Union,[247] and not denied by the Claimant, gas pipeline transport projects are not built every day. The fact that at one point in time there is one project that is fully subject to the generally applicable rules prescribed by the Gas Directive, for justified security of supply and competition reasons, does not make the AD discriminatory, since future projects will also, on the basis of the same justified reasons, be subject to those rules.

182. The Claimant also repeats that it does not consider relevant that, as the European Union has demonstrated, other existing pipelines are also subject to the Gas Directive without benefiting from an Article 49a derogation, one prominent example being Yamal.[248] The Claimant simply states that "[t]hese other pipelines are not comparable to Claimant's pipelines" because "EU law applies on the EU side of the border crossings".[249] The Claimant has never addressed the example of Yamal. This example shows that there are existing third country pipelines that do not benefit from an Article 49a derogation. Moreover, prior to the adoption of the AD, the uncertainty regarding the applicability of the Gas Directive extended also to "the EU side of the border crossing".[250] The amendment to the definition of "interconnector" clarified that such third country interconnectors are subject to EU law, as soon as they enter into the territory of the EU Member States (hence, already when they are in the territorial sea of the Member State). In this regard, the Claimant also fails to explain why in the case of onshore pipelines (like Yamal) EU law would have applied from the international border whereas, in the case of offshore pipelines, EU law would apply only from the point where it makes landfall (which, while being within the Member State's territory, does not constitute its border; the border is instead where the territorial sea begins).

5.8. <u>The application of the EU gas market legal framework to third country interconnectors was foreseeable</u>

183. The European Union has explained at great length that when NSP2AG's adopted its Financial Investment Decision regarding Nord Stream 2 on 4 September 2015, there were numerous indications, including the exchanges with the Commission in the process of the discussions on the South Stream pipeline and countless official statements, that pointed to the applicability of the Third Gas Directive to Nord Stream 2 (Rejoinder on the Merits of 22 February 2022, paragraphs 120-

[247] European Union's Supplementary Counter-Memorial, para. 216.
[248] *See* European Union's Supplementary Counter-Memorial, paras. 217-218.
[249] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 195.
[250] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 195.

171; Supplementary Counter-Memorial on Jurisdiction and Merits of 4 July 2024, paragraphs 212-213).

184. There could have been no doubt in any reasonable investor's mind that EU authorities would see to it that the scope of the existing EU energy market rules extended to NS 2. What is more, the European Union also produced evidence that NSP2AG's parent company Gazprom was well aware already in October 2015 that the Third Gas Directive could apply to pipelines such as Nord Stream 2 (Rejoinder on the Merits, of 22 February 2022 paragraphs 199-205). This evidence continues to stand unrefuted.

185. In its supplementary submissions on this point,[251] the Claimant still provides no explanations of how a Court ruling rendered in 2022 could have influenced expectations regarding an investment decision taken in 2015. Rather, the Claimant prefers to mischaracterise the content and legal scope of this ruling, which has already been addressed above (section 5.3).

186. If the Claimant had indeed adopted a "logical approach" at the time of the investment (as it claims in para 200 of the Supplementary Rejoinder), pursuant to which the EU would apply its internal gas market rules within the territorial reach of EU law, the applicability of the Gas Directive to its investment would have been crystal clear. The territorial scope of EU law has been defined since the inception of the European Communities as applying to the territories of EU Member States.[252] This includes their territorial waters, where Member States exercise sovereignty.[253] Accordingly, no reasonable investor would have assumed that EU rules would not apply to offshore import pipelines in Member States' territorial sea, but only as from the coastal terminal where such pipelines reached landfall in a Member State. By the same token, no reasonable investor would legitimately have sought to avail itself of a much-discussed possible gap in the EU legal regime and then claim its "expectations" had been frustrated when that gap eventually did not benefit its investment.

187. The Claimant does not call into question that official announcements pointing to the applicability of the Third Gas Directive to its investment existed when it took its investment decision. In particular, the Claimant does not deny that its own

[251] Claimant's Supplementary Rejoinder, section IX.8

[252] *See* Exhibit RLA-410, Article 52 TEU https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF ; and Exhibit RLA-411, Article 355 TFEU, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF.

[253] According to settled case, Member States even exercise sovereignty in their Exclusive Economic Zones, in which EU law therefore applies. *See* for instance, Exhibit RLA-413, Case C-6/04, Commission of the European Communities v UK, EU:C:2005:626, para 117; and Exhibit RLA-414 Case C-347/10, Salemink, EU:C:2012:17, para 35.

witness, Dr. [redacted] confirmed that, between 2015 and 2017, representatives of the European Commission had informed the Claimant that the original Gas Directive would apply to Nord Stream 2.[254] Rather, the Claimant now submits alternative interpretations of the Gazprom October 2015 Prospectus in paragraphs 202-205 of its Supplementary Rejoinder. That Prospectus has been shown in the Respondent's Rejoinder on the Merits (Chapter 3.4) as demonstrating Gazprom's awareness of the likely regulatory impact resulting from the Third Gas Directive for its Nord Stream 2 investment.

188. The Claimant's alternative interpretations consist of the claim that the Prospectus merely describes the general potential impact of the 2009 Gas Market Directive on Gazprom operations within the EU internal market and that the section of the Prospectus invoked by the Defendant has "nothing to do with NSP2AG or offshore pipelines" (Supplementary Rejoinder, paragraph 203).

189. It is clear from the Prospectus that such claims are spurious.

190. The section of the Prospectus quoted paragraph 201 in the Respondent's Rejoinder on the Merits was taken from page 14 of the Prospectus. The relevant passage reads as follows:

> If, pursuant to the Third Gas Directive, an EU state chooses to implement the most restrictive measures on participation of energy producers in ownership and management of the transportation networks, it may limit the activities in which we are permitted to engage which may force us to dispose of our gas transportation assets in Europe. These restrictions could affect our competitive position and our ongoing or contemplated projects, and, consequently, our results of operations. […]
>
> In addition, the implementation of the Third Gas Directive could negatively affect the timing and prospects of our gas transportation projects in Europe. In particular, inconsistencies between the provisions of the Third Gas Directive and the terms of bilateral intergovernmental agreements entered into by and between the Russian Federation and the countries that participated in implementing the South Stream pipeline project became one of the reasons for the cancellation of the project in 2014 and its substitution for an alternative project, the Turkish Stream pipeline. The liberalization of the gas market in Europe may also result in a declining role for long-term contracts, which could, in turn, adversely affect the stability of our revenues. Further, in the absence of a special permission granted in accordance with the EU laws, it may not be possible for us to own and control gas transportation assets in Europe. Our ability to implement gas transportation projects in Europe may also be affected by the

[254] [redacted]

> provisions of the Third Gas Directive, which could have a material adverse effect on our operating results in Europe.

191. The first paragraph of the above text describes risks for all of Gazprom's "gas transportation assets in Europe" as well as for the group's "ongoing or contemplated projects". As to these ongoing or contemplated projects, the Prospectus repeatedly refers both to the already constructed offshore pipeline Nord Stream 1 (p. 121-123) and to the investment plan to increase the Nord Stream pipeline capacity by constructing a Nord Stream 2 pipeline (p. 93, 99-102, 121, 124, 125). This leaves no doubt that the section of the Prospectus invoked by the Claimant also addresses Gazprom's subsidiary NSP2AG and its Nord Stream 2 pipeline.

192. Excluding Nord Stream 2 from the scope of the Prospectus would also be irreconcilable with its purpose. The relevant legislation required security issues to inform security investors inter alia of "risks which are specific to the situation of the issuer and/or the securities and which are material for taking investment decisions".[255] Accordingly, the Prospectus was meant to inform about regulatory risks resulting from major investment projects. The Prospectus was published in October 2015 at the time when the Nord Stream 2 investment decision was taken and subsequent to "preinvestment" studies for the Nord Stream 2 project having been conducted (see p. 124 of the Prospectus). Any failure to address the regulatory risks of the Nord Stream 2 multi-billion-dollar investment would have been a breach of Gazprom's information duties under the relevant legislation.

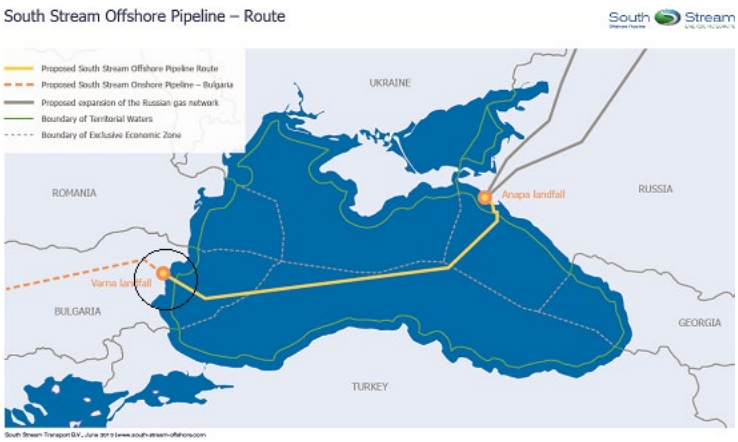
193. Accordingly, the paragraph on page 14 of the Prospectus from which was quoted in the Respondent's Rejoinder on the Merits informed investors also of regulatory risks resulting from the Nord Stream 2 project.

194. The same follows from a contextual reading of the other paragraphs on page 14 of the Prospectus. Page 14 addresses the regulatory risks resulting from the "liberalisation of the European gas market" for Gazprom's "gas transportation assets in Europe" and expresses the concern that "the implementation of the Third Gas Directive could negatively affect the timing and prospects of [Gazprom's] gas transportation projects in Europe". Throughout the Prospectus, no difference whatsoever is made between onshore and offshore gas transportation projects. The concern expressed on page 14 of the Prospectus thus also relates to the Nord

[255] Exhibit RLA-331, Articles 2 and 25 of Regulation 809/2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements, published in EU Official Journal of 30.4.2004, L 149/1.

Stream 2 project, of which mention is made throughout the Prospectus. The same applies to the concern expressed that "in the absence of a special permission granted in accordance with the EU laws, it may not be possible for [Gazprom] to own and control gas transportation assets in Europe". Nowhere in the Prospectus is a difference made between the ownership/control of onshore and offshore gas transportation assets.

195. Page 14 of the Prospectus also informs the reader that the expectation that the Third Gas Directive would apply to the South Stream Project contributed to the latter's cancellation. As illustrated in the below map, the South Stream Pipeline was intended to transport Russian natural gas through the Black Sea from Russia to Bulgaria and then through Serbia, Hungary and Slovenia further to Austria. It was intended to cross the Black Sea as an offshore pipeline, and would thus have been comparable to the Nord Stream 2 offshore natural gas pipeline, which runs under the Baltic Sea from Russia to Germany. As with the Nord Stream 2 pipeline, part of the South Stream pipeline would have been within the EU's (i.e. Bulgarian) territorial waters. This further illustrates that a reasonable investor would have expected at least the part of Nord Stream 2 in the EU's territorial sea to be governed by the Third Gas Directive.



196. Finally, it is worth noting that the first paragraph on page 15 of the Prospectus mentions in addition how "European countries have intensified their efforts to diversify their energy sources […] to reduce European reliance on Russian gas". The Prospectus finds on the same page that such security of supply related measures adopted by European countries could adversely affect Gazprom's "future results of operations, cash flows and financial condition". The Claimant will find it difficult to explain why these concerns had "nothing to do" with the transportation of Russian gas through Nord Stream 2.

5.9. The Claimant could benefit from other flexibilities under the Gas Directive

197. The Claimant also argues that the other flexibilities, besides Article 36 and Article 49a, that are available in the Gas Directive would be "irrelevant for these proceedings".[256] First, with regard to the availability of other unbundling models than ownership unbundling, the Claimant considers that this is a "matter for Member States to decide".[257] However, as the European Union has explained in detail,[258] Germany has made the choice to implement the three unbundling models. When being certified in Germany, NSP2AG would thus not necessarily be required to implement full ownership unbundling. In this regard, the European Union recalls that the Claimant has applied for certification in Germany as an ITO, thus making use of precisely one of those flexibilities it now wants to make the Tribunal believe are "irrelevant". This certification process remains open, even if it is presently suspended due to the Claimant's inaction (see section 3.1, above).

198. Second, with regard to the possibility to unbundle through two separate public bodies exercising the control over a transmission system or a TSO, on the one hand, and over an undertaking performing production or supply, on the other hand, in line with Article 9(6) of the Gas Directive, the Claimant suggests that this is irrelevant since it is a matter of "State control of gas market undertakings".[259] In doing so, the Claimant suggests that the undisputed fact that it is owned and controlled by Gazprom, and through Gazprom, by Russia should be ignored. This is of course entirely misplaced and totally ignores reality, as explained in section 2.2. The decisive point is that Article 9(6) of the Gas Directive provides, in essence, that in respect of State-owned entities the requirements of ownership unbundling are considered to be complied with if the TSO entity has an independent power of decision in relation to any production or supply entities owned by the same state. This applies to all States, whether EU Member States or third countries. As a consequence, Russia was free to organise its control of the Claimant in such a way as to provide it with an independent power of decision in relation to Gazprom or Gazprom Export.

199. Third, as explained before, Russia, which ultimately owns and controls the Claimant, could negotiate an IGA with the European Union[260] and/or allow exports of gas from Russia by undertakings other than the Gazprom group, so as to

[256] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 210.
[257] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 209.
[258] *See* European Union's Counter-Memorial, paras. 202-205.
[259] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 210.
[260] *See* European Union Rejoinder, Section 6.3.5.

facilitate the full use of the NS 2 pipeline.[261] Such an IGA would be in line with well-established practice concerning similar import pipelines.[262]

6. THE AD MAKES A MATERIAL CONTRIBUTION TO THE LEGITIMATE OBJECTIVES PURSUED BY THE GAS DIRECTIVE

6.1. The Claimant's arguments to rebut the demonstrated benefits of the AD remain superficial and contradictory

200. The Claimant continues to argue that the European Union has not demonstrated the benefits of the application of the Gas Directive to the NS 2 pipeline,[263] while disregarding the comprehensive evidence submitted by the European Union.[264] The Claimant limits itself to argue in a very general manner that applying EU rules to third country pipelines within the territorial waters of the Member States makes "no sense"[265] and "plays no role",[266] or that "gas, but not pipelines are of concern[267]" – each time without providing further arguments or evidence.

6.1.1. The European Union is entitled to regulate pipelines within its territory, including its territorial waters

201. At the outset, the European Union stresses, again, that this case raises a question of fundamental importance: does a Contracting Party to the ECT have the right to regulate economic activities with competition and security relevance within its entire territory, including within its territorial waters? The answer to this question can only be affirmative: the EU Member States, acting through the European Union to which they have transferred competences[268], do have a sovereign right to adopt such legislation for legitimate purposes, such as protecting competition and security of supply. The European Union has demonstrated that the AD was adopted to address threats to competition and security of supply that had already materialised in the past - and that did actually materialise again after the adoption of the AD.

[261] European Union's Rejoinder, Section 6.3.4.
[262] *See* European Union's Counter-Memorial, para. 210.
[263] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, Section X.
[264] *See* European Union's Supplementary Counter-Memorial, paras. 266-280 and Annex II.
[265] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, Section X, para. 225
[266] *Ibid*. – para. 216 ("no role for Article 11").
[267] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, Section X, para. 216.
[268] *See* Article 1(3) of the ECT.

6.1.2. The Claimant makes an unsubstantiated claim that rules are of "no use" in the territorial waters

202. The Claimant's core argument seems to be that the European Union is not entitled to apply legislation to gas pipelines within the Member States' territorial waters. The Claimant is adamant that the EU's legislative framework of competition and security of supply rules for gas should apply only to the transmission system operators "within Member States" or "within the EU internal market".[269] The Claimant, nevertheless, appears to consider that the territorial waters of the Member States are not part of their territory and, hence, of the EU internal market. This view is manifestly wrong. Territorial waters undoubtedly belong to the territory of the Member States, and the European Union undoubtedly has the right to adopt legislation applicable within the Member States' territorial waters.

6.1.3. The Claimant's arguments on the impact of the measures at issue are contradictory

203. The European Union notes that there is a general and fundamental contradiction in the Claimant's arguments relating to the alleged impact of EU rules on its pipeline.

204. On the one hand, the Claimant argues consistently that the AD would have no meaningful effect on the 54 km section of the pipeline in EU territorial waters. It consistently downplays any effect of the EU regulatory rules on security of supply or competition with regard to its pipeline.

205. At the same time, the Claimant keeps on stressing that the competition and security of supply rules, allegedly, have a "catastrophic" impact on the NS 2 pipeline. It remains unexplained how rules that are, allegedly, without effect on the 54 km stretch of the 1200 km long NS 2 pipeline within the EU's territory could possibly have such a "catastrophic" impact.

6.1.4. Security of supply concerns existed already before 2019

206. The Claimant argues that the security of supply concerns identified by the European Union in relation to NS 2 focus "on post 2019 circumstances".[270] However, the European Union has provided evidence of supply interruptions from Russia that predate 2019.[271] Russia's illegal annexation of Crimea in 2014 and its intervention in the eastern Ukrainian Donbass region was fresh in the minds of

[269] *See* Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, Section X, paras. 212 and 215.
[270] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 218.
[271] European Union's Supplementary Counter-Memorial, Section 3.2.1, and paras. 257-260, 283. *See* also First Brattle Expert Report, fn. 177.

the co-legislators when adopting the AD. The Claimant takes a purely abstract approach to this dispute when it pretends that subsequent events confirming the concerns that existed in 2019 are irrelevant. These subsequent events (which are in fact a continuation of actions that predate 2019[272]) confirm beyond doubt that the European Union was justified in taking a precautionary approach towards third country interconnectors, ensuring there is a legal basis in EU law to assess and address their impact on competition in the internal market and on security of supply.

207. The European Union finds its remarkable that the Claimant considers that events after 2019 are irrelevant. Even if these events had not happened, the European Union's precautionary approach would be justified given that, as explained by the European Union, security of energy supply is a fundamental interest of society[273] and a matter of public order.[274] The events after 2019 demonstrate *a fortiori* the legitimacy of the European Union's measure.

208. Furthermore, the Claimant's suggestion that BMWi's withdrawn security of supply assessment of 26 October 2021 has determined, once and for all, that the Claimant's control over the Nord Stream 2 pipeline poses no risks[275] is baseless. BMWi withdrew that assessment on 22 February 2022 (see section 3.1 above).[276] It is thus no longer a relevant or valid assessment and cannot therefore support the Claimant's allegations. The Second Brattle Expert Report explains in detail why BMWi's assessment of 26 October 2021 was fundamentally flawed.[277] In any event, that assessment was just a preliminary analysis. In accordance with Article 11(4) of the Gas Directive, that assessment had to be notified to the Commission as part of the German NRA's draft certification decision. Following that notification, the Commission would have been required to deliver its opinion, after consulting interested parties.[278] Under the Gas Directive, the German NRA is required to "take utmost account" of the Commission's opinion.[279] It is thus

[272] Brattle indeed notes that some observers "describe the events since 24 February as a 'further invasion' of Ukraine relative to 2014, when Russia obtained control of Crimea, and Russian separatists established the Donetsk and Luhansk People's Republics". First Brattle Expert Report, fn. 177. *See* also sections 8.2.2.1 and 8.2.2.2 of this submission.
[273] European Union's Supplementary Counter-Memorial, paras. 252-266. *See* also sections 8.2.2.1 and 8.2.2.2 of this submission.
[274] European Union's Supplementary Counter-Memorial, para. 326, referring to Exhibit RLA-76, WTO Panel Report, *EU - Energy Sector*, para. 7.1156.
[275] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 219.
[276] Exhibit R-426: Federal Ministry for Economic Affairs and Climate Action, Press release: Minister Habeck comments on the situation in eastern Ukraine and the discontinuation of the certification procedure for Nord Stream 2, 22 February 2022 https://www.bmwk.de/Redaktion/EN/Pressemitteilungen/2022/02/20220222-minister-habeck-comments-on-the-situation-in-eastern-ukraine-and-the-discontinuation-of-the-certification-procedure-for-nord-stream-2.html
[277] Second Brattle Report, Section II.
[278] Article 11(6) of the Gas Directive.
[279] Article 11(8) of the Gas Directive.

extremely doubtful that the assessment of 26 October 2021, had it not been withdrawn, would have remained unchanged. Finally, it must be underlined that BMWi's assessment of 26 October 2021 was made on the assumption that the EU gas legislation, including the generally applicable rules of the Gas Directive, applied to Claimant's pipeline.[280] The Claimant thus cannot invoke the withdrawn assessment to support its argument that the AD does not contribute to its security of supply objectives.

6.1.5. The AD pursues legitimate and achievable policy objectives

209. Already in its Counter-Memorial of 3 May 2021, the European Union explained in detail that the AD pursues legitimate and achievable policy objectives.[281] More precisely, Recitals (3) and (15) of the Amending Directive indicate specifically that it is intended to ensure that the rules applicable to gas transmission lines connecting two or more Member States are also applicable, within the European Union, to all gas transmission lines to and from third countries. This establishes consistency of the legal framework within the European Union while avoiding distortion of competition and negative impacts on the security of supply. The twin objectives of avoiding distortion of competition and ensuring security of supply within its territory in a consistent manner are thus set out from the beginning in the Gas Directive. These are fundamental policies of the European Union. In addition, as a matter of public international law, the European Union must be entitled to apply the same rules to the whole of the territory under its jurisdiction.

210. The Claimant's suggestion that there is a "fundamental shift of [Respondent's] case"[282] is thus difficult to understand. The legitimate objective of ensuring that third country interconnectors cannot evade the application of EU law on competition and security of supply was described from the beginning, and was set out in the recitals that provide the justification of the AD.

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[280] In fact, the German Ministry for Economy and Energy noted that the fact that the Nord Stream 2 pipeline would be certified as independent transmission operator would, in its view, help avoiding that the transmission system operator would abuse its position to endanger security of supply. ("***Certifying the Applicant as an independent transmission system operator (ITO) is an unbundling option provided for by law (section 10 EnWG),*** *and it is also open to companies from third countries. The supplier remains solely responsible for gas deliveries and compliance with the relevant delivery contracts. There are no obvious opportunities for the transmission system operator to exert influence over the allocation between different delivery routes in normal operations.* ***Subject to compliance with the unbundling rules in sections 10 to 10e EnWG****, there are therefore no additional risks apparent that would differ from those associated with a network operator not controlled by a third country*" – *See* the citation in para. 264 of the Claimant's Supplementary Memorial (emphasis added), referring to: Exhibit CLA-335, Security of Supply Assessment by the German Federal Ministry for Economy and Energy dated 26 October 2021, Section 8 (pp 50-52 of the English translation).)

[281] *See* European Union's Counter-Memorial, Section 2.1.

[282] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 69.

211. The purpose of the AD was to make sure that third country pipeline projects, like Nord Stream 2, cannot evade the application of the generally applicable rules of the Gas Directive that ensure competition and security of supply. While projects like that of the Claimant have particular characteristics that raise special concerns in light of those mentioned objectives, they are not the only ones addressed by the AD.

212. In support of its allegation that the European Union is "unable to show any direct competition and internal market or security of supply benefits"[283] the Claimant argues that "once the gas transported in Claimant's pipelines reaches the EU market – i.e. when the pipeline makes landfall at Lubmin – EU regulations apply with full force and effect". The Claimant thus suggests that the application of the Gas Directive in the entire territory of the European Union is somehow unnecessary.[284]

213. The Claimant disregards that, before the AD, there was uncertainty as to whether the Gas Directive applied to interconnectors with third countries. The uncertainty also extended to the possibility of applying the Gas Directive to the part of those pipelines located within the territory of the Member States. This is why the definition of "interconnector" was amended by the AD to remove the words "between Member States". Now that it is clear that the Gas Directive also applies to interconnectors with third countries the EU and Member State authorities have a firm legal basis to apply the rules on competition and security of supply included in the Gas Directive, and related legal instruments, to third country interconnectors within the entire EU territory, including territorial waters. This includes the rules of the Gas Directive on competition and security of supply (in particular, the provisions on unbundling and third country certification pursuant to Article 11), but also the additional rules included in related legal instruments.

6.2. <u>Further explanations regarding the examples of how the application of specific rules helps addressing competition and security of supply risks posed by third country pipelines</u>

214. The European Union has already explained in a comprehensive manner how the application of the Gas Directive, and related legal instruments, to third country pipelines within its territory, including its territorial waters, makes a material contribution to competition and security of supply.[285] Here below, the European

[283] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 211.
[284] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 211.
[285] *See* European Union's Supplementary Counter-Memorial, paras. 266-280 and Annex II.

Union will provide further explanations with regard to those points where the Claimant has attempted to put the effects of the EU rules in question.

6.2.1. Unbundling rules – preventing foreclosure by vertically integrated suppliers (Articles 9 to 23 of the Gas Directive)

215. The Claimant considers that EU's concerns relate to the *supply of gas* and cannot be addressed through regulation concerning the *transport* of gas through pipelines.[286] Maybe because it is used to operate in a monopolistic environment, the Claimant seems to be ignorant of fundamental principles of competition law and the laws of regulation of network industries (such as the energy industry).

216. An essential competition problem that the Gas Directive seeks to address is the possibility that the owner of a gas transport network who is also controlling gas production and supply activities abuses this position to distort competition.[287] In particular, the unbundling rules aim at ensuring an effective separation of networks from activities of production and supply. As stated in Recital (6) of the Gas Directive, "without [such a separation] […] there is a risk of discrimination not only in the operation of the network but also in the incentives for vertically integrated undertakings to invest adequately in their networks". By eliminating this conflict of interests, the unbundling regime ensures that transmission system operators take their decisions independently and will provide transparent and non-discriminatory access to the transmission networks to all users on the market and will not favour related producers or suppliers.[288] This is not only relevant for the day-to-day decisions of transmission system operators, but also for their strategic investment decisions, which they will thus formulate in an independent manner. Such an independent and non-discriminatory operation of networks in turn contributes to efficient market functioning and security of supply in the EU as a whole.

217. As explained,[289] the Claimant is owned and controlled by Gazprom, who is also the dominant gas producer in Russia. By controlling at the same time the pipeline transport as well as the gas production, Gazprom can abuse this position to the detriment of competition and security of supply in the European Union. The rules of the Gas Directive are thus directly relevant also for third country

[286] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, paras. 212, 216, 221.
[287] *See* also the European Commission's decision practice and jurisprudence of the Court of Justice cited in para. 304 of the European Union's Supplementary Counter-Memorial.
[288] European Union's Counter-Memorial, paras. 82-84 and European Union's Supplementary Counter-Memorial, paras. 300-307.
[289] *See* section 6.5 of the European Union's Rejoinder, as well as paras. 114, 154 and 282 of the European Union's Supplementary Counter-Memorial. *See* also Section 2.2, above.

interconnectors. The European Union has explained in detail in Section 4.3.3 of the Supplementary Memorial, based on evidence including expert evidence, that these concerns are very real and concrete in case of the Nord Stream 2 pipeline. There is thus no basis for the Claimant to suggest that these particular characteristics of "an external pipeline" are irrelevant for the "EU internal gas market",[290] and the Claimant does not demonstrate this beyond the mere statement. If there was any further need to demonstrate that competition concerns resulting from vertical integration between gas transmission lines on the one hand and production and supply of gas on the other hand are real in the case of the Claimant, such evidence is provided by the present investment arbitration: in essence, the Claimant's case is based on the claim that it should be entitled under the investment protection provisions of the ECT to implement its business model as an unregulated, monopolistic gas transport business controlled by, and vertically integrated with a monopolistic gas producer and supplier, Gazprom.

218. Because of these fundamental mistakes, Claimant's arguments that the application of EU gas regulation to the Nord Stream 2 pipeline serves no purpose fail. This is apart from the fact, which hardly needs repetition, that this argument plainly refutes any claim that applying EU gas regulation to the Nord Stream 2 pipeline would have a "catastrophic impact" on the Claimant's business.

219. Indeed, first, there is no reason why the third-country certification under Article 11 of the Gas Directive would only be justified for "internal gas infrastructure within the EU internal market"[291] and not for third country interconnectors, like the Claimant's pipeline. Third country interconnectors pose (at least) the same competition and security of supply risks when the entities that control them are at the same time active in gas transport, on the one hand, and gas supply/production, on the other hand. As just explained, before the AD, there was uncertainty as to whether the Gas Directive applied to interconnectors with third countries. The uncertainty also extended to the possibility of applying the Gas Directive to *the part of those pipelines located within the jurisdiction of the Member States*. The Claimant's suggestion that "potential concerns relate to the export of gas, not the pipeline itself"[292] are unsubstantiated and ignore the well-established concerns that arise from the same entity controlling production and transport.

[290] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, paras. 212, 215.
[291] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 215.
[292] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 216.

220. The Claimant also considers that the fact that derogations under Article 49a also exempt from certification would be inconsistent with the European Union's argument that the application of third country certification under Article 11 would be important for security of supply reasons.[293] Nonetheless, the European Union has demonstrated that a security of supply assessment also takes place as part of the derogation decision under Article 49a.[294]

6.2.2. Non-discriminatory conduct of TSOs (Article 7(4) of the Gas Directive)

221. As concerns Article 7(4) of the Gas Directive, the Claimant argues that:

> while it makes perfect sense to apply this provision in the context of national TSOs in order to encourage market integration, this does not make sense for an external offshore gas pipeline, which functions only as an import infrastructure for gas from a third country.[295]

222. The Claimant's argument reflects the Claimant's habit of operating in a monopolistic environment, in which the Claimant differentiates between "import pipelines" to which no rules market rules should apply, and the EU pipelines, for which the EU rules are, allegedly, designed.

223. This preconception does not reflect the design of the EU gas market and does not find any basis in EU gas legislation. In the EU internal market, all gas transmission pipelines operate under regulatory control; all operators of pipelines have to be designated as "Transmission System Operators" with specific rights and legal obligations concerning competition and security of supply – regardless of whether they are in the water, on land or under the soil.

224. Article 7(4) of the Gas Directive provides:

> Where vertically integrated transmission system operators participate in a joint undertaking established for implementing such cooperation, the joint undertaking shall establish and implement a compliance programme which sets out the measures to be taken to ensure that ***discriminatory and anticompetitive conduct*** *is excluded. That compliance programme shall set out the specific obligations of employees to meet the objective of* ***excluding discriminatory and anticompetitive*** *conduct.* [emphasis added]

225. The Claimant may well consider that that this rule "does not make sense"[296] for its pipelines, having regard to its own business interest, but the rationale to

[293] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 217.
[294] *See* European Union's Counter-Memorial, paras. 278-297.
[295] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 227.
[296] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 227.

prevent discriminatory and anticompetitive behaviour applies certainly to dominant companies such as the Claimant's owner.

6.2.3. Role of Regulatory Authorities for NS 2 (Article 39 of the Gas Directive)

226. As concerns Article 39 of the Gas Directive, the Claimant argues that

> Article 39 of the Gas Market Directive simply deals with the establishment of national regulatory authorities and the related independence requirements. This has no relevance for this case.[297]

227. Articles 39 and 41 of the Gas Directive establish that every Member State has the obligation to create an independent energy regulator. It bears recalling that EU pipelines (be it pipelines for import, for export or for EU internal exchanges) are subject to supervision by independent regulators. These regulators have been created for the purpose of supervising the dominant positions of TSOs, as they hold a natural monopoly over the pipelines and may therefore have an incentive to make access to the grid more difficult or charge unfair tariffs.

228. The regulator has to ensure fair access to gas pipelines and general compliance with the EU regulatory framework for gas. Concerning gas pipelines on EU territory such as the 54 km section of the NS 2 pipeline, the regulator must, *inter alia*

- fix the transmission tariffs (to avoid monopoly pricing or foreclosure)[298]
- ensure compliance of the pipeline with EU legislation[299]
- ensure that there are no cross-subsidies between TSO, distribution, LNG and storage activities (to avoid network foreclosure, e.g. by so-called "margin squeeze")[300]
- monitor investment plans of the TSO, as well as the time taken by TSOs to make repairs and connections (to avoid network foreclosure or price manipulation through so-called "strategic underinvestment"[301] or delaying of repairs[302])

[297] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 228.
[298] Article 41(1)(a) of the Gas Directive.
[299] Article 41(1)(b).
[300] Article 41(1)(f).
[301] Article 41(1)(g).
[302] Article 41(1)(m) - *see* in this context the effects on energy prices resulting from the interruption of the NS1 pipeline in Summer 2022, because of alleged problems with the repair of turbines for the compressors of the pipeline, which were found unjustified. *See* European Union's Supplementary Counter-Memorial, para. 296.

- monitor compliance with network security rules (i.e. operating the pipeline safely)[303]
- monitor transparency obligations[304]
- monitor restrictive contractual practices[305]
- monitor the responsibilities of TSOs under the Gas Regulation (e.g. under Article 7(4) and other Articles)[306]
- monitor the implementation of proportionate safeguard measures in case of a crisis.[307]

229. In case NS 2 is certified as an ITO, the regulator would have additional monitoring and enforcement rights under Article 41(5) (e.g. monitoring of communication and financial relations between TSO and the vertically integrated supplier; carrying out inspections; imposing measures to remedy foreclosure and discrimination).[308]

230. It was the very purpose of the AD to clarify that all pipelines on EU territory are covered and considered as "transmission system operators" under the Gas Directive. This was important to ensure that the national regulator can actually enforce the manifold security and competition rules in territorial waters. It would indeed be difficult to explain why only EU pipelines on land should be subject to regulatory control under Article 41, while pipelines of a dominant supplier in the territorial sea of the Member States, involving significant security and competition risks, remain free of the regulatory control under Article 41.

6.2.4. Certification opinion from the Commission (Article 3 of the Gas Regulation)

231. As concerns Article 3 of the Gas Regulation, the Claimant argues that "Article 3 of the Gas Market Regulation deals with the European Commission's role in the certification of national TSOs. This has nothing to do with the facts of this case."[309]

232. The Claimant seems to suggest that NS 2 is not a "national TSO". This is not correct: NS 2 is a gas transmission pipeline on German territory, therefore a "national TSO". No distinction is made under EU law between "national" and

[303] Article 41(1)(h).
[304] Article 41(1)(i).
[305] Article 41(1)(k).
[306] Article 41(1)(r).
[307] Article 41(1)(t).
[308] Article 41(5).
[309] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 229.

"foreign pipelines", just like no distinction is made between pipelines on land, under the soil or in the water.

6.2.5. Cooperation obligations (Article 12 of the Gas Regulation)

233. As concerns Article 12 of the Gas Regulation, the Claimant argues that

> Article 12 of the Gas Market Regulation deals with, for example, creation of regional cooperation within the European Network of Transmission System Operators for Gas (ENTSOG), regional investment plans, promotion of the development of energy exchanges and coordinated allocation of cross-border capacities. This has nothing to do with the facts of this case.[310]

234. Article 12 establishes the obligation to cooperate on regulatory issues within ENTSO-G and fulfil the obligations that EU law imposes on the members of ENTSO-G and ENTSO-G itself to guarantee a level playing field (e.g. transparent information about investments in view of risks of so-called underinvestment of TSOs owned by dominant suppliers, and to ensure security of supply (e.g. participation in "winter preparedness" reports, provision of data to ENSTO-G, etc.).

6.2.6. Transparency obligations (Article 10 CAM Network Code)

235. The Claimant further suggests that imposing the transparency obligations in the EU legal framework on the Claimant's pipeline would not help addressing the security of supply risks that its pipeline poses.[311] The Claimant makes again the confusing argument that these requirements "do not fit with and are not applicable to a single pipeline bringing gas from a single source and by one exporting company" given that the pipeline "only serves as a transporter".[312] As explained, it is precisely the ownership link between the transport facilities and the production that make such pipeline particularly threatening to competition and security of supply. The Claimant also repeats that the EU rules would only apply to the EU territory (and the part of the pipeline "about 50 km upstream of the landing terminal").[313] However, the European Union also explained that the AD ensures that the EU Gas Directive applies to this pipeline, whereas, because of legal uncertainty, previously this pipeline could escape these rules, supplying gas to the EU market outside any EU legal framework.

[310] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 230.
[311] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, paras. 220-221.
[312] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 221.
[313] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 221.

236. It is important to stress that the European Union must be entitled to impose appropriate transparency obligations on operators of significant pipeline infrastructures in the territory of the Member States, because risks to competition and security of supply can emanate from such pipelines also in the territorial waters of the Member States.

6.2.7. Role of the Competent Authority (Article 3 Gas SOS Regulation)

237. The Claimant suggests that

> Article 3 of the Security of Gas Supply Regulation creates obligations for Member States. They must designate a competent authority and cooperate with the European Commission. This has no relevance to the facts of this case.[314]

238. The Claimant's objection misses the point. Article 3 of the Gas SOS Regulation also provides for obligations for gas pipeline operators on EU territory. For example, paragraph 6 provides that "in the event of a regional or Union emergency, the TSOs shall cooperate and exchange information (…)". It is difficult to see why the NS 2 pipeline should be excluded from this information and cooperation obligation. A leak in water is as relevant as a leak on land.

6.2.8. Bi-directional capacity (Article 3 Gas SOS Regulation)

239. The Claimant further argues that

> Article 5(7) of the Security of Gas Supply Regulation (…) makes sense in certain internal EU situations. But it is completely irrelevant for an import pipeline, like Claimant's, which is a 'one-way highway' bringing large volumes of gas to the EU gas markets.[315]

240. The Claimant again misses the point of the obligation on pipeline operators. If a decision is taken by regulators to enable bi-directional capacity, the TSOs on EU territory have to follow this decision. NS 2 is not exempted from a potential decision to enable bi-directional capacities. The Claimant argues that NS 2 is an "import pipeline" to which the rules of Article 5(7) do not apply. However, there is no such concept as an "import pipeline" in EU law. Under EU law, all transmission pipelines on EU territory form a regulated pipeline network, where third party access must be granted, flow directions can change according to demand and available capacities, and where tariffs are set by independent regulators. As recent events have shown, flow directions of pipelines may well change (such as in the case of the "NEL" or OPAL" pipelines post 2022) in reaction

[314] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 232.
[315] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 233.

to changes of demand and supply, and new access requests may be made. The idea of a flexible pipeline network with open access under EU law is not compatible with the Claimant's static and anti-competitive view of a pipeline with a predefined and exclusive use, harming potential other users and forms of use.

6.2.9. Information obligations (Articles 7-10 Gas SOS Regulation)

241. Claimant claims that:

> Articles 7-10 concern procedural aspects of the security of supply related planning by Member States, their competent authorities and the European Commission and their roles and obligations. These procedural obligations for Member States have little to do with external pipelines supplying gas to the EU market. Even the reporting obligations are only remotely connected with these pipelines where the main concern is the level supply of gas from the exporting country.[316]

242. Article 7(6) of the Gas Security of Supply Regulation obliges TSOs to cooperate with national authorities and provide all information necessary for the national risk assessments, which are the basis for the national preventive action and emergency plans (Article 9 and 10 of the Gas Security of Supply Regulation). The Claimant calls this information obligation "only remotely connected"[317] with his pipeline. However, as a major import pipeline, the 54 km stretch of NS 2 on EU territory is an infrastructure that is relevant for security. It is highly relevant for risk assessments, preventive action plans and emergency plans under the Gas Security of Supply Regulation.

6.2.10. Article 10-13 Gas SOS Regulation

243. The Claimant suggests that

> Articles 11-13 of Security of Gas Supply Regulation (…) are all internal EU measures that do not cover external pipelines bringing gas to the EU market.[318]

244. Article 11 to 13 set out the key obligations for TSOs on how to act in case of gas shortages, more serious disruptions or real emergency situations. It is telling that the Claimant suggests that "these are all internal EU measures that do not cover external pipelines bringing gas to the EU market".[319] There are very concrete and important obligations for TSOs on how to comply with orders of the competent authorities in such situations. It concerns, for instance Article 11(5) and (7), but also Articles 12 and 13, which even provide the power to national authorities to

[316] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, paras. 235 and 236.
[317] *Ibid*.
[318] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 237.
[319] *Ibid*.

order TSOs to change or stop gas flows. These rights must extend to the entire 54 km stretch of the pipeline on EU territory.

6.2.11. Importance of tariff setting on (Article 13 Gas Regulation) NS 2

245. As also explained in Section III.A of the Second Brattle Expert Report, the application of regulated, cost-reflective tariffs even on the part of Nord Stream 2 within German jurisdiction (both in German territorial wates and the landing terminal in Lubmin) provides clear benefits even if such tariff regulation does not apply to the remainder of the pipeline.

246. First, as stated by the BMWi in its 2021 SoS assessment, "a significant share of the costs of Nord Stream 2 would have to be allocated to the regulated pipeline section, as the landfall station in Lubmin accounts for a large share of the costs of the entire pipeline".[320] Second, cost-reflective tariffs for a certain percentage of the route enable market participants to estimate the costs for the entire route. The whole exercise of applying cost-reflective tariffs, even for just a portion, would give important transparency to the costs of the entire route, in a manner that would help deter the abuse of competition.

7. THE CLAIMANT CANNOT DISMISS THE RISKS THAT THE NORD STREAM 2 PIPELINE POSES TO SECURITY OF SUPPLY AND COMPETITION IN THE EU INTERNAL MARKET

7.1. Introduction

247. In response to the European Union's detailed evidence on the risks that Nord Stream 2 poses to competition and security of supply,[321] the Claimant asserts that the European Union's argument that the AD pursues the objectives of ensuring competition and security of supply in the EU internal market is "spurious and invented"[322] for the purpose of this dispute.

248. This is a remarkable statement, given that, as the European Union has demonstrated,[323] these objectives figure prominently in the recitals containing the motivation of the AD and formed part of the debate at the time when the AD was adopted. The Claimant itself referred to its pipeline project as one of the concerns

[320] *See* the citation in para. 264 of the Claimant's Supplementary Memorial, referring to: Exhibit CLA-335, Security of Supply Assessment by the German Federal Ministry for Economy and Energy dated 26 October 2021, Section 8 (pp. 50-52 of the English translation).)
[321] *See* sections 4.3.3.2 and 4.3.3.3 of the European Union's Supplementary Counter-Memorial.
[322] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 243.
[323] *See* section 4.3.3.1 of the European Union's Supplementary Counter-Memorial.

in the minds of the co-legislators when the AD was adopted.[324] What is more, the European Union has just explained again[325] how the security of supply fears and concerns that existed in 2019 – linked to events starting with the illegal annexation of Crimea in 2014 – were confirmed by further actual events in 2022.

249. The European Union has further explained that the AD pursues legitimate and achievable objectives.[326]

250. The European Union has also explained that the Nord Stream 2 pipeline project poses risks for security of supply and competition in the EU internal market.[327] This evidence demonstrates that, regardless of whether the Claimant is eligible to apply for an Article 36 exemption or an Article 49a derogation for NS 2, the end result is the same: it would be fully subject to the generally applicable rules of the Gas Directive ensuring security of supply and competition (of course including the other "flexibilities" available under these rules (see section 5.9, above)).

251. The Claimant argues that the security of supply and competition tests are different in Article 36 and Article 49a.[328] According to the Claimant, in Article 36, "the focus is on the investment itself", whereas in Article 49a the "focus is on the derogation and its impact". This is, however, a distinction without a difference: an exemption cannot be granted unless it is shown that the investment would otherwise not take place. Therefore, if the investment enhances security of supply and competition, so does necessarily the granting of the exemption which makes possible that investment. Therefore, the relevant condition in Article 36 could as well have been formulated as requiring that the exemption (rather than the investment) must enhance competition and security of supply with identical effects.

252. The Claimant further argues that Article 36 of the Gas Directive is "the wrong provision".[329] The European Union has explained, however, that Article 36 was the correct provision under which the NS 2 pipeline should have applied for flexibilities, since it was objectively different from completed and already long-time operating pipelines.[330] Contrary to what the Claimant suggests,[331] the Nord Stream 2 pipeline was more comparable to new interconnectors. In any event, as

[324] *See* Claimant's Memorial of 3 July 2020, Section VI.7.
[325] *See* section 6.1.4 of this Submission.
[326] *See* European Counter-Memorial, Section 2.1 and European Union's Supplementary Counter-Memorial, paras. 248-251, 266-280, 303-316 as well as section 6 above.
[327] *See* sections 4.3.3.2.2 and 4.3.3.3.2 of the European Union's Supplementary Counter-Memorial, as well as the First Brattle Expert Report.
[328] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, paras. 246, 257, 289-291.
[329] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 251.
[330] European Union's Supplementary Counter-Memorial, paras. 232-237.
[331] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 257.

just explained again, under both Article 36 or Article 49a, competition and security of supply are assessed.

253. The Claimant again suggests that the European Union's and Brattle's arguments focus too much on developments since February 2022.[332] First of all, this is incorrect, as the arguments cited to information available as of May 2019.[333] Furthermore, as explained, the mentioned recent events demonstrate *a fortiori* the legitimacy of the European Union's measure.[334]

254. The Claimant also argues that it was "not necessary to adopt the AD in order to ensure security of supply and competition",[335] again relying on the artificial and misleading distinction between gas supply and gas pipeline transport. The European Union has explained the errors in the Claimant's argument before (see section 6.2.1 above). The European Union has also explained why Nord Stream 2 is different from completed and already long-time operating pipelines and thus that it was logical and justified not to apply Article 49a to its pipeline, contrary to what the Claimant suggests.[336]

255. The Claimant further suggests that "there are already instruments in EU law to ensure security of supply and competition", namely EU competition law and the Security of Supply Regulation.[337] However, the European Union considers that internal market rules – like the Gas Directive – are necessary, since they define the fundamental rules on the basis of which a market can develop to ensure a well-functioning gas market in Europe. Competition rules (anti-trust) apply *ex-post* to repair a situation where competition is not ensured. Further, the specific security of supply rules in the Security of Supply Regulation (EU) 2017/1938 address how to prepare for and to address a crisis. The application of these rules depends also on being a TSO – i.e. when NS 2 is designated as TSO, it is, as a consequence, also subject to further obligations under the SoS Regulation.

7.2. The Nord Stream 2 pipeline threatens security of supply in the European Union and the Claimant's attempts to suggest the contrary fail

256. In an attempt to respond to the extensive evidence that the European Union has submitted showing undeniably the risks that the NS 2 pipeline poses to security of supply in the European Union, the Claimant relies on the BMWi's preliminary SoS assessment of 26 October 2021.[338] As already explained (in Section 6.1.4

[332] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 252.
[333] *See* Second Brattle Report, Section II.
[334] *See* Second Brattle Report, Section II.
[335] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 258.
[336] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 258.
[337] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 259.
[338] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, paras. 262-273.

above) this preliminary assessment has been withdrawn by BMWi and is therefore irrelevant. The European Union refers to that explanation.

257. The Claimant, however, cites this withdrawn preliminary assessment *in extenso*, in a futile attempt to respond to the First Brattle Report. The Second Brattle Expert Report addresses these arguments by pointing out to the fundamental flaws in the withdrawn BMWi's SoS assessment. The European Union summarises here below a number of core elements in response to the Claimant's allegations.

258. In particular, the Claimant alleges that the withdrawn BMWi's SoS assessment and the December 2019 [redacted] Report considered the role of the Ukraine Gas Transport System ("UGTS").[339] However, both reports assumed that the UGTS would remain available indefinitely after the construction of NS 2. Both reports recognised the importance of the UGTS, but neither report properly considered its possible closure. Failing adequately to investigate a key issue, neither report constituted "proof" of any sort. The First Brattle Report confirmed the risk of closure.[340]

259. In its Second Report, Brattle explains that the withdrawn BMWi's SoS assessment itself pointed out that continuing gas transit through Ukraine is fundamental to its security of supply appraisal.[341] Brattle then demonstrates that there was no analysis by the BMWi that would justify an assumption of continued gas transit through Ukraine. Brattle explains that in May 2019 (the time when the AD was adopted), there was no contract in place for continued Russian transit through Ukraine. There was no basis to assume a new transit agreement, given the tense relations between Naftogaz and Gazprom following Naftogaz's successful arbitrations against Gazprom. Brattle shows that in September 2019 Naftogaz's base case scenario for Russian transit through the UGTS envisaged "zero transport" from 2020 onwards.[342]

260. Brattle indicates that the BMWi only published the withdrawn SoS Assessment more than two years after May 2019. By then, there was an agreement for further transit through Ukraine. Naftogaz and Gazprom had only signed it in late December 2019, and only for five years, from 2020 through 2024. Brattle demonstrates that any extension of this agreement was pure speculation.[343]

[339] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, paras. 270, 273 and Exhibit CLA-335 (Security of supply assessment by the German Federal Ministry for Economy and Energy) and [redacted]
[340] First Brattle Expert Report, Section V.B.
[341] Second Brattle Report, Section II.A.
[342] Second Brattle Report, Section II.A, para. 15.
[343] Second Brattle Report, Section II.A.

Brattle points to the opinion of the Slovakian Regulator.[344] Brattle also refers to an internal document from the German Ministry of Economic Affairs, which stated that "[a]n important part of our position is advocating that gas transit through Ukraine will continue after 2019", though the same document admitted that "there is no reliable information on the amount of transit".[345] More recent events have justified this and other concerns.

261. Brattle further points to the opinions of several Member States and third countries, which held views that were very different from those held by the BMWi in the withdrawn SoS assessment.[346] As the European Union has explained (in Section 6.1.4 above), it is extremely doubtful that, had the preliminary SoS assessment of 26 October 2021 not been withdrawn by the BMWi, it would have remained unchanged, following its notification to the Commission in accordance with Article 11(4) of the Gas Directive.

262. Brattle adds that if the UGTS and NS 2 both remained available, Gazprom's excess transit capacity to the EU would have deterred future LNG investments and further increased Gazprom's dominance. Such a situation would have raised the security of supply risks inherent in relying on one dominant supplier, and one who was likely to become more dominant over time as other pipeline sources declined. Cost-reflective tariffs, unbundling measures and third-party access requirements would have reduced the risks of abuse.[347]

263. The Claimant further argues that the European Union mentions "very generically past gas supply disruption, and otherwise refers to Brattle's expert consideration".[348] This is entirely wrong. The European Union has provided extensive evidence of supply interruptions from Russia that already predate 2019.[349] Moreover, in Section 6.1.4 of the present Supplementary Reply, the European Union again explains on the basis of evidence that this very relevant context predates the adoption of the AD.

264. Like the First Brattle Report, the Second Brattle Report refers to the abundant specific evidence of supply disruptions and other security of supply issues posed by Gazprom and NS 2.[350] Brattle refers in this regard also to a 2006 study by

[344] Second Brattle Report, Section II.A, para. 17.
[345] Second Brattle Report, Section II.A, para. 12, and the exhibits cited in this regard.
[346] Second Brattle Report, Section II.A, para. 10.
[347] Second Brattle Report, Section II.A, para. 18.
[348] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 271.
[349] European Union's Supplementary Counter-Memorial, Section 3.2.1, and paras. 257-260, 283.
[350] Second Brattle Report, Section II.B.

Larsson, which referred to at least 40 politically motivated oil and gas delivery interruptions by Russia between 1991 and 2004.[351]

265. Brattle also refers to the [redacted] eport's own example of an incident in January 2006 when Gazprom decreased deliveries via the UGTS to 40% below contractually agreed volumes, and another incident in January 2009 when Gazprom ceased deliveries via the UGTS entirely, due to a dispute over the terms of new transit and supply contracts with Naftogaz. The 2009 incident occurred during a winter cold snap, prompting emergency responses and causing severe heating shortages.[352] The Second Brattle Report explains that it would be too simplistic to explain this by a "difficult relationship" between the Russian Federation and Ukraine at one point in time, which the Nord Stream 2 pipeline would have helped to avoid. Brattle considers this an example of Gazprom being willing to let political and commercial disputes influence its behaviour in ways that could threaten European security of supply. Brattle shows that Ukraine is not unique and that Gazprom had interrupted supply in response to "difficult relationships" with other countries.[353]

266. Brattle also refutes the BMWi's responses – in its withdrawn security of supply assessment – to the concerns of other countries about Russian political risk and historical supply disruptions. Brattle explains that (i) there was no demonstration in BMWi's withdrawn SoS assessment that the EU gas market was sufficiently resilient to large interruptions; (ii) Gazprom's past behaviour confirmed the existence of a security of supply risk and, contrary to the BMWi's assumptions, there was no reason at all to believe this past behaviour would not be repeated; (iii) that Gazprom posed a risk if had the freedom to control an unregulated NS2AG; and (iv) although the BMWi stated that the risk of dependence on Russian gas supply "is best countered by diversifying import sources", NS 2 did not diversify supplies, since only Gazprom could use it.[354]

267. For all these reasons, it is established, based on evidence, that the Nord Stream 2 pipeline threatens security of supply in the European Union. The Claimant's attempts to suggest the contrary fail.

7.3. <u>The Nord Stream 2 pipeline threatens competition in the internal market of the European Union and the Claimant's attempts to suggest the contrary fail</u>

[351] First Brattle Report, para. 65, citing Exhibit BR-42, Larsson, R. L., "Russia's Energy Policy: Security Dimensions and Russia's Reliability as an Energy Supplier, Stockholm: Swedish Defence Research Agency", dated 2006, p.4.
[352] Second Brattle Report, Section II.B, para. 22.
[353] Second Brattle Report, Section II.B, para. 23.
[354] Second Brattle Report, Section II.B, para. 25.

268. The Claimant further argues that "Respondent's arguments concerning dominance and potential abusive behavior of Gazprom are irrelevant and wrong".[355]

269. The Second Brattle Expert Report addresses these arguments. The European Union summarises, here below, a number of core elements in response to the Claimant's allegations.

270. The Claimant argues that the longer transit distances do not "allow any direct conclusions to be drawn about costs".[356] The argument is that NS 2 could have lower transport costs, despite greater distances. In the Second Brattle Report, Brattle calculates actual tariffs along each route for 2019. Aside from Germany, the NS 2 route only cost less than the UGTS route for transporting gas to the Czech Republic. The First Brattle Report explained that a small fraction of NS 2's gas would go to the Czech Republic. Conversely, NS 2 was more costly for all other countries, by 14% to 47%. Brattle concludes that the results are in line with the conclusions of the First Brattle Report.[357]

271. Brattle also underlines the important role of cost-reflective tariffs in respect of NS 2. Brattle points out that [redacted] stated that "a significant share of the costs of Nord Stream 2 would have to be allocated to the regulated pipeline section, as the landfall station in Lubmin accounts for a large share of the costs of the entire pipeline".[358] Moreover, Brattle stresses that the whole exercise of applying cost-reflective tariffs, even for just a portion of the route, would give important transparency to the costs of the entire route, in a manner that would help deter the abuse of competition.[359]

272. The Claimant also takes issue with the market definition that Brattle applied.[360] Brattle explains its use of the well-established SSNIP test and points out that the Claimant does not engage with this test.[361] Brattle then explains in detail why it has included certain countries in the geographical market and why others were considered separate markets. The European Union refers to this analysis in the Second Brattle Report.[362]

[355] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, paras. 301-342.
[356] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 328.
[357] Second Brattle Report, Section III.A, para. 30.
[358] Second Brattle Report, Section III.A, para. 31.
[359] Second Brattle Report, Section III.A, para. 32.
[360] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 302.
[361] Second Brattle Report, Section III.B, para. 36.
[362] Second Brattle Report, Section III.B.

273. Brattle further explains that, contrary to what the Claimant suggests, it is well-established that there are separate markets for wholesale gas supply, long-distance transmission, and storage.[363]

274. The Claimant disputes that Gazprom was a "major player" in the storage market.[364] Brattle disagrees, pointing out that Gazprom held 13% of EU storage and 22% of German storage.[365] Brattle also demonstrates that the regulations that existed at the time did not prevent Gazprom abusing its position. Gazprom left its storage facilities empty, and restricted supplies that other companies relied upon to fill their storage facilities.[366] Brattle notes that subsequent events provide confirmation. Gazprom almost emptied its EU facilities by late 2021, exacerbating the effects of supply curtailments.[367]

275. Brattle has explained that NS 2 lacked an independent business justification. Rather, it could serve an anti-competitive purpose: If the UGTS remained open, NS 2 would constitute a pre-emptive capacity expansion that could deter Gazprom's rivals.

276. The Claimant suggests that the "likely" rationale for NS 2 was that "Gazprom was pursuing a diversification strategy".[368] Brattle does not agree with the word "diversification", as it simply indicates the ability to bypass the UGTS. Brattle explains that the prospective closure of the UGTS would reduce diversity.[369]

277. The Claimant also argues that LNG served as a "competitive constraint" on NS 2 and Gazprom.[370] In its Second Brattle Report, Brattle demonstrates that this is incorrect on the basis of several arguments, in particular showing that short-term LNG imports are not informative and that NS 2 risked deterring investments in new LNG infrastructure, with long-run implications, particularly given that new LNG plants rely predominantly on long-term LNG import contracts. Brattle points out that Gazprom explained itself that "US LNG was mainly supplied to European markets with constrained access to pipeline gas" and shows that this concerned indeed mainly mediterranean countries with limited ability to import Russian pipeline gas. Brattle also demonstrates that the replacement of Russian pipeline

[363] Second Brattle Report, Section III.B, para. 40.
[364] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 308.
[365] Second Brattle Report, Section III.B, para. 41.
[366] Second Brattle Report, Section III.B, para. 41.
[367] Second Brattle Report, Section III.B, para. 41.
[368] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 328.
[369] Second Brattle Report, Section III.C, para. 47.
[370] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, paras. 316-317.

gas did not happen quickly. Europe only managed to attract incremental LNG *after* prices rose, and at considerable expense.[371]

278. Brattle also explains that [redacted] and NSP2AG mistakenly associate entry deterrence with "predatory pricing", which arises if a supplier charges prices below short-run operating costs.[372] Brattle explains that nothing in the First Brattle Report presumed predatory pricing. The concern involved episodes of setting prices that recovered only short-run operating costs, not prices that fell below.[373] NS 2 would create a risk of cost recovery for US LNG producers. Gazprom can benefit by introducing that risk, without threatening the recovery of its investment costs.[374]

279. The Claimant considers that the Gas Transportation Agreement would prevent reduced transport tariffs to short-run operating costs.[375] Brattle explains that that statement confuses loan repayment with gas pricing. Gazprom could deter entry while paying off all the NSP2AG loans.[376]

280. The Claimant also disagrees with the usefulness of the obligation to have cost-reflective tariffs, arguing it would conflict with the Gas Transportation agreement and its own business model as intended.[377]

281. Brattle explains that it is a mistake to suggest that cost-reflective tariffs prevent financing. By definition, cost-reflective tariffs allow infrastructure owners to earn a reasonable return on investment, which includes a sufficient return to attract financing. Moreover, Brattle also sees a tension between the Claimant's arguments that regulation would not change anything, while simultaneously arguing that cost-reflective tariffs would derail NS 2. Brattle does not see any business justification for the desire to bypass EU regulations. Brattle also does not see any reason why it would have been problematic for 20% of capacity to be kept for short/medium term bookings, given that only Gazprom Export could use the pipeline.[378] Brattle concludes that cost-reflective tariffs cannot stop abuse, but they offer important transparency to help detect and deter abuse. If Gazprom Export chose to sell gas at low prices in Germany, then cost-reflective tariffs on NS 2 would clarify the lack of cost recovery and allow competition authorities to intervene. Brattle points out that, in general, rules on cost-reflective tariffs,

[371] Second Brattle Report, Section III.B, para. 48.
[372] Second Brattle Report, Section III.C, para. 51, referring to Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 324.
[373] Second Brattle Report, Section III.C, para. 51.
[374] Second Brattle Report, Section III.C, para. 53.
[375] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 319-321.
[376] Second Brattle Report, Section III.C, para. 54.
[377] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 319-321.
[378] Second Brattle Report, Section III.C, para. 57.

unbundling and transparency have succeeded in permitting the development of competitive natural gas markets in the EU and North America.[379]

282. For all these reasons, it is established, based on evidence, that the Nord Stream 2 pipeline threatens competition in the internal market of the European Union. The Claimant's attempts to suggest the contrary fail.

8. IN ANY EVENT, THE AMENDING DIRECTIVE IS JUSTIFIED UNDER THE GENERAL EXCEPTION IN ARTICLE 24.3 OF THE ECT

283. In its Supplementary Memorial the European Union submitted, in the alternative, that, were the Tribunal to find that the Amending Directive breaches Articles 10.1 or 10.7 of the ECT, *quod non*, the Amending Directive is justified under the general exceptions for "public order" and/or for "essential security" measures in Article 24.3 of the ECT.

284. The Claimant alleges that "the wording of Article 24.3 makes clear that "it is not applicable to the facts before the Tribunal".[380] More specifically, the Claimant contends that: i) the concerns relating to security of supply and competition raised by the European Union were not "at hand"[381] when the Amending Directive was adopted; ii) security of supply and competition are not part of the EU's "public order"[382] and the European Union "has failed to explain why the AD was necessary to maintain public order";[383] and iii) there was no "essential security interest […] to worry about when the AD was adopted"[384] and, moreover, "the decision to adopt the AD was certainly not taken in time of war, armed conflict, or other emergency in international relations".[385]

285. Before addressing the Claimant's objections, the European Union will set out the proper legal standard for the application of the relevant provisions of Article 24.3 of the ECT.

8.1. Legal standard

286. Article 24.3 of the ECT reads as follows in relevant part:

> (3) The provisions of this Treaty other than those referred to in paragraph (1) shall not be construed to prevent any Contracting Party from taking any measure which it considers necessary:

[379] Second Brattle Report, Section III.C, para. 59.
[380] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, section XIV.2.
[381] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 394.
[382] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, pars. 398-402.
[383] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 403.
[384] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 405.
[385] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 405.

> (a) for the protection of its essential security interests including those
>
> (i) relating to the supply of Energy Materials and Products to a military establishment; or
>
> (ii) taken in time of war, armed conflict or other emergency in international relations;
>
> (b) relating to the implementation of national policies respecting the non-proliferation of nuclear weapons or other nuclear explosive devices or needed to fulfil its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuclear Suppliers Guidelines, and other international nuclear non-proliferation obligations or understandings; or
>
> (c) for the maintenance of public order.
>
> Such measure shall not constitute a disguised restriction on Transit.[386]

287. Article 24.3 of the ECT is part of Article 24 (which is entitled "Exceptions") and is in the nature of an exception to all the provisions of the ECT, other than those mentioned in Article 24.1. Therefore, Article 24.3 provides an exception to *inter alia* Article 10.1 and 10.7 of the ECT.

288. The Claimant alleges that Article 24.3 of the ECT must be given a "narrow" interpretation, so as "not to undermine the objective to provide a high level of protection in conformity with Article 2 of the ECT".[387] The European Union disagrees. Article 24.3 of the ECT must be interpreted in accordance with the general rules of interpretation in Articles 31 and 32 of the Vienna Convention on the Law of the Treaties ("**VCLT**"), just like any other provision of the ECT. Moreover, the Claimant fails to take into account all the relevant objects and purposes of the ECT.

289. The ECT contains a specific provision, Article 2, entitled "Purpose of the Treaty". It reads as follows:

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

290. Under Article 1.1 of the ECT, the "Charter" means "the European Energy Charter adopted in the Concluding Document of the Hague Conference on the European Energy Charter signed at The Hague on 17 December 1991" (the "**Charter**").

[386] Article 24.3, Energy Charter Treaty.
[387] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 390.

291. The relevant "objectives and principles" of the Charter include not only the promotion and protection of investments, but also the promotion of balanced economic development in a sustainable manner.

292. Thus, the first paragraph of Title I of the Charter describes its overall objective as follows:

> The signatories are desirous of improving security of energy supply and of maximising the efficiency of production, conversion, transport, distribution and use of energy, to enhance safety and to minimise environmental problems, on an acceptable economic basis.[388]

293. The Preamble to the Charter includes the following objective:

> Willing to do more to attain the objectives of security of supply and efficient management and use of resources, and to utilise fully the potential for environmental improvement, in moving towards sustainable development.[389]

294. Moreover, the Charter states that its objectives must be pursued "within the framework of State sovereignty and sovereign rights over energy resources".[390] As clarified by the signatories of the ECT in the subsequent International Energy Charter adopted in 2015, State sovereign rights include the right to regulate for legitimate policy purposes.[391]

295. Article 24.3 of the ECT consists of two elements: 1) a *chapeau*, which authorizes any Contracting Party to take "any measure which it considers necessary", notwithstanding other provisions of the ECT; and 2) three subparagraphs, describing the specific purposes for which those measures may be taken. In this dispute, the European Union relies on sub-paragraphs a) ii) (measures "for the protection of its essential security interests, including […] those taken in time of war, conflict or an emergency in international relations"); and c) (measures "for the maintenance of public order").

296. Here below, the European Union sets out the interpretation of the terms of the *chapeau* and of the relevant sub-paragraphs of Article 24.3 of the ECT, in accordance with the rules of interpretation of the VCLT.

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[388] European Energy Charter, Title I, para. 1
[389] European Energy Charter, Preamble, recital 12.
[390] European Energy Charter, Preamble, recital 14; Title II, para. 2.
[391] Exhibit RLA-377, The Concluding Document of the Ministerial Conference on the International Energy Charter, as adopted in The Hague on 20 May 2015 (the International Energy Charter"). *See* the ninth recital of the preamble, the second paragraph of Title I ("Objectives") and the first paragraph of Title II ("Implementation"), all of which refer to "the sovereignty of each State over its energy resources, and its rights to regulate energy transmission and transportation within its territory respecting all its relevant international obligations".

297. At the outset, it must be recalled that Article 24.3 has not been ruled upon by an arbitral tribunal sitting under the ECT. Nevertheless, similarly worded exceptions have been interpreted and applied by arbitral tribunals under other investment agreements, as well as, with increasing frequency, by WTO panels and the WTO Appellate Body. Of particular significance is the jurisprudence relating to Article XXI of the GATT, which has been considered directly relevant by previous arbitral tribunals sitting under investment agreements.[392]

8.1.1. "Any measure which it considers necessary"

298. The *chapeau* of Article 24.3 authorizes any Contracting Party to take "any measure which it considers necessary" for the purposes set out in the subparagraphs of Article 24.3.

299. The ordinary meanings of "to consider" include "to believe to be", "to think of as", and to "come to judge or classify".[393] Thus, the measures referred to in the *chapeau* of Article 24.3 are measures that the invoking party "believes to be", "thinks of as", "judges" or "classifies" as "necessary" in order to achieve the objectives described in the subparagraphs of Article 24.3. It is, therefore, a subjective standard. Hence the invoking Contracting Party is not required to show that the measure is objectively "necessary".

300. Previous arbitration tribunals have confirmed that analogous wording included in the security exceptions in other investment agreements was self-judging.[394] Similarly, WTO Panels have held that similar terms in the *chapeau* of Article XXI of the GATT are self-judging.[395]

[392] Exhibit RLA-379, *Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Award, 27 June 2024, paras. 684-685 ("684. It is apparent why Article XXI of the GATT is frequently used as a comparator for the essential security exception provisions in the investor-State context, including by the Parties. The wording "*taking any action which it considers necessary for the protection of its essential security interests*" is, indeed, semantically almost identical to the relevant part of Article 22.2(b) of the TPA. 685. Moreover, unlike Article 25 of the ILC Articles, Article XXI of the GATT operates in the same manner, *i.e.*, without establishing the 'wrongful' nature of the underlying State measure but rather treating such measures as *not incompatible* with the State's international obligations in the first place").

[393] Exhibit R-383, Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/consider. *See* also Merriam- Webster Dictionary, https://www.merriam-webster.com/dictionary/consider.

[394] Exhibit RLA-379, *Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Award, 27 June 2024, para. 638 ("The Tribunal concurs with this line of thinking. The power of a State to unilaterally determine the scope of a carveout to the otherwise binding obligations under international law, given its scope and potential for abuse, must be reserved in explicit terms. And in the present case, it is: Article 22.2(b) of the TPA explicitly states that "it", i.e., the Contracting State applying the measures, "considers" necessary, leaving no doubt that this provision is self-judging.").

[395] Exhibit RLA–392, Panel report, *US – Origin Marking (Hong Kong, China)* paras. 7.29-7.31.; Exhibit RLA-380, Panel report, *Russia Traffic in Transit*, para. 7.146: "[I]t is for Russia to determine the "necessity" of the measures for the protection of its essential security interests. This conclusion follows by logical necessity if the adjectival clause "which it considers" is to be given legal effect".

301. The same view has been consistently expressed by the legal doctrine.[396]

8.1.2. "Essential security interests"

302. Subparagraph a) of Article 24.3 of the ECT alludes to the protection of a Contracting Party's "essential security interests".

303. The terms "essential security interests" also appear in Article XXI of the GATT and Article XIV *bis* of the GATS, as well as in the security exceptions included in many bilateral investment treaties.

304. The WTO Panel in *Russia – Traffic in Transit* described the term "essential security interests" as follows:

> Essential security interests', which is evidently a narrower concept than 'security interests', may generally be understood to refer to those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally.[397]

305. The arbitral tribunal in *Seda v Colombia*, established pursuant to the Trade Promotion Agreement between United States and Colombia,[398] found that "a State's essential security interests are no longer understood to be limited to the sphere of military threats and territorial integrity" and may include as well

> […] "political or economic survival, the maintenance of conditions in which its essential services can function, the keeping of its internal peace, the survival of part of its population", protection of the environment, and economic security and stability. What is clear is that a State's essential security interests are no longer understood to be limited to the sphere of military threats and territorial integrity. [...][399]

306. The WTO Panel in *Russia – Traffic in Transit* confirmed that it is for each WTO Member to define its essential security interests:

> The specific interests that are considered directly relevant to the protection of a state from such external or internal threats will

[396] Exhibit RLA-390, Andrew D. Mitchell, "Sanctions and the World Trade Organization", in Larissa van den Herik (ed), Research Handbook on UN Sanctions and International Law (Edward Elgar, 2017) 293; Exhibit RLA-381, Bhala, "National Security and International Trade Law: What the GATT Says, and What the United States Does" 19(2) University of Pennsylvania Journal of International Economic Law (1998), 273, at 268; Exhibit RLA-391, Schill & Briese, ""If the State Consider": Self-Judging Clauses in International Dispute Settlement" 13 Max Planck UNYB (2009), 110, at 61.
[397] Exhibit RLA-380, Panel report, *Russia – Traffic in Transit*, para. 7.130.
[398] Exhibit RLA-383, Article 22, Exceptions, US-Colombia Trade Promotion Agreement. Article 22.2 of the United States-Colombia TPA reads: Essential Security, Nothing in this Agreement shall be construed: (a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or (b) to preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.
[399] Exhibit RLA- 379, *Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Award, 27 June 2024, para. 643, footnotes omitted.

> depend on the particular situation and perceptions of the state in question, and can be expected to vary with changing circumstances. For these reasons, it is left, in general, to every Member to define what it considers to be its essential security interests.[400]

307. The discretion accorded to each WTO Member is limited only by the obligation to interpret and apply the security exception in good faith:

> However, this does not mean that a Member is free to elevate any concern to that of an 'essential security interest'. Rather, the discretion of a Member to designate particular concerns as 'essential security interests' is limited by its obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith. The Panel recalls that the obligation of good faith is a general principle of law and a principle of general international law which underlies all treaties, as codified in Article 31(1) ('[a] treaty shall be interpreted in good faith …') and Article 26 ('[e]very treaty … must be performed [by the parties] in good faith') of the Vienna Convention.

308. The Panel in *Russia – Traffic in Transit* clarified that the obligation of good faith applies both to the definition of "essential security interests" and their connection with the challenged measures:

> The obligation of good faith, referred to in paragraphs 7.132 and 7.133 above, applies not only to the Member's definition of the essential security interests said to arise from the particular emergency in international relations, but also, and most importantly, to their connection with the measures at issue. Thus, as concerns the application of Article XXI(b)(iii), this obligation is crystallized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests.[401]

309. Similarly, the arbitral tribunal in *Seda v Colombia* held that:

> in any case, it is the State itself which can best identify the scope of its own essential security interests.[402]

310. The same arbitral tribunal quoted extensively the Panel report in *Russia – Traffic in Transit* and agreed with that Panel that the invoking party enjoys wide discretion to identify its essential security interests, subject only to the requirements of the obligation of good faith, including the existence of a 'non-implausibility' nexus.[403]

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[400] Exhibit RLA-380, Panel report, *Russia – Traffic in Transit*, para. 7.131.
[401] Exhibit RLA-380, Panel report, *Russia – Traffic in Transit*, para. 7.138. *See* also Exhibit RLA-382, Panel report, *Saudi Arabia – IPRs*, para. 7.70.
[402] Exhibit RLA-379, *Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Award, 27 June 2024, para. 643.
[403] Exhibit RLA-379, *Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Award, 27 June 2024, paras. 652-655.

8.1.3. "Taken in time of war, armed conflict or other emergency in international relations"

311. Subparagraph b) of Article 24.3 of the ECT specifies that measures taken for the protection of a Contracting Party's essential security interests "[include] those … (i) relating to the supply of Energy Materials to a military establishment; or (ii) taken in time of war, armed conflict or other emergency in international relations".

312. The term "including" confirms that the circumstances described under items i) and ii) of Article 24.3 b) do not purport to be exhaustive and that a Contracting Party may, therefore, consider it necessary to protect "essential security interests" arising from other situations.

313. The European Union will show that the measures at issue were "taken in time of war, armed conflict or other emergency in international relations", within the meaning of Article 24.3 b) of the ECT.

314. Nevertheless, whether or not the measure at issue was taken "taken in time of war, armed conflict or other emergency in international relations" is not dispositive because, as just explained, the enumeration of "essential security interests" under Article 24.3 b) is not exhaustive. Security of energy supply may, in and of itself, be legitimately considered as an "essential security interest", regardless of whether there is a "situation of war, armed conflict or other emergency in international relations."

315. Similarly to Article 24.3 b) ii), Article XXI of the GATT alludes to action "taken in time of war or other emergency in international relations". The Panel in *Russia – Traffic in Transit* found that the phrase "taken in time of" connotes a chronological concurrence, and represents an objective fact:

> The phrase 'taken in time of' in subparagraph (iii) describes the connection between the action and the events of war or other emergency in international relations in that subparagraph.
>
> The Panel understands this phrase to require that the action be taken during the war or other emergency in international relations. This chronological concurrence is also an objective fact, amenable to objective determination.[404]

316. In *Russia – Traffic in Transit*, the Panel held that:

> emergency in international relations within the meaning of subparagraph (iii) of Article XXI (b) [is] a situation of armed conflict, or latent armed conflict, or heightened tension or crisis, or general instability engulfing or surrounding a state.

[404] Exhibit RLA-380, Panel report, *Russia – Traffic in Transit*, para. 7.138. *See* also Exhibit RLA-382, Panel report, *Saudi Arabia – IPRs* para. 7.70.

317. The WTO Panel in *US – Origin Marking (Hong Kong, China)* noted that the open reference to "international relations", rather than a more narrow formulation, suggests that the relevant relations are not limited to the bilateral relations between the invoking party and the party which is at the origin of the emergency.[405] Similarly, a war or armed conflict between two or more countries can be invoked by other States, which are not at war or directly participate in the armed conflict.

318. In particular, security exceptions may also be invoked by countries that are military allies of one of the parties at war. It may also be invoked by neighbouring countries or those close to the parties of war, and countries that have delegated their power to design and implement trade policy to a regional organization (such as the European Union), which includes countries neighbouring or close to the parties of war.[406]

319. Even for countries far from the conflict zones, this exception may apply as well in case of an invasion by one State into another, which constitutes aggression in violation of Article 2(4) of the United Nations Charter. Since the prohibition of aggression is an obligation *erga omnes*, the breach of that obligation poses a threat to the international order and thus may affect the "essential security interests" of all States.

320. In *Russia-Traffic in Transit*, the Panel concluded, at Russia's request, that there was a situation of "emergency in international relations" based on the following considerations:

> There is evidence before the Panel that, at least as of March 2014, and continuing at least until the end of 2016, relations between Ukraine and Russia had deteriorated to such a degree that they were a matter of concern to the international community. By December 2016, the situation between Ukraine and Russia was recognized by the UN General Assembly as involving armed conflict. Further evidence of the gravity of the situation is the fact that, since 2014, a number of countries have imposed sanctions against Russia in connection with this situation.[407]

[405] Exhibit RLA-392, Panel report, *US – Origin Marking (Hong Kong, China)* para. 7.280 ("… This definition suggests that the relations relevant for this inquiry are those between states and other participants in international relations, including Members of the WTO, and may involve diverse matters, such as political, economic, social, or cultural exchanges. Furthermore, we note the open reference to "international relations" rather than a narrower formulation that might have sought to limit it to some specific types of international relations, for example the exclusively bilateral relations between the invoking Member and the Member affected by the action".)

[406] Exhibit RLA-384, Kawashima, "Trade Sanctions against Russia and their WTO Consistency: Focusing on Justification under National Security Exceptions", International Community Law Review 26 (2024) 121–150, 19 December 2023, p.140-141.

[407] Exhibit RLA-380, Panel report, *Russia – Traffic in Transit*, para. 7.138. *See* also Exhibit RLA-382 Panel report, *Saudi Arabia – IPRs* para. 7.122.

> Consequently, the Panel is satisfied that the situation between Ukraine and Russia since 2014 constitutes an emergency in international relations, within the meaning of subparagraph (iii) of Article XXI(b) of the GATT 1994.[408]

321. The Panel went on to find that all of the measures in dispute

> were therefore introduced during the emergency in international relations and thus were "taken in time of" an emergency in international relations, within the meaning of subparagraph (iii) of Article XXI(b) of the GATT 1994.[409]

8.1.4. "Maintenance of public order"

322. Pursuant to subparagraph c) of Article 24.3, any Contracting Party may take any action which it considers necessary "for the maintenance of public order".

323. The notion of "public order" appears in Article XIV a) of the GATS and has been interpreted in several cases by WTO Panels and the Appellate Body.

324. The WTO panel in *US – Gambling* held that:

> public order refers to the preservation of the fundamental interests of a society, as reflected in public policy and law, [...] [whereby] these fundamental interests can relate, *inter alia*, to standards of law, security and morality.[410]

325. The panel in *US – Gambling* further noted that the content of the concept of public order "can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values".[411] For this reason:

> Members should be given some scope to define and apply for themselves the concepts of "public morals" and "public order" in their respective territories, according to their own systems and scales of values.[412]

326. In *EC – Energy Package* case, the European Union argued, in the alternative, that certain provisions of the Gas Directive, including the unbundling requirements in Article 9 and the third country certification regime in Article 11, were justified by the public order exception in Article XIV(a) GATS. In support of those defences, the European Union argued that ensuring competition and security of supply were "fundamental interests of the EU society" and, therefore, matters of "public order" for the European Union. The Panel found that the unbundling measure was fully compatible with the GATS and, therefore, the Panel did not have to examine

[408] Exhibit RLA-380, Panel report *Russia – Traffic in Transit*, para. 7.138. *See* also Exhibit RLA-382, Panel report, *Saudi Arabia – IPRs* para. 7.123.
[409] Exhibit RLA-380, Panel report, *Russia – Traffic in Transit*, para. 7.138.
[410] Exhibit RLA-385, Panel report, *US – Gambling*, paras. 6.467-6.468.
[411] Exhibit RLA-385, Panel report, *US – Gambling*, para. 6.461.
[412] *Ibid*.

whether competition was a matter of public order. On the other hand, the Panel agreed with the European Union that ensuring security of gas supply was a "fundamental interest of society" within the scope of the "public order" exception.[413]

8.2. Application of the legal standard

8.2.1. Public order exception (Article 24.3 c)

327. The European Union considers that the Amending Directive is a necessary measure for the maintenance of both competition and security of energy supply, which are both matters of "public order" within the meaning of Article 24.3 c) of the ECT.

328. At the time of adopting the Amending Directive, the EU co-legislators stressed that the objective of that measure was to avoid distortions of competition and negative impacts on security of energy supply in the European Union. As explained in detail in the EU's Supplementary Counter-Memorial,[414] the recitals (3) and (15) of the Amending Directive state specifically that the Amending Directive is aimed at ensuring that the rules applicable to gas transmission lines connecting two or more Member States are also applicable, within the European Union, to all gas transmission lines to and from third countries. This establishes consistency of the legal framework within the European Union, while avoiding distortion of competition and negative impacts on the security of supply.

329. The European Union has explained and demonstrated in its Supplementary Counter-Memorial that, in the European Union, both competition[415] and security of energy supply[416] are "fundamental interests of society" and, therefore, matters of "public order" within the meaning of Article 24.3 c) of the ECT.

330. As just recalled, the WTO Panel in *EU – Energy Package* confirmed that security of energy supply is a fundamental interest of society,[417] which may, therefore, be legitimately considered as a matter of public order by the European Union.

331. The Claimant contends that the interpretation of the notion of public order made by the panel in *EC- Energy Package* cannot be transposed to the ECT.[418] But the

[413] Exhibit RLA-386, Panel report, *EU — Energy Package*, para. 7.1156. *See* for an extensive discussion of the case and background information with regard to energy security: Marhold (2021).
[414] *See* European Union's Supplementary Counter-Memorial, Section 4.3.3.1.
[415] European Union's Supplementary Counter-Memorial, paras. 300-316.
[416] European Union's Supplementary Counter-Memorial, paras. 252-280.
[417] Exhibit RLA-386, Panel report, *EU — Energy Package*, para. 7.1156.
[418] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 399.

Claimant fails to explain why, or to advance any alternative interpretation of that notion. If anything, ensuring security of energy supply must be accorded even greater importance within the ECT in view of the specific objectives pursued by that agreement.

332. The Claimant further argues that the findings in *EC – Energy Package* concerned specifically Article 11 of the Gas Directive.[419] However, the Panel's determination that security of supply is a matter of public order was made without reference to that Article 11 of the Gas Directive or to any other specific provision of the Gas Directive. The Claimant does not explain why the notion of public order should have a different and more limited scope when examined in connection with other certification requirements under the Gas Directive.

333. The Claimant complains that the EU "has failed to explain why the AD was necessary to maintain public order".[420] This is not true. The European Union has provided that explanation in previous submissions,[421] which the Claimant has chosen not to address.

334. To repeat, the Amending Directive contributes to maintaining competition and security of energy supply within the European Union by ensuring that third country pipelines, such as Nord Stream 2, are subject to the generally applicable rules of the Gas Directive on competition and security of supply. In particular, by virtue of the Amending Directive, it must be certified in advance that the operators of third country lines comply with the unbundling requirements and that control of those pipelines by third countries or third country persons does not put at risk the EU's security of energy supply. In addition, by virtue of the Amending Directive, third country lines are subject to generally applicable rules on security of supply, third-party access and cost-reflective tariff regulation. For those reasons, the European Union considers that the Amending Directive is necessary for the maintenance of public order in the European Union.

335. In any event, it is recalled that, in accordance with the *chapeau* of Article 24.3 of the ECT, the European Union is entitled to take any measure "which it considers necessary" for the maintenance public order. There is no requirement to prove that the measure is objectively "necessary". All that is required is that the European Union exercises its discretion in good faith and that the connection between the measures and the public order objective is not implausible.

[419] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 401.
[420] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 403.
[421] European Union's Supplementary Counter-Memorial, paras. 252-280 and 300-316.

336. The Claimant alleges that concerns relating to security of supply and competition were not "at hand"[422] when the Amending Directive was adopted. However, as recalled above, those concerns were expressly mentioned in the recitals of the Amending Directive and inform all the provisions of the Amending Directive, including those provisions which, according to the Claimant, allegedly discriminate against the Claimant. The Claimant cannot have it both ways: if the Tribunal finds that, as alleged by the Claimant, the provisions of the Amending Directive were designed to discriminate against the Claimant, *quod non*, then it would follow that the EU co-legislators "considered" that such discrimination was "necessary" in order to achieve the overarching public order objectives stated by the EU co-legislators in the Amending Directive itself.

337. Moreover, as explained by the European Union, when the Amending Directive was adopted, there were clear indications that the NS 2 pipeline could pose a threat to competition[423] and security of supply.[424] Subsequent developments have confirmed that threat.[425] Thus, on the assumption that the Amending Directive was discriminatory (*quod non*), the EU legislators could have legitimately "considered" that, as of the date of adoption of the Amending Directive, such discrimination was "necessary" for the maintenance of public order.

338. The Claimant "wonders how public order could be maintained by applying the AD only to the Claimant".[426] However, this misstates the scope and effects of the Amending Directive, which does not apply only to the Claimant. The Amending Directive provides a generally applicable legal framework for addressing, on the basis of objective criteria and on a case-by-case basis, the competition and security of supply concerns that *any* pipeline, including third country pipelines, may pose. That the outcome of this case-by-case assessment may differ from one pipeline to another does not undermine the public order justification of the Amending Directive. Rather, this is the logical outcome of applying the same objective and generally applicable criteria for assessing different pipelines, each having its own particular characteristics.

[422] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 394.
[423] *See* European Union's Supplementary Counter-Memorial, paras. 318-323 (with references to First Brattle Report, Sections IV.A and B).
[424] *See* European Union's Supplementary Counter-Memorial, paras. 283-291 (with references to First Brattle Report, Section V). *See* also European Union' Rejoinder, paras. 222 and 223.
[425] European Union's Supplementary Counter-Memorial, paras. 292-299 and 322 and Brattle Report, Section VI.
[426] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 397.

8.2.2. Security exception (Article 24.3 a)ii)

339. As explained above,[427] a Contracting Party invoking the security exception in Article 24.3.a)ii) of the ECT has the right to adopt any measure "which it considers necessary" for the protection of its "essential security interests", subject only to the requirements of the obligation of good faith, including a "nexus" between the measures and the invoked essential security interests which "is not implausible".

340. For the reasons set out below, the European Union considers that the Amending Directive is necessary for the protection of its essential security interests within the meaning of Article 24.3.a)ii) of the ECT.

8.2.2.1. The Amending Directive was taken in time of "war, armed conflict, or other emergency in international relations".

341. The Claimant alleges that "the decision to adopt the AD was certainly not taken 'in time of war, armed conflict or other emergency in international relations'".[428]

342. The Claimant's objection is manifestly disingenuous. The Claimant cannot possibly ignore that the current war between Russian and Ukraine began before 2019, when the Amending Directive was adopted.

343. In early 2014, the Euromaidan protests led to the Revolution of Dignity and the ousting of Ukraine's pro-Russian president Viktor Yanukovych. The protests erupted in response to President Yanukovych's sudden decision not to sign the EU–Ukraine Association Agreement, instead choosing closer ties to Russia and the Eurasian Economic Union.[429] Shortly after, pro-Russian unrest erupted in eastern and southern Ukraine, while unmarked Russian troops occupied Crimea.[430] Russia

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[427] *See* section 8.1.
[428] Claimant's Supplementary Rejoinder on Jurisdiction and Merits of 2 September 2024, para. 405.
[429] Exhibit R-413, Le Monde, « Des premières manifestations à aujourd'hui, comment l'Ukraine en est arrivée là », 21 February 2024, chapter 1, para. 1, available at Des premières manifestations à aujourd'hui, comment l'Ukraine en est arrivée là (lemonde.fr) : « Le mouvement Euromaïdan (de Maïdan, ou « place de l'Indépendance », à Kiev) est né après l'abandon, le 21 novembre par Viktor Ianoukovitch, d'un accord d'association avec l'Union européenne, une semaine avant sa signature prévue. Le président ukrainien préfère renoncer à cet accord, préparé depuis des années, au profit d'une coopération économique renforcée avec la Russie. » ;
Exhibit R-414, The Economist, "A short history of Russia and Ukraine", 29 January 2024, para. 16, available at A short history of Russia and Ukraine (economist.com): "Thousands protested against a rigged presidential election that gave victory to a pro-Russian candidate. Ukraine's democratic resolve was even more visible during the "Maidan revolution" in 2013-14. This was a reaction to the refusal by Viktor Yanukovych, Ukraine's president, who was chummy with Russia, to sign an association agreement (an extensive free-trade deal) with the European Union. Thousands of Ukrainians took to the streets; Mr Yanukovych fled to Russia." ;
Exhibit R-416, The Economist, "Russia's invasion of Ukraine", 26 February 2022, para. 13, available at Russia's invasion of Ukraine (economist.com): "In November 2013 Ukraine's parliament had been preparing to sign an "association agreement" with the EU which would have moved the country a lot closer to the union. At Mr Putin's bidding, and with financial inducements, then-president Viktor Yanukovych, a crooked thug from Donbas, scuppered the deal. People protesting his actions were bludgeoned by the security forces in Kyiv's Independence Square, known as Maidan."
[430] Exhibit R-414, The Economist, "A short history of Russia and Ukraine", 29 January 2024, para. 17, available at A short history of Russia and Ukraine (economist.com): "His response to the Maidan marked

soon annexed Crimea after a highly disputed referendum.[431] In April 2014, Russian-backed militants seized towns in Ukraine's eastern Donbas region and proclaimed the Donetsk People's Republic (DPR) and the Luhansk People's Republic (LPR) as independent states, starting the Donbas war.[432] Russia covertly supported the separatists with its own troops, tanks and artillery, [433] and Ukraine failed to fully retake the territory. In February 2015, Russia and Ukraine signed the Minsk II agreements to end the conflict,[434] but they were never fully implemented in the years that followed.[435] The Donbas war settled into a violent but static conflict between Ukraine and the Russian and separatist forces, with

Russia's first military incursions into independent Ukraine. In 2014 the Kremlin illegally annexed Crimea and sent troops into the Donbas, a predominantly Russian-speaking region in eastern Ukraine.";
Exhibit R-417, Financial Times, "Ukraine accuses Russia of 'direct and unconcealed aggression", 1 September 2014, para. 18, available at Ukraine accuses Russia of 'direct and unconcealed aggression' (ft.com): "Annexed by Russia in March after Kiev protesters ousted Moscow-friendly Viktor Yanukovich from the presidency, the Crimea peninsula is dependent on mainland Ukraine for water and electricity."

[431]Exhibit R-415, The Economist, "The end of the beginning?", 6 March 2014, para. 6, available at The end of the beginning? (economist.com): "Mr Aksenov promptly called an unconstitutional referendum on Crimea's status, declared himself in charge of Crimea's armed forces and called on Mr Putin for help. Days later Crimea's parliament voted to join Russia.";
Exhibit R-418, BBC, "What Russian annexation means for Ukraine's regions", 30 September 2022, para. 7, available at What Russian annexation means for Ukraine's regions (bbc.com): "It looks like a carbon copy of what President Putin did in March 2014, seizing the Crimea region from Ukraine, calling a referendum widely condemned by the international community and then annexing it anyway, through exactly the same constitutional process culminating in a vote in Russia's supportive parliament."

[432] Exhibit R-419, The Economist, "Why Donbas is once again at the heart of the war in Ukraine", 15 February 2022, para. 3, available at Why Donbas is once again at the heart of the war in Ukraine (economist.com): "In April, hostilities erupted in eastern Ukraine, where a patchwork of poorly co-ordinated militias began seizing government buildings throughout Donetsk and Luhansk. These groups, which were almost entirely composed of disgruntled locals and sympathisers from elsewhere in Ukraine, declared independence in May 2014 as the Donetsk People's Republic and the Luhansk People's Republic."
Exhibit R – 420, BBC, "Donbas: Why Russia is trying to capture eastern Ukraine", 26 May 2022, paras. 10,11, available at Why Donbas is once again at the heart of the war in Ukraine (economist.com): "Ukraine's Volodymyr Zelensky declared in April that Russian forces had begun the battle for Donbas and that Ukrainian forces had long prepared for it. Russia is far from subduing the entire area, although if it captures the two big twin cities of Severodonetsk and Lysychansk, then all of Luhansk would be under its control. Just before he launched the war, President Putin recognised all of Luhansk and Donetsk as independent of Ukraine, not just the limited statelets created by Moscow-backed proxies."

[433] Exhibit R-421, The Economist, "Who the Ukrainian rebels are", 31 August 2024, para. 4, available at Who the Ukrainian rebels are (economist.com): "He (President Putin) continues to funnel his fighters and weapons to the rebel army in an effort to create a frozen conflict as he has done elsewhere, in the hope that he can one day insert "Novorossiya" into his new map of the world."

[434] Exhibit R-422, The Economist, "What are the Minsk agreements?", 13 September 2016, paras. 2,3, available at What are the Minsk agreements? (economist.com): "In February, Germany's Angela Merkel and France's François Hollande stepped in to revive the ceasefire, brokering a "Package of Measures for the Implementation of the Minsk Agreements", known as Minsk II. The product of a marathon all-night negotiating session, Minsk II offers a detailed roadmap for resolving the conflict. The 13 point-plan begins with a ceasefire and the withdrawal of heavy weapons from the front lines, to be monitored by the Organization for Security and Co-operation in Europe (OSCE)."

[435] Exhibit R-422, The Economist, "What are the Minsk agreements?", 13 September 2016, para. 4, available at What are the Minsk agreements? (economist.com): "In public, officials declare that there is no alternative to the Minsk agreements. But in private, few *see* any chance for its full implementation. (…) Yet the simmering status quo is not peace, and thus no guarantee that there will not be more war."
Exhibit R-423, The Economist, "Diplomacy has created an opening for detente in Ukraine, but beware a trap", 12 February 2022, para. 3, available at Diplomacy has created an opening for detente in Ukraine, but beware a trap (economist.com): "The Minsk II agreement, signed in 2015, including by a Ukrainian negotiator, was supposed to stop the fighting, but much of it has never been implemented."

many brief ceasefires but no lasting peace and few changes in territorial control.[436]

344. In *Russia – Traffic in Transit*, at the request of Russia, the Panel found that from 2014 until at least 2016, when the most recent measures at issue in that dispute were adopted, there was a situation of "emergency in international relations".[437] That situation persisted until 2019, when the Amending Directive was adopted, and beyond, leading to Russia's illegal full-scale invasion of Ukraine in 2022.

345. As explained above, a "situation of war, armed conflict, or other emergency in international relations" may be invoked by other affected countries, in addition to those which are parties to the war, conflict or emergency.

346. Eight EU Member States are neighbours to Ukraine (Poland, Slovakia, Hungary, Romania) or Russia (Finland, Estonia, Latvia, Lithuania). Moreover, like Ukraine, most of those Member States were part of the former Soviet Union or of the Warsaw Pact, the military block under control of the Soviet Union. Those Member States have been concerned about the risks that the conflict may extend into their territory since 2014. Moreover, Article 42(7) of the Treaty on European Union ("**TEU**") includes a mutual defence clause, which strengthens the solidarity between EU Member States in dealing with external threats. Article 42(7) TEU provides that if a Member State is the victim of armed aggression on its territory, the other Member States have an obligation to aid and assist it by all the means in their power,[438] in accordance with Article 51 of the Charter of the United Nations.[439] It follows that, if any EU Member State was attacked as a result of the extension of the conflict between Russia and Ukraine, the other Member States would have to intervene. Thus, as of the date of adoption of the Amending Directive in 2019 and since at least 2014, the whole European Union was affected by a situation of open or at least latent war between two countries whose borders touch with the borders of eight Member States

[436] Exhibit R-424, Financial Times, "Ukraine's battle against Russia in maps: latest updates", 27 September 2024, available at Ukraine's battle against Russia in maps: latest updates (ft.com)
[437] Exhibit RLA-380, *Russia Traffic in transit*, para. 7.122. ("There is evidence before the Panel that, at least as of March 2014, and continuing at least until the end of 2016, relations between Ukraine and Russia had deteriorated to such a degree that they were a matter of concern to the international community.")
[438] Article 42(7) TEU provides that: "If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States."
[439] Article 51 of the UN Charter reads that: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

347. In addition, the European Union and its Member States are close allies of Ukraine. In 2014 they signed an Association Agreement,[440] which, as explained above, was one of the main factors leading to Russia's illegal annexation of Crimea. Moreover, Ukraine is a member of the Energy Community, based on the Energy Community Treaty, of which the European Union is a contracting party, too.[441] The close links between Ukraine and the European Union and its Member States are not limited to the economic sphere. Relations between the North Atlantic Treaty Organization ("**NATO**"), to which most EU Member States belong, and Ukraine date back to the early 1990s and have since developed into one of the most substantial of NATO's partnerships. Since 2014, in the wake of Russia's illegal annexation of Crimea, cooperation has been intensified in critical areas. Since Russia's full-scale invasion in 2022, NATO and Allies have provided unprecedented levels of support.[442]

8.2.2.2. The EU's "essential security interests"

348. As explained above,[443] a Contracting Party invoking the security exception in Article 24.3 b) of the ECT enjoys wide discretion when identifying its own "essential security interests", subject only to the requirements of the obligation of good faith.

349. The European Union has explained and demonstrated in its Supplementary Counter-Memorial that security of energy supply is a fundamental interest of the EU and, therefore, a matter of public order within the meaning of Article 24.3 c).[444] The European Union considers that, for the same reasons, security of gas supply is an "essential security interest" within the meaning of Article 24.3 b) of the ECT.

350. The EU's "essential security interest" in ensuring security of energy supply was threatened by the "situation of war, conflict or emergency in international relations", which has been described in the preceding section, as of the time of adoption of the Amending Directive and it remains so.

351. The illegal annexation of Crimea in 2014 raised serious security concerns and prompted an immediate response by the European Union and its Member States. On 6 March 2014, the European Council, composed of the Heads of State or Government of the Union's Member States, strongly condemned the unprovoked

[440] Exhibit RLA-387, Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part.
[441] Exhibit R-429, Energy Community portal, "Who we are", https://www.energy-community.org/aboutus/whoweare.htm.
[442] Exhibit R-427, NATO portal, "Relations with Ukraine", https://www.nato.int/cps/en/natohq/topics_37750.htm
[443] *See* above Section 8.1
[444] European Union's Supplementary Counter-Memorial, paras. 252 to 280.

violation of Ukrainian sovereignty and territorial integrity by the Russian Federation.[445] This was followed by the imposition of sanctions, which remain in place until today.[446]

352. The security concerns raised by Russia's illegal annexation of Crimea and the conflict in Eastern Ukraine were spelled out in detail in a resolution adopted in June 2015 by the European Parliament, which declared that:[447]

> 2. [The Parliament] Notes with concern that the illegal annexation of Crimea has precipitated a significant change in the strategic landscape of the Black Sea Basin and the adjacent area; considers that the aggressive actions of Russia represent its return to a hostile, block-to-block type approach; warns that by occupying the entire peninsula, Russia has gained a very important launching pad facing both west (the Balkans, Transnistria and the Danube Mouths) and south (the Eastern Mediterranean), where it has established a permanent naval task force, and that the illegal annexation of Crimea offers Russia a 'southern Kaliningrad', another outpost directly bordering on NATO;
>
> 3. Believes that the change in the geostrategic landscape, the evolving military situation in the Black Sea Basin and the forceful annexation of Crimea by Russia are indicative of broader and systemic challenges to the post-Cold War, norms-based European security architecture; believes that the EU and the Member States must have a security response to these challenges and reconsider their foreign and security policies in light of this, which must be reflected in a reviewed European Security Strategy, in the European Maritime Security Strategy and in the EU Strategy for the Black Sea; is concerned about the intensified Russian pressure on the EU eastern border, including on Romania, Poland and the Baltic States, which represents a major risk;
>
> 8. Is deeply concerned by President Putin's declaration that he was ready to put Russian nuclear forces on alert during Russia's seizure of Crimea, had the West intervened against the annexation; is also deeply concerned by the statements made in a threatening manner by high ranking Russian officials that Russia has the right to deploy and host nuclear weapons in Crimea, which would have global consequences; notes with concern that during a military drill in March 2015, Russia deployed an undisclosed number of strategic nuclear-capable Tu-22M3 bombers in Crimea; is concerned by the new Russian military doctrine of December 2014 which permits the use of nuclear weapons against a state that does not have such

[445] Exhibit RLA-388, Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, recital 1, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014D0145

[446] Exhibit RLA-388, Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014D0145. Exhibit RLA-389, Council Decision 2014/386/CFSP of 23 June 2014 concerning restrictions on goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and Sevastopol.

[447] Exhibit RLA-412, European Parliament resolution of 11 June 2015 on the strategic military situation in the Black Sea Basin following the illegal annexation of Crimea by Russia (2015/2036(INI)).

> weapons;
>
> 26. […] considers that EU needs a bold and result-oriented approach, especially in the areas of economics, defence and security, in order to strengthen the EU internally, update and improve existing instruments, and amplify the Union's reaction capacity to developments in the neighbouring area that affect European security".

353. The security concerns of the European Union and its Member States included, in particular, concerns about the risk of severe gas supply disruptions caused by the conflict between Russia and Ukraine, given that many EU Member States were highly dependent on Russian gas. That risk threatened the EU's security of energy supply and, therefore, the EU's essential security interests.

354. The concerns about the security of gas supply are specifically reflected in the above-mentioned European Parliament's resolution of 2015:

> 18. [The European Parliament] Welcomes the implementation of the EU energy policy aimed at promoting energy security for all Member States; urges the Member States to take the steps needed to reduce their energy dependence and to ensure the security of oil and gas exploitation and transportation activities in the Black Sea region; calls on the EU to sustain initiatives for the diversification of Black Sea energy resources, including through investment and financial measures as part of an energy-independence strategy.[448]

8.2.2.3. The Amending Directive protects the EU's essential security interests

355. As explained above,[449] a Contracting Party invoking the security exception in Article 24.3.a) ii) is not required to show that the measures are objectively "necessary" to address its "essential security interests". All that is required is a "nexus" between those interests and the measures which the invoking party "considers to be necessary" which "is not implausible".

356. In the case at hand, there is a clear and compelling nexus between the Amending Directive and the protection of EU's security interests identified in the previous section.

[448] Exhibit RLA-412, European Parliament resolution of 11 June 2015 on the strategic military situation in the Black Sea Basin following the illegal annexation of Crimea by Russia (2015/2036(INI)). *See* also Exhibit R-385, European Parliament Policy Department, The European Union's energy security made urgent by the Crimean crisis, In-depth analysis, April 2014 ("Military and political tensions are obliging the EU to boost its energy security mechanisms and to seek out short- and long-term alternatives to Russian gas").
[449] *See* above Sub-section 8.2.2 Security exception (Article 24.3 a)ii).

357. As explained elsewhere,[450] already before the adoption of the Amending Directive there were indications that the Nord Stream 2 project could pose a risk to security of supply in the European Union. Indeed, in many instances, some pre-dating the Amending Directive, Russia interrupted gas flows to the European Union through Gazprom owned pipelines for political reasons.[451] The risk to security of supply posed by Nord Stream 2 are described in further detail in the First Brattle Report.[452] This risk was exacerbated by Russia's control over Gazprom and the ongoing conflict between Russia and Ukraine, which would eventually lead to Russia's full-scale invasion of Ukraine in February of 2022. In particular, there was a clear risk that, in the context of that conflict, Russia would disrupt deliberately gas supplies through the Nord Stream 2 pipeline for political purposes. The risk of weaponisation of gas supplies through Gazprom's pipelines has been confirmed beyond doubt by subsequent developments.[453]

358. The Amending Directive addresses the EU's essential security concerns by ensuring that third country pipelines, such as Nord Stream 2, are subject to the generally applicable rules of the Gas Directive, including the rules on security of supply. In particular, by virtue of the Amending Directive, it must be certified that control by third country operators of third country pipelines does not put at risk the EU's security of energy supply. The Amending Directive is thus a measure that the European Union considers to be "necessary" for addressing the risks that the Claimant's control over the NS 2 pipeline may pose to the EU's security of supply, and hence to the EU's "essential security interests", in the context of the situation of "war, armed conflict or other emergency in international relations" described in section 8.2.2.1.

9. THE TRIBUNAL CANNOT AWARD THE INJUNCTIVE RELIEF SOUGHT BY THE CLAIMANT

359. In its Supplementary Rejoinder, the Claimant maintains its flawed position that "[t]he Tribunal has the power to award a restitutionary remedy and its exercise of that power is justified in this case".[454] The Claimant refers to the prayers for relief set out in its Supplementary Memorial dated 27 February 2024, seeking for

[450] *See* European Union's Supplementary Counter-Memorial, paras. 283-291 (with references to Brattle Report, Section V). *See* also European Union's Rejoinder, paras. 222 and 223. *See* also Section 6.1.4 of the present Supplementary Reply.
[451] *See* European Union's Supplementary Counter-memorial, Section 2.5.1 and paras. 257 and 283-291.
[452] First Brattle Report, paras. 66-97.
[453] European Union's Supplementary Counter-Memorial, paras. 292-299 and 322 and First Brattle Report, Section VI. *See* also section 7.2 of this submission.
[454] Claimant's Supplementary Reply, 2 September 2024, p. 102.

an order from the Tribunal that the European Union, "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".[455]

360. In its Supplementary Counter-Memorial, the European Union explained why the new authority put forward by the Claimant (i.e., the judgment of the International Court of Justice ("ICJ") in the case concerning Jurisdictional Immunities of the State) was inapposite to the facts of this case, as an inter-State decision concerning the actions of Italy's courts in violation of German State immunity, and demonstrated that the injunctive relief sought by the Claimant has no basis under customary international law.[456]

361. The Claimant in its Supplementary Rejoinder fails to engage with the Respondent's submissions, choosing simply to ignore them and to leave them unanswered. The Claimant's tacit concession simply underscores the point: Jurisdictional Immunities fails to support the Claimant's unprecedented request for permanent injunctive relief that would see this Tribunal definitively suspend a generally applicable piece of legislation, adopted in the public interest, at the demand of and on behalf of a single foreign investor.[457]

362. Rather than meaningfully engage with the European Union's arguments, the Claimant seeks to further muddy the waters by reference to additional, equally unhelpful jurisprudence. It refers, in this connection, to two arbitral awards (Enron v. Argentina and Cairn v. India) which, in its view, "clearly confirm that an arbitral tribunal in an investment dispute has the power to order restitutionary remedies".[458] Neither of these cases provides authority for the Claimant's unfounded request.

363. The Claimant first reiterates its prior arguments, based upon the jurisdictional decision in *Enron v. Argentina*, in which the tribunal asserted that "it has the power to order measures involving performance or injunction of certain acts".[459] In support of its assertion, the *Enron* tribunal referred to the so-called "ample

[455] Claimant's Supplementary Memorial, 27 February 2024, paras. 241-242 and 248(vii) and (viii).
[456] European Union's Supplementary Counter-Memorial, paras. 351 et seq.
[457] Apart from the issue of whether the Tribunal has the power to award such a remedy in an investor-State case (*quod non*), the aftermath to the *Jurisdictional Immunities* case points to another fundamental challenge in this context: as a general rule, an international court or tribunal which orders the respondent State to provide restitution has no powers to review the subsequent implementation of its decision, much less to settle disputes arising from its enforcement. This practical challenge is all the more acute in the context of investor-State arbitration where an arbitral tribunal becomes *functus officio* after the rendering of the award and underscores the inappropriate nature of such relief.
[458] Claimant's Supplementary Reply, 2 September 2024, paras. 43 and 420.
[459] *Ibid.*, para. 415, citing to *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, para 81, Exhibit CLA-343. *See also* Claimant's Memorial, paras. 496-497.

practice" confirming the "powers of international courts and tribunals to order measures concerning performance or injunction".[460]

364. The European Union maintains its previous submissions that the decision in *Enron* does not offer any sound support to the Claimant's arguments in the present case.[461] As set out in those prior submissions and as reviewed here, the Claimant's argumentation fails, for a number of reasons.

365. *First*, as previously argued, the relevant passage from the *Enron* decision was *obiter dicta*, not even relied upon by the *Enron* tribunal itself. As the Claimant itself acknowledges, in the merits phase the *Enron* tribunal did not award any kind of injunctive relief and did not exercise the "powers" it asserted; rather, it awarded damages to the claimant.[462] In fact, the *Enron* tribunal went on to contradict its own statement: in its ruling on an ancillary claim regarding Argentina's refusal to allow tariff adjustments, the tribunal expressly held that:

> "[a]bsent an agreed form of restitution by means of renegotiation of contracts or otherwise, the appropriate standard of reparation under international law is compensation for the losses suffered by the affected party, as was established by the Permanent Court of International Justice in the *Chorzów* Case*."*[463]

366. Moreover, the *Enron* tribunal's decision went on to be overturned, a fact the Claimant misleadingly fails to acknowledge. The ICSID annulment committee reviewing the *Enron* award subsequently annulled its findings in respect of both liability and reparation. The Committee did so on the specific ground that the *Enron* tribunal had failed to apply the proper law applicable to the merits of the dispute (in particular, the customary rules of State responsibility) and had therefore "manifestly exceeded its powers".[464] Evidently, an *obiter dictum* that was subsequently annulled for manifest excess of powers hardly provides a persuasive authority in support of the Claimant's request in the present case.

367. *Second*, even if the decision on remedies were good law (*quod non*), the *Enron* award in any event is easily distinguishable on the facts.

368. Like other jurisprudence to which the Claimant previously has referred, *Enron* concerned the suspension of a specific monetary obligation purportedly owing to

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[460] *Ibid*.
[461] European Union's Counter-Memorial, paras. 741-751.
[462] *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (22 May 2007), p. 138 (operative clause), Exhibit RLA-141.
[463] *Ibid.*, para. 359 (our emphasis).
[464] *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic (30 July 2010), paras. 395, 406-409 and 428, Exhibit RLA-393.

the State. It did not concern the suspension *vis-à-vis* a particular party of a regulatory scheme of general application, which is the case at hand.

369. In *Enron*, the measures at issue concerned tax assessments issued by Argentina's provinces against the claimant's local subsidiary, which were found by the tribunal to be wrongful under the Argentina-USA BIT.[465] At the stage of preliminary objections, the tax amounts at issue had not yet been paid, because the Supreme Court of Argentina had issued an injunction suspending their judicial collection.[466] Given that enforcement of the contested tax obligation had effectively been suspended at that stage, the claimants "requested that the taxes assessed [but not yet collected] be declared expropriatory and in breach of the Treaty and unlawful, and that they be annulled and their collection permanently enjoined."[467] By asking the tribunal to provide permanent injunctive relief, the claimants sought to prevent the collection of monetary amounts and prevent a pecuniary obligation from arising *in the first place*. As the case progressed, Argentina proceeded to collect the impugned taxes. In response, the claimants modified their submissions, seeking full compensation for the damages they had sustained.[468]

370. Thus, even if the *Enron* tribunal's *obiter* comments on remedies could be relied upon – they cannot – the circumstances of its comments were wholly different from the present case. The *Enron* tribunal at best would have been preventing the State from applying a financial penalty otherwise payable under domestic law – akin to the allocation of responsibility in investment proceedings through awards of financial compensation. In the present case, the Claimant is instead inviting the Tribunal to order the permanent suspension of general legislation, even though these measures have already been adopted and applied as part of a rational regulatory scheme seeking to achieve a key public policy goal. Apart from the fact that *Enron* is bad law on the point in question, it provides no support for the radical remedy the Claimant would have this Tribunal order, in circumstances where the Claimant itself seeks to quantify its alleged losses in damages.

371. *Finally*, and in any event, the *obiter dictum* in the *Enron* award is not supported by the cases cited by the tribunal in that case. Even though the *Enron* tribunal referred to the "ample practice that is available in this respect", it was only able to refer to a single investor-State case (*Goetz v. Burundi*), and the inter-State

[465] *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets,* ***L.P. v.*** *Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (14 January 2004), paras. 1, 20-22, 25 and 65, Exhibit CLA-343.
[466] *Ibid.*, para. 73.
[467] *Ibid.*, para. 77,
[468] *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets,* ***L.P. v.*** *Argentine Republic*, ICSID Case No. ARB/01/3, Award (22 May 2007), para. 346, Exhibit RLA-141.

arbitral award in the *Rainbow Warrior* case.[469] As the European Union has previously explained, neither of these cases provides tenable support for the sweeping assertion that an investor-State tribunal "has the power to order measures involving performance or injunction of certain acts".[470]

372. The European Union maintains its position that neither the ILC Articles on State Responsibility, nor previous judgments ordering restitution at the inter-State level support the proposition that the primacy of restitution as a remedy at the inter-State level automatically extends to the investor-State context.[471] The Claimant has said nothing in its Supplementary Memorial or Reply to rebut these arguments,[472] which stand uncontested before this Tribunal.

373. The Claimant also refers to the case of *Cairn v. India* as further support for its request for permanent injunctive relief against the European Union. In that case, the tribunal found that the Indian Income Tax Department had retroactively applied capital gains tax on a corporate acquisition transaction which was not taxable at the relevant time, in breach of the UK-India BIT. The claimants sought (i) compensation for the damage they had suffered as a result of enforcement measures taken against them; and (ii) an order that the respondent withdraw the outstanding unlawful tax demand (which had not yet been collected) or, in the alternative, additional compensation that would offset the outstanding amount due on the tax demand.[473] In its award, the *Cairn* tribunal awarded compensation for the total harm suffered by the claimants, declared that the claimants were relieved from any obligation to pay it, and ordered India to withdraw and neutralise the effects of the tax demand.[474]

374. Contrary to the Claimant's assertions, *Cairn* is equally inapposite in light of the facts of this case. The claimants in *Cairn* were not seeking the suspension of a general piece of legislation, nor did they ask the tribunal to order injunctive relief in respect of damage that they had already sustained. Rather, the claimants sought to prevent a pecuniary obligation (a tax) from arising in the first place. Just as the claimants in *Enron*, the claimants in *Cairn* requested a preemptive measure to ensure that they would not be subject to a future monetary demand by the respondent. As such, *Cairn* hardly stands for the proposition that the

[469] *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (14 January 2004), paras. 79-80, Exhibit CLA-343.
[470] *Ibid*., para. 81 and European Union's Counter-Memorial, paras. 737-739 and 745-746.
[471] European Union's Rejoinder, paras. 1026-1035; European Union's Counter-Memorial, paras. 713 *et seq*.
[472] European Union's Supplementary Counter-Memorial, para. 353. European Union's Counter-Memorial, paras. 706-707.
[473] *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India*, PCA Case No. 2016-07, Final Award (21 December 2020), paras. 1831 and 1843, Exhibit CLA-344.
[474] *Ibid.*, para 2032, subparas. (3) and (5).

Tribunal has the power to permanently enjoin the application of the Gas Directive to the Claimant and to its assets.

375. As a final distinguishing point, the respondent in *Cairn* did not specifically challenge the Tribunal's authority to order the withdrawal of the tax demand, as set out in the claimants' request for relief. On the contrary, India *opposed* the claimant's alternative request for monetary relief as a set-off payment.[475] Consequently, the respondent *consented* to the tribunal awarding the remedy sought by the applicant. This is materially different from the present case, where the European Union strongly opposes the Claimant's request for permanent injunctive relief, on the basis that to grant such an order would amount to an excess of the Tribunal's powers.[476]

376. In sum, neither of the two cases the Claimant cites in its supplementary brief support the Claimant's requested relief. The decisions in question were rendered in materially different factual, legal or procedural circumstances; concerned *obiter dicta* that were subsequently annulled for failure to apply the proper law (in *Enron*); or were issued in circumstances of consent (in *Cairn*).

377. The Claimant's request for injunctive relief as "primary remedy" therefore fails.

10. RELIEF SOUGHT

378. On the basis of the foregoing, the European Union respectfully requests that the Tribunal:

> 1. Dismiss all the requests made by the Claimant for lack of jurisdiction;
>
> 2. In so far as the Tribunal accepts jurisdiction, reject the Claimant's requests for an order declaring that the European Union is in breach of any substantive obligations under the Energy Charter Treaty;
>
> 3. Decline to order the European Union to remove the application of Articles 9, 10, 11, 32, 41(6), 41(8) and 41(10) of the Gas Directive to NSP2AG and Nord Stream 2;
>
> 4. Decline to order that the European Union pay compensation to NSP2AG, in the alternative to granting the relief requested in (3);

[475] *Ibid.*, para. 1871.
[476] For the avoidance of doubt, the European Union also opposes the Claimant's request for injunctive relief (whether permanent or temporary) on the basis that, even if the Tribunal had such powers (*quod non*), the Claimant has failed to meet both the high threshold required to grant interim or final injunctive relief, and the idiosyncratic test it has advocated for itself. *See*, in this connection, European Union's Rejoinder, Section 9.4, paras. 1056-1091.

5. Order that the Claimant pay the costs of these arbitration proceedings, including the fees and expenses of the Tribunal and costs of legal representation and applicable interest; and

6. Order such other and further relief as to the Tribunal may seem just.

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

[redacted]

Legal Service

European Commission

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