

**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

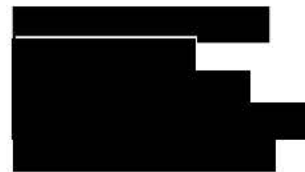
(Claimant)

VS

EUROPEAN UNION

(Respondent)

**EUROPEAN UNION
MEMORIAL ON JURISDICTION AND
REQUEST FOR BIFURCATION**



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1. INTRODUCTION

1. This Memorial on Jurisdiction and Request for Bifurcation (**'Memorial'**) is filed by the European Union in accordance with the Procedural Calendar in Annex 1 of Procedural Order No. 1 of 24 April 2020.
2. In this Memorial, the European Union (**'EU'**) raises two jurisdictional objections.
3. First, the European Union will explain (in Section 2.1, below) that the present Arbitral Tribunal has no jurisdiction because of lack of consent: The European Union's consent to international arbitration under the Energy Charter Treaty (**'ECT'**) is conditional upon compliance with the fork-in-the-road clause in the ECT. Given that Nord Stream 2 AG (**"NSP2AG"** or the **"Claimant"**) has already brought court proceedings before the Court of Justice of the European Union with regard to the adoption of Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 (the **"Amending Directive"**), NSP2AG is prevented from bringing a parallel dispute before the present Arbitral Tribunal under the ECT.
4. Second, the European Union will explain (in Section 2.2, below) that the Arbitral Tribunal lacks jurisdiction *ratione personae*. NSP2AG's claims relate to Directive (EU) 2019/692, which amends Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas (the **"Gas Directive"** or **"Third Gas Directive"**). The Amending Directive can impose no obligations on the Claimant. Therefore, the alleged breaches of the ECT, and the alleged ensuing damages, would not result from the Amending Directive. They could only result from measures which the Member States may or may not take within the scope of the margin of discretion accorded to them when they transpose and implement the Amending Directive. Those measures of the EU Member States would not be attributable to the European Union under international law. Nor would the European Union be otherwise responsible under international law for any alleged breaches of the ECT resulting from those measures, because those breaches would not be required by EU Law.
5. After setting forth the jurisdictional objections, the European Union makes a Request for Bifurcation (Section 3, below). The European Union respectfully requests that the Tribunal decide as a preliminary matter the jurisdictional

objections set out by the European Union in this submission before considering the merits of the claims brought by NSP2AG, as provided for in Article 21(4) of the applicable UNCITRAL Rules. The European Union will demonstrate that the conditions for bifurcation are met.

2. JURISDICTIONAL OBJECTIONS

2.1 THE CLAIMANT HAS ALREADY ELECTED A DIFFERENT JURISDICTION FOR ITS CLAIM

2.1.1 INTRODUCTION

6. The present claim is beyond the Tribunal's jurisdiction: at the time the Claimant filed its Notice of Arbitration, it had already elected to pursue this dispute before the Court of Justice of the European Union. The Claimant's attempt to pursue this dispute simultaneously in multiple fora violates the ECT fork-in-the-road clause, and vitiates the European Union's consent to arbitrate this dispute in an ECT arbitration.

7. The ECT provides at Article 26(3)(b)(i) as follows:

(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

(b) (i) **The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).**¹

8. Articles 26(2)(a) and (b) in turn provide:

(2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:

(a) **to the courts or administrative tribunals of the Contracting Party party to the dispute;**

(b) in accordance with any applicable, previously agreed dispute settlement procedure ...²

9. It follows from the provisions of Article 26(3)(b) that "the consent to international arbitration of the contracting parties listed in Annex ID, is subject to the limitation that where the investor previously has submitted the dispute

¹ Emphasis added.

² Emphasis added.

to the national courts of the host state or under another previously agreed dispute settlement procedure it may not then pursue international arbitration in respect of the same dispute. Almost half of contracting parties have made such a ‘fork-in-the-road’ reservation”.³ Those Contracting Parties thus only give their consent to international arbitration under the ECT provided that the investor has not previously submitted the dispute to their domestic courts or administrative tribunals.

10. As confirmed by Annex I.D of the ECT, the EU is among these contracting parties:

Annex ID: List of Contracting Parties Not Allowing an Investor to Resubmit the Same Dispute to International Arbitration at a Later Stage under Article 26

(in accordance with Article 26(3)(b)(i))

...

8. European Union and EURATOM

11. The European Union has thus reserved its consent to submit disputes to international arbitration under the ECT to disputes that have not been submitted to the courts of the European Union.
12. In disregard of the ECT’s fork-in-the-road provisions, prior to filing the present claim, the Claimant had already launched an application for annulment of the Amending Directive before the General Court of the European Union on 25 July 2019.⁴ On 20 May 2020, the General Court issued an Order declaring the application inadmissible.⁵ On 28 July 2020, the Claimant appealed this Order before the Court of Justice.⁶ That appeal is still pending.
13. Despite this previous filing, on 26 September 2019 the Claimant nonetheless purported to serve a Notice of Arbitration launching the present ECT proceedings. As of that time, the Claimant had already submitted the dispute to the Court of Justice of the European Union for resolution. The European Union’s reservation to its consent to international arbitration pursuant to ECT

³ **EXHIBIT RLA-1:** Kaj Hobér, “Investment Arbitration and the Energy Charter Treaty”, *Journal of International Dispute Settlement*, Vol. 1, No. 1 (2010), p. 163.

⁴ See **EXHIBIT RLA-2** Action brought on 25 July 2019 — *Nord Stream 2 v Parliament and Council* (Case T-526/19) (2019/C 305/80), O.J. 9 September 2019 C 305/70.

⁵ **EXHIBIT RLA-3** Order of the General Court of 20 May 2020 in Case T-526/19, *Nord Stream 2 AG v. European Parliament and Council of the European Union*.

⁶ **EXHIBIT RLA-4** Case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*.

Article 26(3)(b) is thus engaged, and precludes the Arbitral Tribunal's jurisdiction to hear this dispute.

14. Moreover, in further disregard of the ECT's fork-in-the-road provisions, on 15 June 2020, despite proceedings pending before both the Court of Justice of the European Union and the ECT Tribunal, NSP2AG filed an appeal from the decision by the German Bundesnetzagentur that the derogation under Article 49a of the Amending Directive is not available to NSP2AG.⁷ That means that the present dispute is also pending before a German court. The Claimant indeed expressly refers to this parallel proceeding in its Memorial of 3 July 2020, admitting that the positions it adopts in that proceeding flatly contradict the positions it advances before the present Tribunal.⁸ The Claimant thus not only has engaged in a campaign of litigation in respect of the same dispute in multiple jurisdictions, but also openly admits that it is consciously presenting inconsistent arguments before these different fora.
15. In sum, the present dispute is pending simultaneously before no less than three adjudication bodies. If there is any situation that would constitute the perfect example of how and why enforcement of fork-in-the-road clauses is necessary to avoid duplicative litigation in parallel fora, it is the present one.
16. Arbitral awards that have applied fork-in-the-road clauses in past cases have generally relied on legal tests (in particular the "triple identity test" – requiring the same parties; same object; and same normative source) that belong more to the *lis pendens* doctrine rather than to a proper interpretation of the fork-in-the-road clause in the applicable agreement. These past awards may have confused the application of this principle and the clause. The *lis pendens* doctrine and the fork-in-the-road clause are indeed governed by different legal tests. More recent awards have instead adopted a more careful and principled approach, recognising that the fork-in-the-road clause relies upon a distinct test, namely whether the disputes have the "same fundamental basis". In any event, as explained in what follows, the Arbitral Tribunal should conclude that it is precluded from hearing the present dispute regardless of which of the two tests it may apply.

⁷ **EXHIBIT RLA-5** Nord Stream 2 AG appeals against decision of German regulator on Nord Stream 2, *Russian News Agency* 17 June 2020. <https://tass.com/economy/1168603>

⁸ Claimant's Memorial of 3 July 2020, para. 412. The Claimant states that it "must argue not only against the plain and natural meaning of the words contained in the Amending Directive, but also against the clear and targeted nature of the measure"

2.1.2 INTERPRETATION OF THE FORK-IN-THE-ROAD CLAUSE IN ARTICLE 26(3)(B) ECT

17. The fork-in-the-road clause in Article 26(3)(b) of the ECT confirms that Parties do not give unconditional consent to the submission of the dispute to arbitration “where the Investor **has previously submitted the dispute** under subparagraph 2(a) [to the courts or administrative tribunals of the Contracting Party party to the dispute] or (b) [any other dispute settlement]”.
18. A fork-in-the-road clause constitutes a reservation in an agreement explicitly laying down the conditional consent of a party to the agreement to submit disputes to international arbitration. It explicitly expresses the intention of the parties to the agreement (such as the Energy Charter Treaty) not to agree to parallel proceedings.
19. A number of arbitral awards have sought to interpret the fork-in-the-road clause in accordance with the *Vienna Convention on the Law of Treaties*, considering the ordinary meaning of the clause in its context in light of its object and purpose.⁹ These awards found that the tribunal must decline jurisdiction because of the fork-in-the-road clause where the disputes before the domestic courts and before the arbitration tribunal shared the “same fundamental basis”.
20. The European Union submits that the above test is both consistent with international law and reaches the correct result. Accordingly, the EU invites the Tribunal to apply that same test here. As the European Union will explain hereafter, based upon the ordinary meaning of the fork-in-the-road clause in the ECT in its context and in light of its object and purpose (i.e. in accordance with the rules on treaty interpretation in Article 31 of the *Vienna Convention on the Law of Treaties*), the Tribunal must decline jurisdiction where the second case has the same fundamental basis as the first case.
21. The text of Article 26(3)(a) of the ECT provides that the “unconditional consent to the submission of a dispute to international arbitration” is “subject only to subparagraphs (b) and (c)”. Subparagraph (b) (i) provides that the “Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b)”. In turn, the text of Subparagraph (2)(a) provides that the Investor party to the dispute may choose to submit it for resolution: “(a) to

⁹ More precisely, *Pantechniki v. Albania*, *H&H Enterprises v. Egypt* and *Supervision y Control S.A. v. Republic of Costa Rica*, discussed in detail below.

- the courts or administrative tribunals of the Contracting Party party to the dispute”.
22. In other words, Article 26(3) of the ECT together with Annex ID confirms that the European Union has provided only a conditional consent to submit disputes to the ECT. Notably, prior submission of a dispute to the domestic courts or administrative tribunals eliminates the EU’s consent to have that dispute submitted to an ECT tribunal. Moreover, the text of this clause does not require that the triple identity test be met before the fork-in-the-road provision can be invoked. Further, there is no definition of “dispute” in the ECT.
23. Article 26(3) of the ECT clearly guards against multiple parallel proceedings by refusing jurisdiction in case of “prior submission of the dispute” to the courts or administrative tribunals of the Contracting Party party to the dispute. Applying the customary rules of interpretation of international law, reflected in Article 31(1) of the *Vienna Convention on the Law of Treaties*, the ordinary meaning of the words in their context and in light of the object and purpose of the treaty lead to the conclusion that “dispute” applies, as here, to parallel proceedings that share the same fundamental basis.
24. The ordinary meaning of “Dispute” alone leads to this conclusion, in that “dispute” is a broad, non-technical term, which is defined in the Oxford English Dictionary as “[a]n occasion or instance of the same; an argumentative contention or debate, a controversy”.¹⁰ The Cambridge Dictionary simply defines “dispute” as “a disagreement or argument”.¹¹ The ECT notably fails to qualify the term dispute by imposing any further criteria, including those typically employed in relation to *lis pendens*. Thus, the ECT does not require identity of the parties, of the object, or of the cause of action. Instead, the text remains open to an ordinary purposive interpretation “in light of its object and purpose”.
25. The purpose of a fork-in-the-road provision is to ensure that the same dispute is not litigated before different fora. Such parallel proceedings would risk creating conflicting outcomes and would grant claimants several opportunities to prevail in one and the same lawsuit. The respondent, on the other hand, will have to prevail in both (or more) proceedings in order to escape liability.

¹⁰ See **EXHIBIT RLA-6** Oxford English Dictionary, Dispute, n.

¹¹ See **EXHIBIT RLA-7** Cambridge Dictionary, dispute, noun.

Hence, parallel proceedings unduly favour the claimant.¹² Apart from the risk of unfairness to the respondent and contradictory outcomes, in such circumstances a claimant can unfairly exert unreasonable pressure on the host state by launching multiple proceedings on multiple procedural fronts. Parallel proceedings can also lead to multiple damages being granted to the claimant, giving rise to overcompensation, and undermine the efficient resolution of the dispute.

26. The context of Article 26(3) reinforces this reading. The context of Article 26(3) includes Annex ID, which is titled “List of the Contracting Parties Not Allowing an Investor to Resubmit **the Same Dispute** to International Arbitration at a Later Stage under Article 26”.¹³ Once again, the text of this title does not impose any specific test, still less a requirement of identity of cause of action, parties or object (“triple identity test”) for determining what constitutes the “Same Dispute”. The words “Resubmit the Same Dispute to International Arbitration at a Later Stage” support the reading of Article 26(3) as preventing simultaneous submission of the same dispute in multiple fora. Notably, where an investor has submitted a dispute to the national courts of the Contracting Party that is party to the dispute, it cannot “Resubmit” the dispute to international arbitration under the ECT.

27. Article 26(1) ECT constitutes further context of Article 26(3). It reads:

Disputes between a Contracting Party and an Investor of another Contracting party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

28. This provision refers to disputes “relating to an Investment of the latter in the Area of the former”. It does not impose specific limitations on what may constitute the “same dispute”; instead, it again leaves the definition open-ended, providing tribunals the ability to apply the clause in a manner that upholds its object and purpose, in light of the ordinary meaning of “dispute”. It does not refer to the requirement that the disputes must concern the same parties, same object or same cause of action, either.

29. Reference in this provision to Part III (“Investment Promotion and Protection”) does not impose any obligation of identity of cause of action as between two

¹² **EXHIBIT RLA-8** Markus A. Petsche, “The Fork in the Road Revisited: An Attempt to Overcome the Clash Between Formalistic and Pragmatic Approaches”, *Washington University Global Studies Law Review*, Vol. 18:39, 2019, p. 408, at pp. 423-424.

¹³ Emphasis added.

pending disputes. Indeed, such a reading would violate the principle of *effet utile*,¹⁴ rendering null the application of Article 26(3) by imposing a requirement (nowhere stated in the article) that the party must have cited ECT norms in exactly the same terms before national courts for it to constitute the “same dispute”) (a requirement in practice likely impossible to fulfil). Instead, Article 26(3) was meant to address circumstances such as the present, in which the Claimant has brought essentially the same dispute before the ECT as before the Court of Justice of the European Union. Indeed, the obligations claimed to be violated in the case brought before the Court of Justice of the European Union closely parallel those invoked in the subsequent ECT proceeding (as explained in sub-sections 2.1.4 and 2.1.6, below).

30. Arbitral tribunals have indeed concluded that merely asserting that claims based on treaty provisions are different from those pursued under a contract “is an argument by labelling – not by analysis”¹⁵ and must be rejected. In the same way, an assertion that the dispute before the Court of Justice of the European Union refers to EU law and the dispute before the ECT Tribunal refers to the principles in the ECT ignores that the “fundamental cause” of the claims in both disputes (the adoption of the Amending Directive and its alleged effects on NSP2AG) and that the remedy that NSP2AG seeks in both disputes is identical in substance (i.e. to place NSP2AG in the same position it would have occupied had the Amending Directive never been adopted).¹⁶ The “subject matter of the disputes” is fundamentally the same, and accordingly Article 26(3) rightly is invoked to vitiate the Tribunal’s jurisdiction.¹⁷
31. This brings us indeed to the “object and purpose” of Article 26(3) ECT. As explained above, the “purpose” of Article 26(3)(a) is to avoid multiple litigation arising out of the same facts, with the resulting multiplication of cost, risk of contradictory outcomes, and unfairness to the State Respondent (and its stakeholders).

¹⁴ See **EXHIBIT RLA-9** *H&H Enters. Invs., Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award, 6 May 2014, para. 367.

¹⁵ **EXHIBIT RLA-10** *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award (28 July 2009), para. 61.

¹⁶ **EXHIBIT RLA-11** *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, 18 January 2017, para. 310. It can be noted that Article VII(1) of the US-Egypt BIT defines “a legal investment dispute” as a “dispute involving (i) the interpretation or application of an investment agreement between a Party and a national company of the other Party; or (ii) an alleged-breach of any right conferred or created by this Treaty with respect to an investment”. The presence of that definition did not prevent the application of the fork in the road clause in Article VII(3)(a) of the US-Egypt BIT, since the claims shared the same fundamental basis. The arbitral tribunal considered that “what matters is the subject matter of the dispute”. See **EXHIBIT RLA-9** *H&H Enters. Invs., Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award, 6 May 2014, paras. 367-369.

32. The underlying *rationale* for a fork-in-the-road clause supports an interpretation and application of this clause that is not formalistic, but focuses on the fundamental basis of the overlapping disputes. It obliges investors to make a choice when bringing a dispute relating to its investment. Either the investor chooses to bring the dispute before courts of a Contracting Party, or it chooses to bring the dispute before an international arbitration tribunal. Once it has made such choice, the investor is bound by it and has to bear the consequences of that choice. By contrast, allowing a dispute to be litigated before the Court of Justice of the European Union and at the same time before an arbitral tribunal defeats the object and purpose of Article 26(3) ECT.
33. Therefore, in the European Union's respectful submissions, what matters is whether the disputes share the same fundamental basis, or in other words, "share the fundamental cause of the claim and seek for the same effects".¹⁸

2.1.3 THE EUROPEAN UNION'S INTERPRETATION OF THE FORK-IN-THE-ROAD CLAUSE IN THE ECT IS CONSISTENT WITH PAST ARBITRAL AWARDS

34. Recent awards concerning the fork-in-the-road clause have indeed focused on the substantive question of whether the claims share the same fundamental basis, stressing the *ratio legis* of such clauses and recognising that a strict application of the "triple identity" test (same parties; same object; and same normative source) applied by some investment tribunals removes all legal effects from fork-in-the-road clauses.¹⁹
35. In the *Pantechniki* matter, Jan Paulsson sitting as sole arbitrator, faced with parallel investment arbitration and contract claims alleged to violate a fork-in-the-road clause, considered that it is "necessary ... to determine whether the claimed entitlements have the same normative source"²⁰, i.e. whether the claim "truly does have an autonomous existence outside the contract".²¹ Paulsson in this way sought to adopt a principled approach in applying fork-in-the-road clauses. He notably rejected arbitral practice that mechanically relied

¹⁷ See **EXHIBIT RLA-9** *H&H Enters. Invs., Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award, 6 May 2014, para. 367.

¹⁸ **EXHIBIT RLA-11** *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, 18 January 2017, para. 310.

¹⁹ See **EXHIBIT RLA-11** *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, 18 January 2017, para. 330.

²⁰ **EXHIBIT RLA-10** *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award (28 July 2009), para. 62.

²¹ **EXHIBIT RLA-10** *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award (28 July 2009), para. 64.

in its interpretative approach on the distinction between treaty claims and contract claims.²²

36. In *Pantechniki*, the claimant asserted that the Government of Albania had undertaken to pay him for losses arising out of civil strife. The claimant further asserted that a senior Minister had encouraged him to seek a declaration of enforceability of the agreement before the courts in Albania. Being unsuccessful before the courts, he then turned to ICSID, claiming the outcome violated the provisions of the Greece-Albania BIT.
37. The sole arbitrator Jan Paulsson found that the claimant was seeking to enforce fundamentally the same dispute before different fora and therefore had fallen foul of the fork-in-the-road clause. In reaching this conclusion, Paulsson applied the “fundamental basis” test established by the Mexican-Venezuela Mixed Claims Commission in the *Woodruff* case of 1903.²³ He noted that this same test had been endorsed by the ICSID annulment Committee in ICSID Case *Vivendi v. Argentina*²⁴ (annulment decision of 2002).²⁵ He notably distinguished his reasoning from that applied by some prior tribunals, where a more formalistic approach to the “same dispute” had been applied, one that mechanically focussed on elements not expressly required by the clause in question (such as identity of cause of action).
38. The decision in *Pantechniki* stressed the *ratio legis* of fork-in-the-road clauses, recalling that claimants should be aware that they must bear the consequences of their decision to litigate a dispute in the domestic courts. Relying on this *ratio legis*, the arbitrator rejected the distinction between contract claims vs. treaty claims:

Yet there comes a time when it is no longer sufficient merely to assert that a claim is founded on the Treaty. The Tribunal must determine whether the claim truly does have an autonomous existence outside the contract. Otherwise **the Claimant must live with the consequences of having elected to take its grievance to the national courts.**²⁶

39. The arbitrator also relied on the *ratio legis* of the clause more generally:

²² See also **EXHIBIT RLA-12** Gerhard Wegen, Lars Market, “Chapter V: Investment Arbitration – Food for Thought on Fork-in-the-Road – A Clause Awakens from its Hibernation”, in Gerold Zeiler, Irene Welser, et al. (eds.), *Austrian Yearbook on International Arbitration*, Volume 2010, pp. 269-292.

²³ **EXHIBIT RLA-10** *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award (28 July 2009), para. 61.

²⁴ **EXHIBIT RLA-13** *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 101

²⁵ **EXHIBIT RLA-10** *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award (28 July 2009), para. 61.

²⁶ *Ibid.*, para. 64 (emphasis added).

The logic is inescapable. To the extent that this prayer was accepted it would grant the Claimant exactly what it invoked in the contractual debate it began with the General Roads Directorate. **The Claimant chose to take this matter to the Albanian Courts. It cannot now adopt the same fundamental basis as the foundation of a Treaty claim. Having made the election to seize the national jurisdiction the Claimant is no longer permitted to raise the same contention before ICSID.**²⁷

40. In the European Union's respectful submission, the *ratio legis* of the fork-in-the-road clause at stake in *Pantechniki*²⁸ is fully applicable to the ECT clause at stake in the present dispute.
41. In *H&H Enterprises v. Egypt*, the arbitral tribunal followed the same approach. The claimant in that arbitration had brought expropriation claims with respect to a management and operation contract for the development of a holiday resort before the Cairo Arbitral Tribunal as well as before the local courts in Egypt. Once these claims had been rejected by the Cairo Arbitral Tribunal and the local courts (both in first instance and on appeal), the claimant brought expropriation claims before an ICSID tribunal. Interpreting a fork-in-the-road clause that was essentially the same as the clause in the ECT,²⁹ the arbitral tribunal explicitly rejected an attempt to limit application of the fork in the road clause to formulaic cases of identity of parties, cause of action and object (i.e. it refused to import a so-called "triple identity" test that appears nowhere in the treaty). The tribunal referred to the purpose of such clause (i.e. ensuring that a same dispute is not litigated before different fora) and the need to avoid a formalistic approach that would deprive a fork-in-the-road clause from any practical meaning. The arbitral tribunal found:

²⁷ *Ibid.*, para. 67 (emphasis added).

²⁸ The fork-in-the-road clause in Article 10(2) of the Greece-Albania BIT (**EXHIBIT RLA-14**) reads, in relevant part:

If such disputes cannot be settled within six months from the date either party requested amicable settlement, the investor or the Contracting Party concerned may submit the dispute either to the competent court of the Contracting Party, or to an international arbitration tribunal. [...]

²⁹ The fork-in-the-road provision in Article VII(3)(a) of the US-Egypt BIT (**EXHIBIT RLA-15**) reads:

In the event that the legal investment dispute is not resolved under procedures specified above, the national or company concerned may choose to submit the dispute to the International Centre for the Settlement of Investment Disputes ("Centre") for settlement by conciliation or binding arbitration, if, within six (6) months of the date upon which it arose: (i) the dispute has not been settled through consultation and negotiation; or (ii) the dispute has not, for any good faith reason, been submitted for resolution in accordance with any applicable dispute-settlement procedures previously agreed to by the Parties to dispute; or (iii) the national or company, has not brought before the courts of justice or administrative tribunal of competent jurisdiction of the Party that is a Party to the dispute. (b) Each Party hereby consents to the submission of an investment dispute to the Centre for settlement by conciliation or binding arbitration. (c) Conciliation or binding arbitration of such disputes shall be done in accordance with the provisions of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("Convention") and the Regulations and Rules of the Centre.

... the Tribunal is of the view that the triple identity test is not the relevant test as it would defeat the purpose of Article VII of the US-Egypt BIT, which is to ensure that the same dispute is not litigated before different fora. It **would also deprive Article VII from any practical meaning**. The Tribunal notes that the triple identity test originates from the doctrine of *res judicata*. However, investment **arbitration proceedings and local court proceedings are often not only based on different causes of action but also involve different parties. More importantly, the language of Article VII does not require specifically that the parties be the same, but rather that the dispute at hand not be submitted to other dispute resolution procedures; what matters therefore is the subject matter of the dispute rather than whether the parties are exactly the same. Finally, and in any event, it would defeat the purpose of the Treaty and allow form to prevail over substance** if the respondents were required to be strictly the same because in practice, local court proceedings are often brought against state instrumentalities having a separate legal personality and the state itself. This is also the case here, and indeed both the Claimant and the Respondent consistently considered, in the course of the Cairo Arbitration and Egyptian local proceedings, GHE and EGOTH as being the competent parties to account for these claims.³⁰

42. This approach is well-aligned with the fundamental purpose of a fork-in-the-road provision, which is to avoid parallel proceedings and ensure an efficient resolution of disputes between investors and host States, regardless of the fora in which such disputes may be considered. This approach involves an inquiry into whether the claims have the same fundamental basis, i.e. whether the disputes have the same "subject matter", regardless of whether the formal cause of action may be differently expressed (depending on whether it is pursued under a treaty or as a breach of contract) and/or that the formal parties are distinct (i.e. attempting to sue the State under a bilateral investment treaty while at the same time suing a State-owned company under a contract, relying on the same facts).
43. This principled approach to fork-in-the-road clauses was again confirmed by the arbitral tribunal in *Supervision y Control S.A. v. Republic of Costa Rica*, where the tribunal found as follows:

Article XI.3 of the Treaty requires the investor to select the forum in which it will process its claim. Once it has selected arbitration, it must waive the exercise of its claims before the local courts. In this case, Claimant submitted the dispute involving the establishment of rates for the VTI service and the damages and lost profits derived from the conduct and omissions of Costa Rica to the local courts, and failed to withdraw from such proceeding once it initiated the arbitration. Therefore, the claims related to such dispute are inadmissible. In any event, **the Tribunal is of the view that the strict application of the**

³⁰ **EXHIBIT RLA-9** *H&H Enters. Invs., Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award, 6 May 2014, para. 367.

triple identity test (same parties; same object; and same normative source) applied by some investment tribunals removes all legal effects from fork in the road clauses, which contravenes the effet utile principle applicable to the interpretation of treaties. What, in the end, matters for the application of fork in the road clauses is that **the two relevant proceedings under examination have the same normative source and pursue the same aim**. This is, in the Tribunal's view, the case here.³¹

44. The European Union shares this principled approach to fork-in-the-road clauses, which is both formally sound from a treaty interpretation perspective (refusing to "import" a test not stated in the treaty, and giving effect to the specific language that is actually in the treaty), and reaches the correct result from a policy point of view (avoiding abusive multiplicity of proceedings in respect of the same dispute). As tribunals have found, what matter is whether the proceedings before two or more fora "share the fundamental cause of the claim and seek for the same effects".³²

2.1.4 THE APPLICATION FOR ANNULMENT BEFORE THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE PRESENT ARBITRATION PROCEEDINGS HAVE THE SAME FUNDAMENTAL BASIS

45. By first challenging the Amending Directive before the Union Courts (through an application before the General Court and an appeal against the General Court's Order before the Court of Justice),³³ and shortly thereafter bringing the present arbitration proceedings, the Claimant attempts to litigate the same dispute simultaneously in several fora. This is exactly what the fork-in-the-road clause in the ECT seeks to avoid. The substantive basis of the two disputes is fundamentally the same.
46. Article 26(3) is engaged here, and vitiates the Tribunal's jurisdiction, given that the substance of these two proceedings is fundamentally the same: they both concern the "same dispute".

³¹ **EXHIBIT RLA-11** *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, 18 January 2017, para. 330.

³² **EXHIBIT RLA-11** *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, 18 January 2017, para. 310.

³³ The **Court of Justice of the European Union** is one of the institutions of the European Union. The Court of Justice includes the **General Court** and the **Court of Justice**. The latter is competent to hear an appeal against a decision by the General Court. See Articles 13 and 19 of the Treaty on European Union (**TEU**) (**EXHIBIT RLA-16**), and Article 256 of the Treaty on the Functioning of the European Union (**TFEU**) (**EXHIBIT RLA-17**).

(a) The “fundamental cause” of the claims in the disputes is the same

47. First, the “fundamental cause” of the claims in both disputes is the same: the alleged unlawfulness of adopting the Amending Directive and its alleged effects.

48. Indeed, when summarising the essence of its case before the **ECT Tribunal**, the Claimant states:

NSP2AG brings this claim against the European Union (the “EU”) in respect of the EU’s discriminatory adoption of the Directive (EU) 2019/692 (the “**Amending Directive**”), amending Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas (the “**Gas Directive**” or the “**Third Gas Directive**”) The Amending Directive fundamentally undermines NSP2AG’s investment in the Nord Stream 2 pipeline project (an investment made in large part in the EU), and threatens its very future as a company³⁴.

49. Hence, the Claimant essentially claims before the ECT Tribunal that:

- (i) the Amending Directive “**discriminates**” against NSP2AG; and
- (ii) through its adoption the Amending Directive “**undermines NSP2AG’s investment in the Nord Stream 2 pipeline project**”.

50. The Claimant indeed complains about alleged **discrimination** in its ECT claims on:

(i) fair and equitable treatment (**Section VIII.3 of the Claimant’s Memorial**), where the Claimant argues, in particular, that there “is no rational, and certainly no fair and equitable, basis on which Nord Stream 2 ... should not benefit from access to the derogation regime implemented by Article 49a”³⁵ and claims that there was “arbitrary or discriminatory treatment of NSP2AG’s investment”.³⁶

(ii) impairment by unreasonable or discriminatory measures (**Section VIII.4 of the Claimant’s Memorial**),³⁷ where the Claimant argues, in particular, that the adoption of the Amending Directive would “effectively amount to the discriminatory targeting of Nord Stream 2”.³⁸

³⁴ Claimant’s Memorial of 3 July 2020, para. 4. Emphasis in the original. Footnote omitted.

³⁵ Claimant’s Memorial of 3 July 2020, para. 381 (ii).

³⁶ Claimant’s Memorial of 3 July 2020, paras. 394-415.

³⁷ Claimant’s Memorial of 3 July 2020, paras. 441-446.

³⁸ Claimant’s Memorial of 3 July 2020, para. 441.

(iii) the breach of Article 10(7) of the ECT (**Section VIII.6 of the Claimant's Memorial**),³⁹ where the Claimant argues, in particular, that the European Union would have failed to "provide NSP2AG with treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third states".⁴⁰

51. The Claimant next complains about alleged **undermining of NSP2AG's investment in the Nord Stream 2 pipeline project** in its ECT claims on:

(i) breaches of due process under the fair and equitable treatment standard because of the manner in which the Amending Directive was allegedly introduced (**Section VIII.3 of the Claimant's Memorial**), where the Claimant argues, in particular, that the Directive was passed with a "marked failure to observe due process"⁴¹ and an "Improper Legislative Process"⁴² which would have been "non-transparent and unreasonably fast-tracked".⁴³

(ii) arbitrariness and unreasonableness because the means used in the Amending Directive would allegedly not support the stated objectives⁴⁴ (**Section VIII.4 of the Claimant's Memorial – impairment by unreasonable measures and Section VIII.7 of the Claimant's Memorial – expropriation**), where the Claimant argues, in particular, that the Amending Directive would constitute "an unreasonable measure in that it lacks proportionality" given that – in the Claimants opinion – the Directive "bears no reasonable relationship to a rational policy",⁴⁵ but would have as "very intention and purpose" to "divorce the transmission system ... from NSP2AG",⁴⁶ thereby "fundamentally undermining the basis on which NSP2AG has made its investment of over EUR 8 billion in Nord Stream 2".⁴⁷

(iii) undermining of legitimate expectations (**Section VIII.3⁴⁸ and Section VIII.5 of the Claimant's Memorial⁴⁹ – guarantee of most**

³⁹ Claimant's Memorial of 3 July 2020, paras. 452-463.

⁴⁰ Claimant's Memorial of 3 July 2020, para. 452.

⁴¹ Claimant's Memorial of 3 July 2020, para. 381(iii).

⁴² Claimant's Memorial of 3 July 2020, para. 391. See also para. 418(i) and (iii).

⁴³ Claimant's Memorial of 3 July 2020, para. 398.

⁴⁴ Claimant's Memorial of 3 July 2020, paras. 436-440.

⁴⁵ Claimant's Memorial of 3 July 2020, para. 439.

⁴⁶ Claimant's Memorial of 3 July 2020, para. 479.

⁴⁷ Claimant's Memorial of 3 July 2020, para. 477.

⁴⁸ Claimant's Memorial of 3 July 2020, paras. 423-434.

⁴⁹ Claimant's Memorial of 3 July 2020, paras. 447-451.

constant protection and security), where the Claimant argues, in particular, that the Amending Directive would have “undermined the promise of legal security inherent in the CPS standard included in Article 10(1) including by ... causing the Dramatic and Radical Regulatory Change”.⁵⁰

52. The “fundamental cause” for NSP2AG bringing its case before the **Court of Justice of the European Union** is essentially the same. Indeed, the section in NSP2AG’s Application containing the “Pleas in law”⁵¹ reads:

1. First plea in law, alleging infringement of the general EU law principle of equal treatment as the amending Directive leaves the applicant without the prospect of derogation from the application of the rules of Directive 2009/73/EC (1), notwithstanding the sheer magnitude of investment that had already been incurred as at the date of adoption of the amending Directive and even before it was first proposed, whereas all other existing offshore import pipelines are eligible for derogation.

2. Second plea in law, alleging infringement of the general EU law principle of proportionality as the amending Directive is incapable of achieving its stated objectives and cannot, in any event, make a sufficiently meaningful contribution to those objectives that outweigh the burdens it imposes.

3. Third plea in law, alleging infringement of the general EU law principle of legal certainty as the amending Directive fails to incorporate appropriate adaptations with respect to the particular situation of the Applicant, but on the contrary, is specifically designed to impact it negatively.

4. Fourth plea in law, alleging misuse of powers, as the Amending Directive was adopted for a purpose other than those purposes for which the powers used to pass it were conferred.

5. Fifth plea in law, alleging breach of essential procedural requirements, as the Amending Directive was adopted in breach of requirements imposed under Protocol No 1 to the TEU and TFEU on the Role of National Parliaments in the European Union, Protocol No 2 to the TEU and TFEU on the Application of the Principles of Subsidiarity and Proportionality, and the Interinstitutional Agreement on Better Law-Making.

6. Sixth plea in law, alleging failure to state reasons as required by Article 296 TFEU.

53. Before the Court of Justice of the European Union, NSP2AG thus again essentially claims that:

⁵⁰ Claimant’s Memorial of 3 July 2020, para. 451.

⁵¹ See **EXHIBIT RLA-2** Action brought on 25 July 2019 — *Nord Stream 2 v Parliament and Council* (Case T-526/19) (2019/C 305/80), O.J. 9 September 2019 C 305/70.

(i) the Amending Directive does not respect the principle of equal treatment and thus **discriminates**;

(ii) the adoption of the Amending Directive fails to respect a number of fundamental principles of EU law and **thus undermines NSP2AG's investment in the Nord Stream 2 pipeline project**.

54. The Claimant indeed complains about alleged **discrimination** in its **first plea in law** before the Court of Justice of the European Union, where it alleges "infringement of the general EU law principle of **equal treatment** as the amending Directive leaves the applicant without the prospect of derogation from the application of the rules of Directive 2009/73/EC (1) ... whereas all other existing offshore import pipelines are eligible for derogation".⁵²

55. The Claimant next complains about alleged **undermining of NSP2AG's investment in the Nord Stream 2 pipeline project** in its pleas before the Court of Justice of the European Union regarding:

(i) breaches of due process laid down in essential procedural requirements in EU law (**Fifth and Sixth pleas in law**), where the Claimant argues, in particular that the "Amending Directive was adopted in breach of requirements imposed under Protocol No 1 to the TEU and TFEU on the Role of National Parliaments in the European Union, Protocol No 2 to the TEU and TFEU on the Application of the Principles of Subsidiarity and Proportionality, and the Interinstitutional Agreement on Better Law-Making"⁵³ and by a "failure to state reasons as required by Article 296 TFEU".⁵⁴

(ii) arbitrariness and unreasonableness because the means used in the Amending Directive would allegedly not support the stated objectives (**Second plea in law – proportionality and Fourth plea in law – misuse of powers**), where the Claimant argues, in particular, that the Amending Directive "is **incapable of achieving its stated objectives** and cannot, in any event, make a sufficiently meaningful contribution to those objectives that **outweigh the burdens it poses**"⁵⁵ and there

⁵² **EXHIBIT RLA-2** Action brought on 25 July 2019 — *Nord Stream 2 v Parliament and Council* (Case T-526/19) (2019/C 305/80), O.J. 9 September 2019 C 305/70 (emphasis added).

⁵³ **EXHIBIT RLA-2** Action brought on 25 July 2019 — *Nord Stream 2 v Parliament and Council* (Case T-526/19) (2019/C 305/80), O.J. 9 September 2019 C 305/70, Fifth Plea.

⁵⁴ **EXHIBIT RLA-2** Action brought on 25 July 2019 — *Nord Stream 2 v Parliament and Council* (Case T-526/19) (2019/C 305/80), O.J. 9 September 2019 C 305/70, Sixth Plea.

⁵⁵ **EXHIBIT RLA-2** Action brought on 25 July 2019 — *Nord Stream 2 v Parliament and Council* (Case T-526/19) (2019/C 305/80), O.J. 9 September 2019 C 305/70, Second Plea (emphasis added).

would be “**misuse of powers**, as the Amending Directive was adopted for a purpose other than those purposes for which the powers used to pass it were conferred”.⁵⁶

(iii) undermining of legitimate expectations because of failure to respect the “general EU law principle of **legal certainty**” (**Third Plea in law**), where the Claimant argues, in particular, that the Amending Directive “fails to incorporate appropriate adaptations with respect to the particular situation of the Applicant, but on the contrary, is specifically designed to impact it negatively”.⁵⁷

(b) The “request for relief” is the same in both disputes

56. Second, the request for relief is also the same:

57. In the **arbitration proceedings**, the Claimant “seeks a declaration of breach and injunctive relief (and reserves the right to seek, in addition or in the alternative, pecuniary compensation)”.⁵⁸ In its Memorial, the Claimant requests that the Tribunal order that “those provisions which became applicable to Nord Stream 2 as a result of the Amending Directive” be removed.⁵⁹ The Claimant further explains that it wants to obtain restitution by “re-establishing the situation which would have existed had the internationally wrongful act of the EU’s breach of the Energy Charter Treaty not been committed”.⁶⁰ According to the Claimant this is the “only way of providing NSP2AG with restitution”.⁶¹ The Claimant seeks to “prevent the impact of the Amending Directive on NSP2AG”.⁶²

58. In **its case before the Court of Justice of the European Union**, the Claimant claims that the Court should “order the annulment of Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 in its entirety” and “order the defendants to pay the applicant’s costs in these proceedings”.⁶³

⁵⁶ **EXHIBIT RLA-2** Action brought on 25 July 2019 — *Nord Stream 2 v Parliament and Council* (Case T-526/19) (2019/C 305/80), O.J. 9 September 2019 C 305/70, Fourth Plea (emphasis added).

⁵⁷ **EXHIBIT RLA-2** Action brought on 25 July 2019 — *Nord Stream 2 v Parliament and Council* (Case T-526/19) (2019/C 305/80), O.J. 9 September 2019 C 305/70, Third Plea (emphasis added).

⁵⁸ Notice of Arbitration, para. 3. See also para. 52.

⁵⁹ Claimant’s Memorial of 3 July 2020, para. 30. See also para. 527(vi) and para. 486.

⁶⁰ Claimant’s Memorial of 3 July 2020, para. 503. See also para. 507.

⁶¹ Claimant’s Memorial of 3 July 2020, para. 507.

⁶² Claimant’s Memorial of 3 July 2020, para. 511.

⁶³ **EXHIBIT RLA-2** Action brought on 25 July 2019 — *Nord Stream 2 v Parliament and Council* (Case T-526/19) (2019/C 305/80), O.J. 9 September 2019 C 305/70, at 71.

59. Hence, the European Union considers that the claims share the same fundamental basis, namely the alleged unlawfulness of the Amending Directive, and that, therefore, the fork-in-the-road clause is applicable. The European Union considers it indeed undesirable that a claimant would be able to bring parallel proceedings on the same fundamental basis. This is precisely what the clause intends to avoid. For these reasons, the European Union respectfully requests the present Tribunal to decline jurisdiction.

**2.1.5 PAST ARBITRAL AWARDS THAT APPLIED THE “TRIPLE IDENTITY TEST”
CAN BE DISTINGUISHED FROM THE PRESENT CASE**

60. Some earlier investment treaty tribunals, when called upon to assess a jurisdictional objection based upon a fork-in-the-road clause, incorrectly substituted the actual language of the clause in the treaty for elements of a completely different test, borrowed from the distinct context of “*lis pendens*”. As discussed hereafter, these cases can be distinguished from the present case because they concern (i) different fork-in-the-road clauses; (ii) completely different facts; and (iii) – as also recognised in the above-mentioned awards – ignored the object and purpose of fork-in-the-road clauses.

61. The key factor distinguishing the awards in question from those considered above was that the tribunals, refused to apply the fork-in-the-road clause in the treaty to defeat jurisdiction, except in cases of strict identity between:

- i. parties;
- ii. object; and
- iii. cause of action.⁶⁴

62. In other words, rather than apply the fork-in-the-road clause on its own terms, these tribunals, applying the so-called “triple identity” test overlaid the actual language of the treaty with a test of their own making, borrowed from a specific and different context, that of *lis pendens*.

63. The *lis pendens* principle is a jurisdictional principle on the basis of which a court or an arbitral tribunal can rule that it is not appropriate to pursue the dispute before it because the dispute is already pending before another court or tribunal. *Lis pendens* prevents a court or tribunal from hearing a case that is already pending before a different court or tribunal. As an illustration, Article 29 of the Brussels I Regulation provides that a court of an EU Member State is prevented from hearing a dispute whenever “proceedings involving the same

cause of action and between the same parties” have already been brought before a court or tribunal of another EU Member State.⁶⁵ In the case of *lis pendens*, the court or tribunal is invoking a freestanding legal principle subject to recognised and specific limitations; whereas in the case of a fork-in-the-road clause, a tribunal is before a treaty provision which it must apply in accordance with its terms, without importing restrictions not negotiated or agreed between the treaty partners themselves.

64. The “triple identity test” indeed was originally relied upon in investment treaty arbitration in a pure *lis pendens* context, in *Benvenuti & Bonfant v. Congo*.⁶⁶ In that dispute, the treaty in question lacked a fork-in-the-road clause. The Congo instead raised a jurisdictional objection based on the principle of *lis pendens*, relying on the existence of proceedings which the Republic had initiated in the Revolutionary Court of Brazzaville against Mr. Bonfant. The case therefore did not concern the application of a fork-in-the-road clause, at all, and thus the analysis drew on different premises. The ICSID arbitral tribunal considered whether it had to stay the proceedings in light of the Congo’s submissions. To resolve this question, in the absence of any guidance from the treaty, it considered whether there was “identity of the parties, of the subject matter, and of the cause of the suits pending before the two tribunals”.⁶⁷ The arbitral tribunal concluded that the dispute before the Congolese court involved Mr. Bonfant, and not the company Benvenuti & Bonfant in the ICSID proceedings. Given that there was no identity of parties, the arbitral tribunal rejected the *lis pendens* claim.⁶⁸
65. In later awards, arbitral tribunals that were faced with the invocation of a fork-in-the-road clause by a party to a dispute, looking for a precedent, improperly relied upon *Benvenuti* and, through it, incorrectly imported the “triple identity test” into the distinct context of fork-in-the-road clauses. In so doing, these tribunals failed to interpret the fork-in-the-road clauses before them on the basis of the *Vienna Convention on the Law of Treaties*. The distinct context of

⁶⁴ See, for instance, **EXHIBIT RLA-18** *Pey Casado v. Republic of Chile*, ICSID Case No. ARB/98/2, Award (8 May 2008); **EXHIBIT RLA-19** *Toto Costruzioni Generali S.P.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (11 September 2009).

⁶⁵ **EXHIBIT RLA-20** Article 29(1) of Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, O.J. 2012 L 351.

⁶⁶ **EXHIBIT RLA-21** *Benvenuti & Bonfant s.r.l. v. People’s Republic of the Congo*, ICSID Case No. ARB/77/2, Award, 748 (8 August 1980), 21 I.L.M. 740 (1982).

⁶⁷ **EXHIBIT RLA-21** *Benvenuti & Bonfant s.r.l. v. People’s Republic of the Congo*, ICSID Case No. ARB/77/2, Award, 748 (8 August 1980), 21 I.L.M. 740 (1982), at 744.

⁶⁸ *Ibid.*

- these cases also makes them inapposite precedent for resolving the issues before the present tribunal.
66. One of the first of such cases was *CMS v. Argentina*.⁶⁹ This dispute concerned the change in tariff regime for a privatized State utility. The licence holder of that facility affected by the change was TGN, an Argentine company. TGN itself was unable to bring a claim under the US-Argentina treaty due to the absence of binationality. Instead, the claim was brought by CMS, who were minority TGN shareholders. The US-Argentina BIT included a fork-in-the-road clause which required “the national or company concerned” to submit “the investment dispute” either “to the courts or the administrative tribunals of the [host Party]; or to arbitration including inter alia to ICSID”.
67. Argentina claimed that the tribunal lacked jurisdiction inter alia because TGN was required under the license to submit disputes to the Argentine Federal Court, and noted that it had in fact taken part in a domestic proceeding, arguing that this violated the fork-in-the-road clause. CMS successfully argued in response that its claim was distinct from the administrative appeal TGN had filed, which in any event was simply a third party application in the context of an appeal filed by the Argentina Ombudsman. CMS was in fact filing a wholly distinct claim before the BIT tribunal, one which TGN itself was barred from pursuing. TGN was barred from making a claim before the courts or through arbitration due to the provisions of an Argentina Decree and CMS, as the only available “investor”, had an independent right to bring an ICSID claim, and elected this route pursuant to Article 26 of the Convention.
68. It was in this context that the *CMS* tribunal ruled that that “decisions of several ICSID tribunals have held that as contractual claims are different from treaty claims even if there had been or there currently was a recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claims to arbitration”.⁷⁰
69. All of these circumstances are fundamentally different from those of the present case, where the same Claimant has brought fundamentally the same claims seeking the same relief before three different tribunals. Unlike *CMS*, there is no issue of shareholders of NSP2AG being forced to bring an ECT claim because NSP2AG itself cannot. Nor, unlike in *CMS*, is there a substantial

⁶⁹ **EXHIBIT RLA-22** *CMS Gas Transmission Co. v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, 17 July 2003.

⁷⁰ *Ibid.*, para. 80.

difference here between the measures subject to proceedings before the ECT and before the Court of Justice of the European Union, or with regard to the relief sought. In short, *CMS* offers no relevant precedent for the application of the fork-in-the road clause in the present case.

70. The tribunal in *Azurix v. Argentina* was facing facts similar to those at issue in *CMS* and – unsurprisingly – took the same approach as in *CMS* when applying a fork-in-the-road clause.⁷¹ As in *CMS*, *Azurix* had an Argentine corporate vehicle which had entered into licensing agreements with the Argentina State. *Azurix* as shareholder brought the BIT claim, not the local vehicle. As in *CMS*, Argentina argued that the BIT claim was precluded because the licensing arrangements with the local vehicle precluded claims being pursued in other fora, and in any event argued that the already pending proceedings constituted an irrevocable choice of forum. Rejecting Argentina’s position, the tribunal not only noted that the claimants in the two proceedings were different,⁷² but also found that the domestic proceedings were not a true appeal before an independent tribunal.⁷³ In other words, as in *CMS*, the key to the finding was that the proceedings concerned different issues, were brought by different parties, and sought different relief, in circumstances in which the investment tribunal was the only possible vehicle for the *Azurix* claims. This is quite different from the present case, where the same party (NSP2AG) is seeking effectively the same relief in respect of the same facts before the Court of Justice of the European Union and the ECT Tribunal. In other words, unlike *CMS* or *Azurix*, the present case illustrates precisely what fork-in-the-road clauses are meant to prevent.

71. In *Enron v. Argentina*, the factual circumstances resembled those in *Azurix* and in *CMS*, and led to similar results. By the same token, this case is no more apposite to the present circumstances than either previous case. Faced with Argentina’s attempt to preclude in effect the only opportunity to seek redress, the tribunal again relied on the difference between a contract claim and a claim based on the violation of a treaty⁷⁴ to reject the State’s request. The tribunal further referred to the *lis pendens* principle, noting that the claimants in the arbitration were different from the claimant in the domestic

⁷¹ **EXHIBIT RLA-23** *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, para. 88.

⁷² *Ibid.*, para. 90.

⁷³ **EXHIBIT RLA-23** *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, para. 92.

⁷⁴ **EXHIBIT RLA-24** *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, para. 97.

proceedings.⁷⁵ Again, these specific circumstances and conclusions are of no assistance in the present context, where the same party is instead seeking to litigate the same dispute in multiple fora. It is perhaps unsurprising that the tribunals in the Argentina cases were searching for reasons to decline Argentina's request; what would be surprising would be an attempt to rely on their reasoning in the present, wholly different context.

72. In *Occidental v. Ecuador*, the tribunal indeed stressed that it had to consider the specific circumstances of the dispute, and noted that an arbitral tribunal has jurisdiction to the extent that the nature of the dispute is principally, albeit not exclusively, treaty-based.⁷⁶ Based on this distinction, the tribunal rejected the application of the fork-in-the-road clause.
73. Reflecting more recent jurisprudence, the *Occidental* tribunal focussed on the "fundamental nature" of the dispute before both tribunals and whether they are fundamentally the same. The tribunal to this effect noted:

The *Vivendi* ad hoc Committee explained that "In a case where the **essential basis of a claim** brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract". [footnote omitted] However, to the extent that **the fundamental legal basis of a claim** is a treaty, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state "cannot operate as a bar to the application of the treaty standard". [footnote omitted] A similar reasoning applies to the operation of the "fork in the road" mechanism, as **the choice of one or other forum will depend on the nature of the dispute submitted** and these are not necessarily incompatible."⁷⁷

74. The tribunal went on to find that the disputes before the domestic courts and before the Tribunal were different and indeed complementary.⁷⁸ Further, the tribunal found that the Claimant's pursuit of administrative relief before Ecuador's courts was dictated by the very short timeline for such proceedings under Ecuadorian law.⁷⁹ This is quite different from the present case where the Claimant was not "forced" in any sense to pursue its claim before three different fora. Moreover, the tribunal's reasoning in *Occidental* supports that

⁷⁵ *Ibid.*, para. 98.

⁷⁶ **EXHIBIT RLA-25** *Occidental Expl. & Prod. Co. v. Republic of Ecuador*, Case No. UN 3467, Final Award, 1 July 2004, para. 57.

⁷⁷ **EXHIBIT RLA-25** *Occidental Expl. & Prod. Co. v. Republic of Ecuador*, Case No. UN 3467, Final Award, 1 July 2004, para. 53 (emphasis added).

⁷⁸ **EXHIBIT RLA-25** *Occidental Expl. & Prod. Co. v. Republic of Ecuador*, Case No. UN 3467, Final Award, 1 July 2004, para. 58.

⁷⁹ **EXHIBIT RLA-25** *Occidental Expl. & Prod. Co. v. Republic of Ecuador*, Case No. UN 3467, Final Award, 1 July 2004, para. 61 ("The Tribunal is of the view that in this case the investor did not have a real choice. Even if it took the matter instantly to arbitration, which is not that easy to do, the protection of its right to object to the adverse decision of the SRI would have been considered

- put forward by later tribunals, in that the focus is on the essential identity between disputes before an investment treaty tribunal and before local courts.
75. Other subsequent cases simply picked up on the “triple identity” analysis from the Argentina cases, without considering whether it was appropriate for the fork-in-the-road context. Generally speaking, these cases tend to address parallel claims in contract and under the investment treaty. As such, they are equally unhelpful when considering the present case, where the same claimant seeks to bring two parallel and essentially the same “public law” claims before the European and ECT fora.
76. In *Pey Casado v. Chile*, the Respondent claimed that pursuit by the Claimant of a claim before its domestic court violated the fork-in-the-road clause in the treaty. Rejecting this argument, the tribunal noted that while the two cases involved the same parties, they relied on distinct causes of action, as certain claims before the national court were explicitly excluded from the scope of the arbitration proceedings.⁸⁰ This is unlike the present case, in which the claims before the Court of Justice of the European Union and before the ECT Tribunal are essentially the same.
77. In *Toto Costruzioni v. Lebanon*, Lebanon, relying on the fork-in-the-road clause in the treaty, argued that the ICSID tribunal lacked jurisdiction over certain claims because Toto had already submitted these claims to the Conseil d’Etat. The tribunal considered that it would only refuse jurisdiction if “a claim with the same object, parties and cause of action [had] already [been] brought before a different judicial forum”.⁸¹ The tribunal dismissed the fork-in-the-road application, finding that “contractual claims arising out of the Contract do not have the same cause of action as Treaty claims”.⁸² Again, the present case is very different, since NSP2AG seeks to bring two parallel and essentially the same “public law” claims before the Court of Justice of the European Union and the ECT Tribunal.
78. In a number of awards, the tribunal did not refer to the triple identity test explicitly, but based itself on an element of the test to refuse the application of

forfeited if the application before the local courts were not made within the period mandated by the Tax Code.”)

⁸⁰ **EXHIBIT RLA-18** *Pey Casado v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, paras. 483-491.

⁸¹ **EXHIBIT RLA-19** *Toto Costruzioni Generali S.P.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, para. 211.

⁸² *Ibid.*, para. 212.

the fork-in-the-road clause. In the following cases, the lack of the identities of the parties was a relevant factor:

- i. Olguin v. Paraguay (lack of identity of the respondent in the relevant disputes);⁸³*
- ii. Lauder v. Czech Republic (claimant in domestic and arbitration proceedings were separate legal entities);⁸⁴*
- iii. LG&E v. Argentina (claimant in domestic and arbitration proceedings were separate legal entities);⁸⁵*
- iv. Pan American v. Argentina (lack of identity of the respondent in the relevant disputes);⁸⁶*
- v. Total v. Argentina (claimant in domestic and arbitration proceedings were separate legal entities).⁸⁷*

79. The present dispute is very different: the Claimant – NSP2AG – is identical both before the Court of Justice of the European Union and the present Tribunal.

80. In the seven above-mentioned cases, the tribunals were called upon to determine whether the fork-in-the-road clause had been violated, in circumstances in which investments arose out of contractual relations with the host State. Therefore, the nature of the claims before the different tribunals was distinct, which made it easy for the tribunals to find the fork-in-the-road clause had not been engaged. This was all the more the case in that typically in these cases the party bringing the investment claim was different from that pursuing the domestic contract claim, and indeed typically the investment treaty claimant was the only entity that could have brought the investment claim. All of these factual circumstances drew tribunals into a “triple identity” type of analysis. As explained, more recent jurisprudence has pursued a more finely targeted course (already nascent in the previous jurisprudence), asking whether the two proceedings pursue “essentially the same dispute”.

81. For all these reasons, the European Union considers that the “fundamental basis” test is the appropriate test to apply to the fork-in-the-road clause in Article 26(3)(b)(i) of the ECT. As explained above, this test is met in the present case.

⁸³ **EXHIBIT RLA-26** *Olguin v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Decision on Jurisdiction, 8 August 2000.

⁸⁴ **EXHIBIT RLA-27** *Lauder v. Czech Republic*, UNCITRAL Award, 3 September 2001.

⁸⁵ **EXHIBIT RLA-28** *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Objections to Jurisdiction, 30 April 2004.

⁸⁶ **EXHIBIT RLA-29** *BP America Prod. Co. v. Argentine Republic*, ICSID Case No. ARB/04/8, Decision on Preliminary Objections, 27 July 2006.

⁸⁷ **EXHIBIT RLA-30** *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010.

82. However, as explained in the next sub-section, even if the “triple identity test” had to be applied to the present case (*quod non*), the Tribunal would still need to decline jurisdiction, since the conditions of that test are met.

2.1.6 THE PRESENT DISPUTE BEFORE THE ECT TRIBUNAL AND THE DISPUTE BEFORE THE COURT OF JUSTICE OF THE EUROPEAN UNION MEET THE TRIPLE IDENTITY TEST

83. In the alternative, the European Union considers that the proceedings before the General Court of the European Union (Case T-526/19 – appealed before the Court of Justice in Case C-348/20P) and the present arbitration proceedings meet the “triple identity” test developed in the context of claims of *lis pendens*. Thus, to the extent this test is apposite in the context of a fork-in-the-road clause (*quod non*), it is in any event fulfilled here in that there is indeed identity of:

- i. parties;
- ii. object; and
- iii. cause of action

between the proceedings before the Court of Justice of the European Union and the subsequent ECT proceedings.

84. When applying this triple identity test, the Tribunal therefore should conclude it must decline jurisdiction over the present case, whether it applies the “triple identity” test relevant to *lis pendens* or whether it applies the “fundamental basis” test appropriate to a fork-in-the-road clause.

(a) Identity of parties

85. First, the parties to the case before the General Court and before this Arbitral Tribunal are *identical*. The Applicant in Case T-526/19 is “Nord Stream 2 AG (Zug, Suisse)”.⁸⁸ The present arbitration proceedings are also brought by “Nord Stream 2 AG ... a company incorporated in Switzerland”.⁸⁹ The Defendants in Case T-526/19 are the European Parliament and the Council of the European Union, the legislators of the European Union.⁹⁰ The arbitration proceedings are also brought against the European Union.⁹¹

⁸⁸ **EXHIBIT RLA-2** Action brought on 25 July 2019 — *Nord Stream 2 v Parliament and Council* (Case T-526/19) (2019/C 305/80), O.J. 9 September 2019 C 305/70.

⁸⁹ See Notice of Arbitration, paras. 1 and 5.

⁹⁰ **EXHIBIT RLA-2** Action brought on 25 July 2019 — *Nord Stream 2 v Parliament and Council* (Case T-526/19) (2019/C 305/80), O.J. 9 September 2019 C 305/70.

⁹¹ See Notice of Arbitration, para. 1.

(b) Identity of object

86. Second, the object of the application before the General Court and the challenge before this Arbitral Tribunal is also *the same*. In Case T-526/19, NSP2AG claims that the Court should “order the annulment of Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 in its entirety” and “order the defendants to pay the applicant’s costs in these proceedings”.⁹²
87. In the arbitration proceedings, NSP2AG “seeks a declaration of breach and injunctive relief (and reserves the right to seek, in addition or in the alternative, pecuniary compensation)”.⁹³ In its Memorial, NSP2AG requests that the Tribunal order that the “EU, by means of its own choosing, remove the application of Articles 9, 10, 11, 32, 41(6), 41(8) and 41(10) of the Gas Directive to NSP2AG and Nord Stream 2”.⁹⁴ NSP2AG further explains that it wants to obtain restitution by “re-establishing the situation which would have existed had the internationally wrongful act of the EU’s breach of the Energy Charter Treaty not been committed”.⁹⁵ According to NSP2AG this is the “only way of providing NSP2AG with restitution”.⁹⁶ NSP2AG seeks to “prevent the impact of the Amending Directive on NSP2AG”.⁹⁷ In other words, NSP2AG essentially requests the annulment of the Amending Directive (EU) 2019/692 such that the obligations in the Gas Directive are not applicable to Nord Stream 2 and NSP2AG. The Claimant indeed requests that the Tribunal order that “those provisions which became applicable to Nord Stream 2 as a result of the Amending Directive” be removed.⁹⁸ The object of the proceedings before the Court of Justice of the European Union and the object of the proceedings before this Arbitral Tribunal are thus the same.

(c) Identity of cause of action

88. Third, the Application in Case T-526/19 and the challenge in the present arbitration proceedings also share the same cause of action. “Identity of cause of action” cannot mean that identical pleas or arguments must be submitted in the different fora. Otherwise, fork-in-the-road clauses would be deprived of

⁹² **EXHIBIT RLA-2** Action brought on 25 July 2019 — *Nord Stream 2 v Parliament and Council* (Case T-526/19) (2019/C 305/80), O.J. 9 September 2019 C 305/70, at 71.

⁹³ Notice of Arbitration, para. 3. See also para. 52.

⁹⁴ Claimant’s Memorial of 3 July 2020, para. 527(vi). See also para. 486.

⁹⁵ Claimant’s Memorial of 3 July 2020, para. 503. See also para. 507.

⁹⁶ Claimant’s Memorial of 3 July 2020, para. 507.

⁹⁷ Claimant’s Memorial of 3 July 2020, para. 511.

their *effet utile*. It would be easy to circumvent such clauses by remodelling some of the claims before one Court or Tribunal. In addition, such an interpretation would also be against the wording in Article 26 ECT, which refers to the same “dispute” rather than same “claim”.

89. In Case T-526/19, NSP2AG raises six pleas in law. In the present arbitration proceedings, NSP2AG makes five claims of breach of the ECT in respect of Directive (EU) 2019/692.⁹⁹ All of these claims under the ECT have corresponding claims before the Court of Justice of the European Union.

90. The European Union, in making this argument, relies on the public version of the NSP2AG’s pleas in law and main arguments, published in the Official Journal of the European Union on 9 September 2019. This public version demonstrates clearly the correspondence and parallelism of the cause of action. It can already be noted that these pleas in law very often use the same words as the breaches that NSP2AG alleges in the present dispute.¹⁰⁰

i) Fair and equitable treatment claim

91. NSP2AG **first claim** is a **breach of the fair and equitable treatment standard** in Article 10(1) of the ECT.¹⁰¹ This claim has several components that correspond to NSP2AG’s pleas in law before the Court of Justice of the European Union.

(a) Due process and denial of justice

92. First, NSP2AG claims that, through the Amending Directive, the European Union failed to afford **due process and denied justice**.¹⁰² Under this heading, NSP2AG claims that **the objectives cited in the Amending**

⁹⁸ Claimant’s Memorial of 3 July 2020, para. 30. See also para. 527(vi) and para. 486.

⁹⁹ Notice of Arbitration, para. 49. See also Claimant’s Memorial of 3 July 2020, paras. 40-48 and 373-484. The European Union notes that NSP2AG listed in its Notice of Arbitration also a breach of the obligation under Article 10(1) of the ECT to “create stable, equitable, favourable and transparent conditions for NSP2AG’s investment”. The European Union understands for the Claimant’s Memorial of 3 July 2020 that NSP2AG does not bring such separate and self-standing claim, but considers this first sentence of Article 10(1) to “provide[] the general context for the conditions in which investors develop legitimate expectation of stability around their investments”. NSP2AG notes that it “informs and elucidates the meaning of the post-investment obligations laid down in Article 10”. See Claimant’s Memorial of 3 July 2020, para. 371.

¹⁰⁰ The European Union notes that NSP2AG’s Application to the General Court, containing the more detailed arguments in support of these pleas, is not in the public domain. In case NSP2AG were to produce this Application, or the Tribunal were to request its production, the European Union is ready to further specify the correspondence between pleas and claims on this basis.

¹⁰¹ Claimant’s Memorial of 3 July 2020, Section VIII.3.

¹⁰² Claimant’s Memorial of 3 July 2020, para. 388-393.

- Directive are not the “EU’s true motivations for passing it”.**¹⁰³ NSP2AG asserts that “the extension of the rules of the Third Gas Directive to offshore import pipelines ... cannot achieve the EU’s aims and is inconsistent with previously existing energy policy”.¹⁰⁴
93. This corresponds to NSP2AG’s **fourth plea in law before the Court of Justice of the European Union**, where it alleges “**misuse of powers, as the Amending Directive was adopted for a purpose other than those purposes designed to impact it negatively**”.¹⁰⁵ According to the case-law of the Court of Justice of the European Union, a measure is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken solely, or at the very least chiefly, for ends other than those for which the power in question was conferred or with the aim of evading a procedure specifically prescribed by the Treaties for dealing with the circumstances of the case.¹⁰⁶
94. Further, NSP2AG alleges in the ECT proceeding a **lack of due process**, citing an alleged “Improper Legislative Process”, and more specifically the EU’s alleged “failure to conduct an impact assessment in relation to a legislative measure such as the Amending Directive” and because of an alleged lack of “transparency in terms of law-making and the legal framework itself”.¹⁰⁷
95. These allegations correspond to **NSP2AG’s fifth plea in law before the Court of Justice of the European Union**, where it alleges a “breach of essential procedural requirements, as the Amending Directive was adopted in breach of requirements imposed under Protocol No 1 to the TEU and TFEU on the Role of National Parliaments in the European Union, Protocol No 2 to the TEU and TFEU on the Application on the Principles of Subsidiarity and Proportionality, and the Interinstitutional Agreement on Better Law-Making”.¹⁰⁸ In its Memorial, the Applicant itself refers to the latter Interinstitutional Agreement,¹⁰⁹ requiring transparency and that an impact assessment of envisaged legislation to be performed under certain circumstances.

¹⁰³ Claimant’s Memorial of 3 July 2020, para. 389 (emphasis added).

¹⁰⁴ Claimant’s Memorial of 3 July 2020, para. 390.

¹⁰⁵ **EXHIBIT RLA-2** Action brought on 25 July 2019 — *Nord Stream 2 v Parliament and Council* (Case T-526/19) (2019/C 305/80), O.J. 9 September 2019 C 305/70, at 71.

¹⁰⁶ See Judgement of the Court of Justice of 29 November 2018, *Bank Tejerat*, C-248/17 P, ECLI:EU:C:2018:967, paragraph 86 (**EXHIBIT RLA-31**); Judgment of the Court of Justice of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 135 (**EXHIBIT RLA-32**).

¹⁰⁷ Claimant’s Memorial of 3 July 2020, para. 391-392.

¹⁰⁸ **EXHIBIT RLA-2** Action brought on 25 July 2019 — *Nord Stream 2 v Parliament and Council* (Case T-526/19) (2019/C 305/80), O.J. 9 September 2019 C 305/70, at 71.

¹⁰⁹ Claimant’s Memorial of 3 July 2020, para. 391.

(b) Arbitrary or discriminatory treatment

96. Under the fair and equitable treatment standard of the ECT, NSP2AG claims, second, that NSP2AG's investment suffered from "**arbitrary or discriminatory treatment**".
97. Before the ECT Tribunal, NSP2AG claims that the EU's alleged "non-transparent and unreasonably fast-tracked passing of the Amendment Directive ... clearly amounts to arbitrary treatment".¹¹⁰
98. This allegation corresponds directly to that made before the Court of Justice of the European Union, where the Claimant under its **fifth plea in law** alleges a "**breach of essential procedural requirements**", including compliance with "the Interinstitutional Agreement on Better Law-Making",¹¹¹ which requires, *inter alia* "utmost transparency of the legislative process".¹¹²
99. Further, NSP2AG argues before the ECT Tribunal that the Amending Directive would be arbitrary because it would "**lack[] proper purpose**", suggesting that the "**Purported Objectives of the Amending Directive cannot be achieved**" and that the Directive is "without proper purpose and **unreasonable**".¹¹³
100. This corresponds to NSP2AG's **second plea in law before the Court of Justice of the European Union**, where it alleges "infringement of the general EU law principles of proportionality as the amending Directive is incapable of achieving its stated objectives and **cannot, in any event, make a sufficiently meaningful contribution to those objectives that outweigh the burdens it imposes**". It also overlaps with the **fourth plea in law** before the Court of Justice of the European Union, where it alleges "misuse of powers, as the Amending Directive **was adopted for a purpose other than those purposes** designed to impact it negatively".¹¹⁴
101. Finally, NSP2AG also argues before the ECT Tribunal that the Amending Directive "**lacks proportionality because targeting ... only Nord Stream**

¹¹⁰ Claimant's Memorial of 3 July 2020, para. 398.

¹¹¹ **EXHIBIT RLA-2** Action brought on 25 July 2019 — *Nord Stream 2 v Parliament and Council* (Case T-526/19) (2019/C 305/80), O.J. 9 September 2019 C 305/70, at 71.

¹¹² **Exhibit RLA-33**, Interinstitutional Agreement of 13 April 2016 on Better Law-Making, O.J. 12 May 2016, L 123/1, para. 2. See also para. 19.

¹¹³ Claimant's Memorial of 3 July 2020, para. 399.

¹¹⁴ **EXHIBIT RLA-2** Action brought on 25 July 2019 — *Nord Stream 2 v Parliament and Council* (Case T-526/19) (2019/C 305/80), O.J. 9 September 2019 C 305/70, at 71.

- 2” and is “arbitrary in the sense that it targets Nord Stream 2 exclusively, as the only investment affected by the Amending Directive”.¹¹⁵
102. This corresponds to NSP2AG’s **first plea in law before the Court of Justice of the European Union**, where it claims that the “**amending Directive leaves the applicant without the prospect of derogation from the application of the rules of Directive 2009/73/EC ... whereas all other existing offshore import pipelines are eligible for derogation**”. This also corresponds directly to NSP2AG’s **second plea in law**, “alleging infringement of the general EU law principle of **proportionality**”.
103. NSP2AG’s further claim of **discriminatory treatment**¹¹⁶ under the fair and equitable treatment standard in Article 10(1) ECT also directly overlaps with NSP2AG’s **first plea in law** before the Court of Justice of the European Union, where it alleges infringement of the general EU law principle of **equal treatment**. NSP2AG argues that the amending Directive leaves the applicant without the prospect of derogation from the application of the rules of Directive 2009/73/EC whereas all other existing offshore import pipelines would be eligible for derogation.¹¹⁷

(c) Failure to act in good faith

104. Under the fair and equitable treatment standard under the ECT, NSP2AG claims, third, a **failure to act in good faith**. NSP2AG argues that the EU’s conduct in connection with the Amending Directive “has patently been lacking good faith”.¹¹⁸ NSP2AG explains that this is because the Amending Directive’s stated objectives “do not correspond to its true motivations”.¹¹⁹
105. As explained, this corresponds to NSP2AG’s **fourth plea in law** before the Court of Justice of the European Union, invoking precisely that there would be misuse of powers, on the basis that, allegedly, “the Amending Directive was adopted for a purpose other than those purposes for which the powers used to pass it were conferred”.

¹¹⁵ Claimant’s Memorial of 3 July 2020, para. 400.

¹¹⁶ Claimant’s Memorial of 3 July 2020, paras. 402-415.

¹¹⁷ **EXHIBIT RLA-2** Action brought on 25 July 2019 — *Nord Stream 2 v Parliament and Council* (Case T-526/19) (2019/C 305/80), O.J. 9 September 2019 C 305/70, First Plea in Law.

¹¹⁸ Claimant’s Memorial, para. 418.

¹¹⁹ Claimant’s Memorial, para. 418 (i).

106. Further, NSP2AG claims before the ECT Tribunal that the EU “followed an Improper Legislative Process” and “Lacks ... Transparency”.¹²⁰ This corresponds to NSP2AG’s **fifth plea in law**, alleging “breach of essential procedural requirements”, as explained above.

(d) Failure to act proportionately

107. Under the fair and equitable treatment standard under the ECT, NSP2AG claims, fourth, that the European Union failed to **act proportionately**. NSP2AG argues that “the Purported Objectives of the Amending Directive are specious and cannot be achieved” and that the “burden imposed on NSP2AG clearly outweigh[s] any arguable policy benefit of the Amending Directive”.¹²¹

108. This corresponds, almost word-by-word, to NSP2AG’s **second plea in law** before the Court of Justice of the European Union, which is the alleged “infringement of the **general EU law principle of proportionality** as the amending Directive is incapable of achieving its stated objectives and cannot, in any event, make a sufficiently meaningful contribution to those objectives that outweigh the burdens it imposes”.¹²²

(e) Legitimate expectations

109. Under the ECT fair and equitable treatment standard, NSP2AG claims, fifth, that there would be a **breach of NSP2AG’s legitimate expectations**.¹²³ NSP2AG argues that it “did not, should not and could not have anticipated that the EU, on the specious pretext of completing the internal energy market, would extend the application of the Third Gas Directive to offshore import pipelines in a manner which discriminated against, and deliberately targeted, Nord Stream 2”.¹²⁴

110. This claim corresponds to NSP2AG’s **third plea in law** before the Court of Justice of the European Union, where it alleges that the European Union infringed “the general EU law principle of legal certainty as the amending Directive fails to incorporate appropriate adaptations with respect to the

¹²⁰ Claimant’s Memorial, para. 418(ii) and (iii).

¹²¹ Claimant’s Memorial, para. 421.

¹²² **EXHIBIT RLA-2** Action brought on 25 July 2019 — *Nord Stream 2 v Parliament and Council* (Case T-526/19) (2019/C 305/80), O.J. 9 September 2019 C 305/70, Second Plea in Law.

¹²³ Claimant’s Memorial, paras. 423-428.

¹²⁴ Claimant’s Memorial of 3 July 2020, para. 428.

particular situation of the Applicant, but on the contrary is specifically designed to impact it negatively”.¹²⁵ According to settled case-law of the Court of Justice, the principle of legal certainty requires, first, that rules of law must be clear and precise and, second, that their application must be foreseeable by those subject to them.¹²⁶ In EU law, the corollary of the principle of legal certainty is an obligation on the EU authorities to **protect legitimate expectations** where they have caused an applicant to entertain expectations.¹²⁷

(f) Failure to act transparently

111. Finally, under the fair and equitable treatment standard in the ECT, NSP2AG claims, sixth, a **failure to act transparently**. NSP2AG argues before the ECT Tribunal that the “EU’s failure to act transparently is manifest throughout the Improper Legislative Process” and refers to the alleged “failure to conduct an impact assessment” and the “acceleration of the adoption process”.¹²⁸
112. As explained, this claim overlaps with NSP2AG’s **fourth plea in law before the Court of Justice of the European Union**, where NSP2AG alleges a breach of essential procedural requirements, and, notably, the transparency requirement.

ii) Claim of impairment by unreasonable or discriminatory measures

113. NSP2AG’s **second claim** before the ECT Tribunal is **impairment by unreasonable or discriminatory measures**.¹²⁹ NSP2AG makes first an argument that the Amending Directive “constitutes an unreasonable measure in that it lacks proportionality”.¹³⁰ This corresponds to NSP2AG’s **second plea in law** before the Court of Justice of the European Union, alleging infringement of the general EU law principle of proportionality.

¹²⁵ **EXHIBIT RLA-2** Action brought on 25 July 2019 — *Nord Stream 2 v Parliament and Council* (Case T-526/19) (2019/C 305/80), O.J. 9 September 2019 C 305/70, Third Plea in Law.

¹²⁶ Judgment of the Court of Justice of 11 September 2019, *Călin*, C-676/17, EU:C:2019:700, para. 50 and the case-law cited (**EXHIBIT RLA-34**).

¹²⁷ Judgment of the General Court of 29 November 2016, *T & L Sugars and Sidul Açúcares v Commission*, T-103/12, EU:T:2016:682, para. 150 (**EXHIBIT RLA-35**). See also Judgement of the General Court of 10 March 2020, *International Forum for Sustainable Underwater Activities (IFSUA) v Council of the European Union*, Case T-251/18, EU:T:2020:89, paras. 88-89 (**EXHIBIT RLA-36**).

¹²⁸ Claimant’s Memorial of 3 July 2020, para. 432.

¹²⁹ Claimant’s Memorial of 3 July 2020, Section VIII.4.

¹³⁰ Claimant’s Memorial of 3 July 2020, para. 439.

114. Second, NSP2AG claims before the ECT Tribunal that the EU's passing of the Amending Directive "effectively amount to the **discriminatory targeting of Nord Stream 2**".¹³¹
115. This claim corresponds to NSP2AG's **first plea in law** before the Court of Justice of the European Union, alleging infringement of the general EU law principle of **equal treatment**. NSP2AG argues that the amending Directive leaves NSP2AG without the prospect of derogation from the application of the rules of Directive 2009/73/EC ... whereas all other existing offshore import pipelines are eligible for derogation. NSP2AG's focus in the ECT dispute on the alleged specific "targeting" of Nord Stream 2¹³² also overlaps with NSP2AG's **third plea in law** on legal certainty, where it argues that the Amending Directive is "**specifically designed to impact [NSP2AG] negatively**".

iii) Claim of failure to guarantee most constant protection and security

116. NSP2AG's **third claim** before the ECT Tribunal is an alleged breach of the **guarantee of most constant protection and security**.¹³³ NSP2AG argues that this standard "imposes an obligation on the EU to establish a legal framework to protect investments from wrongful interference and to take reasonable measures to ensure that said framework is properly enforced".¹³⁴ According to NSP2AG, the EU would have "undermined the promise of legal security inherent in the CPS standard included in Article 10(1)".¹³⁵
117. This claim corresponds to NSP2AG's **third plea in law** before the Court of Justice of the European Union, alleging infringement of the general EU law principle of legal certainty. As explained, it is settled case-law of the Court of Justice that the principle of **legal certainty** requires, first, that rules of law must be clear and precise and, second, that their application must be **foreseeable** by those subject to them.¹³⁶ In EU law, the corollary of the principle of legal certainty is an obligation on the EU authorities to protect

¹³¹ Claimant's Memorial of 3 July 2020, para. 442.

¹³² Claimant's Memorial of 3 July 2020, para. 442.

¹³³ Claimant's Memorial of 3 July 2020, Section VIII.5.

¹³⁴ Claimant's Memorial of 3 July 2020, para. 447.

¹³⁵ Claimant's Memorial of 3 July 2020, para. 451.

¹³⁶ Judgment of the Court of Justice of 11 September 2019, *Călin*, C-676/17, EU:C:2019:700, para. 50, para. 50 and the case-law cited (**EXHIBIT RLA-34**).

legitimate expectations where they have caused an applicant to entertain expectations.¹³⁷

iv) Claim of breach of the non-discrimination obligation in Article 10(7) ECT

118. NSP2AG's **fourth claim** before the ECT Tribunal is an alleged **breach of Article 10(7) ECT**,¹³⁸ requiring each Contracting Party to accord to investments in its Area of Investors of other Contracting Parties treatment no less favourable than that which it accords to investments of its own Investors or of the Investors of any other Contracting Party or any third states. This provision imposes a **non-discrimination obligation** in the form of an obligation to accord Most Favoured Nation treatment and National Treatment.¹³⁹ NSP2AG claims that NSP2AG and Nord Stream 2 are treated "less favourably by the EU in comparison to treatment by the EU of the like investors in other offshore import pipelines and their respective investments".¹⁴⁰

119. This corresponds to NSP2AG's **first plea in law** before the Court of Justice of the European Union, alleging infringement of the general EU law principle of **equal treatment**.

v) Claim of failure to meet the conditions for expropriation under Article 13 of the ECT

120. NSP2AG's **fifth claim** before the ECT Tribunal is an alleged breach of **Article 13 of the ECT**,¹⁴¹ being the obligation not to **expropriate** investments unless under the conditions set out in Article 13. NSP2AG claims that the Amending Directive "will prevent NSP2AG operating Nord Stream 2 as intended, fundamentally undermining the basis on which NSP2AG made its investment of over EUR 8 billion in Nord Stream 2".¹⁴² NSP2AG complains about the imposition of the unbundling requirements in the Gas Directive, which, in NSP2AG's view, would have the "practical effect ... that Nord Stream 2 will be

¹³⁷ Judgment of the General Court of 29 November 2016, *T & L Sugars and Sidul Açúcares v Commission*, T-103/12, EU:T:2016:682, para. 150 (**EXHIBIT RLA-35**). See also Judgement of the General Court of 10 March 2020, *International Forum for Sustainable Underwater Activities (IFSUA) v Council of the European Union*, Case T-251/18, EU:T:2020:89, paras. 88-89 (**EXHIBIT RLA-36**).

¹³⁸ Claimant's Memorial of 3 July 2020, Section VIII.6.

¹³⁹ Claimant's Memorial of 3 July 2020, para. 454.

¹⁴⁰ Claimant's Memorial of 3 July 2020, para. 462.

¹⁴¹ Claimant's Memorial of 3 July 2020, Section VIII.7.

¹⁴² Claimant's Memorial of 3 July 2020, para. 477.

unable to comply with the GTA and gain revenues from Gazprom Export, unable to maintain its financing structure, will become insolvent".¹⁴³

121. This claim corresponds to NSP2AG's **second plea in law** before the Court of Justice of the European Union, alleging infringement of the EU law principle of proportionality, claiming that the Amending Directive does not make a sufficiently meaningful contribution to the stated objectives "that outweigh the burden it imposes". This plea thus specifically focuses on the burden imposed on NSP2AG with regard to their investment in the Nord Stream 2 pipeline project. Moreover, it corresponds to the **third plea in law**, which is an alleged infringement of the general EU law principle of legal certainty. NSP2AG claims that the Directive "did not incorporate appropriate adaptations with respect to the particular situation of the Applicant" and would be "specifically designed to impact it negatively".¹⁴⁴ Here NSP2AG thus alleges specific targeting of NSP2AG's investment.

2.1.7 CONCLUSION

122. For all the above reasons, whether one applies the "fundamental basis" test or the "triple identity" test, one reaches the conclusion that the Tribunal lacks jurisdiction because of the Claimant has failed to respect the fork-in-the-road clause in Article 26(3) of the ECT. The European Union has not given its consent to bring the present dispute before ECT arbitration in circumstances in which the Claimant NSP2AG has already brought essentially the same dispute before the Court of Justice of the European Union.

2.2 THE ARBITRAL TRIBUNAL LACKS JURISDICTION *RATIONE PERSONAE* TO THE EXTENT THAT THE BREACHES OF THE ECT ALLEGED BY THE CLAIMANT RESULT FROM MEASURES OF THE MEMBER STATES FOR WHICH THE EUROPEAN UNION IS NOT RESPONSIBLE UNDER INTERNATIONAL LAW

2.2.1 INTRODUCTION

123. NSP2AG's claims relate the Amending Directive, which amends the Gas Directive. Directives can impose no legal obligations on the Claimant. The alleged breaches of the ECT, and the alleged ensuing damages, would not result from those EU measures. They could only result from measures which the EU Member States may or may not take within the scope of the margin of discretion accorded to them when they transpose and implement the EU directives challenged by the Claimant. In any event, those measures would not

¹⁴³ Claimant's Memorial of 3 July 2020, para. 482.

¹⁴⁴ **EXHIBIT RLA-2** Action brought on 25 July 2019 — *Nord Stream 2 v Parliament and Council* (Case T-526/19) (2019/C 305/80), O.J. 9 September 2019 C 305/70, Third Plea in Law.

be attributable to the European Union under international law. Nor would the European Union be otherwise responsible under international law for any alleged breaches of the ECT resulting from those measures, because the alleged breaches would not be required by EU Law.

124. To the extent the European Union is not responsible for the alleged breaches of the ECT, the Tribunal lacks jurisdiction *ratione personae* to rule on the dispute.¹⁴⁵

2.2.2 THE MEASURES CHALLENGED BY THE CLAIMANT

125. In its Notice of Arbitration of 28 September 2019, the Claimant set out its claims as follows:

NSP2AG seeks a declaration of breach and injunctive relief (and reserves the right to seek, in addition or in the alternative, pecuniary compensation) arising out of the EU's breaches of the ECT in connection with the EU's discriminatory introduction and enactment of Directive (EU) 2019/692 (the "Amending Directive"), amending Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas (the "Gas Directive" or "Third Gas Directive"), and the consequent impact of the Amending Directive on NSP2AG¹⁴⁶.

126. Similarly, in its Memorial of 3 July 2020, the Claimant has summarised its claims as follows:

NSP2AG brings this claim against the European Union (the "EU") in respect of the EU's discriminatory adoption of the Directive (EU) 2019/692 (the "**Amending Directive**"), amending Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas (the "**Gas Directive**" or the "**Third Gas Directive**") The Amending Directive fundamentally undermines NSP2AG's investment in the Nord Stream 2 pipeline project (an investment made in large part in the EU), and threatens its very future as a company¹⁴⁷.

127. NSP2AG has challenged the Amending Directive as such, rather than the measures adopted by each EU Member State in view of the transposition and implementation of the Amending Directive. Indeed, the Claimant served its Trigger Letter under Article 26(1) ECT to the European Union already on 12 April 2019, i.e. even before the formal adoption of the Amending Directive on 17 April 2019 and its entry into force on 23 May 2019. The Letter of Notice was served to the European Union on 28 September 2019, nearly five months

¹⁴⁵ *Flemingo Duty Free Shop Private Limited (India) v. Republic of Poland*, UNCITRAL, Award, 12 August 2016, para. 481 (**EXHIBIT RLA-37**). See also *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, para. 91 (**EXHIBIT RLA-38**).

¹⁴⁶ Notice of Arbitration, p. 1. Footnotes omitted.

¹⁴⁷ Claimant's Memorial of 3 July 2020, para. 4. Emphasis in the original. Footnote omitted.

before the date (24 February 2020) by which the EU Member States were required to transpose the Amending Directive¹⁴⁸.

128. While NSP2AG challenges the Amending Directive as such, the legal and factual arguments developed in NSP2AG's Memorial confirm that NSP2AG's claims are dependent on alleged "practical effects" of the Amending Directive. The Claimant's allegations relating to the "practical effects" of the Amending Directive are speculative and baseless. In any event, as will be explained below, it is clear that the "practical effects" alleged by the Claimant would not flow from the Amending Directive. Rather, they could only flow from measures (including both actions and omissions) of the EU Member States in transposing and implementing the Amending Directive. Moreover, as further explained below, those measures of the EU Member States would involve the exercise of a wide margin of discretion.

2.2.3 THE EU DIRECTIVES CHALLENGED BY THE CLAIMANT IMPOSE NO LEGAL OBLIGATION ON THE CLAIMANT

(a) General principles governing the conferral and use of competences by the European Union

129. The allocation of competences between the European Union and its Member States is governed by the "principle of conferral"¹⁴⁹ stipulated in Article 5.2 TEU, which states that:

Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred to the Member States remain with the Union¹⁵⁰.

130. Broadly speaking, the EU Treaties confer three categories of competences on the European Union¹⁵¹: "exclusive" competences¹⁵², "shared" competences¹⁵³ and competences to "support, coordinate or supplement" the actions of the Member States¹⁵⁴.

¹⁴⁸ Amending Directive, Article 2.

¹⁴⁹ Article 5.1 TEU (**EXHIBIT RLA-39**).

¹⁵⁰ **EXHIBIT RLA-40**.

¹⁵¹ In addition, the Union is competent to coordinate the economic policies of the Member States (Article 2.3 and Article 5 TFEU) and to implement a common foreign and security policy (Article 2.4 TFEU).

¹⁵² Articles 2.1 and 3 TFEU (**EXHIBIT RLA-41**) and (**EXHIBIT RLA-41**), respectively).

¹⁵³ Articles 2.2 and 4 TFEU (**EXHIBIT RLA-43**) and (**EXHIBIT RLA-44**), respectively).

¹⁵⁴ Articles 2.5 and 6 TFEU (**EXHIBIT RLA-45**) and (**EXHIBIT RLA-46**), respectively).

131. The EU directives at issue in this case fall within one of the areas where competence is, in principle, “shared” between the European Union and the Member States, namely “energy”¹⁵⁵.
132. Where the EU Treaties confer on the European Union a competence shared with the Member States in a given area, both the European Union and the Member States may legislate and adopt legally binding acts in that area¹⁵⁶. Where the European Union has already exercised its shared competence in an area, the Member States remain entitled to exercise their competence to the extent that the Union has not exercised its competence¹⁵⁷.
133. The use of the competences conferred upon the Union is governed by the “principle of subsidiarity” and the “principle of proportionality”¹⁵⁸. Article 5.3 TEU stipulates with regard to the first of those principles that:
- Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level¹⁵⁹.
134. The competences conferred upon the European Union are exercised by means of an “institutional framework”¹⁶⁰ established by the EU Treaties and consisting of seven institutions: the European Parliament, the European Council, the Council, the European Commission, the Court of Justice of the European Union, the European Central Bank and the Court of Auditors¹⁶¹.
135. Each institution is required to act “within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out therein.”¹⁶²
136. The powers conferred by the Treaties upon the European Parliament and the Council include the power to adopt, acting jointly, legislative acts, such as the challenged EU directives¹⁶³.

¹⁵⁵ The Gas Directive is based on Articles 47(2), 55 and 95 ECT, all relating to the establishment of the EU internal market. The Amending Directive is based on Article 194(2) TFEU, which belongs to Title XXI of Part III (entitled “Energy”). Both the “internal market” and “energy” are areas of “shared” competence between the Union and the Member States. See Article 4.2 (a) TFEU and Article 4.2 (i) TFEU, respectively (**EXHIBIT RLA-44**).

¹⁵⁶ Article 2.2 TFEU (**EXHIBIT RLA-43**).

¹⁵⁷ *Ibid.*

¹⁵⁸ Article 5.1 TEU (**EXHIBIT RLA-39**).

¹⁵⁹ (**EXHIBIT RLA-47**).

¹⁶⁰ Article 13.1 TEU (**EXHIBIT RLA-48**).

¹⁶¹ *Ibid.*

¹⁶² Article 13.2 TEU (**EXHIBIT RLA-49**).

(b) Types of EU legal acts

137. In order to exercise the EU's competences, the EU Treaties have conferred upon the EU institutions the power to adopt various types of legal acts. Specifically, Article 288 TFEU states that:

To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

138. The EU institutions are not free to choose the type of legal act to be adopted in each case. Rather, the type of act is generally prescribed by the treaty provision that confers upon the institution concerned the power to adopt a legal act, together with the procedure for doing so. Where the EU Treaties do not specify the type of act to be adopted, the "institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality".¹⁶⁴

139. The EU measures challenged by the Claimant are directives. The nature and legal effects of that type of legal act will be described in detail in the following section. For comparison, it is useful to recall first the essential characteristics of the other types of legal acts enumerated in Article 288 TFEU.

140. A regulation is "generally applicable"¹⁶⁵ to all the individuals and entities within its scope of application. This distinguishes regulations from decisions, which are usually addressed to certain individual persons or entities, or to one or more Member States, and from directives, which are always addressed to one or more Member States.

141. Regulations are "binding in their entirety"¹⁶⁶. In this sense, a regulation is distinct from a directive, which only binds the Member State to which it is addressed "as to the result to be achieved"¹⁶⁷.

142. Lastly, regulations are "directly applicable"¹⁶⁸. This means that, unlike directives, regulations become immediately operative in the Member States, without the need for the Member States to adopt measures to transpose them into their national legal order. Indeed, according to the case-law of the Court of Justice of the European Union, in the case of regulations the adoption of

¹⁶³ Article 14.1 TEU (**EXHIBIT RLA-50**) and Article 16.1 TEU (**EXHIBIT RLA-51**).

¹⁶⁴ Article 296 TFEU (**EXHIBIT RLA-52**).

¹⁶⁵ Article 288 TFEU, second paragraph (**EXHIBIT RLA-53**).

¹⁶⁶ *Ibid.*

¹⁶⁷ Article 288 TFEU, third paragraph (**EXHIBIT RLA-53**).

¹⁶⁸ Article 288 TFEU, second paragraph (**EXHIBIT RLA-53**).

transposing or implementing national legislation is, as a general rule, not only unnecessary but incompatible with the EU Treaties¹⁶⁹.

143. Decisions are usually addressed to one or more individual persons or entities or to one or more Member States and are binding only upon the addressees. Like regulations, and unlike directives, decisions are binding in their entirety¹⁷⁰.
144. Recommendations and opinions have no binding force, unlike regulations, directives and decisions¹⁷¹.

(c) Nature and legal effects of the EU directives

145. Directives are usually addressed to all Member States, but may be addressed as well to only one or some Member States. The challenged directives are addressed to all Member States.
146. A directive is not binding “in its entirety”¹⁷². Rather, a directive is binding only “as to the result to be achieved”¹⁷³ and must leave to the national authorities of the Member States “the choice of form and methods”¹⁷⁴. In other words, directives set a common aim for the Member States, which can then use the most appropriate methods for achieving this aim in their own legal system. In practice, it is relatively usual that directives provide expressly for different options and accord the Member States discretion to select one of them.
147. In addition, in areas of “shared” competence, such as energy¹⁷⁵, the legislators may decide not to exercise fully the Union’s shared competence¹⁷⁶, having regard in particular to the principle of subsidiarity¹⁷⁷. To the extent that the Union has not exercised its shared competence to harmonise in full certain aspects of a matter of shared competence, the Member States remain competent to do so¹⁷⁸. In such cases, the margin of discretion available to the Member States encompasses both the margin of discretion which is inherent in

¹⁶⁹ See e.g. ECJ Judgment of 10 October 1973, *Fratelli Variola S.p.A. v Amministrazione italiana delle Finanze*, Case 34-73, ECLI:EU:C:1973:101 (**EXHIBIT RLA-54**).

¹⁷⁰ Article 288 TFEU, fourth paragraph (**EXHIBIT RLA-53**).

¹⁷¹ Article 288 TFEU, fifth paragraph (**EXHIBIT RLA-53**).

¹⁷² Cf. Article 288 TFEU, first paragraph (**EXHIBIT RLA-53**).

¹⁷³ Article 288 TFEU, third paragraph (**EXHIBIT RLA-53**).

¹⁷⁴ *Ibid.*

¹⁷⁵ See above para.131.

¹⁷⁶ See above para. 132.

¹⁷⁷ See above para. 133.

- any directive, and the additional discretion that results from the lack of complete harmonisation of the matter regulated by the directive in question.
148. Directives are not “directly applicable”¹⁷⁹. The Member States to which a directive is addressed are required to adopt national measures in order to transpose the directive into their domestic legal order. As a rule, directives stipulate a time-limit within which the Member States must adopt the necessary measures to transpose the directive.
149. Directives are binding only upon the Member State or Member States to which they are addressed. They impose no legal obligations on individuals. Individuals can be legally bound only and exclusively by the measures taken by a Member State in order to transpose a directive.
150. Exceptionally, the provisions of a directive may be recognised to have so-called “direct effect”, if they are sufficiently clear, precise and unconditional¹⁸⁰ and if the Member State concerned has failed to implement correctly the directive within the prescribed time-limit¹⁸¹. The provisions of a directive with “direct effect” confer rights which may be invoked by an individual before the national courts vis-à-vis the authorities of a Member State that has failed to implement timely and correctly the directive.
151. The EU Court of Justice, nevertheless, has clarified that a directive cannot, of itself, impose obligations on an individual under any circumstances. It can only confer rights. Consequently, directives do not have so-called “horizontal direct effect”. In other words, directives may not be relied upon by an individual in order to impose an obligation on another individual. Likewise, it is well-settled that a directive may not be relied upon by the national authorities of a Member State in order to impose obligations on an individual. Such obligations may only be imposed by the measures taken by the national authorities in order to implement the directive¹⁸².

¹⁷⁸ See above para. 132.

¹⁷⁹ Cf. Article 288 TFEU (**EXHIBIT RLA-53**).

¹⁸⁰ ECJ Judgement of 4 December 1974, *Van Duyn v Home Office*, Case 41-74, ECLI:EU:C:1974:133 (**EXHIBIT RLA-55**).

¹⁸¹ ECJ Judgment of 5 April 1979, *Publico Ministero v Ratti*, Case 148/78, ECLI:EU:C:1979:110 (**EXHIBIT RLA-56**).

¹⁸² See e.g. ECJ judgment of 26 February 1986, *Marshall*, 152/84, EU:C:1986:84, paragraph 48 (**EXHIBIT RLA-57**), and ECJ order of 7 July 2014, *Group Hygiène v Commission*, T-202/13, EU:T:2014:664, paragraph 33 (**EXHIBIT RLA-58**); see also, to that effect, ECJ judgment of 14 July 1994, *Faccini Dori*, C-91/92, EU:C:1994:292, paragraphs 20 and 25 (**EXHIBIT RLA-59**).

(d) The EU measures challenged by the Claimant are directives, which impose no obligations on the Claimant

152. The measures challenged by the Claimant are directives. Specifically, the Claimant has challenged the Amending Directive to the extent that it renders applicable certain provisions of the Gas Directive with regard to the Claimant's investment in Nord Stream 2.
153. As explained above, however, directives are binding only upon the Member States to which they are addressed. They impose no obligations on individuals, including the Claimant. The Claimant's legal situation has been left unmodified by the Amending Directive, which has no "direct effect" regarding the Claimant. Consequently, the Amending Directive cannot, as such, breach the ECT. Rather, the alleged breaches of the ECT could only result from the measures which the Member States may or may not take in order to transpose and implement the Gas Directive, as modified by the Amending Directive. As explained below, however, the Member States have a broad margin of discretion when transposing and implementing the relevant provisions of the challenged EU directives. This excludes the international responsibility of the European Union for any alleged breaches of the ECT that result from measures of the Member States within that broad margin of discretion.

2.2.4 MEMBER STATES HAVE A WIDE MARGIN OF DISCRETION TO IMPLEMENT THE RELEVANT PROVISIONS OF THE EU DIRECTIVES CHALLENGED BY THE CLAIMANT

154. The Amending Directive establishes a legal framework for the operation of gas transmission lines between a Member State and a third country. It provides expressly that gas transmission lines to and from a third country will be subject to the same rules as those which had already been applicable under the Gas Directive to all gas transmission lines between Member States since 3 March 2011.
155. The Gas Directive provides for rules concerning the transmission, distribution, supply and storage of natural gas in order to facilitate access to the market and encourage fair and non-discriminatory competition. To that end, the Gas Directive provides, in particular, for rules concerning unbundling (Article 9 of the Gas Directive), third party access (TPA) (Article 32 of the Gas Directive) and tariff regulation (Article 41 of the Gas Directive).

156. As described below, the Gas Directive accords to the Member States a wide margin of discretion, which allows them to modulate the application of the key components of the Gas Directive.

(a) Choice of unbundling models

157. The Gas Directive requires Member States to ensure so-called full ownership unbundling (OU), which implies the appointment of the owner of the gas transmission line as transmission system operator and its full independence from any production or supply interests¹⁸³.

158. Nevertheless, with respect to transmission systems that belonged to vertically integrated systems on 3 September 2009, the Gas Directive allows the Member States, at their discretion, to make available in their national legislation, in addition to the OU model, one or two alternative unbundling models¹⁸⁴, namely:

- the independent system operator (ISO) model, under which an undertaking with production or supply interests may continue to own the gas transmission line, but has to appoint an independent entity to carry out all the operator functions listed in the Gas Directive;
- the independent transmission system operator (ITO) model, under which an undertaking with production or supply interests may continue to own and operate the gas transmission line, but with ring fencing provisions related to the organisational measures and measures related to investment.

159. The Amending Directive requires Member States to ensure OU with regard to gas transmission lines between a Member State and a third country, but it allows Member States to make available the alternative ISO and ITO models for gas transmission lines that belonged to a vertically integrated system on 23 May 2019¹⁸⁵.

160. Furthermore, the requirement to ensure OU does not apply where a Member State or another public body (including a third country, such as Russia) chooses to confer to two separate public bodies the control over a transmission system or a transmission system operator on the one hand and over an

¹⁸³ Article 9.1 of the Gas Directive.

¹⁸⁴ Article 9.1 and 9.2 of the Gas Directive.

¹⁸⁵ Article 9.8 and Article 9.9 of the Gas Directive, as modified by the Amending Directive.

undertaking performing any of the functions of production or supply on the other¹⁸⁶.

(b) Tariff setting and approval

161. The Gas Directive confers the power to set or approve tariffs or tariffs methodologies on the national regulatory authority (NRA) of each Member State. While the NRAs must observe certain requirements (the methodologies must be non-discriminatory, transparent, reflect the actual costs incurred by an efficient economic operator and provide transmission system operators with appropriate incentives), they enjoy wide discretion in developing or approving tariff-setting methodologies that are best suited to the network topology¹⁸⁷.

(c) Exemptions from unbundling, TPA and tariff obligations pursuant to Article 36 of the Gas Directive

162. Under Article 36 of the Gas Directive, the NRAs of the Member States *may*, but are not required, to exempt, upon request, major new gas infrastructures (which may include gas transmission lines between a Member State and a third country) from the mandatory unbundling, TPA and tariff obligations.

163. The Gas Directive does not require applications for exemptions to be introduced before an investment decision is taken or before construction is under way. Therefore, exemptions may be requested for transmission lines under construction between a Member State and a third country, which are not “completed” on the relevant date for the purposes of Article 49a of the Gas Directive.

164. Exemption decisions are taken by the NRA of the Member State where the infrastructure in question is connected to the Union network¹⁸⁸. Decisions are taken on a case-by-case basis, after consultation of the NRAs of the Member States whose markets are likely to be affected by the new infrastructure and of the relevant authorities of third countries.¹⁸⁹

¹⁸⁶ Article 9.6 of the Gas Directive.

¹⁸⁷ Article 41(1)(a) and recitals (31) and (32) of the Gas Directive.

¹⁸⁸ Article 36.3 of the Gas Directive.

¹⁸⁹ Article 36.4 of the Gas Directive.

165. The European Commission has a supervisory role and may request the Member State concerned to amend or withdraw a decision granting an exemption to the extent that it is in breach of the legal requirements of the Gas Directive¹⁹⁰. But this is without prejudice to the margin of discretion accorded to Member States under the Gas Directive. The European Commission cannot, on the other hand, request a Member State to issue an exemption decision.
166. Exemptions are not automatic. The infrastructures must meet certain qualifying conditions¹⁹¹ and the NRAs are required to assess the impact of requested exemptions in the light of criteria relating to the objectives pursued by the Gas Directive. In particular, they are required to ascertain that the exemption is not “detrimental to competition in the relevant markets which are likely to be affected by the investment, to the effective functioning of the internal market in natural gas, the efficient functioning of the regulated systems concerned and the security of supply of natural gas in the Union”¹⁹². Nonetheless, the NRAs have a wide degree of discretion in assessing those conditions and criteria.
167. Exemptions must be granted for a defined period of time¹⁹³ and may be subjected to conditions regarding the non-discriminatory access to the infrastructure¹⁹⁴. Once again, however, the NRAs have wide discretion to determine both the duration of the exemption and those conditions.

(d) Derogations from unbundling, TPA and tariff obligations pursuant to Article 49a of the Gas Directive

168. Under Article 49a of the Gas Directive (which was introduced by the Amending Directive), a Member State may derogate from certain obligations imposed by the Gas Directive, including the unbundling, TPA and tariff obligations, in respect of gas transmission lines between that Member State and a third country completed before 23 May 2019¹⁹⁵.
169. Where the transmission line concerned is located in the territory of more than one Member State, it is for the Member State in the territory of which the first

¹⁹⁰ Article 36.9 of the Gas Directive.

¹⁹¹ Article 36.1 of the Gas Directive.

¹⁹² Article 36.1 (e) of the Gas Directive.

¹⁹³ Article 36.1 of the Gas Directive.

¹⁹⁴ Article 36.6 of the Gas Directive.

connection point with the Member States' network is located to decide whether to grant a derogation after consulting all the Member States concerned¹⁹⁶.

170. As with the exemptions granted pursuant to Article 36, the derogations under Article 49a are not automatic. They must be based on objective reasons and the Member State concerned must ascertain that the derogation would not be detrimental to competition or the effective functioning of the internal market in natural gas, or to security of supply in the Union¹⁹⁷.
171. The derogation is limited in time up to 20 years based on objective justification, renewable if justified and may be subject to conditions which contribute to the achievement of the above mentioned criteria¹⁹⁸.
172. Within the limits above described, Member States have wide discretion as regards the grant of derogations under Article 49a. This has been recently confirmed by the EU General Court in a case brought by the Claimant against the Amending Directive:

It is for the Member States to adopt national measures enabling the operators concerned to ask to benefit from those derogations, determining precisely the conditions for obtaining those derogations in the light of the general criteria laid down by Article 49a of Directive 2009/73, as amended, and regulating the procedure enabling their national regulatory authorities to decide on such requests within the periods laid down by the contested directive. In addition, for the purpose of implementing those conditions, the national regulatory authorities have a wide discretion as regards the grant of such derogations and any specific conditions to which those derogations may be subject¹⁹⁹.

(e) Empowerment to maintain and conclude IGAs with third countries

173. The Amending Directive authorises the Member States to maintain existing international agreements between a Member State and a third country relating to the operation of a transmission line between that Member State and the third country, notwithstanding the EU's exclusive competences²⁰⁰.

¹⁹⁵ Article 49(1), first subparagraph, of the Gas Directive.

¹⁹⁶ Article 49(2) of the Gas Directive.

¹⁹⁷ Article 49(1), first subparagraph, of the Gas Directive.

¹⁹⁸ Article 49(1), second subparagraph, of the Gas Directive

¹⁹⁹ Order of the General Court of 20 May 2020, Case T-526/19, *Nord Stream 2 AG v Parliament and Council*, para. 122 (**EXHIBIT RLA-3**)

²⁰⁰ Article 49b (1) of the Gas Directive.

174. In addition, the Amending Directive sets up a procedure for authorising the Member States to amend, extend, adapt, renew or conclude an agreement on the operation of a transmission line with a third country concerning matters falling, entirely or partly, within the scope of the Gas Directive²⁰¹.
175. In accordance with that procedure, the Member States must be authorised by the Commission, notwithstanding the EU's exclusive competences, to negotiate and conclude any such agreements provided that the agreement
- (a) is not in conflict with Union law other than the incompatibilities arising from the allocation of competence between the Union and the Member States;
 - (b) is not detrimental to the functioning of the internal market in natural gas, competition or security of supply in a Member State or in the Union;
 - (c) does not undermine the objectives of pending negotiations of intergovernmental agreements by the Union with a third country;
 - (d) is not discriminatory²⁰².

2.2.5 THE ALLEGED BREACHES WOULD RESULT FROM MEASURES WHICH ARE NOT ATTRIBUTABLE TO THE EUROPEAN UNION

(a) The measures taken by Germany in order to implement the challenged EU directives

176. The Gas Directive was transposed into German law by the *Gesetz zur Neuregelung energiewirtschaftsrechtlicher Vorschriften*, of 26 July 2011, which amended the *Energiewirtschaftsgesetz* (EnWG) of 7 July 2005²⁰³. In turn, the Amending Directive was transposed by an Act of 5 December 2019 further amending the EnWG²⁰⁴.
177. The EnWG transposes the OU, ISO and ITO unbundling models and allows operators to choose one of those three models²⁰⁵. The EnWG also transposes Articles 36 and 49a of the Gas Directive and lays down procedures allowing

²⁰¹ Article 49b (2) to (15).

²⁰² Article 49b (3) and (12) of the Gas Directive.

²⁰³ German Law implementing the Gas Directive of 26 July 2011 (*Neuregelung energiewirtschaftsrechtlicher Vorschriften*, Bundesgesetzblatt Jahrgang 2011 Teil I Nr. 41, ausgegeben zu Bonn am 3. August 2011) (**EXHIBIT RLA-60**).

²⁰⁴ (**Exhibit CLA-47**), German law implementing the Amending Directive of 5 December 2019 (*Gesetz zur Änderung des Energiewirtschaftsgesetzes zur Umsetzung der Richtlinie (EU) 2019/692 des Europäischen Parlamentes und des Rates über gemeinsame Vorschriften für den Erdgasbinnenmarkt*), BGBl., Part 1, No. 45, p 2002, 11 December 2019.

²⁰⁵ §§ 8-10 EnWG.

- operators to request the exemptions and derogations permitted by those two provisions²⁰⁶.
178. The German NRA responsible for the implementation of the Gas Directive is the *Bundesnetzagentur*²⁰⁷. The *Bundesnetzagentur* is responsible *i.a.* for granting exemptions and derogations pursuant to the provisions of the EnWG transposing Articles 36²⁰⁸ and 49a²⁰⁹ of the Gas Directive.
179. On 9 January 2020 the Claimant filed an application for an Article 49a derogation with the *Bundesnetzagentur*. On 15 May 2020 the *Bundesnetzagentur* rejected the Claimant's application on the basis that Nord Stream 2 was not "completed before 23 May 2019"²¹⁰. On 15 June 2020, the Claimant appealed the *Bundesnetzagentur's* decision before the German courts.²¹¹ That appeal is still pending.
180. In its application before the *Bundesnetzagentur*, the Claimant argued strenuously that the Nord Steam 2 pipeline was "completed" on the relevant date²¹². It can be assumed that the Claimant has submitted again the same arguments before the German court hearing its appeal against the decision of the *Bundesnetzagentur*. Yet, as acknowledged by the Claimant, those arguments plainly contradict and defeat the arguments and claims put forward by NSP2AG before this Tribunal²¹³.
181. To the best of the EU's knowledge, as of the date of filing, the Claimant has not submitted to the *Bundesnetzagentur* an application for an Article 36 exemption with regard to the Nord Stream 2 pipeline.
182. Also, to the best of the EU's knowledge, as of the date of filing, the German authorities have taken no position with regard to the possible applicability to the Claimant of Article 9(6) of the Gas Directive.
183. The European Union is not aware that the Claimant has given any indication to the German authorities regarding the model of unbundling that it intends to elect, if necessary. Nor, to the EU's best knowledge, has the

²⁰⁶ §§ 28a and 28b EnWG.

²⁰⁷ §§ 54 *et seq.* EnWG.

²⁰⁸ § 28a paragraph 3 EnGW.

²⁰⁹ § 28b paragraph 1 EnGW.

²¹⁰ (**Exhibit CLA-17**), Bundesnetzagentur decision on NSP2AG's Derogation Application, 15 May 2020, section 2.2.3

²¹¹ Claimant's Memorial of 3 July 2020, para. 412.

²¹² Claimant's Application for an Article 49a derogation filed with the *Bundesnetzagentur* on 9 January 2020, as summarised in Bundesnetzagentur decision on NSP2AG's Derogation Application, 15 May 2020 (**Exhibit CLA-17**).

Bundesnetzagentur taken any position in that regard, or with regard to the modalities of TPA and tariff setting to be implemented by the Claimant.

184. To date the European Union has received no indication from the German authorities that they will seek authorization in order to open negotiations with Russia with regard to the operation of Nord Stream 2, pursuant to Article 49b of the Gas Directive.

(b) The alleged breaches of the ECT would not result from EU measures

185. As aptly summarised by the Claimant in the passages quoted in section 2.2.2, its core claims fall essentially within two categories: claims that the Amending Directive “discriminates” against NSP2AG; and claims that the Amending Directive “undermines NS2PAG’s investment in the Nord Stream 2 pipeline project”.
186. The Claimant acknowledges that the Amending Directive does not discriminate *de iure* against Nord Stream 2. Rather, NSP2AG bases its discrimination-related claims on the allegation that “the practical effect of the Amending Directive” is that “Nord Stream is the only pipeline impacted”²¹⁴.
187. NSP2AG seeks to substantiate this alleged “practical effect” by referring to various individual decisions of certain Member States with regard to derogations requested pursuant to the national provisions transposing Article 49a of the Gas Directive. Such decisions include the decisions already taken by the German authorities with respect to North Stream 1 and North Stream 2, as well as the decisions which NSP2AG speculates that the Italian and the Spanish authorities will take with respect to other offshore pipelines.²¹⁵ However, as explained above, and as confirmed by the EU General Court²¹⁶, those decisions involve the exercise of wide discretion by the competent national authorities of those Member States.
188. Moreover, in order to establish the existence of the alleged “practical effects” of discrimination against the Claimant, it is indispensable to take into consideration also the “practical effects” of other types of possible decisions

²¹³ Claimant’s Memorial of 3 July 2020, para. 420.

²¹⁴ Title of section VI.11 of the Claimant’s Memorial of 3 July 2020. This “practical effect” is invoked, for instance, in paras. 365, 381 ii, 390, 400, 407, 408, 411, 427, 439 iii, 444, and 462.

²¹⁵ Claimant’s Memorial of 3 July 2020, paras. 261-269.

which the Member States may take under the Gas Directive and which may effectively accord no less favourable treatment to the Claimant than an Article 49a derogation. Such decisions may include an Article 36 exemption²¹⁷, a decision applying Article 9(6) of the Gas Directive²¹⁸, or the conclusion of an inter-governmental agreement pursuant to Article 49b of the Gas Directive²¹⁹. Each of those other decisions also involve the exercise of wide discretion by the Member States.

189. Therefore, even assuming that the Amending Directive, as applied in practice by the Member States within their margin of discretion, discriminated *de facto* against NSP2AG (*quod non*), the responsibility for such discrimination would not lie with the European Union.

190. In turn, the second category of NSP2AG's claims is premised on the allegation that the "practical effects" of the Amending Directive will have a "catastrophic impact" on NSP2AG's investment in Nord Stream 2²²⁰.

191. Yet the practical "impact" of the Amending Directive on NSP2AG's investment in North Stream 2 cannot be ascertained on the basis of that directive alone. As acknowledged by the Claimant's witness [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

Indeed, the practical impact of the Amending Directive on NSP2AG's investment in North Stream 2 will depend on measures which the German authorities may or may not take with regard to North Stream 2 within the scope of the wide margin of discretion accorded by the Gas Directive to the Member States.

192. The relevant possible measures of the German authorities include the above mentioned decision with regard to the derogation requested by NSP2AG in respect of Nord Stream 2 pursuant to the national provisions transposing Article 49a of the Gas Directive. As explained above, while the *Bundesnetzagentur* has refused that derogation, the Claimant has appealed that decision before the German courts. It can be assumed, therefore, that NSP2AG considers that such a derogation is both legally possible and

²¹⁶ Order of the General Court of 20 May 2020, Case T-526/19, *Nord Stream 2 AG v Parliament and Council*, para. 122 (**EXHIBIT RLA-3**).

²¹⁷ See above paragraphs 162-167.

²¹⁸ See above paragraph 160.

²¹⁹ See above paragraphs 173-175.

²²⁰ Section VII of the Claimant's Memorial of 3 July 2020. This "practical effect" is invoked, for instance, in paras. 420, 427, 464, 476 and 482.

warranted. Therefore, by the Claimant's own implicit admission, it is still too soon to know whether or not Nord Stream 2 will benefit from an Article 49a derogation granted by the German authorities.

193. Moreover, in any event, the overall practical "impact" of the Amending Directive on Nord Stream 2 cannot be properly ascertained by considering only the Article 49a derogation requested by NSP2AG. In order to assess that impact it is indispensable to take into account other types of possible measures (both actions and omissions) with regard to North Stream 2 that are equally within the discretion of the German authorities. Those measures include, in particular, decisions on whether North Stream 2 is covered by Article 9(6) of the Gas Directive²²²; on whether North Stream 2 is to be exempted pursuant to the national provisions transposing Article 36 of the Gas Directive and under which conditions²²³; on whether North Stream 2 complies with one of the unbundling models available under German law²²⁴; on the TPA and tariff setting modalities to be implemented by the Claimant²²⁵; or on whether Germany should seek authorisation to conclude an international agreement with Russia with regard to the operation of North Stream 2 pursuant to Article 49b of the Gas Directive²²⁶.
194. As explained above, all those decisions involve the exercise of discretion by the authorities of the Member States. Therefore, even assuming that the Amending Directive, as applied in practice by Germany, "undermined"²²⁷ NSP2AG's investment in North Stream 2 (*quod non*), the responsibility for such "practical effects" would not lie with the European Union.

(c) The alleged breaches of the ECT would result from measures that would not be "attributable" to the European Union

195. In principle²²⁸, an international organisation an international organization is responsible under international law only for conduct that is "attributable" to that organization under international law.

221

See above paragraph 160.

222 See above paragraphs 162-167.

223 See above paras. 157-160.

224 See above para. 161.

225 See above paragraphs 173-175.

226 Claimant's Memorial of 3 July 2020, para. 4. Emphasis in the original. Footnote omitted.

227 The parties to an international agreement to which an international organisation is party may agree on specific rules regarding the allocation of international responsibility between the international organisation and its members vis-à-vis other parties. The European Union usually does so in its

196. This is confirmed by Article 4 of the ILC's Draft Articles on the Responsibility of International Organizations ("**ARIO**") (entitled "Elements of an internationally wrongful act of an international organization")²²⁹, which provides that:

There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

(a) is attributable to that organization under international law; and

(b) constitutes a breach of an international obligation of that organization²³⁰.

197. The breaches of the ECT alleged by the Claimant cannot possibly result from the EU directives cited by the Claimant because, as explained, those directives impose no legal obligation on the Claimant. Instead, the alleged breaches could only stem from measures (including both actions and omissions) which Germany may or may not adopt in transposing and implementing the cited EU directives. Those measures of Germany, however, would not be "attributable" to the European Union within the meaning of Article 4 ARIO. They would be "attributable" solely to Germany. This is confirmed by the basic principle of attribution codified in Article 4 of the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts²³¹ ("**ARS**") (entitled "Conducts of organs of a State"), which provides that:

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

bilateral agreements with third countries providing for investment protection. But the ECT contains no such specific rules.

²²⁹ International Law Commission, *Draft Articles on Responsibility of International Organizations*. Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10). The report, which also contains commentaries to the draft articles (para. 88), appears in Yearbook of the International Law Commission, 2011, Vol. II, Part Two (**EXHIBIT RLA-61**). Available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf

²³⁰ Article 4 ARIO mirrors Article 2 of the Draft Articles on responsibility of States for Internationally Wrongful Acts, which states that:

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(a) is attributable to the State under international law; and

(b) constitutes a breach of an international obligation of the State.

²³¹ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*. Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected (**EXHIBIT RLA-62**). Available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

198. It is beyond question that the measures described in section 2.2.5 have been, or would have to be, adopted by organs of Germany exercising legislative or executive functions pursuant to Germany's constitution and laws. Therefore, in accordance with the basic principle of attribution codified in Article 4 ARS, those measures are attributable to Germany and not to the European Union.

**2.2.6 THE EUROPEAN UNION IS NOT OTHERWISE RESPONSIBLE FOR THE
ALLEGED BREACHES OF THE ECT IN ACCORDANCE WITH
INTERNATIONAL LAW**

199. Exceptionally, ARIO provides that an international organisation may be held responsible, under certain circumstances, for conduct that is not attributable to that organisation but to a State which is a member of the international organisation.

200. Articles 14 to 16 ARIO apply to international organizations rules that are similar to those applicable to States according to the ARS, with regard to "aid or assistance"²³² in the commission of a breach, "direction and control"²³³ exercised over a breach, and "coercion"²³⁴.

201. The adoption of the EU directives at issue involves neither "aid or assistance" nor "coercion" by the European Union within the meaning of Article 14 ARIO and Article 16 ARIO, respectively.

202. As regards "direction and control", Article 15 ARIO provides that:

An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if:

(a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that organization.

203. According to the ILC's commentary to Article 15 ARIO, "the adoption of a binding decision on the part of an international organization could constitute, under certain circumstances, a form of direction or control in the commission

²³² Article 14 ARIO (**EXHIBIT RLA-61**).

²³³ Article 15 ARIO (**EXHIBIT RLA-61**).

²³⁴ Article 16 ARIO (**EXHIBIT RLA-61**).

of an internationally wrongful act²³⁵. Nonetheless, the same commentary clarifies that:

The assumption is that the State or international organization which is the addressee of the decision is not given discretion to carry out conduct that, while complying with the decision, would not constitute an internationally wrongful act²³⁶.

204. Article 17 ARIO provides for a further instance of responsibility of an international organization when the international organization seeks to circumvent its international obligations by addressing binding decisions or authorizations to its members.²³⁷

205. Specifically, Article 17 ARIO provides in relevant part that:

1. An international organization incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization.

2. [...] ²³⁸

3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member States or international organizations to which the decision or authorization is addressed.

206. Article 17(1) ARIO differs from Article 15 ARIO in that, as specified by Article 17(3) ARIO, it applies regardless of whether the act in question is a wrongful act for the Member States to which the decision is addressed.

207. In addition, Article 17(1) ARIO differs from Article 15 ARIO in that it requires to ascertain the existence of “circumvention”. According to the ILC’s commentary,

The term “circumvention” implies an intention on the part of the international organization to take advantage of the separate legal personality of its members in order to avoid compliance with an international obligation. The evidence of such an intention will depend on the circumstances²³⁹.

²³⁵ Commentary to Article 15 ARIO, at (4) (**EXHIBIT RLA-61**).

²³⁶ *Ibid.*

²³⁷ Unlike Article 15 ARIO, Article 17 ARIO has no counterpart in ARS. According to the ILC’s commentary, there may be a partial overlap between Article 15 ARIO and Article 17(1) ARIO, but both provisions are consistent. See Commentary to Article 15 ARIO, at (5) (**EXHIBIT RLA-61**).

²³⁸ Article 17(2) deals with authorisations. The EU directives at issue cannot be construed as authorisations. Since the directives address an area of shared competence, in the absence of the directives the Member States would be free to adopt by themselves, on the basis of their own competence, the measures required by those directives. See Article 2.2 TFEU (**EXHIBIT RLA-43**).

²³⁹ Commentary to Article 17 ARIO, at (4) (**EXHIBIT RLA-61**).

208. Notwithstanding the above differences, Article 17(1) ARIO, like Article 15 ARIO, also presupposes that the Member State is not given discretion to carry out conduct that, while complying with the decision, would not constitute an internationally wrongful act²⁴⁰.
209. The EU Directives at issue are binding upon the Member States as to the result to be achieved²⁴¹. But, as explained above²⁴², the Member States have wide discretion to transpose and implement the EU Directives in ways that would not result in the breaches of the ECT alleged by the Claimants. Therefore, the European Union cannot be held responsible for those breaches under either Article 15 ARIO or Article 17(1) ARIO.
210. Moreover, as regards Article 17(1) ARIO, there is no evidence of “circumvention”. Most EU Member States, including Germany, are Contracting Parties to the ECT in their own right.²⁴³ In addition, the adoption of binding decisions in the form of directives is necessary in order to exercise the EU competences in accordance with generally applicable requirements under the EU Treaties.

2.2.7 CONCLUSION

211. The breaches of the ECT, and the ensuing damages, alleged by the Claimant could only result from measures taken by the Member States, and in particular by Germany, within the scope of the margin of discretion accorded to the EU Member States by the EU Directives challenged by the Claimant. The European Union would not be responsible under international law for those alleged breaches. Therefore, the Tribunal lacks jurisdiction *ratione personae* to rule on the claims brought by the Claimant.

3. REQUEST FOR BIFURCATION

3.1 INTRODUCTION

212. The European Union hereby requests, in accordance with the procedural calendar approved by the Arbitral Tribunal in Annex 1 of Procedural Order No.1, a Preliminary Phase on Jurisdiction and Admissibility.
213. More precisely, the European Union requests that the Tribunal decides as a preliminary matter the jurisdictional objections set out by the European Union

²⁴⁰ Commentary to Article 17 ARIO, at (6) and (7) (**EXHIBIT RLA-61**).

²⁴¹ See above paragraphs 145-151.

²⁴² See above paragraphs 185-194.

²⁴³ Cf. Commentary to Article 17 ARIO, at (3) (**EXHIBIT RLA-61**).

in this submission before considering the merits of the claims brought by NSP2AG, as provided for in Article 21(4) of the applicable UNCITRAL Rules.

3.2 THE APPLICABLE RULES

214. Article 21(4) of the UNCITRAL Rules (1976) provides as follows:

In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.

215. By contrast, the UNCITRAL Rules (2010) provide as follows at Articles 17(1) and 23(3):

17(1) Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

23(3) The arbitral tribunal may rule on a plea [concerning its lack of jurisdiction] either as a preliminary question or in an award on the merits. The arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court.

216. Thus, unlike the UNCITRAL Rules (2010), the UNCITRAL Rules (1976) – which are the version applicable to this dispute – include a presumption in favour of preliminary consideration of jurisdictional issues²⁴⁴. Some arbitral tribunals have held that, in light of that presumption, it requires a manifest failure to meet the test set out in *Glamis* (see below paragraph 219) in order to overcome the presumption under Article 21(4) of the 1976 UNCITRAL Rules. It would require a clear prejudice to procedural economy in order not to bifurcate a serious jurisdictional objection which is separable from the merits.²⁴⁵

²⁴⁴ *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Procedural Order No. 2, 18 January 2013, 16 (**EXHIBIT RLA-63**).

²⁴⁵ *Michael Anthony Lee-Chin v. Dominican Republic*, ICSID Case No. UNCT/18/3, Procedural Order No. 2 Decision on Respondent Request for Bifurcation, 6 March 2019, 46-47 (**EXHIBIT RLA-64**).

3.3 THE LEGAL STANDARD

217. It is generally acknowledged that the fundamental principle that should guide tribunals when ruling on requests for bifurcation is the need to ensure both "procedural justice and efficiency, taking all circumstances into account."²⁴⁶
218. In practice, tribunals have interpreted the criteria to be assessed in order to grant or deny a jurisdictional bifurcation request in a reasonably consistent manner.
219. While the precise formulation of the test may vary in each case, most tribunals apply in some form the standard first articulated by the NAFTA Chapter Eleven Tribunal in *Glamis Gold v. United States of America*.²⁴⁷ According to the so-called *Glamis* test, the request for bifurcation is to be decided based upon the following criteria:
- i. Is the objection substantial, inasmuch as preliminary consideration of a frivolous objection to jurisdiction is very unlikely to reduce the costs of, or time required for, the proceeding?
 - ii. Would the objection to jurisdiction if granted result in a material reduction of the proceedings at the next phase?
 - iii. Is bifurcation impractical in that the jurisdictional issue identified is so intertwined with the merits that it is very unlikely that there will be any savings in time or cost?
220. A similar test was put forward more recently by the Tribunal in the *Philip Morris v Australia* case, according to which bifurcation will be appropriate if (1) the objection raised is serious and substantial *prima facie*, (2) the objection raised can be addressed without prejudging the merits of the dispute and (3)

²⁴⁶ *Glencore Finance (Bermuda) Limited v. Plurinational State of Bolivia*, PCA Case No. 2016-39, Procedural Order No. 2 (Decision on Bifurcation), 31 January 2018, 38

²⁴⁷ *Glamis v. USA*. Procedural Order No. 2. 31 May 2005, paragraph 12 (c) (**EXHIBIT RLA-65**):

"Considerations relevant to this analysis include, inter alia, (1) whether the objection is substantial in as much as the preliminary consideration of a frivolous objection to jurisdiction is very unlikely to reduce the costs of, or time required for, the proceeding; (2) whether the objection to jurisdiction if granted results in a material reduction of the proceedings at the next phase (in other words, the tribunal should consider whether the costs and time required of a preliminary proceedings, even if the objecting party is successful, will be justified in terms of the reduction in costs at the subsequent phase of proceedings); and (3) whether bifurcation is impractical in that the jurisdictional issue identified is so intertwined with the merits that it is very unlikely that there will be any savings in time or cost. "

in case the objection was successful, all or a substantial part of the claim would be clarified.²⁴⁸

3.4 THE JURISDICTIONAL OBJECTIONS RAISED BY THE EUROPEAN UNION MEET THE CRITERIA FOR BIFURCATION

3.4.1 THE JURISDICTIONAL OBJECTIONS ARE SUBSTANTIAL

221. When addressing whether a jurisdictional objection is substantial at the bifurcation request stage, tribunals do not conduct a comprehensive analysis of the objections. Rather, they limit their assessment to whether the objection is frivolous or clearly unfounded.

222. The tribunal in the *Resolute Forest* Case described the limited scope of this part of the analysis, as follows:

[t]he determination of the first part of the test, namely whether an objection is *prima facie* serious and substantial [...] should not, in the Tribunal's view, entail a preview of the jurisdictional arguments themselves. Rather, at this stage the Tribunal is only required to be satisfied that the objections are not frivolous or vexatious.²⁴⁹

223. The European Union has submitted extensive arguments in support of each of the jurisdictional objections set out in this Memorial. On the basis of a *prima facie* analysis of those arguments, the objections cannot be dismissed as merely frivolous or vexatious.

3.4.2 GRANTING THE JURISDICTIONAL OBJECTIONS WOULD END THE DISPUTE OR AT LEAST REDUCE THE PROCEEDINGS AT THE NEXT PHASE

224. Granting the objection based on the fork-in-the-road clause in Article 26 ECT would dispose of this dispute in its entirety. Given that the Claimant has made the choice to submit the present dispute to the domestic courts of the EU, the Arbitral Tribunal is prevented from hearing the present case. The dispute is dealt with by the domestic courts of the EU.

225. Granting the objection *ratione personae* would also dispose of this dispute.

3.4.3 BIFURCATION IS NOT IMPRACTICAL

226. The jurisdictional objections raised by the European Union are not so intertwined with the merits that it would be impractical for the Tribunal to rule upon them as a preliminary matter.

²⁴⁸ *Philip Morris Asia Ltd. (Hong Kong) v. The Commonwealth of Australia* (UNCITRAL), Procedural Order No. 8, 14 April 2014, 109 (EXHIBIT RLA-66).

227. It is not impractical for the Arbitral Tribunal to rule on the objection based on fork-in-the-road as a preliminary matter. Under neither of the tests discussed above, there is a need for the Tribunal to enter into an assessment of the merits of the claims. The “fundamental basis” test only requires the Tribunal to consider whether the fundamental cause and the request for relief is the same in the present dispute and the dispute pending before the Court of Justice of the European Union. The “triple identity test” only requires the Tribunal to examine whether the disputes show identity of (i) parties, (ii) object and (iii) cause of action. That can be done by comparison of the pleas in law as set out Application before the Court of Justice of the European Union, on the one hand, and the description of the claims in the Notice of Appeal and Memorial by the Claimant. There is absolutely no need to enter into the substance of these claims.

228. The objection *ratione personae* can be decided without prejudging the merits of the claims brought by NSP2AG. In order to rule on this objection, the Tribunal would not have to decide whether the “practical effects” of the Amending Directive alleged by NSP2AG have been proven and whether they breach the ECT. Rather, all that the Tribunal would have to consider is whether those alleged “practical effects”, and consequently the ensuing violations of the ECT alleged by NSP2AG, even if they were substantiated by the Claimant at the subsequent stage, would result necessarily from the Amending Directive as such or, rather, result from measures of the Member States within their margin of discretion.

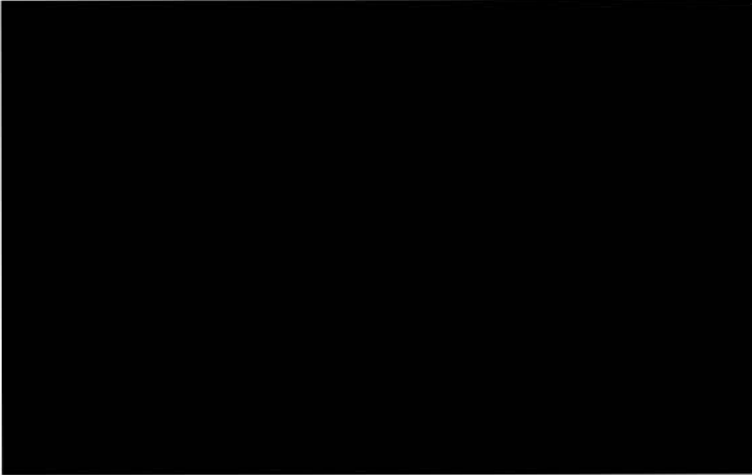
²⁴⁹ *Resolute Forest Products Inc. v. Canada*, PCA Case No. 2016-13, Procedural Order No. 4, 18 November 2016), para. 4.4 (**EXHIBIT RLA-67**).

4. RELIEF SOUGHT

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

- 1) grant the request for bifurcation set out in Section 3;
- 2) in any event, uphold the jurisdictional objections set out in Section 2;
- 3) dismiss all the claims submitted by the Claimant for lack of jurisdiction and, accordingly, reject the relief sought by the Claimant; and
- 4) order the Claimant to pay the costs of these arbitration proceedings, including the fees and expenses of the Tribunal and costs of the European Union's legal representation, including interest.

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



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