

**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)

**AND**

**EUROPEAN UNION**

(Respondent)

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**EUROPEAN UNION'S RESPONSE TO  
NORD STREAM 2 AG'S NOTICE OF ARBITRATION**

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Legal Service  
European Commission  
Rue de la Loi/Wetstraat 200  
1049 Bruxelles/Brussel

**24 October 2019**

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**TABLE OF EXHIBITS**

(NUMBERING CONTINUES FROM EU NOTICE OF CHALLENGE)

<b>Exhibit Number</b>	<b>Title</b>
Exhibit R-25	Email from NSP2AG's Counsel of 11 October 2019

<b>Exhibit Number</b>	<b>Title</b>
Exhibit RL-3	Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas
Exhibit RL-4	Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC
Exhibit RL-5	NS2 Application for Annulment, 25 July 2019.
Exhibit RL-6	NSP2AG Notice of Arbitration, 26 September 2019
Exhibit RL-7	European Union's Notice of Challenge against Mr. Peter Rees as Arbitrator, 10 October 2019

## **1. INTRODUCTION**

1. The European Union ("EU") is in receipt of a letter of 26 September 2019 by the legal counsel of Nord Stream 2 AG ("**NSP2AG**") serving a Notice of Arbitration by Nord Stream 2 AG against the European Union under the Energy Charter Treaty ("**ECT**") ("**Notice of Arbitration**").
2. NSP2AG challenges the introduction and enactment of Directive (EU) 2019/692 ("**Amending Directive**"),<sup>1</sup> amending Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas (the "**Gas Directive**").<sup>2</sup>
3. The European Union hereby responds to NSP2AG's Notice of Arbitration (the "**Response**"). Nothing in this Response should be construed as an implicit admission by the European Union that NSP2AG is entitled to file a request for arbitration under the Energy Charter Treaty.
4. The Claimant purported to file its Notice of Arbitration under the UNCITRAL Arbitration Rules, 1976 (the "**1976 Rules**"). The 1976 Rules do not provide for the filing of a Response. The EU therefore files its Response without prejudice to the question whether the 1976 Rules or 2010 UNCITRAL Arbitration Rules (the "**2010 Rules**") appropriately apply to investment arbitration proceedings currently initiated under the Energy Charter Treaty.

## **2. PROCEDURAL HISTORY**

5. On 12 April 2019, NSP2AG sent a letter addressed to President Juncker, which NSP2AG described as an attempt to reach an amicable settlement with the European Union under Article 26(1) ECT.
6. On 25 June 2019, a delegation of officials of the European Commission and the European Union's External Action Service, led by DG TRADE, met with NSP2AG's representatives.

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<sup>1</sup> Exhibit RL-3, Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas.

<sup>2</sup> Exhibit RL-4, Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC.

7. On 25 July 2019, NSP2AG launched an action for annulment of the Amending Gas Directive before the General Court of the European Union (Case T-526/19).<sup>3</sup> This case is pending before the Court.
8. On 26 September 2019, NSP2AG purported to serve a Notice of Arbitration against the European Union under the Energy Charter Treaty.<sup>4</sup>
9. On 4 October 2019, the European Union addressed to Mr. Peter Rees QC a letter containing a request for disclosure of any circumstances likely to give rise to doubts as to his impartiality or independence as an arbitrator.<sup>5</sup>
10. Mr. Peter Rees replied to that request by email of the same day.<sup>6</sup>
11. On 10 October 2019, the European Union served a Notice of Challenge against Mr. Peter Rees QC, appointed by NSP2AG as arbitrator.<sup>7</sup>
12. On 11 October 2019, NSP2AG's counsel sent email confirmation of their receipt of the EU's Challenge.<sup>8</sup>

### **3. PROCEDURAL MATTERS**

#### **3.1 APPOINTMENT OF ARBITRATORS**

13. The European Union agrees with NSP2AG's proposal to have this dispute heard by a three-member tribunal.
14. The European Union hereby notifies the Claimant that it has appointed Prof. Philippe Sands QC as its party-appointed arbitrator. The contact details of Prof. Philippe Sands QC are as follows:

**Philippe Sands QC**  
Griffin Building, Gray's Inn  
London WC1R 5LN  
DX400 Chancery Lane, London  
United Kingdom  
+44 (0)20 7404 3447  
philippesands@matrixlaw.co.uk

#### **3.2 APPOINTING AUTHORITY**

<sup>3</sup> Exhibit RL-5, NS2 Application for Annulment, 25 July 2019.

<sup>4</sup> Exhibit RL-6, NSP2AG Notice of Arbitration, 26 September 2019.

<sup>5</sup> Exhibit R-21, Letter from the EU Commission Legal Service, Request for Disclosure of any circumstances likely to give rise to doubts as to Mr. Peter Rees' impartiality or independence as an arbitrator, 4 October 2019.

<sup>6</sup> Exhibit R-22, E-mail Response from Mr. Peter Rees, 4 October 2019, 14h06.

<sup>7</sup> Exhibit RL-7, European Union's Notice of Challenge against Mr. Peter Rees as Arbitrator, 10 October 2019.

<sup>8</sup> Exhibit R-25, Email from NSP2AG's Counsel of 11 October 2019.

15. In its initial response to the European Union's Notice of Challenge of Mr. Peter Rees QC as arbitrator,<sup>9</sup> NSP2AG has proposed that the parties agree to designate the Secretary-General of the Permanent Court of Arbitration as the Appointing Authority for the purposes of this arbitration, to decide on the EU's Challenge and to fulfil all other roles of the Appointing Authority under the UNCITRAL Arbitration Rules as necessary.
16. The European Union hereby agrees to designate the Secretary General of the Permanent Court of Arbitration as Appointing Authority.
17. The European Union further agrees that the Secretary General of the Permanent Court of Arbitration, as Appointing Authority, decides on the EU's Challenge against Mr. Peter Rees QC pursuant to the applicable UNCITRAL Arbitration Rules.
18. The European Union further proposes that the Permanent Court of Arbitration be tasked by the Parties with the administration of this arbitration.

### **3.3 LANGUAGE OF THE ARBITRATION**

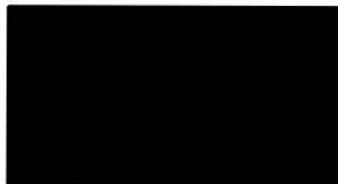
19. NSP2AG has proposed that the language of the arbitration shall be English.<sup>10</sup>
20. The European Union agrees with this proposal.

### **3.4 SEAT OF THE ARBITRATION**

21. The European Union considers that the seat of the arbitration should be in an EU Member State.

### **3.5 REPRESENTATION AND COMMUNICATIONS**

22. The European Union is represented in these arbitration proceedings by the Legal Service of the European Commission, which has appointed the following persons as agents:<sup>11</sup>



<sup>9</sup> Exhibit R-25, Email from NSP2AG's Counsel of 11 October 2019.

<sup>10</sup> Exhibit RL-6, NSP2AG's Notice of Arbitration, para 67.

<sup>11</sup> Exhibit R-1, Authority by the European Commission, 2 October 2019.

23. The European Union proposes to make all subsequent communications regarding this dispute exclusively via email. To this end, the European Union has established the following functional mailbox:

[REDACTED]

24. The direct email addresses of the European Union's agents are as follows:

[REDACTED]

25. The European Union requests the Claimant to address all communications to the agents and to send them to the functional mailbox as well as the direct e-mail addresses of the European Union's agents.

### **3.6 TRANSPARENCY**

26. The European Union proposes that the Parties agree to apply the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration to the conduct of the proceedings.

## **4. JURISDICTION**

27. The European Union does not agree that NSP2AG fulfils all the conditions to request arbitration pursuant to Article 26(2) of the ECT.

## **5. THE EUROPEAN UNION DENIES ANY ALLEGED BREACHES OF THE ECT**

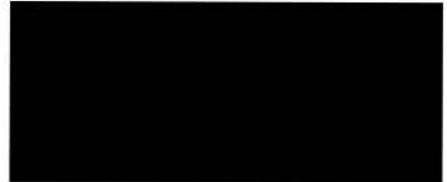
28. The European Union does not agree that the Amending Directive and its actions in connection with the Amending Directive breach the European Union's obligations under the ECT.
- i. The Amending Directive does not constitute an unreasonable or discriminatory measure and does not breach Article 10(1) of the ECT;
  - ii. The Amending Directive does not constitute a breach of the EU's obligation under Article 10(1) to create stable, equitable, favourable and transparent conditions for NSP2AG's investment;
  - iii. The Amending Directive does not constitute a breach of the EU's obligation under Article 10(1) to accord NSP2AG's investment fair and equitable treatment;

- iv. The Amending Directive does not constitute a breach of the EU's obligation to provide NSP2AG's investment constant protection and security, and does not breach of Article 10(1) of the ECT;
- v. The Amending Directive does not constitute a breach of the EU's obligation pursuant to Article 10(7) of the ECT to provide NSP2AG with treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third states; and
- vi. The application of the Amending Directive to NSP2AG and Nord Stream 2 will not have an effect equivalent to an expropriation, and does not constitute a breach of Article 13 of the ECT.

**6. RELIEF AND DAMAGES**

29. The European Union disputes that NSP2AG has suffered any losses as a result of any EU measure allegedly violating obligations under Part III of the ECT. The EU further denies NSP2AG's right to any declaratory or interim injunctive relief or costs in connection with this proceeding. The EU confirms it will be seeking its full costs.

Submitted for and on behalf of the European Union



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