

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

BETWEEN

NORD STREAM 2 AG

(Claimant)

- and -

THE EUROPEAN UNION

(Respondent)

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CLAIMANT'S RESPONSE TO THE EU'S REQUEST FOR A PRELIMINARY PHASE ON  
JURISDICTION AND ADMISSIBILITY

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## I. INTRODUCTION

1. This Response to the EU's Request for a Preliminary Phase on Jurisdiction and Admissibility (the "**Response**") is filed by the Claimant, Nord Stream 2 AG ("**NSP2AG**"). This Response is being submitted pursuant to the procedural timetable set out in Procedural Order No. 1 dated 24 April 2020. It is accompanied by one factual exhibit (**Exhibit C-183**) and 14 legal exhibits (**Exhibit CLA-17A** and **Exhibits CLA-157 to CLA-169**).
2. Factual and legal exhibits are referred to using the same numbering as in the Claimant's Notice and the Claimant's Memorial, in the form C-\* for factual exhibits, with an additional factual exhibit at C-183, and in the form CLA-\* for legal exhibits, with additional legal exhibits starting at CLA-157. Unless otherwise defined, the capitalised terms used herein bear the meaning defined in the Notice and the Memorial.
3. This Response contains six sections in addition to this Introduction:
  - i. Section II provides a summary of NSP2AG's arguments in this Response, and of why the Tribunal should reject the EU's request for a preliminary phase on jurisdiction and admissibility.
  - ii. Section III describes the key legal principles derived from treaty jurisprudence concerning the exercise by the Tribunal of its discretion to rule on jurisdictional objections as a preliminary question.
  - iii. Section IV explains why it would neither be fair nor procedurally efficient for the Tribunal to rule as a preliminary question on the Respondent's argument that NSP2AG is prevented from bringing the dispute before the Tribunal due to the fork-in-the-road clause in the ECT.
  - iv. Section V explains why it would neither be fair nor procedurally efficient for the Tribunal to rule as a preliminary question on the Respondent's argument that the Tribunal lacks jurisdiction *ratione personae*.
  - v. Section VI sets out why bifurcation of any one of the EU's two jurisdictional arguments would neither be fair (due to the inherent contradictions in the EU's two jurisdictional objections) nor procedurally efficient.
  - vi. Section VII explains why bifurcation may not lead to procedural economy.
4. This Response addresses the merits of the EU's jurisdictional objections in the context of the Claimant's submissions on the EU's request for bifurcation only. The Claimant reserves its right to address in full the merits of the EU's jurisdictional objections at a later stage of these proceedings.

## II. SUMMARY OF CLAIMANT'S SUBMISSIONS WITH RESPECT TO THE EU'S REQUEST FOR BIFURCATION

5. The EU's request for a preliminary phase on jurisdiction and admissibility continues its bid to defer, and ultimately to avoid, any adjudication of its unlawful actions in connection with the Amending Directive, and any articulation of its interpretation of the legislative instrument it adopted and which is at the heart of this claim.
6. The EU brings two jurisdictional objections: fork-in-the-road and a *ratione personae* argument, the latter of which it had not previously raised.
7. The overarching principle to be applied to the question of whether the EU's jurisdictional objections should be determined as a preliminary question is one of fairness and procedural efficiency, having regard to the totality of the circumstances.<sup>1</sup> Based on this principle, taking into account the inextricable link between the EU's jurisdictional arguments and the wider merits of the dispute, as well as the inherently weak nature of the EU's jurisdictional arguments, bifurcation cannot be justified.
8. In summary:
  - i. It would be unfair and procedurally inefficient to bifurcate the EU's jurisdictional objections because:
    - (a) Determination of the fork-in-the-road objection requires a full consideration of the nature of the ECT claims, including the factual basis of such claims, and is therefore intertwined with the merits. Indeed, NSP2AG cannot properly address, and the Tribunal cannot fairly rule upon, this objection as not all potentially relevant information is available, particularly as the EU has not filed its Statement of Defence.

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<sup>1</sup> **Exhibit CLA-157**, *Glencore Finance (Bermuda) Limited v. The Plurinational State Of Bolivia*, PCA Case No. 2016-39, Procedural Order No. 2 (Decision on Bifurcation) of 31 January 2018, para 38; **Exhibit CLA-158**, *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 2 (Decision on Bifurcation) of 28 June 2018, para 50 ("*in applying the three part test, it should seek to determine what will best serve the Parties and the sound administration of justice, in particular with respect to procedural efficiency*"); **Exhibit CLA-159**, *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Decision on Respondent's Notice of Jurisdictional Objections and Request for Bifurcation of 8 August 2013, para 38; **Exhibit CLA-160**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order Deciding Bifurcation and Non-Bifurcation of 25 January 2013, para 10 ("*weighing for both sides the benefits of procedural fairness and efficiency against the risks of delay, wasted expense and prejudice*"); **Exhibit CLA-161**, *Cairn Energy Plc and Cairn UK Holdings Limited v. The Republic of India*, PCA Case No. 2016-7, Procedural Order No. 4 (Decision on the Respondent's Application for Bifurcation) of 19 April 2017, paras 77-81.

- (b) The EU's objection that the Tribunal lacks jurisdiction *ratione personae* is also intertwined with the merits of NSP2AG's claims in the ECT arbitration because it raises precisely the substantive questions that these proceedings seek to answer: (i) whether the EU has breached the ECT; and (ii) whether the EU's breaches have caused loss to NSP2AG.
    - (c) Both of the EU's jurisdiction arguments are unmeritorious and, in any event, insufficiently substantial to justify bifurcation.
  - ii. In its objection to jurisdiction *ratione personae*, the EU seeks to rely on the peculiarities of its own legal order to avoid the exercise by the Tribunal of its jurisdiction, arguing that any breach of the ECT and damage therefrom is attributable to Germany. The EU's objection thus raises the important and novel question of its liability as a Regional Economic Integrated Organisation ("**REIO**") for, and in connection with, its own legislative acts, and the liability of its Member States. This gives further reason why the EU's objection to jurisdiction *ratione personae* should be determined with the merits with which it is intrinsically linked.
  - iii. Bifurcation of any one of the EU's two jurisdictional arguments would not be fair due, among other reasons, to the fundamental inconsistencies between them. The EU argues in its jurisdiction *ratione personae* objection that it is not the proper respondent to NSP2AG's claims and, at the same time, its fork-in-the-road objection assumes that it is the proper respondent to the ECT proceedings. Further, the EU's fork-in-the-road and jurisdiction *ratione personae* objections rely on fundamentally different and irreconcilable characterisations of NSP2AG's case.
  - iv. Bifurcation of any one of the EU's two jurisdictional arguments would not be procedurally efficient. Moreover, any decision on bifurcation that gave rise to a decision on the merits of the EU's fork-in-the-road claim before the merits of the EU's objection to jurisdiction *ratione personae* would be illogical because the fork-in-the-road objection is premised on the EU being the proper respondent to NSP2AG's claim.
  - v. Bifurcation of the EU's jurisdictional arguments may not lead to disposal of the case and may preclude the Claimant from bringing claims for denial of justice under Article 10(1) of the ECT and / or breach of Article 10(12) of the ECT in this arbitration.
- 9. The EU's request for a preliminary phase on jurisdiction and admissibility should therefore be rejected.

### III. KEY LEGAL PRINCIPLES WITH RESPECT TO THE EXERCISE OF THE TRIBUNAL'S DISCRETION TO RULE ON A PLEA CONCERNING ITS JURISDICTION AS A PRELIMINARY QUESTION

10. The EU's submissions regarding the question of bifurcation itself are very limited.<sup>2</sup> In essence, the EU seeks to rely only upon a 'presumption in favour of bifurcation' under the 1976 UNCITRAL Rules, a suggestion (based on a single award) that the Tribunal should grant its request for bifurcation unless there is "*clear prejudice to procedural economy*",<sup>3</sup> and a purported satisfaction of the test articulated in the case of *Glamis Gold v. United States of America*.<sup>4</sup> However, the EU omits to give proper weight to the fundamental principle which guides the exercise by a tribunal of its discretion to agree to bifurcation, namely the "*need to ensure both 'procedural justice and efficiency, taking all circumstances into account'*".<sup>5</sup> As further described in the following sub-sections, both the 'presumption' and the *Glamis Gold* criteria should be viewed in the context of this principle.

#### III.1 The Tribunal must exercise its discretion notwithstanding any 'presumption' under the 1976 UNCITRAL Rules

11. It is apparent from the second sentence of Article 21(4) of the 1976 UNCITRAL Rules, and from a significant number of authorities,<sup>6</sup> that a tribunal retains a very broad discretion to determine whether to hear jurisdictional objections separately from the merits of the dispute, notwithstanding any 'presumption'. Indeed, this discretion is emphasised in the *Glamis Gold* decision itself.<sup>7</sup>

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<sup>2</sup> Contained only in the short Section 3 of the EU's Memorial on Jurisdiction and Request for Bifurcation (the "**EU Memorial**").

<sup>3</sup> EU Memorial, para 216.

<sup>4</sup> **Exhibit RLA-65**, *Glamis Gold, Ltd. v. The United States of America*, Procedural Order No. 2 (Revised) of 31 May 2005, para 12(c).

<sup>5</sup> Although the EU does recognise the application of this principle, see EU Memorial, para 217, citing **Exhibit CLA-157**, *Glencore*, supra, para 38.

<sup>6</sup> See, for example, **Exhibit CLA-162**, "*President Allende*" *Foundation, Victor Pey Casado, Coral Pey Grebe (Spain) v. The Republic Of Chile*, PCA Case No. 2017-30, Procedural Order No. 2 of 29 November 2017, para 64: "*However, as accepted by Respondent, that presumption is not absolute. The Tribunal retains a significant degree of discretion when determining whether the efficient administration of the proceedings counsels in favor of hearing an objection to jurisdiction separately from, or joined to, the merits*"; **Exhibit CLA-161**, *Cairn Energy*, supra, para 75: "*The Tribunal concludes that, under the 1976 Rules which apply to this case, it is required to give serious consideration to a request that an objection to its jurisdiction should be heard as a preliminary question. However, it retains full discretion to determine whether, in the circumstances of the case, that objection should be heard preliminarily or be joined to the merits*".

<sup>7</sup> **Exhibit RLA-65**, *Glamis Gold*, supra, para 9: "*Article 21(4) establishes a presumption in favor of the tribunal preliminarily considering objections to jurisdiction. Simultaneously, however, Article 21(4) does not require that pleas as to jurisdiction must be ruled on as preliminary questions. The choice not to do so is left to the tribunal's discretion.*" The tribunal continues in footnote 1: "*The exercise of this discretion is implicit in a number of decisions in proceedings governed by the UNCITRAL Arbitration Rules. See e.g. Canfor Corporation v. United States of America, Decision on the Place of Arbitration, Filing of a Statement of Defense and Bifurcation of the Proceedings, (January 23, 2004), ¶ 46 (Rule "allows an arbitral tribunal to rule on its jurisdiction as a preliminary question")*".

12. Any suggestion that a tribunal determining an application under Article 21(4) should as a matter of principle rule in favour of bifurcation has been firmly rejected. As has the specific notion that such a principle may be established by reference to the differences between Article 21(4) of the 1976 UNCITRAL Rules and Article 23(3) of the 2010 UNCITRAL Rules.<sup>8</sup>

### **III.2 The Tribunal's discretion should be guided by fairness and procedural efficiency**

13. When considering a request for bifurcation, the Tribunal should at all times seek to achieve both fairness and procedural efficiency in the particular circumstances of the case.<sup>9</sup> Indeed, tribunals deciding cases under the 1976 UNCITRAL Rules,<sup>10</sup> the 2010 UNCITRAL Rules,<sup>11</sup> as well as the ICSID Arbitration Rules,<sup>12</sup> have supported this proposition. The EU also agrees that "[i]t 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".<sup>13</sup>

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<sup>8</sup> **Exhibit CLA-161**, *Cairn Energy*, supra, paras 72-75, concluding that "under the 1976 Rules [...], [the tribunal] is required to give serious consideration to a request that an objection to its jurisdiction should be heard as a preliminary question. However, it retains full discretion to determine whether, in the circumstances of the case, that objection should be heard preliminarily or be joined to the merits".

<sup>9</sup> **Exhibit CLA-161**, *Cairn Energy*, supra, para 81: "The Tribunal thus concludes that the question it must ask itself when considering whether to hear a jurisdictional objection as a preliminary question or to join it to the merits is the following: in the circumstances of the particular case, would bifurcation promote fairness and procedural efficiency? In answering that question, the Tribunal may consider the factors identified by the *Glamis Gold* tribunal, among others"; **Exhibit CLA-159**, *Accession Mezzanine*, supra, para 38: "With regard to the applicable standard, Claimants are in agreement with Respondent that the Tribunal shall consider as an overarching question whether fairness and procedural efficiency would be preserved or improved. The Tribunal agrees."

<sup>10</sup> **Exhibit CLA-161**, *Cairn Energy*, supra, para 81.

<sup>11</sup> **Exhibit CLA-157**, *Glencore*, supra, para 56: "Nevertheless, the Tribunal recalls that the overarching principle is the fairness and efficiency of this process as a whole. With this principle in mind, the Tribunal considers that it would be more efficient to deal with all preliminary objections together with liability in a first phase, and leave issues of damages, if any, for determination in a second phase. This approach seems to the Tribunal more efficient in terms of time and costs than the alternative, which is to bifurcate just one issue but leave all other objections to a merits phase".

<sup>12</sup> **Exhibit CLA-163**, *Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Bifurcation of 21 January 2015, para 66; **Exhibit CLA-160**, *Apotex*, supra, para 10: "The Tribunal must take in this case a difficult but not a complicated decision, weighing for both sides the benefits of procedural fairness and efficiency against the risks of delay, wasted expense and prejudice. There is no bright dividing-line as to where that decision now lies, rightly or wrongly. Moreover, the Tribunal must decide the Respondent's application in the particular circumstances of this case. It serves no purpose for this Tribunal to follow blindly what other tribunals have or have not done in other circumstances, particularly with hindsight"; **Exhibit CLA-164**, *Canepa Green Energy Opportunities I, S.á r.l. and Canepa Green Energy Opportunities II, S.á r.l. v. Kingdom of Spain*, ICSID Case No. ARB/19/4, Procedural Order No. 3, Decision on Bifurcation of 28 August 2020, para 68: "The analysis of a bifurcation request is rarely blessed with absolute certainty as to whether bifurcation would be procedurally fair and efficient. The Tribunal is principally weighing the fairness to the Claimants in not unnecessarily prolonging the proceedings (with the attendant costs) as against the efficiencies that might be gained by disposing of all or large parts of the case at a preliminary stage"; **Exhibit CLA-159**, *Accession Mezzanine*, supra, para 38: "With regard to the applicable standard, Claimants are in agreement with Respondent that the Tribunal shall consider as an overarching question whether fairness and procedural efficiency would be preserved or improved. The Tribunal agrees".

<sup>13</sup> EU Memorial, para 217, citing **Exhibit CLA-157**, *Glencore*, supra, para 38.

14. It follows that the *Glamis Gold* criteria are not a straightforward check-box exercise, as the EU seeks to argue.<sup>14</sup> The factors enumerated in that case are "non-exhaustive",<sup>15</sup> and do not constitute a standalone test.<sup>16</sup> There is no 'one size fits all' approach, and each tribunal is free to consider all factors it considers relevant in the particular circumstances of the case.<sup>17</sup>
15. Importantly, tribunals may choose not to bifurcate the proceedings even if all three of the criteria laid down in *Glamis Gold* are met.<sup>18</sup> The EU's suggestion that: "*it requires a manifest failure to meet the test set out in Glamis [...] in order to overcome the presumption under Article 21(4) of the 1976 UNCITRAL Rules*", and its assertion that "[i]t would require a clear prejudice to procedural economy in order not to bifurcate a serious jurisdictional objection

<sup>14</sup> EU Memorial, paras 218-219, Section 3.4.

<sup>15</sup> **Exhibit RLA-65**, *Glamis Gold*, supra, para 12(c). In relation to the Tribunal's discretion to separate jurisdictional objections from the merits of the dispute, the Tribunal held: "*The tribunal may decline to do so when doing so is unlikely to bring about increased efficiency in the proceedings. Considerations relevant to this analysis include, inter alia...*"; **Exhibit CLA-161**, *Cairn Energy*, supra, para 78: "*It is also worth noting that the Glamis Gold tribunal only enumerated the factors listed [...] as non-exhaustive elements to be considered in the quest for procedural efficiency*".

<sup>16</sup> **Exhibit CLA-161**, *Cairn Energy*, supra, para 77; **Exhibit CLA-165**, *Rand Investments Ltd., William Archibald Rand, Kathleen Elizabeth Rand, Allison Ruth Rand, Robert Harry Leander Rand and Semb Investment Limited v. Republic of Serbia*, ICSID Case No. ARB/18/8, Procedural Order No. 3 (Majority Decision) of 24 June 2019, para 16. See also **Exhibit CLA-163**, *Gavrilović*, supra, paras 64-66, where the Tribunal stated in no uncertain terms: "*the Tribunal does not consider that it should be placed in the "straightjacket" of considering this question by reference to the Glamis Gold factors, and nothing further. To do so would be to overlook what can be discerned from relevant cases, namely a governing principle that a decision on an application for bifurcation, like other procedural orders, must have regard to the fairness of the procedure to be invoked and the efficiency of the Tribunal's proceedings. To identify, and discuss in turn, only certain identified factors may distract from the task at hand*".

<sup>17</sup> **Exhibit CLA-160**, *Apotex*, supra, para 10: "*The Tribunal must take in this case a difficult but not a complicated decision, weighing for both sides the benefits of procedural fairness and efficiency against the risks of delay, wasted expense and prejudice. There is no bright dividing-line as to where that decision now lies, rightly or wrongly. Moreover, the Tribunal must decide the Respondent's application in the particular circumstances of this case. It serves no purpose for this Tribunal to follow blindly what other tribunals have or have not done in other circumstances, particularly with hindsight*"; **Exhibit CLA-166**, *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23, Procedural Order No. 3, Decision on the Respondent's Request for Bifurcation of 17 January 2020, para 26: "*Yet, while the jurisprudence identifies certain relevant considerations, it does not suggest that there is a rigid or mandatory formula regarding the process of weighing these considerations. There is no consensus on whether they are to be considered holistically or sequentially (much less in what sequence); whether any particular factor is mandatory; or whether certain factors should be weighted more heavily than others for purposes of reaching an eventual result. Given the absence of standards in the governing instruments, the Tribunal considers it appropriate that no "one-size-fits-all" analytical structure be imposed on the reasoning process, leaving each tribunal free to consider all factors that it considers relevant in the particular circumstances of its case*" (citing **Exhibit CLA-160**, *Apotex*, supra).

<sup>18</sup> **Exhibit CLA-161**, *Cairn Energy*, supra, para 77: "*The Tribunal agrees that these factors should be taken into consideration when determining whether jurisdictional objections should be bifurcated. However, it does not consider that these factors constitute a stand-alone test. In particular, it does not agree that, if factors (a) and (b) are answered in the affirmative and factor (c) in the negative, a tribunal should necessarily bifurcate a jurisdictional objection*". See also **Exhibit CLA-165**, *Rand* (Majority Decision), supra, para 16: "*In this context, Glamis Gold usefully lists some of the main factors to be taken into account when seeking to assess efficiency. This being so, as other tribunals have observed, the factors identified in Glamis Gold are not "stand-alone" criteria [giving the example of Exhibit RLA-66, Philip Morris Asia Ltd v. Commonwealth of Australia (UNCITRAL), Procedural Order No. 8, 14 April 2014, para 109] and arbitral tribunals may well refuse to bifurcate jurisdictional objections even if all three factors are satisfied*" (citing **Exhibit CLA-161**, *Cairn Energy*, para 77).



which is separable from the merits",<sup>19</sup> both misrepresent the approach of the large majority of tribunals to the *Glamis Gold* criteria, as demonstrated by the EU's failure to cite any authority for the first proposition and only a single authority in support of the second.

16. As described further below, bifurcation of one or both of the EU's jurisdictional objections from the merits of this dispute will not serve the ends of fairness and procedural efficiency.<sup>20</sup>

### **III.3 In any event, the *Glamis Gold* criteria for bifurcation are not satisfied in this case**

17. Even if the *Glamis Gold* criteria were to be strictly applied, they do not support bifurcation in the circumstances of this case.

18. For example, the *Glamis Gold* criteria confirm that bifurcation is inappropriate where: "*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*".<sup>21</sup> The relevance of this consideration is confirmed in a number of awards.<sup>22</sup> For the reasons described in detail in Sections IV and V, the EU's fork-in-the-road and jurisdiction *ratione personae* objections are precisely so intertwined with the merits that bifurcating them would be neither fair nor procedurally efficient.

19. The EU has argued that: "*When addressing whether a jurisdictional objection is substantial at the bifurcation request stage, tribunals [...] limit their assessment to whether the objection is frivolous or clearly unfounded*".<sup>23</sup> On the contrary, however, tribunals have taken a much more nuanced approach towards the merits of a jurisdictional objection when determining whether to bifurcate. The tribunal in *Eco Oro Minerals Corp. v. Colombia* held, for example, that, "*for an objection to be held to be "serious and substantial" a higher threshold must be applied than merely requiring that the objection is not frivolous or vexatious*".<sup>24</sup> The tribunal in *Glencore v. Bolivia* determined that whilst certain of the jurisdictional arguments raised by the respondent were "*capable of being argued and worth exploring in depth*", it was not convinced that some of the objections were sufficiently serious and substantial such as to justify bifurcation. Indeed, although in that case one of the respondent's objections could justify bifurcation, the tribunal decided to hear all of the parties' submissions regarding

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<sup>19</sup> EU Memorial, para 216.

<sup>20</sup> See Section VI.

<sup>21</sup> **Exhibit RLA-65**, *Glamis Gold*, supra, para 12(c).

<sup>22</sup> **Exhibit CLA-163**, *Gavrilović*, supra, para 93: "*Once a considerable factual overlap is accepted, [...] little can be said in support of the division of the case*"; **Exhibit CLA-167**, *The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda. v. The Plurinational State of Bolivia*, PCA Case No. 2018-39, Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs of 9 July 2019, para 133: "*The problem that arises out of situations where the jurisdictional objections are, at least in some respects, intertwined with the merits, is two-fold. First, evidence, such as documents and witness testimony, relevant to the determination of jurisdiction would also be relevant to the determination of liability. Thus, assuming the Tribunal finds jurisdiction, the Tribunal will have to review the same or substantially the same evidence in the next phase of the proceedings, dedicated to liability. Such an overlap would not contribute to the efficient conduct of the proceedings. It will hardly be efficient if the same documents would have to be reviewed twice, the same witnesses would have to be heard twice, etc*".

<sup>23</sup> EU Memorial, para 221.

<sup>24</sup> **Exhibit CLA-158**, *Eco Oro Minerals*, supra, para 51.

jurisdiction and admissibility together with their submissions on the merits.<sup>25</sup> As described further below, the EU's objections are not substantial enough to warrant a bifurcation of these proceedings.<sup>26</sup>

#### IV. THE EU'S FORK-IN-THE-ROAD OBJECTION SHOULD NOT BE BIFURCATED

20. The EU seeks to argue that the Tribunal does not have jurisdiction over the Claimant's claims for breach of the ECT by the EU because the claims are precluded by the fork-in-the-road provisions of Article 26 of the ECT.<sup>27</sup> It argues that the "*fundamental basis*" of NSP2AG's claim under the ECT is the same as the action for annulment of the Amending Directive brought by NSP2AG before the General Court of the Court of Justice of the European Union (the "**CJEU**") (the "**CJEU Proceedings**"),<sup>28</sup> and even the same (although this is not entirely clear from its submissions) as the challenge to the decision of the Bundesnetzagentur denying a derogation to Nord Stream 2 under Article 49a of the Amending Directive that NSP2AG has made before the Higher Regional Court of Dusseldorf in Germany (the "**German Proceedings**"). In particular, the EU argues that the "*fundamental basis*" test is satisfied on the alleged basis that the "*fundamental cause*" of the claims in the disputes before this Tribunal and the General Court,<sup>29</sup> and the "*request for relief*", are the same in both disputes.<sup>30</sup>
21. In summary, and as further developed below, the Tribunal should refuse the EU's request for bifurcation of its fork-in-the-road argument for the following reasons:
  - i. Any proper consideration of the EU's fork-in-the-road objection in the context of the ECT, CJEU and German Proceedings requires the Tribunal to consider facts, issues and questions that can only properly be considered and, where appropriate, ruled upon, at the merits stage. Indeed, NSP2AG cannot properly address, and the Tribunal cannot determine, the EU's fork-in-the-road objection as a preliminary question because not all potentially relevant information is available, particularly in the absence of any EU submissions on the merits.
  - ii. The EU's fork-in-the-road objection is not, even on a *prima facie* basis, a serious or substantial objection such as to justify bifurcation.
22. It would therefore be neither fair nor procedurally efficient for the fork-in-the-road objection to be determined as a preliminary question.

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<sup>25</sup> **Exhibit CLA-157**, *Glencore*, supra, paras 42, 50 and 56.

<sup>26</sup> See Sections IV.2 and V.2.

<sup>27</sup> EU Memorial, Section 2.1.4.

<sup>28</sup> The "**General Court**". The Court of Justice of the European Union consists of two courts: the Court of Justice and the General Court, and a number of specialised courts (**Exhibit CLA-41**, TEU, Article 19).

<sup>29</sup> EU Memorial, Section 2.1.4(a).

<sup>30</sup> EU Memorial, Section 2.1.4(b). The EU makes no attempt to apply the "*fundamental basis*" test or the "*triple identity*" test to the German Proceedings.

**IV.1 Determination of the fork-in-the-road argument requires a full consideration of the nature of the CJEU and ECT claims, which is not possible at this stage**

23. The EU asks the Tribunal to determine its fork-in-the-road objection based on an assertion that the CJEU Proceedings and the ECT proceedings have the same "*fundamental basis*", and in particular asserts that the Tribunal must consider whether the "*fundamental cause*" of the claims in both disputes is the same.<sup>31</sup> In so doing, the EU requests the Tribunal both to investigate the scope of the matters complained of as constituting breaches of the ECT and the evidential basis thereof, and to reach a conclusion regarding the extent to which such matters overlap with, or are independent from, the basis of the action for annulment. It presents a similar argument in the context of the "*triple identity*" test.
24. On the "*fundamental basis*" test, and the "*triple identity*" test as described by the EU, the Tribunal would be required to consider, and to draw conclusions from, facts and evidence which are to be considered and ruled upon during the merits phase. As such, the EU's jurisdictional objection based on fork-in-the-road is intertwined with the merits and the request for bifurcation should be refused.
25. This is clear from paragraphs 50 and 51 of the EU's Memorial, which purport to summarise the "*fundamental cause*" of the ECT proceedings for the purposes of the comparison that the EU requests the Tribunal to draw with the "*fundamental cause*" of the CJEU Proceedings. Those paragraphs draw heavily on NSP2AG's presentation of the factual basis of its claims in the ECT arbitration (and not merely their legal basis). In so doing, the EU simply serves to emphasise that it is not possible to establish the "*fundamental cause*" of the claims in the ECT proceedings in order to compare them with the "*fundamental cause*" of the CJEU Proceedings, without evaluating the factual matters and evidence on which the ECT claims are based. By way of example of some of the factual points in issue that would need, on the EU's case, to be examined:
- i. In paragraph 50, footnote 35 of the EU Memorial, the EU cites paragraph 381(ii) of the Memorial which is in a section of the Memorial subtitled "Relevant background and evidence", in which the Claimant asserts, as a matter of fact, that the EU has introduced a Dramatic and Radical Regulatory Change to the regulatory framework in which it made its investment.
  - ii. In paragraph 50, footnote 36, the EU cites paragraphs 394 to 415 of the Memorial, which include: the factual basis for the Claimant's contentions that the Amending Directive was arbitrary (drawing on Professor Cameron's expert evidence as to the question of whether the Amending Directive can achieve its purported internal market objectives);<sup>32</sup> the Claimant's factual assertion as to the percentage of third

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<sup>31</sup> EU Memorial, paras 47-55.

<sup>32</sup> Memorial, para 399.

country import capacity affected by the Amending Directive;<sup>33</sup> the motivations ascribed to the EU's actions by the Claimant;<sup>34</sup> and the Claimant's assertions as to the material similarity of the Nord Stream 2 project to appropriate comparators.<sup>35</sup>

- iii. In paragraph 51, footnote 41, the EU cites paragraph 381(iii) of the Memorial which is in a section of the Memorial subtitled "Relevant background and evidence", and which addresses the Improper Legislative Process.
  - iv. In paragraph 51, footnote 42, the EU cites paragraph 391 of the Memorial which addresses the factual basis of the Claimant's claim for lack of due process, paragraph 418(i) which addresses the motivations which the Claimant ascribes to the EU's actions in connection with the Amending Directive, and paragraph 418(iii) which addresses the EU's failure to respond to requests to clarify the interpretation of the Amending Directive.
  - v. In paragraph 51, footnote 44, the EU cites paragraphs 436 to 440 of the Memorial and in footnote 45, the EU cites specifically paragraph 439 of the Memorial. Paragraph 439 draws on the expert evidence of Professor Cameron to set out the basis for the Claimant's assertion that the Amending Directive bears no relationship to a rational policy.
  - vi. In paragraph 51, footnotes 46 and 47, the EU cites paragraphs 479 and 477 respectively which address the Claimant's factual assertions as to the effect of the Amending Directive on operation of the Nord Stream 2 pipeline and the circumstances in which NSP2AG may be forced to sell the pipeline.
26. Similarly, the EU's over-expansive and inaccurate characterisation of the "*triple identity*" test raises numerous factual matters and evidence that would need to be evaluated.<sup>36</sup> In particular, the EU's characterisation of the "*cause of action*" element of the "*triple identity*" test requests that the Tribunal consider and compare the substance of NSP2AG's arguments in the ECT arbitration with the pleas in law in the CJEU Proceedings. For this purpose the EU then purports to summarise the substance of NSP2AG's ECT claims by reference to selected statements from NSP2AG's Memorial. However, it is clear that, in fairness, any such exercise would require full consideration of the facts and evidence that give rise to the substance of NSP2AG's claims.<sup>37</sup>

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<sup>33</sup> Memorial, para 400.

<sup>34</sup> Memorial, paras 401 and 415.

<sup>35</sup> Memorial, para 407.

<sup>36</sup> EU Memorial, paras 81-121.

<sup>37</sup> By way of example, the EU asserts that one limb of the "*triple identity*" test is met because NSP2AG's allegations of lack of due process correspond to the allegations in NSP2AG's fifth plea in law in the CJEU Proceedings (EU Memorial, paras 94 and 95). To the extent that it is appropriate to compare the substantive basis of each set of proceedings as requested by the EU (which is denied), it is clearly necessary to understand fully what is being claimed by NSP2AG within the scope of NSP2AG's claims of an "Improper Legislative Process" in order to draw such a comparison.

27. Moreover, as described, the EU has placed in issue the matters on which NSP2AG relies as the basis for its ECT claim. However, not all potentially relevant information is available about those matters at this stage of the proceedings, particularly as the EU has not filed its Statement of Defence (and argued against doing so at the same time as filing its jurisdictional objections). NSP2AG's case relies in part on the available evidence concerning the deliberately targeted nature of the Amending Directive and the EU's intention as to the result to be achieved by Article 49a.<sup>38</sup> The EU's submissions on these and other issues could in the usual course be expected to allow NSP2AG to develop its case further. These matters may also need to be taken into account by the Tribunal when ruling on the fork-in-the-road objection. Therefore, as matters stand, NSP2AG cannot properly address, and the Tribunal should not yet rule upon, this objection.
28. As to the German Proceedings, the EU makes no submissions whatsoever as to whether those proceedings satisfy the "*fundamental basis*" test or the "*triple identity*" test as characterised by the EU. This may be deliberate given the entirely baseless nature of such arguments. However, and in any case, it is apparent that the Tribunal will not be able to consider the application of these tests as they are set out by the EU without exploring the reasons and basis for the German Proceedings. This would necessitate considering the manner and motivations for the passing of the Amending Directive by the EU and the reason that the Bundesnetzagentur (whose decision is being appealed in the Higher Regional Court of Dusseldorf in Germany) considered itself compelled to interpret the words "*completed before 23 May 2019*" to deny the Nord Stream 2 pipeline a derogation.<sup>39</sup> Again, these are matters which the Tribunal can only consider fairly and efficiently at the merits stage.

**IV.2 The fork-in-the-road objection is not, even on a *prima facie* basis, a serious or substantial objection such as to justify bifurcation**

29. The EU's fork-in-the-road argument is, in any event, without merit. The Claimant has not submitted the dispute that is before the Tribunal to another forum such as to vitiate the consent given by the EU to the submission of the dispute to international arbitration in accordance with Article 26(3).

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<sup>38</sup> Memorial, Sections VI.3, VI.9 and VI.10.

<sup>39</sup> **Exhibit CLA-17A**, Bundesnetzagentur decision on NSP2AG's Derogation Application (official English translation) of 15 May 2020, p 28.

30. The EU's reading of Article 26 of the ECT is flawed and incomplete.<sup>40</sup> The ECT makes clear that the EU's unconditional consent to the submission of a dispute to arbitration is not undermined unless "*the dispute*" that has been submitted under Article 26(2)(a) or (2)(b) for the purposes of Article 26(3)(b)(i) is a dispute "*which concern[s] an alleged breach of an obligation of [the EU] under Part III*".<sup>41</sup>

**IV.2.i The "fundamental basis" test is an outlier, and even on that basis the objection is not serious or substantial**

31. It bears emphasis that the "*fundamental basis*" test upon which the EU is obliged primarily to rely is itself largely unsupported. The case of *Pantechniki v. Albania* referred to by the EU, and the only two subsequent occasions on which such test has been applied,<sup>42</sup> are outliers in the swathe of jurisprudence in which the "*triple identity*" test has been applied, as discussed further below. Indeed, in each of these three cases, the tribunal considered whether a treaty claim grounded in a contract had any autonomous existence beyond the claim in respect of the contract that was litigated in domestic proceedings, a situation far removed from the current circumstances.
32. Properly interpreted, *Pantechniki* does not support the EU's argument in these circumstances. *Pantechniki* does not lay down a bright-line test which is satisfied by drawing general comparisons between the two sets of proceedings, including as to the identity of the factual basis of those proceedings, as was acknowledged by the sole arbitrator in that case.<sup>43</sup>

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<sup>40</sup> EU Memorial, paras 21-28.

<sup>41</sup> **Exhibit CLA-1/CL-1**, The Energy Charter Treaty, 1994, Articles 26(1) and 26(3)(b)(i). This interpretation is supported in commentary. **Exhibit CLA-22**, E. Gaillard & M. McNeill, "Chapter 2 - The Energy Charter Treaty", in K Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide To The Key Issues*, 2nd ed. (Oxford: OUP), 2018, p 52. As Emmanuel Gaillard explains: "*Article 26(1) defines the relevant "dispute" narrowly as one that "concern[s] an alleged breach of an obligation of the [Respondent] under Part III" of the ECT. Accordingly, it bars only a prior dispute in which the claimant alleged a breach of the Energy Charter Treaty itself and not some other source of law. In contrast, the NAFTA and CAFTA require the claimant to broadly waive all proceedings referring to the same "measure" at issue in the treaty arbitration. In practice, given the narrow scope of Article 26(1) of the ECT, it will likely be rare that Contracting Parties will successfully invoke that article to bar a claim*".

<sup>42</sup> **Exhibit RLA-10**, *Pantechniki S.A Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award of 28 July 2009; **Exhibit RLA-9**, *H&H Enters. Invs., Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award of 6 May 2014; and **Exhibit RLA-11**, *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award of 18 January 2017.

<sup>43</sup> **Exhibit RLA-10**, *Pantechniki*, supra, para 62: "*I am not persuaded that such generalities are helpful in deciding individual cases. The same facts can give rise to different legal claims. The similarity of prayers for relief does not necessarily bespeak an identity of causes of action. What I believe to be necessary is to determine whether claimed entitlements have the same normative source. But even this abstract statement may hardly be said to trace a bright line that would permit rapid decision. The frontiers between claimed entitlements are not always distinct. Each situation must be regarded with discernment*" (emphasis added).

33. In any event, even if the "*fundamental basis*" test were applied to the fork-in-the-road clause in the ECT (which is denied), the test is not met in respect of the CJEU Proceedings. In summary:
- i. The "normative source" of the dispute in each forum is not the same. The ECT arbitration is based on the rights afforded to investors by the Contracting Parties to the ECT as to the standards of treatment guaranteed to their investment. Whereas the normative source of the dispute in the CJEU Proceedings is Article 263 TFEU, which provides the mechanism by which EU acts can be reviewed as to their legality as a matter of EU law.<sup>44</sup> As such, the ECT claim clearly has an autonomous existence outside of the matters raised in the CJEU Proceedings.
  - ii. The relief sought in each of the ECT arbitration and the CJEU Proceedings is completely different. In particular, no damages can be granted in an annulment action. An action for damages in the CJEU is possible but this would be a separate claim on a separate legal basis, namely Article 268 TFEU. NSP2AG has pursued no such claim. The outcome of the action for annulment could not be the same as the outcome of the ECT arbitration – NSP2AG is seeking annulment of the measure as being in breach of EU law. In the event that the CJEU were to overturn the General Court's finding of inadmissibility and find the action to be well founded, it will declare the nullity of the Amending Directive, which would be considered null from the moment of its adoption (i.e. *ex tunc*) and a finding of illegality would have *erga omnes* effect.<sup>45</sup> In the ECT arbitration, NSP2AG seeks, *inter alia*, an order that the EU, by means of its own choosing, remove the application of certain articles of the Gas Directive to NSP2AG and, in addition,<sup>46</sup> reserves the right to claim damages in respect of the losses that have been and are being caused by the EU's breaches of the ECT, to the extent not avoided by the primary relief claimed by NSP2AG.
  - iii. Contrary to the EU's submissions,<sup>47</sup> there is no risk of double-recovery or inconsistent outcomes. A decision of the CJEU on the merits would be a finding as to the legality of the Amending Directive as a matter of EU law, which finding would not be determinative of NSP2AG's claim that the EU violated its obligations under the ECT, for the very reason that the legal basis of the claims is different.<sup>48</sup> Indeed,

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<sup>44</sup> **Exhibit CLA-42**, TFEU, Article 263: "*The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties*".

<sup>45</sup> In contrast to **Exhibit RLA-10**, *Pantehniki*, para 67, in which the tribunal found that if the claimant's claim in the Albanian courts had been successful, the claimant would have been granted the same relief that it requested in the ICSID arbitration proceedings, and, what is more, on the same fundamental basis.

<sup>46</sup> Memorial, para 514.

<sup>47</sup> EU Memorial, para 31.

<sup>48</sup> For example, the Amending Directive could constitute a breach of the ECT on the basis that it is discriminatory as a matter of treaty law, even if it is not found to be discriminatory as a matter of EU law.

even if the CJEU was to reach a decision on the merits that the Amending Directive is lawful as a matter of EU law, this would not mean that there has been no breach of the EU's obligations under the ECT. Conversely, if the CJEU was to reach a decision that the Amending Directive is unlawful, annulling the Amending Directive with *erga omnes* effect, NSP2AG would still be entitled to claim in this arbitration compensation for the damage caused by the EU's actions in breach of the ECT.

iv. Finally, in Section 2.1.4 of its Memorial, the EU has not supplied any meaningful analysis as to how the Claimant's claim for breach of Article 13 of the ECT shares the same "fundamental basis" as the CJEU Proceedings.<sup>49</sup>

34. As to the German Proceedings, the question of how these might trigger the fork-in-the-road provision is nowhere explained by the EU, nor could it be (on a "*fundamental basis*" test or otherwise). A claim derived from international law which includes allegations of lack of transparency and other due process failings in the EU's passing of the Amending Directive in breach of the ECT, simply cannot share the same "*fundamental basis*" as an appeal of the decision of the Bundesnetzagentur denying NSP2AG's application for a derogation under the domestic legislation which implements the Amending Directive because Nord Stream 2 is not "*completed before 23 May 2019*". Further, the remedy sought in the German Proceedings is, of course, wholly different from the ECT proceedings as NSP2AG is seeking a derogation from Article 49a. This aspect of the EU's fork-in-the-road objection is particularly frivolous.

#### IV.2.ii The "*triple identity*" test is also clearly not met

35. Tribunals determining fork-in-the-road objections under the ECT and other treaties have consistently applied the "*triple identity*" test, requiring an identity of object, parties and cause of action to trigger the fork-in-the-road provision.<sup>50</sup> This is clearly the correct test to apply in the context of the ECT, as it follows from the wording of the ECT itself. A "*dispute*" is defined narrowly in Article 26(1) by reference to an allegation by an Investor of a breach by a Contracting Party of an obligation under Part III of the ECT (and not more broadly as in some investment treaties).<sup>51</sup> Consent to submission of a "*dispute*" to international arbitration is unconditional unless the "*dispute*" (as defined in Article 26(1)) has been submitted under

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<sup>49</sup> EU Memorial, para 51.ii.

<sup>50</sup> As noted in the EU Memorial which cites six cases in which the triple identity test was applied (and a further five cases in which one element of the triple identity test was a relevant factor) (EU Memorial, paras 66 to 78), in contrast to the only three cases cited where a "*fundamental basis*" test was invoked. In **Exhibit CLA-168**, *Yukos Universal Limited (Isle Of Man) v. The Russian Federation*, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility of 30 November 2009, para 598, the tribunal recognised that there was "*ample authority*" for application of the triple identity test. The triple identity test was also applied in **Exhibit CLA-169**, *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd v. Mongolia*, PCA Case No. 2011-09, Decision on Jurisdiction of 25 July 2012, para 390. Both *Yukos* and *Khan Resources* were claims under the ECT.

<sup>51</sup> **Exhibit CLA-22**, Gaillard & McNeill, *supra*, p 52.



Article 26(2)(a) or Article 26(2)(b). It can be deduced therefore that parallel proceedings may only trigger the fork-in-the-road provision if, among other things: (i) the cause of action is the same (i.e. it concerns an allegation of breach by the Contracting Party of its obligations under the ECT); and (ii) the action has been brought by the same party (i.e. an Investor as defined in the ECT). The EU's suggestion that the requirement of identity of cause of action should be lessened on the basis that it would deprive the fork-in-the-road clause of practical effect (*effet utile*) has been rejected in the past.<sup>52</sup>

36. The "*triple identity*" test is not satisfied in respect of the ECT proceedings and the CJEU Proceedings (or the German Proceedings), as there is both a different cause of action and object, as well as different respondent parties.
37. As noted in paragraph 33.i above, the Claimant's rights are grounded in the international law obligations which the EU, as an REIO and Contracting Party, has assumed under the ECT. Whereas, in the CJEU Proceedings, NSP2AG has filed an application under Article 263 TFEU for annulment of the Amending Directive on the grounds of its illegality as a matter of EU law. An action for annulment is therefore a legal procedure before the European Court of Justice that "*guarantees the conformity of EU legislative acts, regulatory acts and individual acts with the superior rules of the EU legal order*",<sup>53</sup> i.e. a review of the legislative act itself.
38. Notably, the Council and the European Parliament argued, and the General Court ruled, that NSP2AG had no standing in those proceedings and that they were inadmissible as a matter of EU law.<sup>54</sup> This finding of inadmissibility is scarcely mentioned in the EU's Memorial, unsurprisingly given that it fundamentally undermines the EU's fork-in-the-road argument.

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<sup>52</sup> In **Exhibit CLA-169**, *Khan Resources B. V.*, supra, para 391, the Respondent argued that the triple identity test was too strict and deprived the fork-in-the-road clause of any practical effect since "*it is unrealistic to expect all three prongs of the test to be satisfied*". The arbitral tribunal found that this test "*should not be easy to satisfy*". It further stated that the requirements of triggering the fork in the road provision need to remain difficult to satisfy since "*this could have a chilling effect on the submission of disputes by investors to domestic fora, even when the issues at stake are clearly within the domain of local law. This may cause claims being brought to international arbitration before they are ripe on the merits, simply because the investor is afraid that by submitting the existing dispute to local courts or tribunals, it will forgo its right to later make any claims related to the same investment before an international arbitral tribunal*". In any case, under Article 26(2)(a) and (2)(b) an investor can submit a dispute concerning the breach by a Contracting Party of its obligations under Part III of the ECT to the domestic courts or tribunals of the Contracting Party or in accordance with any applicable previously agreed settlement procedure, in which case the requirement of the identity of cause of action would not render Article 26(3)(b)(i) redundant.

<sup>53</sup> **Exhibit C-183**, European Parliamentary Research Service, "Action for Annulment of an EU Act", Briefing: Court of Justice at work, PE 642.282, November 2019 (last accessed on 14 October 2020 at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642282/EPRS\\_BRI\(2019\)642282\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642282/EPRS_BRI(2019)642282_EN.pdf)), p 1. See also p 8: "*The action for annulment is an important element of the judicial architecture of the European Union. In comparison to national law, it fulfils a double function – on the one hand, it is the equivalent of a constitutional complaint, which enables the Court of Justice to perform constitutional review, i.e. verify the conformity of EU legislation with primary law (the Treaties, the Charter). On the other hand, it is the equivalent of a complaint to an administrative court, which enables the Court of Justice to perform judicial review of administrative action, i.e. verify the legality of individual administrative decisions taken by EU institutions, agencies and bodies with regard to individuals*".

<sup>54</sup> **Exhibit CLA-67**, General Court's Decision on Admissibility of NSP2AG's Annulment Application (partially redacted) of 20 May 2020.

The EU argues in these ECT proceedings that its consent to arbitration is withheld on the basis that NSP2AG has begun the CJEU Proceedings. However, it argues in the CJEU Proceedings that NSP2AG's claim is inadmissible on the basis that NSP2AG cannot demonstrate an interest in bringing the action and is not directly and individually concerned by the Amending Directive. The EU's argument is thus entirely incoherent.

39. Second, contrary to the EU's claim, and as explained fully in paragraph 33.ii above, the object sought in each of the ECT arbitration and the CJEU Proceedings is completely different. The outcome of the action for annulment could not be the same as the outcome of the ECT arbitration – NSP2AG is seeking annulment of the measure as being in breach of EU law. The action for annulment is concerned with the objective legality of the Amending Directive as a matter of EU law. The focus is not on NSP2AG's subjective rights as an investor and how a breach of these might be remedied.
40. Further, the remedy sought in the ECT arbitration is completely different from the CJEU Proceedings: in summary, an order to prevent application of certain provisions of the Gas Directive to NSP2AG or Nord Stream 2, and / or damages, whereas no damages are available in the CJEU Proceedings. In its attempt to construct its argument on identity of object,<sup>55</sup> the EU seeks to equate NSP2AG's claim for costs in the CJEU Proceedings with a damages claim.<sup>56</sup> This is absurd, and should be rejected.
41. Third, in terms of parties, the ECT arbitration is brought against the EU, as an REIO, and the action for annulment in the General Court is brought against two of the specific institutions of the EU: the Council and the European Parliament.
42. Finally, as to the German Proceedings, for all the reasons set out at paragraph 34 above, it is obvious that there is no identity of cause or object such as to satisfy the "*triple identity*" test, and the respondent parties are not the same.
43. Accordingly, the EU should not be permitted to prolong the duration of these significant proceedings based on a jurisdictional objection so clearly lacking in merit.

#### **V. THE EU'S JURISDICTION RATIONE PERSONAE OBJECTION SHOULD NOT BE BIFURCATED**

44. The EU's jurisdictional objection *ratione personae* is based on an argument that the breaches of the ECT alleged by NSP2AG and any resulting damage to NSP2AG are attributable to measures of the Member States for which the EU is not responsible.

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<sup>55</sup> And, indeed, to support its argument that the ECT arbitration and the CJEU Proceedings share the same "*fundamental basis*".

<sup>56</sup> EU Memorial, paras 58, 86 and 87.

45. As with its fork-in-the-road argument and as further developed below, this argument is: (i) intrinsically linked to the determination of the merits, because it is a matter of the merits to determine whether there is a breach of the ECT and to whom it is attributable; and (ii) inherently flawed. As such, bifurcation would not be consistent with the overarching principle of fairness and procedural efficiency.
46. In particular, the EU characterises NSP2AG’s case as relating solely to the "*practical effects*" of the Amending Directive and, relying on its own legal order, attributes those "*practical effects*" to Germany.<sup>57</sup> However, by refusing to commit to any interpretation of the words "*completed before 23 May*" in Article 49a of its own Amending Directive, the EU creates deliberate confusion as to whether these words leave scope to a Member State to grant a derogation to a pipeline in the situation of Nord Stream 2.<sup>58</sup> This refusal serves only to highlight why, as a matter of fairness, this jurisdictional objection simply cannot be bifurcated and must be considered with the merits.

#### V.1 **Intrinsic connection with the merits of the case**

47. The EU’s argument on jurisdiction *ratione personae* is intrinsically linked with the determination of the merits of this case. This is clear from the EU’s own submissions. The EU states: "*to the extent that the EU is not responsible for the alleged breaches of the ECT, the Tribunal lacks jurisdiction ratione personae*".<sup>59</sup> In other words, the EU asks the Tribunal to assume the very matter which it is to decide on the merits of NSP2AG’s claim in order to find that it has no jurisdiction, and to do so in a bifurcated jurisdiction phase. Indeed, the EU’s jurisdiction *ratione personae* objection raises precisely the substantive questions that these proceedings seek to answer: (i) whether the EU has breached the ECT; and (ii) whether the EU’s breaches have caused loss to NSP2AG.
48. Throughout its Memorial, the EU repeatedly highlights the intrinsic connection of its *ratione personae* jurisdictional objection with the wider merits of this case, including, for example, around the nature of the allegations made by NSP2AG and the question of causation of NSP2AG’s loss. In particular, and by way of example, the EU makes the following claims in support of its jurisdictional objection, all of which invoke and require a broader consideration of the merits:<sup>60</sup>
- i. "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

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<sup>57</sup> EU Memorial, para 128, Sections 2.2.5(b) and 2.2.5(c).

<sup>58</sup> EU Memorial, paras 169-172.

<sup>59</sup> EU Memorial, para 124.

<sup>60</sup> For further examples demonstrating that the EU’s jurisdiction *ratione personae* argument rests on matters which are to be considered and determined as part of the merits of the claim, including the question of whether the "*practical effects*" alleged by NSP2AG flow from the Amending Directive and / or any actions of the EU in connection with the Amending Directive, see EU Memorial, paras 189-191, 193 and 194.

*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. [...] 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*" (emphasis added). Whether the breaches of the ECT and damages to NSP2AG result from the EU measures (including but not limited to the Amending Directive) is a question to be considered as part of the merits of this claim.<sup>61</sup>

- ii. *"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. [...] 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"* (emphasis added).<sup>62</sup> The question of whether the "practical effects" alleged by NSP2AG flow from the Amending Directive and / or any actions of the EU in connection with the Amending Directive is a question to be considered as part of the merits of this claim.
- iii. *"[T]he 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"* (emphasis added).<sup>63</sup> Whether the Amending Directive can and did breach the ECT is a question to be considered as part of the merits of this claim.
- iv. *"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"*" (emphasis added).<sup>64</sup> The question of whether the discrimination alleged by NSP2AG flows from the Amending Directive and / or any actions of the EU in connection with the Amending Directive is a question to be considered as part of the merits of this claim.

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<sup>61</sup> EU Memorial, paras 123-124.

<sup>62</sup> EU Memorial, paras 127 and 128.

<sup>63</sup> EU Memorial, para 153.

<sup>64</sup> EU Memorial, para 186.

- v. "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" (emphasis added).<sup>65</sup> The questions of whether the EU breached the ECT and whether damage flowed from such breaches are the very questions that the Tribunal is asked to determine. The Tribunal cannot be asked to assume that these questions are answered in the negative as the basis of a decision on jurisdiction as a preliminary matter.
49. As such, the Tribunal cannot consider the EU's *ratione personae* argument without assessing the factual background of the dispute between the Parties including a detailed review of the relevant factual evidence, comprising documentary, fact witness and expert evidence. This would include a full consideration of the legislative history, the legal content and the practical effects of the Amending Directive, which is relevant to the interpretation, implementation and application of the Amending Directive by the EU Member States including Germany, and which has led to NSP2AG's claim. The EU has to date made no attempt to address the merits of NSP2AG's claims on these or other issues. In particular:
- i. As the EU notes, a Directive is binding as to the result to be achieved.<sup>66</sup> As such, the EU's jurisdiction *ratione personae* argument cannot be considered without reference to the result that the EU, as legislator, sought to achieve. The EU's ultimate intention with regard to the result to be achieved by the Amending Directive must be seen in the context of the EU's previous statements and actions with regard to the regulation of the Nord Stream 2 pipeline.<sup>67</sup> These matters are at the heart of NSP2AG's substantive claims under the ECT.<sup>68</sup>
  - ii. As noted above,<sup>69</sup> the EU continues to resist engagement on the result to be achieved by Article 49a of the Amending Directive, notwithstanding that the issue of what these words seek to achieve is central to these proceedings. Instead, it creates deliberate confusion as to whether the words "*completed before 23 May 2019*" leave scope to a Member State to grant a derogation to a pipeline in the situation of Nord Stream 2. Such a possibility has already been rejected by the German Bundesnetzagentur based, at least in part, on its examination of certain contemporaneous statements made by the EU in connection with the Amending

<sup>65</sup> EU Memorial, para 211.

<sup>66</sup> EU Memorial, para 146; **Exhibit CLA-42**, TFEU, Article 288.

<sup>67</sup> Memorial, Section VI.

<sup>68</sup> Memorial, Section VI and Section VIII.

<sup>69</sup> Response, para 5.

Directive.<sup>70</sup> The Tribunal cannot possibly determine the EU's jurisdictional objection without consideration of these matters, including a detailed review of the relevant evidence, comprising documentary, fact witness and expert evidence. The question of whether there is scope for the Member States to interpret the words "*completed before 23 May 2019*" included in the Amending Directive by the EU to grant a derogation to a pipeline in the position of Nord Stream 2 is a matter that can only be considered during the merits phase of this arbitration.

50. Moreover, in an attempt to strengthen its argument, the EU mischaracterises NSP2AG's claim, arguing that it relates only to the "*practical effects*" of the Amending Directive (as set out above).<sup>71</sup> This presentation of NSP2AG's claim is incorrect. NSP2AG's claim unambiguously rests on matters which pertain to the conduct of the EU, for example the discriminatory intention of the Amending Directive as well as the lack of transparency and lack of due process in connection with the proposal for, and passing of, the Amending Directive. It is clear that these matters (and many more) must be explored by the Tribunal before it can make a decision on the question of whether the EU has any liability under the ECT.
51. There is, therefore, no procedural efficiency to be gained in addressing these matters at a preliminary stage, and it would be unfair and unjust to do so.

## **V.2 The EU's *ratione personae* objection is inherently flawed**

52. The EU's *ratione personae* argument is also fundamentally flawed. The EU's arguments are entirely grounded in its own legal order, accompanied by lengthy descriptions, *inter alia*, of the nature of directives and the rights they grant to, and obligations they impose upon, Member States and individuals as a matter of EU law. However, NSP2AG's claim concerns the consequences of the EU's actions as a matter of international law.
53. The EU's argument is thus made without any regard to: (i) its own competence in the field of energy; and (ii) the fact that the exercise of this competence falls within the scope of, and engages its obligations under, the ECT.<sup>72</sup> As an REIO under the ECT, the EU has assumed the same obligations as the State parties to the ECT as regards matters within the scope of the ECT which fall within its competence. As such, the EU's actions and omissions must be judged against the standards contained in the ECT.

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<sup>70</sup> EU Memorial, paras 178, 188, 189, 191, 193, 194; **Exhibit CLA-17A**, Bundesnetzagentur decision, *supra*, p 28.

<sup>71</sup> Response, para 46, referring to EU Memorial, para 128 and Sections 2.2.5(b) and 2.2.5(c).

<sup>72</sup> Memorial, para 39.

54. The EU's actions in connection with the Amending Directive, including the proposal for the adoption of the Amending Directive which the Commission issued pursuant to Article 194 TFEU, the manner in which the Amending Directive was adopted, the results to be achieved and its ultimate effect, are clearly matters attributable to the EU. Those matters took place before the Amending Directive was implemented by Germany and independently of Germany's actions thereafter. The suggestion, which is never straightforwardly made, that Germany should be the respondent to claims based on those matters, does not withstand scrutiny.
55. The EU itself notes that the present dispute precedes Germany's involvement and implementation of the Amending Directive, as NSP2AG "*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 before the date (24 February 2020) by which the EU Member States were required to transpose the Amending Directive*".<sup>73</sup>
56. In addition, whilst the EU emphasises the "*wide margin of discretion*" which its Member States have in implementing directives,<sup>74</sup> it also admits that they are binding as to the result to be achieved, and that, in relation to the Amending Directive, it can enforce that result as: "*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 Directive*".<sup>75</sup>
57. Furthermore, the EU fails to acknowledge the European Commission's powers to bring infringement proceedings against those Member States which fail to achieve the result to be achieved by the EU's directives. The European Commission (or, indeed, any Member State) may refer such matters to the CJEU,<sup>76</sup> which can, in turn, impose penalties on the non-compliant Member State. As such, there can be no doubt that the Member States must have regard to the purpose and intent of the EU legislator when implementing a directive into domestic law, and applying that domestic law.
58. Returning to the EU's specific argument, the Bundesnetzagentur's decision on NSP2AG's Derogation Application demonstrates clearly that Germany's application of the Amending Directive is a direct result of the binding and specific nature of the result to be achieved by that instrument. Germany implemented Article 49a of the Amending Directive by essentially adapting its law almost word for word to the text of Article 49a.<sup>77</sup> Moreover, in its decision,

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<sup>73</sup> EU Memorial, para 127.

<sup>74</sup> EU Memorial, paras 128, 146, 147, 153, 156, 158, 191, 193, 194, 209 and 211.

<sup>75</sup> EU Memorial, para 165.

<sup>76</sup> **Exhibit CLA-42**, TFEU, Articles 258 and 259.

<sup>77</sup> **Exhibit CLA-17A**, Bundesnetzagentur decision, *supra*, p 29.

the Bundesnetzagentur clearly acknowledged that it was bound by the Amending Directive to refuse to grant a derogation to Nord Stream 2. The Bundesnetzagentur noted that the date of 23 May 2019 could have been amended so that Nord Stream 2 was within the scope of Article 49a, and concluded based on contemporaneous evidence that "*the terms used had been chosen deliberately and with an awareness of the particular situation of Nord Stream 2*".<sup>78</sup>

59. For these reasons, the EU's *ratione personae* jurisdictional objection is inherently flawed, and stands no real prospect of succeeding in this arbitration. It does not justify the bifurcation of these proceedings and the consequent delay to the Tribunal's consideration of the merits of NSP2AG's claims.

**V.3 The potential significance of the Tribunal's decision on jurisdiction *ratione personae* further justifies refusing bifurcation**

60. The EU assumes a unique position under the ECT participating alongside its Member States but with its own obligations as an REIO. This arbitration is the first known claim to be brought against the EU under the ECT, and the Tribunal's award is likely to represent the first jurisprudential contribution on the EU's obligations to protect investments in accordance with its international law obligations under the ECT.
61. As described above, in its objection to jurisdiction *ratione personae* (and without having previously indicated that it is not the correct respondent to NSP2AG's claim), the EU seeks to rely on the peculiarities of its own legal order to seek to avoid the exercise by the Tribunal of its jurisdiction. The ultimate conclusion of the EU's argument that the Tribunal lacks jurisdiction *ratione personae* in relation to NSP2AG's claim appears to be that the EU's actions in connection with an EU directive, however egregious those actions are and even if the sole purpose of that directive is to impair a single specific investment that is protected by the ECT, could never give rise to a claim against it under the ECT.
62. Without prejudice to NSP2AG's position that the EU's objection to jurisdiction *ratione personae* is unmeritorious, the significance of this legal argument gives further reason why the EU's objection to jurisdiction *ratione personae* should not be determined as a preliminary question but determined with the merits with which it is intrinsically linked.

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<sup>78</sup> **Exhibit CLA-17A**, Bundesnetzagentur decision, supra, p 28: "*There was therefore a conscious decision not to change the reference date so that it would clearly also apply to Nord Stream 2, which was still under construction. This is also shown by the comments of Dominique Ristori, then Director-General for Energy at the Commission in March 2019, who, according to a press report [...] stressed on the sidelines of a meeting of EU energy ministers that the new Gas Directive would hopefully come into force "quickly, meaning definitely before Nord Stream 2 is finished". Given his role and the occasion on which he made the comments, they should be understood not as primarily his personal opinion but as an indication that the terms used had been chosen deliberately and with an awareness of the particular situation of Nord Stream 2*".



## VI. BIFURCATION OF ANY ONE OF THE EU'S TWO JURISDICTIONAL DEFENCES WOULD NOT BE FAIR OR PROCEDURALLY EFFICIENT

63. As set out more fully above, the EU's request for bifurcation should be denied in relation to both its fork-in-the-road objection and its objection to jurisdiction *ratione personae*. However, even if any one of the EU's two jurisdictional arguments were to give rise to grounds for bifurcation (which is denied), as described below the request for bifurcation should in any case be rejected in relation to both objections on the grounds of both fairness and procedural efficiency. The two objections should be considered together and together with the merits.

### VI.1 Fairness

64. The fundamental inconsistencies in the EU's two jurisdictional arguments should be laid bare and addressed.

65. First, there is a fundamental inconsistency between arguing on the one hand that the EU is not the proper respondent to the ECT proceedings, while on the other hand arguing that the annulment proceedings that NSP2AG has brought contravene the fork-in-the-road restriction. The EU's argument that consent is vitiated by the CJEU Proceedings is predicated on the EU being the proper respondent to the ECT proceedings. Were the Tribunal to determine the two jurisdictional objections separately from each other – for example, seeking to bifurcate the fork-in-the-road objection but resolving the purported objection on the grounds of jurisdiction *ratione personae* with the merits with which it is intrinsically linked – the EU would be permitted to argue, and the Tribunal would have to determine, the fork-in-the-road objection on an assumption that the EU is the proper respondent to NSP2AG's claim.<sup>79</sup> Having lengthened the procedural timetable by many months, the EU would then open another jurisdictional front based on an argument that the EU is not the proper respondent. This would be inconsistent not only with its previous jurisdictional objection but also with the assumption upon which the Tribunal had made its earlier ruling. Indeed, for this reason, a decision on the EU's request for bifurcation that led to the Tribunal determining the EU's fork-in-the-road objection before it had determined the EU's objection to jurisdiction *ratione personae* would not only be unfair but illogical.

66. Further, in its fork-in-the-road argument, the EU seeks to draw comparisons between: (i) the allegations of breach of the ECT; and (ii) the allegations made in the Annulment Application concerning the Amending Directive and the way in which it was passed.<sup>80</sup> However, in the context of its *ratione personae* argument, the EU characterises NSP2AG's claim in a wholly different way, stating that NSP2AG's allegations of breach do not concern the way in which the Amending Directive was passed and the EU's role therein, but only the "*practical effects*"

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<sup>79</sup> Further, the Tribunal would be invited to rule on the fork-in-the-road objection based on an assumption that the EU was the proper respondent, but with the knowledge that this assumption was fundamentally undermined by the EU's inconsistent objection grounded on lack of jurisdiction *ratione personae*.

<sup>80</sup> EU Memorial, Sections 2.1.4 and 2.1.6.

of its having been implemented and applied by Germany.<sup>81</sup> Were the two jurisdictional arguments to be dealt with separately from each other, the EU would be at liberty to run inconsistent arguments without proper scrutiny.

67. In both cases, it would be unfair for the EU to be able to run two inconsistent jurisdictional arguments at separate times.

## **VI.2 Procedural efficiency**

68. The overarching principle is the fairness and efficiency of the process as a whole.
69. With this principle in mind, it would be more efficient to deal with all preliminary objections together with the merits in a first phase than it would to bifurcate both objections or to bifurcate just one objection but leave the other objection to a merits phase.<sup>82</sup> The proceedings are already bifurcated between merits and quantum.

## **VII. BIFURCATION RISKS NSP2AG BEING UNABLE TO BRING CLAIMS FOR DENIAL OF JUSTICE UNDER ARTICLE 10(1) AND / OR BREACH OF ARTICLE 10(12) IN THIS ARBITRATION**

70. NSP2AG has reserved its rights to bring a claim for denial of justice under Article 10(1) and / or a claim for violation by the EU of its obligations under Article 10(12) of the ECT in relation to the EU's actions in connection with the Annulment Application and the General Court's decision that NSP2AG's claim is inadmissible.<sup>83</sup> Such claims cannot, on any view, be understood to be claims with the same "*fundamental basis*" as the annulment proceedings themselves.<sup>84</sup> Nor can it be asserted that the EU is not the proper respondent to such claims.
71. Determining the EU's jurisdictional arguments as preliminary matters may therefore not resolve the disputes before the Tribunal and, in the event that the Tribunal makes a determination in favour of the EU before NSP2AG has brought such claims, may prejudice NSP2AG's ability to bring them in these proceedings.
72. Ultimately, any prejudice to the EU were the Tribunal to refuse to determine the jurisdictional objections as a preliminary question can be compensated in costs in the unlikely event that the EU were ultimately to succeed on either of its grounds at the merits phase.

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<sup>81</sup> EU Memorial, para 128.


<sup>82</sup> **Exhibit CLA-157**, *Glencore*, supra, para 56.

<sup>83</sup> Memorial, para 393.

<sup>84</sup> **Exhibit RLA-10**, *Pantechniki*, supra, paras 67-68: in this case, the tribunal found that the fork-in-the-road barred re-litigation of the contractual claims, but not the claims arising out of substantive treaty violations, including denial of justice.

73. For all of the above reasons, the Parties having addressed the question of bifurcation in full in their submissions, the Claimant invites the Tribunal to rule upon, and dismiss, the EU's request for bifurcation. The Claimant submits that the question of the costs of the application should be reserved.

Submitted for and on behalf of  
**NORD STREAM 2 AG**



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**Professor Dr Kaj Hobér**  
*and*



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**Herbert Smith Freehills LLP**  
16 October 2020