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Second Panel Hearing

Opening Oral Statement by the European Union

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US – Malt Beverages	GATT Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages*, DS23/R, adopted 19 June 1992, BISD 39S/206

LIST OF ABBREVIATIONS

Abbreviation	Full Name
BEMIP	Baltic Energy Market Interconnection Plan
CPC	Central Product Classification
EC	European Communities
ENTSO	European Network of Transmission System Operators for Gas
ERO	Energy Regulatory Authority (Polish NRA)
EU	European Union
GASCADE	GASCADE Gastransport GmbH
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
IP	Intellectual Property
ISO	Independent System Operator
ITO	Independent Transmission Operator
LNG	Liquefied Natural Gas
MFN	Most Favoured Nation
NABUCCO	Nabucco Gas pipeline International GMBH
NEL	Nordeuropaische Erdgas-Leitung
NRA	National Regulatory Authority
OPAL	Ostsee-Pipeline-Anbindungs-Leitung – Baltic Sea Pipeline Link
OU model	Ownership Unbundling model
PCI	Project of Common Interest
SOCAR	State Oil Company of the Azerbaijan Republic
SoS	Security of supply
TAP	Trans Adriatic Pipeline AG
TEN-E	Trans-European Energy Networks
TPA	Third-Party Access
TSO	Transmission System Operator

Abbreviation	Full Name
UPN	Upstream Pipeline Network
US	United States of America
VIU	Vertically Integrated Undertaking
WTO	World Trade Organization

Mr. Chairman, distinguished Members of the Panel, ladies and gentlemen.

1. INTRODUCTION

1. The European Union ("EU") would like to thank the Chairman and the Members of the Panel for their continued efforts in helping to resolve this dispute. In particular, we thank the Panel for addressing the many terms of reference concerns that this dispute has raised. We also thank the Secretariat for its support throughout these proceedings.

2. In this oral statement, the EU takes the opportunity to respond to the many false allegations, incorrect factual arguments, contradictions and legal errors contained in Russia's second written submission. Unable to provide any evidence to support its allegations that the measures in the EU Third Energy Package would violate WTO law, Russia resorts to conspiracy theories that live only in Russia's imagination. This is nothing more than an attempt to divert the Panel's attention from the fact that Russia cannot make its case based on facts and law.

3. In parallel to Russia pursing this case, Gazprom news highlights Gazprom's successes in selling record gas volumes to the EU.[1] Figures show that Russia is still the biggest supplier of gas to the EU and that Russian gas imports into the EU have not decreased since the Third Energy Package.[2] Russia simply fails to mention these facts as they do not reconcile with the fundamentally erroneous picture of the aims and effects of the EU gas legislation which it tries to portrait.

4. To be absolutely clear: the Third Energy Package has as objective to create a well-interconnected and competitive EU gas market, based on free market and free competition principles.[3] There is nothing in the Third Energy Package that discriminates against service suppliers of any origin, and neither is there discrimination against gas of any origin. To the contrary, the rules and obligations ensure that competition between gas transport systems, between gas producers,

1 EU's second written submission, para. 89.
2 EU's second written submission, para. 89.
3 Commission Communication on an Energy Policy for Europe (Exhibit EU - 14), p. 6; EU's first written submission, paras. 14-33.

and between gas sellers can play to its fullest extent. They prevent that monopolies abuse their position to exclude competitors.

5. Hereinafter, we will address Russia's arguments relating to unbundling (Section 3). Next, we will focus on the claims regarding third country certification (Section 4). Thereafter, we address the infrastructure exemptions (Section 5) and finally, we turn to Russia's arguments regarding projects of common interest (Section 6). Yet, before turning to those specific arguments, we address what Russia has labelled as "common issues"[4] for all its claims (Section 2).

2. COMMON ISSUES

2.1 RUSSIA'S "RELEVANT MARKET" ARGUMENT

6. As a first "common issue", Russia argues that its discrimination claims against the unbundling measure and third-country certification measure must be assessed in the "EU as a whole" as the "relevant market".[5]

7. Russia's argument fails to recognise that, in case of the unbundling requirement, it is the individual Member States' measures that determine how the unbundling requirement applies to service suppliers in each Member State's territory. Comparing treatment of service suppliers between different Member States – as Russia does – essentially involves comparing treatment through *different measures*. Rather, the treatment offered by the unbundling measure must be assessed in each Member State separately. In contrast, in case of the third country certification measure, it is Article 11 of the Directive that determines the treatment of service suppliers throughout the EU. In that case, the appropriate comparator is indeed the treatment of service suppliers through the EU as a whole with the treatment of third country suppliers.

8. Russia claims that the EU has "no support for its 'regulatory jurisdiction' theory".[6] However, it is Russia who has been unable to cite any GATT or WTO jurisprudence where different treatment in separate territorial parts of a WTO Member was considered to establish discrimination. The reason for this is simple:

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4 *See* Russia's second written submission, Section II.

5 Russia's second written submission, para. 12.

such a claim does not fit the discrimination provisions of the GATT and GATS since it involves the comparison of treatment through different measures applicable in different parts of the territory. Russia essentially advances the absurd interpretation that the WTO's non-discrimination obligations prevent the existence of different measures in different parts of a WTO Member's territory.

9. In disputes where the non-discrimination obligation was applied to a measure by sub-territories of a federal state, in particular provinces and states, no panel has ever considered it appropriate to compare the treatment by measures from different provinces or states to find discrimination.

10. In the GATT Panel Report on *Canada – Provincial Liquor Boards (US)*, the panel considered measures of provincial liquor boards which applied both to beer originating outside Canada and beer from other provinces of Canada. A note to the Panel findings provides that "[t]hroughout these findings the reference to domestic beer is a reference to the domestic beer which receives the most favourable treatment by Canada *in the province in question*, that is in most instances the beer brewed in that province".[7] Hence, the Panel considered the treatment offered in one and the same province.

11. Also in the 1992 Panel Report on *United States – Malt Beverages* the Panel did not compare the treatment offered to malt beverages in between different US states. Rather, it examined the treatment in each US state individually.[8]

12. These two cases demonstrate that, under the non-discrimination obligations, an imported good, or service or service supplier, is entitled to the best treatment granted to a domestic good, service or supplier from anywhere in the federal territory. However, the treatment that is considered is the treatment granted *by the provincial (or other sub-federal) measure*. It does not involve a comparison with the treatment granted through *another* measure by *another* sub-federal entity (as Russia is arguing). Neither the United States, nor Canada suggested such comparison in those cases.

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6 Russia's second written submission, para. 24.

7 *GATT Panel Report, Canada – Provincial Liquor Boards (US), para. 5.4 (footnote 1) (emphasis added).*

13. Russia appears to take issue with the fact that the EU has in a Directive allowed Member States the discretion to implement ownership unbundling only, or also the ITO and ISO models.[9] Yet, allowing such discretion does not mean discrimination.[10] It was for Russia to show that discretion is necessarily exercised in a discriminatory manner. Russia has failed to do so. The unbundling provisions in the Directive are not *de jure* discriminatory: they do not distinguish based on the origin of the service supplier, nor on the basis of the origin of the gas. Russia is also unable to show that the requirement is *de facto* discriminatory: Even if the ITO and ISO models conferred some competitive advantage (as Russia wrongly alleges), we have shown in our second written submission that there are Member States where Gazprom had important interests and where the ITO and ISO models are available as well.[11] Russian pipeline transport service suppliers have indeed made use of the ITO model[12] and EU suppliers and other third country pipeline transport service suppliers have been subject to ownership unbundling.[13] Russia cannot establish either that gas from Russia is treated less favourably than gas from other origins.[14]

14. Russia also confuses the "responsibility" of WTO Members with regional sub-divisions under WTO law with the "comparator" that must be used to determine whether a measure by a regional government is discriminatory. The cases we have just cited apply Article XXIV:12 of the GATT, to which Russia also refers.[15] This provision requires federal governments to take all reasonable measures to ensure compliance by their regional governments. Yet, besides the fact that this provision does not apply to the EU – where the Member States are WTO Members themselves and thus not "regional governments" – this provision concerns merely the responsibility *after* it has been established that a measure by such sub-federal government is discriminatory. Article XXIV:12 does not require that one compares the treatment offered by different measures taken by different sub-

8 *See* GATT Panel Report, *US – Malt Beverages*, paras. 5.16-5.17.
9 Russia's second written submission, para. 22.
10 *See* Appellate Body Report, *US – Hot-Rolled Steel*, paras. 197, 200, 208.
11 EU's second written submission, paras. 79-87.
12 EU's second written submission, para. 79; EU's first written submission, paras. 339-341.
13 EU's second written submission, para. 86; EU's first written submission, para. 342.
14 EU's second written submission, paras. 101-140, 150-155, 168-187.
15 Russia's second written submission, paras. 27-30.

federal entities. The same applies to the EU's confirmation that it would take responsibility in the WTO to defend Member States' actions:[16] the fact that the EU takes such responsibility does not imply at all that the comparator for treatment by different individual Member States should be the "EU as a whole".

15. Russia desperately seeks to establish a "conspiracy"[17] between the Member States and the EU to discriminate against Russian service suppliers and gas. Russia thereby cites to a compilation of online newspaper articles and WikiLeaks documents, testifying Russia's desolation.[18]

16. We recall, first, that several panels have stressed that newspaper articles have questionable, if any, evidentiary value in WTO proceedings.[19] These articles and documents could, at most, reflect the result-driven opinion expressed by a few persons at a certain point during the legislative process. They are unable to establish any "intent" by the EU legislator for adopting the Directive. We also strongly object to the Panel accepting illegally obtained confidential documents as evidence in WTO proceedings.

17. Second, in any event, "intent" does not play a role in assessing measures under the WTO's anti-discrimination provisions. Already in the early years of the WTO, the Appellate Body recognized that panels could not "sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent".[20] Rather, what matters is the "design, structure, and expected operation"[21] of the gas Directive. Russia is unable to demonstrate that this reveals discrimination: as explained, the text of the Directive does not show any *de jure* discrimination and neither do the facts support any claim of *de facto* discrimination.[22]

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16 Russia refers to *EC – Trademarks and Geographical Indications (US), EC and certain Member States – Large Civil Aircraft*, and to the EU's letter of 8 May 2014 in Russia's second written submission, paras. 32-35.

17 Russia's responses of 12 October 2016, para. 31; Russia's first oral statement, para. 38; Russia's second written submission, para. 41.

18 Russia's second written submission, paras. 48-74.

19 *See* Panel Report, *China – IP Rights*, paras. 7.628-7.629; Panel Report, *Argentina – Hides and Leather*, para. 11.49.

20 Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 27.

21 Appellate Body, *EC – Seal Products*, para. 5.95 and footnote 1019 (original emphasis).

22 *See* paragraph 13 above and EU's second written submission, paras. 66-71.

2.2 DEFINITION OF THE SERVICES AT ISSUE

18. A second "common issue" concerns the definition of the services at issue. Russia "considered it essential to define the covered services as including both transmission and supply services".[23] Russia may indeed find such broad definition "essential" for making its case before the WTO, but it does not fit with the reality in the gas markets and with the objective characteristics of the activities at stake.[24]

19. First, the entry "pipeline transport services" in the Members' schedules does not cover the supply, i.e. the sale, of gas. Such activities concern trade in goods and not the supply of services.[25] Services that may somehow be associated with the gas industry are not covered by "pipeline transport services" either. According to the principle of mutual exclusivity[26] of service sectors and sub-sectors in the CPC, one should classify such other services under the appropriate service sector in a Member's schedule, rather than interpreting "pipeline transport services" so broadly as to annul the meaning of other services sectors and services.[27]

20. Second, "LNG services" must be distinguished from, and are not "like", "pipeline transport services". The essence of LNG services is liquefaction and importation, offloading and re-gasification of natural gas. It does not concern the transmission via a pipeline. Russia claims that the "end-uses of the products are exactly the same".[28] Russia thereby erroneously focuses on the good, rather than the service. Users of LNG services are gas producers who want to have their gas transported by ships or trucks; traders of LNG; or operators of LNG ships. LNG services are not pipeline transport services under CPC 713, but services auxiliary to gas transport.[29]

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23 Russia's second written submission, para. 78.

24 EU's first written submission, paras. 50-80; EU's responses of 12 October 2016, paras. 145-146, 158-166, 169, 170-171.

25 EU's first written submission, para. 71, referring to Panel Report, *Canada – Feed-In Tariff Program*, para. 7.11 (footnote 46) and to the Harmonised System.

26 Appellate Body Report, *US – Gambling*, para. 180. The Appellate Body clarified that "[i]f this were not the case, and a Member scheduled the same service in two different sectors, then the scope of the Member's commitment would not be clear where, for example, it made a full commitment in one of those sectors and a limited, or no, commitment, in the other." Appellate Body Report, *US – Gambling*, para. 180 (footnote 219).

27 *See* EU's first written submission, paras. 55, 70.

28 Russia's second written submission, para. 94.

29 EU's responses of 12 October 2016, paras. 145-146.

21. Third, "upstream pipeline network" ("UPN") services must also be distinguished from, and are not "like", "pipeline transport services". UPNs connect a gas field to a processing plant or terminal or final coastal landing terminal.[30] They do not carry out transmission as pipeline transport services. Because upstream pipelines are closely linked to the gas extraction field, they are "services incidental to mining".[31]

3. CLAIMS RELATING TO UNBUNDLING

22. We now turn to Russia's claims relating to unbundling.

3.1 THE UNBUNDLING REQUIREMENT, AS IMPLEMENTED IN THE LAWS OF CROATIA, HUNGARY AND LITHUANIA, IS CONSISTENT WITH THE EU'S MARKET ACCESS COMMITMENTS UNDER ARTICLE XVI OF THE GATS

23. Russia argues that the unbundling requirement, as implemented in the laws of Croatia, Hungary and Lithuania, is inconsistent with the market access commitments for "pipeline transmission services" under Article XVI of the GATS in respect of these countries.

24. In its second written submission, Russia persisted in advancing its overly broad interpretation of the market access obligation in sub-paragraphs (e), (a) and (f) of Article XVI:2, to which the EU has already responded in its second written submission.[32] Here, the EU stresses the main points of error in Russia's second submission.

3.1.1 Sub-paragraph (e) of Article XVI:2 of the GATS (Claim 1)

25. Russia's first claim is that the unbundling requirement qualifies as a measure "which restrict[s] or require[s] specific types of legal entity or joint venture through which a service supplier may supply a service", prohibited under sub-paragraph (e).

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30 *See* Figure 1 in the EU's first written submission (p. 22).

31 EU's responses of 12 October 2016, paras. 169-171. *See* also Energy Services, Background Note by the Secretariat, S/C/W/311, p. 11.

32 EU's second written submission, paras. 6-30.

26. First, Russia ignores that the unbundling requirement does not limit the market access for pipeline transport service providers.[33] This requirement only prohibits that service provider to control at the same time production and/or sale of gas.[34]

27. Second, the unbundling requirement does not limit the type of legal entity the service supplier can use.[35] It specifies only certain *characteristics* of an undertaking providing pipeline transport services.

28. Third, Russia ignores the plain words of sub-paragraph (e), which *only* covers measures that restrict or require the use of *a specific type of legal entity* through which a service supplier may supply a service.

29. Fourth, Russia incorrectly focuses on vertically integrated undertakings (VIU) that would want to provide pipeline transport services in the EU. In case of service supply through mode 3, the "legal entity" that sub-paragraph (e) is concerned with is the legal entity that is created in the host territory of the Member States to supply a service.[36] It does not concern the VIU.[37] Russia has explicitly agreed with this interpretation.[38] All Russia's arguments, which focus on the VIU rather than the commercial presence, can thus simply be dismissed.

3.1.2 Sub-paragraph (a) of Article XVI:2 of the GATS (Claim 2)

30. Russia also argues that the unbundling measures in the domestic laws of Croatia and Lithuania limit the number of service suppliers, in violation of sub-paragraph (a). Russia claims that Croatia and Lithuania have instituted a "monopoly supplier of a service".[39]

31. Measures covered by sub-paragraph (a) are measures intended *specifically* to limit the number of "service suppliers".[40] The unbundling requirement does not limit the number of service suppliers that may supply pipeline transport services in the EU,

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33 *See* Russia's second written submission, para. 106.
34 EU's second written submission, para. 10.
35 *See* also Japan's third party written submission, para. 15.
36 *See* EU's first written submission, para. 112.
37 *See also* Japan's third-party submission, para. 15; EU's answers of 12 October 2016, paras. 222-223.
38 Russia's answers of 12 October 2016, para. 378 ("the 'specific types of legal entity' referred to in sub-paragraph (e) is simply another way to describe different forms of commercial presence").
39 Russia's second written submission, paras. 110-111.

nor does it impose a monopoly supplier. Russia has not provided any citation to Croatia's or Lithuania's laws that would impose a quantitative limit on the number of suppliers.[41] Russia appears to believe that, if there is at present only one TSO in Croatia or Lithuania, there could be no others. Yet, no such limitation exists in these Member States' legislation, as Russia has explicitly acknowledged.[42]

3.1.3 Sub-paragraph (f) of Article XVI:2 of the GATS (Claim 3)

32. Russia further claims that the unbundling requirement would violate sub-paragraph (f). Yet, the unbundling requirement applies without distinction to domestic and foreign investment, if at all. Sub-paragraph (f) does not cover such measure.[43]

3.1.4 The unbundling requirement is justified under Article XIV(a) and (c) of the GATS

33. We recall that the unbundling requirement is, in any event, justified under subparagraphs (a) and (c) of Article XIV the GATS.[44] Russia seeks to distract the Panel by suggesting that the threat to competition that the unbundling requirement addresses was the cause of "structural problems" in previous versions of the unbundling measure.[45]

34. Russia thereby misconstrues the EU's argument: the threat to competition is posed by VIUs that combine production and supply, on the one hand, and transmission, on the other hand. Such VIUs have the incentive to foreclose competitors and this poses a genuine threat to competition in the EU energy market.[46] The unbundling of transmission and production/supply, according to the requirements in the third energy package, directly contributes to removing these anti-competitive incentives.[47]

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40 Panel Report, *Argentina – Financial Services*, para. 7.421.

41 *See* Russia's second written submission, paras. 109-111.

42 Russia itself admits that "it would be possible for a domestic entity (i.e. an entity established in … Lithuania or another Member State) to obtain a TSO license under the Law on Natural Gas". Russia's first written submission, para. 219.

43 EU's second written submission, paras. 25-30. *See* also Panel's Question No. 89 and Japan's third party written submission, para. 18.

44 EU's second written submission, paras. 31-46; EU's first written submission, paras. 156-220.

45 Russia's second written submission, para. 131.

46 EU's second written submission, paras. 32-33; EU's first written submission, paras. 189-193.

47 EU's second written submission, para. 33; EU's first written submission, paras. 194-199.

35. Moreover, we reject Russia's suggestion that the third party access ("TPA") requirement in Article 32 of the Directive would be sufficient to ensure competition in the EU energy market.[48] Although unbundling has a strong link with TPA – by determining *how* incentives to foreclose TPA to the network must be removed[49] – past experience has shown that this TPA obligation on itself is insufficient to ensure competition in the market. It is not a reasonably available alternative.[50]

36. Finally, we stress that the ITO and ISO models are not less trade restrictive alternative measures compared to ownership unbundling. First, Russia considers these models "less restrictive" because they would allegedly enable VIUs to control access to the transmission network and abuse the monopolistic position of the TSO. Such would, however, be blatantly illegal under any unbundling model. Second, Russia makes internally inconsistent arguments: in certain parts of its second written submission, it argues that the EU should "adopt only the OU model"[51] because it is the "least trade-restrictive option"[52] whereas in other parts, it argues that the ISO and ITO models "are less trade restrictive than the OU model."[53] Yet, these models are not less trade restrictive alternatives: to the extent the degree of structural separation under one model is less, this is compensated by behavioural requirements, increased regulatory oversight and compliance burdens to achieve the same degree of effective unbundling as OU.[54]

37. For all these reasons, all of Russia's market access claims must fail.

48 Russia's second written submission, para. 136.
49 EU's second written submission, para. 45.
50 EU's second written submission, para. 35.
51 Russia's second written submission, para. 148.
52 Russia's second written submission, para. 148.
53 Russia's second written submission, paras. 160, 147.
54 EU's first written submission, para. 319; EU's answers of 12 October of 12 October 2016, paras. 156-157.

3.2 THE PUBLIC BODY SPECIFICATION IN ARTICLE 9(6) OF DIRECTIVE 2009/73/EC DOES NOT VIOLATE THE NATIONAL TREATMENT OBLIGATION IN ARTICLE XVII OF THE GATS

38. Russia's claim against the public body specification also fails. Russia wrongly suggests that the "EU does not dispute that the government exemption measures base different treatment exclusively on suppliers' origin".[55]

39. The public body measure does not *de jure* discriminate: The text of Article 9(6) does not make any distinction based on the origin of a supplier.[56]

40. And neither is the measure *de facto* discriminatory: nothing prevents third country public bodies from relying on this provision when seeking certification under Articles 10 and 11 of the Directive.[57] Article 9(6) does not only refer to "the Member state", but also, in addition, to "another public body". This phrase is not exceptional, since it also figures in the Merger Jurisdictional Notice to cover third country public bodies.[58] Contrary to what Russia argues, there is thus no "mandat[ory] privatization"[59] of TSOs controlled by third country public bodies. Such bodies could also rely on Article 9(6), just like any EU public body.

41. While insisting that Article 9(6) would not apply to third country public bodies, Russia informs that no such case where the rule could be applied to public bodies of third countries has arisen and no such application has been sought by Russia itself.[60] It is thus unclear what exactly the shortcoming of the EU legislation is – it cannot control when factual situations arise and when not.

42. Russia states that there are no "set of 'ITO-like'" requirements in place in case of public bodies under Article 9(6).[61] This statement makes no sense, since the TSO that is certified under Article 9(6) is subject to the OU requirements. The ITO rules are part of another model. Russia appears to argue that, after certification, the TSOs owned by public bodies would be somehow free to do whatever they like.

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55 Russia's second written submission, para. 169.

56 EU's second written submission, paras. 48-51; EU's responses of 12 October 2016, paras. 3-5; EU's first written submission, paras. 228-230.

57 EU's second written submission, pars. 52-59.

58 EU's second written submission, paras. 54-55.

59 Russia's second written submission, para. 185.

60 Russia's responses of 7 September 2016, paras 70-72.

61 Russia's second written submission, para. 195.

Russia errs: While the Commission opinion is not binding, the national regulator's decision on certification is binding. It can be withdrawn if the requirements for unbundling are no longer met. Regulatory oversight by the national authority applies to all TSOs, privately or publicly owned. Moreover, the Commission can open an infringement procedure against the Member State if it considers that the unbundling rules are not respected, irrespective of whether the TSO are privately or publically owned.

43. Contrary to what Russia tries to convey, all TSOs in all Member States are subject to the unbundling requirement and must respect them: the prohibition of cross-subsidisation[62] and the obligation to separate accounts[63] prevent States owning TSOs through public bodies to "receive … the total amount of revenue and other directly accruing benefits".[64] Moreover, the obligation to be truly separate[65] prohibits one public body in a Member State to "dictate business decisions"[66] by the public body owning the TSO. There is no "exemption" for publicly-owned TSOs and Russia constructs "benefits" that are simply contrary to the law.

44. Russia thus failed to demonstrate that the public body specification discriminates.

3.3 THE UNBUNDLING MEASURE DOES NOT VIOLATE THE NON-DISCRIMINATION OBLIGATIONS IN ARTICLE II:1 OF THE GATS AND ARTICLES I:1 AND III:4 OF THE GATT 1994 (RUSSIA'S CLAIMS 6, 8 AND 10)

45. Turning to the unbundling measure, the EU also disputes that it discriminates against Russian service suppliers, or against Russian gas.

46. First, Russia has not demonstrated that the OU model alters the competitive position of pipeline transport service suppliers, or of gas of a certain origin.

47. Indeed, the type of unbundling model does not alter the competitive relationship of the pipeline transport service supplier. The consequence of unbundling is that the supplier that is part of a VIU cannot provide privileged access to related producers

62 Article 41(1)(f) of the Directive.
63 Article 31 of the Directive. *See* EU's second written submission, para. 97.
64 Russia's second written submission, para. 197.
65 Article 9(6) of the Directive, together with the certification decision that determines the independence of the public bodies from each other. *See* EU's first written submission, paras. 223-226; EU's Responses of 12 October 2016, paras. 33-34.
66 Russia's second written submission, para. 197.

or suppliers that are part of the VIU, or foreclose access to competing producers and sellers of gas. Such actions are also illegal under the ITO and ISO models. There is no "competitive benefit" attached to the latter models.[67]

48. Also with respect to its GATT claims, Russia cannot show that a particular unbundling model translates into a competitive disadvantage for gas of a certain origin.[68] To the contrary, because unbundling prevents a pipeline transport service supplier to abuse its monopoly position to foreclose access, gas from any origin can access each EU Member State without limitation.

49. Second, we have contested Russia's attempt to compare the treatment of service suppliers in different Member States. It is the individual Member States' measures that determine how the unbundling requirement applies to service suppliers in each specific Member State's territory. Therefore, the treatment offered by the unbundling measure must be assessed in each Member State separately.

50. Third, even if, under an incorrect legal standard, Russia could compare the treatment offered in different Member States, Russia is still unable to provide any evidence to show that any alleged negative impact of the unbundling requirement is predominantly on Russian service suppliers, or predominantly on Russian gas.

51. Russia desperately denies established WTO jurisprudence[69] that requires a WTO Member bringing a *de facto* discrimination claim to show that the negative impact of a measure is predominantly on the group of goods or services and suppliers of a certain (here: Russian) origin. Russia appears to believe that it is sufficient to find one instance whereby a Russian service supplier would have had to adjust its activities to comply with a measure to establish *de facto* discrimination. Indeed, Russia is not afraid to say that explicitly, claiming that "[i]t is irrelevant that the treatment may not be discriminatory in other instances of application of the unbundling measure, as with the Gazprom entities in Germany".[70] Russia refers to the Appellate Body's finding in *India – Additional Import Duties*, rejecting the

67 EU's second written submission, paras. 72-75; EU's first written submission, paras. 315-324.
68 EU's second written submission, paras. 95-100.
69 *See* EU's second written submission, paras. 76-78, 101-102; EU's responses of 12 October 2016; EU's first written submission, paras. 301-303, and the case-law referred to in those paragraphs.
70 Russia's second written submission, para. 221.

notion of "offsetting less favourable treatment of some imported products with more favourable treatment of other imported products".[71] Yet, this finding referred to treatment of goods from different third countries that were, for certain countries, treated more favourably, and for other countries, treated less favourably. This has no relevance in case the treatment of one service supplier, e.g. Gazprom, or of gas from a specific origin, e.g. Russia, in the EU is considered.

52. We have provided extensive evidence in our second submission showing that Russian gas transport service suppliers are also active in Member States that have implemented ITO models. Russian pipeline transport service suppliers in Germany – which is the largest gas market in the European Union and the largest export market for Gazprom[72] – have made use of this model and gas transport service suppliers with substantial Russian shareholdings have benefitted from derogations form the unbundling rules granted to Latvia and Finland.[73] Table 1 in our submission demonstrates that OU is not predominantly imposed on the group of Russian service suppliers.[74]

53. Also with respect to the alleged negative competitive impact of OU on Russian gas, Russia has not demonstrated that there is a link between the unbundling model and the volume of Russian gas imports in Member States. Russia seeks to connect the origin of the pipeline service supplier with the origin of the gas flowing through the pipeline. Yet, under the unbundling measure, there is no such relationship. If there would be such link, this would mean that TSOs give preferential treatment to gas of a certain origin. This is illegal under EU law, which requires the TSO – irrespective of the unbundling model – to respect the TPA principle and give access to the networks users under non-discriminatory and transparent terms.[75] Moreover, undisputed facts directly contradict Russia's claims. Russian imports into the EU have increased since 2009.[76] In addition, we have provided evidence that in Member States that have transposed OU only, Russian

71 Appellate Body Report, *India – Additional Import Duties*, footnote 405.
72 EU's second written submission, para. 68.
73 EU's second written submission, para. 79.
74 EU's second written submission, para. 80, Table 1.
75 EU's second written submission, paras. 103-105.
76 EU's second written submission, para. 110.

imports increased with 30% from 2009 to 2014 and Russia's share compared to total gas imports increased as well.[77]

54. Therefore, Russia's arguments that the unbundling measure discriminates against Russian service suppliers and against Russian gas fail on all accounts.

3.4 THE LNG MEASURE DOES NOT VIOLATE THE NON-DISCRIMINATION OBLIGATION IN ARTICLE I:1 OF THE GATT 1994 (RUSSIA'S CLAIM 12)

55. With regard to Russia's MFN claim in respect of the LNG measure, we recall that this is not an "exemption" from a generally applicable unbundling rule. Rather, it is a specific measure that prevents abuses of a monopoly, taking into account the specific technical and economic characteristics of the infrastructure, i.e. LNG facilities.[78] Moreover, Russia cannot demonstrate that the LNG measure, which applies to LNG service providers, alters the competitive position of gas imported from Russia.[79] Russia's reliance on the Commission's investigation against Engie[80] in fact demonstrates exactly the opposite of what Russia claims: LNG operators cannot restrict access of non-affiliated gas producers. If they would do so, they would violate EU law and enforcement actions will be taken, at the national level or by the EU Commission.[81]

56. We also object to Russia's use of the Dragon and South Hook exemptions as "evidence" of how the LNG measure would alter the competitive position of Russian gas.[82] Russia now appears to challenge the *TPA exemption decisions* for those LNG facilities. However, its claim is addressed against the LNG measure, and Russia cannot deny that the TPA rules apply to LNG service suppliers.[83] In fact, Russia's insistence that this is different for Dragon and South Hook exactly shows that these examples do nothing to support its claim against the LNG measure.

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77 EU's second written submission, para. 111. Further detailed factual evidence is provided as part of that submission: EU's second written submission, paras. 108-139.

78 EU's second written submission, paras. 142-143, 145-146; EU's responses of 12 October 2016, paras. 7-8; EU's first written submission, paras. 427-436.

79 EU's first written submission, paras/ 439-446; EU's second written submission, paras. 150-155.

80 Russia's second written submission, paras. 273-277.

81 EU's second written submission, para. 152.

82 Russia's second written submission, paras. 278-279.

83 EU's first written submission, para. 444.

3.5 THE UPSTREAM PIPELINE NETWORKS MEASURE DOES NOT VIOLATE THE NON-DISCRIMINATION OBLIGATIONS IN ARTICLES I:1 AND III:4 OF THE GATT 1994 (RUSSIA'S CLAIMS 13 AND 14)

57. This lack of evidence is also emblematic of Russia's claims against the UPN measure. Russia claims that, because Article 32 of the Directive does not apply to UPNs, there is "different treatment accorded to domestic-origin gas", and, therefore, there would be a "modifi[cation of] the conditions of competition to the detriment of Russian gas".[84] Once more, Russia jumps from a measure that applies to a service supplier to an alleged impact on a good, without explaining why such impact would necessarily follow. The UPN measure does not prevent that Russian suppliers qualify as UPN operators[85] and there is no reason why Russian gas would necessarily be excluded from being transported via such pipeline.[86]

58. Indeed, even if the TPA obligation under Article 32 does not apply, Article 34 of the Directive requires Member States to ensure that UPN operators do not abuse their dominant position and foreclose access to gas from third party producers if there would be such need.[87] That this provision has, until now, not been "utilized",[88] does not demonstrate that such access would be foreclosed. It only demonstrates that the competitive concern for UPNs is entirely different from the concern attached to transmission networks: UPNs are directly linked to the production field and there is normally no risk of foreclosure of competing gas producing or supplying undertakings.[89] Russia's claims with regard to UPNs thus also fails.

4. CLAIMS RELATING TO THIRD COUNTRY CERTIFICATION

4.1 THE THIRD COUNTRY CERTIFICATION MEASURE IS JUSTIFIED UNDER ARTICLE XIV (A) GATS

59. The European Union has shown that the security of supply of energy ("SoS") is a "fundamental interest" of the European Union. Indeed, SoS is one of the core

84 Russia's second written submission, para. 298.
85 EU's second written submission, paras. 168-181.
86 EU's second written submission, paras. 182-187.
87 EU's second written submission, para. 183; EU's responses of 12 October 2016, para. 9; EU's first written submission, para. 457.
88 Russia's second written submission, para. 285.
89 EU's second written submission, paras. 157-167; EU's responses of 12 October 2016, para. 10; EU's first written submission, para. 450.

objectives of the EU's energy policy referred to in Article 194 TFEU and underpins all the legislation enacted by the EU in the field of energy.

60. In its first submission Russia admitted the possibility that SoS could be a fundamental objective of society[90]. In contrast, in its second submission Russia states categorically that "SoS is not a fundamental interest of society"[91] because it is "a means or a tool to achieve various higher policy objectives"[92], such as the "health, life, security and more generally, the well-being of European citizens".[93]

61. As we have explained[94], the distinction drawn by Russia is unprecedented, contrived and irrelevant. The mere fact that an interest can be subsumed into a more broadly defined category of interests does not disqualify the first interest from being regarded as "fundamental" by the society concerned. Whether or not an interest is "fundamental" for a society depends on the relative importance attached to such interest by the society concerned, as reflected in that society's laws and policies, rather than on whether that interest can be regarded as an end "in and of itself".

4.1.1 TSOs controlled by persons of third countries pose genuinely and sufficiently serious threats to SoS

62. As explained by the European Union[95], in certain situations the governments of third countries will have strong incentives to require or induce the TSOs controlled by them, or by their nationals, to act in ways which have the effect of undermining the EU's SoS. Such incentives may result *inter alia* from those governments' interest in ensuring SoS in their own territory.

63. Russia does not contest this potential conflict of interests. Quite to the contrary, in its second written submission Russia emphasizes that "the concept of foreign governments acting in the best interest of their citizens is a bedrock principle of how governments function".[96] The European Union does agree. Indeed, the third

90 Russia's first oral statement, para. 59.
91 Russia's second written submission, p. 142.
92 Russia's second written submission, para. 305.
93 Russia's second written submission, para. 305.
94 EU's second written submission, paras. 195-196.
95 EU's first written submission, paras. 520-526.
96 Russia's second written submission, para. 307.

country certification measure is based on the reasonable expectation that foreign governments will act in their own self-interest where there is a shortage of supply or in the other situations described by the European Union. Hence the need to assess the threats that such self-interested actions may pose to the EU's SoS before certifying an applicant TSO. While stressing Russia's own right to act "in the best interest of its citizens"[97], Russia denies the same right to the European Union.

64. Russia goes on to argue that third-country controlled TSOs pose no "real threat"[98] because the EU legislation in place imposes upon all TSOs certain legal obligations in order to ensure SoS. This argument fails to recognise the source of the EU's concerns. The European Union has explained at length[99] that the Third Energy Package does indeed impose numerous obligations on all TSOs with regard to SoS. The threats to SoS identified by the European Union do not result, however, from the absence of adequate legal obligations on the TSOs. Instead, they stem from the fact that the governments of third countries may require or induce the TSOs controlled by them, or by persons of those third countries, not to comply with their existing legal obligations, including those mentioned by Russia.[100] As further explained by the European Union, the requirements and inducements from third-country governments not to comply with EU law may well outweigh the sanctions for non-compliance provided for under EU law[101,] thereby neutralizing their deterrent effect. The mere existence of the legal obligations cited by Russia does not, therefore, render superfluous the SoS certification requirement.

65. Russia's argument also disregards that the Third Energy Package relies to a large extent on market based mechanisms in order to achieve its energy policy objectives (including SoS). The efficient operation of such mechanisms presupposes that all market participants will act in accordance with their own commercial interest. Thus, foreign governments may also undermine the EU's SoS by requiring or inducing foreign controlled TSO to act in ways which, while not

97 Russia's second written submission, para. 307.
98 Russia's second written submission, para. 307.
99 EU's first written submission, paras. 496-506.
100 EU's fist written submission, para. 512.
101 EU's first written submission, paras. 514-519.

being contrary to any legal obligation, are not in each TSO's own commercial interests[102].

4.1.2 The SoS certification requirement is necessary to achieve its policy objective

66. We now turn to the "necessity" of the measure. Russia contends, in essence, that the SoS certification requirement is not necessary to ensure SoS because the threats to SoS which it seeks to address are already sufficiently addressed by other legal obligations imposed on all TSOs under the Third Energy Package. Thus, according to Russia, the third country certification requirement would make no contribution whatsoever to its intended policy objective[103]. This is again the same argument previously advanced by Russia in order to deny the existence of genuine and sufficiently serious threats to SoS. As I have just explained, in making this argument, Russia fails to recognise the source of the threats which the measure seeks to address.

67. Russia further argues that it is not clear how the third country certification measure "would do anything to prevent [foreign] governments from taking actions that undermine the EU's SoS."[104] Again, Russia misses the point: the third country certification measure does not seek to prevent foreign governments from taking such actions. Instead, its primary objective is preventing the operation on the EU market of TSOs controlled by third countries, or their nationals, where it has been established that there is a significant risk that those TSOs will be required or induced by the governments of those countries to take actions that undermine the EU's SoS. The third country certification measure is manifestly apt to achieve that objective by refusing the certification of the TSOs which are found to pose such a threat.

68. As part of its analysis of the necessity of the measure, Russia has proposed two alternative measures. The first proposed alternative is what Russia calls a "blocking statute". As explained in our second written submission[105], the

102 EU's first written submission, para. 513.
103 Russia's second written submission, paras. 314-316.
104 Russia's second written submission, para. 318.
105 EU's second written submission, paras. 215-219.

"blocking statue" proposed by Russia would manifestly fail to address the threats to SoS identified by the European Union.

69. Russia's second proposed alternative is that the European Union applies "the same set of requirements to all applicants"[106]. Russia has specified that its preference would be that the European Union did not apply the SoS certification requirement to any applicant[107]. It is obvious, however, that this is not a genuine alternative measure. Instead, it amounts to the absence of any measure and, therefore, would make no contribution to the EU's SoS.

70. As a further sub-alternative, Russia suggests that the European Union could apply the contested measure to all the applicants.[108] As explained by the European Union[109], however, the TSOs controlled by the EU Member States, or by their nationals, do not pose comparable threats to SoS. For that reason, it would be manifestly unnecessary and unreasonable to apply the contested measure to those TSOs.

71. The governments of Croatia, Hungary and Lithuania have no incentive whatsoever to require or induce the TSOs controlled by each of them, or by its nationals, to undermine their own SoS. Similarly, the existing EU legislation in the gas sector, together with the general duties of the EU Member States under the EU Treaties, ensure that all EU Member States share the same interests and commitments in respect of SoS. If an EU Member State failed to comply with those obligations, it could be referred to the European Court of Justice. In contrast, the governments of third countries have each their own different, and potentially conflicting, interests and are not, in principle, subject to any legally enforceable obligation which would prevent them from taking actions that undermine the EU's SoS policies.

72. Given the common interests shared by all EU Member States and the enforceable legal obligations imposed upon them by EU law, the EU legislators were justified to consider, at the time when the Gas Directive was enacted, that the TSOs controlled by the governments of the EU Member States, or by their nationals, do

106 Russia's second written submission, para. 320.
107 Russia's second written submission, para. 320.
108 Russia's second written submission, para. 320.

not pose a threat to the EU's SoS. In the case of the TSOs controlled by third countries, or their nationals, the EU legislators could not make the same *ex-ante* SoS assessment because the governments of those countries do not share the same interests and are not subject to equivalent legal obligations. Instead, the Gas Directive provides that the threats to SoS will be assessed *ex-post,* on a case-by-case basis and having regard to the specific circumstances of each applicant TSO.

4.1.3 The SoS certification requirement is applied in conformity with the requirements of the *chapeau*

73. Russia also alleges that the third-country certification measure is not applied consistently with the *chapeau* of Article XIV GATS.[110] Russia does not elaborate on this allegation but instead refers to its claims under Article II:1 GATS (*de facto*) and Article VI GATS with regard to the same measure. The European Union has already shown that those claims are unfounded.

4.2 ARTICLE II:1 OF THE GATS

4.2.1 *De jure* claim (Russia's claim 16)

74. The Panel has ruled that the *de jure* claim under Article II:1 GATS developed by Russia in its first written submission falls outside its terms of reference. In its second written submission[111], Russia has argued, for the first time, a different claim, according to which the third country certification measure would be inconsistent with Article II:1 GATS because in each EU Member State the service suppliers and services of the other EU Member States are treated more favourably than those of third countries, including Russia. We have already addressed this new *de jure* claim in our response to the Panel Question 153.

4.2.2 *De facto* claim (Russia's claim 17)

75. The claim of *de facto* discrimination developed by Russia in its first submission was based on a comparison between the treatment accorded to Gaz-System and the allegedly more favourable treatment accorded to service suppliers of other

109 EU's first written submission, paras. 535-540.
110 Russia's second written submission, paras. 323-325.
111 Russia's second written submission, paras. 326-330.

Members in respect of the SoS certification requirement in Article 11 of the Gas Directive.

76. The European Union has shown that Gaz-System is a Polish service supplier[112]. In turn, EuropolGaz (the owner of the system operated by Gaz-System, which is jointly controlled by Gazprom) is not a service supplier within the meaning of Article II:1 GATS. In response, Russia notes that Gazprom does supply transmission services in the European Union through other legal entities in respect of other systems (NEL GT, GASCADE and OPAL GT).[113] This is, of course, correct. But it does not alter in any way the crucial fact that Gaz-System is not a Russian service supplier and, therefore, that the treatment accorded to Gaz-System cannot be relied upon by Russia as evidence of the alleged *de facto* violation of Article II:1 GATS.

77. Russia has not alleged, far less proven, that NEL GT, GASCADE or OPAL GT were treated less favourably in respect of the third country certification measure than the service suppliers of other Members. In fact, there could be no basis whatsoever for such allegation since none of those three entities has been subjected to certification under article 11 of the Gas Directive. As explained by the European Union[114], the applications for certification for both GASCADE and NEL GT were dealt with exclusively under Article 10 of the Gas Directive because they were filed before 3 March 2013, just like the applications for jordgas and TAP AG. In turn, OPAL GT operates without ever having applied for certification under either Article 10 or Article 11 of the Gas Directive.

78. As I have just recalled, in its first written submission Russia based this claim on a comparison between the treatment accorded to Gaz-System and the treatment accorded to service suppliers of other Members. In its second written submission, Russia attempts an entirely new line of argument: according to Russia, that the third country certification measure discriminates *de facto* against Russian service suppliers would be evidenced by the fact that Gazprom was "prevented" from requesting certification under Article 11 of the Gas Directive with regard to

112 EU's first written submission, paras. 582-584.
113 Russia's second written submission, para. 336.
114 EU's first written submission, para. 599.

Lietuvos because it was required to divest that entity.[115] This was but the necessary consequence of the previous application by Lithuania of a different measure (the unbundling measure), which, as demonstrated by the European Union in response to another claim from Russia, is itself fully consistent with Article II:1 GATS. The European Union, therefore, fails to understand the relevance of this argument.

4.3 ARTICLE VI:1 AND VI:5 OF THE GATS

79. Russia's second written submission repeats to a large extent its previous arguments in support of its claims under Article VI:1 and VI:5 of the GATS. In view of that, we refer the Panel to the rebuttal contained in our previous written submissions.

5. CLAIMS RELATING TO INFRASTRUCTURE EXEMPTIONS

80. We turn now to Russia's claims relating to infrastructure exemptions. In this regard, the main point is that Russia does not openly contest the conditions under which the EU's exemption for new infrastructure is granted, or the legitimacy of the objectives pursued through that measure. However, Russia complains about several instances of application of the measure, alleging that individual exemption decisions either discriminate against Gazprom or favour its competitors.

81. Those accusations are baseless. Contrary to the conspiracy theories formulated by Russia,[116] the EU legislation does not seek to restrict or reduce imports of Russian gas and its application has not resulted in any such restriction or reduction.[117]

82. However, it is clear that the Gas Directive continues to implement an EU internal market in natural gas that aims to deliver a real choice for all consumers, be they citizens or businesses, and to foster new business opportunities and more cross-border trade. This internal market, which is being established progressively since 1999, seeks to achieve efficiency gains, competitive prices, and higher standards of service, and to contribute to security of supply and sustainability.[118]

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115 Russia's second written submission, para. 355.

116 Russia's second written submission, paras. 383 and 384.

117 As noted in the European Union's response to Panel Question 129c, para. 329, according to Eurostat data, imports of gas from Russia to the EU have increased from 114 bcm in 2009 to 115 bcm in 2014 and even to 121.7 bcm in 2015.

118 See recital (1) of Directive 2009/73/EC.

83. An integral part of that effort is the promotion of investment in new gas infrastructure, as underlined in recital (35) of the same directive. Article 36 provides for major new infrastructure to be exempted, upon request, from certain generally applicable requirements, provided that all the conditions listed in that article are fulfilled. The existence and the nature of those conditions cannot be overlooked. They require showing that the investment enhances competition in gas supply and enhances security of supply.[119] Moreover, it must be ensured that the exemption is not detrimental to competition, to the effective functioning of the internal market or of the regulated system to which the infrastructure is connected.[120] Assessing whether those conditions are met in each individual decision requires the competent authorities to carry out a detailed, case-by-case analysis of the infrastructure project and of the markets concerned.[121] There is no automatic entitlement to benefit from an exemption and each exemption is to be tailored to the relevant circumstances, both in terms of scope and of the conditions attached to it.

84. Therefore, Russia's position that differences in the outcome or content of certain individual exemption decisions reflect an unreasonable or partial administration of the measure is untenable. The European Union reiterates its view that a claim under Article X:3(a) of the GATT 1994 is not an appropriate avenue to challenge those individual decisions that Russia simply considers contrary to its interests.

85. As regards **Claim 21**, by which Russia argues that the administration of the infrastructure exemption measure is inconsistent with Article X:3(a), the European Union has questioned how and to what extent Article 36 of the Directive "affects" the sale, distribution and transportation of natural gas. It has argued that it does not suffice to state that Article 36 has "an effect on" those activities, however indirect and remote such effects may be.

86. In paragraph 394 of its second written submission, Russia offers for the first time a description of the effects that, in its view, the infrastructure exemption measure produces on the sale, distribution and transportation of natural gas. According to

119 Article 36(1)(a) of Directive 2009/73/EC.
120 Article 36(1)(e) of Directive 2009/73/EC.
121 As made clear in Article 36, (3), (6) and (8) of Directive 2009/73/EC.

Russia, it "has an effect on the volume of gas that may be imported free of the Directive's requirements".

87. The European Union considers, nonetheless, that it does not follow from this description that the application of Article 36 of the Directive somehow constrains the volume of gas that may be imported into the EU. In fact, the construction of new gas infrastructure by itself, regardless of whether it benefits from an exemption, tends to increase the volume of imported gas. However, it must be noted that the volume of imported gas may also remain constant, if gas that used to be flown through older pipelines is simply diverted to the new infrastructure. As to the reference to gas supposedly imported "free of the Directive's requirements", it seems a stretch of the imagination to assume that exemptions granted to the operation of a particular gas infrastructure automatically trigger a higher volume of cheaper gas imports, while the fact that new infrastructure is subject to regulation, fully or in part, causes a lower volume of expensive gas imports. It may actually be the other way around. The application of unbundling, third-party access and regulated tariffs' rules is intended to achieve enhanced competition on the market, through a more efficient operation and use of gas infrastructure. Exemptions from tariff regulation, for example, often allow a higher return on investment for the pipeline operator, thus resulting in *increased* tariffs for the service of shipping gas through this infrastructure. Russia's position is flawed in pretending, or at least suggesting, that the volume of gas imports necessarily increases if the infrastructure is "free of the Directive's requirements".

88. In short, the effects of the infrastructure exemption measure on the volume and price of imported gas remain remote, unclear and unproven.

89. On the other hand, the European Union is of the opinion that the expression "pertaining …to requirements, restrictions or prohibitions on imports", as mentioned in Article X:1 of the GATT 1994, clearly covers a narrower range of measures than that of measures "affecting their sale, distribution, transportation …or other use". The infrastructure exemption measure certainly does not "pertain" to any requirement, restriction or prohibition on imports of natural gas. It pertains to requirements for the operation and use of certain gas infrastructure. Since its

purpose is to incentivize the construction of new infrastructure, it is beyond doubt that it has an effect on the availability of that infrastructure. However, its effects on gas imports are uncertain and, at best, indirect. The same could be said of an indefinite amount of laws and regulations currently in force, not only in the EU but also in other WTO Members.

90. In any event, the European Union has shown abundantly in its written submissions that all individual decisions adopted so far to implement Article 36 of the Directive correctly apply the relevant legal framework and all differences in outcome and content are justified on the merits of each case.[122] Thus the measure is administered in a uniform, impartial and reasonable manner, so as to meet the requirements of Article X:3(a) of the GATT 1994, if the Panel were to deem them applicable to that measure.

91. With respect to **Claims 22, 23 and 24**, by which Russia argues that the infrastructure exemption measure, as applied, discriminates against Russian gas contrary to the obligation in Article I:1 of the GATT 1994, the European Union reiterates its arguments for rejecting those claims.

92. Even if we were to admit that individual decisions implementing the infrastructure exemption measure have an effect on imports of gas for the purposes of Article I:1 and Article III:4 of the GATT 1994, nothing in those decisions discriminates again Russian gas.

93. Russian natural gas is flown into EU markets through the NEL, OPAL and Gazelle pipelines, as well as through older infrastructure such as the Yamal and Brotherhood pipelines. The European Union stresses once again that each individual decision regarding exemption requests filed for new major gas infrastructure was taken on the merits of each case and in accordance with the applicable rules. The origin of the gas using the infrastructure, to the extent that it is known in advance, plays no role either in the Directive or in those decisions and Russia has not demonstrated otherwise. The same applies to decisions exempting

[122] EU's first written submission, paras. 697 to 712; responses to Panel Question 21, paras. 44 to 46, and Panel Question 141b, para. 368; second written submission, paras. 287 to 314.

LNG facilities, even if the European Union disputes that LNG is "like" natural gas.

94. Moreover, whenever needed and appropriate, conditions were attached to the exemptions granted. This was the case for OPAL, but also for the Nabucco and TAP pipelines and even for a LNG facility, the Gate Terminal in the Netherlands.[123] Again, the origin of the gas that would use the infrastructure played no role here. The conditions attached to the OPAL exemption are by no means exceptional.[124]

95. Russia complains in paragraph 411 of its second written submission that the infrastructure exemption measure has modified the conditions of competition in the EU market to the detriment of Russia's imported natural gas. Nonetheless, it admits that new opportunities for imported gas to compete in the EU market have been created, as we have emphasized all along.

96. This is precisely the point of divergence which bears being emphasised. Russia regards the creation of new opportunities for imported gas to compete in the EU market mostly as a threat to the traditional dominance of Russian gas suppliers in certain markets. The European Union would rather invite it to consider how Russian suppliers have been taking advantage of those new opportunities and how they can continue to do so in the future.

97. In any event, the creation of new opportunities for imported gas to compete in the EU market should not be regarded as violation of Article I:1 of the GATT 1994.

98. As regards Russia's **Claim 25**, according to which Russian pipeline transport services and service suppliers have been discriminated against in violation of Article II:1 of the GATS, the European Union can only reaffirm its position that the claim is unfounded.

99. Russia agrees that there is no *de jure* discrimination, either in the relevant provisions of the Directive or in the individual decisions, which do not distinguish between Russian suppliers of pipeline transport services or "like" service suppliers

123 EU's second written submission, paras. 287 to 294.

of any other origin[125]. As to *de facto* discrimination, the facts do not support the claim. The European Union refers the Panel to all the explanations already provided for refusing the NEL exemption request,[126] for attaching conditions to the OPAL exemption[127] and for granting exemptions to LNG facilities.[128]

100. Russia's **Claim 26,** concerning an "as such" violation of Article I:1 of the GATT 1994 by the EU Directive, due to a supposed blanket exemption for upstream pipeline networks, is likewise unfounded. The European Union has consistently explained the reasons why different rules apply to different types of gas infrastructure[129] and, in addition, has pointed out that the rules in respect of upstream pipeline networks apply regardless of the origin of the gas. Russia has not demonstrated how the rules on upstream pipeline networks grant a competitive advantage to gas of Norwegian origin to the detriment of Russian gas.

101. Through its **Claim 28**, Russia alleges that the OPAL exemption decision restricts the import of natural gas from Russia in violation of Article XI:1 of the GATT 1994.[130]

102. The European Union has rebutted this claim at length in its written submissions.[131] Russia incorrectly and abusively equates any conditions or restrictions on the operation of a pipeline which Gazprom would like to reserve for its exclusive use to quantitative restrictions on imports within the meaning of Article XI:1 of the GATT 1994. This position implies that the EU's generally applicable provisions on third-party access should also be considered quantitative restrictions on imports, to the extent that a vertically integrated undertaking which operates a pipeline is obliged to give competitors access to the gas infrastructure. It would be absurd to conclude that, in those circumstances, the volume of imports is being restricted

124 EU's second written submission, paras. 291 and 292.
125 Russia's second written submission, paras. 428 and 429.
126 EU's first written submission, para. 729, responses to Panel Question 21, paras. 44 to 46, second written submission, paras. 307 to 311.
127 EU's first written submission, para. 733, responses to Panel Question 50, paras. 133 to 135 and to Panel Question 129, paras. 327 and 328, second written submission, paras. 287 to 302.
128 EU's first written submission, para. 734 to 736, responses to Panel Question 47, paras. 127 and 128, second written submission, paras. 293 and 323 to 325.
129 EU's second written submission, paras. 276 to 278.
130 Russia's second written submission, para. 434.

contrary to the prohibition in Article XI:1. The conditions imposed on the operation of OPAL, as third-party access rules themselves, do not seek to reduce the volume of imports but simply to prevent the monopolisation of an essential facility. Article XI:1 does not forbid measures which *allow* imports of products from various sources and foster competition on the market of the importing Member.

103. The European Union also rejects the comparison drawn by Russia between the OPAL exemption decision and the situation at issue in *Colombia – Ports of Entry.*[132] The conditions attached to the OPAL exemption do not have an *indirect limiting effect* on imports from Russia. They do not create uncertainties for the undertakings concerned nor make importation of gas from Russia prohibitively costly.[133]

104. Russia's claim under Article XI:1 of the GATT 1994 must therefore fail.

6. CLAIMS RELATING TO THE TEN – E MEASURE

6.1 ARTICLE II:1 OF THE GATS

105. The European Union has shown that Russia's claim that the TEN – E measure discriminates *de jure* against Russian services and service suppliers is manifestly unfounded.[134] The origin of the promoter of a project is not among the selection criteria and plays no role whatsoever in the designation of PCIs. There is nothing in the TEN – E measure that excludes, either directly or indirectly, the projects promoted by Russian suppliers of transmission services from being designated as a PCI. This is confirmed beyond doubt by the fact that, in practice, many designated PCIs, including numerous PCIs in the BEMIP Gas corridor, have been promoted by Russian service suppliers[135].

131 EU's first written submission, paras. 765 to 769; responses to Panel Question 129b and c, paras. 316 to 330; second written submission, paras. 341 to 353.
132 Panel Report, *Colombia – Ports of Entry*.
133 Panel Report, *Colombia – Ports of Entry*, para 7.240.
134 EU's first written submission, paras. 782-793, 800 and 808.
135 EU's response to Panel Question 77, para. 186.

106. The European Union has further shown that the TEN – E measure does not discriminate *de facto* against Russian service suppliers or services.[136] Russia's *de facto* claim is entirely based on the assumption that the TEN – E measure discriminates against imports of Russian gas. As I will recall later, this is not true. But, even assuming *ad arguendo* that Russia's assumption were correct, it would not follow that the TEN – E measure discriminates *de facto* against Russian service suppliers or services.

107. As we have explained[137], in practice most TSOs operating in the European Union are controlled by EU nationals, whereas the large majority of gas consumed in the European Union is imported. As a result, the TSOs controlled by EU persons very often operate infrastructures that are used exclusively or mainly to transmit imported gas, including to a large extent Russian gas. The European Union has provided numerous examples of such infrastructures.[138] Conversely, TSOs controlled by persons of third countries operate infrastructure used in part to transmit EU gas originating in the European Union[139].

108. Russia has nowhere addressed the argument and evidence which I had just recalled. Instead, Russia relies on the single case of [[ ]] as evidence of the alleged *de facto* discrimination. Even if Russia's allegation with regard to [[ ]] were correct (*quod non*), that would not be sufficient to show that the TEN – E measure "as such" is discriminatory, which is the only claim before the Panel. In any event, as we have shown[140], the non-designation of [[ ]] as a PCI was the outcome of the impartial application of a comprehensive set of objective selection criteria. Russia's allegations to the contrary misrepresent the relevant facts and are wholly unfounded.

6.2 ARTICLES III:4 AND I:1 OF THE GATT 1994

109. Russia's claims against the TEN – E measure under both Article III:4 GATT and Article I:1 GATT raise similar issues and can be addressed together.

136 EU's first written submission, paras. 809-811.
137 EU's first written submission, paras.810 and 620-624.
138 EU's first written submission, paras. 622-623.
139 EU's first written submission, para.624.
140 EU's second written submission, paras. 370-379.

110. Russia's claims of *de jure* discrimination rely, almost exclusively, on the mere fact that the definition of the BEMIP Gas corridor refers to the objective of ending the dependency on a "single supplier".[141] As explained by the European Union[142], however, this objective does not lead to *de jure* discrimination against Russian gas.

111. The various priority corridors have been defined so as to cover in a balanced manner all the main potential sources of supply of gas within and around the European Union, as well as the supply needs of all EU Member States. For obvious geographical reasons, it is inevitable that not each corridor (and not each infrastructure within each corridor) will contribute to facilitate the transmission or storage of gas from each and every potential source of supply to an identical extent. In view of this, it would be manifestly unreasonable to assess the existence of discrimination by considering in isolation each of the priority corridors, such as the BEMIP Gas Corridor. Instead, it is necessary to make an overall assessment of all the corridors, as well as of the already existing infrastructures outside the current priority corridors.[143]

112. For historical reasons, Estonia, Latvia and Lithuania are already adequately connected to sources of gas supply in Russia. Those connections were built by, or with the support of, the Russian authorities or their predecessors. For the same historical reasons, those three EU Member States were, until recently, totally isolated from other EU Member States and sources of gas supply. One of the objectives of the BEMIP Gas corridor priority is to remedy this deficiency by ensuring adequate connections with the other EU Member States. Those connections will not distort market opportunities in favour of domestic gas (or of gas from other third countries) and to the detriment of Russian gas. Rather, they will contribute to achieve greater equality of competitive opportunities for gas from all potential sources.[144]

141 Russia's response to Panel Question 48, paras. 238-240.
142 EU's second written submission, paras. 381-385.
143 EU's first written submission, para. 825.
144 EU's first written submission, paras. 821-825.

113. Moreover, while the BEMIP Gas corridor priority is not aimed at duplicating the existing connections between Russia and each of the EU Member States concerned, we have shown that the projected infrastructures within the scope of the BEMIP Gas corridor will benefit as well Russian gas by facilitating its storage and further transmission to other EU Member States.[145]

114. The European Union has further shown that the TEN – E measure does not discriminate *de facto*, either between Russian gas and EU gas or between Russian gas and gas from any third country.[146] All PCIs can be used for gas from all sources, including Russian gas, and in practice many PCIs are likely to be used for Russian gas, sometimes to a very large extent.

115. The European Union has provided examples of PCIs which are likely to be used mainly for storing or carrying Russian gas.[147] Russia has not disputed those examples. Instead, Russia now claims, for the first time, that those PCIs "are eligible for only a fraction of the financial support that is provided to the PCIs not involving the transmission or storage of Russian natural gas"[148]. This is simply not true. As we have explained[149], the comparisons drawn by Russia are meaningless, because they fail to take into account that not all the projects concerned were at the same stage of maturity and that the grants being compared cover very different types of costs.

116. For the reasons that I have just recalled, the European Union submits that the TEN – E measure is fully consistent with Articles III:4 and I:1 of the GATT. Nonetheless, the European Union also has shown in the alternative that, in any event, the TEN - E measure would be justified under the exception provided for in Article XX (j) GATT.[150]

117. Russia complains that the European Union has not met its burden of demonstrating that the quantity of available supply of gas from both domestic and imported

145 EU's second written submission, para. 385.
146 EU's first written submission, paras. 826-837.
147 EU's first written submission, paras. 828-829.
148 Russia's response to Panel Question 126, para. 522.
149 EU's second written submission, paras. 387-393.
150 EU's second written submission, paras. 394-436.

sources is insufficient to meet the EU demand.[151] This allegation is baseless: the European Union has provided ample evidence showing that in the recent past there have been major disruptions of the supply of imports of gas, which have led to serious shortages within the European Union.[152] Russia has not disputed that evidence.

118. Furthermore, as explained in our first written submission[153], in 2014 both the EU Member States and ENTSO – Gas carried out "stress tests" involving the modelling of the effects of various supply disruption scenarios. Those tests showed that a major disruption of gas supplies (such as a complete halt of Russian gas imports to the European Union or a disruption of Russian gas imports through the Ukrainian transit route) would cause serious shortages in the European Union, and in particular in the Eastern EU Member States.[154] Again, Russia has not contested this evidence.

119. Instead, Russia bases its objections on the fact that in its second written submission the European Union did not address expressly two of the factors mentioned by the Appellate Body in *India – Solar Cells*, namely the volume of exports of domestic gas and the purchasing power of the EU consumers of gas.[155] However, in *India – Solar Cells* the Appellate Body clarified that "whether and which factors are relevant will necessarily depend on the particularities of each case".[156] Russia has given no indication of how, in view of the particularities of this case, the two factors which it has singled out could contradict or detract from the evidence of risk of shortages submitted by the European Union.

120. Total exports of domestic gas from the European Union account for only a small fraction of both its consumption and its imports from third countries[157]. Moreover,

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151 Russia's answer to Panel Question 149, paras. 36-37.

152 EU's second written submission, para. 419.

153 EU's first written submission, para. 493.

154 Communication from the Commission to the European Parliament and the Council of 16 October 2014 on the short term resilience of the European gas system, "Preparedness for a possible disruption of supplies from the East during the fall and winter of 2014/2015", COM (2014) 654 final (Exhibit EU - 72).

155 Russia's answer to Panel Question 149, para. 39.

156 Appellate Body report, *India – Solar cells*, para. 5.89.

157 Statistics on production, imports, exports and consumption of gas in the European Union (Exhibit EU – 146)

most exports originate in a few north-western EU Member States. Exports from the eastern and southern EU Member States most affected by the 2006 and 2009 shortages have always been nil or negligible. As regards the purchasing power of the EU consumers, the European Union has not argued that there is a risk of shortage merely because the available supplies of gas may be too expensive for the EU consumers, but instead because gas may not be available at all or only in insufficient quantities.

121. Russia further argues that the TEN – E measure is not "essential" for ensuring the "distribution" of gas because there is a less trade-restrictive alternative[158]. According to Russia, if the selection criteria which it regards as discriminatory were removed from the TEN – E measure, the resulting alternative measure would make a greater contribution to the objective of ensuring the distribution of gas in the European Union.

122. The EU disagrees. The resources (both administrative and financial) which the European Union can make available under the TEN – E measure are necessarily limited. For that reason, it is essential to ensure that the available resources are used where they are most needed and, for that purpose, to define adequate priorities in the TEN – E measure. In the absence of the selection criteria to which Russia objects, the European Union would have to accord equal priority to projects that duplicate already existing infrastructures. Such duplicate infrastructures would not contribute to reducing the risks of shortage resulting from the disruption of a source of supply because they would be vulnerable to the very same risks of disruption as the existing infrastructures. Moreover, such duplicate infrastructures would consume resources that could otherwise be used to support infrastructure to bring gas from alternative sources of supply. Thus, Russia's alternative measure would diminish the overall contribution of the TEN – E measure to the objective of ensuring SoS.

123. Consider, for example, the case of the BEMIP Gas priority corridor. According to Russia, the European Union would have to accord the projects for building connections between the Baltic EU Member States and Russia the same priority as

158 Russia's answer to Panel Question 149, paras. 49-53.

to the projects for building connections between those EU Member States and alternative sources of supply. As I have just explained, however, the Baltic EU Member States are already adequately connected to the sources of gas supply in Russia. Building new connections between the Baltic EU Member States and Russia would not reduce the risk of disruption of supplies of Russian gas, because those new connections would be exposed to the same risks as the existing ones. For example, assume that Russia decided to halt or limit the supply of gas to the European Union for political reasons or in response to a commercial dispute. Duplicating the existing connections between the Baltic EU Member States and Russia would do nothing to address such risks.

124. Contrary to Russia's assertion, the European Union does not "assume that Russia is […] an unreliable trade partner"[159]. Nonetheless, it is an undisputed fact that supplies from Russia have been seriously disrupted in the recent past. It would be manifestly irresponsible for the EU authorities to assume that supplies of Russian gas will never be disrupted again. For example, in August of last year the Russian government wrote to the Polish authorities warning that the supplies of gas to Poland could be halted unless a dispute between Poland and Russia concerning the application of the Polish-Russian agreements on the management and operation of the Polish section of Yamal-Europe was resolved to Russia's satisfaction.[160]

125. To be clear, the European Union is not suggesting that only supplies from Russia can be disrupted. Each and every source of supply may be disrupted for reasons which are largely beyond the control of the EU authorities. Hence the objective to ensure that every EU region has in place infrastructures allowing access to at least two different sources of supply.[161] Where, as in the case of the Baltic EU Member States, a region is connected to just one source of supply, it is essential, in order to ensure SoS, to give priority to building connections to alternative sources of supply, rather than duplicating unnecessarily the existing connections to the first source of supply.

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159 Russia's answer to Panel Question 149, para. 53.

160 Letter of 16 16 August 2016 from Mr Novak, Russia's Minister for Energy to Mr Tchorzewski, Poland's minister for energy (Exhibit EU – 147).

7. CONCLUSION

Mr Chairman, distinguished Members of the Panel, with that, the European Union thanks you for your attention and looks forward to any questions you may have.

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[161] European Commission, *Energy Infrastructure, priorities for 2020 and beyond – A blueprint for an integrated European energy network*, COM (2010) 677 final of 17 November 2010, p. 14. (Exhibit RUS - 109).