WT/DS476/R/Add.1

10 August 2018

(18-5018)

Page: 1/79

Original: English

EUROPEAN UNION AND ITS MEMBER STATES – CERTAIN MEASURES RELATING TO THE ENERGY SECTOR

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS476/R.

____

LIST OF ANNEXES

ANNEX A

WORKING PROCEDURES OF THE PANEL

Contents		Page
Annex A-1	Working Procedures of the Panel	A-2
Annex A-2	Additional Working Procedures on BCI	A-7

ANNEX B

ARGUMENTS OF THE PARTIES

RUSSIA

Contents		Page
Annex B-1	First part of the executive summary of the arguments of Russia	B-2
Annex B-2	Second part of the executive summary of the arguments of Russia	B-17

EUROPEAN UNION

Contents		Page
Annex B-3	First part of the executive summary of the arguments of the European Union	B-26
Annex B-4	Second part of the executive summary of the arguments of the European Union	B-41

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

Contents		Page
Annex C-1	Executive summary of the arguments of Colombia	C-2
Annex C-2	Executive summary of the arguments of India	C-3
Annex C-3	Executive summary of the arguments of Japan	C-6
Annex C-4	Executive summary of the arguments of Ukraine	C-10

ANNEX D

PRELIMINARY RULINGS BY THE PANEL

Contents		Page
Annex D-1	First Preliminary Ruling by the Panel (conclusions), 9 May 2016	D-2
Annex D-2	Second Preliminary Ruling by the Panel (conclusions), 10 November 2016	D-3

ANNEX A

WORKING PROCEDURES OF THE PANEL

Contents		Page
Annex A-1	Working Procedures of the Panel	A-2
Annex A-2	Additional Working Procedures on BCI	A-7

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 31 March 2016
Amended on 19 May 2016

1.1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

1.2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

1.3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

1.4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

1.5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

1.6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If the Russian Federation requests such a ruling, the European Union shall submit its response to the request in its first written submission. If the European Union requests such a ruling, the Russian Federation shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

1.7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

1.8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits

upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

1.9. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions, to the extent that it is practical to do so.

1.10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by the Russian Federation could be numbered RUS-1, RUS-2, etc. If the last exhibit in connection with the first submission was numbered RUS-5, the first exhibit of the next submission thus would be numbered RUS-6.

Questions

1.11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

1.12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

1.13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite the Russian Federation to make an opening statement to present its case first. Subsequently, the Panel shall invite the European Union to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the Russian Federation presenting its statement first.

1.14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the European Union if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the European Union to present its opening statement, followed by the Russian Federation. If the European Union chooses not to avail itself of that right, the Panel shall invite the Russian Federation to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

1.15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

1.16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

1.17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. on the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

1.18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

1.19. Each party shall submit executive summaries of the facts and arguments as presented to the Panel in its written submissions and oral statements, in accordance with the timetable adopted by the Panel. These summaries may also include a summary of responses to questions. Each such executive summary shall not exceed 15 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

1.20. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

Interim review

1.21. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

1.22. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

1.23. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

1.24. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file nine paper copies of all documents it submits to the Panel. Exhibits may be filed in four copies on CD-ROM or DVD and three paper copies. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to ****.****@wto.org, ****.****@wto.org, ****.****@wto.org, ****.****@wto.org, and ****.****@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

1.25. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES ON BCI

Adopted on 5 April 2016

The following procedures apply to business confidential information (BCI) submitted in the course of the Panel proceedings.

1. For the purposes of these proceedings, BCI means information: (a) that is clearly designated as such by the party submitting it; (b) that is not otherwise accessible to the general public; and (c) that is commercially sensitive, such that release could seriously prejudice an essential interest of the Member submitting the information. Each party and third party shall act in good faith and exercise restraint in designating information as BCI. The Panel shall have the right to intervene in any manner that it deems appropriate, if it is of the view that restraint in the designation of BCI is not being exercised.

2. If a party or the Panel considers that a party or a third party designated information as BCI which should not be so designated, the party designating the information shall provide reasons for the designation within five (5) working days. Similarly, if a party or the Panel considers that information submitted by a party or a third party should have been designated as BCI and objects to its submission without such designation, the party submitting the information shall provide reasons for not designating the information as BCI within five (5) working days. After giving the other party an opportunity to comment on the justification provided within five (5) working days, the Panel shall decide on the designation of the information. The Panel, in deciding whether information subject to an objection should be treated as BCI for purposes of these Panel proceedings, will consider whether disclosure of the information in question could cause serious prejudice to the interests of the originator(s) of the information.

3. Panel Members and employees of the WTO Secretariat assigned to the present dispute, including translators and interpreters, shall have access to BCI submitted in these proceedings. Employees of the Governments of the European Union and the Russian Federation, as well as of the third parties, shall have access to BCI submitted in these Panel proceedings to the extent necessary for their involvement in their official capacity in DS476 proceedings. Subject to paragraph 4 of the Working Procedures of the Panel[1], parties and third parties may give access to BCI to outside advisers and experts providing assistance to the parties in these proceedings and their clerical staff. An outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, distribution, export, or import of the products that are subject of this dispute.

4. Each party and third party shall maintain a list of the names of all outside advisers and experts provided with access to BCI. The list shall be updated when additional outside advisers or experts are provided with access to BCI.

5. As required by paragraph 2 of the Working Procedures of the Panel, the deliberations of the Panel and the documents submitted to it shall be kept confidential. Further, as required by Article 18.2 of the DSU, a party or third party having access to information designated as BCI submitted in these Panel proceedings shall treat it as confidential and shall not disclose that information other than to those persons authorized to receive it pursuant to these Additional Working Procedures. Each party and third party is responsible for ensuring that its employees, outside advisers and experts comply with these Additional Working Procedures to protect BCI.

6. The parties, third parties, the Panel, the WTO Secretariat, and any others permitted to have access to documents containing BCI under the terms of these Additional Working Procedures shall store all documents containing BCI so as to prevent unauthorized access to such information.

[1] Adopted on 31 March 2016.

7. On the request of either party, the Panel will review whether particular confidential information it has submitted is so sensitive that it should not be provided to the third parties, taking into consideration the need for the third parties to have access to the particular information. If the Panel finds such information to be particularly sensitive, it will direct the party submitting the information to provide a non-confidential summary of the contents of the information that will be made available to the third parties.

8. A party or third party submitting or referring to BCI in any written submission (including in any exhibits) shall mark the cover and the first page of the document containing any such information with the words "Contains Business Confidential Information". The specific information in question shall be enclosed in double brackets, as follows: [[xx.xxx.xx]], and the notation "Contains Business Confidential Information" shall be marked at the top of each page containing the BCI.

9. Any BCI that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label on the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.

10. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these Additional Working Procedures are in the room to hear that statement (or the relevant part thereof). The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 8.

11. The Panel may include in its confidential interim report any information designated as BCI under these Additional Working Procedures. However, the Panel will not disclose in its final report any information designated as BCI under these Additional Working Procedures. It will, as necessary, redact the public version of its final report, with BCI being replaced with the formulation **[[BCI]]**. The Panel may, however, make statements of conclusion based on such information. Before the Panel makes its final report publicly available, the Panel shall give each party or third party an opportunity to ensure that any information it has designated as BCI is not contained in the report.

12. At the conclusion of the dispute[2], and within a period to be fixed by the Panel, each party and third party shall either return all documents (including electronic material and photocopies) containing BCI, submitted during the Panel proceedings, to the party that submitted such documents or certify in writing to the Panel and the other parties that all such documents have been destroyed, or otherwise protect the BCI against public disclosure, consistent with the party's obligations under its domestic laws. The Panel and the WTO Secretariat shall likewise return all such documents or certify to the parties that all such documents have been destroyed. The WTO Secretariat shall, however, have the right to retain one copy of each of the documents containing BCI for the archives of the WTO.

13. If a party formally notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU, the Secretariat will inform the Appellate Body of these procedures and will transmit to the Appellate Body any BCI governed by these procedures, including any submissions containing information designated as BCI under these Additional Working Procedures. Such transmission shall occur separately from the rest of the Panel record, to the extent possible.

---

[2] Where this is defined as when (a) the Panel or Appellate Body report is adopted by the DSB, or the DSB decides by consensus not to adopt the Panel or the Appellate Body report; (b) the authority for the establishment of the Panel lapses under Article 12.12 of the DSU; or (c) a mutually satisfactory solution is notified to the DSB under Article 3.6 of the DSU.

ANNEX B

ARGUMENTS OF THE PARTIES

RUSSIA

Contents		Page
Annex B-1	First part of the executive summary of the arguments of Russia	B-2
Annex B-2	Second part of the executive summary of the arguments of Russia	B-17

EUROPEAN UNION

Contents		Page
Annex B-3	First part of the executive summary of the arguments of the European Union	B-26
Annex B-4	Second part of the executive summary of the arguments of the European Union	B-41

ANNEX B-1

FIRST PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF RUSSIA

I. INTRODUCTION

1. This dispute has far reaching implications for international trade in natural gas. The Russian Federation is a major natural gas producer and exporter. Russia also exports what have been defined in this proceeding as "pipeline transport services." Russia values its right to export natural gas and to supply pipeline transport services in territory of the European Union (the "EU").

2. The EU imports natural gas and pipeline transport services. This includes a significant volume from Russia. The EU and Russia have a long trade relationship in this sector. The EU has decided, however, that it wants to import less gas and pipeline transport services from Russia and more from places like Norway and Azerbaijan. Indeed, a major EU objective is now to reduce its reliance on Russian natural gas and pipeline transport services and service suppliers. Toward this end, the EU has enacted a number of discriminatory measures. Most of these derive from Directive 2009/73/EC (the "Directive"), the key part of the EU's Third Energy Package ("TEP"), as well EU Member States legislation adopted in connection with the Directive. Regulation (EU) No 347/2013 ("the TEN-E Regulation"), as amended, is also relevant. It is closely related to the TEP and the Directive and also intended to reduce the EU's reliance on Russian natural gas.

3. Russia weighed its options. It finally chose to challenge many (but not all) of the EU's measures as set out in the Directive and TEN-E Measure. Russia has raised issues that may not have been considered directly by any previous panel. These include the EU's responsibility, as a WTO Member, for the actions of its Member States. Notably, in the case of unbundling, the EU devised a scheme to enable Member States to choose which models to permit, and subsequently enforced it in various Member States modifying the conditions of competition to the detriment of Russian services provides and Russian gas. Russia views this as an overt attempt to manipulate the WTO. The fact that EU Member States are also WTO Members is immaterial. They are still EU Member States. And the relevant market for assessing Russia's claims is the EU as a whole.

4. This dispute also has far reaching implications for WTO jurisprudence. In considering Russia's claims, and the limited defenses the EU elected to put forth in response, Russia urges the Panel not to let the EU avoid its WTO responsibilities. The EU picks and chooses when to hide behind its Member State veil. The Panel should not let the EU hide behind that veil here. Within this context, the following summarizes each of Russia's claims, as discussed in the proceeding to date.

II. GATS ARTICLE XVI:2 – MARKET ACCESS CLAIMS

5. Croatia, Hungary and Lithuania each made market access commitments in their GATS Schedules pertaining to Sector 11G, "Pipeline Transport" services. Russia has presented separate claims under 3 GATS Article XVI:2 provisions, each challenging different aspects of the unbundling measure, as implemented in the laws of Croatia, Hungary and Lithuania. Russia is pursuing claims under GATS Article XVI:2(e) and (f) against Croatia, Hungary and Lithuania. Russia is pursuing claims under Article XVI:2(a) against Croatia and Lithuania. Russia has identified each of these sets of claims as a single claim based on its relevant WTO provision. Russia refers to the Member-specific claims under each sub-paragraph of Article XVI:2 collectively as Claim 1, Claim 2 and Claim 3.

6. GATS Article XVI:2(e) – Article XVI:2(e) ("sub-paragraph (e)") provides that Members shall not maintain or adopt "measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service". Russia demonstrated that Croatia, Hungary and Lithuania's unbundling measures each violates this provision and thus the market access commitments in their respective Schedules. The EU responds that, to be prohibited by sub-paragraph (e), a measure must literally require a service supplier to establish (or not establish) a specific corporate or other recognized type of legal entity. The EU refers to a

"corporation, trust, partnership, joint venture, sole proprietorship or association" as types of legal entity "recognized by law" that a measure must expressly identify to be prohibited by sub-paragraph (e).

7. Whether a measure expressly identifies specific types of legal entity or not, however, if the measure is designed to restrict service suppliers from establishing one or more types of legal entity, it is prohibited by sub-paragraph (e). Likewise, measures are prohibited that have the effect of requiring specific types of legal entity by restricting the ability of service suppliers to establish other types – again without expressly identifying any of the entities in question. This is exactly what each of the three models of unbundling measures does in violation of sub-paragraph (e).

8. For instance, Article 17(3) of the Directive requires that ITOs "shall be organised in a legal form as referred to in Article 1 of Council Directive 68/151/ECC." Croatia, Hungary and Lithuania's laws each contain similar ITO provisions requiring the VIU to form an "independent company separate from" the VIU, with "a special corporate identity…clearly separating it from the parent company." These measures plainly restrict the service supplier from establishing certain types of legal entity or forms of commercial presence. For instance, the VIU cannot establish a branch, which corporate law defines as not being a separate legal entity from the parent company. The ownership unbundling ("OU") model restricts the service supplier from establishing any specific type of legal entity whatsoever. The VIU must divest all but a minority interest in the transmission system. As the service supplier, the VIU is deprived of any right or ability to supply its pipeline transport services through commercial presence in the importing Member. The laws of Croatia and Hungary provide for all three unbundling models, each of each which violates their market access obligations under Article XVI:2(e). Lithuania only permits the OU model and violates Article XVI:2(e) on this basis.

9. GATS Article XVI:2(a) – Article XVI:2(a) ("sub-paragraph (a)") prohibits "limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test". Regarding the second type of limitation referred to in sub-paragraph (a), the GATS defines a "monopoly supplier of a service" as any person that is "authorized or established formally or in effect" by a Member "as the sole supplier of that service." The GATS defines the third limitation, "exclusive service suppliers," as instances in which "a Member, formally or in effect, (a) authorizes or establishes a small number of service suppliers and (b) substantially prevents competition among those suppliers in its territory."

10. In Croatia, despite ostensibly permitting all three unbundling models in its Gas Market Act, the Croatian government actually owns and controls the country's entire natural gas network, including the transmission system, the sole TSO, Plinacro, and the sole gas supplier, HEP. By designating Plinacro as the national TSO for 30 years, Croatia has "authorized or established" Plinacro "formally or in effect as the sole supplier" of transmission services (i.e., the sole TSO) in the country. This constitutes a "monopoly supplier of a service". Similarly, having been appointed as Croatia's natural gas supplier until 31 March 2017, HEP acts as a monopoly supplier of supply services. Both Plinacro and HEP may also be viewed as "exclusive service suppliers" within the meaning of Article XVI:2(a).

11. In Lithuania, the Natural Gas Law requires a domestic TSO to own the country's transmission assets. Following expropriation of the Lithuanian TSO from the Russian service supplier, Lithuania's State-owned TSO now owns all transmission pipelines in Lithuania and, pursuant to the terms of its license, supplies pipeline transport services in each of Lithuania's ten counties. As no other company in these circumstances can be designated a TSO, Lithuania instituted a "monopoly supplier of a service" or "exclusive service suppplier," contrary to Article XVI:2(a).

12. GATS Article XVI:2(f) – Article XVI:2(f) ("sub-paragraph (f)") forbids Members such as Croatia, Hungary and Lithuania from adopting or maintaining measures that impose "limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment." This includes limitations in the form of majority ownership prohibitions. Russia demonstrated that, consistent with the provisions of Article 9 of the Directive, Croatia, Hungary and Lithuania all impose majority ownership prohibitions as part of the OU models of their unbundling measures. The EU responds that these

prohibitions are outside the scope of sub-paragraph (f) because they apply to all potential investors, "domestic or foreign."

13. Contrary to the EU's assertions, sub-paragraph (f) does not forbid measures containing majority ownership prohibitions that apply only to foreign capital investment. It forbids any and all measures that impose majority ownership prohibitions on foreign capital investment. Measures which also impose majority ownership prohibitions on domestic investment are not exempt from the scope of sub-paragraph (f). Simply stated, sub-paragraph (f) forbids measures containing prohibitions against foreign majority ownership. Croatia, Hungary and Lithuania's unbundling measures forbid any type of majority ownership, including foreign. The fact that the measures also forbid domestic majority ownership is irrelevant. For these reasons, the Panel should find that Croatia, Hungary and Lithuania's unbundling measures are contrary to their obligations under GATS Article XVI:2(f).

III. GATS ARTICLE XVII:1 – THE PUBLIC BODY MEASURES

14. Russia's next two claims (Claims 4 and 5) concern GATS Article XVII and the "public body measures" (or "government exemption measures") in the unbundling provisions of Croatia, Hungary and Lithuania's laws. Specifically, Article 9(1) of the Directive prohibits "the same person or persons" from exercising control both over the TSO and supply portion of an undertaking. Article 9(6) and the corresponding Member State laws each recognizes that a Member State or "another public body" may be the "person" that otherwise would be subject to the unbundling measure – that is, the "person" that "directly or indirectly" exercises control over both the TSO and supply portion of the VIU. Provided the government arranges for control to be exercised by "two separate public bodies," however, it is exempted from the unbundling requirements. Although both of these so-called "separate public bodies" are part of the same Member State government, they are "deemed" for purposes of the unbundling measure "not to be the same person or persons." Croatia, Hungary and Lithuania all adopted provisions in their implementing laws modeled on Article 9(6).

15. As an initial matter, Russia explained in the context of these claims that domestic and all third-country pipeline transport services and services suppliers, including those of Russia, are "like" one another within the meaning of both GATS Articles II:1 and XVII. The EU argues only that LNG services and service suppliers are not "like" other pipeline transport services and service suppliers. But Russia has demonstrated, first, that LNG services include the importation, offloading and reconversion or regasification of LNG to its natural gaseous state, as well as the additional services necessary, including any temporary storage, to transport this reconverted natural gas to the transmission system for supply to the market along with all other natural gas. As with other pipeline transport services, these LNG services concern both the supply and transmission of gas. Because they serve the same purpose as other pipeline transport services and are in a directly competitive relationship, LNG services are "like" other pipeline transport services within the meaning of the GATS.

16. Turning to the substance of these claims, Russia challenges the public body measures in Claim 4 as violating Article XVII:1, *as such*. Each measure represents an instance of *de jure* discrimination, because the respective versions of Article 9(6) in these Member's laws each distinguishes between foreign and domestic services and service suppliers based exclusively on origin. In response, the EU argues only that Article 9(6) also makes the exemption available to the "persons controlled by a public body from a third country." According to the EU, a third-country government that controls a TSO through one public body may seek to unbundle in accordance with Article 9(6), provided it controls a production or supply undertaking through another public body. Russia and the Panel both have highlighted evidence, including Recital 20 of the Directive and the Commission's Interpretative Note on Unbundling, showing that this is simply the EU's *post facto* effort to avoid its Member States' national treatment obligations. Article 9(6) was designed to permit Member States to own and control their entire transmission and supply systems. Otherwise, contrary to the EU Treaty, the EU would have imposed an obligation on the EU Member States to privatize State assets. Croatia, Hungary and Lithuania's public body measures achieve the EU's objective and each violates GATS Article XVII:1.

17. In Claim 5, Russia challenges the public body measures in Croatia, Hungary and Lithuania's laws as resulting in *de facto* discrimination. Each of these Members, through separate government agencies, actually owns and controls their entire network supplying both transmission and supply

services to all or a portion of their respective markets. As implemented, therefore, the public body measures provide each of these government-controlled services and service suppliers different and more favorable treatment than those of other Members, in violation of GATS Article XVII:1.

IV. GATS ARTICLE II:1 AND GATT ARTICLES I:1 AND III:4 – THE UNBUNDLING MEASURE

18. Claims 8 through 11 each concerns the unbundling measure. The Directive enables EU Member States, in implementing the unbundling measure, to draw informal regulatory distinctions and thus discriminate between like pipeline transport services and service suppliers of Russian and other third-country origin, as well as like Russian and other third-country natural gas. The EU expected and encouraged Member States to draw distinctions among and between like services and service suppliers as well as gas of different origins. The EU knew this differential treatment would modify the conditions of competition in the EU as a whole, the relevant market for purposes of analyzing claims particularly under GATS Article II:1 and GATT Article I:1. Indeed, the EU fully anticipated that the different manner in which various Member States implemented the unbundling measure would have an adverse impact on the competitive opportunities in the EU market for Russian pipeline transport services and service suppliers and Russian gas. That outcome of implementing the unbundling measure throughout the EU – which resulted in only Gazprom-owned TSOs being forced to undergo ownership unbundling – was a major pillar in furthering the EU's overall objective of reducing its reliance on Russian natural gas.

19. The EU enacted the unbundling measure in the Directive. Implementation of the measure in Lithuania, as well as the other EU Member States, should also be attributed to the EU. After all, the Member States make up the EU and the EU is responsible for Member States' WTO compliance. Previously, Lietuvos, the sole undertaking in Lithuania responsible for the supply, transmission and distribution of natural gas, was jointly owned and controlled by Gazprom. Indeed, as Russia has explained, the Lithuanian government itself originally solicited Gazprom's investment in Lietuvos in 2004. Acting as part of and at the direction of the EU, the Lithuanian government then implemented the unbundling measure so as to require that Lietuvos select the ownership unbundling model. The objectives on the part of the EU and Lithuania included, first, to oust Gazprom from Lithuania so that the Lithuanian government could acquire monopoly ownership and control over the entire gas supply and transmission system; and, second, to guarantee a transportation channel for Norwegian gas to be supplied in the form of LNG, thus reducing the market share of Russian gas imported via pipeline.

20. Through its implementation of the unbundling measure in Lithuania, the EU has accomplished each of its objectives. Gazprom was forced to divest its interest in Lietuvos by transferring the TSO, which was first separated as Amber Grid, and the supply portion of the undertaking to the Lithuanian government. Imports of Norwegian LNG-gas have dramatically increased. And, as the EU planned, the conditions of competition have been modified to the detriment of Russian gas, the market share of which in Lithuania through 2016 has fallen steadily, while that of Norwegian LNG-gas has increased.

21. At the same time, as enabled by the EU in the Directive, other Member States permitted VIUs to adopt the less restrictive ISO and ITO models. For example, consistent with the demands of Germany and France, those Member States implemented the unbundling measure by permitting their more politically powerful VIUs to adopt the ITO model. As a result, Statoil, the Norwegian VIU, was permitted to continue owning 100% of its TSO in Germany, jordgas, which operates under the ITO model. The EU also permitted an ITO model for TAP AG, which is jointly controlled by EU and Azeri VIUs; DESFA, which is to be controlled by SOCAR, the Azeri government-owned VIU; as well as multiple TSOs controlled by domestic VIUs, including Engie and GRTGaz, its ITO, in France. This preferential treatment extended by the EU to other third-country and domestic services and service suppliers and natural gas is in sharp contrast with the treatment accorded to Gazprom, which was forced to divest its interests not only in Lithuania, but also in Estonian and UK/Belgian TSOs, and will be forced to do so soon in the Latvian TSO.

22. Implementing the unbundling measure so as to accomplish the EU's objective of ousting Gazprom from the EU gas market, by forcing the Russian pipeline transport service supplier to divest its TSO interest in Lithuania and every other relevant EU Member State, has modified the conditions of competition, as the EU intended, and has had a detrimental impact on the competitive opportunities for the transportation and sale of Russian gas in the EU market. While

other third-country and domestic VIU service suppliers have been permitted to continue supplying their pipeline transport services to the EU market, as well as their natural gas, the same opportunity has been largely denied to like Russian pipeline transport services and service suppliers, while also adversely impacting the supply of Russian-origin natural gas. As a result of this differential treatment, the unbundling measure is contrary to the EU's obligations under:

23. GATS Article II:1 – The unbundling measure, *as such* and *as applied*, as adopted by the EU in Lithuania by means of the Directive, the Law on Natural Gas and the Law Implementing the Law on Natural Gas to permit only the ownership unbundling model, on the one hand, and as adopted in other EU Member States by means of the Directive and their respective implementing legislation to permit the ISO and ITO models, on the other hand, modifies the conditions of competition to the detriment of Russian pipeline transport services and service providers, as compared to the treatment accorded to like third-country services and service suppliers.

24. GATT Article I:1 – The unbundling measure, *as such* and *as applied*, modifies the conditions of competition in the EU market, by according an advantage to natural gas of other third-countries, which is permitted to be transported and sold through ISOs or ITOs on the EU market by VIUs that own and control EU transmission networks, while not according the same advantage immediately and unconditionally to like Russian gas.

25. GATT Article III:4 – The unbundling measure, *as such* and *as applied*, modifies the conditions of competition in the EU market, by according less favourable treatment to Russian gas, which has been prevented from being transported and sold on the EU market by Russian VIUs that own and control transmission networks in the territory of the EU, compared to like domestic-origin gas that is sold and transported on the EU market through such VIUs.

V. GATT ARTICLE I:1 – THE LNG MEASURE

26. In Claim 12, Russia challenges the LNG measure as violating GATT Article I:1, *as such*. This claim derives from several provisions of the Directive, including Article 9, which sets out the basic unbundling requirement, and Article 2(20), which defines a "vertically integrated undertaking," or VIU, as well as Articles 2(11) and 2(12), which define LNG system operators ("LSOs") and LNG facilities, respectively. By its terms, Article 9 only requires a person or persons, including a VIU, that controls the production or supply portion of an undertaking to unbundle its commonly controlled TSO and transmission system. The unbundling requirement does not apply to commonly controlled LSOs that import third-country natural gas through EU-based LNG facilities. In defining a VIU, Article 2(20) establishes that LSOs are not considered to be either a TSO or production-supply undertaking, thus confirming that LSOs and their LNG facilities are exempt from the Article 9 unbundling requirement.

27. Indeed, the EU has conceded that the Directive is designed to exempt LSOs and LNG facilities from unbundling. The EU's main argument in response is that LNG is not "like" other natural gas within the meaning of the GATT. Russia has established, however, in relation to this and related claims, that LNG is natural gas. LNG has merely been condensed temporarily for economical ocean transport. Natural gas, whether domestically sourced or imported, and whether imported via pipeline or in the form of LNG, has the same physical characteristics and the same end uses. LNG is also in a directly competitive relationship with all other natural gas. For these reasons, LNG is "like" all other natural gas within the meaning of GATT Article I:1 (and Article III:4).

28. Russia has also demonstrated that exempting LSOs and LNG facilities from unbundling accords a competitive advantage to natural gas imported from other third-countries in the form of LNG to the detriment of Russian gas. Russia demonstrated, for one, that the French-based VIU gas supplier Engie owns and controls several LNG facilities in France through its wholly-owned subsidiary, Elengy S.A. Engie also owns 75% of the French TSO, GRTGaz, an ITO. As the EU has acknowledged, Engie's LSOs are not required to unbundle, either from Engie itself, as the supplier, or from GRTGaz, the wholly-owned TSO. Based on this exemption, Engie is free to dictate the foreign suppliers from which those LSOs source gas in the manner that best suits Engie's competitive interests. By controlling all stages of the natural gas supply from extraction in the country of origin up to delivery to the customers in the EU via its own transmission networks, Engie is also enjoying a major advantage in terms of the possibility to enter into long-term

commitments with the EU customers. Russia also demonstrated that LSOs such as Dragon and South Hook in the UK, which are controlled by foreign supply entities, import third-country natural gas in the form of LNG through their EU-based LNG facilities. Unlike suppliers of Russian pipeline gas, these VIUs are not required to unbundle their LSOs and are thus able to exercise influence, simultaneously, over the "functions of LNG" and "supply," as permitted by the unbundling provision in Article 9 and the definitions in the Directive.

VI. GATT ARTICLES I:1 AND III:4 – THE UPSTREAM PIPELINE NETWORK MEASURE

29. Russia next demonstrated that upstream pipeline networks ("UPNs") are subject to broad exemptions under the Directive. Both Claim 13 and Claim 14 challenge the upstream pipeline network measure, *as such*. To start, Article 2(2) of the Directive defines an "upstream pipeline network" as including not only pipelines that are "operated and/or constructed as part of an oil or gas production project, or used to convey natural gas from one or more such projects to a processing plant" but also pipelines used to convey gas from a processing facility to a "terminal or final coastal landing terminal". Article 2(3) then expressly exempts UPNs from the definition of "transmission" and implicitly from the transmission system. The definition of VIUs in Article 2(13) confirms that VIUs that own and control a UPN are exempt from unbundling. In addition, Article 32 of the Directive provides that "Member States shall ensure the implementation of a system of third party access to the transmission…system". Because UPNs are defined as not used for "transmission" and not part of the "transmission system", or indeed any system, they are not subject to the TPA requirement applicable to TSOs. UPNs are similarly defined as exempted from the tariff regulation requirements in Article 41 of the Directive.

30. The carefully worded but broad definition of a UPN, together with the other definitions in the Directive, were all designed to ensure that Norwegian-owned and operated pipelines in the North Sea, as well as offshore domestic pipelines, were exempt from the unbundling, TPA and tariff regulation requirements in the Directive. Russia demonstrated, by submitting legislative history and other documentation, that the Norwegian government and natural gas industry lobbied for and obtained this exemption expressly to reduce the costs of transporting gas and to grant an advantage within the meaning of GATT Article I:1 to Norwegian-origin gas.

31. Russian pipelines entering the EU do not benefit from any similar exemptions. Consequently, imported Russian gas is denied the same advantage as like Norwegian gas, thus distorting the competitive opportunities for Russian gas transported and sold on the EU market. The EU does not even dispute that Norwegian UPNs are exempt from unbundling. The EU contends only that, UPNs are actually subject to TPA requirements pursuant to Article 34 of the Directive and that, therefore, "equal competitive opportunities are guaranteed to all gas, no matter its origin." However, Russia showed that, in fact, Article 34 sets out a vague, non-mandatory regime; it grants Member States discretion to oversee implementation; and is clearly designed to favor upstream pipeline network operators and developers. Thus, because UPNs are exempt from the TPA requirements under Article 32, and because Article 34 in no way requires TPA, the TPA requirements contended by the EU cannot and do not mitigate the detrimental impact on competitive opportunities for imported Russian gas of the unbundling exemption under the UPN measure.

32. Through the differential treatment provided by the UPN measure, the Directive modifies the conditions of competition to the detriment of Russian gas. It grants an advantage to imported Norwegian gas, not accorded unconditionally and immediately to Russian natural gas, in violation of GATT Article I:1. The measure also provides domestic gas more favorable treatment than like Russian gas, in violation of GATT Article III:4, as shown in Claim 14.

VII. GATS ARTICLES XVII:1 AND II:1 – THE THIRD-COUNTRY CERTIFICATION MEASURES

33. Claims 15 through 18 challenge the discriminatory third-country certification requirement contained in Article 11 of the Directive, as well as the implementing laws of Croatia, Hungary and Lithuania. Article 10 of the Directive sets out the certification procedures for designating TSOs controlled by domestic persons. However, a third-country certification applicant must satisfy the additional vague and burdensome requirements in Article 11. This includes demonstrating that "security of supply" will not be put at risk by granting certification. The additional requirements in

Article 11 and the corresponding provisions in Croatia, Hungary and Lithuania's laws are referred to as the "third-country certification" measures.

34. Article XVII:1 – Claim 15, Russia's first claim concerning the third-country certification measures, describes an *as such* violation of Article XVII:1 of the GATS. It is undisputed that Croatia, Hungary and Lithuania each made national treatment commitments in their respective GATS Schedules. Russia demonstrated that, by imposing the additional certification requirements on third-country applicants, the text of Croatia, Hungary and Lithuania's laws implementing Article 11 of the Directive each distinguishes between like foreign and domestic services and service suppliers based exclusively on origin. This formally different treatment provided by the third-country certification measures in each of these Members' laws modifies the conditions of competition in the EU market, *de jure*, resulting in less favorable treatment being accorded to services and service suppliers of other Members, including Russia, compared to like domestic services and service suppliers.

35. The EU offers no rebuttal to this *de jure* claim. Accordingly, Russia requests the Panel to find that the EU has conceded that the third-country certification measures accord less favorable treatment in violation of Article XVII:1. The EU contends only that the third-country certification measures are "necessary…to ensure the EU's security of energy supply, which is part of the EU's public order," and, therefore, justified pursuant to GATS Article XIV(a). To provisionally justify a measure under Article XIV(a), a respondent must demonstrate both that it is "necessary…to maintain public order" and that the chapeau of Article XIV is satisfied. On this basis, the EU's "security of supply" or "SoS" defense should be rejected. The EU argues first that ensuring SoS is a "fundamental interest" of society, regarding which foreign-controlled TSOs "may in some circumstances pose genuine and sufficiently serious threats." Russia does not agree that SoS is an EU fundamental interest. The EU has also failed to demonstrate how foreign control of TSOs, as opposed to national control, poses a "genuine and sufficiently serious threat" to the EU's SoS. The EU's main contention is that third-country governments have "strong incentives to undermine" its SoS policies. For example, the EU argues, foreign-controlled TSOs could discontinue gas supply during cold weather or refuse to provide all users with non-discriminatory access to information. The EU presents no evidence that such threats actually exist, however. While disruptions in the transport of Russian natural gas through Ukraine occurred in 2006 and 2009, these were isolated events and in no way related to Russian ownership or control of TSOs or the supply of Russian pipeline transport services in the EU.

36. The EU has also not demonstrated that the third-country certification measures are "necessary" to address its alleged concerns. A necessity analysis involves "weighing and balancing" a series of factors, including the objective's importance, the measure's contribution to that objective, and the trade-restrictiveness of the measure. The third-country certification measures make no contribution, material or otherwise, to ensuring SoS. According to the EU, Article 11 "is part of a comprehensive policy consisting of a multiplicity of interacting measures," making its effect "very difficult to isolate and quantify." Regardless, to the extent the prospect of TSOs discontinuing gas transmission is a realistic concern, it is equally applicable to domestic and foreign-controlled TSOs; thus, imposing additional requirements only on foreign applicants does not contribute to solving the perceived problem. Moreover, the EU has other means in place to address these concerns. For one, all TSOs are required by Article 2(4) of the Directive "to operate, maintain and develop under economic conditions a secure, reliable and efficient transmission network." Plus, the EU's "Security of Supply Regulation" requires all natural gas undertakings to "take measures to ensure gas supply" during periods of extreme temperatures. Similarly, as the EU recognizes, domestic and foreign TSOs are required to make information public as necessary for "effective competition and the efficient functioning of the market."

37. In determining whether a measure is necessary, the Panel should also examine its restrictive impact on international commerce. The EU claims that the third-country certification measures allow for a "case-by-case" approach that limits "the trade-restrictive effects as much as possible." As demonstrated by Russia, however, the measures' very existence creates uncertainty and results in significant trade restrictive effects. The Directive also grants Member States essentially unlimited discretion to assess restrictions on third-country TSOs, particularly in the absence of key definitions, including the concept of "security of supply" itself. The Commission also recommends restrictions, leading to decisions that unfairly restrict the supply of services from some Members compared to others.

38. There are also reasonably available alternative measures that the EU could and should have adopted instead. Rather than requiring third-country transmission system owners and operators to undertake an additional certification burden, the EU could have required the same set of procedures from all operators, regardless of origin. Doing so would not affect the EU's ability to ensure its security of supply, given the number of legal mechanisms in place to ensure this goal already. Similarly, the EU could enact a "blocking statute" to prevent any TSO from acting on instructions from a foreign shareholder or government that are contrary to the EU law. The same restriction would apply to domestic and all third-country interests. Notably, the EU has used this approach in other contexts.

39. Even if considered provisionally necessary to maintain public order, the measures must also satisfy the requirements of the chapeau of Article XIV, which include not resulting in arbitrary or unjustifiable discrimination. Toward this end, the EU cannot demonstrate that the measures are rationally related to its stated policy objective of ensuring SoS. The EU argues that the third-country certification measures satisfy this requirement because EU-controlled TSOs do not pose "comparable threats" to SoS. As discussed, however, the EU has not identified any realistic "threats" posed by third-country control of TSOs not also posed by domestic persons and not otherwise addressed by existing laws and regulations. The EU also argues that the measures have not been applied in a discriminatory manner between other WTO Members, because "no certification has been refused on SoS grounds." *Id*., para. 542. The lack of certification denials does not equal the absence of discrimination, however. Russia demonstrated that the measures discriminate on their face, *de jure,* vis-à-vis domestic services and suppliers, a claim the EU did not even try to rebut. Russia also demonstrated that certain TSOs and transmission systems in which it has an interest have been subjected to more restrictive EU certification conditions than those of other foreign owners. This discrimination results in part from ambiguities in the third-country certification standard and the broad discretion granted to NRAs and the Commission to assess those requests.

40. GATS Article II:1 – Russia included two claims challenging the third-country certification measure in the Directive under GATS Article II:1. Claim 16 challenges the measure, *as such*, based on the underlying provisions of Article 11 of the Directive. Specifically, Article 11 conditions a favorable security of supply assessment at least in part on the existence of a pre-existing agreement between the relevant Member States and the EU, on the one hand, and the supplying country, on the other. Certification applicants from such third-countries are automatically granted a competitive advantage. By providing this formally differential treatment, the third-country certification measure distorts the conditions of competition and results in less favorable treatment being accorded to the services and service suppliers of certain Members, including Russia, which has not concluded similar agreements with the EU or its Member States, in violation of Article II:1. Moreover, notwithstanding the EU's contention to the contrary, Russia believes that this *de jure* claim was properly included in its panel request and, therefore, is not outside the Panel's terms of reference.

41. Claim 17 challenges the third-country certification measure, *as applied*, based on specific instances of application on Article 11 by Member States and the Commission that also violated GATS Article II:1. Russia demonstrated, for one, that the Commission provided different treatment to the certification application of Gaz-System to operate the Yamal pipeline in Poland than it did applications by various third-country applicants. The Commission made clear in two certification opinions that, from its standpoint, Gaz-System could not qualify for certification because of perceived SoS risks based on the joint control of Europolgaz, the owner of the Yamal pipeline in Poland, by Gazprom, the Russian supplier of natural gas and pipeline transport services. The fact that ERO, the Polish NRA, ultimately elected to certify Gaz-System is not the issue. The issue is the impact on the conditions of competition in the EU market as a result of the Commission's refusal to approve Gaz-System's certification.

42. In Lithuania, the EU declared Lietuvos, the TSO jointly controlled by the Russian service supplier, to be a "non-complaint undertaking," thus preventing it from applying for a TSO designation and certification, unless and until the Russian service supplier divested its interest in the TSO – which the Russian supplier ultimately did. On the other hand, the Commission approved several certification decisions by NRAs regarding TSOs controlled by other third-country undertakings. This includes jordgas, which is wholly-owned by Statoil, the Norwegian VIU. Indeed, jordgas was not even required to satisfy the requirements of the third-country certification measure, due to the arbitrary effective date of Article 11, 3 March 2013. It also includes DESFA,

which owns and operates the entire Greek transmission system and is scheduled to be acquired and brought under the sole control of SOCAR, an Azerbaijan government entity.

43. The different treatment reflected in these inconsistent decisions distorts the competitive opportunities for Russian pipeline transport services and service suppliers in the EU. The Commission's original delay in issuing a decision increased the uncertainty regarding Gazprom's supply of its services. The perception of other market participants, including potential customers, was also negatively impacted. In Lithuania the legislative framework adopted by the EU made it impossible for the domestic TSO controlled by the Russian service supplier to apply for certification. It is also relevant that, in the process of adopting the TEP, as well as throughout its application, Article 11 of the Directive has been commonly referred to as the "Gazprom Clause". It is precisely the fact that the Russian pipeline transport service supplier is singled out by name in the context of Article 11 that is at the heart of Russia's contention under GATS Article II:1. Article 11 was clearly designed to deprive Russia of equal competitive opportunities in the EU market and the EU's implementation of Article 11 has modified the conditions of competition to the detriment of Russian pipeline transport services and service suppliers, in violation of Article II:1.

44. GATT Article III:4 – Finally, Claim 18 challenges the third-country certification measure, *as such*, also based on the underlying provisions of Article 11. Russia argued that the measure results in *de jure* discrimination by adversely impacting the competitive opportunities for other Members' imported natural gas transported and sold on the EU market, compared to domestic-origin gas, in violation of Article III:4 of the GATT 1994.

VIII. GATS ARTICLE VI – THE THIRD-COUNTRY CERTIFICATION MEASURES

45. Claims 19 and 20 also concern the third-country certification measures. Russia demonstrated that Croatia, Hungary and Lithuania's third-country certification measures are each inconsistent with Articles VI:1 and VI:5(a) of the GATS. Beginning with Claim 19, Article VI:1 requires that a measure be administered in a "reasonable, objective and impartial manner." The third-country certification measures do not satisfy any of these requirements. The measures lack any meaningful standards or criteria by which NRAs may evaluate third-country applications. NRAs are thus granted virtually unlimited discretion to evaluate the alleged effects of third-country certification requests on the amorphous concept of "security of supply." Absent concrete, meaningful standards, it is impossible for NRAs to administer the third-country certification measures in a "reasonable, objective, and impartial manner." Croatia, Hungary and Lithuania's measure are thus each in violation of Article VI:1.

46. The three third-country certification measures are also inconsistent with GATS Article VI:5(a). The measures are "licensing and qualification requirements" within the meaning of Article VI:5(a). They also "nullify or impair" Croatia, Hungary and Lithuania's specific commitments in Sector 11G, "Pipeline Transport" services, in a manner that does not comply with the criteria set forth in GATS Article VI:4. The lack of a clear definition of the term "security of supply" means that the laws are not "based on objective and transparent criteria," as required by Article VI:4(a). The measures are also "more burdensome than necessary to ensure the quality of the service, contrary to Article VI:4(b), since third-country applicants must meet a far higher burden than domestic applicants, which are not required to demonstrate that they pose no risk to the security of supply.

47. Moreover, requiring third-country applicants to satisfy this standard has nothing to do with the "quality" of the service – their ability to consistently transmit and supply gas. The measures, as "licensing procedures" setting forth the information required for third-country applicants to apply for a license, are themselves a "restriction on the supply of the service," contrary to Article VI:4(c). The measures limit the supply of pipeline transport services by third-country applicants by conditioning that supply on the ability of applicants to meet the nebulous criteria as determined by NRAs. Finally, the third-country certification requirements "could not reasonably have been expected" at the time Croatia, Hungary and Lithuania scheduled their commitments, pursuant to Article VI:5(a)(ii). They each made commitments years before the third-country certification measure was enacted. It could not have been reasonable for Russia or other Members to expect that Croatia, Hungary or Lithuania would then act to limit those commitments.

IX. GATT ARTICLE X:3(A) – THE INFRASTRUCTURE EXEMPTION MEASURE

48. Article 36 of the Directive governs exemptions from the unbundling, TPA and tariff regulation requirements of the Directive for certain types of "new infrastructure" and "significant increases of capacity in existing infrastructure and to modifications of such infrastructure which enable the development of new sources of gas supply." Article 22 of the SEP Directive provided for the same exemptions, several of which are still in effect. This is referred to as the "infrastructure exemption measure."

49. Claim 21 challenges the EU's failure to administer the infrastructure exemption measure in a uniform, impartial and reasonable manner, based on specific instances of application of the measure by the Commission, in violation of Article X:3(a). To establish a violation of Article X:3(a), it is necessary to show, first, that a law, regulation, judicial decision or administrative ruling of "general application," as referred to in GATT Article X:1, is "pertaining…to requirements, restrictions or prohibitions on imports" and/or "affecting the sale, distribution, transportation," etc. of imports. Second, the respondent must have failed to "administer" the legal instrument at issue in a "uniform, impartial and reasonable" manner. Notably, a violation of any of these three obligations will lead to a violation of the obligations under Article X:3(a).

50. Russia demonstrated that the infrastructure exemption measure satisfies each of the elements of Article X:3(a). The Commission has issued exemption decisions pursuant to the infrastructure exemption measure regarding the OPAL, Gazelle, TAP, Nabucco and Poseidon pipelines, while also approving denial of an exemption for the NEL interconnector. The Commission has also either issued or approved various exemption decisions concerning LNG facilities, including Dragon and South Hook in the UK, regarding which no material restrictions were imposed. Russia views these as additional applications by the Commission of the infrastructure exemption measure, further demonstrating its lack of uniform, impartial and reasonable administration of the measure in violation of Article X:3(a).

51. Russia demonstrated that the individual decisions issued pursuant to the infrastructure exemption measure put into practical effect, or apply, the measure, as contemplated by Article X:3(a) and interpreted by the Appellate Body. Russia showed, for one, that all of the exemption applicants have been similarly situated, including OPAL GT and TAP AG, as well as the applicants for the Gazelle, Nabucco and Poseidon exemptions. The measure also requires NRAs and the Commission, in every case, to examine a series of five "conditions" or criteria, including that the investment enhances competition in gas supply and security of supply; that the level of risk associated with the investment is such that it would not take place absent an exemption; and that the exemption is not detrimental to competition. Leaving aside for now that these criteria are themselves vague and permit excessive discretion, it is in evaluating each individual exemption application, based on these criteria, that the Commission administers, applies or puts the infrastructure exemption measure into practical effect. Each decision by the Commission represents a separate application of the same criteria and thus of the measure.

52. Russia thus demonstrated that the Commission's application of the infrastructure exemption measure, including its examination of the five criteria that must be applied in reviewing every application, constitutes administration of the measure within the meaning of Article X:3(a). Russia also demonstrated that, in administering the measure, the Commission did so in a non-uniform, partial and unreasonable manner, in violation of Article X:3(a). The Commission completely failed to justify imposing not only a 50% capacity cap on the OPAL exemption, but also a 3 bcm/year gas release requirement, while imposing vague and much less restrictive conditions on the TAP, Nabucco and Poseidon exemptions and no conditions whatsoever on the exemptions for LNG facilities such as Dragon and South Hook in the UK. In Russia's view, the EU has deliberately interpreted and administered the infrastructure exemption measure in order to reduce reliance on Russian natural gas, while encouraging and helping to facilitate imports from alternative sources. Indeed, as Russia explained at length, the Commission's already flawed rationale for imposing the OPAL restrictions totally disappeared after the Gazelle pipeline was completed and all of the gas being transported via OPAL was required to be transited across the Czech Republic, back into Germany and onwards to France and elsewhere. Yet the EU has consistently refused even to consider rescinding or modifying the discriminatory restrictions on the volume of gas that may be imported and transported over OPAL.

X. GATT ARTICLE I:1 AND GATS ARTICLE II:1 – THE INFRASTRUCTURE EXEMPTION MEASURE

53. GATT Article I:1 – Claims 22, 23 and 24 also all concern the infrastructure exemption measure. Each of these claims challenges specific instances of application by the Commission of the measure, *as applied*, in violation of GATT Article I:1. In Claim 22, Russia demonstrated that, in implementing the infrastructure exemption measure, BNetzA, the German NRA, narrowly interpreted the term "interconnector" to justify denying an exemption from the Directive's TPA and tariff regulation requirements for NEL. The Commission approved BNetzA's decision. The Commission later adopted a broader interpretation of the same term to justify granting infrastructure exemptions for the Gazelle and TAP pipelines. Claim 23 challenges the manner in which the EU implemented the infrastructure exemption measure by imposing on the exemption granted for the OPAL interconnector more restrictive conditions than it later imposed on the exemptions for Gazelle and TAP, and that it had previously imposed on exemptions for the Nabucco and Poseidon pipelines. Claim 24 challenges the manner in which the EU applied or implemented the measure by denying the NEL exemption and imposing these restrictive conditions on the OPAL exemption, while granting exemptions to various LNG facilities, including Dragon and South Hook in the UK, without imposing any conditions whatsoever.

54. In its first written submission, Russia carefully explained the EU's differing approach to these infrastructure exemption decisions. The EU offered very little in response. Unlike Russia, the EU failed either to analyze the definition of "interconnector" or the meaning of "new" infrastructure in the measure. The EU also made no attempt to explain BNetzA and the Commission's decisions. In reaching those decisions, as Russia has described, the EU sought to further its overall objective of reducing reliance on Russian gas and helping facilitate access to gas from other third-country sources. To do so, the EU found it necessary to adopt inconsistent interpretations of the relevant provisions in the Directive and to take a discriminatory approach in exemption decisions. In light of this reality, in its first written submission, the EU basically just asserted that those decisions and its approach were the "right" thing to do.

55. When examined objectively, however, as Russia has done, it is clear that the EU provided differential treatment in granting the various infrastructure exemptions, which modified the conditions of competition in the EU market to the detriment of Russian gas. In assessing whether an advantage is granted to imported products of certain third-countries within the meaning of Article I:1 that is not immediately and unconditionally extended to like products from another Member, it is necessary to determine whether the "equality of competitive opportunities for like imported products from all Members" is preserved. In reaching this determination, the Appellate Body has made clear that the Panel should analyze whether "any condition attached" by the measure "to the granting of an 'advantage' within the meaning of Article I:1...has a detrimental impact on the competitive opportunities for like imported products from any Member." Where a measure modifies the conditions of competition between like imported products to the detriment of the third-country imported products at issue, it is inconsistent with Article I:1.

56. Russia demonstrated with regard to Claim 22 that the owners and operators of TAP will be able to import, transport and sell significant volumes of Azeri natural gas on the EU market that are exempt from the otherwise applicable unbundling, TPA and tariff regulation requirements. Because the NEL exemption was denied based on the EU's narrower interpretation of the measure, 100% of the imported Russian natural gas that is transported via NEL and sold into the EU market is subject to the TPA and tariff regulation requirements.

57. Likewise, regarding Claim 23, Russia showed that, due to the far less restrictive conditions imposed by the EU on the TAP, Nabucco and Poseidon infrastructure exemptions, compared to the conditions imposed on the OPAL exemption, imported Russian gas that is transported over OPAL and sold on the EU market is denied an advantage granted to Azeri and possibly other third-country gas that will be transported over TAP, or that would have been transported over Nabucco and Poseidon. Finally, in Claim 24, Russia described how the EU granted infrastructure exemptions to the Dragon and South Hook LNG facilities without imposing any material conditions. Thus, because these LSOs are completely exempt from the TPA and tariff regulation requirements, third-country natural gas imported in the form of LNG through these LNG facilities is granted an advantage that is not immediately and unconditionally extended to Russian gas transported via NEL and OPAL and sold on the EU market, which modifies the conditions of competition between like imported products to the detriment of Russian gas.

58. As a result, the infrastructure exemption measure, as implemented, detrimentally impacts the "equality of competitive opportunities" in the EU between Azeri and other third-country gas, on the one hand, and Russian gas, on the other, in violation of Article I:1 of the GATT 1994

59. GATS Article II:1 – Claim 25 also challenges the infrastructure exemption measure, *as applied*, in Article 36 of the Directive (and Article 22 of the SEP Directive). In this claim, Russia demonstrated that the EU violated its MFN obligations under Article II:1 of the GATS. Specifically, this claim challenges the manner in which the EU implemented the measure by denying the NEL exemption and imposing restrictive conditions on the OPAL exemption, while granting exemptions to other pipelines and various LNG facilities, but without imposing similarly restrictive conditions and no conditions in the case of Dragon and South Hook in the UK. As Russia showed, the EU's implementation of the measure, as applied in each of the exemption decisions to date, including both those for interconnectors and LNG facilities, demonstrates *de facto* discrimination and resulted in less favourable treatment being provided to Russian services and service suppliers than like services and service suppliers of other Members, in violation of Article II:1.

XI. GATT ARTICLE I:1 AND GATS ARTICLE II:1 – THE INFRASTRUCTURE EXEMPTION MEASURE AND THE UPSTREAM PIPELINE EXEMPTION

60. Claim 26 concerns GATT Article I:1. Claim 27 concerns GATS Article II:1. Both of these claims also challenge the Commission's implementation of the infrastructure exemption measure in Article 36 of the Directive (and Article 22 of the SEP Directive). Both can also best be characterized as "*as applied*" claims. Unlike previous claims, however, Claim 26 and Claim 27 are predicated on the fact that, in contrast with the EU's treatment of the NEL and OPAL interconnectors, the Directive provides an "*as such*" exemption to upstream pipeline networks. Specifically, Russia challenged implementation of the infrastructure exemption measure to deny the NEL exemption and impose restrictive conditions on the OPAL exemption, while the Directive automatically exempts UPNs from the unbundling, TPA and tariff regulation requirements. Russia demonstrated that this differential treatment results in *de facto* discrimination, by providing an advantage to natural gas primarily of Norwegian origin transported through upstream pipeline networks and sold on the EU market, which is not accorded immediately and unconditionally to like Russian gas transported and sold on the EU market through NEL and OPAL, in violation of GATT Article I:1. Likewise, Russian pipeline transport service suppliers and their services supplied through NEL and OPAL are treated less favourably than like Norwegian service suppliers and their services supplied through upstream pipeline networks, which are automatically exempted from the Directive's requirements, in violation of GATS Article II:1.

XII. GATT ARTICLE XI:1 – QUANTITATIVE RESTRICTIONS

61. Claim 28 concerns GATT Article XI:1, which provides a general prohibition on quantitative restrictions. This general prohibition on quantitative restrictions is intended to be "comprehensive" and apply to "*all* measures instituted or maintained" by a Member, other than duties or taxes, which prohibit or restrict the import or export of products. In Claim 28, Russia challenges a specific instance of application by the Commission and Germany of the infrastructure exemption measure set forth in Article 36 of the Directive (and Article 22 of the SEP Directive), and thus may be considered an "*as applied*" claim. Specifically, the restrictive conditions imposed by the Commission on the OPAL exemption instituted a quantitative restriction on the volume of Russian gas imported into the EU, in violation of GATT Article XI:1. Importantly, as previous panels have held: "There can be no doubt…that the disciplines of Article XI:1 extend to restrictions of a *de facto* nature." Thus, the prohibition on quantitative restrictions also applies to restrictions that have the real-world effect of limiting the importation or exportation of a product. The EU's OPAL exemption decision pursuant to the infrastructure exemption measure institutes such impermissible quantitative restrictions on the importation of natural gas from Russia.

62. In its first written submission and in response to multiple questions from the Panel, Russia explained the manner in which the 50% capacity cap and 3 bcm/year gas release program imposed by the Commission as conditions on the OPAL exemption each constitute separate quantitative restrictions in violation of Article XI:1. OPAL's total capacity is 36.5 bcm/year, of which 4.5 bcm/year is not subject to the exemption because it is allocated for release in Germany at the Groß Köris compressor station south of Berlin. The remaining 32 bcm/year capacity, which is subject to the exemption, is required to be dedicated for transport south to the Czech Republic at the Brandov exit point. However, because Gazprom may book only 50% of that 32 bcm/year

exit capacity at Brandov, or 16 bcm/year (aside from the 3 bcm/year gas release program), it may also only book that amount of entry capacity at Griefswald for gas being transported to Brandov. Accordingly, Gazprom is limited in its ability to control (or own) not only 16 bcm/year of capacity on OPAL, but also 16 bcm of the actual gas that may be transported each year on the pipeline. Because Gazprom is effectively prohibited from controlling more than 16 bcm of the capacity and gas transported on OPAL, its ability to import Russian gas via Nord Stream for transport over OPAL is also restricted by that amount – 16 bcm/year.

63. There also is no basis for the EU to argue that Gazprom can exceed the 50% capacity cap by implementing the required 3 bcm/year gas release program. In reality, the gas release program only institutes another quantitative restriction on the importation of Russian gas in violation of Article XI:1. To exceed the 50% capacity cap, not only must Gazprom "release" or sell 3 bcm of gas per year at artificially imposed prices, it must also implement a "capacity release program" to "ensure the availability of corresponding transport capacity," in the words of the Commission's OPAL Exemption Decision, at paragraph 89(b). *See* Exhibit RUS-82. Of course, this includes both entry and exit capacity, "which are only offered in bundled form." In order to exceed the 50% capacity cap, therefore, Gazprom must unconditionally release or forego the right to transport 3 bcm/year of imported Russian gas over OPAL.

XIII. GATS ARTICLE II:1 AND GATT ARTICLES III:4 AND I:1 – THE TEN-E MEASURE

64. Claims 29, 30 and 31 concern the TEN-E Measure. The EU enacted the TEN-E Regulation on 17 April 2013. It is referred to together with its later amendments as the "TEN-E Measure." The TEN-E Measure sets out a framework for infrastructure planning and identifies nine strategic geographic infrastructure priority corridors, including for natural gas. It establishes a process to identify "projects of common interest" ("PCIs") which benefit from "accelerated and streamlined permit granting procedures, better regulatory treatment and – where appropriate – financial support under the 'Connecting Europe Facility.'" *See* Exhibit RUS-17, p. 2. The TEN-E Measure, together with its underlying policy objective of enhancing diversification and security of supply, is designed to treat Russian services and service suppliers less favourably than those of other countries. Equally, Russian natural gas is accorded less favourable treatment than like domestic and third-country gas.

65. This is evident from the definition of the "Priority Gas Corridors", including the requirement to reduce dependency on "a single supplier" in Annex I.2(8) of the TEN-E Regulation. This "single supplier" is identified as Russia. Exhibit RUS-109, p. 36. Creation of the priority corridors was aimed at reducing the role of Russian services and service suppliers and decreasing competitive opportunities for Russian natural gas. The totality of facts surrounding the TEN-E Measure reveals that its design, structure and expected operation are such that projects that would be operated by non-Russian service suppliers and which would facilitate the importation of non-Russian natural gas are to be preferred.

66. This is evident from the selection criteria used to determine which projects would be designated as PCIs. Annex III.1 of the TEN-E Regulation sets out Working Group rules. The Terms of Reference of the Ad Hoc Working Group for North-South Gas Interconnections in Central-Eastern (CEE) and South-Eastern Europe (SEE) are particularly instructive. That Working Group agreed on the weighting of gas-specific criteria and assessed the proposed projects in light of these criteria. See Exhibit RUS-145, p. 8.

67. Criteria such as diversification, as specified by the sub-criteria "diversification of external supply" and "lower import dependence", were given substantial weight in respect of the project prioritization. Exhibit RUS-147, p. 12. In terms of category weighting, "physical availability" was given a weight of 0.25/1; "promotion of the internal energy market" was given a weight of 0.31/1; and "diversification" was given a weight of 0.44/1. This evidence should be sufficient for the Panel to find the existence of a policy aimed at replacing Russian natural gas imports with domestic production. The implications of these weighting criteria become even more apparent upon examining the application for PCI designation from the South Stream project companies. The EU section of the South Stream pipeline project was one of 25 projects that were scored by the Working Group. It was denied PCI designation after receiving by far the lowest score of all projects – 0.16. *See* Exhibit RUS-146, p. 6.

68. This is not surprising. South Stream was intended to transport Russian natural gas from Russia via the Black Sea to Bulgaria and other destinations in the EU. Clearly, this project, promoted by the Russian service supplier Gazprom, could never have obtained a high PCI-score as it would have led to opening a new route for Russian gas, as was directly acknowledged by the EU Commissioner for Energy. *See* Exhibit RUS-165, p. 2.

69. PCI natural gas benefits from the infrastructure through which it is transmitted, or in which it is stored, receiving substantial financial support from the CEF fund. The same applies to the services supplied through PCI-designated projects and the service suppliers supplying these services. PCIs have access to financial support totalling €5.35 billion. Among the projects selected under the 2014 Energy Call were PCIs 8.2.3 (Capacity Enhancement of the Klaipeda-Kiemenai pipeline in Lithuania) and 8.5 (Gas Interconnection Poland-Lithuania; or GIPL). Exhibit RUS-161, p. 5. PCI 8.2.3 is eligible for a maximum of €27,595,500. This provides the project with a substantial advantage as compared to projects that did not receive PCI designation. The same applies to PCI 8.5, albeit in even greater numbers. Exhibit RUS-162, p. 1. The construction of this PCI is eligible for a maximum of €295,386,600.

70. GATS Article II:1 – Under GATS Article II:1, less favourable treatment is accorded whenever a measure modifies the conditions of competition to the detriment of another WTO Member's services or service suppliers as compared to those of other countries. Specific instances of application by the EU of the TEN-E Measure demonstrate the inability of Russian projects to qualify for PCI designation.

71. By laying down inherently biased criteria for PCI-designation, the TEN-E measure modifies the conditions of competition to the detriment of Russian services and Russian like service suppliers. Projects that are likely to reduce reliance on Russian natural gas are eligible for PCI-designation. Projects that are unlikely to reduce such reliance are unable to obtain PCI-designation. Inevitably, private actors will choose to invest in projects that are likely to benefit from the more favourable administrative, regulatory and financial treatment. This modification of the conditions of competition to the detriment of like Russian services and service suppliers amounts to less favourable treatment being accorded to these services and service suppliers, in violation of Article II:1 of the GATS.

72. GATT Article III:4 – The applicable legal standard under Article III:4 of the GATT 1994 requires an assessment as to whether a measure modifies the conditions of competition to the detriment of like imported products in the relevant market.

73. Russia submits that the modification of the conditions of competition to the detriment of Russian natural gas arises because of the sole fact that the PCI-designation system is in place. The system creates an incentive for TSOs and operators to invest in projects that are not aimed at maintaining the same – or an increased – level of Russian natural gas imports. These projects will benefit from more favourable regulatory, administrative and financial treatment. This system directly impacts the decision of operators as to where they source their natural gas imports from and as to which projects they are likely to invest in. A decision to source natural gas from Russia becomes increasingly unlikely as projects that would make this possible will not benefit from the more favourable regulatory treatment.

74. Natural gas transported through designated PCIs will be able to be marketed at reduced costs as compared to non-PCI natural gas, because of the more favourable regulatory regime that is applicable to PCIs. PCI natural gas thus directly benefits from the reduced regulatory burden that is placed on certain designated projects. The criteria used to allocate the more favourable treatment give effect to the EU's wish to reduce reliance on Russian gas by favouring projects that "enhance diversification" and do not contribute to maintaining or improving the position of Russian natural gas on the EU market. As a result of these criteria, an incentive is created to develop and submit projects for PCI designation that are not intended to promote Russian natural gas.

75. Clearly, the substantial amounts of government support reduce the costs of operators and promoters of these PCIs, which enables them to reduce the price of the gas that is being sold. Inevitably, this modifies the conditions of competition to the detriment of imported Russian natural gas, which is transmitted using facilities that are not eligible for this type of government support.

This treatment is inconsistent with the national treatment obligation of Article III:4 of the GATT 1994.

76. GATT Article I:1 – Article I:1 of the GATT 1994 requires WTO Members to grant any advantage, favour, privilege, or immunity granted to one country's products immediately and unconditionally to the like products of all other WTO Members.

77. As a direct consequence of PCI-designation, natural gas transported through designated PCIs is able to be marketed at reduced costs as compared to non-PCI natural gas, because of the more favourable regulatory regime that is applicable to PCIs. PCI natural gas thus directly benefits from the reduced regulatory burden that is placed on certain designated projects. The operating costs are reduced, thereby resulting in an advantage being accorded to PCI natural gas in the form of more favourable competitive opportunities.

78. As explained, Russian natural gas is predominantly transported and sold through infrastructure that is unable to obtain PCI-designation. The advantage that is granted to PCI-natural gas is not accorded immediately and unconditionally to like Russian natural gas. The TEN-E measure is therefore inconsistent with Article I:1 of the GATT 1994.

XIV. CONCLUSION

79. For the forgoing reasons, the Russia Federation requests the Panel to recommend that the European Union bring each of its nonconforming measures into conformity with its obligations under the relevant provisions of the GATS and GATT 1994.

ANNEX B-2

SECOND PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF RUSSIA

I. INTRODUCTION

1. The European Union has implemented a broad-based regime to regulate trade in the natural gas sector. Among the EU's principal objectives is to reduce its reliance on natural gas and "pipeline transport services" from the Russian Federation. The EU seeks instead to import more gas and pipeline transport services from other countries, including Norway (a WTO Member) and Azerbaijan. The EU has enacted a series of discriminatory measures to achieve these objectives. These measures include Directive 2009/73/EC (the "Directive"), the key component of the EU's Third Energy Package ("TEP"), and Regulation (EU) No 347/2013 ("the TEN-E Regulation"), as amended, which is closely related to the TEP.

2. This dispute has far reaching implications for international trade in natural gas and pipeline transport services. This dispute also raises important, novel WTO issues. These include the scope of the EU's obligation, as a WTO Member, for the actions of its Member States. Notably, the EU required the Member States to implement the unbundling measure. Russia has demonstrated that the unbundling measure, as set forth in the Directive and implemented by the Member States, is a single measure, and not "different measures by different Member States," as argued by the EU. This measure detrimentally impacted the competitive opportunities, *de facto*, in the EU market or territory for Russian pipeline transport services and service suppliers and for Russian natural gas. Accordingly, Russia has shown that the relevant market for assessing its national treatment and most-favoured nation ("MFN") claims under the General Agreement on Tariffs and Trade ("GATT 1994") and its MFN claims under the General Agreement on Trade in Services ("GATS") is the EU as a whole. The Member States did so in a manner that treated Russian pipeline transport services and service suppliers and natural gas less favourably than like domestic and other third-country services, services suppliers and gas.

3. Including Russia's claims against the unbundling measure, this dispute includes a total of 26 claims against the EU and its Member States under both the GATS and the GATT 1994. The following summarizes each of Russia's claims, as discussed in the proceeding to date.

II. THE COVERED SERVICES

4. For purposes of its GATS claims, Russia defined the covered services as natural gas pipeline transport services, which Russia explained should be construed broadly to include the transmission and supply of natural gas, including liquefied natural gas ("LNG"), and all services related to or associated with the transmission and supply of natural gas, including LNG services. The EU argues that LNG is not "like" natural gas within the meaning of the GATT 1994 and that LNG services are not "like" pipeline transport services within the meaning of the GATS. Three EU Member States, Croatia, Hungary and Lithuania, as separate WTO Members, also made specific mode 3 (commercial presence) market access and national treatment commitments in their GATS Schedules regarding the relevant services sector, Sector 11G, "Pipeline Transport" services. The EU argues that Sector 11G does not include LNG services.

5. Russia has demonstrated, however, first, that LNG *is* natural gas and thus "like" all other natural gas within the meaning of the GATT 1994. Russia has also demonstrated that Sector 11G includes LNG services. For one, the relevant UN Provisional Central Product Classification ("CPC") code, CPC 713, as relied upon by Croatia, Hungary and Lithuania to schedule their commitments, includes LNG services. However, Russia has stressed, even if the Panel finds CPC 713 does not include LNG services, and that LNG services are thus excluded from Croatia, Hungary and Lithuania's GATS commitments, LNG services and LNG system operators ("LSOs") are still "like" other pipeline transport services and services suppliers, respectively, within the meaning of the GATS. The Panel should thus find that the covered services include LNG services, which are "like" all other pipeline transport services.

III. THE UNBUNDLING MEASURE (CLAIMS 6, 8 AND 10)

6. The EU enacted the unbundling measure in the Directive, which it required the Member States, collectively, to implement into their laws. Through the Directive, the EU required all Member States to permit the ownership unbundling ("OU") model. The EU let Member States choose whether to also permit the independent transmission operator ("ITO") model and/or the independent system operator ("ISO") model. The OU model requires vertically integrated undertakings ("VIUs") to divest ownership and control of their transmission system operator ("TSO"). The ITO model and, to a lesser extent, the ISO model are both less restrictive. The ITO model, in particular, permits the VIU to retain ownership and some degree of control over its TSO, the ITO. The VIU thus continues to benefit by supplying natural gas and pipeline transport services through its ITO.

7. Russia challenges the unbundling measure, as a single measure, as set forth in the Directive and the implementing laws of the Member States, as violating GATS Article II:1 and GATT Articles III:4 and I:1. Russia has demonstrated that the unbundling measure modifies the conditions of competition within the EU market to the detriment of Russian pipeline transport services and service suppliers and natural gas, compared with like services and service suppliers of other third-countries and like domestic and other third-country gas. Specifically, certain EU Member States, including Lithuania, Latvia and Estonia, permitted only the OU model, as intended by the EU. Gazprom, the Russian VIU and natural gas exporter, had supplied pipeline transport services and gas through TSOs (*i.e.*, commercial presence) in these Member States. Pursuant to the OU model under the Directive, Gazprom was required to divest ownership and control of these TSOs. Meanwhile, other Member States, such as Germany and France, permitted the ITO model. Their domestic and other third-country VIUs were thus permitted to adopt the ITO model and continue benefitting from ownership and partial control of their TSOs.

8. Because the Directive is an EU measure, which the EU required be implemented on an EU-wide basis, the detrimental impact of the measure is also EU-wide. Therefore, as Russia has demonstrated, the entire EU market must serve as the basis for assessing this *de facto* less favourable treatment. Russia has also shown that, as the Member responsible for enacting the Directive, the EU was both obligated and had the legal authority to ensure that its Member States implemented the unbundling measure in accordance with the EU's substantive obligations. The EU failed to fulfill this obligation. The EU's arguments to the contrary – including that doing so would undermine "the constitutional structure of the European Union" and that the Member States are not "regional" governments – are all unavailing.

9. Moreover, even if the Panel determines to base its less favourable treatment assessment of the unbundling measure on only the Directive, the Panel should nevertheless find that *de facto* discriminatory treatment of Russian services and service suppliers is apparent on the face of the Directive alone, based on the design and expected operation of the unbundling measure. Indeed, Russia has demonstrated that the EU fully intended the different manner in which the unbundling measure was implemented among the Member States to have an adverse impact on the competitive opportunities in the EU market for Russian pipeline transport services and service suppliers and Russian gas. This outcome throughout the EU resulted in only Gazprom undertakings being forced to undergo ownership unbundling and was a major pillar in furthering the EU's overall objective of reducing its reliance on Russian natural gas and pipeline transport services.

IV. MARKET ACCESS CLAIMS (CLAIMS 1, 2 AND 3)

10. Russia has pursued separate claims under three GATS Article XVI:2 provisions, each challenging different aspects of the unbundling measure, as implemented by Croatia, Hungary and Lithuania. First, GATS Article XVI:2(e) prohibits "measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service". Croatia, Hungary and Lithuania's unbundling measures each violates this provision and thus their respective market access commitments. The EU responds that, to be prohibited, a measure must literally require a service supplier to establish a specific corporate or other recognized type of legal entity. However, Article XVI:2(e) prohibits any measure that is designed to <u>restrict</u> service suppliers from establishing one or more types of legal entity, or that has the effect of <u>requiring</u> specific types of legal entity by restricting the ability of service suppliers to establish other types. Croatia, Hungary and Lithuania's unbundling measures fall within the scope of Article XVI:2(e) and thus are prohibited.

11. GATS Article XVI:2(a) prohibits "limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test". A "monopoly supplier of a service" is any person "authorized or established formally or in effect" by a Member "as the sole supplier of that service". "Exclusive service suppliers" include where "a Member, *formally or in effect*, (a) authorizes or establishes a small number of service suppliers and (b) substantially prevents competition among those suppliers in its territory." Despite ostensibly permitting all three unbundling models, Croatia actually owns and controls its entire natural gas network, including the sole TSO, Plinacro, and gas supplier, HEP. This constitutes a "monopoly supplier of a service" or "exclusive service suppliers." Lithuania requires a domestic TSO to own the country's transmission assets. Following its expropriation of the TSO from the Russian service supplier, Lithuania assumed ownership and control of its entire network. Because no other company may be designated a TSO, this also violates Article XVI:2(a).

12. GATS Article XVI:2(f) forbids "limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment." Russia demonstrated that, consistent with the provisions of Article 9 of the Directive, the unbundling measures of Croatia, Hungary and Lithuania all impose majority ownership prohibitions. The EU argues that these prohibitions apply to all potential investors, "domestic or foreign," and so are outside the scope of Article XVI:2(f). The fact that the provisions also prohibit domestic majority ownership is irrelevant, however. Sub-paragraph (f) forbids any and <u>all</u> measures that impose majority ownership prohibitions on foreign capital investment. For these reasons, Croatia, Hungary and Lithuania's unbundling measures are contrary to their obligations under GATS Article XVI:2(f).

13. <u>The EU's GATS Article XIV(a) and (c) Defenses</u> – The EU contends that, if the laws of Croatia, Hungary or Lithuania implementing the unbundling measure are found to violate any of the relevant provisions of GATS Article XVI:2, such laws are justified under GATS Article XIV(a) as being "necessary to maintain public order (which includes competition in the energy sector as a 'fundamental interest of society' in the EU)." The EU also argues that the unbundling measure, implemented in these Member States' laws, is necessary to secure compliance with the TPA obligation in Article 32 of the Directive, consistent with the requirements in GATS Article XIV(c).

14. However, the EU has failed to justify any of its three Member States' laws under either GATS Article XIV(a) or (c). This includes after the Panel asked the EU to explain what aspect(s) of the challenged measures would be relevant for the Panel's assessment under these provisions, bearing in mind (i) the differences between the three challenged measures and (ii) the differences between Article XVI:2(a), (e) and (f). Regarding Article XIV(a), the EU has not demonstrated that a "genuine and sufficiently serious threat" to competition exists in Croatia, Hungary or Lithuania; or how any of their different implementing laws is "necessary" to achieve this objective, including the relative importance of the objective pursued by the measure, its "contribution" to realizing the ends pursued, or "the restrictive impact of the measure on international commerce." There are also less restrictive, reasonably available alternatives in the case of each Member State. Similarly, none of the laws can be considered "necessary" under Article XIV(c) for achieving the EU's stated objective of securing compliance with the TPA obligation.

V. THE PUBLIC BODY MEASURES (CLAIMS 4 AND 5)

15. Russia's next two claims concern GATS Article XVII and the "public body measures" (or "government exemption measures") in the unbundling provisions of Croatia, Hungary and Lithuania's laws. Article 9(1) of the Directive prohibits "the same person or persons" from exercising control both over the TSO and supply portion of a VIU. Article 9(6) exempts Member State governments from the unbundling requirements, provided they own and control both the TSO and supply entities through "two separate public bodies." These so-called "separate public bodies" are "deemed" for purposes of the unbundling measure "not to be the same person or persons." Croatia, Hungary and Lithuania all modeled provisions in their implementing laws on Article 9(6), which Russia first challenges as violating Croatia, Hungary and Lithuania's national treatment obligations under Article XVII:1, as such. Their laws each distinguishes *de jure* between foreign and domestic services and service suppliers based exclusively on origin.

16. The EU argues that Article 9(6) also makes the exemption available to "persons controlled by a public body from a third country." However, this is simply the EU's *post facto* effort to avoid its Member States' national treatment obligations. Article 9(6) was designed to permit Member

States, including Croatia, Hungary and Lithuania, to own and control their entire transmission and supply systems. This exemption does not apply to third-countries. The public body measures in Croatia, Hungary and Lithuania's laws also each results in *de facto* discrimination. Each government actually owns and controls all or a portion of the entire transmission and supply networks within its respective territory. As implemented, the measures thus provide their government-controlled services and service suppliers more favorable treatment than those of other Members, again contrary to GATS Article XVII.

VI. THE LNG MEASURE (CLAIM 12)

17. This claim concerns the LNG measure, pursuant to which LSOs and LNG facilities are exempted from the unbundling requirements. The EU concedes this claim. Its response that LNG is not "like" other natural gas within the meaning of the GATT is without merit, as noted above. Russia demonstrated that exempting LSOs and LNG facilities from unbundling accords a competitive advantage to natural gas imported in the form of LNG from other third-countries to the detriment of Russian gas. Russia used the French-based VIU gas supplier Engie as an example. Engie owns and controls all of the LNG facilities in France through its wholly-owned subsidiary, Elengy S.A. Engie also owns its TSO, GRTGaz, an ITO. Russia also highlighted LSOs such as Dragon and South Hook in the UK, which are controlled by foreign supply entities and import third-country natural gas in the form of LNG through their EU-based LNG facilities. As a result, in these and numerous other instances throughout much of the EU, the LNG measure modifies the conditions of competition and results in less favourable treatment being accorded to Russian natural gas.

VII. THE UPSTREAM PIPELINE NETWORK MEASURE (CLAIMS 13 AND 14)

18. The EU designed the Directive to ensure that so-called upstream pipeline networks ("UPNs"), which consist of Norwegian-owned and operated pipelines in the North Sea and offshore domestic pipelines, are exempted from the Directive's unbundling, TPA and tariff regulation requirements. Russia demonstrated by reference to the legislative history accompanying the First Gas Directive that the Norwegian Government lobbied for and obtained the UPN exemption to avoid unbundling the Norwegian natural gas production and transportation monopoly and, thereby, to reduce the costs of transporting Norwegian-origin and EU-origin gas. Russian pipelines entering the EU do not benefit from similar exemptions. On this basis, Russia demonstrated that the UPN measure accords Norwegian-origin gas a competitive advantage within the meaning of GATT Article I:1 compared to like Russian gas. Likewise, the UPN measure provides domestic gas more favorable treatment than like Russian gas, in violation of GATT Article III:4. In both situations, the UPN measure distorts the competitive opportunities for Russian gas transported and sold on the EU market.

19. The EU does not dispute that Norwegian and domestic UPNs are exempt from unbundling. The EU mainly argues that Article 34 of the Directive actually subjects UPNs to TPA requirements and that, therefore, "equal competitive opportunities are guaranteed to all gas, no matter its origin." But Russia showed that, besides never being utilized, Article 34 sets out a vague, non-mandatory regime; grants Member States discretion to oversee implementation; and is clearly designed to favor UPN operators and developers. Thus, because UPNs are exempt from the TPA requirements under Article 32, and Article 34 in no way requires TPA, it does not mitigate the detrimental impact on competitive opportunities for imported Russian gas caused by the UPN measure.

VIII. THIRD-COUNTRY CERTIFICATION MEASURES (CLAIMS 15 THROUGH 17)

20. Russia next challenges the discriminatory third-country certification measure contained in Article 11 of the Directive, as well as the implementing laws of Croatia, Hungary and Lithuania. Article 10 of the Directive sets out the certification procedures for designating TSOs controlled by domestic persons. However, a third-country certification applicant must satisfy the additional vague and burdensome requirements in Article 11. This includes demonstrating that "security of supply" will not be put at risk by granting certification. The additional requirements in Article 11 and the corresponding provisions in Croatia, Hungary and Lithuania's laws are referred to as the third-country certification measures.

21. Article XVII:1 – Russia first challenges the third-country certification measures as violating GATS Article XVII:1, as such, in Claim 15. Russia demonstrated that, by imposing the additional third-country certification requirements, Croatia, Hungary and Lithuania's laws implementing Article 11 each distinguishes between like foreign and domestic services and service suppliers based exclusively on origin. This formally different treatment modifies the conditions of competition in the EU market, *de jure*, thus according less favorable treatment to services and service suppliers of other Members, including Russia, compared to like domestic services and service suppliers.

22. The EU does not contest this *de jure* claim. It contends instead that the measures are "necessary…to ensure the EU's security of energy supply, which is part of the EU's public order," and, therefore, are justified pursuant to GATS Article XIV(a). Article XIV(a) requires that a measure both be "necessary…to maintain public order" and satisfy the chapeau of Article XIV. Even assuming that ensuring "security of supply" or "SoS" is a "fundamental interest" of society, the EU has not demonstrated that foreign TSO control poses a "genuine and sufficiently serious threat" to the EU's SoS. The EU's main contention is that third-country governments have "strong incentives to undermine" its SoS policies and could discontinue gas supply during cold weather or refuse non-discriminatory information access. The EU presents no evidence that such threats actually exist, however. While disruptions in the transport of Russian natural gas through Ukraine occurred in 2006 and 2009, these were isolated events and in no way related to Russian ownership or control of TSOs or the supply of Russian pipeline transport services in the EU.

23. The EU has also not demonstrated that the third-country certification measures are "necessary" to address its alleged concerns. The third-country certification measures make no contribution, material or otherwise, to ensuring SoS. To the extent the prospect of TSOs discontinuing gas transmission is a realistic concern, it is equally applicable to domestic and foreign-controlled TSOs, for which the EU has other measures in place. Russia has also demonstrated that the third-country certification measures result in significant trade restrictive effects. The Directive also grants Member States essentially unlimited discretion to assess restrictions on third-country TSOs, particularly in the absence of key definitions, including the concept of "security of supply" itself.

24. There are also reasonably available, alternative measures that the EU could and should have adopted. The EU could have required the same additional certification procedures from all operators, regardless of origin. Doing so would not affect the EU's ability to ensure SoS, given the number of legal mechanisms in place to ensure this goal already. Similarly, the EU could enact a "blocking statute" to prevent any TSO from acting on instructions from a foreign shareholder or government that are contrary to the EU law. The same restriction would apply to domestic and all third-country interests. Notably, the EU has used this approach in other contexts. Claim 16 is an alternative claim.

25. Even if considered provisionally necessary to maintain public order, the measures do not satisfy the Article XIV chapeau requirements, to include not resulting in arbitrary or unjustifiable discrimination. The EU argues that the third-country certification measures are rationally related to its stated policy objective of ensuring SoS because EU-controlled TSOs do not pose "comparable threats" to SoS. Yet the EU has not identified any realistic "threats" posed by third-country control of TSOs not otherwise addressed by existing laws and regulations. The lack of certification denials also does not equal the absence of discrimination. Russia has demonstrated that the measures discriminate on their face, which the EU did not even try to rebut. This discrimination results in part from ambiguities in the third-country certification standard and the broad discretion granted to NRAs and the Commission to assess those requests.

26. GATS Article II:1 – In Claim 17, Russia also challenges the third-country certification measure based on specific instances of application of Article 11 of the Directive by Member States and the Commission in violation of GATS Article II:1. Russia demonstrated, for one, that the Commission provided different treatment to the certification application of Gaz-System to operate the Yamal pipeline in Poland than it did applications by various third-country applicants. The Commission made clear in two certification opinions that, from its standpoint, Gaz-System could not qualify for certification because of perceived SoS risks based on the joint control of Europolgaz, the owner of the Yamal pipeline in Poland, by Gazprom, the Russian supplier of natural gas and pipeline transport services. The fact that ERO, the Polish NRA, ultimately elected to certify Gaz-System is not the issue. The issue is the impact on the conditions of competition in the EU market

as a result of the Commission's refusal to approve Gaz-System's certification.

27. In Lithuania, the EU declared Lietuvos, the TSO jointly controlled by the Russian service supplier, to be a "non-complaint undertaking," thus preventing it from applying for a TSO designation and certification, unless and until the Russian service supplier divested its interest in the TSO – which the Russian supplier ultimately did. On the other hand, the Commission approved several certification decisions by NRAs regarding TSOs controlled by other third-country undertakings. This includes jordgas, which is wholly-owned by Statoil, the Norwegian VIU. Indeed, jordgas was not even required to satisfy the requirements of the third-country certification measure, due to the arbitrary effective date of Article 11, 3 March 2013. It also includes DESFA, which owns and operates the entire Greek transmission system and was scheduled to be acquired and brought under the sole control of SOCAR, an Azerbaijan government entity.

28. The different treatment reflected in these inconsistent decisions distorts the competitive opportunities for Russian pipeline transport services and service suppliers in the EU. The Commission's original delay in issuing a decision increased the uncertainty regarding Gazprom's supply of its services. The perception of other market participants, including potential customers, was also negatively impacted. In Lithuania the legislative framework adopted by the EU made it impossible for the domestic TSO controlled by the Russian service supplier to apply for certification. It is also relevant that, in the process of adopting the TEP, as well as throughout its application, Article 11 of the Directive has been commonly referred to as the "Gazprom Clause". It is precisely the fact that the Russian pipeline transport service supplier is singled out by name in the context of Article 11 that is at the heart of Russia's contention under GATS Article II:1. Article 11 was clearly designed to deprive Russia of equal competitive opportunities in the EU market and the EU's implementation of Article 11 has modified the conditions of competition to the detriment of Russian pipeline transport services and service suppliers, in violation of Article II:1.

IX. THIRD-COUNTRY CERTIFICATION MEASURES: ARTICLES VI:1 AND VI:5(A) (CLAIMS 19 AND 20)

29. Russia also demonstrated that Croatia, Hungary and Lithuania's third-country certification measures are each inconsistent with Articles VI:1 and VI:5(a) of the GATS. Article VI:1 requires that a measure be administered in a "reasonable, objective and impartial manner." These measures lack any meaningful standards or criteria by which NRAs may evaluate third-country applications. NRAs are thus granted virtually unlimited discretion to evaluate the alleged effects of third-country certification requests on the amorphous concept of "security of supply." Croatia, Hungary and Lithuania's measure are thus each in violation of Article VI:1. The measures are also "licensing and qualification requirements," contrary to GATS Article VI:5(a), based on the specific criteria set out in Article VI:4(a)-(c).

X. THE INFRASTRUCTURE EXEMPTION MEASURE: GATT ARTICLE X:3(A) (CLAIM 21)

30. Article 36 of the Directive, and previously Article 22 of the SEP Directive, govern exemptions from the unbundling, TPA and tariff regulation requirements of the Directive for certain types of "new infrastructure" and "significant increases of capacity in existing infrastructure and to modifications of such infrastructure which enable the development of new sources of gas supply." This is referred to as the "infrastructure exemption measure." Claim 21 challenges the EU's failure to administer the infrastructure exemption measure in a uniform, impartial and reasonable manner, based on specific instances of application of the measure by the Commission, in violation of Article X:3(a).

31. The Commission has issued exemption decisions regarding the OPAL, Gazelle, TAP, Nabucco and Poseidon pipelines, in addition to various exemptions for LNG facilities, including Dragon and South Hook in the UK, regarding which no material restrictions were imposed. The infrastructure exemption measure requires NRAs and the Commission, in every case, to examine a series of five "conditions" or criteria. It is in evaluating each individual exemption application based on these criteria that the Commission administers, applies or puts the measure into practical effect. Russia demonstrated that, in administering the measure, the Commission did so in a non-uniform, partial and unreasonable manner, in violation of Article X:3(a). The Commission failed to justify imposing not only a 50% capacity cap on the OPAL exemption, but also a 3 bcm/year gas release requirement, while imposing vague and much less restrictive conditions on the TAP, Nabucco and

Poseidon exemptions and no conditions whatsoever on the exemptions for LNG facilities such as Dragon and South Hook in the UK. Indeed, as Russia explained, the Commission's already flawed rationale for imposing the OPAL restrictions disappeared after the Gazelle pipeline was completed and all of the gas being transported via OPAL was required to be transited across the Czech Republic, back into Germany and onwards to France and elsewhere. Yet the EU refused to consider rescinding or modifying the restrictions on the volume of gas that may be imported and transported over OPAL.

XI. THE INFRASTRUCTURE EXEMPTION MEASURE (CLAIMS 22-25)

32. In Claims 22 through 24, Russia challenges specific instances of application by the Commission of the infrastructure exemption measure, in violation of GATT Article I:1. Russia demonstrated in Claim 22 that the German NRA narrowly interpreted the term "interconnector" to justify denying the NEL exemption. The Commission later adopted a broader interpretation of this term to grant the Gazelle and TAP exemptions. Thus, the operators of TAP will be able to import, transport and sell significant volumes of Azeri gas on the EU market exempt from the otherwise applicable unbundling, TPA and tariff regulation requirements. Meanwhile, 100% of the imported Russian natural gas that is transported via NEL and sold on the EU market is subject to the TPA and tariff regulation requirements. Claim 23 challenges implementation of the measure to impose more restrictive conditions on OPAL than on these other pipelines. Once again, imported Russian gas is denied an advantage granted to Azeri and possibly other third-country gas that will be transported over TAP, or that would have been transported over Nabucco and Poseidon. Claim 24 challenges implementation of the measure to deny the NEL exemption and impose more restrictive conditions on OPAL, while granting exemptions to various LNG facilities, including Dragon and South Hook in the UK, with no conditions whatsoever. In each instance, the EU violated its obligations under Article I:1 of the GATT 1994. Similarly, Russia demonstrated in Claim 25 that, by denying the NEL exemption and imposing more restrictive conditions on OPAL, the EU's implementation of the measure provided *de facto* less favourable treatment to Russian services and service suppliers than like services and service suppliers of other Members, in violation of Article II:1.

XII. THE INFRASTRUCTURE EXEMPTION MEASURE AND UPN EXEMPTION (CLAIM 26)

33. Claim 26 is predicated on the fact that, in contrast with the EU's treatment of the NEL and OPAL interconnectors, the Directive provides an "as such" exemption to upstream pipeline networks. Specifically, Russia challenges implementation of the infrastructure exemption measure to deny the NEL exemption and impose restrictive conditions on the OPAL exemption, while the Directive automatically exempts UPNs from unbundling, TPA and tariff regulation requirements. This differential treatment results in *de facto* discrimination, by providing an advantage to Norwegian-origin natural gas, which is not accorded immediately and unconditionally to like Russian gas transported and sold on the EU market through NEL and OPAL, in violation of GATT Article I:1.

XIII. QUANTITATIVE RESTRICTIONS: GATT ARTICLE XI:1 (CLAIM 28)

34. GATT Article XI:1 provides for a general prohibition on quantitative restrictions, which is intended to be "comprehensive" and apply to "*all* measures instituted or maintained" by a Member, other than duties or taxes, which prohibit or restrict the import or export of products. In Claim 28, Russia challenges the restrictive conditions imposed by the Commission on the OPAL exemption as instituting a quantitative restriction on the volume of Russian gas imported into the EU. Russia demonstrated the manner in which the 50% capacity cap and 3 bcm/year gas release program imposed as conditions on the OPAL exemption each constitute separate quantitative restrictions in violation of Article XI:1. Of OPAL's total capacity, 32 bcm/year is subject to the exemption and required to be dedicated for transport south to the Czech Republic at the Brandov exit point. Because Gazprom is effectively prohibited from controlling more than 16 bcm of that total capacity and gas transported on OPAL, its ability to import Russian gas via Nord Stream for transport over OPAL is also restricted by that amount – 16 bcm/year. The EU also lacks any basis to argue that Gazprom can exceed the capacity cap by implementing the required 3 bcm/year gas release program, which actually institutes another quantitative restriction on the importation of Russian gas. To exceed the capacity cap, not only must Gazprom "release" or sell 3 bcm of gas per year at artificially imposed prices, it must also implement a "capacity release program" to "ensure the availability of corresponding transport capacity". Therefore, Gazprom must unconditionally release

or forego the right to transport 3 bcm/year of imported Russian gas over OPAL.

XIV. THE TEN-E MEASURE (CLAIMS 29-31)

35. The TEN-E Regulation and its later amendments are referred to together as the "TEN-E Measure." The TEN-E Measure, together with its underlying policy objective of enhancing diversification and security of supply, is designed to treat Russian services and service suppliers less favourably than those of other countries. Equally, Russian natural gas is accorded less favourable treatment than like domestic and third-country gas. This is evident from the definition of the "Priority Gas Corridors", including the requirement to reduce dependency on "a single supplier" in the TEN-E Regulation. This "single supplier" is identified as Russia. Creation of the priority corridors was aimed at reducing the role of Russian services and service suppliers and decreasing competitive opportunities for Russian natural gas. The totality of facts surrounding the TEN-E Measure reveals that its design, structure and expected operation are such that projects that would be operated by non-Russian service suppliers and which would facilitate the importation of non-Russian natural gas are to be preferred.

36. This is also evident from the selection criteria used to determine which projects would be designated as PCIs. Annex III.1 of the TEN-E Regulation sets out Working Group rules. The Terms of Reference of the Ad Hoc Working Group for North-South Gas Interconnections in Central-Eastern (CEE) and South-Eastern Europe (SEE) are particularly instructive. That Working Group agreed on the weighting of gas-specific criteria and assessed the proposed projects in light of these criteria.

37. Criteria such as diversification, as specified by the sub-criteria "diversification of external supply" and "lower import dependence", were given substantial weight in respect of the project prioritization. In terms of category weighting, "physical availability" was given a weight of 0.25/1; "promotion of the internal energy market" was given a weight of 0.31/1; and "diversification" was given a weight of 0.44/1. This evidence should be sufficient for the Panel to find the existence of a policy aimed at replacing Russian natural gas imports with domestic production. The implications of these weighting criteria become even more apparent upon examining the application for PCI designation from the South Stream project companies. The EU section of the South Stream pipeline project was one of 25 projects that were scored by the Working Group. It was denied PCI designation after receiving by far the lowest score of all projects – 0.16.

38. This is not surprising. South Stream was intended to transport Russian natural gas from Russia via the Black Sea to Bulgaria and other destinations in the EU. Clearly, this project, promoted by the Russian service supplier Gazprom, could never have obtained a high PCI-score as it would have led to opening a new route for Russian gas, as was directly acknowledged by the EU Commissioner for Energy.

39. PCI natural gas benefits from the infrastructure through which it is transmitted, or in which it is stored, receiving substantial financial support from the CEF fund. The same applies to the services supplied through PCI-designated projects and the service suppliers supplying these services. PCIs have access to financial support totaling €5.35 billion. Among the projects selected under the 2014 Energy Call were PCIs 8.2.3 (Capacity Enhancement of the Klaipeda-Kiemenai pipeline in Lithuania) and 8.5 (Gas Interconnection Poland-Lithuania; or GIPL). PCI 8.2.3 is eligible for a maximum of €27,595,500. This provides the project with a substantial advantage as compared to projects that did not receive PCI designation. The same applies to PCI 8.5, albeit in even greater numbers. The construction of this PCI is eligible for a maximum of €295,386,600.

40. GATS Article II:1 – By laying down inherently biased criteria for PCI-designation, the TEN-E measure modifies the conditions of competition to the detriment of Russian services and service suppliers. Projects that are likely to reduce reliance on Russian natural gas are eligible for PCI-designation; projects that are unlikely to do so, are not. Inevitably, private actors will choose to invest in projects that are likely to benefit from the more favourable administrative, regulatory and financial treatment. This modification of the conditions of competition to the detriment of like Russian services and service suppliers amounts to less favourable treatment being accorded to these services and service suppliers, in violation of Article II:1 of the GATS.

41. GATT Articles III:4 and I:1 – The modification of the conditions of competition to the

detriment of Russian natural gas arises because of the sole fact that the PCI-designation system is in place. The system creates an incentive for TSOs and operators to invest in projects that are not aimed at maintaining the same – or an increased – level of Russian natural gas imports. These projects will benefit from more favourable regulatory, administrative and financial treatment. This system directly impacts the decision of operators as to where they source their natural gas imports from and as to which projects they are likely to invest in. A decision to source natural gas from Russia becomes increasingly unlikely as projects that would make this possible will not benefit from the more favourable regulatory treatment.

42. Natural gas transported through designated PCIs will be able to be marketed at reduced costs as compared to non-PCI natural gas, because of the more favourable regulatory regime that is applicable to PCIs. PCI natural gas thus directly benefits from the reduced regulatory burden that is placed on certain designated projects. The criteria used to allocate the more favourable treatment give effect to the EU's wish to reduce reliance on Russian gas by favouring projects that "enhance diversification" and do not contribute to maintaining or improving the position of Russian natural gas on the EU market. As a result of these criteria, an incentive is created to develop and submit projects for PCI designation that are not intended to promote Russian natural gas.

43. Clearly, the substantial amounts of government support reduce the costs of operators and promoters of these PCIs, which enables them to reduce the price of the gas being sold. Inevitably, this modifies the conditions of competition to the detriment of imported Russian natural gas, which is transported using facilities that are not eligible for this type of government support. This treatment is inconsistent with the national treatment obligation of Article III:4 and Article I:1 of the GATT 1994.

XV. CONCLUSION

44. For the forgoing reasons, the Russia Federation requests the Panel to recommend that the European Union bring each of its nonconforming measures into conformity with its obligations under the relevant provisions of the GATS and GATT 1994.

ANNEX B-3

FIRST PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. INTRODUCTION

1. In this integrated executive summary, the European Union ("EU") summarizes the facts and arguments presented to the Panel in its first written submission, its opening and closing oral statements at the first substantive meeting and its responses to the Panel's and Russia's questions.

2. FACTUAL BACKGROUND AND THE MEASURES AT ISSUE

2. In 2009, the EU accepted adopted Directive 2009/73/EC, concerning common rules for the internal market in natural gas ("the Directive") as part of its Third Energy Package. The Directive includes unbundling requirements, third country certification requirements and provides for certain infrastructure exemptions. In addition, the EU adopted, in 2013, Regulation 347/2013 ("the Regulation" or the "TEN – E Regulation") on guidelines for trans-European energy infrastructure, which allows for the designation of Projects of Common Interest ("PCIs"). These specificities of the Directive and the Regulation are at the basis of Russia's claims before the Panel and will be examined in the sections below.

3. UNBUNDLING

3. The unbundling requirement in EU energy law has developed since 1998. The Directive applies it with regard to transmission system operators ("TSO") and producers/suppliers of natural gas, aiming at eliminating conflicts of interest, ensuring independence and transparency of TSOs and access to transmission networks for all users, producers and suppliers, thus furthering the objectives of competition, efficient market functioning and security of supply. The principle has grown to demand greater legal and functional independence of TSOs, with the Directive now demanding effective unbundling of transmission activities from production and supply activities. Three models of unbundling are set out – ownership unbundling, independent system operator ("ISO"), and independent transmission operator ("ITO").

4. Ownership unbundling demands that the TSO owns the network which it operates and prohibits the TSO from being part in a vertically integrated undertaking ("VIU"), leading to a full structural separation between transmission and production and/or supply activities. Further requirements with regard to influence and control are imposed to ensure the independence of the TSO. Nevertheless, passive financial rights of minority shareholders are not affected by the ownership unbundling, provided no voting or appointment rights are exercised.

5. The ownership unbundling model *must* be transposed by Member States in their national legal orders. They have the possibility to also transpose the ITO and/or ISO unbundling models, if at the entry into force of the Directive – 3 September 2009 – their transmission system existed and belonged to a VIU. These alternative models allow for the TSO or the transmission system owner to be part of a VIU, i.e. being a subsidiary of the VIU or part of the group to which the VIU belongs, while providing for detailed *behavioural and organisational requirements* for independence, management, investment and network development. They are strictly and permanently controlled by a national regulatory authority ("NRA"). The TSO may choose which unbundling model to apply amongst those transposed into its relevant national law, and subject to a "certification process" by a NRA. The unbundling requirement applies to all TSOs in the EU, irrespective of ownership or control of the networks or the operators, as well as to all producers or suppliers of gas, irrespective of their nationality.

6. Russia's claims with regard to unbundling focus on the implementation of the Directive in Croatian, Hungarian and Lithuanian national laws.

3.1. RUSSIA'S CLAIM OF A VIOLATION OF ARTICLE XVI GATS

7. According to Russia, the unbundling requirement and its implementation in Croatian, Hungarian and Lithuanian laws violates the market access obligations for pipeline transport services in these Member States, or more specifically Article XVI:1, which requires that a WTO Member accord to services and service suppliers of any other Member treatment no less favourable than that provided in their schedules. Russia believes that the unbundling requirement is a prohibited market access limitation, as set out in Article XVI:2(e), (a) and (f) of the GATS.

8. Since Article XVI GATS applies only where the WTO Member concerned has undertaken a commitment for the service sector as well as the specific mode of supply in question, subject to the terms in its Schedule, the EU points out that such commitments have not been undertaken by any of its member States ("MS"), as well as that, of the three states concerned, only Croatia has made any market access commitments with regard to the mode of supply in question (mode 1). Furthermore, the EU submits that Russia has failed to establish its *prima facie* case by not specifying the mode of supply at stake, nor how the unbundling requirement would restrict market access.

9. As regard the definition of the sector "pipeline transport services", the EU argues that it should not be read as wide as Russia's definition seems to suggest (i.e. to include the sale of gas as well as LNG services). Recalling the rules of interpretation of Article 32 of the Vienna Convention of the Law of Treaties, as well as the Appellate Body's guidance (*US – Gambling*), the EU pleads that the term does not include the supply, i.e. the sale, of natural gas in its definition, but, instead, should be read as a specific service that transports a good from one point to another vie a line of joined pipes. It must, therefore, be distinguished from the production, distribution and supply of natural gas, as well as from other methods of gas transportation and processing. Instead, gas and its supply, i.e. sale, should be considered as a good and, therefore, beyond the scope of the GATS (Panel – *Canada – Feed-In Tariff Program*). Given the foregoing, any commitment that may have been made by Croatia in this regard would be intended to cover merely the transportation of natural gas as a service.

10. Should the Panel consider that the commitments made by the MS in question under the GATS apply to the sector and activities at hand, the EU argues that the measures challenged are not impermissible "limitations" within the meaning of Article XVI:2 GATS. The list of limitations of market access which is prohibited under Article XVI:2 GATS is exhaustive, as confirmed by panel interpretations and the Scheduling Guidelines. Therefore, Russia bears the burden to demonstrate that the challenged measure corresponds to one of the types of measures listed in the raised sub-paragraphs (e), (a) and (f) of Article XVI:2.

3.1.1. THE INTERPRETATION AND APPLICATION OF ARTICLE XVI:2(E) GATS WITH REGARD TO THE CONTESTED MEASURE

11. Sub-paragraph (e) prohibits measures that restrict, require or prohibit specific types of legal entities or joint ventures through which a service supplier may supply a service. Interpreting the term in the context of the WTO, the EU argues that Article XVI:2(e) does not cover measures that determine or restrict how the legal entity must be formed, organized, structured, how it must conduct its business, or that determine its characteristics, but only forbids measures that require or prohibit the use of a specific legal entity for the provision of services. For this reason, the unbundling requirement does not fall within the scope of sub-paragraph (e). The models only impose requirements pertaining to the characteristics of that legal entity, and in particular the activities (gas production and supply, on the one hand, and transmission, on the other hand) that must not be combined. This applies both to the Directive, as well as to its implementation in Croatian, Hungarian and Lithuanian laws.

12. For the foregoing reasons, the unbundling requirement, as implemented in the laws of Croatia, Hungary and Lithuania, is not a measure that falls within the scope of Article XVI:2(e) GATS and does not violate any market access commitments.

3.1.2. THE INTERPRETATION AND APPLICATION OF ARTICLE XVI:2(A) GATS WITH REGARD TO THE CONTESTED MEASURE

13. Article XVI:2(a) GATS prohibits a market access limitation on the number of service suppliers allowed on a market. Relying on the interpretations of the article by the Appellate Body and panels, as well as the Scheduling Guidelines, the EU argues that the scope of the article is limited to measures that impose essentially quantitative maximum limitations on the number of service suppliers of a given market. Therefore, measures that impose a qualitative criteria or minimum requirements for services and service suppliers do not constitute market access limitations, as prohibited under Article XVI:3(a) GATS. In such a case, the imposition of minimum requirements, including the unbundling requirement, for TSO certification in the EU does not amount to a quantitative limitation.

14. The contested measure does not, in any way, limit the quantity of TSOs in a given market, despite the current situation of having one TSO and one natural gas supplier in Croatia and Lithuania. There are no legal restrictions, nor exclusive rights granted, to prevent other entities, regardless of the nationality of their ownership, from operating a transmission network as a TSO in either country. Therefore, the unbundling requirement does not violate Article XVI:2(a) GATS.

3.1.3. THE INTERPRETATION AND APPLICATION OF ARTICLE XVI:2(F) GATS WITH REGARD TO THE CONTESTED MEASURE

15. Article XVI:2(f) GATS prohibits any quantitative limitations on the participation of foreign capital in the financing of service suppliers. Pursuant to panel interpretations, these prohibited limitations must be expressed in terms of a maximum percentage limit on *foreign* shareholding, or a maximum percentage limit of the total value of individual or aggregate *foreign* investment. Quantitative maximum restrictions are prohibited, which specifically target foreign investment and require discriminatory treatment. Sub-paragraph (f) does not cover measures that apply without distinction to both domestic and foreign investment. Since the unbundling requirement, as transposed in Croatian, Hungarian and Lithuanian laws, is a non-discriminatory measure and applies to all potential investors, both domestic and foreign, the EU believes it does not fall under sub-paragraph (f).

3.1.4. JUSTIFICATION UNDER ARTICLES XIV(A) AND XIV(C) OF THE GATS

16. Should the Panel deem the unbundling measures in Croatia's, Hungary's and Lithuania's domestic laws to be violations of sub-paragraphs (a), (e) and (f) of Article XVI:2 (*quod non*), the EU argues that the unbundling requirement is nevertheless justified under Article XIV(a) and (c) of the GATS.

17. The justification of a measure under Article XIV must be determined based on (i) the provisional justification under one of the sub-paragraphs of Article XIV GATS – here we will examine in turn sub-paragraph (a) and (c), and (ii) the compliance of the measure with the chapeau of Article XIV.

3.1.4.1. JUSTIFICATION UNDER ARTICLE XIV(A) OF THE GATS

18. The measure at hand is justified under Article XIV(a) GATS, which covers measures necessary to maintain the public order. Relying on the interpretations by the Appellate Body and by the panel in *US – Gambling*, The EU has utilized its freedom to set its policy objectives by taking measures to ensure efficiency gains, competitive prices, a higher standard of service, security of supply and sustainability. This effectively prevents a "genuine and sufficiently serious threat" to competition in the energy sector and to the maintenance of public order.

19. The maintenance and fostering of competition is a fundamental interest of EU society, and well reflected in EU law and policy, including in the European energy policy with regard to natural gas and electricity. It is directed at achieving energy efficiency and competitiveness, security of supply and sustainability. Competition in the energy market is a fundamental interest of the EU and falls within the scope of its public order. Furthermore, incomplete unbundling requirements, under the predecessors of the Directive, still constitute a threat to the competition in the energy sector, as EU experience has established. Therefore, the unbundling requirement is necessary to

effectively ensure fair competition and non-discriminatory access to and quality of the transmission network.

20. Viewing "necessity" in light of the importance of the pursued objective, the contribution of the measure towards the attainment of the objective and the restrictiveness on international commerce, the EU has not adopted measures that are more restrictive than necessary. This is supported by the historical experience and development of the unbundling requirement in EU law and by the lack of reasonably available less restrictive alternatives that would achieve the objective in question.

3.1.4.2. Justification under Article XIV(c) GATS

21. Article XIV(c) GATS provides an exception for measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement". First, the unbundling requirement in the Directive and in the Croatian, Hungarian and Lithuanian measures in question are necessary to secure compliance with that Article 32, which imposes third party access obligations to the transmission system. Furthermore, Article 32 is not in itself inconsistent with WTO law, because its goal is to enable competition on the natural gas market, which is in conformity with WTO's objective of "expanding the production of and trade in goods and services" and GATS' goal to achieve "progressively higher levels of liberalization of trade in services".

22. Finally, there are no less restrictive alternatives available to ensure third party access to transmission networks, as evidenced by the long history of development of the unbundling requirement. For these reasons, the measures are also justified under Article XIV(c) GATS.

3.1.4.3. Justification under the chapeau of Article XIV of the GATS

23. The chapeau of Article XIV GATS prohibits any arbitrary or unjustifiable discrimination between countries in which the same conditions prevail, as well as the imposition of disguised restrictions on international trade. The unbundling requirement applies indistinctly to all pipeline transmission service suppliers, treating them equally where like conditions prevail. There is, therefore, no arbitrary or unjustifiable discrimination. Further, the requirement does not involve any "concealed or unannounced" restrictions on international trade, but genuinely contributes to ensuring their objective.

3.2. *Russia's claim that the public body specification in Article 9(6) of Directive 2009/73/EC violates de jure or de facto the national treatment obligation in Article XVII of the GATS*

24. Article 9(6) of the Directive provides for non-discrimination between public and private bodies, whereby two separate public bodies are allowed to control the production and supply activities, on the one hand, and the transmission services, on the other, if it can be demonstrated that the ownership unbundling requirement is complied with. The requirement of ownership unbundling, therefore, applies to public bodies as well, subject to national regulatory oversight and continued compliance supervision and a Commission opinion. Article 9(6) applies regardless of whether or not the two public bodies' activities operate in the same or different countries, similar to the application of the unbundling requirement to private bodies. There is no limitation on the range of Russian public bodies that could make use of this provision.

25. Article 9(6), as implemented in the relevant national laws, does not violate Article XVII GATS, since it does not provide for either *de jure,* nor *de facto* discrimination with regard to its treatment of foreign and domestic public bodies. The text of Article 9(6) allows for a TSO, controlled by a third country public body, to unbundle, provided all requirements are fulfilled and independence between the third-country public bodies is established. There is no distinction based on origin in the laws and, therefore, there is no *de jure* discrimination.

26. There is also no *de facto* discrimination resulting from Article 9(6), since the conditions of competition are not modified to the detriment of like imported services or third country service suppliers. All service suppliers and operators have the right to seek the application of Article 9(6) regardless of their nationality on equal competitive positions. The effects of the measure are not discriminatory. Furthermore, Article 9(6) extends the unbundling requirements to public bodies,

ensuring the equality between public and private bodies and the TSOs controlled by them. Russia has failed to show that the conditions of competition are modified to the detriment of non-domestic suppliers of pipeline transmission services.

3.2.1. Justification under Article XIV(c) of the GATS

27. If the Panel finds that Article 9(6) of the Directive and its implementation in domestic laws violate Article XVII of the GATS (*quod non*), the EU claims that the measure is "necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of [the GATS]", and as such is justified under Article XIV(c) GATS. Article 9(6) of the Directive requires non-discrimination between public and private bodies with regards to their treatment in law. Furthermore, Article 9 of the Directive is not inconsistent with GATS, as it ensures independence and separation between the separate transmission and production/supply functions, under a regulatory supervision. It is, therefore, justified under Article XVI(c) GATS.

3.3. Russia's claim that the unbundling measure violates the most favoured nation obligation in Article II:1 of the GATS

28. The most favoured nation (MFN) obligation requires that the measures in question fall within the scope of the GATS, that the services or service suppliers are "like", and that the measures treat services and suppliers of one country less favourably than from other WTO Members, meaning that it modifies the conditions of competition to the detriment of foreign services or service suppliers.

29. While the EU agrees that the contested measure falls within the broad scope of GATS, as well as that Russian and other third country suppliers of pipeline transport services are "like" suppliers, it disagrees that LNG services and service suppliers would be "like" pipeline transport services and service suppliers. LNG services involve the liquefaction of natural gas, the importation, offloading and re-gasification of LNG and do not involve the transport of gas from one place to another. Both services differ with regard to their characteristics, consumer tastes, end-use and UN Central Product Classification. Therefore, they are not "like".

30. Regarding the MFN obligation, the EU believes that the Directive does not provide for "less favourable treatment" of Russian service suppliers (i.e. Russian TSOs) than of other third countries' TSOs. First, the Directive does not make a distinction on the basis of origin of the TSO, its unbundling requirement applies indiscriminately to both EU and foreign service providers.

31. Second, contrary to Russia's claim, MS are obliged to transpose the ownership unbundling into their national laws, but may opt to transpose the ITO and ISO models as well, only when certain factual circumstances are fulfilled, as explained above. The origin of the service supplier is not considered at all.

32. Third, a Russian service provider is subject to the same unbundling requirements and subject to the same available models in a given MS as any other service provider from another third country in that same MS. Since it is each individual MS that implements the unbundling requirement, the MFN obligation must be examined under the domestic laws of each MS separately. Depending on the regulatory jurisdiction from which the measure in question that determines the treatment emanates, the MFN obligation would apply throughout the EU or in each individual Member State. The MFN treatment must be assessed in the EU as a whole in cases where the EU implements a fully harmonized legal framework across all MS, in particular through a Regulation. The treatment must be assessed in each individual Member State separately when the measure at issue is in fact the national implementation in a Member State of a requirement in a Directive that leaves Member States certain options for implementing the requirement.

33. Russia seeks compare its own treatment in one Member State with a third country's treatment in another Member State. Such approach is manifestly incorrect. Applying the MFN obligation to the EU cannot mean that a measure in one Member State regulating trade in services has to be exactly the same as the measures adopted in other Member States. The Directive nor the Member State measures do not make a distinction based on the origin of the service supplier. Therefore, there is no *de jure* violation of the EU's MFN obligation under Article II:2.

34. In the event that the Panel disagrees with the EU and allows a comparison of treatments across Member States, the EU argues that the Directive does not constitute a *de facto* discrimination. Considering the "design, structure, and expected operation" of the Directive, there is no evidence of a differential treatment between Russian pipeline transmission service suppliers and all "like" service suppliers of any other origin, both potential and existing. The requirements of the Directive apply to all service suppliers that operate in the EU, regardless of their origin. The choice of unbundling models in each MS does not affect Russian service providers to a greater extent than it does other third country service providers. Finally, there is no evidence that the ISO and the ITO unbundling models are "less restrictive" than ownership unbundling. All three models aim to enhance the competitive conditions on the market and therefore affect the competition among market players to the same degree, *albeit* choosing different avenues. Furthermore, the ISO and the ITO unbundling models may be more restrictive than the ownership unbundling with regard to their behavioural and organisational requirements, as well as the constant regulatory oversight implied.

35. First, with regard to the ownership of the network, irrespective of the unbundling model chosen, effective unbundling of a VIU will have to be ensured. The "advantages" claimed by Russia for a VIU in the ISO and the ITO models, through influence over the TSO, would be blatant abuses of the law, contrary to its purpose.

36. Second, regarding alleged financial benefits for the VIU, effective unbundling demands financial separation of the TSO and the producer/supplier of natural gas and this is enforced by national regulators. Any financial benefits in a VIU structure would take the form of dividends from shares, which may happen under all three models of unbundling.

37. Third, Russia is mistaken in believing that the supervisory body under the ITO model would allow any influence to be exerted by the VIU over the TSO. The representation of the VIU through the Supervisory Body is limited to specific decisions, such as those which may have a significant impact on the value of the assets of the shareholders of the TSO, and is subject to a number of regulatory requirements. The separation between the production and supply interests in the VIU and the operation of the network is ensured and monitored by the NRAs and enforced through financial penalties.

38. In conclusion, there is no evidence that the ISO and ITO unbundling models are "less restrictive" than ownership unbundling, that the unbundling requirement of the Directive would modify the competition conditions to the detriment of Russian service suppliers, nor that the ISO and ITO models are not available to Russian service suppliers. Russian service suppliers are treated equally to all other third country service suppliers in each MS in which they are active. Hence, there is no *de facto* discrimination in violation of Article II:1 GATS.

3.4. Russia's claim under Article III:4 of the GATT 1994

39. Russia claims that the EU has violated its national treatment ("NT") obligation in Article III:4 of the GATT 1994 because TSOs in certain MS have been allowed to adopt the ISO and/or ITO unbundling models, while Russian-origin natural gas would be transported and placed on the market in MS that require ownership unbundling. However, as stated above, the Directive does not allow MS to choose freely between the different unbundling models they may implement into their national laws. Furthermore, as discussed above, the ITO and ISO models cannot be considered to be "less restrictive" than ownership unbundling.

40. The three elements of Article III:4 are examined in turn. First, with regard to the "likeness" of the products in question, while natural gas is a like product regardless of its origin, LNG is not "like" natural gas, as stated above. Second, with regard to the effect of the measure on the sale, purchase, transportation, distribution or use of the product, the Russia has not demonstrated that the unbundling requirement affects the conditions of competition on the gas market and is therefore within the scope of Article III:4. There cannot be any presumption that a measure that regulates characteristics of a service supplier (i.e. the unbundling requirement regulating transmission pipeline service suppliers) affects trade in goods that are transported by the supplier.

41. Third, with regard to any less favourable treatment being accorded to foreign products, the unbundling requirement in the Directive does not distinguish on the basis of origin of the gas,

neither with regard to the unbundling models to be adopted by the states, nor with regard to the models to be applied to specific undertakings. The TSOs choose themselves which models to follow. The requirement, furthermore, does not modify the competitive opportunities of imported gas, since Russian gas is subject to the same legislation as domestic gas, including the requirement of financial separation of the VIU and the TSO under any of the three unbundling models. Moreover, Russian gas, and gas of any origin, can freely enter the EU market, without its competitive position being affected by the unbundling requirement. Finally, Russia has failed to show that any negative competitive impact falls *predominantly* on Russian gas, the relevant test for *de facto* discrimination.

42. Finally, the NT obligation must be assessed and compared in each MS separately. Comparing the models implemented in one Member State of the EU with another does not establish a violation of the NT obligation, as long as within a single MS all gas, regardless of its origin, is subject to the same laws and treated equally. The relevant comparison is determined by the regulatory jurisdiction from which the measure in question emanates, as argued above with regard to the EU's MFN obligation. In case of the unbundling requirement implemented in the Member States, this is each individual Member State. When an examination is conducted, it is clear that there is no difference in treatment between domestic and Russian gas. Even if it would be appropriate to compare gas imported in certain Member States and domestic gas from other Member States, Russia still has not shown that Russian gas is predominantly imported in countries that impose ownership unbundling only.

3.5. RUSSIA'S CLAIM UNDER ARTICLE I:1 OF THE GATT 1994

43. Russia further claims that the unbundling requirement is a violation of the MFN obligation of Article I:1 of the GATT 1994, because Russian gas imported to the EU is treated less favourably than other third countries' gas, since Russian gas is placed on the market in Member States that require ownership unbundling. However, several elements of Article I:1 of the GATT 1994 are not fulfilled.

44. First, the unbundling measure does not fall within the scope of Article I:1 of the GATT 1994, as it does not constitute a "customs duty" or "charge" nor the method of levying duties and charges. It is, furthermore, not a "rule[]" or "formalit[y] in connection with importation and exportation". It is an obligation that applies without distinction to all pipeline service suppliers transporting gas in the EU. In addition, the measure is not among those referred to in Article III:2 and III:4 of the GATT 1994 since it does not concern any "internal taxes or other internal charges of any kind" and because it does not affect trade in gas on the domestic market, as argued above.

45. Second, with regard to an "advantage, favour, privilege or immunity" being granted to gas from other third countries, Russia is unable to demonstrate why and how the unbundling requirement affects the competitive opportunities of imported gas from Russia. The Directive does not impose any discriminatory requirements and does not distinguish gas on basis of its nationality.

46. Furthermore, the MFN obligation of the GATT 1994 must be assessed in each MS individually, rather than imposing a harmonized EU approach to all third countries. Russian gas is treated equally to any other gas in that MS, subject to its national legislation and the unbundling model it has transposed therein. There is no discrimination against Russian-origin gas and any alleged advantage that is granted to imported gas from another origin is extended immediately and unconditionally to gas imported from Russia.

47. To support this, the EU recalls that the unbundling requirement in the Directive is not *de facto* discriminatory, since it cannot be shown to affect the competitive opportunities of imported gas and of Russian gas specifically. Finally, Russia's claims regarding Norwegian LNG imports in Lithuania are not only unfounded, but were also not part of its panel request and must, therefore, fall beyond the Panel's terms of reference.

3.6. RUSSIA'S CLAIM OF VIOLATION OF ARTICLE I:1 OF THE GATT 1994 BECAUSE THE DIRECTIVE WOULD ACCORD NATURAL GAS OF OTHER THIRD COUNTRIES IMPORTED THROUGH LNG FACILITIES AND UPSTREAM PIPELINE NETWORKS AN ADVANTAGE NOT EXTENDED TO RUSSIAN GAS

48. Contrary to Russia's claim of an MFN obligation violation under the GATT with regard to LNG facilities and upstream pipeline networks, the EU argues the differences in the unbundling requirement and its application to LNG facilities is based on objective differences in their technical role and functions in the gas market. They allow the transportation and storage of gas over long distances where a pipeline is not or cannot be built. Additionally, the differences between LNG and gas have already been discussed above and are supplemented by differences in infrastructure, activities and operating entities.

49. The Directive sets out a comprehensive framework for LNG facilities, ensuring their independent operation and protecting non-discriminatory and transparent third party access. The unbundling requirement, however, does not apply to LNG facilities, unless the LNG operator is also a TSO, because, unlike transmission networks, LNG operators do not form natural monopolies but compete with one another. Furthermore, LNG facilities require access to transmission networks, while TSOs do not. However, LNG facilities are subject to the third party access requirement. Importantly, the Directive defines the LNG infrastructure, but *not* the goods that are processed or carried by that infrastructure.

50. The EU does not consider LNG and natural gas to be "like" products, meaning that no discrimination can exist between the two as a result of the Directive. Additionally, the Directive and its provisions on LNG facilities do not distinguish in any way on the basis of the origin of the gas and do not provide any competitive advantage to gas from a certain origin. The Directive requires third party access to all LNG facilities in the EU for all producers and suppliers of gas, irrespective of their country of origin, ensuring equal competition opportunities for all gas in the EU.

51. Moreover, the application of different rules to LNG operators and TSOs has not been shown to provide for competitive advantages to gas from a certain origin as opposed to gas from Russia. Gas that passes through an LNG facility has exactly the same competitive opportunities as gas transported through a transmission pipeline and Russian producers/suppliers are free to operate through LNG terminals in the EU. Furthermore, there are no limitations in EU law on the participation of Russia or Russian companies in LNG facilities on EU territory or on the use of LNG facilities in the EU for Russian gas.

52. Finally, no supplier active on the EU market, irrespective of the origin of the supplier, can own or control the entry points of the transmission network in use. It is subject to the unbundling and third party access requirements in the Directive, ensuring competition on the EU gas market.

53. Further, with regard to upstream pipelines, the EU stresses that transmission networks are different from upstream pipelines. Upstream pipelines are used to convey natural gas from an oil or gas production field to a processing plant or terminal or final coastal landing terminal, therefore not carrying processed gas. Since upstream pipelines are inherently linked to gas production fields, they are tailored to a specific production field and its capacity. There is no risk of competitive foreclosure. In the exceptional situation where such a risk would exist, the Directive prescribes measures to ensure access to upstream pipeline networks to natural gas undertakings and eligible consumers, namely the third party access requirement.

54. There is no unbundling requirement for upstream pipelines, since it is only necessary where several potentially competing parties participate, leading to risk of discriminatory access to the network. Since upstream pipelines are tailored to the gas field's production capacity and may be shared between producers, this risk only exists at the moment the gas enters the transmission network from an upstream pipeline. That is the point where the unbundling requirements apply.

55. Hence, the treatment of upstream pipelines by the Directive is based on objective elements and ensures equal competitive opportunities for gas from different origins. The rules on upstream pipelines apply without any distinction of the origin of the gas, nor the pipelines.

56. Finally, Russia has not demonstrated how the treatment of upstream pipelines would lead to a competitive advantage granted to gas from other countries as compared to Russian gas, provided third party access is guaranteed.

3.7. Russia's claim of violation of Article III:4 of the GATT 1994 because the Directive would accord Russian gas treatment less favourable than like domestic gas transported via upstream pipeline networks

57. As argued above, the EU contends that the Directive does not make a distinction based on the origin of gas and Russia cannot demonstrate that the application of the Directive to upstream pipeline networks from EU countries is more favourable than that accorded to Russian upstream networks and that it modifies the conditions of competition to the detriment of imported gas.

4. THIRD COUNTRY CERTIFICATION

58. Directive 2009/73/EC requires that the undertakings providing gas transmission services must be approved and designated as TSOs by the competent NRA. In turn, before an undertaking is designated as TSO, it must be certified in accordance with the requirements and procedures laid down in Articles 10 and 11 of the Directive. Article 10 applies to all TSOs. Article 11 lays down special requirements and procedures which apply when either the TSO or the transmission system owner is controlled by a person or persons from a third country or third countries. Specifically, Article 11(3) of the Directive provides that, in those cases, the certification is to be refused when it would put at risk the security of energy supply ("SoS") of the Member State concerned and of the Union.

59. Russia claims that the SoS certification requirement stipulated in Article 11(3) of the Directive, as transposed into the national laws of Croatia, Hungary and Lithuania, is inconsistent with Articles XVII, VI:1 and VI:5 GATS. Russia further claims that Article 11(3) of Directive 2009/73/EC is, by itself, inconsistent with Article II:1 GATS and Article III:4 GATT.

4.1. Article XVII of the GATS

60. As regards Russia's claims under Article XVII GATS, the European Union submits that the SoS certification requirement is justified under the exception contained in Article XIV(a) GATS with regard to measures that are necessary to maintain public order.

61. The policy objective pursued by the SoS certification requirement is to ensure the security of energy supply in the European Union. That objective is a "fundamental interest" of the EU society, as reflected in EU's law and policies. Foreign control of TSOs and transmission system owners may in some circumstances pose "genuine and sufficiently serious threats" to such fundamental interest. TSOs and other gas undertakings play a critical role in ensuring SoS within the European Union. They can undermine the EU's SoS strategy either by failing to comply with the legal obligations imposed upon them with a view to ensuring SoS; or by acting in a manner that, while not being contrary to EU law, is not in their own commercial interest, thereby undermining the effectiveness of the market based instruments on which the EU's SoS policies are based.

62. Unlike the authorities of the EU Member States, the governments of third countries may in some cases have important economic and/or political interests which conflict with the EU's own interest in ensuring SoS within the European Union. As a result, third-country governments may, under certain circumstances, have strong incentives to take measures that have the effect of undermining the EU's SoS policies. In addition, a third-country government has at its disposal adequate means to require or induce the TSOs or transmission systems owners which it controls, or which are controlled by persons of that country, to act in manners that have the effect of undermining the EU's SoS. Moreover, where the TSO or the transmission system owner is controlled by the government or persons of a third country, the threats to SoS are compounded by the fact that it may be more difficult for the EU authorities to enforce effectively the legal obligations imposed by EU law with a view to ensuring SoS.

63. Article 11 of Directive 2009/73 addresses the threats to SoS posed by the TSOs or the transmission system owners controlled by persons of a third country in a direct, effective and fully calibrated manner. It does so by putting in place a screening mechanism which allows the

competent authorities to detect and assess in advance the potential risks to SoS posed specifically by each foreign controlled TSO or transmission system owner on the basis of a careful examination of all the relevant facts. Where warranted on the basis of that case-by-case assessment, the competent authorities may deny access to the transmission market for those operators that would put at risk the SoS or make it conditional upon compliance with appropriate safeguards, thereby preventing the risks to SoS from materialising. This preventive approach ensures a high level of protection against the risks to SoS.

64. The challenged measure is, nevertheless, much less restrictive than other possible alternatives, such as a complete ban on third-country TSOs. The competent authorities must take into account all specific facts and circumstances of each case, including any agreements concluded between the European Union or its Member States and the third country concerned which address the issues of SoS. This case-by-case approach allows the competent authorities to limit the trade-restrictive effects as much as possible, by refusing certification only in those specific instances where it has been positively established that a TSO poses a genuine risk to SoS. In practice, the challenged measure has been applied so far in a manner that has caused only minimal trade restrictions, if any at all. The competent authorities have received three applications for certification under Article 11 of Directive 2009/73/EC, including one where the owner of the transmission system was jointly owned and controlled by a Russian entity. None of the three applications has been refused on grounds of SoS and all the three TSOs concerned operate currently on the EU market.

65. The SoS certification does not apply in respect of the certification of TSOs controlled by EU persons. But this difference in treatment is fully consistent with the objective pursued by the SoS certification requirement. Indeed, the SoS certification requirement does not apply to TSOs controlled by EU persons because those TSOs do not pose comparable threats to the EU's SoS. Furthermore, the SoS certification requirement does not give rise to any discrimination between services and service suppliers of third countries, let alone to "unjustifiable or disguised discrimination". The SoS certification requirement applies to all TSOs controlled by persons of any third country, without any distinction being made among them, either directly or indirectly, on the basis of their nationality.

66. Russia also claims that, besides the SoS certification requirement, some allegedly additional requirements included in the national laws of Hungary and Lithuania transposing the Directive 2009/73/EC are also inconsistent with Article XVII GATS. However, these claims are either outside the Panel's terms of reference and/or unfounded.

4.2. ARTICLE II:1 OF THE GATS

67. Russia claims further that Article 11 of Directive 2009/73/EC is inconsistent *de jure* with Article II:1 GATS. According to Russia, it "conditions a favourable security of supply assessment at least in part on the existence of [a] pre-existing agreement" concluded between the European Union and/or the EU Member State concerned and the third country of origin of the certification applicant which addresses the issues of security of supply.

68. This claim was not raised in the Panel request and is manifestly outside the Panel's terms of reference. In any event, this claim is unfounded in substance. The SoS requirement applies equally to all transmission system owners or TSOs which are controlled by a person or persons from any third country or third countries, regardless of the third country of origin. Contrary to Russia's allegations, the certification under Article 11 of Directive 2009/73/EC is not conditional, even "at least in part", upon the existence of an agreement addressing the issues of security of supply. The existence of such an agreement is just one of the facts to be "taken into account" by the NRAs and the Commission. It is neither necessary nor dispositive in itself. Furthermore, there is no basis in Article 11 of the Directive for Russia's contention that only agreements such as the EEAA or the Energy Community Treaty are to be "taken into account".

69. Russia also claims, in the alternative, that the European Union has acted inconsistently with Article II:1 GATS because it has implemented the SoS certification requirement in a manner that, *de facto*, accords less favourable treatment to Gazprom, a Russian service supplier, than to certain TSOs controlled by persons of other countries. These claims are partly outside the Panel's terms of reference and, in any event, factually incorrect.

4.3. ARTICLE III:4 OF THE GATT 1994

70. Russia further claims that the "third-country certification measure" is inconsistent with Article III:4 GATT because it has, "on its face", a detrimental impact on the competitive opportunities of gas imported from other WTO Members vis-à-vis domestically produced EU gas. This claim is manifestly outside the Panel's terms of reference. The Panel request did not include any claim under Article III:4 GATT with respect to the "third country certification measure". In any event, Article 11 of Directive 2009/73/EC applies equally to all TSOs controlled by persons of third countries, irrespective of whether the infrastructure operated by each of them is used to transmit domestic and/or imported gas. Russia has not explained, let alone demonstrated, how the challenged measure results in different and less favourable treatment being accorded to imported gas. In practice the TSOs controlled by EU persons very often operate infrastructures that are used exclusively or mainly to transmit imported gas, including Russian gas. Conversely, TSOs controlled by persons of third countries operate infrastructures used in part to transmit EU gas.

4.4. ARTICLE VI:1 OF THE GATS

71. Russia claims that Croatia, Hungary and Lithuania act inconsistently with Article VI:1 GATS because they do not "administer" their respective national laws transposing Article 11 of Directive 2009/73/EC in a "reasonable, objective and impartial manner". None of the three EU Member States concerned has taken yet any measure in order to "administer" its national laws transposing Article 11 of the Directive. There is no basis whatsoever, therefore, for Russia's claim that those three EU Member States' "administration" of their national laws is not reasonable, objective or impartial. In reality, the claim submitted by Russia is not addressed against the "administration" of measures of general application within the scope of Article VI:1. Instead, it is addressed against the "substantive content" of those measures and, more precisely, against the SoS requirement. That requirement, however, is not open to challenge "as such" under Article VI:1 GATS.

72. In any event, the European Union takes issue with Russia's contention that the SoS requirement is insufficiently precise, let alone so imprecise as to "lead necessarily" to an impermissible "administration" of that requirement. While Article 11 of Directive 2009/73/EC does not define explicitly the term "security of supply", the European Union has pointed out a number of other elements that provide sufficient and adequate guidance for interpreting and applying that notion.

4.5. ARTICLE VI:5 OF THE GATS

73. Russia further claims that the national laws of Croatia, Hungary and Lithuania transposing Article 11 of Directive 2009/73/EC are inconsistent with Article VI:5 GATS.

74. Article 11 of Directive 2009/73/EC and the transposing measures enacted by Croatia, Hungary and Lithuania are fully compliant with each of the three criteria listed in letters (a), (b) and (c) of Article VI:4. Therefore, those measures are consistent with Article VI:5, without it being necessary to examine whether those measures could have been reasonably expected by Russia at the time the commitments were made.

75. First, contrary to Russia's contentions, the mere fact that the measures at issue do not define the notion of SoS does not mean, as just explained, that the SoS certification requirement is not an "objective" and "transparent" criterion within the meaning of Article VI:4 (a) GATS.

76. Second, Russia's allegations under letter (b) of Article VI:4 are based on a fundamental misunderstanding of the scope of that provision. The domestic regulation of services may pursue many legitimate policy objectives in addition to ensuring the "quality" of the services. Letter (b) of Article VI:4 applies only to the extent that a measure is aimed at ensuring the "quality" of the service. It does not apply where, as in the present case, a measure (or a requirement of a measure) pursues a different legitimate policy objective.

77. Third, letter (c) of Article VI:4 applies to "licensing *procedures*", rather than to "licensing requirements". Russia has not alleged, let alone proven, that the licensing *procedures* for the submission and processing of certification applications are in themselves restrictive. Instead, Russia limits itself to argue that the underlying substantive licensing requirement (i.e. the

requirement that the TSO does not put at risk SoS) is restrictive. This claim, therefore, falls plainly outside the scope of letter (c) of Article VI:4.

5. INFRASTRUCTURE EXEMPTIONS

78. Article 36 of the Directive allows for certain major new gas infrastructures to be exempted for a defined period of time from some of the Directive obligations, including unbundling, third party-access and regulated tariff requirements, provided that five cumulative conditions are met. Of all measures challenged, this is the only one providing an exemption from the unbundling, third-party access and regulated tariff requirements. The procedure for administering that measure through the granting of individual exemption decisions is laid down in the same article. The purpose of the exemptions is to incentivise investment in major new infrastructure, while striking a balance with the objective of enhancing competition in the relevant markets. Each exemption must be proportionate and limited to what is strictly necessary to realize the infrastructure project. The assessment of exemption requests by NRAs takes place on a case-by-case basis.

5.1. THE ALLEGED EXEMPTION FOR UPSTREAM PIPELINE NETWORKS

79. As explained above, upstream pipeline networks are not exempted from the requirements of the Directive, but these requirements are tailored to them, due to the specificities of upstream pipeline networks. Therefore, the Directive does not provide for a blanket exemption from its rules to upstream pipeline networks.

5.2. RUSSIA'S CLAIM UNDER ARTICLE X:3(A) OF THE GATT 1994

80. The EU does not agree that it failed to administer the infrastructure exemption measure in a uniform, impartial and reasonable manner, therefore not complying with Article X:3(a) GATT 1994. Article X:1 GATT 1994 applies to measures of general application that affect the sale, distribution and transportation of goods. However, exemptions are granted only upon request and are not necessary for building or operating an infrastructure or the carrying out any of those activities. An individual exemption is not an act of general application. Furthermore, it is unclear how the application of the contested EU measure affects the sale, distribution or transportation of natural gas, since it creates an incentive for new infrastructure projects. Such effects are not of the kind that the wording of Article X:1 GATT 1994 is intended to apprehend. Therefore, Article X:1 GATT 1994 is not applicable to the facts of this dispute.

81. If the Panel would believe that Article 36 of the Directive falls within the scope of Article X:1 GATT 1994, the EU argues that Russia's Article X:3(a) violation claim is unfounded. Russia has not provided appropriate evidence to support its claim. Exemptions under Article 36 are granted on a case-by-case basis, provided that five cumulative conditions are met. Variations and differences among individual exemption decisions are due to the specific characteristics of each infrastructure project and of the markets concerned. Case-by-case decision-making by national authorities entails complex economic and legal assessments and is not a mechanical operation. Nonetheless, the requirement of "uniformity" in Article X:3(a) is fulfilled by the existence of a single set of criteria, detailed procedural rules and a review by the Commission designed to ensure consistency at EU-level. Judicial review of decisions taken on exemption requests is also available in accordance with general principles.

82. Importantly, Russia's attempt to have the individual exemption decision for OPAL reviewed under Article X:3(a) GATT 1994 must fail, since that decision is not an act of general application falling within the scope of that provision . The "administration" of the measure in Article 36 of the Directive should be assessed on the basis of the universe of all relevant individual decisions. Furthermore, Russia's assertion that the most restrictive conditions were those imposed on the OPAL exemption is not supported by the facts.

5.3. RUSSIA'S CLAIM UNDER ARTICLE I:1 OF THE GATT 1994

83. Having regard to the requirements of Article I:1 GATT 1994, the EU argues that the infrastructure exemption measure does not fall within its scope, since the measure does not govern the "internal sale, offering for sale, purchase, transportation, distribution or use" of natural gas within the EU, nor does it restrict the competitive opportunities for gas of any origin. Any such effects are too remote, difficult to assess and have not been demonstrated by Russia. In any case, exemptions are limited to what is necessary and can only be granted if competition is not hindered . Furthermore, gas infrastructure expansion is aimed at enhancing competition.

84. The infrastructure exemption measure does not grant any advantage to products with a specific origin, neither *de jure,* nor *de facto.* Not only is gas origin not considered when deciding to exempt infrastructure projects, it is often not known in advance either. As to any difference in treatment in individual exemption decisions, they do not seem to result in a disadvantage to Russian gas, given the planned uses of the infrastructure. Furthermore, any differences are justified by the different characteristics of the investment projects. Finally, due to the lack of "likeness" between LNG and natural gas, any supposed advantage accorded to LNG through exemption decisions would not discriminate against natural gas. In any event, the same detailed and objective conditions of Article 36 of the Directive apply to LNG facilities. As stated above, how this would result in reduced competitive opportunities for Russian gas is unclear.

5.4. RUSSIA'S CLAIM UNDER ARTICLE II:1 OF THE GATS

85. The EU does not dispute that the infrastructure exemption measure falls within the scope of the GATS, nor that there is likeness between Russian and other third-country suppliers of pipeline transport services and between the services they supply. However, the individual exemption decisions regarding NEL, OPAL, Gazelle, TAP and NABUCCO pipeline investment projects have not resulted in less favourable treatment of Russian service suppliers and services less, since any differences were justified by the factual circumstances of each investment project and comply with the criteria laid down in Article 36 of the Directive. Furthermore, any comparison must take place with due regard to all individual exemption decisions. The identity of the service supplier using the infrastructure is considered in view of assessing the competitive conditions on the relevant gas markets, its origin has no bearing on the analysis.

86. Due to the lack of likeness of LNG services and natural gas transport services, any comparison with them is without merit. Furthermore, LNG exemption decisions comply with the objective criteria of Article 36 of the Directive and do not consider the origin of the service supplier in question. Therefore, the infrastructure exemption measure does not discriminate against Russian pipeline transport services and service suppliers.

5.5. RUSSIA'S CLAIM UNDER ARTICLE I:1 OF THE GATT IN RESPECT OF UPSTREAM PIPELINE NETWORKS

87. As explained above, upstream pipeline networks do not benefit from a blanket exemption under the Directive, nor do they distinguish based on the origin of the gas that is transported over such pipelines. Therefore, no advantage is granted to any third country's gas that is not immediately and unconditionally extended to like Russian gas sold on the EU market. There is no violation of Article I:1 GATT.

5.6. RUSSIA'S CLAIM UNDER ARTICLE II:1 OF THE GATS IN RESPECT OF UPSTREAM PIPELINE NETWORKS

88. For analogous reasons as those above and including the argument that the Directive does not distinguish upstream pipeline networks on the basis of the origin of a pipeline transport service provider, no advantage is granted to any third country's service providers that is not available to Russian ones as well. There is no violation of Article II:1 GATS.

5.7. RUSSIA'S CLAIM UNDER ARTICLE XI:1 OF THE GATT 1994

89. Although Russia claims that the two conditions attached to the OPAL exemption decision constitute *de facto* quantitative restrictions, their wording clearly shows that they do not impose any restrictions on the importation of Russian natural gas. The capacity cap prescribed applies only to services supplied by undertakings dominant on the relevant Czech markets, and does not affect

use of the OPAL pipeline by Russian gas, including gas produced by Gazprom, provided that it is not transported into the Czech territory by undertakings already holding a dominant position in its gas markets. The design, architecture and structure of the conditions attached to the OPAL exemption decision ensure that the exemption is not detrimental to competition or the effective functioning of the internal market of natural gas. The conditions are clear, and provide legal certainty for importers of Russian gas, allowing other undertakings to access and use the OPAL pipeline. For these reasons, Russia's claim is unfounded.

6. PROJECTS OF COMMON INTEREST

90. PCIs are Trans-European energy infrastructure projects which are considered necessary for achieving the European Union's energy policy objectives. Regulation 347/2013 (the "TEN – E Regulation") lays down a procedure for selecting the PCIs and provides for certain measures in order to promote their timely development and interoperability. Russia claims that the TEN – E Regulation and its implementing measures are inconsistent with the EU's obligations under Article II:1 of the GATS and under Articles III:4 and I:1 of the GATT because what Russia calls "Russian projects" have been deliberately excluded from designation as PCIs.

6.1. Article II:1 of the GATS

91. Russia's claims under Article II:1 GATS are manifestly without merit. Article II:1 GATS is not concerned with discrimination between infrastructures. Instead, it concerns discrimination between service suppliers and services of different Members. The TEN –E Regulation does not afford Russian services or service suppliers less favourable treatment. There is nothing in the TEN – E Regulation which excludes, either directly or indirectly, the projects promoted by Russian persons or entities from being designated as a PCI because of the Russian nationality of the promoter.

92. Russia's claim appears to be premised on the unstated and unproven assumption that Russian suppliers of services would have, merely by reason of their nationality, an inherent competitive advantage vis-a-vis the suppliers of the European Union or other third countries with respect to the supply of services for gas of Russian origin. But there is no basis for making such an assumption. As shown by the European Union, in practice, the TSOs controlled by EU persons very often operate infrastructures that are used exclusively or mainly for imported gas, including Russian gas. Conversely, TSOs controlled by Russian persons operate infrastructure used, at least in part, for gas originating in the European Union or in third countries.

93. In any event, as discussed under the next claims, the TEN – E Regulation sets out objective criteria and does not exclude, either *de jure* or *de facto*, the designation as PCIs of projects concerning infrastructure used for gas of Russian origin.

6.2. Articles III:4 and I:1 of the GATT 1994

94. Russia further claims that the TEN – E measure violates Articles III:4 and I:1 GATT According to Russia, this violation would stem from the fact that what Russia calls "Russian projects" are excluded *de jure,* or at least *de facto,* from designation as PCIs.

95. Russia's claim is unfounded because, for the reasons explained in the EU's first written submission, the TEN – E Regulation sets out objective criteria and does not exclude either *de jure* or *de facto* what Russia calls "Russian projects". The selected PCIs can be used for gas from all sources and in practice many of them will be used also for Russian gas, sometimes to a large extent.

96. Russia does not specify anywhere what it regards as a "Russian project". Russia appears to consider, nevertheless, that only those projects aimed specifically at building pipelines for carrying Russian gas into the EU territory can be considered as "Russian projects". This meaning is unduly restrictive and misleading. It disregards that, to repeat once again, all PCIs can be used for gas of all sources, including Russian gas, and that, in practice many PCIs are likely to be used for Russian gas, sometimes to a large extent. In any event, even "Russian projects" within the narrow meaning given by Russia to those terms could fall in principle within the scope of some of the priority gas corridors defined in Annex I of the TEN – E Regulation.

97. Contrary also to Russia's contentions, in order to be selected as a PCI, a project does not necessarily have to contribute to the "diversification of supply sources". This is but one of the sub-criteria for the overall assessment of candidate projects. In any event, the use of that sub-criterion is not inconsistent with Articles III:4 or I:1 GATT. Those two provisions do not guarantee existing market shares. Instead, they guarantee equality of opportunities to compete. Where existing market conditions do not afford such equality, a Member is permitted, and indeed required, to take measures in order to ensure such equality. The TEN – E Regulation seeks, *inter alia*, to improve the access to all the potential sources of supply of gas around the European Union, as well as the interconnections among the traditionally isolated national markets of the EU Member States with a view to ensuring SoS and promoting competition. By pursuing, among others, this priority the TEN –E Regulation does not distort market opportunities in favour of domestic gas (or of gas from other third countries) and to the detriment of Russian gas. Rather, it contributes to achieve greater equality of competitive opportunities for gas from all potential sources, including Russia.

98. Russia claims in the alternative that the TEN – E Regulation is applied *de facto* by the EU authorities in a discriminatory manner because, in practice, no "Russian project" has been included in the first or in the second Union list of PCIs. Again, however, this allegation is premised on Russia's very narrow understanding of what can be considered as a "Russian project". Many PCIs included in the first and the second Union lists are located in EU Member States where Russia is a major supplier and where the existing transmission and storage infrastructure is already being used extensively for Russian gas. By expanding and upgrading the infrastructure of those EU Member States, those PCIs will also benefit Russian gas. Moreover, by improving the interconnectivity of the various national systems, some PCIs will accord to Russian gas greater access to other EU Member States.

ANNEX B-4

SECOND PART OF THE EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. COMMON ISSUES

1.1 RUSSIA'S "RELEVANT MARKET" ARGUMENT

1. 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".

2. 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. The relevant comparator for assessing whether a measure is discriminatory for the purposes of Articles II:1 or XVII GATS must be determined having regard to the regulatory jurisdiction of the authority from which the measure emanates. 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.

3. Russia claims that the EU has no support for its "regulatory jurisdiction" theory. 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: 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.

4. The EU stresses the systemic importance of this point: if the mere fact that an EU measure leaves discretion to the EU Member States on how to achieve a particular legitimate objective – and as a consequence there is some diversity in the requirements that the Member States impose – would mean that the EU measure is the cause of the different treatment that services or suppliers, or goods, receive in each of the Member States, the WTO's non-discrimination obligations would prevent the existence of different measures in different parts of a WTO Member's territory. Such an interpretation would be manifestly absurd and be a direct attack against the constitutional structure of the EU, and of WTO Members with a decentralised or federal governance system. Central governments would not be permitted to provide different options for decentralised entities to achieve a particular legitimate objective.

5. 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. The GATT Panel Reports on *Canada – Provincial Liquor Boards (US)* and *United States – Malt Beverages* 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.

6. Russia takes 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. Yet, allowing such discretion does not mean discrimination. It was for Russia to show that discretion is

necessarily exercised in a discriminatory manner. Russia has failed to do so. The Directive's unbundling provisions 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 a competitive advantage (as Russia wrongly alleges), the EU has shown that there are Member States where Gazprom had important interests and where the ITO and ISO models are available as well. Russian pipeline transport service suppliers have indeed made use of the ITO model and EU suppliers and other third country pipeline transport service suppliers have been subject to ownership unbundling. Russia cannot establish either that gas from Russia is treated less favourably than gas from other origins.

7. 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 cited GATT 1994 cases apply Article XXIV:12 of the GATT. 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-federal entities. The same applies to the EU's confirmation that it would take responsibility in the WTO to defend Member States' actions: 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".

8. Russia desperately seeks to establish a "conspiracy" 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. The EU recalls, first, that several panels have stressed that newspaper articles have questionable, if any, evidentiary value in WTO proceedings. 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". Rather, what matters is the "design, structure, and *expected* operation" 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.

1.2 DEFINITION OF THE SERVICES AT ISSUE

9. 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. 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.

10. 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. Services that may somehow be associated with the gas industry are not covered by "pipeline transport services" either.

11. The basis for interpreting "pipeline transport services" should not be the business model used by one specific Russian company, i.e. Gazprom. Rather, the interpretation should base itself on the ordinary meaning of the commitments, and the objective characteristics of the service at stake, taking into account the CPC classifications that the UN has drafted, the WTO's scheduling guidelines and services sectoral classification list (Document W/120) as well as the schedules of the WTO Members at stake. Such an interpretation should not render the meaning of the distinct and mutually exclusive services sectors and sub-sectors in the CPC meaningless.

12. Indeed, on this basis it is clear that there is no such thing as a "supply service" in the GATS, contrary to what Russia suggests. Services are supplied and the question is whether a WTO Member has made a commitment for each specific and distinct service at stake. There exist

distinct activities relating to energy, including pipeline transport services, wholesale services, retail services and services auxiliary to transport, as well as the distinct activity of production and sale of the good: gas.

13. 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". It 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.

14. 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. 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".

2. CLAIMS RELATING TO UNBUNDLING

2.1 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

15. 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.

16. The EU has summarised its objections against Russia's overly broad interpretation of the market access obligation in sub-paragraphs (e), (a) and (f) of Article XVI:2, as well as its defence under Article XIV, already in its first executive summary.

17. The EU stresses that the ITO and ISO models are not less trade restrictive alternative measures compared to ownership unbundling. The ITO and ISO models are certainly not alternatives to OU in Croatia or Hungary, where they are also implemented. With regard to Croatia, Russia suggests that Croatia "could allow competing private entities to own and operate the transmission system". Yet, Russia hasn't been able to point to any element in Croatia's laws that would prevent other pipeline transport services providers to own a transmission system. With regard to Hungary, Russia only states that "the government could have taken other measures", without, in fact, specifying what such "other measures" would be. Hence, with regard to Croatia and Hungary Russia has not even begun to meet its burden to provide any alternative measures.

18. Also with regard to Lithuania, the ITO is not a less trade restrictive alternative. The EU has explained that the "restrictiveness" that Russia complains about is the inability to control gas producing/selling competitors' access to the transmission network. The EU has also demonstrated that all three models prohibit this, and thus that one is not less trade-restrictive than another. Moreover, when enforcement and compliance costs are considered, the OU model is the least burdensome model because the lower degree of structural separation that exists under the ITO or ISO models is compensated with behavioural requirements and intense supervision. Therefore, the OU model is the "most effective tool" to promote investments in infrastructure in a non-discriminatory way, fair access to the network for new entrants and transparency in the market. If a Member State considers that it wants to avoid the high enforcement and compliance costs for the alternative models, and therefore implements the OU model only since that is what the Member State considers to be the only reasonably available possibility, that is its sovereign right and does not run counter the Directive. Hence, when the trade-restrictiveness of the models and the Member's assessment of the enforcement costs are taken into account, the other models are not reasonably available less trade restrictive alternatives to OU.

2.2 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

19. There is no reason why third country public bodies could not make use of Article 9(6). The EU referred to the Merger Jurisdictional Notice, demonstrating that the term "public body" covers also third countries, something that Russia had disputed.

20. Indeed, when calculating the turnover of a State-owned company (in order to determine whether the EU Commission has jurisdiction to assess a planned merger), the turnover of other undertakings that are owned by a Member State or another public body are not taken into account, unless several State-owned companies are under the same independent centre of commercial decision-making. As explained by the EU with reference to several merger control decisions, this approach has also been applied to companies owned by third countries.

21. This demonstrates that the term "public body" in the phrase "Member States (or other public bodies)" – which is used in the Merger Jurisdictional Notice as well as in the Gas Directive – covers third country governments. This proves that Article 9(6) of the Directive, as implemented in the Member States' laws, is not discriminatory.

22. 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 and the obligation to separate accounts prevent States owning TSOs through public bodies to "receive … the total amount of revenue and other directly accruing benefits". Moreover, the obligation to be truly separate prohibits one public body in a Member State to "dictate business decisions" 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.

2.3 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)

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

24. *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.

25. 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 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.

26. 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. 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.

27. *Second*, the EU 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.

28. *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.

29. According to the Appellate Body, when determining whether the measure at issue modifies the conditions of competition, a panel must examine the "design, structure, and *expected*

operation" of that measure. Hence, the analysis of whether *de facto* discrimination exists must not be static, but focus on whether, under the applicable law, the competitive opportunities in the market are such that they are to the disadvantage of the group of service suppliers from a certain origin. The Appellate Body in *EC – Seal Products* has indeed stressed the focus on the expected operation in order to avoid a conclusion that a measure that is pro-competitive and challenges the established monopoly's position in a market by enabling competition in the market and avoiding abuses of a monopoly would be found to violate the non-discrimination provisions in WTO law. A panel should take a dynamic and forward-looking view of the market, considering what the competitive opportunities in the gas market are for service suppliers. Such view can only confirm that the opportunities are the same for pipeline transport service suppliers in each Member State and that there is nothing in the Directive, nor in the Member States' individual measures implementing the unbundling requirement that is biased against service suppliers, or goods, of any particular origin.

30. The EU provided extensive evidence 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 – have made use of this model and gas transport service suppliers with substantial Russian shareholdings have benefitted from derogations from the unbundling rules granted to Latvia and Finland. The EU provided tables with an overview of the unbundling models and the TSOs in all Member States, demonstrating that OU is not predominantly imposed on the group of Russian service suppliers.

31. 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 third party access ("TPA") principle and give access to the networks users under non-discriminatory and transparent terms. Moreover, undisputed facts directly contradict Russia's claims. Russian imports into the EU increased since 2009. Further, the EU provided evidence that in Member States that have transposed OU only, Russian imports increased with 30% from 2009 to 2014 and Russia's share compared to total gas imports increased as well.

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

32. 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. Moreover, Russia cannot demonstrate that the LNG measure, which applies to LNG service providers, alters the competitive position of gas imported from Russia. Russia's reliance on the investigation against Engie 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.

2.5 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)

33. 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". 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 and there is no reason why Russian gas would necessarily be excluded from being transported via such pipeline.

34. 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. 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. The Member States are obliged to implement Article 34 in their domestic laws and the European Union has provided evidence that Member States have implemented this requirement as well as examples that this obligation has been applied in practice.

3. CLAIMS RELATING TO THIRD COUNTRY CERTIFICATION

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

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

35. Russia argues that third-country controlled TSOs pose no "real threat" because the EU legislation in place imposes upon all TSOs certain legal obligations in order to ensure 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.

36. Russia further contests that foreign governments may have incentives to take measures that have the effect of undermining the EU's SoS policies. The European Union, however, has shown why this is more than "mere speculation". First, Russia does not contest the obvious fact that, in principle, each Member will give priority to its own interests, including its SoS interests. Second, from this it can be inferred that whenever there is a conflict between the EU's SoS and the interests of another Member, including that Member's own SoS, the government of that other Member will have an incentive to take actions that may undermine the EU's SoS. Indeed, the European Union has provided examples of this, such as the interruption of gas supplies to Ukraine in 2006 and 2009. Third, the European Union has described several scenarios where the interests of other Members will come into conflict with the European Union's interest in ensuring its own SoS of gas and where those other Members will have a clear incentive to take measures that undermine the EU's SoS policies. Such measures may include requirements or inducements to the TSOs controlled by them or by their nationals to disregard legal obligations imposed by EU law with a view to ensuring SoS or to act in a manner which is the foreign government's interest, but not in the TSO's own commercial interest. The various scenarios described by the European Union are hypothetical but, nonetheless, realistic and credible.

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

37. 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. As explained above, in making this argument Russia fails to recognise the source of the threats which the measure seeks to address.

38. Russia has proposed two alternative measures. The first proposed alternative (what Russia calls a "blocking statute") would manifestly fail to address the threats to SoS identified by the European Union. Russia's second proposed alternative is that the European Union applies "the same set of requirements to all applicants". Russia has specified that its preference would be that the European Union did not apply the SoS certification requirement to any applicant. Bu 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. As a further sub-alternative, Russia suggests that the European Union could apply the contested measure to all the applicants. 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.

3.2 ARTICLE II:1 OF THE GATS

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

39. This claim is addressed against the Gas Directive as such and, more specifically, against the SoS certification requirement stipulated in Article 11 of the Gas Directive. The EU Member States have no discretion in order to decide whether or not to apply that requirement. In view of that, the difference in treatment invoked by Russia falls outside the scope of Article II:1 GATS. In the alternative, such difference in treatment would in any event be justified by Article V GATS. In the further alternative, the European Union submits that the difference in treatment invoked by Russia would be justified under Article XIV(a) GATS for the same reasons as the difference in treatment invoked by Russia in support of its claim with regard to the third country certification measure under Article XVII GATS.

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

40. 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 Members in respect of the SoS certification requirement in Article 11 of the Gas Directive. The European Union has shown that Gaz-System is a Polish service supplier. In any event, the European Union has shown that Gaz-System was not accorded less favourable treatment.

4. CLAIMS RELATING TO INFRASTRUCTURE EXEMPTIONS

4.1 RUSSIA'S CLAIM UNDER ARTICLE X:3(A) OF THE GATT 1994 (CLAIM 21)

41. Russia's claim under Article X:3(a) of the GATT is in part outside the terms of reference of the Panel. In addition, the requirements of Article X:1 are not met. Russia has not explained, let alone proven, the effects on the sale, distribution and transportation of natural gas that it ascribes to the exemption for new major infrastructure. Moreover, Russia uses Article X:3(a) to challenge the OPAL exemption decision, which is an individual decision.

42. As regards the substance of the claim, Russia did not demonstrate that the European Union has failed to administer the infrastructure exemption measure in a uniform, impartial or reasonable manner. The OPAL decision is perfectly in line with the criteria set out in Article 22(1) of Directive 2003/55/EC, which was applicable at the time. The conditions attached to the OPAL exemption are also perfectly in line with previous Commission practice, in particular the exemption decisions concerning various sections of the Nabucco pipeline. They are furthermore in line with and very similar to the conditions subsequently attached to the TAP exemption. The conditions attached to the OPAL decision are by no means exceptional. On the contrary, capacity caps imposed on undertakings holding a dominant position on the relevant gas markets are rather standard conditions, as specified in the Commission's Explanatory Note.

43. Russia singles out two decisions exempting LNG facilities where the Commission found no need to impose similar capacity caps. It deliberately omits that, for example in the case of the Dutch LNG terminal Gate, such conditions were indeed imposed. Russia compares the situation of Gazprom to that of exporters of Azeri gas or exporters of LNG without taking its analysis any further. However, as is made clear in Article 36(1)(a) and (e) of Directive 2009/73/EC, the investment must enhance competition in gas supply and the exemption must not be detrimental to competition. In the light of those requirements, the position of each exporter on relevant markets within the EU must be taken into consideration before granting an exemption or defining appropriate conditions for the use of infrastructure promoted by those exporters. The origin of the natural gas or LNG imported in the EU through the new infrastructure is, however, irrelevant for that purpose.

44. Nothing in the European Union's administration of the infrastructure exemption measure seeks to reduce imports of Russian gas or the supply of Russian pipeline transport services. The first criterion listed in Article 36 of the EU Directive for granting an exemption is that the investment in new major gas infrastructure must enhance competition in gas supply and enhance security of supply. The objectives of increasing competition and security of supply in the EU gas

markets are quite different from the objective identified by Russia in its attempt to assemble a claim of violation of Article X:3(a) of the GATT 1994. That attempt must fail.

4.2 RUSSIA'S CLAIM UNDER ARTICLE I:1 OF THE GATT 1994 (CLAIM 22)

45. Russia has failed to demonstrate how a measure encouraging the construction of new infrastructure, which is designed to create new opportunities for gas of all sources to compete on the EU markets, restricts the competitive opportunities for Russian gas as compared to foreign gas of other sources.

46. The alleged different treatment of the NEL and Gazelle pipelines does not restrict the opportunities for Russian gas to compete on the EU markets. There are objective reasons for considering TAP an "interconnector" as defined in the EU Directive and for concluding that NEL did not meet that definition. Moreover, TAP is not reserved for exclusive use by Azeri gas, the conditions imposed guarantee that gas from other sources is provided access to TAP.

47. The European Union reiterates that the exemptions granted to Gazelle and TAP do not accord to gas from other Members an advantage that is not immediately and unconditionally extended to Russian gas transported via NEL. Russia's claim under Article I:1 of the GATT must therefore be rejected.

4.3 RUSSIA'S CLAIM UNDER ARTICLE I:1 OF THE GATT 1994 (CLAIM 23)

48. A careful comparison between the conditions imposed on the OPAL exemption and those imposed on other exemption decisions, namely those on Gazelle, TAP, Nabucco and Poseidon, account taken of different objective circumstances, do not show a violation of Article I:I of the GATT. Russia's claim must fail.

4.4 RUSSIA'S CLAIM UNDER ARTICLE I:1 OF THE GATT 1994 (CLAIM 24)

49. For the purpose of obtaining an exemption, LNG facilities are not treated differently from other new major gas infrastructure. The origin of the LNG using a particular facility plays no role in the EU Directive or in individual exemption decisions.

50. Russia has not demonstrated how the exemption granted to the Dragon and South Hook LNG facilities have conferred an advantage to "like" gas of certain origins that were not extended immediately and unconditionally to Russian natural gas flown through NEL and OPAL. Its claim must be rejected.

4.5 RUSSIA'S CLAIM UNDER ARTICLE II:1 OF THE GATS (CLAIM 25)

51. Neither Article 36 of Directive 2009/73/EC, nor Article 22 of Directive 2003/55/EC before it, draw any distinctions based on the origin of the supplier of pipeline transport services.

52. The claim of *de facto* discrimination is not supported by the facts. The terms of each individual exemption decision that was adopted under the EU Directive is justified by the specificities of each infrastructure project and of the gas markets concerned in each case. Because the Directive requires the competent national authorities and the Commission to examine the structure and conditions of competition on the relevant gas markets prior to granting an exemption, they must take account of the identity of the undertaking supplying pipeline transport services to the extent necessary for determining the position they hold on those markets. However, the origin of the undertaking supplying pipeline transport services has no bearing whatsoever on the analysis that must be conducted for granting an exemption and for deciding to impose any conditions.

53. Russia failed to prove that the infrastructure exemption measure discriminates against Russian pipeline transport services supplied via NEL and OPAL and against Russian service suppliers.

4.6 Russia's claim under Article I:1 of the GATT 1994 in respect of upstream pipeline networks (Claim 26)

54. The European Union contests the basis for this claim, which is Russia's erroneous assertion that the Directive provides an "as such" exemption to upstream pipeline networks.

55. The rules in respect of upstream pipeline networks apply regardless of the origin of the gas. Not all gas flown through upstream pipeline networks owned or operated by Norwegian gas suppliers is necessarily gas of Norwegian origin. Third parties could access those upstream pipelines pursuant to Article 34 of Directive 2009/73/EC.

56. The specific rules in the EU Directive applying to upstream pipeline networks do not grant to natural gas of other Members, imported through upstream pipeline networks, an advantage not extended immediately and unconditionally to like Russian gas sold on the EU market through NEL and OPAL. 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. Its claim is unfounded and should be rejected.

4.7 Russia's claim under Article XI:1 of the GATT 1994 (Claim 28)

57. Russia argues that the capacity cap and gas release conditions imposed by the Commission on OPAL constitute quantitative restrictions in violation of Article XI:1 of the GATT 1994

58. The European Union stresses that bookings of OPAL capacities by undertakings unrelated to Gazprom are not restricted in any way by the conditions attached by the Commission to the OPAL exemption decision. Unrelated undertakings may perfectly use OPAL to transport Russian gas produced by Gazprom, including gas intended for resale on the Czech market. In fact, as is clear from its wording, the contested condition imposing a capacity cap only restricts the supply of pipeline transmission services by those undertakings found to be dominant on the Czech gas markets. It does not restrict the quantities or volume of gas that may be imported from Russia.

59. The capacity cap seeks only to prevent Gazprom and RWE Transgas from entrenching their dominant position on the Czech gas markets through their activities as suppliers of pipeline transmission services on OPAL. The origin of the gas is irrelevant for the purpose of applying the 50% cap on the booking of OPAL capacities by undertakings dominant on the Czech gas markets. Nothing in the exemption decision prevents Gazprom from allowing unrelated undertakings to book the remaining OPAL capacities, thereby increasing the overall volumes of Russian natural gas imported into the EU via Nordstream and OPAL

60. By arguing that the conditions attached to the OPAL exemption constitute quantitative restrictions prohibited by Article XI:1 of the GATT 1994, Russia is implicitly arguing that the absence of an exemption from generally applicable obligations would constitute a quantitative restriction on imports as well. That conclusion is surely unwarranted. Article XI:1 forbids measures that restrict imports of foreign products. It does not forbid measures that allow imports of products from various sources and foster competition on the market of the importing Member.

61. Moreover, the conditions attached to the OPAL exemption do not have either an *indirect limiting effect* on imports arriving from Russia. The test devised by the panel in *Colombia – Ports of Entry* refers to measures that create uncertainties and affect investment plans, restrict market access or make importation prohibitively costly. The conditions at issue do not give rise to uncertainties and are not designed to increase costs affecting the price of Russian gas. In any event, Russia has not demonstrated such effects.

62. Therefore, Russia's claim under Article XI:1 of the GATT 1994 is entirely without merit and should be rejected.

5. CLAIMS RELATING TO THE TEN – E MEASURE

5.1 ARTICLE II:1 OF THE GATS

63. Russia's claim that the TEN – E measure discriminates *de jure* against Russian services and service suppliers is manifestly unfounded. 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.

64. The TEN – E measure does not discriminate *de facto* against Russian service suppliers or services. Russia's *de facto* claim is entirely based on the assumption that the TEN – E measure discriminates against imports of Russian gas. 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. 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. Conversely, TSOs controlled by persons of third countries operate infrastructure used in part to transmit EU gas originating in the European Union.

65. Russia has nowhere addressed this argument and evidence. Instead, Russia relies on the single case of [[South Stream]] as evidence of the alleged *de facto* discrimination. Even if Russia's allegation with regard to [[South Stream]] were correct (*quod non*), that would not be sufficient to show that the TEN – E measure "as such" is discriminatory. In any event, the non-designation of [[South Stream]] 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.

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

66. 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". However, this objective does not lead to *de jure* discrimination against Russian gas. 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. 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. 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. 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, 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.

67. 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. 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.

68. For the above reasons, 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. 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 sources is insufficient to meet the EU demand. 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. Russia has not disputed that evidence. Furthermore, 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. Again, Russia has not contested this evidence.

69. 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. However, 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.

70. 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. 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. 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.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

Contents		Page
Annex C-1	Executive summary of the arguments of Colombia	C-2
Annex C-2	Executive summary of the arguments of India	C-3
Annex C-3	Executive summary of the arguments of Japan	C-6
Annex C-4	Executive summary of the arguments of Ukraine	C-10

ANNEX C-1

EXECUTIVE SUMMARY OF THE ARGUMENTS OF COLOMBIA

1. Colombia has an special interest with regards to the determinations in the present case in respect to the likeness test under GATS Articles II:1 and XVII:1, due to its recent developments.[1]

2. The Russian Federation submits that the unbundling requirements which pretend the legal and functional separation of gas production and gas supply are inconsistent with EU's obligations under GATS articles II:1 and XVII:1.

3. Colombia sees that a core issue in the present dispute is the definition of LNG services and services suppliers, given that in Russia's view LNG services and suppliers are in competitive relationship with natural gas transported through pipelines. While the UE considers that LNG services and suppliers are not within the meaning of "pipeline transport services and suppliers" due to their "nature and characteristics" that involve the liquefaction and regasification of natural gas and do not involve transport, whereas pipeline transport services carry the natural gas from one point to another.[2]

4. Colombia would like to call the Panels attention with regards to the likeness test and especially with regards to the "presumption of likeness" approach, given that in the present dispute there is disagreement between Russia and the EU with regards to the likeness of LNG services and LNG suppliers in respect to pipeline transport services and service suppliers.

5. In its written submission Russia claims that the presumption of "likeness" should apply to the de facto claims, as those related to government exemptions explained above.[3] Colombia notes that this issue has not been clarified by previous Panel's or AB reports, however, Colombia recalls that in Argentina – Financial Services the AB noted that "measures allowing the application of a presumption of "likeness" will typically be measures involving a *de jure* distinction between products of different origin."[4]

6. In Colombia's opinion, the expression "typically" used by the AB does not preclude the possibility to extent such presumption of likeness to *de facto* claims, whenever in their assessments a Panel bears in mind that "determination of likeness under GATS for such a presumption would be more limited, and may often involve greater complexity in trade in services. Nonetheless, this does not render the presumption approach inapplicable in trade in services."[5]

7. In conclusion "likeness" may be presumed where the complainant demonstrates that the measure at issue makes a distinction between services and service suppliers based exclusively on origin. However, the analysis of whether or not a distinction is based exclusively on origin is more complex in the context of trade in services.

8. In Colombia's opinion the assessment of likeness of services should not be undertaken in isolation from considerations relating to the service suppliers, and, conversely, the assessment of likeness of service suppliers should not be undertaken in isolation from considerations relating to the likeness of the services they provide.[6]

[1] Appellate Body Report, Argentina – Financial Services.
[2] EU's First Written Submission, para. 286.
[3] Russia's First Written Submission, paras. 249-251
[4] Appellate Body Report, Argentina – Financial Services, para. 6.36
[5] Appellate Body Report, Argentina – Financial Services, para. 6.38
[6] Appellate Body Report, Argentina – Financial Services, para. 6.29

ANNEX C-2

EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDIA[*]

I. INTRODUCTION

Mr. Chairperson, members of the Panel, representatives of Parties and Third Parties and Secretariat.

1. India has joined as a third party in this dispute to provide its views on the systemic issues arising for interpretation under the General Agreement on Trade in Services (GATS) under this dispute. India takes no position on the merits of the claims that are based on the particular facts of this dispute.

2. India's views in this oral statement are limited to three specific issues under GATS, arising in the context of interpretation of scheduled commitments; Article VI:1; and the scope and interpretation of market access limitations specified under Article XVI:2. India will also be addressing some of the questions raised in the indicative list of advance questions from the Panel to the third parties.

II. INTERPRETATION OF SCHEDULED COMMITMENTS UNDER GATS

3. Central to this dispute is the interpretation of EU's commitments with regard to "Pipeline Transport" under its Schedule of Specific Commitments. This needs to be interpreted in view of the *1993 Scheduling Guidelines* issued by the GATT Secretariat on 3 September 1993.[1] These Guidelines constitute an important interpretive tool for WTO jurisprudence. In *US-Gambling,*[2] the Appellate Body has noted that the 1993 Scheduling Guidelines constitute "supplementary means of interpretation" under Article 32(d) of the Vienna Convention on the Law of Treaties. The Panel in *Mexico-Telecoms*[3] considered that "substantial interpretative weight can be given to the supplementary documents" that includes the Scheduling Guidelines.

4. In this context, it is important to bear in view Paragraph 16 of the Scheduling Guidelines, which states in the relevant part that: *"The legal nature of a schedule as well as the need to evaluate commitments, require the greatest possible degree of clarity in the description of each sector or sub-sector scheduled. In general the classification of sectors and sub-sectors should be based on the Secretariat's revised Services Sectoral Classification List.*[4] *Each sector contained in the Secretariat list is identified by the corresponding Central Product Classification (CPC) number. Where it is necessary to refine further a sectoral classification, this should be done on the basis of the CPC or other internationally recognised classification (e.g. Financial Services Annex). The most recent breakdown of the CPC, including explanatory notes for each sub-sector, is contained in the UN Provisional Central Product Classification.*[5]*"*[6]

5. In holding that the 1993 Scheduling Guidelines constitute "supplementary means" under Article 32(d) of the Vienna Convention, the Appellate Body noted that the guidelines "…provided a common language and structure which, although not obligatory, was widely used and relied upon."[7]

6. The 1993 Scheduling Guidelines expressly refer to the UN Provisional CPC as cited above. Members are allowed to complement this system of classification, but the text of the Scheduling

---

[*] India's third-party statement serves as the executive summary of its arguments.

[1] Scheduling of Initial Commitments in Trade in Services: Explanatory Note, MTN.GNS/W/164, 3 September 1993

[2] Appellate Body Report, *US – Gambling*, paras. 196-207.

[3] Panel Report, *Mexico-Telecoms,* para. 7.68

[4] Document MTN.GNS/W/120, dated 10 July 1991

[5] Statistical Papers Series M No. 77, Provisional Central Product Classification, Department of International Economic and Social Affairs, Statistical Office of the United Nations, New York, 1991.

[6] Scheduling of Initial Commitments in Trade in Services: Explanatory Note, MTN.GNS/W/164, 3 September 1993, para. 16

[7] Appellate Body Report, *US-Gambling,* para. 204

Guidelines makes it clear that it is incumbent upon the Member scheduling a commitment to draw it in a way as to avoid any ambiguity. For this purpose, Paragraph 16 of the Guidelines clarifies that where a Member finds that it is not possible to make a reference to the CPC classification, it should give a sufficiently detailed definition to avoid any ambiguity as to the scope of the commitment.[8]

7. The Panel has raised a question on whether the UN Central Product Classification Version 2.1 of 2015[9] is relevant for the purpose of interpreting commitments contained in GATS Schedules in light of Articles 31 and 32 of the Vienna Convention.[10]

8. In India's view, there is no automatic substitution of UN CPC Provisional Classification by the UN CPC Version 2.1 of 2015. Both W/120 and the 1993 Scheduling Guidelines, refer to the UN CPC Provisional Classification. In fact, the Provisional CPC had been superseded in 1998 by UN CPC Ver. 1. The 2001 Scheduling Guidelines developed by the Committee on Specific Commitments, which was a revision of the 1993 Scheduling Guidelines, however, continued to refer to the Provisional CPC, rather than the CPC Ver.1.[11] The reason for this appears to be because the understanding of Members for scheduling, and the use of the Services Classification List (W/120),[12] continued to be the Provisional CPC Classification, even in 2001.

9. It is also instructive to note that while analyzing the interpretive value of the 2001 Scheduling Guidelines, the Appellate Body in *US-Gambling* held that the subsequent versions of the Scheduling Guidelines were intended to enable more precise scheduling of *future* commitments, but were not relevant with regard to the interpretation of *existing* commitments.[13] In India's view, the same principle would hold with regard to versions of the CPC subsequent to UN CPC Provisional Classification, including CPC Version 2.1, which may be relevant for future commitments, or as and when they are specifically used to describe a commitment. However, the interpretation of existing commitments needs to be undertaken in view of CPC Provisional Classification.

10. There are also significant differences in the structure and content of UN CPC Provisional Classification and CPC Version 2.1. Not every classification under the Provisional CPC has a corresponding match in the CPC Version 2.1. Using CPC Version 2.1 classification to interpret a Member's commitments that have relied on the CPC Provisional classification, would therefore open the door for interpretational ambiguities.

III. ISSUES RELATING TO ARTICLE XVI:2 OF THE GATS

11. The form and content of a measure scheduled under Article XVI:2 of GATS is another issue for consideration. India would like to underscore in this regard that any measure that is scheduled under a Member's Market Access commitments, pertains to measures affecting the supply of services. In this regard, it has been noted in *EC-Bananas III,* that the disciplines of the GATS would cover any measure bearing upon conditions of competition in supply of a service, regardless of whether the measure directly governs or indirectly affects the supply of the service.[14]

12. The 1993 Scheduling Guidelines, while explaining the ambit of measures to be scheduled under Article XVI:2 of the GATS, notes that "*The list is exhaustive and includes measures which may also be discriminatory according to the national treatment standard (Article XVII) [...]"*[15] This

---

[8] Scheduling of Initial Commitments in Trade in Services: Explanatory Note, MTN.GNS/W/164, 3 September 1993, para. 16

[9] Statistical Papers Series M No. 77, Ver 2.1, Central Product Classification Version 2.1, Department of International Economic and Social Affairs, Statistics Division, United Nations, New York, 2015, ST/ESA/STAT/SER.M/77/Ver.2.1

[10] European Union And Its Member States – Certain Measures Relating To The Energy Sector (DS476), Advance Questions From The Panel To The Third Parties Before The Third-Party Session At The First Substantive Meeting, 26 August 2016, para. 5

[11] Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS), March, 2001

[12] MTN.GNS/W/120, dated 10 July 1991, Note by the Secretariat "Services Sectoral Classification List".

[13] Appellate Body Report, US-Gambling, para. 193

[14] Panel Report, *EC-Bananas III,* para. 7.281

[15] Scheduling of Initial Commitments in Trade in Services: Explanatory Note, MTN.GNS/W/164, 3 September 1993, para. 4

clearly implies that a market access restriction which falls within the types of measures listed in Article XVI:2 (a) to (f), may or may not be discriminatory. The relevant test to be applied by the Panel is therefore whether the restriction specified falls within the type of measure listed under Article XVI:2.

IV. ISSUES RELATING TO INTERPRETATION OF ARTICLE VI OF THE GATS

13. This is the first dispute which offers an opportunity for the interpretation of Article VI:1 of the GATS. This provision establishes the general obligation of Members to ensure that all measures of general application affecting trade in services are administered in a reasonable, objective, and impartial manner, in sectors where specific commitments have been undertaken. Article VI:1 of the GATS is based on the terms of Article X:1 read with Article X:3(a) of the GATT 1994.

14. In the context of Article X:1 of the GATT 1994, the terms "of general application" has been interpreted to mean that "the actions in question would have to have a significant impact on the overall administration of the law, and not simply on the outcome of a single case in question."[16]

15. The obligation under Article X:3(a) of the GATT 1994 requires administration of "laws, regulations, judicial decisions and administrative rulings" in a uniform, impartial and reasonable manner. In this regard, the Panel in *Argentina-Hides and Leather* has observed that the examination under this provision should refer to the "real effect that a measure might have on traders operating in the commercial world" explaining that this "can involve an examination of whether there is a possible impact on the competitive situation due to the alleged partiality, unreasonableness or lack of uniformity".[17]

16. The Panel has raised a question with regard to applicability of Article VI:1 of the GATS on the *administration* of measures of general application, as against the *substantive* content of those measures.

17. Without commenting on the merits of the dispute, India would like to draw the attention of this Panel to the panel's observation in *Argentina-Hides and Leather* that even the substance of a measure may be challenged under this provision if the measure in question is administrative in nature. It noted that "*If the substance of a rule could not be challenged, even if the rule was administrative in nature, it is unclear what could ever be challenged under Article X.*" The panel explained that there is no requirement in Article X:3(a) of the GATT 1994 that it apply only to "unwritten" rules, and that such an interpretation would be contrary to that provision's own language linking it to Article X:1 of the GATT 1994.[18]

18. In India's view, this principle would need to be appropriately applied to the interpretation of Article VI:1 of the GATS in relation to the facts of this dispute.

V. CONCLUSION

19. This dispute addresses important interpretive issues under GATS which would benefit from further clarification in light of the present dispute. India respectfully requests the Panel to consider its views on the interpretive issues set out above. We thank the Panel for providing this opportunity.

[16] Panel Report, *US – Hot-Rolled Steel*, para. VII.4
[17] Panel Report, *Argentina-Hides and Leather,* para 11.77
[18] Panel Report, *Argentina-Hides and Leather,* paras. 11.70-11.71

ANNEX C-3

EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. GATS ARTICLE XVI

1. GATS Article XVI:2 applies only with respect to the specific measures that are expressly defined in subparagraphs (a)-(f) and would not apply to measures that *indirectly* result in the market access limitations listed under Article XVI:2.[1]

2. With regard to GATS Article XVI:2(a), it must be assessed whether a measure specifically limits the number of service suppliers "in the form of" any of the elements specified under subparagraph (a), or regulates only the operations which the service suppliers may conduct through examining the measure's structure, design and architecture.[2] In this case, as the measures seek to regulate the vertical structure of a service supplier and the operations of the service supplier or other companies in its Vertically Integrated Undertaking, it would be difficult to find that the measure specifically limits the number of service suppliers, "in the form of" establishing a "monopoly" or "exclusive service supplier".

3. With regard to GATS Article XVI:2(e), the term "types of legal entity" can only be properly interpreted as the corporate form of the entity itself, and not the broader structure of the group of companies, or the assignment of ownership or control. The unbundling measures in this case concern the combination of services that a group of companies having a certain vertical structure can provide, regardless of the corporate form of the individual companies themselves, and thus would not be inconsistent with subparagraph (e).

4. With regard to GATS Article XVI:2(f), the use of the term "foreign" to qualify "capital" indicates clearly that subparagraph (f) is not concerned with all limitations on capital participation, but rather is specifically concerned with limitations tied to the fact that the capital originates outside of the Member adopting the limitation. Also, subparagraph (f) specifies only two specific types of limitations: a maximum percentage limit on foreign shareholding and/or the total value of foreign investment. As the unbundling measures in this case apply equally to all investors, domestic or foreign, and do not impose a maximum percentage limit on either foreign shareholding or foreign investment, they do not constitute a violation of subparagraph (f).

II. GATS ARTICLES II and XVII

5. Japan considers that the analyses required for the "likeness" and "no less favourable treatment" under GATS Article II must take into consideration certain regulatory aspects of the unbundling measures.

6. First, with respect to service sectors related to energy, certain regulatory objectives such as ensuring effective competition and a stable and reliable supply are relevant for the analysis of "likeness". For example, under the criteria for analyzing "likeness" which include (i) the characteristics and (ii) consumer preferences,[3] consumer preference will distinguish between services and service suppliers on whether the energy is supplied stably and reliably, and stable and reliable supply is one of the required characteristics for services and service suppliers competing in the energy sector.

---

[1] Panel Report, *Argentina – Financial Services*, para. 7.418. (footnote omitted)

[2] See Ibid. paras. 7.421, 7.428.

[3] Ibid. para. 6.32. See also, e.g., Appellate Body Report, *Argentina – Financial Services,* paras. 6.63-6.64 (which found that whether access to the tax information of foreign suppliers, which reflects the regulatory objective alleged by Argentina, affected the competitive relationship should be taken into consideration in assessing Argentina's arguments concerning the presumption of "likeness"); and Appellate Body Report, *EC – Asbestos*, paras. 121-126 (which took into consideration the element of human health risk – a reflection of the policy objective of the measure – in assessing the consumers' preference criteria under the "likeness" requirement of Article III:4 of GATT 1994).

7. Second, regulatory aspects can and should be taken into consideration when determining whether the measure modifies the conditions of competition as part of the analysis of "no less favourable treatment". While the Appellate Body in *Argentina - Financial Services* rejected a two-step legal test for "less favourable treatment" that would take regulatory aspects into consideration separately from the examination of the measure's detrimental impact on the conditions of competition,[4] it also clarified that "[evidence relating to the regulatory aspects] might be taken into account […] as an integral part of a panel's analysis of whether *the measure at issue* modifies the conditions of competition to the detriment of like services or service suppliers of any other Member".[5] Measures that increase sound, fair and effective competition in a Member's market cannot be said to modify the conditions of competition to the detriment of foreign services or service suppliers and constitute discrimination prohibited under Article II.

8. In the service area of energy production, supply and transmission, sound, fair and effective competition does not typically exist when, due to a natural monopoly, existing suppliers can arbitrarily or abusively distort or control the supply of the energy or can invest the windfall profit gained in the service market to another service, thereby achieving an advantageous position in the second service supply as well. When a measure is taken to remove or modify such a distortion in energy supply, to the extent necessary to ensure sound, fair and effective competition and a stable and reliable energy supply, such modification of the conditions of competition should not be regarded as discrimination prohibited under Article II.

9. Additionally, Japan would like to highlight certain points from the Appellate Body's rejection of the two-step analysis in *Argentina – Financial Services*. First, the prior disputes regarding GATS Articles II and XVII did not discuss a particular legitimate regulatory objective that is not provided under the explicit exceptions of GATS (such as Article XIV). Second, this finding was an *obiter dictum.*[6] Lastly, while the Appellate Body already rejected the same analysis under Article III:4 of GATT 1994 in *EC – Seal*,[7] there are arguments supporting a more flexible interpretation of Article III:4 considering, *inter alia*, the same "less favourable treatment" language with Article 2.1 of the TBT Agreement.

10. Japan is also of the view that the arguments developed above in the context of GATS Article II with respect to "likeness" and "no less favourable treatment", taking into account national policy objectives, also apply to GATS Article XVII.

11. Finally, with regard to Russia's argument that seemingly implies that the EU should not have allowed its member states to choose from certain options, each with a different level of unbundling, to implement the unbundling measure, Japan considers that, to the extent each of multiple model options is consistent with the GATS, it shall be cautiously assessed whether a measure allowing such GATS-consistent options is yet inconsistent with the GATS.

III. ARTICLES I AND III of GATT 199

12. With respect to its claims related to Articles I and III of GATT 1994, Russia has yet to elaborate on how such alleged differential treatment between service suppliers has led to less favourable treatment accorded to goods from Russia, in comparison with like products from the EU and other WTO Members.

IV. ARTICLE X:3(a) of GATT 1994

13. Article X:3(a) of GATT 1994 shall cover general application of rules affecting unidentified number of economic operators, but not the specific "application" of such regulations in each case. In other words, a misapplication of a regulation in a single case does not constitute a violation of Article X:3(a), if not with evidence that the same misapplication arises in a widespread manner, to the extent it establishes or revises a principle or criteria in future cases.

14. The precedents have found that: (i) with regard to "administer" requirement under Article X:3(a), "[a Member's actions in a single instance] in question would have to have a

[4] Appellate Body Report, *Argentina – Financial Services,* para. 6.106. See also paras. 6.111 and 6.125-6.126. Ibid. para. 6.127. (emphasis original)
[6] Ibid. para. 6.83.
[7] Ibid. paras. 6.119-6.121 (citing *EC – Seal* (AB), paras. 5.87-5.88, 5.90, 5.101 and 5.121-5.125).

significant impact on *the overall administration of the law*, and not simply on the outcome in this single case in question"[8]; and (ii) with regard to "of general application" requirement under Article X:1, "[such requirement] should extend to administrative rulings in individual cases *where such rulings establish or revise principles or criteria applicable in future cases*".[9] [10]

V. GATS ARTICLE VI

15. The jurisprudence of Article X:3(a) of GATT 1994 may prove informative in interpreting GATS Article VI:1. The panel of *China – Raw Materials*[11] implies that a lack of any standards or guidelines might also lead to administration of the measure in a manner that is not reasonable, impartial or objective which constitutes the violation of GATS Article VI:1.

16. On the other hand, it should be cautiously assessed whether the measure actually lacks any definition, guidelines or standards in the Member's municipal law. The respondent may establish the existence of the guidance or standards based on other *relevant* domestic regulations, including administration practices, that provide for an appropriate safeguard to prevent the measures from being administered in an unreasonable, non-objective or partial manner.[12]

VI. GATS ARTICLE XIV

(A) GATS Article XIV(a)

17. As the coverage of "public order" of GATS Article XIV(a) is not unlimited, the condition provided in footnote 5 of Article XIV(a) (i.e., whether "a genuine and sufficiently serious threat is posed to one of the fundamental interests of society") should be satisfied. It should also be noted that the "necessity" analysis of GATS Article XIV(a) necessarily requires clear identification of the specific fundamental interest that the measures allegedly protect. Thus, a Member invoking Article XIV(a) must elaborate and describe what the specific fundamental interest of society under threat is, how the threat "is posed" to one of the fundamental interests of society, and why the threat is genuine and sufficiently serious to that interest.

18. With the EU's argument that "Third Country Certification" with a requirement of Security of Supply (SOS) is justified under Article XIV(a), Japan does not disagree that disruption of SoS of energy may, under certain circumstances, cause a threat to "public order" or a fundamental interest of society. However, Japan notes that SoS cannot be regarded as a single national policy objective or the fundamental interest of society in and of itself for the purpose of GATS Article XIV(a). This is because ensuring SoS is a means or tool to achieve various higher policy objectives, some of which appear to constitute "public morals" or "public orders", while others does not.

(B) GATS Article XIV(c)

19. With regard to Article XIV(c), the Panel in *US-Gambling* held that "the measure for which justification is sought must "enforce" "obligations" contained in the laws and regulations.[13] "To secure compliance with" i.e., "to enforce" the underlying laws and regulations is not merely to be consistent with the underlying laws or regulations, but requires that the measures to "'prevent actions that would be illegal under the laws or regulations' at issue."[14] Also, Japan does not believe

---

[8] Panel Report, *US – Hot-Rolled Steel,* para. 7.268. (emphasis added)

[9] Panel Report, *Japan – Film,* para. 10.388. (emphasis added) See also Appellate Body Report, *EC – Poultry,* para. 111 (which found that "Article X does not deal with *specific transactions*, but rather with *rules* 'of general application'"(emphasis added)).

[10] See also Panel Report, *US – Stainless Steel (Korea)*, para. 6.50 (which found that "[the WTO dispute settlement system] was not…intended to function as a mechanism to test the consistency of a Member's particular decisions or rulings with the Member's own domestic law and practice; this is a function reserved for each Member's domestic judicial system, and a function WTO panels would be particularly ill-suited to perform".).

[11] Panel Report, *China – Raw Materials*, para. 7.752.

[12] See Panel Report, *China – Raw Materials*, para. 7.777.

[13] *US-Gambling* (Panel) para.6.538

[14] *India – Solar Cells (Panel)* (para. 7.328) citing GATT Panel Report, *EEC – Parts and Components*, para. 5.15.

that "enforce" would extend to the case where a government secures its own compliance with WTO obligations.

20. Japan also understands that EU directives cannot impose obligations on services or service suppliers without transpositions by each EU member state. In the sectors involved in this case, the EU made commitment in the name of each EU member state, not EU itself. This appears to confirm that an EU directive itself cannot be GATS-inconsistent with regard to the commitments. However, in light of the EU's argument that the implementing measures by each EU member can be justified by GATS Article XIV(c) as it is intended to secure compliance with an EU-wide directive. Such directive by its nature cannot be GATS-inconsistent. This interpretation could unreasonably create a loophole to circumvent GATS-commitments by EU member states. Japan is also concerned whether EU directives and EU Member's national law that transposes such directives are not in relation of "an obligation and its enforcement" as foreseen under subparagraph (c).

(C) Preference for GATS Articles II and XVII

21. While the policy objective of ensuring the competition in the energy sector may be taken into consideration under GATS Article XIV(a), this may lead to the unreasonable conclusion that the unbundling measure can be justified under GATS but not under GATT 1994, as "public order" does not appear in Article XX(a) of GATT 1994. We consider that this objective would be more suitable to be considered under GATS Articles II and XVII by taking a harmonious and consistent interpretation of NT/MFN under GATT 1994 and GATS, in light of their same purpose (i.e., equality of opportunity to compete) and design and the same text.

ANNEX C-4

EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE

I. CRITICAL ISSUES RELATED TO CLAIMS OF THE RUSSIAN FEDERATION REGARDING THE UNBUNLDING MEASURE

1. Ukraine observe that the intention of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 (hereinafter – "the Directive"), is that the unbundling requirements apply equally to private and public entities.[1] Article 9(6) of the Directive is designed specifically to ensure that the principle of non-discrimination between different types of property is respected.[2]

2. Ukraine notes that the Russian Federation does not explain or provide any solid evidence or justification that the unbundling measure affects the internal sale, distribution or use of natural gas in order to establish if a measure at issue violates Article III:4 of the GATT 1994. Ukraine also observes that the Russian Federation does not provide any sufficient evidence in order to consider that the difference in the organizational aspects of three unbundling models do impact "the equality of opportunities" between gas from the Russian Federation and gas from the European Union.

3. In Ukraine's view, the unbundling measure does not affect trade in goods under Articles I:1 and III:4 of the GATT 1994 including that the Russian Federation failed to show existing of discrimination under these articles of the GATT 1994. In particular, three unbundling models may not have a "detrimental impact" on the competitive opportunities for gas from the Russian Federation, and does not modify the equality of competitive opportunities between imported products.

II. CRITICAL ISSUES RELATED TO CLAIMS OF THE RUSSIAN FEDERATION REGARDING THE THIRD COUNTRY CERTIFICATION MEASURES

4. Ukraine observes that the Russian Federation's claims in the Panel Request concern the unbundling measure, exemption for upstream pipeline network and LNG and TEN-E measure with respect to Article III:4 of the GATT 1994, on the other hand the claim regarding the third country certification measure under Article III:4 of the GATT 1994 was not included into the Panel Request by the Russian Federation.

5. While the Russian Federation states that the third country certification measure has a detrimental impact on the conditions of competitions for imported natural gas of other WTO Members[3], it does not demonstrate on how exactly such measure exerts this effect.

III. CRITICAL ISSUES RELATED TO CLAIMS OF THE RUSSIAN FEDERATION REGARDING THE INFRASTRUCTURE EXEMPTION MEASURE

6. As Ukraine noted in its Third Party Written Submission, the "infrastructure exemption measure" grants an "advantage" when it creates "more favorable competitive opportunities" or affects the commercial relationship between products of different origin.

7. Ukraine observes that while stating that the infrastructure exemption measure detrimentally impacts the "equality of competitive opportunities" between the Azeri gas and gas from the Russian Federation in the European Union, the Russian Federation does not provide any facts or arguments regarding how the equality of opportunities of Azeri gas and gas from the Russian Federation are affected.

8. It is highly doubtful that the infrastructure exemption measure may possess characteristics of differentiation between natural gas of different origin, so that the test under Article I:1 of the GATT 1994 could be met.

---

[1] Recital (20) of Directive 20009/73/EC.
[2] Recital (2) of Directive 2009/73/EC.
[3] FWS RF, para 502.

9. Ukraine also considers that the Russian Federation has wrongly applied Article XXVIII of the GATS by designating NEL GT and OPAL GT as "commercial presence" of Russian's company Gazprom in Germany.

10. Ukraine observes that in case of the commercial presence the "place of constitution" by itself is not sufficient. In order to capture the foreign nature of a subsidiary and to ensure that its activities are cornered by the GATS, it is required that the entity be either "owned" or "controlled" by person of another WTO Member (by a Member where the parent company is established).[4]

11. Finally, in Ukraine's view, the Russian Federation failed both to provide and demonstrate evidentiary material and proofs per the claim and the existence of all complained violations.

---

[4] Article XXVIII (n) (i), (ii) of the GATS.

ANNEX D

PRELIMINARY RULINGS BY THE PANEL

Contents		Page
Annex D-1	First Preliminary Ruling by the Panel (conclusions), 9 May 2016	D-2
Annex D-2	Second Preliminary Ruling by the Panel (conclusions), 10 November 2016	D-3

ANNEX D-1

FIRST PRELIMINARY RULING BY THE PANEL (CONCLUSIONS)

1 BACKGROUND

1.1. On 18 March 2016, the European Union submitted to the Panel a request for a preliminary ruling to the effect that certain measures contained in the Russian Federation's (Russia) request for the establishment of a panel (panel request)[1] raise new matters that were not covered by Russia's request for consultations (consultations request)[2] and are, therefore, outside the Panel's terms of reference. More specifically, the European Union asked the Panel to rule that the "Capacity Allocation Measures" (CA measures) and the "Projects of Common Interest Measures" (PCI measures) contained in, respectively, Sections II and III of Russia's panel request impermissibly expanded the scope of the dispute, thereby changing its essence.[3] The European Union also asked the Panel to issue its ruling as soon as possible and, in any event, before the date on which Russia is required to file its first written submission.[4]

1.2. Russia submitted its response to the European Union's request for a preliminary ruling on 18 April 2016. In its response, Russia opposed the European Union's request and asked the Panel to find that the CA measures and the PCI measures were identified in the consultations request and, therefore, are properly within the Panel's terms of reference.[5]

1.3. The Panel provided third parties with an opportunity to comment on the European Union's preliminary ruling request. Only Colombia and Ukraine submitted comments on 25 April 2016.

1.4. Pursuant to the timetable adopted on 31 March 2016, the Panel committed to indicate, on 9 May 2016, how it would dispose of the European Union's request for a preliminary ruling. Having carefully considered the European Union's request, the response by Russia, and the comments of the aforementioned third parties, and taking into account the European Union's request that the Panel rule on its request before Russia files its first written submission, the Panel has decided to communicate its conclusions on the European Union's request today, 9 May 2016. More detailed reasons in support of these conclusions will be provided as soon as possible and, in any event, no later than the date of the issuance of the Interim Report. This approach of issuing a prompt decision followed by the panel's reasoning at a later date has been followed by other panels[6] and is taken in the interest of efficiency of proceedings.

1.5. A copy of this Ruling will be transmitted to the third parties for information.

2 PRELIMINARY RULING OF THE PANEL (CONCLUSIONS)

2.1. The Panel finds that the matters contained in Sections II (CA measures) and III (PCI measures) of Russia's panel request are sufficiently identified in the consultations request and that the inclusion of these matters in Russia's panel request did not expand the scope or change the essence of the dispute. The Panel concludes, therefore, that those matters fall within its terms of reference.

2.2. Finally, we note that these conclusions, together with the reasons supporting them, will become an integral part of our Final Report, subject to any change that may be necessary in the light of comments received from the parties during the interim review.

[1] WT/DS476/2.
[2] WT/DS476/1.
[3] European Union's request for a preliminary ruling, paras. 2 and 4.
[4] European Union's request for a preliminary ruling, para. 43.
[5] Russia's response to the European Union's request for a preliminary ruling, para. 1.
[6] See, for instance, Panel Reports, *Canada – Renewable Energy / Canada – Feed in Tariff Program*, para. 7.8; and *US – Lamb*, paras. 5.15-5.16.

ANNEX D-2

SECOND PRELIMINARY RULING BY THE PANEL (CONCLUSIONS)

1 BACKGROUND

1.1. On 28 October 2016, the European Union requested the Panel to issue a preliminary ruling to the effect that certain of Russia's claims, or their particular aspects, are outside the Panel's terms of reference. The European Union's terms of reference objections that form the basis of this request were provided in two stages.

1.2. Initially, in its first written submission, the European Union raised six terms of reference objections concerning Russia's first written submission.[1] In its comments on Russia's response to Panel question Nos. 5 and 17, the European Union submitted further objections.[2] These objections concerned Russia's Claims 1 through 3, 7, 9 through 18, 21, 27, and 29 through 31, or particular aspects of such claims, as referred to in Russia's response to Panel question No. 5.[3] On that occasion, the European Union also reiterated its six original terms of reference objections.

1.3. The Panel provided Russia with the opportunity to respond to the European Union's original six terms of reference objections, as well as the European Union's further objections.[4] In its comments on the European Union's comments, Russia agreed with the European Union that Claim 18 was outside the Panel's terms of reference and indicated that it would no longer pursue Claim 18 as part of these proceedings.[5] Russia, however, contested the European Union's objections concerning the rest of Russia's claims, arguing that they were within the Panel's terms of reference.

1.4. In its communication of 28 October 2016, the European Union requested the Panel to issue a preliminary ruling on the objections raised by the European Union sufficiently in advance of the date for the filing of the parties' second written submissions and to indicate the date on which the Panel intended to rule on its objections. On the same day, the Panel issued a communication to the parties indicating that it would decide on how it would dispose of the European Union's terms of reference objections no later than on 14 November 2016. In the same communication, the Panel conveyed its decision not to consider the European Union's terms of reference objection concerning Russia's Claim 18.[6]

1.5. Having carefully considered the European Union's request, and guided by the considerations of due process and efficiency of panel proceedings, the Panel has decided to communicate its conclusions on the European Union's request today, 10 November 2016. More detailed reasons in support of these conclusions will be provided in due course and, in any event, no later than the date of the issuance of the Interim Report.

[1] European Union's first written submission, paras. 421-422, 546-551, 553-556, 567-570, 578-581, and 617-618.
[2] European Union's comments on Russia's response to Panel question Nos. 5 and 17.
[3] Throughout this preliminary ruling, the Panel refers to Russia's claims as provided in Russia's response to Panel question No. 5.
[4] See Panel question No. 17 and Russia's comments on the European Union's comments on Russia's response to Panel question Nos. 5 and 17.
[5] Russia's comments on the European Union's comments on Russia's response to Panel question Nos. 5 and 17.
[6] The relevant part of the Panel's communication reads as follows:
Furthermore, the Panel takes this opportunity to acknowledge the agreement of the Russian Federation, in paragraph 7 of its comments on the European Union's comments, with the European Union's contention that "Claim 18" does not fall within the Panel's terms of reference and the statement of the Russian Federation that it is no longer pursuing this claim. In light of this, the Panel does not consider it necessary to rule on the terms of reference objection raised by the European Union in relation to this claim in paragraphs 60 through 62 of its comments.

2 PRELIMINARY RULING OF THE PANEL (CONCLUSIONS)

2.1. The Panel affirms its decision not to rule on the terms of reference objection raised by the European Union in relation to Russia's Claim 18 communicated to the parties on 28 October 2016.[7] The Panel's conclusions regarding the rest of the European Union's terms of reference objections are provided below.

2.2. The Panel considers that the following claims by Russia fall outside the Panel's terms of reference: Claims 7, 9, and 11; alternative "as applied" Claims 29 through 31; Claim 16, as developed in paragraphs 449 through 454 of Russia's first written submission; and Claim 27. The Panel, however, wishes to clarify that it is not ruling that Russia's Claim 16, as described in the first full paragraph on the third page of Russia's panel request,[8] falls outside its terms of reference. The Panel also clarifies that Russia may advance in these proceedings its Claims 6, 8, and 10,[9] as well as the remaining aspects of its Claims 29 through 31, in accordance with its panel request and as subsequently confirmed in its first written submission.

2.3. The Panel finds the following claims by Russia to be within its terms of reference: Claims 12 through 14; and Claim 21. The Panel confirms its understanding that the measure challenged by Russia's Claim 21 is described on page 4 of Russia's panel request as follows:

> The Russian Federation also considers that the OPAL gas release requirement also violates Article X:3(a) of GATT 1994. Specifically, by imposing the 3 bcm gas release requirement under the conditions described above only on imported Russian gas, but not third-country gas transported through pipelines subject to other exemption decisions, the EU has failed to administer the infrastructure exemption provisions in the Directive and the SEP in a uniform, impartial and reasonable manner, including with regard to the sale, distribution and transportation of natural gas.

The Panel thus finds that Russia's Claim 21, as described above, is within its terms of reference.

2.4. The Panel takes note of Russia's clarification that its challenge under Article XVI of the GATS is directed at the laws of Croatia, Hungary and Lithuania implementing the unbundling requirements of Directive 2009/73/EC. The Panel thus understands that Directive 2009/73/EC is a relevant legal instrument, although not a challenged measure in respect of Russia's Claims 1 through 3. The Panel therefore does not consider it necessary to address the European Union's concerns in relation to these claims.

2.5. To ensure an objective assessment of the matter before it, the Panel refrains from providing a definitive ruling at this stage of the proceedings on the European Union's terms of reference objections regarding Russia's Claims 10, 15 and 17, and confirms the following:

- In light of Russia's clarifications, the Panel will not consider Lithuania's grant of priority to natural gas supplied by Litgas UAB through the Klaipeda LNG Terminal and the supply agreement between Litgas and Statoil as challenged measures in respect of Claim 10. The Panel, however, declines to rule at this stage of the proceedings on whether Russia's reference to Lithuania's grant of priority to natural gas supplied by Litgas UAB through the Klaipeda LNG Terminal and the supply agreement between Litgas and Statoil in its first written submission constitutes a separate claim that falls outside the Panel's terms of reference.[10]

[7] As set out in the Panel's communication of 28 October 2016. See above fn 6.

[8] WT/DS476/2.

[9] Subject to the Panel's clarification in para. 2.5 below and to any subsequent decision the Panel may take in relation to the European Union's objections regarding Russia's Claim 10.

[10] In light of the Panel's finding in para. 2.2 above that Russia's Claim 11 falls outside its terms of reference, the Panel does not consider it necessary to rule on the European Union's objections concerning Russia's reference to Lithuania's grant of priority to natural gas supplied by Litgas UAB through the Klaipeda LNG Terminal and the supply agreement between Litgas and Statoil in its first written submission in the context of this claim.

- The Panel further declines to rule at this stage of the proceedings on whether Articles 20(5) and 29(4)(3) of Lithuania's Law on Natural Gas and Article 123 of Hungary's Gas Act are within its terms of reference in respect of Russia's Claim 15.

- In light of Russia's clarifications, the Panel will not consider the Commission's certification opinions regarding TIGF and DESFA as challenged measures in respect of Claim 17. The Panel, however, declines to rule at this stage of the proceedings on whether Russia's reference to these two opinions in its first written submission constitutes a separate claim that falls outside the Panel's terms of reference.

2.6. The Panel takes this opportunity to invite further views and clarifications from the parties on the scope and nature of Russia's Claims 10, 15 and 17 in their second written submissions.

2.7. Finally, the Panel notes that these conclusions, together with the reasons supporting them, will become an integral part of its Final Report, subject to any change that may be necessary in the light of comments received from the parties during the interim review.

____