

8 CONCLUSIONS AND RECOMMENDATION

8.1. Recalling our terms of reference, as set out in Russia's panel request and as clarified in our findings on the contours of these terms of reference²³²⁸, and for the reasons set forth in this Report, the Panel concludes that:

- a. With respect to the unbundling measure:
 - i. Russia has not demonstrated that the unbundling measure in the Directive is inconsistent with Article II:1 of the GATS, or with Articles I:1 or III:4 of the GATT 1994.
 - ii. Russia has not demonstrated that the unbundling measure in the national implementing laws of Croatia and Lithuania is inconsistent with Article XVI:2(a) of the GATS. As we have not found an inconsistency with Article XVI:2(a) of the GATS, we do not consider it necessary to rule on the European Union's defences under Articles XIV(a) or (c) of the GATS.
 - iii. Russia has not demonstrated that the unbundling measure in the national implementing laws of Croatia, Hungary and Lithuania is inconsistent with Articles XVI:2(e) or (f) of the GATS. As we have not found an inconsistency with Articles XVI:2(e) or (f) of the GATS, we do not consider it necessary to rule on the European Union's defences under Articles XIV(a) or (c) of the GATS.
- b. With respect to the public body measure:
 - i. Russia has not demonstrated that the public body measure in the national implementing laws of Croatia, Hungary and Lithuania is inconsistent with Article XVII of the GATS. As we have not found an inconsistency with Article XVII of the GATS, we do not consider it necessary to rule on the European Union's defence under Article XIV(c) of the GATS.
- c. With respect to the LNG measure:
 - i. Russia has not demonstrated that the LNG measure is inconsistent with Article I:1 of the GATT 1994.
- d. With respect to the infrastructure exemption measure:
 - i. Russia has not demonstrated that the European Union has administered Article 36 of the Directive inconsistently with Article X:3(a) of the GATT 1994.
 - ii. Russia has not demonstrated that the European Union applied or implemented Article 36 in an "inconsistent" or "discriminatory" manner for the purposes of its claims under Article II:1 of the GATS or Article I:1 of the GATT 1994.
 - iii. Russia has demonstrated that the two challenged OPAL conditions, that is, the 50% capacity cap and 3 bcm/year gas release programme, are inconsistent with Article XI:1 of the GATT 1994.
- e. With respect to the upstream pipeline networks measure:
 - i. Russia has not demonstrated that the upstream pipeline networks measure is inconsistent with Articles I:1 or III:4 of the GATT 1994.
- f. With respect to the third-country certification measure:
 - i. Russia has not demonstrated that the third-country certification measure in the Directive is inconsistent with Article II:1 of the GATS.

²³²⁸ See section 7.2 above.

- ii. Russia has demonstrated that the third-country certification measure implemented in Article 24 of Croatia's Gas Market Act, Section 128/A of Hungary's Gas Act and Article 29 of Lithuania's Law on Natural Gas²³²⁹ is inconsistent with Article XVII of the GATS and the European Union has not demonstrated that it is justified under the general exception in Article XIV(a) of the GATS. Furthermore, Russia has demonstrated that the third-country certification measure implemented in Sections 123(5) and 123(6) of Hungary's Gas Act is inconsistent with Article XVII of the GATS.
 - iii. we exercise judicial economy in respect of Russia's claims under Articles VI:1 and VI:5(a) of the GATS.
- g. With respect to the TEN-E measure:
- i. Russia has demonstrated that the TEN-E measure is inconsistent with Articles I:1 and III:4 of the GATT 1994 and the European Union has not demonstrated that it is justified under the general exception in Article XX(j) of the GATT 1994.
 - ii. Russia has not demonstrated that the TEN-E measure is inconsistent with Article II:1 of the GATS.

8.2. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with Article XVII of the GATS and Articles I:1, III:4 and XI:1 of the GATT 1994, they have nullified or impaired benefits accruing to Russia under those agreements.

8.3. Pursuant to Article 19.1 of the DSU, we recommend that the European Union and its member States bring the measures into conformity with their obligations under the GATS and the GATT 1994.

²³²⁹ With the exception of Article 29(4)(3), which we have found to fall outside our terms of reference. See section 7.2.2.3.2.3 above.