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

REPORT OF THE PANEL

BCI DELETED, AS INDICATED [\*\*\*]

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## EXHIBITS FREQUENTLY CITED IN THIS REPORT

| Panel Exhibit    | Short title (where applicable) | Full title   |
|------------------|--------------------------------|--|
| EU-1             |                                | Regulation (EC) No. 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No. 1775/2005 (Text with EEA relevance), OJ L 211/36 of 14.8.2009   |
| EU-3             | Regulation (EU) No. 1391/2013  | Commission Delegated Regulation (EU) No. 1391/2013 of 14 October 2013, amending Regulation (EU) No. 347/2013 of the European Parliament and of the Council on guidelines for trans-European energy infrastructure as regards the Union list of projects of common interest, OJ L 349/28 of 21.12.2013                              |
| EU-4             | TEN-E Regulation               | Regulation (EU) No. 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No. 1364/2006/EC and amending Regulations (EC) No. 713/2009, (EC) No. 714/2009 and (EC) No. 715/2009 (Text with EEA relevance), OJ L 115/39 of 25.4.2013 |
| EU-5             | Directive 2009/73/EC           | Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (Text with EEA relevance), OJ L 211/94 of 14.8.2009   |
| EU-6             | Regulation (EC) No. 713/2009   | Regulation (EC) No. 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy regulators (Text with EEA relevance), OJ L 211/1 of 14.8.2009  |
| EU-10/<br>RUS-4  |                                | Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJ L 176/57 of 15.7.2003   |
| EU-15/<br>RUS-38 | W/120                          | Services Sectoral Classification List, Note by the Secretariat, MTN.GNS/W/120 (10 July 1991)   |
| EU-16/<br>RUS-37 |                                | Schedule of Specific Commitments of Croatia, GATS/SC/130 (22 December 2000)  |
| EU-17/<br>RUS-36 |                                | Schedule of Specific Commitments of Hungary, GATS/SC/40 (15 April 1994)  |
| EU-19/<br>RUS-35 |                                | Schedule of Specific Commitments of Lithuania, GATS/SC/133 (21 December 2001)  |
| EU-24            |                                | Oxford English Dictionary Online, definition of "service, n.1"<br><a href="http://www.oed.com/view/Entry/176678?rskey=JSiVqR&amp;result=1&amp;isAdvanced=false#eid">http://www.oed.com/view/Entry/176678?rskey=JSiVqR&amp;result=1&amp;isAdvanced=false#eid</a> (accessed 1 July 2016)   |
| EU-26            |                                | US Department of Transportation, Pipeline & Hazardous Materials Safety Administration, "Stakeholder Communications: Natural Gas Pipeline Systems"<br><a href="https://primis.phmsa.dot.gov/comm/NaturalGasPipelineSystems.htm">https://primis.phmsa.dot.gov/comm/NaturalGasPipelineSystems.htm</a> (accessed 1 July 2016)          |
| EU-27            |                                | MIT Study on the Future of Natural Gas, Chapter 6, "Infrastructure", pp. 131-146, available at:<br><a href="http://energy.mit.edu/research/future-natural-gas/">http://energy.mit.edu/research/future-natural-gas/</a> (accessed 3 August 2017)  |
| EU-28            |                                | NaturalGas.org, "Natural Gas – From Wellhead to Burner Tip"<br><a href="http://naturalgas.org/naturalgas/">http://naturalgas.org/naturalgas/</a> (accessed 3 August 2017)  |
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| US – Offset Act (Byrd Amendment)                     | Appellate Body Report, <i>United States – Continued Dumping and Subsidy Offset Act of 2000</i> , <a href="#">WT/DS217/AB/R</a> , <a href="#">WT/DS234/AB/R</a> , adopted 27 January 2003, DSR 2003:I, p. 375   |
| US – Offset Act (Byrd Amendment)                     | Panel Report, <i>United States – Continued Dumping and Subsidy Offset Act of 2000</i> , <a href="#">WT/DS217/R</a> , <a href="#">WT/DS234/R</a> , adopted 27 January 2003, as modified by Appellate Body Report WT/DS217/AB/R, WT/DS234/AB/R, DSR 2003:II, p. 489  |
| US – Oil Country Tubular Goods Sunset Reviews        | Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , <a href="#">WT/DS268/AB/R</a> , adopted 17 December 2004, DSR 2004:VII, p. 3257  |
| US – Poultry (China)                                 | Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , <a href="#">WT/DS392/R</a> , adopted 25 October 2010, DSR 2010:V, p. 1909  |
| US – Section 337 Tariff Act                          | GATT Panel Report, <i>United States Section 337 of the Tariff Act of 1930</i> , L/6439, adopted 7 November 1989, BISD 36S/345  |
| US – Shrimp  | Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , <a href="#">WT/DS58/AB/R</a> , adopted 6 November 1998, DSR 1998:VII, p. 2755   |
| US – Shrimp (Article 21.5 – Malaysia)                | Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> , <a href="#">WT/DS58/AB/RW</a> , adopted 21 November 2001, DSR 2001:XIII, p. 6481  |
| US – Shrimp (Thailand) / US – Customs Bond Directive | Appellate Body Report, <i>United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties</i> , <a href="#">WT/DS343/AB/R</a> / <a href="#">WT/DS345/AB/R</a> , adopted 1 August 2008, DSR 2008:VII, p. 2385 / DSR 2008:VIII, p. 2773 |
| US – Shrimp II (Viet Nam)                            | Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam</i> , <a href="#">WT/DS429/AB/R</a> , and Corr.1, adopted 22 April 2015  |
| US – Stainless Steel (Korea)                         | Panel Report, <i>United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea</i> , <a href="#">WT/DS179/R</a> , adopted 1 February 2001, DSR 2001:IV, p. 1295   |
| US – Stainless Steel (Mexico)                        | Appellate Body Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , <a href="#">WT/DS344/AB/R</a> , adopted 20 May 2008, DSR 2008:II, p. 513  |
| US – Tuna II (Mexico)                                | Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , <a href="#">WT/DS381/AB/R</a> , adopted 13 June 2012, DSR 2012:IV, p. 1837   |
| US – Tuna II (Mexico)                                | Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , <a href="#">WT/DS381/R</a> , adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R, DSR 2012:IV, p. 2013   |
| US – Tuna II (Mexico) (Article 21.5 – Mexico)        | Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico</i> , <a href="#">WT/DS381/AB/RW</a> and Add.1, adopted 3 December 2015  |
| US – Tuna II (Mexico) (Article 21.5 – Mexico)        | Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico</i> , <a href="#">WT/DS381/RW</a> , Add.1 and Corr.1, adopted 3 December 2015, as modified by Appellate Body Report WT/DS381/AB/RW                                  |
| US – Upland Cotton                                   | Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , <a href="#">WT/DS267/AB/R</a> , adopted 21 March 2005, DSR 2005:I, p. 3   |

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| Short title  | Full case title and citation   |
|--|--|
| <i>US – Wool Shirts and Blouses</i>                | Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , <a href="#">WT/DS33/AB/R</a> , adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323                       |
| <i>US – Zeroing (Japan)</i>                        | Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , <a href="#">WT/DS322/AB/R</a> , adopted 23 January 2007, DSR 2007:I, p. 3  |
| <i>US – Zeroing (Japan) (Article 21.5 – Japan)</i> | Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i> , <a href="#">WT/DS322/AB/RW</a> , adopted 31 August 2009, DSR 2009:VIII, p. 3441 |

### ABBREVIATIONS FREQUENTLY USED IN THIS REPORT

| Abbreviation      | Description  |
|-------------------|--|
| Amber Grid        | AB Amber Grid  |
| Bcm               | Billion cubic meters   |
| BEMIP             | Baltic Energy Market Interconnection Plan  |
| BNetzA            | Bundesnetzagentur  |
| CEE               | Central East European  |
| CNG               | Compressed natural gas   |
| Commission        | European Commission  |
| CPC               | 1991 United Nations Provisional Central Product Classification                       |
| CPC 2.1           | 2015 United Nations Central Product Classification                                   |
| DESFA             | Hellenic Gas Transmission System Operator S.A.                                       |
| Directive         | Directive 2009/73/EC   |
| DSB               | Dispute Settlement Body  |
| DSU               | Understanding on Rules and Procedures Governing the Settlement of Disputes           |
| Engie             | Engie S.A.   |
| EC                | European Communities   |
| EU                | European Union   |
| GATS              | General Agreement on Trade in Services   |
| GATT 1994         | General Agreement on Tariffs and Trade 1994  |
| GRTgaz            | GRTgaz S.A.  |
| GTS               | Gat Transport Services B.V.  |
| HEP               | Hrvatska elektroprivreda d.d   |
| HS                | Harmonized Commodity Description and Coding System of the World Customs Organization |
| ISO               | Independent system operator  |
| ITO               | Independent transmission operator  |
| Lietuvos dujos    | AB Lietuvos dujos  |
| Litgas            | Litgas UAB   |
| LNG               | Liquefied natural gas  |
| LSO               | LNG system operator  |
| m <sup>3</sup> /a | Cubic meters per annum   |
| MGT               | Magyar Gáz Tranzit Zrt.  |
| MVM               | Magyar Villamos Művek Zrt.   |
| NEL pipeline      | Nordeuropäische Erdgasleitung  |
| NEL GT            | NEL Gastransport GmbH  |
| NETRA pipeline    | Norddeutsche Erdgas Transversale Pipeline System                                     |
| NIC               | NABUCCO Gas Pipeline International GmbH  |
| NRA               | National regulatory authority  |
| NSI               | North-South Gas Interconnections   |
| Ofgem             | UK Office of Gas and Electricity Markets   |
| OPAL pipeline     | Ostsee-Pipeline-Anbindungsleitung  |
| OPAL GT           | OPAL Gastransport GmbH & Co. KG  |
| OU                | Ownership unbundling   |
| SCM Agreement     | Agreement on Subsidies and Countervailing Measures                                   |
| SEP               | Second Energy Package  |
| SGC               | Southern Gas Corridor  |
| SOCAR             | State Oil Company of the Azerbaijan Republic   |
| SoS               | Security of energy supply  |
| TAP pipeline      | Trans-Adriatic Pipeline  |
| TAP AG            | Trans-Adriatic Pipeline AG   |
| TBT Agreement     | Agreement on Technical Barriers to Trade   |
| TEP               | Third Energy Package   |
| TEN-E             | Trans-European Networks for Energy   |
| TIGF              | Transport et Infrastructures Gaz France S.A.   |
| TPA               | Third-party access   |
| TRIMs Agreement   | Agreement on Trade-Related Investment Measures                                       |
| TSO               | Transmission system operator   |



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| Abbreviation      | Description   |
|-------------------|---|
| UNECE             | United Nations Economic Commission for Europe   |
| UPN               | Upstream pipeline network   |
| Vienna Convention | Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679 |
| VIU               | Vertically integrated undertaking   |
| WTO               | World Trade Organization  |

## 1 INTRODUCTION

### 1.1 Complaint by Russia

1.1. On 30 April 2014, the Russian Federation (Russia) requested consultations with the European Union and its member States pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the General Agreement on Trade in Services (GATS) and the General Agreement on Tariffs and Trade 1994 (GATT 1994) with respect to the measures and claims set out below.<sup>1</sup>

1.2. Consultations were held on 23 through 24 June 2014 and on 10 July 2014.

### 1.2 Panel establishment and composition

1.3. On 11 May 2015, Russia requested the establishment of a panel pursuant to Article 6 of the DSU, Article XXIII of the GATS, and Article XXIII of the GATT 1994 with standard terms of reference.<sup>2</sup> At its meeting on 20 July 2015, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Russia in document WT/DS476/2, in accordance with Article 6 of the DSU.<sup>3</sup>

1.4. The Panel's terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the Russian Federation in document WT/DS476/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.<sup>4</sup>

1.5. On 22 February 2016, Russia requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 7 March 2016<sup>5</sup>, the Director-General accordingly composed the Panel as follows:

Chairperson: Mr Felipe Lopeandía

Members: Mr Jose-Victor Chan-Gonzaga  
Mr Marco Tulio Molina Tejada

1.6. Brazil, the People's Republic of China (China), Colombia, India, Japan, the Republic of Korea (Korea), the Kingdom of Saudi Arabia (Saudi Arabia), Ukraine and the United States notified their interest in participating in the Panel proceedings as third parties.

### 1.3 Panel proceedings

#### 1.3.1 General

1.7. After consultation with the parties, the Panel adopted its Working Procedures<sup>6</sup> and timetable on 31 March 2016. The Panel modified its Working Procedures on 19 May 2016 and its timetable on 30 September 2016 and 23 March 2017 after consultation with the parties.

1.8. The Panel received a written submission from Russia on 17 May 2016 and from the European Union on 11 July 2016, and sent advance questions before holding its first substantive meeting

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<sup>1</sup> See Russia's request for consultations, WT/DS476/1. Russia's request for consultations (consultations request) was also made pursuant to Articles 4.1, 7.1 and 30 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and Article 8 of the Agreement on Trade-Related Investment Measures (TRIMs Agreement) with respect to potential inconsistencies with those agreements.

<sup>2</sup> Russia's request for the establishment of a panel (panel request), WT/DS476/2. Russia's panel request did not make reference to any provisions of the SCM Agreement or the TRIMs Agreement.

<sup>3</sup> WT/DSB/M/365.

<sup>4</sup> WT/DS476/3.

<sup>5</sup> The Director-General's deadline for appointing the panelists was extended due to unforeseen circumstances and after having notified the parties.

<sup>6</sup> See the Panel's Working Procedures in Annex A-1.

with the parties on 5 through 7 September 2016. A session with the third parties took place on 6 September 2016.

1.9. After the first substantive meeting, the Panel sent the parties questions to be answered in writing. Russia also sent written questions to the European Union following the first substantive meeting. The parties' responses to all such questions were received on 12 October 2016. The parties submitted their second written submissions on 21 November 2016. The Panel sent advance questions before holding its second substantive meeting with the parties on 28 February and 1 March 2017. The Panel sent additional questions in writing after the second substantive meeting, as did both parties. The parties' responses to all such questions were received on 30 March 2017 and the parties commented on each other's responses on 3 May 2017.<sup>7, 8</sup>

1.10. On 16 May 2017, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 8 August 2017. The Panel issued its Final Report to the parties on 24 October 2017.

1.11. In these panel proceedings, certain filings were made outside of the deadlines prescribed by the Working Procedures adopted by the Panel.<sup>9</sup> The Panel stresses the importance of all parties and third parties adhering to the time-limits for filing documents, in the interests of fairness and the orderly conduct of panel proceedings.

### 1.3.2 Additional Working Procedures on Business Confidential Information (BCI)

1.12. At Russia's request and after consultations with both parties, the Panel adopted, on 5 April 2016, additional working procedures for the protection of BCI.<sup>10</sup>

### 1.3.3 Preliminary rulings

1.13. In a communication of 18 March 2016, the European Union requested the Panel to make a preliminary ruling before the date for the filing of the parties' first written submissions, clarifying whether certain matters in Russia's panel request were identified in Russia's consultations request within the meaning of Article 4.4 of the DSU. At the invitation of the Panel, Russia provided a response in writing on 18 April 2016. All third parties were also invited to comment on the European Union's request by 25 April 2016. Colombia and Ukraine availed themselves of this possibility. The Panel communicated its conclusions in writing to the parties and the third parties on 9 May 2016, indicating that the more detailed reasons in support of its conclusions would be provided no later than the date of the issuance of the Interim Report. The Panel's full decision regarding the European Union's first request for a preliminary ruling is set out in section 7 of this Report.

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<sup>7</sup> During the course of the proceedings, both parties requested extensions for several deadlines provided for in the timetable. The dates set out in paragraphs 1.8 and 1.9 reflect extensions granted by the Panel following such requests.

<sup>8</sup> In addition to the steps set out in paragraphs 1.8 and 1.9, the Panel posed several supplementary questions, on 14 October 2016, 21 October 2016, 9 December 2016 and 10 May 2017, pursuant to paragraph 11 of its Working Procedures.

<sup>9</sup> The hard copies of the European Union's first written submission were not received by the 17:00 deadline specified in paragraph 24 of the Panel's Working Procedures and certain hard copies of Exhibit EU-70 to the European Union's first written submission were not received by the deadline specified in the Panel's timetable. The European Union explained that this delay was caused by printing problems due to the size of these documents. Furthermore, the hard copies and electronic copies of the European Union's closing statement at the second meeting of the Panel were not received by the deadline specified in paragraph 14(a) of the Panel's Working Procedures. In response to a complaint by Russia and at the Panel's invitation, the European Union submitted that it had provided "brief remarks" at the end of the second meeting of the Panel and that the Working Procedures "do not provide for the possibility to file *ad hoc* comments on the closing statements". The European Union nonetheless provided a written version of its remarks, which it could not "guarantee ... provides a complete and exact transcription". (European Union's communication of 10 March 2017). Following a complaint by Russia concerning the accuracy of the written version of the European Union's closing remarks, the Panel invited both parties to review the relevant parts of the recordings of the second meeting of the Panel, after which the European Union provided, on 3 May 2017, a "transcript" of its closing remarks. (European Union's communication of 3 May 2017).

<sup>10</sup> See Additional Working Procedures on BCI in Annex A-2.

1.14. In its first written submission of 11 July 2016 and in its comments on Russia's responses to questions by the Panel following the first substantive meeting of 21 October 2016, the European Union requested the Panel to clarify whether certain matters in Russia's first written submission and responses to questions by the Panel were identified in Russia's panel request within the meaning of Article 6.2 of the DSU. At the invitation of the Panel, Russia provided a response in writing on 27 October 2016. In a communication of 28 October 2016, the European Union requested that the Panel make a preliminary ruling on this matter before the date for the filing of the parties' second written submissions. On 10 November 2016, the Panel communicated its conclusions on a number of the terms of reference objections raised by the European Union to the parties, indicating that the more detailed reasons in support of its conclusions would be provided no later than the date of the issuance of the Interim Report. The Panel declined to rule, at that stage of the proceedings, on certain of the terms of reference objections raised by the European Union. The Panel's full decision regarding all terms of reference objections raised by the European Union in its second request for a preliminary ruling is set out in section 7 of this Report.

## 2 FACTUAL ASPECTS

### 2.1 Introduction

2.1. This dispute concerns certain measures that regulate the natural gas sector and facilitate the development of natural gas infrastructure within the European Union. This section of the Report begins by briefly describing the background of the relevant legal and regulatory instruments of the European Union and its member States that give rise to the challenged measures. The relevant aspects of each of the measures are then described in detail.

2.2. The Third Energy Package is a set of legal acts and regulatory instruments that the European Union enacted in 2009 to reform its internal market in natural gas.<sup>11</sup> As regards the natural gas market, the main component of the Third Energy Package is contained in Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (the Directive).<sup>12</sup>

2.3. The Directive establishes common rules for the European Union's internal market in "natural gas, including LNG [liquefied natural gas]".<sup>13</sup> It repeals Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, which formed part of the Second Energy Package (SEP).<sup>14</sup> The rules relate to the organization and functioning of the natural gas sector, access to the market, the criteria and procedures applicable to the granting of authorizations for transmission, distribution, supply and storage of natural gas and the operation of systems.<sup>15</sup> The Directive requires EU member States to "bring into force the laws, regulations and administrative provisions necessary to comply with [it] by 3 March 2011".<sup>16</sup> It also requires EU member States to

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<sup>11</sup> Russia's first written submission, para. 25; and European Union's first written submission, paras. 19-21. The Third Energy Package also reforms the European Union's internal market in electricity, but that aspect is not challenged in this dispute. This dispute is limited to the components of the Third Energy Package which regulate the natural gas market.

<sup>12</sup> Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (Text with EEA relevance), OJ L 211/94 of 14.8.2009, (Directive 2009/73/EC), (Exhibit EU-5). Other components of the Third Energy Package are Regulation (EC) No. 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No. 1775/2005 (Text with EEA relevance), OJ L 211/36 of 14.8.2009, (Exhibit EU-1); Regulation (EC) No. 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy regulators (Text with EEA relevance), OJ L 211/1 of 14.8.2009, (Regulation (EC) No. 713/2009), (Exhibit EU-6); and Regulation (EU) No. 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC (Text with EEA relevance), OJ L 295/1 of 12.11.2010, (Regulation (EU) No. 994/2010), (Exhibit EU-73). (Russia's panel request, p. 5; and Russia's first written submission, para. 26).

<sup>13</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 1(2).

<sup>14</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 53.

<sup>15</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 1(1).

<sup>16</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 54. The date from which EU member States are required to apply Article 11 is, however, 3 March 2013. (Ibid.)

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ensure that national regulatory authorities (NRAs) are appropriately empowered to ensure compliance with the requirements under the Directive.<sup>17</sup>

2.4. A related element of the European Union's energy policy is the Trans-European Networks for Energy measure (TEN-E measure), which complements the requirements of the Third Energy Package by facilitating investments in infrastructure with cross-border impacts.<sup>18</sup> The main component of the TEN-E measure is Regulation (EU) No. 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for Trans-European energy infrastructure and repealing Decision No. 1364/2006/EC and amending Regulations (EC) No. 713/2009, (EC) No. 714/2009 and (EC) No. 715/2009 (TEN-E Regulation). Recital 8 of this Regulation explains that:

Despite the fact that ... Directive 2009/73/EC ... provides for an internal market in energy, the market remains fragmented due to insufficient interconnections between national energy networks and to the suboptimal utilisation of existing energy infrastructure.

To address this fragmentation, the TEN-E Regulation "lays down rules for the timely development and interoperability of trans-European energy networks".<sup>19</sup>

2.5. The TEN-E Regulation repeals and replaces the pre-existing TEN-E framework in Decision No. 1364/2006/EC of the European Parliament and of the Council of 6 September 2006 laying down guidelines for trans-European energy networks and repealing Decision 96/391/EC and Decision No. 1229/2003/EC. It has been amended twice: in October 2013, through Commission Delegated Regulation (EU) No. 1391/2013 of 14 October 2013, amending Regulation (EU) No. 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure as regards the Union list of projects of common interest, and then in November 2015, through Commission Delegated Regulation (EU) 2016/89 of 18 November 2015 amending Regulation (EU) No. 347/2013 of the European Parliament and of the Council as regards the Union list of projects of common interest. We refer to these legal instruments, collectively, as the "TEN-E measure" and expand on the details of this measure below.

## 2.2 The measures at issue

### 2.2.1 Introduction

2.6. Russia's challenge against the Directive is directed at several separate, distinct measures stemming from this instrument. Russia furthermore challenges some of these measures as contained in the national implementing laws of Croatia, Hungary and Lithuania. Russia also challenges the TEN-E measure contained in the EU legal instruments described herein. For purposes of this Report, the measures at issue can be categorized as follows:

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<sup>17</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 41(4). This includes, at minimum, the power to: (a) issue binding decisions on natural gas undertakings; (b) carry out investigations into the functioning of the gas markets and impose any necessary and proportionate measures to promote effective competition and ensure the proper functioning of the market; (c) require any information from natural gas undertakings relevant for the fulfilment of its tasks; (d) impose effective, proportionate and dissuasive penalties on natural gas undertakings not complying with their obligations; and (e) appropriate rights of investigations and relevant powers of instructions for dispute settlement concerning certain obligations under the Directive.

<sup>18</sup> Commission Staff Working Document Accompanying Commission Delegated Regulation (EU) No. 2016/89 of 18 November 2015 amending Regulation (EU) No. 347/2013 of the European Parliament and of the Council as regards the Union list of projects of common interest, SWD(2015) 247 of 18.11.2015, (Exhibit RUS-8), p. 12.

<sup>19</sup> Regulation (EU) No. 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No. 1364/2006/EC and amending Regulations (EC) No. 713/2009, (EC) No. 714/2009 and (EC) No. 715/2009 (Text with EEA relevance), OJ L 115/39 of 25.4.2013, (Exhibit EU-4).

| No. | Short Title                         |
|-----|-------------------------------------|
| 1   | Unbundling measure                  |
| 2   | Public body measure <sup>20</sup>   |
| 3   | LNG measure                         |
| 4   | Infrastructure exemption measure    |
| 5   | Upstream pipeline networks measure  |
| 6   | Third-country certification measure |
| 7   | TEN-E measure                       |

### 2.2.2 The unbundling measure

2.7. The unbundling measure provides rules on the separation, i.e. "unbundling", of "undertaking[s] performing any of the functions of production or supply", on the one hand, and "transmission system operator[s] or [] transmission system[s]", on the other hand.<sup>21</sup> These rules are applicable to vertically integrated undertakings (VIUs), defined in the Directive as:

[A] natural gas undertaking or a group of natural gas undertakings where the same person or the same persons are entitled, directly or indirectly, to exercise control, and where the undertaking or group of undertakings perform at least one of the functions of transmission, distribution, LNG or storage, and at least one of the functions of production or supply of natural gas[.]<sup>22</sup>

2.8. Such VIUs are generally required to unbundle "undertaking[s] performing any of the functions of production or supply" from "transmission system operator[s] or [] transmission system[s]". The specific rules for such unbundling depend on the applicable unbundling model, described below.

2.9. Russia challenges the unbundling measure in the Directive as well as in the national implementing laws of Croatia, Hungary and Lithuania.

#### 2.2.2.1 The unbundling measure in the Directive

2.10. To achieve unbundling, the Directive requires EU member States to implement the ownership unbundling model (OU model). In addition, it allows EU member States to implement, under certain conditions, the independent system operator model (ISO model) or the independent transmission operator model (ITO model), or both.<sup>23</sup>

2.11. Under the OU model, the same natural or legal person or persons cannot exercise control or any right, directly or indirectly, over a natural gas production or supply undertaking as well as a natural gas transmission system or transmission system operator (TSO).<sup>24</sup> These rights include "the power to exercise voting rights"<sup>25</sup>; "the power to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking"<sup>26</sup>; or "the holding of a majority share".<sup>27</sup> Furthermore, the same person cannot serve as a member of the supervisory

<sup>20</sup> Russia refers to it as the "government exemption measure", whereas the European Union refers to it as the "public body specification". (See, e.g. Russia's first written submission, paras. 233, 248, 269, 272, 275, 277 and 280; and European Union's first written submission, paras. 225, 226 and 228). For purposes of this Report, this measure is referred to as the "public body measure".

<sup>21</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 9(1)(b).

<sup>22</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 2(20).

<sup>23</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 9(8).

<sup>24</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 9(1)(b).

<sup>25</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 9(2)(a).

<sup>26</sup> Directive 2009/73/EC, (Exhibit EU-5), Articles 9(1)(c) and 9(2)(b).

<sup>27</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 9(2)(c).

board, the administrative board or of bodies legally representing a natural gas production or supply undertaking as well as a transmission system or a TSO.<sup>28</sup> Under the OU model, the TSO is also the transmission system owner.<sup>29</sup>

2.12. The optional additional models – the ISO and ITO models – are available only if, as of 3 September 2009, the transmission system already belonged to a VIU.<sup>30</sup>

2.13. Under the ISO model, a VIU owns a transmission system network, but the operator of the transmission system must be an independent entity, also referred to as the independent system operator (ISO).<sup>31</sup>

2.14. The *operator* of the transmission system, i.e. the TSO or the ISO, is responsible for granting and managing third-party access to the transmission system, including the collection of access charges and other payments; for operating, maintaining and developing the transmission system; and for the investment planning for this system.<sup>32</sup>

2.15. This operator must (i) comply with the rules on ownership unbundling in Articles 9(1)(b), (c), and (d) of the Directive<sup>33</sup>; (ii) demonstrate that it has at its disposal the required financial, technical, physical, and human resources to carry out the tasks of transmission<sup>34</sup>; (iii) undertake to comply with a ten-year network development plan monitored by the relevant NRA<sup>35</sup>; and (iv) demonstrate its ability to comply with Regulation (EC) No. 715/2009, including the cooperation of TSOs at European and regional level.<sup>36</sup>

2.16. Article 15 of the Directive, entitled "Unbundling of transmission system owners and storage system operators", requires that:

A transmission system owner, where an independent system operator has been appointed, and a storage system operator which are part of vertically integrated undertakings shall be independent at least in terms of their legal form, organisation and decision making from other activities not relating to transmission, distribution and storage.<sup>37</sup>

2.17. For transmission system owners, this requires, at a minimum, that:

(a) persons responsible for the management of the transmission system owner ... shall not participate in company structures of the integrated natural gas undertaking

<sup>28</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 9(1)(d).

<sup>29</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 9(1)(a), stating that "each undertaking which owns a transmission system acts as a transmission system operator".

<sup>30</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 9(8). We note that Russia at times refers to the TAP infrastructure exemption decision, which allowed Trans-Adriatic Pipeline AG (TAP AG) to operate as an "*ad hoc*" ITO" despite not belonging to a VIU on 3 September 2009. (Russia's first written submission, paras. 332-334; and second written submission, para. 227). The possibility of providing exemptions to the rules on unbundling, third-party access, and tariff regulation requirements under the infrastructure exemption measure is described below in section 2.2.5 and is not addressed further in the context of the unbundling measure. Furthermore, we note that Article 9(9) of the Directive also allows another unbundling model for TSOs belonging to a VIU on 3 September 2009. Under this model, EU member States may derogate from the rules in the OU model, the ISO model and the ITO model provided that "there are arrangements in place which guarantee more effective independence of the transmission system operator than the provisions of Chapter IV [concerning the ITO model]" on 3 September 2009. (Directive 2009/73/EC, (Exhibit EU-5), Article 9(9)). See also European Union's first written submission, p. 8, fn 11). However, Russia does not rely on or refer to this model in challenging the unbundling measure in the Directive and the European Union has clarified that Article 9(9) has not been applied or relied on by any entity seeking certification. (European Union's response to Panel question No. 37, para. 69). This model is hence not relevant for the Panel's assessment of the unbundling measure's WTO consistency and is therefore not addressed further.

<sup>31</sup> Directive 2009/73/EC, (Exhibit EU-5), Articles 9(8)(a) and 14.

<sup>32</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 14(4).

<sup>33</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 14(2)(a). See also para. 2.11 above.

<sup>34</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 14(2)(b).

<sup>35</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 14(2)(c).

<sup>36</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 14(2)(e).

<sup>37</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 15(1).

responsible, directly or indirectly, for the day-to-day operation of the production and supply of natural gas;

(b) appropriate measures shall be taken to ensure that the professional interests of persons responsible for the management of the transmission system owner ... are taken into account in a manner that ensures that they are capable of acting independently;

...

(d) the transmission system owner ... shall establish a compliance programme, which sets out measures taken to ensure that discriminatory conduct is excluded, and ensure that observance of it is adequately monitored.<sup>38</sup>

2.18. Furthermore, the transmission system owner must: (i) provide the relevant cooperation and support to the ISO<sup>39</sup>; (ii) finance the investments decided on by the ISO and approved by the relevant NRA, or agree to financing by any other interested party, including the ISO itself<sup>40</sup>; (iii) provide for the coverage of liability relating to the transmission system network assets, excluding liability relating to the tasks of the ISO<sup>41</sup>; and (iv) provide guarantees to facilitate financing of any transmission system network expansions, except where it has agreed to financing by any other interested party.<sup>42</sup>

2.19. When the ISO model is applied, certain aspects of the owner's and the ISO's activities and relationship are subject to monitoring or approval by the NRA of the relevant EU member State. The NRA shall (a) monitor the owner's and the ISO's compliance with the requirements of Article 14 of the Directive<sup>43</sup> and their "relations and communications"<sup>44</sup>; (b) "approve contracts and act as a dispute settlement authority" between the two in respect of complaints in relation to the ISO's obligations under the Directive<sup>45</sup>; (c) approve the investment planning and the multi-annual network development plan of the ISO<sup>46</sup>; (d) ensure that network access tariffs collected by the ISO include remuneration for the owner<sup>47</sup>; and (e) have the powers to carry out unannounced inspections at the premises of the owner and the ISO.<sup>48</sup>

2.20. Under the ITO model, a VIU is required to establish an independent transmission operator (ITO), which owns and operates the transmission system.<sup>49</sup> Under this model, the VIU owns the ITO.<sup>50</sup> Chapter IV of the Directive contains rules specific to the ITO model, including those described below.

2.21. Pursuant to Article 17(1) of the Directive, ITOs "shall be equipped with all human, technical, physical and financial resources necessary for fulfilling their obligations under [the] Directive and carrying out the activity of gas transmission".<sup>51</sup> As further provided by Article 17(1) of the Directive, assets that are necessary for the activity of gas transmission, including the transmission system, shall be owned by the ITO; and personnel necessary for the activity of gas transmission, including the performance of all corporate tasks, shall be employed by the ITO.<sup>52</sup> Under

<sup>38</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 15(2).

<sup>39</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 14(5)(a).

<sup>40</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 14(5)(b). Article 14(5)(b) goes on to state that: The relevant financing arrangements shall be subject to approval by the regulatory authority. Prior to such approval, the regulatory authority shall consult the transmission system owner together with other interested parties.

<sup>41</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 14(5)(c).

<sup>42</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 14(5)(d).

<sup>43</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 41(3)(a).

<sup>44</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 41(3)(b).

<sup>45</sup> Directive 2009/73/EC, (Exhibit EU-5), Articles 41(3)(b) and 41(11).

<sup>46</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 41(3)(c).

<sup>47</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 41(3)(d).

<sup>48</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 41(3)(e).

<sup>49</sup> Directive 2009/73/EC, (Exhibit EU-5), Articles 9(8)(b) and 17(1)(a) and Chapter IV. Under the ITO model, the operator of the transmission system is referred to as the independent transmission operator (ITO) or the TSO.

<sup>50</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 9(8)(b).

<sup>51</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 17(1).

<sup>52</sup> Directive 2009/73/EC, (Exhibit EU-5), Articles 17(1)(a) and 17(1)(b).



Article 17(1)(c) of the Directive, leasing of personnel and rendering of services, to and from any other parts of the VIU, is prohibited. The ITO may, however, render services to the VIU as long as (i) the provision of those services does not discriminate between system users, is available to all system users on the same terms and conditions and does not restrict, distort or prevent competition in production or supply; and (ii) the terms and conditions of the provision of those services are approved by the relevant NRA. Article 17(1)(d) also provides that, "without prejudice to the decisions of the Supervisory Body under Article 20", appropriate financial resources for future investment projects and/or for the replacement of existing assets shall be made available to the TSO in due time by the VIU following an appropriate request from the TSO.<sup>53</sup>

2.22. Article 13 of the Directive sets out the general tasks of a TSO as, among others: "operat[ing], maintain[ing] and develop[ing] under economic conditions secure, reliable and efficient transmission ... facilities"<sup>54</sup>, "refrain[ing] from discriminating between system users or classes of system users, particularly in favour of its related undertakings"<sup>55</sup>, and "provid[ing] ... sufficient information" to "any other transmission system operator, any other storage system operator, any other LNG system operator and/or any distribution system operator"<sup>56</sup> as well as "system users".<sup>57</sup> Article 17(2) of the Directive provides that the activity of gas transmission performed by the ITO "shall include at least the following tasks in addition to those listed in Article 13":

- (a) the representation of the transmission system operator and contacts to third parties and the regulatory authorities;
- (b) the representation of the transmission system operator within the European Network of Transmission System Operators for Gas (ENTSO for Gas);
- (c) granting and managing third-party access on a non-discriminatory basis between system users or classes of system users;
- (d) the collection of all the transmission system related charges including access charges, balancing charges for ancillary services such as gas treatment, purchasing of services (balancing costs, energy for losses);
- (e) the operation, maintenance and development of a secure, efficient and economic transmission system;
- (f) investment planning ensuring the long-term ability of the system to meet reasonable demand and guaranteeing security of supply;
- (g) the setting up of appropriate joint ventures, including with one or more transmission system operators, gas exchanges, and the other relevant actors pursuing the objective to develop the creation of regional markets or to facilitate the liberalisation process; and
- (h) all corporate services, including legal services, accountancy and IT services.<sup>58</sup>

2.23. Article 18 of the Directive requires that, "without prejudice to the decisions of the Supervisory Body under Article 20", the ITO must have "effective decision-making rights, independent from the vertically integrated undertaking, with respect to assets necessary to operate, maintain or develop the transmission system"<sup>59</sup> and "the power to raise money on the capital market".<sup>60</sup> The remainder of Article 18 of the Directive provides for the following rules:

<sup>53</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 17(1)(d).

<sup>54</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 13(1)(a).

<sup>55</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 13(1)(b).

<sup>56</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 13(1)(c).

<sup>57</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 13(1)(d).

<sup>58</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 17(2).

<sup>59</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 18(1)(a).

<sup>60</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 18(1)(b).

2. The transmission system operator shall at all times act so as to ensure it has the resources it needs in order to carry out the activity of transmission properly and efficiently and develop and maintain an efficient, secure and economic transmission system.

3. Subsidiaries of the vertically integrated undertaking performing functions of production or supply shall not have any direct or indirect shareholding in the transmission system operator. The transmission system operator shall neither have any direct or indirect shareholding in any subsidiary of the vertically integrated undertaking performing functions of production or supply, nor receive dividends or any other financial benefit from that subsidiary.

4. The overall management structure and the corporate statutes of the transmission system operator shall ensure effective independence of the transmission system operator in compliance with this Chapter. The vertically integrated undertaking shall not determine, directly or indirectly, the competitive behaviour of the transmission system operator in relation to the day to day activities of the transmission system operator and management of the network, or in relation to activities necessary for the preparation of the ten-year network development plan developed pursuant to Article 22.

5. In fulfilling their tasks in Article 13 and Article 17(2) of this Directive, and in complying with Article 13(1), Article 14(1)(a), Article 16(2), (3) and (5), Article 18(6) and Article 21(1) of Regulation (EC) No 715/2009, transmission system operators shall not discriminate against different persons or entities and shall not restrict, distort or prevent competition in production or supply.

6. Any commercial and financial relations between the vertically integrated undertaking and the transmission system operator, including loans from the transmission system operator to the vertically integrated undertaking, shall comply with market conditions. The transmission system operator shall keep detailed records of such commercial and financial relations and make them available to the regulatory authority upon request.

7. The transmission system operator shall submit for approval by the regulatory authority all commercial and financial agreements with the vertically integrated undertaking.

8. The transmission system operator shall inform the regulatory authority of the financial resources, referred to in Article 17(1)(d), available for future investment projects and/or for the replacement of existing assets.

9. The vertically integrated undertaking shall refrain from any action impeding or prejudicing the transmission system operator from complying with its obligations in this Chapter and shall not require the transmission system operator to seek permission from the vertically integrated undertaking in fulfilling those obligations.

10. An undertaking which has been certified by the regulatory authority as being in compliance with the requirements of this Chapter shall be approved and designated as a transmission system operator by the Member State concerned. The certification procedure in either Article 10 of this Directive and Article 3 of Regulation (EC) No 715/2009 or in Article 11 of this Directive shall apply.<sup>61</sup>

2.24. For the ITO model, the Directive also requires the establishment of a Supervisory Body of the ITO.<sup>62</sup> Article 20 of the Directive sets out, in relevant part, the following provisions concerning a Supervisory Body of the ITO:

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<sup>61</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 18.

<sup>62</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 20.

1. The transmission system operator shall have a Supervisory Body which shall be in charge of taking decisions which may have a significant impact on the value of the assets of the shareholders within the transmission system operator, in particular decisions regarding the approval of the annual and longer-term financial plans, the level of indebtedness of the transmission system operator and the amount of dividends distributed to shareholders. The decisions falling under the remit of the Supervisory Body shall exclude those that are related to the day to day activities of the transmission system operator and management of the network, and in relation to activities necessary for the preparation of the ten-year network development plan developed pursuant to Article 22.

2. The Supervisory Body shall be composed of members representing the vertically integrated undertaking, members representing third party shareholders and, where the relevant legislation of a Member State so provides, members representing other interested parties such as employees of the transmission system operator.<sup>63</sup>

2.25. Furthermore, pursuant to Article 19 of the Directive, the Supervisory Body is in charge of "[d]ecisions regarding the appointment and renewal, working conditions including remuneration, and termination of the term of office, of the persons responsible for the management and/or members of the administrative bodies of the transmission system operator".<sup>64</sup> The identity of, and the conditions governing the term, the duration and the termination of office of, the persons nominated by the Supervisory Body for appointment or renewal as persons responsible for the executive management and/or as members of the administrative bodies of the TSO, and the reasons for any proposed decision must be notified to the relevant NRA. Such nominations become binding if the relevant NRA does not raise objections, within three weeks, in cases where "doubts arise as to the professional independence of a nominated person" or "in the case of premature termination of a term of office, doubts exist regarding the justification of such premature termination".<sup>65</sup> These rules also apply to at least half of the members of the Supervisory Body minus one and the rules concerning premature termination apply to all such members.<sup>66</sup>

2.26. For persons responsible for the management of the ITO and members of the administrative bodies a number of rules apply to secure their independence: (a) these persons cannot exercise any professional position or responsibility, interest or business relationship, either directly or indirectly, with any part of the VIU (other than the ITO) or its controlling shareholders during a period of three years before their appointment<sup>67</sup>, during their appointment<sup>68</sup>, or during a period of four years after termination of their appointment<sup>69</sup>; (b) these persons and other employees of the ITO cannot hold an interest in or receive any financial benefit, directly or indirectly, from any part of the VIU other than the ITO or receive remuneration depending on activities or results of the VIU<sup>70</sup>; and (c) these persons shall be guaranteed "[e]ffective rights of appeal to the regulatory authority ... against premature terminations of their term of office".<sup>71</sup> The same rules apply to at least half of the members of the Supervisory Body minus one.<sup>72</sup>

2.27. When the ITO model is applied, certain aspects of the ITO's and the VIU's activities and relationship are subject to monitoring and/or approval by the NRA of the relevant EU member State. The NRA shall (i) issue penalties for discriminatory behaviour in favour of the VIU<sup>73</sup>; (ii) monitor communications<sup>74</sup> as well as commercial and financial relations<sup>75</sup> between the ITO and the

<sup>63</sup> Directive 2009/73/EC, (Exhibit EU-5), Articles 20(1) and 20(2).

<sup>64</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 19(1).

<sup>65</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 19(2).

<sup>66</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 20(3).

<sup>67</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 19(3). This rule only applies to the majority of the persons responsible for the management and/or members of the administrative bodies of the ITO. The remaining persons shall not have exercised "management or other relevant activity in the vertically integrated undertaking for a period of at least six months before their appointment". (Directive 2009/73/EC, (Exhibit EU-5), Article 19(8)).

<sup>68</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 19(4).

<sup>69</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 19(7).

<sup>70</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 19(5).

<sup>71</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 19(6).

<sup>72</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 20(3).

<sup>73</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 41(5)(a).

<sup>74</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 41(5)(b).

<sup>75</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 41(5)(d).

VIU; (iii) act as dispute settlement authority between the VIU and the ITO in respect of the latter's obligations under the Directive<sup>76</sup>; (iv) approve all commercial and financial agreements between the VIU and the ITO, on the condition that they comply with market conditions<sup>77</sup>; (v) request justification from the VIU in relation to notifications by the compliance officer concerning investment decisions<sup>78</sup>; (vi) carry out inspections on the premises of the VIU and the ITO<sup>79</sup>; and (vii) assign all or specific tasks of the ITO to an appointed independent system operator under the ISO model in case of a persistent breach by the ITO of its obligations under the Directive.<sup>80</sup>

2.28. Under the Directive, derogations from the rules on unbundling are permitted for certain EU member States. More particularly, Article 49 allows EU member States "not directly connected to the interconnected system of any other Member State and having only one main external supplier" to derogate from, among others, the rules on unbundling and specifies that these rules "shall not apply to Estonia, Latvia and/or Finland until any of those Member States is directly connected to the interconnected system of any Member State other than Estonia, Latvia, Lithuania and Finland".<sup>81</sup> Similarly, EU member States "qualifying as an emergent market, which, because of the implementation of this Directive, would experience substantial problems" are permitted to derogate from, among others, the rules on unbundling.<sup>82</sup> The Directive also specifies that the rules on unbundling do not apply to Cyprus, Luxembourg and Malta.<sup>83</sup>

### 2.2.2.2 The unbundling measure in the national implementing laws of Croatia, Hungary, and Lithuania

2.29. Croatia has implemented the rules on unbundling in the Directive through its Gas Market Act, which allows all three unbundling models.<sup>84</sup> The OU model is implemented through Article 14 of the Gas Market Act and the ISO and ITO models are implemented through Articles 15 through 17 and Articles 18 through 22 of the Gas Market Act, respectively.

2.30. Hungary has implemented the rules on unbundling in the Directive through its Gas Act, which also allows all three unbundling models.<sup>85</sup> The OU model is implemented through Section 121/H, the ISO model is implemented through Section 121/I, and the ITO model is implemented through Sections 121/B through 121/G of this Act. In addition, Russia refers to Section 120/A(3)(b)<sup>86</sup> and Section 123(4) of Hungary's Gas Act.<sup>87, 88</sup> Both parties have submitted

<sup>76</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 41(5)(c).

<sup>77</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 41(5)(e).

<sup>78</sup> Directive 2009/73/EC, (Exhibit EU-5), Articles 21(4) and 41(5)(f). The compliance officer is appointed by the Supervisory Body, subject to the approval of the relevant NRA, and is generally in charge of monitoring the implementation of the compliance programme; annually reporting on measures taken in accordance with this programme to the relevant NRA; reporting to the Supervisory Body and issuing recommendations on the compliance programme and its implementation; notifying the NRA of any substantial breaches of the programme; and reporting to the NRA on any commercial or financial relations between the VIU and the ITO. (Directive 2009/73/EC, (Exhibit EU-5), Articles 21(2) and 21(3)).

<sup>79</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 41(5)(g).

<sup>80</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 41(5)(h).

<sup>81</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 49(1).

<sup>82</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 49(2).

<sup>83</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 49(6).

<sup>84</sup> Croatia's Gas Market Act (Official Gazette 28-472/2013, 14-299/2014), (Croatia's Gas Market Act), (Exhibit RUS-45).

<sup>85</sup> Hungary's Act XL of 2008 on Natural Gas Supply – In Force on 31 March 2012 (extracts of an unofficial consolidated version incorporating Government Decree No. 19/2009 (I.30.) on the implementation of the Act on Natural Gas Supply), (Hungary's Gas Act) (Exhibit EU-41); Hungary's Gas Act XL of 2008, including the amendments made after 31 May 2012, (Hungary's Gas Act), (Exhibit EU-155); and Chapter III of Hungary's Act XXIX of 2011 on the Amendment of Regulations Relating to Energy Supply amending Hungary's Act XL of 2008 on Natural Gas Supply, (Hungary's Gas Act), (Exhibit RUS-47). The multiple exhibits are a result of the existence of a separate Hungarian legislation amending the original Act and disagreements between the parties regarding the accuracy of the translation.

<sup>86</sup> Russia's first written submission, paras. 227-228. Section 120/A is entitled "Common Unbundling Rules Relating to Vertically Integrated Natural Gas Companies" and provides, in relevant parts, that "the system operator – other than the authorized operator of the regulated natural gas market and transmission system operators – may not acquire any share in any other authorized operator engaged in activities other than his own activities, which are subject to authorization under this Act". See Hungary's Gas Act (Exhibits EU-155/RUS-47).

<sup>87</sup> Russia's first written submission, paras. 227-228. Section 123(4) provides as follows:

their own translations of Hungary's national implementing law as exhibits, and disagree on the translation of certain provisions and the completeness of the submitted exhibits.<sup>89</sup> The implications of these disagreements will be addressed in the Panel's findings, as appropriate.

2.31. Lithuania has implemented the rules on unbundling in the Directive through Articles 40 and 41 of its Law on Natural Gas<sup>90</sup>, which allow only the OU model. Moreover, Russia refers to Lithuania's Law Implementing the Law Amending the Law on Natural Gas (Lithuania's Law on Implementation)<sup>91</sup>, which lays down "the procedure and principles of implementation of the Law on Natural Gas", including the unbundling requirement contained in Chapter Eight of the Law on Natural Gas.<sup>92</sup> Article 2.2 of the Law on Implementation requires "non-compliant natural gas undertakings" to choose between two different procedures in order to ensure compliance with the unbundling requirement, namely the "control reform procedures", and the "reorganisation procedures", defined respectively in Articles 3 and 4 of Lithuania's Law on Implementation. Pursuant to Article 3.1, non-compliant natural gas undertakings may seek compliance with the unbundling requirement "by reforming the control of an undertaking on their own initiative", which "shall be effected through transactions (transfer of assets or shares, assignment of rights, transfer of shareholders' rights, shareholders' agreement, increasing or decreasing of the authorised capital or any other) made in accordance with the procedure established in paragraph 2 [of Article 3]". Article 3.2 stipulates, *inter alia*, that non-compliant gas undertakings "must obtain the approval of the Commission" before entering into a transaction "which causes or may cause change (emergence, ceasing, decrease or increase) of control defined in Article 41 of the Law on Natural Gas".

### 2.2.3 The public body measure in the national implementing laws of Croatia, Hungary, and Lithuania

2.32. Russia challenges the public body measure in the national implementing laws of Croatia, Hungary, and Lithuania, which transpose Article 9(6) of the Directive. This Article states as follows:

For the implementation of this Article, where the person referred to in points (b), (c) and (d) of paragraph 1 [of Article 9] is the Member State or another public body, two separate public bodies exercising control over a transmission system operator or over a transmission system on the one hand, and over an undertaking performing any of

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Any company that is involved in the extraction of natural gas, the production of electricity, or in the supply of natural gas or electricity, and any shareholders exercising control in such companies may not acquire any share – directly or indirectly – in a transmission system operator where such share constitutes entitlement to exercise control. The acquisition of shares in a transmission system operator, or in a controlling shareholder thereof, where such share constitutes entitlement to exercise control is subject to the Office's prior approval as well. This provision shall have no bearing on the provision contained in Subsection (1) of Section 121/B.

See Hungary's Gas Act (Exhibits EU-155/RUS-47). The text of Section 123(4) in those two exhibits is identical. This provision is referred to as "Section 194" in paragraph 227 of Russia's first written submission and Exhibit RUS-47.

<sup>88</sup> Russia also identifies Section 117(1) of Hungary's Gas Act. (Russia's response to Panel question No. 165, para. 69 (citing Hungary's Gas Act, (Exhibit RUS-47), pp. 37-38)).

<sup>89</sup> With respect to the accuracy of the translations, the European Union submitted corrections to the translations of Sections 120/A and 121/H in Exhibit RUS-47 and offers its own Exhibit EU-41 as an accurate translation. (European Union's first written submission, para. 229; and response to Panel question No. 2, para. 17). Russia accepted the translations of these Sections in Exhibit EU-41. (Russia's response to Panel question No. 145, para. 1). With respect to the completeness of the submitted exhibits, the European Union argued that the text of Section 123 in Exhibit RUS-47, while not fundamentally different in meaning from the text in Exhibits EU-41 and EU-155, is incomplete because it omits Section 123(2). (European Union's first written submission, paras. 548 and 552; and response to Panel question Nos. 2 and 163, paras. 16 and 35, respectively). Russia submitted that its own translation of Section 123 in Exhibit RUS-47 is more accurate than those provided by the European Union. (Russia's response to Panel question Nos. 145 and 163, paras. 2 and 60-65).

<sup>90</sup> Law of the Republic of Lithuania of 10 October 2000 No. VIII-1973 on Natural Gas, (Lithuania's Law on Natural Gas), (Exhibit RUS-136rev).

<sup>91</sup> Law of the Republic of Lithuania of 30 June 2011 No. XI-1565 on the Implementation of the Law Amending the Law on Natural Gas, (Lithuania's Law on Implementation), (Exhibit RUS-22).

<sup>92</sup> Lithuania's Law on Implementation, (Exhibit RUS-22), Article 1(1).

the functions of production or supply on the other, shall be deemed not to be the same person or persons.<sup>93</sup>

2.33. Croatia has implemented this provision through Article 14(6) of its Gas Market Act, Hungary has implemented it through Section 121/H(4) of its Gas Act, and Lithuania has implemented it through Article 41(5) of its Law on Natural Gas. The table below reproduces these provisions:

| Croatia <sup>94</sup>   | Hungary <sup>95</sup>   | Lithuania <sup>96</sup>   |
|---|---|---|
| Two separate public authorities that control the transmission system operator or the transmission system and that control the energy undertaking performing any of the activities of production, trade or supply and the activity of the production of natural gas shall not be considered the same person or persons within the meaning of [the relevant ownership unbundling provisions of the Gas Market Act]. | The obligation set out in [the relevant ownership unbundling provisions of the Gas Act] shall be deemed to be fulfilled in a situation where economic operators defined by law acting in the name of Hungary or other public bodies exercising control over a transmission system operator or over a transmission line on the one hand, and over a company performing any of the functions of production or supply of natural gas on the other. | Where the person referred to in [the relevant ownership unbundling provisions of the Law on Natural Gas] is a member State or another public body, two separate public bodies exercising control over a transmission system operator or over a transmission system on the one hand, and over an undertaking performing any of the functions of production or supply on the other, shall be deemed not to be the same person or persons. |

#### 2.2.4 The LNG measure

2.34. Russia challenges the LNG measure in the Directive. Article 2(11) of the Directive defines an "LNG facility" as "a terminal which is used for the liquefaction of natural gas or the importation, offloading, and re-gasification of LNG". An "LNG system operator" is "a natural or legal person who carries out the function of liquefaction of natural gas, or the importation, offloading, and re-gasification of LNG and is responsible for operating a LNG facility".<sup>97</sup>

2.35. According to Article 2(3) of the Directive, "transmission" involves the transport of natural gas through a high-pressure pipeline network. According to Article 2(4) of the Directive, a TSO is a natural or legal person who carries out the function of transmission and is responsible for operating the transmission system. As LNG facilities and LNG system operators do not fall within the scope of "transmission system" and the definition of a TSO, respectively, they are not subject to the unbundling requirements of the Directive applicable to transmission systems and TSOs. LNG system operators are subject to the rules on third-party access prescribed by Article 32 of the Directive.<sup>98</sup>

#### 2.2.5 The infrastructure exemption measure

2.36. Article 36 of the Directive provides that two categories of infrastructure "may, upon request, be exempted, for a defined period of time" from generally applicable rules such as: rules regarding unbundling; rules regarding third-party access to transmission and distribution systems, LNG facilities, storage facilities and upstream pipeline networks; and rules regulating terms, conditions, tariffs and methodologies for access to these.<sup>99</sup> The first category is "[m]ajor new gas

<sup>93</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 9(6).

<sup>94</sup> Croatia's Gas Market Act, (Exhibit RUS-45), Article 14(6).

<sup>95</sup> Hungary's Gas Act, (Exhibits EU-155/RUS-47), Section 121/H(4). Despite initial disagreement, the parties have subsequently both agreed to the translation of Section 121/H(4). (Russia's response to Panel question No. 2, para. 10; and European Union's first written submission, para. 229).

<sup>96</sup> Lithuania's Law on Natural Gas, (Exhibit RUS-136rev), Article 41(5).

<sup>97</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 2(12).

<sup>98</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 32(1). This Article explicitly mentions LNG facilities.

<sup>99</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 36(1) (referring to Articles 9, 32-34, 41(6), 41(8), and 41(10)). This Article corresponds to Article 22 of Directive 2003/55/EC, which was part of the Second Energy Package. Although the versions of the measure enacted in the different Directives differ slightly, the language

infrastructure, i.e. interconnectors, LNG and storage facilities"<sup>100</sup>; the second category is "significant increases of capacity in existing infrastructure and ... modifications of such infrastructure which enable the development of new sources of gas supply".<sup>101</sup>

2.37. Infrastructure falling within one of these two categories may only be exempted "under the following conditions" as provided in Article 36(1) of the Directive:

- (a) the investment must enhance competition in gas supply and enhance security of supply;
- (b) the level of risk attached to the investment must be such that the investment would not take place unless an exemption was granted;
- (c) the infrastructure must be owned by a natural or legal person which is separate at least in terms of its legal form from the system operators in whose systems that infrastructure will be built;
- (d) charges must be levied on users of that infrastructure; and
- (e) the exemption must not be detrimental to competition or the effective functioning of the internal market in natural gas, or the efficient functioning of the regulated system to which the infrastructure is connected.

2.38. While the decision initially lies with the relevant NRA, it must be notified to the Commission, which can require the NRA to withdraw or amend its original decision.<sup>102</sup> Article 36(10) of the Directive states that the Commission may adopt guidelines for the application of these conditions. The Commission has not thus far adopted such guidelines.

2.39. Article 36 also directs the NRA to consider imposing, on a case-by-case basis, conditions regarding the scope<sup>103</sup> and duration of the exemption and non-discriminatory access to the infrastructure, taking into account the additional capacity to be built or the modification of existing capacity, the time horizon of the project, and national circumstances.<sup>104</sup>

2.40. Pursuant to this provision, the Commission and the NRAs have issued a number of decisions regarding infrastructure exemption requests. The parties refer to those relating to: the Ostsee-Pipeline-Anbindungsleitung (OPAL pipeline)<sup>105</sup>, the Nordeuropäische Erdgasleitung (NEL pipeline)<sup>106</sup>, the Gazelle pipeline<sup>107</sup>, the Trans-Adriatic Pipeline (TAP pipeline)<sup>108</sup>, the Nabucco

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concerning the criteria for granting an exemption is identical. The Panel's references to Article 36 of the Directive generally subsume its predecessor, Article 22 of Directive 2003/55/EC.

<sup>100</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 36(1). Article 2(17) of the Directive defines an "interconnector" as "a transmission line which crosses or spans a border between Member States for the sole purpose of connecting the national transmission systems of those Member States."

<sup>101</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 36(2).

<sup>102</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 36(9).

<sup>103</sup> See Directive 2009/73/EC, (Exhibit EU-5), Article 36(6), which states that "[a]n exemption may cover all or part of the capacity of the new infrastructure, or of the existing infrastructure with significantly increased capacity".

<sup>104</sup> Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJ L 176/57 of 15.7.2003, (Exhibits EU-10/RUS-4), Article 22(3)(b).

<sup>105</sup> Ruling of the German Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railways (BNetzA) of 25 February 2009 on the Application for Exemption from the Regulation by OPAL NEL Transport GmbH (Case ref. BK7-08-009), (BNetzA decision on the exemption of the OPAL and NEL pipelines), (Exhibit RUS-61); and Commission Decision of 12 June 2009 on the exemption of the OPAL pipeline from the requirements on third party access and tariff regulation laid down in Articles 18, 25(2), 25(3) and 25(4) of Directive 2003/55/EC, K(2009) 4694, SG-Greffe (2009)D/3322, (Commission decision on the exemption of the OPAL pipeline), (Exhibit RUS-82). The Commission infrastructure exemption decisions in OPAL and NEL are contained in the same document, but are referred to as separate decisions in our Report for purposes of clarity.

<sup>106</sup> Commission decision on the exemption of the OPAL pipeline, (Exhibit RUS-82).

<sup>107</sup> Commission Decision of 20 May 2011 on the exemption of the Gazelle pipeline from the requirements on third party access and tariff regulation laid down in Articles 32, 33, 34, 41(6), 41(8) and 41(10) of Directive 2009/73/EC, C(2011) 3424, (Commission decision on the exemption of the Gazelle pipeline I), (Exhibit RUS-81); and Commission Decision of 1 December 2011 on the exemption of the Gazelle pipeline from the

pipeline<sup>109</sup>, the Poseidon pipeline<sup>110</sup>, the Dragon LNG facility<sup>111</sup>, the South Hook LNG facility<sup>112</sup>, and the Gate Terminal LNG facility.<sup>113</sup>

2.41. While the parties refer to Article 36 of the Directive and the listed decisions, the precise nature and relevant aspects of the measure differ for each of Russia's claims. We address this in our findings below.

### 2.2.6 The upstream pipeline networks measure

2.42. Russia challenges the upstream pipeline networks measure in the Directive. An "upstream pipeline network" is defined in Article 2(2) of the Directive as:

[A]ny pipeline or network of pipelines 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 or terminal or final coastal landing terminal[.]<sup>114</sup>

2.43. According to Article 2(3) of the Directive, "transmission" means "the transport of natural gas through a network, which mainly contains high-pressure pipelines, *other than an upstream pipeline network* and other than the part of high-pressure pipelines primarily used in the context of local distribution of natural gas, with a view to its delivery to customers, but not including supply".<sup>115</sup> As the transport of natural gas through an upstream pipeline network does not fall

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requirement of ownership unbundling laid down in Article 9 of Directive 2009/73/EC, C(2011) 8777, (Commission decision on the exemption of the Gazelle pipeline II), (Exhibit RUS-87).

<sup>108</sup> Commission Decision of 16 May 2013 on the exemption of the Trans Adriatic Pipeline from the requirements on third party access, tariff regulation and ownership unbundling laid down in Articles 9, 32, 41(6), 41(8) and 41(10) of Directive 2009/73/EC, C(2013) 2949, (Commission decision on the exemption of the TAP pipeline), (Exhibit RUS-10).

<sup>109</sup> Commission Decision of 8 February 2008 on the exemption of the Austrian section of the Nabucco pipeline from the requirements on third party access and tariff regulation laid down in Articles 18, 25(2), 25(3) and 25(4) of Directive 2003/55/EC, CAB D(2008)142, (Commission decision on the exemption of the Austrian section of the Nabucco pipeline), (Exhibit RUS-83); Commission Decision of 20 April 2009 on the exemption of the Bulgarian section of the Nabucco pipeline from the requirements on third party access and tariff regulation laid down in Articles 18, 25(2), 25(3) and 25(4) of Directive 2003/55/EC, CAB D(2009), (Commission decision on the exemption of the Bulgarian section of the Nabucco pipeline), (Exhibit RUS-84); and Commission Decision of 23 June 2009 on the exemption of the Romanian section of the Nabucco pipeline from the requirements on third party access and tariff regulation laid down in Articles 18, 25(2), 25(3) and 25(4) of Directive 2003/55/EC, C(2009), (Commission decision on the exemption of the Romanian section of the Nabucco pipeline), (Exhibit RUS-85). No English translation was made available for the Commission's Decision on the exemption of the Hungarian part of the Nabucco pipeline. (Russia's first written submission, para. 631, fn 826).

<sup>110</sup> Commission Decision of 22 May 2007 on the exemption of the Poseidon pipeline from the requirements on third party access laid down in Articles 18, 20, 25(2), 25(3) and 25(4) of Directive 2003/55/EC, SG-Greffe(2007) D/203046, (Commission decision on the exemption of the Poseidon pipeline), (Exhibit RUS-86).

<sup>111</sup> Final Views of the UK Office of Gas and Electricity Markets (Ofgem) on the draft application by Dragon LNG Ltd for an exemption from the Regulated Third Party Access provisions of the Gas Directive for the Milford Haven LNG import terminal (June 2004), (Final views of the UK NRA on the exemption of the Dragon LNG facility), (Exhibit RUS-66); and Letter of 11 April 2005 from the UK Office of Gas and Electricity Markets (Ofgem) to All Interested Parties regarding the European Commission decision on Ofgem's decision to grant Dragon LNG Ltd (Dragon) an exemption under section 19C(5) of the Gas Act 1986 from the application of section 19D of the Gas Act, (Letter from the UK NRA regarding the Commission decision on the exemption of the Dragon LNG facility), (Exhibit RUS-101).

<sup>112</sup> Final Views of the UK Office of Gas and Electricity Markets (Ofgem) on the application by South Hook LNG Terminal Company Ltd (SHTCL) (owned by Qatar Petroleum and ExxonMobil) under section 19C of the Gas Act 1986 for an exemption from section 19D of the Gas Act 1986 for the entire proposed capacity of its LNG import facility at Milford Haven (November 2004), (Final views of the UK NRA on the exemption of the South Hook LNG facility), (Exhibit RUS-68); and Letter of 11 February 2005 from the UK Office of Gas and Electricity Markets (Ofgem) to All Interested Parties regarding the European Commission decision on Ofgem's decision to grant South Hook LNG Terminal Company Ltd (SHTCL) and Grain LNG Ltd (GLNG) an exemption under section 19C(5) of the Gas Act 1986 from the application of section 19D of the Gas Act, (Letter from the UK NRA regarding the Commission decision on the exemption of the South Hook LNG facility), (Exhibit RUS-102).

<sup>113</sup> Commission's comments of 26 March 2007 to the Decision of the Dutch Ministry of Economic Affairs of 23 November 2006 No. G/2006/01 on the exemption of the Gate Terminal project from certain parts of the Gas Directive 2003/55, (Commission's comments to the Gate Terminal exemption decision), (Exhibit EU-143).

<sup>114</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 2(2).

<sup>115</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 2(3). (emphasis added)



within the definition of "transmission", upstream pipeline networks and upstream pipeline network operators do not fall within the scope of a "transmission system" and the definition of a "TSO", respectively. Consequently, upstream pipeline networks and upstream pipeline network operators are not subject to the rules of the Directive applicable to TSOs, including those on unbundling and tariff regulation. The operators of upstream pipeline networks are also not subject to the rules on third-party access under Article 32 of the Directive.

2.44. For upstream pipeline networks, Article 34, entitled "Access to upstream pipeline networks", provides that member States shall take the necessary measures to ensure that natural gas undertakings and eligible customers are able to obtain access to upstream pipeline networks, except for the parts of those networks and facilities that are used for local production at the site of a field where the gas is produced. According to Article 34(2), such access is provided in a manner determined by the relevant EU member State, applying "the objectives of fair and open access, achieving a competitive market in natural gas and avoiding any abuse of a dominant position, taking into account security and regularity of supplies, capacity which is or can reasonably be made available, and environmental protection".<sup>116</sup>

### 2.2.7 The third-country certification measure

2.45. Russia challenges the third-country certification measure in the Directive and in the national implementing laws of Croatia, Hungary and Lithuania.

#### 2.2.7.1 The third-country certification measure in the Directive

2.46. Article 11 of the Directive is entitled "Certification in relation to third countries" and provides, in relevant parts, as follows:

1. Where certification is requested by a transmission system owner or a transmission system operator which is controlled by a person or persons from a third country or third countries, the regulatory authority shall notify the Commission.

The regulatory authority shall also notify to the Commission without delay any circumstances that would result in a person or persons from a third country or third countries acquiring control of a transmission system or a transmission system operator.

2. The transmission system operator shall notify to the regulatory authority any circumstances that would result in a person or persons from a third country or third countries acquiring control of the transmission system or the transmission system operator.

3. The regulatory authority shall adopt a draft decision on the certification of a transmission system operator within four months from the date of notification by the transmission system operator. It shall refuse the certification if it has not been demonstrated:

(a) that the entity concerned complies with the requirements of Article 9; and

<sup>116</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 34(2). This provision further states:

The following matters may be taken into account:

(a) the need to refuse access where there is an incompatibility of technical specifications which cannot reasonably be overcome;

(b) the need to avoid difficulties which cannot reasonably be overcome and could prejudice the efficient, current and planned future production of hydrocarbons, including that from fields of marginal economic viability;

(c) the need to respect the duly substantiated reasonable needs of the owner or operator of the upstream pipeline network for the transport and processing of gas and the interests of all other users of the upstream pipeline network or relevant processing or handling facilities who may be affected; and

(d) the need to apply their laws and administrative procedures, in conformity with Community law, for the grant of authorisation for production or upstream development.

(b) to the regulatory authority or to another competent authority designated by the Member State that granting certification will not put at risk the security of energy supply of the Member State and the Community. In considering that question the regulatory authority or other competent authority so designated shall take into account:

(i) the rights and obligations of the Community with respect to that third country arising under international law, including any agreement concluded with one or more third countries to which the Community is a party and which addresses the issues of security of energy supply;

(ii) the rights and obligations of the Member State with respect to that third country arising under agreements concluded with it, insofar as they are in compliance with Community law; and

(iii) other specific facts and circumstances of the case and the third country concerned.

4. The regulatory authority shall notify the decision to the Commission without delay, together with all the relevant information with respect to that decision.

5. Member States shall provide for the regulatory authority or the designated competent authority referred to in paragraph 3(b), before the regulatory authority adopts a decision on the certification, to request an opinion from the Commission on whether:

(a) the entity concerned complies with the requirements of Article 9; and

(b) granting certification will not put at risk the security of energy supply to the Community.

...

7. When assessing whether the control by a person or persons from a third country or third countries will put at risk the security of energy supply to the Community, the Commission shall take into account:

(a) the specific facts of the case and the third country or third countries concerned; and

(b) the rights and obligations of the Community with respect to that third country or third countries arising under international law, including an agreement concluded with one or more third countries to which the Community is a party and which addresses the issues of security of supply.

...

9. Nothing in this Article shall affect the right of Member States to exercise, in compliance with Community law, national legal controls to protect legitimate public security interests.

10. The Commission may adopt Guidelines setting out the details of the procedure to be followed for the application of this Article.<sup>117</sup>

### **2.2.7.2 The third-country certification measure in the national implementing laws of Croatia, Hungary and Lithuania**

2.47. Croatia has implemented the rules on third-country certification through Article 24 of its Gas Market Act, Hungary has implemented them through Section 128/A of its Gas Act, and Lithuania

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<sup>117</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 11.

has implemented them through Article 29 of its Law on Natural Gas. The table below reproduces the relevant text of these provisions:

| Croatia <sup>118</sup>  | Hungary <sup>119</sup>   | Lithuania <sup>120</sup>   |
|---|--|--|
| <p>(1) The certification procedure initiated based on the request for certification submitted by the owner of the transmission system or transmission system operator controlled by a person or persons from a third country or third countries shall be subject to the provision of Article 23 of this Act, with the following differences stated in this article.</p> <p>(2) The Agency shall without delay inform the Ministry and the European Commission and submit a proposal of its decision on:</p> <p>1. the request for certification submitted by the owner of the transmission system or transmission system operator controlled by a person or persons from a third country or third countries and</p> <p>2. all circumstances that may result in a person or persons from a third country or third countries taking control of the transmission system or the transmission system operator.</p> <p>...</p> <p>(4) The Ministry shall determine if the Agency's issuing of the certificate would endanger the security of energy supply of the Republic of Croatia and the European Union and shall deliver its opinion to the Agency within 60 days of Agency's notification.</p> | <p>(1) By way of derogation from the certification procedure referred to in Section 128, the Office shall open certification procedures relating to the third countries specified in this Section in the following cases:</p> <p>a) upon receipt of notice from the transmission system operator under Subsection (2);</p> <p>b) upon receipt of the request specified in Paragraph a) of Subsection (3); or</p> <p>c) upon receipt of information specified in Paragraph b) of Subsection (3).</p> <p>...</p> <p>(4) The Office shall refuse to certify compliance with unbundling requirements in certification procedures involving third countries, if the party acquiring control fails to verify:</p> <p>...</p> <p>b) that the certificate, if granted, will not jeopardize the security of the supply of natural gas – including the security of the supply of natural gas in the European Union ...</p> | <p>1. Where the issue of a licence is requested by a transmission system operator which is controlled by a person or persons from a third country or third countries, the Commission shall notify the European Commission. The Commission shall also notify to the European Commission any other circumstances that would result in a person or persons from a third country or third countries acquiring control of a transmission system or a transmission system operator.</p> <p>...</p> <p>4. Having regard to the opinion of the European Commission, if any, the Commission shall adopt a final decision on the designation of a transmission system operator within a period of two months after the day when the opinion of the European Commission was received or should have been received, but was not delivered. The Commission shall designate an operator provided that it demonstrates that:</p> <p>...</p> <p>2) such designation will not put at risk energy supply and the security of such supply of the Republic of Lithuania, another Member State or the European Union.</p> |

2.48. Russia also challenges certain "additional" provisions of the national laws of Hungary, and Lithuania, namely Sections 123(5) and 123(6) of Hungary's Gas Act, as well as Articles 20(5) and 29(4)(3) of Lithuania's Law on Natural Gas.<sup>121</sup>

<sup>118</sup> Croatia's Gas Market Act, (Exhibit RUS-45), Article 24.

<sup>119</sup> Hungary's Gas Act, (Exhibits EU-155/RUS-47 and EU-41), Article 128/A. Despite initial disagreement, Russia agrees with the translation of Article 128/A provided in Exhibit EU-41, but notes that the provisions of Hungary's Gas Act should be referred to as "Sections" rather than "Articles". (Russia's response to Panel question No. 145, para. 3). For reasons of convenience, we refer to the provisions of Hungary's Gas Act as "Sections" in our Report.

<sup>120</sup> Lithuania's Law on Natural Gas, (Exhibit RUS-136rev), Article 29. Despite initial disagreement, the European Union agrees with the English translation of Article 29 contained in Exhibit RUS-136rev. (European Union's response to Panel question No. 145, para. 1).

<sup>121</sup> Russia describes Section 123 of Hungary's Gas Act as imposing "additional" conditions that apply on top of the conditions stipulated in Article 128/A of Hungary's Gas Act. (Russia's first written submission, para. 431). Russia refers to Article 20(5) of Lithuania's Law on Natural Gas as "yet another discriminatory provision", having previously described the provisions of Article 29 of Lithuania's Gas Act. (Russia's first written submission, para. 440). Article 29(4)(3) is described by Russia as setting forth "an entirely different requirement" not closely corresponding to Article 11 of the Directive. (Russia's response to Panel question No.

2.49. Sections 123(5) and 123(6) of Hungary's Gas Act provide as follows:

(5) The Office's resolution granting consent is required for the execution of any transaction that would allow a person or persons from a third country or third countries to acquire control over a transmission system operator or the controlling shareholder of a transmission system operator.

(6) The Office may refuse to grant approval or render its approval conditional for the transactions referred to in Subsections (2) and (5) above and in Subsection (1) of Section 122, if they are deemed to pose any potential threat to the security of natural gas supply, to public safety, to the enforcement of compliance with energy policy objectives, to the discharge of activities subject to authorization under this Act, or the regulations for determining the price of transmission, storage and distribution services, and universal services, and the regulations for determining the quality of such services, furthermore, if the execution of such transactions would infringe upon the pre-emption right notified to the Office according to Subsection (8).<sup>122</sup>

2.50. Article 20 of Lithuania's Law on Natural Gas is entitled "Licences and Certificates in the Natural Gas Sector", with the relevant part of Article 20(5) stating that:

Licences for transmission, distribution, storage and liquefaction shall be issued to a legal entity established in the Republic of Lithuania or a unit of a legal entity or other organisation of another Member State established in the Republic of Lithuania.<sup>123</sup>

2.51. The relevant part of Article 29(4)(3) of Lithuania's Law on Natural Gas reads as follows:

The Commission shall designate an operator provided that it demonstrates that:

...

3) legitimate public security interests are protected.<sup>124</sup>

### 2.2.8 The TEN-E measure

2.52. The TEN-E measure stems from the provisions of the TEN-E Regulation that set out the criteria for the designation of certain infrastructure projects as "projects of common interest" (PCIs), lay out the regulatory framework to facilitate their timely implementation and provide them with certain incentives.<sup>125</sup>

2.53. Article 2(4) of the TEN-E Regulation defines a PCI as a project necessary to implement the energy infrastructure priority corridors and areas set out in Annex I of the Regulation, and which is part of the Union list of PCIs (Union list). The Union list is established by the Commission in the form of an Annex to the TEN-E Regulation, every two years, on the basis of the regional lists of proposed PCIs adopted by twelve Regional Groups.<sup>126</sup> The first Union list was adopted in 2013<sup>127</sup> and the second Union list was adopted in 2015.<sup>128</sup>

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3, para. 15(b)). Following Russia's descriptions, we refer to Sections 123(5) and 123(6) of Hungary's Gas Act and Articles 20(5) and 29(4)(3) of Lithuania's Law on Natural Gas collectively as "additional" conditions. The European Union argues that Russia's challenges to these "additional" conditions are outside the scope of this Panel's terms of reference because they do not implement the rules on third-country certification in the Directive. This issue is addressed in section 7.2.2.3.2 of our findings below.

<sup>122</sup> Hungary's Gas Act, (Exhibit EU-155), Section 123; and Hungary's Gas Act, (RUS-47), Section 194. Despite initial disagreement, both parties have subsequently submitted exhibits with identical translations of Section 123 of Hungary's Gas Act (Exhibits EU-155/RUS-47).

<sup>123</sup> Lithuania's Law on Natural Gas, (Exhibit RUS-136rev), Article 20(5).

<sup>124</sup> Lithuania's Law on Natural Gas, (Exhibit RUS-136rev), Article 29(4). The European Union originally provided its own translation of the Article but agrees with the translation in Exhibit RUS-136rev. (European Union's first written submission, para. 559; and European Union's response to Panel question No. 145).

<sup>125</sup> TEN-E Regulation, (Exhibit EU-4), Article 1(2).

<sup>126</sup> TEN-E Regulation, (Exhibit EU-4), Article 3.

<sup>127</sup> Commission Delegated Regulation (EU) No. 1391/2013 of 14 October 2013, amending Regulation (EU) No. 347/2013 of the European Parliament and of the Council on guidelines for trans-European energy

2.54. To be designated as a PCI (and be included in the Union list), an infrastructure project must meet two sets of criteria: a set of criteria common for all infrastructure projects falling within the scope of the TEN-E Regulation (general criteria), and a set of criteria specific to projects developing a particular group of energy infrastructure categories (specific criteria). The general criteria are set out in Article 4(1) of the Regulation as follows:

- (a) the project is necessary for at least one of the energy infrastructure priority corridors and areas;
- (b) the potential overall benefits of the project, assessed according to the respective specific criteria in paragraph 2, outweigh its costs, including in the longer term; and
- (c) the project meets any of the following criteria:
  - (i) involves at least two Member States by directly crossing the border of two or more Member States;
  - (ii) is located on the territory of one Member State and has a significant cross-border impact as set out in Annex IV.1;
  - (iii) crosses the border of at least one Member State and a European Economic Area country.<sup>129</sup>

2.55. To fall within the scope of the TEN-E Regulation, a project must develop infrastructure falling under the energy infrastructure categories in electricity, gas, oil, and carbon dioxide set out in Annex II of the TEN-E Regulation<sup>130</sup>, as well as fall within the "energy infrastructure priority corridors and areas" defined in Annex I of the TEN-E Regulation.<sup>131</sup> The "energy infrastructure priority corridors and areas" are the geographical areas around which the Union lists "cluster" the PCIs.<sup>132</sup> The priority corridors and areas for projects developing energy infrastructure categories concerning gas<sup>133</sup> are defined in Annex I.2 of the TEN-E Regulation as follows:

## 2. PRIORITY GAS CORRIDORS

- (5) North-South gas interconnections in Western Europe ('NSI West Gas'): gas infrastructure for North-South gas flows in Western Europe to further diversify routes of supply and for increasing short-term gas deliverability.

Member States concerned: Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, Malta, the Netherlands, Portugal, Spain, the United Kingdom;

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infrastructure as regards the Union list of projects of common interest, OJ L 349/28 of 21.12.2013, (Regulation (EU) No. 1391/2013), (Exhibit EU-3).

<sup>128</sup> Commission Delegated Regulation (EU) No. 2016/89 of 18 November 2015 amending Regulation (EU) No. 347/2013 of the European Parliament and of the Council as regards the Union list of projects of common interest, OJ L 19/1 of 27.1.2016, (Regulation (EU) No. 2016/89), (Exhibit RUS-2).

<sup>129</sup> TEN-E Regulation, (Exhibit EU-4), Article 4(1).

<sup>130</sup> This dispute is limited to the components of the TEN-E measure that pertain to projects developing infrastructure concerning natural gas.

<sup>131</sup> TEN-E Regulation, (Exhibit EU-4), Articles 4(1) and 4(2)(b).

<sup>132</sup> See, e.g. Regulation (EU) No. 2016/89, (Exhibit RUS-2), pp. 13-19.

<sup>133</sup> Annex II.2 of the TEN-E Regulation provides that the energy infrastructure categories concerning gas include the following:

- (a) transmission pipelines for the transport of natural gas and bio gas that form part of a network which mainly contains high-pressure pipelines, excluding high-pressure pipelines used for upstream or local distribution of natural gas;
- (b) underground storage facilities connected to the above-mentioned high-pressure gas pipelines;
- (c) reception, storage and regasification or decompression facilities for liquefied natural gas (LNG) or compressed natural gas (CNG);
- (d) any equipment or installation essential for the system to operate safely, securely and efficiently or to enable bi-directional capacity, including compressor stations[.] (TEN-E Regulation, (Exhibit EU-4), Annex II.2)

- (6) North-South gas interconnections in Central Eastern and South Eastern Europe ('NSI East Gas'): gas infrastructure for regional connections between and in the Baltic Sea region, the Adriatic and Aegean Seas, the Eastern Mediterranean Sea and the Black Sea, and for enhancing diversification and security of gas supply.

Member States concerned: Austria, Bulgaria, Croatia, Cyprus, Czech Republic, Germany, Greece, Hungary, Italy, Poland, Romania, Slovakia, Slovenia;

- (7) Southern Gas Corridor ('SGC'): infrastructure for the transmission of gas from the Caspian Basin, Central Asia, the Middle East and the Eastern Mediterranean Basin to the Union to enhance diversification of gas supply.

Member States concerned: Austria, Bulgaria, Croatia, Czech Republic, Cyprus, France, Germany, Hungary, Greece, Italy, Poland, Romania, Slovakia, Slovenia;

- (8) Baltic Energy Market Interconnection Plan in gas ('BEMIP Gas'): gas infrastructure to end the isolation of the three Baltic States and Finland and their dependency on a single supplier, to reinforce internal grid infrastructures accordingly, and to increase diversification and security of supplies in the Baltic Sea region.

Member States concerned: Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Poland, Sweden.<sup>134</sup>

2.56. In addition to meeting the general criteria, projects developing energy infrastructure categories concerning gas must "contribute significantly to at least one of the following specific criteria", as laid out in Article 4(2)(b), namely:

- (i) market integration, inter alia through lifting the isolation of at least one Member State and reducing energy infrastructure bottlenecks; interoperability and system flexibility;
- (ii) security of supply, inter alia through appropriate connections and diversification of supply sources, supplying counterparts and routes;
- (iii) competition, inter alia through diversification of supply sources, supplying counterparts and routes;
- (iv) sustainability, inter alia through reducing emissions, supporting intermittent renewable generation and enhancing deployment of renewable gas.<sup>135</sup>

2.57. When the Regional Groups, referred to in paragraph 2.53 above, assess whether projects fulfil the general and specific criteria, they shall give "due consideration" to (a) the urgency of each proposed project to meet energy policy targets of market integration, *inter alia*, through lifting isolation, competition, sustainability and security of supply; (b) the number of member States affected by each project, whilst ensuring equal opportunities for projects involving peripheral member States; (c) the contribution to territorial cohesion; and (d) complementarity with other proposed projects.<sup>136</sup> In addition, the assessment shall be in accordance with the indicators set out in Annex IV.2 through 5 of the Regulation.<sup>137</sup>

2.58. The TEN-E Regulation provides three types of incentives to projects designated as PCIs. First, Chapter III of the TEN-E Regulation provides for more streamlined administrative processing of the applications relating to such projects. In particular, Articles 7(2) and 7(3) of the TEN-E Regulation require all authorities to "ensure that the most rapid treatment legally possible is given to the [] files [related to PCIs]" and that PCIs shall be "allocated the status of the highest national

<sup>134</sup> TEN-E Regulation, (Exhibit EU-4), Annex I.2. (footnote omitted)

<sup>135</sup> TEN-E Regulation, (Exhibit EU-4), Article 4(2)(b).

<sup>136</sup> TEN-E Regulation, (Exhibit EU-4), Article 4(4).

<sup>137</sup> TEN-E Regulation, (Exhibit EU-4), Article 4(3).

significance possible and be treated as such in permit granting processes", if such a status exists in national law.

2.59. Second, Chapter IV of the TEN-E Regulation contains provisions on the cost allocation of cross-border investments between member States and the granting of certain other regulatory treatment incentives. In particular, Article 12 provides that efficiently incurred project investment costs are to be borne by the relevant operators of the transmission infrastructure or project promoters of the member States to which the project provides a net positive impact, as well as the principal of including such costs in tariffs.<sup>138</sup> In turn, Article 13 envisages that member States and NRAs shall ensure that "appropriate incentives", including those relating to tariffs, are granted to a gas-related PCI where a project promoter incurs higher risks for the development, construction, operation or maintenance of such project compared to the risks normally incurred by a comparable infrastructure project.<sup>139</sup>

2.60. The third type of incentive is the availability of financing, in accordance with Chapter V of the TEN-E Regulation. Gas-related PCIs are eligible for financial assistance in the form of grants for studies and financial instruments.<sup>140</sup> Pursuant to Article 14(2) of the TEN-E Regulation, gas-related PCIs that meet additional criteria – commercially unviable projects that significantly improve security of supply, solidarity or innovation, and that received a cross-border cost allocation decision pursuant to Article 12 – are also eligible for financial assistance in the form of grants for works.

### 3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. In its first written submission, Russia requests the Panel to find that the European Union and its member States have violated their obligations under the following provisions:

- Article XVI:2(e) of the GATS, because the unbundling measures of Croatia, Hungary and Lithuania restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service;
- Article XVI:2(a) of the GATS, because Croatia and Lithuania, in implementing their unbundling measures, have each, in effect, adopted a prohibited quantitative limitation in the form of a monopoly or exclusive service supplier;
- Article XVI:2(f) of the GATS, because Croatia, Hungary and Lithuania each impose prohibited limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding;
- Article XVII:1 of the GATS, because Croatia, Hungary and Lithuania's government exemption measures, adopted pursuant to Article 9(6) of the Directive, arbitrarily exempt government-controlled pipeline transport services and service suppliers from the unbundling requirements, thus modifying the conditions of competition to the detriment of like Russian services and service suppliers, resulting in less favorable treatment on both a *de jure* and *de facto* basis;
- Article II:1 of the GATS, because the unbundling measure under the Directive, by enabling Member States to select from among the unbundling models, *de facto*, modifies the conditions of competition in the EU market to the detriment of Russian services and service suppliers, compared to like services and service suppliers of other Members, thus resulting in less favorable treatment;
- Article III:4 of the GATT 1994, because the unbundling measure under the Directive, by enabling Member States to select from among the unbundling models, *de facto*, modifies the conditions of competition in the EU market to the detriment of imported Russian natural gas, compared to like domestic gas,

<sup>138</sup> TEN-E Regulation, (Exhibit EU-4), Articles 12(1) and 12(4).

<sup>139</sup> TEN-E Regulation, (Exhibit EU-4), Article 13(1); and Directive 2009/73/EC, (Exhibit EU-5), Article 41(8).

<sup>140</sup> TEN-E Regulation, (Exhibit EU-4), Article 14(1).

resulting in less favorable treatment;

- Article I:1 of the GATT 1994, because the unbundling measure under the Directive, by enabling Member States to select from among the unbundling models, *de facto*, grants an advantage to imported natural gas of other Members not accorded immediately and unconditionally to like Russian gas, resulting in less favorable treatment;
- Article I:1 of the GATT 1994, because the Directive accords natural gas of other Members imported through LNG facilities and upstream pipeline networks an advantage not extended immediately and unconditionally to like Russian gas;
- Article III:4 of the GATT 1994, because the Directive accords imported Russian natural gas less favorable treatment than domestic natural gas transported through upstream pipeline networks;
- Article XVII:1 of the GATS, because Croatia, Hungary and Lithuania's third-country certification measures accord other Members' pipeline transport services and service suppliers *de jure* less favorable treatment than like domestic services and service suppliers;
- Article II:1 of the GATS, because the third-country certification measure under the Directive accords Russian pipeline transport services and service suppliers less favorable treatment than like services and service suppliers of other Members, on both a *de jure* and *de facto* basis;
- Article III:4 of the GATT 1994, because the third-country certification measure under the Directive accords other Members' natural gas less favorable treatment than like domestic gas;
- Article VI:1 of the GATS, because Croatia, Hungary and Lithuania do not administer their third-country certification measures in a reasonable, objective and impartial manner;
- Article VI:5 of the GATS, because Croatia, Hungary and Lithuania's third-country certification measures nullify or impair their specific commitments in a manner inconsistent with the criteria of Article VI:4 of the GATS;
- Article X:3(a) of the GATT 1994, because the European Union's administration of the infrastructure exemption measure is not uniform, impartial or reasonable, as applied by the Commission in its OPAL infrastructure exemption decision, and in comparison to its Gazelle, TAP, Nabucco and Poseidon infrastructure exemption decisions;
- Article I:1 of the GATT 1994, because the infrastructure exemption measure, as implemented to deny the NEL exemption, grants an advantage to other Members' imported natural gas, including like Azeri gas to be transported and sold on the EU market via TAP, not extended immediately and unconditionally to Russian gas transported via NEL;
- Article I:1 of the GATT 1994, because the infrastructure exemption measure, as implemented to deny the [sic] impose more restrictive conditions on the OPAL exemption, grants an advantage to other Members' imported natural gas not extended immediately and unconditionally to Russian gas transported via OPAL;
- Article I:1 of the GATT 1994, because the infrastructure exemption measure, as implemented to deny the NEL exemption and to impose more restrictive conditions on the OPAL exemption, grants an advantage to other Members' natural gas imported, transported and sold on the EU market through LNG facilities;



- Article II:1 of the GATS, because the infrastructure exemption measure, as implemented by the Commission, modified the conditions of competition in the EU market, resulting in less favorable treatment being accorded to the Russian pipeline transport service supplier and its services supplied through NEL GT and OPAL GT than the treatment accorded to like services and service suppliers of other Members;
- Article I:1 of the GATT 1994, because the Directive grants natural gas of other Members imported through upstream pipeline networks an advantage not extended immediately and unconditionally to like Russian gas transported and sold on the EU market via NEL and OPAL;
- Article II:1 of the GATS, because the Directive accords pipeline transport services and service suppliers of other Members whose services are supplied via upstream pipeline networks more favorable treatment than accorded to like Russian services and service suppliers via NEL and OPAL;
- Article XI:1 of the GATT 1994, because the OPAL exemption decision, pursuant to the infrastructure exemption measure, institutes two quantitative restrictions on the importation of natural gas from Russia;
- Article II:1 of the GATS, because the TEN-E measure accords Russian pipeline transport services and service suppliers less favorable treatment than like services and services suppliers of other Members;
- Article III:4 of the GATT 1994, because the TEN-E measure accords imported Russian natural gas less favorable treatment than like domestic gas transported and sold on the EU market; and
- Article I:1 of the GATT 1994, because the TEN-E measure grants other Members' natural gas an advantage not extended immediately and unconditionally to like Russian natural gas.<sup>141</sup>

3.2. In its second written submission, Russia requests the Panel to find that the European Union and its member States have violated their obligations under the following provisions:

- Claim 1 – Article XVI:2(e) of the GATS, because the unbundling measures of Croatia, Hungary and Lithuania restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service;
- Claim 2 – Article XVI:2(a) of the GATS, because Croatia and Lithuania, in implementing their unbundling measures, have each, in effect, adopted a prohibited quantitative limitation in the form of a monopoly or exclusive service supplier;
- Claim 3 – Article XVI:2(f) of the GATS, because Croatia, Hungary and Lithuania each impose prohibited limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding;
- Claim 4 – Article XVII:1 of the GATS, because Article 9(6) of the Directive, "as such", arbitrarily exempts government-controlled pipeline transport services and service suppliers from the unbundling requirements, thus modifying the conditions of competition to the detriment of like Russian services and service suppliers, resulting in less favourable treatment as evidenced by the Croatian, Hungarian and Lithuanian government exemption measures;
- Claim 5 – Article XVII:1 of the GATS, because Article 9(6) of the Directive, "as applied" in Croatia's, Hungary's and Lithuania's government exemption measures, arbitrarily exempt government-controlled pipeline transport services

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<sup>141</sup> Russia's first written submission, para. 810. (emphasis omitted)

and service suppliers from the unbundling requirements, thus modifying the conditions of competition to the detriment of like Russian services and service suppliers, resulting in less favourable treatment;

- Claim 6 – Article II:1 of the GATS, because the unbundling measure under the Directive, by enabling Member States to select from among the unbundling models, de facto, modifies the conditions of competition in the EU market to the detriment of Russian services and service suppliers, compared to like services and service suppliers of other Members, thus resulting in less favorable treatment;
- Claim 8 – Article III:4 of the GATT 1994, because the unbundling measure provided for in the Directive, by enabling Member States to select from among the unbundling models, "as such", modifies the conditions of competition in the EU market to the detriment of imported Russian natural gas, compared to like domestic gas, resulting in less favourable treatment;
- Claim 10 – Article I:1 of the GATT 1994, because the unbundling measure under the Directive, by enabling Member States to select from among the unbundling models, de facto, "as such", grants an advantage to imported natural gas of other Members not accorded immediately and unconditionally to like Russian gas, resulting in less favourable treatment;
- Claim 12 and 13 – Article I:1 of the GATT 1994, because the Directive accords natural gas of other Members imported through LNG facilities and upstream pipeline networks an advantage not extended immediately and unconditionally to like Russian gas;
- Claim 14 – Article III:4 of the GATT 1994, because the Directive accords imported Russian natural gas less favorable treatment than domestic natural gas transported through upstream pipeline networks;
- Claim 15 – Article XVII:1 of the GATS, because Croatia, Hungary and Lithuania's third-country certification measures accord other Members' pipeline transport services and service suppliers de jure less favorable treatment than like domestic services and service suppliers;
- Claim 16 – Article II:1 of the GATS, because the third-country certification measure under Article 11 of the Directive, "as such", accords Russian pipeline transport services and service suppliers less favorable treatment than like services and service suppliers of other Members;
- Claim 17 – Article II:1 of the GATS, because the third-country certification measure under Article 11 of the Directive, "as such" by several Member States, accords Russian pipeline transport services and service suppliers less favorable treatment than like services and service suppliers of other Members;
- Claim 19 – Article VI:1 of the GATS, because Croatia, Hungary and Lithuania do not administer their third-country certification measures in a reasonable, objective and impartial manner;
- Claim 20 – Article VI:5(a) of the GATS, because Croatia, Hungary and Lithuania's third-country certification measures nullify or impair their specific commitments in a manner inconsistent with the criteria of Article VI:4 of the GATS;
- Claim 21 – Article X:3(a) of the GATT 1994, because the European Union's administration of the infrastructure exemption measure is not uniform, impartial or reasonable, as applied by the Commission in its OPAL infrastructure exemption decision, and in comparison to its Gazelle, TAP, Nabucco and Poseidon infrastructure exemption decisions;

- Claim 22 – Article I:1 of the GATT 1994, because the infrastructure exemption measure, as implemented to deny the NEL exemption, grants an advantage to other Members' imported natural gas, including like Azeri gas to be transported and sold on the EU market via TAP, not extended immediately and unconditionally to Russian gas transported via NEL;
- Claim 23 – Article I:1 of the GATT 1994, because the infrastructure exemption measure, as implemented to deny the [sic] impose more restrictive conditions on the OPAL exemption, grants an advantage to other Members' imported natural gas not extended immediately and unconditionally to Russian gas transported via OPAL;
- Claim 24 – Article I:1 of the GATT 1994, because the infrastructure exemption measure, as implemented to deny the NEL exemption and to impose more restrictive conditions on the OPAL exemption, grants an advantage to other Members' natural gas imported, transported and sold on the EU market through LNG facilities;
- Claim 25 – Article II:1 of the GATS, because the infrastructure exemption measure, as implemented by the Commission, modified the conditions of competition in the EU market, resulting in less favorable treatment being accorded to the Russian pipeline transport service supplier and its services supplied through NEL GT and OPAL GT than the treatment accorded to like services and service suppliers of other Members;
- Claim 26 – Article I:1 of the GATT 1994, because the Directive grants natural gas of other Members imported through upstream pipeline networks an advantage not extended immediately and unconditionally to like Russian gas transported and sold on the EU market via NEL and OPAL;
- Claim 28 – Article XI:1 of the GATT 1994, because the OPAL exemption decision, pursuant to the infrastructure exemption measure, institutes two quantitative restrictions on the importation of natural gas from Russia;
- Claim 29 – Article II:1 of the GATS, because the TEN-E measure accords Russian pipeline transport services and service suppliers less favorable treatment than like services and services suppliers of other Members;
- Claim 30 – Article III:4 of the GATT 1994, because the TEN-E measure accords imported Russian natural gas less favorable treatment than like domestic gas transported and sold on the EU market; and
- Claim 31 – Article I:1 of the GATT 1994, because the TEN-E measure grants other Members' natural gas an advantage not extended immediately and unconditionally to like Russian natural gas.<sup>142</sup>

3.3. In its first written submission, the European Union requests that the Panel reject Russia's claims in this dispute in their entirety and to find that the challenged measures are consistent with the obligations of the European Union and its member States under the provisions of the WTO agreements. More particularly:

With regard to unbundling, the European Union requests the Panel to find that:

- the implementation of the unbundling requirement in the domestic laws of Croatia, Hungary and Lithuania does not violate the commitments under Article XVI of the GATS in respect of these countries because the challenged measure

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<sup>142</sup> Russia's second written submission, para. 487. The numbering used by Russia in its second written submission originates from its reply to Panel question No. 5, in response to which the European Union raised a number of terms of reference objections. With the exception of the Panel's preliminary ruling concerning these terms of reference objections, the numbering assigned by Russia will not be used further in this Report.

does not qualify as a prohibited market access restriction under sub-paragraphs (e), (a) or (f) of Article XVI of the GATS, and would in any event be justified under Article XIV (a) and (c) of the GATS;

- the implementation of the public body specification in Article 9(6) of Directive 2009/73 in Croatia, Hungary and Lithuania violates neither *de jure* nor *de facto* the national treatment obligation in Article XVII of the GATS, and would in any event be justified under Article XIV (c) of the GATS;
- the unbundling measure does not violate the most favoured nation treatment obligation in Article II:1 of the GATS since it does not discriminate between pipeline transport service suppliers from different third countries;
- the unbundling measure does not violate the national treatment obligation in Article III:4 of the GATT 1994 since it does not accord Russian natural gas less favourable treatment than like domestic gas;
- the unbundling measure does not violate the most favoured nation treatment obligation in Article I:1 of the GATT 1994 since it does not accord third-countries' natural gas an advantage not extended immediately and unconditionally to like Russian gas and, furthermore, Russia's new claim regarding the alleged priority buying by Litgas from Statoil through the Klaipeda LNG Terminal is outside the Panel's terms of reference;
- Directive 2009/73/EC does not violate Article I:1 of the GATT 1994 because it does not accord natural gas of other third countries imported through LNG facilities and upstream pipeline networks an advantage not extended to Russian gas;
- Directive 2009/73/EC does not violate Article III:4 of the GATT 1994 because it does not accord Russian gas treatment less favourable than like domestic gas transported via upstream pipeline networks.

With regard to third country certification, the European Union requests the Panel to find that:

- the SoS certification requirement, as transposed in the domestic laws of Croatia, Hungary and Lithuania, is justified under Article XIV (a) of the GATS.
- the alleged additional certification requirements provided for in the domestic laws of Croatia, Hungary and Lithuania are outside the Panel's terms of reference and/or are not inconsistent with Article XVII of the GATS because they do not accord less favourable treatment to Russian services or service suppliers than to like services or service suppliers of those EU Member States.
- the SoS certification requirement is not inconsistent, either *de iure* or *de facto*, with Article II:1 of the GATS because it does not accord less favourable treatment to Russian services or service suppliers than to like services or service suppliers of other countries. In any event, the alleged difference in treatment would be justified under Article XIV (a) of the GATS. In addition, Russia's *de facto* claims are partly outside the Panel's terms of reference.
- Russia's claim that this measure violates Article III:4 of the GATT is outside the Panel's terms of reference. In any event the measure is not inconsistent with Article III:4 of the GATT because it does not afford less favourable treatment to Russian gas than to EU gas.
- the administration of the SoS certification requirement by Croatia, Hungary and Lithuania is not inconsistent with Article VI:1 of the GATS.
- the SoS certification requirement, as transposed in the domestic laws of

Croatia, Hungary and Lithuania, is not inconsistent with Article VI:5 of the GATS.

With regard to the infrastructure exemption measure, the European Union requests the Panel to find that:

- the European Union's administration of the infrastructure exemption measure is not inconsistent with Article X:3(a) of the GATT 1994;
- the infrastructure exemption measure, as implemented to deny the NEL exemption, is not inconsistent with Article I:1 of the GATT 1994 because it does not grant to other Members' imported natural gas, including like Azeri gas to be transported and sold on the EU market via TAP, an advantage not extended immediately and unconditionally to Russian gas transported via NEL;
- the infrastructure exemption measure is not inconsistent with Article I:1 of the GATT 1994 because it does not impose more restrictive conditions on the OPAL exemption or grants an advantage to other Members' imported natural gas not extended immediately and unconditionally to Russian gas transported via OPAL;
- the infrastructure exemption measure is not inconsistent with Article I:1 of the GATT 1994 because it does not grant an advantage to other Members' natural gas imported, transported and sold on the EU market through LNG facilities;
- the infrastructure exemption measure, as implemented by the Commission, is not inconsistent with Article II:1 of the GATS, because it does not result in less favorable treatment being accorded to the Russian pipeline transport service supplier and its services supplied through NEL GT and OPAL GT than the treatment accorded to like services and service suppliers of other Members;
- the Directive is not inconsistent with Article I:1 of the GATT 1994, because it does not grant natural gas of other Members imported through upstream pipeline networks an advantage not extended immediately and unconditionally to like Russian gas transported and sold on the EU market via NEL and OPAL;
- the Directive is not inconsistent with Article II:1 of the GATS, because it does not accord pipeline transport services and service suppliers of other Members whose services are supplied via upstream pipeline networks more favorable treatment than accorded to like Russian services and service suppliers via NEL and OPAL;
- the infrastructure exemption measure is not inconsistent with Article XI:1 of the GATT 1994, because the OPAL exemption decision does not institute two quantitative restrictions on the importation of natural gas from Russia.

With regard to projects of common interest, the European Union requests the Panel to find that:

- the TEN – E measure is not inconsistent, either *de iure* or *de facto*, with Article II:1 of the GATS or with Articles III:4 and I:1 of the GATT because the selection of PCIs does not afford less favourable treatment to Russian TSOs or to Russian Gas than to like service providers or gas of the European Union or of other countries, respectively.<sup>143</sup>

3.4. In its second written submission, the European Union requests that the Panel reject Russia's claims in this dispute in their entirety.<sup>144</sup>

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<sup>143</sup> European Union's first written submission, paras. 841-844. (emphasis original)

<sup>144</sup> European Union's second written submission, para. 437.

#### 4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 19 of the Working Procedures adopted by the Panel (see Annexes B-1, B-2, B-3 and B-4).

#### 5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Colombia, India<sup>145</sup>, Japan and Ukraine are reflected in their executive summaries, provided in accordance with paragraph 20 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3 and C-4). Brazil, China, Korea, Saudi Arabia and the United States did not submit written or oral arguments to the Panel.

#### 6 INTERIM REVIEW

6.1. On 8 August 2017, the Panel issued its Interim Report to the parties. On 11 September 2017, both parties submitted written requests for the Panel to review aspects of the Interim Report. On 25 September 2017, the European Union submitted comments on Russia's requests for review. Russia did not submit any comments on the European Union's requests for review by the deadline provided for in the Panel's timeline and subsequently confirmed that it did not have any such comments.<sup>146</sup> Neither party requested an interim review meeting.

6.2. In accordance with Article 15.3 of the DSU, this section of the Report addresses the parties' requests for review of the Report made at the interim review stage. We discuss the parties' requests for substantive modifications below, in sequence according to the sections and paragraphs to which the requests pertain. In addition to the substantive requests discussed below, various editorial and drafting improvements were made to the Report, including those requested by the parties.

6.3. In addressing the parties' requests for substantive modifications below, we are mindful of the specific scope, nature and purpose of interim review. With respect to the scope of our review, we observe that Article 15.2 of the DSU, and paragraph 21 of the Panel's Working Procedures, provide parties with an opportunity to request the Panel "to review precise aspects of the interim report". Previous panels have declined to expand the scope of interim review beyond that provided for in Article 15.2 of the DSU and have accordingly circumscribed their review to address only those requests related to "precise aspects" of the interim report.<sup>147</sup> With respect to the nature and purpose of our review, it is well-established that interim review is not an appropriate stage for the parties to raise new arguments or submit new evidence not previously presented before a panel; nor is it an appropriate stage for the parties to re-argue their case on the basis of the arguments already put before a panel.<sup>148</sup>

6.4. In light of the considerations stated above, we will review our Interim Report only in light of the parties' requests that relate to its "precise aspects". We will not accept requests amounting to a party's attempt to re-argue its case.<sup>149</sup>

6.5. As an additional observation of a general nature particularly relevant for the present case, we would like to note that, in the "Findings" section of the Report, we summarize the parties'

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<sup>145</sup> Following the WTO Secretariat's enquiry, India confirmed that its third-party statement will serve as the executive summary of its arguments.

<sup>146</sup> See Russia's communication of 26 September 2017.

<sup>147</sup> Panel Reports, *Brazil – Taxation*, paras. 6.7-6.8; *Japan – Alcoholic Beverages II*, para. 5.2; *Australia – Salmon*, para. 7.3; *Japan – Apples (Article 21.5 – US)*, para. 7.21; *India – Quantitative Restrictions*, para. 4.2; *Canada – Continued Suspension*, paras. 6.16-6.17; *US – Continued Suspension*, paras. 6.17-6.18; and *India – Agricultural Products*, para. 6.5.

<sup>148</sup> Appellate Body Reports, *EC – Sardines*, para. 301; and *EC – Selected Customs Matters*, para. 259. See also Panel Reports, *Japan – DRAMs (Korea)*, para. 6.2; *US – Poultry (China)*, para. 6.32; *India – Agricultural Products*, para. 6.5; *India – Solar Cells*, para. 6.24; *Russia – Pigs*, paras. 6.6-6.7; *US – Zeroing (EC) (Article 21.5 – EC)*, para. 7.26; and *Brazil – Taxation*, para. 6.7.

<sup>149</sup> In following this approach, we also address the general concern expressed in the European Union's comments on Russia's request for review of the Interim Report, that "in several instances, Russia engages in extensive re-argumentation of its claims". (European Union's comments on Russia's request for review of the Interim Report, para. 1).

arguments in the manner and to the extent necessary and appropriate to capture our understanding for the purposes of our own assessment and reasoning. We underline that we have done this on the basis of a comprehensive and holistic reading of the parties' submissions. The parties' arguments are summarized in their own words in the executive summaries annexed to the Final Report. In any event, we emphasize that the disputing parties are responsible for presenting their arguments in a clear manner. A panel is not expected to "divine" a claim or a defence if a party merely submits allegations without relating them to legal arguments.<sup>150</sup>

6.6. Finally, we are mindful of the Appellate Body's request that, when redacting information designated as BCI by a party, "a panel must make efforts to ensure that the public version of its report circulated to all Members of the WTO is understandable".<sup>151</sup> In this dispute, the parties designated a certain amount of information provided to the Panel as BCI. Moreover, during the interim review, Russia requested that certain additional information, which had not been initially submitted as containing BCI, be identified as such in the final report.<sup>152</sup> While we have made every effort to ensure that the public version of our Report will be understandable, we also considered it appropriate to protect all the information designated by the parties as BCI.

6.7. The numbering of some of the paragraphs and footnotes in the Final Report has changed from the numbering in the Interim Report. The discussion below refers to the numbering in the Interim Report and, where it differs, includes the corresponding numbering in the Final Report.

6.8. Pursuant to the DSU, all panel proceedings remain confidential until the Panel Report is circulated to WTO Members. Paragraph 23 of the Panel's Working Procedures states that "[t]he interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed." The confidential nature of the Interim Report was explicitly reiterated when it was transmitted to the parties on 8 August 2017. On 18 October 2017, Russia made the Panel aware of a publicly available webcast from a meeting in the European Parliament where certain elements of the confidential Interim Report were referred to.<sup>153</sup> In its response of 19 October 2017, the European Union expressed its regret and indicated that it had taken steps to have the relevant parts of the webcast removed from public viewing.<sup>154</sup> The Panel wishes to emphasize its disappointment and concern that the confidentiality of the Interim Report was not respected, and notes the subsequent steps taken by the European Union to address the disclosure.

## 6.1 Factual aspects

6.9. Russia requests that a section be added to [paragraph 2.7](#), essentially seeking to clarify that the term VIU "was adopted by the EU for use in the Directive and related legal instruments" and that this is "not a commonly used term in the natural gas sector".<sup>155</sup> The European Union opposes Russia's request, arguing that the term VIU is commonly used and that it would be "incorrect to suggest that it is somehow designed for the purpose of this dispute or the [] Directive."<sup>156</sup>

6.10. We note that [paragraph 2.7](#) quotes the Directive's definition of a VIU and clearly states that it is derived therefrom. We do not believe that it is necessary for us to venture into a discussion of whether, and if so how, the term VIU is "commonly used" and we therefore decline to add the section proposed by Russia. We have, however, modified the language of [paragraph 2.7](#) in a manner that reflects some of the language used by Russia in its request.

6.11. Russia requests the addition of a sentence to [paragraph 2.38](#) as follows: "The Commission has thus far failed to adopt any such guidelines".<sup>157</sup> The European Union disagrees and submits the sentence Russia proposes is irrelevant for the description of the measure.<sup>158</sup> While we have not used the exact language requested by Russia, we consider it useful to reflect the fact that the

<sup>150</sup> Appellate Body Report, *US – Gambling*, para. 140.

<sup>151</sup> Appellate Body Report, *Japan – DRAMs*, para. 279.

<sup>152</sup> Russia's request for review of the Interim Report, para. 247.

<sup>153</sup> Russia's communication of 18 October 2017.

<sup>154</sup> European Union's comments on Russia's communication of 18 October 2017.

<sup>155</sup> Russia's request for review of the Interim Report, para. 4.

<sup>156</sup> European Union's comments on Russia's request for review of the Interim Report, para. 2.

<sup>157</sup> Russia's request for review of the Interim Report, para. 8.

<sup>158</sup> European Union's comments on Russia's request for review of the Interim Report, para. 3.

Commission has not thus far adopted such guidelines, and we have modified paragraph 2.38 accordingly.

6.12. Russia submits that footnote 116 to paragraph 2.44, which describes Article 34 of the Directive, should quote directly from the Directive.<sup>159</sup> Russia further submits that the Panel should note here that Article 34 of the Directive has never been applied.<sup>160</sup> The European Union disagrees that this latter addition should be made, because it considers that it is factually incorrect.<sup>161</sup>

6.13. With respect to Russia's request to quote the text of Article 34 of the Directive, we rephrased footnote 116 in light of Russia's comment. With respect to its comment regarding the application of Article 34, this request is, in our view, tantamount to an attempt to re-litigate arguments already put before us, which we do not consider appropriate at the interim review stage.

## 6.2 Introduction

6.14. Russia submits that the Panel's comment in footnote 154 (footnote 283 in this Report) concerning Russia's use of the labels "*de facto*", "*de jure*", "as such" and "as applied" is superfluous and does not add to the explanation provided by the Panel in the sentence preceding that footnote. Russia hence requests that the footnote be removed.<sup>162</sup> The European Union disagrees, submitting that the concern expressed in that footnote is a relevant one which the European Union also expressed on multiple occasions during the proceedings.<sup>163</sup> The European Union suggests that the Panel could add to this footnote that it shared the same concern.

6.15. As explained below in paragraph 7.13 and footnote 283, Russia's use of the labels "*de facto*", "*de jure*", "as such" and "as applied" in relation to its claims contributed to our impression that the precise nature and content of some of the challenged measures, and claims against them, were not always clear or consistent. We must therefore decline Russia's request to remove footnote 154. We also decline to introduce the European Union's suggested addition.

## 6.3 General issues related to Russia's claims under the GATS

6.16. With respect to footnote 434 to paragraph 7.250 (footnote 563 of this Report), the European Union requests the Panel to indicate that Russia's claim regarding the unbundling measure in the national implementing laws of Hungary did not involve a claim of inconsistency with Article XVI:2(a) of the GATS.<sup>164</sup> The European Union further requests that the same modification be made with respect to paragraph 7.288.<sup>165</sup> We have decided to accommodate the European Union's request and have modified footnote 434 and paragraph 7.288 accordingly. In addition, we have made a similar clarification in paragraph 7.585.

6.17. Russia submits that the "Introduction" to Section 7.4.1 mischaracterizes in several key respects Russia's position regarding the services at issue. Russia argues that, "[i]n addition, ... these and related mischaracterizations in the [Interim Report] lead the Panel to" an incorrect conclusion with respect to the services at issue in paragraph 7.285. Russia agrees that pipeline transport services encompass the transportation of natural gas, but disagrees with the definition of the covered services adopted by the Panel. Russia is of the view that "this misapprehension of the scope of the covered services impacts various other aspects of the Panel's [Interim Report], leading to incorrect findings in those respects as well". Russia encourages the Panel to more closely adhere to the definition of the services proposed by Russia, as the complainant, in the Panel's Final Report.<sup>166</sup> The European Union disagrees with Russia's general comments on the Panel's analysis relating to the definition of the services at issue in Section 7.4 of the Interim Report. For the European Union, the Panel did not misrepresent Russia's position regarding that definition and correctly examined the meaning of the words of the relevant Schedules in

<sup>159</sup> Russia's request for review of the Interim Report, para. 10.

<sup>160</sup> Russia's request for review of the Interim Report, para. 10.

<sup>161</sup> European Union's comments on Russia's request for review of the Interim Report, para. 4.

<sup>162</sup> Russia's request for review of the Interim Report, para. 11.

<sup>163</sup> European Union's comments on Russia's request for review of the Interim Report, para. 5.

<sup>164</sup> European Union's request for review of the Interim Report of the Panel, para. 1.

<sup>165</sup> European Union's request for review of the Interim Report of the Panel, para. 4.

<sup>166</sup> Russia's request for review of the Interim Report of the Panel, paras. 12-13.



accordance with the rules of interpretation of the Vienna Convention. The European Union requests that Russia's comments be dismissed.<sup>167</sup>

6.18. We recall that the limited function of the interim review stage is to consider specific and particular aspects of the Interim Report, and not to reopen arguments and evidence already put before the Panel.<sup>168</sup> It appears to us that Russia's general comments on Section 7.4.1 do not require a specific response by the Panel, but would call on us to engage in a new analysis of arguments and evidence on the record. We must therefore decline Russia's request.

6.19. Russia submits that the last sentence of paragraph 7.252 mischaracterizes in several respects Russia's position in paragraphs 96 and 97 of Russia's first written submission. Russia argues that the main premise of Russia's explanation regarding this topic, in particular in the opening sentence of paragraph 96 of its first written submission, was that "broadly defining the covered services ... is consistent with the 'Subject matter and scope' of the Directive". Russia submits that it never stated "that its proposed definition of the services at issue is consistent with the 'Subject matter and scope' of the Directive". Russia requests that the Panel revise the last sentence of paragraph 7.252 by adding the phrase "as set forth in Article 1 of the Directive", as follows: "Russia submits that its proposed definition of the services at issue is consistent with the 'Subject matter and scope' of the Directive, *as set forth in Article 1 of the Directive*, although Russia takes issue with certain definitions contained in the Directive".<sup>169</sup> The European Union disagrees with Russia disputing the Panel's description of Russia's position. The European Union argues that Russia repeatedly stressed that "pipeline transport services" should be "broadly" defined. According to the European Union, the quote from Russia's first written submission indicates undeniably that the "broad definition" argued for by Russia would, in its view, be "consistent with the 'subject matter and scope' of the Directive".<sup>170</sup>

6.20. We recall that our findings do not aim to fully reproduce the parties' arguments as presented in their submissions, but summarize such arguments to the extent necessary to facilitate our own analysis and assessment. Nonetheless, we have rephrased the last sentence of paragraph 7.252 in order to accommodate Russia's request.

6.21. Russia submits that paragraph 100 of Russia's first written submission does not support the proposition contained in the first sentence of paragraph 7.253. Russia argues that, in paragraph 100 of its first written submission, Russia used "transmission" as an adjective to describe the relevant industry segment, while, in the first sentence of paragraph 7.253, the Panel used that word as a noun. According to Russia, this difference is not immaterial.<sup>171</sup> The European Union submits that the reasoning behind Russia's request is entirely missing. For the European Union, the Panel has correctly described Russia's position and the use of "transmission" as a noun or as an adjective does not alter the meaning of what Russia has stated, nor the Panel's paraphrasing.<sup>172</sup>

6.22. We recall that our findings do not aim to fully reproduce the parties' arguments as presented in their submissions, but summarize such arguments to the extent necessary to facilitate our own analysis and assessment. We note that Russia does not explain why, in its view, using the word "transmission" as a noun rather than as an adjective makes a material difference in the first sentence of paragraph 7.253, and does not make any specific proposal to modify that sentence. Like the European Union, we are of the view that using the word "transmission" as a noun rather than as an adjective does not modify the gist of Russia's arguments as summarized in

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<sup>167</sup> European Union's request for review of the Interim Report of the Panel, para. 6.

<sup>168</sup> See, for instance, Panel Reports, *Japan – Alcoholic Beverages II*, para. 5.2; *Australia – Salmon*, para. 7.3; *Japan – Apples (Article 21.5 – US)*, para. 7.21; *India – Quantitative Restrictions*, para. 4.2; *Canada – Continued Suspension*, paras. 6.16-6.17; *US – Continued Suspension*, paras. 6.17-6.18; *India – Agricultural Products*, para. 6.5; and *Russia – Pigs*, para. 6.7.

<sup>169</sup> Russia's request for review of the Interim Report of the Panel, para. 14 (quoting Russia's first written submission, para. 96).

<sup>170</sup> European Union's comments on Russia's request for review of the Interim Report, para. 15 (quoting Russia's second written submission, para. 75).

<sup>171</sup> Russia's request for review of the Interim Report, paras. 15-16 (quoting Russia's first written submission, para. 100). We note that the last sentence of paragraph 16 of Russia's request for review appears to be unfinished.

<sup>172</sup> European Union's comments on Russia's request for review of the Interim Report, para. 8.

paragraph 7.253 of the Interim Report. For these reasons, we do not find it necessary to modify the first sentence in paragraph 7.253.

6.23. Russia submits that, in the last sentence of paragraph 7.253, the Panel blurred together concepts contained in paragraphs 101 and 102 of Russia's first written submission. According to Russia, it is accurate that, in paragraph 101 of its first written submission, Russia quoted several aspects of the ordinary dictionary definition of "supply", "within which Russia stated that all services related to the supply of natural gas, including its transmission, are included". Russia further argues that, in paragraph 102 of its first written submission, it stated that "[i]f anything, the entire gas market can be thought of as a 'supply system'". According to Russia, by blurring these concepts together in the last sentence of paragraph 7.253, the Panel mischaracterized Russia's position regarding the meaning of "supply" in the context of the covered services, "natural gas pipeline transport services", and in the natural gas industry generally.<sup>173</sup> The European Union submits that the Panel's description of Russia's position is correct and that Russia has consistently argued for the gas market as a "supply system". The European Union recalls that Russia objected to the unbundling measure, which requires separation of transmission interests, on the one hand, and production and/or supply interests, on the other. The European Union also notes that Russia explicitly argued that, in its view, pipeline transport services must be viewed to be "part of a continuum".<sup>174</sup>

6.24. We recall that our findings do not aim to fully reproduce the parties' arguments as presented in their submissions, but summarize such arguments to the extent necessary to facilitate our own analysis and assessment. We note that, while taking issue with the Panel's summary of Russia's arguments in the last sentence of paragraph 7.253, Russia does not make any specific proposal to modify that sentence. In any event, taking into account Russia's comment, we have modified the last sentence of paragraph 7.253, as follows: "Referring to dictionary definitions of the term 'supply', Russia argues that all services related to the supply of natural gas, including its transmission, fall within these broad definitions, ~~and~~ Russia further argues that the entire gas market can be thought of as a 'supply system'."

6.25. Russia submits that it "has identified several concerns" with the Panel's conclusions concerning the services at issue, in paragraphs 7.285 and 7.263. According to Russia, such conclusions "are not consistent with the evidence in the record".<sup>175</sup> We note that Russia's general comment appears to challenge the manner in which the Panel assessed the evidence on record. We recall the limited function of the interim review and that it is not acceptable for parties to re-argue their case during the interim review stage.

6.26. Russia submits that it has never stated that it intended the services at issue to include the "production" of natural gas.<sup>176</sup> The European Union submits that, as demonstrated by Russia's response to Panel question No. 155, Russia did consider that pipeline transport services include "production" of natural gas and, therefore, Russia's objection should be dismissed.<sup>177</sup> We note that, while taking issue with the Panel's assessment of Russia's position, Russia does not identify a specific paragraph (or paragraphs) of the Interim Report which, in its view, should be modified. We further note that, in explaining its understanding of the notions of "supply" and "supply services" in the course of this dispute, Russia made various statements which can reasonably be understood as indicating that, for Russia, such notions include the production of natural gas.<sup>178</sup> Hence, we must decline Russia's objection.

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<sup>173</sup> Russia's request for review of the Interim Report, para. 17 (quoting paragraphs 101 and 102 of Russia's first written submission).

<sup>174</sup> European Union's comments on Russia's request for review of the Interim Report, para. 9 (quoting Russia's response to Panel question No. 155, para. 10).

<sup>175</sup> Russia's request for review of the Interim Report, para. 19.

<sup>176</sup> Russia's request for review of the Interim Report, para. 20.

<sup>177</sup> European Union's comments on Russia's request for review of the Interim Report, para. 9 (quoting Russia's response to Panel question No. 155, para. 10, where Russia stated, *inter alia*: "[b]ut for its discriminatory unbundling measure, the EU would not question the existence of supply services. VIUs in the EU, as in other countries, would still own and control all of the necessary assets for the production, supply and transmission of natural gas, including the transmission system.")

<sup>178</sup> See, for instance, Russia's response to Panel question No. 62, para. 288 ("The main components of the 'supply' of natural gas as a 'service' include services that overlap with natural gas production, as well as services related to the sale of natural gas"); response to Panel question No. 155, para. 1 ("A producer is, by

6.27. Russia questions the accuracy of the Panel finding, in [paragraph 7.309](#), that "Russia does not present specific arguments to the effect that the ordinary meaning of 'pipeline transport services' would include the notions of 'supply' and 'supply services'".<sup>179</sup> We note that Russia does not cite the submission(s) where Russia would have made specific arguments to the effect that the ordinary meaning of "pipeline transport services" includes the notions of "supply" and "supply services". In our view, paragraph 7.309 accurately reflects Russia's arguments. Therefore, we decline Russia's objection.

#### 6.4 The unbundling measure

6.28. The European Union requests that the Panel add another section to the description of its arguments on the issue of whether to assess the Directive's unbundling measure within each EU member State or throughout the EU territory in [paragraph 7.378](#). The requested section essentially denotes the European Union's position that "the Directive is not a 'genuine cause' for any alleged *de facto* discrimination" since it does not "require[] the Member States to exercise the discretion to choose between implementing OU only or also the other models in one or the other manner".<sup>180</sup>

6.29. Since our findings touch upon the notion that the assessment of a challenged measure's WTO consistency must be based on effects that are attributable to, i.e. have a genuine relationship with, that measure, we consider it useful to include the European Union's position on this matter. We have, however, not considered it necessary to include the full section requested by the European Union. Instead, we have added a single sentence to paragraph 7.378, which aims at capturing the essence of the European Union's position.

6.30. Russia requests the Panel to "revise its findings" in [paragraphs 7.381 through 7.383](#) that the unbundling measure challenged by Russia under Article II:1 of the GATS and Articles I:1 and III:4 of the GATT 1994 is that contained in the Directive, and to conclude instead that the challenged measure is a "single measure" consisting of the unbundling measure in the Directive as well as the implementing legislation of each of the EU member States.<sup>181</sup> The European Union submits that the Panel should reject Russia's request, arguing that Russia has not provided evidence that a "single measure" exists, nor that such a measure is "attributable to the EU".<sup>182</sup>

6.31. We note that our decision to first determine exactly what measure Russia is challenging was prompted by the lack of clarity and consistency concerning this matter in Russia's various submissions. In its request for review of the Interim Report, Russia acknowledges that it initially focused on the unbundling measure in the Directive and subsequently altered its focus "[u]pon reviewing the EU's arguments".<sup>183</sup> Russia then goes on to "briefly trace the history of how Russia characterized the unbundling measure in this proceeding" in order to support its view that the challenged measure is a "single measure" consisting of the unbundling measure in the Directive as well as the implementing legislation of each of the EU member States.<sup>184</sup> Russia thus appears to be seeking to clarify the nature of the challenged measure at the interim review stage, and on this basis requests us to revise our findings. In our view, this request is tantamount to an attempt to re-litigate arguments already put before us, which we do not consider appropriate at the interim review stage.

6.32. In any event and as further described in paragraphs 7.381 through 7.383, our conclusion that the challenged measure consists of the unbundling measure in the Directive is based on "an overall reading of Russia's panel request and the submissions provided by Russia throughout these proceedings". This overall reading already takes into account the various characterizations referred to by Russia in its request for review. We see nothing in Russia's request that would cause us to

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definition, a supplier of natural gas. When it sells that gas, of course a good is sold and supplied, as the EU says. In so doing, however, a gas supplier, which may well also be a producer, also supplies the market with pipeline transport services."); and response to Panel question No. 155, para. 10 (quoted by the European Union in its comments on Russia's request for review of the Interim Report, para. 9, see previous footnote).

<sup>179</sup> Russia's request for review of the Interim Report, para. 21.

<sup>180</sup> European Union's request for review of the Interim Report, para. 7 (quoting European Union's response to Panel question No. 171(c), para. 72).

<sup>181</sup> Russia's request for review of the Interim Report, paras. 22-30.

<sup>182</sup> European Union's comments on Russia's request for review of the Interim Report, para. 10.

<sup>183</sup> Russia's request for review of the Interim Report, paras. 24-25.

<sup>184</sup> Russia's request for review of the Interim Report, paras. 26-29.

question or revise our overall reading nor the ensuing conclusion. We therefore reject Russia's request.

6.33. The European Union requests that another sentence be added to paragraph 7.392, repeating parts of the arguments that the European Union requested to have included in paragraph 7.378.<sup>185</sup>

6.34. We recall that we have granted the European Union's request concerning paragraph 7.378 by introducing a sentence aimed at capturing the European Union's argument that "the Directive is not a 'genuine cause' for any alleged de facto discrimination" since it does not "require[] the Member States to exercise the discretion to choose between implementing OU only or also the other models in one or the other manner".<sup>186</sup> We do not believe that a repetition of this argument later on in the same section of our Report serves to clarify the European Union's position further or to otherwise improve our Report, and we therefore reject the European Union's request.

6.35. Russia requests the Panel to "reconsider its determination" in footnote 681 to paragraph 7.426 (footnote 813 of this Report) that the example of the "'ad hoc' ITO" TAP AG is not relevant for the assessment of the unbundling measure's consistency with Article II:1 of the GATS as it pertains to the infrastructure exemption measure rather than the unbundling measure.<sup>187</sup> Russia alternatively requests that we should "better explain" our decision not to accord weight to the example of TAP AG.<sup>188</sup> The European Union criticizes Russia for seeking to conflate "clearly distinct measures when making arguments" and submits that Russia's request should therefore be rejected.<sup>189</sup>

6.36. In our view, Russia does not appear to be questioning the factual accuracy of our finding that TAP AG is not an ITO pursuant to the unbundling measure but an "'ad hoc' ITO" pursuant to the infrastructure exemption measure. Rather, Russia appears to be arguing that we should nonetheless reconsider our decision not to accord weight to this example in the context of assessing the WTO consistency of the unbundling measure. In our view, this amounts to an attempt by Russia to re-litigate arguments already put before us, and we therefore reject Russia's request. In order to accommodate Russia's alternative request, we have however provided further explanation of our reasoning in footnote 681 to paragraph 7.426.

6.37. Russia requests that the Panel modify the characterization of Russia's position concerning the issue of whether the assessment under Article II:1 of the GATS should focus on VIUs or TSOs in paragraph 7.429<sup>190</sup>, whereas the European Union considers that Russia's position has been correctly described in paragraph 7.429 and that the characterization therein should not be modified.<sup>191</sup>

6.38. We note that Russia does not specify what precise aspects of paragraph 7.429 it requests to have modified or how it prefers to have its position characterized. In its request, Russia states that:

Russia argued that the activity of supplying a service "by a service supplier of one Member, through commercial presence in the territory of any other Member," in the words of Article I:2(c) of the GATS, necessitates the involvement of both entities, the "service supplier" in the exporting country and the "commercial presence" (which also is a service supplier), in the supply of that service.<sup>192</sup>

6.39. Russia does not provide a reference for this argument but goes on to quote a statement from its second written submission that "in Member States that permit only the OU model, such as Lithuania, a VIU is required to divest its assets and is restricted from maintaining anything more

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<sup>185</sup> European Union's request for review of the Interim Report, para. 10. See also para. 6.28 above.

<sup>186</sup> See paras. 6.28-6.29 above.

<sup>187</sup> Russia's request for review of the Interim Report, paras. 31-36.

<sup>188</sup> Russia's request for review of the Interim Report, para. 36.

<sup>189</sup> European Union's comments on Russia's request for review of the Interim Report, para. 11.

<sup>190</sup> Russia's request for review of the Interim Report, paras. 37-40.

<sup>191</sup> European Union's comments on Russia's request for review of the Interim Report, para. 13.

<sup>192</sup> Russia's request for review of the Interim Report, para. 38.

than a limited, minority ownership interest in the TSO."<sup>193</sup> In its request, Russia therefore appears to be suggesting that its position is similar to the conclusion we ultimately reach on this matter: namely that the assessment of GATS claims concerning mode 3 may involve looking at both the commercial presence in the importing Member (in the present dispute, TSOs) and the natural or juridical persons in the exporting Member, supplying services through that commercial presence (in the present case, VIUs).<sup>194</sup> We, however, have difficulties locating this position in any part of Russia's prior submissions. In light of this, we do not believe it would be appropriate to suggest, in our findings, that Russia's position throughout the proceedings was that which is now being presented in its request for review of the Interim Report.

6.40. At the same time, we agree with Russia that paragraph 7.429 presents Russia's position as a "contrast" to that of the European Union.<sup>195</sup> This approach was prompted by the European Union's criticism of Russia's position and we find it useful to rephrase paragraph 7.429 to reflect this aspect. As a consequence of this change, we have made minor adjustments to the characterization of the European Union's position in paragraph 7.430.

6.41. Russia disagrees with the Panel's finding in paragraph 7.443 that "[b]ased on the evidence, we understand that the TSOs pointed to by Russia as constituting a commercial presence take the form of juridical persons rather than, *inter alia*, branches or representative offices." Russia requests the Panel to delete this finding and consequently "reanalyze the entire commercial presence issue as set forth in paragraphs 7.443 through 7.451 of the [Interim Report]". Alternatively, Russia requests that the Panel provide "some explanation, including citation to actual evidence in the record, supporting this finding".<sup>196</sup> The European Union disagrees, pointing out that "[n]one of the TSO's that Russia referred to in the proceedings is a branch or representative office" and that Russia "does not seek to demonstrate otherwise, and cannot do so".<sup>197</sup>

6.42. In our view, Russia's request that we delete our finding and "reanalyze the entire commercial presence issue" amounts to an attempt to re-litigate the case, which is not appropriate at the interim review stage. In any event, and as pointed out by the European Union, Russia has provided no argumentation or evidence in these proceedings relating to the supply of services through the commercial presence of TSOs, which take the form of branches or representative offices. In light of this, as well as the fact that it is for Russia as the complaining party to make a *prima facie* case, we have difficulties understanding how we would "reanalyze the entire commercial presence issue" in respect of branches or representative offices. We therefore reject Russia's request.

6.43. With respect to Russia's alternative request that we provide "some explanation, including citation to actual evidence in the record", we note that Russia's position on this matter was not clear throughout the proceedings. For this reason, we had to rely on inferences in making our finding. In order to provide further clarity for the basis of our finding, and to accommodate Russia's alternative request, we have inserted footnote 826 to paragraph 7.443, explaining these inferences.

6.44. Russia requests that the Panel modify paragraph 7.478 and footnote 740 hereto (footnote 873 in this Report) by "tak[ing] account of th[e] evidence" and "provid[ing] its reasoning in response to th[e] argument" provided by Russia in response to Panel question No. 179 concerning the competitive opportunities for pipeline transport service suppliers that are not VIUs under the different unbundling models.<sup>198</sup> More particularly, Russia points to the arguments or "evidence" concerning the public body measure<sup>199</sup> and those concerning the notion that "for purposes of the ITO model, natural or legal persons that are not a VIU are legally prohibited from supplying pipeline transport services in the EU."<sup>200</sup> The European Union criticizes Russia for pointing to a measure that is distinct from the unbundling measure, the public body measure, and

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<sup>193</sup> Russia's request for review of the Interim Report, para. 39 (quoting Russia's second written submission, para. 209).

<sup>194</sup> See para. 7.440 below.

<sup>195</sup> Russia's request for review of the Interim Report, para. 39.

<sup>196</sup> Russia's request for review of the Interim Report, paras. 41-42.

<sup>197</sup> European Union's comments on Russia's request for review of the Interim Report, para. 14.

<sup>198</sup> Russia's request for review of the Interim Report, paras. 43-47.

<sup>199</sup> Russia's request for review of the Interim Report, para. 45.

<sup>200</sup> Russia's request for review of the Interim Report, paras. 46-47 (quoting Russia's response to Panel question No. 179, para. 157).

submits that Russia has been "unable to demonstrate with evidence that 'natural or legal persons that are not a VIU are legally prohibited from supplying pipeline transport services in the EU'." The European Union therefore submits that Russia's request be rejected.<sup>201</sup>

6.45. With respect to Russia's request that we "take account of this evidence", we note that we have already taken into account the two lines of argumentation or "evidence" referred to by Russia but did not consider these relevant to Russia's claim under Article II:1 of the GATS against the unbundling measure. Insofar as Russia is requesting that we reconsider the weight given to these two lines of argumentation or "evidence", this request amounts to an attempt to re-litigate arguments already put before us, which is not appropriate at the interim review stage. With respect to Russia's request that we "provide [our] reasoning in response to this argument", we note that footnote 740 to paragraph 7.478 already contains reasoning in support of our decision not to accord weight to the arguments provided by Russia in response to Panel question No. 179. While it is not clear what precise aspects of this reasoning Russia takes issue with, we have attempted to accommodate Russia's request by clarifying parts of the reasoning herein.

6.46. Russia requests that the Panel modify paragraphs 7.479 and 7.480, which address certain additional arguments submitted by Russia in response to Panel question No. 172(a) concerning the alleged less favourable treatment of pipeline transport service suppliers under the OU model in comparison with the ITO model.<sup>202</sup> Russia's request appears to concern two of the three "points" raised by Russia in its response, namely "the inherent commercial and logistical competitive advantages associated with vertical integration"<sup>203</sup> and the arguments provided in response to Panel question No. 183(a) "with regard to the different treatment and competitive advantage accorded to domestic or imported gas by VIUs subject to the ITO model".<sup>204</sup> Russia requests that the Panel "take this evidence into account" and "provide its reasoning in response to these argument[s]".<sup>205</sup> In respect of the former point, Russia also requests that we delete the "repeated reference to a 'simple internet search'", which is, in Russia's view, superfluous.<sup>206</sup> The European Union submits that "what Russia labels as 'evidence', constitute mere unsubstantiated and general allegations."<sup>207</sup>

6.47. We note that all three additional points raised by Russia in response to Panel question No. 172(a) are addressed in paragraphs 7.479 and 7.480 and footnote 745 hereto (footnote 880 in this Report), including those mentioned by Russia in its request for review. These were, however, found not to have been substantiated by Russia or not to be relevant for our assessment of Russia's claim under Article II:1 of the GATS. Insofar as Russia is requesting that we reconsider the relevance or persuasiveness of these points, this request amounts to an attempt to re-litigate arguments already put before us, which is not appropriate at the interim review stage. In order to address Russia's concerns regarding the adequacy of our reasoning, we have provided further details and references to Russia's response in paragraphs 7.479 and 7.480 and footnote 745 hereto. With respect to Russia's more specific request that we delete the references to a "simple internet search", we note that this is a direct quote from Russia's response to Panel question No. 172(a), which we see no reason to delete.

6.48. Footnote 748 to paragraph 7.482 (footnote 883 in this Report) concerns Russia's contention that the objective of the unbundling measure is to reduce reliance on imported Russian natural gas or Russian pipeline transport services or service suppliers. Russia submits that this footnote includes "only a very small fraction of the evidence put forward by Russia on this issue" and requests that we take into account additional arguments and evidence, listed by Russia in its request for review.<sup>208</sup> The European Union has not provided comments on this request.

6.49. We note that the arguments and evidence concerning the European Union's alleged objectives are provided at a variety of places in Russia's submissions, and not always in connection with Russia's claim against the unbundling measure under Article II:1 of the GATS, rendering it difficult to determine which arguments and evidence to address in the context of this claim.

<sup>201</sup> European Union's comments on Russia's request for review of the Interim Report, para. 15.

<sup>202</sup> Russia's request for review of the Interim Report, paras. 48-57.

<sup>203</sup> Russia's request for review of the Interim Report, paras. 49-52.

<sup>204</sup> Russia's request for review of the Interim Report, paras. 53-56.

<sup>205</sup> Russia's request for review of the Interim Report, para. 57.

<sup>206</sup> Russia's request for review of the Interim Report, fn 31.

<sup>207</sup> European Union's comments on Russia's request for review of the Interim Report, para. 16.

<sup>208</sup> Russia's request for review of the Interim Report, paras. 58-63.

Indeed, some of the arguments and evidence listed by Russia in its request for review do not appear to concern the unbundling measure at all.<sup>209</sup> Nonetheless, and in order to ensure the completeness of our findings, we have provided further details and references to Russia's various submissions in footnote 748.

6.50. Russia requests that the Panel specify which examples are encompassed by the reference to "the above-mentioned examples" in paragraph 7.487.<sup>210</sup> The European Union has not provided comments on this request. We consider that the specification requested by Russia provides additional clarity and have made the necessary modification to paragraph 7.487.

6.51. Paragraphs 7.496 through 7.508 concern four examples of TSOs, which Russia relies on in arguing that "only TSOs controlled by the Russian VIU were required to undergo ownership unbundling", and the issue of whether the Russian VIU Gazprom can be considered to have supplied pipeline transport services through the commercial presence of these TSOs, within the meaning of the GATS. Russia appears to make two separate requests in this regard:

6.52. First, Russia requests that the Panel "set[] forth its own legal interpretation of the key term 'legally direct' in GATS Article XXVIII(n)(ii)" and "respond[] to Russia's interpretation of this term".<sup>211</sup> The European Union criticizes Russia for seeking to "re-argue its claims" and submits that nothing in Russia's request "alters the correctness of the Panel's findings."<sup>212</sup>

6.53. When addressing Russia's request, we begin by noting that it is well-established practice that panels need not address all arguments submitted by the parties to a dispute. In the current dispute, we did not consider it necessary to determine, in the abstract, the meaning of the term "legally direct", which forms part of the definition of "control" under Article XXVIII(n)(ii) of the GATS. Indeed, we specifically found that the concept of "control" is a matter to be assessed on a case-by-case basis.<sup>213</sup> In accordance with this approach, we instead address this issue in respect of the evidence relied on by Russia. We do not believe that a further discussion of the concepts of "control" or "legally direct", in the abstract, would provide further clarity or serve to resolve issues raised by Russia's claim under Article II:1 of the GATS. We therefore reject Russia's request.

6.54. Second, Russia criticizes the Panel for not "according sufficient weight" to the evidence submitted by Russia concerning the [\*\*\*] for four TSOs and requests that the Panel should do so or "[a]t the very least ... properly respond to Russia's arguments concerning this evidence".<sup>214</sup> The European Union criticizes Russia for seeking to "re-argue its claims" and submits that nothing in Russia's request "alters the correctness of the Panel's findings."<sup>215</sup>

6.55. We note that, while we have not found it necessary to address Russia's more general assertions concerning Gazprom's level of control over the four TSOs, we have considered all arguments provided by Russia in relation to the evidence submitted by it, namely the [\*\*\*] for the four TSOs. Insofar as Russia is requesting that we reconsider the weight of this evidence or the persuasiveness of its arguments, this request amounts to an attempt to re-litigate evidence and arguments already put before us, which is not appropriate at the interim review stage. In order to accommodate Russia's concerns regarding the adequacy of our reasoning, we have provided further details when presenting Russia's arguments in paragraph 7.500 and when addressing these in paragraph 7.501. We have, however, not included or addressed certain new arguments raised by Russia in its request for review<sup>216</sup>, as interim review is not the appropriate forum for presenting new arguments.

6.56. Footnote 784 to paragraph 7.498 (footnote 919 in this Report) explains that the European Union was provided an opportunity to comment on new pieces of evidence submitted by Russia in its comments on the European Union's responses to the Panel's questions following the second

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<sup>209</sup> See, e.g. Russia's request for review of the Interim Report, para. 60 (citing Russia's first written submission, paras. 6-7 concerning the TEN-E measure and the possibilities for certain pipelines of being considered projects of common interest)

<sup>210</sup> Russia's request for review of the Interim Report, para. 64.

<sup>211</sup> Russia's request for review of the Interim Report, paras. 66-67.

<sup>212</sup> European Union's comments on Russia's request for review of the Interim Report, para. 17.

<sup>213</sup> See para. 7.470 below.

<sup>214</sup> Russia's request for review of the Interim Report, para. 67.

<sup>215</sup> European Union's comments on Russia's request for review of the Interim Report, para. 17.

<sup>216</sup> Russia's request for review of the Interim Report, para. 72.

meeting, but did not avail itself of this opportunity in respect of certain pieces of new evidence. The European Union requests that the relevant part of its communication be quoted in this regard.<sup>217</sup> We consider the requested addition useful as it clarifies that the European Union actively declined to comment on certain pieces of the new evidence, and we have therefore included the quote in footnote 784.

6.57. The European Union requests that the Panel add another section to the description of its position on the issue of whether the unbundling measure in the Directive falls within the scope of Article III:4 of the GATT 1994 in paragraph 7.526. More particularly, the European Union requests the inclusion of certain arguments concerning the lack of a relationship between "the origin of the pipeline service supplier with the origin of the gas flowing through the pipeline", submitted by the European Union in the context of arguing that imported Russian natural gas is not accorded less favourable treatment under the unbundling measure.<sup>218</sup>

6.58. In paragraph 7.526, we explain that the European Union has pointed to there being "no link between the origin of the gas that flows through a pipeline and the origin of the service supplier" in the context of arguing that the unbundling measure does not fall within the scope of Article III:4 of the GATT 1994. We also explain that we consider this argument misplaced and better addressed in the context of considering whether there is less favourable treatment of imported Russian natural gas in comparison with that of domestic EU natural gas. We do not believe that the inclusion of arguments submitted by the European Union in the context of arguing that imported Russian natural gas is not accorded less favourable treatment under the unbundling measure would provide further clarification. We therefore reject the European Union's request.

6.59. Russia suggests several revisions of the Panel's likeness analysis in the context of Russia's claims under Articles I:1 and III:4 of the GATT 1994 in sections 7.5.1.4.2.2 and 7.5.1.4.3.2.<sup>219</sup> Russia specifically requests that the Panel "should clarify its view" on whether natural gas includes LNG, and "preferably near the outset of the final report".<sup>220</sup> Russia also considers that the Panel should examine the like products issue regarding LNG at this point in its analysis, because this is the first claim reached by the Panel concerning natural gas.<sup>221</sup> The European Union did not provide any comments regarding Russia's requests.

6.60. We note that, in the course of our likeness analysis regarding LNG and natural gas in section 7.7.2.2.2, we rejected Russia's contention that LNG and natural gas are one and the same product. However, in order to make it clear that we do not consider natural gas and LNG as one and the same product in the context of our analysis of Russia's claims against the unbundling measure, we supplement paragraphs 7.532 and 7.574 with additional reasoning. We further consider that paragraphs 7.531, 7.532 and 7.574 set out in sufficient detail the reasons for our not addressing the likeness issue regarding LNG and natural gas in the context of the unbundling measure. Therefore, we decline Russia's request that the Panel examine the like product issue regarding LNG at this point in our analysis.

6.61. Russia further requests that the Panel delete certain sentences from paragraph 7.529, which, in Russia's view, mischaracterize Russia's position and the evidence on the record.<sup>222</sup> We disagree with Russia that anything in paragraph 7.529 mischaracterizes Russia's position or the evidence on the record. We also recall that we only summarize the parties' arguments the extent necessary and appropriate to capture our understanding for the purposes of our own assessment and reasoning.<sup>223</sup> Russia's arguments are summarized in its own words in the executive summaries annexed to the Final Report. For these reasons, we decline Russia's request.

6.62. Paragraphs 7.537 and 7.538 set out the arguments of the parties and the approach of the Panel in assessing whether the unbundling measure accords less favourable treatment to imported Russian natural gas in violation of Article III:4 of the GATT 1994. More particularly, paragraph 7.538 sets out the two issues raised by the parties' argumentation:

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<sup>217</sup> European Union's request for review of the Interim Report, para. 12.

<sup>218</sup> European Union's request for review of the Interim Report, para. 13.

<sup>219</sup> Russia's request for review of the Interim Report, paras. 76-84 and 104-107.

<sup>220</sup> Russia's request for review of the Interim Report, paras. 82 and 104.

<sup>221</sup> Russia's request for review of the Interim Report, para. 83.

<sup>222</sup> Russia's request for review of the Interim Report, para. 84.

<sup>223</sup> See para. 6.5 above.



(a) whether Russia has demonstrated that natural gas is accorded less favourable treatment under the OU model in comparison with that accorded to natural gas under the ISO model and/or the ITO models; and (b) if so, whether Russia has demonstrated that the unbundling measure in the Directive accords less favourable treatment to imported Russian natural gas than that accorded to domestic EU natural gas by "enabling" EU member States to choose between implementing only the OU model or implement the ISO and/or the ITO models in addition to the OU model in respect of transmission systems that belonged to a VIU on 3 September 2009.

6.63. In the immediately following paragraph, it is explained that the first of these issues involves an assessment of "whether the OU model 'modifies the *conditions of competition* in the relevant market to the detriment' of natural gas in comparison with the ISO and/or the ITO models." Russia appears to make two separate requests concerning these paragraphs.

6.64. First, Russia requests that the Panel modify "its description of the issues and order of analysis in paragraph 7.538", arguing that it should instead consider (a) whether the unbundling measure "provides differential treatment to (or 'draws regulatory distinctions between') imported Russian gas transported via pipelines of the Russian VIU, Gazprom, which was required to adopt the OU model in certain Member States ... when compared with the treatment provided by the unbundling measure to like domestic gas transported via pipelines of VIUs that were allowed in other Member States to adopt the less restrictive ITO model"; and (b) "whether this differential treatment (or these 'regulatory distinctions') modifies the conditions of competition, *i.e.*, results in a detrimental impact on the 'equality of competitive opportunities,' for Russian gas in the EU market compared to like domestic gas".<sup>224</sup> The European Union submits that the Panel's approach for determining less favourable treatment under Article III:4 of the GATT 1994 comports with WTO jurisprudence and that Russia "seems to have difficulties in understanding the legal standard that applies in WTO discrimination cases".<sup>225</sup>

6.65. The Appellate Body has clarified that Article III:4 of the GATT is concerned with treatment that modifies the competitive conditions for goods, not formal differences in the treatment of goods<sup>226</sup> and that it does not "preclude any regulatory distinctions between products that are found to be like, as long as treatment accorded to the *group* of imported products is no less favourable than that accorded to the *group* of like domestic products."<sup>227</sup> In our view, the "description of the issues" in paragraphs 7.538 and 7.539 reflects this prior WTO jurisprudence as well as the particularities of the parties' argumentation in the case before us. These elements are likewise reflected in the "order of analysis" in paragraph 7.538. More particularly, this order reflects the fact that it is not necessary to consider whether the unbundling measure *de facto* discriminates or draws regulatory distinctions between imported Russian natural gas and domestic EU natural gas in respect of the applicable unbundling model(s) insofar as the competitive opportunities of natural gas are not modified under the different unbundling models. We therefore see no reason to modify our "description of the issues and order of analysis", and hence reject Russia's request.

6.66. Second, Russia appears to repeat its request that the unbundling measure be characterized as a "single measure" consisting of the unbundling measure in the Directive as well as the implementing legislation of each of the EU member States.<sup>228</sup> In this regard, the European Union recalls its position that Russia has not demonstrated the existence of a so-called "single measure", nor that "such (non-existent) 'single measure'" could be attributed to the European Union.<sup>229</sup> We have already rejected the same request, in paragraphs 6.30 through 6.32 above, and continue to do so for purposes of our findings under Article III:4 of the GATT 1994.

6.67. Russia requests that the Panel delete, from paragraph 7.540, the sentence: "We note that Russia's argumentation concerning the specific alleged competitive advantages under the ISO and the ITO models has not been entirely clear throughout these proceedings." In Russia's view, this

<sup>224</sup> Russia's request for review of the Interim Report, paras. 87-88. (emphasis original)

<sup>225</sup> European Union's comments on Russia's request for review of the Interim Report, para. 18.

<sup>226</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 137. See also Appellate Body Reports, *EC – Seal Products*, para. 5.101 (referring to Appellate Body Reports, *US – Clove Cigarettes*, para. 179; *Thailand – Cigarettes (Philippines)*, para. 128; and *Korea – Various Measures on Beef*, para. 137).

<sup>227</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 193. (emphasis original)

<sup>228</sup> Russia's request for review of the Interim Report, para. 89.

<sup>229</sup> European Union's comments on Russia's request for review of the Interim Report, para. 19.

sentence "does not clarify or contribute to the Panel's analysis".<sup>230</sup> The European Union argues that this sentence is correct and should be maintained, pointing out that it "shared [the Panel's] concern throughout the proceedings".<sup>231</sup>

6.68. In our view, the initial characterization of Russia's arguments in paragraph 7.540 as "unclear" is useful as it serves to explain our approach in the subsequent paragraphs. We therefore reject Russia's request.

6.69. Paragraphs 7.541 through 7.568 contain the Panel's findings concerning the alleged competitive advantages under the ISO and the ITO models, relied on by Russia in its claim under Article III:4 of the GATT 1994. Russia requests that we "revisit" the finding in paragraph 7.542 that "Article III:4 of the GATT 1994 prohibits less favourable treatment of *goods only* and does not refer to less favourable treatment of *producers*" and the finding that Russia therefore must demonstrate that the treatment of VIUs under the ISO and ITO models "translates into a competitive advantage for the natural gas produced or supplied by the VIU". As support, Russia cites certain prior cases in which the treatment of producers or suppliers of goods was taken into account in finding that a challenged measure falls within the scope of Article III:4 of the GATT 1994 or that it accords less favourable treatment to imported goods in violation of this provision. Russia also requests that we revisit our "additional findings and overall conclusion regarding Russia's claim against the unbundling measure under GATT Article III:4" and that "[t]he same holds for Russia's claim against this measure under Article I:1."<sup>232</sup> The European Union has not provided comments on this request.

6.70. We cannot agree with Russia's reading of our finding in paragraph 7.542 as suggesting that we will not take account of the treatment accorded to producers or suppliers of natural gas, such as VIUs, under the ISO or the ITO models. Rather, we specify that this will be taken into account insofar as Russia has demonstrated that this "translates into a competitive advantage for the natural gas produced or supplied by the VIU". We see no divergence between this approach and that taken by the Appellate Body and prior panels in the jurisprudence cited by Russia. We therefore decline to "revisit" our findings in paragraphs 7.541 through 7.568.

6.71. In addition to the request addressed immediately above, Russia also submits certain comments regarding paragraphs 7.541 through 7.568 concerning interpretation of municipal law and the need for a holistic analysis in this regard.<sup>233</sup> We have, however, not been able to discern any request for review in respect of such comments, let alone requests for review of precise aspects of the Interim Report. We further note that the issue of interpretation of municipal law was not raised by any party or addressed in our findings in paragraphs 7.541 through 7.568. We therefore do not address these comments further.

6.72. With respect to the Panel's findings in paragraphs 7.581 and 7.582, Russia requests that the Panel take into account certain evidence, including the evidence concerning Lithuania's grant of priority to natural gas supplied by Litgas through the Klaipeda LNG Terminal and the five-year deal between Statoil and Litgas.<sup>234</sup> The European Union did not comment on Russia's request.

6.73. We note that we have already assessed the relevance and weight of the evidence presented by Russia, which is reflected in paragraphs 7.581 and 7.582. We thus understand Russia to request that the Panel engages in a reassessment of this evidence. As noted above, interim review is not an appropriate stage for a party to re-argue its case.<sup>235</sup> Therefore, we do not find Russia's request acceptable.

6.74. The European Union requests the Panel to add, at the end of paragraphs 7.607 and 7.618, the phrase: "and that no other service suppliers can access the market".<sup>236</sup> We note that the

<sup>230</sup> Russia's request for review of the Interim Report, para. 90.

<sup>231</sup> European Union's comments on Russia's request for review of the Interim Report, para. 20.

<sup>232</sup> Russia's request for review of the Interim Report, paras. 96-103 (referring to Appellate Body Reports, *EC – Seal Products*, para. 1.4; and Panel Reports, *Mexico – Taxes on Soft Drinks*, paras. 8.112-8.113; and *EC – Bananas III*, para. 7.248).

<sup>233</sup> Russia's request for review of the Interim Report, paras. 91-96.

<sup>234</sup> Russia's request for review of the Interim Report, paras. 109-113.

<sup>235</sup> See para. 6.3 above.

<sup>236</sup> European Union's request for review of the Interim Report, paras. 16 and 18.

European Union does not explain the reason for inserting this additional phrase. We do not consider that the phrase requested by the European Union contributes to clarifying our reasoning and we therefore decline the European Union's request.

6.75. Russia submits that, when setting out its analysis of Russia's claim under Article XVI:2(a) of the GATS concerning Lithuania's law implementing the unbundling measure, the Panel found, in [paragraph 7.618](#), that "this evidence consists of a narrative of the Commission Opinion with no established path showing that it is rooted in a legal text". According to Russia, the Panel's analysis is insufficient and results in the conclusion that only *de jure* monopoly service suppliers established by law (and not *de facto*) would qualify as a monopoly supplier of a service under Article XXVIII(h) of the GATS. Russia requests the Panel to revisit and reconsider this analysis.<sup>237</sup> The European Union does not provide comments on this request.

6.76. In our view, Russia's request for the Panel to "revisit and reconsider" its allegedly "insufficient" analysis challenges the manner in which the Panel assessed the evidence on record and amounts to an attempt by Russia to re-argue its case, which, as explained, is not acceptable at the interim review stage. We also disagree with Russia's argument that the Panel's assessment of a specific piece of evidence submitted by Russia in support of its claim "results in" the general conclusion proposed by Russia. Our findings on Russia's claim against Lithuania's national implementing law under Article XVI:2(a) of the GATS are based on an overall analysis of Russia's argumentation and evidence presented in the course of these proceedings. We therefore decline Russia's request.

6.77. With respect to [paragraph 7.640](#), the European Union suggests the Panel add a footnote referring to paragraph 105 of the European Union's first written submission at the end of the third sentence.<sup>238</sup> We do not find it appropriate to add, at the end of that sentence, a footnote referring to arguments made by the European Union in paragraph 105 of its first written submission. Nevertheless, taking into account the European Union's request, we included footnote 1119 at the end of the first sentence of paragraph 7.640 since this sentence quotes arguments by the European Union. This new footnote refers to paragraph 99 of the European Union's first written submission, where these particular arguments are found.

## 6.5 The public body measure

6.78. In respect of [paragraph 7.764](#), the European Union requests that the Panel add, after the words "as the national laws in question implement Article 9(6) of the Directive," the phrase: "and because the member States' national regulatory authorities rely on the Commission's opinion to make their own assessment".<sup>239</sup> The European Union also requests that the Panel supplement [paragraph 7.820](#) with an additional summary of the European Union's arguments.<sup>240</sup> The European Union, however, does not explain what value these changes would have for the Final Report. We further note that the European Union does not provide any reference to its arguments that the member States' national regulatory authorities "rely on the Commission's opinion to make their own assessment". We also observe that there is already a reference to the European Union's confirmation that there have been no instances where a TSO controlled by a public body from a third country sought the application of Article 9(6) of Directive or the corresponding national implementing provisions in [footnote 1229 to paragraph 7.820](#) (footnote 1367 in this Report). In light of these considerations, we do not find the requested additions useful and therefore decline the European Union's requests.

## 6.6 The LNG measure

6.79. Russia requests that the Panel reconsider its finding in [section 7.7.2.2.2](#) that Russia has not demonstrated that natural gas imported from Russia and LNG imported from other countries are like products within the meaning of Article I:1 of the GATT 1994.<sup>241</sup> In the event the Panel does not reverse its like product finding in its Final Report, Russia urges the Panel to assume that natural gas imported in the form of LNG and via pipelines are like products and, on that basis,

<sup>237</sup> Russia's request for review of the Interim Report, para. 114.

<sup>238</sup> European Union's request for review of the Interim Report, para. 20.

<sup>239</sup> European Union's request for review of the Interim Report, para. 24.

<sup>240</sup> European Union's request for review of the Interim Report, para. 25.

<sup>241</sup> Russia's request for review of the Interim Report, para. 118.

complete its analysis under Article I:1 of the GATT 1994, including whether (a) the LNG measure confers an "advantage, favour, privilege, or immunity" on a product originating in the territory of any country and (b) that the advantage so accorded is not extended "immediately" and "unconditionally" to imported Russian natural gas.<sup>242</sup>

6.80. The European Union considers that Russia's comments seek to "reargue issues" relating to the LNG measure.<sup>243</sup> According to the European Union, once the Panel has found that the products are not like products, the Panel is not required to continue and "examine further the consistency of the LNG measure with Article I:1".<sup>244</sup> The European Union therefore submits that Russia's request in respect of the Panel's analysis of the LNG measure must be rejected.<sup>245</sup>

6.81. We decline Russia's request that we reconsider our finding that Russia has not demonstrated that natural gas imported from Russia and LNG imported from other countries are like products within the meaning of Article I:1 of the GATT 1994. Likewise, we do not accept Russia's request that we continue our analysis as to whether the LNG measure confers an advantage, favour, privilege, or immunity on a product originating in the territory of any country that is not extended immediately and unconditionally to imported Russian natural gas. We note that we have the discretion to address only the issues we deem necessary to resolve a particular claim.<sup>246</sup> We are not convinced that continuing our analysis in the abstract, on the basis of the hypothetical assumption that LNG and natural gas are like products, will contribute to this end.

6.82. With respect to the Panel's likeness analysis, Russia also submits that, while the European Union asserted that the use of non-regasified LNG as transport fuel in the European Union is possible, the record contains no evidence demonstrating that LNG has actually been used for this or any other purpose.<sup>247</sup> On this basis, Russia requests that the Panel should conclude that the end-uses of natural gas imported into the European Union in the form of LNG and other natural gas are the same, thus requiring an affirmative competitive relationship finding.<sup>248</sup>

6.83. The European Union requests that, in paragraph 7.826, the Panel add the following text: "The European Union submits that LNG and natural gas are not like products within the meaning of Article I:1 of the GATT 1994."<sup>249</sup> Regarding Russia's request, the European Union responds that, contrary to Russia's claim, there is evidence on the record demonstrating that LNG has actually been used "for transport purposes", and points to Exhibits EU-162 and RUS-195.<sup>250</sup>

6.84. While we decline Russia's request, we decided to modify the text of footnotes 1268 and 1269 (footnotes 1407 and 1408 in this Report) to reflect more fully the basis for our finding in paragraphs 7.842 and 7.843 that a certain amount of LNG imported into the European Union is not regasified for the purposes of its transportation and supply via pipelines in the European Union, and is instead used in its liquid form as a transport fuel. We also decided to accommodate the European Union's request and supplement paragraph 7.826 with a reference to the European Union's argument.

6.85. The European Union requests that the Panel refer to its argument that consumers of LNG purchase LNG to use it as fuel for ships in paragraph 7.849.<sup>251</sup> We observe that paragraph 7.849 concerns the consumers' tastes and habits criterion of likeness. We understand the European Union to have argued that LNG can be used as a transport fuel, including as a fuel for ships, in support of its contention that the end-uses of LNG and natural gas are different, rather than that the consumer's tastes and habits regarding LNG and natural gas are different. For this reason, the explicit reference to the European Union's argument that LNG can be used as a transport fuel is found in paragraph 7.848, which deals with the end-uses criterion of likeness. On this basis, we decline the European Union's request.

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<sup>242</sup> Russia's request for review of the Interim Report, para. 119.

<sup>243</sup> European Union's comments on Russia's request for review of the Interim Report, para. 21.

<sup>244</sup> European Union's comments on Russia's request for review of the Interim Report, para. 22.

<sup>245</sup> European Union's comments on Russia's request for review of the Interim Report, para. 22.

<sup>246</sup> See for instance Panel Report, *EU – Poultry Meat (China)*, para. 6.19 (referring to Appellate Body Report, *EC – Poultry*, para. 135; and Panel Report, *India – Solar Cells*, para. 7.76).

<sup>247</sup> Russia's request for review of the Interim Report, para. 129.

<sup>248</sup> Russia's request for review of the Interim Report, para. 129.

<sup>249</sup> European Union request for review of the Interim Report, para. 26.

<sup>250</sup> European Union's comments on Russia's request for review of the Interim Report, para. 22.

<sup>251</sup> European Union's request for review of the Interim Report, para. 27.

6.86. Russia requests the Panel to address Russia's argument made in response to Panel question No. 109(a), in which Russia referred to the Commission's decision in competition proceedings allegedly recognizing that from the perspective of gas buyers there is no distinction between gas transported by pipeline and gas transported as LNG and regasified.<sup>252</sup> The European Union did not provide any comments on Russia's request.

6.87. Recalling that the purpose of the interim review is not to provide an opportunity for the parties to re-argue their case, we decided to accommodate Russia's request and explicitly address its argument made in response to Panel question No. 109(a) and with reference to Exhibit RUS-157 in two new paragraphs inserted after paragraph 7.850 (paragraphs 7.851 and 7.852 in this Report). We also introduced several minor changes of a consequential nature.

## 6.7 The upstream pipeline networks measure

6.88. We note that Russia submits certain new arguments regarding the alleged advantage granted to Norwegian natural gas not previously developed in its submissions to the Panel.<sup>253</sup> We recall that interim review is not an appropriate stage for the submission of new arguments.<sup>254</sup> Therefore, as Russia did not assert these arguments before, we refuse to consider them at this stage in the proceedings.

6.89. Russia further requests that the Panel revise its reasoning in paragraphs 7.1028 through 7.1039 (paragraphs 7.1030 through 7.1043 in this Report) on whether the upstream pipeline networks measure creates more favourable conditions for the transportation of natural gas via upstream pipelines than via transmission pipelines.<sup>255</sup> In particular, Russia requests that the Panel review Exhibit RUS-116 in its analysis in paragraphs 7.1030 through 7.1031 (paragraphs 7.1032 through 7.1033 in this Report).<sup>256</sup> In Russia's view, the Panel's summary of Russia's arguments in paragraph 7.1029 (paragraph 7.1031 in this Report) does not accurately reproduce Russia's arguments developed in paragraphs 291 and 294 of Russia's second written submission.<sup>257</sup> Russia also submits that the European Union offered no defence regarding the lack of advantage to Norwegian natural gas transported by upstream pipeline networks that are not subject to regulated transportation tariffs, and on this basis, requests that the Panel rectify its finding in paragraph 7.1030 and conclude that such an "exemption" creates an advantage.<sup>258</sup>

6.90. The European Union disagrees with all of Russia's comments with respect to the upstream pipeline networks measure and considers that Russia seeks to re-argue its case.<sup>259</sup> With respect to Russia's alleged demonstration of what the "UPN exemption" consists of on the basis of Exhibit RUS-116<sup>260</sup>, the European Union submits that Exhibit RUS-116 is a UK document describing discussions in the UK House of Lords and does not constitute any "EU admission of any supposed objective of the UPN measure".<sup>261</sup> The European Union further argues that merely citing some words that are taken out of context does not amount to evidence demonstrating the alleged competitive advantage for gas of a certain origin.<sup>262</sup>

6.91. We decided to partially accommodate Russia's request that the Panel review Exhibit RUS-116 in its analysis. While this does nothing but reinforce our view as to the correct outcome of this claim, we supplemented our reasoning with explicit references to Exhibit RUS-116 and Russia's allegations based thereon in two new paragraphs after paragraph 7.1038 (paragraphs 7.1041 and 7.1042 in this Report).

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<sup>252</sup> Russia's request for review of the Interim Report, para. 130. We note that in its response to Panel question No. 109(a), Russia referred to "Regulation (EC) 139/2004 'Merger Procedure' issued by the Commission in a competition proceeding in 2012" rather than the Commission's decision in competition proceedings. (Russia's response to Panel question No. 109(a), para.436)

<sup>253</sup> Russia's request for review of the Interim Report, paras. 147-148.

<sup>254</sup> See para. 6.3 above.

<sup>255</sup> Russia's request for review of the Interim Report, paras. 136-170.

<sup>256</sup> Russia's request for review of the Interim Report, para. 144.

<sup>257</sup> Russia's request for review of the Interim Report, para. 146.

<sup>258</sup> Russia's request for review of the Interim Report, para. 151.

<sup>259</sup> European Union's comments on Russia's request for review of the Interim Report, para. 23.

<sup>260</sup> Russia's request for review of the Interim Report, para. 145.

<sup>261</sup> European Union's comments on Russia's request for review of the Interim Report, para. 24.

<sup>262</sup> European Union's comments on Russia's request for review of the Interim Report, para. 24.

6.92. We understand that Russia's concern that the Panel's summary of Russia's arguments in paragraph 7.1029 does not accurately reproduce Russia's arguments relates to the lack of references to Russia's allegations that the European Union included the upstream pipeline networks measure to avoid the resulting increases in costs and loss of efficiency to Norwegian gas producers on the basis of Exhibit RUS-116. As we are now explicitly referring to Russia's allegations based on Exhibit RUS-116 in a different paragraph, we consider that the summary of Russia's arguments provided in paragraph 7.1029, when read in light of Russia's other arguments, accurately reflects the gist of Russia's submissions. Therefore, we decline Russia's request for a revision of paragraph 7.1029.

6.93. We also decline Russia's request that the Panel rectify its finding in paragraph 7.1030 and conclude that, because the European Union offered no defence regarding the lack of advantage to Norwegian natural gas transported by upstream pipeline networks that are not subject to regulated transportation tariffs, such an "exemption" creates an advantage. We recall that it is Russia, as the complainant in these proceedings, and not the European Union, who bears the burden of demonstrating that there is an advantage granted to natural gas of any origin within the meaning of Article I:1 of the GATT 1994 that is not extended to like Russian natural gas. Except for repeatedly alleging that the operators of upstream pipeline networks are "exempted" from tariff regulation requirements, Russia did not provide any explanation as to how the non-application of tariff regulation requirements to the operators of upstream pipeline networks provides an advantage to natural gas of Norwegian or any other origin. As noted above in paragraph 6.5, a panel is not expected to "divine" a claim of WTO inconsistency from the mere allegations of a complainant.

6.94. With respect to the Panel's reasoning in paragraphs 7.1033 through 7.1038 (paragraphs 7.1035 through 7.1040 in this Report), Russia requests that the Panel clarify the basis for its conclusion that Russia has not demonstrated that the legal regime of the operators of upstream pipeline networks creates more favourable conditions for the transportation of natural gas via upstream pipelines than via transmission pipelines.<sup>263</sup> Russia also requests that the Panel "rule expressly" that the European Union has not satisfied its burden of proof to "demonstrate that, notwithstanding the full control exercised by Norwegian VIUs over their upstream pipeline networks and the Norwegian-origin gas transported through those upstream pipeline networks, Article 34 nevertheless eliminates the possibility that the UPN exemption results in more favourable conditions for the transportation of that Norwegian gas".<sup>264</sup>

6.95. The European Union submits that it was for Russia to demonstrate that a competitive advantage was conferred to a product of a certain origin (rather than to a producer) and to demonstrate that Article 34 imposes "no obligation whatsoever".<sup>265</sup>

6.96. We consider that our reasoning in paragraphs 7.1028 through 7.1039 explains in sufficient detail the basis for our finding that Russia has not demonstrated that the legal regime of the operators of upstream pipeline networks creates more favourable conditions for the transportation of natural gas via upstream pipelines than via transmission pipelines. Therefore, we decline Russia's request for any further clarifications in this regard.

6.97. Furthermore, we do not find acceptable Russia's request that the Panel "rule expressly" that the European Union has not satisfied its burden of proof to "demonstrate that, notwithstanding the full control exercised by Norwegian VIUs over their upstream pipeline networks and the Norwegian-origin gas transported through those upstream pipeline networks, Article 34 nevertheless eliminates the possibility that the UPN exemption results in more favourable conditions for the transportation of that Norwegian gas".<sup>266</sup> We recall that Russia bears the burden of demonstrating that the regulation of the operators of upstream pipeline networks under the Directive, which includes Article 34 of the Directive, grants an advantage to natural gas of any origin that is not extended to natural gas of Russian origin. Therefore, it is for Russia, and not for the European Union, to demonstrate how the application of Article 34 of the Directive, instead of Article 32 of the Directive, provides an advantage to natural gas of any origin.

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<sup>263</sup> Russia's request for review of the Interim Report, para. 156.

<sup>264</sup> Russia's request for review of the Interim Report, para. 159. (emphasis original)

<sup>265</sup> European Union's comments on Russia's request for review of the Interim Report, para. 26.

<sup>266</sup> Russia's request for review of the Interim Report, para. 159.

6.98. With respect to paragraph 7.1037 (paragraph 7.1039 in this Report), Russia submits that contrary to the Panel's description, Russia has not argued that the "obligation" of Article 34(1) is vague and meaningless "because of the 'matters' listed in Article 34(2)" but rather that Article 34 imposes no "obligation" and that it is "vague" and "meaningless" on its face.<sup>267</sup> Russia further submits that the Panel's statement that Article 34 provides "an obligation of third-party access to upstream pipeline networks" does not constitute an objective assessment of the matter before it and requests that the Panel address the difference in treatment of upstream pipeline networks under Article 34 of the Directive and transmission pipelines under Article 32 of the Directive in order to assess whether it results in more favourable conditions of transportation for natural gas of Norwegian origin transported through upstream pipelines, compared to Russian gas transported through transmission pipelines.<sup>268</sup> The European Union does not provide any comments on Russia's request.

6.99. In light of Russia's comments, we decided to modify paragraph 7.1037 concerning the Panel's description of Russia's arguments. However, we decline Russia's request that the Panel provide any additional analysis regarding the difference in treatment of upstream pipeline networks under Article 34 of the Directive and transmission pipelines under Article 32 of the Directive. We consider that we have provided sufficient reasons in support of our rejection of Russia's arguments that Article 34 of the Directive provides *no* obligation of third-party access to upstream pipelines.

6.100. Russia also submits, and requests that the Panel confirm, that "Russia has made a *prima facie* case that Article 34 is vague, serves no meaningful purpose, and has never been utilized".<sup>269</sup> The European Union did not comment on Russia's request. In light of our analysis in section 7.9.2.2.3.1, we decline Russia's request.

6.101. Russia further requests that the Panel complete its analysis regarding Article 34 under the second prong of the "advantage" test the Panel articulated under Article I:1 of the GATT 1994 and examine whether more favourable conditions for the transportation of natural gas via upstream pipelines than via transmission pipelines result in more favourable competitive opportunities for natural gas of any particular origin.<sup>270</sup> The European Union did not comment on Russia's request.

6.102. We decline Russia's request. We fail to understand how we can meaningfully assess whether more favourable conditions for the transportation of natural gas via upstream pipelines than via transmission pipelines result in more favourable competitive opportunities for natural gas of any particular origin without a prior affirmative finding that the upstream pipeline networks measure *does indeed create* more favourable conditions for the transportation of natural gas via upstream pipelines than via transmission pipelines.

## 6.8 The TEN-E measure

6.103. The European Union requests that the Panel supplement footnote 1916 to paragraph 7.1265 (footnote 2065 in this Report) with additional text reflecting certain of the European Union's arguments regarding the criteria used to assess the candidate PCIs.<sup>271</sup> We decide to accommodate the European Union's request and modified the text of footnote 1916 (footnote 2065 in this Report) accordingly.

6.104. With respect to the Panel's assessment of Russia's claim against the TEN-E measure under Article II:1 of the GATS (section 7.11.4.1.3), Russia requests that the Panel revisit its finding in paragraph 7.1427 (paragraph 7.1430 in this Report) that the Panel does not "consider it necessary to make a separate finding on whether the TEN-E measure discriminates against Russian infrastructure projects".<sup>272</sup> According to Russia, the Panel "neglects to articulate a clear legal standard" as to what would constitute a sufficiently close connection between infrastructure "projects" covered by the TEN-E Regulation and pipeline transport services and service suppliers

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<sup>267</sup> Russia's request for review of the Interim Report, para. 164.

<sup>268</sup> Russia's request for review of the Interim Report, para. 165.

<sup>269</sup> Russia's request for review of the Interim Report, para. 168.

<sup>270</sup> Russia's request for review of the Interim Report, para. 169.

<sup>271</sup> European Union's request for review of the Interim Report, para. 30.

<sup>272</sup> Russia's request for review of the Interim Report, para. 173.

within the meaning of the GATS.<sup>273</sup> Russia submits that the Panel has introduced an additional step for the complainant to fulfil that has no basis in the GATS: after establishing that a measure affects trade in services a complainant would now be required to establish a "sufficiently close connection" between a measure and its impact on services or service suppliers.<sup>274</sup> The European Union did not comment on Russia's request.

6.105. In view of Russia's comments, we revised paragraph 7.1419 (paragraph 7.1422 in this Report) in order to clarify our reference to "a sufficiently close connection" between infrastructure projects covered by the TEN-E Regulation and pipeline transport services and service suppliers covered by the GATS. We also introduced other consequential changes in paragraphs 7.1426 and 7.1427 (paragraphs 7.1429 and 7.1430 in this Report). We note that our reasoning in paragraphs 7.1419 through 7.1427 is developed in light of the manner in which Russia chose to pursue its claim against the TEN-E measure under Article II:1 of the GATS and the specific circumstances of the present case. Based on the analysis conducted, we do not consider that separate findings on whether the TEN-E measure discriminates against Russian infrastructure projects would contribute to the resolution of Russia's claim under Article II:1 of the GATS. Therefore, we decline Russia's request that the Panel revisit its decision in paragraph 7.1427 not to make a finding on whether the TEN-E measure discriminates against Russian infrastructure projects.

## 7 FINDINGS

### 7.1 Introduction

#### 7.1.1 Order of analysis

7.1. As we explain in the descriptive part of this Report, Russia makes claims under the GATS and the GATT 1994 relating to various aspects of a number of measures by the European Union and its member States. Russia considers that certain aspects of each of the challenged measures violate one or more specific provisions of the GATS and/or the GATT 1994. The provisions invoked by Russia under the GATS are Articles II:1, VI:1, VI:5, XVI:2(a), (e) and (f) and XVII. Under the GATT 1994, Russia alleges that certain measures are inconsistent with Articles I:1, III:4, X:3(a) and XI:1. More specifically, Russia challenges the unbundling measure under Articles II:1 and XVI(a), (e) and (f) of the GATS and Articles I:1 and III:4 GATT 1994; the public body measure under Article XVII of the GATS; the LNG measure under Article I:1 of the GATT 1994; the infrastructure exemption measure under Article II:1 of the GATS and Articles I:1, X:3(a) and XI:1 of the GATT 1994; the upstream pipeline networks measure under Articles I:1 and III:4 of the GATT 1994; the third-country certification measure under Articles II:1, VI:1, VI:5 and XVII of the GATS and the TEN-E measure under Article II:1 of the GATS and Articles I:1 and III:4 of the GATT 1994.

7.2. In its defence, the European Union asserts, *inter alia*, that certain of its measures, that is, the unbundling measure; the public body measure; and the third-country certification measure, are justified by the exceptions relating to services in Articles V, XIV(a) and/or (c) of the GATS, and that the TEN-E measure is justified under Article XX(j) of the GATT 1994 with regard to claims under that Agreement.

7.3. The Panel recalls that it has the autonomy to decide on the order of its analysis.<sup>275</sup>

<sup>273</sup> Russia's request for review of the Interim Report, para. 171.

<sup>274</sup> Russia's request for review of the Interim Report, para. 172.

<sup>275</sup> As the panel in *Argentina – Financial Services* recalled, the Appellate Body recognized this autonomy in *Canada – Wheat Exports and Grain Imports* when it stated that "[a]s a general principle, panels are free to structure the order of their analysis as they see fit. In so doing, panels may find it useful to take account of the manner in which a claim is presented to them by a complaining Member." See Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 126; Panel Report, *Argentina – Financial Services*, para. 7.67. We are mindful that the order we choose may also have an impact on the potential to apply judicial economy when making our determinations in this case. Panel Report, *India – Autos*, para. 7.161; Panel Report, *Argentina – Financial Services*, para. 7.63.



7.4. In our Report, following this introduction, we first determine the contours of our terms of reference, including in respect of two preliminary ruling requests by the European Union and on our own motion.

7.5. Subsequently, we set out the legal standards pursuant to the legal provisions that we will then apply in our measure-by-measure analysis of Russia's claims and the European Union's defences, beginning with the unbundling measure, and then turning to the public body measure, the LNG measure, the infrastructure exemption measure, the upstream pipeline networks measure, the third-country certification measure and the TEN-E measure.

7.6. As a significant portion of Russia's claims and the parties' argumentation in this dispute dealt with the GATS, we deemed it appropriate next to set out our understanding of key threshold issues relating to the GATS, that is, the meaning and scope of the services at issue in this dispute and whether Croatia, Hungary and Lithuania have undertaken specific commitments with respect to the services at issue.

7.7. With respect to the various claims and defences under the GATS and/or GATT 1994 relating to each measure, we have opted for the order of analysis that we deemed most suitable given the precise nature of Russia's challenge against a particular measure and in light of parties' argumentation. Where appropriate, we offer further observations relating to particular considerations affecting the order of our analysis in respect of certain specific claims and defences below.

### 7.1.2 Burden of proof

7.8. The general rule in WTO dispute settlement is that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.<sup>276</sup> Following this principle, the Appellate Body has explained that the complaining party in any given dispute should establish a *prima facie* case of inconsistency of a measure with a provision of the WTO covered agreements, before the burden of showing consistency with that provision or defending it under an exception must be assumed by the responding party.<sup>277</sup> In other words, "a party claiming a violation of a provision of the *WTO Agreement* by another Member must assert and prove its claim."<sup>278</sup>

7.9. A *prima facie* case is "one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case."<sup>279</sup> To establish a *prima facie* case, the party asserting a particular claim must adduce evidence sufficient to raise a presumption that what is claimed is true. If the complaining party "adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption".<sup>280</sup> In this regard, the Appellate Body has stated that:

[P]recisely how much and precisely what kind of evidence will be required to establish such ... [presumptions] will necessarily vary from measure to measure, provision to provision, and case to case.<sup>281</sup>

7.10. The Appellate Body has also stated that "[a] complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments".<sup>282</sup>

7.11. In this dispute, Russia bears the burden of establishing a *prima facie* case that the challenged measures are inconsistent with the cited provisions of the GATS and/or the GATT 1994.

<sup>276</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:1, 323 at p. 335.

<sup>277</sup> Appellate Body Report, *EC – Hormones*, para. 104.

<sup>278</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16, DSR 1997:1, 323 at p. 337.

<sup>279</sup> Appellate Body Report, *EC – Hormones*, para. 104.

<sup>280</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:1, 323 at p. 335. (footnote omitted)

<sup>281</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:1, 323 at p. 335. (footnote omitted)

<sup>282</sup> Appellate Body Report, *US – Gambling*, para. 140.

Should the Panel find that Russia has established its *prima facie* case, it is for the European Union to provide arguments and evidence that are needed to support its rebuttal, and/or its defence, as appropriate, under the GATS and/or the GATT 1994.

### 7.1.3 General observations

7.12. At the outset, we wish to point out that, in endeavouring to pinpoint the precise nature, scope and subject-matter of, and to properly understand the argumentation in support of, Russia's claims against measures of the European Union, as well as Croatia, Hungary and Lithuania, we have encountered several challenges.

7.13. First, we have, at times, had the impression that the precise nature and content of some of the challenged measures, and claims against them, were not clear or consistent, or appeared to be conflated, throughout the complaining party's submissions. We have endeavoured to address the measures, and claims against them, as presented by the complaining party.<sup>283</sup>

7.14. Second, we have encountered claims against various aspects of the challenged measures under both the GATS and the GATT 1994<sup>284</sup>, accompanied by some argumentation seemingly blurring fundamental distinctions between the GATS and the GATT 1994. We note the important differences between Russia's claims under the GATS and the GATT 1994, the distinct scope and subject matter of the GATS and the GATT 1994, respectively, and the different nature of the specific obligations contained in each of these agreements. Where the parties appeared to conflate or blur their argumentation under these two agreements, we have had to carefully identify and consider relevant argumentation. We wish to underline that, in our assessment of Russia's claims, we have remained mindful of our task and mandate under the DSU in light of the differences that exist between Russia's claims under the GATS and the GATT 1994. Notably, whereas our assessment of Russia's claims under the GATS focuses on services and service suppliers, our assessment of Russia's claims under the GATT 1994 focuses on goods.

7.15. Third, we are cognizant that this dispute occurs in the context of certain highly complex factual realities of the natural gas industry, including particularities of the markets for natural gas and its transport. We are also aware that certain specificities of that industry, notably in terms of transport through fixed infrastructure, raise certain challenges in the application of WTO rules. However, we underline that our duty has been to assess Russia's claims within the confines of WTO law.

## 7.2 Terms of reference issues

### 7.2.1 First request for a preliminary ruling by the European Union

#### 7.2.1.1 Introduction

7.16. On 18 March 2016, the European Union submitted a request for a preliminary ruling, asking the Panel to clarify whether the capacity allocation measures and the projects of common interest measures, included in Sections II and III of Russia's panel request, respectively, raised new matters not covered by Russia's consultations request and, therefore, fell outside the Panel's terms of reference.<sup>285</sup>

7.17. As explained in paragraph 1.13 above, and in order to ensure the efficiency of the proceedings, the Panel decided to issue a prompt preliminary ruling, on 9 May 2016, containing

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<sup>283</sup> In this respect, we were not always able to follow Russia's labelling of its various claims (e.g. "*de facto*", "*de jure*", "as such", "as applied").

<sup>284</sup> Each of these agreements has a distinct scope and subject-matter. It is well established that a measure may be inconsistent with the GATS and the GATT 1994 at the same time: the Appellate Body considers that obligations under the GATS and the GATT 1994 may coexist and that a measure may fall simultaneously within the scope of both Agreements, even though the specific aspects of the measure that are to be examined under each Agreement may differ. (Appellate Body Reports, *Canada – Periodicals*, p. 18, DSR 1997:I, 481, at p. 498 (referring to Panel Report, *Canada – Periodicals*, para. 5.17); and *EC – Bananas III*, para. 221; and Panel Report, *Argentina – Financial Services*, para. 7.54).

<sup>285</sup> European Union's first request for a preliminary ruling, paras. 2, 4, and 42.

the conclusions on the European Union's request, with more detailed reasoning to be provided no later than the date of the issuance of the Interim Report. The issued conclusions are as follows:

The Panel finds that the matters contained in Sections II ([capacity allocation] measures) and III ([projects of common interest] 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.<sup>286</sup>

7.18. Following the approach set out in the preliminary ruling of 9 May 2016, we will now address the conclusions that the capacity allocation measures, included in Section II of Russia's panel request, and the projects of common interest measures, included in Section III of Russia's panel request, fall within the Panel's terms of reference, in turn, below.

7.19. Before turning to our reasoning in support of these conclusions, however, we note that, following the European Union's first request for a preliminary ruling, both parties refer to the challenged measures in Section III of Russia's panel request as the TEN-E measure rather than the projects of common interest measures.<sup>287</sup> For purposes of consistency throughout this Report, we will use the term "TEN-E measure" in our reasoning below as well.

#### **7.2.1.2 The capacity allocation measures included in Section II of Russia's panel request**

7.20. Beginning with the capacity allocation measures, included in Section II of Russia's panel request, we note that Russia has not addressed these further, following the issuance of the Panel's conclusions. Furthermore, in response to a question by the Panel, Russia has clarified that it is no longer challenging these measures.<sup>288</sup> In light of this, the European Union does not consider it necessary for the Panel to provide more detailed reasons in support of its conclusion that the capacity allocation measures fall within its terms of reference<sup>289</sup>, whereas Russia is of the view that it would still be relevant for the Panel to provide such reasons.<sup>290</sup>

7.21. In considering whether to provide more detailed reasons in support of our conclusion that the capacity allocation measures, included in Section II of Russia's panel request, fall within the Panel's terms of reference, we are mindful of the fundamental nature of the terms of reference. As clarified by the Appellate Body, they establish the jurisdiction of the panel and serve the due process objective of providing the parties and third parties notice of the nature of the case.<sup>291</sup> At the same time, we wish to recall that the aim of the dispute settlement mechanism is to "secure a positive solution to a dispute"<sup>292</sup>, and that the "prompt settlement" of disputes is essential to the effective functioning of the WTO.<sup>293</sup>

7.22. In this regard, we note that a complaining Member has "the prerogative to narrow or abandon its claims, and *thereby reduce the scope of its disagreement and dispute*, at any stage of a proceeding".<sup>294</sup> In these proceedings, Russia has exercised its prerogative in a manner that reduces the scope of the dispute before this Panel so as not to cover the capacity allocation measures, included in Section II of Russia's panel request. For this reason, it is no longer necessary to address the capacity allocation measures in order to secure a positive resolution of the dispute before us. In light of this, and bearing in mind the objective of prompt settlement of

<sup>286</sup> Preliminary ruling (conclusions) of 9 May 2016, para. 2.1. These conclusions are annexed to and form part of the Final Report.

<sup>287</sup> See, e.g. Russia's first written submission, paras. 753-809; and second written submission, paras. 441-486; and European Union's first written submission, paras. 806-839 and 844; and second written submission, paras. 354-436.

<sup>288</sup> Russia's response to Panel question No. 15(a), para. 102.

<sup>289</sup> European Union's response to Panel question No. 15(b), para. 35.

<sup>290</sup> Russia's response to Panel question No. 15(b), para. 103.

<sup>291</sup> Appellate Body Report, *US – Carbon Steel*, para. 126 (referring to Appellate Body Report, *Brazil – Desiccated Coconut*, p. 20, DSR 1997:1, 167, at p. 186).

<sup>292</sup> Article 3.7 of the DSU.

<sup>293</sup> Article 3.3 of the DSU.

<sup>294</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.19 (referring to Appellate Body Report, *Japan – Apples*, para. 136). (emphasis added)

disputes, we do not consider it relevant or appropriate to elaborate further on the conclusion that these measures fall within the Panel's terms of reference.<sup>295</sup>

7.23. Accordingly, we will not provide more detailed reasons in support of the conclusion in our preliminary ruling of 9 May 2016 that the capacity allocation measures, included in Section II of Russia's panel request, fall within the Panel's terms of reference.

#### **7.2.1.3 The TEN-E measure included in Section III of Russia's panel request**

7.24. Turning to the TEN-E measure, included in Section III of Russia's panel request, the European Union's preliminary ruling request is based on the contention that this Section raises new matters, which were not covered by Russia's consultations request and, according to the European Union, "expands impermissibly the scope of the dispute, thereby changing its essence".<sup>296</sup> For this reason, the European Union requests the Panel to issue a preliminary ruling to the effect that "the matters raised by the Russian Federation in Section[] ... III of its Panel Request are not within the Panel's terms of reference."<sup>297</sup>

7.25. The question we must consider is, therefore, whether the matters contained in Section III of Russia's panel request are properly before us or whether, as the European Union requests, we should exclude them from our terms of reference on the ground that they were not sufficiently identified in the consultations request. This question involves an examination of the relationship between Russia's consultations request and its panel request.

7.26. We start by recalling that, pursuant to Article 7.1 of the DSU, our terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the Russian Federation in document WT/DS476/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.<sup>298</sup>

7.27. In this regard, we note that "Articles 4 and 6 of the DSU ... set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel."<sup>299</sup>

7.28. Article 4.4 of the DSU sets out the requirements for consultations requests as follows:

Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

7.29. Article 6.2 of the DSU sets out the requirements for panel requests as follows:

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

7.30. Both Articles 4.4 and 6.2 of the DSU thus refer to the identification of the measures and the legal basis, or claims, at issue. The Appellate Body has clarified that the measures and claims

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<sup>295</sup> We note that this approach is consistent with that taken by other panels, which have declined to make preliminary rulings concerning measures that were ultimately not challenged by the complaining Member. (See Panel Reports, *India – Agricultural Products*, paras. 7.107-7.109; and *India – Solar Cells*, para. 7.23).

<sup>296</sup> European Union's first request for a preliminary ruling, para. 2.

<sup>297</sup> European Union's first request for a preliminary ruling, para. 42. See also *ibid.* para. 4.

<sup>298</sup> WT/DS476/3.

<sup>299</sup> Appellate Body Report, *Brazil – Aircraft*, para. 131.

together constitute the "*matter* referred to the DSB"<sup>300</sup>, yet emphasized that measures and claims are "distinct and 'should not be confused'".<sup>301</sup>

7.31. In this regard, we note that the European Union requests the Panel to find that "the *matters* raised by the Russian Federation in Section[] ... III of its Panel Request are not within the Panel's terms of reference"<sup>302</sup>, which could refer to the identification of measures or claims, or both. We note, however, that all arguments by the European Union concerning Section III of Russia's panel request relate to whether the TEN-E measure, included in this Section, was identified in Russia's consultations request. For this reason, our assessment below focuses on the identification of the measure at issue, the TEN-E measure, in Russia's consultations request. Should we find that the TEN-E measure does not fall within our terms of reference, it would appear that the claims raised by Russia in Section III of its panel request against this measure would also fall outside our terms of reference, and hence the *matters* in Section III of Russia's panel request would not be within our terms of reference.<sup>303</sup>

7.32. We begin our assessment by noting that Article 6.2 requires that a panel request "identify the specific measures at issue". Pursuant to Article 4.4 of the DSU, a consultations request shall include "identification of the measures at issue". Hence, while both Articles 6.2 and 4.4 of the DSU refer to the identification of the measures at issue, they impose different requirements. The Appellate Body has clarified that:

This difference in the language between Articles 4.4 and 6.2 makes it clear that, in identifying the measure at issue, greater specificity is required in a panel request than in a consultations request.<sup>304</sup>

7.33. The Appellate Body also cautioned panels against imposing "too rigid a standard" of identity between the scope of the consultations request and the panel request as this would substitute the consultations request for the panel request.<sup>305</sup> According to the Appellate Body, "the requirement under Article 4.4 to identify the measure at issue cannot be too onerous at this initial step in the proceedings ... because 'the claims that are made and the facts that are established during consultations do much to shape the substance and the scope of the subsequent panel proceedings.'"<sup>306</sup> However, the Appellate Body also recognized that "consultations – as well as the request that triggers and precedes them – ... play an important role in defining the scope of the dispute"<sup>307</sup>:

The conduct of consultations, as well as the ability of the parties to engage fully therein, is directly affected by the content of the consultations request. It is this document that informs the respondent, and the WTO membership, of the nature and object of the challenge raised by the complainant, and enables the respondent to prepare for the consultations themselves.<sup>308</sup>

7.34. Hence, the Appellate Body has also made it clear that the language used in the consultations request should "sufficiently alert[]"<sup>309</sup> the responding party to the "nature and object of the challenge raised by the complainant".<sup>310</sup> According to the Appellate Body, a measure

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<sup>300</sup> Appellate Body Reports, *Guatemala – Cement I*, para. 72; *US – Carbon Steel*, para. 125; *Australia – Apples*, para. 416; *EC and certain member States – Large Civil Aircraft*, para. 639; and *China – Raw Materials*, para. 219. (emphasis original)

<sup>301</sup> Appellate Body Report, *Australia – Apples*, para. 417 (quoting Appellate Body Report, *EC – Selected Customs Matters*, para. 132). See also Appellate Body Report, *Guatemala – Cement I*, para. 69.

<sup>302</sup> European Union's first request for a preliminary ruling, para. 42. (emphasis added) See also *ibid.* para. 4.

<sup>303</sup> We note that a similar approach has been followed in previous disputes. (See, e.g. Panel Report, *US – Carbon Steel*, paras. 8.6-8.12; and Appellate Body Report, *US – Carbon Steel*, para. 171).

<sup>304</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.9.

<sup>305</sup> Appellate Body Report, *US – Upland Cotton*, para. 293.

<sup>306</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.12 (quoting Appellate Body Report, *India – Patents (US)*, para. 94).

<sup>307</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.12.

<sup>308</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.12. (footnote omitted)

<sup>309</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 95.

<sup>310</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.12.

identified in the panel request may be found to fall outside the panel's terms of reference if it is "separate and legally distinct" from the measures identified in the consultations request.<sup>311</sup>

7.35. Similarly, it is well-settled that a complaining party may "not expand the scope of the dispute"<sup>312</sup> or change the "essence" of that dispute in its panel request.<sup>313</sup> According to the Appellate Body, "when a party alleges that a panel request has impermissibly expanded the scope of the dispute or changed its essence, ascertaining whether this is so involves scrutinizing the extent to which the identified measure at issue and/or the legal claims have evolved or changed from the consultations request to the panel request".<sup>314</sup> The determination of whether the identification of specific measures in the panel request "expand[s] the scope" or modifies the "essence" of the dispute must be made on a case-by-case basis.<sup>315</sup>

7.36. With these observations in mind, we now turn to the question put before the Panel by the European Union, namely whether the TEN-E measure was sufficiently identified in Russia's consultations request or whether the inclusion of this measure in Section III of Russia's panel request "expand[s] the scope" or changes the "essence" of the dispute. We first examine the panel request, and then turn to the consultations request.

7.37. Section III of Russia's panel request includes a narrative part, which describes the TEN-E measure as follows:

The EU has also enacted regulations establishing "trans-European energy infrastructure priority corridors and areas," including four specific "priority gas corridors." The principal regulation, Regulation (EU) No 347/2013, is referred to as the "TEN-E regulation." It sets forth criteria for identifying "projects of common interest" or "PCIs," which are accorded priority status, including within priority gas corridors. The TEN-E regulation provides for the implementation of PCIs, including those concerning natural gas, to be facilitated by "streamlined and efficient permit granting procedures," "improved regulatory treatment" and EU financial assistance. In October 2013, the Commission issued an amendment to the TEN-E regulation setting out the initial list of PCIs. These include a number of projects that promote and facilitate the production and transportation of domestic natural gas, as well as the importation and transportation of gas from various third-countries, including numerous LNG projects. However, the list of PCIs excludes any project designed to facilitate the importation or transportation of natural gas from Russia. The Russian Federation is not aware of any such projects currently under consideration for designation as a PCI.<sup>316</sup>

7.38. Hereafter, Russia's panel request lists, as legal instruments through which the TEN-E measure is enacted and implemented:

Directive 2009/73/EC [the Directive];

Regulation (EC) No 715/2009;

Regulation (EU) No 347/2013 [the TEN-E Regulation];

Commission Delegated Regulation (EU) No 1391/2013; and

Regulation (EU) No 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010, OJ L 348, 20.12.2013.

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<sup>311</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.13.

<sup>312</sup> Appellate Body Report, *US – Upland Cotton*, para. 293.

<sup>313</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 137-138.

<sup>314</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.13.

<sup>315</sup> Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 293.

<sup>316</sup> Russia's panel request, p. 8. (footnote omitted)

as well as any amendments or extensions, any replacement measures, any renewal measures, any implementing measures, and other related measures of the foregoing.<sup>317</sup>

7.39. Russia's consultations request does not include separate sections but consists of a narrative part, which provides a general description of the measures at issue, namely:

[C]ertain restrictions and requirements maintained by the EU and implemented within its territory by the EU and its Member States, including Croatia, Hungary and Lithuania, through the so-called "Third Energy Package" Directives and Regulations, implementing legislation and decisions of the EU and its Member States and the measures resulting from participation in the Treaty establishing the Energy Community (hereinafter referred to as "Third Energy Package"), and pertaining to, in particular, the unbundling of vertically-integrated undertakings involved in the production, supply, and transmission of natural gas or electricity, the discriminatory certification requirements in relation to third countries, and the requirements in respect of granting of access to natural gas and electricity network capacity by transmission service operators.<sup>318</sup>

7.40. This is followed by more detailed descriptions of measures that "[i]n particular, though not exclusively ..., in the view of the Russian Federation, constitute an infringement"<sup>319</sup>, and a list of "instruments through which the EU and its Member States maintain the above measures includ[ing], but ... not limited to" 36 legal instruments. Three of these 36 legal instruments are also listed in Section III of Russia's panel request, namely the Directive, Regulation (EC) No. 715/2009, and the TEN-E Regulation.<sup>320</sup> Russia's consultations request goes on to list:

[A]ny amendments, supplements, extensions, replacement measures, renewal measures, related measures, or implementing measures; as well as all other implementing measures of or decisions taken under "Third Energy Package" and adopted by the EU Member States that have not been identified in the present request and for the identification of which the Russian Federation requests the assistance of the European Commission during the consultations, or any such measures referred to by either party during the course of the consultations.<sup>321</sup>

7.41. The European Union argues that the consultations request makes no reference to the TEN-E measure. In this regard, the European Union submits that the TEN-E measure does not fall within any of the categories of measures mentioned in the consultations request's general description of the measures at issue and that this measure is not part of the Third Energy Package.<sup>322</sup> In the European Union's view, the "mere listing" of the TEN-E Regulation in Russia's consultations request, without further specification, is not sufficient to identify the TEN-E measure.<sup>323</sup>

7.42. Russia argues that the express reference to the TEN-E Regulation in its consultations request should be considered sufficient to have identified the TEN-E measure.<sup>324</sup> Russia also argues the TEN-E measure is not "separate and legally distinct" from the Third Energy Package and that the broad scope of the consultations request demonstrates that Russia intended to identify a range of measures related to the energy sector.<sup>325</sup> Furthermore, Russia submits that the parties discussed the relevant aspects of the TEN-E measure during their second round of consultations, which, in Russia's view, supports its position that this measure is identified in its consultations request.<sup>326</sup>

7.43. In our view, the arguments of the parties raise three issues: (a) whether our assessment of the scope of Russia's consultations request should take into account what was actually discussed

<sup>317</sup> Russia's panel request, pp. 8-9.

<sup>318</sup> Russia's consultations request, p. 1.

<sup>319</sup> Russia's consultations request, p. 1.

<sup>320</sup> Russia's consultations request, pp. 2-4.

<sup>321</sup> Russia's consultations request, p. 5.

<sup>322</sup> European Union's first request for a preliminary ruling, paras. 34-35.

<sup>323</sup> European Union's first request for a preliminary ruling, para. 38.

<sup>324</sup> Russia's response to the European Union's first request for a preliminary ruling, paras. 11 and 17.

<sup>325</sup> Russia's response to the European Union's first request for a preliminary ruling, para. 16.

<sup>326</sup> Russia's response to the European Union's first request for a preliminary ruling, para. 9 and fn 21.

among the parties during their consultations; (b) whether the listing of the TEN-E Regulation in Russia's consultations request is sufficient to identify the TEN-E measure in Section III of Russia's panel request; and (c) whether the lack of a description of the TEN-E measure in the narrative part of Russia's consultations request entails that this measure is not sufficiently identified.

7.44. We begin with the issue of whether the actual discussions among the parties during their consultations should impact our assessment of the scope of Russia's consultations request. In this regard, we have difficulties understanding Russia's position that the Appellate Body "has yet to rule definitively on this issue".<sup>327</sup> In our view, the Appellate Body was explicit in *US – Upland Cotton*, when finding that panels should limit their analysis to the written consultations request and should not consider what took place during the consultations. In particular, we note that, according to the Appellate Body:

Examining what took place in the consultations would seem contrary to Article 4.6 of the DSU, which provides that "[c]onsultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings." Moreover, it would seem at odds with the requirements in Article 4.4 of the DSU that the request for consultations be made in writing and that it be notified to the DSB. In addition, there is no public record of what actually transpires during consultations and parties will often disagree about what, precisely, was discussed.<sup>328</sup>

7.45. We fully concur with this reasoning by the Appellate Body. In particular, we consider that the confidential character of the consultations and the lack of official record would make it very difficult, if not impossible, for a panel to establish objectively, what the parties said – or did not say – during their consultations. Therefore, we shall not take into consideration what was discussed by the parties during the consultations held pursuant to Article 4 of the DSU in determining whether the TEN-E measure in Section III of Russia's panel request is properly within the Panel's terms of reference.

7.46. With respect to the two other issues raised by the parties' arguments – whether the listing of the TEN-E Regulation in Russia's consultations request is sufficient to identify the TEN-E measure in section III of Russia's panel request and whether the lack of a description of the TEN-E measure in the narrative part of Russia's consultations request entails that this measure is not sufficiently identified – we note that these relate to different elements of Russia's consultations request, namely its list of legal instruments and its narrative or descriptive part. While we find it useful to address the issues raised by the parties, as they relate to a particular element in Russia's consultations request, we wish to emphasize that our ultimate decision concerning the issue of whether the TEN-E measure was sufficiently identified in Russia's consultations request will be based on a holistic reading of the relevant parts of all elements in Russia's consultations request.

7.47. Having set out our general approach, we turn now to the issue of whether the listing of the TEN-E Regulation in Russia's consultations request is sufficient to identify the TEN-E measure in Section III of the panel request.

7.48. In addressing this issue, we find it useful to examine the content of the TEN-E Regulation and compare this with the description of the TEN-E measure in Section III of Russia's panel request.

7.49. We note that, pursuant to its title, the TEN-E Regulation contains "guidelines for trans-European energy infrastructure". Pursuant to its Article 1 ("Subject matter and scope"), this Regulation "lays down guidelines for the timely development and interoperability of priority corridors and areas of trans-European energy infrastructure"<sup>329</sup> and more particularly "addresses the identification of projects of common interest"<sup>330</sup>, "facilitates the timely implementation of projects of common interest by streamlining, coordinating more closely, and accelerating permit granting processes and by enhancing public participation"<sup>331</sup>, "provides rules and guidance for the

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<sup>327</sup> Russia's response to the European Union's first request for a preliminary ruling, fn 21.

<sup>328</sup> Appellate Body Report, *US – Upland Cotton*, para. 287.

<sup>329</sup> TEN-E Regulation, (Exhibit EU-4), Article 1.1.

<sup>330</sup> TEN-E Regulation, (Exhibit EU-4), Article 1.2(a).

<sup>331</sup> TEN-E Regulation, (Exhibit EU-4), Article 1.2(b).



cross-border allocation of costs and risk-related incentives for projects of common interest"<sup>332</sup>, and "determines the conditions for eligibility of projects of common interest for Union financial assistance".<sup>333</sup>

7.50. In accordance with the subject matter and scope set out in Article 1, the remainder of the TEN-E Regulation is focused on projects of common interest. Chapter II is entitled "Projects of common interest" and sets out procedures to establish lists of projects of common interest, criteria for such projects, and rules on implementation and monitoring of those projects. Chapter III deals with the granting of permits and public participation for projects of common interest. Chapter IV addresses the regulatory treatment of projects of common interest. Chapter V concerns EU financial assistance for projects of common interest.

7.51. The TEN-E Regulation thus appears to cover the very aspects described in Section III of Russia's panel request regarding the TEN-E measure and the projects of common interest, in particular, the establishment of "trans-European energy infrastructure priority corridors and areas", "criteria for identifying 'projects of common interest'", and the facilitation of such by "'streamlined and efficient permit granting procedures', 'improved regulatory treatment' and EU financial assistance".<sup>334</sup>

7.52. In addition to these aspects, we note that Russia's description of the TEN-E measure in Section III of its panel request also covers the first list of projects of common interest, contained in Regulation (EU) No. 1391/2013.<sup>335</sup> As pointed out by the European Union, this instrument is not listed in Russia's consultations request.<sup>336</sup>

7.53. In this regard, however, we note that the first list of projects of common interest was adopted pursuant to the TEN-E Regulation<sup>337</sup> and constitutes an amendment to this Regulation, which consists, in its entirety, of an annex with a list of projects of common interest to be added to the TEN-E Regulation.<sup>338</sup> The European Union does not appear to dispute this.<sup>339</sup> Furthermore, we note that Russia's consultations request, following its reference to the TEN-E Regulation, also refers to "*any amendments, supplements, extensions, replacement measures, renewal measures, related measures, or implementing measures*".<sup>340</sup> We consider, therefore, that the content of the TEN-E measure described in Section III of Russia's panel request, including the first list of projects of common interest<sup>341</sup>, is covered by the references in the consultations request to the TEN-E Regulation and to "amendments" and "supplements" hereto.<sup>342</sup>

<sup>332</sup> TEN-E Regulation, (Exhibit EU-4), Article 1.2(c).

<sup>333</sup> TEN-E Regulation, (Exhibit EU-4), Article 1.2(d).

<sup>334</sup> Russia's panel request, p. 8. See also para. 7.37 above.

<sup>335</sup> Russia's panel request, p. 8.

<sup>336</sup> European Union's first request for a preliminary ruling, para. 40.

<sup>337</sup> Regulation (EU) No. 1391/2013, (Exhibit EU-3), preamble.

<sup>338</sup> Regulation (EU) No. 1391/2013, (Exhibit EU-3), Article 1. See also Russia's response to the European Union's first request for a preliminary ruling, para. 18.

<sup>339</sup> European Union's first request for a preliminary ruling, para. 40. In this regard, the European Union notes that "Regulation 1391/2013 supplements Regulation 347/2013 by adding an annex setting out the initial list of PCIs." (Ibid.)

<sup>340</sup> Russia's consultations request, p. 5. (emphasis added)

<sup>341</sup> In response to a question by the Panel, Russia has clarified that the TEN-E measure consists of the TEN-E Regulation and the first and second lists of projects of common interest, added to that Regulation pursuant to Regulation (EU) No. 1391/2013 and Regulation (EU) No. 2016/89. (Russia's response to Panel question No. 5, paras. 52-53). We note that the second list of projects of common interest, contained in Regulation (EU) No. 2016/89, had not been adopted at the time of Russia's consultations or panel requests and is therefore not listed in either of those. The European Union has not raised any terms of reference issue in this regard. In any event, we recall that, similarly to Russia's consultations request, Russia's panel request refers to "*any amendments or extensions, any replacement measures, any renewal measures, any implementing measures, and other related measures of the foregoing*" following its listing of the TEN-E Regulation. (Russia's panel request, p. 9). (emphasis added) As with the first list of projects of common interest, the second list of projects of common interest was adopted pursuant to the TEN-E Regulation and constitutes an amendment to this Regulation, which replaces parts of the annex containing the list of projects of common interest. (Regulation (EU) No. 2016/89, (Exhibit RUS-2), Article 1). For this reason, we believe that the second list of projects of common interest is also within our terms of reference. (See Appellate Body Report, *US – Zeroing (Japan)* (Article 21.5 – Japan), paras. 112 and 116 for a similar approach).

<sup>342</sup> As pointed out by the European Union, Section III of Russia's panel request also lists another legal instrument, namely Regulation (EU) No. 1316/2013, which is not listed in Russia's consultations request.

7.54. Nonetheless, the European Union does not consider the listing of the TEN-E Regulation in the consultations request sufficient because that Regulation is a "multipurpose legal vehicle" which, in addition to laying down guidelines for projects of common interest, amends three pre-existing Regulations that are listed in the consultations request but, in the European Union's view, are unrelated to projects of common interest.<sup>343</sup> According to the European Union, it was therefore reasonable to assume that the TEN-E Regulation had been included in the panel request "only to the extent that it amends Regulations 713/2009, 714/2009 and 715/2009 and not in respect of its provisions concerning the PCIs".<sup>344</sup>

7.55. We have difficulties accepting this argument. The amendments to Regulation (EC) No. 713/2009, Regulation (EC) No. 714/2009 and Regulation (EC) No. 715/2009, enacted by the TEN-E Regulation, appear to concern only projects of common interest.<sup>345</sup> In our view, the fact that the TEN-E Regulation introduces certain amendments, which are exclusively related to projects of common interest, to other Regulations contained in the consultations request could not reasonably lead the European Union to believe that the TEN-E Regulation was listed for purposes other than to identify the TEN-E measure and its provisions concerning the projects of common interest.

7.56. Bearing in mind that the TEN-E Regulation, as amended, covers the aspects of the TEN-E measure described in Section III of Russia's panel request and does not cover or relate to any other measures or instruments except to the extent of amending such in a manner exclusively related to projects of common interest, the listing of the TEN-E Regulation in the consultations request should have been sufficient to alert the European Union of Russia's intention to seek consultations concerning the TEN-E measure.

7.57. We turn now to the question of whether, as argued by the European Union, the fact that the narrative part of Russia's consultations request does not describe the TEN-E measure entails that this measure should not be considered as sufficiently identified in that request.

7.58. When examining Russia's consultations and panel requests, respectively, it is clear that the latter contains a more detailed description of the TEN-E measure, not found in the consultations request.

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(European Union's first request for a preliminary ruling, para. 41). Russia has not relied on this legal instrument further in its challenge against the TEN-E measure and has clarified that this instrument does not form part of the challenged measure. (See, e.g. Russia's response to Panel question No. 5, paras. 52-53). As explained in section 7.2.1.2 above concerning the capacity allocation measures, we do not consider it relevant or appropriate to address in further detail instruments that Russia is no longer challenging in these proceedings. Importantly, the question before us is not whether Russia's decision not to challenge Regulation (EU) No. 1316/2013 served to "cure" any potential deficiencies in its consultations request. Rather, we are concluding that it is not necessary for us to address this legal instrument in further detail following the clarification, provided by Russia in its written submissions and responses to questions, that this instrument does not form part of the challenged measure.

<sup>343</sup> European Union's first request for a preliminary ruling, para. 38.

<sup>344</sup> European Union's first request for a preliminary ruling, para. 39.

<sup>345</sup> These amendments are the following: (a) With respect to Regulation (EC) No. 713/2009, Article 20 of the TEN-E Regulation amends Article 22(1) in order to enable the Agency for the Cooperation of Energy Regulators, established under this latter regulation, to collect fees for decisions related to cross border cost allocation for projects of common interest; (b) With respect to Regulation (EC) No. 714/2009, Article 21 of the TEN-E Regulation amends: (i) Articles 8(3)(a) and 10(a) of Regulation (EC) No. 714/2009 by elaborating the content of the common network operation tools to ensure coordination of network operations and adding that Union aspects of network planning under the TEN-E Regulation shall be included, if appropriate, in national investment plans and that it shall be subject to a cost benefit analysis for projects of common interest; (ii) Article 11 of Regulation (EC) No. 714/2009 by adding that the costs in the cost-benefit analysis for projects of common interest shall be borne by TSOs; (iii) Article 18 of Regulation (EC) No. 714/2009 by allowing the Commission to adopt guidelines on the implementation of operational coordination between TSOs at the EU level; and (iv) Article 23 of Regulation (EC) No. 714/2009 by requiring the rules and general principles concerning mechanisms for control by EU member States of the Commission's exercise of implementing powers to apply in certain circumstances; and (c) With respect to the Regulation (EC) No. 715/2009, Article 22 of the TEN-E Regulation amends: (i) Article 8(10)(a) of Regulation (EC) No. 715/2009 by adding that Union aspects of network planning under the TEN-E Regulation shall be included, if appropriate, in national investment plans and that it shall be subject to a cost benefit analysis for projects of common interest; and (ii) Article 11 of Regulation (EC) No. 715/2009 by adding that the costs in the cost-benefit analysis for projects of common interest shall be borne by TSOs.

7.59. As explained by the Appellate Body, however, a "*precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel" is not required<sup>346</sup> because the difference in the language between Articles 4.4 and 6.2 of the DSU "makes it clear that, in identifying the measure at issue, greater specificity is required in a panel request than in a consultations request".<sup>347</sup>

7.60. For this reason, we do not consider the mere inclusion of additional and more specific language in Russia's panel request sufficient to conclude that it impermissibly expands the scope of the dispute. Instead, we recall that our assessment should focus on the extent to which the TEN-E measure has "evolved" from measures identified in the consultations request.<sup>348</sup>

7.61. In this regard, we are not convinced by Russia's argument that the phrase "measures ... pertaining to ... the requirements in respect of granting of access to natural gas and electricity network capacity by transmission service operators"<sup>349</sup> in the narrative part of Russia's consultations request "implicates" the TEN-E measure.<sup>350</sup> The description of the TEN-E measure in Section III of Russia's panel request clarifies that this measure relates to the facilitation of infrastructure promoting and facilitating the production, importation or transportation of natural gas.<sup>351</sup> We do not consider that the TEN-E measure could properly be categorized as "*requirements* in respect of granting of access to natural gas ... network capacity".<sup>352</sup>

7.62. At the same time, we observe that the description provided in the narrative part of Russia's consultations request contains various phrases indicating a broad coverage of measures. In particular, the use of the expressions "measures ... pertaining to, *in particular*" and "[i]n particular, *though not exclusively*, the following measures"<sup>353</sup> plainly demonstrate that the various descriptions of measures in the narrative part of Russia's consultations request were not exhaustive and should, in our view, have alerted the European Union to this fact.

7.63. Furthermore, in arguing that the TEN-E measure was not described in the narrative part of Russia's consultations request, the European Union also points to the fact that this measure is not part of the Third Energy Package.<sup>354</sup> Russia responds that the TEN-E measure and the Third Energy Package are not "separate and legally distinct", but "share the same underlying legal authorities and policy objectives" and are "integrated, legally and operationally".<sup>355</sup>

7.64. In this regard, we note that the European Union does not explain why it does not consider the TEN-E measure a part of the Third Energy Package, nor does the European Union propose a definition of the Third Energy Package. At the same time, Russia states that "Directive 2009/73/EC and Regulation 715/2009 constitute the TEP for gas"<sup>356</sup>, which could suggest that Russia does not dispute the factual accuracy of the European Union's position that the Third Energy Package may not include the TEN-E measure.

7.65. In any event, we do not consider it necessary to determine the exact content or scope of the Third Energy Package in order to resolve the issue before us. In our view, it was clear from the language used in Russia's consultations request that Russia sought consultations with respect to a broad range of measures. In particular, we observe the reference to:

"Third Energy Package" Directives and Regulations, implementing legislation and decisions of the EU and its Member States and the measures resulting from participation in the Treaty establishing the Energy Community (hereinafter referred to as "Third Energy Package")].<sup>357</sup>

<sup>346</sup> Appellate Body Report, *Brazil – Aircraft*, para. 132. (emphasis original)

<sup>347</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.9.

<sup>348</sup> Appellate Body Reports, *Argentina – Import Measures*, paras. 5.13 and 5.26-5.30.

<sup>349</sup> Russia's consultations request, p. 1.

<sup>350</sup> Russia's response to the European Union's first request for a preliminary ruling, para. 44.

<sup>351</sup> Russia's panel request, p. 8.

<sup>352</sup> Russia's consultations request, p. 1. (emphasis added)

<sup>353</sup> Russia's consultations request, p. 1. (emphasis added)

<sup>354</sup> European Union's first request for a preliminary ruling, para. 35.

<sup>355</sup> Russia's response to the European Union's first request for a preliminary ruling, paras. 35-36.

<sup>356</sup> Russia's response to the European Union's first request for a preliminary ruling, para. 17.

<sup>357</sup> Russia's consultations request, p. 1.

7.66. In this passage of its consultations request, Russia thus identifies three groups of measures, to which it collectively refers as the Third Energy Package, namely (a) Third Energy Package Directives and Regulations; (b) implementing legislation and decisions; and (c) the measures resulting from participation in the Treaty establishing the Energy Community.

7.67. Even if considering the Third Energy Package in a narrow sense, as covering only the Directive and Regulation (EC) No. 715/2009, we note that the TEN-E measure, and in particular the TEN-E Regulation, establishes several explicit links with these instruments. More particularly, the TEN-E Regulation amends Regulation (EC) No. 715/2009 and its purpose is stated as:

Despite the fact that ... Directive 2009/73/EC ... provide[s] for an internal market in energy, the market remains fragmented due to insufficient interconnections between national energy networks and to the suboptimal utilisation of existing energy infrastructure.<sup>358</sup>

7.68. We further note that the TEN-E Regulation explicitly shares and adds to the definitions provided for in the Directive and in Regulation (EC) No. 715/2009.<sup>359</sup> Moreover, the criteria for projects of common interest, established pursuant to Article 4 of the TEN-E Regulation, refer to the objectives of market integration, security of supply, and competition, which are echoed in the Directive.<sup>360</sup> As noted by Russia, the Commission has itself stated that "[t]he TEN-E Regulation complements the requirements of the Third Energy Package and facilitates investments with cross-border impacts".<sup>361</sup>

7.69. Hence, it appears that the TEN-E measure shares the same policy objectives as the Directive and, as argued by Russia, is integrated "legally and operationally"<sup>362</sup> with other instruments, including the Directive and Regulation (EC) No. 715/2009. For this reason, it cannot, in our view, be considered "separate and legally distinct" from the two instruments comprising the Third Energy Package in a narrow sense, namely the Directive and Regulation (EC) No. 715/2009.

7.70. In the above, we have considered both the list of legal instruments and the narrative part of Russia's consultations request as well as the parties' arguments as they pertain to these elements. When assessing the different elements of Russia's consultations request in a holistic manner, we are of the view that the TEN-E measure is sufficiently identified and that the inclusion of this measure in Section III of Russia's panel request does not impermissibly expand the scope of the dispute or change its essence.

7.71. We wish to underline that further specification by Russia in its consultations request would, in our view, have been useful, and that the listing of a legal instrument, without further specification, may not in all circumstances suffice, in particular, if this legal instrument has a broad scope covering aspects other than the challenged measure. Having said this, we recall our finding that the TEN-E Regulation and the amendments hereto cover the TEN-E measure described in Section III of Russia's panel request and does not cover or relate to any other measures or instruments except to the extent of amending such in a manner exclusively related to projects of common interest.

7.72. In light of this, we consider that the explicit listing of the TEN-E Regulation and amendments hereto should have alerted the European Union to the fact that Russia was seeking consultations with respect to the TEN-E measure. We do not believe that the identification of the TEN-E measure, provided by the listing of the TEN-E Regulation and amendments hereto, is invalidated by the lack of an explicit description of this measure in the narrative part of Russia's consultations request, since the open-ended language of this part plainly informs the European Union that the description is not meant to be exhaustive. Similarly, we recall that the language

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<sup>358</sup> TEN-E Regulation, (Exhibit EU-4), Recital (8).

<sup>359</sup> TEN-E Regulation, (Exhibit EU-4), Article 2.

<sup>360</sup> Directive 2009/73/EC, (Exhibit EU-5), Recitals (22), (54) and (56); and TEN-E Regulation (Exhibit EU-4), Article 4(2)(b).

<sup>361</sup> Russia's response to the European Union's first request for a preliminary ruling, para. 35 (quoting Commission Staff Working Document Accompanying Commission Delegated Regulation (EU) No. 2016/89 of 18 November 2015 amending Regulation (EU) No. 347/2013 of the European Parliament and of the Council as regards the Union list of projects of common interest, SWD(2015) 247 of 18.11.2015, (Exhibit RUS-8), p. 12).

<sup>362</sup> Russia's response to the European Union's first request for a preliminary ruling, para. 35.

used in the narrative part of Russia's consultations request makes it clear that Russia is seeking consultations with respect to a broad range of measures and that, in any event, the TEN-E Regulation cannot be considered "separate and legally distinct" from the instruments forming part of the Third Energy Package in a narrow sense, namely the Directive and Regulation (EC) No. 715/2009.

7.73. In conclusion, we are of the view that the TEN-E measure is sufficiently identified in Russia's consultations request, and that the inclusion of this measure in Section III of Russia's panel request does not impermissibly expand the scope of the dispute or change its essence. We therefore find that the matters contained in Section III of Russia's panel request are within our terms of reference.

## 7.2.2 Second request for a preliminary ruling by the European Union

### 7.2.2.1 Introduction

7.74. The European Union submitted its second request for a preliminary ruling on 28 October 2016. That request primarily concerned Russia's response to Panel question No. 5, but also included the initial terms of reference objections raised by the European Union in its first written submission.<sup>363</sup>

7.75. In its response to Panel question No. 5, Russia replied to a request by the Panel to clarify the scope and nature of certain of its claims following the first substantive meeting with the parties.<sup>364</sup> Russia's response provided a brief description of each of its claims and references to the relevant pages of its panel request identifying the challenged measures.<sup>365</sup> Russia included in its response multiple claims, some of which were further subdivided into sub-claims, numbering them Claim 1 through Claim 31.<sup>366</sup>

7.76. The European Union argued that certain matters included by Russia in its response to Panel question No. 5 were not covered by its panel request and therefore fell outside the Panel's terms of reference.<sup>367</sup> Russia agreed with the European Union that its claim under Article III:4 of the GATT 1994 against the third-country certification measure in the Directive, referred to in its response to Panel question No. 5 as Claim 18, fell outside the Panel's terms of reference and indicated that it would no longer pursue Claim 18 as part of these proceedings.<sup>368</sup>

7.77. In light of Russia's statement, on 28 October 2016, the Panel communicated to the parties its decision not to consider the European Union's terms of reference objection concerning Russia's Claim 18. As explained above in paragraph 1.14, on 10 November 2016, the Panel issued its preliminary ruling containing conclusions on a number of the terms of reference objections covered

<sup>363</sup> European Union's first written submission, paras. 421-422, 546-551, 553-556, 567-570, 578-581, and 617-618.

<sup>364</sup> Panel question No. 5.

<sup>365</sup> Russia's response to Panel question No. 5, paras. 23-53. In its response, Russia referred to certain page numbers of its panel request that did not coincide with the page numbers in Russia's panel request (WT/DS476/2). Russia subsequently explained that the discrepancy in page numbering stemmed from Russia's reliance on its panel request "as originally submitted to the WTO Secretariat and circulated among the parties", which, according to Russia, contained page numbers different from page numbers used in Russia's panel request contained in document WT/DS476/2. (Russia's comments on the European Union's comments on Russia's response to Panel question Nos. 5 and 17, fn 2). All references to Russia's panel request in this Report should be understood to be references to document WT/DS476/2.

<sup>366</sup> These claim numbers are referred to in paragraph 3.2 above. For ease of reference, we refer to "Claims" with this numbering in this section.

<sup>367</sup> European Union's comments on Russia's response to Panel question Nos. 5 and 17.

<sup>368</sup> Russia's comments on the European Union's comments on Russia's response to Panel question Nos. 5 and 17, para. 7. In its response to Panel question No. 5, Russia summarized its Claim 18 as follows: Claim 18 – GATT Article III:4 (National Treatment): Claim 18 is described in Section XVI of Russia's FWS. It challenges the third-country certification measure "as such," based on the underlying provisions of Article 11 of the Directive. Moreover, Russia characterizes this as an instance of *de jure* discrimination because Article 11 distinguishes between third-country and domestic applicants for certification based exclusively on origin. (Russia's response to Panel question No. 5, para. 44).

by the European Union's second request for a preliminary ruling, while declining to rule at that stage in the proceedings on several of those objections.<sup>369</sup>

7.78. Our analysis below is structured as follows. First, we provide the reasoning in support of the conclusions issued to the parties on 10 November 2016. We then provide our decision, as well as the reasoning in support of it, on the terms of reference objections on which we declined to rule at that stage in the proceedings.

### 7.2.2.2 Reasoning in support of the conclusions issued in the second preliminary ruling

7.79. In the preliminary ruling issued to the parties on 10 November 2016, the Panel concluded that the following claims by Russia fell 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.<sup>370</sup> However, the Panel found that Russia's Claim 21 and its Claims 12 through 14 were within its terms of reference. The Panel did not consider it necessary to address the European Union's concerns in relation to Russia's Claims 1 through 3.

7.80. In paragraph 1.5 of the preliminary ruling of 10 November 2016, we indicated that the more detailed reasons in support of these conclusions would be provided no later than the date of the issuance of the Interim Report. Thus, in accordance with this indication, we provide reasoning in support of the conclusions contained in this preliminary ruling.

#### 7.2.2.2.1 Relevant legal provisions and general considerations of the Panel

7.81. We recall that a panel's terms of reference are governed by the panel request, unless the parties agree otherwise.<sup>371</sup> This Panel was established with standard terms of reference.<sup>372</sup> Therefore, the scope of our review is limited to the examination of the "matter" referred to the DSB by Russia in its panel request.

7.82. In order to constitute the "matter referred to the DSB" and thus form the basis of a panel's terms of reference, a panel request must identify the specific measures at issue and provide the legal basis of the complaint, in accordance with Article 6.2 of the DSU.<sup>373</sup> Furthermore, by requiring a panel request to adhere to certain threshold standards of specificity and clarity, Article 6.2 serves the due process objective of notifying the parties and third parties of the nature of a complainant's case in order to enable them to respond accordingly.<sup>374</sup> In *US – Carbon Steel*, the Appellate Body explained that when faced with an issue relating to the scope of its terms of

<sup>369</sup> Our decision on the terms of reference objections on which we declined to rule in the preliminary ruling of 10 November 2016, as well as the reasons supporting it, are provided in section 7.2.2.3 below.

<sup>370</sup> More detailed descriptions of these claims are provided below in the relevant parts of this section.

<sup>371</sup> Article 7.1 of the DSU. See also Appellate Body Reports, *US – Carbon Steel*, para. 124; and *Argentina – Import Measures*, para. 5.11.

<sup>372</sup> Document WT/DS476/3 in the relevant part states as follows:

1. At its meeting on 20 July 2015, the Dispute Settlement Body (DSB) established a panel pursuant to the request of the Russian Federation in document WT/DS476/2, in accordance with Article 6 of the DSU (WT/DSB/M/365).

2. The Panel's terms of reference are the following:

"To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the Russian Federation in document WT/DS476/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

<sup>373</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.11. Article 6.2 of the DSU provides as follows:

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

<sup>374</sup> Appellate Body Reports, *Argentina – Import Measures*, paras. 5.11 and 5.39.

reference, a panel must scrutinize carefully the panel request to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU.<sup>375</sup>

7.83. In *Korea – Dairy*, the Appellate Body identified four distinct requirements that a panel request must meet to comply with Article 6.2. Accordingly, the panel request must: (i) be in writing; (ii) indicate whether consultations were held; (iii) identify the specific measures at issue; and (iv) provide a brief summary of the legal basis of the complaint sufficient to present the "problem" clearly.<sup>376</sup>

7.84. As the Appellate Body clarified, a panel request's compliance with the requirements of Article 6.2 of the DSU must be demonstrated on its face as it existed at the time of its filing.<sup>377</sup> Thus, any defects in the panel request cannot be "cured" by the subsequent submissions of the parties.<sup>378</sup> However, the Appellate Body also observed that subsequent submissions, such as the complaining party's first written submission, may be consulted to the extent that they may confirm or clarify the meaning of the words used in the panel request.<sup>379</sup>

7.85. We consider that, in the present dispute, Russia's panel request meets the first two requirements of Article 6.2. The parties do not disagree that these two requirements are satisfied. Therefore, the rest of our analysis is focused on the compliance of Russia's panel request with the third and fourth requirements of Article 6.2. We note that these two requirements are cumulative, which means that a panel request must satisfy both of them. Moreover, as the Appellate Body clarified, they are also distinct requirements that should not be conflated.<sup>380</sup>

7.86. In the subsections below, we provide reasons in support of our conclusions contained in the preliminary ruling of 10 November 2016, as set out above. For ease of reference, the arguments of the parties are summarized in the subsections that address a particular objection or set of objections. For analytical purposes, we have grouped and examined together the European Union's objections that raise similar issues in respect of one or several claims by Russia.

#### **7.2.2.2.2 Russia's claims 1 through 3 against the unbundling measure in the national implementing laws of Croatia, Hungary and Lithuania**

7.87. Russia's Claims 1 through 3 challenge the unbundling measures of Croatia, Hungary and Lithuania under Article XVI(2)(e), (a) and (f), respectively.<sup>381</sup> The European Union expresses its concern that, in its response to Panel question No. 5, Russia referred to the Directive as one of the relevant legal instruments without having identified and connected it with Article XVI of the GATS in the panel request.<sup>382</sup> Russia has clarified that, in the context of its Claims 1 through 3, the unbundling measures of Croatia, Hungary and Lithuania are the main focus of Russia's market access claims.<sup>383</sup>

7.88. We recall that, on the basis of Russia's clarification, we found it unnecessary to rule on the European Union's concern in the preliminary ruling of 10 November 2016. We consider that Russia's clarification is sufficient to resolve the European Union's concern, and therefore, we do not provide any further reasons for our decision here.

<sup>375</sup> Appellate Body Report, *US – Carbon Steel*, para. 126.

<sup>376</sup> Appellate Body Report, *Korea – Dairy*, para. 120.

<sup>377</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.42.

<sup>378</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.42 (referring to Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9).

<sup>379</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.42 (referring to Appellate Body Reports, *US – Carbon Steel*, para. 127; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9).

<sup>380</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 130. See also Appellate Body Report, *Australia – Apples*, paras. 417-421.

<sup>381</sup> Russia's response to Panel question No. 5, paras. 24-27.

<sup>382</sup> European Union's comments on Russia's response to Panel question Nos. 5 and 17, para. 12.

<sup>383</sup> Russia's comments on the European Union's comments on Russia's response to Panel question Nos. 5 and 17, paras. 11-12. See also Russia's first written submission, paras. 141-230.

### **7.2.2.2.3 Russia's claims 12 through 14 against the LNG and upstream pipeline networks measures**

7.89. Russia's Claim 12 challenges the LNG measure under Article I:1 of the GATT 1994. Claims 13 and 14 challenge the upstream pipeline networks measure under Articles I:1 and III:4 of the GATT 1994, respectively.<sup>384</sup> The European Union contends that Russia's panel request fails to identify and "plainly connect" the measures challenged by Claims 12 through 14 with Articles I:1 and III:4 of the GATT 1994.<sup>385</sup> The European Union explains that the identification of the challenged measure is absent from the second full paragraph of page 5 of the panel request referred to by Russia in its response to Panel question No. 5.<sup>386</sup> Russia submits that its panel request plainly satisfies the requirements of Article 6.2 of the DSU with regard to its claims against both the LNG measure under Article I:1 of the GATT 1994 and the upstream pipeline networks measure under Articles I:1 and III:4 of the GATT 1994.<sup>387</sup>

7.90. We consider that, with regard to Claims 12, 13 and 14, the issue before us is more the precise identification of the relevant part of Russia's panel request, rather than its actual compliance with the requirements of Article 6.2 of the DSU. The relevant part of Russia's panel request reads as follows:

Furthermore, the definition of "transmission" in the Directive expressly exempts "upstream pipeline networks," which are defined separately. The Directive also defines the functions of transmission and LNG as separate from the functions of natural gas production and supply. The unbundling provisions, in turn, apply only to the transmission system and TSO, which must be separated from the production and supply portions of the VIU. Domestic and third-country pipeline transport service suppliers are thus exempt from the unbundling requirements with regard to their upstream pipeline networks and LNG facilities. As a result, contrary to the EU's obligations under Article I:1 of GATT 1994, natural gas originating in third-countries that is transported and placed on the EU market through either of these types of infrastructure is accorded an advantage, favor, privilege or immunity that is not immediately and unconditionally accorded to natural gas originating in Russia, which is transported and placed on the market by pipeline transport service suppliers that are subject to the unbundling requirements. Such Russian-origin natural gas is also accorded less favorable treatment than domestic natural gas that is transported and placed on the market through upstream pipeline networks, and possibly LNG facilities, in a manner inconsistent with Article III:4 of GATT 1994.<sup>388</sup>

7.91. Having consulted the above-quoted paragraph, we are satisfied that Russia's panel request identifies the specific measures at issue and provides a brief summary of the legal basis of the complaint in respect of Claims 12 through 14, in accordance with Article 6.2 of the DSU. We therefore find that Claims 12 through 14 fall within our terms of reference.

### **7.2.2.2.4 Russia's claim 16 against the third-country certification measure in the Directive**

7.92. Russia's Claim 16 challenges the third-country certification measure under Article II:1 of the GATS.<sup>389</sup> When developing this claim in its first written submission, Russia argues that the third-country certification measure distinguishes between services and service suppliers from different third countries.<sup>390</sup>

7.93. The European Union objects to the manner in which Russia has developed Claim 16 in its first written submission, arguing that the difference in treatment to which Russia refers in its first written submission constitutes a different "problem" to the one presented in Russia's panel

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<sup>384</sup> Russia's response to Panel question No. 5, paras. 38–40.

<sup>385</sup> European Union's comments on Russia's response to Panel question Nos. 5 and 17, para. 24.

<sup>386</sup> European Union's comments on Russia's response to Panel question Nos. 5 and 17, para. 25.

<sup>387</sup> Russia's comments on the European Union's comments on Russia's response to Panel question Nos. 5 and 17, paras. 25–26.

<sup>388</sup> Russia's panel request, pp. 4-5.

<sup>389</sup> Russia's response to Panel question No. 5, para. 42.

<sup>390</sup> Russia's first written submission, paras. 449–454.



request.<sup>391</sup> The European Union adds that the claim described in Russia's panel request raises the crucial issue of whether the difference in treatment invoked by Russia may be justified under Article V of the GATS.<sup>392</sup> The European Union thus requests the Panel to find that Claim 16 is outside its terms of reference.<sup>393</sup>

7.94. We note that Russia admits that the description of its Claim 16 "varied" in its first written submission from that of the panel request, but maintains, nonetheless, that the brief summary of the legal basis of the complaint with respect to Claim 16 provided in the panel request complies with the requirements of Article 6.2 of the DSU.<sup>394</sup>

7.95. The European Union's objection regarding Claim 16 relates to Russia's compliance with the fourth requirement of Article 6.2 of the DSU – to provide a brief summary of the legal basis of the complaint sufficient to present the "problem" clearly. We understand that the nature of the European Union's objection concerns the issue of whether Russia's Claim 16, as developed in its first written submission, "matches" the claim included in Russia's panel request.

7.96. We recall that, in order to fall within a panel's terms of reference, a claim must be included in a panel request in accordance with Article 6.2 of the DSU.<sup>395</sup> The fourth requirement of Article 6.2 concerns the specification of claims in a panel request, stipulating that "[i]t shall ... provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".<sup>396</sup> As observed by the Appellate Body, even though the fourth requirement demands only a brief summary of the legal basis of the complaint, the summary must be "sufficient to present the problem clearly".<sup>397</sup>

7.97. Thus, in our view, the requirement that the summary "be sufficient to present the problem clearly" sets the benchmark for the provision of "a brief summary of the legal basis of the complaint" in a panel request. We consider that this requirement is also indicative of the purpose that providing "a brief summary of the legal basis of the complaint" serves. As can be inferred from the text of Article 6.2 of the DSU, the purpose of providing this "summary" is "to present the problem clearly".

7.98. We consider that the reference to "*the* problem" in Article 6.2 of the DSU indicates a particular legal problem that a complainant is seeking to resolve through recourse to dispute settlement.<sup>398</sup> Therefore, in our view, once a complainant has set out in its panel request a brief summary of the legal basis of the complaint that is "sufficient" to clearly present a particular legal problem, a complainant may not assert, in the course of the panel proceedings, a claim that presents a different legal problem. If a complainant were allowed to do so it would mean that a panel could consider claims not included in a panel request – a result that is, in our view, manifestly incompatible with Articles 6.2 and 7.1 of the DSU and the due process objective they serve to protect.

7.99. Bearing these considerations in mind, we will first determine the problem presented by Russia's Claim 16, as developed in its first written submission, and then examine whether it presents the same problem as the one presented in Russia's panel request.

7.100. Having reviewed the relevant part of Russia's first written submission, we consider that Russia's Claim 16, as developed in its first written submission, is sufficiently clear to present the following problem: the third-country certification measure allegedly accords more favourable treatment to the services and service suppliers of *one group of third countries* (those that have concluded certain agreements with the European Union or a member State) than to the services and service suppliers of *another group of third countries* (those that have not concluded certain

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<sup>391</sup> European Union's comments on Russia's response to Panel question Nos. 5 and 17, para. 47.

<sup>392</sup> European Union's comments on Russia's response to Panel question Nos. 5 and 17, para. 49.

<sup>393</sup> European Union's comments on Russia's response to Panel question Nos. 5 and 17, para. 50.

<sup>394</sup> Russia's response to Panel question No. 17, para. 111; and Russia's comments on the European Union's comments on Russia's response to Panel question Nos. 5 and 17, paras. 46–48.

<sup>395</sup> Appellate Body Reports, *China – Raw Materials*, para. 219 (referring to Appellate Body Report, *US – Carbon Steel*, para. 125).

<sup>396</sup> Article 6.2 of the DSU.

<sup>397</sup> Appellate Body Report, *Korea – Dairy*, para. 120.

<sup>398</sup> Article 6.2 of the DSU. (emphasis added)

agreements with the European Union or a member State).<sup>399</sup> We further understand that Russia's reference to "third countries" in its first written submission means a reference exclusively to those countries that are not EU member States (non-EU countries).<sup>400</sup>

7.101. Having determined the problem presented by Russia's Claim 16, as developed in its first written submission, we proceed to examine whether a brief summary of the legal basis of the complaint provided in Russia's panel request presents the same problem. We note that the relevant part of Russia's panel request provides as follows:

In addition, pursuant to the Directive, requests for certification by a transmission system owner or TSO located in one EU Member State, but controlled by a person or persons of another Member State, are not subject to the third-country certification measure. The services and service suppliers of one EU Member State are thus treated more favorably by other Member States than are the services and service suppliers of other third-countries, including Russia. This is despite the fact that the EU and each such Member State is also a Member of the WTO. The Russian Federation considers this measure to be inconsistent, *de jure*, with the EU Member States' obligations under Article II:1 of the GATS to accord immediately and unconditionally to services and service suppliers of each Member treatment no less favorable than that it accords to like services and service suppliers of any other country.<sup>401</sup> (underlining added)

7.102. We observe that the problem presented in Russia's panel request concerns the alleged more favourable treatment accorded by an EU member State to the services and service suppliers of *other EU member States* than to services and service suppliers of *third countries*, including Russia. In its panel request, Russia also refers to "third countries", explicitly distinguishing between "Member States" and "third countries, including Russia". We thus understand that the reference to "third countries" in Russia's panel request covers exclusively non-EU countries.

7.103. Therefore, having carefully reviewed Russia's panel request and its first written submission, we consider that Russia's first written submission does not present the same problem as its panel request. The problem presented by Russia in its first written submission is based on the alleged differential treatment of services and service suppliers originating from different non-EU countries. In contrast, as determined above, the problem presented by Russia in its panel request is based on the alleged differential treatment of, on the one hand, services and service suppliers from EU member States and, on the other, services and service suppliers from non-EU countries. Therefore, we consider that Claim 16, as developed by Russia in its first written submission<sup>402</sup>, falls outside our terms of reference.<sup>403</sup>

7.104. However, we do not consider that Russia's Claim 16, based on the problem presented in Russia's panel request, falls outside our terms of reference. In our view, Russia's panel request provides a brief summary of the legal basis of the complaint in accordance with the fourth requirement of Article 6.2 of the DSU, and therefore Russia is not precluded from advancing its Claim 16 within the limits of the problem presented in its panel request.

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<sup>399</sup> Russia's first written submission, paras. 449-454.

<sup>400</sup> Russia distinguishes between the European Union member States and "third countries", including in this latter group Iceland, Liechtenstein and Norway. See Russia's first written submission, paras. 450-451.

<sup>401</sup> Russia's panel request, p. 3.

<sup>402</sup> Russia's first written submission, paras. 449-454.

<sup>403</sup> We note that a similar approach was adopted by the panel in *US – Carbon Steel (India)*, where the panel found that the arguments advanced by India in its first written submission concerning the issue of initiation by the United States of an investigation despite insufficient evidence fell outside the panel's terms of reference because they did not relate to the claims presented in the panel request. The relevant claim presented in India's panel request concerned the alleged failure of the United States to initiate or conduct an investigation to determine the effects of new subsidies included in the administrative reviews. In its examination of the terms of reference objection raised by the United States, the panel reasoned as follows:

In our view, by clearly and only stating that an investigation was *not* initiated or conducted, India's panel request precludes claims relating to the alleged initiation of an investigation, or the manner in which an investigation was conducted, being included in the scope of the dispute. (Panel Report, *US – Carbon Steel (India)*, paras. 1.34 and 1.10–1.43) (emphasis original)

### 7.2.2.2.5 Russia's claim 21 against the infrastructure exemption measure

7.105. Russia's Claim 21 challenges the infrastructure exemption measure under Article X:3(a) of the GATT 1994.<sup>404</sup> The European Union requests the Panel to rule that Claim 21 falls outside its terms of reference because Russia challenges a new measure, not identified in its panel request, and brings a new claim against this non-identified measure.<sup>405</sup> According to the European Union, in its response to Panel question No. 5, Russia challenges the infrastructure exemption measure in general, whereas in the fourth full paragraph of page 4 of Russia's panel request, Russia only identified the OPAL gas release requirement as the measure violating Article X:3(a) of the GATT 1994.<sup>406</sup>

7.106. In response to the European Union's objections regarding Claim 21, Russia submits that three paragraphs of its panel request, read together, laid out the basis for this claim.<sup>407</sup> Russia explains that the first two paragraphs introduce the infrastructure exemption measure challenged by this claim and the third contains the specific claim regarding Article X:3 of the GATT 1994.<sup>408</sup> Russia further states that it identified the specific measure at issue as "the infrastructure exemption provisions in the Directive and the SEP".<sup>409</sup>

7.107. We understand that the disagreement between the parties concerns the measure challenged by Russia's Claim 21 and its identification in the panel request, under the third requirement of Article 6.2 of the DSU.

7.108. The Appellate Body has clarified that, under the third requirement of Article 6.2, the measures at issue must be identified with sufficient precision so that what is referred to adjudication by a panel may be discerned from the panel request.<sup>410</sup>

7.109. The determination of whether a panel request is sufficiently precise requires scrutiny of the panel request "as a whole, and on the basis of the language used".<sup>411</sup> Accordingly, in our analysis, we are required to scrutinize the text of Russia's panel request, the relevant part of which reads as follows:

The Directive further requires Member States to ensure implementation of a system of third-party access ("TPA") to the transmission and distribution system and LNG facilities in the EU.<sup>412</sup> The Directive permits "major new gas infrastructure, i.e. interconnectors, LNG and storage facilities," to be exempted from the unbundling, TPA and other requirements under certain conditions. The same exemptions are also permitted for "significant increases of capacity in existing infrastructure and to modifications of such infrastructure which enable the development of new sources of gas supply."<sup>413</sup> The conditions to be examined in assessing such requests permit Member States and the Commission significant discretion in determining whether to grant infrastructure exemptions.

A number of infrastructure exemptions have been granted under these provisions of the Directive. Similar exemptions remain in effect that were previously granted

<sup>404</sup> Russia's response to Panel question No. 5, para. 46.

<sup>405</sup> European Union's comments on Russia's response to Panel question Nos. 5 and 17, paras. 64-65.

<sup>406</sup> European Union's comments on Russia's response to Panel question Nos. 5 and 17, para. 63.

<sup>407</sup> Russia identifies the following paragraphs: the last paragraph on the bottom of p. 3 of the panel request beginning with the words "The Directive further requires", the first full paragraph on p. 4 beginning with the words "A number of infrastructure exemptions have been granted" and the paragraph on p. 4 beginning with the words "In addition, requiring that the operator". See Russia's comments on the European Union's comments on Russia's response to Panel question Nos. 5 and 17, paras. 60-61.

<sup>408</sup> Russia's comments on the European Union's comments on Russia's response to Panel question Nos. 5 and 17, paras. 61-62.

<sup>409</sup> Russia's comments on the European Union's comments on Russia's response to Panel question Nos. 5 and 17, para. 63.

<sup>410</sup> Appellate Body Report, *US – Continued Zeroing*, para. 168.

<sup>411</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.41 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 641). See also Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.13 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 562).

<sup>412</sup> (footnote original) Directive, Article 32.

<sup>413</sup> (footnote original) Directive, Article 36.

pursuant to comparable provisions of Directive 2003/55/EC, as part of the SEP.<sup>414</sup> A Russian pipeline transport service supplier controls the *Ostseepipeline-Anbindungsleitung* ("OPAL") pipeline. After being categorized as an "inter-connector," the Germany authority granted the OPAL pipeline owners a limited infrastructure exemption for capacity used to transport natural gas from Griefswald, where gas enters Germany from the Nordstream Pipeline ("Nordstream"), to Brandov, where gas exits Germany and enters the Czech Republic. However, the Commission imposed a 50 percent cap on the ability of the Russian supplier operating the OPAL pipeline, described as a "dominant undertaking," to acquire exit capacity at the Czech border. The Russian supplier may exceed this cap only by implementing a "gas release" program and selling 3 billion cubic meters ("bcm") of its gas annually at a government-set, fixed price to competing gas suppliers on the Czech market, regardless of what amount of additional capacity is booked by the Russian supplier. No similar gas release requirement was imposed in decisions granting infrastructure exemptions concerning pipelines defined as interconnectors and controlled by other third-country suppliers of natural gas and pipeline transport services.

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In addition, requiring that the operator of the OPAL pipeline adopt the 3 bcm gas release program has a limiting effect on the volume of Russian gas being imported into the EU market. The measure thus maintains or institutes a *de facto* restriction on importation, contrary to the requirements of Article XI:1 of GATT 1994. 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.<sup>415</sup>

7.110. We observe that, in the first and second paragraphs of the panel request quoted above, Russia describes the provisions of the Directive, as well as the earlier Directive 2003/55/EC, permitting infrastructure exemptions. In the second paragraph quoted above, Russia describes the infrastructure exemption granted to OPAL, including the 50% capacity cap and the 3bcm/year gas release requirement. The third paragraph connects the alleged administration of the infrastructure exemption provisions of both Directives, referring explicitly to both the 50% capacity cap and the 3bcm/year gas release requirement in the OPAL exemption decision, with the alleged violation of Article X:3(a) of the GATT 1994. Therefore, we consider that the third paragraph of the panel request quoted above, when read in the context of the preceding two paragraphs, identifies the specific measure challenged by Russia's Claim 21 and sets the scope of this challenge.<sup>416</sup>

7.111. Thus, on the basis of the analysis conducted, we conclude that Russia's panel request complies with the third requirement of Article 6.2 of the DSU with respect to its Claim 21. Consequently, we find that Russia's Claim 21, as described in the relevant part of its panel request, falls within our terms of reference.

#### **7.2.2.2.6 Russia's claim 27 against the infrastructure exemption/upstream pipeline networks measures**

7.112. In its response to Panel question No. 5, Russia explains that its Claim 27 challenges, under Article II:1 of the GATS, the "implementation of the infrastructure exemption measure to deny the

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<sup>414</sup> (footnote original) Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, Article 22, OJ L 176, 15.7.2003, pp. 57-78 ("Directive 2003/55/EC").

<sup>415</sup> Russia's panel request, pp. 3-4.

<sup>416</sup> As additionally clarified by the Panel in response to the European Union's further concerns raised after the issuance of the preliminary ruling of 10 November 2016. (Communication by the Panel of 9 December 2016, pp. 1-2).

NEL exemption and impose restrictive conditions on the OPAL exemption, while the Directive automatically exempts UPNs from the unbundling, TPA and tariff regulation requirements".<sup>417</sup>

7.113. The European Union contends that Russia is thus challenging a new measure not identified in the panel request.<sup>418</sup> In the European Union's view, Russia's claim is directed against the implementation of the provisions in the Directive relating to upstream pipeline networks.<sup>419</sup> The European Union points out that pages 4 and 5 of the panel request, referred to by Russia, discuss the infrastructure exemption decisions, but do not discuss the upstream pipeline networks provisions in the Directive.<sup>420</sup> The European Union also submits that the panel request does not provide a plain connection between the upstream pipeline networks provisions in the Directive and Article II:1 of the GATS.<sup>421</sup> Consequently, for the European Union, Claim 27 is a new claim not presented in the panel request.<sup>422</sup> The European Union thus requests us to rule that Claim 27 falls outside our terms of reference.<sup>423</sup>

7.114. Russia responds to the European Union's arguments that the third full paragraph on page 4 of the panel request describes the infrastructure exemption measure as well as the fact that both NEL and OPAL were treated less favourably than other infrastructure projects that were granted exemptions.<sup>424</sup> Russia explains that, in this paragraph, Russia did not restrict its description of this claim to apply only to pipelines (or LNG facilities) granted exemptions pursuant to the infrastructure exemption measure.<sup>425</sup>

7.115. Russia also notes that, in the last paragraph on page 4 of the panel request, it described the automatic exemption granted under the Directive to upstream pipeline networks.<sup>426</sup> Russia thus submits that, having already discussed the differential treatment accorded under the Directive to NEL and OPAL earlier on page 4, in the last paragraph on page 4 of the panel request, it intended to include a separate claim (Claim 27) connecting the denial of the NEL exemption and the more restrictive OPAL exemption to the automatic exemptions granted to upstream pipeline networks under the Directive.<sup>427</sup>

7.116. We understand that the European Union's objections concerning Claim 27 raise two issues: (a) whether Russia's panel request identifies the specific measure(s) challenged by this claim, in accordance with the third requirement of Article 6.2 of the DSU; and (b) whether Russia's panel request provides a brief summary of the legal basis of the complaint sufficient to present the "problem" clearly, in accordance with the fourth requirement of Article 6.2 of the DSU.

7.117. In considering whether Russia's panel request complies with the third requirement of Article 6.2 in respect of Claim 27, we note that the "specific measures at issue" to be identified in a panel request is the object of the challenge, namely, the measures that are alleged to be causing the violation of an obligation contained in a covered agreement.<sup>428</sup> In other words, the "measure at issue is *what* is being challenged by the complaining Member".<sup>429</sup>

<sup>417</sup> Russia's response to Panel question No. 5, para. 50.

<sup>418</sup> European Union's comments on Russia's response to Panel question Nos. 5 and 17, para. 66.

<sup>419</sup> European Union's comments on Russia's response to Panel question Nos. 5 and 17, para. 66.

<sup>420</sup> European Union's comments on Russia's response to Panel question Nos. 5 and 17, para. 66.

<sup>421</sup> European Union's comments on Russia's response to Panel question Nos. 5 and 17, para. 67.

<sup>422</sup> European Union's comments on Russia's response to Panel question Nos. 5 and 17, para. 67.

<sup>423</sup> European Union's comments on Russia's response to Panel question Nos. 5 and 17, para. 68.

<sup>424</sup> Russia's comments on the European Union's comments on Russia's response to Panel question Nos. 5 and 17, para. 67.

<sup>425</sup> Russia's comments on the European Union's comments on Russia's response to Panel question Nos. 5 and 17, para. 67.

<sup>426</sup> Russia's comments on the European Union's comments on Russia's response to Panel question Nos. 5 and 17, para. 68.

<sup>427</sup> Russia's comments on the European Union's comments on Russia's response to Panel question Nos. 5 and 17, para. 68.

<sup>428</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.40 (quoting Appellate Body Report, *EC – Selected Customs Matters*, para. 130).

<sup>429</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 130. (emphasis original)

7.118. From Russia's response to Panel question No. 5, we understand that its Claim 27 challenges the infrastructure exemption measure.<sup>430</sup> At the same time, we note that, in its response to Panel question No. 4, Russia states that it included a claim under Article II:1 of the GATS "alleging that the UPN measure provides Russian pipeline transport service suppliers that supply their services via NEL and OPAL less favourable treatment than like services and service suppliers of other Members, whose services are supplied via UPNs".<sup>431</sup> Thus, from Russia's response to Panel question No. 4, it would appear that its Claim 27 challenges the upstream pipeline networks measure.

7.119. Even though we would welcome and expect more clarity from the complaining party regarding the measures it challenges, we do not consider it necessary, nor do we find it fruitful, to resolve which measure is challenged by Russia's Claim 27, as summarized in its response to Panel question No. 5. We note that Russia's panel request identifies both the infrastructure exemption measure and the upstream pipeline networks measure. The relevant parts of Russia's panel request read as follows:

The Russian Federation considers that, contrary to its obligations under GATS Article II:1 in the case of both the OPAL and NEL decisions, the EU accorded Russian services and service suppliers less favorable treatment than it accorded to like services and service suppliers of other third-countries pursuant to relevant decisions granting exemptions to those suppliers. As a result of these measures, natural gas originating in Russia is not accorded immediately and unconditionally any advantage, favor, privilege or immunity granted to natural gas originating in certain third-countries, contrary to the EU's obligations under Article I:1 of GATT 1994.

...

Furthermore, the definition of "transmission" in the Directive expressly exempts "upstream pipeline networks," which are defined separately. The Directive also defines the functions of transmission and LNG as separate from the functions of natural gas production and supply. The unbundling provisions, in turn, apply only to the transmission system and TSO, which must be separated from the production and supply portions of the VIU. Domestic and third-country pipeline transport service suppliers are thus exempt from the unbundling requirements with regard to their upstream pipeline networks and LNG facilities. As a result, contrary to the EU's obligations under Article I:1 of GATT 1994, natural gas originating in third-countries that is transported and placed on the EU market through either of these types of infrastructure is accorded an advantage, favor, privilege or immunity that is not immediately and unconditionally accorded to natural gas originating in Russia, which is transported and placed on the market by pipeline transport service suppliers that are subject to the unbundling requirements. Such Russian-origin natural gas is also accorded less favorable treatment than domestic natural gas that is transported and placed on the market through upstream pipeline networks, and possibly LNG facilities, in a manner inconsistent with Article III:4 of GATT 1994.<sup>432</sup>

7.120. The first paragraph quoted above identifies the implementation of the infrastructure exemption measure in the decisions regarding NEL and OPAL, while the second paragraph identifies the upstream pipeline networks measure. We are thus satisfied that Russia's panel request complies with the third requirement of Article 6.2, regardless of whether Russia challenges the infrastructure exemption measure or the upstream pipeline networks measure. We now turn to examine whether Russia's panel request complies with the fourth requirement of Article 6.2.

7.121. We recall that, as clarified by the Appellate Body in the context of the fourth requirement of Article 6.2, a panel request must "plainly connect the challenged measure(s) with the

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<sup>430</sup> In its response to Panel question No. 5, Russia stated that Claim 27 "challenge[s] implementation of the infrastructure exemption measure to deny the NEL exemption and impose restrictive conditions on the OPAL exemption". (Russia's response to Panel question No. 5, para. 50).

<sup>431</sup> Russia's response to Panel question No. 4, para. 21.

<sup>432</sup> Russia's panel request, pp. 4 and 5. The relevant parts of Russia's panel request describing the infrastructure exemption measure are also provided above in para. 7.109.

provision(s) of the covered agreements claimed to have been infringed"<sup>433</sup> and "explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question".<sup>434</sup>

7.122. In the present case, Russia's panel request must "plainly connect" either the infrastructure exemption measure or the upstream pipeline networks measure with the alleged violation of Article II:1 of the GATS and provide a "succinct" explanation as to how or why either of these measures is, in Russia's view, causing an inconsistency with Article II:1 of the GATS.

7.123. Scrutinizing the relevant part of Russia's panel request, we note that the first paragraph quoted above "plainly connects" the alleged violation of Article II:1 of the GATS with the infrastructure exemption measure. It also explains that the alleged violation of Article II:1 of the GATS is caused by a less favourable treatment of services and service suppliers under the NEL and OPAL infrastructure exemption decisions than services and service suppliers under other infrastructure exemption decisions.

7.124. We recall that a claim developed in the course of panel proceedings must present the same problem as the one presented by a brief summary of the legal basis of the complaint in a panel request, in order for such a claim to fall within a panel's terms of reference, pursuant to Articles 7.1 and 6.2 of the DSU.<sup>435</sup> Therefore, in order to decide on whether Russia's Claim 27, as described in Russia's response to Panel question No. 5, falls within our terms of reference, we must determine whether it presents the same problem as Russia's panel request.

7.125. From Russia's response to Panel question No. 5, we understand that the problem presented by Russia's Claim 27 concerns allegedly less favourable treatment of services and service suppliers under the NEL and OPAL infrastructure exemption decisions when compared to services and service suppliers subject to the upstream pipeline networks measure.<sup>436</sup>

7.126. In our view, this problem is not the same as the problem presented by Russia in its panel request, which concerns allegedly less favourable treatment of services and service suppliers subject to the NEL and OPAL infrastructure exemption decisions than services and service suppliers subject to other infrastructure exemption decisions.

7.127. Thus, while the problem presented in Russia's panel request focuses on the comparison of the treatment of services and service suppliers under the NEL and OPAL decisions vis-à-vis the treatment of services and service suppliers subject to the upstream pipeline networks measure, the problem presented in the description of Claim 27 in its response to Panel question No. 5 focuses on the comparison of the treatment of services and service suppliers under the NEL and OPAL infrastructure exemption decisions vis-à-vis the treatment of services and service suppliers subject to other infrastructure exemption decisions. Therefore, to the extent Russia's Claim 27 challenges the infrastructure exemption measure, it presents a different problem from the one presented by Russia in its panel request and consequently falls outside our terms of reference.

7.128. Turning to the second paragraph of Russia's panel request quoted above, we observe that it "plainly connects" the upstream pipeline networks measure with an alleged violation of Articles I:1 and III:4 of the GATT 1994. This paragraph explains that the alleged violation of Articles I:1 and III:4 of the GATT 1994 stems from a more favourable treatment of domestic and third-country gas transported and placed on the EU market through upstream pipeline networks than Russian gas transported and placed on the market by service suppliers that are subject to the unbundling requirements. However, this paragraph does not mention Article II:1 of the GATS, and therefore, does not "plainly connect" the upstream pipeline networks measure with an alleged violation of Article II:1 of the GATS. This means that, to the extent Russia's Claim 27 challenges the upstream pipeline networks measure, this claim falls outside our terms of reference because

<sup>433</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.

<sup>434</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 130. (emphasis original)

<sup>435</sup> See, above paras 7.96- 7.98.

<sup>436</sup> Russia's response to Panel question No. 5, para. 50. We note that, despite stating that its Claim 27 challenges the upstream pipeline networks measure instead of the infrastructure exemption measure, Russia's response to Panel question No. 4 presents the same problem. (Russia's response to Panel question No. 4, para. 21).

Russia's panel request fails to provide a brief summary of the legal basis of the complaint with respect to this claim.

7.129. In view of the foregoing, we conclude that, regardless of whether Russia's Claim 27 challenges the infrastructure exemption measure or the upstream pipeline networks measure, this claim falls outside our terms of reference.

#### 7.2.2.2.7 Russia's claims 7, 9 and 11 against the unbundling measure in the Directive

7.130. In its response to Panel question No. 5, Russia included Claims 7, 9 and 11, characterizing these as "as applied" claims. These claims concern Russia's challenge against the unbundling measure under Article II:1 of the GATS and Articles III:4 and I:1 of the GATT 1994, respectively. They mirror Russia's Claims 6, 8 and 10, characterized as claims of *de facto* violation, inasmuch as they concern the unbundling measure and allege a violation of the same legal provisions.<sup>437</sup>

7.131. The European Union objects to Russia's inclusion of Claims 7, 9 and 11 in its response to Panel question No. 5, and requests the Panel to rule that these claims are outside the Panel's terms of reference.<sup>438</sup> The European Union argues that Russia's panel request fails to identify the specific measures challenged by Claims 7, 9 and 11 and to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly in respect of these claims. The European Union submits that Russia's panel request does not identify the specific instance of application of unbundling in Lithuania challenged by Claims 7, 9 and 11;<sup>439</sup> and fails to describe the problem covered by Claims 7 and 9, namely the comparison of the instance of application of unbundling in Lithuania with the instances of application of unbundling in Germany (Claim 7) and France (Claim 9).<sup>440</sup>

7.132. Russia responds that the European Union's arguments regarding Claims 7, 9 and 11 should be rejected.<sup>441</sup> Russia submits that the relevant paragraph on pages 2 through 3 of its panel request fully describes the specific instance of application of the unbundling measure in Lithuania, from which "as applied" Claim 7 is derived.<sup>442</sup> Therefore, in Russia's view, its panel request meets the requirements of Article 6.2 of the DSU in respect of Claims 7, 9 and 11. Russia adds that it was not required to mention Germany, France or any other EU member State that permits the ISO and/or ITO models for the purposes of comparison.<sup>443</sup>

7.133. We observe that the European Union argues that Russia's panel request does not meet the third and the fourth requirements of Article 6.2 of the DSU in respect of Russia's Claims 7, 9 and 11. In our analysis, we first determine whether Russia's panel request identifies the specific measure challenged by this claim, in accordance with the third requirement of Article 6.2 of the DSU. If we conclude that Russia's panel request complies with the third requirement of Article 6.2 of the DSU, we will examine whether Russia's panel request provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly, in accordance with the fourth requirement of Article 6.2 of the DSU.

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<sup>437</sup> In its first written submission, Russia explicitly refers to the unbundling measure under the Directive as "enabling" the European Union member States to draw regulatory distinctions between services, service suppliers and gas from different WTO Members by implementing different unbundling models (Russia's first written submission, paras. 326, 353, 371, and 810). Russia then argues that the existence of these distinctions results in the violation of Articles II:1 of the GATS and Articles III:4 and I:1 of the GATT 1994. (Russia's first written submission, paras. 314-316, 326, 361, and 371). These arguments correspond to Russia's Claims 6, 8, and 10 summarized in its response to Panel question No. 5. (Russia's response to Panel question No. 5, paras. 31-32, 34-35 and 37).

<sup>438</sup> European Union's comments on Russia's response to Panel question Nos. 5 and 17, para. 23.

<sup>439</sup> European Union's comments on Russia's response to Panel question Nos. 5 and 17, paras. 16 and 19-20.

<sup>440</sup> European Union's comments on Russia's response to Panel question Nos. 5 and 17, paras. 17 and 21.

<sup>441</sup> Russia's comments on the European Union's comments on Russia's response to Panel question Nos. 5 and 17, paras. 15-16.

<sup>442</sup> Russia's comments on the European Union's comments on Russia's response to Panel question Nos. 5 and 17, paras. 18-19.

<sup>443</sup> Russia's comments on the European Union's comments on Russia's response to Panel question Nos. 5 and 17, para. 20.



7.134. Based on Russia's description and summaries of Claims 7, 9 and 11 in its response to Panel question No. 5, we understand that these claims challenge a specific instance of application of unbundling in Lithuania. Consequently, this specific instance of application of unbundling is a challenged measure that must be identified in Russia's panel request in accordance with the third requirement of Article 6.2 of the DSU. In considering whether Russia's panel request identifies this specific measure, we scrutinize the relevant text of Russia's panel request, which reads as follows:

**1. Unbundling, Third-Country Certification and Infrastructure Exemption Measures**

The Directive requires "vertically integrated natural gas undertakings" ("VIUs") to undergo "unbundling" and to separate their transmission system assets, or the transmission system operator ("TSO"), from assets relating to production and supply. The Directive grants Member States discretion to select from among three alternative unbundling models: ownership unbundling, independent system operator ("ISO"), and independent transmission operator ("ITO"). Ownership unbundling is the most restrictive model. It precludes the same person or persons from exercising control over an undertaking performing any of the functions of production or supply and exercising control or any right over the TSO or the transmission system, and *vice versa*. Among the rights that ownership unbundling precludes is the holding of a majority share. The ISO model, in contrast, permits the VIU to retain full ownership of the TSO upon designation of an outside entity, the ISO, to operate the TSO. The ITO model is even less restrictive and permits VIUs to maintain control and operate the TSO through a separate subsidiary.

...

In addition, in certain Member States that have adopted implementing legislation requiring ownership unbundling, including Lithuania and Estonia, the Russian supplier of pipeline transport services has been required to cede control in the TSO or will be required to do so in the future on the basis of existing legislation. In other Member States that permit the ISO and/or ITO models, VIUs that are owned or controlled by a person or persons of other third-countries have been permitted to adopt either of those unbundling models, and thus to maintain ownership and varying degrees of control over both the TSO and production or supply portions of the VIU. The Russian Federation considers that these measures result in less favorable treatment being accorded to pipeline transport services and service suppliers of Russia than to like services and service suppliers of other third-countries, contrary to the EU's obligations under GATS Article II:1. Moreover, contrary to the requirements of Article I:1 of GATT 1994, the fact that third-country natural gas suppliers in certain Member States have been permitted to adopt the ISO or ITO unbundling models grants an advantage, favor, privilege or immunity to the natural gas imported from those third-countries that is not immediately and unconditionally accorded to natural gas originating in Russia, which is transported and placed on the market in Member States that require ownership unbundling. Such Russian-origin natural gas is also accorded less favorable treatment than domestic natural gas that is transported and placed on the market in Member States permitting the ISO and/or ITO models, contrary to the EU's obligations under Article III:4 of GATT 1994.<sup>444</sup> (footnotes omitted)

7.135. On the basis of our scrutiny of the relevant part of Russia's panel request quoted above, we establish that the specific measure at issue identified in Russia's panel request in accordance with Article 6.2 of the DSU is the unbundling measure based on the provisions of the Directive.

7.136. However, we do not find a clear indication in the relevant part of its panel request that Russia challenges a specific instance of application of unbundling in Lithuania. While Russia's panel request refers to the implementation of unbundling in Lithuania, and the effect thereof<sup>445</sup>, we do

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<sup>444</sup> Russia's panel request, pp. 2–3.

<sup>445</sup> The relevant part of Russia's panel request states that "in certain Member States that have adopted implementing legislation requiring ownership unbundling, including Lithuania and Estonia, the Russian supplier of pipeline transport services has been required to cede control in the TSO or will be required to do so in the future on the basis of existing legislation." (Russia's panel request, p. 2).

not consider that this reference provides a sufficiently clear indication that a particular instance of application of unbundling in Lithuania is a measure challenged by Russia.

7.137. As clarified by the Appellate Body, Article 6.2 of the DSU requires the level of "particularity" in the identification of the measure at issue sufficient to indicate the nature of the measure and the gist of what is at issue.<sup>446</sup> We do not consider that Russia's reference to the implementation of unbundling in Lithuania, and the effect thereof, provides a sufficient indication that the nature of the measure it challenges is the application of unbundling in Lithuania. Therefore, in our view, Russia has failed to provide a sufficiently clear indication that its challenge is directed at a specific instance of application of unbundling in Lithuania in addition to the unbundling measure based on the provisions of the Directive.

7.138. Thus, having carefully reviewed Russia's panel request, we consider that Russia's panel request does not identify any instance of application of unbundling in Lithuania with sufficient specificity as to comply with the third requirement of Article 6.2. Consequently, we find that Russia's Claims 7, 9 and 11 pursuing a challenge against a specific instance of application of unbundling in Lithuania fall outside our terms of reference.

7.139. However, we note that, under the third requirement of Article 6.2, a panel request does not need to identify a measure that a complaining party refers to in its subsequent submissions as part of its argumentation or evidence in seeking to prove its claim.<sup>447</sup> Therefore, we confirm that, to the extent Russia refers to the application of unbundling in Lithuania, and the effect thereof, in its subsequent submissions, as relevant evidence in support of its Claims 6, 8, and 10, it falls within the scope of our examination.

#### 7.2.2.2.8 Russia's alternative claims 29 through 31 against the TEN-E measure

7.140. In its response to Panel question No. 5, Russia included alternative Claims 29 through 31, characterizing these as "as applied" claims. These "as applied" claims mirror Russia's main Claims 29 through 31 inasmuch as they concern the challenge against the TEN-E measure and allege the violation of Article II:1 of the GATS and Articles III:4 and I:1 of the GATT 1994.<sup>448</sup>

7.141. The European Union objects to Russia's inclusion of alternative "as applied" Claims 29 through 31 in its response to Panel question No. 5, and requests the Panel to rule that these claims fall outside the Panel's terms of reference.<sup>449</sup> The European Union argues that, while the panel request makes no reference to "as applied" claims and does not identify any "specific instances" of application of the TEN-E measure, Russia is now advancing "as applied" claims (in the alternative to its *de facto* claims) against "specific instances of application" of the TEN-E measure.<sup>450</sup> The European Union argues further that this new characterization is contradicted by Russia's own first written submission, which makes *de jure* claims and, alternatively, *de facto* claims against the TEN-E measure, but does not advance any "as applied" claims against specific instances of application of the TEN-E measure.<sup>451</sup>

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<sup>446</sup> Appellate Body Report, *US – Continued Zeroing*, para. 169. The Appellate Body observed as follows: "Moreover, although a measure cannot be identified without some indication of its contents, the identification of a measure within the meaning of Article 6.2 need be framed only with sufficient *particularity* so as to indicate the nature of the measure and the gist of what is at issue." (Appellate Body Report, *US – Continued Zeroing*, para. 169). (emphasis added)

<sup>447</sup> Panel Report, *India – Agricultural Products*, paras. 7.44-7.45 and 7.54.

<sup>448</sup> We note that, in its first written submission, Russia argues that the TEN-E measure is inconsistent with Articles II:1 of the GATS and I:1 and III:4 of the GATT 1994 alleging that it operates in such a way as to deny the infrastructure projects that benefit Russian gas, services and service suppliers eligibility for being designated as projects of common interest. See Russia's first written submission, paras. 753-785 (concerning Article II:1 of the GATS); 786-802 (concerning Article III:4 of the GATT 1994); and 803-809 (concerning Article I:1 of the GATT 1994). These arguments are also reflected in the summaries of Russia's main Claims 29 through 31 provided in Russia's response to Panel question No. 5. (Russia's response to Panel question No. 5, paras. 52-53).

<sup>449</sup> European Union's comments on Russia's response to Panel question Nos. 5 and 17, paras. 72 and 76.

<sup>450</sup> European Union's comments on Russia's response to Panel question Nos. 5 and 17, paras. 69-70 and 73-74.

<sup>451</sup> European Union's comments on Russia's response to Panel question Nos. 5 and 17, paras. 71 and 74.

7.142. In response to the European Union's arguments, Russia submits that section 3 on pages 8 and 9 of the panel request makes clear that Russia challenges both the TEN-E measure "as such" and its specific instances of application on an "as applied" basis.<sup>452</sup> Russia contends that the text of its panel request is sufficiently precise as to have enabled the European Union, as the respondent, to draw this conclusion.<sup>453</sup>

7.143. In our view, the European Union's arguments raise the issue of whether Russia's panel request has identified the specific measure challenged by Russia's alternative "as applied" Claims 29 through 31 under the third requirement of Article 6.2 of the DSU.

7.144. On the basis of Russia's description and summaries of these claims, provided in response to Panel question No. 5, we consider that Russia's "as applied" Claims 29 through 31 pursue a challenge against the specific instance(s) of application of the TEN-E Regulation, which, in Russia's view, result(s) in the absence of "Russian projects" designated as PCIs.<sup>454</sup> Therefore, specific instance(s) of application of the TEN-E Regulation constitute a challenged measure that must be identified in the panel request in accordance with the third requirement of Article 6.2. In considering whether Russia's panel request identifies any such specific measure, we scrutinize the relevant text of Russia's panel request, which reads as follows:

### 3. "Projects of Common Interest" Measures

The EU has also enacted regulations establishing "trans-European energy infrastructure priority corridors and areas," including four specific "priority gas corridors." The principal regulation, Regulation (EU) No 347/2013, is referred to as the "TEN-E regulation." It sets forth criteria for identifying "projects of common interest" or "PCIs," which are accorded priority status, including within priority gas corridors. The TEN-E regulation provides for the implementation of PCIs, including those concerning natural gas, to be facilitated by "streamlined and efficient permit granting procedures," "improved regulatory treatment" and EU financial assistance. In October 2013, the Commission issued an amendment to the TEN-E regulation setting out the initial list of PCIs. These include a number of projects that promote and facilitate the production and transportation of domestic natural gas, as well as the importation and transportation of gas from various third-countries, including numerous LNG projects. However, the list of PCIs excludes any project designed to facilitate the importation or transportation of natural gas from Russia. The Russian Federation is not aware of any such projects currently under consideration for designation as a PCI.

The Russian Federation considers that, contrary to GATS Article II:1, these measures accord Russian services and service suppliers less favorable treatment than is accorded to like services and service suppliers of other third-countries, which benefit from having projects listed as PCIs. Natural gas originating in third-countries that is transported and placed on the EU market through pipelines or other infrastructure listed as PCIs is also accorded an advantage, favor, privilege or immunity that is not immediately and unconditionally accorded to natural gas originating in Russia, contrary to Article I:1 of GATT 1994. Such Russian-origin natural gas is also accorded less favorable treatment than domestic natural gas that is transported and placed on the market through pipelines or other infrastructure listed as PCIs, in a manner inconsistent with Article III:4 of GATT 1994.<sup>455</sup> (footnote omitted)

7.145. We observe that the first paragraph quoted above identifies the measure challenged by Russia. This measure (the TEN-E measure) comprises the TEN-E Regulation, setting forth the

<sup>452</sup> Russia's comments on the European Union's comments on Russia's response to Panel question Nos. 5 and 17, para. 74.

<sup>453</sup> Russia's comments on the European Union's comments on Russia's response to Panel question Nos. 5 and 17, para 74.

<sup>454</sup> Russia's response to Panel question No. 5, paras. 52–53. In respect of its Claim 29, Russia explains that it "challenged specific instances of application by the EU of the TEN-E Measure and contended that, by excluding Russian projects from designation as projects of common interest (or 'PCIs'), 'as applied,' the TEN-E Measure provides Russian services and service suppliers less favourable treatment than like services and service suppliers of other countries". (Russia's response to Panel question No. 5, para. 52).

<sup>455</sup> Russia's panel request, p. 8.

criteria for identifying the projects of common interest and the legal regime for such projects, and its amendment, setting out the list of projects of common interest. However, we do not find in this paragraph a clear indication that Russia challenges any specific instance(s) of application of the TEN-E measure. Russia's panel request only refers to the absence of "projects designed to facilitate the importation or transportation of natural gas from Russia" from the list of projects of common interest.

7.146. As already noted, the level of "particularity" in the identification of the measure at issue, under the third requirement of Article 6.2 of the DSU, should be sufficient to indicate the nature of the measure and the gist of what is at issue.<sup>456</sup> We do not deny that the application of the criteria for PCI designation set out in the TEN-E Regulation by the Commission may result in the absence of certain projects from the list of PCIs. However, to our mind, simply pointing to this outcome does not provide a sufficient indication that the nature of the challenged measure is the application of the criteria for the identification of the projects of common interest. Thus, we consider that Russia's panel request does not provide a sufficient indication that any specific instance(s) of the application of these criteria, in addition to the criteria themselves, constitutes the challenged measure.

7.147. In view of the foregoing, we find that Russia's panel request has not identified any specific instance(s) of the application of the TEN-E measure with sufficient specificity in order to meet the third requirement of Article 6.2. As a result, Russia's alternative "as applied" Claims 29 through 31 fall outside our terms of reference.

7.148. However, we note that our decision does not preclude us from reviewing the alleged absence of "projects designed to facilitate the importation or transportation of natural gas from Russia" as evidence submitted in support of Russia's remaining Claims 29 through 31.<sup>457</sup>

### **7.2.2.3 Decision on the terms of reference issues not resolved in the second preliminary ruling**

7.149. We recall that, in the preliminary ruling of 10 November 2016, guided by the consideration of ensuring an objective assessment of the matter before us, we refrained from deciding, at that stage in the proceedings, on certain of the terms of reference objections covered by the European Union's request for a preliminary ruling. These objections concerned the following matters: (a) Lithuania's grant of priority to natural gas supplied by Litgas UAB (Litgas) through the Klaipeda LNG Terminal and the supply agreement between Litgas and Statoil in respect of Russia's claim against the unbundling measure in the Directive under Article I:1 of the GATT 1994, referred to in Russia's response to Panel question No. 5 as Claim 10<sup>458</sup>; (b) Articles 20(5) and 29(4)(3) of Lithuania's Law on Natural Gas and Section 123 of Hungary's Gas Act<sup>459</sup> (additional conditions) in respect of Russia's claim against the third-country certification measure in the national implementing laws of Croatia, Hungary and Lithuania under Article XVII of the GATS, referred to in Russia's response to Panel question No. 5 as Claim 15; and (c) Commission certification opinions regarding TIGF and DESFA in respect of Russia's claim against the third-country certification measure in the Directive under Article II:1 of the GATS, referred to in Russia's response to Panel question No. 5 as Claim 17. We address each of these terms of reference objections below.

#### **7.2.2.3.1 Lithuania's grant of priority to natural gas supplied by Litgas through the Klaipeda LNG Terminal and the supply agreement between Litgas and Statoil**

7.150. In its first written submission, Russia refers to Lithuania's grant of priority to natural gas supplied by Litgas through the Klaipeda LNG Terminal and the supply agreement between Litgas

<sup>456</sup> Appellate Body Report, *US – Continued Zeroing*, para. 169.

<sup>457</sup> See, above para. 7.139. See also Panel Report, *India – Agricultural Products*, paras. 7.44–7.45 and 7.54.

<sup>458</sup> In light of the Panel's finding that Russia's Claim 11 fell outside its terms of reference, the Panel did 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 through the Klaipeda LNG Terminal and the supply agreement between Litgas and Statoil in its first written submission in the context of this claim. (See fn 10 of the preliminary ruling of 10 November 2016).

<sup>459</sup> The specific provisions of Hungary's Gas Act referred to by Russia in its first written submission are Sections 123(5) and 123(6) (Russia's first written submission para. 431). In our analysis below, we focus on these two sections.

and Statoil in the context of its claim against the unbundling measure under Article I:1 of the GATT 1994.<sup>460</sup> The European Union objects to Russia's reference to these circumstances and submits that Russia's claim regarding an alleged priority of purchasing natural gas imported through the Klaipeda LNG terminal in Lithuania is outside the Panel's terms of reference because this measure was not identified, nor the claim mentioned, in Russia's panel request.<sup>461</sup> According to the European Union, both Lithuania's grant of priority to natural gas supplied by Litgas through the Klaipeda LNG Terminal and the five-year deal between Statoil and Litgas "have nothing to do with the unbundling measure in Directive 2009/73/EC that Russia challenges"<sup>462</sup> and Russia's panel request does not mention these measures or claims.<sup>463</sup>

7.151. Russia indicated that it does not argue that Lithuania's grant of priority to natural gas supplied by Litgas through the Klaipeda LNG Terminal and the supply agreement between Litgas and Statoil constitute challenged measures.<sup>464</sup> Russia further clarified that it refers to these arrangements as examples of the alleged discrimination.<sup>465</sup> In light of Russia's clarifications, in the preliminary ruling of 10 November 2016, we indicated that we would not consider Lithuania's grant of priority to natural gas supplied by Litgas through the Klaipeda LNG Terminal and the supply agreement between Litgas and Statoil as challenged measures in respect of Russia's Claim 10.<sup>466</sup> However, we declined to rule at that stage of the proceedings on whether Russia's reference to Lithuania's grant of priority to natural gas supplied by Litgas through the Klaipeda LNG Terminal and the supply agreement between Litgas and Statoil in its first written submission constituted a separate claim that fell outside our terms of reference.

7.152. Turning to our consideration of this issue, we observe that, pursuant to Articles 7.1 and 6.2 of the DSU, we are bound by our terms of reference only with respect to our review of measures and claims, but not evidence. In order to fall within our terms of reference, measures and claims must be included in a panel request in accordance with Article 6.2 of the DSU.<sup>467</sup> However, Article 6.2 of the DSU does not require that evidence a complainant relies on in advancing its claims be included in a panel request.<sup>468</sup> Thus, while our terms of reference limit the scope of our review to those measures and claims that have been included in a panel request, they do not limit the scope of our review of evidence.

7.153. Having conducted a careful examination of Russia's reference to the Klaipeda LNG Terminal and the supply agreement between Litgas and Statoil in its first written submission, in light of Russia's further submissions to the Panel, we understand that Russia refers to these circumstances as evidence in support of its claim against the unbundling measure under Article I:1 of the GATT 1994 (Claim 10). Thus, we consider that, by referring to the Klaipeda LNG Terminal and the supply agreement between Litgas and Statoil, Russia is not presenting a different problem than that presented in its panel request, or asserting a separate claim, but rather refers to evidence in

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<sup>460</sup> Russia's first written submission, paras. 374–375.

<sup>461</sup> European Union's first written submission, paras 421–422; and comments on Russia's response to Panel question Nos. 5 and 17, para. 22.

<sup>462</sup> European Union's first written submission, para. 421.

<sup>463</sup> European Union's first written submission, paras. 421–422; and comments on Russia's response to Panel question Nos. 5 and 17, para. 22.

<sup>464</sup> Russia's response to Panel question No. 17, para. 106. See also Russia's comments on the European Union's comments on Russia's response to Panel question Nos. 5 and 17, para. 21.

<sup>465</sup> Russia's response to Panel question No. 17, para 106.

<sup>466</sup> The European Union objected to Russia's reference to these circumstances in the context of Russia's Claims 10 and 11. (European Union's comments on Russia's response to Panel question Nos. 5 and 17, para. 22). As we found Claim 11 to fall outside of our terms of reference, we did not consider it necessary to decide in the preliminary ruling of 10 November 2016 on the European Union's objections concerning Russia's reference to Lithuania's grant of priority to natural gas supplied by Litgas through the Klaipeda LNG Terminal and the supply agreement between Litgas and Statoil in its first written submission in the context of this claim. See, above paras. 7.138–7.139 and fn 458.

<sup>467</sup> As clarified by the Appellate Body, the measures and claims together constitute the "*matter* referred to the DSB". (Appellate Body Reports, *Guatemala – Cement I*, para. 72; *US – Carbon Steel*, para. 125; *Australia – Apples*, para. 416; *EC and certain member States – Large Civil Aircraft*, para. 639; and *China – Raw Materials*, para. 219) (emphasis original)

<sup>468</sup> We recall that the panel in *India – Agricultural Products* opined as follows:

Like previous panels and the Appellate Body, we are of the view that a measure to which a party refers solely for the purpose of making a comparison with a challenged measure in respect of a discrimination claim may serve as evidence in the argumentation in support of that claim, and does not in itself constitute a measure that must be identified in a panel request by virtue of Article 6.2 of the DSU. (Panel Report, *India – Agricultural Products*, para. 7.53).

support of its claim against the unbundling measure under Article I:1 of the GATT 1994 (Claim 10). In light of this, we need not make a ruling on whether Lithuania's grant of priority to natural gas supplied by Litgas through the Klaipeda LNG Terminal and the supply agreement between Litgas and Statoil fall within our terms of reference. We consider the relevance and weight of this evidence in the appropriate part of this Report.

#### **7.2.2.3.2 Additional conditions in respect of the third-country certification measure in the national implementing laws of Croatia, Hungary and Lithuania**

7.154. As noted above, in advancing its claim against the third-country certification measure in the national implementing laws of Croatia, Hungary and Lithuania under Article XVII of the GATS, Russia challenges certain additional conditions in Articles 20(5) and 29(4)(3) of Lithuania's Law on Natural Gas, and Sections 123(5) and (6) of Hungary's Gas Act.<sup>469</sup>

7.155. The European Union submits that the additional conditions in Sections 123(5) and (6) of Hungary's Gas Act and Articles 20(5) and 29(4)(3) of Lithuania's Law on Natural Gas challenged by Russia are outside the Panel's terms of reference.<sup>470</sup> According to the European Union, Russia failed to identify, in its panel request, the challenged measures in respect of these provisions.<sup>471</sup> The European Union notes that the measures challenged pursuant to Russia's panel request consist of Croatia's, Hungary's and Lithuania's "versions" of the security of supply requirement of Article 11 of the Directive.<sup>472</sup> In the European Union's view, the mentioned provisions do not directly implement the security of supply requirement of Article 11 of the Directive, and therefore, cannot be considered to have been included in Russia's panel request.<sup>473</sup> In addition, the European Union argues that the "problem" referred to by Russia in relation to each of the mentioned provisions is not presented with sufficient clarity in the panel request.<sup>474</sup>

7.156. In response to the European Union's terms of reference objections, Russia submits that, by identifying the EU member State's "versions" of the third-country certification measure in the panel request, Russia has not limited the scope of its potential claims to only those provisions that correspond precisely to the terms of Article 11 of the Directive.<sup>475</sup> Russia therefore argues that Sections 123(5) and (6) of Hungary's Gas Act and Articles 20(5) and 29(4)(3) of Lithuania's Law on Natural Gas are within the Panel's terms of reference.<sup>476</sup>

7.157. We note that the European Union's terms of reference objections with respect to Russia's challenge against Sections 123(5) and (6) of Hungary's Gas Act and Articles 20(5) and 29(4)(3) of Lithuania's Law on Natural Gas are based on the alleged failure of Russia to identify these provisions and to provide a brief summary of the legal basis of the complaint in its panel request. The European Union thus argues that Russia's panel request fails to comply with the third and fourth requirements of Article 6.2 of the DSU.

7.158. We note that the relevant part of Russia's panel request provides as follows:

Next, the Directive requires that TSOs in each Member State be certified as complying with the relevant unbundling requirements. However, when certification is requested by a transmission system owner or TSO controlled by a person or persons from a third-country, the Directive requires that the request be refused unless it is demonstrated that certification "will not put at risk the security of supply" of the

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<sup>469</sup> Russia's first written submission, paras. 430–441 and 446.

<sup>470</sup> European Union's first written submission, paras. 546–551 and 553–556; and comments on Russia's response to Panel question Nos. 5 and 17, paras. 34, 40 and 45.

<sup>471</sup> European Union's comments on Russia's response to Panel question Nos. 5 and 17, paras. 29–30, 36–38 and 41–43.

<sup>472</sup> European Union's comments on Russia's response to Panel question Nos. 5 and 17, paras. 29–30, 36–38 and 41–43.

<sup>473</sup> European Union's comments on Russia's response to Panel question Nos. 5 and 17, paras. 29–30, 36–38 and 41–43.

<sup>474</sup> European Union's comments on Russia's response to Panel question Nos. 5 and 17, paras. 31–33, 39 and 44.

<sup>475</sup> Russia's comments on the European Union's comments on Russia's response to Panel question Nos. 5 and 17, paras. 34, 40 and 44.

<sup>476</sup> Russia's comments on the European Union's comments on Russia's response to Panel question Nos. 5 and 17, paras. 35, 40 and 45.

Member State and the EU.<sup>477</sup> No similar requirement applies to certification requests by domestic persons. Croatia, Hungary and Lithuania have implemented versions of this "third-country certification measure" in their respective legislation. The Russian Federation considers these measures to be inconsistent, *de jure*, with the obligations of Croatia, Hungary and Lithuania under GATS Article XVII to accord services and service suppliers of any other Member treatment no less favorable than these three Members' like services and service suppliers.<sup>478</sup> (emphasis added)

7.159. We consider it appropriate to commence our examination of the European Union's objections by first addressing whether Russia's panel request complies with the fourth requirement of Article 6.2 of the DSU before proceeding to examine its compliance with the third requirement of Article 6.2 of the DSU.

7.160. Based on our scrutiny of Russia's panel request, we find that Russia complies with the fourth requirement of Article 6.2 of the DSU. In our view, by explaining that the "versions" of the third-country certification measure implemented by Croatia, Hungary and Lithuania are inconsistent with Article XVII of the GATS because they require the security of supply assessment only in case of certification requests by third-country persons, and not domestic persons, Russia has provided a brief summary of the legal basis of the complaint sufficient to present the problem clearly in accordance with Article 6.2 of the DSU. Russia's arguments with respect to Sections 123(5) and (6) of Hungary's Gas Act and Articles 20(5) and 29(4)(3) of Lithuania's Law on Natural Gas in its first written submission present the same problem.<sup>479</sup> Therefore, in our analysis below, we focus only on Russia's compliance with the third requirement of Article 6.2 of the DSU regarding the identification of Sections 123(5) and (6) of Hungary's Gas Act and Articles 20(5) and 29(4)(3) of Lithuania's Law on Natural Gas in its panel request.

7.161. We observe that the quoted paragraph of Russia's panel request does not explicitly mention Sections 123(5) and (6) of Hungary's Gas Act and Articles 20(5) and 29(4)(3) of Lithuania's Law on Natural Gas. However, this paragraph indicates that Russia brings a challenge against the "versions of this 'third-country certification measure'" implemented in the laws of Croatia, Hungary and Lithuania. Thus, in considering whether the mentioned provisions of Hungary's Gas Act and Lithuania's Law on Natural Gas are identified in Russia's panel request in accordance with the third requirement of Article 6.2 of the DSU, we need to examine two issues. First, we need to determine whether Russia's reference in its panel request to the "versions of this 'third-country certification measure'" implemented in the laws of Croatia, Hungary and Lithuania satisfies the third requirement of Article 6.2 of the DSU. Second, in case we answer the first question in the affirmative, we will need to determine whether Russia's reference to the "versions of this 'third-country certification measure'" covers Sections 123(5) and 123(6) of Hungary's Gas Act and Articles 20(5) and 29(4)(3) of Lithuania's Law on Natural Gas.

7.162. Turning to the first question, we note that the second sentence of the paragraph quoted above provides a reference to Article 11 of the Directive, which we understand to indicate that "this third-country certification measure" means the third-country certification measure found in Article 11 of the Directive.<sup>480</sup> Therefore, the implemented "versions" of the third-country certification measure referred to in Russia's panel request are those that implement the third-country certification required by Article 11 of the Directive. This sentence also describes the third-country certification measure of Article 11 of the Directive as a measure requiring that a certification request by a transmission system owner or TSO controlled by a person or persons from a third country be refused, unless it is demonstrated that certification "will not put at risk the security of supply"<sup>481</sup> of the EU member State and the European Union. From this description, which broadly corresponds to the text of Article 11 of the Directive, we further infer that the

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<sup>477</sup> (footnote original) Directive, Article 11.

<sup>478</sup> Russia's panel request, p. 3.

<sup>479</sup> Russia's first written submission, paras. 430–441 and 446.

<sup>480</sup> Russia's panel request, p. 3 and fn 11. See also, above para. 7.158 and fn 478.

<sup>481</sup> We note that both parties use the terms "security of energy supply", "security of supply", and "SoS" interchangeably. (See, e.g., Russia's first written submission, paras. 63, 69, 454, 459, 510 and 512; and second written submission, paras. 302, 303 and 347; and European Union's first written submission, paras. 177, 468, 471 and 480; and second written submission, paras. 36, 192, 193 and 301). We further note that Article 11(3)(b) of the Directive uses the term "security of energy supply" and we proceed on the understanding that all of the terms used by the parties refer to "security of energy supply".

"versions" of the third-country certification measure implemented in the national laws of Croatia, Hungary and Lithuania are those that include the same requirement.

7.163. We recall that the Directive requires EU member States to implement its particular provisions in national laws.<sup>482</sup> As we have determined above, Russia's panel request refers to Article 11 of the Directive and explicitly mentions the requirement of the security of energy supply assessment stipulated therein. Russia then refers to the "versions of this 'third-country certification measure'" implemented in the laws of Croatia, Hungary and Lithuania. Thus, given that Russia has referred to Article 11 of the Directive, and moreover, explicitly mentioned the requirement of the security of energy supply assessment prescribed by Article 11, we consider that Russia's reference to the "versions of this 'third-country certification measure'" implemented in the laws of Croatia, Hungary and Lithuania in its panel request is sufficiently specific to identify the challenged measure in accordance with Article 6.2 of the DSU.

7.164. Having determined that the "versions" of the third-country measure implemented in the laws of Croatia, Hungary and Lithuania constitute a specific measure identified by Russia in its panel request, in accordance with Article 6.2 of the DSU, we now proceed to examine whether Sections 123(5) and 123(6) of Hungary's Gas Act and Articles 20(5) and 29(4)(3) of Lithuania's Law on Natural Gas fall within the scope of such "versions". In our view, to be covered by the reference to the "versions of this 'third-country certification measure'" in Russia's panel request, the provisions of the national laws of Croatia, Hungary and Lithuania need not reproduce the text of Article 11 of the Directive verbatim. However, our analysis above requires us to ensure that such provisions, at a minimum, possess the following two characteristics stemming from Article 11 of the Directive: (i) they must concern third-country TSO certification; and (ii) they must include the requirement to conduct an assessment of the security of energy supply. Thus, in the subsections below, we examine separately whether, on the basis of these two characteristics, Sections 123(5) and (6) of Hungary's Gas Act and Articles 20(5) and 29(4)(3) of Lithuania's Law on Natural Gas constitute implemented "versions" of the third-country certification measure in Hungary and Lithuania, respectively.

#### **7.2.2.3.2.1 Sections 123(5) and 123(6) of Hungary's Gas Act**

7.165. We recall that Russia challenges Sections 123(5) and 123(6) of Hungary's Gas Act as providing an additional condition that must be satisfied by a third-country applicant for TSO certification, aside from satisfying the conditions stipulated in Section 128/A of Hungary's Gas Act.<sup>483</sup>

7.166. Section 128/A is located in sub-chapter "Certification Procedure" within Chapter XVI of Hungary's Gas Act entitled "The Office" and governs specifically third-country TSO certification.<sup>484</sup> There is no disagreement between the parties that Section 128/A of Hungary's Gas Act constitutes a "version" of the third-country certification measure implemented in Hungary.<sup>485</sup>

7.167. In contrast, Sections 123(5) and 123(6) are contained in Chapter XIV of Hungary's Gas Act entitled "Common Provisions Relating to Corporate Events".<sup>486</sup> As noted above, the European Union argues that these Sections do not implement the third-country certification measure in Hungary and therefore fall outside our terms of reference.<sup>487</sup> In determining whether Sections 123(5) and 123(6) of Hungary's Gas Act may be covered by the reference to the "version" of the third-country certification measure implemented in Hungary, we are guided by the analytical framework we have set out above in paragraph 7.164.

7.168. Therefore, below we examine whether these sections concern third-country TSO certification and include the requirement to conduct an assessment of the security of energy

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<sup>482</sup> See, above para. 2.3.

<sup>483</sup> Russia's first written submission, para. 431.

<sup>484</sup> Hungary's Gas Act, (Exhibits EU-155/RUS-47), Section 128/A(1).

<sup>485</sup> Russia's first written submission, para. 430; and European Union's first written submission, para. 474.

<sup>486</sup> Hungary's Gas Act, (Exhibits EU-155/RUS-47), Section 123.

<sup>487</sup> European Union's first written submission, paras. 546-551; and comments on Russia's response to Panel question Nos. 5 and 17, para. 45.



supply. We commence our examination by scrutinizing the text of Sections 123(5) and 123(6) of Hungary's Gas Act.

7.169. Sections 123(5) and 123(6) of Hungary's Gas Act provide as follows:

(5) The Office's resolution granting consent is required for the execution of any transaction that would allow a person or persons from a third country or third countries to acquire control over a transmission system operator or the controlling shareholder of a transmission system operator.

(6) The Office may refuse to grant approval or render its approval conditional for the transactions referred to in Subsections (2) and (5) above and in Subsection (1) of Section 122, if they are deemed to pose any potential threat to the *security of natural gas supply*, to public safety, to the enforcement of compliance with energy policy objectives, to the discharge of activities subject to authorization under this Act, or the regulations for determining the price of transmission, storage and distribution services, and universal services, and the regulations for determining the quality of such services, furthermore, if the execution of such transactions would infringe upon the pre-emption right notified to the Office according to Subsection (8).<sup>488</sup>

7.170. On the basis of the text of Sections 123(5) and 123(6), we note that Section 123(6) allows the "Office"<sup>489</sup> to refuse to grant approval or render its approval conditional for the transactions referred to in Section 123(5) on the ground that such transactions "are deemed to pose any potential threat" to "*the security of natural gas supply*". Section 123(6) thus requires the Office to conduct an assessment of the security of energy supply before approving a transaction referred to in Section 123(5). In our view, this means that Section 123(6), read in conjunction with Section 123(5), possesses one of the two characteristics necessary for them to constitute an implemented "version" of the third-country certification measure in Hungary.

7.171. The remaining part of our analysis focuses on whether Sections 123(5) and 123(6) concern third-country TSO certification and thus possess the other characteristic necessary for them to be considered an implemented "version" of the third-country certification measure in the Directive by Hungary. In this regard, we note that the third-country certification measure in the Directive sets out the grounds for the initiation of third-country certification in Articles 11(1) and 11(2), and its procedure in Articles 11(3) through 11(8).

7.172. Pursuant to Articles 11(1) through 11(2) of the Directive, the third-country TSO certification procedure must be initiated in two situations: (i) certification is requested by a transmission system owner or a TSO which is controlled by a person or persons from a third country or third countries; (ii) the regulatory authority has acquired knowledge of any circumstances that would result in a person or persons from a third country or third countries acquiring control of the transmission system or the TSO. The certification procedure, pursuant to Articles 11(3) through 11(8) of the Directive, involves *inter alia* a consideration by the relevant NRA, and then by the Commission, of whether the certification will not put at risk the security of energy supply, and issuing the decision by the NRA and the opinion of the Commission within the set deadlines.

7.173. We note that transactions described in Section 123(5) of Hungary's Gas Act, and which must be approved under Section 123(6), are those that would allow a person or persons from a third country or third countries to *acquire control* over a TSO or the controlling shareholder of a TSO. Such transactions will be covered by Article 11(2) of the Directive as the "circumstances" that would result in a person or persons from a third country or third countries *acquiring control* of a transmission system or a TSO. As the circumstances referred to in Article 11(2) of the Directive require third-country TSO certification<sup>490</sup>, it may be inferred that, by setting out transactions that fall within such "circumstances", Section 123(5) of Hungary's Gas Act includes one of the grounds for the initiation of third-country TSO certification procedure.

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<sup>488</sup> Hungary's Gas Act, (Exhibits EU-155/RUS-47), Sections 123(5) and 123(6). (emphasis added; footnotes omitted)

<sup>489</sup> The "Office" refers to Hungarian Energy and Public Utilities Office, which is Hungary's NRA for the purposes of third-country TSO certification (Hungary's Gas Act, (Exhibits EU-155/RUS-47), Section 3(5)).

<sup>490</sup> European Union's response to Panel question No. 146, para. 2.

7.174. However, Sections 123(5) and 123(6) of Hungary's Gas Act do not contain a textual reference to "certification" and refer instead to "approval". Neither party has pointed us to any provision in Hungary's Gas Act specifying the nature of this approval procedure.

7.175. The European Union argues that the approval procedure under Sections 123(5) and 123(6) of Hungary's Gas Act is separate and independent from the certification procedure prescribed by Article 11 of the Directive and implemented in Section 128/A of Hungary's Gas Act. The European Union submits that approval under Section 123 is a legal pre-condition for registering with the competent commercial court the transactions described in Sections 123(2) and 123(5), whereas certification under Article 128/A is a procedure necessary to enable the controlled entity to operate as a TSO in the gas transmission market.<sup>491</sup> The European Union points to different consequences of the absence of approval under Section 123 and certification under Section 128/A: in the absence of the former, the transactions concerned can have no legal effect under Hungarian law; in the absence of the latter, the controlled entity will not be able to operate as a TSO.<sup>492</sup>

7.176. We observe, however, that the European Union has provided no evidence to substantiate its arguments regarding the alleged differences between the approval procedure under Sections 123(5) and 123(6) of Hungary's Gas Act, on the one hand, and the certification procedure under Section 128/A of Hungary's Gas Act, on the other. The European Union has cited no provision in Hungary's Gas Act prohibiting the Office from relying on the third-country TSO certification procedure of Article 11 of the Directive, and implemented in Section 128/A of Hungary's Gas Act, when granting its approval for transactions referred to in Section 123(5).

7.177. In fact, by subsequently stating that Section 123(5) of Hungary's Gas Act "complies with the responsibilities of the Regulatory Authority deriving from para (1) and (2) of Article 11 of Directive 2009/73/EC", the European Union appears to acknowledge an interlinkage between the third-country TSO certification procedure and the approval of transactions under Sections 123(5) and 123(6).<sup>493</sup> Thus, we are not persuaded by the European Union's arguments that the approval procedure under Sections 123(5) and 123(6) is separate and independent from the third-country TSO certification procedure under Section 128/A.<sup>494</sup>

7.178. Our analysis above shows that there are two important features common to the approval procedure under Sections 123(5) and 123(6) and certification procedure under Section 128/A. These features include: (a) substantially the same grounds to commence both procedures – transactions granting control to persons from third countries over a TSO; and (b) the requirement to conduct a security of energy supply assessment. Given these similarities, we find it plausible that, when granting approval under Sections 123(5) and 123(6), the Office may consider the same factors that it reviews in the context of third-country TSO certification under Section 128/A. The European Union's statement that Section 123(5) of Hungary's Gas Act complies with the responsibilities of the Office deriving from Article 11(1) and 11(2) of the Directive is a further confirmation that the third-country TSO certification procedure is directly relevant for the procedure conducted by the Office under Sections 123(5) and 123(6).

7.179. In light of the above, we consider that the approval of transactions under Sections 123(5) and 123(6) of Hungary's Gas Act is sufficiently closely related to the third-country TSO certification procedure such that Sections 123(5) and 123(6) can be found to implement the third-country certification measure of Article 11 of the Directive. Having previously concluded that Section 123(6), read in conjunction with Section 123(5), contains a requirement to conduct a security of energy supply assessment, we therefore find that Sections 123(5) and 123(6) of Hungary's Gas Act constitute an implemented "version" of the third-country certification measure in Hungary identified in Russia's panel request.

#### **7.2.2.3.2.2 Article 20(5) of Lithuania's Law on Natural Gas**

7.180. We observe that Article 20 of Lithuania's Law on Natural Gas is entitled "Licences and Certificates in the Natural Gas Sector".<sup>495</sup> Article 20(5) of Lithuania's Law on Natural Gas requires

<sup>491</sup> European Union's response to Panel question No. 150, paras. 13-14.

<sup>492</sup> European Union's response to Panel question No. 150, paras. 13-14.

<sup>493</sup> European Union's comments on Russia's response to Panel question No. 169(c), para. 43.

<sup>494</sup> European Union's response to Panel question No. 150, para. 15.

<sup>495</sup> Lithuania's Law on Natural Gas, (Exhibit RUS-136rev), Article 20.

that licenses for transmission, distribution, storage and liquefaction be issued to a legal entity established in the Republic of Lithuania or a unit of a legal entity or other organization of another Member State established in the Republic of Lithuania.<sup>496</sup> As is clear from its text, Article 20(5) does not possess either characteristic necessary for it to be considered a "version" of the third-country certification measure implemented in Lithuania: (i) it does not concern third-country certification required by Article 11 of the Directive; and (ii) it does not include the requirement to conduct a security of energy supply assessment. Therefore, we consider that Article 20(5) of Lithuania's Law on Natural Gas does not constitute Lithuania's implemented "version" of the third-country certification measure identified in Russia's panel request.

### 7.2.2.3.2.3 Article 29(4)(3) of Lithuania's Law on Natural Gas

7.181. Article 29(4)(3) of Lithuania's Law on Natural Gas provides that the NRA of Lithuania shall designate a third-country TSO provided that it demonstrates that legitimate public security interests are protected.<sup>497</sup> The European Union maintains that Article 29(4)(3) of Lithuania's Law on Natural Gas provides a requirement different from Lithuania's "version" of the third-country certification measure, including the security of energy supply requirement, identified in Russia's panel request.<sup>498</sup>

7.182. Russia, on the other hand, argues that its panel request does not limit its claim to only those provisions of Lithuania's law that correspond precisely to the terms of Article 11 regarding "security of supply", directing it instead against Lithuania's "version" of the third-country certification measure.<sup>499</sup> Russia thus submits that Article 29(4)(3) is part of Lithuania's "version" of the third-country certification measure that the European Union applies only to third-country applicants.<sup>500</sup>

7.183. In examining whether Article 29(4)(3) of Lithuania's Law on Natural Gas is an implemented "version" of the third-country certification measure, we note that it is one of the three conditions a third-country applicant must satisfy in order to be certified as a TSO in Lithuania. All three conditions are provided in Article 29(4) of Lithuania's Law on Natural Gas (entitled "Designation of a Transmission System Operator in Relation to Third Countries") as follows:

The Commission shall designate an operator provided that it demonstrates that:

- 1) it complies with the requirements of Chapter Four of this Law;
- 2) such designation will not put at risk energy supply and the security of such supply of the Republic of Lithuania, another Member State or the European Union. ...

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<sup>496</sup> The relevant parts of Article 20 of Lithuania's Law on Natural Gas read as follows:

Article 20. Licences and Certificates in the Natural Gas Sector

1. The following are licensed activities in the natural gas sector:

- 1) transmission;
- 2) distribution;
- 3) storage;
- 4) liquefaction;
- 5) supply;
- 6) activities of a market operator.

...

5. Licences for transmission, distribution, storage and liquefaction shall be issued to a legal entity established in the Republic of Lithuania or a unit of a legal entity or other organisation of another Member State established in the Republic of Lithuania. Licences shall be issued to persons who are equipped with adequate technological, financial and managerial capacities which enable the proper fulfilment of the conditions of licensed activities. Technological, financial and managerial capacities of persons and the procedure for their evaluation shall be established by the Commission taking into account the following criteria:

...

(Lithuania's Law on Natural Gas, (Exhibit RUS-136rev), Article 20).

<sup>497</sup> Lithuania's Law on Natural Gas, (Exhibit Rus-136rev), Article 29(4)(3).

<sup>498</sup> European Union's comments on Russia's response to Panel question Nos. 5 and 17, paras. 37–38.

<sup>499</sup> Russia's response to Panel question No. 147, para. 21.

<sup>500</sup> Russia's response to Panel question No. 147, para. 21.

3) legitimate public security interests are protected.<sup>501</sup>

7.184. On the basis of the text of Article 29(4) of Lithuania's Law on Natural Gas, we consider that Article 29(4)(3) of Lithuania's Law on Natural Gas concerns third-country TSO certification and possesses the first characteristic necessary for it to be considered a "version" of the third-country certification measure implemented in Lithuania.

7.185. As for the second characteristic, we observe that the requirement contained in Article 29(4)(3) of Lithuania's Law on Natural Gas refers to "legitimate public security interests" rather than security of energy supply. Thus, on its face, Article 29(4)(3) contains no requirement to conduct an assessment of the security of such supply. We understand that, under EU law, the concept of "public security" has been interpreted as covering restrictions on the free movement of goods or capital necessary to ensure the security of supply.<sup>502</sup> This raises the question of whether the possibility of interpreting the concept of "public security" as including security of energy supply brings Article 29(4)(3) of Lithuania's Law on Natural Gas within the scope of the implemented "version" of the third-country certification measure referred to in Russia's panel request. In resolving this issue, we consider as follows.

7.186. Article 29(4)(2) of Lithuania's Law on Natural Gas, as quoted above, explicitly requires Lithuania's NRA<sup>503</sup> to conduct a security of energy supply assessment. This implies that, assuming that Article 29(4)(3) could also cover security of energy supply, Lithuania's NRA would be able to rely on either Article 29(4)(2) or 29(4)(3) of Lithuania's Law on Natural Gas in order to conduct a security of energy supply assessment. However, we note that, while Article 29(4)(2) explicitly requires such an assessment in every case of third-country TSO certification, Article 29(4)(3) would require such an assessment only in the event security of energy supply is found to fall within the scope of "legitimate public security interests". Thus, in our view, for a security of energy supply to be conducted under Article 29(4)(3) of Lithuania's Law on Natural Gas, an additional interpretative step, subsuming security of energy supply within "legitimate public security interests", would be necessary. We have not been presented with any evidence, and have no reason to believe, that Lithuania's NRA would rather rely on the public security concept of Article 29(4)(3), instead of Article 29(4)(2), to conduct a security of energy supply assessment in the course of third-country TSO certification.

7.187. Russia further submits that Article 11(9) of the Directive "help[s] demonstrate" that Article 29(4)(3) of Lithuania's Law on Natural Gas is within our terms of reference.<sup>504</sup> Article 11(9) of the Directive provides that "[n]othing in this Article shall affect the right of Member States to exercise, in compliance with Community law, national legal controls to protect legitimate public security interests". Thus, Article 11(9) acknowledges the right of EU member States to protect their "legitimate public security interests".

7.188. Russia argues, and we agree, that Article 29(4)(3) seeks to codify Lithuania's right "to exercise ... national legal controls to protect legitimate public security interests" expressly recognized by Article 11(9).<sup>505</sup> However, we do not consider that Russia's reference in its panel request to the implemented "versions" of the third-country certification measure encompasses the provisions of national laws implementing Article 11(9) of the Directive. As we have established on the basis of our analysis of Russia's panel request, in order to be considered an implemented "version" of the third-country certification measure, a provision of a national law that concerns third-country TSO certification must include the requirement to conduct a security of energy supply assessment.<sup>506</sup> Article 11(9) of the Directive does not contain such a requirement.

7.189. In our view, the analysis conducted above provides sufficient grounds for us to distinguish the concept of security of energy supply required by the third-country certification measure, as described in Russia's panel request, from the concept of "legitimate public security interests". Even

<sup>501</sup> Lithuania's Law on Natural Gas, (Exhibit RUS-136rev), Article 29(4).

<sup>502</sup> European Union's response to Panel question No. 102, para. 247.

<sup>503</sup> Lithuania's NRA is the National Control Commission for Prices and Energy, which is referred to as the "Commission" in Article 29(4) of Lithuania's Law on Natural Gas (Lithuania's Law on Natural Gas, (Exhibit RUS-136rev), Article 4(2)).

<sup>504</sup> Russia's response to Panel question No. 147, para. 14.

<sup>505</sup> Russia's response to Panel question No. 147, para. 16.

<sup>506</sup> See, above para. 7.164.

in situations where the concept of public security may be interpreted to include security of energy supply within its scope, the two concepts retain their distinct roles and separate legal existence in the context of third-country TSO certification. Therefore, we consider that Article 29(4)(3) of Lithuania's Law on Natural Gas does not constitute an implemented "version" of the third-country certification measure in Lithuania identified in Russia's panel request.

#### 7.2.2.3.2.4 Conclusion

7.190. Based on the foregoing, we find that Sections 123(5) and 123(6) of Hungary's Gas Act constitute a "version" of the third-country certification measure implemented in Hungary referred to in Russia's panel request and fall within our terms of reference. However, we conclude that Articles 20(5) and 29(4)(3) of Lithuania's Law on Natural Gas are not covered by the reference to a "version" of the third-country certification measure implemented in Lithuania in Russia's panel request. Consequently, we find that Articles 20(5) and 29(4)(3) of Lithuania's Law on Natural Gas fall outside our terms of reference.

#### 7.2.2.3.3 Commission certification opinions regarding TIGF and DESFA

7.191. In its first written submission, Russia refers to the Commission's certification opinions regarding Transport et Infrastructures Gaz France S.A. (TIGF) and Hellenic Gas Transmission System Operator S.A. (DESFA), in the context of its claim against the third-country certification measure under Article II:1 of the GATS (Claim 17).<sup>507</sup> The European Union objects to Russia's reference to these two opinions in its first written submission, arguing that the "problem" presented in Russia's panel request is different from the "problem" presented by Russia in its first written submission.<sup>508</sup> The European Union explains that the "problem" Russia has presented in its panel request concerns the comparison between the Commission's opinions where the security of energy supply assessment was conducted and other opinions where such an assessment was not conducted.<sup>509</sup> According to the European Union, by referring to the Commission's opinions regarding TIGF and DESFA in its first written submission, Russia presents a different "problem", which allegedly involves less stringent security of energy supply assessment.<sup>510</sup>

7.192. Russia subsequently indicated that it is not challenging the Commission's opinions regarding TIGF and DESFA as the measures at issue and relies on these opinions as evidence supporting its discrimination claim.<sup>511</sup> In light of Russia's clarifications, in the preliminary ruling of 10 November 2016, we indicated that we would not consider the Commission's certification opinions regarding TIGF and DESFA as challenged measures in respect of Claim 17. However, we declined to rule at that stage of the proceedings on whether Russia's reference to those two opinions in its first written submission constituted a separate claim that fell outside our terms of reference.

7.193. On the basis of a careful examination of Russia's reference to the Commission's certification opinions regarding TIGF and DESFA in its first written submission, in light of Russia's further submissions to the Panel, we understand that Russia refers to these opinions as evidence in support of its claim against the third-country certification measure under Article II:1 of the GATS (Claim 17). However, we observe that, in relying on these opinions, Russia develops Claim 17, in its written submissions, on the basis of a "problem" that differs from the "problem" presented in Russia's panel request.

7.194. The problem presented by Russia in its first written submission, when referring to the Commission's certification opinions regarding TIGF and DESFA, is that a Russian service supplier is treated less favourably than service suppliers of other third countries because the Commission allegedly conducted the security of supply assessment regarding Gaz-System on more stringent

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<sup>507</sup> Russia's first written submission, paras. 455-500.

<sup>508</sup> European Union's comments on Russia's response to Panel question Nos. 5 and 17, paras. 57-59.

<sup>509</sup> European Union's comments on Russia's response to Panel question Nos. 5 and 17, paras. 57-58.

See also European Union's first written submission, paras. 579-581.

<sup>510</sup> European Union's comments on Russia's response to Panel question Nos. 5 and 17, paras. 57-58.

See also European Union's first written submission, paras. 579-581.

<sup>511</sup> Russia's comments on the European Union's comments on Russia's response to Panel question Nos. 5 and 17, paras. 51, 52 and 55.

conditions than the security of supply assessment regarding TIGF and DESFA.<sup>512</sup> The relevant part of Russia's panel request, on the other hand, provides as follows:

Moreover, various Member States have issued certification decisions, most of which the European Commission ("Commission") has approved. Yet the Commission refused to approve Poland's certification of Gaz-System S.A. as an ISO for the Polish section of the Yamal-Europe Pipeline ("Yamal"). Having found that Yamal's owner, Europolgaz, is jointly controlled by the Polish gas incumbent and a Russian pipeline transport service supplier, the Commission required Poland to conduct a security of supply assessment. Previously, however, the Commission approved certification of at least two TSOs in Member States in which other third-country persons owned up to 100 percent interests, without any control or "security of supply" assessments having been conducted. *In so doing*, contrary to its obligations under GATS Article II:1, the EU accorded Russian services and service suppliers less favorable treatment than like services and service suppliers of *those third-countries*.<sup>513</sup> (emphasis added)

7.195. We note that the relevant part of Russia's panel request quoted above first states that the Commission "required" Poland to conduct a security of supply assessment in respect of Gaz-system S.A.<sup>514</sup> The panel request then continues by alleging that "[p]reviously, however, the Commission approved certification of at least two TSOs in Member States in which other third-country persons owned up to 100 percent interests, without any control or 'security of supply' assessments having been conducted".<sup>515</sup> It then concludes that, "[i]n so doing", the European Union accorded Russian services and service suppliers less favourable treatment than like services and service suppliers of those third countries, contrary to its obligations under Article II:1 of the GATS.<sup>516</sup>

7.196. Therefore, based on the text of Russia's panel request, we consider that the problem presented in Russia's panel request concerns the issue of whether or not to conduct a security of supply assessment, and more particularly a comparison of the Commission's certification opinion regarding Gaz-System, in which the Commission conducted a security of supply assessment, with the Commission's opinions regarding the certification of TSOs allegedly owned by third persons, in which the Commission did not conduct a security of supply assessment.

7.197. In contrast, the problem presented by Russia in its first written submission, when referring to the Commission's certification opinions regarding TIGF and DESFA, concerns the substance of the security of supply assessments conducted by the Commission, and more particularly a comparison of the security of supply assessment conducted by the Commission in its certification opinion regarding Gaz-System with the security of supply assessment conducted by the Commission in its opinions regarding the certification of TIGF and DESFA. Thus, we consider that, in relying on the Commission's certification opinions regarding TIGF and DESFA in its first written submission, Russia presents a different problem from the one presented in its panel request.

7.198. We recall that a claim developed in the course of panel proceedings must present the same legal "problem" as the one presented by the brief summary of the legal basis of the complaint in the panel request, in order for such a claim to fall within a panel's terms of reference, pursuant to Articles 7.1 and 6.2 of the DSU.<sup>517</sup> We have concluded above that, in relying on the Commission's certification opinions regarding TIGF and DESFA in its first written submission, Russia presents a different problem from the one presented in its panel request. On this basis, we find that the aspects of Russia's Claim 17 concerning the Commission's certification opinions regarding TIGF and DESFA, fall outside our terms of reference. The relevance and weight of these opinions as evidence in respect of Russia's Claim 17 developed within the limits of the problem presented in its panel request are discussed in the appropriate part of this Report.

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<sup>512</sup> Russia's first written submission, paras. 482-489 and 491-500.

<sup>513</sup> Russia's panel request, p. 3.

<sup>514</sup> Russia's panel request, p. 3.

<sup>515</sup> Russia's panel request, p. 3.

<sup>516</sup> Russia's panel request, p. 3.

<sup>517</sup> See, above paragraphs 7.96-7.98.

### 7.2.3 Other terms of reference issues

7.199. Three further terms of reference issues have been considered by the Panel outside of the two preliminary rulings. Two of these issues have been raised by the Panel on its own motion and one has been additionally raised by the European Union. Below, we first address the two issues that we have raised on our own initiative, and then the additional terms of reference objection submitted by the European Union.

#### 7.2.3.1 Terms of reference issues raised by the Panel on its own motion

7.200. As clarified by the Appellate Body, if necessary, panels must address issues that go to the root of their jurisdiction on their own motion.<sup>518</sup> The Appellate Body has further confirmed that the compliance of a panel request with Article 6.2 of the DSU is an issue that concerns a panel's jurisdiction.<sup>519</sup> Following this guidance by the Appellate Body, in the present proceedings, we have raised two jurisdictional issues on our own motion, which we address below.

##### 7.2.3.1.1 Russia's *de facto* claim against the public body measure in the national implementing law of Hungary

7.201. In its first and second written submissions, Russia claims that the public body measure implemented in Croatia, Hungary and Lithuania is inconsistent *de facto* with Article XVII of the GATS because the governments of Croatia, Hungary and Lithuania each own and control undertakings "supplying both transmission and supply services ... within their respective territories".<sup>520</sup> The relevant part of Russia's panel request provides as follows:

Moreover, the governments of Croatia and Lithuania both own and control the TSO and production or supply portions of the single VIU supplying pipeline transport services in their respective territories. Therefore, the Russian Federation considers that these measures are inconsistent, *de facto*, with the obligations of Croatia and Lithuania under GATS Article XVII.<sup>521</sup> (underlining added)

7.202. In light of Russia's omission of the word "Hungary" in the relevant part of its panel request quoted above, we invited the parties to provide their views as to whether the aspect of Russia's claim against the public body measure that concerns the ownership and control by Hungary's government of both transmission and supply undertakings in its territory (Russia's *de facto* claim concerning Hungary) is within the Panel's terms of reference.

7.203. The European Union submits that Russia did not identify any Hungarian measure to support its *de facto* claim and neither did Russia refer to an obligation by Hungary under the GATS for this claim.<sup>522</sup> Hence, in the European Union's view, Russia did not identify the specific measures at issue and also failed to provide "a brief summary of the legal basis of the complaint sufficient to present the problem clearly".<sup>523</sup> Therefore, the European Union argues that Russia's *de facto* claim concerning Hungary is outside the Panel's terms of reference.<sup>524</sup>

7.204. Russia argues that, at the time it submitted the panel request, Russia was unaware of any publicly available evidence indicating that the government of Hungary owned and controlled both the TSO and production or supply undertaking in Hungary.<sup>525</sup> Russia also points to the reference, in the relevant part of its panel request, to "any amendments or extensions, any replacement measures, any renewal measures, any other implementing measures or legal instruments, and other related measures of the foregoing".<sup>526</sup> Russia further emphasizes that it included in its panel request a *de facto* claim concerning the ownership and control of the entire transmission and

<sup>518</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.

<sup>519</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.11.

<sup>520</sup> Russia's first written submission, para. 285. See also Russia's first written submission, paras. 235 and 285–303; response to Panel question No. 5, para. 29; and second written submission, paras. 188–197.

<sup>521</sup> Russia's panel request, p. 2.

<sup>522</sup> European Union's response to Panel question No. 148, para. 11.

<sup>523</sup> European Union's response to Panel question No. 148, para. 11.

<sup>524</sup> European Union's response to Panel question No. 148, para. 11.

<sup>525</sup> Russia's response to Panel question No. 148, para. 29.

<sup>526</sup> Russia's response to Panel question No. 148, para. 30.

supply systems by the governments of Croatia and Lithuania within their respective territories.<sup>527</sup> Russia thus argues that, viewed in this context and in light of Russia's lack of information, its panel request provided the European Union with adequate notice of Russia's intention to pursue its *de facto* claim concerning Hungary.<sup>528</sup>

7.205. In considering whether Russia's *de facto* claim concerning Hungary falls within our terms of reference, we examine whether Russia has identified the measure challenged by this claim and provided a brief summary of the legal basis of the complaint in respect of this claim in its panel request, as required by Article 6.2 of the DSU.

7.206. We note that, in the relevant part of the panel request quoted above, Russia refers to "these measures", which in its view are inconsistent, *de facto*, with the obligations of Croatia and Lithuania under Article XVII of the GATS. We understand that "these measures" refer to the measures Russia has described in its panel request as follows:

The Directive also provides that, when the owner of the VIU is the Member State or another public body, two separate public bodies exercising control over the TSO and over an undertaking performing production or supply functions shall be deemed not to be the same person or persons. In reality, this measure permits a Member State government to own and control both the TSO and the production or supply portions of the VIU, whereas third-country service suppliers, including those of Russia, may not. *Croatia, Hungary and Lithuania have each implemented versions of this measure in their respective legislation.*<sup>529</sup> (footnote omitted; emphasis added)

7.207. Even though Russia's panel request does not explicitly mention Hungary in the context of its *de facto* claim, Russia has, in our view, implicitly identified the "version" of the public body measure implemented in Hungary by its reference to "these measures". Thus, we consider that Russia has identified in its panel request the specific measure at issue in respect of its *de facto* claim concerning Hungary in accordance with the third requirement of Article 6.2 of the DSU.<sup>530</sup> We now turn to an examination of whether Russia's panel request complies with the fourth requirement of Article 6.2 of the DSU in respect of this claim.

7.208. We recall that, under the fourth requirement of Article 6.2, a panel request must "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed"<sup>531</sup> and "explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question".<sup>532</sup> In setting out its *de facto* claim against the public body measure in the panel request (as quoted above), Russia explicitly mentions the obligations of Croatia and Lithuania under Article XVII of the GATS. Russia thus "plainly connects" the public body measure implemented in these member States with an alleged *de facto* breach of their obligations under Article XVII of the GATS.

7.209. Furthermore, by referring to the ownership and control by the governments of Croatia and Lithuania of the TSO and production or supply "portions" of the VIU in their respective territories, Russia has provided an explanation as to why the public body measure implemented in these member States is, in its view, inconsistent with their obligations under Article XVII of the GATS.

7.210. However, when setting out its *de facto* claim against the public body measure in the panel request, Russia refers neither to the obligations of Hungary under Article XVII of the GATS, nor to the ownership and control by the government of Hungary of the TSO and production or supply "portions" of the VIU in its territory. In our view, Russia thus fails to "plainly connect" the public

<sup>527</sup> Russia's response to Panel question No. 148, para. 30.

<sup>528</sup> Russia's response to Panel question No. 148, para. 31.

<sup>529</sup> Russia's panel request, p. 2.

<sup>530</sup> As discussed above in para. 7.163, in the context of the third-country certification measure in the national laws of Croatia, Hungary and Lithuania, Russia's identification of these measures by reference to the "versions" of the third-country certification measure implemented in these member States satisfies the third requirement of Article 6.2 of the DSU. We consider that, similarly, Russia's identification of the public body measure in the national laws of Croatia, Hungary and Lithuania by reference to the "versions" of the public body measure implemented in Croatia, Hungary and Lithuania in its panel request satisfies the third requirement of Article 6.2 of the DSU.

<sup>531</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.

<sup>532</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 130. (emphasis original)



body measure implemented in Hungary with its claim of *de facto* inconsistency with Article XVII of the GATS and to provide an explanation as to why this measure is *de facto* inconsistent with Article XVII of the GATS. Therefore, we consider that Russia's panel request does not comply with the fourth requirement of Article 6.2 of the DSU in respect of its *de facto* claim concerning Hungary.

7.211. Russia argues that, in deciding whether its *de facto* claim concerning Hungary falls within our terms of reference, we should take into account the fact that Russia was not aware of any publicly available evidence that the government of Hungary owned and controlled both the TSO and production or supply undertaking in Hungary. According to Russia, it was unaware of the Commission's opinion concerning certification of Magyar Gáz Tranzit Zrt. (MGT) as the TSO, issued on 17 February 2015, at the time of the submission of its panel request, on 11 May 2015.<sup>533</sup> Russia alleges that "[t]o the best of Russia's knowledge, the Commission's MGT certification opinion had not been made publicly available on the EU's website at the time Russia submitted its panel request in May 2015".<sup>534</sup>

7.212. We thus understand Russia's arguments as implying that, to the extent its panel request does not comply with Article 6.2 of the DSU in respect of its *de facto* claim concerning Hungary, it could be remedied by the fact that Russia was not aware that the government of Hungary owned and controlled both the TSO and production or supply "portions" of any part of the transmission system in Hungary.

7.213. We observe that, as confirmed by the Appellate Body, whether a measure can be identified in conformity with the requirements of Article 6.2 of the DSU may depend on the extent to which that measure is specified in the public domain.<sup>535</sup> We similarly consider that, a complainant's ability to "provide a brief summary of the legal basis of the complaint in order to present the problem clearly" might be affected by the availability of relevant information in the public domain. In our view, it may well be open to a complainant to argue, with due substantiation, that information pertinent to its claim was not publicly available and that, as a consequence, its ability to comply with the requirements of Article 6.2 of the DSU was affected.

7.214. We understand Russia to argue that, due to the absence of relevant information in the public domain, Russia could not have known that the government of Hungary owned and controlled both the TSO and production or supply undertaking in Hungary. We note, however, that Russia does not bring any evidence to substantiate its allegation that the Commission's MGT certification opinion was not publicly available before Russia's submission of its panel request. Furthermore, Russia has not provided any evidence demonstrating that there was no other reasonable opportunity for Russia to gain knowledge of the fact that Hungary's government owned and controlled both the TSO and production or supply undertaking in Hungary. Thus, we consider that Russia has not demonstrated that its ability to comply with the fourth requirement of Article 6.2 of the DSU in respect of its *de facto* claim concerning Hungary was affected by the alleged lack of information in the public domain that the government of Hungary owned and controlled both the TSO and production or supply "portions" of any part of the transmission system in Hungary.

7.215. In view of the foregoing, we find that the aspect of Russia's claim against the public body measure that concerns the ownership and control by Hungary's government of both transmission and supply undertakings in its territory falls outside our terms of reference.

#### **7.2.3.1.2 Section 123(4) of Hungary's Gas Act in respect of the unbundling measure in the national implementing law of Hungary**

7.216. In advancing its claim against the unbundling measure under Article XVI:2(f) of the GATS in its first written submission, Russia refers to Section 123(4) of Hungary's Gas Act<sup>536</sup>, which provides as follows:

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<sup>533</sup> Russia's response to Panel question No. 148, paras. 29-30.

<sup>534</sup> Russia's response to Panel question No. 148, para. 30.

<sup>535</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 648.

<sup>536</sup> Russia's first written submission, para. 227. See also Russia's response to Panel question No. 169(a), paras. 78-80. Even though Russia's reference in its first written submission concerns Section 194(4) of the Act

Any company that is involved in the extraction of natural gas, the production of electricity, or in the supply of natural gas or electricity, and any shareholders exercising control in such companies may not acquire any share - directly or indirectly - in a transmission system operator where such share constitutes entitlement to exercise control. The acquisition of shares in a transmission system operator, or in a controlling shareholder thereof, where such share constitutes entitlement to exercise control is subject to the Office's prior approval as well. This provision shall have no bearing on the provision contained in Subsection (1) of Section 121/B.<sup>537</sup>

7.217. In its panel request, Russia has identified the unbundling measure implemented in the national laws of Croatia, Hungary and Lithuania as a specific measure at issue challenged under Article XVI:2 of the GATS.<sup>538</sup> The provisions of Hungary's Gas Act implementing the unbundling rules of the Directive are located in Chapter XIII of Hungary's Gas Act entitled "Separation of Activities".<sup>539</sup> However, like Sections 123(5) and 123(6) examined above, Section 123(4) is contained in Chapter XIV of Hungary's Gas Act entitled "Common Provisions Relating to Corporate Events".<sup>540</sup> This raises the question of whether Section 123(4) of Hungary's Gas Act falls within our terms of reference as part of the unbundling measure implemented in the national law of Hungary identified in Russia's panel request.

7.218. We note that, according to the last sentence of Section 123(4), this provision shall have no bearing on the provision contained in Section 121/B(1) of Hungary's Gas Act. The latter provision prescribes as follows:

Subsidiaries of vertically integrated natural gas companies performing functions of production or supply of natural gas shall not have any direct or indirect shareholding in the transmission system operator. Transmission system operators shall not have any direct or indirect shareholding in the subsidiaries of vertically integrated natural gas companies performing functions of production or supply of natural gas.<sup>541</sup>

7.219. We understand that Section 121/B(1) of Hungary's Gas Act resembles Article 18(3) of the Directive that concerns the ITO model. In contrast to Section 123(4) of Hungary's Gas Act,

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amending Hungary's Gas Act, Russia has subsequently stated that this reference concerns Section 123(4) of Hungary's Gas Act (Russia's response to Panel question No. 169, paras. 78-80 and 83).

<sup>537</sup> Hungary's Gas Act, (Exhibits EU-155/RUS-47), Section 123(4).

<sup>538</sup> The relevant part of Russia's panel request provides as follows:

The Directive requires "vertically integrated natural gas undertakings" ("VIUs") to undergo "unbundling" and to separate their transmission system assets, or the transmission system operator ("TSO"), from assets relating to production and supply. The Directive grants Member States discretion to select from among three alternative unbundling models: ownership unbundling, independent system operator ("ISO"), and independent transmission operator ("ITO"). Ownership unbundling is the most restrictive model. It precludes the same person or persons from exercising control over an undertaking performing any of the functions of production or supply and exercising control or any right over the TSO or the transmission system, and *vice versa*. Among the rights that ownership unbundling precludes is the holding of a majority share. The ISO model, in contrast, permits the VIU to retain full ownership of the TSO upon designation of an outside entity, the ISO, to operate the TSO. The ITO model is even less restrictive and permits VIUs to maintain control and operate the TSO through a separate subsidiary.

The implementing laws of Croatia and Hungary permit all three unbundling models, whereas Lithuania permits only the ownership unbundling model. In the pipeline transport services sector, as set out in their GATS Schedules of Specific Commitments on Services (the "Schedules"), Croatia, Hungary and Lithuania undertook commitments under Articles XVI and XVII of the GATS with respect to pipeline transport services. In light of these commitments, the Russian Federation considers that the unbundling measures, as implemented in the laws of Croatia, Hungary and Lithuania, are inconsistent with these Members' market access obligations under GATS Article XVI:1 to accord services and service suppliers of any other Member treatment no less favorable than that provided for in their Schedules, and that all three Members are each maintaining or adopting measures set out in GATS Article XVI:2. (Russia's panel request, p. 2) (footnotes omitted)

<sup>539</sup> Hungary's Gas Act, (Exhibits EU-155/RUS-47), Sections 121/B-121/I.

<sup>540</sup> Hungary's Gas Act, (Exhibits EU-155/RUS-47).

<sup>541</sup> Hungary's Gas Act, (Exhibits EU-155/RUS-47), Section 121/B(1).

Section 121/B(1) prohibits any direct or indirect shareholding in a TSO specifically by the subsidiaries of vertically integrated gas companies performing functions of production or supply of natural gas, and not by any company, or its controlling shareholders, involved in extraction or supply of natural gas. Moreover, the prohibition under Section 121/B(1) concerns any direct or indirect shareholding, while the prohibition under Section 123(4) covers only shareholding that grants control.

7.220. In response to a question by the Panel, the parties have confirmed that Section 123(4) of Hungary's Gas Act is not only relevant for the ITO model, but is rather a general rule that applies to all unbundling models.<sup>542</sup> We further note the European Union's position that Section 123(4) of Hungary's Gas Act is "fully in line with the Articles of Directive 2009/73/EC and as such correspond[s] to the principles of unbundling rules".<sup>543</sup>

7.221. Taking into account the clarifications of the parties, we consider that Section 123(4) of Hungary's Gas Act constitutes a provision implementing the unbundling measure in Hungary, and therefore, falls within our terms of reference.

### **7.2.3.2 Article 20(5) of Lithuania's Law on Natural Gas in respect of the unbundling measure in the national implementing law of Lithuania**

7.222. In advancing its claim against the unbundling measure in the national implementing law of Lithuania under Article XVI:2(a) of the GATS, Russia refers to Article 20(5) of Lithuania's Law on Natural Gas.<sup>544</sup> In response to Russia's references to this provision, the European Union submits that "Russia's claim regarding Article 20(5) of Lithuania's Law on Natural Gas is outside the Panel's terms of reference, also when it concerns its suggestion that it would violate Article XVI:2(a) of the GATS".<sup>545</sup> Russia has subsequently indicated that it is not challenging Article 20(5) of Lithuania's Law on Natural Gas as a measure at issue in respect of its claim against the unbundling measure under Article XVI:2(a) of the GATS.<sup>546</sup>

7.223. The European Union, in its turn, has clarified that it would pursue a terms of reference objection only if Russia were challenging Article 20(5) of Lithuania's Law on Natural Gas as a separate measure under Article XVI:2(a) of the GATS.<sup>547</sup>

7.224. In light of these clarifications by the parties, we understand that, as Russia is not challenging Article 20(5) of Lithuania's Law on Natural Gas as a separate measure under Article XVI:2(a) of the GATS, the European Union does not pursue its terms of reference objection. In view of this, we do not consider it necessary to rule on whether Article 20(5) of Lithuania's Law on Natural Gas falls within our terms of reference for the purposes of this claim.

## **7.3 Legal standards**

7.225. As indicated above in paragraph 7.5, below we set out the legal standards pursuant to the relevant legal provisions of the GATS and the GATT 1994 cited by the parties.

### **7.3.1 GATS**

#### **7.3.1.1 Article II:1 of the GATS**

7.226. Article II:1 of the GATS provides as follows:

With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other

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<sup>542</sup> Russia's response to Panel question No. 169(c), para. 89; and European Union's comments on Russia's response to Panel question No. 169(c), para. 42.

<sup>543</sup> European Union's comments on Russia's response to Panel question No. 169, para. 38.

<sup>544</sup> Russia's first written submission, paras. 218 and 219; and response to Panel question No. 3, para. 15(a).

<sup>545</sup> European Union's second written submission, para. 24. (footnotes omitted)

<sup>546</sup> Russia's response to Panel question No. 167(b), para. 77.

<sup>547</sup> European Union's response to Panel question No. 167(b), paras. 46-50.

Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

7.227. In order to establish that a challenged measure is inconsistent with this provision, the complaining Member must demonstrate the following elements: (i) the measure is covered by the GATS; (ii) the relevant services and service suppliers are "like"; and (iii) the measure fails to accord "immediately and unconditionally" to services and service suppliers of any other Member "treatment no less favourable" than that the responding Member accords to like services and service suppliers of any other country.<sup>548</sup>

### 7.3.1.2 Article XIV(a) of the GATS

7.228. Article XIV of the GATS provides, in relevant part, as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

- (a) necessary to protect public morals or to maintain public order[.]<sup>5</sup>

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<sup>5</sup> The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

7.229. In order to justify a challenged measure under the general exception in Article XIV(a) of the GATS, the responding Member must demonstrate the following elements: (i) the measure is provisionally justified under paragraph (a) of Article XIV; and (ii) the measure satisfies the requirements of the *chapeau* of Article XIV.<sup>549</sup>

7.230. In order to provisionally justify a challenged measure under paragraph (a) of Article XIV of the GATS, the responding Member must show that this measure is: (i) "designed" to protect public morals or to maintain public order; and (ii) "necessary" to protect public morals or to maintain public order.<sup>550</sup>

7.231. In order to demonstrate that the challenged measure provisionally justified under paragraph (a) of Article XIV satisfies the requirements of the *chapeau* of Article XIV of the GATS, the responding Member must show that this measure is not "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services".<sup>551</sup>

### 7.3.1.3 Article XVI:2(a), (e) and (f) of the GATS

7.232. Article XVI:2 of the GATS provides, in relevant part, as follows:

2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

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<sup>548</sup> See Appellate Body Report, *Canada – Autos*, paras. 170-171. See also Panel Report, *EC – Bananas III (Ecuador)*, para. 7.381.

<sup>549</sup> Appellate Body Reports, *US – Gambling*, para. 292; and *Argentina – Financial Services*, paras. 6.161-6.162 and 6.241. See also Panel Report, *Argentina – Financial Services*, para. 7.586.

<sup>550</sup> Appellate Body Report, *US – Gambling*, para. 292. The Appellate Body has also articulated this legal standard for a provisional justification of a challenged measure under a similar general exception contained in Article XX(a) of the GATT 1994 (for measures "necessary to protect public morals") (Appellate Body Reports, *Colombia – Textiles*, para. 5.67; and *EC – Seal Products*, para. 5.169).

<sup>551</sup> Appellate Body Report, *US – Gambling*, para. 339.

- (a) 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;
- ...
- (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service;
- (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign share-holding or the total value of individual or aggregate foreign investment.

7.233. In order to establish that a challenged measure is inconsistent with subparagraphs (a), (e) or (f) of Article XVI:2 of the GATS, the complaining Member must demonstrate two elements: (i) the responding Member has undertaken market access commitments in its GATS Schedule with respect to the relevant sector(s) and mode(s) of supply; and (ii) the measure constitutes an impermissible limitation falling within subparagraph (a), (e) or (f) of Article XVI:2 of the GATS.<sup>552</sup>

#### 7.3.1.4 Article XVII of the GATS

7.234. Article XVII of the GATS provides as follows:

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.<sup>10</sup>
2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

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<sup>10</sup> Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent disadvantages which result from the foreign character of the relevant services or service suppliers.

7.235. In order to establish that a challenged measure is inconsistent with Article XVII of the GATS, the complaining Member must demonstrate the following three elements: (i) the responding Member has assumed national treatment commitments in the relevant sector(s) and mode(s) of supply in its GATS Schedule; (ii) the measure in question "affect[s] the supply of services" in the relevant sector(s) and mode(s); (iii) the relevant services and service suppliers are "like"; and (iv) the measure fails to accord to services and service suppliers of any other Member "treatment no less favourable" than that accorded by the responding Member to its own like services and service suppliers.<sup>553</sup>

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<sup>552</sup> Appellate Body Report, *US – Gambling*, para. 143. See also Panel Reports, *China – Publications and Audiovisual Products*, para. 7.1354; *China – Electronic Payment Services*, para. 7.511; and *Argentina – Financial Services*, para. 7.391.

<sup>553</sup> Panel Reports, *Argentina – Financial Services*, para. 7.448; *China – Electronic Payment Services*, para. 7.641; *China – Publications and Audiovisual Products*, para. 7.944; and *EC – Bananas III*, para. 7.314.

### 7.3.2 GATT 1994

#### 7.3.2.1 Article I:1 of the GATT 1994

7.236. Article I:1 of the GATT 1994 provides as follows:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,\* any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members.

7.237. In order to establish that a challenged measure is inconsistent with Article I:1 of the GATT 1994, the complaining Member must demonstrate the following elements: (i) the measure falls within the scope of application of Article I:1; (ii) the imported products at issue are "like" products; (iii) the measure confers an "advantage, favour, privilege, or immunity" on a product originating in the territory of any country; and (iv) the advantage so accorded is not extended "immediately" and "unconditionally" to like products originating in the territory of all Members.<sup>554</sup>

#### 7.3.2.2 Article III:4 of the GATT 1994

7.238. Article III:4 of the GATT 1994 provides as follows:

The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

7.239. In order to establish that a challenged measure is inconsistent with Article III:4 of the GATT 1994, the complaining Member must demonstrate the following elements: (i) the measure is a law, regulation, or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of the products at issue; (ii) the imported and domestic products are "like products"; and (iii) the treatment accorded to imported products is "less favourable" than that accorded to like domestic products.<sup>555</sup>

#### 7.3.2.3 Article X:3(a) of the GATT 1994

7.240. Article X of the GATT 1994, entitled "Publication and Administration of Trade Regulations", provides, in relevant parts, as follows:

1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. ...

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<sup>554</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.86.

<sup>555</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.99 (referring to Appellate Body Report, *Thailand – Cigarettes (Philippines)*), para. 127 (in turn referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 133)). See also Panel Reports, *EC – Seal Products*, para. 7.605.

...

3. (a) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

7.241. In order to establish that a challenged measure is inconsistent with Article X:3(a) of the GATT 1994, the complaining Member must demonstrate the following elements: (i) the measure is a law, regulation, judicial decision or administrative ruling of general application; (ii) the measure is of the kind described in Article X:1 of the GATT 1994; and (iii) the measure is not administered in a "uniform, impartial and reasonable manner".<sup>556</sup>

#### 7.3.2.4 Article XI:1 of the GATT 1994

7.242. Article XI:1 of the GATT 1994, entitled "General Elimination of Quantitative Restrictions", provides as follows:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any Member on the importation of any product of the territory of any other Member or on the exportation or sale for export of any product destined for the territory of any other Member.

7.243. Based on the text of Article XI:1 of the GATT 1994, in order to establish that a challenged measure is inconsistent with Article XI:1 of the GATT 1994, the complaining Member must demonstrate the following elements: (i) the measure falls within the scope of the phrase "quotas, import or export licences *or other measures*" (emphasis added); and (ii) the measure constitutes a prohibition or restriction on the importation or on the exportation or sale for export of any product.<sup>557</sup>

#### 7.3.2.5 Article XX(j) of the GATT 1994

7.244. Article XX of the GATT 1994 provides, in relevant part, that nothing in the GATT 1994 shall be construed to prevent the adoption or enforcement by any Member of measures:

[E]ssential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all Members are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist.

7.245. In order to justify a challenged measure under the general exception in Article XX(j) of the GATT 1994, the responding Member must demonstrate the following elements: (i) the measure is provisionally justified under paragraph (j) of Article XX; and (ii) the measure satisfies the requirements of the *chapeau* of Article XX.<sup>558</sup>

7.246. In order to provisionally justify a challenged measure under paragraph (j) of Article XX, the responding Member must establish the following elements: (i) the measure is "designed" to address "the acquisition or distribution of products in general or local short supply"; and (ii) the measure is "essential" to the acquisition or distribution of products in general or local short supply.<sup>559</sup>

7.247. Based on the text of Article XX(j), the provisional justification of a measure under paragraph (j) of Article XX also includes two additional elements: (i) that the measure must "be

<sup>556</sup> See Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.866.

<sup>557</sup> Appellate Body Reports, *Argentina – Import Measures*, paras. 5.217-5.218.

<sup>558</sup> Appellate Body Report, *India – Solar Cells*, paras. 5.56, 5.57 and 5.60 (referring to Appellate Body Reports, *US – Gasoline*, p. 22, DSR 1996:I, 3, at p. 20; *Dominican Republic – Import and Sale of Cigarettes*, para. 64; *US – Shrimp*, paras. 119-120; and *EC – Seal Products*, para. 5.169).

<sup>559</sup> Appellate Body Report, *India – Solar Cells*, paras. 5.57-5.60.

consistent with the principle that all Members are entitled to an equitable share of the international supply of the products concerned"; and (ii) that the measure inconsistent with the other provisions of the GATT 1994 must be "discontinued as soon as the conditions giving rise to [the measure] have ceased to exist".

7.248. In order to demonstrate that the challenged measure provisionally justified under paragraph (j) of Article XX satisfies the requirements of the *chapeau* of Article XX of the GATT 1994, the responding Member must show that the measure is not "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade".<sup>560</sup>

#### 7.4 General issues related to Russia's claims under the GATS

7.249. In this section, we shall start with an examination of the meaning and scope of the services at issue for Russia's claims under the GATS, "natural gas pipeline transport services" or "pipeline transport services", as defined by Russia in its panel request.<sup>561</sup>

7.250. We shall then turn to an examination of the Schedules of Croatia, Hungary and Lithuania, at stake in this dispute. It is well-established that, for purposes of claims under Articles XVI:2 and XVII of the GATS, a complaining party must demonstrate, as a first step, that the respondent has undertaken relevant specific commitments in its GATS Schedule.<sup>562</sup> Keeping in mind that, in this dispute, Russia has made claims under Articles XVI:2 and XVII of the GATS against the national implementing laws of Croatia, Hungary and Lithuania<sup>563</sup>, we need therefore to determine whether Russia has shown that those EU member States have undertaken relevant market access and national treatment commitments with respect to the services at issue.

##### 7.4.1 The services at issue

###### 7.4.1.1 Introduction

7.251. In its request for the establishment of a panel, Russia submits that "the TEP, like the EU's natural gas and broader energy policy overall, unjustifiably restricts imports of natural gas originating in Russia and discriminates against Russian natural gas pipeline transport services and service suppliers."<sup>564</sup> In a footnote attached to that sentence, Russia explains as follows:

"Natural gas pipeline transport services" (or "pipeline transport services") include, but are not necessarily limited to, the transmission (or transport) and supply of natural gas, including LNG, and the services related to the transmission and supply of natural gas, including LNG services.<sup>565</sup>

7.252. Russia states that "the services at issue in this dispute consist of 'natural gas pipeline transport services', or simply 'pipeline transport services'".<sup>566</sup> In Russia's view, the services at issue should be construed "broadly" to include the transmission and supply of natural gas, including LNG, and all services related to or associated with the transmission and supply of natural gas, including LNG services.<sup>567</sup> Russia submits that "[b]roadly defining the covered services as including all pipeline transport services, including LNG services, is also consistent with the 'Subject

<sup>560</sup> See Appellate Body Reports, *EC – Seal Products*, para. 5.296. See also Panel Report, *India – Solar Cells*, para. 5.296.

<sup>561</sup> Russia's panel request, p. 1.

<sup>562</sup> See paras. 7.233 and 7.235 above.

<sup>563</sup> In this dispute, Russia claims that the unbundling measure in the national implementing laws of Croatia, Hungary and Lithuania is inconsistent with Article XVI:2(e) and (f) of the GATS, that the unbundling measure in the national implementing laws of Croatia and Lithuania is inconsistent with Article XVI:2(a) of the GATS, and that the public body measure and the third-country certification measure in those national implementing laws are inconsistent with Article XVII of the GATS. See sections 7.5.2, 7.6 and 7.10.2 below.

<sup>564</sup> Russia's panel request, p. 1.

<sup>565</sup> Russia's panel request, fn 3.

<sup>566</sup> Russia's first written submission, para. 93.

<sup>567</sup> Russia's first written submission, para. 93; and Russia's second written submission, para. 75.



matter and scope' of the Directive, as set forth in Article 1", although Russia takes issue with certain definitions contained in the Directive.<sup>568</sup>

7.253. According to Russia, "transmission" is a segment of the energy industry, i.e. the TSO under the Directive, which is responsible for delivering or transporting natural gas via high pressure pipelines between the producers/generators and local distribution companies or large end users.<sup>569</sup> Industry definitions of "transmission" recognize the role of the entities involved, including TSOs, in supplying natural gas, along with the services necessary to transport and supply that gas, to customers at various stages of the supply chain.<sup>570</sup> Referring to dictionary definitions of the term "supply", Russia argues that all services related to the supply of natural gas, including its transmission, fall within these broad definitions.<sup>571</sup> Russia further argues that the entire gas market can be thought of as a "supply system".<sup>572</sup>

7.254. In Russia's view, the "supply" of natural gas as a service overlaps with natural gas production, sale and transmission<sup>573</sup>, and "a gas supplier, which may well also be a producer, also supplies the market with pipeline transport services".<sup>574</sup> For Russia, natural gas is produced for the purpose of supplying it to customers and "[t]his takes place through the sale and resale of gas, including LNG, but also through its transmission, just as the transmission of natural gas naturally includes its supply."<sup>575</sup>

7.255. Russia further submits that the services at issue also include LNG services as well as services necessary to convey raw gas from gas fields or gas production projects to the processing plant or terminals or final coastal landing terminals, which the Directive defines as "upstream pipeline networks".<sup>576</sup> While, according to Russia, the supply of natural gas "naturally includes its 'distribution' and related services", Russia indicates that "distribution" and related services, which are supplied by "distribution system operators", are excluded from the services at issue.<sup>577</sup>

7.256. The European Union contends that Russia's definition of the services at issue is excessively broad<sup>578</sup>, and does not fit with the reality in the gas markets or the objective characteristics of the activities at stake.<sup>579</sup>

7.257. The European Union submits that pipeline transport services are very specific services consisting of the carrying of natural gas from one point to another via pipeline, namely from the point of production to the point where the gas is transferred into local distribution systems for supply (i.e. sale) to customers at lower pressure.<sup>580</sup> The European Union argues that the distribution or supply (i.e. the sale) of natural gas<sup>581</sup>, and LNG services are not covered under "pipeline transport services".<sup>582</sup>

7.258. The European Union further argues that Russia's proposed definition does not correspond to the ordinary meaning of "pipeline transport services" and ignores the principle of mutual exclusivity of sectors and sub-sectors in the CPC.<sup>583</sup> For the European Union, there is no such thing

<sup>568</sup> Russia's first written submission, paras. 96-97.

<sup>569</sup> Russia's first written submission, para. 100.

<sup>570</sup> Russia's first written submission, paras. 99-100 (referring to Sprague Natural Gas Glossary, <http://www.spragueenergy.com/natgas/additional-resources/glossary> (accessed 10 May 2016), (Exhibit RUS-28)).

<sup>571</sup> Russia's first written submission, paras. 101-102.

<sup>572</sup> Russia's first written submission, para. 102.

<sup>573</sup> Russia's response to the Panel question No. 62, para. 288; and second written submission, para. 79.

<sup>574</sup> Russia's response to the Panel question No. 155, para. 1.

<sup>575</sup> Russia's first written submission, para. 104.

<sup>576</sup> Russia's first written submission, para. 94.

<sup>577</sup> Russia's first written submission, fn 117. Russia also excludes storage services from the services at issue. (See Russia's comments on European Union's response to Panel question No. 156, para. 58).

<sup>578</sup> European Union's first written submission, para. 51.

<sup>579</sup> European Union's first written submission, para. 50; and opening statement at the second meeting of the Panel, para. 18.

<sup>580</sup> European Union's first written submission, para. 80.

<sup>581</sup> European Union's first written submission, paras. 71 and 80; and opening statement at the second meeting of the Panel, para. 19.

<sup>582</sup> European Union's first written submission, para. 80; and opening statement at the second meeting of the Panel, para. 20.

<sup>583</sup> European Union's comments on Russia's response to Panel question No. 155, para. 5.

as "supply services" in the GATS and the basis for interpreting "pipeline transport services" should not be the business model used by one specific Russian company.<sup>584</sup>

7.259. We observe, first, that it is the prerogative of Russia, as the complaining party, to identify the services at issue in this dispute. Nonetheless, this prerogative does not necessarily entail unlimited discretion when it comes to defining the services at issue.

7.260. In our view, the definition of the services at issue is fundamental for a proper assessment of claims under the GATS and, consequently, a panel has the authority, indeed the duty, to address it.<sup>585</sup> We also recall that previous panels looked into the meaning and scope of the services at issue identified in the complainant's panel request.<sup>586</sup> Likewise, we consider that we are not bound by Russia's proposed definition and that we must look into the meaning and scope of the services at issue identified in Russia's panel request before proceeding to an assessment of Russia's claims under the GATS.

7.261. Two different, albeit closely related, tasks arise with respect to our assessment of the meaning and scope of the services at issue. One task is for us to look into the meaning and scope of the phrase "natural gas pipeline transport services" or "pipeline transport services". Another task is to interpret, in accordance with the rules of treaty interpretation, the meaning and scope of the relevant sectoral entries in the Schedules of Croatia, Hungary and Lithuania identified by Russia in the context of its claims under Articles XVI:2 and XVII of the GATS (see section 7.4.2 below).

7.262. In this dispute, we note the similarity between, on the one hand, the terms used by Russia to identify the services at issue, i.e. "natural gas pipeline transport services" or "pipeline transport services", and, on the other hand, "Pipeline Transport [Services]"<sup>587</sup>, the terms found under sector 11.G in the Schedules of Croatia, Hungary and Lithuania. In view of this similarity, we need to ensure a coherent interpretation of the meaning and scope of, respectively, the services at issue and the terms used in the Schedules.<sup>588</sup>

7.263. We recall that the parties to the dispute agree that the services at issue are "natural gas pipeline transport services" or "pipeline transport services".<sup>589</sup> Both parties also concur that the services at issue encompass transmission of natural gas, which they describe in a similar manner.<sup>590</sup> We also observe that both parties consider that transportation or transmission of

<sup>584</sup> European Union's comments on Russia's response to Panel question No. 155, paras. 5-6.

<sup>585</sup> The Appellate Body explained that:

Panels have to address and dispose of certain issues of a fundamental nature, even if the parties to the dispute remain silent on those issues. ... panels cannot simply ignore issues which go to the root of their jurisdiction – that is, to their authority to deal with and dispose of matters.

Rather, panels must deal with such issues – if necessary on their own motion – in order to satisfy themselves that they have authority to proceed. (Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36).

<sup>586</sup> Panel Reports, *China – Electronic Payment Services*, paras. 7.25-7.37; and *China – Publications and Audiovisual Products*, paras. 7.1147-7.1153.

<sup>587</sup> For the use of the expression "Pipeline Transport [Services]", see below footnote 652.

<sup>588</sup> According to Russia, "Sector 11G, 'Pipeline Transport' services, includes natural gas pipeline transport services, including LNG services, the services at issue in this dispute, as broadly defined therein" (Russia's first written submission, para. 117). We note that, in a response to a question by the Panel, Russia explains that the "scope issues" concerning the services at issue are "relevant to the commitments of Croatia, Hungary and Lithuania in Sector 11G of their GATS Schedules, the 'Pipeline Transport' services sector, which do not necessarily overlap with the scope of covered services, as discussed below". (Russia's response to Panel question No. 155, para. 2). However, Russia does not further specify to what extent the scope of, respectively, the services at issue and the services covered under sector 11.G in those three Schedules would "not necessarily overlap." We also understand that the arguments of the European Union when discussing the services at issue and the interpretation of the sectoral entries in the Schedules of Croatia, Hungary and Lithuania are largely based on the same grounds. (See European Union's first written submission, paras. 50 ff.; and comments on Russia's response to Panel question No. 155, paras. 5-7).

<sup>589</sup> For the sake of convenience, we shall use the phrase "pipeline transport services" when referring to the services at issue in the remainder of our Report.

<sup>590</sup> According to Russia, "transmission" includes the industry segment responsible for transporting natural gas via high pressure pipelines between the producers/generators and local distribution companies or large end users. (See Russia's first written submission, para. 100). The European Union states that "pipeline transport services" encompass "the carrying of natural gas from one point to another via pipeline, namely from the point of production to the point where the gas is transferred to the local distribution system". (See

natural gas through transmission pipelines correspond to the services provided by TSOs under the Directive.<sup>591</sup> We see no reason to disagree with the parties. In our view, "pipeline transport services" encompass the transportation or transmission of natural gas through transmission pipelines and also coincide with the services provided by a TSO under the Directive.

7.264. The parties disagree, however, on whether (i) "supply" of natural gas and "supply services", as well as (ii) LNG services should be encompassed under the definition of "pipeline transport services".<sup>592</sup> We shall therefore turn to these two issues.

#### 7.4.1.2 Analysis by the Panel

##### *"Supply" of natural gas and "supply services" in Russia's proposed definition*

7.265. According to Russia, the "supply" of natural gas is not a separate market segment, unlike the transmission segment, but encompasses the entire gas market which, in Russia's view, can be thought of as a "supply system".<sup>593</sup> For Russia, it is essential to include the supply of natural gas or "supply services" – the latter referring, according to Russia, to a service overlapping with natural gas production, sale and transmission – in the definition of "natural gas pipeline transport services".<sup>594</sup> In Russia's view, "a producer is, by definition, a supplier of natural gas", and a gas supplier "also supplies the market with pipeline transport services".<sup>595</sup> In response to a question by the Panel, Russia further explains:

The main components of the "supply" of natural gas as a "service" include services that overlap with natural gas production, as well as services related to the sale of natural gas, as the EU has argued. Supply services naturally overlap to a broad degree with the services required for the "transmission" or transport of natural gas. Russia considered it essential to include both transmission and supply services in the definition of covered services to recognize expressly (1) that this overlapping relationship is critical to understanding how pipeline transport services are supplied in the EU and elsewhere and the competitive relationship between related types of service suppliers; and (2) that the EU seeks to separate the supply and transmission segments of the market in certain instances, but not others, in what Russia believes is a selective effort to marginalize Russian pipeline transport services and service suppliers and fulfil the EU's overriding objective of reducing reliance on Russian natural gas.<sup>596</sup>

7.266. The European Union argues that "natural gas pipeline transport services" do not include the supply of natural gas which entails the activity of selling gas to industrial, commercial and household consumers.<sup>597</sup> The definition of the word "service" indicates that the production of a good must be distinguished from the services that are related to that good.<sup>598</sup> Moreover, for the European Union, there is no such thing as a "supply service" in the GATS.<sup>599</sup>

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European Union's first written submission, para. 80). The parties do not distinguish between transmission of one's own natural gas versus transmission of somebody else's natural gas and we do not feel it is necessary to draw such a distinction for the purpose of this case.

<sup>591</sup> See Russia's first written submission para. 100; and European Union's second written submission, para. 72.

<sup>592</sup> The parties also disagree as to whether services related to "upstream pipeline networks", as defined in Article 2(2) fall under the scope of the services at issue. Russia also argues that upstream pipeline networks services are included in the definition of the services at issue. (See Russia's first written submission, para. 94). The European Union is of the view that upstream pipeline networks do not carry out transmission as pipeline transport services. (European Union's opening statement at the second meeting of the Panel, para. 21). As we have determined that Russia's claim under the GATS against the upstream pipeline networks measure is outside our terms of reference (see para. 7.129), we will not discuss further whether upstream pipeline network services fall within the scope of "pipeline transport services".

<sup>593</sup> Russia's first written submission, para. 102.

<sup>594</sup> Russia's response to the Panel question No. 62, para. 288.

<sup>595</sup> Russia's response to the Panel question No. 155, para. 1.

<sup>596</sup> Russia's response to Panel question No. 62, para. 288.

<sup>597</sup> European Union's first written submission, para. 60.

<sup>598</sup> European Union's first written submission, paras. 65-66 (referring to Oxford English Dictionary Online, definition of "service, n.1")

7.267. Russia's explanations with respect to "supply" and "supply services" are not entirely clear. We understand that Russia views "supply" as referring to the "supply" of natural gas by producers to consumers, which Russia also refers to as "the entire gas market" or "a supply system". Russia also seems to equate "supply" of natural gas with "supply services".<sup>600</sup> To our mind, the notions of "supply" and "supply services" that Russia includes in its proposed definition of the services at issue raise three types of conceptual and systemic difficulties. They (i) encompass activities falling outside the scope of the GATS; (ii) are redundant to the extent that "transmission" of gas, in Russia's own words, "overlaps" with "supply", and (iii) do not allow to identify with sufficient clarity the services which would be concerned by our findings and cannot be reconciled with the principle of mutual exclusivity of sectors and sub-sectors. We discuss these three issues in turn below.

7.268. Starting with the first issue raised in the previous paragraph, we observe that Russia grounds its proposed understanding of the "supply" of natural gas on dictionary definitions of the word "supply" which, Russia notes, has a broad ordinary meaning.<sup>601</sup> As acknowledged by Russia, however, "[i]ndustry and other glossaries of natural gas terms normally do not define natural gas 'supply'".<sup>602</sup> In any event, assuming that the "supply" of natural gas should be ascribed the broad definition proposed by Russia<sup>603</sup>, we cannot agree with Russia's proposition that the "supply" of natural gas should be viewed as a service. We recall that the GATS applies to measures affecting "trade in services", the latter being defined as "the supply of a service" through any of the four modes defined in Article I:2(a) to (d). In turn, the "supply of a service" includes "the production, distribution, marketing, sale and delivery of a service" (GATS Article XXVIII(b)). Hence, the "supply" of natural gas, namely the supply of a good<sup>604</sup>, does not fall within the scope of the GATS.<sup>605</sup>

7.269. In addition, by including production and/or services related to production, transmission and sale of natural gas, it appears to us that Russia's notion of "supply" seeks to subsume the entire gas supply chain under the phrase "pipeline transport services", thus blurring the line between trade in goods and trade in services. As noted by the European Union, the gas industry

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<http://www.oed.com/view/Entry/176678?rskey=JSiVqR&result=1&isAdvanced=false#eid> (accessed 1 July 2016), (Exhibit EU-24)).

<sup>599</sup> European Union's comments on Russia's response to Panel question No. 155, para. 6.

<sup>600</sup> See, for instance, Russia's response to Panel question No. 155, para. 8.

<sup>601</sup> Russia's first written submission, para. 101, (referring to *Shorter Oxford English Dictionary*, W. Trumble and A. Stevenson (eds) (Oxford University Press, 2002), Vol. II, pp.3118-3119, which defines the verb "supply" as meaning, inter alia, "provide or make available (something needed or wanted); furnish for use or consumption, esp. commercially; yield, afford"). Russia also refers to the definition of "supply" as a noun being defined, inter alia, as "A quantity or amount of something supplied, a stock or store of something provided or obtainable ... A system by which such a store (of water, gas, blood, etc.) is made available at a distance; a network by which something is conveyed to a site". (Ibid.)

<sup>602</sup> Russia's first written submission, para. 102, (referring to H. R. Williams and C. J. Myers (eds.), *Manual of Oil and Gas Terms*, 15th edn (LexisNexis, 2012) (selected pages), (Exhibit RUS-29); and University of Texas at Austin, Petroleum Extension Service, *A Dictionary for the Oil and Gas Industry*, 2nd edn, (Austin, Texas 2011), p. 165, (Exhibit RUS-270)). Russia also refers to "market descriptions" which, in its view, "tend instead to describe supply and supply services in the broadest possible sense". (See Russia's first written submission, para. 102 (referring to A. Goldthau, "The Geopolitics of Natural Gas: The Politics of Natural Gas Development in the European Union", Harvard University's Belfer Center & Rice University's Baker Institute Center for Energy Studies, (October 2013), (Exhibit RUS-30))). We observe that this document is a "study on the geopolitical implications of natural gas" (see p. 5) and Russia does not point to a specific page or paragraph allegedly supporting its views. Having reviewed this document, we understand that the term "supply" as used therein chiefly refers to supply of gas and we observe that the notion of "supply services" is not used in this document.

<sup>603</sup> According to the European Union, which refers to the definition contained in Article 2(7) of the Directive, "supply" includes only the sale of gas. (European Union's first written submission, para. 67). Russia takes issue with this definition which it considers too narrow. (Russia's first written submission, para. 103). We do not find it necessary to discuss the appropriateness of the definition of "supply" in the Directive in this case.

<sup>604</sup> Natural gas is obviously not "tangible", i.e., "[a]ble to be touched; discernible or perceptible by touch; having material form" (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 3175), but is unquestionably a "good". As noted by the European Union, natural gas is classified under the Harmonised System, which covers only goods (LNG is found under HS 2711.11 and natural gas in its gaseous state under HS 2711.21). (European Union's first written submission, para. 71 (referring to Harmonized Commodity Description and Coding System, Chapter 27, available at: [www.wcoomd.org](http://www.wcoomd.org) (accessed 3 August 2017), (HS Chapter 27), (Exhibit EU-32))). We also note that Russia does not argue otherwise.

<sup>605</sup> For the same reasons, we cannot accept Russia's proposition that the "supply" of LNG is a service.

does not involve only trade in services, it also involves trade in goods.<sup>606</sup> The production of gas does not fall within the scope of the GATS and the sale of gas is not necessarily a service.<sup>607</sup> In our view, it would be improper for a panel to rely on a definition of the services at issue which includes activities falling outside the scope of the GATS.

7.270. Turning to the second issue raised in paragraph 7.267, we recall that "transmission" and "supply" are two elements in Russia's definition of "pipeline transport services". Russia explains that transmission of natural gas "naturally includes its supply"<sup>608</sup> and also that "[s]upply services naturally overlap to a broad degree with the services required for the 'transmission' or transport of natural gas".<sup>609</sup> As noted above, both parties agree that transmission of gas through pipelines is encompassed under Russia's proposed definition of the services at issue as per the reference to the term "transmission (or transport)" included therein. To the extent that the notions of "supply" and "supply services" "overlap" with transmission of gas, these notions are redundant.

7.271. Finally, with respect to the third issue raised in paragraph 7.267, we examine more closely the notion of "supply services". In its first written submission, Russia calls for an interpretation of "supply" and "supply services" in the "broadest possible sense" to include the services covered by the Directive.<sup>610</sup> In response to a question by the Panel, Russia explains that "supply services" "overlap with natural gas production", are "related to the sale of natural gas" and "naturally overlap to a broad degree with the services required for the 'transmission' or transport of natural gas".<sup>611</sup> In response to another question by the Panel, Russia explains that "it is more accurate and consistent with the ordinary meanings of these terms and actual industry practice to view pipeline transport services as supplied not in a vacuum ... but rather as part of a continuum".<sup>612</sup> Russia further explains that the "entire continuum of pipeline transport services" provided by VIUs "also includes typical 'supply' services, such as cleaning, processing and similar services to prepare the gas for consumption and facilitate its transmission and sale to traders and consumers; negotiating supply and purchase commitments and relevant terms of sale, including price and volume, normally via long term services and supply contracts; and injection of the purified (or "sales") gas into the transmission system to include arranging for and ensuring adequate and timely pipeline transmission capacity".<sup>613</sup>

7.272. Based on Russia's explanations, the notion of "supply services" appears to be a catch-all term to subsume under "pipeline transport services" an open-ended list of services that are related to the "supply" of natural gas.<sup>614</sup> For Russia, this notion includes not only "the entire continuum" of services supplied by VIUs, but also all services referred to in the Directive, except those services that Russia has decided to exclude from the dispute.<sup>615</sup>

7.273. Russia's notion of "supply services" calls for two comments. First, we find it impossible to identify with sufficient clarity the services which are encompassed under the notion of "supply services", which means that, should we use that notion, we would not be in a position to assess

<sup>606</sup> European Union's first written submission, para. 71; and comments on Russia's response to Panel question No. 155, para. 6. Ukraine also argues that "the sale of gas and services related thereto are clearly different business activities" and that "the sale of gas as a good, including to end-users" must be dealt with under the GATT. (See Ukraine's third-party submission, para. 7).

<sup>607</sup> In *China – Publications and Audiovisual Products*, the panel found that "[o]bviously, the simple production of a good could not be said to constitute a service, nor would it make sense to undertake commitments under the GATS as regards the production of a good". (Panel Report, *China – Publications and Audiovisual Products*, fn 659). Moreover, like the sale of other goods, the sale of gas may entail the direct sale by producers or the resale by traders (wholesalers or retailers). Wholesale and retail services fall under the GATS, but not the direct sale of a product by a producer.

<sup>608</sup> Russia's first written submission, para. 104.

<sup>609</sup> Russia's response to Panel question No. 62, para. 288.

<sup>610</sup> Russia's first written submission, paras. 102-103; and Russia's response to Panel question No. 155(a), paras. 3-12.

<sup>611</sup> Russia's response to Panel question No. 62, para. 288 (quoted above at para. 7.265).

<sup>612</sup> Russia's response to Panel question No. 155, para. 10.

<sup>613</sup> Russia's response to Panel question No. 155, para. 10 (referring to Article 44 of the Directive, entitled "Record keeping").

<sup>614</sup> We also recall that, pursuant to Russia's proposed definition, pipeline transport services "include, but are not necessarily limited to" transmission, supply and LNG services.

<sup>615</sup> We recall that Russia excludes distribution services of gas and storage services from the scope of the dispute. (See Russia's first written submission, fn 117; response to Panel question No. 57, para. 310; and comments on European Union's response to Panel question No. 156, para. 58).

the scope of our findings. Second, pursuant to the principle of mutual exclusivity of sectors and sub-sectors – referred to by the Appellate Body when interpreting GATS Schedules<sup>616</sup> – a given service cannot fall under two different sectors or subsectors at the same time.

7.274. The importance of the concept of "sector" under the GATS is obvious for Members' obligations on market access (GATS Article XVI) and national treatment (GATS Article XVII) because these provisions apply in service sectors as listed by each Member in its GATS Schedule. However, as indicated by the definition of "'sector' of a service" in GATS Article XXVIII(e), the relevance of the concept of "sector" is not limited to Members' specific commitments.<sup>617</sup> The application of other GATS provisions is also premised on the identification of sectors<sup>618</sup>, as is the application of certain other WTO obligations.<sup>619</sup> By clustering all services related to natural gas under the notion of "supply services", the latter being in turn meant to be included under the terms "pipeline transport services", Russia's proposed definition leads to an artificially broad construction of the latter terms and cannot be reconciled with the principle of mutual exclusivity of sectors and sub-sectors.

7.275. Russia also explains that an objective in defining the covered services is "to follow as closely as possible the scope and subject matter of the Directive", while also including "corrections" in response to the fact that "the EU attempts in the Directive to manipulate definitions to serve its regulatory objectives".<sup>620</sup> According to Russia, the definitions in the Directive help support the regulatory and policy distinction "between the TSO, transmission system and services or 'functions of transmission', on the one hand, and the supply portion of the VIU and 'functions of production or supply', on the other"<sup>621</sup>, which, in turn, "helps facilitate the European Union providing discriminatory treatment through the Directive and other measures, to Russian pipeline transport services and service suppliers".<sup>622</sup>

7.276. We are not convinced by the proposition that the definition of the services at issue should be governed by the scope of a challenged instrument when this leads to an artificially broad construction and/or includes activities falling outside the scope of the GATS. We are similarly unconvinced by Russia's explanations that its definition seeks to address the "discriminatory treatment" granted to Russian services and service suppliers that, according to Russia, derives from the definitions contained in the Directive<sup>623</sup> and that all these "overlapping" services would be in a competitive relationship.<sup>624</sup> While a determination of whether Russian service suppliers are in a competitive relationship and discriminated against when compared with other services and service suppliers is an integral part of a panel's assessment under Articles II:1 and XVII of the GATS, it does not, in and of itself, define the services at issue.

7.277. In light of the foregoing, we conclude that the notions of "supply" and "supply services" are not encompassed within the meaning and scope of the terms "pipeline transport services".

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<sup>616</sup> Appellate Body Report, *US – Gambling*, para. 172. We discuss this principle further in section 7.4.2 below.

<sup>617</sup> Pursuant to Article XXVIII(e) of the GATS, a "'sector' of a service means, (i) with reference to a specific commitment, one or more, or all, subsectors of that services, as specified in a Member's Schedule, (ii) *otherwise*, the whole of that service sector, including all of its subsectors." (emphasis added)

<sup>618</sup> For instance, in order to be consistent with Article V of the GATS, an economic integration agreement needs to have "substantial sectoral coverage", a condition which is understood, *inter alia*, in terms of "number of sectors". While the application of the MFN obligation in Article II:1 of the GATS is not explicitly sector-based, MFN exemptions maintained by Members pursuant to Article II:2 and the GATS Annex on Article II Exemptions are listed by sector. (See Lists of Article II Exemptions, documents GATS/EL/2 to -/156). Members' Lists of Article II Exemptions are part of the GATS Annex on Article II Exemption and, consequently, form an integral part of the GATS.

<sup>619</sup> Pursuant to Article 22.3(f)(ii) of the DSU, the suspension of concessions under the GATS also takes place on the basis of "sectors" as identified in the "Services Sectoral Classification List". The latter refers to Services Sectoral Classification List, Note by the Secretariat, MTN.GNS/W/120 (10 July 1991), (W/120), (Exhibits EU-15/RUS-38).

<sup>620</sup> Russia's response to the Panel question No. 68, para. 313.

<sup>621</sup> Russia's first written submission, para. 110.

<sup>622</sup> Russia's first written submission, para. 110.

<sup>623</sup> Russia's first written submission, para. 97.

<sup>624</sup> Russia explains that by including "both supply and transmission services in the definition of covered services in this dispute", Russia "sought to emphasise that ... pipeline transport services include each of these overlapping services, many of which along with the suppliers of pipeline transport services are in a competitive relationship". (Russia's second written submission, para. 79).

### *LNG services in Russia's proposed definition*

7.278. Russia submits that LNG services are included within the meaning of "pipeline transport services".<sup>625</sup> According to Russia, LNG services correspond to the services described in Articles 2(11) and 2(12) of the Directive and relate to the operation by LNG system operators of LNG facilities, including the importation, offloading and regasification or reconversion of LNG to its natural gaseous state, as well as related temporary storage.<sup>626</sup> For Russia, "just as LNG services are 'supply' services they are 'transmission services', in that they concern the transport or conveyance of reconverted natural gas either directly from the LNG transport vessel or from the adjacent regasification facility via pipeline to the transmission system".<sup>627</sup>

7.279. The European Union argues that LNG services must be distinguished from "pipeline transport services".<sup>628</sup> For the European Union, the essence of LNG services is liquefaction and importation, offloading and re-gasification of natural gas, but does not concern transmission via pipeline.<sup>629</sup> The European Union also submits that CPC 2.1, which classifies LNG services and pipeline transportation services in two different categories, confirms this understanding.<sup>630</sup>

7.280. We start by observing that Russia's inclusion of LNG services in the definition of the services at issue stems from the same proposition, discussed in the previous section, that all services involved in the gas supply chain should fall under the phrase "pipeline transport services" on the ground that they are supplied as part of a "continuum" and are covered under the Directive. When discussing Russia's notions of "supply" and "supply services" in the previous section, we have addressed the conceptual and systemic problems arising from such a proposition. The various concerns we raised above are equally relevant when it comes to Russia's proposition that LNG services should be viewed as "supply" and "transmission" services and, for that reason, included within the meaning of "pipeline transport services".

7.281. Furthermore, we note that, according to the parties, LNG services consist principally of the liquefaction of natural gas and importation, offloading and re-gasification of LNG.<sup>631</sup> Hence, the essential or core activities carried out in relation to LNG do not entail transportation or transmission of natural gas. Liquefaction of natural gas and re-gasification of LNG take place at special terminals, while transportation or transmission of natural gas requires a pipeline infrastructure.

7.282. We observe that there is complementarity between LNG activities and transport via pipeline: liquefaction of natural gas permits the transport of LNG in special tankers via sea vessels, while regasification allows regasified LNG to be delivered to the transmission system and subsequently to the final consumer.<sup>632</sup> Hence, we can agree with Russia that LNG services concern or enable "pipeline transport services" of regasified LNG.<sup>633</sup> However, in our view, a service concerning or enabling the supply of another service must not necessarily and automatically be that other service for GATS purposes.

7.283. Finally, the fact that regasified LNG "is ... eventually consumed in the same manner as"<sup>634</sup> natural gas that has not been previously liquefied does not make LNG services and pipeline transport services one and the same thing. Russia's argument conflates the service with the good.

<sup>625</sup> Russia's first written submission, para. 105.

<sup>626</sup> Russia's second written submission, para. 80.

<sup>627</sup> Russia's second written submission, para. 81.

<sup>628</sup> European Union's opening statement at the second meeting of the Panel, para. 20.

<sup>629</sup> European Union's opening statement at the second meeting of the Panel, para. 20; and European Union's response to the Panel question No. 53, para. 145.

<sup>630</sup> European Union's comments on Russia's response to Panel question No. 155, para. 12.

<sup>631</sup> Both parties define LNG services by reference to the definitions of "LNG facility" and "LNG system operator" contained, respectively, in Article 2(11) and (12) of the Directive. (See Russia's first written submission, para. 107; and European Union's first written submission, para. 285). We do not mean to say, however, that the definitions in the Directive should govern the definition of LNG services for the purpose of the GATS.

<sup>632</sup> As further discussed in para. 7.842 below, regasified LNG is transported and supplied via pipelines in the same way as natural gas that has not been previously liquefied.

<sup>633</sup> Russia's second written submission, para. 81.

<sup>634</sup> Russia's first written submission, para. 105.

7.284. On the basis of the foregoing, we conclude that LNG services are not encompassed within the terms "pipeline transport services".

### **Conclusion**

7.285. Our analysis of Russia's proposed definition of the services at issue leads us to the conclusion that "pipeline transport services" encompass transportation or transmission of natural gas through transmission pipelines and coincide with the services provided by TSOs under the Directive.<sup>635</sup> We further conclude that "pipeline transport services" do not include the notions of "supply" and "supply services", nor do they include LNG services. These conclusions find further support in our analysis of the meaning and scope of the treaty terms "Pipeline Transport [Services]" in the Schedules of Croatia, Hungary and Lithuania, as we shall see in section 7.4.2 below.

7.286. Therefore, any finding concerning "pipeline transport services", the services at issue, will not concern "supply" and "supply services", nor will they concern LNG services.

## **7.4.2 Interpretation of the Schedules of Croatia, Hungary and Lithuania**

### **7.4.2.1 Introduction**

7.287. We turn now to an examination of the Schedules of Croatia, Hungary and Lithuania at stake in this dispute.

7.288. As will be discussed in more detail below, Russia claims that the unbundling measure in the national implementing laws of Croatia, Hungary and Lithuania is inconsistent with Article XVI:2(e) and (f) of the GATS and that the unbundling measure in the national implementing laws of Croatia and Lithuania is inconsistent with Article XVI:2(a) of the GATS (see section 7.5.2 below). Russia further claims that the public body measure and the third-country certification measure in the national implementing laws of Croatia, Hungary and Lithuania are inconsistent with Article XVII of the GATS (see sections 7.6 and 7.10.2 below).

7.289. It is well-established that, in order to establish a *prima facie* case of violation under Article XVI:2 of the GATS, a complaining party must first establish that the responding party has undertaken relevant market access commitments.<sup>636</sup> Similarly, in order to sustain a claim that a measure breaches Article XVII of the GATS, a complaining party must first establish that the responding party has made relevant commitments on national treatment.<sup>637</sup>

7.290. Russia alleges that Croatia, Hungary and Lithuania have undertaken specific commitments on market access and national treatment with respect to the services at issue under sector 11.G, "Pipeline Transport [Services]"<sup>638</sup> in their respective Schedules.<sup>639</sup> Russia has also confirmed that each of its claims under the GATS in this dispute concerns mode 3, namely the commercial presence mode of supply.<sup>640</sup>

7.291. Therefore, we need to determine whether Russia has shown that Croatia, Hungary and Lithuania have undertaken market access and national treatment commitments with respect to the services at issue under sector 11.G, "Pipeline Transport [Services]" of their Schedules. For that purpose, we shall turn, first, to an examination of the terms "Pipeline Transport [Services]" in the sectoral column of the Schedules concerned. We shall then examine, successively, Croatia's, Hungary's and Lithuania's market access and national treatment commitments, as identified by Russia in this dispute.

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<sup>635</sup> See Russia's first written submission para. 100; and European Union's second written submission, para. 72.

<sup>636</sup> See para. 7.233 above.

<sup>637</sup> See para. 7.235 above.

<sup>638</sup> For the use of the expression "Pipeline Transport [Services]", see below footnote 652.

<sup>639</sup> See Russia's first written submission, headings VI.A, VII.B and VIII.B.

<sup>640</sup> Russia's response to Panel question No. 56, para. 285.



### 7.4.2.2 The terms "Pipeline Transport [Services]"

#### 7.4.2.2.1 Introduction

7.292. We need to determine whether Russia has demonstrated that Croatia, Hungary and Lithuania have undertaken specific commitments with respect to the services at issue under sector 11.G, concerning "Pipeline Transport [Services]" in their respective Schedules of Specific Commitments.<sup>641</sup>

7.293. Article XX:1 of the GATS provides that each Member "shall set out in a Schedule the specific commitments it undertakes", notably on market access and national treatment. Pursuant to Article XX:3 of the GATS, Schedules of specific commitments "shall form an integral part" of the GATS and, thus, are legally part of the WTO Agreement. The Appellate Body has confirmed that GATS Schedules must be interpreted according to customary rules of interpretation of public international law, as codified in Articles 31 and 32 of the Vienna Convention.<sup>642</sup>

7.294. We shall therefore interpret the relevant entries in the Schedules of Croatia, Hungary and Lithuania in accordance with the ordinary meaning to be given to the terms of those Schedules in their context and in light of the object and purpose of the GATS in accordance with Article 31 of the Vienna Convention. If necessary, we will turn to supplementary means of interpretation pursuant to Article 32 of the Vienna Convention.

#### 7.4.2.2.2 Analysis by the Panel

7.295. Russia submits that the inscriptions "Pipeline Transport [Services]" under sector 11.G in the Schedules of Croatia, Hungary and Lithuania cover natural gas transport pipeline services, i.e. the services at issue in this dispute, which encompass the transmission and supply of natural gas, including LNG, and the supply of services necessary or otherwise related to the transmission (i.e. transport) and supply of natural gas, including LNG services.<sup>643</sup> According to Russia, "pipeline transport" as a specific subsector within the transport services sector includes services related to each of the categories or types of pipelines, including gathering, transmission and distribution systems; it also includes the supply of services that enable the transport by pipelines of reconverted natural gas from an LNG carrier through the necessary connection lines and the transmission system.<sup>644</sup>

7.296. The European Union argues that Russia's proposed definition is excessively broad and does not correspond to the ordinary meaning of the relevant terms read in their context. According to the European Union, Russia attempts to artificially stretch the meaning of the committed services in order to make an interpretation of WTO obligations that is also inappropriately broad.<sup>645</sup> The European Union submits that the relevant entries in the Schedules of Croatia, Hungary and Lithuania consist of the carrying of natural gas from one point to another via pipeline, namely from the point of production to the point where the gas is transferred into local distribution systems for supply to customers at lower pressure.<sup>646</sup> According to the European Union, sector 11.G does not cover the production and supply or sale of gas, nor does it include transport via other means than pipelines.<sup>647</sup> The European Union further contends that pipeline transport services must be distinguished from liquefaction and regasification of natural gas (LNG services) for which other CPC codes exist.<sup>648</sup>

7.297. The relevant sectoral entries in the three Schedules at issue are as follows:

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<sup>641</sup> Schedule of Specific Commitments of Croatia, GATS/SC/130 (22 December 2000), (Exhibits EU-16/RUS-37); Schedule of Specific Commitments of Hungary, GATS /SC/40 (15 April 1994), (Exhibits EU-17/RUS-36); and Schedule of Specific Commitments of Lithuania, GATS/SC/133 (21 December 2001), (Exhibits EU-19/RUS-35).

<sup>642</sup> See Appellate Body Reports, *US – Gambling*, para. 160; and *China – Publications and Audiovisual Products*, para. 348.

<sup>643</sup> Russia's first written submission, para. 128.

<sup>644</sup> Russia's first written submission, para. 133.

<sup>645</sup> European Union's first written submission, paras. 50-51.

<sup>646</sup> European Union's first written submission, para. 80.

<sup>647</sup> European Union's first written submission, para. 67.

<sup>648</sup> European Union's first written submission, para. 76.

| Sector or subsector   |   |  |
|---|---|--|
| Croatia <sup>649</sup>  | Hungary <sup>650</sup>  | Lithuania <sup>651</sup>   |
| 11. Transport Services<br>...<br>G. <u>Pipeline Transport Services</u><br>(CPC 713) | 11. Transport Services<br>...<br>G. <u>Pipeline Transport</u> | 11. Transport Services<br>...<br>G. <u>Pipeline Transport</u><br>(CPC 713) |

7.298. We observe that the sectoral entries in the three Schedules at issue all contain the terms "Pipeline Transport" and are inscribed under sector G ("Pipeline Transport"), Section 11 ("Transport Services"). These entries also exhibit some variations. The entry in Hungary's Schedule does not contain a reference to "CPC 713" under the heading "Pipeline Transport", contrary to the entries in the Schedules of Croatia and Lithuania. Another variation is the absence of the word "Services" following the terms "Pipeline Transport" in the Schedules of Hungary and Lithuania. Considering the similarities of those entries, we will conduct a holistic analysis of the three Schedules concerned, taking into account, as appropriate, the variations just noted.<sup>652</sup> We observe that this approach coincides with the way both parties presented their arguments.

7.299. Following the principles of treaty interpretation, we first determine the ordinary meaning of the relevant terms used in sector 11.G.

#### *Ordinary meaning of "Pipeline Transport [Services]"*

7.300. Russia submits that, given the widely accepted ordinary meaning of "pipeline transport" and the related terms within the energy and transport service sectors, it follows that the use of "Pipeline Transport" in sector 11.G of the relevant Schedules was intended to encompass the natural gas pipeline transport services at issue in this proceeding, i.e. the transmission and supply of natural gas, including LNG, and the supply of services necessary or otherwise related to the transmission (i.e. transport) and supply of natural gas, including LNG services.<sup>653</sup>

7.301. The European Union argues that the ordinary meaning of "pipeline transport services" based on dictionary definitions and industry-specific descriptions does not involve the production and processing of gas, nor the supply (i.e. sale) of gas to consumers. The European Union also excludes transport via means of transport other than pipeline.<sup>654</sup>

7.302. We begin our analysis with the ordinary meaning of the term "Pipeline Transport". The *Shorter Oxford English Dictionary* defines "pipeline" as "[a] continuous line of pipes; a long pipe for conveying oil, gas, etc., long distances, esp. underground; a (usu. flexible) tube for carrying liquid in machinery etc."<sup>655</sup> The term "transport" means "[t]he carrying or conveyance of a person or thing from one place to another".<sup>656</sup> Hence, pursuant to dictionary definitions, "pipeline transport" refers to the carrying or conveying of oil, gas or other products over long distances through a long pipe which is often underground.

<sup>649</sup> Schedule of Specific Commitments of Croatia, GATS/SC/130 (22 December 2000), (Exhibits EU-16/RUS-37), p. 33.

<sup>650</sup> Schedule of Specific Commitments of Hungary, GATS /SC/40 (15 April 1994), (Exhibits EU-17/RUS-36), p. 32.

<sup>651</sup> Schedule of Specific Commitments of Lithuania, GATS/SC/133 (21 December 2001), (Exhibits EU-19/RUS-35), p. 23.

<sup>652</sup> For the sake of convenience and in order to reflect the variations in those three entries, we shall use the expression "Pipeline Transport [Services]" throughout this Report when referring collectively to the entry found under sector 11.G in the Schedules of Croatia, Hungary and Lithuania.

<sup>653</sup> Russia's first written submission, para. 128; and second written submission, para. 82-86.

<sup>654</sup> European Union's first written submission, paras. 67-68.

<sup>655</sup> *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2218.

<sup>656</sup> *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 3327.

7.303. In the Schedule of Croatia, the term "Pipeline Transport" is followed by the word "Services". The ordinary meaning of the term "services" is "[t]he sector of the economy that supplies the needs of the consumer but produces no tangible goods, as banking or tourism".<sup>657</sup>

7.304. We note that the Schedules of Hungary and Lithuania do not contain the term "Services" after "Pipeline Transport". However, in those two Schedules, sector G is found under Section 11, entitled "Transport Services", which suggests that all the sectors contained in Section 11 concern services of transport, whether or not the word "services" is explicitly mentioned in the sub-heading.<sup>658</sup> Hence, the absence of the word "Services" after "Pipeline Transport" does not make a material difference with respect to the meaning and scope of the commitments at issue in the Schedules of Hungary and Lithuania, as, in our view, this word is implied.

7.305. Our analysis of dictionary definitions of the phrase "Pipeline Transport [Services]" in the Schedules of Croatia, Hungary and Lithuania indicates that this sector covers the activity consisting in carrying or conveying goods such as oil or gas through a long pipe, often underground, over long distances. The ordinary meaning of this phrase further indicates that the sector does not produce tangible goods.<sup>659</sup>

7.306. Both parties refer to more specific glossaries and industry sources when discussing the ordinary meaning of "pipeline transport services". The panel in *China – Electronic Payment Services* considered it appropriate to examine industry sources as potential relevant evidence of the ordinary meaning of a specific term in a particular industry, in addition to general dictionaries, for the purpose of determining the meaning of a term appearing in a GATS Schedule.<sup>660</sup> With this guidance in mind, we shall examine the meaning of the terms "Pipeline Transport [Services]" in industry sources and specialized publications provided to us by the parties.

7.307. The *Manual of Oil & Gas Terms*, provided by Russia, defines a "pipeline" as "[a] tube or system of tubes used for the transportation of oil or gas".<sup>661</sup> According to the *Illustrated Glossary for Transport Statistics*, also referred to by Russia, the term "pipeline" is defined as "a closed conduit, with pumps, valves and control devices, for conveying fluids, gases, or finely divided solids by pumping or compression".<sup>662</sup> In the same *Glossary*, a "gas pipeline" is defined as "[a]ll parts of the pipe conduit, complete with such equipment as valves, compressor stations, communications systems, and meters for transporting natural and/or supplemental gas from one point to another, usually from a point in or beyond the producing field or processing plant to another pipeline or to points of utilization".<sup>663</sup> "Pipeline transport" is defined as "[a]ny movement of crude or refined liquid petroleum products or gases in a given pipeline network".<sup>664</sup> A "pipeline network" means "[a]ll pipelines in a given area".<sup>665</sup>

7.308. Industry sources provided by the parties also present a similar description of three different types of natural gas pipelines, namely gathering pipelines, transportation (or trunk) pipelines and distribution pipelines, used to convey natural gas from production fields to the

<sup>657</sup> *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2766.

<sup>658</sup> We observe that, in the W/120, the word "Services" is not used in a consistent manner across the different sub-sectors in the "Transport Services" Section. For instance, while W/120 refers to "Maritime Transport Services", "Air Transport Services", "Rail Transport Services", "Road Transport Services", it omits the word "Services" for "Internal Waterways Transport", "Space Transport" and "Pipeline Transport". (See W/120, (Exhibits EU-15/RUS-38)). We observe a similar pattern in the Schedules of Hungary and Lithuania. We agree with Russia that "given that it cannot reasonably be disputed that all of the subsectors concern 'services', the fact that the description of certain subsectors includes the word 'services' is not a material distinction". (Russia's first written submission, fn 200).

<sup>659</sup> As noted in footnote 604 above, natural gas is not tangible but is a good.

<sup>660</sup> Panel Report, *China – Electronic Payment Services*, para. 7.89. That panel cautioned, however, that "panels must be mindful of the limitations, such as self-interest, that industry sources may present and should govern their interpretive task accordingly". (Ibid.)

<sup>661</sup> H. R. Williams and C. J. Myers (eds.), *Manual of Oil and Gas Terms*, 15th edn (LexisNexis, 2012) (selected pages), (Exhibit RUS-29), p. 766.

<sup>662</sup> *Illustrated Glossary for Transport Statistics*, Chapter D, "Pipeline Transport", 4<sup>th</sup> edn (UNECE 2009), pp. 97-103, (UNECE glossary for transport statistics), (Exhibit RUS-41), p. 97.

<sup>663</sup> UNECE glossary for transport statistics, (Exhibit RUS-41), p. 97.

<sup>664</sup> UNECE glossary for transport statistics, (Exhibit RUS-41), p. 100.

<sup>665</sup> UNECE glossary for transport statistics, (Exhibit RUS-41), p. 97.

transmission system and then to the final consumer.<sup>666</sup> The usage of the terms "pipeline" and "pipeline transport" in industry sources or specialized glossaries does not cause us to question our understanding reached on the basis of dictionary definitions.

7.309. Russia does not present specific arguments to the effect that the ordinary meaning of "pipeline transport services" would include the notions of "supply" and "supply services". Our own assessment based on dictionary definitions, industry sources and other specialized glossaries does not allow us to read "supply" of natural gas or "supply services" into the ordinary meaning of the terms "Pipeline Transport [Services]".

7.310. Russia further asserts that the ordinary meaning of "Pipeline Transport [Services]" in sector 11.G includes LNG services, and refers to various sources which, in its view, support this proposition.<sup>667</sup> Russia points to the description of the Klaipėdos Nafta LNG terminal which states, *inter alia*, that "all the services necessary to process that LNG, ..., are supplied to facilitate the pipeline transport of the natural gas to customers".<sup>668</sup> Russia further quotes Article 2(11) of the Directive which defines an LNG facility as including "... ancillary services and temporary storage necessary for the re-gasification process and subsequent delivery to the transmission system...."<sup>669</sup> The United Nations Economic Commission for Europe's (UNECE) LNG study also quoted by Russia indicates that, at regasification terminals, "[t]he LNG is then warmed ... and the resulting natural gas is injected into pipelines for delivery to local users".<sup>670</sup>

7.311. Even if the sources cited by Russia constitute relevant evidence to establish the ordinary meaning of a treaty term<sup>671</sup>, they do not go towards demonstrating that the ordinary meaning of "pipeline transport" includes LNG services. First, the sources referred to by Russia concern LNG and related activities, not "pipeline transport services". In addition, the fact that LNG services are supplied "to facilitate the pipeline transport of natural gas", for "subsequent delivery [of gas] to the transmission system" or with the purpose of injecting gas "into the pipelines for delivery to local users" indicates that there is a close relationship between LNG services and pipeline transport services: this does not establish, however, that the ordinary meaning of "pipeline transport services" includes LNG services. Similarly, the fact that LNG facilities may include some pipelines, for example for the purpose of connecting the LNG facility with the transmission system<sup>672</sup> is not sufficient to read "LNG services" into the ordinary meaning of "pipeline transport services". Therefore, we must conclude that the ordinary meaning of "Pipeline Transport [Services]" does not refer to LNG services.

7.312. To sum up, our examination of the ordinary meaning of the terms "Pipeline Transport [Services]" based on dictionary definitions and industry sources indicates that this sector covers the activity consisting in carrying or conveying goods, usually oil or gas through a long pipe, often

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<sup>666</sup> UNECE glossary for transport statistics, (Exhibit RUS-41), pp. 97-98; and US Department of Transportation, Pipeline & Hazardous Materials Safety Administration, "Stakeholder Communications: Natural Gas Pipeline Systems" <https://primis.phmsa.dot.gov/comm/NaturalGasPipelineSystems.htm> (accessed 1 July 2016) (Exhibit EU-26); MIT Study on the Future of Natural Gas, Chapter 6, "Infrastructure", pp. 131-146, available at: <http://energy.mit.edu/research/future-natural-gas/> (accessed 3 August 2017), (Exhibit EU-27); NaturalGas.org, "Natural Gas – From Wellhead to Burner Tip" <http://naturalgas.org/naturalgas/> (accessed 3 August 2017) (Exhibit EU-28); and US Energy Information Administration, Natural Gas Transmission Path [http://www.eia.gov/pub/oil\\_gas/natural\\_gas/analysis\\_publications/ngpipeline/transpath\\_fig.html](http://www.eia.gov/pub/oil_gas/natural_gas/analysis_publications/ngpipeline/transpath_fig.html) (accessed 1 July 2016), (Exhibit EU-29).

<sup>667</sup> Russia's first written submission, paras. 129-130.

<sup>668</sup> Russia's first written submission, para. 132 (referring to Commission Decision of 20 November 2013 on the state aid to Klaipėdos NAFTA – LNG Terminal (SA.36740 (2013/NN)), C(2013) 7884 final, (Exhibit RUS-42)).

<sup>669</sup> Russia's first written submission, para. 130 (referring to Directive 2009/73/EC, (Exhibit EU-5), Article 2(11)).

<sup>670</sup> Russia's first written submission, para. 120, (referring to United Nations Economic Commission for Europe, Study on Current Status and Perspectives for LNG in the UNECE Region (UN 2013), Chapter 2, Figure 1: Illustrations of LNG and Pipeline Value Chains, p. 2, (UNECE LNG Study), (Exhibit RUS-271)) (the document originally submitted by Russia with its first written submission did not contain the quote referred to by Russia. At the request of the Panel, Russia submitted the document quoted in its first written submission as Exhibit RUS-271).

<sup>671</sup> For the sake of discussing comprehensively Russia's arguments, we consider the evidence relied to by Russia and contained in Exhibits RUS-271, RUS-42 and EU-5. We also note that the European Union does not object to Russia using these sources for the purpose of establishing the ordinary meaning of treaty terms.

<sup>672</sup> See Russia's first written submission, paras. 131-132 (referring to the Klaipėdos Nafta LNG terminal).

underground, over long distances. We also found that the ordinary meaning of those terms does not refer to "supply" or "supply services", nor does it refer to LNG services.

7.313. We turn now to the contextual elements of the phrase "Pipeline Transport [Services]" contained in the Schedules of Croatia, Hungary and Lithuania.

### **Context**

7.314. Principles of treaty interpretation direct us to consider the ordinary meaning of treaty terms in their context, which comprises the text of the treaty, including its preamble and annexes. For the purpose of interpreting a GATS Schedule, the Appellate Body has explained that the context includes (a) the remainder of the Member's Schedule; (b) the substantive provisions of the GATS; (c) the provisions of covered agreements other than the GATS; and (d) the GATS Schedules of other Members.<sup>673</sup>

7.315. In this dispute, we consider that our examination of the relevant context should cover other elements in the Schedules of Croatia, Hungary and Lithuania, in particular: (i) the rest of sector 11.G; and (ii) the remainder of the Schedules of Croatia, Hungary and Lithuania.

### **The rest of sector 11.G in the Schedules of Croatia, Hungary and Lithuania**

7.316. The phrase "Pipeline Transport [Services]" in the Schedules of Croatia and Lithuania is immediately followed by the inscription "(CPC 713)" to which we must give meaning and effect.

7.317. The panel in *EC – Bananas III* observed that, in the Schedule of the European Community, the terms "(CPC 622)" were inscribed after the terms "wholesale trade services", and concluded that "[a]ny legal definition of the scope of the EC's commitments in wholesale services should be based on the CPC description of the sector and the activities it covers".<sup>674</sup> Hence, following the guidance by the panel in *EC – Bananas III*, we consider that the legal definition of the scope of the commitments on "Pipeline Transport [Services]" under sector 11.G in the Schedules of Croatia and Lithuania should be based on the description found under CPC 713.<sup>675</sup>

7.318. Before proceeding to an examination of the description found under "CPC 713", we recall that the sectoral entry in Hungary's Schedule under sector 11.G, entitled "Pipeline Transport", is not followed by the inscription "CPC 713". We must therefore determine whether the absence of the inscription "CPC 713" in the Schedule of Hungary has a material effect on the assessment of scope of Hungary's commitments under sector 11.G. In addressing this question, we note that the horizontal section of Hungary's Schedule contains a footnote that states as follows:

Numbering of sectors and sub-sectors is that of the Services Sectoral Classification List (MTN.GNS/W/120). However, if reference to another definition is also made, the specific commitment relates only to the services covered by that definition. Where an "ex" is attached to a CPC code, only part of the services defined under the relevant code of the UN Central Product Classification is covered.<sup>676</sup>

7.319. According to the European Union, the CPC is relevant for interpreting Hungary's commitments because this footnote "refers to W/120, indicating that the numbering is according

<sup>673</sup> Appellate Body Report, *US – Gambling*, para. 7.102. When examining the remainder of a Member's Schedule as part of a contextual analysis, previous panel and the Appellate Body reports reviewed in particular the structure of the Schedule, other relevant elements of the subsector at issue, sectoral headings in the sector concerned, market access and national treatment commitments, as well as commitments scheduled under another related sector. (Appellate Body Reports, *US – Gambling*, para. 179; and *China – Publications and Audiovisual Products*, paras. 361-372; and Panel Report, *China – Electronic Payment Services*, para. 7.104).

<sup>674</sup> Panel Reports, *EC – Bananas III*, para. 7.289.

<sup>675</sup> CPC codes in the W/120 Services Sectoral Classification List refer to the 1991 Provisional Central Product Classification and both parties agree that the Schedules of Croatia, Hungary and Lithuania are based on the classification contained in the W/120. (See Russia's first written submission, paras. 113 and 136, (referring to W/120, (Exhibits EU-15/RUS-38)); and European Union's first written submission, para. 73). Hence, CPC references in those Schedules are those of the 1991 Provisional Central Product Classification. The parties do not argue otherwise.

<sup>676</sup> Schedule of Specific Commitments of Hungary, GATS /SC/40 (15 April 1994), (Exhibits EU-17/RUS-36), p. 2.

to the Services Sectoral Classification List in W/120" and that "[t]his list in turn refers to the Provisional CPC, including CPC 7131".<sup>677</sup> Russia states that this footnote has no relevance for interpreting the scope of Hungary's specific commitments<sup>678</sup>, but considers nonetheless that Hungary has included the "same services as Croatia and Lithuania" under sector 11.G<sup>679</sup> and that the reference to "CPC 713" is "also relevant for interpreting the commitments undertaken by Hungary in its Schedule."<sup>680</sup>

7.320. A review of Hungary's Schedule shows that, as a general rule, Hungary has followed the structure of W/120, by using the same numbering and language. The wording of the aforementioned footnote suggests that the services listed in Hungary's Schedule are defined on the basis of the CPC, unless another definition is referenced. In our view, therefore, the absence of a CPC code for sector 11.G does not mean that the words used therein have a different meaning and scope than the same words used in the Schedules of Croatia and Lithuania.<sup>681</sup> The parties do not opine otherwise. Thus, based on an examination of Hungary's Schedule and keeping in mind the guidance provided by the Appellate Body, we consider that, although it does not contain the inscription "CPC 713", the terms "Pipeline Transport" in Hungary's Schedule have the same meaning and scope as in the Schedules of Croatia and Lithuania. The legal definition of the scope of the commitments on "Pipeline Transport" under sector 11.G in the Schedule of Hungary should therefore be based on the CPC description found under CPC 713.

7.321. We examine now the description found under the code "CPC 713". In the CPC, Group 713 "Transport services via pipeline", which corresponds to sector 11.G of W/120 ("Pipeline Transport"), is broken down into two sub-classes, namely:

7131 71310 Transportation of petroleum and natural gas

7139 71390 Transportation of other goods

7.322. According to the explanatory note for CPC 71310, "Transportation of petroleum and natural gas" encompasses "[t]ransportation via pipeline of crude or refined petroleum and petroleum products and of natural gas". By including a reference to CPC 713, Croatia and Lithuania have undertaken a commitment with respect to the entire Group covered under this code, including CPC 71310. To the extent that the commitments on "Pipeline Transport [Services]" under sector 11.G in the Schedule of Hungary should be based on the CPC description of the sector and the activities covered under CPC 713, Hungary similarly undertook specific commitments with respect to CPC 71310. Hence, Croatia, Hungary and Lithuania have undertaken specific commitments with respect to CPC 71310, which covers the "transportation via pipeline of ... natural gas". We therefore find that sector 11.G, as defined in the description contained under CPC 713, covers transmission of natural gas via pipelines and we note that the parties do not opine otherwise.

7.323. The parties disagree, however, as to whether "supply" of natural gas and "supply services", as well as LNG services are also covered under sector 11.G. According to Russia, the fact that Croatia, Hungary and Lithuania did not limit the coverage of sector 11.G confirms that these Members intended to include all the services at issue, including LNG services.<sup>682</sup> The

<sup>677</sup> European Union's response to Panel question No. 61, para. 168.

<sup>678</sup> Russia's response to Panel question No. 61, para. 287.

<sup>679</sup> Russia's response to Panel question No. 65, para. 307 ("Hungary did not inscribe any CPC listing. However, by making its commitments in Sector 11G, Hungary signified its intention to include the same services as Croatia and Lithuania. After all, Sector 11G in Document W/120 is structured very similarly to CPC 713 in the Provisional CPC. That is, it includes both 'Transportation of fuels 7131' and 'Transportation of other goods 7139'").

<sup>680</sup> Russia's response to Panel question No. 66, para. 308.

<sup>681</sup> We recall that, in a previous dispute involving the interpretation of an entry which did not contain a reference to a CPC code, the Appellate Body observed that the Schedule at issue "generally follows the structure, and adopts the language, of W/120". These "structural and linguistic similarities" led the Appellate Body to conclude "that the absence of references to CPC codes does not mean that words used in the [] Schedule *must* have a different meaning and scope than the same words used in the Schedules of other Members". (See Appellate Body Report, *US – Gambling*, para. 183). (emphasis original; footnote omitted)

<sup>682</sup> Russia's first written submission, para. 140.

European Union responds that Russia errs when it seeks to interpret these entries as covering "supply" of natural gas as well as LNG services.<sup>683</sup>

7.324. We therefore turn to other relevant context, namely the remainder of the Schedules of Croatia, Hungary and Lithuania.

### The remainder of the Schedules of Croatia, Hungary and Lithuania

7.325. In considering the remainder of the Schedules of Croatia, Hungary and Lithuania as providing relevant context for interpreting the scope of the terms "Pipeline Transport [Services]" in sector 11.G, we keep in mind that a Member's Schedule should be considered as a whole because, as explained by the Appellate Body, sectors and subsectors "must be mutually exclusive".<sup>684</sup> We note that both parties refer to and agree with the principle of mutual exclusivity of sectors and sub-sectors as guiding the interpretation of GATS Schedules.<sup>685</sup>

7.326. Like the European Union<sup>686</sup>, we observe that the Schedules of Croatia, Hungary and Lithuania include commitments in various service sectors which constitute relevant context for the interpretation of "Pipeline Transport [Services]" in sector 11.G.

7.327. Croatia's Schedule contains commitments with respect to "Services incidental to energy distribution (CPC 887)" under sector 1.F. ("Other Business Services"), which include, *inter alia*, distribution services of gaseous fuels to household, industrial, commercial and other users. The explanatory note for CPC 887 further specifies that "transport services via pipeline on a fee or contract basis of petroleum and natural gas are classified in subclass 71310", thereby distinguishing distribution services of gas from pipeline transportation services.

7.328. The same observation can be made with respect to Hungary and Lithuania which have undertaken partial commitments on "Services incidental to energy distribution (CPC 887)"<sup>687</sup> under sector 1.F, "Other Business Services". In the section "Other Business Services" (1.F), Hungary also has commitments on "Consultancy services incidental to mining (ex CPC 883)". The relevant definition of the CPC defines "services incidental to mining" as "services rendered on a fee or contract basis at oil and gas fields [...]". Hence, services related to the production of gas are not found under sector 11.G.

7.329. Continuing our examination of the remainder of the three Schedules at issue, we observe that all three Members have undertaken specific commitments on "Distribution Services", in particular "Whole Trade Services" (sector 4.B) and "Retailing Services" (sector 4.C). The sector "Whole Trade Services" covers, *inter alia*, "Wholesale trade services of solid, liquid and gaseous fuels and related products (CPC 62271)" and "Retailing Services" encompasses, *inter alia*, the "[r]etail sales of fuel oil, bottled gas, coal and wood (CPC 63297)". Thus, wholesaling and retailing services of natural gas are not found under sector 11.G.

7.330. Furthermore, all three Members have commitments under sector 11.H, "Services Auxiliary to All Modes of Transport", in particular on "Storage and Warehouse Services (CPC 742)". This sector encompasses, *inter alia*, the "[b]ulk storage services of liquids or gases (CPC 7422)". Finally, we observe that, under sector 11.A, "Maritime Transport", Croatia has commitments on "Freight transportation (CPC 7212)", which includes, under "Transportation of bulk liquids or gases (CPC 72122)", "transportation by seagoing vessels of bulk liquids or gases in special tankers". In our view, this entry encompasses transportation services of LNG in sea tankers.

<sup>683</sup> European Union's first written submission, para. 80.

<sup>684</sup> Appellate Body Report, *US – Gambling*, para. 180. The Appellate Body further explained: "If this were not the case, and a Member scheduled the same service in two different sectors, then the scope of the Member's commitment would not be clear where, for example, it made a full commitment in one of those sectors and a limited, or no, commitment, in the other." (Ibid. fn 219).

<sup>685</sup> Russia's first written submission, para. 135; and European Union's first written submission, para. 55.

<sup>686</sup> European Union's first written submission, fn 71.

<sup>687</sup> Hungary has commitments on "Consultancy services incidental to energy distribution (ex CPC 887)" and Lithuania on "Services incidental to energy distribution (CPC 887[...])" which Lithuania defines as covering "consultancy services related to the transmission and distribution on a fee basis of electricity, gaseous fuels, steam and hot water to household, industrial, commercial and other users)".

7.331. Our review of the remainder of the Schedules of Croatia, Hungary and Lithuania provides several pertinent indications. The existence of different commitments encompassing gas-related services confirms that, under the GATS, the terms "Pipeline Transport [Services]" cannot cover all services related to natural gas, which, in turn, does not support Russia's proposition that sector 11.G includes the notions of "supply" and "supply services".<sup>688</sup>

7.332. None of the three Schedules contains a reference to LNG services.<sup>689</sup> Nonetheless, our examination of the remainder of those Schedules gives us two useful indications.

7.333. First, the existence of commitments on "Services Auxiliary to All Modes of Transport" confirms that services closely related to, or enabling, transportation, are classified separately from transportation *per se*. Second, the fact that "Transportation of bulk liquids or gases (CPC 72122)" encompasses transportation of LNG in sea tankers contradicts Russia's argument that LNG services fall under sector 11.G, "Pipeline Transport [Services]". The reason is that, if LNG services should be considered to fall under "Pipeline Transport [Services]" on the ground that the essential role of re-gasification is to facilitate the transport of natural gas via pipelines, LNG services might also be considered to fall under "Transportation of bulk liquids or gases (CPC 72122)" on the ground that liquefaction facilitates the transport of LNG in sea tankers. However, in accordance with the principle of mutual exclusivity of sectors and sub-sectors, LNG services cannot be classified at the same time under sector 11.A, "Maritime Transport", and sector 11.G, "Pipeline Transport". Thus, we can only conclude that LNG services must be classified elsewhere. For the purpose of this dispute, we do not need to determine where LNG services should be classified in the W/120 or in the CPC, but we feel confident that they are not found in sector 11.G, "Pipeline Transport [Services]".

7.334. In light of the foregoing, we find that a consideration of the remainder of the Schedules of Croatia, Hungary and Lithuania as relevant context confirms that sector 11.G does not cover "supply" or "supply services" nor does it cover LNG services. It also confirms our view that sector 11.G, "Pipeline Transport [Services]" encompasses the transportation or transmission of natural gas through transmission pipelines.

### **Object and purpose of the GATS**

7.335. The parties do not make specific arguments with respect to the consistency of their proposed interpretation with the object and purpose of the GATS.

7.336. In *US – Gambling* and in *China – Publications and Audiovisual Products*, the Appellate Body observed that the objectives contained in the preamble of the GATS did not provide specific guidance as to the correct interpretation of GATS Schedules.<sup>690</sup> In *US – Gambling*, the Appellate Body found nonetheless that the purpose of transparency contained in the preamble to the GATS supported the need for precision and clarity in scheduling GATS commitments, and underlined the importance of having Schedules that are readily understandable by all other WTO Members, as well as by service suppliers and consumers.<sup>691</sup>

7.337. We find that our interpretation of the scope of the commitments undertaken by Croatia, Hungary and Lithuania under sector 11.G, "Pipeline Transport [Services]" is consistent with the purpose of transparency contained in the preamble of the GATS because we define the meaning and scope of the relevant commitments in accordance with the ordinary meaning of the terms used and the relevant context as described above.

<sup>688</sup> GATS Schedules do not contain specific commitments on activities falling outside the scope of the GATS. Hence, for the reasons explained above (see section 7.4.1.2), the Schedules of Croatia, Hungary and Lithuania do not include commitments on "supply" of natural gas or LNG.

<sup>689</sup> We also note that neither the W/120 nor the CPC contain an explicit reference to LNG services. However, as confirmed by the Appellate Body in *US – Gambling*, "the CPC is exhaustive (all goods and services are covered)". (Appellate Body Report, *US – Gambling*, para. 172). W/120, which is based on the CPC, should be considered to be equally exhaustive. The parties concur with this view even though they disagree on where LNG services should be classified. (See Russia's response to Panel question No. 53, para. 275; and European Union's response to Panel question No. 53, para. 146).

<sup>690</sup> Appellate Body Reports, *US – Gambling*, para. 189; and *China – Publications and Audiovisual Products*, para. 393.

<sup>691</sup> Appellate Body Report, *US – Gambling*, para. 188.



## Conclusion

7.338. We conclude that sector 11.G, "Pipeline Transport [Services]", in the Schedules of Croatia, Hungary and Lithuania encompasses the transportation or transmission of natural gas through transmission pipelines. We further find that this sector does not cover "supply" or "supply services", nor does it cover LNG services.<sup>692</sup>

### 7.4.2.3 Market access and national treatment commitments

#### 7.4.2.3.1 Introduction

7.339. As indicated above, in order to make a *prima facie* case of violation under Article XVI:2 and/or XVII of the GATS, a complaining party must first establish that the responding party has undertaken commitments on market access and/or national treatment with respect to the relevant sector and mode at issue.<sup>693</sup>

7.340. In this section, we shall assess whether Russia has demonstrated that Croatia, Hungary and Lithuania have undertaken specific commitments on market access and/or national treatment with respect to sector 11.G, "Pipeline Transport [Services]". Russia has confirmed that each of its claims under the GATS in this dispute concerns mode 3, namely the commercial presence mode of supply.<sup>694</sup>

7.341. We shall therefore consider, first, the commitments inscribed under mode 3 in the market access column for sector 11.G. We shall then turn to the mode 3 commitments contained in the national treatment column. In our analysis, we shall also consider the horizontal commitments contained in the Schedules of Croatia, Hungary and Lithuania.

#### 7.4.2.3.2 Market access commitments

7.342. Russia argues that Croatia and Lithuania, having inscribed a "None" for mode 3 in the market access column with respect to sector 11.G, signified their intention to impose no limitation on the supply of pipeline transport services through mode 3.<sup>695</sup> Russia further argues that Hungary has made essentially a full mode 3 commitment as, in Russia's view, the phrase included by Hungary in the market access column with respect to mode 3 does not materially limit Hungary's market access commitment.<sup>696</sup>

7.343. The European Union does not make specific arguments with respect to the market access commitments contained in the Schedules of Croatia and Lithuania. The European Union submits,

<sup>692</sup> We consider that our interpretation pursuant to Article 31 of the Vienna Convention of the terms "Pipeline Transport [Services]", in sector 11.G, does not leave the meaning of those terms ambiguous or obscure, nor does it lead to a result which is manifestly absurd or unreasonable. Accordingly, we do not find it necessary to resort to supplementary means of interpretation under Article 32 of the Vienna Convention. For this reason, it is also not necessary for us to determine whether, as argued by the European Union, the CPC 2.1 constitutes supplementary means of interpretation. We recall that the European Union refers to the CPC 2.1 to support its view that pipeline transport services must be distinguished from LNG services. (European Union's first written submission, para. 76). CPC 2.1 distinguishes "Transport services via pipeline of petroleum and natural gas" (CPC 65131), which includes "transportation via pipeline of natural gas" from "Other supporting transport services n.e.c." (CPC 67990), the latter including the services of liquefaction of natural gas and regasification of LNG for transportation. (See CPC Ver.2.1 code 65131, Detailed structure and explanatory notes, United Nations Statistics Division, Classifications Registry <http://unstats.un.org/unsd/cr/registry/regcs.asp?Cl=31&Lg=1&Co=65131> (accessed 1 July 2016), (CPC 2.1 code 65131), (Exhibit EU-34); and CPC Ver.2.1 code 67990, Detailed structure and explanatory notes, United Nations Statistics Division, Classifications Registry <http://unstats.un.org/unsd/cr/registry/regcs.asp?Cl=31&Lg=1&Co=67990> (accessed 1 July 2016), (CPC 2.1 code 67990), (Exhibit EU-37)). According to the European Union, CPC 2.1 constitutes "supplementary means of interpretation" under Article 32 of the Vienna Convention. (European Union's response to Panel question No.60, para. 165). Russia submits that CPC 2.1 is not relevant for the purpose of interpreting GATS Schedules since those are based on the 1991 Provisional CPC. (Russia's response to Panel question No. 60, para. 286; and second written submission, para. 86).

<sup>693</sup> See, above paras. 7.233 and 7.235.

<sup>694</sup> Russia's response to Panel question No. 56, para. 285.

<sup>695</sup> Russia's first written submission, paras. 144 and 146.

<sup>696</sup> Russia's first written submission, para. 145.

however, that Hungary has included a "specific limitation" for this mode which, in its view, means that "[t]hese services may only be provided through a Contract of Concession granted by the state or the local authority".<sup>697</sup>

7.344. We recall that Russia has identified the market access commitments under sector 11.G for mode 3 by, respectively, Croatia, Hungary and Lithuania as follows<sup>698</sup>:

| Limitations on Market Access                              |  |   |
|---|--|---|
| Croatia <sup>699</sup>                                    | Hungary <sup>700</sup>   | Lithuania <sup>701</sup>                  |
| 1) None   | 1) Unbound   | 1) Unbound                                |
| 2) None   | 2) None  | 2) None                                   |
| 3) <i>None</i>  | 3) <i>Services may be provided through a Contract of Concession granted by the state or the local authority.</i> | 3) <i>None</i>                            |
| 4) Unbound, except as indicated in the horizontal section | 4) Unbound, except as indicated in Part I  | 4) Unbound, except as indicated in Part I |

7.345. According to Article XX:3 of the GATS, Members' Schedules of Specific Commitments are an integral part of the GATS and their meaning must be determined in accordance with the rules of interpretation of the Vienna Convention.<sup>702</sup>

7.346. We start our analysis with the Schedules of Croatia and Lithuania, both of which contain the word "None" in the "Limitations on market access" column for mode 3 with respect to sector 11.G.

7.347. The word "None" is not defined in the GATS, but, in *US – Gambling*, the Appellate Body explained that the word "None" in the market access column means that the Member concerned "has undertaken to provide full market access, within the meaning of Article XVI, in respect of the services included within the scope of" its commitment in the sector at issue, and, in so doing, the Member concerned "has committed not to maintain any of the types of measures listed in the six sub-paragraphs of Article XVI:2".<sup>703</sup>

7.348. In light of the foregoing, we conclude that, having inscribed "None" in the "Limitations on market access" with respect to mode 3, Croatia and Lithuania have made a full commitment for "Pipeline Transport [Services]" under sector 11.G. In other words, Croatia and Lithuania have undertaken not to maintain any of the six measures listed under Article XVI:2.

7.349. We turn now to the "Limitations on Market Access" column in the Schedule of Hungary which contains the following inscription under mode 3: "Services may be provided through a Contract of Concession granted by the state or the local authority".

<sup>697</sup> European Union's first written submission, para. 46.

<sup>698</sup> Russia's first written submission, paras. 144-146.

<sup>699</sup> Schedule of Specific Commitments of Croatia, GATS/SC/130 (22 December 2000), (Exhibits EU-16/RUS-37), p. 33. (emphasis added)

<sup>700</sup> Schedule of Specific Commitments of Hungary, GATS /SC/40 (15 April 1994), (Exhibits EU-17/RUS-36), p. 32. (emphasis added)

<sup>701</sup> Schedule of Specific Commitments of Lithuania, GATS/SC/133 (21 December 2001), (Exhibits EU-19/RUS-35), p. 23. (emphasis added)

<sup>702</sup> Appellate Body Report, *US – Gambling*, para. 160.

<sup>703</sup> Appellate Body Report, *US – Gambling*, para. 215. As explained by the panel in *China – Electronic Payment Services*, the term "None" needs to be read in conjunction with the title of the column in which this term appears; it means that the Member has undertaken "no" limitation, or, in other words, a full commitment, with respect to market access (or national treatment) in the mode concerned. (See Panel Report, *China – Electronic Payment Services*, para. 7.651).

7.350. The parties hold different views on the meaning and effect of this inscription. According to Russia, this limitation "only makes the mode 3 supply of pipeline transport services in Hungary subject to winning a concession tender issued by the state or a local authority" and does not correspond to any of the six limitations enumerated in Article XVI:2 of the GATS.<sup>704</sup> The European Union replies that the entry at issue "falls under the scope of XVI:2(a) of the GATS, under the form of service suppliers having a concession" and means that Hungary's commitment "does not oblige the state or a local authority to grant a single concession contract".<sup>705</sup> The European Union further explains that, at the moment, two service suppliers have the permission to supply pipeline transport services, but the maximum number of TSOs is not limited under the Hungarian Gas Act.<sup>706</sup>

7.351. We observe that, in this dispute, Russia's claim under Article XVI:2(a) of the GATS challenges the unbundling measure in the implementing laws of Croatia and Lithuania, but not Hungary.<sup>707</sup> We therefore do not find it necessary to determine whether, as argued by the European Union, the inscription in Hungary's Schedule amounts to a limitation within the meaning of Article XVI:2(a). We recall, however, that Russia challenges Hungary's unbundling measure under Article XVI:2(e) and (f) of the GATS.<sup>708</sup> Therefore, we need to determine whether this inscription amounts to a limitation within the meaning of either, or both, of those two provisions.

7.352. We note, first, that Hungary has not inscribed the term "Unbound" in the "Limitations on market access" column with respect to mode 3, which is the notation used to indicate that the Member concerned undertakes no specific commitment.<sup>709</sup> Therefore, we do not consider that Hungary has undertaken no market access commitments for mode 3. The European Union is not arguing either that the entry at issue amounts to an "Unbound", nor is the European Union contending that Hungary's inscription in the market access column under mode 3 amounts to a limitation within the meaning of Article XVI:2(e) or (f).

7.353. We recall that the mode 3 inscription at issue states that "Services may be provided through a Contract of Concession granted by the state or the local authority". It is clear – and the parties do not argue otherwise – that, by its own terms, this inscription does not refer to measures restricting or requiring specific types of legal entity or joint-venture, nor does it refer to limitations on the participation of foreign capital. We conclude, therefore, that, in its "Limitations on Market Access" column under sector 11.G, "Pipeline Transport", Hungary has not inscribed any limitation within the meaning of Article XVI:2(e) or (f), or both, with respect to the commercial presence mode of supply (mode 3).<sup>710</sup>

7.354. We recall that sectoral entries in a Member's Schedule have to be read together with the relevant entries in the so-called horizontal section of that Member's Schedule, as the latter applies to all the sectors and subsectors listed in the Schedule.<sup>711</sup> Hence, as a general matter, the so-

<sup>704</sup> Russia's response to Panel question No. 86, paras. 372 and 374.

<sup>705</sup> European Union's response to Panel question No. 168, paras. 52-53. See also European Union's response to Panel question No. 86, paras. 220-221.

<sup>706</sup> European Union's response to Panel question No. 168, para. 54.

<sup>707</sup> See below section 7.5.2.2. In its response to a question by the Panel after the second substantive meeting, Russia appears to allege that Hungary's unbundling measure is inconsistent with Article XVI:2(a) of the GATS. (See Russia's response to Panel question No. 169, para. 83). However, for the reasons explained in section 7.5.2.2, we shall not rule on this allegation by Russia.

<sup>708</sup> See sections 7.5.2.3 and 7.5.2.4 below.

<sup>709</sup> Appellate Body Report, *US – Gambling*, fn 257. We observe that Hungary has used the notation "Unbound" in a number of sectors and modes across its Schedule, including under sector 11.G, in the market access column for mode 1. Hence, the fact that Hungary did not inscribe "Unbound" in the "Limitations on market access" for mode 3 with respect to the same sector indicates that Hungary has undertaken market access commitment with respect to this sector and mode. (See Schedule of Specific Commitments of Hungary, GATS/SC/40 (15 April 1994), (Exhibits EU-17/RUS- 36)).

<sup>710</sup> We wish to clarify that we have not determined whether this limitation amounts to a limitation on the number of service suppliers within the meaning of Article XVI:2(a). Nor have we determined whether this entry amounts to a limitation under sub-paragraphs (b), (c) or (d) in Article XVI:2. Moreover, without further examination, we cannot exclude that the meaning and effect of this entry does not coincide with any of the six types of limitations listed under Article XVI:2. However, we do not need to reach a finding on these particular issues and we do not. We only determine, for the purpose of addressing Russia's claims in this case, that this particular entry does not amount to a limitation within the meaning of Article XVI:2(e) or (f).

<sup>711</sup> See Panel Reports, *China – Publications and Audiovisual Products*, para. 7.950; and *China – Electronic Payment Services*, paras. 7.574 and 7.677.

called "horizontal commitments" contained in the Schedules of Croatia, Hungary and Lithuania may set out relevant limitations on market access. While Lithuania's Schedule does not contain any horizontal limitation on market access for mode 3, Croatia and Hungary have listed mode 3 horizontal limitations. We therefore examine the horizontal limitations in the Schedules of Croatia and Hungary, starting with the Schedule of Croatia.

7.355. Croatia's Schedule contains certain horizontal limitations with respect to mode 3, as follows<sup>712</sup>:

| Sector or subsector                   | Limitations on market access  |
|---------------------------------------|---|
| <b>HORIZONTAL COMMITMENTS</b>         |   |
| All sectors included in this schedule | <p>3) <u>Investment</u><br/>Branch offices can perform all kind of business activities, but are not considered to be independent legal entities. The rights and obligations of the branch offices are those vested in the parent companies which have founded them.</p> <p>3) <u>Real Estate</u><br/>Unbound in relation to acquisition of real estate by services suppliers not established and incorporated in Croatia.<br/>Acquisition of real estate necessary for the supply of services by companies established and incorporated in Croatia as legal persons is allowed.<br/>Acquisition of real estate necessary for the supply of services by branches requires the approval of the Ministry of Foreign Affairs.</p> |

7.356. In the horizontal section of its Schedule, Croatia has inscribed two entries concerning the mode 3 mode of supply, which concern, respectively, "Investment" and "Real Estate" in the column dealing with "Limitations on market access". According to the European Union, this entry "does not limit the types of legal entities that can be used, but determines merely that a branch is not considered independent" and, hence, "is merely for transparency purposes".<sup>713</sup> We see no reason to disagree with the European Union that this entry clarifies the "rights and obligations" of "branch offices" vis-à-vis the "parent companies". Neither party discusses the entry related to "Real Estate" nor do we have any reason to believe that this entry has relevance in this dispute. Having reviewed the horizontal section in the Schedule of Croatia, we consider that it does not set out additional relevant limitations on market access for the purpose of this case. We therefore find that, with respect to market access, Croatia's horizontal commitments do not modify the conclusion reached on the basis of the mode 3 entry under sector 11.G in paragraph 7.348 above. The parties do not argue otherwise.

7.357. Turning to the Schedule of Hungary, we observe that Hungary has inscribed in the horizontal section of its Schedules certain limitations on market access under mode 3 as follows<sup>714</sup>:

<sup>712</sup> Schedule of Specific Commitments of Croatia, GATS/SC/130 (22 December 2000), (Exhibits EU-16/RUS-37), p. 2.

<sup>713</sup> European Union's response to Panel question No. 90, para. 229. The European Union explains: It is well documented that WTO Members have inscribed certain specifications in their schedules that are not measures that fall within the scope of Articles XVI or XVII of the GATS. Such so-called "fog" in schedules of commitments, i.e. entries that cannot be associated with any of the relevant provisions of Article XVI (market access) or Article XVII (national treatment) of the GATS, is due to the desire of the WTO Members to specify as transparent as possible how each of them sees its WTO obligations. (European Union's response to Panel question No. 90, para. 230 (referring to R. Adlung, P. Morrison, M. Roy and W. Zhang, "FOG in GATS Commitments – Boon or Bane?", Staff Working Paper ERSD-2011-04, World Trade Organization, Economic Research and Statistics Division (31 March 2011), (Exhibit EU-93))).

Russia refers to the horizontal entry related to "Investment" as context to support its interpretation of Article XVI:2(e). (See Russia's first written submission, para. 173).

<sup>714</sup> Schedule of Specific Commitments of Hungary, GATS /SC/40 (15 April 1994), (Exhibits EU-17/RUS-36), p. 1.

| Sector or subsector             | Limitations on market access  |
|---------------------------------|---|
| <b>HORIZONTAL COMMITMENTS</b>   |   |
| ALL SECTORS INCLUDED IN PART II | 3) Commercial presence should take the form of limited liability company, joint-stock company or representative office. Initial entry as branch is not permitted.<br><br>Unbound for the acquisition of state owned properties. |

7.358. Under the horizontal section of its Schedule, Hungary has listed two distinct entries in the market access column for mode 3. The first entry stipulates that "[c]ommercial presence should take the form of a limited liability company, joint-stock company or representative office" and prohibits "[i]nitial entry as a branch". Both parties concur that this entry limits the scope of Hungary's market access commitments for mode 3.<sup>715</sup> In our view, by stipulating that service suppliers establishing a commercial presence in Hungary "should take the form of limited liability company, joint-stock company or representative office", and that "initial entry as branch is not permitted", this limitation may have relevance for the purpose of assessing Russia's claim against Hungary under Article XVI:2(e) of the GATS.

7.359. The second mode 3 entry contained in the market access column in the horizontal part of Hungary's Schedule excludes from Hungary's commitments "the acquisition of state-owned properties". In our view, this entry does not set out a limitation which is relevant for the purpose of assessing Russia's claims under Article XVI:2(e) or (f) of the GATS. The parties do not argue otherwise.

7.360. Having reviewed the relevant sectoral and horizontal entries in the Schedules of Croatia, Hungary and Lithuania, we conclude that Croatia and Lithuania have undertaken a full mode 3 market access commitment for "Pipeline Transport [Services]" under sector 11.G of their Schedule. We further conclude that, in its "Limitations on Market Access" column under mode 3 for "Pipeline Transport", Hungary has undertaken not to maintain any limitation within the meaning of Article XVI:2(e) or (f). Nonetheless, in the horizontal part of its Schedule, Hungary has inscribed a limitation stipulating that services suppliers establishing a commercial presence in Hungary "should take the form of limited liability company, joint-stock company or representative office", and that "initial entry as branch is not permitted": this limitation may have relevance for the purpose of assessing Russia's claim under Article XVI:2(e) of the GATS.

#### **7.4.2.3.3 National treatment commitments**

7.361. Russia argues that Croatia, Hungary and Lithuania recorded the word "None" in the national treatment column for mode 3, thus signifying their commitment without limitation to permit service suppliers of other Members to supply pipeline transport services through commercial presence in their respective territories.<sup>716</sup> The European Union does not comment on this issue.

7.362. Russia has identified the national treatment commitments under subsector 11.G for mode 3 by, respectively, Croatia, Hungary and Lithuania as follows<sup>717</sup>:

<sup>715</sup> According to Russia, "Hungary does appear to have limited the permissible 'forms of commercial presence' and thus the 'specific types of legal entity through which a service supplier may supply a service'. However, this limitation in no way excludes Hungary's unbundling measure from the coverage of Article XVI:2(e)." (Russia's first written submission, para. 174; and response to Panel question No. 165, para. 71). The European Union submits that "Hungary's limitation does limit its commitments for mode 3, by stating that commercial presence should take the form of a limited liability company, joint-stock company, or representative office and that initial entry as a branch is not permitted." (European Union's response to Panel question No. 5, para. 228).

<sup>716</sup> Russia's first written submission, para. 236.

<sup>717</sup> Russia's first written submission, para. 174; and response to Panel question No. 165, para. 71.

| Limitations on National Treatment   |   |   |
|---|---|---|
| Croatia <sup>718</sup>  | Hungary <sup>719</sup>  | Lithuania <sup>720</sup>  |
| 1) None<br>2) None<br>3) <i>None</i><br>4) Unbound, except as indicated in the horizontal section | 1) None<br>2) None<br>3) <i>None</i><br>4) Unbound, except as indicated in Part I | 1) Unbound<br>2) None<br>3) <i>None</i><br>4) Unbound, except as indicated in Part I. |

7.363. With respect to sector 11.G, Croatia, Hungary and Lithuania have inscribed the word "None" in the "Limitations on national treatment column" for mode 3.

7.364. In paragraph 7.347 above, we noted that the word "None" in the market access column means that the Member concerned has undertaken to accord full market access within the meaning of Article XVI:2 of the GATS. Similarly, the word "None" in the national treatment column means that the Member must accord full national treatment with respect to the particular sector and mode of supply, such national treatment extending to "'all measures affecting the supply of services', which is the scope of Article XVII as defined in that provision".<sup>721</sup> We see no reason to depart from that interpretation.

7.365. We conclude, therefore, that, having inscribed the word "None" with respect to mode 3 for sector 11.G, Croatia, Hungary and Lithuania have undertaken to accord full national treatment for mode 3 in this sector.

7.366. We recall that sectoral entries in a Member's Schedule have to be read together with the relevant entries in the so-called horizontal section of that Member's Schedule, as the latter applies to all the sectors listed in the Schedule.<sup>722</sup> Hence, the section on "horizontal commitments" contained in Schedules of Croatia, Hungary and Lithuania may set out relevant limitations on national treatment.

7.367. The relevant part of Croatia's Schedule lists the following commitments<sup>723</sup>:

| Sector or subsector                   | [...] | Limitations on national treatment   |
|---------------------------------------|-------|---|
| <b>HORIZONTAL COMMITMENTS</b>         |       |   |
| All sectors included in this schedule |       | 1), 2), 3) Eligibility for subsidies from the Republic of Croatia may be limited to legal persons established within the territory of Croatia or a particular geographical sub-division thereof.<br>Research and development subsidies are limited to legal persons established in Croatia. |

7.368. We turn to the Schedule of Hungary. The relevant part of Hungary's Schedule lists the following commitments<sup>724</sup>:

<sup>718</sup> Schedule of Specific Commitments of Croatia, GATS/SC/130 (22 December 2000) (Exhibits EU-16/RUS-37), p. 33. (emphasis added)

<sup>719</sup> Schedule of Specific Commitments of Hungary, GATS /SC/40 (15 April 1994), (Exhibits EU-17/RUS-36), p. 32. (emphasis added)

<sup>720</sup> Schedule of Specific Commitments of Lithuania, GATS/SC/133 (21 December 2001), (Exhibits EU-19/RUS-35), p. 23. (emphasis added)

<sup>721</sup> Panel Report, *Argentina – Financial Services*, para. 7.454.

<sup>722</sup> See, for instance, Panel Reports, *China – Publications and Audiovisual Products*, para. 7.950; and *China – Electronic Payment Services*, paras. 7.574 and 7.677.

<sup>723</sup> Schedule of Specific Commitments of Croatia, GATS/SC/130 (22 December 2000), (Exhibits EU-16/RUS-37), p. 2.

| Sector or subsector             | [...] | Limitations on national treatment  |
|---------------------------------|-------|--|
| <b>HORIZONTAL COMMITMENTS</b>   |       |  |
| ALL SECTORS INCLUDED IN PART II |       | 3) Unbound for the acquisition of state owned properties.<br>Unbound with respect to subsidies |

7.369. Finally, we observe that the relevant part of Lithuania's Schedule is as follows<sup>725</sup>:

| Sector or subsector           | [...] | Limitations on national treatment   |
|-------------------------------|-------|---|
| <b>HORIZONTAL COMMITMENTS</b> |       |   |
| HORIZONTAL COMMITMENTS        |       | 3) <u>Investment</u><br>None other than investments in organizing the lotteries which are forbidden under the Law on Foreign Capital Investment. Eligibility of subsidies may be limited to legal persons established within the territory of Lithuania or a particular geographical subdivision thereof. |

7.370. We observe that neither party argues that the horizontal limitations above are relevant to Russia's claims. Likewise, having reviewed these limitations, we consider that they do not modify the conclusions we have reached above in paragraph 7.365.

7.371. Having examined the relevant sectoral and horizontal entries in the three Schedules at issue, we conclude that Croatia, Hungary and Lithuania have undertaken a full national treatment commitment for mode 3 under sector 11.G, "Pipeline Transport [Services]".

## 7.5 The unbundling measure

### 7.5.1 The unbundling measure in the Directive

#### 7.5.1.1 Introduction

7.372. Russia challenges the unbundling measure in the Directive, described in paragraphs 2.10 through 2.28 above, under Article II:1 of the GATS and Articles I:1 and III:4 of the GATT 1994. The European Union rejects all three claims and has raised no defences in response to these claims.

7.373. Generally, the question before the Panel in respect of Russia's challenge against the unbundling measure in the Directive is whether this measure violates Article II:1 of the GATS and Articles I:1 and III:4 of the GATT 1994 by setting out different unbundling models, namely the ownership unbundling model (OU model), the independent system operator model (ISO model), and the independent transmission operator model (ITO model). Importantly, Russia's claims against the unbundling measure in the Directive do not challenge the requirement to unbundle *per se*, but rather the alleged discrimination stemming from the Directive "enabling" EU member States to choose between implementing only the OU model or implementing the ISO and/or the ITO models in addition to the OU model in respect of transmission systems that belonged to a vertically integrated undertaking (VIU) on 3 September 2009.<sup>726</sup>

<sup>724</sup> Schedule of Specific Commitments of Hungary, GATS /SC/40 (15 April 1994), (Exhibits EU-17/RUS-36), p. 1.

<sup>725</sup> Schedule of Specific Commitments of Lithuania, GATS/SC/133 (21 December 2001), (Exhibits EU-19/RUS-35), p. 2.

<sup>726</sup> See, e.g. Russia's first written submission, paras. 314, 318-319, 326-327, 353, 355-356, 360-361, 371 and 810; opening statement at the first meeting of the Panel, para. 35; and second written submission, paras. 58, 229-230, 237, 258 and 487.

7.374. We note that there are important differences between Russia's claims under Article II:1 of the GATS, Article I:1 of the GATT 1994 and Article III:4 of the GATT 1994 due to the distinct scope and subject matter of the GATS and the GATT 1994, respectively, and the different nature of the MFN and national treatment obligations in Articles I:1 and III:4 of the GATT 1994, respectively. Notably, whereas our assessment of Russia's claim under Article II:1 of the GATS will focus on the treatment accorded to *pipeline transport services and service suppliers* under the different unbundling models, our assessment of Russia's claims under Articles I:1 and III:4 of the GATT 1994 will focus on the treatment accorded to *natural gas* under the different unbundling models. Furthermore, whereas our assessment of Russia's claim under Article I:1 of the GATT 1994 will involve a comparison of the treatment accorded to imported natural gas from Russia with that accorded to imported natural gas from other non-EU countries, our assessment of Russia's claim under Article III:4 of the GATT 1994 will involve a comparison of the treatment accorded to imported Russian natural gas with that accorded to domestic natural gas.

7.375. Regardless of their differences, we note that all three of Russia's claims against the unbundling measure in the Directive share a common feature. More particularly, they involve a comparison of the alleged less favourable treatment accorded to pipeline transport services and service suppliers or natural gas in EU member States, which have only implemented the OU model, with the alleged more favourable treatment accorded to pipeline transport services and service suppliers or natural gas in EU member States, which have implemented the ISO and/or the ITO models in addition to the OU model in respect of transmission systems that belonged to a VIU on 3 September 2009.

7.376. This specific approach calls upon us to consider the threshold issue of whether to assess the unbundling measure's consistency with Article II:1 of the GATS and Articles I:1 and III:4 of the GATT 1994 throughout the European Union or within each individual EU member State. The parties have opposite views but appear to agree that this issue should be dealt with in the same manner for Russia's claims under Article II:1 of the GATS and Articles I:1 and III:4 of the GATT 1994.<sup>727</sup> In light of the approach taken by both parties, and the nature and object of Russia's claims, we are similarly of the view that, regardless of the differences between the GATS and the GATT 1994, it would be appropriate to assess this issue uniformly for Russia's three claims.

7.377. Accordingly, we will address, first, whether the unbundling measure's consistency with Article II:1 of the GATS and Articles I:1 and III:4 of the GATT 1994 should be assessed throughout the European Union or within each individual EU member State. We will then turn to the substantive assessment under each of these provisions, beginning with Russia's claim under Article II:1 of the GATS and followed by Russia's claims under Articles I:1 and III:4 of the GATT 1994.

#### **7.5.1.2 Level for assessing the WTO consistency of the unbundling measure**

7.378. The European Union argues that the unbundling measure's consistency with Article II:1 of the GATS and Articles I:1 and III:4 of the GATT 1994 should be assessed within the individual EU member States and that the same unbundling model(s) apply within each individual EU member State regardless of the origin of the pipeline transport services and service suppliers or the natural gas.<sup>728</sup> In support of its position, the European Union argues that a measure's conformity with the MFN and national treatment obligations must be assessed in that measure's "regulatory jurisdiction", hereby referring to "the jurisdiction of the regulatory authority that

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<sup>727</sup> See, e.g. Russia's response to Panel question No. 45(g), paras. 215-216; and second written submission, paras. 12-74; and European Union's responses to Panel question No. 45(b), paras. 102-104 and No. 45(g), para. 117; and opening statement at the second meeting of the Panel, para. 39. Russia addresses this as a "common issue[]" for its three claims, and we note that the European Union, while having addressed the issue separately for each of Russia's three claims in its written submissions, does not distinguish its position in regard to either of the three claims and has referred to it as a "common issue" at the second meeting of the Panel with the parties. (Russia's second written submission, paras. 12-74; and European Union's first written submission, paras. 289-297, 366-367 and 412-415; second written submission, paras. 63-71, 90-94 and 140; and opening statement at the second meeting of the Panel, paras. 6-17 and 39).

<sup>728</sup> European Union's first written submission, paras. 293-296, 366-367 and 413-415; opening statement at the first meeting of the Panel, para. 32; and second written submission, paras. 63-64, 90 and 140.



determines the conditions for selling a good or supplying a service."<sup>729</sup> The European Union argues that the regulatory jurisdiction of the unbundling measure is each individual EU member State since the "precise conditions" for supplying pipeline transport services and selling natural gas are determined by the national implementing laws adopted by the regulatory authorities of each EU member State, rather than the Directive.<sup>730</sup> In the European Union's view, a measure should be assessed throughout the European Union only if it does not require further implementation by the EU member States<sup>731</sup> or does not leave any discretion to the EU member States in implementing it.<sup>732</sup> The European Union also argues that there is no genuine relationship between the unbundling measure in the Directive and any alleged *de facto* discrimination, as the Directive does not require EU member States to exercise the discretion to choose between implementing only the OU model or also the ISO and ITO models "in one or the other manner".<sup>733</sup>

7.379. Russia disagrees with the European Union's position and argues that the unbundling measure should be assessed throughout the European Union, by comparing the treatment accorded in EU member States that have only implemented the OU model with the treatment accorded in EU member States that have implemented the ISO and/or the ITO models in addition to the OU model in respect of transmission systems that belonged to a VIU on 3 September 2009. In support of its position, Russia argues that the European Union is responsible for each of its measures, regardless of their form.<sup>734</sup> In this regard, Russia points out that the Directive required each EU member State to implement the unbundling measure and that, in doing so, each EU member State was required to incorporate the OU model and authorized to incorporate the ISO and/or the ITO models in respect of transmission systems that belonged to a VIU on 3 September 2009.<sup>735</sup> Russia also submits that the European Union is responsible for the actions of its member States, arguing that EU member States are "'regional' governments" for which the European Union, under Article I:3(a) of the GATS and Article XXIV:12 of the GATT 1994, is "required to 'take such reasonable measures as may be available to it to ensure observance'" of the relevant provisions of the GATS and the GATT 1994.<sup>736</sup> Russia submits that the European Union has acknowledged this responsibility for its member States in previous cases, in a formal letter responding to Russia's consultations request, and in response to questions by the Panel.<sup>737</sup> As further support for its position, Russia submits that the European Union was not an "innocent bystander" in the alleged discriminatory implementation of the Directive by the EU member States<sup>738</sup>, but rather had "active involvement in securing this discriminatory result"<sup>739</sup>, ranging from being "fully aware"<sup>740</sup> or knowing<sup>741</sup> which EU member States would implement which

<sup>729</sup> European Union's response to Panel question No. 45(b), para. 102.

<sup>730</sup> European Union's response to Panel question No. 45(b), para. 103.

<sup>731</sup> European Union's response to Panel question No. 45(b), para. 102.

<sup>732</sup> European Union's response to Panel question No. 45(b), para. 104. Japan appears to agree with the European Union's position, stating that "to the extent that each model is consistent with GATS Article II ..., it is also reasonable to provide each member state a choice among such models, depending on its distinctive unbundling necessities." (Japan's third-party submission, para. 37). At the same time, Japan considers that this issue should be determined on a "case-by-case basis depending on the measure and obligation of the Member at issue", taking into account "(i) [w]hether the measure ... is taken by the EU or a EU member state, which will partly depend on whether the alleged aspect of the measure is of the exclusive competence of the EU, the exclusive competence of EU member states, or shared by the EU and its member states" and "(ii) [w]ith regard to the national treatment obligation in the trade in services, whether the relevant commitment is made in the name of the EU or the name of a EU member state". (Japan's response to Panel question No. 2, para. 8). In our assessment below, we take into account the fact that the unbundling measure in the Directive is an EU measure rather than a measure taken by individual EU member States, but we have not found it necessary to address the competences, under EU law, of the European Union or its member States in this regard. Furthermore, as Russia's claims against the unbundling measure in the Directive under Article II:1 of the GATS do not involve specific commitments, we have not considered whether relevant commitments are made.

<sup>733</sup> European Union's response to Panel question No. 171(c), para. 72.

<sup>734</sup> Russia's second written submission, para. 21.

<sup>735</sup> Russia's second written submission, para. 17.

<sup>736</sup> Russia's second written submission, paras. 27-30 (quoting Article XXIV:12 of the GATT 1994 and Article I:3(a) of the GATS).

<sup>737</sup> Russia's second written submission, paras. 32-33 (referring to Panel Reports, *EC – Trademarks and Geographical Indications (US)*, para. 7.98 and *EC and certain member States – Large Civil Aircraft*, para. 7.172; Letter of 8 May 2014 from the Permanent Mission of the European Union to the WTO regarding Russia's request for consultations (Exhibit RUS-115bis); and European Union's response to Panel question No. 45(d), para. 106).

<sup>738</sup> Russia's second written submission, para. 20.

<sup>739</sup> Russia's second written submission, para. 16.

<sup>740</sup> Russia's second written submission, para. 14.

unbundling model(s) to "authoriz[ing]"<sup>742</sup>, "encourag[ing] and coordinat[ing]"<sup>743</sup> or "enact[ing] and help[ing]"<sup>744</sup> with the implementation of different combinations of unbundling models in different EU member States in order to discriminate against Russian pipeline transport services and service suppliers or imported Russian natural gas.

#### 7.5.1.2.1 Analysis by the Panel

7.380. For purposes of determining whether to assess the unbundling measure on an EU-wide or EU member State-specific basis, and more generally for assessing Russia's claims, we find it crucial to know exactly what measure Russia is challenging.

7.381. In this respect, we concur with the concerns raised by the European Union regarding Russia being "imprecise as to what measure it actually challenges."<sup>745</sup> We note that Russia has pointed to different measures as the challenged measure throughout these proceedings, including in response to questions by the Panel seeking clarification on this matter.<sup>746</sup> More particularly, Russia has at different times appeared to be challenging either the unbundling measure in the Directive<sup>747</sup>, specific instances of application of the unbundling measures in the national implementing laws of Lithuania and Germany<sup>748</sup>, the unbundling measure in the Directive as well as the unbundling measures in the national implementing laws of all EU member States<sup>749</sup>, the unbundling measure in the Directive and the unbundling measure in the national implementing law of Lithuania as "a single measure"<sup>750</sup>, or the unbundling measure in the Directive and the unbundling measures in the national implementing laws of all EU member States as "a single measure".<sup>751</sup>

7.382. We wish to emphasize that it is the responsibility of the complaining party to specify which measure it is challenging. At the same time, and as mentioned above, we believe that it is crucial to understand exactly what measure Russia is challenging in order to determine whether to assess this measure on an EU-wide or EU member State-specific basis. We therefore find it necessary to scrutinize Russia's submissions with a view to clarifying which of the above-listed measures should be viewed as the challenged measure.

7.383. We consider that an overall reading of Russia's panel request and the submissions provided by Russia throughout these proceedings points to the challenged measure being the unbundling measure in the Directive. As explained by Russia throughout these submissions, including in its requests for findings, it is claiming that "the unbundling measure under the Directive" or "the unbundling measure provided for in the Directive" violates Article II:1 of the GATS and Articles I:1 and III:4 of the GATT 1994 "by enabling Member States to select from among the unbundling models".<sup>752</sup> Aside from the limited references, in Russia's various submissions, to the other measures listed in paragraph 7.381 above, Russia has not provided a clear explanation of how its claims that "the unbundling measure under the Directive" or "the unbundling measure provided for in the Directive" violates Article II:1 of the GATS and Articles I:1 and III:4 of the GATT 1994 "by enabling Member States to select from among the unbundling

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<sup>741</sup> Russia's second written submission, para. 15.

<sup>742</sup> Russia's second written submission, paras. 17 and 21.

<sup>743</sup> Russia's second written submission, para. 21.

<sup>744</sup> Russia's second written submission, para. 41.

<sup>745</sup> European Union's response to Panel question No. 171(f), para. 81. See also European Union's closing statement at the first meeting of the Panel, para. 6.

<sup>746</sup> See, e.g. Panel question Nos. 5 and 171(a).

<sup>747</sup> See, e.g. Russia's response to Panel question No. 5, para. 31.

<sup>748</sup> See, e.g. Russia's response to Panel question No. 5, para. 33. In this regard, we note our preliminary ruling of 10 November, in which we concluded that Russia's "as applied" claims under Article II:1 of the GATS and Articles I:1 and III:4 of the GATT 1994, raised by Russia in its response to Panel question No. 5 following the first meeting of the Panel, fall outside our terms of reference. (Preliminary ruling (conclusions) of 10 November 2016, para. 2.2; and section 7.2.2.2.7 above).

<sup>749</sup> See, e.g. Russia's response to Panel question No. 171(a), para. 100.

<sup>750</sup> See, e.g. Russia's responses to Panel question No. 5, para. 31 and No. 171(a), para. 101.

<sup>751</sup> See, e.g. Russia's comments on the European Union's response to Panel question No. 154, paras. 6-7.

<sup>752</sup> Russia's first written submission, para. 810, bullet points 5-7; and second written submission, para. 487, bullet points 6-8.

models"<sup>753</sup> could be addressed in respect of these other measures. Nor has Russia substantiated its notion of the unbundling measure in the Directive and the unbundling measure in the national implementing laws of Lithuania being "a single measure"<sup>754</sup>, or its alternative notion of the unbundling measure in the Directive and the unbundling measures in the national implementing laws of all EU member States being "a single measure".<sup>755</sup>

7.384. Furthermore, while we agree with the European Union's concerns regarding lack of precision in Russia's submissions, we do not believe that there has been prejudice to the European Union's ability to prepare its defence, nor that its due process rights are violated by our decision to focus on the unbundling measure in the Directive, when assessing Russia's claims under Article II:1 of the GATS and Articles I:1 and III:4 of the GATT 1994. The European Union itself generally appears to focus its responses to these claims on the unbundling measure in the Directive and has in this regard explicitly referred to Russia's statement that "the 'unbundling measure in the Directive is the only measure relevant to this claim'."<sup>756</sup>

7.385. Having established that our assessment should focus on the unbundling measure in the Directive, we begin this assessment by examining the nature of this measure, including its design, expected operation and regulatory effects.

7.386. In this regard, we note that the European Union, when applying its own notion of "regulatory jurisdiction" as "the jurisdiction of the regulatory authority that determines the conditions for selling a good or supplying a service"<sup>757</sup>, appears to focus exclusively on the role played by the national implementing laws while disregarding that of the Directive. The European Union thus "disagrees that [the Directive] has effects throughout the European Union: the provisions in the Directive only have effects once implemented in the individual Member States."<sup>758</sup>

7.387. However, and as pointed out by Russia, the Directive creates a legal obligation for the EU member States to implement the rules on unbundling, and more particularly requires the EU member States to implement the OU model and provides them the choice of implementing the ISO and/or the ITO models in addition to the OU model in respect of transmission systems that belonged to a VIU on 3 September 2009.<sup>759</sup> In this way, the Directive therefore does "determine the conditions for selling [natural gas] or supplying [pipeline transport services]".<sup>760</sup> In other words, the unbundling measure in the Directive applies in and has the above-mentioned regulatory effects throughout the EU territory.

7.388. For this reason, the situation before us is also different from those addressed by the two GATT panels referred to by the European Union in support of its position, *Canada – Provincial Liquor Boards (US)* and *US – Malt Beverages*.<sup>761</sup> The challenged measures in these two disputes were measures by certain Canadian provinces or US states, applicable within these provinces or states only. Unlike the situation before us, these disputes did not involve any underlying measures applying throughout Canada or the United States and requiring implementation by their provinces or states, respectively.

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<sup>753</sup> Russia's first written submission, para. 810, bullet points 5-7; and second written submission, para. 487, bullet points 6-8.

<sup>754</sup> See, e.g. Russia's responses to Panel question No. 5, para. 31, and No. 171(a), para. 101.

<sup>755</sup> See, e.g. Russia's opening statement at the second meeting of the Panel, para. 102; and comments on the European Union's response to Panel question No. 154, paras. 1 and 6-7. We emphasize that while we consider the unbundling measure in the Directive the challenged measure for purposes of Russia's claims under Article II:1 of the GATS and Articles I:1 and III:4 of the GATT 1994, we are not precluded from addressing evidence relating to the implementation of the unbundling measure in the Directive through the national implementing laws of EU member States, as necessary and appropriate, when assessing Russia's claims against the unbundling measure in the Directive.

<sup>756</sup> European Union's comments of 21 October 2016 regarding terms of reference, para. 15; and response to Panel question No. 171(f), para. 81 (quoting Russia's first written submission, para. 307).

<sup>757</sup> European Union's response to Panel question No. 45(b), para. 102.

<sup>758</sup> European Union's response to Panel question No. 171(b), para. 71.

<sup>759</sup> Russia's second written submission, para. 17.

<sup>760</sup> European Union's response to Panel question No. 45(b), para. 102.

<sup>761</sup> European Union's opening statement at the second meeting with the Panel, paras. 10-11 (referring to GATT Panel Reports, *Canada – Provincial Liquor Boards (US)*, fn 1 to para. 5.4; and *US – Malt Beverages*, paras. 5.16-5.17).

7.389. We also wish to make clear that we are not suggesting that the Directive imposes a direct requirement to unbundle, or a particular unbundling model, on any economic actor in the EU territory. We are aware that the notion of "direct effect" has a particular meaning in the EU legal system, which was a point of discussion among the parties at the second meeting of the Panel.<sup>762</sup> Our finding that the Directive applies in and has regulatory effects throughout the EU territory does not concern such "direct effect".<sup>763</sup> Rather, and as explained above, this finding concerns the Directive's above-mentioned regulatory effects of creating a legal obligation for EU member States to implement the rules on unbundling, hereunder requiring EU member States to implement the OU model and providing them the choice to implement the ISO and/or the ITO models in addition to the OU model in respect of transmission systems that belonged to a VIU on 3 September 2009.

7.390. Having determined that the unbundling measure in the Directive applies in and has regulatory effects throughout the EU territory, we turn to the argument by the European Union that the discretionary nature of the Directive should entail that the WTO consistency of this measure should be assessed within the individual EU member States.<sup>764</sup>

7.391. We begin by noting that the unbundling measure in the Directive is not entirely discretionary in nature. As acknowledged by both parties, EU member States do not have discretion to choose whether or not to implement the OU model. Rather, they are allowed discretion to choose whether or not to implement the ISO and/or the ITO models in addition to the OU model and only with respect to transmission systems that belonged to a VIU on 3 September 2009.<sup>765</sup>

7.392. We understand the European Union to be arguing that this element of discretion under the Directive's unbundling measure entails that the WTO consistency of this measure should be assessed within the territory of individual EU member States rather than throughout the entire EU territory.<sup>766</sup> Effectively, the position of the European Union appears to be that this type of measure should not be subject to a challenge under the MFN or national treatment obligations in the GATS and the GATT 1994 and that a complaining Member would instead have to challenge the "national measure transposing the Directive".<sup>767</sup>

7.393. We have difficulties accepting this position. In our view, the approach suggested by the European Union would be tantamount to automatically excluding the unbundling measure in the Directive from review under Article II:1 of the GATS and Articles I:1 and III:4 of the GATT 1994 by virtue of the fact that this measure involves an element of discretion. As indicated by the European Union, complaining parties would thus be confined to challenging the "national measure[s] transposing the Directive" and the treatment accorded by such measures in the territory of the individual EU member States.<sup>768</sup> This would, in our view, contradict the Appellate Body's finding in *US – Corrosion-Resistant Steel Sunset Review* that there is "no reason for concluding that, in principle, non-mandatory measures cannot be challenged 'as such'"<sup>769</sup> and that the discretionary or mandatory nature of a challenged measure "is relevant, if at all, only as part of the panel's assessment of whether the measure is, as such, inconsistent with particular obligations."<sup>770</sup>

7.394. In conclusion, and having established that the unbundling measure in the Directive applies in and has regulatory effects throughout the entire EU territory, we see no reason to assess the WTO consistency of this measure within each individual EU member State, simply due to the fact

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<sup>762</sup> Russia's oral response to advance Panel question No. 26 at the second meeting of the Panel; and European Union's oral response to advance Panel question No. 26 at the second meeting of the Panel.

<sup>763</sup> We understand the European Union's position that "the provisions in the Directive only have effects once implemented in the individual Member States" to be closely connected to the concept of "direct effect". (European Union's response to Panel question No. 171(a), para. 71).

<sup>764</sup> European Union's response to Panel question No. 171(c), paras. 71-76.

<sup>765</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 9(8).

<sup>766</sup> European Union's response to Panel question No. 45(b), para. 103.

<sup>767</sup> European Union's response to Panel question No. 45(b), para. 103. See also European Union's first written submission, para. 296; and second written submission, paras. 64-65.

<sup>768</sup> European Union's response to Panel question No. 45(b), para. 103. See also European Union's first written submission, para. 296; and second written submission, paras. 64-65.

<sup>769</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 88.

<sup>770</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 89.

that its design and expected operation are such that it requires implementation by EU member States and allows these member States an element of discretion when implementing it.

7.395. Following the approach by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, we will consider the element of discretion under the Directive's unbundling measure only if relevant in the context of our substantive assessments under Article II:1 of the GATS and Articles I:1 and III:4 of the GATT 1994. More particularly, should we find that Russia has demonstrated that its pipeline transport services and service suppliers or its imported natural gas are accorded less favourable treatment, we will consider whether such potential less favourable treatment is attributable to the unbundling measure in the Directive, taking into account the element of discretion allowed under it.

7.396. When reaching this conclusion, we are mindful that the issue of whether to assess the unbundling measure in the Directive on an EU-wide or a member State-specific basis has been a contentious one, with both parties raising concerns of a systemic nature.<sup>771</sup> We note, in particular, the position of the European Union that "[t]he consequence of Russia's claim would be that any differences that may exist in the laws or regulations that apply in sub-divisions of the territory of a WTO Member must disappear"<sup>772</sup> and that "[a]n interpretation of the MFN obligation in the GATS that would require one single harmonised treatment throughout the Member States of the European Union is manifestly wrong and would have grave consequences for any WTO Member with a federal system."<sup>773</sup> In light of these concerns, we find it useful to provide a few observations concerning the basis for and scope of our finding, including what we have *not* found.

7.397. We, first, wish to emphasize that our finding regarding the relevant level for assessing the WTO consistency of the Directive's unbundling measure is based on the particularities of this measure and Russia's challenge against it, taking into account the *sui generis* nature of the European Union and its member States in the WTO. Hence, our finding does not determine whether this would be the relevant level in future cases involving a different type of measure or challenge. In particular, we recall that the challenged measure is an EU measure, which applies in and has regulatory effects throughout the EU territory, and that the alleged discrimination challenged by Russia stems from models explicitly provided for by the Directive. This situation is therefore distinguishable from other situations where "differences ... may exist in the laws or regulations that apply in sub-divisions of the territory of a WTO Member" without the existence of an underlying measure applying throughout such a WTO Member. For the same reasons, we do not believe that our finding that the unbundling measure in the Directive should be assessed on an EU-wide basis would automatically "require one single harmonised treatment throughout the Member States of the European Union". We also emphasize that, under Article II:1 of the GATS and Articles I:1 and III:4 of the GATT 1994, a complaining party would, in any event, be required to demonstrate that any differences in the treatment or that any lack of "one single harmonised treatment" throughout the responding party result in less favourable treatment being accorded to the services and service suppliers or the goods of the complaining party. In fact, these are the very issues we address in sections 7.5.1.3 and 7.5.1.4 below.

7.398. Secondly, we wish to point out that we have not found it necessary to address all arguments submitted by Russia in response to the European Union's position that the unbundling measure in the Directive should be assessed within the individual EU member States. In particular, we have not found it necessary to address Russia's argument that EU member States are "'regional' governments" within the meaning of Article I:3(a) of the GATS and Article XXIV:12 of the GATT 1994<sup>774</sup>, a position the European Union opposes.<sup>775</sup> Nor have we found it necessary to address Russia's argument that the European Union and its member States are granted "a type of preferential treatment compared to other WTO Members" by "enjoy[ing] a special relationship with the WTO" under which both the European Union and its member States are Members of the

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<sup>771</sup> See, e.g. Russia's opening statement at the first meeting of the Panel, para. 38; second written submission, para. 38; and opening statement at the second meeting of the Panel, para. 81; and European Union's first written submission, paras 296-297; opening statement at the first meeting of the Panel, para. 33; and response to Panel question No. 171(c), para. 77.

<sup>772</sup> European Union's first written submission, para. 297.

<sup>773</sup> European Union's opening statement at the first meeting of the Panel, para. 33. See also European Union's response to Panel question No. 171(c), para. 77.

<sup>774</sup> Russia's second written submission, paras. 27-30; and opening statement at the second meeting of the Panel, para. 83.

<sup>775</sup> European Union's opening statement at the second meeting of the Panel, para. 14.

WTO.<sup>776</sup> Our finding that the unbundling measure in the Directive should be assessed throughout the EU territory therefore should not be viewed as addressing, let alone resolving, these issues.

7.399. Likewise, we have not found it necessary to address the alleged involvement by the European Union in the implementation of the unbundling measure in the different EU member States, including the evidence submitted by Russia, which was obtained through Wikileaks.<sup>777</sup> The European Union rejects the notion of a "conspiracy" between itself and its member States, and submits, instead, that the adoption and implementation of the unbundling measure was "the result of a normal democratic process"<sup>778</sup>, and "strongly object[s] to the Panel accepting illegally obtained confidential documents as evidence in WTO proceedings".<sup>779</sup> In reaching the conclusion that the unbundling measure in the Directive should be assessed throughout the EU territory, we have not found it necessary to address these issues, nor does this finding rely on any evidence obtained by Russia through Wikileaks.

#### **7.5.1.2.2 Conclusion**

7.400. For the reasons explained in paragraphs 7.378 through 7.395 above, we conclude that the WTO consistency of the Directive's unbundling measure should be assessed throughout the EU territory.

7.401. Having reached this conclusion, we proceed to examine Russia's claims against the unbundling measure in the Directive under Article II:1 of the GATS and Articles I:1 and III:4 of the GATT 1994 by comparing the treatment accorded throughout the EU territory to pipeline transport services and service suppliers and to natural gas of different origin.

#### **7.5.1.3 Russia's claim under Article II:1 of the GATS**

##### **7.5.1.3.1 Introduction**

7.402. The gist of Russia's claim against the unbundling measure in the Directive under this provision is, as explained above, that the unbundling measure in the Directive accords less favourable treatment to Russian pipeline transport services and service suppliers by "enabling" EU member States to choose between implementing only the OU model or implementing the ISO and/or the ITO models in addition to the OU model in respect of transmission systems that belonged to a VIU on 3 September 2009.<sup>780</sup>

7.403. In response, the European Union submits that the treatment accorded to pipeline transport services and service suppliers under the OU model is not less favourable than that accorded to pipeline transport services and service suppliers under the ISO or ITO models<sup>781</sup> and that the unbundling measure in the Directive, in any event, does not discriminate against Russian pipeline transport services and service suppliers, as these are not "predominantly" subject to the OU model in comparison with the pipeline transport services and service suppliers of other non-EU countries.<sup>782</sup>

##### **7.5.1.3.2 Analysis by the Panel**

7.404. In accordance with the legal standard for Article II:1 of the GATS, set out in paragraphs 7.226 and 7.227 above, our analysis below will focus on whether Russia has demonstrated that (a) the unbundling measure in the Directive falls within the scope of the GATS;

<sup>776</sup> Russia's comments on the European Union's response to Panel question No. 154, paras. 43-46.

<sup>777</sup> Russia's second written submission, paras. 48-56 (referring to, e.g. Wikileaks, Public Library of US Diplomacy, Cable of 7 November 2007 "Grand Coalition Opposes European Union Commission's Unbundling Directives", (Exhibit RUS-172); and Wikileaks, Public Library of US Diplomacy, Cable of 31 October 2008 "Outlook for the EU's Third Energy Package", (Exhibit RUS-178)).

<sup>778</sup> European Union's second written submission, paras. 67 and 71; and response to Panel question No. 171(c), paras. 73-75.

<sup>779</sup> European Union's opening statement at the second meeting of the Panel, paras. 15-16.

<sup>780</sup> See, e.g. Russia's first written submission, paras. 318-326.

<sup>781</sup> See, e.g. European Union's first written submission, para. 306-337; and second written submission, para. 72-75.

<sup>782</sup> See, e.g. European Union's first written submission, paras. 299-305 and 338-343; and second written submission, para. 76-87.

(b) the relevant services and service suppliers are like; and (c) the unbundling measure in the Directive accords less favourable treatment to Russian services and service suppliers than that accorded to like services and service suppliers of any other country.

7.405. We address these elements, in turn, below.

#### 7.5.1.3.2.1 Scope of the GATS

7.406. Article I:1 of the GATS sets out the scope of this Agreement as applying to "measures by Members affecting trade in services". As explained by the Appellate Body, this requires Russia to make a *prima facie* case: (a) that "there is 'trade in services' in the sense of Article I:2"; and (b) that the unbundling measure in the Directive "'affects' such trade in services within the meaning of Article I:1".<sup>783</sup>

7.407. In this regard, we note that Article I:2 of the GATS defines trade in services as the supply of a service through one of the four modes of supply set out in this provision. Russia has identified pipeline transport services as the relevant services<sup>784</sup> and mode 3 or commercial presence, within the meaning of Article I:2(c), as the relevant mode of supply.<sup>785</sup> It is undisputed that pipeline transport services can be and are supplied through commercial presence in the European Union and, therefore, that there can be and is trade in pipeline transport services.

7.408. Turning to whether the unbundling measure in the Directive affects trade in pipeline transport services, we recall that the Appellate Body has clarified that the ordinary meaning of the term "affecting" implies a measure that has "an effect on", which indicates a broad scope of application, wider in coverage than such terms as "regulating" or "governing".<sup>786</sup>

7.409. We note that the unbundling measure, including all three unbundling models set out by it, regulates the conditions under which a pipeline transport service supplier may supply such services and, in particular, the relationship between a pipeline transport service supplier and producers or suppliers of natural gas. More specifically, and as explained by the European Union itself, the OU model requires a pipeline transport service supplier to be structurally separated from natural or juridical persons engaged in the production or supply of natural gas in order for it to supply pipeline transport services in the European Union<sup>787</sup>, whereas the ISO and ITO models impose "behavioural and organisational" requirements<sup>788</sup>, as well as "increased regulatory oversight".<sup>789</sup> We further note that both parties agree that the unbundling measure in the Directive affects trade in pipeline transport services and thus falls within the scope of the GATS.<sup>790</sup>

7.410. Mindful of these considerations, it is clear to us that the unbundling measure in the Directive does in fact affect the supply of pipeline transport services under mode 3, and we therefore conclude that this measure falls within the scope of the GATS.

#### 7.5.1.3.2.2 Like services and service suppliers

7.411. As explained in paragraphs 7.226 and 7.227 above, the MFN obligation in Article II:1 of the GATS applies only with respect to services and service suppliers that are like and we therefore turn to the issue of whether Russia has made a *prima facie* case that the relevant services and service suppliers are like within the meaning of Article II:1 of the GATS.

7.412. Before turning to the actual assessment of likeness, we note that Russia briefly refers to LNG services and service suppliers when claiming that the relevant services and service suppliers are like, stating that "pipeline transport services and service suppliers, including LNG services and service suppliers, are in a competitive relationship with each other and thus satisfy the 'likeness'

<sup>783</sup> Appellate Body Report, *Canada – Autos*, para. 155.

<sup>784</sup> Russia's first written submission, paras. 93-110 and 308.

<sup>785</sup> Russia's first written submission, para. 308; and response to Panel question No. 56, para. 285.

<sup>786</sup> Appellate Body Report, *EC – Bananas III*, para. 220.

<sup>787</sup> European Union's response to Panel question No. 59, para. 157.

<sup>788</sup> European Union's first written submission, para. 313.

<sup>789</sup> European Union's second written submission, para. 74.

<sup>790</sup> Russia's first written submission, paras. 307-308; and European Union's first written submission, para. 281.

requirement".<sup>791</sup> It is therefore not clear whether the relevant services and service suppliers, for purposes of Russia's claim under Article II:1 of the GATS against the unbundling measure in the Directive, include both pipeline transport services and service suppliers as well as LNG services and service suppliers.

7.413. For this reason, we consider it helpful to determine the scope of the likeness enquiry to be conducted for Russia's claim against the unbundling measure in the Directive under Article II:1 of the GATS, before turning to the actual assessment of likeness.

7.414. In this regard, we recall that Russia's claim under Article II:1 of the GATS pertains to the alleged less favourable treatment of Russian services and service suppliers stemming from the Directive "enabling" EU member States to choose between implementing only the OU model or implementing the ISO and/or the ITO models in addition to the OU model in respect of transmission systems that belonged to a VIU on 3 September 2009. More particularly, Russia claims concern the alleged less favourable treatment of pipeline transport services under the OU model compared to the ISO and/or the ITO models.<sup>792</sup>

7.415. In substantiating its claim, Russia focuses solely on entities supplying services within the EU territory through commercial presence in the form of TSOs.<sup>793</sup> Such entities supply pipeline transport services within the meaning we employ throughout this Report, i.e. transportation or transmission of natural gas via transmission pipelines.<sup>794</sup> While Russia, as mentioned, briefly refers to LNG services and service suppliers in claiming that the relevant services and service suppliers are like, such services and service suppliers do not appear relevant for the substance of Russia's claim under Article II:1 of the GATS against the unbundling measure in the Directive. As explained above, this particular claim pertains to the alleged discrimination stemming from the Directive "enabling Member States either to require full ownership unbundling or to permit the ISO and ITO unbundling models" and not to the requirement to unbundle *per se*.<sup>795</sup>

7.416. Both parties agree that the requirement to unbundle does not apply to LNG service suppliers.<sup>796</sup> In other words, LNG service suppliers are not subject to any of the three unbundling models and are thus not accorded the alleged more favourable treatment under the ISO or the ITO models or the alleged less favourable treatment under the OU model, challenged by Russia under its claim against the unbundling measure in the Directive. Notably, the alleged "exemption" of LNG facilities from the requirement to unbundle (referred to in this Report as "the LNG measure") is *not* the object of this particular claim, but is instead challenged by Russia as a "separate, distinct measure[]" under a separate claim.<sup>797</sup> In our view, this suggests that LNG services and service suppliers are not relevant to Russia's claim against the unbundling measure in the Directive under Article II:1 of the GATS. This conclusion is confirmed by the fact that Russia does not rely on any example or argumentation with respect to LNG services or service suppliers in arguing that the unbundling measure in the Directive accords less favourable treatment in violation of Article II:1 of the GATS.

7.417. For the reasons outlined above, we find that only pipeline transport services and service suppliers are relevant for Russia's claim against the unbundling measure in the Directive under Article II:1 of the GATS. For the same reasons, it is not necessary or relevant for us to consider, in the context of this claim, whether pipeline transport services and service suppliers are like LNG services and service suppliers.

7.418. Having determined that the scope of our likeness enquiry should be limited to pipeline transport services and service suppliers, we proceed to consider the actual assessment of likeness. As mentioned above, Russia's claim under Article II:1 of the GATS pertains to the alleged less favourable treatment of Russian pipeline transport services and service suppliers under the OU

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<sup>791</sup> Russia's first written submission, para. 309.

<sup>792</sup> Russia's first written submission, paras. 318-326; and second written submission, para. 204.

<sup>793</sup> Russia's first written submission, paras. 329-339; and second written submission, paras. 209 and 223.

<sup>794</sup> See para. 7.285 above.

<sup>795</sup> Russia's first written submission, heading IX.D.2.b and paras. 314, 319, and 326-327.

<sup>796</sup> Russia's response to Panel question No. 1, paras. 4 and 7; and European Union's first written submission, para. 433.

<sup>797</sup> Russia's first written submission, paras. 380-414; and responses to Panel question No. 4, para. 16, and No. 5, para. 38.



model in comparison with that accorded to pipeline transport services and service suppliers under the ISO and/or the ITO models.<sup>798</sup> In light of this, two issues arise in determining whether the relevant services and service suppliers are like: First, whether pipeline transport services and service suppliers are like regardless of their origin, and second, whether pipeline transport services and service suppliers are like regardless of whether these are supplied/supply their services under the OU model or the ISO or ITO models.

7.419. In addressing these issues of likeness, we recall that the Appellate Body has clarified that the assessment of whether services and service suppliers are like involves an examination of their "degrees of 'competitiveness' or 'substitutability'"<sup>799</sup>, taking into account the specific circumstances of the particular case including, but not necessarily limited to: (a) the nature and characteristics of the services and service suppliers; (b) the end-uses of the services; (c) consumers' preferences in respect of the services and service suppliers; and (d) the classification and description of the services under, for instance, the CPC.<sup>800</sup>

7.420. Russia argues that pipeline transport services and service suppliers are like "regardless of whether the service supplier is located in Russia or any other third-country and supplies its services via commercial presence within one or more EU Member States."<sup>801</sup> The European Union does not dispute that Russian pipeline transport services and service suppliers are like pipeline transport services and service suppliers of other non-EU countries, as "[a]ll these suppliers are in a competitive relationship, taking into account the 'nature and characteristics' of the services transactions and suppliers at stake."<sup>802</sup> Similarly, the European Union considers that "all transmission pipeline transport service providers are 'like' and enjoy the same competitive opportunities to provide services, regardless of the unbundling model under which they operate."<sup>803</sup>

7.421. It is undisputed that the nature and characteristics, the end-uses, and the classification under the CPC<sup>804</sup> of the pipeline transport services and service suppliers described in paragraph 7.418 above are identical, which suggests that these are like. Furthermore, none of the evidence and argumentation supplied by the parties suggests that consumers' preferences differ for these pipeline transport services and service suppliers.

7.422. In light of the above, we hence conclude that the relevant services and service suppliers – i.e. pipeline transport services and service suppliers of different origins, operating under different unbundling models – are like within the meaning of Article II:1 of the GATS. Having made this finding of likeness, we proceed to assess whether Russia has demonstrated that the unbundling measure in the Directive accords less favourable treatment to Russian pipeline transport services and service suppliers than that accorded to the like pipeline transport services and service suppliers of any other non-EU country.

#### **7.5.1.3.2.3 Less favourable treatment**

7.423. As explained above, the underlying premise of Russia's claim under Article II:1 of the GATS is that the unbundling measure in the Directive violates this provision by "enabling" EU member States to choose between implementing only the OU model or implementing the ISO and/or the ITO models in addition to the OU model in respect of transmission systems that belonged to a VIU on 3 September 2009. More particularly, Russia argues that the implementation of only the OU model in respect of transmission systems that did not belong to a VIU on 3 September 2009 as well as in respect of transmission systems that did belong to a VIU on 3 September 2009 in certain EU member States results in less favourable treatment of Russian pipeline transport service suppliers. Russia contrasts this treatment with that of pipeline transport

<sup>798</sup> Russia's first written submission, paras. 318-326; and second written submission, para. 204.

<sup>799</sup> Appellate Body Report, *Argentina – Financial Services*, para. 6.26 (quoting Appellate Body Report, *EC – Asbestos*, para. 99).

<sup>800</sup> Appellate Body Report, *Argentina – Financial Services*, para. 6.32.

<sup>801</sup> Russia's first written submission, para. 309.

<sup>802</sup> European Union's first written submission, para. 282.

<sup>803</sup> European Union's response to Panel question No. 182, para. 123.

<sup>804</sup> As explained in section 7.4.2 above, pipeline transport services are classified as CPC 713 under the CPC prov. In addition, we further note that pipeline transport services are classified as CPC 65131 under the CPC 2.1, an element that, as explained below in paragraph 7.1412, has been found relevant for assessing likeness of services and service suppliers.

services and service suppliers of other non-EU countries, supplying their services through commercial presence in certain EU member States that have implemented the ISO and/or the ITO models in addition to the OU model in respect of transmission systems that belonged to a VIU on 3 September 2009.<sup>805</sup>

7.424. The European Union responds that Russia has failed to demonstrate that pipeline transport services and service suppliers are accorded less favourable treatment under the OU model in comparison with the ISO and/or the ITO models.<sup>806</sup> In any event, the European Union submits that Russia has failed to demonstrate that the unbundling measure is discriminatory, pointing out that all pipeline transport service suppliers, regardless of their origin, are subject to the same unbundling model(s) when operating through commercial presence in any particular EU member State, and that Russia has not shown that the OU model "predominantly" affects Russian pipeline transport services and service suppliers.<sup>807</sup>

7.425. Before addressing the alleged less favourable treatment of Russian pipeline transport services and service suppliers under the different unbundling models, we find it useful to recall a few factual aspects concerning these different models.

7.426. As explained in paragraphs 2.10 through 2.28 above, the OU model requires structural separation between natural or juridical persons engaged in the production and supply of natural gas, on the one hand, and natural or juridical persons engaged in the transportation or transmission of natural gas through transmission pipelines, on the other hand.<sup>808</sup> Under this model, a VIU is therefore required to divest its control and rights, including the power to exercise voting rights, the power to appoint members of the supervisory board, of the administrative board or of representative bodies, and the holding of a majority share<sup>809</sup>, over either its natural gas production and supply undertakings or its transmission systems and TSOs.<sup>810</sup> Under the ISO model – applicable only in EU member States that have chosen to implement this model and only where the transmission system belonged to the VIU on 3 September 2009<sup>811</sup> – a VIU continues owning the transmission system but the TSO, also known as the ISO, is required to be separate from the VIU by complying with the rules on ownership unbundling.<sup>812</sup> Under the ITO model – also applicable only in EU member States that have chosen to implement this model and only where the transmission system belonged to the VIU on 3 September 2009<sup>813</sup> – the owner and operator of

<sup>805</sup> See, e.g. Russia's first written submission, paras. 320-326; and second written submission, para. 204.

<sup>806</sup> See, e.g. European Union's first written submission, paras. 306-337; opening statement at the first meeting of the Panel, paras. 35-37; and second written submission, paras. 72-75.

<sup>807</sup> See, e.g. European Union's first written submission, paras. 299-305 and 338-343; opening statement at the first meeting of the Panel para. 38; and second written submission, paras. 76-87.

<sup>808</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 9.

<sup>809</sup> We note that Russia, at times, contends that the OU model does not permit passive, minority shareholding in a transmission system or a TSO whereas the European Union disagrees with this position. (Russia's opening statement at the second meeting of the Panel, paras. 90 and 96; and response to Panel question No. 172(a), paras. 116-119; and European Union's first written submission, paras. 28 and 311; second written submission, paras. 82 and 132; and comments on Russia's response to Panel question No. 172(a), paras. 58-60). Generally, we have difficulties understanding how the Directive could be construed so as to prevent the holding of a passive, minority share. Most notably, Recital (8) explicitly states that "a production or supply undertaking should be able to have a minority shareholding in a transmission system operator or transmission system." In fact, Russia, at times, appears to agree with the European Union's position that such passive, minority shareholding is permitted. (See, e.g. Russia's opening statement at the first meeting of the Panel, para. 41; response to Panel question No. 87, para. 384; and second written submission, paras. 107, 209, 211 and 234). In any event, and as explained below, our assessment of Russia's claim under Article II:1 of the GATS focuses on the conditions of competition for pipeline transport services and service suppliers, rather than financial rights such as passive, minority shareholding. We therefore do not find it relevant for us to examine further whether or not the OU model under the Directive permits passive, minority shareholding. Indeed Russia itself, at times, suggests that this issue is not relevant for the assessment of Russia's claim. (See, e.g. Russia's opening statement at the first meeting of the Panel, para. 41; and second written submission, para. 234).

<sup>810</sup> Directive 2009/73/EC, (Exhibit EU-5), Articles 9(1) and 9(2).

<sup>811</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 9(8).

<sup>812</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 14.

<sup>813</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 9(8). We note that the infrastructure exemption measure in Article 36 of the Directive allows exemptions to be granted from, among others, the requirement to unbundle and that Russia at times refers to the TAP infrastructure exemption decision, which allowed TAP AG to operate as an "'ad hoc' ITO" despite not belonging to a VIU on 3 September 2009. (Russia's first written

the transmission system, the TSO or the ITO, belongs to a VIU but a number of requirements apply in respect of the relationship between the two.<sup>814</sup>

7.427. In our view, the parties' argumentation raises two issues: (a) whether Russia has demonstrated that pipeline transport services and service suppliers are accorded less favourable treatment under the OU model in comparison with that accorded to pipeline transport services and service suppliers under the ISO and/or the ITO models; and (b) if so, whether Russia has demonstrated that the unbundling measure in the Directive accords less favourable treatment to Russian pipeline transport services and service suppliers than that accorded to pipeline transport services and service suppliers of any other non-EU country by "enabling" EU member States to choose between implementing only the OU model or implementing the ISO and/or the ITO models in addition to the OU model in respect of transmission systems that belonged to a VIU on 3 September 2009.

7.428. Before addressing these issues, we note that there appears to be an underlying disagreement, or at least a difference in approach, between the parties with respect to the focus of their argumentation:

7.429. The European Union criticizes Russia for focusing its argumentation on *VIUs* when arguing that such entities are "prevented from supplying [their] pipeline transport services to the EU market through a commercial presence" under the OU model, whereas other *VIUs* "are able to continue supplying their like pipeline transport services to the EU market through a commercial presence in the form of an ITO (or ISO)" in EU member States that have implemented the ISO and/or the ITO models in addition to the OU model in respect of transmission systems that belonged to a *VIU* on 3 September 2009.<sup>815</sup>

7.430. The European Union faults Russia for "equat[ing]" *VIUs* with pipeline transport service suppliers and instead submits that it is *TSOs* which constitute pipeline transport service suppliers<sup>816</sup>, arguing that the ISO and the ITO models are in fact more restrictive for such entities than the OU model in terms of the "behavioural and organisational"<sup>817</sup> requirements, as well as increased "regulatory oversight".<sup>818</sup>

7.431. We consider this issue a fundamental one, which determines the basis for our continued assessment of Russia's claim under Article II:1 of the GATS. We therefore find it appropriate to begin our examination of the alleged less favourable treatment of Russian pipeline transport services and service suppliers by addressing this issue.

#### ***Focus of the assessment under Article II:1 of the GATS***

7.432. We recall that Russia has identified mode 3 as the relevant mode of supply.<sup>819</sup> In this regard, we note that the supply of a service through mode 3 is defined in Article I:2(c) of the GATS as "the supply of a service ... by a service supplier of one Member, through commercial presence in the territory of any other Member". We further note that "commercial presence" is

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submission, paras. 332-334; second written submission, para. 227; and response to Panel question No. 172(a), para. 120 (referring to Russia's response to Panel question No. 183(a)). As we explained at the outset of our Report, we consider it important not to conflate the different measures challenged by Russia under different claims. Since TAP AG is an "'*ad hoc*' ITO" under the infrastructure exemption measure rather than an ITO under the unbundling measure in the Directive, we do not believe it is relevant to consider this example further in the context of addressing Russia's claims against the latter measure. More particularly, and as further explained below, it is the design, structure and expected operation of the unbundling measure we must consider when determining whether this measure is WTO consistent or not. Russia does not suggest that the design, structure and expected operation of the unbundling measure are such that it would have subjected TAP AG to the ITO model. Indeed, this is the reason why TAP AG was obliged to apply for – and ultimately receive – an exemption from the rules on unbundling pursuant to the infrastructure exemption measure.

<sup>814</sup> Directive 2009/73/EC, (Exhibit EU-5), Articles 17-23.

<sup>815</sup> Russia's second written submission, para. 204. See also Russia's first written submission, paras. 316 and 324-325; and second written submission para. 209.

<sup>816</sup> European Union's second written submission, para. 72.

<sup>817</sup> European Union's first written submission, para. 313. See also European Union's second written submission, para. 74.

<sup>818</sup> European Union's second written submission, para. 74. See also European Union's first written submission, para. 313.

<sup>819</sup> Russia's first written submission, para. 308; and response to Panel question No. 56, para. 285.

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defined in Article XXVIII(d) as "any type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service".

7.433. These provisions make it clear that two types of entities are involved when a service is supplied under mode 3. First, the commercial presence within the "host" or "importing" Member, which according to Article XXVIII(d) of the GATS consists of any type of business or professional establishment within the territory of that Member "for the purpose of supplying a service", including a juridical person or a branch or representative office. Second, natural or juridical persons of another, "exporting" Member, which supply services through the commercial presence, in accordance with Article I:2(c) of the GATS. We understand from the evidence and argumentation provided by the parties that TSOs within the EU territory constitute the former type of entity, the commercial presence, for purposes of the dispute before us. Furthermore, we understand that natural or juridical persons, including VIUs, from other, exporting Members may supply services through the commercial presence of such TSOs, in which case these natural or juridical persons, including VIUs, from other Members would constitute the latter type of entity.

7.434. Bearing in mind the nature of the supply of services under mode 3 described above, we do not believe it would be appropriate to automatically conclude that only one of these two types of entities – i.e. the commercial presence in the importing Member or the natural or juridical persons in the exporting Member – is *the* service supplier for purposes of considering claims under the GATS. We find support for this approach both in the relevant provisions of the GATS as well as in prior jurisprudence.

7.435. Beginning with the relevant provisions of the GATS, Article XXVIII(g) defines a "service supplier" as "any person that supplies a service", which could imply that a service supplier is the natural or juridical person directly supplying a service.

7.436. We recall, however, the definition of mode 3 in Article I:2(c) of the GATS as "the supply of a service ... by a service supplier of one Member, through commercial presence in the territory of any other Member". This definition is echoed in Article XXVIII(f)(ii), which defines a service of another Member as "a service which is supplied, ... in the case of the supply of a service through commercial presence ..., by a service supplier of that other Member". In our view, the references in these provisions to a service supplier supplying services *through* commercial presence suggest that, while the service may be supplied directly by the commercial presence, the service supplier cannot necessarily be considered as consisting solely of this commercial presence.

7.437. Furthermore, footnote 12 to the definition of a service supplier in Article XXVIII(g) states that:

Where the service is not supplied directly by a juridical person but through other forms of commercial presence such as a branch or a representative office, *the service supplier (i.e. the juridical person)* shall, nonetheless, through such presence be accorded the treatment provided for service suppliers under the Agreement. Such treatment shall be extended to the presence through which the service is supplied and need not be extended to any *other parts of the supplier* located outside the territory where the service is supplied.<sup>820</sup>

7.438. The language of this footnote clarifies that, under mode 3, the commercial presence forms part of the service supplier and that the natural or juridical person in the exporting Member, although not directly supplying a service, should also be considered the service supplier. As with the definitions in Articles I:2(c) and XXVIII(f)(ii) of the GATS, footnote 12 to Article XXVIII(g) thus suggests that a more comprehensive notion of a service supplier is called for when addressing claims concerning the supply of a service through commercial presence.

7.439. A similarly comprehensive approach has been taken by panels in prior cases. For instance, in *EC – Bananas III*, the panel referred to the commercial presence as the service supplier when stating that there are "non-EC-owned or controlled service suppliers commercially present in the

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<sup>820</sup> Emphasis added.

EC for GATS purposes that provide wholesale trade services in bananas"<sup>821</sup> yet, in the same paragraph, explains that "companies registered in the Complainants' countries provide wholesale trade services in respect of bananas to and in the EC through commercially present owned or controlled subsidiaries in the meaning of Article XXVIII(n)."<sup>822</sup> Similarly, the panel in *China – Publications and Audiovisual Products*, clarified that "the term 'service suppliers of another Member' supplying a service through commercial presence includes entities that have established a commercial presence in the host Member and/or entities that seek to establish in the host Member".<sup>823</sup>

7.440. In light of the nature of mode 3, as evidenced by the relevant provisions of the GATS and prior jurisprudence, we therefore do not believe it would be appropriate to automatically disregard either the commercial presence in the importing Member or the natural or juridical persons in the exporting Member, supplying a service through that commercial presence, when considering the treatment of services and service suppliers in the context of GATS claims concerning this mode of supply. Depending on the particular claim and measure at issue, it may therefore be relevant to look at either of these two types of entities, or at both.

7.441. With respect to Russia's claim under Article II:1 of the GATS against the unbundling measure in the Directive, we therefore do not agree with the European Union insofar as it suggests that we should focus solely on the treatment of TSOs and entirely disregard natural or juridical persons, including VIUs, that supply pipeline transport services through the commercial presence of such TSOs. In fact, in response to a question by the Panel, the European Union states that it "does not exclude that a VIU owning or controlling a TSO within the meaning of GATS Article XXVIII(m)(ii) may supply services within the meaning of GATS Article I:2(c) (if a commercial presence is established) and may be a pipeline transport service supplier."<sup>824</sup>

7.442. At the same time, we agree with the European Union that the treatment accorded to VIUs is relevant only insofar as it has been demonstrated that these are in fact pipeline transport service suppliers, supplying such services in the EU territory through the commercial presence of TSOs within the meaning of the GATS.<sup>825</sup>

7.443. Based on the evidence, we understand that the TSOs pointed to by Russia as constituting a commercial presence take the form of juridical persons rather than, *inter alia*, branches or representative offices.<sup>826</sup> When a commercial presence takes the form of a juridical person,

<sup>821</sup> Panel Reports, *EC – Bananas III*, para. 7.329.

<sup>822</sup> Panel Reports, *EC – Bananas III*, para. 7.329.

<sup>823</sup> Panel Report, *China – Publications and Audiovisual Products*, para. 7.974.

<sup>824</sup> European Union's response to Panel question No. 176(b), para. 105.

<sup>825</sup> European Union's response to Panel question Nos. 176(a) and (b), paras. 104-105. We note that Ukraine has raised concerns regarding this issue in the context of two particular TSOs, namely the TSOs NEL Gastransport GmbH (NEL GT) and OPAL Gastransport GmbH & Co. KG (OPAL GT), in respect of which Ukraine "considers that the Russian Federation has wrongly applied GATS Article XXVIII by designating NEL GT and OPAL GT as 'commercial presence' of the Russian company Gazprom in Germany." (Ukraine's third-party submission, para. 72). Both parties agree that Gazprom supplies pipeline transport services through the commercial presence of the TSOs NEL GT and OPAL GT in Germany. (Russia's response to Panel question No. 52, paras. 263-265; and second written submission, para. 336; and European Union's response to Panel question No. 52, para. 143). We however agree with the underlying premise of Ukraine's arguments, namely that it is for Russia to demonstrate that any particular VIU supplies pipeline transport services through the commercial presence of a TSO within the meaning of the GATS.

<sup>826</sup> We note that Russia has not provided a clear characterization of the form(s) of commercial presence at issue in this dispute. However, Russia has made continuous references to VIUs either having divested or continuing to have "shares" or an "interest" in TSOs. (See, e.g. Russia's first written submission, paras. 325, 327 and 332-336; and second written submission, paras. 66, 70 and 211). In our view, these references suggest that the TSOs at issue are separate juridical persons, in which VIUs own a particular share or have a particular interest, rather than branches or representative offices of the VIUs. We further note that Russia has made continuous references to VIUs either having divested or continuing to have "control" over TSOs. (See, e.g. Russia's first written submission, paras. 324-325, 327 and 329-330; and second written submission, paras. 66, 142, 225 and 227). The term "control" is found in Articles XXVIII(m)(ii) and XXVIII(n)(ii) of the GATS, which concern juridical persons rather than branches or representative offices. We also recall that footnote 12 to Article XXVIII(g) of the GATS distinguishes between, on the one hand, services supplied by a juridical person and, on the other hand, services supplied by "other forms of commercial presence", the latter including a branch or a representative office. This further confirms our understanding that the TSOs pointed to by Russia as constituting a commercial presence take the form of juridical persons rather than, *inter alia*, branches or representative offices.

Article XXVIII(m)(ii) clarifies that a "juridical person of another Member" is "a juridical person which is ... in the case of the supply of a service through commercial presence, owned or controlled by: 1. natural persons of that Member; or 2. juridical persons of that other Member". In other words, for a natural or juridical person from an exporting Member to supply services through a commercial presence taking the form of a juridical person in another, importing Member, the juridical person constituting the commercial presence in the importing Member must be "owned or controlled" by the natural or juridical person from the exporting Member.

7.444. In this regard, we note that Article XXVIII(n)(i) of the GATS specifies that a juridical person is "'owned' by persons of a Member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member" and that Article XXVIII(n)(ii) of the GATS specifies that a juridical person is "'controlled' by persons of a Member if such persons have the power to name a majority of its directors or otherwise to legally direct its actions".

7.445. Russia argues that "the GATS does not require the service supplier of one Member that supplies services through 'commercial presence' within the territory of another Member to have majority ownership or control of that commercial presence."<sup>827</sup> In Russia's view, it is instead "the 'juridical person of another Member,' which supplies a service through commercial presence within the territory of the importing Member, that must be majority owned or controlled by natural or juridical persons of that other Member."<sup>828</sup> Russia appears to suggest that any juridical person of another exporting Member, which owns shares in a juridical person supplying services within the territory of the importing Member, should be considered a service supplier, supplying its services through commercial presence, provided that it is owned or controlled by a "third layer" of natural or juridical persons from that other, exporting Member.

7.446. In our view, this position has no basis in the text of the GATS and we therefore cannot agree with Russia. In line with the position taken by prior panels, we believe that the appropriate focus under mode 3 is the relationship between the commercial presence in the importing Member and the natural or juridical person in the exporting Member, which supplies services through the commercial presence.<sup>829</sup> We do not believe that it is relevant to consider any potential relationship between the natural or juridical person in the exporting Member, supplying services through the commercial presence in the importing Member by owning or controlling it, and natural or juridical persons that may, in turn, own or control the former of these two.

7.447. Furthermore, we agree with the European Union that our assessment of the unbundling measure in the Directive under Article II:1 of the GATS should focus on the treatment of VIUs, which own or control TSOs within the meaning of Article XXVIII(n)(i) or (ii), only in their capacity of supplying pipeline transport services through the commercial presence of such TSOs.<sup>830</sup>

7.448. VIUs are, per definition, engaged in both the supply of pipeline transport services and in the production or supply of natural gas. As explained at the outset of our Report, however, the focus under the GATS is how the challenged measure affects the supply of a service or service suppliers, not how it affects trade in goods.<sup>831</sup> In accordance with the scope and subject matter of the GATS, our assessment of the unbundling measure's consistency with Article II:1 of the GATS will therefore focus on how this measure affects the supply of pipeline transport services and service suppliers, rather than how it affects trade in natural gas. For these reasons, we do not consider Russia's arguments concerning the latter, such as the European Union's alleged "objective of ousting Gazprom from the EU gas market" or the "detrimental impact on the competitive opportunities for the transportation and sale of Russian gas in the EU market"<sup>832</sup>, in the context of addressing Russia's claim under Article II:1 of the GATS. We address such arguments, instead, in the context of Russia's claims against the unbundling measure in the Directive under Articles I:1 and III:4 of the GATT 1994.

7.449. Having set out these considerations concerning the focus of our assessment, we turn to the two issues raised by the parties' argumentation, namely (a) whether Russia has demonstrated

<sup>827</sup> Russia's response to Panel question No. 52, para. 269.

<sup>828</sup> Russia's responses to Panel question No. 52, para. 269, and No. 92, para. 397.

<sup>829</sup> Panel Reports, *EC – Bananas III*, fn 493 to para. 7.318; and *Canada – Autos*, para. 10.257.

<sup>830</sup> European Union's response to Panel question No. 176(b), para. 105.

<sup>831</sup> Appellate Body Report, *EC – Bananas III*, para. 221.

<sup>832</sup> Russia's second written submission, para. 228.

that pipeline transport services and service suppliers are accorded less favourable treatment under the OU model in comparison with that accorded to pipeline transport services and service suppliers under the ISO and/or the ITO models; and (b) if so, whether Russia has demonstrated that the unbundling measure in the Directive accords less favourable treatment to Russian pipeline transport services and service suppliers than that accorded to pipeline transport services and service suppliers of any other non-EU country by "enabling" EU member States to choose between implementing only the OU model or implementing the ISO and/or the ITO models in addition to the OU model in respect of transmission systems that belonged to a VIU on 3 September 2009. Below, we address each of these issues in turn.

***Comparison of the treatment of pipeline transport services and service suppliers under the OU model and the ISO and ITO models***

7.450. We begin our comparison of the treatment of pipeline transport services and service suppliers under the OU model and the ISO and ITO models by noting that the Appellate Body has clarified that the assessment of less favourable treatment under Article II:1 of the GATS calls for an examination of whether a measure "modif[ies] the conditions of competition to the detriment of services or service suppliers of any other Member".<sup>833</sup> Our comparison of the different unbundling models will therefore focus on whether the conditions of competition are modified to the detriment of pipeline transport services and service suppliers under the OU model in comparison with pipeline transport services and service suppliers under the ISO and/or the ITO models.

7.451. Russia's main position appears to be that a VIU is "prevented from supplying its pipeline transport services to the EU market through a commercial presence" under the OU model, whereas "VIUs are able to continue supplying their like pipeline transport services to the EU market through a commercial presence in the form of an ITO (or ISO)" under the ISO and ITO models.<sup>834</sup> In response, the European Union argues that the objective of all three models is the same, "ensuring independence of the transmission interest, on the one hand, from the production and supply interests, on the other hand ('effective unbundling')"<sup>835</sup> and that "no matter the model that applies, 'effective unbundling' will need to be ensured, and thus there will be an 'effective separation of networks from activities of production and supply'".<sup>836</sup>

7.452. We begin by examining the OU model and Russia's assertion that a VIU is "prevented from supplying its pipeline transport services through a commercial presence" under this model. In this regard, we recall our findings above that a VIU can be considered to supply pipeline transport services through the commercial presence of a TSO when that VIU owns or controls the TSO within the meaning of Article XXVIII(n)(i) or (ii) of the GATS. We further recall that the OU model does not allow the same person or persons:

[D]irectly or indirectly to exercise control over an undertaking performing any of the functions of production or supply, and directly or indirectly to exercise control or exercise any right over a transmission system operator or over a transmission system[.]<sup>837</sup>

7.453. As explained above, these rights include "the power to exercise voting rights"<sup>838</sup>, "the power to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking"<sup>839</sup>, and "the holding of a majority share".<sup>840</sup> A VIU, which per definition performs "at least one of the functions of transmission, distribution, LNG or storage, and

<sup>833</sup> Appellate Body Report, *Argentina – Financial Services*, para. 6.106. See also *ibid.* paras. 6.103-6105 and 6.127.

<sup>834</sup> Russia's second written submission, para. 204. See also Russia's first written submission, paras. 316, 324-325, 329 and 331.

<sup>835</sup> European Union's first written submission, para. 306.

<sup>836</sup> European Union's first written submission, para. 316.

<sup>837</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 9(1)(b)(i). Article 9(1)(b)(ii) mirrors this provision by not allowing the same person or persons:

[D]irectly or indirectly to exercise control over a transmission system operator or over a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of production or supply[.]

<sup>838</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 9(2)(a).

<sup>839</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 9(2)(b).

<sup>840</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 9(2)(c).

at least one of the functions of production or supply of natural gas"<sup>841</sup>, is therefore required to relinquish its control and rights over either the "undertaking performing any of the functions of production or supply" or the "transmission system operator or [] transmission system".

7.454. Insofar as the VIU chooses to continue to perform any of the functions of production or supply of natural gas, it will therefore not be permitted to hold a majority share in a TSO. In this case, the VIU will plainly not be permitted to own a TSO within the meaning of Article XXVIII(n)(i) of the GATS, defined as "beneficially own[ing]" "more than 50 per cent of the equity interest".

7.455. Furthermore, in this situation, the VIU will not be permitted "[d]irectly or indirectly to exercise control" over the TSO or to "exercise any right" over it, including the right to exercise voting rights and to appoint members of the supervisory board, the administrative board or bodies legally representing the TSO. In our view, the VIU will, in this situation, not be permitted to control a TSO within the meaning of Article XXVIII(n)(ii) of the GATS, defined as having "the power to name a majority of [the TSO's] directors or otherwise to legally direct its actions".

7.456. We note that Russia has indicated that the concepts of control used in Article XXVIII(n)(ii) of the GATS and in the Directive, respectively, "are similar"<sup>842</sup> and the European Union has indicated that the concept of control used in Article XXVIII(n)(ii) of the GATS "is more limited" than that used in the Directive.<sup>843</sup> We do not believe it is necessary or appropriate for us to consider, in the abstract, the exact content of the concepts of "control" in the Directive and in Article XXVIII(n)(ii) of the GATS, respectively, but agree with the spirit underlying both parties' positions, namely that a VIU which cannot "exercise control" or "exercise any right" over a TSO within the meaning of the Directive, cannot "control[]" a TSO within the meaning of Article XXVIII(n)(ii) of the GATS.

7.457. We therefore agree with Russia to the extent that a VIU, which chooses to continue to perform any of the functions of production or supply of natural gas, will be "prevented from supplying its pipeline transport services to the EU market through a commercial presence" under the OU model. At the same time, we do not find it entirely accurate to conclude that the OU model "prevent[s]" a VIU from supplying its pipeline transport services to the EU market through a commercial presence *per se*. Rather, we find it more accurate to conclude that the OU model imposes the legal necessity for VIUs to make a choice between continuing to perform any of the functions of production or supply of natural gas, on the one hand, or continuing to supply pipeline transport services through commercial presence, on the other hand.<sup>844</sup>

7.458. Before addressing the ISO and ITO models, we note that both parties have provided a considerable amount of argumentation concerning the issue of whether the OU model permits a passive, minority shareholding in a transmission system or a TSO.<sup>845</sup> We do not consider this aspect relevant to our assessment of the OU model under Article II:1 of the GATS and Russia's claim that a VIU is "prevented from supplying its pipeline transport services to the EU market through a commercial presence" under the OU model. More particularly, even if the OU model

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<sup>841</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 2(20).

<sup>842</sup> Russia's response to Panel question No. 28, para. 144.

<sup>843</sup> European Union's response to Panel question No. 28, para. 61.

<sup>844</sup> Russia argues that "[i]t seems unlikely that any VIU would 'choose' instead to divest ownership and control over its production and supply activities" and on this basis appears to conclude that "[t]hus, contrary to the EU's baseless assertion in response otherwise, that VIU may not continue to supply any amount of services whatsoever in the EU." (Russia's comments on the European Union's response to Panel question No. 178(b), para. 136). We do not believe it is appropriate, nor possible, for us to conclude in the abstract how VIUs will decide to exercise the choice imposed upon them under the OU model. For purposes of considering whether the conditions of competition are modified to the detriment of pipeline transport services and service suppliers under the OU model in comparison with pipeline transport services and service suppliers under the ISO and/or the ITO models, we believe it is sufficient for us to conclude that the OU model imposes the legal necessity for VIUs to make a choice between continuing to perform any of the functions of production or supply of natural gas, on the one hand, or continuing to supply pipeline transport services through commercial presence, on the other hand. We will address the issue of how VIUs have or will exercise this choice, as appropriate, in the context of considering whether the unbundling measure in the Directive accords less favourable treatment to Russian pipeline transport services and service suppliers.

<sup>845</sup> Russia's opening statement at the second meeting of the Panel, paras. 90 and 96; and response to Panel question No. 172(a), paras. 116-119; and European Union's first written submission, paras. 28 and 311; second written submission, paras. 82 and 132; and comments on Russia's response to Panel question No. 172(a), paras. 58-60.



permits a VIU to have a passive minority shareholding, this would, in and of itself, plainly not entail that the VIU is permitted to *own* a TSO within the meaning of Article XXVIII(n)(i) of the GATS. Similarly, such passive minority shareholding would, in our view, not entail that the VIU is permitted to *control* a TSO within the meaning of Article XXVIII(n)(ii) of the GATS. Hence, even if the OU model permits a VIU to have a passive minority shareholding in a TSO, it does not alter the conclusion we reached in the preceding paragraphs and we therefore do not address this aspect further.

7.459. Having examined the OU model, we turn to Russia's contention that "VIUs are able to continue supplying their like pipeline transport services to the EU market through a commercial presence in the form of an ITO (or ISO)" under the ISO and ITO models.

7.460. Under the ISO model, a VIU owns, partly or fully, the transmission system network, but not the operator of the transmission system.<sup>846</sup> Rather, the TSO, also known as the ISO, is required to comply with the rules under the OU model.<sup>847</sup> In light of this, it is unclear to us how a VIU could, in Russia's view, "continue supplying their like pipeline transport services to the EU market through a commercial presence in the form of an [] ISO" under the ISO model when Russia itself argues that a VIU is "prevented" from doing so under the OU model.<sup>848</sup>

7.461. In the context of another claim raising a similar issue<sup>849</sup>, Russia has suggested that the owner of a transmission system serves as "the means through which" pipeline transport services are supplied and hence constitute a commercial presence within the meaning of Article XXVIII(d) of the GATS.<sup>850</sup> In support of this position, Russia points out that the GATS does not define a "service" and that the ISO model "provides that 'the transmission system owner shall ... provide all relevant cooperation and support' to the ISO 'for the fulfilment of its tasks,' as well as all necessary financing."<sup>851</sup> In Russia's view, "[t]his 'cooperation' requires some degree of active participation on the part of the transmission system owner to facilitate operation of the system by the ISO."<sup>852</sup>

7.462. In this regard, we recall that, while the GATS does not define a "service", it does define "supply of a service" as including "the production, distribution, marketing, sale and delivery of a service" in Article XXVIII(b). In paragraph 7.285 above, we have explained that pipeline transport services cover transportation or transmission of natural gas through transmission pipelines. The issue is whether a VIU can be considered to produce, distribute, market, sell or deliver such pipeline transport services when owning a transmission system under the ISO model. In our view, Russia has not provided a satisfactory explanation of how this would be the case, by pointing to the obligation of the transmission system owner to cooperate with the ISO and to provide financing for the ISO's investment decisions.

7.463. More particularly, we note that Article 14(5)(a) of the Directive requires the owner of the transmission system to "provide all the relevant cooperation and support to the independent system operator for the fulfilment of its tasks, including in particular all relevant information", and Article 14(5)(b) requires the owner of the transmission system to "finance the investments decided by the independent system operator and approved by the regulatory authority, or give its agreement to financing by any interested party including the independent system operator."<sup>853</sup> It

<sup>846</sup> Directive 2009/73/EC, (Exhibit EU-5), Articles 9(8) and 14(1).

<sup>847</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 14(2)(a), stating that an EU member State "may approve and designate an independent system operator only where ... the candidate operator has demonstrated that it complies with the requirements of Article 9(1)(b), (c) and (d)".

<sup>848</sup> Russia's second written submission, para. 204.

<sup>849</sup> This claim is Russia's claim of *de facto* violation under Article II:1 of the GATS against the third-country certification measure in the Directive, where a similar issue arises in respect of a particular transmission system owner, Europolgaz, and a particular ISO, Gaz-System. In the context of this claim, Russia also submits arguments based on the operatorship agreement between Europolgaz and Gaz-System. (Russia's response to Panel question No. 204(a), paras. 244-251). We do not address these more specific arguments in the context of examining the ISO model generally for purposes of Russia's claim under Article II:1 of the GATS against the unbundling measure in the Directive, but rather address these only when examining Russia's arguments concerning Europolgaz and Gaz-System in the context of its claim against the third-country certification measure. (See paras. 7.1084 through 7.1095 below).

<sup>850</sup> Russia's response to Panel question No. 55, para. 284.

<sup>851</sup> Russia's response to Panel question No. 55, para. 284. (omission by Russia)

<sup>852</sup> Russia's response to Panel question No. 55, para. 284.

<sup>853</sup> Article 14(5)(b) goes on to state that:

is not clear to us how these cooperation and financing requirements would entail that the transmission system owner produces, distributes, markets, sells or delivers pipeline transport services. On the contrary, the Directive makes it clear that it is the ISO, rather than the owner of the transmission system, which operates the transmission system<sup>854</sup> and provides access for third parties to the transmission system.<sup>855</sup> As these are the obligations of the ISO, rather than the owner of the transmission system, we have difficulties understanding how the owner of the transmission system could be considered as supplying pipeline transport services.

7.464. At other times, Russia appears to acknowledge that the ISO, rather than the owner of the transmission system, supplies pipeline transport services, but instead suggests that the VIU can exercise control over the ISO.<sup>856</sup> Russia does not explain, however, how a VIU would be able to control the ISO within the meaning of Article XXVIII(n)(ii) of the GATS under the ISO model. We have difficulties understanding Russia's position in this regard, as the ISO is required to be unbundled under the OU model. When responding to a Panel question concerning this issue, Russia argues that the VIU "by being permitted to retain complete ownership of the transmission system" "is entitled to receive ongoing financial benefits from the operation of that transmission system by the ISO".<sup>857</sup>

7.465. The European Union does not dispute that a VIU receives certain sources of revenue when owning a transmission system under the ISO model.<sup>858</sup> Indeed, Article 41(3)(d) of the Directive explicitly requires that the "network access tariffs collected by the independent system operator include remuneration for the network owner or owners". Russia has, however, provided no explanation of how such sources of revenue would entail that the VIU supplies pipeline transport services within the meaning of the GATS or be relevant for our assessment under Article II:1 of the GATS in any other way.

7.466. In light of this, we do not believe that Russia has demonstrated that "VIUs are able to continue supplying their like pipeline transport services to the EU market through a commercial presence" – be that through an ISO or the owner of the transmission system – under the ISO model.

7.467. Under the ITO model, it is undisputed that a VIU is permitted to own, partly or fully, the owner and operator of the transmission system, the TSO or the ITO.<sup>859</sup> Hence, the VIU is plainly able to continue owning the ITO within the meaning of Article XXVIII(n)(i) of the GATS and we therefore agree with Russia that VIUs are "able to continue supplying their like pipeline transport services to the EU market through a commercial presence in the form of an ITO" under the ITO model.

7.468. The parties disagree, on the other hand, concerning the issue of whether a VIU is able to control the ITO under the ITO model. In support of its position that a VIU is able to control the ITO, Russia points to "the role of the ITO's 'Supervisory Body'" and its relationship with the VIU.<sup>860</sup> More particularly, Russia argues that "the Supervisory Body may be composed entirely of 'members representing' the VIU" and "[i]n any event, the VIU seems almost certain to control a majority of the members"<sup>861</sup> and points to Article 19(1) of the Directive, stating:

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The relevant financing arrangements shall be subject to approval by the regulatory authority. Prior to such approval, the regulatory authority shall consult the transmission system owner together with other interested parties[.]

<sup>854</sup> Directive 2009/73/EC, (Exhibit EU-5), Articles 13(1)(a) and 14(2)(b).

<sup>855</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 14(4).

<sup>856</sup> See, e.g. Russia's response to Panel question No. 183(b), para. 184, in which Russia states that: Even assuming the ISO model is implemented in accordance with the terms of the Directive, a VIU under the ISO model may still be in a position to exercise at least limited rights or influence over how the ISO operates, maintains and develops the system.

<sup>857</sup> Russia's response to Panel question No. 172(b), para. 126.

<sup>858</sup> See, e.g. European Union's response to Russia's question No. 15, para. 9, stating that "[t]he financial benefits for the VIU would typically consist of a financial remuneration for the commercial use of the infrastructure from the ISO."

<sup>859</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 9.8(b) and Chapter IV.

<sup>860</sup> Russia's first written submission, para. 322.

<sup>861</sup> Russia's first written submission, para. 323.

Decisions regarding the appointment and renewal, working conditions including remuneration, and termination of the term of office, of the persons responsible for the management and/or members of the administrative bodies of the transmission system operator shall be taken by the Supervisory Body of the transmission system operator appointed in accordance with Article 20.<sup>862</sup>

7.469. The European Union, on the other hand, argues that "[t]he VIU cannot control the network operation" under the ITO model<sup>863</sup> and that there are "strict rules for independence of the ITO management"<sup>864</sup>; that "the VIU can, via the Supervisory Body, only be involved in the decisions that are specifically provided under the Directive"<sup>865</sup> and that "all decisions concerning the day-to-day activities of the TSO and the management of the network and ten-year network development plan" are "explicitly excluded from the decision-making of the Supervisory Body"<sup>866</sup>; that "the Directive ensures control over the Supervisory Body by the national regulatory authority" in respect of decisions concerning appointment of persons responsible for the management and/or members of the administrative bodies of the ITO, which only become binding if the relevant NRA has not raised any objections<sup>867</sup>; that there are certain independence requirements for "at least half of the members of the Supervisory Body minus one" and other requirements for all members of the Supervisory Body<sup>868</sup>; and that "the independence of the ITO is explicitly required by the Directive".<sup>869</sup>

7.470. When addressing this issue, we recall that Article XXVIII(n)(ii) of the GATS clarifies that a juridical person is "'controlled' by persons of a Member if such persons have the power to name a majority of its directors or otherwise to legally direct its actions". Generally, we wish to emphasize that we do not believe that the concept of control under Article XXVIII(n)(ii) of the GATS is a matter to be assessed in the abstract, but rather on a case-by-case basis. We further note that, having already agreed with Russia that VIUs are "able to continue supplying their like pipeline transport services to the EU market through a commercial presence in the form of an ITO" under the ITO model, by virtue of being permitted to *own* an ITO within the meaning of Article XXVIII(n)(i) of the GATS, it is less pertinent for us to assess, in detail, whether VIUs are also "able to continue supplying their like pipeline transport services to the EU market through a commercial presence in the form of an ITO" under the ITO model, by virtue of being permitted to *control* an ITO within the meaning of Article XXVIII(n)(ii) of the GATS.

7.471. Having said this, we consider it useful to provide observations regarding the arguments submitted by the parties. We begin by noting that while we are not convinced that the Supervisory Body may be composed entirely of members representing the VIU, as suggested by Russia<sup>870</sup>, it is

<sup>862</sup> Russia's first written submission, para. 322 (quoting Directive 2009/73/EC, (Exhibit EU-5), Article 19(1)).

<sup>863</sup> European Union's first written submission, para. 319.

<sup>864</sup> European Union's first written submission, para. 329 (referring to Directive 2009/73/EC, (Exhibit EU-5), Article 19).

<sup>865</sup> European Union's first written submission, para. 331 (referring to Directive 2009/73/EC, (Exhibit EU-5), Article 20(1)).

<sup>866</sup> European Union's first written submission, para. 330 (referring to Directive 2009/73/EC, (Exhibit EU-5), Article 20(1)).

<sup>867</sup> European Union's first written submission, para. 332 (referring to Directive 2009/73/EC, (Exhibit EU-5), Article 19(2)).

<sup>868</sup> European Union's first written submission, para. 333 (referring to Directive 2009/73/EC, (Exhibit EU-5), Article 20(3)).

<sup>869</sup> European Union's first written submission, para. 334. In this regard, the European Union points to the "general obligation of independence" under Article 18 of the Directive and to certain specific requirements, namely the requirement for the ITO to have the power to raise money on the capital market; for subsidiaries of the VIU performing functions of production or supply not to have any direct or indirect shareholdings in the ITO and *vice versa*; for "all commercial and financial relations between the ITO and other parts of the VIU, including loans from the ITO to other parts of the VIU, [to] comply with market conditions and [to] be disclosed to the regulatory authority upon request" and for "[a]ll commercial and financial relations with other parts of the vertically integrated undertaking giving rise to a formal agreement, oral or written, [to] be submitted for approval to the regulatory authority"; for the VIU to refrain from "any action impeding or prejudicing the ITO from complying with its obligations"; and for the "overall management structure and the corporate statutes of the ITO [to] provide for a decision-making structure and rules ensuring effective independence of the ITO". (Ibid. (referring to Directive 2009/73/EC, (Exhibit EU-5), Articles 18(1)(b), 18(3), 18(4), 18(6), 18(7), and 18(9)).

<sup>870</sup> Russia's first written submission, para. 323. In particular, we note that, for "half of the members of the Supervisory Body minus one", the Directive requires that: (a) these members cannot exercise any

undisputed that a majority of the members of the Supervisory Body may be members representing the VIU.<sup>871</sup> In light of this, as well as the fact that the Supervisory Body is responsible for "[d]ecisions regarding the appointment ... of the persons responsible for the management and/or members of the administrative bodies" of the ITO<sup>872</sup>, we believe that there could be situations where a VIU would "have the power to name a majority of [the ITO's] directors" and hence to control it within the meaning of Article XXVIII(n)(ii) of the GATS. At the same time, we reiterate our position that the concept of control should be addressed on a case-by-case basis, and the issue of whether a VIU has "the power to name a majority of [the ITO's] directors" will depend on the corporate statutes of any particular ITO as well as the provision under Article 19(2) of the Directive that the Supervisory Body's appointments "become binding only if the regulatory authority has raised no objections within three weeks of notification".

7.472. We therefore agree with Russia that "VIUs are able to continue supplying their like pipeline transport services to the EU market through a commercial presence in the form of an ITO" under the ITO model in the sense that a VIU is permitted to own an ITO within the meaning of Article XXVIII(n)(i) of the GATS and could, under certain circumstances, be permitted to control an ITO within the meaning of Article XXVIII(n)(ii) of the GATS under this model.

7.473. In light of the above, we conclude that pipeline transport services and service suppliers are accorded less favourable treatment under the OU model in comparison with the ITO model in the sense that the OU model imposes the legal necessity for VIUs to make a choice between continuing to perform any of the functions of production or supply of natural gas, on the one hand, or continuing to supply pipeline transport services through commercial presence, on the other hand, which the ITO model does not. Insofar as the VIU chooses to continue to perform any of the functions of production or supply of natural gas, it will be required to cease supplying pipeline transport services and its competitive opportunities as a pipeline transport service supplier are therefore entirely eliminated under the OU model, which is not the case under the ITO model.

7.474. Having reached this conclusion, we wish to emphasize that this conclusion, as well as the considerations set out above, concern the different unbundling models and the competitive conditions for pipeline transport services and service suppliers under these models in general. In other words, we have addressed the possibilities for VIUs of supplying pipeline transport services through the commercial presence of TSOs, in general, under each of these models. These general considerations do not prejudge the situations that may occur on a case-by-case basis.

7.475. In particular, we note that Russia, when asserting that the unbundling measure in the Directive accords less favourable treatment to Russian pipeline transport services and service suppliers under the OU model, appears to suggest that the Russian VIU Gazprom supplied pipeline transport services before the entry into force of the Directive whenever Gazprom had shareholdings in TSOs, including minority shareholdings. Correspondingly, Russia appears to suggest that Gazprom was "prevented" or ceased supplying pipeline transport services when divesting its shares in these TSOs under the OU model.

7.476. As we explained in this, as well as the preceding section, a VIU can be considered to supply pipeline transport services through the commercial presence of a TSO only when this TSO is owned or controlled by the VIU within the meaning of Article XXVIII(n)(i) or (ii) of the GATS. While we have concluded that the OU model imposes the legal necessity for VIUs to make a choice between continuing to perform any of the functions of production or supply of natural gas, on the one hand, or continuing to supply pipeline transport services through commercial presence, on the other hand, the issue of whether a particular VIU can be considered to have supplied pipeline transport services through commercial presence before the entry into force of the Directive – and

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professional position or responsibility, interest or business relationship, either directly or indirectly, with any part of the VIU (other than the ITO) or its controlling shareholders during a period of three years before their appointment, during their appointment, or during a period of four years after termination of their appointment; (b) these members cannot hold an interest in or receive any financial benefit, directly or indirectly, from any part of the VIU other than the ITO or receive remuneration depending on activities or results of the VIU; and (c) these members shall be guaranteed "[e]ffective rights of appeal to the regulatory authority ... against premature terminations of their term of office". (Directive 2009/73/EC, (Exhibit EU-5), Articles 19(3)-19(7) and 20(3)).

<sup>871</sup> See Directive 2009/73/EC, (Exhibit EU-5), Articles 20(2) and 20(3). See also European Union's first written submission, para. 331.

<sup>872</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 19(1).

to have ceased doing so following the entry into force of the Directive – is a matter to be determined on a case-by-case basis.

7.477. Similarly, when asserting that the unbundling measure in the Directive accords more favourable treatment to pipeline transport services and service suppliers from any other non-EU country under the ITO model, Russia, at times, appears to suggest that VIUs from any other non-EU country continue to supply pipeline transport services whenever they have shareholdings in an ITO, including minority shareholdings. As we have explained above, a VIU can be considered to continue supplying pipeline transport services through the commercial presence of an ITO only insofar as that ITO is owned or controlled by the VIU within the meaning of Articles XXVIII(n)(i) or (ii) of the GATS. While we have concluded that VIUs, generally, are able or permitted to continue supplying pipeline transport services through the commercial presence of an ITO under the ITO model, the issue of whether a particular VIU does in fact supply pipeline transport services through the commercial presence of a particular ITO should be assessed on a case-by-case basis, taking into account whether "more than 50 per cent of the equity interest in [the ITO] is beneficially owned by [the VIU]" or whether the VIU has "the power to name a majority of [the ITO's] directors or otherwise to legally direct its actions".

7.478. We further wish to emphasize that the conclusion and considerations set out above concern only pipeline transport service suppliers in the form of VIUs supplying pipeline transport services through the commercial presence of TSOs. Russia has, in our view, not submitted any argumentation suggesting that the different unbundling models modify the conditions of competition of pipeline transport service suppliers, which are not VIUs or part thereof.<sup>873</sup> Furthermore, the European Union has not addressed the relevance of pipeline transport service suppliers, which are not VIUs, except by stating that "the possibilities are the same for all natural and juridical persons that are service suppliers"<sup>874</sup>, when responding to a question by the Panel concerning this issue. We therefore do not address this situation further in our assessment below.

7.479. We note that Russia has also submitted certain further arguments, in addition to its main line of argumentation. More particularly, Russia generally refers to "the inherent commercial and logistical competitive advantages associated with vertical integration"<sup>875</sup> and, in this regard, points to a "simple internet search quickly reveal[ing]" the following advantages: "[l]ower transaction costs; [s]ynchronization of supply and demand along the chain of products; [l]ower uncertainty

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<sup>873</sup> In response to a question by the Panel concerning this issue, Russia states that "[t]he possibilities – or legal rights – of natural or juridical persons that do not meet the definition of a 'VIU' to supply pipeline transport services in the EU differ depending upon which unbundling model or models is permitted by an individual Member State." (Russia's response to Panel question No. 179, para. 152). Russia goes on to explain "situations in which Member State governments have opted to exercise their rights under the [public body] measure set out in Article 9(6) of the Directive" and that this has "implications" not just for the public body measure. (Ibid. paras. 154-156). Russia then explains that "for purposes of the ITO model, natural or legal persons that are not a VIU are legally prohibited from supplying pipeline transport services in the EU ... because, in Member States that permit the ITO model, only those VIUs that owned and controlled the entire transmission and supply infrastructure as of 3 September 2009 were permitted pursuant to Article 9(8) of the Directive to adopt the ITO model." (Ibid. para. 157). We have difficulties understanding the position expressed by Russia in its response. First, the relevance of Russia's arguments concerning the public body measure remains unclear to us. More particularly, Russia itself explains that the public body measure applies regardless of the applicable unbundling model(s). (Russia's request for review of the Interim Report, para. 45). In light of this, it is difficult to understand how or why this distinct measure would be relevant for assessing whether the different unbundling models modify the conditions of competition for pipeline transport service suppliers, including those that are not VIUs. Second, we have difficulties understanding Russia's position that "natural or legal persons that are not a VIU are legally prohibited from supplying pipeline transport services in the EU" in EU member States that have implemented the ITO model in addition to the OU model in respect of transmission systems that belonged to a VIU on 3 September 2009. Insofar as a natural or juridical person does not perform "at least one of the functions of production or supply of natural gas", and is hence not a VIU, it will already be in compliance with the rules under the OU model and will therefore be able to supply pipeline transport services without having to unbundle under either of the models. Even assuming that pipeline transport service suppliers that are not VIUs are prohibited from supplying pipeline transport services where the ITO model has been implemented, we fail to see how this relates to or supports Russia's position that the conditions of competition are modified to the detriment of pipeline transport service suppliers under the OU model in comparison with the ITO model.

<sup>874</sup> European Union's response to Panel question No. 179, para. 112.

<sup>875</sup> Russia's response to Panel question No. 172(a), para. 121.

and higher investment; [s]trategic independence; and '[c]ompetitive advantages.'<sup>876</sup> These arguments appear to involve a comparison of VIUs supplying pipeline transport services through commercial presence in the EU territory under the ITO model<sup>877</sup> with pipeline transport service suppliers supplying their services through a commercial presence in the EU territory without being part of a VIU.

7.480. However, Russia does not provide any concrete explanation of whether the advantages revealed by a "simple internet search" exist in the relationship between a VIU and an ITO under the ITO model, taking into account the requirements imposed on their relationship under this model. Nor does Russia elaborate on how this comparison demonstrates the existence of less favourable treatment of Russian pipeline transport services and service suppliers. Instead, Russia submits that it is "clear why multinational energy giants such as the owners of TAP AG and Engie, the dominant French gas production-supplier, choose the ITO model" and that "[t]hey know it provides them and their gas a competitive advantage over other suppliers, such as Gazprom and its imported Russian gas in Lithuania, Estonia and Latvia".<sup>878</sup> We recall that Russia, as the complaining party, cannot "simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency" nor "simply allege facts without relating them to its legal arguments".<sup>879</sup> Accordingly, we cannot simply assume that Russia's assertions concerning the alleged advantages under the ITO model are demonstrated by the fact that certain private entities have opted for this model over the OU model. We, therefore, do not address this line of argumentation further in assessing Russia's claim.<sup>880</sup>

7.481. Having provided these considerations concerning the treatment of pipeline transport services and service suppliers under the OU model and the ISO and ITO models, we proceed to examine the second issue raised by the parties' argumentation: whether Russia has demonstrated that the unbundling measure in the Directive accords less favourable treatment to Russian pipeline transport services and service suppliers than that accorded to pipeline transport services and service suppliers of any other non-EU country by "enabling" EU member States to choose between

<sup>876</sup> Russia's response to Panel question No. 172(a), para. 122 (referring to Wikipedia, "Vertical Integration", [https://en.wikipedia.org/wiki/Vertical\\_integration#Problems\\_and\\_benefits](https://en.wikipedia.org/wiki/Vertical_integration#Problems_and_benefits) (accessed 11 May 2017), (Exhibit RUS-251); and Neil Kokemuller, "The Advantages of a Vertical Integration Strategy" <http://smallbusiness.chron.com/advantages-vertical-integration-strategy-20987.html> (accessed 3 August 2017), (Exhibit RUS-252)). Russia also states that a "study conducted concerning unbundling among European electricity utilities attempted to quantify the cost and other benefits of avoiding unbundling" which, in Russia's view, "[w]hile not precisely applicable to the gas industry ... dramatizes the general principle". (Ibid. fn 106 (referring to K. Gluger, M. Liebensteiner, and S. Schmitt, Vienna University of Economics and Business, "Assessing the Economies of Scope from Vertical Integration: Evidence from European Electricity Utilities", PowerPoint Presentation at IAEE Conference held in New York on 18 June 2014, (Exhibit RUS-188)).

<sup>877</sup> Notably, these arguments by Russia do not appear to be directed at the ISO model.

<sup>878</sup> Russia's response to Panel question No. 172(a), para. 124.

<sup>879</sup> Appellate Body Report, *US – Gambling*, para. 140. See also para. 7.10 above.

<sup>880</sup> In addition to its arguments concerning the "inherent commercial and logistical competitive advantages associated with vertical integration", Russia has emphasized two other "points" when asked to clarify its position regarding the treatment of pipeline transport services and service suppliers under the OU model and the ITO model: (a) Russia argues that the OU model does not "permit 'a producer or supplier' to maintain 'a passive minority shareholding' in the TSO"; and (b) Russia refers to its response to Panel question No. 183(a) concerning "the different treatment and competitive advantage accorded to domestic or imported gas by VIUs subject to the ITO model, compared to Russian-origin natural gas imported via pipelines that were subjected to the OU model". (Russia's response to Panel question No. 172(a), paras. 116-120 (quoting the European Union's first written submission, para. 311)). With respect to the first of these points, we recall that we have already addressed Russia's arguments concerning the possibility for VIUs of maintaining a passive minority shareholding in TSOs under the OU model and found these arguments irrelevant for Russia's claim under Article II:1 of the GATS. With respect to the second of these points, we begin by reiterating our position that the focus under the GATS is how the challenged measure affects the supply of a service or service suppliers, not how it affects trade in goods. Consequently we consider Russia's arguments concerning the "different treatment and competitive advantage accorded to domestic or imported gas" irrelevant for Russia's claim under Article II:1 of the GATS. Russia does, at times, refer to pipeline transport services and service suppliers in its response to Panel question No. 183(a). More particularly, Russia argues that "[f]rom a services standpoint, the certainty that its natural gas will have guaranteed access to the EU market through its ITO also accords more favourable treatment to a third-country VIU supplier and its ITO in the EU". (Russia's response to Panel question No. 183(a), fn 150). Russia, however, does not provide a more concrete explanation of how the ITO model allegedly enhances the "certainty that [a VIU's] natural gas will have guaranteed access to the EU market through its ITO" and how this translates into a competitive advantage for the pipeline transport services supplied by the VIU. Accordingly, we do not believe that Russia's reference to its response to Panel question No. 183(a) suffices to make a *prima facie* case of violation under Article II:1 of the GATS.

implementing only the OU model or implementing the ITO model in addition to the OU model in respect of transmission systems that belonged to a VIU on 3 September 2009. As we have found that Russia has not demonstrated that pipeline transport services and service suppliers are accorded less favourable treatment under the OU model in comparison with the ISO model, we do not address the latter model any further in our assessment of this second issue.

***Whether the unbundling measure in the Directive accords less favourable treatment to Russian pipeline transport services and service suppliers***

7.482. Russia appears to acknowledge that the unbundling measure in the Directive does not involve any *de jure* discrimination against Russian pipeline transport services and service suppliers<sup>881</sup> and does not dispute the European Union's position that the Directive is neutral in the sense that the same unbundling models are applicable at any given time and within any given EU member State regardless of the origin of the pipeline transport services or service suppliers.<sup>882</sup> Instead, Russia seeks to demonstrate that the Directive accords *de facto* less favourable treatment of Russian pipeline transport services and service suppliers in comparison with that accorded to pipeline transport services and service suppliers of any other non-EU country by referring to its design, structure and expected operation.<sup>883</sup>

<sup>881</sup> See, e.g. Russia's first written submission, para. 326.

<sup>882</sup> See, e.g. European Union's first written submission, paras. 289 and 292.

<sup>883</sup> See, e.g. Russia's second written submission, paras. 219-220. Russia also submits some arguments concerning the objective or intentions of the European Union in adopting the unbundling measure in the Directive. Notably, Russia at times refers to the European Union having the "major", "overall" or "overriding" objective of reducing its reliance on imported Russian natural gas or its reliance on Russian pipeline transport services. (See, e.g. Russia's first written submission, para. 314; and second written submission, paras. 21, 62, 73, 79, 226 and 228). As pointed out by the Appellate Body in *EC and certain member States – Large Civil Aircraft*, we note that "the Appellate Body and panels have, on several occasions, cautioned against undue reliance on the intent of a government behind a measure to determine the WTO-consistency of that measure" and have found that "the intent, stated or otherwise, of the legislators *is not conclusive*" although "objectively reviewable expressions of a government's policy objectives" may constitute relevant evidence. (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1050 (citing Appellate Body Reports, *Japan – Alcoholic Beverages II*, p. 27, DSR 1996:1, 97, at p. 119; *US – Offset Act (Byrd Amendment)*, para. 259; and Panel Report, *Japan – DRAMs (Korea)*, para. 7.104)). (emphasis original) We begin by noting that Russia refers to the alleged objectives of reducing reliance on imported Russian natural gas and reducing reliance on Russian pipeline transport services and service suppliers interchangeably, and at a variety of places in its submissions and statements. In accordance with the scope and subject-matter of the GATS, we however believe that the relevant issue is whether Russia has provided "objectively reviewable expressions" of the European Union's policy objective being to reduce reliance on Russian pipeline transport services or service suppliers, rather than imported Russian natural gas. (Appellate Body Report, *EC – Bananas III*, para. 221). Having reviewed Russia's various arguments, we do not believe it has done so. More particularly, Russia has made unsubstantiated assertions (Russia's opening statement at the first meeting of the Panel, para. 2); submitted arguments or evidence concerning the European Union allegedly having a general objective of reducing reliance on Russian pipeline transport services and service suppliers, without relating it to the unbundling measure or by relating it to different, distinct measures (Russia's response to the European Union's first request for a preliminary ruling, para. 26 (referring to Communication from the Commission to the European Parliament and the Council, European Energy Security Strategy, COM(2014) 330 final, (28 May 2014), (Exhibit RUS-5)); first written submission, paras. 6-7; and opening statement at the first meeting of the Panel, para. 2); submitted arguments and evidence relating to the implementation of the unbundling measure in Lithuania, consisting primarily of individual statements by Lithuanian ministers or politicians and the notion that the Lithuanian Government "directed a negative public relations campaign against Gazprom and Lietuvos [dujos] in conjunction with implementing the Directive and requiring adoption of the OU model" and "launched investigative proceedings against Lietuvos [dujos] and the members of its Board of Directors nominated by Gazprom" (Russia's response to Panel question No. 32(a), paras. 152-188 (referring to "Prime Minister: Construction of Terminal Increases", <https://lrv.lt/en/news/prime-minister-construction-of-terminal-increases-br-energy-independence-and-reduces-gas-prices>, (Exhibit RUS-129); Baltic Business News, "Kubilius: Gazprom's influence on Lithuania must decrease", (online, 13 September 2010), (Exhibit RUS-132); Seimas of the Republic of Lithuania, 6th (Spring) Session, Evening's Plenary Session No. 346, Verbatim Report, 28 June 2011 (unofficial translation), (Exhibit RUS-133); Seimas of the Republic of Lithuania, 6th (Spring) Session, Evening's Plenary Session No. 347, Verbatim Report, 30 June 2011 (unofficial translation), (Exhibit RUS-134); ICIS, "Incumbent opposes Lithuanian grid unbundling decision", (online, 20 May 2010), (Exhibit RUS-135); V. Žinios, "Interview: Interview with Andrius Kubilius, Lithuania's Prime Minister by Rytas Staselis", *Business News*, (Vilnius, 6 September 2010) (unofficial translation), (Exhibit RUS-138); Baltic News Service, "Energy Minister: Gazprom, Lithuania's Govt Pursue Different Interests With Building of Gas Pipeline to Klaipėdia", (Vilnius, 22 September 2009), (Exhibit RUS-139); Baltic News Service, "Govt Asks Lithuanian Gas' Top Execs to Resign", (Vilnius, 8 February 2011), (Exhibit RUS-140); Elta, "Prime Minister Armed For

7.483. We begin our assessment of the alleged *de facto* less favourable treatment of Russian pipeline transport services and service suppliers under the unbundling measure in the Directive by addressing certain disagreements between the parties concerning the approach for determining *de facto* discrimination or less favourable treatment.

7.484. In its first written submission, Russia points to one example of the Russian VIU Gazprom having divested its shares in a TSO under the OU model in Lithuania, which has implemented only this model<sup>884</sup> and three examples of VIUs from other non-EU countries, namely Norway and Azerbaijan, continuing to have shares in ITOs in Germany, Greece, and Italy, which have implemented the ITO model in addition to the OU model in respect of transmission systems that belonged to a VIU on 3 September 2009.<sup>885</sup> On the basis of this, Russia submits that the Russian

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Negotiations With Gazprom", (online, 8 September 2011) (unofficial translation), (Exhibit RUS-141); and Ministry of Energy of the Republic of Lithuania: "Ministry of Energy appeals to court to launch legal investigation of the operations of AB Lietuvos Dujos", 17 March 2011, (Exhibit RUS-142)); and second written submission, para. 21 and fn 73); submitted arguments and evidence concerning the EU process of adopting the unbundling measure in the Directive and the introduction of more unbundling models, which do not appear to refer to any objective of reducing reliance on or discriminating against Russian pipeline transport services or service suppliers (Russia's second written submission, paras. 48-52 (referring to Energy Council, Memo/08/127, (27 February 2009), (Exhibit RUS-166); EurActiv, "EU unveils plan to dismantle big energy firms", (online, 20 September 2007), (Exhibit RUS-170); Shepherd and Wadderburn LLP, "Full ownership unbundling: no way or the third way", *Lexology*, (online, 7 August 2008), (Exhibit RUS-171); Wikileaks, Public Library of US Diplomacy, Cable of 7 November 2007 "Grand Coalition Opposes European Union Commission's Unbundling Directives", (Exhibit RUS-172); EurActiv, "Eight EU states oppose unbundling, table 'third way'", (online, 1 February 2008), (Exhibit RUS-173); E. Chow, "France, Germany Propose End-Run Around Unbundling", *Law360*, (online, 29 January 2008), (Exhibit RUS-174); EurActiv, "Commission rebuffs Franco-German energy proposals", (online, 15 February 2008), (Exhibit RUS-175); I. Wissenbach, "EU Commission sets strict terms on unbundling", *Reuters*, (Brussels, 25 April 2008), (Exhibit RUS-176); V. Horváth, "Compromise in sight on energy liberalization", *EurActiv*, (online, 16 May 2008), (Exhibit RUS-177); Wikileaks, Public Library of US Diplomacy, Cable of 31 October 2008 "Outlook for the EU's Third Energy Package", (Exhibit RUS-178); R. Goldirova, "Parliament rejects full gas company unbundling", *Euobserver*, (online, 10 July 2008), (Exhibit RUS-179); S. Stefanini, "EU Backs a Compromise on Gas Unbundling", *Law360*, (online, 9 July 2008), (Exhibit RUS-180); and P. Newton, "EU institutions agree unbundling terms for energy networks", *Utility Week*, (online 8 April 2009), (Exhibit RUS-181)); and submitted arguments and evidence relating to the Commission's role in the implementation of the unbundling measure in Lithuania, which do not appear to refer to any objective of reducing reliance on or discriminating against Russian pipeline transport services or service suppliers (Russia's second written submission, paras. 61-71 (referring to Draft Decision of the Government of the Republic of Lithuania "On Approval of the Concept of the Amendment of the Law on Natural Gas of the Republic of Lithuania", (23 March 2010), (unofficial translation), (Exhibit RUS-130); and V. Pakalkaite, "Lithuania's Strategic Use of EU Energy Policy Tools: A Transformation of Gas Dynamics" (2016), paper NG111, *Oxford Institute for Energy Studies*, (Exhibit RUS-167))). We do not consider the evidence provided by Russia to be "objectively reviewable expressions" of the European Union's policy objectives, nor do we believe that Russia has provided a clear explanation of how its evidence demonstrates that the objective of the Directive's unbundling measure, including its use of different unbundling models, is to reduce reliance on or discriminate against Russian pipeline transport services or service suppliers.

<sup>884</sup> Russia's first written submission, paras. 315-316, 325 and 229-331. This example concerns the Russian VIU Gazprom having sold its shares in the TSO AB Amber Grid (Amber Grid) under the OU model in Lithuania, which has implemented only this model. Russia, at times, refers to the entity AB Lietuvos dujos (Lietuvos dujos) rather than Amber Grid. We understand that Lietuvos dujos operated the transmission system in Lithuania prior to the implementation of the unbundling measure, after which its transmission assets were incorporated in the TSO Amber Grid. Gazprom then sold its shares in Amber Grid. (Russia's first written submission, para. 202). For clarity and ease of reference, we refer only to Amber Grid in our assessment of the unbundling measure in the Directive. In its first written submission, Russia also points to the example of the TSO NEL GT in Germany. (Russia's first written submission, paras. 337-339). However, as acknowledged by both parties, Germany allows all three unbundling models and NEL GT has in fact been certified as an ITO and Gazprom has accordingly not sold any shares in this TSO. (See Shareholdings of TSOs before and after the Third Package, (Exhibit RUS-189), row 25; and Shareholdings in TSOs in the European Union (Exhibit EU-110) (BC1), row 23). We therefore fail to see how this example is relevant for Russia's claim that the unbundling measure in the Directive violates Article II:1 of the GATS by "enabling" EU member States to select from among the unbundling models.

<sup>885</sup> Russia's first written submission, paras. 324 and 329-336. These examples concern the Norwegian VIU Statoil and its ITO Jordgas under the ITO model implemented in Germany in addition to the OU model in respect of transmission systems that belonged to a VIU on 3 September 2009; and the Azerbaijani VIU State Oil Company of the Azerbaijan Republic (SOCAR) and its ITO DESFA under the ITO implemented in Greece in addition to the OU model in respect of transmission systems that belonged to a VIU on 3 September 2009. Russia also refers to the Azerbaijani VIU SOCAR and its "'ad hoc' ITO" TAP AG under an infrastructure exemption granted pursuant to Article 36 of the Directive. As explained above, however, since TAP AG is an "'ad hoc' ITO" under the infrastructure exemption measure rather than an ITO under the unbundling measure



VIU Gazprom was "prohibited from supplying its pipeline transport services to the European Union through a commercial presence in Lithuania" whereas these other VIUs from other non-EU countries "are able to continue supplying their pipeline transport services to the European Union through a commercial presence in other Member States".<sup>886</sup>

7.485. The European Union criticizes this approach, arguing that the treatment of the "group" of Russian pipeline transport services and service suppliers must be compared with the treatment of the "group" of like pipeline transport services and service suppliers of any other non-EU country.<sup>887</sup> More specifically, the European Union submits that Russia must demonstrate that the detrimental impact under the OU model is "predominantly" on the group of Russian pipeline transport services and service suppliers.<sup>888</sup>

7.486. We also question the approach taken by Russia. As pointed out by the European Union, similar approaches have been rejected for goods, under the national treatment obligations of the GATT 1994 and the Agreement on Technical Barriers to Trade (TBT Agreement). In particular, we note the following finding by the panel in *US – Clove Cigarettes*:

In our view, WTO jurisprudence does not support the proposition that "less favourable treatment" can be established merely by showing that there are *some* imported products that are treated less favourably than *some* domestic like product[s]. Indeed, we agree with the United States that this is an "extreme view that has been squarely rejected by the Appellate Body" in *EC – Asbestos*.<sup>889</sup>

This sentiment was echoed by the Appellate Body in the same dispute, stating:

[T]he national treatment obligation of Article 2.1 [of the TBT Agreement] does not require Members to accord no less favourable treatment to each and every imported as compared to each and every domestic like product. Article 2.1 does not preclude any regulatory distinctions between products that are found to be like, as long as treatment accorded to the *group* of imported products is no less favourable than that accorded to the *group* of like domestic products.<sup>890</sup>

7.487. Russia's reliance on the examples listed in paragraph 7.484 above appears to denote a more general approach under which Russia believes that the assessment of less favourable treatment under Article II:1 of the GATS should be based on a comparison of Russian pipeline transport services and service suppliers subject to the less favourable treatment under the OU model, on the one hand, with the pipeline transport services and service suppliers of other non-EU countries subject to the more favourable treatment under the ITO model, on the other hand. In other words, Russia appears to suggest that evidence concerning Russian pipeline transport services and service suppliers subject to the more favourable treatment under the ITO model and pipeline transport services and service suppliers from other non-EU countries subject to the less favourable treatment under the OU model, is irrelevant.<sup>891</sup>

7.488. We note that similar approaches have been rejected for goods. In particular, we note the Appellate Body's warning in *US – Tuna II (Mexico) (Article 21.5 – Mexico)* that "a panel may not artificially limit its analysis to only subsets of the relevant groups of like products in a manner that risks skewing the proper comparison for purposes of determining detrimental impact."<sup>892</sup>

7.489. In our view, the rationale behind the findings above is equally applicable for claims under Article II:1 of the GATS. As with the MFN and national treatment obligations under the GATT 1994 and the TBT Agreement, Article II:1 of the GATS contains a fundamental non-discrimination

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in the Directive, we do not believe it is relevant to consider this example further in the context of addressing Russia's claims against the latter measure.

<sup>886</sup> Russia's first written submission, para. 316. See also Russia's first written submission, paras. 324-325, 329 and 331.

<sup>887</sup> European Union's first written submission, paras. 301-302.

<sup>888</sup> European Union's first written submission, para. 301; and second written submission, paras. 76-77.

<sup>889</sup> Panel Report, *US – Clove Cigarettes*, para. 7.273. (emphasis original)

<sup>890</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 193. (emphasis original)

<sup>891</sup> See, e.g. Russia's second written submission, para. 221.

<sup>892</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.71.

obligation and is thus concerned with prohibiting discriminatory measures.<sup>893</sup> If we were to accept Russia's approach, it would, in our view, "risk[] skewing the proper comparison" in a manner that would not allow us to discern whether or not the measure is in fact discriminatory. Instead, we believe that our assessment should "take into consideration 'the totality of facts and circumstances before [us]'"<sup>894</sup> and assess whether the "design, structure, and expected operation"<sup>895</sup> of the unbundling measure in the Directive is such that the conditions of competition are modified to the detriment of the group of Russian pipeline transport services and service suppliers in comparison with the group of pipeline transport services and service suppliers from any other non-EU country.

7.490. Having said this, we wish to emphasize that we do not mean to suggest that the "predominant effect" test, set out by the European Union, is the sole means through which a complaining party may demonstrate *de facto* discrimination. While such evidence has been relied on in a number of previous disputes<sup>896</sup>, we do not believe it would be appropriate to automatically limit the standard for demonstrating *de facto* discrimination to only this type of evidence. There may be several ways for a complaining Member to demonstrate that the design, structure and expected operation of a challenged measure is such that this measure, while neutral on its face, results in *de facto* discrimination. We do not preclude that, as suggested by Russia as well as Japan, specific instances of application could serve as relevant evidence in this regard, nor that this may be particularly relevant for claims under the GATS where the number of service suppliers in a specific sector could be limited.<sup>897</sup> However, it would be for the complaining party to expound that such instances of application serve to demonstrate that the challenged measure is, as such, of a discriminatory nature.<sup>898</sup>

7.491. Furthermore, we wish to point out that, in deciding to assess Russia's claim by comparing the treatment of the group of Russian pipeline transport services and service suppliers with that of the group of pipeline transport services and service suppliers of any other non-EU country, we do not believe we are accepting the notion of "offsetting", as suggested by Russia.<sup>899</sup> This concept was introduced in *US – Section 337 Tariff Act*, where the complaining party challenged the alleged discrimination stemming from imported products being subject to different proceedings in patent-based actions than those applying to domestic products. In that dispute, the panel rejected the argument that the less favourable treatment under the proceedings applicable to imported products was "offset" by certain advantages under those proceedings<sup>900</sup>, stating that such "an element of more favourable treatment would only be relevant if it would always accompany and offset an element of differential treatment causing less favourable treatment."<sup>901</sup> In contrast, when deciding to assess the WTO consistency of the unbundling measure by comparing the treatment of the group of Russian pipeline transport services and service suppliers with that of the group of pipeline transport services and service suppliers of any other non-EU country, we are not permitting any "element of more favourable treatment" under the OU model to "offset" the less favourable treatment under this model. Rather, we are examining the design, structure and expected operation of the unbundling measure in respect of the entire group of relevant services and service suppliers, instead of only the subsets pointed to by Russia.

<sup>893</sup> See, e.g. Appellate Body Report, *Argentina – Financial Services*, para. 6.105.

<sup>894</sup> Appellate Body Reports, *US – COOL*, para. 269 (quoting Appellate Body Report, *US – Clove Cigarettes*, para. 206).

<sup>895</sup> Appellate Body Reports, *US – COOL*, para. 269 (quoting Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 130).

<sup>896</sup> See, e.g. Appellate Body Reports, *EC – Bananas III*, paras. 243-244 and 246; *Korea – Alcoholic Beverages*, para. 150; *Chile – Alcoholic Beverages*, paras. 50-52, 64 and 76; *US – Tuna II (Mexico)*, paras. 234-235; and *EC – Seal Products*, paras. 5.95-5.96; and Panel Reports, *EC – Bananas III*, paras. 7.332-7.338, 7.363-7.368, 7.378-7.380 and 7.392-7.393; *Korea – Alcoholic Beverages*, para. 10.102; *Chile – Alcoholic Beverages*, paras. 7.123, 7.128-7.129 and 7.155; *EC – Hormones*, para. 8.205; and *EC – Seal Products*, paras. 7.597 and 7.600.

<sup>897</sup> Russia's response to Panel question No 44, para. 197; and second written submission, para. 220; and Japan's response to Panel question No. 1, paras. 1, 4 and 6-7.

<sup>898</sup> In this regard, we note Japan's argument that "less favourable treatment shall not be accidental, but shall be discerned from the structure, design, and architecture of the measure." (Japan's response to Panel question No. 1, para. 4).

<sup>899</sup> Russia's response to Panel question No. 44, para. 197; and second written submission, para. 221 (citing Appellate Body Report, *India – Additional Import Duties*, fn 405; and GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.14).

<sup>900</sup> GATT Panel Report, *US – Section 337 Tariff Act*, paras. 5.15-5.20.

<sup>901</sup> GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.16.

7.492. In light of the above-mentioned considerations, we proceed to assess Russia's claim under Article II:1 of the GATS by examining whether the design, structure and expected operation of the unbundling measure in the Directive result in *de facto* discrimination against Russian pipeline transport services and service suppliers by "enabling" EU member States to choose between implementing only the OU model or implementing the ITO model in addition to the OU model in respect of transmission systems that belonged to a VIU on 3 September 2009. More particularly, and in accordance with our findings in paragraphs 7.452 through 7.473 above, we examine whether the unbundling measure in the Directive results in Russian VIUs being prevented from or ceasing to supply pipeline transport services to the EU market through a commercial presence under the OU model whereas VIUs from other non-EU countries are "able to continue supplying their like pipeline transport services to the EU market through a commercial presence" under the ITO model.<sup>902</sup>

7.493. In this regard, we note that both parties appear to agree on the relevant aspects of the underlying design and structure of the unbundling measure in the Directive. First, that VIUs are able to choose between the OU model and the ITO model with respect to TSOs that belonged to them on 3 September in 2009 in EU member States that have implemented the ITO model in addition to the OU model in respect of such TSOs. Second, that VIUs are required to undergo ownership unbundling subject to the OU model with respect to TSOs that did not belong to them on 3 September 2009 in all EU member States, regardless of the implemented unbundling models, and with respect to TSOs belonging to them on 3 September 2009 in EU member States that have implemented only this model.<sup>903</sup>

7.494. Bearing this in mind, we agree with Russia that "the ITO option was being introduced in the Directive only to benefit a finite number of TSOs".<sup>904</sup> More particularly, we agree that "[a]s the EU and its Member States had a finite list of TSOs belonging to a VIU on 3 September 2009 – the date of entry of the Directive into force – the Directive explicitly limits the possibility to apply the ITO option to these VIUs and TSOs only and to the Member States where they were located."<sup>905</sup> Having said this, we are not convinced that the introduction of the ITO model for a "finite list of TSOs belonging to a VIU on 3 September 2009" results in *de facto* discrimination against Russian pipeline transport services and service suppliers. Russia does not dispute that the Russian VIU Gazprom continues to supply pipeline transport services through the commercial presence of a number of ITOs in EU member States that have implemented this model in addition to the OU model in respect of transmission systems that belonged to a VIU on 3 September 2009.<sup>906, 907</sup>

<sup>902</sup> Russia's first written submission, para. 331; and second written submission, para. 204.

<sup>903</sup> Russia's first written submission, paras. 31 and 318; second written submission, fn 12 and para. 146; and responses to Panel question No. 171(c), para. 112, and No. 183(a), para. 182; and European Union's first written submission, para. 257.

<sup>904</sup> Russia's comments on the European Union's response to Panel question No. 154, para. 49.

<sup>905</sup> Russia's comments on the European Union's response to Panel question No. 154, para. 50.

<sup>906</sup> More particularly, both parties agree that the Russian VIU Gazprom continues to supply pipeline transport services through the commercial presence of the ITO GASCADE and the ITO NEL GT under the ITO model implemented in Germany in addition to the OU model in respect of transmission systems that belonged to a VIU on 3 September 2009. (Russia's response to Panel question No. 52, para. 265; and second written submission, para. 336; and European Union's first written submission, paras. 339 and 341; and response to Panel question No. 52, para. 143). In addition, both parties appear to agree that Gazprom continued to supply pipeline transport services through the commercial presence of the ITO ONTRAS VNG in Germany following implementation of the unbundling measure in the Directive. (Russia's response to Panel question No. 52, para. 264; and European Union's first written submission, para. 340). Russia points out that Gazprom subsequently divested its interest in ONTRAS, in 2015, and that it is therefore not a Russian supplier of pipeline transport services. (Russia's response to Panel question No. 180(b), para. 159). As pointed out by Russia itself, however, since "ONTRAS operates under [the] ITO model and thus did not have [to] be ownership unbundled, a change in its shareholding is irrelevant as it was not enforced by the Directive." (Russia's response to Panel question No. 161(c), para. 45.) We believe that this evidence is still relevant to demonstrate that the Russian VIU Gazprom continued to supply pipeline transport services through the commercial presence of ITOs following implementation of the unbundling measure in the Directive.

<sup>907</sup> We further note that there are also examples of the Russian VIU Gazprom continuing to supply pipeline transport services through the commercial presence of a TSO by virtue of having been exempted from the rules on unbundling in their entirety pursuant to Article 36 of the Directive. More particularly, both parties agree that the Russian VIU Gazprom continues to supply pipeline transport services through the commercial presence of the TSO OPAL GT in Germany, having been granted an infrastructure exemption by the German NRA. (Russia's response to Panel question No. 52, para. 265; and European Union's response to Panel question No. 52, para. 143). However, and as explained above, we do not consider evidence related to the infrastructure exemption measure relevant for assessing the WTO consistency of the unbundling measure in

Indeed, when examining the evidence provided by Russia itself, it appears that the "finite list of TSOs belonging to a VIU on 3 September 2009" involves more instances of the Russian VIU Gazprom continuing to supply pipeline transport services through the commercial presence of ITOs than instances of VIUs from any other non-EU country continuing to supply pipeline transport services through the commercial presence of ITOs.<sup>908, 909</sup>

7.495. We similarly agree with Russia's position that the Directive is "designed and expected to operate so as to subject" "all TSOs that were in existence on 3 September 2009 and that did not form part of a VIU", as well as all new TSOs, to the OU model.<sup>910</sup> However, we do not believe that Russia has demonstrated that these aspects of the design, structure and expected operation of the unbundling measure in the Directive result in *de facto* discrimination against Russian pipeline transport services and service suppliers. Russia argues that the European Union established an "arbitrary deadline" by only allowing EU member States the choice of implementing the ITO model in respect of transmission systems that belonged to a VIU on 3 September 2009, and hereby "foreclosed the legal right and ability of other VIUs to supply natural gas and pipeline transport services in the form of transmission services through a commercial presence in the EU market".<sup>911</sup> The issue before us is, however, not whether the Directive's deadline of 3 September 2009 is arbitrary or not. Rather, the issue is whether Russia has demonstrated that the design, structure and expected operation of the unbundling measure in the Directive, including this allegedly arbitrary deadline, result in less favourable treatment of Russian pipeline transport services and service suppliers. In our view, Russia has not made such a demonstration. Indeed, Russia does not contest that VIUs of all origins will be subject to the OU model in respect of TSOs that did not belong to such VIUs on 3 September 2009.

7.496. Instead, Russia asserts that "only TSOs controlled by the Russian VIU were required to undergo ownership unbundling"<sup>912</sup> and in this regard points to four instances "where a change in ownership occurred, pursuant to the Directive"<sup>913</sup>, namely those involving the TSOs [\*\*\*], [\*\*\*], [\*\*\*]<sup>914</sup>, and [\*\*\*].<sup>915, 916</sup> Having carefully reviewed this evidence, we do not believe that Russia's

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the Directive. Such evidence is addressed instead below in section 7.8 when assessing Russia's claims against the infrastructure exemption measure.

<sup>908</sup> In contrast to the three instances of the Russian VIU Gazprom continuing to supply pipeline transport services through the commercial presence of ITOs, we can identify only one instance of the Norwegian VIU Statoil continuing to supply pipeline transport services through an ITO, namely the ITO jordgas in Germany; and one instance of the Azerbaijani VIU SOCAR supplying pipeline transport services through an ITO, namely the ITO DESFA in Greece. (Russia's response to Panel question No. 52, para. 266; and European Union's response to Panel question No. 52, paras. 143-144. We note that the European Union's position that SOCAR supplies pipeline transport services through the commercial presence of DESFA is conditional upon the projected acquisition by SOCAR of 66% of the shareholdings in DESFA, but do not consider this of further relevance for our findings concerning the WTO consistency of the unbundling measure in the Directive).

<sup>909</sup> As was the case for the Russian VIU Gazprom, there are also examples of VIUs from other non-EU countries continuing to supply pipeline transport services through the commercial presence of TSOs by virtue of having been exempted from the rules on unbundling pursuant to Article 36 of the Directive. Indeed, Russia refers to one such example, namely TAP AG which was granted an infrastructure exemption and hereby exempted from the requirement to belong to a VIU on 3 September 2009 and certified as an "'ad hoc' ITO". (Russia's first written submission, paras. 332-334; and second written submission, para. 227). However, and as explained above, we do not consider evidence related to the infrastructure exemption measure relevant for assessing the WTO consistency of the unbundling measure in the Directive. Such evidence is addressed instead below in section 7.8 when assessing Russia's claims against the infrastructure exemption measure.

<sup>910</sup> Russia's comments on the European Union's response to Panel question No. 154, para. 53.

<sup>911</sup> Russia's response to panel question No. 183(a), para. 182.

<sup>912</sup> Russia's response to Panel question No. 12(c), para. 99. See also Russia's second written submission, para. 223.

<sup>913</sup> Russia's opening statement at the second meeting of the Panel, para. 95.

<sup>914</sup> We note that Russia appears to acknowledge that Gazprom continues to own shares in the TSO [\*\*\*] in Latvia, as Latvia has been granted a derogation from the rules on unbundling, but instead submits that it is "being unbundled based on the Directive, pursuant to the amendments to the Latvian Energy Law of February 11, 2016" which will require the OU model from 31 December 2017. (Russia's response to Panel question No. 173, para. 130. See also Russia's second written submission, para. 253; and response to Panel question No. 25(a), para. 128). The European Union does not dispute the factual accuracy of this.

<sup>915</sup> We note that Russia appears to acknowledge that Gazprom continued to own shares in the TSO [\*\*\*] in Estonia following the entry into force of the Directive, as Estonia was granted a derogation from the rules on unbundling, and instead submits that Gazprom divested its shares once Estonia implemented the OU model in 2015. (Russia's response to Panel question No. 173, para. 130; and Shareholdings of TSOs before and after the Third Package, (Exhibit RUS-189), row 52). The European Union does not dispute the factual accuracy of this.

references to such instances suffice to make a *prima facie* case that the unbundling measure in the Directive discriminates, on a *de facto* basis, against Russian pipeline transport services and service suppliers for the reasons that follow.

7.497. First of all, Russia's arguments concerning these four TSOs focus on the change in shareholdings by the Russian VIU Gazprom prior to and following the entry into force of the Directive. As we have explained above, however, a VIU can be considered to supply pipeline transport services through the commercial presence of a TSO only when this TSO is owned or controlled by the VIU within the meaning of Articles XXVIII(n)(i) or (ii) of the GATS.

7.498. We recall that Article XXVIII(n)(i) of the GATS clarifies that a juridical person is "'owned' by persons of a Member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member". Since Gazprom owned only [\*\*\*], [\*\*\*], [\*\*\*], and [\*\*\*] of the shares in the TSOs [\*\*\*], [\*\*\*], [\*\*\*] and [\*\*\*], respectively<sup>917</sup>, it plainly did not own these entities within the meaning of Article XXVIII(n)(i). We further recall that Article XXVIII(n)(ii) of the GATS clarifies that a juridical person is "'controlled' by persons of a Member if such persons have the power to name a majority of its directors or otherwise to legally direct its actions". The European Union submits that it is "uncertain" or "unlikely" that Gazprom was able to control [\*\*\*], [\*\*\*], [\*\*\*] and [\*\*\*] within the meaning of Article XXVIII(n)(ii) of the GATS.<sup>918</sup> In its comments on the European Union's responses to questions following the second meeting of the Panel, Russia has provided [\*\*\*] and argues, on the basis of these, that Gazprom was able to control [\*\*\*], [\*\*\*], [\*\*\*] and [\*\*\*] within the meaning of Article XXVIII(n)(ii) of the GATS by being able to "legally direct [their] actions".<sup>919</sup>

7.499. For the TSO [\*\*\*], Russia submits that Gazprom was able to legally direct its actions, and in this regard points out that:

[\*\*\*]<sup>920</sup>

7.500. Russia points out that [\*\*\*] and [\*\*\*].<sup>921</sup> Russia also points out that [\*\*\*].<sup>922</sup> Lastly, Russia points out that:

[\*\*\*]<sup>923</sup>

7.501. In our view, Russia's references to [\*\*\*] are insufficient to demonstrate that Gazprom controlled this TSO within the meaning of Article XXVIII(n)(ii) of the GATS. We recall that Russia bears the burden of making a *prima facie* case of violation under Article II:1 of the GATS. In this regard, we do not believe that it is sufficient for Russia to merely point to the fact that shareholders [\*\*\*], including Gazprom, may have limited possibilities of voting against one another in respect of certain decisions, without further explanation of how this relates to the ability of Gazprom to "legally direct" [\*\*\*] actions, and in particular its actions concerning the supply of pipeline transport services. Nor do we believe that it is sufficient for Russia to point to the fact that

<sup>916</sup> Russia's response to Panel question No. 174(a), para. 132.

<sup>917</sup> Shareholdings of TSOs before and after the Third Package, (Exhibit RUS-189), rows 54, 48, 53, and 52; and Shareholdings in TSOs in the European Union, (Exhibit EU-110) (BCI), rows 38, 54, 37, and 10. We note that Exhibit RUS-189 indicates that Gazprom owned 37.03% of the shares in [\*\*\*] whereas Exhibit EU-110 indicates that Gazprom owned [\*\*\*] of the shares in [\*\*\*]. In our view, this minor difference in shareholding does not have any bearing on our findings.

<sup>918</sup> European Union's response to Panel question No. 174(b), paras. 85-88.

<sup>919</sup> Russia's comments on the European Union's response to Panel question No. 174(b), paras. 108-118. The European Union was accorded an opportunity to comment on new evidence submitted by Russia in its comments on the European Union's responses to Panel questions following the second meeting of the Panel, but did not avail itself of this opportunity in respect of the [\*\*\*] submitted by Russia, noting that it had "no further comments". (European Union's comments on new evidence submitted by Russia after the second meeting, para. 8).

<sup>920</sup> Russia's comments on the European Union's response to Panel question No. 174(b), para. 109 (referring to [\*\*\*], (Exhibit RUS-217) (BCI)).

<sup>921</sup> Russia's comments on the European Union's response to Panel question No. 174(b), para. 110 (referring to [\*\*\*], (Exhibit RUS-217) (BCI)). Russia also points out that [\*\*\*]. (Ibid.)

<sup>922</sup> Russia's comments on the European Union's response to Panel question No. 174(b), para. 111 (referring to [\*\*\*], (Exhibit RUS-217) (BCI)).

<sup>923</sup> Russia's comments on the European Union's response to Panel question No. 174(b), para. 111 (referring to [\*\*\*], (Exhibit RUS-217) (BCI)).

Gazprom is able to name a minority of [\*\*\*] board members and [\*\*\*] without explaining how this translates into "control" of a supplier of pipeline transport services.

7.502. For the TSO [\*\*\*], Russia asserts that Gazprom was able to legally direct its actions, pointing out that:

[\*\*\*]<sup>924</sup>

7.503. In our view, these brief arguments by Russia do not suffice to demonstrate that Gazprom controlled [\*\*\*] within the meaning of Article XXVIII(n)(ii) of the GATS. More particularly, we do not believe that it is sufficient for Russia to merely point to the fact that Gazprom had veto rights or voting rights in respect of certain actions or decisions by [\*\*\*], without any further explanation of how these rights relate to the ability of Gazprom to "legally direct" [\*\*\*] actions, and in particular its actions concerning the supply of pipeline transport services.

7.504. For the TSO [\*\*\*], Russia asserts that Gazprom was able to legally direct its actions, pointing out that:

[\*\*\*]<sup>925</sup>

7.505. We do not consider these brief arguments sufficient. As explained above, the mere reference to Gazprom having veto rights in respect of certain specific decisions, which appear to relate to corporate and financial issues concerning [\*\*\*] rather than its supply of pipeline transport services, in our view, falls short of making a *prima facie* case that Gazprom controlled [\*\*\*] within the meaning of Article XXVIII(n)(ii).

7.506. In addition to these [\*\*\*], Russia provides the [\*\*\*].<sup>926</sup> It is not clear whether Russia meant for this [\*\*\*] to be relevant for the TSO [\*\*\*] and Russia provides no explanation in this regard. Instead Russia argues that Gazprom was able to legally direct the actions of [\*\*\*], as Gazprom:

[\*\*\*]<sup>927</sup>

7.507. Even assuming that the [\*\*\*] provided by Russia relates to [\*\*\*], we do not consider Russia's brief arguments sufficient to demonstrate that Gazprom controlled [\*\*\*] within the meaning of Article XXVIII(n)(ii) of the GATS, especially since Gazprom could only appoint a minority, namely [\*\*\*]<sup>928</sup>, of the members of the management board of [\*\*\*] or [\*\*\*].

7.508. As explained in the preceding paragraphs, we are not convinced that Russia has demonstrated that the four instances relied upon by it involve Russian pipeline transport services or service suppliers. In light of this, it is difficult to understand how this evidence could serve to substantiate Russia's assertion that the unbundling measure in the Directive accords *de facto* less favourable treatment to Russian pipeline transport services and service suppliers.

7.509. Even assuming that Gazprom could be considered to have supplied pipeline transport services through the commercial presence of these four TSOs before the entry into force of the Directive and to have ceased doing so pursuant to the OU model, we nonetheless have difficulties understanding how Russia reaches the conclusion that "only TSOs controlled by the Russian VIU were required to undergo ownership unbundling".<sup>929</sup> As pointed out by the European Union, one of the instances referred to by Russia, namely that involving the TSO [\*\*\*], demonstrates that not

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<sup>924</sup> Russia's comments on the European Union's response to Panel question No. 174(b), para. 114 (referring to [\*\*\*], (Exhibit RUS-218) (BCI)).

<sup>925</sup> Russia's comments on the European Union's response to Panel question No. 174(b), para. 117 (referring to [\*\*\*], (Exhibit RUS-221) (BCI)).

<sup>926</sup> Russia's comments on the European Union's response to Panel question No. 174(b), para. 116 (referring to [\*\*\*], (Exhibit RUS-220) (BCI)).

<sup>927</sup> Russia's comments on the European Union's response to Panel question No. 174(b), para. 116 (referring to [\*\*\*], (Exhibit RUS-220) (BCI)).

<sup>928</sup> [\*\*\*], (Exhibit RUS-220) (BCI).

<sup>929</sup> Russia's response to Panel question No. 12(c), para. 99. See also Russia's second written submission, para. 223.

only Russian VIUs were subject to the OU model.<sup>930</sup> More particularly, the US VIU Conoco Phillips had shareholdings in [\*\*\*] equal to those of Gazprom, was a party to the same [\*\*\*], and also divested its shares pursuant to the OU model.<sup>931</sup> Insofar as the Russian VIU Gazprom could be considered to have supplied pipeline transport services through the commercial presence of Interconnector UK prior to the entry into force of the Directive and to have ceased doing so pursuant to the OU model, the US VIU Conoco Phillips should also be considered to have done so. Likewise, in stating that "only TSOs controlled by the Russian VIU were required to undergo ownership unbundling", Russia appears to disregard the fact that the OU model, as pointed to by Russia itself, is the only applicable model with respect to TSOs that did not belong to a VIU on 3 September 2009 and that VIUs of all origins will therefore be subject to the OU model in respect of TSOs that did not belong to such VIUs on 3 September 2009.

7.510. Indeed, even assuming that there are more instances where the Russian VIU Gazprom ceased supplying pipeline transport services through the commercial presence of TSOs that belonged to it prior to 3 September 2009 pursuant to the OU model than instances where VIUs from any other non-EU country did so, this is mirrored by the fact that there are more instances where the Russian VIU Gazprom continues to supply pipeline transport services through the commercial presence of ITOs that belonged to it on 3 September 2009 under the ITO model than instances where VIUs from any other non-EU country continue to do so.<sup>932</sup> In our view, this pattern does not suggest that the unbundling measure in the Directive is discriminatory in nature. Rather, it seems to reflect the factual particularities of the EU market for pipeline transport services and more specifically the fact that Russian pipeline transport service suppliers had a greater commercial presence than those of other non-EU countries, when the Directive entered into force on 3 September 2009. It is for this reason, rather than the design, structure and expected operation of the unbundling measure in the Directive, that there were more instances of Russian pipeline transport service suppliers subject to *both* the OU and the ITO models in 2009. The mere fact that the unbundling measure in the Directive results in more instances of Russian pipeline transport service suppliers being subject to both the OU and the ITO models in 2009 is, in our view, not a proper basis for concluding that this measure violates Article II:1 of the GATS when this result is explained by factors unrelated to the origin of the pipeline transport services and service suppliers.<sup>933</sup>

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<sup>930</sup> European Union's second written submission, para. 84. We note that the European Union has also pointed to other examples of persons from other non-EU countries having divested shares in TSOs, namely the VIU Eni SpA having divested its shares in the TSO Snam SA in Italy after its "successful but temporary certification under the ITO model", the VIU Sonatrach Petroleum Investment Corporation BV having "modified" its shares in the TSO Reganosa to be "passive financial rights with no influence or voting power" "in order to comply with OU" in Spain, the "ownership structure and rights of individual shareholders [being] changed (e.g. regarding Board Members) in order to comply with OU" in the TSO REN Gasodutos SA "wherein several third country persons have shareholdings", and "OU [taking] place" in respect of the TSO TIGF in France, where GIC Private Limited had a shareholding. (European Union's second written submission paras. 85-86). Russia argues that these examples are "beside the point and ha[ve] nothing to do with the effect of the Directive which is the subject matter of this dispute." (Russia's opening statement at the second meeting of the Panel, para. 97). More particularly, Russia points out that the TSOs Snam SA and TIGF were certified as ITOs and that it was a voluntary decision for VIUs to "exit" these TSOs. For the TSO Reganosa and for the TSO REN Gasodutos SA, Russia points out that "Portugal had to privatize TSO REN Gasodutos SA pursuant to the Economic Adjustment Programme, aimed at restoring confidence, enabling the return of the economy to sustainable growth, and safeguarding financial stability in Portugal, the euro area and the EU" rather than the OU model. (Russia's opening statement at the second meeting of the Panel, paras. 97-98). The European Union points out that "the MoU concluded with Portugal in the context of the Economic Adjustment Programme fell in between the adoption of the Gas Directive in 2009 and the deadline for complying with the unbundling requirements of March 2012" and "[h]ence, the Programme's requirement to privatise REN Gasodutos was based on and motivated by the respective provisions of the Gas Directive" and that "the sale of [] shareholding in SNAM and the subsequent certification as ownership unbundled TSO were based on a decree by the Italian Government" as well as an antitrust procedure by the Commission, but does not appear to dispute that these examples are not directly related to the unbundling measure in the Directive. (European Union's response to Panel question No. 175, paras. 89-94). Since these examples are not directly related to the unbundling measure in the Directive, we consider them of less relevance to our assessment of the unbundling measure in the Directive under Article II:1 of the GATS.

<sup>931</sup> Shareholdings of TSOs before and after the Third Package, (Exhibit RUS-189), row 48; Shareholdings in TSOs in the European Union, (Exhibit EU-110) (BCI), row 54; and [\*\*\*], (Exhibit RUS-218) (BCI).

<sup>932</sup> See para. 7.494 and fns 906 and 908 above.

<sup>933</sup> See Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96.

7.511. In fact, when Russia points out that the unbundling measure in the Directive reserves the ITO model for a "finite list of TSOs belonging to a VIU on 3 September 2009"<sup>934</sup>, this would seem to suggest that the design, structure and expected operation of the unbundling measure is such that pipeline transport services and service suppliers from countries with a greater commercial presence in the EU market on 3 September 2009 benefit from the Directive "enabling" EU member States to implement the ITO model in addition to the OU model in respect of transmission system that belonged to a VIU on this date. More particularly, only VIUs that were commercially present through VIUs on 3 September 2009 had the possibility of continuing to supply pipeline transport services through the commercial presence of an ITO, albeit only in EU member States that made use of the possibility of implementing the ITO model in respect of transmission systems that belonged to a VIU on this date.

7.512. Therefore, while the design, structure and expected operation of the unbundling model is such that regulatory distinctions are drawn between: (a) TSOs that did not belong to a VIU on 3 September 2009; (b) TSOs that did belong to a VIU on 3 September 2009 and are commercially present in EU member States that have implemented only the OU model; and (c) TSOs that did belong to a VIU on 3 September 2009 and are commercially present in EU member States that have made use of the possibility, provided for in the Directive, of implementing the ITO model in addition to the OU model, we do not believe that Russia has made a *prima facie* case that these regulatory distinctions result in *de facto* discrimination against Russian pipeline transport services and service suppliers. In other words, Russia has not demonstrated that the unbundling measure accords less favourable treatment to the group of Russian pipeline transport services and service suppliers than that accorded to the group of pipeline transport services and service suppliers from any other non-EU country.<sup>935</sup>

7.513. As we have concluded that Russia has not demonstrated the existence of less favourable treatment of Russian pipeline transport services and service suppliers, we do not find it necessary or appropriate to consider, in the abstract, whether such – non-existent – less favourable treatment is attributable to the unbundling measure in the Directive, taking into account the element of discretion under this measure.

#### 7.5.1.3.3 Conclusion

7.514. Having considered the various arguments and evidence provided by Russia, and for the reasons explained in paragraphs 7.482 through 7.513 above, we conclude that Russia has not demonstrated that the unbundling measure in the Directive accords less favourable treatment to Russian pipeline transport services and service suppliers in comparison with that accorded to pipeline transport services and service suppliers of any other non-EU country. Hence, we find that Russia has failed to make a *prima facie* case of violation under Article II:1 of the GATS with respect to the unbundling measure in the Directive.

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<sup>934</sup> Russia's comments on the European Union's response to Panel question No. 154, para. 52.

<sup>935</sup> We note that both parties have, at times, also pointed to and submitted arguments and evidence with respect to VIUs that are not subject to the rules on unbundling in respect of TSOs in EU member States that are permitted to derogate from these rules all together. (See Russia's response to Panel question No. 158, para. 39; and comments on the European Union's response to Panel question No. 154, para. 55; and European Union's second written submission, paras. 69 and 79). In this regard, we recall that EU member States falling within the categories set out in Article 49 of the Directive are permitted to derogate from the rules on unbundling in their entirety, including all three models set out herein. It is not entirely clear, in our view, how such arguments pertain to Russia's overarching claim concerning the unbundling measure in the Directive "enabling" EU member States to choose between implementing only the OU model or implementing the ITO model in addition to the OU model in respect of transmission systems that belonged to a VIU on 3 September 2009. In any event, we do not believe that our findings above would alter, taking into account evidence concerning TSOs operating in EU member States that have been permitted to derogate from the rules on unbundling altogether. More particularly, the Russian VIU Gazprom continued to have shares in the TSO [\*\*\*] in Finland, which has been permitted to derogate from the rules on unbundling. Although Gazprom's shares in [\*\*\*] were later divested to the Finnish State, Russia acknowledges that this divestiture was "due to reasons unrelated to [the implementation of the Directive] – as Finland enjoyed a derogation". (Russia's response to Panel question No. 161, para. 54). Similarly, we recall that Gazprom continued to have shares in the TSO [\*\*\*] during the period in which Estonia was granted a derogation and that Gazprom continues to have shares in the TSO [\*\*\*] in Latvia, which has been granted a derogation. (See fns 914-915 above).



#### 7.5.1.4 Russia's claims under Articles I:1 and III:4 of the GATT 1994

##### 7.5.1.4.1 Introduction

7.515. The gist of Russia's claims under Articles I:1 and III:4 of the GATT 1994 is, as explained above, that the unbundling measure in the Directive accords less favourable treatment to imported Russian natural gas than that accorded to imported natural gas from other non-EU countries and to domestic EU natural gas by "enabling" EU member States to choose between implementing only the OU model or implementing the ISO and/or the ITO models in addition to the OU model in respect of transmission systems that belonged to a VIU on 3 September 2009.<sup>936</sup> In response, the European Union submits that the unbundling measure in the Directive does not affect trade in natural gas and hence falls outside the scope of Articles I:1 and III:4 of the GATT 1994.<sup>937</sup> Furthermore, the European Union argues that natural gas is not accorded less favourable treatment under the OU model in comparison with that accorded to natural gas under the ISO or the ITO models<sup>938</sup> and, in any event, that Russia has not demonstrated that the unbundling measure in the Directive discriminates against imported Russian natural gas, as the OU model does not "predominantly" impact imported Russian natural gas in comparison with imported natural gas from other non-EU countries or domestic EU natural gas.<sup>939</sup>

7.516. Before assessing Russia's claims, we recall that, as explained in paragraph 7.3 above, a panel has discretion in setting out the order of its analysis. With respect to Russia's claims under Articles I:1 and III:4 of the GATT 1994 against the unbundling measure in the Directive, we note that both parties address the latter claim first and, to a large degree, refer to their argumentation concerning that claim in addressing the claim under Article I:1 of the GATT 1994. In light of this, we find it practical to begin with our assessment of Russia's claim under Article III:4 of the GATT 1994, followed by our assessment of Russia's claim under Article I:1 of the GATT 1994.

##### 7.5.1.4.2 Analysis by the Panel of Russia's claim under Article III:4 of the GATT 1994

7.517. Bearing in mind the legal standard under Article III:4 of the GATT 1994, set out in paragraphs 7.238 and 7.239 above, we proceed to assess Russia's claim against the unbundling measure in the Directive under this provision by determining whether Russia has made a *prima facie* case that: (a) the unbundling measure in the Directive falls within the scope of Article III:4 of the GATT 1994; (b) the relevant imported and domestic products are like; and (c) the unbundling measure in the Directive accords less favourable treatment to the relevant imported Russian products than the treatment it accords to the relevant like domestic products.

7.518. We address these elements, in turn, below.

###### 7.5.1.4.2.1 Scope of Article III:4 of the GATT 1994

7.519. As explained by the panel in *Argentina – Financial Services*, the legal standard for determining whether a measure is covered by Article III:4 of the GATT 1994 is as follows:

[F]or a measure to be covered by Article III:4 of the GATT 1994 it must (i) consist of a "law, regulation or requirement" and (ii) "affect[ing] the internal sale, offering for sale, purchase, transportation, distribution or use" of the products concerned.<sup>940</sup>

7.520. We note that the European Union does not appear to disagree with Russia's assertion that the unbundling measure in the Directive is a "'law' or 'regulation,' which imposes 'requirements'" within the meaning of GATT Article III:4<sup>941</sup>, and we are similarly of the view that this measure falls within the types of instruments covered by Article III:4 of the GATT 1994.

<sup>936</sup> See, e.g. Russia's first written submission, paras. 353, 356 and 370-371.

<sup>937</sup> See, e.g. European Union's first written submission, paras. 361-362 and 403-406.

<sup>938</sup> See, e.g. European Union's first written submission, paras. 368-373 and 409; and second written submission, paras. 95-100 and 140.

<sup>939</sup> See, e.g. European Union's first written submission, paras. 365, 374-376 and 417-419; and second written submission, paras. 101-138 and 140.

<sup>940</sup> Panel Report, *Argentina – Financial Services*, para. 7.1015.

<sup>941</sup> Russia's first written submission, para. 342.

7.521. Instead, the main point of contention between the parties relates to the second element, namely, whether the unbundling measure in the Directive affects the internal sale, offering for sale, purchase, transportation, distribution or use of natural gas.

7.522. Russia argues that the unbundling measure in the Directive affects "natural gas being sold, offered for sale, supplied, purchased, transported, etc. on the market by the undertakings subject to the unbundling requirements in the same manner as it affects the undertakings themselves."<sup>942</sup> More particularly, Russia argues that all three unbundling models affect natural gas since they impact the ability of VIUs to control TSOs and thus to make "decisions relating to the transmission or transportation or downstream sale of the gas".<sup>943</sup> The European Union argues that any effects of the unbundling measure in the Directive on the conditions of competition of natural gas in the EU market are "merely 'hypothetical'".<sup>944</sup> More particularly, the European Union argues that "the unbundling measure is exactly meant to increase competition between gas of different origin and to ensure that gas from different producers and suppliers is not foreclosed from having access to the transmission network"<sup>945</sup> and that "[t]here is no link between the origin of the gas that flows through a pipeline and the origin of the service supplier, because of the third party access principle".<sup>946</sup>

7.523. At the outset, we wish to emphasize that we agree with the point raised by the European Union, as well as Japan and Ukraine, that it would not be appropriate to assume that the unbundling measure in the Directive affects the internal sale, offering for sale, purchase, transportation, distribution or use of natural gas solely by virtue of affecting services related to natural gas.<sup>947</sup> As pointed out at the outset of our Report, the subject-matter and scope of the GATS and the GATT 1994, respectively, are distinct and we are mindful of this in assessing Russia's claims under each Agreement. We therefore reiterate our view mentioned in paragraph 7.14 above concerning the conflation, at times, by Russia of its various claims under these two Agreements.

7.524. At the same time, however, Russia has, in our view, not solely substantiated its assertion that the unbundling measure in the Directive is covered by Article III:4 of the GATT 1994 by pointing to this measure's effects on pipeline transport services and service suppliers. In addition to these effects, Russia also points to the effects on suppliers or producers of natural gas, in particular VIUs, and their ability to control and make certain decisions relating to the transmission, transportation or sale of the natural gas produced by them.<sup>948</sup>

7.525. We agree with Russia that the unbundling measure in the Directive has effects on producers and suppliers of natural gas in respect of the supply or transportation of that good. More particularly, the unbundling measure regulates the relationship that producers or suppliers of natural gas may have with undertakings involved in transportation of that natural gas. Importantly, it regulates the manner in which that relationship may impact the competitive conditions under which the natural gas produced or supplied by the former is transported. As pointed out by the European Union itself, it does so either by requiring natural gas producers or suppliers to be structurally separated from undertakings involved in transportation of natural gas (the OU model)<sup>949</sup> or by imposing "behavioural and organisational"<sup>950</sup> requirements, as well as "increased regulatory oversight"<sup>951</sup> concerning the relationship between such undertakings (the ISO and the ITO models).

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<sup>942</sup> Russia's second written submission, para. 235.

<sup>943</sup> Russia's second written submission, para. 236.

<sup>944</sup> European Union's first written submission, para. 361 (quoting Panel Report, *Argentina – Financial Services*, para. 7.1028).

<sup>945</sup> European Union's first written submission, para. 362.

<sup>946</sup> European Union's first written submission, para. 362.

<sup>947</sup> See European Union's first written submission, paras. 361-362 (referring to Appellate Body Report, *China – Auto Parts*, para. 195; and Panel Report, *Argentina – Financial Services*, para. 7.1028); Japan's third-party submission, paras. 41-42; and Ukraine's third-party submission, paras. 20-23 and 36 (referring to Appellate Body Reports, *US – FSC (Article 21.5 – EC)*, para. 208; and *Korea – Various Measures on Beef*, para. 133).

<sup>948</sup> Russia's second written submission, paras. 234-236.

<sup>949</sup> European Union's response to Panel question No. 59, para. 157.

<sup>950</sup> European Union's first written submission, para. 313.

<sup>951</sup> European Union's second written submission, para. 74.

7.526. In our view, a number of the arguments put forward by the European Union in the context of the scope of Article III:4 appear misplaced. More particularly, by arguing that the unbundling measure is "meant to increase competition between gas of different origin"<sup>952</sup>, the European Union seems to suggest that our assessment of the scope of Article III:4 should address not only whether the unbundling measure in the Directive affects the conditions of competition for natural gas in the EU market, but also the manner in which those conditions of competition are affected. We do not believe such an analysis is warranted when considering whether a measure falls within the scope of Article III:4 of the GATT 1994 as this would truncate the further assessment under this provision. Similarly, the European Union's argument that "[t]here is no link between the origin of the gas that flows through a pipeline and the origin of the service supplier, because of the third party access principle"<sup>953</sup> seems to relate to the issue of whether there is less favourable treatment of imported Russian natural gas in comparison with that of domestic EU natural gas, rather than the preliminary issue of whether the competitive conditions of natural gas are, generally, affected by the unbundling measure in the Directive.

7.527. Having established that the unbundling measure in the Directive affects the internal sale, offering for sale, purchase, transportation, distribution or use of natural gas, we find that this measure falls within the scope of Article III:4 of the GATT 1994 and proceed to assess whether the relevant imported and domestic products are like and whether the unbundling measure accords less favourable treatment to the relevant imported Russian products.

#### 7.5.1.4.2.2 Like products

7.528. As explained in paragraphs 7.238 and 7.239 above, the national treatment obligation in Article III:4 of the GATT 1994 applies only with respect to like products and we, therefore, turn to assess whether Russia has made a *prima facie* case that the relevant products are like within the meaning of this provision.

7.529. Similarly to Russia's claim against the unbundling measure in the Directive under Article II:1 of the GATS, the scope of Russia's likeness enquiry is not entirely clear for its claim under Article III:4 of the GATT 1994. Notably, Russia states that "Russian and domestic gas, like natural gas imported from any other country, including LNG, are in a perfectly competitive relationship and thus are 'like products' within the broad meaning of that term under Article III:4."<sup>954</sup> Furthermore, Russia includes a few references to LNG when challenging the unbundling measure under Article III:4 of the GATT 1994, pointing to that fact that "the LSO, the gas supplier and TSO are now all owned by the [Lithuanian] State" and to the increase in imports of Norwegian LNG in Lithuania.<sup>955</sup> We therefore begin by determining the scope of the likeness enquiry before turning to the actual assessment of likeness.

7.530. In this regard, we recall that Russia's claim under Article III:4 of the GATT 1994 pertains to the alleged discrimination against imported Russian natural gas stemming from the Directive "enabling" EU member States to choose between implementing only the OU model or implementing the ISO and/or the ITO models in addition to the OU model in respect of transmission systems that belonged to a VIU on 3 September 2009.<sup>956</sup>

7.531. Both parties agree that the requirement to unbundle does not apply to LNG facilities.<sup>957</sup> In other words, a VIU may produce and supply LNG without having to unbundle any ownership or control over its LNG facilities or the operators of such facilities under either of the unbundling models. LNG is thus not accorded the alleged more favourable treatment under the ISO and/or the ITO models or the alleged less favourable treatment under the OU model, challenged by Russia under its claim against the unbundling measure in the Directive under Article III:4 of the GATT 1994. As previously explained, the alleged "exemption" of LNG facilities (referred to in this

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<sup>952</sup> European Union's first written submission, para. 362.

<sup>953</sup> European Union's first written submission, para. 362.

<sup>954</sup> Russia's first written submission, para. 349.

<sup>955</sup> Russia's second written submission, para. 251.

<sup>956</sup> Russia's first written submission, paras. 353 and 356.

<sup>957</sup> Russia's response to Panel question No. 1, paras. 4 and 7; and European Union's first written submission, para. 433.

Report as "the LNG measure") is *not* the object of this particular claim, but is instead challenged by Russia as a "separate, distinct measure" under a separate claim (see section 7.7 below).<sup>958</sup>

7.532. For these reasons, we find that natural gas is the only relevant product for Russia's claim against the unbundling measure in the Directive under Article III:4 of the GATT 1994 and do not consider it necessary or relevant to determine, in the context of this claim, whether LNG is like natural gas. As explained in paragraphs 7.840 through 7.845 below, we consider that natural gas and LNG are distinct products.

7.533. Having determined that the scope of our likeness enquiry should be limited to natural gas, we proceed to the actual assessment of likeness. As mentioned above, Russia's claim under Article III:4 of the GATT 1994 pertains to the alleged discrimination against imported Russian natural gas stemming from the alleged less favourable treatment of natural gas being supplied by VIUs subject to the OU model compared to that of natural gas being supplied by VIUs subject to the ISO and/or the ITO models. In our view, this claim raises two issues of likeness: first whether imported Russian natural gas is like domestic EU natural gas and, second, whether natural gas is like regardless of whether it is supplied by VIUs subject to the OU model or by VIUs subject to the ISO or the ITO models.

7.534. In addressing these issues of likeness, we recall that the Appellate Body has clarified that the assessment of whether products are like for purposes of Article III:4 of the GATT 1994 involves an assessment of the extent of the competitive relationship or substitutability between these products, taking into account all relevant evidence, including: (a) the physical properties of the products, including the nature and quality of the products; (b) the end-uses of the products; (c) consumers' tastes and habits; and (d) the international classification of the products for tariff purposes.<sup>959</sup> The Appellate Body has further explained that panels must examine all the relevant evidence and determine whether that evidence, as a whole, indicates that the products in question are like within the meaning of Article III:4 of the GATT 1994.<sup>960</sup>

7.535. Both parties agree that imported Russian natural gas and domestic EU natural gas are like within the meaning of Article III:4 of the GATT 1994 regardless of whether that natural gas is supplied by VIUs subject to the OU model or by VIUs subject to the ISO or the ITO models.<sup>961</sup> We are equally convinced that these are like: it is clear that the physical properties, end-uses and tariff classification of these groups of natural gas are identical. Furthermore, there is nothing on the record indicating that the preferences of consumers of natural gas differ depending on the origin of that natural gas or the applicable unbundling model.

7.536. We therefore conclude that imported Russian natural gas and domestic EU natural gas, supplied by VIUs subject to the different unbundling models, are like within the meaning of Article III:4 of the GATT 1994. Having made this finding of likeness, we proceed to assess whether Russia has demonstrated that the unbundling measure in the Directive accords less favourable treatment to imported Russian natural gas than that accorded to domestic EU natural gas.

#### **7.5.1.4.2.3 Less favourable treatment**

7.537. As explained above, the underlying premise of Russia's claim under Article III:4 of the GATT 1994 is that the unbundling measure in the Directive violates this provision by "enabling" EU member States to choose between implementing only the OU model or implementing the ISO and/or the ITO models in addition to the OU model in respect of transmission systems that belonged to a VIU on 3 September 2009.<sup>962</sup> More particularly, Russia argues that the implementation of only the OU model in respect of transmission systems that did not belong to a VIU on 3 September 2009 as well as in respect of transmission systems that did belong to a VIU on 3 September 2009 in certain EU member States results in less favourable treatment of

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<sup>958</sup> Russia's first written submission, paras. 380-414; and responses to Panel question No. 4, para. 16, and No. 5, para. 38.

<sup>959</sup> Appellate Body Report, *EC – Asbestos*, paras. 101-102.

<sup>960</sup> Appellate Body Report, *EC – Asbestos*, para. 103.

<sup>961</sup> Russia's first written submission, paras. 343-347; and response to Panel question No. 110(a), para. 445; and European Union's first written submission, para. 359; and response to Panel question No. 110(a), para. 285.

<sup>962</sup> See, e.g. Russia's first written submission, paras. 353 and 356.

imported Russian natural gas of VIUs subject to this model, in comparison with that accorded to domestic EU natural gas, produced and supplied by VIUs that continue to own a transmission system, under the ISO model, or continue to own an ITO, under the ITO model, in EU member States that have implemented these models in addition to the OU model in respect of transmission systems that belonged to a VIU on 3 September 2009.<sup>963</sup> The European Union responds that Russia has failed to demonstrate that natural gas is accorded less favourable treatment under the OU model in comparison with the ISO and/or the ITO models.<sup>964</sup> In any event, the European Union submits that Russia has failed to demonstrate that the unbundling measure is discriminatory, pointing out that the applicable unbundling model does not depend on the origin of the natural gas and that Russia has not shown that the OU model "predominantly" affects imported Russian natural gas.<sup>965</sup>

7.538. In our view, the parties' argumentation raises two issues: (a) whether Russia has demonstrated that natural gas is accorded less favourable treatment under the OU model in comparison with that accorded to natural gas under the ISO and/or the ITO models; and (b) if so, whether Russia has demonstrated that the unbundling measure in the Directive accords less favourable treatment to imported Russian natural gas than that accorded to domestic EU natural gas by "enabling" EU member States to choose between implementing only the OU model or implementing the ISO and/or the ITO models in addition to the OU model in respect of transmission systems that belonged to a VIU on 3 September 2009.

7.539. We begin our assessment with the first of these issues. In this regard, we recall that the Appellate Body has expressly found that "'[a] formal difference in treatment between imported and like domestic products is ... neither necessary, nor sufficient, to show a violation' of the national treatment obligation."<sup>966</sup> Instead, our assessment will focus on whether the OU model "modifies the *conditions of competition* in the relevant market to the detriment" of natural gas in comparison with the ISO and/or the ITO models.<sup>967</sup>

7.540. We note that Russia's argumentation concerning the specific alleged competitive advantages under the ISO and the ITO models has not been entirely clear throughout these proceedings. On the basis of a reading of all submissions by Russia, we can, however, discern three alleged competitive advantages or three specific "aspects of the relevant advantage"<sup>968</sup>, namely (a) that VIUs can "facilitate the importation and supply of their natural gas" by exercising control over a TSO<sup>969</sup>; (b) that VIUs can continue to receive "transport fees and other revenue associated with being the TSO and helping to operate the transmission system"<sup>970</sup>; and (c) that VIUs "retain[] at least some role in overseeing investments into the transmission system".<sup>971</sup> It is not always clear from Russia's argumentation whether these alleged advantages pertain to the ISO model or the ITO model, or both. For the sake of completeness, we will consider both of these models in addressing the three alleged advantages below:

### ***Control over the TSO***

<sup>963</sup> See, e.g. Russia's response to Panel question No. 183(a), paras. 160-182 and 183(b) paras. 183-186.

<sup>964</sup> See, e.g. European Union's first written submission, paras. 368-373; and second written submission, paras. 95-100.

<sup>965</sup> See, e.g. European Union's first written submission, paras. 165 and 374-376; and second written submission, paras. 101-138.

<sup>966</sup> Appellate Body Reports, *US – COOL*, para. 277 (quoting Appellate Body Report, *Korea – Various Measures on Beef*, para. 137). (omission by the Appellate Body)

<sup>967</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 137. (emphasis original) See also Appellate Body Reports, *EC – Seal Products*, para. 5.101 (referring to Appellate Body Reports, *US – Clove Cigarettes*, para. 179; *Thailand – Cigarettes (Philippines)*, para. 128; and *Korea – Various Measures on Beef*, para. 137).

<sup>968</sup> Russia's response to Panel question No. 183(a), para. 160.

<sup>969</sup> Russia's response to Panel question No. 114(a), para. 473. See also Russia's first written submission, para. 357; second written submission, para. 245; and response to Panel question No. 183(a), para. 163.

<sup>970</sup> Russia's response to Panel question No. 114(f), para. 494. See also Russia's first written submission, para. 357; second written submission, para. 245; and responses to Panel question No. 183(a), para. 163, and No. 183(b), para. 186.

<sup>971</sup> Russia's response to Panel question No. 183(b), para. 185. See also Russia's first written submission, paras. 321 and 354.

7.541. Beginning with Russia's arguments concerning the possibilities of a VIU maintaining some control over a TSO, we initially note that these arguments appear directed at the ITO model. More particularly, Russia argues that this model allows a VIU to "continue exercising some degree of control over the ITO, which benefits its gas"<sup>972</sup> or which "helps facilitate the supply and sale"<sup>973</sup> of that VIU's natural gas. The European Union responds that a VIU "cannot control the network operation, as this is the very aim of unbundling".<sup>974</sup> Furthermore, the European Union argues that "[a]ny approach to the ISO or ITO model in which the VIU would try to influence TSO decision-making in order to favour its production or supply interests would ... be illegal"<sup>975</sup>, pointing out that the rules on third-party access and capacity allocation, which apply under all three unbundling models, ensure that "the supply branch of a VIU enjoys no privilege vis-a-vis other suppliers on the market as regards access to the transmission network or booking a certain amount of the capacity".<sup>976</sup>

7.542. In addressing this alleged competitive advantage, we are mindful of the fact that Article III:4 of the GATT 1994 prohibits less favourable treatment of *goods only* and does not refer to less favourable treatment of *producers*, unlike the non-discrimination provisions of the GATS, which refer to less favourable treatment of *services and service suppliers*.<sup>977</sup> For this reason, we do not believe that it is sufficient for Russia to point to the ITO model permitting VIUs, which are producers or suppliers of natural gas, to own and exert some control over the operator of the transmission system, the ITO. Rather, Russia must demonstrate that this translates into a competitive advantage for the natural gas produced or supplied by the VIU.

7.543. In this regard, we first note that the ITO model does not allow a VIU full control over the ITO belonging to it. As pointed out by the European Union, the provisions of the ITO model require the ITO and its staff and management to be independent, both generally and specifically from the VIU.<sup>978</sup> Most notably, Article 18(4) of the Directive specifies that the VIU "shall not determine, directly or indirectly, the competitive behaviour of the transmission system operator in relation to the day to day activities of the transmission system operator and management of the network, or in relation to activities necessary for the preparation of the ten-year network development plan".

7.544. In light of provisions such as these, we find it difficult to agree with Russia's assertion concerning the ITO model that:

VIUs not only retain full ownership of the transmission system, they enjoy ongoing financial benefits from the ITO, a separate subsidiary, which provides much greater flexibility and control over the entire transmission system. This includes network management and investment decisions through the ITO, providing the VIU greater influence over those assets.<sup>979</sup>

7.545. Russia makes similar assertions when pointing to the example of GRTgaz S.A. (GRTgaz), which is an ITO in France and belongs to the French VIU Engie S.A. (Engie) in accordance with the ITO model, implemented in France pursuant to the Directive. More specifically, Russia asserts that "Engie continues exercising some degree of control over GRTgaz, its subsidiary and ITO, and thus over the competitive opportunities for its domestically sourced gas"<sup>980</sup> or that "Engie continues to exert at least some level of control over GRTGaz's network management and investment decisions".<sup>981</sup> Russia appears to support this assertion by suggesting that the VIU can exert control

<sup>972</sup> Russia's response to Panel question No. 183(a), para. 163.

<sup>973</sup> Russia's second written submission, para. 245.

<sup>974</sup> European Union's first written submission, para. 319.

<sup>975</sup> European Union's first written submission, para. 319.

<sup>976</sup> European Union's second written submission, paras. 119-120. See also European Union's second written submission, paras. 96-99.

<sup>977</sup> See, e.g. Appellate Body Report, *Argentina – Financial Services*, para. 6.27.

<sup>978</sup> Directive 2009/73/EC, (Exhibit EU-5), Articles 18 and 19. See also European Union's first written submission, paras. 329-334.

<sup>979</sup> Russia's first written submission, para. 321.

<sup>980</sup> Russia's first written submission, para. 358.

<sup>981</sup> Russia's first written submission, para. 354. See also Russia's first written submission, para. 373 where Russia states as follows concerning the Norwegian VIU Statoil, in the context of its claim under Article I:1 of the GATT 1994:

Statoil retains at least some control over jordgas' network management and investment decisions, including the right to appoint members to the Supervisory Body and other advantages authorized by the Directive in its ITO provisions.

over the ITO through the so-called Supervisory Body<sup>982</sup>, which is provided for in Article 20 of the Directive and may include a majority of members representing the VIU.<sup>983</sup> However, and as pointed out by the European Union, the role of the Supervisory Body is limited to:

[T]aking decisions which may have a significant impact on the value of the assets of the shareholders within the transmission system operator, in particular decisions regarding the approval of the annual and longer-term financial plans, the level of indebtedness of the transmission system operator and the amount of dividends distributed to shareholders.<sup>984</sup>

7.546. Russia suggests that it is for the European Union to clarify what "decisions which may have a significant impact on the value of the assets of the shareholders within the transmission system operator" entail.<sup>985</sup> While further clarification may have been helpful, we recall that it is for Russia to make a *prima facie* case of violation, and we do not believe it would be appropriate for us to simply assume that the decisions referred to in Article 20(1) of the Directive have a bearing on the competitive opportunities of the natural gas produced or supplied by the VIU. This is particularly so in light of the fact that the Supervisory Body is explicitly excluded from making decisions in relation to "the day to day activities of the transmission system operator and management of the network, and in relation to activities necessary for the preparation of the ten-year network development plan".<sup>986</sup>

7.547. Russia also points to Article 19(1) of the Directive, according to which "[d]ecisions regarding the appointment and renewal, working conditions including remuneration, and termination of the term of office, of the persons responsible for the management and/or members of the administrative bodies of the transmission system operator shall be taken by the Supervisory Body" as "just one example" of a VIU being able to exert control over an ITO belonging to it under the ITO model.<sup>987</sup> Russia does not elaborate further on this one example, yet the implication presumably is that the VIU, through the members representing it in the Supervisory Body, would appoint persons that would seek to advance the competitive opportunities of natural gas produced or supplied by the VIU. We have difficulties agreeing with this notion as Article 19(2) of the Directive provides that the NRA may object to the Supervisory Body's appointments if "doubts arise as to the professional independence of a nominated person responsible for the management and/or member of the administrative bodies", in which case the appointment does not become binding.<sup>988</sup>

7.548. In addition to the doubts explained above concerning the possibilities under the ITO model of a VIU exercising control over an ITO in a manner that impacts the competitive opportunities of natural gas, we further note the European Union's argument that the rules on third-party access and capacity allocation render it "illegal" for an ITO, which belongs to a VIU under the ITO model, to favour the natural gas of that VIU.<sup>989</sup> In this regard, we note that Article 32 of the Directive requires the EU member States to implement:

[A] system of third party access to the transmission and distribution system ... based on published tariffs, applicable to all eligible customers, including supply undertakings, and applied objectively and without discrimination between system users.

<sup>982</sup> Russia's first written submission, paras. 322-323 and 358.

<sup>983</sup> Directive 2009/73/EC, (Exhibit EU-5), Articles 20(2)-20(3).

<sup>984</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 20(1). See also European Union's first written submission, para. 330.

<sup>985</sup> Russia's second written submission, para. 213.

<sup>986</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 20(1). See also European Union's first written submission, para. 330.

<sup>987</sup> Russia's first written submission, para. 358. See also *ibid.* para. 322.

<sup>988</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 19(2). We note Russia's argument that "there are no clear consequences following an objection by the regulatory authority to a nomination or termination." (Russia's first written submission, para. 49). In this regard, we would, however, agree with the European Union that these consequences are clear from the text of Article 19(2), which explicitly states that these decisions "become binding only if the regulatory authority has raised no objections within three weeks of notification."

<sup>989</sup> European Union's first written submission, para. 319; and second written submission, paras. 96, 99 and 120. Ukraine submits similar arguments, stating that the advantage alleged by Russia "in case of the ITO or ISO and not available under the OU model consists of the possibility for the VIU to retain its abusive control over the transmission system." (Ukraine's third-party submission, paras. 29-30).

7.549. It is undisputed that the rules on third-party access apply to all TSOs, regardless of the applicable unbundling model. In our view, it is therefore clear from Article 32 that ITOs, which belong to a VIU under the ITO model, cannot give the natural gas of that VIU access to the transmission system on more favourable competitive terms than those given to any other source of natural gas. In fact, we note that the provisions of the ITO model specifically call for "[a]ny commercial and financial relations between the vertically integrated undertaking and the transmission system operator ... [to] comply with market conditions"<sup>990</sup> and that all commercial and financial agreements between the ITO and the VIU must be approved by the relevant NRA.<sup>991</sup>

7.550. Therefore, even assuming that a VIU may exert some control over an ITO belonging to it under the ITO model, we agree with the European Union that the rules on third-party access would prohibit the VIU from exerting that control in a manner that would provide its natural gas access to the transmission system on more favourable competitive terms. At the same time, we note Russia's argument that:

[A]s the VIUs in Germany and France knew well when insisting on including the ITO model, it's a game of cat and mouse. The VIUs try to get away with as much as possible. Some regulators try to catch them more than others, which take long afternoon naps instead.<sup>992</sup>

7.551. It may well be true that a VIU might attempt to exert control over its ITO in a manner that would provide the natural gas of that VIU access to the transmission system on more favourable competitive terms than those given to natural gas from other sources. However, this would clearly violate the rules on third-party access. We do not believe it would be appropriate to attribute, to the European Union, any potential competitive advantage for natural gas under the ITO model, which stems from a VIU violating provisions in the Directive, including provisions under the ITO model itself.

7.552. For these reasons, we find that Russia has not demonstrated that the ITO model allows VIUs to control an ITO in a manner that would accord a competitive advantage to the natural gas of that VIU.

7.553. Having considered Russia's arguments concerning control over an ITO in respect of the ITO model, we note that Russia at times appears to suggest that these arguments apply, at least to some extent, with respect to the ISO model as well.<sup>993</sup> Russia does not, however, provide any explanation of the notion that a VIU would be able to control the operator of the transmission system, the ISO, under the ISO model. As explained above, the ISO model only permits a VIU to continue to own the transmission system. The operator, the ISO, of this system must be unbundled from the VIU in accordance with the rules under the OU model<sup>994</sup>, and we hence have difficulties understanding how the ISO model would render a VIU more capable of controlling the operator of a transmission system than the OU model. In any event, we recall that the rules on third-party access apply also for the ISO model. In light of this, we do not believe that Russia has demonstrated that the ISO model allows a VIU to control an ISO in a manner that would provide the natural gas of that VIU a competitive advantage over the natural gas of a VIU subject to the OU model or any other source of natural gas.

### *Financial fees, revenue and dividends*

7.554. We turn now to Russia's arguments concerning various sources of revenue that accrue to a VIU, which owns a transmission system under the ISO model or an ITO under the ITO model. These arguments appear to concern both the ISO and the ITO models.

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<sup>990</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 18(6).

<sup>991</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 18(7).

<sup>992</sup> Russia's second written submission, para. 210.

<sup>993</sup> See, e.g. Russia's response to Panel question No. 183(b), para. 184, in which Russia states that "[e]ven assuming the ISO model is implemented in accordance with the terms of the Directive, a VIU under the ISO model may still be in a position to exercise at least limited rights or influence over how the ISO operates, maintains and develops the system." Russia does not expand on this position but instead proceeds to discuss the possibility of a VIU influencing the investment decisions concerning the transmission system. (Ibid. para. 185). This alleged advantage is discussed below in paragraphs 7.561 through 7.565.

<sup>994</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 14(2)(a).



7.555. In its written submissions, Russia has pointed to certain sources of revenue being available to a VIU under the ISO or the ITO models, which are not available under the OU model. More particularly, Russia has pointed to "revenue derived from the TSO's transmission and supply of [] gas"<sup>995</sup>, "ongoing financial benefits from the operation of [the] transmission system"<sup>996</sup>, "transport fees and other revenue associated with being the TSO and helping to operate the transmission system"<sup>997</sup>, and "dividends that accrue to VIUs as a result of revenue and profits generated by their ITO-subidiaries from transmission fees, transmission tariffs and any other sources".<sup>998</sup>

7.556. In accordance with the approach set out in paragraph 7.542 above, we do not believe it is sufficient for Russia to point to the fact that a VIU, which is a producer or supplier of natural gas, may have certain sources of revenue under the ISO and/or the ITO models, which are not available under the OU model. Rather, Russia must demonstrate that such sources of revenue translate into a competitive advantage for the natural gas produced or supplied by the VIU. Having considered all of Russia's arguments, we do not believe it has done so.

7.557. More particularly, and as pointed to by the European Union<sup>999</sup>, we note that Article 31(3) of the Directive requires natural gas undertakings, including VIUs, to:

[K]eep separate accounts for each of their transmission, distribution, LNG and storage activities as they would be required to do if the activities in question were carried out by separate undertakings, with a view to avoiding discrimination, cross-subsidisation and distortion of competition.

7.558. The European Union has confirmed that the rules on unbundling of accounts and the prohibition of cross-subsidization apply to all fees, revenue and dividends that may accrue to a VIU under the ISO or the ITO models<sup>1000</sup>, and Russia has not provided any evidence suggesting otherwise. We further note that these rules apply regardless of the applicable unbundling model.

7.559. Russia argues that the European Union's position is "questionable, at best" and that it is "clear ... that the EU itself has not viewed the concept of 'unbundling of accounts' as being effective."<sup>1001</sup> In support of this contention, Russia points out that the predecessors to the Directive, Directive 98/30/EC and Directive 2003/55/EC, both included rules on unbundling of accounts, which were "exactly the same in all material respects" and that Recital (7) of the Directive states that "[t]he rules on legal and functional unbundling as provided for in Directive 2003/55/EC have not, however, led to effective unbundling of the transmission system operators."<sup>1002</sup> It is not clear to us how the existence of similar or identical rules on unbundling of accounts in previous EU legal packages would necessarily lead to the conclusion that the current rules should somehow be viewed as allowing cross-subsidization. Alternatively, Russia's argument concerning the effectiveness of the rules on unbundling of accounts could be viewed as a reformulation of its argument that a VIU may "try to get away with as much as possible"<sup>1003</sup> and hence attempt to enhance the competitive opportunities of its natural gas by cross-subsidizing it with revenue accruing from its transmission activities, in contravention of Article 31 of the Directive. In this regard, we reiterate our view that it would not be appropriate to attribute, to the European Union, potential effects stemming from economic actors contravening EU law, including the rules on unbundling of accounts and the prohibition of cross-subsidization.

7.560. Furthermore, Russia argues that "even if the unbundling of accounts requirement, along with the monitoring by regulatory authorities pursuant to Article 41(1)(b) of the Directive do help avoid cross-subsidisation, as the EU argues, the fact remains that money is fungible."<sup>1004</sup> Russia does not, however, expand on the relevance of the fungible nature of money and we do not

<sup>995</sup> Russia's response to Panel question No. 183(a), para. 163.

<sup>996</sup> Russia's response to Panel question No. 183(b), para. 186.

<sup>997</sup> Russia's first written submission, para. 357.

<sup>998</sup> Russia's second written submission, para. 255.

<sup>999</sup> European Union's second written submission, para. 97.

<sup>1000</sup> European Union's response to Panel question No. 183(e), para. 129.

<sup>1001</sup> Russia's response to Panel question No. 117, para. 507.

<sup>1002</sup> Russia's response to Panel question No. 117, paras. 507-508 (quoting Directive 2009/73/EC, (Exhibit EU-5), Recital (7)).

<sup>1003</sup> Russia's second written submission, para. 210.

<sup>1004</sup> Russia's response to Panel question No. 117, para. 509.

believe that it would be appropriate to assume that this would entail a competitive advantage for natural gas produced or supplied by VIUs subject to the ISO or the ITO models.

### *Investment in the transmission system*

7.561. Lastly, we address Russia's arguments concerning the role of VIUs in decisions regarding investment in the transmission system. These arguments appear to concern both the ISO and the ITO models.

7.562. At the outset, we note that Russia has not provided much further explanation of how the alleged role by a VIU in investment decisions regarding the transmission system, under the ISO and the ITO models, would translate into a competitive advantage for the natural gas of that VIU. The implication of Russia's position presumably is that a VIU can seek to develop the transmission system in a manner that would enhance the competitive opportunities of its natural gas, through its alleged role in making investment decisions. However, we do not believe that Russia has substantiated this position.<sup>1005</sup>

7.563. With respect to the ISO model, Russia argues that the OU model allows a VIU "no input whatsoever into the investment decisions ... and thus no possibility to influence the decisions regarding its gas being supplied and placed on the EU market"<sup>1006</sup> whereas the provisions of the ISO model require the owner of the transmission system, which may be a VIU, to "'finance the investments decided' by the ISO and 'approved by the regulatory authority'".<sup>1007</sup> Russia therefore appears to suggest that a VIU can influence the investment decisions of an ISO by virtue of being required to finance such investments. We have difficulties accepting this position. The relevant provisions of the ISO model require the VIU to finance investments decided by the ISO or to "give its agreement to financing by any interested party including the independent system operator".<sup>1008</sup> It is, however, the ISO that makes these investment decisions<sup>1009</sup> and, as explained above, the ISO is required to be separate from the VIU, i.e. complying with the rules on ownership unbundling, under the ISO model.<sup>1010</sup> Furthermore, and as pointed to by Russia itself, such investment decisions must be approved by the relevant NRA.<sup>1011</sup> In light of this, we fail to see how a VIU would have any more influence over investment decisions under the ISO model than under the OU model, or be able to influence such investment decisions in a manner that would enhance the competitive opportunities of its natural gas.

7.564. With respect to the ITO model, Russia similarly argues that a VIU retains control over the transmission system, including "investment decisions through the ITO, providing the VIU greater influence over those assets".<sup>1012</sup> Russia does not substantiate its assertion that a VIU can control or influence "the investment decisions through the ITO", but we note that the ITO model, similarly to the ISO model, requires that "appropriate financial resources for future investment projects and/or for the replacement of existing assets shall be made available to the transmission system operator in due time by the vertically integrated undertaking following an appropriate request from the transmission system operator."<sup>1013</sup> However, for the reasons explained above, we do not believe this financing requirement serves to demonstrate that the ITO model allows a VIU to influence investment decisions in a manner that would enhance the competitive opportunities of its natural gas.

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<sup>1005</sup> See, e.g. Russia's response to Panel question No. 183(b), para. 185, where Russia states, with respect to the ISO model, that "the owner retains at least some role in overseeing investments into the transmission system" and that "[i]n so doing, the owner must thereby be presumed to be in a position to influence the decisions regarding its gas being supplied and placed on the EU market through its transmission system as operated by the ISO." Without further elaboration, Russia concludes that "[t]his constitutes a competitive advantage over a VIU such as Gazprom, which was subjected to the OU model".

<sup>1006</sup> Russia's response to Panel question No. 183(b), para. 185.

<sup>1007</sup> Russia's response to Panel question No. 183(b), para. 184 (quoting Directive 2009/73/EC, (Exhibit EU-5), Article 14(5)(b)).

<sup>1008</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 14(5)(b).

<sup>1009</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 14(5)(b).

<sup>1010</sup> See Directive 2009/73/EC, (Exhibit EU-5), Article 14(2)(a).

<sup>1011</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 14(5)(b).

<sup>1012</sup> Russia's first written submission, para. 321. See also *ibid.* para. 354

<sup>1013</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 17(1)(d).

7.565. We therefore do not believe that Russia has demonstrated that the ISO or the ITO models allow a VIU to influence investment decisions in the transmission network in a manner that would enhance the competitive opportunities of that VIU's natural gas.

#### ***Additional considerations***

7.566. We note that, in addition to the specific alleged advantages considered above, Russia submits that the advantages accorded to natural gas under at least the ITO model are "much broader".<sup>1014</sup> In this respect, Russia appears to focus on the notion of "certainty". More particularly, Russia points to "the certainty that [a VIU's] domestic and/or third-country natural gas will be supplied by and transported through its own transmission system, which is operated and controlled by its own ITO" and that "[t]his certainty, predicated on the ability to base investment, supply and transmission decisions on access to the EU market via an ITO, contributes to the more favourable treatment accorded to the VIU".<sup>1015</sup> In our view, the "certainty" referred to by Russia does not appear to be distinct from the alleged advantages addressed in paragraphs 7.541 through 7.565 above, but rather an underlying feature permeating all three, and in particular the alleged advantage stemming from a VIU supposedly being able to exert control over the TSO.

7.567. In this regard, we recall our conclusion that Russia has not demonstrated that the ITO model, or the ISO model, allows a VIU to exercise control over the TSO in a manner that would provide its natural gas access to the transmission system on more favourable competitive terms than those given to natural gas from any other source. Similarly, since the Directive calls for a system of non-discriminatory third-party access to the transmission system, we do not believe that Russia has substantiated its contention that the natural gas of a VIU has any greater "certainty" of access to the transmission system of a TSO belonging to that VIU than the natural gas of any other source. Furthermore, we recall our conclusions that Russia has not demonstrated that a VIU can employ financial fees, revenue or dividends, accruing to it under the ISO or the ITO models, to enhance the competitive opportunities of its natural gas, nor that the ISO or the ITO models allow a VIU to influence investment decisions in a manner that would enhance the competitive opportunities of its natural gas. We therefore also do not believe that Russia has demonstrated any additional "certainty" for natural gas under the ISO model or the ITO model in this regard.

7.568. Having considered the alleged competitive advantages under the ISO and the ITO models, we therefore conclude that Russia has not demonstrated that natural gas is accorded less favourable treatment under the OU model in comparison with the treatment accorded to natural gas under the ISO and/or the ITO models. In light of this conclusion, it is not necessary for us to address the issue of whether the unbundling measure in the Directive results in *de facto* discrimination against imported Russian natural gas by "enabling" EU member States to implement the ISO and/or the ITO models in addition to the OU model in respect of transmission systems that belonged to a VIU on 3 September 2009.

#### **7.5.1.4.2.4 Conclusion**

7.569. For the reasons explained in paragraphs 7.537 through 7.568 above, we conclude that Russia has not demonstrated that the unbundling measure in the Directive accords less favourable treatment to imported Russian natural gas than that accorded to domestic EU natural gas. Hence, we find that Russia has failed to make a *prima facie* case of violation under Article III:4 of the GATT 1994 with respect to the unbundling measure in the Directive.

#### **7.5.1.4.3 Analysis by the Panel of Russia's claim under Article I:1 of the GATT 1994**

7.570. Bearing in mind the legal standard under Article I:1 of the GATT 1994, set out by the Appellate Body and explained above in paragraphs 7.236 and 7.237, we will assess Russia's claim against the unbundling measure in the Directive under this provision by determining whether Russia has made a *prima facie* case that: (a) the unbundling measure in the Directive falls within the scope of Article I:1 of the GATT 1994; (b) the relevant imported products are like products; (c) the unbundling measure in the Directive confers an "advantage, favour, privilege or immunity" on

<sup>1014</sup> Russia's response to Panel question No. 183(a), para. 164.

<sup>1015</sup> Russia's response to Panel question No. 183(a), paras. 165-166.

a product originating in the territory of any country; and (d) the advantage so accorded is not extended "immediately" and "unconditionally" to like Russian products.

7.571. Before turning to the assessment of Russia's claim under Article I:1, we note that the legal standards under Articles I:1 and III:4 of the GATT 1994 are similar in the sense that these are both "fundamental non-discrimination obligations under the GATT 1994"<sup>1016</sup> and are both "concerned, fundamentally, with prohibiting discriminatory measures by requiring, in the context of Article I:1, equality of competitive opportunities for like imported products from all Members, and, in the context of Article III:4, equality of competitive opportunities for imported products and like domestic products".<sup>1017</sup> At the same time, we note that Articles I:1 and III:4 differ in respect of their points of comparison. Most notably, Article I:1 of the GATT 1994 involves a comparison of the treatment accorded to imported products from different Members, whereas Article III:4 of the GATT 1994 involves a comparison of the treatment accorded to imported products and domestic products, respectively.<sup>1018</sup>

7.572. We further note that Russia's claims against the unbundling measure in the Directive under these provisions involve certain similarities. In particular, both of Russia's claims under Articles I:1 and III:4 of the GATT 1994 pertain to the alleged discrimination against imported Russian natural gas stemming from the Directive "enabling" EU member States to choose between implementing only the OU model or implementing the ISO and/or the ITO models in addition to the OU model in respect of transmission systems that belonged to a VIU on 3 September 2009.<sup>1019</sup> Due to the similarities between the legal standards under the two provisions as well as between Russia's claims under these two provisions, our assessment of Russia's claim under Article I:1 of the GATT 1994 will be guided by our findings on Russia's claim under Article III:4 of the GATT 1994 when relevant and appropriate.

#### 7.5.1.4.3.1 Scope of Article I:1 of the GATT 1994

7.573. With respect to the issue of whether the unbundling measure in the Directive falls within the scope of Article I:1 of the GATT 1994, we note that this provision covers "all matters referred to in paragraphs 2 and 4 of Article III". We have already concluded, in paragraphs 7.519 through 7.527 above, that the unbundling measure in the Directive falls within the scope of Article III:4 of the GATT 1994 as it affects the internal sale, offering for sale, purchase, transportation, distribution or use of natural gas, and we can therefore also conclude that this measure falls within the scope of Article I:1 of the GATT 1994 for the same reasons.

#### 7.5.1.4.3.2 Like products

7.574. We begin our likeness enquiry for Russia's claim under Article I:1 of the GATT 1994 by noting that the scope of this enquiry is unclear in the same manner as was the case for the likeness enquiry for Russia's claim under Article III:4 of the GATT 1994. More particularly, in addition to its argumentation concerning natural gas, Russia at times refers to LNG in arguing that the unbundling measure violates Article I:1 of the GATT 1994.<sup>1020</sup> In determining the scope of our likeness enquiry, we recall that Russia's claim under Article I:1 of the GATT 1994, similarly to its claim under Article III:4 of the GATT 1994, pertains to the alleged discrimination against imported

<sup>1016</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.79.

<sup>1017</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.82 (referring to Appellate Body Reports, *US – Clove Cigarettes*, para. 176, in turn referring to GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.10; *China – Publications and Audiovisual Products*, para. 305, in turn referring to Appellate Body Report, *Korea – Various Measures on Beef*, paras. 135-136; *Thailand – Cigarettes (Philippines)*, para. 126, in turn referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16, DSR 1996:1, 97, at p. 109; and *Korea – Alcoholic Beverages*, para. 127; and Panel Reports, *US – COOL*, para. 7.571, in turn referring to Panel Report, *Colombia – Ports of Entry*, para. 7.236, in turn referring to Panel Report, *Argentina – Hides and Leather*, para. 11.20, in turn referring to Appellate Body Reports, *Japan – Alcoholic Beverages II*, p. 16, DSR 1996:1, 97, at p. 109; and *Korea – Alcoholic Beverages*, paras. 119, 120 and 127).

<sup>1018</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.79.

<sup>1019</sup> See, e.g. Russia's first written submission, paras. 353, 356 and 370-371.

<sup>1020</sup> See, e.g. Russia's first written submission, paras. 374-376; and second written submission, paras. 266-267. Furthermore, when arguing that imported Russian natural gas is like imported natural gas from other non-EU countries, Russia states that "the Panel should find that natural gas imported from Russia is 'like' natural gas, including LNG, imported from other countries within the meaning of Article I:1." (Russia's first written submission, para. 366). (emphasis added)

Russian natural gas, stemming from the Directive "enabling" EU member States to choose between implementing only the OU model or implementing the ISO and/or the ITO models in addition to the OU model in respect of transmission systems that belonged to a VIU on 3 September 2009 and, more particularly, the alleged less favourable treatment of natural gas being supplied by VIUs subject to the OU model compared to natural gas being supplied by VIUs subject to the ISO and/or the ITO models.<sup>1021</sup> As explained above in paragraph 7.531, the requirement to unbundle, including all three unbundling models, does not apply with respect to VIUs' ownership or control over LNG facilities or LNG system operators and we therefore consider that natural gas is the only relevant product for Russia's claim under Article I:1 of the GATT 1994 against the unbundling measure in the Directive.<sup>1022</sup>

7.575. Having determined that the scope of our likeness enquiry should be limited to natural gas, we further note that Russia's claim under Article I:1 of the GATT 1994 raises two issues of likeness: first whether imported Russian natural gas is like imported natural gas from other non-EU countries and, second, whether natural gas is like regardless of whether it is supplied by VIUs subject to the OU model or by VIUs subject to the ISO or the ITO models.

7.576. We note that both parties agree that imported Russian natural gas and imported natural gas from other non-EU countries are like within the meaning of Article I:1 of the GATT 1994 regardless of whether that natural gas is supplied by VIUs subject to the OU model or by VIUs subject to the ISO or the ITO models.<sup>1023</sup> We are equally convinced that these are like: more particularly, and in accordance with the approach taken by previous panels, we believe that our assessment of these issues of likeness should be informed by the approach taken by the Appellate Body in respect of likeness under Article III:4 of the GATT 1994.<sup>1024</sup> In this regard, we reiterate our position that the physical properties, end-uses and tariff classification of these groups of natural gas are identical. Furthermore, there is nothing on the record indicating that the preferences of consumers of natural gas differ depending on the origin of that gas or the applicable unbundling model.

7.577. We therefore conclude that imported Russian natural gas and imported natural gas from other non-EU countries, supplied by VIUs subject to the different unbundling models, are like within the meaning of Article I:1 of the GATT 1994.

#### **7.5.1.4.3.3 An advantage, favour, privilege or immunity**

7.578. Similarly to its claim under Article III:4 of the GATT 1994, the underlying premise of Russia's claim under Article I:1 of the GATT 1994 is that the unbundling measure in the Directive violates this provision by "enabling" EU member States to choose between implementing only the OU model or implementing the ISO and/or the ITO models in addition to the OU model in respect of transmission systems that belonged to a VIU on 3 September 2009.<sup>1025</sup> As with Russia's claim under Article III:4, Russia's claim under Article I:1 is thus premised on the notion that natural gas is accorded an advantage under the ISO and/or the ITO models, which is not granted under the OU model.<sup>1026</sup> In section 7.5.1.4.2.3 above, we concluded that Russia has not demonstrated this to be the case for its claim under Article III:4.

7.579. As explained above, both Articles I:1 and III:4 of the GATT 1994 are "concerned, fundamentally, with prohibiting discriminatory measures by requiring, in the context of Article I:1, equality of competitive opportunities for like imported products from all Members, and, in the context of Article III:4, equality of competitive opportunities for imported products and like

<sup>1021</sup> See, e.g. Russia's first written submission, paras. 370-371.

<sup>1022</sup> As explained in paragraphs 7.840 through 7.845 below, we consider that natural gas and LNG are distinct products.

<sup>1023</sup> Russia's first written submission, para. 366; and response to Panel question No. 110(a), para. 445; and European Union's first written submission, para. 407; and response to Panel question No. 110(a), para. 285.

<sup>1024</sup> See, e.g. Panel Reports, *US – Poultry (China)*, paras. 7.424-7.425 (referring to Appellate Body Reports, *EC – Asbestos*, para. 102; and *Japan – Alcoholic Beverages II*, pp. 21-22, DSR 1996:1, 97, at pp. 113-114; Panel Report, *US – Gasoline*, para. 6.8; and GATT Panel Reports, *EEC – Animal Feed Proteins*, para. 4.2; and *Japan – Alcoholic Beverages I*, para. 5.6); and *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.409.

<sup>1025</sup> See, e.g. Russia's first written submission, paras. 370-371.

<sup>1026</sup> Russia's responses to Panel question No. 183(a), paras. 160-182 and No. 183(b), paras. 183-186.

domestic products".<sup>1027</sup> While these provisions have different points of comparison, we recall that the enquiry under Article I:1 of whether a challenged measure confers an advantage, favour, privilege or immunity to a product involves an assessment of whether this measure "create[s] 'more favourable competitive opportunities' or affect[s] the commercial relationship between products of different origins".<sup>1028</sup> This enquiry, thus, closely resembles the assessment of less favourable treatment under Article III:4, which involves an assessment of whether a challenged measure "modifies the conditions of competition in the relevant market to the detriment of imported products".<sup>1029</sup> We further note that none of the parties suggests that this issue should be dealt with differently for Russia's claims under Articles I:1 and III:4 of the GATT 1994, respectively.

7.580. The points of comparison are different under the two claims and Russia therefore also points to different examples in seeking to demonstrate that the ISO and/or ITO models confer an advantage, favour, privilege or immunity to natural gas, within the meaning of Article I:1, that is not extended to natural gas under the OU model. More particularly, for its claim under Article I:1, Russia compares the treatment of imported Russian gas with that of imported natural gas from any other non-EU country, rather than domestic EU natural gas. As examples of this, Russia refers to the imported natural gas of the Russian VIU Gazprom and compares this with the imported natural gas of the Norwegian VIU Statoil, which continues to own the ITO jordegas in Germany under the ITO model<sup>1030</sup>, rather than the domestic EU natural gas of the French VIU Engie, which continues to own the ITO GRTgaz in France under the ITO model.<sup>1031</sup> However, Russia does not indicate that the various unbundling models operate differently, nor that the ISO or ITO models confer any additional or different advantages, in the context of this comparison.

7.581. Moreover, we note that Russia refers to Lithuania's grant of priority to natural gas supplied by Litgas through the Klaipeda LNG Terminal and the five-year deal between Statoil and Litgas.<sup>1032</sup> As explained above in section 7.2.2.3.1, the European Union has raised a terms of reference objection in respect of Russia's reliance on these. In our finding concerning this terms of reference objection, we concluded that Lithuania's grant of priority to natural gas supplied by Litgas through the Klaipeda LNG Terminal and the five-year deal between Statoil and Litgas should be considered evidence relied upon by Russia, which does not concern our terms of reference.<sup>1033</sup> Having said this, we have difficulties understanding the relevance of this evidence for Russia's claim under Article I:1 against the unbundling measure in the Directive. When attempting to demonstrate the relevance of this evidence, Russia argues that:

By requiring that TSOs unbundle, while exempting LSOs and LNG facilities and providing other preferences for LNG in Lithuania and elsewhere, it should be clear that the Directive was intended to provide differential treatment between pipeline gas transported by TSOs and LNG-gas transported by LSOs and LNG facilities.<sup>1034</sup>

7.582. However, and as explained above, Russia's claim under Article I:1 of the GATT 1994 against the unbundling measure pertains to the Directive "enabling" EU member States to choose between implementing only the OU model or implementing the ISO and/or the ITO models in addition to the OU model in respect of transmission systems that belonged to a VIU on 3 September 2009.<sup>1035</sup> It does not pertain to the alleged exemption of LNG from the requirement

<sup>1027</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.82 (referring to Appellate Body Reports, *US – Clove Cigarettes*, para. 176, in turn referring to GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.10; *China – Publications and Audiovisual Products*, para. 305, in turn referring to Appellate Body Report, *Korea – Various Measures on Beef*, paras. 135-136; *Thailand – Cigarettes (Philippines)*, para. 126, in turn referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16, DSR 1996:I, 97, at p. 109; and *Korea – Alcoholic Beverages*, para. 127; and Panel Reports, *US – COOL*, para. 7.571, in turn referring to Panel Report, *Colombia – Ports of Entry*, para. 7.236, in turn referring to Panel Report, *Argentina – Hides and Leather*, para. 11.20, in turn referring to Appellate Body Reports, *Japan – Alcoholic Beverages II*, p. 16, DSR 1996:I, 97, at p. 109; and *Korea – Alcoholic Beverages*, paras. 119, 120, and 127).

<sup>1028</sup> Panel Report, *US – Poultry (China)*, para. 7.415 (quoting Panel Report, *Colombia – Ports of Entry*, para. 7.341, in turn quoting to Panel Reports, *EC – Bananas III*, para. 7.239).

<sup>1029</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 137. (emphasis omitted)

<sup>1030</sup> Russia's first written submission, paras. 372-373; and second written submission, para. 265.

<sup>1031</sup> Russia's first written submission, paras. 357-358; and second written submission, paras. 245-246.

<sup>1032</sup> Russia's first written submission, paras. 374-375; and second written submission, paras. 266-267.

<sup>1033</sup> See section 7.2.2.3.1 above.

<sup>1034</sup> Russia's response to Panel question No. 122, para. 514.

<sup>1035</sup> See, e.g. Russia's first written submission, paras. 370-371.

to unbundle *per se* (referred to as the "LNG measure" in this Report), a measure that is challenged separately by Russia under Article I:1 of the GATT 1994.<sup>1036</sup> It is difficult to see how Lithuania's grant of priority to natural gas supplied by Litgas through the Klaipeda LNG Terminal or a 5-year deal between Litgas and Statoil for the supply of natural gas via the Klaipeda LNG terminal would have any bearing on the use of different unbundling models in the European Union. In light of this, we agree with the European Union that this evidence lacks relevance for Russia's claim under Article I:1 against the unbundling measure in the Directive.<sup>1037</sup>

7.583. Therefore, and consistently with our findings on Russia's claim under Article III:4 of the GATT 1994, we also conclude that Russia has failed to demonstrate that the unbundling measure in the Directive confers an advantage, favour, privilege or immunity to natural gas under the ISO and/or the ITO models. In light of this conclusion, it is not necessary for us to address the issue of whether the unbundling measure in the Directive results in *de facto* discrimination of imported Russian natural gas by "enabling" EU member States to implement the ISO and/or the ITO models in addition to the OU model in respect of transmission systems that belonged to a VIU on 3 September 2009.

#### 7.5.1.4.3.4 Conclusion

7.584. For the reasons explained in paragraphs 7.578 through 7.583 above, we conclude that Russia has not demonstrated that the unbundling measure in the Directive confers an advantage, favour, privilege or immunity to imported natural gas from other non-EU countries, which is not accorded immediately and unconditionally to imported Russian natural gas. Hence, we find that Russia has failed to make a *prima facie* case of violation under Article I:1 of the GATT 1994 with respect to the unbundling measure in the Directive.

### 7.5.2 The unbundling measure in the national implementing laws of Croatia, Hungary and Lithuania

#### 7.5.2.1 Introduction

7.585. Russia challenges the unbundling measure in the national implementing laws of Croatia, Hungary and Lithuania under Article XVI:2(e) and XVI:2(f) of the GATS. Russia further challenges the unbundling measure in the national implementing laws of Croatia and Lithuania under Article XVI:2(a) of the GATS.

7.586. The European Union asks the Panel to reject all claims by Russia and, should the Panel find otherwise, submits that the unbundling measure in the national implementing laws of Croatia, Hungary and Lithuania is justified under Article XIV(a) and (c) of the GATS.

7.587. We follow the legal standard, as set out in paragraph 7.233 above, in our examination of Russia's claims against the unbundling measure in the national implementing laws of Croatia, Hungary and Lithuania under Article XVI:2(a), (e) and (f) of the GATS.

7.588. The unbundling measure challenged by Russia under Article XVI:2(a), (e) and (f) of the GATS consists of the provisions of the national laws of Croatia, Hungary and Lithuania implementing the unbundling requirement in the Directive.<sup>1038</sup> Russia has clarified that it is challenging separately each of the national implementing laws of Croatia, Hungary and Lithuania.<sup>1039</sup> We recall that those laws are legally separate and distinct from each other and from the Directive, and that the Directive is not a measure at issue under these claims. We also recall that, while Croatia and Hungary have implemented the three unbundling models, Lithuania has implemented only the OU model.<sup>1040</sup>

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<sup>1036</sup> See section 7.7 below, where we assess the consistency of the LNG measure with Article I:1 of the GATT 1994.

<sup>1037</sup> European Union's first written submission, para. 421.

<sup>1038</sup> We refer to our factual description of the three unbundling models in section 2.2.2.1 above.

<sup>1039</sup> Russia's response to Panel question No. 5, para. 27.

<sup>1040</sup> See section 2.2.2.2 above.

7.589. Keeping in mind that a panel has the autonomy to decide on the order of its analysis<sup>1041</sup>, we shall start with Russia's claim under Article XVI:2(a) of the GATS, and will then turn, successively, to Russia's claims under Article XVI:2(e) and (f) of the GATS.

### 7.5.2.2 Russia's claims under Article XVI:2(a) of the GATS

#### 7.5.2.2.1 Introduction

7.590. Russia claims that the unbundling measure in the national implementing laws of Croatia and Lithuania imposes a limitation on the number of service suppliers in a manner inconsistent with Article XVI:2(a) of the GATS.<sup>1042</sup>

7.591. Before turning to the assessment of Russia's claim under Article XVI:2(a) of the GATS, we wish to clarify our understanding of the measure at issue under this provision as, throughout its submissions and responses to questions, Russia's characterization of this measure has varied.<sup>1043</sup> Based on an overall reading of Russia's arguments and explanations, in particular Russia's clarification to question No. 5 by the Panel, we understand that Russia is challenging the unbundling measure in the national implementing laws of Croatia and Lithuania as imposing an

<sup>1041</sup> Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 126.

<sup>1042</sup> In its response to a question by the Panel concerning its claim under Article XVI:2(f) of the GATS, Russia appears to allege that Section 123(4) of Hungary's Gas Act violates Article XVI:2(a) of the GATS. Russia states as follows:

As explained in response to Question 169(a), "Section 194" refers to the relevant provision of Hungary's Amendment Act that amended Section 123 of its Gas Act (or GET). It is Subsection (4) of Section 123 of the Gas Act, as amended by the Amendment Act, that Russia is challenging under Article XVI:2(f) of the GATS – along with the remaining provisions of the Gas Act that Russia identified, Sections 120/A, Section 121/B, and Section 121/H, each of which also forms part of Hungary's unbundling measure that violates Article XIV:2(a). Specifically, Section 123(4) provides that any company involved in the extraction of natural gas or the "supply of natural gas... and any shareholders exercising control in such companies may not acquire any share – directly or indirectly – in a transmission system operator where such share constitutes entitlement to exercise control." It is in this regard that Section 123(4) violates Article XIV:2(a). (Russia's response to Panel question No. 169(b), para. 83). (emphasis original)

We observe that this is the first and only instance where Russia alleges that Hungary's Gas Act is inconsistent with Article XVI:2(a) of the GATS as, throughout these proceedings, Russia's claim under this provision only concerned the unbundling measure in the national implementing laws of Croatia and Lithuania. (See Russia's first written submission, heading VII:E; second written submission, para. 101 and heading III:B; and response to Panel question No. 5, para. 27). Furthermore, Russia does not substantiate its allegation that Section 123(4) in Hungary's Gas Act amounts to a limitation on the number of service suppliers within the meaning of Article XVI:2(a). Since there is no basis on which we can assess Russia's allegation against Hungary under Article XVI:2(a), we shall not give further consideration to this issue.

<sup>1043</sup> In its first written submission, Russia alleges that "Croatia and Lithuania's Unbundling Measures Impose Limitations on the Number of Service Suppliers, Contrary to Article XVI:2(a) of the GATS" (Russia's first written submission, heading VII:E), "Croatia and Lithuania, in implementing their unbundling measures, have adopted quantitative limitations on the number of TSOs within their respective territories" (Russia's first written submission, para. 210), and "[Croatia] [Lithuania] Adopted a Prohibited Quantitative Limitation, in Effect, in the Form of a Monopoly or Exclusive Service Supplier, Contrary to Article XVI:2(a)". (Russia's first written submission, headings VII:E:2; and VII:E:3). In response to a question by the Panel asking Russia to clarify, with respect to each claim, which measure was being challenged, Russia explains that, under Article XVI:2(a) of the GATS, it challenges "the unbundling measure in Croatia and Lithuania's implementing laws as each imposing impermissible quantitative restrictions" and further explains that "the quantitative restrictions resulting from Croatia and Lithuania's unbundling measures can best be characterized as violating each of these Members' obligations, as they constitute instances of *de facto* discrimination". (Russia's response to Panel question No. 5, para. 25). Russia alleges in its second written submission that it "has made a *prima facie* case that Croatia and Lithuania's unbundling measures each violates Article XVI:2(a) of the GATS". (Russia's second written submission, para. 109). In response to another question by the Panel, Russia explains that its claim against Lithuania under Article XVI:2(a) "concerns the fact that, through its unbundling measure, as set out in various provisions of the Law on Natural Gas, as amended, Lithuania has, formally or *in effect*, imposed a limitation on the number of service suppliers of pipeline transport services in the form of a monopoly or exclusive service supplier". (Russia's response to Panel question No. 167, para. 77). (emphasis original) Finally, with respect to this claim, Russia asks the Panel to find that the European Union and its member States violate Article XVI:2(a) of the GATS "because Croatia and Lithuania, in implementing their unbundling measures, have each, in effect, adopted a prohibited quantitative limitation in the form of a monopoly or exclusive service supplier". (Russia's first written submission, para. 810; and second written submission, para. 487).



impermissible quantitative limitation on the number of service suppliers in the form of a monopoly or exclusive service suppliers.

7.592. The text and legal standard to establish a violation under Article XVI:2 of the GATS are set out above in paragraphs 7.232 and 7.233. Pursuant to that legal standard, in order to establish a *prima facie* case of violation of Article XVI:2(a) of the GATS, Russia needs to demonstrate that:

- a. Croatia and Lithuania have undertaken market access commitments in their respective GATS Schedules with respect to the sector(s) and mode(s) identified by Russia; and that
- b. The unbundling measure in the national implementing laws of Croatia and Lithuania imposes an impermissible quantitative limitation on the number of service suppliers in the form of a monopoly or exclusive service suppliers within the meaning of Article XVI:2(a) of the GATS.

7.593. We concluded above in paragraph 7.360 that Croatia and Lithuania have undertaken a full market access commitment for mode 3 under sector 11.G, "Pipeline Transport [Services]". Accordingly, we turn now to the second element of the legal standard, namely whether the unbundling measure in the national implementing laws of Croatia and Lithuania breaches Article XVI:2(a) of the GATS by imposing an impermissible quantitative limitation on the number of service suppliers in the form of a monopoly or exclusive service suppliers.

#### 7.5.2.2.2 Analysis by the Panel

7.594. Russia argues that, when deciding whether a Member maintains any of the four types of quantitative limitations on the number of suppliers listed under Article XVI:2(a), consideration should be given to the substance and effect of a challenged measure, rather than merely its formal construction. Based on this interpretation, Russia alleges that Croatia and Lithuania, in implementing their unbundling measures, have adopted quantitative limitations on the number of TSOs within their respective territories, contrary to their scheduled commitments and in violation of Article XVI:2(a).<sup>1044</sup> Russia further submits that the quantitative limitation Croatia and Lithuania have each adopted on the number of service suppliers that may supply pipeline transport services within their territories is in the form of a monopoly or an exclusive service supplier.<sup>1045</sup> According to Russia, both Croatia and Lithuania, in effect, maintain a state-owned monopoly or, alternatively, exclusive service suppliers, both with regard to suppliers of transmission services and natural gas supply services within their respective territory, thus breaching Article XVI:2(a) of the GATS.<sup>1046</sup>

7.595. According to the European Union, the Appellate Body considered that the focus of Article XVI:2(a) is on quantitative limitations and stressed that not any measure having a quantitative effect would fall within the scope of this provision.<sup>1047</sup> The European Union concurs with Japan that "to qualify as a measure under sub-paragraph (a), the core characteristic of the measure must be to limit the number of service suppliers".<sup>1048</sup> For the European Union, the unbundling requirement does not impose a quantitative maximum limit, but must be rather regarded as a minimum requirement for being certified as a TSO in the European Union.<sup>1049</sup> The European Union submits that an unlimited number of service providers can be certified as transmission service operators in Croatia and Lithuania and that nothing in Croatia's or Lithuania's implementing laws challenged by Russia would limit the number of pipeline transport service suppliers.<sup>1050</sup>

<sup>1044</sup> Russia's first written submission, para. 210; and second written submission, para. 109.

<sup>1045</sup> Russia's first written submission, paras. 211 and 215.

<sup>1046</sup> Russia's first written submission, paras. 214 and 220; and second written submission, paras. 110-111.

<sup>1047</sup> European Union's first written submission, paras. 121-122; and second written submission, para. 22.

<sup>1048</sup> European Union's second written submission, para. 21, (referring to Japan's third-party submission, para. 11). For Japan, Article XVI:2(a) of the GATS does not capture "limitations which have *any* characteristics or *any* effect", but, rather, "a measure falls under subparagraph (a) only when its core characteristic or effect is to limit the number of service suppliers." (Ibid.)

<sup>1049</sup> European Union's first written submission, paras. 130-131.

<sup>1050</sup> European Union's second written submission, para. 23, (referring to the European Union's first written submission, paras. 132-134).

7.596. Before assessing Russia's claim under Article XVI:2(a), we need to address the parties' arguments regarding the scope of Article XVI:2(a). Both parties refer to the Appellate Body's interpretation of Article XVI:2(a) in *US – Gambling*, but draw different conclusions from this report.<sup>1051</sup>

7.597. We recall that, after considering the definitions of the terms "monopoly" and "exclusive service suppliers" in, respectively, Articles XXVIII(h) and VIII:5 of the GATS<sup>1052</sup>, the Appellate Body observed as follows:

[T]he reference, in Article XVI:2(a), to limitations on the number of service suppliers "in the form of monopolies and exclusive suppliers" should be read to include limitations that are in the form *or in effect*, monopolies or exclusive service suppliers.<sup>1053</sup>

7.598. This led the Appellate Body to consider that the words "in the form of" in Article XVI:2(a) should not be interpreted so as to require that quantitative limitations be explicitly expressed in numerical terms.<sup>1054</sup> The Appellate Body stressed, however, that the words "in the form of" should not be ignored or replaced by the words "that have the effect of" because, when viewed as a whole, "it is clear that the thrust of subparagraph (a) is not on the *form* of limitations, but on their *numerical, or quantitative, nature*".<sup>1055</sup>

7.599. Referring to this statement by the Appellate Body, the panel in *China – Electronic Payment Services* stressed that, when assessing the consistency of a measure with Article XVI:2(a) of the GATS, the focus must be on whether the measure at issue "constitute[s] a limitation that is numerical and quantitative in nature" or acts "as a quota would do", and not on whether it "formally or explicitly institute[s] a monopoly or an exclusive service supplier."<sup>1056</sup> When assessing more specifically whether the measure at issue instituted a monopoly or exclusive service suppliers, that panel decided to assess whether those measures "are of such a nature that they limit to one, or a small number", the number of service suppliers.<sup>1057</sup>

7.600. Hence, following the guidance provided by previous Appellate Body and panel reports, we consider that our analysis must focus on whether the measure at issue constitutes a limitation that is numerical and quantitative in nature. In other words, our analysis of whether Russia has demonstrated that the unbundling measure in the national implementing laws of Croatia and Lithuania breaches Article XVI:2(a) of the GATS by imposing an impermissible quantitative limitation in the form of a monopoly or exclusive service suppliers must focus on whether Russia has demonstrated that the measure at issue is of such a nature that it "limit[s] to one, or a small number", the number of pipeline transport service suppliers in Croatia and Lithuania.

7.601. We shall start with the unbundling measure in the national implementing law of Croatia and will then turn to Lithuania.

### *Croatia*

7.602. Russia submits that, while Croatia's Gas Market Act permits the three unbundling models and provides procedures for obtaining TSO certification, in reality, however, Croatia has adopted a

<sup>1051</sup> See Russia's first written submission, para. 207; and European Union's first written submission, paras. 121-122.

<sup>1052</sup> Pursuant to Article XXVIII(h) of the GATS, a "monopoly supplier of a service" is "any person, public or private, which in the relevant market of the territory of a Member is authorized or established formally or in effect by that Member as the sole supplier of that service" (emphasis added). Article VIII:5 of the GATS states that "[t]he provisions of this Article shall also apply to cases of exclusive service suppliers, 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". (emphasis added)

<sup>1053</sup> Appellate Body Report, *US – Gambling*, para. 230. (emphasis original)

<sup>1054</sup> Appellate Body Report, *US – Gambling*, para. 236.

<sup>1055</sup> Appellate Body Report, *US – Gambling*, para. 232.

<sup>1056</sup> Panel Report, *China – Electronic Payment Services*, paras. 7.592-7.593. We note that the issue before that panel also involved a determination whether the challenged measures constituted limitations on the number of service suppliers in the form of a monopoly or an exclusive service supplier within the meaning of Article XVI:2(a) of the GATS.

<sup>1057</sup> Panel Report, *China – Electronic Payment Services*, para. 7.593.

quantitative limitation in the form of a monopoly or an exclusive service supplier as the Croatian government owns and controls both the sole TSO, Plinacro, and the sole gas supplier, HEP.<sup>1058</sup>

7.603. The European Union contends that Russia fails to demonstrate how the unbundling measure, as implemented in Croatia's Gas Market Act, is of a quantitative nature, in the sense that it limits the number of TSOs that can provide pipeline transport services in Croatia. According to the European Union, merely noting that there is, at present, only one TSO in Croatia does not establish that the unbundling measure would impose a quantitative limitation on the number of service suppliers in Croatia.<sup>1059</sup>

7.604. We recall that the measure at issue is the unbundling measure contained in Croatia's 2014 Gas Market Act<sup>1060</sup>, namely Articles 14, 15 through 17, and 18 through 22 of that Act implementing the three unbundling models. The question before us is whether Russia has demonstrated that the unbundling measure in Croatia's national law is of such a nature that it limits to one, or a small number, the number of pipeline transport service suppliers in Croatia.

7.605. We turn to Russia's allegation that Plinacro has been established as a monopoly supplier of pipeline transport services in Croatia. According to Russia, by designating Plinacro as the national TSO in Croatia for a period of 30 years, "the Croatian government has 'authorized or established' Plinacro 'formally or in effect' as the sole supplier of transmission services (i.e. as the sole TSO) in the country," which, for Russia, constitutes a monopoly supplier of a service prohibited by Article XVI:2(a).<sup>1061</sup> In support of its allegation that Plinacro is authorized or established "formally or in effect" as a monopoly supplier of transmission services in Croatia, Russia refers to Article 10 of the 2007 Gas Market Act which stipulates as follows: "PLINACRO d.o.o., Zagreb, is appointed gas transmission system operator in the Republic of Croatia for the period of 30 years."<sup>1062</sup>

7.606. We note, first, that the 2007 Gas Market Act was superseded by the 2014 Gas Market Act which implemented the unbundling measure of the Directive (Article 112 of Croatia's Gas Market Act) and Russia does not explain whether the 2014 Gas Market Act, which implemented the unbundling measure, has confirmed the designation of Plinacro as TSO in Croatia.<sup>1063</sup> Furthermore, Article 10 of the 2007 Gas Market Act submitted by Russia as evidence merely states that Plinacro "is appointed gas transmission system operator" in Croatia for 30 years.

7.607. On its own, and in the absence of any other evidence, this statement does not allow us to conclude that no other TSO can be appointed in Croatia and therefore that, as claimed by Russia, Croatia maintains "formally or in effect" a state-owned monopoly supplier of pipeline transport services.<sup>1064</sup> To us, and we agree with the European Union on this point, the fact that Plinacro is currently the only supplier of pipeline transport services in Croatia<sup>1065</sup> is not sufficient *per se* to conclude that it has been established as a monopoly supplier of such services.

7.608. Russia does not explain nor submits evidence as to why, pursuant to the unbundling measure, other suppliers of pipeline transport services cannot enter the Croatian market. While referring to the provisions in Croatia's Gas Market Act setting out the three unbundling models, Russia does not substantiate why the unbundling measure would be of such a nature that it limits to one, or a small number, the number of pipeline transport service suppliers. As explained by the

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<sup>1058</sup> Russia's first written submission, paras. 211-212; second written submission, para. 110; and opening statement at the second meeting of the Panel, para. 24.

<sup>1059</sup> European Union's first written submission, para. 133; and second written submission, para. 23.

<sup>1060</sup> Croatia's Gas Market Act (Exhibit RUS-45).

<sup>1061</sup> Russia's first written submission, para. 213; and opening statement at the second meeting of the Panel, para. 24.

<sup>1062</sup> Russia's response to Panel question No. 54, para. 279 (referring to Croatia's Gas Market Act (2007) (Exhibit RUS-152), Article 10).

<sup>1063</sup> The European Union notes that "with respect to the designation of Plinacro as a TSO, Russia does not refer to any current legislation in force". (European Union's first written submission, fn 120).

<sup>1064</sup> Russia's first written submission, para. 212.

<sup>1065</sup> The European Union does not contest Russia's argument that Plinacro is currently the only TSO in Croatia, but argues that "[m]erely noting that there is, at present, only one TSO in Croatia does not establish that the unbundling measure would impose a quantitative limitation on the number of service suppliers in Croatia". (European Union's first written submission, para. 133).

Appellate Body, "[a] *prima facie* case must be based on 'evidence *and* legal argument' put forward by the complaining party in relation to *each* of the elements of the claim."<sup>1066</sup>

7.609. Croatia has implemented the rules on unbundling in the Directive through its Gas Market Act and allows all three unbundling models. We have carefully reviewed the provisions on unbundling in Croatia's Gas Market Act<sup>1067</sup>, as well as the corresponding provisions under the Directive when assessing Russia's claim under Article II:1 of the GATS.<sup>1068</sup> We see nothing in these provisions indicating that the unbundling requirement is of such a nature that it limits to one, or a small number, the number of service suppliers and Russia has not pointed to anything in Croatia's law which would cause us to reach a different conclusion.

7.610. We turn to Russia's allegation that Hrvatska elektroprivreda d.d (HEP) acts as a monopoly supplier of pipeline transport services.<sup>1069</sup> Russia refers to HEP as, alternatively, "the country's natural gas supplier", a "monopoly supplier of pipeline transport supply services" or "a monopoly supplier of supply services".<sup>1070</sup> Based on the evidence provided by Russia, HEP has been appointed as a supplier of wholesale services of natural gas until 31 March 2017.<sup>1071</sup> Therefore, this evidence indicates that HEP does not supply pipeline transport services.

7.611. We recall that Croatia's specific commitments under sector 11.G, "Pipeline Transport Services", cover transmission of gas through high pressure pipelines and that this sector does not encompass wholesale services, nor does it encompass "supply" or "supply services".<sup>1072</sup> Hence, the example of HEP cannot constitute relevant evidence for the purpose of demonstrating that the unbundling measure allegedly breaches Article XVI:2(a) with respect to Croatia's specific commitments on "Pipeline Transport Services" in sector 11.G of its Schedule. Therefore, we shall not give further consideration to HEP in our assessment of whether Croatia's unbundling measure breaches Article XVI:2(a).<sup>1073</sup>

7.612. In view of the foregoing, we find that Russia has not demonstrated that the unbundling measure in the national implementing law of Croatia imposes an impermissible quantitative limitation on the number of service suppliers in the form of a monopoly or exclusive service suppliers within the meaning of Article XVI:2(a) of the GATS. Hence, we conclude that Russia has not demonstrated that the unbundling measure in the national implementing law of Croatia is inconsistent with Article XVI:2(a) of the GATS.

### **Lithuania**

7.613. Russia submits that, in the context of implementing full ownership unbundling, Lithuania adopted a quantitative limitation in the form of a monopoly or an exclusive service supplier. According to Russia, Lithuania did so by forcing Gazprom and E.ON, who were holding joint majority ownership in Lietuvos, to spin off Amber Grid, the new TSO, and then sell their shares in Amber Grid and Lietuvos to the Lithuanian government.<sup>1074</sup> According to Russia, while, in theory, it would be possible for a domestic entity to obtain a TSO licence under the Law of Natural Gas, in effect, the establishment of another TSO is not possible because Amber Grid was established for

<sup>1066</sup> Appellate Body Report, *US – Gambling*, para. 140. (emphasis original)

<sup>1067</sup> See sections 7.5.2.3 and 7.5.2.4 below.

<sup>1068</sup> See section 7.5.1.3 above.

<sup>1069</sup> Russia's first written submission, paras. 212-213.

<sup>1070</sup> Russia's first written submission, para. 213; and opening statement at the second meeting of the Panel, para. 24.

<sup>1071</sup> Decision of the Government of the Republic of Croatia of 3 October 2016 on Appointing the Supplier on the Wholesale Gas Market, (Exhibit RUS-151). Pursuant to this Decision, "Hrvatska elektroprivreda d.d. [HEP] is hereby appointed supplier on the wholesale gas market" for the period until 31 March 2017 and its task is to "sell the gas to suppliers under public service obligation for the purposes of customers in the household category, as well as ensure a reliable and secure supply, including the gas import into the Republic of Croatia".

<sup>1072</sup> See paras 7.329-7.331 above.

<sup>1073</sup> For the same reason, we do not address Russia's allegation that "[a]lternatively, both Plinacro and HEP may be viewed as 'exclusive service suppliers'" evidencing, according to Russia, that Croatia has "'formally or in effect' authorized or established 'a small number of service suppliers', within the meaning of Article VIII:5 of the GATS and 'substantially prevent[ed] competition among those suppliers in its territory'". (See Russia's first written submission, para. 213).

<sup>1074</sup> Russia's first written submission, paras. 215 and 217. See also Russia's response to Panel question No. 167, para. 77.

the purpose of exclusively owning and operating the transmission grid. Russia further alleges that the Lithuanian government has "authorized or established" Amber Grid "formally or in effect" as the sole supplier of transmission services in Lithuania and Lietuvos duju tiekimas as the sole supplier of "natural gas supply services". For Russia, Amber Grid and Lietuvos duju tiekimas may be alternatively viewed as "exclusive service suppliers" within the meaning of Article XVI:2(a).<sup>1075</sup>

7.614. The European Union replies that Russia's allegations that Gazprom and E.ON were forced to sell their shares in Amber Grid and Lietuvos "are merely speculation".<sup>1076</sup> The European Union further asserts that Russia does not demonstrate how the unbundling requirement as implemented in Lithuania's Law on Natural Gas limits the number of pipeline transport service suppliers to only one. According to the European Union, there are no legal restrictions preventing other entities (be they domestically owned or owned by a third country person) from operating as a TSO a transmission network in Lithuania because Amber Grid has no exclusive right to create or operate the transmission network.<sup>1077</sup>

7.615. We recall that the measure at issue is the unbundling measure implemented by Lithuania through its Law on Natural Gas and its Law Implementing the Law Amending the Law on Natural Gas (the "Implementing Law"). The question before us is whether Russia has demonstrated that the unbundling measure in Lithuania's national implementing law is of such a nature that it limits to one, or a small number, the number of pipeline transport service suppliers in Lithuania.

7.616. Russia submits that Amber Grid has been established as a monopoly supplier of pipeline transport services and that the establishment of another TSO is not possible in Lithuania.<sup>1078</sup> In support of this allegation, Russia refers to the Certification Opinion by the European Commission with respect to the Lithuanian NRA's draft decision on the certification of Amber Grid as TSO for gas (the "Commission Opinion") and points to a statement, contained in that Commission Opinion, indicating that Amber Grid "owns and operates the entire gas transmission system of Lithuania" and "was established for the purpose of exclusively owning and operating the transmission grid".<sup>1079</sup>

7.617. To us, the text of the Commission Opinion highlighted by Russia does raise a doubt as to whether Amber Grid has been established as the sole supplier of pipeline transmission services in Lithuania. By stating that Amber Grid owns and operates "the entire" gas transmission system in Lithuania and was established "exclusively" for that purpose, this text may be read as indicating that no other TSO can provide pipeline transport services in Lithuania.

7.618. However, we must note that this evidence consists of a narrative of the Commission Opinion with no established path showing that it is rooted in a legal text. While Russia further contends that Lithuania's "Natural Gas Law requires a domestic TSO to own the country's transmission assets"<sup>1080</sup>, Russia does not point to any provision in that Law containing such "requirement".<sup>1081</sup> Russia also submits that "pursuant to the terms of its licence, [Lithuania's State-owned TSO] supplies pipeline transport services in each of Lithuania's ten counties"<sup>1082</sup>, but does not submit any evidence to buttress this allegation. In other words, in the absence of evidence rooting the Commission Opinion's narrative in Lithuania's Law on Natural Gas or in any other legal document, we feel reluctant to conclude, on the basis of this Commission Opinion's narrative alone, that Amber Grid has been *established* as a monopoly supplier of pipeline transport services in Lithuania. Moreover, as noted above with respect to Croatia, the fact that there is

<sup>1075</sup> Russia's first written submission, paras. 219-220; and second written submission, para. 111.

<sup>1076</sup> European Union's first written submission, para. 134.

<sup>1077</sup> European Union's first written submission, paras. 135-136; and second written submission, para. 23.

<sup>1078</sup> Russia's first written submission, para. 219-220; and second written submission, para. 111.

<sup>1079</sup> Commission Opinion of 23 March 2015 pursuant to Article 3(1) of Regulation (EC) No. 715/2009 and Article 10(6) of Directive 2009/73/EC - Lithuania - Amber Grid, C(2015) 2135 final, (Commission Opinion on the Certification of Amber Grid), (Exhibits EU-54/RUS-50), p. 1.

<sup>1080</sup> Russia's second written submission, para. 111.

<sup>1081</sup> We recall that, as explained by the Appellate Body, it is not sufficient for a complaining party to "merely to file an entire piece of legislation and expect a panel to discover, on its own, what relevance the various provisions may or may not have for a party's legal position." (See Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 191).

<sup>1082</sup> Russia's second written submission, para. 111.

currently only one supplier of pipeline transport services in Lithuania<sup>1083</sup> is not sufficient in and of itself to conclude that this supplier has been *established* as a monopoly supplier of such services.

7.619. Russia does not explain nor submits evidence as to why, pursuant to the unbundling measure, other suppliers of pipeline transport services cannot supply pipeline transport services in Lithuania. While referring to the provisions in Lithuania's Law on Natural Gas and Law on Implementation, Russia does not explain how the OU model is of such a nature that it limits to one, or a small number, the number of authorized TSOs in Lithuania. As explained by the Appellate Body, "[a] *prima facie* case must be based on 'evidence *and* legal argument' put forward by the complaining party in relation to *each* of the elements of the claim."<sup>1084</sup>

7.620. We have carefully reviewed the provisions on unbundling in Lithuania's Law on Natural Gas and Implementation Law<sup>1085</sup>, as well as the corresponding provisions in the Directive when assessing Russia's claim under Article II:1 of the GATS.<sup>1086</sup> We saw nothing in these rules indicating that the unbundling measure implemented in Lithuania is of such a nature that it limits to one, or a small number, the number of service suppliers in Lithuania. Moreover, Russia has not pointed to anything in Lithuania's law which would cause us to reach a different conclusion. We are therefore unable to conclude that the unbundling measure in Lithuania's national implementing law limits to one the number of service suppliers.

7.621. We turn to Russia's allegation that Lietuvos duju tiekimas is the sole supplier of "natural gas supply services".<sup>1087</sup> Russia contends that this "constitutes a 'monopoly supplier of a service' within the meaning of Article XXVIII(h) of the GATS", or "[a]lternatively, both Amber Grid and Lietuvos duju tiekimas may be viewed as 'exclusive service suppliers' within the meaning of Article XVI:2(a)".<sup>1088</sup> As per Russia's explanations, Lietuvos duju tiekimas is a supplier of "natural gas supply services" and we recall our conclusion above that natural gas "supply" or "supply services" are not encompassed under sector 11.G, "Pipeline Transport" in the Schedule of Lithuania.<sup>1089</sup> We further note that Russia has submitted no evidence in these proceedings regarding the establishment of Lietuvos duju tiekimas as the alleged monopoly supplier of "natural gas supply services". Therefore, we shall not give further consideration to Lietuvos duju tiekimas in our assessment of whether Lithuania's unbundling measure breaches Article XVI:2(a) of the GATS.<sup>1090</sup>

7.622. In view of the foregoing, we find that Russia has not demonstrated that the unbundling measure in the national implementing law of Lithuania imposes an impermissible quantitative limitation on the number of service suppliers in the form of a monopoly or exclusive service suppliers within the meaning of Article XVI:2(a) of the GATS. Hence, we conclude that Russia has not demonstrated that the unbundling measure in the national implementing law of Lithuania is inconsistent with Article XVI:2(a) of the GATS.

### 7.5.2.3 Russia's claims under Article XVI:2(e) of the GATS

#### 7.5.2.3.1 Introduction

7.623. Russia submits that the unbundling measure in the national implementing laws of Croatia, Hungary and Lithuania restricts or requires specific types of legal entity through which service suppliers of other Members may supply pipeline transport services, contrary to Article XVI:2(e) of

<sup>1083</sup> The European Union does not contest Russia's argument that Amber Grid is currently the only pipeline transport service supplier in Croatia, but argues that Amber Grid has no exclusive right to create or operate the transmission network. According to the European Union, an entity may connect new segments of the transmission pipeline (if the infrastructure is compliant with existing infrastructure) and, thus, may operate the transmission system or part thereof. (European Union's first written submission, para. 136).

<sup>1084</sup> Appellate Body Report, *US – Gambling*, para. 140. (emphasis original)

<sup>1085</sup> See sections 7.5.2.3 and 7.5.2.4 below.

<sup>1086</sup> See section 7.5.1.3 above.

<sup>1087</sup> Russia's first written submission, para. 220.

<sup>1088</sup> Russia's first written submission, para. 220.

<sup>1089</sup> See para. 7.338 above.

<sup>1090</sup> For the same reason, we also decline to address Russia's allegation that "both Amber Grid and Lietuvos duju tiekimas may be viewed as 'exclusive service suppliers' within the meaning of Article XVI:2(a)." (Russia's first written submission, para. 220).

the GATS.<sup>1091</sup> The European Union responds that 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) of the GATS.<sup>1092</sup>

7.624. Pursuant to the relevant legal standard set out above in paragraphs 7.232 and 7.233, in order to make a *prima facie* case of violation of Article XVI:2(e), Russia is required to demonstrate that:

- a. Croatia, Hungary and Lithuania have undertaken market access commitments in their respective GATS Schedules with respect to the sector(s) and mode(s) identified by Russia; and that
- b. The unbundling measure in the national implementing laws of Croatia, Hungary and Lithuania constitutes an impermissible limitation within the meaning of Article XVI:2(e) of the GATS.

7.625. With respect to the first element, we concluded that Croatia and Lithuania have undertaken a full market access commitment for mode 3 in sector 11.G, "Pipeline Transport [Services]". We further concluded that, for the same sector and mode, Hungary has undertaken not to maintain any limitation within the meaning of Article XVI:2(e) of the GATS. Nonetheless, in the horizontal section of its Schedule, Hungary has inscribed a limitation stipulating that service suppliers establishing a commercial presence in Hungary "should take the form of limited liability company, joint-stock company or representative office", and "[i]nitial entry as branch is not permitted". We found that this limitation may have relevance for the purpose of assessing Russia's claim under Article XVI:2(e) of the GATS.<sup>1093</sup>

7.626. Accordingly, we turn now to the second element of the legal standard, namely whether the unbundling measure in the national implementing laws of Croatia, Hungary and Lithuania breaches Article XVI:2(e) of the GATS by impermissibly restricting or requiring specific types of legal entity or joint-venture through which a service supplier may supply a service.

### 7.5.2.3.2 Analysis by the Panel

#### 7.5.2.3.2.1 Introduction

7.627. We note at the outset that this is the first time that Article XVI:2(e) of the GATS is invoked in a WTO dispute. Article 3.2 of the DSU directs us to interpret this provision "in accordance with customary rules of interpretation of public international law". In line with the principles of treaty interpretation in Article 31 of the Vienna Convention, we shall interpret Article XVI:2(e) of the GATS in accordance with the ordinary meaning to be given to the terms of this provision in their context, and in the light of the object and purpose of the GATS and the WTO Agreement. We may have recourse to supplementary means of interpretation in accordance with Article 32 of the Vienna Convention to confirm the meaning resulting from the application of Article 31, or to determine the meaning of the terms if we conclude that the interpretation according to Article 31 leaves the meaning ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable.

7.628. According to Russia, Article XVI:2(e) defines measures as prohibited based on their nature or characteristics, and must be interpreted broadly.<sup>1094</sup> Russia submits that dictionary definitions of the term "legal entity" do not describe or in any way restrict how a "legal entity" must be formed, organized or structured.<sup>1095</sup> Russia further alleges that Article XVI:2(e) broadly prohibits all measures that restrict the ability of service suppliers to supply services, whether through "juridical persons" directly or through other specific "forms of commercial presence".<sup>1096</sup> For

<sup>1091</sup> Russia's first written submission, heading VII.D and para. 178; and second written submission, para. 102.

<sup>1092</sup> European Union's first written submission, para. 119.

<sup>1093</sup> See para. 7.360 above.

<sup>1094</sup> Russia's first written submission, para. 154 and heading VII.D.1.a; and second written submission, para. 103.

<sup>1095</sup> Russia's first written submission, para. 157.

<sup>1096</sup> Russia's first written submission, para. 176.

Russia, this prohibition applies to measures that require total divestment of control over the legal entity through which that service supplier would otherwise supply the service.<sup>1097</sup> Russia urges the Panel to reject the interpretation proposed by the European Union because it would, in Russia's view, create a loophole for Members to enact and implement coercive measures, such as unbundling.<sup>1098</sup>

7.629. The European Union distinguishes the "existence" of an entity, as created by law, from "qualitative requirements" that may be attached to that entity regarding its formation, organization or structure.<sup>1099</sup> For the European Union, Article XVI:2(e) prohibits measures that restrict or require specific types of legal entity, but does not cover measures that lay down characteristics of those types of legal entities and how these entities can do business, for instance the different activities they can or cannot deploy simultaneously.<sup>1100</sup>

7.630. We recall that, in sectors where specific commitments are undertaken, Article XVI:2(e) prohibits – unless they are scheduled – measures which "restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service." We understand that the parties' disagreement focuses on the meaning and scope of the terms "specific types of legal entity" in Article XVI:2(e).

7.631. The term "legal entity" is not defined in the GATS and we start our analysis with its ordinary meaning. An "entity" is defined as "[e]xistence, being, as opp. to non-existence; the existence of a thing as opp. to its qualities or relations"<sup>1101</sup> or "an organization (as a business or governmental unit) that has an identity separate from those of its members".<sup>1102</sup> The term "legal" means "[o]f or pertaining to law; falling within the province of law".<sup>1103</sup> Continuing our textual analysis with the phrase "specific types of" which precedes the phrase "legal entity", we note that the adjective "specific" means "[c]learly or explicitly defined; precise, exact; definite".<sup>1104</sup> The noun "type" is defined as "[a] class of people or things distinguished by common essential characteristics; a kind, a sort."<sup>1105</sup>

7.632. Hence, based on the ordinary meaning of relevant terms, Article XVI:2(e) appears to cover measures which restrict or require clearly defined kinds of organization falling within the province of law. Measures falling within the purview of Article XVI:2(e) do not "restrict or require" a "legal entity" itself, but rather, "restrict or require" *clearly defined kinds* of legal entity. Thus, measures falling within the purview of Article XVI:2(e) do not generally restrict a legal entity from doing something, nor do they require a legal entity to do something. Rather, such measures restrict or require clearly defined kinds of legal entity through which a service supplier may supply a service. To us, the ordinary meaning of the terms "specific types of legal entity" indicates that measures falling within the purview of Article XVI:2(e) concern the legal form of a legal entity.<sup>1106</sup>

7.633. The remainder of Article XVI:2(e) refers to "specific types of ... joint-venture" which measures falling within the scope of that provision cannot restrict or require. A joint-venture is defined as "[a] business undertaking by two or more persons engaged in a single defined

<sup>1097</sup> Russia's first written submission, paras. 157 and 176-177; and second written submission, paras. 103-104.

<sup>1098</sup> Russia's second written submission, para. 108.

<sup>1099</sup> European Union's first written submission, para. 94.

<sup>1100</sup> European Union's first written submission, paras. 94 and 100; and second written submission, para. 11.

<sup>1101</sup> *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 843.

<sup>1102</sup> Merriam Webster online, at <http://www.merriam-webster.com/dictionary/entity>, visited on 14 November 2016.

<sup>1103</sup> *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1575.

<sup>1104</sup> *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2944.

<sup>1105</sup> *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 3392.

<sup>1106</sup> Japan reaches a similar conclusion. According to Japan, "[t]he term 'types of legal entity' ... can only be properly interpreted as the corporate form of the entity itself ... not the broader structure of the group of companies, or the assignment of ownership or control." (See Japan's third-party submission, para. 14; and response to Panel question No. 9, para. 25). The European Union agrees with the interpretation proposed by Japan. (See European Union's second written submission, para. 12).



project."<sup>1107</sup> We note that the parties concur that a joint venture could be viewed as a specific type of legal entity.<sup>1108</sup> Finally, the expression "through which a service supplier may supply a service" in Article XVI:2(e) indicates, in our view, that this limitation concerns primarily the commercial presence mode of supply. Hence, nothing in the remainder of Article XVI:2(e) causes us to question the conclusion reached in the previous paragraph.

7.634. As observed by both parties, the definition of "juridical person" contained in Article XXVIII(I) of the GATS provides relevant context for the interpretation of Article XVI:2(e). Pursuant to that provision,

"juridical person" means any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association.

7.635. Both parties concur that, in its latter part, Article XXVIII(I) lists certain "types of legal entity"<sup>1109</sup> and that this list is non-exhaustive, as evidenced by the use of the word "including".<sup>1110</sup>

7.636. We find it instructive to consider the ordinary meaning of the terms "corporation", "trust", "partnership", "joint venture", "sole proprietorship" or "association" in Article XXVIII(I).

7.637. A "corporation" is "[a]n entity (usu. a business) having authority under law to act as a single person distinct from the shareholders who own it and having rights to issue stock and exist indefinitely."<sup>1111</sup> A "trust" is "the right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the trustee) at the request of another (the *settlor*) for the benefit of a third party (the *beneficiary*)."<sup>1112</sup> A "partnership" is a "voluntary association of two or more persons who jointly own and carry on a business for profit."<sup>1113</sup> A "sole proprietorship" is "a business in which one person owns all the assets, owes all the liabilities, and operates in his or her personal capacity."<sup>1114</sup> An "association" is an "unincorporated organization that is not a legal entity separate from the persons who compose it."<sup>1115</sup>

7.638. To us, a review of these definitions indicates that the different types of legal entity listed in a non-exhaustive manner in Article XXVIII(I) are identified by reference to the possible legal form that those entities may take.

7.639. Article XXVIII(I) also contains other elements which may potentially shed light on the terms "specific types of legal entity". Turning to the phrase, "duly constituted or otherwise organized under applicable law", we observe that "constitute" is defined as "make up, go to form" and "[e]stablish (an institution etc.); give legal form to."<sup>1116</sup> "Duly" means "[i]n due manner,

<sup>1107</sup> *Black's Law Dictionary*, 9th ed., B.A. Garner (ed.) (West Group, 2009), p. 915.

<sup>1108</sup> Article XXVIII(I) of the GATS contains the terms "legal entity" and "joint venture", but, unlike Article XVI:2(e), Article XXVIII(I) does not mention the term "joint venture" alongside the term "legal entity" (or as alternatives). Pursuant to Article XXVIII(I), a joint venture would appear to be a type of legal entity. In response to a question by the Panel, both parties submit that there is no material difference between the concepts of "legal entity" and "joint venture" as used in, respectively, Articles XVI:2(e) and XXVIII(I) of the GATS. Both parties also consider that a joint venture is a type of legal entity. (See Russia's response to Panel question No. 88, paras. 387-388; and European Union's response to Panel question No. 88, paras. 225 and 227). Russia considers that "joint venture" "is of less relevance in this proceeding". (See Russia's first written submission, fn 214).

<sup>1109</sup> Russia's first written submission, para. 167; and European Union's first written submission, para. 99.

<sup>1110</sup> Russia's response to Panel question No. 88, para. 387; and European Union's second written submission, para. 13.

<sup>1111</sup> *Black's Law Dictionary*, 9th ed., B.A. Garner (ed.) (West Group, 2009), p. 391.

<sup>1112</sup> *Black's Law Dictionary*, 9th ed., B.A. Garner (ed.) (West Group, 2009), p. 1647.

<sup>1113</sup> *Black's Law Dictionary*, 9th ed., B.A. Garner (ed.) (West Group, 2009), p. 1230.

<sup>1114</sup> *Black's Law Dictionary*, 9th ed., B.A. Garner (ed.) (West Group, 2009), p. 1520.

<sup>1115</sup> *Black's Law Dictionary*, 9th ed., B.A. Garner (ed.) (West Group, 2009), p. 141.

<sup>1116</sup> *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 500.

order, form or season; ...".<sup>1117</sup> "Organized" is defined as "[f]ormed into a whole with interdependent parts; coordinated so as to form an orderly structure."<sup>1118</sup> To our mind, the expression "duly constituted or otherwise organized under applicable law" conveys the idea that the "specific types of legal entity" are established or given legal form, or in another way formed under "applicable law", namely under the domestic law applicable in the Member concerned.

7.640. Turning to the phrase "whether for profit or otherwise, and whether privately-owned or governmentally-owned" in Article XXVIII(I), we note that, according to the European Union, these elements "indicate possible characteristics of legal entities" as opposed to the "types of" such entities which are found in the latter part of the definition.<sup>1119</sup> Russia does not comment on this issue. We can agree with the European Union that terms such as "for profit or otherwise", or "privately-owned" vs. "governmentally-owned" may refer to certain characteristics of a legal entity. However, depending on applicable domestic law, we do not exclude that these characteristics could also relate to the legal form of an entity. We are therefore reluctant to endorse in the abstract the categorization proposed by the European Union with respect to these particular elements of the definition contained in Article XXVIII(I). In any event, the phrase "whether for profit or otherwise, and whether privately-owned or governmentally-owned" in Article XXVIII(I) does not cause us to question our analysis so far.

7.641. Our contextual analysis based on Article XXVIII(I) of the GATS indicates that the legal entities listed in a non-exhaustive manner in that provision refer to different types of legal entity as distinguished by their legal form. Moreover, those legal entities are established or given legal form under applicable domestic law in the Member concerned.<sup>1120</sup>

7.642. In light of the foregoing, our interpretation of Article XVI:2(e) based on the ordinary meaning of relevant terms read in their context leads us to conclude that measures falling under Article XVI:2(e) restrict or require the legal form of a legal entity through which a service supplier may supply a service under the applicable law of the Member concerned. Such measures do not generally restrict legal entities from doing something, nor do they require legal entities to do something. In other words, the phrase "restrict or require specific types of legal entity" in Article XVI:2(e) does not cover any measure that may affect a legal entity, either by requiring a legal entity to do something or by restricting a legal entity from doing something. Those "specific types of legal entities" are established or given legal form under applicable domestic law in the Member where the service is supplied.<sup>1121</sup> The application of Article XVI:2(e) calls for a case-by-case approach and it is up to the complaining Member to show, with reference to applicable domestic law in the Member concerned, that the measure at issue "restrict[s] or require[s] specific types of legal entity."

7.643. Having reached our conclusion on what is, in our view, the proper scope of Article XVI:2(e), we wish nevertheless to address further arguments presented by Russia on this issue to ensure that nothing in these arguments causes us to question our interpretation.

7.644. While agreeing that the non-exhaustive list in Article XXVIII(I) identifies "certain types of 'legal entity' by reference to business or organizational form that a 'juridical person' might adopt"<sup>1122</sup>, Russia contests the idea that Article XVI:2(e) would prohibit only measures that expressly identify the type or types of legal entity that a service supplier may or may not

<sup>1117</sup> *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 776.

<sup>1118</sup> *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2013.

<sup>1119</sup> See European Union's first written submission, para. 99.

<sup>1120</sup> We note Russia's argument that the entries found in the horizontal sections of the Schedules of Croatia and Hungary may serve as relevant context for the purpose of interpreting Article XVI:2(e). (Russia's first written submission, paras. 173-174). In our view, it is not necessary to address this argument in further detail for the purpose of our contextual interpretation. We would like to recall in this regard that, while Members' Schedules are an integral part of the GATS, each Schedule "has its own intrinsic logic". (Appellate Body Report, *US – Gambling*, para. 182). While this word of caution by the Appellate Body concerned the use of Members' Schedules as context when interpreting an entry in a particular Schedule, it should also be kept in mind when interpreting a provision of the GATS.

<sup>1121</sup> To our mind, Members have left themselves a degree of flexibility to articulate, in their respective jurisdictions, the specific types of legal entity through which service suppliers can supply services under the GATS.

<sup>1122</sup> Russia's first written submission, para. 167.

establish.<sup>1123</sup> Based on the alleged "broad ordinary meaning" of the term "legal entity", Russia asserts that using that term to define prohibited measures in Article XVI:2(e) "should be presumed as intending a broad interpretation of the provision."<sup>1124</sup> While the term "legal entity" may be viewed as having a "broad" ordinary meaning, we do not believe that this term alone defines the scope of Article XVI:2(e) or, in Russia's words, "defines prohibited measures" in that provision. To us, an important flaw in Russia's proposed interpretation is that, by focusing on the term "legal entity", Russia fails to give meaning and effect to the terms "specific types of" which precedes the term "legal entity". However, as underlined by the Appellate Body, "[o]ne of the corollaries of the 'general rule of interpretation' ... is that interpretation must give meaning and effect to all the terms of the treaty."<sup>1125</sup>

7.645. Russia also refers to various GATS provisions (e.g., Article XXVIII(d), (g) and (l) and footnote 12<sup>1126</sup>) which, in its view, demonstrate that "the GATS recognizes various means by which a 'service supplier (i.e. the juridical person)' (in the words of footnote 12) of one Member may supply services 'through commercial presence' in the territory of another Member – as well as the means by which that Member may improperly seek to restrict or require the supply of that service."<sup>1127</sup> For Russia, "the various 'forms of commercial presence' are each 'specific types of legal entity', all of which 'shall ... be accorded the treatment provided for service suppliers under the Agreement."<sup>1128</sup> Russia concludes

Members can and will distinguish an equally broad range of clearly or explicitly defined common or essential characteristics (from the definitions of "specific" and "type") to apply in seeking to design *measures* that restrict or require the supply of a service through commercial presence in their territory. In accordance with the express terms of Article XVI:2(e), however, absent a properly scheduled limitation, any such measure is prohibited from restricting or requiring the "specific types of legal entity" (i.e. "forms of commercial presence") through which a service supplier may supply services in another Member's territory.<sup>1129</sup>

7.646. To us, Russia seems to blend different GATS concepts ("types of legal entity", "forms of commercial presence", "service supplier", "juridical person") and this is potentially problematic as we do not believe that these concepts are synonymous or can be used interchangeably under the GATS. Although, conceivably, the drafters of the GATS could have used the expression "forms of commercial presence" in Article XVI:2(e), they chose instead the phrase "specific types of legal entity". We therefore do not consider it appropriate to use the expressions "specific types of legal entity" and "forms of commercial presence" interchangeably.

7.647. For Russia, Article XVI:2(e) "broadly prohibits *all measures* that restrict the ability of service suppliers to supply services, whether through 'juridical persons' directly or through other specific 'forms of commercial presence'."<sup>1130</sup> Russia also argues that Article XVI:2(e) covers measures "designed" to restrict service suppliers from establishing one or more type(s) of legal entity, as well as measures that "have the effect" of requiring specific types of legal entity by restricting the ability of service suppliers to establish other types without expressly identifying any of the entities in question.<sup>1131</sup>

7.648. In view of our conclusion above regarding the proper scope of Article XVI:2(e), we are not persuaded by Russia's arguments. We share Japan's concern that, pursuant to Russia's proposed interpretation, any measure indirectly resulting in a market access limitation may fall under the

<sup>1123</sup> Russia's response to Panel question No. 87, para. 376.

<sup>1124</sup> Russia's first written submission, para. 158.

<sup>1125</sup> Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:1, 3, at p. 21.

<sup>1126</sup> These provisions are cited above in paras. 7.432, 7.435, 7.634 and 7.437, respectively.

<sup>1127</sup> Russia's first written submission, paras. 168-170.

<sup>1128</sup> Russia's first written submission, para. 171. See also Russia's response to Panel question No. 87, para. 378.

<sup>1129</sup> Russia's first written submission, para. 172 (emphasis original); and second written submission, para. 107.

<sup>1130</sup> Russia's first written submission, para. 176. (emphasis original)

<sup>1131</sup> Russia's response to Panel question No. 87, para.381; second written submission, para. 106; and opening statement at the second meeting of the Panel, para. 5.

scope of Article XVI:2.<sup>1132</sup> Like the European Union<sup>1133</sup>, we find it difficult to reconcile Russia's proposed interpretation with the case-law under Article XVI:2. We recall that previous panels stressed that "the scope of the market access obligation does not extend generally to 'all measures affecting the supply of services'", but, applies, instead, "to six carefully defined categories of measures ..."<sup>1134</sup>, which form a closed or exhaustive list, as indicated in the *chapeau* of Article XVI:2 which provides that the six measures listed below "are defined as".<sup>1135</sup> As explained by the panel in *Argentina – Financial Services* "the list of measures in the six subparagraphs of Article XVI:2 ... also fulfils the function of establishing clearly, exactly and precisely the types of limitation on market access that are prohibited and hence may not be maintained or adopted in those sectors where a Member had adopted specific commitments, unless it has specifically mentioned this possibility in its Schedule."<sup>1136</sup> We also agree with this panel that "any interpretation of Article XVI:2 of the GATS must give effect to each of the six subparagraphs of the provision."<sup>1137</sup>

7.649. Having considered Russia's arguments, we see nothing that causes us to modify the conclusion reached above in paragraph 7.642.

7.650. We find that our interpretation of Article XVI:2(e) is consistent with the object and purpose of the GATS as reflected in the preamble of the Agreement, which confirms, *inter alia*, Members' intention to expand trade in services "under conditions of transparency"<sup>1138</sup> and underlines "the right of Members to regulate, and to introduce new regulations, on the supply of services ... in order to meet national policy objectives ...".<sup>1139</sup> As observed by a previous panel, "Members retain the right to regulate in order to meet their national policy objectives, subject to relevant GATS disciplines, Article VI in particular, including in those sectors where they have made specific commitments under Article XVI of the GATS".<sup>1140</sup> Our interpretation of Article XVI:2(e) respects Members' right to regulate, including in sectors where they have made specific commitments.

7.651. Our interpretation pursuant to Article 31 of the Vienna Convention does not leave the meaning of those terms ambiguous or obscure, nor does it lead to a result which is manifestly

<sup>1132</sup> Japan considers that "Russia, in this case, improperly attempts to expand this list to include measures that *indirectly* result in the market access limitations listed under Article XVI:2." (See Japan's third-party submission, para. 2). (emphasis original) This concern is also shared by the European Union which considers that Russia's proposed interpretation would cover "any measure that somehow would affect the possibility of a service supplier from one WTO Member to provide services through commercial presence in a host WTO Member." (See European Union's second written submission, para. 9).

<sup>1133</sup> According to the European Union, Russia's proposed interpretation of Article XVI:2(a) "ignores past WTO jurisprudence that has stressed the exhaustive nature of the list of measures in Article XVI:2, precisely to respect the delicate balance carefully sought by the drafters of the GATS between the right to regulate and the principle of trade liberalization". (European Union's second written submission, para. 11 (referring to Panel Reports, *US – Gambling*, para. 6.298; *China – Publications and Audiovisual Products*, para. 7.1353; *China – Electronic Payment Services*, para. 7.629; and *Argentina – Financial Services*, para. 7.418)). Similarly, for Japan, a broad interpretation of Article XVI:2(e) "would excessively restrict the Members' 'right . . . to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives', which is expressly recognized by WTO Members in the fourth recital of the GATS." (See Japan's third-party submission, para. 5).

<sup>1134</sup> Panel Report, *China – Electronic Payment Services*, para. 7.652. We also recall that, when examining a claim under Article XVI:2(a) of the GATS, the Appellate Body stated that "the words 'in the form of' [in Article XVI:2(a)] should [not] be ignored or replaced by the words 'that have the effect of'". (Appellate Body Report, *US – Gambling*, para. 232). This statement indicates, in our view, that, while cautioning that the words used in Article XVI:2(a) (*in casu* "in the form of") should not be read as "prescribing a rigid mechanical formula", the Appellate Body nonetheless considered that a broad "effect" test was inappropriate under this provision. (Ibid. para. 231). While the Appellate Body's pronouncement was made in relation to a particular subparagraph of Article XVI:2, we believe that its gist should equally guide the assessment of other subparagraphs contained in that provision.

<sup>1135</sup> Panel Reports, *China – Publications and Audiovisual Products*, para. 7.1353; *China – Electronic Payment Services*, para. 7.629 and 7.652; and *Argentina – Financial Services*, para. 7.418. We note that the word "define" means "[d]etermine or indicate the boundary or extent of ... Set out precisely, describe or explain the nature, properties, scope, or essential qualities of (a thing or concept)". (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 629).

<sup>1136</sup> Panel Report, *Argentina – Financial Services*, para. 7.418.

<sup>1137</sup> Panel Report, *Argentina – Financial Services*, para. 7.420.

<sup>1138</sup> Second recital of the GATS preamble.

<sup>1139</sup> Fourth recital of the GATS preamble.

<sup>1140</sup> Panel Report, *Argentina – Financial Services*, para. 7.423. See also Panel Report, *US – Gambling*, paras. 6.314-6.317.

absurd or unreasonable. Accordingly, we do not find it necessary to resort to supplementary means of interpretation under Article 32 of the Vienna Convention.

#### 7.5.2.3.2.2 Whether the measures at issue constitute impermissible limitations within the meaning of Article XVI:2(e)

7.652. Russia claims that the unbundling measure in the national implementing laws of Croatia, Hungary and Lithuania is inconsistent with Article XVI:2(e) as each unbundling model improperly restricts or requires specific types of legal entity through which service suppliers may supply transmission services.<sup>1141</sup>

7.653. The European Union responds that 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) of the GATS.<sup>1142</sup>

7.654. The question before the Panel is whether Russia has made a *prima facie* case that the unbundling measure implemented in the national laws of Croatia, Hungary and Lithuania breaches Article XVI:2(e) of the GATS by impermissibly restricting or requiring specific types of legal entity or joint-venture through which a service supplier may supply a service.

7.655. We begin our analysis with Russia's claim against the national implementing law of Croatia, and will then turn to the national implementing laws of Hungary and Lithuania, respectively.

#### Croatia

7.656. Croatia has implemented the ISO and ITO models, in addition to the OU model.

7.657. With respect to the OU model, Russia claims that Article 14 of Croatia's Gas Market Act is inconsistent with Article XVI:2(e). Russia points to Article 14(1) which stipulates that "[t]he transmission system operator must be the owner of the transmission system and shall be organized as a legal entity, independently of other activities in the gas sector".<sup>1143</sup> Hence, Russia submits that "Article 14(1) of Croatia's Gas Market Act expressly requires that the TSO be 'organized as a legal entity', but fundamentally restricts how that legal entity may be organized."<sup>1144</sup>

7.658. The European Union responds that, by merely focusing on the words "shall be organized as a legal entity" in Article 14(1) of Croatia's Gas Market Act, Russia ignores that the TSO can take the form of any type of legal entity. For the European Union, ownership unbundling in Croatia's law merely requires that the TSO be "independent of other activities in the gas sector".<sup>1145</sup>

<sup>1141</sup> Russia's first written submission, paras. 180 (Croatia), 194 (Hungary) and 203 (Lithuania); response to Panel question No. 5, para. 24; and second written submission, para. 107.

<sup>1142</sup> European Union's first written submission, para. 119.

<sup>1143</sup> Russia's first written submission, paras. 182-183, (referring to Croatia's Gas Market Act (Exhibit RUS-45), Article 14(1)).

<sup>1144</sup> Russia's first written submission, para. 183.

<sup>1145</sup> European Union's second written submission, para. 15. We also note the European Union's argument that the WTO Working Party on Domestic Regulation has identified measures very similar to the unbundling requirement, i.e. prohibition to combine certain activities, as falling within the scope of Article VI:4 of the GATS and not within the scope of Article XVI. (See European Union's first written submission, para. 100 and second written submission, para. 13, (referring to Working Party on Domestic Regulation, Informal Note by the Secretariat, "Examples of measures to be addressed by Disciplines under GATS Article VI:4", JOB(02)/20/Rev.10 (31 January 2005), (Exhibit EU-40))). The two examples cited by the European Union are "[l]icensing is conditional upon the observance of the prohibition for service suppliers in the wholesale subsector to undertake retailing activities simultaneously" and "[l]icense is conditional upon the observance of the prohibition for service suppliers acting in the fixed telephony subsector to undertake activities in the mobile telephony subsector simultaneously". Commenting on the evidence submitted by the European Union, Russia replies that the measures described by the Working Party do not appear to be particularly similar to the European Union's unbundling regime and further notes that the Working Party declined to reach any conclusion about the GATS provisions under which the various measures should fall. (See Russia's opening statement at the second meeting of the Panel, para. 19).

7.659. We agree with the European Union that, by merely requiring that a TSO "shall be organized as a legal entity", Article 14(1) does not restrict or require the legal form through which a pipeline transport service supplier may supply services in Croatia. To our mind, pursuant to Article 14(1) of Croatia's Gas Market Act, a TSO can take any legal form as long as it is organized independently from other activities in the gas sector. Similarly, merely asserting that a TSO is a "legal entity"<sup>1146</sup> does not amount to a demonstration that the OU model in Article 14 of Croatia's Gas Market Act "restricts or requires a specific type of legal entity" within the meaning of Article XVI:2(e). In fact, it rather connotes that no specific type of legal entity is restricted or required.

7.660. Russia further points to Articles 14(3)<sup>1147</sup> and 14(4)<sup>1148</sup> of Croatia's Gas Market Act, but does not substantiate how these particular provisions allegedly breach Article XVI:2(e).<sup>1149</sup>

7.661. We observe that Article 14(3) enforces the independence requirement between, on the one hand, the TSO and, on the other hand, the production or supply undertaking. Pursuant to that provision, the independence of the TSO "shall be ensured in a manner that prevents the same person or persons to simultaneously perform" certain activities, including (i) "directly or indirectly control" the production or supply undertaking and "directly or indirectly control or execute other rights" over the TSO; and (ii) "directly or indirectly control" the TSO, and "directly or indirectly control or execute other rights" over the production or supply undertaking. Article 14(4) applies the prohibitions in Article 14(3) to "the use of voting rights", "the right to appoint members of the supervisory board, members of the management board or any other body representing the legal entity" or "owning a majority stake." These two provisions address therefore the combination of activities, including services, that an entity can or cannot carry out simultaneously by preventing an entity to control (or "execute other rights over") another entity. These provisions, however, do not speak to the legal form of either entity. Hence, we see nothing in Articles 14(3) and 14(4) which would "restrict or require specific types of legal entity" through which a service supplier may supply pipeline transmission services in Croatia.

7.662. Russia also argues that, "pursuant to Article 14, a VIU is required to fully divest control (or is restricted from acquiring control), including majority ownership, of its TSO."<sup>1150</sup> Russia argues:

Article 14 restricts – to the point of nonexistence – the specific types of legal entity through which a foreign VIU may supply transmission services in Croatia. In other words, the service supplier is prohibited from providing transmission services through

<sup>1146</sup> Russia's first written submission, para. 183.

<sup>1147</sup> Article 14 is entitled "Separation of the transmission system and the transmission system operator". Article 14(3) stipulates that:

The independence of the transmission system operator shall be ensured in a manner that prevents the same person or persons to simultaneously perform one of the following activities:

1. directly or indirectly control the energy undertaking performing any of the activities of production, trade or supply of gas and the activity of the production of natural gas, and directly or indirectly control or execute other rights over the transmission system operator or the transmission system,
2. directly or indirectly control the transmission system operator or the transmission system, and directly or indirectly control or execute other rights over the energy undertaking performing any of the activities of production, trade, supply and the activity of the production of natural gas,
3. appoint members of the supervisory board, members of the management board or any other body which represents the energy undertaking in case of transmission system operator or the transmission system, and directly or indirectly control or execute other rights over the energy undertaking performing any of the activities of production, trade or supply and the activity of the production of natural gas and
4. act as a member of the supervisory board, the management board or any other body which represents the energy undertaking or performs any of the activities of production, trade or supply and the activity of the production of natural gas, transmission system operator or transmission system.

<sup>1148</sup> Article 14(4) stipulates as follows:

The prohibitions from paragraph 3 of this Article shall in particular apply to:

1. the use of voting rights,
2. the right to appoint members of the supervisory board, members of the management board or any other body representing the legal entity or
3. owning a majority stake.

<sup>1149</sup> Russia's first written submission, para. 182.

<sup>1150</sup> Russia's first written submission, para. 184.

any "form of commercial presence" in Croatia. Similarly, the TSO may not be controlled, including through majority ownership, by a foreign VIU.<sup>1151</sup>

7.663. As noted in paragraph 7.646, the concepts "specific types of legal entity" and "forms of commercial presence" are not synonymous and cannot be used interchangeably. We also recall our conclusion above, in paragraph 7.642, that Article XVI:2(e) covers measures which restrict or require the legal form a service supplier may take to supply a service under the applicable law of the Member concerned, but does not cover any measure which affects a legal entity, either by requiring a legal entity to do something or by restricting a legal entity from doing something. To us, the mere fact that an entity may (or may not) own or control another entity is not sufficient to make the former entity (or the latter) a "specific type of legal entity" within the meaning of Article XVI:2(e) because ownership or control *per se* does not speak to the legal form of either entity.<sup>1152</sup> As noted above, Article 14 of Croatia's Gas Market Act restricts the combination of activities, including services, that an entity can or cannot carry out simultaneously in Croatia<sup>1153</sup>, but it does not address the legal form of the entities concerned.<sup>1154</sup>

7.664. Moreover, if Russia is to be understood as arguing that, by preventing a VIU from supplying certain services, the measure at issue indirectly "restricts the specific type of legal entity" through which such service may be supplied, acceptance of Russia's argument would mean *in fine* that any measure affecting the supply of a service through commercial presence could fall under Article XVI:2(e). We explained above why, in our view, Russia's proposed interpretation of Article XVI:2(e) is incorrect. We recall that, as explained by a previous panel, "the scope of the market access obligation does not extend generally to 'all measures affecting the supply of services'", but applies "to six carefully defined categories of measures".<sup>1155</sup> We also refer to our conclusion above that Article XVI:2(e) covers measures which restrict or require the legal form a service supplier may take to supply a service under the applicable law of the Member concerned. Thus, while a measure restricting the types of service that a service supplier is allowed to supply in the host Member may "affect trade in services", it is not, for that reason, a measure falling within the "carefully defined" scope of Article XVI:2(e).

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<sup>1151</sup> Russia's first written submission, para. 184. See also Russia's second written submission, para. 107. Pursuant to Article 3(55) of Croatia's Gas Market Act, a VIU is "a gas undertaking or a group of undertakings under the direct or indirect control of the same person or persons and performing at least one of the following activities: transmission of gas, distribution of gas, storage of gas and operating LNG facility and one of the following activities: production, trade or supply of gas, or production of natural gas". (Croatia's Gas Market Act, (Exhibit RUS-45), Article 3(55)). We note that Russia does not further substantiate why, in its view, a VIU is a specific type of legal entity within the meaning of Article XVI:2(e). (Russia's first written submission, para. 183).

<sup>1152</sup> We note that Japan disagrees with Russia's view that "measures restricting the vertical structure of a service supplier (e.g., the structure of a group of companies, or the relationship of ownership or control – through capital or management – in a group of companies) in the pipeline sector would be prohibited under GATS Article XVI:2(e)". For Japan, Article XVI:2(e) does not address "the broader structure of the group of companies, or the assignment of ownership or control." (Japan's third-party submission, paras. 13-14; and response to Panel question No. 9, paras. 24-25. See also European Union's second written submission, para. 12).

<sup>1153</sup> We also recall that, as noted above in our assessment of Russia's claim against the unbundling measure in the Directive, it is not entirely accurate to conclude that the OU model prevents a VIU from supplying its pipeline transport services to the EU market through a commercial presence *per se*. Rather, we find it more accurate to conclude that the OU model imposes the legal necessity for VIUs to make a choice between continuing to perform any of the functions of production or supply, on the one hand, or continuing to supply pipeline transport services through commercial presence, on the other hand. However, this choice relates to the combination of services that an entity may or may not supply simultaneously and, for the reasons explained above, this kind of measure does not fall within the scope of Article XVI:2(e) of the GATS.

<sup>1154</sup> This view is also shared by Japan:

[U]nbundling requirements by Croatia, Hungary and Lithuania in this case concern the combination of services (e.g., supply and transmission, or operating and owning) that a group of companies having a certain vertical structure can provide, regardless of the corporate form of the individual companies themselves. In other words, the unbundling measures do not restrict the corporate structure of the service supplier. In fact, a service supplier may belong to a VIU as long as the other companies in the same VIU do not engage in the restricted combination of services. (Japan's third-party submission, para. 15; and response to Panel question No. 9, para. 26).

<sup>1155</sup> Panel Report, *China – Electronic Payment Services*, para. 7.652.

7.665. On the basis of the foregoing, we find that Russia has not demonstrated that the OU model implemented in Croatia's national law restricts or requires the "specific types of legal entity" through which a service supplier may supply pipeline transport services in Croatia.

7.666. Concerning the ISO model, Russia challenges Articles 15 to 17 of Croatia's Gas Market Act. Russia's arguments with respect to how these different provisions violate Article XVI:2(e) are succinct. Russia refers to the definition of the "independent system operator" contained in the Act on the Regulation of Energy Activities<sup>1156</sup> and argues that, pursuant to that definition, the VIU must "relinquish control" of the TSO to the ISO. According to Russia, as per Article 15<sup>1157</sup>, "the VIU is required to arrange a separate legal entity to supply the services through commercial presence in the form of an ISO."<sup>1158</sup>

7.667. We recall that, under the ISO model, the TSO, i.e. the pipeline transport service supplier, is required to undergo ownership unbundling, while the VIU can continue to own the transmission system.

7.668. Pursuant to Article 15(3)1 of Croatia's Gas Market Act, the ISO must therefore "meet[] all the requirements of article 14(3)" of the same Act. As observed above, the mere requirement that a legal entity be "established as an independent company" does not speak to the legal form of that legal entity.<sup>1159</sup> By requiring the VIU to relinquish control of the TSO, this provision secures the separation between two entities, namely the VIU – which owns the transmission system – and the ISO which operates that transmission system, i.e. which supplies pipeline transport services. As observed above with respect to the OU model in Croatia's Gas Market act, a TSO can take any legal form as long as it is organized independently from other activities in the gas sector; hence, this provision addresses the combination of activities, including services, that an entity can or cannot carry out simultaneously. Moreover, the mere fact that an entity may (or may not) own or control another entity is not sufficient to make the former entity (or the latter) a "specific type of legal entity" within the meaning of Article XVI:2(e) because ownership or control *per se* does not speak to the legal form of either entity. Thus, Article 15 of Croatia's Gas Market Act is not a measure restricting or requiring the "specific types of legal entity" through which a service supplier may supply a service within the meaning of Article XVI:2(e).

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<sup>1156</sup> Pursuant to Article 3(7) of the Act on the Regulation of Energy Activities, an ISO is "an independent operator of a transmission/transport system, established as an independent company that carries out the activities of a transmission/transport system operator, whereas the facilities of a transmission/transport network remain in the ownership of a vertically integrated undertaking." (Croatia's Act on the Regulation of Energy Activities of 25 October 2012, (Croatia's Act on the Regulation of Energy Activities), (Exhibit RUS-46), Article 3(7)).

<sup>1157</sup> Article 15, entitled "Requirements for designating an independent system operator", provides as follows:

- (1) Notwithstanding the provisions of Article 14 of this Act, the Agency may, at the proposal of the owner of the transmission system or the Agency, designate an independent system operator.
- (2) The certification of the independent system operator shall be performed by the Agency under the conditions and in the manner prescribed by this Act.
- (3) An independent system operator may be designated only if the following conditions are met:
  1. the proposed operator meets all the requirements of article 14(3) of this Act,
  2. the proposed operator has the financial, material and technical capacity and staff necessary for the performance of its duties,
  3. the proposed operator has undertaken to harmonize its system with the ten-year development plan of the transmission system monitored by the Agency,
  4. the proposed operator has proven its ability to meet obligations as set out in Regulation (EC) 715/2009 and the ability to establish cooperation with transport system operators at the regional and European level, and
  5. the owner of the transmission system has demonstrated its ability to meet the obligations laid down in Article 16(2) of this Act. To this end, all draft agreements with the proposed operator or another competent entity shall be delivered to the Agency.

<sup>1158</sup> Russia's first written submission, para. 186.

<sup>1159</sup> In response to a question by the Panel, Russia, argues that, based on its ordinary meaning, a "company" "easily satisfies the definition of 'legal entity' within the meaning of the GATS". (Russia's response to Panel question No. 177(a), para. 75). The European Union considers that the ordinary meaning of that word indicates that a company "takes the form of a particular 'type of legal entity', but is not a specific type of legal entity itself, in the sense of Article XVI:2(e) of the GATS." (European Union's response to Panel question No. 166(a), paras. 42-44). In our view, referring to a "company" as a "legal entity" does not necessarily mean that a "company" is a "specific type of legal entity" within the meaning of Article XVI:2(e) of the GATS.



7.669. We note that Russia does not make any specific argument with respect to Article 16 of Croatia's Gas Market Act and we shall therefore refrain from examining this provision.

7.670. Russia further alleges that Article 17 of Croatia's Gas Market Act contains "additional restrictions on the form of the legal entity that may provide transmission services".<sup>1160</sup> Russia refers to Article 17(1) and (2), but does not substantiate what these "additional restrictions" allegedly entail for the service supplier. We note that Article 17 of Croatia's Gas Market Act lays out the rules for the independence of the owner of the transmission system. To us, and as discussed in more detail in paragraphs 7.460 to 7.466 above, the owner of the transmission system is not a service supplier within the meaning of the GATS. Hence, Russia has not made a *prima facie* case that Article 17 restricts or requires "specific types of legal entity ... through which a service supplier may supply a service."

7.671. On the basis of the foregoing, we find that Russia has not demonstrated that the ISO model implemented in Croatia's national law restricts or requires the "specific types of legal entity" through which a service supplier may supply pipeline transport services in Croatia.

7.672. With respect to the ITO model, Russia focuses on Article 3(6) of Croatia's Act on the Regulation of Energy Activities and on Article 18 of Croatia's Gas Market Act.<sup>1161</sup>

7.673. Russia points to the definition of an ITO contained in Article 3(6) of Croatia's Act on the Regulation of Energy Activities and argues that the reference to "an independent company separate from" the VIU in that definition means that the ITO is "possibly organized in the form of a subsidiary."<sup>1162</sup>

7.674. The European Union responds that Article 3(6) does not entail a requirement to use a specific type of legal entity, but only requires that the TSO be "independent" and thus "separate from a vertically integrated undertaking."<sup>1163</sup>

7.675. To us, the requirement that the ITO be "established as an independent transmission/transport operator from a vertically integrated undertaking" does not in and of itself restrict or require the legal form that a pipeline transport service supplier may take to supply services in Croatia. The fact that the ITO may be owned by the VIU does not modify our conclusion, since, as noted above, ownership or control *per se* does not speak to the legal form of either entity.

7.676. We note that, in response to a question by the Panel, both parties consider that a "subsidiary" is a "specific type of legal entity" within the meaning of Article XVI:2(e).<sup>1164</sup> The parties provide different definitions of the term "subsidiary". While Russia focuses on "control", the European Union puts the emphasis on the fact that the subsidiary has a "separate legal personality" from the parent company. However, we are of the view that the mere fact that an entity is controlled by another entity or has a separate legal personality, does not speak to the legal form of either entity. Hence, to the extent that these characteristics would define a

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<sup>1160</sup> Russia's first written submission, fn 248. Pursuant to Article 17(1), "the owner of the transmission system that is a part of the structure of the vertically integrated undertaking shall be independent at least in terms of its legal form, organization and decision-making capabilities and shall be independent of other activities not related to the transmission of gas". Pursuant to Article 17(2), "[t]he independence of the owner of the transmission system referred to in paragraph 1 of this Article shall be secured as follows: 1. persons responsible for the management of the transmission system owner may not participate in structures of the vertically integrated entity that are, directly or indirectly, responsible for the daily operation of gas production, gas distribution and gas supply".

<sup>1161</sup> Russia's first written submission, paras. 187-188.

<sup>1162</sup> Russia's first written submission, para. 188 (referring to Article 3(6) of Croatia's Act on the Regulation of Energy Activities, (Exhibit RUS-46)). Pursuant to this provision, an ITO is "an independent transmission/transport operator, established as an independent company separate from a vertically integrated undertaking, which may be owned by that undertaking, but has to be equipped with all financial, physical and human resources necessary for carrying out its activity."

<sup>1163</sup> European Union's second written submission, para. 16.

<sup>1164</sup> According to Russia, a "subsidiary" is defined as "[a]n enterprise controlled by another (called the parent) through the ownership of greater than 50 per cent of its voting stock". (Russia's response to Panel question No. 166(b), para. 76). For the European Union, a subsidiary is "an entity for which the law determines that it is legally distinct, and thus has a separate legal personality, from the parent entity (e.g. a holding)". (European Union's response to Panel question No. 166(b), para. 45).

"subsidiary", they would not be sufficient in and of themselves to find that a subsidiary is a "specific type of legal entity" within the meaning of Article XVI:2(e).<sup>1165</sup> Moreover, merely alleging that the ITO is "possibly organized in the form of a subsidiary" is not enough in and of itself to establish that the ITO is required to take a particular legal form.<sup>1166</sup> Therefore, Russia's demonstration does not reach the level required for us to conclude that Article 2(6) of Croatia's Act on the Regulation of Energy Activities "restricts or requires a specific type of legal entity" within the meaning of Article XVI:2(e).<sup>1167</sup>

7.677. Russia further takes issue with Article 18 of Croatia's Gas Market Act ("Requirements for designating an independent transmission operator – assets, equipment, staff and identity"), in particular Articles 18(4) and (6), which, in Russia's view, restrict the specific types of legal entity or forms of commercial presence through which the VIU may supply transmission services in Croatia, contrary to the requirements of Article XVI:2(e).<sup>1168</sup> The European Union responds that this is not a measure within the scope of Article XVI:2(e) because the essence of this requirement is that the ITO be "clearly separated" from the parent company and any type of legal entity is permitted.<sup>1169</sup>

7.678. Russia quotes Article 18(4)<sup>1170</sup>, but provides limited substantiation for its proposition that this provision restricts or requires "a specific type of legal entity" within the meaning of Article XVI:2(e) of the GATS. We understand that Article 18(4) prevents production or supply subsidiaries in the VIU from having "ownership interest" in the TSO. To our mind, this provision does not speak to the legal form of the TSO.

7.679. In addition, merely requiring an entity to have a "special corporate entity, communication, brand name and business premises clearly separating it from the parent company" (Article 18(6)<sup>1171</sup>) does not, in our view, restrict or require the legal form a TSO may take to supply

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<sup>1165</sup> In fact, the European Union itself considers that the mere requirement that a service supplier (*in casu* an ITO) be "separate" from the parent undertaking is not a measure falling within the scope of Article XVI:2(e). (See European Union's second written submission, para. 15). Hence, we have difficulties understanding the European Union's position that a "subsidiary" is a "specific type of legal entity" within the meaning of Article XVI:2(e) on the ground that a subsidiary has a "separate" legal personality from the parent entity.

<sup>1166</sup> Russia's first written submission, para. 188. We observe that Russia does not point to any provision in Croatia's Gas Market Act which would refer to the ITO as a "subsidiary".

<sup>1167</sup> We also note that, in response to a question by Russia on the existence, nature and extent of the financial benefits accruing to a VIU under the ISO and ITO models, the European Union states that "[t]he ITO is a subsidiary of the VIU". (European Union's response to Russia's question No. 15, para. 8). We understand that this statement by the European Union, made in the context of a discussion concerning the financial benefits accruing to the VIU under the ISO and ITO models, relates to the fact that the VIU owns the ITO, but does not address the legal form of the ITO. This being said, we note that, on the one hand, the European Union asserts that "the legal form that the entity providing transmission pipeline transport services can take is not disciplined by the Directive under any of the unbundling models" and that "any type of legal entity is permitted" under the ITO provisions of Croatia's Gas Market Act and, on the other hand, the European Union contends that "[t]he ITO is a subsidiary" and that a "subsidiary" is a type of legal entity within the meaning of Article XVI:2(e). (European Union's first written submission, para. 110; second written submission, para. 15; response to Russia's question No. 15, para. 8; and response to Panel question No. 166(b), para. 45). In any event, these statements by the European Union do not cause us to question our view that, pursuant to the legal test we have developed, Russia has not demonstrated that the provisions of Croatia's Gas Market Act speak to the legal form of the ITO, hence, restrict or require a "specific type of legal entity" within the meaning of Article XVI:2(e).

<sup>1168</sup> Russia's first written submission, para. 188.

<sup>1169</sup> European Union's second written submission, para. 15.

<sup>1170</sup> Article 18(4) of Croatia's Gas Market Act provides as follows:

(4) The subsidiaries within the structure of a vertically integrated undertaking performing the activities of gas production and the production of natural gas or gas supply shall not, directly or indirectly, have ownership interests in the independent transmission operator.

The independent transmission operator shall not, directly or indirectly, have ownership interests in a subsidiary within the structure of the vertically integrated undertaking performing activities of gas production and natural gas production or gas supply, not shall it have the right to receive dividends or other financial benefit from this subsidiary. (Croatia's Gas Market Act, (Exhibit RUS-45), Article 18(4)).

<sup>1171</sup> Croatia's Gas Market Act, (Exhibit RUS-45), Article 18(6). This provision stipulates as follows: The independent transmission operator shall have a special corporate identity, communication, brand name and business premises clearly separating it from the parent company in the system of the vertically integrated undertaking and not misleading as to the identity of the vertically

pipeline transport services in Croatia. As indicated in the second sentence of Article 18(6), this provision enforces a separation requirement between two entities so as to, *in fine*, "clearly distinguish the activities or services" of the ITO from the activities or services of other parts of the VIU. Article 18(6) does not speak to the legal form of the ITO.

7.680. On the basis of the above, we find that Russia has not demonstrated that the ITO model implemented in Croatia's national law restricts or requires the "specific types of legal entity" through which a service supplier may supply pipeline transport services in Croatia.

7.681. In light of the foregoing analysis, we conclude that Russia has not demonstrated that the unbundling measure implemented in Croatia's national law is inconsistent with Article XVI:2(e) of the GATS.<sup>1172</sup>

### Hungary

7.682. Hungary has implemented the ISO and ITO models, in addition to the OU model.

7.683. We must observe at the outset that Russia's arguments in support of its claim that Hungary's unbundling measure is incompatible with Article XVI:2(e) of the GATS are succinct. Russia refers to the provisions in Hungary's Gas Act implementing the three unbundling models, which, in its view, are "closely modelled after", "similar to" or "closely resemble" the corresponding provisions in the Directive, and concludes that "[a]s in the case of Croatia, the provisions of Hungary's law setting forth the respective unbundling models ... each restricts or requires specific types of legal entity" in a manner inconsistent with Article XVI:2(e).<sup>1173</sup> Russia does not really substantiate how the provisions in Hungary's Gas Act allegedly breach Article XVI:2(e).<sup>1174</sup> We must recall that, as explained by the Appellate Body, it is not sufficient for a complaining party to "merely to file an entire piece of legislation and expect a panel to discover, on its own, what relevance the various provisions may or may not have for a party's legal position."<sup>1175</sup>

7.684. Concerning the OU model, Russia asserts that Section 121/H of Hungary's Gas Act "prohibits a VIU from providing services through any type of legal entity or form of commercial presence in Hungary"<sup>1176</sup>, but does not further substantiate its legal position. To the extent that Russia's claim with respect to Hungary's implementation of the OU model appears to be based on the same proposition as Russia's claim with respect to the OU model in Croatia's Gas Market Act,

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integrated undertaking or any parts thereof. It may only use signs, designs, names, letters, numbers, shapes and images that clearly distinguish the activities or services of the independent transmission operator from those performed by the vertically integrated undertaking.

<sup>1172</sup> In light of the foregoing, we do not find it necessary to address Russia's argument that, in addition to violating Article XVI:2(e), "the provisions of Croatia's law regarding each unbundling model ... do just the opposite of what the horizontal limitation requires". (Russia's first written submission, para. 191, (referring to Schedule of Specific Commitments of Croatia, GATS/SC/130 (22 December 2000), (Exhibits EU-16/RUS-37), p. 2). We also note that Russia does not point to any provision in Croatia's Gas Market Act which would refer to TSOs as "branch offices" and does not explain whether, pursuant to Croatian law, TSOs should be viewed as "branch offices".

<sup>1173</sup> Russia's first written submission, paras. 192 and 194. See also Russia's second written submission, para. 107.

<sup>1174</sup> Russia also refers to two TSO supplying transmission services in Hungary, namely FGSZ Földgázszállító Zártkörűen Működő Részvénytársaság (FGSZ) and MOL Magyar Olaj-és Gázipari Nyrt (MOL). (See Russia's first written submission, para. 193) Beyond asserting that FGSZ and MOL are a "type of legal entity" and a "service supplier" (Russia's first written submission, para. 194). Russia does not further explain the relevance of these two examples for its claim that the unbundling measure in Hungary's national implementing law is incompatible with Article XVI:2(e) of the GATS.

<sup>1175</sup> Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 191.

<sup>1176</sup> Russia's first written submission, para. 194 (referring to Hungary's Gas Act, (Exhibits EU-155/RUS-47)). We note that Section 121/H, while using a different wording, implements essentially the same requirement as Article 14 of Croatia's Gas Market Act discussed above. In particular, paragraph (1)(b) of Section 121/H of Hungary's Gas act states as follows:

the same person or persons are entitled neither: *ba*) directly or indirectly to exercise control over a company performing any of the functions of production or supply, and directly or indirectly to exercise control or exercise any right over a transmission system operator or over a transmission system, nor *bb*) directly or indirectly to exercise control over a transmission system operator or over a transmission system, and directly or indirectly to exercise control or exercise any right over a company performing any of the functions of production or supply of natural gas. Hungary's Gas Act, (Exhibits EU-155/RUS-47), Section 121/H).

we refer to our discussion above, in particular in paragraphs 7.663 and 7.664, which, in our view is similarly relevant for the OU model in Hungary's Gas Act. This also leads us to conclude that Russia has not demonstrated that the OU model implemented in Hungary's Gas Act is inconsistent with Article XVI:2(e) of the GATS.

7.685. Russia claims that the ISO model in Section 121/I of Hungary's Gas Act "requires that the services be supplied through an independent legal entity in the form of an ISO separate from the VIU, and also restrict (or requires) the specific types of legal entity permitted".<sup>1177</sup> Russia does not further substantiate how the text of Section 121/I supports its legal position that the ISO model is inconsistent with Article XVI:2(e).

7.686. We recall that, under the ISO model, the TSO, i.e. the pipeline transport service supplier, is required to undergo ownership unbundling, while the VIU can continue to own the transmission system. Accordingly, pursuant to Section 121/I(1)a) of Hungary's Gas Act, the ISO must "meet the requirements set out in Paragraphs b), c) and d) of Subsection (1) of Section 121/H."<sup>1178</sup> We therefore refer to our finding with respect to Section 121/H of Hungary's Gas Act above, and also recall our discussion and conclusion above concerning the ISO provisions in Croatia's Gas Market Act.

7.687. To us, the requirement, in Section 121/I(1)a) of Hungary's Gas Act, that the ISO be an "independent legal entity... separate from the VIU" does not in and of itself speak to the legal form of the ISO. Thus, Russia has not demonstrated that the ISO model in Hungary's Gas Act is inconsistent with Article XVI:2(e) of the GATS.

7.688. With respect to the ITO model, Russia argues that "the ITO provisions in Sections 121/B-121/G impose unwarranted restrictions on the types of legal entity by requiring that a VIU supply services through a separate subsidiary or other form of commercial presence in the form of an ITO."<sup>1179</sup> Russia does not further substantiate how the text of Sections 121/B-121/G supports its legal position. Referring in particular to our observations in paragraph 7.676 above, we consider that an allegation that services are required to be supplied "through a separate subsidiary or other form of commercial presence" is not sufficient in and of itself to show that a measure restricts or requires a specific type of legal entity within the meaning of Article XVI:2(e). In response to a question by the Panel<sup>1180</sup>, Russia further explains that "[t]here is no provision in Hungary's Gas Act that expressly requires a VIU, when adopting the ITO model, to supply its pipeline transport services through a separate 'subsidiary'."<sup>1181</sup> Hence, Russia's response to our question appears to contradict Russia's assertions in its first written submission.<sup>1182</sup>

7.689. Furthermore, in response to the same question by the Panel, Russia submits that it "should also have identified Section 117(1) of the Gas Act"<sup>1183</sup> which, in Russia's view, "expressly restricts the specific types of legal entity through which a service supplier may supply its pipeline transport services in the form of an ITO in Hungary."<sup>1184</sup>

7.690. We have difficulties following Russia's allegations under this claim. Section 117(1), for which Russia now appears to make an allegation of incompatibility, was identified in response to a question by the Panel concerning other provisions of Hungary's Gas Act. We also note that this

<sup>1177</sup> Russia's first written submission, para. 194, (referring to Hungary's Gas Act, (Exhibits EU-155/RUS-47)).

<sup>1178</sup> Hungary's Gas Act, (Exhibits EU-155/RUS-47), Section 121/I.

<sup>1179</sup> Russia's first written submission, para. 194, (referring to Hungary's Gas Act, (Exhibits EU-155/RUS-47)). We note, like Russia, that the term "Independent Transmission Operator" or "ITO" does not appear in the Gas Act, which uses instead the terms the "transmission system operator" or "transmission system operator member," including in the ITO provisions. (See Russia's response to Panel question No. 165, para. 68). We do not consider, however, that this different wording has a material impact on our assessment of Russia's claim and the parties do not argue otherwise.

<sup>1180</sup> Panel question No. 165 to Russia, (referring to Russia's first written submission, para. 194).

<sup>1181</sup> Russia's response to Panel question No. 165, para. 68.

<sup>1182</sup> Russia's first written submission, para. 194; and second written submission, para. 107.

<sup>1183</sup> Russia's response to Panel question No. 165, para. 69, (referring to Hungary's Gas Act, (Exhibits EU-155/RUS-47), pp. 37-38). Section 117(1) stipulates in relevant parts: "The transmission system operator shall function as a business association operating in the form of a limited company". This provision is contained in Chapter VI ("Authorization Procedures") of Hungary's Gas Act, (Exhibits EU-155/RUS-47).

<sup>1184</sup> Russia's response to Panel question No. 165, para. 73, (referring to Hungary's Gas Act, (Exhibits EU-155/RUS-47)), pp. 37-38.

new allegation comes at a late stage in these proceedings.<sup>1185</sup> Furthermore, Section 117(1) is contained in Chapter VI ("Authorization Procedures") of Hungary's Gas Act and Russia does not explain how this Section implements the ITO model (or any other model). Finally, Russia also asserts that Section 117(1) is "consistent with" Hungary's horizontal market access limitation inscribed in its Schedule.<sup>1186</sup> We would agree with the European Union that, by arguing that Section 117(1) is "consistent" with that horizontal limitation, Russia seems to acknowledge that this provision is not inconsistent with Article XVI:2(e).<sup>1187</sup>

7.691. In light of the foregoing, we find that Russia has not demonstrated that the ITO model in Hungary's Gas Act is inconsistent with Article XVI:2(e) of the GATS.

7.692. We therefore conclude that Russia has not demonstrated that the unbundling measure implemented in Hungary's national law is inconsistent with Article XVI:2(e) of the GATS.<sup>1188</sup>

### *Lithuania*

7.693. We recall that Lithuania has implemented only the OU model.

7.694. Russia challenges Articles 40 to 43 in Chapter 8 ("Unbundling of activities and accounts") of the Law on Natural Gas<sup>1189</sup> implementing the OU model. Russia refers to Article 40(1) ("Activities subject to unbundling") which provides for the obligation to separate the activities of gas production and supply from transmission<sup>1190</sup>, Article 41 ("Unauthorized control"), in particular Article 41(1)<sup>1191</sup> and 41(4).<sup>1192</sup> Russia also takes issue with an alleged "additional requirement not found in the Directive" and contained in Article 41(2) of the Law on Natural Gas.<sup>1193</sup> According to Russia, this provision "expressly prohibits any third-country undertaking that supplies natural gas

<sup>1185</sup> Russia made this allegation in response to a question by the Panel after the second substantive meeting.

<sup>1186</sup> Russia's response to Panel question No. 165, para. 71, (referring to Hungary's horizontal limitation stipulating in relevant parts that "[c]ommercial presence should take the form of limited liability company, joint-stock company or representative office ...". (See Schedule of Specific Commitments of Hungary, GATS/SC/40 (15 April 1994), (Exhibits EU-17/RUS- 36), p. 1)).

<sup>1187</sup> European Union's comments on Russia's response to Panel question No. 165, para. 30.

<sup>1188</sup> Consequently, we do not consider it necessary to assess the relevance for that measure of the market access limitation inscribed in the horizontal part of Hungary's Schedule. (See, above para. 7.360).

<sup>1189</sup> Lithuania's Law on Natural Gas, (Exhibit RUS-136rev).

<sup>1190</sup> Pursuant to Article 40(1) of the Lithuania's Law on Natural Gas, (Exhibit RUS-136rev): "The activities of natural gas transmission carried out in the Republic of Lithuania must be separated from the activities of natural gas production and supply by separating the assets of a transmission system and/or a transmission system operator from natural gas undertakings engaged in the activities of production and/or supply."

<sup>1191</sup> Pursuant to Article 41(1) of Lithuania's Law on Natural Gas, (Exhibit RUS-136rev):

1. The same person or persons shall not be entitled:

1) directly or indirectly to exercise control over a production or supply undertaking and, at the same time, exercise direct or indirect control or any control or management right over a transmission system operator or transmission system;

2) directly or indirectly to exercise control over a transmission system operator or transmission system and, at the same time, exercise direct or indirect control or any control or management right over a production or supply undertaking;

3) to appoint members of the supervisory board or the board of a transmission system operator or bodies representing an undertaking and, at the same time, exercise direct or indirect control or any control or management right over a production or supply undertaking.

<sup>1192</sup> Pursuant to Article 41(4) of the Law on Natural Gas (which Russia erroneously refers to as Article 41(3) in para. 199 of its first written submission):

The rights referred to in paragraphs 1 and 2 of this Article shall include, in particular:

1) the power to exercise voting rights;

2) the power to appoint members of supervisory bodies, administrative bodies and other bodies legally representing the undertaking;

3) the management and holding of a majority share.

<sup>1193</sup> Russia's first written submission, para. 198. Article 41(2) of the Law on Natural Gas reads as follows: "A undertaking performing any of the functions of production or supply in any other country whose transmission system is connected to the natural gas transmission system of the Republic of Lithuania shall not be entitled directly or indirectly to exercise control or exercise any right over a transmission system operator".

to Lithuania via a connection between the two countries' transmission systems (i.e. via pipelines) from any possibility of exercising control or any right over the TSO in Lithuania."<sup>1194</sup>

7.695. The European Union submits that Article 41(2) is not an additional requirement but merely specifies what is already the case under the Directive, namely that the prohibition established under Article 41(1) is also applicable in cases where the undertakings perform the respective production or supply activities in any other countries which are interconnected with Lithuania.<sup>1195</sup>

7.696. Turning to this last issue first, we consider that, as Russia's challenge under Article XVI:2(e) is directed against Lithuania's Law on Natural Gas, the question whether Article 41(2) is "an additional requirement" not contained in the Directive is not pertinent. Our task is to assess the compatibility of Lithuania's Law with Article XVI:2(e), not the compatibility of that Law with the Directive.

7.697. According to Russia, "[i]n terms of Article XVI:2(e), Lithuanian law restricts – to the point of nonexistence – the specific types of legal entity through which a foreign VIU may supply transmission services in Lithuania."<sup>1196</sup> While Russia provides limited substantiation for its legal position, we understand nonetheless that the gist of Russia's arguments concerning the OU model implemented in Lithuania's Law on Natural Gas is similar to that underlying its claims against the OU model implemented by Croatia and Hungary.

7.698. We observe that Article 40 of Lithuania's Law on Natural Gas calls for "separating the assets" of a TSO from undertakings engaged in production and/or supply. Article 41(1) provides that the "same person or persons" may not exercise control over a production or supply undertaking and, at the same time, exercise control or management rights over a TSO (and *vice-versa*). Article 41(2) contains the same type of requirement as Article 41(1), with the added clarification that prohibition for a production or supply undertaking to "directly or indirectly exercise control or exercise any right" over a TSO shall also apply in cases where such undertaking is situated in "any other country whose transmission system" is connected with Lithuania's natural gas transmission system. Article 41(4) further specifies the "rights" that "the same person or persons" shall not be entitled to exercise pursuant to Articles 41(1) and 41(2).

7.699. To us, the OU model implemented in Lithuania's national law calls for the same analysis as that made with respect to the OU model implemented in the national laws of Croatia and Hungary and we therefore refer to our discussion above, in particular paragraphs 7.663 and 7.664. This also leads us to conclude that Russia has not demonstrated that the OU model implemented in Lithuania's Law on Natural Gas is inconsistent with Article XVI:2(e) of the GATS.

7.700. Russia further refers to the Law on Implementation<sup>1197</sup>, in particular the two procedures available for complying with the unbundling requirement, namely the "reform of control" procedure (Article 3) and the "reorganisation" procedure (Article 4).<sup>1198</sup> Russia argues that Article 3(1) "appears to require that the VIU divest ownership of its TSO".<sup>1199</sup> We fail to see, and Russia does

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<sup>1194</sup> Russia's first written submission, para. 198.

<sup>1195</sup> European Union's first written submission, para. 114; and second written submission, paras. 17-18.

<sup>1196</sup> Russia's first written submission, para. 203; and second written submission, para. 107.

<sup>1197</sup> Lithuania's Law on Implementation, (Exhibit RUS-22).

<sup>1198</sup> Russia does not develop specific arguments with respect to Article 4 of Lithuania's Law on Implementation.

<sup>1199</sup> Russia's first written submission, para. 200. Article 3(1) of Lithuania's Law on Implementation stipulates as follows:

In order to achieve compliance with the requirements of Chapter Eight "Unbundling of Activities and Accounts" of the Law on Natural Gas, non-compliant natural Gas undertakings may see compliance with the requirements of Chapter Eight "Unbundling of Activities and Accounts" of the Law on Natural Gas by reforming the control of an undertaking on their own initiative. Reforming of control of the natural gas undertaking shall be effected through transactions (transfer of assets or shares, assignment of rights, transfer of shareholders' rights, shareholders agreement, increasing or decreasing of the authorised capital or any other) made in accordance with the procedure established in paragraph 2 of this Article. (Lithuania's Law on Implementation (Exhibit RUS-22), Article 3(1))

not further substantiate, how and why an alleged requirement to divest restricts or requires "specific types of legal entity" within the meaning of Article XVI:2(e).<sup>1200</sup>

7.701. In light of the foregoing, we conclude that Russia has not demonstrated that the unbundling measure implemented in Lithuania's national law is inconsistent with Article XVI:2(e) of the GATS.

#### 7.5.2.4 Russia's claims under Article XVI:2(f) of the GATS

##### 7.5.2.4.1 Introduction

7.702. Russia submits that the national implementing laws of Croatia, Hungary and Lithuania set forth formal limitations on the participation of foreign capital relating to TSOs within the meaning of Article XVI:2(f), in contradiction with the mode 3 market access commitments undertaken by these three Members under sector 11.G in their respective Schedules.<sup>1201</sup>

7.703. The text and legal standard to establish a violation under any of the six subparagraphs contained in Article XVI:2 of the GATS are set out in paragraphs 7.232 and 7.233 above. Pursuant to that legal standard, in order to establish a *prima facie* case of violation of Article XVI:2(f) of the GATS, Russia is required to demonstrate that:

- a. Croatia, Hungary and Lithuania have undertaken market access commitments in their respective GATS Schedules with respect to the sector(s) and mode(s) identified by Russia; and that
- b. The unbundling measure in the national implementing laws of Croatia, Hungary and Lithuania constitutes an impermissible limitation within the meaning of Article XVI:2(f).

7.704. We concluded, in paragraph 7.360 above, that Croatia and Lithuania have undertaken a full market access commitment for mode 3 under sector 11.G, "Pipeline Transport [Services]", and that Hungary has undertaken not to maintain any limitation pursuant to Article XVI:2(f) of the GATS for mode 3 in that same sector. Accordingly, we turn now to the second element of the legal standard, namely whether Russia has demonstrated that the unbundling measure in the national implementing laws of Croatia, Hungary and Lithuania constitutes an impermissible limitation on the participation of foreign capital within the meaning of Article XVI:2(f) of the GATS.

##### 7.5.2.4.2 Analysis by the Panel

7.705. Russia claims that the unbundling rule in each of the implementing laws of Croatia, Hungary and Lithuania expressly prohibits a supply undertaking from owning a majority share in the TSO or transmission system. According to Russia, a limitation on the ability of investors to hold majority ownership is the same as a "maximum percentage of capital that can be held".<sup>1202</sup> Russia also submits that Article XVI:2(f) does not forbid measures containing majority ownership prohibitions that apply only to foreign capital investment, but forbids any and all measures

<sup>1200</sup> In relation to its allegation concerning Article 3 of Lithuania's Law on Implementation, Russia also explains that Gazprom, which used to own 37.1 % of the shares in the VIU Lietuvos dujos, formerly responsible for supplying the Lithuanian market with natural gas, sold its share in the new TSO Amber Grid to the Lithuanian Ministry of Energy following enactment of the unbundling measure in Lithuania. According to Russia, while a VIU may choose between two OU methods set out in Articles 3 and 4 of the Law on Implementation, in reality, the "example demonstrates" that Gazprom, was required "to fully divest" its shares. (See Russia's first written submission, paras. 201-203). The European Union considers that Russia engages in speculations in respect of Lietuvos' decision when seeking to comply with the unbundling requirement in Lithuania's law. In particular, according to the European Union, there were no circumstances or conditions which may have forced Lietuvos' shareholders to sell their shares in Lietuvos dujos. (See European Union's first written submission, paras. 115-118). In our view, these facts are not relevant for the purpose of assessing Russia's claim against the unbundling measure implemented in Lithuania's national law under Article XVI:2(e).

<sup>1201</sup> Russia's first written submission, para. 224; and second written submission, para. 113.

<sup>1202</sup> Russia's first written submission, paras. 221 and 223; opening statement at the first meeting of the Panel, para. 13; second written submission, paras. 112-113; and opening statement at the second meeting of the Panel, para. 30.

imposing majority ownership prohibitions on foreign capital investment, including measures that also impose majority ownership prohibitions on domestic investment.<sup>1203</sup>

7.706. The European Union argues that measures prohibited under Article XVI:2(f) of the GATS are essentially of a quantitative nature and must impose a quantitative maximum ceiling for foreign investment in order to fall within the scope of that provision.<sup>1204</sup> According to the European Union, prohibited limitations must specifically target foreign investment, which means that measures which apply without distinction to domestic and foreign investment are not covered by sub-paragraph (f).<sup>1205</sup> The European Union submits that the Croatian, Hungarian and Lithuanian measures challenged by Russia are not covered by Article XVI:2(f) because they apply without distinction to domestic and foreign investment.<sup>1206</sup>

7.707. We recall that Article XVI:2(f) of the GATS applies to "limitations on the participation of foreign capital in terms of maximum percentage limit on foreign share-holding or the total value of individual or aggregate foreign investment." To our mind, a measure must fulfil two conditions in order to constitute an impermissible limitation within the meaning of Article XVI:2(f) of the GATS. First, the measure must be a limitation on the "participation of foreign capital." Second, and as observed by a previous panel, the measure must take one of the two forms provided for in that provision, namely (i) a maximum percentage of capital that can be held by foreign investors; or (ii) a total value of foreign investment, either by an individual investor or foreign investors as a whole.<sup>1207</sup>

7.708. We turn to the first question, namely whether the measures at issue amount to a limitation on the "participation of foreign capital" within the meaning of Article XVI:2(f) of the GATS. If we find that the measures at issue meet this first condition, we shall then examine whether those measures take one of the two forms provided for in that provision.

#### **7.5.2.4.2.1 Whether the measures at issue limit "the participation of foreign capital"**

7.709. The European Union argues Article XVI:2(f) is specifically concerned with limitations tied to the fact that the capital originates outside the Member adopting the limitation.<sup>1208</sup> In contrast, Russia posits that Article XVI:2(f) forbids any and all measures that impose majority ownership prohibitions on foreign capital, and considers the fact that the measure also forbids domestic majority ownership irrelevant.<sup>1209</sup>

7.710. The issue before the Panel is therefore whether Article XVI:2(f) prohibits limitations on the participation of foreign capital due to the foreign origin of the capital or whether this provision encompasses any limitation on capital participation, regardless of the origin (domestic or foreign) of the capital. This is a novel issue for which no previous panel or Appellate Body guidance exists.

7.711. We turn to the text of Article XVI:2(f) and observe that the "capital", the participation of which is subject to a limitation is preceded by the word "foreign". Moreover, the two forms which a measure falling under this provision may take are also qualified by the word "foreign" ("foreign share-holding" and "foreign investment"). Consistent with the principle of effective treaty interpretation, the word "foreign", which is used three times in Article XVI:2(f), must be given meaning and effect.<sup>1210</sup>

<sup>1203</sup> Russia's second written submission, para. 116.

<sup>1204</sup> European Union's first written submission, para. 143.

<sup>1205</sup> European Union's first written submission, para. 144; and second written submission, paras. 26-27. This view is shared by Japan which submitted that the use of the term "foreign" to qualify "capital" clearly indicates that this provision does not cover all limitations on capital participation, but specifically concerns limitations tied to the origin of the capital and, more particularly, to the fact that the capital originates outside the Member adopting the limitation. (Japan's third-party submission, para. 18; and response to Panel question No. 10, para. 28).

<sup>1206</sup> European Union's first written submission, paras. 147-154.

<sup>1207</sup> Panel Report, *China – Publications and Audiovisual Products*, para. 7.1360.

<sup>1208</sup> European Union's second written submission, para. 26.

<sup>1209</sup> Russia's second written submission, para. 116.

<sup>1210</sup> According to the Appellate Body:

One of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a



7.712. The ordinary meaning of "foreign" is "[b]elonging to, coming from, or characteristic of, another country or nation".<sup>1211</sup> The ordinary meaning of the word "foreign" indicates that Article XVI:2(f) covers limitations on the participation of capital "belonging to", or "coming from" another country or nation. Similarly, the share-holding whose maximum percentage level may be limited, as well as the individual or aggregate investment whose total value may also be limited within the meaning of Article XVI:2(f) "belongs to" or "comes from" another country or nation. The parties concur that limitations targeting foreign capital due to its foreign origin fall under the scope of this provision. Parties disagree, however, on whether Article XVI:2(f) also encompasses limitations applying without distinction to domestic and foreign investment.

7.713. Turning to the context of Article XVI:2(f), which includes the rest of Article XVI:2, we note that the word "foreign" is absent from the other five limitations listed in Article XVI:2. The fact that these provisions are drafted in an origin-neutral manner suggests that they apply to the listed limitations regardless of the origin of services and service suppliers. We note that this interpretation was endorsed by a previous panel.<sup>1212</sup> To us, the fact that subparagraphs (a) to (e) are drafted in an origin-neutral manner and cover limitations applying to both foreign and domestic services and service suppliers supports the view that the explicit origin-based distinction found in subparagraph (f) indicates that, in contrast, this provision encompasses limitations on the participation of foreign capital due to the foreign origin of the capital. In other words, if the drafters of the GATS had intended Article XVI:2(f) to cover discriminatory and non-discriminatory capital limitations, they would not have inserted the word "foreign" in Article XVI:2(f).

7.714. In response to a question by the Panel seeking Russia's view on the fact that only Article XVI:2(f) contains the word "foreign" (three times) while the other five sub-paragraphs are origin-neutral, Russia submits that the reference to joint-ventures in Article XVI:2(e) indicates that this provision is also inherently discriminatory as, according to Russia, this business form is very likely applicable only to foreign service suppliers.<sup>1213</sup> Russia also argues that the words "monopolies" and "exclusive service suppliers" in Article XVI:2(a) are not necessarily origin-neutral because, according to Russia, it does not seem likely that a Member would establish a foreign person as a monopoly service supplier or exclusive service supplier in its territory.<sup>1214</sup>

7.715. We do not find Russia's arguments entirely convincing. While in practice, joint-ventures may often refer to an association between a domestic and a foreign firm, and monopolies and exclusive service suppliers may tend to be of domestic origin, none of these concepts is "expressly discriminatory". The ordinary meaning of "joint-venture"<sup>1215</sup> indicates that this term tends to be origin-neutral and, therefore, can also refer to an association between two domestic firms. Also, in practice, nothing would prevent a monopoly and/or exclusive service suppliers from being of foreign origin.<sup>1216</sup> The fact that these situations may be less frequent or even uncommon does not contradict the view that, on their face, these provisions are origin-neutral, contrary to subparagraph (f) which is "expressly discriminatory".<sup>1217</sup>

7.716. We also recall that, as evidenced by the terms "are defined as" in the *chapeau* of Article XVI:2, this provision contains a closed or exhaustive list of measures which, unless scheduled, shall not be maintained or applied in sectors and modes where market access

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reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility. (Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:1, 3, at p. 21).

<sup>1211</sup> *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1015.

<sup>1212</sup> The panel in *China – Electronic Payment Services* found that "the wording of the quantitative measures described in subparagraphs (a)-(d) contains nothing that would suggest that measures having discriminatory aspects are for this reason excluded", thus indicating that those provisions encompass non-discriminatory limitations. (Panel Report, *China – Electronic Payment Services*, para. 7.654).

<sup>1213</sup> Russia's response to Panel question No. 89, para. 392 (referring Panel Report in *China – Electronic Payment Services*, para. 7.653); and second written submission, para. 119.

<sup>1214</sup> Russia's response to Panel question No. 89, paras. 393-394.

<sup>1215</sup> A "joint venture" is defined as "[a] business undertaking by two or more persons engaged in a single defined project" (*Black's Law Dictionary*, 9th ed., B.A. Garner (ed.) (West Group, 2009), p. 915).

<sup>1216</sup> The GATS definitions of "monopoly supplier of a service" (Article XXVIII(h) of the GATS) and "exclusive service suppliers" (Article VIII:5 of the GATS) do not make any reference to the origin (domestic or foreign) of those suppliers.

<sup>1217</sup> As observed by the panel in *China – Electronic Payment Services*, "subparagraph (f) ... is expressly discriminatory". (Panel Report, *China – Electronic Payment Services*, para. 7.653).

commitments have been undertaken.<sup>1218</sup> Another panel also noted that this provision applies to "six carefully defined categories of measures".<sup>1219</sup> The fact that Article XVI:2 encompasses an exhaustive and carefully defined list of measures enables Members "wishing to undertake specific commitments on market access, as well as all the other Members, to understand precisely the scope of such commitments".<sup>1220</sup> Following the guidance by previous panels, we consider that the presence of the word "foreign" in Article XVI:2(f), while this word is absent from the other subparagraphs in Article XVI:2 must be given meaning and effect. We therefore agree with the European Union and Japan that Article XVI:2(f) is not concerned with all limitations on capital participation, but is specifically concerned with limitations on foreign capital due to its foreign origin.<sup>1221</sup>

7.717. Russia also argues that the presence of the word "foreign" in Article XVI:2(f) is explained by the fact that "governments have historically tended to impose restrictions on foreign direct investment" and concludes that it was these types of concerns that the drafters of the GATS sought to address in Article XVI:2(f).<sup>1222</sup> Russia does not explain, however, why this alleged historical trend would support an interpretation whereby the word "foreign" would now be erased from subparagraph (f). If anything, the fact that governments used to impose restrictions on foreign direct investment<sup>1223</sup> would rather support an interpretation that Article XVI:2(f) concerns limitations on the participation of foreign capital due to its foreign origin.

7.718. In our view, limitations falling within the scope of Article XVI:2(f) must target foreign capital participation due to the foreign origin of the capital; limitations applying without distinction to both foreign and domestic capital participation are not covered by this provision. We wish to clarify that we do not mean to say that only limitations which explicitly refer to foreign capital participation fall under subparagraph (f). For example, a measure articulating a condition in relation to domestic capital participation may be encompassed within the scope Article XVI:2(f) if such measure targets foreign capital participation due to the foreign origin of the capital (e.g. domestic capital participation shall be no less than X per cent).

7.719. We examine now whether the unbundling measure in the national implementing laws of Croatia, Hungary and Lithuania limits the "participation of foreign capital" within the meaning of Article XVI:2(f) of the GATS.

### *Assessment of the measures at issue*

7.720. Russia claims that the unbundling measure in the implementing laws of Croatia, Hungary and Lithuania each sets forth limitations on the participation of foreign capital in violation of Article XVI:2(f) of the GATS.<sup>1224</sup> The European Union responds that the measures challenged by

<sup>1218</sup> Panel Report, *China – Publications and Audiovisual Products*, para. 7.1353.

<sup>1219</sup> Panel Report, *China – Electronic Payment Services*, para. 7.652.

<sup>1220</sup> Panel Report, *Argentina – Financial Services*, para. 7.418. (footnote omitted)

<sup>1221</sup> European Union's second written submission, para. 26; and Japan's third-party submission, para. 18.

<sup>1222</sup> Russia's response to Panel question No. 89, para. 390; and second written submission, para. 118. In order to support that view, Russia refers to a 2003 OECD Report and a 2010 World Bank report, both of which found, according to Russia, that most economies had "specific restrictions that hindered foreign investment". (OECD Economic Outlook No. 73, Chapter 7, "Foreign direct investment restrictions in OECD countries" (OECD 2003), (Exhibit RUS-154); and World Bank, *Investing Across Borders 2010*, pp. 7-20, (Exhibit RUS-155)).

<sup>1223</sup> The 2010 World Bank report provided by Russia is based on the results of a survey conducted between April and December 2009 in 87 economies. As noted by Russia, the World Bank found that, while there were few restrictions on foreign ownership in the primary sectors and manufacturing, "services – such as media, transportation, and electricity – have stricter limits on foreign participation." We observe that the report further indicates that, in sectors such as banking, insurance and media "laws often limit the share of foreign equity ownership allowed in enterprises". (See Russia's response to Panel question No. 89, para. 390; and World Bank, *Investing Across Borders 2010*, pp. 7-20, (Exhibit RUS-155), p. 8). Similarly, the 2003 OECD Economic Outlook also finds that "FDI restrictions are concentrated in services sectors". (OECD Economic Outlook No. 73, Chapter 7, "Foreign direct investment restrictions in OECD countries" (OECD 2003), (Exhibit RUS-154), p. 2).

<sup>1224</sup> Russia's first written submission, para. 224; and second written submission, para. 113. In response to a question by the Panel asking Russia to clarify the scope of the challenged measures, Russia responded that, under Article XVI:2(f) of the GATS, it:

[C]hallenges the unbundling measures in Croatia, Hungary and Lithuania's implementing laws because each improperly imposes ownership prohibitions on majority capital investment, including foreign capital. In Russia's view, these violations are also *de facto* in nature. In

Russia apply without distinction to foreign and domestic investors and, therefore, fall outside the scope of Article XVI:2(f).<sup>1225</sup>

7.721. Keeping in mind the interpretation of Article XVI:2(f) set forth above, we must determine whether Russia has demonstrated that the measures at issue negatively impact foreign capital due to the foreign origin of the capital. Russia challenges the following provisions in the implementing laws of Croatia, Hungary and Lithuania: (i) Article 14(4) of Croatia's Gas Market Act, (ii) Section 120/A, Section 121/B, Section 121/H and Section 123(4) of Hungary's Gas Act; and (iii) Article 41(4)(3) of Lithuania's Law on Natural Gas.

7.722. Article 14(3) of Croatia's Gas Market Act prevents the same person or persons to "directly or indirectly control the energy undertaking performing any of the activities of production, trade or supply of gas and the activity of the production of natural gas, and directly or indirectly control or execute other rights over the transmission system operator or the transmission system" (Article 14(3)(1)). Conversely, Article 14(3)(2) prevents the same person or persons to "directly or indirectly control the transmission system operator or the transmission system, and directly or indirectly control or execute other rights over the energy undertaking performing any of the activities of production, trade, supply and the activity of the production of natural gas". Pursuant to Article 14(4), "[t]he prohibitions from paragraph 3 [of Article 14] shall apply to ... owning a majority stake".<sup>1226</sup>

7.723. Pursuant to Section 120/A(3) of Hungary's Gas Act, a system operator "may not acquire any share in any other authorized operator engaged in activities other than his own activities." Section 121/B provides in relevant parts that "[s]ubsidiaries of vertically integrated natural gas companies performing functions of production or supply of natural gas shall not have any direct or indirect shareholding in the transmission system operator". Pursuant to Section 121/H, the same person or persons cannot exercise control over an undertaking performing production or supply and "exercise any right" over a TSO. Such "right" includes "the holding of a majority share". Pursuant to Section 123(4), "any company that is involved in the extraction of natural gas ... or in the supply of natural gas ..., and any shareholders exercising control in such companies may not acquire any share – directly or indirectly – in a transmission system operator where such share constitutes entitlement to exercise control."<sup>1227</sup>

7.724. Article 40 of Lithuania's Law on Natural Gas sets forth the OU model. Pursuant to Article 41(4)(4) of that Law, the "rights" that a person or persons directly or indirectly controlling an undertaking engaged in production or supply of natural gas cannot exercise include "the management and holding of a majority share" in a TSO.<sup>1228</sup>

7.725. We observe that, on their face, the provisions cited by Russia are origin-neutral. These provisions prohibit production/supply undertakings from owning/holding "a majority share", "any share", "any direct or indirect shareholding", "the holding of a majority share", in a TSO. Conversely, TSOs are prevented from owning/holding "a majority share", "any share", "any direct or indirect shareholding" in a production/supply undertaking. Russia itself describes these provisions as "not specific to foreign investors"<sup>1229</sup> and asserts that they preclude "any investor (foreign or domestic) who is also 'directly or indirectly' in control of production or supply services from owning more than 50% of a TSO in the country."<sup>1230</sup> Russia considers, however, that the fact

prohibiting majority ownership, the measures do not distinguish on the basis of origin, as would typically demonstrate a *de jure* violation. The effect of the measures is to prohibit foreign majority ownership, thereby resulting in *de facto* discrimination. (Russia's response to Panel question No. 5, para. 26).

We note, however, that Russia does not develop this *de facto* discrimination claim in these proceedings. We shall therefore not consider this issue further.

<sup>1225</sup> Japan supports the view that, as the unbundling measures at issue are not specifically tied to the origin of the capital, but apply equally to domestic and foreign investors, they do not constitute a violation of Article XVI:2(f). (Japan's third-party submission, para. 18).

<sup>1226</sup> Croatia's Gas Market Act, (Exhibit RUS-45), Articles 14(3) and (4).

<sup>1227</sup> Hungary's Gas Act, (Exhibits EU-155/RUS-47). We recall that Section 123(4) of Hungary's Gas Act is referred to as Section 194(4) in Russia's first written submission and Exhibit RUS-47.

<sup>1228</sup> Lithuania's Law on Natural Gas, (Exhibit RUS-136rev).

<sup>1229</sup> Russia's first written submission, para. 226 (regarding Croatia); para. 228 (regarding Hungary), and para. 230 (regarding Lithuania).

<sup>1230</sup> Russia's first written submission, para. 226 (regarding Croatia); para. 228 (regarding Hungary), and para. 230 (regarding Lithuania).

that these laws "prohibit both domestic and foreign majority ownership is irrelevant."<sup>1231</sup> We disagree with Russia. As established above, Article XVI:2(f) covers limitations negatively impacting foreign capital due to the foreign origin of the capital, but does not cover limitations that apply without distinctions to foreign and domestic capital.<sup>1232</sup>

7.726. In light of the foregoing, we find that Russia has not demonstrated that the measures at issue limit the "participation of foreign capital" within the meaning of Article XVI:2(f) of the GATS. Having found that the measures at issue do not amount to limitations "on the participation of foreign capital" within the meaning of Article XVI:2(f) of the GATS, we refrain from assessing whether those measures take one of the two forms provided for in that provision.

7.727. We therefore conclude that Russia has not demonstrated that the unbundling measure in the national implementing laws of Croatia, Hungary and Lithuania is inconsistent with Article XVI:2(f) of the GATS.

#### 7.5.2.5 Conclusion

7.728. In view of the foregoing analysis, we conclude that 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. We further conclude that Russia has not demonstrated that the unbundling measure in the national implementing laws of Croatia, Hungary and Lithuania is inconsistent with Article XVI:2(e) and (f) of the GATS. As we have not found an inconsistency with Article XVI:2(a), (e) or (f) of the GATS, we do not consider it necessary to examine the European Union's defence under Article XIV(a) or (c) of the GATS.

### 7.6 The public body measure

#### 7.6.1 Introduction

7.729. In this section we examine Russia's claim against the public body measure in the national implementing laws of Croatia, Hungary and Lithuania. We have set out the description of the public body measure above.<sup>1233</sup> Russia challenges the public body measure under Article XVII of the GATS. The European Union argues that the public body measure is not inconsistent with Article XVII of the GATS, and that, in case we find otherwise, it is justified under Article XIV(c) of the GATS. We first examine whether Russia has demonstrated that the public body measure is inconsistent with Article XVII of the GATS. In the event we find an inconsistency with Article XVII of the GATS, we will assess the European Union's defence under Article XIV(c) of the GATS.

#### 7.6.2 Russia's claim under Article XVII of the GATS

##### 7.6.2.1 Introduction

7.730. Russia argues that the public body measure in the national implementing laws of Croatia, Hungary and Lithuania "exempts" pipeline transport service suppliers owned and controlled by member State governments from the requirement to unbundle.<sup>1234</sup> Russia submits that, by not extending the same "exemption" to service suppliers of other Members, the public body measure modifies the conditions of competition to the detriment of like service suppliers of other Members, in breach of Article XVII of the GATS.<sup>1235</sup> Russia also argues that the implementation of the public body measure by Croatia, Hungary and Lithuania results in the violation of Article XVII of the GATS

<sup>1231</sup> Russia's second written submission, para. 120; and response to Panel question No. 89, para. 395.

<sup>1232</sup> As noted above, Russia claims that the measures at issue also result in *de facto* discrimination, but does not develop this claim in these proceedings. We shall therefore not consider this issue further.

<sup>1233</sup> See, above paras. 2.32-2.33.

<sup>1234</sup> Russia's first written submission, paras. 233, 269, 272, 275, 277 and 280; responses to Panel question No. 1, para. 2, and No. 5, para. 28; and second written submission, para. 170.

<sup>1235</sup> Russia's first written submission, paras. 275, 277, 280 and 284; and second written submission, paras. 177-178.

because the governments of Croatia, Hungary and Lithuania own and control both the TSO and supply undertaking within their respective territories.<sup>1236</sup>

7.731. The European Union contests Russia's claim that the public body measure is inconsistent with Article XVII. According to the European Union, the public body measure requires an examination of whether the two public bodies are truly separate *in addition* to verifying whether the entities concerned comply with the unbundling requirements, and therefore the public body measure does not constitute an "exemption" from the requirement to unbundle.<sup>1237</sup> The European Union submits that the public body measure does not prevent service suppliers controlled by public bodies of third countries from relying on this measure when they apply to be certified as TSOs.<sup>1238</sup> In the European Union's view, the fact that the governments of Croatia, Hungary and Lithuania each control, at present, a TSO as well as an undertaking performing production or supply, does not imply that third-country operators may not rely on the public body measure nor that any TSO owned by third country persons would be in a less favourable competitive position.<sup>1239</sup>

7.732. We recall that the measure challenged by Russia consists of the national implementing laws of Croatia, Hungary and Lithuania. While all three national laws implement Article 9(6) of the Directive in the territories of Croatia, Hungary and Lithuania, they are legally distinct from each other, as well as from Article 9(6) of the Directive. However, we note that the parties have developed a significant part of their argumentation solely on the basis of Article 9(6) of the Directive, without clearly distinguishing Article 9(6) of the Directive and each of the national implementing laws. In light of the manner the parties developed their arguments, we will conduct a joint assessment of Russia's claim concerning each of the three national implementing laws. We emphasize, however, that Article 9(6) of the Directive is not a measure at issue in this dispute.<sup>1240</sup>

#### 7.6.2.2 Analysis by the Panel

7.733. In accordance with the legal standard under Article XVII of the GATS, as set out in paragraphs 7.234 and 7.235 above, we proceed to assess Russia's claim by examining whether Russia has demonstrated that (a) Croatia, Hungary, and Lithuania have assumed national treatment commitments in the relevant sector(s) and mode(s) in their GATS Schedules; (b) the public body measure affects the supply of services in the relevant sector(s) and mode(s); (c) the relevant services and service suppliers are like; and (d) the public body measure fails to accord to services and service suppliers of any other Member treatment no less favourable than that accorded by the Member concerned to its own like services and service suppliers.

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<sup>1236</sup> Russia's first written submission, paras. 235 and 285–303; response to Panel question No. 5, para. 29; and second written submission, paras. 188–197.

<sup>1237</sup> European Union's first written submission, paras. 225–226.

<sup>1238</sup> European Union's first written submission, para. 228; and second written submission, paras. 52–53.

<sup>1239</sup> European Union's first written submission, para. 231.

<sup>1240</sup> In its second written submission, Russia requests the Panel to find *inter alia* that the European Union and its member States have violated their obligations under Article XVII:1 of the GATS, because "*Article 9(6) of the Directive*", exempts government-controlled pipeline transport services and service suppliers from the unbundling requirements "as evidenced by the Croatian, Hungarian and Lithuanian government exemption measures". (Russia's second written submission, para. 487). (emphasis added) We observe that this request for findings is different from the request for findings in Russia's first written submission, where Russia asks the Panel to find that the European Union and its member States violate their WTO obligations under Article XVII of the GATS because "*Croatia, Hungary and Lithuania's government exemption measures*, adopted pursuant to Article 9(6) of the Directive, arbitrarily exempt government-controlled pipeline transport services and service suppliers from the unbundling requirements". (Russia's first written submission, para. 810). (emphasis added) Moreover, Russia's request for findings in its second written submission is not based on the claim Russia developed in these proceedings which is that the national laws of Croatia, Hungary and Lithuania implementing Article 9(6) of the Directive are inconsistent with Article XVII of the GATS. (Russia's first written submission, paras. 269–285; response to Panel question No. 5, paras. 28–29; and second written submission, paras. 167–168). Consequently, it is the national implementing laws of Croatia, Hungary and Lithuania that constitute the measure at issue challenged by Russia, and not Article 9(6) of the Directive, as would appear from Russia's request for findings in its second written submission.

#### 7.6.2.2.1 National treatment commitments by Croatia, Hungary and Lithuania in the relevant sector(s) and mode(s)

7.734. We have determined above that Croatia, Hungary and Lithuania undertook national treatment commitments in their respective GATS Schedules for sector 11.G, "Transport Pipeline [Services]", for mode 3.<sup>1241</sup>

#### 7.6.2.2.2 Affecting the supply of services in the relevant sector(s) and mode(s)

7.735. The second element of our Article XVII enquiry calls for an analysis of whether Russia has demonstrated that the public body measure "affects the supply of services" in the relevant sector(s) and mode(s). As we have concluded above, the relevant sector for the purposes of our enquiry is sector 11.G, "Transport Pipeline [Services]".<sup>1242</sup> Furthermore, as clarified by Russia, the relevant mode of supply for its GATS claims is mode 3 (commercial presence).<sup>1243</sup> Russia submits that the public body measure, which Russia considers to be an "aspect of the unbundling measure"<sup>1244</sup>, "affects" the supply of pipeline transport services via mode 3 for the same reasons as the unbundling measure.<sup>1245</sup> The European Union does not contest Russia's arguments.

7.736. We recall that the Appellate Body has clarified, in the context of Article I:1 of the GATS, that the ordinary meaning of the term "affecting" implies a measure that has "an effect on", which indicates a broad scope of application, wider in coverage than such terms as "regulating" or "governing".<sup>1246</sup> As considered by the panel in *China – Electronic Payment Services*, while the clarification of the Appellate Body was made in relation to the term "affecting" in the context of Article I:1 of the GATS, it is equally relevant and persuasive when looked at in the context of Article XVII analysis.<sup>1247</sup> Accordingly, we need to determine whether, as a minimum threshold, the public body measure has "an effect on"<sup>1248</sup> the supply of pipeline transport services.

7.737. As set out above, the public body measure is applicable in situations where public bodies exercise control over, on the one hand, a TSO or transmission system, and on the other hand, an undertaking performing the function of natural gas production and/or supply.<sup>1249</sup> We recall that, for the purposes of the present dispute, we consider that TSOs supply pipeline transport services in the European Union and that natural or juridical persons from non-EU countries can and do supply pipeline transport services through the commercial presence of such TSOs.<sup>1250</sup> Thus, by prescribing rules that concern TSOs, the public body measure affects suppliers of pipeline transport services, and consequently, has "an effect on" the supply of pipeline transport services within the meaning of Article XVII.

#### 7.6.2.2.3 Like services and service suppliers

7.738. We note that, in the context of the public body measure, Russia argues that LNG services and service suppliers and pipeline transport services and service suppliers are like within the meaning of Article XVII.<sup>1251</sup> It is therefore not clear whether the relevant services and service suppliers, for purposes of Russia's claim under Article XVII against the public body measure, include both pipeline transport services and service suppliers and LNG services and service suppliers. We consider it helpful to determine the scope of the likeness enquiry to be conducted before turning to the actual assessment of likeness.

7.739. In this regard, we note that the public body measure concerns unbundling where public bodies exercise control over, on the one hand, a TSO or transmission system, and on the other hand, an undertaking involved in production or supply activities. Both parties agree that LNG

<sup>1241</sup> See above para. 7.371.

<sup>1242</sup> See above para. 7.291.

<sup>1243</sup> Russia's response to Panel question No. 56, para. 285.

<sup>1244</sup> Russia's first written submission, para. 233.

<sup>1245</sup> Russia's first written submission, para. 237 (referring to section VII.C of its first written submission).

<sup>1246</sup> Appellate Body Report, *EC – Bananas III*, para. 220.

<sup>1247</sup> Panel Report, *China – Electronic Payment Services*, para. 7.681 and fn 873 to para. 6.781.

<sup>1248</sup> Appellate Body Report, *EC – Bananas III*, para. 220.

<sup>1249</sup> See above paras. 2.32 and 2.33.

<sup>1250</sup> See above paras. 7.263 and 7.407.

<sup>1251</sup> Russia's first written submission, paras. 254–261.

service suppliers are not subject to unbundling<sup>1252</sup> and, consequently, they are not subject to the public body measure. We also observe that Russia does not develop any arguments with respect to the application of the public body measure to LNG service suppliers. For these reasons, we find that only pipeline transport services and service suppliers are relevant for Russia's claim against the public body measure under Article XVII.

7.740. Russia argues that the public body measure distinguishes between foreign and domestic services and service suppliers based "exclusively on origin", and therefore the relevant services and service suppliers are presumed to be like.<sup>1253</sup> Russia further submits that, "to the extent a 'more detailed analysis' is considered necessary", such an analysis demonstrates that domestic pipeline transport services and service suppliers and those of other Members are in a competitive relationship with each other and thus satisfy the likeness requirement pursuant to Article XVII.<sup>1254</sup> The European Union contests Russia's arguments that the public body measure distinguishes between foreign and domestic service suppliers based exclusively on origin.<sup>1255</sup> However, the European Union does not contest Russia's arguments that the relevant services and service suppliers are like within the meaning of Article XVII.

7.741. We recall that, according to the Appellate Body, "where a measure provides for a distinction based exclusively on origin, there will or can be services and service suppliers that are the same in all respects except for origin and, accordingly, 'likeness' can be presumed".<sup>1256</sup> In our view, the text of the public body measure, as implemented in the national laws of Croatia, Hungary and Lithuania, does not, on its face, distinguish between service suppliers based exclusively on origin. The relevant provisions of the national implementing laws of Croatia, Hungary and Lithuania refer to "*two separate public authorities*"<sup>1257</sup>, "economic operators defined by law acting in the name of Hungary or *other public bodies*"<sup>1258</sup> and "a Member State or *another public body*".<sup>1259</sup> The references to "two separate public authorities", "other public bodies" and "another public body" in the mentioned laws may be read as covering both domestic public bodies (or authorities) and foreign public bodies (or authorities). Therefore, we see no support in the text of the national laws of Croatia, Hungary and Lithuania for the proposition that such laws distinguish between service suppliers based exclusively on origin. In these circumstances, we do not consider that the relevant domestic services and service suppliers can be presumed to be like services and service suppliers of any other Member within the meaning of Article XVII.

7.742. In the context of its "more detailed analysis" of likeness, Russia argues that "domestic and third-country pipeline transport services are closely similar if not identical", referring to the industry definition of natural gas pipeline transport service and sector 11.G of the Schedules of Croatia, Hungary and Lithuania.<sup>1260</sup> Russia further asserts that foreign-owned and controlled TSOs supply the same directly competitive pipeline transport services as domestic suppliers.<sup>1261</sup> In Russia's view, the natural gas and the services for supplying that gas serve the same end-uses and there is no known indication that consumers prefer domestic or certain third-country gas or related services.<sup>1262</sup>

7.743. We recall that, as determined above, foreign service suppliers established as TSOs in the European Union supply identical pipeline transport services, and are like service suppliers within the meaning of Article II:1 of the GATS.<sup>1263</sup> Based on the same considerations, we find that domestic suppliers of pipeline transport services and pipeline transport service suppliers of other Members established as TSOs in Croatia, Hungary and Lithuania are like service suppliers within

<sup>1252</sup> Russia's response to Panel question No. 1, para. 4; and European Union's first written submission, paras. 433 and 452.

<sup>1253</sup> Russia's first written submission, paras. 234 and 248.

<sup>1254</sup> Russia's first written submission, para. 252. (footnote omitted)

<sup>1255</sup> European Union's first written submission, para. 228.

<sup>1256</sup> Appellate Body Report, *Argentina – Financial Services*, para. 6.38. The Appellate Body referred to the establishment of likeness in this manner as the "presumption approach". (Appellate Body Report, *Argentina – Financial Services*, para. 6.35).

<sup>1257</sup> Croatia's Gas Market Act, (Exhibit RUS-45), Article 14(6). (emphasis added)

<sup>1258</sup> Hungary's Gas Act, (Exhibits EU-155/EU-47), Section 121/H(4). (emphasis added)

<sup>1259</sup> Lithuania's Law on Natural Gas, (Exhibit RUS-136rev), Article 41(5). (emphasis added)

<sup>1260</sup> Russia's first written submission, paras. 254-255.

<sup>1261</sup> Russia's first written submission, para. 255.

<sup>1262</sup> Russia's first written submission, para. 255.

<sup>1263</sup> See above paras. 7.421 and 7.422.

the meaning of Article XVII of the GATS.<sup>1264</sup> In our view, this conclusion is not affected by the fact that, in the context of this measure, certain TSOs are controlled by public bodies.

#### 7.6.2.2.4 Less favourable treatment

7.744. Scrutinizing the text of Article XVII of the GATS, the Appellate Body has considered that the "treatment no less favourable" standard calls for an examination of whether a measure modifies the conditions of competition between, on the one hand, domestic services and service suppliers, and on the other, services and service suppliers of any other Member.<sup>1265</sup> If the measure at issue modifies the conditions of competition to the detriment of services and service suppliers of any other Member, it will be inconsistent with Article XVII.<sup>1266</sup> Thus, in the present case, we shall assess whether Russia has demonstrated that the public body measure modifies the conditions of competition to the detriment of service suppliers of any other Member in comparison to like domestic service suppliers.

7.745. Under Article XVII, a measure can modify the conditions of competition to the detriment of services and service suppliers of any other Member by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to domestic services and service suppliers.<sup>1267</sup>

7.746. We note that Russia bases its claim on the interpretation of the text of the public body measure, as well as on the fact that the governments of Croatia, Hungary and Lithuania own and control both a TSO and supply undertaking within their respective territories.<sup>1268</sup> Therefore, in our assessment of whether the public body measure modifies the conditions of competition to the detriment of service suppliers of any other Member in comparison to like domestic service suppliers, we will examine closely its design, structure and expected operation.

7.747. As Russia brings its challenge on the basis of the interpretation of the text of the public body measure in the implementing national laws of Croatia, Hungary and Lithuania, we will also establish the meaning and scope of the public body measure in these national implementing laws, as the municipal laws at issue. The Appellate Body has observed that, "[a]s part of their duties under Article 11 of the DSU, panels have the obligation to examine the meaning and scope of the municipal law at issue in order to make an objective assessment of the matter before it."<sup>1269</sup> We further recall that, "under the usual allocation of the burden of proof, a responding Member's measure will be treated as *WTO-consistent*, until sufficient evidence is presented to prove the contrary".<sup>1270</sup> In these proceedings, Russia, as the complaining party, bears the burden of

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<sup>1264</sup> We note that, in the context of the public body measure, Russia argues that LNG service suppliers and pipeline transport service suppliers are like within the meaning of Article XVII of the GATS. (Russia's first written submission, paras. 254-261). We do not consider LNG service suppliers to be relevant for our assessment of Russia's claims against the public body measure because the public body measure only concerns TSOs, that is pipeline transport service suppliers. LNG system operators (LNG service suppliers) are not subject to the requirement to unbundle (see above paras. 2.34 and 2.35), and consequently are not subject to the public body measure. We also observe that Russia does not develop any arguments with respect to the application of the public body measure to LNG service suppliers.

<sup>1265</sup> Appellate Body Report, *Argentina – Financial Services*, paras. 6.103-6.104.

<sup>1266</sup> Appellate Body Report, *Argentina – Financial Services*, para. 6.106.

<sup>1267</sup> Article XVII:3 of the GATS provides as follows:

Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

<sup>1268</sup> We note that Russia divided its claim against the public body measure in the national implementing laws of Croatia, Hungary and Lithuania into *de facto* and *de jure* claims. (Russia's first written submission, paras. 269-285; response to Panel question No. 5, paras. 28-29; and second written submission, paras. 167-168). We find it appropriate to conduct a single analysis of the consistency of this measure with Article XVII of the GATS based on its design, structure and expected operation.

<sup>1269</sup> Appellate Body Report, *US – Shrimp II (Viet Nam)*, para 4.31 (quoting Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.98).

<sup>1270</sup> Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 66. (emphasis original)



providing sufficient evidence that the public body measure is inconsistent with Article XVII, including on the basis of its meaning and scope as municipal law.<sup>1271</sup>

7.748. As regards the evidentiary elements that may be used in establishing the meaning and scope of municipal law, the Appellate Body has clarified as follows:

A party asserting that another party's municipal law is inconsistent "as such" with relevant WTO obligations bears the burden of introducing evidence as to the meaning of such law to substantiate that assertion.<sup>1272</sup> When a municipal law is challenged "as such", the starting point for the analysis will be the text of that municipal law, on its face.<sup>1273</sup> A complainant may seek to support its understanding of the meaning of the municipal law on the basis of the text of that municipal law only. A complainant may also seek to support its understanding of the meaning of the municipal law at issue with additional elements such as "evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars".<sup>1274</sup> Likewise, in addition to setting out its understanding of the text of the municipal law at issue, the respondent may submit evidence relating to such additional elements to rebut the complainant's arguments. In conducting its independent assessment of the meaning of the municipal law at issue, a panel must undertake a holistic assessment of all the relevant elements before it.<sup>1275, 1276</sup>

7.749. We recall that the Appellate Body has held that the "treatment no less favourable" standard calls for an examination of whether a measure modifies the conditions of competition between, on the one hand, domestic services and service suppliers, and on the other, services and service suppliers of any other Member.<sup>1277</sup> Therefore, Russia needs to demonstrate that the public body measure modifies the conditions of competition to the detriment of service suppliers of any other Member in comparison to like domestic service suppliers.

7.750. Bearing these considerations in mind, we proceed with our assessment of whether the public body measure modifies the conditions of competition to the detriment of service suppliers of any other Member in comparison to like domestic service suppliers, in accordance with the analytical framework set out above in paragraphs 7.746 and 7.747.

7.751. We understand Russia to argue that the alleged modification of the conditions of competition to the detriment of service suppliers of any other Member in comparison to like domestic service suppliers stems from the alleged competitive advantage granted to domestic service suppliers as a result of being "exempted" from the requirement to unbundle.<sup>1278</sup> In the specific circumstances of this claim, and based on our understanding of Russia's arguments, in order for its claim to succeed, Russia needs to demonstrate two elements: (i) that the public body measure is an "exemption" from the requirement to unbundle, and (ii) that it applies only to domestic service suppliers, excluding like service suppliers of other Members, and hence modifies the conditions of competition to the detriment of service suppliers of any other Member.

7.752. Below, we examine each of these elements separately. However, we wish to stress that neither of them, taken separately, is sufficient for Russia to demonstrate that the public body measure is inconsistent with Article XVII. Rather, these two elements represent distinct yet integral aspects of a demonstration that the public body measure modifies the conditions of

<sup>1271</sup> It is well established that "[t]he party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion". (Appellate Body Report, *US – Carbon Steel*, para. 157).

<sup>1272</sup> (footnote original) The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case. (Appellate Body Report, *US – Carbon Steel*, para. 157)

<sup>1273</sup> (footnote original) Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 168.

<sup>1274</sup> (footnote original) Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.100 (quoting Appellate Body Report, *US – Carbon Steel*, para. 157).

<sup>1275</sup> (footnote original) Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.101.

<sup>1276</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.156.

<sup>1277</sup> Appellate Body Report, *Argentina – Financial Services*, paras. 6.103-6.104.

<sup>1278</sup> Russia's first written submission, paras. 275, 277, 280 and 284; and second written submission, paras. 177-178.

competition to the detriment of service suppliers of any other Member in comparison to like domestic service suppliers.

7.753. We begin our assessment with the first element of Russia's claim and examine whether Russia has demonstrated that the public body measure constitutes an "exemption" from the requirement to unbundle.

***Whether the public body measure is an "exemption" from the requirement to unbundle***

7.754. In Russia's view, the public body measure provides an "exemption" from the requirement to unbundle to service suppliers controlled by domestic public bodies.<sup>1279</sup> Russia alleges that the public body measure treats "two separate public bodies" as "deemed not to be" the same person or persons, while, in reality, they are the same person in the form of the same member State government.<sup>1280</sup> Thus, according to Russia, provided the member State government arranges for control over, on the one hand, a TSO or transmission system, and on the other, an undertaking involved in supply or production activities, to be exercised by "two separate public bodies", the government is exempted from the requirement to unbundle.<sup>1281</sup>

7.755. The European Union opposes Russia's characterization of the public body measure as an "exemption" from the requirement to unbundle. According to the European Union, the public body measure is meant to ensure that the principle of non-discrimination between public and private sectors is respected in the implementation of effective unbundling.<sup>1282</sup> The European Union submits that the public body measure requires an examination of whether the two public bodies exercising control over, on the one hand, a TSO or transmission system, and on the other hand, an undertaking involved in supply or production activities, are "truly separate" in addition to ascertaining that these two public bodies meet the unbundling requirement.<sup>1283</sup>

7.756. We recall that, under the unbundling measure, the function of transmission network operation must be separated from the function of natural gas production and/or supply on the basis of one of the applicable unbundling models: the OU model, the ITO model or the ISO model.<sup>1284</sup> The OU model, as implemented in the national laws of Croatia, Hungary and Lithuania, prohibits the same person or persons from directly or indirectly exercising control over, on the one hand, a TSO or transmission system, and on the other, an undertaking performing any of the functions of production or supply.<sup>1285</sup> Pursuant to the public body measure, as implemented in the national laws of Croatia, Hungary and Lithuania, where the person subject to the ownership unbundling requirement is a public body, two separate public bodies exercising control over a TSO or a transmission system on the one hand, and over an undertaking performing any of the functions of production or supply on the other, shall be deemed not to be the same person or persons.<sup>1286</sup> Thus, the public body measure in these national implementing laws sets out a legal

<sup>1279</sup> Russia's first written submission, paras. 233, 269, 272, 275, 277 and 280; responses to Panel question No. 1, para. 2, and No. 5, para. 28; and second written submission, para. 170.

<sup>1280</sup> Russia's response to Panel question No. 1, para. 3. See also Russia's first written submission, para. 245; and opening statement at the first meeting of the Panel, para. 29.

<sup>1281</sup> Russia's opening statement at the first meeting of the Panel, para. 29.

<sup>1282</sup> European Union's first written submission, para. 223 (referring to the Directive 2009/73/EC, (Exhibit EU-5), Recital (20)).

<sup>1283</sup> European Union's first written submission, paras. 226 and 228; and second written submission, para. 49.

<sup>1284</sup> Commission Staff Working Paper, Interpretative Note on Directive 2009/72/EC Concerning Common Rules for the Internal Market in Electricity and Directive 2009/73/EC Concerning Common Rules for the Internal Market in Natural Gas – The Unbundling Regime (22 January 2010), (Commission Interpretative Note on the Unbundling Regime), (Exhibits EU-42/RUS-19), p. 4.

<sup>1285</sup> See above para. 2.11.

<sup>1286</sup> Article 14(6) of Croatia's Gas Market Act, Section 121/H(4) of Hungary's Gas Act and Article 41(5) of Lithuania's Law on Natural Gas implementing Article 9(6) of the Directive. The wording of the national implementing laws differs, to various degrees, from that of Article 9(6) of the Directive. The national implementing laws also differ in wording among each other. The text of Article 9(6) of the Directive, as well as the national implementing laws, is provided below.

Article 9(6) of the Directive contains the following rule:

regime for service suppliers controlled by public bodies that is different from the ownership unbundling requirement provided by the unbundling measure for all other service suppliers.<sup>1287</sup>

7.757. In our view, however, the mere fact that the public body measure in the national implementing laws of Croatia, Hungary and Lithuania sets a legal regime that is different from the ownership unbundling requirement does not necessarily mean that this measure is an *exemption* from this requirement. Such a conclusion can only be reached on the basis of a rigorous scrutiny of the design, structure and expected operation of the public body measure, as well as its relationship with the unbundling measure.

7.758. We note that the ordinary meaning of the word "exemption" is "the action of exempting, or the state of being exempted from a liability, obligation, penalty, law, or authority".<sup>1288</sup> "To exempt", in turn, means "to grant to (a person, etc.) immunity or freedom from a liability to which others are subject", such as "a burden, duty, or obligation, a burdensome state or condition".<sup>1289</sup> Therefore, an assessment of whether the public body measure constitutes an exemption from the ownership unbundling requirement involves a determination of whether it "releases" service suppliers controlled by public bodies from the prohibition of exercising control over, on the one hand, a TSO or transmission system, and on the other, an undertaking performing the function of natural gas production and/or supply.

7.759. We recall that, in arguing that the public body measure constitutes an "exemption" from the requirement to unbundle, Russia focuses on the words "shall be deemed not to be the same person or persons" used in Article 9(6) of the Directive. In Russia's view, even though a "separate" public body exercising control over a TSO or transmission system and a "separate" public body

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For the implementation of this Article, where the person referred to in points (b), (c) and (d) of paragraph 1 is the Member State or another public body, two *separate* public bodies exercising control over a transmission system operator or over a transmission system on the one hand, and over an undertaking performing any of the functions of production or supply on the other, shall be deemed not to be the same person or persons. (Directive 2009/73/EC, (Exhibit EU-5), Article 9(6)) (emphasis added)

Article 14(6) of Croatia's Gas Market Act provides as follows:

Two *separate* public authorities that control the transmission system operator or the transmission system and that control the energy undertaking performing any of the activities of production, trade or supply and the activity of the production of natural gas shall not be considered the same person or persons within the meaning of [the relevant ownership unbundling provisions of the Gas Market Act]. (Croatia's Gas Market Act, (Exhibit RUS-45), Article 14(6)). (emphasis added)

Section 121/H/4 of Hungary's Gas Act states that:

The obligation set out in [the relevant ownership unbundling provisions of the Gas Act] shall be deemed to be fulfilled in a situation where economic operators defined by law acting in the name of Hungary or other public bodies exercising control over a transmission system operator or over a transmission line on the one hand, and over a company performing any of the functions of production or supply of natural gas on the other. (Hungary's Gas Act, (Exhibits EU-155/RUS-47), Section 121/H(4)).

Article 41(5) of Lithuania's Law on Natural Gas is worded as follows:

Where the person referred to in [the relevant ownership unbundling provisions of the Law on Natural Gas] is a Member State or another public body, two *separate* public bodies exercising control over a transmission system operator or over a transmission system on the one hand, and over an undertaking performing any of the functions of production or supply on the other, shall be deemed not to be the same person or persons. (Lithuania's Law on Natural Gas, (Exhibit RUS-136rev), Article 41(5)). (emphasis added)

<sup>1287</sup> According to Russia, the "exemption" pursuant to Article 9(6) of the Directive covers "the general and full ownership unbundling provisions of Article 9, as well as the ISO and ITO provisions of Article 14 and Chapter IV, respectively". (Russia's first written submission, para. 270). The European Union does not discuss the relationship between the public body measure and the ISO and ITO models.

<sup>1288</sup> Oxford English Dictionary Online, definition of "exemption, n.2.a"  
<http://www.oed.com/view/Entry/66070?redirectedFrom=exemption> (accessed 3 August 2017).

<sup>1289</sup> Oxford English Dictionary Online, definition of "exempt, v.4.d"  
<http://www.oed.com/view/Entry/66066?rskey=UdEDfX&result=2&isAdvanced=false> (accessed 3 August 2017).

exercising control over an undertaking involved in production or supply activities 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".<sup>1290</sup> Russia contends that the public body measure thus created a "legal fiction" to preserve the right of EU member States under the Treaty on the Functioning of the European Union to continue owning and controlling the entire VIU.<sup>1291</sup>

7.760. In our view, words such as "shall not be considered the same person or persons" and "shall be deemed not to be the same person or persons" in the text of the public body measure may indicate that, while the government in question is one and the same person, it is considered as consisting of two persons for the purposes of the ownership unbundling requirement. In this sense, the public body measure could be understood as creating a "legal fiction". We also note that, when assessing a "deeming" provision in municipal law, the Appellate Body in *US – FSC (Article 21.5 - EC)* ignored the "legal fiction" created by that provision and found that the legal consequences prescribed by that provision did not correspond to the factual situation described therein.<sup>1292</sup> Deriving guidance from this approach of the Appellate Body, we consider that, similarly, in the present case, we should examine relevant facts and evidence, as submitted to us by the parties.

7.761. We observe that, pursuant to the public body measure in the national implementing laws of Croatia, Hungary and Lithuania, the ownership unbundling requirement will be fulfilled (i.e. the two public bodies will be "deemed" not to be the same person or persons) when the public body exercising control over a TSO or transmission system and the public body exercising control over an undertaking performing the function of natural gas supply and/or production are "separate".<sup>1293</sup> Therefore, in determining whether, by treating the same government as not being one person, the public body measure creates a "legal fiction", and by that means exempts service suppliers controlled by public bodies from the requirement to unbundle, it is relevant for us to examine the role of the word "separate" used in the text of this measure. In particular, as part of our holistic assessment of the design, structure and expected operation of the public body measure, we consider it important to establish whether this word imposes a requirement that the public bodies in question be "separate", and if so, how this requirement compares with the ownership unbundling requirement.

7.762. We understand Russia to argue that a government, by virtue of its nature, is not able to effectively "unbundle" within the meaning of the Directive.<sup>1294</sup> We further understand that, in Russia's view, this is confirmed by the fact that, despite being controlled by two "separate" ministries, the "central government[s]" of Hungary and Lithuania retain control over a TSO and supply undertaking in their territories.<sup>1295</sup>

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<sup>1290</sup> Russia's second written submission, para. 175.

<sup>1291</sup> Russia's response to Panel question No. 179, para. 155.

<sup>1292</sup> The Appellate Body held that "because the manufacturer and distributor are related, the measure deems the foreign economic process requirement to have been met in the sales transaction between the related parties, when, in fact, it was not met". (Appellate Body Report, *US – FSC (Article 21.5 - EC)*, para. 159).

<sup>1293</sup> Croatia's Gas Market Act, (Exhibit RUS-45), Article 14(6); and Lithuania's Law on Natural Gas, (Exhibit RUS-136rev), Article 41(5). We note, however, that the text of Section 121/H(4) of Hungary's Gas Act does not contain the word "separate". While none of the parties provided any arguments regarding the relevance of this omission, it is also uncontested that Section 121/H(4) implements Article 9(6) of the Directive, which contains the word "separate". For the texts of the relevant provisions of the national implementing laws at issue see above fn 1286.

<sup>1294</sup> Russia's response to Panel question No. 1, para. 3. See also Russia's second written submission, paras. 192-195; and opening statement at the first meeting of the Panel, para. 29.

<sup>1295</sup> Russia's second written submission, paras. 188-195. See also Russia's first written submission, paras. 285-305. In support of its arguments, Russia refers to the Commission's certification opinions concerning MGT in Hungary and Amber Grid in Lithuania. We discuss Russia's arguments below in paragraphs 7.777 through 7.782. We note that Russia submits these arguments in the context of developing its claim on the basis of the ownership and control by the governments of Croatia, Hungary and Lithuania of a TSO and supply undertaking within their respective territories. (Russia's second written submission, paras. 188-197). We recall that we have found that the aspect of Russia's claim that concerns the ownership and control by the government of Hungary of a TSO and supply undertaking in its territory falls outside our terms of reference. (See above para. 7.215). We understand that Russia relies on the Commission's certification opinion concerning MGT in Hungary not only to prove that, in its view, the government of Hungary owns and controls a TSO and supply undertaking in its territory but also as a support for its more general proposition that a government cannot unbundle. We thus consider that our decision that the aspect of Russia's claim

7.763. We understand the European Union to argue that the word "separate" used in the text of the public body measure constitutes a requirement that must be fulfilled by the two public bodies in question in order to be able to rely on the public body measure.<sup>1296</sup> Russia does not contest this argument but submits that, like Article 9(6) of the Directive, the national implementing laws of Croatia, Hungary and Lithuania do not define their "key terms", including the word "separate".<sup>1297</sup> In Russia's view, the public body measure thus leaves the European Union and the member States a broad discretion to interpret these terms "as desired".<sup>1298</sup>

7.764. In support of its arguments that the public body measure requires an assessment of whether the two public bodies in question comply with the unbundling requirement and are "truly separate"<sup>1299</sup>, the European Union provides four certification opinions of the Commission where the Commission allegedly conducted such an assessment. We observe that the Commission's certification opinions are based on the application by the Commission of Article 9(6) of the Directive, rather than national implementing laws of Croatia, Hungary and Lithuania. We recall that Article 9(6) of the Directive is not a challenged measure.<sup>1300</sup> However, as the national laws in question implement Article 9(6) of the Directive, the evidence regarding the meaning and scope of Article 9(6) of the Directive may be relevant for our assessment to the extent that such evidence may clarify the meaning and scope of the national implementing laws.<sup>1301</sup>

7.765. The Commission's certification opinions provided by the European Union concern the interpretation of the word "separate" used in the text of Article 9(6) of the Directive. We recall that the same word is used in the national implementing laws of Croatia and Lithuania. In our view, given that the same word appears both in Article 9(6) of the Directive and national implementing laws, the interpretation of the word "separate" by the Commission is relevant for our assessment of whether this word imposes a requirement to be fulfilled by the public bodies, and if so, how this requirement compares to the ownership unbundling requirement. Therefore, in our view, the interpretation of the word "separate" used in Article 9(6) of the Directive can shed light on the meaning of the same word, as used in the national implementing laws. Bearing these considerations in mind, we proceed to the analysis of the Commission's certification opinions provided by the European Union.

7.766. The European Union relies on the Commission's opinions concerning the certification, under Article 9(6) of the Directive, of the following TSOs: Energinet.dk (Denmark)<sup>1302</sup>, Gat Transport Services B.V. (GTS) (the Netherlands)<sup>1303</sup>, MGT (Hungary)<sup>1304</sup>, and Amber Grid (Lithuania).<sup>1305</sup> Russia does not directly challenge the European Union's contention that, in the certification opinions under Article 9(6) of the Directive, the Commission conducts an examination of whether the two public bodies comply with the ownership unbundling requirement and are "truly separate".

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concerning the ownership and control by the government of Hungary of a TSO and supply undertaking in its territory falls outside our terms of reference does not preclude us from reviewing Russia's arguments and evidence related to this general proposition.

<sup>1296</sup> European Union's first written submission, paras. 226 and 228; and second written submission, para. 49.

<sup>1297</sup> Russia's first written submission, paras. 271, 275 and 278.

<sup>1298</sup> Russia's first written submission, para. 271.

<sup>1299</sup> European Union's first written submission, paras. 224–226; and second written submission, para. 49.

<sup>1300</sup> See above para. 7.732.

<sup>1301</sup> This seems to also be the view of the parties, which, as mentioned above, have developed a significant part of their arguments on the basis of Article 9(6) of the Directive.

<sup>1302</sup> Commission Opinion of 9 January 2012 pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of Directive 2009/73/EC - Denmark - Certification of Energinet.dk (gas), C(2012) 88 final, (Commission Opinion on the Certification of Energinet.dk), (Exhibit EU-51), pp. 3-5.

<sup>1303</sup> Commission Opinion of 1 July 2013 pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of Directive 2009/73/EC – the Netherlands - Certification of Gas Transport Services B.V., C(2013) 4205 final, (Commission Opinion on the Certification of GTS), (Exhibit EU-52), pp. 2-5.

<sup>1304</sup> Commission Opinion of 17 February 2015 pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of Directive 2009/73/EC – Hungary – Certification of Magyar Gáz Tranzit Zrt., C(2015) 1046 final, (Commission Opinion on the Certification of MGT), (Exhibits EU-53/RUS-53), pp. 3-4.

<sup>1305</sup> Commission Opinion on the Certification of Amber Grid, (Exhibits EU-54/RUS-50), pp. 1-3.

Russia discusses, however, the Commission's certification opinions concerning MGT and Amber Grid when advancing its own position that no effective unbundling applies to public bodies.<sup>1306</sup>

7.767. In its opinion concerning the certification of Energinet.dk, a TSO fully owned by the Danish State, the Commission noted that Article 9(6) provides the possibility for the State to control transmission activities, as well as generation, production and supply activities, provided however that the respective activities are exercised by separate public entities. Thus, according to the Commission, two separate public bodies should be seen as two distinct persons and should be able to control generation and supply activities on the one hand and transmission activities on the other, provided that it can be demonstrated that they are not under the common influence of another public entity in violation of the rules on ownership unbundling.<sup>1307</sup> In its assessment, the Commission found that Energinet.dk is fully owned by the Danish State, which also owns 76.49 % of the shares in DONG Energy A/S, which is active in production and supply of natural gas. The ownership of Energinet.dk is administered by the Danish Minister of Climate, Energy and Building, who exercises control over Energinet.dk and can make decisions on any matters pertaining to Energinet.dk. The ownership of DONG Energy A/S is administered by the Danish Minister of Finance.<sup>1308</sup>

7.768. The Commission confirmed that two separate ministries controlling, on the one hand, transmission of natural gas, and on the other hand, activities of production and supply of natural gas, can under certain circumstances constitute public bodies with a sufficient degree of separation as required by Article 9(6) Gas Directive.<sup>1309</sup> The Commission established that, according to Danish constitutional law, individual ministers have an independent power of decision in the areas for which they are responsible, and enjoy a high degree of independence. The minister of finance, who controls the production and supply interests of DONG Energy S.A., has no legal means to give instructions to the minister of climate, energy and building, who controls the transmission activities of Energinet.dk, and *vice versa*. The ministers are ultimately both legally and politically responsible for their own ministry, and have as a consequence an independent power of decision in their areas of competence. The Commission also established that the independence of the individual ministers in the areas of their competence also precludes the prime minister from giving orders or instructions as regards the minister's responsibilities concerning the transmission of natural gas. Having identified several other relevant elements, including the independence of the day-to-day running of Energinet.dk and the separateness of its financial resources, the Commission considered that the requirements of Article 9(6) of the Gas Directive were complied with.<sup>1310</sup>

7.769. In its opinion concerning the certification of GTS, the operator of the entire Dutch onshore gas transmission grid owned by the Dutch State, the Commission conducted a similar analysis. The Commission enquired whether the Dutch minister of finance, in charge of administering the state ownership of GTS, and the Dutch ministry of economic affairs (MEA), managing the participation of the Dutch State in two companies active in the production and supply of gas (Energie Beheer Nederland and GasTerra), were separate and not under the common influence of another public entity in violation of the rules on ownership unbundling.<sup>1311</sup>

7.770. In its review of the preliminary decision of the Dutch regulatory authority, the Commission noted that, according to the Dutch Constitution, ministers have separate tasks for which they are personally and politically responsible. This includes independent decision-making powers concerning the participation of the State in energy undertakings managed by a ministry. The prime minister is responsible only for the areas that are not covered by the ministries. Neither the prime minister nor the ministry of finance can give instructions to MEA, or *vice versa*. The separation of competences applies throughout the entire organization of a ministry, including each individual public official employed by the ministries concerned. On the basis of this analysis, the Commission agreed with the conclusion of the Dutch regulatory authority that the structural separation of

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<sup>1306</sup> Russia's second written submission, paras. 188–195. See also Russia's first written submission, paras. 285–305. We discuss Russia's arguments below in paras. 7.777 through 7.782.

<sup>1307</sup> Commission Opinion on the Certification of Energinet.dk, (Exhibit EU-51), p. 4.

<sup>1308</sup> Commission Opinion on the Certification of Energinet.dk, (Exhibit EU-51), p. 4.

<sup>1309</sup> Commission Opinion on the Certification of Energinet.dk, (Exhibit EU-51), p. 4.

<sup>1310</sup> Commission Opinion on the Certification of Energinet.dk, (Exhibit EU-51), pp. 4-5.

<sup>1311</sup> Commission Opinion on the Certification of GTS, (Exhibit EU-52), pp. 2-3.

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competences provides for a degree of separation between the ministry of finance and MEA sufficient to comply with Article 9(6) of the Directive.<sup>1312</sup>

7.771. However, the Commission raised concern about a number of explicit tasks and competences that MEA has with regard to GTS on the basis of the Dutch Gas Act, including the power of approval of the bylaws of GTS and the power of approval of special investments. The Commission noted that complying with the OU model within the State does not only imply compliance with Article 9(6), but also with Article 9(1)(b), (c) and (d) of the Directive, which means *inter alia* that the competences of MEA, insofar as its power over GasTerra and/or Energie Beheer Nederland amounts to control, with regard to GTS may not amount to any right within the meaning of Article 9(1) and (2) of the Directive. On the basis of further analysis of the Dutch Gas Act, the Commission recommended that, before taking its final certification decision, the Dutch regulatory authority should assess in detail the way in which MEA can carry out these two tasks and whether or not this gives rise to the incentive and the ability of MEA to influence the TSO decision making in order to favour MEA's generation and supply interests to the detriment of other network users.<sup>1313</sup>

7.772. In its opinion concerning the certification of MGT, the promoter of the Hungarian section of the natural gas pipeline interconnecting the Slovakian and Hungarian gas systems 100% owned by the Hungarian State, the Commission assessed the separation between the ministry of interior exercising control over MGT and the ministry of national development, which exercises control over the Hungarian electricity and gas incumbent Magyar Villamos Művek Zrt. (MVM).<sup>1314</sup> The Commission found that ministers in Hungary are in charge of their ministries and responsible for the issues assigned to them. Ministers carry out the tasks falling within their competence autonomously, excluding the possibility of exercising influence over multiple ministries by the prime minister. Based on its analysis, the Commission concluded that the requirements of Article 9(6) of the Gas Directive were complied with.<sup>1315</sup>

7.773. A similar analysis was conducted by the Commission in providing its opinion on the certification of Amber Grid, a TSO in Lithuania, 96.58% of shares in which are ultimately held by the Lithuanian State via the ministry of energy.<sup>1316</sup> The Commission found that the Lithuanian State also has "participations" in energy supply and generation companies, including Litgas, which would fall under the remit of the ministry of finance.<sup>1317</sup> The Commission established that the ministry of energy indirectly holds 23.52% of the shares and votes in Litgas.<sup>1318</sup> The Commission was concerned that the financial incentives of the ministry of energy as a shareholder in a gas supplier may lead it to unduly influence Amber Grid, for instance on issues related to capacity allocation, maintenance or investment. The Commission therefore urged the Lithuanian regulatory authority to make the certification of Amber Grid conditional upon the relinquishing by the ministry of energy of its indirect shareholding in Litgas.<sup>1319</sup>

7.774. Having now examined the Commission's certification opinions provided by the European Union, we observe that, in all of these opinions, the Commission conducted an assessment of whether a public body controlling a TSO or transmission system and a public body controlling an undertaking performing the function of natural gas production and/or supply were separate.

7.775. Therefore, we consider that the word "separate" in the text of the public body measure in the national implementing laws of Croatia, Hungary and Lithuania indeed constitutes a requirement that the public bodies must fulfil in order to be able to rely on the public body measure. The Commission's assessment indicates that, substantively, this requirement presupposes that the two public bodies in question do not exercise any influence over each other and are not under a common influence of another public body. In the four certification opinions analysed above, the Commission conducted its assessment on the basis of the review of the competencies, organisational structure and decision-making of the public bodies involved, under the law of the State in question.

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<sup>1312</sup> Commission Opinion on the Certification of GTS, (Exhibit EU-52), p. 3.

<sup>1313</sup> Commission Opinion on the Certification of GTS, (Exhibit EU-52), pp. 4-5.

<sup>1314</sup> Commission Opinion on the Certification of MGT, (Exhibits EU-53/RUS-53), p. 3.

<sup>1315</sup> Commission Opinion on the Certification of MGT, (Exhibits EU-53/RUS-53), p. 4.

<sup>1316</sup> Commission Opinion on the Certification of Amber Grid, (Exhibits EU-54/RUS-50), p. 1.

<sup>1317</sup> Commission Opinion on the Certification of Amber Grid, (Exhibits EU-54/RUS-50), p. 2.

<sup>1318</sup> Commission Opinion on the Certification of Amber Grid, (Exhibits EU-54/RUS-50), p. 2.

<sup>1319</sup> Commission Opinion on the Certification of Amber Grid, (Exhibits EU-54/RUS-50), pp. 2-3.

7.776. As we have established above, the OU model, as implemented in the national laws of Croatia, Hungary and Lithuania, prohibits the same person or persons from directly or indirectly exercising control over, on the one hand, a TSO or transmission system, and on the other, an undertaking performing any of the functions of production or supply.<sup>1320</sup> The prohibition of this control is aimed at ensuring the separation of the function of natural gas transmission from the function of natural gas supply and/or production.<sup>1321</sup> In our view, the Commission's assessment of whether the two public bodies in question do not exercise any influence over each other and are not under a common influence of another public body, in order to establish that these two public bodies are "separate", serves to ensure separation between the function of natural gas transmission and the function of natural gas production and/or supply entrusted to each of these public bodies. Thus, even though the "separation" requirement applicable to service suppliers controlled by public bodies differs from the ownership unbundling requirement applicable to all other service suppliers, we understand these two requirements as functionally equivalent in ensuring separation between the function of natural gas transmission and the function of natural gas production and/or supply.

7.777. We recall that, in support of its proposition that a government cannot effectively unbundle, Russia argues that, despite being controlled by two "separate" ministries, the "central government[s]" of Hungary and Lithuania retain control over a TSO and supply undertaking in their territories.<sup>1322</sup>

7.778. In respect of MGT in Hungary, Russia argues that "it should not matter that the transmission and supply portions of this service supplier are supplied by different undertakings (MGT and MVM) and ostensibly controlled by separate ministries", as long as both ministries are the integral parts of the Hungarian central government.<sup>1323</sup> In Russia's view, the Hungarian central government "clearly" restricts the alleged autonomy of the minister of national development and the ministry of interior to act independently vis-à-vis MGT and MVM.<sup>1324</sup>

7.779. In respect of Amber Grid in Lithuania, Russia contends that allocating control between the ministry of energy and the ministry of finance over the transmission and supply systems in no way diminishes the Lithuanian central government's ability to directly influence both the supply and transmission.<sup>1325</sup>

7.780. Russia also alleges that, as with Hungary and Lithuania, the government of Croatia is able to "coordinate and direct the provision of both transmission and supply services", acknowledging however that, in the absence of a certification decision, "little is known about how the Croatian government has structured ownership and control of Plinacro and HEP".<sup>1326</sup>

7.781. Russia did not provide any evidence in support of its allegation that the "central government[s]" of Hungary and Lithuania "directly influence[]" both functions of natural gas transmission and supply.<sup>1327</sup>

7.782. We acknowledge that, due to its specific nature, a government may not be able to "unbundle" in the same way as a private undertaking would within the meaning of the Directive. The rules of the Directive applicable to service suppliers controlled by public bodies, often acting in

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<sup>1320</sup> See above para. 2.11. See also Commission Interpretative Note on the Unbundling Regime, (Exhibits EU-42/RUS-19), pp. 7-8.

<sup>1321</sup> Commission Interpretative Note on the Unbundling Regime, (Exhibits EU-42/RUS-19), p. 4.

<sup>1322</sup> Russia's response to Panel question No. 1, para. 3. See also Russia's first written submission, para. 245; second written submission, paras. 188–195; and opening statement at the first meeting of the Panel, para. 29. See also above para. 7.762.

<sup>1323</sup> Russia's first written submission, paras. 287–289 (referring to Commission Opinion on the Certification of MGT, (Exhibits EU-53/RUS-53)).

<sup>1324</sup> Russia's first written submission, paras. 287–289 (referring to Commission Opinion on the Certification of MGT, (Exhibits EU-53/RUS-53)).

<sup>1325</sup> Russia's first written submission, paras. 296–298 (referring to Commission Opinion on the Certification of Amber Grid, (Exhibits EU-54/RUS-50)).

<sup>1326</sup> Russia's first written submission, para. 302. According to Russia, Plinacro is a TSO in Croatia owned and controlled by the government of Croatia and HEP is a gas supplier in Croatia. (Russia's first written submission, paras. 300–301).

<sup>1327</sup> In addition, we note that the Commission's opinions concerning the certification of MGT in Hungary and Amber Grid in Lithuania, reviewed in paragraphs 7.772 and 7.773 above, do not provide support for this proposition.



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the form of separate ministries of the same government, are different from the unbundling rules applicable to all other service suppliers.

7.783. However, as we noted above, a difference in the legal regime does not automatically amount to an "exemption". To the contrary, our analysis shows that the requirement that the public bodies in question be separate serves to ensure the same result – a separation of the function of natural gas transmission from the function of natural gas production and/or supply. While the precise manner in which this separation must be achieved in respect of service suppliers controlled by public bodies and in respect of all other service suppliers is different, Russia has not argued that the mere existence of this difference amounts to a violation of Article XVII of the GATS.<sup>1328</sup>

7.784. We recall that Article XVII:3 of the GATS makes it clear that formally different treatment of domestic services and service suppliers and like services and service suppliers of any other Member is insufficient to establish a violation of Article XVII. In order for a violation of Article XVII to ensue, it must be shown that such formally different treatment modifies the conditions of competition in favour of domestic services and service suppliers compared to like services and service suppliers of any other Member.

7.785. Thus, we consider that, even if Russia were to prove that the public body measure applies only to domestic service suppliers (the issue we examine below), the fact that this measure would provide formally different treatment to domestic service suppliers and like service suppliers of other Members would not be sufficient to demonstrate that it violates Article XVII. Russia would still need to demonstrate that this formally different treatment "modifies the conditions of competition in favour of" domestic services and service suppliers compared to like services and service suppliers of any other Member.<sup>1329</sup>

7.786. In concluding, we recall that, as established above, the public body measure provides different rules for service suppliers controlled by public bodies than those prescribed by the unbundling measure for all other service suppliers. However, we have found these rules to be functionally equivalent to those provided by the unbundling measure in ensuring a separation of the function of natural gas transmission from the function of natural gas production and/or supply.

7.787. Being designed to ensure a separation of the function of natural gas transmission from the function of natural gas production and/or supply, the public body measure thus cannot be considered as "releasing" service suppliers controlled by public bodies from the prohibition of exercising control over, on the one hand, a TSO or transmission system, and on the other, an undertaking performing the function of natural gas production and/or supply. Therefore, we conclude that Russia has not established that the public body measure "exempts" service suppliers controlled by public bodies from the requirement to unbundle.

7.788. In the specific circumstances of this dispute and for reasons of completeness, we find it useful to continue with our analysis of alleged less favourable treatment by examining the parties' arguments concerning the issue of whether the public body measure applies exclusively to domestic service suppliers.

### ***Whether the public body measure applies exclusively to domestic service suppliers***

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<sup>1328</sup> We recall that Russia argues that the public body measure modifies the conditions of competition to the detriment of service suppliers of any other Member in comparison to like domestic service suppliers because, in its view, this measure grants an "exemption" to domestic service suppliers. (Russia's first written submission, paras. 275, 277, 280 and 284; and second written submission, paras. 177-178).

<sup>1329</sup> We note that the Appellate Body in *Argentina – Financial Services* observed as follows:

In our view, while Article XVII:3 refers to the modification of conditions of competition in favour of domestic services or service suppliers, the legal standard set out in Article XVII:3 calls for an examination of whether a measure modifies the conditions of competition to the detriment of services or service suppliers of any other Member. Less favourable treatment of foreign services or service suppliers and more favourable treatment of like domestic services or service suppliers are flip-sides of the same coin. (Appellate Body Report, *Argentina – Financial Services*, para. 6.103).

7.789. We have addressed the first element of Russia's claim – whether the public body measure is an "exemption" from the requirement to unbundle. We now turn to examine the other element of Russia's claim – whether the public body measure applies exclusively to domestic service suppliers. We recall Russia's position that the public body measure in the national implementing laws of Croatia, Hungary and Lithuania grants an "exemption" from the requirement to unbundle to service suppliers controlled by domestic public bodies.<sup>1330</sup> Thus, according to Russia, the "exemption" provided by the public body measure applies only to service suppliers controlled by domestic public bodies, excluding service suppliers of other Members.<sup>1331</sup>

7.790. Russia does not indicate whether, as a result of the alleged "exemption", service suppliers controlled by foreign public bodies would be excluded from the scope of this measure or whether foreign service suppliers not controlled by public bodies would be excluded from its scope.<sup>1332</sup> In other words, Russia does not specify whether it compares the treatment of service suppliers controlled by domestic public bodies with the treatment of service suppliers controlled by foreign public bodies or with the treatment of foreign service suppliers not controlled by public bodies.<sup>1333</sup>

7.791. In paragraph 7.756 above, we have determined that the public body measure in the national implementing laws of Croatia, Hungary and Lithuania sets out a legal regime for service suppliers controlled by public bodies that is different from the ownership unbundling requirement provided by the unbundling measure for all other service suppliers. Thus, on its face, the only category of service suppliers subject to the public body measure is service suppliers controlled by public bodies. Service suppliers not controlled by public bodies are subject to the OU model, as well as the other two unbundling models, where applicable. Therefore, in our analysis below, we will assess whether Russia has demonstrated that the public body measure applies exclusively to

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<sup>1330</sup> Russia's first written submission, paras. 233, 235 and 269–303; second written submission, paras. 176–197; and response to Panel question No. 5, para. 29.

<sup>1331</sup> Russia's first written submission, paras. 275, 277, 280 and 284; and second written submission, paras. 177–178.

<sup>1332</sup> We note that, in its panel request, Russia describes this claim as follows:

The Directive also provides that, when the owner of the VIU is the Member State or another public body, two separate public bodies exercising control over the TSO and over an undertaking performing production or supply functions shall be deemed not to be the same person or persons. In reality, this measure permits a Member State government to own and control both the TSO and the production or supply portions of the VIU, whereas third-country service suppliers, including those of Russia, may not. (Russia's panel request, p. 2) (footnote omitted)

In its first written submission, Russia argues that the public body measure "arbitrarily exempts government-owned and controlled VIUs from the requirements of the unbundling measure" and thus "provides pipeline transport services and service suppliers of other Members formally different treatment than like government-controlled services and service suppliers". (Russia's first written submission, paras. 233–234). Russia similarly alleges that "[a]fter all, as a legal matter, the service suppliers actually owned and controlled by the respective governments are all exempt from the unbundling requirements *entirely because* they are domestic (government-owned) rather than third-country entities". (Russia's first written submission, para. 250). In its second written submission, Russia first argues that, "[p]rovided the government arranges for control to be exercised by 'two separate public bodies,' ... it is exempted from the unbundling requirements" and then concludes that this measure "expand[s] the competitive opportunities of government-controlled service suppliers to supply both transmission and supply/production services, while denying those same opportunities to other Members' service suppliers, including those of Russia". (Russia's second written submission, paras. 175 and 178). The resulting ambiguity, however, concerns only our determination of whether the public body measure applies exclusively to domestic service suppliers. It has no impact on our assessment of whether the public body measure is an "exemption" from the requirement to unbundle and does not affect our conclusion that Russia has not demonstrated so.

<sup>1333</sup> At the same time, we observe that Russia does not assert that domestic service suppliers not controlled by public bodies may be certified on the basis of the public body measure. Likewise, aside from its allegations that service suppliers controlled only by domestic public bodies may be certified under this measure, Russia does not develop any arguments that, in its operation, the public body measure excludes foreign service suppliers not controlled by public bodies. In other words, we do not see in Russia's submissions any arguments that, in Russia's view, the public body measure excludes foreign service suppliers not controlled by public bodies any more than it excludes domestic service suppliers not controlled by public bodies. There is no evidence on the record that would allow us to reach such a conclusion. In any event, even if Russia were to be understood as arguing that, by allegedly providing an "exemption" from the requirement to unbundle to only service suppliers controlled by domestic public bodies, the public body measure modified the conditions of competition to the detriment of foreign service suppliers not controlled by public bodies, our conclusion above that Russia has not demonstrated that this measure constitutes an "exemption" from the requirement to unbundle means that Russia's claim understood this way would not succeed.

service suppliers controlled by domestic public bodies (domestic service suppliers) and excludes service suppliers controlled by foreign public bodies (foreign service suppliers).<sup>1334</sup>

7.792. We commence our examination by observing that, as we have determined in paragraph 7.741, the text of the public body measure in the national implementing laws of Croatia, Hungary and Lithuania is origin-neutral. Thus, on its face, the public body measure, as implemented in the national laws of Croatia, Hungary and Lithuania, can be read as covering service suppliers controlled by domestic public bodies, as well as service suppliers controlled by foreign public bodies.

7.793. However, we recall that the Appellate Body has underscored that the text of the municipal law is only the starting point in establishing its meaning and scope.<sup>1335</sup> As further clarified by the Appellate Body, a complainant may seek to support its understanding of the meaning and scope of the municipal law on the basis of additional elements such as evidence of the consistent application of the municipal law at issue, the pronouncements of domestic courts on the meaning of such law, the opinions of legal experts and the writings of recognized scholars.<sup>1336</sup> Thus, taking into account this clarification, we continue our analysis to examine whether Russia has provided pertinent evidence with respect to such other elements. We shall also consider evidence submitted by the European Union in order to rebut Russia's arguments.

7.794. We note that, aside from the text of the national implementing laws of Croatia, Hungary and Lithuania, Russia does not provide any direct evidence in support of its understanding of the meaning and scope of these laws. Russia relies, instead, on the evidence pertaining to the meaning and scope of Article 9(6) of the Directive. We recall that Article 9(6) of the Directive is not a challenged measure.<sup>1337</sup> However, the national laws in question implement Article 9(6) of the Directive. Therefore, as we have already noted, evidence regarding the meaning and scope of Article 9(6) of the Directive may be relevant for our assessment to the extent that such evidence may clarify the meaning and scope of the national laws.<sup>1338</sup> Thus, we will take into account evidence regarding the meaning and scope of Article 9(6) of the Directive inasmuch as it can shed light on the meaning and scope of the national implementing laws at issue.

7.795. We recall that Article 9(6) of the Directive provides as follows:

For the implementation of this Article, where the person referred to in points (b), (c) and (d) of paragraph 1 is the Member State *or another public body*, two separate public bodies exercising control over a transmission system operator or over a transmission system on the one hand, and over an undertaking performing any of the functions of production or supply on the other, shall be deemed not to be the same person or persons.<sup>1339</sup> (emphasis added)

7.796. Russia argues that Recital (20) of the Directive, the Explanatory Memorandum of the Commission to the Proposal of the Directive, and the Commission Interpretative Note on the Unbundling Regime demonstrate that Article 9(6) of the Directive covers only EU public bodies.<sup>1340</sup> We understand that, on this basis, Russia draws the same conclusion in respect of the national implementing laws of Croatia, Hungary and Lithuania.

7.797. We observe that the relevant part of Recital (20) of the Directive provides as follows:

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<sup>1334</sup> We note that the European Union understands Russia's claim in the same manner, arguing that the public body measure in the national implementing laws of Croatia, Hungary and Lithuania applies to service suppliers controlled by domestic public bodies, as well as those controlled by foreign public bodies. (European Union's second written submission, paras. 52-53). In the course of the panel proceedings, Russia has been engaging with the arguments provided by the European Union and has not indicated that they are premised on an incorrect understanding of its claim.

<sup>1335</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.156.

<sup>1336</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.156.

<sup>1337</sup> See para. 7.732.

<sup>1338</sup> This seems to also be the view of the parties, which, as mentioned above, have developed a significant part of their arguments on the basis of Article 9(6) of the Directive.

<sup>1339</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 9(6).

<sup>1340</sup> Russia's response to Panel question No. 7(a), paras. 64–69.

With regard to ownership unbundling and the independent system operator solution, provided that *the Member State in question* is able to demonstrate that the requirement is complied with, two separate public bodies should be able to control production and supply activities on the one hand and transmission activities on the other.<sup>1341</sup> (emphasis added)

7.798. Russia contends that the reference to "the Member State in question" in the text of Recital (20) means that "another public body" in Article 9(6) should be understood as a public body of an EU member State.<sup>1342</sup>

7.799. Russia also refers to the following part of the Explanatory Memorandum of the Commission to the Proposal of the Directive:

In keeping with Article 295 EC, the proposal applies in the same way to publicly and privately owned companies. This means that irrespective of its public or private nature, no person or group of persons would be able alone or jointly to influence the composition of the boards, the voting or decision making of either transmission system operators or the supply or production companies. This ensures that where supply or production activities are in public ownership, the independence of a publicly owned transmission system operator is still guaranteed; *but these proposals do not require state owned companies to sell their network to a privately owned company.* For instance, to comply with this requirement, any public entity or the State could transfer the rights (which provide the "influence") to another publicly or privately owned legal person. The important thing is that in all cases where unbundling is carried out, *the Member State in question must demonstrate that in practice, the results are truly effective and that the companies operate entirely separate from one another, providing a real level-playing field across the whole of the EU.*<sup>1343</sup> (emphasis added)

7.800. According to Russia, the italicized text supports its position that Article 9(6) of the Directive does not cover TSOs controlled by a non-EU public body.<sup>1344</sup>

7.801. Similarly, Russia relies on the Commission Interpretative Note on the Unbundling Regime<sup>1345</sup>, the relevant part of which provides:

The rules on unbundling apply equally to private and public entities. For the purpose of the rules on ownership unbundling, two separate public bodies should therefore be seen as two distinct persons and should be able to control generation and supply activities on the one hand and transmission activities on the other provided they are not under the common influence of another public entity in violation of the rules on ownership unbundling provided for in Article 9 Electricity and Gas Directives; the public bodies concerned must be truly separate. In these cases, *the Member State in question* will need to be able to demonstrate that the requirements of ownership unbundling of Article 9 Electricity and Gas Directives are enshrined in national law and are duly complied with.<sup>1346</sup> (emphasis added)

7.802. The European Union disagrees with Russia that Recital (20) of the Directive and the documents referred to above support the interpretation of Article 9(6) of the Directive (and by implication the national implementing laws) advocated by Russia. According to the European Union, in the certification procedure under the Directive, including under Article 9(6), the TSO seeking certification must demonstrate to the regulatory authority in the EU member State that it complies with the relevant requirements.<sup>1347</sup> The European Union argues that, since ultimately it is

<sup>1341</sup> Directive 2009/73/EC, (Exhibit EU-5), Recital (20).

<sup>1342</sup> Russia's response to Panel question No. 7(a), para. 67.

<sup>1343</sup> Russia's response to Panel question No. 7(a), para. 68 (referring to European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/55/EC concerning common rules for the internal market in natural gas, COM(2007) 529 final, 2007/0196 (COD) (19 September 2007), (Commission Proposal for the Directive), (Exhibit RUS-119), p. 6).

<sup>1344</sup> Russia's response to Panel question No. 7(a), para. 69.

<sup>1345</sup> Russia's response to Panel question No. 7(a), para. 67; and second written submission, para. 180.

<sup>1346</sup> Commission Interpretative Note on the Unbundling Regime, (Exhibits EU-42/RUS-19), p. 10.

<sup>1347</sup> European Union's response to Panel question No. 14(c), para. 33.

the EU member State that has to ensure that the TSO operating on its territory is compliant with the unbundling rules, explanatory documents on unbundling, as well as Recital (20) of the Directive, refer to the obligations of the EU member States.<sup>1348</sup> Thus, the European Union submits that, "[e]ven if the TSO or system owner is controlled by (a) third country person(s), it is for the EU Member State where the TSO operates to ultimately ensure compliance with unbundling".<sup>1349</sup>

7.803. Russia challenges this explanation, alleging that the European Union has cited no actual evidence showing that there was any intention at the time of inclusion of Article 9(6) of the Directive for "the Member State ... to demonstrate" compliance on behalf of a third-country government.<sup>1350</sup>

7.804. We observe that, as quoted above, Article 9(6) of the Directive refers to "the Member State *or another public body*". We understand that, relying on the references to "the Member State in question" in Recital (20) of the Directive, the Explanatory Memorandum of the Commission to the Proposal of the Directive, and in the Commission Interpretative Note on the Unbundling Regime, Russia contends that the phrase "another public body" in Article 9(6) of the Directive should be understood as meaning a public body of an EU member State.

7.805. Commencing our own analysis, we observe that Recital (20) of the Directive and the two documents cited by Russia explicitly refer to "the Member State in question" in the context of the latter's obligation to ensure effective compliance with the unbundling requirement. In our view, the question raised by Russia's arguments is whether it can be inferred from the explicit reference to the "Member State" in this obligation that only the public bodies of *this State* may seek application on the basis of Article 9(6) of the Directive. For the reasons explained below, we consider that, while plausible, this is not the only inference that may be drawn.

7.806. We observe that the Commission Interpretative Note on the Unbundling Regime states, in the relevant part, that "the Member State in question will need to be able to demonstrate that the requirements of ownership unbundling of Article 9 Electricity and Gas Directives are enshrined in national law and are duly complied with".<sup>1351</sup> This statement thus speaks of two obligations of "the Member State in question": (i) the obligation to demonstrate that the ownership unbundling requirements are "duly complied with"; and (ii) the obligation to demonstrate that such requirements are "enshrined" in national law. As mentioned above, the reference to "the Member State in question" in the former obligation could imply that only the public bodies of an EU member State may request certification on the basis of Article 9(6) of the Directive. However, in our view, the reference to "the Member State in question" in the latter obligation could suggest that public bodies of other States, including non-EU States, may request certification on the basis of Article 9(6) of the Directive.

7.807. As "the Member State in question" will be able to comply with its latter obligation even if the public bodies seeking certification under Article 9(6) of the Directive are not the public bodies of this member State, it could be inferred that the reference to "the Member State in question" does not necessarily imply any limitation on the origin of public bodies that may seek certification under Article 9(6). In light of this, we consider that the reference to "the Member State in question" in the Commission Interpretative Note on the Unbundling Regime allows different inferences as to whether the phrase "another public body" in Article 9(6) of the Directive covers public bodies of non-EU States, leaving the meaning and scope of this phrase ambiguous.

7.808. In our view, this ambiguity is not resolved by Recital (20) of the Directive and the Explanatory Memorandum of the Commission to the Proposal of the Directive. The latter document states, in relevant part, that "[t]he important thing is that in all cases where unbundling is carried out, the Member State in question must demonstrate that in practice, the results are truly effective and that the companies operate entirely separate from one another, providing a real level-playing field across the whole of the EU".<sup>1352</sup> The quoted passage does not unambiguously indicate that "the Member State in question" must demonstrate "effective" compliance with the requirement to unbundle *only* on behalf of its own public bodies. Likewise, we consider that Recital (20) of the

<sup>1348</sup> European Union's response to Panel question No. 14(c), para. 33.

<sup>1349</sup> European Union's response to Panel question No. 14(c), para. 33.

<sup>1350</sup> Russia's opening statement at the second meeting of the Panel, para. 68.

<sup>1351</sup> Commission Interpretative Note on the Unbundling Regime, (Exhibits EU-42/RUS-19), p. 10.

<sup>1352</sup> Commission Proposal for the Directive, (Exhibit RUS-119), p. 6.

Directive does not clarify the origin of public bodies in respect of which "the Member State in question" should be able to demonstrate that the ownership unbundling requirement is complied with.

7.809. We recall that the European Union advances its own explanation as to why Recital (20) of the Directive and the two documents relied on by Russia refer to "the Member State in question". According to the European Union's explanation, this reference denotes the ultimate responsibility of the member State in which a TSO controlled by a public body operates to ensure compliance of this TSO with the unbundling requirement, without implying any limitation on the origin of the public body controlling such a TSO.<sup>1353</sup> While arguing that the European Union has not provided any evidence to support its position, Russia does not offer any arguments refuting this explanation. In light of our own analysis, we do not find the explanation provided by the European Union implausible. We further consider that it is Russia who bears the burden of introducing evidence that the public body measure is inconsistent with Article XVII of the GATS, including with respect to its meaning and scope.<sup>1354</sup> Therefore, to the extent the parties advance divergent interpretations of the public body measure, it is, in our view, insufficient for Russia to simply point to the absence of evidence supporting the European Union's interpretation. Rather, as the complainant, Russia needs to prove the interpretation of the public body measure it relies on in advancing its claim that this measure is inconsistent with Article XVII.

7.810. Russia further argues that, in the certification opinions concerning Lithuania and Hungary under Article 9(6) of the Directive, the Commission titles the relevant section of its opinion "Separation within the State", which in Russia's view, means that it is only within an EU member State government that this "[s]eparation" is contemplated.<sup>1355</sup> We understand that, on this basis, Russia draws the conclusion that the public body measure covers only service suppliers controlled by public bodies of EU member States. We are not persuaded that the mentioned certification opinions support Russia's interpretation of Article 9(6) of the Directive. We consider that the mere reference to "*the State*" does not necessarily mean it is a reference to an *EU member State*. In our view, this reference may also cover non-EU States. As the certification opinions in question concern EU member States (*in casu*, Hungary and Lithuania), the reference to "the State" in those opinions is ultimately a reference to the EU member State. However, it does not follow from this fact that the word "State" means an EU member State, and therefore, limits the scope of the public body measure exclusively to service suppliers controlled by public bodies of EU member States.

7.811. We observe that neither party has referred to any domestic court pronouncements regarding the meaning of Article 9(6) of the Directive or the national implementing laws at issue. Furthermore, aside from referring to the titles of certain sections in the Commission certification opinions, which we have examined in the previous paragraph, Russia has provided no evidence of the application of Article 9(6) of the Directive, or the national implementing laws at issue, in support of its arguments that the public body measure applies exclusively to service suppliers controlled by public bodies of EU member States. However, we note that the European Union has provided evidence of the alleged application of the term "public body" by the Commission in the merger control context.

7.812. According to the European Union, the Commission Merger Jurisdictional Notice<sup>1356</sup> refers to "Member States or other public bodies" and has been applied to undertakings owned by the Chinese state in several merger control decisions.<sup>1357</sup> The European Union thus argues that this

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<sup>1353</sup> European Union's response to Panel question No. 14(c), para. 33.

<sup>1354</sup> See para. 7.747 above.

<sup>1355</sup> Russia's second written submission, para. 181 (referring to Commission Opinion on the Certification of Amber Grid, (Exhibits EU-54/RUS-50), p. 2; and Commission Opinion on the Certification of MGT, (Exhibits EU-53/RUS-53), p. 3)).

<sup>1356</sup> Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, 2008/C 95/01, (Commission Merger Jurisdictional Notice), (Exhibit EU-101).

<sup>1357</sup> European Union's second written submission, paras. 54-55; and response to Panel question No. 236, paras. 312-315.

demonstrates that the reference to "another public body" in Article 9(6) of the Directive was intended to extend to third-country public bodies.<sup>1358</sup>

7.813. Russia contests the relevance of the evidence introduced by the European Union regarding the alleged application of the term "public body" in the merger control context, submitting that the Commission Merger Jurisdictional Notice and the Commission's decisions referred to by the European Union do not define the concept of "public body".<sup>1359</sup> We observe that paragraph 193 of the Commission Merger Jurisdictional Notice refers to "Member States (or other public bodies)", and in the relevant part clarifies as follows:

Member States (or other public bodies) are not considered as "undertakings" under Article 5(4) simply because they have interests in other undertakings which satisfy the conditions of Article 5(4). Therefore, for the purposes of calculating turnover of State-owned undertakings, account is only taken of those undertakings which belong to the same economic unit, having the same independent power of decision.<sup>1360</sup>

7.814. We are satisfied that, in the two decisions cited by the European Union, the Commission assessed whether the decision-making of China's state-owned companies involved in a concentration was independent referring *inter alia* to paragraph 193 of the Commission Merger Jurisdictional Notice.<sup>1361</sup> Thus, we confirm that, while neither the Commission Merger Jurisdictional Notice nor the Commission's decisions referred to by the European Union define the concept of the "public body", the Commission applied the phrase "Member States (or other public bodies)" to China's state-owned undertakings in the merger control context.

7.815. We are mindful that the application of the same term ("public bodies") in the merger control context may not be automatically transposable into the public body measure context. However, in our view, this does not render the evidence of such application adduced by the European Union irrelevant for our analysis, as Russia appears to suggest.<sup>1362</sup> We consider that the application of the term "public bodies" to non-EU entities in the merger control context constitutes indirect evidence that the term "public body" may conceivably cover non-EU public bodies, also in the context of the public body measure.

7.816. Thus, having carefully reviewed the arguments and evidence presented by the parties, we consider that Russia has not demonstrated that the phrase "another public body" used in Article 9(6) of the Directive covers only service suppliers controlled by EU public bodies. Consequently, evidence pertaining to the meaning and scope of Article 9(6) of the Directive does not support Russia's position that the national implementing laws of Croatia, Hungary and Lithuania apply only to service suppliers controlled by domestic public bodies. We also recall that, aside from the text of the national implementing laws, Russia has provided no direct evidence supporting its claim that the references to "two separate public authorities", "other public bodies" and "another public body" in the national implementing laws of Croatia, Hungary and Lithuania, respectively, cover only domestic public bodies.

7.817. We now turn to the issue of whether in advancing its claim on the basis of the alleged ownership and control by the governments of Croatia, Hungary and Lithuania of a TSO and supply undertaking within their respective territories, Russia has demonstrated that the public body measure in practice operates to exclude service suppliers controlled by foreign public bodies.

7.818. Russia explains the basis for its claim as follows:

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<sup>1358</sup> European Union's second written submission, para. 55; and response to Panel question No. 236, paras. 312–315.

<sup>1359</sup> Russia's opening statement at the second meeting of the Panel, paras. 62–63. See also Russia's comments on the European Union's response to Panel question No. 236, para. 245.

<sup>1360</sup> Commission Merger Jurisdictional Notice, (Exhibit EU-101), para. 193.

<sup>1361</sup> Commission Decision of 31 March 2011 on China National Bluestar/Elkem notification pursuant to Article 4 of Council Regulation No. 139/2004, Case COMP/M.6082, (Exhibit EU-104), para. 8 and fn 4; and Commission Decision of 19 May 2011 on DSM/Sinochem/JV notification pursuant to Article 4 of Council Regulation (EC) No. 139/2004, Case COMP/M.6113, (Exhibit EU-106), para. 9 and fn 4.

<sup>1362</sup> Russia's comments on the European Union's response to Panel question No. 236, para. 245.

The governments of Croatia, Hungary and Lithuania each owns and controls the entire pipeline transport service supplier supplying both transmission and supply services to all or a portion of the natural gas market within their respective territories. These Member States do so through their government exemption measures adopted pursuant to Article 9(6) of the Directive. Accordingly, as implemented, Croatia, Hungary and Lithuania's government exemption measures provide their respective domestic, government-controlled services and service suppliers different treatment than they do like services and service suppliers of other Members.<sup>1363</sup>

7.819. We thus understand Russia to argue that, because the implementation of the public body measure in Croatia, Lithuania and Hungary results in the governments of these EU member States owning and controlling a TSO and supply undertaking within their territories, service suppliers controlled by foreign public bodies are effectively prevented from making use of the public body measure in these EU member States.<sup>1364</sup> As we have determined above, the aspect of Russia's claim that concerns the ownership and control by the government of Hungary of a TSO and supply undertaking in its territory falls outside our terms of reference and we shall therefore not consider it further.<sup>1365</sup>

7.820. In respect of the alleged ownership and control by the governments of Croatia and Lithuania of a TSO and supply undertaking within their respective territories, Russia only argues that this ownership and control are based on the application of the "ineffective" concept of unbundling.<sup>1366</sup> However, Russia has not argued that the fact that the governments of Croatia and Lithuania own and control a TSO and supply undertaking within their respective territories actually prevents service suppliers controlled by foreign public bodies from being certified on the basis of the public body measure in these member States. Furthermore, Russia has developed no other arguments that the public body measure in practice operates to exclude from its scope service suppliers controlled by foreign public bodies, and, in response to a question by the Panel, confirmed that no Russian entity sought certification under the public body measure.<sup>1367</sup>

7.821. We recall that, on the basis of our analysis of the meaning and scope of the public body measure, in light of the arguments of the parties and pertinent evidence, including the references to "the Member State in question" in Recital (20) of the Directive, the Explanatory Memorandum of the Commission to the Proposal of the Directive, and the Commission Interpretative Note on the Unbundling Regime, we have concluded that Russia has not demonstrated that the public body measure in the national laws of Croatia, Hungary and Lithuania applies only to service suppliers controlled by domestic public bodies.

7.822. Based on our examination of Russia's arguments with respect to the additional basis for its claim, we further conclude that Russia has not demonstrated that the public body measure in the national laws of Croatia, Hungary and Lithuania in practice operates to exclude service suppliers controlled by foreign public bodies.

### 7.6.2.3 Conclusion

7.823. As indicated in paragraph 7.751 above, in the specific circumstances of this claim, and based on our understanding of Russia's arguments, in order for its claim to succeed, Russia needs

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<sup>1363</sup> Russia's first written submission, para. 285. See also Russia's second written submission, para. 188.

<sup>1364</sup> Russia's first written submission, paras. 233–235 and 285–303; response to Panel question No. 5, para. 29; and second written submission, paras. 188–197.

<sup>1365</sup> See above para. 7.215.

<sup>1366</sup> Russia's second written submission, paras. 192–195.

<sup>1367</sup> Russia's response to Panel question No.7(c), paras. 73-74. The European Union further confirms that there have been no instances where a TSO controlled by a public body from a third country sought the application of Article 9(6) of Directive or the corresponding national implementing provisions. (European Union's response to Panel question No. 14(a), para. 31). Russia explains that no Russian entity has sought certification on the basis of Article 9(6) of the Directive or the corresponding provisions in the national implementing laws due to the following reasons: there is no objective indication that the public bodies of non-EU countries, including Russian, could make use of this provision; the term "public body" is "intentionally vague" to ensure that the member states can own and control their entire transmission and supply systems and comply with "the Directive's technical requirements"; and there are no Russian TSOs operating within the EU that could possibly be considered a "public body" within the meaning of Article 9(6) of the Directive. (Russia's response to Panel question No. 7(c), paras. 73-74).



to demonstrate two elements: (i) that the public body measure is an "exemption" from the requirement to unbundle, and (ii) that it applies only to domestic service suppliers, excluding like service suppliers of other Members, and hence modifies the conditions of competition to the detriment of service suppliers of any other Member. The analysis conducted above leads us to conclude that Russia has demonstrated neither of these elements. Therefore, we find that Russia has not demonstrated that the public body measure in the national implementing laws of Croatia, Hungary and Lithuania modifies the conditions of competition to the detriment of service suppliers of other Members in comparison to like domestic service suppliers, and is, for this reason, inconsistent with Article XVII of the GATS. As we have not found an inconsistency with Article XVII, we do not consider it necessary to examine the European Union's defence under Article XIV(c) of the GATS.

## 7.7 The LNG measure

### 7.7.1 Introduction

7.824. As noted above in section 2.2.4, the LNG measure challenged by Russia stems from the provisions of the Directive defining a "LNG facility" and "LNG system operator". LNG facilities are terminals used for the importation, offloading, and regasification of LNG in the European Union.<sup>1368</sup> LNG system operators are responsible for operating a LNG facility and carry out the importation, offloading, and regasification of LNG.<sup>1369</sup>

### 7.7.2 Russia's claim under Article I:1 of the GATT 1994

#### 7.7.2.1 Introduction

7.825. Russia's claim under Article I:1 of the GATT 1994 arises from the fact that, as a consequence of how LNG facilities and LNG system operators are defined in the Directive, LNG system operators are not subject to the requirement to unbundle applicable to TSOs.<sup>1370</sup> Russia argues that, because LNG system operators are not required to unbundle and TSOs are required to do so, LNG imported into the European Union via LNG facilities receives an advantage within the meaning of Article I:1 of the GATT that is not accorded to Russian natural gas imported into the European Union via pipelines.<sup>1371</sup>

7.826. The European Union submits that Russia has not demonstrated how the different rules applicable to LNG system operators impact the competitive opportunities of natural gas imported from Russia.<sup>1372</sup> The European Union also argues that LNG and natural gas are not like products within the meaning of Article I:1 of the GATT 1994.<sup>1373</sup> According to the European Union, due to the specific nature of LNG facilities, in comparison to transmission networks, the non-application of the unbundling requirement of the Directive to LNG system operators does not grant any advantage to LNG imported into the European Union via LNG facilities.<sup>1374</sup> The European Union further points out that the Directive requires third-party access to all LNG facilities in the European Union, regardless of ownership.<sup>1375</sup> The European Union thus maintains that nothing prevents Russian gas from being imported via LNG facilities in the European Union.<sup>1376</sup>

#### 7.7.2.2 Analysis by the Panel

7.827. In light of the legal standard under Article I:1 of the GATT 1994, as set out in paragraphs 7.236 and 7.237 above, our analysis below will focus on whether Russia has

<sup>1368</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 2(11).

<sup>1369</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 2(12).

<sup>1370</sup> See above section 2.2.4.

<sup>1371</sup> Russia's first written submission, paras. 391–396; responses to Panel question No. 1 paras. 1 and 5, No. 6, paras. 54–63, and No. 184, paras. 200–201; and second written submission, para. 273.

<sup>1372</sup> European Union's first written submission, paras. 440 and 446; and second written submission, para. 150.

<sup>1373</sup> European Union's first written submission, paras. 360 and 437; and second written submission, paras. 147–149.

<sup>1374</sup> European Union's first written submission, paras. 427–434 and 441; response to Panel question No. 1, para. 8; and second written submission, para. 145.

<sup>1375</sup> European Union's first written submission, paras. 442 and 444.

<sup>1376</sup> European Union's first written submission, para. 442; and second written submission, para. 153.

established the following elements: (a) that the LNG measure falls within the scope of Article I:1; (b) that the relevant imported products are like products; (c) that the LNG measure confers an "advantage, favour, privilege, or immunity" on a product originating in the territory of any country; and (d) that the advantage so accorded is not extended "immediately" and "unconditionally" to like Russian products.

#### 7.7.2.2.1 Scope of Article I:1 of the GATT 1994

7.828. Russia asserts that the LNG measure is a law, regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use of natural gas imported from Russia and other third-countries within the meaning of Article III:4 of the GATT 1994, and consequently, falls within the scope of Article I:1 of the GATT 1994.<sup>1377</sup> The European Union does not contest Russia's arguments that the LNG measure falls within the scope of Article I:1 of the GATT 1994.

7.829. As observed by the Appellate Body, Article I:1 of the GATT 1994 "incorporates all matters referred to in paragraphs 2 and 4 of Article III".<sup>1378</sup> Thus, in light of Russia's arguments, we need to determine whether the LNG measure falls within the scope of the "matters" referred to in Article III:4 of the GATT 1994 in order to determine whether it falls within the scope of Article I:1 of the GATT 1994. For a measure to fall within the scope of Article III:4 of the GATT 1994, such a measure must constitute a law, regulation or requirement "affecting" the "internal sale, offering for sale, purchase, transportation, distribution or use" of imported natural gas.<sup>1379</sup>

7.830. We note that the parties do not disagree that the Directive constitutes a law, regulation or requirement within the meaning of Article III:4 of the GATT 1994. In our view, the Directive is undeniably a law, regulation or requirement within the meaning of this provision. However, as clarified by the Appellate Body, it is "not *any* 'laws, regulations and requirements' which are covered by Article III:4, but only those which "'affect' the specific transactions, activities and uses mentioned in that provision".<sup>1380</sup> According to the Appellate Body, "the word 'affecting' operates as a link between identified types of government action ('laws, regulations and requirements') and specific transactions, activities and uses relating to the products in the marketplace ('internal sale, offering for sale, purchase, transportation, distribution or use')".<sup>1381</sup>

7.831. Turning to the question of whether the LNG measure "affects" any of the transactions, activities or uses mentioned in Article III:4 of the GATT 1994, we recall that, as a consequence of how LNG facilities and LNG system operators are defined in the Directive, LNG system operators are not subject to the requirement to unbundle. As applicable to TSOs, the obligation to unbundle requires a separation of gas transmission function from the function of gas production and/or supply on the basis of one of the applicable unbundling models, including ownership unbundling. Under the OU model, the same person is prohibited from directly or indirectly exercising control over, on the one hand, a TSO or transmission system, and on the other, an undertaking performing any of the functions of production or supply.<sup>1382</sup> Applied *mutatis mutandis* to LNG system operators, the unbundling obligation would require a separation of the function of LNG system operation from the function of LNG production and/or supply. As LNG system operators are not subject to the requirement to unbundle, it means that, in practice, an LNG supply undertaking may exercise control over an LNG system operator.

7.832. Russia submits that, as a consequence of the non-applicability of the unbundling obligation to LNG system operators, "LSOs and their foreign production-supply owners can thereby reduce their costs and otherwise [increase] competitive opportunities for the sale, purchase and transportation of their natural gas products on the EU market".<sup>1383</sup> We understand that, on this

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<sup>1377</sup> Russia's first written submission, paras. 342, 364-365 and 382; and second written submission, para. 271.

<sup>1378</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.80.

<sup>1379</sup> Panel Report, *Argentina – Financial Services*, para. 7.1015.

<sup>1380</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 208. (emphasis original)

<sup>1381</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 208.

<sup>1382</sup> See above para. 2.11. See also Commission Interpretative Note on the Unbundling Regime, (Exhibits EU-42/RUS-19), pp. 7–8.

<sup>1383</sup> Russia's response to Panel question No. 113, para. 467.

basis, Russia argues that the LNG measure affects the internal sale, offering for sale, purchase, transportation, distribution or use of natural gas.<sup>1384</sup>

7.833. In our view, it is conceivable that the ability of an LNG supply undertaking to exercise control over an LNG system operator could allow such an undertaking to adjust its costs associated with the internal sale of imported LNG. The LNG measure may, as a result, affect imported LNG supplied by such an undertaking and gas imported into the European Union via pipelines. Therefore, we consider that the LNG measure affects the internal sale of imported natural gas in the European Union and consequently falls within the scope of the "matters" referred to in Article III:4 of the GATT 1994. On this basis, we find that the LNG measure falls within the scope of Article I:1 of the GATT 1994.

#### 7.7.2.2.2 Like products

7.834. Russia argues that natural gas imported from Russia and LNG imported from other countries are like products within the meaning of Article I:1 of the GATT 1994.<sup>1385</sup> For Russia, LNG is natural gas and the only difference between the two is the method of importation and the form in which LNG is imported.<sup>1386</sup> According to Russia, natural gas is converted into liquid form to facilitate long distance ocean transport, and when LNG reaches the European Union it is necessarily reconverted to its gaseous state (regasified) for insertion in the transmission system and marketing to consumers.<sup>1387</sup> Thus, natural gas imported via pipelines and in the form of LNG is "marketed in an equally close, competitive relationship".<sup>1388</sup> On this basis, Russia concludes that natural gas imported from Russia and LNG imported from other countries are "identical in terms of physical characteristics and perfectly substitutable in terms of consumer perceptions and end uses, as required to satisfy the like products standard under Article I:1".<sup>1389</sup>

7.835. The European Union submits that LNG and natural gas are not like products within the meaning of Article I:1 of the GATT 1994.<sup>1390</sup> For the European Union, LNG and natural gas are at different stages in production, and therefore do not constitute "like or directly competitive products".<sup>1391</sup> The European Union contends that the physical characteristics of LNG and natural gas are different: LNG is liquid, while natural gas is in gaseous form.<sup>1392</sup> The European Union also alleges that LNG and natural gas have different end-uses, pointing to the use of LNG as a transport fuel.<sup>1393</sup> Furthermore, in the European Union's view, consumers of LNG purchase this product in order to transport it by ships or trucks and trade or store LNG.<sup>1394</sup> In addition, according to the European Union, LNG and natural gas have a different tariff classification: in the Harmonized Commodity Description and Coding System of the World Customs Organization (HS), LNG is classified under subheading 2711.11 while natural gas is classified under subheading 2711.21.<sup>1395</sup>

7.836. Russia submits that the Directive treats natural gas as including LNG.<sup>1396</sup> Responding to the European Union's arguments that the end-uses of LNG and natural gas are different, Russia also contends that, ultimately, both types of natural gas will be used by consumers "to heat their

<sup>1384</sup> Russia's second written submission, para. 271.

<sup>1385</sup> Russia's first written submission, para. 366.

<sup>1386</sup> Russia's first written submission, para. 348; response to Panel question No. 109, para. 435; and second written submission, para. 272.

<sup>1387</sup> Russia's response to Panel question No. 109(a), para. 435.

<sup>1388</sup> Russia's first written submission, para. 348.

<sup>1389</sup> Russia's first written submission, paras. 348 and 366; and second written submission, para. 272.

<sup>1390</sup> European Union's first written submission, paras. 360 and 437; and second written submission, paras. 147–149.

<sup>1391</sup> European Union's second written submission, para. 148 (referring to Appellate Body Report, *US – Lamb*, paras. 77–96).

<sup>1392</sup> European Union's second written submission, para. 149.

<sup>1393</sup> European Union's second written submission, para. 149; and responses to Panel question No. 109(c), para. 282, and No. 188, para. 130.

<sup>1394</sup> European Union's second written submission, para. 149.

<sup>1395</sup> European Union's second written submission, para. 149.

<sup>1396</sup> Russia's panel request, fn 2 (stating that "[n]atural gas" includes liquefied natural gas ('LNG'), consistent with the provisions of the Directive."); and response to Panel question No. 109(e), paras. 443–444 (referring to Directive 2009/73/EC, (Exhibit EU-5), Articles 1(2), 2(1) and 2(7)).

homes, for example, or cook their food".<sup>1397</sup> Thus, for Russia, "in the eyes of the consumer", the end use of both types of natural gas is exactly the same.<sup>1398</sup>

7.837. We consider that our assessment of likeness under Article I:1 of the GATT 1994 may be informed by the analytical framework set out by the Appellate Body for a determination of likeness under Article III:4 of the GATT 1994.<sup>1399</sup> We recall that the Appellate Body has found that a determination of whether the products at issue are like for the purposes of Article III:4 of the GATT 1994 involves an assessment, on a case-by-case basis, of the nature and extent of the competitive relationship between and among these products, taking into account all relevant evidence, including the following criteria: (a) the properties, nature and quality of the products; (b) the end-uses of the products; (c) consumers' tastes and habits in respect of the products; and (d) the tariff classification of the products.<sup>1400</sup>

7.838. The Appellate Body has further explained that panels must examine all the relevant evidence and determine whether that evidence, as a whole, indicates that the products in question are like.<sup>1401</sup> We follow this analytical framework in our assessment of whether LNG imported from third countries and natural gas imported from Russia are like products within the meaning of Article I:1 of the GATT 1994.

7.839. While the parties disagree on whether LNG and natural gas are like products on the basis of the likeness criteria mentioned in the previous paragraph, we consider that the main point of contention between the parties concerns the significance of the fact that LNG may be reconverted into gas at an LNG facility in the European Union for its subsequent transportation and supply via pipelines. Therefore, we address this issue before turning to the analysis based on the four likeness criteria mentioned in the previous paragraph.

7.840. We understand that, for Russia, the fact that LNG may be reconverted into gas at an LNG facility means that LNG and natural gas are indistinguishable and therefore like<sup>1402</sup>, whereas the European Union considers that LNG and natural gas are at different stages in production.<sup>1403</sup>

7.841. Based on the evidence on the record, we understand that natural gas may be converted into LNG through the process of liquefaction, which facilitates its long-distance transportation by seagoing vessels.<sup>1404</sup>

7.842. We also understand that LNG, in turn, may be reconverted back into gas (regasified) at an LNG facility to enable its transportation and supply via pipelines.<sup>1405</sup> The parties do not contest that a certain amount of LNG imported into the European Union undergoes regasification for the purposes of transporting and supplying regasified LNG via pipelines in the European Union.<sup>1406</sup> The parties also agree that a certain amount of LNG imported into the European Union is not regasified for the purposes of its transportation and supply via pipelines in the European Union, and is instead used in its liquid form as a transport fuel.<sup>1407</sup> Thus, LNG imported into the European Union

<sup>1397</sup> Russia's opening statement at the first meeting of the Panel, para. 50.

<sup>1398</sup> Russia's opening statement at the first meeting of the Panel, para. 50.

<sup>1399</sup> We also note that this approach is consistent with the observations made by the Panel in *US – Poultry (China)*. (Panel Report, *US – Poultry (China)*, paras. 7.424-7.425).

<sup>1400</sup> Appellate Body Report, *EC – Asbestos*, paras. 99 and 101-102.

<sup>1401</sup> Appellate Body Report, *EC – Asbestos*, para. 103.

<sup>1402</sup> See Russia's response to Panel question No. 109, paras. 432-442. We also note that, similarly, Colombia is of the opinion that LNG is natural gas that is converted to liquid form for ease of storage or transport, which does not "necessarily" imply that these products would not be able to compete in the same market. (Colombia's third-party statement, para. 12)

<sup>1403</sup> European Union's second written submission, para. 148.

<sup>1404</sup> Russia's first written submission, para. 348; and European Union's first written submission, para. 285 and 428. See also Gas Strategies, Industry Glossary (excerpts) <http://www.gasstrategies.com/industry-glossary> (accessed 3 August 2017), (Gas Strategies industry glossary), (Exhibit RUS-268) definition of "LNG (Liquefied Natural Gas)"; and UNECE glossary for transport statistics, (Exhibit RUS-41), p. 101.

<sup>1405</sup> Russia's first written submission, para. 348; and European Union's first written submission, para. 285. See also Gas Strategies industry glossary, (Exhibit RUS-268), definition of "LNG (Liquefied Natural Gas)".

<sup>1406</sup> Russia's response to Panel question No. 109, paras. 439 and 442; and European Union's first written submission, para. 429.

<sup>1407</sup> European Union's second written submission, para. 149; responses to Panel question No. 109(c), para. 282, and No. 188, para. 130; and Russia's response to Panel question No. 187, paras. 207-209. See also

may be either regasified and then transported and supplied via pipelines in the same way as natural gas that was never liquefied and imported into the European Union as such, or it may be used as a transport fuel without prior regasification.

7.843. We consider that the fact that a certain amount of imported LNG is reconverted into gas in the European Union does not mean that LNG cannot be distinguished from natural gas. Contrary to Russia's initial arguments, not all LNG imported into the European Union undergoes regasification in order to be transported and supplied via pipelines.<sup>1408</sup> The fact that LNG can be used as a transport fuel without prior regasification indicates that LNG is not simply a temporary physical state of natural gas that enables its transportation by seagoing vessels but can be considered a separate product distinguishable from natural gas. This, in our view, is also confirmed by the HS, which distinguishes between LNG and natural gas, classifying them under different subheadings.<sup>1409</sup> We thus disagree with Russia's position that LNG is indistinguishable from natural gas and is, for this reason, like natural gas within the meaning of Article I:1 of the GATT 1994.

7.844. We also consider that the provisions of the Directive allegedly treating natural gas as including LNG do not change our conclusion that LNG is distinct from natural gas in the context of our likeness analysis.<sup>1410</sup> We recall that Russia's claim against the LNG measure stems from the regulation, under the Directive, of LNG system operators in comparison with TSOs, rather than natural gas or LNG. When prescribing the rules for gas-related infrastructure and the operators of such infrastructure, there may have been regulatory reasons for referring to natural gas as including LNG. While we take the approach of the Directive into account, we do not consider it as definitive for the purposes of our likeness analysis.

7.845. As clarified by the Appellate Body, the determination of likeness should be based on an assessment of a competitive relationship between and among products "in the marketplace" rather

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European Commission Memo "Clean Power for Transport – Frequently Asked Questions", (Memo/13/24) (24 January 2013), (Exhibit RUS-195), pp. 3, 4, 9, 10 and 14. Describing the "[c]urrent situation" regarding natural gas vehicles, the European Commission Memo noted that there were "38 LNG filling stations in the EU, 22 in United Kingdom, and the rest in Spain, Sweden, Estonia, the Netherlands, Poland and Belgium". (European Commission Memo "Clean Power for Transport – Frequently Asked Questions", (Memo/13/24) (24 January 2013), (Exhibit RUS-195), pp. 3 and 10); with respect to refuelling stations for waterborne transport, the Memo notes that "LNG infrastructure for fuelling vessels is at a very early stage, with only Norway and Sweden having developed small-scale LNG terminals for bunkering purposes" (European Commission Memo "Clean Power for Transport – Frequently Asked Questions", (Memo/13/24) (24 January 2013), (Exhibit RUS-195), p. 9. We consider that these references to LNG filling and refuelling stations for road and waterborne transport demonstrate the use of LNG as a transport fuel as of 24 January 2013. In addition, we note that the Memo referred to a number of solutions aimed at expanding the use of LNG as a fuel for road and waterborne transport in the future: for waterborne transport, the Commission proposed that LNG refuelling stations be installed in all maritime and inland ports of the trans-European transport (TEN-T) core network by 2020 (2025 for inland ports) (European Commission Memo "Clean Power for Transport – Frequently Asked Questions", (Memo/13/24) (24 January 2013), (Exhibit RUS-195), p. 9; for road transport, the Commission proposed that, by 2020, along the roads of the Trans-European Transport Core Network refuelling stations are installed every 400 km (European Commission Memo "Clean Power for Transport – Frequently Asked Questions", (Memo/13/24) (24 January 2013), (Exhibit RUS-195), p. 10).

<sup>1408</sup> Despite initially alleging that all imported LNG is regasified in the European Union, Russia acknowledges that LNG is used as a transport fuel in the European Union. In its response to Panel question No. 187, Russia stated as follows: "[s]ome small amount of natural gas condensed in the form of LNG has been used as fuel for ships". (Russia's response to Panel question No. 187, para. 207). Russia however emphasizes the small amount of LNG thus used. (See Russia's responses to Panel question No. 109, paras. 435-436, and No. 187, paras. 207-209; second written submission, para. 272; and comments on European Union's response to Panel question No. 188, para. 155). In our view, regardless of what that amount may be, it shows that LNG is used as such and is not just a temporary physical state of natural gas for the purposes of its transportation by seagoing vessels.

<sup>1409</sup> HS Chapter 27, (Exhibit EU-32).

<sup>1410</sup> We note that Article 1(2) of the Directive provides as follows:

The rules established by this Directive for *natural gas, including LNG*, shall also apply in a non-discriminatory way to biogas and gas from biomass or other types of gas in so far as such gases can technically and safely be injected into, and transported through, the natural gas system. (Directive 2009/73/EC, (Exhibit EU-5), Article 1(2)). (emphasis added)

Article 2(1) of the Directive, defining "natural gas undertaking", lists the functions of such undertakings as including the supply of "natural gas, including LNG". In a similar vein, Article 2(7) of the Directive, defines "supply" as "the sale, including resale, of natural gas, including LNG, to customers". (See Directive 2009/73/EC, (Exhibit EU-5), Articles 2(1) and 2(7)).

than the regulatory objectives of the measure.<sup>1411</sup> Therefore, the references in the Directive to "natural gas, including LNG" do not change our conclusion that, for the purposes of our likeness analysis, LNG is distinct from natural gas.

7.846. Having rejected Russia's arguments that LNG is indistinguishable from natural gas and is, for this reason, like natural gas within the meaning of Article I:1 of the GATT 1994, we now turn to the parties' arguments and evidence on whether LNG is like natural gas on the basis of the four likeness criteria identified in paragraph 7.837 above.<sup>1412</sup> We also address Russia's argument that LNG and natural gas are like products within the meaning of Article I:1 of the GATT 1994 because the Commission allegedly recognized that natural gas and LNG are in a direct competitive relationship.

7.847. With respect to the properties, nature and quality of LNG and natural gas, we recall that, in Russia's view, LNG and natural gas are "identical in terms of physical characteristics", while the European Union submits that LNG and natural gas do not share the same properties, nature and quality.<sup>1413</sup> We consider that the evidence on the record supports the European Union's position. LNG is liquid while natural gas is gaseous.<sup>1414</sup> Thus, in terms of physical characteristics, LNG and natural gas do not share the same properties, nature and quality.<sup>1415</sup>

7.848. With respect to the end-uses of LNG and natural gas, Russia submits that, ultimately, both types of natural gas will be used by consumers for the same end-use, "to heat their homes, for example, or cook their food".<sup>1416</sup> The European Union disagrees with Russia, noting that LNG may be used as a transport fuel.<sup>1417</sup> We understand Russia's position regarding the end-uses of LNG and natural gas being the same as premised on the comparison of the end-uses of regasified LNG with natural gas.<sup>1418</sup> We agree that, as far as regasified LNG is concerned, its end-uses are identical to those of natural gas. However, we disagree that the same applies to LNG and natural gas. Russia has not provided any evidence that LNG itself, without prior regasification, can be used for domestic heat generation. In this sense, we see that the end-uses of LNG and natural gas may differ.<sup>1419</sup>

<sup>1411</sup> Appellate Body Report, *US – Clove Cigarettes*, paras. 111–120.

<sup>1412</sup> We note that we asked Russia to confirm our understanding that Russia is not comparing natural gas, which is being transported as such through regular pipelines, to natural gas, which is currently in its final gaseous stage but has previously been transported as LNG (Panel question No. 109). In its response, Russia indicated that our understanding was not "exactly correct", reiterating its position that "LNG is natural gas". (Russia's response to Panel question No. 109, para. 432). Russia further indicated that "the like product comparison should be between LNG, as imported, and all other natural gas". (Russia's response to Panel question No. 109, para. 434).

<sup>1413</sup> Russia's first written submission, paras. 348 and 366; and European Union's first written submission, paras. 360 and 437; and second written submission, para. 149.

<sup>1414</sup> This conclusion stems from the definition of the processes of liquefaction and regasification. According to industry definitions, liquefaction "consists of chilling natural gas to the point where it becomes liquid, at an average temperature of  $-160^{\circ}\text{C}$  ( $-260^{\circ}\text{F}$ )", while regasification "consists of returning LNG to its regular gaseous phase at about  $5^{\circ}\text{C}$  using heat exchangers" (United Nations Economic Commission for Europe, Study on Current Status and Perspectives for LNG in the UNECE Region (UN 2013), (Exhibit RUS-32), pp. 5-6; and UNECE LNG Study, (Exhibit RUS-271), Chapter 2, p. 2. See also Gas Strategies industry glossary, (Exhibit RUS-268), definition of "LNG (Liquefied Natural Gas)")

<sup>1415</sup> We recall that the Appellate Body in *EC – Asbestos* observed as follows: "We see the first criterion, 'properties, nature and quality', as intended to cover *the physical qualities and characteristics* of the products." (Appellate Body Report, *EC – Asbestos*, para. 110). (emphasis added)

<sup>1416</sup> Russia's opening statement at the first meeting of the Panel, para. 50.

<sup>1417</sup> European Union's second written submission, para. 149; and response to Panel question No. 109(c), para. 282.

<sup>1418</sup> This is confirmed by Russia's response to Panel question No. 109, where Russia states that "LNG also serves the same end uses once it has been reconverted, as it inevitably must be". (Russia's response to Panel question No. 109, para. 433).

<sup>1419</sup> We also note, at the same time, that there is no support on the record for a proposition that natural gas cannot be used as a transport fuel, which would allow us to conclude that being used as a transport fuel distinguishes the end-use of LNG from the end-use of natural gas. In this regard, we note that the evidence provided by Russia indicates the following uses of natural gas in the European Union: (i) residential and commercial; (ii) industry; (iii) power plants; (iv) transport; (v) other uses. (Inland Sales of Natural Gas in the European Union in 2014, <http://www.eurogas.org/uploads/2016/flipbook/statistical-report-2015/index.html#p=6> (accessed 3 August 2017), (Exhibit RUS-194)). In our view, the "transport" use of natural gas may encompass the use of natural gas as a transport fuel. However, this evidence is inconclusive because it does not distinguish between natural gas and LNG. Russia further indicates that gas consumed as a

7.849. With respect to consumers' tastes and habits, we note that Russia alleges that LNG and natural gas are perfectly substitutable in terms of consumer perceptions.<sup>1420</sup> The European Union argues that LNG "meets different consumer preferences" from those of natural gas.<sup>1421</sup> The European Union further alleges that consumers of LNG purchase this product in order to transport it by ships or trucks and trade or store LNG.<sup>1422</sup> Neither party substantiated its arguments with evidence.<sup>1423</sup>

7.850. Russia does not assert any arguments regarding the tariff classification of LNG and natural gas, while the European Union argues that LNG and natural gas have a different tariff classification. We consider that the European Union has established that, at the six-digit level, the HS indeed classifies LNG and natural gas under different subheadings – subheading 2711.11 and 2711.21, respectively.<sup>1424</sup>

7.851. Russia also submits that LNG and natural gas are like products within the meaning of Article I:1 of the GATT 1994 because the Commission recognized that natural gas and LNG are in a direct competitive relationship.<sup>1425</sup> According to Russia, in one of its decisions in competition proceedings, the Commission recognized that "generally from the perspective of gas buyers there is no distinction between gas which is transported by pipeline and gas which is transported as LNG and regasified" and confirmed "that, in countries where import infrastructures for LNG are present, LNG would constitute a direct competitive constraint to gas imported via pipelines".<sup>1426</sup>

7.852. We observe that, in the decision of the Commission referred to by Russia, the analysis of the Commission concerned the determination of the relevant product market in the context of the Commission's assessment of the proposed concentration. We also note that, in the context of that assessment, the decision refers to "gas which is transported as LNG and regasified".<sup>1427</sup> Thus, the Commission's statement about LNG and natural gas being indistinguishable from the perspective of gas buyers should be understood as pertaining only to regasified LNG. We consider that the Commission's statement that, in countries where import infrastructure for LNG is present, LNG would constitute a direct competitive constraint to gas imported via pipelines should also be read in this light. We recall that, in response to a question by the Panel asking Russia to confirm our understanding of its arguments, Russia did not indicate that it was arguing that, for the purposes of the likeness analysis, the Panel should compare regasified LNG with natural gas.<sup>1428</sup> Therefore, we do not consider that the decision of the Commission referred to by Russia supports its position that LNG and natural gas are like products within the meaning of Article I:1 of the GATT 1994.

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fuel for transport is consumed as compressed natural gas. (Russia's response to Panel question No. 187, para. 209 (referring to European Commission Memo "Clean Power for Transport – Frequently Asked Questions", Memo/13/24 (24 January 2013), (Exhibit RUS-195), p. 10)). On this basis, Russia alleges that there is no difference between natural gas and LNG from the point of view of use. (Russia's response to Panel question No. 187, para. 209). However, we do not consider that the identity of end-use between CNG and LNG necessarily implies the identity of end-use between natural gas and LNG.

<sup>1420</sup> Russia's first written submission, para. 366.

<sup>1421</sup> European Union's response to Panel question No. 109, para. 280.

<sup>1422</sup> European Union's second written submission, para. 149.

<sup>1423</sup> Russia submits Commission Decision of 16 May 2012 on BP/ Chevron/ Eni/ Sonangol/ Total/ JV notification pursuant to Article 4 of Council Regulation No. 139/2004, Case No COMP/M.6477, (Commission decision on BP/ Chevron/ Eni/ Sonangol/ Total/ JV concentration), (Exhibit RUS-157), in support of its more general proposition that LNG and natural gas are in a direct competitive relationship. We discuss this evidence in paras. 7.851 through 7.852 below.

<sup>1424</sup> HS Chapter 27, (Exhibit EU-32).

<sup>1425</sup> Russia's response to Panel question No. 109(a), paras. 436-437.

<sup>1426</sup> Russia's response to Panel question No. 109(a), para. 436.

<sup>1427</sup> Commission decision on BP/ Chevron/ Eni/ Sonangol/ Total/ JV concentration), (Exhibit RUS-157), para. 17.

<sup>1428</sup> We asked Russia to confirm our understanding that Russia is not comparing natural gas, which is being transported as such through regular pipelines, to natural gas, which is currently in its final gaseous stage but has previously been transported as LNG (Panel question No. 109). In its response, Russia indicated that our understanding was not "exactly correct", reiterating its position that "LNG is natural gas". (Russia's response to Panel question No. 109, para. 432). Russia further indicated that "the like product comparison should be between LNG, as imported, and all other natural gas". (Russia's response to Panel question No. 109, para. 434). While we do not find it necessary to rule on this issue, we observe that, assuming regasified LNG and natural gas are like products within the meaning of Article I:1 of the GATT 1994, there is no evidence on the record that would show a discriminatory treatment of natural gas imported via pipelines as compared to regasified imported LNG in the European Union. Both natural gas imported via pipelines and regasified imported LNG may be transported and supplied via the same pipelines under identical legal regimes.

7.853. We recall that, as a complaining party in these proceedings, Russia bears the burden of making a *prima facie* case that the LNG measure is inconsistent with Article I:1 of the GATT 1994.<sup>1429</sup> This includes a demonstration that the products at issue are like within the meaning of Article I:1 of the GATT 1994.

7.854. In the course of our analysis above, we have rejected Russia's position that LNG is indistinguishable from natural gas and is, for this reason, like natural gas within the meaning of Article I:1 of the GATT 1994. In terms of the likeness criteria, we have established that LNG and natural gas do not share the same properties, nature and quality and, at the six-digit level, are classified under different subheadings of the HS. Russia has, furthermore, not substantiated its allegations that the end-uses and consumer preferences in respect of LNG and natural gas are the same. We have also found that the decision of the Commission referred to by Russia does not support its position that LNG is like natural gas within the meaning of Article I:1 of the GATT 1994. Thus, having holistically assessed the arguments of the parties and evidence on the record, we are of the view that Russia has not discharged its burden to establish that LNG and natural gas are like products within the meaning of Article I:1 of the GATT 1994.

7.855. Therefore, we consider that Russia has not demonstrated that natural gas imported from Russia and LNG imported from other countries are like products within the meaning of Article I:1 of the GATT 1994. In view of this finding, we do not consider it necessary to examine further the consistency of the LNG measure with Article I:1 of the GATT 1994.

### 7.7.2.3 Conclusion

7.856. In view of the foregoing, we find that Russia has not demonstrated that the LNG measure is inconsistent with Article I:1 of the GATT 1994.

## 7.8 The infrastructure exemption measure

### 7.8.1 Introduction

7.857. In the context of the broader category referred to by Russia as "the infrastructure exemption measure", Russia advances claims under, first, Article X:3(a) of the GATT 1994, then, Article I:1 of the GATT 1994 and Article II:1 of the GATS, and finally, under Article XI:1 of the GATT 1994. The European Union rejects all of these claims and has raised no defences in response to them. As mentioned in paragraph 2.41 above, we note that the precise nature and relevant aspects of the infrastructure exemption measure differ for each of Russia's claims. Accordingly, we clarify our understanding of the precise aspects of the measure challenged by Russia in our findings on each of the claims below

7.858. We further note that the argumentation pertaining to, and evidentiary underpinnings for, Russia's claims overlap to a large extent. This is particularly the case in respect of aspects of Russia's claims under Articles I:1 and X:3(a) of the GATT 1994 and Article II:1 of the GATS, which involve various aspects of the infrastructure exemption provision in Article 36 the Directive and a number of NRA and Commission decisions regarding individual infrastructure exemption requests, relating to: the OPAL pipeline<sup>1430</sup>, the NEL pipeline<sup>1431</sup>, the Gazelle pipeline<sup>1432</sup>, the TAP

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<sup>1429</sup> The Appellate Body in *EC – Hormones* explained that, to meet its burden of proof, the complainant must establish a *prima facie* case, i.e. the one that in the absence of effective refutation by the respondent requires a panel, as a matter of law, to rule in favour of the complainant. (Appellate Body Report, *EC – Hormones*, para. 104). How much and what kind of evidence will be required to establish a *prima facie* case will necessarily vary from measure to measure, provision to provision, and case to case.

<sup>1430</sup> Commission decision on the exemption of the OPAL pipeline, (Exhibit RUS-82). As explained in the Commission Decision, on 25 February 2009, BNetzA (the German NRA) issued two decisions on the exemption of the OPAL and NEL pipelines. Both applicants (OPAL NEL Transport GmbH and E.ON Ruhrgas Nord Stream Anbindungsgesellschaft mbH) were the planned network operators of the OPAL and NEL pipelines and applied to the BNetzA in separate proceedings for the granting of an exemption for the OPAL and NEL pipelines. Hence, the Commission notes, "BNetzA therefore issued two (essentially identical) decisions". (Commission decision on the exemption of the OPAL pipeline, (Exhibit RUS-82), paras. 1-2). As further explained in the Commission Decision, as a result of BNetzA granting the OPAL exemption, the capacities created via the OPAL were to be exempt for a period of 22 years from third party access and tariff regulation. In addition, "[a]n exemption was not granted for NEL. In response to the refusal to grant the exemption for NEL, neither of the applicants appealed against the two decisions of the BNetzA." (Ibid. para. 4). See also BNetzA decision on the exemption



pipeline<sup>1433</sup>, the Nabucco pipeline<sup>1434</sup>, the Poseidon pipeline<sup>1435</sup>, the Dragon LNG facility<sup>1436</sup>, the South Hook LNG facility<sup>1437</sup>, and the Gate Terminal LNG facility.<sup>1438</sup> In particular, in advancing its claims under Article II:1 of the GATS and Article I:1 of the GATT 1994, Russia relies, to a significant degree, on its arguments under Article X:3(a) of the GATT 1994 concerning the alleged lack of a uniform, impartial and reasonable administration of Article 36 of the Directive.

7.859. In light of these considerations, and of the nature and content of the legal provisions in question, we considered it appropriate to begin our examination with Russia's claim under Article X:3(a) of the GATT 1994, in order to determine whether Russia has demonstrated that the European Union administered the infrastructure exemption measure in a manner contrary to that provision. Next, we address Russia's claims under Articles I:1 of the GATT 1994 and II:1 of the GATS. Finally, we address Russia's claim under Article XI:1 of the GATT 1994, which challenges two conditions contained in the 2009 OPAL infrastructure exemption decision.

## 7.8.2 Russia's claim under Article X:3(a) of the GATT 1994

### 7.8.2.1 Introduction

7.860. Following the legal standard under Article X:3(a) of the GATT 1994, set out in paragraphs 7.240 and 7.241 above, we are required to assess whether Russia has demonstrated the following elements: (i) the infrastructure exemption measure is a law, regulation, judicial decision or administrative ruling of general application; (ii) the infrastructure exemption measure is of the kind described in Article X:1 of the GATT 1994; and (iii) the infrastructure exemption measure is not administered in a "uniform, impartial and reasonable manner".

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of the OPAL and NEL pipelines, (Exhibit RUS-61). The infrastructure exemption decisions in OPAL and NEL are referred to as separate decisions in our Report for purposes of clarity.

We note that, during the Panel process, the European Union indicated that:

[T]he Commission has agreed to revise its OPAL decision. On 28 October 2016, the Commission adopted a decision agreeing, subject to additional conditions, to a revised exemption framework for the OPAL pipeline. This decision was implemented by way of a settlement agreement between Gazprom, the OPAL TSO OPAL Gastransport GmbH, Gazprom export, and the German NRA Bundesnetzagentur. Both the Commission decision and the settlement agreement are currently suspended due to pending appeal procedures launched by third parties before domestic courts. Three appeals have been filed with the General Court of the European Union and one with a German court. The suspension of the effects of the revised exemption framework has been requested in all those cases. (European Union's comments on Russia's response to Panel question No. 231, para. 155).

In light of this comment, the Panel asked the European Union to clarify whether the 2009 OPAL infrastructure exemption decision (Commission decision on the exemption of the OPAL pipeline, (Exhibit RUS-82), para. 89) remained in effect. The European Union confirmed that, as of 12 May 2017, the decision "remains in effect". (European Union's responses to the Panel's Additional Questions of 10 May 2017, para. 3). The Panel also asked Russia to clarify whether that decision remained the relevant legal instrument pertaining to the OPAL pipeline for Russia's claims relating to the infrastructure exemption measure. Russia confirmed that this was the case. (Russia's responses to the Panel's Additional Questions of 10 May 2017, p. 1). Accordingly, the Panel's examination focused on the 2009 OPAL infrastructure exemption decision. See also European Commission Press Release, "Gas markets: Commission reinforces market conditions in revised exemption decision on OPAL pipeline" (28 October 2016), (Exhibit RUS-246).

<sup>1431</sup> BNetzA decision on the exemption of the OPAL and NEL pipelines, (Exhibit RUS-61). See also fn 1430.

<sup>1432</sup> Commission decision on the exemption of the Gazelle pipeline I, (Exhibit RUS-81); and Commission decision on the exemption of the Gazelle pipeline II, (Exhibit RUS-87).

<sup>1433</sup> Commission decision on the exemption of the TAP pipeline, (Exhibit RUS-10).

<sup>1434</sup> Commission decisions on the exemption of the Austrian, Bulgarian, and Romanian sections of the Nabucco pipeline, (Exhibits RUS-83, RUS-84 and RUS-85).

<sup>1435</sup> Commission decision on the exemption of the Poseidon pipeline, (Exhibit RUS-86).

<sup>1436</sup> Final views of the UK NRA on the exemption of the Dragon LNG facility, (Exhibit RUS-66); and Letter from the UK NRA regarding the Commission decision on the exemption of the Dragon LNG facility, (Exhibit RUS-101).

<sup>1437</sup> Final views of the UK NRA on the exemption of the South Hook LNG facility, (Exhibit RUS-68); and Letter from the UK NRA regarding the Commission decision on the exemption of the South Hook LNG facility, (Exhibit RUS-102).

<sup>1438</sup> Commission's comments to the Gate Terminal exemption decision, (Exhibit EU-143).

7.861. The obligations of uniformity, impartiality and reasonableness are legally independent and the WTO Members are obliged to comply with all three requirements.<sup>1439</sup> This means that a violation of any one of the three obligations will lead to a violation of the obligations under Article X:3(a).<sup>1440</sup>

7.862. Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations.<sup>1441</sup> We recall the Appellate Body's statement that, as allegations that the conduct of a WTO Member is biased or unreasonable are serious under any circumstances, such allegations should not be brought lightly, or in a subsidiary fashion.<sup>1442</sup> The Appellate Body underlined that "[a] claim under Article X:3(a) of the GATT 1994 must be supported by solid evidence; the nature and the scope of the claim, and the evidence adduced by the complainant in support of it, should reflect the gravity of the accusations inherent in claims under Article X:3(a) of the GATT 1994".<sup>1443</sup>

7.863. Article X:1 of the GATT 1994 makes it clear that Article X does not deal with specific transactions, but rather with rules "of general application".<sup>1444</sup> Laws, regulations, judicial decisions and administrative rulings of general application described in Article X:1 of the GATT 1994 are those that apply to a range of situations or cases, rather than being limited in their scope of application.<sup>1445</sup>

7.864. It is well established that the obligations under Article X:3(a) apply to the *administration* of the laws, regulations, decisions and rulings of the kind falling within the scope of Article X:1, but *not* to such laws and regulations *themselves*.<sup>1446</sup> To the extent that such laws and regulations are discriminatory, they can be examined for their consistency with the relevant provisions of the GATT 1994.<sup>1447</sup>

7.865. Furthermore, a government's act of administration subject to the provisions of Article X:3(a) includes not only acts of administering the laws and regulations of the kind in Article X:1, but also legal instruments that regulate the application or implementation of such laws and regulations.<sup>1448</sup> Moreover, administrative processes leading to administrative decisions may also be included in the scope of the term "administer" and hence Article X:3(a).

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<sup>1439</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.866–7.868 (citing Panel Report, *Argentina – Hides and Leather*, para. 11.86).

<sup>1440</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.867 (citing Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.383).

<sup>1441</sup> Appellate Body Report, *US – Shrimp*, paras. 182-183. The Appellate Body also underlined that:

Inasmuch as there are due process requirements generally for measures that are otherwise imposed in compliance with WTO obligations, it is only reasonable that rigorous compliance with the fundamental requirements of due process should be required in the application and administration of a measure. (Ibid. para. 182).

<sup>1442</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 217.

<sup>1443</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.874 (quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 217).

<sup>1444</sup> Appellate Body Report, *EC – Poultry*, para. 111. See also Panel Report, *US – Hot-Rolled Steel*, para. 7.268.

<sup>1445</sup> Panel Report, *EC – Selected Customs Matters*, para. 7.116.

<sup>1446</sup> Appellate Body Report, *EC – Poultry*, para. 115 (quoted in Appellate Body Report, *EC – Bananas III*, para. 200). The panel in *Argentina – Hides and Leather* also stated that "Article X:3(a) refers specifically to the *method of application* of measures identified in Article X:1." (Panel Report, *Argentina – Hides and Leather*, para. 11.73). (emphasis added) That panel also stated that "[t]he relevant question is whether the substance of such a measure is administrative in nature or, instead, involves substantive issues more properly dealt with under other provisions of the GATT 1994." (Ibid., para. 11.70). See also Panel Report, *US – Byrd Amendment*, para. 7.143.

<sup>1447</sup> Appellate Body Report, *EC – Bananas III*, para. 200.

<sup>1448</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 200. The Appellate Body stated: "[u]nder Article X:3(a), a distinction must be made between *the legal instrument being administered* and *the legal instrument that regulates* the application or implementation of that instrument. While the substantive content of the legal instrument being administered is *not* challengeable under Article X:3(a), we see no reason why a legal instrument that regulates the application or implementation of that instrument cannot be examined under Article X:3(a) if it is alleged to lead to a lack of uniform, impartial, or reasonable administration of that legal instrument". (emphasis added)

7.866. However, to the extent that a claim of violation under Article X:3(a) is based on an administrative process, the complainant must demonstrate how and why certain features of the administrative processes necessarily lead to a lack of uniform, impartial, or reasonable administration of a legal instrument of the kind described in Article X:1.<sup>1449</sup> In addition, while it is not inconceivable that a Member's actions in a single instance might be evidence of lack of uniform, impartial, and reasonable administration of its laws, regulations, decisions and rulings, the actions in question would have to have a significant impact on the overall administration of the law, and not simply on the outcome in the single case in question.<sup>1450</sup> We consider that, in determining the proper scope of Article X:3(a), the relevant question is "whether the substance of such a measure is *administrative in nature* or, instead, involves substantive issues more properly dealt with under other provisions of the GATT 1994".<sup>1451</sup>

7.867. We also note that Article X:3(a) was not intended to be used to test the consistency of a Member's particular decisions or rulings with the Member's own domestic law and practice.<sup>1452</sup>

7.868. Before us, Russia submits that the European Union's administration of the infrastructure exemption measure has not been uniform, impartial or reasonable, as required by Article X:3(a). Russia argues that the infrastructure exemption measure is the specific measure at issue<sup>1453</sup> and that it is the administration of the infrastructure exemption measure that is the subject of this claim.<sup>1454</sup> Russia asserts that the Directive (and its predecessor, the Second Energy Package Directive) are "laws...of general application" within the meaning of Article X:1 of the GATT 1994.<sup>1455</sup> It further submits that the measure is "affecting" or having an effect on, the sale, distribution and transportation of natural gas within the meaning of Article X:1.<sup>1456</sup>

7.869. To establish the administration of the measure in violation of Article X:3(a), Russia compares the Commission's infrastructure exemption decision regarding the OPAL pipeline to its exemption decisions in the cases of the Gazelle, TAP, Nabucco and Poseidon pipelines. Russia considers that the evaluation by the Commission of the exemption application for the OPAL pipeline, as compared to evaluation of the Gazelle, TAP, Nabucco and Poseidon pipelines, based on the criteria in Article 36, constitutes the administration, application or putting into practical effect of the infrastructure exemption measure.<sup>1457</sup> According to Russia, the Commission has administered the five criteria in the Directive in a manner inconsistent with its own internal guidance and decisions.<sup>1458</sup> In particular, Russia compares the Commission's competition analysis and the conditions it imposed in each of these decisions; Russia also argues that the Commission has failed to review its decisions despite a change in the circumstances on which they were based.

7.870. The European Union does not dispute that Article 36 of the Directive (as well as Article 22 of the Second Energy Package Directive before it) is a measure of general application.<sup>1459</sup> In addition, the European Union argues that Article 36 applies exclusively upon request of the undertaking seeking to benefit from an individual exemption decision, to which specific conditions may be attached, taking account of the particular features of the major infrastructure project at stake. For the European Union, individual exemption decisions, and any conditions attached to them, are not measures of general application.<sup>1460</sup>

<sup>1449</sup> Appellate Body Report, *EC – Selected Customs Matters*, paras. 224-226; and Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.873.

<sup>1450</sup> Panel Report, *US – Hot-Rolled Steel*, para. 7.268. The panel also considered that it is unlikely that a violation of Article X:3 would be found where actions in the single case in question were, themselves, consistent with more specific obligations under other WTO Agreements.

<sup>1451</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.869 (quoting Panel Report, *Argentina – Hides and Leather*, para. 11.70). (emphasis original)

<sup>1452</sup> Panel Report, *US – Stainless Steel (Korea)*, para. 6.50.

<sup>1453</sup> Russia's first written submission, para. 535.

<sup>1454</sup> Russia's second written submission, para. 399. For Russia, individual exemption decisions are instances of application of the measure of general application.

<sup>1455</sup> Russia's first written submission, para. 534.

<sup>1456</sup> Russia's first written submission, para. 534.

<sup>1457</sup> Russia's first written submission, paras. 539-672; response to Panel question No. 142, paras. 595-597; and second written submission, paras. 399-404.

<sup>1458</sup> Russia's first written submission, paras. 535-538.

<sup>1459</sup> European Union's first written submission, para. 687; and second written submission, para. 283.

<sup>1460</sup> European Union's first written submission, paras. 689 and 693; and second written submission, para. 285.

7.871. The European Union asserts that Article X:1 is not applicable to the facts of this dispute because it has not been proven that Article 36 of the Directive affects the sale, distribution and transportation of natural gas within the meaning of that provision.<sup>1461</sup> According to the European Union, it is incumbent on Russia to prove the effects on the sale, distribution and transportation of natural gas, which cannot be presumed.<sup>1462</sup> The European Union considers that Russia has not demonstrated what effects the measure will produce on the sale, distribution or transportation of natural gas.<sup>1463</sup> The European Union argues that Article 36 of the Directive may only affect the sale, distribution and transportation of natural gas, if at all, as an indirect consequence of encouraging the construction of new infrastructure or significant increases of capacity in existing infrastructure.<sup>1464</sup>

7.872. The European Union submits that, in case Article 36 of the Directive is found to fall within the scope of Article X:1 of the GATT 1994 ("*quod non*"), the claim of violation of Article X:3(a) brought by Russia cannot succeed, as the European Union administers the infrastructure exemption provision in a uniform, impartial and reasonable manner, and Russia has not proved otherwise.<sup>1465</sup>

## 7.8.2.2 Analysis by the Panel

### 7.8.2.2.1 Introduction

7.873. As set out in paragraph 2.37 above, the infrastructure exemption provision in Article 36 of the Directive (and Article 22 of its predecessor) lays out five criteria to evaluate applications for infrastructure exemptions. In accordance with the legal standard set out in paragraphs 7.240 and 7.241 above, in our examination of Russia's claim of violation under Article X:3(a) of the GATT 1994, we consider whether Russia has demonstrated that the infrastructure exemption measure is (i) a law, regulation, judicial decision or administrative ruling of general application; (ii) of the kind described in Article X:1 of the GATT 1994; and (iii) not administered in a "uniform, impartial and reasonable manner".

#### 7.8.2.2.2 Measure of general application

7.874. The parties do not disagree that Article 36 of the Directive is a measure of "general application"<sup>1466</sup>, and we are similarly of the view that this measure falls within the types of instruments covered by Articles X:3(a) and X:1 of the GATT 1994.<sup>1467</sup> However, in light of the parties' arguments, we first clarify whether Russia's claim is directed at Article 36 of the Directive itself, or rather at particular infrastructure exemption decisions issued pursuant to that provision.

7.875. Russia submits that it does not challenge the individual exemption decisions or any conditions attached to them *per se* under Article X:3(a), but rather that it challenges the administration of the infrastructure exemption measure.<sup>1468</sup> Russia considers that individual exemption decisions put into practical effect, or apply, the measure as contemplated in Article X:3(a) and as interpreted by the Appellate Body in *EC – Selected Customs Matters*.<sup>1469</sup> According to Russia, each decision by the Commission represents a separate application of the same criteria and thus of the measure such that "[o]ver time, a series of decisions are issued, each presumably building on prior decisions, and all of which are supposedly designed to ensure a fair and even-handed outcome in each instance."<sup>1470</sup>

7.876. The European Union submits that this claim focuses on two conditions attached to an individual exemption decision (the OPAL decision) and that the comparison with other individual

<sup>1461</sup> European Union's first written submission, para. 687; and second written submission, paras. 283-284.

<sup>1462</sup> European Union's first written submission, para. 693.

<sup>1463</sup> European Union's first written submission, para. 690.

<sup>1464</sup> European Union's first written submission, para. 691.

<sup>1465</sup> European Union's first written submission, para. 694.

<sup>1466</sup> Russia's first written submission, para. 534; and European Union's second written submission, para. 283.

<sup>1467</sup> See also, above para. 7.520.

<sup>1468</sup> Russia's second written submission, para. 399.

<sup>1469</sup> Russia's response to Panel question No. 138, paras. 576-579.

<sup>1470</sup> Russia's response to Panel question No. 142, para. 595.

exemption decisions is intended to force a review by the Panel of the OPAL decision, rather than serving as a demonstration of an unreasonable administration of Article 36 of the Directive.<sup>1471</sup> The European Union considers that individual decisions issued pursuant to the Article are clearly not measures of general application within the meaning of Article X:1.<sup>1472</sup> It hence contends that, to assess how the measure has been administered and applied, the universe of all relevant individual decisions should be taken into consideration.<sup>1473</sup>

7.877. Past panels and the Appellate Body have distinguished between instruments that apply in specific situations or to a specific company, and those that apply more broadly across a range of situations or unidentified economic operators. In particular, the Appellate Body in *EC – Poultry* upheld a panel finding that an import licence issued to a specific company did not meet the "of general application" criterion, noting that "licences issued to a specific company or applied to a specific shipment cannot be considered to be a measure 'of general application' within the meaning of Article X".<sup>1474</sup>

7.878. However, we also note the Appellate Body's caution in *EC – Selected Customs Matters* that:

[I]t is important to distinguish between, on the one hand, the measures at issue and, on the other hand, acts of administration that have been presented as evidence to substantiate the claim that the measures at issue are administered in a manner inconsistent with Article X:3(a) of the GATT 1994.<sup>1475</sup>

7.879. Recalling the paramount importance of distinguishing between the measure at issue and the acts of administration presented as evidence to substantiate a claim under Article X:3(a), we note that Article 36 of the Directive applies broadly to economic operators that apply for an infrastructure exemption from certain other generally applicable obligations under the Directive, and that there is no disagreement between the parties that this provision of the Directive is a measure of general application. We therefore consider that the measure of general application here is Article 36 of the Directive.<sup>1476</sup> We understand that the Commission's decisions regarding the OPAL and other pipelines constitute the alleged acts of "administration" which have been presented as evidence in order to substantiate Russia's claim under Article X:3(a). While accepting the Commission's decisions as evidence, we retain the discretion to determine their "relevance and probative value"<sup>1477</sup> in our assessment of Russia's claim.

7.880. We are thus satisfied that Russia has identified Article 36 of the Directive as the relevant measure of general application, and next turn to examine whether it affects the sale, distribution or transportation or other use of imports within the meaning of Article X:1 of the GATT 1994.

#### 7.8.2.2.3 Measure of the kind described in Article X:1 of the GATT 1994

7.881. Russia argues that Article 36 of the Directive affects the sale, distribution and/or transportation of imports because the purpose of this provision is to exempt suppliers of natural

<sup>1471</sup> European Union's second written submission, para. 282. The European Union states that the comparison "is more of a prop to force a review by the Panel of the OPAL decision, than it is a demonstration of an unreasonable administration of the exemption".

<sup>1472</sup> European Union's response to Panel question No. 138, para. 364.

<sup>1473</sup> European Union's response to Panel question No. 139, para. 365.

<sup>1474</sup> Appellate Body Report, *EC – Poultry*, para. 113 (quoting Panel Report, *EC – Poultry*, para. 269). (footnote omitted) See also Panel Report, *US – Hot-Rolled Steel*, para. 7.268:

While it is not inconceivable that a Member's actions in a single instance might be evidence of lack of uniform, impartial, and reasonable administration of its laws, regulations, decisions and rulings, we consider 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 in the single case in question.

<sup>1475</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 188.

<sup>1476</sup> We recall that, in *EC – Selected Customs Matters*, in the context of addressing a terms of reference challenge, the Appellate Body clarified that "the measure at issue in this dispute is not the *manner of administration* but, rather, the legal instruments identified in the first paragraph of the panel request, as administered collectively or as a whole." (Appellate Body Report, *EC – Selected Customs Matters*, para. 187). (emphasis original) Similarly, we consider that the administration we are called upon to examine under Article X:3(a) is of this measure of general application.

<sup>1477</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 188.

gas from the substantive requirements of the Directive.<sup>1478</sup> Russia submits that, because any reasonable supplier of natural gas would evaluate their prospects for being granted an exemption when deciding whether to undertake a new infrastructure project, this creates an incentive to move forward with developing an infrastructure project.<sup>1479</sup>

7.882. In addition, Russia submits that, particularly in the course of its administration by the Commission, the infrastructure exemption measure has an effect on the volume of gas that may be imported free of the Directive's requirements. Russia offers the capacity cap and gas release requirement imposed in the OPAL exemption decision as an example of how such administration affects the sale, distribution, transportation or other use of natural gas.<sup>1480</sup> Russia submits that less gas can be sold or transported over the OPAL pipeline than would otherwise be the case, whereas the Commission imposed less restrictive conditions in the case of the Gazelle, TAP, Nabucco and Poseidon pipelines, meaning the effect or detrimental impact on the sale and transportation of gas via those pipelines is not as great as in the case of the OPAL pipeline.<sup>1481</sup>

7.883. The European Union submits that the purpose of Article 36 of the Directive is to incentivize investment in major new infrastructure and that it may only affect the sale, distribution and transportation of natural gas, if at all, as an *indirect consequence* of fulfilling this purpose.<sup>1482</sup> It considers that Russia has not explained the measure's effects on the sale, distribution and transportation of natural gas.<sup>1483</sup> It further submits that the measure does not create incentives for gas of particular sources to be imported into or transported within the European Union.<sup>1484</sup> Specifically, regarding the OPAL exemption decision, the European Union submits that the decision does not restrict the volume of gas that can be transported on the pipeline, but rather that "[t]he restrictions concern exclusively the supply of pipeline transport services on OPAL by Gazprom and related companies."<sup>1485</sup>

7.884. Article X:1 of the GATT 1994 covers a broad range of measures. In light of the argumentation of the parties, in this case, we focus on measures "affecting" the "sale, distribution, transportation ... or other use" of imports.

7.885. We recall that the Appellate Body in *EC – Bananas III* established that the ordinary meaning of the word "affecting" implies a measure that has "an effect on", and that the word has a broad scope which is not limited to the scope of terms such as "regulating" or "governing".<sup>1486</sup>

7.886. In addition, the panel in *Argentina – Financial Services* clarified that the word "affects", in the context of Article III:4 of the GATT 1994, also covers measures which affect the conditions of competition of the products in question on the domestic market, even if their main objective is not to regulate the internal sale, offering for sale, purchase or use of the product.<sup>1487</sup>

7.887. Furthermore, in *China – Publications and Audiovisual Products*, when discussing the word "affect" in the context of Article III:4, the panel included "measures which create incentives or disincentives with respect to the sale, offering for sale, purchase, and use of an imported product".<sup>1488</sup>

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<sup>1478</sup> Russia relies on the broad interpretation of the term "affecting" outlined in Appellate Body Report, *EC – Bananas III*, para. 220. (Russia's response to Panel question No. 143, paras. 598-599; and second written submission, paras. 392-393).

<sup>1479</sup> Russia's second written submission, para. 393; and response to Panel question No. 224, para. 313.

<sup>1480</sup> Russia's second written submission, para. 393.

<sup>1481</sup> Russia's response to Panel question No. 143, paras. 598-599.

<sup>1482</sup> European Union's first written submission, paras. 690-691.

<sup>1483</sup> European Union's second written submission, paras. 283-284.

<sup>1484</sup> European Union's response to Panel question No. 224, para. 290. The European Union elaborates that it "does not disagree that, by creating incentives for the construction of new major infrastructure, the infrastructure exemption measure also indirectly incentivizes natural gas imports, in general. Such incentives are not linked or dependent on the origin of the gas that will be flown through the new interconnectors." (European Union's comments on Russia's response to Panel question No. 224, para. 149).

<sup>1485</sup> European Union's second written submission, para. 299.

<sup>1486</sup> Appellate Body Report, *EC – Bananas III*, para. 220.

<sup>1487</sup> Panel Report, *Argentina – Financial Services*, para. 7.1023.

<sup>1488</sup> Panel Report, *China – Publications and Audiovisual Products*, para. 7.1450.

7.888. We observe that Article 36 of the Directive sets out provisions governing the exemption of infrastructure, upon request and for a defined period of time, from other generally applicable obligations under the Directive.<sup>1489</sup> We recall our findings, in the context of our examination of Russia's claims against the unbundling measure in the Directive under Articles I:1 and III:4, that the unbundling measure affects the internal sale, offering for sale, purchase, transportation, distribution or use of natural gas.<sup>1490</sup>

7.889. We see that Article 36 may exempt certain producers and suppliers from some or all of the rules on unbundling and may further determine the particular legal framework applicable in respect of certain infrastructure, including infrastructure designed to import and transport natural gas in the European Union.

7.890. We understand that the infrastructure exemption and any related conditions are rules that effectively "replace" otherwise applicable rules (such as unbundling or third party access); they become the binding legal regime pertaining to the infrastructure concerned as long as the relevant infrastructure exemption decision remains operational.

7.891. Having established that the unbundling measure in the Directive is within the scope of Articles I and III:4 of the GATT 1994, we also consider that the infrastructure exemption provision in Article 36 of the Directive affects the sale and transportation of natural gas within the meaning of Article X:1 and hence Article X:3(a) of the GATT 1994.

7.892. We recall that, in response to Panel questioning concerning the scope of the term "affects" in Articles X:1 and X:3(a) of the GATT 1994, both parties acknowledge that the measure creates "incentives" for importation, as that term was used in *China – Publications and Audiovisual Products*.<sup>1491</sup> We note this shared view of the parties, and consider it supports our view that the infrastructure exemption provision in the Directive affects, in particular, the sale and transportation of imports of natural gas for the purposes of Article X:1 and hence Article X:3(a) of the GATT 1994.

#### **7.8.2.2.4 Administered in a manner that is not uniform, impartial and reasonable**

##### **7.8.2.2.4.1 Introduction**

7.893. Russia submits that the evaluation by the Commission of each infrastructure exemption application, based on the five criteria set out in Article 36 of the Directive, constitutes the administration, application or putting into practical effect of the infrastructure exemption measure.<sup>1492</sup> Russia further submits that the substantive content of legal instruments that regulate the application or implementation of laws, regulations, decisions, and administrative rulings of the kind described in Article X:1 can be challenged under Article X:3(a).<sup>1493</sup> Russia relies on a comparison of five infrastructure exemption decisions (OPAL, Gazelle, TAP, Nabucco and Poseidon), asserting that the infrastructure exemption criteria are "vague" and grant the NRAs and the Commission significant discretion in evaluating individual applications.<sup>1494</sup>

7.894. While maintaining that Russia's claim is outside the scope of Article X:3(a)<sup>1495</sup>, the European Union submits that uniformity in the administration of the infrastructure exemption measure is ensured through the existence of a single set of criteria, namely those listed in Article 36(1) of the Directive, detailed procedural rules for examination and decision-making by the competent NRAs (set out in paragraphs 3 to 7 of that Article) and a review procedure by the Commission (provided for in paragraphs 8 and 9 of the Article), designed to ensure consistency at

<sup>1489</sup> See, above paras. 2.36-2.41.

<sup>1490</sup> See, above paras. 7.521-7.527 and 7.573.

<sup>1491</sup> See, e.g. European Union's comments on Russia's response to Panel question No. 224, para. 149; and Russia's response to Panel question No. 224, para. 313. In Russia's comments on the European Union's response to Panel question No. 224, para. 228, Russia states: "Obviously, the measure creates incentives for the construction of major gas infrastructure, as defined in Article 36, as the EU contends. In so doing, however, as Russia has demonstrated, the measure necessarily also creates an incentive for the sale, offering for sale, purchase and use of imported natural gas."

<sup>1492</sup> Russia's response to Panel question No. 142, para. 595; and second written submission, para. 401.

<sup>1493</sup> Russia's response to Panel question No. 142, para. 597.

<sup>1494</sup> Russia's response to Panel question No. 142, para. 594.

<sup>1495</sup> European Union's first written submission, para. 713.

an EU-wide level.<sup>1496</sup> The European Union asserts that the OPAL exemption decision is "perfectly in line with the criteria" in the Directive and Commission practice<sup>1497</sup>, pointing out that Article 36 itself calls for a case-by-case assessment taking into account the factual circumstances of each decision.<sup>1498</sup>

7.895. Japan asserts that Russia's argument focuses on the unreasonableness of the OPAL infrastructure exemption decision, and whether the criteria in the Directive were misapplied and ignored. According to Japan, Article X:3(a) of the GATT 1994 covers the general application of rules affecting an unidentified number of economic operators, but it does not cover the specific "application" of such regulations in each case. Furthermore, Japan relies on the panel's analysis in *US – Stainless Steel (Korea)* to argue that a misapplication of a regulation in a single case does not constitute a violation of Article X:3(a), unless there is evidence that the same misapplication is arising or will arise in a widespread manner, to the extent it establishes or revises a principle or criteria in future cases. Based on the panel report in *US – Hot-Rolled Steel*, Japan asserts that it should be assessed whether the complainant has established that the OPAL decision is not a sporadic case of misapplication of the Directive but, instead, shows that such misapplication will arise in a manner constituting non-uniform, partial or unreasonable "administration" of the laws and regulations of "general application".<sup>1499</sup>

7.896. As we have already indicated, the Appellate Body has consistently held that a claim under Article X:3(a) must not be directed against the substance of a law itself; rather, such a claim must challenge its administration.<sup>1500</sup> We recall our view that the relevant question in determining whether a measure falls within the scope of Article X:3(a) is "whether the substance of such a measure is *administrative in nature* or, instead, involves substantive issues more properly dealt with under other provisions of the GATT 1994".<sup>1501</sup> We also recall that the term "administer" means "putting into practical effect" or "applying" a legal instrument of the kind described in Article X:1.<sup>1502</sup>

7.897. In this section, we first examine whether Russia's claim can be properly considered as one against the administration (rather than the substance) of Article 36 in the Directive. If this is the case, we will proceed to examine whether the administration of the measure satisfies the requirements of Article X:3(a) of the GATT 1994.

#### 7.8.2.2.4.2 Administered

7.898. We observe that, in its challenge under Article X:3(a), Russia compares the Commission's OPAL decision to decisions on Gazelle, TAP, Nabucco and Poseidon and submits that the measure was not administered in a uniform, impartial and reasonable manner. We understand Russia to allege four main types of discrepancies in relation to its comparison of the decisions:

<sup>1496</sup> European Union's first written submission, para. 700-702; and opening statement at the first meeting of the Panel, paras. 90-91. The European Union asserts that the "impartial and reasonable administration of the measure ... is further supported by an obligation to state reasons for individual decisions, which are subject to judicial review in accordance with general rules. The competent jurisdictions may be either the domestic courts of the Member States or the European Court of Justice, depending on who is the author of the challenged final decision." (European Union's opening statement at the first meeting of the Panel, para. 91). The European Union further refers to Commission Staff Working Document on Article 22 of Directive 2003/55/EC Concerning Common Rules for the Internal Market in Natural Gas and Article 7 of Regulation (EC) No. 1228/2003 on Conditions for Access to the Network for Cross-border Exchanges in Electricity – New Infrastructure Exemptions, SEC(2009) 642 final (6 May 2009), (Commission Explanatory Note on New Infrastructure Exemptions), (Exhibit RUS-27), as an interpretive note providing transparency and guidance to increase predictability. (European Union's comments on Russia's response to Panel question No. 216, para. 133).

<sup>1497</sup> European Union's second written submission, paras. 287-288.

<sup>1498</sup> European Union's first written submission, para. 697 (referring to Directive 2009/73/EC, (Exhibit EU-5), Article 36(3)).

<sup>1499</sup> Japan's third-party submission, paras. 43-48.

<sup>1500</sup> Appellate Body Reports, *EC – Bananas III*, para. 200; and *EC – Poultry*, para. 115.

<sup>1501</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.869 (quoting Panel Report, *Argentina – Hides and Leather*, para. 11.70).

<sup>1502</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.983.



1. differences in the Commission's interpretation of criteria in the competition analysis and the definition of the geographic market in the OPAL decision as compared to the Gazelle, TAP, Nabucco and Poseidon decisions<sup>1503</sup>;
2. differences in the conditions imposed in the OPAL decision as compared to the Gazelle, TAP, Nabucco and Poseidon decisions<sup>1504</sup>;
3. the Commission's alleged failure to review its OPAL decision once the Gazelle pipeline had been completed<sup>1505</sup>; and
4. the Commission's alleged failure to review its TAP exemption based on subsequent changes in, and acquisitions by, TAP's shareholders.<sup>1506</sup>

7.899. The discrepancies alleged by Russia pertain to elements of the reasoning contained in particular decisions stemming from the considerations identified in the pertinent criteria in Article 36 of the Directive, and the alleged failure to revisit or re-evaluate that reasoning when material changes had allegedly occurred.

7.900. We once again recall the fundamental conceptual distinction between the administration of a measure, and the substance of a measure, and the need to ascertain whether the substance of the measure is *administrative in nature* or, instead, involves substantive issues more properly dealt with under other provisions of the GATT 1994<sup>1507</sup> and the Appellate Body's view that "[t]he WTO-consistency of ... substantive content must be determined by reference to provisions of the covered agreements other than Article X of the GATT 1994".<sup>1508</sup>

7.901. Having carefully reviewed Russia's claim and the related argumentation of the parties<sup>1509</sup>, we do not believe that Russia's claim can properly be considered as relating to the administration of the infrastructure exemption measure within the meaning of Article X:3(a) of the GATT 1994.

7.902. The elements of the infrastructure exemption decisions identified in the parties' argumentation express the implementation of the content of the criteria and determine the substantive legal regime imposed. Our consideration of Russia's arguments leads us to the conclusion that such arguments pertain to the substantive *content* of the criteria guiding the grant of the infrastructure exemption, which articulate a set of defined, systematic benchmarks guiding the substantive assessment of the merits of an infrastructure exemption application.

7.903. To our mind, these are thus substantive, rather than administrative, in nature within the meaning of Article X:3(a). We see that Russia's claim thus concerns the substantive aspects of the criteria set out in Article 36 rather than how they are administered. As the conditions enshrined in the infrastructure exemption criteria in the Directive, and the assessment that occurs thereunder, are substantive rather than administrative in nature, we also consider that the Commission's alleged failure to re-visit the situations in order to assess the existence and impact of any material change in light of allegedly changed circumstances pursuant to these criteria is also substantive, rather than administrative, in nature. Russia's claims pertaining to these elements therefore also fall outside the scope of Article X:3(a)<sup>1510</sup> and accordingly, we find that Russia has not demonstrated a violation of Article X:3(a) of the GATT 1994.

<sup>1503</sup> Russia's first written submission, paras. 560-573 (regarding OPAL), 574-579 (regarding Gazelle), 607-609 (regarding TAP), 649-654 (regarding Nabucco), and 663-668 (regarding Poseidon).

<sup>1504</sup> Russia's first written submission, paras. 544-546 (comparing OPAL and Gazelle), 618-627 (comparing OPAL and TAP), 655-660 (comparing OPAL and Nabucco), and 668-671 (comparing OPAL and Poseidon).

<sup>1505</sup> Russia's first written submission, para. 583-593.

<sup>1506</sup> Russia's first written submission, para. 610-617.

<sup>1507</sup> Panel Reports, *Argentina – Hides and Leather*, para. 11.70 (emphasis added); and *Thailand – Cigarettes (Philippines)*, para. 7.869.

<sup>1508</sup> Appellate Body Report, *EC – Poultry*, para. 115. See also Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.293.

<sup>1509</sup> See, below paras. 7.940-7.963.

<sup>1510</sup> We find support for our approach in the findings of the panel in *Thailand – Cigarettes (Philippines)*. That panel was requested to consider whether the usage of a particular methodology for calculating the excise tax on imported cigarettes constituted the "administration" of a measure. That panel concluded that the

7.904. Moreover, while the Appellate Body has clarified that panels may be required to examine municipal law "in assessing its consistency with WTO law"<sup>1511</sup>, this role does not, in our view, include an assessment of a challenged measure's inconsistency with municipal, rather than WTO, law. We understand that, by asking us to compare the OPAL decision to the Commission's internal guidance and its other decisions, certain of Russia's arguments invite us to address the consistency of the cited infrastructure exemption decisions with internal EU law and practice. We do not believe our mandate properly encompasses a review of the consistency of decisions with EU internal law or practice. In this regard, we recall that the panel in *US – Hot-Rolled Steel* opined that it is not properly a panel's task to consider whether a Member has acted consistently with its own domestic legislation.<sup>1512</sup> This was reiterated by the panel in *US – Stainless Steel (Korea)* 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; that is a function reserved for each Member's domestic judicial system, and a function WTO panels would be particularly ill-suited to perform.<sup>1513</sup>

7.905. Russia acknowledges these views but submits that we may consider this claim without testing the European Union's adherence to its own domestic law and practice.<sup>1514</sup> Russia argues that the internal guidance and decisions it cites here differ materially from the practice or policy at issue in that case.<sup>1515</sup>

7.906. The European Union maintains that it has not departed from its domestic law and from Commission practice as it is explained in the Commission Explanatory Note on New Infrastructure Exemptions but submits that, if the Panel were to consider Russia's arguments regarding the Commission's alleged deviations from that Note, it would be testing the European Union's adherence to its own domestic law and practice. The European Union considers that the Panel is not well equipped to fulfil that task, which should be left to the domestic courts of the European Union.<sup>1516</sup>

7.907. We concur with the view of these previous panels and consider that, by asking us to compare the OPAL decision to the Commission's internal policy guidance and its other decisions, Russia's submissions improperly invite us to consider whether the European Union has followed its own laws and practice.

7.908. Accordingly, we find that Russia's claim under Article X:3(a) in respect of the alleged administration of the infrastructure exemption provision in Article 36 of the Directive does not properly fall within the scope of Article X:3(a) of the GATT 1994. We therefore do not further examine the consistency of the cited infrastructure exemption decisions with the Article X:3(a) requirements to administer the measure in a uniform, impartial and reasonable manner. We address the substantive aspects of Russia's claims pertaining to certain aspects of the mentioned infrastructure exemption decisions in our examination of Russia's claims under Article I:1 of the GATT 1994, and we examine Russia's claim concerning the conditions contained in the OPAL decision under Article XI:1 of the GATT 1994 below.

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challenged aspects of the legislation in question were substantive, rather than administrative, in nature within the meaning of Article X:3(a). (Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.986-7.988). That panel thus considered it unnecessary to continue its analysis under this provision to consider whether the administration of the measure was uniform, impartial and reasonable.

<sup>1511</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 200. See also Appellate Body Reports, *US – Carbon Steel (India)*, para. 4.445; and *India – Patents (US)*, para. 66.

<sup>1512</sup> Panel Report, *US – Hot-Rolled Steel*, para. 7.267.

<sup>1513</sup> Panel Report, *US – Stainless Steel (Korea)*, para. 6.50. (footnote omitted)

<sup>1514</sup> Russia's response to Panel question No. 227, para. 314.

<sup>1515</sup> Russia's response to Panel question No. 227, para. 317. In particular, Russia asserts that the Panel is not precluded from considering the Commission Explanatory Note on New Infrastructure Exemptions, (Exhibit RUS-27).

<sup>1516</sup> European Union's comments on Russia's response to Panel question No. 227, para. 150. See also European Union's opening statement at the first meeting of the Panel, para. 93, where the European Union stresses that "judicial review of an individual measure should be left for the municipal courts and is not the task of a panel assessing a claim under Article X:3(a)."

### 7.8.2.3 Conclusion

7.909. For the reasons stated above, we find that Russia has not demonstrated that the European Union has administered the infrastructure exemption measure in the Directive inconsistently with Article X:3(a) of the GATT 1994.

## 7.8.3 Russia's claims under Article II:1 of the GATS and Article I:1 of the GATT 1994

### 7.8.3.1 Introduction

7.910. Russia has raised four claims under Article II:1 of the GATS and Article I:1 of the GATT 1994 in the context of the broader category referred to by Russia as "the infrastructure exemption measure", one under Article II:1 of the GATS<sup>1517</sup> and three under Article I:1 of the GATT 1994.<sup>1518</sup> At the outset, we note that there has been some ambiguity, throughout these proceedings, about the exact nature and content of the measure challenged by Russia under these claims.

7.911. Throughout its submissions, Russia has focused its argumentation under Article II:1 of the GATS and Article I:1 of the GATT 1994 on the "manner in which the EU applied or implemented" Article 36 of the Directive, by comparing and contrasting different specific infrastructure exemption decisions taken by the Commission and the relevant NRAs.

7.912. More particularly, Russia argues: (a) that the Commission and the relevant NRAs interpreted certain requirements for being eligible to receive an infrastructure exemption differently in respect of one infrastructure exemption decision involving a Russian pipeline transport service supplier and imported Russian natural gas, on the one hand, and two infrastructure exemption decisions involving pipeline transport service suppliers and imported natural gas from other non-EU countries, on the other hand<sup>1519</sup>; (b) that the Commission and the relevant NRAs interpreted certain criteria differently and imposed different conditions as regards one infrastructure exemption granted in respect of a Russian pipeline transport service supplier and imported Russian natural gas, on the one hand, and a number of infrastructure exemptions granted in respect of pipeline transport service suppliers and imported natural gas from other non-EU countries, on the other hand<sup>1520</sup>; and (c) that the Commission and the relevant NRAs applied or implemented Article 36 differently in respect of two infrastructure exemption decisions involving Russian pipeline transport service suppliers and imported Russian natural gas, on the one hand, and infrastructure exemption decisions concerning LNG facilities, on the other hand.<sup>1521</sup>

7.913. In response to questions by the Panel, Russia explained that it is not challenging Article 36 of the Directive *per se*, nor the specific instances of application of this provision in the different

<sup>1517</sup> Russia's first written submission, paras. 721-731; and second written submission, paras. 426-431.

<sup>1518</sup> Russia's first written submission, paras. 680-701; and second written submission, paras. 412-417 (Russia's first claim under Article I:1 of the GATT 1994); Russia's first written submission, paras. 702-715; and second written submission, paras. 418-423 (Russia's second claim under Article I:1 of the GATT 1994); and Russia's first written submission, paras. 716-720; and second written submission, paras. 424-425 (Russia's third claim under Article I:1 of the GATT 1994).

<sup>1519</sup> Russia's first written submission, paras. 680-701; and second written submission, paras. 412-417 (Russia's first claim under Article I:1 of the GATT 1994, comparing the NEL infrastructure exemption decision with the Gazelle and TAP infrastructure exemption decisions); and first written submission, paras. 729-731; and second written submission, paras. 426-431 (Russia's claim under Article II:1 of the GATS, comparing the NEL and OPAL infrastructure exemption decisions with the Gazelle, TAP, Nabucco, Dragon and South Hook infrastructure exemption decisions).

<sup>1520</sup> Russia's first written submission, paras. 702-715; and second written submission, paras. 418-423 (Russia's second claim under Article I:1 of the GATT 1994, comparing the OPAL infrastructure exemption decision with the Gazelle, TAP, Nabucco and Poseidon infrastructure exemption decisions); and first written submission, paras. 729-731; and second written submission, paras. 426-431 (Russia's claim under Article II:1 of the GATS, comparing the NEL and OPAL infrastructure exemption decisions with the Gazelle, TAP, Nabucco, Dragon and South Hook infrastructure exemption decisions).

<sup>1521</sup> Russia's first written submission, paras. 716-720; and second written submission, paras. 424-425 (Russia's third claim under Article I:1 of the GATT 1994, comparing the NEL and OPAL infrastructure exemption decisions with the Dragon and South Hook infrastructure exemptions decisions); and first written submission, paras. 729-731; and second written submission, paras. 426-431 (Russia's claim under Article II:1 of the GATS, comparing the NEL and OPAL infrastructure exemption decisions with the Gazelle, TAP, Nabucco, Dragon and South Hook infrastructure exemption decisions).

infrastructure exemption decisions referred to by Russia.<sup>1522</sup> Instead, Russia is challenging the alleged "inconsistent"<sup>1523</sup> or "discriminatory"<sup>1524</sup> "manner in which the EU applied or implemented"<sup>1525</sup> Article 36 of the Directive.<sup>1526</sup> We understand that by using the terms "inconsistent" or "discriminatory", Russia refers to alleged differences or lack of coherence in the interpretation of eligibility requirements and in the interpretation of certain criteria and imposition of conditions referred to in letters (a), (b) and (c) in the immediately preceding paragraph. Russia also confirmed that the challenged measure is the same for Russia's claims under Article II:1 of the GATS and Article I:1 of the GATT 1994.<sup>1527</sup>

7.914. In this regard, we note that "[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings."<sup>1528</sup> We further note that the European Union does not appear to take issue with Russia challenging this type of measure<sup>1529</sup>, although it disputes the merits of Russia's contention that the European Union applied or implemented Article 36 of the Directive in an "inconsistent" or "discriminatory" manner. We also see no reason to preclude Russia from challenging the alleged "inconsistent" or "discriminatory" manner in which the European Union applied or implemented Article 36 of the Directive. At the same time, we believe that it is for Russia to demonstrate the existence of this measure.<sup>1530</sup> In other words, as Russia's claims under Article II:1 of the GATS and Article I:1 of the GATT 1994 are predicated on the notion that the European Union applied or implemented Article 36 of the Directive in an "inconsistent" or "discriminatory" manner, we believe that it is for Russia to demonstrate that the European Union did in fact apply or implement Article 36 of the Directive in this manner, as a basis for its claims.

7.915. Accordingly, we begin by addressing the threshold issue of whether Russia has demonstrated the existence of the alleged measure, which is, according to Russia, that the European Union applied or implemented Article 36 of the Directive in an "inconsistent" or "discriminatory" manner.

<sup>1522</sup> Russia's responses to Panel question No. 47(a), paras. 223-225, and No. 217(a), para. 283.

<sup>1523</sup> Russia's responses to Panel question No. 5, para. 47, and No. 47(a), para. 224.

<sup>1524</sup> Russia's first written submission, paras. 730-731.

<sup>1525</sup> Russia's responses to Panel question No. 5, paras. 47-49, and No. 47(a), paras. 224-225.

<sup>1526</sup> Russia's response to Panel question No. 217(a), para. 283.

<sup>1527</sup> Russia's response to Panel question No. 217(b), para. 284.

<sup>1528</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

<sup>1529</sup> We note that the European Union, in response to a question by the Panel following the first meeting, states that:

[I]t would only be possible to assess the consistency of the individual decisions with the MFN obligation by taking into account the universe of relevant individual similar decisions ("like" decisions) and examining if pipeline transport services and service suppliers of any other WTO Members have indeed received more favourable treatment than that accorded to Russian services and services suppliers.

It is entirely inappropriate and inadequate to "pick and choose" two individual decisions from a universe of relevant similar decisions and base a discrimination claim in WTO law on this comparison. (European Union's response to Panel question No. 47, paras. 125-126).

We recognize and echo the concerns raised by the European Union regarding the approach of "pick[ing] and choos[ing]" individual decisions for purposes of advancing discrimination claims under the MFN or national treatment obligations in the GATS or the GATT 1994. More particularly, we agree with the European Union that this approach may not in all circumstances "allow an unbiased assessment". (Ibid. para. 127). At the same time, we note that the European Union does not pursue this issue further in its subsequent submissions. We further note that the European Union has only pointed to additional infrastructure exemption decisions concerning LNG facilities and LNG storage, and has not pointed to any infrastructure exemption decisions regarding pipelines in addition to those referred to, and relied on, by Russia in its argumentation. (Ibid. paras. 127-128). Such additional infrastructure exemption decisions concerning LNG facilities and LNG storage appear to concern only the third aspect of the alleged "inconsistent" or "discriminatory" manner in which the European Union applied or implemented Article 36 of the Directive, namely that the Commission and the relevant NRAs allegedly applied different requirements and imposed different conditions in respect of two infrastructure exemption decisions involving Russian pipeline transport service suppliers and imported Russian natural gas, on the one hand, and infrastructure exemption decisions concerning LNG facilities, on the other hand. In order to address the European Union's concerns and to ensure "an unbiased assessment", our assessment of this aspect takes into account the existence of additional infrastructure exemption decisions concerning LNG facilities and LNG storage.

<sup>1530</sup> We note that similar approaches have been taken in previous disputes. (See, e.g. Appellate Body Reports, *Argentina – Import Measures*, para. 5.108; and Panel Report, *Russia – Tariff Treatment*, paras. 7.283-7.294).

7.916. We wish to emphasize that the assessment of whether Russia has demonstrated the existence of the challenged measure does not concern the issue of whether the application or implementation of Article 36 of the Directive is *WTO inconsistent* or discriminatory in a manner that would violate Articles II:1 of the GATS or Article I:1 of the GATT 1994. Rather, we are examining solely whether Russia has demonstrated the existence of the challenged measure, which Russia itself characterizes as the alleged "inconsistent"<sup>1531</sup> or "discriminatory"<sup>1532</sup> "manner in which the EU applied or implemented"<sup>1533</sup> Article 36 of the Directive.<sup>1534</sup>

7.917. Since Russia has confirmed that the challenged measure is the same for Russia's claims under Article II:1 of the GATS and Article I:1 of the GATT 1994<sup>1535</sup>, we will conduct a single assessment of whether Russia has demonstrated the existence of the measure challenged under both of these provisions, the alleged "inconsistent" or "discriminatory" manner in which the European Union implemented or applied Article 36 of the Directive.

7.918. Should we find that this measure exists, we will examine Russia's claims under Article II:1 of the GATS and Article I:1 of the GATT 1994 separately, following the approach set out at the outset of our Report. More particularly, should we find that the European Union applied or implemented Article 36 of the Directive in an "inconsistent" or "discriminatory" manner, our assessment of Russia's claim under Article II:1 of the GATS will focus on how the "inconsistent" or "discriminatory" implementation or application of Article 36 of the Directive affects the supply of pipeline transport services and service suppliers, whereas our assessment of Russia's claims under Article I:1 of the GATT 1994 will focus on how it affects trade in natural gas.

### **7.8.3.2 Whether the European Union applied or implemented Article 36 of the Directive in an "inconsistent" or "discriminatory" manner**

7.919. As already indicated above, Russia focuses on three different aspects, when arguing that the European Union applied or implemented Article 36 of the Directive in an "inconsistent" or "discriminatory" manner, namely (a) that the Commission and the relevant NRAs interpreted certain requirements for being eligible to receive an infrastructure exemption differently in respect of one infrastructure exemption decision involving a Russian pipeline transport service supplier and imported Russian natural gas, on the one hand, and two infrastructure exemption decisions involving pipeline transport service suppliers and imported natural gas from other non-EU countries, on the other hand<sup>1536</sup>; (b) that the Commission and the relevant NRAs interpreted certain criteria differently and imposed different conditions as regards one infrastructure exemption granted in respect of a Russian pipeline transport service supplier and imported Russian natural gas, on the one hand, and a number of infrastructure exemptions granted in respect of pipeline transport service suppliers and imported natural gas from other non-EU countries, on the other hand<sup>1537</sup>; and (c) that the Commission and the relevant NRAs applied or implemented Article 36 differently in respect of two infrastructure exemption decisions involving Russian pipeline transport service suppliers and imported Russian natural gas, on the one hand, and infrastructure exemption decisions concerning LNG facilities, on the other hand.<sup>1538</sup>

<sup>1531</sup> Russia's responses to Panel question No. 5, para. 47, and No. 47(a), para. 224.

<sup>1532</sup> Russia's first written submission, paras. 730-731.

<sup>1533</sup> Russia's responses to Panel question No. 5, paras. 47-49, and No. 47(a), paras. 224-225.

<sup>1534</sup> Russia's response to Panel question No. 217(a), para. 283.

<sup>1535</sup> Russia's response to Panel question No. 217(b), para. 284.

<sup>1536</sup> Russia's first written submission, paras. 680-701; and second written submission, paras. 412-417 (Russia's first claim under Article I:1 of the GATT 1994, comparing the NEL infrastructure exemption decision with the Gazelle and TAP infrastructure exemption decisions); and first written submission, paras. 729-731; and second written submission, paras. 426-431 (Russia's claim under Article II:1 of the GATS, comparing the NEL and OPAL infrastructure exemption decisions with the Gazelle, TAP, Nabucco, Dragon and South Hook infrastructure exemption decisions).

<sup>1537</sup> Russia's first written submission, paras. 702-715; and second written submission, paras. 418-423 (Russia's second claim under Article I:1 of the GATT 1994, comparing the OPAL infrastructure exemption decision with the Gazelle, TAP, Nabucco and Poseidon infrastructure exemption decisions); and first written submission, paras. 729-731; and second written submission, paras. 426-431 (Russia's claim under Article II:1 of the GATS, comparing the NEL and OPAL infrastructure exemption decisions with the Gazelle, TAP, Nabucco, Dragon and South Hook infrastructure exemption decisions).

<sup>1538</sup> Russia's first written submission, paras. 716-720; and second written submission, paras. 424-425 (Russia's third claim under Article I:1 of the GATT 1994, comparing the NEL and OPAL infrastructure exemption decisions with the Dragon and South Hook infrastructure exemptions decisions); and first written submission,

7.920. For its three claims under Article I:1 of the GATT 1994, Russia focuses on each of the three aspects described in the immediately preceding paragraph, respectively<sup>1539</sup>, whereas it focuses on all three aspects for its single claim under Article II:1 of the GATS.<sup>1540</sup>

7.921. As mentioned above, Russia has confirmed that it is challenging all three aspects as a single overarching measure and that the challenged measure is the same for Russia's claims under Article II:1 of the GATS and Article I:1 of the GATT 1994.<sup>1541</sup> For the purposes of examining the existence of the overarching measure, we address each of these three aspects, in turn, below.

7.922. Before turning to our assessment of these aspects, however, we wish to emphasize that this assessment will be tailored to Russia's challenge and the nature of the challenged measure. More particularly, we will examine and compare the various infrastructure exemption decisions cited by Russia with a view to determining whether the Commission and the relevant NRAs interpreted requirements differently or imposed different conditions in a way that supports Russia's contention that Article 36 was applied or implemented in an "inconsistent" or "discriminatory" manner.

7.923. We will not consider, outside the confines of this comparative assessment, the issue of how to interpret the various eligibility requirements or how to apply the various criteria and conditions under Article 36 of the Directive, nor will we review the consistency of the individual infrastructure exemption decisions, pointed to by Russia, with EU law, generally, or Article 36 of the Directive, more specifically. As we have already observed<sup>1542</sup>, we do not believe that such an approach would comport with the functions of panels under Article 11 of the DSU. More particularly, while the Appellate Body has clarified that panels may be required to examine municipal law "in assessing its consistency with WTO law"<sup>1543</sup>, we agree with prior panels that the task of WTO panels is not to determine whether a Member has acted consistently with its own domestic legislation. Nor do we believe that Russia's challenge or the nature of the challenged measure warrants such an approach.

#### ***(a) Interpretation of certain requirements for eligible types of infrastructure***

7.924. We begin with the first aspect, the alleged "inconsistent" or "discriminatory" interpretation of certain requirements for being eligible to receive an infrastructure exemption under Article 36 of the Directive. In this regard, we recall that this provision allows infrastructure exemptions to be granted only for certain types of infrastructure. More particularly, to be eligible for an infrastructure exemption, the infrastructure must be considered "[m]ajor new gas infrastructure, i.e. interconnectors, LNG and storage facilities" within the meaning of Article 36(1) of the Directive or "significant increases of capacity in existing infrastructure and [] modifications of such infrastructure which enable the development of new sources of gas supply" within the meaning of Article 36(2) of the Directive.

7.925. In its argumentation on this, Russia contrasts the infrastructure exemption decision concerning the NEL pipeline with those concerning the Gazelle and TAP pipelines.<sup>1544</sup> In the

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paras. 729-731; and second written submission, paras. 426-431 (Russia's claim under Article II:1 of the GATS, comparing the NEL and OPAL infrastructure exemption decisions with the Gazelle, TAP, Nabucco, Dragon and South Hook infrastructure exemption decisions).

<sup>1539</sup> Russia's first written submission, paras. 680-701; and second written submission, paras. 412-417 (Russia's first claim under Article I:1 of the GATT 1994); Russia's first written submission, paras. 702-715; and second written submission, paras. 418-423 (Russia's second claim under Article I:1 of the GATT 1994); and Russia's first written submission, paras. 716-720; and second written submission, paras. 424-425 (Russia's third claim under Article I:1 of the GATT 1994).

<sup>1540</sup> Russia's first written submission, paras. 721-731; and second written submission, paras. 426-431. We note that Russia, despite focusing on all three aspects for its single claim under Article II:1 of the GATS, does not refer to one of the individual infrastructure exemption decisions relied on by Russia for its second claim under Article I:1 of the GATT 1994 concerning the second aspect listed in paragraph 7.919, namely the Poseidon infrastructure exemption decision. We do not, however, believe that this alters the nature of the underlying measure challenged by Russia nor our assessment of whether this measure exists.

<sup>1541</sup> Russia's response to Panel question No. 217(b), para. 284.

<sup>1542</sup> See, above para. 7.904.

<sup>1543</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 200. See also Appellate Body Reports, *US – Carbon Steel (India)*, para. 4.445; and *India – Patents (US)*, para. 66.

<sup>1544</sup> Russia's first written submission, paras. 680-701 and 729-731; and second written submission, paras. 412-417 and 427.

former, the NEL pipeline was not considered eligible for, and hence denied, an infrastructure exemption by virtue of not being considered an interconnector within the meaning of Article 36(1) of the Directive.<sup>1545</sup> In the two latter, the Gazelle and TAP pipelines were considered eligible for, and eventually granted, infrastructure exemptions by virtue of being considered major new interconnectors within the meaning of Article 36(1) of the Directive.<sup>1546</sup>

7.926. Russia's main point of criticism pertains to the Commission's and the relevant NRAs' interpretation of the term "interconnectors", which is defined in the Directive as "a transmission line which crosses or spans a border between Member States for the sole purpose of connecting the national transmission systems of those Member States".<sup>1547</sup> Based on this definition, the Commission and the relevant NRAs have considered the definition of an interconnector as involving two cumulative requirements: (i) that the transmission line "crosses or spans a border between Member States"; and (ii) that the transmission line has the "sole purpose of connecting the national transmission systems of those Member States".<sup>1548</sup>

7.927. Russia argues that the Commission implicitly accepted the German NRA's "narrow" interpretation of the definition of an interconnector in relation to the first of these requirements, by not reviewing the conclusion that the NEL pipeline does not "cross[] or span[] a border between Member States", based on the fact that this pipeline "begins and ends in Germany".<sup>1549</sup> In Russia's view, the Commission "expanded" this definition when reviewing the Czech NRA's decision to exempt the Gazelle pipeline by considering that this pipeline "crosses or spans a border between Member States" as it connects to the German transmission system, despite the fact that this pipeline connects to the German transmission system by using 20 km of existing pipeline "located entirely in the Czech Republic".<sup>1550</sup> Similarly, Russia argues that the Commission "continued to expand" the definition of an interconnector by finding that the TAP pipeline "crosses or spans a border between Member States" regardless of the fact that a non-EU member State was crossed in between the two EU member States.<sup>1551</sup>

7.928. We note that the German NRA's denial of the NEL infrastructure exemption appears to be based on the fact that this pipeline is located only within Germany and does not directly connect to the transmission system of any other EU member State. More particularly, in its decision, the German NRA stated that:

[I]t is necessary for the pipeline itself to cross or span a national border in order to create the connection between transmission systems of the Member States. This is already missing in the case of the NEL, which begins at the Greifswald landfall station (NEL east) and ends at the Achim valve station (NEL west), i.e. on German territory over 100 km from the German-Dutch border.<sup>1552</sup>

7.929. As acknowledged by Russia, the NEL pipeline does not itself cross or span a border between EU member States. Instead, Russia points to the fact that the NEL pipeline "connects with the existing German transmission system, which then connects to the transmission systems of the Netherlands and Belgium."<sup>1553</sup>

7.930. The Commission's conclusion that the Gazelle pipeline "crosses or spans a border between Member States", on the other hand, appears to be based on the fact that the Gazelle pipeline itself "crosses a border between Member States, namely the Czech/German border at the Waidhaus

<sup>1545</sup> See BNetzA decision on the exemption of the OPAL and NEL pipelines, (Exhibit RUS-61), p. 77.

<sup>1546</sup> See Commission decision on the exemption of the Gazelle pipeline II, (Exhibit RUS-87), pp. 2 and 12-13; and Commission decision on the exemption of the TAP pipeline, (Exhibit RUS-10), pp. 2, 8-9 and 55-62.

<sup>1547</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 2(17).

<sup>1548</sup> See, e.g. BNetzA decision on the exemption of the OPAL and NEL pipelines, (Exhibit RUS-61), p. 20.

<sup>1549</sup> Russia's first written submission, paras. 681-682, 684, 723 and 729 (referring to BNetzA decision on the exemption of the OPAL and NEL pipelines, (Exhibit RUS-61), pp. 20-22).

<sup>1550</sup> Russia's first written submission, paras. 687-688 and 723 (referring to Commission decision on the exemption of the Gazelle pipeline I, (Exhibit RUS-81), paras. 19-21; and Commission decision on the exemption of the Gazelle pipeline II, (Exhibit RUS-87)).

<sup>1551</sup> Russia's first written submission, paras. 694-697 and 723 (referring to Commission decision on the exemption of the TAP pipeline, (Exhibit RUS-10), paras. 55-56).

<sup>1552</sup> BNetzA decision on the exemption of the OPAL and NEL pipelines, (Exhibit RUS-61), p. 21.

<sup>1553</sup> Russia's first written submission, para. 680. See also Russia's first written submission, para. 692.

border station where it is connected to the German transmission system".<sup>1554</sup> Russia does not appear to suggest otherwise, but instead points to the fact that "'Gazelle uses 20 km of an existing pipeline' located entirely in the Czech Republic" and criticizes the Commission for addressing this only in the context of considering whether the Gazelle pipeline is "new" and not in the context of considering whether it is an interconnector.<sup>1555</sup> As pointed to by Russia itself, however, these 20 km of an existing pipeline are "located entirely in the Czech Republic". For this reason, we do not see the usage of these existing 20 km of pipeline as altering the fact that the Gazelle pipeline, unlike the NEL pipeline, crosses or spans a border between EU member States. In light of this factual difference, we therefore do not agree with Russia's position that the Commission's conclusion that the Gazelle pipeline fulfilled the first requirement for being an interconnector, whereas the NEL pipeline did not, can be viewed as demonstrating that the Commission applied or implemented Article 36 in an "inconsistent" or "discriminatory" manner.

7.931. Similarly, we note that the Commission's conclusion that the TAP pipeline "crosses or spans a border between Member States" appears to be based, as pointed out by the European Union<sup>1556</sup>, on the fact that this pipeline is located within the territories of both Italy and Greece.<sup>1557</sup> Russia argues that the Commission "continued to expand its interpretation of the definition of 'interconnector'" and "acted contrary to BNetzA's decision regarding NEL" by concluding that "the concept of 'interconnectors' must be understood as comprising, inter alia, gas pipelines which span the borders of (at least) two EU Member States, regardless as to whether the territory of a non-EU Member State is crossed in between."<sup>1558</sup>

7.932. We recall that our examination is not directed at determining how to interpret the various requirements under Article 36 of the Directive consistently with EU law, including whether the requirement to "cross[] or span[] a border between Member States" should be interpreted to cover pipelines that span the borders of two EU member States by crossing a non-EU member State in between. Instead, we focus on Russia's assertion that the Commission and the relevant NRAs interpreted this requirement in an "inconsistent" or "discriminatory" manner in the infrastructure exemption decisions pointed to by Russia. In light of the factual differences between the NEL and TAP pipelines, and in particular the fact that the NEL pipeline is located solely within a single EU member State, Germany, whereas the TAP pipeline is located within and connects two EU member States, Italy and Greece, we do not agree with Russia's position that the Commission's conclusion that the latter fulfilled the first requirement for being an interconnector, whereas the former did not, can be viewed as demonstrating that the Commission applied or implemented Article 36 in an "inconsistent" or "discriminatory" manner.

7.933. Russia also asserts certain arguments pertaining to the second requirement under the definition of an interconnector, namely that such have the "sole purpose of connecting the national transmission systems of [] Member States" and to the requirement under Article 36(1) of the Directive that the infrastructure be "new". More particularly, Russia faults the Commission for finding that the Gazelle pipeline was "new" infrastructure despite the fact that it uses 20 km of an existing pipeline<sup>1559</sup>, and for finding that its sole purpose was to connect the national transmission systems of Germany and the Czech Republic without considering its earlier finding that "the 'purpose' of Gazelle is to continue OPAL 'as part of the wider Nord Stream project which aims at transporting Russian gas to Europe via the Baltic Sea.'"<sup>1560</sup> Similarly, Russia faults the Commission for "brush[ing] aside" the requirement regarding the sole purpose of the infrastructure being to

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<sup>1554</sup> Commission decision on the exemption of the Gazelle pipeline I, (Exhibit RUS-81), p. 6.

<sup>1555</sup> Russia's first written submission, para. 688 (quoting Commission decision on the exemption of the Gazelle pipeline I, (Exhibit RUS-81), p. 6).

<sup>1556</sup> European Union's first written submission, para. 730. See also European Union's second written submission, para. 312.

<sup>1557</sup> Commission decision on the exemption of the TAP pipeline, (Exhibit RUS-10), para. 14.

<sup>1558</sup> Russia's first written submission, paras. 694-696 (quoting Commission decision on the exemption of the TAP pipeline, (Exhibit RUS-10), para. 55).

<sup>1559</sup> Russia's first written submission, paras. 690-691 and 723 (quoting Commission decision on the exemption of the Gazelle pipeline I, (Exhibit RUS-81), paras. 24-25).

<sup>1560</sup> Russia's first written submission, paras. 689 and 723 (quoting Commission decision on the exemption of the Gazelle pipeline I, (Exhibit RUS-81), para. 19).



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connect the national transmission systems of EU member States in the TAP infrastructure exemption decision.<sup>1561</sup>

7.934. As explained above, our examination pertains to the issue of whether Russia has demonstrated that the European Union applied or implemented Article 36 in an "inconsistent" or "discriminatory" manner. In our view, Russia's arguments concerning the requirements that a pipeline have "the sole purpose of connecting the national transmission systems of [] Member States" and be "new" are inapposite in this regard. More particularly, since the NEL pipeline was found not to comply with the requirement to "cross[] or span[] a border between Member States", the requirement that the NEL pipeline have the "sole purpose of connecting the national transmission systems of [] Member States" and the requirement that the NEL pipeline be "new" infrastructure were never interpreted or applied in the NEL infrastructure exemption decision. We therefore have no point of comparison for determining whether the Commission and the relevant NRAs interpreted or applied these requirements differently in the NEL infrastructure exemption decision, on the one hand, and the Gazelle and TAP infrastructure exemption decisions, on the other hand, in a way that would support Russia's contention that the European Union applied or implemented Article 36 of the Directive in an "inconsistent" or "discriminatory" manner.

7.935. Russia appears to criticize the German NRA and the Commission for not examining the purpose of the NEL pipeline, arguing that "[h]ad either BNetzA or the Commission conducted this analysis, as was required, they would likely also have reached the same affirmative finding regarding NEL as they did for Gazelle."<sup>1562</sup> More generally, Russia appears to fault the German NRA and the Commission for not examining "any of the additional factors in relation to NEL", including the requirement that this pipeline have "the sole purpose of connecting the national transmission systems of [] Member States" and the requirement to be "new" under Article 36(1) of the Directive.<sup>1563</sup> It is, however, undisputed that the requirements to "cross[] or span[] a border between Member States", to have "the sole purpose of connecting the national transmission systems of those Member States", and to be "new", are cumulative.<sup>1564</sup> For this reason, it is unclear to us why Russia suggests that the German NRA and the Commission would be required to consider the latter two requirements in respect of the NEL pipeline, having already found that this pipeline did not fulfil the first.

7.936. In other words, the Commission and the relevant NRAs decided to consider the latter two requirements in the Gazelle and TAP infrastructure exemption decisions, having found that these pipelines met the first requirement. The Commission and the German NRA, on the other hand, did not consider those latter two requirements in the NEL infrastructure exemption decision, having found that this pipeline did not meet the first requirement to begin with. In our view, this does not support Russia's contention that the European Union applied or implemented Article 36 in an "inconsistent" or "discriminatory" manner. It simply stems from the fact that the three requirements, as acknowledged by Russia<sup>1565</sup>, are cumulative.

7.937. Russia also submits that the German NRA and the Commission failed to consider whether the NEL pipeline was a "significant increase[] of capacity in existing infrastructure" or a "modification[] of such infrastructure which enable[s] the development of new sources of gas supply" under Article 36(2) of the Directive as an "alternative exemption basis", having found that the NEL pipeline was not "[m]ajor new gas infrastructure, i.e. interconnectors, LNG and storage facilities" within the meaning of Article 36(1).<sup>1566</sup>

7.938. When examining the German NRA's decision concerning the NEL pipeline, it appears that the applicants themselves requested an exemption for the NEL pipeline as being "[m]ajor new gas infrastructure" under the provision of the German national implementing law equivalent to Article 36(1) of the Directive, rather than requesting an exemption for the NEL pipeline as being a "significant increase[] of capacity in existing infrastructure" or a "modification[] of such infrastructure which enable[s] the development of new sources of gas supply" under the provision

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<sup>1561</sup> Russia's first written submission, paras. 697 and 723 (referring to Commission decision on the exemption of the TAP pipeline, (Exhibit RUS-10), para. 56).

<sup>1562</sup> Russia's first written submission, para. 689.

<sup>1563</sup> Russia's first written submission, para. 692.

<sup>1564</sup> Russia's first written submission, para. 692.

<sup>1565</sup> Russia's first written submission, para. 692.

<sup>1566</sup> Russia's first written submission, paras. 683-684.

equivalent to Article 36(2) of the Directive.<sup>1567</sup> This was unlike the "capacity expansions in existing transport systems of Wingas Transport GmbH & Co. Kg", which were "not the subject of the application".<sup>1568</sup> For this reason, we have difficulties understanding Russia's criticism of the German NRA and the Commission for not examining this "alternative exemption basis".

7.939. In light of the considerations above, we do not believe that Russia has demonstrated that the Commission and the relevant NRAs interpreted or applied the eligibility requirements under Article 36 of the Directive for granting an infrastructure exemption in a way that demonstrates its contention that the European Union applied or implemented Article 36 in an "inconsistent" or "discriminatory" manner.

### ***(b) Interpretation of criteria and imposition of conditions***

7.940. We turn to the second aspect, that is Russia's arguments that the Commission and the relevant NRAs interpreted the criteria set out in Article 36(1) of the Directive differently and imposed different conditions as regards one infrastructure exemption granted in respect of a Russian pipeline transport service supplier and imported Russian natural gas, on the one hand, and a number of infrastructure exemptions granted in respect of pipeline transport service suppliers and imported natural gas from other non-EU countries, on the other hand. Russia offers a detailed comparison of the interpretation by the relevant NRAs and the Commission of certain criteria in the infrastructure exemption provision relating to the competition analysis, as well as of the conditions imposed in the OPAL infrastructure exemption decision, with the corresponding elements in the Gazelle, TAP, Nabucco and Poseidon infrastructure exemption decisions. We first examine Russia's arguments on the interpretation of criteria, and then turn to Russia's arguments on the conditions imposed in the various decisions cited by Russia. In examining Russia's arguments, we will look at whether Russia has demonstrated the existence of the challenged measure, that is, that the European Union applied or implemented Article 36 in an "inconsistent" or "discriminatory" manner, as a basis for its claims.

### **Interpretation of criteria**

7.941. Article 36(1) of the Directive sets out five cumulative criteria for obtaining an infrastructure exemption.<sup>1569</sup> Russia focuses its argumentation on only two of these, namely that (a) the investment must enhance competition in gas supply and enhance security of supply; and (e) the exemption must not be detrimental to competition or the effective functioning of the internal market in natural gas, or the efficient functioning of the regulated system to which the infrastructure is connected.<sup>1570</sup>

7.942. We recall and underline that our examination is not directed at determining how to interpret the criteria in Article 36 of the Directive consistently with EU law, including the specific parameters of any assessment taking place under the competition-related paragraphs thereof with respect to relevant markets and competitive impacts of infrastructure in respect of which an exemption has been requested. Rather, we focus on Russia's assertion that the Commission and the relevant NRAs interpreted these criteria in an "inconsistent" or "discriminatory" manner in the infrastructure exemption decisions pointed to by Russia.

7.943. We observe that the Commission's OPAL decision includes an assessment of competitive impacts based on nationally defined geographic markets, not only in the Czech Republic<sup>1571</sup>, but

<sup>1567</sup> BNetzA decision on the exemption of the OPAL and NEL pipelines, (Exhibit RUS-61), p. 5.

<sup>1568</sup> BNetzA decision on the exemption of the OPAL and NEL pipelines, (Exhibit RUS-61), p. 5.

<sup>1569</sup> See, above para. 2.37.

<sup>1570</sup> Directive 2009/73/EC, (Exhibit EU-5), Articles 36(1)(a) and 36(1)(e).

<sup>1571</sup> We note that the Commission disagreed with BNetzA's assessment of competitive impact in the Czech market. See Commission decision on the exemption of the OPAL pipeline, (Exhibit RUS-82), paras. 41-44, where the Commission observes that the BNetzA concludes that as a whole the OPAL project will contribute to an enhancement of competition in gas supply, noting that "[t]he basis for the evaluation by the BNetzA is an analysis of the anticipated effects of the OPAL project on competition on the gas sales markets in the Czech Republic and in Germany, and on the market (which is demarcated at least Europe-wide) for the supply of supra-regional wholesale companies with gas ('producer market')." (footnotes and emphasis omitted) The Commission also observes that "[t]he BNetzA comes to the conclusion that the OPAL at least 'as a whole' (i.e. in consideration of the imposed ancillary provisions) contributes to the enhancement of competition in gas supply. It bases this assumption on the fact that the OPAL or the ancillary provisions linked to the exemption

also in Germany (regarding which the Commission accepts the analysis of BNetzA, the German NRA).<sup>1572</sup> In reaching its decision that OPAL posed risks for competition, the Commission considered that

[I]t is probable that no volumes relevant for competition from OPAL will remain in the Czech Republic. However, the Commission believes that it is at least possible that a certain amount of the gas transported via the OPAL will remain there. This kind of scenario, in which Gazprom would deliver even more gas to the Czech market than it currently does, would strengthen Gazprom's dominant position on the producer market and therefore lead to a deterioration in competition. If the gas were to be supplied to RWE Transgas, this would also strengthen the market-dominating position of RWE Transgas on the downstream wholesale market.<sup>1573</sup>

7.944. Turning to the Commission's Gazelle decision, Russia asserts that the Commission examined both the "upstream producer market" and the "wholesale and retail markets" and implicitly identified the relevant geographic market as being EU-wide and that, having examined not only the Czech market but also the markets of "Germany and other countries", the Commission found that Gazprom has a dominant position on the Czech upstream producer market. Russia further submits that the Commission appeared to base its decision entirely on the conclusion that Gazprom supplies the "majority of the Czech gas consumption."<sup>1574</sup> Russia notes that the Commission nevertheless determined that "the construction of Gazelle will not strengthen Gazprom's market position on this market" and concluded that "Gazelle will therefore positively affect the competitive situation on the Czech gas markets, without strengthening the position of dominant players on these markets."<sup>1575</sup> We understand that the allegedly inappropriate "EU-wide"

will lead to enhanced competitive conditions on the Czech gas sales market." The Commission further observes that "[i]n relation to the German gas sales markets and the producer market, the BNetzA comes to the conclusion that OPAL's effects on these markets are 'neutral'. Consequently the BNetzA does not assume that the OPAL pipeline will have positive effects on competition in gas supply in Germany." (footnotes and emphasis omitted). The Commission then states its own opinion that "the BNetzA statements in relation to the alleged enhancement of competition in the Czech gas sales market are not convincing. In actual fact, the Commission is concerned that the OPAL may even have negative effects on competition in the Czech Republic." The Commission then proceeds to analyse effects on competition in the Czech Republic, including lack of positive effects on competition and possible negative effects on competition (in paras. 45-74), concluding (in paras. 78-79) that:

It must be determined that, according to the information available to the Commission, it should not be expected that there will be an *enhancement* of competition on the gas markets in question. The Commission also does not have any reliable indications of positive competitive effects from the OPAL in other Member States. The BNetzA also did not present any such positive effects. In addition, there are *risks* for competition from the OPAL in the Czech producer market. Due to the lack of enhancement and the possible deterioration of competition on the relevant markets, the requirements for granting an exemption as per Article 22(1) a) and e) of Directive 2003/54/EC are not present. (emphasis original)

<sup>1572</sup> Commission decision on the exemption of the OPAL pipeline, (Exhibit RUS-82), paras. 75-77 (contained in a section entitled "3. Effects on competition in Germany"):

The Commission shares the assessment of the BNetzA that the OPAL project will not enhance competition on the German gas markets.

The Commission also agrees with the BNetzA finding that the OPAL project will not lead to negative effects on competition in the German gas markets.

As the present exemption relates exclusively to the cross-border transport capacities of the OPAL to the Czech Republic, the Commission believes that it is primarily the Czech gas market which is relevant for the analysis of competition.

<sup>1573</sup> Commission decision on the exemption of the OPAL pipeline, (Exhibit RUS-82), para. 71. The Commission further surmised that "[t]he additional access option created for Gazprom to Nord Stream gas could also weaken potential competitors on the producer market" (para. 72).

<sup>1574</sup> Russia's first written submission, para. 576 (citing Commission decision on the exemption of the Gazelle pipeline I, (Exhibit RUS-81), para. 31).

<sup>1575</sup> Russia's first written submission, para. 576 (citing Commission decision on the exemption of the Gazelle pipeline I, (Exhibit RUS-81), paras. 31-33 and 35). In its Gazelle decision, the Commission observed that Gazelle would start at the Czech/German border point Brandov, cross the northwest of the Czech Republic and end at the Czech/German border at Waidhaus, noting that gas quantities taken up by Gazelle would "be directly shipped to Waidhaus and can only be exited in Waidhaus". (para. 9) The Commission emphasized that "[t]he gas volumes on Gazelle will be transported to Germany and other markets ... and are not intended to

approach that Russia points to appears to be the Commission's consideration of nationally defined geographic markets other than the Czech Republic (the German market and the national markets of other countries). The Commission's consideration of such other national markets in its Gazelle analysis appears to be based on the particular situation and route of the Gazelle pipeline, which it considers has the effect of de-congesting the Czech transmission system.<sup>1576</sup>

7.945. We further understand Russia to argue, in essence, that the Commission should have considered OPAL and Gazelle as a single pipeline and that, hence, any differences in the facts taken into consideration in the two decisions constitute evidence of discriminatory treatment.<sup>1577</sup> We observe that the possibility existed that gas transported through OPAL could remain in the Czech market, although, as noted above, the Commission opined that it was probable that no volumes relevant for competition from OPAL would remain there. As Russia itself acknowledges<sup>1578</sup>, the Commission recognized the interlinkages between OPAL and Gazelle, observing *inter alia* that "[w]hile the three projects Nord Stream, OPAL and Gazelle are sponsored by different companies, they depend on one another, as both OPAL and Gazelle transport further the Russian gas delivered through Nord Stream."<sup>1579</sup> The Commission thus took account of existing plans to link OPAL to Gazelle, but the Gazelle pipeline was not yet constructed at the time of the 2009 OPAL decision (its construction was completed in 2013). The applications for exemptions for the two pipelines were made separately.<sup>1580</sup> Since Gazelle's completion, we understand that Russia and the European Union have discussed, on several occasions, the modification of the OPAL conditions.<sup>1581</sup> However, these conditions remain in place.<sup>1582</sup>

7.946. We observe that, in its TAP exemption decision, the Commission conducted analyses of the relevant geographic market and of the impact on competition in the Greek market<sup>1583</sup> and on competition in the Italian market separately.<sup>1584</sup> The Commission had similarly distinguished both markets as separate geographic markets in other parts of its decision.<sup>1585</sup> For Russia, this "contradicted its approach to OPAL and Gazelle as well as the European Union's stated competition policy" and "[t]he Commission's approach to TAP suggests that the Greek and Italian gas markets

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serve the Czech market, except for emergency situations. From a competition point of view, the Gazelle pipeline is thus rather a substitute for the 'Brotherhood' pipeline, which is currently used for transports to the German border, than an additional source for gas imports to Czech markets" (para. 32). (footnotes and emphasis omitted).

<sup>1576</sup> Commission decision on the exemption of the Gazelle pipeline I, (Exhibit RUS-81), para. 29.

<sup>1577</sup> We note that, in its Gazelle decision, the Commission stated that exemptions "may notably have a detrimental effect on competition if a similar infrastructure project is planned in parallel to the project for which an exemption is requested and the exemption for this project risks jeopardizing the commercial viability of the other project" and concluded that "[s]ince no alternative projects to Gazelle exist in the present case, the exemption for the Gazelle project is unlikely to be detrimental to competition." (Commission decision on the exemption of the Gazelle pipeline I, (Exhibit RUS-81), para. 63). (footnotes omitted)

<sup>1578</sup> Russia's first written submission, para. 574.

<sup>1579</sup> Commission decision on the exemption of the Gazelle pipeline I, (Exhibit RUS-81), para. 10.

<sup>1580</sup> Russia's first written submission, para. 574, refers to the "18 months separating the Commission's two exemption decisions".

<sup>1581</sup> For example, Russia notes, Gazprom formally requested the German NRA to reconsider its second OPAL decision adopting the Commission's decision and the conditions. See Russia's first written submission, paras. 583 and 706 (citing [\*\*\*], (Exhibit RUS-91) (BCI); and [\*\*\*], (Exhibit RUS-92) (BCI)). Russia submits that a settlement was agreed upon with the German NRA but was not finalized as a binding agreement because the Commission did not give its approval. See Russia's first written submission, para. 706 (citing [\*\*\*], (Exhibit RUS-94) (BCI)).

<sup>1582</sup> See, above fn 1430.

<sup>1583</sup> Commission decision on the exemption of the TAP pipeline, (Exhibit RUS-10), paras. 99-123. It reads:

Currently, competition in the Greek gas markets can only be characterised as nascent. Greece has no domestic gas production. All gas consumed in Greece is imported. The incumbent gas supplier in Greece's wholesale and retail gas markets is DEPA.

At least three market levels are currently dominated by the incumbent player (DEPA) in Greece:

Gas imports (including both pipeline and LNG imports);

Wholesale supply;

Retail supply (including supplies to individual households and industries).

(Ibid. paras. 99-100). (footnote omitted)

<sup>1584</sup> Commission decision on the exemption of the TAP pipeline, (Exhibit RUS-10), paras. 124-139.

<sup>1585</sup> Commission decision on the exemption of the TAP pipeline, (Exhibit RUS-10), see e.g. paras. 66-77 and 84-93.

operate independently, while its other findings suggest the opposite".<sup>1586</sup> The basis for Russia's argument about the inappropriateness of the Commission's findings that the Greek and Italian markets operated independently is unclear to us, given that, before the construction of TAP, there was no direct interconnection between the gas systems of these countries. This differs from the factual situation surrounding the German and Czech markets in the OPAL decision.

7.947. Russia argues, in addition, that the Commission excluded Albania entirely from its competition assessment, even though it is directly crossed by TAP.<sup>1587</sup> In this connection, we acknowledge the European Union's arguments<sup>1588</sup> that the Commission did not review the Albanian NRA's conclusions in detail because, firstly, Albania is not a member of the European Union and hence the Commission did not have the requisite competence to do so and, secondly, before completion and entry into operation of the TAP pipeline, Albania did not have a gas system or market, and thus the impact of the infrastructure investment and of its exemption on competition could not be assessed in the same manner as when markets already exist.<sup>1589</sup>

7.948. We see that the Commission's approach to Nabucco was based on the effects of the exemption in nationally defined relevant geographic markets, similar to its approach to OPAL, with the difference that the Nabucco pipeline crosses four countries while OPAL crosses two (the OPAL pipeline crosses Germany and ends in the Czech Republic whereas the Nabucco pipeline was planned to stretch from Turkey via Romania, Bulgaria and Hungary to Austria.) The Commission analysed the impact on competition in each affected market and concluded that the requested exemption did not enhance competition, and further conditions were therefore contemplated (summarized below at paragraph 7.954).<sup>1590</sup> As for the particular markets analysed, we acknowledge the European Union's view that the product markets to be analysed in a decision depend on the concrete market situation for a given project, offering the example that "[where] local distributors and industrial consumers are exclusively supplied by one incumbent, but subject to different conditions, this can require a separate analysis, as was the case of Nabucco in Bulgaria".<sup>1591</sup> While the Commission does appear to have conducted a relatively more detailed

<sup>1586</sup> Russia's first written submission, para. 608.

<sup>1587</sup> Russia's first written submission, para. 609. Russia submits that Albania joined Greece and Italy in the Joint Opinion but that the Commission noted only that the Secretariat of the Energy Community had found that TAP enhances competition in Albania, on the basis of a relevant geographical market delineated on the basis of national boundaries (citing Final Joint Opinion of the Energy Regulators on TAP AG's Exemption Application, (Exhibit RUS-97), para. 31).

<sup>1588</sup> European Union's response to Panel question No. 226, para. 298.

<sup>1589</sup> We recall that Russia notes that the list of TAP's shareholders has changed significantly since the Commission's TAP decision was issued and that two of the current shareholders in TAP - SOCAR and Snam - acquired other TSOs in the same markets after the exemption was issued, thus potentially modifying the basis for the Commission's competition analysis. In this connection, Russia states that "[a]t the time of its decision in May 2013, the Commission identified TAP AG's shareholders as Statoil ASA (Norway) (42.5%), Axpo AG (Switzerland) (42.5%) and E.ON Ruhrgas AG (Germany) (15%). The shareholders later changed dramatically and now consist of: BP (UK) (20%), AzTAP (subsidiary of SOCAR) (20%), Snam S.p.A. (Italy) (20%), Fluxys (Belgium) (19%), Enagás (Spain) (16%) and Axpo (5%)." (Russia's first written submission, para. 595). (footnotes omitted) Russia asserts that the Commission should have monitored the exemption decision in order to verify whether the assumptions underlying the decision prove to be correct, as required by text of the decision and the Commission's internal guidance. (Russia's first written submission, paras. 610-617 and 703 (citing Commission Explanatory Note on New Infrastructure Exemptions, (Exhibit RUS-27); and Commission decision on the exemption of the TAP pipeline, (Exhibit RUS-10), p. 61)). See also Russia's comments on European Union's response to Panel question No. 226, para. 236. The European Union offers reasons for why the circumstances did not trigger a re-assessment of the decision, including that the alleged ownership changes did not take place to the extent alleged; the situation of TSO Snam being distinct from that of a VIU acquiring major shareholdings in transmission systems; the monitoring of exemption decisions falling within the purview of NRAs and the Commission not being aware of a failure by the relevant NRA to assess the effects of ownership changes. (European Union's response to Panel question No. 229, paras. 302-303; No. 230, para. 304; and No. 233, para. 305). We do not consider it necessary to address this issue in order to properly address Russia's claim. In respect of the allegedly material changes in circumstances concerning TAP pointed to by Russia, we underline the factual and geographic particularities pertaining to each infrastructure exemption and recall that it is not our task here to conduct or re-conduct the Commission's own competition analysis, nor to measure the European Union's (or EU member States') compliance with its/their own internal law and practice.

<sup>1590</sup> Commission decision on the exemption of the Austrian section of the Nabucco pipeline, (Exhibit RUS-83), paras. 31-40; Commission decision on the exemption of the Bulgarian section of the Nabucco pipeline, (Exhibit RUS-84), paras. 33-43; and Commission decision on the exemption of the Romanian section of the Nabucco pipeline, (Exhibit RUS-85), paras. 38-52.

<sup>1591</sup> European Union's response to Panel question No. 226, para. 300.

analysis of Nabucco's impacts on the upstream wholesale market, the downstream wholesale market, the market for supply to local distributors and the retail market for industrial consumers, we acknowledge the European Union's explanation that the more detailed analysis could operate as a more stringent standard to qualify for an exemption.<sup>1592</sup>

7.949. We see that the Commission's approach in its Poseidon decision was based on the effects of the exemption in nationally defined relevant geographic markets (Italy and Greece).<sup>1593</sup> It accepted the assessments of the Italian and Greek NRAs regarding the generally positive effects on competition, but considered that the positive effects on competition and security of supply were not fully proportional to the extent of the exemption granted (and hence attached additional conditions, discussed below at paragraph 7.954).<sup>1594</sup>

7.950. We have examined the elements of the infrastructure exemption decisions pointed to by Russia on the basis of the parties' argumentation. We are not persuaded that the Commission took such divergent approaches to its competition analysis in the OPAL and Gazelle, TAP, Nabucco and Poseidon infrastructure exemption decisions in a manner that would amount to an "inconsistent" or "discriminatory" application of the infrastructure exemption measure in Article 36 of the Directive for the purposes of our analysis of whether the alleged measure exists as a basis for Russia's claims. We consider that the differences identified by Russia in the competition analysis in the OPAL and Gazelle, TAP, Nabucco and Poseidon infrastructure exemption decisions stem from the Commission's assessment of the specific circumstances, distinct geographical situations and competitive impacts of these pipelines and are not evidence of an "inconsistent" or "discriminatory" application of Article 36 for the purposes of our assessment of the existence of the measure as a basis for Russia's claims here.

### Imposition of conditions

7.951. With respect to the conditions imposed in connection with the granting of infrastructure exemptions, Article 36(6) of the Directive states that:

An exemption may cover all or part of the capacity of the new infrastructure, or of the existing infrastructure with significantly increased capacity.

In deciding to grant an exemption, consideration shall be given, on a case-by-case basis, to the need to impose conditions regarding the duration of the exemption and non-discriminatory access to the infrastructure. When deciding on those conditions, account shall, in particular, be taken of the additional capacity to be built or the modification of existing capacity, the time horizon of the project and national circumstances.<sup>1595</sup>

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<sup>1592</sup> European Union's response to Panel question No. 226, para. 299.

<sup>1593</sup> Commission decision on the exemption of the OPAL pipeline, (Exhibit RUS-82), pp. 10-18 (analysing effects on the Czech market); and p. 19 (analysing effects on the German market); and Commission decision on the exemption of the Poseidon pipeline, (Exhibit RUS-86). The Commission refers throughout to separate competition analyses of the Poseidon pipeline carried out by the Greek and Italian NRAs. See, e.g. p. 5: "[T]he Greek and Italian authorities consider that the project will not have a detrimental effect on the functioning of the internal gas market or the efficient functioning of the regulated system to which the infrastructure is connected."

<sup>1594</sup> Commission Decision on the Exemption of the Poseidon pipeline, (Exhibit RUS-86), p. 6.

<sup>1595</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 36(6). Article 36(6) includes two further paragraphs:

Before granting an exemption, the regulatory authority shall decide upon the rules and mechanisms for management and allocation of capacity. The rules shall require that all potential users of the infrastructure are invited to indicate their interest in contracting capacity before capacity allocation in the new infrastructure, including for own use, takes place. The regulatory authority shall require congestion management rules to include the obligation to offer unused capacity on the market, and shall require users of the infrastructure to be entitled to trade their contracted capacities on the secondary market. In its assessment of the criteria referred to in points (a), (b) and (e) of paragraph 1, the regulatory authority shall take into account the results of that capacity allocation procedure.

The exemption decision, including any conditions referred to in the second subparagraph of this paragraph, shall be duly reasoned and published.

7.952. Russia's submissions compare the conditions imposed on the OPAL pipeline, on the one hand, with conditions imposed on each of the Gazelle, TAP, Nabucco and Poseidon pipelines, on the other hand, alleging that the OPAL conditions are more restrictive than the conditions imposed in the other exemption decisions.

7.953. Regarding the conditions attached to the respective exemptions, the European Union submits that the conditions imposed on the OPAL pipeline are not more restrictive than those imposed on the other pipelines.<sup>1596</sup> The European Union's characterization of conditions attached to exemptions generally is that they "are determined taking account of the size of the relevant market, the expected evolution of gas demand and of the market shares of competitors" and that "the level of a capacity cap or gas release requirement is established to ensure that with the access to the relevant infrastructure (in the case of capacity cap), or to a gas supply (in the case of gas release program), competing undertakings will be able to exercise a competitive constraint on the dominant undertaking."<sup>1597</sup> The European Union asserts that the imposition of capacity caps and gas release requirements generally is in line with previous Commission practice as well as the Commission Explanatory Note on New Infrastructure Exemptions. In particular, the European Union argues that capacity caps imposed on undertakings holding a dominant position on the relevant gas markets are standard conditions appended to such exemptions. The European Union also cites the conditions attached to the Nabucco and TAP exemptions to argue that capacity caps and gas and capacity release programs are not unusual conditions for infrastructure exemptions.<sup>1598</sup>

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We see that "partial" exemptions may include "[l]imiting the exemption to part of the infrastructure, i.e. less than 100% of the capacity. In this case, part of the capacity would fall under regulated TPA and the project promoters would be exempted from the TPA rules only for the other part of the capacity." (Commission Explanatory Note on New Infrastructure Exemptions, (Exhibit RUS-27), para. 18.1). We note that, among the possible conditions that may be imposed in connection with an infrastructure exemption, the same document enumerates: "[a] limitation of the maximum percentage of capacity that can be allocated to an undertaking with significant market power in the relevant market(s). This condition can be combined with the requirement to release the capacity share or corresponding gas volumes exceeding the defined maximum percentage." (para. 39.2).

<sup>1596</sup> European Union's first written submission, paras. 708-712; and second written submission, paras. 288-293.

<sup>1597</sup> European Union's response to Panel question No. 234, para. 310; and Commission Explanatory Note on New Infrastructure Exemptions, (Exhibit RUS-27), para. 39.

<sup>1598</sup> European Union's second written submission, paras. 289-292.

7.954. We summarize the main conditions imposed in the exemption decisions referred to by Russia in the table below:

| OPAL <sup>1599</sup>   | Gazelle <sup>1600</sup>   | TAP <sup>1601</sup>  | Nabucco <sup>1602</sup>   | Poseidon <sup>1603</sup>  |
|--|---|--|---|---|
| Market dominating companies (e.g. Gazprom), are not allowed to book more than 50% of the exit capacity of the pipeline at the Czech border.  | The TSO is to enable sufficient bi-directional capacity on Gazelle to safeguard the security of supply of the Czech market in emergencies.                            | Market dominating undertakings are not allowed to reserve more than 50% of the capacity on the TAP exit point in the country.  | Market dominating undertakings are not allowed to book more than 50% of the total capacity at the exit points in the section of the Nabucco pipeline in the country.  | No gas shipper through the Poseidon Pipeline will be authorized to contract more than 80% of the exempted transportation capacity.  |
| The capacity cap may be exceeded if the company (or companies) offers a gas volume of 3 billion cubic meters per annum (m <sup>3</sup> /a) to the market on the OPAL (i.e. a "gas release program"), along with a corresponding capacity release program. The programs must be approved by the German NRA. | At the new border point of Brandov, regulated virtual reverse flow shall apply from the exit point of Gazelle into OPAL and from the exit point of OPAL into Gazelle. | In case a lack of interest by other parties causes capacity to remain idle, a derogation from the capacity cap (regulated by the NRA) is possible - in the form of a gas and capacity release requirement. | In case a lack of interest by other parties causes capacity to remain idle, a derogation from the capacity cap (regulated by the NRA) is possible – in the form of a gas and capacity release requirement. A formula to calculate gas volume to be offered to the market is also recommended. | The applicant TSO is to make available to third parties incremental transportation capacity to meet the effective demand. The minimum capacity to be made available in this procedure shall not be less than 0.8 bcm/year, making full use where possible of all the technical capacity reasonably available. |
|  |   | Changes in shareholders are to be notified to the NRA.   | Changes in shareholders are to be notified to the NRA.  |   |

7.955. We focus on Russia's assertion that the Commission and the relevant NRAs imposed conditions on exemptions granted in connection with such criteria in an "inconsistent" or "discriminatory" manner in the infrastructure exemption decisions pointed to by Russia.

7.956. We note that (unlike in the OPAL decision) no capacity cap or gas release programme was imposed in the Gazelle decision<sup>1604</sup>, although part of that pipeline's capacity, i.e. above 30 bcm,

<sup>1599</sup> Commission decision on the exemption of the OPAL pipeline, (Exhibit RUS-82), para. 89. The cap also applies to cumulative bookings by companies belonging to the same market dominating corporate group (e.g. Gazprom and Wingas), or market-dominating companies or groups between which there are long-term and significant gas supply agreements (e.g. RWE Transgas and Gazprom).

<sup>1600</sup> Commission decision on the exemption of the Gazelle pipeline I, (Exhibit RUS-81), pp. 15-16. The exemption must also be conditional upon the treatment of the border point of Brandov as one common entry/exit point with the existing exit/entry point of Hora Svate Kateřiny for the purpose of trading gas from the Czech Republic to Germany and from Germany to the Czech Republic, so that access from the Czech virtual hub (i.e. its entry/exit system) to the German exit point of OPAL and the German virtual hub, and vice versa from Germany to the Czech Republic, is possible.

<sup>1601</sup> Commission decision on the exemption of the TAP pipeline, (Exhibit RUS-10), pp. 55-62. The decision also recommends that, in the event that two or more undertakings together hold a market share of at least 80% and each of these undertakings have a market share of more than 20% in any relevant product market for the supply of gas in that country, or on the upstream market of supplying gas for that country, the relevant NRA will have the right to impose a capacity cap on these undertakings on the TAP exit point in the country. Undertakings belonging to the same group of companies shall be considered together.

<sup>1602</sup> Commission decisions on the exemption of the Austrian, Bulgarian, and Romanian sections of the Nabucco pipeline, (Exhibit RUS-83), pp.14-15; (Exhibit RUS-84), pp. 18-20; and (Exhibit RUS-85), pp. 20-21. The decisions also recommend that, for the calculation of the capacity cap, undertakings belonging to the same group shall be considered together. With respect to dominant market players in Romania, the Commission recommended two additional conditions: a) In the event of collective dominance on the upstream wholesale market the competent national authority should have the right to limit the capacity share of any of the collectively dominant undertakings. The competent national authority should set a capacity cap in such a way that non-dominant undertakings are enabled to compete effectively with the jointly dominant undertakings, and b) Nabucco International shall inform ANRE in good time of the result of the open season procedures. ANRE should then, within a reasonable and specified period of time express its preliminary or final opposition to the submitted capacity allocation if one or more undertakings holding a dominant position exceed(s) the single dominance or the collective dominance capacity cap.

<sup>1603</sup> Commission decision on the exemption of the Poseidon pipeline, (Exhibit RUS-86), pp. 6-7.

<sup>1604</sup> Russia's first written submission, paras. 544-546 (citing Commission decision on the exemption of the Gazelle pipeline I, (Exhibit RUS-81), p. 15).



was not exempted and thus fully regulated.<sup>1605</sup> The Commission considered the two pipelines to end in different national markets: while the physical end-point of Gazelle is in Germany, OPAL ends in the Czech Republic.<sup>1606</sup> As Russia itself notes, the Commission required that the exemption's term be reduced from 23 to 22 years (the same as for OPAL), along with several other minor conditions.<sup>1607</sup>

7.957. We note that the proportional gas release programs that the Commission imposed in each of its Nabucco decisions required that undertakings exceeding the capacity cap be required to release a percentage of their annual gas volume to the market. Russia contrasts this with the "arbitrary" 3 bcm/year required in the case of OPAL if it books capacity in excess of the 50% cap.<sup>1608</sup> Furthermore, Russia notes that the Nabucco gas release programmes were each based on the "share of booked capacity" of the dominant undertaking involved.<sup>1609</sup> Russia argues that the Commission effectively imposed a capacity cap on Gazprom in its Nabucco exemption decision pertaining to Bulgaria, despite Gazprom not being affiliated with Bulgargaz and being considered dominant in a different segment of the market. Russia considers that by treating Bulgargaz and Gazprom jointly for purposes of this capacity cap, the Commission created a situation in which Gazprom – a third party – could be completely precluded from acquiring any Nabucco capacity in Bulgaria.<sup>1610</sup> We note that the Commission established that the requested exemption would have a detrimental impact on competition in the relevant market unless a capacity cap would apply.

7.958. We note that TAP received an exemption from third-party access for 50% of its capacity. The usage of TAP capacities by gas undertakings with a market share above 40% is limited to 50% of exit capacities both in Greece and in Italy. Russia asserts "[t]he authorities may thus choose to impose a capacity cap, make it lower than 50%, impose it on the "two or more undertakings together," impose it on each individually, or impose no cap at all. There are no rules." We nevertheless acknowledge the European Union's argument that, because not all undertakings with a 40% market share are dominant, but undertakings with less than 40% are very unlikely to be dominant, the capacity cap imposed on the TAP pipeline could be regarded as stricter than the one imposed on OPAL and that the additional possibility of applying a capacity cap to two undertakings reaching a combined share of 80% would tend to reinforce the operation of the capacity cap.<sup>1611</sup> We take note that in case a lack of interest by other parties caused capacity to remain idle, a derogation from the capacity cap (regulated by the NRA) is possible - in the form of a gas and capacity release requirement.

7.959. We take note of the European Union's argument that such programmes were not used in the case of TAP<sup>1612</sup> because the pipeline is still under construction and Nabucco<sup>1613</sup> because that pipeline project was abandoned while, in the case of OPAL, the decision not to use the gas and capacity release programs rests entirely with Gazprom.

7.960. We note that in its Poseidon decision, the Commission imposed an 80% exit capacity cap and no gas release requirement<sup>1614</sup>, and added conditions to those that had been imposed by the Italian and Greek regulatory authorities, namely to make available to third parties incremental transportation capacity.<sup>1615</sup> We do not disagree with Russia's assertion that, notwithstanding that the exemption granted in 2007 to Poseidon has expired<sup>1616</sup>, the decision could nonetheless have had a "detrimental impact to the equality of competitive opportunities between Russian and other

<sup>1605</sup> European Union's first written submission, para. 708 (citing Commission decision on the exemption of the Gazelle pipeline I, (Exhibit RUS-81), para. 16).

<sup>1606</sup> European Union's first written submission, para. 708 (citing Commission decision on the exemption of the Gazelle pipeline I, (Exhibit RUS-81), para. 40; and Commission decision on the exemption of the OPAL pipeline, (Exhibit RUS-82), paras. 45-48).

<sup>1607</sup> Russia's first written submission, para. 546 (citing Commission decision on the exemption of the Gazelle pipeline I, (Exhibit RUS-81), p. 15).

<sup>1608</sup> Russia's first written submission, paras. 659, 712; and second written submission, para. 421.

<sup>1609</sup> Russia's first written submission, paras. 656, 712; and second written submission, para. 421.

<sup>1610</sup> Russia's first written submission, para. 661; and second written submission, para. 421.

<sup>1611</sup> European Union's first written submission, para. 711.

<sup>1612</sup> European Union's response to Panel question No. 130, para. 333; and No. 136, para. 358.

<sup>1613</sup> European Union's response to Panel question No. 130, para. 333; and No. 136, para. 358.

<sup>1614</sup> Russia's first written submission, paras. 664-672, 713 (citing Commission decision on the exemption of the Poseidon pipeline, (Exhibit RUS-86), pp. 2-3).

<sup>1615</sup> European Union's first written submission, para. 732; and Commission decision on the exemption of the Poseidon pipeline, (Exhibit RUS-86), p. 6.

<sup>1616</sup> European Union's first written submission, para. 732.

third-country gas in the EU market result[ing] from the differential treatment."<sup>1617</sup> It would, however, remain for Russia to demonstrate that this was the case.

7.961. We focus on Russia's assertion that the Commission and the relevant NRAs imposed conditions on exemptions granted in connection with such criteria in an "inconsistent" or "discriminatory" manner in the infrastructure exemption decisions pointed to by Russia. We are not persuaded that the Commission took such divergent approaches to its imposition of conditions in the OPAL and Gazelle, TAP, Nabucco and Poseidon infrastructure exemption decisions in a manner that would amount to an "inconsistent" or "discriminatory" application of the infrastructure exemption measure in Article 36 of the Directive for the purposes of our analysis of whether the alleged measure exists as a basis for Russia's claims here.

7.962. To our mind, the mere fact that there are differences in the conditions attached to the various infrastructure exemption decisions, including in terms of numerical thresholds for capacity caps and gas release programmes does not necessarily lead to the existence of inconsistency or discrimination where factual differences exist between the relevant situations. We consider that the differences identified by Russia in the conditions imposed in each of the individual situations concerned do stem from the Commission's assessment of the specific circumstances, distinct geographical situations and competitive impacts of the different pipelines concerned.

7.963. For these reasons, we do not believe that Russia has demonstrated that the Commission and the relevant NRAs interpreted or applied the criteria under Article 36 of the Directive for granting an infrastructure exemption in a way that demonstrates the existence of the challenged measure, that is, its contention that the European Union applied or implemented Article 36 in an "inconsistent" or "discriminatory" manner.

### *(c) Application or implementation of Article 36 in respect of LNG facilities*

7.964. With respect to the third aspect, the alleged "inconsistent" or "discriminatory" application or implementation of Article 36 in respect of LNG facilities, we begin by recalling that the types of infrastructure that are eligible for an infrastructure exemption include "[m]ajor new gas infrastructure, i.e. interconnectors, LNG and storage facilities" within the meaning of Article 36(1) of the Directive. Eligible types of infrastructure therefore include not only major new "interconnectors", addressed in paragraphs 7.924 through 7.939 above, but also major new "LNG and storage facilities".<sup>1618</sup>

7.965. In its argumentation regarding the third aspect, Russia contrasts the infrastructure exemption decisions concerning the NEL and OPAL pipelines with those concerning the Dragon and South Hook LNG facilities.<sup>1619</sup> In the NEL infrastructure exemption decision, the NEL pipeline was not considered eligible for, and hence denied, an infrastructure exemption by virtue of not being considered an interconnector within the meaning of Article 36(1) of the Directive.<sup>1620</sup> In the OPAL infrastructure exemption decision, the OPAL pipeline was granted an infrastructure exemption from the third-party access and tariff regulation requirements by virtue of being considered a major new interconnector within the meaning of Article 36(1) of the Directive but a 50% capacity cap and a 3 billion m<sup>3</sup>/year gas release programme were imposed as conditions on this infrastructure exemption.<sup>1621</sup> In the Dragon and South Hook infrastructure exemption decisions, both were granted infrastructure exemptions from the third-party access and tariff regulation requirements by virtue of being considered major new LNG facilities within the meaning of Article 36(1) of the Directive and no conditions were imposed on these exemptions.<sup>1622</sup>

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<sup>1617</sup> Russia's second written submission, para. 420.

<sup>1618</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 36(1).

<sup>1619</sup> Russia's first written submission, paras. 716-720 and 729-731; and second written submission, paras. 424-425 and 429.

<sup>1620</sup> See BNetzA decision on the exemption of the OPAL and NEL pipelines, (Exhibit RUS-61), p. 77.

<sup>1621</sup> Commission decision on the exemption of the OPAL pipeline, (Exhibit RUS-82), paras. 88-90.

<sup>1622</sup> Final views of the UK NRA on the exemption of the Dragon LNG facility, (Exhibit RUS-66), pp. 1-2 and 13; Letter from the UK NRA regarding the Commission decision on the exemption of the Dragon LNG facility, (Exhibit RUS-101), pp. 1-2; Final views of the UK NRA on the exemption of the South Hook LNG facility, (Exhibit RUS-68), pp. 1-2 and 21; and Letter from the UK NRA regarding the Commission decision on the exemption of the South Hook LNG facility, (Exhibit RUS-102), pp. 1-2.

7.966. Generally, Russia's arguments concerning the third aspect are brief. More particularly, Russia faults the United Kingdom's NRA for imposing "no requirement similar to that for 'interconnectors'", for "assum[ing] that the infrastructure that both Dragon and South Hook proposed to construct qualified as LNG facilities, without even examining the Article 2(11) definition", and for not imposing "any conditions restricting the TPA exemption for either LNG facility".<sup>1623</sup>

7.967. Regarding the lack of "requirement similar to that for 'interconnectors'", Russia suggests that this criticism is directed more generally at Article 36 of the Directive rather than the specific infrastructure exemptions for the Dragon and South Hook LNG facilities. Russia thus submits that "[i]ndeed, the infrastructure exemption measure is designed to treat LNG facilities differently than new pipelines, which must satisfy the interconnector definition."<sup>1624</sup> In this regard, we recall that an LNG facility is defined in Article 2(11) of the Directive as:

[A] terminal which is used for the liquefaction of natural gas or the importation, offloading, and re-gasification of LNG, and includes ancillary services and temporary storage necessary for the re-gasification process and subsequent delivery to the transmission system, but does not include any part of LNG terminals used for storage[.]

7.968. Bearing in mind this definition, it is not clear to us why the Commission and the relevant NRAs, in Russia's view, should consider the requirements for being an "interconnector" when assessing whether a particular infrastructure qualifies as an "LNG facility". Indeed, if one were to follow the approach Russia appears to be suggesting, the Commission and the relevant NRAs would presumably also be required to consider the requirements for being an "LNG facility" when assessing whether a particular infrastructure qualifies as an "interconnector".

7.969. Generally, we do not believe it is sufficient for Russia to simply point to the fact that the definitions of an "interconnector" and an "LNG facility" involve different requirements, in order to demonstrate that the European Union applied or implemented Article 36 of the Directive in an "inconsistent" or "discriminatory" manner. Similarly, we note that Russia does not elaborate any further on its arguments that the United Kingdom's NRA "assumed that the infrastructure that both Dragon and South Hook proposed to construct qualified as LNG facilities, without even examining the Article 2(11) definition" and did not impose "any conditions restricting the TPA exemption for either LNG facility"<sup>1625</sup>, nor does Russia provide any explanation of how these arguments relates to its contention that the European Union applied or implemented Article 36 in an "inconsistent" or "discriminatory" manner.

7.970. For this reason, we do not believe that Russia has demonstrated that European Union applied or implemented Article 36 in an "inconsistent" or "discriminatory" manner in respect of infrastructure exemption decisions for LNG facilities. This conclusion is not altered by the fact that, as pointed out by the European Union<sup>1626</sup>, more infrastructure exemptions have been issued concerning LNG facilities and storage, than those explicitly relied on by Russia.

### 7.8.3.3 Conclusion

7.971. On the basis of our findings above, we conclude that Russia has not demonstrated that the European Union applied or implemented Article 36 in an "inconsistent" or "discriminatory" manner. As we explained in paragraphs 7.913 through 7.917 above, the alleged "inconsistent" or "discriminatory" application or implementation of Article 36 constitutes the measure challenged by Russia for both its claim under Article II:1 of the GATS and its claims under Article I:1 of the GATT 1994 and it is therefore necessary for Russia to demonstrate the existence of this alleged "inconsistent" or "discriminatory" application or implementation of Article 36 as a basis for its claims. Having found that Russia has not made such a demonstration, we do not believe it is necessary for us to consider whether the "non-existent" measure, namely the alleged "inconsistent" or "discriminatory" manner in which the European Union applied or implemented

<sup>1623</sup> Russia's first written submission, para. 719.

<sup>1624</sup> Russia's first written submission, para. 720.

<sup>1625</sup> Russia's first written submission, para. 719.

<sup>1626</sup> European Union's response to Panel question No. 47, para. 128.

Article 36 of the Directive, has resulted in violations of Article II:1 of the GATS or Article I:1 of the GATT 1994, or both.

#### 7.8.4 Russia's claim under Article XI:1 of the GATT 1994

##### 7.8.4.1 Introduction

7.972. The legal standard under Article XI:1 of the GATT 1994, as set out in paragraphs 7.242 and 7.243 above, requires us to conduct a two-step analysis of whether a challenged measure (a) falls within the scope of the phrase "quotas, import or export licences *or other measures*" (emphasis added) and (b) constitutes a prohibition or restriction on the importation or on the exportation or sale for export of any product.

7.973. In determining whether a measure falls within the scope of Article XI:1 of the GATT 1994, the panel in *Brazil – Retreaded Tyres* considered that a panel must examine the "nature" of the measure.<sup>1627</sup> In *Argentina – Import Measures*, the panel considered that what is relevant when examining a measure under Article XI:1 of the GATT 1994 is whether a measure prohibits or restricts trade, rather than the means by which such prohibition or restriction is made effective.<sup>1628</sup> The Appellate Body in *Argentina – Import Measures* explained that the words "made effective through" suggest that the scope of Article XI:1 covers measures through which a prohibition or restriction is produced or becomes operative.<sup>1629</sup> Some panels have focused on whether a given measure prohibits or restricts trade, rather than examining the means by which such prohibition or restriction would be made effective.<sup>1630</sup> It is well established that the residual terms "or other measures" in Article XI suggest a broad coverage.<sup>1631</sup>

7.974. The Appellate Body has noted that the use of the word "quantitative" in the title of Article XI of the GATT 1994 informs the interpretation of the words "restriction" and "prohibition" in Article XI:1, suggesting that the coverage of Article XI includes those prohibitions and restrictions that limit the quantity or amount of a product being imported.<sup>1632</sup> According to the Appellate Body, this provision

[D]oes not cover simply any restriction or prohibition. Rather, Article XI:1 refers to prohibitions or restrictions "on the importation ... or on the exportation or sale for export". Thus, in our view, not every condition or burden placed on importation or exportation will be inconsistent with Article XI, but only those that are limiting, that is, those that limit the importation or exportation of products.<sup>1633</sup>

7.975. When examining whether a measure constitutes a restriction, the focus has thus been on whether a measure is a limitation (i.e. something that has a limiting effect)<sup>1634</sup> on importation and limits the competitive opportunities available to imports.<sup>1635</sup> Panels have thus noted factors such as the existence of uncertainties affecting importation<sup>1636</sup>, whether the measures affect investment

<sup>1627</sup> Panel Report, *Brazil – Retreaded Tyres*, para. 7.372.

<sup>1628</sup> Panel Reports, *Argentina – Import Measures*, para. 6.363.

<sup>1629</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.218.

<sup>1630</sup> See e.g. Panel Reports, *Argentina – Import Measures*, para. 6.363.

<sup>1631</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.219. Nevertheless, as observed by the Appellate Body, the scope of application of Article XI:1 of the GATT 1994 is not unfettered. Article XI:1 itself explicitly excludes "duties, taxes and other charges" from its scope of application. Article XI:2 of the GATT 1994 further restricts the scope of application of Article XI:1 by providing that the provisions of Article XI:1 shall not extend to the areas listed in Article XI:2.

<sup>1632</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.217 (citing Appellate Body Reports, *China – Raw Materials*, para. 320).

<sup>1633</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.217.

<sup>1634</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.217 (citing Appellate Body Reports, *China – Raw Materials*, para. 319 (in turn quoting *Shorter Oxford English Dictionary*, 6th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2007), Vol. II, p. 2553).

<sup>1635</sup> Panel Reports, *Argentina – Import Measures*, paras. 6.254 and 6.264 (citing Panel Report, *Argentina – Hides and Leather*, para. 11.20, which stated that "Article XI:1, like Articles I, II and III of the GATT 1994, protects competitive opportunities of imported products, not trade flows"; and Panel Report, *Colombia – Ports of Entry*, para. 7.252).

<sup>1636</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.240. In that case, the uncertainties in question included access to one seaport for extended periods of time and the likely increased costs that would arise for importers operating under the constraints of the port restrictions. That panel observed that:

plans, restrict market access for imports or make importation prohibitively costly or unpredictable or whether they constitute disincentives affecting importation.<sup>1637</sup> The fact that a measure is not administered at the border does not necessarily alter its nature as a restriction on importation within the meaning of Article XI:1 of the GATT 1994.<sup>1638</sup>

7.976. Under Article XI:1 of the GATT 1994, Russia challenges a specific instance of application of the infrastructure exemption measure in the Directive. In particular, as summarized at paragraph 7.954 above, Russia challenges the capacity cap and gas release programme contained in the 2009 OPAL infrastructure exemption decision, asserting that these two "additional restrictive conditions" imposed by the Commission (over and above those imposed by the German NRA BNetzA) result in a *de facto* quantitative restriction on the volume of imported Russian gas, in violation of Article XI:1 of the GATT 1994.<sup>1639</sup>

7.977. According to Russia, the two challenged OPAL conditions do not limit the volume of gas that Gazprom may import through a direct ban, which would permit quantifying the effects of the measure. Rather, Russia asserts that the restrictions limit the volume of gas on a *de facto* basis, as shown by their design, architecture, and revealing structure. In Russia's view, this limits Gazprom's ability and incentive to import Nord Stream gas for OPAL transport, which has the same effect as banning a certain volume of imports directly.<sup>1640</sup>

7.978. The European Union asserts that the two challenged conditions in the Commission's OPAL decision do not impose any restrictions on the importation of natural gas from Russia. According to the European Union, there is no direct or indirect limiting effect on imports arriving from

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[A] number of GATT and WTO panels have recognized the applicability of Article XI:1 to measures which create uncertainties and affect investment plans, restrict market access for imports or make importation prohibitively costly, all of which have implications on the competitive situation of an importer. Moreover, it appears that findings in each of these cases were based on the design of the measure and its potential to adversely affect importation, as opposed to a standalone analysis of the actual impact of the measure on trade flows.

<sup>1637</sup> For example, the panel in *Brazil – Retreaded Tyres* found a violation of Article XI:1 where fines did not impose a *per se* restriction on importation, but acted as an absolute disincentive to importation by penalizing it and making it "prohibitively costly" (Panel Report, *Brazil – Retreaded Tyres*, para. 7.370).

<sup>1638</sup> Panel Report, *Brazil – Retreaded Tyres*, para. 7.372. See also Panel Report, *India – Autos*, paras. 7.254-7.263. The panel stated that "it is the nature of the measure as a restriction *in relation to importation* which is the key factor to consider in determining whether a measure may properly fall within the scope of Article XI:1" and considered that the phrase "restrictions ... on ... importation" does not necessarily limit the scope of Article XI:1 to border measures. (*Ibid.*, paras. 7.261-7.262) (emphasis original) The panel in *EC – Seal Products* noted: "The guidance provided in previous disputes regarding its scope suggests that Article XI:1 does not apply to internal regulations affecting imported products that also apply to the like domestic products; instead, according to the Ad Note to Article III of the GATT 1994, these are dealt with under Article III." (Panel Reports, *EC – Seal Products*, fn 1007). The Ad Note to Article III of the GATT 1994 reads as follows:

Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.

See, e.g. Panel Report, *India – Autos*, para. 7.220 (quoting GATT Panel Report, *Canada – FIRA*, para. 5.14, which stated that "the General Agreement distinguishes between measures affecting the 'importation' of products, which are regulated in Article XI:1, and those affecting 'imported products', which are dealt with in Article III. If Article XI:1 were interpreted broadly to cover also internal requirements, Article III would be partly superfluous.").

<sup>1639</sup> Russia requests the Panel to find a violation of Article XI:1 of the GATT 1994, because the OPAL exemption decision, pursuant to the infrastructure exemption measure in Article 36 of the Directive (and its predecessor, Article 22 of the Second Energy Package Directive), institutes two quantitative restrictions on the importation of natural gas from Russia. ("Requests for Findings", Russia's first written submission, para. 810; and second written submission, para. 487). In Russia's response to Panel question No. 5, para. 51, Russia asserts that the OPAL exemption decision, pursuant to the infrastructure exemption measure, restricts the import of natural gas from Russia, "as applied", in violation of Article XI:1 of the GATT 1994. In Russia's response to Panel question No. 133, paras. 555-556, Russia underlines that it challenges the European Union's decision to impose the capacity cap and gas release programme on OPAL as quantitative restrictions, arguing that both conditions have the effect of limiting the quantity or volume of gas that Gazprom may import via Nord Stream for transport on OPAL.

<sup>1640</sup> Russia's response to Panel question No. 134(a), para. 560.

Russia.<sup>1641</sup> The European Union submits that 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."<sup>1642</sup>

7.979. According to the European Union, the "confusing attempts of Russia"<sup>1643</sup> to explain how the conditions imposed on Gazprom and related companies translate into restrictions of imports of Russian gas again assume, incorrectly, that Russian gas can only be imported into the EU market by Gazprom.<sup>1644</sup> The European Union asserts that the capacity cap does not affect all Russian undertakings, only those which are dominant on the relevant Czech markets. There are Russian undertakings other than Gazprom active in the market for natural gas in Russia. The transport of natural gas of Russian origin by Russian undertakings that do not hold a dominant position on the Czech market, such as Rosneft or Novatek, is not limited in any way by the conditions attached to the OPAL exemption or any other provision of EU law. It is rather Russian law that limits their activities in the European Union, since Russian law grants Gazprom an export monopoly for gas via pipelines, thus limiting competitive opportunities for both Russian and foreign companies.<sup>1645</sup> According to the European Union, the origin of the gas is irrelevant for the purpose of applying the 50% cap on the booking of OPAL capacities by undertakings dominant in the Czech gas markets.<sup>1646</sup>

#### 7.8.4.2 Analysis by the Panel

7.980. Russia's claim under Article XI:1 of the GATT 1994 requires us to consider whether the capacity cap and gas release programme contained in the Commission's 2009 OPAL infrastructure exemption decision<sup>1647</sup> constitute "prohibitions or restrictions" other than duties, taxes or other charges made effective through quotas, import or export licences or "other measures" that are "instituted or maintained" by the European Union on the importation of Russian gas within the meaning of Article XI:1 of the GATT 1994.

7.981. It is well established that the scope of Article XI:1 (and, in particular, the scope of the residual basket of "other measures") is broad, and that it encompasses measures of a *de facto* nature. There is no disagreement between the parties that Article XI:1 may apply to the contents of a single decision.<sup>1648</sup> Accordingly, based on this and the broad scope of the residual category of "other measures" falling within the ambit of Article XI:1, we consider that we are permitted to examine the challenged OPAL conditions under Article XI:1 of the GATT 1994. Therefore, in accordance with the legal standard under Article XI:1 of the GATT 1994 articulated above<sup>1649</sup>, we will assess whether Russia has demonstrated that the challenged conditions in the OPAL infrastructure exemption decision constitute restrictions (i.e. limitations, something that has a limiting effect) on the importation of Russian natural gas into the European Union.

7.982. We understand that this analysis must be carried out on a case-by-case basis, taking into account the import formality or requirement at issue and the relevant facts of the case.<sup>1650</sup> Moreover, for the purposes of Article XI:1 of the GATT 1994, the limitation on importation need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context.<sup>1651</sup> Mindful of these considerations, we proceed with our analysis.

<sup>1641</sup> European Union's response to Panel question No. 133, paras. 342-347.

<sup>1642</sup> European Union's second written submission, para. 345.

<sup>1643</sup> European Union's first written submission, para. 766.

<sup>1644</sup> European Union's first written submission, para. 766.

<sup>1645</sup> European Union's first written submission, para. 767.

<sup>1646</sup> European Union's second written submission, para. 346.

<sup>1647</sup> Commission decision on the exemption of the OPAL pipeline, (Exhibit RUS-82), para. 89.

<sup>1648</sup> European Union's response to Panel question No. 131, paras. 335-336; and Russia's response to Panel question No. 131, paras. 541-544.

<sup>1649</sup> See, above paras. 7.242-7.243.

<sup>1650</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.245.

<sup>1651</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.217. See also Panel Report, *Colombia – Ports of Entry*, para. 7.252.

7.983. Turning first to the two OPAL conditions challenged by Russia<sup>1652</sup>, we recall that the first challenged condition in the OPAL infrastructure exemption decision is the 50% capacity cap. It is imposed as a condition for exempting the OPAL pipeline from otherwise generally applicable obligations (third-party access and regulated tariffs). Thus, we understand that, due to the infrastructure exemption granted in respect of the OPAL pipeline, allocation by OPAL's system operator (Opal Gastransport GmbH ("OGT")) of capacities on the route from Greifswald to Brandov is not subject to the generally applicable requirements. OGT would thus, in principle, be able to choose which entities obtain access to the exempted capacities. However, the capacity cap limits OGT in allocating, in any given year, more than 50% of capacities in the pipeline to "dominant undertakings on one of the Czech gas markets"<sup>1653</sup>, which include Gazprom and RWE Transgas<sup>1654</sup>, unless the second challenged condition in the OPAL infrastructure exemption decision is fulfilled. This second condition permits Gazprom (and related companies) to exceed the capacity cap provided that it fulfils the gas release programme requirements of freeing 3 bcm in an open, transparent and non-discriminatory process and the capacity release programme requirement is satisfied (i.e. OGT (or the undertakings concerned) provide the corresponding transport capacity on the OPAL pipeline). BNetzA must approve both the gas release programme and the capacity release programme.<sup>1655</sup> It is an undisputed fact that the second OPAL condition (release of 3 bcm) has never been used, and the capacity cap threshold in the first condition has never been surpassed.<sup>1656</sup>

7.984. We first recall that the challenged conditions in the OPAL decision are conditions placed on an exemption (i.e. the infrastructure exemption from certain otherwise generally applicable requirements (e.g. third party access and regulated tariffs)).<sup>1657</sup> We note the European Union's contention that an infrastructure exemption must be regarded as an "advantage" for VIUs owning or operating a pipeline, since the exemption allows them to freely allocate capacities on the pipeline.<sup>1658</sup> The European Union asserts:

Pursuant to an exemption, vertically integrated undertakings may charge discriminatory transmission tariffs to competitors on the gas markets seeking to use or access the infrastructure. They may also exclude altogether the use of the infrastructure by other gas undertakings. The competent regulatory authorities do not grant such an advantage unless its beneficiary has specifically requested it and the criteria necessary for an exemption are met.<sup>1659</sup>

7.985. The European Union posits that the capacity cap challenged by Russia "has a very limited scope".<sup>1660</sup> The European Union asserts that since the exemption granted to the OPAL pipeline is an "advantage" that benefits its joint-owner, Gazprom, this implies that, contrary to Russia's contention, the conditions restricting the scope of that advantage do not constitute, in themselves, a restriction on imports within the meaning of Article XI:1 of the GATT 1994.<sup>1661</sup> For the European Union, Article XI:1 forbids measures that restrict imports of foreign products, not measures that

<sup>1652</sup> See also, above para. 7.954 for a summary of conditions imposed on infrastructure exemptions.

<sup>1653</sup> European Union's response to Panel question No. 129(a), para. 313; and Commission decision on the exemption of the OPAL pipeline, (Exhibit RUS-82), para. 89.

<sup>1654</sup> As noted above, the bookings of the undertakings concerned are counted together for this purpose. (Commission decision on the exemption of the OPAL pipeline, (Exhibit RUS-82), para. 89(a)).

<sup>1655</sup> European Union's response to Panel question No. 129(a), para. 315; and Commission decision on the exemption of the OPAL pipeline, (Exhibit RUS-82), para. 89.

<sup>1656</sup> Russia's response to Panel question No. 130, paras. 535-540; and European Union's response to Panel question No. 130, paras. 331-334.

<sup>1657</sup> See, above para. 7.954 for a summary of conditions imposed on infrastructure exemptions. In this case, the OPAL exemption is partial (including by being subject to the two challenged conditions).

<sup>1658</sup> European Union's response to Panel question No. 135, para. 350.

<sup>1659</sup> European Union's response to Panel question No. 135, para. 350.

<sup>1660</sup> European Union's second written submission, para. 343. The European Union states that "the 50% capacity cap only concerns a very small part of the activities of the vertically integrated undertaking Gazprom" and underlines "the very limited scope of the capacity cap". (European Union's response to Panel question No. 129(b), paras. 316-317).

<sup>1661</sup> See e.g. Russia's response to Panel question No. 220, paras. 299-304. In the context of its challenge to the infrastructure exemption measure, we note that Russia has alleged that the infrastructure exemption constitutes a benefit or "advantage", as it may exempt an undertaking partially or fully from the unbundling, third-party access and regulated tariff requirements in the Directive. (Russia's responses to Panel question No. 113, para. 469, and No. 224, para. 313).

allow imports from other sources, in addition to those of a particular Member, and foster competition on the market of the importing Member.<sup>1662</sup>

7.986. We recall that the OPAL conditions were imposed in connection with the infrastructure exemption granted in respect of the OPAL pipeline, pursuant to a process initiated by an application submitted in respect of the OPAL pipeline under the Directive's infrastructure exemption provision. The conditions imposed are binding as long as the decision remains operational.<sup>1663</sup> However, nothing legally prevents a request for modification and/or termination of the infrastructure exemption decision (or any of the conditions contained therein), or seeking an alternative legal/regulatory arrangement under the Directive.<sup>1664</sup> As we have already mentioned<sup>1665</sup>, we understand that the infrastructure exemption and any related conditions are rules that effectively "replace" otherwise applicable rules (such as unbundling): they become the binding legal regime pertaining to the infrastructure concerned as long as the relevant infrastructure exemption decision remains operational. It is precisely the legal regime in respect of the OPAL pipeline imposed pursuant to the OPAL infrastructure exemption decision which we examine here. We underline that we are basing our assessment on the design, architecture and revealing structure of the measure, and do not find it necessary or constructive to characterize the measure as constituting (or not constituting) a condition on an "advantage" for the purposes of conducting our examination under Article XI:1 of the GATT 1994.<sup>1666</sup>

7.987. We next observe that there is no question that the challenged OPAL conditions are "quantitative" in nature: they consist of percentages (50%) and numerical conditions (3 bcm/yr). We note, however, the European Union's assertion that the OPAL exemption decision does not restrict the importation of a product – natural gas – from Russia and thus has no "limiting effect"<sup>1667</sup> for the purposes of Article XI:1 of the GATT 1994. According to the European Union, the OPAL decision:

[O]nly restricts the exit capacity that Gazprom may book on OPAL as a supplier of pipeline transmission services, thereby allowing other undertakings to access that pipeline. The restriction is imposed on the capacities that Gazprom and RWE Transgas may together book on OPAL as transport service providers, not on the importation of Russian gas.<sup>1668</sup>

7.988. Thus, while the challenged OPAL conditions may unquestionably be "quantitative" in nature, we nonetheless still need to consider whether quantitative conditions addressing the capacity allocation available to certain companies in respect of certain infrastructure for the transport of natural gas may constitute a quantitative restriction having a limiting effect on imports of a product – here, natural gas - within the meaning of Article XI:1 of the GATT 1994.

7.989. We understand that the conditions place quantitative restrictions on pipeline transport capacities that Gazprom and RWE Transgas may together book on the OPAL pipeline as transport service providers. To our minds, transport capacity allocated to a given company is the "flip-side" of the volume (i.e. quantity) of natural gas that may be transported using this allocated capacity.<sup>1669</sup> We therefore consider that conditions on the allocation of pipeline transport capacity may, in principle, have an effect on the volume (i.e. quantity) of natural gas that may be

<sup>1662</sup> European Union's second written submission, paras. 350-351.

<sup>1663</sup> We recall that the OPAL exemption remains valid for a period of 22 years from the commissioning of the pipeline, which took place in 2011. (See BNetzA decision on the exemption of the OPAL and NEL pipelines, (Exhibit RUS-61), p. 76; and Russia's first written submission, para. 540).

<sup>1664</sup> See, e.g. European Union's first written submission, para. 688. Indeed, we understand that Russia and the European Union have, on various occasions, discussed options for modifying the OPAL conditions. (See, e.g. above fns 1430 and 1581).

<sup>1665</sup> See, above paras. 7.881-7.892.

<sup>1666</sup> We disagree with the proposition that conditions attached to a measure that can arguably be characterized as an "advantage" would thereby, for that reason alone, be excluded from the scope of Article XI:1 of the GATT 1994. As we have already mentioned, we see Article XI:1 as focusing on the issue of whether a particular measure restricts imports rather than the means by which such restriction is brought about.

<sup>1667</sup> European Union's response to Panel question No. 131, para. 336; and No. 133, paras. 341-349.

<sup>1668</sup> European Union's response to Panel question No. 131, para. 336.

<sup>1669</sup> Indeed, the challenged OPAL conditions themselves reinforce our view: the second condition requires the release of 3 bcm of natural gas. This must be accompanied by the availability of the transport capacity corresponding to this volume (quantity) of natural gas. (Commission decision on the exemption of the OPAL pipeline, (Exhibit RUS-82), para. 89(b)).



transported by a given company transporting gas from a particular origin through a given infrastructure.

7.990. We thus proceed with our examination to discern whether the challenged OPAL conditions have a limiting effect on the importation of natural gas of Russian origin into the European Union.

7.991. As we have already observed, Russia has acknowledged that the two challenged conditions do not constitute a "direct ban", but rather limit Gazprom's ability and incentive to import Nord Stream gas for OPAL transport, which Russia alleges has the same effect as banning a certain volume of imports directly.<sup>1670</sup> The European Union counters that the measure affects pipeline transmission services and does not limit directly or indirectly<sup>1671</sup> the quantities or volume of gas that may be imported from Russia.<sup>1672</sup> The European Union also asserts that the conditions pertain only to the conditions surrounding a company's (Gazprom's) natural gas transported through a particular pipeline and do not limit the total amount of EU natural gas imports from Russia.<sup>1673</sup>

7.992. It is well established that the disciplines of Article XI:1 extend to restrictions of a *de facto* nature.<sup>1674</sup> Thus, even where a measure does not provide for an outright ban on importation, it may have the effect of prohibiting or limiting the importation of the product concerned, in violation of Article XI:1.<sup>1675</sup> We are nevertheless cognizant that not every measure affecting the opportunities for entering the market would be covered by Article XI of the GATT 1994, but only those measures that constitute a prohibition or restriction on the importation of products, i.e. those measures which affect the opportunities for importation itself.<sup>1676</sup>

7.993. We see that the Nord Stream pipeline connects to both OPAL<sup>1677</sup> and NEL<sup>1678</sup> at Greifswald, in Germany, for delivery of Russian gas.<sup>1679, 1680</sup> Both of these pipelines transport gas imported

<sup>1670</sup> Russia's response to Panel question No. 134, para. 560.

<sup>1671</sup> European Union's responses to Panel question No. 129(a), para. 313, No. 132, paras. 337-338, and No. 133, paras. 342-343.

<sup>1672</sup> European Union's response to Panel question No. 129(c), paras. 324-330.

<sup>1673</sup> European Union's response to Panel question No. 129(c), paras. 324-330.

<sup>1674</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.17 (referring to GATT Panel Report, *Japan – Semi-Conductors*, paras. 105–109; and Appellate Body Report, *EC – Bananas III*, paras. 232–234 (in turn citing GATT Panel Reports, *EEC – Imports of Beef; Spain – Unroasted Coffee; and Japan – SPF Dimension Lumber*)).

<sup>1675</sup> Panel Report, *Brazil – Retreaded Tyres*, para. 7.15.

<sup>1676</sup> Panel Reports, *Argentina – Import Measures*, para. 6.458 (referring to Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.261).

<sup>1677</sup> The Commission Decision on the exemption of the OPAL pipeline indicates the following:

According to the findings of the BNetzA, the OPAL is planned as follows: "The OPAL is intended to be 470 km long and have a diameter of 1,420 mm and a maximum operating pressure of 100 bar. In terms of capacity, it is divided into two sections; OPAL north and OPAL south. The OPAL north starts on the premises of the Greifswald/Lubmin compressor station and ends at the planned [Gross Koeris] compressor station to the south of Berlin. The OPAL south is intended to start in [Gross Koeris] and run to the border between the Federal Republic of Germany and the Czech Republic. The capacity of the OPAL north is intended to be 36.5 billion m<sup>3</sup>/a. In [Gross Koeris] it is planned that there will be an exit point with a bookable output capacity of 4.5 billion m<sup>3</sup>/a. There, the pipeline will be continued via the OPAL south with a capacity of 32 billion m<sup>3</sup>/a in the direction of the Czech Republic. Beyond the German/Czech border it is intended that a bookable output point for transport customers will be constructed near to the Czech municipality of Brandov. There, it is planned that there will be a network coupling with the transmission system operated by RWE Transgas Net s.r.o. (hereinafter 'RWE Transgas Net') or its new pipeline project called Gazelle." (Commission decision on the exemption of the OPAL pipeline, (Exhibit RUS-82), para. 13). (emphasis and footnotes omitted)

<sup>1678</sup> The Commission Decision on the exemption of the OPAL pipeline indicates the following:

According to the findings of the BNetzA, the NEL is planned as follows: "As a second onshore connection line, the NEL is intended to allow for the transport of another part of the gas volumes which arrive in the Federal Republic of Germany via the Nord Stream. The NEL is intended to run from the exit point of the Nord Stream in Greifswald/Lubmin with a length of approximately 440 km along the Baltic Sea coast in the direction of Hamburg and via Heidenau and Achim onwards towards Rehden in Lower Saxony. There, it is intended that there will be a connection to the transmission system of Wingas Transport GmbH & Co. KG and E.ON Gastransport GmbH (formerly E.ON Gastransport AG & Co. KG). The NEL is intended to be ready for operation in 2012. In Greifswald/Lubmin, a total of 21.8 billion m<sup>3</sup>/a can be fed from the Nord Stream into the NEL." (Commission decision on the exemption of the OPAL pipeline, (Exhibit RUS-82), para. 14). (emphasis and footnotes omitted).

from Russia via Nord Stream to separate parts of the European Union. The OPAL pipeline continues southward through Germany and crosses the Czech border at Brandov and then connects to the Gazelle pipeline. The remainder and majority of the OPAL pipeline gas is transited via Gazelle across the northern portion of the Czech Republic and exits back into Germany at Waidhaus.<sup>1681</sup>

7.994. Once imported at the point of entry, the onward transportation of natural gas throughout the European Union could be considered as no longer constituting "importation". Hence, a condition focusing on the exit capacity of the OPAL pipeline at Brandov on flows from the Greifswald entry point might be considered as an internal EU regulatory measure, rather than one relating to importation from Russia via Nord Stream to the Greifswald entry point. However, we note the nature of pipelines and natural gas transmission and the essential function of transmission pipeline infrastructure in the transport of natural gas. We recall Russia's observation that, "[o]nce gas enters a pipeline, its movement, direction and potential for release either into the market or another pipeline are all strictly controlled".<sup>1682</sup> We further note that, in order to be "imported" into the European Union, natural gas transported by pipeline from various origins enters the European Union through a limited number of fixed entry points. We consider that due to the fixed nature of pipeline infrastructure and the necessity for natural gas transported by pipeline to flow along predetermined paths and to be imported through a limited number of fixed entry points, an arrangement conditioning access to the transport capacity of such fixed infrastructure with a demonstrable and sufficiently direct link to an entry point for that product into the market of the importing Member may have an effect on the importation of the product in question.

7.995. We see that the two challenged OPAL conditions limit the transport capacities that Gazprom (and related companies) may together book on the OPAL pipeline in any given year. We recall that the OPAL decision described the capacity cap as an annual 50% cap on the "exit capacity" of OPAL at the Czech border.<sup>1683</sup> However, "[t]he exemption applies exclusively to connection capacities" on OPAL, which BNetzA, the German NRA, defined as "entry and exit capacities subject to allocation restrictions, which are only offered in bundled form."<sup>1684</sup> We understand that the exit conditions imposed at Brandov may have an effect on the entry conditions at Greifswald (and, consequently, on the interconnection with the Nord Stream pipeline at

<sup>1679</sup> A predetermined volume of gas is released in Germany at Gross Koeris. This gas is not subject to the infrastructure exemption. Commission decision on the exemption of the OPAL pipeline, (Exhibit RUS-82), para. 13 states: "In [Gross Koeris], it is planned that there will be an exit point with a bookable output capacity of 4.5 [bcm/year]."

<sup>1680</sup> Commission decision on the exemption of the OPAL pipeline, (Exhibit RUS-82) states: "It is intended that the OPAL will start in Greifswald, northern Germany. It is planned that it will be an *onshore continuation of the Nord Stream gas pipeline, which is also planned and will directly connect Russia and the European Union* via the Baltic Sea. In the south, it is intended that the OPAL will connect to the planned 'Gazelle' gas pipeline near Brandov in the Czech Republic. From there, it is intended that the Gazelle will run onwards towards Germany (Waidhaus)." (Ibid. para. 10). (emphasis added) It adds that the OPAL, Gazelle and Nord Stream "projects depend on each other in that the OPAL and Gazelle projects will accept the gas volumes supplied by the Nord Stream and are intended to then transport southwards through Germany and through the Czech Republic." (Ibid. para. 12); that "[t]he OPAL connects directly to the Nord Stream Baltic Sea pipeline, which will bring natural gas from Russia to the EU." (Ibid., para. 27); that "[t]he gas volumes from the Nord Stream require the construction of new pipelines onshore for transmission in Germany, but also to other Member States. The existing pipelines are not sufficient to accept the gas volumes from the Nord Stream." (Ibid., para. 28); and that "[a]s the OPAL will be fed exclusively from the Nord Stream, technical, political or economic risks of Nord Stream have a direct effect on OPAL." (Ibid. para. 33).

<sup>1681</sup> See, e.g. Russia's responses to Panel question No. 221, para. 305, and No. 222, para. 309.

<sup>1682</sup> Russia's response to Panel question No. 222, para. 308. Russia explains: "That is, once the gas enters a pipeline, it flows unimpeded, as directed, and may not be released for transit through another pipeline or for consumption unless and until an affirmative decision is reached to permit that release."

<sup>1683</sup> Commission decision on the exemption of the OPAL pipeline, (Exhibit RUS-82), para. 89(a).

<sup>1684</sup> Commission decision on the exemption of the OPAL pipeline, (Exhibit RUS-82), para. 5 (quoting BNetzA Decision on the Exemption of OPAL and NEL, para. 1(a)). The exemption granted to OPAL by BNetzA in its initial decision from the third-party access and tariff regulation requirements "applies exclusively for connection capacities on the OPAL with entry in German state territory and exit in Brandov." BNetzA defined the term "connection capacities" for purposes of the exemption "to mean entry and exit capacities subject to allocation restrictions, which are only offered in bundled form." According to BNetzA: "If the level of the offered/booked entry capacity differs from the level of the offered/booked exit capacity, then in this respect the exemption as a whole shall only extend to the lower of the two values (hereinafter: 'exempt capacities')." (Commission decision on the exemption of the OPAL pipeline, (Exhibit RUS-82), para. 5 (quoting BNetzA decision on the exemption of the OPAL and NEL pipelines, (Exhibit RUS-61), para. 1(a))). The Commission's decision and the additional conditions it imposed did not alter this aspect of BNetzA's decision or the OPAL infrastructure exemption. (See Russia's response to Panel question No. 129(a), para. 533.)

Greifswald). Thus, the OPAL capacity cap condition effectively limits Gazprom from booking more than 50% of the "connection" or "bundled" or "exempt capacities", both to transport gas on OPAL from Greifswald, the entry point in Germany for Nord Stream gas imported from Russia, to Brandov at the Czech border, and to release that gas at Brandov for further transport on Gazelle (unless the second challenged OPAL condition is fulfilled).

7.996. Given the particular facts and circumstances before us in the context of transporting natural gas from Russia onward within the European Union, we consider that the conditions imposed at the Brandov exit point have a demonstrable and sufficiently direct link to the entry point linking Nord Stream/OPAL at Greifswald to be considered as having an effect on the importation of natural gas from Russia into the European Union. Therefore, the fact that the challenged OPAL conditions are not administered directly at the border does not, in our view, alter their nature as relating to importation, nor their potential to have a limiting effect on importation of Russian natural gas into the European Union within the meaning of Article XI:1 of the GATT 1994.<sup>1685</sup>

7.997. We recall that, in response to Panel questioning, Russia clarified that "100% of the natural gas transported through Nord Stream is of Russian origin. Likewise, 100% of the natural gas transported (a) through OPAL from Greifswald to Brandov and (b) released at Brandov for further transport on Gazelle is of Russian origin."<sup>1686</sup> We observe that Gazprom (and RWE Transgas) are the only entities subject to the 50% capacity cap; that Gazprom is currently the only importer of natural gas from Russia via the Nord Stream pipeline to the European Union; that Gazprom was and has remained the exclusive user of the OPAL pipeline capacity; that others have not, in fact, sought to use the remaining vacant capacity in the OPAL pipeline<sup>1687</sup>; and that the natural gas flown through the Nord Stream and OPAL pipelines is exclusively of Russian origin. Thus, in the particular circumstances before us, Gazprom's gas flown through OPAL is Russian gas. We take note that only half of the capacity of the OPAL pipeline is utilized. This means that the OPAL pipeline is currently transporting half of the amount of (Russian) gas that it has the capacity to transport.

7.998. We recall the European Union's assertion that Russian law grants Gazprom an export monopoly for natural gas via pipelines. The European Union asserts that this limits competitive opportunities for both Russian and foreign companies.<sup>1688</sup> Russia calls this a "red herring".<sup>1689</sup> According to Russia, Russian law and its treatment of Gazprom in Russia has nothing to do with this claim or the standard under which the Panel should interpret Article XI.<sup>1690</sup> The Panel notes that Russia also does not contest the existence of Gazprom's export monopoly on natural gas.<sup>1691</sup> The record thus supports a finding in the context of this dispute that Gazprom enjoys an exclusive export monopoly of natural gas from Russia.<sup>1692</sup> In this connection, the Panel recalls that Article XI:1 deals with the elimination of quantitative restrictions on imports and concurs with Russia that, in general, and in the particular facts and circumstances of this dispute, an exporting WTO Member's domestic law is not the focus of an analysis of a claim of violation of Article XI:1 by an importing Member. The Panel underlines that it is assessing Russia's challenge against this EU measure in light of the European Union's obligations contained in Article XI:1. As our analysis targets the particular OPAL conditions imposed by the European Union in this case, we do not find it necessary or fruitful to examine any alleged aspect of Russia's domestic law in order to resolve this claim.

<sup>1685</sup> See, e.g. Panel Report, *Brazil – Retreaded Tyres*, paras. 7.372-7.373. See also, above fn 1638.

<sup>1686</sup> Russia's response to Panel question No. 221, para. 305.

<sup>1687</sup> In its response to Panel question No. 223 concerning whether anyone had sought to use the remaining 50% capacity in the OPAL pipeline, Russia stated: "Russia is aware of a single third-party, European gas trading company having used a portion of the remaining 50% capacity on OPAL. This company purchased gas via auction for delivery at the Greifswald entry point for transit of the gas through the OPAL pipeline to the Czech Republic. This company purchased only a very small amount of gas, 60 MWh/h, which amounts to only 0.4% of the remaining 50% OPAL transit capacity." (Russia's response to Panel question No. 223, para. 312). We consider that this supports the view that, in the prevailing circumstances, there were no other companies competing for this capacity or seeking to transport their natural gas through this pipeline.

<sup>1688</sup> European Union's first written submission, para. 767.

<sup>1689</sup> Russia's response to Panel question No. 132(a), para. 546.

<sup>1690</sup> Russia's response to Panel question No. 132(a), paras. 546-549.

<sup>1691</sup> Russia's response to Panel question No. 29, para. 145.

<sup>1692</sup> Russia's response to Panel question No. 29, para. 145; and European Union's responses to Panel question No. 29, para. 62, and No. 132, para. 340. Both parties refer to Article 3 of Federal Law No. 117-FZ of July 18, 2006.

7.999. We see that the challenged conditions affect the ability of Gazprom (and related companies) to access transport capacity on the OPAL pipeline. We recognize that other opportunities exist for the onward transportation of natural gas of Russian origin from Greifswald (e.g. via NEL). We further recognize that neither party disputes that other opportunities exist for natural gas of Russian origin to enter the European Union.<sup>1693</sup> Moreover, other possibilities exist for natural gas from Russia to be imported into the European Union using the remaining 50% capacities of OPAL.<sup>1694</sup> Thus, additional capacity on the OPAL pipeline could become available, thereby allowing additional quantities of natural gas to flow through the pipeline in a given period, and these additional quantities could include imports of Russian natural gas. In this connection, we observe that the challenged OPAL conditions permit the remaining OPAL capacities to be booked by other (non-Gazprom-related) Russian undertakings or by satisfaction of the gas (and capacity) release programme requirements.<sup>1695</sup> These options could result in the increase of the volumes of Russian natural gas imported into the European Union via the Nord Stream and OPAL pipelines. Nevertheless, we concur with Russia that Article XI:1 does not require a demonstration that all of a certain type of goods imported by one Member from another are restricted or limited to support a finding of violation.<sup>1696</sup> Rather, as we have already stated, Article XI:1 prohibits a Member from limiting competitive opportunities for importation from another Member.

7.1000. We consider that the challenged OPAL conditions effectively impose a limitation on the competitive opportunities for natural gas of Russian origin that may be imported (by Gazprom) into the European Union on the Nord Stream pipeline at the pipeline's termination point at Greifswald, Germany, to be transported through the OPAL pipeline. The restrictive effects of the numerical limitation in the 50% capacity cap are reinforced by the requirements of the gas (and capacity) release programme. These requirements – which would require Gazprom, as an importer of natural gas of Russian origin, to release the transport of 3 bcm/yr of natural gas over the OPAL pipeline -- have never been triggered. We consider that the existence of, and requirements imposed by, this condition effectively operate so as to discourage certain importers of Russian natural gas, i.e. Gazprom and related companies, from exceeding the 50% capacity cap. We therefore see the consequence of the operation of the two challenged OPAL conditions as disincentivizing importation of Russian natural gas flown through the Nord Stream pipeline and, thereafter, the OPAL pipeline. In light of our analysis above and the particular facts and circumstances before us, we thus concur with Russia<sup>1697</sup> that the challenged OPAL conditions have a limiting effect on the competitive opportunities for importation of Russian gas into the European Union.<sup>1698</sup>

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<sup>1693</sup> The European Union imports gas from Russia through several pipelines. Part of the gas imported via Nord Stream is transported over OPAL. The remainder is transported over the NEL interconnector across the north of Germany to other EU Member States. Other pipelines include Brotherhood, which travels from Russia across Ukraine and Slovakia into the Czech Republic, from which gas is also directed via connecting pipelines to other Member States. Likewise, Gazprom imports gas through the Yamal pipeline through Belarus into the Baltic States and across Poland into Germany and onward. (See, e.g. Russia's response to Panel question No. 134(c), para. 563.) The Panel observes that Russian natural gas imported via other pipelines goes to other EU destinations and cannot be substituted for natural gas that could have been transported through the additional capacity on the OPAL pipeline.

<sup>1694</sup> For example, the possibility exists that Russian gas may be imported via Nord Stream for transport over OPAL by undertakings unrelated to Gazprom (i.e. that do not hold a "dominant position on the Czech market" (such as Rosneft or Novatek)). See, e.g. European Union's second written submission, paras. 344-345. See also European Union's second written submission, para. 344, stating that

[t]hese possibilities include the sale by Gazprom of Russian gas already at Greifswald or on the Gaspool virtual trading point, allowing the gas to be transported onwards by the client. If Gazprom supplies the pipeline transmission services on OPAL itself, volumes of gas exceeding the 50% allowed capacities must be intended for the exit point near Berlin, at [Gross Koeris], or they must be sold on the Czech market in a regulated and non-discriminatory manner, implementing the 3bcm gas release program provided for in the second condition imposed by the Commission.

<sup>1695</sup> Commission decision on the exemption of the OPAL pipeline, (Exhibit RUS-82), para. 89(b); Russia's first written submission, paras. 744-745; and response to Panel question No. 134(a), para. 559.

<sup>1696</sup> Russia's responses to Panel question No. 134(c), paras. 564-566, and No. 132(a), para. 549.

<sup>1697</sup> Russia's response to Panel question No. 134(a), para. 560.

<sup>1698</sup> We find guidance for our approach in Panel Report, *Colombia – Ports of Entry*, para. 7.240. We do not mean to suggest that each and every capacity cap or gas (and capacity) release programme would necessarily violate Article XI:1 of the GATT 1994. We once again underline that our finding is limited to the particular facts and circumstances of this case in light of the parties' argumentation and evidence.

7.1001. We are not persuaded by the European Union's contention that Russia's "insistence" on the link between the use of the OPAL pipeline by Gazprom and the importation of Russian gas proceeding from Nord Stream is "fundamentally flawed".<sup>1699</sup> We note the European Union's statement that the capacity cap "does not restrict, and is not intended to restrict, the importation of Russian gas exceeding the allowed 50% of OPAL's capacities, provided that the gas is not transported by Gazprom or to the Brandov exit point giving access to the Czech market".<sup>1700</sup> We understand this as an acknowledgement, by the European Union itself, that the challenged OPAL conditions restrict, that is, have a limiting effect on, natural gas transported by Gazprom or to the Brandov exit point (or both).<sup>1701</sup> We see this as further support for our view that the challenged OPAL conditions restrict market access for importers of Russian natural gas, thereby limiting competitive opportunities for importation of Russian natural gas in contravention of Article XI:1 of the GATT 1994.

7.1002. Given the particular facts and circumstances of this case, and the particularities of natural gas pipeline transport, we consider that the design, architecture and revealing structure of the two challenged OPAL conditions restrict market access for EU imports of natural gas from Russia and limit competitive opportunities for the importation of Russian natural gas into the European Union. We therefore find that they have a limiting effect on the importation of natural gas from Russia within the meaning of Article XI:1 of the GATT 1994.

#### 7.8.4.3 Conclusion

7.1003. For the reasons stated above, we find that Russia has demonstrated that the two challenged OPAL conditions (that is, the 50% capacity cap and 3 bcm/yr gas release programme) are inconsistent with Article XI:1 of the GATT 1994.

### 7.9 The upstream pipeline networks measure

#### 7.9.1 Introduction

7.1004. As determined above in section 2.2.6, the upstream pipeline networks measure stems from the provisions of the Directive defining upstream pipeline networks and setting out their legal regime. In contrast to TSOs, the operators of upstream pipeline networks are not subject to the rules of the Directive on unbundling and tariff regulation. The operators of upstream pipeline networks are also not subject to the rules on third-party access under Article 32 of the Directive, but are instead subject to the provisions of Article 34 of the Directive, entitled "Access to upstream pipeline networks".<sup>1702</sup>

7.1005. Russia challenges the upstream pipeline networks measure under Articles I:1 and III:4 of the GATT 1994, advancing one claim under Article III:4 and two claims under Article I:1. First, Russia advances its claims under Articles I:1 and III:4 based on the comparison of the general legal regimes applicable to the operators of upstream pipeline networks and TSOs under the Directive. Then, Russia submits a separate claim under Article I:1 focused on the comparison of the general legal regime of the operators of upstream pipeline networks under the Directive with the specific legal regime applicable to the operators of the NEL and OPAL pipelines pursuant to the exemption decisions under Article 36 of the Directive.

<sup>1699</sup> European Union's second written submission, para. 342.

<sup>1700</sup> European Union's second written submission, para. 343. See also European Union's response to Panel question No. 129(b), paras. 316-330.

<sup>1701</sup> In this context, we also note the European Union's statement that:

It cannot, therefore, be excluded that, in the absence of the conditions attached by the Commission to the OPAL exemption, Gazprom and related companies would have decided to release additional quantities of gas into the Czech market, where they already held a dominant position, instead of transporting the gas further on Gazelle back into Germany. (European Union's comments on Russia's response to Panel question No. 222, para. 148.)

We see this statement, and in particular, the reference to "additional quantities of gas" that might have flown through OPAL from Russia as a further implicit acknowledgement by the European Union that the OPAL conditions restrict market access and have a limiting effect on the competitive opportunities of imports of natural gas from Russia.

<sup>1702</sup> See, above paras. 2.43 and 2.44.

7.1006. In our assessment of Russia's claims, we follow the same order. First, we address Russia's claims under Articles I:1 and III:4 of the GATT 1994 based on the comparison of the general legal regimes of the operators of upstream pipeline networks and TSOs under the Directive. Then we turn to examine Russia's additional claim under Article I:1 of the GATT 1994 focused on the comparison of the general legal regime of the operators of upstream pipeline networks under the Directive with the specific legal regime applicable to the operators of the NEL and OPAL pipelines pursuant to the exemption decisions under Article 36 of the Directive.

## **7.9.2 Russia's claim under Article I:1 of the GATT 1994**

### **7.9.2.1 Introduction**

7.1007. Russia argues that, due to the non-application of the unbundling obligation, tariff regulation rules and Article 32 of the Directive to the operators of upstream pipeline networks, imported natural gas originating in third countries and transported via upstream pipelines is granted an advantage within the meaning of Article I:1 of the GATT that is not accorded to natural gas originating in Russia and transported via transmission pipelines.<sup>1703</sup> In Russia's view, this "differential treatment" of the operators of upstream pipelines and TSOs modifies the conditions of competition to the detriment of Russian natural gas, in violation of Article I:1 of the GATT 1994.<sup>1704</sup>

7.1008. The European Union submits that Russia has not explained how a competitive advantage is granted to natural gas transported through upstream pipelines, and of what this advantage constitutes.<sup>1705</sup> In the European Union's view, upstream pipeline networks are different in nature from transmission pipelines and therefore a different legal regime of the operators of upstream pipeline networks does not modify the conditions of competition to the detriment of Russian natural gas transported through transmission pipelines within the meaning of Article I:1 of the GATT 1994.<sup>1706</sup>

### **7.9.2.2 Analysis by the Panel**

7.1009. In light of the legal standard under Article I:1 of the GATT 1994, as set out in paragraphs 7.236 and 7.237 above, our analysis below will focus on whether Russia has established the following elements: (a) that the upstream pipeline networks measure falls within the scope of Article I:1; (b) that the relevant imported products are like products; (c) that the upstream pipeline networks measure confers an "advantage, favour, privilege, or immunity" on a product originating in the territory of any country; and (d) that the advantage so accorded is not extended "immediately" and "unconditionally" to like Russian products.

#### **7.9.2.2.1 Scope of Article I:1 of the GATT 1994**

7.1010. According to Russia, the upstream pipeline networks measure affects the internal sale of the imported natural gas in the European Union within the meaning of Article III:4 of the GATT 1994 and therefore falls within the scope of Article I:1 of the GATT 1994.<sup>1707</sup> The European Union does not contest Russia's arguments.

7.1011. As observed by the Appellate Body, Article I:1 of the GATT 1994 "incorporates all matters referred to in paragraphs 2 and 4 of Article III".<sup>1708</sup> Thus, in light of Russia's arguments, we need to determine whether the upstream pipeline networks measure falls within the scope of the "matters" referred to in Article III:4 of the GATT 1994 in order to determine whether it falls within the scope of Article I:1 of the GATT 1994. For a measure to fall within the scope of Article III:4 of the GATT 1994, such a measure must constitute a law, regulation or requirement "affecting" the

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<sup>1703</sup> Russia's first written submission, paras. 402 and 411; and second written submission, paras. 294-296.

<sup>1704</sup> Russia's first written submission, para. 411.

<sup>1705</sup> European Union's first written submission, para. 457.

<sup>1706</sup> European Union's first written submission, paras. 450-454; and second written submission, para. 182.

<sup>1707</sup> Russia's first written submission, para. 382; and response to Panel question No. 113, para. 468.

<sup>1708</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.80.

"internal sale, offering for sale, purchase, transportation, distribution or use" of imported natural gas.<sup>1709</sup>

7.1012. We note that the parties do not disagree that the Directive constitutes a law, regulation or requirement within the meaning of Article III:4 of the GATT 1994. In our view, the Directive is undeniably a law, regulation or requirement within the meaning of this provision. However, as clarified by the Appellate Body, it is "not *any* 'laws, regulations and requirements' which are covered by Article III:4, but only those which "'affect' the specific transactions, activities and uses mentioned in that provision".<sup>1710</sup> According to the Appellate Body, "the word 'affecting' operates as a link between identified types of government action ('laws, regulations and requirements') and specific transactions, activities and uses relating to the products in the marketplace ('internal sale, offering for sale, purchase, transportation, distribution or use')".<sup>1711</sup>

7.1013. Russia argues that the non-application of the unbundling obligation, tariff regulation requirements and Article 32 of the Directive to the operators of upstream pipeline networks "lowers the costs and increases the profit margin on natural gas supplied through these pipelines".<sup>1712</sup> Therefore, in Russia's view, "the measure must be viewed as affecting the sale of natural gas".<sup>1713</sup>

7.1014. We recall that, as set out above, the upstream pipeline networks measure lays out a legal regime for the operators of upstream pipeline networks, which regulates the relationship that producers and suppliers of natural gas may have with those operators. We understand that upstream pipeline networks are used to transport natural gas from a gas production project to a processing plant, terminal or final coastal landing terminal.<sup>1714</sup> Thus, we believe that this measure affects the internal transportation of natural gas.

7.1015. Therefore, we consider that the upstream pipeline networks measure affects the internal transportation of imported natural gas in the European Union and consequently falls within the scope of the "matters" referred to in Article III:4 of the GATT 1994. On this basis, we find that the upstream pipeline networks measure falls within the scope of Article I:1 of the GATT 1994.

#### 7.9.2.2.2 Like products

7.1016. In Russia's view, natural gas transported via upstream pipelines is identical to natural gas transported via transmission pipelines. Therefore, Russia considers that natural gas originating in third countries and transported via upstream pipelines is like natural gas originating in Russia and transported via transmission pipelines within the meaning of Article I:1 of the GATT 1994. We note, however, that Ukraine, in its third-party submission, argues that natural gas transported via upstream pipelines is "raw" gas, which is not like natural gas transported through transmission pipelines.<sup>1715</sup> The European Union agrees with Ukraine's position.<sup>1716</sup>

7.1017. We observe that "raw" or "unprocessed" gas is natural gas that has not undergone any processing upon its extraction.<sup>1717</sup> "Processed" gas, on the other hand, is natural gas that has undergone necessary processing after its extraction in order to produce gas suitable for

<sup>1709</sup> Panel Report, *Argentina – Financial Services*, para. 7.1015.

<sup>1710</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 208. (emphasis original)

<sup>1711</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 208.

<sup>1712</sup> Russia's response to Panel question No. 113, para. 468.

<sup>1713</sup> Russia's response to Panel question No. 113, para. 468.

<sup>1714</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 2(2).

<sup>1715</sup> Ukraine's third-party submission, paras. 39–43.

<sup>1716</sup> In response to a question by the Panel, the European Union stated that it agrees with Ukraine that "Russia has not demonstrated that 'raw gas' is 'like' natural gas transported through regular pipeline networks". (European Union's response to Panel question No. 107, para. 278). The European Union further indicated that it considers that upstream pipelines do not carry processed gas. (European Union's response to Panel question No. 108(c), para. 279).

<sup>1717</sup> US Department of Transportation, Pipeline & Hazardous Materials Safety Administration, "Stakeholder Communications: Natural Gas Processing Plants"

<https://primis.phmsa.dot.gov/comm/FactSheets/FSNaturalGasProcessingPlants.htm> (accessed 23 March 2017), (Exhibit EU-166); and NaturalGas.org, Processing Natural Gas <http://naturalgas.org/naturalgas/processingng/> (accessed 11 May 2017), (Exhibit RUS-260), p. 1.

transmission and subsequent delivery to the final consumer.<sup>1718</sup> Neither Ukraine nor the European Union provides any evidence that pipelines that meet the definition of "upstream pipeline network" in the Directive transport only unprocessed gas. The European Union asserts that upstream pipelines are used to convey natural gas from an oil or gas production project to a processing plant or terminal or final coastal landing terminal, and if the pipeline conveys gas from the production project to a final coastal landing terminal, processing would take place once this terminal is reached.<sup>1719</sup> Russia, on the other hand, contends that pipelines that meet the definition of "upstream pipeline network" in the Directive include those that convey processed gas from a processing plant to a "terminal or final coastal landing terminal".<sup>1720</sup> The parties do not disagree that transmission pipelines transport processed natural gas.

7.1018. The Directive defines "upstream pipeline network" as follows:

'[U]pstream pipeline network' means any pipeline or network of pipelines 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 or terminal or final coastal landing terminal[.]<sup>1721</sup>

7.1019. Based on this definition, we understand that an "upstream pipeline network" covers any of the following pipelines or networks of pipelines: (a) operated and/or constructed as part of an oil or gas production project; (b) used to convey natural gas from one or more oil or natural gas production projects to a processing plant; (c) used to convey natural gas from one or more oil or natural gas production projects to a terminal; (d) used to convey natural gas from one or more oil or natural gas production projects to a final coastal landing terminal.<sup>1722</sup> We consider that pipelines operated and/or constructed as part of an oil or gas production project, as well as those used to convey natural gas from one or more such projects to a processing plant will transport unprocessed gas. The processing of such gas will take place at a processing plant. We are, however, unconvinced by the European Union's explanation that pipelines used to convey natural gas from one or more oil or gas production projects to a terminal or final coastal landing terminal will transport unprocessed gas.

7.1020. As noted above, the European Union argues that the processing of gas transported by pipelines running from one or more oil or gas production projects to a terminal or final coastal landing terminal will take place once the terminal or final coastal landing terminal is reached. We disagree. The processing of gas can take place only at a specialized processing facility referred to in the Directive as a "processing plant". Aside from referring to a "processing plant", the Directive also refers to "terminal" and "final coastal landing terminal". We consider that if a "terminal", "final coastal landing terminal" and "processing plant" had the same meaning, the Directive would have referred only to pipelines used to convey gas to a "processing plant", and not to pipelines "used to convey natural gas ... to a processing plant or terminal or final coastal landing terminal".<sup>1723</sup> We

<sup>1718</sup> US Department of Transportation, Pipeline & Hazardous Materials Safety Administration, "Stakeholder Communications: Natural Gas Processing Plants" <https://primis.phmsa.dot.gov/comm/FactSheets/FSNaturalGasProcessingPlants.htm> (accessed 23 March 2017), (Exhibit EU-166); and NaturalGas.org, Processing Natural Gas <http://naturalgas.org/naturalgas/processingng/> (accessed 11 May 2017), (Exhibit RUS-260), pp. 1-2.

<sup>1719</sup> European Union's response to Panel question No. 108(c), para. 279.

<sup>1720</sup> Russia's responses to Panel question No. 107, para. 426, and No. 108, paras. 429-431.

<sup>1721</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 2(2).

<sup>1722</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 2(2).

<sup>1723</sup> One of the documents cited by Russia in response to Panel question No. 10 reflects the following understanding of a "processing plant", "terminal" and "final coastal landing terminal" in Article 2(2) of the Directive:

The definition in Article 2.2 was designed to meet a number of circumstances. The reference to "processing plant" was intended to allow Article 23 to apply to pipelines or pipeline networks which carry largely unprocessed gas from a production project (field) to a facility at which the gas is processed to sales quality (broadly speaking, the main practice offshore in United Kingdom). "Terminal" in Article 2.2 was intended to allow Article 23 to apply to pipelines, or pipeline networks, which carry gas which has been processed to sales quality but which has not previously entered a transmission or distribution system (largely the Norwegian approach). "Final coastal landing terminal" was intended to allow Article 23 to apply to pipelines, or pipeline networks, which carry processed gas, which has not previously entered a transmission or distribution system but may have passed through a "terminal", to a facility in another country from which the gas enters that country's transmission or distribution system (also largely the



also note that the evidence on the record indicates that, in respect of natural gas transported from an oil or gas production project to a terminal or final coastal landing terminal, processing can take place at a processing plant located between an oil or gas production project and a terminal.<sup>1724</sup> This means that parts of upstream pipeline networks running from an oil or gas production project to a terminal or final coastal landing terminal will transport processed natural gas.

7.1021. Therefore, we conclude that the definition of "upstream pipeline network" in the Directive covers pipelines that transport processed natural gas. In light of this conclusion, we do not consider it necessary to determine whether processed and unprocessed gas are like products within the meaning of Article I:1 of the GATT 1994. Instead, we turn to consider whether processed natural gas transported via upstream pipeline networks is like processed natural gas transported via transmission pipelines.

7.1022. The parties agree that processed natural gas transported via upstream pipelines and natural gas transported via transmission pipelines are like products within the meaning of Article I:1 of the GATT 1994.<sup>1725</sup> We also recall that, in the context of the unbundling measure, we have found that imported Russian natural gas and imported natural gas from other countries are like products within the meaning of Article I:1 of the GATT 1994.<sup>1726</sup> We consider that processed natural gas transported via upstream pipelines is identical in all respects to natural gas transported via transmission pipelines. Therefore, we find that imported natural gas of Russian origin transported via transmission pipelines and imported natural gas originating in any other third country transported via upstream pipelines are like products within the meaning of Article I:1 of the GATT 1994.

#### 7.9.2.2.3 An advantage, favour, privilege or immunity

7.1023. Russia argues that, as a consequence of the definition of "upstream pipeline network" in the Directive, a number of operators of upstream pipelines transporting imported natural gas originating in third countries are "exempted" from the unbundling obligation, tariff regulation rules and Article 32 of the Directive.<sup>1727</sup> In Russia's view, due to this "exemption", imported natural gas

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Norwegian approach but potentially relevant to the United Kingdom/Belgium interconnector). In the United Kingdom we tend to use the term "terminal" to encompass all of the above – this is reflected in the proposals at Section 3.8 below. (Russia's response to Panel question No. 10, para. 91 (referring to the UK Department for Trade and Industry, Consultation Document, Implementation of those provisions of Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning the common rules for the internal market in natural gas which relate to access to upstream pipeline networks (March 2000), (Exhibit RUS-184), para. 3.6))

The European Union observes that none of the "Reports" that Russia cites in its response to Panel question No. 10 is an EU document, but rather a UK source. (European Union's second written submission, para. 170 and fn 195). The document quoted above appears to be indeed a UK source. Nevertheless, we find the explanations provided in this document instructive. We also note that the European Union has not challenged the accuracy or credibility of information contained in this document.

<sup>1724</sup> We note the "Europipe II" pipeline carries natural gas from an onshore processing plant in Norway (Kårstø) to an interconnection point in Germany (Dornum) across the North Sea. The processing plant in Norway (Kårstø) is connected to gas production sites in the North Sea. The "Norpipe" and "Europipe I" pipelines are also connected to the onshore processing plants in Norway (Kårstø and Kollsnes) before transporting gas from the production sites in the North Sea to the interconnection points in Germany (Emden and Dornum, respectively). We therefore understand that the "Europipe II" pipeline transports processed gas, and that similarly, the "Norpipe" and "Europipe I" pipelines may also transport processed gas. (Norway Pipelines Map, (Exhibit RUS-196); Gassco AS, the Norwegian Ministry of Petroleum and Energy, List of gas pipelines on the Norwegian continental shelf, (Exhibit RUS-197); Gassco, Europipe II, <https://www.gassco.no/en/our-activities/pipelines-and-platforms/europipe-II/> (accessed 25 February 2017), (Exhibit RUS-204); and Gassco, Kollsnes Gas Processing Plant, (Exhibit RUS-266)).

<sup>1725</sup> Russia's first written submission, paras. 345-349; and responses to Panel question No. 107, paras. 426-427, and No. 108, paras. 430 – 431. See also European Union's first written submission, para. 359; and response to Panel question No. 110(a), para. 285. Regarding the likeness of gas in the context of the upstream pipeline networks measure, the European Union considers that consumers will not differentiate between "gaseous" natural gas based on the infrastructure by which it has been processed or transported. In the European Union's view, the competitive relationship is not affected by the infrastructure. (European Union's response to Panel question No. 120, para. 301)

<sup>1726</sup> See, above para. 7.577.

<sup>1727</sup> Russia's first written submission, paras. 403-410; responses to Panel question No. 114(c), paras. 483-484, and No. 191, paras. 214-215; and second written submission, paras. 288-296. In particular, Russia indicates that such pipelines transport gas of Norwegian origin. Russia also notes other pipelines, that,

originating in third countries and transported through upstream pipelines is granted an advantage within the meaning of Article I:1 of the GATT 1994.<sup>1728</sup>

7.1024. The European Union argues that the non-application of the unbundling obligation, tariff regulation rules and Article 32 of the Directive to the operators of upstream pipelines does not amount to an "exemption".<sup>1729</sup> According to the European Union, the definition of "upstream pipeline network" is based on objective characteristics.<sup>1730</sup> The European Union further submits that the different legal regime of upstream pipeline networks as compared to transmission systems reflects the economic, technical and operational characteristics of such networks.<sup>1731</sup> The European Union also argues that Russia assumes that the non-application of the unbundling requirement to upstream pipeline networks automatically implies that gas from owners of such upstream networks has a competitive advantage that is not extended to Russian gas.<sup>1732</sup> The European Union submits, however, that Russia does not explain how such competitive advantage is granted, and of what this advantage actually constitutes.<sup>1733</sup>

7.1025. We recall that previous panels considered that a measure grants an advantage within the meaning of Article I:1 of the GATT 1994 when such a measure creates "more favourable competitive opportunities" to products of a particular origin.<sup>1734</sup>

7.1026. We understand Russia to derive its claim against the upstream pipeline networks measure under Article I:1 of the GATT 1994 from the legal regime of the operators of upstream pipelines in comparison to TSOs. Accordingly, we consider that, in order to establish that the upstream pipeline networks measure grants an advantage to natural gas of a particular origin within the meaning of Article I:1 of the GATT 1994, Russia needs to demonstrate that this legal regime creates "more favourable competitive opportunities" to natural gas of a particular origin.

7.1027. We further understand that, in Russia's view, the legal regime of the operators of upstream pipeline networks based on the non-application of the unbundling obligation, tariff regulation rules and Article 32 of the Directive allows a VIU to exercise control over the operators of such pipelines, refuse third-party access and minimize its costs when transporting natural gas via these pipelines.<sup>1735</sup> Thus, Russia's arguments imply that a VIU transporting natural gas via upstream pipelines whose operators it controls would be in a better position than a VIU transporting natural gas via transmission pipelines whose operators it does not control. In Russia's view, this means that natural gas produced and transported by the former VIU would thus receive an advantage within the meaning of Article I:1 of the GATT 1994 in comparison to natural gas produced and transported by the latter VIU.<sup>1736</sup> We thus understand Russia to argue that the

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in its view, are similarly "exempted" and transporting gas of Algerian and Libyan origin (Russia's response to Panel question No. 191, paras. 213-215).

<sup>1728</sup> Russia's first written submission, para. 411; response to Panel question No. 114(c), paras. 483-484 and No. 191, paras. 213-215; and second written submission, para. 296.

<sup>1729</sup> European Union's response to Panel question No. 1, paras. 2, 6 and 9; and second written submission, para. 142.

<sup>1730</sup> European Union's first written submission, para. 448. See also European Union's second written submission, paras. 170 – 173.

<sup>1731</sup> European Union's first written submission, paras. 450-453; and second written submission, paras. 157-167 and 173.

<sup>1732</sup> European Union's first written submission, para. 456.

<sup>1733</sup> European Union's first written submission, para. 457.

<sup>1734</sup> Panel Reports, *EC – Bananas III (Guatemala and Honduras)*, para. 7.239; and *Colombia – Ports of Entry*, para. 7.346. The panel in *EC – Seal Products* considered that the advantage granted by the EU Seal Regime was in the form of market access (Panel Reports, *EC – Seal Products*, para. 7.596).

<sup>1735</sup> Russia's response to Panel question No. 114(c), paras. 483 – 484; and second written submission, paras. 291 and 294.

<sup>1736</sup> Russia's second written submission, para. 296. Russia initially argued that an "advantage" is granted to gas of Norwegian origin. Thus, in its response to a question by the Panel regarding the "advantage" that gas transported via upstream pipeline networks receives, Russia states as follows:

As a result of these exemptions, the entire Norwegian export pipeline network is operated by a single state-owned company, Gassco. Additionally, because its upstream pipeline network, by definition, is exempt from the unbundling, TPA and tariff regulation requirements under the Directive, the Norwegian-origin gas supplied and placed on the EU market by Gassco is accorded an advantage. Gassco is not required to divest ownership of its transmission pipelines running from the processing facilities in the North Sea or TSO under the OU model, or even to engage an ISO or establish a separate subsidiary in the form of an ITO. Gassco is also not required to grant third-party access to its pipelines. (Russia's response to Panel question No. 114(c), para. 484).

differences in the legal regime of the operators of upstream pipeline networks and TSOs create more favourable conditions for the transportation of natural gas via upstream pipeline networks than via transmission pipelines.

7.1028. In our view, more favourable conditions for the transportation of products can be considered a competitive advantage. We recall, however, that the "advantage" referred to in Article I:1 of the GATT 1994 is an advantage granted to "any product originating in or destined for any other country".<sup>1737</sup> Therefore, in order to establish that the upstream pipeline networks measure grants an advantage within the meaning of Article I:1 of the GATT 1994, Russia needs to demonstrate that allegedly more favourable conditions for the transportation of natural gas via upstream pipelines than via transmission pipelines result in more favourable competitive opportunities to natural gas of a particular origin.

7.1029. In light of Russia's arguments, we will conduct a two-pronged assessment of whether the upstream pipeline networks measure grants an advantage to natural gas of a particular origin within the meaning of Article I:1 of the GATT 1994. Under the first prong, we will examine whether Russia has demonstrated that the legal regime of upstream pipeline networks creates more favourable conditions for the transportation of natural gas via upstream pipelines than via transmission pipelines. Should we conclude that this is the case, under the second prong, we will assess whether Russia has demonstrated that more favourable conditions for the transportation of natural gas via upstream pipelines than via transmission pipelines results in more favourable competitive opportunities to natural gas of any particular origin.

#### **7.9.2.2.3.1 More favourable conditions for the transportation of natural gas**

7.1030. We begin our assessment by noting that there is no disagreement between the parties that the unbundling obligation of the Directive does not apply to the operators of upstream pipeline networks.<sup>1738</sup> Furthermore, the European Union does not contest that tariff regulation rules and Article 32 of the Directive do not apply to the operators of upstream pipeline networks. Similarly, the parties do not disagree that Article 34 of the Directive, entitled "Access to upstream pipeline networks" is applicable to the operators of upstream pipeline networks.<sup>1739</sup> However, the parties draw different conclusions as to the content of the obligation contained in Article 34 of the Directive, as further discussed below.

7.1031. Russia argues that, being "exempted" from "the unbundling, TPA and tariff regulation requirements" allows a VIU controlling the operator of an upstream pipeline network to "develop its export pipeline network and control the supply and placement of its gas on the EU market as it deems appropriate".<sup>1740</sup> In Russia's view, this reduces the costs of such a VIU in transporting natural gas via upstream pipeline networks.<sup>1741</sup> Russia also argues that the "UPN exemption" provides greater certainty to investors in pipelines and allows them to plan and implement the investment based on the possibility to equally invest and have long-term planning in natural gas

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Likewise, in its second written submission, Russia makes the following allegations:

Today, the entire Norwegian export pipeline network is operated by a single state-owned company, Gassco, which is free to develop its export pipeline network and control the supply and placement of its gas on the EU market as it deems appropriate. Gassco and its Norwegian gas export pipelines are exempt from the unbundling, TPA and tariff regulation requirements. Russian gas export pipelines are identical in terms of their purpose to the Norwegian gas export pipelines. They transport identical gas and are both operated by VIUs. (Russia's second written submission, para. 294)

In its response to Panel question No. 191, however, Russia indicated that pipelines transporting gas of Algerian and Libyan origin are, in its view, similarly "exempted" from the unbundling, third-party access and tariff regulation requirements. (Russia's response to Panel question No. 191, para. 213). We thus understand Russia to imply that, as a consequence, gas of Algerian and Libyan origin would also be granted an advantage. (Russia's response to Panel question No. 191, para. 215)

<sup>1737</sup> Article I:1 of the GATT 1994.

<sup>1738</sup> Russia's first written submission, para. 406; and second written submission, para. 282. See also European Union's first written submission, para. 452.

<sup>1739</sup> Russia's first written submission, para. 408; and second written submission, para. 284. See also European Union's first written submission, para. 451; and second written submission, para. 159.

<sup>1740</sup> Russia's second written submission, para. 294

<sup>1741</sup> Russia's second written submission, para. 291; and opening statement at the second meeting of the Panel, para. 134.

production, while "the status of a transmission pipeline, with its unbundling and TPA requirements, does not provide such a certainty".<sup>1742</sup> On this basis, Russia concludes that natural gas carried through an upstream pipeline network has a "clear-cut" competitive advantage over natural gas carried through a transmission pipeline.<sup>1743</sup>

7.1032. We understand that, for Russia, the possibility that a VIU may control the operator of an upstream pipeline network creates more favourable conditions for the transportation of natural gas via upstream pipelines than via transmission pipelines. Russia asserts that, being "exempted" from "the unbundling, TPA and tariff regulation requirements" allows a VIU controlling the operator of an upstream pipeline network to "develop its export pipeline network and control the supply and placement of its gas on the EU market as it deems appropriate".<sup>1744</sup> However, Russia does not explain how this transforms into more favourable conditions for the transportation of natural gas via upstream pipelines than via transmission pipelines.

7.1033. Russia further contends that the "UPN exemption" provides greater certainty to the investor in pipelines and allows them to plan and implement the investment based on the possibility to equally invest and have long-term planning in terms of production of natural gas.<sup>1745</sup> It is unclear to us, and Russia has not explained, how issues related to investment decisions in connection with natural gas pipelines are relevant for our assessment of Russia's claim under the GATT 1994.

7.1034. Thus, we consider that Russia has not demonstrated that a control by a VIU of the operator of an upstream pipeline network results in more favourable conditions for the transportation of natural gas via upstream pipelines than via transmission pipelines.<sup>1746</sup>

7.1035. Russia also argues that, not being subject to the third-party access rules of Article 32 of the Directive, the operators of upstream pipeline networks are not obliged to grant access to these pipelines to all interested parties.<sup>1747</sup> We thus understand that, in Russia's view, the non-application of the third-party access rules of Article 32 of the Directive to the operators of upstream pipeline networks creates more favourable conditions for the transportation of natural gas via upstream pipelines than via transmission pipelines, whose operators (TSOs) are subject to Article 32 of the Directive.

7.1036. We observe that the European Union contests Russia's arguments that the operators of upstream pipeline networks are not obliged to grant third-party access, pointing to the fact that Article 34 of the Directive, entitled "Access to upstream pipeline networks", requires such access.<sup>1748</sup> As already noted, the parties disagree on the content of the obligation contained in Article 34 of the Directive.

7.1037. Russia argues that Article 34 of the Directive "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".<sup>1749</sup> Russia considers that, in particular, the "matters" listed in Article 34(2) of the Directive that may be taken into account in providing access to upstream pipeline networks make the obligation contained in Article 34 of the Directive "vague" and "meaningless".<sup>1750</sup> Russia also states that the European Union confirmed that Article 34 of the Directive has never been utilized.<sup>1751</sup> The European Union, however, contends that all EU member States have implemented Article 34 of the Directive in their national law.<sup>1752</sup> The European Union

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<sup>1742</sup> Russia's opening statement at the second meeting of the Panel, para. 146.

<sup>1743</sup> Russia's opening statement at the second meeting of the Panel, para. 146.

<sup>1744</sup> Russia's second written submission, para. 294

<sup>1745</sup> Russia's opening statement at the second meeting of the Panel, para. 146.

<sup>1746</sup> We note that Russia has not provided any specific argumentation on the non-application of the rules on tariff regulation to the operators of upstream pipeline networks. We therefore do not address this issue further.

<sup>1747</sup> Russia's response to Panel question No. 114(c), para. 484.

<sup>1748</sup> European Union's first written submission, para. 451; and second written submission, para. 159.

<sup>1749</sup> Russia's first written submission, para. 408;

<sup>1750</sup> Russia's second written submission, para. 286; and response to Panel question No. 201(c), para. 236.

<sup>1751</sup> Russia's opening statement at the second meeting of the Panel, para. 133.

<sup>1752</sup> European Union's response to Panel question No. 201, para. 157.

has also indicated that five disputes were notified in the United Kingdom for access to upstream pipelines and one decision on effective access was adopted in Denmark.<sup>1753</sup>

7.1038. Article 34 of the Directive, entitled "Access to upstream pipeline networks", provides, in relevant part, as follows:

1. Member States shall take the necessary measures to ensure that natural gas undertakings and eligible customers, wherever they are located, are able to obtain access to upstream pipeline networks, including facilities supplying technical services incidental to such access, in accordance with this Article, except for the parts of such networks and facilities which are used for local production operations at the site of a field where the gas is produced. The measures shall be notified to the Commission in accordance with the provisions of Article 54.

2. The access referred to in paragraph 1 shall be provided in a manner determined by the Member State in accordance with the relevant legal instruments. Member States shall apply the objectives of fair and open access, achieving a competitive market in natural gas and avoiding any abuse of a dominant position, taking into account security and regularity of supplies, capacity which is or can reasonably be made available, and environmental protection. The following matters may be taken into account:

- (a) the need to refuse access where there is an incompatibility of technical specifications which cannot reasonably be overcome;
- (b) the need to avoid difficulties which cannot reasonably be overcome and could prejudice the efficient, current and planned future production of hydrocarbons, including that from fields of marginal economic viability;
- (c) the need to respect the duly substantiated reasonable needs of the owner or operator of the upstream pipeline network for the transport and processing of gas and the interests of all other users of the upstream pipeline network or relevant processing or handling facilities who may be affected; and
- (d) the need to apply their laws and administrative procedures, in conformity with Community law, for the grant of authorisation for production or upstream development.

3. Member States shall ensure that they have in place dispute-settlement arrangements, including an authority independent of the parties with access to all relevant information, to enable disputes relating to access to upstream pipeline networks to be settled expeditiously, taking into account the criteria in paragraph 2 and the number of parties which may be involved in negotiating access to such networks.<sup>1754</sup>

7.1039. We observe that the content of Article 34 of the Directive is different from the content of Article 32 of the Directive.<sup>1755</sup> However, in our view, this does not mean that Article 34 of the Directive contains absolutely no obligation of third-party access to upstream pipeline networks. We note, in particular, that Article 34(1) of the Directive requires member States to "take the necessary measures to ensure that natural gas undertakings and eligible customers, wherever they are located, are able to obtain access to upstream pipeline networks".<sup>1756</sup> Russia argues that the obligation in Article 34 of the Directive is "vague" and "meaningless".<sup>1757</sup> However, aside from

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<sup>1753</sup> European Union's response to Panel question No. 201, para. 158.

<sup>1754</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 34.

<sup>1755</sup> Article 32 of the Directive, entitled "Third-party access", requires EU member States to "ensure the implementation of a system of third party access to the transmission and distribution system, and LNG facilities based on published tariffs, applicable to all eligible customers, including supply undertakings, and applied objectively and without discrimination between system users". (Directive 2009/73/EC, (Exhibit EU-5), Article 32(1)).

<sup>1756</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 34(1).

<sup>1757</sup> Russia's second written submission, para. 286; and response to Panel question No. 201(c), para. 236.

referring to the text of Article 34 of the Directive, Russia has not submitted any evidence that this obligation is ineffective.

7.1040. Based on the scrutiny of the text of Article 34 of the Directive, in light of the arguments of the parties and evidence on the record, we consider that Article 34 of the Directive provides an obligation of third-party access to upstream pipeline networks. Therefore, we reject Russia's arguments that the operators of upstream pipeline networks are not obliged to grant access to other parties interested in using these pipelines. Thus, contrary to Russia's arguments, the operators of upstream pipelines are not "exempted" from third-party access rules and, consequently, cannot use the non-application of Article 32 of the Directive to transport natural gas on more favourable conditions than TSOs.

7.1041. Russia also alleges, "based on legislative history and other EU documentation, that the Norwegian government and natural gas industry lobbied for and obtained this EU exemption expressly to reduce the costs of transporting Norwegian-origin gas, thus granting that gas a competitive advantage within the meaning of GATT Article I:1".<sup>1758</sup> Russia further alleges that the "EU included the UPN measure to avoid '[t]he resulting increases in costs and loss of efficiency [which] would put Norway at an unfair disadvantage compared with other non-EEA producers'".<sup>1759</sup> In support of these allegations, Russia quotes from the Seventh Report of the Select Committee on European Communities of the UK House of Lords on the Amended Proposal for a European Parliament and Council Directive concerning common rules for the internal market in natural gas (UK House of Lords Report).<sup>1760</sup>

<sup>1758</sup> Russia's second written submission, para. 291. See also Russia's response to Panel question No. 10, paras. 93-94.

<sup>1759</sup> Russia's second written submission, para. 294. See also Russia's response to Panel question No. 10, paras. 93-94.

<sup>1760</sup> UK House of Lords, Select Committee on European Communities, Seventh Report on the Amended Proposal for a European Parliament and Council Directive concerning common rules for the internal market in natural gas (18 November 1997) <https://publications.parliament.uk/pa/ld199798/ldselect/ldcom/035vii/ec0701.htm> (accessed 15 September 2017), (UK House of Lords Report), (Exhibit RUS-116). Russia quotes the following parts of the UK House of Lords Report:

45. Norway, although not an EU Member State, was obliged by its membership of the EEA Agreement to implement any Community legislation involving the single market which was adopted by the EEA Joint Committee. As a result, Norway was likely to be significantly affected by the Directive, despite having no direct influence in the negotiations. The Norwegian Ministry of Petroleum and Energy said that gas had been a success story in Europe and had the potential to provide a larger share of future energy needs, with benefits for the environment and security of supply, but the investments that were necessary to secure the future development of gas would be jeopardised by the uncertainty that the draft Directive would introduce. Some amendments were needed to secure a long-term regulatory regime and to guarantee the contracts that were needed (pp 97-8).

#### APPLICATION TO UPSTREAM PRODUCTION AND COMPETITION IN GAS SUPPLY

46. One of Norway's key concerns as a major European gas producer was with the scope of application of the Directive, which it proposed should be limited to "the outlet flange of the ultimate landing terminal", thus excluding offshore production-related pipelines[13]. Without such a change, which was supported by the oil industry and was consistent with existing EC and Norwegian legislation, Norway believed its existing integrated production system would have to be split up under different regulatory regimes. The resulting increases in costs and loss of efficiency would put Norway at an unfair disadvantage compared with other non-EEA producers (p 97, QQ 277, 292-5).

...

#### ASPECTS OF THE DIRECTIVE STILL UNDER NEGOTIATION

...

#### *Application of the Directive to upstream transmission pipelines*

106. We sympathise with the arguments of the Norwegian Government and gas producers about the possible impact of the Directive on upstream activities, principally access to

7.1042. After a careful review of the UK House of Lords Report referred to by Russia, we do not consider that it supports Russia's position that the upstream pipeline networks measure grants an advantage to Norwegian natural gas within the meaning of Article I:1 of the GATT 1994. The paragraphs of the UK House of Lords Report referred to by Russia, reflecting the discussions held in the UK House of Lords, do not in any way connect the definition of upstream pipeline networks in the Directive with the alleged efforts of the Norwegian government and natural gas industry to obtain an "exemption" in order to "reduce the costs of transporting Norwegian-origin gas".<sup>1761</sup> The fact that the House of Lords "sympathise[d] with the arguments of the Norwegian Government and gas producers about the possible impact of the Directive on upstream activities"<sup>1762</sup> does not in and of itself establish such a connection. Even assuming that the discussions reflected in the parts of the UK House of Lords Report referred to by Russia somehow pointed to the intent of the European Union to favour natural gas of Norwegian origin, it would not release Russia from its burden to demonstrate how the alleged advantage is granted to natural gas of Norwegian origin within the meaning of Article I:1 of the GATT 1994. Merely showing the discriminatory intent of the regulator would be insufficient to establish a violation of Article I:1 of the GATT 1994.

7.1043. In view of the analysis conducted above, we consider that Russia has not demonstrated that the legal regime of the operators of upstream pipeline networks creates more favourable conditions for the transportation of natural gas via upstream pipelines than via transmission pipelines. This means that Russia cannot demonstrate that the upstream pipeline networks measure grants an advantage to natural gas of any particular origin transported via upstream pipelines within the meaning of Article I:1 of the GATT 1994. It is thus unnecessary for us to proceed to the second prong of our analysis identified above in paragraph 7.1029.

### 7.9.2.3 Conclusion

7.1044. In view of the foregoing, we find that Russia has not established that the upstream pipeline networks measure grants an advantage to natural gas of any particular origin, and consequently, failed to demonstrate that this measure is inconsistent with Article I:1 of the GATT 1994.

### 7.9.3 Russia's claim under Article III:4 of the GATT 1994

7.1045. In the context of its claim under Article III:4 of the GATT 1994, Russia argues that the upstream pipeline network measure modifies the conditions of competition to the detriment of Russian natural gas in comparison to domestic natural gas because the legal regime of the operators of upstream pipeline networks creates more favourable conditions for the transportation of domestic natural gas via these networks than for the transportation of Russian natural gas via transmission pipelines.<sup>1763</sup> Therefore, the issue of whether the legal regime of the operators of upstream pipeline networks creates more favourable conditions for the transportation of natural gas via upstream pipelines than via transmission pipelines is a central premise for Russia's claim under Article III:4 of the GATT 1994. In advancing its claim under Article III:4, Russia does not provide any arguments in addition to those submitted in the context of its claim under Article I:1 in order to demonstrate that the legal regime of the operators of upstream pipeline networks creates more favourable conditions for the transportation of natural gas via upstream pipelines than via transmission pipelines.<sup>1764</sup>

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transmission pipelines in the North Sea. In most cases, however, pipelines are natural monopolies and the cost of transporting gas onshore represents a significant part of the final price paid by the consumer. As a result of the refinement of the definition of transmission in the 6 October text (see paragraph 21 above) it is now clear that, in the North Sea, only transmission pipelines will be subject to the terms of the Directive. The Committee welcomes this clarification. (UK House of Lords Report, (Exhibit RUS-116), paras. 45, 46 and 106).

<sup>1761</sup> Russia's second written submission, para. 291.

<sup>1762</sup> UK House of Lords Report, (Exhibit RUS-116), para. 106.

<sup>1763</sup> Russia's first written submission, paras. 412–414; and second written submission, paras. 297–298.

<sup>1764</sup> We note that Russia explicitly relies on the arguments developed in the context of its claim under Article I:1 of the GATT 1994. Russia states that "[t]he same explanation as set forth in the preceding section with regard to upstream pipeline networks and third-country gas applies equally to domestic-origin gas produced in the European Union that is transported and sold on the EU market through what the Directive

7.1046. In the course of our assessment of Russia's claim under Article I:1, we have found that Russia has not demonstrated that the legal regime of the operators of upstream pipeline networks creates more favourable conditions for the transportation of natural gas via upstream pipelines than via transmission pipelines.<sup>1765</sup> We are aware of distinctions between Article I:1 and Article III:4 of the GATT 1994, which are two separate legal provisions. However, given that both of Russia's claims are premised on Russia's contention that the legal regime of the operators of upstream pipeline networks creates more favourable conditions for the transportation of natural gas via upstream pipelines than via transmission pipelines, our conclusion that Russia has not proved this contention in the context of its claim under Article I:1 also leads us to consider that Russia has not proved this contention for the purposes of its claim under Article III:4. Without proving this contention, Russia cannot establish that the upstream pipeline networks measure accords to Russian natural gas transported via transmission pipelines treatment less favourable than that accorded to domestic natural gas transported via upstream pipelines, in breach of Article III:4 of the GATT 1994.<sup>1766</sup>

7.1047. Therefore, in light of how Russia has developed its discrimination claims under the GATT 1994 against the upstream pipeline networks measure, we conclude that Russia has not demonstrated that this measure is inconsistent with Article III:4 of the GATT 1994.

#### **7.9.4 Russia's additional claim against the upstream pipeline networks measure**

7.1048. In addition to its claims against the upstream pipeline networks measure focused on the differences in the general legal regime of the operators of upstream pipeline networks and TSOs under the Directive,<sup>1767</sup> Russia submits a claim focused on the comparison of the general legal regime of the operators of upstream pipeline networks under the Directive with the specific legal regime of the operators of the NEL and OPAL pipelines pursuant to the exemption decisions under Article 36 of the Directive.

7.1049. In advancing this claim, Russia argues that, while the operators of upstream pipeline networks are "automatically exempted" from the rules on unbundling, third-party access and tariff regulation rules under the Directive, the Commission denied the exemptions from the third-party access and tariff regulation rules to the operator of the NEL pipeline and attached conditions to the granting of such exemptions to the operator of the OPAL pipeline.<sup>1768</sup> According to Russia, as a result, imported natural gas originating in third countries and transported through upstream pipelines is granted an advantage within the meaning of Article I:1 of the GATT 1994 that is not accorded to natural gas originating in Russia and transported through the OPAL and NEL pipelines.<sup>1769</sup> Russia thus submits that "this separate claim demonstrates yet another violation by the EU of its obligations under Article I:1 of the GATT 1994".<sup>1770</sup>

7.1050. We recall that we have already found that Russia's failure to demonstrate that the differences in the general legal regime of upstream pipeline networks and TSOs under the Directive create more favourable conditions for the transportation of natural gas via upstream pipelines than via transmission pipelines.<sup>1771</sup> On this basis, we have concluded above in paragraph 7.1044 that Russia has not established that the upstream pipeline networks measure grants an advantage to imported natural gas of any particular origin within the meaning of Article I:1 of the GATT 1994. These findings also inform our assessment below.

7.1051. We understand that, in the context of the present claim, Russia argues that the advantage allegedly granted to natural gas transported through upstream pipelines stems from the fact that the operators of upstream pipeline networks are not subject to the unbundling obligation, tariff regulation rules and the third-party access rules of Article 32 of the Directive, while the

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defines as upstream pipeline networks" (Russia's first written submission, para. 412; and second written submission, para. 297).

<sup>1765</sup> See above para. 7.1044.

<sup>1766</sup> Taking into account our findings above in paragraphs 7.536 and 7.1015, the upstream pipeline measure falls within the scope of Article III:4 of the GATT 1994, and domestic natural gas and Russian natural gas are like products within the meaning of Article III:4 of the GATT 1994.

<sup>1767</sup> See above paras. 7.1007 and 7.1045.

<sup>1768</sup> Russia's first written submission, para. 734; and second written submission, para. 432.

<sup>1769</sup> Russia's first written submission, para. 736; and second written submission, para. 432.

<sup>1770</sup> Russia's second written submission, para. 433.

<sup>1771</sup> See above para. 7.1043.



operator of the NEL pipeline was denied an exemption from the tariff regulation rules and Article 32 of the Directive. We note that the NEL pipeline is a transmission pipeline. Therefore, not being granted an exemption under Article 36 of the Directive, the operator of this pipeline is subject to the general rules of the Directive applicable to TSOs. We have already found that the differences in the general legal regime of the Directive applicable to the operators of upstream pipeline networks and TSOs do not result in granting an advantage within the meaning of Article I:1 of the GATT 1994 to imported natural gas of any origin transported through upstream pipelines.<sup>1772</sup> In light of this finding, the denial of the mentioned exemption to the operator of the NEL pipeline, which results in the application of the general rules of the Directive to the operator of this transmission pipeline, cannot lead to granting an advantage to imported natural gas of any origin within the meaning of Article I:1 of the GATT 1994.

7.1052. As for the OPAL pipeline operator, we recall that the exemption from the tariff regulation rules and third-party access rules of Article 32 of the Directive was granted to the operator of this pipeline subject to a 50% capacity cap and 3 bcm/year gas release programme.<sup>1773</sup> We understand Russia to argue that, because the operators of upstream pipelines are "automatically exempted" from the rules on unbundling, third-party access and tariff regulation rules under the Directive, while the exemption granted to the operator of the OPAL pipeline is subject to these conditions, imported natural gas transported through the former pipelines is granted an advantage within the meaning of Article I:1 of the GATT 1994.<sup>1774</sup>

7.1053. There are certain similarities and differences in the legal regime of the operators of upstream pipelines under the general rules of the Directive, on the one hand, and the legal regime of the operator of the OPAL pipeline under the exemption decision under Article 36 of the Directive, on the other. First, the operators of both types of infrastructure are not subject to the tariff regulation rules and third-party access rules of Article 32 of the Directive. However, under the general rules of the Directive, the operators of upstream pipeline networks are required to provide third-party access in accordance with Article 34 of the Directive,<sup>1775</sup> while no such obligation applies to the operator of the OPAL pipeline. Second, the operators of upstream pipeline networks are not subject to the unbundling obligation of the Directive, while this obligation applies to the operator of the OPAL pipeline.<sup>1776</sup> Third, the operator of the OPAL pipeline is subject to a 50% capacity cap and 3 bcm/year gas release programme, while no such requirements apply to the operators of upstream pipeline networks.

7.1054. We note, however, that Russia offers no explanation as to how the application of the separate, and somewhat different, legal regimes to the operators of upstream pipeline networks and the operator of the OPAL pipeline grants an advantage within the meaning of Article I:1 of the GATT 1994 to imported natural gas of any origin. It is well established that Article I:1 of the GATT 1994 protects the equality of competitive opportunities of products<sup>1777</sup>, rather than the operators of the infrastructure used to transport such products. Thus, in order to establish a *prima facie* case of a violation of this provision, a complainant needs to demonstrate that the challenged measure modifies the conditions of competition to the detriment of imported products of any origin. The differences in the regulatory treatment of the operators of the infrastructure used to transport these products, in and of themselves, would not be sufficient to establish a violation of Article I:1 of the GATT 1994. While Russia has pointed to the differences in the legal regimes applicable to the operators of upstream pipeline networks and the operator of the OPAL pipeline, it has not demonstrated how these differences affect the conditions of competition of imported natural gas of Russian or any other origin. Therefore, we consider that Russia has failed to make a *prima facie* case of a violation of Article I:1 of the GATT 1994.

7.1055. In view of the foregoing, we conclude that Russia's separate claim against the upstream pipeline networks measure based on the comparison of the general legal regime of the operators of upstream pipeline networks under the Directive with the specific legal regime of the operators of the NEL and OPAL pipelines pursuant to the infrastructure exemption decisions under Article 36 of

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<sup>1772</sup> See above para. 7.1043.

<sup>1773</sup> See above para. 7.983.

<sup>1774</sup> Russia's first written submission, paras. 734 and 736.

<sup>1775</sup> See above para. 7.1040.

<sup>1776</sup> See above para. 7.983.

<sup>1777</sup> Appellate Body Reports, *EC – Seal Products*, paras. 5.82 and 5.87.

the Directive does not demonstrate a violation by the European Union of Article I:1 of the GATT 1994.

## 7.10 The third-country certification measure

### 7.10.1 The third-country certification measure in the Directive

#### 7.10.1.1 Introduction

7.1056. Russia challenges the third-country certification measure in the Directive, described in paragraph 2.46 above, under Article II:1 of the GATS. In its written submissions, Russia has developed both a claim of *de jure* violation<sup>1778</sup> and a claim of *de facto* violation<sup>1779</sup> against the third-country certification measure in the Directive. The European Union rejects both claims and has, alternatively, raised defences under Articles V<sup>1780</sup> and XIV(a)<sup>1781</sup> of the GATS in respect of Russia's claim of *de jure* violation, but not in respect of Russia's claim of *de facto* violation.

7.1057. In our Preliminary Ruling of 10 November 2016, we found that Russia's claim of *de jure* violation under Article II:1 of the GATS, as developed in its first written submission, falls outside our terms of reference, but that the claim of *de jure* violation presented in Russia's panel request falls within our terms of reference.<sup>1782</sup>

7.1058. In its second written submission, Russia has developed a claim of *de jure* violation based on that presented in its panel request, claiming that the alleged less favourable treatment of Russian pipeline transport services and service suppliers in comparison with like pipeline transport services and service suppliers of EU member States violates the MFN obligation in Article II:1 of the GATS as "each such Member State is also a Member of the WTO".<sup>1783</sup>

7.1059. Following the second meeting of the Panel, however, Russia has explained that it asserts this claim of *de jure* violation on an alternative basis and that it would not be necessary for the Panel to address this claim if it were to agree with Russia that the unbundling measure in the Directive should be assessed on an EU-wide basis.<sup>1784</sup>

7.1060. In this regard, we recall that we have found, in section 7.5.1.2 above, that the WTO consistency of the unbundling measure in the Directive should be assessed throughout the EU territory rather than within each individual EU member State. We further recall that a complaining party has "the prerogative to narrow or abandon its claims, and thereby reduce the scope of its disagreement and dispute, at any stage of a proceeding".<sup>1785</sup> In light of this, we do not consider it necessary or appropriate to address Russia's claim of *de jure* violation under Article II:1 of the GATS against the third-country certification measure in the Directive. It is therefore also not necessary for us to address the defences raised by the European Union under Articles V and XIV(a) of the GATS in respect of this claim.

7.1061. We therefore proceed to consider solely Russia's claim of *de facto* violation under Article II:1 of the GATS against the third-country certification measure in the Directive. In this regard, we recall that, in section 7.2.2.3.3 above, we have found certain aspects of Russia's claim, as developed in its written submissions, to fall outside our terms of reference. Accordingly, we do not address these below but instead focus our assessment on the claim that falls within our terms of reference, namely the alleged *de facto* less favourable treatment of Russian pipeline transport services and service suppliers stemming from the Commission, when reviewing and providing opinions on draft certification decisions by NRAs, requiring a security of energy supply assessment

<sup>1778</sup> Russia's first written submission, paras. 446-454; and second written submission, paras. 326-330.

<sup>1779</sup> Russia's first written submission, paras. 455-500; and second written submission, paras. 331-356.

<sup>1780</sup> European Union's responses to Panel question No. 153, para. 27, and No. 205(a), paras. 172-188.

<sup>1781</sup> European Union's response to Panel question No. 153, para. 28.

<sup>1782</sup> Preliminary Ruling (conclusions) of 10 November 2016, para. 2.2. See also section 7.2.2.2.4 above wherein reasons in support of this conclusion are provided.

<sup>1783</sup> Russia's second written submission, paras. 326-330.

<sup>1784</sup> Russia's response to Panel question No. 202(b), paras. 237 and 247.

<sup>1785</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.19 (referring to Appellate Body Report, *Japan – Apples*, para. 136).

for certifications concerning Russian pipeline transport service suppliers but not for certifications concerning pipeline transport service suppliers of any other non-EU country.

7.1062. We also wish to clarify that although Russia seeks to demonstrate its claim of *de facto* violation under Article II:1 of the GATS by "contrasting" different individual Commission opinions concerning third-country certification<sup>1786</sup>, Russia has repeatedly explained that it is challenging the third-country certification measure in Article 11 of the Directive *per se* or "as such".<sup>1787</sup>

### 7.10.1.2 Analysis by the Panel of Russia's claim under Article II:1 of the GATS

7.1063. In accordance with the legal standard for Article II:1 of the GATS, set out in paragraphs 7.226 and 7.227 above, our assessment below will focus on whether Russia has made a *prima facie* case that: (a) the third-country certification measure in the Directive falls within the scope of the GATS; (b) the relevant services and service suppliers are like; and (c) the third-country certification measure in the Directive accords less favourable treatment to Russian services and service suppliers than that accorded to the like services and service suppliers of any other country.

7.1064. We address these requirements, in turn, below.

#### 7.10.1.2.1 Scope of the GATS

7.1065. As explained above, Article I:1 of the GATS sets out the scope of this Agreement as applying to "measures by Members affecting trade in services", which requires Russia to demonstrate: (a) that "there is 'trade in services' in the sense of Article I:2"; and (b) that the third-country certification measure in the Directive "'affects' such trade in services within the meaning of Article I:1".<sup>1788</sup>

7.1066. Russia has identified pipeline transport services as the relevant services<sup>1789</sup> and mode 3 or commercial presence, within the meaning of Article I:2(c) of the GATS, as the relevant mode of supply.<sup>1790</sup> In this regard, we recall that we have already found, in paragraph 7.407 above, that such pipeline transport services can be and are supplied through commercial presence in the EU territory and hence that there can be and is trade in pipeline transport services.

7.1067. Turning to whether the third-country certification measure in the Directive affects trade in pipeline transport services, we note that this measure imposes requirements for the certification of TSOs where "certification is requested by a transmission system owner or a transmission system operator which is controlled by a person or persons from a third country or third countries".<sup>1791</sup> As explained in paragraphs 7.433 and 7.441 through 7.446 above, persons from non-EU countries supply pipeline transport services through the commercial presence of TSOs in the EU territory. As the third-country certification measure sets out the requirements for TSOs to be certified and hence permitted to supply pipeline transport services in the EU territory, it therefore affects trade in such pipeline transport services.

7.1068. In light of this, we conclude that the third-country certification measure in the Directive falls within the scope of the GATS.

<sup>1786</sup> Russia's first written submission, para. 459.

<sup>1787</sup> Russia's comments on the European Union's comments on Russia's response to Panel question Nos. 5 and 17, para. 51; and second written submission, para. 331. We further note that, although Russia's approach of "contrasting" individual opinions by the Commission resembles the approach taken by Russia in respect of its claims under Article II:1 of the GATS and Article I:1 of the GATT 1994 against the so-called infrastructure exemption measure, the nature of the challenged measure differs for these claims as Russia has specified that it is not challenging the infrastructure exemption measure in Article 36 *per se* but rather the alleged "inconsistent" or "discriminatory" "manner in which the EU applied or implemented" Article 36 of the Directive. (Russia's first written submission, paras. 730-731; and responses to Panel question No. 5, para. 47(a), No. 47, para. 224, and No. 217(a), para. 283).

<sup>1788</sup> Appellate Body Report, *Canada – Autos*, para. 155.

<sup>1789</sup> Russia's first written submission, para. 443.

<sup>1790</sup> Russia's response to Panel question No. 56, para. 285.

<sup>1791</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 11(1).

### 7.10.1.2.2 Like services and service suppliers

7.1069. As explained in paragraphs 7.226 and 7.227 above, the MFN obligation in Article II:1 of the GATS applies only with respect to services and service suppliers that are like and we therefore turn to the issue of whether Russia has made a *prima facie* case that the relevant services and service suppliers are like within the meaning of Article II:1 of the GATS.

7.1070. Russia states that "for purposes of analyzing the *de facto* third-country certification measure claim set out below in Section XV.C.2 under Article II:1 of the GATS, domestic and third-country pipeline transport services and service suppliers, including LNG services and service suppliers, are in a competitive relationship with each other and thus satisfy the 'likeness' requirements on this basis".<sup>1792</sup> As with certain other claims by Russia, it is therefore not clear whether the relevant services and service suppliers, for purposes of Russia's claim under Article II:1 of the GATS against the third-country certification measure in the Directive, include both pipeline transport services and service suppliers as well as LNG services and service suppliers. We therefore consider it helpful to determine the scope of the likeness enquiry to be conducted for Russia's claim against the third-country certification measure in the Directive under Article II:1 of the GATS, before turning to the actual assessment of likeness.

7.1071. We recall that Russia's claim pertains to the alleged less favourable treatment of Russian pipeline transport services and service suppliers stemming from the Commission requiring a security of energy supply assessment for certifications concerning Russian pipeline transport service suppliers but not for certifications concerning pipeline transport service suppliers of any other non-EU country. It is undisputed that the rules on certification apply with respect to TSOs only, be that those in Article 10 of the Directive or those in Article 11 in relation to third countries. Neither of the parties suggests that these rules apply with respect to operators of LNG facilities. Furthermore, we note that Russia, with the exception of the above-mentioned brief reference to LNG services and service suppliers in the context of its arguments concerning likeness<sup>1793</sup>, does not rely on any example or argumentation with respect to LNG services or service suppliers in arguing that the third-country certification measure in the Directive accords less favourable treatment in violation of Article II:1 of the GATS.

7.1072. For these reasons, we find that pipeline transport services and service suppliers are the only relevant ones for Russia's claim against the third-country certification measure in the Directive under Article II:1 of the GATS. It is therefore not necessary or relevant for us to consider, in the context of this claim, whether pipeline transport services and service suppliers are like LNG services and service suppliers.

7.1073. Having determined that the scope of our likeness enquiry should be limited to pipeline transport services and service suppliers, we proceed to consider the actual assessment of likeness. As mentioned above, Russia's claim under Article II:1 of the GATS against the third-country certification measure in the Directive pertains to the alleged less favourable treatment of Russian pipeline transport services and service suppliers stemming from the Commission requiring a security of energy supply assessment for certifications concerning Russian pipeline transport service suppliers but not for certifications concerning pipeline transport service suppliers of any other non-EU country. We have already concluded that pipeline transport services and service suppliers are like regardless of their origin in the context of Russia's claim under Article II:1 of the GATS against the unbundling measure in the Directive.<sup>1794</sup> We see nothing on the record of these proceedings that would suggest that this analysis would differ in the context of Russia's claim under Article II:1 of the GATS against the third-country certification measure and the parties do not argue otherwise.<sup>1795</sup>

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<sup>1792</sup> Russia's first written submission, para. 445.

<sup>1793</sup> Russia's first written submission, para. 445.

<sup>1794</sup> See above paras. 7.421-7.422.

<sup>1795</sup> Russia's first written submission, para. 445. The European Union does not explicitly address likeness in the context of Russia's claim against the third-country certification measure in the Directive under Article II:1 of the GATS, but states more generally that it "does not dispute that Russian and other third country suppliers of pipeline transport services are 'like' suppliers" in the context of Russia's claim against the unbundling measure in the Directive under this provision. (European Union's first written submission, para. 282).

7.1074. In light of the above, we hence conclude that the relevant services and service suppliers are like within the meaning of Article II:1 of the GATS. Having made this finding of likeness, we proceed to assess whether Russia has demonstrated that the third-country certification measure in the Directive accords less favourable treatment to Russian pipeline transport services and service suppliers than that accorded to pipeline transport services and service suppliers of any other non-EU country.

#### 7.10.1.2.3 Less favourable treatment

7.1075. Russia argues that the third-country certification measure in the Directive accords *de facto* less favourable treatment to Russian pipeline transport services and service suppliers than that accorded to the like pipeline transport services and service suppliers of any other non-EU country due to the "double standard"<sup>1796</sup> or "differential treatment accorded by the Commission and the Member States in implementing the third-country certification measure".<sup>1797</sup> More specifically, and as explained above, this claim concerns the alleged less favourable treatment of Russian pipeline transport services and service suppliers stemming from the Commission requiring a security of energy supply assessment for certifications concerning Russian pipeline transport service suppliers, but not for certifications concerning pipeline transport service suppliers of any other non-EU country. Russia seeks to demonstrate this alleged "double standard" or *de facto* discrimination:

[B]y contrasting each of the five instances in which other third-country certification requests have been granted, while the Commission repeatedly directed the Polish NRA to reassess the security of supply issue regarding the ISO request of Gaz-System and Yamal.<sup>1798</sup>

7.1076. More particularly, Russia "contrast[s]" the certification of Gaz-System as the ISO of the Yamal pipeline in Poland with those of jordgas as the ITO of the Norddeutsche Erdgas Transversale Pipeline System (NETRA pipeline) in Germany, TAP AG as the "*ad hoc* ITO" of the TAP pipeline in Greece and Italy, NABUCCO Gas Pipeline International GmbH (NIC) as the TSO of the Nabucco pipeline in Austria, TIGF as the TSO of the TIGF network in France, and DESFA as the ITO of the Greek transmission system in Greece.<sup>1799</sup>

7.1077. The European Union rejects Russia's claim of *de facto* violation by criticizing each of the examples relied on by Russia. More particularly, the European Union argues that the example of Gaz-System being subject to a security of energy supply assessment under the third-country certification measure in Article 11 of the Directive does not involve a Russian pipeline transport service supplier<sup>1800</sup>, that Russia's argumentation concerning jordgas and NIC not being subject to a security of energy supply assessment is "misguided because it overlooks" the fact that the third-country certification measure in Article 11 of the Directive was not "applicable" when these requested certification<sup>1801</sup>, and that Russia's argumentation concerning TAP AG not being subject to a security of energy supply assessment is "manifestly unfounded" as "[t]he situation at issue in TAP was very different from that considered in Gaz-System".<sup>1802</sup>

7.1078. As explained above in section 7.2.2.3.3, the European Union has raised a terms of reference objection concerning the examples of TIGF and DESFA as these concern the content or strictness of the Commission's security of energy supply assessments<sup>1803</sup>, and submits that the

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<sup>1796</sup> Russia's second written submission, para. 342.

<sup>1797</sup> Russia's first written submission, para. 459.

<sup>1798</sup> Russia's first written submission, para. 459.

<sup>1799</sup> Russia's first written submission, paras. 457 and 460-500.

<sup>1800</sup> European Union's first written submission, paras. 582-584; and second written submission, paras. 232-234.

<sup>1801</sup> European Union's first written submission, paras. 597-598 (concerning jordgas) and 605-606 (concerning NIC).

<sup>1802</sup> European Union's first written submission, paras. 602-603.

<sup>1803</sup> European Union's first written submission, paras. 578-581; and second written submission, paras. 229-231.

difference in the content or strictness of the security of energy supply assessments is, in any event, explained by the "fundamentally different factual situations".<sup>1804</sup>

7.1079. We begin our assessment of the alleged less favourable treatment challenged by Russia by recalling that the third-country certification measure in the Directive requires the relevant NRAs to adopt a draft decision concerning certification of TSOs when such certification is requested by a transmission system owner or a TSO, which is "controlled by a person or persons from a third country or third countries", and to notify the Commission of this draft decision.<sup>1805</sup> The relevant NRA can request an opinion from the Commission concerning, among others, whether certification "will not put at risk the security of energy supply".<sup>1806</sup> If the Commission does not provide an opinion, it is "deemed not to raise objections to the decision of the regulatory authority" but if the Commission does provide an opinion, the relevant NRA is required to "take utmost account of the Commission's opinion" in adopting its final decision.<sup>1807</sup>

7.1080. As explained above, Russia's claim of *de facto* violation under Article II:1 of the GATS is based on "contrasting" the Commission opinion regarding certification of Gaz-System with "each of the five instances in which other third-country certification requests have been granted".<sup>1808</sup>

7.1081. In this regard, we reiterate our concerns regarding Russia's approach of seeking to demonstrate the WTO consistency of an underlying measure by only pointing to examples of its application.<sup>1809</sup> As explained above, Russia is required to demonstrate, on the basis of "the totality of facts and circumstances"<sup>1810</sup>, that "the design, structure, and expected operation"<sup>1811</sup> of the third-country certification measure in Article 11 of in the Directive are such that the conditions of competition are modified to the detriment of the group of Russian pipeline transport services and

<sup>1804</sup> European Union's first written submission, paras. 608-612 (concerning TIGF) and 613-616 (concerning DESFA).

<sup>1805</sup> Directive 2009/73/EC, (Exhibit EU-5), Articles 11(3) and 11(4).

<sup>1806</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 11(5).

<sup>1807</sup> Directive 2009/73/EC, (Exhibit EU-5), Articles 11(6) and 11(8). We note that Russia is of the view that "the Commission retains authority under the Directive and more generally to restrict" EU member States from granting certification when the Commission has "reach[ed] a contrary decision", whereas the European Union argues that the relevant NRAs are not legally bound by opinions by the Commission but only required to "take utmost account" of such. (Russia's first written submission, para. 458; and European Union's first written submission, para. 587). In support of its position, Russia refers to the European Commission's Fact Sheet on Intergovernmental Agreements on Energy, which provides that:

The whole idea of an obligatory ex-ante assessment of by the Commission is to avoid the situation where Member States sign agreements which are not compatible with EU law. Firstly, the revised IGA Decision would ensure cooperation between the Commission and the Member State by initiating a dialogue on potential non-compliance with EU law. Secondly, under the new Decision Member States will not be able to sign an IGA before the Commission has issued its opinion. When signing, ratifying or agreeing an IGA, the Member States will have to take utmost account of the Commission's opinion. Should a Member State decide to sign an IGA that would be incompatible with EU law, the Commission would have the possibility to launch infringement procedures. (Russia's response to Panel question No. 20, para. 118 (quoting European Commission Fact Sheet, Intergovernmental agreements in energy (16 February 2016), (Exhibit RUS-122), p. 2). (emphasis added by Russia)

We agree with the European Union that there is no basis in the Directive for us to conclude that the opinions of the Commission are legally binding on NRAs and that this conclusion is not altered by Russia's reference to the Commission's Fact Sheet on Intergovernmental Agreement and the possibility, mentioned herein, of the Commission launching infringement procedures in case an EU member State signs an intergovernmental agreement incompatible with EU law. (European Union's second written submission, paras. 236-238). At the same time, we do not agree with the European Union that "only [the final certification decisions issued by the NRAs] are capable of affecting the legal status of the applicant TSOs under the Directive and hence their competitive opportunities". (European Union's first written submission, para. 588). As acknowledged by the European Union, the relevant NRAs are required to "take utmost account" of the Commission opinions and such opinions could therefore potentially impact the final decisions of the relevant NRAs and hence the competitive opportunities of pipeline transport service suppliers. It is this impact of the Commission opinions that we take into account when assessing Russia's claim under Article II:1 of the GATS against the third-country certification measure in the Directive.

<sup>1808</sup> Russia's first written submission, para. 459.

<sup>1809</sup> See, above paras. 7.486-7.492.

<sup>1810</sup> Appellate Body Reports, *US – COOL*, para. 269 (quoting Appellate Body Report, *US – Clove Cigarettes*, para. 206).

<sup>1811</sup> Appellate Body Reports, *US – COOL*, para. 269 (quoting Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 130).

service suppliers in comparison with the group of pipeline transport services and service suppliers from any other non-EU country.<sup>1812</sup> Although examples of specific instances of application could serve as relevant evidence in this regard, it would be for Russia, as the complaining party, to expound that these serve to demonstrate that the third-country certification measure in Article 11 of the Directive is, as such, of a discriminatory nature. Below we assess whether Russia has done so.

7.1082. We begin by examining the one example provided by Russia to demonstrate alleged less favourable treatment of a Russian pipeline transport service supplier, namely the Commission opinions concerning certification of Gaz-System as the ISO of the Yamal pipeline.<sup>1813</sup> Russia argues that the Polish NRA, in its first draft decision, did not consider that the owner of Yamal, Europolgaz, was controlled by persons from a non-EU country within the meaning of the Directive and therefore did not conduct a security of energy supply assessment under the third-country certification measure, following which the Commission opined that a security of energy supply assessment was required as a person from a non-EU country, Gazprom, had joint control over Europolgaz.<sup>1814</sup> Following a second draft decision by the Polish NRA, in which it determined that the effects of Gazprom's joint control over Europolgaz did not "translate into control over the network", the Commission opined that a "true risk assessment" under Article 11 had not been carried out and that this assessment needed to be extended.<sup>1815, 1816</sup>

<sup>1812</sup> See, above paras. 7.486-7.492.

<sup>1813</sup> We note that Russia, after the first meeting of the Panel, has pointed to a "second situation" or example to demonstrate less favourable treatment of Russian pipeline transport services and service suppliers under the third-country certification measure in the Directive, namely that of Lietuvos dujos in Lithuania. We recall that this is also one of the examples relied upon by Russia when challenging the unbundling measure in the Directive under Article II:1 of the GATS. (See, above fn 884). As explained in this regard, Lietuvos dujos operated the transmission system in Lithuania prior to the implementation of the unbundling measure, after which its transmission assets were incorporated in the TSO Amber Grid. Gazprom then sold its shares in Amber Grid. In the context of its claim against the third-country certification measure under Article II:1 of the GATS, Russia argues that Lietuvos dujos was "denied an opportunity to apply for certification" by virtue of having been found not to comply with the rules on ownership unbundling in Lithuania. (Russia's second written submission, para. 339. See also Russia's response to Panel question No. 73, para. 324). We begin by recalling that we expressed doubts, in paragraphs 7.497 through 7.501 above, as to whether this example involves a Russian pipeline transport service supplier. We further note the European Union's position that it "is at a loss to understand the new issue raised by Russia" and that the third-country certification measure in Article 11 of the Directive "is different from the unbundling requirements and applies to all entities within the scope of the provision, irrespective of the unbundling model." (European Union's second written submission, paras. 248-249). We too have difficulties understanding the relevance of this situation or example for Russia's claim against the third-country certification measure in the Directive. As Russia itself acknowledges, Lietuvos dujos did not apply for certification under the third-country certification measure in Article 11 or the rules on domestic certification in Article 10 since its transmission assets were incorporated in the TSO Amber Grid and Gazprom hereafter sold its shares in Amber Grid pursuant to the OU model. The fact that Lietuvos dujos was "prevent[ed] ... from applying for certification under one of the unbundling models" appears entirely irrelevant for the assessment of whether the third-country certification measure led to *de facto* less favourable treatment of Russian pipeline transport services and service suppliers. More particularly, assuming that Lietuvos dujos had complied with the rules under the OU model in Lithuania, there does not appear to be any reason to believe that this entity would have received different treatment than TSOs owned or controlled by persons from other non-EU countries when seeking certification.

<sup>1814</sup> Russia's first written submission, paras. 461-462.

<sup>1815</sup> Commission Opinion of 19 March 2015 pursuant to Article 3(1) of Regulation (EC) No. 715/2009 and Article 10(6) and 11(6) of Directive 2009/73/EC – Poland – Certification of Gaz-System as the operator of the Polish section of Yamal-Europe Pipeline, (Commission opinion on the certification of Gaz-System II), (Exhibit RUS-73), p. 5.

<sup>1816</sup> We note that the European Union submits that "Russia's argument is based, to a large extent, on the assumption that the Commission 'has still not issued a final opinion' on the certification of Gaz-System", an assumption that the European Union points out to be mistaken since the Polish NRA has issued a final decision granting certification following the two opinions provided by the Commission. (European Union's first written submission, paras. 589-594 (quoting Russia's first written submission, para. 479)). Russia does not dispute that Gaz-System has been certified as the ISO of the Yamal pipeline under the third-country certification measure in Article 11 of the Directive, but argues that this "is not the issue" and that "[t]he issue concerns the differential treatment provided by the Commission in considering the Gaz-System application". (Russia's second written submission, para. 339). Seeing as Russia's claim under Article II:1 of the GATS against the third-country certification measure pertains to the alleged less favourable treatment of Russian pipeline transport services and service suppliers stemming from the Commission requiring a security of energy supply assessment for certifications concerning Russian pipeline transport service suppliers but not for certifications concerning pipeline transport service suppliers of any other non-EU country, we do not consider the fact that

7.1083. The European Union argues that this one example relied on by Russia does not involve a Russian pipeline transport service supplier at all.<sup>1817</sup> We recall that this example involves the certification request for Gaz-System as the operator, also known as the ISO, of the Yamal pipeline under the ISO model.<sup>1818</sup> We further recall that under the ISO model, a VIU continues to own, directly or indirectly, the transmission system but the ISO is required to be separate from the VIU by complying with the rules on ownership unbundling.<sup>1819</sup> In the case of the Yamal pipeline, Gaz-System serves as the ISO and Europolgaz as the owner of this transmission system. Both parties agree that the ISO Gaz-System is wholly-owned by the Polish Government and cannot be considered a Russian pipeline transport service supplier nor a commercial presence through which Russian pipeline transport services are supplied within the meaning of the GATS.<sup>1820</sup> Russia instead submits that the Russian VIU Gazprom "supplies pipeline transport services through Europolgaz, a commercial presence in the EU, based on Gazprom's joint ownership and control of Europolgaz".<sup>1821</sup>

7.1084. We have already addressed the issue of whether the owner of a transmission system can be considered to supply pipeline transport services under the ISO model in general, when the owner does not operate the transmission system under this particular unbundling model. In paragraphs 7.460 through 7.466 above, we found that Article XXVIII(b) of the GATS defines the "supply of a service" as including "the production, distribution, marketing, sale and delivery of a service" and that Russia has not demonstrated, generally, that the owner of the transmission system produces, distributes, markets, sells or delivers pipeline transport services under the ISO model. We consider this finding to be relevant also for the specific issue of whether the Russian VIU Gazprom can be considered to supply pipeline transport services through the transmission system owner Europolgaz. At the same time, we note that Russia has submitted certain additional arguments concerning the specific issue of whether the Russian VIU Gazprom can be considered to supply pipeline transport services through the transmission system owner Europolgaz, and we proceed to address these.

7.1085. First, Russia points out that "the EU as a whole is the relevant market for assessing Russia's MFN claims" and that the European Union has acknowledged that the Russian VIU Gazprom supplies pipeline transport services through certain other TSOs in the EU territory, namely NEL GT, OPAL GT and GASCADE.<sup>1822</sup> On the basis of this, Russia appears to conclude that "Gazprom thus supplies pipeline transport services through Europolgaz, a commercial presence in the EU".<sup>1823</sup> While Russia is correct in stating that it is undisputed among the parties that the Russian VIU Gazprom supplies pipeline transport services through the commercial presence of these three TSOs<sup>1824</sup>, we cannot agree that this, in and of itself, would suffice to demonstrate that Gazprom also does so through the transmission system owner Europolgaz.

7.1086. Second, Russia points to the fact that the Commission required Gaz-System to undergo third-country certification pursuant to Article 11 of the Directive due to Gazprom's "joint ownership and control" over Europolgaz.<sup>1825</sup> We understand Russia to suggest that this indicates that the Commission considered that Gazprom supplies pipeline transport services through the commercial presence of Europolgaz. However, Article 11 of the Directive explicitly calls for third-country certification "[w]here certification is requested by a transmission system owner or a transmission system operator which is controlled by a person or persons from a third country or third countries".<sup>1826</sup> We therefore do not consider the application of Article 11 decisive or relevant for

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Gaz-System was ultimately certified, after having undergone a security of energy supply assessment, detrimental to Russia's claim.

<sup>1817</sup> European Union's first written submission, paras. 582-584; and second written submission, paras. 232-234.

<sup>1818</sup> Russia's first written submission, paras. 460-463; and second written submission, paras. 333-339.

<sup>1819</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 14(2)(a).

<sup>1820</sup> Russia's response to Panel question No. 52, para. 268; and second written submission, para. 333; and European Union's first written submission, paras. 582-583.

<sup>1821</sup> Russia's response to Panel question No. 52, para. 268.

<sup>1822</sup> Russia's second written submission, para. 336.

<sup>1823</sup> Russia's second written submission, para. 338.

<sup>1824</sup> Russia's response to Panel question No. 52, para. 265; and second written submission, para. 336; and European Union's first written submission, paras. 338-341; and response to Panel question No. 52, para. 143.

<sup>1825</sup> Russia's second written submission, paras. 334 and 338; and response to Panel question No. 204(a), para. 249.

<sup>1826</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 11(1). (emphasis added)



the assessment of whether Gazprom can be considered to supply pipeline transport services through Europolgaz.

7.1087. Third, Russia argues that:

Europolgaz supplies services under historical long-term gas transmission contracts pursuant to relevant provisions of the intergovernmental agreement between Russia and Poland of 1993 (as amended in 2010) and the respective operatorship agreement between Europolgaz and Gaz-System.<sup>1827</sup>

7.1088. While Russia [\*\*\*].<sup>1828</sup> Russia points to several statements by the Polish NRA that do indeed suggest that Europolgaz supplies pipeline transport services, in particular that:

[\*\*\*].<sup>1829</sup>

7.1089. We find it curious for the Polish NRA to make such statements while, at the same time, having certified Gaz-System as the ISO under the ISO model: a model which, as explained in paragraphs 2.13 through 2.19 above, requires the ISO, rather than the owner of the transmission system, to operate the transmission system<sup>1830</sup> and to provide access for third parties to the transmission system.<sup>1831</sup> Indeed, this model requires the ISO to be separate from the owner by complying with the rules under the OU model<sup>1832</sup> and Article 14(4) of the Directive explicitly states that "[t]he transmission system owner shall not be responsible for granting and managing third-party access".

7.1090. At the same time, we note the European Union's explanation that the "unrelated matter", which the Polish NRA addressed in the correspondence referred to by Russia, concerned "certain historical transmission contracts"<sup>1833</sup>, which we understand to be those between Europolgaz, on the one hand, and JSC "PGNiG" and OOO "Gazprom export", on the other hand. Russia does not elaborate on what the "unrelated matter" relates to, and we consider the European Union's explanation reasonable in light of the conclusion reached by the Polish NRA that "Europolgaz shall submit to ACER a request for [the] contracts [concluded with JSC 'PGNiG' and OOO 'Gazprom export']".

7.1091. We agree with the European Union that the Polish NRA's statements "must be understood within [the] limited context" of these historical contracts<sup>1834</sup> and in this regard note the European Union's arguments that "Europolgaz remains formally responsible for the execution of certain historical transmission contracts, but only until their expiration"<sup>1835</sup> and that:

Europolgaz's responsibility for the execution of those historical contracts does not involve any activities with regard to the operation of the pipeline. Europolgaz remains formally a party to those historical contracts from a legal point of view and is therefore legally responsible for their execution. But Europolgaz does not "execute" them in the sense of undertaking by itself any action with a view to transmitting the gas since, as stated above, Gaz-System is the entity solely responsible for operation of flows on the pipeline. Europolgaz's responsibility only means that if one of the historical contracts was not properly executed as a result of the TSO's (i.e. Gaz-System's) actions, the gas supplier could lodge a claim against Europolgaz.<sup>1836</sup>

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<sup>1827</sup> Russia's response to Panel question No. 204(a), para. 249.

<sup>1828</sup> Russia's response to Panel question No. 204(a), para. 250.

<sup>1829</sup> Russia's response to Panel question No. 204(a), para. 250. We note that Russia has provided [\*\*\*] in Exhibit RUS-206 (BCI), which is in Polish with no translation. Russia has provided translations only of the sections quoted in its response to Panel question No. 204(a). The European Union does not appear to take issue with the translation provided by Russia.

<sup>1830</sup> Directive 2009/73/EC, (Exhibit EU-5), Articles 13(1)(a) and 14(2)(b).

<sup>1831</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 14(4).

<sup>1832</sup> Directive 2009/73/EC, (Exhibit EU-5), Article 14(2)(a).

<sup>1833</sup> European Union's comments on Russia's response to Panel question No. 204(a), para. 124.

<sup>1834</sup> European Union's comments on Russia's response to Panel question No. 204(a), para. 125.

<sup>1835</sup> European Union's comments on Russia's response to Panel question No. 204(a), para. 124.

<sup>1836</sup> European Union's comments on Russia's response to Panel question No. 204(a), para. 124.

7.1092. Indeed, at times, Russia appears to echo the European Union's position that "Gaz-System is the entity solely responsible" for the operation of the Yamal pipeline, stating that Gaz-System "pursuant to the Directive's ISO provisions, is required to operate Yamal in a manner completely separate from the influence of Europolgaz".<sup>1837</sup>

7.1093. We further note that the European Union, in support of this position, provides a section of the 2010 amendment to the 1993 Intergovernmental Agreement between Poland and Russia, referred to by Russia, which states that:

[T]he functions of the operator on the Polish section of the Gas Transit Pipeline System Yamal – Europe are realised by Gas Transmission Operator Gaz-System S.A. in accordance with the Agreement of entrusting operator responsibilities.<sup>1838</sup>

7.1094. Insofar as Gaz-System is the entity "solely responsible for the operation of all flows on Yamal" and that Europolgaz' responsibilities pursuant to the historical transmission contracts with JSC "PGNiG" and OOO "Gazprom export" consist solely of a legal responsibility in case Gaz-System does not supply the required pipeline transport services, we would agree with the European Union that Europolgaz' role in these historical contracts do not entail that it supplies pipeline transport services within the meaning of the GATS.

7.1095. Bearing in mind the fact that Russia, as the complaining party, bears the burden of making a *prima facie* case and that Russia has only provided excerpts from correspondence by the Polish NRA on the "unrelated matter" of certain historical contracts, which appear to contradict this NRA's own certification decision as well as the excerpt from the 1993 Intergovernmental Agreement between Poland and Russia provided by the European Union and indeed statements made by Russia itself in the current proceedings, we do not believe that Russia has carried its burden of demonstrating the Europolgaz supplies pipeline transport services, nor that the Russian VIU Gazprom supplies pipeline transport services through the commercial presence of Europolgaz.<sup>1839</sup>

7.1096. Given that the one example provided by Russia to demonstrate the alleged less favourable treatment of Russian pipeline transport services and service suppliers does not appear to involve a Russian pipeline transport service supplier at all, we have difficulties seeing how Russia could be considered to have made a *prima facie* case of violation under Article II:1 of the GATS. More specifically, the assessment under Article II:1 is an inherently comparative one, requiring the complaining party to demonstrate that its services and service suppliers are accorded less favourable treatment in comparison with that accorded to the like services and service suppliers of any other country. In our view, the absence of any evidence relating to Russian

<sup>1837</sup> Russia's first written submission, para. 465.

<sup>1838</sup> European Union's comments on Russia's response to Panel question No. 204(a), para. 121.

<sup>1839</sup> Even assuming that Russia had demonstrated that Europolgaz supplies pipeline transport services, we recall that it would also be required to demonstrate that the Russian VIU Gazprom owns or controls Europolgaz within the meaning of Articles XXVIII(n)(i) or (ii) of the GATS in order to prove that Gazprom supplies pipeline transport services through the commercial presence of Europolgaz and hence the existence of a Russian pipeline transport service supplier. In this regard, we note Russia's statement that:

[A]s the European Commission found in its decision concerning the application for certification of Gaz-System as ISO, Europolgaz ... is a joint venture between Gazprom and PGNiG, the state-owned Polish gas incumbent, each of which owns 48% of Europolgaz, with Polish Gas-Trading S.A. holding a 4% interest. ... Gazprom thus supplies pipeline transport services through Europolgaz, a commercial presence in the EU, based on Gazprom's joint ownership and control of Europolgaz. (Russia's response to Panel question No. 52, para. 268 (referring to Commission Opinion of 9 September 2014 pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) and 11(6) of Directive 2009/73/EC – Poland - Certification of Gaz-System as the operator of the Polish section of the Yamal-Europe Pipeline, C(2014) 6463, (Commission opinion on the certification of Gaz-System I), (Exhibit RUS-59)). See also Russia's first written submission, para. 460).

As Gazprom does not own "more than 50 per cent of the equity interest" in Europolgaz, it does not own Europolgaz within the meaning of Article XXVIII(n)(i) of the GATS and we do not believe it is sufficient for Russia to point to the Commission's finding of "joint control" within the meaning of the Directive in order to demonstrate control within the meaning of Articles XXVIII(n)(ii) of the GATS. In particular, and as explained above in paragraphs 7.455 and 7.456, the concepts of control in the Directive and in the GATS, respectively, do not necessarily coincide as the latter refers to the "power to name a majority of [] directors or otherwise to legally direct [] actions" whereas the former covers the possibility to "block certain major decisions".

pipeline transport services and service suppliers, in and of itself, means that Russia has not made a *prima facie* case of violation under Article II:1 of the GATS. Nevertheless, we consider it useful to provide certain considerations below regarding the main arguments of the parties on the Commission opinions, which Russia "contrasts" with the Commission opinion on the certification of Gaz-System.

7.1097. Even assuming that the Russian VIU Gazprom can be considered to supply pipeline transport services through the commercial presence of Europolgaz, and hence that the certification under Article 11 of Gaz-System involves a Russian pipeline transport service supplier, we do not believe that Russia has demonstrated *de facto* discrimination against Russian pipeline transport services and service suppliers by "contrasting" the Commission opinion concerning certification of Gaz-System with "each of the five instances in which other third-country certification requests have been granted".<sup>1840</sup> In this regard, we recall that Russia "contrast[s]" the certification of Gaz-System as the ISO of the Yamal pipeline in Poland with those of jorngas as the ITO of the NETRA pipeline in Germany, TAP AG as the "*ad hoc* ITO" of the TAP pipeline in Greece and Italy, NIC as the TSO of the Nabucco pipeline in Austria, TIGF as the TSO of the TIGF network in France, and DESFA as the ITO of the Greek transmission system in Greece.<sup>1841, 1842</sup>

7.1098. With respect to the certifications of jorngas and NIC, Russia faults the Commission for not requiring the relevant NRAs to conduct a security of energy supply assessment under Article 11 of the Directive in relation to these – contrary to the Commission opinion concerning the certification of Gaz-System as the ISO for the Yamal pipeline.<sup>1843</sup> However, as acknowledged by Russia, the third-country certification measure in the Directive did not enter into force until 3 March 2013 and therefore had not entered into force when jorngas or NIC applied for certification.<sup>1844</sup>

7.1099. Russia argues that "[a]s with jorngas, it is also irrelevant that NIC's certification was granted before 3 March 2013, the stated effective date of the [third-country certification measure in the Directive]".<sup>1845</sup> We cannot agree with this position. Most legal instruments have a date of entry into force and the mere existence of a regulatory distinction or difference in treatment prior to and following the entry into force of a measure does not, in our view, suffice to demonstrate a violation of non-discrimination provisions such as Article II:1 of the GATS.

<sup>1840</sup> Russia's first written submission, para. 459.

<sup>1841</sup> Russia's first written submission, paras. 457 and 460-500.

<sup>1842</sup> We note that, in order to demonstrate that these five examples involve pipeline transport service suppliers from other non-EU countries, Russia would be required to demonstrate that persons from non-EU countries own or control these five TSOs within the meaning of Articles XXVIII(n)(i) or (ii) of the GATS. Both parties agree that the Norwegian VIU Statoil owns and controls jorngas within the meaning of the GATS and that the Singaporean juridical person GIC Private Limited controls TIGF within the meaning of the GATS. (Russia's response to Panel question No. 52, para. 267; and European Union's response to Panel question No. 52, para. 143). Furthermore, provided that the Azerbaijani VIU SOCAR's pending acquisition of 66% of the shareholdings in DESFA is completed, both parties agree that SOCAR owns and controls DESFA within the meaning of the GATS. (Russia's response to Panel question No. 52, para. 266; and European Union's response to Panel question No. 52, para. 144). No such agreement exists with respect to TAP AG or NIC. Instead, Russia points to the minority shareholdings of non-EU juridical persons in these TSOs and on this basis suggests that each of these supplies pipeline transport services by owning and controlling the commercial presence of TAP AG or NIC. (Russia's response to Panel question No. 52, paras. 266-267). In our view, these references to minority shareholdings do not suffice to demonstrate ownership or control within the meaning of the GATS.

<sup>1843</sup> Russia's first written submission, paras. 464-468 (concerning jorngas) and 480-481 (concerning NIC). For the ITO jorngas, Russia argues that "the more favourable treatment accorded jorngas went beyond just exempting it from Article 11", pointing to "the current 'Beneficial Use Agreement' between jorngas and the other TSOs for NETRA" under which "jorngas is entitled to operate and commercially exploit" some undisclosed percentage of the capacities of NETRA." Russia submits that "jorngas receives additional commercial benefits and competitive advantages by being able to jointly operate NETRA in this manner" and that "jorngas may develop and invest in the NETRA transmission system, manage capacity, and otherwise exploit NETRA's commercial potential as it sees fit, without any possibility of jorngas's rights or those of Statoil being restricted or suspended as a result". (Russia's first written submission, para. 467). Russia, however, provides no explanation of how these alleged "additional commercial benefits and competitive advantages" relate to the third-country certification measure in the Directive or Russia's claim under Article II:1 of the GATS against this measure, and we therefore do not consider these arguments further in our assessment of this measure and claim.

<sup>1844</sup> Russia's second written submission, para. 342. See also Directive 2009/73/EC, (Exhibit EU-5), Article 54(1).

<sup>1845</sup> Russia's first written submission, para. 481.

7.1100. Russia also argues that the date of entry into force of the third-country certification measure in the Directive constitutes a "double standard at work"<sup>1846</sup> and that the European Union "selected this date knowing that companies such as Jordgas and NIC ... would submit applications before 3 March 2013 and thereby automatically be exempted from the EU's discriminatory security of supply analysis".<sup>1847</sup> Russia appears to suggest that it is for the European Union to explain "why 3 March [2013] was chosen for application of Article 11, rather than 3 March [2011], the date of application for the remainder of the Directive".<sup>1848</sup> We again recall that it is for Russia, as the complaining party, to make a *prima facie* case that the third-country certification measure in the Directive violates Article II:1 of the GATS. We further note the European Union's argument that:

[A]s of the date of adoption of the Directive on 13 July 2009, the EU authorities could not have possibly anticipated which TSOs would file applications before and after 3 March 2013. Nor could they possibly have anticipated the origin of the persons that would control each TSO at the time where it chooses to file for certification.<sup>1849</sup>

7.1101. Russia has provided no evidence that would suggest otherwise. Indeed, and as pointed out by the European Union, both parties agree that the Russian VIU Gazprom supplies pipeline transport services through the commercial presence of the TSOs GASCADE and NEL GT<sup>1850</sup>, which both applied for certification prior to 3 March 2013 and were therefore not subject to a security of energy supply assessment under Article 11 of the Directive but rather subject to the rules in Article 10, similarly to Jordgas and NIC.<sup>1851</sup> We find this evidence difficult to reconcile with Russia's contention that the timing of the entry into force of Article 11 should somehow be viewed as resulting in *de facto* discrimination against Russian pipeline transport services and service suppliers.

7.1102. Turning to the certification of TAP AG, it is undisputed that, unlike the certification of Gaz-System, this entity did not undergo third-country certification pursuant to Article 11 and thus was not subject to a security of energy supply assessment regardless of this provision having entered into force when certification was requested.

7.1103. Generally, Russia faults the Commission for having provided "no analysis" nor "cite[d] any evidence" in support of its agreement with the Greek and Italian NRAs' conclusion that "none of TAP AG's shareholders enjoy either sole or joint control over TAP AG" and hence that third-country certification was not required.<sup>1852</sup> In this regard, the European Union argues that Russia "disregards the Commission's proper role in the certification process", which is not "to re-do *ex novo* the NRA's analysis" and that the Commission must "substantiate properly" any objections to the NRA's analysis but is not required "to motivate in detail" where it agrees with an element of the NRA's analysis.<sup>1853</sup> We agree with the European Union that the mere fact that the Commission did not provide its own analysis, but rather agreed with that of the relevant NRAs, in and of itself, does not suffice to demonstrate a violation under Article II:1 of the GATS.

7.1104. Russia also points, more specifically, to the Commission having "overlooked" the fact that TAP AG was registered in a non-EU country, Switzerland<sup>1854</sup>, in response to which the European Union points out that the "relevant criterion for determining the applicability of Article 11 of Directive 2009/73/EC is whether the TSO or the transmission system is controlled by a person or persons of a third country or third countries, rather than the country of incorporation of the

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<sup>1846</sup> Russia's second written submission, para. 342.

<sup>1847</sup> Russia's response to Panel question No. 73, para. 323.

<sup>1848</sup> Russia's second written submission, para. 346.

<sup>1849</sup> European Union's second written submission, para. 243.

<sup>1850</sup> Russia's response to Panel question No. 52, para. 265; and second written submission, para. 336; and European Union's first written submission, paras. 338-341; and response to Panel question No. 52, para. 143.

<sup>1851</sup> European Union's first written submission, para. 599; and second written submission, para. 245.

<sup>1852</sup> Russia's first written submission, para. 472 (quoting Commission Opinion of 28 January 2016 pursuant to Article 3(1) of Regulation (EC) No. 715/2009 and Article 10(6) of Directive 2009/73/EC – Italy - Greece - Certification of TAP AG, C(2016) 538 final, (Exhibit RUS-57), p. 7).

<sup>1853</sup> European Union's first written submission, para. 601.

<sup>1854</sup> Russia's first written submission, para. 473.

TSO."<sup>1855</sup> We see nothing in the text of Article 11, nor in the remainder of the records of this proceeding, to suggest otherwise.

Lastly, Russia points to the Commission having stated, in its opinion concerning the certification of Gaz-System, that "[f]or the question of joint control it suffices that the parties can jointly exercise decisive influence over the joint venture, which is the case for Europolgaz" and faults the Commission for not reaching the same conclusion for TAP AG where the Azerbaijani entity AzTAP and the two EU entities BP and Snam each held 20%.<sup>1856</sup> Russia appears to interpret the Commission's statement as defining the concept of joint control in the Directive to cover all situations where a foreign shareholder and a domestic shareholder or shareholders, together, can exercise decisive influence. We note, however, that a more complete reading of the Commission's reasoning in its opinion concerning certification of Gaz-System provides that:

"Joint control exists where two or more undertakings or persons have the possibility of exercising decisive influence over another undertaking. Decisive influence in this sense normally means the power to block actions which determine the strategic commercial behaviour of an undertaking. Joint control is characterized by the possibility of a deadlock situation resulting from the power of two or more parent companies to reject proposed strategic decisions. Parties are required to cooperate to reach a common understanding in determining the commercial policy of their joint venture.

...

For the question of joint control it suffices that the parties can jointly exercise decisive influence over the joint venture, which is the case for Europolgaz. Moreover, there are clear indications that Gazprom's veto possibilities go beyond the protection of its financial interests. For instance, in case Gazprom is absent in the General Meeting, in the Supervisory Board or in the Management Board, no decision at all can be taken by these bodies. ERO itself concludes that "*it should be noted that all **significant** decisions related to the company's operations as well as its current activity rules shall be, in fact, agreed upon with the company's partners, including Gazprom*".<sup>1857</sup>

7.1105. A more complete reading of the Commission's reasoning concerning the certification of Gaz-System therefore suggests that the finding of joint control over Europolgaz by a foreign person, Gazprom, was based on cooperation by Gazprom being a prerequisite for the operation of Europolgaz, and on the ability of Gazprom to block strategic decisions.

7.1106. In contrast, the European Union points out that the "situation at issue in TAP was very different from that considered in Gaz-System", since a foreign person, AzTAP, held "only" 20% of the shares in the TAP AG and there was "no indication" that AzTAP had the power to "block the adoption of any strategic decisions by TAP [AG]".<sup>1858</sup>

7.1107. Russia does not dispute the existence of these differing circumstances.<sup>1859</sup> We recall that it does not fall within the tasks of panels to consider whether a responding party has acted consistently with its own domestic legislation.<sup>1860</sup> Hence, we do not consider it appropriate for us to determine how the concept of sole or joint control should properly be interpreted or applied under EU law, nor to assess whether or not the Commission and the relevant NRAs interpreted and applied the concept of sole or joint control consistently with EU law. Rather, we assess whether Russia has demonstrated that the design, structure and expected operation of the third-country certification measure is *de facto* discriminatory by "contrasting" the Commission opinion

<sup>1855</sup> European Union's first written submission, para. 603.

<sup>1856</sup> Russia's first written submission, paras. 473-474; and second written submission, para. 350 (quoting the Commission opinion on the certification of Gaz-System I, (Exhibit RUS-59), p. 9).

<sup>1857</sup> Commission opinion on the certification of Gaz-System I, (Exhibit RUS-59), p. 9. (emphasis added by the Commission)

<sup>1858</sup> European Union's first written submission, para. 602.

<sup>1859</sup> Russia's second written submission, para. 350, stating "[o]f course, the Europolgaz circumstances were not present in the case of TAP AG. Plenty of other circumstances were present, however".

<sup>1860</sup> See Panel Reports, *US – Hot-Rolled Steel*, para. 7.267; and *US – Stainless Steel (Korea)*, para. 6.50.

concerning certification of Gaz-System with that concerning certification of TAP AG.<sup>1861</sup> Given the differences pointed to by the European Union, and acknowledged by Russia, we do not consider this to be the case.

7.1108. With respect to the last two examples, TIGF and DESFA, Russia does not dispute that these underwent third-country certification under Article 11 of the Directive and were subject to a security of energy supply assessment in this regard.<sup>1862</sup> Instead Russia focuses its argumentation on the content of and process for conducting the security of energy supply assessments in respect of DESFA and TIGF, and compares this to the content of and process for conducting the security of energy supply assessment in respect of Gaz-System.<sup>1863</sup>

7.1109. As we have found above in section 7.2.2.3.3, our terms of reference concerning Russia's claim under Article II:1 of the GATS against the third-country certification measure in the Directive include only the claim presented in Russia's panel request, namely the alleged violation of Article II:1 stemming from the Commission requiring a security of energy supply assessment for certifications concerning Russian pipeline transport service suppliers but not for certifications concerning pipeline transport service suppliers of any other non-EU country, rather than the substance of such security of energy supply assessments.

7.1110. The examples of TIGF and DESFA, in our view, provide no support for the contention that the third-country certification measure results in a *de facto* violation of Article II:1 of the GATS by virtue of the Commission requiring a security of supply assessment for certifications concerning Russian pipeline transport service suppliers but not for certifications concerning pipeline transport service suppliers of any other non-EU country. On the contrary, these examples appear to demonstrate that pipeline transport service suppliers from other origins than Russian are subject to third-country certification under Article 11 of the Directive, including a security of energy supply assessment, where certification is requested by a transmission system owner or a TSO that is "controlled by a person or persons from a third country or third countries" within the meaning of the Directive, following entry into force of the third-country certification measure in the Directive on 3 March 2013.

7.1111. Having considered the various examples relied on by Russia, we do not believe that these demonstrate that the third-country certification measure in the Directive results in Russian pipeline transport services and service suppliers being accorded *de facto* less favourable treatment than that accorded to the like pipeline transport services and service suppliers of any other non-EU country.<sup>1864</sup>

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<sup>1861</sup> We note that Russia has also raised certain arguments in which it appears to "contrast" the Commission opinion concerning certification of TAP AG with its opinion concerning certification of DESFA, rather than its opinion concerning certification of Gaz-System. (See, e.g. Russia's first written submission, paras. 476-478; and second written submission, paras. 352-354). We note that Russia does not suggest that the example of DESFA involves a Russian pipeline transport service supplier. Indeed in other parts of its submission, Russia "contrasts" the Commission opinion concerning DESFA with its opinion concerning certification of Gaz-System, suggesting that the former, like the certification of TAP AG, is an example of the alleged more favourable treatment of pipeline transport services and service suppliers from any other non-EU country. (Russia's first written submission, paras. 490-500). In light of this, it is unclear to us how the "contrasting" of the Commission opinion concerning certification of TAP AG with its opinion concerning certification of DESFA would serve to demonstrate *de facto* discrimination against Russian pipeline transport services and service suppliers, and we do not address these arguments further.

<sup>1862</sup> Russia's first written submission, paras. 482 (concerning TIGF) and 491 (concerning DESFA).

<sup>1863</sup> Russia's first written submission, paras. 482-489 (concerning the ITO TIGF) and 490-500 (concerning the TSO DESFA).

<sup>1864</sup> We note that Russia has also submitted certain arguments concerning the objective of the third-country certification measure in the Directive. More particularly, Russia argues that "[i]t is no accident that throughout the adoption and implementation of the [Third Energy Package], Article 11 of the Directive has commonly been referred to as the 'Gazprom Clause'" and that "the EU's sole objective was to enact what it now concedes is a discriminatory certification measure that could be selectively applied to prevent Gazprom from acquiring too many EU transmission assets". (Russia's second written submission, para. 343; and opening statement at the second meeting of the Panel, para. 164). In this regard, we recall that "the Appellate Body and prior panels have, on several occasions, cautioned against undue reliance on the intent of a government behind a measure to determine the WTO-consistency of that measure" and have found that "the intent, stated or otherwise, of the legislators is *not conclusive*" although "objectively reviewable expressions of a government's policy objectives" may constitute relevant evidence. (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1050 (citing Appellate Body Reports, *Japan – Alcoholic Beverages*

### 7.10.1.3 Conclusion

7.1112. Having considered the various arguments and evidence provided by Russia, and for the reasons explained in paragraphs 7.1075 through 7.1111 above, we conclude that Russia has not demonstrated that the third-country certification measure in the Directive accords less favourable treatment to Russian pipeline transport services and service suppliers in comparison with that accorded to pipeline transport services and service suppliers of any other non-EU country. Hence, we find that Russia has failed to make a *prima facie* case of violation under Article II:1 of the GATS with respect to the third-country certification measure in the Directive.

## 7.10.2 The third-country certification measure in the national implementing laws of Croatia, Hungary and Lithuania

### 7.10.2.1 Introduction

7.1113. The third-country certification measure implemented in the national laws of Croatia, Hungary and Lithuania is described above in section 2.2.7.2. Russia contends that this measure is inconsistent with Article XVII of the GATS. Aside from raising terms of reference objections with respect to certain of the provisions in the national laws of Hungary and Lithuania challenged by Russia, the European Union submits that the third-country certification measure implemented in the national laws of Croatia, Hungary and Lithuania is justified under Article XIV(a) of the GATS.<sup>1865</sup> In our analysis below, we first determine whether this measure is inconsistent with Article XVII of the GATS and then proceed, as appropriate, to an examination of the European Union's defense.

7.1114. As discussed above in section 7.2.2.3.2, the European Union has raised terms of reference objections with respect to Sections 123(5) and 123(6) of Hungary's Gas Act and Articles 20(5) and 29(4)(3) of Lithuania's Law on Natural Gas. We have concluded that Articles 20(5) and 29(4)(3) of Lithuania's Law on Natural Gas fall outside, while Sections 123(5) and 123(6) of Hungary's Gas Act within, our terms of reference.<sup>1866</sup> Therefore, below we examine the consistency with Article XVII of the GATS of the following provisions of the national laws implementing the third-country certification measure: (i) Article 24 of Croatia's Gas Market Act; (ii) Section 128/A of Hungary's Gas Act; (iii) Sections 123(5) and 123(6) of Hungary's Gas Act; (iv) and Article 29 of Lithuania's Law on Natural Gas.<sup>1867</sup>

7.1115. The third-country certification measure challenged by Russia under Article XVII of the GATS consists of the national laws of Croatia, Hungary and Lithuania implementing Article 11 of

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*II*, p. 27, DSR 1996:1, 97, at p. 119; *US – Offset Act (Byrd Amendment)*, para. 259; and Panel Report, *Japan – DRAMs (Korea)*, para. 7.104). (emphasis original) In support of its arguments concerning the "objective" of the third-country certification measure in the Directive, Russia has referred to a press release, namely "EU Parliament, 3rd Energy Package gets final approval from MEPs" at <http://www.europarl.europa.eu/sides/getDoc.do?language=en&type=IM-PRESS&reference=20080616FCS31737>. (Russia's opening statement at the first meeting of the Panel, para. 68). The European Union argues that this press release describes "the personal views expressed by one MEP (Mr. La Russa), who acted as a rapporteur for the Industry Committee" and that the reference to Gazprom was:

[P]robably because at the time Gazprom had more shareholdings in EU gas undertakings than other third country entities and because, as mentioned in the press release, Russia/Gazprom was the most vocal opponent to the envisaged provision while the proposal was still being debated by the European Parliament. (European Union's second written submission, paras. 259-260).

Russia does not dispute the European Union's characterization of this press release but instead submits that it is for the European Union to offer evidence or argue that "the press release was inaccurate" or that "it had a different objective in enacting the third-country certification measure[]". In this regard, we again recall that Russia bears the burden of making a *prima facie* case of violation under Article II:1 of the GATS. We do not believe that Russia, by referring to a press release quoting a Member of the European Parliament, has provided "objectively reviewable expressions" of the European Union's policy objectives behind the third-country certification measure in the Directive being to discriminate against Russian pipeline transport services or service suppliers. Hence, this evidence does not suffice to make a *prima facie* case of violation under Article II:1 of the GATS.

<sup>1865</sup> As discussed further below, the European Union argues that Sections 123(5) and 123(6) of Hungary's Gas Act are not inconsistent with Article XVII of the GATS.

<sup>1866</sup> See above section 7.2.2.3.2.4.

<sup>1867</sup> Our references to Article 29 of Lithuania's Law on Natural Gas are to be understood as excluding Article 29(4)(3), which we found to fall outside our terms of reference. See above section 7.2.2.3.2.4.

the Directive. The national implementing laws are legally separate and distinct from each other, as well as from the Directive. However, the parties have developed a significant part of their arguments mainly on the basis of Article 11 of the Directive, without clearly distinguishing between the national implementing laws at issue. Therefore, we provide a single, joint analysis of Russia's claim and the European Union's defence for all three national implementing laws at issue, except Sections 123(5) and 123(6) of Hungary's Gas Act, which will be addressed separately, as explained further below in paragraphs XX. We emphasize, however, that Article 11 of the Directive is not a measure at issue under this claim.

### **7.10.2.2 Russia's claim under Article XVII of the GATS**

#### **7.10.2.2.1 Introduction**

7.1116. Russia claims that Article 24 of Croatia's Gas Market Act, Sections 123(5), 123(6) and 128/A of Hungary's Gas Act, and Article 29 of Lithuania's Law on Natural Gas apply only to transmission system owners or TSOs controlled by persons from third countries, and, consequently, provide to third-country pipeline transport services and service suppliers treatment less favourable than that accorded to like domestic pipeline transport services and service suppliers, contrary to Article XVII of the GATS.<sup>1868</sup> The European Union does not contest that 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 Gas provide less favourable treatment to like services and service suppliers of third countries within the meaning of Article XVII of the GATS but argues that any inconsistency with Article XVII is justified under Article XIV(a) of the GATS.<sup>1869</sup> The European Union, however, submits that Sections 123(5) and 123(6) of Hungary's Gas Act are not inconsistent with Article XVII of the GATS but, as explained below, does not raise a defence under Article XIV(a) of the GATS in respect of these provisions.<sup>1870</sup>

#### **7.10.2.2.2 Analysis by the Panel**

7.1117. We note that the European Union concedes that 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 Gas are inconsistent with Article XVII of the GATS but argues that they are justified under Article XIV(a) of the GATS.<sup>1871</sup> However, the European Union argues that Sections 123(5) and 123(6) of Hungary's Gas Act are not inconsistent with Article XVII of the GATS, while not raising any defense in the event we find otherwise.<sup>1872</sup>

7.1118. In light of this particular way the European Union structured its arguments, we separately examine the consistency of 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 Gas with Article XVII of the GATS and the consistency of Sections 123(5) and 123(6) of Hungary's Gas Act with Article XVII of the GATS.

7.1119. In accordance with the legal standard for Article XVII of the GATS, set out in paragraphs 7.234 and 7.235 above, our analysis will focus on whether Russia has demonstrated the following elements: (a) Croatia, Hungary, and Lithuania have assumed national treatment commitments in the relevant sector(s) and mode(s) of supply in their GATS Schedules; (b) the third-country certification measure affects the supply of services in the relevant sector(s) and mode(s); (c) the relevant services and service suppliers are like; and (d) the third-country certification measure fails to accord to services and service suppliers of any other Member treatment no less favourable than that accorded by the Member concerned to its own like services and service suppliers.

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<sup>1868</sup> Russia's first written submission, paras. 426–438.

<sup>1869</sup> European Union's response to Panel question No. 95, para. 233. See also European Union's first written submission, paras. 476 and 550.

<sup>1870</sup> European Union's first written submission, para. 552.

<sup>1871</sup> European Union's first written submission, paras. 476 and 550. See also European Union's response to Panel question No. 95, para. 233.

<sup>1872</sup> European Union's response to Panel question No. 151, para. 18.



### 7.10.2.2.2.1 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 Gas

7.1120. Russia submits that Croatia, Hungary and Lithuania made national treatment commitments in their GATS Schedules with respect to pipeline transport services for mode 3, and that the third-country certification measure affects the supply of these services by foreign suppliers by directly regulating the terms on which those services may be supplied in the European Union, including in Croatia, Hungary and Lithuania.<sup>1873</sup> According to Russia, the relevant services and service suppliers are presumed to be like and 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 Gas fails to accord to services and service suppliers of other Members treatment no less favourable than that accorded to like domestic services and service suppliers.<sup>1874</sup>

7.1121. In response to a question by the Panel asking the European Union to clarify whether it agrees with Russia that the third-country certification measure is inconsistent with Article XVII of the GATS, the European Union replied as follows:

The SoS certification requirement provided for in Article 11 of the Directive does not apply to the certification of TSOs if neither the TSO nor the owner of the transmission system are controlled by a person or persons of a third country or countries. Therefore, the European Union does not contest that the SoS certification requirement provides different and "less favourable treatment" (within the specific meaning of Article XVII GATS) to like service suppliers and services of other Members.<sup>1875</sup>

7.1122. As we have determined above, Croatia, Hungary and Lithuania undertook national treatment commitments in their respective GATS Schedules with respect to sector 11.G, "Pipeline Transport [Services]", for mode 3.<sup>1876</sup> Russia has also indicated that the relevant mode of supply for its GATS claims is mode 3 (commercial presence).<sup>1877</sup> The third-country certification measure in the national implementing laws of Croatia, Hungary and Lithuania concerns the certification of TSOs.<sup>1878</sup>

7.1123. As explained above, we consider that TSOs supply pipeline transport services in the European Union and that natural or juridical persons from non-EU countries can and do supply pipeline transport services through the commercial presence of such TSOs.<sup>1879</sup> Hence, in our view, the measure at issue has "an effect on"<sup>1880</sup> the supply of pipeline transport services within the meaning of Article XVII of the GATS. Thus, we consider that Russia has established the first two elements of the legal standard under Article XVII of the GATS.

7.1124. In determining whether the measure in question does not accord to services and service suppliers of other Members treatment no less favourable than that accorded to like domestic services and service suppliers, we note that only TSOs may supply pipeline transport services in the European Union. Accordingly, any person seeking to supply pipeline transport services in the European Union via mode 3 will need to establish, or acquire ownership or control over, a TSO.

7.1125. 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 Gas provides rules and procedures for the certification of TSOs, where the TSO or the transmission system owner is controlled, or is in the process of being controlled, by a person or persons from a third country or third countries.<sup>1881</sup> Under this measure, the NRA responsible for the certification of a

<sup>1873</sup> Russia's first written submission, para. 418-419.

<sup>1874</sup> Russia's first written submission, paras. 415, 420-421 and 423-441; and response to Panel question No. 56, para. 285.

<sup>1875</sup> European Union's response to Panel question No. 95, para. 233.

<sup>1876</sup> See above para. 7.371.

<sup>1877</sup> Russia's response to Panel question No. 56, para. 285.

<sup>1878</sup> See above section 2.2.7.2.

<sup>1879</sup> See above paras. 7.263 and 7.407.

<sup>1880</sup> Appellate Body Report, *EC – Bananas III*, para. 220.

<sup>1881</sup> Third-country certification must be conducted in two situations: (i) when certification is requested by a transmission system owner or a TSO which is controlled by a person or persons from a third country or third countries; and (ii) when the regulatory authority has acquired knowledge of any circumstances that would

TSO is required to assess whether granting certification will not put at risk the security of energy supply.<sup>1882</sup> The NRA shall refuse certification if it has not been demonstrated to the NRA that granting certification will not put at risk the security of energy supply.<sup>1883</sup> Thus, when third-country certification is requested, a third-country person that controls – or is in the process of acquiring control over – a TSO or a transmission system owner, will be subject to a security of energy supply assessment.

7.1126. 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 Gas applies with respect to the certification of all TSOs controlled by third-country persons, and hence with respect to all third-country pipeline transport service suppliers supplying their services through the commercial presence of TSOs. In contrast, certification of TSOs controlled by domestic EU persons is generally governed by the rules implementing Article 10 of the Directive, which does not require a security of energy supply assessment to be conducted.<sup>1884</sup>

7.1127. We recall that, in the context of the public body measure in the national implementing laws of Croatia, Hungary and Lithuania, we have concluded that domestic suppliers of pipeline transport services and pipeline transport service suppliers of other Members established as TSOs in Croatia, Hungary and Lithuania are like service suppliers within the meaning of Article XVII of the GATS.<sup>1885</sup> Guided by this finding, we consider that domestic and third-country pipeline transport service suppliers are like service suppliers within the meaning of Article XVII of the GATS also in the context of the third-country certification measure in the national implementing laws of Croatia, Hungary and Lithuania.

7.1128. As follows from our analysis conducted above, the requirement of security of energy supply assessment is an additional condition imposed on all third-country pipeline transport service suppliers before they are allowed to supply pipeline transport services through the commercial presence of TSOs. Domestic service suppliers are generally not subject to the same requirement. Therefore, we consider that the measure in question places an additional burden on third-country service suppliers and thus modifies the conditions of competition in favour of domestic service suppliers compared to like service suppliers of other Members.

7.1129. Furthermore, as we have already observed, the European Union does not contest that the requirement of a security of energy supply assessment provides different and less favourable treatment to like services and service suppliers of other Members within the specific meaning of Article XVII GATS.<sup>1886</sup> Therefore, taking into account the European Union's position, we find that the third-country certification measure implemented in Article 24 of Croatia's Gas Market Act,

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result in a person or persons from a third country or third countries acquiring control of the transmission system owner or the TSO. (Croatia's Gas Market Act, (Exhibit RUS-45), Article 24(2); Hungary's Gas Act, (Exhibits EU-155/RUS-47), Section 128/A(1); and Lithuania's Law on Natural Gas, (Exhibit RUS-136rev), Article 29(1) (implementing Directive 2009/73/EC, (Exhibit EU-5), Articles 11(1) and 11(2)).

<sup>1882</sup> Croatia's Gas Market Act, (Exhibit RUS-45), Article 24(4); Hungary's Gas Act, (Exhibits EU-155/RUS-47), Section 128/A(4)(b); and Lithuania's Law on Natural Gas, (Exhibit RUS-136rev), Article 29(4)(2) (implementing Directive 2009/73/EC, (Exhibit EU-5), Article 11(3)).

<sup>1883</sup> Croatia's Gas Market Act, (Exhibit RUS-45), Article 24(4); Hungary's Gas Act, (Exhibits EU-155/RUS-47), Section 128/A(4)(b); and Lithuania's Law on Natural Gas, (Exhibit RUS-136rev), Article 29(4)(2).

<sup>1884</sup> We note that third-country certification is required not only where the TSO is controlled by a third-country person or persons, but also where the transmission system owner is controlled by a third-country person or persons. As explained above in paragraph 2.13, the owner and operator of the transmission system are two separate entities under the so-called ISO model, which is applicable only in EU member States that have chosen to implement this model in addition to the OU model and only in respect of transmission systems that belonged to a VIU on 3 September 2009. Under this particular model, it is therefore possible that a TSO controlled by a domestic person or persons would be subject to third-country certification insofar as the owner of the transmission system is controlled by a third-country person or persons. Indeed, we addressed this situation with respect to the domestic controlled TSO Gaz-System and the third-country controlled transmission system owner Europogaz above in section 7.10.1.2.3. The fact that domestic controlled TSOs are subject to third-country certification in these limited circumstances does, however, not alter our finding above that all TSOs controlled by third-country persons are subject to third-country certification, whereas TSOs controlled by domestic persons, generally, are not.

<sup>1885</sup> See above para. 7.743.

<sup>1886</sup> See above para. 7.1121.

Section 128/A of Hungary's Gas Act and Article 29 of Lithuania's Law on Natural Gas<sup>1887</sup> is inconsistent with Article XVII of the GATS.

#### 7.10.2.2.2 Sections 123(5) and 123(6) of Hungary's Gas Act

7.1130. Russia argues that Sections 123(5) and 123(6) of Hungary's Gas Act are inconsistent with Article XVII of the GATS for the same reasons as Section 128/A of Hungary's Gas Act.<sup>1888</sup> The European Union, on the other hand, submits that Sections 123(5) and 123(6) are not inconsistent with Article XVII of the GATS.<sup>1889</sup> According to the European Union, Section 123(6) does not apply only to the foreign investments described in Section 123(5) of Hungary's Gas Act, but also applies to the transactions described in Section 123(2), which covers both domestic and foreign investments.<sup>1890</sup>

7.1131. In paragraph 7.179, we have found that Sections 123(5) and 123(6) of Hungary's Gas Act constitute a "version" of the third-country certification measure implemented in Hungary. We have concluded that the third-country certification measure implemented in Section 128/A of Hungary's Gas Act, as well as in Article 24 of Croatia's Gas Market Act and Article 29 of Lithuania's Law on Natural Gas, is inconsistent with Article XVII of the GATS.<sup>1891</sup> In our view, being an implemented "version" of the *same* measure, the third-country certification measure contained in Sections 123(5) and 123(6) of Hungary's Gas Act is necessarily inconsistent with Article XVII of the GATS on the basis of the same grounds.

7.1132. We are also of the opinion that it is irrelevant that Section 123(6) of Hungary's Gas Act also applies to transactions described in Section 123(2) of Hungary's Gas Act.<sup>1892</sup> Section 123(6) of Hungary's Gas Act establishes a range of grounds allowing the Office to refuse, or make conditional, its approval for various types of transactions described in Sections 122(1), 123(2) and 123(5) of Hungary's Gas Act.<sup>1893</sup> While it is true that neither Section 122(1) nor Section 123(2) of Hungary's Gas Act distinguishes, on its face, between domestic and third-country persons involved in such transactions, Section 123(5), in contrast, explicitly describes only transactions involving third-country persons. The European Union has not contested that the approval of the transactions described in Section 123(5) may be refused or made conditional on the basis that such transactions pose a potential threat to the security of natural gas supply.<sup>1894</sup>

7.1133. As we have determined in paragraphs 7.170 and 7.173 above, Sections 123(5) and 123(6) result in the application of the requirement of security of energy supply assessment to third-country persons in the process of acquiring control over a TSO. In the same manner as the requirement provided for in Section 128/A of Hungary's Gas Act, this requirement places an additional burden on third-country suppliers, and is thus incompatible with Hungary's national treatment obligation under Article XVII of the GATS. Therefore, and for the reasons laid out above, 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.

<sup>1887</sup> Our finding of inconsistency does not concern Article 29(4)(3) of Lithuania's Law on Natural Gas, which we found to be outside our terms of reference. See above section 7.2.2.3.2.4.

<sup>1888</sup> Russia's first written submission, para. 432.

<sup>1889</sup> European Union's first written submission, para. 552.

<sup>1890</sup> European Union's first written submission, para. 552.

<sup>1891</sup> See above paras. 7.1128-7.1129.

<sup>1892</sup> European Union's first written submission, para. 552.

<sup>1893</sup> Section 122(1) of Hungary's Gas Act sets out the following transactions: "[t]he demerger (division, separation) of any authorized operator under the Civil Code, their merger with another company (merger by the formation of a new company or merger by acquisition), winding up without succession, or reduction of the initial capital or equity capital by at least one-quarter". Section 123(2) of Hungary's Gas Act concerns the acquisition of control of more than 25, 50 or 75 per cent of the voting rights in a natural gas company, and the exercise of the rights associated therewith. Aside from these transactions posing a potential threat to the security of natural gas supply, the grounds that allow the Office to refuse, or make conditional, its approval include the existence of a potential threat to *inter alia* the following interests: public safety; the enforcement of compliance with energy policy objectives; discharge of activities subject to authorization under Hungary's Gas Act or the regulations for determining the price of transmission, storage and distribution services, and universal services, and the regulations for determining the quality of such services. (Hungary's Gas Act, (Exhibits EU-155/RUS-47), Sections 122(1), 123(2), and 123(6)).

<sup>1894</sup> European Union's response to Panel question No. 150, paras. 12-17.

### 7.10.2.2.3 Conclusion

7.1134. In view of the foregoing, we find that the third-country certification measure implemented in Article 24 of Croatia's Gas Market Act, Sections 123(5) and 123(6) and 128/A of Hungary's Gas Act and Article 29 of Lithuania's Law on Natural Gas is inconsistent with Article XVII of the GATS.<sup>1895</sup> We recall that, in response to a question by the Panel, the European Union confirmed that it is not invoking Article XIV(a) of the GATS in the event we find Sections 123(5) and 123(6) to be inconsistent with Article XVII of the GATS.<sup>1896</sup> Thus, we will examine the European Union's defence under Article XIV(a) of the GATS with respect to the third-country certification measure implemented only 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 Gas.

### 7.10.2.3 The European Union's defence under Article XIV(a) of the GATS

#### 7.10.2.3.1 Introduction

7.1135. As explained above, the European Union raises a defence under Article XIV(a) of the GATS in response to Russia's claim under Article XVII of the GATS against the third-country certification measure implemented in the national laws of Croatia, Hungary, and Lithuania, arguing that this measure is necessary to ensure the European Union's security of energy supply and hence to maintain public order.

7.1136. At the outset, we recall that the European Union has raised its defence under Article XIV(a) solely in respect of Russia's claims against 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 Gas, and not in respect of Sections 123(5) and 123(6) of Hungary's Gas Act, which Russia has also challenged under Article XVII of the GATS. While we have made findings of inconsistency with Article XVII of the GATS for the third-country certification measure implemented in Sections 123(5) and 123(6) of Hungary's Gas Act in addition to 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 Gas, our findings on the defense raised by the European Union under Article XIV(a) of the GATS therefore concern only the latter.

7.1137. We further note that, although the national implementing laws of Croatia, Hungary and Lithuania are legally separate and distinct from each other as well as from the Directive, both parties have developed a single line of argumentation for the European Union's defense under Article XIV(a) of the GATS, mainly on the basis of Article 11 of the Directive without clearly distinguishing between the different national implementing laws at issue. As explained in paragraph 7.1115 above, the parties followed a similar approach when addressing the underlying claim by Russia under Article XVII of the GATS and both agree that 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 Gas all implement the substance of the third-country certification measure in the Directive. In light of this, we too provide a single, joint analysis of the European Union's defence for all three national implementing laws.

#### 7.10.2.3.2 Analysis by the Panel

7.1138. In accordance with the legal standard for Article XIV(a) of the GATS, set out in paragraphs 7.228 through 7.231 above, our analysis will focus on whether the European Union has made a *prima facie* case that: (i) the third-country certification measure implemented in the national laws of Croatia, Hungary and Lithuania is provisionally justified under paragraph (a) of Article XIV of the GATS; and (ii) the third-country certification measure implemented in the national laws of Croatia, Hungary and Lithuania satisfies the requirements of the *chapeau* of Article XIV of the GATS.

7.1139. Below, we address these elements in turn.

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<sup>1895</sup> Except Article 29(4)(3) of Lithuania's Law on Natural Gas, which we found to fall outside our terms of reference. See above section 7.2.2.3.2.4.

<sup>1896</sup> European Union's response to Panel question No. 151, para. 18.

### 7.10.2.3.2.1 Provisional justification under Article XIV(a) of the GATS

7.1140. An assessment of whether a challenged measure is provisionally justified under Article XIV(a) of the GATS involves examining whether it is: (1) "designed" to protect public morals or to maintain public order; and (2) "necessary" to protect public morals or to maintain public order.<sup>1897</sup>

7.1141. As explained above, the European Union focuses its defence of the third-country certification measure implemented in the national laws of Croatia, Hungary and Lithuania on the ground that it is necessary to maintain public order. Below, we therefore consider whether the European Union has demonstrated that third-country certification measure is (1) designed to maintain public order and (2) necessary to maintain public order within the meaning of Article XIV(a) of the GATS.

#### 7.10.2.3.2.1.1 Designed to maintain public order

7.1142. When considering whether the third-country certification measure implemented in the national laws of Croatia, Hungary and Lithuania is designed to maintain public order, we begin by assessing, first, whether the stated policy objective of ensuring the European Union's security of energy supply falls within the scope of those meant to "maintain public order" within the meaning of Article XIV(a) of the GATS and, second, whether the third-country certification measure is designed to ensure the European Union's security of energy supply.<sup>1898</sup>

7.1143. With respect to the first of these issues, the European Union follows the standard in footnote 5 to Article XIV(a) of the GATS, arguing that security of energy supply is a "fundamental interest[] of society"<sup>1899</sup> and that foreign control of TSOs<sup>1900</sup> may in some circumstances pose a "genuine and sufficiently serious threat" to this interest.<sup>1901</sup>

7.1144. The Appellate Body has found that the definition of public order "include[s] the standard in footnote 5" and has clarified that panels are not required "to make a separate, explicit determination that the standard of footnote 5 ha[s] been met".<sup>1902</sup> In the dispute before us, both parties have structured their arguments based on the standard in footnote 5. Therefore, while we agree that an explicit examination under this standard may not be necessary in all circumstances, we find it appropriate to follow this structure in our assessment below. Hence, we begin by considering whether the European Union has demonstrated that security of energy supply is a fundamental interest of society and turn, as appropriate, to consider whether it has demonstrated that foreign control of TSOs poses a genuine and sufficiently serious threat to this interest.

<sup>1897</sup> Appellate Body Report, *US – Gambling*, para. 292. See also Appellate Body Report, *Colombia – Textiles*, para. 5.67 concerning the corresponding provision in Article XX(a) of the GATT 1994.

<sup>1898</sup> For a similar approach, see Panel Report, *Colombia – Textiles*, para. 7.331.

<sup>1899</sup> European Union's first written submission, paras. 480-506.

<sup>1900</sup> The European Union generally argues that foreign control of both TSOs and transmission system owners poses a genuine and sufficiently serious threat to its security of energy supply. (See, e.g. European Union's first written submission, paras. 480 and 507-509; and second written submission, paras. 189 and 197-198). In this regard, we recall that our finding of violation under Article XVII of the GATS in respect of the third-country certification measure is based on the less favourable treatment accorded to third-country *pipeline transport services and service suppliers*, in accordance with the scope and subject matter of the GATS. As explained in paragraphs 7.440 through 7.446 and 7.460 through 7.466 above, TSOs supply pipeline transport services in the European Union and natural or juridical persons from third countries can and do supply pipeline transport services through the commercial presence of such TSOs, whereas the owners of transmission systems do not supply pipeline transport services. As was the case for our underlying finding of violation under Article XVII of the GATS, we believe that our assessment of the European Union's defence under Article XIV(a) of the GATS should focus on pipeline transport services and service suppliers, and we therefore do not address foreign control of transmission system owners further. This approach is also confirmed by the fact that certain arguments by the European Union under its defence appear to relate solely to foreign controlled TSOs and not foreign controlled transmission system owners. (See, e.g. European Union's first written submission, paras. 512-513; and response to Panel question No. 209, paras. 205-206).

<sup>1901</sup> European Union's first written submission, paras. 507-526.

<sup>1902</sup> Appellate Body Report, *US – Gambling*, para. 298.

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*Security of energy supply as a fundamental interest of society*

7.1145. The European Union argues that security of energy supply is a fundamental interest of society, pointing to energy being "one of the most basic necessities of modern societies"<sup>1903</sup> and disruptions in supply potentially having "severe social, economic and, ultimately, political consequences".<sup>1904</sup> The European Union points out that the fundamental nature of security of energy supply is reflected in its laws and policies, referring to Article 194 of the Treaty on the Functioning of the European Union (TFEU), to various strategies covered by the Commission's Communication on a European Energy Security Strategy, and to other pieces of EU legislation, including the Directive which forms the underlying basis of the third-country certification measure.<sup>1905</sup>

7.1146. Russia does not dispute that security of energy supply is a fundamental interest of society, but submits that "neither the Directive nor any other EU authority on the record identifies a clear and consistent definition of security of supply".<sup>1906</sup> In Russia's view, this was "deliberate" and meant to "maximize [the European Union's] discretion to define security of supply in the manner most advantageous to its overall objectives, to include reducing reliance on Russian pipeline transport services and natural gas imports".<sup>1907</sup>

7.1147. We note that Russia, at times, appears to direct its criticism at the Directive or other EU legal sources for not containing a definition of the term security of energy supply<sup>1908</sup> and, at other times, appears to be criticizing the European Union more generally for failing to provide a clear definition of security of energy supply when advancing its defence under Article XIV(a) of the GATS.<sup>1909</sup> With respect to the lack of a definition of security of energy supply in the Directive or other EU legal sources, we see no basis for considering that footnote 5 covers only fundamental interests which are defined in the challenged measure or elsewhere in the legislation of the responding party.

7.1148. Turning to the definition of security of energy supply employed by the European Union when advancing its defence, we note that Russia agrees that "the scope of a 'fundamental interest' may vary, at least to some degree, from Member to Member given the difference in values between societies", but submits that this variation in scope is not limitless and that the "term must have some continuity in meaning from Member to Member".<sup>1910</sup> More particularly, Russia submits that:

[A] "fundamental interest" must be considered an interest which lies at the core of a society and which that society constantly strives to achieve and maintain. As such, it will be "specific" and easily identified by other parties.<sup>1911</sup>

7.1149. We agree with Russia that a certain minimum level of clarity is required in order to assess, in a meaningful manner, whether a stated interest can be considered a fundamental interest of society within the meaning of footnote 5. Furthermore, as the responding party bears the burden of making a *prima facie* case when advancing a defence, we also agree that it is for the European Union to provide sufficient clarity concerning the meaning of the concept of security of energy supply.

7.1150. Having said this, we do not believe that the European Union has defined or employed the concept of security of energy supply in a manner that is problematically unclear or inconsistent

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<sup>1903</sup> European Union's first written submission, para. 481.

<sup>1904</sup> European Union's first written submission, para. 485.

<sup>1905</sup> European Union's first written submission, paras. 490-501 (referring to Article 194 of the TFEU; Communication from the Commission to the European Parliament and the Council, European Energy Security Strategy, COM(2014) 330 final, (28 May 2014), (Exhibit RUS-5); Regulation (EU) No. 994/2010, (Exhibit EU-73), Articles 1, 3(1), 5(1), 6, 8, 9(3), and 10; Directive 2009/73/EC, (Exhibit EU-5), Articles 2(4) and 13 and Recitals (1), (6), (8), and (22); and TEN-E Regulation, (Exhibit EU-4), Recital (1)).

<sup>1906</sup> Russia's opening statement at the second meeting of the Panel, para. 153. See also Russia's opening statement at the first meeting of the Panel, para. 59; and second written submission, para. 305.

<sup>1907</sup> Russia's opening statement at the second meeting of the Panel, para. 153.

<sup>1908</sup> Russia's opening statement at the first meeting of the Panel, para. 59.

<sup>1909</sup> Russia's second written submission, para. 305.

<sup>1910</sup> Russia's second written submission, para. 304.

<sup>1911</sup> Russia's second written submission, para. 304.

during these proceedings. More particularly, when explaining this concept, the European Union has pointed to the International Energy Agency defining energy security as "the uninterrupted availability of energy sources at an affordable price"<sup>1912</sup> and the UNECE defining it as:

[T]he availability of usable energy supplies, at the point of final consumption, at economic price levels and in sufficient quantities and timeliness, so that, given due regard to encouraging energy efficiency, the economic and social development of a country is not materially constrained.<sup>1913</sup>

7.1151. The European Union also explains that security of energy supply has a short-term and a long-term dimension: The former focuses on "the ability to respond promptly to sudden changes within the supply-demand balance"<sup>1914</sup> caused by, e.g. "infrastructure breakdown, natural disasters, social unrest, political action or terrorism".<sup>1915</sup> The latter focuses on the need for "adequate investments in the production and distribution of energy and efficient energy markets"<sup>1916</sup> and the need to overcome obstacles related to the "traditional fragmentation of the EU market" for natural gas and the "relatively limited number of foreign sources of supply".<sup>1917</sup>

7.1152. Even if the concept of security of energy supply and the European Union's definition or explanation of it involve some ambiguities, we do not consider this detrimental to the European Union's defence under Article XIV(a) of the GATS. While we do not disagree with Russia that a fundamental interest is one that "lies at the core of a society and which that society constantly strives to achieve and maintain", we are not convinced that such a fundamental interest of society will hereby necessarily be "'specific' and easily identified".<sup>1918</sup>

7.1153. In this regard, we agree with the panel in *US – Gambling*, that "the term 'public morals' denotes standards of right and wrong conduct maintained by or on behalf of a community or nation"<sup>1919</sup> and "the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values."<sup>1920</sup> It was on the basis of this standard that the Appellate Body rejected the argument "that, for the purposes of an analysis under Article XX(a), a panel is required to identify the exact content of the public morals standard at issue."<sup>1921</sup> We believe a similar approach is warranted for the purposes of our analysis of the public order standard under Article XIV(a) of the GATS and footnote 5 hereto. Therefore, while we reiterate our view that a certain minimum level of clarity is required in order to meaningfully assess whether a stated interest can be considered fundamental, we do not believe that the required level of clarity should be overly demanding. In our view, the explanations and definitions of security of energy supply provided by the European Union in these proceedings provide the level of clarity required to assess its defence in a meaningful manner.

7.1154. Having found that the European Union has defined or explained the concept of security of energy supply with sufficient clarity, we recall that the European Union explains the fundamental nature of security of energy supply by pointing to disruptions of energy supply potentially having "severe social, economic and, ultimately, political consequences".<sup>1922</sup> Russia does not appear to

<sup>1912</sup> European Union's first written submission, para. 482 (quoting International Energy Agency, Energy supply security: Emergency Response of IEA Countries 2014 (OECD/IEA 2014), (Exhibit EU-70), p. 13).

<sup>1913</sup> European Union's first written submission, para. 482 (quoting United Nations Economic Commission for Europe, Emerging Global Energy Security Risks, No. 36 (2007), pp. 8-9, (Exhibit EU-71), p. 8).

<sup>1914</sup> European Union's first written submission, para. 483.

<sup>1915</sup> European Union's first written submission, para. 487.

<sup>1916</sup> European Union's first written submission, para. 483.

<sup>1917</sup> European Union's first written submission, paras. 488-489.

<sup>1918</sup> Russia's second written submission, para. 304.

<sup>1919</sup> Panel Report, *US – Gambling*, para. 6.465.

<sup>1920</sup> Panel Report, *US – Gambling*, para. 6.461.

<sup>1921</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.199.

<sup>1922</sup> European Union's first written submission, para. 485. As examples of social consequences, the European Union argues that disruptions may "prevent the heating of households and public spaces" and as a result "disrupt the provision of essential social services, such as healthcare, childcare, education and other welfare activities, as well as many other basic public services, such as transportation, police or the administration of justice" which, in turn, "may endanger the health, life, security and, more generally, the well-being of the European citizens, in particular in the event of prolonged disruptions during the winter months". (Ibid.) As examples of economic consequences, the European Union argues that disruptions "may require the interruption of important industrial processes, cause irreparable damage to certain industrial installations, in particular in case of sudden interruptions, and, more generally, have a serious impact on the overall economy".

dispute these potential effects of disruptions of energy supply, nor their gravity. We further recall that the European Union seeks to demonstrate the importance placed on security of energy supply in the EU society by pointing to it being reflected in its laws and policies.<sup>1923</sup> Again, Russia does not dispute the existence of these laws or policies, nor the fact that the EU society places a great importance on its security of energy supply. In light of this, we consider that the European Union has demonstrated that security of energy supply is a fundamental interest of society within the meaning of footnote 5.

7.1155. Furthermore, we are of the view that Russia's argument that the European Union is deliberately seeking to "maximize its discretion to define security of supply in the manner most advantageous to its overall objectives, to include reducing reliance on Russian pipeline transport services and natural gas imports" does not so much pertain to the issue of whether security of energy supply is a fundamental interest of society but rather to the relationship between the third-country certification measure and this stated objective. We believe that these arguments are more appropriately addressed in other parts of the analysis under Article XIV(a), namely when assessing whether the third-country certification measure is designed and necessary to ensure security of energy supply, as well as in the analysis under the *chapeau* of Article XIV.<sup>1924</sup>

7.1156. Hence, we conclude that security of energy supply is a fundamental interest of society within the meaning of footnote 5 to Article XIV(a) of the GATS, and we proceed to assess whether the European Union has demonstrated that foreign control of TSOs poses a genuine and sufficiently serious threat to this interest.

***Foreign control of TSOs as a genuine and sufficiently serious threat to the European Union's security of energy supply***

7.1157. At the outset, we wish to point out that the standard for determining whether a threat is "genuine and sufficiently serious" has not been explicitly addressed in previous disputes. In light of this, we consider it useful to begin with some general considerations regarding the interpretation of these terms, following the principles of treaty interpretation in Article 31 of the Vienna Convention.

7.1158. Both parties appear to agree that the term "genuine" and the term "sufficiently serious" should be given distinct meanings. More particularly, both parties agree that the term "genuine" speaks to the "degree of likelihood" of a threat materializing<sup>1925</sup> and that the term "sufficiently

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(Ibid.) The European Union then goes on to argue that "[t]hese social and economic effects may in turn lead to unrest and disturbances affecting the maintenance of law and order. (Ibid.) We note that Japan considers security of energy supply a "means or tool to achieve various higher policy objectives ... but not the fundamental interest of society in and of itself". (Japan's third-party statement, para. 8). Russia echoed Japan's position in its second written submission but subsequently abandoned this distinction, indicating that it does not consider it relevant in the context of the European Union's defence of the third-country certification measure under Article XIV(a) of the GATS. (Russia's second written submission, para. 305; and response to Panel question No. 206, para. 256). In our view, the relevant inquiry under Article XIV(a) of the GATS and footnote 5 hereto is whether a stated interest can be considered a fundamental interest in society, regardless of whether it has reached this standing due to its role or relationship with other fundamental interests. We therefore do not believe that a separate inquiry into the relationship between the stated interest and other fundamental interests is called for. Indeed, and as pointed out by the European Union, most interests of society could be characterized as a means to achieve basic social and economic interests and panels in previous disputes have accepted this. (European Union's second written submission, para. 196 (referring to Panel Report, *US – Gambling*, para. 6.469, in which the panel accepted the prevention of criminal activity as a fundamental interest even though this could also be regarded as a means to protect the life, health, security and well-being of citizens)).

<sup>1923</sup> European Union's first written submission, paras. 490-501. More specifically, and in addition to its reference to Article 194 of the TFEU and to the Commission's Communication on a European Energy Security Strategy, the European Union refers to Regulation (EU) No. 994/2010, (Exhibit EU-73), Articles 1, 3(1), 5(1), 6, 8, 9(3), and 10; Directive 2009/73/EC, (Exhibit EU-5), Articles 2(4) and 13 and Recitals (1), (6), (8), and (22); and TEN-E Regulation, (Exhibit EU-4), Recital (1).

<sup>1924</sup> See paras. 7.1203-7.1208, 7.1213-7.1224 and 7.1241-7.1253 below.

<sup>1925</sup> European Union's response to Panel question No. 207, para. 192; and Russia's response to Panel question No. 207(a), para. 261.



serious" speaks to the "potential consequences"<sup>1926</sup> or the "potential gravity of the effects"<sup>1927</sup> of a threat materializing.

7.1159. We too believe it is important to give meaning to the fact that the drafters of the GATS included two separate terms to qualify the type of threat covered by the standard in footnote 5. Hence, we consider that only threats that are both genuine and sufficiently serious are covered by footnote 5, and we consider that the inclusion of both of these terms suggests that they must each be given their own, distinct meaning.

7.1160. We begin by noting that the term "threat" is defined in the *Shorter Oxford English Dictionary* as "an indication of the approach of something unwelcome or undesirable; a person or thing regarded as a likely cause of harm".<sup>1928</sup>

7.1161. With respect to the meaning of a "sufficiently serious" threat, we note that the term "sufficiently" is defined in the *Shorter Oxford English Dictionary* as "in a sufficient manner; adequately, satisfactory, enough"<sup>1929</sup>, whereas the term "serious" is defined as "[i]mportant, grave; having (potentially) important, esp. undesired, consequences; giving cause for concern; of significant degree or amount; worthy of consideration".<sup>1930</sup>

7.1162. We further note that the latter term has been used in other covered agreements as referring to the effects or the impact of a measure or an event occurring. For instance, Article 6.3 of the SCM Agreement lists a number of effects of subsidies that would constitute "serious prejudice to the interests of another Member" and Article 4.1(a) of the Agreement on Safeguards defines "serious injury" as "a significant overall impairment in the position of a domestic industry".

7.1163. When the term "sufficiently serious" is used to qualify a threat, which is, as mentioned above, defined as "an indication of the approach of something unwelcome or undesirable; a person or thing regarded as a likely cause of harm"<sup>1931</sup>, we therefore agree with the parties that it should be understood as referring to the potential consequences or the potential gravity of the effects of a threat materializing. In other words, for a threat to be considered sufficiently serious within the meaning of footnote 5, the potential consequences or effects on the fundamental interest of society must be of a certain magnitude or gravity.

7.1164. As for the meaning of a "genuine" threat, we note that the term "genuine" is not used elsewhere in the covered agreements, but is defined in the *Shorter Oxford English Dictionary* as "[h]aving the character claimed for it; real, true, not counterfeit".<sup>1932</sup> When this term is used to qualify a threat, which is, as mentioned above, defined as "an indication of the approach of something unwelcome or undesirable; a person or thing regarded as a likely cause of harm"<sup>1933</sup>, we therefore agree with the parties that it relates to the degree of likelihood of the threat materializing. This conclusion is furthermore supported by the abovementioned consideration that the term "genuine" should be given a distinct meaning from that of the term "sufficiently serious".

7.1165. Having determined that the examination of whether a threat is genuine relates to the likelihood of it materializing, we note that, while the term "genuine" is not used elsewhere in the covered agreements, other terms have been used to qualify the likelihood of a threat or an event occurring. More particularly, Article XII:2(a) of the GATT 1994 refers to "the imminent threat of ... a serious decline in [] monetary reserves", Article 3.7 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 specifies that for a "threat of

<sup>1926</sup> Russia's response to Panel question No. 207(b), para. 264.

<sup>1927</sup> European Union's response to Panel question No. 207, para. 191.

<sup>1928</sup> *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 3248.

<sup>1929</sup> *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 3097.

<sup>1930</sup> *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2762.

<sup>1931</sup> *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 3248.

<sup>1932</sup> *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1094.

<sup>1933</sup> *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 3248.

material injury" to exist, "[t]he change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent" and "the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur", and Article 4.1(b) of the Agreement on Safeguards defines a "threat of serious injury" as a "serious injury that is clearly imminent".

7.1166. In our view, the fact that footnote 5 uses the term "genuine" rather than terms such as "imminent" or "clearly imminent", and does not provide a definition or specification similar to those listed above, suggests that a lesser degree of likelihood is required under footnote 5.

7.1167. While we agree with Russia that it is not sufficient for a responding party to rely on "mere conjecture" or "speculation"<sup>1934</sup>, we therefore cannot agree with Russia that the standard for determining whether a threat is genuine requires "at a minimum, circumstantial evidence that, unless the measure is adopted or enforced, there is a significant degree of likelihood that the threat in question will materialize".<sup>1935</sup>

7.1168. If the drafters of the GATS had intended to cover only threats where "there is a significant degree of likelihood that the threat in question will materialize" "unless the measure is adopted or enforced", language to this effect should have been included. Indeed, and as mentioned above, such language is included elsewhere in the covered agreements. Its absence in footnote 5, in our view, suggests that the standard under this provision is closer to that suggested by the European Union, namely, whether the occurrence of the threatened event is "a real, true and authentic possibility" rather than "an imaginary or very remote risk invoked in order to escape the obligations imposed by the GATS".<sup>1936</sup> This is confirmed by the abovementioned ordinary meaning of the term "genuine" being "[h]aving the character claimed for it; real, true, not counterfeit". We do not believe that a threat can be considered not to have the character claimed for it, or not to be real or true, simply because it does not have a significant degree of likelihood of materializing.

7.1169. Having set out these considerations regarding the distinct meaning of the terms "genuine" and "sufficiently serious", respectively, we note the European Union's argument that these terms "provide context for the interpretation of each other" and that "the degree of likelihood necessary to regard a threat as 'genuine' must take into account the seriousness of the threat."<sup>1937</sup> We agree that it may not always be appropriate to conduct the analyses of whether a threat is genuine and sufficiently serious, respectively, in complete isolation from one another. Depending on the particularities of the situation, a more holistic approach may be warranted and in these circumstances the seriousness of a threat may impact the assessment of whether it is genuine, and *vice versa*.

7.1170. Turning to whether the European Union has demonstrated the existence of a genuine and sufficiently serious threat to its security of energy supply, we note that the European Union argues that foreign control of TSOs poses a genuine and sufficiently serious threat to the European Union's security of energy supply due to "the interaction of a number of circumstances".<sup>1938</sup>

7.1171. More particularly, the European Union has pointed to the following "circumstances": (a) that foreign governments, in some circumstances, have "important economic and/or political interests which conflict with the EU's own interest in ensuring SoS within the European Union" and, thus, incentives to undermine the European Union's security of energy supply<sup>1939</sup>; (b) that foreign controlled TSOs can effectively undermine the European Union's security of energy supply either by failing to comply with legal obligations imposed under EU law or by acting in a manner that is not in their own commercial interest<sup>1940</sup>; and (c) that foreign governments have the means to require or induce foreign controlled TSOs to undermine the European Union's security of energy

<sup>1934</sup> Russia's response to Panel question No. 207(a), para. 261.

<sup>1935</sup> Russia's response to Panel question No. 207(a), para. 261.

<sup>1936</sup> European Union's response to Panel question No. 207, para. 190.

<sup>1937</sup> European Union's response to Panel question No. 207, para. 192.

<sup>1938</sup> European Union's response to Panel question No. 209, para. 203.

<sup>1939</sup> European Union's first written submission, para. 511. See also European Union's second written submission, para. 197; and response to Panel question No. 209, paras. 213-219.

<sup>1940</sup> European Union's first written submission, paras. 512-513. See also European Union's second written submission, para. 197; and response to Panel question No. 209, paras. 205-206.

supply.<sup>1941</sup> The European Union also argues that the threat of foreign control over TSOs is "compounded"<sup>1942</sup> or "may be further aggravated"<sup>1943</sup> by two other circumstances: (d) that it may be more difficult for the EU authorities to "detect and investigate" violations of obligations under EU law in relation to foreign controlled TSOs<sup>1944</sup>; and (e) that it may be more difficult for EU authorities to effectively enforce sanctions in response to violations of obligations under EU law in relation to foreign controlled TSOs.<sup>1945</sup>

7.1172. We understand from the European Union's responses to questions by the Panel that the above-mentioned circumstances primarily relate to the issue of whether foreign control of TSOs poses a genuine risk to the European Union's security of energy supply.<sup>1946</sup> We also understand the European Union to argue that the threat to its security of energy supply will materialize when circumstances (a), (b), and (c) are all present simultaneously.<sup>1947</sup> In other words, the European Union's rationale appears to be that if a foreign government has an incentive to undermine the European Union's security of energy supply as well as the means to require or induce foreign controlled TSOs to do so, there is a genuine threat within the meaning of footnote 5. The European Union, on the other hand, explains that circumstances (d) and (e) are "aggravating factors, rather than indispensable elements for the existence of the threat".<sup>1948</sup>

7.1173. In light of this, we find it useful to begin by considering the validity of each of the three "indispensable" circumstances, before turning to address the degree of likelihood of these circumstances – compounded by the "aggravating factors" – simultaneously occurring, and in particular whether this degree of likelihood renders the threat of foreign control over TSOs a genuine one, within the meaning of footnote 5.

7.1174. With respect to the first "circumstance", that foreign governments may have incentives to undermine the European Union's security of energy supply, the European Union has pointed to a number of more specific situations where this would, in the European Union's view, be the case: (i) where a foreign government "may be interested in maximizing its exports of gas to the European Union at the expense of any other domestic or foreign sources of supply, contrary to the EU's interest in diversifying its sources of supply and promoting competition"; (ii) where a foreign government may be interested in ensuring its own security of energy supply at the expense of the European Union's, in particular in case of "parallel shortage"; (iii) where a foreign government is seeking to "gain leverage vis-à-vis the European Union or the EU Member States in commercial or political negotiations"; or (iv) where a foreign government seeks to "punish behaviour by the European Union, by a certain EU Member State or by a certain operator which that third-country government regards as a threat to its political interests".<sup>1949</sup> The European Union has furthermore pointed to historical examples, namely the 1973 oil embargo by the Organization of Arab Petroleum Exporting Countries and the interruption of Russian natural gas supplies to Ukraine in 2006 and 2009, as illustrations of "how a country's economic or political interests may enter into conflict with another country's interest in ensuring its SoS and lead the former country to take measures that have the effect of undermining the latter's SoS."<sup>1950</sup> Russia does not appear to dispute that foreign governments may have conflicting interests that would give them cause to seek to undermine the European Union's security of energy supply. In fact, Russia states that:

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<sup>1941</sup> European Union's first written submission, paras. 514-519. See also European Union's second written submission, para. 197; and response to Panel question No. 209, paras. 207-210.

<sup>1942</sup> European Union's first written submission, para. 520; and second written submission, para. 198.

<sup>1943</sup> European Union's response to Panel question No. 209, para. 211.

<sup>1944</sup> European Union's first written submission, paras. 521-524. See also European Union's second written submission, para. 198; and response to Panel question No. 210, paras. 223-225.

<sup>1945</sup> European Union's first written submission, paras. 525-526. See also European Union's second written submission, para. 198; and response to Panel question No. 210, paras. 226-230.

<sup>1946</sup> European Union's response to Panel question No. 207, para. 193.

<sup>1947</sup> European Union's response to Panel question No. 207, para. 193.

<sup>1948</sup> European Union's response to Panel question No. 210, para. 222.

<sup>1949</sup> European Union's first written submission, para. 511.

<sup>1950</sup> European Union's response to Panel question No. 212, para. 240. See also European Union's second written submission, paras. 204-206.

The concept of foreign governments acting in the best interest of their citizens is a bedrock principle of how governments function; it cannot and should not be considered a threat to the EU's security of supply.<sup>1951</sup>

7.1175. We agree with both parties that any government will act in accordance with its national interests and that this is indeed "a bedrock principle of how governments function". While we wish to emphasize that we are not suggesting that the right of foreign governments to "act[] in the best interest of their citizens", in and of itself, should be considered a threat to the European Union's security of energy supply, we agree with the European Union that it is not mere conjecture or speculation for it to suggest that a foreign government may have incentives to undermine the European Union's security of energy supply when their interests conflict, including in the specific situations listed by the European Union.

7.1176. With respect to the second "circumstance", that foreign controlled TSOs can effectively undermine the European Union's security of energy supply, the European Union argues that TSOs "play a critical role" in ensuring the European Union's security of energy supply and that foreign controlled TSOs can undermine it either by failing to comply with the obligations imposed under EU law or by failing to act in accordance with "their own commercial interests, contrary to the reasonable expectation on which the market-based mechanisms provided for in the Third Energy Package are premised."<sup>1952</sup>

7.1177. The European Union points to the following more specific ways in which foreign controlled TSOs can undermine its security of energy supply by failing to comply with obligations imposed under EU law: (i) discontinuing the transmission of natural gas in extreme periods of cold or neglecting network maintenance for extended periods contrary to Articles 2(4) and 13(a) of the Directive; (ii) failing to provide third-party access on a non-discriminatory basis and favouring affiliated producers or suppliers contrary to Article 32 of the Directive; (iii) failing to plan investments or not implementing mandatory network investments and thereby preventing competing sources of natural gas from reaching the EU market contrary to Articles 14(5)(b) and 14(5)(d), 17(1)(d) and 17(2)(f), and 22(2) and 22(7) of the Directive; (iv) disclosing confidential information to foreign governments contrary to Article 16 of the Directive, thereby providing them with "undue advantages in contractual negotiations"; and (v) refusing non-discriminatory access to necessary information for network users, preventing the optimal use of available infrastructure and thereby "reducing the quantity of available gas in regions with scarcity or ensuring economic advantages for certain producers or suppliers" contrary to Article 16(3) of the Directive and "a number of detailed obligations on transparency in Regulation (EC) No 715/2009".<sup>1953</sup>

7.1178. Furthermore, the European Union points to the following more specific ways in which foreign controlled TSOs can undermine its security of energy supply by failing to act in accordance with their own commercial interests: (i) not implementing "economically rational" network investments that would allow competing sources of natural gas to reach the EU market; (ii) scheduling maintenance works in periods of high demand; and (iii) underinvesting in the networks, increasing the risks of technical failure, accidents and interruptions.<sup>1954</sup>

7.1179. We note that Russia does not dispute the role of TSOs for the European Union's security of energy supply, nor the existence of obligations imposed on TSOs under EU law. Rather, Russia appears to argue that there is no threat to the European Union's security of energy supply stemming from foreign controlled TSOs engaging in the actions listed by the European Union exactly because these are "already prohibited" under EU law.<sup>1955</sup>

7.1180. We have difficulties understanding the relevance of this argument. As pointed out by the European Union, its position is that foreign controlled TSOs can effectively undermine the European Union's security of energy supply by *not complying* with the obligations imposed on them under EU law – or by failing to act in accordance with their own commercial interests. The existence of obligations under EU law that prohibit the types of actions referred to by the European Union therefore does not appear to invalidate the European Union's position. Russia also argues

<sup>1951</sup> Russia's second written submission, para. 307.

<sup>1952</sup> European Union's response to Panel question No. 209, paras. 205-206.

<sup>1953</sup> European Union's first written submission, para. 512.

<sup>1954</sup> European Union's first written submission, para. 512.

<sup>1955</sup> Russia's second written submission, para. 308.

that the actions by TSOs referred to by the European Union are "entirely hypothetical".<sup>1956</sup> In this regard, we recall that we are, at this point, only addressing the validity of the European Union's second "circumstance", that foreign controlled TSOs *can* effectively undermine the European Union's security of energy supply by not complying with the obligations imposed under EU law or by failing to act in accordance with their own commercial interests. We address Russia's arguments concerning whether it is "entirely hypothetical" that foreign controlled TSOs will actually do so, when considering the degree of likelihood of all three "circumstances" occurring simultaneously.

7.1181. Given that TSOs are responsible for operating the transmission systems through which natural gas is supplied, granting access to such systems, and investing in them, we agree with the European Union that it is a reasonable inference, rather than mere conjecture or speculation, to suggest that foreign controlled TSOs can effectively undermine the European Union's security of energy supply.

7.1182. With respect to the third "circumstance", that foreign governments have the means to require or induce foreign controlled TSOs to undermine the European Union's security of energy supply, the European Union points to two scenarios:

7.1183. First, the European Union argues that where the foreign government itself controls a TSO, the foreign government can require or induce it to undermine the European Union's security of energy supply "by exercising its ownership rights and/or other rights which give it control over the management of the TSO".<sup>1957</sup>

7.1184. Second, the European Union argues that a foreign government can require or induce TSOs controlled by foreign private persons to undermine the European Union's security of energy supply by imposing legal obligations "that make it impossible or more difficult for them to comply with the obligations imposed under EU law with a view to ensuring SoS"<sup>1958</sup> or by "offering to grant, or threatening to withdraw, certain benefits in respect of their activities in their home third country" where the foreign private persons "conduct similar or related economic activities in their country of origin".<sup>1959</sup> As an example, the European Union has pointed to Decree of the President of the Russian Federation No. 1285 of 11 September 2012 on Measures to protect the interests of the Russian Federation when Russian legal entities engage in foreign economic activity.<sup>1960</sup>

7.1185. Russia disputes that foreign governments have the means to require or induce foreign controlled TSOs to undermine the European Union's security of energy supply, but does not elaborate on this position.<sup>1961</sup>

7.1186. In our view, it would indeed appear that a foreign government can require or induce TSOs to undermine the European Union's security of energy supply when that foreign government itself controls the TSOs.

7.1187. With respect to TSOs that are controlled by foreign private persons, we agree with the European Union that such foreign private persons are subject to legal obligations imposed under their originating jurisdiction and could be subject to inducement in the form of offers to grant or threats to withdraw benefits. Where foreign private persons are subject to legal obligations or inducements by foreign governments, which conflict with obligations imposed under EU law or with its commercial interests in the European Union, the result will ultimately depend on that foreign private person and the weight or importance of its interests in its country of origin and in the European Union, respectively. While we see no reason to assume that foreign controlled TSOs will always comply with the legal obligations or inducements imposed by foreign governments, rather than the legal obligations under EU law or their own commercial interests in the European Union, it

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<sup>1956</sup> Russia's second written submission, para. 308.

<sup>1957</sup> European Union's first written submission, para. 515.

<sup>1958</sup> European Union's first written submission, para. 517.

<sup>1959</sup> European Union's first written submission, para. 518.

<sup>1960</sup> European Union's second written submission, fn 255; and response to Panel question No. 209, para. 209 (referring to Resolution of the Government of the Russian Federation No. 1017 of 5 October 2012 on measures implementing Decree of the President of the Russian Federation No. 1285 of 11 September 2012, (Exhibit EU-131)).

<sup>1961</sup> Russia's opening statement at the second meeting of the Panel, para. 158.

does not appear to be mere conjecture or speculation to suggest that foreign controlled TSOs may comply with the legal obligations or inducements imposed by foreign governments, at least in some situations.

7.1188. Having found that the three "indispensable" circumstances referred to by the European Union are not, in and of themselves, mere conjecture or speculation but rather reasonable inferences, we turn to consider whether the degree of likelihood of these three circumstances – compounded by the two additional, "aggravating" circumstances pointed to by the European Union – simultaneously occurring, and in particular whether this degree of likelihood renders the threat of foreign control over TSOs a genuine one, within the meaning of footnote 5.

7.1189. In this regard, we note Russia's argument that the threat of foreign governments undermining the European Union's security of energy supply through foreign controlled TSOs is "entirely hypothetical". More specially, Russia submits that this has "not occurred to date, and will not occur in the future".<sup>1962</sup> The European Union does not dispute that the alleged threat posed by foreign control over TSOs has not yet materialized, but instead faults Russia for suggesting that "only evidence of actual disruptions of supply could be relevant".<sup>1963</sup>

7.1190. We agree with the European Union that evidence of a threat already having materialized is not a prerequisite for demonstrating that this threat is genuine, i.e. has the character of a threat and is real and true. As acknowledged by Russia itself, "a threat, by its very nature, is something that has not yet occurred or materialized".<sup>1964</sup>

7.1191. At the same time, we recall that the alleged threat cannot be entirely hypothetical in nature and that mere conjecture or speculation does not suffice. In our view, however, the European Union does not merely engage in conjecture or speculation. Rather, we recall that it has pointed to a number of actual situations where a foreign government will have incentives to undermine the European Union's security of energy supply and will have the means to do so either by controlling a TSO itself or by being in a position to require or induce foreign private persons that, in turn, control a TSO to do so.

7.1192. While we consider the "aggravating" circumstances pointed to by the European Union, namely the fact that it may be more difficult to investigate, detect and enforce legal obligations under EU law in respect of foreign controlled TSOs, of less importance, we agree with the European Union that these are reasonably inferred from the fact that the EU authorities' investigative powers are limited to the EU territory<sup>1965</sup> and the fact that sanctions typically take the form of fines, which may be less effective where a person has limited assets within the EU territory.<sup>1966</sup>

7.1193. We also agree that these obstacles to the investigation, detection, and enforcement of EU legal obligations in respect of foreign controlled TSOs may serve to aggravate the likelihood of foreign governments seeking to induce or require foreign controlled TSOs to undermine the European Union's security of energy supply.

7.1194. Bearing this in mind, we believe that the European Union has made a *prima facie* case that there is a real and true possibility, rather than a merely hypothetical one, of foreign governments requiring or inducing foreign controlled TSOs to undermine the European Union's security of energy supply. Hence, the European Union has, in our view, demonstrated that foreign control over TSOs poses a genuine risk to its security of energy supply.

7.1195. As we have found that foreign control of TSOs poses a genuine threat to the European Union's security of energy supply, we turn to the issue of whether this threat can also be considered a sufficiently serious one. In this regard, we recall our finding that this issue relates to the potential consequences or the potential gravity of the effects of a threat materializing. In other words, for the threat of foreign control of TSOs to be considered sufficiently serious within the

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<sup>1962</sup> Russia's second written submission, para. 308.

<sup>1963</sup> European Union's second written submission, para. 201.

<sup>1964</sup> Russia's response to Panel question No. 207(a), para. 260.

<sup>1965</sup> European Union's first written submission, paras. 521-524; and response to Panel question No. 210, paras. 223-225.

<sup>1966</sup> European Union's first written submission, paras. 525-526; and response to Panel question No. 210, paras. 226-230.

meaning of footnote 5, the potential consequences or effects on the European Union's security of energy supply must be of a certain magnitude or gravity.

7.1196. The European Union argues that foreign control of TSOs poses a sufficiently serious threat to the European Union's security of energy supply, pointing to the arguments made in the context of claiming that security of energy supply is a fundamental interest of society.<sup>1967</sup>

7.1197. We recall that the European Union has explained that disruptions of supply may have "severe social, economic and, ultimately, political consequences".<sup>1968</sup> As examples of social consequences, the European Union has explained that disruptions may "prevent the heating of households and public spaces" and as a result "disrupt the provision of essential social services, such as healthcare, childcare, education and other welfare activities as well as many other basic public services, such as transportation, police or the administration of justice" which, in turn, "may endanger the health, life, security and, more generally, the well-being of the European citizens, in particular in the event of prolonged disruptions during the winter months".<sup>1969</sup> As examples of economic consequences, the European Union argues that disruptions "may require the interruption of important industrial processes, cause irreparable damage to certain industrial installations, in particular in case of sudden interruptions, and, more generally, have a serious impact on the overall economy".<sup>1970</sup> The European Union then goes on to argue that "[t]hese social and economic effects may in turn lead to unrest and disturbances affecting the maintenance of law and order".<sup>1971</sup>

7.1198. Russia does not dispute the severity of the effects disruptions of supply may have on society and we too consider this relevant. In this regard, we also take into account the fact that natural gas, according to the European Union, "plays an essential and ever-growing role in the energy balance of many countries, including the European Union, making gas security a key element in energy security".<sup>1972</sup> Presumably, disruptions in the supply of natural gas will therefore lead to similar disruptions in the overall energy balance.

7.1199. We further note the European Union's explanation of the "specific characteristics of the gas sector", namely that "[n]atural gas is far less fungible than oil, particularly with regard to transporting the fuel to end users" and that "downstream gas transport is always performed by fixed infrastructure".<sup>1973</sup> This, in turn, means that "[i]f any part of a major gas transmission pipeline is destroyed, supply downstream is typically stopped until the damage can be repaired or the pipeline replaced; alternative arrangements by road are not an option."<sup>1974</sup> Since natural gas is transported by TSOs through infrastructure, which is fixed and, at any given time, of finite quantity, it can reasonably be inferred that there will be a significant impact on the supply of natural gas, and hence energy, if a foreign government requires or induces even a single or a few TSOs to violate their obligations under EU law or to act contrary to their commercial interests.

7.1200. Although Russia, as explained, does not dispute the severity of the effects disruptions of energy supply may have on society, it argues that "the potential consequences of foreign control of TSOs are mitigated by the existing regulatory framework in the European Union."<sup>1975</sup> This appears to be a reiteration of the position that the legal obligations imposed on TSOs under EU law entail that foreign control of TSOs does not constitute a threat against the European Union's security of energy supply.

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<sup>1967</sup> European Union's response to Panel question No. 207, para. 194 (referring to European Union's first written submission, para. 485).

<sup>1968</sup> European Union's first written submission, para. 485.

<sup>1969</sup> European Union's first written submission, para. 485.

<sup>1970</sup> European Union's first written submission, para. 485.

<sup>1971</sup> European Union's first written submission, para. 485.

<sup>1972</sup> European Union's first written submission, para. 484. More particularly, the European Union submits that "[t]he share of gas in the total primary energy supply (TPES) of the European Union has increased from 18 % in 1990 to 23 % in 2013" and that "the share of gas in the power generation mix rose from 8.6 % in 1990 to 16.6 % in 2013, with around 48 % of incremental power generation coming from natural gas". (Ibid.)

<sup>1973</sup> European Union's first written submission, para. 486 (quoting International Energy Agency, Energy supply security: Emergency Response of IEA Countries 2014 (OECD/IEA 2014), (Exhibit EU-70), pp. 53-54).

<sup>1974</sup> European Union's first written submission, para. 486 (quoting International Energy Agency, Energy supply security: Emergency Response of IEA Countries 2014 (OECD/IEA 2014), (Exhibit EU-70), pp. 53-54).

<sup>1975</sup> Russia's response to Panel question No. 207(c), para. 270.

7.1201. We have addressed this argument already in the context of considering whether foreign control of TSOs constitutes a genuine threat to the European Union's security of energy supply. We reiterate the position that the existence of obligations on TSOs under EU law does not mitigate the gravity of the effects on the European Union's security of energy supply caused by foreign governments requiring or inducing foreign controlled TSOs to violate the obligations imposed on them under EU law – or to fail to act in accordance with their own commercial interests.

7.1202. We therefore conclude that foreign control of TSOs poses a genuine and sufficiently serious threat to a fundamental interest of the EU society, namely its security of energy supply, and proceed to assess whether the European Union has demonstrated that the third-country certification measure is designed to maintain public order by being designed to address this threat against the European Union's security of energy supply.

***Whether the third-country certification measure is designed to ensure the European Union's security of energy supply***

7.1203. When considering whether the European Union has demonstrated that the third-country certification measure implemented in the national laws of Croatia, Hungary and Lithuania is designed to address the threat against the European Union's security of energy supply posed by foreign control over TSOs, we recall that the Appellate Body has found, in the context of Article XX(a) of the GATT 1994, that the analysis of a challenged measure's design is only a threshold examination, which is not "a particularly demanding step".<sup>1976</sup> We consider these findings relevant for our assessment under Article XIV(a) of the GATS as well.<sup>1977</sup>

7.1204. We therefore follow the approach set out by the Appellate Body and focus our assessment on whether the European Union has demonstrated that the third-country certification measure is not "incapable" of addressing the threats posed by foreign control over TSOs to the European Union's security of energy supply, and hence maintaining public order within the meaning of Article XIV(a) of the GATS.<sup>1978</sup>

7.1205. In this regard, we note the European Union's argument that:

[B]y its own express terms, the SoS requirement included in Article 11 of the Gas Directive is specifically aimed at ensuring the security of gas supply in the European Union by addressing the threats to SoS posed by foreign controlled TSOs.<sup>1979</sup>

7.1206. The European Union furthermore refers to its arguments on the contribution of the third-country certification measure to the objective of ensuring security of energy supply, made in the context of arguing that this measure is necessary to maintain public order.<sup>1980</sup>

7.1207. While the assessment of a measure's contribution in this context is a more demanding one than the assessment of whether the measure is designed to maintain public order, we see no problem in assessing the latter on the basis of argumentation and evidence provided in the context of the former.<sup>1981</sup> We recall the European Union's explanation of the design, structure and

<sup>1976</sup> Appellate Body Report, *Colombia – Textiles*, paras. 5.68 and 5.70.

<sup>1977</sup> In the context of Article XIV(c) of the GATS, the Appellate Body has similarly considered the assessment of the design of a challenged measure an "initial examination" and the assessment of a challenged measure's necessity a "more in-depth, holistic analysis". (Appellate Body Report, *Argentina – Financial Services*, paras. 6.203-6.204).

<sup>1978</sup> Appellate Body Reports, *Argentina – Financial Services*, para. 6.203; and *Colombia – Textiles*, para. 5.68.

<sup>1979</sup> European Union's response to Panel question No. 213, para. 243.

<sup>1980</sup> European Union's response to Panel question No. 213, para. 246 (referring to European Union's first written submission, paras. 507-529; and second written submission, paras. 197-204).

<sup>1981</sup> See Appellate Body Report, *Argentina – Financial Services*, para. 6.205, in which the Appellate Body referred to these two elements as "conceptually distinct, yet related, aspects of the overall inquiry to be undertaken" in the context of Article XIV(c) of the GATS and stated that:

We do not see the content of these two elements of the analysis as entirely separate. Nor do we see the structure of each analysis as one that must follow a rigid path. Rather, the analyses of these two elements may overlap in the sense that some considerations may be relevant to both elements of the Article XIV(c) defence. The way in which a panel organizes its examination of these elements in scrutinizing a defence in any given dispute will be influenced by the measures



expected operation of the third-country certification measure, namely that it involves a "screening mechanism which allows the competent authorities to detect and assess in advance the potential risks to SoS" and, where warranted, allows the authorities to "deny access to the transmission market" to TSOs that would pose a risk, "thereby preventing the risks to SoS from materialising".<sup>1982</sup> We further note that Russia does not dispute that the third-country certification measure "may, in the abstract, not be incapable of contributing to ensuring SoS"<sup>1983</sup> and we too believe that the above mentioned explanation of this measure's design, structure and expected operation demonstrates that it is not incapable of ensuring the European Union's security of energy supply by addressing the threat posed by foreign control over TSOs.

7.1208. As we have found that the third-country certification measure is not incapable of ensuring the European Union's security of energy supply by addressing the threat posed by foreign control over TSOs, we conclude that it is designed to maintain public order within the meaning of Article XIV(a) of the GATS. We therefore proceed to assess whether the European Union has demonstrated that this measure is necessary to maintain public order within the meaning of Article XIV(a) of the GATS by being necessary to address the threat to the European Union's security of energy supply posed by foreign control over TSOs.

#### 7.10.2.3.2.1.2 Necessary to maintain public order

7.1209. The Appellate Body has clarified that the assessment of whether a challenged measure is necessary to maintain public order within the meaning of Article XIV(a) of the GATS involves a process of weighing and balancing a series of factors including: (i) "the 'relative importance' of the interests or values furthered by the challenged measure"<sup>1984</sup>; (ii) "the contribution of the measure to the realization of the ends pursued by it"<sup>1985</sup>; and (iii) "the restrictive impact of the measure on international commerce".<sup>1986</sup> Furthermore, panels must then compare the challenged measure with reasonably available alternative measures, which achieve the same level of protection while being less trade restrictive.<sup>1987</sup>

7.1210. Below, we consider each of the three factors listed above as well as the alternative measures proposed by Russia, and then turn to provide an overall assessment, weighing and balancing all of these elements.

#### *Relative importance of the objective of security of energy supply*

7.1211. With respect to the relative importance of the objective of security of energy supply, we note that the Appellate Body has clarified, in the context of Article XX(d) of the GATT 1994, that:

[A]ssessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important those common interests or values are, the easier it would be to accept as "necessary" a measure designed as an enforcement instrument.<sup>1988</sup>

7.1212. The European Union refers to its arguments concerning security of energy supply being a fundamental interest of society within the meaning of footnote 5 to Article XIV(a) of the GATS<sup>1989</sup>, whereas Russia does not address this factor. We recall our finding in paragraphs 7.1145 through 7.1156 above that security of energy supply is a fundamental interest of society. In our view, this

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and laws or regulations at issue, as well as by the way in which the parties present their respective arguments. (Ibid.)

<sup>1982</sup> European Union's first written submission, para. 529.

<sup>1983</sup> Russia's comments on the European Union's response to Panel question No. 213, para. 211.

<sup>1984</sup> Appellate Body Report, *US – Gambling*, para. 306 (quoting Appellate Body Report, *Korea – Various Measures on Beef*, para. 162).

<sup>1985</sup> Appellate Body Report, *US – Gambling*, para. 306.

<sup>1986</sup> Appellate Body Report, *US – Gambling*, para. 306.

<sup>1987</sup> Appellate Body Report, *US – Gambling*, paras. 307-308.

<sup>1988</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 162. See also Panel Reports, *EC – Seal Products*, para. 7.632; and Appellate Body Reports, *EC – Seal Products*, para. 5.203.

<sup>1989</sup> European Union's first written submission, para. 527.

finding suggests that this objective is of fundamental importance to the European Union also for the purposes of our necessity analysis.

### *Contribution to the objective of security of energy supply*

7.1213. Turning to the third-country certification measure's contribution to the objective of security of energy supply, we note the European Union's argument that this measure forms "part of a comprehensive policy consisting of a multiplicity of interacting measures" and that it is therefore difficult to "isolate and quantify its effects".<sup>1990</sup> For this reason the European Union suggests that a "qualitative analysis" would be best suited to assess the contribution of the third-country certification measure.<sup>1991</sup>

7.1214. The European Union argues that the "design and expected operation" of the measure is "manifestly apt to make a material contribution" to the objective of ensuring security of energy supply.<sup>1992</sup> More particularly, the European Union points out that the third-country certification measure sets out a "screening mechanism which allows the competent authorities to detect and assess in advance the potential risks" and, where warranted, allows the authorities to "deny access to the transmission market" to TSOs that would pose a risk, "thereby preventing the risks to SoS from materialising".<sup>1993</sup>

7.1215. Russia does not appear to question the underlying design of the third-country certification measure, and we agree with the European Union that a measure which explicitly requires the relevant authorities to assess potential threats to the European Union's security of energy supply and to deny access to the market unless it has been determined that no such threat exists, appears to be "manifestly apt to make a material contribution" to the objective of security of energy supply.

7.1216. At the same time, we note that Russia argues that the third-country certification "do[es] not actually ensure that TSOs take action to ensure the security of supply of energy beyond those they are already required to take."<sup>1994</sup> This appears to be a reiteration of its position that the third-country certification measure is redundant since other EU laws and regulations already impose obligations on TSOs that prohibit actions, which could threaten the European Union's security of energy supply.<sup>1995</sup>

7.1217. We are not convinced that the mere existence of other measures addressing the same or similar threats to the European Union's security of energy supply entails that the third-country certification measure is redundant or does not contribute to this objective. As explained by the Appellate Body, concerns or challenges may arise that require Members to implement "a comprehensive policy comprising a multiplicity of interacting measures".<sup>1996</sup>

7.1218. The European Union explicitly refers to the third-country certification measure forming part of such a comprehensive policy.<sup>1997</sup> As pointed out by the European Union, the third-country certification measure has an *ex ante* effect, namely, to detect and address in advance the risk that TSOs controlled by foreign persons may *not comply* with the various substantive requirements imposed on TSOs under EU law.<sup>1998</sup>

7.1219. We therefore agree with the European Union that the third-country certification measure interacts with other provisions, such as those banning the types of behaviour referred to by the European Union, by allowing the relevant authorities to detect TSOs which may not to comply with such provisions due to foreign control, and prevent such TSOs from gaining access to the market.

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<sup>1990</sup> European Union's first written submission, para. 528 (referring to Appellate Body Reports, *Brazil – Retreaded Tyres*, paras. 151; and *EC – Seal Products*, para. 5.212).

<sup>1991</sup> European Union's first written submission, para. 528.

<sup>1992</sup> European Union's first written submission, para. 529 (referring to Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 150; and *EC – Seal Products*, para. 5.213).

<sup>1993</sup> European Union's first written submission, para. 529.

<sup>1994</sup> Russia's second written submission, para. 315.

<sup>1995</sup> Russia's second written submission, paras. 315-316.

<sup>1996</sup> Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 151; *China – Publications and Audiovisual Products*, fn 480; and *EC – Seal Products*, para. 5.212.

<sup>1997</sup> European Union's first written submission, para. 528.

<sup>1998</sup> European Union's second written submission, para. 209.

7.1220. Russia also criticizes the third-country certification measure for not being designed to address all threats posed to the European Union's security of energy supply. As examples, Russia submits that the third-country certification measure would not have prevented "the interruptions in the flow of Russian gas through Ukraine in 2006 and 2009", which the European Union itself has relied on "as 'a compelling illustration of how foreign governments may find in their own interest to disrupt gas supplies to another country in order to advance their foreign policy objectives'.<sup>1999</sup>

7.1221. In this regard, we note that the European Union does not dispute that the interruptions in gas supplies in 2006 and 2009 would not have been prevented by the third-country certification measure. Generally, the European Union does not suggest that the third-country certification measure is necessary to address all potential threats that may be posed to its security of energy supply, but rather that it is necessary to address the specific threat pointed to, namely that posed by foreign control over TSOs. We agree that a measure need not be necessary to prevent all potential threats to a fundamental interest of society in order to be justified under Article XIV(a) of the GATS. In particular, we recall the Appellate Body's finding in *EC – Seal Products* that a responding Member is not required to address the same or similar public moral concerns in the same way.<sup>2000</sup> We also recall the European Union's position that the third-country certification measure forms "part of a comprehensive policy consisting of a multiplicity of interacting measures". This further supports the conclusion that the third-country certification measure is not required to address all threats to the European Union's security of energy supply in order to be justified under Article XIV(a) of the GATS.

7.1222. Lastly, Russia criticizes the third-country certification measure for having only an *ex ante* effect, arguing that "the threat that the measure addresses by means of an 'ex-ante' assessment automatically pre-empts the 'certain circumstances' as referred to by the EU from being present" and that "[c]onsequently, the EU attempts to obtain justification for a measure that does not, in any way, shape or form, address the threat that arises whenever these 'certain circumstances' are in fact present."<sup>2001</sup>

7.1223. We see no issue with a responding party attempting to justify a measure that is of an *ex ante* nature under Article XIV(a) of the GATS and such measures have been accepted in a number of previous disputes.<sup>2002</sup> We also reiterate the point made by the European Union that the third-country certification measure forms "part of a comprehensive policy consisting of a multiplicity of interacting measures". Indeed, the European Union has pointed to other provisions, which provide EU authorities with the possibility of imposing sanctions should TSOs engage in actions that threaten the European Union's security of energy supply.<sup>2003</sup> This does, however, not entail that a measure, which *ex ante* seeks to prevent such threats from materializing in the first place, should not be considered as contributing towards the objective of ensuring the European Union's security of energy supply.

7.1224. In light of the above, we therefore agree with the European Union that the design, structure and expected operation of the third-country certification measure renders it manifestly apt to address *ex ante* the threat to the European Union's security of energy supply posed by foreign control over TSOs, and that this conclusion is not altered by the fact that the third-country certification measure may not address certain other potential threats to the European Union's security of energy supply.

### ***Trade-restrictiveness of the third-country certification measure***

7.1225. The European Union compares the third-country certification measure to a "complete ban", pointing to the third-country certification measure being "much less restrictive".<sup>2004</sup> More particularly, the European Union submits that this measure "restricts trade in services to the extent that it requires that the competent authorities refuse the certification of any third country

<sup>1999</sup> Russia's response to Panel question No. 214(a), para. 275 (quoting the European Union's second written submission, para. 206).

<sup>2000</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.200.

<sup>2001</sup> Russia's comments on the European Union's response to Panel question No. 212, para. 110.

<sup>2002</sup> See, e.g. Appellate Body Reports, *Korea – Various Measures on Beef*, para. 178; and *Argentina – Financial Services*, para. 6.231; and Panel Report, *Argentina – Financial Services*, paras. 7.694, 7.697, 7.709 and 7.716.

<sup>2003</sup> European Union's response to Panel question No. 210, paras. 229-230.

<sup>2004</sup> European Union's first written submission, para. 531.

controlled TSO which puts at risk the security of supply".<sup>2005</sup> We therefore understand from the European Union that the degree of trade-restrictiveness depends on the relevant authorities' application of the rules on third-country certification, which – as acknowledged by both parties – takes place on a case-by-case basis.<sup>2006</sup>

7.1226. In the European Union's view, this limits the trade-restrictiveness of the third-country certification measure as the authorities will only impose restrictions on foreign controlled TSOs when they are found to pose a threat to the European Union's security of energy supply.<sup>2007</sup> Contrary to the European Union, Russia submits that this increases the trade-restrictiveness of the third-country certification measure, arguing that the lack of a "clear standard" for applying Article 11 of the Directive means that "there are virtually no limitations on the restrictions on commerce that may be imposed."<sup>2008</sup>

7.1227. We cannot agree with Russia that the third-country certification measure should be considered highly trade-restrictive solely because it requires a case-by-case analysis by the relevant authorities and permit these flexibility or discretion in determining whether a foreign controlled TSO poses a threat to the European Union's security of energy supply. At the same time, we can only agree with what appears to be the underlying sentiment of both parties' position, namely that the trade-restrictiveness of the third-country certification measure will ultimately depend on how it is applied by the relevant authorities.

7.1228. In this regard, we find it relevant that, as pointed out by the European Union, all applications for third-country certification have so far been granted.<sup>2009</sup> In our view, this suggests that the European Union is correct in stating that the third-country certification measure will only restrict trade in pipeline transport services when there is found to be a threat against the European Union's security of energy supply, and hence that the trade-restrictiveness of this measure is limited.

#### ***Reasonably available alternative measures***

7.1229. The Appellate Body has clarified that a responding party is not required to "identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective".<sup>2010</sup> Instead, as the responding party, the European Union is required to address alternative measures raised by Russia and demonstrate "why its challenged measure nevertheless remains 'necessary' in light of that alternative or, in other words, why the proposed alternative is not, in fact, 'reasonably available'", taking into account "the interests or values being pursued and the party's desired level of protection".<sup>2011</sup>

7.1230. Russia has pointed to two measures, which, in its view, are reasonably available alternatives to the third-country certification measure and would achieve the same level of protection while being less trade restrictive: (a) applying the same certification rules for all TSOs, i.e. either applying the third-country certification measure under Article 11 of the Directive or the

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<sup>2005</sup> European Union's first written submission, para. 530.

<sup>2006</sup> European Union's first written submission, para. 531; and Russia's second written submission, para. 319.

<sup>2007</sup> European Union's first written submission, para. 530.

<sup>2008</sup> Russia's second written submission, para. 319.

<sup>2009</sup> European Union's first written submission, para. 532 (referring to Decision of the French Commission for the Regulation of Energy (CRE) of 4 June 2014 on the certification of Transport et Infrastructures Gaz France (TIGF), (Decision of the French NRA on the certification of TIGF), (Exhibit EU-67); Decision of the Greek Regulatory Authority for Energy (RAE) of 25 September 2014 on the certification of the Hellenic TSO (DESFA), (Decision of the Greek NRA on the certification of DESFA), (Exhibit EU-68); and Decision of 19 May 2015 of the Polish Energy Regulatory Office (ERO) on the certification of Gazociągów Przesyłowych Gaz-System Spółka Akcyjna (Gaz-System) in connection with its function as the TSO on the Polish section of the Yamal-Western Europe pipeline, (Decision of the Polish NRA on the certification of Gaz-System), (Exhibit EU-69).

<sup>2010</sup> Appellate Body Report, *US – Gambling*, para. 309.

<sup>2011</sup> Appellate Body Report, *US – Gambling*, para. 311.

rules for domestic TSOs under Article 10 to all TSOs regardless of their origin<sup>2012</sup>; and (b) a "blocking statute".<sup>2013</sup>

7.1231. With respect to the first alternative measure proposed by Russia, applying the same certification rules for all TSOs, we note that Russia suggests that the European Union should apply Article 10 of the Directive in respect of all TSOs or, alternatively, that it should apply the third-country certification measure in Article 11 of the Directive in respect of all TSOs.<sup>2014</sup> As to the former proposal, we recall that Article 10 calls for certification without any assessment of threats posed to the European Union's security of energy supply. Applying these rules to domestic as well as foreign controlled TSOs would therefore, plainly, not achieve the same level of protection in respect of threats posed by foreign control over TSOs.

7.1232. Turning to the proposed use of the rules on third-country certification with respect to all TSOs, the European Union argues that this alternative is not reasonably available to the European Union.<sup>2015</sup> In this regard, the European Union points out that this alternative would "make no contribution whatsoever to the SoS objective" and that it would therefore be "manifestly unreasonable and place an 'undue burden' on both the domestically controlled T[S]Os and the EU authorities responsible for the administration of the third-country certification measure."<sup>2016</sup> The European Union does not expand on the "undue burden" allegedly placed on domestically controlled TSOs and EU authorities, but argues that the potential risk that a foreign government may induce or require domestically controlled TSOs to undermine the European Union's security of energy supply is "by no means comparable to the threat addressed by the third country certification measure and does not require the adoption of similar measures".<sup>2017</sup>

7.1233. We further note the European Union's argument that the basis for Russia's claim under Article XVII of the GATS against the third-country certification measure, and hence for our finding of violation, is the lack of application of this measure to domestically controlled TSOs.<sup>2018</sup>

7.1234. We agree with the European Union that the justification for not applying the same treatment to domestically controlled TSOs is more appropriately addressed under the *chapeau* of Article XIV of the GATS, an approach that, as pointed out by the European Union, has been followed in previous disputes.<sup>2019</sup> We therefore do not consider this proposed alternative measure further but rather address the underlying issues, as appropriate, in the context of our assessment of whether the third-country certification measure fulfils the requirements of the *chapeau* of Article XIV.<sup>2020</sup>

7.1235. With respect to the second alternative measure proposed by Russia, the "blocking statute", both parties appear to agree that such a measure would require TSOs not to comply with certain extra-territorial laws adopted by foreign governments which affect trade with the European Union.<sup>2021</sup> On this basis, Russia argues that a blocking statute would "explicitly prevent these TSOs from receiving or acting upon instructions from foreign persons or foreign governments in violation of EU law".<sup>2022</sup> The European Union, on the other hand, does not believe that such a blocking statute would ensure compliance with existing EU obligations, arguing:

<sup>2012</sup> Russia's second written submission, para. 320.

<sup>2013</sup> Russia's second written submission, paras. 321-322.

<sup>2014</sup> Russia's second written submission, para. 320.

<sup>2015</sup> European Union's response to Panel question No. 215(a), para. 259. The European Union also states that this proposed measure "would maintain the existing burden on foreign controlled TSOs while imposing a new burden upon the domestically controlled TSOs" and that "Russia has not explained how, in view of this, the proposed alternative would be less 'restrictive'". (Ibid. para. 258). In this regard, we note that Russia suggests that the proposed alternative would be less trade restrictive as it would "level the playing field for all TSOs". (Russia's comments on the European Union's response to Panel question No. 215, para. 217).

<sup>2016</sup> European Union's response to Panel question No. 215(a), para. 259.

<sup>2017</sup> European Union's response to Panel question No. 214, para. 252.

<sup>2018</sup> European Union's response to Panel question No. 215(a), para. 261.

<sup>2019</sup> European Union's response to Panel question No. 215(a), para. 261 (referring to Appellate Body Report, *US – Gasoline*, pp. 28-29, DSR 1996:I, 3, at pp. 30-31).

<sup>2020</sup> See paras. 7.1241-7.1253 below.

<sup>2021</sup> European Union's second written submission, paras. 215-216; and Russia's second written submission, paras. 321-322.

<sup>2022</sup> Russia's second written submission, para. 322.

Just like a foreign government can require or induce a third country TSO not to comply with the obligations of the Third Energy Package aimed at ensuring SoS, it could do the same with regard to the "blocking statute" proposed by Russia. Indeed, nothing would prevent the third country concerned from enacting its own "blocking statute" in order to block compliance with the "blocking statute" proposed by Russia.<sup>2023</sup>

7.1236. When addressing this proposed alternative measure, we recall that we have already found that there are situations where a foreign government can require or induce foreign controlled TSOs not to comply with obligations under EU law. As previously explained, it is this threat that the third-country certification measure addresses.

7.1237. We have difficulties understanding how a blocking statute could achieve the same level of protection in relation to this threat. More particularly, if a foreign government, in certain circumstances, has the means to require or induce foreign controlled TSOs not to comply with obligations imposed under EU law, it would presumably also have the means to require or induce such TSOs not to comply with the proposed blocking statute.

7.1238. In light of this, we do not consider the proposed blocking statute a reasonably available alternative measure, which would achieve the same level of protection as the third-country certification measure.

### **Overall assessment**

7.1239. We have found that the objective of ensuring security of energy supply is of fundamental importance and that the third-country certification measure, although it may not address all potential threats posed to the European Union's security of energy supply, is manifestly apt to address the specific threat pointed to by the European Union, namely that posed by foreign control over TSOs. While the trade-restrictiveness of the third-country certification measure will ultimately depend on the manner in which it is applied by the relevant authorities, the evidence submitted by the European Union on past assessments suggests that the trade-restrictiveness of this measure is limited. Lastly, we recall that the alternative measures proposed by Russia have either been found not to achieve the same level of protection of the European Union's security of energy supply or not to be reasonably available alternatives. All of these factors suggest that the third-country certification measure is necessary within the meaning of Article XIV(a) of the GATS.

7.1240. We therefore conclude that the European Union has made a *prima facie* case that the third-country certification measure implemented in the national laws of Croatia, Hungary and Lithuania is necessary to address the threat to the European Union's security of energy supply posed by foreign control over TSOs, and therefore necessary to maintain public order. Hence, we conclude that this measure is provisionally justified under Article XIV(a) of the GATS and therefore turn to consider whether the European Union has demonstrated that it fulfils the requirements under the *chapeau* of Article XIV of the GATS.

#### **7.10.2.3.2.2 Requirements under the *chapeau* of Article XIV of the GATS**

7.1241. We begin our assessment under the *chapeau* of Article XIV of the GATS by recalling that this involves an examination of whether the challenged measure is "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services".<sup>2024</sup>

7.1242. The European Union has acknowledged the existence of differential and less favourable treatment between domestic pipeline transport services and service suppliers and third-country pipeline transport services and service suppliers. Indeed it is this less favourable treatment that forms the basis of our finding of violation under Article XVII of the GATS to begin with.<sup>2025</sup>

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<sup>2023</sup> European Union's second written submission, para. 217 (referring to Resolution of the Government of the Russian Federation No. 1017 of 5 October 2012 on measures implementing Decree of the President of the Russian Federation No. 1285 of 11 September 2012, (Exhibit EU-131)).

<sup>2024</sup> See paragraph 7.231 above.

<sup>2025</sup> See section 7.10.2.2 above.

7.1243. The European Union, however, argues that the third-country certification measure does not give rise to arbitrary or unjustifiable discrimination.<sup>2026</sup>

7.1244. In this regard, we recall that the Appellate Body has clarified, in the context of Article XX of the GATT 1994, that the nature and quality of the discrimination to be examined under the *chapeau* of this provision is different from that found to be inconsistent with the substantive obligations.<sup>2027</sup> More particularly, the Appellate Body has explained that "[a]nalyzing whether discrimination is arbitrary or unjustifiable usually involves an analysis that relates primarily to the cause or the rationale of the discrimination."<sup>2028</sup> In our view, these findings are relevant also for the assessment of arbitrary or unjustifiable discrimination under the *chapeau* of Article XIV of the GATS.

7.1245. The European Union contends that the discrimination between domestic and third-country pipeline transport services and service suppliers is not arbitrary or unjustifiable, arguing that the threat of foreign governments inducing or requiring domestically controlled TSOs to undermine the European Union's security of energy supply is "by no means comparable to the threat addressed by the third-country certification measure".<sup>2029</sup>

7.1246. More particularly, the European Union points out that a foreign government would "find it extremely difficult to require or induce a TSO owned or controlled by an EU Member State ... to act in ways that would undermine the interests of that EU Member State or of the European Union."<sup>2030</sup> The European Union also argues that foreign private persons "are much more likely to have their principal place of business and/or personal and family links in that foreign country than the nationals of an EU Member State", rendering foreign persons "much more vulnerable to the requirements and inducements emanating from the government of that foreign country".<sup>2031</sup> Similarly, the European Union argues that "requirements or inducements emanating from a foreign country could be effectively countered by the requirements or inducements from the EU Member State of which the persons in question are nationals and where they usually have their main personal links and business activity."<sup>2032</sup>

7.1247. We recall that the European Union, when arguing that foreign control over TSOs poses a genuine and sufficiently serious threat to its security of energy supply, has pointed to foreign governments having the means to require or induce a foreign controlled TSO to undermine the European Union's security of energy supply where that foreign government itself controls the TSO or where the TSO is controlled by foreign private persons.<sup>2033</sup> In respect of the latter, the European Union submits that foreign governments can require or induce TSOs controlled by foreign private persons to undermine the European Union's security of energy supply by imposing legal obligations "that make it impossible or more difficult for them to comply with the obligations imposed under EU law with a view to ensuring SoS"<sup>2034</sup> or by "offering to grant, or threatening to withdraw, certain benefits in respect of their activities in their home third country" where the foreign private persons "conduct similar or related economic activities in their country of origin".<sup>2035</sup>

7.1248. As we explained when addressing this argument above, where a foreign private person is subject to legal obligations or inducements by foreign governments, which conflict with obligations imposed under EU law or with its commercial interests in the European Union, the result will ultimately depend on that foreign private person and the weight or importance of its interests in its country of origin and in the European Union, respectively.<sup>2036</sup>

7.1249. In our view, this reasoning applies to domestic persons as well. More particularly, where a domestic person, who controls a TSO within the European Union and also "conduct[s] similar or

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<sup>2026</sup> European Union's first written submission, paras. 535-540.

<sup>2027</sup> Appellate Body Report, *US – Shrimp*, para. 150.

<sup>2028</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 225.

<sup>2029</sup> European Union's response to Panel question No. 214, para. 252.

<sup>2030</sup> European Union's response to Panel question No. 214, para. 254.

<sup>2031</sup> European Union's response to Panel question No. 214, para. 255.

<sup>2032</sup> European Union's response to Panel question No. 214, para. 255.

<sup>2033</sup> European Union's first written submission, paras. 515-518.

<sup>2034</sup> European Union's first written submission, para. 517.

<sup>2035</sup> European Union's first written submission, para. 518.

<sup>2036</sup> See para. 7.1187 above.

related economic activities" in a foreign country, is subject to legal obligations or inducements by foreign governments, which conflict with obligations imposed under EU law or with its commercial interests in the European Union, the result will ultimately depend on that domestic private person and the weight or importance of its interests in the European Union and the foreign country in question.

7.1250. While we do not disagree with the European Union that foreign private persons may be more likely to have their "principal place of business and/or personal and family links" in its foreign country of origin and hence be more "vulnerable to the requirements and inducements emanating from the government of that foreign country"<sup>2037</sup>, we see no reason to conclude that there is no risk of domestic persons having commercial interests and/or personal and family links in foreign countries, which would render them vulnerable to requirements and inducements emanating from foreign governments. Similarly, while we do not disagree with the European Union that the European Union may be more likely to "effectively counter" requirements or inducements emanating from a foreign country with requirements or inducements emanating from EU member States or the European Union itself in respect of domestic private persons<sup>2038</sup>, we see no reason to conclude that the European Union would not also be able to do so, in some circumstances, in respect of foreign private persons controlling a TSO within the EU territory.

7.1251. In other words, while the risk or threat to the European Union's security of energy supply posed by domestically controlled TSOs may be different or less than that posed by foreign controlled TSOs, the European Union has not demonstrated that this risk or threat does not exist, nor that it is entirely speculative or hypothetical. It is undisputed that the third-country certification measure does nothing to address this risk or threat. More particularly, and as explained above, Article 10, which generally regulates certification of domestically controlled TSOs, involves no assessment of threats to the European Union's security of energy supply at all.<sup>2039</sup>

7.1252. The European Union has itself explained that the design of the third-country certification measure is such that it operates in an *ex ante* manner by requiring the relevant authorities to detect and address, in advance, the risk of foreign controlled TSOs undermining the European Union's security of energy supply, and to certify the TSO only if it is found not to pose such a risk.<sup>2040</sup> The European Union has further explained that the third-country certification measure will restrict the supply of pipeline transport services only insofar as the TSO is found to pose a risk to the European Union's security of energy supply.<sup>2041</sup> Bearing this in mind, we have difficulties reconciling the lack of *any* prior assessment of the risk of domestically controlled TSOs undermining the European Union's security of energy supply with the cause or rationale of ensuring the European Union's security of energy supply. More particularly, and as explained above, the European Union has not demonstrated that a foreign government would not, in some circumstances, be able to require or induce a domestically controlled TSO to undermine the European Union's security where that domestic person also "conduct[s] similar or related economic activities" in a foreign country.

7.1253. While we do not mean to imply that the same regulatory scheme should necessarily be applied with respect to foreign and domestically controlled TSOs, we believe that the European Union is required to adapt or "calibrate" its measure in a way so it addresses the threats posed by foreign governments requiring or inducing domestically controlled TSOs to undermine the European Union's security of energy supply as well.<sup>2042</sup> The lack of *any* assessment of threats posed by foreign governments requiring or inducing domestically controlled TSOs to undermine the European Union's security of energy supply, in our view, is not compatible with the cause or rationale of the third-country certification measure. Hence, this constitutes arbitrary and unjustifiable discrimination in violation of the *chapeau* of Article XIV of the GATS.<sup>2043</sup>

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<sup>2037</sup> European Union's response to Panel question No. 214, para. 255.

<sup>2038</sup> European Union's response to Panel question No. 214, para. 255.

<sup>2039</sup> See para. 7.1231 above.

<sup>2040</sup> European Union's second written submission, para. 209.

<sup>2041</sup> European Union's first written submission, para. 530.

<sup>2042</sup> For a similar approach, see Appellate Body Reports, *US – Tuna II (Mexico)*, para. 286, where the Appellate Body found that the *chapeau* of Article XX of the GATT 1994 required the challenged measure to be "calibrated" to the different risks of adverse effects on dolphins arising under different fishing methods.

<sup>2043</sup> Both parties have also submitted arguments concerning alleged arbitrary and unjustifiable discrimination between pipeline transport services and service suppliers from *different third countries*, which



### 7.10.2.3.3 Conclusion

7.1254. Having considered the various arguments and evidence provided by the European Union, and for the reasons explained in paragraphs 7.1241 through 7.1253 above, we conclude that the European Union has not demonstrated that the third-country certification measure implemented in the national laws of Croatia, Hungary and Lithuania fulfils the requirements in the *chapeau* of Article XIV of the GATS. Hence, we find that the European Union has failed to make a *prima facie* case that this measure is justified under this provision.

### 7.10.2.4 Russia's claims under Articles VI:1 and VI:5(a) of the GATS

7.1255. Russia claims that the third-country certification measure in the national implementing laws of Croatia, Hungary and Lithuania is also inconsistent with Articles VI:1 and VI:5(a) of the GATS.<sup>2044</sup>

7.1256. We have found above that the third-country country certification measure in the national implementing laws of Croatia, Hungary and Lithuania is inconsistent with the national treatment obligation in Article XVII of the GATS and is not justified under Article XIV(a) of the GATS.

7.1257. We recall that the principle of judicial economy is recognized in WTO law. Pursuant to that principle, a panel may decide to address only those claims "which must be addressed in order to resolve the matter in issue in the dispute."<sup>2045</sup> Hence, a panel may "refrain from making multiple findings that the same measure is *inconsistent* with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute."<sup>2046</sup> The Appellate Body also warned against "false judicial economy" whereby a panel would provide only a partial resolution of the matter at issue. Thus, a panel must address those claims "on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members.'"<sup>2047</sup> The Appellate Body has further clarified that "the fact that two provisions have a different 'scope and content' does not, in and of itself, imply that a panel must address each and every claim under those provisions"

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does not relate to the discrimination forming the basis of our underlying finding of violation under the national treatment obligation in Article XVII of the GATS. (European Union's first written submission, paras. 541-544; and second written submission, para. 223; and Russia's second written submission, para. 325). More particularly, Russia appears to briefly refer to the argumentation advanced for its claims under Articles VI:1 and VI:5(a) of the GATS against the third-country certification measure. (Russia's second written submission, para. 325). Russia has also submitted certain additional arguments in the context of the *chapeau* of Article XIV of the GATS. More particularly, Russia points to Recital (22) of the Directive stating that an assessment of security of energy supply should take into account "the treatment of both domestic and foreign trade and investment in energy in a particular third country". (Russia's closing statement at the second meeting of the Panel, para. 3 (quoting Directive 2009/73/EC, (Exhibit EU-5), Recital (22)). Furthermore, Russia has provided evidence that the treatment of foreign investment in energy in third countries has in fact been taken into account when considering whether to grant certification to foreign controlled TSOs. (Russia's closing statement at the second meeting of the Panel, para. 3 (referring to Commission opinion of 17.10.2014 correcting Opinion C(2014) 5483 final of 28 July 2014 pursuant to Article 3(1) of Regulation (EC) No. 715/2009 and Article 10(6) and 11(6) of Directive 2009/73/EC – Greece – Certification of DESFA, (Exhibit RUS-60)). In our view, panels are not necessarily precluded from addressing, in the context of the *chapeau* of Article XIV of the GATS, alleged arbitrary and unjustifiable discrimination that does not relate to the underlying finding of violation. Having said this, we would tend to agree with Russia that the reference to the treatment of foreign investments in third countries in Recital (22) of the Directive appears to have little to do with addressing the risk of foreign governments seeking to induce or require TSOs to undermine the European Union's security of energy supply, but rather suggests a notion of reciprocity under which the treatment of "investment in energy" by domestic EU persons in foreign countries could impact the decision on whether or not to grant certification to foreign controlled TSOs. However, as we have already found that the third-country certification measure in the Directive does not fulfil the requirements of the *chapeau* of Article XIV, and in light of the brevity of these additional arguments by Russia, we do not consider it necessary to address these arguments in further detail.

<sup>2044</sup> Russia's first written submission, paras. 519-520; and second written submission, para. 358.

<sup>2045</sup> Appellate Body Reports, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:1, 323, at p. 340; and *US – Tuna II (Mexico)*, para. 403.

<sup>2046</sup> Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133. (emphasis original)

<sup>2047</sup> Appellate Body Report, *Australia – Salmon*, para. 223. (footnotes omitted)

as a panel should rather be guided by "the need to address all of those claims whose resolution is necessary to resolve the dispute so as to avoid a partial resolution of the dispute."<sup>2048</sup>

7.1258. Article VI:1 of the GATS<sup>2049</sup> concerns the administration of the measure at issue rather than its substantive content.<sup>2050</sup> Having found that the measure at issue is inconsistent with the substantive obligation prescribed in Article XVII of the GATS, the question of whether that measure is administered in a manner inconsistent with Article VI:1 of the GATS becomes irrelevant.<sup>2051</sup>

7.1259. Article VI:5(a) of the GATS imposes disciplines with respect to licensing and qualification requirements and technical standards.<sup>2052</sup> As we have found that the third-country country certification measure in the national implementing laws of Croatia, Hungary and Lithuania is inconsistent with the national treatment obligation in Article XVII of the GATS and is not justified under Article XIV(a) of the GATS, the European Union will need to take steps to make that measure WTO-compliant. We therefore consider that our findings above are sufficient to resolve the matter at issue in this dispute.

7.1260. In light of the above, we decide to exercise judicial economy in respect of Russia's claims under Articles VI:1 and VI:5 of the GATS.

## 7.11 The TEN-E measure

### 7.11.1 Introduction

7.1261. In this section we address Russia's claims against the TEN-E measure<sup>2053</sup>, described above in paragraphs 2.52 through 2.60, and the European Union's defence. Russia challenges the TEN-E measure under both the GATT 1994 and the GATS. The European Union advances a defence under Article XX(j) of the GATT 1994 in respect of Russia's claims under the GATT 1994, while not asserting any defence with respect of Russia's claim under the GATS. We first address Russia's claims under the GATT 1994, followed by the examination of the European Union's defence under Article XX(j) of the GATT 1994. We then proceed to the analysis of Russia's claim under the GATS.

### 7.11.2 Russia's claims under the GATT 1994

#### 7.11.2.1 Introduction

7.1262. Russia advances two claims against the TEN-E measure under the GATT 1994: one under Article I:1 and the other under Article III:4. In its submissions to the Panel, Russia does not

<sup>2048</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.194.

<sup>2049</sup> Article VI:1 of the GATS states as follows: "In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner."

<sup>2050</sup> Panel Report, *US – Gambling*, para. 6.432.

<sup>2051</sup> In the same sense, see Panel Reports, *Argentina – Import Measures*, para. 6.498.

<sup>2052</sup> Article VI:5(a) of the GATS states as follows:

In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which: (i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and (ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.

Article VI:4 of the GATS, which is referenced in Article VI:5(a)(i), states as follows:

With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, inter alia: (a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service; (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

<sup>2053</sup> We recall that we have found Russia's "as applied" claims against the TEN-E measure to fall outside our terms of reference. See, above paras. 7.147-7.148. In this section, we address Russia's remaining claims against this measure.

always cross-refer to its arguments developed in the context of its claim under Article III:4 when advancing its claim under Article I:1. Nevertheless, we understand that the main thrust of its arguments under both claims is largely the same.<sup>2054</sup>

7.1263. Russia argues that the TEN-E measure is inconsistent with Articles I:1 and III:4 of the GATT 1994 because, in its view, the criteria used to select PCIs, which are eligible for certain benefits under the TEN-E Regulation<sup>2055</sup>, are discriminatory towards Russian natural gas. According to Russia, based on the objectives of "diversification of gas supply" and "end[ing] the isolation of the three Baltic States and Finland and their dependency on a single supplier", these criteria are designed to reduce the supply and transmission of imported Russian natural gas into and within the European Union.<sup>2056</sup> In Russia's view, the criteria for PCI designation reduce the competitive opportunities of Russian natural gas *vis-à-vis* domestic natural gas, as well as natural gas imported from any other country.

7.1264. The European Union argues that the criteria for PCI designation under the TEN-E measure do not discriminate against Russian natural gas within the meaning of either Article I:1 or III:4 of the GATT 1994. According to the European Union, the TEN-E measure defines the priority corridors 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.<sup>2057</sup> The European Union also submits that, in order to satisfy one of the specific criteria for PCI designation, a project does not necessarily have to contribute to the "diversification of supply sources".<sup>2058</sup> In the European Union's view, the sub-criterion "diversification of supply sources" applies regardless of the origin of the gas in those EU member States that source their gas primarily from Russia, as well as in those EU member States that source their gas from other countries.<sup>2059</sup>

7.1265. We understand that the main point of contention between the parties concerns the references to the objectives of diversification of natural gas supply and "end[ing] the isolation of the three Baltic States and Finland and their dependency on a single supplier" in the criteria for PCI designation. Whereas for Russia, these references demonstrate discrimination against Russian natural gas within the meaning of Article III:4 and I:1 of the GATT 1994, the European Union maintains that the criteria for PCI designation, including the sub-criterion "diversification of supply sources", operate regardless of the source of natural gas supply.

7.1266. We recall the manner in which the parties have developed their arguments concerning the role of the objectives of diversification of natural gas supply and "end[ing] the isolation of the three Baltic States and Finland and their dependency on a single supplier" (hereinafter collectively referred to as the objective of diversification of natural gas supply), described above. This approach does not allow us to clearly distinguish the arguments relevant only for Russia's claim under Article I:1 from those relevant only for Russia's claim under Article III:4 of the GATT 1994. Thus, in the particular circumstances of this case, we structure our analysis as follows. First, on the basis of the design, structure and expected operation of the TEN-E measure, we determine the meaning and expected operation of the objective of diversification of natural gas supply in the context of the criteria for PCI designation. Second, we conduct separate analyses of the impact of the criteria for PCI designation, including the objective of diversification of natural gas supply referred to therein, on the competitive opportunities of Russian natural gas under Article I:1 and Article III:4 of the GATT 1994.

<sup>2054</sup> In its response to Panel question No. 5, Russia summarizes its GATT claims against the TEN-E measure as follows:

Claim 30 concerns GATT Article III:4 and is described in Section XXV of Russia's FWS. Claim 31 concerns GATT Article I:1 and is described in Section XXVI of Russia's FWS. Both claims also concern the TEN-E Measure. Like Claim 29, these two claims challenge the TEN-E Regulation, *de facto*, by demonstrating that Russian natural gas is provided differential and less favourable treatment based exclusively on origin than than [*sic*] like domestic and other third-country gas; and alternatively that the TEN-E Measure, "as applied," treats Russian natural gas less favourably based on the absence of Russian projects designated as PCIs. (Russia's response to Panel question No. 5, para. 53). (emphasis original)

See also Russia's response to Panel question No. 112, para. 460.

<sup>2055</sup> The benefits available to PCIs are discussed above in paras. 2.58-2.60.

<sup>2056</sup> Russia's first written submission, paras. 763-770 and 791-793.

<sup>2057</sup> European Union's second written submission, para. 383.

<sup>2058</sup> European Union's first written submission, para. 819.

<sup>2059</sup> European Union's first written submission, para. 820.

### 7.11.2.2 Analysis by the Panel

#### 7.11.2.2.1 The objective of diversification of natural gas supply

7.1267. As explained above in section 2.2.8, the TEN-E measure sets forth the criteria for the selection of PCIs and facilitates the implementation of PCIs by providing a set of administrative, regulatory and financial incentives.<sup>2060</sup> Infrastructure developed as part of PCIs includes *inter alia* transmission pipelines for the transportation of natural gas.<sup>2061</sup> In order to be designated as a PCI, an infrastructure project must satisfy the general criteria and "significantly contribute" to at least one of the specific criteria.<sup>2062</sup> To satisfy the general criteria, an infrastructure project must be necessary for at least one of the priority gas corridors defined in Annex I.2 of the TEN-E Regulation. The relevant specific criteria for PCI designation are set out in Article 4(2)(b). The definitions of the priority corridors and the text of the specific criteria are provided above in paragraphs 2.55 through 2.56.

7.1268. Diversification of natural gas supply is one of the European Union's energy policy objectives pursued by the TEN-E Regulation.<sup>2063</sup> References to this objective occur several times in the definition of the priority corridors, as well as in the specific criteria for PCI designation. In particular, the definitions of NSI East Gas and SGC corridors refer to infrastructure to enhance "diversification of gas supply", while the definition of the BEMIP Gas corridor mentions infrastructure to "end the isolation of the three Baltic States and Finland and their dependency on a single supplier" and to increase "diversification and security of supplies in the Baltic Sea region".<sup>2064</sup> Among the specific criteria, "diversification of supply sources" is mentioned, and serves as a sub-criterion, in the "security of supply" and "competition" criteria.<sup>2065</sup>

7.1269. The TEN-E Regulation does not define the concept of "diversification of gas supply" and does not further elaborate on what the objective of diversification of natural gas supply entails. The ordinary meaning of "diversification" is "the action of diversifying; the process of becoming diversified; the fact of being diversified; the production of diversity or variety of form or qualities".<sup>2066</sup> "To diversify" means "to render diverse, different, or varied, in form, features, or qualities; to give variety or diversity to; to variegate, vary, modify".<sup>2067</sup>

7.1270. We consider that one way of introducing variety or diversity in the supply of natural gas is to introduce variety or diversity in the sources of natural gas supply. For instance, Recital (5) of the TEN-E Regulation refers to the diversification of "the Union's energy supplies, *sources* and routes".<sup>2068</sup> As already noted, two specific criteria for PCI designation explicitly refer to "diversification of supply *sources*".<sup>2069</sup> The definition of the BEMIP Gas corridor refers to infrastructure "to end the isolation of the three Baltic States and Finland and their dependency on a *single supplier*".<sup>2070</sup> In our view, the "source" of natural gas supply in this context is synonymous with the "supplier" of natural gas.

<sup>2060</sup> TEN-E Regulation, (Exhibit EU-4), Article 1(2).

<sup>2061</sup> See above para. 2.55 and fn 133.

<sup>2062</sup> See above section 2.2.8.

<sup>2063</sup> TEN-E Regulation, (Exhibit EU-4), Recital (5).

<sup>2064</sup> TEN-E Regulation, (Exhibit EU-4), Annexes I.2(6), I.2(7) and I.2(8).

<sup>2065</sup> TEN-E Regulation, (Exhibit EU-4), Articles 4(2)(b)(ii) and 4(2)(b)(iii). We note that in the course of the proceedings, Russia provided a document that purports to show the application of the "security of supply" criterion by one of the Regional Groups in the process of drawing up a list of suitable projects for the designation as PCIs by the Commission. According to this document, within the "security of supply" criterion, the sub-criterion "diversification" was accorded the weight of 0.44, with "physical availability" receiving 0.25 and "promotion of IEM" 0.31 (European Commission, PowerPoint Presentation on North-South Interconnections in Central-Eastern Europe – The South-Eastern European subgroup in electricity and gas (15 February 2012), (Exhibit RUS-147), p. 12). While the European Union contests the accuracy of this document, according to the evidence provided by the European Union, [\*\*\*].

<sup>2066</sup> Oxford English Dictionary Online, definition of "diversification, n.a"  
<http://www.oed.com/view/Entry/56053?redirectedFrom=diversification> (accessed 3 August 2017).

<sup>2067</sup> Oxford English Dictionary Online, definition of "diversify, v.1.a"

<http://www.oed.com/view/Entry/56058?redirectedFrom=diversify> (accessed 3 August 2017).

<sup>2068</sup> TEN-E Regulation, (Exhibit EU-4), Recital (5). (emphasis added)

<sup>2069</sup> See above para. 7.1268.

<sup>2070</sup> TEN-E Regulation, (Exhibit EU-4), Annex I.2(8).

7.1271. The Communication of the Commission "Energy infrastructure priorities for 2020 and beyond – A Blueprint for an integrated European energy network" (hereinafter Energy Infrastructure Blueprint),<sup>2071</sup> explicitly mentioned in Recital (3) of the TEN-E Regulation, provides further context for our understanding of the concept of "diversification of gas supply". Under subheading 4.1.2, entitled "Diversified gas supplies to a fully interconnected and flexible EU gas network", the Energy Infrastructure Blueprint states as follows:

The aim of this priority area is to build the infrastructure needed to allow gas from any source to be bought and sold anywhere in the EU, regardless of national boundaries. This would also ensure security of demand by providing for more choice and a bigger market for gas producers to sell their products. A number of positive examples in Member States demonstrate that diversification is key to increased competition and enhanced security of supply. Whilst on an EU level supplies are diversified along three corridors — Northern Corridor from Norway, Eastern corridor from Russia, Mediterranean Corridor from Africa — and through LNG, single source dependency still prevails in some regions. Every European region should implement infrastructure allowing physical **access to at least two different sources**.<sup>2072</sup> (emphasis original)

7.1272. We note the concern about "single source dependency" expressed in the above-quoted excerpt from the Energy Infrastructure Blueprint and the language calling for the implementation in "[e]very European region" of "infrastructure allowing physical **access to at least two different sources**".<sup>2073</sup> Moreover, the above-quoted text of the Energy Infrastructure Blueprint explicitly refers to countries supplying natural gas to the European Union, such as Norway and Russia. We thus understand that the Energy Infrastructure Blueprint treats a "source" of natural gas supply as synonymous with a country supplying natural gas, which we also understand to be synonymous to the "supplier" of natural gas.

7.1273. On the basis of our analysis, we thus consider that the concept of "diversification of natural gas supply" in the context of the TEN-E measure means introducing or increasing variety in the countries supplying natural gas. Based on the ordinary meaning of the word "diversification", taking into account pertinent context, we further believe that, in situations where there is only one gas supplier, or where there is more than one gas supplier but only one of them supplies the predominant share of gas, the objective of "diversification of natural gas supply" implies introducing at least one additional source of natural gas supply.

7.1274. With these considerations in mind, we proceed to the examination of how the objective of diversification of natural gas supply operates in the context of the criteria for PCI designation. We first examine the definitions of the BEMIP Gas, NSI East Gas and SGC priority corridors and then the specific criteria for PCI designation.

7.1275. According to the definition of the BEMIP Gas corridor, projects falling within the scope of this corridor include gas infrastructure "to end the isolation of the three Baltic States and Finland and their dependency on a single supplier".<sup>2074</sup> The relevant part of the Energy Infrastructure Blueprint states that "[t]he Eastern Baltic Sea region (Lithuania, Latvia, Estonia and Finland) requires urgent action to ensure security of supply through connection to the rest of the EU".<sup>2075</sup> It continues further to note that "[e]ven though the annual gas consumption of the three Baltic States and Finland together is only about 10 bcm, all the gas they consume comes from Russia".<sup>2076</sup>

7.1276. In our view, the reference to a "single supplier" in the definition of the BEMIP Gas corridor, read in conjunction with the Energy Infrastructure Blueprint, sufficiently clearly identifies Russia as a single source of natural gas supply.<sup>2077</sup> We thus understand that projects contributing

<sup>2071</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Energy infrastructure priorities for 2020 and beyond – A Blueprint for an integrated European energy network" COM(2010) 677 (17 November 2010), (Energy Infrastructure Blueprint), (Exhibit RUS-109).

<sup>2072</sup> Energy Infrastructure Blueprint, (Exhibit RUS-109), pp. 13-14.

<sup>2073</sup> Energy Infrastructure Blueprint, (Exhibit RUS-109), p. 14. (emphasis original)

<sup>2074</sup> TEN-E Regulation, (Exhibit EU-4), Annex I.2(8).

<sup>2075</sup> Energy Infrastructure Blueprint, (Exhibit RUS-109), p. 34.

<sup>2076</sup> Energy Infrastructure Blueprint, (Exhibit RUS-109), p. 34.

<sup>2077</sup> TEN-E Regulation, (Exhibit EU-4), Annex I.2(8).

to the diversification of natural gas supply in the BEMIP corridor will develop infrastructure to end the dependency of Estonia, Finland, Latvia and Lithuania on the supply of Russian natural gas. In line with our understanding of the concept of "diversification of natural gas supply", articulated above in paragraph 7.1273, such projects will develop infrastructure aimed at connecting Estonia, Finland, Latvia and Lithuania with sources of natural gas supply other than Russia.

7.1277. Turning to the definition of the NSI East Gas priority corridor, we observe a reference to "gas infrastructure for regional connections between and in the Baltic Sea region, the Adriatic and Aegean Seas, the Eastern Mediterranean Sea and the Black Sea, and for enhancing diversification and security of gas supply".<sup>2078</sup> The Energy Infrastructure Blueprint states that this would provide the overall flexibility for the entire Central East European (CEE) region to create a robust, well-functioning internal market and promote competition.<sup>2079</sup> The relevant part of the Energy Infrastructure Blueprint also provides as follows:

There is one main supplier in the CEE region; the current linear (from East to West) and isolated networks are the heritage of the past. While the proportion of gas imported from Russia constitutes 18% of the EU-15 consumption, in the new Member States this indicator is 60% (2008). Gazprom deliveries are the overwhelming bulk of gas imports in the region (Poland: 70%, Slovakia: 100%, Hungary: 80%, certain Western Balkan countries: 100%).<sup>2080</sup>

7.1278. We thus understand that the concern cited by the Energy Infrastructure Blueprint is about "one main supplier in the CEE region", identifying this supplier as Gazprom - the exclusive exporter of Russian natural gas via pipelines.<sup>2081</sup> In our view, similar to the BEMIP Gas corridor, this evidence is sufficiently clear in identifying Russia as the main source of supply in several EU member States falling within the geographical reach of this corridor. The Energy Infrastructure Blueprint mentions Russia as the only natural gas supplier in Slovakia and certain Western Balkan countries. In 2013 (the year the TEN-E Regulation entered into force), Russia was also the only natural gas supplier in Bulgaria and Czech Republic.<sup>2082</sup> Furthermore, Russia supplied 95% and 92% of all natural gas consumed in Hungary and Romania, respectively.<sup>2083</sup> In light of our understanding of the meaning of the concept of "diversification of natural gas supply" articulated above in paragraph 7.1273, and given the predominance of the supply of Russian natural gas in these EU member States, projects contributing to "diversification of natural gas supply" in this priority corridor will develop infrastructure aimed at connecting the mentioned EU member States with sources of natural gas supply other than Russia.

7.1279. We further note that the definition of the SGC priority corridor contains a reference to infrastructure for the transmission of natural gas from the Caspian Basin, Central Asia, the Middle East and the Eastern Mediterranean Basin to the European Union "to enhance diversification of gas supply".<sup>2084</sup> According to the Energy Infrastructure Blueprint, "[t]he aim of the Southern Corridor is to directly link the EU gas market to the largest deposit of gas in the world".<sup>2085</sup> Thus, the definition of the SGC corridor and the Energy Infrastructure Blueprint explicitly refer to the geographical regions of natural gas supply – the Caspian Basin, Central Asia, the Middle East and the Eastern Mediterranean basin.

7.1280. The EU member States falling within the geographical reach of the SGC corridor include Austria, Bulgaria, Croatia, Cyprus, Czech Republic, France, Germany, Greece, Hungary, Italy, Poland, Romania, Slovakia and Slovenia.<sup>2086</sup> We note that, in 2013, Russia was the only natural gas supplier in Bulgaria, Czech Republic and Slovakia, and the predominant natural gas supplier in

<sup>2078</sup> TEN-E Regulation, (Exhibit EU-4), Annex I.2(6).

<sup>2079</sup> Energy Infrastructure Blueprint, (Exhibit RUS-109), p. 34.

<sup>2080</sup> Energy Infrastructure Blueprint, (Exhibit RUS-109), p. 34.

<sup>2081</sup> Russia's response to Panel question No. 29, para. 145; and European Union's response to Panel question No. 29, para. 62.

<sup>2082</sup> Eurostat statistics on natural gas supplies to the European Union and member States by partner, volume and share between 2006 and 2015, and gross inland consumption of natural gas in the EU member States between 2006 and 2015, (Eurostat statistics on natural gas supplies and consumption), (Exhibit EU-190), p. 9.

<sup>2083</sup> Eurostat statistics on natural gas supplies and consumption, (Exhibit EU-190), p.9.

<sup>2084</sup> TEN-E Regulation, (Exhibit EU-4), Annex I.2(7).

<sup>2085</sup> Energy Infrastructure Blueprint, (Exhibit RUS-109), p. 32. (footnotes omitted)

<sup>2086</sup> TEN-E Regulation, (Exhibit EU-4), Annex I.2(7).

Hungary (95% of all natural gas supply), and Romania (92% of all natural gas supply).<sup>2087</sup> In light of our understanding of the concept of "diversification of natural gas supply" articulated above in paragraph 7.1273, and given the predominance of the supply of Russian natural gas in these EU member States, projects contributing to "diversification of natural gas supply" in this priority corridor will develop infrastructure aimed at connecting the mentioned EU member States with sources of natural gas supply other than Russia.

7.1281. On the basis of our review of the definitions of the BEMIP Gas, NSI East Gas and SGC corridors for gas infrastructure conducted above, we consider that the objective of diversification of natural gas supply will operate to bring within the scope of those corridors projects developing infrastructure aimed at connecting a number of EU member States with sources of natural gas supply other than Russia. Such EU member States include those where Russia is the only or predominant supplier of natural gas.

7.1282. We are of the view that the "diversification of supply sources" sub-criterion within the specific criteria of "security of supply" and "competition" will operate in a manner similar to the objective of diversification of natural gas supply in the definitions of priority corridors. As we have determined above in paragraph 7.1273, the objective of diversification of natural gas supply is designed to reduce reliance on the predominant natural gas supplier, and as underscored by the Energy Infrastructure Blueprint, eliminate situations where there is dependency on a single source.

7.1283. Given that Russia is the main natural gas supplier to the European Union, and the only or predominant supplier in a number of individual EU member States,<sup>2088</sup> meeting the "diversification of supply" sub-criterion will, in many instances, imply developing infrastructure aimed at connecting certain EU member States with sources of natural gas supply other than Russia.

7.1284. While we acknowledge that other natural gas suppliers in the European Union, including domestic, will also be affected by the sub-criterion "diversification of gas supply", none of them would likely be affected to the same extent as Russia. In our view, this is explained by the fact that, in comparison to external and domestic sources of natural gas supply to the European Union, Russia is the only or predominant supplier of natural gas in the highest number of individual EU member States.<sup>2089</sup>

7.1285. Our analysis above leads us to conclude that, by virtue of the objective of diversification of natural gas supply, the criteria for PCI designation include those that in practice condition PCI designation on projects developing infrastructure aimed at connecting certain EU member States with sources of natural gas supply other than Russia. This means that some projects will be

<sup>2087</sup> Eurostat statistics on natural gas supplies and consumption, (Exhibit EU-190), p. 9.

<sup>2088</sup> See, below fn 2089.

<sup>2089</sup> According to the evidence provided by Russia, in 2014, the top four external sources of gas supply to the European Union were as follows: Russia at 37.5%, Norway at 31.6%, Algeria at 12.3% and Qatar at 6.9% (European Commission, EU Energy in Figures: Statistical Pocketbook 2016, pp. 26 and 65, (Exhibit RUS-214), p. 26). According to the evidence provided by the European Union, in 2013, in terms of the distribution of shares in the total natural gas supply to individual EU member States, Russia was the main source of supply in the following EU member States: Austria (63%), Bulgaria (100%), Czech Republic (100%), Estonia (100%), Finland (100%), Greece (67%), Hungary (95%), Latvia (100%), Lithuania (100%), Poland (77%), Romania (92%), Slovenia (58%) and Slovakia (100%). In contrast, in 2013, Norway held the position of the main supplier of gas only in Luxemburg (64%), the Netherlands (60%) and the United Kingdom (57%). In 2013, Algeria was the main gas supplier only in Spain with the market share of 54%. Qatar was not the main supplier of gas in any EU member State in 2013. Thus, in 2013, not only was Russia the main gas supplier in more EU member States than its three closest competitors (Algeria, Norway and Qatar), it also enjoyed a higher degree of market dominance, being the only supplier in Bulgaria, Czech Republic, Estonia, Finland, Latvia, Lithuania and Slovakia. In comparison, the highest market share reached by Norway in 2013 was 64% in Luxemburg, and the highest share reached by Algeria in 2013 was 54% in Spain. Among the domestic sources of gas supply in the European Union, in 2013, the Netherlands maintained a 46% share in the total supply of gas to Belgium, while Denmark and the United Kingdom were the only gas suppliers in Sweden and Ireland, respectively. (Eurostat statistics on natural gas supplies and consumption, (Exhibit EU-190), p. 9).

We note that the Appellate Body in *Dominican Republic – Import and Sale of Cigarettes* rejected the argument that the measure at issue imposed a higher per-unit cost of the bonding requirement on the imported cigarettes due to a relatively small market share of the imported cigarettes. The Appellate Body considered that the difference between the per-unit costs of the bond requirement alleged by Honduras did not depend on the foreign origin of the imported cigarettes (Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96). In contrast, we consider that, in the present dispute, the objective of diversification of gas supply is directly connected to the origin of gas.

designated as PCIs because they develop pipeline infrastructure to transport natural gas of non-Russian origin.

7.1286. We now turn to provide separate analyses on how the criteria for PCI designation, including the objective of diversification of natural gas supply referred to therein, impact the competitive opportunities of Russian natural gas under Articles I:1 and III:4 of the GATT 1994, in light of the conclusions reached in this subsection. We note that Russia first advances its claim under Article III:4 and then its claim under Article I:1. We do not consider that there is a predetermined order of analysis of Russia's claims and see no compelling reason to deviate from the order in which Russia has presented its claims. Therefore, we first examine Russia's claim under Article III:4 and then Russia's claim under Article I:1.

#### **7.11.2.2.2 Russia's claim under Article III:4 of the GATT 1994**

##### **7.11.2.2.2.1 Introduction**

7.1287. Russia submits that the inevitable consequence of the design of the TEN-E measure is the modification of the conditions of competition to the detriment of Russian natural gas *vis-à-vis* domestic natural gas.<sup>2090</sup> The European Union, on the other hand, maintains that the TEN-E measure seeks to achieve a broad geographical balance, which would ensure equivalent competitive opportunities for all suppliers, and does not exclude projects concerning the supply and transmission of Russian-origin gas from PCI designation.<sup>2091</sup>

##### **7.11.2.2.2.2 Analysis by the Panel**

7.1288. In accordance with the legal standard under Article III:4 of the GATT 1994, as set out in paragraphs 7.238 and 7.239 above, we proceed to examine whether Russia has demonstrated the following elements: (a) the TEN-E measure falls within the scope of Article III:4; (b) the imported and domestic products at issue are like; and (c) the TEN-E measure accords less favourable treatment to the relevant imported Russian products than the treatment it accords to the relevant like domestic products.

7.1289. With respect to the first element of the legal standard under Article III:4 of the GATT 1994, Russia argues that the TEN-E Regulation creates a regulatory framework that governs the infrastructure used to transport, distribute and sell natural gas, and therefore constitutes a law or regulation that affects such transportation, distribution and sale.<sup>2092</sup> The European Union does not contest Russia's argument.

7.1290. We recall that the Appellate Body has found that the term "affecting" has a broad scope,<sup>2093</sup> clarifying at the same time that it is "not *any* 'laws, regulations and requirements' which are covered by Article III:4, but only those which '*affect*' the specific transactions, activities and uses mentioned in that provision."<sup>2094</sup>

7.1291. We observe that the TEN-E measure provides a regulatory framework for PCIs developing infrastructure concerning transmission pipelines, LNG and natural gas storage facilities.<sup>2095</sup> The mentioned types of infrastructure may be used for one or several activities covered by Article III:4 of the GATT 1994, such as the internal transportation, sale or use of imported natural gas in the European Union. In particular, we note the essential function of transmission pipelines in the transportation of natural gas. In light of these considerations, we find that the TEN-E measure "affects" the internal transportation, sale and use of imported natural gas in the European Union, and therefore, falls within the scope of Article III:4 of the GATT 1994.

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<sup>2090</sup> Russia's first written submission, para. 794; second written submission, para. 461; and response to Panel question No. 238(b), paras. 340–346.

<sup>2091</sup> European Union's first written submission, paras. 815–817 and 823–825.

<sup>2092</sup> Russia's second written submission, para. 462. See also Russia's response to Panel question No. 113, para. 471.

<sup>2093</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 210.

<sup>2094</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 208. (emphasis original)

<sup>2095</sup> See above para. 2.55 and fn 133.



7.1292. With respect to the second element, Russia submits that, in the context of this claim, domestic and Russian natural gas are like products within the meaning of Article III:4 of the GATT 1994. The European Union agrees with Russia that natural gas of different origin(s) is like, in the context of the TEN-E measure.<sup>2096</sup> We also note that, in advancing this claim, Russia asserts that "Russian and domestic gas, like natural gas imported from any other country, *including LNG*, are in a perfectly competitive relationship" and thus are "like products" within the meaning of Article III:4 of the GATT 1994.<sup>2097</sup>

7.1293. In paragraph 7.855, we have concluded that LNG is not like natural gas within the meaning of Article I:1 of the GATT 1994. It is well established that the determination of "likeness", in the context of the MFN and national treatment obligations is the determination about the nature and extent of the competitive relationship between and among the products at issue.<sup>2098</sup>

7.1294. In our view, the origin of LNG – whether domestic for the purposes of an Article III:4 claim or imported for the purposes of an Article I:1 claim – has no bearing on the issue of whether LNG is in a competitive relationship with natural gas in the EU market. Therefore, having concluded that LNG is not like natural gas within the meaning of Article I:1 of the GATT 1994, we find that LNG and natural gas are not "like products" within the meaning of Article III:4 of the GATT 1994. Consequently, we do not proceed further with our assessment of the TEN-E measure concerning its treatment of LNG, or natural gas in comparison to LNG.

7.1295. In paragraph 7.536, we found that Russian and domestic natural gas are like products within the meaning of Article III:4 of the GATT 1994. On the basis of this finding, we also consider that Russian and domestic natural gas are like products for the purposes of our assessment of this claim. Thus, in the next step of our analysis, we focus on the treatment of like Russian and domestic natural gas under the TEN-E measure.

7.1296. In order to prove that the measure at issue is inconsistent with Article III:4 of the GATT 1994, under the third element of the legal standard articulated above, a complainant must demonstrate that the measure modifies the conditions of competition to the detriment of imported products *vis-à-vis* like domestic products.<sup>2099</sup> The "treatment no less favourable" standard under Article III:4 thus requires us to assess the impact of the TEN-E measure on the equality of competitive conditions between Russian and like domestic natural gas. An assessment of the impact of the contested measure on the equality of competitive conditions between domestic and imported products is based on close scrutiny of the measure, including its design, structure, and expected operation.<sup>2100</sup>

7.1297. In Russia's view, there is a "genuine relationship" between the TEN-E measure and the adverse impact on the competitive opportunities for Russian natural gas in the EU gas market, because PCI designation makes domestic natural gas more readily available in the market and potentially less costly, thus incentivizing final customers and other market participants to purchase domestic rather than Russian natural gas.<sup>2101</sup>

7.1298. We recall that, under the TEN-E Regulation, projects designated as PCIs receive administrative, regulatory and financial incentives.<sup>2102</sup> We consider that, as a result of

<sup>2096</sup> European Union response to Panel question No. 110(d), para. 288.

<sup>2097</sup> Russia's first written submission, para 789. See also Russia's response to Panel question No. 110(d), para. 448. (emphasis added)

<sup>2098</sup> We note that the Appellate Body has employed this approach to the determination of "likeness" in the context of Articles III:2 and III:4 of the GATT (national treatment), as well as Article 2.1 of the TBT Agreement involving both the MFN and national treatment obligations. (See Appellate Body Reports, *Philippines – Distilled Spirits*, para. 170; *EC – Asbestos*, para. 99; and *US – Clove Cigarettes*, para. 120. See also Panel Report, *US – Tuna II (Mexico)*, para. 7.225).

<sup>2099</sup> Appellate Body Reports, *EC – Seal Products*, paras. 5.82 and 5.117 (referring to Appellate Body Reports, *US – Clove Cigarettes*, para. 176 (referring to GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.10); *China – Publications and Audiovisual Products*, para. 305 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, paras. 135-136); *Thailand – Cigarettes (Philippines)*, para. 126 (referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16, DSR 1996:1, 97, at p. 109); and *Korea – Alcoholic Beverages*, para. 127).

<sup>2100</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, paras. 130 and 134.

<sup>2101</sup> Russia's first written submission, paras. 801-802.

<sup>2102</sup> See above paras. 2.58-2.60.

administrative incentives granted to PCIs in the form of more streamlined administrative processing of the applications relating to such projects, such projects will be completed faster than projects not designated as PCIs.<sup>2103</sup> We also consider that financial incentives in the form of applicable financial assistance, as well as regulatory treatment incentives, for instance, in the form of project-related cost allocation, will make the completion of PCIs less costly than projects not designated as PCIs.<sup>2104</sup> In view of such benefits accruing to projects designated as PCIs, economic actors are thus more likely to invest in the projects that meet the criteria for PCI designation.

7.1299. We also recall our conclusion that, by virtue of the objective of diversification of natural gas supply, the criteria for PCI designation include those that in practice condition PCI designation on projects developing infrastructure aimed at connecting certain EU member States with sources of natural gas supply other than Russia.<sup>2105</sup> As a consequence, some projects will be designated as PCIs, and receive benefits associated with their PCI designation, because they develop pipeline infrastructure to transport natural gas of non-Russian origin.

7.1300. In our view, the TEN-E measure is thus designed to increase the availability of new projects developing pipeline infrastructure to transport natural gas of non-Russian origin, including domestic, and decrease the availability of new projects developing pipeline infrastructure to transport natural gas of Russian origin. We consider that, by this means, the TEN-E measure provides more favourable conditions for the transportation of natural gas of any origin other than Russian, including natural gas of domestic origin. Therefore, for these reasons, we conclude that the TEN-E measure negatively affects the competitive opportunities of Russian natural gas *vis-à-vis* domestic natural gas.

#### **7.11.2.2.2.3 Conclusion**

7.1301. In view of the foregoing, we conclude that the TEN-E measure is inconsistent with Article III:4 of the GATT 1994.

#### **7.11.2.2.3 Russia's claim under Article I:1 of the GATT 1994**

##### **7.11.2.2.3.1 Introduction**

7.1302. Russia submits that the TEN-E measure is inconsistent with Article I:1 of the GATT 1994 because the advantages of PCI eligibility and designation extended by the TEN-E measure to imported third-country "PCI gas" are denied to Russian natural gas.<sup>2106</sup> The European Union maintains that Russia's claim under Article I:1 of the GATT 1994 is unfounded for the same reasons as Russia's claim under Article III:4.<sup>2107</sup> In the European Union's view, the TEN-E measure does not distort market opportunities in favour of natural gas from other third countries and to the detriment of Russian natural gas, but contributes instead to achieving greater equality of competitive opportunities for natural gas from all potential sources, including Russia.<sup>2108</sup>

##### **7.11.2.2.3.2 Analysis by the Panel**

7.1303. In light of the legal standard under Article I:1 of the GATT 1994, as set out in paragraphs 7.236 and 7.237 above, we proceed to examine whether Russia has demonstrated the following elements: (a) the TEN-E measure falls within the scope of Article I:1; (b) the relevant imported products are like products; (c) the TEN-E measure confers an "advantage, favour, privilege, or immunity" on a product originating in the territory of any country; and (d) that the advantage so accorded is not extended "immediately" and "unconditionally" to like Russian products.

7.1304. With respect to the first element, Russia considers that the TEN-E measure falls within the scope of Article I:1 of the GATT 1994 because it falls within the scope of the "matters" referred

<sup>2103</sup> See above para. 2.58.

<sup>2104</sup> See above paras. 2.59-2.60.

<sup>2105</sup> See above para. 7.1285.

<sup>2106</sup> Russia's first written submission, paras. 806-807 and 809. See also Russia's second written submission, para. 486.

<sup>2107</sup> European Union's first written submission, para. 839.

<sup>2108</sup> European Union's first written submission, para. 839.

to in Article III:4 of the GATT 1994.<sup>2109</sup> As observed by the Appellate Body, Article I:1 of the GATT 1994 "incorporates all matters referred to in paragraphs 2 and 4 of Article III".<sup>2110</sup> Above, we found that the TEN-E measure falls within the scope of Article III:4 of the GATT 1994. On this basis, we find that the TEN-E measure falls within the scope of the "matters" referred to in Article III:4 and therefore falls within the scope of Article I:1 of the GATT 1994.

7.1305. With respect to the second element, we note that the parties do not disagree that imported natural gas of different origins is like within the meaning of Article I:1 of the GATT 1994.<sup>2111</sup> We also recall that, in the context of the unbundling measure, we have already found that imported Russian natural gas and imported natural gas from other non-EU countries are like products within the meaning of Article I:1 of the GATT 1994.<sup>2112</sup> Guided by this finding, we consider that imported Russian natural gas and imported natural gas from other non-EU countries constitute like products within Article I:1 of the GATT 1994 also in the context of the TEN-E measure.

7.1306. In what concerns the likeness of LNG and natural gas, we recall that, in the context of the LNG measure, we found that LNG is not like natural gas within the meaning of Article I:1 of the GATT 1994.<sup>2113</sup> Guided by this finding, we conclude that LNG is not like natural gas also in the context of the TEN-E measure. Consequently, we do not proceed further with our assessment of the TEN-E measure concerning its treatment of LNG, or natural gas in comparison to LNG, and focus instead on the treatment, under the TEN-E measure, of natural gas imported from Russia and like natural gas imported from any other non-EU country.

7.1307. Article I:1 of the GATT 1994 prohibits Members from granting an advantage to imported products that is not "immediately" and "unconditionally" extended to like imported products from all Members.<sup>2114</sup> Thus, under the last two elements of the legal standard under Article I:1 of the GATT 1994, a complainant must establish that the measure at issue confers an "advantage on a product originating in the territory of any country and that the advantage so accorded is not extended "immediately" and "unconditionally" to like products originating in the territory of all Members.

7.1308. Russia argues that the TEN-E measure grants an advantage to natural gas originating in any third country, except Russia, because the TEN-E measure incentivizes the creation of infrastructure that is not aimed at importing, transmitting, or distributing Russian natural gas.<sup>2115</sup> We recall that, under the TEN-E measure, projects designated as PCIs receive administrative, regulatory and financial incentives.<sup>2116</sup>

7.1309. Previous panels considered that a measure grants an advantage within the meaning of Article I:1 of the GATT 1994 when such a measure creates "more favourable competitive opportunities" to products of a particular origin.<sup>2117</sup>

7.1310. We recall that, under the TEN-E Regulation, projects designated as PCIs receive administrative, regulatory and financial incentives.<sup>2118</sup> We consider that, as a result of administrative incentives granted to PCIs in the form of more streamlined administrative processing of the applications relating to such projects, such projects will be completed faster than

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<sup>2109</sup> Russia's first written submission, paras. 787-788 and 804.

<sup>2110</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.80.

<sup>2111</sup> Russia submits that Russian gas and gas from any other origin are like products for the purposes of its claim against the TEN-E measure under Article I:1 of the GATT 1994, relying on the arguments developed in the context of its claims against the unbundling measure. (Russia's first written submission, paras. 343-349 and 804, and fn 1092). The European Union agrees with Russia that natural gas of different origin is like, in the context of the TEN-E measure. (European Union response to Panel question No. 110(d), para. 288).

<sup>2112</sup> See above para. 7.577.

<sup>2113</sup> See above para. 7.855.

<sup>2114</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.88.

<sup>2115</sup> Russia's response to Panel question No. 238(c), paras. 347-348.

<sup>2116</sup> See above paras. 2.58-2.60.

<sup>2117</sup> Panel Reports, *EC – Bananas III (Guatemala and Honduras)*, para. 7.239; and *Colombia – Ports of Entry*, para. 7.346. The panel in *EC – Seal Products* considered that the advantage granted by the EU Seal Regime was in the form of market access. (Panel Reports, *EC – Seal Products*, para. 7.596).

<sup>2118</sup> See above paras. 2.58-2.60.

projects not designated as PCIs.<sup>2119</sup> We also consider that financial incentives in the form of applicable financial assistance, as well as regulatory treatment incentives, for instance, in the form of project-related cost allocation, will make the completion of PCIs less costly than projects not designated as PCIs.<sup>2120</sup> In view of such benefits accruing to projects designated as PCIs, economic actors are thus more likely to invest in the projects that meet the criteria for PCI designation.

7.1311. We also recall our conclusion that, by virtue of the objective of diversification of natural gas supply, the criteria for PCI designation include those that in practice condition PCI designation on projects developing infrastructure aimed at connecting certain EU member States with sources of natural gas supply other than Russia.<sup>2121</sup> As a consequence, some projects will be designated as PCIs, and receive benefits associated with their PCI designation, because they develop pipeline infrastructure to transport natural gas of non-Russian origin.

7.1312. In our view, the TEN-E measure is thus designed to increase the availability of new projects developing pipeline infrastructure to transport natural gas of non-Russian origin and decrease the availability of new projects developing pipeline infrastructure to transport natural gas of Russian origin. As we have concluded above, by this means, the TEN-E measure provides more favourable conditions for the transportation of natural gas of any origin other than Russian. Therefore, we consider that imported natural gas of any origin other than Russian will benefit from more favourable conditions of transportation, and as a result, from more favourable competitive opportunities. On this basis, we find that the TEN-E measure grants an advantage to imported natural gas of any origin other than Russia within the meaning of Article I:1 of the GATT 1994 that is not "immediately" and "unconditionally" extended to imported natural gas of Russian origin.

#### **7.11.2.2.3.3 Conclusion**

7.1313. Based on the foregoing, we find that the TEN-E measure is inconsistent with Article I:1 of the GATT 1994 by failing to provide "immediately and unconditionally" to natural gas imported from Russia an advantage accorded to like natural gas imported from any other country.

#### **7.11.2.2.4 Observations on certain additional arguments in respect of Russia's claims under Articles I:1 and III:4 of the GATT 1994**

7.1314. We consider that the analysis that we have conducted above sufficiently supports our findings that the TEN-E measure is inconsistent with Articles I:1 and III:4 of the GATT 1994. However, we consider it appropriate to provide additional observations in response to certain arguments raised by the European Union. We emphasise that our observations below are intended to clarify the scope of our findings and do not affect our overall conclusion on the inconsistency of the TEN-E measure with Articles I:1 and III:4 of the GATT 1994.

7.1315. First, we note the European Union's argument that, in order to meet the specific criteria for PCI designation, a project does not necessarily have to contribute to the sub-criterion "diversification of supply sources".<sup>2122</sup> We agree with the European Union that this sub-criterion concerns only two out of four *specific* criteria for PCI designation. We further observe that, to be eligible for PCI selection, a project is required to "significantly contribute" only to one of the four *specific* criteria stipulated in Article 4(2)(b) of the TEN-E Regulation, in addition to meeting the *general* criteria. On this basis, we confirm that projects not contributing to the sub-criterion "diversification of supply sources" may still be designated as PCIs, provided they meet the *general* criteria.

7.1316. However, in our view, the fact that there are ways for projects to be designated as PCIs other than by enhancing the diversification of natural gas supply, which we determined to imply developing infrastructure for the transportation of natural gas of non-Russian origin, does not change our conclusion that the TEN-E measure modifies the conditions of competition to the detriment of Russian natural gas. It is well-established that, in situations where a measure creates a disincentive to use imported products, the overall conclusion that the measure modified the conditions of competition to the detriment of imported products is "not nullified by the fact that the

<sup>2119</sup> See above para. 2.58.

<sup>2120</sup> See above paras. 2.59-2.60.

<sup>2121</sup> See above para. 7.1285.

<sup>2122</sup> European Union's first written submission, para. 819.

[measure] will not give rise to less favourable treatment for like imported products in each and every case".<sup>2123</sup>

7.1317. The facts of the present case are distinct. However, our analysis shows that the TEN-E measure creates incentives for economic actors to develop transport infrastructure "favouring" domestic or imported natural gas over Russian natural gas. Thus, deriving guidance from the approach of the Appellate Body and panels in previous disputes, we consider that the existence of some criteria that condition PCI designation on projects developing infrastructure for the transportation of natural gas of non-Russian origin is sufficient for our finding that the TEN-E measure negatively affects the conditions of competition of Russian natural gas within the meaning of Articles I:1 and III:4 of the GATT 1994. Conversely, the existence of some possibilities for projects to be designated as PCIs other than by developing infrastructure for the transportation of natural gas of non-Russian origin does not alter this finding.

7.1318. Second, we note the European Union's contention that the existence of discrimination cannot be assessed by considering in isolation just one of the priority corridors, such as BEMIP Gas, but should instead be based on an overall assessment of all corridors, as well as of the already existing infrastructures outside the current priority corridors.<sup>2124</sup> In our scrutiny of the TEN-E measure, we have holistically assessed its design, structure and expected operation, including all gas priority corridors and specific criteria for PCI designation. We are, however, unconvinced by the European Union's argument that we need to assess existing infrastructure outside the current priority corridors. Our examination is limited to the assessment of the impact on the competitive opportunities of Russian natural gas attributable to the TEN-E measure challenged by Russia in these proceedings.<sup>2125</sup> We fail to see how the impact of existing infrastructure outside the current priority corridors can be attributed to the TEN-E measure.

7.1319. Third, we understand the European Union to argue that, because the ultimate goal of the TEN-E measure is to expose all market participants to increased competition, creating bigger market opportunities for each of them, the TEN-E measure is not inconsistent with Articles I:1 and III:4 of the GATT 1994.<sup>2126</sup> According to the European Union, in those EU member States that are already adequately connected to sources of natural gas supply in Russia, the TEN-E measure will contribute to achieve "greater" equality of competitive opportunities for natural gas from all potential sources.<sup>2127</sup>

7.1320. It appears to us that the European Union's position is premised on the proposition that, under Articles I:1 and III:4 of the GATT 1994, where existing market conditions do not afford domestic or imported products equality of opportunities to compete with products of a particular origin, a Member "is permitted, and indeed required, to take measures in order to ensure such equality".<sup>2128</sup>

7.1321. We do not enter into a debate as to whether Article I:1 or III:4 of the GATT 1994 contains an obligation to address a perceived distortion of competition in the domestic market of a Member. In our view, to the extent the TEN-E measure seeks to address the perceived inequality of competition between and among domestic and imported natural gas in the EU market by suppressing the competitive opportunities of natural gas imported from a particular Member, it is inconsistent with Articles I:1 and III:4 of the GATT 1994.<sup>2129</sup>

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<sup>2123</sup> Appellate Body Report, *US – FSC (Article 21.5 - EC)*, paras. 220-221. See also Panel Reports, *Canada – Autos*, para. 10.87; and *India – Solar Cells*, para. 7.95.

<sup>2124</sup> European Union's second written submission, para. 383.

<sup>2125</sup> See Appellate Body Reports, *Korea – Various Measures on Beef*, para. 149; *US – Tuna II (Mexico)*, para. 236; and *US – COOL*, para. 270.

<sup>2126</sup> European Union's first written submission, paras. 823–824 and 839.

<sup>2127</sup> European Union's second written submission, para. 384.

<sup>2128</sup> European Union's first written submission, para. 823.

<sup>2129</sup> Appellate Body Report, *Argentina – Financial Services*, paras. 6.143–6.145. We note that, in the context of Article XVII of the GATS, the Appellate Body opined as follows:

However, ensuring equal competitive conditions, which is required by the legal standard of "treatment no less favourable", is *not* the same as guaranteeing that one group of services or products does not have any competitive advantage over another group. As Panama rightly points out, ensuring equal conditions of competition under the national treatment obligation means "to guarantee *equality of opportunities to compete* in the marketplace", rather than to guarantee

7.1322. It is well established that a determination that a measure modifies the conditions of competition to the detriment of imported products of a particular origin is sufficient to find a violation of Article I:1 or III:4 of the GATT 1994, without further enquiry into the regulatory objectives of this measure.<sup>2130</sup> Therefore, we consider that the ultimate goal of achieving "greater" equality of competitive opportunities<sup>2131</sup>, allegedly pursued by the TEN-E measure, does not alter our conclusion that the TEN-E measure has modified the conditions of competition to the detriment of Russian natural gas, and is therefore inconsistent with Articles I:1 and III:4 of the GATT 1994.

7.1323. Fourth, the European Union submits that, if upheld, Russia's claim would interfere in a manifestly unreasonable manner with each Member's sovereign right to plan and develop its transport infrastructures according to its own needs and resources.<sup>2132</sup> According to the European Union, Russia's claim implies that a Member could not build, or support the building of, any transport infrastructure which, in practice, is used more frequently for the transportation of domestic products or of imported products from a certain origin.<sup>2133</sup> However, in the European Union's view, this will often be the unavoidable consequence of geographical factors.<sup>2134</sup>

7.1324. We do not agree with the European Union's position. We are not deciding, in the abstract, on the issue of the WTO Members' rights to develop transport infrastructure. The TEN-E measure provides a legal framework for the development of fixed pipeline infrastructure used specifically for the transportation of natural gas.<sup>2135</sup> Natural gas is thus the only product transported via these pipelines. Our finding concerns the consistency of the TEN-E measure with Articles I:1 and III:4 of the GATT 1994 in light of this and other specific circumstances of this case.

### 7.11.3 European Union's defence under Article XX(j) of the GATT 1994

#### 7.11.3.1 Introduction

7.1325. In paragraphs 7.1301 and 7.1313 above, we found that the TEN-E measure is inconsistent with Articles I:1 and III:4 of the GATT 1994. The European Union submits a single defence under Article XX(j) of the GATT 1994, in the event we find that the TEN-E measure is inconsistent with Article I:1 and/or III:4 of the GATT 1994.<sup>2136</sup> We observe that the aspects of the TEN-E measure that violate both Articles I:1 and III:4 are the criteria for the selection of PCIs that condition PCI designation on projects developing infrastructure aimed at connecting certain EU member States with sources of natural gas supply other than Russia.<sup>2137</sup> Therefore, we consider it appropriate to provide a joint analysis of the European Union's defence in respect of both the inconsistency of the TEN-E measure with Articles I:1 and III:4 of the GATT 1994.

7.1326. The European Union contends that the TEN-E measure is justified under Article XX(j) of the GATT 1994. The European Union argues that natural gas is a product "in general or local short

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that all like services and service suppliers are "equally *competitive*". (emphasis original; footnote omitted) (Appellate Body Report, *Argentina – Financial Services*, para. 6.144)

<sup>2130</sup> Appellate Body Reports, *EC – Seal Products*, paras. 5.90 and 5.117. See also Appellate Body Reports, *US – Clove Cigarettes*, para. 179 and fn 372 to para. 179; *Thailand – Cigarettes (Philippines)*, para. 128; and *Korea – Various Measures on Beef*, para. 137.

<sup>2131</sup> European Union's first written submission, paras. 824 and 839.

<sup>2132</sup> European Union's first written submission, para. 825.

<sup>2133</sup> European Union's first written submission, para. 825.

<sup>2134</sup> European Union's first written submission, para. 825; and second written submission, para. 383.

<sup>2135</sup> See above para. 2.55 and fn 133.

<sup>2136</sup> European Union's second written submission, para. 394. We note that the European Union raised its defence under Article XX(j) for the first time in its second written submission. Russia objects to the timing of the European Union's defence, alleging due process concerns. (Russia's response to Panel question No. 149, para. 32). In its additional questions to the parties after the first meeting, the Panel provided Russia with the opportunity to comment on the European Union's defence. (Panel question No. 149). Russia had further opportunity to respond to the European Union's defence in the course of the second meeting of the Panel. We recall that, in similar circumstances that involved the respondent raising its defence under Article XIV of the GATS for the first time in its second written submission, the Appellate Body considered that the Panel did not fail to ensure the complainant's due process rights in deciding to assess the defence, in light of the fact that the complainant had had the opportunity to respond to that defence. (Appellate Body Report, *US – Gambling*, paras. 274–276). In the present case, we acknowledge that the European Union could have raised its defence earlier in the proceedings. However, given the opportunities provided to Russia to respond to the European Union's defence, we consider that Russia's due process rights were respected.

<sup>2137</sup> See above paras. 7.1299–7.1300 and 7.1311–7.1312.

supply" because of the existence of "genuine and serious risks of disruption of supply of gas".<sup>2138</sup> According to the European Union, the TEN-E measure seeks to develop and improve infrastructure to connect the European Union with the main potential sources of supply of gas within and around the European Union in order to ensure security of gas supply, and is therefore "essential" to "the acquisition or distribution" of natural gas.<sup>2139</sup> The European Union argues that the TEN-E measure is applied consistently with the *chapeau* of Article XX, emphasizing that any difference in treatment between Russian gas and gas of any other origin, which might result from the application of the criteria for PCI designation, would not amount to "unjustified" or "arbitrary" discrimination.<sup>2140</sup>

7.1327. Russia contends that the European Union has not satisfied its burden, under Article XX(j) of the GATT 1994, to justify the inconsistency of the TEN-E measure with Articles I:1 and III:4 of the GATT 1994.<sup>2141</sup> According to Russia, the European Union failed to demonstrate that natural gas is a product "in general or local short supply" because the European Union has not established that the quantity of available gas supply is insufficient to meet demand.<sup>2142</sup> Russia further argues that the TEN-E measure is not "essential" to "the acquisition or distribution" of natural gas because, in Russia's view, the TEN-E measure is not aimed at ensuring the security of gas supply but is rather aimed at decreasing the attractiveness of investing in infrastructure that would facilitate the importation of Russian natural gas.<sup>2143</sup> Russia submits that, by removing discriminatory incentives to avoid projects that would facilitate imports of natural gas from Russia, the European Union could have implemented a less trade restrictive alternative to the TEN-E measure that would equally contribute to the stated objective of the TEN-E measure.<sup>2144</sup> In Russia's view, the discriminatory application of the criteria for PCI designation also results in "arbitrary" and "unjustifiable" discrimination within the meaning of the *chapeau* of Article XX of the GATT 1994.<sup>2145</sup>

### 7.11.3.2 Analysis by the Panel

7.1328. In accordance with the legal standard under Article XX(j) of the GATT 1994, as set out in paragraphs 7.244 through 7.248 above, in order to justify the TEN-E measure under Article XX(j), the European Union must demonstrate that the TEN-E measure (i) is provisionally justified under paragraph (j) of Article XX and (ii) satisfies the requirements of the *chapeau* of Article XX.

7.1329. As indicated in paragraph 7.246 above, in order to provisionally justify a challenged measure under paragraph (j) of Article XX, the responding Member must establish the following elements: (i) the measure is "designed" to address "the acquisition or distribution of products in general or local short supply"; and (ii) the measure is "essential" to the acquisition or distribution of products in general or local short supply.<sup>2146</sup> Thus, the first step in our analysis of whether the TEN-E measure is provisionally justified under paragraph (j) of Article XX consists of determining whether the European Union has demonstrated that this measure is "designed" to address "the acquisition or distribution of products in general or local short supply". We proceed to this analysis immediately below.

#### 7.11.3.2.1 Designed to address "the acquisition or distribution of products in general or local short supply"

7.1330. In order for a measure to be "designed" to address "the acquisition or distribution of products in general or local short supply", the respondent must first establish that the product in

<sup>2138</sup> European Union's second written submission, paras. 419–421; and opening statement at the second meeting of the Panel, paras. 117–119.

<sup>2139</sup> European Union's second written submission, paras. 422–434; and opening statement at the second meeting of the Panel, paras. 121–125.

<sup>2140</sup> European Union's second written submission, paras. 435–436.

<sup>2141</sup> Russia's response to Panel question No. 149, para. 32.

<sup>2142</sup> Russia's response to Panel question No. 149, paras. 37–40; and opening statement at the second meeting of the Panel, para. 200.

<sup>2143</sup> Russia's response to Panel question No. 149, paras. 41–48; and opening statement at the second meeting of the Panel, para. 201.

<sup>2144</sup> Russia's response to Panel question No. 149, paras. 49–53.

<sup>2145</sup> Russia's response to Panel question No. 149, paras. 54–58; and opening statement at the second meeting of the Panel, para. 202.

<sup>2146</sup> See also above para. 7.247.

question is "in general or local short supply".<sup>2147</sup> In the present case, we need to determine whether the European Union has demonstrated that natural gas is a product "in general or local short supply".

#### 7.11.3.2.1.1 Products "in general or local short supply"

7.1331. The Appellate Body in *India – Solar Cells* has provided extensive guidance for panels in their assessment of whether products are "in general or local short supply" in the context of Article XX(j) of the GATT 1994. We therefore find it useful to briefly recall this guidance here.

7.1332. Having considered how the different terms used in Article XX(j) of the GATT 1994 inform one other, the Appellate Body found that products can be said to be "in short supply" when the "quantity" of a product that is "available" does not meet "demand" for that product.<sup>2148</sup> The Appellate Body further observed that the phrase "products in general or local short supply" is focused on products for which a situation of short supply exists within the territory of the Member invoking Article XX(j), while acknowledging that a situation of "general" short supply may also extend beyond the boundaries of that territory, as long as it also occurs within that territory.<sup>2149</sup> In the Appellate Body's view, the terms "general" and "local", together with the disjunctive "or", suggest that there is no requirement for a Member to demonstrate that the shortage extends to all parts of its territory, but that, depending on the circumstances, it may be sufficient to demonstrate that the existence of such a situation of shortage occurs locally, or is limited to certain parts of its territory.<sup>2150</sup>

7.1333. Having recalled that Article XX(j) stipulates that any measures taken under paragraph (j) "shall be discontinued as soon as the conditions giving rise to them have ceased to exist", the Appellate Body considered that Article XX(j) contemplates situations of "short supply" that may continue over time, but are nonetheless expected not to last indefinitely.<sup>2151</sup> Therefore, an analysis of whether a respondent has identified "products in general or local short supply" is not satisfied by considering only whether there is a mathematical difference at a single point in time between demand and the quantity of supply that is "available" for purchase in a particular geographical area or market.<sup>2152</sup> According to the Appellate Body, Article XX(j) requires, instead, a careful scrutiny of the relationship between supply and demand based on a holistic consideration of trends in supply and demand as they evolve over time, as well as whether the conditions giving rise to short supply have ceased to exist.<sup>2153</sup>

7.1334. The Appellate Body thus determined that an assessment of whether products are "in general or local short supply" involves an examination of the extent to which a particular product is "available" for purchase in a particular geographical area or market, and whether this is sufficient to meet demand in the relevant area or market.<sup>2154</sup> The Appellate Body further identified a number of factors that, depending on the particularities of each case, may be relevant for this analysis. These factors include the following: the level of domestic production of a particular product and the nature of the product that is alleged to be "in general or local short supply"; the relevant product and geographic market; potential price fluctuations in the relevant market; the purchasing power of foreign and domestic consumers; the role that foreign and domestic producers play in a particular market, including the extent to which domestic producers sell their production abroad; the total quantity of imports that may be "available" to meet demand in a particular geographical area or market; the extent to which international supply of a product is stable and accessible, including by examining factors such as the distance between a particular geographical area or market and production sites, as well as the reliability of local or transnational supply chains; the level of economic development of the relevant Members.<sup>2155</sup> We further note

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<sup>2147</sup> See Appellate Body Report, *India – Solar Cells*, para. 5.60; and Panel Report, *India – Solar Cells*, para. 7.199.

<sup>2148</sup> Appellate Body Report, *India – Solar Cells*, paras. 5.64-5.66.

<sup>2149</sup> Appellate Body Report, *India – Solar Cells*, para. 5.67.

<sup>2150</sup> Appellate Body Report, *India – Solar Cells*, para. 5.67.

<sup>2151</sup> Appellate Body Report, *India – Solar Cells*, para. 5.70.

<sup>2152</sup> Appellate Body Report, *India – Solar Cells*, para. 5.70.

<sup>2153</sup> Appellate Body Report, *India – Solar Cells*, para. 5.70.

<sup>2154</sup> Appellate Body Report, *India – Solar Cells*, para. 5.71.

<sup>2155</sup> Appellate Body Report, *India – Solar Cells*, paras. 5.71-5.72 and 5.89.



that the Appellate Body recognized that a consideration of potential risks of disruption in supply of a given product may also inform the question of whether a situation of "short supply" exists.<sup>2156</sup>

7.1335. According to the Appellate Body, in all cases, the responding party has the burden of demonstrating that the quantity of "available" supply from both domestic and international sources in the relevant geographical market is insufficient to meet demand.<sup>2157</sup>

7.1336. The European Union argues that natural gas is a product "in general or local short supply" because of the existence of "genuine and serious risks of disruption of supply of gas".<sup>2158</sup> The European Union observes that the supply of gas from any given source, or through any given route, may be disrupted by events such as infrastructure breakdowns, commercial disputes, natural disasters, social unrest, political actions or terrorism.<sup>2159</sup> The European Union explains that, as the transmission of gas requires especially dedicated fixed infrastructure that is costly and time-consuming to build, in the event of disruption of gas supply, it is not possible to resort to an alternative source or route of supply unless the required infrastructure is already in place.<sup>2160</sup>

7.1337. The European Union points to two additional factors that, in its view, aggravate further the risks of disruptions of gas supply in the European Union. The first factor is the European Union's dependency on a relatively limited number of sources of supply.<sup>2161</sup> The European Union asserts that it imports 66% of the natural gas it consumes and that several EU member States import all<sup>2162</sup> or almost all<sup>2163</sup> their gas from one single external source of supply.<sup>2164</sup> For the European Union, this makes it vulnerable to disruptions of supply of gas resulting from the events in its own territory, as well as those events that take place in the country of origin of gas or transit countries and are beyond the control of the EU authorities.<sup>2165</sup> The second factor referred to by the European Union is the inadequacy of the infrastructure interconnecting the transmission networks of the various EU member States.<sup>2166</sup>

7.1338. The European Union contends that the above factors expose it to genuine and serious risks of disruption of supply of gas, adding that such risks materialised in the past.<sup>2167</sup> The European Union submits that such disruptions may seriously compromise the stability and reliability of the existing "local and transnational chains" for the supply of gas into, and within, the European Union.<sup>2168</sup> In the European Union's view, due to the identified risks of disruption of gas supply in the European Union, natural gas is thus a product in "short supply" in the European Union within the meaning of Article XX (j) GATT.<sup>2169</sup>

7.1339. Russia argues that the European Union failed to establish that natural gas is a product "in short supply" in the European Union.<sup>2170</sup> Russia submits that, in order to demonstrate that a product is "in general or local short supply", the respondent must show that the quantity of available supply from both domestic and international sources in the relevant geographical market is insufficient to meet demand.<sup>2171</sup> In Russia's view, this requires the respondent to quantify the available supply.<sup>2172</sup>

<sup>2156</sup> Appellate Body Report, *India – Solar Cells*, para. 5.76.

<sup>2157</sup> Appellate Body Report, *India – Solar Cells*, para. 5.71.

<sup>2158</sup> European Union's second written submission, paras. 419 and 420-421; and opening statement at the second meeting of the Panel, paras. 117-119.

<sup>2159</sup> European Union's second written submission, para. 414.

<sup>2160</sup> European Union's second written submission, para. 415.

<sup>2161</sup> European Union's second written submission, para. 417.

<sup>2162</sup> European Union's second written submission, para. 417 (referring to Bulgaria, Finland and Slovakia).

<sup>2163</sup> European Union's second written submission, para., 417 (referring to Estonia, Latvia and Lithuania).

<sup>2164</sup> European Union's second written submission, para. 417.

<sup>2165</sup> European Union's second written submission, para. 417.

<sup>2166</sup> European Union's second written submission, para. 418.

<sup>2167</sup> European Union's second written submission, para. 419 (referring to disruptions of gas supply from Russia to the European Union via Ukraine in 2006 and 2009).

<sup>2168</sup> European Union's second written submission, paras. 420-421.

<sup>2169</sup> European Union's second written submission, para. 421.

<sup>2170</sup> Russia's response to Panel question No. 149, para. 37.

<sup>2171</sup> Russia's response to Panel question No. 149, para. 36 (referring to Appellate Body Report, *India – Solar Cells*, para. 5.71); and opening statement at the second meeting of the Panel, para. 200.

<sup>2172</sup> Russia's response to Panel question No. 149, paras. 37-38.

7.1340. Russia further submits that, instead of addressing all the factors relevant for the assessment of whether a product is "in general or local short supply", as follows from the clarifications of the Appellate Body in *India – Solar Cells*, the European Union focuses only on one factor – the extent to which international supply of a product is stable and accessible, including the reliability of local or transnational supply chains.<sup>2173</sup> According to Russia, the European Union rests its entire argument on the assertions relating to the disruptions of gas supply in 2006 and 2009.<sup>2174</sup> In Russia's view, however, these assertions are not sufficient to establish that local or transnational supply chains are unstable or inaccessible, or that gas is in short supply in the European Union.<sup>2175</sup> Russia contends that accepting the European Union's position – that, as long as the risks of a major disruption of supply of gas in the European Union persist, natural gas will be in short supply in the European Union – "would hollow out the 'short supply' test into an empty shell".<sup>2176</sup>

7.1341. We understand the positions of the parties as follows. On the one hand, the European Union maintains that, due to the alleged "genuine and serious risks" of disruption of supply of natural gas, which in its view, may seriously compromise the stability and reliability of the existing "local and transnational chains" for the supply of natural gas into and within the European Union, natural gas is "in short supply" in the European Union. On the other hand, we understand Russia's arguments as implying that the demonstration that natural gas is a product in "short supply" requires the European Union to quantify the available gas supply in order to show that it is insufficient to meet the demand in the European Union.<sup>2177</sup> We further understand Russia to argue that such demonstration should be based on the consideration of all the relevant factors identified by the Appellate Body in *India – Solar Cells*, and not just the factor addressed by the European Union.

7.1342. We recall that the Appellate Body in *India - Solar Cells* determined that an assessment of whether products are "in general or local short supply" involves an examination of the extent to which a particular product is "available" for purchase in a particular geographical area or market, and whether this is sufficient to meet demand in the relevant area or market.<sup>2178</sup> The Appellate Body further considered that this assessment requires a case-by-case analysis of the relationship between supply and demand based on a holistic consideration of all relevant factors.<sup>2179</sup> The Appellate Body stressed that whether and which factors are relevant will necessarily depend on the particularities of each case.<sup>2180</sup>

7.1343. It is our understanding that, in setting out the factors that may be relevant in an assessment of whether products are "in general or local short supply", the Appellate Body did not focus solely on quantitative factors. The Appellate Body underscored *inter alia* the potential relevance of such factors as the role that foreign and domestic producers play in a particular market, the nature of the products that are alleged to be "in general or local short supply", the extent to which international supply of a product is stable and accessible, and different levels of economic development of the relevant Members.<sup>2181</sup> These factors are rather more qualitative than quantitative in nature. We thus do not see any support for a proposition that the demonstration that a product is "in general or local short supply" requires the respondent to necessarily quantify, at any given point in time or over any given period, the available supply in order to show that it is insufficient to meet demand in the relevant geographical market. In our view, an assessment of whether a product is "in general or local short supply" in the context of Article XX(j) is not limited only to the quantitative analysis, and depending on the circumstances of a particular case, may also be based on certain qualitative elements.

7.1344. Therefore, we disagree with Russia that the demonstration that natural gas is a product "in short supply" requires the European Union to quantify the available gas supply in order to show

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<sup>2173</sup> Russia's response to Panel question No. 149, paras. 38-39 (referring to Appellate Body Report, *India – Solar Cells*, para. 5.74).

<sup>2174</sup> Russia's response to Panel question No. 149, para. 40.

<sup>2175</sup> Russia's response to Panel question No. 149, para. 40.

<sup>2176</sup> Russia's response to Panel question No. 149, para. 40.

<sup>2177</sup> See Russia's response to Panel question No. 149, paras. 37-38; and opening statement at the second meeting of the Panel, para. 200.

<sup>2178</sup> Appellate Body Report, *India – Solar Cells*, para. 5.71.

<sup>2179</sup> Appellate Body Report, *India – Solar Cells*, para. 5.74.

<sup>2180</sup> Appellate Body Report, *India – Solar Cells*, paras. 5.71 and 5.89.

<sup>2181</sup> Appellate Body Report, *India – Solar Cells*, paras. 5.71 and 5.89.

that it is insufficient to meet demand in the European Union. Bearing this consideration in mind, we now turn to the analysis of whether the European Union has demonstrated that natural gas is "in short supply" in the European Union.

7.1345. We observe that the European Union bases its argument that natural gas is "in short supply" in the European Union on the alleged existence of "genuine and serious risks" of disruption of supply of natural gas, which in the European Union's view, may seriously compromise the stability and reliability of the existing "local and transnational chains" for the supply of natural gas into and within the European Union. We note that, in the context of the European Union's defence under Article XX(j), Russia does not contest the European Union's arguments with respect to the existence of risks that natural gas supply to the European Union may be disrupted. Similarly, Russia does not contest the European Union's characterization of such risks as "genuine and serious".

7.1346. We recall that, in the context of our assessment of the European Union's defence under Article XIV(a) of the GATS, we have found that certain risks of natural gas supply disruptions that may be caused by foreign controlled TSOs, identified by the European Union, are not merely hypothetical and the occurrence of an actual disruption in natural gas supply may entail serious consequences for the European Union.<sup>2182</sup> We consider that, taking into account the essential role of fixed pipeline infrastructure for the transportation of natural gas, such disruptions may compromise the reliability of the local or transnational chains of natural gas supply to the European Union.

7.1347. We note that the extent to which international supply of a product is stable and accessible, including the reliability of local or transnational supply chains, is one of the factors the Appellate Body in *India – Solar Cells* found relevant in an assessment of whether a product is "in general or local short supply".<sup>2183</sup> We understand that for the European Union, the existence of "genuine and serious" risks that the international supply of natural gas to the European Union may become unstable or inaccessible is sufficient to establish that natural gas is a product "in short supply". We disagree with this proposition.

7.1348. In our view, the European Union's position implies that the existence of risks of disruption in the supply of a product necessarily means that this product is in "general or local short supply" within the meaning of Article XX(j) of the GATT 1994. We observe that the plain reading of the terms "products in ... short supply" indicates that the products referred to in Article XX(j) of the GATT 1994 are those products that are presently in short supply. This indicates that Article XX(j) does not cover products that are currently not in short supply but that may become "products in ... short supply" in the future.

7.1349. We recall that in considering whether Article XX(j) covers products at risk of being in short supply, the panel in *India – Solar Cells* concluded that Article XX(j) does not cover such products.<sup>2184</sup> The findings of the panel in *India – Solar Cells* based on its conclusions regarding the meaning of the terms "products in general or local short supply" were upheld by the Appellate Body.<sup>2185</sup>

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<sup>2182</sup> See above paras. 7.1174-7.1199.

<sup>2183</sup> Appellate Body Report, *India – Solar Cells*, paras. 5.71 and 5.89.

<sup>2184</sup> Panel Report, *India – Solar Cells*, para 7.250. On the basis of the interpretation of Article XX(j) "in accordance with customary rules of interpretation of public international law", as required by Article 3.2 of the DSU, the panel concluded that the ordinary meaning of the terms "products in general or local short supply" refers to a situation in which the quantity of available supply of a product does not meet demand in the relevant geographical area or market. The panel then considered, "in light of Articles 31 and 32 of the Vienna Convention", the issue of whether the concept of "products in general or local short supply" may cover products at risk of being in short supply. (Panel Report, *India – Solar Cells*, paras. 7.202–7.218 and 7.243–7.250).

<sup>2185</sup> Appellate Body Report, *India – Solar Cells*, para. 5.90. The Appellate Body upheld the panel's findings in paragraph 7.265 of its report, in which the panel stated that "[f]or the reasons set forth above, we find that solar cells and modules are not 'products in general or local short supply' in India within the meaning of Article XX(j) of the GATT 1994". We understand that "the reasons set forth above" include the panel's conclusion in para. 7.250 of its report that the terms "products in general or local short supply" do not cover products at risk of becoming in short supply. (Appellate Body Report, *India – Solar Cells*, para. 5.90; and Panel Report, *India – Solar Cells*, paras. 7.250 and 7.265).

7.1350. It is well established that the legal interpretation embodied in adopted panel and Appellate Body reports becomes "part and parcel of the *acquis* of the WTO dispute settlement system"; and ensuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that absent "cogent reasons", an adjudicatory body will resolve the same legal question in the same way in a subsequent case.<sup>2186</sup> We find no cogent reason to disagree with the legal interpretation of the panel in *India – Solar Cells*. Thus, we consider that the terms "products in general or local short supply" do not cover products at risk of being in short supply.

7.1351. We consider that the European Union has demonstrated that, due to certain risks of natural gas supply disruptions, natural gas may become a product "in short supply". However, the European Union has provided neither arguments nor evidence that natural gas is *currently* "in short supply" in the European Union. We are mindful that an analysis of whether a respondent has identified "products in general or local short supply" is not satisfied by considering only whether there is a mathematical difference at a single point in time between demand and the quantity of supply that is "available" for purchase in a particular geographical area or market.<sup>2187</sup>

7.1352. As indicated by the Appellate Body, Article XX(j) requires a careful scrutiny of the relationship between supply and demand based on a holistic consideration of trends in supply and demand as they evolve over time.<sup>2188</sup> However, to the extent the European Union seeks to demonstrate a shortage of natural gas supply in the European Union over a certain period of time, taking into account the inherent risks of supply disruptions, the European Union bears the burden of introducing evidence that would allow us to conduct a holistic consideration of trends in supply and demand as they evolve over time. The European Union has not provided such evidence.<sup>2189</sup>

7.1353. In view of the foregoing, we find that the European Union has not demonstrated that natural gas is a product "in short supply" in the European Union.

7.1354. This finding is sufficient for us to conclude that the European Union has not demonstrated that the TEN-E measure is justified under Article XX(j) of the GATT 1994. However, we observe that if our finding were modified or reversed on appeal, then the Appellate Body could be called upon to examine whether the TEN-E measure fulfils the other elements of the legal standard under Article XX(j) of the GATT 1994, in particular, whether the TEN-E measure is "essential" to the "acquisition or distribution" of natural gas. Therefore, we consider it useful to follow the approach of certain previous panels in conducting a limited analysis and review so that the Appellate Body may have the benefit of our factual findings related to these elements.<sup>2190</sup>

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<sup>2186</sup> Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160.

<sup>2187</sup> Appellate Body Report, *India – Solar Cells*, para. 5.70.

<sup>2188</sup> Appellate Body Report, *India – Solar Cells*, para. 5.70.

<sup>2189</sup> We requested the parties to provide statistical data on the annual demand/consumption of natural gas in the European Union and each EU member State (Panel question No. 246(c)). However, neither party provided such data. In its response, the European Union refers to Table 246 c) contained in Exhibit EU-190. (European Union's response to Panel question No. 246(c), para. 336). Table 246 c) in Exhibit EU-190 provides gross inland consumption of natural gas (bcm) in the EU member States for the period of 2006 through 2015, but contains no data on the annual demand for natural gas. The other tables contained in Exhibit EU-190 provide data on the natural gas supply to the European Union and individual EU member States for the period of 2006 through 2015, by partner, volume, share and year. In response to our request, Russia refers to its response to the previous question, which does not contain the requested data. (Russia's response to Panel question No. 246(c), para. 370).

However, we observe that the European Union has provided statistical data on production, imports, exports and consumption of gas in the European Union between 2011 and 2015. According to these data, there was more natural gas available for consumption than natural gas consumed in the European Union during the mentioned period. We understand that the volume of natural gas available for consumption in the European Union would be determined by subtracting the volume of exported natural gas from the combined volumes of domestically produced and imported natural gas. Based on this methodology, we have determined as follows: in 2011, there were 496.2 bcm of gas available for consumption and 496.7 bcm of gas consumed; in 2012, the numbers were 459.8 bcm and 448.1 bcm respectively; in 2013 – 439.4 bcm and 437.1 bcm; in 2014 – 411.4 bcm and 430.4 bcm; in 2015 – 409.1 bcm and 381.7 bcm. Overall, for the period of 2011 through 2015, there were 2215.9 bcm of natural gas available for consumption and 2194.0 bcm of natural gas consumed in the European Union. (Eurostat statistics on production, imports, exports and consumption of gas in the European Union between 2011 and 2015, (Exhibit EU-146)).

<sup>2190</sup> See Panel Reports, *India – Solar Cells*, paras. 7.334–7.336; and *US – COOL (Article 21.5 – Canada and Mexico)*, para. 7.672.

7.1355. Our limited analysis and review is provided below. It will involve identifying the different issues that would need to be considered, the parties' positions on those different issues, and our factual findings on those issues.

#### **7.11.3.2.1.2 Whether the TEN-E measure is designed to address "the acquisition or distribution" of natural gas**

7.1356. A measure considered to be "designed" to "address the particular interest specified"<sup>2191</sup> in one of the paragraphs of Article XX of the GATT 1994 must, at a minimum, not be "incapable" of addressing this interest.<sup>2192</sup> The European Union does not provide any arguments with respect to this aspect of its defence under Article XX(j) of the GATT 1994. As Article XX(j) covers measures "essential to the acquisition or distribution" of products in short supply, a measure "designed" to address the interest specified in this provision must be the one that is not "incapable" of addressing "the acquisition or distribution of products in general or local short supply".<sup>2193</sup>

7.1357. As explained above, the TEN-E measure facilitates the development of *inter alia* natural gas transport infrastructure, which includes transmission pipelines.<sup>2194</sup> This infrastructure can be used in the course of the "acquisition" of natural gas from external sources, as well as for the transportation of natural gas within the European Union, for the purposes of its "distribution" between the different parts of the European Union. Thus, the TEN-E measure is responsible for developing gas transport infrastructure that may serve both the "acquisition" and "distribution" of natural gas. Provided that it is established that natural gas is a product in short supply, the TEN-E measure would therefore not be "incapable" of addressing the "acquisition or distribution of products in general or local short supply". In our view, this would provide a sufficient basis for the conclusion that the TEN-E measure is "designed" to address the particular interest specified in Article XX(j).

#### **7.11.3.2.2 Essential to "the acquisition or distribution" of natural gas**

7.1358. As indicated in paragraph 7.246 above, the second element to be established by the respondent in order to demonstrate that a challenged measure is provisionally justified under paragraph (j) of Article XX of the GATT 1994 is that the measure is "essential" to the acquisition or distribution of products in general or local short supply.

7.1359. The Appellate Body *India – Solar Cells* opined that the "plain meaning" of the word "essential" suggests that this word is located at least as close to the "indispensable" end of the continuum as the word "necessary".<sup>2195</sup> The Appellate Body further clarified that the process of weighing and balancing employed to determine whether the measure is "necessary" is relevant in assessing whether a measure is "essential" within the meaning of Article XX(j).<sup>2196</sup> In particular, the Appellate Body considered that the following factors are relevant in assessing whether a measure is "essential": (a) the extent to which the measure sought to be justified contributes to "the acquisition or distribution of products in general or local short supply"; (b) the relative importance of the societal interests or values that the measure is intended to protect; and (c) the trade-restrictiveness of the challenged measure.<sup>2197</sup> In most cases, a comparison between the challenged measure and reasonably available alternative measures would also be undertaken.<sup>2198</sup>

#### ***Contribution to "the acquisition or distribution" of natural gas***

7.1360. We begin our assessment by determining the extent to which the measure sought to be justified contributes to "the acquisition or distribution of products in general or local short supply". As the Appellate Body has explained, "a contribution exists when there is a genuine relationship of

<sup>2191</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.169 (quoting Appellate Body Report, *US – Gambling*, para. 292).

<sup>2192</sup> Appellate Body Reports, *India – Solar Cells*, para. 5.58.

<sup>2193</sup> Appellate Body Report, *India – Solar Cells*, para. 5.60.

<sup>2194</sup> See above para. 2.55 and fn 133.

<sup>2195</sup> Appellate Body Report, *India – Solar Cells*, para. 5.62.

<sup>2196</sup> Appellate Body Report, *India – Solar Cells*, para. 5.63.

<sup>2197</sup> Appellate Body Report, *India – Solar Cells*, para. 5.63.

<sup>2198</sup> Appellate Body Report, *India – Solar Cells*, para. 5.63 (referring to Appellate Body Reports, *EC – Seal Products*, para. 5.169 (referring to Appellate Body Report, *US – Gambling*, para. 307, in turn referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 166)).

ends and means between the objective pursued and the measure at issue".<sup>2199</sup> The selection of a methodology to assess a measure's contribution "depends on the nature, quantity, and quality of evidence existing at the time the analysis is made".<sup>2200</sup> The contribution of a measure to the fulfilment of an objective can be demonstrated by way of "quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence".<sup>2201</sup>

7.1361. The European Union argues that the TEN-E measure facilitates building infrastructure that would enable switching promptly to alternative sources or routes of gas supply in case of disruption, thereby ensuring the "continued" "acquisition" and "distribution" of gas and hence the security of gas supply.<sup>2202</sup> The European Union submits that the criteria for PCI designation are necessary in order to ensure that the resources made available under the TEN-E measure are used to fill infrastructure gaps, rather than in order to promote infrastructure that would merely duplicate already existing infrastructure.<sup>2203</sup>

7.1362. We note that Russia does not disagree with the European Union that building new and additional infrastructure may contribute to the acquisition and distribution of natural gas.<sup>2204</sup> However, Russia considers that, due to the PCI selection criteria aimed at the exclusion of projects that would result in developing infrastructure that could be used to import Russian natural gas, the contribution of the TEN-E measure to its stated objective – ensuring the acquisition and distribution of natural gas – is severely diminished.<sup>2205</sup>

7.1363. We recall our analysis above in section 7.11.2.2.1, which led us to conclude that the criteria for PCI designation implement the objective of diversification of natural gas supply. Given that the transportation of natural gas to, as well as within, the European Union from a particular source of natural gas supply often requires specifically dedicated pipelines, a diversification of natural gas supply sources will often also entail a diversification of natural gas supply routes. In addition, we note that two specific criteria for PCI designation include the diversification of supply "routes".<sup>2206</sup> In our view, this shows that the criteria for PCI designation implement the objective of diversification of sources and routes of natural gas supply.

7.1364. The European Union submits that the diversification of sources and routes of natural gas supply contributes to the "continued" acquisition and distribution of gas, "and hence the SoS of gas", by mitigating the risks of natural gas supply disruptions.<sup>2207</sup> We thus understand that, for the European Union, the mitigation of the risks of natural gas supply disruptions is the medium through which the TEN-E measure contributes to the objective of "acquisition or distribution" of natural gas.

7.1365. We consider that the diversification of sources and routes of natural gas supply can mitigate the risks of natural gas supply disruptions by providing alternative routes and sources of natural gas supply to those that may be affected by a disruption. However, the degree to which the diversification of sources and routes of natural gas supply contributes to the "acquisition or distribution" of natural gas depends on the extent to which the "acquisition or distribution" of natural gas is affected by the risks of natural gas supply disruptions. We note that the European Union does not offer any explanation of how its ability to take measures for the "acquisition or distribution" of natural gas is affected by natural gas supply disruptions.

7.1366. We acknowledge that the words "acquisition or distribution", when read outside of the context of Article XX(j), may be interpreted as having a broad coverage. Any "acquisition or distribution" of any product could potentially fall within their scope. However, in our view, these words should be read in the specific context of Article XX(j), which covers measures "essential to the acquisition or distribution of products in general or local short supply". Thus, Article XX(j) does

<sup>2199</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145.

<sup>2200</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145.

<sup>2201</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

<sup>2202</sup> European Union's second written submission, para. 425.

<sup>2203</sup> European Union's second written submission, para. 426.

<sup>2204</sup> Russia's response to Panel question No. 149, para. 48.

<sup>2205</sup> Russia's response to Panel question No. 149, para. 48.

<sup>2206</sup> TEN-E Regulation, (Exhibit EU-4), Articles 4(2)(b)(ii) and 4(2)(b)(iii).

<sup>2207</sup> European Union's second written submission, para. 425; and opening statement at the second meeting of the Panel, para. 122.

not cover measures "essential to the acquisition or distribution" of *any* products but only those that are "essential to the acquisition or distribution" of "*products in general or local short supply*". We consider that the wording of Article XX(j) indicates that there is an already existing situation of shortage of supply of a particular product and that a Member is addressing this situation by taking measures "essential to the acquisition or distribution" of this product. In other words, Article XX(j) implicitly points to the situation that the measures covered by this provision are to address (a general or local shortage in the supply of a particular product) and the means by which this situation is to be addressed (measures "essential to the acquisition or distribution" of this product).

7.1367. We consider that, in arguing that the diversification of natural gas supply sources and routes contributes to the "acquisition or distribution" of natural gas because it reduces the risks of natural gas supply disruptions, the European Union attempts to substitute the means of addressing the shortage of natural gas supply with the circumstances that may cause this shortage. We recall that the central premise of the European Union's argumentation that natural gas is a product "in general or local short supply" is that there are serious risks of natural gas supply disruptions.<sup>2208</sup> Thus, to the extent that the European Union argues that the risks of natural gas supply disruptions cause a shortage of natural gas supply, these arguments pertain to whether natural gas is a product in short supply. The means of addressing this shortage covered by Article XX(j) would be measures "essential to the acquisition or distribution" of natural gas. While the risks of natural gas supply disruptions may affect the product itself (i.e. they risk causing a shortage in natural gas supply), they may not equally affect the European Union's ability to take measures seeking to address this shortage (measures "essential to the acquisition or distribution" of natural gas).

7.1368. In arguing that the diversification of sources and routes of natural gas supply contributes to the "continued" acquisition and distribution of natural gas, "and hence the SoS of gas", by mitigating the risks of natural gas supply disruptions,<sup>2209</sup> the European Union also attempts to substitute the means of addressing a shortage of natural gas supply covered by Article XX(j) (measures "essential to the acquisition or distribution" of natural gas) with other measures that may contribute to addressing a shortage of natural gas supply (measures necessary for the security of energy supply). However, the text of Article XX(j) is unequivocal that the only measures seeking to address a shortage of supply of a particular product covered by this provision are those that are "essential to the acquisition or distribution" of this product. Therefore, a respondent arguing that its measure is provisionally justified under Article XX(j) needs to demonstrate the contribution of its measure to the "acquisition or distribution" of a product found to be in short supply, and not merely that its measure contributes to addressing a shortage of supply of this product.

7.1369. We have concluded, in the context of our assessment of the European Union's defence under Article XIV(a) of the GATS, that the European Union has demonstrated that certain natural gas supply disruptions that may be caused by foreign controlled TSOs pose "a genuine and sufficiently serious threat" to the security of energy supply in the European Union.<sup>2210</sup> We have also noted in paragraph 7.1365 above that the diversification of sources and routes of natural gas supply can mitigate the risks of natural gas supply disruptions by providing alternative routes and sources of natural gas supply to those that may be affected by a disruption. In our view, the diversification of natural gas supply sources and routes can thus contribute to the security of energy supply in the European Union.

7.1370. However, we observe that the security of energy supply is a broad concept defined as the "availability of usable energy supplies, at the point of final consumption, at economic price levels and in sufficient quantities and timeliness, so that, given due regard to encouraging energy efficiency, the economic and social development of a country is not materially constrained".<sup>2211</sup> The European Union explains that security of energy supply has a short-term and a long-term dimension. The former focuses on "the ability to respond promptly to sudden changes within the supply-demand balance"<sup>2212</sup> caused by, e.g. "infrastructure breakdown, natural disasters, social

<sup>2208</sup> We have addressed these arguments above in section 7.11.3.2.1.1.

<sup>2209</sup> European Union's second written submission, para. 425; and opening statement at the second meeting of the Panel, para. 122.

<sup>2210</sup> See above paras. 7.1174-7.1199.

<sup>2211</sup> European Union's first written submission, para. 482 (quoting United Nations Economic Commission for Europe, *Emerging Global Energy Security Risks*, No. 36 (2007), pp. 8-9, (Exhibit EU-71), p. 8).

<sup>2212</sup> European Union's first written submission, para. 483.

unrest, political action or terrorism".<sup>2213</sup> The latter focuses on the need for "adequate investments in the production and distribution of energy and efficient energy markets"<sup>2214</sup> and includes obstacles related to the "traditional" fragmentation of the EU market for natural gas and the "relatively limited" number of foreign sources of supply.<sup>2215</sup>

7.1371. As follows from the definition of the concept of "security of energy supply", the means of addressing the security of energy supply may encompass a broad range of measures, including those that address a shortage of natural gas supply. However, not all such measures will be "essential to the acquisition or distribution" of natural gas. For this reason, measures that mitigate the risks of natural gas supply disruptions, and thus contribute to the security of energy supply, do not necessarily contribute to the "acquisition or distribution" of natural gas.

7.1372. Therefore, in our view, the fact that the European Union has demonstrated that, due to the risks of natural gas supply disruptions, there is a threat to the security of energy supply does not establish that natural gas supply disruptions, or a risk of such disruptions, affect the European Union's ability to take measures "essential to the acquisition or distribution" of natural gas. Conversely, a demonstration that the diversification of natural gas supply and routes contributes to the security of energy supply does not establish that the diversification of natural gas supply and routes also contributes to the "acquisition or distribution" of natural gas.

***Relative importance of the societal interests or values that the TEN-E measure is intended to protect***

7.1373. The next factor in our assessment is the relative importance of the societal interests or values that the TEN-E measure is intended to protect. The Appellate Body has clarified, in the context of Article XX(d) of the GATT 1994, that:

[A]ssessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important those common interests or values are, the easier it would be to accept as "necessary" a measure designed as an enforcement instrument.<sup>2216</sup>

7.1374. The European Union submits that a particular interest that the TEN-E measure seeks to protect is the security of natural gas supply, which according to the European Union, is a matter of fundamental importance.<sup>2217</sup> We note that, according to Recital (17) of the TEN-E Regulation,

This Regulation lays down rules for the timely development and interoperability of trans-European energy networks in order to achieve the energy policy objectives of the Treaty on the Functioning of the European Union (TFEU) to ensure the functioning of the internal energy market and *security of supply* in the Union, to promote energy efficiency and energy saving and the development of new and renewable forms of energy, and to promote the interconnection of energy networks. By pursuing these objectives, this Regulation contributes to smart, sustainable and inclusive growth and brings benefits to the entire Union in terms of competitiveness and economic, social and territorial cohesion.<sup>2218</sup>

7.1375. We observe that, in the context of our assessment of the European Union's defence under Article XIV(a) of the GATS, we have concluded that disruptions in the supply of natural gas may lead to similar disruptions in the overall energy balance in the European Union.<sup>2219</sup> Therefore, the security of natural gas supply can be understood as an integral component of the broader concept of security of energy supply, which we have found to constitute a fundamental interest of society

<sup>2213</sup> European Union's first written submission, para. 487.

<sup>2214</sup> European Union's first written submission, para. 483.

<sup>2215</sup> European Union's first written submission, paras. 488-489.

<sup>2216</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 162.

<sup>2217</sup> European Union's second written submission, para. 422.

<sup>2218</sup> TEN-E Regulation, (Exhibit EU-4), Recital (17). (emphasis added)

<sup>2219</sup> See above paras. 7.1196-7.1198.



in the European Union. In light of this finding, it would appear that the TEN-E measure seeks to protect a societal interest of a high importance.

### *Trade-restrictiveness of the TEN-E measure*

7.1376. The third factor in our analysis is the trade-restrictiveness of the TEN-E measure. The Appellate Body has clarified that the necessity analysis may include consideration of "the extent to which the compliance measure produces restrictive effects on international commerce, that is, in respect of a measure inconsistent with Article III:4, restrictive effects *on imported goods*", and stated that "[a] measure with a relatively slight impact upon imported products might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects".<sup>2220</sup> In our view, this consideration is equally valid for the "essentiality" analysis under Article XX(j) of the GATT 1994.

7.1377. The European Union argues that the TEN-E measure places no restriction on the importation or sale of gas from Russia or from any other country and instead facilitates and promotes trade in natural gas.<sup>2221</sup> The European Union contends that, in order to contribute to this goal, the TEN-E measure provides certain regulatory and financial incentives for building missing infrastructure or improving inadequate existing infrastructure.<sup>2222</sup> According to the European Union, to the extent that the benefits provided under the TEN-E measure to certain infrastructure distorted competition between gas from different sources, such distortion would be, having regard to the nature of the benefits involved, minimal and temporary.<sup>2223</sup> In Russia's view, however, the trade restrictive effect of the TEN-E measure on Russian gas is severe.<sup>2224</sup>

7.1378. We note that the TEN-E measure certainly does not introduce a ban on the importation of natural gas of any origin or prohibit the development of infrastructure to transport natural gas of any origin. As we have already established, the trade-restrictive impact of the TEN-E measure stems from the criteria of PCI designation that make it more burdensome to build infrastructure to transport Russian natural gas than natural gas of any other origin.<sup>2225</sup>

### *Reasonably available alternative measures*

7.1379. The final step in our analysis of whether the measure is "essential" within the meaning of Article XX(j) is the enquiry as to whether a less trade-restrictive alternative measure, which the Member concerned could "reasonably be expected to employ", is available.<sup>2226</sup> Russia submits that, in light of the discriminatory criteria for PCI designation, the only significantly less trade restrictive measure, equally contributing to the objective of acquisition and distribution of natural gas, is the elimination of the discriminatory elements serving to incentivize projects that will not improve the competitive opportunities of Russian natural gas on the EU market.<sup>2227</sup>

7.1380. The European Union disagrees with the alternative measure proposed by Russia, pointing out that, 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 infrastructure.<sup>2228</sup> According to the European Union, such duplicate infrastructure would not contribute to reducing the risks of shortage resulting from the disruption of a source of supply because it would be vulnerable to the very same risks of disruption as the existing infrastructure, and would, at the same time, consume resources that could otherwise be used to support infrastructure to bring natural gas from alternative sources of supply.<sup>2229</sup> The European Union thus concludes that the

<sup>2220</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 163. (emphasis original)

<sup>2221</sup> European Union's second written submission, para. 427.

<sup>2222</sup> European Union's second written submission, para. 428.

<sup>2223</sup> European Union's second written submission, para. 429.

<sup>2224</sup> Russia's response to Panel question No. 149, para. 49.

<sup>2225</sup> See our analysis above in sections 7.11.2.2.2 and 7.11.2.2.3.

<sup>2226</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.261 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 166).

<sup>2227</sup> Russia's response to Panel question No. 149, para. 49.

<sup>2228</sup> European Union's opening statement at the second meeting of the Panel, para. 122.

<sup>2229</sup> European Union's opening statement at the second meeting of the Panel, para. 122.

alternative measure proposed by Russia would diminish the overall contribution of the TEN-E measure to the objective of ensuring security of gas supply.<sup>2230</sup>

7.1381. We consider that, if the diversification of sources and routes of natural gas supply, as reflected in the criteria for PCI designation, contributes to the "acquisition" or "distribution" of natural gas, the removal of the criteria for PCI designation that require such diversification will indeed diminish the contribution of the TEN-E measure to the "acquisition or distribution" of natural gas. The extent to which the removal of these criteria will diminish the contribution of the TEN-E measure to the "acquisition or distribution" of natural gas (in case there is such contribution) is determined by the degree of contribution these criteria make in the first place. We recall our observation above in paragraph 7.1372 that a demonstration that the diversification of natural gas supply and routes contributes to the security of energy supply does not establish that the diversification of natural gas supply and routes also contributes to the "acquisition or distribution" of natural gas.

#### 7.11.3.2.3 Conclusion

7.1382. We have found that the European Union has not demonstrated that natural gas is a product "in short supply" in the European Union, which is sufficient for us to conclude that the European Union defence under Article XX(j) cannot succeed. Having made this finding, we, nevertheless, decided to proceed with a limited analysis and review of whether the TEN-E measure fulfils the other elements of the legal standard under Article XX(j) of the GATT 1994, in particular, whether it is "essential" to the "acquisition or distribution" of natural gas. The primary purpose of our limited analysis and review was to provide factual findings on the issues relevant for the Appellate Body's analysis in the event our finding that the European Union has not demonstrated that natural gas is a product "in general or local short supply" were modified or reversed on appeal. In light of this purpose, we do not see any compelling reason for us to reach an overall conclusion, or make any finding, on whether the TEN-E measure is "essential to the acquisition or distribution" of natural gas.

#### 7.11.4 Russia's claim under Article II:1 of the GATS

7.1383. Russia submits that the TEN-E measure modifies the conditions of competition to the detriment of Russian services and service suppliers. In Russia's view, the criteria for PCI designation under the TEN-E measure are inherently biased against Russian services and service suppliers.<sup>2231</sup> According to Russia, while projects of other Members are eligible for PCI designation, "and the services and service suppliers promoting and supplying those services are actually receiving the administrative, regulatory and financial benefits available under the TEN-E measure", "Russian gas projects" are excluded from PCI eligibility.<sup>2232</sup>

7.1384. Russia further contends that the references in the text of the TEN-E Regulation to reducing dependency on "a single supplier", "diversification of gas supply" and "diversification of supply sources, supplying counterparts and routes", read in light of relevant policy documents, show that the TEN-E measure targets Russian services and service suppliers.<sup>2233</sup>

7.1385. Russia also argues that the TEN-E measure modifies the conditions of competition to the detriment of Russian services and service suppliers because projects that are likely to reduce reliance on Russian natural gas are eligible for PCI designation, whilst projects that are unlikely to reduce such reliance are unable to obtain PCI designation.<sup>2234</sup> In support of its contention that the TEN-E measure is inconsistent with Article II:1 of the GATS, Russia also invokes the "internal organization of Gazprom" and refers to the [\*\*\*] project as the specific instance of the discriminatory application of the TEN-E measure.<sup>2235</sup>

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<sup>2230</sup> European Union's opening statement at the second meeting of the Panel, para. 122.

<sup>2231</sup> Russia's second written submission, para. 456.

<sup>2232</sup> Russia's first written submission, para. 781. See also Russia's response to Panel question No. 48, para. 240.

<sup>2233</sup> Russia's first written submission, paras. 763–770; and second written submission, paras. 452–453.

<sup>2234</sup> Russia's second written submission, para. 456.

<sup>2235</sup> Russia's second written submission, paras 448 and 458; and response to Panel Question No. 48, paras. 239 and 243.

7.1386. The European Union considers Russia's claim to be without merit.<sup>2236</sup> According to the European Union, Article II:1 of the GATS is not concerned with discrimination between infrastructures or "projects" but with discrimination between services and service suppliers.<sup>2237</sup> In the European Union's view, Russia has not established that the benefits provided by the TEN-E measure to certain infrastructures or projects result in less favourable treatment being accorded to Russian service suppliers or services than to like service suppliers or services of other Members.<sup>2238</sup>

7.1387. The European Union further considers that the reference in the definition of the BEMIP Gas Corridor to the objective of ending dependency on a "single supplier" is a reference to a supplier of natural gas rather than a supplier of transmission services.<sup>2239</sup> Therefore, in the European Union's view, the definition of the BEMIP Corridor would not translate into discrimination against Russian services or service suppliers.<sup>2240</sup>

7.1388. The European Union submits that even if Russia's premise that the TEN-E measure discriminates against imports of Russian gas were correct, it would not follow that the TEN-E measure discriminates against Russian service suppliers or services.<sup>2241</sup> The European Union also contests Russia's arguments regarding the [\*\*\*] project, submitting that non-designation of this project was the result of the impartial application of objective selection criteria that did not involve discrimination against Russian gas or against Russian service suppliers or services.<sup>2242</sup>

#### 7.11.4.1 Analysis by the Panel

7.1389. Pursuant to the legal standard under Article II:1 of the GATS, as set out in paragraphs 7.226 and 7.227 above, we shall examine whether Russia has demonstrated that: (a) the TEN-E measure falls within the scope of the GATS; (b) the relevant services and service suppliers are like; and (c) the TEN-E measure accords less favourable treatment to Russian services and service suppliers than that accorded to like services and service suppliers of any other country.

##### 7.11.4.1.1 Scope of the GATS

7.1390. In order to establish that a measure falls within the scope of the GATS, a complainant must show that: (a) "there is 'trade in services' in the sense of Article I:2"; and (b) the measure at issue "'affects' such trade in services within the meaning of Article I:1".<sup>2243</sup>

7.1391. "[T]rade in services" within the meaning of Article I:2 of the GATS is defined as "the supply of a service" through the four modes of supply mentioned in paragraphs (a) through (d) of Article I:2. We note that Russia has identified "natural gas pipeline transport services" as the relevant services sector<sup>2244</sup>, and mode 3 (commercial presence) as the relevant mode of supply with respect to all of the measures at issue in the dispute.<sup>2245</sup> We also note that the European Union has not denied that there are suppliers of pipeline transport services, including from Russia, which are established through commercial presence in the territory of the European Union. Thus, we consider that Russia has demonstrated that there is trade in services within the meaning of Article I:2 of the GATS.

7.1392. With respect to the second element, Russia asserts that the TEN-E measure affects trade in services because it affects infrastructure projects related to natural gas.<sup>2246</sup> The European Union

<sup>2236</sup> European Union's first written submission, para. 807.

<sup>2237</sup> European Union's first written submission, para. 807; and second written submission, paras. 358 and 362.

<sup>2238</sup> European Union's first written submission, para. 807; and response to Panel question No. 76, para. 173.

<sup>2239</sup> European Union's second written submission, para. 365.

<sup>2240</sup> European Union's second written submission, paras. 365 and 367.

<sup>2241</sup> European Union's second written submission, para. 367.

<sup>2242</sup> European Union's second written submission, para. 371.

<sup>2243</sup> Appellate Body Report, *Canada – Autos*, para. 155.

<sup>2244</sup> Russia's panel request, page 1; Russia's first written submission, paras. 93 and 754; and Russia's second written submission, para. 75.

<sup>2245</sup> Russia's response to Panel question No. 56, para. 285.

<sup>2246</sup> Russia's first written submission, para. 754.

does not contest Russia's argument.<sup>2247</sup> The Appellate Body and previous panels have consistently held that the use of the term "affecting" in Article I:1 means that the GATS covers not only measures that directly govern or regulate trade in services but also measures that, even though they may regulate other matters, nevertheless "affect" trade in services.<sup>2248</sup>

7.1393. The TEN-E measure provides a regulatory framework for PCIs.<sup>2249</sup> Infrastructure projects that may qualify as PCIs include *inter alia* those that develop transmission pipelines for the transport of natural gas.<sup>2250</sup> Thus, the TEN-E measure does not directly govern trade in services, but regulates other matters, namely infrastructure projects developing *inter alia* transmission pipelines. Given the essential function of transmission pipelines in the supply of pipeline transport services, we believe that the regulatory framework of infrastructure projects that develop transmission pipelines may have an "effect on"<sup>2251</sup> the supply of pipeline transport services. Therefore, we consider that the TEN-E measure affects trade in services within the meaning of Article I:1 of the GATS.

7.1394. Having determined that Russia has demonstrated that there is "trade in services" within the meaning of Article I:2 of the GATS and that the TEN-E measure "affects trade in services" within the meaning of Article I:1 of the GATS, we find therefore that the TEN-E measure falls within the scope of the GATS.

#### 7.11.4.1.2 Like services and service suppliers

##### 7.11.4.1.2.1 Introduction

7.1395. Russia argues that Russian pipeline transport services and service suppliers are like pipeline transport services and service suppliers of other third countries, including LNG services and service suppliers, within the meaning of Article II:1 of the GATS. In Russia's view, "the 'likeness' requirement under Article II:1 of the GATS is satisfied" because the TEN-E measure distinguishes exclusively on the basis of origin between Russian services and service suppliers, on the one hand, and domestic and other third-country services and service suppliers, on the other.<sup>2252</sup> Russia further submits that, to the extent we disagree that the TEN-E measure distinguishes between Russian and other third-country pipeline transport services and service suppliers exclusively on the basis of origin, Russian and other third-country pipeline transport services and service suppliers, including LNG services and service suppliers, are in a competitive relationship with each other and therefore satisfy the likeness requirement on this basis within the meaning of Article II:1 of the GATS.<sup>2253</sup>

7.1396. The European Union does not contest that Russian pipeline transport services and service suppliers are like within the meaning of Article II:1 of the GATS but opposes Russia's inclusion of LNG services within the scope of pipeline transport services.<sup>2254</sup> The European Union further contests Russia's arguments that pipeline transport services and service suppliers are like LNG services and service suppliers within the meaning of Article II:1 of the GATS.<sup>2255</sup>

7.1397. We recall that, in paragraph 7.284 above, we have established that pipeline transport services do not encompass LNG services. However, we have also found that, as far as pipeline

<sup>2247</sup> In Panel question No. 76, we asked the European Union whether the European Union was arguing that the TEN-E measure is not "covered by the GATS" within the meaning of Article II:1 of the GATS. In its response, the European Union indicated that Article II:1 of the GATS is not concerned with the treatment of infrastructures, and that, in its view, Russia has not demonstrated how the treatment of certain infrastructures under the TEN-E measure results in less favourable treatment being accorded to Russian service suppliers or services than to like service suppliers or services of other Members (European Union's response to Panel question No. 76, paras. 172–173).

<sup>2248</sup> Appellate Body Report, *EC – Bananas III*, para. 220. See also Panel Reports, *Argentina – Financial Services*, para. 7.103; and *China – Publications and Audiovisual Products*, paras. 7.970–7.971.

<sup>2249</sup> See above section 2.2.8.

<sup>2250</sup> Annex II.(2)(a) of the TEN-E Regulation refers specifically to transmission pipelines for the transport of natural gas. (TEN-E Regulation, (Exhibit EU-4), Annex II.2(a))

<sup>2251</sup> Appellate Body Report, *EC – Bananas III*, para. 220.

<sup>2252</sup> Russia's first written submission, para. 756.

<sup>2253</sup> Russia's first written submission, para. 757.

<sup>2254</sup> European Union's first written submission, paras. 80 and 282.

<sup>2255</sup> European Union's first written submission, para. 283.

transport services and service suppliers are concerned, such services and service suppliers are like within the meaning of Article II:1 of the GATS.<sup>2256</sup> Given that we have already reached a conclusion that pipeline transport services and service suppliers are like under Article II:1 of the GATS, we do not find it necessary to address Russia's arguments that the likeness of pipeline transport services and service suppliers can be presumed. Therefore, we now turn to the question of whether LNG services and service suppliers are like pipeline transport services and service suppliers within the meaning of Article II:1 of the GATS.<sup>2257</sup>

#### 7.11.4.1.2.2 Likeness of LNG and pipeline transport services and service suppliers

7.1398. Russia contends that LNG services and pipeline transport services are like within the meaning of Article II of the GATS.<sup>2258</sup> According to Russia, "LNG services and service suppliers are 'essentially or generally the same in competitive terms' and thus in a competitive relationship with other pipeline transport services and service suppliers in the EU market".<sup>2259</sup> Russia further argues that LNG services and pipeline transport services are substitutable.<sup>2260</sup> In Russia's view, these services are supplied for the same purpose and their users/consumers, as well as nature and characteristics, are essentially the same.<sup>2261</sup> Russia also submits that LNG services are "presumed to be included" in pipeline transport services on the basis of the UN Central Product Classification (CPC) and Services Sectoral Classification (W/120).<sup>2262</sup>

7.1399. The European Union contests Russia's arguments that LNG services and pipeline transport services are like within the meaning of Article II of the GATS.<sup>2263</sup> In the European Union's view, the nature and characteristics of LNG services and service suppliers are different from pipeline transport services and service suppliers.<sup>2264</sup> The European Union further considers that the different nature and characteristics of LNG services and pipeline transport services mean that consumers will not consider these services to be interchangeable, since they serve a different end-use.<sup>2265</sup> According to the European Union, the CPC also places LNG services and pipeline transport services under a different classification.<sup>2266</sup>

7.1400. The Appellate Body observed that the analysis of likeness in the context of both trade in goods and trade in services is aimed at determining whether the products or services and service suppliers, respectively, are in a competitive relationship with each other.<sup>2267</sup> On this basis, the Appellate Body considered that the criteria traditionally developed in the context of trade in goods may be relevant for determining likeness of services and service suppliers, provided that they are adapted as appropriate to account for the specific characteristics of trade in services.<sup>2268</sup> The Appellate Body noted that the criteria traditionally developed in the context of trade in goods are the following: (i) the properties, nature, and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits or consumers' perceptions and behaviour in respect of the products; and (iv) the tariff classification of the products.<sup>2269</sup> The Appellate Body also indicated that the determination of likeness is a holistic analysis and further clarified that no evidence should

<sup>2256</sup> See above para. 7.422.

<sup>2257</sup> We observe that, according to Annex II.2(c) of the TEN-E Regulation, the energy infrastructure categories concerning gas include reception, storage and regasification facilities for LNG. (TEN-E Regulation, (Exhibit EU-4), Annex II.2(c)) Infrastructure projects for the construction of such facilities may thus be designated as PCIs under the TEN-E Regulation. Therefore, in contrast to the unbundling, third-country certification and the public body measures, the treatment of LNG service suppliers may be relevant for our assessment of Russia's GATS claim against the TEN-E measure. However, we note that Russia has not developed any specific arguments that its pipeline transport services and service suppliers are treated less favourably than LNG services and service suppliers of other third countries.

<sup>2258</sup> Russia's first written submission, para. 261.

<sup>2259</sup> Russia's response to Panel question No. 94, para. 403.

<sup>2260</sup> Russia's first written submission, paras. 260-261.

<sup>2261</sup> Russia's second written submission, para. 93; and response to Panel question No. 53(a), para. 271.

<sup>2262</sup> Russia's responses to Panel question No. 53(b), paras. 275-277, and No. 60, para. 286; and second written submission, paras. 83-85.

<sup>2263</sup> European Union's first written submission, para. 283.

<sup>2264</sup> European Union's first written submission, paras. 285 and 428-434.

<sup>2265</sup> European Union's first written submission, para. 286.

<sup>2266</sup> European Union's first written submission, para. 287.

<sup>2267</sup> Appellate Body Report, *Argentina – Financial Services*, para. 6.31.

<sup>2268</sup> Appellate Body Report, *Argentina – Financial Services*, para. 6.31.

<sup>2269</sup> Appellate Body Report, *Argentina – Financial Services*, para. 6.30.

be *a priori* excluded from a panel's analysis of likeness.<sup>2270</sup> The likeness of services and service suppliers can only be determined on a case-by-case basis, taking into account the specific circumstances of the particular case.<sup>2271</sup>

7.1401. Thus, based on the clarifications of the Appellate Body, in the specific circumstances of this case, we will conduct a holistic analysis of likeness, taking into account the following criteria: (a) the nature and characteristics of the relevant services; (b) the end-uses of the relevant services; (c) the preferences of the consumers with respect to the relevant services; and (d) the classification and description of the relevant services under the CPC.<sup>2272</sup> We will also consider Russia's arguments that LNG services and pipeline transport services are substitutable.

7.1402. We recall that we have determined that pipeline transport services concern the transmission of natural gas via pipelines, while LNG services primarily concern the liquefaction of natural gas and regasification of LNG.<sup>2273</sup> Bearing this understanding in mind, we turn to our analysis of whether LNG services and pipeline transport services are like on the basis of the analytical framework set out above.

### *Nature and characteristics of services*

7.1403. Russia is of the opinion that the nature and characteristics of LNG services and pipeline transport services are "essentially" the same.<sup>2274</sup> In the European Union's view, however, the nature and characteristics of LNG services differ from those of pipeline transport services, due to the differences in the activities, infrastructure and infrastructure operators involved in the supply of these services.<sup>2275</sup> We consider that one of the factors informing our analysis of the nature and characteristics of the services in question is the core activities involved in the supply of these services.<sup>2276</sup> As noted above, the core activity involved in the supply of pipeline transport services is the conveyance of natural gas from one point to another through a pipeline. In contrast, the core activities involved in the supply of LNG services are the liquefaction of natural gas and regasification of LNG.

7.1404. According to industry definitions, liquefaction "consists of chilling natural gas to the point where it becomes liquid, at an average temperature of  $-160^{\circ}\text{C}$  ( $-260^{\circ}\text{F}$ )", while regasification "consists of returning LNG to its regular gaseous phase at about  $5^{\circ}\text{C}$  using heat exchangers".<sup>2277</sup> As evident from these definitions, both liquefaction of natural gas and regasification of LNG entail changing the physical state of natural gas and LNG, respectively. Thus, while pipeline transport services concern the conveyance of natural gas from one point to another through a pipeline, LNG services primarily concern changing the physical state of natural gas and LNG. This means that the supply of pipeline transport services, on the one hand, and LNG services, on the other, involve

<sup>2270</sup> Appellate Body Report, *Argentina – Financial Services*, paras. 6.29-6.30 and 6.32.

<sup>2271</sup> Appellate Body Report, *Argentina – Financial Services*, para. 6.26.

<sup>2272</sup> Appellate Body Report, *Argentina – Financial Services*, paras. 6.30–6.32.

<sup>2273</sup> See above paras. 7.281-7.283.

<sup>2274</sup> Russia's second written submission, para. 93.

<sup>2275</sup> European Union's first written submission, paras. 286 and 431;

<sup>2276</sup> The panel in *EC – Bananas III (Ecuador)* applied this criterion in the following manner:

Fourth, in our view, the nature and the characteristics of wholesale transactions as such, as well as of each of the different subordinated services mentioned in the headnote to section 6 of the CPC, are "like" when supplied in connection with wholesale services, irrespective of whether these services are supplied with respect to bananas of EC and traditional ACP origin, on the one hand, or with respect to bananas of third-country or non-traditional ACP origin, on the other. Indeed, it seems that each of the *different service activities* taken individually is virtually the same and can only be distinguished by referring to the origin of the bananas in respect of which the service activity is being performed. Similarly, in our view, to the extent that entities provide these like services, they are like service suppliers. (Panel Report, *EC – Bananas III (Ecuador)*, para. 7.322) (emphasis added)

<sup>2277</sup> United Nations Economic Commission for Europe, Study on Current Status and Perspectives for LNG in the UNECE Region (UN 2013), (Exhibit RUS-32), pp. 5-6; and UNECE LNG Study, (Exhibit RUS-271), Chapter 2, p. 2. See also Gas Strategies industry glossary, (Exhibit RUS-268), definition of "LNG (Liquefied Natural Gas)".

different core activities.<sup>2278</sup> Therefore, in our view, LNG services and pipeline transport services do not share the same nature and characteristics.

### *End-uses and consumer preferences*

7.1405. We observe that, in the context of trade in goods, the Appellate Body described end-uses as "the extent to which products are *capable* of performing the same, or similar, functions" and consumer tastes and habits as "the extent to which consumers are willing to use the products to perform these functions".<sup>2279</sup> In our view, adapted to trade in services, the end-uses criterion would refer to the extent to which services are capable of performing the same or similar functions, while the consumer preferences criterion would concern the extent to which the relevant consumers use the services to perform these functions.<sup>2280</sup>

7.1406. We understand Russia to argue that the ultimate consumers of both pipeline transport services and LNG services are the same.<sup>2281</sup> Russia also appears to imply that the end-uses of LNG services and pipeline transport services are the same because, in its view, the end-uses of LNG are the same as the end-uses of natural gas.<sup>2282</sup>

7.1407. The European Union considers that pipeline transport services and LNG services serve different end-uses and therefore the consumers will not consider them as interchangeable.<sup>2283</sup> According to the European Union, LNG services involve the liquefaction of natural gas and regasification of LNG and do not involve transport, whereas pipeline transport services carry natural gas from one point (the processing plant, or the LNG facility) to another point (the place where the transmission pipeline connects to the distribution pipeline network).<sup>2284</sup> The European Union further submits that the users of LNG services will be gas producers who want to have their gas transported by ships or trucks, traders of LNG, or operators of LNG ships.<sup>2285</sup> We thus

<sup>2278</sup> We also note the European Union's arguments, uncontested by Russia, that the supply of LNG services and pipeline transport services involve technically different types of infrastructure – LNG terminals in case of the former and transmission pipelines in case of the latter (European Union's first written submission, para. 431).

<sup>2279</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 125 (referring to Appellate Body Report, *EC – Asbestos*, para. 117). (emphasis original)

<sup>2280</sup> According to Article XXVIII(i) of the GATS, "service consumer" means any person that receives or uses a service.

<sup>2281</sup> In its response to Panel question No. 53(a), Russia argues that:

[T]he users/consumers of LNG services are no different than the users/consumers of other pipeline transport services. Virtually all natural gas imported in the form of LNG is necessarily regasified and placed in the transmission system. The users/consumers of the services necessary to supply this reconverted LNG are, at the outset, the TSOs receiving that gas via pipelines from the LNG facility – just as TSOs are supplied gas from an overland pipeline, along with the services necessary to supply that gas. Once reconverted LNG-gas enters the transmission system, it blends indistinguishably with all other gas and is supplied to downstream consumers, including large utilities and distribution system operators and ultimately smaller commercial and private consumers. Given that the natural gas cannot be distinguished, these ultimate consumers are also the users/consumers of LNG services. (Russia's response to Panel question No. 53(a), para. 271).

<sup>2282</sup> Russia's second written submission, paras.93–94. In its second written submission, Russia asserts that "the EU itself makes explicit in the Directive and elsewhere that it views ... LNG services as equivalent to and supplied for the same purpose as all other pipeline transport services". (Russia's second written submission, para. 93) Russia continues as follows:

Likewise, and again contrary to the EU's unsupported claim, the end-uses of the products are exactly the same. Similarly, "consumers' tastes and habits or consumers' perceptions and behavior in respect of" LNG services and all other pipeline transport services are the same. LNG and all other natural gas are perfectly substitutable, or 100% interchangeable, as Russia has explained. LNG is imported and re-gasified only to be reconverted into its natural gaseous state; this reversion takes place only so that natural gas can be placed into the transmission system and transported via pipeline to downstream consumers. Those consumers do not demand or purchase LNG, which is indistinguishable from, and exactly the same as, any other natural gas. Rather, the consumers demand and purchase natural gas, some of which just happens to have once been condensed in the form of LNG at one point in the transmission process. These consumers do not know or care that some of the natural gas they purchase may have once been LNG. (Russia's second written submission, para. 94).

<sup>2283</sup> European Union's first written submission, para. 286.

<sup>2284</sup> European Union's first written submission, para. 286.

<sup>2285</sup> European Union's response to Panel question No. 53(a), para. 145.

understand the European Union to imply that the consumers of pipeline transport services are different from the consumers of LNG services.

7.1408. It is undisputed that regasified LNG injected into a transmission system will be ultimately delivered to the same final customer and will serve the same end-uses as natural gas that has never been liquefied. We note that the parties do not disagree that, following regasification, a certain amount of reconverted LNG will be transported via pipelines in the European Union with a view to its subsequent delivery to the final customer.<sup>2286</sup> However, in our view, these circumstances relate to the consumers and end-uses of natural gas as a *product*, and do not relate to the consumers and end-uses of *services*. We do not consider that services that concern products with allegedly the same end-uses will necessarily constitute services with the same end-uses.

7.1409. As we have established above in paragraph 7.263, pipeline transport services for the purposes of this dispute cover the transmission of natural gas via pipelines. The function of transmission pipelines is to deliver natural gas to the distribution system for its subsequent delivery to the final customer. The liquefaction of natural gas and regasification of LNG, in contrast, change the physical state of natural gas and LNG, respectively, in order to facilitate and enable their transportation. The regasification of LNG is a step that precedes the transmission of regasified LNG via pipelines. In a similar manner, the liquefaction of natural gas would precede its transportation by seagoing vessels. Thus, we consider that the function performed by LNG services is the change of the physical state of natural gas and LNG for the purposes of their transportation, either via transmission pipelines or via seagoing vessels, while the function performed by pipeline transport services is the delivery of natural gas to the distribution system. On this basis, we conclude that the end-uses of pipeline transport services and LNG services are different.

7.1410. Russia has not provided any evidence regarding consumer preferences, and therefore we do not make any findings regarding this criterion.

#### ***Classification and description under the CPC***

7.1411. The parties disagree with respect to the version of the CPC that we should take into account for the purposes of our likeness analysis. Russia insists that only CPC prov. is relevant because it formed the basis for the Services Sectoral Classification (W/120) used by the Members in drafting their services schedules.<sup>2287</sup> The European Union, on the other hand, relies on the latest version of the CPC, namely CPC 2.1, issued in 2015.<sup>2288</sup>

7.1412. We recall that the Appellate Body in *Argentina – Financial Services* observed that the classification and description of services under, for instance, the CPC could be relevant in the determination of whether the services at issue are like.<sup>2289</sup> While the Appellate Body did not specify which version of the CPC a panel should take into consideration, it noted the existence of the most recent version of the CPC.<sup>2290</sup> For the purposes of our analysis, we will consider the latest version of the CPC, namely CPC 2.1.

7.1413. We observe that, in CPC 2.1, the transportation of natural gas via pipelines is included in subclass 65131 ("Transport services via pipeline of petroleum and natural gas").<sup>2291</sup> An

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<sup>2286</sup> See above para 7.842.

<sup>2287</sup> Russia's response to Panel question No. 60, para. 286.

<sup>2288</sup> European Union's first written submission, paras. 75 and 79; and response to Panel question No. 60, paras. 165-166.

<sup>2289</sup> Appellate Body Report, *Argentina – Financial Services*, para. 6.32.

<sup>2290</sup> The Appellate Body made the following observation:

We note that, with regard to the national treatment obligation, Members' Schedules of Commitments define the scope of service transactions and sectors that are subject to the obligation. We further note that, in trade in services, the classification and description of services is based mainly on two instruments: (i) the Services Sectoral Classification List, established by the WTO Secretariat in 1991; and (ii) the UN Central Product Classification (CPC). The Services Sectoral Classification List was based on the 1991 provisional UN CPC. The most recent UN CPC (Ver.2.1) was released on 11 August 2015, and is available at: <<http://unstats.un.org/unsd/cr/registry/cpc-21.asp>>.

(Appellate Body Report, *Argentina – Financial Services*, fn 185 to para. 6.27)

<sup>2291</sup> CPC 2.1 code 65131, (Exhibit EU-34).



explanatory note to this subclass provides that it does not include liquefaction and regasification services, which belong to subclass 67990 ("Other supporting transport services n.e.c.").<sup>2292</sup> Thus, according to CPC 2.1, pipeline transport services and LNG services fall within different subclasses. They also belong to different broader groups of services, referred to in CPC 2.1 as "divisions". While pipeline transport services belong to division 65 ("Freight transport services"), LNG services are found in division 67 ("Supporting transport services").<sup>2293</sup>

### ***Substitutability of services***

7.1414. We observe that Russia also submits that services supplied at an LNG facility and those supplied via pipeline are like because they are "responsive to the same market dynamics of supply and demand".<sup>2294</sup> In Russia's view, this "substitutability results in cross-price elasticity, i.e. the demand for one is impacted by a change in demand for the other".<sup>2295</sup>

7.1415. We do not find Russia's arguments convincing. Regasified LNG can be transported via transmission pipelines only after LNG has been regasified. The service of LNG regasification precedes, and in fact enables, pipeline transport services in relation to regasified LNG.<sup>2296</sup> Pipeline transport services in relation to regasified LNG depend on, and therefore cannot substitute, LNG regasification services. For these reasons, we reject Russia's arguments that LNG services and pipeline transport services are substitutable.

### ***Conclusion***

7.1416. Based on the foregoing analysis, we conclude that LNG services and pipeline transport services do not share the same nature and characteristics and serve different end-uses. We have also established that LNG services and pipeline transport services are not only found in different subclasses of the latest version of the CPC, namely CPC 2.1, but also belong to different divisions – "Supporting transport services" and "Freight transport services", respectively. We have, furthermore, rejected Russia's argument that LNG services and pipeline transport services are substitutable. In light of these conclusions, we consider that Russia has not demonstrated that LNG services and pipeline transport services are like within the meaning of Article II of the GATS.

#### **7.11.4.1.2.3 Conclusion**

7.1417. In view of the foregoing, we conclude that, as far as pipeline transport services and service suppliers are concerned, we consider that such services and service suppliers are like within the meaning of Article II:1 of the GATS. As concerns the likeness of LNG services and service suppliers and pipeline transport services and service suppliers, we conclude that Russia has not demonstrated that LNG services and pipeline transport services are like within the meaning of Article II:1 of the GATS. Therefore, we continue our examination of Russia's claim against the TEN-E measure under Article II:1 of the GATS focusing on pipeline transport services and service suppliers.

#### **7.11.4.1.3 Less favourable treatment**

7.1418. In line with the Appellate Body jurisprudence, the "less favourable treatment" standard under Article II:1 of the GATS calls for an examination of whether a measure modifies the

<sup>2292</sup> CPC 2.1 code 65131, (Exhibit EU-34); and CPC 2.1 code 67990, (Exhibit EU-37). The acronym "n.e.c." stands for "not elsewhere classified".

<sup>2293</sup> CPC 2.1 code 65131, (Exhibit EU-34); and CPC 2.1 code 67990, (Exhibit EU-37). In addition, we recall that sector 11.G in the Schedules of Croatia, Hungary and Lithuania corresponds to Group 713 of CPC prov., entitled "Pipeline transport services" (see para. 7.321 above). Moreover, we also found that sector 11.G, "Pipeline Transport [Services]", in the Schedules of Croatia, Hungary and Lithuania does not cover LNG services (see paras. 7.332-7.333). Hence, in our view, Group 713 of CPC prov., "Pipeline transport services", does not cover LNG services.

<sup>2294</sup> Russia's first written submission, paras. 260-261. We note that Russia indicated that no commercial liquefaction takes place in the European Union, and therefore, "liquefaction is not among the services in a direct competitive relationship with other pipeline transport services in the EU". (Russia's response to Panel question No. 63, para. 297).

<sup>2295</sup> Russia's first written submission, para. 260.

<sup>2296</sup> See above paras. 7.281-7.283.

conditions of competition to the detriment of services or service suppliers of any Member, in comparison to like services or service suppliers of any other country.<sup>2297</sup>

7.1419. Russia argues that by excluding gas projects concerning Russian pipeline transport services and service suppliers from eligibility for PCI designation, the TEN-E measure modifies the conditions of competition to the detriment of Russian pipeline transport services and service suppliers.<sup>2298</sup> In Russia's view, the projects of other Members are eligible for PCI designation, "and the services and service suppliers promoting and supplying those services are actually receiving the administrative, regulatory and financial benefits available under the TEN-E measure".<sup>2299</sup> Russia submits that, in contrast, "Russian gas projects" are excluded from PCI eligibility.<sup>2300</sup> Russia thus concludes that service suppliers of other Members are thereby better positioned to compete in the European Union market, including against like Russian services and service suppliers.<sup>2301</sup>

7.1420. The European Union considers that arguments concerning "Russian projects" submitted by Russia in the context of this claim are irrelevant<sup>2302</sup>, as the provisions of the GATS invoked by Russia are not concerned with discrimination between "infrastructures" or "projects" but with discrimination between services and service suppliers.<sup>2303</sup> According to the European Union, Russia has neither explained nor proven how the benefits provided by the TEN-E measure to certain infrastructure result in less favourable treatment being accorded to Russian service suppliers or services than to like service suppliers or services of other Members.<sup>2304</sup>

7.1421. We understand Russia to argue that the TEN-E measure discriminates against "Russian projects", which, in Russia's view, necessarily implies discrimination against Russian services and service suppliers.<sup>2305</sup> The European Union responds that Russia has not demonstrated that the alleged discriminatory treatment of infrastructure or infrastructure projects results in discrimination against Russian services or service suppliers. We note that, while referring to "Russian projects", Russia has not provided a consistent definition of this phrase.<sup>2306</sup> In any event, we understand Russia's references to a "project", in the context of this claim, as references to an infrastructure project within the meaning of the TEN-E Regulation. The addition of the adjective "Russian" does not, in our view, change this conclusion.

<sup>2297</sup> Appellate Body Report, *Argentina – Financial Services*, paras. 6.103–6.106 (referring to Appellate Body Report, *EC – Bananas III*, paras. 240-248).

<sup>2298</sup> Russia's first written submission, paras. 760, 779 and 781.

<sup>2299</sup> Russia's first written submission, para. 781.

<sup>2300</sup> Russia's first written submission, para. 781.

<sup>2301</sup> Russia's first written submission, para. 781.

<sup>2302</sup> European Union's second written submission, para. 358.

<sup>2303</sup> European Union's first written submission, para. 807; and second written submission, paras. 358 and 362.

<sup>2304</sup> European Union's first written submission, para. 807; and response to Panel question No. 76, para. 173.

<sup>2305</sup> It appears that, throughout its submissions to the Panel, Russia at times uses the concepts of "service" and "service suppliers" interchangeably with the concept of "Russian projects". For instance, in its first written submission, Russia makes the following allegations in respect of the treatment of "Russian projects": "[b]y excluding Russian gas projects from PCI eligibility, the TEN-E measure provides formally different treatment to Russian pipeline transport services and service suppliers than to those of other Members" (Russia's first written submission, para. 770); "[t]he TEN-E measure excludes Russian gas projects, *de jure*, from eligibility for PCI designation" (Russia's first written submission, para. 771); "[e]ven if the Panel disagrees with this conclusion, it cannot be denied that Russian projects have been *de facto* entirely excluded from PCI designation" (Russia's first written submission, para. 784). In its second written submission, Russia asserts as follows:

Second, should the Panel find itself unable to agree with the preceding argument, a specific instance of application by the EU of the TEN-E measure evidences the inability of Russian projects to be designated as PCIs. This constitutes further evidence of the *de facto* discrimination that the TEN-E measure results in. (Russia's second written submission, para. 454)

<sup>2306</sup> In its response to Panel question No. 49, Russia explains that "Russian projects" refers to "projects that would maintain the presence of Russian natural gas, and Russian services and service suppliers on the EU market" (Russia's response to Panel question No. 49(a), para. 246); "projects that would maintain the competitive position of Russian natural gas on the EU market" (Russia's response to Panel question No. 49(b), para. 250); projects that "are designed to facilitate or promote the transmission or storage of Russian natural gas" (Russia's response to Panel question No. 49(c), para. 252; "projects that would likely, but not necessarily, be operated by Russian pipeline transport service suppliers, and which would involve Russian supplied transport services" (Russia's response to Panel question No. 49(c), para. 252).

7.1422. In light of the arguments of the parties, we examine whether Russia has demonstrated that the alleged discriminatory treatment, under the TEN-E measure, of "Russian projects" results in discrimination against Russian pipeline transport services and service suppliers within the meaning of Article II:1 of the GATS. In our analysis, we shall first determine what an infrastructure "project" covered by the TEN-E Regulation entails. Then, we will examine any relationship between infrastructure "projects" covered by the TEN-E Regulation and pipeline transport services and service suppliers covered by the GATS. If we conclude that Russia has established a sufficiently close connection between infrastructure "projects" covered by the TEN-E Regulation and pipeline transport services and service suppliers covered by the GATS such that the alleged discriminatory treatment of "Russian" infrastructure projects will necessarily result in discrimination against Russian pipeline transport services or service suppliers, we will examine whether Russia has demonstrated discrimination against "Russian" infrastructure "projects".

7.1423. The TEN-E Regulation provides a regulatory framework for infrastructure projects and does not regulate the supply of pipeline transport services.<sup>2307</sup> A "project" is defined in Article 2(3) of the TEN-E Regulation as "one or several lines, pipelines, facilities, equipment or installations falling under the energy infrastructure categories". A "project of common interest" is defined as "a project necessary to implement the energy infrastructure priority corridors and areas set out in Annex I and which is part of the Union list of projects of common interest referred to in Article 3".<sup>2308</sup> It is clear from these definitions that the concept of infrastructure project under the TEN-E Regulation does not coincide with the concept of pipeline transport service or service supplier.

7.1424. We further note that the TEN-E Regulation provides the definition of such notions as "studies", "works" and "commissioning", which in our view, could constitute distinct stages in the execution of an infrastructure project designated as a PCI. Pursuant to Article 2(9) of the TEN-E Regulation, "studies" means "activities needed to prepare project implementation, such as preparatory, feasibility, evaluation, testing and validation studies, including software, and any other technical support measure including prior action to define and develop a project and decide on its financing, such as reconnaissance of the sites concerned and preparation of the financial package". According to Article 2(8) of the TEN-E Regulation, "works" means "the purchase, supply and deployment of components, systems and services including software, the carrying out of development and construction and installation activities relating to a project, the acceptance of installations and the launching of a project". "Commissioning" means "the process of bringing a project into operation once it has been constructed".<sup>2309</sup> We observe that none of these activities, performed as part of the execution of a project designated as a PCI, involves the supply of pipeline transport services.

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<sup>2307</sup> We note that the regulatory ambit of the TEN-E Regulation is defined in Article 1 of the TEN-E Regulation as follows:

*Article 1*

**Subject matter and scope**

1. This Regulation lays down guidelines for the timely development and interoperability of priority corridors and areas of trans-European energy infrastructure set out in Annex I ("energy infrastructure priority corridors and areas").
2. In particular, this Regulation:
  - (a) addresses the identification of projects of common interest necessary to implement priority corridors and areas falling under the energy infrastructure categories in electricity, gas, oil, and carbon dioxide set out in Annex II ("energy infrastructure categories");
  - (b) facilitates the timely implementation of projects of common interest by streamlining, coordinating more closely, and accelerating permit granting processes and by enhancing public participation;
  - (c) provides rules and guidance for the cross-border allocation of costs and risk-related incentives for projects of common interest;
  - (d) determines the conditions for eligibility of projects of common interest for Union financial assistance. (TEN-E Regulation, (Exhibit EU-4), Article 1)

<sup>2308</sup> TEN-E Regulation, (Exhibit EU-4), Article 2(4).

<sup>2309</sup> TEN-E Regulation, (Exhibit EU-4), Article 2(11).

7.1425. Thus, we consider that the concept of infrastructure project under the TEN-E Regulation does not coincide with the concept of pipeline transport service or service supplier and the activities regulated by the TEN-E measure do not involve the supply of pipeline transport services.

7.1426. In its response to a question by the Panel, Russia explains that, for the purposes of its GATS claim, "Russian projects" are to be understood as "projects that would likely, but not necessarily, be operated by Russian pipeline transport service suppliers, and which would involve Russian supplied transport services".<sup>2310</sup> We thus understand Russia to imply that an infrastructure project would involve the supply of pipeline transport services or "be operated" by a pipeline transport service supplier. We cannot agree with Russia. We acknowledge that, once the pipeline infrastructure developed by an infrastructure project has been put in operation, it will involve the supply of gas pipeline transport services. However, a project to *develop* infrastructure precedes the *use* of such infrastructure, and therefore does not itself involve the supply of pipeline transport services.

7.1427. In our view, infrastructure projects may conceivably have an effect on the supply of pipeline transport services because they lead to the construction of infrastructure that will be used in the supply of such services.<sup>2311</sup> However, we do not read Russia's assertion that "Russian" infrastructure "projects" would involve the supply of "Russian" pipeline transport services or "be operated" by "Russian" pipeline transport service suppliers as relating to the impact of the TEN-E measure on the supply of pipeline transport services in the future. To our mind, this assertion reflects Russia's understanding of the relationship between infrastructure projects and pipeline transport services and service suppliers. As we have already determined, the activities regulated by the TEN-E measure concern infrastructure projects that develop pipeline infrastructure, which will be used to supply pipeline transport services *only after* the infrastructure becomes operational. Thus, we see no basis for the proposition that infrastructure projects would "involve" the supply of pipeline transport services or be "operated" by service suppliers in the course of supplying pipeline transport services. Consequently, we reject Russia's understanding of the relationship between infrastructure projects and pipeline transport services and service suppliers reflected in its assertion referred to above.

7.1428. We note that a supplier of pipeline transport services may, in certain cases, be a "project promoter" under the TEN-E measure.<sup>2312</sup> Thus, assuming *arguendo* that the TEN-E measure were distinguishing between project promoters on the basis of origin, it could be then argued, on this basis, that the TEN-E measure is inconsistent with Article II:1 of the GATS. However, Russia has advanced no argument to the effect that the TEN-E measure distinguishes between project promoters on the basis of origin.<sup>2313</sup> We observe that the text of the TEN-E measure contains no reference to the origin of a project promoter. In the absence of specific arguments and evidentiary support from Russia, we do not see a compelling reason, nor do we have sufficient information on the record, to make any other findings on this issue. We emphasize, nevertheless, that the regulatory treatment by the TEN-E measure of a TSO promoting an infrastructure project would concern this TSO in its capacity as project promoter rather than as supplier of pipeline transport services. The burden is on Russia to provide arguments and evidence to demonstrate that the regulatory treatment of a project promoter, which may be a TSO, results in the modification of the conditions of competition to the detriment of Russian suppliers of pipeline transport services.

7.1429. Based on the foregoing analysis, we conclude that Russia has not established that there is a sufficiently close connection between infrastructure projects covered by the TEN-E Regulation

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<sup>2310</sup> Russia's response to Panel question No. 49(c), para. 252.

<sup>2311</sup> See also our conclusion in paragraph 7.1393.

<sup>2312</sup> According to Article 2(6)(a) of the TEN-E Regulation, a "project promoter" may be a TSO, distribution system operator or other operator or investor developing a project of common interest. (TEN-E Regulation, (Exhibit EU-4), Article 2(6)(a)) A TSO is a natural or legal person who carries out the function of transmission of gas. (TEN-E Regulation, (Exhibit EU-4), Article 2(6)(a); and Directive 2009/73/EC, (Exhibit EU-5), Article 2(4)). According to Article XXVIII(g) of the GATS, "service supplier" means "any person that supplies a service". (footnote omitted) A TSO owned or controlled by a non-EU person could thus fall within a definition of a service supplier contained in Article XXVIII(g) of the GATS. It follows that a supplier of pipeline transport services may, but will not always, be a promoter of an infrastructure project under the TEN-E Regulation.

<sup>2313</sup> We note that the European Union contends that the origin of the promoter of an infrastructure project is not among the selection criteria prescribed by the TEN-E Regulation and plays no role in the designation of PCIs under the TEN-E measure. (European Union's response to Panel question No. 77(a)). Russia does not make any argument in this regard.

and pipeline transport services and service suppliers covered by the GATS such that the alleged discriminatory treatment of "Russian" infrastructure projects will necessarily result in discrimination against Russian pipeline transport services or service suppliers. Therefore, Russia cannot establish that the alleged discrimination against Russian infrastructure projects results in discrimination against Russian pipeline transport services and service suppliers within the meaning of Article II:1 of the GATS. Thus, we find that, to the extent Russia claims that the TEN-E measure is inconsistent with Article II:1 of the GATS because of the alleged discrimination against Russian infrastructure projects, its claim cannot succeed.

7.1430. In light of our finding that Russia has not established that there is a sufficiently close connection between infrastructure projects covered by the TEN-E Regulation and pipeline transport services and service suppliers covered by the GATS such that the alleged discriminatory treatment of "Russian" infrastructure projects will necessarily result in discrimination against Russian pipeline transport services or service suppliers, we do not consider it necessary to make a separate finding on whether the TEN-E measure discriminates against Russian infrastructure projects. This being said, we find it useful to address Russia's other arguments that the TEN-E measure is inconsistent with Article II:1 of the GATS, to the extent such arguments may be understood as not being premised on the allegedly discriminatory treatment of Russian infrastructure projects.

7.1431. Russia submits that the language of the TEN-E measure, and the policy documents that support it, constitutes evidence of *de jure* discrimination.<sup>2314</sup> In Russia's view, the reference to reducing dependency on "a single supplier" – and the clear identification of that supplier as Russia in policy documents supporting the Regulation – makes clear that the text of the Regulation targets Russian services and service suppliers.<sup>2315</sup> As we have determined above in section 7.11.2.2.1, the references to "single supplier", "diversification of gas supply" and "diversification of supply sources, supplying counterparts and routes" concern suppliers, and sources of supply, of natural gas. Russia has not demonstrated that these references may also encompass pipeline transport services or service suppliers. Therefore, we do not consider that these references support Russia's argument that the TEN-E measure results in a *de jure* discrimination within the meaning of Article II:1 of the GATS.

7.1432. Russia contends that private actors are likely to invest in projects reducing reliance on Russian natural gas because such projects are eligible for PCI designation.<sup>2316</sup> Russia thus infers that the TEN-E measure modifies the conditions of competition to the detriment of like Russian services and service suppliers within the meaning of Article II:1 of the GATS.<sup>2317</sup> We understand Russia to claim that by allegedly discriminating against Russian natural gas, the TEN-E measure also discriminates against Russian pipeline transport services and service suppliers.

7.1433. We refer to our analysis of Russia's claims under the GATT 1994, where we have concluded that the TEN-E measure discriminates against Russian natural gas within the meaning of Articles I:1 and III:4 of the GATT.<sup>2318</sup> However, we do not consider that, in and of itself, our finding of violation under the GATT is automatically transposable to the GATS. We recall the findings of the Appellate Body in *EC – Bananas III* that the GATT 1994 and the GATS may apply to the same measure concurrently.<sup>2319</sup> Nonetheless, the Appellate Body clarified that, while the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different: under the GATT 1994, the focus is on how the measure affects the goods involved; under the GATS, the focus is on how the measure affects the supply of services or service supplier.<sup>2320</sup>

7.1434. In sections 7.11.2.2.2 and 7.11.2.2.3 above, we have examined the effect of the TEN-E measure on the competitive opportunities of Russian natural gas, focusing on the pertinent aspects of this measure. In this section, we must focus our analysis on the effect of the TEN-E measure on Russian pipeline transport services and service suppliers. Aside from referring to the aspects of the TEN-E measure that we have already found to be inconsistent with Articles I:1 and III:4 of the

<sup>2314</sup> Russia's second written submission, para. 451.

<sup>2315</sup> Russia's second written submission, para. 453.

<sup>2316</sup> Russia's second written submission, para. 456.

<sup>2317</sup> Russia's second written submission, para. 456.

<sup>2318</sup> See above paras. 7.1301 and 7.1313.

<sup>2319</sup> Appellate Body Report, *EC – Bananas III*, para. 221.

<sup>2320</sup> Appellate Body Report, *EC – Bananas III*, para. 221.

GATT, Russia does not point to any other aspect of the TEN-E measure that, in its view, is inconsistent with Article II:1 of the GATS. As we have stated above, we do not consider that our finding of inconsistency under Articles I:1 and III:4 of the GATT in respect of the TEN-E measure leads to a violation of Article II:1 of the GATS.

7.1435. Russia also appears to argue that, in our assessment of the impact of the TEN-E measure on Russian pipeline transport service suppliers, we should take into account the "internal organization" of Gazprom.<sup>2321</sup> According to Russia, due to Gazprom's internal organization, which also includes the sale of Russian natural gas, Gazprom will have an interest in developing infrastructure that can contribute to such sale.<sup>2322</sup> Thus, we understand Russia to argue that, in view of Gazprom's "internal organization", the TEN-E measure operates in a manner that diminishes Gazprom's opportunities to develop projects eligible for PCI designation.

7.1436. We recall that Article II:1 of the GATS requires the equality of competitive opportunities for service suppliers as concerns their activities in "supplying" the services at issue.<sup>2323</sup> In the present case, the focus of our analysis is on the competitive opportunities of Russian service suppliers regarding their ability to supply pipeline transport services in the European Union via mode 3.<sup>2324</sup> We understand Russia's argument to imply that it would be contrary to Gazprom's commercial interests to promote infrastructure projects that reduce the European Union's dependence on Russian natural gas, while projects that contribute to the sale of Russian natural gas would not be eligible for PCI designation. However, Russia offers no explanation – even less evidence – as to how and why Gazprom's alleged consequential inability to promote, under the TEN-E measure, PCIs that contribute to the sale of Russian natural gas negatively affects the competitive opportunities of Gazprom as a supplier of pipeline transport services in the European Union. Consequently, we find that Russia has not demonstrated that the competitive opportunities of Gazprom to supply pipeline transport services in the European Union, as opposed to developing infrastructure that can contribute to the sale of Russian natural gas, are hindered by the TEN-E measure.

7.1437. Russia further refers to the [\*\*\*] project as evidence of the alleged discrimination by the TEN-E measure against Russian services and service suppliers.<sup>2325</sup> In Russia's view, this discrimination is evidenced by the low score obtained by this project, because it would have transported Russian natural gas.<sup>2326</sup> The European Union contests Russia's allegation that the [\*\*\*] project failed because of the European Union's decision "to score the project so low as to make it unable to ever obtain PCI designation", pointing out that the promoters of this project cancelled it more than one year after the first Union list of PCIs had been adopted.<sup>2327</sup>

7.1438. We do not consider it necessary to resolve this issue. Even assuming *arguendo* that the failure of the [\*\*\*] project may be attributed to the European Union and that it was the result of discrimination against this infrastructure project, it would still, in our view, be insufficient to establish a violation of Article II:1 of the GATS. As we have already concluded, Russia has not demonstrated that the alleged discriminatory treatment of infrastructure projects leads to a modification of competitive opportunities to the detriment of Russian pipeline transport services or service suppliers. Thus, the allegedly discriminatory treatment of the [\*\*\*] project would not establish an inconsistency of the TEN-E measure with Article II:1 of the GATS.

#### 7.11.4.2 Conclusion

7.1439. In view of the foregoing, we conclude that Russia has not demonstrated that the TEN-E measure is inconsistent with Article II:1 of the GATS.

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<sup>2321</sup> Russia's second written submission, para. 458.

<sup>2322</sup> Russia's second written submission, para. 458.

<sup>2323</sup> According to Article XXVIII(b) of the GATS, "'supply of a service' includes the production, distribution, marketing, sale and delivery of a service".

<sup>2324</sup> Russia indicated that mode 3 is the only relevant mode of supply in connection with each of Russia's claims under the GATS. (Russia's response to Panel question No. 56, para. 285).

<sup>2325</sup> Russia's response to Panel question No. 48, paras. 239 and 243. See also Russia's second written submission, para. 448.

<sup>2326</sup> Russia's response to Panel question No. 48, para 243, and No. 74, paras. 325–327.

<sup>2327</sup> European Union's second written submission, para. 379.

## 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 reference<sup>2328</sup>, 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.

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<sup>2328</sup> 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 Gas<sup>2329</sup> 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.

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<sup>2329</sup> 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.