Memorandum on Possible Implications under Denmark's Investment Treaty Commitments of the Draft Bill to Amend the Danish Continental Shelf Act (submitted for public consultation on 23 June 2017)

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Executive Summary

The proposed amendment of the Danish Continental Shelf Act raises concerns as to its lawfulness under the obligations Denmark has undertaken under the Energy Charter Treaty (ECT) as it would apply to the pending application for a construction permit by Nord Stream 2 AG. The ECT applies to Nord Stream Pipeline 2 (NSP2) because both Denmark and Switzerland are Contracting Parties to the ECT, and because Nord Stream 2 AG qualifies as a Swiss investors (under Article 1(7)(a)(ii) ECT) that has made an 'investment' in Denmark pursuant to Article 1(6) ECT. Only with respect to the part of the pipeline that is set to be built in Denmark, Nord Stream 2 AG has spent sums in the order of 60 million Euros for administrative steps, contracts and expenditures, including for permitting, surveying and logistics.

The ECT provides for protection under international law to investments in the energy sector made by investors from another contracting state. This protection is independent of Denmark's domestic, including constitutional law and the law of the European Union. The ECT protects, inter alia, against expropriations and measures having an equivalent effect that are not accompanied by compensation (Article 13 ECT). It also requires contracting states to provide for 'stable' and 'transparent' investment conditions and 'fair and equitable treatment' (Article 10(1) ECT). Moreover, under Article 10(12) ECT states have to provide in their domestic law for 'effective means for the assertion of claims and the enforcement of rights with respect to investments'. Foreign investors can claim for any damages resulting from breach of these commitments through the investor-state dispute settlement mechanism provided for in Article 26 ECT.

The introduction of the new requirement arguably has an effect that is equivalent to an expropriation, if applied retroactively to deny NSP2, thus contravening Article 13 ECT. Since NSP2 cannot be implemented without the construction permit, an amendment of the Danish Continental Shelf Act that would allow the refusal of the applied-for permit would destroy Nord Stream 2 AG's investment. Such a refusal would only be legal under Article 13(1) ECT if accompanied by compensation. In addition, the fact that no reasons have to be provided by the Ministry for Foreign Affairs in providing its recommendation against a project prevents Nord Stream 2 AG from having recourse to the prompt review required by Article 13(2) ECT.

The proposed amendment of the Danish Continental Shelf Act arguably also violates the right to stable and transparent investment conditions and to stability under the fair and equitable treatment granted by Article 10(1) ECT. This provision protects against unreasonable and

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disproportionate change of the regulatory framework in place, in particular if that change applies retroactively. Furthermore, Nord Stream 2 AG has a legitimate expectation that its application for a construction permit is dealt with under the existing regulatory framework. The retroactive introduction of the new requirement would upset the stability required by Article 10(1) ECT. This is all the more the case as the virtually identical Nord Stream Pipeline 1 had been approved by Danish authorities in the past.

The introduction of the new requirement is also not an exercise of Denmark's legitimate 'right to regulate' as the proposed bill excludes central due process rights, such as a reason-giving requirement, prior consultation and access to documents, which are usually available under Danish administrative law. Instead, the lack of those, as well as the uncertainty for foreign investors to know beforehand what criteria their project has to fulfill to meet Denmark's foreign-, security- and defense policy interests, arguably breaches the obligation under Article 10(1) ECT to provide transparent investment conditions. In addition, the exclusion of the reason-giving requirement arguably also results in a breach of Article 10(12) ECT, which requires states to provide in their domestic laws effective means for the assertion of claims and the enforcement of rights with respect to investments.

Finally, in addition to liability under the ECT, the proposed amendment to the Danish Continental Shelf Act may also expose the Kingdom of Denmark to international responsibility, including for the payment of damages, for breach of its commitments to promote and protect foreign investments under the bilateral investment treaty between Denmark and the Russian Federation in light of the detrimental economic effects it has on the investment of the sole shareholder of Nord Stream 2 AG and Nord Stream AG, the Russian energy company Gazprom, in NSP2.

I. Summary of Instructions

1. I have been asked by Nord Stream 2 AG, Baarerstrasse 52, CH-6300 Zug, Switzerland to provide, in the form of a short legal analysis, possible arguments based on the law of international investment protection against the amendment of Denmark's Continental Shelf Act, respectively the application of this amendment to Nord Stream 2 AG's existing application for the necessary (construction) permit for the Nord Stream Pipeline 2 (NSP2). The resulting arguments are set out below (Parts III and IV), preceded by a summary overview over the content and mechanism of protection offered by international investment treaties (Part II).

2. The present analysis is ultimately to be used as a basis to address a more general audience in the context of ongoing public consultation procedures in Denmark relating to the above mentioned legislative amendment in order to protect commercial interests of Nord Stream 2 AG. I have not been asked, however, to provide a comprehensive expert analysis of the implications of the proposed amendment and its application to NSP2 under the investment treaties to which Denmark is a party. I do therefore not take a view on the lawfulness or unlawfulness of the above mentioned measures under international investment law, nor do I advise on the legal, political, economic and other risks of such arguments. For this reason, legal or other counterarguments to the arguments presented below are only occasionally, and certainly not comprehensively, addressed. Similarly, the arguments in

favor of the positon of Nord Stream 2 AG are not comprehensively, but only occasionally, backed up by authorities. Any of this would require more in-depth expert analysis.

3. What is also not addressed in the present memo are possible arguments, in light of the specific factual circumstances, against the proposed amendment of the Danish Continental Shelf Act based on limitations under the United Nations Convention on the Law of the Sea (UNCLOS) of 'the right of the coastal State to establish conditions for cables or pipelines entering its territory or territorial sea' mentioned in Article 79(4) UNCLOS or limitations of Denmark's sovereignty stemming from the transit rights laid down in Article 7 of the Energy Charter Treaty (ECT). Possible breaches of these commitments could potentially be used to claim an independent breach of Article 10(1) sentence 4 ECT, which requires treatment of foreign investors that is no 'less favorable than that required by international law, including treaty obligations.' To pursue this avenue of argument further would equally require more in-depth research and expert advice.

4. For purposes of the present analysis, I have been provided with the following documents and information, the content and veracity of which I have not, however, verified:

- the 'Draft Bill to Amend the Danish Continental Shelf Act' (undated);
- the 'Consolidated Act no. 1101 ... on the Continental Shelf', which includes the amendments proposed by the above draft bill;
- a summary of the core changes affecting the interests of Nord Stream 2 AG in the successful implementation of NSP2; and
- a draft 'Memo on Constitutional Issues in the Draft Bill" by the law offices of Bech-Bruun, Copenhagen, dated 6 July 2017.

5. According to the information provided to me, the draft bill, if it enters into law, will have the following consequences:

a. A permit for laying of transit pipelines in the territorial waters will only be issued if this is compatible with national foreign-, security- and defense policy interests.

b. The Minister for Energy, Utilities and Climate will obtain a recommendation from the Minister for Foreign Affairs that include national foreign-, security- and defense policy interests. The recommendation of the Minister for Foreign Affairs will either be positive or negative (nothing in between). In case the recommendation of the Minister for Foreign Affairs is positive, the permit application will be subject to the usual environmental and safety assessment. In case the recommendation of the Minister for Foreign Affairs is negative, the Minister for Energy, Utilities and Climate must decline the permit application on this basis.

c. The recommendation of the Minister for Foreign Affairs regarding national foreign-, security- and defense policy interests will be based on a wide, political discretionary basis. A number of diversified considerations can be included in the recommendation, including considerations for national security and defense, politics, economics and/or military capacities, and foreign policy, including European and alliance interests.

d. The recommendation of the Minister for Foreign Affairs will not be a decision falling within the scope of the Public Administration Act, therefore the Minister for Foreign Affairs is not

subject to the rules under the Public Administration Act regarding consultation with parties involved, access to documents, or the obligation to provide justification for the recommendation.

e. The Minister for Energy, Utilities and Climate's decision to decline the permit application on the basis of the recommendation of the Minister for Foreign Affairs cannot be appealed to another public authority. The case can be brought before the Danish courts by instituting legal action against the Minister for Energy, Utilities and Climate. The limitation period is 6 months.

f. The act for the amendment of the Continental Shelf Act is presumed to enter into force on 1 January 2018.

g. The act will apply to applications for laying of pipelines which are received before the act enters into force, but where the processing of the applications is not finalized. This means that the permit application for the Nord Stream 2 pipeline project may be subject to the act if the permit application is not processed by 1 January 2018.

h. Companies are obliged to inform the Danish Public Administrations about material changes within 3 days.

6. It is my understanding that the Danish Government, or any of its ministries or agencies, has not entered into any specific agreements with Nord Stream 2 AG relating to NSP2, nor has given individual assurances that the applied-for construction permit would be granted under the present legislation. What I understand to be the case under Danish law, however, is that under the existing legislation the applied-for construction permit can only be refused based on environmental and safety concerns and that such concerns are not present, in particular given that NSP2 is to follow exactly the same course as the existing Nord Stream 1 pipeline and does not raise any different concerns in terms of environmental impact or safety. Finally, I understand that Nord Stream 2 AG does not have subsidiaries that are directly engaged in the pipeline project, neither in Denmark nor elsewhere, but is itself the entity undertaken the planning, construction and later operation of the pipeline. Nord Stream 2 AG, I understand, is wholly owned by the Russian company Gazprom. NSP2 is in turn co-financed on a non-equity basis by major energy companies from Austria, France, Germany, and The Netherlands.

II. Protection Mechanisms Offered by International Investment Treaties to Which Denmark Is a Party

7. Foreign investors in the European Union (EU) do not only enjoy the protection of their economic activities under domestic law, as well as EU law. They can also, under certain circumstances, avail themselves of independent protection under international law, in particular based on international investment treaties to which the host state and the investor's home state are party.

8. These treaties, which are generally concluded on a bilateral basis, but also include multilateral agreements, such as the North-American Free Trade Agreement (NAFTA) or the Energy

Charter Treaty (ECT),[1] provide for protection of foreign investors against a catalogue of undue government interferences with a foreign investment and allow investors to claim for damages arising out of that interference directly against the host state through investor-state dispute settlement mechanisms provided for under the treaties. Dispute settlement options usually include investor-state arbitration (under a variety of arbitration rules) without the need for prior recourse to the domestic courts of the host state.

9. On substance, investment treaties generally provide for protection against (direct and indirect) expropriations without compensation, national and most-favored-nation treatment, 'fair and equitable treatment', which includes the protection of 'legitimate expectations', a certain degree of consistency, predictability, and stability of the regulatory framework, transparent procedures, due process rights and the right to access to justice, 'full protection and security', protection against arbitrary and discriminatory measures, and a right to free capital transfer.

10. In the present situation, Nord Stream 2 AG could potentially avail itself of protection under the ECT (in particular Articles 10 and 13) (see Part III). Gazprom, in turn, as Nord Stream 2 AG's sole shareholder could, albeit to a more limited extent, avail itself of protection under the bilateral investment treaty between Denmark and the Russian Federation (Denmark-Russia BIT) (Articles 2, 3 and 4)[2] (see Part IV).

11. The protection granted under the ECT and the Denmark-Russia BIT provides possible arguments against the proposed amendment of Denmark's Continental Shelf Act, respectively against the application of this amendment to Nord Stream 2 AG's existing application for the necessary (construction) permit for NSP2.[3] Investment treaty commitments would likely not be violated by the amendment as such, but by its application to the concrete project. Furthermore, only if the permit in the end is refused will there be any damage and hence a breach of Denmark's ECT commitment. If the permit is granted even under the new criteria, there is nothing to complain about. However, the bill suggests already that the new criteria will also apply to existing applications. For this reason, it is arguable that the proposed amendment as such already affects Nord Stream 2 AG's investment treaty rights as it creates an uncontrollable risk of refusal.

12. Protection against such measures under these treaties requires 1) that the respective treaty applies (namely that the activities thus far undertaken qualify as a covered 'investment' which is made by a covered 'investor') and 2) that the measures in question interfere with one of the rights laid down in the respective treaty.

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1 Energy Charter Treaty (signed 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95.

2 Agreement between the Government of the Kingdom of Denmark and the Government of the Russian Federation concerning the Promotion and Reciprocal Protection of Investments, signed 4 Nov 1993, entered into force 28 August 1996.

3 Other investment treaties of Denmark do not seem to be of direct relevance as none of the entities co-funding NSP2, provided their financing qualified as an investment, seems to be from a state that has an investment treaty with Denmark other than the ECT. The possible protection of the co-financiers is, therefore, not further addressed in the present memo as no additional investment treaties other than the ECT would be available in the relationship between Denmark and the co-financiers' home states. What is also not considered in the present text is whether shareholders of Gazprom could be protected under an investment treaty with Denmark.

III. Responsibility of Denmark for Breach of the Energy Charter Treaty

13. The proposed amendment of the Danish Continental Shelf Act, respectively its application to Nord Stream 2 AG's application for a construction permit for NSP2, raises concerns about compliance of Denmark with its commitments concerning the protection of foreign investors and their investments under the ECT. This is particularly the case as the application of the proposed amendment can be argued to qualify as a retroactive under the theory that an investment of Nord Stream 2 AG already exists and that Nord Stream 2 AG had the legitimate expectation that a permit would be granted under the existing legislative framework. This notwithstanding the notion of retroactivity that international investment law operates with is unsettled. The qualification of the proposed amendment as retroactive would, however, maximize the exposure to risk that Denmark is facing under its investment treaty commitments.

1. Overview over the Protection Granted under the ECT to Foreign Energy Investors

14. The ECT provides protection under international law to investments in the energy sector made by investors from another Contracting State. This protection is independent of both Danish law, including Danish constitutional law, and EU law.

15. Substantive investment protection under the ECT includes, inter alia, protection against expropriations and measures having equivalent effect that are not accompanied by compensation (Article 13 ECT), protection against measures that contravene an investor's right to a 'stable' investment conditions and to 'fair and equitable treatment' (Article 10(1) ECT), and protection against measures that interfere with any obligation the Contracting State has entered into with foreign investors (Article 10(1) ECT). Moreover, Article 10(12) ECT requires States to provide in their domestic law for 'effective means for the assertion of claims and the enforcement of rights with respect to investments'.

16. A possible infringement of all of these rights is at stake in respect of the proposed amendment to the Danish Continental Shelf Act and its application to NSP2, as explained in more detail below. Ultimately, these rights can be enforced by foreign investors asking for the payment of damages arising out of internationally wrongful behavior through the investor-state dispute settlement mechanism provided for in Article 26 ECT.

2. Application of the ECT to NSP2

17. The ECT applies to NSP2. Both Denmark and Switzerland are Contracting Parties to the ECT. As a corporation under Swiss Law, Nord Stream 2 AG qualifies as an 'investor' in the sense of Article 1(7)(a)(ii) ECT. Nord Stream 2 AG is, as required by that provision, 'a company … organized in accordance with the law applicable in [Switzerland]'.

18. Nord Stream 2 AG also has an 'investment' in Denmark as defined in Article 1(6) ECT. Pursuant to that provision

> 'Investment' means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:

(a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;

(b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;

(c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;

(d) Intellectual Property;

(e) Returns;

(f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

…

'Investment' refers to any investment associated with an Economic Activity in the Energy Sector …

19. 'Economic Activity in the Energy Section, in turn, is defined in Article 1(5) ECT to mean

> an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products …

20. The notion of what is protected under the ECT as an investment is particularly broad. It includes 'every kind of asset', including, but not limited to, those specifically listed, which is 'associated with' 'an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products'. Transmission includes the operation of a gas pipelines.[4]

21. Against this broad definition, it is clear that NSP2 itself qualifies as an investment made by Nord Stream 2 AG. This project also has a territorial nexus to Denmark as it passes through Danish territorial waters and Denmark's Exclusive Economic Zone, which are both part of the 'Area' to which the obligations under Articles 10 and 13 ECT apply territorially.[5]

22. Furthermore, already at the present stage, Nord Stream 2 AG has not only incurred pre-investment expenditure,[6] but has made substantial commitments towards the planning and

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[4] This is clarified by Article 7(10)(b) ECT, which states that transmission of energy is at stake in the context of gas pipelines. Article 7(10)(b) ECT mentions 'high-pressure gas transmission pipelines' among the 'Energy Transport Facilities' it defines.

[5] See Article 1(10) ECT ('"Area" means with respect to a state that is a Contracting Party: (a) the territory under its sovereignty, it being understood that territory includes land, internal waters and the territorial sea; and (b) subject to and in accordance with the international law of the sea: the sea, sea-bed and its subsoil with regard to which that Contracting Party exercises sovereign rights and jurisdiction.').

[6] Note that some investment treaty tribunals have doubted whether pre-investment expenditure is protected under investment treaties. See eg *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award (15 March 2002) paras 48-51; *William Nagel v Czech Republic*, SCC Case 049/2002, Award (9 September 2003) paras 325-329. Others consider that there already is an investment even prior to permits or licenses being issued provided that the project is sufficiently concrete and has advanced beyond the initial planning stages. See *Nordzucker AG v. Poland*, ad hoc Arbitration, Partial Award (10 December 2008) paras 160-185, *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, para 304 ('An investment can

implementation of the NSP2, which is covered as an investment under the ECT. Only with respect to the part of the pipeline that is set to be built in Denmark, Nord Stream 2 AG has spent sums in the order of 60 million Euros for administrative steps, contracts and expenditures. This includes investment for permitting, surveying and logistics, including a contract with the Danish company Blue Water Shipping for transport of the pipes of a value of some 40 million Euros. The investment for the pipes to be placed in Denmark amounts to around 260 million Euros. These investments have been made in reliance on the continuous validity and application of the domestic legal framework in place in Denmark, which governs the need for, but also the right to, as well as the administrative procedure for applying for, a construction permit for the part of NSP2 that crosses Danish territorial waters.

23. What is also highly relevant is that at the time of making its investment and applying for the construction permit, Nord Stream 2 AG could rely on the fact that NSP2 is scheduled to follow exactly the same route as the Nord Stream 1 pipeline and does not raise any different environmental or safety concerns. Consequently, the granting of the necessary construction permit is a mere technical step in the realization of NSP2, and does not constitute a condition of the project the meeting of which was subject to any commercial or political risk.

3. Interference with Substantive Rights under Article 13 ECT

24. The investments of foreign investors in the energy sector, such as the investment of Nord Stream 2 AG in NSP2, are protected under Article 13 ECT against expropriations and measures having equivalent effect that do not meet the stipulated requirements (public purpose, non-discriminatory application, due process, and compensation).

25. Article 13 ECT provides in relevant part

> (1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalised, expropriated or subjected to a measure or measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as 'Expropriation') except where such Expropriation is:
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> (a) for a purpose which is in the public interest;
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> (b) not discriminatory;
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> (c) carried out under due process of law; and
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> (d) accompanied by the payment of prompt, adequate and effective compensation.
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> Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the 'Valuation Date').
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> …
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> (2) The Investor affected shall have a right to prompt review, under the law of the Contracting Party making the Expropriation, by a judicial or other competent

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take many forms before actually reaching the construction stage, including most notably the cost of negotiations and other preparatory work leading to the materialization of the Project…').

> and independent authority of that Contracting Party, of its case, of the valuation of its Investment, and of the payment of compensation, in accordance with the principles set out in paragraph (1).
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> …

26. Since NSP2 cannot be implemented without the construction permit to be granted by Denmark, an amendment of the Danish Continental Shelf Act that would allow the refusal of the applied-for permit would arguably destroy the entire investment. While Nord Stream 2 AG would not be formally expropriated, a refusal to grant the permit could be argued to have an effect that is equivalent to an expropriation. Such a refusal, even if for a public purpose, would then require compensation of Nord Stream 2 AG.[7] In addition, the fact that no reasons have to be provided by the Ministry for Foreign Affairs in providing its recommendation against the project, would not allow Nord Stream 2 AG to have recourse to the prompt review required by Article 13(2) ECT.

4. Interference with Substantive Rights under Article 10 ECT

27. In addition to a possible breach of Article 13 ECT, Article 10 ECT grants a variety of rights to investments in the energy sector by foreign investors, such as NSP2.

28. Article 10 ECT provides in relevant part

> (1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.
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> …
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> (12) Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorisations.

29. Article 10 ECT contains a number of different standards of protection of foreign investors in the energy sector that are relevant for assessing the lawfulness of the proposed amendment of the Danish Continental Shelf Act under the ECT. These are first the duty to provide a stable legal framework, the duty to protect an investor's legitimate expectations as part of the duty to provide

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[7] A similar argument was raised by Swedish power producer Vattenfall in its first claim against Germany under the ECT concerning the refusal of the City of Hamburg to grant an operating license for a coal-fired power plant with the specification and environmental conditions that were informally agreed between the immediately preceding City Government and the power company. See *Vattenfall AB, Vattenfall Europe AG and Vattenfall Europe Generation AG and Co. KG* v. *Federal Republic of Germany*, ICSID Case No. ARB/09/06, Request for Arbitration (30 March 2009) para 54(v) <https://www.italaw.com/sites/default/files/case-documents/ita0889.pdf> accessed 12 July 2017.

fair and equitable treatment against unreasonable and disproportionate change of the regulatory framework in place, the duty to provide transparency, the duty to observe any obligations entered into with a foreign investor, and the duty to provide effective means for asserting claims and enforcing rights. All of these rights can be argued to be affected by the proposed amendment of the Danish Continental Shelf Act.

a. Stability and Protection of Legitimate Expectations

30. Article 10(1) ECT provides protection to foreign investors in the energy sector, such as Nord Stream 2 AG, against unreasonable and disproportionate changes of the regulatory framework in place. This duty can be grounded in either the duty to 'create stable ... conditions for Investors … to make Investments' laid down in Article 10(1) sentence 1 ECT, the duty to provide a stable legal framework as part of the fair and equitable treatment standard, or the duty to protect an investor's 'legitimate expectations' as part of the standard of fair and equitable treatment mentioned in Article 10(1) sentence 2 ECT.

31. In fact, as the Tribunal in *Plama v. Bulgaria* has found, the duty to provide a stable legal framework mentioned in the first sentence of Article 10(1) 'extends ... to all stages of the Investment and not only to the pre-Investment matters'.[8] As regards the fair and equitable treatment standard, it is equally widely accepted that this standards contains to duty to provide a stable legal framework, either as an independent element of fair and equitable treatment,[9] or as part of the duty to protect the legitimate expectations of foreign investors against change.

32. The duty to provide a stable legal framework encompasses 'the "reasonable and justifiable" expectations that were taken into account by the foreign Investor to make the Investment.'[10] While often used to address non-compliance with contractual promises or other specific assurances made by the host state, various tribunals have also considered that legitimate expectations could encompass the observance and application of a host state of its own laws, including those relating to the grant of an administrative license or permit.[11] While the protection of an investor's legitimate

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[8] *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award (27 January 2008) para. 172.

[9] See *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award (27 December 2016) para 315(c).

[10] *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award (27 January 2008) para. 176. See also *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) para 7.75 (stating that '[i]t is widely accepted that the most important function of the fair and equitable treatment standard is the protection of the investor's reasonable and legitimate expectations').

[11] See eg *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003) para 154 (stating that fair and equitable treatment 'requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.'). Other tribunals are critical whether legitimate expectations can arise from general, legislative provisions; they instead require specific, individual assurances. See eg *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016) para 552; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Uruguay*, ICSID Case No. ARB/10/7, Award (9 July 2016) para 426. Still, even in such cases,

expectations does not freeze the legal and regulatory and framework in place, it can be violated when conditions for the approval of a license or permit are changed through subsequent alteration in the regulatory framework.[12]

33. Regulatory change has been found to be in breach of the protection of an investor's legitimate expectations in particular in situations where the change was 'fundamental' and did not take into account the circumstances of existing investments made in reliance upon the prior regime. As the Tribunal in *Eiser Infrastructure v. Spain* recently held:

> Taking account of the context and of the ECT's object and purpose, the Tribunal concludes that Article 10(1)'s obligation to accord fair and equitable treatment necessarily embraces an obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long-term investments. This does not mean that regulatory regimes cannot evolve. Surely they can. '[T]he legitimate expectations of any investor [...] [have] to include the real possibility of reasonable changes and amendments in the legal framework, made by the competent authorities within the limits of the powers conferred on them by the law.' However, the Article 10(1) obligation to accord fair and equitable treatment means that regulatory regimes cannot be radically altered as applied to existing investments in ways that deprive investors who invested in reliance on those regimes of their investment's value.[13]

34. Thus, while certain changes – in the sense of evolution of the regulatory framework – are possible and are to be expected by foreign investors, the fair and equitable treatment standard under Article 10(1) ECT protects against radical and fundamental changes to a host state's regulatory framework in place.

35. The proposed amendment of the Danish Continental Shelf Act violates the stability requirement arising from Article 10(1) ECT. Nord Stream 2 AG has a legitimate expectation that its application for a construction permit is dealt with under the existing regulatory framework. The retroactive introduction of a new requirement, namely that the project must also be in line with Denmark's national foreign-, security- and defense policy interests, could, if applied to NSP2, result in the effective destruction of Nord Stream 2 AG's investment, without taking into account the investor's reliance on being treated under the regulatory presently in place. This is all the more the

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tribunals often consider that regulatory change must be proportionate. See *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award (27 December 2016) para 372 (stating that '[i]n the absence of a specific commitment, the state has no obligation to grant subsidies such as feed-in tariffs, or to maintain them unchanged once granted. But if they are lawfully granted, and if it becomes necessary to modify them, this should be done in a manner which is not disproportionate to the aim of the legislative amendment, and should have due regard to the reasonable reliance interests of recipients who may have committed substantial resources on the basis of the earlier regime.').

[12] For a case concerning the alteration of assessment criteria for the grant of an environmental permit through reinterpretation of the statutory framework see *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015) paras 446-454 (for a summary of the tribunal's considerations under the fair and equitable treatment provision in NAFTA).

[13] *Eiser Infrastructure Limited and Energia Solar Luxembourg S.À R.I. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award (4 May 2017) para 382 (quoting *El Paso Energy International Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011) para 400).

case as the (from an environmental and safety perspective identical) Nord Stream 1 pipeline had been approved by Danish authorities in the past. If used to ultimately refuse the implementation of NSP2, the proposed legislative change would contravene the stability requirement under the ECT and Nord Stream 2 AG's legitimate expectations.

36. The introduction of the new requirement is also not an exercise of Denmark's legitimate 'right to regulate'. While the national foreign-, security- and defense policy qualifies as a public purpose, the proposed bill excludes central due process rights, such as a reason-giving requirement, prior consultation and access to documents as under regular administrative procedure in Denmark. For this reason it cannot be regarded as part of the regular and to-be-expected exercise of Denmark's right to regulate.

b. Transparency

37. In addition to stable conditions, Article 10(1) sentence 1 ECT also requires transparent conditions for investments. This has been understood by arbitral tribunals to

> indicate an obligation to be forthcoming with information about intended changes in policy and regulations that may significantly affect investments so that the investor can adequately plan its investment and, if needed, engage the host State in dialogue about protecting its legitimate expectations. Finally, the term 'favourable' suggests the creation of an investor-friendly environment.[14]

38. Similarly, the requirement of transparency has also been understood by tribunals to be an element of the duty to grant foreign investors fair and equitable treatment.[15] Non-transparent government action, including in administrative decision-making, can therefore constitute breach of the fair and equitable treatment standard.[16]

39. The proposed amendment to the Danish Continental Shelf Act could be argued to violate the transparency requirement because the criteria applied by the Ministry for Foreign Affairs in determining whether a pipeline project in Danish territorial waters conforms to, or contradicts, Denmark's foreign-, security- and defense policy interests is unclear and unpredictable and does not allow foreign investors to know beforehand what criteria their respective project has to fulfill. In addition, a violation of the transparency requirement could be said to result from the fact that the Ministry for Foreign Affairs is not required to provide reasons for a decision determining the incompatibility of a pipeline project with Denmark's foreign-, security- and defense policy interests.

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[14] *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) para 7.79.

[15] See *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000) para 76; *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003) para 154.

[16] For the situation where the secret awarding of licenses was found to be in breach of fair and equitable treatment see *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (21 January 2010) para 418. In the same way, a secret refusal of a permit could constitute breach of fair and equitable treatment.

c. Observance of Obligations-Provision

40. The amendment of the Danish Continental Shelf Act, and a subsequent refusal of the construction permit based on newly introduced grounds to NSP2, could also be argued to breach the duty under Article 10(1) ECT to 'observe any obligations' the state has entered into with foreign investors . Such 'obligations' under Article 10(1) ECT have been understood, at least by some arbitral tribunals, as encompassing not only contractual commitments between a foreign investor and the host state, but also commitments that are based on statutory provisions.[17]

41. In the present case, the obligation in Denmark under the present legislation to grant a construction permit when the statutory conditions are met, in particular when taking into account the identical nature of the Nord Stream 1 and 2 pipelines could be argued to contain such a commitment. This commitment could be argued to be breached if new licensing criteria are retroactively introduced and used to refuse the construction of the pipeline in question.

42. However, as compared to the arguments relating to the duty of stability under the fair and equitable treatment standard contained in Article 10(1) sentence 2 ECT, the argument based on breach of the observance of obligations-provisions are weaker.

d. Effective Means for Review (Article 10(12) ECT)

43. Under Article 10(12) ECT '[e]ach Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorisations.'

44. This provision could be argued to be violated if the amendment of the Danish Continental Shelf Act excludes due process guarantees, which are otherwise available under Danish administrative law for the review of any other administrative decision, such as access to documents or the duty to give reasons. These would be necessary in order to allow an affected investor, such as Nord Stream 2 AG, effectively to ask Danish courts to review the decision of the Ministry for Foreign Affairs recommending a refusal of the construction of the pipeline in Danish territorial waters.[18] Their absence could therefore be argued to contravene the right granted in Article 10(12) ECT.

IV. Responsibility of Denmark under the Denmark-Russia Bilateral Investment Treaty

45. One can also consider the possibility of raising arguments as to the possible breach of the Denmark-Russia BIT based on the fact that the sole shareholder of Nord Stream 2 AG is the Russian

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[17] See, eg, *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award (27 January 2008) para 186 (suggesting that the 'wide' wording of 'any obligation' in Article 10(1) ECT 'refers to any obligation regardless of its nature, *i.e.,* whether it be contractual or statutory').

[18] Cf. *Chevron Corporation and Texaco Petroleum Company v. Ecuador*, UNCITRAL, Partial Award on the Merits (30 March 2010) paras 241-248 (considering that a provision like Article 10(12) ECT would allow a tribunal to consider the individual treatment of foreign investors in domestic courts and determine whether they have been able to effectively enforce their rights in domestic courts).

company Gazprom. While Gazprom is protected as an investor under that treaty[19] - but not the ECT given Russia's withdrawal from it in 2009 – and could be argued to already have an (indirect) investment in Denmark in light of both the existing Nord Stream 1 project and because of the activities already undertaken in connection with NSP2,[20] the Denmark-Russia BIT provides much narrower substantive protections as compared to the ECT in the present type of situation, where a project has not been approved, but is still in the process of obtaining the necessary permits for construction and/or operation.

46. In particular, and unlike under the Energy Charter Treaty, the Denmark-Russia BIT does not provide independent protection under international law for the admission of new or the expansion of existing investments. Instead, Article 2 only imposes a duty to 'admit … investments in accordance with its legislation'. While one could argue that this provision also protects against retroactive changes to the domestic law that are introduced after an application for a necessary permit has been made, such an argument is much weaker and more difficult to present than the arguments available under the ECT.

V. Conclusion

47. All in all, I would suggest limiting arguments about the risks under international investment treaties principally to those arising under the ECT. Under this treaty it can be plausibly argued that the proposed amendment of the Danish Continental Shelf Act, and its application to the application of Nord Stream 2 AG for a construction permit for NSP2, risk incurring Denmark's international responsibility. Nord Stream 2 AG can be argued to already have made an investment that is covered by the ECT.

48. The ECT, in turn, requires Denmark to provide for stable investment conditions, to protect Nord Stream 2 AG's legitimate expectations, to provide for transparent criteria for the decision on applications for construction permits for pipelines in the territorial sea and provide transparency in case an application is denied, and to provide for possibilities for affected investors to have decisions effectively reviewed in domestic courts. In addition, arguments as to the duty to observe its obligations under the existing statutory framework towards Nord Stream 2 AG could be added.

49. None of these obligations are arguably met if the proposed criterion - that pipelines in the territorial sea must pass be considered to comply with Denmark's foreign-, security- and defense

[19] Gazprom is an investor under Article 1(3)(b) of the Denmark-Russia BIT, as it is a corporation organized in the territory of the Russian Federation in accordance with its legislation and is competent, in accordance with Russian legislation, to make investments in Denmark. The fact that it is only a shareholder of a company having an investment is generally not considered to be an obstacle to the protection *ratione personae* under international investment treaties.

[20] The notion of investment is defined in Article 1(1) of the Denmark-Russia BIT and covers, inter alia, 'movable and immovable property' lit e) 'any rights, conferred by law or under contract, to undertake economic activity, including rights to search for, cultivate, extract or exploit natural resources'. While not explicitly in this respect, Article 1(1) of the Denmark-Russia BIT would likely also cover investments that are made indirectly by Gazprom via its Swiss subsidiaries that have direct interests in the Nord Stream 1 and 2 projects. This is so because so-called indirect investments are mostly considered to be covered by the wide notions of 'investment' adopted by international investment treaties.

policy interests by the Ministry for Foreign Affairs - is applied retroactively to NSP2's permit application and used to refuse implementation of that project.

50. With respect to the Denmark-Russia BIT, the possibilities of arguing for the existence of a breach are more difficult. For this reason, I would at the most add one sentence to the text submitted in reaction to the proposed bill about the possible exposure of Denmark to international responsibility for breach of the Denmark-Russia BIT.

Amsterdam, 17 July 2017

(Prof. Dr. Stephan Schill)

Compatibility of the proposed Act on the Continental Shelf and certain pipeline installations in the territorial waters with international trade law

I have been asked by Nord Stream 2 AG ("Nord Stream 2") to provide independent reflections on the Danish government bill to amend the Danish Continental Shelf Act and the new Act on the Continental Shelf and certain pipeline installations in the territorial waters ("Proposal"). Specifically, I have been asked to briefly examine with compatibility of the Proposal with WTO related rules on transit.

I have had no particular guidance as to my findings. My conclusions are independent from Nord Stream 2.

The context for the request is that the Proposal would include new provisions on laying of pipelines in the Danish territorial waters. A brief overview of the relevant parts of the Proposal is provided in Section 1 of the Opinion.

My qualifications are available at the final page of this document.

Joensuu, 27 July 2017

Kim Talus

Professor of European Energy Law
UEF Law School

Professor of Energy Law
University of Helsinki

1. Overview of the Proposed Amendments

Through the proposed amendments to the Danish Continental Shelf Act, the Danish government seeks to introduce a new type of permit or permit conditions for laying power cables and pipelines for the transportation of hydrocarbons in the Danish territorial waters. The permit conditions for power cables and pipelines under the Proposal differ. No explanation is offered for this difference of treatment. This section will only focus on the permitting of pipelines.

According to the Proposal, a permit for laying of transit pipelines in the territorial waters would only be issued if this is compatible with national foreign-, security- and defense policy interests. According to the Government Bill, this foreign, security and defence policy recommendation reflects a free political assessment in which a large number of different considerations may be involved, including for example the interests of the state security and defence of the kingdom, political, economic and/or military capacities and foreign policy considerations, including European and alliance considerations.

The procedural elements of the Proposal consists of a scheme where the Minister for Energy, Utilities and Climate will obtain a recommendation from the Minister for Foreign Affairs which includes an assessment of national foreign-, security- and defense policy interests. The recommendation of the Minister for Foreign Affairs will either be positive or negative. In case the recommendation of the Minister for Foreign Affairs is positive, the permit application will be subject to the usual environmental and safety assessment. In case the recommendation of the Minister for Foreign Affairs is negative, the Minister for Energy, Utilities and Climate must decline the permit application on this basis.

The recommendation of the Minister for Foreign Affairs will not be a decision falling within the scope of the Public Administration Act, therefore the Minister for Foreign Affairs is not subject to the rules under the Public Administration Act regarding consultation with parties involved, access to documents, or the obligation to provide justification for the recommendation.

The act for the amendment of the Continental Shelf Act is scheduled to enter into force on 1 January 2018. However, the new act will apply to applications for laying of pipelines, which

are received before the act enters into force, but where the processing of the applications is not finalized.

The Proposal and the accompanying Government Bill raise serious concerns over their compatibility with international trade rules and WTO related rules on transit in particular.

2. Compatibility with the WTO regulation of transit

The regulation of energy transit through fixed infrastructure, such as pipelines is part of the multilateral trading frameworks of the WTO. Article V of the GATT on "Freedom of Transit" establishes a general requirement of freedom of transit to or from other WTO Members.[1] The Trade Facilitation Agreement (TFA), which entered into force in early 2017, has added new requirements on the regulation of transit. One such requirement is to not impose regulations or formalities on transit which "[w]ould constitute a disguised restriction on traffic in transit".[2] In addition to the WTO, the significance of energy transit for international trade has been recognized, *inter alia,* in the Energy Charter Treaty as well as at the United Nations where reliable energy transportation has been considered to be "[i]n the interest of the entire international community".[3] This section will primarily focus on the GATT and TFA frameworks.

2.1 GATT Article V

In the multilateral framework of the WTO, Article V (2) of the GATT provides that

> "[t]here shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties."

The term "traffic in transit" derives from the first paragraph of Article V, which provides that:

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[1] GATT, Article V (2).
[2] WTO, Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, WT/L/940, 28 November 2014, Article 11.
[3] UNGA Res 67/263 (17 May 2013) UN Doc A/Res/67/263.

> "Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Traffic of this nature is termed in this article "traffic in transit".[4]

Although the term "traffic in transit" can be considered somewhat ambiguous, [5] there is a general consensus that this also covers transit through fixed infrastructure, such as pipelines.[6] In the Doha round negotiations, the EU was an active proponent of amending the current definition of "traffic in transit" to specifically include fixed infrastructure.[7]

GATT Article V establishes several non-discrimination requirements for transit. Most-favoured Nation (MFN) treatment obligations are created in two separate paragraphs. The first is established in GATT Article V(2), which states that no distinction shall be made based on "[f]lag of vessel, the place of origin, departure, entry, exit or destination, or any circumstances relating to the ownership of goods, of vessels or other means of transport."[8] In *Colombia — Ports of Entry,* the panel concluded that "[A]rticle V:2, [...] requires that goods from all Members must be ensured an identical level of access and equal conditions when proceeding in international transit".[9]

The second non-discrimination requirement is established by Article V(5), which creates a specific MFN obligation in relation to all charges, regulations and formalities in connection with transit.[10] The interpretative note *Ad* Article V states that with regards to transportation

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[4] GATT, Article V (1).
[5] See on this: G. Marceau, The WTO in the Emerging Energy Governance Debate, (2010), Vol. 5(3) *Global Trade and Customs Journal*, p. 89; D. Azaria, Energy Transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade, (2009), Vol. 27 (4) *Journal of Energy & Natural Resources Law*, p. 569-570.
[6] L. Ehring and Y. Selivanova, "Energy Transit", in Y. Selivanova (ed.), *Regulation of Energy in International Trade Law*, (The Netherlands: Kulwer Law International BV, 2011), p. 60; P. Ugaz, Prospects for a transit regime on energy in the WTO (2011), No. 29 *Agenda Internacional*, p.285.
[7] WTO, Negotiating Group on Trade Facilitation, Communication from Armenia, Canada, The European Communities, The Kyrgyz Republic, Mongolia, New Zealand, Paraguay, and the Republic of Moldova, TN/TF/W/79, 15 February 2006.
[8] GATT, Article V (2).
[9] WTO Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry,* WT/DS366/ R, 27 April 2009, VII.402.
[10] GATT, Article V (5).

charges, the principles of the Article refer only "[t]o like products being transported under the same route under like conditions."[11] It is relevant to note that whereas this narrows the scope of GATT Article V(5), it does so *only* in relation to transportation charges and not in relation to regulations and formalities, to which a MFN obligation applies. Consequently, regulatory changes which treat transiting products of one Member state more favourably than they treat those of another, for example by requiring an assessment of national foreign-, security- and defense policy interests on pipelines but not for power cables, could be argued to violate GATT Article V(5).

In relation to non-discrimination, the scope of some paragraphs of Article V go beyond a MFN treatment requirement. As Article V(2) requires that no distinction is made in relation to "[p]lace of origin, departure, entry, exit or destination", it has been argued that this includes some elements of a National Treatment obligation.[12] Article V also imposes other obligations that may be relevant to regulatory burdens, for example through paragraph 4, which requires that charges and regulations "[s]hall be reasonable, having regard to the conditions of the traffic.[13]

In summary, to give freedom of transit, as defined in GATT Article V, practical meaning in the context of pipeline gas transportation, the right to transit can either be established through third party access or by establishment of new capacity. In the case of the Nord Stream 2 project, establishment of new capacity is the only option. Although transit states, such as Denmark have the sovereign right to regulate in their territorial waters, they cannot disregard their obligation to provide freedom of transit for those states that are dependent on transit.[14] As will be discussed below, regulations and formalities that are a "disguised restriction" on transit are not allowed either. The introduction of security and defence political "interests" as qualifying requirements for commercial pipeline projects can be argued to meet the definition of "disguised restrictions".

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[11] GATT, Annex I, *Ad* Article V.
[12] L. Ehring and Y. Selivanova, "Energy Transit", in Y. Selivanova (ed.), *Regulation of Energy in International Trade Law*, (The Netherlands: Kulwer Law International BV, 2011), p. 65.
[13] GATT, Article V (4).
[14] V. Pogoretskyy, *Freedom of Transit and Access to Gas Pipeline Networks under WTO Law*, (Cambridge University Press, 2017), p. 133.

2.2 TFA Article 11

A key requirement under the TFA, established in Article 11(1)(b), is the requirement not to apply any formalities or regulations in a manner that "[w]ould constitute a disguised restriction on traffic in transit".[15] This provision is clearly aimed at policies, which *de facto* target trade and transit originating from certain WTO Members. In its dispute against certain measures of EU energy law, the Russian Federation has already challenged measures, which are similar to those prohibited by Article 11(1) of the TFA.[16] Denmark´s Proposal clearly fits the criteria of Article 11(1)(b) as it is aimed at products originating from one specific WTO Member, namely natural gas from the Russian Federation.

A soft law requirement for Members to "[e]ndeavour to cooperate and coordinate with one another with a view to enhancing freedom of transit" is established by Article 11(16).[17] For the EU, enhancing free trade generally, and transit via pipelines specifically, has been a central foreign policy objective.[18] Justifying a volte-face by one Member State in times of rising protectionism globally is surely not in the interest of the EU, which continue to speak of the importance of free international trade.[19]

2.3 Prior publication of changes to national regulations

International obligations limit the scope and manner by which sovereign states can amend or add to their national laws. In the sphere of international trade law a general requirement, established by GATT Article X, is the publication and impartial administration of laws and regulations which affect, *inter alia,* the sale, distribution and *transportation* of goods.[20] Further, the enforcement of measures which establish a more burdensome requirement on trade shall not be enforced before such measures have been published.[21] The purpose and effect of Article

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[15] WTO, Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, WT/L/940, 28 November 2014, Article 11(1)(b).
[16] See M. Wüstenberg, 'An Overview of the Dichotomy between EU Energy Market Liberalisation and the Multilateral Trading System', *International Trade Law and Regulation*, 22(1), (2016), pp. 8-18.
[17] WTO, Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, WT/L/940, 28 November 2014, Article 11(16).
[18] European Parliament, *Trade and Investments in Energy in the Context of the EU Common Commercial Policy*. Available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2015/535001/EXPO_STU(2015)535001_EN.pdf.
[19] Ibid.
[20] GATT, Article X(1) and (3).
[21] GATT, Article X(2)

X is to establish "[c]ertain minimum standards for transparency and procedural fairness in the administration of trade regulations".[22] The introduction or amendment of laws in a manner that affects large projects, such a transit pipelines, in an advanced stage is arguably to be contrary to the spirit, if not the letter, of Article X.

Article 2.1.1 of the recently adopted Trade Facilitation Agreement (TFA) establishes a further obligation for Members to provide an opportunity to comment and consult on the proposed introduction or amendment of laws and regulations of "[g]eneral application related to the movement, release, and clearance of goods, *including goods in transit*.[23] New laws and regulation should consequently be made public "[a]s early as possible *before* their entry into force".[24] Similarly to the argumentation on GATT Article X, amending laws on transit to the effect that they affect projects in late stages is unlikely to fulfill the criteria of Article 2.1.1 of the TFA. As such, the Proposal fails to comply with the requirements under Article 2.1.1 of the TFA.

2.4. Conclusions on WTO rules

Firstly it is relevant to note that the rules of the WTO establish for freedom of transit generally. Whilst the transit rules of Article V have so far not been part of a dispute on pipeline transit, these rules clearly apply to pipelines similarly as they do for other modes of transit. Further per Article V, all regulations and formalities should generally be applied in a non-discriminatory manner.

Secondly, in order to enforce transit rules, the newly adopted TFA has added a prohibition on regulations, which function as a disguised restriction on transit. Regulations, which primarily affect the transit of goods from certain WTO Members arguably qualify as a disguised restriction.

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[22] WTO, Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*. WT/DS58/AB/R, 12 October 1998, paras. 182–183.
[23] WTO, Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, WT/L/940, 28 November 2014, Article 2.1.1 (emphasis added).
[24] WTO, Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, WT/L/940, 28 November 2014, Article 2.1.2 (emphasis added).

Lastly, WTO rules require prior publication of laws and regulations, which affect, for example, the transportation of goods. The TFA has clarified that this applies specifically also to transiting goods and that WTO Members should be provided with the opportunity to comment and consult on regulatory changes. Clearly, the Danish Proposal falls short of meeting a number of WTO obligations, not only in relation to transit but also in relation to rules of general application.

Qualifications

I am Kim Talus, Professor of European Economic and Energy Law at UEF Law School and a Professor of Energy Law at the University of Helsinki. I have also held positions and visiting professorships at University College London, the University of Houston and the University of Bonn. In these capacities I have authored a large number of books and articles on many areas of European Union and international energy law. Specifically, I have also written a monograph and several articles relating to the application of EU law to pipeline projects and natural gas commodity and capacity contracts. These include:

1. Kim Talus, *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law* (Kluwer Law International 2011)

2. Kim Talus, *EU Energy Law and Policy: A Critical Account* (Oxford University Press 2013)

3. Kim Talus (ed.), *Research Handbook on International Energy Law* (Edward Elgar 2014)

4. Kim Talus, *Introduction to EU Energy Law* (Oxford University Press 2016)

I frequently work with governments, international organisations and private companies in all areas of national, European and international energy law. I have specifically also provided legal advice in respect of cross-border infrastructure projects within the EU.