



# DISPUTES AROUND NORD STREAM 2

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# OVERVIEW

1. BACKGROUND
2. ANNULMENT PROCEEDINGS AT THE EUROPEAN COURT OF JUSTICE
3. POTENTIAL ENERGY CHARTER TREATY CASE

# NORD STREAM 2 RELATED LITIGATION: BACKGROUND

- **STEP I** – GAS MARKET DIRECTIVE IS APPLICABLE TO NORD STREAM 2
- **STEP II** – A SEPARATE INTERGOVERNMENTAL AGREEMENT (IGA) FOR NORD STREAM 2
- **STEP III** – AMENDING THE GAS MARKET DIRECTIVE

# EU ANNULMENT PROCEEDINGS

T-526/19, NORD STREAM 2 V PARLIAMENT AND COUNCIL

**CLAIM:** NORD STREAM 2 REQUESTS THAT DIRECTIVE (EU) 2019/692 AMENDING THE EU GAS DIRECTIVE BE ANNULLED BECAUSE OF AN INFRINGEMENT OF THE EU LAW PRINCIPLES OF EQUAL TREATMENT AND PROPORTIONALITY

**CHALLENGE:** NO COMPANY HAS EVER CHALLENGED A DIRECTIVE SUCCESSFULLY

# EU ANNULMENT PROCEEDINGS

*LOCUS STANDI*: UNDER ARTICLE 263 TFEU THE COMPANY NEEDS TO SHOW THAT IT HAS “DIRECT AND INDIVIDUAL CONCERN”

“**DIRECT CONCERN**” UNION MEASURE MUST DIRECTLY AFFECT THE LEGAL SITUATION OF THE INDIVIDUAL AND, IT MUST LEAVE NO DISCRETION TO ITS ADDRESSEES, WHO ARE ENTRUSTED WITH THE TASK OF IMPLEMENTING IT, SUCH IMPLEMENTATION BEING PURELY AUTOMATIC AND RESULTING FROM EU RULES WITHOUT THE APPLICATION OF OTHER INTERMEDIATE RULES.

“**INDIVIDUAL CONCERN**” ONLY PERSONS AFFECTED BY A DECISION BY REASON OF THEIR INDIVIDUALITY OR OF THEIR SPECIAL POSITION MAY BE CONSIDERED AS INDIVIDUALLY CONCERNED FOR THE PURPOSE OF BRINGING AN ACTION.

# EU ANNULMENT PROCEEDINGS

**SUBSTANTIVE ISSUE:** NON-DISCRIMINATION ENTAILS THAT COMPARABLE SITUATIONS ARE NOT TREATED DIFFERENTLY UNLESS SUCH DIFFERENCE IN TREATMENT IS OBJECTIVELY JUSTIFIED

- DEROGATION FOR COMPLETED PIPELINES (RELEVANT MOMENT: COMPLETION)
- EXEMPTION OPTION IF INVESTMENT WOULD NOT BE MADE (RELEVANT MOMENT FID)

NORD STREAM 2 APPEARS TO FALL INTO THE CRACK... IF SO, INTENT AND EFFECT SEEMS DISCRIMINATORY (BUT ALWAYS DIFFICULT TO PROVE... ESPECIALLY CONSIDERING THE OPAL JUDGMENT!)

# ENERGY CHARTER TREATY CLAIM

PURSUANT TO ARTICLE 26(1) OF THE ECT, NORD STREAM 2 INFORMED EU OF A POSSIBLE INVESTMENT DISPUTE ON 12 APRIL 2019

3 MONTH PERIOD FOR CONSENSUS SEEKING IS OVER AND A LETTER DATED 8 JULY 2019 FROM NORD STREAM 2 TO COMMISSION INDICATES THAT NO AGREEMENT WAS REACHED

FIRST CLAIM AGAINST EU IS NOW AN OPTION

# ENERGY CHARTER TREATY CLAIM

*LOCUS STANDI*: AN "INVESTOR" MAKING AN "INVESTMENT"

CLAIM: DISCRIMINATION (BUT PROBABLY ALSO A VIOLATION OF FET STANDARD)

DISCRIMINATION SOMEWHAT SIMILAR TO EU APPROACH BUT INTENT MAY CARRY MORE WEIGHT



# CONCLUDING THOUGHTS

*DISPUTES COMMON FOR LARGE INFRASTRUCTURE PROJECTS*

*MANY CASES ARE GROUNDBREAKING, BUT POSSIBLE GIVEN THE NATURE OF EU ACTION*

*ACTIONS AGAINST THE PROJECT APPEAR TO BE POLITICALLY MOTIVATED, THESE CASES TEST THE RELATIONSHIP BETWEEN LAW AND POLITICS AND ULTIMATELY THE RULE OF LAW IN THE EUROPEAN UNION*



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