

PCA CASE Nº 2020-07

**IN THE MATTER OF AN ARBITRATION
UNDER THE ENERGY CHARTER TREATY**

- and -

THE UNCITRAL ARBITRATION RULES

-between-

NORD STREAM 2 AG

-and-

THE EUROPEAN UNION

PROCEDURAL ORDER NO. 11

The Arbitral Tribunal

Professor Ricardo Ramírez Hernández (Presiding Arbitrator)
Professor Philippe Sands QC
Justice David Unterhalter SC

14 July 2023

I. PROCEDURAL BACKGROUND

1. By e-mail of 1 March 2022, the Claimant informed the Tribunal as follows:

The designation of Nord Stream 2 AG as a US Specially Designated National (SDN) on 23 February 2022 and recent geopolitical developments have led to an inability on the part of the Claimant to pursue the arbitration at this time. In particular, the Claimant's bank accounts have been blocked, meaning NSP2AG is unable to make any payments or access finance.

2. The Claimant consequently requested a suspension of the arbitration.
3. By letter dated 7 March 2022, the Respondent requested that the Tribunal order the Claimant to provide a more complete description of its current circumstances, and opposed the Claimant's request for a suspension, except under certain conditions.
4. By letter dated 14 March 2022, the Claimant informed the Tribunal that its external counsel no longer represented it and reiterated its request for a suspension of the arbitration until 1 September 2022, proposing to update the Tribunal in three months as to its ability to continue the proceedings.
5. On 16 March 2022, the Tribunal issued Procedural Order No. 7, suspending the arbitration and scheduling a procedural meeting for 20 June 2022 at which the Claimant would be invited to update the Tribunal on its circumstances and ability to continue the proceedings.
6. By letter dated 8 June 2022, the Claimant informed the Tribunal that it had been granted a provisional composition moratorium until 10 September 2022 by the Cantonal Court in Zug, by which date the Cantonal Court would decide on a definitive composition moratorium, an extension of the provisional composition moratorium, or a declaration of bankruptcy. The Claimant noted that, given these circumstances, until "that point in time [it] will not be in a position to give any further substantial indication concerning its circumstances, its ability to continue the proceedings, nor on the further conduct of the proceedings, or on timing." Accordingly, it requested a continuation of the suspension of the proceedings and a postponement of the 20 June 2022 procedural meeting until a date after 10 September 2022. At the same time, the Claimant undertook to update the Tribunal and the Respondent should circumstances change substantially prior to that date.
7. By letter dated 13 June 2022, the Respondent submitted that it would be prejudiced by a suspension of the proceedings, as it would unnecessarily prolong a situation of legal uncertainty and would generate continuing legal costs for the Respondent. The Respondent also submitted that the Claimant had insufficiently explained how the proceedings before the Cantonal Court of Zug resulted in a continued inability of the Claimant to pursue the arbitration. In particular, the Respondent asserted as follows:

According to the Claimant's email of 1 March 2022, its inability to pursue the arbitration was the consequence of the U.S. sanctions and "recent geopolitical developments". In view of that, and in the absence of any other explanation, the European Union fails to understand how the outcome of the ongoing proceedings before the Cantonal Court of Zug referred to by the Claimant could have any impact on such alleged inability. [...] The Claimant should explain how its alleged current inability to pursue the arbitration might be overcome given, in particular, that there is no indication whatsoever that the U.S. sanctions imposed on the Claimant, which have caused such inability, may be lifted by the U.S. authorities within a reasonably foreseeable timeframe.

8. Accordingly, the Respondent requested that the Tribunal “order the Claimant to provide a properly substantiated justification of the reasons for the Claimant’s request to maintain the suspension.” The Respondent further requested that any further suspension be limited to a maximum additional period of four months and that the Claimant should bear any additional legal costs incurred by the Respondent as a result of the suspension, regardless of the outcome of the arbitration.
9. By letter dated 15 June 2022, the Tribunal cancelled the procedural meeting scheduled for 20 June 2022 and invited the Claimant to submit comments on the Respondent’s letter dated 13 June 2022.
10. By letter dated 20 June 2022, the Claimant informed the Tribunal that it had no additional information to provide at this stage and reiterated its request for a suspension of the arbitration until after 10 September 2022.
11. On 30 June 2022, the Tribunal issued Procedural Order No. 8, fixing a new procedural meeting for 13 October 2022, at which the Claimant would be invited to update the Tribunal regarding its circumstances and ability to continue the proceedings, and the Parties may thereafter make submissions on the further conduct of the proceedings. The Tribunal also indicated that, for any further suspension to be granted, the Claimant would be required to provide further information demonstrating a reasonable possibility of resuming the arbitration. In the absence thereof, the Tribunal would commence the procedure for terminating the present arbitration in accordance with Article 34(2) of the Arbitration Rules of the United Nations Commission on International Trade Law 1976 (the “**UNCITRAL Rules**”).
12. By e-mail of 22 July 2022, the Respondent submitted a Request for Security for Costs.
13. By e-mail of 22 August 2022, the Claimant submitted its Response to the Respondent’s Request for Security for Costs.
14. On 2 September 2022, the Tribunal issued Procedural Order No. 9, deciding that that a case has not been made for urgency to determine the Respondent’s Request for Security for Costs, given that the arbitration is suspended, and may not proceed further. The Tribunal further stated that should the Claimant indicate an intention to resume the arbitration or in the event of any other material change of circumstances, the Respondent may resubmit a Request for Security for Costs.
15. By letter dated 16 September 2022, the Claimant informed the Tribunal that the Cantonal Court in Zug had decided to extend the provisional composition moratorium until 10 January 2023.
16. By letter dated 3 October 2022, the Respondent submitted that a further suspension of the arbitration would be unwarranted, and that the Tribunal should terminate the present arbitration in accordance with Article 34(2) of the UNCITRAL Rules. The Respondent submitted that the Claimant had failed to demonstrate a reasonable possibility of resuming the arbitration. The Respondent further asserted that the continuation of the arbitration had become manifestly unnecessary.
17. On 13 October 2022, the Tribunal held a procedural meeting with the Parties by videoconference. The Claimant informed the Tribunal that its administrator appointed pursuant to the provisional composition moratorium would allow the arbitration to continue, provided that a third party provides the financing necessary to pursue the arbitration. The Claimant further advised that there were ongoing discussions at shareholder level in this regard, and that it was optimistic that one of its shareholders would agree to finance the arbitration. The Claimant stated that the discussions

would take approximately six weeks to conclude, and requested that the Tribunal refrain from deciding on the termination of the arbitration until at least 24 November 2022.

18. In response, the Respondent submitted that the Claimant had failed to demonstrate a reasonable possibility of resuming the arbitration, and that the additional information provided by the Claimant did not justify a further extension of the suspension of the arbitration. The Respondent also reiterated that the present arbitration has become unnecessary, because the Claimant would be unwilling and unable to operate its gas pipelines in any case, for reasons not attributable to the Respondent.
19. By e-mail of 26 October 2022, the Respondent submitted another Request for Security for Costs.
20. On 27 October 2022, the Tribunal issued Procedural Order No. 10, deciding to continue the suspension of the proceedings. The Tribunal also directed the Claimant to provide, by 24 November 2022, further information demonstrating a reasonable possibility of resuming the arbitration—including but not limited to the details of its funding arrangements (including as to adverse costs), the adequacy of the funding, and its intended representation going forward—as well as a response on the necessity limb for termination of the arbitration under Article 34(2) of the UNCITRAL Rules and the Respondent's Request for Security for Costs dated 26 October 2022.
21. By letter dated 24 November 2022, the Claimant informed the Tribunal that it had secured funding to continue the arbitration. [REDACTED] The Claimant submitted that the request for security for costs should thus be denied. [REDACTED] The Claimant consequently asked the Tribunal to lift the suspension of the proceedings.
22. By letter dated 16 December 2022, the Respondent replied to the Claimant's letter dated 24 November 2022 and reiterated its request for order terminating the arbitration proceedings pursuant to Article 34(2) of the UNCITRAL Rules, or in the alternative, an order rejecting the resumption of the arbitration unless the Claimant posts security for costs in an adequate manner and amount.
23. By letter dated 1 February 2023, the Claimant responded to the Respondent's letter dated 16 December 2022, reiterating its request to resume the arbitration proceedings and reject the Respondent's request for security for costs. The Claimant advised that on 27 December 2022 the Cantonal Court in Zug had granted the Claimant a definitive composition moratorium for renewable periods of six months as of 10 January 2023 and up to a maximum of 24 months (i.e. until 10 January 2025).
24. By letter dated 6 February 2023, the Respondent requested the Claimant to produce the following five documents that had been referred to in the Claimant's letter dated 1 February 2023 in support of the Claimant's submissions that the continuation of the proceedings had not become impossible and that the request for security for costs should be denied:

(i) [REDACTED]

(ii) [REDACTED]

(iii) [REDACTED]

(iv) [REDACTED]

(v) Priority rules applicable to creditors' claims under Swiss Law.¹

25. By letter dated 7 February 2023, the Tribunal invited the Claimant to submit the five supporting documents requested by the Respondent.
26. By letter dated 14 February 2023, the Claimant submitted redacted versions of the five supporting documents requested by the Respondent, along with a letter from its Administrator of the same date stating, *inter alia*, that the redacted documents accurately support the statements made in the Claimant's letter dated 1 February 2023. The Claimant further asserted that the statements in its letter dated 1 February 2023 regarding its financial situation were also corroborated by the fact that the letter was approved and signed by its Administrator who was appointed by the Swiss courts and independent of the Claimant.
27. By letter dated 16 February 2023, the Respondent requested that the Tribunal order the Claimant to produce unredacted versions of [REDACTED]
[REDACTED]
28. By e-mail dated 16 February 2023, the Claimant opposed the Respondent's request for unredacted documents.
29. By letter dated 27 February 2023, the Tribunal rejected the Respondent's request and invited the Respondent to submit any comments it might have on the Claimant's submission in its letter dated 1 February 2023 that the Respondent "has not established impecuniosity".
30. By letter dated 10 March 2023, the Respondent submitted its comments on the Claimant's submission that the Respondent "has not established impecuniosity".
31. By letter dated 29 March 2023, the Claimant provided its comments on the Respondent's letter dated 10 March 2023.
32. By letter dated 12 April 2023, the Respondent provided its response to the Claimant's letter dated 29 March 2023.
33. By e-mail of 17 April 2023, the Claimant replied to the Respondent's letter dated 12 April 2023 and reiterated its request that the Tribunal resume the arbitration and deny the Respondent's request for security for costs.

¹ Respondent's Letter dated 6 February 2023, para. 2.

II. PARTIES' SUBMISSIONS

A. Termination of the Proceedings

(a) *The Respondent's Position*

34. The Respondent requests the Tribunal to terminate the arbitration proceeding pursuant to Article 34(2) of the UNCITRAL Rules. The Respondent submits that the continuation of the arbitration proceeding has become “impossible”, because the Claimant has failed to demonstrate a reasonable possibility of resuming this arbitration, and “unnecessary”, because the proceedings have become moot, within the meaning of Article 34(2).² Article 34(2) states:

If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless a party raises justifiable grounds for objection.

35. The Respondent submits that the continuation of the present proceeding causes it prejudice, because it prolongs unnecessarily a situation of legal uncertainty and it generates continuing legal costs for the Respondent that the Respondent might not be able to recover.³ In contrast, termination of this proceeding would not have any irreversible consequences for the Claimant as it could bring fresh proceedings at a later stage.⁴
36. On the impossibility limb of Article 34(2), the Respondent argues that the continuation of the proceedings has become impossible because the Claimant lacks the necessary funds to continue the proceedings until its completion, and if necessary, to reimburse the Respondent the costs awarded by the Tribunal.⁵ It submits that the proceedings must be terminated “unless the Claimant provides adequate security for costs”, which it has not done.⁶ The Respondent submits that insolvency is an event that frequently triggers termination of an arbitration.⁷ It adds that arbitration proceedings have been terminated in circumstances in which a claimant failed to comply with an order of security for costs.⁸
37. The Respondent submits that Article 34(2) does not require that the Claimant is impecunious to continue the arbitration; rather, “what must be shown is that it is not reasonably ‘possible’ for the Claimant to *complete* the arbitration and comply with the Tribunal’s awards”.⁹ The Respondent submits that the Claimant, “[a]t best [...] has shown that it can resume the arbitration now and take the immediate next procedural steps”, but the Claimant “has not demonstrated a ‘reasonable possibility’ that it can *complete* the arbitration”.¹⁰ The Respondent argues that the Claimant is “wholly dependent” on third-party funders to pay its current expenses and there is “simply no

² Respondent’s Letter dated 16 December 2022, paras. 2, 9.

³ Respondent’s Letter dated 16 December 2022, para. 4.

⁴ Respondent’s Letter dated 16 December 2022, para. 5.

⁵ Respondent’s Letter dated 12 April 2023, para. 7.

⁶ Respondent’s Letter dated 16 December 2022, para. 86.

⁷ Respondent’s Letter dated 16 December 2022, para. 11, *citing* David Caron and Lee Caplan, *The UNCITRAL arbitration rules: a commentary (with an integrated and comparative discussion of the 2010 and 1976 UNCITRAL arbitration rules)*, Oxford University Press, 2013, p. 571.

⁸ Respondent’s Letter dated 12 April 2023, paras. 13-15.

⁹ Respondent’s Letter dated 10 March 2023, para. 5.

¹⁰ Respondent’s Letter dated 12 April 2023, para. 12.

guarantee that that third party will continue to provide the necessary funds until the completion of the arbitration”.¹¹

38. The Respondent argues that it has made out a *prima facie* case that it is not reasonably possible for the Claimant to complete the arbitration. The Respondent argues that the burden of proof then shifts to the Claimant, and the Claimant failed to meet its burden.¹² It has failed to demonstrate a reasonable possibility of resuming the arbitration and refused to disclose highly relevant financial information.¹³

39. According to the Respondent, the [REDACTED] to fund the litigation is “not an adequate financial instrument to guarantee that the Claimant will be able to cover all the costs related to this arbitration”.¹⁴

[REDACTED]¹⁵
[REDACTED]¹⁶
[REDACTED]¹⁷

(i) [REDACTED]

(ii) [REDACTED]

(iii) [REDACTED]

(iv) [REDACTED]

(v) [REDACTED]

(vi) [REDACTED]

(vii) [REDACTED]

40. [REDACTED]¹⁸

41. Fifth, citing a study conducted on the average costs for investor-State arbitrations, the Respondent argues that the amount of [REDACTED] “clearly is

¹¹ Respondent’s Letter dated 12 April 2023, para. 8.

¹² Respondent’s Letter dated 12 April 2023, para. 17.

¹³ Respondent’s Letter dated 12 April 2023, para. 18.

¹⁴ Respondent’s Letter dated 16 December 2022, para. 20.

¹⁵ Respondent’s Letter dated 16 December 2022, paras. 21-22.

¹⁶ Respondent’s Letter dated 16 December 2022, paras. 23-28.

¹⁷ Respondent’s Letter dated 16 December 2022, para. 30, *referring to* Financial (accounting) reporting according to the Federal Tax Service and Rosstat, Gazprom Gazenergoset LLC (R-283).

¹⁸ Respondent’s Letter dated 16 December 2022, paras. 55-65.

insufficient” to cover the average costs of an investor-State arbitration.¹⁹ The Respondent further argues that [REDACTED] also provides insufficient guarantees to cover the costs of the arbitration.²⁰ It does not constitute a guarantee, and has no value as security for the costs of this arbitration.²¹ Further, it shows that [REDACTED] are aware that the amount in the [REDACTED] is insufficient.

42. Lastly, the Respondent disputes the Claimant’s suggestion that it has assets that can be realised to make good on its obligations.²² [REDACTED]

[REDACTED]²³

[REDACTED]²⁴

43. Turning to its submission that the proceeding has become unnecessary, the Respondent argues that the Claimant is both unable and unwilling to operate the NS2 Pipeline and will remain so for the foreseeable future, for reasons not attributable to the Respondent.²⁵
44. First, the Claimant would be effectively unable to operate the NS2 Pipeline as a result of United States (“US”) sanctions, which would remain in place for the foreseeable future.²⁶ The Respondent points out that the primary sanctions, particularly the Specially Designated National (“SDN”) designation of the Claimant, will continue to have a major impact on the Claimant’s ability to conduct business because the blocking sanctions prevent US companies and individuals from transacting with the Claimant,²⁷ and because the SDN designation prohibits US financial institutions that process funds transfers in an intermediary or correspondent banking capacity from conducting any transaction in which the Claimant has an interest, unless authorized.²⁸ Even non-US financial institutions may choose to refrain from transacting with the Claimant due to reputational concerns and concerns of running afoul of US prohibitions.²⁹ In addition, the Respondent submits that non-US entities would also avoid dealing with the Claimant for fear of being caught by US secondary sanctions.³⁰
45. The Respondent argues that the US sanctions have already had a “paralysing impact” on the Claimant’s activities, evidenced by the “triggering of the Claimant’s insolvency”, thereby forcing the Claimant to suspend the current arbitration.³¹ The Swiss authorities had also noted that the Claimant faced massive payment difficulties that rendered its ongoing operations impossible, leading to the Claimant being placed under a composition moratorium.³² In addition, the

¹⁹ Respondent’s Letter dated 16 December 2022, paras. 48-51.

²⁰ Respondent’s Letter dated 16 December 2022, para. 52.

²¹ Respondent’s Letter dated 16 December 2022, para. 54.

²² Respondent’s Letter dated 12 April 2023, para. 20.

²³ Respondent’s Letter dated 12 April 2023, para. 22.

²⁴ Respondent’s Letter dated 12 April 2023, paras. 23-27.

²⁵ Respondent’s Letter dated 3 October 2022, para. 26; Respondent’s Letter dated 16 December 2022, para. 88.

²⁶ Respondent’s Letter dated 3 October 2022, paras. 28-29; Respondent’s Letter dated 16 December 2022, paras. 89, 94, 132.

²⁷ Respondent’s Letter dated 16 December 2022, paras. 110-111, 114.

²⁸ Respondent’s Letter dated 16 December 2022, para. 112.

²⁹ Respondent’s Letter dated 16 December 2022, para. 113.

³⁰ Respondent’s Letter dated 16 December 2022, para. 116.

³¹ Respondent’s Letter dated 16 December 2022, paras. 96, 119-121.

³² Respondent’s Letter dated 16 December 2022, para. 122.

Respondent notes that within a few days of its SDN designation, the Claimant was forced to terminate its contracts with most of its employees and abandon its premises in Zug.³³ Further, the Claimant has been unable to take any further action in order to meet the conditions imposed by the German regulatory authority for resuming the process of certification pursuant to the Gas Directive.³⁴ The [REDACTED] have abandoned their investments.³⁵ The Respondent also submits that the operation of NS2 Pipeline demands considerable human and economic resources, and cannot be accomplished with just a skeleton staff and without ready access to finance or financial services.³⁶ In addition, the Respondent highlights the delay of more than eight months taken by the Claimant to procure [REDACTED] and the inability of the Claimant to procure the funds from any reputable and solvent financial institution.³⁷

46. The Respondent further notes that the Claimant itself, as well as its witness [REDACTED] and its expert [REDACTED], have submitted that the threat of US sanctions had complicated or prevented either the renegotiation of financing agreements or the sale of the NS2 Pipeline. According to the Respondent, the Claimant had also previously described the sanctions as having extraterritorial effects, contrary to the Claimant's most recent submission.³⁸ Thus, it is "manifestly misleading and disingenuous" for the Claimant to claim that the sanctions had a very limited impact.³⁹
47. In response to the Claimant's claim that no US secondary sanctions have been imposed since February 2022, the Respondent rebuts that it was due to a lack of material actionable activities being conducted. Should the Claimant seek to repair and operate the NS2 Pipeline, the Respondent submits that there is little doubt that the US authorities will respond with sanctions.⁴⁰
48. Second, the recent act of sabotage against the Nord Stream 1 and Nord Stream 2 pipelines might prevent the Claimant from operating the NS2 Pipeline.⁴¹ The Respondent submits that the Claimant's submission that the NS2 Pipeline is partially functioning and may be repaired is merely "speculations".⁴² Contrary to the Claimant's position, the Respondent cites the German authorities, which have stated that the NS2 Pipeline may not be repairable, and press reports that assess the damage to be significant.⁴³ Regardless, the Respondent points out that the reparation would face obstacles due to US sanctions, the need for permission from the Danish government since it would be carried out in the Danish territorial waters, and difficulty in obtaining insurance.⁴⁴
49. Third, operation of the NS2 Pipeline would be commercially unfeasible, due to the current behaviour of the Russian Federation, Gazprom, and the Claimant that has eroded customers' trust and caused them to seek out alternative suppliers.⁴⁵
50. Fourth, there are clear indications that the Claimant would in any event be unwilling to operate the NS2 Pipeline, because the Russian Federation has deliberately chosen to "weaponise" its

³³ Respondent's Letter dated 16 December 2022, para. 123.

³⁴ Respondent's Letter dated 16 December 2022, para. 124.

³⁵ Respondent's Letter dated 16 December 2022, para. 125.

³⁶ Respondent's Letter dated 16 December 2022, para. 129.

³⁷ Respondent's Letter dated 16 December 2022, para. 131.

³⁸ Respondent's Letter dated 16 December 2022, para. 127.

³⁹ Respondent's Letter dated 16 December 2022, para. 96.

⁴⁰ Respondent's Letter dated 16 December 2022, para. 128.

⁴¹ Respondent's Letter dated 3 October 2022, para. 31.

⁴² Respondent's Letter dated 16 December 2022, paras. 134-135.

⁴³ Respondent's Letter dated 16 December 2022, para. 136.

⁴⁴ Respondent's Letter dated 16 December 2022, paras. 137-138.

⁴⁵ Respondent's Letter dated 16 December 2022, paras. 140-144.

supplies of natural gas to the European Union and has stopped or severely limited its supplies.⁴⁶ The Respondent points to Gazprom's decision to restrict and eventually stop gas supplies through the Nord Stream 1 Pipeline since June 2022, although it had been accorded a derogation pursuant to Article 49a of the Gas Directive.⁴⁷ Moreover, since the invasion of Ukraine, the Claimant has taken no further action in order to meet the conditions imposed by the German regulatory authority for resuming the process of certification of the Claimant.⁴⁸

51. Fifth, in the current circumstances and for the foreseeable future, even if the Claimant were allowed to apply for a derogation pursuant to Article 49a of the Gas Directive, the Claimant would fail to meet the condition imposed by the provision that the derogation must not be "detrimental to security of supply in the Union".⁴⁹
52. Finally, the Respondent disagrees with the Claimant's assertion that the Respondent is liable for damages from October 2021 to the period before the geopolitical developments occurred in February 2022. The Respondent argues that no evidence has been provided to substantiate the claim that the NS2 Pipeline was commercially operable from October 2021.⁵⁰ The Respondent submits that the Claimant has incurred no damages attributable to the Respondent prior to February 2022.⁵¹ Further, the "weaponisation" of gas supplies to the European Union had started well before October 2021.⁵² In addition, since the Claimant would not have qualified for a derogation pursuant to Article 49a of the Gas Directive in any case, it suffered no damage from being ineligible to apply for such a derogation.⁵³
53. Accordingly, the Respondent requests that the Tribunal terminate the arbitral proceedings.

(b) The Claimant's Position

54. The Claimant asks the Tribunal to lift the suspension of the proceedings and to issue appropriate directions for the continuation of the proceedings.⁵⁴ The Claimant submits that it has the right to continue the arbitration and the Tribunal cannot terminate the arbitration under Article 34(2) of the UNCITRAL Rules. It emphasizes that it has paid the advance deposits and made all other payments required by the Tribunal. Further, it is in funds and wishes to continue the arbitration.⁵⁵ In these circumstances, terminating the arbitration would amount to a denial of justice.⁵⁶ The Claimant adds that even if it had no funds of its own, the Claimant has "the ability – and a legal interest – to continue with the arbitration", and there is consequently "no reason" for the Tribunal to terminate the arbitration.⁵⁷
55. The Claimant puts forward the following arguments in response to the Respondent: (a) Article 34(2) is intended to apply to situations other than those in the present case; (b) a tribunal cannot terminate an arbitration if one or both parties object to the termination of the

⁴⁶ Respondent's Letter dated 3 October 2022, paras. 38-44.

⁴⁷ Respondent's Letter dated 16 December 2022, para. 145.

⁴⁸ Respondent's Letter dated 3 October 2022, para. 45; Respondent's Letter dated 16 December 2022, para. 147.

⁴⁹ Respondent's Letter dated 3 October 2022, paras. 49-51.

⁵⁰ Respondent's Letter dated 16 December 2022, para. 150.

⁵¹ Rejoinder on Merits and Reply Memorial on Jurisdiction, section 6.4.

⁵² Respondent's Letter dated 16 December 2022, para. 152.

⁵³ Respondent's Letter dated 16 December 2022, para. 153.

⁵⁴ Claimant's Letter dated 24 November 2022, p. 2; Claimant's Letter dated 1 February 2023, p. 12.

⁵⁵ Claimant's Letter dated 1 February 2023, p. 2.

⁵⁶ Claimant's Letter dated 1 February 2023, p. 2.

⁵⁷ Claimant's Letter dated 29 March 2023, p. 2.

proceedings; (c) the arbitration has neither become impossible nor unnecessary; and (d) even if the Tribunal finds that the arbitration has become impossible or unnecessary, the request to continue the arbitration constitutes “justifiable grounds” under Article 34(2) of the UNCITRAL Rules.⁵⁸

56. First, the Claimant argues that Article 34(2) has applied to the following situations: when a claimant fails to pursue its case; when a claimant withdraws its case; failure by a party, or both parties, to pay required fees; the parties have settled their dispute in another forum; the parties have settled their dispute without asking for a consent award. Article 34(2) does not in its view apply to the present case.⁵⁹
57. Secondly, the Claimant submits that the legislative history of Article 34(2) makes clear that even if a tribunal considers discontinuance appropriate, it must nevertheless proceed with the arbitration, if one or both parties object to termination of the proceedings.⁶⁰
58. Thirdly, the Claimant submits that the arbitration has not become impossible. It emphasizes that it is in funds to continue the arbitration, after receiving [REDACTED].⁶¹ The Claimant explains that the [REDACTED] is intended to finance the first phase of the arbitration (referring to the hearing that was originally scheduled to take place in June 2022); it is sufficient to finance the Claimant’s cost and any additional fees and costs of the arbitrators.⁶² The Claimant is confident that payments will be made to the Claimant [REDACTED] and there is thus no financial impediment to the Claimant going forward with this arbitration. The Claimant submits that the fact that the Cantonal Court in Zug has granted the definitive composition moratorium shows that the Court and the Administrator are satisfied that the Guarantor will make payments to the Claimant.⁶³ Further, the Claimant points out that the Guarantor has already guaranteed and paid [REDACTED] to cover the costs of the Claimant during the moratorium.⁶⁴
59. In response to the Respondent’s criticisms of the Guarantor, the Claimant explains that the [REDACTED].⁶⁵
60. The Claimant emphasizes that it has undergone composition proceedings, and not bankruptcy or insolvency proceedings. The former is aimed at restoring the financial health of a company, and is initiated if the court concludes that such restoration is possible. The latter is to shut down business operations and liquidate the company to pay the creditors. In any case, the Claimant explains that, even if it were to be declared bankrupt and even if it were to be ordered to reimburse the Respondent’s arbitration costs, such costs would constitute mass claims under Swiss law if

⁵⁸ Claimant’s Letter dated 1 February 2023, p. 2.

⁵⁹ Claimant’s Letter dated 24 November 2022, p. 2.

⁶⁰ Claimant’s Letter dated 24 November 2022, p. 2, citing *Commentary on the UNCITRAL Arbitration Rules, The Application by the Iran-U.S. Claims Tribunal* (Jacomijnkje Janine van Hof, 1963), para. 4.4.1; United Nations Commission on International Trade Law, 1976 Yearbook, p. 179.

⁶¹ Claimant’s Letter dated 1 February 2023, p. 3.

⁶² Claimant’s Letter dated 1 February 2023, p. 3.

⁶³ Claimant’s Letter dated 1 February 2023, p. 3.

⁶⁴ Claimant’s Letter dated 1 February 2023, p. 3.

⁶⁵ Claimant’s Letter dated 1 February 2023, p. 4.

they were incurred during the moratorium, and would be paid from the bankruptcy estate before any other claims.⁶⁶

61. On the issue of the US sanctions, the Claimant submits that the sanctions do not, and will not, affect the continuation of the arbitration. The Claimant argues that the Respondent conflates the effect of the sanctions on the continuation of the arbitration with their effect on the future operations of the NS2 Pipeline, when only the former issue is relevant.⁶⁷ Further, the Claimant submits that the sanctions imposed on individuals and entities on the SDN list only apply to transactions that involve US persons, the US financial system and/or other US jurisdictional elements, and the secondary US sanctions resulting from the Protecting Europe's Energy Security Act (PEESA) and the Countering America's Adversaries Through Sanctions Act (CAATSA) do not have extraterritorial applicability. The Claimant points out that the current arbitration does not have a US nexus, and the Claimant's activities have a very limited US nexus. Moreover, such sanctions have been in place since 2017 and did not prevent the completion of the project. The Claimant emphasizes that no sanctions are imposed on itself and its Chief Executive Officer under the current EU or Swiss sanctions regimes, and there are no economic or trade restrictions under the EU or Swiss sanctions regimes that would make participation in the arbitration impossible.⁶⁸
62. The Claimant further submits that the arbitration has not become unnecessary. The Claimant argues that it is essential for the Claimant to have the application of the relevant provisions of the Amending Directive removed with respect to the Claimant and the NS2 Pipeline. Furthermore, the Claimant submits that it is not unwilling or unable to operate the NS2 Pipeline. The Claimant submits that it was ready to start commercial operations in October 2021; it has obtained all required technical certificates and permissions. The only thing preventing the Claimant from doing so was the EU certification procedure in Germany imposed by the Amending Directive.⁶⁹ In addition, the Claimant submits that it cannot be ruled out that gas from Russia will be delivered to Europe in the future.⁷⁰
63. The arbitration is also not unnecessary, the Claimant argues, because it has to be compensated for the costs and loss of revenue that incurred during the period from October 2021 to the time of the geopolitical developments of end February 2022.⁷¹
64. Lastly, the Claimant submits that even if the Tribunal were to find that the arbitration had become impossible or unnecessary, the request to continue the arbitration constitutes a "justifiable ground" under Article 34(2) of the UNCITRAL Rules. Relying on previous cases, the Claimant argues that as long as there is a claim from either party to be determined by the tribunal, the arbitral proceedings could not be said to be unnecessary.⁷²
65. Accordingly, the Claimant requests that the Tribunal resume the arbitral proceedings.

⁶⁶ Claimant's Letter dated 1 February 2023, p. 3.

⁶⁷ Claimant's Letter dated 24 November 2022, p. 3; Claimant's Letter dated 1 February 2023, pp. 2, 4.

⁶⁸ Claimant's Letter dated 24 November 2022, pp. 3-4; Claimant's Letter dated 1 February 2023, pp. 4-5.

⁶⁹ Claimant's Letter dated 24 November 2022, p. 5; Claimant's Letter dated 1 February 2023, p. 5.

⁷⁰ Claimant's Letter dated 24 November 2022, p. 5.

⁷¹ Claimant's Letter dated 24 November 2022, pp. 5-6.

⁷² Claimant's Letter dated 1 February 2023, p. 6, citing *Forminster Limited v The Czech Republic*, Final Award, 15 December 2014, para. 77; *Plicoflex Inc v The Islamic Republic of Iran and the National Iranian Gas Company*, Iran-US Claims Tribunal, Award No. 535-354-1, paras. 4-6.

B. Parties' Submissions on security for costs

66. The Respondent submits that the Tribunal is empowered to order that the Claimant post a security for costs, pursuant to Articles 15(1) and 26(1) of the UNCITRAL Rules.⁷³ Article 15(1) states that:

[T]he arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provide that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

Article 26(1) states that:

At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

(a) *The Respondent's Position*

67. The Respondent submits that the proceedings must be terminated unless the Claimant provides adequate security for costs; otherwise, the failure to provide such security renders the arbitration impossible under Article 34(2) of the UNCITRAL Rules.⁷⁴ The key consideration, according to the Respondent, is “the existence of a proven risk that ‘Claimant would not reimburse Respondent for its incurred costs, be it due to Claimant’s unwillingness or its inability to comply with its payment obligations’”.⁷⁵
68. The Respondent that the applicable standard that the Tribunal should apply is as set out in *Manuel García Armas et al. v. Venezuela*, involving the following requirements:⁷⁶
- (i) “a *prima facie* reasonable possibility that an award in favor of the respondent including its costs of representation will be rendered” (this standard, according to the Respondent, does not require certainty nor does it require undisputed evidence);⁷⁷
 - (ii) “the urgency of the requested measure cannot wait for the issuance of the award since it is probable that there will be a not adequately compensated damage if the order for security for costs is not granted”; and
 - (iii) such “damage shall be significantly more serious than that which the party affected by the provisional measure may suffer, if the provisional measure is granted”.
69. On the first limb, the Respondent argues that it has established a *prima facie* case through its evidence and expert reports.⁷⁸ It submits that it “cannot be denied that there is a reasonable

⁷³ Respondent’s Letter dated 26 October 2022, paras. 60-65.

⁷⁴ Respondent’s Letter dated 16 December 2022, paras. 83, 86.

⁷⁵ Respondent’s Letter dated 26 October 2022, para. 66, citing *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia’s Request for Security for Costs, 13 August 2014, para. 81 (**RLA-339**).

⁷⁶ Respondent’s Letter dated 26 October 2022, paras. 67-69; Respondent’s Letter dated 16 December 2022, para. 68, citing *Manuel García Armas et al. v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Procedural Order No. 9, 20 June 2018, para. 191 (**RLA-338**).

⁷⁷ Respondent’s Letter dated 16 December 2022, paras. 71-72.

⁷⁸ Respondent’s Letter dated 16 December 2022, para. 74.

possibility that the award will be in [its] favour”.⁷⁹ It also argues the Claimant has misread the judgment of the Court of Justice of the European Union (“CJEU”) in case C-348/20 P dated 12 July 2022. According to the Respondent, the CJEU has merely decided on the admissibility of the action for annulment. Moreover, neither the Court of Justice, nor the General Court, has pronounced on the substance of NS2’s application for annulment. Thus, the judgment has procedural but not substantive value, with the consequence that it cannot be relied upon by the Claimant to argue that the Respondent has not established a *prima facie* case.⁸⁰

70. On the second limb, the Respondent submits that it has satisfied the test because it has shown that, “should the Tribunal grant the resumption of these proceedings without issuing an order for security for costs, the risk that the European Union suffer a damage which cannot be adequately compensated would be manifestly and unbearably high”.⁸¹ The Respondent submits that it has established the impecuniosity of the Claimant, warranting security for costs.⁸² It describes the current case as a “classic situation in which security for costs should be ordered” because the Respondent is forced to take on the risk of defending itself without any assurance that it will be made whole for its costs.⁸³ It relies on cases in which the tribunals required the posting of security for costs where the claimant was undergoing insolvency proceedings or in the presence of a third party funder.⁸⁴
71. The Respondent argues that there is a “manifest threat of imminent and irreparable harm” based on the following circumstances related to the financial situation of the Claimant:⁸⁵
- (i) the Claimant lacks sufficient funds to complete the arbitration:
 - a. the [REDACTED] is not designated to reimburse the Respondent’s legal costs and is not sufficient to cover the costs of this arbitration;
 - b. [REDACTED]
 - c. [REDACTED] and
 - d. it is doubtful that the sale of the NS2 Pipeline in case of bankruptcy of the Claimant would be enough to cover the costs of the arbitration, and the Claimant has no apparent source of self-funding;

⁷⁹ Respondent’s Letter dated 26 October 2022, para. 81.

⁸⁰ Respondent’s Letter dated 16 December 2022, para. 77; Respondent’s Letter dated 26 October 2022, paras. 76-78.

⁸¹ Respondent’s Letter dated 16 December 2022, para. 80.

⁸² Respondent’s Letter dated 16 December 2022, para. 78.

⁸³ Respondent’s Letter dated 10 March 2023, para. 12.

⁸⁴ *Manuel García Armas et al. v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, 20 June 2018 (RLA-338); *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan*, ICSID Case No. ARB/18/35, Decision On The Respondent’s Request For Security For Costs And The Claimant’s Request For Security For Claim, 27 January 2020, Section VIII (RLA-344); *Eugene Kazmin v Republic of Latvia*, ICSID Case No. ARB/17/5, Procedural Order No. 6 Decision on the Respondent’s Application For Security for Costs (RLA-340).

⁸⁵ Respondent’s Letter dated 10 March 2023, paras. 10, 20-29, 31-37, 45-47, 55-57.

- (ii) the Definitive Composition Moratorium can result in the declaration of bankruptcy of the Claimant; and
 - (iii) the Respondent's costs have no priority over other mass claims.⁸⁶
72. The Respondent submits that the definitive composition moratorium granted by the Cantonal Court of Zug does not imply *per se* that the Claimant will have the necessary funds to complete these proceedings.⁸⁷ The level of risk considered acceptable by the Swiss courts may be different from the level of risk that may justify the termination of arbitration proceedings.⁸⁸ In addition, there is a 36% chance that the definitive composition moratorium will result in the opening of bankruptcy proceedings against the Claimant, based on statistics on the outcome of definitive composition moratoria in Switzerland in the period 2014-2017.⁸⁹ The Respondent submits that the statistics provide credible and compelling evidence of significant risk that the Claimant's definitive composition moratorium could result in full bankruptcy proceedings.⁹⁰
73. In response to the Claimant's evidence that the Guarantor has already provided [REDACTED] the Claimant previously, the Respondent argues that there is no evidence that the Claimant will receive any additional funds beyond the end of June 2023.⁹¹ This in turn means that there is no evidence that the Claimant will be able to secure the necessary additional funds to cover its expenses for the entire duration of the Definitive Composition Moratorium, let alone for the duration of this arbitration.⁹²
74. In addition, the Respondent expresses concern that [REDACTED] will cease providing funds to the Claimant as soon as the Tribunal rules against the Claimant. According to the Respondent, there would be "little incentive" for [REDACTED] to continue to keep the Claimant as a going concern. The Respondent argues that the Claimant and [REDACTED] are used as an instrument for the Russian Federation's foreign policy, and the government of the Russian Federation might view it as politically unacceptable to fund any payments to the Respondent in connection with the NS2 Pipeline.⁹³
75. The Respondent urges the Tribunal to draw adverse inferences from the decision of the Claimant to submit the Redacted Documents instead of unredacted versions, or at the very least, find the Redacted Documents not to be probative.⁹⁴ The Respondent claims that the redacted sections are relevant to assessing whether the Claimant is and will remain in funds for the arbitration.⁹⁵ The Respondent further submits that the Redacted Documents fail to establish that the Claimant will be able to make good on any costs award in this arbitration.⁹⁶
76. On the third limb regarding proportionality, the Respondent submits that it is seeking to prevent the situation where it would be unable to recover the costs it would be entitled to.⁹⁷ It argues that the Claimant has admitted that it might be able to pay no more than a portion of the costs of

⁸⁶ See also Respondent's Letter dated 12 April 2023, paras. 34-35.

⁸⁷ Respondent's Letter dated 10 March 2023, para. 18.

⁸⁸ Respondent's Letter dated 10 March 2023, para. 18.

⁸⁹ Respondent's Letter dated 10 March 2023, paras. 52-53.

⁹⁰ Respondent's Letter dated 12 April 2023, para. 31.

⁹¹ Respondent's Letter dated 10 March 2023, para. 44.

⁹² Respondent's Letter dated 10 March 2023, para. 44.

⁹³ Respondent's Letter dated 12 April 2023, para. 10.

⁹⁴ Respondent's Letter dated 10 March 2023, paras. 13-14.

⁹⁵ Respondent's Letter dated 10 March 2023, para. 14.

⁹⁶ Respondent's Letter dated 10 March 2023, para. 12.

⁹⁷ Respondent's Letter dated 26 October 2022, paras. 104-106.

arbitration, on the basis of its submission that “it cannot credibly be argued that there would be *any* lack of funds to reimburse *any* of the Respondent’s arbitration costs” (emphasis added by Respondent).⁹⁸ Regarding the proportionality of the amount of security requested, the Respondent argues that EUR 5.65 million is proportionate and is a “conservative amount”.⁹⁹ First, it is only a fraction of the alleged losses claimed by the Claimant.¹⁰⁰ Second, the Respondent has already accounted for the amount of deposit paid by the Claimant in the sum of [REDACTED]¹⁰¹

77. Turning to the amount of security, the Respondent requests EUR 5.65 million secured by “an irrevocable bank guarantee issued by a reputable international bank located in the European Union” valid “until 30 days after the award in this arbitration is rendered”.¹⁰² The amount of security is to cover the Respondent’s legal fees, costs and expenses, including the Tribunal’s and the PCA’s administrative costs.¹⁰³

(b) *The Claimant’s Position*

78. From the outset, the Claimant submits that the Respondent is wrong to conflate the applicability of Article 34(2) of the UNCITRAL Rules and the issue of security for costs.¹⁰⁴
79. On the issue of security for costs, the Claimant argues that the request must be denied. First, the Claimant argues that the Respondent has not established a *prima facie* case. In this regard, the Claimant places importance on the decision by the CJEU in case C-348/20 P. According to the Claimant, the CJEU made its findings with a view to determining whether the Claimant is directly or individually concerned and affected by the Amending Directive.¹⁰⁵ The CJEU did find that the Claimant was directly and individually concerned and affected.¹⁰⁶ In particular, the Claimant submits that the CJEU found that (i) the Amending Directive affects the Claimant by changing its legal status, (ii) those effects on the Claimant did not exist prior to the adoption of the Amending Directive, (iii) the contents of the Amending Directive treats the Claimant differently than all other pipelines, and (iv) this different treatment is fully attributable to the Respondent.¹⁰⁷ The Claimant submits that since these are core elements of its case, the findings in case C-348/20 P support its case and undermine the Respondent’s attempt to establish a *prima facie* case.¹⁰⁸
80. Second, the Claimant submits that the Respondent has failed to prove that the Claimant is impecunious.¹⁰⁹ The Claimant argues that the burden of proof lies with the Respondent; the Claimant does not bear the burden to prove that money will be readily available.¹¹⁰

⁹⁸ Respondent’s Letter dated 16 December 2022, para. 81, *citing* Claimant’s letter to the Tribunal dated 24 November 2022, p. 7.

⁹⁹ Respondent’s Letter dated 26 October 2022, para. 108.

¹⁰⁰ Respondent’s Letter dated 26 October 2022, para. 109.

¹⁰¹ Respondent’s Letter dated 26 October 2022, para. 110.

¹⁰² Respondent’s Letter dated 26 October 2022, paras. 123, 125; Respondent’s Letter dated 10 March 2023, para. 27.

¹⁰³ Respondent’s Letter dated 26 October 2022, paras. 114-122; Respondent’s Letter dated 10 March 2023, para. 27.

¹⁰⁴ Claimant’s Letter dated 1 February 2023, p. 1; Claimant’s Letter dated 29 March 2023, p. 2.

¹⁰⁵ Claimant’s Letter dated 1 February 2023, p. 8.

¹⁰⁶ Claimant’s Letter dated 1 February 2023, p. 9.

¹⁰⁷ Claimant’s Letter dated 1 February 2023, p. 10.

¹⁰⁸ Claimant’s Letter dated 24 November 2022, p. 6; Claimant’s Letter dated 1 February 2023, p. 10.

¹⁰⁹ Claimant’s Letter dated 1 February 2023, p. 10; Claimant’s Letter dated 29 March 2023, p. 2.

¹¹⁰ Claimant’s Letter dated 29 March 2023, p. 2.

81. The Claimant emphasizes that the Cantonal Court in Zug has granted a definitive composition moratorium of six months as of 10 January 2023. The Claimant argues that the “mere fact that the Cantonal Court of Zug has approved a definitive composition moratorium ... *does* imply that Claimant will have the necessary funds to complete this arbitration”.¹¹¹ The Claimant disputes the Respondent’s use of statistics concerning the probability of bankruptcy proceedings, arguing that statistics are not accurate predictions for individual cases.¹¹²
82. The Claimant explains that the requirements for a definitive composition moratorium are higher than those for a provisional composition moratorium, and the definitive composition moratorium was granted to the Claimant after consideration of the Administrator’s report.¹¹³ The Administrator explained in his report that the Guarantor has previously provided [REDACTED] and that the amounts had been transferred to the Claimant. The Administrator also informed that the Guarantor has provided an [REDACTED] to cover the Claimant’s costs during the first half of 2023. The Claimant explains that the Cantonal Court in Zug granted the definitive composition moratorium relying on the track record of the Guarantor. It further argues that there is every reason to expect that the Guarantor will honour its obligations [REDACTED].¹¹⁴ The Claimant relies on a letter from its Administrator, Transliq AG, which states:¹¹⁵
- I can confirm explicitly that all mass liabilities that have arisen since 10 May 2022 have been paid in full thanks to the guarantees granted by the third party to date. All employees, service providers and contractors have been continuously paid for their work and services for the period after 10 May 2022. The newly incurred costs will continue to be paid, thanks to the guarantee granted for the definitive composition moratorium. Practically three months have already passed since the definitive composition moratorium was granted and all new arising debts have been paid by the Claimant for this period as well.
83. Further, the Claimant points out that [REDACTED] has also given [REDACTED].¹¹⁶
84. In addition, the Claimant argues that it has other assets besides the claim in this arbitration, including the pipelines. The Claimant states that [REDACTED] as confirmed by the Administrator.¹¹⁷ Further assets [REDACTED].¹¹⁸ In the event of bankruptcy, the proceeds would be used to serve to satisfy the mass creditors.¹¹⁹
85. Lastly, the Claimant submits that, even if it were to be declared bankrupt and even if it were to be ordered to pay the Respondent’s costs, such costs incurred during the moratorium would be paid before any other claims.¹²⁰ The Claimant explains that the Respondent’s claim in relation to its arbitration costs would be classified as a mass claim, which has priority right after the expenses of the composition proceedings. The Claimant argues that the Respondent’s claim would

¹¹¹ Claimant’s Letter dated 29 March 2023, p. 4 (emphasis in original).

¹¹² Claimant’s Letter dated 29 March 2023, p. 4.

¹¹³ Claimant’s Letter dated 1 February 2023, p. 11.

¹¹⁴ Claimant’s Letter dated 1 February 2023, p. 11.

¹¹⁵ Letter from Transliq AG, 29 March 2023 [Appendix No. 1 to Claimant’s Letter dated 12 April 2023].

¹¹⁶ Claimant’s Letter dated 1 February 2023, p. 11; Claimant’s Letter dated 24 November 2022, Appendix 5.

¹¹⁷ Letter from Transliq AG, 29 March 2023 [Appendix No. 1 to Claimant’s Letter dated 12 April 2023].

¹¹⁸ Claimant’s Letter dated 29 March 2023, p. 3.

¹¹⁹ Claimant’s Letter dated 29 March 2023, p. 3.

¹²⁰ Claimant’s Letter dated 1 February 2023, p. 11.

“practically enjoy a super-privilege” since the expenses of the composition proceedings would be of “no significance”.¹²¹

III. THE TRIBUNAL’S ANALYSIS

86. The Respondent has made two applications: the first is for the termination of the arbitration proceeding under Article 34(2) of the UNCITRAL Rules; the second is for an order for security for costs under Articles 15(1) and 26(1) of the UNCITRAL Rules. They overlap to a significant extent on their underlying rationale. Nevertheless, the legal provisions and legal tests for determining these issues remain distinct. The Tribunal therefore examines each in turn, albeit referring only to those considerations necessary to its decision on each.

A. Termination of the Proceedings

87. The text of Article 34(2) of the UNCITRAL Rules predicates the power of the tribunal to terminate arbitral proceedings on the grounds that “the *continuation* of the arbitral proceedings becomes *unnecessary* or *impossible*” (emphasis added). Given that the text clearly refers to the “continuation” of arbitral proceedings, the Tribunal has difficulty agreeing with the Respondent that the test of necessity or impossibility pertains to the “complet[ion]” of the arbitral proceedings.¹²² Moreover, Article 34(2) grants a discretion to the Tribunal to decide whether to order termination. The language does not dictate that a tribunal must terminate arbitral proceedings, even if the article’s predicates are fulfilled. While the text does not grant any party a veto over the termination of the proceedings—the objection to termination must be required to be “justifiable” in the circumstances—the Tribunal considers that a presumption nevertheless exists in principle against terminating proceedings in the face of a party’s objection.¹²³
88. On the impossibility limb of Article 34(2), the Tribunal observes that the US sanctions have had serious implications for the Claimant’s ability to operate the NS2 Pipeline, and also on the Claimant’s ability to pursue this arbitration. This was acknowledged by the Claimant, in its letter dated 1 March 2022, where it informed the Tribunal that “the designation of Nord Stream 2 AG as a US Specially Designated National (SDN) on 23 February 2022 and recent geopolitical developments have led to an inability on the part of the Claimant to pursue the arbitration at this time”. Nevertheless, the Tribunal is persuaded that there are no restrictions under the sanction regimes, including the EU and Swiss regimes, which would make participation in the current arbitration impossible. In the Tribunal’s view, the main impediment to the continuation of the arbitral proceedings was the lack of funds – no doubt exacerbated by the US sanctions – instead of the US sanctions in and of themselves. Given that the Claimant has now obtained the funds to continue the arbitral proceedings at least until the end of 2024, the Tribunal finds it difficult to agree with the Respondent that the continuation of the proceedings has become impossible.
89. Turning to the necessity limb of Article 34(2), the Tribunal finds that the Respondent has also failed to show that the continuation of the arbitral proceedings has become unnecessary. The main thrust of the Respondent’s argument is that the Claimant would be unable to operate the NS2 Pipeline as a result of US sanctions, economic considerations, and damage to the NS2 Pipeline, or would choose not to operate the NS2 Pipeline for geopolitical reasons regardless of the outcome of this arbitration. The Tribunal finds that these expectations involve a significant degree of speculation, including on matters of fact, and may touch upon issues that are part of the

¹²¹ Claimant’s Letter dated 29 March 2023, p. 5.

¹²² Respondent’s Letter dated 10 March 2023, para. 5.

¹²³ David Caron and Lee Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, Oxford University Press, 2006, p. 864.

substantive aspects of this proceeding. The geopolitical situation may change, and the NS2 Pipeline may prove to be reparable. In any event, the Tribunal is persuaded by the Claimant's submission that there is a dispute over the Respondent's liability for damages prior to February 2022, which is independent from the current geopolitical scenario. The existence of this claim is sufficient at this juncture to find that the arbitration has not become without object.

90. In light of the above, the Tribunal concludes that the continuation of the arbitral proceedings is neither unnecessary nor impossible. Thus, the Tribunal finds, on the basis of the material that is before it at present, that the criteria for the termination of arbitral proceedings under Article 34(2) are not met.

B. Security for Costs

91. Preliminarily, the Tribunal finds that it has the power to order interim measures, including security for costs, under Article 26(1) of the UNCITRAL Rules. Other tribunals have taken the same view.¹²⁴ The Tribunal also does not understand the Respondent to contest the Tribunal's competence in this regard. Furthermore, the Parties appear to agree on the proper factors to be taken into account in determining whether to order security for costs, namely the general requirements for interim measures as adapted to the situation of security for costs by the tribunal in *Manuel García Armas* among various others.¹²⁵ These requirements include: (i) a reasonable possibility that an award in favour of the applicant, including its costs of legal representation, could be rendered; (ii) a reasonable risk that the applicant will not be able to recover the costs awarded in its favour from the other party; and (iii) an assessment that the harm of non-recovery substantially outweighs the harm of an order for security for costs.
92. The Claimant relies heavily on the decision by the CJEU in case C-348/20P, and asserts that this recent development undercuts the Respondent's *prima facie* case on the merits, let alone costs. Nevertheless, the Tribunal considers that the Respondent has established a reasonable possibility of an award on costs in its favour. To decide otherwise would require the Tribunal to pronounce itself on issues of liability, which would be inappropriate at this stage.
93. As regards the further two requirements, the Tribunal considers that the risks weigh in the favour of the requested order for security for costs. Even though the arrangements made by the Claimant to finance the arbitration are sufficient to reassure the Tribunal of the Claimant's ability to resume and pursue its claims these proceedings, they are not sufficient to allay reasonable concerns about its ability—independent of the intentions or actions of other members [REDACTED]—to cover an adverse costs award if the Tribunal were to so rule. Whereas the Claimant can rely on the support of other members of the corporate group to help finance the costs of the proceedings, an award of costs to the Respondent would only be enforceable against the Claimant itself, who acknowledges that it is presently relying on the support of its Guarantor and shareholders to meet its own costs.
94. The support of the Claimant's Guarantor and shareholders also demonstrates the Claimant's ability to cover both its own costs and security for the Respondent's costs in a reasonable amount. An order for security for costs would therefore not appear to risk denying the Claimant the ability

¹²⁴ *Manuel García Armas et al. v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Procedural Order No. 9, 20 June 2018, paras. 186-187 (**RLA-338**); *South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10, 11 January 2016, para. 52.

¹²⁵ *Manuel García Armas et al. v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Procedural Order No. 9, 20 June 2018, para. 191 (**RLA-338**).

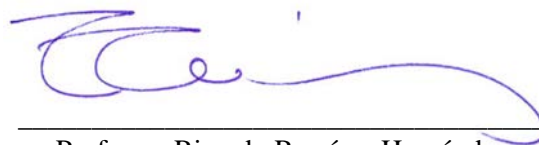
to pursue this arbitration, whereas it would leave the Respondent without sufficiently reliable guarantees that it would be able to collect on an award of costs. The foregoing considerations lead the Tribunal to conclude that an order for security for costs is, on the material that has been made available to it, necessary to protect the Respondent's rights.

95. As for the appropriate amount of security for costs, the Tribunal considers this to be [REDACTED]. In addition, the Tribunal intends to request a supplementary deposit from the Parties in the amount of [REDACTED] from each Party) in order to ensure sufficient funds to continue the proceedings. In reaching these figures, the Tribunal has taken note in particular of the amount of [REDACTED] as the Claimant's own estimate of its potential costs in the next phase of these proceedings. The Tribunal considers this adequate security for the period until it renders its award in the present phase of the proceedings, after which it may revisit the need for security as well as its modalities.

IV. DECISION

96. Having carefully considered the circumstances and the Parties' respective submissions, the Tribunal rejects the Respondent's application for the termination of the arbitration, accepts the Respondent's application for security for costs, and orders as follows:
- (i) the Claimant shall deposit with the PCA the amount of [REDACTED] as security for the Respondent's costs of legal representation;
 - (ii) the Parties shall make a supplementary deposit of [REDACTED] from each Party) in order to ensure sufficient funds for the Tribunal's costs;
 - (iii) the Tribunal may modify, suspend, or terminate this order upon application of any party or on the Tribunal's own initiative on account of any material change in the circumstances on the basis of which this order was requested or granted; and
 - (iv) the Tribunal shall in any event revisit this order following its award in the present phase of proceedings.

So ordered by the Tribunal.



Professor Ricardo Ramírez Hernández
(Presiding Arbitrator)

On behalf of the Tribunal