THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE NO. ARB/20/11

PETERIS PILDEGOVICS
SIA NORTH STAR

Claimants

v

KINGDOM OF NORWAY

Respondent

REQUEST FOR BIFURCATION

8 April 2021

A. INTRODUCTION

1. The Respondent, The Kingdom of Norway ("**Norway**") submits the present Request for Bifurcation in accordance with the procedural timetable set out in Annex B of Procedural Order No. 1 dated 12 October 2020 ("**PO-1**").

2. Having seen the case that the Claimants have presented in their Memorial dated 11 March 2021 ("**the Memorial**"), Norway remains of the opinion that, for several reasons the Arbitral Tribunal has no jurisdiction in this case and intends to contest the Tribunal's jurisdiction. However, for reason of procedural economy and because several of its objections are better dealt with together with a thorough discussion of the facts, Norway is not requesting bifurcation of jurisdictional issues from the merits.[1]

3. Norway does, however, request that the Tribunal bifurcate jurisdiction and merits on the one hand from reparations and quantum on the other. Norway's position is that such bifurcation now is likely to save time and costs by enabling the Parties to focus submissions and expert reports on quantum on the breaches of the BIT (if any) that are actually found by the Tribunal.

B. THE RELEVANT PRINCIPLES

4. Bifurcation of quantum falls under the Tribunal's general case-management power in Article 44 of the ICSID Convention. Where bifurcation of the merits is sought (between liability on the one hand and reparation/quantum on the other), the overriding consideration is procedural economy, to which Norway attaches particular importance in the interests of both parties.

C. BIFURCATION WOULD BE PROCEDURALLY EFFICIENT AND ECONOMICAL

5. Bifurcation will serve the procedural economy of this case and will, in all likelihood, significantly reduce legal costs by focussing lengthy and often costly submissions and reports on the present monetary value of any or all of the various losses said to have been caused to the Claimants by actions for which Norway is responsible.

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[1] Though the Tribunal can of course decide of its own motion to consider jurisdictional issues as a preliminary question: Article 41(2) ICSID Convention (CL-0042 at p.23).

6. The case that has been presented by the Claimants is complex and multifaceted, as it involves several stakeholders engaged in a number of different activities of a fundamentally different nature. The two Claimants allege that they held several investments relating to a crabbing enterprise in Norway that suffered losses as a result of several alleged several breaches by Norway of the Norway-Latvia BIT (the "**BIT**"), alongside an allegation that Norway has "illegally" asserted its rights in the Barents Sea, contrary to various other treaties.

7. The Claimants do not particularise the causative effect of each alleged breach on each of the Claimants' alleged investments. Instead, the Claimants address causation on the assumption that each and every one of their claimed breaches is established,[2] and only discuss the "overall effect" of their allegations on quantum on the basis of that assumption. See, for example, the Claimants' descriptions at §409 and §871 of the Memorial:

> *409. Norway's actions have deprived Claimants of their fishing rights to catch snow crabs in the NEAFC zone and in maritime areas around Svalbard. The economic impact of Norway's interference with the Claimants' investments was catastrophic, causing among other financial losses an instant collapse in North Star's revenues and profits from which the company has not so far recovered.*
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> *871. In the case submitted to the Tribunal, the losses suffered by Claimants have undoubtedly resulted from Norway's actions in breach of the BIT preventing them from operating their snow crab fishing enterprise. The evidence clearly shows that, but for those breaches, Claimants would have exercised those rights, exploited their snow crab fishing enterprise and earned profits, as quantified below.*

8. This approach is maintained in the Claimants' discussion of the differences between their "actual" and "but-for" scenarios (see e.g. Memorial at §943), which assume that all of the Claimants' allegations of breaches by Norway have been made out. This approach has also been adopted in the report of Mr Kiran Sequeira dated 11 March 2021 on behalf of the Claimants ("**Sequeira**"). At Sequiera §4, Mr Sequeira states that he has been "informed" of several measures which are said to be in violation of the BIT (which he defines as the "Measures") and at §78 asserts that the "but-for" analysis that has been conducted is on the basis of the scenario "*that would have existed but for* [all

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[2] Memorial at §868: "*Regarding the first element of causation (cause), the internationally wrongful acts attributable to Norway constitute the cause. As discussed above, the facts of the present case plainly show that Norway's breaches of the BIT prevented Claimants from exercising their snow cab fishing rights in the Loophole and the waters off the Svalbard archipelago*".

of] *the Measures*". The report is thus of very limited use if any or all of the alleged breaches are not established.

9. The complexity of this case – as presented by the Claimants, in relation to both the investments and the alleged breaches, means that even if Norway were to be only partially successful at a jurisdiction and merits hearing, large swathes of the Claimants' analysis on quantum would become irrelevant. If, for example (and with a full reservation of rights), the Tribunal were to rule that the obligation not to cause a denial of justice had been made out, but that others had not, much of the Memorial's analysis on causation (and the reports on quantum) would become otiose.

10. By way of further example (and again with a full reservation of rights), the Claimants have pleaded breaches of the BIT relating to alleged investments: (1) on Norwegian soil; (2) within "the Loophole" of the Barents Sea; and (3) in the Fisheries Protection Zone around Svalbard. Were the Tribunal to find that any one of those breaches was not made out, or that any of those alleged "investments" fell outside its jurisdiction, the Memorial's analysis on quantum would again be of little or no avail.

11. The grey area regarding the relationship between the First Claimant and Kirill Levanidov is a further indication of the complexity of dealing with quantum together with jurisdiction and the merits. The alleged "joint venture" between the First Claimant and Kirill Levanidov appears central to the Claimants' claims,[3] although very little information beyond witness accounts has been given about the existence of it, nor any information on what precise impact the alleged joint venture has on the quantum of the Claimants' claims. The bifurcation sought by Norway will also allow these complex issues to be resolved before a detailed analysis of quantum is undertaken.

12. By contrast, were the Tribunal now to bifurcate issues of reparations and quantum, it would allow pleadings and reports on the details of the issue of quantum to be focused on the actual findings made by the Tribunal as to jurisdiction and liability. There are several benefits to such an approach, as has been recognised by various tribunals:

Lidercón, S.L. v. Republic of Peru:

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3 Memorial at §§205-207. It is described at §205 as an "*essential precondition*" to the First Claimant's investments, "*including those made by* [the Second Claimant]".

> *It seems to the Tribunal that putting quantum issues to the side for now has at least three conceivable advantages: (i) avoiding the cost of full presentations of quantum at this stage, which experience often shows to be a very expensive process; (ii) allowing subsequently more precise debate on quantum in light of the findings in relation to liability; (iii) reducing the complexity and therefore the length of the deliberations and drafting of the Tribunal's more limited decision, and (iv) conceivably creating an impetus for the Parties, in light of the Tribunal's decision on the non-quantum matters, to resolve the dispute directly.*[4]
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> *Gran Colombia Gold Corp. v. Republic of Colombia:*
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> *The Tribunal accepts that in some cases there may be considerable burdens and costs associated with preparing quantum submissions, including the need to develop damages models to address multiple possible scenarios, and that this burden may be exacerbated in cases where challenges are brought to multiple different government acts, and the quantum analysis may differ depending on which (if any) acts eventually are found to violate which (if any) treaty articles. In such cases, a decision to defer quantum submissions may enable the parties to accelerate the liability briefing schedule, while later focusing any quantum submissions on the relevant liability scenario which applies.*[5] (emphasis added)

13. The Claimants might argue that, as an individual and a small/medium-sized enterprise which have already been put to the expense of preparing submissions and an expert report, the Tribunal should refuse this Request for Bifurcation. Any such arguments should be dismissed:

    13.1. First, as outlined above, Norway's position is that bifurcation would in fact serve the procedural economy of this case. This Request for Bifurcation is in line with the consistent position that Norway has adopted in these proceedings, which is to favour the most cost-effective procedure possible. It was to this end that Norway proposed reducing the time limit for this Request, as the Tribunal noted in its Decision on Bifurcation and Other Matters at para. 9.[6] Consistently with this position, before filing this Request, Norway sought the agreement of the Claimants to bifurcate along the lines now proposed.[7] No agreement was reached.

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4 *Lidercón, S.L. v. Republic of Peru*, ICSID Case No. ARB/17/9, Award, 6 March 2020, para. 25 (**RL-0001**).

5 *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23, Procedural Order No. 3 (Decision on the Respondent's Request for Bifurcation), 17 January 2020 **(RL-0002)**, para. 35.

6 See also at para. 6: "*According to the Respondent, it has already assisted in the expeditious conduct of the proceedings ensuring, for example, that the Tribunal was constituted in significantly less time than has been the average in investment cases*".

7 Norway's letter to the Claimants dated 25 March 2021 (**R-0003**).

13.2. Secondly, the Tribunal has already expressed "*serious doubts*" that it could order bifurcation at the time of PO-1 and before the filing of the Claimants' Memorial.[8] Thus any argument by the Claimants that bifurcation should be rejected because they have been put to the expense of having drafted their submissions on quantum should be given little to no weight. That is the procedure envisaged by the ICSID Convention and Arbitration Rules. If the fact that a Memorial had been prepared was a complete answer to a Request for Bifurcation, none would ever be granted. Instead, the correct question is whether (the Memorial and expert reports now having been filed) it appears that it is procedurally economical to bifurcate proceedings. Norway's position, as argued above, is that it is.

13.3. Thirdly, the Claimants' argument before the Tribunal in relation to PO-1 was that the Tribunal should - in October 2020 - have ordered bifurcation of jurisdiction and the merits. Norway warned (and the Tribunal accepted – see paras. 6-8) that it would have been impossible to make any reasoned decision on bifurcation until the Memorial had been seen. Norway has been vindicated in that argument: on having full sight of the Claimants' arguments, it is not requesting bifurcation of jurisdiction and the merits. Norway could not have made this Request at any stage until it had read the full Memorial.

13.4. Fourth, bifurcation would save time and money for both Parties. If Norway submits a detailed expert report on quantum, addressing the range of allegations advanced by the Claimants, the Claimants will in turn have to submit a detailed report with their Reply, and then prepare an expert presentation for the hearing. All of these presentations will be aiming to quantify the precise losses resulting from what will still be an unknown scenario concerning liability. Indeed, if liability and quantum are decided together, the quantum experts will never have the opportunity to address the question of deciding the value of those losses, if any, that the Tribunal finds to have been caused by Norway. That is neither efficient nor economical.

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8 Decision on Bifurcation and other Matters, 12 October 2020 at para. 7

D. CONCLUSION

14. For the reasons given above, Norway respectfully requests the Tribunal to bifurcate proceedings as outlined above.

Respectfully submitted on 8 April 2021

[signed]

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