INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

PETERIS PILDEGOVICS AND SIA NORTH STAR

v.

KINGDOM OF NORWAY

(ICSID Case No. ARB/20/11)

PROCEDURAL ORDER No. 3

DECISION ON RESPONDENT'S REQUEST FOR BIFURCATION

Members of the Tribunal

Sir Christopher Greenwood, GBE, CMG, QC, *President*
The Honourable Yves L. Fortier, CC, OQ, QC, *Arbitrator*
Professor Donald M. McRae, CC, ONZM, FRSC, *Arbitrator*

Secretary of the Tribunal

Ms Leah Waithira Njoroge

1 June 2021

(1) Background

1. The Tribunal has been asked by the Respondent to order the bifurcation of the proceedings so that jurisdiction and merits would be dealt with in a first phase with quantum reserved, should the Tribunal find that it has jurisdiction and that the Respondent has incurred liability, to a later phase (Request for Bifurcation, 8 April 2021 (the "**Request**")). This Request is opposed by the Claimants (Claimants' Observations on Respondent's Application for Bifurcation, 6 May 2021 (the "**Observations**").

2. The Tribunal has already considered, and rejected, a request by the Claimants for bifurcation of the proceedings so as to separate consideration of jurisdiction from that of merits and quantum (Decision of 12 October 2020). The Claimants made that request before the filing of any substantial pleadings other than the Request for Arbitration. Since the Tribunal gave its Decision on the Claimants' request, the Claimants have filed, on 11 March 2021, their Memorial, which addresses issues of jurisdiction, liability and quantum. The Memorial was accompanied by three witness statements and three expert reports.

(2) The Respondent's Submissions

3. The Respondent has not requested that jurisdiction be addressed in a separate preliminary phase, although it has made clear that it considers that the Tribunal lacks jurisdiction and that it plans to raise arguments to that effect (Request, para. 2). It is content for the Tribunal to consider jurisdiction and merits in the same phase of the proceedings (Request, para. 3).

4. The Respondent argues that the Tribunal has the authority to order this bifurcation in the exercise of its general case-management powers under Article 44 of the ICSID Convention, which reads:

> *Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.*

5. The Respondent states that it has been unable to reach agreement on bifurcation with the Claimants and therefore invites the Tribunal to use its powers under the final sentence of Article 44.

6. According to the Respondent, bifurcation will serve the procedural economy of this case and will, in all likelihood, significantly reduce legal costs. The Respondent comments that "*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*" (Request, para. 6). The Respondent maintains that the Claimants have not particularised the causative effect of each of the several breaches which they allege on their different investments but instead address causation on the assumption that each and every one of the claimed breaches is established and only discuss the overall effect of their allegations on quantum on the basis of that assumption (Request, para. 7).

7. The Respondent contends 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*" (Request, para. 9). If bifurcation were ordered, it would become possible for the quantum pleadings and evidence (if a quantum stage were to be required) to focus on the Tribunal's actual findings of liability (Request, para. 12).

8. In these circumstances, the Respondent argues that other ICSID tribunals have ordered bifurcation in order to ensure the economical and effective conduct of the proceedings. It refers to *Lidercón SL v. Republic of Peru* (ICSID Case No. ARB/17/9, **RL-1**), Award of 6 March 2020, para. 25, and *Gran Colombia Gold Corp. v. Republic of Colombia* (ICSID Case No. ARB/18/23, **RL-2**), Procedural Order No. 3, para. 35.

9. The Respondent maintains that the fact that the Claimants are an individual and a small/medium-sized enterprise with limited resources is not relevant since bifurcation would be likely to reduce costs in any event (Request, para. 13).

(3) The Claimants' Submissions

10. The Claimants oppose the Respondent's request. They accept that the Tribunal's power to regulate the proceedings under Article 44 of the ICSID Convention extend to ordering bifurcation but argue that the Tribunal should not exercise that power to bifurcate as requested (Observations, para. 4).

11. The Claimants maintain that the Tribunal should consider (a) whether bifurcation would reduce the time and cost of the proceeding; (b) whether determination of the bifurcated questions would dispose of all or a substantial part of the proceedings and (c) whether the questions to be bifurcated were so intertwined as to make bifurcation impractical. According to the Claimants, the present request fails on all three grounds (Observations, pars. 5-9).

12. The Claimants contend that bifurcation rarely promotes procedural economy and would not do so in the present case, because it would be likely to lengthen the proceedings and increase the costs (Observations, paras. 13-24). Many of the factual assertions pleaded by the Claimants are relevant to both jurisdiction and liability as well as quantum and would therefore have to be relitigated if the proceedings were bifurcated. There were as yet no indications of Norway's defences on the merits or arguments as to jurisdiction, so it was impossible at this stage to ascertain whether they had any prospect of success. That makes it impossible to determine whether bifurcation might offer the chance of reducing the length and cost of the proceedings. The Claimants consider that it would not do so. They reject the Respondent's suggestion that the manner in which the Claimants have pleaded their case on causation and quantum means that bifurcation would favour procedural economy.

13. The Claimants also maintain that the issues on jurisdiction and liability are intertwined with those on quantum, so that the absence of full pleadings on quantum would complicate the task of the Tribunal in establishing whether there was jurisdiction and whether the Respondent was liable in respect of all or any of the alleged breaches (observations, paras. 25-32).

14. Finally, the Claimants contend that the authorities relied upon by the Respondent are inapposite as *Lidercón* involved a decision to bifurcate after the tribunal had seen pleadings from both parties on all of the issues in question, while *Gran Colombia* was

a decision to bifurcate in respect of a single well-defined jurisdictional issue (Observations, paras. 33-38). They also maintain that the different resources available to Norway and to the Claimants militate in favour of a decision not to bifurcate (Observations, paras. 39-43).

(4) The Analysis of the Tribunal

15. The Tribunal notes that there is no difference between the Parties as to the authority of the Tribunal to order bifurcation if it considers that to do so would benefit the orderly, effective and cost-efficient conduct of the proceedings. The Tribunal agrees that that is so.

16. Article 44 of the ICSID Convention gives the Tribunal a wide measure of discretion in regulating the procedure in order to ensure that the proceedings are conducted in an orderly, effective and cost-efficient way but that discretion is not unlimited. The Tribunal agrees with the Claimants that, in exercising its discretion, it should have regard to whether bifurcation would be likely to reduce the length and cost of the proceedings, whether a bifurcated first phase would be likely to dispose of all or a substantial part of the case and whether the issues in the proposed different stages are so intertwined as to be inseparable.

17. That is a relatively straightforward task where what is proposed is hiving off jurisdictional issues to a preliminary phase, provided that those jurisdictional issues are sufficiently clearly defined. Tribunals frequently make such an assessment on the basis of either a full pleading on jurisdiction (and/or admissibility) submitted by the respondent or at least a detailed exposition of the jurisdiction (and/or admissibility) issues in the respondent's plea for bifurcation.

18. The task in the present case is far more difficult. While the Tribunal has had the benefit of a full statement of the Claimants' case in a Memorial which runs to nearly three hundred pages and which is accompanied by witness statements and expert reports, it has only a five page request from Norway and thus has no precise indication of what Norway's arguments on jurisdiction and liability will be. In these circumstances, the Tribunal cannot form a view as to the prospects of success of those arguments. While it might be true that the pleadings on quantum could be shorter, more focussed and less costly if Norway is successful on some of its arguments and those pleadings could, of course, be wholly avoided if Norway was wholly successful on either jurisdiction or liability, the Tribunal cannot, at this stage, form any realistic assessment of the chances that any or all of those arguments will succeed.

19. Nor is it realistic to form a view on whether the quantum issues are so intertwined with those on jurisdiction and liability as to make bifurcation impracticable when the Tribunal has seen only one Party's arguments and evidence.

20. Accordingly, the Tribunal rejects the Request for Bifurcation at the present stage. It will be prepared to consider a fresh request from either Party once it has seen the Counter-Memorial.

(5) Timetable

21. Procedural Order No. 1 left open the timetable to be followed in the event that a request for bifurcation was made.

22. The Tribunal notes that the Memorial was deposited on 11 March 2021, the Claimants having been given, in Procedural Oder No. 1, 180 days to file the Memorial. Had there been no Request for Bifurcation, the Respondent would have had 180 days from 11 March 2021 to file its Counter-Memorial.

23. The Tribunal considers that it would be inappropriate to require the Respondent to file its Counter-Memorial within 180 days of 11 March 2021, given that more than eighty days have passed since then. However, it considers that the Respondent must have started work on its Counter-Memorial while the exchanges of argument on bifurcation were taking place. Accordingly, the Tribunal directs that the Respondent should file its Counter-Memorial within 150 days of the date of this Procedural Order, namely by 29 October 2021.

24. The Tribunal will issue a fresh timetable after hearing from the Parties. The Parties are invited to endeavour to agree a new timetable and to revert to the Tribunal by 14 June 2021.

For and on behalf of the Tribunal,

[signed]

Sir Christopher Greenwood
President of the Tribunal
1 June 2021