**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**PETERIS PILDEGOVICS AND SIA NORTH STAR**

***v.***

**KINGDOM OF NORWAY**

**(ICSID Case No. ARB/20/11)**

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# PROCEDURAL ORDER No. 5

# DECISION ON RESPONDENT'S RENEWED REQUEST FOR BIFURCATION

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***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

6 December 2021

## I. BACKGROUND

1. In its Procedural Order No. 3, the Tribunal rejected a request by the Respondent to bifurcate the proceedings by dividing jurisdiction and merits from quantum. The Tribunal held that it had authority, under Article 44 of the ICSID Convention, to order bifurcation and that the factors which it would have to take into account included "*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*" (Procedural Order No. 3, para. 16).

2. The Tribunal considered that, at the stage which the proceedings had reached when it issued Procedural Order No. 3, it did not have sufficient information to make a decision on those factors. It stated that:

> *18. … 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.*
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> *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.*

3. The Tribunal concluded that "[i]*t will be prepared to consider a fresh request from either Party once it has seen the Counter-Memorial*" (Procedural Order No. 3, para. 20).

4. Norway deposited its Counter-Memorial on Merits and Memorial on Jurisdiction (the "**Counter-Memorial**") on 29 October 2021. The Counter-Memorial sets out Norway's arguments on Jurisdiction and Merits at considerable length. Norway invites the Tribunal to conclude that it lacks jurisdiction but that if, *vel non*, the Tribunal finds that it possesses jurisdiction, to dismiss the case on the merits.

5. Norway addresses issues of reparation in Chapter 7 of the Counter-Memorial. Its main thesis is that "*Norway cannot sensibly respond on quantum at this stage*" (Counter-Memorial sub-heading 7.2). According to Norway, "[a]*ny detailed critique of the Claimants' calculation of the financial compensation sought would have to address the various permutations of possible answers to each of* [the different issues of merits raised] *and that is plainly impractical*" (Counter-Memorial, para. 866). Norway

develops this argument in paras. 867-873 of the Counter-Memorial. It then goes on to argue that "[e]*ven if all of the conduct by Norway of which the Claimants complain* were *assumed to violate the BIT, the Claimants have not presented a case on which it is practicable to determine what losses, if any, they have sustained as a result*" (Counter-Memorial, para. 874). That argument is further developed in paras. 875-891.

6. Norway states that it has not, therefore, submitted detailed pleadings on quantum or an expert report of its own. Instead, it renews its request for bifurcation.

## II. THE SUBMISSIONS OF THE PARTIES

7. On 10 November 2021 the Claimants wrote to the Tribunal to object to Norway's conduct. They maintain that the effect of Procedural Order No. 3 was to require Norway to submit a full response on quantum with its Counter-Memorial and that, by failing to do so, Norway has endeavoured to reverse the effect of the Procedural Order and has behaved as if its earlier request had been granted. According to the Claimants, Norway has unilaterally decided to hold back its case on quantum in a manner which both pre-empts the decision on bifurcation which Norway now seeks and is unfair to the Claimants. The Claimants therefore oppose the renewed request and ask the Tribunal to dismiss it.

8. Initially, the Claimants also asked the Tribunal to set a new timetable for Norway to file its expert evidence on quantum, but this request was later withdrawn (see para. 14, below).

9. According to the Claimants, bifurcation would not contribute to the efficient conduct of the proceedings. On the contrary, it would considerably add to the costs which the Claimants would incur (having already incurred considerable costs in making a full submission with supporting material on quantum). The Claimants contend that many of the issues relevant to jurisdiction and merits overlap with those on quantum with the result that the Claimants would be forced to call the same witnesses and submit the same documents at both phases of the case.

10. The Claimants also highlight the imbalance between the resources available to Norway and those available to the Claimants as an individual and a small enterprise.

11. At the invitation of the Tribunal, Norway responded by letter of 24 November 2021. Norway denies that it has taken a unilateral decision to hold back its case on quantum. On the contrary, it maintains that it has set out its case in Chapter 7 of the Counter-Memorial. While not accepting the Claimants' methodology, Norway maintains that no compensation is due.

12. With regard to the Claimants' case on bifurcation, Norway maintains:

> *It seems to be suggested that Norway should have filed an expert report to say that* if *Norway had been in breach of the Treaty by doing some or all of acts X, Y, Z etc., in various combinations, and* if *some or all of those acts were proved to have caused compensable losses to the Claimants, the damage due would have been x, y or z euros, as calculated in accordance with some theoretical model. Norway*

> *declines to engage in such a charade, which would involve considerable time, and very considerable expense.*

13. Norway also denies that it is holding back an expert report and states that it has not commissioned one and has no intention at this stage of doing so. If the request for bifurcation is rejected, Norway states that it will rely upon cross-examination of the Claimants' experts and other witnesses.

14. The Claimants replied on 29 November 2021. In that letter, they state that it is their understanding that Norway has waived its right to submit an expert report with the Rejoinder and will be content to rely on cross-examination on quantum issues. They accordingly withdrew their request that the Tribunal amend the schedule of pleadings set out in Procedural Order No. 4.

## III. THE DECISION OF THE TRIBUNAL

15. Procedural Order No. 3 envisaged that the pleadings on a renewed request for bifurcation would be submitted at a later stage. Nevertheless, the Tribunal now has before it quite detailed arguments from both Parties and considers that it can and should take its decision on the renewed request now.

16. The Tribunal does not consider that Norway has acted improperly in the way that it has approached the question of quantum in the Counter-Memorial. A respondent is not obliged to submit evidence or an expert report if it does not wish to do so. Save in a few cases where pertinent information is available only to a respondent, it is for the claimant to prove its case, including its case on the amount of damages to which it is entitled. A respondent is free to challenge the claimant's case through argument and cross-examination.

17. Doing so involves a degree of risk, since evidence which might refute the claimant's case will not be before the tribunal but it is for the respondent to decide whether or not it wishes to take that risk. What is not acceptable is for a respondent to submit in its rejoinder expert testimony and detailed evidence to refute a case which the claimant has already set out in the memorial. Norway's letter of 24 November 2021 makes clear, however, that it has no intention of doing that.

18. On the other hand, the fact that a respondent has decided not to submit expert testimony and detailed evidence with its counter-memorial cannot in itself be a reason for a tribunal to order bifurcation. Otherwise, a respondent could, in effect, force the tribunal into bifurcating the proceedings by the way in which it pleads its case.

19. In considering whether to grant Norway's renewed request for bifurcation, therefore, the Tribunal has not accorded any weight to the way in which Norway has chosen to plead its case on quantum.

20. What is important is that the Tribunal now has before it a detailed statement of Norway's case on its jurisdictional objections (which occupies approximately a hundred pages of the Counter-Memorial) and the merits (which is almost as long) as opposed to the brief summary which was before it when Norway first requested bifurcation. That means that the situation facing the Tribunal is, as the Tribunal expressly envisaged, significantly different from that which existed when it issued Procedural Order No. 3.

21. While the Tribunal expresses no opinion – indeed has formed no opinion – on whether these arguments will succeed, it is of the view that they show that there is a very wide range of outcomes possible before any question of quantum could arise.

22. For the purposes of deciding on the present request, the Tribunal considers that what matters most is the range of possible outcomes in which the Claimants' case is defeated only in part. Those outcomes have the potential to make a very substantial difference to the way in which the issue of quantum would have to be approached. That raises the possibility that either each of these different possibilities will have to be debated by the Parties, so that argument on quantum would have to cover a significant number of different permutations, or that the Tribunal, having reached its conclusion on jurisdiction and merits, might have to revert to the Parties for further argument and perhaps seek additional evidence and expert testimony. That consideration argues in favour of a decision to hive the quantum issues off to a second stage of the proceedings (if such a stage is necessary) and not to have them considered at a single hearing on jurisdiction, merits and quantum.

23. The Tribunal is not persuaded that issues of quantum are so interwoven with issues arising on the merits or with regard to jurisdiction that they cannot sensibly be left for a subsequent phase.

24. The Tribunal has therefore concluded that the most efficient way to conduct the proceedings is to grant the request for bifurcation. Once the Tribunal has reached its decision on jurisdiction and merits, then – if the Claimants have succeeded in whole or in part – a second stage of the proceedings can be held to focus exclusively on issues of quantum.

25. While the Tribunal is sympathetic to the Claimants' argument that they have already incurred considerable expense and that any saving would only be of benefit to the Respondent, it does not consider that this argument is sufficiently compelling to override the considerations set out above.

26. First, ensuring that the remaining written pleadings in the current phase and the hearing which will follow focus only on jurisdiction and merits is likely to result in savings for both Parties.

27. Secondly, if the Claimants are successful in whole or in part in the first phase, the costs which they have incurred in submitting detailed argument on quantum with their Memorial will be a factor to be taken into account in the Tribunal's eventual decision on costs.

28. For the avoidance of doubt, the present Procedural Order does not affect the right of the Claimants to make their own request for bifurcation when they file their Reply on Merits and Counter-Memorial on Jurisdiction, as specified in the schedule annexed to Procedural Order No. 4.

29. In these circumstances, the Tribunal **DECIDES** that:

(1) The Respondent's request to bifurcate the proceedings is granted;

(2) The current phase of the proceedings will be devoted to jurisdiction and merits, with the Claimants next filing their Reply on Merits and Counter-Memorial on Jurisdiction; and

(3) No alteration to the current schedule laid down in Procedural Order No. 4 (as amended by the various agreements regarding document production) will be made unless either Party expressly applies for such modification or the Parties agree thereon.

For and on behalf of the Tribunal,

[signed]

Sir Christopher Greenwood
President of the Tribunal
6 December 2021