ADDENDUM TO EXPERT REPORT - ICSID CASE NO. ARB/20/11

From: Dr. Anders Ryssdal
Date: 28 February 2022

1 INTRODUCTION

1 Upon engagement by the claimants, Mr. Peteris Pildegovics and SIA North Star, and their counsel, Mr. Pierre-Olivier Savoie, I provided an expert report dated 10 March 2021 to be submitted in ICSID CASE NO. ARB/20/11 before the International Centre for the Settlement of Investment Disputes.

2 On 1 November 2021 I received a copy of i.a. Respondent's, the Kingdom of Norway, counter-memorial and memorial on jurisdiction, which in certain paragraphs refers to and comments on my expert opinion¹.

3 I have been asked to review and provide this addendum to my expert report commenting on:

   (i) the contents of the joint venture agreement between Mr. Pildegovics and Mr. Levanidov with regard to "claims to any performance under contract having an economic value", cf. the definition of "Investment" in Article 1 of the Norway-Latvia BIT; and

   (ii) the impact of such contents relating to the issue of legal venue.

4 I will address the contractual rights of the joint venture agreement in section 2 and legal venue in section 3.

5 In addition to my expert report and the relevant documentation referred to in paragraph 5, I have reviewed Respondent's counter-memorial and memorial on jurisdiction as well as Mr. Pildegovics' and Mr. Levanidov's second witness statements dated 28 February 2022.

6 It is my understanding having reviewed the counter-memorial that the Respondent is not contesting my presentation of the general principles of law in my expert report, but rather the application of facts as mainly set out in the witness testimonies of Mr. Pildegovics and Mr. Levanidov on which I have been instructed to base my considerations. Thus, I will in the following focus mainly on application of facts to the principles of law.

¹ Counter-memorial paragraphs 437-459.
For the sake of good order, it must be stressed that for my considerations I am instructed to rely on the facts presented to me (including those appearing from the witness statements) without further investigation at my end.

THE CONTRACTUAL RIGHTS OF THE JOINT VENTURE AGREEMENT

2.1 Rights and obligations

Respondent states that it has been described what Mr. Pildegovics and Mr. Levanidov "have done in connection with the Båtsfjord snow crab operation and emphasise the closeness of their collaboration". However, it is emphasised:

"But they do not identify – let alone prove – any of Mr Pildegovics' alleged "contractual rights in his joint venture agreement" that are said to have been injured by actions of Norway in breach of the BIT."

The Respondent further refers paragraphs 37-39 and 92 of my expert report before stating that:

"The 'investment' threshold cannot be crossed simply by asserting that there is a contract which contains unparticularised claims to performance".

It is not within my assignment to consider the mentioned threshold, but I do not agree with Respondent that the joint venture agreement "contains unparticularised claims". In this regard, I refer to the following statement from paragraphs 29-30 of Mr. Pildegovics' witness testimony quoted in paragraph 33 of my expert report:

"In late 2013, Mr. Levanidov and I started discussing the possibility of establishing a venture whereby we would work collaboratively towards the operation of an integrated snow crab fishing and processing enterprise based in Baatsfjord.

As part of this joint venture, I would be responsible for building a fishing company to deliver supplies of snow crab, while Mr. Levanidov would build capacity to process these snow crabs at his company's Baatsfjord factory."

It appears from the above that the essential obligations under the joint venture agreement were for Mr. Pildegovics to ensure deliveries of snow crabs and thus he apparently invested at least EUR 10 million in SIA North Star and Sea & Coast AS for "the purchase, repair, equipment and maintenance of a fleet of vessels fitted to harvest snow crabs".

The essential obligations of Mr. Levanidov under the joint venture agreement were to ensure sufficient capacity to process – and hence take delivery of – the snow crabs at the

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2 Counter-memorial paragraph 436.
3 Counter-memorial paragraphs 439-442.
4 Request for Arbitration paragraph 29.
said Båtsfjord factory, Seagourmet AS, for which purpose he apparently invested EUR 12 million.

13 In other words; the right of Mr. Pildegovics was to be able to deliver the snow crab to the Båtsfjord factory for processing which ensured a ready source of demand for the snow crab harvest and the right of Mr. Levanidov was to get deliveries of snow crab for processing at the said factory.

14 The mentioned rights and obligations are connected to Norwegian territory, namely ability to deliver, take delivery and process snow crab at the Båtsfjord factory.

2.2 Other interpretative principles

15 Respondent has argued that the scope of the joint venture agreement “must obviously have some terms and limits” with reference to Woxholth, Avtalerett, 11th edition, 2021, part IV section 4.38, p. 500-501 in which simple contractual form indicates less extensive commitments.

16 There are a few comments that must be taken into account in this regard:

(i) The form of contract may be used as an interpretation of the obligations thereunder where the parties to the contract disagrees on the terms. This was for instance the case in the Norwegian Supreme Court decision 29 March 1995 in Rt. 1995 p. 543 to which Woxholth refers just before the statement quoted by Respondent. In the dispute at hand the situation is different. The parties to the joint venture agreement seem to agree on its terms. It is a third party, i.e. Respondent, who is questioning whether there is in fact an agreement and, if so, what the terms are.

(ii) As stated by the author himself the form only “indicates” how extensive the terms may be in case of uncertainty – it is not decisive. He even states in the same section that [my office translation]:

“However, there are limits as to how far it would be relevant to interpret burdensome contract terms restrictively to the benefit of the promissor, cf. section 5.3 regarding criticism against the so-called minimum rule.”

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5 Request for Arbitration paragraph 31, see also Mr. Pildegovics’ witness statement paragraph 32 et seq.
6 Request for arbitration paragraph 34, see also Mr. Pildegovics’ witness statement paragraph 32 et seq.
7 Counter-memorial paragraph 450.
8 AR-0024.
Consideration of these principles does not lead me to change my conclusion expressed in the previous section and in my initial report about the existence of an agreement and its terms.

3 LEGAL VENUE

19 Respondent criticizes my expert report based on the facts and states as follows:

"Norwegian courts would not assume jurisdiction in the event of a dispute between the Mr Pildegovics and Mr Levanidov in connection with their alleged agreement."

Based on the witness testimonies of Mr. Pildegovics and Mr. Levanidov as emphasized in section 2 above, the most vital rights and obligations under the joint venture agreement pertaining to deliver on one side and take delivery and process on the other, are both connected to the Båtsfjord factory.

21 On the basis of the facts set out, Norwegian courts are more likely than not to assume Norwegian jurisdiction irrespective of whether such venue is based on Sections 4-3 and 4-5 no. 2 of the Norwegian Dispute Act or Article 5 no. 1 of the Lugano Convention.

22 With regard to the Lugano Convention, it is correct that Article 2 sets out the main rule that a person should be sued in the courts of domicile. However, this is "subject to the provisions of this Convention". One such provision is Article 5 no. 1 stating that a person domiciled in a state "may" be sued in another state (both states having ratified the convention) "in matter relating to a contract, in the court for the place of performance of the obligation in question".

23 In this connection, it must be observed that it cannot be deemed a condition for legal venue that a written formal agreement is in place in which the legal venue is mentioned. If so, Section 4-6 of the Norwegian Dispute Act and/or Article 23 of the Lugano Convention relating to formal agreements on legal venue could apply.

24 Further, it is not a criterion that an agreement must be in writing or that all parts of the agreement must be evident. Reference is made to the fact that under Norwegian contract law an oral agreement is equally binding as a written contract. As such, when applying Section 4-5 no. 2 of the Norwegian Dispute Act the court must place emphasis on the

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11 Counter-memorial pragraph 453 et seq.
12 AR-0001.
13 Cf. the decision 10 May 1996 in Rt. 1996 p. 822 by the Appeal Committee of the Norwegian Supreme Court, AR-0026.
14 AR-0009.
15 My expert report paragraph 23.
claimant’s pretensions\textsuperscript{16}. With regard to the Lugano Convention, it appears from the decision 25 September 2008 in \textit{Rt. 2008 p. 1207}\textsuperscript{17} paragraph 16 by the Appeal Committee of the Norwegian Supreme Court that:

\begin{quote}
\textit{“It does not prevent application of Article 5 no. 1 that the respondent disputes that a contract exists. It is assumed to be sufficient to make probable to a certain degree that a contractual obligation in fact exists […].”}
\end{quote}

On the above basis and the facts provided to me, I maintain my conclusion that Norwegian courts would assume jurisdiction over disputes arising under the joint venture agreement\textsuperscript{18}.

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Dr. Anders Ryssdal\smallskip
Oslo, 28 February 2022
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\textsuperscript{17} AR-0028.
\textsuperscript{18} My expert report paragraph 67.
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