INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Peteris Pildegovics and SIA North Star

v.

Kingdom of Norway

(ICSID Case No. ARB/20/11)

DECISION ON BIFURCATION AND OTHER MATTERS

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

Secretary of the Tribunal
Ms. Leah Waithira Njoroge

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12 October 2020

I. Background

1. The present Decision addresses various matters raised by the Parties in correspondence preceding, and in oral submissions during, the first session of the Tribunal on 28 September 2020. It should be read together with Procedural Order No. 1. The Tribunal has issued the Decision separately and in addition to the Procedural Order to enable a fuller explanation of the reasons for some of the rulings which it has made on matters on which the Parties expressed sharply divided views.

2. The present proceedings are brought by Mr. Peteris Pildegovics and SIA North Star ("the Claimants") against the Kingdom of Norway ("the Respondent") under the terms of the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the ICSID Convention") and the Agreement between the Government of the Kingdom of Norway and the Government of the Republic of Latvia on the Mutual Protection of Investments, 1992 ("the BIT").

II. Request concerning Bifurcation

3. The Claimants request that either the Tribunal order bifurcation of the proceedings now or else decide that it will not order bifurcation, should the Respondent so request, after the Respondent has filed any jurisdictional objections it may make. The Claimants maintain that a decision at this stage is necessary in order to ensure that the proceedings are conducted expeditiously and maintain that this is particularly important as they are a small enterprise without the resources available to the Respondent.

4. In that connection, the Claimants contend that the Respondent has been on notice of the existence of the dispute since March 2019. On 8 March 2019, the Claimants sent the Respondent a detailed letter, accompanied by forty-five exhibits outlining their allegations of violation of the BIT. Moreover, the Claimants maintain that the Request for Arbitration filed on 18 March 2020 gives the Respondent sufficient detail regarding the claim to enable it to decide whether or not it wishes to raise jurisdictional objections and to formulate those objections.

5. The Respondent opposes this request. It argues, first, that the Tribunal has no power to make such a decision. According to the Respondent, the Tribunal lacks power to decide on bifurcation at the present stage of the proceedings, due to the provisions of Article 41 of the ICSID Arbitration Rules, the relevant parts of which read as follows:

> *(1) Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial …*
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> …

> *(3) Upon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceedings on the merits. ...*

6. Secondly, the Respondent maintains that, even if the Tribunal has the power to decide at this stage whether or not the proceedings should be bifurcated, it should not exercise that power. 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. The Respondent also contends that the purpose of bifurcation is to ensure the most efficient conduct of the proceedings and that it will not be possible for the Tribunal to make a judgment on that question until it has seen the jurisdictional objections in question. Nor can the Respondent make a proper assessment of what jurisdictional objections it might make until it has seen a full pleading of the Claimants' case.

7. The Tribunal has serious doubts about whether it has the power to make an order of the kind sought by the Claimants at the present stage of the proceedings. Article 41(1) of the ICSID Arbitration Rules gives a respondent the right to raise jurisdictional objections at any time up to the date of filing of the counter-memorial. Moreover, Article 41(3) of the ICSID Arbitration Rules confers on a tribunal the power to suspend the proceedings "upon the raising of a formal objection". To date there has been no formal objection to jurisdiction and the date for filing the counter-memorial has not even been determined.

8. Moreover, even if – in principle – the Tribunal possesses the power to determine at the present stage whether or not the proceedings should be bifurcated, it considers that the situation is not such as to warrant the exercise of that power. Without knowing what jurisdictional objections – if any – are being advanced, it is impossible for the Tribunal to make a sensible assessment of whether bifurcation would facilitate or hinder the effective and expeditions conduct of the proceedings. The Claimants' request is therefore rejected.

9. While the Tribunal is sympathetic to the point made by the Claimants regarding the concern of a small business that it not face unduly protracted proceedings, the Tribunal considers that the more appropriate way of meeting that concern is to set a schedule which is as tight as due process will allow. In that context, the Tribunal notes that the Respondent has already proposed that it should make any request for bifurcation within four weeks of the receipt of the Memorial. The Tribunal has therefore enshrined such a requirement within the timetable annexed to Procedural Order No. 1.

10. The Tribunal also takes the view that the time limit for filing the Memorial should be shorter than the 210 days proposed by the Respondent. Given the detail already contained in the Request for Arbitration, the Tribunal considers that 150 days from the date of Procedural Order No. 1 is sufficient.

III. Examination of Witnesses and Experts

11. The Parties agreed that fact witnesses should not be permitted in the hearing room prior to their own testimony. They also agreed that there should be an exception for witnesses who

are themselves parties and, by logical extension, officers, officials or employees of the Second Claimant or the Respondent if their presence was necessary to enable counsel to receive instructions. They disagreed, however, regarding a proposal from the Claimants that "associates or partners" of a party should similarly be permitted to be present prior to their own testimony. At the initial session, it became clear that this difference related to the right of Mr. Kirill Levanidov to be present in the hearing prior to testifying.

12. According to paragraph 27 *et seq*. of the Request for Arbitration, Mr. Levanidov is a cousin and business partner of the First Claimant. Mr. Levanidov is a United States national and cannot therefore be a claimant in his own right under the BIT. Nor, it appears, is he an officer or employee of the Second Claimant. The Tribunal therefore has difficulty seeing how his presence in the hearing room could be necessary to enable counsel for the Claimants to receive instructions. Accordingly, the Claimants' proposal is, for the time being, rejected and paragraph 18.5 of Procedural Order No. 1 has been drafted in terms which would exclude Mr. Levanidov.

13. Nevertheless, the Tribunal is open to reconsidering this matter if the Claimants, within twenty working days of the receipt of this Order, clarify the precise status of Mr. Levanidov and explain why his presence prior to testifying is necessary.

IV. Confidentiality

14. The Parties also differed on whether there should be a separate confidentiality order and on what that order, or the relevant parts of Procedural Order No. 1, should contain.

15. The Tribunal does not consider it necessary to deal with confidentiality in a separate order and has therefore set out the confidentiality provisions in paragraph 23 of Procedural Order No. 1.

16. The Tribunal has taken note of the Claimants' concerns regarding business secrets but considers that their proposal to create two categories of "confidential information" and "restricted access information" is unnecessary and inappropriate. It does not accept that there should be a category of information which may be disclosed only to counsel and not to those instructing them. It also considers that the Respondent may have its own concerns regarding confidentiality provisions in Norwegian law.

17. The Tribunal has endeavoured, in paragraph 23 of Procedural Order No. 1, to strike a proper balance between the different concerns of the Parties. It draws attention in particular to the provisions of paragraphs 23.6 and 23.7, which make clear that confidential information is to be disclosed only to officials, officers and employees of the Second Claimant or the Respondent if disclosure is necessary for the purposes of the proceedings and that confidential information thus disclosed may not be used for any purpose other than the conduct of the present proceedings.

18. The Tribunal expects the Parties to co-operate in resolving any differences between them regarding whether or not information is properly designated as confidential and not to

trouble the Tribunal with those differences unless they cannot be thus resolved.

19. The Tribunal also draws attention to paragraph 23.8. The Tribunal does not exclude the possibility that a Party might be required by law to disclose confidential information received during the course of the proceedings to a court or other body, including for reasons not directly connected with the present proceedings. The Tribunal considers that it would not be appropriate to lay down at this stage a general rule either permitting or forbidding such disclosure. However, should a Party consider that it has such an obligation, it should first inform the Tribunal which will then rule on the matter after hearing the other Party.

V. Production of Documents

20. The Claimants request that the Tribunal provide for a round of document disclosure on jurisdictional matters in the event of bifurcation.

21. The Tribunal is sympathetic to the Claimants' proposal that there should be such a round provided that it is strictly confined to documents relevant to jurisdiction. To avoid over-complication of Annex B to Procedural Order No. 1, the Tribunal has not laid down a separate timetable for such a round. Instead it will be determined if and when a decision to bifurcate is made.

For and on behalf of the Tribunal,

[signed]

Sir Christopher Greenwood
President of the Tribunal
Date: 12 October 2020