



**Savoie  
Laporte**

THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE No. ARB/20/11

**PETERIS PILDEGOVICS and SIA NORTH STAR**

CLAIMANT

**V.**

**THE KINGDOM OF NORWAY**

RESPONDENT

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**CLAIMANTS' OBSERVATIONS ON RESPONDENT'S  
APPLICATION FOR BIFURCATION**

**6 May 2021**

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## I. INTRODUCTION

1. Pursuant to the Tribunal's Procedural Order No. 1, Claimants hereby respond to the application for bifurcation made by Respondent on 8 April 2021 (the "**Application**").
2. Claimants respectfully request that the Tribunal reject the Application on the ground that bifurcation as sought by Norway would be detrimental to procedural efficiency and fairness.

## II. THE APPLICABLE FRAMEWORK

3. Claimants acknowledge the Tribunal's general power to regulate the proceedings under Article 44 of the ICSID Convention, which includes the power to order bifurcation when justified by considerations of procedural economy and fairness.<sup>1</sup>
4. However, as noted by the *Siag* ICSID tribunal, it is "*not ... the usual practice*"<sup>2</sup> to bifurcate part of the merits from damages in ICSID proceedings. Such bifurcation should therefore only be ordered when a departure from usual practice is justified in the circumstances of a case.
5. According to ICSID caselaw<sup>3</sup> (as usefully restated in Proposed ICSID Rule 44(2)<sup>4</sup>), "*in determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether:*

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<sup>1</sup> See e.g., *Eco Oro Minerals Corp v. Republic of Colombia*, ICSID Case No ARB/16/41, Procedural Order No. 2, 28 June 2018, **CL-0364**, para. 50 (where the tribunal held that in deciding to bifurcate or not it should "determine what will best serve the Parties and the sound administration of justice, in particular with respect to procedural efficiency"); *Emmis et al v. Hungary*, ICSID Case No ARB/12/2, Decision on Respondent's Application for Bifurcation, 13 June 2013, **CL-0365**, para. 48. Proposals for Amendment of the ICSID Rules – Working Paper 2, Volume 1, March 2019, Arbitration Rules, **CL-0366**, para. 292 ("*[t]he consideration whether the facts on the basis of which the preliminary objection is based are too intertwined with the merits is covered by the two other considerations concerning Procedural Economy*").

<sup>2</sup> *Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID ARB/05/15, Procedural Order No. 3, reprinted in part in the Award of 1 June 2009, **CL-0367**, para. 116.

<sup>3</sup> *Rand Investments v. Serbia*, ICSID Case No. ARB/18/8, Procedural Order No. 3, 24 June 2019, **CL-0368**, paras. 12-13; *LSG Building Solutions GmbH and others v. Romania*, ICSID Case No. ARB/18/19, Procedural Order No. 3, 9 October 2019, **CL-0369**, paras. 36 and 57; *Gran Colombia v. Colombia*, ICSID Case No. ARB/18/23, Procedural Order No. 3, 17 January 2020, **CL-0370**, para. 25; *The Carlyle Group and others v. Morocco*, ICSID Case No. ARB/18/29, Procedural Order No. 4, 20 January 2020, **CL-0371**, para. 66; *Westwater Resources v. Turkey*, ICSID Case No. ARB/18/46, Procedural Order No. 2, 28 April 2020, **CL-0372**, para. 15; *Eco Oro Minerals Corp v. Republic of Colombia*, ICSID Case No ARB/16/41, Procedural Order No. 2, 28 June 2018, **CL-0364**, para. 49.

<sup>4</sup> Proposals for Amendment of the ICSID Rules – Working Paper 1, Volume 3, 2 August 2018, Arbitration Rules, **CL-0373**, para. 393; Proposals for Amendment of the ICSID Rules – Working Paper 4, Volume 1, February 2020, Arbitration Rules, **CL-0034**, p. 50.

- (a) *bifurcation would materially reduce the time and cost of the proceeding;*
- (b) *determination of the questions to be bifurcated would dispose of all or a substantial portion of the dispute; and*
- (c) *the questions to be addressed in separate phases of the proceeding are so intertwined as to make bifurcation impractical.”*

6. With respect to the first criterion, empirical research has shown that bifurcated proceedings do not, on average, bring benefits as regards timeliness and cost. According to a study carried out in 2011 based on a review of 174 ICSID cases, bifurcated proceedings took on average 3.62 years to complete, while non-bifurcated proceedings took only 3.04 years.<sup>5</sup> An updated version of the same study published in 2019 based on a review of 38 ICSID cases came to a similar conclusion. It found that bifurcated proceedings had taken on average four years and three months to conclude, against three years and two months for non-bifurcated proceedings.<sup>6</sup> Hence, on average, the effect of bifurcation is to *increase* the time of an ICSID proceeding, not to reduce it.

7. With respect to the second criterion, the latter study also noted that bifurcation was associated with a reduction in the time of the proceedings when the objection underlying the request for bifurcation (for example, an objection to jurisdiction) was successful, while it had the opposite effect when the objection was unsuccessful. For example, in cases where the Tribunal ordered bifurcation of the jurisdictional phase, the average duration of the case was two years and four months where the Tribunal ultimately declined jurisdiction, and five years and two months where it accepted jurisdiction and proceeded on the merits through a second phase.<sup>7</sup>

8. Two conclusions can be drawn from this empirical research as to the effects of bifurcation on procedural efficiency:

- a. On average, bifurcation does not reduce, but rather increases the time (and presumably the cost) of ICSID proceedings.
- b. Bifurcation is only likely to favour procedural efficiency in cases where the

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<sup>5</sup> L. Greenwood, “Does Bifurcation Really Promote Efficiency?”, *Journal of International Arbitration*, Kluwer Law International, 2011, **CL-0374**, pp. 105-111.

<sup>6</sup> L. Greenwood, “Revisiting Bifurcation and Efficiency in International Arbitration Proceedings”, *Journal of International Arbitration* 36, no. 4, 2019, **CL-0375**, pp. 421-430.

<sup>7</sup> *Ibid.*

dispute can be disposed of after the initial phase. When a bifurcated dispute proceeds to the second phase, the time (and presumably the cost) of the proceedings increases dramatically.

9. It should follow from these findings that an ICSID tribunal should approach any request for bifurcation with skepticism, given that experience has shown that bifurcation more often than not fails to advance the goal of procedural economy.

10. Given that bifurcation is likely to be procedurally efficient only where a case can be disposed of after the first phase, a decision to bifurcate should at a minimum require an understanding of how the applicant proposes to dispose of the matter in a single phase (or at least significantly reduce the scope of issues to be considered in the later phase). The Tribunal has expressed a similar view in its Decision on Bifurcation and Other Matters of 12 October 2020, where it stated that “*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 expeditious conduct of the proceedings*”.<sup>8</sup>

11. It should be noted at the outset that, while assuring the Tribunal that bifurcation would be procedurally efficient in this case, Norway has failed to provide the merest hint of the jurisdictional objections it would raise or the arguments it wishes to present on the merits. This effectively prevents the Tribunal from passing any judgment as to the likelihood that Norway’s arguments might allow for disposition or even simplification of the case after an initial bifurcated phase.

### **III. BIFURCATION WILL NOT PROMOTE PROCEDURAL ECONOMY IN THIS CASE**

12. In the Claimants’ respectful submission, an order for bifurcation as sought by the Respondent would severely impair the efficiency of these proceedings, for the following reasons:

- (A) bifurcation would cause unnecessary delay and increase the cost of this arbitration, and it is unknown whether bifurcation may substantially simplify issues in dispute;

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<sup>8</sup> Decision on Bifurcation and Other Matters, 12 October 2020, para. 8

- (B) jurisdiction and merits are clearly intertwined with damages and quantum;
- (C) the alleged complexity of Claimants' damages theory is not established and cannot be an overriding factor in this case; and
- (D) finally, the manifest disproportion of resources available to Claimants and Respondent, considering that Claimants are a small enterprise and a physical person, should lead the Tribunal to resolve any doubt in favour of Claimants and against bifurcation.

**A. BIFURCATION WILL CAUSE UNNECESSARY DELAY AND ADDITIONAL COSTS AND IT IS UNKNOWN WHETHER IT MAY SUBSTANTIALLY SIMPLIFY ISSUES IN DISPUTE**

13. If granted, the Respondent's Application would in all likelihood increase the time and cost of these proceedings.

14. Norway has, as noted, provided no indication of the jurisdictional objections and defenses it would put forward in a first phase dedicated only to jurisdiction and liability. Without any hint of Norway's positions, the Tribunal of course has no way to conclude that the case is likely to be disposed of (or even significantly narrowed) through such an initial bifurcated phase. Any chances of success Norway may have as to jurisdiction or the merits are not only hypothetical, but completely unknown at this stage.

15. In that light, it cannot be excluded (and it should be presumed) that the Claimants will ultimately be able to present their entire case to the Tribunal, which in bifurcated proceedings would require two phases instead of one. The empirical evidence unmistakably shows that such a scenario would involve a substantial increase in the time and cost of these proceedings.

16. Having regard to the particular circumstances of this case, it should also be noted that a large number of factual issues pleaded by Claimants regarding jurisdiction and the merits are also relevant to the assessment of their damages. Consequently, should the proceedings be bifurcated, and assuming that the case would proceed to the second phase, the very same facts will need to be pleaded twice. This would entail an obvious duplication of cost and effort for both parties and for the Tribunal.

17. For example, a key factual issue in this case relates to the size and spread of the snow crab population in relevant areas of the Barents Sea. This issue is relevant to the merits of the case since it demonstrates the lack of ecological or economic justification for Norway's snow crab quotas and supports Claimants' submission that such quotas constitute an arbitrary measure in breach of the BIT.<sup>9</sup> The same issue is also relevant to damages, to the extent that an assessment of North Star's expected catches in the projection period requires consideration of the availability of snow crab in the relevant fishing areas.<sup>10</sup>

18. If the proceedings are bifurcated, Dr. Brooks Kaiser, the expert who has testified on the topic of snow crab populations, would have to present two reports and be available for cross-examination at both hearings, all on the same or substantially similar factual issues. Dr. Kaiser's report goes to both the amount of snow crab available for Claimants in the Barents Sea<sup>11</sup> and to the fact that Norway's snow crab quota is arbitrary, without any plausible scientific basis<sup>12</sup> and lacking in transparency.<sup>13</sup>

19. To give another example, the organisation and operation of Claimants' investments are relevant to jurisdiction, notably with respect to the question of whether Claimants have investments in the territory of Norway.<sup>14</sup> They are also obviously relevant to damages, insofar as Claimants are claiming lost profits sustained by North Star and provided that these can only be assessed having regard to the company's operations and performance.<sup>15</sup>

20. The organisation and operation of Claimants' investments are primarily evidenced through the witness statements of Mr. Pildegovics and Mr. Levanidov. These witness statements are plainly relevant to jurisdiction and liability as well as damages. Both witness statements include testimony pertinent to Claimants' damages, including with regards to the productivity of North Star's vessels and other factors that serve to establish the extent of Claimants' fishing capacity.<sup>16</sup> Both witness statements also present facts related to

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<sup>9</sup> Claimants' Memorial, paras. 692-695, 733-752.

<sup>10</sup> *Ibid*, para. 925-1019.

<sup>11</sup> Expert Report of Dr. Brooks Kaiser, paras. 48-55, 71-78.

<sup>12</sup> *Ibid*, paras. 94-96.

<sup>13</sup> *Id.*, paras. 29, 78, 83.

<sup>14</sup> Claimants' Memorial, para. 581.

<sup>15</sup> *Ibid*, paras. 213-216, 541, 926-940, 952-966, 971.

<sup>16</sup> Witness Statement of Kirill Levanidov, 11 March 2021, paras. 19-33, 42-48; Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 20-43, 145-162.

jurisdictional issues, such as the existence of investments in the territory of Norway.<sup>17</sup> With respect to the merits, the witness statements present facts establishing Claimants' legitimate expectations<sup>18</sup> that were both general and specific related to the stability of the investment framework existing in Norway at the time of their investments. They further show the opacity and inconsistency of Norway's actions towards EU vessel owners engaged in the Barents Sea snow crab fishery.<sup>19</sup> If the proceedings are bifurcated and the case is ultimately split in two phases, Mr. Pildegovics and Mr. Levanidov will have to appear before the Tribunal in each one of them and be cross-examined twice on the same or similar factual matters.

21. The joint venture between Mr. Pildegovics and Mr. Levanidov (which Norway considers a "grey area"<sup>20</sup>, despite the abundant testimonial and documentary evidence adduced by Claimants on the subject) is yet another factual topic with very clear overlap across the proposed bifurcated phases. On the one hand, the joint venture is a key component of Claimants' investments in the territory of Norway.<sup>21</sup> On the other hand, the joint venture provided North Star with a guaranteed source of demand for its snow crab harvests, which underpins Claimants' assessment of their lost profits caused by Norway's illegal actions.<sup>22</sup> If the case is bifurcated, Claimants will have no choice but to present evidence related to the joint venture in both phases of the case, which may require not only Mr. Pildegovics and Mr. Levanidov, but also Mayor Knutsen<sup>23</sup> and Dr. Anders Ryssdal<sup>24</sup> to attend two hearings instead of one and undergo two cross-examinations on the same or substantially similar factual issues.

22. In short, while Norway has stated an intent to object to the Tribunal's jurisdiction and can of course be presumed to have arguments to make on liability, virtually nothing is known about these eventual objections and arguments. Hence, there is simply no basis to conclude that the Tribunal's determination of the questions to be bifurcated would dispose

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<sup>17</sup> Witness Statement of Kirill Levanidov, 11 March 2021, paras. 8-55, 68. Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 13-116.

<sup>18</sup> Witness Statement of Kirill Levanidov, 11 March 2021, paras. 23-25, 28-32; **KL-0013; KL-0016; KL-0017; KL-0018; KL-0019; KL-0020; C-0087; C-0088.**

<sup>19</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 184-236.

<sup>20</sup> Norway's Request for Bifurcation, 8 April 2021, para. 11.

<sup>21</sup> Claimants' Memorial, paras. 164-168, 200-242, 276.

<sup>22</sup> Claimants' Memorial, paras. 946-975.

<sup>23</sup> Witness Statement of Geir Knutsen, para. 3.

<sup>24</sup> Expert Report of Dr. Anders Ryssdal, paras. 31-32.

of all or a substantial portion of the dispute, or that a solution could be found without consideration of the full case put forward by the Claimants.

23. Experience in prior ICSID Cases has shown that bifurcation is more often than not procedurally inefficient, and dramatically so in bifurcated cases that ultimately require two separate phases. Claimants have provided but a few examples illustrating why bifurcation would have the same effect in the present case.

24. Contrary to Norway's assertion, bifurcation would not "save time and money for both Parties".<sup>25</sup> Claimants have already spent the time and money needed to build their case on damages. The most that could be said is that bifurcation would grant Norway significantly more time to consider issues of quantum and in that sense, "save time and money" for Norway in the short term. However, this benefit to Norway would come at a heavy cost for Claimants in the form of additional delays and undoubtedly higher costs to pursue this arbitration.<sup>26</sup>

#### **B. THE QUESTIONS TO BE ADDRESSED IN SEPARATE PHASES OF THE PROCEEDING ARE SO INTERTWINED AS TO MAKE BIFURCATION IMPRACTICAL**

25. The jurisprudence of ICSID tribunals<sup>27</sup>, as restated by Proposed ICSID Rule 44(2), requires consideration of whether the questions to be addressed in separate phases of the proceeding are so intertwined as to make bifurcation impractical.<sup>28</sup>

26. As already noted above, numerous factual issues overlap jurisdiction, liability and quantum, making them closely intertwined. Should the case proceed in two phases, the same set of facts will inevitably need to be pleaded and argued in both phases, and several witness will need to be cross-examined twice on the same issues.

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<sup>25</sup> Norway's Request for Bifurcation, 8 April 2021, para. 13.4.

<sup>26</sup> Norway would also have a significantly disproportionate amount of time to consider Claimants' quantum theory (eg 2-3 years) prior to submitting a Counter-Memorial on damages, by comparison to only a few months (as between a Counter-Memorial and Reply on quantum) for Claimants' experts to eventually reply to Norway's position on quantum.

<sup>27</sup> *Eco Oro Minerals Corp v. Republic of Colombia*, ICSID Case No ARB/16/41, Procedural Order No. 2, 28 June 2018, **CL-0364**, para. 49; *LSG Building Solutions GmbH and others v. Romania*, ICSID Case No. ARB/18/19, Procedural Order No. 3, 9 October 2019, **CL-0369**, paras. 36 and 57; *Gran Colombia v. Colombia*, ICSID Case No. ARB/18/23, Procedural Order No. 3, 17 January 2020, **CL-0370**, paras. 25 and 32; *The Carlyle Group and others v. Morocco*, ICSID Case No. ARB/18/29, Procedural Order No. 4, 20 January 2020, **CL-0371**, para. 66; *Westwater Resources v. Turkey*, ICSID Case No. ARB/18/46, Procedural Order No. 2, 28 April 2020, **CL-0372**, para. 15.

<sup>28</sup> Proposals for Amendment of the ICSID Rules – Working Paper 1, Volume 3, 2 August 2018, Arbitration Rules, **CL-0373**, para. 393; Proposals for Amendment of the ICSID Rules – Working Paper 4, Volume 1, February 2020, Arbitration Rules, **CL-0034**, p. 50.



27. As a legal matter, liability and quantum are conceptually intertwined insofar as the Tribunal must determine whether a sufficient causal nexus exists between the State's illegal acts and the damages sustained by a claimant. Because the law requires consideration of the existence of such a nexus, it is certainly practical for a tribunal to consider liability and quantum within the same phase. In that sense, Norway's submission that issues of causation argue *in favour* of bifurcation is at the very least surprising, and apparently based on a misunderstanding of Claimants' submissions on causation and quantum.<sup>29</sup>

28. Norway's statement that Claimants "*address causation on the assumption that each and every one of their claimed breaches is established*"<sup>30</sup> is incorrect. Claimants' quantum calculations stem from the plain fact that their economic operations have been stopped by Norway through a series of well documented actions, none of which has so far been denied by Norway. Claimants have suffered substantial economic losses as the direct result of these actions. The question of liability is whether these actions (or some of them) violated the BIT.

29. However, the quantum of Claimants' losses, which is an economic fact, does not change depending on whether Norway's prohibition of their activities amounted to an illegal expropriation, a breach of the duty to provide equitable and reasonable treatment and protection, a breach of the obligation to provide most favoured nation treatment, or all of the above. Any one of these violations would constitute an internationally wrongful act having caused Claimants' damages, which would suffice to trigger Norway's duty to make full reparation.

30. In that light, the Respondent's arguments that Mr Sequeira's report on damages would become "*of very limited use if any or all of the alleged breaches are not established*" and that "*large swathes of the Claimants' analysis on quantum would [then] become irrelevant*" are unfounded.<sup>31</sup> On the contrary, the entire analysis presented in Mr. Sequeira's report will continue to be relevant insofar as the Tribunal finds a single breach of the BIT, provided that each of the alleged breaches is causally linked to the economic losses suffered by North Star.

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<sup>29</sup> In particular, the territorial nexus of an investment and the territory in which harm has been suffered are interrelated questions which pertain to not only jurisdiction, but also causation and damages, as shown by *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, **CL-0207**, paras. 136, 154, 348, 523. See also Claimants' Memorial, para. 575.

<sup>30</sup> Norway's Request for Bifurcation, 8 April 2021, para. 8

<sup>31</sup> *Ibid.*

31. At any rate, the fact that Norway apparently wishes to debate causation strongly militates against bifurcation, since such a debate would only increase the Tribunal's interest in considering liability and quantum issues together within the same phase of the proceedings.

32. Finally, since Norway has failed to provide any indication of the jurisdictional objections and defenses it would put forward in an initial bifurcated phase, there is simply no tangible ground upon which to conclude that the matters to be debated during this first phase would be sufficiently distinct from those to be addressed in the later phase. By failing to explain its position on jurisdiction and the merits, Norway cannot be granted the benefit of the doubt that merits and jurisdiction can be easily separated from damages. In any event, as shown above, they clearly cannot and regardless of Norway's eventual positions, factual and legal issues arising in two proposed bifurcated phases would remain substantially intertwined.

### **C. THE ALLEGED COMPLEXITY OF CLAIMANTS' DAMAGES CASE DOES NOT SUPPORT BIFURCATION**

33. The complexity of a claim for damages does not, on its own, constitute an argument in favour of bifurcation. The relevant question remains one of procedural economy: even in cases where an assessment of damages demands complex analysis, it may still be more efficient to consider damages within a single phase along with issues of liability.

34. Norway has not shown in what way Claimants' damages theory is particularly complex as compared with other ICSID cases. Claimants are claiming economic losses flowing from the fact that, as the direct result of Norway's unlawful acts, they have been prevented from operating their snow crab fishing business. These losses are calculated using financial models commonly encountered in ICSID cases. As is often the case, these models must rely on certain assumptions about an alternative scenario in which Norway would not have breached the BIT (the "but for" scenario), which serves to reveal the extent of the losses suffered by claimants and the result of such breaches. The Respondent has not explained how these models would somehow become simpler if the case were to be bifurcated.

35. The Respondent has cited two ICSID decisions in support of its argument that the "*burdens*" and "*costs*" of going through complex damage submissions would militate in favour of bifurcation. However, upon closer consideration, neither of these decisions stand for this proposition.

36. First, it is important to consider the circumstances in which bifurcation was ordered in *Lidercon, SL v. Republic of Peru*. In that case, the tribunal decided to bifurcate liability and quantum after the Parties had submitted their written pleadings on both issues. The parties were then asked to comment on the Tribunal's proposal to bifurcate in advance of a scheduled hearing on the merits. When the Tribunal suggested bifurcation, it had access to the parties' arguments on all aspects of the case and was therefore in a position to judge whether bifurcation would support procedural efficiency at this advanced stage in the proceedings.<sup>32</sup> The *Lidercon* tribunal ultimately dismissed all claims on the merits without considering damages, suggesting that bifurcation was indeed procedurally efficient in that case.<sup>33</sup>

37. The Tribunal in the present case of course finds itself in a very different position from the *Lidercon* tribunal. Not only has the Tribunal no access to a full record of pleadings from both parties, it has virtually no indication of the positions intended to be adopted by the Respondent. As argued above, unlike the *Lidercon* tribunal, the Tribunal has no tangible basis upon which to conclude that a quantum phase will not likely be needed to resolve this dispute.

38. The reference to *Gran Colombia Gold. Corp. v. Republic of Columbia* is similarly unconvincing. In that case, the tribunal ordered bifurcation of a single well-defined jurisdictional objection, namely Colombia's denial of benefits objection under the Canada-Colombia FTA.<sup>34</sup> While the Tribunal made comments on the possibility of a bifurcation of damages, and while Respondent argued for such bifurcation, the *Gran Colombia* tribunal did not in fact order it.<sup>35</sup> At most, the *Gran Colombia* case shows that if a respondent puts forward a substantial jurisdictional objection with specificity, it may be possible, based on the seriousness of this objection and the potential benefits of bifurcation to procedural economy, that an ICSID tribunal may grant bifurcation. This reasoning however does not support Norway's Application.

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<sup>32</sup> *Ibid*; *Lidercon S.L. v. Republic of Peru*, ICSID Case No. ARB/17/9, Award, 6 March 2020, **CL-0376**, para. 25 ; *Lidercon v. Peru*, Case Procedural Details, ICSID website, **CL-0377**.

<sup>33</sup> *Lidercon S.L. v. Republic of Peru*, ICSID Case No. ARB/17/9, Award, 6 March 2020, **CL-0376**, para. 283.

<sup>34</sup> *Gran Colombia v. Colombia*, ICSID Case No. ARB/18/23, Procedural Order No. 3, 17 January 2020, **CL-0370**, paras. 32-33.

<sup>35</sup> *Gran Colombia v. Colombia*, ICSID Case No. ARB/18/23, Procedural Order No. 3, 17 January 2020, **CL-0370**, paras. 35-36.

#### D. THE CONSIDERABLE DISPROPORTION BETWEEN THE PARTIES' ECONOMIC RESOURCES SHOULD BE TAKEN INTO ACCOUNT AS A MATTER OF PROCEDURAL FAIRNESS

39. Considerations of procedural efficiency in international adjudication require that each party has an adequate opportunity to make its case.<sup>36</sup> The fact that the Kingdom of Norway has disproportionately more resources to pursue this arbitration than a small Latvian enterprise is a circumstance that requires particular attention, to ensure that any decision taken by the Tribunal effectively maintains Claimants' access to justice.

40. In its *Opinion 1/17*, the Court of Justice of the European Union (**CJEU**) held that the ISDS mechanism contained in CETA is compatible with Article 47 of the EU Charter of Fundamental Rights so long as ISDS is financially accessible to claimants such as individuals or small and medium-sized enterprises.<sup>37</sup> The CJEU noted that this was the case regarding CETA because it includes particular commitments and procedural arrangements notably financial arrangements for SMEs.<sup>38</sup> These principles set out in *Opinion 1/17* reflect rules of international law pertaining to access to justice for SMEs and individuals that this Tribunal must take into consideration in its interpretation and application of the arbitration mechanism found in the Latvia-Norway BIT.<sup>39</sup>

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<sup>36</sup> See, e.g., *Canfor Corp. v. United States*, UNCITRAL (1976 Rules), Decision on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of the Proceedings, 23 January 2004, **CL-0378**, para. 52.

<sup>37</sup> CJEU, *Opinion 1/17*, 30 April 2019, **CL-0379**, para. 214 (“*It is necessary, consequently, in order to assess the compatibility of Section F of Chapter Eight of the CETA with Article 47 of the Charter, to examine whether the provisions, contained in Section F and in the texts that determine the effect of Section F, on improving the financial accessibility of the envisaged tribunals for natural persons and for small and medium-sized enterprises, represent commitments that a body of rules to ensure the level of accessibility required by Article 47 of the Charter will be put in place as soon as those tribunals are established.*”).

<sup>38</sup> CJEU, *Opinion 1/17*, 30 April 2019, **CL-0379**, paras. 217, 218 (“*However, Statement No 36 states that ‘there will be better and easier access to this new court for the most vulnerable users, namely [small and medium-sized enterprises] and private individuals’ and provides, to that end, that the ‘adoption by the Joint Committee of additional rules, provided for in Article 8.39.6 of the CETA ... will be expedited so that these additional rules can be adopted as soon as possible’ and that, ‘irrespective of the outcome of the discussions within the Joint Committee, the Commission will propose appropriate measures of (co)-financing of actions of small and medium-sized enterprises before that Court’. It is clear that, by means of that Statement, the Commission and the Council have given a commitment to implement, rapidly and adequately, Article 8.39.6 of the CETA and to ensure the accessibility of envisaged tribunals to small and medium-sized enterprises, even if work within the CETA Joint Committee were to be fruitless.*”).

<sup>39</sup> The principles of interpretation applicable to the Latvia-Norway BIT require the Tribunal to take into account relevant rules of international law applicable in the relations between Latvia and Norway, as per the principles found in Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties. The rules found in *Opinion 1/17* on access to justice for SMEs and physical persons in investment treaty arbitration are such rules of international law applicable in the relationship between Norway and Latvia. Indeed, Norway and Latvia are both party to the 1994 Agreement on the European Economic Area, which integrates EU law and CJEU decisions pursuant to the principle of homogeneity of interpretation between substantial similar provisions: Agreement on the European Economic Area, 1994, **CL-0380**, Article 6; Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, 1994, **CL-0381**, Article 3(2); see also, EFTA Court, *EFTA Surveillance Authority v. The Kingdom of Norway*, Case E-2/06, Judgment, 26 June 2007, **CL-0382**, para. 59; ECJ, *Margarethe Ospelt v. Schlössle Weissenberg Familienstiftung*, Case C-452/01, Judgment, 23 September 2003, **CL-0383**, para. 29. Furthermore, since Article 47 of the

41. The practice of States such as France,<sup>40</sup> the Netherlands,<sup>41</sup> Canada, Vietnam and Singapore<sup>42</sup> further supports the existence of a specific right of access to justice for SMEs and physical persons in international and arbitration proceedings.

42. The Tribunal has itself confirmed the relevance of the disproportion of resources between the parties to ensuring procedural fairness and efficiency.<sup>43</sup>

43. Therefore, should there be any doubt, the balance of procedural economy should be resolved in favor of a small enterprise and physical person against a State, especially in the presence of significantly disproportionate resources, as is undoubtedly the case here.

#### IV. CLAIMANTS' CONCLUSIONS AND PROPOSED CALENDAR

44. For the reasons presented above, Claimants oppose Norway's Application to bifurcate issues of jurisdiction and liability on the one hand, and issues of quantum on the other. Norway has failed to make the case that such bifurcation would bring any benefits in terms of procedural economy and procedural fairness. Claimants have shown that how it would most likely have the opposite effect.

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EU Charter of Fundamental Rights, **CL-0384**, which underpins the CJEU's ratio on access to justice in *Opinion 1/17*, is substantially identical to Article 6(1) of the European Convention on Human Rights (which is directly applicable to both Norway and Latvia), **CL-0385**, then the relevant principles of *Opinion 1/17* on access to justice are a relevant rule of international law applicable to both Norway and Latvia, and thus relevant to proceedings under the Latvia-Norway BIT. Finally, there is no question that rulings of the CJEU are rules of international law for the purposes of VCLT Article 31(3)(c): *Landesbank Baden-Württemberg et al. v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection, 25 February 2019, **CL-0386**, para. 158.

<sup>40</sup> French courts have judged that the insolvent litigant has a right of access to justice, and that the arbitrator himself has the obligation to guarantee this right: French Court of Cassation, Case n° 11/27770, 28 March 2013, **CL-0387**; Court of Appeal of Paris, Case n° 12/12953, 26 February 2013, **CL-0388**.

<sup>41</sup> The Netherlands adopted a new model BIT which contains a specific reference to small and medium-sized enterprises regarding disputes resolution: Netherlands Model Investment Agreement, 22 March 2019, **CL-0389**, Article 19(7) ("*If two or more claims have been submitted separately to arbitration under this Article and the claims have a question of law or fact in common and arise out of the same events or circumstances, either party to the dispute may seek a consolidation order at either Tribunal. After giving all disputing parties the opportunity to be heard, the Tribunal shall in principle accept such request for consolidation, especially where the claimants are small and medium sized enterprises.*"). [Emphasize Added]

<sup>42</sup> EU-Singapore Investment Protection Agreement, 19 October 2018, **CL-0390**, Article 13.2; Comprehensive and Economic Trade Agreement, 30 October 2016, **CL-0391**, Articles 8.39(6), 8.19-3; EU-Vietnam Free Trade Agreement, 30 June 2019, **CL-0392**, Chapter 14, Article 14.1. CETA includes for example a provision which proposes holding consultations through videoconference for SMEs. See Comprehensive and Economic Trade Agreement, 30 October 2016, **CL-0391**, Article 8.19-3. See also judgment of the Supreme Court of Canada, including the majority judgment, the concurring opinion of Justice Brown, as well as the dissenting reasons of Justice Côté, all recognizing that certain steps must be taken to ensure access to justice in the arbitration context: *Uber v. Heller*, 2020 SCC 15, 26 June 2020, **CL-0393**.

<sup>43</sup> Decision on Bifurcation and Other Matters, 12 October 2020, para. 9 ("*the Tribunal is sympathetic to the point made by Claimants regarding the concern of a small business that it not face unduly protracted proceedings*").

45. Claimants note that Norway has also failed to propose a procedural calendar in its Application, even though Annex B of Procedural Order No. 1 provides that at the time of deciding on a request for bifurcation, the Tribunal would set a new procedural schedule.

46. Claimants can only assume that Norway has already begun work on its Counter-Memorial.<sup>44</sup> Norway's submission of a very brief Application for bifurcation should not, in and of itself, allow Norway to benefit from an extended timeline for submission of its Counter-Memorial, thereby unduly delaying these proceedings.

47. Claimants therefore propose that Norway be given 180 days calculated from the filing of Claimants' Memorial on 11 March 2021 to submit its Counter-Memorial on the merits and damages, including any jurisdictional objections. Claimants submit that the remaining steps and timelines found in the section "*In the event that no request for bifurcation is made*" found in Annex B of Procedural Order No. 1 should be maintained.

## V. RELIEF SOUGHT

48. For the above reasons, Claimants respectfully request that the Tribunal:

- Dismiss the Respondent's Application for Bifurcation; and
- Set the procedural schedule as proposed in Section IV of this submission, *i.e.*:
  - The Respondent shall submit its Counter-Memorial on the merits and damages (including any jurisdictional objections) within 180 days from 11 March 2021; and
  - The remaining steps and timelines found in the section entitled "*In the event that no request for bifurcation is made*" of Annex B of Procedural Order No. 1 shall be maintained.

Respectfully submitted,

6 May 2021

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<sup>44</sup> Indeed, Norway has been on notice since 9 April 2021 of Claimants' position on the procedural calendar presented in this submission: Letter of Claimants to Respondent, 9 April 2021, **C-0183**.

[signed]

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