

**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. 2**

**PUBLICATION OF REQUEST FOR ARBITRATION**

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***Members of the Tribunal***

Sir Christopher Greenwood, GBE, CMG, QC, *President*  
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

21 December 2020

## I. BACKGROUND

1. By paragraph 23.9 of Procedural Order No. 1 (“**PO1**”) the Tribunal provided that:

*The Parties consent to the publication by ICSID of the award and any order of decision of the Tribunal, as well as the request for arbitration and the pleadings of the Parties provided that any confidential information is redacted before publication.*

2. Pursuant to this provision, on 20 October 2020 the Secretary of the Tribunal wrote to the Parties to inform them that ICSID proposed to publish on its website “by 2 November 2020” the request for arbitration (the “**RFA**”), PO1 and the Tribunal’s Decision on Bifurcation and Other Matters (the “**Decision**”).
3. On 27 October 2020, the Claimants wrote to the Secretary stating that they had already notified the Respondent of the redactions which they considered necessary to the RFA, that “no objections were made by Respondent” and that a redacted version of the RFA had already been made publicly available on a website. Those redactions concerned (a) the identification of [REDACTED] and (b) the amount claimed in the proceedings. The Claimants gave their consent to publication of the RFA in the same redacted form on the ICSID website. The Claimants also indicated that PO1 and the Decision contained no confidential information and therefore could be published in full. ICSID posted the redacted RFA and the full texts of the Order and the Decision on its website on 2 November 2020.
4. The Respondent wrote to ICSID on 5 November 2020. In its letter, the Respondent stated that:

*The redactions to the [RFA] proposed by the Claimants, and made in the version published on the ICSID website, concern matters of public interest. Norwegian political bodies and taxpayers have a legitimate interest in knowing what are the issues in dispute, what is at stake, the amount claimed and who is involved in the case.*

*This case is being defended at public expense, which also means that we have had to provide detailed information into the government budget processes for fiscal years 2020 and 2021. Furthermore, in conformity with our constitutional duties we have already provided briefings and documentation to the Council of Ministers, to Parliament and to various government bodies, where the amount in dispute has been furnished. Verbatim records of Parliamentary meetings will be published on the website of the Parliament in due course, which will include the amount being claimed.*

The Respondent challenged both redactions proposed by the Claimants.

5. At the invitation of the Tribunal, the Claimants replied on 19 November 2020. The Claimants expressed their concern that, in the passage of its letter of 5 November 2020 quoted above, the Respondent appeared to indicate that it would publish the amount of the claim before the Tribunal had ruled on whether this information was confidential and asked the Tribunal to remind the Parties of their obligation to treat as confidential any information which a Party had designated as confidential information until the Tribunal had ruled upon that designation.

6. The Claimants further maintained that the Respondent's requests in its letter were time barred under the principle in ICSID Arbitration Rule 27, as well as procedurally improper, being in breach of paragraph 23.5 of PO1, and that the amount of the claim and the identity of [REDACTED] were business confidential information within paragraph 23.1 and 23.2 of PO1. Finally, the Claimants contended that the Respondent's conduct "*will be a factor to award costs against Respondent in the Tribunal's award*".
7. The Respondent replied on 24 November 2020. In its letter the Respondent maintained that the Claimants had failed to establish that the amount of the claim was business confidential information since the amount was an estimated figure, described in the RFA as "*the total economic value of their snow crab harvesting operation*", so that it was unclear how a competitor would be able to deduce from that figure any confidential information regarding the Claimants' business. The Respondent also contended that the identity of [REDACTED] and its status as [REDACTED] of Seagourmet AS (a company to which SIA North Star was described in the RFA as the "*official provider*") was in the public domain and thus could not constitute business confidential information.
8. The Respondent denied that its objection to the redactions was untimely or that it had been put forward in a procedurally improper manner. The Respondent also stated that "*Norway will comply with all its obligations under PO-1, including the procedure under 23.8, which is applicable in circumstances where disclosure is required by law*".
9. In their final letter, dated 26 November 2020, the Claimants took note of the assurance given by the Respondent (and set out in the preceding paragraph), in light of which they withdrew their request that the Tribunal remind the Parties of their obligations under PO1. They continued, however, to maintain that the Respondent was in breach of PO1 paragraph 23.5 and that its request to publish the RFA without redactions was out of time. According to the Claimants, the Respondent had ignored its obligation, under PO1 paragraph 23.5, to endeavour to reach agreement with the Claimants regarding the issue of confidentiality.
10. The Claimants maintained that the amount of the claim was properly regarded as business confidential information, because its publication would enable the Claimants' competitors to deduce information about the Claimants' business model and adapt their own positions to the detriment of the Claimants. With regard to [REDACTED] the Claimants asserted that the [REDACTED] website, on which [REDACTED] had been identified as a strategic partner of Seagourmet AS, was an unreliable source and that, in any event, the "*redaction of the identity of [REDACTED] concerns a contract with North Star, not with Seagourmet*".

## **II. THE ISSUES BEFORE THE TRIBUNAL**

11. The Claimants having dropped the request for the Tribunal to remind the Parties of their obligations under PO1 in case the Respondent might disclose information before a ruling had been made (see paragraphs 5, 8 and 9, above), there are five matters which require decision. These are most conveniently summarized in the final paragraph of the Claimants' letter of 26 November 2020, which reads as follows:

*For the above reasons, Claimants request that the Tribunal:*

- *Find that the requests found in Respondent's letter of 5 November 2020 are barred as untimely;*
- *Find that the amount of the claim is business confidential information within the terms of Procedural Order No. 1;*
- *Find that the identity of [REDACTED] as a contractual partner of SIA North Star is business confidential information within the terms of Procedural Order No. 1;*
- *Find that Respondent's letter of 5 November 2020 was submitted to the Tribunal in breach of paragraph 23.5 of Procedural Order No. 1;*
- *Find that Respondent's application of 5 November 2020 was made in a procedurally improper manner and that such conduct will be a factor to award costs against Respondent in the Tribunal's award.*

12. The Tribunal will consider each of these requests in turn. Before doing so, however, it is necessary, first, to examine the legal standard to be applied and, secondly, to review certain aspects of the correspondence between the Parties (as well as their correspondence with the Tribunal) since these bear on the first, fourth and fifth requests.

### **III. THE LEGAL STANDARD TO BE APPLIED**

13. PO1 paragraph 23.1 defines "confidential information" as

*... information designated as confidential by a Party on the grounds that it is:*

*23.1.1 business confidential information relating to a Party;*

*23.1.2 business confidential information belonging to a third party;*

*...*

14. PO1 paragraph 23.2 defines "business confidential information" to include:

*23.2.1 trade secrets;*

*23.2.2 financial, commercial, scientific or technical information that is consistently treated as confidential by the Party or third party to which it relates, including pricing and costing information, marketing and strategic planning documents, market share data, or detailed accounting or financial records;*

*23.2.3 information the disclosure of which could result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, the Party or third party to which it relates; and*

*23.2.4 information the disclosure of which could interfere with ongoing or future contractual or other negotiations of the Party or third party to which it relates.*

15. Paragraph 23.3 of PO1 provides that “[i]nformation which is already in the public domain may not be designated as confidential for the purposes of these proceedings”.
16. Paragraph 23.5 of PO1 lays down a procedure for resolving disputes between the Parties regarding whether information has properly been designated as confidential:

*If the other Party wishes to contest the designation of information as confidential, it shall inform the Party making that designation within ten working days of receipt of the material so designated. In that event, the Parties shall endeavour to reach agreement. If after a further ten working days they have been unable to do so, the matter shall be referred to the tribunal for decision. Until the Tribunal gives its decision, both Parties shall treat the information concerned as confidential.*

17. Paragraph 23.9, concerning publication on the ICSID website, has already been set out at paragraph 1, above. Two other provisions also require attention. Paragraph 23.8 of PO1 states that “[i]f a Party considers that it is required by law to make disclosure of confidential information to a court or other body, it shall first consult the Tribunal”. Paragraph 18 of the Decision states that “[t]he Tribunal expects the Parties to cooperate 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.”

18. Finally, it is appropriate to quote ICSID Arbitration Rule 27, which states:

*Waiver*

*A party which knows or should have known that a provision of ... these Rules, or of any other rules or agreement applicable to the proceedings, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed – subject to Article 45 of the Convention – to have waived its right to object.*

#### **IV. CORRESPONDENCE BETWEEN THE PARTIES**

19. While the correspondence between the Parties and ICSID has been summarized in paragraphs 3 to 10, above, the Tribunal considers that it is also necessary to review certain items of *inter partes* correspondence concerning publication and redaction of the RFA.
20. In a letter of 28 August 2020, the Claimants notified the Respondent of their “*intention to make public both the notice of dispute of 8 March 2019 and the Request for Arbitration of 18 March 2020.*” At this stage, the initial session of the Tribunal had not yet been held and the Parties were still discussing drafts of a possible order on confidentiality. The Claimants specified the two redactions which they proposed, and which have already been summarized above. By an email of 31 August 2020, the Claimants requested the Respondent’s views on the proposed redactions by 4 September 2020.

21. The Respondent replied on 3 September 2020 expressing surprise that the Claimants now wished to make public information which they had previously sought to keep confidential. The Respondent observed that “*the proposed redactions are not necessary from our perspective, in particular we see no reason for withholding the size of the claim from public disclosure*”.
22. On 4 September 2020, the Claimants replied defending their desire to make the RFA and the Notice of Arbitration public now that the case had been registered by ICSID. They commented:

*As for the amount of the claim, it is standard that this aspect of claims can be redacted at the request of the claimant, when information is made public. Specifically, it also goes not only to the Claimants’ business model, but also to the value of the enterprise, which is clearly market-sensitive and competitive information. ...*

*Claimants assume that Respondent has made comments rather than a formal objection to the disclosure of the notice of dispute and Request for Arbitration in the manner proposed. To the extent Claimants have misunderstood and Respondent was actually making an objection to the proposed disclosure of those two documents by Claimants, Claimants request that Respondent correct the Claimants’ understanding by 7 September 2020 at the latest.*

23. The Tribunal is not aware of any response and the text of the RFA, as redacted by the Claimants, was published on the italaw website.
24. The initial session of the Tribunal was held by video call on 28 September 2020 and PO1 was issued on 12 October 2020.

## **V. DECISION OF THE TRIBUNAL**

### ***(1) Was the Respondent too Late in Raising Objections to the Proposed Redactions?***

25. According to the Claimants, the Respondent’s objections to the Claimants’ proposed redactions to the RFA was made too late.
26. The Claimants maintain that the Respondent was placed on notice that the Claimants intended to publish the RFA with redactions on 28 August 2020. When the Respondent replied, on 3 September 2020, that it considered the redactions were “*not necessary*”, the Claimants, in their letter of 4 September 2020, sought clarification as to whether the Respondent actually objected to the publication of the RFA as redacted and received no reply. The Claimants assert that they therefore believed on good grounds that the Respondent had consented to the redactions proposed. They also maintain that the failure to object until 5 November 2020 amounted to waiver under ICSID Arbitration Rule 27, since the Respondent had not raised its objection promptly. In addition, the Claimants point to the requirement of PO1 paragraph 23.5 that a Party wishing to contest the designation of information as confidential should do so within ten working days of being notified of the designation. Finally, the Claimants observe that the letter of 20 October 2020 from the Secretary of the Tribunal stated that ICSID proposed to publish the RFA on its website “by 2 November 2020”, yet the Respondent did not raise its objections until 5 November 2020.

27. The Respondent counters that, at the time of the correspondence between the Parties in late August and early September 2020, PO1 had not yet been adopted and there was therefore no set procedure which Norway was required to follow. It maintains that the proposed publication on the official ICSID website was of a different quality from the earlier, unofficial posting on the italaw website. Once the Tribunal had raised the possibility of publication by ICSID on 20 October 2020, the Claimants then raised their desire to redact parts of the RFA in their letter of 27 October 2020 and the Respondent's reply of 5 November 2020 was within the ten working days deadline in paragraph 23.5 of PO1, as well as the general requirement of prompt objection in ICSID Arbitration Rule 27.
28. The Tribunal considers that the exchanges of late August and early September 2020 are of a different character from those which followed the Secretary's letter of 20 October 2020. The earlier exchanges took place before the adoption of PO1 and the procedure which it prescribes. What took place in the early exchanges cannot, therefore, be regarded as a designation of confidential information by the Claimants or an objection (or a failure to object) to such a designation by the Respondent. Moreover, it is important to note that what the Claimants proposed was their publication of the RFA on a private website. It was the fact of publication to which the Respondent was invited to consent or object. The Respondent made no such objection. Under ICSID Arbitration Rule 27, its failure to do so would have precluded it from objecting to publication six weeks later. The Respondent did, however, make clear that it considered the proposed redactions unnecessary. If the events of late August and early September 2020 must have made the Respondent aware that the Claimants did not wish the amount of the claim or the identity of [REDACTED] to be made public, they can also have left the Claimants in no doubt that the Respondent did not regard those items of information as confidential. The Tribunal cannot read what happened then as precluding a later proposal from the Respondent that publication on the ICSID website should be of the full, unredacted text of the RFA.
29. With regard to the later exchange, the Tribunal agrees that the proposed publication on the ICSID official website was an act of a different quality from the Claimants' unilateral action (albeit an action to which the Respondent had been given the chance to object) of publishing a redacted text on an unofficial website in September 2020. Moreover, the Claimants' letter of 27 October 2020 must be regarded as the first formal action by the Claimants to designate the information about [REDACTED] and the amount of the claim as confidential information within paragraph 23.5 of PO1. While it is a matter for regret that the Respondent did not react to the Claimants' letter of 27 October 2020 until 5 November 2020, by which time the redacted text had already been placed on the ICSID website, its response came within the ten working days stipulated by paragraph 23.5 of PO1. The Respondent's letter of 5 November 2020 was not, therefore, time barred by paragraph 23.5 of PO1. Nor does the Tribunal consider that it was barred by ICSID Arbitration Rule 27.
30. The Tribunal therefore rejects the Claimants' request that it find that the Respondent failed to act in a timely fashion.

***(2) Is the Amount of the Claim Business Confidential Information?***

31. Paragraph 306(b) of the RFA requests an award “*directing Norway to pay damages in an amount to be proved at the hearing but which the Claimants presently estimate to be in excess of EUR 388 million over the life of their operation*”.
32. According to the Claimants:
- The amount of the claim is “business confidential information relating to a party” on at least two grounds. First, it consists of “financial, commercial ... information that is consistently treated as confidential by the party ... to which it relates”. Secondly, it is “information the disclosure of which ... could reasonably be expected to prejudice the competitive position of the party ... to which it relates”. (Claimants’ letter of 19 November 2020)*
33. The Claimants state that they have always treated the amount of the claim as confidential. Moreover, they assert that, even though the claimed amount is, as the Respondent points out (see paragraph 7, above) an estimated gross amount, a sophisticated competitor would be able to deduce from the publication of that figure the profits expected by the Claimants and, therefore, their business model.
34. The Respondent, on the other hand denies that the publication of an estimated figure would be sufficient to damage the Claimants’ competitive position.
35. The Tribunal does not accept that the fact that the Claimants have always treated the amount of the claim as confidential is sufficient to warrant its designation as confidential information. Paragraph 23.2.2 of PO1 is intended to ensure that the concept of “business confidential information” covers the financial, commercial and other information which form part of the working records and planning documents of an investor. The amount of a claim is a piece of information assembled purely for the purpose of litigation.
36. A more difficult question is whether the amount of the claim is information “the disclosure of which could result in material financial loss ... or could reasonably be expected to prejudice the competitive position” of the Claimants. The Tribunal accepts that that would be the case if the figure of the total amount claimed was published together with such other information that a competitor would be able to work out the details of the Claimants’ business model, its profitability or the scale and nature of its expenses. Disclosure of that degree of information would risk giving a significant competitive advantage to other investors. In the present case, however, the information which the Claimants seek to designate as confidential is no more than a “*headline figure*” which the RFA itself describes as an estimate. There is no indication of the income, expenses and profit calculations or the number of years which have been taken into account to arrive at “the life of the operation”.
37. In these circumstances, the Tribunal does not accept that the amount of the claim is properly to be regarded as “business confidential information”. Its finding to that effect should not, however, be taken to mean that it would reach a similar conclusion with regard to the more detailed calculations which the Claimants are likely to include in their Memorial and other pleadings.

38. The Claimants' request that the Tribunal find that the amount of the claim is business confidential information is therefore rejected.

***(3) Is the Identity of [REDACTED] as a Contractual Partner of SIA North Star Properly Regarded as Business Confidential Information?***

39. This request concerns footnote 36 of the RFA which states that North Star, the second Claimant, "also concluded similar agreements with ... [REDACTED]". The differences between the Parties regarding this request turn on whether or not the information which the Claimants seek to redact is in the public domain. If it is, then the Parties agree that paragraph 23.3 of PO1 precludes it being treated as business confidential information.

40. The Respondent points to two website pages (which it has exhibited as **R-1** and **R-2**). Both describe [REDACTED] as "[REDACTED] of [REDACTED] 'Seagourmet Norway AS'". The Claimants maintain that at least one of the websites is "unreliable" and that the information which they contain is that [REDACTED] has a contractual relationship with Seagourmet AS (which is not a claimant), whereas the information which the Claimants seek to treat as confidential is that [REDACTED] has a contractual relationship with North Star.

41. The Tribunal begins by observing that the Claimants' suggestion that "it is well known that the [REDACTED] website is not always a reliable source" (Claimants' letter of 26 November 2020) misses the point. Whatever its general reliability, the particular information regarding [REDACTED] is confirmed by a different website (see Exhibit R-2).

42. The Tribunal is, however, persuaded by the argument that the disclosure that [REDACTED] for Seagourmet AS is not sufficient to put the Claimants' assertion that [REDACTED] has a contractual relationship with North Star in the public domain. Accordingly, the Tribunal accepts the Claimants' contention that the information in footnote 36 which the Claimants seek to treat as confidential falls outside paragraph 23.3 of PO1.

43. Since the fact that [REDACTED] is a contractual partner of North Star is not in the public domain, the question is whether it is "business confidential information". The Tribunal has concluded that it is. The identity of a third party with which one of the Claimants has a contractual relationship is reasonably designated as business confidential information.

44. The Claimants' request that the Tribunal find that the identity of [REDACTED] as a contractual partner of SIA North Star is business confidential information is therefore accepted.

***(4) Was the Respondent's Letter of 5 November 2020 submitted to the Tribunal in breach of Paragraph 23.5 of PO1?***

45. The Tribunal does not consider the letter of 5 November 2020 to have been submitted to the Tribunal in breach of paragraph 23.5 of PO1.

46. The Tribunal has already rejected the Claimants' assertion that the letter was submitted in breach of the deadline of ten working days in paragraph 23.5 (see paragraphs 28-29 above).

47. Nor is the Tribunal persuaded by the Claimants' argument that it was a breach of paragraph 23.5 for the Respondent to submit the letter to the Tribunal rather than trying to reach agreement with the Claimants regarding the designation as confidential of the information which the Claimants wished to redact. Given that the issue of whether this information should be redacted had already been the subject of exchanges between the Parties in late August and early September 2020 and that the question had arisen again in the context of a letter from the Tribunal Secretary to which the Claimants had replied directly, the Tribunal considers that the Respondent was within its rights in responding directly to the Tribunal in its letter of 5 November 2020.
48. The Tribunal does, however, expect that, in any future case where the Parties disagree regarding the designation as information as confidential, they will endeavour to reach agreement before approaching the Tribunal.
49. The Claimants' request that the Tribunal find that the Respondent's letter of 5 November 2020 was submitted to the Tribunal in breach of paragraph 23.5 of PO1 is therefore rejected.

**(5) Costs**

50. The Claimants' request that the improper manner in which the Respondent's application of 5 November 2020 was made will be a factor in relation to costs when the Tribunal makes its award is predicated upon the Tribunal accepting the Claimants' earlier arguments that the Respondent's conduct was improper. Since the Tribunal has rejected those arguments, it follows that this request too must be rejected.

**VI. DISPOSITIF**

- (1) The Claimants' third request is granted.
- (2) The Claimants' other requests are rejected.
- (3) The redaction of parts of footnote 36 in the text of the RFA published on the ICSID website shall stand. The redaction of the amount in paragraph 306(b) shall be removed.
- (4) The Parties shall endeavour to agree which parts of the present Procedural Order shall be redacted prior to its publication on the ICSID website.
- (5) The costs incurred in connection with the various applications considered in this Procedural Order are reserved.

For and on behalf of the Tribunal,

[signed]

Sir Christopher Greenwood  
President of the Tribunal  
21 December 2020