



Paris, 28 August 2020

**VIA E-MAIL**

To:

**Helge Seland, Director General**

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**Subject: ICSID Arbitration Case ARB/20/11 – Confidentiality, Transparency and Access to Information Issues**

Dear Mr. Seland,

Claimants write to Respondent to recall the importance of agreeing to rules on the disclosure to the public of information from the present proceedings (subsection 1); and to object to the deadline proposed by Respondent in its email of 25 August 2020<sup>1</sup> for the disclosure of such information pursuant to Norway's *Freedom of Information Act (FOIA)* (subsection 2).<sup>2</sup>

This letter is copied to the Tribunal to make it aware of Claimants' objection to Respondent's disclosure to the public, including in response to a FOIA request, of any information from the present proceedings absent an agreement between the parties or a decision of the Tribunal on the relevant issue.

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<sup>1</sup> Email from Respondent (O. Myklebust) to Claimants (P.O. Savoie), 25 August 2019, **C-123**.

<sup>2</sup> Freedom of Information Act (FOIA), 4 June 1970, **CL-27**.

Claimants further take this opportunity to require clarifications from the Respondent as to why it believes it would be appropriate and legal to disclose to the public an access to information request made by Claimants (subsection 3); and to notify the Respondent of Claimants' intention to disclose certain documents to the public (subsection 4).

### **1) The Parties Must Agree on How Documents from this Arbitration Are to Be Made Public**

Claimants recall the importance for the parties to agree on a process for the disclosure to the public of information about the present ongoing proceedings. Claimants do so in this letter in the light of recent perplexing correspondence from the Respondent.

On 21 August, Respondent informed Claimants that it did not intend to comment the draft Confidentiality Order at this time.<sup>3</sup> On 25 August, Respondent notified Claimants of its intention to disclose no less than 50 documents based on a request under its *Freedom of Information Act (FOIA)*.<sup>4</sup> Respondent gave three days to Respondent, until 28 August, to provide comments on the documents proposed to be disclosed in answer to this FOI request.

This short deadline was proposed despite: the fact that Claimants have proposed a Confidentiality Order which outlines a structured process (including reasonable time limits) for the disclosure of information about this arbitration to the public; the fact that there are pending disputes as to which documents can be disclosed by Respondent in response to FOIA requests or otherwise, as further described below; and the fact that Claimants have made it clear for over a year that a Confidentiality Order should be agreed or be adopted by the Tribunal should the case proceed<sup>5</sup>.

While the parties have been able to generally cooperate on proposed disclosures since July 2019, in the absence of an agreement of the parties on which documents can be disclosed, or in absence of a Tribunal decision, the Respondent should refrain from doing anything that threatens the integrity of the proceedings or aggravates the dispute.

On 28 June 2019, Respondent informed the Claimants that it had received a FOI request and that certain documents had been disclosed.<sup>6</sup>

On 1 July 2019, Claimants objected to the disclosure on the basis that they should have been notified in advance.<sup>7</sup> Claimants also objected to the fact certain documents concerning amicable discussions were disclosed and reserved their rights in this respect. Claimants further underscored the importance of agreeing to a Confidentiality Order in due course.

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<sup>3</sup> Email from Respondent (O. Myklebust) to Claimants (P.O. Savoie), 21 August 2019, **C-124**.

<sup>4</sup> Email from Respondent (O. Myklebust) to Claimants (P.O. Savoie), 25 August 2019, **C-123**.

<sup>5</sup> Email from Claimants (P.O. Savoie) to Respondent (M. Norum), 1 July 2019, **C-125**, ("*Communications and documents from one party to the other should not be made public prior to notification to the other party as well as the conclusion of an agreement on the manner and extent of disclosure of such documents.*")

<sup>6</sup> Email from Respondent (M. Norum) to Claimants (P.O. Savoie), 28 June 2019, **C-126**.

<sup>7</sup> **C-125**.

Correspondence from Respondent dated 27 August 2019 confirms the parties' agreement to cooperate on the disclosure of information about the proceedings requested under Norway's FOIA.<sup>8</sup>

While Claimants agree with Respondent<sup>9</sup> that there is no general duty of confidentiality in ICSID proceedings (as confirmed by various ICSID decisions<sup>10</sup>), there remain multiple obligations related to transparency and confidentiality, including obligations to preserve the integrity of the proceedings and to not aggravate disputes,<sup>11</sup> which must be respected.

For Claimants, it is important that correspondence concerning amicable discussions and settlement negotiations be recognized as such and not disclosed. The confidentiality of such documents is recognized under international law<sup>12</sup>, which Norway's FOIA also appears to recognize as a ground not to disclose documents<sup>13</sup>, despite Respondent's unclear practice on this issue. Compounding this issue is the fact that some of the documents listed in Respondent's email of 25 August 2020 as documents that may be disclosed pursuant to the FOIA are clearly labeled as documents that are confidential and not for disclosure, as relating to settlement discussions.

At least for this reason, and also for reasons of efficiency going forward, it is important for Respondent to engage with Claimants' proposed Confidentiality Order. Claimants therefore request that Respondent provide its comments on the draft Confidentiality Order **by 11 September 2020**, so the parties have the chance to discuss their respective positions, and hopefully come to an agreement on as many issues as possible in advance of the Tribunal's first session.

## **2) Claimants Object to Respondent's Deadline of 28 August to Comment on Respondent's Email of 25 August 2020 Concerning an FOIA request**

While Claimants will continue to cooperate with Respondent regarding the disclosure of documents from this arbitration, Claimants object to the short deadline proposed by Norway in its email of 25 August.

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<sup>8</sup> Email from Respondent (M. Norum) to Claimants (P.O. Savoie), 27 August 2019, **C-127**. See also Email from Respondent (M. Norum) to Claimants (P.O. Savoie), 27 September 2019, **C-128**.

<sup>9</sup> **C-128**.

<sup>10</sup> See *Biwater Gauff Tanzania Ltd. V. United Republic of Tanzania*, ICSID Case no. ARB/05/22, Procedural Order No. 3, 29 September 2006, **CL-28**, paras. 121; *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Procedural Order on Confidentiality, 27 January 2020, **CL-29**, paras. 79; *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Decision on Respondent's Application for Provisional Measures, 12 May 2016, **CL-30**, paras. 80-85.

<sup>11</sup> See **CL-28**, paras. 135-136; **CL-29**, paras. 72; **CL-30**, paras. 93.

<sup>12</sup> *Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/15/41, Procedural Order No. 6b, 15 January 2018, **CL-31**, para. 32 ("The Tribunal accepts that the "Without Prejudice" privilege is borne out of the public policy of encouraging disputing parties to engage in good faith settlement to avoid contentious proceedings. So long as the documents are related to genuine attempts to resolve the matters in difference, they are privileged."); see also *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, **CL-32**, para. 46 ("As to the merits of the objections, the Tribunal found that legal privilege extends not only to outside counsel, but also to in-house lawyers and found no evidence suggesting that Claimants had waived legal or, to the extent relevant, settlement privilege."); *Pawlowski AG and Projekt Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Procedural Order No. 2, 14 August 2018, **CL-33**, Section 3.1 (referring to settlement privilege as a ground to object to document production requests).

<sup>13</sup> **CL-27**, s. 20 (a) ("Exemptions from access may be made in respect of information when this is required out of regard for Norway's foreign policy interests where: (a) Norway is obliged under rules of international law to deny access to information").

While Claimants note Respondent's obligations under its Freedom of Information Act to decide requests "*without undue delay*", pursuant to section 29, the parties in the arbitration must have a reasonable timeframe to consider whether to oppose the disclosure of a document and/or whether to request certain redactions for reasons of confidentiality.

In offering Claimants, in its email of 25 August, only 3 full business days to consider such issues in respect of no less than 50 documents, Respondent did not propose a reasonable timeframe within which to respond.

Claimants nevertheless confirm they expect to be in a position, **by Friday 4 September 2020**, to provide any objections to the disclosure of the documents listed in 25 August email, or to consent to such disclosure with or without redactions.

In respect of Respondent's 25 August 2020 request to disclose documents, Claimants also note that the Request for Arbitration proper, dated 18 March 2020, does not appear to be on of the list of documents Respondent intends to disclose. This raises a question about Respondent's interpretation of the access to information request by the journalist referred to in the email of 25 August, since Mr. Seland and Ms. Norum were in copy of Claimants' email to ICSID. Claimants will therefore carefully review the list of documents included on the list to ensure Respondent is not proposing to selectively disclose documents that may be responsive to the request. Claimants will thus confirm in its response whether the list provided in Respondent's email of 25 August is complete.

In any event, in the light of Respondent's obligations to litigate in good faith<sup>14</sup>, to preserve the integrity of the proceedings and to not aggravate the dispute, Claimants expect that Respondent will not disclose any document without the Claimants' prior consent, or without a ruling by the Tribunal concerning the process for disclosure of documents exchanged by the parties, as well as those issued by the Tribunal, in the present arbitration. Further, and as a general matter, Claimants take the position that the amount of the claim is business confidential information, the disclosure of which may harm Claimants' competitive position, and is thus protected by both general principles of international law and Norwegian law<sup>15</sup>.

### **3) Objection to Respondent's Intended Public Disclosure of Claimants' Access to Information Request**

Although this matter does not concern issues arising in respect of Claimants' proposed draft Confidentiality Order, Claimants also take this opportunity to question Respondent on certain

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<sup>14</sup> In the context of the amendments to the ICSID Arbitration Rules, a broad number of States have lent their support to confirm the existence of an obligation on the parties to act in good faith in the conduct of arbitration proceedings. See Proposals for the Amendment of ICSID Arbitration Rules, Working Paper No. 4, February 2020, **CL-34**, Rule 2(1) ("*The Tribunal and the parties shall conduct the proceeding in good faith and in an expeditious and cost-effective manner.*").

<sup>15</sup> **CL-27**, s. 13 (referring to the existence of a duty of confidentiality to refuse disclosure); see in turn *Public Administration Act*, 10 February 1967, **CL-35**, s. 13 (for an elaboration of the duty of secrecy under Norwegian law, which includes the protection of personal information and information concerning the competitive interests of businesses).

comments made in its correspondence of 25 August 2020, which tend to show that one or more persons within the government of Norway are leaking information about the present case to outside sources.

In particular, Claimants were surprised by the following information provided by Respondent:<sup>16</sup>

*For your information, the Ministry of Oil and Energy has received a request for access to your request for information to that Ministry dated 12 August 2020, which will be made public in line with the provisions of the Freedom of Information Act.*

As a general matter, it is unclear to Claimants why access to information requests should be disclosable through access to information requests. Respondent needs to explain how its legislation, properly applied, allows for this. Indeed, such an application of the *Freedom of Information Act* appears as contrary to the purposes of such legislation, *ie* that it be blind as to the identity of the applicant and to his or her motive.<sup>17</sup> In any event, the disclosure of a request reveals both personal and competitive information about a person and/or a business, which are grounds to refuse FOIA requests.<sup>18</sup>

At this time Claimants therefore object to the release, by the Ministry of Petroleum, of Claimants' access to information request referred to in Respondent's email of 25 August 2020. The basis for Claimants' objection is that such release is an improper application of access to information legislation that targets and potentially harasses the person(s) making the request. Should Respondent provide a reasonable explanation as to why access to information requests are themselves subject to and disclosable pursuant to subsequent access to information requests, Claimants may reconsider their position. Moreover, should Claimants eventually agree with Respondent that access to information requests are themselves subject

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<sup>16</sup> Email from Respondent (O. Myklebust) to Claimants (P.O. Savoie), 25 August 2019, **C-123**.

<sup>17</sup> For example, s. 4(2.1) of Canada's *Access to Information Act* provides, 1985, **CL-36** ("*The head of a government institution shall, without regard to the identity of a person making a request for access to a record under the control of the institution, make every reasonable effort to assist the person in connection with the request, respond to the request accurately and completely and, subject to the regulations, provide timely access to the record in the format requested.*") [emphasis added]. The same principle has been confirmed by UK courts. In *S v the Information Commissioner*, 9 May 2007, UKIT EA/2006/0030, **CL-37**, paras. 19, 80, the first-tier Tribunal (Information Rights) held: "*FOIA is, however, applicant and motive blind. It is about disclosure to the public and public interests. It is not about specified individuals or private interests. ... In dealing with a Freedom of Information request there is no provision for the public authority to look at from whom the application has come, the merits of the application or the purpose for which it is to be used.*" The same principle exists in French Law. See *Refonder le droit à l'information publique à l'heure du numérique : Rapport d'information de Mme Corinne BOUCHOUX, fait au nom de la MCI sur l'accès aux documents administratifs (auditions et contributions écrites), No. 589 tome II (2013-2014), 5 June 2014, Preliminary Chapter, CL-38* (In French original : "*Dès l'origine, le droit d'accès a été reconnu à toute personne, physique ou morale, sans que celle-ci ait à justifier d'une quelconque qualité ni d'un intérêt pour agir. Il peut donc être exercé sans considération de la nationalité, française ou étrangère, ni du lieu de résidence, en France ou à l'étranger, sans explicitation des motifs de la démarche ni de l'usage, y compris à des fins commerciales, que le demandeur entend faire du document dont il sollicite la communication. La circonstance que le demandeur agisse dans une perspective contentieuse ou encore qu'il soit un agent public est ainsi sans incidence sur son droit à invoquer le bénéfice de la liberté d'accès.*") [emphasis added] "The circumstance that the requesting person is acting from an litigious perspective or that he or she is a public agent is without impact on the right to invoke the freedom of access." (free translation of counsel)). The principle of blind application of access to information rights also applies under US Law. See US Geological Survey website, "Is a Freedom of Information Act (FOIA) request confidential? Does my identity impact the results?", **CL-39** ("*The identity of the FOIA requester does not have any bearing on the outcome of the FOIA request, regardless of what the FOIA requester may know about the subject matter or the records.*").

<sup>18</sup> **CL-27**, s. 13 (referring to the existence of a duty of confidentiality to refuse disclosure); see **CL-35**, s. 13 (for an elaboration of the duty of secrecy under Norwegian law, which includes the protection of personal information and information concerning the competitive interests of businesses).

to such requests, Claimants will of course request the identity of the person having made the request to the Ministry of Petroleum referred to in Respondent's correspondence of 25 August. Claimants also reserve the right to further investigate how the existence of their access to information request for came to the attention of the person who made the request to the Ministry of Petroleum and whether this may have occurred as a result of a breach of the duty of secrecy under Norwegian law.<sup>19</sup> If this there was a breach of the duty of secrecy within the Respondent's administration, Claimants note that certain legal consequences, outlined in section 13.e of the *Public Administration Act*, would follow.<sup>20</sup>

Considering such possible consequences, it is important for Respondent to promptly explain its position on the above issue, **by September 11, 2020 at the latest**. Moreover, at this time, and to be clear, Claimants' position is that any access to information request by them is covered by the duty of secrecy under Norwegian law and must therefore be treated as such.

Again, in the light of Respondent's obligations to litigate in good faith and to not threaten the integrity of the proceedings or to aggravate the dispute, Claimants expect that Respondent will not disclose Claimants' access to information request to the Ministry of Petroleum prior to an agreement of the parties or a ruling by the Tribunal. Claimants reserve their rights in this respect.

#### **4) Notification of Public Disclosure of Documents**

Claimants also take this opportunity to notify Respondent of its intention to make public both the notice of dispute of 8 March 2019 and the Request for Arbitration of 18 March 2020. Claimants' proposed redactions which are being sent separately (without copying the Tribunal). In the light of the deadlines proposed by Respondent to make certain documents public, Claimants intend to make these documents public by **Friday 4 September 2020**. This proposed deadline is without prejudice to Claimants' proposal on timelines found in the draft Confidentiality Order.

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Based on the above, Claimants request the Respondent:

- To provide comments on its draft Confidentiality Order, by 11 September 2020;
- To provide an explanation on why disclosing an access to information request may be legal and proper under Norwegian law, by 11 September 2020; and
- That Respondent not disclose to the public, or in response to a request under its *Freedom of Information Act*, any document exchanged in the context of the present proceedings and dispute, in respect of which disclosure is objected to by Claimants, prior to an agreement of the parties or a ruling of the Tribunal on the matter.

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<sup>19</sup> **CL-35**, s. 13, 13.a, 13b, 13c, 13d, 13e, 13f.

<sup>20</sup> *Id.*

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Sincerely,



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