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Paris, 4 September 2020

VIA E-MAIL

To:

Helge Seland, Director General

Norwegian Ministry of Foreign Affairs
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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 in response its email of 25 August 2020 concerning a request for disclosure of information from the present ICSID proceedings pursuant to Norway's *Freedom of Information Act* (***FOIA***).

At the outset, Claimants underscore that it appears that both Respondent and Claimants are able to come to reasonable views on many issues of confidentiality and disclosure and, in effect, to successfully cooperate on such matters.

In this letter, Claimants address: 1) the relationship between Norway's FOIA and the rules applicable in the present ICSID proceedings; 2) Claimants' response to Norway's FOIA request notified 25 August 2020; 3) requests for disclosures of access to information requests; 4) Claimants' notification of public disclosure of documents; 5) access to information requests made by Claimants; 6) the proposed Confidentiality Order.

1) Relationship between Norway's FOIA and the Rules Applicable in the present ICSID Proceedings

The Claimants recognize that from Respondent's perspective it is important, indeed essential, that Respondent continue to apply its FOIA. Nevertheless, as recalled in Claimants' letter of 28 August 2020, one ground to refuse an FOIA request is where international law prevents disclosure. Indeed, section 20(a) of the FOIA provides:

> *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*

By offering to arbitrate under the ICSID Convention, Norway has agreed to the procedural framework of the Convention. It is well-accepted that where procedural issues arising under the Convention or the ICSID Arbitration Rules are not explicitly provided for therein, then it is general principles of international law that govern the matter.[1] Not only do such principles already apply to the framework of the present proceedings, but so will any decision or order of the Tribunal, which will constitute a rule of international law binding on Respondent. As such, decisions and orders of the Tribunal are automatically incorporated into Norway's FOIA by way of section 20(a).

Again, while the parties agree there is no "*general*" duty of confidentiality under the ICSID Convention, as did the NAFTA Parties in the 2001 Note of Interpretation issued by Canada, Mexico and the United States in respect of NAFTA Chapter Eleven (Investment) arbitration,[2] specific duties continue to exist. These include duties of confidentiality regarding the well-recognized privileges such as solicitor-client privilege, litigation privilege and settlement privilege, as well as the right to redact confidential business information and also personal information.

2) Claimants' Response to the FOIA notified by Respondent on 25 August 2020

Claimants provide in attachment a chart of their responses regarding the documents listed in Respondent's email of 25 August.

Claimants agree to the disclosure of many documents, but do not agree to the disclosure of others, in whole or in part. Proposed redactions are provided with this correspondence.

The documents identified by Claimants should be withheld from disclosure on the basis that they are covered by the privilege attaching to amicable discussions and settlement negotiations.

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[1] *Abaclat and Others v. Argentine Republic*, ICSID Case ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, **CL-40**, paras. 436, 447.

[2] North American Free Trade Agreement, Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission, 31 July 2001, **CL-41**, A.

In their letter of 28 August, Claimants cited to the decision of the ICSID Tribunal in *Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania* (**CL-31**, para. 32) to explain the scope of such privilege:

> *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.*

This means that documents "*related to genuine attempts to resolve the matters in difference*" are privileged and thus not subject to disclosure.

The purpose of this privilege is to allow the parties to try to resolve their differences without outside interference and also by being able to speak more freely than in contentious proceedings.

As such, the scope of that privilege includes the existence of meetings to resolve differences as well as the content of any communications in preparation of or in relation to those meetings. The documents covered by this privilege, which is recognized as a general principle of international law, are identified in the chart provided in annex.

Should the Respondent disagree with Claimants' assessment, Respondent is invited to provide its comments, at its earliest convenience, in the attached chart listing the documents, provided by Claimants. If the parties cannot eventually agree, Respondent will need to raise the matter with the Tribunal. It cannot simply disclose contested documents under its FOIA as this could either threaten the integrity of the proceedings or aggravate the dispute, in violation of well-accepted principles of ICSID caselaw.

Claimants have also identified two additional documents not listed by Respondent that are responsive to the FOIA request. Respondent should disclose those documents in response to the FOIA request in the manner suggested by Respondent in the chart.

3) Requests for Disclosures of Access to Information Requests

Claimants note Respondent's response concerning the potential disclosure of access to information requests. Claimants find Respondent's explanations reasonable and do not further object to that request for access to information. Claimants nevertheless maintain their warning as to any improper leaks of information that could aggravate the dispute or threaten the integrity of the proceedings.

4) Claimants' Notification of Public Disclosure of Documents

Claimants thank Respondent for its response. Nevertheless, Claimants are surprised by the Respondent's position, which is now that Claimants' proposed redactions are "*not necessary*" and that the amount of the claim should not be redacted. Claimants are also surprised by Respondent's comments that it would be somehow unexpected for Claimants to propose to

make public certain documents from the proceedings, since in 2019 Claimants took the position that, at that time, all communications between the parties were confidential in that they pertained to amicable discussions or settlement negotiations.

The Claimants' position is that until the registration of the Request for Arbitration, the communications between the parties should have been entirely covered by the privilege attaching to amicable discussions and settlement privilege. Prior to the registration of the RFA, Norway had only been notified of the dispute, which was not yet proceeding. The situation has now changed. Nevertheless, communications still covered by the privilege attaching to amicable discussions and settlement negotiations cannot be disclosed, but other communications may be. That said, in light of Norway's imperatives under the FOIA, the Claimants nevertheless agreed last year to the disclosure of the 8 March 2019 notice of dispute in the way Norway had suggested it be redacted. The redactions were extensive and included the amount of the claim, as well as several other issues, notably the joint venture aspect of the claim and mentions of Mr. Levanidov.

Now that the existence of the claim is public, notably because of its registration on the ICSID website, the Claimants take the position that it is appropriate for the parties to disclose information publicly, should they agree to do so, as is the case in principle, subject to the contours of such disclosures being finalized. The Claimants also take the position that if information about the claim is to be made public, this should be done in an even-handed way that gives a global and not only a partial view of the claim. This is why Claimants now propose that certain documents be made public, notably a trigger letter that is less redacted and the Request for Arbitration, with almost no redactions. While it is not for Claimants to suggest to Respondent whether it may eventually wish to disclose all pleadings in the arbitration to reduce FOIA requests, the fact that Respondent will be answering several FOIA requests about this case means that to ensure access to an even-handed public record, Claimants may request in due course that all pleadings and Tribunal decisions in the present matter be made public.

The importance of even-handed access to information by the public is also why Claimants have proposed that the aspects of the claim concerning Mr. Levanidov and Seagourmet, as strategic partners of Mr. Pildegovics and North Star, is an element that is not only proper but also relevant to disclose. Moreover, this strategic partnership has long been in the public domain.

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 note that Norway itself had proposed that this aspect of the trigger letter be redacted when making disclosure under its FOIA last year. Respondent has not provided any argument as to why the amount of the claim should not be redacted.

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.

5) **Access to information requests made by Claimants**

Claimants take note of Respondent's comments on this issue.

6) **Proposed Confidentiality Order**

Claimants take note of Respondent's comments on this issue. Claimants recall again that a Confidentiality Order adopted by the Tribunal would automatically be incorporated into the FOIA by virtue of section 20(a). While Claimants wish to be mindful of Norway's obligations under the FOIA and its wish to have its practice under the FOIA to continue to apply, there may also be generally recognized international principles that are not currently applied under Norway's current practice, and that would have to be applied in respect of the present proceedings. This includes how the various legal privileges are applied as well as the scope of confidential information (both business confidential information and personal information).

Past correspondence has shown the parties are able to generally cooperate on the above issues. Claimants nevertheless raise these issues again since Respondent needs to present a position that will allow the parties and the Tribunal to proceed in a manner that is both predictable and as efficient as possible, regarding the public disclosure of documents.

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Sincerely,

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