

THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE No. ARB/20/11 (ANNULMENT PROCEEDINGS)

PETERIS PILDEGOVICS AND SIA NORTH STAR

APPLICANTS

V.

THE KINGDOM OF NORWAY

RESPONDENT

APPLICANTS' APPLICATION FOR DOCUMENT PRODUCTION

4 FEBRUARY 2025

Savoie Arbitration s.e.l.a.s.u.
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I. INTRODUCTION

1. Pursuant to the calendar set by the *Ad Hoc* Committee in its Procedural Order No. 1 of 8 November 2024, Mr. Peteris Pildegovics and SIA North Star (**Applicants**), respectfully submit this Application for Document Production.
2. Paragraph 14(2) of PO1 provides:

The Committee has provisionally included a document production step in the timetable after the Applicants' Memorial on Annulment. At that stage, the Committee will decide, based on a reasoned application from Applicants, whether special circumstances exist that justify permitting a document production phase.
3. Applicants note that in Annex B (Procedural Calendar) to PO1, refers to the possibility that "*Either Party*" make an application for document production on 4 February 2025.
4. In this Application for Document Production, Applicants explain why there are "*special circumstances*" that exist for the document production sought.
5. In this application, Applicants make two types of production requests.
6. The first part concerns what could be said to be a traditional document production request, *ie* Applicants' request for documents in control and possession of Norway. These document requests concern documents related to KPMG, Wikborg Rein, Glimstedt, Kroll, damages report, and/or investigative firms.
7. The second part is different and concerns a request, at least for an explanation, and, perhaps for relevant documents, from the ICSID Secretariat and/or from the members of the original Tribunal, regarding the procedural decision, that would have been made on 5 December 2022, mentioned at paragraph 70 of the Award, but which Applicants never received.
8. The Application is divided in five parts: what can constitute "*special circumstances*" (II); how relevant special circumstances apply to documents in possession of Norway in relation to KPMG, Wikborg Rein, Glimstedt, the damages report, Kroll, and/or investigative firms, which must be produced (III); how relevant circumstances apply to documents or requests for information related to the decision of 5 December 2022

mentioned at paragraph 70 of the Award **(IV)**; and, in the alternative, a request for appointment of a neutral to review the documents to be produced by Norway to determine whether they are relevant to Applicants' annulment grounds and can be produced **(V)**.

9. With this Application, Applicants submit a Redfern Schedule.

II. WHAT CONSTITUTE SPECIAL CIRCUMSTANCES ALLOWING DOCUMENT PRODUCTION IN ICSID ANNULMENT PROCEEDINGS

10. In the present case, Applicants believe there are two types of “*special circumstances*” that allow for document production (or information requests) in ICSID annulment proceedings.
11. The first type of special circumstances is the “crime-fraud” or “inequity” exception to legal privilege, which Applicants believe is triggered in the present case. Applicants believe there exists a general principle of international law that no legal privilege exists in documents and communications brought into existence as part of or in furtherance of an iniquity, which can be a serious allegation of crime, fraud (whether criminal or civil), or any other wrongdoing or inequity having been caused by one party in relation to litigation. Should this iniquity be integral to an annulment ground in an ICSID annulment proceeding, then document production can be sought regarding relevant documents. Applicants believe that such “*special circumstances*” apply to documents in the possession of Norway related to KPMG, Wikborg Rein, Glimstedt, the damages report, Kroll, and/or investigative firms, which issues all arose after the case was pleaded on the merits, in the context of costs submissions, and on which Applicants promptly reserved their rights.
12. Pursuant to Article 43 and 52(4) of the ICSID Convention read together, the *ad hoc* Committee has the power to request “*parties*” to produce documents or other evidence, which goes to the first type of special circumstance.
13. The second type of special circumstances is that document production can be requested and/or other inquiries be conducted by an ICSID *ad hoc* Committee where a procedural decision mentioned in an ICSID Award cannot be found and does not appear to have been notified to the parties. Such investigations could include interrogating the ICSID Secretariat and the original Tribunal about this procedural decision.
14. Pursuant to Article 44 and 52(4) of the ICSID Convention read together, the *ad hoc* Committee has general powers to decide questions of procedure not encompassed by the Convention or the Arbitration Rules. It is Applicants’ submission that a decision of the Committee to interrogate ICSID and the Tribunal on the above-mentioned issue would come within the exercise of such powers. It is also Applicants’ submission that

such investigations would be proper if they go to the integrity of the original proceeding, which would be so in the case of an apparently missing procedural decision.

15. Those two types of special circumstances will be examined in part **II.a** and **II.b** of the Application.

a. THE CRIME-FRAUD OR INEQUITY EXCEPTION TO PRIVILEGE

16. The first “special circumstance” concerns a large number of apparently improper, if not fraudulent, behavior which may have been committed by Norway in the course of the arbitration.
17. This concerns the repeated hiring of conflicted firms, misrepresenting to the Tribunal whether it was in a position to submit a damages report in order to obtain bifurcation of quantum, and apparently hiring investigative firms to pursue investigations of Applicants and persons close to them, most likely on the basis of information improperly obtained.
18. Applicants have already made a strong prima facie case of all these iniquities and improper conduct of Norway, which are all integral to annulment grounds. However, Applicants do not have access to documents in the possession of Norway, which it has in the past refused to produce of its own motion.¹ The attached Redfern Schedule explains their relevance.
19. Further, solicitor-client privilege and/or litigation privilege does not exist in respect of such documents if it is used to shield advice given to commit fraud (including civil fraud), or if it is otherwise used to shield other improper actions in breach of a duty. This is well recognized domestically and has also been recognized internationally.
20. In *St. Marys v. Canada*, an UNCITRAL case under NAFTA’s Investment Chapter, the umpire, Mr. Spigelman, was appointed by the tribunal to assess whether certain documents were covered by privilege or not. In his report, he held:²

Canada contends that the improper purpose issue falls within the questions submitted for my determination. It submits: “Improper purpose goes to whether

¹ Second Witness Statement of Mr. Peteris Pildegovics in Annulment Proceedings, paras. 37, 38, 45.

² *St. Marys VCNA LLC v. Canada* (UNCITRAL), Report on Inadvertent Disclosure of Privileged Documents of Mr. James Spigelman, 27 December 2012, **AL-0014**, p. 2, p. 4.

privilege exists: where this exception is applied, the documents subject to its application are deemed not to be privileged at all.”

In my opinion this submission should be accepted. ...

*Case law in many jurisdictions supports the proposition that the improper purpose / crime / fraud exception goes to the existence of the privilege. (See e.g. *United States v Zolin* 491 US 554, 562-563 (1989).*

...

the policy considerations underlying the existence of privilege support the proposition for which Canada contends. The privilege exists to serve the public interest in the administration of justice ... It does not extend to communications which undermine the integrity of, or otherwise constitute an abuse of, the administration of justice. Documents that came into existence for such an improper purpose are not entitled to attorney-client privilege from the outset.

21. In that case, Mr. Spigelman admitted several documents into the record where he found they were likely produced in order to manufacture jurisdiction of an investment treaty claim, even though the documents constituted communications with counsel.
22. In various domestic jurisdictions such as the United States³, Canada⁴ and the United Kingdom⁵ the same exception to privilege has been recognized. Moreover, in Norway and Latvia there are also limits to legal privilege in the context of a right to fair trial, through the application of the European Convention on Human Rights.⁶

³ *United States v Zolin*, 491 US 554, 21 June 1989, **AL-0102**, pp. 562-563; *Clark v. United States*, 289 U.S. 1, 15 (1933), **AL-0120**; *U.S. v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991), 3 January 1991, **AL-0121**, para. 1292 (“[T]he attorney-client privilege cannot at once be used as a shield and a sword. ... A defendant may not use the privilege to prejudice his opponent’s case or to disclose some selected communications for self-serving purposes.”); *Mattenson v. Baxter Healthcare Corp.*, 438 F.3d 763 (7th Cir. 2006), 21 February 2006, **AL-0122**, para. 769 (“there is no protection when the attorney is assisting his client to commit a crime or a fraud”).

⁴ Adam Dodek, “Solicitor-Client Privilege in Canada”, Discussion Paper for the Canadian Bar Association, February 2011, **AL-0103**, pp. 11-14 (on the crime-fraud exception).

⁵ *Al Sadeq v Dechert LLP and others*, [2024] EWCA Civ 28, Approved Judgment, 24 January 2024, **AL-0104** (on the “iniquity” exception to privilege); see also *Barrowfen Properties v Patel and others* [2020] EWHC 2536 (Ch), Approved Judgment, 24 September 2020, **AL-0105**.

⁶ Caselaw of the European Court of Human Rights makes it clear that where proportionate and to achieve a proper and legitimate objective, including to fight crime, or to respect the right to a fair trial, professional secrecy may have to yield: *Michaud v. France*, ECHR, Judgment [6 December 2012], 6 March 2013, **AL-0106** (holding it is proportional to report suspicions of money laundering for lawyers); *M. v. the Netherlands*, ECHR, Judgment [25 July 2017], 25 October 2017, **AL-0107** (holding professional secrecy of former secret agent cannot be used by State to prevent the former agent from having a fair trial and

23. In the recent English case of *Al Sadeq v Dechert LLP*, Lord Justice Popplewell, writing for a unanimous Court of Appeal, held that the scope of the “iniquity” (or crime-fraud) exception was as follows:⁷

I would favour the formulation that where there is a prima facie case of iniquity which engages the exception, there is no privilege in documents and communications brought into existence as part of or in furtherance of the iniquity.

24. As for what constitutes iniquity, or otherwise comes within the “crime-fraud” exception, courts in relevant jurisdictions have found that this includes bad faith litigation,⁸ bad faith breach of duty,⁹ other misconduct,¹⁰ civil fraud,¹¹ intentional torts,¹² that the

properly instructing counsel); *Sérvulo & Associados – Sociedade de Advogados, RL v. Portugal*, Judgment [3 September 2015], 3 December 2015, **AL-0108** (holding it proportional to search law firm’s files in targeted way in criminal investigation); *Klaus Müller v. Germany*, Judgment [19 November 2021], 19 February 2021, **AL-0109** (holding it is proportional to allow privilege to be waived by client under domestic law and for testimony, despite privilege, in criminal proceedings).

⁷ *Al Sadeq v Dechert LLP and others*, [2024] EWCA Civ 28, Approved Judgment, 24 January 2024, **AL-0104**, para. 166.

⁸ *Cleveland Hair Clinic, Inc. v. Puig*, 968 F.Supp. 1227 (N.D. Ill. 1996), 22 November 1996, **AL-0110**, para. 1241 (holding that bad faith litigation conduct attracted the application of the crime-fraud exception to privilege and citing to *Sound Video Unlimited, Inc. v. Video Shack Inc.*, 661 F. Supp. 1482, 1487 (N.D. Ill. 1987)).

⁹ *Harris Mgmt., Inc. v. Coulombe*, 151 A.3d 7, ¶ 27 (Maine Supreme Judicial Court, 2016), 8 November 2016, **AL-0112** (crime fraud exception applies in civil cases, including to crime, fraud, other misconduct or a bad faith breach of duty, otherwise justice would not be served if the exception was narrowly interpreted); *Cent. Constr. Co. v. Home Indem. Co.*, 794 P.2d 595, Supreme Court of Alaska, 2 July 1990, **AL-0113**, para. 598 (holding the crime fraud exception should not be narrowly defined and that it included a bad faith breach of duty).

¹⁰ *In re Sealed Case*, 754 F.2d 395 (D.C. Cir. 1985), 8 February 1985, **AL-0114**, para. 399 (“*Communications otherwise protected by attorney-client privilege are not protected if the communications are made in furtherance of a crime, fraud, or other misconduct.*”); *Volcanic Gardens Mgmt. Co. v. Paxson*, 847 S.W.2d 343 (Tex. App. 1993; Court of Appeals of Texas, El Paso), 27 January 1993, **AL-0115**, para. 347 (“*fraud*” in the crime fraud exception is a “generic term, embracing all multigiarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and cinludes all surprise, trick, cunning dissembling, and any unfair way by which another is cheated.”).

¹¹ *Harris Mgmt., Inc. v. Coulombe*, 151 A.3d 7, ¶ 27 (Maine Supreme Judicial Court, 2016), 8 November 2016, **AL-0112** (crime fraud exception applies in civil cases, including to crime, fraud, other misconduct or a bad faith breach of duty, otherwise justice would not be served if the exception was narrowly interpreted); *Al Sadeq v Dechert LLP and others*, [2024] EWCA Civ 28, Approved Judgment, 24 January 2024, **AL-0104**, para. 46 (iniquity is not confined to crime or fraudulent misrepresentation but extends to fraud in a relatively wide sense).

¹² *Cooksey v. Hilton Int’l Co.*, 863 F. Supp. 150 (S.D.N.Y. 1994), 8 September 1994, **AL-0116**, para. 151, citing to *Diamond v. Stratton*, 95 F.R.D. 503 (S.D.N.Y. 1982), 30 August 1982, **AL-0117**, and *Irving Trust Co. v. Gomez*, 100 F.R.D. 273 (S.D.N.Y 1983), 23 June 1983, **AL-0111** (intentional torts moored in fraud can trigger the crime-fraud exception).

exception should not be interpreted narrowly,¹³ and also that it is not confined to crime or fraudulent misrepresentation but extends to fraud in a relatively wide sense.¹⁴

25. If a *prima facie* case has been made that a party acted improperly or that there is an iniquity or a crime or fraud, then the documents can be admitted into the record.¹⁵
26. On the other hand, no *prima facie* showing of any iniquity is required for an *in camera* inspection of the documents by a judge,¹⁶ or by another neutral, as was done by the UNCITRAL tribunal in *St. Marys v. Canada*.

b. A MISSING PROCEDURAL DECISION

27. The second type of special circumstances arising in this case is where a procedural decision mentioned in an ICSID Award cannot be found and does not appear to have been notified to the parties, and that the lack of notification of the decision is a ground for annulment.
28. In such circumstances, the ICSID *ad hoc* Committee can enquire, pursuant to its general procedural powers, with the Tribunal and/or the ICSID Secretariat about the circumstances of the missing decision, and perhaps even request any relevant document the Tribunal or Secretariat may wish to provide.

¹³ *Cent. Constr. Co. v. Home Indem. Co.*, 794 P.2d 595 (Supreme Court of Alaska, 1990), 2 July 1990, **AL-0113**, para. 598 (holding the crime fraud exception should not be narrowly defined and that it included a bad faith breach of duty).

¹⁴ *Al Sadeq v Dechert LLP and others*, [2024] EWCA Civ 28, Approved Judgment, 24 January 2024, **AL-0104**, para. 46 (citing to *Barclays Bank plc v. Eustice*).

¹⁵ *A v. Dist. Ct.*, 191 Colo. 10 (Colo. 1976; Supreme Court of Colorado. En Banc), 24 May 1976, **AL-0118**, para. 23 (“However, there must be a *prima facie* showing that the exception applies to each document before the document is actually stripped of its privilege and admitted into evidence. Of course, the burden is upon the party asserting the exception.”); *Radiac Abrasives v. Diamond Technology*, 177 Ill. App. 3d 628 (Ill. App. Ct. 1988; Appellate Court of Illinois, Second District), 16 December 1988, **AL-0119**, para. 636; *Clark v. United States*, 289 U.S. 1, 15 (1933), 13 March 1933, **AL-0120**, page 289 U.S. 15 (“It is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud.’ [Citation.] To drive the privilege away, there must be ‘something to give color to the charge;’ there must be ‘*prima facie* evidence that it has some foundation in fact.’ [Citation.] When that evidence is supplied, the seal of secrecy is broken.”).

¹⁶ *A v. Dist. Ct.*, 191 Colo. 10 (Colo. 1976; Supreme Court of Colorado. En Banc), 24 May 1976, **AL-0118**, para. 23 (“A *prima facie* showing is not required before the judge can order a document produced for his *in camera* inspection to determine whether the privilege applies. The judge may order a document or documents produced when the privilege is first contested by the other party. However, there must be a *prima facie* showing that the exception applies to each document before the document is actually stripped of its privilege and admitted into evidence. Of course, the burden is upon the party asserting the exception.”); *Radiac Abrasives v. Diamond Technology*, 177 Ill. App. 3d 628 (Ill. App. Ct. 1988; Appellate Court of Illinois, Second District), 16 December 1988, **AL-0119**, para. 636.

III. THE APPLICATION OF THE CRIME-FRAUD OR INEQUITY EXCEPTION IN RELATION TO KPMG, WIKBORG REIN, GLIMSTEDT, KROLL, NORWAY'S DAMAGES REPORT, AND/OR INVESTIGATIVE FIRMS

29. Applicants believe that Norway has, in essence, conducted its litigation of the underlying arbitration in bad faith. In the arbitration, Norway has perpetrated iniquity after iniquity. Those iniquities border on fraud, or at least deceit.
30. Those iniquities or improper behaviour are explained in the Memorial on annulment, but come in three categories of behaviour.
31. The first category of improper behaviour is that Norway has hired external professional advisers (law firms and others) close to Applicants, or actually having worked with them before. They did it at least three times, hiring KPMG, which had been hired in the same case by Applicants, hiring Glimstedt, which had also been hired in the same case by Applicants, and hiring Wikborg Rein, which had worked with Applicants' business partner, UAB Arctic Fishing, in a domestic Norwegian case related to the investment arbitrations brought by both Applicants and Arctic Fishing. This behaviour appears to have been based on the possibility of improperly obtaining information about Applicants and persons close to them, which they may well have, notably to make (incorrect) allegations that Mr. Pildegovics would not be a real investor and rather that Mr. Levanidov would be the real investor.¹⁷
32. The second category of iniquity is that Norway applied for bifurcation of quantum on the basis that it was not possible for it to submit a damages report because there were too many scenarios. However, it appeared in costs submissions that Norway actually had a damages report ready to go, but that it must have preferred not to submit it.¹⁸
33. The third category of iniquities is that Norway appears to have investigated Applicants and related persons, notably on the basis of time sheets showing that investigative firms were contacted.¹⁹

¹⁷ Memorial for Annulment, paras. 171-232.

¹⁸ Memorial for Annulment, paras. 233-241.

¹⁹ Memorial for Annulment, paras. 227-231.

34. There is therefore a very well established *prima facie* of improper conduct, or iniquity. As such, the Tribunal can order the production of all categories of documents requested, without any further question.
35. Applicants' Redfern Schedule further sets out the various categories of documents sought to be produced.

IV. APPLICATION OF A MISSING PROCEDURAL DECISION

36. Where a procedural decision mentioned in an ICSID Award cannot be found and does not appear to have been notified to the parties, and that the lack of notification of the decision is a ground for annulment, the ICSID *ad hoc* Committee should be able to enquire with the Tribunal and/or the ICSID Secretariat about the circumstances of the missing decision, and perhaps even request any relevant document the Tribunal or Secretariat may wish to provide.
37. Applicants believe this would be an appropriate use of the Committee's general procedural powers.
38. The circumstances and related annulment grounds in respect of the decision mentioned at paragraph 70 of the Award have been mentioned extensively in the Memorial on Annulment.²⁰
39. Applicants have also already mentioned that it can be proper to enquire with arbitrators in the context of annulment or set aside proceedings of international awards.²¹
40. As such, Applicants request that the *ad hoc* Committee exercise its general powers and request both the ICSID Secretariat and the Tribunal members an explanation, and any document they may wish to provide, as to whether and when the decision of 5 December 2022 mentioned at paragraph 70 of the Award was notified to all parties in the arbitration, as well as a copy thereof.

²⁰ Memorial for Annulment, paras. 75, 80, 83, 88, 90, 92, 98, 99, 110, 111-116.

²¹ Memorial for Annulment, paras. 72, 116.

V. APPLICANTS REQUEST IN THE ALTERNATIVE THE APPOINTMENT OF NEUTRAL TO REVIEW NORWAY'S DOCUMENTS TO DETERMINE IF THEY ARE RELEVANT TO APPLICANTS' ANNULMENT CASE AND SHOULD OTHERWISE BE PRODUCED

41. In the alternative of direct production of all requested documents from Norway where Applicants would be allowed to use those documents, Applicants request the appointment of a neutral (or umpire), like in *St. Marys*, to review Norway's documents and determine if they are relevant to Applicants' grounds for annulment and should otherwise be produced.
42. Under this scenario, Applicants should also receive a copy of the documents, so they can make their arguments to the neutral, but it is only upon acceptance by the neutral that the documents are relevant to Applicants' grounds for annulment and should otherwise be produced, that the Applicants could use them in the annulment.

VI. APPLICANTS' APPLICATION FOR ADDITIONAL DOCUMENT INTO THE RECORD

43. Applicants also request, pursuant to section 15.5 of Procedural Order No. 1, that the Committee authorize the addition of one new factual exhibit in support of Applicants' document production request No. 7.
44. The new document is an email received from elnnsyn, Norway's public document platform, on 27 January 2025, at 10:51pm, in respect of a search for certain documents. It shows that Norway's embassy in Riga appears to have received three different invoices from the law firm Glimstedt in 2023. Considering Norway's representations that it would not work with Glimstedt anymore on this case as of late June 2022,²² it would be important to introduce this document into the record in support of Applicants' request to produce No. 7.
45. Pursuant to section 15.5 of PO1, the special circumstance requiring the admission of this exhibit is that it comes within the scope of the special circumstances established above, *ie* documents that may go to show the existence of an iniquity in Norway's conduct during the arbitration. The admission of this sole new document goes to

²² Letter from Norway on Glimstedt Conflict, 24 June 2022, **A-0086**.

support the request allowing to determine whether it is true or not that following Norway's representation that Glimstedt would not further work on the matter, that is what actually occurred. The existence, in the public record, of invoices from Glimstedt to Norway's embassy in Riga raise a *prima facie* question on the issue which makes it appropriate include the document so it can support request to produce No. 7.

46. Should the Committee authorize this additional document into the record, Applicants will submit it and update its relevant exhibit list.
47. In any event, Applicants will transmit the document separately to Norway so it can know what is the document Applicants wish to introduce in evidence.

VII. CONCLUSION AND PRAYER FOR RELIEF

48. For the reasons set out above the Applicants request that the Committee :
 - Exercise its powers and allow all document production requests set out in Applicants' Redfern Schedule and that documents produced be used in the annulment proceedings;
 - In the alternative, appoint a neutral to review Norway's documents responsive to all document production requests set out in Applicants' Redfern Schedule to determine if they are relevant to Applicants' grounds for annulment and should otherwise be produced and used in the annulment proceedings, and allowing Applicants access to those documents in any event to comment on them for the purpose of the decision of the neutral;
 - Exercise its general powers and request both the ICSID Secretariat and the original Tribunal members an explanation, and any document they may wish to provide, as to whether and when the decision of 5 December 2022 mentioned at paragraph 70 of the Award was notified to all parties in the arbitration, as well as a copy thereof;
 - Admit as a new exhibit an email received from elnnsyn, Norway's public document platform, on 27 January 2025, at 10:51pm, showing that Norway's

embassy in Riga appears to have received three different invoices from the law firm Glimstedt in 2023; and

- Adopt any further relief it deems just.

4 February 2025

Respectfully submitted

[signed]

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