INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
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CERTIFICATE

PETERIS PILDEGOVICS AND SIA NORTH STAR

v.

KINGDOM OF NORWAY

(ICSID CASE NO. ARB/20/11)

I hereby certify that the attached document is a true copy of the Tribunal's Award dated December 22, 2023.

Meg Kinnear
Secretary-General

Washington, D.C., December 22, 2023

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

PETERIS PILDEGOVICS
AND
SIA NORTH STAR

Claimants

and

KINGDOM OF NORWAY

Respondent

ICSID Case No. ARB/20/11

AWARD

Members of the Tribunal
Sir Christopher Greenwood, GBE, CMG, KC, President of the Tribunal
The Honourable L. Yves Fortier, CC, OQ, KC, Arbitrator
Professor Donald M. McRae, CC, ONZM, FRSC, Arbitrator

Secretary of the Tribunal
Mr Govert Coppens

Date of dispatch to the Parties:

22 December 2023

REPRESENTATION OF THE PARTIES

Representing Peteris Pildegovics and SIA North Star:

Mr Pierre-Olivier Savoie
Ms Tatiana Gorkaya
Mr Ryan Pistorius
Ms Léna Kim
Ms Caroline Defois
Mr Valentin Bourgeois
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75009 Paris
French Republic

and

Professor Alina Miron
FAR Avocats
22 rue de Lisbonne
75008 Paris
French Republic

and

Professor Mads Andenas, KC
Brick Court Chambers
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United Kingdom

and

Professor Eirik Bjorge
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United States of America

Representing the Kingdom of Norway:

Mr Kristian Jervell
Mr Olav Myklebust
Ms Margrethe R. Norum
Ms Kristina Nygård
Mr Fredrik Bergsjø
Norwegian Ministry of Foreign Affairs
Legal Affairs Department
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Kingdom of Norway

and

Professor Vaughan Lowe, KC
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Essex Court Chambers
24 Lincoln's Inn Fields
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United Kingdom

and

Professor Alain Pellet
36 rue Bernard Buffet (BAL 36)
75017 Paris
French Republic

and

Mr Ysam Soualhi
15 rue Malsou
49100 Angers
French Republic

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TABLE OF SELECTED ABBREVIATIONS AND DEFINED TERMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
BIT	Agreement Between the Government of the Kingdom of Norway and the Government of the Republic of Latvia on the Mutual Promotion and Protection of Investments
C-[#]	Claimants' Exhibit
Cl. Memorial	Claimants' Memorial on Jurisdiction and Merits dated 11 March 2021
Cl. Rejoinder	Claimants' Rejoinder on Jurisdiction dated 28 July 2022
Cl. Reply	Claimants' Reply on the Merits and Counter-Memorial on Jurisdiction dated 28 February 2022
CL-[#]	Claimants' Legal Authority
Hearing	Hearing on Jurisdiction and Merits held from 30 October 2022 to 4 November 2022
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Kaiser ER1	Expert Report of Dr Brooks Kaiser dated 11 March 2021 and submitted with the Claimants' Memorial
Knutsen WS	Witness Statement of Mr Geir Knutsen dated 8 March 2021 and submitted with the Claimants' Memorial
Levanidov WS1	Witness Statement of Mr Kirill Levanidov dated 11 March 2021 and submitted with the Claimants' Memorial

Levanidov WS2	Second Witness Statement of Mr Kirill Levanidov dated 28 February 2022 and submitted with the Claimants' Reply
Pildegovics WS1	Witness Statement of Mr Peteris Pildegovics dated 11 March 2021 and submitted with the Claimants' Memorial
R-[#]	Respondent's Exhibit
Resp. Counter-Memorial	Respondent's Counter-Memorial on Merits and Counter-Memorial on Jurisdiction dated 29 October 2021
Resp. Rejoinder	Respondent's Rejoinder on the Merits dated 30 June 2022
RL-[#]	Respondent's Legal Authority
Ryssdal ER1	Expert Report of Dr Anders Ryssdal dated 10 March 2021 and submitted with the Claimants' Memorial
Ryssdal ER2	Second Expert Report of Dr Anders Ryssdal dated 28 February 2022 and submitted with the Claimants' Reply
Transcript, Day [#], p. [#], line(s) [#] ([Speaker])	Transcript of the Hearing
Tribunal	Arbitral tribunal constituted on 10 August 2020

I. INTRODUCTION AND PROCEDURAL HISTORY

A. INTRODUCTION

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Agreement Between the Government of the Kingdom of Norway and the Government of the Republic of Latvia on the Mutual Promotion and Protection of Investments, which entered into force on 1 December 1992 (the "**BIT**" or "**Treaty**"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force for the Kingdom of Norway on 15 September 1967 and for the Republic of Latvia on 7 September 1997 (the "**ICSID Convention**").

2. The claimants are Mr Peteris Pildegovics ("**Mr Pildegovics**" or the "**First Claimant**"), a natural person having the nationality of the Republic of Latvia ("**Latvia**"), and North Star SIA ("**North Star**" or the "**Second Claimant**"), a company organized under the laws of the Republic of Latvia (together, the "**Claimants**").

3. The respondent is the Kingdom of Norway ("**Norway**" or the "**Respondent**").

4. The Claimants and the Respondent are collectively referred to as the "**Parties**". The Parties' representatives and their addresses are listed above on page (i).

5. The dispute arises out of measures taken by the Respondent regarding the alleged restriction of the fishing of snow crab in certain zones over which Norway exercises certain sovereign rights, which allegedly undermined the Claimants' investments in snow crab fishing, resulting in a loss to their investment.

B. PROCEDURAL HISTORY

6. On 18 March 2020, ICSID received a request for arbitration dated 18 March 2020 from Peteris Pildegovics and SIA North Star against the Kingdom of Norway (the "**Request for Arbitration**"), together with Exhibits C-0001 through C-0122 and Legal Authorities CL-0001 through CL-0026. The Request for Arbitration was supplemented by letters of 25 and 26 March 2020 in answer to a question posed by the ICSID Secretariat.

7. On 1 April 2020, the Secretary-General of ICSID registered the Request for Arbitration in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

8. On 18 June 2020, in accordance with Article 37(2)(a) of the ICSID Convention, the Parties agreed on the number of arbitrators and the method of their appointment as follows: the Tribunal would consist of three arbitrators, one to be appointed by each Party and the third, presiding arbitrator to be appointed by agreement of the co-arbitrators in accordance with the procedure agreed by the Parties.

9. By letter dated 8 May 2020, the Claimants appointed the Hon. L. Yves Fortier, CC, OQ, KC, a national of Canada, as arbitrator. By letter of 20 May 2020, the Respondent appointed Professor Donald M. McRae, CC, ONZM, FRSC, a national of Canada and New Zealand, as arbitrator. Since the Parties did not agree on the method of constitution of the Tribunal until 18 June 2020, ICSID proceeded to seek Mr Fortier's and Professor McRae's acceptance of their appointments on 18 June 2020, in accordance with Rule 5(2) of the 2006 ICSID Rules of Procedure for Arbitration Proceedings (the "**ICSID Arbitration Rules**"). On 22 June 2020, ICSID informed the Parties that Mr Fortier and Professor McRae had accepted their appointments.

10. As per the Parties' agreement concerning the method to appoint the President of the Tribunal, on 23 June 2020, ICSID invited the co-arbitrators to jointly prepare a shortlist of five candidates suitable to serve as President. On 4 July 2020, the co-arbitrators provided the Parties with the list for ranking, allowing each Party to strike one candidate from the list. In accordance with their agreement, the Parties notified ICSID of their respective rankings on 30 and 31 July 2020.

11. On 31 July 2020, ICSID informed the Parties that the co-arbitrators would jointly approach Sir Christopher Greenwood GBE, CMG, KC, a national of the United Kingdom and the highest-ranked candidate on the shortlists submitted by the Parties, with a view to

confirming his availability to act as presiding arbitrator. On 5 August 2020, ICSID informed the Parties that Mr Fortier and Professor McRae had confirmed Sir Christopher's availability and willingness to act as presiding arbitrator in this case. Pursuant to the Parties' agreed process, ICSID proceeded to seek acceptance of his appointment in accordance with Arbitration Rule 5(2).

12. On 10 August 2020, the ICSID Secretary-General, in accordance with ICSID Arbitration Rule 6(1), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Copies of each arbitrator's signed declaration submitted in accordance with ICSID Arbitration Rule 6(2) were transmitted to the Parties on the same date. Ms Leah Njoroge, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal. Mr Govert Coppens, ICSID Legal Counsel, succeeded Ms Njoroge on 12 April 2022.

13. The Tribunal is thus composed of Sir Christopher Greenwood, GBE, CMG, KC, a national of the United Kingdom, President, appointed by agreement of the co-arbitrators in accordance with the agreement of the Parties; the Hon. L. Yves Fortier, CC, OQ, KC, a national of Canada, appointed by the Claimants; and Professor Donald M. McRae, CC, ONZM, FRSC, a national of Canada and New Zealand, appointed by the Respondent.

14. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 28 September 2020 by video conference. Following the first session, the Tribunal issued Procedural Order No. 1 on 12 October 2020 ("**PO 1**"). PO 1 provides, *inter alia*, that the applicable ICSID Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English, and that the place of proceeding would be Paris, French Republic. PO 1 also set out a schedule for the jurisdictional and merits phase of the proceeding.

15. The Tribunal's Decision on Bifurcation and Other Matters, also dated 12 October 2020 (the "**Decision on Bifurcation and Other Matters**"), addresses various matters raised by the Parties in correspondence (during which the Claimants also filed Exhibits C-0123 through C-0128 and Legal Authorities CL-0027 through CL-0041), and in oral submissions during, the first session. The Tribunal rejected the Claimants' request to address bifurcation

as a preliminary question, before the submission of the Claimants' Memorial on the Merits, as it found the request premature. The Tribunal likewise deferred its ruling on the Claimants' request that there be a round of requests for document production in case of bifurcation if and when bifurcation is ordered.

16. As part of the "Other Matters", the Claimants sought a ruling to allow Mr Kirill Levanidov, a cousin and business partner of the First Claimant, to attend the hearing prior to testifying as a witness, as an exception to the general rule that all witnesses will be sequestrated before their own testimony. The Tribunal rejected the Claimants' request as it had "*difficulty seeing how his presence in the hearing room could be necessary to enable counsel for the Claimants to receive instructions*". In addition, the Tribunal expanded on the reasoning of its ruling in Section 23 of PO 1 on what constitutes confidential information and how confidential information should be treated.

17. In accordance with Section 23.9 of PO 1, on 20 October 2020, ICSID proposed to the Parties to publish on its website by 2 November 2020 the Request for Arbitration, PO 1 and the Tribunal's Decision on Bifurcation and Other Matters.

18. On 27 October 2020, the Claimants transmitted a redacted version of the Request for Arbitration for publication and indicated that they had received no objections to the redactions by the Respondent. The Claimants also stated that PO 1 and the Decision on Bifurcation and Other Matters contained no confidential information and could therefore be published in full. Having received no objection from the Respondent to publication of the documents, as redacted, ICSID posted them on its website on 2 November 2020.

19. On 5 November 2020, the Respondent objected to the Claimants' redactions to the Request for Arbitration based on the need for transparency given the public interest and the Claimants' alleged failure to demonstrate the redacted information constituted business confidential information. At the invitation of the Tribunal, the Claimants replied on 19 November 2020, together with Exhibits C-0130 through C-0145 and Legal Authorities CL-0042 through CL-0059. The Respondent then responded on 24 November 2020, together with Exhibits R-0001 and R-0002, and on 26 November 2020, the Claimants filed their final comments, together with Exhibits C-0146 through C-0149.

20. On 9 November 2020, the Claimants wrote to the Tribunal, attaching Exhibit C-0129, informing that Mr Levanidov (see above paragraph 16) had formally accepted an invitation to join the Board of North Star; this development, the Claimants argued would now "*confirm* [Mr Levanidov's] *qualification as an officer of a party whose presence at hearings is necessary to enable instructions to be given to counsel*". At the invitation of the Tribunal, the Respondent replied on 12 November 2020. The Tribunal took note of the Parties' positions on the issue by email of later that same date.

21. On 21 December 2020, the Tribunal issued Procedural Order No. 2 ("**PO 2**") concerning the publication of the Request for Arbitration. The Tribunal ruled that certain of the Claimants' redactions be removed and a revised redacted version of the Request for Arbitration was published. Following further exchanges between the Parties and the Tribunal, on 7 January 2021, the Claimants wrote to propose additional redactions to those ordered by the Tribunal in PO 2; with their request, the Claimants attached Exhibit C-0150.

22. In accordance with the timetable in PO 1, on 12 March 2021, the Claimants filed their Memorial on the Merits dated 11 March 2021 (the "Claimants' **Memorial**"), together with Exhibits C-0151 through C-0182 and Legal Authorities CL-0060 through CL-0363; a Witness Statement of Mr Geir Knutsen ("**Knutsen WS**"); a Witness Statement of Mr Kirill Levanidov ("**Levanidov WS1**"), with Exhibits KL-0001 through KL-0052; a Witness Statement of Mr Peteris Pildegovics ("**Pildegovics WS1**"), with Exhibits PP-0001 through PP-0221; an Expert Report of Dr Anders Ryssdal ("**Ryssdal ER1**"), with Exhibits AR-0001 through AR-0023; an Expert Report of Dr Brooks Kaiser ("**Kaiser ER1**"), with Exhibits BK-0001 through BK-0055; and an Expert Report of Mr Kiran Sequeira, MBA, PE ("**Sequiera ER**"), with Exhibits VP-0001 through VP-0103.

23. On 8 April 2021, the Respondent filed a Request for Bifurcation (the "**Request for Bifurcation**"), together with Exhibits R-0001 through R-0003 and Legal Authorities RL-0001 and RL-0002. The Respondent requested to address the quantum stage in a separate phase of the proceeding.

24. On 6 May 2021, the Claimants submitted their observations on the Request for Bifurcation, together with Exhibit C-0183 and Legal Authorities CL-0364 through CL-0393.

25. On 1 June 2021, the Tribunal issued Procedural Order No. 3 ("**PO 3**") concerning the Request for Bifurcation. The Tribunal rejected the Respondent's request to bifurcate the quantum phase of the proceeding but expressed its preparedness to consider a renewed request from either Party after the filing of the Respondent's Counter-Memorial.

26. Following the Tribunal's invitation in PO 3 for the Parties to consult regarding a revised procedural timetable, on 14 June 2021 the Parties informed the Tribunal of an agreed timetable which was adopted by the Tribunal in its Procedural Order No. 4 of 30 June 2021 ("**PO 4**"). PO 4 also clarifies certain matters concerning confidentiality designations made by the Parties pursuant to PO 1.

27. On 29 October 2021, the Respondent filed its Counter-Memorial on the Merits and Memorial on Jurisdiction (the "Respondent's **Counter-Memorial**") as well as a renewed Request for Bifurcation to address the quantum stage in a separate phase of the proceeding (the "**Renewed Request for Bifurcation**"), together with Exhibits R-0004 through R-0186 and Legal Authorities RL-0003 through RL-0171. On 10 November 2021, the Claimants submitted their response to the Respondent's Renewed Request for Bifurcation. At the invitation of the Tribunal, the Respondent replied to the Claimants' response on 24 November 2021, with the Claimants filing their final response on 29 November 2021.

28. On 6 December 2021, the Tribunal issued Procedural Order No. 5 ("**PO 5**") concerning the Renewed Request for Bifurcation. The Tribunal granted the Respondent's request, considering *inter alia* the significant number of different permutations of the arguments on quantum in case the Claimants' case is only partially successful on jurisdiction and liability. The Tribunal was further satisfied that issues of quantum were not so interwoven with jurisdiction or liability that they could not sensibly be left for a subsequent phase.

29. In accordance with the timetable set out in PO 1 as subsequently modified, on 10 December 2021, the Parties submitted their requests for production of documents in the form of Redfern Schedules. On 22 December 2021, the Tribunal issued Procedural Order No. 6 ("**PO 6**") concerning the production of documents, wherein it ruled on the disputed requests and directed each Party to produce certain documents to the other Party by 14 January 2022.

30. On 28 February 2022, the Claimants filed their Reply on the Merits and Counter-Memorial on Jurisdiction (the "Claimants' **Reply**") together with Exhibits C-0184 through C-0293 and Legal Authorities CL-0394 through CL-0519; a Second Witness Statement of Mr Kirill Levanidov ("**Levanidov WS2**"); a Second Witness Statement of Mr Peteris Pildegovics ("**Pildegovics WS2**"); a Second Expert Report of Dr Anders Ryssdal ("**Ryssdal ER2**"); and a Second Expert Report of Dr Brooks Kaiser ("**Kaiser ER2**").

31. On 6 May 2022, the Parties indicated their availability to hold the hearing between 27 October and 4 November 2022 and their preference to hold the hearing in Europe.

32. On 10 May 2022, the Tribunal set the dates for the hearing on jurisdiction and liability from 31 October to 4 November 2022, with 5 November held in reserve (the "**Hearing**"), and proposed to hold it in London, United Kingdom. On 13 May 2022, the Parties communicated their agreement to hold the Hearing in London.

33. On 11 May 2022, the Parties informed the Tribunal of their agreement on certain confidentiality designations in their written submissions and agreed on a submissions schedule regarding one disputed matter, the confidentiality of the Expert Report of Mr Kiran Sequiera, to the Tribunal for a ruling. The Parties disagreed on the extent to which this Expert Report should be considered confidential, with the Claimants arguing it should be designated as "*business confidential information belonging to a third party*" in its entirety and the Respondent arguing that only certain information in the Report can be deemed confidential. On 17 May 2022, the Tribunal approved the Parties' agreement regarding the schedule for submissions regarding confidentiality designations.

34. On 3 June 2022, the Parties informed the Tribunal of their agreement to an amended schedule to submit their submissions regarding the confidentiality designation of the Expert Report of Mr Kiran Sequiera simultaneously on 10 June 2022. On 5 June 2022, the Tribunal confirmed its acceptance of the Parties' agreement to file their submissions on the contested issue by 10 June 2022. On 10 June 2022, both Parties filed their submissions as scheduled.

35. On 27 June 2022, the Tribunal issued its Procedural Order No. 7 ("**PO 7**"), the Decision on Confidentiality of Expert Report, *i.e.* the Expert Report of Mr Kiran Sequiera. The

Tribunal dismissed the Claimants' request to have the entire Report designated as confidential and ordered that, subject to the redactions agreed between the Parties and any other redactions which may prove necessary to preserve confidentiality protected by PO 1, the Report shall be treated as a matter of public record.

36. On 30 June 2022, the Respondent submitted its Rejoinder on the Merits and Reply on Jurisdiction (the "Respondent's **Rejoinder**"), together with Exhibits R-0187 through R-0436 and Legal Authorities RL-0172 through RL-0272; and a Witness Statement of Mr Karl Olav Kjile Pettersen ("**Pettersen WS**").

37. On 28 July 2022, the Claimants filed their Rejoinder on Jurisdiction (the "Claimants' **Rejoinder**") together with Exhibits C-0294 through C-0316 and Legal Authorities CL-0520 through CL-0576.

38. In response to ICSID's invitation to the Parties to attest, in light of their agreement on the publication of case documents, that all the applicable data protection and privacy regulations had been complied with in requesting that the ICSID Secretariat publish the documents in this arbitration on its website as agreed by the Parties, on 5 August 2022, the Parties attested that all applicable data protection and privacy regulations had been complied with for the purposes of publishing documents from the proceeding on the ICSID website, and that appropriate notice had been given to all relevant data subjects.

39. On 16 August 2022, the Tribunal sent the Parties a draft agenda of the pre-Hearing organizational meeting and a draft Procedural Order No. 8 concerning the Hearing, inviting them to submit their comments.

40. On 19 August 2022, the Respondent informed the Tribunal that both Contracting Parties to the BIT had agreed on 27 July 2022 to terminate the BIT (the "**Termination Agreement**"). The Respondent further stated that this decision "*will not affect the Tribunal's competence in the current case*". The Termination Agreement entered into force 30 days after the date of the last written notification by the Contracting Parties confirming that the national legal procedures necessary for the entry into force of the Termination Agreement have been completed, *i.e.* on 22 December 2022.

41. On 25 August 2022, at the invitation of the Tribunal, the Claimants submitted their observations on the Respondent's letter dated 19 August 2022, together with Exhibits 1 through 6.

42. On 26 August 2022, both Parties confirmed their willingness to comply with all applicable data protection and privacy regulations. On the same day, the Parties submitted their comments on the draft agenda and the draft Procedural Order No. 8 concerning the Hearing.

43. On 29 August 2022, the Tribunal held a pre-hearing organizational meeting with the Parties by video conference regarding various modalities of the Hearing.

44. On 30 August 2022, at the invitation of the Tribunal, the Respondent submitted its observations on the Claimants' letter of 25 August 2022 regarding the termination of the BIT.

45. Also on 28 September 2022, the Tribunal invited the Parties to comment on respective proposals made regarding the Hearing, which the Parties did on 30 September 2022 and 3 October 2022.

46. On 13 October 2022, ICSID sent the Parties logistical information regarding the Hearing and requested their responses on certain practical issues.

47. On 14 October 2022, the Parties submitted their respective (i) *dramatis personae*, (ii) chronology of events, and (iii) Lists of Issues to be determined by the Tribunal. The Parties also agreed to add new documents to the record. On 17 October 2022, the Tribunal approved the agreement between the Parties regarding additional evidence and provided instructions for their submission.

48. On 24 October 2022, the Parties communicated their agreement on the transparency regime of the Hearing to the Tribunal, in particular that it would be open to the public and available through livestream. The Parties further agreed to endeavour to reach agreement on arrangements to protect confidential information and eventually communicated their agreement to the Tribunal at the Hearing.

49. On 26 October 2022, having received the Parties' comments on draft Procedural Order No. 8 concerning the Hearing, the Tribunal issued Procedural Order No. 8 ("**PO 8**").

50. Following the Parties' agreement, on 29 October 2022, the Respondent filed Exhibits R-0437 through R-0450.

51. On 29 October 2022, the Respondent added two additional members to its counsel team for the Hearing, Dr Marius Emberland, Lawyer at Norway's Attorney General's Office and Mr Vidar Jarle Landmark, Special Adviser in Norway's Ministry for Trade and Fishery.

52. The Hearing was held from 31 October to 4 November 2022 in London. The Hearing was livestreamed online with interruptions as needed for the protection of confidential information.

53. The following persons were present at the Hearing:

Tribunal:

Sir Christopher Greenwood, GBE, CMG, KC	President
The Honourable L. Yves Fortier, CC, OQ, KC	Arbitrator
Professor Donald M. McRae, CC, ONZM, FRSC	Arbitrator

ICSID Secretariat:

Mr Govert Coppens	Secretary of the Tribunal

For the Claimants:

Mr Peteris Pildegovics	Party representative
Mr Kirill Levanidov	Party representative
Mr Pierre-Olivier Savoie	Savoie Laporte
Mr Pierre-Olivier Laporte	Savoie Laporte
Ms Myriam Seers	Savoie Laporte
Ms Léna Kim	Savoie Laporte
Ms Caroline Defois	Savoie Laporte
Mr Ryan Pistorius	Savoie Laporte
Ms Beate Strautkalne	Savoie Laporte
Ms Justine Touzet	Avocate à la Cour, Paris Bar
Professor Alina Miron	University of Angers
Professor Mads Andenas KC	University of Oslo
Professor Eirik Bjorge	University of Bristol

For the Respondent:

Mr Kristian Jervell	Ministry of Foreign Affairs
Mr Olav Myklebust	Ministry of Foreign Affairs

Ms Margrethe R. Norum	Ministry of Foreign Affairs
Ms Kristina Nygård	Ministry of Foreign Affairs
Mr Fredrik Bergsjø	Ministry of Foreign Affairs
Mr Vidar Landmark	Ministry of Trade, Industry and Fisheries
Mr Marius Emberland	The Norwegian Office of the Attorney General
Professor Vaughan Lowe	Essex Court Chambers
Professor Alain Pellet	Professor emeritus, University Paris Nanterre
Mr Ysam Soualhi	Researcher, Centre Jean Bodin (CJB), University of Angers
Mr Mubarak Waseem	Essex Court Chambers

Court Reporter:

Ms Claire Hill	Court Reporter

Interpreters:

Ms Hanne B.K. Mørk	Interpreter
Ms Siri Fuglseth	Interpreter
Ms Bente Karin Rismo	Interpreter

54. During the Hearing, the following persons were examined:

On behalf of the Claimants:

Dr Brooks Kaiser	University of Southern Denmark
Dr Anders Ryssdal	Glittertind
Mr Geir Knutsen	Former Mayor of Båtsfjord

On behalf of the Respondent:

Mr Karl Olav Kjile Pettersen (remote participation)	Skipper on the M/S *Tromsbas*

55. With the Claimants' agreement, on 2 November 2022, the Respondent submitted a written response to certain Tribunal questions and Legal Authorities RL-0273 and RL-0274.

56. Following leave granted by the Tribunal at the Hearing, on 4 November 2022, the Claimants submitted a "Note on the invasiveness of the snow crab (C. opilio) and its management in the Barents Sea" by Dr Brooks Kaiser, dated 3 November 2022, together with Exhibits C-0321 and C-0322 and Legal Authority CL-0579.

57. On 11 November 2022, the Tribunal recapitulated the post-Hearing arrangements, in particular regarding the submission of Statements of Costs and corrections to the transcript of the Hearing.

58. On 2 December 2022, the Parties submitted their respective Statements of Costs.

59. On 7 December 2022, the Parties submitted their corrections to the transcript of the Hearing.

60. On 13 December 2022, the Claimants raised two alleged conflicts of interest which they considered may have arisen with regard to the employment by the Respondent of the law firm Wikborg Rein and the accounting firm KPMG AS. The Claimants stated that they were unaware that either Wikborg Rein or KPMG AS had performed work for Norway in connection with the present case until they received the Respondent's Statement of Costs dated 2 December 2022. The Claimants alleged these two professional services firms have had, or were likely to have had, access to confidential information regarding one or more of the Claimants. The Claimants also referred to what they described as an earlier conflict of interest arising out of Norway's use of the Latvian office of the Glimstedt Law Firm ("**Glimstedt**") while Glimstedt's Lithuanian office had represented the Claimants in an earlier stage of this arbitration. However, the Claimants noted that Glimstedt had withdrawn from advising Norway in this case when they had been alerted to the conflict by the Claimants. The Claimants reserved their rights to request any action by the Tribunal concerning this matter.

61. The Respondent responded by letter dated 19 December 2022, denying that there was any conflict of interest and enclosing correspondence between the Parties on this subject.

62. On 31 January 2023, the Claimants applied for the exclusion of Wikborg Rein and KPMG AS advisors to the Respondent and reserved their right to request disclosure of all documents relating to the retainers between those firms and the Respondent. In addition, the Claimants asked the Tribunal to exclude Glimstedt from further advising Norway unless the Respondent confirmed that Glimstedt had not advised it since June 2022.

63. At the invitation of the Tribunal, on 10 February 2023, the Respondent confirmed that it had not sought advice or assistance from Glimstedt since June 2022. The Respondent argued that there was no conflict of interest in the case of either Wikborg Rein or KPMG AS and stated that it would not refrain from using their services unless the Tribunal so ordered.

64. On 23 February 2023, the Tribunal issued Procedural Order No. 9 ("**PO 9**") regarding the alleged conflicts of interests. The Tribunal noted that, given the Respondent's confirmation, no decision was required regarding Glimstedt. Regarding Wikborg Rein, the Tribunal rejected the Claimants' request. Regarding the KPMG network, and in particular KPMG AS, it granted the Claimants' request and directed the Respondent not to make any further use of those entities in the present arbitration.

65. Following the Respondent's clarification on 9 March 2023 of its position regarding certain corrections to the transcript as proposed by the Claimants, the Tribunal accepted the corrections as agreed between the Parties.

66. On 17 March 2023, the Claimants (i) requested that the Tribunal "*ask Norway to clarify Wikborg Rein's status in the present case*"; and (ii) in reference to the Termination Agreement between Latvia and Norway (see above paragraph 40) set to enter into force on 27 March 2023, inquired whether the Tribunal could "*invite Norway to clarify its position and/or provide the diplomatic note of Latvia transmitting the notice of termination of the BIT, if possible*". Upon invitation from the Tribunal, the Respondent responded to both points. On 23 March 2023, the Respondent informed the Tribunal of the law firms and additional persons, including those affiliated with Wikborg Rein, who are or have been assisting it in the present case. On 24 March 2023, the Respondent stated that it did not find it "*appropriate to submit the Latvian note*" due to its classification as "*limited access information*" under Latvian law; however, it did confirm that the Termination Agreement will enter into force on 27 March 2023.

67. On 27 March 2023, the Tribunal acknowledged the Parties' correspondence of 17, 23 and 24 March and stated that it did not consider any further action on its part to be appropriate at this stage.

68. On 16 October 2023, the Claimants wrote to the Tribunal to inform it "*of a recent Note Verbale from the EU to Norway*" concerning a Norway Supreme Court decision to deny North star Svalbard fishing licences. The Claimants stated that they had only obtained a draft of the note and could not "*confirm whether it has been formally sent to Norway at this time*". With their correspondence, the Claimants submitted Exhibits C-0357 through C-0359. Upon invitation from the Tribunal, the Respondent provided its observations on 23 October 2023, therein (i) objecting to the Claimants' submission of additional documents without requesting leave from the Tribunal pursuant to Section 16.3 of PO 1, and (ii) stating that the "*'draft Note Verbale' seems to be an internal document* […] *and should not be shared*".

69. On 1 November 2023, the Tribunal invited the Claimants to make a formal application, by 7 November 2023, for admission to the record of the exhibits submitted with its 16 October correspondence; the Respondent would then be permitted to respond by 15 November 2023. The Parties complied with the Tribunal's instructions.

70. The Tribunal decided that it should admit the documents in order to ensure that it has the fullest possible picture of what happened. Accordingly, on 5 December 2023, the Tribunal agreed to admit the documents as C-0357 to C-0359. In doing so, the Tribunal noted, however, that the application to submit these documents was made at a very late stage of the proceedings, when the Claimants had already contacted the Tribunal to inquire when the Tribunal would give its ruling. That is both highly unusual and not conducive to the orderly conduct of the arbitration. Moreover, since the Judgment of the Supreme Court and the article critical of that Judgment had been public since late March 2023, it was not even a timely application. Nevertheless, the Tribunal is conscious of the importance of the present case and the fact that other arbitrations have been stayed pending its ruling.

71. The proceeding was closed on 22 December 2023.

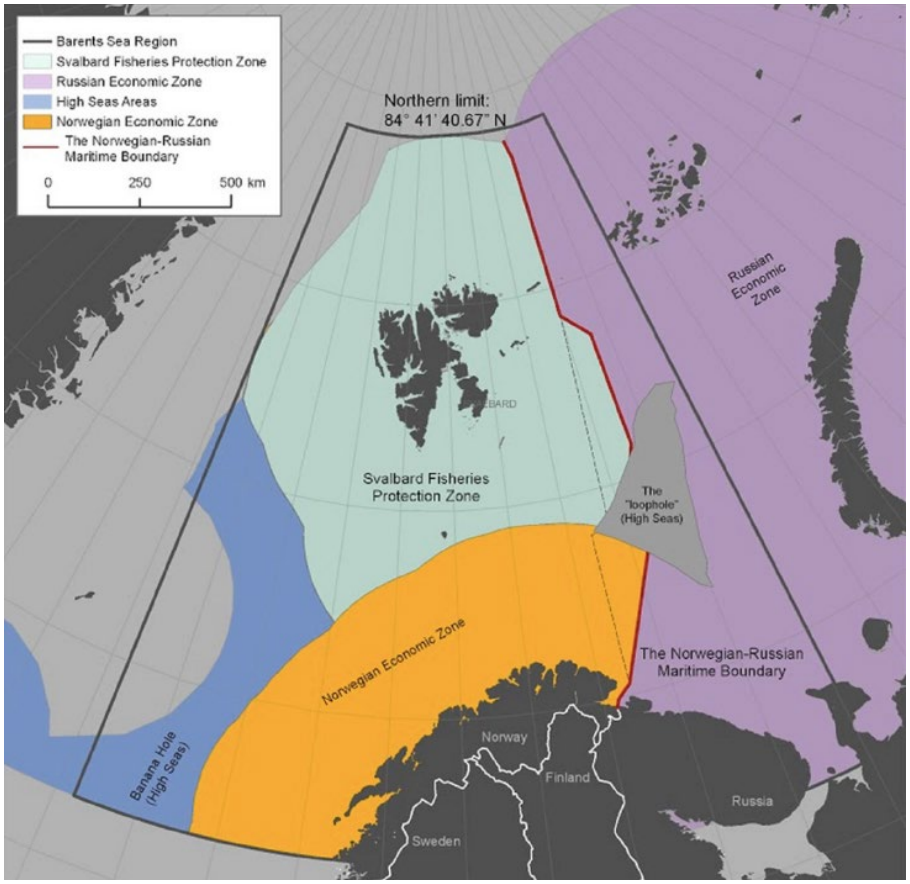
II. FACTUAL BACKGROUND

72. This section sets out the factual background to the case. Insofar as the Parties differ regarding factual aspects of the case, the present section merely highlights the differences;

where it is necessary for the Tribunal to rule on those differences, it does so later in the Award.

A. THE BARENTS SEA

73. The Barents Sea lies to the north of the European landmass and south of the Arctic Ocean. It is bounded by the Norwegian and Russian mainland to the south, the Svalbard archipelago to the north-west, and the Russian islands of Novaya Zemla and Franz Josef Land to the east and north-east. The relevant part of the Barents Sea is divided as follows:[1]



(i) Norwegian waters, namely the territorial sea and the Norwegian Exclusive Economic Zone;

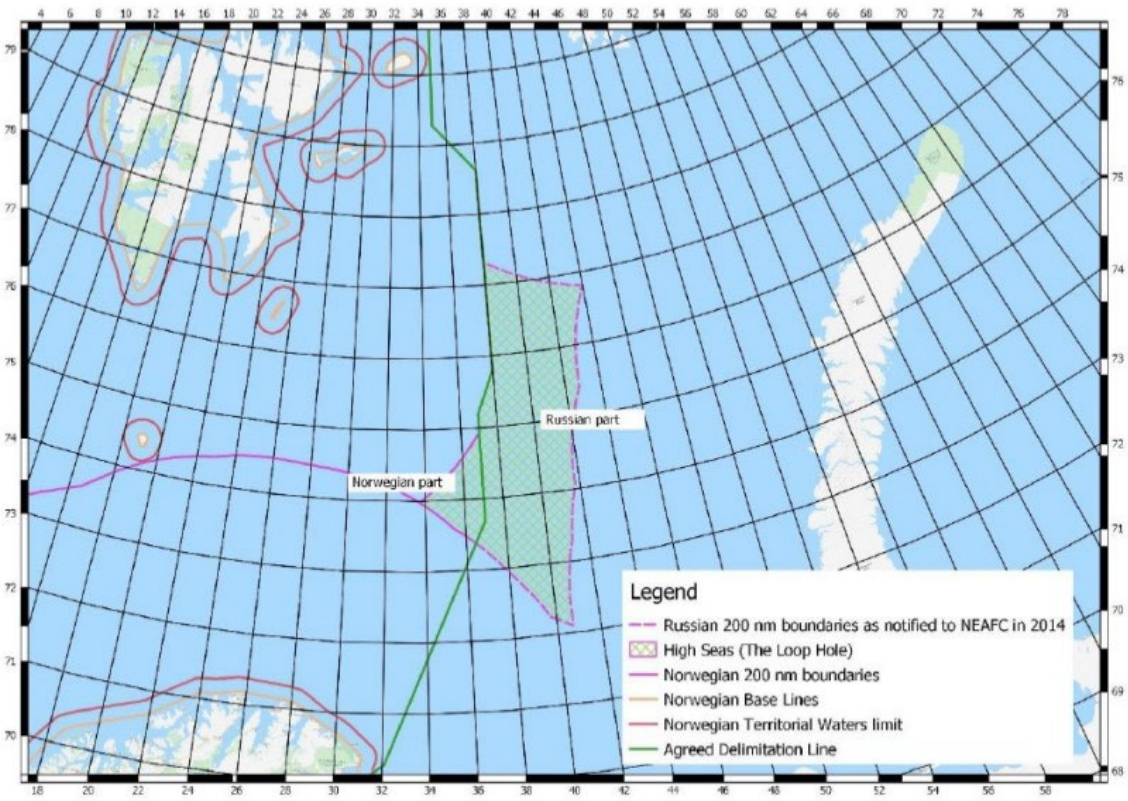
[1] Claimants' Opening Presentation: Facts, slide 6.

(ii) Russian Federation waters, namely territorial sea and the Russian Exclusive Economic Zone;

(iii) the waters pertaining to the islands of Svalbard, namely the territorial sea and the Svalbard Fisheries Protection Zone; and

(iv) an area known as the "Loop Hole" (in Norwegian, the "*Smutthullet*").

74. The Loop Hole, an area of 78,220 square kilometres, is located more than 200 nautical miles from any point on the Norwegian or Russian coast and is therefore part of the High Seas.[2]



75. However, the seabed in the Loop Hole is divided between the extended continental shelf of Norway and that of the Russian Federation.[3] In 2010 the two States agreed a maritime

[2] *See* Respondent's Opening Presentation, slide 5.

[3] The Commission on the Limits of the Continental Shelf has concluded that "*the entire area of the seabed and subsoil within the* Loophole *located beyond 200 M limits of Norway and the Russian Federation is part of the continental*

delimitation[4] under which, according to Norway, approximately 89.19% of the seabed in the Loop Hole was attributed to the Russian Federation and the remaining 10.81% to Norway.[5]

76. Under the United Nations Convention on the Law of the Sea, 1982 ("**UNCLOS**"), Article 56(1)(a), in the exclusive economic zone (the "**EEZ**") the coastal State has "*sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil*".[6] The maximum extent of the EEZ is 200 nautical miles from the coastal State's baselines. In most cases, the seabed and subsoil within the EEZ will also form part of the continental shelf of the coastal State which thus enjoys sovereign rights in respect of the seabed, subsoil and the superjacent waters.

77. Where a State enjoys a continental shelf beyond 200 nautical miles from its baselines (known as an "*extended continental shelf*"), Article 77 of UNCLOS gives the coastal State sovereign rights for the purpose of exploring and exploiting the resources of the seabed and subsoil. It does not, however, possess sovereign rights, of the kind enjoyed within its EEZ, in the superjacent waters which remain high seas.

78. Svalbard is an archipelago which forms part of Norway. The Svalbard Treaty, 1920,[7] recognized the sovereignty of Norway over the archipelago but subject to certain rights for the other parties to the Treaty (of whom there are now 46).

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shelf of these coastal States" (Summary of the Recommendations of the Commission on the Limits of the Continental Shelf in regard to the Submission made by Norway in respect of Areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea on 27 November 2006, adopted 2009 (**C-0072**), para. 21).

[4] Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean, 2010 (**RL-0004** (Norwegian), **CL-0015** (English)).

[5] Transcript, Day 1, p. 157, lines 19-23 (Mr Jervell). The Claimants estimate the Russian Federation has approximately 85% and Norway 15% of the Loop Hole: Transcript, Day 1, p. 35, lines 7-10 (Mr Laporte). Nothing turns on this difference.

[6] United Nations Convention on the Law of the Sea, 1982 ("**UNCLOS**") (**CL-0013**), Art. 56(1)(a).

[7] Treaty between Norway, the United States of America, Denmark, France, Italy, Japan, the Netherlands, Great Britain and Ireland and the British overseas Dominions and Sweden concerning Spitsbergen, 1920 ("**Svalbard Treaty**") (**CL-0002**).

79. The Barents Sea forms part of the waters subject to regulation by the North East Atlantic Fisheries Commission (the "**NEAFC**"), the members of which are the European Union, Iceland, Norway, the Russian Federation, the United Kingdom (since it left the European Union) and Denmark (in respect of the Faroes and Greenland).

80. Norway and the Russian Federation have for many years had in place agreements for co-operation regarding fishing in the Barents Sea.[8] In 1975, Norway and the Soviet Union concluded an agreement on fisheries co-operation which established what since 1992 has been known as the Norwegian-Russian Joint Fisheries Commission.[9] In 1976 an agreement was concluded for reciprocal access to each other's zones.[10] The 2010 Treaty[11] committed the parties to close co-operation in relation to fisheries.[12]

B. SNOW CRAB IN THE BARENTS SEA

81. Snow crab (*chionoecetes opilio*) is a migrating or invasive species,[13] not native to the Barents Sea. It is unclear how it came to be introduced into the Barents Sea. The first reports of snow crab being caught in the Barents Sea date from 1996 (on the Russian continental shelf) and 2003 (on the Norwegian continental shelf) but very few crabs were caught until 2012, when the commercial possibilities of harvesting snow crab became apparent. The Claimants' expert, Dr Brooks Kaiser, gives the following figures for landings of snow crab:[14]

Year	*Landings Total (metric tonnes)*	*Landings Norway*	*Landings Russian Federation*	*Landings EU*
2012	2	2	0	0

[8] *See* Resp. Rejoinder, Sec. 7.2.

[9] Agreement between the Government of the Kingdom of Norway and the Government of the Union of Soviet Socialist Republics on Co-operation in the Fishing Industry (**RL-0257** (Norwegian) and **RL-0258** (English)).

[10] Agreement between the Government of the Kingdom of Norway and the Government of the Union of Soviet Socialist Republics concerning Mutual Relations in the Field of Fisheries (**RL-0259** (Norwegian), **RL-0260** (English)).

[11] *See* Note 4, above (**RL-0004** (Norwegian), **CL-0015** (English)).

[12] Article 4.

[13] Transcript, Day 1, p. 24, line 5 (Mr Savoie: "*invasive*") and p. 160, lines 6-9 (Mr Jervell: "*probably a migrating species*"). Nothing turns on the difference for the purposes of the present case.

[14] Kaiser ER1, p. 39, Table 10. The table in the text is a simplified presentation of the data on landings only.

2013	251	189	62	0
2014	8,204	1,800	4,104	2,300
2015	18,140	3,482	8,895	5,763
2016	16,500	5,290	7,520	3,690
2017	10,847	3,153	7,780	2
2018	12,532	2,804	9,728	0
2019	13,878	4,038	9,840	0
2020 (partial)	13,905	3,405	10,500	0

82. It appears that, during the period covered by this table, the population density of snow crab was much higher in the Russian continental shelf than in the other parts of the Barents Sea.[15] In particular, the snow crab in the Loop Hole were heavily concentrated on the Russian side of the 2010 demarcation line. However, Dr Kaiser indicates that the population was spreading rapidly into other parts of the Barents Sea.[16]

83. According to the Respondent, the majority of snow crab harvested by the Claimants in the Loop Hole during the relevant period was taken in the Russian sector of the Loop Hole and landed in Norway at the port of Båtsfjord.[17] In the words of a report cited by both Parties: "*Snow crab fishing takes place in an area where the majority is the Russian shelf, while a smaller area furthest west is the Norwegian shelf* […]. *This has an impact on who has the right to manage, and fish, the crab.*".[18]

[15] Kaiser ER1, para. 23. See also Resp. Rejoinder, para. 396.

[16] *Loc. cit*.

[17] Transcript, Day 1, p. 154, lines 10-23 and p. 161, lines 10-12 (Mr Jervell).

[18] *Økonomisk fiskeriforskning* [Nofima – Fishery economics research] 2021, 31(Special Issue: Snow Crab):13-28, pdf p. 7 "The snow crab – A management challenge" (**BK-0006**); See Resp. Rejoinder, para. 391.

C. REGULATION OF SNOW CRAB HARVESTING AND LANDING BY NORWAY AND THE RUSSIAN FEDERATION

84. It is common ground that the catching of snow crab in the Loop Hole was originally unregulated by Norway, although a vessel seeking to catch snow crab in the Loop Hole would have to be registered with the NEAFC.[19] In July 2014, in response to an inquiry regarding whether vessels registered in the European Union (the "**EU**") could land snow crab caught in the NEAFC area at Norwegian ports, the Norwegian Directorate of Fisheries wrote:

> 1. *In principle, EU vessels can land fish, including snow crab to Norway on an equal footing with Norwegian fishing vessels. There are therefore no other rules for EU vessels when it comes to fresh and live goods. All registered buyers in Finnmark* [the region in northern Norway where Båtsfjord is located] *have a good overview of the conditions for landing.*
> 2. *In principle, no special documentation shall be submitted to the fisheries authorities when the crab is to be landed alive at a Norwegian reception centre, and the crab has been caught outside the Norwegian Economic Zone.*[20]

85. The first Norwegian regulations regarding snow crab fishing were adopted in December 2014 and entered into force on 2 January 2015. The Regulations on the Prohibition of Catching Snow Crabs (the "**2014 Regulations**")[21] were adopted under the Marine Resources Act 2008.[22] The Regulations provided:

> *§ 1 General prohibition*
> *It is prohibited for Norwegian and foreign vessels to catch snow crabs in the territorial waters of Norway (Norges territorialfarvann), including the territorial waters at Svalbard, the economic zone and the fishery protection zone at Svalbard. For Norwegian vessels, the prohibition also applies to international waters.*

[19] Email from Mr Sigmund Hågensen of the Norwegian Directorate of Fisheries to Mr Sergei Ankipov, 16 May 2013 (**KL-0016**).

[20] Email from Mr Ton-Ola Rudi of the Norwegian Directorate of Fisheries to Mr Sergei Ankipov, 25 July 2014 (**KL-0020**).

[21] J-280-2014 (**C-0104**).

[22] Act Relating to the Management of Wild Living Marine Resources, 2008 (**CL-0012**).

> *§ 2 Exemptions*
> *An exemption may be granted from the prohibition on the conditions laid down by the Directorate of Fisheries. The terms shall apply to conditions such as reporting of catches and positions, area, period restrictions and the like.*
>
> *Applications for an exemption are sent to the Directorate of Fisheries.*
>
> *Vessels that have fished snow crab in 2014 can continue catching after 1 January 2015, but must apply for an exemption by 15 February 2015.*

86. On 17 July 2015, the Deputy Minister of Agriculture of the Russian Federation and the Minister of Fisheries of the Kingdom of Norway held a meeting in Malta, in the context of the regular meeting of the Joint Fisheries Commission established by the two States. The minutes of this meeting (the "**Agreed Minutes**" or the "**Malta Declaration**") record that they agreed as follows:

> *In accordance with Article 77 of the United Nations Convention on the Law of the Sea of 1982 (UNCLOS), the two Coastal States, the Russian Federation and Norway, exercise their sovereign rights in respect of the continental shelf of the Barents Sea for its exploration and development of its natural resources.*
>
> *Therefore, only these two Coastal States have the exclusive rights to harvest sedentary species on the continental shelf of the Barents Sea.*
>
> *Pursuant to paragraph 4 of Article 77 of the Convention, both the Russian Federation and Norway will proceed from the fact that harvesting of sedentary species, <u>including snow crab</u>, in the NEAFC Regulatory Area in the Barents Sea shall not be carried out without the express assent of the Coastal State*.[23] [emphasis added]

87. The significance of whether snow crab are sedentary or non-sedentary is that non-sedentary species are subject to the jurisdiction of a Coastal State only within its territorial waters and EEZ. Since the Loop Hole falls outside the EEZs of Norway and the Russian Federation, if snow crab are non-sedentary then neither State would have rights in respect

[23] Minutes of the Meeting between Ilya V. Shestakov, Deputy Minister of Agriculture of the Russian Federation – Head of the Federal Agency for Fisheries, and Elisabeth Aspaker, Minister of Fisheries of the Kingdom of Norway, 17 July 2015 ("**Malta Declaration**") (**C-0106**).

of the snow crab stock in the Loop Hole. If, on the other hand, snow crab are a sedentary species, then the stock in the Loop Hole would fall within the continental shelf jurisdiction of either Norway or the Russian Federation.

88. Article 77(4) of UNCLOS defines a sedentary species as "*organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil*".[24]

89. The decision of the two governments that snow crab was a sedentary species within the meaning of Article 77(4) of UNCLOS is the subject of much criticism by the Claimants, who maintain that it represented a radical change of position by Norway, which they say had always treated snow crab as non-sedentary and therefore as falling outside the continental shelf jurisdiction. They maintain that the effect of this change of position was that, in the words of a working group of the International Council for the Exploration of the Sea, "[t]*he snow crab stock in the Loop Hole area then shifted from being in international waters to become Russian and Norwegian property on their continental shelves*".[25] The Tribunal will return to this issue later in its Award. For the present, it is sufficient to note the agreement between Norway and the Russian Federation.

90. That agreement was followed by a change in Norwegian regulation of the harvesting and landing of snow crab. On 22 December 2015, Norway amended the 2014 Regulations with immediate effect. The new Regulations on the Prohibition of Catching Snow Crabs (the "**2015 Regulations**")[26] amended Section 1 of the 2014 Regulations to read as follows:

> *It is prohibited for Norwegian and foreign vessels to catch snow crabs in the Norwegian territorial see* [*sic*] *(norsk sjøterritorium) and inland waters, and on the Norwegian continental shelf. For Norwegian vessels the prohibition also applies to other countries' continental shelf.*

Section 2 of the 2014 Regulations was amended as follows:

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[24] **CL-0013**.

[25] ICES, Report of the Working Group on the Integrated Assessments of the Barents Sea (**BK-0045**), p. 128.

[26] J-298-2015 (**C-0110**).

> *Application for an exemption is sent to the Directorate of Fisheries. The Directorate of Fisheries may impose restrictions on the number of vessels granted exemption for catching on the Russian continental shelf in the area outside 200 nautical miles of the Russian coast in the Barents Sea.*

The 2015 Regulations added a new Section 3:

> *§ 3 Catching from Russian Vessels*
>
> *Notwithstanding the prohibition in § 1, Russian vessels may catch snow crabs on the Norwegian Continental shelf in the area outside 200 nautical miles of the Norwegian coast in the Barents Sea.*

91. The 2015 Regulations did not address the catching of snow crab by non-Norwegian vessels on the Russian continental shelf. That remained lawful under Russian law until September 2016. Under Norwegian law there was no prohibition on non-Norwegian vessels landing in Norway snow crab lawfully harvested outside Norwegian waters and the Norwegian continental shelf.[27] In September 2016, the Russian Federation introduced a ban on foreign fishing vessels harvesting snow crab on the Russian continental shelf.[28] Since snow crab taken on the Russian continental shelf in the Loop Hole by foreign vessels after 4 September 2016 was taken in breach of Russian law, from that point such takings could not lawfully be landed in Norway.

92. During 2016, a one-year agreement between Norway and the Russian Federation permitted reciprocal access by the vessels of each State to the continental shelf of the other State in the Loop Hole.[29] This agreement was expressly stated to be a temporary arrangement "*in the period leading up to a management scheme*" and "*so as to avoid any unnecessary disturbance of the economic activities*".[30] The agreement, and the corresponding exception

[27] Transcript, Day 1, p. 155, line 24 to p. 156, line 1 (Mr Jervell).

[28] Resp. Rejoinder, para. 402, citing Notices to Mariners, 3 September 2016 (**R-0045** (English), **R-0046** (Russian)).

[29] Resp. Counter-Memorial, para. 114; Protocol from the 45th Session of the Joint Norwegian-Russian Fisheries Commission, 9 October 2015 (**R-0099**), Sec. 10; Letter from the Deputy Secretary-General of the Norwegian Ministry for Trade, Industry and Fisheries to the Russian Federal Agency for Fishery, 3 August 2015 (**R-0146**). Russia also notified Norway of the vessels which would fish in the Norwegian sector during 2016: *see* Letter from the Russian Federal Agency for Fishery to the Norwegian Directorate of Fisheries, 30 December 2015 (**R-0055**).

[30] Letter from the Assistant Secretary-General of Norway's Ministry for Trade, Industry and Fisheries to the Russian Federal Agency for Fishery, 3 August 2015 (**R-0146**).

for Russian vessels harvesting snow crab in the Norwegian sector of the Loop Hole came to an end at the end of 2016.[31]

D. THE CLAIMANTS' ACTIVITIES

93. In 2009, Mr Kirill Levanidov, a United States national, cousin and business partner of the First Claimant and later a director of the Second Claimant, took steps to establish a seafood business in Båtsfjord.[32] He began performing consultancy services for the Norwegian fishing company Båtsfjord Fangst AS. The plan was initially to harvest red king crab, another species which had become established in the Barents Sea. Båtsfjord Fangst acquired a fishing vessel, the *Havnefjell*, which was registered in Norway[33] and started catching crab in October 2009. In August 2009, Mr Levanidov founded another Norwegian company, Ishavsbruket AS, later renamed Seagourmet Norway AS ("**Seagourmet**", the name by which it will be referred to in this Award). In 2010, Seagourmet began to construct a factory in Båtsfjord for storing and processing crab. That facility was built up extensively over the next six years.[34]

94. There is considerable evidence that the Seagourmet processing facility had a significant effect upon the economy of Båtsfjord, employing some 60 people (3% of the workforce of the town). Its positive effects on Båtsfjord are confirmed by the testimony of Mr Geir Knutsen, the Mayor of Båtsfjord, in his Witness Statement and his examination before the Tribunal.[35]

95. In May 2010, Mr Levanidov met his cousin, the First Claimant, to discuss financing for the business, which he described, in an email to Mr Pildegovics,[36] as an integrated business for harvesting, processing and selling crab. Although the initial plan was for red king crab, Mr Levanidov subsequently became aware of the presence of snow crab in the Barents Sea and the possibilities for commercial exploitation which that offered. Mr Levanidov's

[31] Resp. Counter-Memorial, para. 115; FOR-2017-01-04-07 (**RL-0024**), amending the 2014 and 2015 Regulations.
[32] Levanidov WS1 and WS2; Transcript, Day 1, p. 36, line 8 to p. 51, line 12 (Mr Laporte).
[33] Certificate of Nationality for *Havnefjell*, 8 September 2009 (**KL-0005**).
[34] Levanidov WS1, paras. 10-15.
[35] Transcript, Day 3, p. 31, line 11 to p. 41, line 7 (Mr Knutsen).
[36] Email from Mr Levanidov to Mr Pildegovics, 14 May 2010 (**PP-0009A**).

colleague, Mr Ankipov, inquired about regulation of snow crab fishing and received the reply that "[c]*atching of snow crab is unregulated. Norwegian fishing vessels* […] *can fish for this species in* [the Norwegian EEZ and the Svalbard Fisheries Protection Zone]. *If Norwegian vessels are to catch snow crab in international waters, they must be registered for fishing in the NEAFC area*".[37] On 5 July 2013, the *Havnefjell* was registered for snow crab fishing in the NEAFC area (*i.e.* the Loop Hole) and caught 1.4 tonnes of snow crab in 2013 and 4.6 tonnes in 2014. These catches were disappointing and Mr Levanidov decided to look for other ways of supplying Seagourmet's Båtsfjord factory.[38]

96. Mr Levanidov and his colleagues therefore inquired about the possibility of fishing vessels registered in the EU harvesting snow crab and landing it in Norway and received the reply that "*EU-registered fishing boats can deliver crab freely to Norwegian crab receptions*" but that the boats must have a quota if the fishing was quota-regulated.[39] A later inquiry elicited the reply set out at paragraph 84, above. Mr Levanidov concluded from these exchanges that EU-registered fishing vessels could lawfully harvest snow crab in the Loop Hole and land their catches in Norway.[40]

97. Mr Pildegovics therefore began to explore the possibility of using fishing vessels registered in Latvia to harvest snow crab in the Loop Hole. The Latvian Government inquired of the European Commission regarding "*snow crab fisheries in the NEAFC international waters*" adding that "*we presume that this is unregulated fisheries and after notification our vessels could start fisheries*".[41] The Commission replied that "[y]*our presumption is correct. Snow crab/Opilio is un-regulated as far as NEAFC is concerned and you can start fishing once your vessel is notified*".[42]

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[37] Levanidov WS1, para. 23; Email from Mr Sigmund Hågensen of the Norwegian Directorate of Fisheries to Mr Sergei Ankipov, 16 May 2013 (**KL-0016**).

[38] Levanidov WS1, paras. 26-27.

[39] Email exchanges between Mr Sergei Ankipov Mr Sofus Olsen of the Norwegian Food Safety Authority, 3-5 February 2014 (**KL-0019**).

[40] Levanidov WS1, paras. 33-34.

[41] Email from Mr Janis Laguns of the Latvian Ministry of Agriculture Fisheries Department to the European Commission, 19 August 2013 (**C-0089**).

[42] Email from Ms Pernille Skov Jensen of the European Commission to Mr Janis Laguns of the Latvian Ministry of Agriculture Fisheries Department, 30 September 2013 (**C-0090**).

98. In January 2014, Mr Pildegovics and Mr Levanidov met in Riga and agreed to implement the concept of an integrated snow crab harvesting and processing business. They describe the outcome of the meeting as the creation of a joint venture between them, in which Mr Pildegovics would build a fishing enterprise to harvest and land snow crab, while Mr Levanidov would build capacity to process the crab in Båtsfjord.[43] The agreement which they say they reached was oral.[44] The Tribunal will return (see paragraphs 238-248, below) to the evidence regarding this joint venture agreement and the implications for the present case.

99. Mr Pildegovics arranged the incorporation of North Star in Latvia in February 2014. Shortly after it was incorporated, Mr Pildegovic's partner (later his wife) became the sole shareholder and director until in June 2015 Mr Pildegovics bought the 100% shareholding and became the sole director. Mr Levanidov became a second director in December 2020.[45]

100. Sea & Coast was incorporated by Mr Levanidov's colleague, Mr Ankipov, as a limited liability company in Norway in June 2014 with its head office in Båtsfjord (in the same premises as Mr Levanidov's company Seagourmet). In October 2015, Mr Pildegovics acquired a 100% shareholding in Sea & Coast and became its sole director.[46] Mr Pildegovics testifies that:

> *Since June 2014, Sea & Coast has operated as a local agent for North Star's vessels and crews in Norway. Its mission was to facilitate the vessels' operation and to procure the goods and services they required, notably by building commercial relationships with suppliers from the local community.*[47]

[43] Levanidov WS1, paras. 34-41; Pildegovics WS1, paras. 29-43.

[44] Levanidov WS2, paras. 38-39; Pildegovics WS1, para. 31.

[45] Pildegovics WS1, paras. 50-52.

[46] Pildegovics WS1, paras. 53-59.

[47] Pildegovics WS1, para. 58.

Sea & Coast also provided services to other marine companies with operations in Båtsfjord.[48] By 2016 the greater part of its revenue came from companies other than North Star.[49]

101. Mr Levanidov's colleague, Mr Ankipov, wrote to the Norwegian Directorate of Fisheries on 20 July 2014 to clarify the position regarding "*a project where a fishing vessel under the EU flag will land live snow crabs at approved Norwegian reception stations (factories)*" and inquiring about the process. The Directorate replied on 25 July 2014 that "*EU vessels can land fish, including snow crab to Norway on an equal footing with Norwegian fishing vessels*" and confirming that no special documentation was required provided that "*the crab has been caught outside the Norwegian Economic Zone*".[50]

102. Between April and December 2014, North Star acquired four ships: *Solvita* (acquired for USD 1,075,000 in April 2014[51] and registered under the Latvian flag in June 2014),[52] *Senator* (acquired for EUR 900,000 on 25 August 2014,[53] registered under the Latvian flag in September 2014[54] and refitted at a cost said to exceed EUR 1.63 million),[55] *Saldus* (acquired for USD 1,050,000 on 30 November 2014[56] and registered under the Latvian flag in December 2014),[57] and *Solveiga* (acquired for USD 1,150,000 on 22 December 2014[58] and registered under the Latvian flag in January 2015).[59] EU fishing capacity rights were acquired for all four vessels.[60] Mr Pildegovics and North Star also began the process for

[48] Transcript, Day 2, p. 70, lines 8-18 (Mr Pildegovics).

[49] Transcript, Day 2, p. 70, line 23 to p. 71, line 4 (Mr Pildegovics).

[50] Email from Mr Ton-Ola Rudi of the Norwegian Directorate of Fisheries to Mr Sergei Ankipov, 25 July 2014 (**KL-0020**).

[51] Invoice No. 39, 15 April 2014 (**PP-0052**).

[52] Latvian Certificate of Registry for *Solvita*, 4 June 2014 (**PP-0053**). *Solvita* was formerly registered in the Russian Federation.

[53] Bill of Sale, 28 August 2014 (**PP-0054**).

[54] Latvian Certificate of Registry for *Senator*, 12 September 2014 (**PP-0059**).

[55] Pildegovics WS1, para. 66; Invoice from Remontowa, 12 May 2015 (**PP-0061**).

[56] Invoice No. 54, 20 November 2014 (**PP-0062**).

[57] Latvian Certificate of Registry for *Saldus*, 5 December 2014 (**PP-0063**). *Saldu*s was formerly registered in the Russian Federation.

[58] Invoice No. 81, 22 December 2014 (**PP-0064**).

[59] Latvian Certificate of Registry for *Solveiga*, 5 January 2015 (**PP-0065**). *Solveiga* was formerly registered in the Russian Federation.

[60] Pildegovics WS1, paras. 75-84.

the acquisition of two further vessels, *Sokol* and *Solyaris* but the purchase was not completed.[61]

103. In June 2014, North Star obtained a special permit from the Government of Latvia providing it with the right to engage in fishing in international waters and the waters of other countries outside the Baltic Sea.[62] This permit was renewed in 2017 and 2019 and was valid until January 2023.[63]

104. Mr Pildegovics testifies that in July 2014 North Star also acquired fishing licences from the Government of Latvia authorizing its ships to take snow crab in the international waters of the NEAFC zone (including the Loop Hole).[64]

105. Since 1 November 2016, North Star has also held fishing licences from the Government of Latvia authorizing its ships to take snow crab in the waters off the Svalbard archipelago.[65]

106. *Solvita* landed its first catch of snow crabs in August 2014, although these were not delivered to Seagourmet whose facility was not yet ready.[66] It was in 2015 that North Star's harvesting of snow crab really got under way with all four vessels operating and most of the catch being processed by Seagourmet in Båtsfjord.[67] *Senator* commenced operations in May 2015, *Saldus* and *Solveiga* in April 2015. Until September 2016 the four vessels operated to catch snow crab in the Loop Hole and landed them in Norwegian ports, mainly at Seagourmet's factory in Båtsfjord.[68] According to the Respondent, the snow crab were harvested "*almost exclusively*" in the part of the Loop Hole which was on the Russian side

[61] Pildegovics WS1, paras. 98-108.

[62] Pildegovics WS1, para. 85; Special Permit (Licence) No. ZS000023, 11 June 2014 (**PP-0074**).

[63] Pildegovics WS1, para. 85; Special Permit (Licence) Nos. ZS000193, 1 March 2017 (**PP-0075**) and ZS000348, 9 December 2019 (**PP-0076**).

[64] Pildegovics WS1, para. 86.

[65] Pildegovics WS1, para. 87. The licences for *Solvita* are at **C-0023** to **C-0030** and **PP-0077** to **PP-0084**. Those for *Senator* are at **C-0011** to **C-0017** and **PP-0085** to **PP-0090**. Those for *Saldus* are at **C-0004** to **C-0009** and **PP-0091** to **PP-0098**. Those for *Solveiga* are at **C-0018** to **C-0022**.

[66] Transcript, Day 2, p. 26, lines 21-25 (Mr Pildegovics).

[67] Transcript, Day 2, p. 27, lines 7-11 (Mr Pildegovics).

[68] Pildegovics WS1, para. 72.

of the 2010 demarcation line.[69] That is questioned by the Claimants and will be considered further in paragraphs 262 to 267, below.

107. The Norwegian authorities were aware of the operations of North Star's vessels. Shipments of sea crab to processing facilities in Norway were inspected and some 79 certificates of landing were issued by Norwegian port authorities.[70]

108. Mr Levanidov testifies that:

> *For purposes of the operation of this facility* [*i.e.* the Seagourmet Båtsfjord factory], *between April 2015 and September 2016, Seagourmet relied on a single snow crab supplier, North Star, as contemplated by my joint venture agreement with Mr Pildegovics. In 2016 and 2017, Seagourmet entered into supplier agreements with North Star pursuant to which Seagourmet committed to purchase predetermined quantities of snow crabs from North Star.*[71]

109. Mr Pildegovics gives further details as follows:

> *On 29 December 2016, North Star entered into a supply agreement with Seagourmet. Pursuant to this agreement, North Star agreed to supply, and Seagourmet agreed to purchase, up to 100 tonnes of live snow crab per week until 31 December 2017. The agreement specified the grade and quality of snow crabs to be delivered and prices to be paid by Seagourmet. Deliveries were to be made by North Star to Seagourmet's factory in the port of Baatsfjord. A similar agreement was signed between North Star and Seagourmet on 27 December 2017 for deliveries in 2018.*[72]

110. North Star signed similar agreements on 29 December 2016 with Link Maritime Consulting[73] (a company owned by Mr Levanidov) and [redacted].[74]

111. North Star's vessels ceased to be able to harvest snow crab in the Russian part of the Loop Hole following the change in Russian regulations in September 2016. Mr Pildegovics

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[69] Transcript, Day 1, p. 148, lines 20-22 (Mr Jervell).

[70] Transcript, Day 1, p. 27, lines 1-5 (Mr Savoie).

[71] Levanidov WS1, para. 59.

[72] Pildegovics WS1, para. 110. The 2016 agreement is at **C-0053** and the 2017 agreement is at **C-0054**.

[73] **C-0065**.

[74] **C-0066**; a further agreement was signed with [redacted] on 27 December 2017: **C-0067**.

testified that, after that date, the ships were at risk of arrest by the Russian authorities and therefore they ceased to operate in the Russian sector.[75]

112. In September 2016, the *Senator* was arrested by Norwegian authorities for taking snow crab in the Norwegian sector of the Loop Hole during June 2016. North Star was fined NOK 81,000 for this offence against the 2015 Regulations.[76] As counsel for the Claimants put it:

> *This marked the end of North Star's snow crab fishing activities in the NEAFC area, since Russia almost simultaneously closed its continental shelf that same month as advocated by Norway.*
>
> *So in September 2016, North Star's snow crab deliveries to Norway suddenly fell from hundreds of tons per month to zero*.[77]

113. According to the testimony of Mr Pildegovics, "[a]*fter this incident, North Star decided to redirect its vessels to the waters off the Svalbard archipelago, another fishing area for which it held valid snow crab harvesting licences*".[78] However, on 16 January 2017, Norwegian authorities arrested the *Senator* for harvesting snow crab in the waters around Svalbard in breach of the 2015 Regulations. North Star was later fined NOK 1,150,000.[79]

114. Thereafter, North Star ceased to be able to harvest snow crab in the Barents Sea.

E. PROCEEDINGS IN THE NORWEGIAN COURTS

115. The first relevant case in the Norwegian courts did not directly concern the Claimants but is cited by both Parties for the rulings made by the Norwegian courts. The case of the *Juros Vilkas* involved a Lithuanian fishing vessel which was fined for harvesting snow crab in the Norwegian sector of the Loop Hole in July 2016 in breach of the 2015 Regulations.[80] On 24 January 2017, the Øst-Finnmark District Court quashed the fine:

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[75] Transcript, Day 2, p. 103, lines 8-25 (Mr Pildegovics).

[76] Pildegovics WS1, paras. 205-207; Finnmark Police Chief, Confiscation Order, 27 September 2016 (**PP-0191**).

[77] Transcript, Day 1, p. 89, lines 2-9 (Mr Laporte).

[78] Pildegovics WS1, para. 207.

[79] Pildegovics WS1, paras. 208, 212.

[80] The *Juros Vilkas* had been arrested in 2014 by the Russian authorities for harvesting snow crab in the Russian EEZ: *see* Note Verbale from the Russian Federation to Norway, 15 June 2020 (**R-0101**).

> *The Court concludes that the national restriction to conduct fishery operations for snow crabs within the area of Smutthullet of the Norwegian Continental Shelf is not applicable in the present case because the said restriction infringes on the undertaken obligations of Norway in accordance with the NEAFC convention and NEAFC Scheme of Control and Enforcement* […] .[81]

116. That judgment was, however, reversed by the Court of Appeal.[82] On appeal to the Supreme Court of Norway, the judgment of the Court of Appeal was upheld. The Supreme Court decided:

> *It is correct, as the appellants have pointed out, that the Regulation on the Prohibition against Catching of Snow Crab was not applicable for the continental shelf until 22 December 2015, and some catching did take place before that on the Norwegian side of the Loop Hole, also from foreign vessels. But this clearly does not oblige Norway or other Contracting Parties to continue to accept such catching without the coastal State's consent. In 2015, moreover, Norway, Russia and the EU expressed that the coastal States, as set out in the rules I have reviewed, have a right alone to exploit the snow crab on their respective continental shelves.* […]
>
> *On these grounds, I have concluded that Norway is not bound by any obligation under international law to accept catching of snow crab in the Loop Hole from a Lithuanian vessel without a Norwegian permit. The Regulation on the Prohibition against Catching of Snow Crab must therefore apply according to its contents*.[83]

117. When the *Senator* was arrested and fined for harvesting snow crab in the Norwegian part of the Loop Hole (see paragraph 112, above), North Star paid the fine and there were no court proceedings.[84]

118. When, however, the *Senator* was arrested a second time in January 2017, this time for harvesting snow crab in the waters around Svalbard (see paragraph 113, above), North Star

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[81] *Superintendent of the Police Department v. Arctic Fishing*, Øst-Finnmark District Court Case No. 16-127201MED-OSFI, Judgment, 24 January 2017 (**C-0162**), p. 5.

[82] Hålogaland Court of Appeal, Judgment No. LH-2017-45056, 28 June 2017 (**C-0163**).

[83] Supreme Court of Norway, Judgment No. HR-2017-2257-A, 29 November 2017 (**C-0161**), paras. 34-35.

[84] Pildegovics WS1, para. 206.

and the captain of the *Senator* contested the fine in the Norwegian courts,[85] arguing that the Norwegian prohibition on harvesting snow crab in the waters off Svalbard were a violation of the Svalbard Treaty.

119. The District Court of Øst-Finnmark accepted that Norway applied the 2014 Regulations, as amended by the 2015 Regulations, in such a way that only Norwegian vessels were permitted to harvest snow crab on the continental shelf around Svalbard and that "*this practice conflicts with the principle of non-discrimination established by the Svalbard Treaty, provided the Treaty is applicable in this case*".[86] The Court went on, however, to hold that the Treaty only applied in the territorial waters around Svalbard and not to the continental shelf beyond 12 nautical miles from the coast.[87]

120. The Court of Appeal upheld the judgment of the District Court, although it did not accept that the Regulations had been applied in a discriminatory way.[88] The Court found

> *it to have been proved beyond reasonable doubt that both the shipping company and the captain considered it certain or overwhelmingly probable that the Norwegian authorities had not granted the* Senator *permission to catch snow crab on the Norwegian continental shelf, including in the fishery protection zone around Svalbard, and that the permit/licence issued by the Latvian authorities would be considered invalid by Norwegian supervisory authorities. Both parties were also aware that fishing and catching without a valid permit were criminal offences pursuant to Norwegian legislation*.[89]

121. The Supreme Court dismissed the appeal by North Star and the captain of the *Senator*. The procedure followed by the Supreme Court is an important feature of the Claimants' case that they suffered a denial of justice and will be considered in that context. For now, it is

[85] Cl. Memorial, para. 377.

[86] *Public Prosecuting Authority v. Rafael Uzakov and SIA North Star*, Øst-Finnmark District Court Case Nos. 17-057396MED-OSFI and 17-057421MED-OSFI, Judgment, 22 June 2017 (**C-0039**), p. 8.

[87] *Id*., p. 10.

[88] *Rafael Uzakov and SIA North Star v. Public Prosecuting Authority*, Hålogaland Court of Appeal Case No. 17-144441AST-HALO, Judgment, 7 February 2018 (**C-0041**).

[89] *Id*., p. 12.

sufficient to note that, in its Judgment of 14 February 2019,[90] the Court ruled (in the judgment of Justice Berglund, with whom the other members of the Grand Chamber agreed):

> *(66) The* [Svalbard] *Treaty establishes that Norway is to manage the natural resources and assumes that the High Contracting Parties comply with the rules that are implemented to fulfil this task. It is therefore clear that the Treaty gives Norway a right to enforce a regulatory system under which unauthorised catching is punishable, as long as such a system is practised in a non-discriminatory manner* […].
>
> *(67) As it appears from the legal framework I have described, a management system has been established by the Snow Crab Regulations under which a permit is required for anyone who wishes to catch snow crab. Unauthorised catching is punishable, regardless of nationality. No one has a legal right to a permit. To obtain an exemption, various requirements must be met, and the wording of the provision suggests that the granting of such an exemption is left to the authorities' discretion. I add that even if one meets the basic requirements for a commercial licence, which is necessary to attain a permit to catch snow crab, such a permit is not automatically issued. Previous violation of fishery legislation may, for instance, form a basis for refusal.*
>
> […]
>
> *(80) As I see it, it cannot be derived from the Svalbard Treaty or other sources of international law that the courts in a criminal case like the one at hand must decide on a preliminary basis whether an exemption should have been granted, as long as there is an alternative legal possibility to obtain an efficient review of the disagreement on the obligations under international law. If there are several acceptable procedures, it must be up to the individual country to decide which procedure to employ. Under Norwegian law, an issue of conflict between Norwegian public administration and international obligations should be solved through a civil action. This is not an unreasonable system. If the party succeeds with a civil claim, the party may – if the general conditions are otherwise met – demand*

[90] *SIA North Star v. Public Prosecuting Authority*, Supreme Court of Norway Case No. 18-064307STR-HRET, Judgment No. HR-2019-282-S, 14 February 2019 (**C-0038**).

> *compensation for economic loss and coverage of costs. A civil judgment declaring a regulation invalid will also give Norwegian authorities the possibility to amend the rules in accordance with international law while at the same time taking into account other concerns, such as protection of natural resources.*
>
> […]
>
> *(83) Consequently, I agree with the court of appeal that the defendants can be punished irrespective of whether the Svalbard Treaty applies to snow crab catching in the relevant area. Furthermore, it is irrelevant whether the basis for exemption in section 2 of the Snow Crab Regulations is in conflict with the Treaty. What ultimately justifies punishment of the defendants is that Svalbard Treaty's principle of equal rights has not in any case been violated, since everyone – also Norwegian citizens and companies – can be punished for catching snow crab in the area without a permit from Norwegian fishery authorities. The defendants did not hold such a permit.*[91]

122. North Star subsequently brought civil proceedings to challenge the refusal to permit its vessels to take snow crab on the continental shelf around Svalbard. Having lost in the lower courts, it appealed to the Supreme Court. In a judgment of 20 March 2023, delivered by Justice Ringnes with whom the other fourteen justices concurred, the Supreme Court dismissed the appeal and concluded that

> *the shipping company does not have a right to catch snow crab on the continental shelf outside Svalbard. This follows from the equal rights of the nationals and ships of the High Contracting Parties to fish and hunt under Article 2 of the Svalbard Treaty being geographically limited to Svalbard's internal waters and territorial sea. Nor may Article 1 or Article 3 be interpreted to mean that a right of equality applies to the continental outside off Svalbard. The decision of the Ministry of Trade, Industry and Fisheries is thus based on a correct interpretation of the Svalbard Treaty.*[92]

[91] *Id*., paras. 66-67, 80, 83.

[92] *SIA North Star Ltd. v. The State of Norway, represented by the Ministry of Trade, Industry and Fisheries*, HR-2023-491-P, Case No. 22-134375SIV-HRET, Judgment of 20 March 2023, para. 227 (**C-0358**).

123. The Claimants have submitted two documents criticising this decision. The first is an article by Norwegian Supreme Court Justice Skoghøy, writing in an extra-judicial capacity.[93] The second is said to be a draft Note Verbale from the EU Commission to Norway.[94] Norway denies having received a Note Verbale in these terms, although it states that it has received a Note from the Commission regarding Svalbard, in which the Commission has protested about the Supreme Court Judgment.[95]

III. THE PARTIES' CLAIMS AND REQUESTS FOR RELIEF

124. The Claimants request:

> [A]*n award in their favour:*
>
> *(a) finding that the Tribunal has jurisdiction over the entire dispute involving the Claimants and the Respondent;*
>
> *(b) finding that Norway has breached Article III of the BIT by failing to accord to the Claimant's investments equitable and reasonable treatment and protection, and by failing to accept such investments in accordance with its laws;*
>
> *(c) finding that Norway has breached Article IV of the BIT by failing to accord to the Claimants' investments treatment no less favourable than that accorded to investments made by investors of third states;*
>
> *(d) finding that Norway has breached Article VI of the BIT by unlawfully expropriating the Claimants' investments in Norway;*
>
> *(e) deciding that a second phase of the proceeding devoted to reparation shall be held;*
>
> *(f) granting the Claimants leave to amend their requests for reparation, if and to the extent necessary, having regard to the Tribunal's decision on jurisdiction and the merits; and*

[93] *Interpretation of the Wording of Treaties – Commentary on the Snakrab Judgment*, 23 March 2023 (**C-0359**).

[94] Draft EU Note Verbale to the Kingdom of Norway, 2 October 2023 (**C-0357**).

[95] Letter from the Respondent to the Tribunal, 23 October 2023; Letter from the Respondent to the Tribunal, 15 November 2023.

(g) ordering such other and further relief as the Tribunal deems available and appropriate in the circumstances.[96]

125. The Respondent requests the Tribunal:

(1) To dismiss all of the Claimants' claims;

(2) To order the Claimants to pay Norway its costs, professional fees, expenses and disbursements; and

(3) To order such further or other relief as the Tribunal deems appropriate.[97]

IV. JURISDICTION AND ADMISSIBILITY

A. THE RESPONDENT'S POSITION

(1) Introduction

126. The Respondent objects to the jurisdiction of the Tribunal and/or the admissibility of the claim on two main grounds. The Respondent first argues that "*the core issues at stake*" in the present case are not the Claimants' alleged investments in Norway but rather Norway's sovereign rights in its maritime areas around Svalbard and in the Loop Hole.[98] According to the Respondent, this Tribunal has consequently no jurisdiction over the dispute (the "**First Objection**").[99]

127. Secondly, the Respondent submits that the dispute "*does not relate to investments made by the Claimants*".[100] According to the Respondent, the alleged investments are not investments "*in the territory of Norway*", were not made "*in accordance with its laws and regulations*", and the dispute does not "*relate[] to*" such an investment as required respectively by Article I(1) and Article IX(1) of the BIT (the "**Second Objection**").[101]

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[96] Cl. Reply, para. 901.

[97] Resp. Rejoinder, para. 631.

[98] Resp. Counter-Memorial, Part II, para. 209.

[99] Resp. Counter-Memorial, Chapter 4; Resp. Rejoinder, Chapter 4.

[100] Resp. Counter-Memorial, Part II, para. 209.

[101] Resp. Counter-Memorial, Chapter, 5; Resp. Rejoinder, Chapters 5-6.

(2) Applicable Law

128. According to the Respondent, the law applicable to jurisdiction is Article IX of the BIT and Article 25 of the ICSID Convention.[102] For the Tribunal to assume jurisdiction, it is necessary that the dispute (i) is "*a legal dispute*"; (ii) that involves an "*investor*" of Latvia; (iii) "*in relation to*" and "*arising directly out of*"; (iv) an "*investment*"; (v) "*in the Territory of*" Norway; (vi) "*which the parties to the dispute* [have] *consent*[ed] *in writing to submit to the Centre*"; and (vii) which has been preceded by a period of three months prior to the commencement of the dispute.[103]

129. The Respondent submits that Norwegian domestic law must also be considered when establishing the jurisdiction of the Tribunal given the provision in Article 1 of the BIT that "[t]*he term 'investment' shall mean every king* [*sic*] *of asset invested in the territory of one contracting party in accordance with its laws and regulations by an investor of the other contracting party*". According to the Respondent, the Tribunal has no jurisdiction over any alleged investment by the Claimants that is not made in accordance with Norwegian law.[104]

130. The Respondent specifies that it is not its case that Norwegian law by itself can bar the Tribunal's jurisdiction. It only contends that "[t]*he validity of the 'investment' within the meaning of Article 25 of the ICSID Convention and Article IX of the BIT must therefore be assessed under Norwegian law*" because the BIT itself requires that a protected investment is made in accordance with Norwegian law.[105]

(3) The First Objection

a. The Subject Matter of the Dispute is Not Directly Related to the Alleged Investments

131. The Respondent submits that the subject matter of the dispute "*does not relate to questions directly related to the alleged investments*".[106] It claims that the dispute depends on a

[102] Resp. Counter-Memorial, para. 184.
[103] Resp. Counter-Memorial, para. 186.
[104] Resp. Counter-Memorial, para. 187.
[105] Resp. Rejoinder, paras. 50-54.
[106] Resp. Counter-Memorial, Sec. 4.1.

preliminary decision by the Tribunal clarifying the legal regime applicable to the harvesting of snow crab on the Norwegian continental shelf around Svalbard and in the Loop Hole. In order to deal with this dispute, the Respondent argues that the Tribunal is required to interpret and apply UNCLOS, the NEAFC Convention and the Svalbard Treaty, for which it does not have jurisdiction.[107] The harm alleged by the Claimants is only a subsequent and ancillary issue.[108]

132. According to the Respondent, there is an open dispute between Norway, Latvia and the EU about the legal regime applicable to the harvesting of sedentary species, including snow crab, on the Norwegian continental shelf around Svalbard and in the Loop Hole.[109] The Respondent submits that "*most central claims*" submitted by the Claimants "*inevitably require prior determinations of the legality and therefore existence of alleged harvesting rights on the Norwegian continental shelf around Svalbard, and in the part of the Loop Hole*".[110] The Respondent submits that the Tribunal, with a limited jurisdiction based on the BIT and the ICSID Convention, cannot *ratione materiae* deal with core issues requiring prior determination based on treaties other than the BIT.[111] The only "*convenient—and competent—fora*" to deal with such issues would be the International Court of Justice ("**ICJ**") or the International Tribunal for the Law of the Sea ("**ITLOS**").[112] According to the Respondent, the legality, and therefore the existence, of the Claimants' alleged investments is dependent upon the answer to the questions relating to the legal regime applicable to the harvesting of snow crab and Norway's sovereign rights relating to the Norwegian continental shelf around Svalbard and in the Loop Hole.[113] According to the Respondent, a dispute is defined by the "*preponderance of questions*" involved.[114] The Respondent alleges that since the "*preponderance of questions*" in this dispute relates to

[107] Resp. Counter-Memorial, Sec. 4.1.3.
[108] Resp. Counter-Memorial, Sec. 4.1.2.
[109] Resp. Counter-Memorial, Sec. 4.1.2.2.
[110] Resp. Counter-Memorial, Sec. 4.1.3, para. 246.
[111] Resp. Counter-Memorial, Sec. 4.1.3.
[112] Resp. Counter-Memorial, Sec. 4.1.3.1, para. 249.
[113] Resp. Counter-Memorial, Sec. 4.1.3.1, para. 265.
[114] Resp. Counter-Memorial, Sec. 4.1.3.2.

Norway's sovereign rights, this Tribunal established to adjudicate disputes under the BIT has no jurisdiction to adjudicate this case.[115]

133. *First*, the Claimants question whether the objection to jurisdiction relied on by the Respondent—*i.e.* that the dispute does not relate to questions directly related to the alleged investments and depends on a preliminary decision on the legal regime applicable to the harvesting of snow crab—"*exists at all in investment arbitration*".[116] The Respondent argues that there is no basis for the Claimants' assertion.[117] In any event, the Respondent submits that even if the Tribunal were to consider that the dispute submitted by the Claimants is directly related to their investments, this would not eliminate the need first to deal with the fundamental question of the sovereign rights of Norway, the EU and Latvia, to establish the existence of the alleged investments.[118]

134. *Second*, the Claimants allege that the very subject matter of the dispute does not concern the exercise of sovereign rights.[119] The Respondent argues sovereign rights are at the centre of the dispute.[120] According to the Respondent, the Claimants' alleged rights derive from the—equally alleged—rights of Latvia and the EU, in effect asking the Tribunal to base its reasoning on the asserted existence of the respective sovereign rights of Latvia and the EU as well as on those of Norway.[121]

135. Furthermore, the Respondent rejects the Claimants' arguments that its objections regarding the subject matter relate to admissibility and not jurisdiction.[122] By ratifying the ICSID Convention and the BIT, the Respondent accepted the jurisdiction of the Centre regarding

[115] Resp. Counter-Memorial, Sec. 4.1.3.2.
[116] Cl. Reply, para. 571.
[117] Resp. Rejoinder, Sec. 4.1.1.
[118] Resp. Rejoinder, para. 124.
[119] Cl. Reply, para. 576.
[120] Resp. Rejoinder, Sec. 4.1.2.
[121] Resp. Rejoinder, para. 127.
[122] Resp. Rejoinder, Sec. 4.1.

its investment disputes but "*not to give ICSID tribunals general and unlimited jurisdiction to apply international law rules*".[123]

b. The Legal Interests of Absent Parties are the "Very Subject Matter" of the Dispute

136. According to the Respondent, the principles of consent-based jurisdiction and the *Monetary Gold* principle prevent a tribunal from adjudicating upon a claim if, in so doing, it would need to decide on the rights and obligations of third parties which "*would form the very subject matter of the decision*".[124] The Respondent argues that in this case, the legal interests of absent parties—including those of Latvia and the EU—would form "*the very subject matter*" of the Tribunal's decision.[125] Consequently, the Tribunal may not adjudicate upon the Claimants' claims in this arbitration.[126]

137. According to the Respondent, the dispute requires the Tribunal to rule on the validity of the licences granted by Latvia and on the EU's rights and obligations under the Svalbard Treaty, the NEAFC Convention, and UNCLOS.[127]

138. First, the Respondent alleges that the central issue before the Tribunal requires a decision on Latvia's competence as a matter of international law to issue the relevant licences.[128] The Tribunal would have to answer this question not only to determine the licences' validity and the existence of an investment but also to determine the Claimants' main

[123] Resp. Rejoinder, para. 107. See also Resp. Counter-Memorial, paras. 327-333, citing, *inter alia*, *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, 27 February 2012 (**RL-0089**), para. 4.61; *ICS Inspection and Control Services Limited v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012 (**RL-0091**), para. 280; *Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal*, ICSID Case No. ARB/15/21, Award, 5 August 2016 (**RL-0090**), para. 130.

[124] Resp. Counter-Memorial, Sec. 4.2, citing *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, ICJ, Judgment – Preliminary Question, 15 June 1954 (**RL-0083**), pp. 32-33.

[125] Resp. Counter-Memorial, Sec. 4.2.

[126] Resp. Counter-Memorial, Sec. 4.2.

[127] Resp. Counter-Memorial, Secs. 4.2.1-4.2.2.

[128] Resp. Counter-Memorial, Sec. 4.2.1, para. 291.

allegations of breach. The Respondent states that "*the only title on which the Claimants base their claimed rights are the licences granted to North Star by Latvia*".[129]

139. Second, the Respondent submits that, since the Claimants rely on the alleged position of the EU and/or Latvia and in particular EU Regulation 2017/127, the central issue before the Tribunal also requires it to determine the EU's rights and obligations under the NEAFC Convention and UNCLOS. The Respondent further notes that the EU's positions in relation to the continental shelf around Svalbard and the Loop Hole differ.[130] Concerning Svalbard, the EU seems to share, in part, the Claimants' analysis. So far as the Loop Hole is concerned, the EU's views differ from those of the Claimants.[131]

140. The Respondent claims that since neither Latvia nor the EU have agreed to this Tribunal's jurisdiction, a ruling on the above-mentioned issues would infringe the principle of consent to jurisdiction of international courts and tribunals and Article 25 of the ICSID Convention.[132] The Respondent contends that the *Monetary Gold* principle prevents the Tribunal from ruling on the mentioned questions.[133] According to the Respondent, the Tribunal's decision would not simply "*engage*" the "*legal interests*" of Latvia but the rights and obligations of Latvia and the EU under the NEAFC Convention and the Svalbard Treaty would be the "*very subject matter*" of the dispute.[134]

141. The Claimants allege that inadmissibility based on the existence of a "*larger*" inter-State dispute involving parties not present before the investment treaty tribunal would allow respondent States artificially to create such disputes to hamper claimants' access to investor-State dispute resolution. In its rebuttal, the Respondent submits that the disputes between Norway and the EU on the one hand, and Norway and Latvia on the other hand, concerning the harvesting of snow crab in the Barents Sea were not "*artificially created*"

[129] Resp. Counter-Memorial, para. 292; see also Secs. 4.2.1.2-4.2.1.3.
[130] Resp. Counter-Memorial, Sec. 4.2.2.1.
[131] Resp. Counter-Memorial, para. 323.
[132] Resp. Counter-Memorial, Sec. 4.2.3.
[133] Resp. Counter-Memorial, Sec. 4.2.3.2.
[134] Resp. Counter-Memorial, para. 340.

in order to avoid the settlement of the dispute before the Tribunal but were existing disputes.[135]

142. Second, the Claimants argue that the *Monetary Gold* principle does not apply in this arbitration as the Tribunal might need to address other international law instruments only "*in an ancillary manner*". According to the Respondent, for the Tribunal to determine the existence and legality of certain rights the Claimants allege have been infringed by the Respondent, such as the Claimants' alleged fishing licences, it is "*inevitable*" for the Tribunal to rule on the conduct of Latvia and/or the EU.[136]

(4) The Second Objection: The Dispute Does Not Relate to Investments Made by the Claimants

143. The Respondent argues that (i) the Claimants' alleged investments were not made "*in the territory of Norway* […]", as required by Article I(1) of the BIT; (ii) the Claimants' alleged investments were not made "*in accordance with its* [i.e. Norway's] *laws and regulations*", as required by Article I(1) of the BIT; (iii) the dispute does not "*relate to*" such an investment, as required by Article IX(1) of the BIT; and (iv) the Claimants' alleged investments are not investments "*invested* […] *by an investor*" of Latvia, as required by BIT Article I(1).[137] The Respondent' considers the alleged investments of the two Claimants in turn.

a. The Alleged Investments of Mr Pildegovics

144. The Respondent disputes that Mr Pildegovics had any joint venture agreement with Mr Levanidov and denies that he had any contractual rights under the alleged agreement.

[135] Resp. Rejoinder, Sec. 4.2.1.

[136] Resp. Rejoinder, Sec. 4.2.2.

[137] Resp. Counter-Memorial, Chapter 5, paras. 401-403.

It also contests the Claimants' argument that Mr Pildegovics's shareholdings in North Star qualify as investments.

(i) Mr Pildegovics' contractual rights in his joint venture agreement with Mr Levanidov

145. *First*, according to the Respondent, the Claimants have neither proven the existence of the alleged oral joint venture agreement, nor substantiated the existence of Mr Pildegovics' contractual rights under this joint venture within the meaning of Article I(1) of the BIT.[138] As the Claimants have only offered the witness statements of Mr Levanidov and Mr Pildegovics as evidence, the time of conclusion, the terms, the scope, number and identity of participants, and the integration—or lack thereof—within the joint venture, are unclear.[139]

146. According to the Respondent, if the joint venture exists—which it disputes—it would be governed by Latvian law for the purpose of examining its existence as well as any rights and obligations arising under it.[140] If, in the alternative, the alleged joint venture were to be considered to be governed by Norwegian law, there is a presumption against the formation of the alleged joint venture by oral agreement as a matter of Norwegian law.[141] The Respondent does not dispute that there are no absolute requirements as to contractual form under Norwegian contract law or that an oral contract is legally possible under Norwegian law but submits that Norwegian courts have displayed considerable caution when faced with claims that complex or high value contracts have been concluded orally.[142] Norwegian courts have, the Respondent alleges, upheld "*strict requirements*" for the existence of an oral agreement, in particular "[i]*n the case of extensive transactions, the presumption would be that there is no oral agreement*" and "[t]*he larger the amount* […], *the stronger evidence is required*".[143]

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[138] Resp. Counter-Memorial, Sec. 5.2.1; Resp. Rejoinder, Sec. 5.2.

[139] Resp. Counter-Memorial, Sec. 5.2.1.2.

[140] Resp. Rejoinder, para. 174.

[141] Resp. Rejoinder, Sec. 5.2.1.

[142] Resp. Rejoinder, paras. 176-187.

[143] Resp. Rejoinder, paras. 193-196, citing, *inter alia*, *Fram Shipowning Ltd. v. Pareto Securities AS*, Borgarting Court of Appeal, Case No. LB-2011-175564, Judgment, 20 January 2014 (**RL-0252**).

147. On the evidence in the present case, the Respondent submits that "*practically no contemporaneous documentation*" has been provided to support the existence and terms of the alleged joint venture.[144] In particular, the Claimants answered that there were "*no responsive documents*" in response to the Respondent's document production request nos. 9 and 11, which were intended to capture all documents relating to the joint venture.[145] The Respondent further argues that the fact that the Claimants have referred to different dates for the alleged conclusion of the joint venture (2009, 2013 and 2014) "*raise*[s] *strong doubts about the true existence of the joint venture*".[146]

148. According to the Respondent, Dr Ryssdal's Expert Report does not prove the existence of the joint venture.[147] The Respondent alleges that Dr Ryssdal's First and Second Export Reports are based on "*highly subjective evidence*" taken from Mr Pildegovics's and Mr Levanidov's testimonies in this arbitration.[148] Further, the Respondent argues that if the joint venture in fact existed, it was part of a broader enterprise of Mr Levanidov and companies such as [redacted], and Link Maritime.[149]

149. *Second*, the Respondent argues that the Claimants have not explained—let alone proven—what the alleged claim to performance is.[150] The Claimants allege that Mr Pildegovics's "*contractual rights in his joint venture agreement*" are "*claims to performance having an economic value*", but the Respondent rebuts that the "*investment*" threshold cannot be crossed simply by the Claimants' assertion that there is a contract which contains unparticularized claims to performance.[151]

[144] Resp. Rejoinder, para. 188-192, Secs. 5.2.1.2-5.2.1.3.
[145] Resp. Rejoinder, paras. 190-192.
[146] Resp. Rejoinder, para. 199.
[147] Resp. Rejoinder, Sec. 5.2.2.
[148] Resp. Rejoinder, paras. 221-228.
[149] Resp. Rejoinder, Sec. 5.2.3.
[150] Resp. Counter-Memorial, Sec. 5.2.1.3.
[151] Resp. Counter-Memorial, paras. 242 *et seq*., citing, *inter alia*, Cl. Memorial, para. 502.

150. The Respondent contends that the alleged joint venture cannot be considered as an investment under the BIT.[152] In addition to the lack of clarity about the alleged claims,[153] the Respondent alleges that any claims to performance under the alleged joint venture—if they exist—are not a qualifying investment in the territory of Norway.[154] The place of performance of a joint venture depends on the interpretation of the joint venture agreement, which, even on the Claimants' case, had several places of performance.[155] Given this uncertainty and the fact that each of the parties to the alleged joint venture is domiciled in jurisdictions other than Norway, the Respondent submits it is "*highly unlikely*" that the Norwegian courts would find a sufficiently close connection to Norway for the purposes of finding jurisdiction.[156]

151. *Third*, the Respondent alleges the putative claims to performance have no "*economic value*", as required by the definition in the BIT. According to the Respondent, this is demonstrated by the fact that the Claimants' expert on quantum only considers Mr Pildegovics's alleged losses by virtue of his shareholding in North Star and no losses are identified in respect of the alleged rights to performance in the alleged joint venture.[157]

152. *Fourth*, the Respondent submits that the claims to performance are not investments "*in the* […] *Territory*" of Norway as required by the BIT.[158] The Respondent contests the Claimants' assertion that the joint venture, an agreement allegedly concluded in Riga between two non-Norwegian nationals, is governed by Norwegian law.[159] In contrast to the Claimants' argument, the Respondent considers that Dr Ryssdal's Expert Report does not establish that the joint venture is governed by Norwegian law. Dr Ryssdal's conclusion that the performance of the contract took place in Norwegian territory is based on the claims in Mr Pildegovics's Witness Statement.[160] The Respondent emphasizes that the

[152] Resp. Rejoinder, Sec. 5.3.
[153] Resp. Rejoinder, Sec. 5.3.1.
[154] Resp. Rejoinder, Sec. 5.3.2.
[155] Resp. Rejoinder, para. 251.
[156] Resp. Rejoinder, para. 257.
[157] Resp. Counter-Memorial, Sec. 5.2.1.4.
[158] Resp. Counter-Memorial, Sec. 5.2.1.5.
[159] Resp. Counter-Memorial, Sec. 5.2.1.5.2.
[160] Resp. Counter-Memorial, para. 454.

obligations of the joint venture are unclear and so is their place of performance. Even if the obligations under the joint venture concern snow crab fishing, the Respondent argues that the harvesting of snow crab took place "*practically entirely*" in locations outside of Norwegian jurisdiction.[161]

153. Furthermore, the Respondent claims that the Claimants' business operation is in fact that of Mr Levanidov in which Mr Pildegovics' role appears to have been "*very limited*".[162] According to the Respondent, Mr Levanidov is the "*real*" investor in this case.[163] As a U.S., not Latvian, national, this Tribunal has no *ratione personae* jurisdiction over him or any of his investments, including the alleged joint venture.[164]

154. The Respondent further argues that "*the centrality*" of Mr Levanidov and his investments "*constitutes an obstacle to the exercise of the Tribunal's jurisdiction even in respect of Mr Pildegovics and North Star alone*" as the investments at issue are in fact Mr Levanidov's—not those of the Claimants.[165] Consequently, the Tribunal should reject any jurisdiction over the alleged joint venture and should focus solely on the investments actually made by Mr Pildegovics personally and by North Star.[166]

155. The Respondent alleges that it was Mr Levanidov who had experience in the industry from the early 2000s and that Mr Pildegovics became involved in the former's enterprise only from 2013.[167] While the Claimants assert that Mr Pildegovics' involvement took the form of a joint venture with Mr Levanidov, the Respondent questions the existence of such an agreement.[168] The Respondent states there are no contemporaneous documents that record the preparations for or conclusion of the alleged joint venture. Further, there is no evidence

[161] Resp. Counter-Memorial, Sec. 5.2.1.5, para. 455.
[162] Resp. Counter-Memorial, para. 349.
[163] Resp. Counter-Memorial, para. 410.
[164] Resp. Counter-Memorial, Secs. 4.3, 5.2.1.
[165] Resp. Counter-Memorial, para. 396.
[166] Resp. Counter-Memorial, para. 397.
[167] Resp. Counter-Memorial, Sec. 4.3.1.2.
[168] Resp. Counter-Memorial, Sec. 4.3.1.

that after the "*handshake*", which according to the Claimants established the snow crab fishing enterprise, Mr Pildegovics began acting in his own right.[169]

156. The Respondent claims that Mr Levanidov (and/or his associates and companies) alone is at the origin of the alleged investments.[170] According to the Respondent, based on the requirements of the BIT, the question is whether the investments identified in this case were investments made by Mr Pildegovics or North Star, or by someone else.[171] It alleges that Mr Pildegovics played only a "*minimal role*", with Mr Levanidov initially being the sole investor.[172] The Respondent asserts further that North Star's financial situation demonstrates the "*uneven financial risks*" taken by Mr Levanidov or his companies compared with Mr Pildegovics.[173]

157. In fact, according to the Respondent, the Claimants' alleged investments remained Mr Levanidov's business concern, demonstrated by his role in North Star, "*directing*" Mr Pildegovics,[174] and the financing of its fishing vessels.[175] The Respondent claims there is "*a complex web of loans, transactions, companies and (re)financing arrangements surrounding the alleged 'investments' in this arbitration*" in which Mr Pildegovics occupies only a "*marginal position*".[176] As a result, the Respondent requests that the Tribunal reject jurisdiction over the alleged joint venture.[177]

(ii) Mr Pildegovics' shareholding in North Star

158. With regard to Mr Pildegovics' 100% shareholdings in North Star, the Respondent recognizes that a shareholding can qualify as a protected "*asset*" under the BIT but argues that it only qualifies as a protected investment under Article I(1)(ii) of the BIT if it is invested "*in the territory*" of the other State Party to the BIT. The Respondent submits that

[169] Resp. Counter-Memorial, para. 363.
[170] Resp. Rejoinder, Sec. 5.4.
[171] Resp. Rejoinder, para. 263.
[172] Resp. Rejoinder, Sec. 5.4.1.
[173] Resp. Rejoinder, Sec. 5.4.1, para. 279.
[174] Resp. Counter-Memorial, para. 372.
[175] Resp. Counter-Memorial, Sec. 4.3.2.
[176] Resp. Counter-Memorial, para. 391.
[177] Resp. Counter-Memorial, Sec. 4.3.3.

as North Star is a Latvian company, a shareholding in North Star cannot qualify as an investment in the territory of Norway.[178]

159. The Respondent also claims that any losses the Claimants allege as having been sustained by Mr Pildegovics personally as shareholder of North Star are subsumed within the claims made in the name of North Star itself.[179]

(iii) Mr Pildegovics' shareholding in Sea & Coast AS

160. As to Mr Pildegovics' 100% shareholding in Sea & Coast AS ("**Sea & Coast**"), a Norwegian company, the Respondent does not dispute that Mr Pildegovics's ownership of Sea & Coast falls within the definition of a protected "*investment*" under the BIT. However, the Respondent questions whether there is a dispute with Mr Pildegovics *in relation to* this particular shareholding.[180] Sea & Coast was in existence and operating as a local agent for North Star's vessels and crews in Norway for around 16 months before Mr Pildegovics acquired his interest in Sea & Coast by buying his shares on 15 October 2015 for NOK 66,000.[181]

161. According to the Respondent, any of Mr Pildegovics's alleged losses in this case are suffered by virtue of his shareholding in North Star. There are in fact no claims in respect of any alleged losses arising from his shareholding in Sea & Coast.[182]

b. The Alleged Investments of North Star

162. For the investments of the Second Claimant, North Star, the Respondent submits no investment was made in the territory of the Respondent.

163. *First*, as to North Star's four fishing vessels, according to the Respondent, they are not investments in the territory of Norway.[183] The Respondent accepts that the definition of its territory in Article 1(4) of the BIT includes its land territory, its territorial sea, and its

[178] Resp. Counter-Memorial, Sec. 5.2.2, para. 462.
[179] Resp. Counter-Memorial, Sec. 5.2.2, para. 465.
[180] Resp. Counter-Memorial, para. 467.
[181] Resp. Counter-Memorial, Sec. 5.2.3, para. 470.
[182] Resp. Counter-Memorial, Sec. 5.2.3, para. 471.
[183] Resp. Counter-Memorial, Sec. 5.3.2.2.

continental shelf but does not accept that it includes its 200 nautical mile zones which includes the Norwegian Economic Zone outside mainland Norway, the Fisheries Protection Zone around Svalbard and the Fisheries Zone around Jan Mayen.[184]

164. Moreover, the four vessels were all Latvian-flagged, had no necessary connection with Norway, and could be used elsewhere.[185] The Respondent argues that the vessels were in fact used elsewhere. It claims not a single vessel caught more than 0.27% of its total catch of snow crab on the Norwegian continental shelf. Overall, 99.84% of the total catch of snow crab was caught outside the Norwegian continental shelf.[186] The Respondent concludes that Latvian-flagged vessels that were able to operate anywhere—and were in fact harvesting snow crab on the Russian continental shelf for over 99% of their harvesting operations—cannot be investments "*in the territory*" of Norway.[187]

165. The Respondent further invokes the requirement in Article I of the BIT that qualifying investments are made "*in accordance with*" Norwegian law. It argues that if the Claimants had in fact "*operated*" their vessels in Norwegian territory, the investment would patently have been made in direct contravention of Norwegian law.[188]

166. In addition, the Respondent refers to the fact that in 2018, Link Maritime, a company owned by Mr Levanidov, agreed to purchase North Star's outstanding loans from its creditors ([redacted]), effectively accepting responsibility for North Star's debt.[189] In the Respondent's view, this is "*a further indication*" that the vessels were in reality investments of Mr Levanidov and/or one or more of the companies owned or controlled by him and/or others.[190]

167. *Second*, as to North Star's so-called "*fishing capacity*" rights to operate a ship as a fishing vessel, according to the Respondent, North Star's acquisition of "*fishing capacity*" entailed

[184] Resp. Counter-Memorial, Sec. 5.3.2.2.2.
[185] Resp. Counter-Memorial, Sec. 5.3.2.2.3.
[186] Resp. Counter-Memorial, para. 490.
[187] Resp. Counter-Memorial, Sec. 5.3.2.2.3.
[188] Resp. Counter-Memorial, Sec. 5.3.2.2.4.
[189] Resp. Counter-Memorial, Sec. 5.3.2.2.5.
[190] Resp. Counter-Memorial, para. 497.

no right or actual authorizations to take crab within Norwegian waters or on the Norwegian continental shelf. The "*fishing capacity*" only made North Star eligible to apply for such rights (and other fishing rights) as a matter of EU law.[191] The Respondent further asserts that the Claimants have not alleged anything that impinges on this right conferred by the Latvian government.[192]

168. *Third*, as to North Star's alleged fishing licences authorizing each vessel to catch snow crab in the Loop Hole area of the NEAFC zone and in maritime areas around Svalbard, the Respondent points to the fact that North Star's licences were requested from and issued by the State Environmental Service of Latvia and authorized Latvian vessels to engage in commercial fishing in the NEAFC area to the extent that such fishing remained unregulated.[193] The Respondent further submits that these licences do not, and cannot, have the effect of granting to North Star any legal right to exploit Norway's resources on its continental shelf contrary to regulations adopted by Norway.[194] The NEAFC regime does not apply in areas under the jurisdiction of a Contracting Party unless that State has specifically consented. Norway has given no such consent and therefore even the licences cannot be investments in the territory of Norway.[195]

169. *Fourth*, as to North Star's alleged contractual rights to purchase two additional ships along with fishing capacity for such ships, the Respondent recognizes that North Star did indeed sign letters of intent on 23 July 2015 with the Russian companies Paroos and Primrybflot for the purchase of two further vessels but highlights that the definitive agreements were signed on 5 January 2017, after the date of the alleged breach of the Claimants' rights.[196] The Respondent also disputes the Claimants' assertion that these "*claims for the delivery of the two vessels to North Star*" are claims to performance in the territory of Norway. It submits that a contract for the delivery of an asset to Norway cannot in itself be considered a qualifying investment in the territory of Norway, in particular since neither the sellers

[191] Resp. Counter-Memorial, Sec. 5.3.3.
[192] Resp. Counter-Memorial, para. 503.
[193] Resp. Counter-Memorial, Sec. 5.3.4.
[194] Resp. Counter-Memorial, paras. 505-506.
[195] Resp. Counter-Memorial, para. 507.
[196] Resp. Counter-Memorial, Sec. 5.3.5, para. 509.

nor their ships were located in Norway.[197] Further, even if the two ships had been delivered, as with North Star's other fishing vessels, they would not have been used in Norwegian territory but on the high seas and in Russian territory.[198]

170. *Fifth*, as to the contracts with purchasers of snow crab products, the Respondent maintains that there are five such contracts identified by the Claimants and all of them were made after the date of the alleged breach of the BIT.[199] The Respondent argues these contracts are all contracts for the sale of goods and as "*ordinary commercial transactions*" do not fall within the definition of "*investment*" under the ICSID Convention or that of the BIT.[200] Further, the Respondent alleges the Claimants have not demonstrated these contracts constitute "*claims to performance*" under the BIT as these do not appear to establish concrete rights or obligations.[201]

171. Moreover, to the extent that there are qualifying claims to performance, these have not been shown to be investments in the territory of Norway. The Claimants allege the contracts were concluded in Båtsfjord, Norway, though the Respondent argues that this cannot be indicative of whether a particular clause in the contract gives a right to performance in Norway.[202] The particular claim to performance relied upon by the Claimants is the claim to payment, which according to the Respondent would have been made, if at all, into North Star's Latvian bank account. The Respondent further argues that the fact that the delivery of snow crab took place in Seagourmet's factory in Norway is the wrong focus. It submits that whether North Star has claims to performance as against Seagourmet cannot be determined by the place where North Star's own obligations to Seagourmet would be performed.[203] Finally, the Respondent asserts the contracts are void

[197] Resp. Counter-Memorial, para. 511.
[198] Resp. Counter-Memorial, para. 512.
[199] Resp. Counter-Memorial, para. 513.
[200] Resp. Counter-Memorial, Sec. 5.3.6.2.
[201] Resp. Counter-Memorial, Sec. 5.3.6.3.
[202] Resp. Counter-Memorial, Sec. 5.3.6.4.
[203] Resp. Counter-Memorial, Sec. 5.3.6.4, para. 527.

as a matter of Latvian law to the extent they envisaged action in breach of Norwegian law.[204]

172. In response to the Claimants' arguments, the Respondent (i) rejects the Claimants' "*unity approach*"; (ii) reiterates the Claimants' alleged investments are not "*made in the territory of Norway*"; and (iii) restates that the alleged investments were not made "*in accordance with law*".

173. With regard to what the Respondent refers to as the Claimants' "*unity approach*" for "*all jurisdictional purposes*", it argues, first, that such an approach is inconsistent with Article I(1) of the BIT. The Respondent claims that the relevant question is not whether "*the elements comprising the investment qualify as 'assets'*" but whether "*every kind of asset*" was "*invested in the territory of one contracting party in accordance with its laws and regulations*".[205] Second, the Respondent argues that "*the facts of this dispute preclude a unitary approach*" as—contrary to the Claimants' argument that their assets are "*an*" investment—a commercial operation or single business venture cannot operate to catch each and every element of a transaction within the Tribunal's jurisdiction.[206] Third, the Respondent asserts that if the Tribunal were to apply a "*unity approach*", the key element of the Claimants' investment would be the fishing licences granted by Latvia.[207]

174. With regard to the Claimants' investments allegedly "*made in the territory of Norway*", the Respondent submits, first, that the Tribunal should not adopt a "*unity approach*" to territoriality.[208] Second, the Respondent argues that if the Tribunal were to adopt such an approach to territoriality, the Claimants' investments are "*distinct and severable*" and should be addressed individually with regard to territoriality.[209] Third, the Respondent

[204] Resp. Counter-Memorial, Sec. 5.3.6.5.
[205] Resp. Rejoinder, Sec. 6.2.2.
[206] Resp. Rejoinder, Sec. 6.2.3.
[207] Resp. Rejoinder, Sec. 6.2.4.
[208] Resp. Rejoinder, Sec. 6.3.1.
[209] Resp. Rejoinder, Sec. 6.3.2.

claims that, in any event, even considered as a whole, the Claimants' investments are not made in the territory of Norway.[210]

175. With regard to the Claimants' allegation that its investment were made "*in accordance with* [Norway's] *laws and regulations*", the Respondent scrutinizes both the fishing licences and the vessels in turn.[211] Regarding the fishing licences, the Respondent submits, first, that these were null and void as a matter of Norwegian law insofar as they permitted the Claimants to harvest snow crab on the Norwegian continental shelf.[212] Second, the Respondent claims that there was no attempt by the Claimants actually to use those licences to harvest snow crab on the Norwegian continental shelf (as opposed to the Russian continental shelf) before it was illegal as a matter of Norwegian law.[213] Regarding the vessels, the Respondent states that its argument is not that the vessels themselves were an unlawful investment by their acquisition but that the Tribunal has no jurisdiction over any alleged breach of the BIT because the first utilization of these vessels on the Norwegian continental shelf was after harvesting had already been forbidden by Norwegian law.[214]

B. THE CLAIMANTS' POSITION

(1) Applicable Law

176. The Claimants agree with the Respondent that the applicable law for the purpose of determining the jurisdiction of the Tribunal is to be found in Article IX of the BIT and Article 25 of the ICSID Convention.[215]

177. However, they take issue with the Respondent's submission that Norwegian law is also relevant. They maintain that the Respondent's position on the role of domestic law would "*constitute an artificial trap depriving investors of the very protection the BIT was intended to provide*" since the alleged breaches of the BIT concern the Norwegian regulatory

[210] Resp. Rejoinder, Sec. 6.3.3.
[211] Resp. Rejoinder, Sec. 6.4.
[212] Resp. Rejoinder, para. 368.
[213] Resp. Rejoinder, para. 369.
[214] Resp. Rejoinder, para. 375.
[215] Cl. Memorial, para. 436.

framework applicable to the investment.[216] Further, the Claimants submit that, in any event, an allegation that a claimant has violated the law of the host State "*can be raised only in respect of the acquisition or establishment of the investment*" and not as regards the subsequent conduct of the claimant in the host State.[217]

(2) The First Objection

178. As a preliminary point, the Claimants are of the view that the Respondent's First Objection to Jurisdiction pertains to admissibility rather than to jurisdiction.[218] The Claimants argue that "*[j]urisdiction is an attribute of a tribunal and not of a claim, whereas admissibility is an attribute of a claim but not of a tribunal*".[219] In their view, the claim is admissible in this case and the Tribunal has jurisdiction.

a. The Subject Matter of the Dispute is Not Directly Related to the Alleged Investments

179. *First*, the Claimants allege that the Respondent's characterization of its objection related to the legality of the Claimants' fishing licences as a *jurisdictional* objection is an impermissible attempt to read additional conditions for the establishment of the Tribunal's jurisdiction into Article IX of the BIT.[220] Invoking "*the general principle that, while the Tribunal must not exceed the jurisdiction conferred upon it by the Parties, 'it must also exercise that jurisdiction to the full'*", the Claimants argue all the conditions established by Article IX of the BIT, which establishes the Tribunal's jurisdiction in this case, are met.[221]

180. *Second*, according to the Claimants, the admissibility of any given claim must be analysed on its own and does not entail consequences for the Tribunal's jurisdiction to hear the case

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[216] Cl. Reply, para. 405, quoting *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008 (**CL-0399**), para. 106.

[217] Cl. Reply, para. 406.

[218] Cl. Reply, paras. 553-569.

[219] Cl. Reply, para. 556, citing *Hochtief AG v. Argentine Republic*, ICSID Case No ARB/07/31, Decision on Jurisdiction, 24 October 2011 (**CL-0456**), para. 90. See also *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C., Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008 (**CL-0455**), para. 63.

[220] Cl. Reply, paras. 559-561.

[221] Cl. Reply, para. 561, citing *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, ICJ, Judgment, 3 June 1985 (**CL-0460**), para. 19.

as a whole. By contrast, the Respondent's admissibility objections do not target the entire case submitted to the Tribunal but only concern the legality of the fishing rights asserted by the Claimants to form part of their investments.[222]

181. *Third*, the Respondent's objection is based on a recharacterization of the Claimants' claims and the dispute as a whole. The Claimants allege that it is not possible to conclude that the very subject matter of the case is Norway's sovereign rights in the Loop Hole and around Svalbard without misrepresenting the claims formulated in the Claimants' pleadings.[223] The Claimants "*claim that they held snow crab fishing rights in the maritime areas over which Norway (now) asserts jurisdiction, in the Loop Hole and off the Svalbard archipelago*" and claim reparation for the losses suffered to their investment as the result of the Respondent's breaches of its obligations under the BIT.[224]

182. *Fourth*, the Claimants agree that the Tribunal might need to address the interpretation of other international law instruments such as UNCLOS, the Svalbard Treaty or the NEAFC Convention so as to determine the existence and scope of the fishing rights forming part of the investment protected under the BIT.[225] However, the Claimants frame this as an application "*in an ancillary manner*", which they argue is a question of applicable law, not of admissibility or jurisdiction.[226]

183. The Claimants further deny there is any merit in the substance of the Respondent's arguments by addressing: (i) the subject matter of the dispute and jurisdiction *ratione materiae*; (ii) the subject matter of the dispute and the exercise of sovereign rights; (iii) the subject matter of the dispute and applicable law; and (iv) the subject matter of the dispute and *forum non conveniens*.[227]

[222] Cl. Reply, para. 562.
[223] Cl. Reply, paras. 563-565.
[224] Cl. Reply, para. 564.
[225] Cl. Reply, paras. 566-568.
[226] Cl. Reply, para. 566.
[227] Cl. Reply, Sec. V.B.a.

(i) The subject-matter of the dispute and jurisdiction ratione materiae

184. The Claimants contest that a dispute in investment arbitration is defined by the "*preponderance of questions*", as argued by the Respondent.[228] According to the Claimants, this argument has only been applied in inter-State cases in which the applicant was invoking a particular convention to seek a ruling on a larger dispute with the respondent.[229]

185. The Claimants submit that the Respondent's argument "*is not independent from the one concerning jurisdiction ratione materiae*". According to the Claimants, *ratione materiae* jurisdiction must be determined on the basis of Article 25 of the ICSID Convention and the relevant provisions of the applicable investment treaty. The Claimants argue that under Article 25 of the ICSID Convention, a dispute is "*arbitrable*" if it is "*arising directly out of an investment*" and under Article IX of the BIT a dispute is arbitrable if it is "*in relation to an investment*". They therefore conclude that "[t]*he arbitrability of the claim (or jurisdiction of the Tribunal to entertain it)*" is established if there is an investment "*in relation to*" which a dispute exists.[230] According to the Claimants, if these *ratione materiae* conditions are met, no further inquiry is needed.[231]

(ii) The subject-matter of the dispute and the exercise of sovereign rights

186. The Claimants reject the Respondent's argument that the Tribunal would have to consider an underlying dispute over Norway's sovereign rights in its maritime areas around Svalbard and in the Loop Hole.[232] Instead, the Claimants argue that the Tribunal is not requested to decide upon "*the existence*" of Norway's sovereign rights in the Loop Hole and in the maritime areas off Svalbard but to find that the Respondent, in "*the exercise*" of its asserted sovereign rights, breached its obligations towards the Claimants as Latvian investors under the BIT.[233] The Claimants state they "*have not – could not have – a dispute*

[228] Cl. Reply, paras. 571-572.
[229] Cl. Reply, para. 572.
[230] Cl. Reply, para. 580.
[231] Cl. Reply, para. 581.
[232] Cl. Reply, paras. 582-586.
[233] Cl. Reply, paras. 574, 583.

with Norway over the latter's sovereign rights" and deny that this arbitration raises a challenge to Norway's jurisdiction over the Loop Hole or in the maritime areas off Svalbard. According to the Claimants, they merely dispute the Respondent's "*exercise of its jurisdiction in the Loop Hole and off the Svalbard archipelago, insofar as this exercise amounts to a violation of their rights under the BIT*".[234]

(iii) The subject-matter of the dispute and applicable law

187. The Respondent argues that the Tribunal has no jurisdiction over the present dispute as it involves *inter alia* the Svalbard Treaty and the NEAFC Convention. In response, the Claimants argue that there is a distinction between, on the one hand, the scope of the rights and obligations which an international tribunal has jurisdiction to enforce and, on the other hand, the law which it applies in doing so.[235] The Claimants further submit that the extent to which external rules need to be taken into consideration is a question for the merits and does not affect the Tribunal's jurisdiction, or the admissibility of claims.[236]

188. As in **Section (ii)** above, the Claimants submit that the Tribunal is not requested to determine "*the existence*" and extent of Norway's sovereign rights but to determine whether, in "*the exercise*" of those rights, the Respondent violated the Claimants' rights under the applicable BIT.[237] According to the Claimants, in the course of that examination, the Tribunal "*may examine external applicable law to the extent necessary to decide the issues put before it*".[238] If the Tribunal considers it necessary to address the question of the legality of the Claimants' fishing licences in order to determine the extent of the Claimants' rights and of the Respondent's correlative obligations, it has the power to do so by considering the interpretation of UNCLOS, NEAFC and of the Svalbard Treaty.[239] The Claimants maintain that these are not questions of admissibility or jurisdiction but of

[234] Cl. Reply, para. 574.
[235] Cl. Reply, para. 587.
[236] Cl. Reply, para. 588.
[237] Cl. Reply, para. 591; see also paras. 574, 583.
[238] Cl. Reply, para. 591.
[239] Cl. Reply, para. 592.

applicable law going to the determination and interpretation of standards of investment protection.[240]

(iv) The subject-matter of the dispute and forum non conveniens

189. The Respondent argues that the ICJ or the ITLOS would be the only convenient and competent fora to deal with questions about the legality of the Claimants' licences to harvest snow crab on the Norwegian continental shelf.[241] In response, the Claimants submit that even if some of the ancillary questions arising in this arbitration could in theory be dealt with by the ICJ or the ITLOS within the framework of inter-State proceedings, these international courts could not be seized of the same cause of action by the same parties.[242]

190. Further, the Claimants submit that no preliminary decision by another forum is necessary, and that even if the Claimants' fishing rights could also be analysed as a violation under UNCLOS, the NEAFC Convention, or the Svalbard Treaty, this does not render the claims submitted by the Claimants in this arbitration inadmissible.[243]

b. The Legal Interests of Absent Parties are the "Very Subject Matter" of the Dispute

191. According to the Claimants, the existence of an underlying public international law dispute involving the EU and Latvia does not prevent the Tribunal from adjudicating this case based on the applicable law. The Claimants advance five reasons in support.[244]

192. *First*, the fact there is an underlying dispute between States is no basis to decline to resolve a dispute between an investor and a State.[245] *Second*, if the Respondent's position were accepted, it would be enough for States to create disputes with other States to deprive investors of their substantive and procedural rights.[246] *Third*, the Claimants assert that the

[240] Cl. Reply, para. 593.
[241] Resp. Counter-Memorial, para. 249.
[242] Cl. Reply, para. 596.
[243] Cl. Reply, para. 597.
[244] Cl. Reply, Sec. V.B.b.
[245] Cl. Reply, paras. 599-600.
[246] Cl. Reply, para. 601.

existence of disputes between the host and home States cannot deprive investors of their substantive rights and procedural protections under a BIT.[247]

193. *Fourth*, the Claimants submit that the Tribunal is not required to make determinations as to the legal rights or obligations of Latvia, the EU, or the Respondent vis-à-vis each other. The Tribunal is requested only to rule upon the Respondent's alleged violations of the Claimants' rights under the BIT.[248]

194. *Fifth*, the Claimants argue that the *Monetary Gold* principle is inapposite.[249] According to the Claimants, the source of the Claimants' rights resides in the BIT's substantive protection standards. Even if the Tribunal might have to consider the competence of Latvia to issue the fishing licences, that determination would not fall under the *Monetary Gold* exception.[250]

195. According to the Claimants, nothing in this proceeding requires the Tribunal to determine whether any "*absent State party*" has committed any international wrong against the Respondent.[251] Furthermore, any of the conclusions reached by the Tribunal would only concern the Respondent's obligations towards the Claimants and leave Latvia's legal position substantially unaffected, whether or not the licences it granted to the Claimants are held valid.[252]

196. In addition, the Claimants allege that the disagreements between Norway and Latvia or the EU do not affect the admissibility of the case based on the application of the *Monetary Gold* principle.[253] According to the Claimants, for the *Monetary Gold* principle to apply, (i) the claim must bear upon the engagement of the third State's responsibility for an

[247] Cl. Reply, para. 603.
[248] Cl. Reply, para. 604.
[249] Cl. Reply, paras. 605-617.
[250] Cl. Reply, para. 606.
[251] Cl. Reply, paras. 611-612.
[252] Cl. Reply, para. 613.
[253] Cl. Rejoinder, Sec. IV.B.

allegedly wrongful act;[254] and (ii) the very subject matter of the dispute must involve a determination of a third State's international legal responsibility.[255]

(3) The Second Objection

197. The Claimants argue that (i) the dispute is in relation to an Investment; (ii) the Investment is "*in the Territory of Norway*"; and (iii) the Investment was made "*in accordance with*" the laws and regulations of Norway.[256] The Claimants distinguish these objections from the Respondent's objections it considers as pertaining to admissibility, *i.e.* the objection regarding the subject matter of the dispute and regarding the existence of a "*larger dispute*".[257]

a. The Dispute is in Relation to an Investment

198. For the investments of Mr Pildegovics, the Claimants refer to:

> *(i) contractual rights in his joint venture agreement with Mr. Levanidov; (ii) 100% of the shares in North Star; and (iii) 100% of the shares in Sea & Coast.*[258]

199. For the investments of North Star the Claimants group the alleged investments under five headings:

> *Several assets owned by North Star contributed to the achievement of its operating results, all of which constitute investments by North Star in the territory of Norway: fishing vessels (subsection i); "fishing capacity", referring to the right to operate a ship as fishing vessel (subsection ii); fishing licenses authorizing each vessel to catch snow crabs in the "Loop Hole" area of the NEAFC zone and in waters off the Svalbard archipelago (subsection iii); contractual rights to purchase two additional ships, along with "fishing capacity" for such ships (subsection iv); and supply agreements with purchasers of snow crab products (subsection v).*[259]

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[254] Cl. Rejoinder, Sec. IV.B.a.

[255] Cl. Rejoinder, Sec. IV.B.b.

[256] Cl. Reply, Sec. V.A.

[257] Cl. Reply, para. 460.

[258] Cl. Memorial, para. 166.

[259] Cl. Memorial, para. 257.

200. The Claimants argue that a qualifying investment venture can be composed of a number of contracts and assets and that it is the "*entire operation*" with an "*overall economic goal*" that must be considered. Moreover, the BIT's definition includes "*any kind of asset*" and Mr Pildegovics' contractual rights under the joint venture are properly characterized as "*claims to performance under contract having an economic value*".[260] The Claimants allege their assets were moreover acquired to form a single business with a common economic purpose. The Claimants explain their economic operations as follows.

(a) By entering into a joint venture agreement with Mr Levanidov, the owner of Seagourmet, Mr Pildegovics secured a dedicated source of demand for his snow crab catches as well as key operational benefits tied to the close coordination between supplier (North Star) and customer (Seagourmet).[261]

(b) Through his sole shareholding in North Star, Mr Pildegovics controlled a fishing company with the capacity to catch and deliver the snow crab supplies required by Seagourmet and other customers related to the joint venture. North Star was the main operational arm of Mr Pildegovics' snow crab fishing business, and the main conduit through which he fulfilled his commitments under the joint venture with Mr Levanidov.[262]

(c) Through his sole shareholding in Sea & Coast, Mr Pildegovics controlled a Norwegian local agency which served as his investment's procurement arm, supporting North Star's vessel's by ensuring their supply of needed goods and services through sourcing in the local community.[263]

(d) North Star's vessels, fitted and equipped for snow crab fishing in the Barents Sea, gave the company the material means to catch and deliver large quantities of snow crabs to Seagourmet and other customers of the joint venture—North Star's *raison*

[260] Cl. Reply, Sec. V.A.a.
[261] Cl. Reply, para. 488(a).
[262] Cl. Reply, para. 488(b).
[263] Cl. Reply, para. 488(d).

d'être. North Star's fishing capacity rights enabled its ships to operate as fishing vessels for this purpose.[264]

(e) North Star's fishing licences gave the company the legal right to engage in snow crab fishing in the Barents Sea, first in the international waters of the NEAFC area (from 1 July 2014) and later in waters off the Svalbard archipelago (from 1 November 2016), fishing grounds with a large and growing snow crab population.[265]

(f) North Star's contracts for the purchase of additional vessels (*Sokol* and *Solyaris*) were concluded to enable the company to expand its fishing capacity, in response to growing demand, including Seagourmet's increased absorption capability. The vessels were already operating in the Barents Sea snow crab fishery, were suited to the needs of the joint venture, and were available for delivery to the port of Båtsfjord. North Star also acquired fishing capacity rights to allow these ships to operate as fishing vessels under the Latvian flag.[266]

(g) Finally, North Star concluded supply agreements to formalize the terms of its snow crab sales to Seagourmet and other seafood distributors linked to the joint venture.[267]

201. According to the Claimants, "[t]*he above assets, forming a single economic operation, <u>together</u> define the investment at issue in this case*".[268] As such, the Claimants allege that the dispute between the Claimants and the Respondent is "*in relation to*" the investment so defined and thus "*arising directly out of an investment*" as required by the BIT. They claim that the Respondent's actions have caused North Star to become banned from the snow crab fishery and the company was consequently unable to pursue deliveries to Seagourmet,

[264] Cl. Reply, para. 488(d).
[265] Cl. Reply, para. 488(e).
[266] Cl. Reply, para. 488(f).
[267] Cl. Reply, para. 488(g).
[268] Cl. Reply, para. 489 [emphasis in original].

which in turn prevented Mr Pildegovics from fulfilling his core commitment under the joint venture.[269]

202. The Claimants argue that their investment was "*part of an integrated snow crab business operating within the framework of a joint venture agreement concluded between Mr. Pildegovics and Mr. Levanidov*", based in Båtsfjord, Norway.[270] In response to the Respondent's argument that the alleged joint venture is an "ex post *characterization of the project*" and that no information about the alleged joint venture has been provided, the Claimants refer to the Witness Statements of Mr Pildegovics and Mr Levanidov and the supporting documents thereto.[271]

203. The Claimants assert that Mr Pildegovics and Mr Levanidov agreed to work together and did in fact work together "*to take the complete production cycle in the same hands*".[272] They did so, not by establishing a "*separate legal entity*", but by "*concluding a contract or legal agreement generating rights and obligations*", "*chiefly to cooperate with each other in building a snow crab fishing and processing joint enterprise based in Båtsfjord*".[273]

204. The Claimants allege that their "*investment must be viewed as a whole*".[274] In addressing the Respondent's arguments, the Claimants claim, *first*, that it is not contested between the Parties that the ICSID Convention "*allows for a unitary approach to an investment*".[275] *Second*, the Claimants argue that whether the BIT's definition of "*investment*" refers to "*asset*" in the singular or "*assets*" in the plural has no relevance to whether the Tribunal should examine the investment on the basis of "*unity*" or of each asset individually. In this context, the Claimants rely on decisions of arbitral tribunals that have adopted the unitary approach where the investment had been defined as "*every kind of asset*" in the singular.[276]

[269] Cl. Reply, paras. 490-491.
[270] Cl. Reply, Sec. III.E, para. 363.
[271] Cl. Reply, paras. 369-399.
[272] Cl. Reply, para. 371.
[273] Cl. Reply, paras. 371-372.
[274] Cl. Rejoinder, Sec. V.A.
[275] Cl. Rejoinder, Sec. V.A.a.
[276] Cl. Rejoinder, Sec. V.A.b.

Third, the Claimants claim that unity applies generally in light of the entire economic operation and its overall economic goal, not only after a "*key or head agreement*" has been identified.[277] *Fourth*, the Claimants insist they have not abandoned their position that every asset forming part of the snow crab business of North Star and Mr Pildegovics is an investment under the BIT, in particular the sales of goods contracts and the joint venture.[278]

205. As to the absence of a written agreement, the Claimants allege that Mr Pildegovics and Mr Levanidov are cousins who have been personally close to one another, by virtue of which "*a great deal of trust existed (and continues to exist) between them*".[279] In response to the Respondent's allegation that an agreement on "*basic financial obligations*" was absent, the Claimants advance that the decision made between Mr Levanidov and Mr Pildegovics "*was to maintain separate ownership of their respective investments and companies* […] *(chiefly North Star in the case of Mr. Pildegovics, and Seagourmet in the case of Mr. Levanidov)*" so that "*as an initial matter, there would be no obligation between them to share the proceeds of the joint venture, since each would stand to profit from the result of his own investments*".[280]

206. As to the legal aspect, the Claimants argue that under Norwegian law, a contract can exist even in the absence of a formal written agreement recording its terms.[281] The Claimants summarize Dr Ryssdal's expert opinion as follows:

(a) Norwegian contract law is rooted in three general principles: freedom of contract; freedom of contractual form; and respect for and protection of legitimate expectations;[282]

(b) regarding the freedom of contractual form, Dr Ryssdal writes that "*there are no specific requirements to the form of a contract for it to be legally binding* inter

[277] Cl. Rejoinder, Sec. V.A.c.
[278] Cl. Rejoinder, Secs. V.A.d-V.A.f.
[279] Cl. Reply, para. 385.
[280] Cl. Reply, para. 386 [emphasis in original].
[281] Cl. Reply, paras. 388-389.
[282] Cl. Reply, para. 389(a).

partes. […] *This is also the case in more complex areas of business, where one could assume that a formal written and signed contract would be required*";[283]

(c) according to the Norwegian Supreme Court, "*the question of whether a binding agreement has been entered into, rests* […] *first and foremost on a legal assessment of what has passed between the parties*";[284] and

(d) thus, the assessment of whether a contract has been entered into "*is based on a contextual examination of the parties' relationship and negotiations, their legitimate expectations, and whether they have agreed on what is deemed to be the 'significant terms'*".[285]

207. Dr Ryssdal concludes that the joint venture gives rise "*to a binding contract under Norwegian law*".[286] The Claimants invoke Dr Ryssdal's characterization of the joint venture: "*'the essential obligations under the joint venture agreement were for Mr. Pildegovics to ensure deliveries of snow crabs' while the 'essential obligations of Mr. Levanidov under the joint venture agreement were to ensure sufficient capacity to process – and hence take delivery of – the snow crabs at the said Båtsfjord factory, Seagourmet AS'*".[287] The Claimants conclude that "*the contract between Mr. Pildegovics and Mr. Levanidov generates an obligation to cooperate and a duty of mutual loyalty*".[288]

b. The Investment is "in the Territory of Norway"

208. The Claimants allege that the question of the territoriality of the investment must be considered looking at the investment as a whole, *i.e.* whether the business viewed in its entirety has sufficient nexus to the territory of Norway to fulfil the territorial requirement of Article IX of the BIT.[289]

[283] Cl. Reply, para. 389(b), citing Ryssdal ER1, paras. 9, 26.
[284] Cl. Reply, para. 389(c).
[285] Cl. Reply, para. 389(d).
[286] Cl. Reply, para. 390, citing Ryssdal ER1, paras. 20-21.
[287] Cl. Reply, para. 393, citing Ryssdal ER2, para. 12.
[288] Cl. Reply, para. 395.
[289] Cl. Reply, Section V.A.b.

209. According to the Claimants, the "*economic goal pursued by the investment*" is the starting point for the territorial nexus.[290] The Claimants submit that this economic goal was accomplished through the delivery of a resource (snow crab) at a specific location in Norway (the port of Båtsfjord), predominantly to a Norwegian partner (Seagourmet), resulting in sales generated by North Star at that same location in Norway.[291]

210. The Claimants further argue that the operation of the investment reveals "*a very strong territorial nexus to Norway*".[292] In support, the Claimants rely on the following assertions.

(a) The Claimants managed their investment from the port of Båtsfjord, where North Star and Sea & Coast employees (including Mr Pildegovics) shared office space with employees of Seagourmet.[293]

(b) Consistent with their core mission to supply Seagourmet with snow crabs, North Star's vessels operated exclusively from the port of Båtsfjord. This meant that every fishing trip started and ended in Båtsfjord, and the ships were berthed there between trips. The Claimants' business consisted fundamentally in bringing a resource (snow crab) to Norway.[294]

(c) North Star's vessels were serviced by a Norwegian company owned by Mr Pildegovics, Sea & Coast, based in the port of Båtsfjord, which served as its local agent "*in ports of call and on fishing ground in Norway*".[295]

(d) At its operational peak in 2016, North Star employed over ninety seafarers and administrative staff who were based in or operated from Båtsfjord. This compared to no more than four employees at the company's headquarters in Riga.[296]

[290] Cl. Reply, paras. 498-499.
[291] Cl. Reply, para. 500.
[292] Cl. Reply, para. 503.
[293] Cl. Reply, para. 503(a).
[294] Cl. Reply, para. 503(b).
[295] Cl. Reply, para. 503(c).
[296] Cl. Reply, para. 503(d).

(e) Mr Pildegovics and his joint venture partner Mr Levanidov met at the venture's Båtsfjord premises at least twenty times over a period of seven years.[297]

(f) Mr Pildegovics' claims arising from the joint venture agreement pertained to Mr Levanidov's performance in Norway: chiefly to build capacity to process North Star's snow crab catches at Seagourmet's factory in the port of Båtsfjord, and to purchase large supplies of snow crabs to be delivered there by North Star.[298]

211. The Claimants further add that the fact that certain aspects of the investment also had links to other territories certainly does not preclude a finding that the territorial requirement is met with regard to the investment in the territory of Norway.[299] According to the Claimants, the relevant activity was "*the delivery and sale of snow crab*", which took place "*almost exclusively*" in the territory of Norway. They further argue that "*the act of fishing does not, in and of itself, qualify as an economic activity*" but is only "*the first step of the economic process*".[300] The Claimants contend that even if the snow crabs came from outside the territory of Norway, *e.g.* the Russian continental shelf, these catches were still delivered in Norway, which is where the economic activity occurred, and what ties the investment to the territory of Norway.[301]

212. The Claimants also assert that the investment contributed to the economic development of Norway and allege that "[a]*long with their joint venture partner, the Claimants helped create 67 jobs in the Norwegian town of Båtsfjord out of a population of about 2,200. They spent tens of millions of Norwegian kroner with Norwegian suppliers, gave substantial business to Norwegian shipyards for the repair and maintenance of their vessels, helped justify infrastructure investments in Båtsfjord and contributed to the social and cultural development of the municipality*".[302]

[297] Cl. Reply, para. 503(e).
[298] Cl. Reply, para. 503(f).
[299] Cl. Reply, paras. 505-510.
[300] Cl. Reply, paras. 511-518.
[301] Cl. Reply, para. 519(a).
[302] Cl. Reply, para. 527.

213. In response to the Respondent's arguments, the Claimants maintain that their investment is in the territory of Norway under Article I(1) of the BIT.[303] In support, the Claimants argue that (i) the Respondent mischaracterizes what the *Inmaris* decision stands for on unity of investment in respect of territoriality;[304] (ii) the Claimants' business operation taken as a whole has a sufficient nexus with Norway;[305] (iii) the Respondent misapplies the alleged "*substantial and non-severable*" test, which, in any event, is not applicable;[306] (iv) each of Claimants' investments, even taken individually, are in any event investments in the territory of Norway for the purpose of the BIT;[307] and (v) the extension or exercise of a State's jurisdiction—where it affects and interferes with a foreign investment—is a relevant factor to conclude that such investment was "*in the territory*" of the host State for the purposes of arbitral jurisdiction.[308]

c. The Investment was Made "in Accordance with" the Laws and Regulations of Norway

214. The Claimants submit that the legality of the Claimants' investment must be assessed with reference to domestic law as it existed at the time the investment was established. They further argue that the Respondent changed the legal regime applicable to the Loop Hole's snow crab fishery following its designation in July 2015 of snow crab as a sedentary species.[309]

215. According to the Claimants, when their investment was established in 2014, this investment was fully in accordance with the laws and regulations of Norway.[310] Norway's first regulations prohibiting snow crab fishing were adopted in December 2014, after the establishment of the investment. These regulations did not apply to EU-flagged vessels operating in the Loop Hole and thus did not concern the Claimants' operations.[311] At that

[303] Cl. Rejoinder, Sec. V.B.
[304] Cl. Rejoinder, Sec. V.B.a.
[305] Cl. Rejoinder, Sec. V.B.b.
[306] Cl. Rejoinder, Sec. V.B.b.
[307] Cl. Rejoinder, Sec. V.B.c.
[308] Cl. Rejoinder, Sec. V.B.d.
[309] Cl. Reply, Sec. V.A.c; paras. 533-534.
[310] Cl. Reply, Sec. V.A.c, paras. 533-534.
[311] Cl. Reply, para. 542(a).

time, the Respondent had not yet adopted the position that the snow crab fishery fell under its continental shelf jurisdiction according to UNCLOS. Its Directorate of Fisheries consistently referred to this fishery as an "*international waters*" fishery falling "*outside any state's fisheries jurisdiction*" and registered Norwegian vessels for this fishery through notifications to NEAFC—as Latvia did.[312]

216. The Claimants further assert that their investment was also fully in accordance with the NEAFC regulatory framework. The Claimants' fishing licences were issued by Latvia through notifications pursuant to the NEAFC's regulations and thus, in accordance with NEAFC regulatory framework.[313] According to the Claimants, it was only in July 2015 that the Respondent designated snow crab as a sedentary species falling under its continental shelf jurisdiction. It then waited until December 2015 to amend its regulations, which prohibited snow crab fishing on its continental shelf.[314]

217. According to the Claimants, when they established their investment in 2014, they did not have an intention to fish in Norwegian waters, nor did they pretend to have rights to fish in Norwegian waters.[315] However, the Claimants submit they did operate their vessels in Norwegian territory as the vessels were based in the port of Båtsfjord and landed 98% of their catches in Norwegian ports with Norway's authorization.[316] In sum, the Claimants submit that their investment and every asset comprising it was made "*in accordance with the laws and regulations*" of Norway when it was established in 2014.[317]

218. In response to the Respondent's arguments, the Claimants maintain that their investment was made in accordance with Norway's laws and regulations.[318] In support, the Claimants claim that (i) their investment was legal at the time of the investment;[319] (ii) there is no

[312] Cl. Reply, para. 542(b).
[313] Cl. Reply, para. 543.
[314] Cl. Reply, para. 544.
[315] Cl. Reply, para. 548.
[316] Cl. Reply, paras. 548-549.
[317] Cl. Reply, para. 550.
[318] Cl. Rejoinder, Sec. V.C.
[319] Cl. Rejoinder, Sec. V.C.a.

jurisprudence constante on illegality of investment affecting the investment as a whole;[320] (iii) the Respondent cannot use its own domestic law to avoid the Tribunal's jurisdiction;[321] (iv) the Respondent cannot use NEAFC, UNCLOS, and the Svalbard Treaty, as incorporated into Norwegian law through the Marine Resources Act, to avoid a decision on legality;[322] and (v) the Respondent's prior acts prevent it from invoking illegality.[323]

219. In addition, the Claimants state that they are Latvian nationals, which is not disputed by the Respondent,[324] and qualify as protected investors under the BIT.[325] They do not dispute Mr Levanidov's involvement but disagree that he is the "*real*" investor. The Claimants respond in turn to the five arguments identified by the Respondent.

220. *First*, as to the argument that Mr Pildegovics is not the originator of the business project, the Claimants acknowledge that "*Mr. Levanidov was already working on a snow crab venture in Norway when Mr. Pildegovics joined him as a partner*" but submit this does not disqualify him from being an investor. Were this accepted, any investor acquiring an investment which had already started operations would be deprived of protection under the BIT.[326]

221. *Second*, as to the argument that North Star was incorporated by a third party, not by Mr Pildegovics, the Claimants state that the BIT does not require that in order for a person to qualify as an investor by holding shares in a company, this person must have been the person who incorporated that company.[327]

222. *Third*, as to the argument that Mr Levanidov had "*very close involvement in the purchase and financing of all of North Star's vessels in this case*", the Claimants do not dispute this fact but allege this reflects the fact that Mr Levanidov and Mr Pildegovics worked closely

[320] Cl. Rejoinder, Sec. V.C.b.
[321] Cl. Rejoinder, Sec. V.C.c.
[322] Cl. Rejoinder, Sec. V.C.d.
[323] Cl. Rejoinder, Sec. V.C.e.
[324] *See* Resp. Counter-Memorial, Sec. 1.3.1.
[325] Cl. Reply, Sec. III.D, paras. 328-331.
[326] Cl. Reply, para. 333.
[327] Cl. Reply, para. 335.

together as joint venture partners.[328] Further, the Claimants explain that North Star built a fleet of fishing vessels for the specific purpose of supplying Seagourmet's factory at Båtsfjord, which was owned and operated by Mr Levanidov. Mr Pildegovics thus initially relied on the advice of Mr Levanidov not only to benefit from his experience but also to ensure that the vessels to be purchased would satisfy the needs of their joint venture.[329]

223. *Fourth*, as to the argument that North Star relied on financing by third-party companies and that Mr Pildegovics did not fund the company's operation entirely with his own equity, the Claimants assert this does not entail that North Star's lenders had any control over the company's operations or that Mr Pildegovics was not an "*investor*" under the BIT.[330]

224. *Fifth*, as to the argument that Mr Pildegovics and North Star are a façade designed to enable the presentation of Mr Levanidov's investments as Latvian, the Claimants allege that the record contains contemporaneous documents presenting Mr Levanidov and Mr Pildegovics as partners dating back at least to early 2015, before a potential investment dispute with the Respondent.[331] Further, the Claimants maintain that Mr Pildegovics played and continues to play a "*central role*" at North Star, as its General Manager and as a member of the board, as well as at Seagourmet, on which board he also sits.[332]

225. In sum, the Claimants submit that they are the "*real investors*" in this case and that, at any rate, the BIT does not impose on the Claimants the burden to prove a certain level of contribution or control in order to qualify as "*investors*" under the BIT.[333]

[328] Cl. Reply, para. 339.
[329] Cl. Reply, para. 341.
[330] Cl. Reply, para. 343.
[331] Cl. Reply, para. 351.
[332] Cl. Reply, para. 354.
[333] Cl. Reply, para. 362.

C. THE TRIBUNAL'S ANALYSIS

(1) Introduction

226. For the Tribunal to have jurisdiction, the Claimants must satisfy the requirements of both the BIT[334] and Article 25 of the ICSID Convention.

227. Article I(3) of the BIT provides:

> *The term "investor" shall mean with regard to each Contracting Party:*
>
> *a) A natural person having status as a national of the Contracting Party in accordance with its laws;*
>
> *b) Any legal person such as any corporation, company, firm, enterprise, organization or association incorporated or constituted under the laws in force in the territory of the Contracting Party.*

228. Article IX of the BIT provides, in relevant part:

> *1. This Article shall apply to any legal disputes between an investor of one contracting party and the other contracting party in relation to an investment of the former in the territory of the latter.*
>
> *2. If any dispute between an investor of one Contracting Party and the other Contracting Party continues to exist after a period of three months, the investor shall be entitled to submit the case* […] *to:*
>
> *(a) the International Centre for Settlement of Investment Disputes having regard to the applicable provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington D.C. on 18 March 1965* […].

229. Article 25 of the ICSID Convention provides, in relevant part:

> *(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State* […] *and a national of another Contracting State, which*

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the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) "National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

[…]

230. The Respondent does not dispute that the First Claimant, Mr Pildegovics, is a national of Latvia within the meaning of Article I(3)(A) of the BIT. Nor is it asserted that he also holds the nationality of Norway, so there is no question of jurisdiction being excluded by Article 25(2)(a) of the ICSID Convention on that account.

231. With regard to the Second Claimant, there is no dispute that it is a company duly incorporated under Latvian law which therefore meets the requirements of Article I(3)(B) of the BIT and Article 25(2)(b) of the ICSID Convention.

232. The Respondent maintains, however, that the Tribunal lacks jurisdiction, because the dispute is not in relation to an investment by either Claimant in the territory of Norway, as required by Article IX(1) of the BIT. Norway also maintains that the dispute does not arise directly out of such an investment, as required by Article 25(1) of the ICSID Convention.

233. As summarised above, the Respondent advances two objections. The first objection is that the real dispute is between Norway, the EU and other States and concerns not the rules of investment protection but quite different bodies of international law, in particular UNCLOS and the Svalbard Treaty, which the Tribunal lacks jurisdiction to apply. Moreover, if the Tribunal were to try to apply those instruments, it would inevitably be required to determine the legality of the acts of other States not party to the case.

234. The Respondent's second objection is that neither Claimant has made an investment in the territory of Norway to which its claim relates. According to Norway, the real investor is Mr Levanidov who, as a national of the United States, may not bring a claim under the Latvia-Norway BIT.

235. While the Tribunal notes the order in which the Respondent has presented its objections, it considers that it is more appropriate to begin by examining whether the Claimants have made an investment, as defined in the BIT, in the territory of Norway, and whether they have shown the existence of a dispute relating to, or arising directly out of, that investment. Only if the Tribunal considers that these fundamental jurisdictional requirements are satisfied, will it then be necessary to move on to a discussion of the Respondent's First Objection. Before addressing either Objection, however, the Tribunal will briefly consider the issue of the law applicable to the issues of jurisdiction and admissibility.

(2) Applicable Law

236. The Tribunal notes that the Parties are in broad agreement on the issue of applicable law. The Tribunal concurs with their view that the applicable law is to be found in Article 25 of the ICSID Convention and Article IX of the BIT, the provisions of which are to be interpreted in accordance with the rules of international law respecting treaty interpretation. Those rules are generally considered to have been codified in the Vienna Convention on the Law of Treaties, 1969. While the Vienna Convention is not in force between Latvia and Norway, the rules and principles of treaty interpretation contained in Articles 31 to 33 are generally regarded as declaratory of customary international law and will therefore be applied as such.

237. With regard to the difference between the Parties concerning the role of Norwegian law, Article I(1) of the BIT provides in relevant part:

> *The term "investment" shall mean every kind of asset invested in the territory of one Contracting Party in accordance with its laws and regulations by an investor of the other Contracting Party* […]. [emphasis added]

238. The Tribunal considers that the passage emphasised means that for an asset to qualify as an investment within the meaning of the BIT it must be made in accordance with the laws and regulations of the host State. Otherwise it is not an "investment" for the purposes of the BIT and a tribunal constituted under Article IX will not have jurisdiction over a dispute which arises out of it. In the view of the Tribunal, this requirement is satisfied if, at the time that the asset is first invested, it is invested in accordance with the laws and regulations of the host State. If those laws and regulations subsequently change, that change will not deprive the asset of its quality as an investment within the meaning of the BIT. To hold otherwise would enable a host State to circumvent the protection of the BIT.

(3) The Respondent's Second Objection

239. The Respondent's Second Objection is that the dispute does not relate to, or arise directly out of, an investment made by the Claimants in the territory of Norway. This objection requires determination of several different issues.

a. The "Joint Venture"

240. A threshold issue is the precise relationship between the two Claimants and Mr Levanidov and the companies owned and controlled by Mr Levanidov. Neither Mr Levanidov nor any of the companies which he owns and controls possess Latvian nationality, so none can be a claimant. The Claimants recognize that fact but maintain that Mr Pildegovics and Mr Levanidov concluded in 2014 a joint venture agreement and that the joint venture, or at least the Claimants' rights under that joint venture, is a central part of the investment in the present case. That claim goes to the heart of the relationship between the Claimants on the one hand and Mr Levanidov and his companies on the other and, in turn, to the identification of any investment on the part of the Claimants.

241. There is a degree of ambiguity in the Claimants' pleadings regarding this alleged joint venture. On the one hand, the Claimants maintain that their operations and those of Mr Levanidov and Seagourmet in Båtsfjord were "*an integrated economic enterprise*"[335] and were in practice inseparable. The evidence of Mr Knutsen, the Mayor of Båtsfjord,[336] lends some support to this view but his evidence is that, to an outside observer, the two men appeared and worked together. He could not testify as to the legal nature of the arrangements between them.

242. Nevertheless, the Claimants, when talking about the effect of "*their*" investments on the economy of Norway and, in particular, of Båtsfjord, tend to treat Seagourmet's employment of local staff and the money which Seagourmet brought to Båtsfjord as though they were part of the Claimants' investment.

243. In addition, the Claimants make much of the fact that Mr Pildegovics worked for significant periods of time from the offices of Seagourmet in Båtsfjord, and that he and Mr Levanidov marketed the activities of Seagourmet and North Star together. They also testified that, during 2015 and 2016, Seagourmet was entirely dependent upon North Star for supplies of snow crab and that North Star supplied most of the snow crab which it harvested in the Loop Hole to Seagourmet (the remaining stock being sold to other processing facilities only because of the limits on the capacity of Seagourmet).

244. On the other hand, the Claimants accept that the companies were separate entities and that there was, in 2014 to 2016, no arrangement for sharing of profits. They admit that Seagourmet invoiced North Star and Sea & Coast for the office space occupied by Mr Pildegovics[337] and that "[i]*t was decided, on the managerial level, that we don't want to mix operations of Seagourmet and operations of Sea & Coast*".[338] Mr Levanidov testified that the joint venture did not make either Seagourmet or Mr Levanidov personally

[335] Pildegovics WS1, para. 42.

[336] Knutsen WS, para. 3; Transcript, Day 3, p. 32, line 23 to p. 33, line 2 (Mr Knutsen).

[337] Pildegovics WS1, para. 42(f): "*North Star and Sea & Coast rented office space from Seagourmet*"; see also the invoice at **PP-0033**.

[338] Transcript, Day 2, p. 67, lines 17-19 (Mr Pildegovics).

liable for any award of costs which the Tribunal might make against the Claimants.[339] Although they date from 2016 and 2017, the Tribunal has been shown agreements between North Star and Seagourmet (and [redacted]) for the supply of snow crab and the price to be paid.

245. The Claimants describe the joint venture agreement as a purely oral agreement. The evidence of both Mr Pildegovics and Mr Levanidov was that it was concluded by a handshake on the basis of mutual trust between two cousins. They accepted that there was no documentary proof of the existence or terms of the joint venture. The Claimants' expert, Dr Ryssdal, stated that under Norwegian law purely oral agreements are recognized and enforceable. He considered that the joint venture existed and was governed by Norwegian law.

246. The Tribunal accepts the evidence of Dr Ryssdal that Norwegian law recognizes and will enforce a purely oral agreement. It notes that the Parties differ as to whether the oral agreement alleged by the Claimants would in fact have been governed by Norwegian law but considers that it is unnecessary to decide that question.

247. The Tribunal notes that the only evidence of the existence or contents of the supposed joint venture is the testimony of Mr Pildegovics, a party to these proceedings, and Mr Levanidov, a director of the second Claimant and someone intimately involved in the case though not himself a Party.[340] The Tribunal considers it remarkable that during the two or more years that this joint venture is said to have operated there is apparently not a single document of any kind which confirms its existence, let alone its terms.[341]

248. The Tribunal accepts that the evidence of Mr Pildegovics and Mr Levanidov establishes that the two of them agreed to co-operate in setting up an operation, designed to be

[339] Transcript, Day 3, p. 26, line 19 to p. 27, line 2 (Mr Levanidov).

[340] Mr Knutsen's evidence goes to outside appearances and not the nature or content of any agreement between Mr Levanidov and Mr Pildegovics.

[341] The Claimants assert that "*the record contains contemporaneous public documents presenting Mr Levanidov and Mr Pildegovics as partners dating back at least to early 2015, years before any hint of a potential investment dispute with Norway*" (Cl. Reply, para. 351). A footnote refers to the First Witness Statement of Mr Pildegovics, paras. 133-144, but while those passages certainly show that Mr Pildegovics and Mr Levanidov worked closely together, they do not evidence a legally binding agreement or the contents which such an agreement might have had.

"*seamless*", under which Mr Pildegovics' company, North Star, would harvest snow crab and deliver it to Seagourmet's facility in Båtsfjord, where it would be processed and then marketed by Seagourmet. However, the record before the Tribunal is not sufficient to establish what rights Mr Pildegovics might have been able to claim under that oral agreement. While Mr Pildegovics and Mr Levanidov spoke of the possibility of a sharing of profits at some undetermined time in the future[342] and of one day establishing a holding company which would own both North Star and Seagourmet (and perhaps Sea & Coast),[343] none of this materialised. Mr Pildegovics and Mr Levanidov seem to have treated these questions as matters to be resolved at some future stage.

249. Although the BIT includes claims to performance under contract which have an economic value as an example of investment,[344] there is no evidence of what, if any, performance Mr Pildegovics could have claimed under the supposed joint venture or what value it might have had. The evidence shows that North Star was paid by Seagourmet for the snow crab which it delivered to Seagourmet in 2015 and 2016 and that Seagourmet invoiced Sea & Coast and North Star for the use of office space; in other words, the companies operated at arms' length and not as though they were all part of a single venture. It also establishes that there was, as late as early 2017, no agreement regarding sharing profits beyond a vague thought that one day an agreement would be reached on that subject.

250. It follows that, in determining the focus of each Claimant's activities, their operations and those of Seagourmet and Mr Levanidov's other companies must be kept separate. The fact that Seagourmet's operations were based in Norway does not give the Claimants' activities a Norwegian location. Whether or not they have such a location so that any investment they have is considered to be located in Norwegian territory must be decided without reference to the activities of Seagourmet and Mr Levanidov.

[342] Transcript, Day 2, p. 110, line 11 to p. 111, line 8 (Mr Pildegovics); Levanidov WS1, paras. 49-50.

[343] Transcript, Day 2, p. 29, line 22 to p. 30, line 3 (Mr Pildegovics).

[344] BIT (**CL-0001**), Art. I(1)(iii).

b. The Claimants' Alleged Investments

251. The Tribunal will, therefore, focus on what assets, owned either by Mr Pildegovics or by North Star, might qualify as an investment under the BIT.

(i) The definition of investment

252. The BIT defines investment in Article I:

> *For the purpose of the present Agreement:*
>
> *1. The term "investment" shall mean every kind of asset invested in the territory of one Contracting Party in accordance with its laws and regulations by an investor of the other Contracting Party and shall mean in particular, though not exclusively:*
>
> *(i) movable and immovable property and any other property rights such as mortgages, liens, pledges and similar rights;*
>
> *(ii) shares, debentures or any other forms of participation in companies;*
>
> *(iii) claims to money which has been used to create an economic value or claims to any performance under contract having an economic value;*
>
> […]
>
> *(v) business concessions conferred by law or under contract including concessions to search for, cultivate, extract and exploit natural resources;*
>
> […]

253. Article I(4) of the BIT provides that:

> *The term "territory" shall mean:*
>
> *The territory of the Kingdom of Norway and the territory of the Republic of Latvia, including the territorial sea, as well as the continental shelf over which the State concerned exercises, in accordance with international law, sovereign rights for the purpose of exploration and exploitation of the natural resources of such areas.*

(ii) The First Claimant

254. The Tribunal has accepted that Mr Pildegovics had some kind of joint venture agreement with Mr Levanidov, although it has rejected most of his case regarding the content of that joint venture. The Second Claimant earned substantial revenues by delivering snow crab to Seagourmet in 2015 and the first eight months of 2016 but those revenues accrued to North Star and not to Mr Pildegovics, and North Star was not a party to the joint venture agreement (as Mr Levanidov made clear when discussing the possible liability for costs of the present proceeding). Even if Mr Pildegovics had a right, under his oral agreement with Mr Levanidov, to have Seagourmet accept and pay for the deliveries of crab, it was North Star which enjoyed any economic benefit.

255. The Tribunal cannot see that reference to his 100% shareholding in North Star takes Mr Pildegovics anywhere. North Star is a Latvian company and a shareholding in that company is not, on the face of it, an investment in Norway. If North Star made an investment in Norway, then Mr Pildegovics could claim in respect of his indirect ownership thereof but his claim would not add anything to the claim being made by the company itself.

256. Sea & Coast is a different matter. That was a Norwegian company based in Norway and deriving its revenue from providing marine services in Norway. Mr Pildegovics acquired 100% of the shares in Sea & Coast in October 2015. The Counter-Memorial states that "*Norway does not dispute that Mr Pildegovics' ownership of Sea & Coast falls within the definition of an 'investment' in the BIT*"[345] though it questions whether there is a dispute between Mr Pildegovics and Norway in relation to that shareholding.

257. The Tribunal considers that Mr Pildegovics' shareholding in Sea & Coast was an investment in Norway. Article I(1)(ii) of the BIT provides that "*shares, debentures or any other forms of participation in companies*" are a form of investment. The company was located in Båtsfjord and its operations were conducted there. The Tribunal also concludes that there is a dispute between the Parties in relation to that investment in that Mr

[345] Resp. Counter-Memorial, para. 467.

Pildegovics claims, and Norway denies, that Norway's actions resulted in Sea & Coast's business drying up as North Star and its other customers ceased harvesting snow crab and thus no longer required the services of Sea & Coast.

(iii) The Second Claimant

258. North Star refers to the following as investments in Norway:-

(i) the four fishing vessels: *Solvita, Senator*, *Saldus* and *Solveiga*;

(ii) the fishing licences granted in respect of these four vessels by Latvia;

(iii) the fishing capacity granted in respect of these four vessels;

(iv) the contract to purchase the two further vessels; and

(v) the right to payment from Seagourmet and the other processing facilities for snow crab to be provided by North Star.

259. North Star, however, urges the Tribunal to take an "*holistic*" view, looking at the operation as a whole, rather than considering individual parts. It contends that fishing is not in itself an economic activity but only the first step in a process which also involves processing and marketing.

260. The Tribunal accepts that there is often a strong case for a tribunal to look at the totality of a claimant's activities rather than at individual contracts.[346] However, what has to be decided here is not just whether there was an investment but whether there was an investment *in Norway*.

261. North Star maintains that the chief economic locus of its operations was in Norwegian territory. The Tribunal accepts that it was in Norway (Båtsfjord) that North Star's vessels landed their catch between 2014 and September 2016 and sold it to Seagourmet and other processing facilities. The ships were also serviced by Sea & Coast in Norway. However,

[346] See, e.g., C. Schreuer, "Article 25" in *The ICSID Convention: A Commentary* (Cambridge University Press, 2009) (**CL-0060**), paras. 93-105.

the ships were all registered in Latvia and there is no evidence that any of them was purchased from an owner in Norway.[347] Moreover, the project, as originally conceived and as explained in Mr Ankipov's inquiry to the Norwegian Directorate of Fisheries, was that the ships would harvest crab outside Norwegian waters (see paragraph 101, above). The licences initially issued to North Star came from the Government of Latvia, not Norway, and authorized the harvesting of snow crab in international waters (see paragraph 104, above).

262. As explained above (see paragraphs 73 to 80), the entire seabed and subsoil of the Loop Hole is divided between the continental shelf of Norway and that of the Russian Federation, in accordance with the 2010 Delimitation Treaty. Article I(4) of the BIT defines the territory of Norway as including the continental shelf over which Norway exercises sovereign rights in accordance with international law. The effect of the 2010 Delimitation Treaty is that just under 11% of the Loop Hole falls within the Norwegian continental shelf, while the remaining 89% is part of the continental shelf of the Russian Federation.

263. At the Hearing, the Claimants advanced an argument that, because Norwegian Government ships conducted inspections in the Russian sector of the Loop Hole, the entire continental shelf in the Loop Hole should be regarded as Norwegian territory for the purposes of Article I(4) of the BIT, on the basis that Norway exercised sovereign rights there.[348] The Tribunal is not convinced by this argument (which the Claimants advanced only as an alternative). Norway and the Russian Federation shared certain policing responsibilities in the Loop Hole as part of a scheme for joint management of resources there but to the extent that one State exercised authority on the continental shelf of the other State, it did so only because it had the permission of the latter State to do so. It was not exercising its own sovereignty. Moreover, Article 2 of the 2010 Delimitation Agreement is quite explicit on this point:

[347] *Solvita*, which was formerly Russian flagged, was delivered to North Star at Båtsfjord. *Senator* was delivered in Iceland and the other two vessels in South Korea: Resp. Counter-Memorial, para. 480. See also paragraph 102, above, and the references in the footnotes to that paragraph.

[348] Transcript, Day 4, p. 18, line 10 to p. 20, line 17 (Mr Savoie); p. 27, line 14 to p. 28, line 17 (Mr Savoie) and p. 35, line 12 to p. 36, line 21 (Professor Miron).

> *Each Party shall abide by the maritime delimitation line as defined in Article 1 and shall not claim or exercise any sovereign rights or coastal State jurisdiction in maritime areas beyond this line*.[349]

264. The Tribunal concludes that the only part of the Loop Hole which constitutes Norwegian territory for the purposes of the BIT is the 10.81% of the continental shelf which lies on the Norwegian side of the 2010 demarcation line. It is therefore necessary to consider where North Star's four vessels harvested snow crab.

265. According to Norway, which based its submission on reports[350] provided by the Section of Analysis in Vardø, a Norwegian Government agency, 99.84% of the snow crab harvested by North Star's vessels up to 9 September 2016 was taken on the Russian continental shelf.[351] The Claimants are highly critical of these reports on the basis that they are not the work of an independent expert who could be subjected to cross-examination.[352] The Respondent replies that the Claimants have submitted no evidence of their own about the location of the harvesting and that the ships' log books, which Mr Pildegovics testified would have shown that information,[353] are not part of the record in the present case.

266. The Claimants have not adduced evidence of substantial activity by their vessels in the Norwegian sector of the Loop Hole. Moreover, they admit that the main harvesting activity took place on the Russian side of the 2010 delimitation line. When Mr Pildegovics gave evidence, the following exchange took place:

> *The President:* […] [Y]*esterday, counsel for the Respondent said that, if I remember rightly, 98% of the snow crab harvested by your ships in 2015 and 2016 was taken from the Russian part of the Loop Hole, is that correct ?*

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[349] **CL-0015**.

[350] Section of Analysis in Vardø, Guidance and Summary Reports Concerning Vessels Belonging to the Latvian Company SIA North Star, 28 October 2021 (**R-0151**); Section of Analysis in Vardø, Report on *Saldus*, 28 October 2021 (**R-0152**); Section of Analysis in Vardø, Report on *Senator*, 28 October 2021 (**R-0153**); Section of Analysis in Vardø, Report on *Solveiga*, 28 October 2021 (**R-0154**); Section of Analysis in Vardø, Report on *Solvita*, 28 October 2021 (**R-0155**).

[351] Resp. Counter-Memorial, para. 490.

[352] Cl. Reply, paras. 253-292.

[353] Transcript, Day 2, p. 88, lines 12-25 (Mr Pildegovics).

> [Mr Pildegovics]*: To the best of my knowledge, I would doubt the accuracy of this calculation, but I need to admit that so-called Russian part of NEAFC was the part where the majority of all catches by all flags were made, including Norwegian*.[354]

267. The evidence before the Tribunal is that North Star's four vessels took the great majority of their catch in the Russian sector of the Loop Hole, which was where the greatest concentration of snow crab was to be found at the relevant time.

268. In urging the Tribunal to take an holistic approach, North Star cites the decisions of the tribunals in *SGS v. Pakistan*[355] and *SGS v. Philippines*.[356] SGS provided a comprehensive import supervision service (CISS) to the two respondent States. Although most of its work in inspecting goods due to be exported took place in the countries of origin, the operation as a whole was held to be an investment in the respondent States. As the tribunal in *SGS v. Philippines* put it:

> *Under the CISS agreement, SGS was to provide services, within and outside the Philippines, with a view to improving and integrating the import services and associated customs revenue gathering of the Philippines. The focal point of SGS's services was the provision, in the Philippines, of a reliable inspection certificate (termed a Clean Report of Findings (CRF)) on the basis of which import clearance could be expedited and the appropriate duty charged. SGS's inspections abroad were not carried out for their own sake but in order to enable it to provide, in the Philippines, an inspection certificate on which BOC* [the Philippines Bureau of Customs] *could rely to enter goods to the customs territory of the Philippines and to assess and collect the ensuing revenue.* […] *Further, those operations were organized through the Manila Liaison Office, which under Article 5 of the CISS Agreement SGS was obliged to "continue and maintain… until the date upon which this Agreement ceases to be effective or its implementation is interrupted or indefinitely suspended." This was a substantial office, employing a significant number of people*.[357]

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[354] Transcript, Day 2, p. 164, lines 15-23 (Mr Pildegovics).

[355] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003 (**CL-0447**).

[356] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004 (**CL-0205**).

[357] *Loc. cit.*, para. 101.

269. The circumstances of the *SGS* cases were, however, markedly different from those of the present case. SGS had agreements with the governments of Pakistan and the Philippines for the provision of services regarding the import of goods into the two States. It provided the reports, which were the central feature of its obligation under the agreements, in the territory of those States, even though the inspections were conducted elsewhere, and SGS itself maintained the offices in the respondent States which delivered these reports.

270. By contrast, in the present case, North Star had no agreement with the Government of Norway to provide anything. Moreover, two separate entities were involved. North Star was a fishing enterprise incorporated in Latvia and distinct from the processing and marketing concern to which it sold its crab. North Star's fishing vessels, registered in and licensed by Latvia, harvested snow crab primarily on the Russian continental shelf. The fact that North Star then landed the crab in Norway and sold it to a separate entity, Seagourmet, is not sufficient to make Norway the focus of the North Star enterprise. While the focus of Seagourmet's activities was in Norway, the focus of North Star's operations was either in Latvia or the Russian Federation. An holistic view would therefore point to the conclusion that North Star lacked an investment in Norway.

271. Nevertheless, the fact that the main focus of a company's activities lies outside the territory of a State does not preclude the possibility that aspects of its activities taking place within the territory of that State might amount to an investment in that State. The Tribunal will, therefore, consider each of the five alleged investments in turn.

272. So far as the fishing vessels themselves are concerned, the Tribunal considers that Latvian vessels which harvested a natural resource on the continental shelf of the Russian Federation pursuant to licences granted by Latvia cannot be regarded as an investment in the territory of Norway, even though they subsequently landed and sold their catch at a Norwegian port. The fact that they may have taken a small part of the catch in Norwegian territory does not alter the fact that the main locus of their fishing activity was outside Norway.

273. It is true that in June 2016, shortly before the introduction by the Russian Federation of the ban on taking snow crab on the Russian continental shelf, the *Senator* attempted to take

snow crab on Norwegian territory.[358] The *Senator* was arrested and North Star fined for this attempt, although that did not occur until September 2016 after the Russian ban came into effect. The Tribunal does not consider, however, that this attempt alters the basic fact that the North Star fleet had been fishing almost exclusively in the Russian sector of the Loop Hole until Russia enacted its ban.

274. The Tribunal thus concludes that, up to the end of September 2016, the four North Star vessels cannot be regarded as an investment by North Star in the territory of Norway.

275. Nor can the Tribunal accept that the fishing licences for the four vessels constituted an investment in Norway. Those licences were granted not by Norway but by Latvia. They did not confer any rights on North Star vis-à-vis Norway. Like the fishing capacity which North Star acquired for its four ships, the licences were necessary for North Star to comply with EU law requirements for fishing in the NEAFC area. Even if North Star had intended, at the time that it applied for and was granted those licences and the capacity rights, to take snow crab mainly in Norwegian territory, the Tribunal doubts that licences granted by another State in order to satisfy non-Norwegian requirements could be regarded as an investment in Norway. However, at that time, North Star intended to conduct most of its fishing activities in the Russian sector of the Loop Hole. In these circumstances, neither the licences nor the capacity rights can be regarded as an investment in the territory of Norway.

276. Once North Star ceased to be able to take snow crab in the Loop Hole, it then decided to redirect its efforts to the waters off Svalbard.[359] In doing so, it hoped to take advantage of the provisions of Article 2 of the Svalbard Treaty[360] under which, according to the Claimants, nationals of all the parties to the Treaty are entitled to take crab in the waters around Svalbard. That interpretation of the Treaty is contested by Norway, which maintains that the rights conferred by Article 2 apply only on land and in the territorial sea and not in the Fisheries Protection Zone or continental shelf. The Tribunal will discuss the

[358] See paragraphs 112-113, above.

[359] Pildegovics WS1, para. 207. See also paragraph 113, above.

[360] *See* Note 7, above (**CL-0002**).

Svalbard Treaty in more detail later (see Section V.B(4), below). For the moment, however, the only question is whether this proposed redeployment alters the conclusion that North Star's fishing vessels were not an investment in the territory of Norway.

277. The Tribunal has concluded that it does not do so. Latvia became a party to the Svalbard Treaty only in June 2016 and first granted licences to the North Star vessels to fish off Svalbard in November 2016.[361] Only the *Senator* ever attempted to take snow crab off Svalbard (in January 2017) and was arrested when attempting to do so. The Tribunal does not consider that the mere grant of licences by Latvia was sufficient to render the vessels an investment in Norwegian territory. Moreover, by the time that the licences were granted and the *Senator* attempted to harvest snow crab off Svalbard, it was well known that Norwegian law prohibited fishing for snow crab within 200 nautical miles of Svalbard. That prohibition had been adopted in the 2014 Regulations and was maintained (with a reference to the continental shelf rather than the Fisheries Protection Zone) in the 2015 Regulations.[362] Thus, whatever the dispute regarding the effect of Articles 2 and 3 of the Svalbard Treaty, there was no doubt that the taking of snow crab off Svalbard was prohibited by Norwegian law. Accordingly, even if the proposed redeployment of the North Star fleet was capable of amounting to an investment in Norwegian territory, it was not one which was made in accordance with the laws and regulations of Norway and does not, therefore, meet the requirements of the BIT.

278. So far as the two ships which North Star intended to purchase (*Sokol* and *Solyaris*) are concerned, the Tribunal has reached the same conclusion as it has done with regard to the four ships which North Star had already acquired. Even if the contracts for purchase of the vessels, and the licences and fishing capacity which were acquired in respect of them, were capable of amounting to an investment, it did not meet the requirements of the BIT. Those steps which North Star took until September 2016 were taken with a view to the *Sokol* and the *Solyaris* joining the existing four North Star vessels taking snow crab mainly in the

[361] Licences were granted for *Saldus* (**C-0006**), *Senator* (**C-0013**), *Solveiga* (**C-0020**) and *Solvita* (**C-0026**) on 1 November 2016. These licences were stated to be valid for the remainder of 2016 and new licences were granted in January 2017.

[362] See paragraphs 85 and 90, above.

Russian sector of the Loop Hole. At that stage, for the reasons already given, any investment represented by the two vessels would not have been an investment in the territory of Norway. Thereafter, if it was intended that they would take crab off Svalbard, then this would not have been an investment in accordance with the laws and regulations of Norway.

279. Accordingly, the Tribunal concludes that the first four items claimed as investments by North Star—namely, the fishing vessels operated by the company, the fishing licences granted by Latvia, the fishing capacity granted in respect of the four vessels and the contract to purchase two further vessels—do not constitute investments within the meaning of the BIT.

280. That leaves the fifth claimed investment, North Star's claimed right to payment from Seagourmet and the other processing facilities for snow crab landed in Norway by North Star. Article I(1)(iii) of the BIT includes, as an example of an investment, "*claims to money which has been used to create an economic value or claims to any performance under contract having an economic value*". It appears that North Star and Seagourmet did not conclude written agreements for the supply of snow crab until late in 2016, after the bans on taking snow crab in the Loop Hole entered into force in both Russia and Norway. The Tribunal attaches no significance to these later written agreements which post-date the events said to constitute the breach of the BIT and were concluded at a time when both parties must have known that there was no realistic prospect of performance. The question, therefore, is whether there is sufficient evidence that, before then there was an unwritten contract that Seagourmet would take, at market price, the snow crab offered to it by North Star the extent of Seagourmet's capacity. To some extent North Star's argument that that was the case suffers from the same defects as the arguments regarding the existence of the supposd "joint venture". Nevertheless, there is evidence that North Star delivered most of its snow crab to Seagourmet before July 2016, that it was being paid for that snow crab, that North Star provided all of Seagourmet's snow crab and that both companies were proceeding on the basis that North Star would supply Seagourmet's needs and that Seagourmet would continue to take delivery of, and pay for, the snow crab harvested by

North Star unless that exceeded Seagourmet's processing capacity.[363] While the Tribunal has some reservations about the asserted unwritten agreement between the two companies, it has nevertheless concluded that the evidence that the contractual relationship between North Star and Seagourmet went beyond a series of unconnected contracts for the sale of goods and that North Star operated on the basis that Seagourmet had an obligation to take and pay for catches of snow crab; this is sufficient to justify the Tribunal in finding that North Star had an investment within the meaning of Article I(1)(iii) of the BIT.

281. Norway argues that the claim to performance was located in Latvia, not Norway, since payment was made by Seagourmet to North Star's bank account in Latvia.[364] The Tribunal considers this argument to be somewhat artificial. North Star was obliged to deliver, and Seagourmet to take delivery, of the crab in Norway. That was the act which triggered the obligation of payment. Invoices were sent to Seagourmet's offices there. The fact that payment was made to a bank account in Latvia, as opposed to one in Norway, is not sufficient to alter the character of the claim to performance as one which was located in Norway. Accordingly, the Tribunal concludes that North Star had an investment in Norway in the form of its rights under the contract or contracts with Seagourmet.

282. The first catch of snow crab obtained by North Star from the Loop Hole (by the *Solvita* in August 2014) was sold to another facility because Seagourmet's plant was not yet ready.[365] The Tribunal does not consider that this one-off sale amounts to an investment. The Tribunal has no information regarding the terms on which North Star supplied snow crab to other facilities during 2015 and 2016. Nevertheless, for the purpose of determining whether the Tribunal has jurisdiction, it accepts that North Star would not have delivered crab without receiving some payment and that there must therefore have been agreements, whether written or oral, between North Star and the owners of the other facilities. There is, however, no evidence that these were anything other than isolated contracts for sale concluded when North Star had quantities of snow crab which Seagourmet could not

[363] Transcript, Day 2, p. 144, lines 6-15 (Mr Pildegovics). See also the sample invoice dated 6 January 2016 (**PP-0153**).

[364] See the sample invoice at **PP-0153**.

[365] Transcript, Day 2, p. 26, lines 21-25 (Mr Pildegovics).

accept. In particular, there is nothing to suggest that any agreement existed whereby any processing company other than Seagourmet had undertaken in advance to accept snow crab from North Star. On the contrary, the evidence suggests only that North Star sold any snow crab which was surplus to Seagourmet's requirements wherever it could do so. The Tribunal does not regard its actions in doing so as an investment in Norway; there was no guarantee that it would be able to find a buyer for future landings of snow crab which Seagourmet did not require.

(iv) Was Mr Levanidov the "real investor"?

283. The Respondent also argues that, even if there were investments in Norway nominally held by the Claimants, the real or true investor was Mr Levanidov, who, not being a Latvian national, cannot be a claimant in this case.

284. The record before the Tribunal does not support this contention. It is true that the idea for an integrated harvesting, processing and marketing operation came from Mr Levanidov, that it was his colleague, Mr Ankipov, who made the initial inquiries to the Norwegian Government and established Sea & Coast and that one of Mr Levanidov's companies bought up North Star's debts. Nevertheless, that would not suffice to make Mr Levanidov the "*real investor*". In addition, Mr Pildegovics has testified that he put his own money into North Star and Sea & Coast.

285. Moreover, the Tribunal has held that North Star, a Latvian company, had an investment in Norwegian territory. Even if it had been proved by Norway that it was Mr Levanidov that had supplied the funds to North Star, that would not in itself deprive North Star of its status as an investor and its right to claim under the BIT in respect of that investment.

286. The Tribunal therefore rejects Norway's argument that Mr Levanidov has to be treated as the real investor to the exclusion of North Star and Mr Pildegovics.

(v) Conclusion

287. For the reasons stated above, the Tribunal dismisses the Respondent's Second Objection insofar as it relates to the following investments:-

- the rights of Mr Pildegovics in respect of his shareholding in Sea & Coast, an investment dating from October 2015; and

- the rights of North Star under its agreements with Seagourmet, an investment dating from the beginning of 2015.

288. The Tribunal rejects the Claimants' argument that they held other investments in Norway.

289. Subject to what is said below regarding the Respondent's First Objection, the Tribunal therefore concludes that it has jurisdiction but only in respect of the dispute to the extent that it relates to the investments as set out in paragraph 287, above.

(4) The Respondent's First Objection

290. Having established the nature and limits of the investments of each Claimant, the Tribunal can now turn to the Respondent's First Objection. That objection is put in two different but related ways.

291. The Respondent first argues that the subject matter of the dispute which the Claimants seek to bring before the Tribunal does not arise directly out of their investments but rather out of international agreements—specifically, UNCLOS, the Svalbard Treaty and the NEAFC Convention. According to the Respondent, the Tribunal has no jurisdiction to interpret and apply these treaties but without resolving the inter-State disputes which arise under them cannot rule on the claims of either Claimant.

292. Secondly, Norway maintains that the rights and obligations of States not party to the present proceeding would have to be determined before any ruling could be made on the issues that might arise under the BIT. The Respondent argues that for the Tribunal to rule on the rights and interests of third parties— in particular, Latvia, the EU and the Russian Federation—would be contrary to the principle laid down by the International Court of Justice in the *Monetary Gold*[366] and *East Timor*[367] cases.

[366] See Note 124, above.

[367] *Case Concerning East Timor Case* (*Portugal v. Australia*), ICJ, Judgment, 30 June 1995 (**RL-0092**).

293. The Tribunal considers that this objection, in whichever way it is put, is one which goes to the admissibility of the claim rather than the jurisdiction of the Tribunal. That is one reason why it has addressed this objection only after it has dealt with Norway's Second Objection—if there is no jurisdiction, then questions of admissibility do not arise. Another, more practical, reason is that until the precise nature and limits of the Claimants' investments have been identified, it is difficult to say whether a decision in respect of them would run counter to the principles relied on by Norway in its First Objection.

294. The Tribunal does not agree that the present dispute does not arise directly out of the investments which it has found the Claimants to have possessed. A dispute may arise directly out of an investment and require the interpretation and application of the provisions of a bilateral investment treaty even though it also involves other rules of international law which may be derived from treaties involving other States. An investment tribunal seised of such a case is not deprived of the jurisdiction granted to it by the BIT and the ICSID Convention. Indeed, such a tribunal may well be required to rule on an issue of interpretation of the ICSID Convention which is contested between different States party to that Convention. Nor is the claim before such a tribunal thereby rendered inadmissible.

295. Nevertheless, such a tribunal needs to be conscious of the limits of its authority. UNCLOS tribunals have held that, in determining maritime entitlements between two States, they may not rule on the sovereignty over the land territory from which maritime entitlements are claimed to derive.[368] In the present case, the Tribunal is not entitled to rule on the dispute between the different parties to the Svalbard Treaty on whether or not Article 2 of that Treaty requires Norway to allow nationals of the other States parties access to hunting and fishing resources on the continental shelf around Svalbard.[369] That does not, however, prevent the Tribunal from determining whether either Claimant has made an investment

[368] See *Chagos Marine Protected Area Arbitration* (*Mauritius v. United Kingdom*), PCA/UNCLOS, Award, 18 March 2015 (**RL-0081**); *South China Sea Arbitration* (*Philippines v. People's Republic of China*), PCA Case No. 2013-19 (UNCLOS), Award, 12 July 2016 (**RL-0082**).

[369] Article 2 provides in relevant part that "[s]*hips and nationals of all the High Contracting Parties shall enjoy equally the rights of fishing and hunting in the territories specified in Article 1* [i.e. the Svalbard or Spitsbergen archipelago] *and in their territorial waters*" (**CL-0002**).

which meets the requirements of the BIT in the waters around Svalbard. For the reasons given above, the Tribunal has held that neither Claimant made such an investment.

296. Nor are the claims in the present case rendered inadmissible in their entirety by the *Monetary Gold* principle. In its subsequent case-law on this point, the International Court of Justice has made clear that this principle is applicable only when the rights and obligations of the third State form the very subject matter of the dispute before it. In the *East Timor* case, the Court held that Portugal's claim that Australia had failed to recognize the right of self-determination of the people of East Timor in its dealings with the Government of Indonesia (which at that time occupied East Timor) could not be decided without determining whether Indonesia had itself acted contrary to that right by occupying the territory after the collapse of Portuguese administration in 1975. Unless Indonesia had acted unlawfully, Australian recognition of the situation brought about by Indonesia could not be unlawful. By contrast, in the *Nauru* case,[370] the Court held that it could rule on Australia's actions in mining for phosphate on Nauru without having first to determine whether the United Kingdom or New Zealand had acted unlawfully.

297. In the present case, the *Monetary Gold* principle limits the Tribunal's ability to deal with certain aspects of the Claimants' case but not others. To the extent that the Claimants argue that Norway has violated the BIT by, as they put it, conspiring with, or inciting, the Russian Federation to deprive the Claimants of their access to snow crab in the Loop Hole, that would require the Tribunal to determine that the Russian Federation had acted unlawfully, which the Tribunal cannot do. That aspect of the case appears to fall on the *East Timor* as opposed to the *Nauru* side of the line identified by the International Court of Justice.

298. On the other hand, there are other aspects of the Claimants' case which would not require the Tribunal to rule on the legality of the Russian Federation's actions and thus are not contrary to the *Monetary Gold* principle.

[370] *Case Concerning Certain Phosphate Lands in Nauru* (*Nauru v. Australia*), ICJ, Judgment – Preliminary Objections, 26 June 1992 (**RL-0094**).

299. So far as the rights and obligations of Latvia and the EU are concerned, the Tribunal does not consider that the Claimants' case requires the Tribunal to rule on those rights and obligations in order to determine the claims before it.

300. The Tribunal therefore dismisses the Respondent's First Objection insofar as it is advanced as a bar to the entirety of the Claimants' case. However, in examining different aspects of the claims before it, the Tribunal will be mindful of the limits of its jurisdiction and of what is admissible and that may require the Tribunal declining to rule on parts of those claims.

V. LIABILITY

A. THE POSITIONS OF THE PARTIES

(1) Introduction

301. The Claimants allege, *first*, that the Respondent illegally asserted sovereignty over the Barents Sea snow crab fishery.[371] This allegation is composed of three parts: (i) the Respondent's bad faith designation of snow crab as a sedentary species under Article 77 of UNCLOS constitutes an abuse of right in violation of Article 300 of UNCLOS;[372] (ii) the Respondent acted in breach of the Claimants' acquired rights;[373] and (iii) the Respondent violated the Svalbard Treaty.[374]

302. The Claimants contend that the assessment of the international legality of Norway's actions is important since the interpretation of the BIT must take into account "*any relevant rules of international law applicable in the relations between the parties*". Following this principle, if a State's conduct violated international law beyond the BIT, "*such violation may inform the Tribunal's assessment as to whether the BIT itself may have been breached*".[375]

[371] Cl. Memorial, Sec. VII.
[372] Cl. Memorial, Sec. VII.A.
[373] Cl. Memorial, Sec. VII.B.
[374] Cl. Memorial, Sec. VII.C.
[375] Cl. Memorial, para. 594.

303. *Second*, the Claimants submit that the Respondent violated the BIT.[376] In particular, the Claimants assert that the Respondent breached four provisions of the BIT: (i) the obligation to provide compensation in case of expropriation (Article VI of the BIT);[377] (ii) the obligation to provide equitable and reasonable treatment and protection (Article III of the BIT);[378] (iii) the obligation to provide the most favoured nation treatment (Article IV of the BIT);[379] and (iv) the obligation to accept investment in accordance with its laws (Article III of the BIT).[380]

304. In contrast, the Respondent submits it has not breached any provision of the BIT.[381] *First*, the Respondent raises the issue of the timing of the Claimants' investment, which it argues undermines any claim of legitimate expectations on their part.[382] Since the Claimants allege that the Respondent's cumulative actions until September 2016 constitute a creeping expropriation, investments occurring *after* September 2016 cannot be said to have been made in ignorance of Norwegian law and policy. This includes *inter alia* the alleged supply agreements between North Star, Seagourmet and others, the earliest of which is said to have been entered into on 29 December 2016.[383]

305. *Second*, the Respondent contests the factual basis of multiple of the Claimants' allegations.[384] In particular, the Respondent emphasizes the important distinction between a resource that had not been the subject of regulation and a resource that could not be the subject of regulation.[385] According to the Respondent, it began the process of regulating snow crab in 2014 but it had the right to do so before and it never stated that it would not regulate snow crab harvesting.[386] Furthermore, the Respondent submits that the Claimants'

[376] Cl. Memorial, Sec. VIII.
[377] Cl. Memorial, Sec. VIII.A.
[378] Cl. Memorial, Sec. VIII.B.
[379] Cl. Memorial, Sec. VIII.C.
[380] Cl. Memorial, Sec. VIII.D.
[381] Resp. Counter-Memorial, Ch. 6; Resp. Rejoinder, Chs. 7-11.
[382] Resp. Counter-Memorial, Sec. 6.2.
[383] Resp. Counter-Memorial, para. 538.
[384] Resp. Counter-Memorial, Sec. 6.3.
[385] Resp. Rejoinder, para. 420.
[386] Resp. Rejoinder, paras. 425-427.

alleged investments were unaffected by the Norwegian regulations at issue, with the Claimants' self-declared "*operational peak*" following in 2016, the year after the regulation at issue.[387] *Third*, the Respondent submits that the Claimants have failed to demonstrate that the Respondent breached (i) the obligation to provide compensation in the case of expropriation (Article VI of the BIT);[388] (ii) the obligation to provide equitable and reasonable treatment (Article III of the BIT);[389] (iii) the obligation to provide most favoured nation treatment (Article IV of the BIT);[390] or (iv) the obligation to accept investments made in accordance with its laws (Article III of the BIT).[391]

(2) Applicable Law

a. The Claimants' Position

306. The Claimants submit that to determine the law applicable to the merits of the dispute, the Tribunal must, in accordance with Article 42(1) of the ICSID Convention, look at "*any agreement of the parties on applicable law*".[392] Article 42(1) of the ICSID Convention provides:

> *The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.*

307. According to the Claimants, the Tribunal "*has no need to go beyond the first sentence of Article 42(1) of the ICSID Convention to determine the law applicable to the merits, which is the BIT and general principles and other applicable rules of international law*".[393]

308. The Claimants submit that the BIT does not provide "*an explicit applicable law clause for an investor-State dispute under Article IX*". However, there is an applicable law provision

[387] Resp. Rejoinder, para. 430.
[388] Resp. Counter-Memorial, Sec. 6.4.
[389] Resp. Counter-Memorial, Sec. 6.5.
[390] Resp. Counter-Memorial, Sec. 6.6.
[391] Resp. Counter-Memorial, Sec. 6.7.
[392] Cl. Memorial, Sec. V.B.
[393] Cl. Memorial, para. 444.

for disputes relating to the "*interpretation or application*" of the BIT, as between the Contracting Parties under Article X.[394] The Claimants allege that while the extent of applicable law for an investor-State dispute under Article IX "*may well be wider than for disputes under Article X*", the law applicable to a dispute under Article IX "*must certainly include 'the provisions of the present agreement and the general principles and rules of international law', should the investor wish to invoke them*".[395] The Claimants argue that, in any event, the BIT provides the primary source of the obligations and must be considered as *lex specialis* in the relationship between the Claimants and the Respondent.[396]

309. The Claimants contend that the interpretation of the BIT and the ICSID Convention follows the rules of interpretation in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties ("**VCLT**") as these reflect customary international law.[397] The VCLT does not apply as such since Norway is not a Contracting Party.[398]

b. The Respondent's Position

310. The Respondent argues that the Claimants have failed to demonstrate that Article IX of the BIT, dealing with investor-State disputes, would allow the application, "*lock, stock and barrel*", of international law to the merits of the dispute.[399] While Article X, concerning disputes between the Contracting Parties to the BIT, provides expressly that "*the tribunal reaches its decision on the basis of the provisions of the present agreement and of the general principles and rules of international law*" the Respondent argues that nothing comparable is contained in Article IX of the BIT.[400] The parties to the BIT thus did not agree to apply "*the general principles and rules of international law*" in investor-State disputes and international rules are applicable to the merits of a dispute only to the extent that they are necessary to interpret the BIT.[401]

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[394] Cl. Memorial, para. 441.
[395] Cl. Memorial, para. 442.
[396] Cl. Memorial, para. 443.
[397] Cl. Memorial, Sec. V.C.
[398] Cl. Reply, para. 628, fn. 752. Latvia is a Contracting Party to the VCLT.
[399] Resp. Rejoinder, para. 58.
[400] Resp. Rejoinder, para. 59.
[401] Resp. Rejoinder, para. 59.

311. According to the Respondent, the Claimants do not confine themselves to asking the Tribunal to interpret the provisions of the BIT in light of UNCLOS, the Svalbard Treaty and the NEAFC Convention but ask the Tribunal to find violations of these treaties by the Respondent and to decide on the existence of the Claimants' alleged rights under these instruments.[402] The Respondent asserts that these treaties do not constitute rules of international law that may be applicable in the present dispute;[403] and even if it were accepted that they do apply, these instruments do not, in themselves, grant any rights directly to individuals, or violations of these instruments by Norway;[404] nor does Norwegian domestic law require their application.[405]

(3) The Respondent's Alleged Illegal Assertion of Sovereignty over the Barents Sea Snow Crab Fishery

a. The Claimants' Position

312. The Claimants contend that "*the interpretation of the BIT must take into account 'any relevant rules of international law applicable in the relations between the parties'*". According to the Claimants, "*if a State's conduct has violated international law beyond the BIT, such violation may inform the Tribunal's assessment as to whether the BIT itself may have been breached*".[406] On this basis, the Claimants consider the Respondent's alleged violations of UNCLOS, the Claimants' acquired rights (see Section V.A(4), below), and the Svalbard Treaty (see Section V.A(5), below).

313. In addition, the Claimants invoke the most favoured nation ("**MFN**") clause in Article IV of the BIT "*which states that where the obligations of another international agreement concluded between Norway and its investment treaty partner provides a standard of protection higher than that investment treaty itself, then provisions of that other international agreement shall prevail*"[407] (see Section V.A(8), below). The Claimants allege that if the Tribunal finds a breach of the BIT that results in full reparation of

[402] Resp. Rejoinder, paras. 65.
[403] Resp. Rejoinder, Sec. 3.2.1.
[404] Resp. Rejoinder, Sec. 3.2.2.
[405] Resp. Rejoinder, Sec. 3.2.3.
[406] Cl. Memorial, para. 594.
[407] Cl. Memorial, para. 597.

Claimants' damages, then the Tribunal need not examine the Respondent's alleged violations of other treaties. However, if the Tribunal finds that the Respondent has acted consistently with the BIT considered in isolation, then the Tribunal "*must examine the provisions of these other international agreements to see if Norway has breached them and in consequence caused harm to Claimants, which must be compensated*".[408]

314. The Claimants argue that the Respondent "*has asserted rights over snow crab as a purportedly sedentary species in an abusive manner falling well short of the requirements of good faith*". According to the Claimants, whether or not snow crabs are a sedentary or non-sedentary species is "*not a live issue for this Tribunal*".[409] Nonetheless, the Claimants state that Article 300 of UNCLOS provides that States shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of rights.[410]

315. The Claimants submit that "*the sudden, and clearly arbitrary regime change from non-sedentary to sedentary*" resulted in injury to the rights of EU Member States with fishing interests in the Barents Sea, in particular Latvia, and severely injured the persons and companies holding licences, such as North Star and, indirectly, Mr Pildegovics.[411]

316. According to the Claimants, "*until at least July 2016*" the Respondent "*expressly accepted*" the legal validity of snow crab fishing licences issued under the NEAFC Convention regime.[412] The Claimants allege the Respondent had the obligation to act in good faith under Article 300 of UNCLOS to discuss its intention to change the characterization of snow crab and the consequences that would follow within NEAFC itself, allowing other NEAFC Convention Member States to share their views and debate the matter.[413] The

[408] Cl. Memorial, para. 597.
[409] Cl. Memorial, para. 598.
[410] Cl. Memorial, para. 602, citing UNCLOS (**CL-0013**), Art. 300.
[411] Cl. Memorial, para. 606.
[412] Cl. Memorial, para. 607.
[413] Cl. Memorial, para. 609.

Claimants assert that the Respondent did not do so and therefore violated its obligations under Article 300 of UNCLOS.[414]

b. The Respondent's Position

317. The Respondent submits that species are not "*designated*" as sedentary species under UNCLOS, as the Claimants allege. According to the Respondent species either are or are not sedentary species in accordance with Article 77(4) of UNCLOS, depending on whether they are "*organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or subsoil*". The Respondent submits that there is no doubt snow crabs are unable to move except in constant physical contact with the seabed and the Claimants have not alleged otherwise, hence their categorization as a sedentary species is clear.[415] The Respondent asserts it has not changed its position on snow crab at any point since the 1958 Convention on the Continental Shelf established the legal category of "*sedentary species*".[416]

318. Further, the Respondent argues that, in accordance with case law of the ITLOS, Article 300 of UNCLOS becomes relevant only when the rights, jurisdiction or freedoms recognized in the Convention are exercised in bad faith.[417] According to the Respondent, the Claimants have not shown that it is a breach of Article 77 of UNCLOS to treat snow crab as a sedentary species, or, *a fortiori*, that the Respondent did so in bad faith.[418]

(4) The Respondent's Alleged Breach of the Claimants' Acquired Rights

a. The Claimants' Position

319. The Claimants allege their acquired rights "*recognized by both domestic and international law*" are the Claimants' NEAFC and Svalbard fishing licences for snow crab issued by Latvia, as referred to in the immediately preceding section.[419] The Claimants claim that the

[414] Cl. Memorial, paras. 610-614.
[415] Resp. Counter-Memorial, para. 836.
[416] Resp. Counter-Memorial, para. 837.
[417] Resp. Counter-Memorial, paras. 838-840.
[418] Resp. Counter-Memorial, paras. 841-846.
[419] Cl. Memorial, Sec. VII.B, para. 623.

exclusion of EU vessels from the Barents Sea snow crab harvesting was made in violation of those acquired rights.[420] According to the Claimants, the Respondent consequently "*cannot unilaterally change the regime governing snow crab fisheries without facing the consequences, even if it is in the right regarding such change (which Claimants do not admit)*".[421]

320. In support, the Claimants cite a decision from the Permanent Court of International Justice ("**PCIJ**") that held: "*the principle of respect of vested rights* […] *forms part of generally accepted international law*".[422] The Claimants argue that acquired rights come to exist either through domestic law, or through international treaties "*that may confer and recognize on nationals of a contracting State the capacity to acquire and hold certain property or patrimonial rights*".[423] The Claimants allege that if a State takes such vested rights, it must pay prompt, adequate and effective compensation.[424] In the context of investment treaty cases, the Claimants argue that arbitral tribunals have "*recognized the link between customary international law* […] *and the doctrine of acquired or vested rights*".[425]

321. According to the Claimants, "[u]*ntil July 2015, there was no question that snow crabs in the Barents Sea were considered non-sedentary and that EU vessels could freely harvest them in the Loop Hole*".[426] However, the Respondent's 2015 fisheries regulation, which came into force on 22 December of that year, "*radically changed this previous regime*". Nonetheless, the Respondent allegedly continued to accept and "*thus expressly consent*" to EU vessels fishing snow crabs until September 2016.[427] The Claimants allege that "[t]*he*

[420] Cl. Memorial, Sec. VII.B, para. 615.

[421] Cl. Memorial, para. 628.

[422] Cl. Memorial, para. 616, citing *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, PCIJ, Judgement on the Merits, 25 May 1926 (**CL-0225**), p. 42 [the Claimants incorrectly cite to **CL-0221**]. See also *Goldenberg Case (Germany v. Romania)*, Special German-Romanian Arbitral Tribunal, Award, 27 September 1928 (**CL-0222**), p. 909.

[423] Cl. Memorial, para. 617.

[424] Cl. Memorial, para. 621.

[425] Cl. Memorial, para. 622.

[426] Cl. Memorial, para. 625.

[427] Cl. Memorial, para. 626.

rights under the prior regime, which is the NEAFC regime where all parties, including Norway, treated the snow crab as non-sedentary, must be given effect".[428]

322. In conclusion, the Claimants submit that the Respondent's acts constitute a failure to respect the Claimants' acquired rights to catch snow crab in the Barents Sea, the violation of which requires full reparation, as per the applicable international law principles.[429]

b. The Respondent's Position

323. Regarding the legal basis of acquired rights, the Respondent asserts that neither the PCIJ judgment in the *Upper Silesia* case, nor any of the other authorities cited by the Claimants explain what the public international law criteria are for the creation of an acquired right.[430]

324. The Respondent points out that the Claimants base their alleged rights on the licences granted by Latvia. According to the Respondent, these licences were granted by Latvia without Norway's consent.[431] The Respondent considers these licences to be contrary to UNCLOS, the NEAFC Convention and the Svalbard Treaty as well as domestic law.[432] Furthermore, the Respondent submits that any snow crabs that may have been harvested on the Norwegian continental shelf prior to the regulations were harvested as a result of the absence of a prohibition, which cannot be equated with the exercise of a legal right.[433]

325. In any event, the Respondent points out that for the establishment of historic rights, practice over many years is necessary. The Claimants' first licence is said to have been issued on 1 July 2014 and the first regulation at issue entered into force in January 2015, with the extension to the continental shelf in the Loop Hole following that same year. According to the Respondent, the Claimants could thus not have established any historic or habitual rights to harvest crab in the waters at issue within this period.[434]

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[428] Cl. Memorial, para. 628.

[429] Cl. Memorial, para. 629.

[430] Resp. Rejoinder, para. 512.

[431] Resp. Counter-Memorial, para. 297.

[432] Resp. Counter-Memorial, paras. 297-300; Resp. Rejoinder, paras. 508-509.

[433] Resp. Rejoinder, para. 569.

[434] Resp. Rejoinder, para. 514.

(5) The Respondent's Alleged Breach of the Svalbard Treaty

a. The Claimants' Position

326. The Claimants argue that the Respondent has acted in violation of the Svalbard Treaty by failing to uphold the rights of equal access and treatment that benefit the Claimants within the territory covered by that treaty, which includes its economic zone, the Svalbard Fisheries Protection Zone ("**Svalbard FPZ**"), as well as Svalbard's continental shelf.[435]

327. The Svalbard Treaty recognized Norway's sovereignty over Svalbard, once considered *terra nullius*, as well as the servitudes under which Norway can exercise such sovereignty.[436] The Claimants submit that the other State Parties to the Svalbard Treaty acceded to Norway's request on condition that their rights and the rights of their nationals be protected *ad vitam aeternam* and that they would accrue new rights whenever these would be granted to private persons.[437]

328. Latvia ratified the Svalbard Treaty on 13 June 2016. On this basis, the Claimants argue that its nationals, including Mr Pildegovics and North Star, enjoy the rights provided for the nationals of the parties to the Svalbard Treaty.[438] Article 2(2) of the Svalbard Treaty provides that the ships and nationals of all parties enjoy the same rights as those reserved by Norway to its nationals.[439] According to the Claimants, Article 3(3) of the Svalbard Treaty, which provides for equal liberty of access and entry to the waters of Svalbard, reinforces Norway's obligation of non-discrimination.[440]

329. The Claimants maintain that by refusing to recognize the fishing licences granted to North Star's vessels by Latvia pursuant to Article 2 of the Svalbard Treaty and the relevant EU regulations, by rejecting the applications made by the Claimants to snow crabs quota reserved by Norway to its nationals, by harassing, arresting, fining North Star and its

[435] Cl. Memorial, Sec. VII.C, citing Svalbard Treaty (**CL-0002**).
[436] Cl. Memorial, paras. 632-633.
[437] Cl. Memorial, para. 635.
[438] Cl. Memorial, para. 637.
[439] Cl. Memorial, para. 638, citing Svalbard Treaty (**CL-0002)**, Art. 2(2).
[440] Cl. Memorial, para. 639, citing Svalbard Treaty (**CL-0002)**, Art. 3(3).

vessels, and by convicting North Star and one of its captains, the Respondent has violated its obligations under the Svalbard Treaty.[441]

330. In response to the Respondent's argument that Articles 2 and 3 of the Svalbard Treaty do not cover maritime areas beyond the territorial sea, the Claimants argue that, interpreted in its context, the phrase "*territorial waters*" in the Svalbard Treaty is not restricted to a particular maritime category.[442] The terms in 1920 did not indicate what is now called the "*territorial sea*" and Norway's interpretation frustrates the object and purpose of the Treaty.[443] In conclusion, the Claimants allege that the phrase "*territorial waters*" found in the Svalbard Treaty should be considered to cover the exclusive economic zone and the continental shelf pertaining to the territory, over which Norway was granted sovereign rights in 1920.[444]

b. The Respondent's Position

331. The Respondent asserts that the Svalbard Treaty is "*simply irrelevant*" in this case.[445] In response to the Claimants' allegation of entitlement to rights of equal access and treatment under the Svalbard Treaty, the Respondent submits that the Claimants do not assert that vessels of other nationalities were given mutual access to harvest snow crab on the Norwegian continental shelf around Svalbard. In any event, no vessels of other nationalities were given such access.[446] The Respondent granted Russian vessels only access to the Norwegian continental shelf part in the Loop Hole—not around Svalbard.[447] According to the Respondent, there is therefore no relevant better "*treatment*" which was accorded to Russian vessels in the Norwegian continental shelf around Svalbard.[448]

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[441] Cl. Memorial, para. 642.

[442] Cl. Memorial, paras. 643-673, citing, *inter alia*, Note Verbale from Norway to the EU, 8 February 2021 (**C-0176**).

[443] Cl. Memorial, paras. 645-655.

[444] Cl. Memorial, para. 673.

[445] Resp. Counter-Memorial, Sec. 6.6.5.3, para. 847.

[446] Resp. Counter-Memorial, para. 847.

[447] Resp. Counter-Memorial, para. 847, citing Protocol from the 45th Session of the Joint Norwegian-Russian Fisheries Commission, 9 October 2015 (**R-0099**), Sec. 10.

[448] Resp. Counter-Memorial, para. 848.

(6) The Respondent's Alleged Breach of the Obligation to Provide Compensation in Case of Expropriation (Article VI of the BIT)

a. The Claimants' Position

332. The Claimants assert that, taken together, the Respondent's actions from July 2015 to September 2016, confirmed in January 2017 and subsequently, constituted a creeping and illegal expropriation of the Claimants' investment under Article VI of the BIT.[449]

333. According to the Claimants, the BIT endorses that expropriations may occur either directly or indirectly.[450] The Claimants further submit that the concept of indirect expropriation includes "*creeping*" expropriation, an expropriation that occurs through "*composite acts*", *i.e.* a series of acts or omissions over time that cumulatively result in an unlawful expropriation, even if each individual measure would not constitute an expropriation.[451] The test for an indirect expropriation, according to the Claimants, is based on "*substantial deprivation*" or an "*effects test*" of the investment.[452] The relevant question is therefore whether the Claimants have been substantially deprived of the value of their integrated snow crab business, not whether the Claimants retain title to individual elements of that business.[453]

334. The Claimants allege that the following actions by the Respondent constitute "*a creeping (or indirect) expropriation of Claimants' snow crab enterprise*" since they have substantially deprived Claimants of the value of their snow crab harvesting enterprise.[454] According to the Claimants, the Respondent's actions caused that the Claimants' investment cannot be used for its intended purpose and cannot generate any commercial return.[455] In particular, the Claimants make the following allegations:

[449] Cl. Memorial, Sec. VIII.A, para. 675.
[450] Cl. Memorial, para. 679.
[451] Cl. Memorial, paras. 680-688.
[452] Cl. Reply, Sec. VI.B.a.
[453] Cl. Reply, para. 838.
[454] Cl. Memorial, paras. 689, 691; Cl. Reply, Sec. VI.B.b.
[455] Cl. Reply, para. 842.

- 17 July 2015: the Respondent changes the characterization of the snow crab from a non-sedentary to a sedentary species pursuant to Article 77(4) of UNCLOS when representatives of the Norwegian and Russian governments met in Valletta, Malta, and came to an agreement on the designation of snow crab as a sedentary species;

- 22 December 2015: the Respondent amends the 18 December 2014 snow crab regulations and shifts the prohibition on snow crab fisheries from "*Norway's territorial waters, including the territorial waters at Svalbard*" and "*the economic zone and the fishery protection zone at Svalbard*" to "*Norwegian territorial sea and inland waters, and on the Norwegian continental shelf*", in effect legally closing off the Loop Hole, in addition to Svalbard waters;

- July 2015–July 2016: the Respondent "*accepts*" the fishing of snow crab by EU vessels;

- 15 July 2016: the Respondent starts issuing fines to EU vessels;

- July–September 2016: the Respondent continues to consent to North Star's snow crab catches, caught with NEAFC licences, until its last offload, on 6 September 2016; and

- 27 September 2016: North Star receives a fine from Norwegian authorities for fishing snow crab in the Loop Hole in June 2016.[456]

335. According to the Claimants, losses to the investment "*started accruing in October 2016*", as the Claimants' snow crab harvesting activities were effectively stopped in September 2016, when Norway and Russia "*together completed the closure of the Loop Hole*".[457] Nonetheless, "[t]*his does not mean that the last act causing the expropriation occurred in September 2016*" and the Claimants allege it occurred in January 2017, when the Respondent is alleged to have taken North Star's Svalbard fishing rights.[458]

[456] Cl. Memorial, para. 689; Cl. Reply, paras. 75-77.

[457] Cl. Reply, para. 846.

[458] Cl. Reply, para. 846.

336. In addition, the Claimants argue that they had a "number of investment-backed expectations which further support a finding of expropriation", such as:

- the Respondent was perceived as a stable country with a regulatory and legal framework that can be trusted;
- the Respondent had a longstanding practice, since at least 1958, to consider snow crab as a non-sedentary species;
- prior to the Claimants' making their investments, in 2013 and 2014, the Respondent's Directorate of Fisheries confirmed that snow crab could be caught in the Loop Hole with NEAFC licences by EU vessels, which could then offload their cargo in Norway; and
- between July 2015 and July 2016, the Respondent allegedly "*accepted*" the harvesting of snow crab by EU vessels, as mentioned above.[459]

337. The Claimants submit that, as they invested prior to the Respondent's change in policy on 17 July 2015, in light of the "*continued encouragement by a large number of Norwegian politicians*" and the "*consent of the Norwegian administration to North Star's activities until September 2016*", the Respondent's actions constitute an expropriation of the Claimants' investment.[460]

338. The Claimants further allege that there was no legitimate regulatory goal to justify the allegedly discriminatory actions that excluded EU vessels from the snow crab fisheries while allowing Norwegian vessels to continue.[461] In addition, the Claimants reject that the Respondent can rely on "*police powers*" in defence of its actions.[462] According to the Claimants, this is a narrow defence inapplicable in the circumstances because the Respondent is not exercising a legitimate regulatory authority or acting in the public

[459] Cl. Memorial, para. 694.
[460] Cl. Memorial, para. 695.
[461] Cl. Memorial, para. 693.
[462] Cl. Reply, Sec. VI.B.c.

interest.[463] Further, police powers cannot be invoked in cases where the expropriation is discriminatory or disproportionate.[464] Finally, the Claimants maintain that police powers cannot be applicable where the measures are contrary to an investor's legitimate expectations.[465]

339. In conclusion, the Claimants argue that, as the Respondent has failed to provide "*prompt, adequate and effective compensation*", there was no legal process for such expropriation, and the expropriation was discriminatory, the Respondent's actions constitute an unlawful expropriation.[466]

b. The Respondent's Position

340. The Respondent denies that the Claimants' alleged investments have been expropriated or been subjected to measures having similar effect.[467] According to the Respondent, for there to be a direct or indirect expropriation there should be "*conduct on the part of the respondent that implies a non-ephemeral taking of an asset, or a substantial deprivation of the economic value and enjoyment of the asset*" and this standard is "*subject to the well-established limitation deriving from the undisputed power of States to regulate their economies and public affairs in the public interest*". The Respondent contends that there is no support to conclude that the denial of an opportunity or failure to grant a concession, license or other legal authorization can in itself amount to an expropriation.[468]

341. The Respondent argues that, in this case, between the date of their acquisition and the alleged date of expropriation, *i.e.* 27 September 2016, there has neither been a taking of an investment,[469] nor any expropriatory act with regard to any of the Claimants' alleged investments.[470]

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[463] Cl. Reply, Sec. VI.B.c.i.
[464] Cl. Reply, Sec. VI.B.c.ii.
[465] Cl. Reply, Sec. VI.B.c.iii.
[466] Cl. Memorial, Sec. VIII.A.c.
[467] Resp. Counter-Memorial, para. 626.
[468] Resp. Counter-Memorial, para. 634.
[469] Resp. Counter-Memorial, Sec. 6.4.3.2.
[470] Resp. Counter-Memorial, Sec. 6.4.3.3.

342. Analysing both of the Claimants' respective investments in turn, for Mr Pildegovics' alleged investment, the Respondent alleges the following.

343. *First*, with regard to the contractual rights in his alleged joint venture agreement with Mr Levanidov, the Respondent argues that Mr Pildegovics does not even appear to make a claim for compensation in respect of injury to his alleged rights under the joint venture.[471]

344. *Second*, with regard to the 100% of the shares in North Star, according to the Respondent, the Claimants have made no attempt to show what the market value of the shareholding was at any date between acquisition and the alleged date of expropriation.[472] Mr Pildegovics does not even appear to make a claim for compensation in respect of injury to this shareholding.[473]

345. *Third*, with regard to the 100% of the shares in Sea & Coast, according to the Respondent, Mr Pildegovics acquired his 100% shareholding in Sea & Coast on 15 October 2015 for the sum of NOK 66,000 and still holds these shares.[474] The Claimants appear to have made no attempt to establish that there was any injury to Mr Pildegovics' shareholding in Sea & Coast. The Claimants allege that Sea & Coast's revenue "*collapsed as a result of Norway's actions*"; however, the Respondent emphasizes that this collapse is not reflected in the Claimants' expert report on quantum.[475]

346. As to North Star's alleged investments, the Respondent submits the following.

347. *First*, with regard to the crab harvesting vessels—*Solvita*, *Senator*, *Saldus*, and *Solveiga*—the Respondent argues that it is not disputed that all four ships remained the property of North Star immediately after the completion of the alleged creeping expropriation.[476] The Claimants' complaint is that the vessels were bought by North Star with a specific aim in mind and that they became less valuable to North Star when it became evident that the

[471] Resp. Counter-Memorial, paras. 643-644.
[472] Resp. Counter-Memorial, para. 646.
[473] Resp. Counter-Memorial, para. 647.
[474] Resp. Counter-Memorial, para. 649.
[475] Resp. Counter-Memorial, para. 651, citing Cl. Memorial, para. 252.
[476] Resp. Counter-Memorial, para. 656.

specific aim could not be achieved.[477] The Respondent states that the expectation of the vessels' profitable employment in a specific trade cannot be an investment and could thus not be expropriated.[478]

348. *Second*, regarding the "*fishing capacity*" granted by Latvia, the Respondent argues that this was not linked to any particular location and meant only that the vessels were entitled to be registered in the Latvian registry for fishing vessels and apply for Latvian permission to catch fish.[479] The fishing capacity issued by Latvia could not and was not affected by any action of Norway. Indeed, the fishing capacity remained unimpaired and freely transferrable after the time of the alleged expropriation.[480]

349. *Third*, with regard to the fishing licences authorizing each vessel to harvest snow crab in the Loop Hole area of the NEAFC zone and in maritime zones around Svalbard, the Respondent argues that the licences were issued by Latvia, not by Norway, and the Claimants failed to establish that Latvia purported to license the harvesting of snow crab on the Norwegian continental shelf. Even if that were the case, according to the Respondent Latvia did not have the legal power to grant such licences.[481] The BIT cannot protect rights purportedly granted by a State other than the Respondent and which had no legal authority to grant such rights.[482]

350. *Fourth*, with regard to the contractual rights to purchase two additional ships, the Respondent contends that the Claimant North Star signed definitive agreements for the purchase of two ships, the *Sokol* and the *Solyaris* only on 5 January 2017.[483] The agreements were thus concluded after the date of the alleged expropriation and cannot have

[477] Resp. Counter-Memorial, para. 657.
[478] Resp. Counter-Memorial, paras. 658-660.
[479] Resp. Counter-Memorial, paras. 661-663.
[480] Resp. Counter-Memorial, para. 664.
[481] Resp. Counter-Memorial, paras. 666-672.
[482] Resp. Counter-Memorial, paras. 676-677.
[483] Resp. Counter-Memorial, para. 678.

been protected investments expropriated by September 2016.[484] Moreover, it was the Claimants themselves who cancelled these contracts.[485]

351. *Fifth*, with regard to the supply agreements with purchasers of snow crab products, the Respondent emphasizes that the Claimants' agreements were entered into on 29 December 2016 and 29 December 2017. The agreements were thus concluded after the date of the alleged expropriation and cannot have been protected investments expropriated by September 2016.[486]

352. Finally, the Respondent further maintains that "*merely the causing of a financial loss or the loss of an opportunity to make a profit*" might be relevant for a claim for a breach of the fair and equitable treatment standard but these "*are not acts which constitute 'expropriation'*".[487]

(7) The Respondent's Alleged Breach of the Obligation to Provide Equitable and Reasonable Treatment and Protection to the Claimants' Investment (Article III of the BIT)

a. The Claimants' Position

353. The Claimants allege that the Respondent has breached the obligation to provide "*equitable and reasonable treatment and protection*" to the Claimants' investment pursuant to Article III of the BIT.[488] The BIT does not define this standard of treatment. According to the Claimants, this standard is "*considered to equate the more commonly used expression 'fair and equitable treatment'*" based on the interpretation in accordance with the rules of treaty interpretation in the VCLT and arbitral decisions.[489]

354. Moreover, the Claimants argue that Article III of the BIT requires that the Respondent, in addition to treating the Claimants' investments equitably and reasonably, also "*protects*" the Claimants' investment in an equitable and reasonable manner. According to the

[484] Resp. Counter-Memorial, para. 679.
[485] Resp. Counter-Memorial, paras. 678-680.
[486] Resp. Counter-Memorial, para. 681.
[487] Resp. Counter-Memorial, paras. 685-688.
[488] Cl. Memorial, Sec. VII.B.
[489] Cl. Memorial, para. 701; Cl. Reply, Sec. VI.A.a.

Claimants, this means that the Respondent "*must take positive steps to prevent the Claimants' investments from harm and damage, whether tangible or intangible*".[490]

355. The Claimants submit the fair and equitable treatment ("**FET**") standard includes a "*non-exhaustive*" list of the following obligations: (i) to refrain from acting arbitrarily; (ii) to refrain from acting in bad faith; (iii) to respect the specific or general legitimate expectations of an investor; (iv) to respect certain standards regarding the transparency and consistency of a state's actions as well as of its investment framework; and (v) to refrain from causing a denial of justice.[491]

356. According to the Claimants, the relevant facts demonstrating a violation of these standards of treatment can be summarized as follows:

- the Claimants invested in Norway on the clear understanding that the Loop Hole's snow crab fishery was "*a high seas fishery*";[492]
- the Respondent reversed its position on the characterization of snow crab to expand the scope of its fisheries jurisdiction into the Loop Hole and exclude EU crabbers, including the Claimants, from this area of the high seas;[493]
- the Respondent then behaved as if it had always considered snow crab as a sedentary species of its continental shelf and negated the legitimacy of EU fishing activities in the Loop Hole predating its change of position;[494]
- the Respondent refused to respect the Claimants' acquired rights derived from their historical fishing activities in the Loop Hole;[495]

[490] Cl. Reply, para. 631.
[491] Cl. Memorial, paras. 704-728; Cl. Reply, para. 634.
[492] Cl. Reply, Sec. VI.A.b.i.
[493] Cl. Reply, Sec. VI.A.b.ii.
[494] Cl. Reply, Sec. VI.A.b.iii.
[495] Cl. Reply, Sec. VI.A.b.iv.

- the Respondent acted in concert with Russia to close the entire Loop Hole to EU crabbers, including the Claimants;[496]

- the Respondent refused to recognize the legality of the Claimants' Svalbard licences or to grant them otherwise equivalent fishing rights;[497] and

- the Respondent acted in a discriminatory and politically motivated manner justified by neither economic nor environmental goals and was not exercising any legitimate right to regulate.[498]

357. The Claimants argue that the above-mentioned facts "*both individually and cumulatively*", demonstrate that the Respondent breached its obligations under Article III of the BIT, as set out in further detail below.[499]

(i) The obligation not to act arbitrarily

358. The Claimants assert that the Respondent's conduct, taken together, is "*simply shocking*" and thus "*shocks, or at least surprises, a sense of judicial propriety*".[500] According to the Claimants, the Respondent, after having initially allowed snow crab catches, "*purposely chose to destroy Claimants' investment and to engage in what appears to be a harassment campaign against them*".[501] The Claimants allege that, from 2015, the Respondent's policies towards snow crab fishing "*commenced shifting in arbitrary, unpredictable and inconsistent ways, ultimately leading to the destruction of Claimants' snow crab fishing enterprise*".[502]

359. In particular, the Claimants consider the Respondent's allegedly arbitrary conduct to have been demonstrated by:

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[496] Cl. Reply, Sec. VI.A.b.v.

[497] Cl. Reply, Sec. VI.A.b.vi.

[498] Cl. Reply, Sec. VI.A.b.vii.

[499] Cl. Reply, Sec. VI.A.b., para. 639.

[500] Cl. Memorial, para. 730, citing *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, ICJ, Judgement, 20 July 1989 ("***ELSI***") (**CL-0288**), para. 128.

[501] Cl. Memorial, para. 730.

[502] Cl. Memorial, para. 733.

- 17 July 2015: the Respondent's "*Malta Declaration*", made in Valetta, Malta, changes jointly with Russia the characterization of snow crab from a non-sedentary to a sedentary species pursuant to Article 77(4) of UNCLOS, contradicting Norway's longstanding practice to the contrary dating back to at least 1958;[503]

- 22 December 2015: the Respondent amends the 18 December 2014 snow crab regulations and shifts the prohibition on snow crab fisheries from "*Norway's territorial waters, including the territorial waters at Svalbard*" and "*the economic zone and the fishery protection zone at Svalbard*" to "*Norwegian territorial sea and inland waters, and on the Norwegian continental shelf*" (dropping references to "*territorial waters at Svalbard*"), in effect legally closing off the Loop Hole, in addition to the Svalbard waters;[504]

- July 2015–July 2016: during this period, the Respondent still "*accepts*" the fishing of snow crab by EU vessels, independently of its position that they may be a sedentary species and of the 22 December 2015 snow crab regulation. Norwegian officials visit the Claimants' joint venture partners Seagourmet and "*show support for their economic operation*";[505]

- 15 July 2016: the Respondent starts issuing fines to EU vessels, notably to the *Juros Vilkas*, on 15 July 2016, a Lithuanian vessel that had been authorized by the Norwegian coastguard the day before to offload snow crabs caught with NEAFC licences at a Norwegian port;[506]

- July–September 2016: the Respondent continues to consent to the offloading of North Star's snow crab catches, caught with NEAFC licences, until its last offload, on 6 September 2016;[507]

[503] Cl. Memorial, para. 733, citing Malta Declaration (**C-0106**). See also Cl. Memorial, paras. 103-105.
[504] Cl. Memorial, para. 733.
[505] Cl. Memorial, para. 733.
[506] Cl. Memorial, para. 733.
[507] Cl. Memorial, para. 733.

- 27 September 2016: North Star receives a fine from Norwegian authorities for fishing snow crab in the Loop Hole during the month of July 2016;[508]

- 16 January 2017: the Respondent arrests the vessel *Senator*, two days after it entered Svalbard waters to catch snow crabs "*pursuant to rights granted by the Svalbard Treaty as implemented by the EU fisheries regulation and Latvian law*";[509]

- 2017–2019: Norwegian Minister Per Sandberg issues a number of public statements "*showing his discriminatory intent against EU fishermen*". North Star is prosecuted, denied justice in Norwegian courts and ordered to pay fines on account of the *Senator*'s arrest. The company's "*reputation is smeared in the Norwegian media*";[510] and

- 2017–2021: Norway adopts quotas which are set an artificially low level, "*justified by neither economic nor environmental goals*". The Norwegian snow crab fishery is now "*but a shadow of what it was in 2015-2016*".[511]

360. According to the Claimants, the Respondent's acts were "*discriminatory, arbitrary and capricious*" and "*contrary* […] *to the rule of law*" and thus breached the prohibition on arbitrariness encapsulated in Article III of the BIT.[512]

(ii) The obligation not to act in bad faith

361. The Claimants argue that the Respondent's acts detailed in their submissions regarding the obligation not to act arbitrarily equally demonstrate that the Respondent "*was egregiously acting in bad faith*".[513]

[508] Cl. Memorial, para. 733.
[509] Cl. Memorial, para. 733.
[510] Cl. Memorial, para. 733.
[511] Cl. Memorial, para. 733.
[512] Cl. Memorial, paras. 734-735.
[513] Cl. Memorial, para. 736.

(iii) The obligation to respect the specific or general legitimate expectations of an Investor

362. The Claimants allege that they had legitimate expectations that were general and specific in respect of their investment in Norway. According to the Claimants, the Respondent breached these legitimate expectations when it "*radically altered*" the regulatory framework applicable to the Claimants' investments and "*completely destroyed*" this regulatory framework.[514]

363. The Claimants submit that they made their investments "*of at least EUR 12.7 million*" in a snow crab fishing enterprise on the basis of Norway's position that it recognized NEAFC snow crab licences issued by EU Member States, allowing EU vessels to participate in the snow crab fisheries in the Loop Hole. When Mr Pildegovics entered into his joint venture agreement with Mr Levanidov in January 2014, and when the initial steps of the Claimants' investments were taken, Mr Pildegovics and North Star "*were well aware of Norway's general position on this matter*".[515]

364. In particular, the Claimants refer to the following events to demonstrate the Respondent's "*general position*" regarding snow crab harvesting.

365. In May 2013, the Norwegian Directorate of Fisheries wrote that "*catching of snow crab is unregulated. Norwegian fishing vessels (i.e. vessels entered in the Norwegian Register of Fishing Vessels (Merkeregisteret) can fish for this species in the NOS/Svalbard zone. If Norwegian vessels are to catch snow crab in international waters, they must be registered for fishing in the NEAFC area*".[516]

366. In June 2013, the Directorate sent an email to which it appended the "*regulations for registration and reporting when fishing in waters outside any state's fisheries jurisdiction*" which were applicable to snow crab fishing in the NEAFC area.[517] In the same email, the Directorate explained that "*vessels that are to fish in waters outside any state's jurisdiction*

[514] Cl. Memorial, para. 737.
[515] Cl. Memorial, para. 740.
[516] Cl. Memorial, para. 740.
[517] Cl. Memorial, para. 740.

must be registered through notification to the Directorate of Fisheries" and that "*the registration notification will be processed and information about the vessel will be sent to the NEAFC Secretariat in London*". The "*processing of registration notifications*" would "*normally take 2-3 days*", according to the Claimants indicating that registration was a mere formality.[518]

367. In February 2014, the Norwegian Food Safety Authority (*Mattilsynet*) wrote that "*EU-registered fishing boats can deliver crab freely in Norwegian crab reception points. If the catch is quota-regulated (king crab, for example), the boats must possess a quota*".[519]

368. On 25 July 2014, the Norwegian Directorate of Fisheries provided the following reply to a request for information in relation to "*a project where a fishing vessel under the EU flag will land live snow crabs at approved Norwegian reception stations (factories)*":

> *1. In principle, EU vessels can land fish, including snow crab to Norway on an equal footing with Norwegian fishing vessels. There are therefore no other rules for EU vessels when it comes to fresh and live goods. All registered buyers in Finnmark have a good overview of the conditions for landing.*
>
> *2. In principle, no special documentation shall be submitted to the fisheries authorities when the crab is to be landed alive at a Norwegian reception centre, and the crab has been caught outside the Norwegian Economic Zone.*[520]

369. According to the Claimants, the statement from the Norwegian Directorate of Fisheries that EU vessels were being treated "*on an equal footing with Norwegian fishing vessels*" confirmed their understanding that they could legally rely on an EU-based fishing company for its supplies of snow crabs, provided that the crabs were caught "*outside the Norwegian Economic Zone*". Since the Loop Hole area of the NEAFC zone was considered by the Directorate as "*international waters*" falling "*outside any state's fisheries jurisdiction*",

[518] Cl. Memorial, para. 740.

[519] Cl. Memorial, para. 740.

[520] Cl. Memorial, para. 740, citing, *inter alia*, Email from the Directorate of Fisheries (*Mattilsynet*) to Mr Sergei Ankipov, 25 July 2014 (**KL-0020**) [emphasis added by the Claimants].

EU-registered vessels could catch snow crabs there in full compliance with Norwegian laws and regulations.[521]

370. Moreover, the Claimants invoke "*additional representations*" allegedly made by Norwegian officials in 2015:

- on 10 June 2015, the Mayor of Båtsfjord personally cut the ribbon marking the official launch of the factory Seagourmet in Båtsfjord, co-hosted by North Star;[522]
- on 4 September 2015, the visit of a delegation of Norwegian parliamentarians at Båtsfjord who gave "*a message of encouragement*" to North Star and Seagourmet about their joint project, after Norway's declaration that snow crabs were a sedentary species, thus showing that Norway continued to be supportive of the project;[523]
- on 8 September 2015, the visit of Norway's Minister of Fisheries to Seagourmet's factory, co-hosted by North Star, after Norway's declaration that snow crabs were a sedentary species, thus showing that Norway continued to be supportive of North Star's fishing efforts in the Barents Sea and of the joint venture with Seagourmet;[524]
- in September 2015, the approval by Norway's Minister of Fisheries of substantial investments for the refurbishment of the port of Båtsfjord to allow for easier docking and offloading of large vessels, such as those of North Star, simultaneous with her visit in Båtsfjord;[525] and
- on 23 October 2015, the visit of a delegation from the Ministry of Trade, Industry and Fisheries to the premises of the joint venture at Båtsfjord, once again "*giving their encouragements*" to the joint venture partners.[526]

[521] Cl. Memorial, para. 740.
[522] Cl. Memorial, para. 742.
[523] Cl. Memorial, para. 742.
[524] Cl. Memorial, para. 742.
[525] Cl. Memorial, para. 742.
[526] Cl. Memorial, para. 742.

371. According to the Claimants, until July 2016, the Respondent "*accepted*" that EU vessels holding NEAFC licences issued by EU Member States could catch snow crabs in the Loop Hole, irrespective of its position on the sedentary nature of the species and of the 22 December 2015 snow crab regulation.[527]

372. The Claimant allege that the Respondent's issuance of a fine to the Claimants' vessel in September 2016 as well as its "*closure of the Loop Hole and the general exclusion of Claimants from the snow crab fishery in the Barents Sea*" breached their legitimate expectations that they could operate legally in the mentioned waters and thus violated Article III of the BIT.[528]

(iv) The obligation to respect certain standards regarding transparency and consistency

373. Relying on the same facts as detailed in the Claimants' submissions on the other aspects of the FET standard, the Claimants submit that the "*opacity and inconsistency*" of the Respondent's actions towards EU vessels engaged in snow crab fishing in the Barents Sea constitutes a breach of the consistency and transparency required by Article III of the BIT.[529]

(v) The obligation to refrain from a denial of justice

374. The Claimants' make three allegations regarding the denial of justice standard: first, the Norwegian Supreme Court "*refused to adjudicate*" the Claimants' defence that they had a valid Latvian license to fish snow crabs; second, the Norwegian Supreme Court caused "*unconscionable*" delay by its failure to decide on material aspects of the claim; and, third, the Norwegian Supreme Court permitted the appointment of Mr Tolle Stabell, a government lawyer, as a deputy prosecutor in the case, evidencing "*subservience to executive pressure*".[530]

[527] Cl. Memorial, para. 743.

[528] Cl. Memorial, para. 744.

[529] Cl. Memorial, paras. 746-755.

[530] Cl. Reply, Sec. VI.A.c, para. 798. See also Cl. Memorial, paras. 756-757.

375. As to the relevant facts, the Claimants state that Norwegian authorities had brought charges against North Star and the captain of its ship, the *Senator*, for alleged violations of the provisions of the Marine Resources Act related to snow crab harvesting on account of the vessel's operations on the Norwegian continental shelf without a license from Norwegian authorities.[531]

376. The defendants, Mr Rafael Uzakov and SIA North Star LTD, pleaded not guilty. An aspect of the defendants' defence was that the prohibitions under which the defendants were being tried violated the Svalbard Treaty's provisions on equal access to Svalbard's marine resources.[532] According to the Claimants, the District Court held that while the wording of the regulations was not discriminatory, the practice of the Norwegian Fisheries Directorate's conflicted with the principle of non-discrimination established by the Svalbard Treaty. However, the District Court found that the Svalbard Treaty did not apply beyond the territorial sea of the Svalbard archipelago. Consequently, the District Court held that the Norwegian authorities were within their right to prohibit foreign vessels from harvesting snow crabs from the Norwegian continental shelf beyond the territorial sea.[533]

377. The defendants appealed the District Court's judgment before the Court of Appeal. On appeal, the Court was not convinced of the existence of a discriminatory practice. As a result, the Court of Appeal dismissed the defendants' appeal.[534]

378. Before the Supreme Court, the defendants contended that they had a valid EU permit granted by Latvian authorities to catch snow crab. The defendants further argued that they had not applied for an exemption to the applicable snow crab regulation but that an application would have been rejected "*according to the way in which the Regulations are worded and practised*". According to the defendants, such a rejection would have been in contravention of international law.[535]

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[531] Cl. Memorial, para. 758.
[532] Cl. Memorial, paras. 758-759.
[533] Cl. Memorial, para. 760.
[534] Cl. Memorial, paras. 761-762.
[535] Cl. Memorial, para. 769.

379. In its unanimous judgment of 14 February 2019, the Supreme Court, sitting as an expanded eleven-judge bench, ruled against the defendants.[536] The Supreme Court held that the better way to adjudicate the issue would have been for the defendants to have brought a civil claim.[537] The Court refused to decide on the defendants' contention that they had a valid EU permit issued by Latvia.[538] Further, the Court did not rule on the alleged breach of the principle of equal rights in the Svalbard Treaty.[539] Instead, the Supreme Court stated that the relevant Svalbard Treaty provision gives Norway "*a right to enforce a regulatory system under which unauthorised catching is punishable, as long as such a system is practised in a non-discriminatory manner*".[540]

380. The Claimants' first allegation of denial of justice is that the Supreme Court "*refused to engage*" with whether the Norwegian system of permits was discriminatory under the Svalbard Treaty given the way in which regulations are worded and practiced.[541] In contrast, the Court reasoned that "[u]*nauthorised catching is punishable, regardless of nationality*" and relied on a principle of Norwegian law according to which any person who has not applied for a necessary permit cannot, as a matter of self-help, do the thing for which the permit is needed.[542] According to the Claimants, Norwegian authorities and courts are not free to interpose administrative law mechanisms to limit international law rights and certainly not "*in this arbitrary and discretionary manner*".[543]

381. The Claimants' second allegation of denial of justice is that the Supreme Court's failure to decide on material aspects of the claim caused "*unconscionable*" delay.[544] According to the Claimants, the Supreme Court "*refused to exercise its functions and to give a decision*

[536] Cl. Memorial, para. 767, citing *Rafael Uzakov and SIA North Star LTD v. Public Prosecuting Authority*, Supreme Court of Norway, Judgment, 14 February 2019 ("***Uzakov v. Norway***") (**C-0038**).

[537] Cl. Memorial, para. 768.

[538] Cl. Memorial, para. 771.

[539] Cl. Memorial, para. 772.

[540] Cl. Memorial, para. 772, citing *Uzakov v. Norway* (**C-0038**), para. 66.

[541] Cl. Memorial, para. 772; Cl. Reply, Sec. VI.A.c.i.

[542] Cl. Memorial, para. 772.

[543] Cl. Memorial, para. 776; Cl. Reply, paras. 805-806.

[544] Cl. Memorial, paras. 779-782; Cl. Reply, Sec. VI.A.c.ii.

on the claims of the Claimants [*sic*] *(as defendants in the criminal proceedings)*".[545] The Claimants allege that by requiring the defendants to file a new civil suit in order to have their contentions properly decided, the Supreme Court committed a denial of justice.[546]

382. The Claimants' third allegation of denial of justice is the Supreme Court's alleged "*subservience to executive pressure*" by permitting the appointment of Mr Tolle Stabell as prosecutor in the case.[547] Mr Stabell is Deputy Attorney General at the Office of the Attorney General (Civil Affairs). According to the Claimants, this was the first time that a lawyer from the Office of the Attorney General was deputed to act as a prosecutor in a criminal case before the Supreme Court.[548] The Claimants maintain that by allowing a Deputy Attorney General to act as prosecutor before it, the Supreme Court committed the denial of justice of "*subservience to executive pressure*".[549]

b. The Respondent's Position

383. As to the legal standard, the Respondent argues that the standard of "*equitable and reasonable treatment and protection*" in Article III of the BIT, requires "*treatment in such an unjust or arbitrary manner that the treatment rises to a level that is unacceptable from an international perspective*".[550] The Respondent states it agrees with the Claimants on the applicable legal standard, as accepted by the International Court of Justice in the ELSI case, which requires "*conduct in wilful disregard of due process, an act that shocks or surprises a sense of judicial propriety*".[551] The Respondent argues that since its conduct "*comes nowhere near a violation*", there is no need to discuss the precise delineation of the fair and equitable treatment standard.[552]

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[545] Cl. Memorial, para. 778.

[546] Cl. Reply, para. 807.

[547] Cl. Memorial, para. 783; Cl. Reply, Sec. VI.A.c.iii.

[548] Cl. Reply, para. 808.

[549] Cl. Reply, paras. 809-814.

[550] Resp. Counter-Memorial, para. 696, citing *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010 ("***Vivendi v. Argentina***") (**RL-0120**), para. 213.

[551] Resp. Counter-Memorial, para. 700, citing *ELSI* (**CL-0288**), para. 128; Cl. Memorial, para. 706.

[552] Resp. Counter-Memorial, para. 697.

384. As to the facts that form the basis of the Claimants' allegations of FET standard violations, the Respondent disputes the Claimants' allegations. In response to the Claimants' assertion that they understood the Loop Hole crab harvesting was a high seas fishery, the Respondent argues that the Claimants "*never contacted the Norwegian authorities regarding the legality of harvesting snow crab by Latvian vessels in the Loop Hole*". According to the Respondent, any information obtained from the Respondent was requested by Mr Levanidov and his companies regarding the landing—not the harvesting—of snow crab catches.[553] Further, on 2 August 2013, Mr Levanidov emailed Mr Pildegovics saying that "[t]*he catch of snow crabs in the area (open part of the Barents Sea)* [*i.e.* the Loop Hole] *is a new object, it's still not regulated by quotas or anything else*". Mr Levanidov added, in another email later that day, "*sooner or later there will be introduced quotas*".[554] According to the Respondent, the Claimants had no right to believe or expect that Norway would refrain from exercising its right to regulate a sedentary species on its continental shelf.[555]

385. The Respondent addresses the Claimants' multiple allegations of violations of the Article III standard of "*equitable and reasonable treatment*" separately, as detailed below, and submits that, whether considered individually or cumulatively, none of these allegations amount to a breach of the applicable standard.[556]

(i) The Respondent did not act arbitrarily

386. The Respondent states that none of the Claimants' allegations of arbitrary conduct are made out.[557] As to the Claimants' allegation that the Respondent had "*confirmed that EU vessels could legally catch snow crabs in the Loop Hole and unload them in Norway*",[558] the Respondent submits that its Directorate of Fisheries referred to the *landing* of catches only,

[553] Resp. Rejoinder, para. 441.

[554] Resp. Rejoinder, para. 446, citing Emails between Mr Kirill Levanidov and Mr Peteris Pildegovics, 2 August 2013 (**PP-0012**).

[555] Resp. Rejoinder, paras. 447-468.

[556] Resp. Counter-Memorial, para. 691.

[557] Resp. Counter-Memorial, Sec. 6.5.3.2.

[558] Cl. Memorial, para. 730.

not to the *harvesting* of snow crab.[559] The Respondent addresses in turn the acts that form the basis of the Claimants' allegation of arbitrary conduct.

387. As to the so-called "*Malta Declaration*" or the "*Agreed Minutes*" of the meeting on 17 July 2015 between a representative of the Respondent and a representative of the Russian Federation in which snow crab was identified as a sedentary species, the Respondent states that nothing in these Agreed Minutes suggests that it had previously taken a different view on the categorization of snow crab as a sedentary species.[560]

388. The Respondent rejects the allegation of collusion with the Russian Federation.[561] According to the Respondent, Norway's consultations with Russia are irrelevant and the Respondent's actions are no more and no less lawful with or without consultation with Russia; moreover, the "*gratuitous allegation of bad faith*" adds nothing to the Claimants' arguments.[562]

389. The Respondent explains that snow crab was not known on the Norwegian continental shelf until 2003–2004, and the harvesting of snow crab in commercially viable quantities began only in 2014. In this period, snow crab was covered by Norwegian regulations applicable to "*wild living marine resources*", including sedentary species.[563] The Respondent concludes there was thus never a "*change of position*" regarding the categorization of snow crab.[564]

390. As to the 22 December 2015 Amendment to the Respondent's snow crab regulation, from 1 January 2015 until 22 December 2015, the prohibition on harvesting activity covered the Norwegian continental shelf within 200 nautical miles but not in the small part of the Norwegian continental shelf in the Loop Hole.[565] The purpose of the 22 December 2015

[559] Resp. Counter-Memorial, para. 699.
[560] Resp. Counter-Memorial, paras. 574-575, 702, citing Malta Declaration **(C-0106)**.
[561] Resp. Rejoinder, Sec. 9.1.5.
[562] Resp. Rejoinder, para. 521.
[563] Resp. Counter-Memorial, para. 578.
[564] Resp. Counter-Memorial, para. 583; Resp. Rejoinder, Sec. 9.1.3.
[565] Resp. Counter-Memorial, para. 585.

Amendment was to make Norway's regulations cover all areas under Norway's jurisdiction, including the Norwegian continental shelf in the Loop Hole.[566]

391. The Respondent argues, first, that this is in line with the precautionary principle for new and exploratory fisheries.[567] Secondly, the Respondent argues that the regulations applicable to the harvesting of snow crab have been amended many times, giving an indication of the change that might be expected.[568] Thirdly, there was no secrecy in the changes to the regulation and there was even a public workshop organized in Tromsø in March 2014, which was attended by Mr Ankipov and Mr Pavel Krugov of Ishavsbruket (later Seagourmet).[569] In sum, the Respondent asserts that the need for regulation of snow crab harvest, not only within 200 nautical miles but on the entire continental shelf, was recognized before the alleged investments in the present case were made.[570]

392. As to the Claimants' allegations that the Respondent's accepted snow crab harvesting between July 2015 to July 2016 and its allegedly continued consent to such harvesting between July and September 2016, the Respondent submits these are factually incorrect. The Respondent states that it did not in this period (or at any time) consent to *harvesting* activity by the Claimants' vessels on any part of the Norwegian continental shelf.[571] It only accepted *landings* by EU-flagged vessels in Norwegian ports of snow crab harvested on the Russian continental shelf in the Loop Hole. The Respondent states it had no legislation in place that could prohibit such landings unless the Russian Federation declared this harvesting to be illegal. The Russian Federation did so on 3 September 2016, when it closed its part of the Loop Hole to EU-flagged vessels.[572]

393. The Respondent further responds that the Claimants do not specify which of their catches originated from the in the 89% of the Loop Hole on the Russian continental shelf instead

[566] Resp. Counter-Memorial, paras. 585, 703.
[567] Resp. Counter-Memorial, paras. 586-588.
[568] Resp. Counter-Memorial, paras. 589-594.
[569] Resp. Counter-Memorial, paras. 595.
[570] Resp. Counter-Memorial, para. 596.
[571] Resp. Counter-Memorial, para. 598.
[572] Resp. Counter-Memorial, para. 599.

of on the 11% on the Norwegian continental shelf.[573] According to the Respondent, of the 79 occasions referred to by the Claimants that North Star vessels offloaded crab catches in Norwegian ports between July 2015 and September 2015, only one of those involved harvesting activity by North Star on the Norwegian continental shelf.[574] On that occasion, the *Senator* was arrested and fined.[575] Consequently, the landing of snow crab catching in Norwegian ports does not demonstrate acquiescence by Norway in North Star's harvesting of snow crab on the Norwegian continental shelf.[576]

394. As to the Claimants' argument that Respondent's inspections of ships approved the catches, the Respondent asserts that these inspections concerned only technical safety and visa questions.[577] Further, these inspections occurred prior to the prohibition on harvesting snow crab on the Russian continental shelf.[578]

395. As to the Respondent's imposition of fines on and the arrest of the *Senator*, the Respondent argues that neither the fines nor the arrest of the *Senator* were arbitrary.[579] The prohibition on snow crab harvesting on the Norwegian continental shelf in the Loop Hole came into force on 22 December 2015.[580] Following the *Senator*'s harvest of snow crab in June 2016, a fine was imposed and the vessel was arrested. The Respondent emphasizes that the fine was accepted and paid by North Star.[581]

396. According to the Respondent, the Claimants have failed to explain why the arrest of the *Senator* was arbitrary. The Respondent submits that the *Senator*'s sole voyage into the Fisheries Protection Zone around Svalbard in January 2017 was: (i) more than two years after the general ban on snow crab harvesting had entered into force on 1 January 2015; (ii) over a year since the regulations had been amended to clarify that they applied to the

[573] Resp. Counter-Memorial, para. 606.
[574] Resp. Counter-Memorial, Sec. 6.3.4.3, paras. 607-608.
[575] Resp. Counter-Memorial, para. 608.
[576] Resp. Counter-Memorial, paras. 610-611.
[577] Resp. Counter-Memorial, para. 699.
[578] Resp. Counter-Memorial, para. 699; see also Sec. 6.3.4.4.
[579] Resp. Counter-Memorial, Secs. 6.5.3.2.4-6.5.3.2.5.
[580] Resp. Counter-Memorial, para. 705.
[581] Resp. Counter-Memorial, para. 705.

entirety of the Norwegian Continental Shelf; and (iii) a few months after the *Senator*'s prior arrest for illegally harvesting snow crab on the Norwegian continental shelf.[582]

397. The Respondent contends that in addition to the Claimants' general awareness of the Respondent's position regarding snow crab harvesting, the Claimants had also received specific confirmation of the Respondent's position on several occasions, including on 22 February 2016 when the Claimants were told by Minister Sandberg that Norway's position was that EU vessels were not allowed to harvest snow crab "*without Norway's consent*".[583] The Claimants received further specific confirmation of Norway's position in January 2017, when North Star and the Norwegian authorities engaged in correspondence concerning the legality of snow crab harvesting.[584] Nonetheless, the *Senator* entered the Fisheries Protection Zone around Svalbard on 15 January 2017 and launched 13 lines with a total of 2,594 pots onto the Norwegian continental shelf to harvest snow crab. The *Senator* was boarded by the Coast Guard and arrested on 17 January 2017.[585] The Respondent further points out that this claim contradicts the Claimants' other claim that the Respondent was in fact consenting to the harvesting of snow crab.[586]

398. As to the statements made by Norway's Minister Per Sandberg between 2017 and 2019, the Respondent rejects the Claimants' allegation that these demonstrate "*discriminatory intent*".[587] The Claimants in particular rely on the statement "*we will not give them a single crab*", however, the Respondent submits that this statement was made in the context of Norway's negotiations with the EU for the establishment of quotas and Norway had attempted to negotiate the inclusion of quotas for snow crab but the EU had rejected such offers.[588]

[582] Resp. Counter-Memorial, para. 711.
[583] Resp. Counter-Memorial, para. 713.
[584] Resp. Counter-Memorial, para. 714.
[585] Resp. Counter-Memorial, para. 716.
[586] Resp. Counter-Memorial, para. 706.
[587] Resp. Counter-Memorial, para. 719.
[588] Resp. Counter-Memorial, para. 723.

399. The Respondent submits that its aim was to manage the resource in an optimal manner consistent with its environmental and economic obligations and goals, set out in the *Strategy for the further development of snow crab management*: "*Snow crabs are managed with the aim of achieving the highest possible long-term, sustainable financial return*".[589] The possibility of third-country access to the stocks was expressly envisaged.[590] The Respondent sought a *quid pro quo* from the EU for such access, such as fishing quota, but the EU has made no such offer. According to the Respondent, not providing access to EU-flagged vessels does not violate any of Norway's international obligations, including the BIT.[591]

400. As to the Claimants' allegation that the Respondent "*smeared*" North Star's reputation by supplying forged documents to the media via its embassy in Indonesia, the Respondent denies any wrongdoing.[592] The Norwegian newspaper *Dagbladet* ran several articles on the crab fishing in Norwegian waters and beyond, including on working conditions for the ships' crew, with particular focus on the loss at sea of a Ukrainian crew member of the *Valka*, owned by the Latvian company Baltjura-serviss.[593] *Dagbladet* presented *inter alia* a copy of an employment contract which had been submitted to the Norwegian Embassy to Indonesia in order to obtain a visa. The document identified "*SEA & COAST AS*" as "*Operator/Ship manager*" and "*M/V SALDUS*" as the name of the ship to serve on. It sets out a monthly wage of USD 450, 20 packs of cigarettes per month, and 18 hours working day. Mr Pildegovics commented that the contract was forged.[594]

401. The Respondent submits that the Norwegian embassy in Indonesia received these documents attached to a visa application and was obliged under Norway's Freedom of

[589] Resp. Rejoinder, para. 532, citing "Strategy for the further development of snow crab management", 19 September 2016 (**C-0209**), Sec. 4.1.

[590] Resp. Rejoinder, para. 535.

[591] Resp. Rejoinder, para. 536.

[592] Resp. Counter-Memorial, paras. 726-727.

[593] Resp. Counter-Memorial, paras. 760-761.

[594] Resp. Counter-Memorial, para. 762, referring to, *inter alia*, "Secret slave contracts", *Dagbladet*, 17 December 2018 (**R-0138**).

Information Act to disclose them.[595] The Respondent argues that the Claimants do not allege that the Respondent itself is responsible for the alleged forgeries.[596]

(ii) The Respondent did not act in bad faith

402. The Respondent submits it is unclear if the Claimants' allegation of bad faith is distinct from the claim of arbitrary conduct. In any event, the Respondent submits that bad faith cannot be established merely because a State chooses one of several policy alternatives without egregious intent.[597] According to the Respondent, the Claimants rely on the same facts in respect of bad faith as they do with respect to their claim of arbitrary conduct. As nothing in the facts relied on by the Claimants demonstrates any bad faith, the Respondent considers these need not be addressed further.[598]

(iii) The Respondent did not act in breach of legitimate expectations

403. The Respondent submits that it did not breach any specific or general legitimate expectations.[599] It argues that its conduct did not give rise to any legitimate expectations on the part of the Claimants and that the Claimants have failed to provide evidence of their alleged reliance on any such expectations.[600]

404. As to the email correspondence dating from May and June 2013 between Mr Ankipov of Ishavsbruket (later Seagourmet) and the Norwegian Directorate of Fisheries, the Respondent argues that, first, neither of these emails are addressed to any of the Claimants.[601] Second, in response to the May 2013 question by Mr Ankipov about the ability of foreign vessels to harvest snow crab, the Norwegian Directorate of Fisheries responded: "*Russian fishing vessels cannot catch snow crab in the NØS / Svalbard zone* […] *The same applies to other foreign vessels*".[602] In response to the question by

[595] Resp. Counter-Memorial, para. 727.
[596] Resp. Counter-Memorial, para. 764.
[597] Resp. Counter-Memorial, para. 729.
[598] Resp. Counter-Memorial, para. 730.
[599] Resp. Counter-Memorial, para. 731.
[600] Resp. Counter-Memorial, Sec. 6.5.5.
[601] Resp. Counter-Memorial, para. 736.
[602] Resp. Counter-Memorial, para. 736.1.

Mr Ankipov, which made no mention of foreign fishing vessels, the Norwegian Directorate of Fisheries' response concerned the regime applicable to Norwegian vessels, as evidenced by the regulations attached to that email.[603]

405. Therefore, the Respondent rejects that it had made any representation that the registration of the Claimants' fishing vessels would be "*a mere formality*". The email at issue mentioned only that "[a]*s stated in §2* [of the regulation] *vessels that are to fish in waters outside any state's fisheries jurisdiction must be registered through notification to the Directorate of Fisheries*" and that "[t]*he processing of registration notifications will normally take 2-3 days*". According to the Respondent, this was not a statement that the Claimants' vessels were able to be registered under this regulation since the referenced regulation was not applicable to foreign vessels, such as those of the Claimants, and still less meant that was only a formality.[604]

406. As to the landing of snow crab that allegedly amounted to the Respondent's consent to the harvesting of snow crab on the Norwegian continental shelf, the Respondent relies on the same arguments as set out above. In essence, the Respondent submits that the Claimants conflate, on the one hand, an authorization to *land* snow crab harvested anywhere (*e.g.* on the Russian continental shelf within the Loop Hole) with, on the other hand, an authorization to *harvest* snow crab on the Norwegian continental shelf.[605]

407. The February 2014 response of the Norwegian Food Safety Authority to the question whether EU-registered ships are free to deliver snow crab receptions, was that EU-registered fishing boats could "*deliver*" crab freely to Norway. The Respondent asserts that no question was asked about the lawfulness of the *harvesting* of snow crab on the Norwegian continental shelf and this was thus not addressed in the response.[606]

408. The July 2014 response of the Norwegian Directorate of Fisheries to the question from Mr Ankipov about the "process regarding the documents to be sent to the Directorate of

[603] Resp. Counter-Memorial, para. 736.2.
[604] Resp. Counter-Memorial, para. 736.3.
[605] Resp. Counter-Memorial, para. 738.
[606] Resp. Counter-Memorial, para. 738.1.

Fisheries" where "a fishing vessel under the EU flag will land live snow crabs at approved Norwegian reception stations" was that:

> *1. In principle, EU vessels can land fish, including snow crab to Norway on an equal footing with Norwegian fishing vessels* […].
>
> *2. In principle, no special documentation shall be submitted to the fisheries authorities when the crab is to be landed alive at a Norwegian reception centre, and the crab has been caught outside the Norwegian Economic Zone.*[607]

409. The Respondent argues that this could not possibly confirm the Claimants' alleged understanding that North Star could legally rely on an EU-based fishing company for its supplies of snow crabs provided that the crabs were caught outside the Norwegian Economic Zone. According to the Respondent, the Directorate of Fisheries did not—and Mr Ankipov did not ask it to—represent that any harvesting activity outside the Norwegian Economic Zone would be lawful.[608] In sum, the Respondent denies that the above-mentioned exchanges in any way verified the legality of North Star's harvesting or could have been the basis for any legitimate expectations.[609]

410. The Respondent claims that none of the Claimants' further alleged representations "*throughout 2015*", could have been the basis for any legitimate expectations. As a preliminary argument, the Respondent notes that several of the Claimants' investments, including the four vessels, had already been acquired at that time. Since a touchstone for legitimate expectations is the reliance thereon by an investor in the making of the investment, any representations post-dating the making of the investment cannot have been adversely relied upon.[610]

411. Reviewing each representation alleged by the Claimants, the Respondent submits:

- On 10 June 2015, the Mayor of Båtsfjord attended and cut the ribbon at the launch of the Seagourmet factory: the fact that the Mayor supported the opening of the

[607] Resp. Counter-Memorial, paras. 738.2-738.3 [emphasis added by the Respondent].
[608] Resp. Counter-Memorial, para. 738.4.
[609] Resp. Counter-Memorial, para. 739.
[610] Resp. Counter-Memorial, para. 740.

Seagourmet factory, a factory not owned by the Claimants, which processed already landed crab, cannot have been a representation to the Claimants about the legality of harvesting snow crab on the Norwegian continental shelf.[611]

- Visits by members of the Norwegian Parliament and Norwegian officials to Båtsfjord in September and October 2015: a general visit to several businesses in Båtsfjord and the "*blessings and best wishes of success*" in support of the Seagourmet factory by Norwegian officials cannot be equated with a representation regarding the legality of harvesting snow crab on Norway's continental shelf.[612]

- Visit by Norway's Minister of Fisheries, Ms Elisabeth Aspaker, to the Seagourmet factory on 8 September 2015 and that she "*expressed no reservations*" about the fact that Latvian-flagged vessels were responsible for the catches: the Claimants do not allege that they told Minister Aspaker that any of their harvesting was taking place in the area of the Loop Hole that comprised the Norwegian continental shelf. Minister Aspaker's silence can thus not reasonably be any ground for legitimate expectations.[613]

- On 23 October 2015, a delegation from the Ministry of Trade, Industry and Fisheries visited Seagourmet's factory: this was not a visit specifically to Seagourmet but a more general trip to Båtsfjord.[614] The Claimants allege that the delegation was "*informed of Seagourmet's dependence on North Star's deliveries of snow crabs caught in the Loop Hole*". However, the Respondent emphasizes that there is no evidence that the delegation was told that any of the harvesting took place on the Norwegian continental shelf in the Loop Hole. Moreover, no specific representation by the delegation is relied on and the Claimants merely allege that it "*appeared enthusiastic about the project and gave their encouragements*", which does not suffice for any legitimate expectations.[615]

[611] Resp. Counter-Memorial, para. 742.
[612] Resp. Counter-Memorial, para. 743.1.
[613] Resp. Counter-Memorial, para. 743.2.
[614] Resp. Counter-Memorial, para. 743.3.
[615] Resp. Counter-Memorial, para. 743.3.

- The approval given by Minister Aspaker of substantial investments for the refurbishment of Båtsfjord port: this was a general investment that cannot sensibly be isolated as a representation vis-à-vis the Claimants regarding anything, let alone on the legality of foreign vessels harvesting snow crab on the Norwegian continental shelf.[616]

412. The Respondent further submits that, even if there had been any legitimate expectations, *quod non*, the Claimants have also failed to establish that they relied on any such alleged expectations in the making of their investment.[617]

413. In addition to the absence of any specific legitimate expectations, the Respondent argues that the equitable and reasonable treatment in the BIT does not imply the general stability of the Norwegian regime concerning the harvesting of natural resources on its continental shelf.[618] Absent a specific undertaking on the part of the host State to stabilize or freeze its regulatory framework, the Claimants cannot make out a claim for a general legitimate expectation about Norway's regulatory environment. The Respondent alleges that the Claimants have failed to identify such a specific undertaking and can therefore not have held any legitimate general expectation of stability of the regulatory framework.[619]

414. In any event, the Respondent submits that nothing it did would have breached any legitimate expectations. The Respondent "*at no point changed its position on the designation of snow crab as a sedentary species (which position has been consistent for decades)*", nor did it change its policy on enforcing its regulations.[620]

[616] Resp. Counter-Memorial, para. 743.4.
[617] Resp. Counter-Memorial, para. 744.
[618] Resp. Counter-Memorial, para. 746.
[619] Resp. Counter-Memorial, paras. 747-748.
[620] Resp. Counter-Memorial, para. 749.

(iv) The Respondent did not violate standards of transparency and consistency

415. The Respondent argues that the accepted legal standard regarding an alleged lack of transparency in an administrative process under the FET standard is whether there was "*a complete lack of transparency and candour*".[621]

416. The factual basis of the Claimants' allegations of "*opacity and inconsistency*" by the Respondent overlaps with that relied on for the Claimants' other allege breaches of the equitable and reasonable treatment standard in the BIT.[622]

417. In addition to the facts already mentioned, the Claimants allege that the Respondent's setting of snow crab quotas was "*opaque and inconsistent*".[623] In response, the Respondent contends that it had been advised by the Norwegian Institute of Marine Research ("**IMR**"), one of the foremost research institutes in the world and arguably the best research institute for marine research in the marine areas in question, which undertakes targeted studies of the snow crab population on the Norwegian continental shelf in the Barents Sea.[624] The Respondent's annual quota have been set within the IMR's quota advice, which is publicly available on its website.[625] The fact that the Respondent's quota do not correspond with the Claimants' desired volumes or the assumptions presented by their expert, Dr Brooks Kaiser, is no example of opaque or inconsistent conduct.[626]

418. The Respondent considers the Claimants' allegation that Norway's police and public prosecutor, Mr Morten Daae, had intentionally orchestrated certain measures to smear the Claimants to be "*a travesty of the true position*".[627] Based *inter alia* on a notice of concern from the Norwegian Embassy in Jakarta referring to working conditions for Indonesian crew members of vessels in the snow crab industry, as set out in their employment contracts, the police started gathering information about companies in the snow crab

[621] Resp. Counter-Memorial, para. 751.
[622] Resp. Counter-Memorial, para. 752.
[623] Resp. Counter-Memorial, para. 756.
[624] Resp. Counter-Memorial, paras. 756.1-756.2.
[625] Resp. Counter-Memorial, para. 756.3.
[626] Resp. Counter-Memorial, para. 757.
[627] Resp. Counter-Memorial, para. 758.

business due to the possible serious violations of Norwegian law, including human trafficking. Further investigation was abandoned when the Indonesian crew members left and when crab harvesting ceased following the Russian ban on harvesting snow crab on the Russian continental shelf.[628]

(v) The Respondent did not deny the Claimants justice

419. The Respondent rejects any allegation of a denial of justice by its Supreme Court, whether on the basis of its alleged failure to decide on a material aspect of the claim and deferring to a civil suit, or whether on the basis of alleged "*subservience to executive pressure*" by the appointment of a government lawyer as deputy prosecutor.[629]

420. As to the Supreme Court's case management decision, the Respondent argues that the decision was not about avoiding considerations of issues related to the Svalbard Treaty; rather, the Supreme Court determined that it would first consider whether harvesting snow crab without a Norwegian licence was a punishable offence under Norwegian law irrespective of the geographical scope of the Svalbard Treaty. If the answer was positive, as it was in this case, there was no need to consider the geographical scope of the provisions of the Svalbard Treaty.[630] Contrary to what the Claimants allege, there was no *volte face* by the Supreme Court when it did touch upon aspects of the Svalbard Treaty in its ruling. The Supreme Court's case management decision was that it would reserve solely the question of the geographical scope of the Svalbard Treaty to a later phase and did not exclude dealing with other aspects of the Svalbard Treaty if otherwise pertinent.[631] According to the Respondent, not dealing with every argument presented by the parties to a case does not amount to a refusal to exercise its function, let alone to a denial of justice.[632]

421. As to the Supreme Court's ruling that the appropriate forum to challenge the validity of the snow crab regulations was a civil action, no delay was caused.[633] The civil action was

[628] Resp. Counter-Memorial, para. 758.
[629] Resp. Counter-Memorial, para. 773.
[630] Resp. Counter-Memorial, para. 779.
[631] Resp. Counter-Memorial, para. 780.
[632] Resp. Counter-Memorial, para. 784.
[633] Resp. Counter-Memorial, para. 785.

eventually only brought by the Claimants on 19 October 2020 despite having had the opportunity to commence it earlier, including from 25 May 2018, when the Directorate of Fisheries denied North Star's application for a dispensation to harvest snow crab on the Norwegian continental shelf.[634] Moreover, the Respondent submits that Norwegian law allows private parties to challenge the validity of administrative decisions immediately by means of civil proceedings, even first instance decisions.[635] However, the Claimants had not done so.[636]

422. On the Claimants' second allegation of a denial of justice, the appointment of a government lawyer as deputy prosecutor, Mr Tolle Stabell, the Respondent submits the impartiality of the deputy prosecutor had been considered at length by the Supreme Court. After the Supreme Court had held its second preparatory meeting, the Director General of Public Prosecution decided to ask Mr Stabell to assist the main prosecutor during the Grand Chamber hearing.[637] The defendants in the case brought an application to the Supreme Court to disqualify him. The Supreme Court dismissed the application in a 39-paragraph judgment assessing Mr Stabell's impartiality and independence.[638] In any event, Mr. Stabell, acting as prosecutor before the Supreme Court, was not under the instruction of the Office of the Prime Minister but under the sole instruction of the Prosecutor General.[639]

423. In conclusion, the Respondent emphasizes the high threshold necessary for a breach of natural justice. A denial of justice requires "*a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice*" and refers to "*an act which shocks, or at least surprises a sense of judicial propriety*".[640] According to the Respondent, the Claimants have "*manifestly failed*" to "*go*

[634] Resp. Counter-Memorial, para. 785.

[635] Resp. Rejoinder, para. 547.

[636] Resp. Rejoinder, para. 548.

[637] Resp. Counter-Memorial, para. 788.

[638] Resp. Counter-Memorial, para. 789.

[639] Resp. Rejoinder, para. 552.

[640] Resp. Counter-Memorial, para. 790, citing *Vannessa Ventures Ltd. V. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013 (**RL-0130**), para. 227; *Waste Management, Inc. v. United Mexican States*, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004 (**CL-029**), para. 98; *ELSI* (**CL-0288**), para. 128.

beyond a mere misapplication of domestic law and [to] *show that there was a failure of the national system as a whole*". Any errors in judicial decision-making must rise to the level that they were decisions that "*no competent judge would reasonably have made*".[641] The alleged defects do not in any manner reach this threshold.[642]

(8) The Respondent's Alleged Breach of the Obligation to Provide Most Favoured Nation Treatment (Article IV of the BIT)

a. The Claimants' Position

424. The Claimants contend that the MFN obligation in Article IV of the BIT requires that the Respondent provides the Claimants the best treatment (in law or fact) the Respondent has provided to any national of a third State.[643] Such treatment can be based on "*a treaty, another agreement or a unilateral, legislative, or other act, or mere practice*".[644] According to the Claimants, the MFN obligation grants a claimant the right to benefit from any substantive guarantees granted to third-country investors under other investment treaties, such as, in the present case, the Norway-Russian Federation BIT.[645]

425. The Claimants allege that the Respondent has breached Article IV of the BIT by granting more favourable treatment to Russian snow crab fishing vessels and operators.[646] According to the Claimants, the East Finnmark Court of Appeal in its judgment concerning North Star admitted that five fishing authorizations to harvest snow crab in Norwegian waters had been granted to Russian vessels.[647] According to the Claimants, by granting such authorizations to Russian vessels while rejecting North Star's applications for the same, the Respondent breached Article IV of the BIT.[648]

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[641] Resp. Counter-Memorial, para. 791, citing, *inter alia*, *Agility Public Warehousing Company K.S.C. v. Republic of Iraq*, ICSID Case No. ARB/17/7, Award, 22 February 2021 (**RL-0131**), para. 212.

[642] Resp. Counter-Memorial, para. 792.

[643] Cl. Memorial, Sec. VIII.C.a.

[644] Cl. Memorial, para. 787, citing International Law Commission*, Draft Articles on most-favoured-nation clauses with commentaries* (1978) (**CL-0314**), Art. 8, para. 1.

[645] Cl. Memorial, paras. 789-795.

[646] Cl. Memorial, paras. 796-798.

[647] Cl. Memorial, para. 797.

[648] Cl. Memorial, para. 798.

426. Furthermore, the Claimants allege that the Respondent has breached Article IV of the BIT by having failed to grant the Claimants national treatment, a standard which was granted to Russian investors pursuant to the Norway-Russian Federation BIT. Article 3 of the Norway-Russian Federation BIT provides:

> *Each Contracting Party will accord in its territory for the investments made by investors of the other Contracting Party fair and equitable treatment.*
>
> *The treatment referred to in paragraph 1 of this Article shall as a minimum not be less favourable than that which is granted with regard to investments by investors of any third state.*
>
> *Subject to paragraphs 1 and 2 of this Article each Contracting Party shall, unless other treatment is required by its legislation, accord in its territory to investments made by investors of the other Contracting Party treatment no less favourable than that which it accords to investments by its own investors.*[649]

427. The Claimants claim that by allowing Norwegian vessels but not the Claimants to harvest snow crab in the relevant waters, the Respondent has violated the national treatment obligation it has given to the Claimants under Article IV of the Latvia-Norway BIT.[650]

428. The Claimants further assert that the Respondent has also the obligation to ensure that it grants Latvian investors and their investments the better treatment as between the Latvia-Norway BIT and other international treaties in force between Latvia and Norway.[651]

429. According to the Claimants, the application of Article IV read together with Article 12 of the Norway-Russian Federation BIT means that in the event the Tribunal finds no independent breach of the BIT, it "*must examine other relevant international obligations in force between Norway and Latvia to determine if such obligations may have been breached* […] *under UNCLOS, the customary international law principle (or general principle) of acquired rights, as well as the Svalbard Treaty*" to determine if such

[649] Cl. Memorial, paras. 799-800, citing Agreement between the Government of the Kingdom of Norway and the Government of the Russian Federation on Promotion and Mutual Protection of Investments, 4 October 1995 ("**Norway-Russian Federation BIT**") (**CL-0022**), Art. 3 [emphasis added by the Claimants].

[650] Cl. Memorial, paras. 803-804.

[651] Cl. Memorial, para. 805.

obligations may have been breached. If the Tribunal finds a breach of such an obligation "*causing Claimants a loss identical to the loss caused by the breach of the BIT's provisions*" this "*requires full reparation of Claimants' loss*".[652]

430. The Claimants submit that, contrary to the Respondent's argument, there can be no exception because the treatment concerned a scarce resource or is the subject of another bilateral agreement.[653] Neither the ordinary meaning of the text of Article IV, nor the essential object of an MFN clause, *i.e.* to prevent discrimination, provide a basis for such an exception.[654] Further, the Claimants assert that unlike certain other MFN provisions, Article IV does not include an "in like circumstances" qualifier so there is no need to establish that the investors or investments at issue were in like circumstances.[655] The only relevant question is whether the treatment received by the Claimants was less favourable than that received by the third-state investors.

431. The Claimants reject the Respondent's argument that the Russian vessels fishing for snow crab in comparison with whom the Claimants allege discrimination were not "*investments*" made in the territory of Norway by Russian investors.[656] According to the Claimants, there is ample evidence that Russian-flagged vessels, owned by Russian companies, fished for snow crabs in the area of the Loop Hole suprajacent to Norway's continental shelf in 2016.[657] In addition, the Claimants argue that the 1975 Norwegian-Russian Fisheries Commission is neither a customs union nor an economic union, making the exception for such unions under Article IV(2) inapplicable.[658]

432. In conclusion, the Claimants argue that the Tribunal should find that Norway has breached its obligation to the Claimants to provide MFN treatment by allowing Russian vessels to

[652] Cl. Memorial, para. 808.
[653] Cl. Reply, paras. 879-881, 886.
[654] Cl. Reply, para. 880.
[655] Cl. Reply, para. 892.
[656] Cl. Reply, para. 894.
[657] Cl. Reply, para. 894.
[658] Cl. Reply, para. 896-897.

fish for snow crab in the Loop Hole and offshore of Svalbard, while preventing the Claimants from doing so.[659]

b. The Respondent's Position

433. The Respondent submits that the Claimants' reading of the MFN standard in Article IV of the BIT is incorrect. According to the Respondent, Article IV of the BIT protects only "*investments*" and not "*investors*".[660] The investment must exist before the MFN obligation can be engaged, "*potential investments*" are not covered.[661]

434. In response to the allegation that that five Russian vessels were authorized to take crab from the Norwegian continental shelf while the Claimants' vessels were not, the Respondent claims that the vessels were not investments in the territory of Norway as required by the BIT and were not made in accordance with Norwegian law.[662] The Respondent further argues that there were no applications by North Star for Norwegian licences until 17 May 2018, well after the alleged date of breach.[663] In addition, the Respondent states that the Claimants' presentation of the issue demonstrates that their real complaint is not that their investments were treated differently but that their vessels and licences were never admitted into the territory of Norway as investments, which does not concern the MFN clause.[664]

435. The Respondent also rejects the Claimants' interpretation of the MFN clause in Article IV as concerning treatment given to "*any national of a third State*". Instead, "*treatment no less favourable than that accorded to investments made by investors of any third State*" means that the Claimants must show (1) that the Respondent has accorded actual treatment; (2) to

[659] Cl. Reply, para. 900.
[660] Resp. Counter-Memorial, para. 798.
[661] Resp. Counter-Memorial, para. 799.
[662] Resp. Counter-Memorial, para. 800.
[663] Resp. Counter-Memorial, para. 801.
[664] Resp. Counter-Memorial, para. 802.

an investment made by an investor of a third State.[665] The Claimants must thus establish that the comparative Russian vessels were in fact investments in the territory of Norway.[666]

436. According to the Respondent, the MFN standard does not mean that foreign investors have to be treated equally irrespective of their concrete activity and different treatment is justified vis-à-vis investors from different foreign countries if they are in different objective situations.[667] In circumstances where access is granted to a limited resource, it cannot be maintained that equal access must be given to all investors and/or investments that are covered by an MFN clause in a BIT.[668]

437. According to the Respondent, the legal rights and duties under UNCLOS presuppose that the coastal State can exercise a controlled discretion in allocating fishing rights and may allocate rights to some States without allocating the same rights to other States. That premise is "*obstructed – perhaps defeated*" if every fishing license granted to one State automatically generates rights to the same treatment for all other States which have concluded a BIT containing an MFN provision with the coastal State concerned.[669] The Respondent alleges this is a straightforward application of basic principles of treaty interpretation to the MFN clause and of the need to avoid manifestly absurd interpretations. The MFN principle can operate only where the treatment being compared relates to "*persons or things in the same relationship*" with the States concerned, like must be compared with like.[670]

438. The Respondent submits that the Claimants, or more specifically their licences, were not in the same position as the licences granted to the Russian vessels. The Russian Federation had a relevant bilateral fishing agreement with Norway while Latvia had not. The EU (on behalf of Latvia) had declined to negotiate an exchange of catch quotas with Norway, and

[665] Resp. Counter-Memorial, para. 803.

[666] Resp. Counter-Memorial, para. 805.

[667] Resp. Counter-Memorial, paras. 806-807, citing G. Fitzmaurice, *The Law and Procedure of the International Court of Justice: Volume One* (1986) (**RL-0030**), p. 329; UNCTAD, *Most-Favoured-Nation Treatment* (1999) (**RL-0134**), p. 7.

[668] Resp. Counter-Memorial, para. 808.

[669] Resp. Counter-Memorial, para. 810.

[670] Resp. Counter-Memorial, para. 811.

EU States and investors could not claim the very same rights of access to Norwegian continental shelf resources as States that had negotiated such agreements. Comparing investments by such different classes of investors is not comparing like with like.[671]

439. Further, the Respondent claims access granted to Russian investments under the aegis of the 1975 Joint Norwegian-Russian Fisheries Commission falls outside the scope of the MFN clause since it was granted on the basis of a "*similar international agreement*" to a customs or economic union, which is carved out from the scope of the MFN clause in Article IV.[672]

440. Based on the same arguments made with regard to the MFN clause above, the Respondent further objects to the Claimants' use of the MFN clause to incorporate the national treatment standard found in the Norway-Russian Federation BIT into the BIT applicable in this arbitration.[673] In addition, the Respondent remarks that the national treatment standard in Article 3 of the Norway-Russian Federation BIT that is subject "*other treatment* [being] *required by its legislation*", which in any event prevents the Claimants' reliance on this clause.[674]

441. The Respondent also refutes the Claimants' further argument that they are entitled to any better treatment set out in other international agreements to which both Norway and Latvia are parties, based on an MFN provision in Article 12 of the Norway-Russian Federation BIT.[675] First, the Respondent argues that the Claimants have provided no authority to support their "*double-MFN*" argument, *i.e.* to use an MFN clause in the BIT to invoke a broader MFN clause in another treaty, which in turn would allow the Claimants to rely on more favourable provisions in a third treaty.[676] According to the Respondent, the Claimants cannot rely on the MFN clause to invoke either Article 300 of UNCLOS or any provision

[671] Resp. Counter-Memorial, para. 815.

[672] Resp. Counter-Memorial, para. 816.

[673] Resp. Counter-Memorial, para. 819.

[674] Resp. Counter-Memorial, para. 823.

[675] Resp. Counter-Memorial, Sec. 6.6.5, para. 825, citing Norway-Russian Federation BIT (**CL-0022**): "*If on the basis of the legislation of a Contracting Party or on the basis of an international agreement binding upon both Contracting Parties, investments of an investor of the other Contracting Party is* [sic.] *accorded treatment more favourable than that which is provided for in this Agreement, the more favourable treatment shall apply*".

[676] Resp. Counter-Memorial, Sec. 6.6.5.1.

of the Svalbard Treaty. Even if the Claimants would be able to do so, the Respondent submits that it violated neither UNCLOS nor the Svalbard Treaty.[677]

(9) The Respondent's Alleged Breach of the Obligation to Accept Investments in Accordance with its Laws (Article III of the BIT)

a. The Claimants' Position

442. The Claimants submit that the by failing to allow the Claimants to exercise their rights under Svalbard licences issued by Latvia, the Respondent violated the obligation to "accept such investments in accordance with its laws and regulations" in Article III of the BIT.[678]

443. According to the Claimants, if Norway fails to "*accept*" a Latvian investment in Norway in accordance with Norwegian law, this is not only a violation of Norwegian law but also a violation of Article III of the BIT.[679] Since the Respondent is alleged to have failed to accept the Claimants' Svalbard licences, the Claimants submit the Respondent violated Article III of the BIT.[680] In particular, the Claimants argue that the Respondent was required, pursuant to Article 6 of the Norwegian Marine Resources Act, the Svalbard Treaty, and EU Regulations, to give effect to those licences.[681]

b. The Respondent's Position

444. The Respondent submits that the obligation in Article III of the BIT to "*accept* […] *investments in accordance with its laws and regulations*" cannot mean, as the Claimants argue, that Norway must accept and give legal effect to an alleged Latvian authorization to harvest snow crab on Norway's continental shelf.[682] The Claimants' assertion that Norway should have recognized that *Latvia* could authorize Latvian vessels to catch sedentary species on the *Norwegian* continental shelf is "*obviously and startlingly incompatible*"

[677] Resp. Counter-Memorial, Secs. 6.6.5.2-6.6.5.3.
[678] Cl. Memorial, Sec. VIII.D.
[679] Cl. Memorial, para. 811.
[680] Cl. Memorial, para. 812; Cl. Reply, Sec. VI.A.d.
[681] Cl. Reply, para. 819.
[682] Resp. Counter-Memorial, Sec. 6.7.

with Article 77 of UNCLOS regarding the rights of the coastal State over the continental shelf.[683]

445. Any authorizations by Latvian authorities cannot be equated with authorizations validly issued by the competent Norwegian authorities and cannot constitute an "*investment*" in Norway.[684] According to the Respondent, Article III can be no basis for an obligation on the Respondent to accept and give legal effect to such Latvian licences "*in accordance with its laws and regulations*" on the basis of the Claimants' interpretation of Norwegian law.[685]

B. THE TRIBUNAL'S ANALYSIS

(1) Applicable Law

446. The applicable law is governed by Article 42(1) of the ICSID Convention:

> *The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.*

447. In the present case, it is common ground that there is no agreement of the kind envisaged by the first sentence, so that it is the second sentence of Article 42(1) which is applicable. It is also common ground that the Tribunal must apply the BIT which, as a treaty, must be interpreted and applied in accordance with the international law of treaties. While the VCLT is not in force between Latvia and Norway, the rules and principles of treaty interpretation contained in Articles 31 to 33 are generally regarded as declaratory of customary international law and will therefore be applied as such.

448. Although they maintain that the BIT gives the Tribunal jurisdiction over claims for breach of other rules of international law, the Claimants state that they claim only for breaches of the BIT.[686] Nevertheless, they contend that the Svalbard Treaty, UNCLOS and the NEAFC Convention are "*applicable to the extent that it becomes necessary to consider and*

[683] Resp. Rejoinder, para. 524.

[684] Resp. Counter-Memorial, paras. 851-853.

[685] Resp. Counter-Memorial, para. 851.

[686] Cl. Reply, paras. 421-423.

interpret them for the purpose of ruling on whether or not there has been a breach of the BIT".[687] Norway agrees,[688] but argues that the Claimants in reality go much further and seek to hold Norway responsible for a violation of the BIT if there has been a violation of any of the other treaties. Norway maintains that the Tribunal has no jurisdiction to do that.

449. The Tribunal considers that there is less to this apparent difference than might at first appear. Since the Claimants are claiming only for alleged breaches of the BIT, it is the BIT which the Tribunal must apply. In doing so, it can consider — if it is necessary to do so — the other treaties invoked, as well as other rules of international law. However, whether a provision of one of those treaties is relevant to the determination of whether Norway has breached a provision of the BIT is not a matter on which it is safe to generalise; that question must be considered in the context of the specific facts and allegation raised. In addition, the Tribunal recalls that, in addressing the Respondent's First Objection to jurisdiction and admissibility (see paragraphs 288 to 298, above), it made clear that there were limits on the extent to which it could rule on a matter involving the rights and obligations of other States.

450. It is also common ground that the second sentence of Article 42(1) of the ICSID Convention directs the Tribunal to apply Norwegian law. The Claimants argue, however, that Norwegian law incorporates the Svalbard Treaty, UNCLOS and the NEAFC Convention, because of the terms of Section 6 of the Marine Resources Act, which provides that the Act "*applies subject to any restrictions deriving from international agreements and international law*".[689] Norway disagrees with this interpretation of Section 6.[690]

451. The Tribunal again considers that this is not a matter on which it is useful to try and generalise. The effect of Section 6 will have to be considered in the light of the particular circumstances of each part of the Claimants' claims.

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[687] Cl. Reply, para. 421.

[688] Resp. Rejoinder, para. 57.

[689] Cl. Reply, paras. 452-453, referring to Marine Resources Act, 2008 (**CL-0012**).

[690] Resp. Rejoinder, para. 93.

(2) The Different Parts of the Claimants' Claims

452. The Claimants developed their case almost entirely by reference to North Star and say very little about Sea & Coast. The Tribunal will therefore assess North Star's claims and then briefly turn to Sea & Coast.

453. Although the Claimants do not separate out the claims in this way, in practice there are two distinct parts to those claims: first, the claims relating to the exclusion of North Star from taking snow crab in the Loop Hole (the "**Loop Hole claims**"), and, secondly, the claims relating to Norway subsequently blocking North Star's attempt to take snow crab within 200 miles of Svalbard (the "**Svalbard claims**"). These raise different issues and the Tribunal will therefore address them separately.

(3) The Loop Hole Claims

a. Introduction

454. The Claimants maintain that Norway violated their right to "*equitable and reasonable treatment*" under Article III of the BIT, expropriated their investment without compensation contrary to Article VI of the BIT and failed to accord them treatment no less favourable than that accorded to investments made by investors of another State contrary to Article IV. These claims will be considered in that order.

455. First, however, the Tribunal considers it necessary to examine two matters which cut across the different claims: the status of snow crab as a sedentary species and the effect of the measures taken by the Russian Federation.

b. The Status of Snow Crab as a Sedentary Species

456. The Claimants assert that Norway treated snow crab as non-sedentary until 2015 when it decided that "*actually the snow crab does not swim*"[691] and, together with the Russian Federation, changed tack and designated the snow crab as a sedentary species which therefore fell within the continental shelf jurisdiction. According to the Claimants, Norway took this decision not for scientific reasons but to ensure that it took control of the snow

[691] Transcript, Day 1, p. 23, line 25 (Mr Savoie).

crab stock in the Norwegian sector of the Loop Hole for the benefit of its own fishing industry and to give it a bargaining counter in its dispute with the EU over access to marine resources.

457. Norway, on the other hand, maintains that it is not a matter of "*designation*". The definition of a sedentary species is a matter of law under Article 77(4) of UNCLOS, which provides that sedentary species are "*organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant contact with the seabed or subsoil*". According to Norway, either a species falls within this definition or it does not. If it does, then it is sedentary and no designation as such by a coastal State is required. Norway maintains that it has consistently regarded crabs (of all varieties) as sedentary within this definition and that it is "*blindingly obvious*" that snow crab is a sedentary species.[692]

458. Article 77(4) is a provision taken over verbatim from Article 2 of the 1958 Convention on the Continental Shelf. At the conference which adopted the 1958 Convention, Norway had originally opposed including living creatures such as crustaceans within the resources over which the coastal State would have control by virtue of its sovereign rights over the continental shelf. For the Claimants, that stance shows that Norway had not then considered crab to be sedentary. That argument misunderstands the position which Norway adopted in 1958. Norway, together with several other States, opposed the proposal to include living resources within the coastal State's continental shelf rights. The Norwegian stance was about what should be allocated to the coastal State, not what fell within the definition of a sedentary species. Moreover, Norway withdrew its opposition and ratified first the 1958 Convention and then UNCLOS.

459. The Tribunal agrees with Norway that whether the snow crab is a sedentary species is a matter of law, namely whether it falls within the definition in Article 77(4), and that no designation is required. What happened in 2014–2015 was that, after considerable internal

[692] Resp. Counter-Memorial, para. 474.

discussion and talks with the Russian Federation, Norway concluded that snow crab did come within the definition in Article 77(4).

460. The Tribunal considers that Norway's stance in this proceeding — that it has been completely consistent since 1958 in recognizing the "*blindingly obvious*" fact that crab, including snow crab, are sedentary — is difficult to reconcile with the hesitation which its internal documents reveal during the period 2014 to 2015. It is worth briefly examining the main features of the discussions within the Norwegian Government and between that Government and the Russian Federation.

461. In its responses to inquiries from the Claimants and Mr Levanidov's staff in 2013 and 2014, Norway made no reference to the possibility that it had continental shelf rights in respect of the snow crab in the Norwegian sector of the Loop Hole (although the exchanges between them, which will be reviewed in greater detail below at paragraphs 513 to 523, contain no discussion of whether the snow crab is a sedentary or non-sedentary species). Moreover, the 2014 Regulations addressed the issue of taking snow crab through the frame of exclusive economic zone rights and did not apply to the Norwegian outer continental shelf in the Loop Hole.

462. The initiative in suggesting that the snow crab is sedentary and thus that the stock in the Loop Hole could be managed by Norway and the Russian Federation relying on their continental shelf rights seems to have come from Russia at a meeting of the Joint Norway-Russia Fisheries Commission in October 2014. A Norwegian official attending the meeting commented in an email to a colleague that "*Russia seems to assume at the meeting that the snow crab is a sedentary species that is covered by their shelf jurisdiction so that fishing for snow crab in the Smutthullet will not be regulated by NEAFC*".[693]

463. On 31 October 2014, Ms Elisabeth Gabrielsen, Deputy Director General of the Fisheries and Acquaculture Department of the Norwegian Ministry of Fisheries wrote to

[693] Email from Ms Therese Johansen to Ms Kristina Nygård, 7 October 2014 (**C-0191**). Ms Johansen, in an email sent as the Joint Norway-Russia Fisheries Commission was about to hold its October 2014 meeting, asked "[i]*sn't the snow crab a sedentary species* […] *that is covered by the* [continental] *shelf jurisdiction?*": see Email from Ms Therese Johansen to Ms Kristina Nygård, 22 September 2014 (**C-0192**).

Ms Christine Finbak, Senior Adviser in the Legal Department of the Ministry of Foreign Affairs:

> *At the Commission meeting in October, the Russians referred to the fact that snow crab are a benthic species and that fishing in the Loop Hole is regulated by continental shelf jurisdiction.* […]
>
> *NEAFC's annual meeting is in 2 weeks and we are currently working on a mandate for the negotiations. What are your views on this issue*?[694]

464. The two later held a conversation after which Ms Finbak replied, on 4 November 2014:

> *As mentioned, we have had a preliminary round here. In order to conclude whether snow crab are a sedentary species, it will be necessary to obtain a scientific assessment from the Norwegian Institute of Marine Research.* […]
>
> *With regard to the NEAFC meeting, it will be important to have a flexible mandate which we will not be bound by, because it will probably be difficult to reach a conclusion in the short period of time until the meeting*.[695]

465. The NEAFC meeting took place between 10 and 14 November 2014. The mandate for the Norwegian delegation, issued by the Ministry of Trade, Industry and Fisheries, included the following:

> *Russia signalled during the last meeting of the mixed commission that they considered that the snow crab is a sedentary species, and that in this case it means that it is the continental shelf jurisdiction that applies to the management of the crab. It cannot be ruled out that they will raise this issue at this meeting. The Ministry of Foreign Affairs is in the process of investigating the legal aspects and consequences for the management of snow crab as a potential sedentary species. The Ministry of Foreign Affairs has asked us to "lie low" in this case until the case is better clarified on the Norwegian side. Completely new information from KV also indicates that there is currently no fishing for snow crab on the Norwegian shelf outside NØS (only on the Russian shelf).*
>
> […]

[694] Email from Ms Elisabeth Gabrielsen to Ms Christine Finbak, 31 October 2014 (**R-0097**).

[695] Email from Ms Christine Finbak to Ms Elisabeth Gabrielsen, 4 November 2014 (**R-0097**).

> *The delegation will as far as possible await the situation. Should there be an initiative regarding snow crab that needs to be decided on, the delegation will discuss the matter with the department for a further mandate in this area.*[696]

466. On 4 November 2014, in response to an inquiry from Ms Gabrielsen, which quoted Article 77(4) and asked whether snow crab fell within the definition therein, Mr Jan Sundet (a researcher at the Norwegian Institute of Maritime Research)[697] responded:

> *From the last part of the article, "...* or are unable to move except in constant physical contact with the seabed or the subsoil,*" there is little doubt that the snow crab must be considered an immobile species - in contrast to migratory species. The direct meaning of the term "*sedentary*" in biology is "*fixed*", and it is not. In the* "catchable" *stage, it moves, but is completely dependent on having contact with the seabed to be able to move.*
> *Of course, I am not an expert on the Convention on the Law of the Sea, but the text referred to here is as far as I can see unequivocal. The conclusion is therefore that it must be considered sedentary even if the term itself is not particularly good in the description of the snow crab.*[698]

467. While the Claimants describe this reply, which was sent within an hour of Mr Sundet having received the inquiry, as "*somewhat tentative*",[699] the Tribunal does not see it as such. Mr Sundet points out that the biological concept of "*sedentary*" is something which does not move at all, but he then recognizes that the term has a different meaning in law. While acknowledging that he is not an expert on the law, he states unequivocally that the snow crab, in what Article 77(4) refers to as the "*harvestable stage*", can move only in contact with the seabed and thus falls within the definition of a sedentary species in the Convention.

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[696] Fisheries and Aquaculture Department , Mandate for the 33rd Annual Meeting of NEAFC", 28 October 2014 (**C-0256**), p. 2.

[697] See R. Churchill, J. Sundet and G. Ulfstein, "The Snow Crab as a 'Sedentary Species', in 57 Lov og Rett (2018), p. 510 (**RL-0176**).

[698] Email from Mr Jan Sundet to Mr Harald Loeng, 4 November 2014 (**C-0186**) (responding to an inquiry of the same date from Ms Gabrielsen).

[699] Cl. Reply, para. 60.

468. Mr Sundet produced a more detailed note on 15 January 2015. That note traced the history of snow crab in the Barents Sea and pointed out that the main concentration appeared to be in the Russian continental shelf but that there was a chance that the crab would migrate to the Svalbard Fisheries Protection Zone. He stated:

> *The snow crab eats and lives on the bottom all its life except in the larval phase where the larvae live in the upper water masses up to several months before they settle.*
>
> […]
>
> *After bottoming, the snow crab, like most other crab species, depends on the bottom to be able to move. There are a few species of so-called* "swimming crabs" *that use transformed walking legs to swim, but it is not known that such species have been found in our waters. The beach crab has something similar to* "swimming legs" *but it only lives in the littoral zone and is not of commercial importance in our areas either.*[700]

469. On 19 January 2015, Ms Finbak provided a written opinion to Ms Gabrielsen in which she said that her section of the Legal Department of the Ministry of Foreign Affairs had made a "*preliminary assessment of the issue with a view to communicating a preliminary Norwegian position at the meeting of NEAFC's PECCOE (the Permanent Committee on Control and Enforcement)*".[701] PECCOE had before it a proposal for a recommendation under Article 5 of the NEAFC Convention related to snow crab. The opinion noted that NEAFC had the power to adopt recommendations regarding crustaceans but under Article 6 could do so in relation to resources within the national jurisdiction of a State only if that State requested it to do so. If snow crab were sedentary, then any snow crab in the Loop Hole fell within Article 6.

470. Referring to Mr Sundet's note, Ms Finbak gave as her section's preliminary assessment:

> *Historically, it has not been entirely obvious that the crab, including the snow crab, is considered a sedentary species according to the Convention on the Law of the Sea Article 77 (4). The content of the provision was little discussed during the Conference on the Law of*

[700] J. Sundet, "Note: Status of the Snow Crab in the Barents Sea", 15 January 2015 (**C-0254**), p. 3.

[701] Opinion of Ms Finbak, 19 January 2015 (**C-0249**), p. 1.

the Sea, other than that a proposal from several states (including Norway) during the 1958 conference that crustaceans and swimming species should not be included was the subject of discussion and was finally voted down in plenum. There have been several conflicts related to the interpretation of the provision (mainly in the 60s), i.a. related to the king crab between resp. Japan and the United States and the Soviet Union and the United States. The United States and the Soviet Union reached an agreement in 1964 which meant that the king crab was considered a "natural resource of the continental shelf", but the Soviet Union was allowed to fish for king crab on more specific terms. Although it seems relatively open for a period whether the crab is to be regarded as a sedentary species, recent literature seems quite unambiguous by assuming that the crab is to be regarded as a sedentary species that follows shelf jurisdiction.

It is the section's preliminary assessment that there are good reasons for considering the snow crab as a sedentary species which is thus subject to shelf jurisdiction. This means that the snow crab in this case is regulated by the relevant shelf state (s). We have understood that the snow crab at the moment is mainly located on the Russian shelf. However, we have been informed by IMR that it will be able to move over to the Norwegian shelf.

<u>Recommendation</u>:
The Ministry of Foreign Affairs, Section for Treaty Law, Environmental Law and the Law of the Sea recommends that during the PECCOE meeting the Norwegian side refers to Article 77 (4) of the Convention on the Law of the Sea and that it may be considered that the snow crab is a sedentary species covered by shelf jurisdiction. This means that it is not natural for the species to be included in NEAFC's Annex I. However, it will be useful to clarify with other states how they assess this issue, in particular Russia's assessment will be important in this context. We ask to be informed about the discussions during the PECCOE meeting, so that we on the Norwegian side can prepare a clearer Norwegian position ahead of NEAFC's annual meeting.[702]

471. In a report on the PECCOE meeting, Mr Terje Løbach of the Directorate of Fisheries stated:

The EU had proposed to define prawns and snow crab as resources managed by NEAFC, including the obligations that follow from this regarding reporting etc. Both Russia and Norway said that they are still considering the status of snow crab and that it is very likely that

[702] Opinion of Ms Finbak, 19 January 2015 (**C-0249**), p. 2.

it is to be defined as a sedentary species, and therefore will be under the jurisdiction of the coastal state in accordance with Article 77(4) of the Convention on the Law of the Sea. Russia put forward the same argument regarding prawns (!). PECCOE will therefore not submit proposals to the Commission regarding either prawns or snow crab.[703]

472. In June 2015, an internal memorandum of the Norwegian Government, repeating much of Ms Finbak's preliminary assessment of January 2015, concluded:

> *The EU has raised the issue of regulation of snow crab in NEAFC, both at the Commission meeting in 2014 and in PECCOE, but so far without success. Russia has stated in the NEAFC that they consider the snow crab as a sedentary species that must be managed according to the shelf jurisdiction in accordance with the Convention on the Law of the Sea. From the Norwegian side, it was communicated in PECCO in January that we currently have the case under consideration, but that there is much to suggest that the snow crab is a sedentary species according to UN Convention on the Law of the Sea, Article 77 (4).*
>
> *On 1 April, the EU sent a letter to NEAFC and all delegation leaders informing them that an EU vessel intends to conduct experimental fishing for snow crab and red king crab in parts of the Smutthullet in accordance with Recommendation 19:2015 (recommendation related to the protection of vulnerable marine ecosystems in NEAFC's regulatory area). The relevant area is the Russian continental shelf, cf. the Demarcation Agreement of 2010. If the snow crab and red king crab are considered sedentary species, they will be subject to shelf jurisdiction and it will be up to the coastal state to decide on any experimental fishing in the relevant area, cf. Convention on the Law of the Sea, Article 77 (2). Given that the relevant area where experimental fishing is to be carried out is subject to Russian shelf jurisdiction, it is Russia that has the clearest interest in pointing this out to NEAFC. At the same time, the snow crab will eventually also be able to be on the Norwegian shelf and it will therefore be in Norway's interest to point out to NEAFC that NEAFC here cannot allow experimental fishing without the coastal state's consent.*
>
> […]
>
> *It is the Section's assessment that there are good reasons for considering the snow crab as a sedentary species which is thus*

[703] Email from Mr Terje Løbach to Ms Ann-Kristin Westberg, 28 January 2015 (**R-0016**)

> *subject to shelf jurisdiction. This means that the snow crab in this relevant case is regulated by the relevant shelf state and that utilization requires explicit permission from the coastal state, cf. Article 77 (2)* [of UNCLOS].[704]

473. Shortly afterwards, on 17 July 2015, Norway and the Russian Federation, meeting in Malta (see paragraph 86, above), agreed that they "*will proceed from the fact that harvesting of sedentary species, including snow crab, in the NEAFC Regulatory Area in the Barents Sea shall not be carried out without the express assent of the coastal State*".[705]

474. On 3 August 2015, Mr Arne Røksund of the Norwegian Ministry of Trade, Industry and Fisheries wrote to the Federal Russian Fisheries Agency to follow up on the Agreed Minutes of the Malta meeting. He stated:

> *I refer to the agreed minutes from the meeting between you and the Minister of Fisheries Elisabeth Aspaker on 17 July in Malta, and the agreement between us that sedentary species in the Barents Sea, including snow crab, are subject Norwegian and Russian management competence in accordance with Article 77 of the Convention on the Law of the Sea.*
>
> *As there is currently activity from vessels from other countries in the area, I consider it expedient that Norway and Russia will continue to act in a coordinated manner in the further work to gain acceptance for this. I would also consider it expedient if, at the forthcoming session of the joint Norwegian Russian Fisheries Commission, we discuss how the snow crab is to be managed in the future.*
>
> *I also suggest that in the period leading up to a management regime, we allow Norwegian and Russian vessels to continue the activities they currently have in Smutthullet so that we avoid disturbing the economic activities unnecessarily*.[706]

475. The EU reacted to this agreement by a letter to all EU Member States from the Directorate-General for Maritime Affairs and Fisheries of the European Commission ("**DG Mare**") on 5 August 2015. The letter stated:

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[704] Memorandum, "Snow Crab", 6 June 2015 (**C-0193**).

[705] Malta Declaration (**C-0106**).

[706] Letter from Mr Arne Røksund, 2 August 2015 (**C-0196**).

The Commission writes to refer to the discussions in the Fishery Attaches meeting of 30 July last in relation to snow crab fisheries in the so-called "Loop Hole" of the NEAFC Regulatory Area.

Your attention is drawn to the particular features of those waters, namely a water column that falls under the international regime of the high seas as reflected in Part VII of the United Nations Convention on the Law of the Sea (UNCLOS), on the one hand, but, at the same time, waters superjacent to the extended continental shelves of Norway and the Russian Federation, which fall under part VI of UNCLOS, on the other.

With regard to snow crab, it appears that this species is "unable to move except in constant physical contact with the seabed or the subsoil" and it thus falls within the definition of "sedentary species" of Article 77(4) of UNCLOS. The fact that snow crab falls within that definition formed the subject matter of an earlier dispute between Canada and the United States about the prosecution of snow-crab fisheries conducted by United States fishing vessels on the Canadian continental shelf at a location where Canada's continental shelf extended beyond 200 nautical miles in the Northwest Atlantic. At that time, the European Union (then the European Community) considered snow crab to fall within the definition of "sedentary species" and, therefore, did not lodge any protest against Canada.

Indeed whenever the question of whether or not a crab species fell within the definition of "sedentary species" gave rise to an international dispute, e.g. the dispute between Japan and the United States about the latter's classification of Alaskan king crab as "sedentary species", the relevant coastal State has always prevailed in the end.

It follows from this classification of snow crab as "sedentary species" that only the relevant coastal States, i.e. Norway and the Russian Federation, are entitled to exploit (i.e. to harvest) it by virtue of their sovereign rights under the continental shelf regime of UNCLOS and that, as spelled out in Article 77(2) of UNCLOS, no other state is able to do so unless it has obtained the coastal State's explicit consent. Moreover, the coastal State's rights are exclusive in a sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake any such activities without the express consent of the coastal state.

Therefore, without the express consent of the relevant coastal States (namely Norway and the Russian Federation in the present

> *instance), these fisheries are illegal as they would be in contravention of Article 77(2) of UNCLOS.*
>
> *The Commission would underline that the EU, as a Contracting Party to UNCLOS, is under an obligation to respect Article 77(2) of UNCLOS. Similarly, upon its ratification by the Union, UNCLOS forms part of the legal order of the Union pursuant to the provisions of Article 216 of the Treaty on the Functioning of the European Union, such that also the Member States are bound to respect it.*
>
> *Consequently, since both Norway and the Russian Federation have given no such consent, member States are advised that they should rescind any current licences authorising their vessels to fish for snow crab and any other sedentary species such as king crab in the NEAFC Regulatory Area and should not issue any new licences to this effect and, as appropriate, re-call the vessels concerned.*[707]

476. On 30 October 2015, Norway sent a Note Verbale to the European Union explaining that Norway, the Russian Federation and Denmark had voted in the NEAFC against an EU proposal for exploratory bottom fishing activities in the Loop Hole for red king crab and snow crab and asserting the right of the coastal State to control the harvesting of sedentary species in the Loop Hole.[708]

477. Latvia protested about these developments. In a Letter to the Commissioner for Environment, Maritime Affairs and Fisheries of the European Union dated 11 September 2015, Latvia stated, in response to the Norwegian Note Verbale, that it had never been questioned that Norway and the Russian Federation had delegated their rights regarding management of sedentary species in NEAFC waters to the NEAFC. Latvia requested that the EU take the following position:

> [A]*ll ambiguous issues or disputes concerning fisheries of snow crab have to be dealt within NEAFC and if any of signatory countries of the NEAFC Convention would like to suggest changes in the current procedure (e.g. introduce new regulations regarding*

[707] Letter from Ms Lowri Evans, Director-General of DG Mare, to Spanish Ambassador Mr José Pascual Marco Martínez, 5 August 2015 (**R-0033**).

[708] Note Verbale from Norway to the EU, 30 October 2015 (**C-0109**).

> *unregulated species), the issue should be dealt with within procedures established by NEAFC.*[709]

478. Latvia also complained directly to Norway. Latvia did not revoke the licences it had issued to North Star's vessels and indeed renewed those licences in 2016.

479. This record shows that, notwithstanding Norway's references to its longstanding and consistent position regarding the inclusion of crabs within the definition of "*sedentary species*", Norway initially treated the stock of snow crab in the Loop Hole as being in international waters and falling within the regime established by the NEAFC, which would be the case only if the snow crab was non-sedentary. That was the assumption underlying Norway's replies to inquiries from Mr Levanidov's colleagues (see paragraphs 513 to 523, below), the reference in the 2014 Regulations to the exclusive economic zone and the Svalbard Fisheries Protection Zone rather than the continental shelf, and Norway's own practice of licensing its fishing vessels to take snow crab in the Loop Hole. Moreover, when the Russian Federation raised the question in October 2014, there was initially some hesitation in the Norwegian Government regarding whether the snow crab was a sedentary species within the meaning of Article 77(4) of UNCLOS. The Tribunal does not, however, consider that Norway's actions can be regarded as improper or unwarranted.

480. First, while the Tribunal is not called upon to decide whether or not the snow crab is a sedentary species within the UNCLOS definition,[710] Norway's conclusion that it is a sedentary species cannot be regarded as an outlier. The letter from DG Mare to the EU Member States in the wake of the Agreed Minutes of the Malta meeting makes clear that the EU Commission shared the view that snow crab meets the definition of a sedentary species and cites practice of other States to the same effect.[711] The Commission's letter bears out Norway's assertion that State practice on this question supports Norway's view.[712] It is noticeable that Latvia's protest concerned not whether snow crab is a

[709] Letter from the Latvian Minister of Agriculture to the Commissioner for Environment, Maritime Affairs and Fisheries of the European Union, 11 September 2015 (**C-0108**). Latvia also protested directly to Norway: see Report of a Meeting between the Norwegian Embassy in Latvia and the Latvian Ministry of Foreign Affairs, 4 November 2015 (**C-0206**).

[710] The Claimants expressly deny that this is a "*live issue*" in the proceeding: Cl. Memorial, para. 598.

[711] See paragraph 473475, above.

[712] Resp. Rejoinder, para. 15.

sedentary species but whether Norway and Russia had delegated management powers in respect of snow crab on their extended continental shelves to the NEAFC.

481. Secondly, such scientific assessment as has been shown to the Tribunal tends to support the conclusion that, at the harvestable stage, snow crab "*are unable to move except in constant physical contact with the seabed*".

482. Thirdly, Norway's hesitation during 2014 is understandable when one considers the circumstances. Snow crab had only recently begun to appear in the Loop Hole (as the table at paragraph 8181 shows, 2014 was the first year in which commercially significant quantities were harvested) and at that stage were not believed to be present in the Norwegian sector of the Loop Hole, though it was thought likely that they would in time spread into that sector. It is therefore not surprising that Norwegian officials started to think about the status of snow crab only in the second half of 2014. Moreover, when they did do so, it was entirely reasonable that they sought advice about the scientific properties of the species, not least because there appears to have been another species of crab which would not have fallen within the definition in Article 77(4) of UNCLOS. That advice was unequivocal and clearly informed the preliminary assessment of the legal department of the Ministry of Foreign Affairs.[713] At the PECCOE meeting in January 2015, Russia and Norway informed the meeting that, while they were still considering the status of the snow crab, "*it is very likely that it is to be defined as a sedentary species*".[714] That Norway wanted to explore the views of other States and coordinate its action with the Russian Federation is also entirely understandable given the diplomatic situation, especially in light of the fact that, at that point in time, the snow crab was predominantly, if not exclusively, located on the Russian continental shelf.

483. Finally, the Tribunal does not accept the Claimants' argument that the language used in different emails and other communications show that Norway intended the "*designation*" of snow crab to be a matter for the future only. That submission confuses the question of whether snow crab is a sedentary species — a question of law which, if answered in the

[713] See paragraph 469, above.

[714] See paragraph 469471, above.

affirmative, cannot be limited to the future — with the issue of regulation of harvesting of snow crab. Since neither Russia nor Norway had in place regulations for harvesting snow crab in their outer continental shelves at the date of the Malta Declaration, reference to regulation and a management programme were necessarily in the future tense.

c. Measures Taken by the Russian Federation

484. An important element of the Claimants' case, which cuts across different claims, is the allegation that Norway incited the Russian Federation to assert sovereign rights over snow crab in the Loop Hole, or conspired with the Russian Federation to exclude EU crabbers. As counsel for the Claimants put it at the Hearing:

> *Which brings me to my last point about what this case, our merits case, is not about. It's not about harm caused by Russian measures that Norway was powerless to prevent. It's not about that at all. It's an attractive temptation perhaps, in this day and age, to blame the world's ills on the Russian Federation, but that's just not the evidence at all.*
>
> *What the evidence on this topic is, is that it was Norway who was the instigator of the idea that the coastal States should begin asserting sovereign rights over snow crab in the NEAFC area which was a sharp reversal of the prior approach that this fishery was open to vessels flagged in any NEAFC Member State*. […][715]

485. While counsel for the Claimants maintained that "*Norway is not responsible for the actions of the Russian Federation*", she went on to assert that "*Norway is responsible for what Norway does in reaction to the actions of others*".[716]

486. The Tribunal has already explained, in its discussion of the *Monetary Gold* principle (see paragraphs 294 to 295, above), that, while that principle does not preclude it from exercising jurisdiction in the present case, it does circumscribe what the Tribunal can decide. It is not open to the Tribunal to decide whether or not the Russian Federation was in breach of international law. However, it is unnecessary for the Tribunal to delve deeper into the ramifications of *Monetary Gold*, because the record simply does not support the

[715] Transcript, Day 4, p. 72, lines 8-20 (Ms Seers).

[716] Transcript, Day 4, p. 78, lines 2-4 (Ms Seers).

proposition that Norway was the "*instigator of the idea that the coastal States should begin asserting sovereign rights over snow crab in the NEAFC area*".

487. As the Norwegian reports of the meeting in October 2014 of the Joint Norway-Russian Federation Fisheries Commission (quoted in paragraph 461463, above) indicates, it appears to have been the Russian Federation which first raised the issue of whether snow crab was a resource covered by the regime of the outer continental shelf. It was that which prompted the Norwegian Ministry of Trade, Industry and Fisheries to seek legal advice from the Ministry of Foreign Affairs on whether the snow crab met the UNCLOS definition of a sedentary species.

488. Since, at that time, most of the snow crab in the Loop Hole was believed to be in the Russian sector, Norway recognized that it was for the Russian Federation to take the lead.[717] Norway planned to "*lie low*" in any NEAFC discussion in late 2014 and see what Russia did.

489. It is true that, in the Norwegian record of a later meeting between the Russian Federation and Norway in September 2015, it is recorded that "[t]*he Russian side was concerned about the handling of snow crab in the NEAFC area and concerns that unregulated fishing could mean that some countries acquired fishing rights*".[718] It is also the case that Russia did not adopt regulations banning the harvesting of snow crab by foreign vessels in its sector of the Loop Hole until almost nine months after Norway had adopted the 2015 Regulations banning such activity in its sector of the Loop Hole. In July 2016, a Norwegian report of a bilateral meeting, held in the wings of the North Atlantic Fisheries Ministers Conference, stated that the Russian Minister had informed his Norwegian counterpart that "*the Russian Coast Guard cannot perform enforcement, as the fishing takes place outside the 200-mile zone*" and asked that the Norwegians ban the landing in Norway of snow crab taken on the

[717] See paragraph 472, above.

[718] Report from the Norwegian Fisheries and Acquaculture Department to the Minister of Trade, Industry and Fisheries, 29 September 2015 (**C-0201**), p. 2.

Russian outer continental shelf. Norway responded that it could not act until Russia banned snow crab harvesting on its extended continental shelf.[719]

490. The Tribunal does not read these exchanges as confirming the Claimants' view that Norway instigated the Russian ban. Not only was it Russia which first raised the issue of exercising continental shelf rights with regard to snow crab in the Loop Hole, the Russian concern about acquired rights was understandable given that it was on the Russian continental shelf that most of the harvesting in the Loop Hole had taken place between 2014 and 2016. Moreover, it was Russia which tried to persuade Norway to introduce a landing ban, something which Norway understandably said could not be done in respect of crab which had been lawfully taken on the Russian continental shelf. Russia's reference to its coast guard being unable to act reflected the fact that, at the time that comment was made, Russia had not legislated to ban taking of snow crab in the outer continental shelf.

491. The Tribunal therefore rejects the Claimants' argument that Norway had incited the Russian ban. It also rejects the conspiracy argument. There is no evidence that would suggest anything like a conspiracy between the two States. The Tribunal has already concluded that the determination that snow crab is a sedentary species within the meaning of Article 77(4) of UNCLOS was in no way unwarranted or improper. The question whether what followed that determination was an arbitrary act or was carried out in bad faith is considered below.

492. The Tribunal has already held (see paragraphs 265 to 267, above) that, until the Russian ban was introduced in September 2016, North Star's harvesting of snow crab occurred almost entirely in the Russian sector of the Loop Hole. It has also rejected the Claimants' argument that the Russian sector of the Loop Hole must be regarded, for the purposes of Article I(4) of the BIT, as Norwegian territory (see paragraphs 263 to 264, above).

493. The real damage to North Star (and, by extension, to Sea & Coast) came about as a result of the September 2016 Russian ban on foreign vessels taking snow crab in the Russian part of the Loop Hole. While Norway understandably maintained close contact with Russia in

[719] Report of the Minister of Trade, Industry and Fisheries on the 2016 North Atlantic Fisheries Ministerial Conference and Bilateral Meetings (**C-0207**), pp. 2-3.

relation to the snow crab stock in the Loop Hole, Norway cannot be held responsible for the actions of the Russian Federation. To the extent that it was the Russian action which caused the Claimants' loss, there has been no breach of the BIT and there can be no compensation in these proceedings.

494. Nor is the Tribunal persuaded by the Claimants' alternative argument that Norway's response to the Russian measures amounted to a breach of the BIT, so that Norway incurred liability for losses resulting from North Star's vessels being excluded from the Russian continental shelf in the Loop Hole.[720] The Tribunal can see no reason why Norway had an obligation to North Star to protect it from Russia's action (or, indeed, how Norway might have done so). Nor does the Tribunal consider that Norway's obligations under the BIT required it to take steps to ameliorate the consequences of that action.

495. It follows that the Claimants can succeed only if they can show that Norway's own actions in respect of their investments (as those investments have been defined in paragraphs 238 240 to 287289, above) violated the BIT and, if they can do that, they can recover damages only in respect of any losses which can be shown to have been caused by Norway's actions and not by those of the Russian Federation.

d. Has Norway breached the Obligation to Provide Equitable and Reasonable Treatment

(i) The legal standard to be applied under Article III

496. Article III of the BIT provides:

> *Promotion and Protection of Investments*
>
> *Each Contracting Party shall promote and encourage in its territory investments of investors of the other Contracting Party and accept such investments in accordance with its laws and regulations and shall accord them equitable and reasonable treatment and protection. Such investments shall be subject to the laws and regulations of the Contracting Party in the territory of which the investments are made.*[721]

[720] Transcript, Day 4, p. 79, line 18 to p. 80, line 4 (Ms Seers).

[721] **CL-0001**.

497. Article III of the BIT uses language slightly different from that which appears in most BITs, where the formula used is more frequently that of "*fair and equitable treatment*". The Claimants maintain that there is no difference between a requirement of "*equitable and reasonable treatment*" and one of "*fair and equitable treatment*".[722] That approach has been endorsed by the arbitral tribunal in another case under the same BIT[723] and is not contested by Norway.[724]

498. Norway maintains that the standard of "*equitable and reasonable treatment*" is "*based on the minimum standard of treatment for aliens in customary international law*".[725] The Claimants dispute that.[726] The Tribunal does not consider this difference to be material to the task before it. Norway is not contending that Article III does no more than embody the standard so often cited in cases from the inter-war period and the Tribunal considers that that the modern day standard of treatment under customary law is not – at least so far as the issues in the present case are concerned – materially different from the approach taken by arbitral tribunals in applying the standard of "*fair and equitable treatment*".

499. With regard to the content of that standard, the Tribunal agrees with the observation of the *Vivendi II* tribunal that

> *one cannot say more than the tribunal did in* S.D. Myers *by stating that an infringement of the standard requires "treatment in such an unjust or arbitrary manner that the treatment rises to a level that is unacceptable from an international perspective".*[727]

500. The Claimants further draw attention to the fact that Article III also requires that the host State accord the investment "*equitable and reasonable* […] *protection*". The Tribunal agrees that this is an additional requirement not found in all other BITs. The Claimants rely upon it in support of their argument that Norway should have protected their

[722] Cl. Memorial, para. 701.

[723] *Staur Eiendom AS, EBO Invest AS & Rox Holding AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award, 28 February 2020 (**CL-0284**), para. 416.

[724] Resp. Counter-Memorial, para. 689.

[725] *Ibid*.

[726] Cl. Reply, para. 636.

[727] *Vivendi v. Argentina* (**RL-0120**), para. 213, citing *Saluka Investments BV v. Czech Republic*, PCA/UNCITRAL, Partial Award, 17 March 2006 ("***Saluka v. Czech Republic***") (**CL-0216**), para. 297.

investment from the effects of the introduction by the Russian Federation of a ban on harvesting snow crab in the Russian sector of the Loop Hole. For the reasons given in paragraphs 492 to 494, above, the Tribunal considers that claim unsustainable.

(ii) The violations alleged by the Claimants

501. The Claimants allege five violations which they advance both separately and cumulatively:-

(i) that Norway acted arbitrarily;

(ii) that Norway acted in bad faith;

(iii) that Norway acted in disregard of the legitimate expectations of the Claimants;

(iv) that Norway acted without the requisite transparency and consistency; and

(v) that Norway committed a denial of justice.

502. The allegation of denial of justice arises in respect of the Svalbard claims and will be considered there. In addition, North Star argues that Norway violated the obligation under Article III to encourage investments of Latvian investors in its territory. While that allegation affects both the Loop Hole claims and the Svalbard claims, it arises in particular in connection with Svalbard and the Tribunal will therefore consider it in Section V.B(4), below.

503. The Tribunal considers that the Claimants' arguments regarding the other four alleged violations are closely bound up together and that the Claimants' assertions regarding what they claim were their legitimate expectations are at the heart of these allegations. The Tribunal will therefore begin by analysing that part of the Claimants' case.

(iii) Legitimate expectations

504. There is no doubt that the concept of respect for legitimate expectations is an important part of the standard of fair and equitable or equitable and reasonable treatment.[728] As the

[728] See, e.g., the observation of the tribunal in *Saluka v. Czech Republic* (**CL-0216**), paras. 301-302.

tribunal in *Lemire v. Ukraine* held, legitimate expectations may be of a general character or derived from specific assurances given to the investor.[729]

505. Legitimate expectations of a general character include the expectation that the organs of the host State will use the powers given to them for the purpose for which they were given and not for extraneous and improper purposes.[730] It is also generally agreed that there is an expectation of some degree of stability in respect of the treatment of investments by the host State. However, the Tribunal does not accept that an investor has a general legitimate expectation that the law affecting the investment will remain unchanged. The Tribunal agrees with the observation of the tribunal in *EDF v. Romania*:

> *The idea that legitimate expectations, and therefore* [fair and equitable treatment], *imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The* [fair and equitable treatment] *might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life. Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable.*[731]

506. The Claimants, while accepting that foreign investors do not have an absolute right to legal and economic stability,[732] maintain that this statement is too broad and point to a series of awards given in the Spanish solar power cases, in which a claim based on legitimate expectations that the system of tariff support for existing solar power plants would not be altered.[733] However, the facts of those cases were very different from those of the present

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[729] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011 (**CL-0291**), para. 69.

[730] See *Técnicas Medioambalientes Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 ("***Tecmed v. Mexico***") (**CL-0252**), para. 157.

[731] *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 (**RL-0124**), para. 217.

[732] Cl. Reply, para. 661.

[733] Cl. Reply, paras. 662-664. The Claimants rely in particular upon the statement of one tribunal that "*a regulatory regime* […] *cannot be radically altered – i.e., stripped of its key features – as applied to existing investments in ways that affect investors who invested in reliance on those regimes*": see *OperaFund Eco-Invest SIVAC PLC and Schwab Holding AG v. Kingdom of* Spain, ICSID Case No. ARB/15/36, Award, 6 September 2019 (**CL-0293**), para. 509 (quoting *Antin Infrastructure Services Luxembourg S.á.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018 (**CL-0297**), para. 532).

case. They turned on the fact that detailed Spanish legislation regulating the electricity industry contained specific statements that future changes in the tariff support system would not be applied to existing investments. There is nothing similar in Norway's legislation in the present case.

507. Moreover, it is necessary to be cautious about taking statements of tribunals in cases regarding matters such as State support for a particular category of investments and applying them to facts such as those of the present case. No question of State support arose here. Nor did Norway sell permits for exploitation of snow crab. The issue concerns the imposition of a ban on harvesting snow crab where previously one had not existed.

508. It is also necessary to bear in mind the chronology. Although both Parties speak about long-held assumptions, the fact is that snow crab was a recent arrival in the Barents Sea. As the Tribunal has already held (see paragraphs 81 to 82, above), it was not until 2013 that significant quantities of snow crab were harvested in the Barents Sea and throughout the period until September 2016, snow crab were taken almost entirely from Russian waters and the Russian sector of the Loop Hole. While the Norwegian Government was aware that snow crab were migrating westwards and would thus probably become common in the Norwegian sector of the Loop Hole, until well into 2016 there appears to have been no significant harvesting of snow crab in the Norwegian sector of the Loop Hole. There was, therefore, no particular reason for Norway to have taken a position about banning or regulating such harvesting until comparatively late in the day.

509. The Tribunal concludes, therefore, that the absence of any Norwegian legislation regarding the harvesting of snow crab by foreign vessels in the Norwegian sector of the Loop Hole before December 2015 could not, in itself, have given rise to a legitimate expectation that there would be no such legislation banning or restricting that activity in the future. Accordingly, it rejects the claim that there was a legitimate expectation of a general character.

510. Of course, such a legitimate expectation could have arisen from specific statements, actions or undertakings given by Norway. The Claimants maintain that they did indeed have such

a legitimate expectation as a result of Norway's statements and actions, the fishing licences and fishing capacity which they were granted and the actions of the EU and NEAFC.

511. The Tribunal considers that the fishing licences and fishing capacity are irrelevant to the question whether the Claimants had a legitimate expectation that they would be allowed to harvest snow crab in the Loop Hole. Only the actions and statements of Norway, or of another body acting on behalf of Norway, could give rise to a legitimate expectation on which the Claimants could rely as against Norway. The fishing licences were granted by Latvia and fishing capacity by the EU (of which Norway is not a Member State). Neither could therefore create a legitimate expectation regarding the treatment by Norway of an investment by the Claimants. Similarly, Norway's statements and actions could not give rise to a legitimate expectation that the Claimants could take snow crab in the Russian sector of the Loop Hole.

512. The position is different as regards the NEAFC, since Norway is a member of that organization. However, the Tribunal does not accept that the actions of the NEAFC as regards harvesting snow crab in the Loop Hole gave rise to a legitimate expectation that Norway would not in future ban or limit the taking of snow crab in its portion of the Loop Hole. The fact that the NEAFC had not regulated snow crab in 2014 did not imply that Norway would not impose regulation in the future. First, the reference to regulated and unregulated species in the NEAFC context refers only to whether the NEAFC had fixed a quota for the species. Secondly, the NEAFC has no authority to do more than recommend measures in respect of an area under national jurisdiction. The continental shelf in the Norwegian part of the Loop Hole is under Norwegian jurisdiction and no recommendation could therefore have been made regarding sedentary species there without Norway's request and support. No such recommendation was ever made and EU proposals to approve experimental harvesting were rejected in the NEAFC. Lastly, NEAFC rules regarding *how* catches were made did not imply authority to make such catches.

513. The Tribunal therefore turns to the different statements and actions of Norway itself. These have already been summarised in Sections II.C to II.E, above. They are, however, of such importance that it is necessary to set them out in greater detail. Most of them are responses

to inquiries by Mr Levanidov or his representative. Norway highlights the fact that they were not made directly to either Claimant. The Tribunal accepts that but considers that the relationship between Mr Levanidov and Mr Pildegovics was such that it may be assumed that the latter was made aware of those responses.

514. The responses are frequently in the form of brief emails and it is important that these are seen in the context of the inquiries to which they replied.

515. The first such communication was in May 2013. On 9 May 2013, Mr Ankipov, then the CEO of Ishavsbruket and later the founder of Sea & Coast, emailed Mr Sigmund Hågensen, the Section Chief of the Directorate of Fisheries of the Finnmark Region of Norway:

> *We are a company called Ishavsbruket AS and located in Båtsfjord and currently we are working on investigating a topic regarding snow crab and in this regard there are some questions that we would like to ask you.*
>
> *1. Can foreign fishing vessels, in our case Russian vessels, engage in SNOW CRAB catching in NØS (Norwegian Economy Zone* [*sic*] *and in Spitsberg)???*
>
> *2. What applies to e.g. Norwegian fishing vessels in both NØS and Spitsberg's zone, which Norwegian fishing vessels can catch snow crab in NØS and in Spitsberg, are there any restrictions, possibly special permits for catching, type of vessel???*
>
> *We need the above information to support this project.*[734]

516. Mr Hågensen replied on 16 May 2013:

> *1. Russian vessels cannot catch snow crab in the NØS / Svalbard zone. This is because the snow crab is not a part of the fisheries agreement between Russia and Norway. The same applies to other foreign vessels.*
>
> *2. Catching of snow crab is unregulated. Norwegian fishing vessels (i.e. vessels entered in the Norwegian Register of Fishing Vessels (Merkeregisteret) can fish for this species in the NØS / Svalbard*

[734] **KL-0016** [emphasis in the original].

> *zone. If Norwegian vessels are to catch snow crab in international waters, they must be registered for fishing in the NEAFC area*.[735]

517. Mr Ankipov then forwarded this exchange to Mr Levanidov.

518. This exchange says nothing about EU vessels taking snow crab anywhere. The reference to "*fishing in the NEAFC area*" was in reply to a question about Norwegian fishing vessels. While the Claimants maintain that the second sentence of the second paragraph is broader and suggests that Mr Hågensen considered snow crab to be a non-sedentary species, the Tribunal considers that far too slender a reed on which to build a legitimate expectation regarding the right of a type of vessel not mentioned in the exchange to take snow crab in the Norwegian part of the Loop Hole.

519. On 7 June 2013, Mr Ankipov emailed Ms Hilde Jensen of the Norwegian Directorate of Fisheries:

> *I have been in contact with Sigmund Hågensen regarding a question concerning the NEAFC register* […].
>
> *We have a question regarding the NEAFC area. How should registration take place?*
>
> *This applies for fishing for snow crab in the area.*
>
> *It would be good if you could describe this process for registration and how long it takes to obtain registrations*?[736]

520. Ms Jensen replied on 12 June 2013:

> *The attached regulations for registration and reporting when fishing in waters outside any state's fisheries jurisdiction are sent for information.*
>
> *As stated in § 2, vessels that are to fish in waters outside any state's fisheries jurisdiction must be registered through notification to the Directorate of Fisheries. Attached is the registration form that can be used.* […]

[735] **KL-0016** [emphasis in the original].

[736] **R-0095**.

> *The registration notification will be processed and information about the vessel will be sent to the NEAFC Secretariat in London.*
>
> *The processing of registration notifications will normally take 2-3 days*.[737]

521. The email was accompanied by the text of the regulations. Section 1 reads:

> *§ 1 Scope*
>
> *These regulations apply to Norwegian citizens and persons resident in Norway who fish with Norwegian vessels in waters outside any state's fisheries jurisdiction that are not regulated by regional or subregional fisheries management organizations or entities with their own reporting provisions. The regulations also applies to NEAFC's regulatory area*.[738]

522. The Tribunal considers that the response refers only to catching of snow crab by Norwegian vessels; the attached regulations are applicable only to Norwegian vessels. It is true that, as the Claimants maintain, the response did not make clear that foreign vessels had no right to harvest crab on the Norwegian continental shelf without Norwegian authorization,[739] but that was not the question raised and the response simply does not address that question. The response speaks of fishing and of waters outside the jurisdiction of a State and the Tribunal agrees with the Claimants that this was how Norwegian officials saw the matter at the time, but this was a technical exchange relating to registration requirements and it would be wrong to read much into it.

523. The next communications were between Mr Ankipov and the Norwegian Food Safety Authority in February 2014. On 5 February 2014, Mr Sofus Olsen of the Authority responded to an inquiry from Mr Ankipov which Mr Olsen summarised as "*whether EU-registered boats are free to deliver crab to approved crab receptions in accordance with our regulations*" and answered "*EU-registered fishing boats can deliver crab freely to Norwegian crab receptions. If the fishing is quota-regulated (king crab, for example), the*

[737] **KL-0017**.

[738] Regulations Amending Regulations on Registration and Reporting when Fishing in Waters Outside any State's Fisheries Jurisdiction, 18 April 2013 (**KL-0018**).

[739] Cl. Reply, para. 647.

boats must have a quota".[740] This exchange relates to the landing of crabs and says nothing about their harvesting.

524. On 20 July 2014, Mr Ankipov wrote to the Section Chief of the Directorate of Fisheries of the Finnmark region regarding "*the information that is relevant for EU vessels that will fish snow crab in the NEAFC area*". The relevant part of the email stated:

> *This is a project where a fishing vessel under the EU flag will land live snow crabs at approved Norwegian reception stations (factories). Please describe or present the process regarding the documents to be sent to the Directorate of Fisheries in this case.*[741]

525. The reply, sent on 25 July 2014, read:

> *Basically this corresponds to matters concerning the regulations of the Fisheries Administration. Regulations issued by other agencies, such as the Norwegian Food Safety Authority, Råfiklaget etc. must be clarified to these agencies.*
>
> 1. *In principle, EU vessels can land fish, including snow crab to Norway on an equal footing with Norwegian fishing vessels. There are therefore no other rules for EU vessels when it comes to fresh and live goods. All registered buyers in Finnmark have a good overview of the conditions for landing.*
>
> 2. *In principle, no special documentation shall be submitted to the fisheries authorities when the crab is to be landed alive at a Norwegian reception centre, and the crab has been caught outside the Norwegian Economic Zone.*
>
> 3. *The catch shall be landed to the buyer who is registered with the Directorate of Fisheries' Register of Buyers. Regulations on the duty to provide information:* [internet link] *determines the procedures for landing.*
>
> 4. *If the vessel is to deliver frozen products, this must be reported 24 hours in advance in accordance with the regulations on fishing by foreigners....* [internet link]. *Vessels that are to fish in the Norwegian Economic Zone are also subject to reporting*

[740] Email exchanges between Mr Sergei Ankipov Mr Sofus Olsen of the Norwegian Food Safety Authority, 3-5 February 2014 (**KL-0019)**.

[741] **KL-0020**.

> *according to the same regulations. As the activity is described, it does not fall under these regulations.*
>
> *According to the Norwegian Food Safety Authority, it should also be okay to land live crabs at Norwegian reception centres.*[742]

526. Norway maintains that this email relates only to landing not harvesting of snow crab. That is true but the Tribunal does not consider that it put Mr Ankipov on notice that there might be a need for authorization for EU vessels to take snow crab in the Loop Hole. On the contrary, the assumption of both correspondents appears to have been that there was no such requirement and, indeed, until December 2015 there were no Norwegian regulations prohibiting the taking of snow crab in the Loop Hole.

527. Nevertheless, the critical point is that nothing in any of the correspondence suggests, let alone undertakes, that Norway might not introduce restrictions, or even a ban, on the taking of snow crab in the Norwegian sector of the Loop Hole. The Claimants are correct when they say that in none of the exchanges with Norwegian officials did anyone warn that there might be a change in regulations, but that is not at all the same as an assurance that there would be no such change and it is an assurance of that kind that is required to give rise to a specific legitimate expectation. Moreover, it has to be remembered that, at the time that the correspondence took place, the focus was on the Russian sector of the Loop Hole, the much larger area in which snow crab were then concentrated. The Tribunal considers that the correspondence is nowhere near sufficient to create a legitimate expectation that Norway would not change its law.

528. The same is true of the practice on which the Claimants rely. The fact that Norwegian government ships inspected North Star's vessels and that Norway accepted North Star's NEAFC PSC forms without inquiring whether the crab in question had been caught in the Norwegian or the Russian sector of the Loop Hole has to be viewed in light of the fact that the great majority of snow crab caught in the Loop Hole at the relevant times was caught in the Russian sector. The fact that there are no prosecutions in Norway of EU vessels for fishing in the Loop Hole during the first six months of 2016 does not imply that Norway

[742] **KL-0020**.

"*systematically 'accepted' that EU vessels holding NEAFC licences issued by EU Member States could catch snow crabs in the Loop Hole*".[743] At the relevant time, most harvesting of snow crab was still taking place in the Russian sector, where there was no ban to enforce. That Norway did not more aggressively enforce its 2015 Regulations in its own sector of the Loop Hole is understandable in view of the difficulty of determining whether a catch had taken place there or in the Russian sector. It was certainly not enough to give rise to a legitimate expectation that North Star would be permitted to take snow crab from the Norwegian sector where, until then, it had been largely inactive.

529. Finally, there are the actions of the Mayor of Båtsfjord and visiting ministers and parliamentarians to Båtsfjord which the Claimants maintain showed positive encouragement for the "joint venture".[744] The Tribunal does not consider that these sustain the Claimants' argument that they gave rise to a legitimate expectation that North Star's vessels, which it had already acquired, would be permitted to harvest snow crab in the Norwegian sector of the Loop Hole. Not only did they take place after the investment had already been made and at a time when North Star's activities were concentrated in the Russian sector of the Loop Hole, their character was not such as to justify a legitimate expectation that Norwegian law relating to the Norwegian sector would not change.

530. The Tribunal therefore rejects the Claimants' argument that they had a legitimate expectation that Norway would permit them to take snow crab in the Norwegian sector of the Loop Hole after June 2016.

531. Although separate from the argument about legitimate expectations, the Claimants' argument that they had an acquired right to take snow crab in the Norwegian sector of the Loop Hole fails for similar reasons. Even if the period of time in which North Star's vessels were engaged in taking snow crab in the Loop Hole was sufficient to give rise to an acquired right, the fact remains that, with minimal exceptions, North Star did not take snow crab in the Norwegian sector. The fact that it was extensively engaged in taking snow crab

[743] Cl. Memorial, para. 743.

[744] Cl. Memorial, para. 742.

in the Russian part of the Loop Hole could not give rise to an acquired right to take snow crab in the Norwegian sector once the crab had migrated there.

(iv) Arbitrariness and bad faith

532. The Tribunal turns to the Claimants' related arguments that Norway's actions were arbitrary and were not performed in good faith. Both arguments have two separate strands: first, that Norway acted arbitrarily and in bad faith in determining that snow crab is a sedentary species; and, secondly, that Norway acted arbitrarily and in bad faith in introducing and maintaining the ban on EU vessels taking snow crab in the Norwegian sector of the Loop Hole.

533. The standard of what constitutes arbitrary behaviour was authoritatively stated by the International Court of Justice in the ELSI case:

> *Arbitrariness is not so much something opposed to a rule of law as something opposed to the rule of law.* […] *It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety*.[745]

534. The duty to act in good faith in the exercise of a State's power is expressly provided for in Article 300 of UNCLOS, which provides:

> *States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right*.[746]

535. Moreover, the Tribunal agrees with the Claimants that a similar duty exists as a matter of customary law.[747]

536. The Tribunal does not accept that Norway's treatment of the status of snow crab was arbitrary or that it demonstrated a lack of good faith. As the Tribunal has already determined (see paragraphs 455 to 457, above), whether snow crab is a sedentary species

[745] *ELSI* (**CL-0288**), para. 128.

[746] **CL-0013**.

[747] Cl. Memorial, para. 710; Cl. Reply, para. 634.

is a matter of law, namely whether or not it falls within the definition in Article 77(4) of UNCLOS, and is not dependent upon "designation" by a coastal State. The evidence before the Tribunal shows that snow crab has generally been treated as falling within that definition. It is particularly noticeable that, following the Malta Declaration, the EU's notice to Member States accepted without question that snow crab is a sedentary species.[748]

537. Nor can Norway be faulted for the procedure which it followed. As set out in paragraphs 458460 to 472474, above, Norway's Fisheries Directorate and Foreign Ministry sought and obtained both scientific and legal advice before reaching the conclusion that snow crab is sedentary. While the Tribunal does not accept Norway's argument that it always treated the answer to the question whether or not snow crab came within the definition in UNCLOS Article 77(4) as "*blindingly obvious*", given the time it took to assess the matter in 2014 to 2015, the fact remains that the scientific and legal advice which it took was eventually categorical in concluding that snow crab was sedentary and that was in line with general international practice.

538. Since snow crab was a recent arrival in the Barents Sea and was only gradually migrating into Norwegian waters, it is not really surprising and is certainly not a matter for criticism that Norway took some time to assess the status of the snow crab. In these circumstances, it is impossible to characterise Norway's determination that snow crab is a sedentary species as being either arbitrary or taken in bad faith.

539. That leaves the question whether, once Norway had concluded that snow crab is sedentary, its action in imposing a ban on taking snow crab in the Norwegian sector of the Loop Hole was arbitrary or amounted to a lack of good faith within the meaning of Article 300 of UNCLOS or customary international law. The Tribunal does not accept that that was the case.

540. There are two grounds on which the Claimants seek to impugn Norway's actions: that they were contrary to assurances given before the Claimants made their investment and that

[748] Letter from Ms Lowri Evans, Director-General of DG Mare, to Spanish Ambassador Mr José Pascual Marco Martínez, 5 August 2015 (**R-0033**) (see paragraph 475, above).

Norway acted for improper reasons. The Tribunal has already rejected the first ground (see paragraphs 508 to 528, above).

541. With regard to the second ground, the Tribunal accepts that a State which uses a power that it possesses for an extraneous, improper purpose may be considered to have acted arbitrarily and in abusive or bad faith manner. As the tribunal in *Tecmed v. Mexico* put it:

> *Upon making its investment, the fair expectations of the Claimant were that the Mexican laws applicable to such investment, as well as the supervision, control, prevention and punitive powers granted to the authorities in charge of managing such system, would be used for the purpose of assuring compliance with environmental protection, human health and ecological balance goals underlying such laws*.[749]

542. It is essential, however, to be clear what is the purpose of the power which the State is accused of exercising improperly. In the case of the powers of the coastal State over the resources of the continental shelf, Articles 77(1) and (2) of UNCLOS make clear that those rights are conferred for the purpose of enabling the coastal State to enjoy the benefit of the resources of the continental shelf:

> *1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.*
>
> *2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake those activities without the express consent of the coastal State.*[750]

543. The Claimants have argued that Norway acted in order to exclude the EU vessels harvesting snow crab on its continental shelf and reserve the resource for its own fishing industry, but that is exactly what Article 77 provides for. There is nothing extraneous or improper in Norway acting in this way. Nor is there anything wrong with it using its sovereign rights as a bargaining chip with the EU which has done the same in relation to marine resources in the continental shelves and EEZs of its Member States.

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[749] *Tecmed v. Mexico* (**CL-0252**), para. 157.

[750] **CL-0013**.

544. The Tribunal therefore rejects the Claimants' argument that Norway has acted arbitrarily or in bad faith.

(v) Transparency and consistency

545. To a large extent the Claimants' allegation that Norway displayed a lack of the transparency and consistency impliedly required by the duty of equitable and reasonable treatment recycles the arguments about legitimate expectations and arbitrariness and fails for the same reasons, as explained above. The Tribunal will, therefore, be brief in addressing this part of the Claimants' case.

546. The Tribunal has already held that Norway did change its position regarding taking snow crab in the Loop Hole but that there was nothing improper or unwarranted either in the fact that it did so, or in the manner in which it reached its decision. The Tribunal has also held that the Claimants were not entitled to expect that there would be no change in the regulation of snow crab harvesting.

547. Although the Claimants assert that "*in July 2015 Norway proceeded to re-characterize snow crabs as a 'sedentary species' despite decades of practice to the contrary*",[751] there were no such decades of practice. There is no evidence that Norway took any position about snow crab — or that it needed to do so — until snow crab started to be harvested commercially in the Barents Sea. Norwegian practice is limited to the period from 2013.

548. Even then, the stock of snow crab was almost entirely located in the Russian sector of the Loop Hole and in Russian waters to the north-east. Norway's practice in allowing the landing of snow crab caught in the Russian sector at a time when Russia had no ban on taking snow crab in that sector is not in any way inconsistent with Norway's actions in enacting and then enforcing a ban on the taking of snow crab in the Norwegian sector of the Loop Hole. Nor did allowing such landings amount to Norway giving "*express consent to snow crab fishing activities by EU vessels in the Loop Hole*".[752]

[751] Cl. Memorial, para. 747.

[752] Cl. Memorial, para. 749.

549. The Claimants criticise the quotas for taking snow crab which Norway has adopted since 2016 as too low and environmentally inappropriate, based on the Expert Report of Dr Kaiser. That is not a matter on which the Tribunal needs to opine. Even if that criticism was justified, it would not amount to a breach of the duty of consistency and transparency under Article III of the BIT.

550. Finally, the Claimants maintain that there was a smear campaign against them in a Norwegian newspaper and false allegations by a Norwegian prosecutor. The Tribunal does not consider this part of the Claimants' case to be sustained by the evidence and it is, in any event, irrelevant to the issues which arise under Article III of the BIT. There is no evidence that the allegations or the press reports influenced, or were affected by, the Norwegian decisions regarding harvesting snow crab.

551. The Tribunal therefore rejects the claim that Norway displayed a lack of consistency or transparency such as would rise to the level of a violation of Article III of the BIT.

(vi) Conclusion

552. The Tribunal therefore rejects North Sea's Loop Hole claims that it has been the victim of a violation of Article III of the BIT.

e. Has Norway Expropriated North Star's Investment Contrary to Article VI

553. Article VI(1) of the BIT provides:

> *Expropriation and Compensation*
>
> *1. Investments made by investors of one Contracting Party in the territory of the other Contracting Party cannot be expropriated, nationalized or subjected to other measures having a similar effect (all such measures hereinafter referred to as "expropriation") except when the following conditions are fulfilled:*
>
> *(i) The expropriation shall be done for public interest and under domestic legal procedures;*
>
> *(ii) It shall not be discriminatory;*

> *(iii) It shall be done only against prompt, adequate and effective compensation.*[753]

554. The Parties are agreed that this provision is not confined to cases of formal nationalization or outright taking but includes so-called "*indirect expropriation*". There is also broad agreement that the concept of indirect expropriation was summed up in the following passage from the award in *Metalclad v. Mexico*:

> [E]*xpropriation* […] *includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.*[754]

555. In applying this test to the facts of the present case, the Tribunal considers that it is necessary to begin by recalling three findings which it has already made. First, the Tribunal has held that the only investment which North Star had made in the territory of Norway was the entitlement to contractual performance of an agreement that Seagourmet would purchase such snow crab as the former offered for sale up to the limit of Seagourmet's capacity at its Båtsfjord plant (see paragraphs 258 to 282, above). The question, therefore, is whether Norway's actions could be said to amount to indirect expropriation of *this* investment.

556. Secondly, the evidence shows that throughout the period from January 2015 to September 2016,[755] North Star's catch of snow crab came almost entirely from the Russian sector of the Loop Hole. During the first eight months of 2016, when the ban introduced by Norway in the 2015 Regulations prohibited EU vessels from taking snow crab in the Norwegian sector of the Loop Hole, North Star was able to operate profitably. It was the introduction of the Russian ban on 3 September 2016 which put a stop to the majority of North Star's

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[753] **CL-0001**.

[754] *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 (**CL-0260**), para. 103.

[755] See paragraphs 263 to 265, above. Prior to January 2015, there was only one landing of snow crab by North Star and that was sold to a different processing plant: see Transcript, Day 2, p. 26, line 21 to p. 27, line 11 (Mr Pildegovics).

activities in the Loop Hole; had that ban not been introduced, there is no reason to believe that North Star would have been unable to take snow crab in the quantities it had been taking in the first part of 2016 or that it would have been unable to land them and sell them to Seagourmet. The Tribunal has already found (see paragraphs 484 to 495, above) that Norway cannot be held responsible for the measures taken by the Russian Federation. It follows that the Claimants' claim for expropriation can succeed only if they can establish that the measures taken by Norway, as opposed to those taken by the Russian Federation, amounted to indirect expropriation of the investment identified above.

557. Thirdly, in advancing their expropriation claim, the Claimants argue that *Metalclad v. Mexico*, and other awards on indirect expropriation,[756] support a submission that expropriation can result from "*the vitiation of an investor's legitimate expectations*" and cite the *Tecmed v. Mexico* award as finding that the *"repudiation of the investor's legitimate expectation of an economic return on its investment*" could constitute an indirect expropriation.[757] Norway disputes that these awards sustain those propositions but even if they did, the Tribunal recalls that it has already rejected the Claimants' argument that they had a legitimate expectation of being able to take snow crab in the Norwegian sector of the Loop Hole (see paragraphs 502 to 528, above). Similarly, the Tribunal has rejected the Claimants' contentions that Norway acted arbitrarily, without sound basis under UNCLOS or for improper purposes in determining that snow crab is a sedentary species and then banning EU vessels from taking snow crab on the Norwegian outer continental shelf (see paragraphs 532 to 544, above).

558. Accordingly, even if the Tribunal were to accept the very broad definition of indirect expropriation advanced by the Claimants, the expropriation claim would fail.

[756] The Claimants rely in particular on the awards in *Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, *ad hoc*, Award on Jurisdiction and Liability, 27 October 1989 ("***Biloune v. Ghana***") (**CL-0259**); *Compañia de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007 (**CL-0253**); and *Tecmed v. Mexico* (**CL-0252**).

[757] Cl. Memorial, para. 684.

559. North Star's investment in the territory of Norway was restricted to a claim to performance under an unwritten contract with Seagourmet that the latter would buy snow crab from North Star.

560. The precise extent and value of the claim to performance is extremely difficult to determine. There appears to have been no agreement as to the quantity of snow crab which North Star would sell and Seagourmet purchase until the first written contracts between them were concluded in late 2016 and in 2017. In cross-examination, Mr Pildegovics said that there had been no need for a written agreement until late 2016.[758] The Tribunal finds that statement strange, to say the least. Throughout 2015 and the first eight months of 2016, North Star was delivering substantial quantities of snow crab to Seagourmet. The need for a written agreement about how much would be delivered in the future only appeared at the time when the Claimants maintain it was already clear that North Star would not be able to harvest *any* snow crab in the Loop Hole and thus would not be able to make any deliveries to Seagourmet.[759]

561. Nevertheless, the Tribunal is prepared to accept that North Star had a claim to performance, albeit of undefined scope and value, of an unwritten agreement to deliver snow crab to Seagourmet which would buy it at the market price so long as the quantity did not exceed the capacity of the processing facility at Båtsfjord. Once North Star was unable to take snow crab, that claim to performance effectively lost its economic value. However, what caused it to lose its economic value was the action of the Russian Federation in banning the harvesting of snow cab in the Russian sector of the Loop Hole. Had the Russian Federation not taken that action, there is no evidence that North Star would not have been able to continue delivering large quantities of snow crab to Seagourmet. Norway did not prohibit the landing of snow crab lawfully taken in the Russian sector even after Norway had banned EU crabbers from taking snow crab in the Norwegian sector.

[758] Transcript, Day 2, p. 144, lines 6-15 (Mr Pildegovics).

[759] North Star's plan to redeploy at least part of its fleet to the waters off Svalbard is considered below but North Star must have realized that Norway would not permit it to take snow crab there since doing so had been prohibited ever since the 2014 Regulations had entered into force at the beginning of 2015.

562. The Claimants' response is that Norway could, and should, have allowed them to harvest snow crab in the Norwegian sector of the Loop Hole. However, the Tribunal has already held that the Claimants had no legitimate expectation of being allowed to take snow crab in the Norwegian sector of the Loop Hole.[760] It has also rejected the argument (advanced rather tentatively at the Hearing) that Norway's obligation under Article III of the BIT to protect North Star's investment obliged it to respond to Russia's actions by opening up its own part of the Loop Hole.[761]

563. The Tribunal wishes to make clear, however, that it does not accept the Claimants' submission about the broad scope of indirect expropriation. It agrees with Norway that the awards on which the Claimants rely do not support that submission. In *Metalclad v. Mexico*, the claimant's project to build and operate a hazardous waste plant required, and had been granted, express authorization by the federal government only to be halted by the refusal of a municipal permit in circumstances which the tribunal held exceeded the authority of the municipality.[762] In *Biloune v. Ghana*, the finding of indirect expropriation was based upon the arrest, detention and expulsion of Mr Biloune, who played a key role in the entire project.[763] Moreover, the context was a joint venture between Mr Biloune's company and a company owned by the host State. In *Vivendi II*, the claimant held a concession from the government which it was forced to abandon.[764] In *Tecmed v. Mexico*, the issue was the refusal to renew a permit based on what the tribunal described as "*a literal and strict interpretation of the conditions under which the Permit was granted*".[765]

564. The present case is very different. Norway had granted no permit to North Star. North Star had commenced operations at a time when Norway did not regulate the taking of snow crab in the Loop Hole. Its operations were carried out almost entirely in the Russian part of the Loop Hole and the Tribunal has held that North Star had no legitimate expectation

[760] See paragraphs 522 to 528, above.

[761] See paragraph 492, above.

[762] *Metalclad v. Mexico* (**CL-0260**), paras. 104-107.

[763] *Biloune v. Ghana* (**CL-0259**), para. 81.

[764] *Compañia de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007 (**CL-0253**), paras. 7.5.27-7.5.33.

[765] *Tecmed v. Mexico* (**CL-0252**), para. 149.

that Norway would not in the future regulate the taking of snow crab on its outer continental shelf. In these circumstances, North Star's argument amounts to saying that if an investment is adversely affected by a change in the general regulatory regime then this may amount to an expropriation if the economic value of the investment is sufficiently badly affected. If that were the case, then the maker of sports cars whose business is seriously affected by the introduction or lowering of speed limits would be entitled to compensation on the basis that they had been the victims of indirect expropriation. If those business had been induced to invest by assurances given by the host State that such changes in the law would not be introduced, they might have a claim (though more likely for inequitable treatment than for expropriation). But in the present case, no such assurances were given.

565. The Tribunal therefore dismisses the expropriation claim.

f. Has Norway Violated the Duty of Most Favoured Nation Treatment

566. Article IV(1) of the BIT provides:

> *Most Favoured Nation Treatment*
>
> *1. Investments made by investors of one Contracting Party in the territory of the other Contracting Party shall be accorded treatment no less favourable than that accorded to investments made by investors of any third State.*[766]

567. North Star argues that Norway permitted Russian vessels to harvest snow crab in the Norwegian sector of the Loop Hole even though it banned North Star's vessels from operating there.

568. This allegation relates to a comparatively short period of time. During 2016, a temporary arrangement was in place between Norway and the Russian Federation under the terms of which each State permitted reciprocal access to its sector of the Loop Hole for snow crab vessels of the other State (see paragraph 92, above) pending the adoption of a management agreement. The arrangement came to an end at the end of 2016. Since there is no evidence that North Star's vessels took or attempted to take significant quantities of snow crab from

[766] **CL-0001**.

the Norwegian sector until the *Senator* harvested crab there in late June 2016 (see paragraph 112, above), it is only in the second half of 2016 that the temporary arrangement between Norway and the Russian Federation could have had any effect for the purposes of the present case.

569. Article IV of the BIT does not prohibit discrimination between Latvian investors and Russian investors. It prohibits discrimination between the *investment* of a Latvian investor and the *investment* of a Russian investor. Moreover, the effect of the definition provision in Article I(1) of the BIT is that both the Latvian investment and the Russian investment must be investments within the territory of Norway. The Tribunal has held that North Star's only investment in the territory of Norway was the claim to performance under the agreement with Seagourmet (see paragraphs 278 to 279, above). The question, therefore, is whether there was during 2016 a Russian investor's investment in Norway which was treated more favourably than North Star's investment.

570. The Tribunal is not persuaded that that was the case. The Tribunal accepts that the Russian flagged vessels which harvested snow crab in the Norwegian sector of the Loop Hole during the second half of 2016 were owned by Russian companies but it does not consider that those vessels were an investment in Norway. The fact that a ship flagged in State A and owned by a company in State A operates for a few months taking snow crab on the continental shelf of State B does not amount to an investment by the State A company in the territory of State B. There is no long-term commitment and no apparent benefit to the economy of State B. In the present case, there is no indication of any benefit to the economy of Norway arising from the fact that those Russian vessels harvested snow crab from the Norwegian outer continental shelf.

571. The Tribunal therefore dismisses the Article IV claim.

(4) The Svalbard Claims

a. Background

572. This part of the case turns on the Claimants' argument that the ban on harvesting snow crab in the zone contravenes the terms of the Svalbard Treaty.

573. That ban was introduced in the 2014 Regulations and, in effect, maintained in the 2015 Regulations—although the 2015 Regulations referred to the continental shelf rather than the Svalbard Fisheries Protection Zone, the effect was the same. At the time that North Star made its investment in Norway (as defined in Section IV above), it was not interested in harvesting snow crab in the waters around Svalbard but was focussed entirely on the Loop Hole. It was for that reason that it did not participate in the public consultations which preceded Norway's adoption of the 2014 Regulations.[767]

574. Moreover, at the time that North Star made its investment in Norway and began operations in the Loop Hole, it could not have claimed any right to harvest snow crab in the Svalbard FPZ. Latvia was not at that time a party to the Svalbard Treaty and could not have claimed any rights for its nationals under the terms of that Treaty.

575. The Claimants' interest in taking snow crab in the waters around Svalbard dates from the period after their vessels were excluded from harvesting snow crab in the Loop Hole. Following the adoption of the Russian ban in September 2016 and the arrest of the *Senator* in the same month on charges of having taken snow crab in the Norwegian sector of the Loop Hole, North Star ceased all operations in the Loop Hole. At that point it became interested in taking snow crab within 200 nautical miles of Svalbard.[768] Latvia had become a party to the Svalbard Treaty in June 2016. In November 2016, Latvia issued licences for North Star's four ships to take snow crab in the waters around Svalbard.[769]

576. Shortly before the *Senator* attempted to harvest snow crab on the continental shelf around Svalbard and was arrested on 16 January 2017, the technical director of North Star, Mr Andrey Kinzhalov, wrote to the Norwegian authorities in the following terms:

> *Our vessels are ready for their voyage to SVALBARD zone in order to catch Snow crab. Our vessels all have appropriate Certificates and Licenses.*

[767] Cl. Reply, para. 146.

[768] Pildegovics WS1, para. 207.

[769] The licence for *Senator* was issued on 1 November 2016 and was valid to the end of 2016 (**C-0017**). Similar licences were issued by Latvia for the other three ships and for subsequent years. See also Pildegovics WS1, para. 87.

> *In order not to have any problems with the allowed area for catching we kindly ask you to inform us about the coordinates of conservancy areas where we have not the right to catch.*
>
> *Also please inform us – do we have the right to catch the snow crab less than 12 nautical miles from Svalbard and islands around Svalbard.*
>
> *Also please inform us what is the rules concerning informing of Coast Guard or any department on catching of crab*[.][770]

577. On 15 January 2017, the Norwegian Ministry of Trade, Industry and Fisheries replied:

> *Snow crab is a sedentary species under the UN Convention on the Law of the Sea (UNCLOS). This means that the Coastal State exercises sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources, including snow crab. This means that other States cannot harvest snow crab on the continental shelf of a coastal State, without the express consent of the coastal State concerned. According to UNCLOS, exploring and exploiting the natural resources of the continental shelf is a sovereign right vested with the coastal State. Under no circumstances may a State "license" the exploitation of living or non-living resources on the continental shelf of another State. Such illegal licensing would be a blatant violation of the coastal State's sovereign rights under international law. This includes licensing by the EU on behalf of vessels from EU member States. This has at several occasions been communicated to the EU, including in a verbal note from the Norwegian Ministry of Foreign Affairs to the EU dated 9 January 2017. Hence the certificates and licenses your vessels are referring to in the letter are not in accordance with neither* [*sic*] *Norwegian nor international law.*
>
> *Harvesting of snow crab on the Norwegian continental shelf is prohibited unless an exemption has been granted. No such exemption has been granted to vessels flying the flag of an EU Member State. Therefore your vessels are not authorized to fish on the Norwegian continental shelf. This includes the whole Norwegian continental shelf, including the areas around Svalbard.*
>
> *Regulation no. 1836 of 19 December 2014, as amended by Regulation no. 1833 of 22 December 2015, prohibiting catches of snow crab is fully consistent with Norway's rights, jurisdiction and obligations as a coastal State under international law. The*

[770] **R-0059**.

> *regulation also establishes the prohibition of harvesting snow crab within 12 nautical miles for all vessels that are granted exemption to harvest.*
>
> *Possible future harvesting of snow crab by vessels from EU member* [S]*tates on the Norwegian continental shelf, must be based on bilateral agreement. During the EU-Norway bilateral fisheries negotiations for 2017, Norway opened for snow crab being part of the quota exchange between Norway and the EU. However, the EU declined.*
>
> *Norway expects everyone to follow applicable regulations in Norwegian maritime areas, and we want to leave no doubt that such regulations will be enforced consistently as conveyed in the above mentioned note to the EU, and in accordance with international law.*
>
> *The Norwegian Coast Guard is prepared to enforce Norwegian law, and vessels starting fishing activity after snow crab without expressed consent from Norway will be arrested and prosecuted*.[771]

578. The *Senator* was arrested the following day (see paragraph 113, above). The Norwegian courts, up to the level of the Supreme Court, upheld the penalties imposed on North Star and the captain of the *Senator* (see paragraphs 118 to 121, above).

b. The Svalbard Treaty and the BIT

579. As the Tribunal has explained (see paragraph 78, above), the status of Svalbard (or Spitsbergen) is subject to the provisions of the Svalbard Treaty, 1920. Under Article 1 of the Treaty, the Contracting Parties "*undertake to recognise, subject to the stipulations of the present Treaty, the full and absolute sovereignty of Norway over the Archipelago of Spitsbergen*".[772]

580. Article 2 of the Svalbard Treaty provides in relevant part:

> *Ships and nationals of all the High Contracting Parties shall enjoy equally the rights of fishing and hunting in the territories specified in Article 1 and in their territorial waters.*

[771] **R-0060**.

[772] Svalbard Treaty (**CL-0002**).

581. Article 3 provides in relevant part:

> *The nationals of all the High Contracting Parties shall have equal liberty of access and entry for any reason or object whatever to the waters, fjords and ports of the territories specified in Article 1; subject to the observance of local laws and regulations, they may carry on there without impediment all maritime, industrial, mining and commercial operations on a footing of absolute equality.*
> *They shall be admitted under the same conditions of equality to the exercise and practise of all maritime, industrial, mining or commercial enterprises both on land and in the territorial waters, and no monopoly shall be established on any account for any enterprise whatever.*
>
> *Notwithstanding any rules relating to coasting trade which may be enforced in Norway, ships of the High Contracting Parties going to or coming from the territories specified in Article 1 shall have the right to put into Norwegian ports on their outward or homeward voyage for the purpose of taking on board or disembarking passengers or cargo going to or coming from the said territories, or for any other purpose.*
>
> *It is agreed that in every respect and especially with regard to exports, imports and transit traffic, the nationals of all the High Contracting Parties, their ships and goods shall not be subject to any charges or restrictions whatever which are not borne by the nationals, ships or goods which enjoy in Norway the treatment of the most favoured nation; Norwegian nationals, ships or goods being for this purpose assimilated to those of the other High Contracting Parties, and not treated more favourably in any respect.*

582. The Claimants maintain that Article 2 and Article 3 apply to the continental shelf of Svalbard and thus that, as Latvian nationals, they have an equal right to fish, including to take snow crab, in the Svalbard continental shelf. Norway's refusal to allow them to do so, they maintain, is contrary to Article 2 and therefore amounts to a violation of the BIT. Norway disputes this interpretation of Article 2, maintaining that it applies only to the territorial sea around Svalbard and not to the continental shelf, which did not exist as a legal concept in 1920.[773]

[773] *See*, *e.g.*, Note Verbale from Norway to the EU, 8 February 2021 (**C-0176**).

583. Norway's view has long been contested by certain other parties to the Svalbard Treaty. The USSR and latterly the Russian Federation have maintained that the provisions of Articles 2 and 3 apply to the continental shelf around Svalbard.[774] The same view has been expressed by Iceland,[775] Spain[776] and the United Kingdom,[777] as well as by the EU.[778]

584. The Tribunal doubts that it can adjudicate upon that inter-State dispute. On a purely textual basis, the position taken by Norway cannot be dismissed out of hand but neither can the different interpretation advanced by other parties to the Treaty. Although the Claimants deny that they are asking the Tribunal to "*rule*" on the meaning of the Treaty provisions, in practice that is exactly what the Tribunal would have to do in order to determine whether in excluding North Star's vessels from the Svalbard continental shelf Norway acted contrary to its obligations under the Svalbard Treaty.

585. However, even if the Tribunal could make such a determination, that would not mean that Norway had acted in breach of the BIT. The Tribunal agrees with Norway that a breach of the Svalbard Treaty is not automatically a breach of the BIT. In the next section of this Award, therefore, the Tribunal will examine whether, assuming *arguendo* that the Claimants are correct in their interpretation of the Svalbard Treaty, Norway's actions amounted to a violation of the BIT.

c. Did Norway Violate the BIT by Excluding North Star's Vessels from taking Snow Crab on the Svalbard Continental Shelf

586. The Claimants argue that, if Norway acted contrary to the Svalbard Treaty in excluding their vessels from taking snow crab on the Svalbard continental shelf, that action was also a violation of the obligation to admit their investment and to accord to their investment

[774] Notes Verbale from the USSR to Norway, 15 June 1977 (**CL-0246**) and 14 June 1988 (**CL-0247**); from the Russian Federation to Norway, 17 July 1998 (**CL-0248**).

[775] Note Verbale from Iceland to Norway, 30 March 2006 (**CL-0249**).

[776] Note Verbale from Spain to Norway, 2 March 2007 (**C-0078**).

[777] Note Verbale from the United Kingdom to Norway, 11 March 2006 (as cited in M. Apostolaki, E. Methymaki, C. Musto and A. Tzanakopoulos, "United Kingdom Material on International Law" in 87 British Yearbook of International Law (2007) (**CL-0069**), p. 794).

[778] Note Verbale from the EU to Norway, 1 November 2016 (**C-0071**). See also the references to Notes Verbale from the EU to Norway sent on 25 October 2016 and 24 February 2017 in Council Regulation (EU) 2019/124, 30 January 2019 (**CL-0003**), para. 42.

"*equitable and reasonable treatment*" under Article III of the BIT. They also maintain that Norway's actions with regard to access to Svalbard, taken together with Norway's earlier actions, amounted to expropriation contrary to Article VI. Finally, there is a separate allegation that the Claimants suffered a denial of justice.

587. The Tribunal will begin with the argument that by refusing access to the continental shelf around Svalbard, Norway violated the obligation in Article III of the BIT to "*promote and encourage in its territory investments of investors of the other Contracting Party and accept such investments in accordance with its laws and regulations*". The Claimants argue that the refusal to allow them to access the continental shelf around Svalbard was a refusal to accept a new investment. That argument overlaps with the Loop Hole Claim in that North Star there makes the same argument in relation to denial of access to the Norwegian sector of the Loop Hole.

588. There are two difficulties with this argument. First, although Article III imposes a duty to accept a proposed investment, Article IX gives the Tribunal jurisdiction only with regard to a dispute concerning an existing investment.

589. Secondly, both with regard to a proposed investment in the Norwegian sector of the Loop Hole and with regard to a proposed investment in the continental shelf around Svalbard, the proposed investment would not have been in accordance with the laws and regulations of Norway.

590. Insofar as North Star sought in 2017 to make a fresh investment by taking snow crab in the Norwegian outer continental shelf in the Loop Hole at the time its vessels were excluded from the Russian sector of the Loop Hole, that proposed investment was contrary to Norwegian regulations which had been in force for several months prior to North Star seeking to make that fresh investment. Those regulations have been upheld by *the Supreme Court of Norway both in the criminal proceedings concerning the Senator*[779] and in the 2023 judgment in the civil proceedings.[780]

[779] See para. 121, above.

[780] See para. 122, above.

591. With regard to the Svalbard element of the claim, the Norwegian regulations prohibiting foreign vessels from taking snow crab in the Svalbard continental shelf had been in force for even longer (since January 2015) and, crucially, since before Latvia acceded to the Svalbard Treaty.

592. North Star responds that the requirement that the proposed investment must be in accordance with Norwegian laws and regulations as they *should* be construed, which it takes to mean in accordance with its interpretation of the Svalbard Treaty. The Tribunal is not persuaded by this argument. The Norwegian Supreme Court has upheld the convictions in respect of the *Senator's* attempt to take snow crab in the Svalbard continental shelf. Moreover, in the 2023 civil judgment, the Supreme Court considered in some detail the argument now advanced by the Claimants regarding the interpretation of the Svalbard Treaty and unanimously rejected it. It is not open to an international tribunal to determine that a country's highest national court has misinterpreted and misapplied the law of that country. The Tribunal will return to this issue when it considers the denial of justice argument below.

593. That leaves the question whether Norway's exclusion of North Star's vessels from the Svalbard continental shelf violated either Article III or Article IV of the BIT in relation to North Star's *existing* investment. The Tribunal has already held that that investment was confined to the claim to performance under the agreement that Seagourmet would buy from North Star snow crab landed in Båtsfjord by North Star so long as Seagourmet had the necessary capacity at its Båtsfjord plant.

594. There is very little in the way of evidence of that agreement. The Tribunal has deduced its existence from the evidence of Mr Pildegovics and Mr Levanidov and from the pattern of deliveries by North Star to Seagourmet which began in 2015. At that time, the focus of North Star's activities was the Loop Hole. North Star did not participate in the consultation process which led to the adoption of the 2014 Regulations concerning the taking of snow crab in the Svalbard Fisheries Protection Zone and the Norwegian Exclusive Economic Zone because it was not then interested in those waters. For the same reason, it did not

apply for an exemption under the 2014 Regulations. Moreover, Latvia was not then a party to the Svalbard Treaty and North Star could not have invoked the Svalbard Treaty.

595. In short, at the time that the investment came into existence, it had nothing to do with Svalbard and the continental shelf around it. There is no evidence that in 2015 North Star (or Mr Pildegovics) had any expectations regarding the possibility of taking snow crab on the Svalbard continental shelf or that the investment was made in reliance upon any such expectations. In these circumstances, the Tribunal cannot see that the refusal of Norway to permit North Star's vessels to take snow crab on the Svalbard continental shelf when North Star subsequently attempted to do so, violates Norway's Article III obligation to accord North Star's claim to performance under its earlier agreement with Seagourmet equitable and reasonable treatment.

596. The written contracts between Seagourmet and North Star, concluded in late 2016 and 2017, which for the first time referred to the quantities of snow crab which North Star undertook to deliver and Seagourmet to purchase, do not alter this conclusion. By the time those written contracts were drafted, both of the parties to them knew that North Star's vessels would not be able to take snow crab in the Loop Hole and that Norwegian laws and regulations prohibited them from doing so in the Svalbard continental shelf. Unlike the earlier, unwritten agreement, these were essentially artificial instruments which neither party could have expected to implement.

597. That leaves North Star's claim that it has been the victim of a denial of justice. There are two elements to this claim: first, that the process followed in the Norwegian courts amounted to a procedural denial of justice; and, secondly, that North Star suffered a substantive denial of justice when the Supreme Court refused to rule on its defence based on the Svalbard Treaty. The Tribunal has concluded that North Star has not made out either limb of this claim.

598. With regard to procedural denial of justice, North Star's case is based an allegation that the appointment of Mr Stabell, the Deputy Attorney-General, as a prosecutor in the case was contrary to the principle that the prosecutor must be independent and demonstrated

"*subservience to executive pressure*".[781] The Tribunal does not accept that submission. North Star's argument is based first on what it conceives as the role of a prosecutor under Norwegian law. However, the Director of Public Prosecutions and the Norwegian Supreme Court expressly considered this issue and ruled that Mr Stabell's presence as a co-prosecutor was not contrary to Norwegian law.[782] The Tribunal must defer to that decision insofar as the issue is whether there was a breach of Norwegian law. To the extent that North Star argues that even if the appointment was consistent with Norwegian law, it was nevertheless a breach of international law, the Tribunal notes that North Star is unable to point to any provision in an applicable human rights treaty and relies on a report of the Inter-American Commission of Human Rights, which is clearly not applicable to Norway, and a report of a UN Special Rapporteur which deals in fairly general terms with the independence of a prosecutor and is, in any event, not binding.[783]

599. So far as the claim of a substantive denial of justice is concerned, the Tribunal notes that the Norwegian Supreme Court in the criminal proceedings did not hold that North Star's argument based on the Svalbard Treaty was not justiciable in a Norwegian court but that it had to be advanced in civil proceedings and not as a defence in a criminal case. A State is entitled to determine the means by which a particular issue may be litigated before its courts. The Tribunal finds no denial of justice in the Supreme Court taking the view that it did. Nor does it accept that this approach led to unconscionable delay.

600. Moreover, North Star did pursue civil proceedings which culminated in the ruling of the Supreme Court in 2023 dismissing its claim and rejecting its interpretation of the Svalbard Treaty.[784] There was, therefore, no refusal on the part of the Norwegian justice system to consider and rule upon North Star's claims. The Claimants have submitted two documents critical of the 2023 Supreme Court judgment.[785] The first is an article by a Supreme Court

[781] Cl. Memorial, para. 783.

[782] See Memorandum on Appointment of Co-prosecutor for Supreme Court in Case No. 18-064307STR-HRET, 14 December 2018 (**R-0172**); *SIA North Star LTD v. Public Prosecuting Authority*, Supreme Court of Norway, Judgment, 9 January 2019 (**RL-0138**).

[783] *See* Cl. Reply, paras. 809-810, and the sources cited therein.

[784] *SIA North Star Ltd. v. The State of Norway, represented by the Ministry of Trade, Industry and Fisheries*, HR-2023-491-P, Case No. 22-134375SIV-HRET, Judgment of 20 March 2023 (**C-0358)**; see paragraph 122, above.

[785] See paragraph 123, above.

justice who did not take part in the proceedings criticising the reasoning of the Court.[786] While this article shows that there is a degree of controversy about the decision, the views of the justice who wrote it have to be set against the contrary views of the fifteen justices who took part in the judgment. The second is said to be a draft of a Note Verbale to be sent to Norway by the EU protesting the decision.[787] There is no indication that such a Note was ever sent. Moreover, the text submitted to the Tribunal is headed with the following statement:

> *This document serves as a basis for discussion at the Working Party on Fisheries Policy. It cannot in any circumstances be regarded as the official position of the Commission. It is intended solely for those to whom it is addressed.*

In these circumstances, the Tribunal considers that it cannot attach any weight to this document. Even if it could, however, the draft Note does no more than reiterate that the EU takes a different view of the Svalbard Treaty from the Norwegian Government and the Supreme Court. For the reasons already given the Tribunal cannot rule on that difference. Neither the EU draft nor the article by Justice Skoghøy afford any support to the Claimants' argument that they suffered a denial of justice.

601. The Tribunal therefore rejects the Article III part of the Svalbard claims.

602. Nor does the Tribunal consider that there has been a breach of Article VI. It has already held that Norway's actions during 2015 and 2016 did not amount to an expropriation of North Star's investment. The fact that Norway subsequently prevented North Star from taking snow crab in the Svalbard continental shelf does not raise Norway's actions to the level of an expropriation of that investment. The Tribunal therefore rejects the Article VI claim.

(5) Sea & Coast

603. The Tribunal turns briefly to the First Claimant's case that he has suffered a violation of the BIT based on his ownership of 100% of the shares in Sea & Coast. He acquired those

[786] *Interpretation of the Wording of Treaties – Commentary on the Snakrab Judgment*, 23 March 2023 (**C-0359**).
[787] Draft EU Note Verbale to the Kingdom of Norway, 2 October 2023 (**C-0357**).

shares in 2015. It is common ground between the Parties that they constitute an investment by Mr Pildegovics in Norway within the meaning of the BIT. [788]

604. Mr Pildegovics maintains that his shareholding in Sea & Coast was the subject of multiple violations of the BIT. However, this claim was scarcely developed in the Memorial and not mentioned in the Reply. Nor does the expert report on valuation submitted by the Claimants contain any assessment of the value of the damage allegedly sustained by Sea & Coast. That led Norway to argue that there is in fact no separate claim in respect of Sea & Coast.[789] The Tribunal expressly raised that issue at the Hearing.[790] In response, the First Claimant stated:

> *The answer to this question is yes, there is a distinct claim in respect of the alleged damage to Sea & Coast or rather to Mr Pildegovics' investment in Sea & Coast. That claim exists because Mr Pildegovics' shares in Sea & Coast, which are part of the investment, have lost value due to Norway's breaches of the BIT.*
>
> *That loss of value is distinct from the loss suffered by North Star, because Sea & Coast and North Star are two different businesses with different business models.*
>
> *However, the claim related to Sea & Coast has not yet been quantified, it would have required its own expert report, because these are different businesses, calling for different analyses, but the Claimants reserve the right to do so in a subsequent phase of this arbitration if needed.*[791]

605. The claim in respect of Mr Pildegovics's shares in Sea & Coast was not therefore particularised until the Hearing and, even then, almost no detail has been given as to the acts which are said to have constituted the breaches of the BIT. Article 36(2) of the ICSID Convention requires that the Request for Arbitration "*shall contain information concerning the issues in dispute*". In addition, ICSID Arbitration Rule 31(3) requires that the Memorial shall contain "*a statement of the relevant facts; a statement of law; and the submissions*". In the case of the First Claimant's claim regarding Sea & Coast, it is difficult to see how

[788] See paragraph 160, above.

[789] Res. C-Mem., paras. 467 and 471; Transcript, Day 4, p. 168, lines 9-13.

[790] Transcript, Day 3, p. 117, lines 21-24.

[791] Transcript, Day 4, p. 101, line 8 to p. 102, line 2.

these requirements can be considered to have been met. Nevertheless, Norway did not raise an objection on these grounds and the Tribunal will consider the claim as advanced at the Hearing.

606. The Memorial describes the activities of Sea & Coast in the following terms:

> *Since June 2014, Sea & Coast operated as a service agent for North Star, its vessels and its crews. Its mission was to procure goods and services needed for the operation of North Star's vessels, notably by building commercial relationships with suppliers from the local community*.[792]

607. Mr Pildegovics alleges that Sea & Coast had operating revenues of NOK 19.3 million in 2015 and NOK 18.5 million in. 2016.[793] Of these revenues, however, only NOK 1.7 million in 2015 and NOK 2.7 million in 2016 appear to have come from North Star.[794] In his testimony at the Hearing, Mr Pildegovics admitted that the majority of Sea & Coast's revenues came from clients other than North Star.[795]

608. Mr Pildegovics was asked a number of questions about the clients, other than North Star, which Sea & Coast had and about the claim in respect of Sea & Coast. His initial comment was:

> [T]*here were lots of Russian vessels coming to Båtsfjord for unloadings. and some of the Russian companies came to us and asked if we can help them as well to organise the same things which we organised for North Star.*[796]

Later, there were the following exchanges:

> *Q. Is it your case that Norway in any way impeded Sea & Coast's ability to act as an agent for the vessels of North Star and any other company?*

[792] Cl. Mem. Para. 248.

[793] Cl. Mem. Para. 251; Pildegovics WS1, para. 168; Sea & Coast Annual Reports for 2014 (**PP-0215**), 2015 (**PP-0216**) and 2016 (**PP-0217**).

[794] Pildegovics WS1, para. 167.

[795] Transcript, Day 2, p. 70, lines 8-18.

[796] Trabnscript, Day 2, p. 70, lines 15-18.

> *A. The actions of Norway definitely led to the drop, a sharp drop of revenues of that company, due to the fact that vessels which were serviced by that company were not able to continue fishery.*
> *Q. Does that include Russian vessels as well as the North Star vessels ?*
>
> *A. Well, primarily we are talking about European vessels which were stopped starting from September.*[797]
>
> […]
>
> […] *Sea & Coast lost not only North Star as a client but lost all other crab fishing companies, which were not able to continue fishing due to actions of Norway. I think this is important, because since that happened, Sea & Coast lost all clients, not only North Star, but all.*[798]

Finally, in re-examination, there was the following exchange:

> *Q.* […] *in addition to North Star, who were the other clients of Sea & Coast ?*
>
> *A. Just before September 2016 the client was the Lithuanian company who was catching with three vessels in the Barents Sea, and as I said, there were a couple of Russian companies who were also catching snow crab.*[799]

609. The Annual Reports for 2015 and 2016 show that the company made a loss (NOK 118,602 in 2015 and NOK 1,240,661 in 2016) in both years. Thereafter there was a marked decline in the company's results with revenue of only NOK 3.1 million and a loss of NOK 3.61 million in 2017.[800]

610. Since the present proceedings were bifurcated (see paragraph 28, above) the First Claimant cannot be criticised for not having set out the extent of the damages which he claims to have suffered. However, the question of liability has to be determined in the present phase of the proceedings. It follows that the existence of a breach, or breaches, of the BIT has to

[797] Transcript, Day 2, p. 71, lines 11-21.
[798] Transcript, Day 2, p. 147, lines 8-13.
[799] Transcript, Day 2, p. 154, lines 18-23.
[800] Annual report 2017 (**PP-0218**).

be established at this stage. The Tribunal considers that the First Claimant has failed to establish the existence of any such breach.

611. The essence of the claim relating to Sea & Coast appears to be that once North Star's fleet and other EU, and perhaps Russian, crabbers were obliged to cease operating in the Loop Hole and continued to be barred from taking snow crab around Svalbard, Sea & Coast's business of servicing these vessels suffered a severe decline.

612. Norway was not, however, under any obligation to ensure that there was a market for Sea & Coast's services. To the extent that Sea & Coast's business decline was due to the disappearance of work from North Star, the Tribunal considers that there could be no claim under the BIT in respect of Sea & Coast unless, at the very least, Norway had acted unlawfully in the steps which it took that affected North Star's business. The Tribunal has held that there was no such illegality in Norway's treatment of North Star.

613. To the extent that the Sea & Coast claim is based on the loss of work from other clients, the Tribunal has been provided with no information about those clients or how acts attributable to Norway affected their demand for the services of Sea & Coast.

614. In these circumstances, the Tribunal concludes that there is nothing in the record on which a finding of a breach of the BIT with regard to Sea & Coast could possibly be based and dismisses the First Claimant's claim in respect of his shareholding in that company.

(6) Conclusion

615. For the reasons set out above, the Tribunal therefore concludes that the Claimants' claims should be dismissed in their entirety.

VI. COSTS

616. Article 61(2) of the ICSID Convention provides that:

> *In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members*

of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

617. Unlike the UNCITRAL Arbitration Rules, neither the ICSID Convention nor the ICSID Arbitration Rules contain a presumption in favour of an award of costs to the successful Party. The Tribunal thus has a discretion regarding whether to make an award of costs and, if so, on what terms. Costs fall into two distinct categories: the costs of the arbitration, including the fees and expenses of the Members of the Tribunal, and the costs incurred by the Parties for their legal representation, for retaining the services of experts and for incidental expenses ("**Costs of Representation**").

618. The Tribunal considers that it is only just that the unsuccessful Party should meet the entire costs of the arbitration. In the present case, those costs are as follows:

ICSID's administrative fees:	USD 168,000.00
Direct Expenses:	USD 111,323.15
Fees and expenses of the Members of the Tribunal:	
Sir Christopher Greenwood:	USD 131,857.04
The Hon. L. Yves Fortier:	USD 111,076.12
Professor Donald McRae:	USD 75,050.73
Total:	**USD 597,307.04**.

619. These costs have been met by advance payments made on an equal basis by the Parties.[801]

620. The Tribunal directs that the Claimants pay to the Respondent the sum of **USD 597,307.04** to cover the entirety of the arbitration costs. Each Claimant shall be jointly and severally liable for the entirety of this sum.

[801] The ICSID Secretariat will provide the Parties with a detailed Financial Statement of the case account. The outstanding balance will be reimbursed to the Parties in proportion to the advance payments that they have made to ICSID.

621. So far as the Costs of Representation are concerned, the Tribunal considers that, since Norway has been successful in the proceeding, the Claimants should pay to the Respondent at least some part of the latter's reasonable costs of representation and legal expenses.

622. The Respondent's costs of representation are as follows:[802]

Costs of representation by Ministry of Foreign Affairs officials:	EUR 395,259.76
Costs of representation by external counsel:	EUR 1,105,800.00
Expenses:	EUR 118,388.38
Total:	**EUR 1,619,448.14**.

623. The Tribunal considers that these costs and expenses are reasonable. In reaching that assessment, it has taken account of the length and complexity of the proceedings and the fact that the amount claimed by the Respondent in respect of Costs of Representation, both by officials of the Ministry of Foreign Affairs and external counsel, is considerably less than that set out in the Preliminary Statement of Costs submitted by the Claimants. While the Claimants inform the Tribunal that "*counsel is engaged on a mixed fee agreement (ie with a success fee component)*" so that "*it is difficult, especially at this stage, for Claimants to identify with precision costs 'incurred or borne' under the terms of Article 28(2) of the ICSID Arbitration Rules*".[803] Nevertheless, the estimate of costs of legal representation submitted by the Claimants is significantly higher than the costs claimed for legal representation by the Respondent, while the figure for expenses (excluding the costs of expert witnesses) is comparable to that of the Respondent.

624. However, the Tribunal considers that it should also take into account that the Respondent raised a number of objections to jurisdiction and admissibility which were either wholly

[802] Resp. Statement of Costs, 2 December 2022. Costs are itemised in detail in the attachments. The total amount claimed by Norway was EUR 1,882,505.85 but that figure included EUR 263,057.71 in respect of Norway's advance payments to ICSID which are dealt with separately in this Award (see paragraph 620, above). That left a total of EUR 1,619,448.14 of which the figure given in paragraph 625 represents half.

[803] Letter from counsel for the Claimants to the Tribunal, 2 December 2022.

unsuccessful or successful only in part. For that reason, it has concluded that the Claimants should be required to meet only one half of the Respondent's costs of representation.

625. Accordingly, the Tribunal decides that the Claimants shall reimburse the Respondent a total of **EUR 809,724.07** in respect of the Costs of Representation incurred. Each Claimant shall be jointly and severally liable for the entirety of this sum.

VII. AWARD

626. For the reasons set out above, the Tribunal:

(1) DECIDES that it has jurisdiction over the Claimants' claims to the extent, and only to the extent, set out in Part IV.C of this Award;

(2) DISMISSES the Claimants' claims in their entirety;

(3) ORDERS the Claimants to pay the sum of **USD 597,307.04** to the Respondent in respect of the arbitration costs, the Claimants to be jointly and severally liable to make this payment;

(4) ORDERS the Claimants to pay the sum of **EUR 809,724.07** to the Respondent in respect of the latter's Representation Costs, the Claimants to be jointly and severally liable to make this payment; and

(5) ORDERS the Claimants to pay the Secured Overnight Financing Rate ("**SOFR**") plus 2%, compounded twice yearly, from 60 days after the date of dispatch of this Award to the Parties.

The Honourable Yves L. Fortier, CC, OQ, KC
Arbitrator

Date: 22 DEC. 2023

Professor Donald M. McRae, CC, ONZM, FRSC
Arbitrator

Date: 22 DEC. 2023

Sir Christopher Greenwood, GBE, CMG, KC
President of the Tribunal

Date: 22 DEC. 2023