

THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE NO. ARB/20/11

PETERIS PILDEGOVICS AND SIA NORTH STAR

CLAIMANTS

V.

THE KINGDOM OF NORWAY

RESPONDENT

CLAIMANTS' REQUEST FOR ANNULMENT OF THE AWARD

22 FEBRUARY 2024

Savoie Arbitration s.e.l.a.s.u.
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I. RELIEF SOUGHT AND APPLICATION REQUIREMENTS

1. Pursuant to Article 52 of the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (the “**ICSID Convention**”) and Rule 50 of the *Rules of Procedure for Arbitration Proceedings* (“**Arbitration Rules**”), the Claimants, Mr. Peteris Pildegovics and SIA North Star, respectfully submit this Application for Annulment, in its entirety, of the Award dated 22 December 2023 in the case *Peteris Pildegovics and SIA North Star v. the Kingdom of Norway*, ICSID Case No. ARB/20/11 (the “**Award**”), rendered by an arbitral tribunal (the “**Tribunal**”) constituted pursuant to the *Agreement Between the Government of the Kingdom of Norway and the Government of the Republic of Latvia and for the Mutual Promotion and Protection of Investments* (the “**BIT**” or “**Latvia-Norway BIT**”).
2. The Claimants enclose, with this Application for full annulment, confirmation that payment of the USD 25,000 lodging fee has been made.
3. The Claimants reserve the right to supplement, modify or otherwise change the grounds for annulment presented in this Application for Annulment.
4. In the present Application, the Claimants submit at least:
 - **3 (three) grounds** for annulment as to **the proceedings in their entirety**;
 - **6 (six) grounds** for annulment on how the Tribunal exercised its **jurisdiction**;
 - **10 (ten) grounds** for annulment on how the Tribunal examined the **merits**;
and
 - **3 (three) grounds** for annulment regarding **costs**.
5. This Application for Annulment is structured as follows:
 - (a) **Part II** briefly recalls the facts of the case;
 - (b) **Part III** briefly addresses the law on annulment of ICSID awards;
 - (c) **Part IV** discusses the following three grounds for Annulment of the Award:
 - (i) First, the Tribunal failed to discharge its duty to properly adjudicate the matter by acting well below the standards expected from an ICSID Tribunal, including by spending insufficient time working on the matter,

- by failing to notify to Claimants an important procedural ruling weeks before the Award was rendered, and by rendering a non-sensical and fundamentally unfair award on costs, which constitute serious breaches of the fundamental rule of procedure that requires ICSID arbitrators to effectively fulfil their mandate;
- (ii) Second, the Tribunal caused a denial of justice to Claimants when it failed to exercise its powers by applying the *Monetary Gold* principle and refusing to decide certain issues before it, while also creating a situation of fundamental inequality between the parties since a State is not affected in the same way as a private person by the *Monetary Gold* principle, in breach of a fundamental rule of procedure;
 - (iii) Third, Respondent multiplied improper behaviour, notably by intentionally retaining, on multiple occasions, outside counsel and experts with conflicts of interest, as well as by misleading the tribunal when requesting bifurcation of damages, rendering the proceedings fundamentally unequal, in breach of a fundamental rule of procedure.
- (d) **Part V** discusses the following six grounds for annulment of the Award regarding how the Tribunal exercised its jurisdiction:
- (i) First, the Tribunal manifestly exceeded its powers by refusing to decide and/or incorrectly deciding how the Svalbard Treaty applied to the dispute;
 - (ii) Second, the Tribunal manifestly exceed its powers by incorrectly holding that neither NEAFC nor Svalbard licenses could be investments in Norway;
 - (iii) Third, the Tribunal manifestly exceeded its powers and/or provided contradictory reasons by incorrectly holding that the joint venture was not an investment in Norway under the BIT;
 - (iv) Fourth, the Tribunal manifestly exceeded its powers and/or provided contradictory reasons by adopting several improper considerations going to whether the Claimant's investment was in the territory of Norway;

- (v) Fifth, the Tribunal manifestly exceed its powers and/or provided contradictory reasons by failing to apply the approach of “unity” of the investment to the present case;
 - (vi) Sixth, the Tribunal manifestly exceed its powers by incorrectly holding that it did not have jurisdiction to hear Claimants’ claim that Norway acted in breach of Article III of the BIT with respect to the admission of the investment.
- (e) **Part VI** discusses the following ten grounds for annulment of the Award regarding how the Tribunal examined the merits:
- (i) First, the Tribunal failed to reopen the proceedings to hear the question of whether the 20 March 2023 judgment of the Supreme Court of Norway constituted a breach of the BIT, notably in the light of the EU’s diplomatic note of 30 October 2023 protesting against the judgment, despite Claimants’ request to reopen the proceedings, while the Tribunal also failed to notify Claimants its decision not to reopen the proceedings, in what constituted a manifest, serious, and even shocking, or at least surprising breach of a fundamental rule of procedure;
 - (ii) Second, Respondent misled the Tribunal when it requested bifurcation of damages, which must lead to the annulment of the entire Award, because it created a fundamental inequality between the Parties in how they were able to put their case to the Tribunal;
 - (iii) Third, the Tribunal provided contradictory, false and improper reasons regarding several issues going to whether Norway caused the damages suffered by Claimants, including whether the Russian Federation ever adopted a snow crab fishing ban and whether Norway and Russia acted jointly to close the Loophole, which must lead to annulment of the merits section of the Award;
 - (iv) Fourth, the Tribunal failed to state reasons regarding whether the Norwegian Supreme Court committed a denial of justice in 2019 by refusing to decide a matter going to the defense of North Star in a criminal proceeding, which must lead to annulment of the parts of the Award considering that issue;

- (v) Fifth, the Tribunal failed to state reasons and seriously breached fundamental rules of procedure in the way it disposed of the argument Claimants had “acquired rights” regarding snow crab fisheries, which requires to annul the parts of the award considering that issue;
 - (vi) Sixth, the Tribunal failed to state reasons and seriously breached fundamental rules of procedure in the way it disposed of the argument that Respondent acted arbitrarily and in bad faith, which requires annulment of parts of the Award considering that issue;
 - (vii) Seventh, the Tribunal failed to state reasons and seriously breached fundamental rules of procedure in the way it disposed of the argument that Respondent adopted discriminatory quotas, which requires annulment of that part of the Award;
 - (viii) Eighth, the Tribunal failed to state reasons and seriously breached fundamental rules of procedure in the way it disposed of the argument that Norway breached its obligation to admit Latvian investment in accordance with Norwegian law, which requires annulment of that part of the Award;
 - (ix) Ninth, the Tribunal failed to state reasons regarding why there was no better treatment under other treaties, meaning that the entire merits analysis must be annulled, and also regarding why the analysis under the other treaties, including the Svalbard Treaty, must or must not be done, which also constituted a manifest excess of power because the Tribunal failed to apply the proper law on the merits;
 - (x) Tenth, the Tribunal failed to state reasons and otherwise provided contradictory reasons in its application of the Most Favoured Nation standard.
- (f) **Part VII** discusses the following three grounds for annulment of the Award regarding costs:
- (i) First, the Tribunal awarded interest on Norway’s costs even though Norway did not ask for it and the Tribunal did not put the issue to the Parties, in breach of Claimants’ right to be heard, which constitutes a serious departure from a fundamental rule of procedure;

- (ii) Second, the Tribunal failed to state reasons regarding why it awarded to Norway arbitration costs higher than those Norway had paid, in an amount beyond what Norway asked for, and which contradicted the recognition that Claimants had paid their part of the requested costs, thereby seriously departing from a fundamental rule of procedure;
 - (iii) Third, since Claimants request annulment of the entire Award, as well as of parts of the Award without which Respondent would not have won the case, then the consequence is that the entire costs award must be annulled.
- (g) **Part VIII** discusses Claimants' application for a stay of enforcement of the Award.
 - (h) **Part IX** discusses Claimants' request for costs in the annulment proceedings.
 - (i) **Part X** provides Claimants' request for relief.
6. Claimants in no way admit the correctness of any of the legal or factual positions taken by Respondent in its pleadings, whether in the arbitration or in the present annulment proceedings, except if explicitly admitted.

II. FACTS

- 7. The present dispute arises from Norway's multiple breaches of international law, including of the Latvia-Norway BIT which have caused Claimants significant damages to their snow crab enterprise in Norway.
- 8. The Claimants established in Norway a snow crab fishing enterprise, which had a joint venture and/or cooperation agreement with the business partner of one of the Claimants. The Claimants' vessels started fishing snow crab in international waters in 2014 and offloading their catches in Norway, with full approval of Norway.
- 9. Starting in July 2015, Norway and the Russian Federation acted in concert to oust EU interests, including Latvian interests such as the Claimants, from the snow crab fisheries occurring in international waters in the Loophole, area in the Barents Sea beyond Norway and the Russian Federation's exclusive economic zones, but where the extended continental shelf of the two countries meet.

10. The snow crab was a new species in the Barents Sea at the time and thus Russian, Norwegian and EU interests started fishing snow crab in what was considered by all as international waters at the time. The hope was that participating in this new fishery would allow the participants to obtain quotas on a 'acquired rights' basis, based on historical catches.
11. Latvia and the EU have protested Norway and the Russian Federation's measures excluding EU crabbers ever since 2015. The EU has stated in a regional fisheries organization that EU vessels who had participated in the Loophole snow crab fisheries had "acquired rights" and needed to be compensated.¹ Latvia expressed its surprise to Norway about the measures leading to the closure of the Loophole to EU interests.² In October 2023, the EU went so far as making a diplomatic protest against Norway regarding a 20 March 2023 Norwegian Supreme Court decision refusing one of the Claimants, SIA North Star, snow crab fishing licenses.³
12. In the face of such manifest breaches of international law, including of the BIT, by Norway, Claimants filed an ICSID claim which was registered 1 April 2020.
13. Over the course of 2022, Norway proceeded to terminate its BITs with several EU countries, including with Latvia, in an apparent attempt to preclude other claims regarding its closure of the Loophole to snow crab fisheries.⁴ The agreement terminating the Latvia-Norway BIT terminates the sunset clause. An initial agreement terminating the Latvia-Norway BIT also appeared to preclude the re-constitution of a tribunal, even following a successful annulment. Following Claimants' lobbying of the Latvian Parliament's foreign relations commission, the Latvian Parliament adopted a law approving the termination with some modifications, which included ensuring that ongoing cases could be continued in a matter that respected Norway's agreement to arbitrate matters in ICSID cases,⁵ which agreement is irrevocable once it has been accepted.

¹ **C-0214**, p. 18; Claimants' Reply to Respondent Counter-Memorial and Counter-Memorial on Jurisdiction, 28 February 2022, para. 751.

² Minutes of the meeting between the Norwegian Embassy and the Latvian Foreign Ministry, 4 November 2015, **C-0206**, p. 2 (Norwegian Embassy's minutes of this meeting showing that the change in regulation of snow crab by Norway caused "*genuine surprise and indignation*" on the Latvian side).

³ EU Diplomatic Note to Norway, 30 October 2023, referred to in Claimants' Letter of 7 November 2023 to the Tribunal.

⁴ See e.g. Claimants' Letter of 24 August 2022 to the Tribunal.

⁵ See Claimants' Letter of 17 March 2023 to the Tribunal; Norway's Letter of 24 March 2023 to the Tribunal; Tribunal Letter of 27 March 2023.

14. The Tribunal rendered an Award on 22 December 2023, finding jurisdiction in respect of parts of Claimants' investment in Norway and rejecting the claims on the merits. However, in rejecting the claims on the merits, the Tribunal refused to adjudicate parts of the claim on the basis that it involved States not present before the Tribunal and required the interpretation of other international treaties. By doing so, the Tribunal caused a substantive denial of justice to Claimants, who cannot bring their claim elsewhere. As will be seen in this application, the Tribunal made many mistakes in rendering the Award and in conducting the proceedings, which require annulment of the Award in its entirety.

III. THE LAW ON ANNULMENT OF ICSID AWARDS

15. Article 52 of the ICSID Convention provides the grounds for annulment of an ICSID Award:

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.

16. While Claimants have reserved the right to raise any further annulment grounds in respect of the Award, at this stage Claimants invoke grounds under subparagraphs (1)(b), (d) and (e) of Article 52.

17. It is well established that a Tribunal's excess of its powers includes but is not limited to an error in how the Tribunal applied its jurisdiction (including an excess or a failure to exercise it), as well as a failure to apply the proper law.

18. As to serious departures of fundamental rules of procedure, such rules of procedure include: a) the right to be heard, including the right to contradict grounds used by a tribunal for its decision; b) the principle of equality of the parties; c) the prohibition

against ruling *ultra petita* (i.e. beyond what was asked by the parties); d) the prohibition against awarding double compensation; e) the prohibition against misleading the tribunal ; f) the prohibition against threatening the integrity of ICSID proceedings by retaining counsel with a conflict of interest to act against the opposing party; and g) the requirement that arbitrators fulfil their contract to provide arbitrator services with their best efforts, in an effective manner and in a way that ensures that the parties' right to be heard has been respected.

19. As to the annulment ground where there has been a failure to state reasons, it also includes contradictory and insufficient reasons.

IV. CLAIMANTS HAVE THREE GENERAL GROUNDS FOR ANNULMENT OF THE ENTIRE AWARD

20. The Claimants have three general grounds which, both individually and together, justify annulment of the Award in its entirety: a) the Tribunal failed to discharge its duty to properly adjudicate the dispute; b) the Tribunal committed a denial of justice by refusing to decide certain issues before it; c) the Respondent committed fundamentally improper behaviour which led to a breach of the principle requiring that the equality of the parties be respected in the proceedings.

A. THE TRIBUNAL FAILED TO DISCHARGE ITS DUTY TO PROPERLY ADJUDICATE THE DISPUTE

21. Claimants' first ground for annulment is that the Tribunal failed to discharge its duty to properly adjudicate the matter by acting well below the standards expected of an ICSID Tribunal. This is so for at least three reasons: a) the Tribunal cannot have spent sufficient time on the matter to fully consider the parties' submissions; b) the Tribunal failed to notify an important procedural ruling to Claimants; and c) the Tribunal rendered non-sensical rulings on costs.
22. There is no question that an ICSID tribunal has a generally duty to discharge its mandate – to provide arbitrator services – in a fair and efficient way. A fair adjudicatory process includes that the parties must have been heard. However, here the Parties were clearly not heard and/or did not have the chance to make themselves heard on issues the Tribunal ruled on. Where an ICSID tribunal acts in a manner that does not respect these principles, it constitutes a serious breach of a fundamental rule of procedure warranting full annulment of the award.

a. It is impossible that the Tribunal spent enough time to consider fully the parties' submissions

23. Based on the amount of time billed to ICSID by the members of the Tribunal, it is simply impossible that they properly considered the case record in advance of drafting the Award. The amount of time billed also raises serious questions as to whether the Tribunal could have drafted the Award itself.

24. The costs of arbitration are listed as such in the Award:⁶

- 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 75,050.75
- Total: USD 597,307.04

25. The hourly rate for arbitrators pursuant to ICSID's Schedule of Fees is currently USD 500/h. Based on such a rate, the presiding arbitrator would have spent about 263 hours on the case and the party-appointed arbitrators would have spent about 222 hours and 150 hours each.

26. These are surprisingly low numbers of hours for a case where the Tribunal was fully active for over three years or 40 months, as the Tribunal was constituted 10 August 2020, a one-week hearing on jurisdiction and merits was held in October and November 2022, and the Award was rendered in December 2023.

27. It is not clear how in such time the Tribunal could have:

- Drafted nine procedural orders after reviewing the parties' pleadings on relevant matters;

⁶ Award, para. 622.

- Reviewed 1,345 pages of merits pleadings (without counting witness statements totalling over 120 pages, expert reports totalling over 175 pages, as well over 1,200 factual exhibits and 848 legal authorities, which exhibits and authorities easily add up to tens of thousands of pages);
 - Attended a one-week substantive hearing;
 - Conducted deliberations; and
 - Drafted a 202-page award.
28. Merely drafting a 202-page award (after one has actually read the pleadings and considered the arguments) should normally take more than 263 hours.
29. It is also intriguing that ICSID's administrative fees are higher than the fees of any individual arbitrator.
30. On the face of the number of hours billed to ICSID, it is manifest that the Tribunal failed to take into consideration all of the parties' pleadings and arguments. This failure will become obvious when considering more specific annulment grounds.

b. The Tribunal failed to notify an important procedural ruling

31. The Tribunal's failure to properly adjudicate the Claimants' dispute is also shown by the fact the Tribunal did not notify an important procedural ruling that would have been made on 5 December 2023, approximately two weeks before the Award was rendered.
32. The Award refers in the following way to this procedural decision:⁷

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.

⁷ Award, para. 70.

33. However, Claimants' counsel never received this decision, which appears to contain reasons. Claimants were thus unable to react to this decision before the Award.
34. What is more, the Tribunal's apparent decision would have concerned Claimants' request to reopen the proceedings regarding the EU's diplomatic note of 30 October 2023 protesting the Norwegian Supreme Court decision of 20 March 2023.⁸ The Claimants had requested to reopen the proceedings if there was no other ground on which they succeeded on the merits.⁹ However, the Tribunal did not reopen the proceedings, nor did it even give the chance to Claimants to react to its procedural decision which, at least in effect, refused to further consider the question. Moreover, since the BIT had been terminated by Latvia and Norway, including its sunset clause, as the Tribunal well knew,¹⁰ the Claimants have no other possibility to submit themselves an international claim on this issue, pursuant to the BIT. Finally, despite the Tribunal's attempt to frame the issue differently, it was not possible to put before the Tribunal the EU's diplomatic protest of Norway's Supreme Court decision, which was made only in October 2023.
35. There is something that shocks, or at least surprises a sense of judicial propriety where a procedural ruling in adjudicatory proceedings is not notified to the parties. This is especially so where such a ruling has the potential of fully extinguishing not only a party's legal rights but also the existence of any effective recourse, as it is the case here. This, in and of itself warrants annulment of the entire Award.

c. The Tribunal rendered non-sensical rulings on costs

36. Two aspects of the Tribunal's ruling on costs further support Claimants' conviction that the Tribunal failed to properly adjudicate the Claimants' dispute.
37. First, the Tribunal awarded interest on costs in favour of Respondent even though it did not make such a request.¹¹ The fact that Respondent requested "*such further or*

⁸ Claimants' Letter to the Tribunal of 16 October 2023; Norway's Letter to the Tribunal of 23 October 2023; Claimants' Letter to the Tribunal of 7 November 2023; Claimants' Letter to the Tribunal of 15 November 2023.

⁹ See Claimants' Letter of 7 November 2023, ("*the Claimants underscore that, in order to ensure the efficiency of the proceedings, they do not at this stage seek such a finding, all the while reserving the possibility of raising it in a subsequent phase, if useful, except if the Tribunal is minded to rule that it has no jurisdiction and/or that there are no breaches of the BIT on the merits*").

¹⁰ See e.g. Claimants' Letter to the Tribunal of 24 August 2022.

¹¹ See e.g. Respondent's Rejoinder and Reply on Jurisdiction, 30 June 2022, para. 631 as well as Norway's Costs Statement of Costs of 2 December 2022.

*other relief as the Tribunal deems appropriate*¹² is no support for the Tribunal to award interest that was not sought. Awarding something not asked is not only a prohibited *ultra petita* ruling, but also prevents the party against whom such thing is awarded from being heard on that issue.

38. The Tribunal awarded interest on its costs award of SOFR + 2%, compounded twice a year.¹³ The SOFR has been above 5% since June 2023 and is currently about 5.3%, which yields an annual interest of 7.3% on costs, which is substantial¹⁴ highly unusual in investment treaty awards. Had Norway made such a request, the Claimants would have had much to say about it, but no such request was made, nor debated.
39. Secondly, the Tribunal granted Respondent USD 597,307.04 in arbitration costs even though Respondent paid **less** than this sum in arbitration costs. Paragraphs 618-620 of the Award states:

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: ...

Total: USD 597,307.04

619. These costs have been met by advance payments made on an equal basis by the Parties.

620. The Tribunal directs that the Claimants pay 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.

40. Then, in paragraph 626(3), the Tribunal:

(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;

41. The Tribunal's reasoning contradicts itself and creates a situation where Claimants are ordered to provide Respondent double compensation.

¹² Respondent's Rejoinder and Reply on Jurisdiction, 30 June 2022, para. 631.

¹³ Award, para. 626(5).

42. The Tribunal holds that “*the unsuccessful Party should meet the entire costs of the arbitration*”. It then recognizes that each side has already made advance payments on an “*equal basis*”, as was the case, meaning that Respondent had paid only half of the advances. According to ICSID’s financial table, as of 22 December 2023,¹⁵ Claimants had paid USD 375,000 in arbitration costs advances and Norway had paid USD 374,922. Therefore, by ordering Claimants to pay to Norway more than it had paid in arbitration costs advances, the Tribunal is not ordering Claimants to “*meet the entire costs of the arbitration*”, but is actually ordering Claimants to pay to Norway more than such costs. The Tribunal thus contradicts itself.
43. The Tribunal’s approach to costs is further evidence that it failed to properly adjudicate the manner, which justifies annulling the entire Award.

B. THE TRIBUNAL CAUSED A DENIAL OF JUSTICE TO CLAIMANTS AND MANIFESTLY FAILED TO EXERCISE ITS POWERS WHEN FAILING TO DECIDE A NUMBER OF ISSUES BASED ON THE *MONETARY GOLD* PRINCIPLE

44. The Tribunal caused a denial of justice to Claimants and manifestly failed to exercise its powers by failing or refusing to decide several fundamental issues in dispute on the basis of its application of the *Monetary Gold* principle.¹⁶
45. The application of the *Monetary Gold* principle – which provides that a dispute cannot be decided when a State party to such dispute is not present before the Tribunal – cannot serve to deprive an investor from a decision on the issue raised before an ICSID tribunal. The *Monetary Gold* rule exists in a State-to-State world, where even though a State is not present before the relevant jurisdiction, the State bringing the claim still has the possibility of raising the dispute, as matter of international law, with the other State, through diplomatic channels. However, private persons are certainly not subjects of international law in the same manner as States. Private persons do not have, as a matter of law, access to diplomatic channels. As such, private persons using an ICSID arbitration to raise an international wrong do not have the alternative of

¹⁵ ICSID Financial Table, 22 December 2023.

¹⁶ See e.g., Award, paras. 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.*”), 584 (“*The Tribunal doubts that it can adjudicate 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.*”).

entering into international negotiations should no adjudicatory avenue be open to them. It is trite to say that Mr. Pildegovics and SIA North Star do not have diplomatic relations with Norway, like Latvia, the Russian Federation and/or the EU do. Applying the *Monetary Gold* principle to Mr. Pildegovics and SIA North Star creates fundamental inequality between the Claimants and Norway in ICSID arbitral proceedings. That is because Norway can still have ongoing diplomatic discussions on the issues, which the Tribunal refused to decide, while the Claimants cannot.

46. The Tribunal applied the *Monetary Gold* principle to at least two situations.
47. First, the Tribunal held that it could not examine whether the Russian Federation had committed an international wrong and, as such, held that it could not examine several issues raised by Claimants, which went to the joint actions of Norway and the Russian Federation to close the Loophole to EU vessels.¹⁷ The Tribunal then promptly contradicted itself by holding that, in any event, in its view the record showed there was no “conspiracy” between Norway and the Russian Federation against EU interests.¹⁸ However, by coming to that conclusion, the Tribunal also entirely failed to examine significant evidence that did show joint intentional action between Norway and the Russian Federation against EU interests in the Loophole.¹⁹
48. Second, the Tribunal held that there was a dispute regarding the proper interpretation of the Svalbard Treaty and that it should not opine on it, even though the Svalbard Treaty is incorporated into Norwegian law and under relevant Norwegian law inconsistencies between a treaty and Norwegian law will be decided in favour of the treaty. To dismiss the Claimants’ position that Norway’s interpretation of the Svalbard treaty, as echoed by the Norwegian judiciary, is manifestly incorrect, the Tribunal simply stated, without further reasons: “*It is not open to an international tribunal to determine that a country’s highest national court has interpreted and misapplied the law of that country.*”²⁰ As a matter of law, this statement is manifestly incorrect, as

¹⁷ See e.g., Award, paras. 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.*”).

¹⁸ Award, para. 491 (“*It also rejects the conspiracy argument. There is no evidence that would suggest anything like a conspiracy between the two states.*”).

¹⁹ See e.g. Claimants’ Reply, 28 February 2022, pp. 58-70, paras. 171-207.

²⁰ Award, para. 592.

reflected by the following statement from the International Court of Justice in the 2010 judgment in the *Diallo* case:²¹

The Court recalls that it is for each State, in the first instance, to interpret its own domestic law. The Court does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts (see, for this latter case, *Serbian Loans*, Judgment No. 14, 1929, P.C.I.J., Series A, No. 20, p. 46 and *Brazilian Loans*, Judgment No. 15, 1929, P.C.I.J., Series A, No. 21, p. 124). **Exceptionally, where a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case, it is for the Court to adopt what it finds to be the proper interpretation.**

[Emphasis added]

49. As the Tribunal well knew, the EU's position was indeed that Norway and its courts adopted a manifestly incorrect interpretation of the 1920 Svalbard Treaty to gain an advantage both in respect of the present case and also in respect of a longstanding dispute between Norway and, essentially, all other parties to the Svalbard Treaty. This was even further underscored by the documents and correspondence submitted by the Claimants to the Tribunal in October and November 2023, which contained reference to the EU's 30 October 2023 diplomatic note protesting the manifestly incorrect interpretation of the Svalbard Treaty given by the Supreme Court of Norway on 20 March 2023.²²
50. The Tribunal thus committed a manifest excess of power by refusing to decide these questions and also failed to state reasons and/or provided contradictory reasons for its ruling.

C. RESPONDENT COMMITTED FUNDAMENTALLY IMPROPER BEHAVIOUR

51. Respondent multiplied improper behaviour, notably by intentionally retaining, one after the other, outside counsel and experts with conflicts of interest, as well as by misleading the Tribunal as to the reasons asserted in its request to bifurcate damages,

²¹ *Diallo* case, ICJ Judgment, 30 November 2010, para. 70.

²² Claimants' Letter to the Tribunal of 16 October 2023; Norway's Letter to the Tribunal of 23 October 2023; Claimants' Letter to the Tribunal of 7 November 2023; Claimants' Letter to the Tribunal of 15 November 2023.

which rendered the proceedings fundamentally unequal between the parties and thus constituted a breach of fundamental rules of procedure.

a. Norway intentionally retained counsel and experts with a conflict of interest to gain an improper advantage in the arbitration

52. It became obvious with the Respondent's statement of costs, that Norway had engaged intentionally in a practice of hiring outside counsel and experts who had worked previously either with the Claimants themselves or with persons very close to the Claimants in respect of the same dispute (i.e. the dispute between Norway and EU crabbing interests following the closure of snow crab fisheries in the Loophole).²³
53. Respondent hired lawyers from law firm Glimstedt's Riga office to investigate Claimants even though it is the Vilnius office of Glimstedt which filed the first notice of dispute of Claimant North Star in February 2017. This situation came to Claimants' attention in June 2022. Glimstedt immediately withdrew. Nonetheless, either Norway's counsel have no knowledge whatsoever of conflict of interest rules, or they acted maliciously and improperly to try to gain information about Claimants by hiring Glimstedt.
54. Claimants discovered two other conflicts of interest through Norway's costs submission.
55. First, Norway had hired KPMG AS (Norway) to provide consulting services while KPMG Eastern and Central Europe provided a preliminary damages assessment in 2018, in the same case. The conflict of interest was so manifest that Norway did not even try to defend itself when Claimants applied to have KPMG excluded from the case, which is what the Tribunal ordered in Procedural Order No. 9.²⁴
56. Second, Norway hired the Norwegian law firm Wikborg Rein to assist it, in background in the litigation. However, Wikborg Rein represented Arctic Fishing (a Lithuanian company that jointly submitted a notice of dispute regarding the present case with North Star) in criminal proceedings before Norwegian courts regarding fines issued to Arctic Fishing for fishing snow crab in NEAFC waters. Surprisingly, the Tribunal did not find Wikborg Rein had a conflict of interest to act against North Star and Mr.

²³ See Letter of Claimants to Tribunal, 30 January 2023; Letter of Norway to Tribunal, 13 February 2023.

²⁴ Procedural Order No. 9, 23 February 2023.

Pildegovics, though it left the door open for another application should Claimants adduce more information that would have pointed to improper sharing of information between Wikborg Rein and Norway. Claimants reserved their rights to seek further documents regarding this issue.

57. The accumulation of such obvious and apparent conflicts can only show that Norway acted intentionally in a way to ensure that it would gain an improper advantage over Claimants, trying to access information on them from their former advisers. The continued conduct of Norway in this manner, despite the fact it was advised by highly respected international law practitioners and barristers, who should have advised against such practices, created a lack of equality between the parties in the proceedings that was so significant that the entire Award should be annulled.
58. Claimants reserve the right, in the present proceedings, to seek discovery of all communications and documents that may show how Norway acted improperly in relation to the conduct outlined above.

b. Norway acted in breach of the Tribunal's directions and misled the Tribunal to gain bifurcation of damages

59. Norway also misled the Tribunal in order to prevent Claimants from fully arguing their damages case, thereby gaining an improper advantage in the proceedings.
60. To obtain bifurcation of damages, Norway simply lied to the Tribunal. In its Counter-Memorial of 29 October 2021, Respondent wrote:²⁵

Even if all of the conduct by Norway of which the Claimants complain were assumed to violate the BIT, the Claimants have not presented a case on which it is practicable to determine what losses, if any, they have sustained as a result.

61. In that submission, despite the Tribunal's instructions to submit the entire case on the merits (which would include quantum), following Norway's first (failed) attempt at obtaining bifurcation of damages, Respondent only provided a short section on damages and without submitting any expert report.
62. However, in its costs submission, Norway submitted invoices from Wikborg Rein showing it was working on a damages report in July 2022.

²⁵ Respondent's Counter-Memorial, para. 874.

63. In a letter of 13 December 2022, Claimants registered the following protest with the Tribunal:²⁶

Claimants also take this opportunity to note that in Attachment 7 to Norway's Statement of Costs, which is one of Wikborg Rein's invoices, there are at least 8 entries from July 2021 (see eg page 2, entries of partner Aadne Haga) which refer to work on a "report on quantum" or "quantum report". Nevertheless, Norway decided not to submit the report on quantum it had commissioned with its Counter-Memorial of 29 October 2021 (arguing it was not in a position to address quantum at that stage). Claimants fully reserve all their rights in this respect.

64. Norway thus intentionally flaunted the Tribunal's procedural directions to make a full submission on the merits on 29 October 2021 and then falsely argued that it was not in a position to make a submission on quantum.
65. Norway's misrepresentations and failure to respect the Tribunal's Procedural Order No. 4,²⁷ establishing a procedural schedule, led to a fundamental inequality of the Parties in presenting their case.
66. By not submitting a damages report, Norway avoided giving the Tribunal the benefit of such report to decide bifurcation of damages. Norway also likely preferred to try to minimize as much as possible the risk of having a damages expert cross-examined by Claimants. Such cross-examination would have showed the very high value of snow crab to Norway and the cross-examination may have shown how the closure of the Loophole substantially benefitted Norway financially.
67. Norway's improper behaviour regarding the bifurcation of the proceedings thus constituted a serious breach of fundamental rules of procedure which must lead to the annulment of the entire Award, for generally skewing the presentation of the case in favour of Respondent.

V. CLAIMANTS HAVE SIX GROUNDS FOR ANNULMENT REGARDING HOW THE TRIBUNAL EXERCISED ITS JURISDICTION

68. The Award must be annulled in its entirety because the Tribunal manifestly exceeded its powers by: a) refusing to decide and/or incorrectly deciding how the Svalbard Treaty applied to the dispute; b) incorrectly holding that neither NEAFC nor Svalbard licenses

²⁶ Claimants' Letter to the Tribunal of 13 December 2022.

²⁷ Procedural Order No. 4, 30 June 2021.

could be investments in Norway; c) incorrectly holding that the joint venture was not an investment in Norway under the BIT; d) providing contradictory reasons regarding whether the Claimant's investment was in the territory of Norway; e) providing contradictory reasons by failing to apply the approach of "unity" of the investment to the present case; and f) incorrectly holding it did not have jurisdiction to hear Claimants' claim that Norway acted in breach of Article III of the BIT with respect to the admission of the investment.

A. MANIFEST EXCESS OF POWER BY REFUSING TO DECIDE HOW THE SVALBARD TREATY APPLIES TO THE DISPUTE

69. As already explained, it was a manifest excess of powers for the Tribunal to refuse to interpret and apply the Svalbard Treaty,²⁸ including as a matter of Norwegian law going to jurisdictional issues, such as whether investments were made legally in Norway.

B. MANIFEST EXCESS OF POWER BY REFUSING TO HOLD NEAFC AND SVALBARD LICENSES WERE INVESTMENTS IN THE TERRITORY OF NORWAY

70. The Tribunal manifestly exceeded its powers by holding that the Claimants' NEAFC and Svalbard licenses were not investments in the territory of Norway pursuant to the BIT. Such conclusion also was contrary to the requirement to state reasons.

71. First, the Tribunal failed to state reasons to justify the following conclusion and statement:²⁹

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.

72. The Tribunal completely failed to address the fact, or to give cogent reasons, as to why Norway was not misapplying its own law, which it is. The Tribunal has fully and entirely refused to engage on this issue, which constitutes a manifest excess of powers while also constituting a denial of justice for Claimants.

²⁸ See e.g., Award, para. 584: "*The Tribunal doubts that it can adjudicate 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.*"

²⁹ Award, para. 277.

73. Relatedly, the Tribunal's failure to properly address the diplomatic note of 30 October 2023 and reopen the proceedings³⁰ went to important jurisdictional issues. That is, it concerned the proper application of Norwegian law since it went to the right interpretation of Svalbard and the effect it may have on the legality of the investment regarding the Svalbard licenses.
74. Moreover, at paragraph 275 of the Award, the Tribunal stated that: "*the Tribunal doubts that licenses granted by another State in order to satisfy non-Norwegian requirements could be regarded as an investment in Norway.*" This statement and all relevant consequences must be annulled for at least two reasons. It is incorrect as a matter of jurisdiction and the Tribunal failed to state reasons to address some of Claimants' arguments notably made at the hearing.³¹ What is even more surprising is that Claimants' arguments which the Tribunal failed to consider and respond to were in response to a question from the Tribunal at the hearing.³²

C. MANIFEST EXCESS OF POWER AND CONTRADICTION REASONS IN REFUSING TO HOLD JOINT VENTURE WAS INVESTMENT IN THE TERRITORY OF NORWAY

75. The Tribunal recognized there was a cooperation agreement between Mr. Pildegovics and Mr. Levanidov.³³ However, the Tribunal failed to give any effect to this finding as a matter of the Tribunal's jurisdiction. In doing so, the Tribunal issued contradictory reasons and failed to explain how and why it concluded that there was no effect to this agreement, which is contrary to the effect given by Norwegian law to such an agreement.

³⁰ See e.g., para. 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.*"); and then the Tribunal noting that Norway denied having received the Note Verbale (para. 123) and thus improperly questioning its existence at para. 600 ("*There is no indication that such a Note was ever sent.*"), despite Claimants' statements to the opposite, and eventually failing to decide the matter, again at para. 600 ("*For the reasons already given the Tribunal cannot rule on the difference.*").

³¹ Hearing Transcript, Day 4, p. 21 (from line 17) to p. 25 (line 3) (answering the Tribunal's question: "*How can a licence granted by another State or granted by an organisation be an investment in the State of Norway, or part of an investment in the State of Norway?*").

³² *Ibid.*

³³ Award, para. 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 "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.*")

76. Paragraphs 247-250 and 254 of the Award eloquently show these contradictions.³⁴
77. The Tribunal in its reasoning also pretended not to understand what effect there could be from an oral cooperation agreement under Norwegian law, even though it was clearly stated by Dr. Ryssdal, Claimants' expert, that such an agreement establish a duty of loyalty and cooperation.³⁵ This is sufficient to create a claim to performance, but the Tribunal failed to state reasons by feigning not to understand the consequences of the agreement they found existed.
78. As such, all aspects of the Award that are impacted by the Tribunal's failure to give effect to the agreement between Mr. Pildegovics and Mr. Levanidov must be annulled.

D. MANIFEST EXCESS OF POWER AND CONTRADICTIONARY REASONS ON WHETHER CLAIMANT'S INVESTMENT WAS IN THE TERRITORY OF NORWAY

79. The Tribunal manifestly exceeded its powers and provided contradictory reasons in concluding that the Claimant's investment was not in the territory of Norway, for the most part.
80. Notably, the Tribunal contradicted itself by finding that the dispute concerned Russia and that Claimants' catches were in Russia³⁶ while at the same time recognizing that some of Claimants' catches were over Norway's continental shelf.³⁷
81. The Tribunal also manifestly exceeded its powers by assigning the catches over Russia's continental shelf, which at the time were made in an area considered by all as international waters.
82. The Tribunal failed to address, and thus state reasons, in respect of the fact that fisheries were in international waters, not in Russia, which in any event goes to an

³⁴ For example, compare the first sentence of para. 248 of the Award (cited just above) to the next sentence of that same paragraph: "*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.*"

³⁵ See e.g. Claimants' Rejoinder on Jurisdiction, 28 July 2022, para. 529 ("*A joint venture, as the one existing between Mr. Pildegovics and Mr. Levanidov, and established on the facts, and as further confirmed by Dr. Ryssdal in light of Norwegian law, is certainly an "asset" and/or "claim to performance" with "economic value". Obligations of loyalty and cooperation exist and they are enforceable. Such cooperation, as explained, has real economic value in that a guaranteed flow of snow crab catches to Seagourmet's factory guarantees purchases for North Star and Mr. Pildegovics, on the one hand, and guarantees goods to transform, on the other, for Seagourmet and Mr. Levanidov. This is enough to confirm that it is a protected investment under the Latvia-Norway BIT.*").

³⁶ See e.g., Award, para. 270 ("*the focus of North Star's operations was either in Latvia or the Russian Federation*").

³⁷ Award, para. 393 (reference to Respondent stating there was some activity on the "*Norwegian continental shelf*").

issue of incorrect jurisdictional scope on the territorial scope of the investment.³⁸ There are also references in the Award to the “Russian sector”³⁹ of the Loop Hole, which further reflects an incorrect approach to the territory in which the investment was situated, as the use of licenses and vessels in the Loophole was in an international area, not in the territory of any particular State.

83. Furthermore, by considering the snow crab as a sedentary species for the purposes of the Award, the Tribunal made an annulable error, with such finding being a manifest excess of power as well as a serious breach of a fundamental rule of procedure, notably because the Tribunal failed to consider Claimants’ evidence and position on this issue.⁴⁰
84. The Tribunal made another jurisdictional error, regarding what effect to give to Norway’s approval of snow crab landings. The Tribunal erroneously failed to accept that the landings, because they were accepted by Norway, were legal in Norway for jurisdictional purposes. Moreover, the Tribunal failed to state reasons regarding the arguments put at the hearing on the jurisdictional issue, as already explained.⁴¹

³⁸ For the Tribunal’s references to fisheries on the Russian side of the Loop Hole, see e.g. paras. 267 (“*the Russian sector of the Loop Hole*”), 270 (“*harvested snow crab primarily on the Russian continental shelf*”; “*the focus of North Star’s operations was either in Latvia or the Russian Federation*”), 272 (“*Latvian vessels which harvested a natural resource on the continental shelf of the Russian Federation*”), 278 (“*Russian sector of the Loop Hoole*”).

³⁹ Award, e.g. at paras. 527, 528 (“*That Norway did not aggressively enforce its 2015 Regulations in its own sector of the Loop Hole is understandable in view of the difficult of determining whether a catch had taken place there or in the Russian sector.*”), 548, 556. The references to fisheries in the Russian side of the Loop Hole, and the conclusion that the investment would have possibly been in the Russian Federation (e.g. para. 270: “*the focus of North Star’s operations was either in Latvia or the Russian Federation*”) is a manifest jurisdictional error, as the investment was made with respect to Norway and international waters, not Russia.

⁴⁰ The Tribunal seems to take for granted the status of snow crab as a sedentary species: e.g. Award, para. 455. However, Claimants’ evidence that the crab is not a sedentary species was not considered, which must lead to a failure to state reasons. See e.g. Claimants’ Rejoinder on Jurisdiction, para. 31 and evidence cited therein: “*Tanner Crab (Chionoecetes bairdi and C. opilio)*,” Alaska Department of Fish and Game, Undated, **C-0294**; Sarah Seabrook, Fabio C. De Leo, Andrew R. Thurber, “*Flipping for Food: The Use of a Methane Seep by Tanner Crabs (Chionoecetes tanneri)*,” *Frontiers in Marine Science*, 19 February 2019, **C-0295**; Emmelie K. L. Astrom, Arunima Sen, Michael L. Carroll, JoLynn Carroll, “*Cold Seeps in a Warming Arctic: Insights for Benthic Ecology*,” *Frontiers in Marine Science*, 21 May 2020, **C-0296**, p. 13; The Yomiuri Shimbun, “*Snow crabs found clustered around methane vents at bottom of Sea of Japan*,” *Taiwan News*, 28 August 2010, **C-0297**; Emmelie K.L. Astrom and others, “*Trophic relationships and community structure at cold seeps in the Barents Sea*,” *The Arctic University of Norway*, Undated, **C-0298**; Oregon State University, “*Tanner Crab*,” Youtube, 19 February 2019, **C-0299**.

⁴¹ Hearing Transcript, Day 4, p. 21 (from line 17) to p. 25 (line 3) (answering the Tribunal’s question: “*How can a licence granted by another State or granted by an organisation be an investment in the State of Norway, or part of an investment in the State of Norway?*”).

E. THE TRIBUNAL EXCEEDED ITS POWERS AND CONTRADICTED ITSELF IN FAILING TO APPLY AN APPROACH OF “UNITY” OF INVESTMENT

85. On the facts of the case, the Tribunal should have applied a “unity” of investment approach. This is particularly so in the light of the Tribunal’s contradictory approach on the matter of the joint venture. The Tribunal found there was an agreement but then failed to give effect to it. Further, the Tribunal failed to consider that investors hold investments both directly and indirectly in investment law, including under the relevant rules found in the Latvia-Norway BIT. As such, the only possible and logical effect of the cooperation (or joint venture) agreement between Mr. Pildegovics and Mr. Levanidov, which the Tribunal found existed, was that North Star and Mr. Pildegovics’ investments in Norway should have been seen as a whole, as one snow crab enterprise. The contradictory reasons of the Tribunal which led to a contrary holding also constituted a manifest excess of power regarding how the Tribunal approached its jurisdiction.

F. THE TRIBUNAL MANIFESTLY EXCEEDED ITS POWERS BY HOLDING IT DID NOT HAVE JURISDICTION TO HEAR WHETHER NORWAY BREACHED ITS ADMISSION OBLIGATIONS UNDER ARTICLE III OF THE BIT

86. It was a manifest excess of power for the Tribunal to hold it could not hear Claimants’ claim that Norway breached its obligation under the BIT to admit Claimants’ investments in accordance with Norwegian law.⁴²

87. Article III (Promotion and Protection of Investments) of the BIT provides:

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 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.

88. Article IX (Disputes between an investor and a Contracting Party) of the BIT provides:

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.

⁴² Award, para. 588 (“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.”).

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 either to:

89. Two things are obvious from these two provisions of the BIT. First, they should be read together, as context to one another. Secondly, it is manifest that Article III is badly drafted in that the obligation to “accept” investments applies to “*such investments*” which in turn are “*investments of investors of the other contracting party*” that are ‘*promoted*’ and ‘*encouraged*’ by the other contract party in its territory. As such, there is simply no distinction in those obligations (acceptance, promotion and encouragement) that usefully separate investments that have been made and not made, whereas such distinction exists in a number of other treaties that are drafted more clearly. On one reading of Article III, the obligation to “accept” in accordance with domestic law applies only to investments already made. This would of course make no sense. Therefore, when Article IX states that it allows for disputes to be put to an ICSID tribunal “*in relation to an investment of the former in the territory of the latter*”, the only consistent reading with Article III is that the obligation to accept investments is also within the scope of Article IX, because the obligation to accept under Article III concerns “*investments of investors*” that already exist, not “investments” that “*investors*” are “*seeking to make*” like, for example, under NAFTA’s investment Chapter.⁴³

VI. CLAIMANTS HAVE TEN ANNULMENT GROUNDS REGARDING HOW THE TRIBUNAL ADDRESSED THE MERITS

90. Claimants have ten annulment grounds regarding how the Tribunal addressed the merits: a) the Tribunal failed to reopen the proceedings to hear whether the 20 March 2023 judgment of the Supreme Court of Norway constituted a breach of the BIT; b) Respondent misled the Tribunal in the manner it requested and obtained bifurcation of damages; c) the Tribunal provided contradictory, false and improper reasons regarding whether Norway and/or the Russian Federation caused Claimants’ damages; d) the Tribunal provided contradictory reasons regarding whether the 2019 Supreme Court judgment was denial of justice or not; e) the Tribunal failed to state reasons to explain why Claimants had no “*acquired rights*” that could be vindicated; f) the Tribunal failed to state reasons to explain why Claimants were not treated arbitrarily and in bad faith; g) the Tribunal failed to state reasons to explain why Norway’s adoption of

⁴³ See e.g. Article 1139 of NAFTA (“*investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment;*”).

discriminatory quotas were not a breach of the BIT; h) the Tribunal improperly disposed of the argument Norway breached its obligation to admit Latvian investment in accordance with Norwegian law; i) the Tribunal improperly disposed of the argument that Norway had an obligation to provide the better treatment between the BIT and other treaties; and j) the Tribunal improperly disposed of the Claimants' Most Favoured Nation treatment argument.

A. THE TRIBUNAL ERRONEOUSLY FAILED TO REOPEN THE PROCEEDINGS IN RELATION TO THE NORWEGIAN SUPREME COURT JUDGMENT OF 20 MARCH 2023

91. First, the Tribunal failed to reopen the question of whether the 20 March 2023 judgment of the Supreme Court of Norway constituted a breach of the BIT, notably in the light of the EU's diplomatic note of 30 October 2023 protesting the judgment, despite Claimants' request to reopen the matter, and the Tribunal also failed to notify Claimants its decision not to reopen the proceedings.
92. On 16 October 2023, the Claimants wrote to inform the Tribunal that the EU had prepared a diplomatic note making a significant and unusual protest against the Supreme Court of Norway's judgment of 20 March 2023 denying SIA North Star the right to obtain snow crab licenses on the basis of the Svalbard Treaty. The 2 October 2023 draft Note said:⁴⁴
- As set out in this and in previous Notes Verbales, the European Union strongly disagrees with the incoherent interpretation and the decisions of the Supreme Court of Norway, in that judgement, according to which Articles 2 and 3 of the 1920 Treaty of Paris would apply only in the territorial waters of the archipelago, and not beyond. ... This judgment can therefore in no way, be regarded as reflecting a correct interpretation of the 1920 Treaty of Paris at the international level. Consequently, the European Union reserves the right to qualify this judgement as an internationally wrongful act attributable to Norway.
93. In their 16 October 2023 letter, in respect of the draft Note, the Claimants indicated that they "*cannot confirm whether it has been formally sent to Norway at this time, though assume Norway is aware of its contents.*" On 23 October 2023 Norway provided observations and on 1 November 2023 the Tribunal sought further explanations from Claimants.
94. In their letter of 7 November 2023, the Claimants further sought to include in the record the actual Note Verbale of 30 October 2020 from the EU, which was identical to the

⁴⁴ Draft Note Verbale of EU to Norway, 2 October 2023, C-0357.

draft in all relevant respects.⁴⁵ Further, the Claimants sought to re-open the proceedings if necessary, writing as follows:⁴⁶

Secondly, the Claimants could allege that the decision of 23 March 2023, rather than only confirming the destruction of Claimants' investment (and the breaches of equitable and reasonable treatment, as well as the uncompensated expropriation) is, in and of itself, an additional breach of the BIT. While it should be found to be, **the Claimants underscore that, in order to ensure the efficiency of the proceedings, they do not at this stage seek such a finding, all the while reserving the possibility of raising it in a subsequent phase, if useful, except if the Tribunal is minded to rule that it has no jurisdiction and/or that there are no breaches of the BIT on the merits.** Only the Tribunal knows what its ruling is and as such only the Tribunal knows whether the parties need to brief that question, which the Tribunal may, if necessary, raise of its own motion. While the 23 March 2023 judgment is in and of itself a violation of international law, and of the BIT, arguing this question now is likely to delay the proceedings, which, as shown by their recent letters, neither Claimants nor Norway would want.

[Emphasis in original]

95. The Claimants thus clearly requested that the Tribunal re-open the proceedings, in the alternative (should the Tribunal not uphold jurisdiction and/or not find breaches on the merits).
96. The Claimants, however, never received any response prior to the Award.
97. Indeed, the Tribunal did not notify an important procedural ruling on this issue that would have been made on 5 December 2023, approximately two weeks before the Award. Claimants' counsel never received any decision regarding their application to supplement the record and/or re-open the proceedings.
98. Nonetheless, the Award refers in the following way to a procedural decision that appears to go to the matter:⁴⁷

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

⁴⁵ Note Verbale from EU to Norway, 30 October 2023.

⁴⁶ Claimants' Letter of 7 November 2023 to the Tribunal.

⁴⁷ Award, para. 70.

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.

99. Since Claimants' counsel never received this decision, Claimants were thus unable to react to it before the Award.
100. The Tribunal's apparent procedural decision would have necessarily concerned Claimants' request to reopen the proceedings regarding the EU's diplomatic note of 30 October 2023 protesting the Norwegian Supreme Court decision of 20 March 2023, whether implicitly or explicitly. What is more, since the BIT had been terminated by Latvia and Norway, including its sunset clause, as the Tribunal well knew, the Claimants have no other possibility to be heard on this issue under the BIT. Moreover, despite the Tribunal's attempt to frame the issue differently, it was not possible to put before the Tribunal, prior to October 2023, the EU's diplomatic protest of Norway's Supreme Court decision.
101. As shown above, international law allows an international court or tribunal to review the propriety of a domestic Supreme Court decision when this decision takes a manifestly improper or incorrect position in order to gain an advantage in an ongoing dispute. Considering the ICJ's holding in *Diallo*, the EU's protest in October 2023 was a relevant fact on whether Claimants were entitled to ask the Tribunal to review the propriety of the Norwegian Supreme Court decision on the content of Norwegian law.
102. The failure to re-open the proceedings, despite Claimants' request, and especially in the light of the Tribunal's failure to notify its 5 December 2023 procedural ruling is a ground for annulment, at least in that a reconstituted Tribunal must be able to reconsider whether the 20 March 2023 Supreme Court of Norway constituted a breach of the BIT. Relatedly, should that be the case and the EU's position found to be the correct one on the interpretation of Svalbard, including as a matter of Norwegian law, this also affects all parts of the Award that related to the Svalbard Treaty, which would thus have to be reconsidered.

B. RESPONDENT MISLED THE TRIBUNAL

103. Second, the Respondent misled the Tribunal when it requested bifurcation of damages, which must lead to the annulment of the entire Award, because this created a fundamental inequality between the parties in how they were able to put their case

to the Tribunal. Moreover, misleading the Tribunal led to the Claimants' undeveloped position on Sea & Coast, which the Tribunal criticized.⁴⁸

C. FALSE AND CONTRADICTIONARY REASONS REGARDING CAUSATION

104. The Tribunal provided contradictory, false and improper reasons regarding several issues going to whether Norway caused the damages suffered by Claimants. This included whether the Russian Federation ever adopted a snow crab fishing ban and whether Norway and Russia acted jointly to close the Loophole, which must lead at least to annulment of the entire merits section of the Award.
105. First, the Tribunal failed to examine significant evidence of Norway and Russia's joint actions,⁴⁹ thus failing to treat the parties equally by not examining Claimants' evidence as to causation on the merits.
106. Second, the Tribunal failed to state reasons to justify its statement that there was a "Russian ban"⁵⁰ (as there never was). As such all parts of the Award which rely on such a finding must be annulled, especially in respect to causation on the merits.
107. Third, while the Tribunal held it could not examine Russia's actions,⁵¹ it then nonetheless proceeded to make comments on them and hold there was no evidence of a conspiracy,⁵² while failing to examine Claimants' evidence on the same issue,⁵³ as shown above. The Tribunal thus provided manifestly contradictory reasons, which

⁴⁸ See e.g. Award, paras. 452, 604, 605, 608, 610, 613.

⁴⁹ See notably Claimants' Reply, 28 February 2022, pp. 58-70, paras. 171-207.

⁵⁰ On the incorrect description of Russian regulations and reference to "Russian ban", see Award, para. 91 (*"The 2015 Regulation 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."*), para. 273 (*"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."*), as well as paras 491, 492, 493, 556.

⁵¹ See e.g., Award, paras. 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."*), 584 (*"The Tribunal doubts that it can adjudicate 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."*).

⁵² Award, para. 491 (*"It also rejects the conspiracy argument. There is no evidence that would suggest anything like a conspiracy between the two states."*).

⁵³ See notably Claimants' Reply, 28 February 2022, pp. 58-70, paras. 171-207.

also created a substantial inequality between the parties, meaning all parts of the Award that go to causation must be annulled.

108. Fourth, and relatedly, the Tribunal, when finding that there was no conspiracy involving Norway and Russia, actually failed to state reasons for that finding.⁵⁴
109. Fifth, the Tribunal also failed to state reasons regarding its factual statements or findings that there would have been a Russian ban of snow crab fishing in the Loophole,⁵⁵ which there never was.
110. Sixth, the Tribunal failed to state reasons as to why it could not hold one of the joint tortfeasors liable while still respecting the *Monetary Gold* principle.
111. Seventh, the Tribunal provided contradictory reasons, by first stating it could not deal with several issues on the merits because of the *Monetary Gold* principle,⁵⁶ while nonetheless proceeding to hold that there was no evidence of a conspiracy between Russia and Norway.
112. Eighth, there are significant contradictions in the Tribunal's reasons regarding what caused Claimants' loss. The Tribunal held:⁵⁷

what caused it to lose its economic value was the action of the Russian Federation in banning the harvesting of snow crab [sic] 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.

113. The Tribunal says it cannot opine on the Russian Federation's liability but it says it is its fault. It also premises its reasoning on a "ban" which never occurred. And it fails to address Norway's necessary participation in what happened, and that the Russian Federation would and could never have acted alone. As such, not only must the whole

⁵⁴ Award, para. 491 (*"It also rejects the conspiracy argument. There is no evidence that would suggest anything like a conspiracy between the two states."*) This statement is manifestly conclusory.

⁵⁵ See e.g., Award, para. 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 relation to the snow crab stock in the Loop Hole, Norway cannot be held responsible for the actions of the Russian Federation."*) However, there never was such a ban.

⁵⁶ Award, paras. 297-300, para. 584 (*"The Tribunal doubts that it can adjudicate 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."*).

⁵⁷ Award, para. 561.

section on expropriation be annulled, but the entire liability analysis, because it is entirely based on this erroneous, contradictory and manifestly incorrect premise.

D. THE TRIBUNAL PROVIDED CONTRADICTORY REASONS REGARDING WHETHER THE NORWEGIAN SUPREME COURT DID NOT COMMIT A DENIAL OF JUSTICE IN 2019

114. The Tribunal provided contradictory reasons regarding whether the Norwegian Supreme Court committed a denial of justice in 2019 by refusing to decide a matter going to the defense of North Star in a criminal proceeding, which must lead to annulment of the parts of the Award considering that issue.
115. The Tribunal clearly failed to state reasons why there was no denial of justice through the Norwegian Supreme Court's 2019 judgment refusing to examine the Svalbard Treaty as a court to avoid criminal liability for the fines.
116. The Award states:⁵⁸

So far as the claim for 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.

117. The Tribunal clearly fails to state reasons regarding how a domestic court can refuse to address a defence to criminal liability while respecting international law.

E. ACQUIRED RIGHTS

118. The Tribunal failed to state reasons and seriously breached fundamental rules of procedure in the way it disposed of the argument that Claimants had "*acquired rights*" regarding snow crab fisheries, which requires to annul the parts of the award considering that issue.
119. The Tribunal held:⁵⁹

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

⁵⁸ Award, para. 599.

⁵⁹ Award, para. 531.

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 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.

120. This reasoning and all its consequences must be annulled.
121. First, the Tribunal failed to properly address the fact the catches were in international water, not on any State's continental shelf.
122. Second, the Tribunal contradicted itself and failed to state reasons when taking the position that the fact a species is sedentary is a matter of law, which would justify considering the situation had always taken place on the continental shelf, rather than related to a change of situation. The Tribunal notably failed to explain away the EU and Russian position which does not seem to accord with the Tribunal's conclusion.⁶⁰
123. Third, the distinction the Tribunal made between the Russian and Norwegian side of the Loophole leads to the Tribunal contradicting itself because it has also stated it was difficult to determine on which side of the Loop Hole catches were made.⁶¹
124. Moreover, the Tribunal fails to state reasons to explain the apparent lack of value of evidence adduced by Claimants which clearly shows that a State asserting continental shelf rights, and thus changing how a particular species is regulated, must compensate other affected States.⁶²

⁶⁰ On the one hand the Tribunal states that a snow crab as a sedentary species is a matter of law: Award, para. 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."*). On the other hand, the Tribunal fails to explain how this position is consistent with the EU position, cited extensively at para. 475 of the Award, which clearly states that the coastal state always wins on the dispute and/or determination regarding whether a species is sedentary or not. Such a statement by the EU clearly shows that the legal criteria are not necessarily objective, nor particularly legal. Further, the Tribunal refers, at para. 471 of the Award to a report by Mr. Terje Lobach of Norway's Directorate of Fisheries regarding a PECCOE meeting where it is clearly recognized, by the use of an exclamation mark in Mr. Lobach's report, that states assert that certain species are sedentary in circumstances where it clearly may not be the case, with the example of Russia asserting that prawns are sedentary: *"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 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."*

⁶¹ Award, para. 528 (*"That Norway did not 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."*).

⁶² See notably Claimants' Reply, 28 February 2022, paras. 729-740, referring to: An Act to prohibit fishing in the territorial waters of the United States and in certain other areas by vessels other than vessels of the

F. ARBITRARY CONDUCT AND BAD FAITH

125. The Tribunal failed to state reasons and seriously breached fundamental rules of procedure in the way it disposed of the argument Respondent acted arbitrarily and in bad faith, which requires annulment of parts of the Award considering that issue.
126. The Tribunal held:⁶³

Nor is there anything wrong with 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.

[Emphasis added]

127. However, the underlined part was not argued and comes from the Tribunal, which did not put this question to the parties. As such, the section of arbitrariness and bad faith should be annulled because a reason underlying the decision was not debated by the parties.

G. DISCRIMINATORY QUOTAS

128. The Tribunal failed to state reasons and seriously breached fundamental rules of procedure in the way it disposed of the argument Respondent adopted discriminatory quotas, which requires annulment of that part of the Award.
129. The Tribunal held:⁶⁴

The Claimants criticize 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.

United States and by persons in charge of such vessels (Bartlett Act), 78 Stat. 194, 20 May 1964, **CL-0508**; Ko Nakamura, "The Japan United-States Negotiations concerning King Crab Fishery in the Eastern Bering Sea," Japanese Annual of International Law, 1965, **CL-0478**, pp. 36, 37, 44; Agreement effected by exchange of notes on Fisheries (King Crab), between Japan and the USA, 25 November 1964, **CL-0479**; Exchange of notes constituting an agreement concerning king and tanner crab fisheries in the eastern Bering Sea, between the USA and Japan, 24 December 1974, **CL-0480**; Exchange of notes constituting an agreement between the Government of Japan and the Government of the United States of America regarding the king and tanner crab fisheries in the eastern Bering Sea, 20 December 1972, **CL-0481**.

⁶³ Award, para. 543.

⁶⁴ Award, para. 549.

130. The Tribunal clearly does not explain itself. Also, the low quotas were relevant regarding other issues under FET and other provisions. As such, not only must the “transparency and consistency” analysis be annulled, but also all other parts of the Award that should have examined the claim of discriminatory quotas.

H. ADMISSION OF INVESTMENT IN ACCORDANCE WITH NORWEGIAN LAW

131. The Tribunal failed to state reasons and seriously breached fundamental rules of procedure in the way it disposed of the argument that Norway breached its obligation to admit Latvian investment in accordance with Norwegian law, which requires annulment of that part of the Award.

132. The Tribunal held at paragraph 589 of the Award:⁶⁵

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.

133. The Tribunal added, in the same paragraph 589:⁶⁶

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.

134. This is in manifest contradiction with what was stated a few paragraphs above, at paragraph 585, where it held:⁶⁷

However, even if the Tribunal could make such a determination [whether Norway breach Svalbard], 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.

135. As such, at paragraph 589 the Tribunal should have assumed a breach of Svalbard by Norway. Then it should have examined the effect of this breach through the lens of the Marine Resources Act which states that international treaties override inconsistent

⁶⁵ Award, para. 588.

⁶⁶ Award, para. 589.

⁶⁷ Award, para. 585.

Norwegian law provisions. The Tribunal should have engaged in that analysis (where Claimants argue that this should have led to the licenses being valid under Norwegian law). However, rather than engaging in an analysis of Norwegian law – which the Tribunal definitely could and should have engaged with, both for jurisdictional purposes and liability purposes – the Tribunal invented, in paragraph 589, a false and contradictory reasoning by contrast to the premise of its analysis stated at paragraph 585.

136. For these reasons, at least the part of the Award on the merits discussion of Norway's obligations to accept investments must be annulled, as well as all other parts of the Award affected in whole or in part by such reasoning.

I. FAILURE TO APPLY PROPER LAW ON THE MERITS

137. The Tribunal failed to state reasons regarding why there was no better treatment under other treaties, meaning that the entire merits analysis must be annulled, or at least regarding why the analysis under the other treaties, including the Svalbard Treaty, must or must not be done, which also constituted a manifest excess of power as where the Tribunal failed to apply the proper law on the merits.

138. In respect of Claimants' position that various other treaties (Svalbard, UNCLOS, NEAFC) were part of the applicable law, the tribunal appears to have failed to apply the applicable law, by applying it on an arbitrary and incomplete basis, stating:⁶⁸

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 and 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.

139. At the same time the Tribunal contradicts itself by stating it cannot examine certain grounds, but then doing it, which also shows that the applicable law was improperly applied.

⁶⁸ Award, para. 449.

140. The Tribunal also fails to state reasons regarding why Claimants could not have benefitted from better treatment under other treaties.⁶⁹

J. THE TRIBUNAL'S MOST FAVOURED NATION ANALYSIS MUST BE ANNULLED

141. The MFN section of the Award must be annulled for failure to state reasons, as the Tribunal's reasons are contradictory, do not make sense, and fail to address relevant evidence.
142. The Tribunal held:⁷⁰

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 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.

143. One obvious benefit to the economy of Norway, which does not even require any evidence to establish, was that Norwegian ships could fish on the Russian side of the Loophole in exchange for allowing Russian ships fish on the Norwegian side, which they certainly did based on Norway's own evidence.⁷¹

VII. CLAIMANTS HAVE THREE ANNULMENT GROUNDS IN RESPECT OF COSTS

144. The entire costs decision must be annulled because: a) the Tribunal awarded interest that was neither requested nor debated on Norway's costs award; b) the Tribunal stated contradictory reasons when awarding Norway more arbitration costs than it had claimed or paid; and c) the entire costs award must be annulled in the light of Claimants' other grounds for annulment.
145. First, the Tribunal awarded interest on the costs awarded in favour of Respondent even though Norway did not make such a request. The fact the Respondent requested the Tribunal to order "*such further or other relief as the Tribunal deems appropriate*"⁷² is still no support for the Tribunal to award interest that was not sought. Awarding

⁶⁹ Award, para. 428.

⁷⁰ Award, para. 570.

⁷¹ See e.g. Witness Statement of Karl Olav Kjile Pettersen, 27 June 2022; Transcript Day 3, pp. 41-68.

⁷² Respondent's Rejoinder and Reply on Jurisdiction, 30 June 2022, para. 631.

something not asked is not only a prohibited *ultra petita* ruling, but also prevents the party against whom such thing is awarded from being able to defend itself, and thus be heard, on that issue. The Tribunal awarded interest on its costs award of SOFR + 2%, compounded twice a year. The SOFR has been above 5% since June 2023 and is currently about 5.3%, which yields an annual interest of 7.3% on costs, which is substantial, especially as it would be compounded twice a year. Moreover, an award of compound interest is unusual in investment treaty awards. Had Norway made such a request, the Claimants would have had much to say about it, but no such request was made, nor debated.

146. Secondly, the Tribunal granted Respondent USD 597,307.04 in arbitration costs even though Respondent paid **less** than such sum in arbitration costs. Paragraphs 618-620 of the Award states:

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: ...

Total:	USD 597,307.04
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619. These costs have been met by advance payments made on an equal basis by the Parties.

620. The Tribunal directs that the Claimants pay 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.

147. Then, in paragraph 626(3), the Tribunal:

(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;

148. The Tribunal's reasoning contradicts itself and creates a situation where Claimants are ordered to provide Respondent double compensation.

149. The Tribunal held that "*the unsuccessful Party should meet the **entire costs of the arbitration***". It then recognized that each side has already made advance payments on an "*equal basis*", as was the case, meaning that Respondent had paid only half of the advances. According to ICSID's financial table as of 22 December 2023, Claimants had paid USD 375,000 in arbitration costs advances and Norway had paid USD 374,922. Therefore, by ordering Claimants to pay to Norway more than it had paid in arbitration costs advances, the Tribunal did not order Claimants to "*meet the entire*

costs of the arbitration", but ordered Claimants to pay to Norway more than the entire costs. The Tribunal thus contradicts itself.

150. Third, since Claimants request annulment of the entire Award, as well as of parts of the Award without which Respondent would not have won the case, then the consequence is that the entire costs award must be annulled.

VIII. CLAIMANTS' REQUEST FOR STAY OF ENFORCEMENT

151. Rule 54 of the ICSID Arbitration Rules provides:

(1) The party applying for the interpretation, revision or annulment of an award may in its application, and either party may at any time before the final disposition of the application, request a stay in the enforcement of part or all of the award to which the application relates. The Tribunal or Committee shall give priority to the consideration of such a request.

(2) If an application for the revision or annulment of an award contains a request for a stay of its enforcement, the Secretary-General shall, together with the notice of registration, inform both parties of the provision stay of the award. As soon as the Tribunal or Committee is constituted it shall, if either party requests, rule within 30 days on whether such stay should be continued; unless it decides to continue the stay, it shall automatically be terminated.

(4) A request pursuant to paragraph (1), (2) (second sentence) or (3) shall specify the circumstances that require the stay or its modification or termination. A request shall only be granted after the Tribunal or Committee has given each party an opportunity of presenting its observations.

152. Claimants thus request a stay in the enforcement of all of the Award, notably in the light of the dispositive part, paragraph 626, where costs are ordered against Claimants.

153. Paragraph 626 of the Award provides:

626. For all 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.

[Emphasis added]

154. Claimants also request a stay without conditions.
155. With respect to both the arbitration costs, *ie* Paragraph 626(3), and the interest, *ie* Paragraph 625(5), the Tribunal awarded costs that were not claimed by Norway. As such, it is only fair that those two subparagraphs of Paragraph 626 be stayed without condition.
156. With respect to the representation costs, *ie* Paragraph 626(4), they stem from the fact that Respondent won the arbitration. However, Claimants' present application shows how there were significant issues with the proceedings and that the entire Award should be annulled, including because an important procedural decision was never notified and the Tribunal simply refused to decide some of Claimants' claims. As such, it is only fair that this subparagraph also be stayed without condition.
157. It should also be considered that Claimants are a physical person and a small or medium enterprise who have been bringing this arbitration against, in essence, the richest country in the world. The arbitration, and now this annulment, have been brought on the basis, amongst other things, that Claimants' position is fully supported by the EU and Latvia, and the EU has even stated in a diplomatic note that Norway has breached international law specifically regarding Claimants. In the circumstances, it would be wholly unfair to force the Claimants either pay this amount now or put forward a guarantee or similar instrument in the amount of almost EUR 1.4 million. This is particularly so as Claimants' business was destroyed by Norway and as such sum is really of no consequence to Norway by contrast to the value of snow crab it has taken by excluding EU vessels from the Barents Sea snow crab fisheries.
158. The Claimants thus request a stay of enforcement of all of the Award, without condition, and that the *ad hoc* Committee confirm this stay.

159. The Claimants will also reach out to Norway to confirm whether it can agree with Claimants that the stay should be extended throughout the annulment proceedings to save resources and avoid having to brief the Tribunal on the matter.

IX. CLAIMANTS' REQUEST FOR COSTS AND INTERESTS

160. Claimants request their full costs for submitting this annulment application. This includes both the *ad hoc* Committee's and/or ICSID costs and costs related to their representation.
161. Claimants will also request both pre- and post-Decision interest on its costs.
162. Claimants believe non-compound single interest on their costs, at a rate of Secured Overnight Financing Rate plus 1%, from the date of payment of the relevant costs, would be appropriate in the circumstances.

X. CONCLUSION AND PRAYER FOR RELIEF

163. For the reasons set out above the Claimants request:
- The provisional stay in the enforcement of all of the Award;
 - That the *ad hoc* Committee confirm the stay of enforcement of all of the Award, without condition;
 - That the *ad hoc* Committee annul the Award in full;
 - That Claimants be granted their costs advanced to pay for the present proceedings before the *ad hoc* Committee;
 - That Claimants be granted their costs of representation in the present proceedings;
 - That Claimants be awarded pre-decision single, non-compound single interest on their costs at a rate of Secured Overnight Financing Rate plus 1% from the date of payment of the relevant costs;

- That Claimants be awarded post-decision single, non-compound interest on their costs until payment by Respondent at a rate of Secured Overnight Financing Rate plus 1% from the date of the Decision.

22 February 2024

Respectfully submitted



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