INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

PETERIS PILDEGOVICS
SIA NORTH STAR

Claimants

v

KINGDOM OF NORWAY

Respondent

(ICSID Case No. ARB/20/11)

NORWAY'S COUNTER-MEMORIAL AND MEMORIAL ON JURISDICTION

29 October 2021

TABLE OF CONTENTS

[intentionally left blank]

PART I: INTRODUCTION AND SUMMARY OF FACTS

CHAPTER 1: INTRODUCTION

1.1 INTRODUCTION

1. At the heart of this case are four Latvian flagged vessels, financed by companies in the Russian Federation, Asia and the Americas, which were engaged in the unregulated harvesting of living marine resources on the continental shelf of the Russian Federation. At no stage did the vessels have any authorisation from Norway to harvest snow crab in areas under Norwegian jurisdiction, as required by international and Norwegian law.

2. But that did not affect the activities of the Claimants, SIA North Star ("**North Star**") and its current owner, Mr Peteris Pildegovics, because over 99.8% of all snow crab harvested by North Star was caught on the Russian continental shelf. From 2014 to September 2016, the Claimants were able to exploit the absence of a Russian prohibition on the harvesting of snow crab on the Russian continental shelf.

3. North Star's catches continued to increase until September 2016, when the Russian Federation prohibited the harvesting of snow crab on its continental shelf in the Loop Hole, and all of the Claimants' snow crab harvesting activity came to an abrupt end. Norway had already, nine months prior to this, prohibited the harvesting of snow crab on the Norwegian continental shelf in the Loop Hole.

4. Norway has at no point restricted the *landing* of snow crab in Norwegian ports, insofar as it had not been harvested illegally on Norwegian or foreign continental shelves.

5. Four months after the Claimants' commercial activities had been ground to a halt by the Russian prohibition, North Star for the first time sent its vessel *Senator* on a sole voyage to the Norwegian continental shelf around the Archipelago of Svalbard. North Star knew that harvesting snow crab on the Norwegian continental shelf around Svalbard was illegal under Norwegian law; indeed Norway had told them this expressly.

6. The Claimants had no investments in the Territory of Norway, as required for protection under the 1992 BIT. In fact, it is not even clear that the Claimants themselves are the *real* investors. The alleged 'investments' were funded by Mr Kirill Levanidov, an

American citizen whose companies or associated companies in the United States, Russia and Hong Kong provided the financial input into North Star, including taking on its substantial debts and providing several of North Star's vessels. Whether Mr Pildegovics acted otherwise than on behalf of Mr Levanidov throughout the history of this case is an open question.

7. The key to the Claimants' case is a series of 'licences' issued by Latvia which they say granted North Star the right to engage in snow crab harvesting. The Tribunal cannot determine whether those 'licences' actually granted that right without impermissibly involving itself in matters of contention between Norway, Latvia and the EU concerning (among other things) the exercise of Norway's sovereign rights and the proper interpretation of UNCLOS, the NEAFC Convention, and the Svalbard Treaty. Those matters plainly lie outside the jurisdiction of the Tribunal.

8. However, should the Tribunal consider that it has jurisdiction, Norway has committed no breach of the BIT. Norway's regulations have been fully consistent with international best practice agreed in the United Nations Food and Agriculture Organization for managing a new fishery. Most States, like Norway, restrict foreign access to fishing and harvesting activity in their maritime areas. New regulations must particularly be expected when new species become commercially exploitable. Norway's policies have been consistent, widely publicised, and well-known to the Claimants.

1.2 THE PROCEEDINGS AND BIFURCATION

9. Norway first received a "Notice of the Dispute" dated 27 February 2017 from the law firm Glimstedt in Vilnius, Lithuania.[1] This notice was submitted on behalf of: (1) North Star; and (2) 'UAB Arctic Fishing', a Lithuanian company, under both the Agreement between the Government of the Kingdom of Norway and the Government of the Republic of Latvia on The Mutual Promotion and Protection of Investments, signed

[1] **C-0002**.

16 June 1992 and entered into on 1 December 1992 (the "**BIT**")[2] and the 1992 Norway-Lithuania BIT. There was no follow-up to this notice.

10. Norway thereafter received a Notification of Dispute letter of 8 March 2019 sent on behalf of North Star and Mr Pildegovics.[3] The Claimants and Norwegian Government representatives met on 4 July 2019 and 13 February 2020. The Claimants filed their Request for Arbitration on 18 March 2020.

11. The Tribunal, composed of Sir Christopher Greenwood (President of the Tribunal), Mr Yves Fortier (appointed by the Claimants) and Professor Donald McRae (appointed by Norway), was constituted on 10 August 2020.

12. Norway has previously suggested to the Tribunal that the proceedings be bifurcated and the question of any remedies to be awarded to the Claimants be deferred until after the Tribunal had decided on jurisdiction and the merits.[4] The Tribunal, in Procedural Order No. 3 dated 1 June 2021, at paragraph 20, rejected bifurcation at that stage, but indicated that it would be prepared to consider a "*fresh request from either Party once it has seen the Counter-Memorial*."

13. Norway submits its Request for Bifurcation together with this Counter-Memorial, pursuant to Annex A of Procedural Order No. 4, dated 30 June 2021. Norway disputes that the Tribunal has jurisdiction in this case and further disputes that it has committed any breach of the BIT. Those points notwithstanding, Norway is unable to sensibly respond to the Claimants' arguments regarding quantum at this stage, for the reasons given in **Chapter 7** of this Counter-Memorial. Any detailed critique of the Claimants' calculations of the financial compensation sought would have to address the various permutations of possible answers to each of the points raised, which is impractical at this stage.

14. Furthermore, 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

---

2 **CL-0001** Norway is in the process of negotiating the termination of the BIT. This is linked to an overall termination of all of Norway's bilateral investment treaties with EEA Member States.

3 **C-0068**.

4 Norway's Request for Bifurcation dated 8 April 2021.

is practicable to determine what losses, if any, they have sustained as a result. For example, approximately 90% of the Loop Hole is Russian continental shelf and 99.8% of the snow crab landed in Norway by North Star's vessels was harvested on the Russian continental shelf. The Claimants have not separated out those parts of their alleged losses which were caused by Russia's prohibition of the harvesting of snow crab on its continental shelf in the Loop Hole. Further, the Claimants have not addressed any losses caused by Latvia issuing invalid 'licenses'. Further still, all losses presented are those of North Star; none have been separately identified in respect of Mr Pildegovics.

15. These inconsistencies in the approach of the Claimants, among others, are addressed in **Chapter 7** of this Counter-Memorial.

16. Against this background, Norway respectfully requests the Tribunal to consider bifurcation of quantum and reparation and address jurisdiction and merits only at this stage.

1.3 THE PARTIES

1.3.1 The Claimants

17. The Claimants in this dispute are Mr Pildegovics, the First Claimant, and North Star, the Second Claimant.

18. Norway does not dispute that Mr Pildegovics, originally from Vladivostok in what at that time was the Soviet Union, has been a citizen of Latvia since 1991.[5] It is not known whether he also still holds Russian citizenship. According to the Claimants' Memorial,[6] he holds three assets of relevance to this dispute:

    18.1. *Sea & Coast AS*: The company is stated to have been acquired by Mr Pildegovics from Mr Sergei Ankipov, an associate of Mr Kirill Levanidov, on 15 October 2015 for NOK 66,000.[7] Norway does not dispute that Mr Pildegovics is the registered owner of Sea & Coast AS, a Norwegian

5 Witness Statement of Peteris Pildegovics dated 11 March 2021 ("**Pildegovics**"), ¶5.

6 Claimants' Memorial dated 11 March 2021 ("**Memorial**"), ¶17.

7 **PP-0050**.

incorporated company. No loss is claimed by Mr Pildegovics in respect of his shareholding in this company, and Norway can only draw the conclusion that this company is not relevant to the claims in this dispute.

18.2. *North Star*: Mr Pildegovics is said to have owned 100% of the shares of North Star at the time the Claimants submitted their Memorial. Mr Pildegovics acquired the company (incorporated in Latvia) on 15 June 2015 from his wife, Ms Nadežda Bariševa, at a price of EUR 3,000.[8]

18.3. *'Joint venture'*: Mr Pildegovics is said to have contractual rights in a purported 'joint venture' with Mr Kirill Levanidov, his cousin and a US national. Norway disputes the existence of any alleged 'joint venture', and the existence of any claims to performance said to arise therefrom (though the Claimants have identified none); in any event, the Claimants have not demonstrated what the alleged 'joint venture' adds to their claim.

19. North Star, the Second Claimant, is a fishing company incorporated in Latvia. Its head office is in Riga.[9] At the time of Norway's alleged breach, North Star is said to have had five classes of investments in Norway.[10]

19.1. *Four Latvian flagged vessels*: The vessels were owned by a Latvian company and subject to Latvia's flag State jurisdiction. Two of those vessels, the *Solvita* and the *Solveiga*, have since been sold.

19.2. '*Fishing capacity*': 'Fishing capacity' is a prerequisite under European Union ("**EU**") law to be able to introduce a new fishing vessel into the registry of an EU Member State. It is bought from an owner of another vessel, which must be retired from the EU fleet in order not to contribute to overcapacity.[11] As a non-EU Member State, Norway has no jurisdiction or influence over 'fishing capacity'.

---

8 Pildegovics, ¶51; **C-0076**.

9 Memorial, ¶18.

10 Memorial, ¶257.

11 Memorial, ¶¶271-276.

19.3. *Fishing 'licenses' issued by Latvia:* the licences held by the Claimants, and purporting to grant them rights to harvest snow crab were null and void. Latvia violated international law by purporting to grant rights on the Norwegian continental shelf without the express consent of Norway.

19.4. *Contractual rights to purchase two additional ships, along with "fishing capacity" for such ships:* These agreements were entered into *after* the date of the alleged breaches by Norway of the BIT.

19.5. *Supply agreements with purchasers of snow crab products*: it appears that, after the date of the alleged breaches by Norway of the BIT, and *after* all its harvesting activity was brought to an end by Russian legislation, the Claimants appear – bizarrely – to have entered into long-term supply agreements with companies owned by or associated with Mr Levanidov, which on their own case they could have had no hope of fulfilling.

20. As is further detailed in **Chapter 5** of this Counter-Memorial, Norway disputes that the elements above, together or individually, can be considered as investments in Norway.

21. Mr Levanidov and his companies are also central to the claims in this case, although he is not himself a Claimant. It is clear from the Memorial[12] that Mr Levanidov, or companies that at the relevant times were owned or controlled by him, financed or provided North Star's investments and possibly also financed all of Mr Pildegovics' very limited investments. Norway returns to the relevance of Mr Levanidov in **Chapter 4.3**.

1.3.2 The Respondent

22. The Kingdom of Norway comprises mainland Norway, Jan Mayen and the Archipelago of Svalbard, over which Norway has full, absolute and undisputed sovereignty. Norway has maritime areas, including in the Barents Sea, over which it exercises sovereign rights and jurisdiction in accordance with the United Nations Convention on the Law of the Sea 1982 ("**UNCLOS**"), to which it is a Party.[13]

---

12 See, e.g., Memorial ¶226; see also **PP-0117** to **PP-0131**.

13 **C-0154**, p.3.

23. There are several matters of contention involving Norway, Latvia and the EU concerning (among other things) Norway's exercise of its sovereign rights in the Loop Hole and around Svalbard and the proper interpretation of UNCLOS, the NEAFC Convention, and the Svalbard Treaty. Those matters plainly lie outside the jurisdiction of the Tribunal. Norway further disputes the application of the BIT to this dispute. These matters are dealt with in **Chapters 4 and 5**, below.

1.4 OVERVIEW OF THIS COUNTER-MEMORIAL

24. This Counter-Memorial is structured in the following chapters:

Part I – Introduction and Summary of Facts

24.1. **Chapter 1** (this Chapter) sets out the background to this dispute, an overview of the proceedings and an introduction to the parties.

24.2. **Chapter 2** summarises the pertinent facts of the case.

24.3. **Chapter 3** sets out the law applicable to jurisdiction and to the merits.

Part II – Objections to Jurisdiction

24.4. In **Chapter 4**, Norway argues that the Tribunal has no jurisdiction over the core issues at stake.

24.5. **Chapter 5** explains that the dispute does not relate to investments by the Claimants protected under the BIT.

Part III - Merits

24.6. **Chapter 6** presents Norway's arguments that it has not breached any provision of the BIT.

24.7. **Chapter 7** sets out Norway's preliminary arguments regarding reparation and explains why it is not possible to address this issue at this point *inter alia* due to lack of information from the Claimants.

Part IV – Prayer for Relief

24.8. Norway's prayer for relief is found in Part IV.

CHAPTER 2: SUMMARY OF FACTS

2.1 OVERVIEW

25. This Chapter of Norway's Counter-Memorial sets out the pertinent facts of the case. It is structured as follows:

25.1. **Section 2.2** presents an overview of the beginning of snow crab harvesting on the Russian continental shelf and subsequently on the Norwegian continental shelf in the Loop Hole. It explains how the Russian Federation and Norway have regulated this sedentary species in accordance with UNCLOS, and explains the irrelevance of the North-East Atlantic Fisheries Commission (NEAFC) and the NEAFC Convention to the harvesting of sedentary species.

25.2. **Section 2.3** presents an overview of the Claimants' harvesting activities, over 99.8% of which took place on the Russian continental shelf.

25.3. **Section 2.4** outlines the legal proceedings that have been brought in Norway in relation to the Claimants' harvesting activities.

2.2 SNOW CRAB ON THE RUSSIAN CONTINENTAL SHELF AND THE NORWEGIAN CONTINENTAL SHELF IN THE BARENTS SEA

2.2.1 The Seabed and Subsoil of the Barents Sea are parts of the Continental Shelves of Russia and Norway

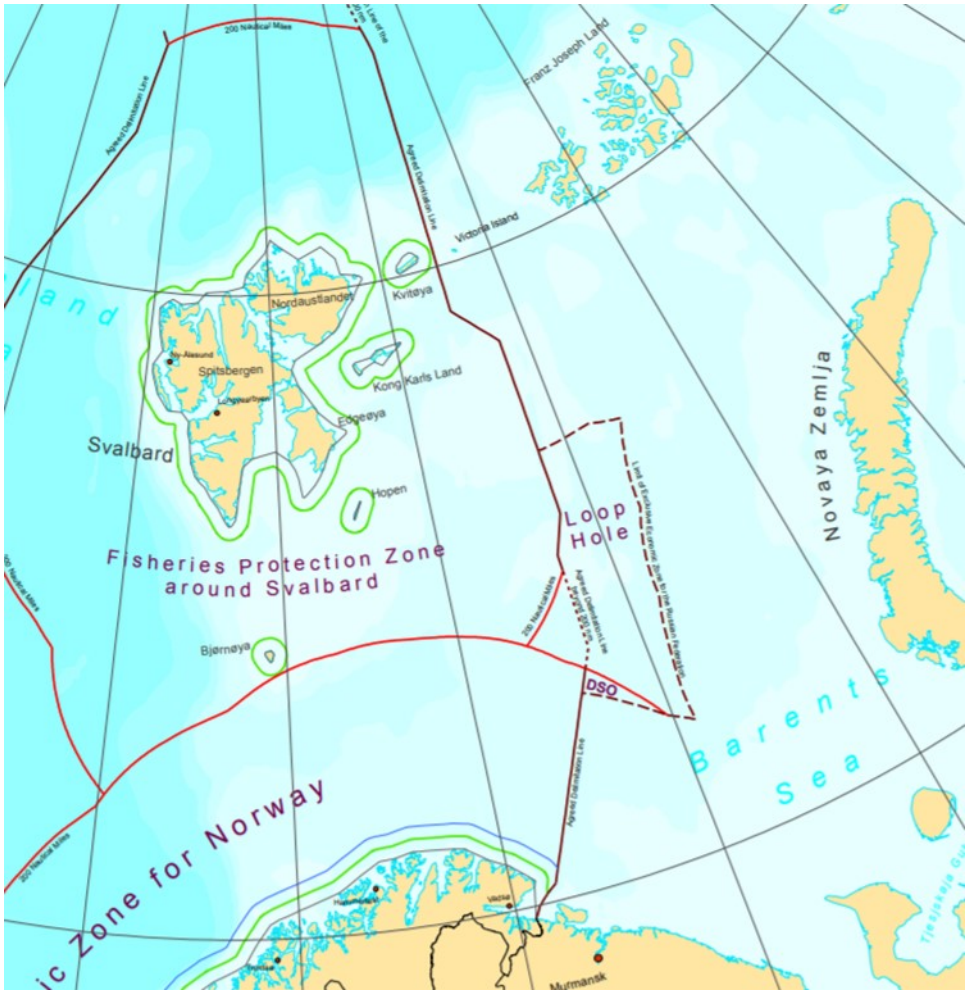
26. From 2014 until September 2016, the snow crab harvesting activity of the vessels belonging to North Star took place in an area of the Barents Sea called the "Loop Hole".[14] In the following paragraphs the geography and relevant areas of jurisdiction in the Barents Sea will be outlined.

2.2.1.1 The Barents Sea

27. The Barents Sea is bordered by the Norwegian and the Russian mainland to the south, the Norwegian archipelago of Svalbard to the west, the Russian islands of Novaya

[14] **R-0151-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*), "Guidance and summary - Report concerning vessels belonging to the Latvian company SIA North Star".

Zemlja to the east and the Franz Joseph Land archipelago to the north. Part of a map of the area is included below.[15]



Central part of the Barents Sea, showing the Loop Hole.

28. The bathymetry of the Barents Sea is characterised by several banks separated by deeper troughs and basins. The average depth is 220 metres, with depths ranging from 20 metres at the Spitsbergen Bank to 500 metres in the Bear Island Trough. The water masses in the southwest are dominated by the inflowing North Atlantic Current and bottom temperatures around 5°C, as opposed to the Arctic-influenced areas in the north and east where bottom temperatures tend to be around 0°C and can reach below -1°C in deeper areas.

15 **R-0006-ENG** Excerpt from map of Norwegian Maritime Boundaries (September 2012), published by Forsvarets Militærgeografiske Tjeneste (Norwegian Military Geographic Service).

29. The eastern part of the Barents Sea comprises the exclusive economic zone of the Russian Federation. The western part of the Barents Sea comprises the Economic Zone around mainland Norway and the Fisheries Protection Zone around Svalbard.

2.2.1.2 The Loop Hole

30. In the middle of the Barents Sea is an area which is more than 200 nautical miles from the baselines of Norway and the Russian Federation, and thus does not form part of the exclusive economic zones of either country. This area is called the Loop Hole. Situated more than 200 nautical miles beyond the coastal States, the water column of the Loop Hole is high seas, beyond coastal state jurisdiction.[16]

31. As recognised by the UNCLOS Commission on the Limits of the Continental Shelf ("**CLCS**") "*the entire area of seabed and subsoil within the Loop Hole located beyond 200 M limits of Norway and the Russian Federation is part of the continental shelf of these coastal States*".[17] The Claimants appear to agree with this description.[18] Accordingly, Norway and the Russian Federation, as coastal States, exercise sovereign rights for the purpose of exploring and exploiting the natural resources of the seabed and subsoil in the Loop Hole, both living and non-living.[19]

32. On 15 September 2010, the two coastal States signed the Treaty between Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean, by which the maritime areas of both States, including the continental shelves, were delimited.[20] The treaty entered into force 7 July 2011.

33. The Loop Hole is shown in more detail on the map below,[21] where the agreed delimitation line between Norway and the Russian Federation is shown in green.

---

16 Articles 57 and 86, UNCLOS (**CL-0013**).

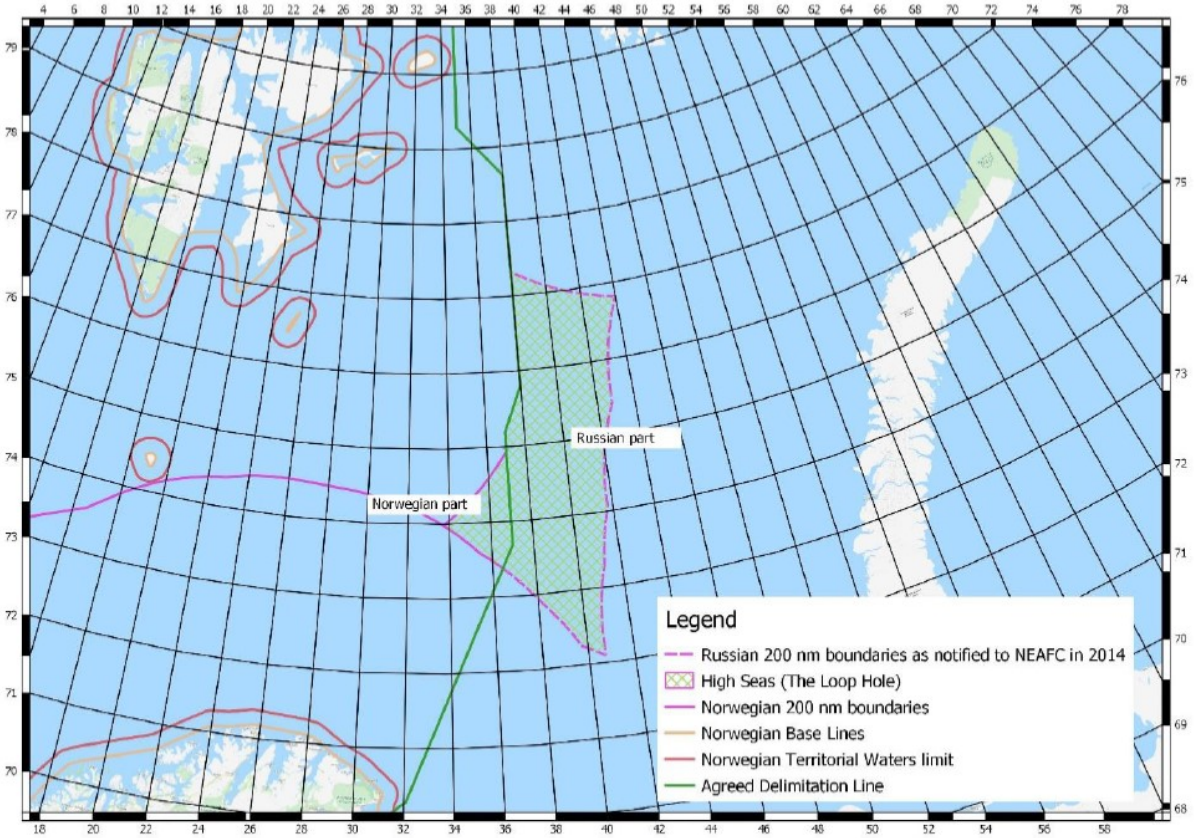
17 **C-0072**, ¶21.

18 Memorial, ¶¶81-83.

19 Article 77, UNCLOS (**CL-0013**).

20 **RL-0004-NOR** *Overenskomst mellom Norge og Russland om maritim avgrensning og samarbeid I Barentshavet og Polhavet*. The treaty was entered into in the Norwegian and Russian languages, both texts being equally authentic. The Claimants have submitted an English translation at **CL-0015**. Two maps showing the delimitation line are provided as **RL-0005-ENG** and **RL-0006-NOR**.

21 **R-0008-ENG** Report 23 June 2020 from the Norwegian Mapping Authority (Kartverket).



34. As is readily apparent from the map, most of the seabed and subsoil in the Loop Hole is Russian continental shelf, and only a small part in the south-west corner is Norwegian continental shelf. The total area of the Loop Hole is approximately 78,220 km^2, of which 69,766 km^2 or 89.19% is Russian continental shelf and only 8,454 km^2 or 10.81% is Norwegian continental shelf.[22]

2.2.2 Snow Crab and its Arrival in the Barents Sea

2.2.2.1 Biology of snow crab

35. The snow crab *(Chionoecetes opilio)*[23] is an Arctic species that thrives best at temperatures between -1ºC and 6ºC. Snow crab normally live at depths between 200 and 300 metres. There they prey on animals living in and on soft bottom sediments like

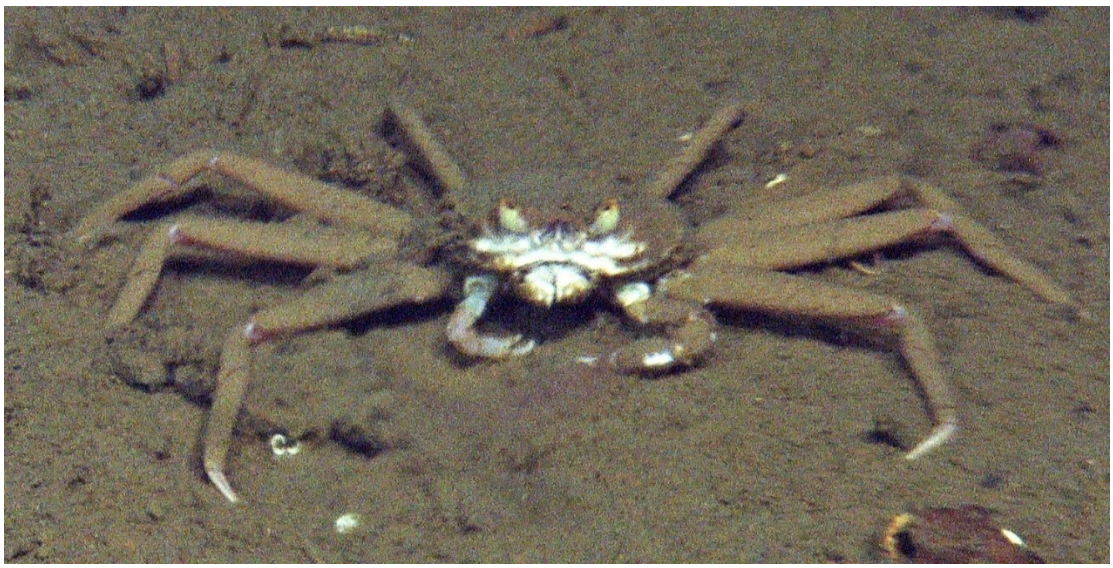
22 *Id*.

23 **R-0009-ENG** The generic name *Chionoecetes* means snow (χιών, chion) inhabitant (οικητης, oiketes); *opilio* means shepherd, and *C. opilio* is the primary species referred to as snow crab. Marketing strategies, however, employ the term 'snow crab' for any species in the genus Chionoecetes, which include, in particular, two forms of Tanner crab (*Chinoecetes Bairdi* and *Chinoecetes Tanneri*).

mud and clay. Research indicates that snow crab is not dependent on any particular prey species for survival.[24]

36. The reproductive cycle of the snow crab can span either one or two years, depending on the temperature conditions in the crab's habitat. Spawning and mating take place over an extended period – from January to May. The larval stage is pelagic and normally lasts about two months. After settling on the seabed the larva takes on the form of a tiny snow crab, only about 3.5 mm long. The crab grows by shedding its outer shell (moulting) several times until the final (terminal) moult when it becomes sexually mature, normally at five years old.[25]

37. The commercially harvestable snow crab are large males which live on the seabed. They have negative buoyance and no swim bladder or similar organ enabling them to rise in the water column, so they move only in constant contact with the seabed. The snow crab's movements could be described as lifting its legs and pushing and sliding its body across the substrate.



A snow crab on the Norwegian continental shelf in the Barents Sea. Photo courtesy of MARENO/Norwegian Marine Institute

24 **R-0010-ENG** Jan H. Sundet: *The snow crab – a new and important player in the Barents Sea ecosystem* (date provided is date accessed). Published in "Fram Forum 2015".

25 *Ibid.*

2.2.2.2 The first arrival of snow crab on the Russian continental shelf in the Barents Sea

38. The native distribution areas of the snow crab are in the Bering Sea, along the east coast of Canada and on the west coast of Greenland. In all these areas there is significant harvesting activity taking place, with the largest activity taking place on the continental shelf off Eastern Canada.[26] However, catches have varied significantly. The snow crab harvesting in the Bering Sea off Alaska reached a peak of 150,000 tonnes in 1991, declined rapidly until 1996 (around 25,000 tonnes), rebounded in 1998, but then plummeted to about 12,000 tonnes. "*Overfishing, poor recruitment and shifting environmental conditions are all suspected to have played a role in the recent collapse and poor recovery*", according to a 2005 report of the Canadian Fisheries Resource Conservation Council. [27]

39. The current prevailing theory regarding the origin and introduction of snow crab into the Barents Sea is that snow crab naturally migrated into the Barents Sea from the Bering Strait area.[28]

40. The first reported catch of snow crab in the Barents Sea was on the Russian continental shelf in 1996. This was on the Goose Bank next to Novaya Zemlja. Since then, snow crab spread throughout most of the Russian continental shelf in the Barents Sea and was by 2014 found in most parts of the eastern Barents Sea.[29] A relatively long lag-phase (1996-2011) was followed by an almost exponential growth (2011-2013).

---

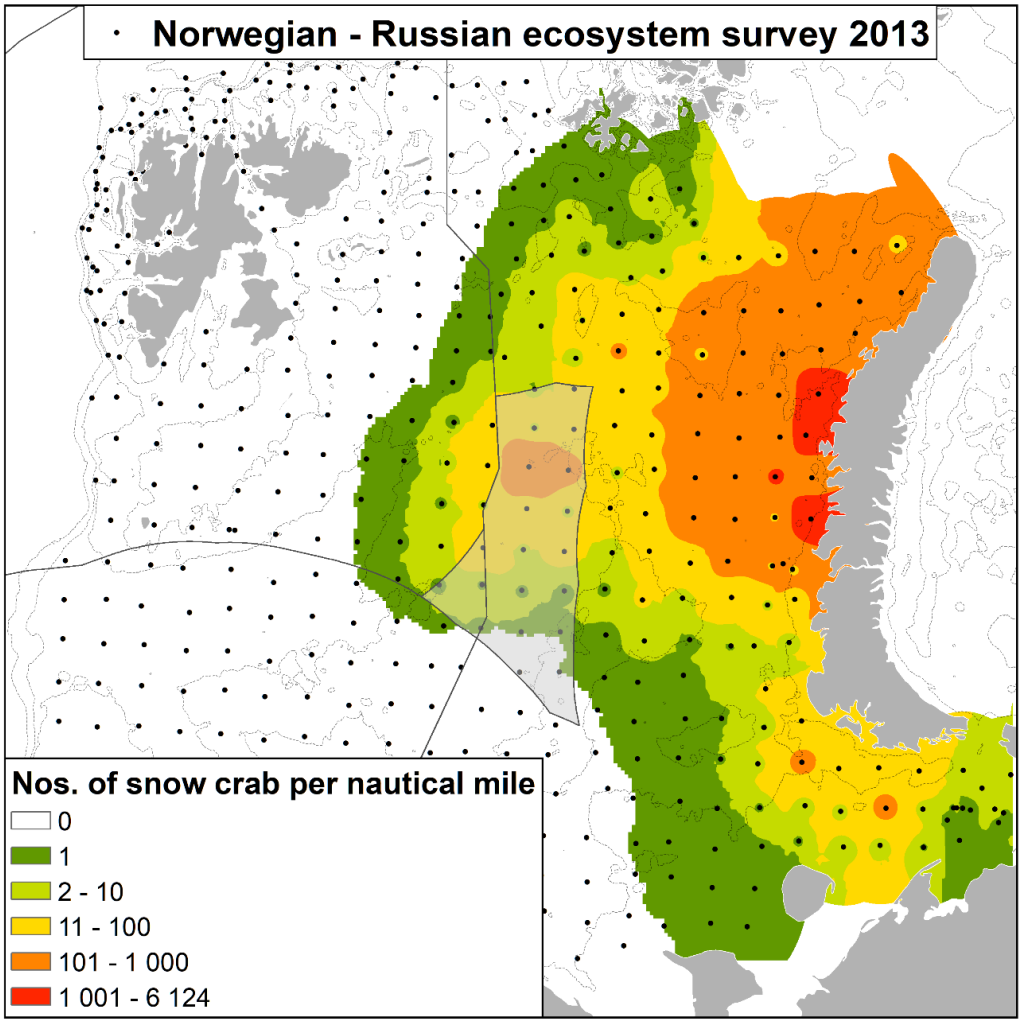
26 **R-0148-ENG** *Report from the workshop: Workshop on king- and snow crabs in the Barents Sea* (Tromsø 11 – 12 March 2014), page 52. **R-0149-ENG** Information on Snow Crab from Fisheries and Oceans Canada: "In 2013, total landings in Canada were 98,065 tonnes and in 2012, total landings were 92,849 tonnes. In 2011 landings were 84,139 mt. In 2010, the total landings in Atlantic Canada were 83,584 tonnes, with total allowable catch set at 87,952 tonnes."

27 **R-0156-ENG** Fisheries Resource Conservation Council: Strategic Conservation Framework for Atlantic Snow Crab, report to the Minister of Fisheries and Oceans, FRCC.05.R1, 2005, p.13.

28 **R-0116-NOR; R-0150-ENG** IMR; *Snøkrabbe på norsk sokkel i Barentshavet - Bestandsvurdering og kvoterådgivning 2021* (*Snow crab on the Norwegian Continental Shelf in the Barents Sea - Stock Assessment and Quota Advice for 2021*), November 2020.

29 **R-0148-ENG** *Report from the workshop: Workshop on king- and snow crabs in the Barents Sea* (Tromsø 11 – 12 March 2014), pages 4 and 52. Lis Lindal Jørgensen and Vassily Spiridonov: Effect from the king- and snow crab on Barents Sea benths, Reults and conclusions form the Norwegian-Russian Workshop in Tromsø 2010, published in Fisken og havet 8/2013. **R-0157-ENG** Hanna E. H. Danilesen, Ann M. Hjelset, Bodil A. Bluhm, Carsten Hvingel and Ann-Lisbeth Agnalt: A first fecundity study of the female snow crab Chionoecetes opilio Fabricius, 1788 (Decapoda: Brachyura: Oregoniidae) of the

41. The map below shows the distribution of snow crab in the Barents Sea in 2013:



Map provided by the Norwegian Institute of Marine Research.

2.2.2.3 Prevalence and distribution of snow crab on the continental shelf in the Barents Sea

42. The first reported catch of snow crab on the Norwegian continental shelf occurred in the spring of 2003, when two snow crabs were caught just north of mainland Norway. Thereafter, a few specimens were caught during the 2004 bottom trawling expedition carried out by Norway's Institute for Marine Research (the **"IMR**"). From 2004, the IMR has systematically recorded snow crab found in the winter bottom surveys in the Barents Sea.

---

newly established population in the Barents Sea, published in Journal of Crustacean Biology, Volume 39, Issue 4, 11 June 2019.

43. The IMR has presented total biomass estimates and recommendations for the total allowable catch ("**TAC**") for snow crab on the Norwegian continental shelf in the Barents Sea in their yearly quota advice for the years 2017 to 2021.

2.2.3 Snow Crab is a Sedentary Species Covered by Article 77(4) of UNCLOS

2.2.3.1 Recognition of sovereign rights and jurisdiction of the continental shelf State over crab

44. The Geneva Convention on the Continental Shelf 1958 ("**Continental Shelf Convention**") established sovereign rights and jurisdiction for coastal States over their continental shelf.[30]

45. Going into the 1958 negotiations, positions varied as to whether living marine resources should be included in the coastal State's sovereign rights on the continental shelf. At the outset, Norway did not support such an inclusion due to its interests in bottom trawling for fish in the North Sea. But Norway changed its position during the negotiations and voted in favour of Article 2(4) of the Continental Shelf Convention.[31]

46. Article 2(1) of the Continental Shelf Convention establishes sovereign rights of coastal States over the continental shelf for the purpose of exploring it and exploiting its natural resources, and Article 2(4) goes on to state that these natural resources include:

> "[…] *the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.*"

47. The provisions of Article 2 of the Continental Shelf Convention were included in Article 77 of UNCLOS. Furthermore, Article 68 of UNCLOS explicitly states that Part V on the Exclusive Economic Zone does not apply to sedentary species as defined in

---

30 **RL-0012-ENG** Geneva Convention of 29 April 1958 on the Continental Shelf.

31 **R-0114-ENG** Extract from the Official Records of the United Nations Conference on the Law of The Sea, Volume VI (Fourth Committee (Continental Shelf)), Geneva, Switzerland 24 February to 27 April 1958, Document: A/CONF.13/C.4/L.19-36 and **R-0115-ENG** United Nations Conference on the Law of the Sea, Official records, Volume II: Plenary meetings and **R-0011-NOR**; **R-0012-ENG** Report by the Norwegian Delegation to the United Nations Conference on the Law of the Sea, Geneva 24 February to 27 April 1958. (Report from the conference adopting the text of the 1958 Continental Shelf Convention.)

Article 77(4). This entails *inter alia* that the provisions of UNCLOS Article 62, including access to living resources for other States, do not apply to sedentary species.

48. In the Norwegian report from the 1958 negotiations, it is explicitly stated that the agreed text of the Continental Shelf Convention meant that crab would be considered a sedentary species and would be subject to the sovereign rights of the coastal State.[32] Norway has consistently held this position since 1958, including bilaterally with the Russian Federation and with the EU and its Member States, as well as in multilateral settings, such as in NEAFC.

49. After the Russian arrest of the Lithuanian flagged vessel *Juros Vilkas* on 18 September 2014 for illegal snow crab harvesting in the Russian Exclusive Economic Zone,[33] the Russian Federation raised the issue of the regulatory consequences of the snow crab being a sedentary species, to be regulated by the continental shelf States in the Loop Hole, at the October 2014 meeting of the Joint Norwegian-Russian Fisheries Commission ("**Joint Fisheries Commission**").[34] The Joint Fisheries Commission was established in 1975 in order to facilitate and improve scientific research and the management of living marine resources in the Barents Sea. It represents an example of how States bordering a semi-enclosed sea can organise their cooperation in the exercise of their rights and in the performance of their duties, under UNCLOS Article 123.

50. Following discussions within the framework of the Joint Fisheries Commission, the Ministers of Fisheries of Norway and the Russian Federation on 17 July 2015 in Valletta, Malta, confirmed in the agreed minutes that the Russian Federation and Norway "*exercise their sovereign rights in respect of the continental shelf of the Barents Sea for its exploration and development of its natural resources*", and "*will proceed from the fact that the harvesting of sedentary species, including snow crab, in the NEAFC Regulatory Area in the Barents Sea shall not be carried out without the*

---

32 **R-0011-NOR; R-0012-ENG** Report of 23 December 1958 by the Norwegian Delegation to the United Nations Conference on the Law of the Sea, Geneva 24 February to 27 April 1958.

33 **R-0102-RUS; R-0103-NOR; R-0101-ENG** Note verbale 15 June 2020 from the Russian Federation to Norway with attachment.

34 **R-0013-NOR; R-0014-ENG** Email 17 October 2014 from Therese Johansen to Kjell Kristian Egge relating the statements of the Russian Head of Delegation.

express consent of the Coastal State."[35] The practice of the Russian Federation, evidenced in, e.g., notes verbales, statements and votes in NEAFC,[36] confirms Russia's position that snow crab is a sedentary species.

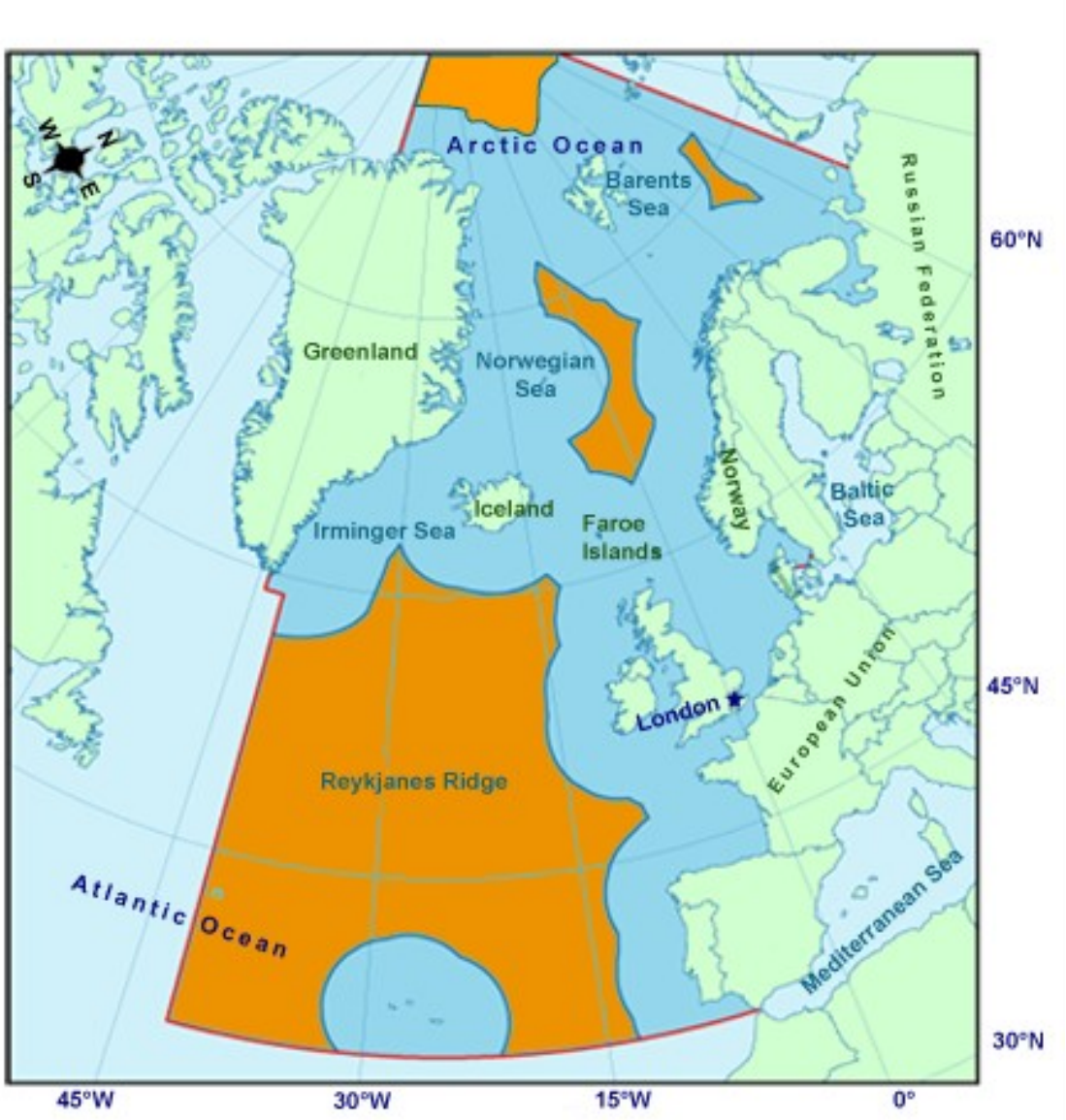
2.2.3.2 NEAFC has no competence to regulate the harvesting of snow crab in the Loop Hole

2.2.3.2.1 *NEAFC may only regulate the harvesting of sedentary species with the consent of the coastal State*

51. The area covered by the NEAFC Convention stretches from the southern tip of Greenland, east to the Barents Sea, and south to Portugal. Current contracting parties are Denmark (in respect of the Faroe Islands and Greenland), the EU, Iceland, Norway, the Russian Federation, and (from 7 October 2020) the United Kingdom.

35 **C-0106**.

36 Discussed further below at paragraph 57.



Map showing the area covered by the NEAFC convention. Areas beyond 200 nautical miles from baselines in orange.

52. NEAFC's objective is to ensure the long-term conservation and optimum utilisation of the fishery resources in the area covered by the NEAFC Convention, providing sustainable economic, environmental and social benefits. To this end, NEAFC adopts management measures for various fish stocks and control measures to ensure that they are properly implemented. NEAFC also adopts measures to protect other parts of the marine ecosystem from potential negative impacts of fisheries.

53. Crucial to an understanding of the competence of NEAFC are Articles 5 and 6 of the NEAFC Convention. Article 5 states that NEAFC:

> "*shall, as appropriate, make recommendations concerning fisheries conducted beyond the areas under jurisdiction of Contracting Parties. Such recommendations shall be adopted by a qualified majority.*"[37]

54. Article 6 adds that NEAFC:

> "*may make recommendations concerning fisheries conducted within an area under the jurisdiction of a Contracting Party, provided that the Contracting Party in question so requests and the recommendation receives its affirmative vote.*"[38]

55. NEAFC's regulatory competence thus *only applies in areas beyond national jurisdiction* (Article 5). In addition, NEAFC may make recommendations concerning fisheries in areas under coastal State jurisdiction if – but only if – the affected coastal State so requests *and* the recommendation is endorsed by it (Article 6). NEAFC has *never* had the competence to regulate snow crab harvesting in the Loop Hole, as snow crab is a sedentary species and is therefore subject to the national jurisdiction of Norway and the Russian Federation.

2.2.3.2.2 *The inclusion of snow crab within NEAFC's regulatory competence was rejected by NEAFC Members*

56. In November 2014, following the aforementioned arrest of the *Juros Vilkas*, the EU proposed to add snow crab (and a shrimp species) to the list of NEAFC regulated species. The proposal was referred to the NEAFC's Permanent Committee on Control and Enforcement ("**PECCOE**").[39]

57. At the PECCOE meeting in January 2015, Norway and the Russian Federation presented their position that snow crab is a sedentary species and thus to be regulated by the continental shelf State.[40] The following was said regarding the discussions in the official report:

> "*The Chair presented document PE 2015-01-13, which included a proposal that the EU had made at the 2014 Annual Meeting to include two additional species in a new Annex I c) to the Scheme. The Annual Meeting had not adopted the proposal, but rather requested that PECCOE consider this issue.*"

---

37 **CL-0018**, Article 5 (emphasis added).

38 *Id.*, Article 6 (emphasis added).

39 **R-0007-ENG** Report from meeting on 27 and 28 January 2015 in the NEAFC Permanent Committee on Control and Enforcement (PECCOE). See section 4.6.1.

40 **R-0015-NOR; R-0016-ENG** Norwegian report in email 28 January 2015 from Terje Løbach.

> "*There was opposition to the inclusion, based on the position of some Contracting Parties that these were sedentary species on the extended continental shelves of coastal States, which NEAFC should not include on a list of regulated resources. Some of the Contracting Parties expressed the position that this applied to crab and some Contracting Parties expressed the position that this applied to both crab and shrimp. There was no consensus on including either species in Annex I of the Scheme.* […]"[41]

Accordingly, snow crab was *not* added to the list of NEAFC regulated species.

58. In April-July 2015 the EU introduced three proposals to NEAFC for "*exploratory bottom fisheries of snow crab*" in the Barents Sea (on 1 April 2015 for a Spanish vessel; on 19 June 2015 for Lithuanian vessels; and on 8 July 2015 for four Latvian vessels including two owned by North Star).[42]

59. By way of background, in 2015, NEAFC had in place conservation measures for Vulnerable Marine Ecosystems ("**VMEs**") to protect them from being destroyed by "*bottom fishing activity*",[43] e.g. through trawling for fish with gear that touches the bottom.

60. VME recommendations are based upon a distinction between:

- "*closed areas*" (those areas that are still vulnerable, and where no bottom fishing should take place);
- "*existing bottom fishing areas*" (those areas that have already been destroyed by bottom fishing); and
- areas outside of existing bottom fishing areas and closed areas.

In existing bottom fishing areas, bottom fishing can continue, with certain restrictions, whereas in closed areas no bottom fishing is allowed. In the areas outside the existing

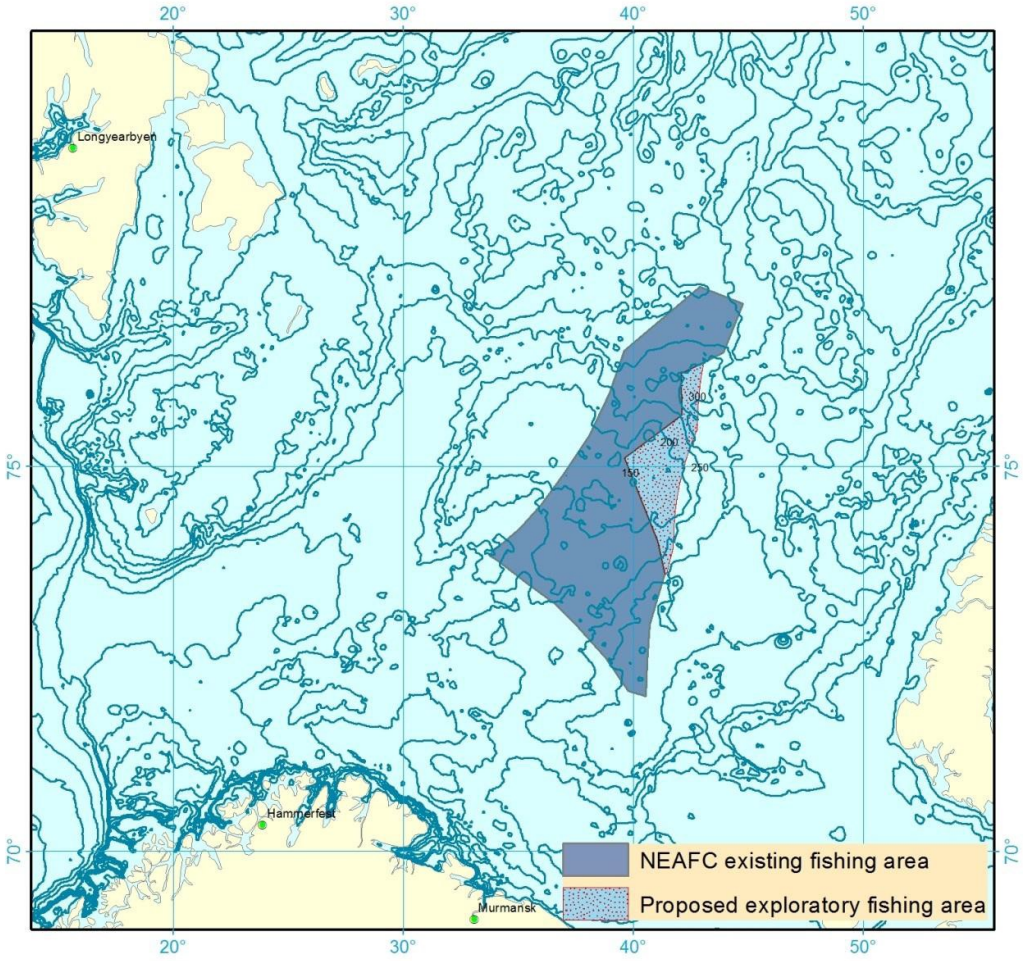
---

41 **R-0007-ENG** Report from meeting on 27 and 28 January 2015 in the NEAFC Permanent Committee on Control and Enforcement (PECCOE). See section 4.6.1.

42 **R-0017-ENG** Letter 1 April 2015 from the NEAFC Secretariat to the Heads of delegation of the parties. **R-0018-ENG** Letter 19 June 2015 from the NEAFC Secretariat with enclosed letter from EU 19 June 2015 regarding second proposed exploratory fisheries (Lithuanian vessels). **R-0041-ENG** Letter 8 July 2015 from the NEAFC Secretariat with enclosed letter 8 July 2015 from the EU regarding third proposed exploratory fisheries (Latvian vessels)

43 **R-0019-ENG** NEAFC Recommendation 19 (1014) on the protection of vulnerable marine ecosystems in the NEAFC Regulatory Area.

bottom fishing area and the closed areas, "exploratory bottom fishing" can take place with permission from NEAFC.



Map from EU's Proposed exploratory fisheries No. 3 to NEAFC for Latvian vessels. All of the proposed area was on the Russian continental shelf in the Loop Hole.[44]

61. A large part of the Loop Hole – including all of the Norwegian continental shelf there – is classified by NEAFC as an existing bottom fishing area, whilst an area in the Eastern and Northern part of the Loop Hole (part of the Russian continental shelf) is defined as being outside existing bottom fishing areas. As such, exploratory bottom fishing could only take place with permission from NEAFC.

62. The part of the Loop Hole defined as being outside of existing bottom fishing areas is in its *entirety* part of the Russian continental shelf. Therefore, by definition, the

[44] **R-0041-ENG** Letter 8 July 2015 from the NEAFC Secretariat with enclosed letter from EU 8 July 2015 regarding third proposed exploratory fisheries (Latvian vessels).

proposals introduced in 2015 related only to the Russian continental shelf. Regardless of the outcome of those proposals, there would have been *no consequences whatsoever for snow crab harvesting on the Norwegian continental shelf* in the Loop Hole.

63. In a letter of 16 May 2015 concerning the EU's proposal, Iceland referred to UNCLOS Article 77 and noted:

> "*The intended exploratory fisheries are on an extended continental shelf and therefore the coastal state exercises sovereign rights of exploring and exploiting sedentary species in the area of concern.*" [45]

Iceland also referred to Article 6 of the NEAFC Convention on fisheries "*conducted within an area under jurisdiction of a Contracting Party*".

64. The NEAFC Secretariat announced, by letter of 29 June 2015 to the Contracting Parties,[46] a postal vote[47] on the first proposal put forward by the EU (Spanish vessel). Later, the NEAFC Secretariat also announced postal votes on the second proposal (Lithuanian vessels)[48] and the third proposal (Latvian vessels).[49]

65. On 30 July 2015, the NEAFC Secretariat informed the Contracting Parties of the outcome of the postal vote concerning the first proposal from the EU (Spanish vessel).

---

45 **R-0020-ENG** Letter 16 May 2016 included as attachment to letter 26 May 2015 from NEAFC (reference HOD 15/43), Annex III.

46 **R-0021-ENG** Letter 29 June 2015 from the NEAFC Secretariat on commencement of postal vote on first proposal (Spanish vessel).

47 Where a proposal requiring a decision of the Commission is made between meetings of the Commission, the decision shall be made through written communication. The Secretary shall without undue delay communicate to all Contracting Parties the proposal and the closing date of a 30-day period that Contracting Parties have to reply. The response from each Contracting Party shall be communicated to the Secretary and shall include a notification as to whether it votes in favour of the proposal, votes against the proposal or abstains. The Secretary shall immediately communicate the outcome of this decision making process to all Contracting Parties, initiating, if relevant, the objection period as set out in Article 12 of the Convention. If a Contracting Party fails to respond within the 30-day period, it will be recorded as having abstained and be considered part of the relevant quorum for decision-making. This procedure is regulated in the NEAFC Rules of Procedure. A copy of the Rules of Procedure adopted at the 32nd Annual Meeting, November 2013 and as amended at the 39th Annual Meeting November 2020 is included as **R-0080-ENG**.

48 **R-0022-ENG** Letter 17 September 2015 from the NEAFC Secretariat on commencement of postal vote on second proposal (Lithuanian vessels).

49 **R-0023-ENG** Letter 7 October 2015 from the NEAFC Secretariat on commencement of postal vote on third proposal (Latvian vessels).

There was one vote in favour, one abstention and three votes against.[50] The proposal was rejected. In the explanation of their votes Norway and the Russian Federation, who both voted against the proposal for exploratory fishing, referred to snow crab as a sedentary species subject to coastal States' exclusive rights.[51]

66. The outcome of the postal vote for the second proposal (Lithuanian vessels) was no votes in favour (not even the EU), three abstaining, and two votes against.[52] Consequently, this proposal was also rejected. Norway explained its negative vote in similar terms to its explanation for the first vote. [53]

67. As to the third proposal (Latvian vessels), the outcome of the postal vote was no votes in favour (not even the EU), two abstaining, and three votes against.[54] The proposal was accordingly rejected. Norway once again explained that snow crab was a sedentary species subject to the sovereign rights of the coastal State.[55] The same explanations were also given by the Russian Federation to both the second[56] and the third proposal.[57]

2.2.3.3 The EU recognises that snow crab is a sedentary species

68. The voting pattern described above shifted throughout the process of handling the three proposals. Except for one vote in favour on proposal 1, there are *no* positive votes in favour of the three proposals. These results should be read in conjunction with other clarifications taking place throughout the autumn of 2015. The EU's Director General

---

50 **R-0024-ENG** Letter 30 July 2015 from the NEAFC Secretariat on the outcome of the postal vote on the first proposal (Spanish vessel).

51 **R-0025-ENG** Letter 23 July 2015 from Norway regarding explanation to postal vote on the first proposal (Spanish vessel) **R-0026-ENG** Letter 27 July 2015 from the Russian Federation regarding explanation to postal vote on the first proposal (Spanish vessel).

52 **R-0027-ENG** Letter 20 October 2015 from the NEAFC Secretariat on the outcome of the postal vote on the second proposal (Lithuanian vessels)

53 **R-0028-ENG** Letter 2 October 2015 from Norway regarding explanation to postal vote on the second proposal (Lithuanian vessels)

54 **R-0029-ENG** Letter 9 November 2015 from the NEAFC Secretariat on the outcome of the postal vote on the third proposal (Latvian vessels)

55 **R-0030-ENG** Letter 5 November 2015 from Norway regarding explanation to postal vote on the third proposal (Latvian vessels)

56 **R-0031-ENG** Letter 15 October 2015 from the Russian Federation regarding explanation to postal vote on the second proposal (Lithuanian vessels)

57 **R-0032-ENG** Letter 5 November 2015 from the Russian Federation regarding explanation to postal vote on the third proposal (Latvian vessels)

for Maritime Affairs and Fisheries ("**DG Mare**") sent a clarificatory letter to the EU Member States in August 2015, after the vote on proposal 1 and before the vote on proposals 2 and 3.[58]

69. That letter finds no mention in the Claimants' Memorial, and is worth setting out in some detail:

> "*With regard to snow crab, it appears that this species is "unable to move except in constant physical contact with the seabed or the subsoil" and it thus falls within the definition of "sedentary species" of Article 77(4) of UNCLOS. The fact that snow crab falls within that definition formed the subject matter of an earlier dispute between Canada and the United States about the prosecution of snow-crab fisheries conducted by United States fishing vessels on the Canadian continental shelf at a location where Canada's continental shelf extended beyond 200 nautical miles in the Northwest Atlantic. At that time, the European Union (then the European Community) considered snow crab to fall within the definition of "sedentary species" and, therefore, did not lodge any protest against Canada. Indeed whenever the question of whether or not a crab species fell within the definition of "sedentary species" gave rise to an international dispute, e.g. the dispute between Japan and the United States about the latter's classification of Alaskan king crab as "sedentary species", the relevant coastal State has always prevailed in the end.*
>
> *It follows from this classification of snow crab as "sedentary species" that only the relevant coastal States, i.e. Norway and the Russian Federation, are entitled to exploit (i.e. to harvest) it by virtue of their sovereign rights under the continental shelf regime of UNCLOS and that, as spelled out in Article 77(2) of UNCLOS, no other State is able to do so unless it has obtained the coastal State's explicit consent. Moreover, the coastal State's rights are exclusive in a sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake any such activities without the express consent of the coastal State.*
>
> *Therefore, without the express consent of the relevant coastal States (namely Norway and the Russian Federation in the present instance), these fisheries are illegal as they would be in contravention of Article 77(2) of UNCLOS.*
>
> *The Commission would underline that the EU, as a Contracting Party to UNCLOS, is under an obligation to respect Article 77(2) of UNCLOS. Similarly, upon its ratification by the Union, UNCLOS forms part of the legal order of the Union pursuant to the provisions of Article 216 of the Treaty on the Functioning of the European Union, such that also the Member States are bound to respect it.*
>
> *Consequently, since both Norway and the Russian Federation have given no such consent, Member States are advised that they should rescind any current licences authorising their vessels to fish for snow crab and any other sedentary species such as king crab in the NEAFC Regulatory Area and should not issue any new licences to this effect and, as appropriate, re-call the vessels concerned.*

---

58 **R-0033-ENG** Letter 5 August 2015 from DG Mare to the EU Member States.

> *Consequently, since both Norway and the Russian Federation have given no such consent, Member States are advised that they should rescind any current licences authorising their vessels to fish for snow crab and any other sedentary species such as king crab in the NEAFC Regulatory Area and should not issue any new licences to this effect and, as appropriate, re-call the vessels concerned*".[59]

70. Whilst the letter obviously speaks for itself, the EU reconfirmed this view in its letter of 12 March 2018 to Latvia.[60]

71. Furthermore, Norway sent notes verbales to all relevant EU and NEAFC members underlining continental shelf jurisdiction and the sovereign rights of the coastal State. The Russian Federation sent similar notes verbales.

72. In paragraph 51 of their Memorial, the Claimants write that "*NEAFC members had agreed that they could regulate together both sedentary and non-sedentary resources in the context of NEAFC*." This overlooks the crucial distinction between NEAFC's competence in areas beyond national jurisdiction according to NEAFC Article 5 and its much more limited competence in areas subject to national jurisdiction according to NEAFC Article 6. True it is that NEAFC *can* in certain circumstances regulate sedentary species. But that can only be done where the coastal State has requested such measures and subsequently approved them.

73. Neither Norway, nor the Russian Federation, has ever requested any NEAFC recommendations for the harvesting of snow crab in the Loop Hole and NEAFC has never issued any such recommendations.

2.2.3.4 Recognition of the sedentary nature of snow crab among other States

74. So far as Norway is aware, all States that have crab harvesting activity in areas under their jurisdiction consider crab species as sedentary within Article 77 of UNCLOS, and have done so since UNCLOS was adopted (if not since the conclusion of the Continental Shelf Convention). This includes all States with significant snow crab

---

59 **R-0033-ENG** Letter 5 August 2015 from DG Mare to the EU Member States (emphasis added).

60 **R-0037-ENG** See paragraph 20 of the Annex to European Commission: Position of the European Commission concerning a call to act from the Republic of Latvia pursuant to Article 265 TFEU, Brussels 12.03.2018 (C(2018)1418 final).

activity in areas under their jurisdiction (Canada,[61] Denmark/Greenland, Norway, Russian Federation,[62] United States of America[63]). It also includes other States with significant crab populations of other species on their continental shelf, such as Australia.[64]

---

61 Canada informed the North Atlantic Fisheries Organisation (NAFO) in an official letter of 19 July 1995 that "*snow crab is a sedentary species and that fishing for this species on the Canadian continental shelf is limited to Canadian Fishermen*" This was reiterated in a new letter of 3 April 1997 to NAFO, when Canada updated the list of sedentary species which are restricted to Canadian fishermen only. Following a request from a fisherman from another NAFO State Party on the possibility for fishing for crab, Canada reaffirmed the point in a letter 13 May 2002 to NAFO about the 3 April 1997 letter. The 1997 and 2002 letters are included as exhibit **R-0034-ENG** (The letters are attachments to further letter dated 6 October 2015 from NAFO to NAFO contracting Parties). **RL-0003-ENG** Canada's Coastal Fisheries Protection Act reserves the right to fish for snow crab on the Canadian continental shelf for Canadian citizensed cf. section 3 and 4. In response to a request from Norway, Canada responded that Canada has always regarded the snow crab as sedentary species for which Canada has exclusive rights on the continental shelf and that no other State has ever challenged Canada's management of snow crab. Canada's response in June 2021 to questions by Norway are included as exhibit **R-0035-NOR; R-0036-ENG** (The response is included in an internal email from the Fisheries Adviser at the Norwegian Embassy in Washington to the Norwegian Ministry of Foreign Affairs on 23 June 2021.)

62 **RL-0031-ENG** The Soviet Union declared sovereign rights over its continental shelf by Proclamation of 6 February 1968. Paragraph 3 of the Proclamation repeats the criteria of Article 2(4) of the 1958 Geneva Convention, and authorized the Fisheries Ministry to draw up a list of such living organisms. The "List of species of living organisms that are natural resources of the continental shelf of the USSR", approved by order of the USSR Ministry of Fisheries of October 29, 1968 N 350 includes both snow and king crab.

In its international relations, Russia has proceeded from the fact that the snow crab (sometimes referred to as 'tanner crab') is a sedentary species subject to continental shelf State jurisdiction at least since the *Agreement between the United States and the Union of Soviet Socialist Republics relating to fishing for king and tanner crab (with appendix and exchange of letters),* signed at Washington on 18 July 1975. Registered as UNTS 11132. **R-0104-ENG** In paragraph 1 of the agreement, it is stated that: "*The king crab and tanner crab are natural resources of the continental shelf over which the coastal state exercises sovereign rights for the purposes of exploration and exploitation in accordance with the provisions of Article 2 of the Convention on the Continental Shelf.*"

63 **RL-0033-ENG** The United States, with the enactment of the *Submerged Lands Act* of 22 May 1953, 43 U.S.C. § 1301 et seq., declared sovereign rights over the natural resources of the continental shelf outside its territorial waters. The act defines these natural resources as: "(e) *The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include waterpower, or the use of water for the production of power;*" (Section 2(e)). This was continued in **RL-0034-ENG** the Magnuson-Stevens Fisheries Conservation and Management Act of 13 April 1976, 16 U.S.C Chapter 38 § 1801 et seq., where Section 3(3)(4) defines a large number of crabs, including Tanner crab (snow crab), as Continental Shelf Fishery Resources, which again are defined by reference to the criteria of Article 2(4) of the 1958 Continental Shelf Convention. Information regarding the regulation of harvesting of snow crab in U.S. Waters may also be found in letter of 25 June 2021 from the United States Department of Commerce, Office of General Counsel to Petter Meier, Counsellor Fisheries and Oceans at the Royal Norwegian Embassy in Washington **R-0145-ENG**.

64 **R-0105-ENG** For the latest Australian measures, see "Fisheries Management (Sedentary Organisms) Proclamation 2015" of 3 September 2015, made under subsection 12(1) of the Fisheries Management Act 1991, which includes crab among the sedentary organisms to which the Fisheries Management Act applies because they are, for the purposes of international law, part of the living natural resources of the Australian continental shelf.

75. Further, the status of snow crab as a sedentary species has been confirmed by national courts.[65]

76. Snow crab is, and has always been, a sedentary species subject to the exclusive jurisdiction of the continental shelf State.

2.2.4 The NEAFC Scheme of Control and Enforcement

77. Before addressing Norway's management of snow crab, one further aspect of NEAFC cooperation should be mentioned.

78. The NEAFC Scheme of Control and Enforcement ("**NEAFC Scheme**") is a set of rules establishing how fishing activities are to be carried out, what control measures should be in place, how inspections should be conducted, etc.[66] The NEAFC Scheme does not authorise the taking of any marine resources: its purpose is limited to regulating how an activity that has been properly authorised should be carried out and controlled.

79. One of the control measures regulated in the NEAFC Scheme is inspections of vessels operating in NEAFC regulated areas by inspectors of the fishery control service of the NEAFC Members assigned to the scheme. In the case of Norway, such inspections are performed by the Norwegian Coast Guard.

80. During the period 2013-2017 the Norwegian Coast Guard undertook 33 NEAFC inspections at sea related to snow crab vessels, although not all of them were harvesting snow crab at the time of the inspection.

81. Two of these inspections were related to vessels owned by North Star; the inspections of *Solveiga* on 1 May 2015, and of *Saldus* on 15 January 2016.[67] Both inspections took place in the waters above the Russian continental shelf in the Loop Hole pursuant to

---

65 **RL-0018-NOR; RL-0019-ENG** Judgment 29 November 2017 by the Supreme Court of Norway (*Juros Vilkas*). Translation to English provided by the Court. **RL-0155-ENG** Judgment 31 January 2003 by the Provincial Court of Newfoundland and Labrador, Canada v. Perry, 2003 CanLII 52758 (NL PC).

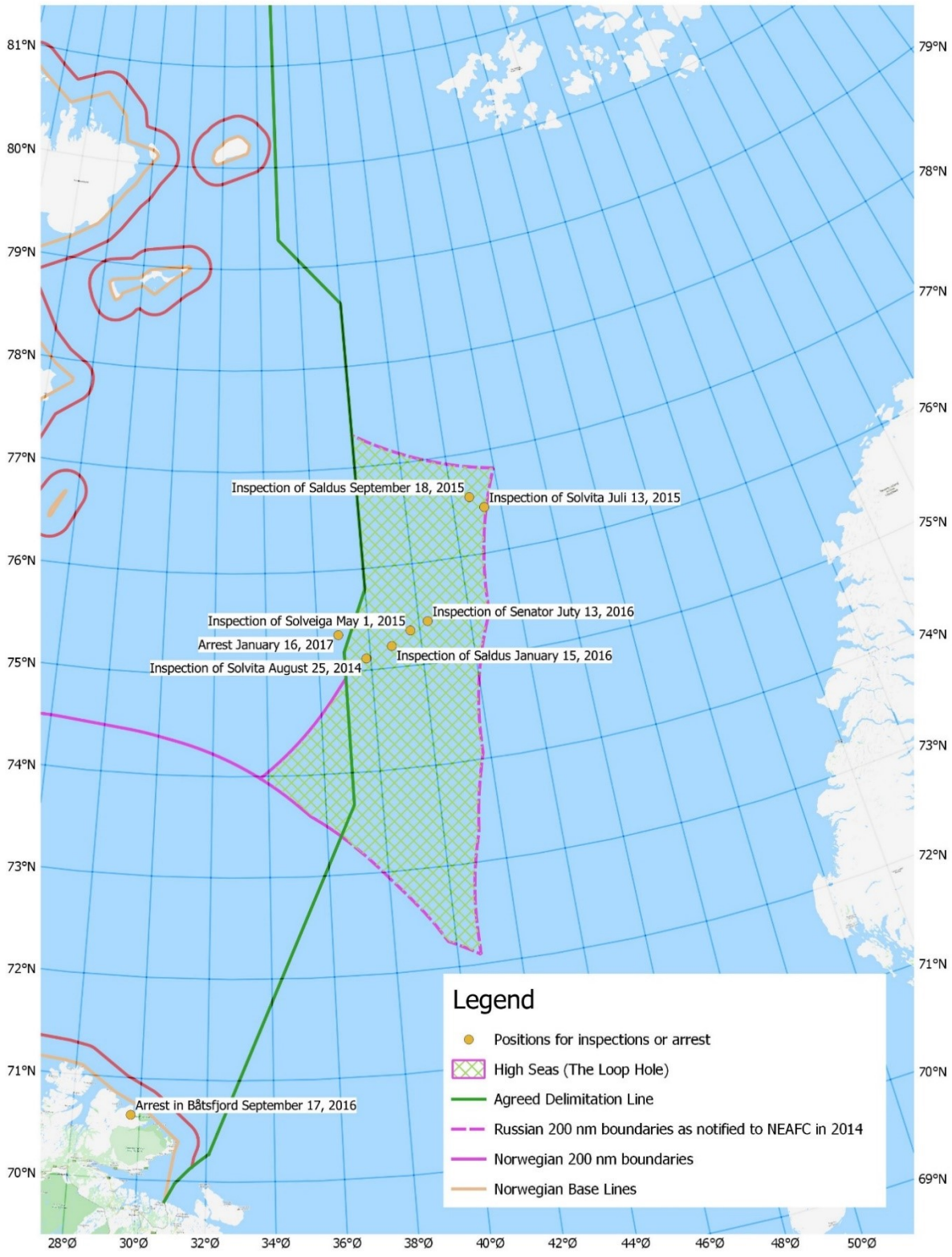
66 **CL-0019**.

67 **R-0151-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*), "Guidance and summary - Report concerning vessels belonging to the Latvian company SIA North Star"" **R-0152-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*) regarding *Saldus* **R-0153-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*) regarding *Senator* **R-0154-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*) regarding *Solveiga* **R-0155-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*) regarding *Solvita.*

the NEAFC Scheme. The inspection of *Solveiga* on 1 May 2015 took place at 75˚, 21' N and 39˚, 38' E. The inspection of *Saldus* on 15 January 2016 took place at 75˚, 13' N and 38˚, 51' E.

82. The Claimants also refer to further four NEAFC inspections by Russian authorities of North Star's vessels: 25 August 2014 (*Solvita*); 13 July 2015 (*Solvita*) 18 September 2015 (*Saldus*); 13 July 2016 (*Senator*).

83. The location of the six inspections referred to by the Claimants in their Memorial can be seen from the map below, which also shows the location at which *Senator* was arrested on 16 January 2017.



Locations of inspections and arrests of North Star's vessels

84. In their Memorial the Claimants refer to the fact that several inspections of North Star's vessels were carried out under the NEAFC Scheme without any infringement being found.[68] It is true that none of the inspections carried out by the Norwegian Coast Guard at sea revealed harvesting of snow crab in contravention of a coastal State prohibition. The simple reason is that the Russian Federation had not imposed any such prohibition when those inspections were carried out (August 2014 – July 2016).

2.2.5 Norway's management of snow crab in the Barents Sea

2.2.5.1 Norway's management policies for fisheries including new fisheries

85. The development of the modern Law of the Sea after WWII has been marked by the establishment of new legal regimes such as the continental shelf and the Exclusive Economic Zone (EEZ), under which coastal States have exclusive rights to explore and exploit the natural resources of the ocean and seabed adjacent to their coasts. Previous regimes, where resources beyond the territorial sea of a coastal State were regarded as global commons, freely accessible to all, are a thing of the past. Such extended national jurisdiction was a step towards the efficient management and sustainable development of fisheries.[69] Today, marine living resources that are located within the jurisdictional areas appertaining to a coastal State that can be commercially exploited, are regulated by the coastal State, which has the sovereign right to explore and exploit them. Such coastal State regulations form the backbone of the modern management of marine living resources and are the key element in the sustainable management of the resources.

86. Norway is committed to international standards for sustainable management of living marine resources when developing its national legislation and policies for fisheries, including new fisheries. FAO's Code of Conduct for Responsible Fisheries, unanimously adopted at the 28th session of the FAO Conference 31 October 1995,[70] is considered to reflect best international practices in this regard. Of relevance for Norway's regulation of snow crab harvesting is, *inter alia*, the Code of Conduct section 7.6.2, which recommends that States adopt measures to ensure that no vessel be allowed

---

68 Memorial, ¶¶694; 732.

69 **R-0038-ENG** FAO Code of Conduct for Responsible Fisheries, p.13.

70 *Id.*

to fish within areas under national jurisdiction unless authorised,[71] and section 8.1.1 which recommends that States should ensure that only fishing operations positively authorised (as opposed to simply not forbidden) by them are conducted within waters under their jurisdiction and that these operations are carried out in a responsible manner. These recommendations form part of the basis for global efforts to prevent illegal, unreported and unregulated (IUU) fisheries.

87. Norway's regulation of snow crab harvesting on its continental shelf is no exception and it corresponds to similar regulations adopted by other States. The introduction of such regulations during the period when the snow crab population moved westwards onto the Norwegian continental shelf in the Loop Hole, and commercial harvesting became possible should have come as no surprise whatsoever to the Claimants. It is fully in line with what is required under the Code of Conduct in respect of new fisheries, including section 7.5.4, which reads:

> "*In the case of new or exploratory fisheries, States should adopt as soon as possible cautious conservation and management measures, including, inter alia, catch limits and effort limits. Such measures should remain in force until there are sufficient data to allow assessment of the impact of the fisheries on the long-term sustainability of the stocks, whereupon conservation and management measures based on that assessment should be implemented. The latter measures should, if appropriate, allow for the gradual development of the fisheries.*"[72]

88. The most important Norwegian national legislation for the management of marine living resources is the Marine Resources Act (havressurslova) (2008)[73] and the Participation Act (deltakerloven) (1999).[74] According to the Marine Resources Act, Section 1, management of marine resources must pursue two main purposes: (1) ensuring the sustainable and socio-economic profitable management of wild marine

---

71 *Id.*, section 7.6.2: "*States should adopt measures to ensure that no vessel be allowed to fish unless so authorized, in a manner consistent with international law for the high seas or in conformity with national legislation within areas of national jurisdiction*."

72 *Id*., section 7.5.4.

73 **RL-0009-NOR** Act of 6 June 2008 No. 37, last amended by LOV-2017-06-16-73. **RL-0008-ENG** Unoffical translation to English updated on 17 March 2015. The Claimants have submitted an English translation of this amendment as CL-12.

74 **RL-0010-NOR; RL-0011-ENG** Act of 26 March 1999 No. 21, last amended by LOV-2019-06-14-21 and LOV-2019-12-13-79.

living resources and (2) contributing to employment and sustained population in coastal societies.

89. Those purposes must be read in context with Section 2 of the Act which establishes that the wild living marine resources belong to the Norwegian society as a whole. The latter provision underscores *society's* right to the resources: marine resources are not a privately owned resource. The provision is in particular related to the Government's role in managing marine resources for the benefit of society as a whole. The provision was introduced in the Marine Resources Act in 2008; but it reflects a well-established principle in Norwegian management of marine resources. This principle has been expressed on various occasions by the Norwegian Parliament. An example of this is in Innst. O. nr. 38 (1998-99) by the Parliament's Standing Committee on Business and Industry (Næringskomiteen) in its proposal for decision in relation to adoption of the Participation Act. In Chapter 2.3 it is stated that "[t]*he Committee will underline that the fishery resources belong to the Norwegian people, jointly. At the outset, no individual person or company may be given everlasting exclusive rights to harvest of (and benefit from) these resources*".[75]

90. The Marine Resources Act, Section 7, establishes the main principles for management of wild marine living resources. Those principles are of particular relevance to the establishment of a management scheme for previously unregulated species, such as the snow crab.

91. According to Section 7(1), the responsible Ministry is under an obligation to review what kind of management measures are necessary to ensure a sustainable management of the marine resources. A precautionary approach should be pursued (Section 7(2)(a)). The paragraph also mentions, *inter alia*, an ecosystem approach that takes into account habitats and biodiversity, effective control of harvesting and other forms of utilisation of resources, appropriate allocation of resources and optimal utilisation of resources.

92. The practical implications of these management principles when applied to emerging fisheries are dealt with in the proposition for adoption of the Marine Resources Act, Section 4.4.4.2.4. With regard to species in the process of becoming commercially

---

75 **R-0106-NOR** Innst. O. nr. 38 (1998-99) Chapter 2.3. **R-0107-ENG** Translation of Section 2.3.

exploitable, the proposition states that it follows from the management principle that commercial harvesting of such resources should not be allowed to commence without specific managerial follow-up. Norway's adoption of regulations was exactly such a follow-up.

93. The right to participate in commercial fishing is fully regulated through the rules laid down in and pursuant to the Participation Act of 26 March 1999 ("*deltakerloven*")[76]. According to Section 4, "*a vessel may not be used for commercial fishing or hunting unless a licence for this purpose has been issued by the Ministry*."[77] A commercial fishing licence is granted to the owner for a specific vessel.

94. The Proposition to Parliament for adoption of the Marine Resources Act,[78] Section 4.3.4, which discusses ownership of the resources also contains clarifications with regard to the trading of different types of permits between private parties and the expectations created by such trade. The proposition underscores that transfer of rights to harvest marine living resources against compensation between private parties does not in itself create a stand-alone permission to fish. The permission given by the authorities has a specified content defined by the legal basis on which it is granted and conditions in the permit itself. The proposition further emphasizes that the framework for the activity may change, either in accordance with the existing legal framework or as a result of changes in the law.

2.2.5.2 The process leading to Norway's the Snow Crab Regulations of December 2014

95. Norway's national legislation for the harvesting of snow crab is based on Norway's sovereign rights as the continental shelf State pursuant to Article 77 of UNCLOS.

96. From 2004, when the first specimen of snow crab was found on the Norwegian continental shelf, until the end of 2014, the harvesting of snow crab on the Norwegian

---

76 **RL-0010-NOR; RL-0011-ENG** Act of 26 March 1999 No. 21, last amended by LOV-2019-06-14-21 and LOV-2019-12-13-79.

77 "*the Ministry*" refers to the Ministry of Trade, Industry and Fisheries. The Ministry has delegated its competence to i.a. the Directorate of Fisheries, cf. Regulations FOR-2005-06-17-607 of 17 June 2005.

78 **RL-0166-NOR; RL-0167-ENG** Ot.prp. nr. 20 (2007-2008) Proposition to the Norwegian Parliament for adoption of the Marine Resources Act (*Om lov om forvaltning av viltlevande marine ressursar (havressurslova)*). Only available in Norwegian.

continental shelf was either non-existent or minimal. During this period there was no practical need to regulate the harvesting of snow crab: harvesting was not prohibited, and no quota was set for such harvesting in Norwegian jurisdictional areas.

97. In 2013, Norwegian vessels landed 189 tonnes of snow crab. In 2014, Norwegian vessels landed 1,881 tonnes and foreign vessels 2,440 tonnes. All of this crab was harvested on the Russian continental shelf in the Loop Hole.[79]

98. The growing landings of snow crab in Norwegian ports together with scientific data, (e.g. from ecosystem surveys in the Barents Sea), and projections from the IMR that snow crab would migrate from the Goose Bank area (on the Russian continental shelf) onto the Norwegian continental shelf, indicated that the population of snow crab in the Barents Sea was increasing and that harvesting of snow crab on the Norwegian continental shelf could soon become commercially viable. In accordance with the management policies for fisheries described above Norway went on to consider the adoption of regulations for the harvesting of snow crab in Norwegian jurisdictional areas.

99. The development of the new regulation was the subject of communications between the Directorate of Fisheries and the Ministry of Trade, Industry and Fisheries in the winter, spring and summer of 2013 and 2014.[80] In an internal report of 2 July 2014 the Ministry assessed the information received from IMR and the Directorate. It concluded that harvesting of snow crab should be regulated.[81]

100. On 24 October 2014 a new draft regulation was submitted for public hearing.[82] The Ministry suggested a general ban on harvesting snow crab, coupled with the possibility to apply for exemptions, to be effective until a more developed management plan for the species could be adopted. The public hearing and draft regulations on harvesting of

---

79 **R-0112-NOR; R-0113-ENG** Public hearing of 24 October 2014 regarding the management of snow crab and draft regulations.

80 **R-0098-NOR; R-0097-ENG** Emails of 31 October 2014 and 4 November 2014 between the Norwegian Ministry of Foreign Affairs and the Norwegian Ministry of Ministry of Trade, Industry and Fisheries which exemplifies the steps taken to make it clear that the snow crab is a sedentary species.

81 **R-0109-NOR; R-0108-ENG** Internal report of 2 July 2014 in the Norwegian Ministry of Trade, Industry and Fisheries.

82 **R-0112-NOR; R-0113-ENG** Public hearing of 24 October 2014 regarding the management of snow crab and draft regulations.

snow crab were reported in the media, particularly the media serving the fisheries industry,[83] and observations were invited from any interested parties. Sixteen interested parties commented on the proposal during the public hearing. Neither of the Claimants, nor Seagourmet, submitted any observations.

2.2.5.3 Management measures adopted December 2014

101. Regulations regarding the prohibition of harvesting snow crab ("*forskrift om forbud mot fangst av snøkrabbe*" - FOR-2014-12-19-1836) (the "**Regulations**")[84] were adopted on 19 December 2014 and entered into force on 1 January 2015. They have been amended many times thereafter, and changes relevant to the present case are noted below. The EU was notified of the Regulations by note verbale of 24 June 2015. The notification included an unofficial English translation of the Regulations. [85]

102. The legal basis for the Regulations is the Marine Resources Act, Section 16;[86] the Act related to Svalbard *("lov om Svalbard")*, Section 4;[87] and the Participation Act, Section 20.[88]

---

83 **R-0110-NOR**; **R-0111-ENG** I.a. in *Fiskeribladet* on 28 October 2014: "*Harvesting of snow crab to be regulated*" ("*Snøkrabbefisket skal reguleres*") (date provided is date accessed)

84 **RL-0156-NOR**; **RL-0157-ENG** Historic version of Regulations FOR-2014-12-19-1836 as it was adopted on 19 December 2014 and entered into force on 1 January 2015. The Claimants provided the 18 December 2014 regulations as exhibit C-104. It does not state where the text and translation are taken from.

85 **R-0039-ENG** Note verbale 24 June 2015 from Norway to the EU including an unofficial translation of the regulations It is the responsibility of EU to make the notification known to its Member States. A letter of 20 October 2015 from the Lithuanian Fisheries Services, under the Ministry of Agriculture indicates that the Member States were informed. In the letter to the Norwegian Directorate of Fisheries, Lithuania writes that they haven "*informed on the Regulations relating to a prohibition against harvesting snow crabs*" and "*ask for detailed information and specified conditions under which the submission of an application to the Norwegian Directorate of Fisheries would be possible*."

86 **RL-0009-NOR** Act of 6 June 2008 No. 37, last amended by LOV-2017-06-16-73. **RL-0008-ENG** Unofficial translation to English updated on 17 March 2015. The Claimants have submitted an English translation of this amendment as **CL-0012**.

87 **RL-0022-NOR; RL-0023-ENG** Act LOV-1925-07-17-11, last amended by Act LOV-2019-05-24-17

88 **RL-0010-NOR**; **RL-0011-ENG** Act of 26 March 1999 No. 21, last amended by LOV-2019-06-14-21 and LOV-2019-12-13-79. The legal basis for the first version of the snow crab regulations was the Act on the Management of Wild Marine Resources ("*lov om forvaltning av viltlevande marine ressursar*") Section 16 and the Act concerning Svalbard ("*lov om Svalbard*") Section 4. The Act concerning participation in the fisheries ("*lov om retten til å delta i fiske og fangst*") Section 20 was added as a part of the legal basis for the amendments introduced 22 December 2015. When quotas were introduced in 2017, additional provisions from the Act on loving Marine Resources were added as part of the legal basis for the regulation.

103. The first version of the Regulations, which entered into force on 1 January 2015, prohibited in Section 1 the harvesting of snow crab by Norwegian and foreign vessels in Norway's territorial waters (including in the territorial waters around Svalbard, in Norway's Economic Zone around mainland Norway, and in the Fisheries Protection Zone around Svalbard).

104. Section 2 of the Regulations, in its version applicable from 1 January 2015, provided for the grant of certain exemptions from the prohibition in Section 1. These exemptions could be granted by the Norwegian Directorate of Fisheries and were not dependent on the vessels' nationality. Moreover, the Regulations stipulated a transitional period for vessels, regardless of flag, that had harvested snow crab in 2014, so that they did not need to have an exemption until 15 February 2015.

105. Norway had not previously regulated any sedentary species on its continental shelf beyond 200 nautical miles, as there had not been any such species of commercial interest that far offshore. Sedentary species previously regulated, e.g. king crab, only occur in coastal areas well within the 200 nautical miles Norwegian Economic Zone.

106. So far as Norway is aware, there had been *no* commercial landings of snow crab harvested on the Norwegian continental shelf in the Loop Hole as of October 2014, the time of the public hearings on the Regulations. For this reason, Norway continued its previous practice of only regulating species harvested on the seabed and species harvested from the water column in (i) its territorial waters, and (ii) the Norwegian Economic Zone outside mainland Norway and the Fisheries Protection Zone around Svalbard. There was at the time of adoption of the Regulations no previous practice in Norway of regulating the harvesting of sedentary species from locations beyond 200 nautical miles from Norway's baselines; and there was initially no reason even to consider such regulation, because there was no harvesting taking place beyond 200 nautical miles.

2.2.5.4 Amendments in February 2015 - exemptions to certain Norwegian vessels

107. Through an amendment to the Regulations,[89] which took effect on 19 February 2015, exemptions under Section 2 were only to be granted to vessels covered by the Participation Act *i.e.* certain Norwegian flagged vessels.

2.2.5.5 The amendments in 2015, extending the coverage of the snow crab regulation also to the Norwegian continental shelf beyond 200 nautical miles[90]

108. Through an additional amendment, which took effect on 22 December 2015, the references to the Economic Zone around mainland Norway and the Fisheries Protection Zone around Svalbard in Section 1 of the snow crab Regulation were removed and replaced by a reference to the Norwegian continental shelf and the continental shelves of foreign States.[91] The EU was notified of these amendments to the Regulations by note verbale of 22 January 2016. The notification included a description of the amended Regulations.[92]

109. The amendment was adopted to make the Regulations cover all areas under Norwegian jurisdiction, including the Norwegian continental shelf in the Loop Hole, and thus to implement section 7.6.2 of the FAO Code of Conduct, which recommends that States adopt measures to ensure that no vessel be allowed to fish within areas of national

---

89 **RL-0159-NOR; RL-0159-ENG** Regulations FOR-2015-02-19-137 amending Regulations FOR 2014-12-19-1836, adopted on and entered into force on 19 February 2015. The amendment introduced in Section 2 also required observers from the Norwegian Institute of Marine Research and the Norwegian Directorate of Fisheries be allowed to participate on board the vessels if the two institutions so required. The Claimants provided the amendment as **C-105**.

90 **R-0100-NOR; R-0099-ENG** Protocol from the 45th Session of the Joint Norwegian- Russian Fisheries Commission, section 10. See *infra*, paragraph2.2.7140 This agreement was initiated by Norway in letter of 3 August 2015 from Mr Arne Røksund, Assistant Secretary General of Norway's Ministry for Trade, Industry and Fisheries, to the Federal Agency for Fisheries on mutual access **R-0146-ENG R-0147-NOR**. In letter of 30 December 2015 from Russia's Federal Agency for Fisheries to the Norwegian Directorate of Fisheries **R-0055-ENG** Norway was notified of Russian vessels intending to fish snow crab in the NEAFC Regulatory Area in the Barents Sea in 2016.

91 **RL-0148-ENG; RL-0147-NOR** Regulations FOR-2015-12-22-1833 amending Regulations FOR-2014-12-19-1836, adopted on and entered into force on 22 December 2015 the Claimants provided the amendments as **C-110**.

92 **R-0040-ENG** Note verbale 22 January 2016 from Norway to the EU and letter attached to the note verbale.

jurisdiction unless authorised in conformity with the national legislation of the coastal State.[93]

110. The amendment reflected the international consensus—already addressed above— that snow crab is a sedentary species covered by Article 77 of UNCLOS.

111. The amendment was also a logical outcome of the NEAFC process described above. After this process, the EU advised its Member States to revoke any licence that they had given to harvest snow crab without the express consent of the coastal State.[94]

112. In a parallel process, the Ministers of Fishery of Norway and the Russian Federation reiterated, in Agreed Minutes from a meeting in Malta on 17 July 2015, that the two coastal States proceeded from the fact that the snow crab is a sedentary species subject to coastal State jurisdiction according to UNCLOS Article 77.[95]

113. It should be emphasised that neither the NEAFC process, nor the meeting in Malta, changed the legal status of the snow crab from a non-sedentary to sedentary species or in any other way. Nor did Norway change its position with regard to this status.[96]

114. After the ban on snow crab harvesting on the Norwegian continental shelf, no foreign flagged vessels have been permitted to harvest on the Norwegian continental shelf, except certain Russian flagged vessels that could access the Norwegian continental shelf in the Loop Hole in 2016 under the terms of a special one-year agreement for reciprocal access to continental shelf resources.[97]

---

93 **R-0038-ENG** FAO Code of Conduct for Responsible Fisheries.

94 **R-0033-ENG** Letter 5 August 2015 from DG Mare to the EU Member States.

95 **C-0106**.

96 **R-0011-NOR; R-0012-ENG** Report of 23 December 1958 by the Norwegian Delegation to the United Nations Conference on the Law of the Sea, Geneva 24 February to 27 April 1958.

97 **R-0100-NOR; R-0099-ENG** Protocol from the 45th Session of the Joint Norwegian- Russian Fisheries Commission, section 10. This agreement was initiated by Norway in letter of 3 August 2015 from Mr Arne Røksund, Assistant Secretary General of Norway's Ministry for Trade, Industry and Fisheries, to the Federal Agency for Fisheries on mutual access **R-0146-ENG; R-0147-NOR**. In letter of 30 December 2015 from Russia's Federal Agency for Fisheries to the Norwegian Directorate of Fisheries **R-0055-ENG** Norway was notified of Russian vessels intending to fish snow crab in the NEAFC Regulatory Area in the Barents Sea in 2016

2.2.5.6 Amendments in January 2017 - removing the mutual access for Russian vessels

115. In January 2017 the former exception to the Regulations, which applied to Russian vessels, was removed.[98] That exception had been based on the Agreement between Norway and the Russian Federation regarding mutual access in the Loop Hole.

116. Furthermore, the wording in Section 2 of the Regulations regarding the licensing of snow crab harvesting on Russia's continental shelf was removed.

2.2.5.7 The establishment of Total Allowable Catch (TAC) since 2017

117. From 2017, the IMR has provided quota advice to the Norwegian authorities for the harvesting of snow crab on the Norwegian continental shelf. Its estimates of biomass and distribution of snow crab in the Barents Sea are primarily based on the annual Norwegian-Russian bottom trawling surveys and reported catch data. The yearly quota advice, and the quotas adopted, are set out below.

Year	2017	2018	2019	2020	2021[99]
Quota advice from IMR	2,700 - 5,400	4,000-5,500	3,500 -5,000	5,500	6,500
Yearly quota	4,000	4,000	4,000	4,500	6,500

118. On 5 July 2017, Norway's snow crab Regulations were amended,[100] and a quota for the Norwegian continental shelf of 4,000 tonnes was set for the year 2017, including 500 tonnes 'set aside', which could be allocated pursuant to possible agreements with other States. The Regulations, and the quota, applied to all parts of the Norwegian continental shelf.

98 **RL-0025-NOR; RL-0024-ENG** Regulations FOR-2017-01-04-7 amending Regulations FOR-2014-12-19-1836

99 **R-0116-NOR; R-0150-ENG** IMR; Snøkrabbe på norsk sokkel i Barentshavet - Status og rådgivning 2021 ("Snow crab on the Norwegian continental shelf in the Barents Sea - Status and Advice for 2021"), November 2020.

100 **RL-0027-NOR; RL-0026-ENG** Regulations FOR-2017-07-05-1140 amending Regulations FOR-2014-12-19-1836, adopted on and entered into force on 5 July 2017

119. The national quota for 2017, determined by the Ministry for Trade, Industry and Fisheries, was based on biological advice from the IMR,[101] and on management advice from the Norwegian Directorate of Fisheries contained in a letter of 5 May 2017 to the Ministry.[102] The Regulations did not establish a quota for individual vessels, but provided that harvesting would be discontinued once the overall catch limit was reached. The amended Regulations also contained further provisions aiming at ensuring sustainable harvesting, such as provisions for the closure of fisheries in the moulting season, and limitations on the percentage of soft shell crab allowed in the catch. From 2017 onwards the IMR and the Directorate of Fisheries have provided yearly advice to the Ministry of Trade, Industry and Fisheries on catch limits and other management measures.

120. New amendments effective 1 January 2018[103] set the quota for the Norwegian continental shelf for 2018 at 4,000 tonnes, identical to the quota for 2017. At the same time, it discontinued the "set aside" of 500 tonnes for negotiations with the EU, because the EU had declined Norway's offer.

121. New amendments effective 1 January 2019[104] set the quota for 2019 at 4,000 tonnes, in line with the recommendation from the IMR.[105] New in 2019 was a 25 tonnes set-aside for research, taken out of the total quota of 4,000 tonnes. Two more technical amendments were introduced in 2019, none of which made any difference for foreign flagged vessels.

---

101 **R-0119-NOR** Norway's Institute of Marine Research: *Snøkrabbe i norsk forvaltningssone - Biologisk rådgivning 2017*, («Snow crab in Norwegian maritime areas – biological advice 2017») dated February 2017. Translation to English only available for the quota advice for 2021, see **R-150-ENG.**

102 **R-0118-NOR; R-0117-ENG** Letter 5 May 2017 from the Norwegian Directorate of Fisheries to the Ministry of Trade, Industry and Fisheries.

103 **RL-0028-NOR; RL-0029-ENG** Regulations FOR-2017-12-18-2203 amending Regulations FOR-2014-12-19-1836, adopted on and entered into force on 1 January 2018.

104 **RL-0041-NOR; RL-0042-ENG** Regulations FOR-2018-12-17-2045 amending Regulations FOR-2014-12-19-1836, adopted on and entered into force on 1 January 2019.

105 **R-0120-NOR** IMR; *Snøkrabbe på norsk sokkel i Barentshavet - Bestandsvurdering og kvoterådgivning 2019 (*"Snow crab on the Norwegian continental shelf in the Barents Sea - Stock Assessment and Quota Advice for 2019"), November 2020. Translation to English only available for the quota advice for 2021, see **R-150-ENG.**

122. The amendment effective 1 January 2020[106] increased the quota for 2020 to 4,500 tonnes in line with the recommendation from the IMR.[107]

123. The amendment effective 1 January 2021[108] increased the quota for 2021 to 6,500 tonnes, again in line with the recommendation from the IMR.[109]

2.2.6 The Russian Federation's management of snow crab in the Barents Sea

2.2.6.1 The Russian continental shelf in the Barents Sea

124. It might be asked what the relevance to this case is of the Russian regulations regarding the harvesting of snow crab on its continental shelf. As explained above,[110] 9/10^{ths} of the Loop Hole is the continental shelf of the Russian Federation, with only a small portion to the south-west belonging to Norway. Further, despite their insistence that *Norwegian* measures impacted their business, the actual position is that over 99.8% of the catches by North Star's four vessels in the Loop Hole were caught on the *Russian* continental shelf. It was therefore the imposition of Russian measures which caused North Star to cease what was the overwhelming majority of its harvesting activity in the Loop Hole. That important fact finds no mention in the Claimants' Memorial, nor in the witness statements submitted on their behalf.

125. On 3 August 2015, the Russian Federation submitted a partially revised submission in respect of its continental shelf in the Arctic Ocean to the CLCS.[111] The CLCS has not yet adopted a recommendation for Russia in this geographical area. However, its

---

106 **RL-0143-NOR; RL-0144-ENG** Regulations FOR-2019-12-11-1710 amending Regulations FOR-2014-12-19-1836, adopted on and entered into force on 1 January 2020.

107 **R-0121-NOR** IMR; Snøkrabbe på norsk sokkel i Barentshavet - Bestandsvurdering og kvoterådgivning 2020 ("Snow crab on the Norwegian continental shelf in the Barents Sea - Stock Assessment and Quota Advice for 2020"), November 2019. Translation to English only available for the quota advice for 2021, see **R-150-ENG.**

108 **RL-0145-NOR; RL-0146-ENG** Regulations FOR-2020-12-18-2963 amending Regulations FOR 2014-12-19-1836, adopted on 23 December 2020 and entered into force on 1 January 2021.

109 **R-0148-NOR; R-0149-ENG** IMR; Snøkrabbe på norsk sokkel i Barentshavet - Status og rådgivning 2021 ("Snow crab on the Norwegian continental shelf in the Barents Sea - Status and Advice for 2021"), November 2020.

110 See above, paragraph 34.

111 **R-0043-ENG** Executive summary of the partial revised submission of 3 August 2015 of the Russian Federation to the Commission on the Limits of the Continental Shelf in respect of the Russian Federation in the Arctic Ocean.

recommendation to Norway on 27 March 2009 established that seabed of the Loop Hole in its entirety consists of continental shelf either of Norway or of Russia.[112]

2.2.6.2 Russia's regulations before 2016 - applicability to the continental shelf beyond 200 nautical miles

126. At a Joint Fisheries Commission meeting in October of 2014, the Russian Federation informed Norway that it was preparing regulations regarding the harvesting of snow crab on the Russian continental shelf because of the increased prominence of snow crab within its jurisdiction. The Russian Federation confirmed: "*the crab is considered a sedentary species belonging to Russian shelf jurisdiction*".[113]

127. Although the Russian Federation once again made clear in NEAFC in 2015 that it considered the snow crab to be a sedentary species, and that it was the exclusive right of the continental shelf State to regulate its harvest, no legislation was adopted by the Russian Federation to prohibit harvesting of snow crab on the Russian continental shelf in the Loop Hole before September 2016.

2.2.6.3 Russia's ban on harvesting on the continental shelf beyond 200 nautical miles

128. The Russian legislation was published in a "Notice to Mariners" Editions No. 36, Nos. 4801-4932.[114] It came into force on 3 September 2016 and was enforced from 4 September 2016. The publication also contained new charts for the continental shelf boundaries of Russia in the Barents Sea.

129. Following the adoption of this legislation, the Border Service of the Federal Security Service ("**FSB**"), was authorised to enforce state control measures relating to the harvesting of sedentary species from 4 September 2016 onwards.

---

112 **R-0004-ENG** "Continental Shelf Submission of Norway in respect of areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea" regarding continental shelf beyond 200 nautical miles to the Commission on the Limits of the Continental Shelf (CLCS) on 27 November 2006, at point 4.2

113 **R-0013-NOR; R-0014-ENG** Email 17 October 2014 from Therese Johansen to Kjell Kristian Egge relating the statements of the Russian Head of Delegation.

114 **R-0045-ENG; R-0046-RUS** Russian Notice to Mariners 3 September 2016, No 4801-4932.

130. These amendments to Russian legislation and regulations were notified to the European Commission (DG Mare) on 2 September 2016 by the Russian Delegation to the EU in Brussels.[115]

131. The ban changed everything for the foreign flagged vessels that had taken advantage of the absence of legislation to engage in the unregulated harvesting of snow crab on the Russian continental shelf in the Loop Hole.

2.2.6.4 Requests from the Russian Federation to prevent EU vessels from snow crab harvesting

132. Early in 2016, before Russia's adoption of its ban, the Russian Federation raised with Norway the issue of EU vessels harvesting snow crab in the Loop Hole and possible measures to prevent this.

133. In a meeting with Norway's Ministry of Trade, Industry and Fisheries on 19 January 2016, the Russian Embassy referred to six Latvian vessels and one Spanish vessel present in the Loop Hole and enquired whether Norway had issued any licences to these vessels for harvesting snow crab. The Ministry responded that Norway had not issued any licenses to these vessels and informed the Russian Embassy that the Norwegian Coast Guard could not intervene as the harvesting had taken place on the Russian continental shelf. This issue was raised again by the Russian ambassador to Norway in a meeting with Norway's Minister of Fisheries on 24 February 2016.

134. In a letter of 27 April 2016, Deputy Minister Shestakov of the Russian Federal Agency for Fisheries emphasised to Norway that the Russian Federation had not granted permission for EU vessels to harvest snow crab on its continental shelf, but that the activity nonetheless continued. He then proposed that Norway should introduce a ban on the landing of snow crab from such vessels.[116] In its response of 3 June 2016, the Ministry of Trade, Industry and Fisheries reiterated that it was difficult under Norwegian law to prohibit these landings as long as the harvest of snow crab on the

---

115 **R-0047-ENG** Letter 2 September 2016 from the Russian Federation to the EU.

116 **R-0048-ENG; R-0049-RUS** Letter 27 April 2016 from Deputy Minister Shestakov of the Russian Federation Federal Agency for Fisheries, to Mr Arne Røksund, Assistant Secretary General of Norway's Ministry for Trade, Industry and Fisheries. **R-0050-ENG** Letter 25 May 2016 from the Russian Embassy in Oslo to the Norwegian Ministry of Trade, Industry and Fisheries conveying the letter of 27 April 2016 in Russian and an English translation.

Russian continental shelf in the Loop Hole was not specifically prohibited under Russian legislation.[117] Following bilateral discussions on the same issue at the North Atlantic Fisheries Ministers' Conference ('NAFMC') on 9-10 June 2016 in St. Petersburg, Deputy Minister Shestakov reiterated the Russian proposal in a letter of 21 June 2016 to Norway's Minister of Fisheries. In the letter he refers to the coordinated statements by Norway and Russia concerning their exclusive rights to harvest snow crab in the Regulatory Area of NEAFC in the Barents Sea, which had been forwarded to the flag States concerned and announced at the 34th session of NEAFC in 2015, and continues:

> "*However, the vessels of some member states of the European Union continue fishery of this king of aquatic bioresources on the Russian part of continental shelf in the open part of the Barents sea without the consent of the Russian Federation.*
>
> *Taking in to consideration the common interest of our countries on conservation and rational using of this stock we kindly request to give further consideration to the possibility of a ban of discharge of snow crab by vessels of the European Union, carrying out fishery in the mentioned region, at the ports of Norway.*"[118]

135. This issue became moot with Russia's ban on foreign flagged vessels harvesting snow crab in the Loop Hole effective 3 September 2016.

2.2.7 Cooperation between the Russian Federation and Norway regarding snow crab

136. Norway and the Russian Federation have a long history of cooperation regarding marine living resources in the Barents Sea. As an example, estimates of the biomass of snow crab are primarily based on the annual joint Norwegian-Russian bottom trawling surveys and reported catch data.[119]

---

117 **R-0123-NOR; R-0122-ENG** Letter 3 June 2016 from Mr Arne Røksund, Assistant Secretary General of Norway's Ministry for Trade, Industry and Fisheries, to the Federal Agency for Fisheries.

118 **R-0051-ENG R-0052-RUS** Letter 21 June 2016 from Deputy Minister Shestakov of the Russian Federation Federal Agency for Fisheries, to Norway's Minister for Fisheries, Mr Per Sandberg. **R-0053-ENG** Letter 30 June 2016 from the Russian Embassy in Oslo to the Norwegian Ministry of Trade, Industry and Fisheries conveying the letter of 21 June 2016 in Russian and English translation. **R-0054-ENG** Letter 27 July 2016 from the Russian Embassy in Oslo to the Norwegian Ministry of Trade, Industry and Fisheries conveying the letter of 21 June 20 in Russian and an English translation.

119 **R-0116-NOR; R-0150-ENG** References to the importance of the yearly Norwegian-Russian joint bottom trawling surveys may be found in the yearly quota advise from the Institute of Marine Research for the years 2017 – 2021.

137. In a letter of 3 August 2015 to the Russian Federation, the Norwegian Ministry of Trade, Industry and Fisheries suggested that the issue of snow crab harvesting should be included on the agenda of the Joint Russian-Norwegian Fisheries Commission. The Ministry suggested that until a regulatory regime was adopted, Norwegian and Russian vessels should be allowed to continue harvesting operations in the Loop Hole. In a letter of 26 August 2015 from the Russian Federal Agency for Fisheries to the Norwegian Ministry of Trade, Industry and Fisheries, cooperation between Norway and the Russian Federation on issues related to snow crab was supported.[120]

138. On 9 October 2015, the Russian Federation and Norway agreed to cooperate in scientific research on snow crab to enable sustainable harvesting. Furthermore, they agreed that notes verbales were to be sent to member States of NEAFC, emphasizing the need for the coastal States' express consent for harvesting of snow crab on the continental shelf. They also agreed on reciprocal access for fishing vessels of the other State on their continental shelves for harvesting snow crab during the year of 2016. The mutual access for Norwegian and Russian vessels to the continental shelf of the two coastal States was reflected in the Norwegian Regulations concerning snow crab in 2016.[121]

139. On 30 December 2015, the Federal Agency for Fisheries of the Russian Federation ("**ROSRYBOLOVTSVO**") informed the Norwegian Directorate for Fisheries of the names and details for 17 Russian vessels intending to harvest snow crab in 2016 on the Norwegian continental shelf in the Loop Hole.[122]

140. Based on the reciprocal agreement, a total of five Russian vessels harvested 58 tonnes of snow crab on the Norwegian continental shelf in the Loop Hole in 2016. Following the introduction of the Russian ban on snow crab harvesting, the reciprocal arrangement was discontinued.

2.3 THE LOCATION OF THE CLAIMANTS' SNOW CRAB ACTIVITIES

120 **R-0125-NOR; R-0124-ENG** Letter 26 August 2015 from the Federal Agency for Fisheries of the Russian Federation to the Norwegian Ministry of Trade, Industry and Fisheries.

121 **RL-0147-NOR; RL-0148-ENG** Regulations FOR.2015-12-22-1833 amending regulations 2014-12-19-1836, effective from 22 December 2015.

122 **R-0055-ENG** Letter 30 December 2015 from the Federal Agency for Fisheries of the Russian Federation (ROSRYBOLOVTSVO) to the Norwegian Directorate for Fisheries.

2.3.1 Harvesting of snow crab

141. The first times that North Star's vessels arrived in Norway were 17 January 2014 (*Solvita*), 20 March 2015 (*Solveiga*), 27 March 2015 (*Saldus*) and 19 May 2015 (*Senator*). Relatively shortly after their first arrivals in Norway, the vessels started harvesting snow crab on the Russian continental shelf in the Loop Hole.

142. Detailed analyses of the movements of each of North Star's four vessels conducted by the Section of Analysis, a joint unit of the Norwegian Directorate of Fisheries and the Norwegian Coastal Administration,[123] demonstrate that the Claimants' snow crab harvesting activities took place almost exclusively on the Russian continental shelf. Reports on the snow crab harvesting activities of each of the four vessels as well a guidance to and summary of the reports are submitted as exhibits.

143. The reports show that:

143.1. the *Solveiga* made 31 voyages to the Loop Hole, harvesting 1,388,075 kg of snow crab exclusively from the Russian continental shelf;[124]

143.2. the *Saldus* made 22 voyages, harvesting 652,362 kg of snow crab. Approximately 1,500 kg (0.23%) could, theoretically, have been harvested on the Norwegian continental shelf;[125]

143.3. the *Senator* made 10 voyages to the Loop Hole, harvesting almost 2 million kg of snow crab on the Russian continental shelf. For a brief period at the end of June 2016, *Senator* did illegally harvest snow crab on the Norwegian continental shelf in the Loop Hole, which led to fines and a confiscation order against the skipper and North Star that were accepted. The illegal catch of

---

123 **R-0151-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*), "Guidance and summary - Report concerning vessels belonging to the Latvian company SIA North Star". **R-0152-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*) regarding *Saldus*. **R-0153-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*) regarding *Senator*. **R-0154-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*) regarding *Solveiga*. **R-0155-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*) regarding *Solvita*.

124 **R-0154-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*) regarding *Solveiga*, p.1.

125 **R-0152-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*) regarding *Saldus*, p.1.

approximately 2,500 kg of snow crab from the Norwegian continental shelf in the Loop Hole amounts to less than 0.2% of *Senator*'s total catches;[126] and

143.4. the *Solvita* made 39 voyages to the Loop Hole, harvesting a total of 1,354,032 kg of snow crab. Less than 4,000 kg (0.28%) could theoretically have been caught on the Norwegian continental shelf according to the reports.[127]

144. In total, North Star's vessels made 102 snow crab harvesting voyages to the Loop Hole, harvesting a total of 5.3 million kg of snow crab. While the catch may well have been harvested exclusively on the Russian continental shelf, it is theoretically possible that around 8,500 kg could have been harvested on the Norwegian continental shelf. Even so, this would amount to less than 0.2% of North Star's catches.[128] More than 99.8% of North Star's catches of snow crab in the Loop Hole were from the Russian continental shelf, beyond Norwegian coastal state jurisdiction.[129]

145. The snow crab harvesting activities of the four vessels continued until 2 September 2016 (*Saldus*), 3 September 2016 (*Senator*), and 4 September 2016 (*Solvita* and *Solveiga*).[130] In other words, within three days of the Russian ban on snow crab harvesting on its continental shelf, all of North Star's snow crab harvesting activity ceased. There appears to have been—and in fact there was—no impact caused to the Claimants by the earlier Norwegian prohibition on the harvesting of snow crab on the Norwegian continental shelf in the Loop Hole, which came into force on 22 December 2015.

---

126 **R-0153-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*) regarding *Senator*, pp.1, 35-38.

127 **R-0155-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*) regarding *Solvita*, p.1

128 0.16%, to be precise: **R-0151-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*), "Guidance and summary - Report concerning vessels belonging to the Latvian company SIA North Star", p.3.

129 99.84%: *Ibid.*

130 **R-0152-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*) regarding *Saldus*, pp.1, 60. **R-0153-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*) regarding *Senator*, pp.1, 43. **R-0154-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*) regarding *Solveiga*, pp.1, 77. **R-0155-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*) regarding *Solvita*, pp.1, 107.

146. After the Russian ban and the cessation of North Star's snow crab harvesting in the Loop Hole, *Saldus* began catching prawns in the Loop Hole and did so from August 2018 to March 2019. *Solveiga* was re-flagged to Russia and sailed to South Korea, arriving at the end of January 2018, and has been operating in the Bering Sea and the Okhotsk Sea since. *Solvita* sailed to Lithuania at the end of 2016, arriving in January 2017. *Senator* stayed in Båtsfjord, Norway, from 8 October 2016, when it returned from its last trip to the Loop Hole, until 14 January 2017, when it sailed for the Fisheries Protection Zone around Svalbard.

147. On 15 January 2017, the *Senator* started snow crab harvesting activities in the Fisheries Protection Zone around Svalbard; and it was duly arrested by the Norwegian Coast Guard the following day.

2.3.2 Landings of Snow Crab

148. North Star's vessels landed most of their snow crab catches from the Russian continental shelf in Norway. The *Saldus*' 22 landings were primarily delivered to Seagourmet Norway AS (649,953 kg), while 3,944 kg was delivered to Arctic Catch AS, Svartnes, Norway.[131] For *Solvita*, 40 landings are recorded, with deliveries to Seagourmet Norway AS (1,002,175 kg), to Arctic Catch AS, Svartnes (288,790 kg) and to Norway Seafoods AS, Kjøllefjord (64,529 kg).[132] For *Solveiga*, 34 landings are recorded, with deliveries to Seagourmet Norway AS (1,202,971 kg), Arctic Catch AS, Svartnes (156,284 kg) and Norway Seafoods AS, Kjøllefjord (28,820 kg).[133] *Senator*'s frozen catches where partly delivered through 10 landings to Båtsfjord Sentralfryselager AS (1,357,788 kg live weight) and partly transferred to reefers "Nadir" (368,428 kg live weight) and "Nikolay Kasatkin" (229,998 kg live weight) according to available landing notes.[134]

---

131 **R-0152-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*) regarding *Saldus*, p.1.

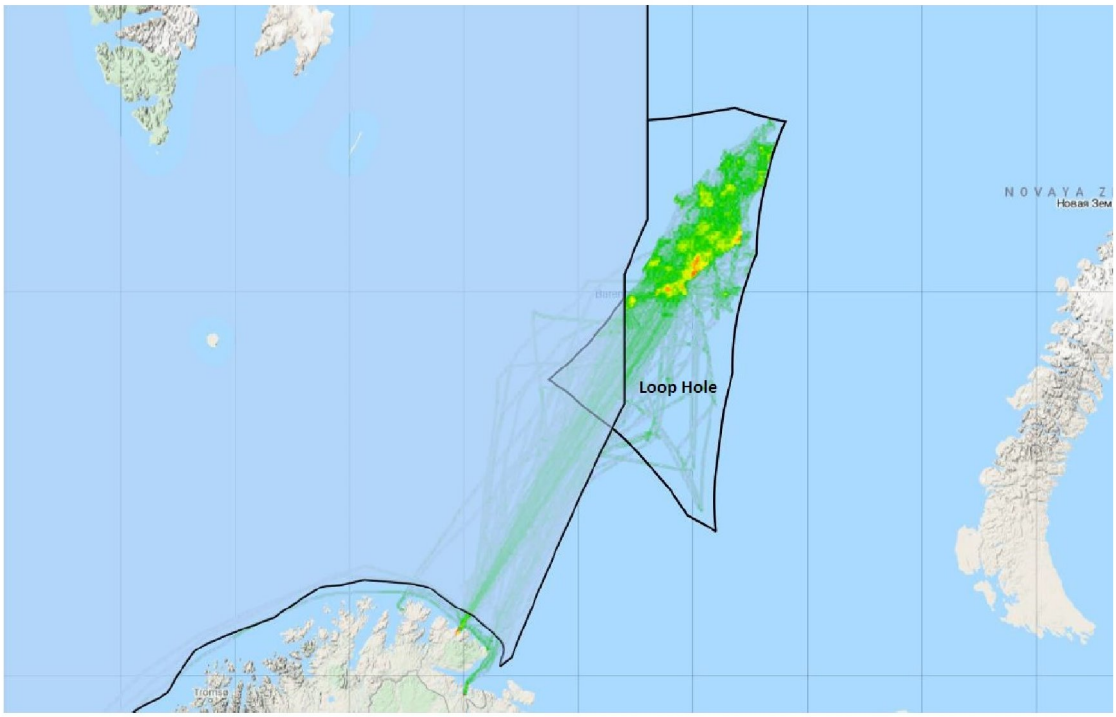
132 **R-0155-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*) regarding *Solvita*, p.1.

133 **R-0154-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*) regarding *Solveiga*, p.2.

134 **R-0153-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*) regarding *Senator*, p.1. The "live weight" conversion rate is explained in **R-0151-ENG** Report of 28

149. So, for the four vessels concerned, the catches were landed in 3 locations and transferred to Seagourmet Norway AS (2,855,099 kg), Båtsfjord Sentralfryselager (1,357,788 kg live weight), Arctic Catch AS (449,018 kg) and Norway Seafoods AS (93,349 kg). In addition, *Senator* transshipped frozen snow crab equalling [redacted] to other vessels.

150. To sum up the activities of North Star: its four Latvian vessels harvested over [redacted] of snow crab from the Russian continental shelf in the Loop Hole from July 2014 until September 2016, when Russia's ban forced them to stop. It is theoretically possible that the four vessels harvested 8,500kg from the Norwegian continental shelf, but it is not certain that this in fact occurred.



The above map is provided by the Section of Analysis in Vardø to illustrate the vessel tracks. The density plot clearly shows that the overwhelming majority of North Star's harvesting activities took place on the Russian continental shelf.

October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*), "Guidance and summary - Report concerning vessels belonging to the Latvian company SIA North Star", p.4.

2.3.3 Activities of Sea & Coast

151. Sea & Coast AS is a Norwegian private limited company that was registered on 16 July 2014 by Sergei Ankipov who, according to the Claimants, at that time was a Project Coordinator for Seagourmet.[135]

152. The Company's business/industry is listed as "52291- Forwarding (*Spedisjon*)" and its statutory purpose is to convey services and goods to maritime customers, and to provide services naturally connected with this (Shipping agents).[136]

153. Mr Pildegovics acquired 100% of the shares in Sea & Coast AS in 2015 for NOK 66,000.[137] The share capital is NOK 30,000, which Mr Pildegovics seems to have borrowed from the company itself, and presumably paid back in 2016.[138]

154. According to the Claimants, Mr Piledgovics was appointed as the Company's sole director from 15 October 2015.[139] Mr Pildegovics is apparently still the sole owner and chairman of the Company. He is the only board member listed.

155. According to the Claimants the company operated as "*a service agent for North Star, its vessels and its crews*"[140]. The Claimants further state that

> "*Between 2014 and 2017, Sea & Coast acted as a local ship agent and provided onshore assistance and services for local crab fishing crews. Services were provided to vessels of North Star as well as those of other fishing companies operating from Baatsfjord*".[141]

156. The documentation provided by the Claimants shows that North Star entered into four vessel agency and servicing agreements with Sea & Coast in the period between 1 February 2015 and 1 January 2021.[142] In 2015, Sea & Coast invoiced North Star NOK

---

135 **R-0057-NOR; R-0056-ENG** Register print out for Sea & Coast AS and Memorial, ¶¶225 and 246.

136 **R-0057-NOR; R-0056-ENG** Register print out for Sea & Coast AS.

137 **R-0144-NOR; R-0143-ENG** Annual financial statement 2015 for Sea & Coast. See also Memorial, ¶215 (a)

138 **PP-0216** (Note 4; Short-term loan to share holder).

139 Memorial, ¶245.

140 Memorial, ¶¶248-250.

141 Memorial, ¶508.

142 **PP-0029** to **PP-0032**.

2.77 million for its services. By comparison, Sea & Coast reported operating revenues of NOK 19.34 million in its annual financial statement for 2015.[143] This means that revenues from North Star only comprised around 14% of Sea & Coast's operating revenues that year. Similarly, in 2016, Sea & Coast invoiced North Star NOK 1.75 million, and reported operating revenues of NOK 18.5 million.[144] Revenues from North Star had thus decreased to around 9.5% of Sea & Coast's operating revenues in 2016. By 2017, Sea & Coast's operating revenues had dropped to NOK 3 million.[145] Norway has seen no documentation which suggests that any of this revenue came from the provision of services to North Star.

157. The Claimants have given no information regarding Sea & Coast's other clients,[146] but in the Memorial it is stated that "[s]*tarting in 2017, Sea & Coast's revenues collapsed as a result of Norway's actions impacting the snow crab fishery"*[147]. However, the annual financial statements show that, though the company has negative equity, the results for 2018 and 2019 are positive. Also, in the notes to the annual financial statements from 2017, 2018 and 2019[148] it is stated that the Company is focusing on new projects from clients to improve the general economic situation, and that there is reason to believe in a positive development "*towards the end of 2018*"[149]/"*during 2019*"[150]/"*during 2020*".[151] It is asserted in the annual financial statements from 2017-2020 that one of the company's customers is considering the start-up of shrimp fishing in the NEAFC area, and that this news has been well received by the "*company's*

143 **PP-0216**.

144 **PP-0217**.

145 **PP-0218**.

146 And this is notable given that Sea & Coast's annual financial statements from 2015 and 2016 show that transactions with North Star only accounted for 10-15% of the company's revenues in those years, se **C-0032** and **C-0033**.

147 Memorial, ¶252.

148 **PP-0218, R-0129-NOR; R-0132-ENG** Annual financial statement 2019 for Sea & Coast and **R-0134-NOR; R-0133-ENG** Annual financial statement 2018 for Sea & Coast

149 **PP-0218.**

150 **R-0134-NOR; R-0133-ENG** Annual financial statement 2018 for Sea & Coast.

151 **R-0129-NOR; R-0132-ENG** Annual financial statement 2019 for Sea & Coast.

management" and that they hope that this business opportunity will contribute to better and more predictable earnings.

158. In the same annual accounts Mr Pildegovics states that:

> "*The main problem is that Norway and Russia have unfortunately decided to ban EU vessels from fishing for snow crab in the Barents Sea in international waters in NEAFC. Later, the countries have not been able to agree on how to organize the fishing activity for their own vessels in Smutthullet. As a result, the Norwegian fleet has been able to fish for snow crab on the east side of NEAFC, but Russian fishermen are not allowed to fish in NEAFC at all.*"[152]

2.4 LEGAL PROCEEDINGS BEFORE NORWEGIAN COURTS

2.4.1 Criminal case (*Senator*)

159. The *Senator* has been arrested twice by Norwegian authorities for illegally harvesting snow crab on the Norwegian continental shelf. The first arrest was on 17 September 2016, in the port of Båtsfjord, for illegally harvesting on the Norwegian continental shelf in the Loop Hole in June 2016. The Norwegian Ministry of Foreign Affairs informed the Embassy of Latvia of the arrest by a note verbale of 19 September 2016.[153]

160. The vessel was arrested, again, on 16 January 2017 for harvesting snow crab on the Norwegian continental shelf around Svalbard. On board the vessel, a licence with the number 2017D3426 was found. The licence was issued by the State Environmental Service of Latvia on 1 January 2017 for harvesting of snow crab in the ICES[154] fishing area I and IIb.[155] At the time of the arrest, the captain of the vessel, the Russian national Mr Uzakov, presented a typed declaration in English dated 16 January 2017 as follows:

> " - *the vessel SENATOR conducts fishing operations in accordance with fishing license (Nr 2017D3426) issued by Latvian Government that allow for snow crab*

---

152 **PP-0218** and **R-0129-NOR; R-0132-ENG** Annual financial statement 2019 for Sea & Coast and **R-0134-NOR; R-0133-ENG** Annual financial statement 2018 for Sea & Coast. The statement is presumably linked to the negative equity.

153 **R-0058-ENG** Note verbale 19 September 2016 from the Norwegian Ministry of Foreign Affairs to the Embassy of Latvia in Oslo.

154 The International Council for the Exploration of the Sea (ICES) is an intergovernmental marine science and research organization for the provision of information and advice to Member States and international bodies.

155 The geographical area stated, I and IIb, must be understood to refer to sub-area I ("the Barents Sea") and division IIb ("Spitzbergen and Bear Island") of the UN Food and Agricultural Organisation's (FAO) Major Fishing Area 27. These areas are indicated on the maps provided as exhibit **R-0131-ENG**.

fishing activities in the areas I, II b including maritime zones around Svalbard. […]

- *the fishing license is based on the EU Regula approved by the Council of Ministers on 13.12.2016.* […]

- *EU has officially informed Norway its position regarding fishing rights of EU member states in maritime zones around Svalbard in accordance with the Treaty of Paris (1920)* […]

- *EU also duly transmitted to Norwegian authorities the list of vessels licensed by EU for snow crab fishing activities in Svalbard Area.* […]

Based on the above, I declare:

My vessel is conducting legal fishing operations and any unjustified interference with it must be considered illegal by the Law of the Sea. Should you, as official representative of Norwegian Government, have any further inquiries or disagreement, it should be addressed to Latvian and EU officials and discussed at that level. […]"[156]

161. The declaration referred to the fishing license issued by Latvian authorities and to an EU Council Regulation (provisionally) approved by EU Ministers on 13 December 2016. At the time of arrest, the Council Regulation (EU) 127/2017 had not yet been adopted and published.[157]

162. Prior to being arrested, Andrey Kinzhalov, the 'Technical Director' of North Star, had enquired with Norwegian authorities about the legality of snow crab harvesting on the Norwegian continental shelf around Svalbard, by email of 12 January 2017, to the Norwegian Ministry of Trade, Industry and Fisheries.[158] On Sunday 15 January 2017, North Star was informed that the harvesting would be illegal, and that the prohibition would be enforced:

"*Harvesting of snow crab on the Norwegian continental shelf is prohibited unless an exemption has been granted. No such exemption has been granted to vessels flying the flag of an EU Member State. Therefore your vessels are not authorized to fish on the*

156 **R-0130-ENG** Declaration 16 January 2017 signed by Rafael Uzakov, Master of the vessel *Senator*.

157 **RL-0014-ENG** "Council Regulation (EU) 2017/127 fixing for 2017 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters" was formally adopted on 20 January 2017 and published on 28 January 2017 in the Official Journal of the European Union (OJ 2017 Vol. 24/1).

158 **R-0059-ENG** Email 12 January 2017 from Andrey Kinzhalov, Technical Director of SIA North Star, to the Norwegian Ministry of Trade, Industry and Fisheries.

> *Norwegian continental shelf. This includes the whole Norwegian continental shelf, including the areas around Svalbard.* […]
>
> *The Norwegian Coast Guard is prepared to enforce Norwegian law, and vessels starting fishing activity after snow crab without expressed consent from Norway will be arrested and prosecuted.*"[159]

163. On 3 February 2017, after the arrest of the *Senator*, North Star enquired with the Norwegian Coast Guard and the Norwegian Ministry of Trade, Industry and Fishing as to whether there had been any changes or developments in Norway's application of the NEAFC Convention.[160] The Ministry of Trade, Industry and Fisheries responded to the enquiry by letter of the same day, stating the following:

> "*Snow crab is a sedentary species. According to the international Law of the Sea, only Norway as the coastal State can validly issue licenses for harvesting of snow crab on the Norwegian continental shelf. Currently, Norway has not consented to any licence being issued by any other country or to any foreign vessel. Any presumed licence issued by a foreign authority without the express consent of Norway is contrary to international law as well as domestic Norwegian law and will be regarded as having no legal effect.*"[161]

164. In addition to the contact between North Star and the Norwegian authorities, there had been contact between the EU and Norway in late 2016 and early 2017. On 22 December 2016 the Norwegian Directorate of Fisheries received an email from DG Mare with a list of vessels "*having a licence to fish for snow crab in the sea areas around Svalbard*."[162] The Directorate responded to the email on 6 January 2017, clearly pointing out that

> "*Harvesting snow crab on the Norwegian continental shelf is prohibited for these vessels, ref. forskrift 19. desember 2014 nr. 1836 om forbud mot fangst av snøkrabbe § 1.*
>
> *Norwegian regulations will be enforced on this matter.*

---

159 **R-0060-ENG** Letter 15 January 2017 from the Norwegian Ministry of Trade, Industry and Fisheries to North Star.

160 **R-0061-ENG** Letter 3 February 2017 from North Star to the Norwegian Coast Guard.

161 **R-0062-ENG** Letter 3 February 2017 from the Norwegian Ministry of Trade, Industry and Fisheries to North Star.

162 **R-0063-ENG** Email 22 December 2016 from DG Mare to the Norwegian Directorate of Fisheries.

Any vessel fishing in contrary to the Regulations mentioned above will be prosecuted."[163]

165. The Norwegian Ministry of Foreign Affairs informed the Embassy of Latvia in Oslo of the arrest of the *Senator* by a note verbale of 17 January 2017.[164]

166. The court of first instance, Øst-Finnmark District Court, on 22 June 2017 handed down fines both to the owner and the captain of the vessel *Senator* for illegal harvesting of snow crab on the Norwegian continental shelf. The ship-owner was sentenced to pay a total of NOK 1,359,000. The captain was ordered to pay a fine of NOK 40,000. The court found aggravating circumstances in the fact that the same vessel, captain, and owner were caught illegally harvesting snow crab in 2016. The District Court concluded that snow crab is a sedentary species within the meaning of Article 77 of UNCLOS and that Norway consequently has the exclusive right to exploit it. The District Court also concluded that the snow crab Regulations would contravene the principle of equal rights under the Svalbard Treaty, but it found that the Svalbard Treaty does not apply beyond the 12 nautical mile territorial waters around Svalbard and therefore was not applicable at the location where the harvesting took place.[165]

167. The owner and the captain appealed to Hålogaland Court of Appeal against the findings of fact and the application of the law in the determination of guilt. The Court of Appeal in a judgment 7 February 2018 upheld the District Court's convictions. The Court of Appeal, *inter alia*, found it proven that the defendants had wilfully acted without a Norwegian permit, and that they knew that this was an offence under Norwegian law. The Court of Appeal also concluded that the snow crab is a sedentary species but found that it was unnecessary to consider whether the equal rights provisions in the Svalbard Treaty had been violated. The Court further concluded that harvesting snow crab without a permit on the Norwegian continental shelf is punishable under general criminal law principles, and this would be so regardless of the perpetrator's nationality

163 **R-0064-ENG** Email 6 January 2017 from the Norwegian Directorate of Fisheries to DG Mare.

164 **R-0065-ENG** Note verbale 17 January 2017 from Norway to Latvia.

165 **RL 0149-NOR, C-0039** Judgment of 22 June 2017 of the District Court of Øst-Finnmark.

and regardless of whether any of the equal treatment provisions of the Svalbard Treaty applied in the area or not.[166]

168. North Star and the captain appealed against the Court of Appeal's judgment to the Supreme Court, save for the part of the judgment in which the Court of Appeal had found that the defendants had wilfully acted without a Norwegian permit and that they knew that this was an offence under Norwegian law. The appeals concerned the application of the law in the determination of guilt, both with regard to whether the snow crab is a sedentary species and with regard to whether the Svalbard Treaty's equal rights provisions had been violated.

169. On 4 June 2018, the Supreme Court's Appeals Selection Committee granted leave to appeal against the convictions. In its decision the Committee[167] decided that the Supreme Court would deal separately with the two groups of issues presented in the appeal. The first hearing would deal with the question whether the snow crab is a sedentary species and whether snow crab catching on the Norwegian continental shelf, without the vessel having obtained valid exemption from the prohibition, is punishable. The remainder, in particular the question of the geographical application of the Treaty, and whether the Regulations on the Prohibition, or the practicing thereof, contravenes the principle in the Treaty of equal rights, was put on hold. The Supreme Court would deal with these latter issues – in a subsequent hearing – if required. The Supreme Court decided on 22 November 2018 to refer the case to an 11-judge Grand Chamber of the Supreme Court [168]

170. After this decision, Mr Tolle Stabell was appointed a co-prosecutor in the Supreme Court proceedings, pursuant to the procedure set out in section 77 of the Criminal Procedure Act. By a decision communicated 7 December 2018,[169] the Ministry appointed Mr Stabell to their general roster, emphasising that any advocate litigating

---

166 **RL-0151-NOR; C-0040** Judgment of 7 February 2018 of the Court of Appeal of Hålogaland.

167 Decision 4 June 2018 of the Appeals Committee of the Norwegian Supreme Court, HR-2018-1028-U, Case No. 18-064307STR-HRET, ¶17. There are several errors in the translation that appears as exhibit **C-0117**. A more accurate translation is submitted as **R-0136-NOR; R-0135-ENG**.

168 **R-0042-NOR; R-0044-ENG** Decision 23 November 2018 of the Norwegian Supreme Court, HR-2018-2231-J.

169 **R-0171-NOR; R-0172-ENG** Letter 14 December 2018 from the Office of the Director General of Public Prosecutions to the Supreme Court.

on behalf of the public prosecution authorities must exercise the task in a personal capacity. On 14 December 2018, Mr Stabell was appointed as a deputy prosecutor for the Supreme Court hearing in the case.

171. The Supreme Court, sitting in the formation of a grand chamber of eleven justices, first addressed the issue of whether snow crab is a sedentary species under the United Nations Convention on the Law of the Sea (UNCLOS). The Supreme Court found it necessary to do so as the Marine Resources Act Section 6 as well as the Norwegian Penal Code Section 2 apply subject to Norway's international obligations.[170] After interpreting UNCLOS in accordance with the Vienna Convention on the Law of Treaties, and assessing the evidence presented to the Appeals Court, the Supreme Court "found it clear" that the snow crab is a sedentary species under UNCLOS Article 77 (4), and thus is covered by the coastal state's exclusive right to exploit the natural resources of the continental shelf.[171]

172. The Supreme Court, noting that North Star did not possess a Norwegian license authorising the harvesting of snow crab, and had not even *applied* for a Norwegian license, found with reference to previous caselaw that this was sufficient to render their actions punishable:

> "[…] *All rulings rest on the basic view that a person who has an obligation to apply for a permit cannot, unpunished, act as if a licence or a permit were granted, regardless of whether the refusal contains errors. Nor is it possible in such cases to obtain a decision on a preliminary basis on underlying issues of validity in the criminal case. As a general rule, any person who finds that a permit has been unfairly refused must bring a civil action to have the refusal declared invalid. I add that the same principles must apply if a permit has not been sought. A hypothetic refusal cannot lead to a better legal position than an actual refusal.*"[172]

173. Furthermore, in the Court's view, any Norwegian obligations under international law did not exempt the defendants from punishment. If the defendants had been Norwegian, they would have been punished in any case for having harvested without a valid

---

170 **C-0038** Judgment of 14 February 2019 of the Norwegian Supreme Court in Case. No 18-064307STR-HRET, HR-2019-282-S at paragraph 58 in original and at paragraphs 42-43 in English translation provided by the Supreme Court.

171 **C-0038** Judgment of 14 February 2019 of the Norwegian Supreme Court in Case. No 18-064307STR-HRET, HR-2019-282-S.

172 *Id, ¶71.*

exemption permit.[173] Neither national law nor international law could be interpreted to mean that Norway in a case like this was precluded from punishing foreign nationals who, for commercial purposes, acted without a permit where such a permit is required.[174] The Supreme Court also observed that any issues that the Claimants might have with the Norwegian snow crab regulations could be raised by them in a civil action before the Norwegian courts, rather than by disregarding the requirements of Norwegian regulations.[175]

174. Consequently the defendants' appeal was dismissed.

2.4.2 Civil case (SIA North Star)

175. On 17 May 2018 North Star applied for a dispensation to harvest snow crab on the Norwegian continental shelf for the vessels *Senator*, *Solvita* and *Saldus* under the Norwegian regulations in force at the time.[176] On 25 May 2018, the Directorate of Fisheries rejected the application.[177] On 1 June 2018, North Star requested the Directorate to review the application for a dispensation once again.[178] That request was followed by emails from Mr Pildegovics of 3 July 2018 and 5 October 2018.[179] The Directorate confirmed its rejection in letter of 9 October 2018.[180]

176. On 28 February 2019, North Star once again applied for a dispensation from the Directorate for the vessels *Senator*, *Solvita* and *Saldus* to catch snow crab, again specifically relating to harvesting on the Norwegian continental shelf.[181] North Star on

---

173 *Id, ¶75.*

174 *Id, ¶¶79-80.*

175 *Id, ¶80.*

176 **R-0066-ENG** Letter 17 May 2018 from North Star to the Norwegian Directorate of Fisheries.

177 **R-0067-ENG** Letter 25 May 2018 from the Norwegian Directorate of Fisheries to North Star.

178 **R-0068-ENG** Letter 1 June 2018 from North Star to the Norwegian Directorate of Fisheries.

179 **R-0069-ENG; R-0070-ENG** Emails 3 July 2018 and 5 October 2018 from North Star to the Norwegian Directorate of Fisheres .

180 **R-0071-ENG** Letter 9 October 2018 from the Norwegian Directorate of Fisheries to North Star.

181 **R-0072-ENG** Letter 28 February 2019 from North Star to the Norwegian Directorate of Fisheries.

22 March 2019 issued a reminder of its application to the Directorate in a similarly phrased letter as that in the application, but with the following underlined addition:[182]

> "*I am following the recommendation of the Supreme Court of Norway and I am applying for dispensation to catch snow crab on the Norwegian Continental Shelf of* [sic] *Barents Sea.*"

177. The Directorate rejected the application for dispensation on 13 May 2019.[183] The decision stated that the vessels referred to in the application did not possess a commercial fishing licence pursuant to the Participation Act. The requirements for obtaining a permit for harvesting snow crab set forth in the Snow Crab Regulations were therefore not met. North Star, through its counsel, appealed to the Ministry of Trade, Industry and Fisheries on 31 May 2019,[184] arguing, first, that as a Latvian company, North Star was entitled to a dispensation pursuant to Articles 2 and 3 of the Svalbard Treaty, and second, that the Supreme Court of Norway's judgment on the sedentary nature of snow crab was incorrect and that as the snow crab Regulations only prohibited harvesting on the continental shelf and not in the waters above, the Directorate's decision was invalid also on these grounds. The Ministry upheld the Directorate's decision on 14 November 2019.[185] The operative parts of the Ministry's decision stated as follows:

> "*Pursuant to Article 77 of the United Nations Convention on the Law of the Sea, as a coastal state, Norway has an exclusive right to exploit snow crab on the Norwegian continental shelf. The wording of the Svalbard Treaty, as well as its negotiating history and general rules relating to the interpretation of treaties clearly indicate that the rules relating to equal rights in the treaty only apply in territorial waters, i.e. within 12 nautical miles.*
>
> *The Ministry does not agree with the appellant's assertion that snow crab is not a sedentary species. Our view is supported by the Supreme Court in Rt. 2019, page 282, and we consider it sufficient to make reference to the discussions of the Supreme Court in paragraphs 45 to 58 of the judgment. In the decision Rt. 2019, page 272, which is cited in the appeal, the Supreme Court did not consider whether the treaty applies on the continental shelf nor did it consider the general scope of the treaty.*

---

182 **R-0073-ENG** Letter 22 March 2019 from North Star to the Norwegian Directorate of Fisheries.

183 **R-0074-ENG** Letter 13 May 2019 from the Norwegian Directorate of Fisheries to North Star.

184 **R-0160-NOR; R-0158-ENG** Letter 31 May 2019 from North Star/Lawyer Østgård to the Norwegian Directorate of Fisheries.

185 **R-0161-NOR; R-0162-ENG** Letter 14 November 2019 from the Norwegian Ministry of Fisheries to North Star/Lawyer Østgård

Section 1 of the Snow Crab Regulations states that it is "prohibited for Norwegian and foreign vessels to catch snow crab in the Norwegian territorial sea and internal waters, and on the Norwegian continental shelf."

On the date the shipping company submitted their application, the catching of snow crab was regulated by an exemption scheme in Section 2 of the Snow Crab Regulations which entailed that a vessel could be granted an exemption from the prohibition against catching snow crab if a commercial licence was issued pursuant to the Norwegian Participation Act to harvest outside of territorial waters.

The exemption scheme in Section 2 of the Snow Crab Regulations was repealed effective from 1 July 2019. It is still prohibited to catch snow crab, however the exemption scheme has been replaced by a requirement for a license to engage in the catching of snow crab pursuant to Regulations No. 1157 of 13 October 2006 relating to special permits to conduct certain forms of fishing and hunting (Licencing Regulations). The rules relating to the catching of snow crab otherwise remained unchanged, and the purpose of the amendment was to include the catching of snow crab in more traditional forms for regulating fishing and hunting.

The shipping company SIA North Star applied for an exemption before the rules were amended, however since vessels with an exemption pursuant to the Snow Crab Regulations must still apply for a snow crab licence in accordance with the Licencing Regulations, it is now natural to consider the application in relation to the conditions in the Licencing Regulations. This is of no significance to the outcome of this case.

Section 6-1 of the Licencing Regulations states that the Norwegian Directorate of Fisheries can issue licenses for the catching of snow crab in the Barents Sea. The conditions for being issued a license are stipulated in Section 6-2.

Pursuant to Section 6-2, subsection 1, the vessel must be registered in the Norwegian Register of Fishing Vessels and be suitable and equipped for the catching of snow crab. Subsection 2 also states that "a snow crab license can only be granted to vessels that have a different basis for operations in the form of a special permit or participation access rights."

None of the three vessels (Senator, Solvita and Saldus) satisfy the conditions in Section 6-2 and can therefore not be issued a licence pursuant to Section 6-1 of the Licencing Regulations, cf. Section 6-2. Section 6-2 lists certain other factors that may also result in a snow crab license being issued, however none of these are applicable in this case."

178. North Star issued a writ of summons to the Oslo District Court on 19 October 2020. The company demanded that the refusal of 19 November 2019 to grant them permission to harvest snow crab be set aside as it violated Norway's international obligations under Articles 2 and 3 of the Svalbard Treaty. The public hearing in the Oslo District Court took place on 21 to 22 June 2021. The Claimant was represented in the court room by counsels Mr Haldvard Østgård and Mr Mads Andenæs. A special arrangement was made to allow the Claimants' lawyers in this arbitration follow the entire hearing via

videolink. The duration of the court hearing was translated into English at the request of the Claimant.[186]

179. The Oslo District Court delivered judgment on 5 July 2021.[187] It found that both the decision of 14 November 2019 and Section 3 of the Regulations were valid. The Court conducted an in-depth assessment of the geographical scope of the Svalbard Treaty following the principles of treaty interpretation set out in Articles 31-33 of the Vienna Convention on the Law of Treaties.

180. On 14 September 2021 North Star appealed to the Borgarting Court of Appeal, claiming that the District Court had faulted in its interpretation of the Svalbard Treaty. The Government replied on 6 October 2021. The case is pending.

186 **R-0163-NOR; R-0164-ENG** Court Records of the District Court of Oslo signed on 5 July 2021 regarding the public hearing on 21 June 2021.

187 **RL-0007-NOR; RL-0162-ENG** Judgment of 5 July 2021 of the District Court of Oslo.

CHAPTER 3: APPLICABLE LAW

181. A distinction must be drawn between the law applicable to determine the jurisdiction of the Tribunal and the law applicable to the merits of the dispute if the Tribunal were to assume jurisdiction.

182. As to the law applicable to jurisdiction, it is for the Tribunal to verify that the conditions set out in Article 25 of the ICSID Convention and in the Norway-Latvia BIT are met for the Tribunal to assume jurisdiction, taking into account Norwegian law.

183. As to the law applicable to the merits of the dispute, Norway disagrees with the Claimants' statements. No agreement has been reached between Norway and the Claimants to determine the applicable law. It is therefore necessary to adhere to the second sentence of Article 42(1) of the ICSID Convention, which provides that "*The Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable*" .

3.1 THE LAW APPLICABLE TO JURISDICTION: THE ICSID CONVENTION AND THE BIT

184. Norway shares the Claimants' views regarding the law applicable to the jurisdiction of the Tribunal:[188] that law is based on Article IX of the 1992 bilateral investment treaty between Norway and Latvia (the "**BIT**") and Article 25 of the ICSID Convention.[189]

185. The Claimants have brought their claim under Article IX of the BIT which concerns the settlement of "*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*". This Article states that

> "*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:*
>
> > *(A) The International Centre for Settlement of Investment Disputes having regard to the applicable provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for*

188 Memorial, ¶436.

189 Both Norway and Latvia are States parties to the ICSID Convention.

> *signature at Washington D.C. on 18 March 1965, or in case both contracting parties have not become parties to this convention,*
>
> *(B) An arbitrator or international ad hoc tribunal established under the arbitration rules of the United Nations Commission on International Trade Law. The parties to the dispute may agree in writing to modify these rules. The arbitral awards shall be final and binding on both parties to the dispute.*"

Article 25 of the ICSID Convention provides that

> "*1. The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.*
>
> *2. 'National of another Contracting State' means:*
>
> *(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and*
>
> *(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.*"

186. Norway also shares the Claimants' views regarding the criteria for the Tribunal to assume jurisdiction over an investment dispute based on Article IX of the BIT and Article 25 of the ICSID Convention.[190] For the Tribunal to assume jurisdiction, it is necessary that: (a) the dispute is "a legal dispute"; (b) it involves an "investor" and one of the contracting parties to the BIT; (c) the dispute is "in relation to" and "arising directly out of"; (d) an "investment"; (e) "in the Territory of" Norway; (f) "which the parties to the dispute [have] consent[ed] in writing to submit to the Centre"; and (g) it has been preceded by a period of three months prior to the commencement of the dispute.

---

190 Memorial ¶439.

187. However, Norwegian domestic law must also be considered when establishing the jurisdiction of the Tribunal. Article 1 of the BIT provides that "[t]*he term 'investment' shall mean every king of asset invested in the territory of one contracting party in accordance with its laws and regulations by an investor of the other contracting party*".[191] The validity of the "investment" within the meaning of Article 25 of the ICSID Convention and Article IX of the BIT must therefore be assessed under Norwegian law. The Tribunal has no jurisdiction over any alleged 'investment' by the Claimants that is not made in accordance with Norwegian law.[192] In this respect, Latvian law and EU law are irrelevant.

188. As demonstrated below, criteria (b), (c), (d) and (e) are not met and the Tribunal does not have jurisdiction to deal with the dispute.[193]

3.2 LAW APPLICABLE TO THE MERITS

3.2.1 The Basis for the Determination of the Applicable Law

189. As to the law applicable to the merits of the dispute, the starting point is Article 42(1) of the ICSID Convention which provides that:

> "*(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.*"

190. The BIT contains a provision on mixed investor-State disputes (Article IX) and another provision on inter-State disputes (Article X). Article X(5) on inter-State disputes states that

> "*5. The arbitral tribunal determines its own procedure. The tribunal reaches its decision on the basis of the provisions of the present agreement and of the general principles and rules of international law. The arbitral tribunal reaches its decision by*

---

191 Emphasis added.

192 **CL-0175** *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, ¶46; **CL-0057** *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, 24 January 2003, ¶301; **CL-0108** *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005, ¶¶33-34; **CL-0172** *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, ¶115.

193 See below, **Chapters 4** and **5**.

> *a majority vote. Such decision shall be final and binding on both contracting parties.*"[194]

By contrast, Article IX does not specify the law applicable to the dispute presented to the Tribunal.

191. The Claimants infer from the silence of Article IX the applicability of the same law expressly provided for in Article X.[195] They consider that "*the extent of applicable law for a dispute under Article IX may well be wider than for disputes under Article X*"[196] and assert that "*the Tribunal therefore has no need to go beyond the first sentence of Article 42(1) of the ICSID Convention to determine its applicable law to the merits*".[197] In this regard, the Claimants attempt to apply Article X of the BIT to an investor-State dispute, whereas Article X is specifically and exclusively concerned with inter-State disputes.

192. It is apparent that Article IX of the BIT does not specify the law applicable to the merits of the dispute. While the parties were careful to specify the application of the principles and rules of international law in Article X of the BIT concerning inter-state disputes, they did not specify it for investor-State disputes. Given the proximity of both provisions, it is obvious that this omission was deliberate. A comparison of Article IX and Article X of the BIT inevitably leads to the conclusion that, *a contrario*, Article IX does not contain a clause on the applicable law. In these circumstances, the second sentence of Article 42(1) of the ICSID Convention applies.[198]

---

194 Emphasis added.

195 Memorial, ¶442.

196 Memorial, ¶442.

197 Memorial, ¶444.

198 **RL-0039-ENG** *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, ¶350; **CL-0164** *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, ¶217; **CL-0230** *Mr Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶402.

3.2.2 The Applicable Law

3.2.2.1 International law

193. The Claimants themselves seem to be inconsistent on this point. On the one hand, they assert that "*the applicable law to the merits of the present dispute is only the BIT itself*"[199] (Norway disagrees; Norwegian law is also applicable).[200] At the same time, the Claimants request the Tribunal to find that Norway has allegedly violated other rules of international law, including in UNCLOS and the Svalbard Treaty.[201]

194. Norway agrees with the Claimants that the BIT is the only treaty directly applicable to the merits of the dispute. As this arbitration is based on the BIT, it describes the law applicable to the merits of the dispute.[202] The use of other norms of international law can only be made "*if and to the extent that it comes into play for interpreting and applying the provisions of the Treaty*."[203]

195. This position is echoed by the Claimants when they refer to Article 31(3)(c) of the Vienna Convention on the Law of Treaties ("**VCLT**") and state that the Tribunal must

> "*tak*[e] *into account other relevant rules of international law in force between Latvia and Norway, which this Tribunal must do in the process of interpreting the provisions of the BIT, as per the applicable rule of interpretation reflected by VCLT Article 31(3)(c)*."[204]

196. While the parties agree on this reasoning, Norway disagrees with the conclusions that the Claimants attempt to draw therefrom, namely that:

> "*Norway's actions adversely affecting Claimants' investments are not only in violation of several provisions of the BIT, but also in violation of the provisions of other*

---

199 Memorial, ¶447.

200 See below, paragraph 201.

201 See, for example, Memorial, ¶455.

202 **RL-0040-FR** *(DS)2, S.A., Peter De Sutter and Kristof De Sutter v. Republic of Madagascar (II)*, ICSID Case No. ARB/17/18, Award, 17 April 2020, ¶130.

203 **RL-0041-ENG** *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/37, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis, 12 June 2020, ¶261; **CL-0243** *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶290.

204 Memorial ¶454.

international treaties to which both Latvia and Norway are parties, including UNCLOS and the Svalbard Treaty".[205]

197. Article 31, paragraphs (1) and (3)(c), of VCLT provide that

> "*Article 31 General rule of interpretation*
>
> *1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.* […]
>
> *3. There shall be taken into account, together with the context:* […]
>
> *(c) any relevant rules of international law applicable in the relations between the parties.*"[206]

198. As an ICSID Tribunal has recalled, Article 31(3)(c) mentions the expression "*'taking into account' – as opposed to applying – 'any relevant rules of international law applicable in the relations between the parties'*".[207] This follows from the nature of Article 31 itself as a provision dealing with the *interpretation* of treaties. Another ICSID Tribunal has asserted even more clearly that:

> "*It is not the proper role of Article 31(3)(c) VCLT to rewrite the treaty being interpreted, or to substitute a plain reading of a treaty provision with other rules of international law, external to the treaty being interpreted*".[208]

199. Moreover, the international conventions invoked by the Claimants do not provide a direct basis for their rights, nor do they engage Norway's responsibility. The scheme and nature of UNCLOS do not permit the invocation of a violation of these provisions (even less so before an investment arbitration tribunal).[209] As the Court of Justice of the European Union ("**CJEU**") has stated: "*UNCLOS does not establish rules intended to*

---

205 Memorial ¶455.

206 **CL-0021** Article 31, Vienna Convention on the Law of Treaties (1969).

207 **RL-0044-ENG** *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum, 30 December 2019, ¶316, fn. 312.

208 **RL-0045-ENG** *Vattenfall AB and Others v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018, ¶154; reproduced in **RL-0046-ENG** *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019, ¶229.

209 See below **Chapter 4**.

apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States".[210]

200. Thus, whilst the relevant rules of international law must make it possible to interpret the provisions of the BIT "*to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions*",[211] Article 31(3)(c) does not permit the Tribunal to apply these rules.

3.2.2.2 Norwegian law

201. Even though the BIT is the primary source of law applicable by the Tribunal, the application of Norwegian law cannot be ruled out. Norway considers that Norwegian domestic law is applicable to the merits of the dispute in accordance with the second sentence of Article 42(1) of the ICSID Convention.[212]

202. The absence of a provision in the BIT clearly stating that the law of the host State is applicable to the merits of the dispute is insufficient to preclude its application.[213] Norwegian law should be used, *inter alia*, to determine the nature and existence of the

---

210 **RL-0047-ENG** Case C-308/06, *Intertanko*, Judgment, 3 June 2008, ¶64.

211 **CL-0240** *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited*, IUSCT Case No. 56, Partial Award (Award No. 310-56-3), 14 July 1987, ¶112 quoted in **RL-0048-ENG** *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶616; **RL-0049-ENG** *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013, ¶1064. See also **RL-0050-ENG** *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, ¶¶1200-1201.

212 **RL-0040-FR** *(DS)2, S.A., Peter de Sutter and Kristof De Sutter v. Republic of Madagascar (II)*, ICSID Case No. ARB/17/18, Award, 17 April 2020, ¶130.

213 **RL-0051-ENG** *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award of the Tribunal, 22 December 2017, ¶792

Claimants' rights, as is common before arbitral tribunals.[214] The Claimants appear to agree: they themselves have referred directly to Norwegian law in their Memorial.[215]

3.2.2.3 The relationship between Norwegian law and international law

203. In several cases, ICSID tribunals have addressed the relationship between international and domestic law. Some older awards considered that domestic law took priority, international law being only called to fill lacunae in domestic law with a complementary or corrective function.[216]

204. The second sentence of Article 42(1) of the ICSID Convention is now more regularly interpreted as requiring the simultaneous application of both domestic and international law, as the ICSID Tribunal considered in *Wena Hotels v Egypt*:

> "*39.* […] *the use of the word 'may' in the second sentence of this provision* [Art. 42(1)] *indicates that the Convention does not draw a sharp line for the distinction of the respective scope of international and of domestic law and, correspondingly, that this has the effect to confer on to the Tribunal a certain margin and power for interpretation.*
>
> *40. What is clear is that the sense and meaning of the negotiations leading to the second sentence of Article 42(1) allowed for both legal orders to have a role. The law of the host State can indeed be applied in conjunction with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other ambit*".[217]

---

214 **RL-0052-ENG** *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award, 3 February 2006, ¶184; **RL-0053-ENG** *Bayview Irrigation District and others v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Final Award, 19 June 2007, ¶118; **RL-0054-ENG** *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent's Application for Bifurcation, 13 June 2013, ¶44; **RL-0055-ENG** Georg *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, ¶437.

215 See, for example, Memorial ¶501. **RL-0058-ENG** *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 20 November 1984, ¶148; **RL-0056-FR** *Joseph Houben v. Republic of Burundi*, ICSID Case No. ARB/13/7, Award, 12 January 2016, ¶151.

216 **RL-0057-ENG** *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision of the ad hoc Committee (English unofficial translation from the French original), 3 May 1985, ¶69; **RL-0058-ENG** *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Ad hoc Committee Decision on the Application for Annulment, 16 May 1986, ¶20; **CL-0266** *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, ¶222; **CL-0350** *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award, 23 September 2003, ¶102.

217 **RL-0059-ENG** *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Application for Annulment, 5 February 2002, ¶¶39-40. Footnotes omitted. See also **CL-0292** *Ron*

Another ICSID Tribunal has stated that:

> "*It is this Tribunal's opinion that 'and' means 'and', so that the rules of international law, especially those included in the ICSID Convention and in the Bilateral Treaty, as well as those of domestic law are to be applied. In the Wena Hotels Limited v. Arab Republic of Egypt case, the Tribunal affirmed that "and means and", but accepted the supremacy of international law*".[218]

205. Considering that "[t]*he question is not about the preeminence of one rule over the other but about applying the relevant rule depending on the type of norm that has been breached. It is the Tribunal's task to identify the specific rules that dictate the consequences for each of these breaches*".[219]

206. The BIT as the principal instrument applicable by the Tribunal itself provides guidance on the application of Norwegian law. This is the case with Article 3 of the BIT which clearly states that:

> "*Each contracting party shall promote and encourage in its territory investments of investors of the other contracting party and accept such 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.*"[220]

207. The Claimants are therefore wrong in their attempt to exclude Norwegian law from the legal rules applicable in the present case. It has an important role to play, notably in order to determine whether the Claimants' alleged investments were made in accordance with Norwegian laws and regulations.

Fuchs v. The Republic of Georgia, ICSID Case No. ARB/07/15, Award, 3 March 2010, ¶221, consolidated with *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Award, 3 March 2010, ¶221.

218 **CL-0271** *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶96. See also **RL-0055-ENG** *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, ¶437.

219 **RL-0060-ENG** *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶441. See also **RL-0061-ENG** *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶209, ¶¶205-209; **RL-0062-ENG** *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, 4 May 2021, ¶¶717-718.

220 Emphasis added.

PART II: OBJECTIONS TO JURISDICTION

208. The Claimants in the present case invoke Article 25(1) of the ICSID Convention and Article IX of the BIT as the basis for the jurisdiction of the Case. These provisions are quoted above, paragraph 185.

209. The Tribunal lacks jurisdiction both on the basis of these provisions and more generally, on principles of international law:

- The Tribunal has no jurisdiction on the core issues at stake (**Chapter 4**); and
- The dispute does not relate to investments made by the Claimants (**Chapter 5**).

CHAPTER 4: THE TRIBUNAL HAS NO JURISDICTION OVER THE CORE ISSUES AT STAKE

210. Contrary to the Claimants' allegations, the core issues at stake in the present case are by no means their alleged investments in Norway (assuming for the moment—*quod non* as will be shown in **Chapter 5** below—that they exist). Rather, the core issues at stake in this case are Norway's sovereign rights in its maritime areas around Svalbard and in the Loop Hole, which lie outside the jurisdiction of the Tribunal. Moreover, legal interests of absent parties "*would form the very subject-matter of the decision*" which is a bar to the exercise of jurisdiction by the Tribunal in accordance with the *Monetary Gold* principle.

4.1 THE SUBJECT-MATTER OF THE DISPUTE DOES NOT RELATE TO QUESTIONS DIRECTLY RELATED TO THE ALLEGED INVESTMENTS

211. Article 41(1) of the ICSID Convention provides that "[t]*he Tribunal shall be the judge of its own competence*." It is for the Tribunal "*to determine, taking account of the parties' submissions*" the subject-matter of the dispute of which it is seized. Though the Tribunal may well be obliged to take account of the Claimants' requests,[221] the Tribunal is not bound by their presentation and characterisation of the dispute.[222]

---

221 **RL-0063-ENG** ICJ, *Nuclear Tests (New Zealand v. France)*, Judgment, *I.C.J. Reports* 1974, ¶30; **RL-0064-ENG** *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, *I. C.J. Reports* 1998, ¶¶29-30.

222 **CL-0239** *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment - Jurisdiction of the Court, 19 December 1978, ¶¶86-90; **RL-0065-ENG** *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France)* Case, Order of 22 September 1995, *I.C.J. Reports* 1995, ¶56; **RL-0064-ENG** *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, *I.C.J. Reports* 1998, ¶29-32; **CL-0122** *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, ¶¶90-91; **RL-0066-ENG** PCA, *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, Case No. 2017-06, Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020, ¶151; **RL-0067-ENG** *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. USA)*, Preliminary Objections, Judgment, *I.C.J. Reports* 2021, ¶¶52-53; **RL-0068-ENG** *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Preliminary Objections, Judgment, *I.C.J. Reports* 2021, ¶42.

212. It is well-established that it is for the Tribunal itself to "*isolate the real issue in the case and to identify the object of the claim*".[223] The definition of the dispute subject-matter by the Tribunal must be made "*on an objective basis*".[224] Otherwise:

> "*the inquiry to jurisdiction and competence would be reduced to naught, and tribunals would be bereft of the* compétence de la compétence *enjoyed by them under Article 41(1) of the ICSID Convention*".[225]

213. The definition of the dispute is a central issue. As stated by the UNCLOS Annex VII Tribunal in the *South China Sea Arbitration*:

> "*The nature of the dispute may have significant jurisdictional implications, including whether the dispute can fairly be said to concern the interpretation or application of the Convention or whether subject-matter based exclusions from jurisdiction are applicable*".[226]

214. In the present case, the dispute essentially concerns Norway's sovereign rights on the Norwegian continental shelf around Svalbard and in the Loop Hole.

4.1.2 The Dispute Concerns the Scope of Norway's Sovereign Rights in the Norwegian Maritime Areas in the Loop Hole and Around Svalbard

215. The Claimants define the 'legal dispute' as follows:

> "*Claimants' claim relates to a 'conflict of rights' concerning the 'existence or scope of a legal right' as well as the 'extent of the reparation to be made for a breach of a legal obligation.' Claimants and Norway are at odds on the interpretation and application of several provisions of the BIT (as shown by this very Memorial, as well as the RFA*

---

223 **RL-0063-ENG** ICJ, *Nuclear Tests (New Zealand v. France)*, Judgment, *I.C.J. Reports* 1974, ¶29; **RL-0069-ENG** *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment, *I.C.J. Reports* 2015, ¶26; **RL-0070-ENG** *Carlos Ríos and Francisco Ríos v. Republic of Chile*, ICSID Case No. ARB/17/16, Award, 11 January 2021, ¶172.

224 **RL-0071-ENG** *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment *I.C.J. Reports* 2018, p. 308-309, ¶48; **RL-0066-ENG** PCA, *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, Case No. 2017-06, Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020, ¶151.

225 **RL-0072-ENG** *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, ¶50.

226 **RL-0073-ENG** *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility, 29 October 2015, ¶150; **RL-0066-ENG** *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, PCA Case No. 2017-06, Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020, ¶151; **RL-0074-ENG** *The Enrica Lexie Incident (Italy v. India)*, PCA Case No. 2015-28, Award, 21 May 2020.

and notice of dispute) as well as the extent of reparation Norway should make for its breaches of the BIT, which the Claimants value at EUR 448.7 million".[227]

216. However, in order to deal with the dispute, the Claimants ask the Tribunal set up by ICSID (*i.e.* the International Centre for Settlement of *Investment* Disputes), to interpret and apply various treaty instruments which are entirely unrelated to investments. By the insistent acknowledgement of the Claimants themselves, to define the existence or scope of the Claimants' rights, the Tribunal should interpret and apply UNCLOS, the NEAFC Convention and the Svalbard Treaty. As shown in **Chapter 3** above, the Tribunal cannot interpret or apply these treaties and thereby take a stand on long-standing inter-State disputes.[228]

217. While the Claimants argue that the dispute concerns alleged infringements of the BIT in relation to their investments, it is apparent from their pleadings that the dispute they have brought before the Tribunal depends on a preliminary decision clarifying the legal regime applicable to the harvesting of snow crab on the Norwegian continental shelf, both around Svalbard and in the Loop Hole. The potential harm to the Claimants' alleged investments is only a subsequent and ancillary issue to this central and preliminary issue. There is a preliminary 'up-stream' dispute between Latvia, Norway and the EU (among others), as outlined further below.

4.1.2.1 The Claimants' Submissions

218. All of the Claimants' allegations in the RFA are rooted in the issue of Norway's sovereign rights on the Norwegian continental shelf around Svalbard and in the Loop Hole.

219. In the RFA, the Claimants request the Tribunal to rule that Norway breached its obligations under the BIT, the Svalbard Treaty, the NEAFC Convention and UNCLOS[229] and argue that the dispute before the Tribunal relates to their "*investments*".[230] This presentation mischaracterises the dispute, which in reality concerns the scope of Norway's sovereign rights on the Norwegian continental shelf

---

227 Memorial, ¶463.

228 See above, **Section 3.2.2.1**.

229 RFA, ¶245.

230 See, for example, Memorial, ¶¶455, 602, 630, and 808; RFA, ¶1 and ¶¶26-28.

around Svalbard and in the Loop Hole as clarified by the Claimants in their Memorial where they affirm that "*Norway's actions have deprived Claimants of their fishing rights to catch snow crabs in the NEAFC zone and in maritime areas around Svalbard*".[231] The whole enterprise and the arguments put forward by the Claimants are based on an alleged right to harvest snow crab which Norway says does not exist, but which existence depends on a prior determination of those preliminary, 'up-steam' disputes.

220. In their Memorial, the Claimants have attempted to present their dispute as one touching solely on the 'investment' question. Thus, in the first paragraph of the Memorial, the Claimants state that "[t]*his case concerns Norway's illegal destruction of Claimants' investments in a snow crab fishing, processing and distribution enterprise in Norway*",[232] and later state that "*this dispute relates to Claimants' investment operation as a whole, this operation is made up of several different parts, all of which constitute 'investments' made by Claimants within the BIT's above definition*".[233]

221. However, those statements stand in contrast to other assertions made by the Claimants, which make clear that the dispute is quite far from being essentially or only an investment dispute:

> "*521. As of 2014, these licences were issued by the Republic of Latvia in respect of waters regulated under NEAFC. The licences specifically authorized North Star to harvest snow crabs in the Loophole area of the Barents Sea, an area of high seas suprajacent to the extended continental shelf of Norway.*
>
> *522. Since 2016, North Star has also acquired licences authorizing it to harvest snow crabs in waters off the Svalbard archipelago, a territory that is under Norwegian sovereignty but subject to important stipulations of the Svalbard Treaty, which include rights of equal access by nationals of contracting parties to the Treaty. These licences were also issued by the Republic of Latvia, a party to the Svalbard Treaty, based on its allocation of fishing opportunities determined by European Council Regulations adopted with reference to the rights of the parties to the Svalbard Treaty*".[234]

---

231 Memorial, ¶409.

232 Memorial, ¶1. See also RFA, ¶1: "This matter concerns Norway's discriminatory and arbitrary actions which wiped out the Claimants' integrated investment in a snow crab fishing, transformation and sales enterprise in Norway."

233 Memorial, ¶491; RFA, ¶26.

234 Memorial, ¶¶521-522. See also, RFA ¶¶45-47 – footnotes omitted.

222. Further statements made by the Claimants are particularly telling on the true nature of the dispute, especially in their RFA. They ask the Tribunal to hold that:

> "*Norway's conduct in breach of the Svalbard Treaty, including the regulations prohibiting snow crab catches, breaches Article IV of the BIT (most favoured nation treatment)*";[235]
>
> "*Norway's conduct in breach of UNCLOS and NEAFC breaches Article IV of the BIT (most favoured nation treatment)*".[236]

223. In asking the Tribunal to find that Norway has violated the Svalbard Treaty, the NEAFC Convention and UNCLOS, the Claimants have themselves made clear that the dispute is first and foremost about Norway's sovereign rights on the Norwegian continental shelf around Svalbard and in the Loop Hole, and not about the Claimants' alleged investments even if the answers to the questions concerning Norway's sovereign rights might have consequences on said "*investments*".

224. The main thrust of the Claimants' claim against Norway is that they have the right to harvest snow crab on the Norwegian continental shelf, since they have obtained 'licences' from the Latvian authorities which are "valid" (*i.e.* they do actually grant the alleged rights), which are investments in the territory of Norway, and which Norway has injured.[237] Thus, among numerous other assertions, the Claimants allege that:

> "[they] *were effectively banned from exercising their valid NEAFC licence rights to harvest snow crabs from the Loop Hole on the basis of a theory recently adopted by Norway that the species was sedentary and therefore exclusive to Norway*";[238]
>
> "*North Star was prosecuted by Norway and condemned for nothing more than exercising the valid fishing rights granted to it by Latvia under the Svalbard Treaty*";[239]

---

235 RFA, ¶254 – emphasis added.

236 *Ibid* – emphasis added.

237 See, for example, Memorial, ¶¶257, 312 and 409.

238 RFA, ¶267.

239 *Id.*, ¶273 – emphasis added. See also on Notice of Dispute, 8 March 2019, p. 2: "*This dispute stems from Norway's manifestly arbitrary and discriminatory acts, notably against investors from the European Union (EU), including Latvian investors, who hold or have held licenses to harvest snow crabs in the Loophole's international waters and licenses issued on the basis of the 1920 Svalbard Treaty*."

The Claimants' also assert that Norway "*failed to accept*" the Claimant's 'licences' to harvest snow crab.[240]

225. Setting aside the 'investment' and 'breach' questions for the moment, which Norway returns to in **Chapters 5** and **6**, below, the Claimants' submissions make clear the central issue in the present dispute is the existence of an alleged right of access to harvest snow crab.

226. But in order to decide whether Norway's actions constitute "*an expropriation, since they have substantially deprived the Claimants of the value of their snow crab harvesting enterprise*",[241] the Tribunal would unavoidably have to first decide on the existence and legality of such alleged investments, including the existence of the rights allegedly granted under those Latvian-issued licences.

227. But that depends, first and foremost, on the resolution of a dispute about whether such licenses did grant the rights that the Claimants say they did. That, as shown below, is the subject of a current dispute between Latvia, Norway and the EU over which the Tribunal has no jurisdiction.

4.1.2.2 Statements of Latvia, the EU, and Norway

228. A series of contemporaneous communications between and involving Norway, Latvia and the EU (known to the Claimants, who quoted them profusely in their RFA,[242] and strangely less in their Memorial[243]) demonstrates that there is between Norway, Latvia and the EU an open dispute about the legal regime applicable to the harvesting of sedentary species on the Norwegian continental shelf around Svalbard and in the Loop Hole, including snow crab. This dispute is 'upstream' from, and arises logically prior to, the dispute allegedly brought by the Claimants before the Tribunal. Its resolution is a necessary precondition to the resolution of the investment dispute.

---

240 Memorial, ¶809. See also RFA, ¶254: "Norway failed to accept the Claimants' investments in Norway, in particular the Claimants' licences issued lawfully under EU Regulations 2017/127, 2018/120 and 2019/124, in breach of Article III of the BIT".

241 Memorial, ¶691. See also RFA, ¶254: "*Norway's conduct has wiped out the value of Claimants' investments, amounting to an illegal expropriation in violation of Article VI of the BIT*".

242 See, for example, RFA, ¶¶122, 133, 136, 137, 144, and 226.

243 Though see Memorial, ¶¶63, 135 and 643.

229. These communications are of great importance, given that the Claimants claim to have the *right* to harvest snow crab on the Norwegian continental shelf around Svalbard and in the Loop Hole pursuant to the EU's participation in the NEAFC system and Latvia's status as a State party to the Svalbard Treaty.[244] The Claimants rely on interpretations of the Svalbard Treaty by the EU and Latvia to assert the existence of their alleged right to harvest snow crab on the continental shelf around Svalbard.[245] The Claimants also rely on Latvia's unilateral issuance of licenses for the Loop Hole, in violation of UNCLOS and the NEAFC Convention, to assert the existence of their alleged right to harvest snow crab on the Norwegian continental shelf in the Loop Hole. However, Norway does not share those interpretations of the Svalbard Treaty, UNCLOS and the NEAFC Convention. It is noteworthy that the EU (which is a party to the NEAFC Convention) does not share the interpretation of the Claimants and Latvia concerning Latvia's right to issue licences for the harvesting of snow crab on Norwegian continental shelf in the Loop Hole.[246]

230. The proper interpretation of Article 77 of UNCLOS, Articles 1 and 2 of the Svalbard Treaty, and the NEAFC Convention is a decisive precondition to the existence and validity of the Claimants' alleged rights at issue in this investment dispute. That can be amply illustrated by examining communications between Norway, Latvia and the EU setting out their dispute.

4.1.2.2.1 *The disputes regarding the NEAFC Convention*

231. In relation to the NEAFC Convention, there are disputes between Norway and Latvia, and between Latvia and the EU in relation to the purported issuance of Latvian "*licenses*" over the Loop Hole (including, but importantly not limited to, those issued to North Star in respect of its vessels).

232. As early as 2015, the EU (which is itself a party to the NEAFC Convention, rather than its Member States) proposed to the NEAFC parties the possibility of "*exploratory bottom fisheries of snow crab*" by Latvian vessels, two of which belonged to North

244 Memorial, ¶¶278-280; RFA, ¶4, 209, and 273.

245 See, for example, RFA, ¶¶4, 209, and 273.

246 **R-0033-ENG** Letter 5 August 2015 from DG Mare to the EU Member States.

Star, on the Russian continental shelf.[247] After a postal vote on this issue, it was rejected.[248] In its explanation of vote, Norway reaffirmed that snow crab harvesting falls under the continental shelf regime of UNCLOS and that, therefore, NEAFC has a limited role to play[249] because the Commission can only "*make recommendations concerning fisheries conducted beyond the areas under jurisdiction of Contracting Parties*".[250]

233. As explained above,[251] with regards to areas under the jurisdiction of a coastal State, NEAFC may only make recommendations if the relevant State (in the Loop Hole either Norway or the Russian Federation in respect of their continental shelves) requests such a recommendation and consents to the recommendation.[252] Neither Norway nor the Russian Federation have done this.

234. In the same vein, in a note verbale of 30 October 2015, Norway directly communicated its position to the EU by stating, *inter alia*, that

> "*the right to harvest sedentary species on the continental shelf of the Barents Sea in the NEAFC regulatory area is the exclusive right of the Coastal States. Pursuant to paragraph 2 of Article 77 of the Convention of 1982, harvesting of sedentary species in the NEAFC Regulatory Area in the Barents Sea cannot be carried out without the express consent of the Coastal States*".[253]

A note verbale with the same content was also communicated to the Latvian authorities.[254]

235. The dispute regarding the NEAFC Convention is not only between Norway and Latvia; there is also a dispute between Latvia and the EU. The EU agrees with Norway's position, and communicated its views regarding the harvesting of snow crab on the

---

247 See above, paragraph 58.

248 See above, paragraph 67.

249 **R-0030-ENG** Letter November 2015 from Norway regarding explanation to postal vote on the third proposal (Latvian vessels).

250 **CL-0018** NEAFC Convention, Article 5(1).

251 See above, paragraph 55.

252 *Ibid*., Article 6(1). See also **Section 2.2.3.2** in which the competence of NEAFC is clarified.

253 **C-0109**.

254 **R-0081-ENG** Note verbale 2 November 2015 from Norway to Latvia.

continental shelf in the Loop Hole to its Member States, emphasising the centrality of UNCLOS to this issue. In a crucial letter of 5 August 2015, it stated that:

> "*It follows from this classification of snow crab as 'sedentary species' that only the relevant coastal States, i.e. Norway and the Russian Federation, are entitled to exploit (i.e. to harvest) it by virtue of their sovereign rights under the continental shelf regime of UNCLOS and that, as spelled out in Article 77(2) of UNCLOS, no other State is able to do so unless it has obtained the coastal State's explicit consent. Moreover, the coastal State's rights are exclusive in a sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake any such activities without the express consent of the coastal State.*
>
> *Therefore, without the express consent of the relevant coastal States (namely Norway and the Russian Federation in the present instance), these fisheries are illegal as they would be in contravention of Article 77(2) of UNCLOS.*
>
> *The Commission would underline that the EU, as a Contracting Party to UNCLOS, is under an obligation to respect Article 77(2) of UNCLOS. Similarly, upon its ratification by the Union, UNCLOS forms part of the legal order of the Union pursuant to the provisions of Article 216 of the Treaty on the Functioning of the European Union, such that also the Member States are bound to respect it.*
>
> *Consequently, since both Norway and the Russian Federation have given no such consent, Member States are advised that they should rescind any current licences authorising their vessels to fish for snow crab and any other sedentary species such as king crab in the NEAFC Regulatory Area and should not issue any new licences to this effect and, as appropriate, re-call the vessels concerned*".[255]

236. Latvia (which is not a party to the NEAFC Convention) was undeterred by the declaration of the EU (which is a party to the NEAFC Convention). On 22 September 2016, the Latvian Ambassador requested to enter into consultations with Norway about "*the possibilities/procedures of snow crab harvesting in the Svalbard maritime area and NEAFC Regulatory Area*". This was done without any mention of the BIT.[256] On 30 September 2016, the Norwegian Ministry of Foreign Affairs reaffirmed, with reference to its previous note verbale of 2 November 2015, and to its previous meetings with the Latvian authorities, that the harvesting of snow crab is governed by the continental shelf regime and subject to the consent of the coastal State.[257] Norway also

---

255 **R-0033-ENG** Letter 5 August 2015 from DG Mare to the EU Member States (emphasis added).

256 **R-0082-ENG** Email 22 September 2016 from the Ambassador of Latvia to the Norwegian Ministry of Foreign Affairs.

257 **R-0083-ENG** Email 30 September 2016 from the Norwegian Ministry of Foreign Affairs to the Ambassador of Latvia in Oslo.

maintained that the Svalbard Treaty and the NEAFC regime were irrelevant.[258] Latvia not being a State party to NEAFC, its position as regards licences for snow crab harvesting in the Loop Hole puts it at odds with the EU's position, given that its licenses—on which the Claimants rely in this proceeding—were issued despite agreement between Norway and the EU that there was no right to do so under NEAFC.

237. It is worth noting that, through these actions, Latvia incurs responsibility before the European courts as provided for in Article 216(2) TFEU, which provides that "[a]*greements concluded by the Union are binding upon the institutions of the Union and on its Member States*".

238. That, of course, is a matter between Latvia and the EU, but it underscores the complex nature of dispute between Norway, Latvia and the EU which bears upon the 'licenses' said to have been validly granted by Latvia and on which the Claimants base their claims.

4.1.2.2.2 *The dispute on the maritime areas around Svalbard*

239. There is also an inter-State dispute, between some States party to the Svalbard Treaty, as to the extent of its application. In its note verbale of 1 November 2016, the EU, itself not a Party to the Treaty, presented its position regarding the interpretation of the Svalbard Treaty stating that

> "*The European Union considers that the Svalbard archipelago, including Bear Island, generates its own maritime zones, separate from those generated by other Norwegian territory, in accordance with the 1982 United Nations Convention on the Law of the Sea. It follows that there is a continental shelf and an exclusive economic zone, which pertain to Svalbard. The European Union also considers that the maritime zones generated by Svalbard are subject to the provisions of the Treaty of Paris of 1920, which grants, by virtue of its Articles 2 and 3, an equal and non-discriminatory access to resources for all Parties to the Treaty, in particular with respect to fishing activities, including fishing for sedentary species on the continental shelf around Svalbard*".[259]

240. Norway responded on 9 January 2017 by reiterating that Article 2 of the Svalbard Treaty does not apply outside the territorial waters and that "*harvesting snow crab on the Norwegian continental shelf cannot be carried out without the express consent of*

---

258 *Id*.

259 **R-0084-ENG** Note verbale 1 November 2016 from the EU to Norway (the Claimants have submitted a different version of the note verbale as **C-0071**).

Norway as the coastal state."[260] Norway's position regarding the geographical application of Article 2 of the Svalbard Treaty was well known at the time. Earlier communications to EU in that regard included a note verbale of 9 August 2011 from Norway.[261]

241. With little consideration for the consistent view held by Norway as the coastal State which has been clearly communicated to the EU on several previous occasions since the 1970s,[262] the EU decided to include the Norwegian maritime areas around Svalbard as a fishing zone for European vessels in its regulation 2017/127. In its preamble, the regulation mentions that:

> "*As regards the fishing opportunities for snow crab around the area of Svalbard, the Treaty of Paris of 1920 grants an equal and non-discriminatory access to resources for all parties to that Treaty, including with respect to fishing. The Union's view of this access as regards fishing for snow crab on the continental shelf around Svalbard has been set out in a Note Verbale to Norway dated 25 October 2016*[263]*, in respect of a Norwegian regulation of the fishing for snow crab on its continental shelf, which in the Union's view disregards the specific provisions of the Treaty of Paris and in particular those laid down in Articles 2 and 3 thereof. In order to ensure that the exploitation of snow crab within the area of Svalbard is made consistent with such non-discriminatory management rules as may be set out by Norway, which enjoys sovereignty and jurisdiction in the area within the limits of the said Treaty, it is appropriate to fix the number of vessels that are authorised to conduct such fishery. The allocation of such fishing opportunities among Member States is limited to 2017. It is recalled that primary responsibility for ensuring compliance with applicable law lies with the flag Member States*".[264]

242. On 23 February 2017 Norway delivered a note verbale to the EU making clear that self-licencing of snow crab harvesting on the Norwegian continental shelf, as envisaged in Council Regulation 2017/127, constitutes an international wrongful act. Norway

---

260 **R-0085-ENG** Note verbale 9 January 2017 from Norway to the EU.

261 **R-0086-ENG** Note verbale 9 August 2011 from Norway to the EU.

262 **R-0005-ENG** Note verbale 6 August 1986 from Norway to the European Communities.

263 Norway is not aware of a note verbale of 25 October 2016, but assumes that the reference should be to the note verbale of 1 November 2016 **R-0084-ENG** from the Delegation of the EU to Norway, to the Ministry of Foreign Affairs. (The Claimants have submitted a different version of the note verbale as **C-0071**.)

264 See **RL-0014-ENG** EU Regulation 2017/127, ¶35. See also EU Regulations 2018/120, ¶37, 2019/124, ¶42 and 2020/123, ¶49.

requested the EU to repeal the applicable parts of the Regulation.[265] In the same note verbale of 23 February 2017, Norway recalled that

> "*In the preamble of Regulation 2017/12, paragraph 35, reference is made to Svalbard and the Treaty of Paris of 1920. The EU is not a Party to this Treaty. Moreover, none of the provisions of the Treaty granting rights to nationals of the contracting parties applies beyond the territorial waters of Svalbard.*
>
> *Furthermore, it should be noted that Norway, as part of its undisputed sovereignty over the archipelago, also has the sole regulatory power in areas to which the Treaty grants rights to nationals of the contracting parties.*
>
> *The EU and its Member States have no right under international law to license any exploitation of snow crab or any other natural resources on the Norwegian continental shelf without the express consent of Norway as the coastal State. No such consent has been granted. In this situation, any licensing by the EU or a member State of the EU constitutes a breach of an international obligation and infringes Norway's rights as a coastal State.*
>
> *The Ministry calls on the EU and its member States to repeal the relevant part of the Council Regulation, and not to authorise or issue any licenses in contravention to international law. Furthermore, Norway urges the EU to remind its member States that it is illegal to harvest snow crab on the Norwegian continental shelf without the express consent of Norway. Moreover, member States should recall any such licenses they may have issued. Norway considers any license issued without its consent to be without legal effect*".

243. In parallel, by a note verbale of 17 January 2017, the Norwegian Ministry of Foreign Affairs notified the Embassy of Latvia in Oslo of the arrest of the *Senator*.[266] In its answer of the following day, Latvia referred to the licence[267] Latvian authorities had issued to *Senator* "*on the basis of a respective Regulation adopted by the Council of the European Union*".[268] Furthermore, Latvia invited the Norwegian authorities to ensure prompt release of the fishing vessel and its crew, and to request authorities charged with at-sea controls and enforcement to desist from interfering "*with legitimate fishing activities conducted by Latvia vessels within the maritime zones around Svalbard*",[269] demonstrating a clear link between the legality of the activities of North

---

265 **R-0087-ENG** Note verbale 23 February 2017 from Norway to the EU.

266 **R-0065-ENG** Note verbale 17 January 2017 from Norway to Latvia.

267 **C-0015** Licence No 2017D3426 issued by Latvian authorities to *Senator*.

268 **R-0088-ENG** Note verbale 18 January 2017 from Latvia to Norway.

269 *Id*.

Star and the central issue of the legal regime applicable to the harvesting of snow crab on the Norwegian continental shelf around Svalbard.

244. Norway's Ministry of Foreign Affairs responded to the Latvian note verbale of 18 January 2017 by a further note verbale to the Embassy of Latvia in Oslo on 8 February 2017.[270] In this note verbale, the Ministry of Foreign Affairs reiterated Norway's position on the interpretation of the Svalbard Treaty as well as UNCLOS with regard to the legal regime surrounding the harvesting of snow crab, and underscored that any purported licensing by Latvia for harvesting snow crab on the Norwegian continental shelf without Norway's express consent would be unlawful.[271] Following the EU's TAC and quota-regulations in 2018-2021, Norway has reminded Latvia of its position and of the fact that any licences issued without Norway's consent are without legal effect.[272]

245. In addition to highlighting the centrality of Latvia and the EU in this dispute, this summary of the communications between Latvia, the EU and Norway unquestionably points to the existence of disputes between Norway, Latvia and the EU concerning the interpretation and application of Article 77 of UNCLOS, Articles 1 and 2 of the Svalbard Treaty, and the NEAFC Convention. It is these same disputes that the Claimants are asking the Tribunal to settle, as the determination of the legal existence of their alleged investment requires prior resolution of the issue of the regime applicable to the harvesting of snow crab in those two areas.

4.1.3 The Tribunal lacks jurisdiction to rule on the Claimants' access to snow crab on the Norwegian continental shelf around Svalbard and in the Loop Hole

246. The most central claims submitted by the Claimants inevitably require prior determinations of the legality and therefore existence of alleged harvesting rights on the Norwegian continental shelf around Svalbard, and in the part of the Loop Hole which comprises Norwegian continental shelf. The Tribunal, whose jurisdiction is based on the ICSID Convention and the BIT, cannot deal with such claims, which

270 **R-0089-ENG** Note verbale 8 February 2017 from Norway to Latvia.

271 *Idem*.

272 Note verbales **R-0090-ENG** 15 February 2018, **R-0091-ENG** 28 December 2018, **R-0092-ENG** 31 January 2020 and **R-0093-ENG** 9 February 2021 from Norway to Latvia.

despite being far-removed from the question of investment constitute the core subject matter of the dispute. The dispute as a whole predominantly concerns the issue of Norway's maritime sovereign rights, and the Tribunal lacks jurisdiction *ratione materiae* to deal with a dispute over the scope of Norway's sovereign rights, which is a necessary precondition to the determination of the alleged 'investment' dispute.

4.1.3.1 The Tribunal has no jurisdiction to deal with core issues requiring a prior determination based on international treaties other than the BIT

247. The Tribunal has been constituted pursuant to Article IX of the BIT,[273] and under the ICSID Convention.[274] It is competent to deal with:

> "*any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre*".[275]

248. It is established that international courts and tribunals base their jurisdiction on the treaties that establish them. Only the International Court of Justice ("**ICJ**") has limitless *ratione materiae* competence in relation to inter-State legal disputes, and even then only when the disputing States have consented to its jurisdiction without any reservation or limitation.[276] Other courts and tribunals have limited jurisdiction. This is the case with, for example, ITLOS, in accordance with the autonomous dispute settlement system provided for in UNCLOS.[277]

249. Thus, Article 286 of UNCLOS provides, *inter alia*, that "*any dispute concerning the interpretation or application of this Convention shall, if it has not been settled by recourse to Section 1, be submitted at the request of any party to the dispute to the court or tribunal competent under this Section*".[278] Questions about the legality of the

---

273 **CL-0001** Agreement between the Government of the Kingdom of Norway and the Government of the Republic of Latvia on the Mutual Promotion and Protection of Investments, 16 June 1992.

274 **CL-0042** Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965.

275 *Ibid*, article 25(1).

276 **CL-0217** Statute of the International Court of Justice, Article 36(1).

277 **CL-0153** UNCLOS, Part XV. Settlement of Disputes ; AGNU, *Fragmentation du droit international : difficultés découlant de la diversification et de l'expansion du droit international*, Rapport du Groupe d'étude de la Commission du droit international, A/CN.4/L.682, § 45.

278 UNCLOS, Article 285.

Claimants' licences to harvest snow crab on the Norwegian continental shelf, based on EU regulations or the Latvian position or the violations of UNCLOS alleged by the Claimants fall within the scope of this provision.[279] Consequently, the ICJ or the ITLOS would be the only convenient—and competent—fora to deal with such issues.

250. Similarly, the jurisdiction of ICSID tribunals is limited; this limitation derives from their constitutive treaty.[280] The Report of the Executive Directors on the Convention clarifies that "*the jurisdiction of the Centre is further limited by reference to the nature of the dispute*".[281] Thus ICSID tribunals have specific subject matter jurisdiction (*compétence d'attribution*).

251. Article 25 of the ICSID Convention is the focal point that defines the limited jurisdiction of ICSID tribunals. Tribunals have observed that the word "*directly*", included in the phrase "*dispute arising directly out of an investment*" in Article 25(1) of the ICSID Convention,[282] relates to the connection between the dispute and the investment out of which it arises, and not to the character of the underlying investment.[283]

252. During the *travaux préparatoires*, two groups of States disagreed on the scope of the jurisdiction of ICSID Tribunals. One group of States was in favour of limiting their jurisdiction and proposed a list of disputes within ICSID jurisdiction. Another group of States was in favour of broadening their jurisdiction, and not adopting a closed list of

---

279 See **RL-0075-FR** ECtHR, judgement, 16 September 2014, *Plechkov v. Romania*, req. no 1660/03, para. 67: "*qu'il ne lui appartient de se prononcer ni sur l'interprétation de la CNUDM* […] *Elle ne saurait, dès lors, se prononcer sur l'étendue ou l'existence de la zone économique exclusive de la Roumanie au sens de la CNUDM et des droits et obligations qu'aurait la Roumanie à l'égard d'une telle zone*." Our translation ; – our translation: "*…that it is not for it to pronounce* […] *on the interpretation of UNCLOS or of the relevant Romanian laws* [...]. *It can, therefore, pronounce neither on the extent or existence of Romania's exclusive economic zone within the meaning of UNCLOS nor on the rights and obligations which Romania would have in respect of such a zone*." See also **RL-0047-ENG** CJEU, judgment, 3 June 2008, *Intertanko*, Case C-308/06, para. 64: "*UNCLOS does not establish rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States*."

280 For ICSID tribunals, see: **RL-0013-ENG** Understanding on Rules and Procedures Governing the Settlement of Disputes (1994), adopted on 15 April 1994, Article 3.2.

281 **CL-0105** Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, paras. 25-26.

282 For the full text of Article 25(1) see above, paragraph 185.

283 **CL-0106** ICSID, *Fedax N.V. v. Republic of Venezuela*, Decision on Jurisdiction, 11 July 1997, 37 ILM 1378 (1998), para. 24.

specific disputes. While no closed list was eventually chosen, a safeguard was included within the ICSID Convention to limit the jurisdiction of ICSID Tribunals.

253. The first draft of Article 26(1) (later Article 25) stated that:

> "*The jurisdiction of the Center shall extend to all legal disputes between a Contracting State (or one of its political subdivisions or agencies) and a national of another Contracting State, arising out of or in connection with any investment, which the parties to such disputes have consented to submit to it*".[284]

254. The first French version, which is relevant for understanding the safeguard included in the actual Article 25 of the ICSID Convention, provided that:

> "*(1) La juridiction du Centre s'étend a tout différend d'ordre juridique entre un État contractant (ou une de ses collectivités publiques ou établissements publics) et un national d'un autre État contractant, se rapportant directement ou indirectement a un investissement et que les parties ont consenti de lui soumettre.*"[285]

255. Discussing this first draft of the ICSID Convention, the representative of the Central African Republic, Mr Bigay, noted that the terms of Article 26 "*must be precise in order that the States may determine exactly the extent of their commitment*".[286] In that regard:

> "[w]*ith respect to Article 26, he suggested that the words 'or in connection with' which were translated in the French version by the word 'indirectement' be deleted since disputes indirectly related to investments should be excluded*".[287]

256. This proposal was notably supported by the Portuguese representative who stated that "[t]*he jurisdiction of the Centre should be confined to disputes of a legal character arising directly out of investments*".[288]

257. The Brazilian representative even stated that "[i]*t is probably correct to state that the more the jurisdiction of the Centre is restricted, the closer we shall be to a satisfactory result, that is, to the realization of the proposed plan*".[289] After proposing a drafting of

---

284 **RL-0076-ENG** History of the ICSID Convention, Volume II (1), p.622 – emphasis added.

285 **RL-0171-FR** History of the ICSID Convention, Volume I, p.116.

286 **RL-0077-ENG** History of the ICSID Convention, Volume II (2), p.707.

287 *Id* – emphasis added.

288 *Id*., p. 708.

289 **RL-0077-ENG** History of the ICSID Convention, Volume II (2), p.838.

the then Article 26 close to the current Article 25, he specified that the objective of this drafting was to:

> "*eliminate certain expressions used in the draft so as to avoid contradictions of other principles supported by us in considering other Articles. Thus, we prefer to define the jurisdiction of the Centre as extending to disputes (and not to <u>all</u> disputes) arising out of an investment (and not out of <u>any</u> investment) as the Draft reads*".[290]

258. This proposal to limit ICSID's jurisdiction to disputes directly related to investments was accepted and resulted in the current wording of Article 25 of the ICSID Convention: "*(1) The jurisdiction of the Centre shall extend to any legal dispute arising <u>directly</u> out of an investment*".[291]

259. It follows, as convincingly explained by the ICSID Tribunal in *Emmis International Holding v. Hungary* that:

> "*140.* […] *An arbitral tribunal owes its jurisdiction solely to the consent of the parties. In the case of an arbitral tribunal constituted under the ICSID Convention, Article 25 states this requirement in terms by providing that '[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment [...] which the parties to the dispute consent in writing to submit to the Centre' [emphasis added]. As the Executive Directors stated in their Report on the ICSID Convention: 'Consent of the parties is the cornerstone of the jurisdiction of the Centre.[292]*".[293]

260. As noted by another ICSID Tribunal:

> "*International Tribunals (like this one) set up to decide cases registered with the Centre under the Washington Convention (like the present arbitration case) are bodies of limited competence. They are empowered to adjudicate such cases only if the conditions for the exercise of their jurisdiction are fulfilled. There is considerable authority in the field of international law (starting with the PCIJ – predecessor of the*

---

290 **RL-0077-ENG** History of the ICSID Convention, Volume II (2), p. 838 (emphasis in original).

291 **RL-0078-ENG** *Ahmonseto, Inc. and others v. Arab Republic of Egypt*, ICSID Case No. ARB/02/15, Award, 18 June 2007, para. 183, emphasis added.

292 **CL-0105** Footnote 245 in the original: "*International Bank for Reconstruction and Development, "Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States" 18 March 1965, [22]*".

293 **RL-0079-ENG** *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, paras. 140 and 145 – emphasis added. See also **CL-0118** *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, para. 92.

> *ICJ) as to how such bodies of limited competence should approach questions of jurisdiction*".[294]

261. The BIT constitutes the 'written consent' by Norway to submit disputes to ICSID, cf. Article 25(1) of the ICSID Convention. Article IX of the BIT also requires that the "*legal dispute*" is "*in relation to an investment*". As noted by the Claimants, this language is equivalent to the requirement for directness found in the ICSID Convention.[295] The Tribunal must therefore limit itself to deal with allegations of violation of the BIT, the object of which is "*the mutual promotion and protection of investments*".[296] Though, as demonstrated in **Chapter 5**, the Claimants have no investments in the territory capable of protection under the BIT.

262. The Arbitral Tribunal finds itself in the same position as the European Court of Human Rights in the *Plechkov* case where the Court considered

> "*qu'il ne lui appartient de se prononcer* […] *sur l'interprétation de la CNUDM ou des lois roumaines pertinentes* […]. *Elle ne saurait, dès lors, se prononcer sur l'étendue ou l'existence de la zone économique exclusive de la Roumanie au sens de la CNUDM et des droits et obligations qu'aurait la Roumanie à l'égard d'une telle zone*."[297]

263. Similarly, in the present case, the Tribunal – which, like the ECtHR has a limited jurisdiction (compétence d'attribution) – and therefore cannot pronounce on the interpretation and application of UNCLOS (or, for that matter of NEAFC).

264. Moreover, although the Claimants attempt to take the position that "[w]*hether or not snow crabs are a sedentary or non-sedentary species is not a live issue for this Tribunal*",[298] the Tribunal will have to address this issue in order to resolve the dispute. A number of the Claimants' arguments are predicated on a determination of the sedentary nature of the snow crab. If the Tribunal does not rule on this issue, it will not

---

294 **RL-0080-ENG** *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, para. 65.

295 See Memorial, ¶¶474-475.

296 Latvia - Norway BIT (1992), adopted on 16 June 1992, Preamble.

297 **RL-0075-FR** ECtHR, judgment, 16 September 2014, *Plechkov v. Romania*, req. no 1660/03, para. 67 – our translation: *"...that it is not for it to pronounce [...] on the interpretation of UNCLOS or of the relevant Romanian laws [...]. It can, therefore, pronounce neither on the extent or existence of Romania's exclusive economic zone within the meaning of UNCLOS nor on the rights and obligations which Romania would have in respect of such a zone*."

298 Memorial, ¶598, footnote omitted.

be able to determine whether Norway's consent was necessary for the granting of licences by Latvia in accordance with the continental shelf regime and Article 77 of UNCLOS. In so doing, the Tribunal will not be able to take a position on the legality or the existence of the Claimants' investments, which is a necessary precondition for establishing its jurisdiction. The 'sedentary question' would therefore need to be determined by the Tribunal before any decision could be made on the validity of the Claimants' alleged rights and investments, and before deciding on any possible questions of breach.

265. In other words, the question of the validity of the licenses is dependent upon a prior determination of the legal status of both the continental shelf around Svalbard and in the Loop Hole and the sedentary nature of snow crab, which makes it a resource of the continental shelf.

266. These issues must, moreover, be addressed on an inter-State level and, in particular, between Norway and Latvia, the latter of which, in breach of UNCLOS, the NEAFC Convention and the Svalbard Treaty, has purported to issue various 'licences' for harvesting snow crab on the Norwegian continental shelf around Svalbard and in the Loop Hole. It is also to be addressed between Norway and the EU, given that the EU has issued regulations that apparently permits Latvia to do this as a matter of EU law, in contravention of UNCLOS.

267. The present Tribunal has no jurisdiction *ratione materiae* to deal with these disputes. They are far from the jurisdiction of the Tribunal, but it is the settlement of those disputes that are necessary preconditions to the determination of the investment dispute brought before the Tribunal.

4.1.3.2 The Tribunal has no jurisdiction to deal with the dispute as a whole in view of the preponderance of questions relating to Norway's sovereign rights.

268. As demonstrated above,[299] to determine its competence, the Tribunal must decide what the real subject-matter of the case that has been submitted to it is. This was explained adroitly in the Award in the *Chagos Marine Protected Area Arbitration*:

[299] See above, paragraph 212.

> "*211. Finally, the Parties clearly differ regarding the identity of the 'coastal State'. For the purpose of characterizing the Parties' dispute, however, the Tribunal must evaluate where the relative weight of the dispute lies. Is the Parties' dispute primarily a matter of the interpretation and application of the term 'coastal State, with the issue of sovereignty forming one aspect of a larger question? Or does the Parties' dispute primarily concern sovereignty, with the United Kingdom's actions as a 'coastal State' merely representing a manifestation of that dispute?* […A]*s Mauritius itself has argued its case, the consequences of a finding that the United Kingdom is not the coastal State extend well beyond the question of the validity of the MPA* [Marine Protected Area]. *In the words of Mauritius' counsel, the Tribunal is 'entitled' to - rule that the United Kingdom is* [...] *not 'the coastal State' of the Chagos Archipelago*".

The Tribunal went on to determine, for itself, the proper characterisation of the dispute:

> "*These are not the sort of consequences that follow from a narrow dispute regarding the interpretation of the words 'coastal State' for the purposes of certain articles of the Convention.*
>
> *212. Accordingly, the Tribunal concludes that the Parties' dispute with respect to Mauritius' First Submission is properly characterized as relating to land sovereignty over the Chagos Archipelago. The Parties' differing views on the 'coastal State' for the purposes of the Convention are simply one aspect of this larger dispute*".[300]

269. The underlying reasoning applies here with equal force: in order to determine the dispute submitted to it by the Claimants, the Tribunal would first have to decide much broader and politically sensitive disputes between Norway, Latvia and, at least in part, the EU than the apparently limited commercial dispute introduced by the Claimants. In fact, the position is starker here given that the parties to those broader disputes are not the same as the parties to this investor-State arbitration; unlike in the *Chagos* case, the Parties to these 'upstream disputes' are sovereign entities and the EU, whereas the Claimants are private persons. As such, the Claimants are not entitled to have a court or tribunal decide on these questions of sovereign rights, and in so doing circumvent the fundamental principle of State consent to jurisdiction.[301]

270. In the *Chagos* dispute between Mauritius and the United Kingdom, the Arbitral Tribunal stated that it "*does not categorically exclude that in some instances a minor issue of territorial sovereignty could indeed be ancillary to a dispute concerning the*

---

300 **RL-0081-ENG** Award, 18 March 2015, *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, paras. 211-212.

301 See below, paragraph 285.

interpretation or application of the Convention (UNCLOS)".[302] Norway reserves its position on the correctness or otherwise of that statement. But in any event, it is just the reverse here: the investment dispute is ancillary to (and indeed depends upon) the resolution of the sovereign rights dispute. Norway's sovereign rights over the maritime resources on the Norwegian continental shelf around Svalbard and in the Loop Hole are at the heart of the dispute before the Tribunal and by no means constitute minor issues.

271. By contrast, "*minor issues*" are ancillary matters which do not form the basis of the dispute submitted to the Tribunal and are not prerequisites to obtain a decision for the other submissions. International courts and tribunals have adopted a negative definition of "*minor issues*".

272. The ICSID Tribunal in *Gold Reserve v. Venezuela* affirmed that "[i]*t appears to the Tribunal that there are two key issues that need to be addressed initially, with a number of more minor issues to consider thereafter*."[303]

273. In the *South China Sea Arbitration* case, the Tribunal stated that

> "*The Convention* [UNCLOS]*, however, does not address the sovereignty of States over land territory. Accordingly, this Tribunal has not been asked to, and does not purport to, make any ruling as to which State enjoys sovereignty over any land territory in the South China Sea, in particular with respect to the disputes concerning sovereignty over the Spratly Islands or Scarborough Shoal. None of the Tribunal's decisions in this Award are dependent on a finding of sovereignty, nor should anything in this Award be understood to imply a view with respect to questions of land sovereignty*".[304]

274. The circumstances of the present case are the reverse: the present Tribunal's decisions *are* dependent on a finding regarding Norway's sovereign rights to the living (sedentary) resources on its continental shelf in the Loop Hole and on its continental

---

302 **RL-0081-ENG** Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), PCA Case No. 2011-03, Award, 18 March 2015, para. 221; see also: **RL-0066-ENG** Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation), PCA Case No. 2017-06, Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020, para. 157; **RL-0082-ENG** The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China), PCA Case No. 2013-19, Award, 12 July 2016, para. 47.

303 **CL-0337** *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, para. 752 – emphasis added.

304 **RL-0082-ENG** *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Award, 12 July 2016, para. 5 – emphasis added.

shelf around Svalbard, and on the territorial application of certain provisions of the Svalbard Treaty.

275. In an even more recent case, another Tribunal stated:

> "*The Arbitral Tribunal is of the view that, in the present case, the Parties' dispute regarding sovereignty over Crimea is not a minor issue ancillary to the dispute concerning the interpretation or application of the Convention. On the contrary, the question of sovereignty is a prerequisite to the Arbitral Tribunal's decision on a number of claims submitted by Ukraine under the Convention*".[305]

The same is true in the present case: the question of the exercise of Norway's sovereign rights is a prerequisite to all claims submitted by the Claimants under the ICSID Convention and the BIT. With the utmost respect, an investment tribunal cannot decide extremely sensitive political questions of the exercise of sovereign rights.

276. Since the Tribunal cannot rule on the existence of the Claimants' entitlement to harvest snow crab on the Norwegian continental shelf without ruling on the exercise of Norway's sovereign rights on the continental shelf around Svalbard and in the Loop Hole, it follows that the Tribunal cannot decide on the subsequent question of the Claimants' alleged rights.

277. The Claimants consider that:

> "*the NEAFC licenses were issued for 'unlimited' or 'unregulated' species, the licenses were issued by Latvian authorities based on the representation that North Star would be fishing for snow crabs in international waters, without quota restrictions*".[306]

They further allege that:

> *"Norway's arbitrary, contradictory, discriminatory and unreasonable actions between July 2015 and today, taken individually and together, ultimately preventing Claimants from harvesting snow crabs either in the Loophole or in the Svalbard waters, are in*

---

305 **RL-0066-ENG** *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, PCA Case No. 2017-06, Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020, para. 195. In that case, as a consequence, the Tribunal found that it had no jurisdiction over the Ukrainian claims inasmuch as Ukraine's submissions explicitly or implicitly required a prior answer to the question of sovereignty and ordered the Applicant to go back over its Memorial accordingly. See also **RL-0082-ENG** *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Award, 12 July 2016, paras. 47 and 48.

306 Memorial, ¶280.

> *violation of the obligation to provide Claimants 'equitable and reasonable' treatment under Article III of the BIT.*"[307]

And that:

> "*Norway has also acted in violation of the 1920 Svalbard Treaty by failing to uphold the rights of equal access and treatment that benefit Claimants within the territory covered by that treaty, which includes its economic zone, or the SFPZ, as well as its continental shelf. Notably, Norway has refused to recognize validly issued fishing licences issued by Latvia, a party to the Svalbard Treaty, on the basis of an EU Regulation.*"[308]

278. Those assertions first require the regime applicable to the harvesting of snow crab on the Norwegian continental shelf around Svalbard and in the Loop Hole to be determined. The determination of that regime would involve the resolution of several interlocking questions, including:

- first, in relation to the Svalbard Treaty, whether the harvesting of snow crab outside the territorial waters is covered by Article 2 of the Svalbard Treaty;
- secondly - *if* the Svalbard Treaty applies beyond the territorial waters - whether any state Party to it may unilaterally regulate exploitation of snow crab regardless of Article 77 of UNCLOS and Norwegian legislation;
- thirdly, whether the snow crab is a sedentary species in accordance with Article 77 of UNCLOS and thus falls under the jurisdiction of the coastal State on the continental shelf, or whether snow crab is not a sedentary species and harvesting falls under the regime of the high seas and is covered by the NEAFC Convention in the Loop Hole.

279. The Claimants further argue that:

> "*Norway's refusal to grant the Claimants an exemption to harvest snow crabs, combined with the granting of such exceptions to at least five Russian vessels is a breach of Article IV of the BIT which requires Norway to grant Claimants most favourable treatment*".[309]

---

307 RFA, ¶254.

308 Memorial ¶630 – footnote omitted. See also Memorial, ¶522.

309 *Idem*.

> "*Norway is, through the operation of this provision, obliged to observe its obligations entered into with regard to the Claimants and their investments pursuant to the Svalbard Treaty. Norway's violations of this Treaty, through its refusal to grant North Star access to the maritime resources of Svalbard (including its continental shelf) and its discriminatory treatment of the Claimants' requests for exemptions from the prohibition against snow crab harvesting, therefore also constitute violations of Article IV BIT*."[310]

By making such an assertion, the Claimants (rightly) place the question of the legal regime applicable to the harvesting of snow crab and the question of subsequent legality of their alleged licences under the Svalbard Treaty as a prerequisite to determining alleged violations of the BIT.

280. Similarly, the Claimants allege that:

> "*Norway has through its actions expropriated the Claimants' snow crab fishing rights in the Loop Hole and in the maritime zones of the Svalbard archipelago, or subjected such rights to measures having similar effects (such measures also being considered "expropriation" under Article VI BIT)*."[311]

> "*Norway's expropriation of the Claimants' fishing rights effectively halted the Claimants' entire business operation in Norway*."[312]

281. But they do not address the point that the very existence of their rights is dependent upon the nature of Norway's sovereign rights on its continental shelf in the Loop Hole and around Svalbard. The legality and therefore the very existence of these alleged investments is dependent upon the answer to the questions relating to legal regime applicable to the harvesting of snow crab and Norway's sovereign rights relating to the Norwegian continental shelf around Svalbard and in the Loop Hole. This again demonstrates the preponderance of the dispute concerning Norway's sovereign rights over the dispute relating to the Claimants' alleged investment.

282. As demonstrated above, the Tribunal could not determine the Claimants' claims without deciding first on issues relating to Norway's sovereign rights on the Norwegian continental shelf around Svalbard and in the Loop Hole and can only be settled following a determination of those rights. Necessarily, the Tribunal would have to pre-determine issues in this matter *before* dealing with the alleged breaches of the BIT. The

---

310 *Ibid*, ¶286 – emphasis added.

311 *Ibid*, ¶para. 292.

312 *Ibid*, ¶para. 299.

preponderant dispute before the Tribunal is therefore that which both relates to the legal regime applicable to harvesting of crab and to the sovereign rights of Norway to those resources.

283. The Tribunal constituted on the basis of the ICSID Convention and Article IX of the BIT has no jurisdiction *ratione materiae* to deal with the Claimants' submissions in their entirety. They require, on the one hand, a prior determination of the regime applicable to harvesting of snow crab and, on the other hand, another preliminary determination of the legality of alleged fishing rights by an application of the NEAFC Convention in the Loop Hole linked with Article 77 of UNCLOS and an application of the Svalbard Treaty in Norway's maritime areas around Svalbard. Consequently, Norway requests the Tribunal to find that it does not have jurisdiction to deal with the dispute as presented by the Claimants.

4.2 LEGAL INTERESTS OF ABSENT PARTIES "WOULD FORM THE VERY SUBJECT-MATTER OF THE DECISION"

284. The well-known and undisputed 'Monetary Gold' principle provides a further bar to the Tribunal's jurisdiction. According to the principle, the Tribunal may not adjudicate upon the Claimants' case if, in so doing, it would need to decide on the rights and obligations of third parties which "*would form the very subject matter of the decision*".[313] The principle is engaged in the present case because, in order to deal with the Claimants' submissions, the Tribunal would necessary have to decide—as a necessary pre-requisite—the rights and obligations of Latvia and the European Union.

285. The Claimants' case relies heavily on rights supposedly granted to North Star by licences issued by Latvia as a Member State of the EU. The existence of such a right depends upon the competence of Latvia to issue such licences. It also follows that, in the case of the licences purportedly granted by Latvia in respect of the Loop Hole, the Tribunal cannot determine those claims without determining whether the EU (as the NEAFC Convention party) has been placed in breach by Latvia's actions. The Claimants rely on the fact that the EU is a party to the NEAFC Convention to argue

313 **RL-0083-ENG** *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Judgment - Preliminary question, 15 June 1954, pp. 32-33.

that the licences granted by Latvia are valid. But the EU itself objects to European vessels harvesting snow crab in the Loop Hole. With regard to Svalbard, the EU considers that Norway cannot object to harvesting in the Svalbard area beyond 12 nautical miles. It was on those bases—the NEAFC Convention (through the EU) and the Svalbard Treaty—that Latvia issued licences to North Star. And those licences form the basis of the Claimants' claim to an entitlement to harvest snow crab on the Norwegian continental shelf. Thus in order to determine the dispute as submitted by the Claimants, the Tribunal will be required to decide on the legal rights and obligations of two absent indispensable Parties, Latvia and the EU, which it cannot do by virtue of the *Monetary Gold* principle.

4.2.1 The dispute relates to the validity of the licences granted by Latvia

286. The purported 'licences' granted to North Star by Latvia are at the heart of the Claimants' case. This is true generally and, in particular, in relation to the Claimants' claims that: (1) their investment was expropriated; and (2) their alleged acquired rights and legitimate expectations, allegedly based on those licences, were breached.

4.2.1.1 The Claimant's claims are based on the licences granted by Latvia

287. As early as paragraph 4 of the RFA, the Claimants assert that they "*acquired fishing rights through licences issued by the Republic of Latvia*" and they explain:

> "*These licences were issued under two international fisheries agreements to which Norway is a party. The first set of licences, for fishing in the Loophole, were issued under the North-East Atlantic Fisheries Convention (**NEAFC**) regime. The second set of licenses were issued under the 1920 Treaty concerning the Status of Spitsbergen (Svalbard) (**Svalbard Treaty**) for harvesting crabs in an area within 200 nautical miles off the coasts of the archipelago of Svalbard*".[314]

And the Claimants stress that these licenses:

> "*are assets in the nature of 'business concessions conferred by law' and/or claims to performance having economic value, namely licences to harvest a natural resource (snow crabs) issued under enabling provisions of European law, Latvian law, NEAFC and the Svalbard Treaty, and which Norwegian authorities have an obligation to respect. As such, North Star's licences are 'investments' pursuant to Article I(1) BIT*".[315]

---

314 RFA, ¶4; see also RFA ¶¶45-47.

315 RFA, ¶48 (emphasis added, footnotes omitted). See also Memorial, ¶¶519-523.

288. In several other passages in the RFA, the Claimants stress that it was these licences, issued by Latvia, which gave North Star "*the legal right to harvest snow crabs in waters where Norway exercises its jurisdiction* […]"[316] and that these licenses are therefore "*investments in the 'territory' of Norway pursuant to Article I(5) BIT.*"[317] They further stress that these licences provided North Star "*with legal authorization to harvest snow crabs in the NEAFC zone*"[318] and "*in waters around the Svalbard*".[319] They complain that "*North Star was prosecuted by Norway and condemned for nothing more than exercising the valid fishing rights granted to it by Latvia under the Svalbard Treaty*."[320] And the Claimants reiterate in the Memorial that they:

> "*certainly have acquired or vested rights recognized by both domestic and international law. Claimants hold NEAFC and Svalbard fishing licenses for snow crab issued by Latvia, pursuant to the NEAFC Scheme and Convention in respect of NEAFC and pursuant to EU Regulations in respect of Svalbard. Further, under Latvian law, existing fishing licences are both automatically renewable and transferable rights*".[321]

Similarly, Mr Pildegovics in his witness statement explains that "[t]*he NEAFC licences issued to North Star thus authorized it to fish for any unregulated species, including snow crab*."[322] Further, the Claimants allege that they relied upon those licences when North Star

> "*decided to redirect its vessels to the waters off the Svalbard archipelago, another fishing area <u>for which it held valid snow crab harvesting licences issued by Latvia</u>, in accordance with an EU Council Regulation, and pursuant to rights existing under the Svalbard Treaty*".[323]

---

316 RFA, ¶60.

317 *Ibid.*, emphasis added.

318 RFA, ¶61; see also, ¶¶182, 205, 267, and Memorial ¶521.

319 RFA, ¶62; see also ¶¶209-210, 273 or Memorial ¶¶278 and 522.

320 RFA, ¶273.

321 Memorial, ¶623.

322 Pildegovics, ¶95. See also ¶¶86-87, 93-95 and Witness Statement of Kirill Levanidov, 11 March 2021 ("**Levanidov**"), ¶36.

323 RFA, ¶132 (emphasis added); see also Memorial, ¶¶5, 372, 377.

289. In a passage entitled "*Norway's violations of the Svalbard Treaty*", the Claimants complain that "*Norway has refused to recognize validly issued fishing licences issued by Latvia, a party to the Svalbard Treaty, on the basis of an EU Regulation*".[324]

290. That is the Claimants' case. It is not accepted by Norway, as the Claimants themselves acknowledge:

> "*the current Norwegian position is* […] *that Claimants' Svalbard licences, issued by the Republic of Latvia on the basis of an EU Regulation (itself adopted based on the EU and Latvia's rights under the Svalbard Treaty) are without legal effect*".[325]

291. It is indeed true that "*Norway's position on international law does not make it international law*";[326] but the same is true of the Claimants' position. For its part, Norway considers that these licences—put forward by the Claimants as investments—are not valid and Latvia had no authority to issue them. That issue is considered further in **Chapter 5**, below. In other words, the central issue which is before the Tribunal requires a decision on the validity of licences *issued by Latvia*, and—necessarily—Latvia's *competence as a matter of international law* to issue them. If Latvia had no such competence, the Claimants' could have had no rights to engage in snow crab harvesting, and therefore no investment: *nemo dat quod non habet*.

292. A decision on Latvia's competence would therefore form the very subject matter of the Tribunal's decision in this case. As well as arising generally in order for the Tribunal to decide on the very existence of an investment, the point also arises when considering the Claimants' two main allegations of breach:

- the alleged expropriation of their fishing rights; and
- the allegedly acquired rights of the Claimants around Svalbard and in the Loop Hole.

In both respects the only title on which the Claimants base their claimed rights are the licences granted to North Star by Latvia.

---

324 Memorial, ¶630 (emphasis added).

325 Memorial, ¶588.

326 *Id.* – emphasis in the text.

4.2.1.2 The alleged expropriation of the Claimants' harvesting rights

293. The Claimants assert that Norway "*effected a creeping and illegal expropriation of Claimants' investment*."[327] They allege that "[f]*rom September 2016, it therefore became clear that Norway would no longer allow the fishing of snow crab in the Loop Hole by EU vessels holding NEAFC licences, or the landing of their catches in Norwegian ports*."[328]

294. Expropriation is dealt with in **Chapter 6** of this Counter-Memorial, but the fact is that the allegedly expropriated rights or expectations are, by the Claimants' own admission, derived from Latvia's licences and dependent upon Latvia's competence as a matter of international law to have issued them.

295. For its part, Norway considers that the Claimants were never entitled to harvest snow crab on the Norwegian continental shelf, either around Svalbard or in the Loop Hole. But, in order to resolve that very central issue, the Tribunal would have to rule on the existence of those alleged rights said to have been granted by Latvia, *i.e.* to rule on Latvia's rights and obligations which would form the very subject-matter of its decision.

4.2.1.3 The alleged acquired rights of the Claimants

296. The Claimants also argue that the Tribunal should find and decide that Norway has infringed their acquired rights. Here, the point is the same. In order to determine whether any rights had in fact been acquired under the relevant treaties, *i.e.* whether the Latvian-issued licences were in fact a source of rights, the Tribunal would have to rule on whether Latvia had competence to issue those licences. And, if it were not, the consequence would be that the purported issuance of those rights would constitute an internationally wrongful act entailing Latvia's and the EU's responsibility, a determination which plainly falls out of the Tribunal's jurisdiction.

297. The Claimants ask the Court to find that:

---

327 Memorial, ¶675.

328 *Id*., ¶690.

> "[i]*n the circumstances, Norway's acts constitute a failure to respect Claimants' acquired rights to catch snow crab in the Barents, the violation of which requires full reparation, as per applicable international law principles*".[329]

They claim that they:

> "*certainly have acquired or vested rights recognized by both domestic and international law. They hold NEAFC and Svalbard fishing licenses for snow crab issued by Latvia, pursuant to the NEAFC Scheme and Convention in respect of NEAFC and pursuant to EU Regulations in respect of Svalbard. Further, under Latvian law, existing fishing licences are both automatically renewable and transferable rights*".[330]

Here yet again, the Claimants base their alleged rights on the licences purportedly granted by Latvia and which relate: (1) to the continental shelf areas around Svalbard pursuant to EU Regulations and Latvia's interpretation of the Svalbard Treaty; and (2) to the Loop Hole pursuant to Latvia's (but not the EU's) interpretation of the NEAFC Convention and UNCLOS.[331] The latter licenses were granted by Latvia in blatant disregard of the provisions of the NEAFC Convention, and without either Norway's or Russia's express consent as required by UNCLOS Article 77, and (further) in spite of the request by the EU to Latvia to revoke these licences.

298. The Claimants' presentation of the issue makes clear that the basis of their alleged rights is, and is only, the licences granted by Latvia:

> "*Norway has also acted in violation of the 1920 Svalbard Treaty by failing to uphold the rights of equal access and treatment that benefit Claimants within the territory covered by that treaty, which includes its economic zone, or the SFPZ, as well as its continental shelf. Notably, Norway has refused to recognize validly issued fishing licences issued by Latvia, a party to the Svalbard Treaty, on the basis of an EU Regulation*".[332]

Once again, the Claimants rely on the Latvian licences to assert the existence of rights to harvest snow crab in maritime areas around Svalbard, and the violation of the Svalbard Treaty.

299. They add:

---

329 *Id*., ¶629.

330 *Id.*, ¶623.

331 *Id.*, ¶629.

332 *Id*., ¶630.

> "*By refusing to recognize the fishing licences granted to North Star's vessels by Latvia pursuant to Article 2 of the 1920 Treaty and the relevant EU regulations, by rejecting the applications made by Claimants to snow-crabs quotas reserved by Norway to its nationals, by harassing, arresting, fining North Star and its vessels and by convicting North Star and one of its captains, Mr. Uzakov, Norway has violated each and every one of the obligations listed above*."[333]

In other words, the Claimants complain that Norway does not recognise their harvesting rights based on the licences granted by Latvia.

300. However, Norway does not accept the validity of these licences and considers them to be contrary to the UNCLOS, the NEAFC Convention and the Svalbard Treaty as well as domestic law. And since Norway has acted against North Star and its vessels and temporarily arrested one of its vessels precisely because in its view those licences are unlawful, the legality of the licences and, consequently, Latvia's right to issue them, are at the heart of the dispute.

301. In order to resolve that very central issue, the Tribunal would again have to rule previously on the existence of these alleged rights to harvest snow crab, that is on the validity of the Latvian licenses, *i.e.* on Latvia's rights and obligations which would form the very subject-matter of its decision.

4.2.2 The Claimants' Purported 'Licences' are said to Derive from the EU's position on the Svalbard Treaty and its Membership of the NEAFC Convention

302. In addition to the licences granted by Latvia, the Claimants also rely on EU regulations and declarations to assert their right to harvest snow crab on the Norwegian continental shelf around Svalbard, and on the EU's membership of the NEAFC Convention, by which Latvia has purportedly granted them 'licences' to harvest snow crab on the Norwegian continental shelf in the Loop Hole, despite the EU's own objections.

303. In both areas, the Claimants' reasoning places the EU (and its rights and obligations) at the centre of the argument, in the same way as Latvia, and requires the Tribunal to rule on the rights and obligations of the EU; for similar reasons it follows that the Tribunal has no jurisdiction to rule on two of the main arguments which are at the heart of the Claimants' case:

---

333 *Id*., ¶642 – footnotes omitted.

- the alleged expropriation of their investments; and

- the claim of alleged acquired rights or legitimate expectations.

4.2.2.1 The Claimants' claims are based on the EU position

304. As stated above, the EU is not a neutral and external party to the dispute between the Claimants and Norway.[334] The EU has exclusive competence with regard to "*the conservation of marine biological resources under the common fisheries policy*"[335] and shared competence over "*fisheries*".[336] Accordingly, the EU manages the European Common Fisheries Policy[337] and publishes an annual regulation concerning the fishing possibilities of Member States and their nationals in waters beyond its Member States' waters. It is the EU, and not its Member States, which is a party to the NEAFC Convention.

4.2.2.1.1 *The Claimants' claims are based on the EU position regarding the Svalbard Treaty*

305. In view of its competence in the field of fisheries, the EU – as a non-party – has taken a position on the interpretation of the Svalbard Treaty, expressed in a note verbale dated 1 November 2016 to Norway.[338] Its position is that the Svalbard Archipelago generates its own continental shelf and EEZ and nationals of the States parties to the Svalbard Treaty have equal access to fishing and harvesting of sedentary and non-sedentary resources in accordance with Articles 2 and 3 of the Svalbard Treaty (which Norway refutes).[339]

306. The position of the EU was also affirmed by an email of 22 December 2016 from the EU Directorate-General for Maritime Affairs and Fisheries (DG Mare) to the Norwegian Directorate of Fisheries in which it was specified that vessels from the EU

---

334 See above, paragraph 422.

335 **RL-0084-ENG** Consolidated version of the Treaty on the Functioning of the European Union of 25 March 1957, Article 2.1.

336 *Id*., Article 4.2(d).

337 *Id*., Article 38.1.

338 **R-0084-ENG** Note verbale 1 November 2016 from the EU to Norway is quoted above, paragraph 239.

339 **R-0084-ENG** Note verbale 1 November 2016 from the EU to Norway. (The Claimants have submitted a different version of the note verbale as **C-0071**).

Member States have "*a licence to fish for snow crab in the sea areas around Svalbard*".[340] It was confirmed by the EU Regulation 2017/127, in which the EU states that:

> "*As regards the fishing opportunities for snow crab around the area of Svalbard, the Treaty of Paris of 1920 grants an equal and non-discriminatory access to resources for all parties to that Treaty, including with respect to fishing. The Union's view of this access as regards fishing for snow crab on the continental shelf around Svalbard has been set out in a note verbale to Norway dated 25 October 2016, in respect of a Norwegian regulation of the fishing for snow crab on its continental shelf, which in the Union's view disregards the specific provisions of the Treaty of Paris and in particular those laid down in Articles 2 and 3 thereof. In order to ensure that the exploitation of snow crab within the area of Svalbard is made consistent with such non-discriminatory management rules as may be set out by Norway, which enjoys sovereignty and jurisdiction in the area within the limits of the said Treaty, it is appropriate to fix the number of vessels that are authorised to conduct such fishery. The allocation of such fishing opportunities among Member States is limited to 2017. It is recalled that primary responsibility for ensuring compliance with applicable law lies with the flag Member States*".[341]

307. Thus, the Claimants at one and the same time assert that their alleged rights to harvest snow crab on the Norwegian continental shelf around Svalbard are derived from Latvian licences, and those licenses are based on EU regulations. They say that Norway's alleged violations include:

> "*Norway's refusal to recognize the validity of snow crab fishing licences around the archipelago issued by Latvia <u>on the basis of an EU Regulation</u> and the consecutive arrest of one of Claimants' vessels. This EU Regulation was adopted only after Norway had failed to withdraw a discriminatory regulation regarding snow crab fishing adopted 22 December 2015, following the EU's protest against such regulation*".[342]

308. That the EU regulation is the basis for the Claimants' alleged rights is affirmed and reaffirmed by the Claimants in several places in their RFA and Memorial:

- "*Claimants hold* [...] *Svalbard fishing licenses for snow crab issued by Latvia* [...] *<u>pursuant to EU Regulations</u> in respect of Svalbard*";[343]

---

340 **R-0063-ENG** Email 22 December 2016 from DG Mare to the Norwegian Directorate of Fisheries.

341 See Memorial, ¶672 and **RL-0014-ENG** EU Regulation 2017/127, para. 35. See also **RL-0163-ENG** EU Regulations 2018/120, para. 37, **RL-0164-ENG** 2019/124, para. 42 and **RL-0165-ENG** 2020/123, para. 49.

342 Memorial, ¶5 – emphasis added.

343 Memorial, ¶623 – emphasis added.

- "[n]*otably, Norway has refused to recognize validly issued fishing licences issued by Latvia, a party to the Svalbard Treaty, on the basis of an EU Regulation*";[344]

- "[b]*y refusing to recognize the fishing licences granted to North Star's vessels by Latvia pursuant to Article 2 of the 1920 Treaty and the relevant EU regulations*";[345]

- "[b]*y failing to allow Claimants to exercise their rights under Svalbard licenses issued by Latvia, on the basis of EU Regulations, to fish snow crab around the Svalbard Archipelago, Norway has committed a further violation of the BIT*".[346]

309. The EU does not seem to share the Claimants' bald assertions. Regulation 2017/127 states that: "*The allocation of fishing opportunities available to the Union in the zone of Svalbard is without prejudice to the rights and obligations deriving from the Treaty of Paris of 1920*".[347] That qualification calls for caution concerning the rights deriving from the Treaty.

310. The issue of the scope of Regulation 2017/127 (and the sensitive, inter-State nature of the underlying dispute) is further underscored by the fact that Latvia initiated a dispute against the European Commission for failure to act against Norway in relation to the snow crab dispute (Case T-293/18). The case was ultimately found to be inadmissible by CJEU, but the reasoning is instructive. Latvia initiated the case and sought, in the words of the CJEU:

> "*in essence, to require the Commission to adopt measures relating to the defence of the fishing rights and European Union interests in the Svalbard fishing area (Norway) and, second, to order the Commission to adopt a position in that regard which is not the source of legal effects unfavourable to the Republic of Latvia*".[348]

---

344 *Ibid*., ¶630 – emphasis added.

345 Memorial, ¶642 – emphasis added.

346 *Ibid*., ¶809. See also RFA, ¶254: "Norway failed to accept Claimants' investments in Norway, in particular the Claimants' licences *issued lawfully under EU Regulations 2017/127, 2018/120 and 2019/124*" – emphasis added.

347 See **RL-0014-ENG** EU Regulation 2017/127, Annex. IA.

348 **RL-0085-ENG** Case T-293/18 *Latvia v European Commission*, Order, 30 January 2020.

311. The case thus concerned the harvesting of snow crab in "*the Svalbard fishing area in Norway*", and Latvia argued that the Commission had infringed *its* rights, firstly by not setting a deadline for negotiating the harvesting possibilities of the Member States in the area, and, secondly, by not having brought litigation against Norway.[349] In addition to underlining the inter-State nature of the issues presented by the Claimants to this Tribunal and the existence of intractable disputes involving Norway, the Claimants, Latvia and the European Union,[350] it is noteworthy that the CJEU itself noted that:

> "*29. In the second place, with regard to the part entitled 'The snow crab dispute in Svalbard: key actions carried out so far by the Commission' (paragraphs 18 to 52 of the position on the invitation to act), the Commission describes in detail the EU position on the interpretation of the Treaty of Paris by the Member States which are Contracting Parties, the correspondence with the Republic of Latvia subsequent to that Member State's accession to the Treaty of Paris on 13 June 2016, and the various actions undertaken by the Commission. In that regard, the Commission concludes that 'all these actions cannot be interpreted in the sense that [it] had authorised Latvian vessels to engage in this fishing activity and assumed the legal risks associated with disregarding Norwegian [legislation]'* [...]
>
> *30. It follows that that part of the position on the invitation to act is, in essence, descriptive and, in itself, cannot produce legal effects affecting the interests of the Republic of Latvia*".[351]

312. The CJEU directly addressed the actions of the Claimants in noting the European Commission's position that:

> "*despite those warnings, the vessel 'Senator' fished for snow crab in the Svalbard fishing area and was arrested for having fished without the express consent of the Kingdom of Norway and in breach of Norwegian Regulation No 1836 of 19 December 2014*."[352]

313. In particular, when addressing the alleged right deriving from Regulation 2017/127—now directly relied upon by the Claimants—the CJEU noted:

> "*32. It is true that, in paragraph 20 of the position on the invitation to act, the Commission stated that, 'in line with the EU's consistent position on the interpretation of [the Treaty of Paris], those Member States which [were]*

---

349 *Id*., paras. 3 and 4.

350 Indeed, the Commission itself considered that: "[t]*he issues at stake around Svalbard go beyond fisheries interests and spill-over risks* [are] *an important element that had to be taken into account at every step of the way*" (*Id*., para. 5, quoting para. 63 of the Commission's written submissions).

351 **RL-0085-ENG** Case T-293/18 *Latvia v European Commission*, Order, 30 January 2020, paras. 29-30.

352 *Id*., para. 29

> *contracting parties [were] entitled to equal access to fishing resources on the maritime zones of Svalbard, including to sedentary species such as snow crab on the archipelago's continental shelf'. However, contrary to the Republic of Latvia's claims, that sentence cannot be interpreted as expressing encouragement to make use of the fishing rights granted by EU legislation. First, as is apparent from paragraph 25 of the position on the invitation to act, the Commission highlights the fact that Regulation 2017/127 contains a footnote according to which 'the allocation of fishing opportunities available to the Union in the zone of Svalbard is without prejudice to the rights and obligations deriving from [the Treaty of Paris]', pointing out that 'a provision of EU law cannot have by itself any binding effects and/or create enforceable obligations upon third countries'. Second, it is apparent from the case file that, on several occasions, the Commission reminded the Member States and, in particular, the Republic of Latvia of the legal and practical uncertainties surrounding fisheries in the Svalbard area, requesting that they inform national operators considering such activities of the risks involved.*"[353]

314. The EU has disavowed Latvia's position—now adopted by the Claimants—that Regulation 2017/127 granted the Claimants' rights to harvest snow crab on the Norwegian continental shelf around Svalbard pursuant to the Svalbard Treaty. Norway is of the view that the Svalbard Treaty does not confer rights to third States in relation with the Norwegian continental shelf around Svalbard. But that is not a dispute that the Tribunal can engage with, because in so doing the Tribunal would have to take a position on the interpretation of that Treaty given by the EU, thus interfering in "[t]*he diplomatic row between Norway and the European Union*"[354] (which is also a "juridical row") and determining the rights and obligations of all State parties to the Svalbard Treaty.

4.2.2.1.2 *The Claimants' claims are allegedly based on rights deriving from the EU's membership of the NEAFC Convention*

315. The issue arises differently with respect to the Norwegian continentals shelf in the Loop Hole. According to the Claimants, their rights to harvest snow crab in the Loop Hole are based on licences "*issued under the North-East Atlantic Fisheries Convention (NEAFC) regime*"[355] to which the EU alone (and not Latvia) is a party.[356] The EU's participation in the NEAFC system is presented as the basis for the North Star's alleged rights in the Loop Hole, since the licences issued by Latvia are presented as NEAFC

353 *Id*., para. 32 – emphasis added.

354 RFA, ¶144.

355 RFA, ¶4.

356 Memorial, ¶45.

licences which Latvia could have issued only because the EU is a member of the NEAFC system.[357]

316. The Claimants also assert that the EU has confirmed their right to harvest snow crab in the Loop Hole: "[t]*he European Union confirmed on 30 September 2013 that snow crab fishing could be started immediately following the appropriate notification to NEAFC*".[358] In doing so, the Claimants place the EU's membership of the NEAFC system at the centre of the existence of their alleged rights in the area.

317. But the EU's position is (once again) at odds with the Claimants' position. In its letter of 5 August 2015 (which has already been quoted), the EU stated:

> "*It follows from this classification of snow crab as 'sedentary species' that only the relevant coastal States, i.e. Norway and the Russian Federation, are entitled to exploit (i.e. to harvest) it by virtue of their sovereign rights under the continental shelf regime of UNCLOS and that, as spelled out in Article 77(2) of UNCLOS, no other State is able to do so unless it has obtained the coastal State's explicit consent. Moreover, the coastal State's rights are exclusive in a sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake any such activities without the express consent of the coastal State.*
>
> *Therefore, without the express consent of the relevant coastal States (namely Norway and the Russian Federation in the present instance), these fisheries are illegal as they would be in contravention of Article 77(2) of UNCLOS.*
>
> *The Commission would underline that the EU, as a Contracting Party to UNCLOS, is under an obligation to respect Article 77(2) of UNCLOS. Similarly, upon its ratification by the Union, UNCLOS forms part of the legal order of the Union pursuant to the provisions of Article 216 of the Treaty on the Functioning of the European Union, such that also the Member States are bound to respect it.*
>
> *Consequently, since both Norway and the Russian Federation have given no such consent, Member States are advised that they should rescind any current licences authorising their vessels to fish for snow crab and any other sedentary species such as king crab in the NEAFC Regulatory Area and should not issue any new licences to this effect and, as appropriate, re-call the vessels concerned.*"[359]

Of course, this firm position has not deterred Latvia from maintaining the 'licences' granted to the Claimants, nor has it deterred the Claimants from relying on their alleged validity. But it demonstrates that the Claimants base their alleged entitlement on a

---

357 See , for example, Memorial, ¶¶280, 326, 690.

358 Memorial, ¶330.

359 **R-0033-ENG** Letter 5 August 2015 from DG Mare to the EU Member States.

foundation which—at its core—involves an unresolved dispute involving Latvia, Norway and the EU about the entitlement under the NEAFC Convention and UNCLOS to grant such licences.

318. Neither the fact that the EU is a party to the NEAFC system nor its misinterpretation of the Svalbard Treaty as a non-party can be used by the Claimants as a basis for harvesting snow crab on the Norwegian continental shelf, without Norway's consent in accordance with the Article 77 of the UNCLOS.

319. Here, then, the position is similar to that in respect of the Svalbard Treaty. It is in fact more stark, because as the EU is the party to the NEAFC Convention, the Tribunal would have to address the issue of the *EU*'s rights and obligations deriving from the NEAFC Convention and UNCLOS in order to determine the legality of the Claimants' alleged rights to harvest snow crab. The Tribunal would also have to consider Latvia's obligations *vis-à-vis* the EU, since Latvia purportedly issued those licences, in contradiction to the EU position on the NEAFC Convention and the harvesting of snow crab.

320. In both cases, by justifying their claims on the position (or alleged position) of the EU, the Claimants place this issue at the centre of several of their claims, in particular (though not exclusively):

- the alleged expropriation of their fishing rights; and
- their allegedly acquired rights on the Svalbard and the Loop Hole.

4.2.2.2 The alleged expropriation of Claimants' harvesting rights

321. Norway has already described the Claimants' position regarding the alleged expropriation of their so-called 'right' to harvest snow crab on the Norwegian continental shelf.[360] In addition to relying on licences issued by Latvia to harvest snow crab in the areas around Svalbard and in the Loop Hole also rely on rights allegedly derived from the EU's statements and regulations.

[360] See above, **Section 4.2.1.3**.

322. The fact that the EU is a party to the NEAFC Convention and that annual EU regulations concerning fisheries outside the waters of its Member States mention the Svalbard area, and the content of EU statements concerning the Svalbard Treaty interpretation do not provide a satisfactory basis for determining the existence of the Claimants' right to harvest snow crab.

323. As noted above,[361] the precise nature of the involvement of the EU and its position in relation to the Norwegian continental shelf around Svalbard, on the one hand, and the Norwegian continental shelf in the Loop Hole, on the other hand, are not identical: concerning Svalbard, the EU seems to share in part the Claimants' basic analysis, although it disapproves any immediate implementation[362] but its views clearly differ from those of the Claimants so far as the Loop Hole is concerned. However, in both cases, the Tribunal will itself have to pronounce on the validity, or otherwise, of the EU's legal positions – and this would be an indispensable prerequisite for deciding on the case placed before it by the Claimants.

4.2.2.3 The alleged acquired rights of the Claimants

324. The Claimants also allege that Norway failed to respect their acquired rights[363] contained in the licences issued by Latvia. From the Claimants' own presentation of the point, it appears that the existence of these alleged acquired rights was based from the outset on the position of the EU. For example, they affirm that:

> *"209. The Svalbard Treaty is relevant to this dispute insofar as North Star held licenses issued by Latvia under European Council Regulations adopted pursuant to the rights of EU member states deriving from the Svalbard Treaty.*
>
> *210. These licences granted North Star the right to harvest snow crabs in waters off the Svalbard archipelago, including from Svalbard's continental shelf. North Star's Svalbard licences are part of its investments in the territory of Norway*."[364]

The Claimants also affirm that "[b]*y refusing to recognize the fishing licences granted to North Star's vessels by Latvia pursuant to Article 2 of the 1920 Treaty and the*

361 See above, paragraphs 285 and 302.

362 See above, **Section 4.1.2.2** and paragraphs 309-310.

363 Memorial, ¶629.

364 RFA, ¶¶209-210 – emphasis added.

relevant EU regulation", Norway has violated the Svalbard Treaty and BIT obligations.[365]

325. In these statements, the Claimants complain that Norway has failed to live up to the expectations that the EU's position has raised among the Claimants, or has failed to respect rights that they *actually have* as a matter of law.

326. In order to determine whether Norway has failed to respect the Claimants' acquired rights, *quod non*, the Tribunal would again have to ascertain the validity of the EU's position concerning UNCLOS, the Svalbard Treaty and the scope of its membership to NEAFC system; in other words, to rule on the EU's rights and obligations, which, unavoidably, would be the very subject-matter of the Tribunal's decision.

4.2.3 Latvia and the European Union not being Parties to the Proceedings, the Tribunal Cannot Decide on the Claimants' claims

4.2.3.1 The principle of consent to jurisdiction

327. As shown above, the Tribunal could only decide on the Claimants' submissions regarding the alleged breaches of their 'rights' to harvest snow crab on the Norwegian continental shelf after having first determined: (1) whether Latvia was legally entitled to grant licences authorising North Star to harvest snow crab in the Loop Hole and in the waters around the Svalbard; (2) whether the positions of the European Union, as a party to the NEAFC Convention, and in its interpretation of the Svalbard Treaty as allowing the harvesting of snow crab beyond the territorial waters around Svalbard (12 nautical miles), can provide a basis for the Claimants' alleged rights. In doing so, the Tribunal would have to evaluate the lawfulness of Latvia's and EU's conduct, something it cannot do in the absence of Latvia and the EU in the present proceedings.

328. According to Article 36(1) of the ICSID Convention, it is open to "*any Contracting State or any national of a Contracting State*" to institute arbitration proceedings through a Request for Arbitration. But this is a separate type of proceeding from investor-State dispute settlement. This is also confirmed by Article 64 of the ICSID Convention concerning "*Disputes Between Contracting States"* which provides for the submission to the ICJ of "*any dispute arising between Contracting States concerning the*

365 Memorial, ¶642 – footnotes omitted.

interpretation or application of this Convention which is not settled by negotiation […]". This strict demarcation between inter-State and investor-State disputes is also confirmed by Article 27(1) according to which:

> "[n]*o Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention* […]".

329. In other words, Latvia and the EU have not agreed to the jurisdiction of the Tribunal, and their consent cannot be presumed. As an ICSID Tribunal stated, "*consent cannot be presumed; it must be established by an express manifestation of intent or implicitly by conduct that demonstrates consent*."[366] In any case, Latvia and the EU could not agree to the Tribunal's jurisdiction and, *a fortiori*, could not be parties to the present dispute.

330. Consequently, any pronouncement of the Tribunal concerning differences between Norway and Latvia, Norway and the EU, the EU and Latvia, or all three of them, would infringe the fundamental principle of consent to jurisdiction of international courts and tribunals – a principle so well established that it is indeed superfluous to push the point any further before the Tribunal, except perhaps to recall that it fully applies before investment tribunals. Indeed Article 25 of the ICSID Convention expressly states:

> "*The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, <u>which the parties to the dispute consent in writing to submit to the Centre</u>*."[367]

331. The Report of the Executive Directors on the ICSID Convention stresses: "*Consent of the parties is the <u>cornerstone</u> of the jurisdiction of the Centre*."[368]

---

366 **RL-0086-ENG** *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste*, ICSID Case No. ARB/15/2, Award, 22 December 2017, para. 148. See also **RL-0087-ENG** *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, para. 175.

367 **CL-0042** ICSID Convention, Article 25(1) – emphasis added.

368 **CL-0105** Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, para. 23 – emphasis added.

332. The consent principle which "*establishes and limits both the jurisdiction of the Centre and the competence of tribunals*"[369] has been consistently and regularly recalled by ICSID Tribunals. Thus, the *Chevron v. Ecuador* Tribunal considered that

> "*the principle that no international tribunal may exercise jurisdiction over a State without the consent of that State; and, by analogy, no arbitration tribunal has jurisdiction over any person unless they have consented. That may be called the 'consent' principle, and it goes to the question of the tribunal's jurisdiction*."[370]

333. Referring to the principle of consent to arbitration, another ICSID Tribunal has considered that

> "*a State's consent to arbitration shall not be presumed in the face of ambiguity. Consent to the jurisdiction of a judicial or quasi-judicial body under international law is either proven or not according to the general rules of international law governing the interpretation of treaties. The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent. Where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined*."[371]

4.2.3.2 The 'Monetary Gold principle'

334. In the well-known *Monetary Gold* case, the ICJ was called upon to rule on a dispute whose very subject matter concerned the rights of third party. The Court held that its Statute "*cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania*."[372] The Court also stated that:

> "[t]*he Court cannot decide such a dispute without the consent of Albania. But it is not contended by any Party that Albania has given her consent in this case either expressly or by implication. To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international*

---

369 **RL-0088-ENG** *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela (II)*, ICSID Case No. ARB/12/23, Decision on Annulment, 28 December 2018, para. 66.

370 **RL-0089-ENG** *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (II)*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, 27 February 2012, para. 4.61. See also **RL-0090-FR** *Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal*, ICSID Case No. ARB/15/21, Award, 5 August 2016, para. 130.

371 **RL-0091-ENG** *ICS Inspection and Control Services Limited v. The Argentine Republic (I)*, PCA Case No. 2010-09, Award on Jurisdiction, 10 February 2012, para. 280.

372 **RL-0083-ENG** *Monetary Gold removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary Question, Judgment, I.C.J. Reports 1954, p. 32.

> *law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent*."[373]

335. In the *East Timor* case, the ICJ affirmed that

> "[w]*hatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case*."[374]

336. The ICJ has reaffirmed this principle several times,[375] as have other international courts and tribunals. Thus, in the *M/V Norstar* case, the ITLOS considered that:

> "*where 'the vital issue to be settled concerns the international responsibility of a third State' or where the legal interests of a third State would form 'the very subject-matter' of the dispute, a court or tribunal cannot, without the consent of that third State, exercise jurisdiction over the dispute*."[376]

337. Likewise, a PCA arbitral tribunal noted that it could not:

> "*rule on the lawfulness of the conduct of the respondent in the present case if the decision would entail or require, as a necessary foundation for the decision between the parties, an evaluation of the lawfulness of the conduct of the United States of America, or, indeed, the conduct of any other State which is not a party to the proceedings before the Tribunal*".[377]

338. There is no doubt that ICSID tribunals can apply the principle (and must apply it when the conditions are fulfilled). Several tribunals have recognised that a dispute which has as its very subject matter the responsibility of a third party would be outside their jurisdiction. Thus, in its recent Decision on Annulment, the *ad hoc* Committee in

---

373 *Ibid.* pp. 32-33.

374 **RL-0092-ENG** *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, para. 29.

375 **RL-0093-ENG** *Case concerning the Land, the Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Application by Nicaragua for Permission to Intervene, Judgment, I.C.J. Reports 1990, paras. 54-56; **RL-0094-ENG** *Case concerning Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, paras. 50-55; **RL-0092-ENG** *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, paras. 26-36; **RL-0095-ENG** *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, paras. 203-204; **RL-0096-ENG** *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment - Merits, 3 February 2015, para. 116.

376 **RL-0097-ENG** ITLOS, 4 November 2016, *The M/V "NORSTAR" (Panama v. Italia)*, Preliminary objections, Judgment, Case No. 25, para. 172 – emphasis added.

377 **RL-0098-ENG** PCA, 5 February 2001, *Lance Paul Larsen v. Hawaii*, Award, para. 11.23.

Orascom recalled the applicability of the *Monetary Gold* principle before investment tribunals:

> "*The concept of admissibility thus allows, in certain circumstances, an international court or tribunal to decline to exercise jurisdiction which has been conferred upon it. Jurisdiction of international courts and tribunals, including investment tribunals, is based on consent. Even when the consent has been granted, there may be situations in which it would be inappropriate for an international court or tribunal to exercise its jurisdiction. In the absence of specific provisions on admissibility in the applicable legal instruments, international courts and tribunals have derived the rules on admissibility from general international law, in particular from its principles. For instance, the International Court of Justice found that while it had jurisdiction conferred upon it by the common agreement of France, the United Kingdom, the United States of America and Italy, it could not exercise this jurisdiction to adjudicate on the claim submitted by Italy without the consent of a third State (Albania), since ruling on Italy's claim would have required the Court to determine whether that third State committed any international wrong against Italy*."[378]

339. In other cases, ICSID or other investment tribunals have referred to the *Monetary Gold* principle but found that the conditions for its application were not met as since the actions of the third party concerned did not form the very subject-matter of the dispute and no decision on their lawfulness was required to settle the disputes before them.[379]

340. Here, it is not simply that the "*legal interests*" of Latvia are engaged by the Claimants' claims. In order to resolve the dispute submitted by the Claimants, the Tribunal would have to decide on the validity of licences issued by Latvia, which constitute the Claimants' alleged rights to harvest snow crab on the Norwegian continental shelf. Similarly, the Tribunal will have to determine whether the EU has been placed in breach

---

[378] **RL-0099-ENG** *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Decision on annulment, 17 September 2020, para. 256. See also **RL-0080-ENG** *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, para. 160-3; **RL-0087-ENG** *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, para. 175.

[379] See **RL-100-ENG** *Bridgestone Americas, Inc. and Bridgestone Licensing Services, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, 13 December 2017, paras. 352 *et seq.*; **CL-0130** *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")*, ICSID Case No. ARB/10/11 and No. ARB/10/18, Decision on Jurisdiction, 19 August 2013, paras. 520 *et seq.*; **RL-0089-ENG** *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (II)*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, 27 February 2012, paras. 4.60 *et seq.*; **RL-0031-ENG** *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/37, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis, 12 June 2020, para. 307; or **RL-0101-ENG** *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia (I)*, ICSID Case No. ARB/17/34, Decision on the Respondent's Jurisdictional Objections, 30 September 2020, para. 294.

of the NEAFC Convention by Latvia (whose licences the EU considers *not* to have been issued in accordance with the NEAFC Convention), and whether the EU's Regulations and positions on the Svalbard Treaty (relied upon by the Claimants in these disputes) were permissible and capable of granting rights. This would also require the Tribunal to take a position on the dispute between Latvia (which claims that it can issue licences for the harvesting of snow crab on the Loop Hole) and the EU (which says that Latvia cannot). As aptly noted by the ICSID Tribunal in *Addiko Bank*:

> "*the concerns that the ICJ stated in Monetary Gold relate to a situation in which the very subject-matter of the dispute involves a determination of a third State's international legal responsibility, such as where that determination is a necessary prerequisite for decision on the claimant's claims.*"[380]

341. There is obviously no principled distinction to be drawn in the application of that principle between a State and the EU.

342. The "very subject matter" criterion is clarified by firmly established case law. In *Monetary Gold* case, the ICJ stated:

> "*The dependence of the second claim upon the first is confirmed by the Italian Submission itself. When the Italian Government speaks of 'Italy's right to receive the said share of monetary gold', it is not referring to any hypothetical right it must be referring to a right which it believes it possesses and which, by the first Submission in its Application, it requests the Court to uphold*."[381]

343. The Court concluded that "*inasmuch as it cannot adjudicate on the first Italian claim, it must refrain from examining the question of priority between the claim of Italy and that of the United Kingdom.*"[382]

344. For its part, and by contrast, confirming the same analysis *a contrario*, the ITLOS stated in the *Norstar* case that

> "*it is the legal interests of Italy, not those of Spain, that form <u>the subject matter</u> of the decision to be rendered by the Tribunal on the merits of Panama's Application. The*

---

380 **RL-0031-ENG** *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/37, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis, 12 June 2020, para. 307.

381 **RL-0083-ENG** *Monetary Gold removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary Question, Judgment, I.C.J. Reports 1954, p. 33 – emphasis added.

382 *Ibid*, p. 34.

decision of the Tribunal on jurisdiction and admissibility does not require the prior determination of Spain's rights and obligations."[383]

345. In *East-Timor*, the ICJ noted that "*Australia's behaviour cannot be assessed without first entering into the question why it is that Indonesia could not lawfully have concluded the 1989 Treaty, while Portugal allegedly could have done so*".[384] In the present case, Norway's challenged behaviour cannot be assessed as being in accordance with or in contravention of the BIT without first determining whether the Latvia's licences were valid. The Tribunal cannot do this in the absence of Latvia and the EU. Deciding otherwise and proceeding to the merits would run contrary to the fundamental principle of consent necessary for the settlement of international disputes.

346. As Latvia and the EU are not party to these proceedings, the Tribunal lacks jurisdiction *ratione personae* to deal with the Claimants' claims.

4.3 THE POSITION OF MR LEVANIDOV AND THE ALLEGED 'JOINT VENTURE'

347. Aside from the absence of Latvia and the EU, there is another protagonist in this case, who is ever-present in the facts but conspicuously *absent* as a party.

348. As the Tribunal will recall, Norway initially raised the issue of Mr Levanidov's participation in these proceedings at the first hearing on 28 September 2020, when the issue of the presence of "*associates or partners*" was discussed in Procedural Order No. 1. The Claimants pressed for the admission of Mr Levanidov into the hearings.[385] The inclusion of the "*associates or partners*" wording was not included in Procedural Order No. 1.[386] After this, in December 2020, Mr Levanidov was appointed to the Board

---

383 **RL-0097-ENG** ITLOS, 4 November 2016, *The M/V "NORSTAR" (Panama v. Italy)*, Preliminary objections, Judgment, Case No. 25, para. 173 – emphasis added.

384 **RL-0092-ENG** *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, para. 28; **RL-0097-ENG** ITLOS, 4 November 2016, *The M/V "NORSTAR" (Panama v. Italy)*, Preliminary objections, Judgment, Case No. 25, para. 172.

385 The recording of the First Session (at 1:04:32) records counsel for the Claimants as follows: "*the Claimants take the position that essentially Mr Levanidov should be treated like Mr Pildegovics and should be allowed to be there at all instances of the hearing*".

386 Procedural Order No. 1 dated 12 October 2020, ¶18.5.

of North Star, purportedly so that he would have a right to sit in on the hearings in this case.[387]

349. Mr Levanidov is a US citizen,[388] and therefore the Tribunal has no jurisdiction over him. The Claimants have argued that the 'investments' in this case were made by Mr Pildegovics and North Star, each in their *own* name. However, the limited documentary record that does exist with respect to the alleged 'joint venture' instead demonstrates that this was in fact *Mr Levanidov's* business operation in which Mr Pildegovics' role appears to have been very limited.

4.3.1 The Role of Mr Levanidov and Mr Pildegovics in the Alleged 'Joint Venture'

350. It is helpful first to analyse the background to the alleged 'joint venture' as it has been presented on behalf of the Claimants.

4.3.1.1 The background to the alleged 'joint venture'

4.3.1.1.1 *Early history*

351. The Claimants begin their section "*Background to the Claimants' Investments*" with several paragraphs about Mr Levanidov and his companies. Mr Levanidov's experience in the industry apparently commenced in the "*early 2000s*".[389]

352. The first mention of Mr Pildegovics is in May 2010, when he and Mr Levanidov had a meeting in Oslo. There is no indication, either from the early emails exchanged between the two gentlemen, or from the witness statements of either, that any joint venture was discussed or even contemplated. Rather, it appears that Mr Levanidov was simply *informing* Mr Pildegovics about *his* venture. See, for example:

---

387 Norway's position as to whether Mr Levanidov has a right to sit in on hearings is reserved. That applies to "*officers, officials or employees of a Party whose presence is necessary to enable instructions*". Mr Pildegovics, the sole shareholder, Chairman of the Board, and person "*with a right of sole representation*" (**PP-0039**), will no doubt be present at the hearings, rendering Mr Levanidov's presence (save in the capacity of witness) unnecessary.

388 Levanidov, ¶1; **C-0051**.

389 Memorial, ¶171.

352.1. "*In May 2010, I met with my cousin* […] *to tell him about my business project in Norway* […] *I was interested in his advice regarding financing options for my project*";[390]

352.2. "*In May and June 2010, Mr. Levanidov and I exchanged emails about his business projects*".[391]

4.3.1.1.2 *Mr Pildegovics' first input – June to December 2013*

353. It was apparently not until June 2013 that Mr Levanidov first approached Mr Pildegovics. He did so in order to obtain assistance from Mr Pildegovics in finding an EU vessel for his (Mr Levanidov's) business plan in the Barents Sea:

> "*I have a business question for you, which is not related to your subject, but maybe you can recommend or help. I need to find a fishing vessel for sale, under any EU flag - can be Latvian or other Baltic or any EU with active fishing license from European commission. We only need general license to operate fishery activities, no specific quotas for any spices needed. If such a vessel is registered with NEAFC this will be a huge plus, but not necessary. We prefer to consider purchase of the company, but can also buy only the vessel. Basic requirements - lenght 35m+, hold 150m3+. Any old soviet era trawlers can be considered.*
>
> *I absolutely do not know the situation in this industry in Latvia, apart from the fact that I heard, that a few years ago, under pressure from the EU, a large fleet reduction was carried out. Could you please do some asking around, if you have the opportunity?*"[392]

354. It is not clear who the term "we" refers to in this email.

355. At this point, Mr Levanidov was simply asking Mr Pildegovics a "*business question*" about where to find a fishing vessel. He was interested only in an EU vessel, and expressed no particular interest either in Latvia, or in partnering with Mr Pildegovics. The email that appears to have been Mr Pildegovics' response was sent on 28 July 2013, and states:

> "*I succeed*[ed in making] *contact with a person from the Latvian state agency engaged in fishing issues.*
>
> *I had a long conversation with him and one thing I understood 100% - I'm not specialized at all and it was sometimes difficult for me to answer his questions. For*

390 Levanidov, ¶17 (emphasis added).

391 Pildegovics, ¶18 (emphasis added).

392 **R-0140-ENG** This email was exhibited by the Claimants as **PP-0011**, but that was a poor translation of the original. Norway has translated the original email.

example - according to his words, each ship has a license, there must be a quota for catching certain fish species in coastal waters or in neutral waters (if I remembered everything correctly). If you buy a ship, you buy a license for fishing too, as well as a certain amount of quotas, something like this. It's not easy to transfer a ship from another flag country under LV-flag, because there is a volume of kW and M3 (if I remember correctly) fixed for each EU country - i.e. if one ship (whose capacity is included in the total quota) will be excluded from the LV-flag, you can get another/new ship, which corresponds to those characteristics of the excluded ship. In other words - without taking one ship, you cannot start buying other.

In addition, each ship has a different permission - in what waters it has the right to catch. As long as I remember, you were interested in NEAFC water, right?

My contact person could remember one ship (he was also hired on LV company) - which can meet your requirements. I have contact information about the owner. However, my contact person asked you to clarify - more accurately the zones in which you wanted to catch and more accurate info about the species (desired with codes).

This will give him additional information for reflection. Can you send it to me? I told him we will transmit that information.

As for the above-mentioned ship – how do you think it will be better to approach it and what do I need to know? Or do you want to talk to him directly? I can give you his contact details. My contact person said that if it comes to a real deal - then he will be able to check all the info about the licenses, quotas, permission, etc. for a particular ship. And he also recommends to establish a new company in LV without any skeleton in the cupboard, and make a ship over to the company property. <u>It is possible to do without undue delay (the transfer procedure may take about 1 month) and it will be much safer for the new owners</u>.

Well, here is the info – tell me what we are going to do.

All the best, greetings to all!

Peter".[393]

356. In this conversation, Mr Pildegovics was relaying information to Mr Levanidov—at the latter's request—which had been provided to him by a contract in the relevant Latvian Ministry. Mr Pildegovics was doing all of this for and on behalf of Mr Levanidov, and there was no suggestion that anything was being done in his own right or pursuant to any nascent business plan between him and Mr Levanidov.

[393] **R-0141-ENG** This email was exhibited by the Claimants as **PP-0012**, but that was a poor translation of the original. Norway has translated the original email.

357. The same is also evident in the limited email correspondence that the Claimants have disclosed between Mr Pildegovics and Mr Levanidov dating from the remainder of 2013. The emails are reproduced at exhibits **PP-0013** to **PP-0021**.[394]

357.1. Mr Pildegovics was told by Mr Levanidov in terms that he was to find an EU-flagged Vessel, because it was Mr Levanidov's goal to crab in the NEAFC zone.[395]

357.2. When told by Mr Levanidov that the *Otto* (later the *Senator*) was too big for his purposes, Mr Pildegovics responded (23 December 2013[396]):

> "*Regarding that vessel "Otto". If I remember correctly, it doesn't suit to you? Is it too big? Too expensive? Maybe we can "change places in a table"? To transfer this vessel into other flag? RU, f.example. And so to keep fishing? And in its stead transfer an other vessel, which is more modern? Here may you have combination.*"[397]

4.3.1.1.3 *Mr Pildegovics expressed an "interest in taking part in the project"*

358. The first indication that Mr Pildegovics had a desire to take part in Mr Levanidov's business venture is was apparently in late 2013:

> "*In late 2013, Mr Pildegovics informed Mr Levanidov that he was interested in taking part in the project and the cousins arranged a meeting in Riga in January 2014 to seal their agreement*."[398]

359. The footnote to that paragraph refers to four documents. The first two are the witness statements of Mr Pildegovics (at ¶29) and Mr Levanidov (at ¶37). Those paragraphs repeat the assertion in the Memorial but provide no further documents. The other documents are exhibits **PP-0022**: a schedule for Mr Levanidov's January 2014 trip to Latvia, and **PP-0018**, an email exchange between Mr Pildegovics and Mr Levanidov.

---

394 It should be noted that the email record is incomplete and some emails appear to start partway through an email thread. Those emails that have been provided have not been provided in their native format but as printed PDFs.

395 **R-0140-ENG** and **R-0141-ENG**. These emails were exhibited by the Claimants as **PP-0011** and **PP-0012**, but that was a poor translation of the original. Norway has translated the original email.

396 22 December 2013 in the Claimants' translation.

397 **R-0142-ENG** This email was exhibited by the Claimants as **PP-0014**, but that was a poor translation of the original. Norway has translated the original email.

398 Memorial, ¶203. This presentation is markedly different from the impression the Claimants sought to create in the RFA, at ¶27 which describes the alleged 'joint venture' as having been the product of "several years of discussion".

In none of those documents is Mr Pildegovics' alleged "*interest*" in joining Mr Levanidov's business evidenced. The allegation appears in the Memorial and in the witness statements, but does not appear in the contemporaneous documentation.

360. In fact, Mr Pildegovics' evidence is that at that time he "*conducted research in Latvia to learn about the regulatory and licensing requirements to build a fishing company according to Mr Levanidov's plan*",[399] suggesting that he accepts that he played only a passive or subordinate role at that time consisting only of making enquiries for Mr Levanidov.

361. At this stage (*i.e.*, late 2013), Mr Levanidov was aware that Norway would not permit the harvesting of snow crab by foreign vessels in the Economic Zone outside mainland Norway or in the Fisheries Protection Zone around Svalbard, through enquiries he had made or caused to be made.[400]

4.3.1.2 The alleged 'joint venture'

362. The next step is said to have been the alleged 'joint venture' itself. This was said by the Claimants in the RFA dated 18 March 2020 to have been agreed "*in 2013*".[401] In the Memorial, the alleged 'joint venture' is said to have been agreed between Mr Pildegovics and Mr Levanidov on 29 January 2014.[402] The Claimants' Memorial refers to no contemporaneous documents which record the preparations for or conclusion of the alleged joint venture, and there is no reason to suppose that any contract was actually agreed between the two men.

363. The documents on the record show that before the date(s) (either 2013 or 2014) of the alleged joint venture, Mr Pildegovics was acting for and on behalf of Mr Levanidov and Mr Levanidov's own business ventures, but not in his own right. There is equally no evidence that after the alleged handshake which supposedly "*established an*

399 Pildegovics, ¶27.

400 **KL-0016** Email dated 16 May 2013 from the Norwegian Directorate of Fisheries to Sergei Ankipov, CEO of Ishavsbruket: "*Russian fishing vessels cannot catch snow crab in the NØS / Svalbard zone* […] *The same applies to other foreign vessels*".

401 RFA, ¶27.

402 Memorial, ¶209.

integrated snow crab […] *enterprise*"[403]—on which no concrete and precise information is given (see **Chapter 5**)— Mr Pildegovics began acting in his own right, as opposed to continuing to act for Mr Levanidov. Rather, as discussed below, the evidence that is available about the role of Mr Levanidov (and his associated companies) in the web of transactions surrounding the alleged 'investments' in this matter demonstrate in that these in fact remained *Mr Levanidov's* business concerns.

4.3.2 The Role of Mr Levanidov (and his Associated Companies) in the 'Investments' in this case

364. In order to determine who the *real* investor is in this case, the Tribunal must analyse the contributions (in terms of finances and other input) made by Mr Levanidov and his associated companies to investments which are allegedly the Claimants', and the control exercised by him over them, and also the extent to which the actions of North Star can truly be said to have been pursuant to the alleged 'joint venture'.

4.3.2.1 The incorporation of North Star

365. North Star was registered in Latvia's Commercial Register on 4 March 2014.[404] This is after the date of the conclusion of the alleged joint venture. It is said[405] by the Claimants that North Star was founded "*within the framework established by the joint venture agreement*". No documents are available to demonstrate what the "*framework established by the joint venture*" was.

366. For his part, Mr Levanidov says that Mr Pildegovics created North Star,[406] and that he (Mr Levanidov) "*supported Mr Pildegovics in his efforts to create North Star*".[407] The

403 Memorial, ¶210.

404 The Claimants have alleged that this date is 27 February 2014, but this appears only to be the date on which the application to register the company was made (see **PP-0004** and **PP-0006**).

405 Memorial, ¶20.

406 Levanidov, ¶40: "*Following my agreement with Mr Pildegovics to form a joint venture and Mr Pildegovics' subsequent creation of SIA North Star (**North Star**) in March 2014* […]".

407 Levanidov, ¶42.

Claimants suggest that Mr Pildegovics' role in the joint venture included the establishment and management of North Star.[408]

367. But Mr Pildegovics did not himself establish North Star, and it is not clear why. It was established by Ms Irina Fiksa, a "*representative*" of [redacted].[409] It was not until 10 May 2014 that the shares in North Star were purchased from Ms Fiksa by Ms Nadežda Bariševa, Mr Pildegovics' "*life partner and* […] *wife*".[410] And it was not until 15 June *2015* that Mr Pildegovics purchased those shares from Ms Bariševa.[411]

368. Mr Pildegovics' involvement or otherwise in North Star does not directly impact the question whether North Star qualifies as an investor. But the suggestion made by the Claimants is that Mr Pildegovics fulfilled his own role in the alleged 'joint venture' by the establishment and management of North Star.[412]

369. Very few emails between Mr Pildegovics and Mr Levanidov from *after* the date of the alleged 'joint venture' have been disclosed. There are therefore no contemporaneous documents by which the Tribunal can establish whether certain things were done by Mr Pildegovics *qua* joint venture partner, or on behalf of Mr Levanidov. For example, whilst there is some evidence that Mr Pildegovics agreed with [redacted][413] for the establishment of North Star and the transfer to it of fishing capacity rights,[414] this is not inconsistent with a characterisation of these actions as having been done *for and on behalf of* Mr Levanidov.

---

408 See, for example, Memorial ¶222: "From January 2014 onward, Mr Levanidov and Mr Pildegovics together made all the strategic decisions concerning North Star, Sea & Coast and Seagourmet within the framework of their joint venture". See also Pildegovics, ¶34 and Levanidov, ¶42.

409 Pildegovics, ¶46. Ms Fiksa appears as the only board member when the company was established (**PP-0004**) and the signed the paperwork to apply for registration of the company (**PP-0006**).

410 See **PP-0041**, and Pildegovics, ¶50.

411 See **C-0076.**

412 See above, footnote 406.

413 Pildegovics, ¶80. [redacted]

414 See **PP-0040** and **PP-0070**.

4.3.2.2 Mr Levanidov's Involvement in the Purchase of North Star's Vessels

370. It is also clear from the facts that Mr Levanidov had a very close involvement in the purchase and financing of all of North Star's vessels in this case, notwithstanding that this allegedly fell within Mr Pildegovics' part of the alleged 'joint venture'.[415]

4.3.2.2.1 *Mr Levanidov's involvement in the purchase of the vessels*

371. Although Mr Pildegovics is said himself to have 'caused' North Star to purchase the vessels pursuant to the alleged 'joint venture',[416] the four vessels were actually purchased in 2014, before Mr Pildegovics became either a director or a shareholder of North Star on 15 June 2015. The contracts for each vessel were signed by Ms Bariševa and are dated:

371.1. In respect of the *Solvita*, 15 April 2014;[417]

371.2. In respect of the *Senator*, 25 August 2014;[418]

371.3. In respect of the *Saldus*, 20 November 2014;[419] and

371.4. In respect of the *Solveiga*, 22 December 2014.[420]

372. Mr Pildegovics states that he "*led the negotiations*" and that Mr Levanidov provided "*strategic advice and guidance*". With respect to the *Solvita* (originally *Ivangorod*) and the *Senator* (originally *Otto*) that appears to downplay Mr Levanidov's involvement. The emails that have been disclosed suggest that Mr Levanidov was essentially *directing* Mr Pildegovics as to which vessels to purchase. See, for example, in respect of the *Otto* (later *Senator*):

---

415 Memorial, ¶¶215-498.

416 Memorial, ¶215.

417 **C-0061.**

418 **C-0057.**

419 **C-0055.**

420 **C-0059.**

372.1. On 23 December 2013[421] Mr Pildegovics asked: "*Regarding that vessel "Otto". If I remember correctly, it doesn't suit to you? Is it too big? Too expensive?*".[422]

372.2. On 23 December 2013 Mr Levanidov responded: "*Otto yes, and too big/voracious, and too expensive* […] *May reduce the price, then you can discuss*".[423]

372.3. On 17 January 2014 Mr Levanidov stated: "*please contact Otto again. I would meet, talk, can find a contact. If not sold yet. Or maybe there is something else*".[424]

373. In respect of the *Ivangorod* (later *Solvita*) it appears that the impetus for purchasing the vessel came solely from Mr Levanidov. On 20 January 2014, Mr Levanidov wrote:

> "*there is a steamer, the name of Ivangorod, moreover, it is ready for fishing even tomorrow and is in Norway in the port of Batsferd, with crew and traps aboard ... He has a Russian flag, which will be removed as soon as it is possible to bring it under another. It is also under the supervision of the Russian register - RMRS (this is the technical supervision of the condition), which is included in the main classification societies of the world (IACS) and is recognized everywhere, that is, the register is not necessary to change. In addition, he has the so-called EU number - it means this vessel is EU approved non-EU establishment, that is, it complies with the requirements of EU and its products are allowed for export to EU. EU number H35.*
>
> *This steamer is just a nightmare for us how to get under the euro flag. There is another steamer which we would also bring if there is enough kilowatt.*"[425]

374. Here, Mr Levanidov appears simply to be informing Mr Pildegovics of what has already been decided in relation to the *Solvita*, saying for example that the vessel's Russian flag "*will be removed*", and that Mr Levanidov "*would* […] *bring*" it along with "*another steamer*" if there was sufficient kilowattage available.[426]

---

421 The Claimants' translation lists the date as 22 December 2013. This is an error.

422 **R-0142-ENG** This email was exhibited by the Claimants as **PP-0014**, but that was a poor translation of the original. Norway has translated the original email.

423 **PP-0014**. The reason that **PP-0014** has been used but not Norway's re-translation is that the Claimants' *translated* copy includes an email which is not present in the Russian original.

424 **PP-0016**.

425 **PP-0016**.

426 That second vessel appears to have been the *Solyaris*. See **PP-0017**.

375. There are no contemporaneous emails which have been provided outlining the "*strategic advice and guidance*" given by Mr Levanidov in respect of the other two vessels purchased by North Star (the *Saldus* and the *Solveiga*), or the two vessels which the Claimants allegedly agreed to purchase but had to cancel (the *Sokol* and the *Solyaris*).

4.3.2.2.2 *The financing of North Star's vessels*

376. Several loans were given to North Star by four separate companies. According to Mr Pildegovics, Mr Levanidov "*introduced*" him to all of North Star's lenders and was "*instrumental in obtaining loans for North Star from these companies*".[5]

377. North Star's investments were funded as follows:

377.1. EUR [redacted] from the personal funds of Mr Pildegovics and his wife, Ms Bariševa, lent in the period April 2015 to July 2020.[427] However, these loans were made starting on 8 April 2015, and therefore could not have been used to fund the purchase of the four vessels.[428]

377.2. Loans obtained by North Star from[429]:

377.2.1. [redacted] ("**Promrybcom**"), totalling EUR [redacted].

377.2.2. [redacted], totalling EUR [redacted]

377.2.3. [redacted] totalling EUR [redacted].[430]

377.2.4. [redacted], totalling EUR [redacted]

427 The relevance of the timing of these loans is important, given that several of them are lent after the date of the alleged breaches of the BIT in this case (17 July 2015: Memorial, ¶695, or possibly September 2016: Memorial, ¶689). That discussion is taken up again in **Chapter 6**.

428 **PP-0117**

429 **PP-0118** to **PP-0131**

430 This loan was, however, novated to [redacted] on the same date that it was granted.

378. One loan, obtained from [redacted] has written on it in pencil "*Note: Purchase of 'Senator'*".[431]

379. Three of the loans from [redacted] are stated to be for "*vessel purchase*",[432] and two for "*vessel repair service*".[433]

380. The Russian-sounding [redacted] is registered in [redacted] and is or was wholly owned by [redacted], a company incorporated in [redacted] in 2019 but now apparently inactive.[434] It appears to have been incorporated in 2011,[435] and it appeared on a list issued on 4 December 2020 by the [redacted] Registrar of Companies, indicating that it would be struck off the companies register and dissolved three months later "*unless cause is shown to the contrary.*"[436]

381. [redacted] may be related to [redacted] a [redacted] company party to some of the supply contracts with Seagourmet and North Star.[437] [redacted] was originally incorporated on 4 November 2015 under the name "[redacted]".[438] In the Memorial, [redacted] is described as being "*owned and operated by one of Mr Levanidov's associates*".[439] [redacted] appears to be that owner and operator.[440] [redacted] name was redacted from the published RFA.

---

431 **PP-0127**, a contract between [redacted] and North Star dated 10 August 2014 for EUR [redacted].

432 **PP-0118**, dated 14 April 2014, at Clause 1.1 (for the *Ivangorod*, later *Solvita*); **PP-0120**, dated 19 November 2014, at Clause 1.1 (for the *Saldus*); **PP-0123**, dated 20 December 2014, at Clause 1.1 (for the *Solveiga*).

433 **PP-0125**, dated 28 February 2015, at Clause 1.1 (for the Senator); **PP-0121**, dated 5 December 2014 at Clause 1.1 (for the *Solveiga*).

434 **R-0178-ENG** (a screenshot from the [redacted] International Corporate Affairs Registry entry for [redacted]) (date accessed: 29 October 2021).

435 **R-0179-ENG** (a screenshot from the website hkcorporationsearch.com, accessed 29 October 2021).

436 **R-0180-ENG** - G.N. 7095, 4 December 2020, issued by the Companies Registry pursuant to section 745(2)(b) of the Companies Ordinance.

437 See RFA, ¶49 and footnote 36.

438 **R-0177-KOR** [redacted] entry on the [redacted] Corporate Registry, accessed 30 July 2021.

439 Memorial, ¶219.

440 See footnote 438, above.

382. [redacted] is reported to have been the employer of some of the employees on Båtsfjord-based crabbing vessels, along with Sea & Coast, although Mr Pildegovics is reported to have said that employment contracts purporting to be signed by Sea & Coast are forgeries.[441]

383. [redacted] is incorporated in [redacted], and appears also to have an 'office' in [redacted] at the same address as [redacted] and [redacted][442] In August 2012, Mr Levanidov held 20% of the shares in [redacted]. His co-shareholders were [redacted]. At around the same time, [redacted] were also shareholders of Seagourmet; [redacted] was also the chairman of Seagourmet,[443] which is owned and controlled by Mr Levanidov.[444] The director in 2012 was [redacted]. The director is, apparently, now "[redacted]"[445] who appears to be the same [redacted] who is a director of [redacted]. As of 6 August 2018 (the date of the company's last filed annual return), however, Mr Levanidov held 100% of the shares of [redacted].[446] In his witness statement, Mr Levanidov describes [redacted] as "*a [redacted]-based company in which I was a shareholder*".[447] Although the present shareholding of [redacted] is unclear, it is evidence from the above that [redacted] was controlled by Mr Levanidov and his close associates at all relevant times.

384. As to the other companies from which North Star obtained loans, [redacted] is registered in Washington State, USA.[448] The company's registered agent is [redacted] Five individuals [redacted]

---

441 Pildegovics, ¶226.

442 Though it is not clear that any of those companies actually operate out of [redacted]

443 **C-0053.**

444 Levanidov, ¶48. See also **KL-0028.**

445 **PP-0127.** The address in that exhibit is given as an address [redacted], by July 2017, [redacted] **PP-0129**.

446 **R-0181-ENG** (a report produced by "D&B Credit" on behalf of Norway).

447 Levanidov, ¶48 (emphasis added).

448 Though it is described in PP-0130 as "*organized and existing under the* [redacted] *law*".

[redacted]; are listed as "*governing persons*". The current and historic ownership structure of the company is unclear.

385. [redacted] is registered in Washington State, USA, and its address is [redacted].[449] It is 100% owned by Mr Levanidov, who is also its President.[450] Little is known about this company, including the nature of its business operations. The Claimants' Memorial states that [redacted] provides "*consulting services relating to commercial fisheries*" and also "*acts as an investor in seafood projects globally*".[451] [redacted] does not appear to have a website or any other form of online presence, or to advertise its consulting services.

386. As well as their initial financing, the vessels' re-financing arrangements also point to the conclusion that these were essentially *Mr Levanidov's investments*. Between 22 and 24 May 2018, Mr Levanidov's company Link Maritime entered into agreements to purchase North Star's outstanding loans from [redacted] and [redacted] (*i.e.* the two companies owned and/or controlled by [redacted]).[452] The outstanding loans amounted to [redacted]. According to North Star's Annual Report for 2019, there is "*no schedule for either repayment of the principal amount of the loan or the assessed interest*", nor has any security been defined for the loan. This assumption by Mr Levanidov of liability for North Star's debts to other companies connected to Mr Levanidov, apparently on non-commercial terms, suggests that the entire arrangement was treated as a matter of 'internal' concern to Mr Levanidov.

4.3.2.2.3 *The sellers of the vessels*

387. Two of the vessels, *Solvita* and *Solveiga,* were bought from [redacted]. [redacted] (which may also be transcribed as '[redacted]') is a Russian limited liability company. Its registered office until recently (July 2021) appears to have been in the Russian city of Yuzhno-Sakhalinsk, at the address of [redacted]. [redacted] (a former shareholder of Seagourmet) and Mr Levanidov's wife, Ms Nadezda Levanidova, each held a 25% stake in the company between

449 **PP-0131.**

450 **PP-0131.**

451 Memorial, ¶172.

452 **PP-0132** to **PP-0135.**

approximately January 2013 and sometime in 2017.[453] [redacted], sometime director and shareholder of [redacted], and shareholder of Seagourmet, appears to have held a 50% stake in [redacted] during the same period. An Orbis database search suggests that [redacted] is now controlled by Russian private joint stock company [redacted], which in turn is owned by [redacted].[454] [redacted] (and therefore [redacted]) is also the controlling owner of the company that purchased *Solveiga* from North Star in October 2017.[455]

388. The vessel *Saldus* was purchased on 20 November 2014 from Russian registered company [redacted] ("[redacted]"), located in [redacted] and owned by unnamed Russian national(s). Ms Levanidova, [redacted] are all former shareholders, and [redacted] controls the company (as well as [redacted]).[456] The registered office of [redacted] appears to be in the Russian city of Yuzhno-Sakhalinsk, at the address of [redacted]. This is the same address, albeit with a different office number, as [redacted]. North Star took delivery of the *Saldus* at the port of Busan, South Korean in December 2014.

389. On 5 January 2017, North Star entered into purchase agreements for the acquisition of the *Solyaris* for USD 1.7 million (approximately EUR 1.4 million) from [redacted],[457] and *Sokol* for USD 1.5 million (approximately EUR 1.23 million), from Russian-registered company [redacted],[458] located in Yuzhno-Sakhalinsk at the same address as [redacted] and [redacted]. Although the sellers of *Sokol* and *Solyaris* were two Russian registered companies, the purchase agreements show that the funds, totalling approximately EUR 2.63 million, were payable to the [redacted] bank account of [redacted]. Furthermore, the "invoices" incurred on 6 May 2017 when those vessel purchase agreements were cancelled[459] were both also payable to

---

453 **R-0182-ENG** (excerpt from the "*Orbis*" company database, last updated on 15 October 2021 and accessed on 19 October 2021).

454 *Ibid*.

455 **R-0183-ENG** (excerpt from the "*Orbis*" company database, last updated on 24 October 2021 and accessed on 26 October 2021).

456 This can be seen from Russian litigation records: **R-0184-RUS**; **R-0185-RUS**; **R-0186-RUS**.

457 **PP-0114.**

458 **PP-0112** and **PP-0113**.

459 **PP-0016**.

[redacted] account. It appears that these liabilities may also have been transferred to [redacted], given that the refinancing letter of 23 May 2018 from [redacted] confirms that "*no debt or liability will remain from North Star Ltd. To* [redacted] *after the the transfer* [sic] *is complete*".[460]

390. Therefore three of the four vessels purchased by North Star (as well as the two vessels that North Star intended to purchase) were acquired or to be acquired from Russian companies with close connections to Mr Levanidov.

4.3.3 The Tribunal has no Jurisdiction over Mr Levanidov's Investments

391. There is a complex web of loans, transactions, companies and (re)financing arrangements surrounding the alleged 'investments' in this arbitration, illustrated in the map below. In this web, Mr Pildegovics occupies a marginal position. At the relevant times, he was not a shareholder or officer of North Star, he did not finance the purchase of the vessels, and he appears to have had very little to say about which vessels were purchased for North Star. His financial input into the operation was eclipsed by that of Mr Levanidov and his associated companies.

460 PP-0132.

The various locations of Mr Levanidov's companies and associated companies.

392. By contrast, at the heart of it all is Mr Levanidov, the main protagonist of the case and the 'real' investor. The snow crab venture was his. He appears to have decided on which vessels to purchase. His companies or those he was connected to have financed and re-financed North Star so that it could purchase its vessels and their 'fishing capacity' rights.

393. The alleged 'joint venture' of 2013 or 2014 now presented by the Claimants appears to be an *ex post facto* characterisation of the project, designed to enable the presentation of Mr Levanidov's investments as 'Latvian'. Norway's primary case is that the alleged 'joint venture' simply does not exist. These are, in reality, *Mr Levanidov's* investments, not those of Mr Pildegovics. Mr Levanidov is an indispensable third party over whom the Tribunal has no jurisdiction *ratione personae*.

394. The 'joint venture' so constructed may thus enable Mr Levanidov to recover what are essentially *his* investments – the loans to North Star from his associated companies, which Link Maritime has refinanced – and to realise *his* potential profits. The conspicuous absence of any profit-sharing terms within the alleged 'joint venture' are noteworthy in this regard: both Mr Pildegovics and Mr Levanidov appear to agree that the money from the alleged 'joint venture' (which includes all the investments in this case) will be shared between them somehow;[461] but to this date, over seven years since the alleged creation of the 'joint venture', they have not yet agreed how this is to be done.[462]

395. The Norway-Latvia BIT does not protect investments in Norway made by non-Latvian investors. It is not the purpose of the BIT to enable Mr Levanidov to recoup his sunk costs and unrealised profits by passing what are in truth *his* business interests through the lens of a supposed Latvian 'joint venture' which (even if it exists) has no legal personality.

396. Further, the centrality of Mr Levanidov and his investments to this case constitutes an obstacle to the exercise of the Tribunal's jurisdiction even in respect of Mr Pildegovics and North Star alone. It is *Mr Levanidov's* investment that appears to be the very subject-matter of the dispute,[463] and Mr Levanidov is not a party to these proceedings.

397. For those reasons, the Tribunal should reject any jurisdiction over the alleged 'joint venture'. It should focus solely on the investments actually made by Mr Pildegovics personally and by North Star, and not on investments made by Mr Levanidov.

---

461 Pildegovics, ¶40.

462 Pildegovics, ¶¶40-41.

463 See **RL-0083-ENG** Monetary Gold removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954, p. 33; **RL-0098-ENG** Larsen v. Hawaiian Kingdom, PCA Case No. 1999-01, Award, 5 February 2001, paras 11.8-11.24.

CHAPTER 5: THE DISPUTE DOES NOT RELATE TO INVESTMENTS MADE BY THE CLAIMANTS

398. The present claims are brought under the dispute settlement procedure in Article IX of the BIT. That procedure applies 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*."

399. As mentioned above,[464] Norway shares the Claimants' views as to the jurisdictional criteria required under Article IX of the BIT and Article 25 of the ICSID Convention. There must be (a) "a legal dispute"; (b) between an "investor" and Norway; (c) which dispute is "in relation to" and "arising directly out of"; (d) an "investment"; (e) "in the territory of" Norway; (f) "which the parties to the dispute consent in writing to submit to the Centre"; and (g) it has been preceded by a period of three months prior to the commencement of the dispute.[465]

400. Norway accepts that:

400.1. there is a legal dispute which had existed for more than three months when the case was submitted;

400.2. certain aspects of that dispute are a matter of dispute between the Parties;

400.3. for the purposes of Article IX of the BIT Mr Pildegovics and North Star are respectively a national of Latvia and a company incorporated in Latvia, in accordance with the terms of Article I(3) of the BIT;[466]

400.4. the BIT constitutes the consent of Norway to submit disputes falling within the ambit of BIT Article IX to arbitration, and Mr Pildegovics and North Star have given their consent in writing to submit such disputes to arbitration.

401. Norway does not accept, however, that the alleged investments are investments "*in the territory of Norway* […] *in accordance with its laws and regulations*" (as required by

---

464 See above, paragraph 186.

465 Memorial, ¶439.

466 Strictly without prejudice to its arguments that Mr Levanidov is the *real* investor in this case, and the Tribunal has no jurisdiction over him.

BIT Article I(1)), or that the dispute "*relates to*" such an investment (as required by BIT Article IX(1)).

402. The present claims are presented in the name of the two Claimants, Mr Pildegovics and North Star. They are based on the premise that investments falling within the scope of the BIT, made by those Claimants, sustained a compensable injury as a result of conduct attributable to the Respondent.

403. As pleaded above,[467] Norway also denies that the alleged investments that are the subject of this claim are in fact investments "*invested … by an investor*" of Latvia, *i.e. by one or other of the Claimants*, as required by BIT Article I(1). The question is fundamental. If, for example, the investments were in fact made by Mr Levanidov, a US citizen, it cannot be said that claims can be brought under the Latvia-Norway BIT for all losses allegedly suffered, simply because he was assisted by Mr Pildegovics, a Latvian citizen. There is no bilateral investment treaty between Norway and the USA.

404. There are also questions about the relationship between Mr Pildegovics' claims and the claims of North Star. One element of Mr Pildegovics' claim relates to damage sustained by reason of his 100% shareholding in North Star, but North Star claims in respect of damage to itself. Plainly, questions of overlapping claims and double recovery must be addressed.[468]

405. Before deciding such questions, it is necessary first to identify the investments upon which the Claimants' build their case and the dates on which and the persons by whom they were made, and then to identify which of those investments are said to have been injured.

406. There are three alleged investments of Mr Pildegovics. In Memorial ¶166 the Claimants refer to:

> "*the relevant investments made by Mr Pildegovics in the territory of Norway, namely (i) contractual rights in his joint venture agreement with Mr. Levanidov; (ii) 100% of the shares in North Star; and () 100% of the shares in Sea & Coast.*"

---

467 See above, paragraphs 186-188.

468 Versant Expert Report, ¶90, fn 139.

407. As for North Star, the section of the Memorial headed "*Investments by North Star in the territory of Norway*" groups them under five headings:

> *"Several assets owned by North Star contributed to the achievement of its operating results, all of which constitute investments by North Star in the territory of Norway: fishing vessels (subsection i); "fishing capacity", referring to the right to operate a ship as fishing vessel (subsection ii); fishing licenses authorizing each vessel to catch snow crabs in the "Loophole" area of the NEAFC zone and in waters off the Svalbard archipelago (subsection iii); contractual rights to purchase two additional ships, along with "fishing capacity" for such ships (subsection iv); and supply agreements with purchasers of snow crab products (subsection v)*".[469]

408. When each of those alleged 'investments' is examined in detail, however, it is evident that they all fall outside the scope of the BIT, with the possible exception of the shares in Sea & Coast AS acquired by Mr Pildegovics in October 2015. Norway addresses each of the alleged investments in turn.

5.2 MR PILDEGOVICS' ALLEGED INVESTMENTS

5.2.1 Mr Pildegovics' contractual rights under the alleged 'joint venture'

409. Despite the Claimants' continuous focus on an alleged 'joint venture' between Mr Pildegovics and his cousin, Mr Levanidov, the Claimants have manifestly failed to prove its actual existence. The Claimants do not allege that the 'joint venture' was established as a separate legal entity. It is not even established by any written instrument, but by a 'handshake' which apparently "*established an integrated snow crab fishing, processing and distribution enterprise*",[470] which in any event failed to encompass an agreement on important terms such as any profit and cost-sharing obligations of the two men.

410. Above (**Chapter 4**), Norway has set out its view that Mr Levanidov is the *real* investor in this case, and that there is no jurisdiction *ratione personae* over him, so that the Tribunal lacks jurisdiction over all claims based on the existence of the alleged 'joint venture' to which Mr Levanidov is said to have been a party.

411. Furthermore, there are indications that other entities/persons closely connected to Mr Levanidov could be heavily involved in the financing of the various elements of the

469 Memorial, ¶257; Pildegovics, ¶60.

470 Memorial, ¶¶209-210.

alleged joint venture, but no further information on their status is provided by the Claimants.

412. The evidence that has been presented by the Claimants regarding the existence of the alleged joint venture is in any event deficient and contradictory, as is shown below; and it points to the conclusion that the alleged joint venture is no more than an artifice to describe what was in reality *Mr Levanidov's* business venture. It follows that there is no jurisdiction over the alleged 'joint venture'. Further, the Tribunal has no jurisdiction *ratione materiae* over the alleged 'joint venture' for the additional reason that, even if the picture painted by the Claimants were accepted, the joint venture would not fall within the definition of an 'investment' *in the territory of Norway*.

413. Mr Pildegovics' contractual interest under the alleged joint venture is said to constitute an investment in the territory of Norway as a "*[c]laim[s] to ... performance under contract having an economic value*" (BIT Article I(1)(III)).[471] However, the Claimants have not substantiated the existence of such "claims" within the meaning of Article I(1) of the BIT.

5.2.1.2 No information about the alleged 'joint venture' has been provided

414. According to the Claimants, the alleged 'joint venture' is an extensive multi-jurisdictional operation, with a considerable turnover, involving multiple entities. Mr Pildegovics describes himself as a "*business executive with over twenty-five years of experience*"[472] and apparently Mr Levanidov has managed multiple companies, including a consulting company involved in the "*strategic planning and realization of seafood projects*".[473] There are several written agreements between relevant entities in this case, including loan agreements, sales contracts and vessel purchase agreements. In fact, even when entering into an agreement with his wife, Mr Pildegovics deemed it sufficiently important to enter into a written agreement.[474]

---

471 Memorial, ¶493

472 Pildegovics, ¶6.

473 Levanidov ¶¶8-9.

474 **C-0076**

415. That it is in stark contrast to the so-called 'joint venture', though it is said by Mr Levanidov to be "*a valuable and essential asset of my seafood business in Norway*",[475] and Mr Pildegovics says that it was an "*essential precondition for all of my other investments*".[476] That the two men would have entered into such an important and allegedly overarching aspect of their business without having signed a written agreement or having agreed on basic financial obligations is highly unlikely. Furthermore, neither seems to have considered it prudent to formalise the agreement in writing after having shaken hands.

416. The Claimants have presented no evidence, apart from the co-ordinated witness statements from Mr Levanidov and Mr Pildegovics, to substantiate the existence of any 'joint venture'. Norway's position is that there was no joint venture agreement (whether under Norwegian or any other law) let alone an agreement that would create any rights under the BIT.

417. In order for the alleged joint venture to form a relevant element in the dispute, the existence, characteristics, and terms of the joint venture must be established by the Claimants and shown be to fall within the category of "*claims to performance*" under Article I(1)(iii) of the BIT. It is not the joint venture itself that is said to be the investment, but rather Mr Pildegovics' "*contractual rights in his joint venture agreement*"[477] insofar as those rights constitute "*claims to performance having an economic value*".[478]

5.2.1.2.2 *Temporal aspects*

418. There is a manifest lack of information regarding the alleged 'joint venture' and in particular a complete absence of contemporaneous evidence supporting its existence and terms.[479] Indeed, it is not even clear what 'contemporaneous' even means: the 'joint

---

475 Levanidov, ¶54.

476 Pildegovics, ¶43.

477 Memorial, ¶166.

478 Memorial, ¶493.

479 See also **Chapter 4** of this Counter-Memorial

venture' has been variously said by the Claimants to have been established in 2014,[480] 2013,[481] and even in 2009. In a handout received by Norway in a meeting of 4 July 2019 in Paris, attended by Mr Pildegovics, Mr Levanidov and others, it is said that the 'joint venture' was established in 2009 (p. 8). In the same document it is asserted that Mr Levanidov and Mr Pildegovics *started* discussions "*to establish a joint project regarding snow crabs in Norway*" in 2009/2010 (p. 4). There is no mention of the alleged oral agreement or any handshake under the presentation of "*Significant events over the course of 2010 – 2016*" in the document whether in 2013, 2014 or at any time.[482]

5.2.1.2.3 *Terms and scope*

419. No details of the terms of the alleged 'joint venture' are provided. In his witness statement, Mr Pildegovics says that:

> "[w]*hile no written instrument was drawn to formalize the terms of our joint venture agreement, I consider myself bound by it and I recognize that this agreement generates legal rights and obligations between Mr. Levanidov and myself*."[483]

There is no indication of what these legal rights and obligations are, and what other terms (if any), of the joint venture that Mr Pildegovics has in mind. This indicates that no such details exist, because the details of the alleged 'joint venture' – including, crucially, profit-sharing arrangements with between Mr Levanidov and Mr Pildegovics – were apparently never settled.

420. Mr Pildegovics and Mr Levanidov made their respective Witness Statements on the same day, 11 March 2021. Each had read the statement made by the other, and each agreed with the other's description of the alleged 'joint venture'.[484] Mr Pildegovics gives the following account of the design of the 'joint venture':

---

480 See Levanidov, ¶¶37-38 (asserting that the joint venture was concluded in Riga on 29 January 2014); and cf., Pildegovics, ¶13)

481 The RFA, at ¶27, gives the date as "*in 2013*".

482 **R-0128-ENG** Handout received from Mr Savoie in a meeting between Norwegian authorities and Pildegovics, Levanidov, Third party financing institution and Latvian authorities in Paris on 4 July 2019

483 Pildegovics, ¶14.

484 Pildegovics, ¶15; Levanidov, ¶6.

> *"29. In late 2013, Mr. Levanidov and I started discussing the possibility of establishing a joint venture whereby we would work collaboratively towards the operation of an integrated snow crab fishing and processing enterprise based in Baatsfjord.*
>
> *30. As part of this joint venture, I would be responsible for building a fishing company to deliver supplies of snow crab, while Mr. Levanidov would build capacity to process these snow crabs at his company's Baatsfjord factory. Mr. Levanidov would also leverage his contacts in the international seafood markets to find outlets for our snow crab products and help arrange financing for the project."*[485]

421. Notwithstanding the inconsistencies in the temporal point which have been discussed above, there is no indication that Mr Pildegovics and Mr Levanidov each made or were intended to make a contribution to the capital and other resources of the 'joint venture', or whether they intended to share its profits, and/or any proceeds they might have hoped to obtain as a result of the present claim, between them, and if so, in what proportion. Nor is it known if the 'joint venture' had a finite or an indefinite duration.

422. There is no information regarding the scope of the alleged 'joint venture': whether at the material times it extended to crabbing, processing, and sale of snow crab and/or other species, and if so upon what terms.

423. There is evidence that indicates that Mr Pildegovics' part of the arrangement was limited to arranging the harvesting of snow crab. He did not invest in their subsequent processing by the Seagourmet facility, or in their distribution; nor did North Star. Those elements were parts of Mr Levanidov's responsibility and of his investment. Mr Levanidov had already founded Ishavsbruket AS, which later became Seagourmet Norway AS, in Norway in 2009; and began investing in the processing facility at Båtsfjord in 2009-2010, before any cooperation with Mr Pildegovics (on the current case, at least). Although Mr Levanidov's investments are sometimes presented in the Memorial as if they were investments of the Claimants, that is not the case. Mr Levanidov is not a Claimant in this case (see **Chapter 4**).

424. It is said that all the strategic decisions concerning North Star, Sea & Coast and Seagourmet were made by Mr Levanidov and Mr Pildegovics "*together*": but it is not known how decisions were to be taken within the 'joint venture', or which, if any, of the decisions lay in the hands of Mr Pildegovics or were subject to his ultimate

485 Pildegovics, ¶¶ 29-30.

approval. As set out in **Chapter 4** of this Counter-Memorial, there is strong evidence that both prior to and after the alleged handshake agreement Mr Pildegovics was acting for and on behalf of Mr Levanidov and Mr Levanidov's own business ventures, but not in Mr Pildegovics' own right.

425. The precise terms of the alleged participation between each party are important. No evidence has, for example, been presented to support that Mr Pildegovics and Mr Levanidov each assumed joint and several responsibility for the debts of the 'joint venture'. The evidence put forward rather indicates that the 'joint venture' consisted of two branches, one run by Mr Pildegovics and one run by Mr Levanidov, with each responsible exclusively for its own liabilities and/or for the allocation of its own profits. This all goes to the un-pleaded and unestablished terms on which Mr Pildegovics' "*claims to performance*" might be said to be based.

5.2.1.2.4 *Participation of others*

426. Furthermore, it is not known whether Mr Levanidov and Mr Pildegovics were the only participants in the alleged joint venture. The Memorial might give the impression that Mr Pildegovics and Mr Levanidov were two individual entrepreneurs who saw the opportunity to join together in making an investment in snow crab harvesting, processing and sale. On the other hand, however, the evidence, as well as the timing and nature of specific transactions attributed to the joint venture, gives the impression that Mr Pildegovics was acting as agent for one part of a much larger enterprise, which appears to have been organised, controlled and operated by Mr Levanidov and his associates.

427. There are strong indications that other individuals and entities were involved[486] and that the alleged snow crab 'joint venture' was part of a broader enterprise of which Mr Levanidov, and/or companies such as [redacted], were part, as discussed in **Chapter 4**.

[486] In an email dated 4 October 2013, Mr Pildegovics refers to his having "*spent 3 days in Minsk with my partners / owners*"; but neither the role nor the identify of these 'partners / owners' (in the plural) is known (**PP-0013**). Similarly, in an e-mail of 10 January 2014, Mr Levanidov suggests that someone referred to as "Andron" may advise on the possibility of purchasing a vessel under Lithuanian or Latvian flag, but that he does not want to write or call him directly, to avoid "*harm*[ing] *him by chance*". In a response e-mail of 11 January 2014, Mr Pildegovics says that he will talk to Andron (**PP-0015**).

5.2.1.2.5 *Alleged integration*

428. According to Mr Pildegovics, he and Mr Levanidov had their "*respective duties as part of the joint venture*" and they allegedly agreed to operate their "*investments collaboratively*" and for "*common benefit*".[487]

429. However, it is apparent from his witness statement that the alleged joint venture consisted in fact of two independent businesses acting in collaboration with one another. He writes;

> "*The joint venture I concluded with Mr. Levanidov was designed to avoid [certain] pitfalls through the coordinated management of our respective investments. This gave our companies significant operational benefits which could not have been achieved had they been operated independently from one another*."[488]

430. This characterisation of the joint venture as a loose cooperation between two independent businesses finds confirmation in the Witness Statement of Mr Levanidov, who writes that

> "*49. Mr. Pildegovics and I initially decided to maintain separate ownership of our respective investments and companies. While these companies would work together on a daily basis, and while Mr. Pildegovics and I took all important decisions together regarding each company participating in our joint venture (namely North Star, Seagourmet and Sea & Coast AS), each company maintained its independent existence and profit-and loss profile.*
>
> *50. Mr. Pildegovics and I agreed that we would discuss the possibility of developing a profit-sharing mechanism between us once our investments came to maturity, including the possibility of bringing our respective assets together within a single corporate structure. When Norway started taking adverse action against North Star, we had not yet settled this aspect of our joint venture, and the discussion has since been suspended due to the destruction of the value of our respective investments following Norway's decision to stop EU vessels from harvesting snow crabs in the Barents Sea.*"[489]

431. On this view, the 'joint venture' – even if being accepted as such – appears to have been no more than cooperation between two investors, each with his own investment, coordinating their plans for their mutual benefit.

---

487 Pildegovics, ¶¶34-36.

488 Pildegovics, ¶¶19, 39. See also **PP-0009**.

489 Levanidov, ¶¶49-50 (emphasis added).

5.2.1.3 There are no identified "claims to performance"

432. It is not the joint venture itself that is said to be the investment, but rather Mr Pildegovics' "*contractual rights in his joint venture agreement*"[490] insofar as those rights constitute "*claims to performance having an economic value*".[491]

433. Norway accepts that in principle contractual rights can qualify as investments under Article I(1)(iii) of the BIT. But not all contracts constitute investments: a tourist who buys a postcard in Oslo enters into a contract, but does not make an investment in Norway within the meaning of the BIT.

434. When considering "*claims to performance*" as investments under investment treaties, Tribunals have begun by defining what the alleged claim to performance *under the contrac*t is.[492] In the present case it is that claim to performance, and not the 'joint venture' as a whole, which must be established and defined so that its status as an investment can be scrutinised.

435. That requires an analysis of the terms of the alleged 'joint venture'; an identification of which of those terms are said to give rise to the alleged "*performance*" to which Mr Pildegovics had legal claims; an assessment of whether Mr Pildegovics was actually entitled to the claimed performance; and then a determination as to whether the claimed performance amounts to an 'investment'. However, the Claimants have not explained what the alleged claim to performance is.

436. The paragraphs of the Memorial describing the alleged 'joint venture' component of Mr Pildegovics' investment[493] describe what Mr Levanidov and Mr Pildegovics are said to have done in connection with the Båtsfjord snow crab operation and emphasise the closeness of their collaboration. But they do not identify – let alone prove – any of

---

490 Memorial, ¶166.

491 Memorial, ¶493.

492 See for example, **CL-0144** *European Media Ventures SA v The Czech Republic*, UNCITRAL, Partial Award on Liability, 8 July 2009, ¶37: "*We must therefore consider, as a first step, whether the rights so defined are capable of amounting to an investment*".

493 Memorial, ¶¶208-239.

Mr Pildegovics' alleged "*contractual rights in his joint venture agreement*" that are said to have been injured by actions of Norway in breach of the BIT.

437. That section of the Memorial concludes with a simple assertion, for which the authority cited in the accompanying footnote is the expert report of Dr Ryssdal:

> "*As a party to a joint venture agreement with his cousin Kirill Levanidov, Mr. Pildegovics has contractual rights or claims against Mr. Levanidov pertaining to the performance of his duties as a party to the joint venture.*"[494]

438. The paragraphs in Dr Ryssdal's report, however, are based only on assertions set out by Mr Levanidov and Mr Pildegovics in their witness statements, without any further investigation.[495]

439. Dr Ryssdal goes on to observe that, "[o]*ne question to consider further is what this contract entails*."[496] His answer to that question, at the end of this section of his Expert Report, reads as follows:

> "*37. The parties have undoubtedly entered a binding contract between them regarding their business activities in the snow crab business in Norway. Under this contract, Mr. Pildegovics and Mr. Levanidov had clear roles. They had also agreed to operate their investments based on continuous consultation and a common strategy. They were to work together on a daily-basis and consult each other on important decisions regarding the companies participating in the joint venture, which I understand consisted of North Star, Seagourmet Norway AS and Sea and Coast AS. The contractual obligation to cooperate and the duty of mutual loyalty apply to this contract.*
>
> *38. As mentioned in section 2.3 a cooperation based on agreement can under the circumstances fall within the definition of a "partnership" in the Norwegian "Partnership Act", where the business activity is conducted for the joint account and risk of two or more partners. In this case, the parties to the contract "derived important competitive advantages from the coordinated management of our companies", and had agreed they would be "developing a profit-sharing mechanism between us once our investments came to maturity, including the possibility of bringing our respective assets together within a single corporate structure". These discussions were however stopped and suspended when the Norwegian authorities took actions against North Star.*
>
> *39. Whether the parties' contract also constitutes a "partnership" today is therefore a somewhat open question, but it is not necessary to conclude on this*

494 Memorial, ¶239.

495 Expert Report of Dr Anders Ryssdal ("**Ryssdal**"), ¶¶31-32.

496 Ryssdal, ¶33.

> *point, as long as it is clear that a valid contract to collaborate exists in contractual or corporate form.*"[497]

440. A little later in his Report, Dr Ryssdal writes:

> "*As elaborated on above, the contract created reciprocal contractual duties between the parties. The parties have a contractual duty to cooperate and a duty of loyalty towards each other. Each and any of the contract(s) between the parties, oral or written, provide such obligations. The contract therefore plainly gives 'claims' to 'performance' between the parties. These claims could materialise in many different scenarios, i.e., if one of the parties did not fulfil his agreed role in the joint venture or failed to comply with the agreed common strategy*."[498]

441. Dr Ryssdal, considering the commercial benefits of cooperation between the business endeavours of Mr Levanidov and Mr Pildegovics, concludes that it is therefore "*clear that any 'claims to performance' under the contract would be of an economic value to the parties.*"[499]

442. The problem is that all of that argument is self-evidently question-begging. The 'investment' threshold cannot be crossed simply by asserting that there is a contract which contains unparticularised claims to performance.

5.2.1.4 There is no 'economic value' in any alleged claim to performance

443. In any event, even if Mr Pildegovics could *identify* a claim to performance contained within the alleged 'joint venture', any such 'claim to performance' is only an investment if it has an "*economic value*".[500] Further, the Tribunal only has jurisdiction over "*disputes* […] *in relation to an investment*".[501] Those two different jurisdictional hurdles are both relevant to the alleged rights to performance under the 'joint venture'.

444. There is no factual basis for a claim that there is any economic value to Mr Pildegovics' alleged rights to performance, or that Norway's actions give rise to a dispute "*in*

---

497 Ryssdal, ¶¶37-39. Footnotes omitted.

498 Ryssdal, ¶92.

499 Ryssdal, ¶93.

500 BIT, Article I(1)(III).

501 BIT, Article IX(1). See also above, paragraph 399.

relation to" Mr Pildegovics' alleged contractual rights under the 'joint venture' agreement.

445. Perhaps no such claim is brought. It appears that the Claimants' expert on quantum sees no such claim. In his expert report he writes:

> "*89.* […] *the objective of the damages analysis is to determine a monetary amount that would return Claimants to the same economic position they would have enjoyed but for the Measures. Since the Measures have directly impacted the value of the North Star enterprise, the subject of the valuation exercise is the North Star enterprise.*
>
> *90.* […] *In the present case, we conduct a valuation of the North Star enterprise.*
>
> [footnote:] *We note that Claimant Mr. Pildegovics is the 100% equity shareholder* [in North Star]. *We understand that by North Star being put back in the economic position it would have been in but for the Measures, Claimant Mr. Pildegovics would similarly be put back in the economic position he would have otherwise been in but for the Measures.*"[502]

446. Norway understands that statement to indicate that *all* of Mr Pildegovics' alleged losses in this case are suffered by virtue of his shareholding in North Star. In other words, *no losses* are identified in respect of his rights to performance in the alleged 'joint venture'. This may indicate either that those rights had no economic value, or that they were not in fact affected by any alleged measure taken by Norway. In either event, Norway has no liability.

5.2.1.5 There is no investment *in the Territory* of Norway

5.2.1.5.1 *The Claimants have not identified why any 'claim to performance' is an 'investment … in the 'Territory' of Norway*

447. The Claimants similarly slide over the question of territoriality. They do not explain why they say that any claims to performance under the 'joint venture' are investments "*in the* [Norwegian] *Territory*".[503]

448. Perhaps the Claimants mean to imply that the territoriality threshold is met because the 'joint venture' is said to governed by Norwegian law (even though it is said to have

---

502 Versant Expert Report, ¶¶89, 90 and fn. 139 (emphasis added).

503 Article I(1) BIT.

been established by agreement in Riga).[504] Even if it is (and that proposition is questioned below), it is not the joint venture but the particular claim to performance which is the investment and which must therefore be "*in the* [Norwegian] *Territory*". For example, a contract governed by Norwegian law for the purchase of real estate in Latvia would manifestly *not* be an investment in Norway, but an investment in Latvia.

5.2.1.5.2 *It is not established that the 'joint venture' is governed by Norwegian law or subject to the jurisdiction of Norwegian courts*

449. As no agreement has been set out in writing, the status, subject-matter and terms (and, indeed, the parties) of the alleged 'joint venture' remain unclear. It has not even been established that the alleged 'joint venture' was legally binding and enforceable, rather than being a simple gentlemen's agreement – whatever its terms might have been.

450. Should the tribunal find that a legally binding agreement has been entered into, the scope of such an agreement must obviously have some terms and limits. A leading authority on Norwegian contract law, Professor Geir Woxholth states:

> "*The key is thus the connection between form and content. The courts are reluctant to choose the most extensive interpretation in favour of the promisor, when the parties have made so little effort to give the agreement proper and detailed form. Their view is that the simple (contractual) form is a factor which indicates that the parties have not intended to commit themselves in an extensive way.*"[505]

451. The Claimants state that the alleged 'joint venture' agreement between Mr Pildegovics and Mr Levanidov would come under the jurisdiction of Norwegian courts, and moreover, that Norwegian law would be applicable to it – though why, given that the agreement was made in Riga between non-Norwegian nationals and there is no evidence of agreement on the law applicable to it, is not clear. Both statements are allegedly confirmed by the Expert Report of Dr Anders Ryssdal.

452. The practical situation where Norwegian courts would have to decide whether to assume jurisdiction, and whether the alleged agreement was governed by Norwegian law, would be if a claim was initiated based on a dispute under the alleged 'joint venture'.

---

504 Pildegovics, ¶31.

505 **RL-0015-NOR** Geir Woxholth, *Avtalerett*, 11th ed. (Oslo, Norway: Gyldendal, 2021) at pp. 500–501 (emphasis added). **RL-0016-ENG** English translation of the relevant paragraph.

453. Norway maintains that Norwegian courts would not assume jurisdiction in the event of a dispute between the Mr Pildegovics and Mr Levanidov in connection with their alleged agreement. The Expert Report of Dr Anders Ryssdal primarily fails because of the facts on which it is based, but also because of the lack of precision as regards the applicable law.

454. The conclusions reached in the report of Dr Ryssdal seem to be based on Mr Pildegovics' own statement that the agreement relates to a joint enterprise "*spanning snow crab fishery, the processing of raw snow crab catches and their transformation into end products, and the marketing and sale of such products to end customers*". Based on that statement, Dr Ryssdal reaches the conclusion that "*the performance of the contractual obligation between the parties belongs in Norway*".

455. No agreement has been set out in writing, and *none* of the terms of the purported agreement are clear. It is not possible to ascertain which obligations may arise from the alleged 'joint venture' agreement, nor where the place of performance would be.[506] There are certainly no grounds for conclusively stating that the place of performance would be in Norway. This is further emphasised by the fact that, as has been shown elsewhere in this Counter-Memorial,[507] the harvesting of snow crab evidently took place practically entirely in locations outside of Norwegian jurisdiction. Nor does the marketing and sale of the end products (live or frozen snow crab) appear to have been aimed at the Norwegian market. The Claimants note that only 10% and 7% of North Star's sales, in 2015 and 2016 respectively, were made to Norwegian companies other than Seagourmet. Seagourmet, in turn, appears to have focused its marketing and sales on Asia, the United States and the EU.[508] Subsequently, in 2016 and 2017 (covering the years 2017 and 2018), North Star entered into supply agreements with companies based in the United States and South Korea.

---

506 See the Lugano Convention article 5(1)a (**AR-0001**) and the Norwegian Disputes Act §4-5(2) (**AR-0009**).

507 See above, paragraphs 142-143.

508 See the marketing material exhibited by the Claimants: e.g. **PP-0023; PP-0057; PP-0150; C-0052; C-0079**.

456. Dr Ryssdal's analysis refers to the Lugano Convention.[509] If no identifiable contractual place of performance can be established, the rule of special jurisdiction in the Lugano Convention article 5(1)(a) and the Norwegian Disputes Act 2005 section § 4-5 (2) will not apply. In such case, the main rule of the defendant's domicile will be applied, and Norwegian courts would not assume jurisdiction over any contractual disputes arising from the 'joint venture', for the reasons set out below.

457. As stated by Dr Ryssdal, if the court decides that the Lugano Convention does not apply, the question of jurisdiction must be resolved on the basis of the Norwegian Disputes Act section § 4-3(1), which provides that

> "[d]*isputes in international matters may only be brought before the Norwegian courts if the facts of the case have a sufficiently strong connection to Norway*."[510]

458. The evidence presented by the Claimants does not support an assertion that the alleged joint venture agreement is more closely connected to Norway than to one of the other jurisdictions materially connected with this case. The alleged 'joint venture' agreement itself is likely to have at least as much connection to other jurisdictions. It was supposedly concluded in Latvia, by a U.S. and a Latvian citizen, which would point to a connection with Latvia or the United States, rather than Norway. Further, the evidence filed in this case shows that there was no intention of operating at least two of what might have been, depending upon its terms, the main legs of the alleged 'joint venture' (snow crab harvesting, the sale of snow crab to distributors and/or processors, and the marketing and sale of products to end customers) within Norwegian territory. Given the complete absence of evidence of the terms and scope of the alleged 'joint venture' agreement, and the fact that two of the parties to it are domiciled in jurisdictions other than Norway (and none, it seems, is domiciled in Norway), it is unlikely that Norwegian courts would determine that the matter has a sufficiently close connection to Norway for it to be subject to the jurisdiction of the Norwegian courts.

459. Further, even if the Norwegian courts were to assume jurisdiction over disputes arising under the alleged 'joint venture' agreement, it is unlikely that they would come to the conclusion that the purported agreement is governed by Norwegian law. Norwegian

---

509 Ryssdal, section 4.2.

510 Ryssdal, ¶49.

courts would apply Norwegian private international law in order to determine the applicable law of the 'joint venture'. Without more evidence concerning the alleged agreement it is difficult even to speculate as to what the applicable law might be.

460. For a contract as vague as the alleged 'joint venture' would be (if it were to be recognised as a legally-binding contract, or other form of agreement, at all), there is no specific Norwegian choice of law rule, other than the choice of the law of the country to which the contract has the closest connection.

5.2.2 Mr Pildegovics' shares in North Star

461. It is not entirely clear whether Mr Pildegovics' shares in North Star are formally advanced as an investment at all. On the one hand, they are identified in paragraph 166 of the Claimants' Memorial as an 'investment' made by Mr Pildegovics in the territory of Norway. On the other hand, his shares in North Star do not feature in the section of the Claimants' Memorial which argues that the Claimants' assets fall within the definition of "investments" (Memorial, ¶¶487-542).

462. Mr Pildegovics' 100% shareholding in North Star (which is nominally the second claimant in this arbitration and is a Latvian company) cannot be considered an investment in the territory of Norway. While 'shareholdings' are protected as an 'asset' under Article I(1)(ii) in the BIT, they only qualify as an "investment" if they are invested "*in the territory*" of the other State Party to the BIT. Further, to lie within the jurisdiction of this ICSID Tribunal they must also fall within Article 25 ICSID Convention.

463. The acquisition and holding of that shareholding by Mr Pildegovics, a Latvian national, was a domestic Latvian transaction involving the acquisition of shares in a local Latvian company. The history of that acquisition has been addressed in **Chapter 3**.[511] By way of summary:

[511] See above, **Section 4.3.2.1**.

463.1. North Star was incorporated on 27 February 2014, as a Latvian company,[512] and all of its shares were then held by Ms Irina Fiksa.[513]

463.2. On 10 May 2014 all of Ms Fiksa's shares were sold to Ms Nadežda Bariševa (Mr Pildegovics' life partner and later wife), and North Star became wholly owned by Ms Bariševa.[514] That share purchase agreement was made in Riga, Latvia, and was subject to Latvian Court jurisdiction (clause 19). The nationality of Ms Bariševa, now and at that time, is not known. Ms Bariševa is not a Claimant in this case.

463.3. Mr Pildegovics purchased those shares from Ms Bariševa on 15 June 2015, for the sum of EUR 3,000.[515] The agreement was made in Latvia and was subject to Latvian court jurisdiction (clause 19).

464. It is axiomatic that the object and purpose of the BIT is to protect foreign investment in the Host State.[516] Mr Pildegovics' shareholding in a Latvian company (which company is itself said by the Claimants in this case to be a *Latvian* investor) is not an investment in Norway. Purely domestic interests in the home State do not qualify for protection under international investment agreements.

465. Moreover, as was noted above,[517] whatever losses the Claimants allege have been sustained by Mr Pildegovics personally as the shareholder of North Star, all such losses are subsumed within the claims in this case made in the name of North Star itself. No claims are identified in the Memorial, or in the Versant Expert Report, as claims made in the name of Mr Pildegovics himself, distinct from the claims of North Star.[518]

---

512 Pildegovics, ¶44; **PP-0006**.

513 Pildegovics, ¶¶ 46-49; **PP-0007**.

514 Pildegovics, ¶¶49-50; **PP-0041**.

515 Pildegovics, ¶¶ 50-51; **C-0076**.

516 See BIT, Preamble paragraph 3: "*Preoccupied with encouraging and creating favourable condition for Investments by Investors of one contracting party in the Territory of another contracting party on the basis of equality and mutual benefit*".

517 See above, paragraphs 445-446.

518 Versant Expert Report, ¶¶89, 90 and fn. 139.

5.2.3 Mr Pildegovics' shares in Sea & Coast

466. The third of Mr Pildegovics' investments identified in the Memorial is his 100% shareholding in Sea & Coast AS ("**Sea & Coast**"), a Norwegian company.[519]

467. Although Norway does not dispute that Mr Pildegovics' ownership of Sea & Coast falls within the definition of an 'investment' in the BIT, it is not clear that there is a dispute between Mr Pildegovics and Norway *in relation to* this particular shareholding.

468. Mr Pildegovics acquired his shares in Sea & Coast on 15 October 2015.[520] Sea & Coast was established in 2014 by Mr Sergei Ankipov (whose nationality/ies is/are unclear) who was CEO and Project Coordinator of Ishavsbruket (later Seagourmet).[521] Ishavsbruket itself was a Norwegian company established in 2009,[522] apparently by Mr Levanidov.[523] Although Mr Levanidov was at one point the sole shareholder in Ishavsbruket, he is described in the Memorial as its majority shareholder.[524] It is not clear when, or to whom, Mr Levanidov disposed of the other shares in Ishavsbruket. What is clear, however, is that Seagourmet received an injection of share capital in 2015 or early 2016, which resulted in the dilution of Mr Levanidov's shareholding to 0.4%. In February 2016, he subsequently reacquired 40% of Seagourmet's shares through two transactions with a company controlled by Roman Chika and with WGI. Other shareholders at that time appear to have been Mr Danilenko, Mr Nezhinsky and Mr Chika (directly).[525]

469. Mr Pildegovics states that:

> "*Since June 2014, Sea & Coast has operated as a local agent for North Star's vessels and crews in Norway. Its mission was to facilitate the vessels' operations and to*

519 **PP-0048.**

520 **PP-0050**, clause 2.1.

521 Pildegovics, ¶56.

522 **KL-0006**. The Board of Ishavsbruket AS initially consisted of Anna Sharova Mortensen, with Andre Hellem Mortensen listed as her Deputy: ibid.

523 **KL-0028**. Cf., **KL-0027**, the Shareholder Book for Ishavsbruket AS, which states that as of 28 August 2009 Mr Levanidov owned stock number 1-100 of the 100 shares in the company. Cf., Memorial ¶175.

524 Memorial, ¶17(a).

525 **KL-0021**.

> *procure the goods and services they required, notably by building commercial relationships with suppliers from the local community.*
>
> *Through this important role, Sea & Coast enabled North Star's snow crab fishing operations and was therefore a key contributor to my joint venture with Mr. Levanidov.*"[526]

470. Thus, Sea & Coast, then owned by Mr Ankipov (perhaps on behalf of Ishavsbruket and/or Mr Levanidov) was in existence and operating as a local agent for North Star's vessels and crews in Norway for around 16 months before Mr Pildegovics acquired his interest in Sea & Coast by buying Mr Ankipov's shares on 15 October 2015[527] for NOK 66,000.[528]

471. Here again, the basic point is that all of Mr Pildegovics' losses in this case, as set out in the Versant Report, are suffered by virtue of his shareholding in North Star ("*the subject of the valuation exercise is the North Star enterprise*").[529] There are no claims in respect of any alleged losses arising from Mr Pildegovics' shareholding in Sea & Coast at all.

472. That point is one that is, of course, applicable to all supposed 'claims' made on behalf of Mr Pildegovics in his own name. No such claims being actually identified in the Claimants' submissions, that part of the claim can be put aside, leaving attention focused solely on the claims of injury to North Star.

5.3 NORTH STAR'S ALLEGED INVESTMENTS

473. Norway accordingly turns to North Star's alleged investments. According to the Claimants' Memorial, these relate to the following: (A) crabbing vessels; (B) "fishing capacity", referring to the right to operate a ship as fishing vessel; (C) fishing licenses authorizing each vessel to catch snow crab in the Loop Hole of the NEAFC zone and in maritime areas the Svalbard archipelago; (D) contractual rights to purchase two

---

526 Pildegovics, ¶¶58-59.

527 Pildegovics, ¶57.

528 **PP-0050**.

529 Versant Expert Report, ¶¶89, 90 and fn. 139.

additional ships, along with "fishing capacity" for such ships; and (E) supply agreements with purchasers of snow crab products.

474. Before addressing each in turn, a point applicable to several of North Star's alleged investments can be made. In the Claimants' Memorial at paragraphs 598-601 and corresponding footnote 755, the position of the Claimants on the question of the sedentary or non-sedentary status of the snow crab is kept purposefully (and, given its blindingly obvious answer, pointlessly) unclear. In fact, the Claimants' position in respect of snow crab as sedentary or non-sedentary species appears to have changed. Before the Norwegian courts the Claimants have argued that the snow crab is a non-sedentary species, like fish that swim in the ocean. If the position that the snow crab is not a sedentary species were correct, it would enable the Claimants to argue that it is not subject to coastal State jurisdiction but could be harvested with a Latvian license valid for the water column in the Loop Hole. But that position is clearly not correct, and has not been correct at any material time.

475. Perhaps the reason for the Claimants' newly-adopted non-committal stance is that neither position *actually* suits them. If snow crab is a sedentary species, it is a resource of the continental shelf, which falls within the territorial scope of the BIT (see Article I(4)). But that also means that the Claimants' 'licenses' are invalid, because Latvia (as explained above) had no right to issue any 'licences' for harvesting on Norway's continental shelf, over which Norway—and Norway alone—has sovereign rights under UNCLOS.

5.3.2 North Star's Four Vessels

5.3.2.1 Introduction

476. As was noted above, it was during the 16-month period during which it was owned by Ms Irina Fiksa and subsequently by Ms Nadežda Bariševa,[530] that North Star acquired its four ships.[531]

---

530 Memorial, ¶¶46-49; **PP-0007**.

531 Memorial, ¶61. The ships were acquired between April and December 2014.

477. It was also noted above[532] that the purchases of the ships appear to have been financed and re-financed by companies with which Mr Levanidov had a connection – and in the case of the refinancing, apparently without any schedule for repayment or security from North Star, which suggests that it was not a commercial arrangement. That point was made above in relation to Mr Pildegovics' investments because of its bearing on the question whether Mr Pildegovics was himself an actual investor or was acting as an agent for Mr Levanidov and/or other persons.

478. In the context of an analysis of North Star's investments, different questions arise. For example, the terms of the loans go to the question of the value of the company and its assets, and are to be considered in relation to quantum. At present, it is still unclear where the money from the vessel purchases came from, how the various loans obtained by North Star were actually used or invested by it, and what the actual practice was in relation to repayment of the loans.

479. Norway does not dispute that the purchases of the ships by North Star using loans from various companies may in principle constitute an investment. It *does* dispute that the vessels were an investment by an investor of one Contracting Party to the BIT (Latvia, because that is the nationality of North Star) in the territory of the other Contracting Party (Norway).

5.3.2.2 The four vessels are not investments in the territory of Norway

480. The *Solvita* (formerly *Ivangorod*) was delivered to Båtsfjord in June 2014.[533] North Star took delivery of *Senator* at the port of Hajnarfjordur, Iceland, in September 2014;[534] of *Saldus* (formerly *Iskander*) at the port of Busan, South Korea, in December 2014;[535] and of *Solveiga* (formerly *Saratoga*) at the port of Busan, South Korea, in January 2015.[536]

---

532 See above, **Section 4.3.2.2.1**, in particular paragraph 386.

533 Memorial, ¶259.

534 Memorial, ¶261.

535 Memorial, ¶264.

536 Memorial, ¶266.

481. Thus, none of the ships were bought in Norway or from a Norwegian company, and it seems that none of the ships were in Norway when they was purchased. They might have been intended to be used in Norwegian maritime areas, among other places: but that is not enough to make them investments in Norway.

5.3.2.2.2 *The definition of "territory" under the BIT*

482. The BIT specifically defines the "territory" of Norway as meaning:

> "[t]*he territory of the Kingdom of Norway* […] *including the territorial sea, as well as the continental shelf over which the state concerned exercises, in accordance with international law, sovereign rights for the purpose of exploration and exploitation of the natural resources of such areas*".

483. The Claimants assert that:

> "*Norway's land mass; Norway's territorial sea; Norway's continental shelf; Norway's exclusive economic zone, including the Svalbard Fisheries Protection Zone; as well as any other area where Norway "exercises" what it believes to be its "sovereign rights for the purpose of exploration and exploitation of natural resources*".[537]

The assertion is made without argument and without citation of authority. Moreover, the Claimants' reference to "any *other* area where Norway "*exercises*" what it believes to be its "*sovereign rights*" does not appear in the text of the BIT at all.

484. Norway accepts that the definition of its territory in Article 1(4) of the BIT includes its land territory, its territorial sea, and its continental shelf. It does not accept that it includes Norway's 200 nautical mile zones which includes the Norwegian Economic Zone outside mainland Norway, the Fisheries Protection Zone around Svalbard and the Fisheries Zone around Jan Mayen. Norwegian law has provided for the establishment of EEZs since 1976,[538] 16 years before the signature of the BIT on 16 June 1992. Yet the BIT refers specifically to the territorial sea and to the continental shelf and *not* to the 200 nautical mile zones, including the Norwegian Economic Zone outside mainland Norway or the Fisheries Protection Zone around Svalbard. The specific identification of the territorial sea and continental shelf, and the omission of those other maritime

---

537 Memorial, ¶547.

538 **RL-0102-NOR**; **RL-0017-ENG** Act No. 91 of 17 December 1976 relating to the Economic Zone of Norway: Regulations 17 December 1976 No. 15 established the Economic Zone outside mainland Norway, **RL-0105-NOR** Regulations 3 June 1977 No. 6 established the Fisheries Protection Zone around Svalbard and Regulations 23 May 1980 No. 4 established the Fisheries Zone around Jan Mayen.

zones, cannot credibly be treated as an insignificant accident, particularly in the case of a State whose economy is so dependent upon EEZ fisheries. Norway has consciously and consistently excluded its 200 nautical mile zones from any of its BITs. On the plain wording of the BIT, the Norwegian Economic Zone outside mainland Norway and the Fisheries Protection Zone around Svalbard are not to be treated for the purposes of identifying an investment "*in the territory of Norway*" as a part of Norway's "territory". The Claimants have given no reason to suppose that the terms of BIT should not be given their "*ordinary meaning ... in their context and in the light of its object and purpose*".[539]

5.3.2.2.3 *The four vessels are not investments in the "territory of Norway"*

485. The Claimants' argument that the vessels were an investment in the territory of Norway is flawed for other reasons.

486. First, the ships had no necessary connection with Norway. They could be used practically anywhere at sea; and in fact they had been used elsewhere. Certainly, there is no reason why the vessels could not be used for harvesting of snow crab on a non-Norwegian continental shelf (as to which see below). The *Saldus* and the *Solveiga*, for instance, had been brought from the port of Busan in South Korea when they were purchased by North Star.[540]

487. Indeed, it seems that it was always intended that the use of the vessels would not be limited to harvesting snow crab or to activities in Norwegian waters. For example, in the agreement between Mr Pildegovics and [redacted], dated 16 July 2014, by which "fishing capacity" was transferred to the *Solveiga* (formerly, *Saratoga*), Mr Pildegovics signed the statement that:

> "*In case of necessity the CONTRACTOR will prepare the attestation that SIA NORTH STAR LTD. only plans to fish for quota-free and unrestricted fish species (including, but not limited to Opilio (snow crab)) in the NEAFC fishing areas and does not claim and will not claim the fishing quotas in the deep-sea allocated to Latvia.*"[541]

---

539 VCLT, Article 31(1) **CL-0021**.

540 Pildegovics, ¶¶68, 70.

541 **PP-0070**, clause 1.1.5.

488. Then there is the possibility of the conversion of the ships into fishing vessels optimized for taking a different catch. The *Senator* had undergone one such a refit to suit it for harvesting of snow crab when it was bought by North Star, for instance.[542]

489. The fact that the vessels could have been used practically anywhere demonstrates that there is no real territorial link to Norway. The vessels were Latvian-flagged, and therefore subject to flag State jurisdiction of Latvia, wherever they might be.[543] If there was a continuing link between the vessels and a State, it was a link with Latvia, not with Norway.

490. Second, the vessels *were in fact* used elsewhere, and overwhelmingly so during the relevant period. The vast majority of the four vessels' time harvesting snow crab in the Loop Hole was spent on the *Russian* continental shelf, not on the Norwegian continental shelf.[544] Of the four vessels that were operational, no single vessel caught more than *0.27%* of its total catch of snow crab on the Norwegian continental shelf. Overall, 99.84% of the total catch of snow crab was caught outside the Norwegian continental shelf.[545] It is estimated that:

490.1. Of the *Saldus*'s total catch of 653,897 kg of snow crab between 8 April 2015 and 4 September 2016, 0.23% was caught on the Norwegian continental shelf.[546]

490.2. Of the *Solveiga*'s total catch of 1,388,075 kg of snow crab between 31 March 2015 to 5 September 2016, none (0.00%) was caught on the Norwegian continental shelf.[547]

---

542 Pildegovics, ¶66.

543 UNCLOS, Article 92(1) **CL-0013**.

544 **R-0151-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*), "Guidance and summary - Report concerning vessels belonging to the Latvian company SIA North Star".

545 **R-0151-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*), "Guidance and summary - Report concerning vessels belonging to the Latvian company SIA North Star".

546 **R-0152-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*) regarding *Saldus*, p.1.

547 **R-0154-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*) regarding *Solveiga*, p.2.

490.3. Of the *Solvita*'s total catch of 1,357,796 kg of snow crab between 26 July 2014 and 9 September 2016, 0.28% was caught on the Norwegian continental shelf.[548]

490.4. Of the *Senator*'s total catch of 1,956,214 kg of snow crab between 20 May 2015 and 8 September 2016, 0.13% was caught on the Norwegian continental shelf.[549]

491. These figures are stark, and demonstrate clearly that the main business of North Star – its snow crab harvesting activity – was only conducted on the Norwegian continental shelf on the tiniest scale. The numbers are sufficiently negligible that the four vessels cannot seriously be regarded as having been operating in the "territory" of Norway, let alone being 'investments' *in* the territory of Norway. They were in fact operated practically entirely on the *Russian* continental shelf. It cannot be said that vessels which could operate anywhere and were in fact harvesting snow crab on the Russian continental shelf for over 99% of their harvesting operations can be 'investments in the territory of Norway'.

492. Furthermore – and it is this fact, among others, that makes the claims in this case so startling – the licences that the Claimants obtained were neither sought nor obtained from Norway. The licences were all issued by and bought from Latvia. They were investments in Latvian licences – investments in Latvia, not in Norway.

5.3.2.2.4 *The four ships are not investments made "in accordance with" Norwegian law*

493. Third, the claim that these vessels were 'investments in the territory of Norway' fails for the further reason that the 'investments' are expressly made subject to Norwegian law. Article I of the BIT stipulates that investments are assets invested "*in accordance with*" the laws and regulations of Norway. The Claimants cannot simply announce that they have bought vessels with the intention of using them to fish in Norwegian waters and therefore have rights to fish in Norwegian waters that are protected under the BIT

548 **R-0155-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*) regarding *Solvita*, p.1.

549 **R-0153-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*) regarding *Senator*, p.1.

because their vessels are 'investments in the territory of Norway'. Had the Claimants in fact "operated" their vessels in Norwegian territory (*i.e.* had they harvested snow crab on the Norwegian continental shelf and were that sufficient to satisfy the territoriality threshold) the investment would patently have been made in direct contravention of Norwegian law.

494. As in other States, under Norwegian law commercial fishing requires permission, and there is no legal entitlement to be given that permission. Moreover, the fishing industry is based on the grant of annual quotas, and the grant of a quota for one year does not entail a right to be granted quotas for subsequent years. If someone had been invited to invest in the vessels, they would surely have recognized that there could be no guarantee that the vessels would be able to operate in any particular location, year after year. It was not an investment specifically *in the territory of Norway.*

495. The vessels were all purchased, and the alleged investment initiated,[550] in 2014. Their first fishing licences were in each case obtained after their purchase, and there is no suggestion that there was any prior legal commitment to issue them with licences to catch crab or fish in Norwegian waters. The investment in the fishing vessels was just that: an investment in mobile vessels to be used for fishing wherever and whenever permission to fish could be obtained. Even if there were evidence that the Claimants really did intend to engage in harvesting of snow crab on the Norwegian continental shelf (*quod non*), and the glaring evidence that they in fact operated elsewhere – including, when in the Loop Hole, almost entirely on the Russian continental shelf – is ignored, that intention could not have converted the investment in the fishing vessels into an investment in a particular State. The claim would be plausible only if the vessels had a *right* to engage in harvesting of snow crab on the Norwegian continental shelf, rather than a mere *hope* that they might obtain permission to do so. But they had no such right.

496. It appears that this was well understood by Mr Levanidov as early as 2010, when he referred in correspondence with Mr Pildegovics to the Norwegian law which, Mr Levanidov said, "*does not allow foreigners to hold more than 40% in fishing*

550 Memorial, ¶544.

companies".[551] The law that Mr Levanidov is referring to is the Participation Act, Section 5 which provides that a "*commercial license*" for participation in Norwegian fisheries could only be granted to companies who were owned at least 60% by Norwegian citizens.[552] Thus, as early as 2010, Mr Pildegovics was aware that North Star (as a Latvian company) was unable to obtain permits to participate in Norwegian fisheries.

5.3.2.2.5 *The ownership of the four vessels*

497. Fourth, as was noted above,[553] in 2018 [redacted] agreed to purchase North Star's outstanding loans from its creditors [redacted] and [redacted] effectively accepting responsibility for North Star's debt. This arrangement was not entered into on commercial terms, and is a further indication that the vessels were in reality investments of Mr Levanidov and/or one or more of the companies owned or controlled by him and/or others.

5.3.2.2.6 *Conclusion*

498. For these reasons, the purchases of the four ships in the name of North Star, regardless of the source of the funding for them, cannot be regarded as "investments in the territory of Norway" made by North Star.

5.3.3 "Fishing capacity" – the right to operate a ship as fishing vessel

499. Similar points can be made in relation to the second of the alleged 'investments in the territory of Norway' made by the Claimants: the supposed investment in "fishing capacity", referring to the right to operate a ship as a fishing vessel.

500. 'Fishing capacity' is an aspect of the EU scheme for regulating fishing. The EU aims to avoid overfishing, and to manage fish stocks, in part by limiting the number and size of fishing vessels eligible to engage in fishing activities under an EU flag.[554] As Mr Pildegovics explains,

---

551 **PP-0009**.

552 **RL-0010-NOR; RL-0011-ENG** Act of 26 March 1999 No. 21, last amended by LOV-2019-06-14-21 and LOV-2019-12-13-79.

553 See above, **Section 4.3.2.2.1**.

554 Memorial, ¶517.

"*75. In order to build a fleet of fishing vessels, a new fishing company must acquire not only physical ships, but also fishing "capacity", referring to the right to operate ships as fishing vessels.*

76. In the European Union, fishing capacity is constrained by a management scheme which seeks to balance the fishing capacity of the total fleet and available fishing opportunities. The goal of the scheme is to reduce the risk of overfishing by limiting the number of EU ships that can fish at any given time.

77. For each EU country, a fishing fleet capacity ceiling is established with respect to maximum total engine and cargo capacity, calculated in kilowatts (kW) and gross tonnage (GT). Since the total kW and GT ceiling is fixed, a new fishing vessel may only enter a country's fishing fleet if an existing vessel is removed from the fleet.

78. The fishing capacity management scheme creates a significant barrier to new entrants in the fishing industry because incumbent fishing companies own all existing fishing capacity. Fishing capacity may therefore only become available to a new entrant if an incumbent fishing company decommissions a fishing vessel without replacing it with a new one, in effect reducing its fishing capacity."[555]

501. From that description, several points are apparent. *First*, the acquisition of 'fishing capacity' entailed no right whatsoever to engage in fishing or crabbing within Norwegian waters or on the Norwegian continental shelf. It simply made North Star eligible to apply for such rights (and other fishing rights) as a matter of EU law. Having acquired 'fishing capacity' recognised under EU law, it had fishing vessels in respect of which it could apply to the EU for fishing rights – in EU parlance, the vessels became eligible for 'fishing opportunities'.[556]

502. *Secondly*, the need to acquire 'fishing capacity' is imposed not by Norwegian law but by EU law. The acquisition of 'fishing capacity' was approved not by Norwegian but by Latvian authorities,[557] and was effected by means of contracts made in Latvia, with Latvian counter-parties, governed by Latvian law and subject to Latvian court jurisdiction.[558] The approval of the acquisitions of fishing capacity made clear that in themselves they carried with them no actual authorisations to fish. For example, the approval dated 22 April 2014 relating to the *Ivangorod / Solvita* said:

---

555 Pildegovics, ¶¶75–78. Cf., **PP-0068**.

556 See e.g. **CL-0003.**

557 Pildegovics, ¶¶79–82; **PP-0069, PP-0071, PP-0072, PP-0073**.

558 See **PP-0040**; **PP-0070**; **C-0057**. Note that although Mr Pildegovics says (Pildegovics, ¶82) that the *Senator*'s fishing capacity was sold with the vessel, the contract (**C-0057**, clause 3.4) provides that: "*No fishing rights or quotas are included in the sale*".

> "*The Ministry of Agriculture has examined application by LLC "NORTH STAR LTD." dated 22 April 2014 whereby it asks to allow it to buy the deep-sea fishing vessel "IVANGOROD" by using the necessary capacity of main engine of 852 kW and gross volume of 734 GT received from LLC* [redacted].
>
> *The Ministry of Agriculture hereby informs that according to the Cabinet Regulation No. 296 of 2 May 2007 "Regulation on industrial fishing in territorial waters and economic area waters", Articles 8.11 and 27, SIA „NORTH STAR LTD." is allowed to purchase the fishing vessel "IVANGOROD" with the capacity of main engine of 852 kW and gross volume of 734 GT by using the necessary capacity of main engine of 852 kW and gross volume of 734 GT received from* [redacted] *under a condition that the fishing vessel is registered in the Latvian Ship Register until 22 April 2015.*
>
> *At the same time, we would like to point out that in order for SIA "NORTH STAR LTD." to be able to do commercial deep-sea fishing with the fishing vessel "IVANGOROD", it should receive a relevant authorisation (licence) for fishing business operation in compliance with Cabinet Regulations No.1015 "Procedure for the issue of special permits (licences) for commercial activities in fishery and payment of the state fee for the issue of special permits (Licences)". We would also like to notify you that at present there are no free not allocated catch quotas for the deep-sea fishing which could be allocated to SIA «NORTH STAR LTD." and it will only be possible to use the fishing vessel "IVANGOROD" for catching unrestricted fish species in international waters or the waters of third countries. We kindly ask to take into account that you will not be eligible to claim any compensation or public aid for exclusion of the fishing vessel "IVANGOROD" from the Latvian Ship Register.*"[559]

503. Norway is not even alleged to have done anything that impinges on this "*right to operate a ship as a fishing vessel*". But the point here is that nothing about that right, conferred by the Latvian Government in order to meet an obligation imposed by the EU, and conferring no actual rights to catch fish or harvest crab, supports the view that it can be regarded as an investment by North Star in the 'territory' of Norway or any other State, as opposed to a purely Latvian (or internal EU) matter which did not give or purport to give North Star any enforceable legal rights in respect of the 'territory' of Norway as defined in the BIT.

5.3.4 Fishing licenses authorizing each vessel to catch snow crab in the Loop Hole area of the NEAFC zone and in maritime areas around Svalbard

504. The third of the five investments alleged to have been made in the territory of Norway by North Star is the purchase of the fishing licenses authorizing each vessel to harvest snow crab in the Loop Hole area of the NEAFC zone and in maritime areas around Svalbard.

---

559 **PP-0069** (emphasis added).

505. The licences[560] were requested by North Star from and issued by the State Environmental Service of Latvia. It was Latvia that was paid for those licences. While they authorise Latvian vessels to engage in commercial fishing in the NEAFC area to the extent that such fishing remains unregulated, they do not, and cannot, have the effect of granting to North Star any legal right to exploit Norway's resources on its continental shelf contrary to regulations adopted by Norway. Nor, indeed, would it be expected that Latvia would purport to grant licences to exploit Norway's marine resources, let alone purport to authorise their exploitation in breach of Norwegian law.

506. The licences, like the "fishing capacities", are authorisations within the EU fisheries management regime for the named Latvian vessels to operate at sea. They are not, and do not purport to be, authorisations given by or on behalf of the Norwegian authorities to take Norwegian resources. Nothing about these licences supports the view that they can be regarded as investment by North Star in the territory of Norway.

507. Indeed, as has been explained in **Chapter 2** above[561] the NEAFC regime does not apply in areas under the jurisdiction of a contracting party, unless that State has specifically consented. Those areas include the Norwegian continental shelf (*i.e.* its "territory" for the purposes of the BIT). Norway has given no such consent, and therefore even if the licences could be considered 'investments' at all, they are self-evidently not investments in the territory of Norway.

5.3.5 Contractual rights to purchase two additional ships, along with "fishing capacity" for such ships

508. It is even harder to understand the basis for the claim that the fourth of the five alleged North Star investments in the territory of Norway. This is the "contractual rights to purchase two additional ships, along with "fishing capacity" for such ships." The ships were named *Sokol* and *Solyaris*.

509. North Star did indeed sign letters of intent on 23 July 2015 with the Russian companies [redacted] and [redacted], for the purchase of two further vessels[562]. Both companies are

---

560 The licences are identified and their Exhibit numbers listed Exhibits in the Memorial, at ¶¶89–92.

561 See above, paragraphs 53-55.

562 **PP-0102, PP-0103**.

based in the city of Yuzhno-Sakhalins on the Russian island of Sakhalin, which lies between the Sea of Okhotsk and the Sea of Japan. On 5 January 2017 – *after* the date of the alleged breach of the Claimants' rights[563] – the transactions having been approved by the Latvian authorities, definitive agreements for the purchases were signed.[564]

510. North Star cancelled the contracts in May 2017, after the arrest of the *Senator* and North Star's "*realisation*"[565] that it did not have the permission to catch snow crab on which the viability of the purchase of the two ships was premised. North Star allegedly incurred penalties for the cancellation of the contracts,[566] though Mr Pildegovics does not allege, let alone evidence, that the penalty payments were in fact made, but only that they were "*incurred*". Further, as noted above,[567] it is possible that these debts ([redacted]) were in fact transferred to [redacted].

511. The situation here is similar to that in relation to the four ships that were actually purchased.[568] The Claimants put forward these contracts as claims to performance, namely "*claims for the delivery of the two vessels to North Star*".[569] But a contract for the delivery of an asset to Norway cannot in itself be considered an 'investment' in the territory of Norway.[570] Neither the sellers nor their ships were in Norway.

512. Further, and as mentioned above in relation to North Star's four ships, even if they had been delivered it seems clear that the *Sokol* and *Solyaris* would not have been used in the "territory" of Norway but on the high seas or on the Russian continental shelf. The ships would have had no legal right to catch crab in Norwegian waters, and there had been no commitment to allocate them any such right. The intended purchases were

---

563 Memorial, ¶814.

564 Pildegovics, ¶¶98–106.

565 Though of course Norway says that its position was clear—and known—to the Claimants. See **Chapter 6**.

566 Pildegovics, ¶¶106, 107.

567 See above, paragraph 386.

568 See above, paragraphs 387-390.

569 *Ibid*.

570 See below, in relation to sales contracts, **Section 5.3.6**.

made in the hope that the two additional vessels would be able to engage in harvesting of snow crab. This speculative transaction, which sat on the shelf for almost two years between 2015 and 2017, was not an investment in the territory of Norway.

5.3.6 Contracts with purchasers of snow crab products

513. The final investments by North Star that are identified by the Claimants consist of the contracts between North Star and the purchasers of snow crab products. These are contracts for the sale of goods. There are five such contracts identified by the Claimants, all of them made *after* the date of the alleged breach of the BIT. They can be divided into contracts with Seagourmet and contracts with other companies.

Agreements with Seagourmet

513.1. A contract dated 29 December 2016 between North Star and Seagourmet (produced as exhibit **C-0053**); and

513.2. a contract dated 27 December 2017 between North Star and Seagourmet (produced as exhibit **C-0054**).

Agreements with other entities

513.3. A contract dated 29 December 2016 (subsequently extended for a further year by a protocol dated 20 December 2018) between North Star and [redacted]. Here, the position is somewhat unclear. In both Mr Pildegovics' witness statement[571] and in the Claimants' Memorial,[572] there is discussion of a contract between North Star and [redacted], but the footnote references **C-0054**, the above contract between North Star and Seagourmet. It appears that the correct reference is **C-0065**;

513.4. a contract dated 29 December 2016 between North Star and [redacted] (produced as exhibit **C-0066**); and

571 Pildegovics, ¶111.

572 Memorial, ¶306.

513.5. a further contract dated 27 December 2017 between North Star and [redacted] (produced as exhibit **C-0067**).

514. North Star claims (Memorial, ¶527) that these contracts for the sale of goods are investments insofar as they give North Star claims to performance, "*namely for payment against delivery of snow crabs*".

515. The point has already been made above (**Chapter 3**) that these counterparties are all owned and/or controlled by Mr Levanidov and his associates, further suggesting that this entire operation belonged to *Mr Levanidov*, and not to Mr Pildegovics or to a 'joint venture'.

5.3.6.2 Sale of goods contracts are not "investments"

516. Contracts for the sale of goods, as ordinary commercial transactions, do not fall within the definition of "investment" under the ICSID Convention, which term was not intended to be wide enough to cover such transactions.[573] In *Joy Mining* the Tribunal observed:

> "*if a distinction is not drawn between ordinary sales contracts, even if complex, and an investment, the result would be that any sales or procurement contract involving a*

---

573 **RL-0109-ENG** *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, para. 58 (contract for the provision of mining systems and supporting equipment), cited with approval in *Romak S.A. v. The Republic of Uzbekistan,* PCA Case No. 2007-07/AA280, Award, 26 November 2009 ("*Romak*"), paras. 185-188 (supply of wheat) and both of the foregoing cited with approval in **RL-0110-ENG** Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela (II), ICSID Case No. ARB(AF)/11/1, Award, 30 April 2014 at para. 78; *Id.*, para. 105, referring to the "risk" criterion: "*any transaction involves a risk, but what is required for an investment is a risk that is distinguishable from the type of risk that arises in an ordinary commercial transaction*"; *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010, para. 56 (poultry sale and purchase agreements); **CL-0141** *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, para. 69: "*It appears to have been assumed by the Convention's drafters that the use of the term 'investment' excluded a simple sale and like transient commercial transactions from the jurisdiction of the Centre*". See also *Id.*, para. 72, describing a "*fundamental assumption* [within Article 25] *that the term 'investment' does not mean 'sale'*"; "Article 25", in Christoph Schreuer, *The ICSID Convention: A Commentary* (CUP 2010) at §122: "*it was always clear that ordinary commercial transactions would not be covered by the Centre's jurisdiction no matter how far-reaching the parties' consent might be*"; **RL-0111-ENG** Ibrahim F.I. Shihata and Antonio R. Parra, "The Experience of the International Centre for the Settlement of Investment Disputes" (1999) 14(2) ICSID Review 299, p.308: "*A simple sale of goods is often cited as an example of a transaction that is clearly not an investment*". The authors report that the ICSID Secretary-General refused to register a request for arbitration in relation to a sale of goods contract given that the transaction "*manifestly could not be considered an investment*". See also the ICSID Additional Facility Rules, Article 4(3), which provides that even where a dispute does not relate to an investment, the Secretary-General may only give approval if satisfied that the "*underlying transaction has features which distinguish it from an ordinary commercial transaction*".

> *State agency would qualify as an investment. International contracts are today a central feature of international trade and have stimulated far reaching developments in the governing law,* […] *Yet, those contracts are not investment contracts, except in exceptional circumstances, and are to be kept separate and distinct for the sake of a stable legal order. Otherwise, what difference would there be with the many State contracts that are submitted every day to international arbitration in connection with contractual performance, at such bodies as the International Chamber of Commerce and the London Court of International Arbitration?*"

517. They also do not fall within the meaning of 'investment' under the BIT. There is nothing in the term "*claims to any performance under contract having an economic value*" which suggests that Norway and Latvia intended contracts for the sale of goods to be protected under the BIT. The Tribunal in *Romak*, dealing with an almost identical provision in the 1993 Uzbekistan-Switzerland BIT,[574] made the following observations (acknowledging that, as an UNCITRAL Tribunal, it did not need to engage in a discussion of the definition of 'investment' under the ICSID Convention):

> "*As stated above at paragraph 180, the categories enumerated in Article 1(2) are not exhaustive and are clearly intended as* illustrations*. Thus, for example, while many "claims to money" will qualify as "investments," it does not follow that all such assets necessarily so qualify. The term "investments" has an intrinsic meaning, independent of the categories enumerated in Article 1(2). This meaning cannot be ignored*".[575]

> " […] *contracting States are free to deem any kind of asset or economic transaction to constitute an investment as subject to treaty protection. Contracting States can even go as far as stipulating that a "pure" one-off sales contract constitutes an investment, even if such a transaction would not normally be covered by the ordinary meaning of the term "investment." However, in such cases, the wording of the instrument in question must leave no room for doubt that the intention of the contracting States was to accord to the term "investment" an extraordinary and counterintuitive meaning. As explained above, the wording of the BIT does not permit the Arbitral Tribunal to infer such an intent in the present case*".[576]

518. Contracts for the sale of goods are archetypical 'pure' commercial transactions which fall outside the scope of the definition of "Investment" in the ICSID Convention and the BIT.

519. The cases cited by the Claimants at paragraph 525 of the Memorial are not apposite:

---

574 **CL-0139**, para. 97, referring to Article 1(2) of the relevant treaty: "*claims to money or any performance having economic value*".

575 *Id*., para. 188. Emphasis in original.

576 *Id*., para. 205.

519.1. *Petrobart Limited v The Kyrgyz Republic*[577] is an SCC Award, not an ICSID Award, and therefore the outer limits of the definition of the term "Investment" under the ICSID Convention did not fall for consideration by the Tribunal. Further, the relevant investment treaty was the Energy Charter Treaty, which the Tribunal noted was "*a treaty with a broad definition of 'investment'*",[578] and which (In Article 1(6)(f) and 1(5)), *specifically included* within the definition of "investment" any "*economic activity concerning* […] *the sale of Energy Materials and Products*",[579] which included the gas condensate at issue in that case.[580]

519.2. *Enkev Beheer BV v Republic of Poland*[581] is also not an ICSID Award. The Claimants advance the (PCA) Award, para. 310 for the proposition that "*contracts*" are "*in principle within the definition of 'moveable property' of the NL-Poland BIT*".[582] That is a paraphrase of what the Tribunal actually said. The Tribunal decided that the Claimant's shareholding in a Polish subsidiary was an "investment" but held that its investment did not extend beyond that shareholding so that the Claimant could stand in the shoes of the Polish subsidiary as regards its "*moveable and immovable property (including intellectual property), contracts, assets and monies*". The Tribunal did not decide whether such contracts fell within the BIT, whether "*in principle*"—as alleged—or otherwise.

519.3. The third non-ICSID award cited by the Claimants is *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia (I)*.[583] After referring to *Joy Mining* the UNCITRAL Tribunal said (paras. 117-118):

> "*However, this latter ratione materiae test for the existence of an investment in the sense of Article of the 25 ICSID Convention is one specific to the ICSID Convention*

---

577 **CL-0158** SCC Case No. 126/2003, Arbitral Award, 29 March 2005.

578 *Id.*, p.72.

579 **RL-0112-ENG** Energy Charter Treaty (1994) 2080 UNTS 100.

580 **CL-0158**, p.72.

581 **CL-0151** PCA Case No. 2013-01, First Partial Award, 29 April 2014.

582 Memorial, footnote 676.

583 **CL-0113** (UNCITRAL) Partial Award on Jurisdiction, 8 September 2006.

and does not apply in the context of ad hoc arbitration provided for in BITs as an alternative to ICSID.

In the present ad hoc arbitration under the UNCITRAL Rules one would therefore have to conclude that the only requirements that have to be fulfilled in order to confer ratione materiae jurisdiction on this Tribunal are those under the BIT. (footnotes removed)."[584]

519.4. *GEA Group Aktiengesellschaft v. Ukraine*[585] concerned a contract that "*conveyed the right* [...] *to exercise an economic activity in Ukraine at the relevant time*" and was "*more than just goods against a tolling fee*".[586] The same cannot be said for the sale of goods contracts in this case.

520. Further, and fundamentally, on any reckoning the contracts are not in themselves investments at all. Any 'investment' would have been in the resources necessary to procure and deliver the snow crab pursuant to the contracts. The contracts do no more than point to the way – or at least, to one way – in which North Star hoped to sell its catch of snow crab and to recoup its expenditure and earn its profit.

521. The agreements referred to by North Star are simple contracts for the sale of goods, and North Star's "*claims to performance*" are, as the Claimants acknowledge, simply claims for payment against the delivery of snow crab. Such transactions are not "*investments*" within the ICSID Convention and the Tribunal has no jurisdiction over them.

5.3.6.3 The alleged 'claims to performance'

522. It is for the Claimants to demonstrate that the alleged claims to performance ("*namely for payment against delivery of snow crabs*")[587] have actually arisen. At least with respect to the Link Maritime contract[588] and the [redacted] contracts[589] there do

---

584 The Tribunal went on to discuss, *obiter*, what their views would have been outside of the confines of the BIT. That discussion (not being relevant to the determination of the dispute) not an authoritative statement from a Tribunal actually applying Article 25. But in any case, the Tribunal considered that the relevant contracts, taken together, would *not* constitute an ordinary commercial transaction. If they had, it appears the Tribunal would not have made the *obiter* statement that it had.

585 **CL-0159** (ICSID Case No. ARB/08/16, Award, 31 March 2011).

586 *Id.*, para. 149.

587 Memorial, ¶527.

588 **C-0065.**

589 **C-0066**; **C-0067**.

not appear to be any concrete rights or obligations established by the contract (for example a minimum delivery obligation on North Star, regularity of deliveries, etc.). It is therefore not clear what the claims to performance actually are as a matter of the concrete contractual obligations, and it is for the Claimants to prove this.

523. Moreover, all five of the contracts have *force majeure* clauses which provide that:

> "*[i]n the event of any circumstances preventing the Parties from fulfilling their obligations hereunder wholly or in part, namely: flood, fire, earthquake and other Acts of God, war and hostilities, blockade, embargo, export/import ban, and other circumstances beyond the Parties' control, the term of the contract shall be extended proportionately to the period during which such Circumstances will be active.*"[590]

524. The Claimants have not proven or even alleged that any action was taken or threatened under any of the contracts, either by or against North Star, and if so what the effect of the *force majeure* clause might have been, in particular given that (as addressed below **Chapter 5**) the reality is that it was Russia's ban on snow crab harvesting which prevented the Claimants from harvesting snow crab in the Loop Hole.

5.3.6.4 Any 'claims to performance' are not in the territory of Norway

525. The Claimants must also prove that their claims to performance are investments in the territory of Norway. It is difficult to see that these contracts themselves constitute investments in the territory of Norway. All of the contracts are governed by Latvian law, and subject to the jurisdiction of the Latvian courts.[591] They are alleged to have been "*concluded*" at Båtsfjord,[592] but presumably that only indicates the place that the contract was signed, which cannot be indicative of whether a particular clause in the contract gives a right to performance in Norway.

526. Furthermore, the particular claim to performance relied upon by the Claimants is the claim to payment under the contracts. That right is not located in Norway, given that the contracts do not say that payment is to be made *in Norway* or to a Norwegian bank account. Presumably, payment would have been made (if at all) into North Star's local

---

590 **C-0053**, clause 6.1; **C-0054**, clause 6.1; **C-0066**, clause 6.1; **C-0067** clause 6.1. The terms of **C-0065**, clause 8.1 are materially the same.

591 **C-0053**, clauses 7.1 and 7.2; **C-0054**, clauses 7.1 and 7.2; **C-0065**, clause 9.1; **C-0066**, clauses 7.1 and 7.2; and **C-0067**, clause 7.1 (clause 7.2 appears to be cut off).

592 Memorial, ¶526.

Latvian bank account. The claim to performance is thus a claim by North Star for payment, into a Latvian bank account, governed by Latvian law, with Latvian court jurisdiction.

527. The Claimants rely on the fact that delivery of snow crab took place in *Seagourmet*'s factory at Båtsfjord.[593] But that is the wrong focus. The alleged investment is not the contract as a whole, or the claims to performance that *Seagourmet* might have as against North Star. Whether North Star has claims to performance *as against* Seagourmet cannot be determined by where North Star's own obligations to Seagourmet would be performed.

5.3.6.5 The contracts are void as a matter of Latvian law

528. To the extent that the contracts required or envisaged action in breach of Norwegian law (or the law of any other State, for example Russian law), they were void as a matter of Latvian law.

529. According to the Latvian Civil Law Section 1415:

> "*An impermissible or indecent action, the purpose of which is contrary to religion, laws or moral principles, or which is intended to circumvent the law, may not be the subject-matter of a lawful transaction; such a transaction is void.*"[594]

530. Additionally, pursuant to Section 1592:

> "*No contract which encourages anything illegal, immoral or dishonest shall be binding. If one party has been persuaded to enter into such a contract fraudulently, then he or she has the right to request compensation for losses.*"[595]

531. If, therefore, the sales contracts required North Star to engage in snow crab harvesting on *either* the Norwegian or the Russian continental shelf, they were void, as both of those actions were unlawful according to Norwegian and Russian law.

532. The sales contracts being void, they cannot contain any claims to performance and *a fortiori* cannot have been injured by Norway.

---

593 Memorial, ¶527.

594 **RL-0115-ENG** Relevant provisions of the Civil Law of Latvia (the exhibit also includes the Latvian language text).

595 *Ibid*.

5.3.6.6 The Temporal Point

533. The question of timing is discussed below, in **Chapter 5**. It is the Claimants explicit case that they "*invested in Norway prior to its change in policy arising on 17 July 2015*."[596] Even if a broader view that the alleged expropriation took place in September 2016 is accepted, it is clear that *all* of North Star's sales contracts were entered into *after* the date that the Claimants' investments are said to have been destroyed by Norway. Even if they are capable of being 'investments' under the ICSID Convention and the BIT, there is no allegation by the Claimants that these sales contracts were in fact impacted by any breach of the BIT entered into by Norway. There is therefore no 'dispute' in relation to these sales contracts.

5.4 CONCLUSION

534. For these reasons the Claimants' case does not evidence the making of any investment in the territory of Norway in respect of which a claim is made in this case. The application in this case should be dismissed because it does not relate to a legal dispute between Latvian investors and Norway in relation to an investment by the Latvian investors in the territory of Norway.[597]

---

596 Memorial, ¶695.

597 BIT Art. IX, cf. Art I. And, in **Chapter 5** below, the question of *when* those alleged investments were made as against the dates of Norway's alleged breaches of the BIT is considered.

PART III: MERITS

CHAPTER 6: NORWAY HAS NOT BREACHED ANY PROVISION OF THE BIT

6.1 INTRODUCTION

535. In this chapter, Norway responds to the Claimants' allegation that it has breached various provisions of the BIT. The Claimants allege violations of Articles III, IV and VI of the BIT. The allegations are presented in a different order in the Memorial, giving priority to the allegation of expropriation, and that order is followed here. The sequence is summarised by the Claimants as follows:

> "[…] *Norway has breached the following provisions of the BIT: A) the obligation to compensate in the case of expropriation (Article VI); B) the obligation to provide "equitable and reasonable" treatment (Article III); C) the obligation to provide most favoured nation treatment (Article IV); and, D) the obligation to accept Claimants' investments in Norway in accordance with Norwegian laws (Article III)*".[598]

536. Before doing so, however, Norway turns to important issues of factual clarification.

6.2 THE TEMPORAL QUESTION

537. The discussion in **Chapter 5** above has focused on the question whether the Claimants made investments in the territory of Norway. There is a further aspect of this question that would be relevant if questions of legitimate expectations and of quantum are reached. That is the question of timing.

538. It is the Claimants explicit case that they "*invested in Norway prior to its change in policy arising on 17 July 2015*."[599] Even if the broader view that might be argued to be implicit in the assertion that "*Norway's cumulative actions until September 2016 … constitute a creeping (or indirect) expropriation of Claimants' snow crab enterprise in Norway*"[600] is accepted, investments occurring *after* September 2016 can scarcely be said to have been made in ignorance of Norwegian law and policy. That includes, for

---

598 Memorial, ¶674.

599 Memorial, ¶695.

600 Memorial, ¶689.

example, the alleged 'supply agreements' between North Star, Seagourmet and others, the earliest of which is said to have been entered into on 29 December 2016.[601]

6.3 THE VARIOUS 'FACTS' OR 'EPISODES' RELIED ON BY THE CLAIMANTS

539. In this section, Norway addresses several 'facts' or 'episodes of conduct' presented by the Claimants in the Memorial, which they allege give rise to breaches of the BIT. Those 'episodes of conduct' are addressed here (1) separately from the sections on each alleged breach; and (2) chronologically, because the Claimants rely on the same factual allegations in respect of multiple allegations of breach of the BIT.

540. There are several such 'episodes' which the Claimants rely on. They are:

(A) Exchanges in 2013-2014 between Mr Levanidov (and his associates) and Norway, said by the Claimants to evidence Norway's verification of the "*legality of North Star's fishing activities*";[602]

(B) the so-called 'Malta Declaration', which was in figured the agreed of a meeting of 17 July 2015, held in Malta between representatives of Norway and the Russian Federation (the "**Agreed Minutes**");

(C) Norway's 22 December 2015 amendment of its 2014 snow crab regulations which included reference to the Norwegian continental shelf and the continental shelves of other States;

(D) Norway's alleged "acceptance" of harvesting of snow crab by EU vessels independently of its position that they were a sedentary species between July 2015-September 2016

(E) Norway's issuance of fines, including to the *Juros Vilkas* on 15 July 2016 and to North Star on 27 September 2016 for snow crab harvesting on the Norwegian continental shelf.

---

601 **C-0053**; **C-0066**.

602 Memorial, ¶741.

6.3.1 The Alleged 'Verification' of the Legality of Snow Crab Harvesting

541. Chronologically the first such 'episode' is the alleged verification by Norway of the Claimant's harvesting activities.

542. In several places in the Memorial,[603] the Claimants allege that Norway, through its communications with the Claimants and Mr Levanidov "*accepted*" that the Claimants (or, more accurately, North Star) had a right to harvest snow crab on the Norwegian continental shelf. That allegation is said to give rise to specific legitimate expectations on the part of the Claimants, who allege that they "*verified the legality of North Star's fishing activities with regards to Norwegian law*".[604]

543. The Claimants assert that Norway considered snow crab to be an 'unregulated' species,[605] and "*the Loophole snow crab fishery as taking place 'in international waters' 'outside any state's fishing jurisdiction'*," so that "*vessels flying an EU flag could participate in this fishery on the same terms as Norwegian vessels*".[606]

544. This is unfortunately the first of several instances where the evidence adduced by the Claimants does not say exactly what the Claimants wish it said and suggest that it said.

545. The Claimants set out their case plainly in two paragraphs in the Memorial:

> "*196. The statement from the Norwegian Directorate of Fisheries that EU vessels were being treated "on an equal footing with Norwegian fishing vessels" confirmed Ishavsbruket's understanding that it could legally rely on an EU-based fishing company for its supplies of snow crabs, provided that the crabs were caught "outside the Norwegian Economic Zone". Since the Loophole area of the NEAFC zone was considered by the Directorate as "international waters" falling "outside any state's fisheries jurisdiction", EU- registered vessels could catch snow crabs there in full compliance with Norwegian laws and regulations*
>
> *197. Ishavsbruket's various inquiries with the Norwegian authorities clearly highlighted that the company was looking to supply its factory with snow crabs caught by EU vessels. As part of these exchanges, Norwegian officials expressed no concerns or doubts about the legality of such fishing activities by*

603 Memorial, ¶¶186-198; 740.

604 Memorial, ¶741.

605 Memorial, ¶91.

606 Memorial, ¶95.

EU vessels, or about the right of such vessels to catch snow crabs in the NEAFC zone".[607]

546. The statements referred to here and elsewhere[608] by the Claimants are presented as Exhibits **KL-0016** to **KL-0020**.

6.3.1.1 Initial communications in May-June 2013

547. Chronologically, the first communications date from May 2013. In the RFA, the alleged 'joint venture' is said to have been formed "*in 2013*".[609] This exchange concerns two questions posed by Sergei Ankipov, CEO of Ishavsbruket of and founder of Sea & Coast, to Sigmund Pleym Hågensen, Section Chief, Directorate of Fisheries Finnmark region with two questions. It is worth setting them out, with the response from Mr Hågensen, in full:

> *"1. Can foreign fishing vessels, in our case Russian vessels, engage in SNOW CRAB catching in NØS*[610] *(Norwegian Economy Zone and in Spitsberg)???*
>
> *2. What applies to e.g. Norwegian fishing vessels in both NØS and Spitsberg's zone, which Norwegian fishing vessels can catch snow crab in NØS and in Spitsberg, are there any restrictions, possibly special permits for catching, type of vessel???*"[611]

548. The response of the Directorate of Fisheries was as follows:

> "*1. Russian fishing vessels cannot catch snow crab in the NØS / Svalbard zone. This is because the snow crab is not a part of the fisheries agreement between Russia and Norway. The same applies to other foreign vessels.*
>
> *2. Catching of snow crab is unregulated. Norwegian fishing vessels (i.e. vessels entered in the Norwegian Register of Fishing Vessels (Merkeregisteret) can fish for this species in the NØS / Svalbard zone. If Norwegian vessels are to catch snow crab in international waters, they must be registered for fishing in the NEAFC area.*"[612]

549. Two points will be noted. First, question 1 concerned 'foreign' (by which was meant Russian, and not Latvian), vessels, but the answer plainly mirrored the question posed

---

607 Memorial, ¶¶196, 197.

608 See Memorial, ¶¶95-96; ¶740.

609 RFA, ¶27. In the Memorial, the date given is 29 January 2014 (Memorial, ¶209).

610 "*NØS*" is an abbreviation of *Norges økonomiske sone*. That is translated as "The Norwegian Economic Zone".

611 **KL-0016.**

612 **KL-0016.**

and stated that Russian (as well as other foreign) vessels could not harvest snow crab within Norway's 200 nautical miles zones. Second, question 2 concerned the rules applicable to Norwegian (not foreign) fishing vessels, and the reply reflected that at this time (2013) snow crab was unregulated, in the sense that there were no quotas or other specific regulations set by Norway for snow crab, so that Norwegian fishing vessels were free to harvest snow crab in the Norwegian maritime zones.

550. The reply from Norway does not purport to claim that snow crab were unregulated under NEAFC. The use of "*unregulated*" in that email simply reflects the fact that, at the time, there were no Norwegian rules applicable to the harvesting of snow crab and it was thus unregulated as a matter of domestic law. The only reference to "NEAFC" in that email was a requirement that Norwegian vessels in international waters had to be registered for fishing in the NEAFC area.

551. The Claimants make a misguided reference to "regulated" vs. "unregulated" species under NEAFC that has no relevance to the answer given by the Directorate of Fisheries:

> *"So-called "regulated" species are those for which NEAFC members fix quotas, while "unregulated" species are those for which no quota is fixed. Nevertheless, an "unregulated" species within the jurisdiction of NEAFC remains regulated in the sense that multiple rules stemming from that international organization apply to the fisheries of such an "unregulated" species*."[613]

552. It was the position concerning the registration of Norwegian vessels with NEAFC that was addressed in the next email quoted presented by the Claimants: that dated 12 June 2013, sent by Mr Ankipov to Mr Levanidov in order to pass on the information concerning NEAFC registration.[614]

553. The Claimants do not refer to or quote Mr Ankipov's initial email to the Norwegian Directorate of Fisheries. They do not do so because it does not suit their presentation of the case. On 7 June 2013, Mr Ankipov sent an email to the Directorate of Fisheries in the Norwegian language requesting certain information. That email contains no reference to foreign vessels. Translated into English, the email reads:

> "*Hi Hanne,*

613 Memorial, ¶48.

614 **KL-0017** and **KL-0018**.

I have been in contact with Sigmund Hågensen regarding a question concerning the NEAFC register and was given your telephone number. I have tried to call you on two occasions.

We have a question regarding the NEAFC area. How should registrations take place?

This applies for fishing for snow crab in the area.

It would be good if you could describe this process for registration and how long it takes to obtain registrations?

I look forward to hearing from you

Best regards

Sergei Ankipov

Managing Director

Ishavsbruket AS [...]".[615]

554. It was thus taken for granted that his questions concerned Norwegian vessels, and the reply reflected this. It is produced as exhibit **KL-0017** and set out in full below:

"*The attached regulations for registration and reporting when fishing in waters outside any state's fisheries jurisdiction are sent for information.*

As stated in § 2, vessels that are to fish in waters outside any state's fisheries jurisdiction must be registered through notification to the Directorate of Fisheries. Attached is the registration form that can be used. The completed form is returned to the Directorate of Fisheries postmottak@fiskeridir.no <mailto:postmottak@fiskeridir.no> and with a copy to the undersigned hilde.jensen@fiskeridir.no <mailto:hilde.jensen@fiskeridir.no>

The registration notification will be processed and information about the vessel will be sent to the NEAFC Secretariat in London.

The processing of registration notifications will normally take 2-3 days".[616]

615 **R-0094-NOR; R-0095-ENG** Email 7 June 2013 from Sergei Ankipov to the Norwegian Directorate of Fisheries (Hanne Østgård).

616 **KL-0017**.

555. Ms Jensen's reply was also in the Norwegian language, the information provided concerned Norwegian vessels and both of the attachments[617] to the email were in Norwegian and applicable to Norwegian vessels only.

556. Indeed, the first paragraph of the first attachment states: "*These Regulations apply to Norwegian citizens and persons living in Norway who are fishing with Norwegian vessels* […]", and the form which was the second attachment asks for "*The Vessel's registration number in the Directorate of Fisheries' "Merkeregister"*", which only applies to Norwegian vessels.

6.3.1.2 Subsequent communications – February 2014

557. The second set of exchanges dates from February 2014 and was between Mr Ankipov and the Norwegian Food Safety Authority. Mr Ankipov asked "*whether EU-registered boats are free to deliver crab to approved crab receptions in accordance with our regulations*".[618] Note that the question concerned the delivery (or landing) and not the harvesting of snow crab. The reply from the Food Safety Authority stated that "*EU-registered fishing boats can deliver crab freely to Norwegian crab receptions. If the fishing is quota-regulated (king crab, for example), the boats must have a quota*".[619] That reply was forwarded by Mr Ankipov to Mr Levanidov.

558. The third set of exchanges, from July 2014, also concerns the question of the landing of snow crab. In an email to the Fisheries Directorate Mr Ankipov wrote about "*a project where a fishing vessel under the EU flag will land live snow crabs at approved Norwegian reception stations(factories)*" and had asked Hermod Larsen of the Fisheries Directorate to "*describe or present the process regarding the documents to be sent to the Directorate of Fisheries in this case*".[620] The answer came from Ton-Ola Rudi, section chief in the Fisheries Directorate, Finnmark region:

> "*Basically this corresponds to matters concerning the regulations of the Fisheries Administration. Regulations issued by other agencies, such as the Norwegian Food*

617 **R-0173-NOR; R-0174-ENG** Attachment 1 to the email of 12 June 2013 from the Directorate of Fisheries. **R-0175-NOR; R-0176-ENG** Attachment 2

618 **KL-0019.**

619 **KL-0019.**

620 **KL-0020.**

Safety Authority, Råfisklaget, etc. must be clarified by making inquiries to these agencies.

1. In principle, EU vessels can land fish, including snow crab to Norway on an equal footing with Norwegian fishing vessels. There are therefore no other rules for EU vessels when it comes to fresh and live goods. All registered buyers in Finnmark have a good overview of the conditions for landing.

2. In principle, no special documentation shall be submitted to the fisheries authorities when the crab is to be landed alive at a Norwegian reception centre, and the crab has been caught outside the Norwegian Economic Zone.

3. The catch shall be landed to the buyer who is registered with the Directorate of Fisheries' Register of Buyers. Regulations on the duty to provide information:http://www.fiskeridir.no/fiske-og-fangst/j-meldinger/gjeldende-j-meldinger/j-45-2014 determines the procedures for landing.

4.If the vessel is to deliver frozen products, this must be reported 24 hours in advance in accordance with regulations on fishing by foreigners....http://www.fiskeridir.no/fiske-og-fangst/j-meldinger/gjeldende-j-meldinger/j-38-2014. Vessels that are to fish in the Norwegian Economic Zone are also subject to reporting according to the same regulations. As the activity is described, it does not fall under these regulations.

According to the Norwegian Food Safety Authority, it should also be okay to land live crabs at Norwegian reception centres."[621]

559. Again, the response explicitly concerns the landing, not the harvesting, of snow crab.

560. These are the statements that the Claimants rely upon,[622] and which they summarise as follows:

> "*In the words of Norway's Directorate of Fisheries, Norway considered the Loophole snow crab fishery as taking place "in international waters" "outside any state's fishing jurisdiction". It thus recognized that vessels flying an EU flag could participate in this fishery on the same terms as Norwegian vessels*".[623]

561. When deciding if that is a fair summary of the alleged representations by Norway to Mr Ankipov, on which the Claimants rely as evidence of Norway's supposed 'acceptance' of snow crab harvesting by EU vessels on the Norwegian continental

621 **KL-0020**.

622 See Memorial, ¶¶91, 94-96, 186-188, 192-193, 195, 327, 583, 740.

623 Memorial, ¶95.

shelf, the Tribunal will recall not only the clarity of the EU letter of 5 August 2015,[624] but also the fact that:

561.1. after a public hearing in the autumn of 2014, Norway had adopted Regulations FOR-2014-12-19 no. 1836 ('Regulations related to a prohibition of harvesting snow crab') on 19 December 2014,[625] and amended it on 19 February 2015;[626]

561.2. the EU had made three separate requests that NEAFC Members allow exploratory bottom fishing for snow crab in the Loop Hole, on 1 April 2015,[627] on 19 June 2015,[628] and on 8 July 2015,[629] each of which had been rejected by NEAFC;[630] and

561.3. Norway had issued notes verbales to NEAFC Members, the EU, and EU flag States, and specifically to Latvia and Lithuania, on 30 October 2015 and 2 November 2015, in which Norway referred to the NEAFC convention, the postal votes, and UNCLOS Article 77, and concluded that harvesting of sedentary species "cannot be carried out without the express consent of the Coastal States."[631]

562. It should be noted that until January 2017 – after the date of the alleged expropriation and destruction of the investment – the Claimants themselves had never directly asked Norwegian authorities about crab harvesting opportunities for their vessels in areas under Norwegian jurisdiction. When they eventually asked, in January 2017, the answer received was a resounding "no".[632] While the Claimants now assert that they based themselves on interpretations of fragments of information provided by Norwegian

---

624 **R-0033-ENG** Letter 5 August 2015 from DG Mare to the EU Member States.

625 See above, paragraphs 101-103.

626 See above, paragraph 107.

627 See above, paragraph 58.

628 *Ibid*.

629 *Ibid*.

630 See above, paragraph 65-67.

631 *Ibid.*

632 **R-0060-ENG** Letter 15 January 2017 from the Norwegian Ministry of Trade, Industry and Fisheries to North Star.

authorities to another – Norwegian – company, in response to questions concerning Russian and Norwegian vessels, the question remains, why did the Claimants not ask Norwegian authorities pertinent questions about crab harvesting opportunities for their own vessels? Mr Levanidov and the Claimants had been well aware at least since 2010 that foreign-owned vessels would not get Norwegian fishing licenses on the basis of Norwegian domestic legislation.[633] One possible explanation is that the Claimants did not ask the Norwegian authorities about crab harvesting opportunities for their own vessels in areas under Norwegian jurisdiction because they already knew the answer to that question; and accordingly they focused their commercial activities on the harvesting of snow crab on the Russian continental shelf, and off-loaded the catches in Norwegian ports, knowing that having a Norwegian license for harvesting snow crab in areas under Norwegian jurisdiction was not necessary for their commercial operation based on the Russian continental shelf.

563. This first 'episode' can therefore be discarded. There was nothing in these emails to verify the legality of snow crab harvesting on the Norwegian continental shelf.

6.3.2 17 July 2015 – The Agreed Minutes

564. The second episode is the alleged arbitrary change by Norway of the characterisation of the snow crab from a non-sedentary to a sedentary species pursuant to Article 77(4) of UNCLOS, on 17 July 2015. This is advanced as a 'fact' supporting both an allegation of unlawful expropriation (Article VI BIT),[634] and an allegation of a breach of the equitable and reasonable treatment provision (Article III BIT).[635]

565. That assertion is incorrect: there was no such change, despite the Claimants' use of the phrase 'Malta Declaration' to suggest otherwise.

566. Of course, Norway cannot unilaterally change the characterisation of a species under UNCLOS. Nor did Norway ever purport or attempt to change the characterisation of snow crab under UNCLOS. Norway's position on the legal characterisation of crustaceans has not changed in the past 63 years.

---

633 **PP-0009**.

634 Memorial, ¶689.

635 Memorial, ¶733.

567. As a matter of international law, 'sedentary species' has had the same definition since 1958. Sedentary species are defined as "*organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil*." That definition appears in Article 2(4) of the Continental Shelf Convention[636] and exactly the same text appears in UNCLOS Article 77(4).

568. The *travaux préparatoires* of the Continental Shelf Convention show that there was a debate during the drafting regarding the status of sedentary species, and that despite an unsuccessful attempt to exclude crustaceans from the definition of 'sedentary species', Norway accepted the definition adopted in the Continental Shelf Convention.[637] The Norwegian report on the Geneva conference discussed the definition as it emerged from the conference and concluded that this definition meant that crab is considered as a sedentary species covered by a coastal State's continental shelf State jurisdiction.[638] Norway has not questioned or modified the definition, either as a matter of international law or as it applies in Norwegian law, at any time since then.

569. There is no suggestion that snow crab is now, or have at any material time been, able to move except in constant physical contact with the seabed or the subsoil at the harvestable stage.

570. Indeed, both Norway and the EU have consistently held to the position that snow crab is a sedentary species.[639] The matter was well summarized in a letter of 5 August 2015 from the European Commission, on the subject of "Snow Crab Fisheries in the NEAFC Regulatory Area":[640]

---

636 **RL-0012**.

637 See above, paragraph 48. Cf., **RL-0113-ENG** R. Young, 'sedentary Fisheries and the Convention on the Continental Shelf', 55 *AJIL* 359-373 (1961); **RL-0114-ENG** S V Scott, 'The Inclusion of Sedentary Fisheries within the Continental Shelf Doctrine', 41 *ICLQ* 788–807 (1992).

638 **R-0011-NOR; R-0012-ENG** Report of 23 December 1958 by the Norwegian Delegation to the United Nations Conference on the Law of the Sea, Geneva 24 February to 27 April 1958.

639 **C-0161** Judgment of 29 November 2017 of the Norwegian Supreme Court in in Case. No 2017/1570, HR-2017-2257-A (Arctic Fishing), at ¶17.

640 **R-0033-ENG** Letter 5 August 2015 from DG Mare to EU Member States. The text of the letter was published on line: < https://www.politico.eu/wp-content/uploads/2017/06/SPOLITICO-17061514340.pdf >. It was attached to an article published on 18 June 2017: < https://www.politico.eu/article/of-crustaceans-and-oil-the-case-of-the-snow-crab-on-svalbard/ >.

> "*With regard to snow crab, it appears that this species is "unable to move except in constant physical contact with the seabed or the subsoil" and it thus falls within the definition of "sedentary species" of Article 77(4) of UNCLOS. The fact that snow crab falls within that definition formed the subject matter of an earlier dispute between Canada and the United States about the prosecution of snow-crab fisheries conducted by United States fishing vessels on the Canadian continental shelf at a location where Canada's continental shelf extended beyond 200 nautical miles in the Northwest Atlantic. At that time, the European Union (then the European Community) considered snow crab to fall within the definition of "sedentary species" and, therefore, did not lodge any protest against Canada.*
>
> *Indeed whenever the question of whether or not a crab species fell within the definition of "sedentary species" gave rise to an international dispute, e.g. the dispute between Japan and the United States about the latter's classification of Alaskan king crab as "sedentary species", the relevant coastal State has always prevailed in the end.*"[641]

571. The Claimants and their associates appear to have some familiarity with snow crab exploitation in the United States and Canada[642] and in the waters near Japan.[643] It seems unlikely that the disputes to which the European Commission referred, and the resultant confirmations of the status of snow crab as a sedentary species, were unknown to those in the trade.

572. Furthermore, Mr Levanidov, as a US national and trader of crab products with interests in Russian crab harvesting vessels, should have been aware of the fact that both the USA and the Russian Federation had long held *Chionoecetes opilio* – 'snow crab' or 'queen crab' or 'Tanner crab'– to be a sedentary species. The USA prohibited foreign fisheries for snow crab under the Magnuson–Stevens Fisheries Conservation and Management Act in 1978,[644] and snow crab (*Chionoecetes opilio*) had since 1968 at the latest been explicitly listed as what the US Government referred to, with unambiguous clarity, as a "*Continental Shelf fishery resource, i.e., living organisms belonging to sedentary species, which at the harvestable stage either are immobile on or under the*

641 **R-0033-ENG** Letter 5 August 2015 from DG Mare to the EU Member States.

642 **R-0126-NOR; R-0127-ENG** Letter 15 December 2016 from Sergei Ankipov, Project Manager of Seagourmet Norway AS, to the Prime Minister of Norway.

643 See above, paragraph 351.

644 **R-0096-ENG** B Daly et al, 'Recommended Harvest Strategy for Behring Sea Tanner Crab', Fishery Manuscript No. 20-03, Alaska Department of Fish and Game, (2020), p. 1. See also **RL-0034-ENG** The Magnuson–Stevens Fishery Conservation and Management Act of 13 April 1976, 16 U.S.C. ch. 38 § 1801 et seq. The Magnuson-Stevens act, section 102 and section 201 establish exclusive competence of the United States over continental shelf resources on the continental shelf of the United States, and makes it illegal for foreign vessels to harvest such resources. Section 3(4) defines *chinoecetes opilio* among the continental shelf resources of the United States.

seabed or are unable to move except in constant physical contact with the seabed or subsoil of the Continental shelf".[645]

573. Similarly, the 12 February 1971 USA-USSR Agreement relating to fishing for king and tanner crab in the Bering Sea stated that the USA and USSR

> "[h]*ave agreed as follows: The king crab and tanner crab are natural resources of the continental shelf over which the coastal state exercises sovereign rights for the purposes of exploration and exploitation in accordance with the provisions of article 2 of the* [Continental Shelf] *Convention.*"[646]

It is difficult to see how the point could have been made any clearer.

574. The Claimants refer to only one document as evidence of the alleged arbitrary change by Norway of the characterisation of the snow crab from a non-sedentary to a sedentary species. That is the document headed 'Minutes of the Meeting between Ilya V. Shestakov, Deputy Minister of Agriculture of the Russian Federation – Head of the Federal Agency for Fisheries, and Elisabeth Aspaker, Minister of Fisheries of the Kingdom of Norway' – the Agreed Minutes of 17 July 2015.[647] The document reads, in full, as follows:

> "*On 17 July 2015, in the city of Valletta, the Republic of Malta, Ilya Shestakov, Deputy Minister of Agriculture of the Russian Federation - Head of the Federal Agency for Fisheries, and Elisabeth Aspaker, Minister of Fisheries of the Kingdom of Norway, (hereinafter referred to as Parties) held a working meeting in the framework of the 20th North Atlantic Fisheries Ministers Conference and achieved their mutual understanding as follows:*
>
> *In accordance with Article 77 of the United Nations Convention on the Law of the Sea of 1982 (UNCLOS), the two Coastal States, the Russian Federation and Norway, exercise their sovereign rights in respect of the continental shelf of the Barents Sea for its exploration and development of its natural resources.*
>
> *Therefore, only these two Coastal States have the exclusive rights to harvest sedentary species on the continental shelf of the Barents Sea.*
>
> *Pursuant to paragraph 4 of Article 77 of the Convention, both the Russian Federation and Norway will proceed from the fact that harvesting of sedentary species, including*

---

645 **RL-0116-ENG** US Federal Register, vol. 33, No. 215 (2 November 1968), p. 16114, at §295.2; Snow crab is referred to there as "Tanner crab – *Chionocetes opilio."*

646 **RL-0032-ENG** 781 UNTS 204, UNTS No. 11132. See also **RL-0117-ENG** the 21 February 1973 USA-USSR Agreement relating to fishing for king and tanner crab, 912 UNTS 86, UNTS No. 12996.

647 **C-0106.**

> *snow crab, in the NEAFC Regulatory Area in the Barents Sea shall not be carried out without the express assent of the Coastal State.*"[648]

575. Nothing – absolutely nothing – in that statement suggests that Norway had previously taken a different view on the categorisation of snow crab as a sedentary species, subject to the sovereign rights of the coastal State on whose continental shelf they are found, in accordance with Article 2 of the 1958 Continental Shelf Convention and Article 77 of UNCLOS.

576. The Claimants were well aware of the Agreed Minutes, as their comments on them demonstrate. In the Memorial they say that:

> "*While there was of course some initial surprise about the Malta Declaration of July 2015, Claimants understood that Norway was not opposed to a continuation of fishing activities by EU vessels in the Loophole, since Norway indeed derived significant economic benefits from these activities*."[649]

577. Why the Claimants were so confident that they could rely on their 'understanding'[650] that despite its express terms Norway and Russia would act in accordance with their shared views against EU vessels, and what purpose the Claimants thought that the Agreed Minutes had, is not clear. In any event, any such misunderstanding on the part of the Claimants would have been very short-lived. It would have been dispelled by the terms in which the EU responded to the Agreed Minutes shortly afterwards, in its letter of 5 August 2015, which referred to "*discussions in the Fisheries Attaches Meeting of 30 July last.*" That is further considered below in relation to the Claimant's allegation that Norway 'accepted' snow crab harvesting on its continental shelf between July 2015-2016.[651]

578. What the Claimants represent as a change of position by Norway was nothing of the sort. As has been noted, snow crab was not known on the Norwegian continental shelf until 2003-2004,[652] and harvesting activity was non-existent or minimal until 2013. The

---

648 **C-0106**.

649 Memorial, ¶359.

650 Which understanding was itself founded on a questionable basis—see above **Section 6.3.2**.

651 See above, paragraph 704.

652 See above, paragraph 42.

harvesting of snow crab in commercially viable quantities began only in 2014.[653] Throughout this period snow crab was covered by Norwegian regulations applicable to 'wild living marine resources' including sedentary species.

579. Given the minimal level of the catch of this new resource on the Norwegian continental shelf, it is unsurprising that the regulations applicable in the first season of serious commercial exploitation of snow crab – 2014 – were modest. There were, for example, limits on the minimum size of crabs (10 cm) that could be caught (which is a normal mechanism for safeguarding the juveniles and the spawning stock of a species) and on the kind of catch gear that could be used.

580. Equally, it is unsurprising that when the catch was very obviously increasing at an 'almost exponential rate'[654] – from a total of two tonnes in 2012, to 251 tonnes in 2013, and 8,204 tonnes in 2014 – Norway should decide that action was needed to safeguard the sustainability of the resource. That is what proper fisheries management requires; and it is also what UNCLOS requires.

581. The regulations applicable specifically to the harvesting of snow crab on the Norwegian continental shelf were first introduced in December 2014, consisting of a ban combined with exceptions. Even so, the catch that was landed from harvesting activity in the Barents Sea area—almost exclusively from the Russian continental shelf—increased to 18,140 tonnes in 2015, underlining the urgency of the need for regulatory action to get a better overview of the participation in the fishery and to increase knowledge on this new species.

582. The Claimants simply present a misunderstanding of the factual record. The introduction of quotas and regulations had nothing whatever to do with any change in the characterisation of the snow crab from a non-sedentary to a sedentary species. It was instead a management measure taken in line with Norway's rights and obligations

653 **R-0148-ENG** K Sokolov, 'Megalop of snow crab in the Kara Sea', in Jørgensen L.L., and Spiridonov V., 2013. Effect from the king- and snow crab on Barents Sea benthos in *Report from the workshop: Workshop on king- and snow crabs in the Barents Sea* (Tromsø 11 – 12 March 2014).

654 **R-0148-ENG** J H Sundet, 'The snow crab (Chionoecetes opilio) in the Barents Sea,' in Jørgensen L.L., and Spiridonov V., 2013. Effect from the king- and snow crab on Barents Sea benthos in *Report from the workshop: Workshop on king- and snow crabs in the Barents Sea* (Tromsø 11 – 12 March 2014).

under international law when faced with the increased presence of a commercially valuable marine living resource within its jurisdiction.

583. The so-called Agreed Minutes can thus be put to one side. The alleged 'change of position' simply did not occur.

6.3.3 22 December 2015 – Amendment of Norway's Regulations

584. The next episode relied upon by the Claimants is the 22 December 2015 amendment to the snow crab Regulations, advanced by the Claimants both as a fact supporting an allegation of unlawful expropriation,[655] and a breach of the obligation to provide equitable and reasonable treatment.[656]

585. These amendments have been addressed above, in **Chapter 2**.[657] From 1 January 2015 until 22 December 2015 the prohibition on harvesting activity in the Regulations covered Norwegian continental shelf within 200 nautical miles, but not in the small part on the Norwegian continental shelf in the Loop Hole. The purpose of the 22 December 2015 amendment was to make the Norway's 2014 regulations cover all areas under Norway's jurisdiction, including the Norwegian continental shelf in the Loop Hole. The legal effect (or otherwise) of that amendment is addressed below. Here, some initial points need to be made about the background to the December 2015 amendment.

586. First, amendments of fisheries regulations are common and frequent, especially as new activity develops. The framework of obligations concerning the monitoring and active management of fisheries, set out in instruments such as UNCLOS and the FAO Code of Conduct for Responsible Fisheries, presupposes that States will amend their fisheries regulations in response to changing pressures on the fisheries or *inter alia* where there are new, emerging fisheries.

587. The 'precautionary approach', in its classic formulation in the 1992 Rio Declaration, states that "[w]*here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures*

655 Memorial, ¶689.

656 Memorial, ¶733.

657 See above, **Section 2.2.5.5**.

to prevent environmental degradation".[658] The emphasis is upon not postponing action to prevent environmental harm, but upon prompt action. The FAO Code of Conduct for Responsible Fisheries (1995) urges Member States to apply the precautionary approach for new and exploratory fisheries in Article 7.5.4:

> "*7.5.4 In the case of new or exploratory fisheries, States should adopt as soon as possible cautious conservation and management measures, including, inter alia, catch limits and effort limits. Such measures should remain in force until there are sufficient data to allow assessment of the impact of the fisheries on the long-term sustainability of the stocks, whereupon conservation and management measures based on that assessment should be implemented. The latter measures should, if appropriate, allow for the gradual development of the fisheries.*"[659]

588. In its approach to regulating snow crab harvesting on its continental shelf, Norway has been guided by this internationally recognised approach to precaution where new harvesting opportunities emerge.

589. Secondly, the regulations applicable to the harvesting of marine living resources, which since 2004 have included harvesting of snow crab, have been amended many times since 2004, even many times each year, giving an indication of the level of stability and change that might be expected, by contrast with the Claimant's focus on one particular amendment. Thus, the online Lovdata website shows that the Regulations on the practice of fishing in the sea in FOR-2004-12-22-1878 (a 2004 measure) were amended by several further instruments.[660]

---

658 **RL-0150-ENG** Rio Declaration of 13 June 1992.

659 **R-0038-ENG** FAO Code of Conduct for Responsible Fisheries.

660 The individual amendments to all regulations have not been exhibited for obvious reasons. But the full list (which can be viewed at < https://lovdata.no/dokument/SF/forskrift/2004-12-22-1878 > was as follows at the date of this Counter-Memorial: Regulations 17 March 2005 No. 239 , 4 May 2005 No. 435 , 20 May 2005 No. 439 , 2 June 2005 No. 507 , 24 June 2005 No. 736 , 12 Sep 2005 No. 1047 , 7 Nov 2005 No. 1280 , 22 Dec 2005 No. 1766 , 21 Dec 2005 No. 1782 , 14 Feb 2006 No. 168 , 20 Feb 2006 No. 230 , 20 March 2006 No. 363 , 19 May 2006 No. 546 , 31 May 2006 No. 569 , July 22, 2005 No. 1810 ,3 Aug 2006 No. 960 , 4 Sep 2006 No. 1037 , 20 Oct 2006 No. 1182 , 21 Dec 2006 No. 1613 , 3 April 2007 No. 403 , 29 May 2007 No. 564 , 4 July 2007 No. 882 , 30 July 2007 No. 939 , 4 Sep 2007 No. 1028 , Dec 19, 2007 No. 1722 , Feb 25, 2008 No. 218 , Aug 25, 2008 No. 964 , Aug 25, 2008 No. 955 , Nov 18, 2008 No. 1237 , Dec 19, 2007 2008 No. 1495 , 19 Dec 2008 No. 1527 , 13 Jan 2009 No. 38 , 6 Feb 2009 No. 150 ,17 March 2009 No. 331 , 10 June 2009 No. 651 , 16 June 2009 No. 656 , 30 July 2009 No. 1026 , 27 Aug 2009 No. 1140 , 4 Sep 2009 No. 1154 , 6 Oct 2009 No. 1251 , 23 Oct 2009 No. 1313 , 25 Nov 2009 No. 1402 , 9 July 2009 No. 994 , 16 Dec 2009 No. 1557 as repealed regulation 13 July 2009 No. 1006 , 21 Dec 2009 No. 1803 , 14 Jan 2010 No. 27 , March 26, 2010 No. 467 , May 10, 2010 No. 679 , May 11, 2010 No. 682 ,18 June 2010 No. 897 , 1 July 2010 No. 1060 , 6 Aug 2010 No. 1147 , 3 Sep 2010 No. 1243 , 25 May 2010 No. 1358 , 22 Dec 2010 No. 1818 , 21 Jan 2011 No. 63 , 10 March 2011 No. 299 , March 16, 2011 No. 302 , March 28, 2011 No. 348 , July 7, 2011 No.

590. The original snow crab Regulations as enacted in 2004 regulated the use of pots for harvesting snow crab, the minimum size for harvestable snow crab (10 cm), and the marking of harvesting pots to advise other vessels of their locations. There was at that time no quota on catches of snow crab. That was a natural consequence of the fact that in 2004 snow crab had only just been detected on the Norwegian continental shelf, and there was no commercial interest in catches of snow crab for almost a decade thereafter. In this phase it was necessary to get a better knowledge on this new species and how it should be regulated, which the yearly scientific bottom trawling surveys of the IMR and the Russian Polar Research Institute of Marine Fisheries and Oceanography (PINRO) contributed to.

591. The landings of snow crab in Norway, which started in 2013 from vessels primarily harvesting on the Russian continental shelf,[661] and the projections from the IMR that the snow crab would migrate from the Goose Bank area in the Russian part of the south-eastern Barents Sea onto the Norwegian continental shelf, led to the recognition that snow crab needed separate regulations.

764 , March 24, 2011 No. 346 , September 19, 2011 No. 937 , September 2, 2011 No. 1000 , Dec 21 2011 No. 1519 , 9 Feb 2012 No. 130 , 10 Feb 2012 No. 133 , March 30, 2012 No. 272 ,26 June 2012 No. 684 , 22 Nov 2012 No. 1087 , 31 Oct 2012 No. 1018 , 11 Dec 2012 No. 1236 , 26 Jan 2013 No. 74 , 4 Feb 2013 No. 149 , 11 March 2013 No. 267 , 14 June 2013 No. 640 , June 21, 2013 No. 724 , June 28, 2013 No. 813 , July 2, 2013 No. 854 , July 5, 2013 No. 861 , July 8, 2013 No. 873 , October 3, 2013 No. 1169 , October 25 2013 No. 1264 , 26 Nov 2013 No. 1360 , 6 Dec 2013 No. 1417 , 27 Jan 2014 No. 95 ,21 March 2014 No. 308 , 24 March 2014 No. 330 , April 7, 2014 No. 405 , June 6, 2014 No. 708 , June 20, 2014 No. 854 , July 3, 2014 No. 936 , July 28, 2014 No. 1001 , 1 Aug 2014 No. 1023 , 2 Sep 2014 No. 1143 , 26 Sep 2014 No. 1265 , 16 Oct 2014 No. 1309 , 19 Dec 2014 No. 1796 , 22 Dec 2014 No. 1863 , 22 Dec 2014 No. 1897 , 5 Jan 2015 No. 10 , 6 Jan 2015 No. 14 , 17 Feb 2015 No. 134 , 19 Feb 2015 No. 143 ,20 Feb 2015 No. 145 , 23 Feb 2015 No. 152 , 18 March 2015 No. 246 , 24 June 2015 No. 765 , 24 June 2015 No. 859 , 24 June 2015 No. 861 , 10 July 2015 No. 885 , 21 Dec 2015 No. 1805 , 7 Jan 2016 No. 17 , 12 Jan 2016 No. 20 , June 1, 2016 No. 563 , June 21, 2016 No. 769 , December 22, 2016 No. 1877 , March 6, 2017 No. 270 , March 9 2017 No. 290 , April 25, 2017 No. 499 , May 30, 2017 No. 704 , July 4, 2017 No. 1130 ,1 Sep 2017 No. 1329 , 13 Sep 2017 No. 1391 , 9 Oct 2017 No. 1587 , 10 Oct 2017 No. 1595 , 30 Oct 2017 No. 1689 , 21 Nov 2017 No. 1805 , 28 Nov 2017 No. 1901 , 5 Dec 2017 No. 1921 , Dec 11, 2017 No. 1984 , Dec 21, 2017 No. 2364 , Jan 4, 2018 No. 13 , Feb 7, 2018 No. 161 , March 16, 2018 No. 383 , March 22, 2018 No. 447 , April 19 2018 No. 674 , May 8, 2018 No. 703 , May 14, 2018 No. 720 , May 24, 2018 No. 760 ,14 May 2018 No. 720 , 19 Dec 2018 No. 2173 , 4 Feb 2019 No. 68 , 27 Feb 2019 No. 154 , 13 March 2019 No. 224 , 25 March 2019 No. 320 (effective 15 June 2019), 16 Sep 2019 No. 1133 (effective 1 Oct 2019), 19 Dec 2019 No. 2094 (effective 1 Jan 2020), 20 May 2020 No. 1039 (effective 1 June 2020), 22 June 2020 No. 1347 (effective 10 July 2020), 1 Dec 2020 No. 2554 (effective 1 Jan 2021), 21 Dec 2020 No. 3098 (effective 1 Jan 2021), 2 Feb 2021 No. 296 , 25 March 2021 No. 1034 , 14 April 2021 No. 1158, June 4, 2021 no. 1808, 13 Oct 2021 no. 3063.

661 The landings came from three Norwegian flagged vessels, and the *Adexe Primero*, a recently reflagged Russian vessel with Russian owners flying the Spanish flag.

592. Furthermore, the application in May 2013 from Spain regarding the Spanish-flagged (but Russian-owned) vessel, *Adexe Primero*, to harvest snow crab and king crab around Svalbard, led the Ministry of Foreign Affairs to suggest to the Ministry of Trade, Industry and Fisheries that a new regulation for snow crab be issued.[662]

593. It was at around this time that Mr Levanidov and his associates were communicating with Norwegian authorities about the legality of the *landing* of snow crab. Those communications have been addressed above.

594. The development of the new regulation was subject to communications between the IMR, the Directorate of Fisheries and the Ministry of Trade, Industry and Fisheries during second half of 2013 and first half of 2014.[663] On 24 October 2014 a new regulation was submitted for public hearing.[664] The Ministry suggested a general ban coupled with the possibility to apply for exemptions, to be effective until a management plan for the species could be adopted.[665]

595. Thirdly, there was no secrecy about this process. There had in fact been meetings devoted to the subject. For example, the IMR and its Russian equivalent, the Nikolai M. Knipovich Polar Research Institute of Marine Fisheries and Oceanography (PINRO) were asked by the Joint Russian-Norwegian Fisheries Commission to organize a workshop on red king crab and snow crab. It was held in Tromsø on 11–12 March 2014, and was attended by, *inter alios*, Mr Ankipov and Mr Pavel Krugov of Ishavsbruket (later Seagourmet).[666]

596. Thus, the December 2015 amendment to the Norwegian fishing regulations did not come unexpectedly out of a clear blue sky. The emergence of snow crab as a significant commercial resource was being publicly discussed – with the participation of

---

662 **R-0076-NOR; R-0077-ENG** Email 12 June 2013 from the Ministry of Foreign Affairs to the Ministry of Trade, Industry and Fisheries.

663 **R-0098-NOR; R-0097-ENG** Emails 31 October 2014 and 4 November 2014 between the Norwegian Ministry of Foreign Affairs and the Norwegian Ministry of Ministry of Trade, Industry and Fisheries which exemplifies the steps taken to make it clear that the snow crab is a sedentary species.

664 **R-0112-NOR; R-0113-ENG** Public hearing 24 October 2014 regarding the management of snow crab and draft regulations.

665 See above, **Section 2.2.5.3**.

666 **R-0148-ENG** *Report from the workshop: Workshop on king- and snow crabs in the Barents Sea* (Tromsø 11 – 12 March 2014), p. 9/83.

Ishavsbruket – and the need for regulation, not only within 200 nautical miles, but on the entire continental shelf, was recognised, before the main investments in issue in the present case were made.

6.3.4 July 2015-September 2016 — Alleged Norwegian 'acceptance' of Snow Crab Harvesting

597. The next episode relied upon by the Claimants, and said to be part of a 'creeping expropriation' of their investments[667] and a breach of the obligation to accord equitable and reasonable treatment[668] is the alleged 'acceptance' by Norway of snow crab harvesting during the 12 month period from July 2015 to July 2016, until the arrest of the Lithuanian vessel *Juros Vilkas* in July 2016 for illegally harvesting snow crab on the Norwegian continental shelf in the Loop Hole, notwithstanding Norway's 22 December 2015 amendments to its regulations. The Claimants also rely on Norway's "*continue*[d] *consent*" between July-September 2016, when the *Senator* was arrested and fined.[669]

598. Norway has already addressed what the Claimants say are its alleged 'assurances' that the Claimants would be able to harvest snow crab on the Norwegian continental shelf. These further alleged 'acceptances' are also factually incorrect. Norway did not in this period (or at any time) consent to harvesting activity by the Claimants' vessels on any part of the Norwegian continental shelf.

599. As demonstrated above, what Norway did was to accept *landings* by EU flagged vessels in Norwegian ports of snow crab harvested on the Russian continental shelf in the Loop Hole. Norway had no legislation in place that could prohibit such landings unless the Russian Federation first declared this harvesting to be illegal. The Russian Federation only extended its legislation to cover snow crab harvesting on its continental shelf in the Loop Hole on 3 September 2016, when the Russian Federation closed its part of the Loop Hole to EU flagged vessels. The instances of 'acceptance' of *harvesting* by EU flagged vessels on the Norwegian continental shelf thus did not occur.

---

667 Memorial, ¶689.

668 Memorial, ¶733.

669 Memorial, ¶¶689, 733.

600. It is, however, worthwhile to consider this episode further, because it is the only period in which the Claimants positively assert that Norway 'accepted' snow crab harvesting.[670] As evidence for this alleged 'acceptance', the Claimants cite (1) the decision of the Norwegian Supreme Court in the *Juros Vilkas* case, (2) Norway's acceptances of snow crab offloads, and (3) Norway's inspection of EU vessels.[671]

601. It is also relevant to consider (4) the contemporaneous letter of 5 August 2015 from the EU Commission to the EU Member States,[672] because this letter is dated at the start of the 12-month period during which Norway is said to have 'accepted' the harvesting of snow crab on its continental shelf, though the Claimants do not mention this development.

6.3.4.2 The decision of the Norwegian Supreme Court in the *Juros Vilkas* case

602. There is in truth little disagreement between the Parties on this episode. In their Memorial Claimants refer to the 29 November 2017 decision of the Supreme Court in the Arctic Fishing case,[673] and say this:

> "*131. In its decision, the Supreme Court of Norway confirmed what had long been plain to all industry participants, namely that Norway had "accepted" that EU-licensed vessels could legally catch snow crabs "on the Norwegian side of the Loophole". However, according to the Court, international law did not oblige Norway "to continue to accept such catching" (in the case of Juros Vilkas, beyond 14 July 2016) in view of its newly asserted sovereign rights in relation to the continental shelf. In other words, while Norway had previously consented to snow crab fishing in the Loophole by European vessels, it could withdraw this consent.*
>
> *132. The Court stopped short of considering whether the withdrawal of Norway's consent was subject to any legal conditions, or whether such withdrawal carried any legal consequences for Norway (indeed issues that are central to the present case, as discussed in more ample detail below).*"[674]

603. The Claimants' statement that the Court "*confirmed* […] *that Norway had 'accepted' that EU-licensed vessels could legally catch snow crabs 'on the Norwegian side of the*

---

670 See Memorial, ¶¶689, 694.

671 Memorial, ¶689.

672 **R-0033-ENG** Letter 5 August 2015 from DG Mare to the EU Member States.

673 **C-0161** Judgment of 29 November 2017 of the Norwegian Supreme Court in in Case. No 2017/1570, HR-2017-2257-A (Arctic Fishing).

674 Memorial, ¶¶131, 132. Footnotes removed.

Loophole" is a paraphrase of what the Court in fact said. The Court's five-page ruling is of great importance in this case, and is reproduced in full by the Claimants as Exhibit **C-0161**.

604. The Court did not suggest that Norway acknowledged that EU-licensed vessels had a legal right as against Norway to harvest snow crab on the Norwegian continental shelf. The simple fact was that until 1 January 2015 Norway had no snow crab specific regulation in place, and only from 22 December 2015 did Norway prohibit the harvesting of snow crab on its continental shelf beyond 200 nautical miles in the Loop Hole. Prior to that date, EU-flagged vessels were not explicitly prohibited in Norwegian legislation from harvesting snow crab in the Loop Hole – they had the liberty, but not a legal right, to do so. Throughout this period, Norway and the EU were clear in their view that Norway had the legal right to forbid the harvesting of snow crab also on its continental shelf beyond 200 nautical miles: it simply had not yet exercised that right. Not yet having prohibited an activity in its national legislation is not the same as having 'accepted' or 'consented to' that activity. And it is certainly far from the "*express consent*" that UNCLOS Article 77(2) requires in order to make such activity lawful under public international law.

6.3.4.3 Norway's acceptance of snow crab offloads

605. The Claimants also rely upon the fact that Norway accepted North Star's landings of snow crab at Norwegian ports. The Claimants say

> "*On at least seventy-nine (79) occasions between July 2015 and September 2016, Norwegian authorities gave North Star's vessels permission to enter the Norwegian ports of Baatsfjord, Kjollefjord and Vardo and consented to North Star's landing of snow crabs in these ports. This consent was given through Norway's approval of NEAFC Port State Control forms clearly indicating that North Star's catches had been made in the Loophole*".[675]

606. The Claimants present relevant landing permits as Exhibits **C-100, C-101, C-102** and **C-103**. Those permits do indeed indicate the catch of 'CQR' (the NEAFC species identifier for Chionoecetes opilio) in area '1a' (which is the *entire* area of the Loop Hole). The permits do not indicate whether, within area 1a, the snow crab was caught in the 89% of the Loop Hole that consists of Russian continental shelf or the 11% that

675 Memorial, ¶336, footnotes omitted.

consists of the Norwegian continental shelf. The permits do indicate that Janis Laguns confirmed, on behalf of Latvia as the flag State of the vessels, that each "*fishing vessel declared to have caught the fish had sufficient quota for the species declared*" and "*had authorisation to fish in the area declared*" and that "*the presence of the fishing vessel in the area of catch declared has been verified according to VMS data*."

607. The VMS (Vessel Monitoring System) / AIS (Automatic Identification System) data for North Star's vessels[676] are instructive. As to those:

607.1. Tracks of the *Senator*'s voyages between 1 January 2014 and May 2016 show no evidence of harvesting activity on the Norwegian continental shelf. The first harvesting activity on the Norwegian continental shelf occurred in June 2016, for which the Senator was arrested and issued with a fine.[677]

607.2. Tracks of the *Solveiga*'s voyages between 31 March 2015 and 26 September 2016 show no instances of *possible* harvesting activity on the Norwegian continental shelf.[678]

607.3. Tracks of the *Saldus*'s voyages between 8 April 2015 to 3 September 2016 show only one instance of *possible* harvesting activity on the Norwegian continental shelf, on 10-11 April 2015, before Norway's December 2015 amendment to its regulations.[679] During this voyage, it is estimated that the *Saldus* spent no longer than 17 hours and 38 minutes engaged in snow crab harvesting activity on the Norwegian continental shelf, and would have harvested an estimated 1,535kg of snow crab on the Norwegian continental shelf. By contrast, over the course of its operation the *Saldus* is estimated to have harvested over 650,000kg of

676 See the detailed explanation provided in **R-0151-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*), "Guidance and summary - Report concerning vessels belonging to the Latvian company SIA North Star".

677 **R-0153-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*) regarding Senator.

678 **R-0154-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*) regarding *Solveiga*.

679 **R-0152-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*) regarding *Saldus*.

snow crab on the Russian continental shelf and spent 5,279 hours harvesting snow crab on the Russian continental shelf.[680]

607.4. Tracks of the *Solvita*'s voyages between 24 July 2014 and 25 September 2016 show five instances of *possible* harvesting activity on the Norwegian continental shelf.[681] The first four of these took place before Norway's December 2015 amendment to its regulations.[682] The final instance was a stint of 1 hour, 44 minutes of *possible* snow crab harvesting on the Norwegian continental shelf, where it is estimated that the *Solvita* would have caught no more than 201kg of snow crab, though the Section of Analysis concludes that there are other explanations for the brief period spent travelling slowly on the water column above the Norwegian continental shelf.[683] In total, the *Solvita* is estimated to possibly have harvested 3,764kg of snow crab on the Norwegian continental shelf and spent no longer than 31 hours harvesting on the Norwegian continental shelf. By contrast, over the course of its operation the *Solvita* is estimated to have harvested over 1,300,000kg of snow crab on the Russian continental shelf and spent over 8,850 hours engaged in harvesting activity on the Russian continental shelf.

608. Of the 79 occasions referred to by the Claimants between July 2015 and September 2015, therefore, only one of those involved harvesting activity by North Star on the Norwegian continental shelf. And on that occasion, the *Senator* was arrested and fined.

609. The Claimants also refer[684] to a series of Sales Notes and Landing Notes issued by Norges Rafisklaget, the Norwegian Fishermen's Sales Organisation.[685] These do not all

---

680 **R-0151-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*), "Guidance and summary - Report concerning vessels belonging to the Latvian company SIA North Star".

681 **R-0155-ENG** Report of 28 October 2021 by the Section of Analysis in Vardø (*Analyseenheten i Vardø*) regarding *Solvita.*

682 *Ibid.*

683 *Id*., p.79: "*This period could, however, be explained by weather conditions, engine failures or other technical issues, given that the vessel appears to have been traveling in a relatively direct line*".

684 Memorial, ¶369.

685 Råfisklaget Sales Notes for *Saldus*, 2016, **PP-0160**; Råfisklaget Sales Notes for *Solvita*, 2016, **PP-0162**; Råfisklaget Sales Notes for *Solveiga*, 2016, **PP-0164**; Råfisklaget Landing Notes for *Senator*, 2016, **PP-0166**; and a Sample English translation of a Råfisklaget Sales Note, Undated, **PP-0167.**

relate to the period July-September 2015: one Note in **PP-0164**, for example, relates to a voyage on which the "*første fangstdato*" (first catch date) is 24 December 2015 and the "*siste fangstdato*" (last catch date) is 31 December 2015.

610. The important point is, however, that the sales notes are nothing more than that, a recording of a sale in a Norwegian port. It cannot seriously be contended that these Notes evidence some sort of acquiescence by Norway in North Star's harvesting of snow crab on the Norwegian continental shelf. Further, the point has already been made that landing snow crab and harvesting snow crab are two different activities subject to different controls. Allowing the landing of snow crab in Norway does not imply that the vessel had been or will be authorised to harvest snow crab on the Norwegian continental shelf. Indeed, the representation on the landing permits as to "*authorisation to fish in the area declared*" was made not by Norway but by Latvia; and the vast majority of the catches in question were taken on the Russian, and not the Norwegian, continental shelf. Norway had no reason to object to the landing of catches of snow crab taken from the Russian continental shelf at its ports.

611. The landings in Norway of snow crab harvested on the Russian continental shelf on at least seventy-nine occasions between July 2015 and September 2016 does nothing to demonstrate Norway's acceptance that the Claimants had the right to harvest snow crab on the Norwegian continental shelf, and these additional materials add nothing to the Claimants' case.

6.3.4.4 Norway's alleged 'consent' expressed through inspections of EU vessels

612. The Claimants also assert that:

> "*During their fishing operations in the NEAFC zone, North Star ships underwent routine inspections by NEAFC coastal states Norway and the Russian Federation pursuant to the NEAFC Scheme. While all of these inspections found snow crab onboard the ship, none of them resulted in any infringement finding against North Star*."[686]

613. The locations of the inspections are instructive. The locations are recorded in the Inspection Reports, presented by the Claimants as Exhibits **C-0094, C-0095, C-0096, C-0097, C-0098**, and **C-0099**. The locations, together with the dates on which they

686 Memorial, ¶339 (footnotes omitted).

occurred, are depicted on the map in **Chapter 2** of this Counter-Memorial.[687] The short, and perhaps predictable, point is that not one of the inspections of North Star's vessels occurred within the Norwegian continental shelf in the Loop Hole. They all occurred in the Russian part, and all occurred before the Russian ban on harvesting snow crab came into force.

614. The Claimants refer also to inspections of North Star's vessels by the Norwegian Coast Guard in Norwegian harbours, evidenced by the Inspection Forms presented as Exhibits **PP-0169**, **PP-0170**, **PP-0171**, **PP-0172**. The Claimants note the absence of any expression of concern on the part of the Norwegian authorities that the forms recorded their 'last cargo' as having been snow crab.[688] The reason is plain. These inspections were, as the Inspection Forms make clear, concerned with technical safety matters and visa questions. Moreover, all the inspections occurred in the period prior to the prohibition on harvesting snow crab on the Russian continental shelf, which covers 89% of the Loop Hole.

615. To return to the heading of this sub-section, the Claimants' argument is that events considered above evidence the 'acceptance' by Norway during the 12-month period from July 2015 to July 2016 that North Star has a right to take snow crab from the Norwegian continental shelf. That argument cannot withstand scrutiny. On examination, each and every one of the pieces of evidence that Claimant's adduce fails to provide the proof that their case requires.

6.3.4.5 The EU Commission's Letter of 5 August 2015

616. All of the above points are made with equal clarity in a letter of 5 August 2015 from the European Commission to the EU Member States, issued right at the beginning of the 12-month period during which Norway is said by the Claimants to have 'accepted' the harvesting of snow crab on its continental shelf. The EU Commission states clearly the key point that was made later by the Norwegian Supreme Court:

> "*It follows from this classification of snow crab as "sedentary species" that only the relevant coastal States, i.e. Norway and the Russian Federation, are entitled to exploit (i.e. to harvest) it by virtue of their sovereign rights under the continental shelf regime of UNCLOS and that, as spelled out in Article 77(2) of UNCLOS, no other State is able*

687 See above, paragraph 83.

688 Memorial, ¶342. See **PP-0169, PP-0170, PP-0171, PP-0172.**

to do so unless it has obtained the coastal State's explicit consent. Moreover, the coastal State's rights are exclusive in a sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake any such activities without the express consent of the coastal State.

Therefore, without the express consent of the relevant coastal States (namely Norway and the Russian Federation in the present instance), these fisheries are illegal as they would be in contravention of Article 77(2) of UNCLOS.

The Commission would underline that the EU, as a Contracting Party to UNCLOS, is under an obligation to respect Article 77(2) of UNCLOS. Similarly, upon its ratification by the Union, UNCLOS forms part of the legal order of the Union pursuant to the provisions of Article 216 of the Treaty on the Functioning of the European Union, such that also the Member States are bound to respect it.

Consequently, since both Norway and the Russian Federation have given no such consent, Member States are advised that they should rescind any current licences authorising their vessels to fish for snow crab and any other sedentary species such as king crab in the NEAFC Regulatory Area and should not issue any new licences to this effect and, as appropriate, re-call the vessels concerned.

I would be grateful if you could swiftly bring this information to the attention of the competent authorities of your Member State. A version in the language of the Member State will follow in due course."[689]

617. Fisheries matters relating to third States are not within the legal competence of the EU Member States: they are within the exclusive competence of the EU itself. The letter from the EU Commission to the Member States shows clearly that already in August 2015 EU Member States, were explicitly made aware, by the body with sole legal competence to conduct fisheries negotiations with Norway on their behalf:

617.1. that Norway had given no consent to the harvesting of snow crab on its continental shelf;

617.2. that Norway had the legal right to prohibit the harvesting of snow crab on its continental shelf;

617.3. that the EU acknowledged that right, and

617.4. that EU Member States, including Latvia, were specifically "*advised that they should rescind any current licences authorising their vessels to fish for snow*

689 **R-0033-ENG** Letter 5 August 2015 from DG Mare to the EU Member States. See also **RL-0084-ENG** Consolidated version of the Treaty on the Functioning of the European Union of 25 March 1957, Article 216.

crab and any other sedentary species such as king crab in the NEAFC Regulatory Area and should not issue any new licences to this effect and, as appropriate, re-call the vessels concerned."[690]

618. The position could scarcely have been made clearer. Yet the Claimants rely in these proceedings on licences purportedly issued by Latvia four months after this letter in order to establish their right to take snow crab from the Norwegian continental shelf.

619. There are two aspects of this episode that will be taken up later, but merit mention now. The first is the significance of the episode as between Norway and the EU (and, therefore, Latvia). In that context, the letter is dispositive. There is no room for doubt that the EU (1) recognised the need to obtain Norway's consent for harvesting snow crab on the Norwegian continental shelf, and (2) recognised that no such consent had been given as of August 2015, and (3) advised Member States (including Latvia) not simply to refrain from issuing licences to take snow crab but actually to rescind existing licences issued for the NEAFC regulatory area (Loop Hole) and recall the vessels flying their respective flags. There is no room for the suggestion that the EU regards Norway as exceeding its rights under UNCLOS to regulate snow crab on its continental shelf.

620. The second aspect is the significance of the episode as between the Claimants and Norway. The Claimants' case is that despite the position taken by the EU, and despite the fact that their sole claim to an entitlement to take snow crab consisted in licences issued by Latvia under the EU fisheries regime which the EU had said should be rescinded because they lacked any legal basis under UNCLOS, somehow the Claimants had a legal right as against Norway to harvest snow crab on the Norwegian continental shelf. It is the second aspect that is crucial for the Claimants' case.

6.3.5 15 July 2016 and 27 September 2016 – the Imposition of Fines

621. The next chronological episode relied upon by the Claimants is the commencement of the issuing by Norway of fines on EU vessels for unlawful harvesting of snow crab, notably with the imposition of fines on the Lithuanian vessel *Juros Vilkas* on 15 July 2016. Further, the imposition of a fine on North Star by Norwegian authorities on 27 September 2016 for harvesting snow crab in the Loop Hole during the month of June

690 *Ibid.*

2016. This is advanced both as a fact supporting an allegation of unlawful expropriation[691] and as a breach of the obligation of equitable and reasonable treatment.[692]

622. Simply put, what defeats the Claimants' case is the simple fact that they never had any legal right to harvest snow crab on the Norwegian continental shelf without Norway's authorisation, which was never given, as demonstrated in Norway's answer to the previous allegations. The acts said by the Claimants to constitute an 'acceptance' of North Star's harvesting activities on the Norwegian continental shelf can be dismissed.

623. Having examined each of these episodes, Norway accordingly turns to the Claimants' claim that Norway has breached the BIT.

6.4 NORWAY HAS NOT BREACHED THE OBLIGATION TO PROVIDE COMPENSATION IN THE CASE OF EXPROPRIATION (ARTICLE VI OF THE BIT)

6.4.1 Introduction

624. The first allegation is that Norway breached the obligation to provide compensation in the case of expropriation. That allegation obviously depends upon there having been an expropriation.

625. Article VI of the BIT stipulates that

> "*Investments made by investors of one Contracting Party in the territory of the other Contracting Party cannot be expropriated, nationalized or subjected to other measures having a similar effect (all such measures hereinafter referred to as "expropriation").*"

626. The Claimants do not allege a direct expropriation (there has been no formal transfer of title), but a "*creeping (or indirect) expropriation*".[693] There must be some act by Norway that has an effect similar to expropriation or nationalisation. Norway denies that the alleged investments of the Claimants (the terms 'Claimants' and 'investments' being used strictly without prejudice to Norway's arguments on jurisdiction) have been expropriated or been subjected to measures having similar effect.

---

691 Memorial, ¶689.

692 Memorial, ¶733; ¶744.

693 Memorial, ¶689.

6.4.2 Indirect Expropriation: The Relevant Legal Criteria

627. The terms "*expropriated*", "*nationalized*" and "*other measures having a similar effect*" are familiar. The Claimants have quoted the classic *Metalclad* definition of expropriation, which refers to takings and covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.[694]

628. The Claimants also say that

> "*tribunals have also found expropriation to result from the vitiation of an investor's legitimate expectations. The tribunals in Biloune, Metalclad, and Vivendi II all found the investor's justified reliance on host State representations relevant to their findings of expropriation.*"[695]

629. That awkward formulation conflates two propositions: (i) that tribunals have also found expropriation to result from the vitiation of an investor's legitimate expectations, and (ii) that proposition (i) is evidenced by the fact that tribunals have found the investor's justified reliance on host State representations relevant to their findings of expropriation. The cases cited do not evidence the proposition for which they are offered as authority.

630. In *Biloune* [696] it was not the 'vitiation' (or disappointment) of the investor's "legitimate expectations" – a term that does not appear in the *Biloune* award – or the "*failure to award a construction permit*" that constituted the expropriation of the investor's contractual rights in a construction project. The tribunal explained its reasoning clearly:

> "*… the conjunction of the stop work order, the demolition, the summons, the arrest, the detention, the requirement of filing assets declaration forms, and the deportation of Mr Biloune without possibility of re-entry had the effect of causing the irreparable cessation of work on the project. Given the central role of Mr Biloune in promoting, financing and managing MDCL, his expulsion from the country effectively prevented*

694 **CL-0260** *Metalclad Corporation v. The United Mexican States*, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000, para. 103

695 Memorial para. 684.

696 Memorial para. 684, fn 842 says "*See*, *Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre*, UNCITRAL Case, Award on Jurisdiction and Liability, 27 October 1989, **CL-0259**, pp. 201-211 (finding that failure to award a construction permit to a local-operating entity in contravention of the investor's justified reliance on hostState representations constituted a constrictive expropriation because it resulted in the "irreparable cessation" of investment activity)."

> *MDCL from further pursuing the project. In the view of the Tribunal, such prevention of MDCL from pursuing its approved project would constitute constructive expropriation of MDCL's contractual rights in the project and, accordingly, the expropriation of the value of Mr Biloune's interest in MDCL …*"[697]

631. As might be expected, that passage is entirely consistent with the view that there is a need to demonstrate conduct on the part of a respondent that interferes with property or other legal rights of a claimant. *Biloune* provides no support for the proposition that the disappointment or 'vitiation' of the hopes or expectations of an investor can constitute an expropriation.

632. Nor does *Metalclad*. In that case a project that "was fully approved and endorsed by the federal government"[698] – *i.e.*, a project that had already been approved by the State, and had already been constructed, with the knowledge of the State[699] – was closed down,[700] allegedly for want of an additional permit (although there was no legal requirement for such a permit).[701] The tribunal found a breach of the fair and equitable treatment standard,[702] and held that it also amounted to an indirect expropriation.[703] *Metalclad* was based on the premise that the project had been authorised by the State. It provides no authority for the proposition that a decision *not* to authorise an activity can amount to an expropriation.

---

697 **CL-0259** *Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre*, UNCITRAL Case, Award on Jurisdiction and Liability, 27 October 1989, para. 81.

698 **CL-0260** *Metalclad Corporation v. The* United *Mexican States*, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000, paras 78, 80, 85-86, 89, 104.

699 **CL-0260** *Metalclad Corporation v. The United Mexican States*, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000, paras 45, 87.

700 **CL-0260** *Metalclad Corporation v. The United* Mexican *States*, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000, paras 95-96.

701 **CL-0260** *Metalclad Corporation v. The United Mexican States*, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000, paras 104–107.

702 **CL-0260** *Metalclad Corporation v. The United Mexican States*, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000, para. 101.

703 **CL-0260** *Metalclad Corporation v. The United Mexican States*, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000, paras 107, 109.

633. Similarly, in *Vivendi II*, the claimants were forced to abandon *existing* contractual rights under a concession already granted.[704] Again, the Award provides no authority for the proposition that a decision *not* to authorise an activity can amount to an expropriation.

634. The concept of expropriation has been considered in detail and at length in a recent study.[705] There is no single authoritative definition of the concept. But what all of the definitions have in common is that the requirement that there should be conduct on the part of the respondent that implies a non-ephemeral taking of an asset, or a substantial deprivation of the economic value and enjoyment of the asset.[706] That requirement is subject to the well–established limitation deriving from the undisputed power of States to regulate their economies and public affairs in the public interest.[707] There is no support for the view that the denial of an opportunity or failure to grant a concession, licence or other legal authorisation can *in itself* amount to an expropriation.

6.4.3 There Has Been No Expropriation

635. There are two major flaws in the Claimants' argument. First, no 'Investment' protected by the BIT has been taken. The Claimants' investments remains as they were: their complaint is simply that they cannot use them in the way that they had hoped and/or that they cannot use them as profitably as they had hoped. Second, Norway has not engaged in any expropriatory act. It has done nothing that could amount to a taking.

6.4.3.2 No 'Investment' has been taken

636. It will be recalled from Chapter 4 that the Claimants' present their investments as follows:

Mr Pildegovics

636.1. contractual rights in his alleged 'joint venture' agreement with Mr Levanidov

636.2. (possibly) 100% of the shares in North Star

---

704 **CL-0253** *Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No ARB/97/3, Award, 20 August 2007, ¶¶7.5.27, 7.5.33.

705 **RL-0161-ENG** Johanne M. Cox, Expropriation in Investment Treaty Arbitration, (2019), ch. 4.

706 *Id.*, ¶¶5.01-5.59.

707 *Id.*, ¶¶7.01-7.46.

636.3. 100% of the shares in Sea & Coast

North Star

636.4. fishing vessels

636.5. "fishing capacity", referring to the right to operate a ship as fishing vessel

636.6. fishing licenses authorizing each vessel to harvest snow crab in the Loop Hole area of the NEAFC zone and in maritime zones around Svalbard

636.7. contractual rights to purchase two additional ships, along with "fishing capacity" for such ships

636.8. supply agreements with purchasers of snow crab products.

637. The Claimants' case is that "*Norway's actions starting in July 2015 and concluding in September 2016 (and further confirmed in January 2017 and later) effected a creeping and illegal expropriation of Claimants' investment*."[708] The date of the alleged expropriation is thus September 2016. The Claimants say specifically that "In cases of creeping expropriation, as here, the date on which the expropriation will crystallize is always fact-specific and occurs with "*the last step … that tilts the balance … the straw that breaks the camel's back*" (footnotes omitted).[709]

638. The point is made repeatedly and clearly:

> "*These actions constitute, together, an expropriation, since they have substantially deprived Claimants of the value of their snow crab harvesting enterprise. Indeed, after the last snow crab landing allowed in Baatsfjord, on 6 September 2016, Claimants have been unable to generate any revenues at all from snow crab fisheries, due to Norway's actions. Claimants' snow crab enterprise having been entirely halted, it can only be considered to have been expropriated. Indeed, under the "effects test", Norway's actions effectively put an end to the investment.*"[710]

639. The specific event in September 2016 to which the Claimants point, which would be the date of the alleged expropriation, appears to be the 27 September issuance of a fine to North Star in respect of the *Senator*'s illegal harvesting of snow crab on the

708 Memorial, ¶675. Cf., Memorial, ¶689.

709 Memorial, ¶687.

710 Memorial, ¶691.

Norwegian continental shelf.[711] That is the latest episode of conduct relied on by the Claimants in the list of acts said to constitute the alleged 'creeping expropriation.'

640. The Claimants say that "*From September 2016, it therefore became clear that Norway would no longer allow the fishing of snow crab in the Loophole by EU vessels holding NEAFC licences, or the landing of their catches in Norwegian ports*."[712] Of course, the Claimants do not say that it was also in September 2016 that all EU-flagged vessels were expelled by the Russia from the Russian continental shelf in the Loop Hole as of 4 September 2016, forcing North Star to cease activities on the only portion of the Loop Hole from which they had harvested snow crab since Norway's 22 December 2015 amendment to its snow crab regulations.

641. Norway accordingly adopts 27 September 2016 as the date of the alleged expropriation. The task is thus to consider how, if at all, the Claimants' investments had been changed or affected between (a) the date of their acquisition by the relevant Claimant and (b) 27 September 2016.

6.4.3.2.2 *Mr Pildegovics' rights in the alleged 'joint venture' agreement*

642. Taking the investments in turn, we begin with Mr Pildegovics' claims to performance in his alleged 'joint venture' agreement with Mr Levanidov, which is claimed to have been entered into in either "*2013*" or "*January 2014*" or "*2009*"[713]

643. As addressed in **Chapter 5**, the Claimants put forward no evidence of the alleged claims to performance, or any terms of the alleged 'joint venture'. They further provide no details of any alleged breach of those rights or of any damage flowing from their alleged breach. They provide no evidence of any complaint by Mr Pildegovics or Mr Levanidov that the contractual provisions are not being respected. They do not identify any loss resulting from any supposed damage to these alleged contractual rights. Indeed, it appears that Mr Pildegovics does not even make a claim for compensation in respect of injury to these rights which claim could be said to have been expropriated by Norway.

---

711 Memorial, ¶689.

712 Memorial, ¶690.

713 RFA, ¶27; Memorial, ¶209; **R-0128**.

644. There is no basis in the Claimants' pleaded case on which the Tribunal could determine that Mr Pildegovics's investment in "the contractual rights in his joint venture agreement with Mr Levanidov" has been expropriated or subjected to other measures having a similar effect.

6.4.3.2.3 *The 100% shareholding in North Star*

645. As outlined above, Mr Pildegovics acquired his 100% shareholding in North Star on 15 June 2015 from Ms Nadežda Bariševa, his life partner and later his wife, for the sum of EUR 3000. She had acquired them from Ms Irina Fiksa on 10 May 2014 for the same sum.[714]

646. The Claimants have made no attempt to show what the market value of Mr Pildegovics's 100% shareholding in North Star was at any date between 15 June 2015, when he acquired it, and 27 September 2016, by which date the alleged expropriation was complete. In any event, that the question appears to be immaterial. As far as is known, Mr Pildegovics still holds the shares in North Star. There is no allegation that Norway interfered in any way with Mr Pildegovics's rights as a shareholder in North Star. The Claimants do not identify any loss resulting from any supposed damage to this shareholding.

647. Indeed, it appears that Mr Pildegovics does not even make a claim for compensation in respect of injury to this shareholding. The claim is only for the loss in value of North Star as a company; and that claim is entirely accounted for by the claims made in this case in the name of North Star.[715]

648. Again, there is no basis in the Claimants' pleaded case on which the Tribunal could determine that Mr Pildegovics's investment in the shares in North Star has been expropriated or subjected to other measures having a similar effect.

---

714 **PP-0041.**

715 Versant Expert Report, ¶¶89, 90 and fn. 139 .

6.4.3.2.4 *The 100% shareholding in Sea & Coast*

649. Mr Pildegovics acquired his 100% shareholding in Sea & Coast from Mr Ankipov on 15 October 2015 for the sum of NOK 66,000.[716] As far as is known, Mr Pildegovics still holds the shares in Sea & Coast.

650. There is no allegation that Norway interfered in any way with Mr Pildegovics's rights as a shareholder in Sea & Coast or injured it in any way. Nor is there any allegation that Norway interfered in any way with the rights of Sea & Coast itself. No claim is made in the name of Sea & Coast itself. Nor could there be: Sea & Coast is a Norwegian company.

651. The Claimants have made no attempt to establish that there was any injury to Mr Pildegovics' shareholding in Sea & Coast. They do not show what the market value of Mr Pildegovics' shareholding was at any date between 15 October 2015, when he acquired it, and 27 September 2016, by which date the alleged expropriation was complete. The Claimants refer in the Memorial to the allegation that Sea & Coast's revenue "*collapsed as a result of Norway's actions*".[717] The evidence of that collapse does not appear to be reflected in their expert report on quantum.

652. Yet again, there is no basis in the Claimants' pleaded case on which the Tribunal could determine that Mr Pildegovics's investment in the shares in Sea & Coast has been expropriated or subjected to other measures having a similar effect. As discussed in **Chapter 2**, the business is in fact continuing, and quite successfully.[718]

653. No case is made out that any injury or damage has been sustained by any of Mr Pildegovics' investments. Norway addresses North Star's alleged investments next.

6.4.3.2.5 *Crab harvesting vessels*

654. The first investment of North Star is that made in the four vessels, the *Solvita*, *Senator*, *Saldus*, and *Solveiga*.

---

716 **PP-0050.** In the Memorial, ¶247, the date is given as 15 October 2015.

717 Memorial, ¶252.

718 See above, paragraph 151 and following.

655. As was explained above,[719] it is unclear whether these were in fact, in whole or in part, investments of North Star or of [redacted] or Mr Levanidov, none of whom is a Claimant in this case.

656. The *Solveiga* was sold in October 2017,[720] and the *Solvita* was sold in March 2021,[721] but the other vessels apparently remain the property of North Star. It is, however, not disputed that on the Claimants' case (and putting aside for the moment questions of beneficial ownership, agency, etc.) all four ships remained the property of North Star immediately after the completion of the alleged 'creeping expropriation'.

657. Even if the vessels could, *quod non*, qualify as investments in Norway, protected under the BIT, there is no suggestion that the vessels were themselves the subject of a taking by Norway. Nor is there any suggestion that the vessels were in some way rendered unsuitable for harvesting other species, or for harvesting crab in other locations, or for other purposes. The complaint is that they were bought by (or for) North Star with a specific aim in mind, and that they became less valuable to North Star when it became evident that the specific aim could not be achieved. What was limited, or metaphorically 'taken', was the opportunity to realise the expectation that the vessels could generate significant profits, specifically (and perhaps exclusively) by harvesting snow crab on the Continental Shelf of the Loop Hole. But that 'expectation' related overwhelmingly to the Russian position, given that over 99% of North Star's harvesting activity took place there.

658. The flaw in that argument is that while the vessels, as 'property' within the meaning of Article I(1)(I) of the BIT, could be an 'Investment' protected by the BIT against expropriation, the expectation of their profitable employment in a specific trade could not. The 'expectation' is not an 'Investment' that could possibly be taken.

659. Certainly, 'business concessions conferred by law or under contract including concessions to search for, cultivate extract and exploit natural resources' qualify as investments, under Article I(1)(V) of the BIT. But there was no such concession, and

---

719 See above, **Section 4.3**.

720 Pildegovics, ¶¶10, 71; **PP-0066**.

721 Pildegovics, ¶¶10, 73; **PP-0067**.

no similar right, conferred by Norway on North Star. What North Star and those behind it were relying upon was nothing more than the fact that Norway did not, at the time that the four vessels were purchased, have in force an actual prohibition under Norwegian law on the harvesting of snow crab on all parts of the Norwegian continental shelf.

660. The absence of a prohibition under the Norwegian regulations applicable at the time of purchase of the vessels is not a protected 'Investment' that could be expropriated. Norway responds to that argument below. But to try to force the facts into the mould of the expropriation provisions is to sacrifice accurate pleading in favour of multiplying the number of claims and of different formulations of claims, perhaps in the hope that at least one of them might hit its target.

6.4.3.2.6 *'Fishing capacity' — the right to operate a ship as fishing vessel*

661. The second alleged investment of North Star to which the Claimants point is the acquisition of 'fishing capacity'. 'Fishing capacity', it will be recalled, is the means of controlling the size of the EU fishing fleet under the EU Common Fisheries Policy. It is a qualification, obtained pursuant to obligations under EU law, which establishes the eligibility of a vessel to be to apply to the EU (via the flag State) for approval to fish and for a share of any EU catch quota. A fishing vessel registered in an EU Member State but without certification of its 'fishing capacity' attached to it is not eligible for 'fishing opportunities' anywhere at sea for any species in any amounts.

662. The corollary is that the 'fishing capacity' of North Star's vessels was and is not linked to fishing in Norwegian waters or any other specific location, or to fishing for snow crab or any other specific species. It meant simply that the vessels were entitled to be registered in the Latvian registry for fishing vessels and apply for Latvian permission to catch fish.

663. That 'entitlement to apply' is not an 'Investment' within the meaning of Article I of the BIT, protected by the BIT against expropriation. The 'entitlement to apply' is not an 'Investment' that could possibly be taken. And even less so as it is an 'entitlement to apply' for fishing opportunities allocated by the EU and not by Norway.

664. Moreover, the 'entitlement to apply' was entirely unimpaired by any action of Norway. After 27 September 2016, applications in respect of each vessel could still be made to Latvia, acting as flag State of the vessels for the EU, for permission to fish. Further, North Star's 'fishing capacity' remained a freely transferrable, valuable asset which could (for example) have been sold on to third parties.[722] In reality, the Claimants are complaining that they no longer had the expectation or hope of utilising that fishing capacity on the continental shelf in the Loop Hole.

665. That is not an 'expropriation' of those fishing capacity rights. Here, again, the expropriation claim is misconceived, and there is no credible argument that the Claimants 'fishing capacity' was expropriated in breach of the BIT. Indeed, Norway has no authority to issue, amend or revoke any "fishing capacity" under the EU Common Fisheries Policy and did not do so or purport to do so.

6.4.3.2.7 *Fishing licenses authorising each vessel to harvest snow crab*

666. The claim that Norway expropriated the Claimants' fishing licences depends upon sevveral assumptions. The licences were issued by Latvia, not by Norway. The Claimants therefore need to establish (i) that Latvia did in fact purport to licence harvesting of snow crab on the Norwegian continental shelf, and (ii) that Latvia had the legal power to grant such licences.

667. As to the first point, the licences were equivocal. Only a minority of the licences — six out of 27 — specifically refer to the harvesting of snow crab (using the FAO Code 'CRQ'), and all of those did so in relation to FAO/ICES fishing areas I and IIb (sometimes referred to as 27I,IIb). The continental shelf below those FAO areas is the natural prolongation of the land territory of Norway, the Russian Federation and Greenland/Denmark. It is subject to their exclusive jurisdiction and is delimited by agreement between Norway and Denmark together with Greenland dated 20 February 2006 and by the agreement between Norway and the Russian Federation dated 15 September 2010. Those licences do not distinguish between the various national areas of jurisdiction.

722 Memorial, ¶¶272-273.

668. The remaining licences refer to 'unregulated' species, *i.e.*, those for which no quota has been set. They do not refer specifically to snow crab.

669. The position is summarised in the table below.

EXHIBIT	LICENCE No.	AREA	VESSEL	SPECIES	DATE of issue and expiry
C-0004	CS2015J0246	NEAFC	Saldus	Unregulated	01.01.2015—31.12.2015
C-0005	CS2016J0461	NEAFC	Saldus	Unregulated	01.01.2106—31.12.2016
C-0006	CS2016J0532	27IIB2	Saldus	Unregulated	01.11.2016—31.12.2016
C-0007	2017D3424	NEAFC (Unregulated)	Saldus	Unregulated	01.01.2017—31.12,2017
C-0008	2017D3428	I, IIb	Saldus	CRQ	01.01.2017—31.12.2017
C-0009	2018D3586	I, IIb (Unregulated CRQ)	Saldus	CRQ; Unregulated	01.01.2018—31.12.2018
C-0010	2018D3583	NEAFC (Unregulated)	Saldus	Unregulated	01.01.2018—31.12.2018
C-0011	2015J0244	NEAFC	Senator	Unregulated	01.01.2015—31.12.2015
C-0012	CS2016J0495	NEAFC	Senator	Unregulated	01.01.2016—31.12.2016
C-0013	CS2016J0530	27IIB2	Senator	Unregulated	01.11.2016—31.12.2016
C-0014	2017D3422	NEAFC (Unregulated)	Senator	Unregulated	01.01.2017—31.12.2017
C-0015	2017D3426	27I,IIb	Senator	CRQ	01.01.2017—31.12.2017
C-0016	2018D3581	NEAFC (Unregulated)	Senator	Unregulated	01.01.2018—31.12.2018
C-0017	2018D3584	I, IIb (Unregulated CRQ)	Senator	CRQ; Unregulated	01.01.2018—31.12.2018
C-0018	CS2015JS0247	NEAFC	Solveiga	Unregulated	20.01.2015—31.12.2015
C-0019	CS2016J0462	NEAFC	Solveiga	Unregulated	01.01.2016—31.12.2016

EXHIBIT	LICENCE No.	AREA	VESSEL	SPECIES	DATE of issue and expiry
C-0020	CS2016J0533	27IIB2	Solveiga	Unregulated	01.11.2016—31.12.2016
C-0021	2017D3425	NEAFC (Unregulated)	Solveiga	Unregulated	01.01.2017—31.12.2017
C-0022	2017D3429	I, IIb	Solveiga	CRQ	01.01.2017—31.12.2017
C-0023	CS2014J020	NEAFC	Solvita	Unlimited fish species	01.07.2014—31.12.2014
C-0024	CS2015J0245	NEAFC	Solvita	Unregulated	01.01.2015—31.12.2015
C-0025	CS2016J0460	NEAFC	Solvita	Unregulated	01.01.2016—31.12.2016
C-0026	CS2016J0531	27IIB2	Solvita	Unregulated	01.11.2016—31.12.2016
C-0027	2017D3427	I,IIb (27I,IIb)	Solvita	CRQ	01.01.2017—31.12.2017
C-0028	2017D3423	NEAFC (Unregulated)	Solvita	Unregulated	01.01.2017—31.12.2017
C-0029	2018D3582	NEAFC (Unregulated)	Solvita	Unregulated	01.01.2018—31.12.2018
C-0030	2018D3585	I,IIb (Unregulated, CRQ)	Solvita	CRQ; Unregulated	01.01.2018—31.12.2018

670. It would therefore be difficult to say that the licences conclusively established that Latvia had intended to license North Star vessels to harvest snow crab on the Norwegian continental shelf.

671. What is, however, perfectly clear and more important is that Latvia had no legal right whatsoever to authorise the harvesting of snow crab — or any other sedentary species — on the Norwegian continental shelf of Norway absent any explicit (or implicit) consent from Norway.

672. Latvia, as a party to UNCLOS, cannot have been unaware of this. Similarly the EU, as a party to UNCLOS, cannot have been unaware of this; and it is the EU that carries international responsibility for breaches of international law in this context.

673. As outlined in **Chapter 2**, there is no doubt that by August 2015 the EU and Latvia were very well aware of the legal position. The EU letter of 5 August 2015 to Member States has already been quoted. That was the letter that referred to the need for coastal State consent for the harvesting of sedentary species from the continental shelf and said "*since both Norway and the Russian Federation have given no such consent, Member States are advised that they should rescind any current licences authorising their vessels to fish for snow crab … in the NEAFC Regulatory Area and should not issue any new licences to this effect and, as appropriate, re-call the vessels concerned*."[723]

674. Indeed, Norway made the point explicitly. On 30 October 2015 it sent a note verbale to the European Commission in which it stated:

> "*In accordance with Article 77 of the United Nations Convention on the Law of the Sea of 10 December 1982 (hereafter referred to as Convention of 1982), the Coastal State exercises sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources, including sedentary species.*
>
> *The Kingdom of Norway and the Russian Federation delimited the continental shelf beyond 200 nautical miles in the Barents Sea by signing the Treaty between the Russian Federation and the Kingdom of Norway concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean of 15 September 2010, in force on 7 July 2011. The continental shelf of this treaty includes the continental shelf of the NEAFC regulatory area.*
>
> *On the basis of the above, the right to harvest sedentary species on the continental shelf of the Barents Sea in the NEAFC regulatory area is the exclusive right of the Coastal States. Pursuant to paragraph 2 of Article 77 of the Convention of 1982, harvesting of sedentary species in the NEAFC Regulatory Area in the Barents Sea cannot be carried out without the express consent of the Coastal States.*"[724]

675. A similar note verbale was sent to Latvia on 2 November 2015.[725]

676. The Claimants' case is, accordingly, that while Latvia was aware that it had no legal right under international law or under EU law to do so, it conferred on North Star the specific right to harvest snow crab on the Norwegian continental shelf by issuing North Star with the licences referred to above; and that those specific rights were

---

723 **R-0033-ENG** Letter 5 August 2015 from DG Mare to the EU Member States.

724 **C-0109.**

725 **RL-0081-ENG**. Note verbale 2 November 2015 from Norway to Latvia.

'expropriated' by Norway when Norway exercised the rights under international law that the EU, Latvia and all other UNCLOS parties recognised it to have.

677. That case cannot stand. The BIT cannot protect 'rights' purportedly granted by a State which patently had no legal authority to grant them: *nemo dat quod non habet.* Non-existent rights cannot constitute an 'investment' and cannot be expropriated.

6.4.3.2.8 *Contractual rights to purchase two additional vessels*

678. On 5 January 2017 North Star signed definitive agreements for the purchase of two ships, the *Sokol* and the *Solyaris*.[726] North Star cancelled the agreements in May 2017.[727] The Claimants say that "*Norway's actions starting in July 2015 and concluding in September 2016 (and further confirmed in January 2017 and later) effected a creeping and illegal expropriation of Claimants' investment*."[728]

679. Vessels for which North Star did not conclude agreements until January 2017 cannot be 'Investments' protected by the BIT against an alleged expropriation that was complete by September 2016.

680. Moreover, the decision to cancel the contract was that of the Claimants alone.[729] The Claimants need not have cancelled the contracts. The vessels were two tuna long liners, which could have been used elsewhere.[730] This is another instance of the argument that if the Claimants incurred costs in the hope of being permitted to do something in the future that they had no legal right, as against Norway, to do in the future, and that hope was disappointed, that somehow constitutes an expropriation. That is not the case.

6.4.3.2.9 *Supply agreements with purchasers of snow crab products*

681. The claim that the Claimants' supply agreements with purchasers of snow crab products were expropriated by Norway is equally misconceived. They refer[731] to agreements

726 Pildegovics, ¶¶104, 105. **PP-0112**, **PP-0113**, **PP-0114** and **PP-0115**.

727 Memorial, ¶303.

728 Memorial, ¶675.

729 Memorial, ¶675.

730 Pildegovics, ¶248.

731 Memorial, ¶¶304-310.

entered into on 29 December 2016,[732] and 29 December 2017.[733] These contracts, organised by Mr Levanidov and made with related businesses in which Mr Levanidov had an interest,[734] were discussed in **Chapter 4**, and their lack of specific rights and obligations was noted. The points made there will not be repeated. The salient additional point is that *all* of these contracts were made months after the supposed conclusion of the expropriation.[735]

682. To put it in other words, after the Claimants came to the view that their alleged 'joint venture' and their investments had been expropriated by Norway, by virtue of the prohibition on the harvesting of snow crab from the Norwegian continental shelf, they chose to enter into supply contracts whose fulfilment they say depended upon the harvesting of snow crab from the Norwegian continental shelf. Then, though there is no evidence of any legal action or penalty or threat thereof arising from non-performance of these contracts,[736] they say that "North Star was unable to honour its commitments under these supply agreements and lost the sales contemplated therein",[737] and that this constitutes an expropriation of the Claimants' investment.[738] That is not a credible claim.

683. The remaining point concerning the Claimants' argument on expropriation can be stated even more briefly.

6.4.3.3 Norway has not engaged in any expropriatory act

684. The second flaw in the Claimants' argument on expropriation is that Norway has not engaged in any acts that could constitute an expropriation.

---

732 Memorial, ¶¶305, 306; **C-0053**. Renewed on 27 December 2017, **C-0054**.

733 Memorial, ¶305, **C-0054, C-0066**.

734 Memorial, ¶309.

735 See **C-0053; C-0054; C-0065; C-0066; C-0067**.

736 And, indeed, it is not clear what said "non-performance" would entail given that, in respect of the contracts with [redacted] and [redacted], as discussed above there do not appear to be any concrete obligations imposed.

737 Memorial, ¶311.

738 Memorial, ¶675.

685. The ‘effect’ in that context is not merely the causing of a financial loss or the loss of an opportunity to make a profit. Terms such as ‘expropriation’ have a meaning. The Claimants’ claims focus on acts which might be said to be relevant under a claim for a breach of an obligation to provide fair and equitable treatment, but are not acts which constitute ‘expropriation’. The Claimants’ conflation of the law on expropriation and legitimate expectations has already been addressed above. Even if it is supposed that every instance of an expropriation *ipso facto* amounts to unfair and inequitable treatment, it must be the case that some instances of unfair and inequitable treatment do not constitute expropriation. It follows that there must be at least some characteristics that mark out acts of expropriation or nationalisation from other instances of unfair and inequitable treatment that do not constitute expropriation.

686. Framing a precise and comprehensive definition of those characteristics is undoubtedly difficult, and is not necessary in this case. Here it is plain that Norway has done no more than exercise legal rights — in this case, under UNCLOS and under customary international law — that Latvia and the EU recognise. Those acts are not ‘expropriations’ or measures having a similar effect.

687. The point matters. The distinction is important if ‘expropriation’ is to retain a coherent meaning in international law and in investment treaty practice. The distinction has wider implications, notably in relation to public and private investment protection schemes that provide insurance protection against expropriation. And there is a significant repetitional point: a State should not be accused of unlawful expropriation when what is in reality alleged is something else, such as a denial of legitimate expectations or unfair or inequitable treatment.

688. This element of the Claimants’ case is based not on law but on a metaphor — that anything that affects the profitability of an investment is in some sense a ‘taking of value’ from the investor and therefore an expropriation. That metaphor is inept, and incorrect as a matter of law. As a matter of fact, as has been shown, all of the Claimants arguments under the heading of ‘expropriation’ depend upon the proposition that it made investments on the basis of an expectation that Norway would not regulate the exploitation of the exponentially-growing snow crab population on its continental shelf, despite Norway’s long-held position that snow crab is a sedentary species subject to its exclusive jurisdiction and control. The Claimant’s real complaint is that Norway

exercised its undoubted regulatory competence in a manner that adversely affected their business. That is not expropriation, nor is it a measure having similar effect.

6.5 NORWAY HAS NOT BREACHED THE OBLIGATION TO PROVIDE EQUITABLE AND REASONABLE TREATMENT

6.5.1 Introduction

689. The Claimants' second allegation is that Norway breached the obligation to accord equitable and reasonable treatment and protection to the Claimants' investments. Norway accepts, *arguendo*, that "*equitable and reasonable*" treatment can be equated with the "*fair and equitable*" treatment standard, which is based on the minimum standard of treatment for aliens in customary international law.

690. It is said by the Claimants that Norway has violated Article III of the BIT in five ways:[739]

- Norway acted arbitrarily;
- Norway acted in bad faith;
- Norway failed to respect the Claimants' legitimate expectations;
- Norway failed to act transparently and consistently with its actions and its investment framework; and
- Norway caused a denial of justice.

691. The Claimants have presented these five distinct allegations as "*a gross and manifest breach*" of the BIT, alleging a single, cumulative violation of Article III. Norway deals with each of these allegations separately, though whether they are taken individually or cumulatively, it is clear that there has been no breach of the obligation of reasonable and equitable treatment.

692. The allegations made by the Claimants in relation to the purported breach of Article III of the BIT rely to varying extents on the same episodes addressed above.

---

739 Particularised at Memorial, ¶¶730-783

6.5.2 The Legal Content of the Obligation Imposed by Article III of the BIT

693. The BIT provides in Article III that:

> "*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*."

694. Article III of the BIT requires each States Party to "*accept such investments* [of investors of the other contracting party] *in accordance with its laws and regulations.*" Norway has no duty to accept Latvian investments except in accordance with Norwegian laws and regulations. Any claim of a breach of this part of Article III would have to be based on an allegation that Norway had not acted accordance with Norwegian Laws and Regulations. Furthermore, once accepted into Norway, all Latvian investments are "*subject to the laws and regulations*" of Norway.

695. Those provisions impose a duty to treat *investments* (not, it will be noted, *investors*) in Norway in accordance with Norwegian law. It might be described as a kind of 'Rule of Law' provision, reflecting obligations of the sort contained in the 'international minimum standard'.

696. Article III's requirement that investments be accorded "*equitable and reasonable treatment and protection*", which the Claimants consider to equate to 'fair and equitable treatment',[740] is harder to define, as the tribunal in *Vivendi II* observed.[741] That tribunal concluded that:

> "*one cannot say more than the tribunal did in S.D. Myers by stating that an infringement of the standard requires "treatment in such an unjust or arbitrary manner that the treatment rises to a level that is unacceptable from an international perspective.*"[742]

---

740 Memorial, ¶701 and footnote 897.

741 **RL-0120-ENG** *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.) v. Argentine Republic (II)*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, ¶213.

742 **RL-0120-ENG** *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.) v. Argentine Republic (II)*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July

697. While there may be room for debate over the boundaries of fair and equitable treatment standard, it is not necessary to explore that frontier territory in this case. Norway's conduct in this case comes nowhere near a violation of the standards regarding arbitrariness and bad faith, respect for the specific or general legitimate expectations, transparency and consistency or the denial of justice, which the Claimants identify as manifestation of the fair and equitable treatment standard.[743]

6.5.3 Norway has not acted arbitrarily

698. The Claimants' first allegation is that Norway has acted arbitrarily. The Claimants open their arguments under this heading with many of the same factual mischaracterisations that plague their arguments on expropriation. For example:

> "[…] *After the Directorate of Fisheries had confirmed that EU vessels could legally catch snow crabs in the Loophole and unload them in Norway, after Norway had inspected North Star's vessels and approved a large number of offloads of snow crab in 2014 and 2015*".[744]

> "*As Claimants were contemplating investing in Norway, Norway's Directorate of Fisheries confirmed that snow crab could be harvested in the Loophole with NEAFC licenses, by EU vessels, which could then unload them in Norway*".[745]

> "[Norway] *accepted a large number of its snow crab landings, thereby confirming the validity of North Star's fishing licences*".[746]

699. As explained above[747] these propositions are not supported by the evidence in the case. As to the first proposition (that Norway had expressly confirmed that EU vessels could *harvest* snow crab within the Loop Hole), the communications from the Directorate of Fisheries referred only to the *landing*, not harvesting, of snow crab. As to the second (that Norway's inspections somehow approved the catches), these inspections were, as the Inspection Forms make clear, concerned with technical safety matters and visa questions, and further they occurred in the period prior to the prohibition on harvesting

---

2010, ¶213, citing *S.D. Myers, Inc. v. Government of Canada*, Partial Award (Merits), 13 November 2000, ¶263.

743 Memorial, ¶704.

744 Memorial, ¶730.

745 *Id.*, ¶731.

746 *Id.*, ¶732.

747 See above, **Section 6.3.1**.

snow crab on the Russian continental shelf. As to the third (that Norway accepted landings, thereby confirming the validity of North Star's licenses), there is nothing in that point, as discussed above.

6.5.3.1 The relevant standard

700. Norway accepts that the relevant standard, as quoted by the Claimants, is that of the International Court of Justice in *ELSI*. That standard requires conduct in wilful disregard of due process, an act that shocks or surprises a sense of judicial propriety.[748]

701. None of the allegations of arbitrary conduct made against Norway come close to this standard. The actual substance of the allegation[749] relies on several of the same episodes that have been dealt with at the start of this chapter. The allegation that those episodes are evidence of arbitrary conduct can thus be dealt with swiftly.

6.5.3.2 None of the allegations of arbitrary conduct are made out

6.5.3.2.1 *The Agreed Minutes*

702. As addressed above, the Claimants' premise surrounding the Agreed Minutes is fundamentally misconceived. There was no change in Norway's position regarding the designation of snow crab, and therefore the Agreed Minutes itself (which was no more than a statement of common understanding) cannot be an example of 'arbitrary conduct'.

6.5.3.2.2 *22 December 2015 amendment*

703. The allegation that the 22 December 2015 amendment to Norway's 2014 snow crab regulations was arbitrary is reliant upon the Agreed Minutes being an arbitrary change of position. It was not, and the extension of Norway's regulations to its continental shelf cannot be considered as arbitrary. Further, as noted above, the 22 December 2015 amendment did not come out of a clear blue sky, but was the process of public consultations.

---

748 **CL-0288** *Elettronica Sicula Case (United States of America v Italy)* (1987) ICJ rep 15 ("***ELSI***"), [128], quoted in Memorial, ¶706.

749 Particularised in Memorial, ¶733.

6.5.3.2.3 *Norway's alleged 'acceptance' of snow crab harvesting in July 2015-September 2016*

704. The same points can be made here. All that Norway did was accept 'landings' of snow crab in Norwegian ports, in circumstances where the Russian regulations in force at the time (*i.e.* those *actually* applicable to the Claimants' harvesting activity) did not prohibit foreign vessels from harvesting snow crab on their continental shelf. This, again, is far from arbitrary conduct.

6.5.3.2.4 *The imposition of fines*

705. Norway's imposition of fines on the *Senator* was not arbitrary. The prohibition on snow crab harvesting on the Norwegian continental shelf in the Loop Hole came into force on 22 December 2015. Following the *Senator*'s harvest of snow crab in June 2016, a fine was imposed and the vessel was arrested. That fine was accepted and paid by North Star.

706. The alleged arbitrariness of this action is parasitic upon the Claimant's previous points that Norway, whilst regulating snow crab harvesting on its continental shelf on the one hand, was nevertheless consenting to the very activity it was prohibiting on the other. As shown above, that allegation simply does not accord with the factual record.

6.5.3.2.5 *The arrest of the Senator*

707. The next allegations of arbitrary conduct have not been addressed above. They therefore need to be explored in more detail. But on examination, none of them comes close to making out a claim of arbitrary conduct.

708. The arrest of the *Senator* in the Fisheries Protection Zone around Svalbard on 16 January 2017 is a key allegation made by the Claimants, featuring in several places in their Memorial.[750] The main facts of the allegations are described at paragraph 373 of the Memorial, where reference is made to exhibits **C-0039** and **C-0040**. The first of those exhibits is the judgment of the Øst-Finnmark District Court against the Captain of the *Senator* (Rafael Uzakov) and North Star on charges relating to a violation of Section 61 of the Marine Resources Act and Section 36(1)(a) of the Coast Guard Act. This is the judgment that was later appealed, leading to the judgment of the Norwegian

750 Memorial, ¶¶134; 373; 692.

Supreme Court that the Claimants now contend constituted a denial of justice. The second exhibit is the order of the Supreme Court giving permission to appeal from the judgment of the Court of Appeal. Those are discussed elsewhere. The Claimants do not appear to rely on any further factual information in respect of this incident.

709. The Claimants have failed to explain why the arrest of the *Senator* is said to have been arbitrary, other than by stating at paragraph 733 of the Memorial that all the actions taken together are evidence of Norway's policy shifting in "*arbitrary, unpredictable and inconsistent ways*". It is therefore important to contextualise this event in the overall chronology of the case.

710. On 3 September 2016, the Russian ban on the harvesting of snow crab on its continental shelf beyond 200 nautical miles.[751] Within three days, all harvesting activity by North Star's vessels in the Loop Hole ceased.

711. The *Senator*'s sole voyage into the Fisheries Protection Zone around Svalbard in January 2017 thus came four months after the Claimants had ceased all harvesting activity in the Loop Hole. January 2017 was also: (1) more than two years after the general ban on snow crab harvesting had entered into force on 1 January 2015; (2) over a year since the regulations had been amended to clarify that they applied to the entirety of the Norwegian Continental Shelf; and (3) a few months after the *Senator*'s prior arrest for illegally harvesting snow crab on the Norwegian continental shelf.

712. January 2017 is the first, and only record that Norway has of the Claimants' vessels engaged in harvesting activity on the Norwegian continental shelf around Svalbard. There could have been no doubt in the Claimants' minds in January 2017 that:

712.1. Norway considered that harvesting on the Norwegian continental shelf without Norwegian authorisation, including by vessels purportedly authorised by Latvia, was illegal;

712.2. Norway's position was that snow crab is a sedentary species;

751 See above, **Section 2.2.6.3**.

712.3. Norway's position was that nationals of States parties to the Svalbard Treaty do not have any right under that Treaty to equal treatment of exploitation of natural resources on the Norwegian continental shelf around Svalbard.[752]

713. As well as this general awareness of Norway's position, the Claimants had also received specific confirmation of Norway's position on several occasions. These included on 22 February 2016 when, as the Claimants admit[753] that they were told by Minister Sandberg that Norway's position was that EU vessels were not allowed to harvest snow crab "*without Norway's consent*".

714. The Claimants received further specific confirmation of Norway's position in January 2017, very shortly before the arrest of the *Senator*, when North Star and the Norwegian authorities engaged in correspondence concerning the legality of snow crab harvesting. On 12 January 2017, Andrey Kinzhalov, Technical Director of North Star, inquired with the Norwegian Ministry of Trade, Industry and Fisheries about the legality of harvesting Snow Crab on the Norwegian continental shelf.[754] He said:

> "*Our vessel are ready for their voyage to SVALBARD zone in order to catch Snow crab. Our vessels have all appropriate Certificates and Licenses.*
>
> *In order not to have any problems with the allowed area for catching we kindly ask you to inform us about the coordinates of conservancy areas where we have not the right to catch.*
>
> *Also please inform us – do we have the right to catch the snow crab less than 12 nautical miles from Svalbard and Islands around Svalbard.*"

715. On 15 January 2017 at 15:25 UTC North Star was informed that such harvesting would be illegal, *and that the prohibition would be enforced*:

> "*Harvesting of snow crab on the Norwegian continental shelf is prohibited unless an exemption has been granted. No such exemption has been granted to vessels flying the flag of an EU Member State. Therefore your vessels are not authorized to fish on the*

---

752 Not least also because, as is evident from **KL-0016**, Norway had told Mr Levanidov as early as May 2013 that "*Russian fishing vessels cannot catch snow crab in the NØS / Svalbard zone. This is because the snow crab is not a part of the fisheries agreement between Russia and Norway. The same applies to other foreign vessels.*"

753 Memorial, ¶367; Pildegovics, ¶204.

754 **R-0059-ENG** Email dated 12 January 2017 from Andrey Kinzhalov, Technical Director of North Star, to the Norwegian Ministry of Trade, Industry and Fisheries.

> *Norwegian continental shelf. This includes the whole Norwegian continental shelf, including the areas around Svalbard* […]
>
> *Norway expects everyone to follows applicable regulations in Norwegian maritime areas, and we want to leave no doubt that such regulations will be enforced consistently as conveyed in the above mentioned note to the EU, and in accordance with international law*".[755]

716. Despite this knowledge and forewarning, the *Senator* entered the Fisheries Protection Zone around Svalbard on 15 January 2017. It launched 13 lines with a total of 2,594 pots onto the Norwegian continental shelf to harvest snow crab.[756] The *Senator* was boarded by the Coast Guard and arrested on 17 January 2017.

717. The Claimants' submissions on this point amount to no more than an allegation that Norway's enforcement of its criminal laws was a breach of the BIT, notwithstanding that the Claimants had asked whether their planned activity was lawful, and had been told clearly by Norway not only that it was unlawful, but also that the prohibition "*would be enforced*".

718. The Claimants claim that Norway "*knew*" that the vessel was heading towards the Fisheries Protection Zone around Svalbard, but "*let it reach the SFPZ and install its pots before arresting it*".[757] If that is put forward as an allegation of arbitrariness, it is baseless. It is not 'arbitrary' to wait until a person has committed an offence before arresting them for it.[758]

---

755 **R-0060-ENG** Letter 15 January 2017 from the Norwegian Ministry of Trade, Industry and Fisheries to North Star.

756 **C-0039**, p.5

757 Pildegovics, ¶208; Memorial ¶373.

758 Nor would it have been consistent with Norwegian domestic law to have done so. The Norwegian Penal Code of 2015 **(RL-0168-NOR; RL-0169-ENG)**, in Section 16, makes clear that generally attempted violations will not entail condemnation as long as the person making the attempt can still retreat before the violation has begun. Thus the *Senator* could not have been arrested for setting off in the direction of the Fisheries Protection Zone around Svalbard, but only when the first pot was sent over the railing of the vessel.

6.5.3.2.6 *Allegations relating to statements made by Per Sandberg in 2017-2019*

719. The next allegation is that between 2017 and 2019, Norwegian Minister Per Sandberg issued a number of public statements showing "*discriminatory intent*" towards EU fishermen. Those statements add nothing further to the allegations of arbitrary conduct.

720. The statements relied upon are referred to in the Memorial at paragraphs 374; 375; 381-385. Each is taken in turn.

721. At paragraph 374 of the Memorial, the Claimants refer to a letter from Mr Sandberg. That letter is reproduced at exhibit **PP-0193** and describes Norway's conditions for negotiation with the EU for the establishment of snow crab quotes.

722. At paragraph 375 of the Memorial, the Claimants refer to media statements by Mr Sandberg which again describe the negotiations between Norway and the EU for the establishment of quotas. On such statement includes a quotation on which the Claimants place heavy emphasis, that "*we will not give them a single crab*": but they do not quote the next paragraph in the media article (exhibit **C-0036**), which emphasises that Mr Sandberg "*wants something in return from the EU. For example fish quotas*" in order to engage in negotiations for snow crab quotas. The same point is made in a letter from the Minister Sandberg himself to Seagourmet, produced as exhibit **PP-0193**, in which Minister Sandberg says:

> "*In the bilateral negotiations for 2016 and 2017, Norway has offered the EU a quota for snow crab as part of the current account in the annual negotiations. A prerequisite for such a change from the Norwegian side is that all snow crab fished by EU vessels on the Norwegian continental shelf must be landed in Norway. This is, among other things, to facilitate the demand for raw materials for the land-based snow crab business. In order to reach such an agreement, the EU must compensate Norway for this by allocating quotas for other species to Norway. So far, the EU has not wanted to pay for such a quota change on snow crab. The EU was most recently reminded of Norway's offer of a quota exchange agreement for snow crabs in a meeting between the Norwegian fisheries authorities and the EU on 10 January 2017.*
>
> *As the EU has so far not wanted to enter into an agreement with Norway on the exchange of a quota for snow crab for other species, the Latvian vessels cannot be given access through a pilot project. It is an absolute precondition for the Latvian vessels to have access to snow crab fishing on the Norwegian continental shelf that an agreement is entered into between the EU Commission and Norway.*"

723. This position was also repeated in response a question put to Mr Sandberg by Ms Helga Pedersen, which the Claimants refer to at paragraphs 381-385 of the Memorial. There

(exhibit **KL-0046**), Mr Sandberg emphasised that Norway *had* attempted to negotiate with the EU for the inclusion of snow crab quotas, but the EU had rejected those offers. See for example:

> "*An offer to exchange snow crab was first presented by Norway during the negotiations with the EU in November 2015. At that time, the EU rejected the offer immediately on the grounds that they did not have available means of payment (i.e. fishing quotas). The case was therefore not discussed further in any detail.*
>
> *In the spring of 2016, the European Commission took the initiative for a new discussion on the replacement of snow crab. From the Norwegian side, we demanded that all catches be landed in Norway and that Norway would also receive fishing quotas from the EU as compensation. The fishing could take place on the entire Norwegian continental shelf. But this time, too, the talks did not materialize in any particular agreement.*
>
> *Norway again presented the offer to the EU to fish for snow crab on the Norwegian continental shelf during the negotiations in November and December 2016. The Commission rejected the offer, and did not enter into any substantive discussions.*
>
> *I have long been aware of the situation around the lack of raw materials for Seagourmet AS's factory in Båtsfjord, and the EU fleet's interest in fishing for snow crab in the Barents Sea. Norway has therefore tried to get snow crab into the quota agreement with the EU. At the same time, I would like to emphasize that every player who establishes a business is responsible for ensuring that operations have a sufficient resource base. This is important to ensure a level playing field for everyone who wants to run a fishing industry facility in Norway.*"[759]

724. There is therefore nothing in these statements to suggest that Norway's actions were arbitrary. Rather, they demonstrate that Norway and the EU were engaged in bilateral negotiations to find a mutually acceptable solution.

6.5.3.2.7 *Allegation of Denial of Justice*

725. Although the allegation of denial of justice is presented as a separate breach of Article III of the BIT, it also appears as an example of arbitrary conduct. It is dealt with fully below at **Section 6.5.7**. In summary, the proceedings before the Norwegian Courts were conducted with full regard for due process, and the Claimants have failed to identify any procedural or substantive defects with the process, let alone "*an act which shocks,*

[759] **KL-0046.**

or at least surprises a sense of judicial propriety"[760] sufficient gravity to constitute a breach of the BIT.

6.5.3.2.8 *North Star's reputation is "smeared"*

726. The Claimants refer to the allegation that North Star's reputation was "smeared" in the Norwegian media as an example of arbitrary conduct.[761]

727. The only allegation that appears to be made against Norway (as opposed to private media organisations) is that the Norway (via its embassy in Indonesia) supplied the media organisations with forged documents. This has been addressed above in **Chapter 1**. There is nothing in this point. The Norwegian embassy in Indonesia received those documents attached to a visa application and was obliged—pursuant to Norway's Freedom of Information Act—to disclose them.

6.5.3.3 Quotas set in 2017-2021

728. The final allegation of 'arbitrary' conduct is Norway's adoption of quotas in the period 2017-2021. The Claimants allege that these are "*artificially low*". That is wrong. As addressed in **Chapter 2**,[762] Norway's quotas are set in accordance with scientific advice from the IMR. The Claimants' actual complaint is that the *portion* of the quota set aside for foreign vessels is too low. Norway has permanent sovereignty over its natural resources. As demonstrated amply in this **Chapter 6**, Norway's decision to regulate snow crab and the manner in which it did so is manifestly not arbitrary.

6.5.4 Norway Did Not Act in Bad Faith

729. The second alleged breach of Article III of the BIT is that Norway acted in bad faith. It is not clear from the Claimants' presentation what (if anything) they say the difference is between conduct in 'bad faith' and arbitrary conduct,[763] but a State cannot be accused of acting in 'bad faith'

---

760 **CL-0288** *ELSI*, [128].

761 Memorial, ¶733.

762 See above, paragraph 117.

763 Memorial, ¶¶709-710.

> "[…] *merely because it chooses one of several policy alternatives. Even where the course of action adopted is capable of criticism there is no showing of bad faith absent egregious intent*".[764]

730. The Claimants rely on the same factual episodes in respect of bad faith as they do of arbitrary conduct.[765] They have been addressed above and are not repeated here. Clearly, there is nothing in those episodes to demonstrate any bad faith on the part of Norway.

6.5.5 Norway did not Act in Breach of any Legitimate Expectations

731. The next allegation of breach Article III BIT raised by the Claimants is that Norway violated the Claimants' specific and general legitimate expectations.

6.5.5.1 Specific legitimate expectations

732. The Claimants identify the specific legitimate expectation that they rely on at paragraph 740 of the Memorial:

> "*Claimants' investments* […] *were made on the basis of Norway's position that it recognized NEAFC snow crab licenses issued by EU Members States allowing their vessels to participate in snow crab fisheries in the Loophole*".

6.5.5.1.2 *Norway's conduct has not given rise to any legitimate expectations*

733. The Claimants must first demonstrate that Norway's conduct objectively gave rise to the pleaded expectation on the part of the Claimants and that that expectation was legitimate.

734. There are seven episodes which the Claimants rely on for the proposition that they had such a legitimate expectation, particularised at paragraph 740 of the Memorial. Neither in isolation nor taken cumulatively can they be said to have given rise the legitimate expectation claimed by the Claimants. They are considered in turn below.

735. Before turning to each, though, it is important to remember that 2013 was not the start of the information given to the Claimants about Norway's laws and regulations surrounding the harvesting of marine living resources. As discussed above, as early as 2010 Mr Levanidov had already informed Mr Pildegovics about the Participation Act,

---

764 **RL-0121-ENG** *Invesmart v. Czech Republic*, Award, 26 June 2009, ¶430.

765 Memorial, ¶736.

i.e. "*the law which does not allow foreigners to hold more than 40% in fishing companies*".[766]

736. May-June 2013 Emails. The Claimants first rely on the email exchanges between Mr Ankipov of Ishavsbruket and the Norwegian Directorate of Fisheries in May and June 2013. Those exchanges have been considered elsewhere.[767] Notwithstanding that neither of these emails are addressed to Mr Pildegovics or North Star (the latter had not even been incorporated at the relevant time), neither exchange is capable of generating the legitimate expectation for which the Claimants contend. In summary:

736.1. The May 2013 exchange involves Mr Ankipov asking about the ability of foreign vessels to harvest snow crab, to which the answer is "*Russian fishing vessels cannot catch snow crab in the NØS / Svalbard zone* […] *The same applies to other foreign vessels*".[768]

736.2. The June 2013 exchange involved Mr Ankipov asking questions with *no reference* to foreign fishing vessels. The response from the Directorate of Fisheries[769] was solely concerned with regime applicable to Norwegian vessels, as is made clear by the regulations attached to that email which at the first paragraph ("Scope") provide:

> "*These regulations apply to Norwegian citizens and persons resident in Norway who fish with Norwegian vessels in waters outside any state's fisheries jurisdiction that are not regulated by regional or subregional fisheries management organizations or entities with their own reporting provisions. The regulations also apply to NEAFC's regulatory area.*"

736.3. The Claimants therefore also cannot rely on the text of Ms Jensen's email response as "*indicating that registration was a mere formality*".[770] It is true that in her email, Ms Jensen said that "*As stated in §2* [of the regulation] *vessels that are to fish in waters outside any state's fisheries jurisdiction must be registered through notification to the Directorate of Fisheries*" and that "*The processing*

---

766 **PP-0009.**

767 See above, **Section 6.3.1**.

768 **KL-0016.**

769 **KL-0017.**

770 Memorial, ¶740.

of registration notifications will normally take 2-3 days" (emphasis added). Plainly, however, that was not a statement that the Claimants' vessels were able to be registered under this regulation, and still less that "*registration was a mere formality*" for vessels that were not Norwegian, to whom the regulation was not applicable. This was nothing more than procedural information about Norwegian vessels.

737. Thus, on inspection of the underlying documents, the proposition that these emails in fact generated any sort of expectations whatsoever concerning Latvian vessels, let alone legitimate ones, quickly falls apart.

738. February and July 2014: Landing snow crab. The Claimants also rely on several events between February and July 2014, which can be taken together.[771] They all make the same conflation Norway has already dismissed above, that between (1) an authorisation to *land* (*i.e.* offload) snow crab harvested anywhere; and (2) an authorisation to *harvest* snow crab on the Norwegian continental shelf. Norway's full account of these matters has already been given above, but taking each briefly:

738.1. In February 2014, in response to a question (summarised as "*whether EU-registered boats are free to deliver snow crab receptions*"),[772] the Food Safety Authority wrote that EU-registered fishing boats could "*deliver*" crab freely to Norway. No question was asked, and no answer was given, about the lawfulness of *harvesting* snow crab on the Norwegian continental shelf.

738.2. In July 2014, Mr Ankipov inquired with the Directorate of Fisheries about the "*process regarding the documents to be sent to the Directorate of Fisheries*" where "*a fishing vessel under the EU flag will land live snow crabs at approved Norwegian reception stations*".[773] The reply, given on 25 July 2014 was—as might be expected—directed to that question alone. The position of Norway was set out clearly at paragraph 1:

771 Memorial, ¶740.

772 **KL-0019**, p.1 (emphasis added).

773 **KL-0020.**

> "*1. In principle, EU vessels <u>can land fish, including snow crab</u> to Norway on an equal footing with Norwegian fishing vessels…*".[774]

738.3. Paragraph 2 is also important, and the Claimants place reliance on it.[775] It reads:

> "*2. In principle, no special documentation shall be submitted to the fisheries authorities when the crab is to be landed alive at a Norwegian reception centre, and the crab has been caught outside the Norwegian Economic Zone*".

738.4. The jump made by the Claimants in the final bullet point of paragraph 740 of their Memorial is to suggest that the statements made above "*confirmed the understanding that it*[776] *could legally rely on an EU-based fishing company for its supplies of snow crabs provided that the crabs were caught 'outside the Norwegian Economic Zone'*". That is unsustainable. None of the communications referred to by the Claimants referred to the legality of harvesting snow crab. Paragraph 2 of the email of 25 July 2014 merely states that there was no special documentation needed to land live snow crab which had been caught outside the Norwegian Economic Zone. The Directorate of Fisheries did not—nor were they asked by Mr Ankipov to—represent that any harvesting activity outside the Norwegian Economic Zone would be lawful. On the other hand, Norway made it clear that foreign vessels had no right to harvest crab on the Norwegian continental shelf without Norwegian authorization.

739. The suggestion made by the Claimants in paragraph 741 of their Memorial that the exchanges referred to above "*verified the legality of North Star's*" harvesting activities is therefore wrong. Properly considered, these exchanges could not have generated any legitimate expectations regarding the harvesting of snow crab on the Norwegian continental shelf.

740. <u>Additional representations:</u> At Memorial ¶742 the Claimants rely on several further "representations" said to have been encouraging the Claimants' investments said to

---

774 **KL-0020** p.1 (emphasis added).

775 Memorial, ¶¶96; 195; 740.

776 By "it", the Claimants presumably mean North Star.

have taken place "*throughout 2015*".[777] These matters are of course of no legal import given that several of the Claimants' alleged investments (in particular the four vessels) had already been acquired at this point, and the touchstone for legitimate expectations is reliance at the time of the *making* of the investment.[778]

741. Nevertheless, even taken at their highest, none of them is remotely relevant to the key issue: whether Norway represented to the Claimants that they had a right to harvest snow crab on the Norwegian continental shelf. They can therefore be dismissed.

742. The first allegation (Memorial, ¶742, first bullet point) is that on 10 June 2015 the Mayor of Båtsfjord attended and personally cut the ribbon at the launch of the Seagourmet factory. The fact that the Mayor supported the opening of the Seagourmet, a factory not even owned by the Claimants, processing already landed crab, cannot sensibly be said to have been a representation to the Claimants about the legality of harvesting on the Norwegian continental shelf.

743. There is similarly nothing in the visits by members of the Norwegian Parliament and Norwegian officials to Båtsfjord in September and October 2015 (Memorial, paragraph 742, second, third and fifth bullet points) to justify any legitimate expectations:

743.1. The first visit (bullet point two) appears (from the translated emails at **PP-0179**[779]) to have been a general visit to several businesses in Båtsfjord and not—as the Claimants appear to present it at paragraph 742 of the Memorial and in Mr Pildegovics' witness statement at paragraph 192—a visit to Seagourmet in particular. The Claimants allege that Mr Bakke-Jensen, leading the delegation, gave the factory his "*blessings and best wishes of success*".[780] Norway's support

---

777 They are: (1) the fact that the Mayor of Båtsfjord cut the ribbon on the launch of the Seagourmet factory; (2) that Mr Frank Bakke-Jensen gave a "message of encouragement" to North Star and Seagourmet about their joint project; (3) that Norway's Minister of Fisheries visited Sea gourmet's factory on 8 September 2015; (4) that Minister Aspaker approved investments in the refurbishment of Båtsfjord; and (5) that a delegation from the Ministry of Trade, Industry and Fisheries visited and "encouraged" the joint venture on 23 October 2015.

778 **RL-0122-ENG** *Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award, 26 February 2021, ¶456; **RL-0123-ENG** *Frontier Petroleum Services Ltd. v. The Czech Republic*, PCA Case No. 2008-09, Final Award, 12 November 2010, ¶287: "*Tribunals have stated consistently that protected expectations must rest on the conditions as they exist at the time of the investment*".

779 The first two emails in this chain are dated September 2020. It appears that these are emails attaching translations on the earlier 2015 emails.

780 Memorial, ¶347.

of the Båtsfjord factory is not the same as a representation of the legality of harvesting on its continental shelf by a long way.

743.2. The second visit (bullet point three) is similar. Ms Aspaker's one-hour visit (see **C-0080**) to the Seagourmet factory on 8 September 2015 cannot have sensibly generated any legitimate expectations; indeed the Claimants rely principally on the fact that Ms Aspaker "*expressed no reservations*" about the fact that Latvian-flagged vessels were responsible for the catches. Of course, at no point do the Claimants allege that they told Ms Aspaker that any of their harvesting were taking place in the area of the Loop Hole that comprised Norwegian continental shelf. Ms Aspaker's silence on an issue that was not even raised to her cannot sensibly be grounds for any legitimate expectations on the part of the Claimants.

743.3. The third visit (bullet point five) is the only visit where it is alleged that the visitors were specifically informed that the Claimants were harvesting snow crab in the Loop Hole. On 23 October 2015 a delegation from the Ministry of Trade, Industry and Fisheries visited Seagourmet's factory – again, this was not a specific visit to Seagourmet, but a more general trip with the tagline: "*Ministry of Trade, Industry and Fisheries visits the Fishing Capital Båtsfjord*" (**PP-0183**). The general visit involved a 75-minute tour of the Seagourmet factory. Whilst Mr Pildegovics alleges that the delegation was "*informed of Seagourmet's dependence on North Star's deliveries of snow crabs caught in the Loophole*", there is no evidence that the delegation was told that any of the harvesting took place on the Norwegian continental shelf in the Loop Hole. No specific representation is even relied on. Rather, the Claimants allege that the delegation "*appeared enthusiastic about the project and gave their encouragements*".[781]

743.4. The final point relied upon[782] is the approval given by Minister Aspaker of substantial investments for the refurbishment of Båtsfjord port. This was a general investment that cannot sensibly be isolated as a representation given to

781 Pildegovics, ¶194.

782 Memorial, ¶742, bullet point 4.

the Claimants of anything, let alone the acceptability to Norway of foreign vessels harvesting snow crab on the Norwegian continental shelf. Given that Båtsfjord has been described as the "*fishing capital*" of Norway[783] it is unsurprising that investment in the city as a whole would be valuable for Norway. Indeed at no point have the Claimants alleged that the specific investment (dredging works to increase the depth of the harbour[784]) was necessary or even beneficial to the Claimants.

6.5.5.1.3 *No evidence of reliance*

744. The absence of any legitimate expectations generated by Norway's conduct is sufficient to dispose of this alleged violation of Article III of the BIT. It is also the case, however, that there is no evidence that the Claimants relied on any expectations said to have been generated by the above conduct. The Claimants assert[785] that they:

> "*would never have made the substantial investments they made in Norway without having verified the legality of North Star's fishing activities with regards to Norwegian law, as confirmed by the above exchanges with Norwegian authorities in 2013 and 2014*."

745. The content of the 2013 and 2014 email exchanges does not need to be repeated here. They contain no evidence of any reliance of any reliance *by the Claimants*. They were not even addressed to the Claimants, but to Mr Ankipov of Ishavsbruket. The Claimants never requested any relevant information (*i.e.* confirmation regarding the legality of *harvesting* snow crab on the Norwegian continental shelf) from Norwegian authorities until January 2017. The issue of specific legitimate expectations can therefore be put to one side.

6.5.5.2 General Legitimate Expectations

746. It is wrong to suggest that equitable and reasonable treatment implies the general stability of the Norwegian regime concerning the harvesting of natural resources on its continental shelf. The point was made eloquently by the Tribunal in *EDF v Romania*:

---

783 **PP-0183.**

784 Memorial, ¶350.

785 Memorial, ¶741.

> "*The idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life. Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable.*"[786]

747. Other Tribunals have emphasised the State's sovereign right to regulate with the benefit of a "*high measure of deference*".[787] Thus, absent a specific undertaking on the part of the host State to stabilise or freeze the regulatory framework,[788] the Claimants cannot make out a claim for a general legitimate expectation about Norway's regulatory environment.

748. No such specific undertaking has been identified (and none exists). The Claimants therefore could not have held any legitimate "*general expectation of stability*" in the regulatory framework.[789]

749. In any event, nothing that Norway did would have breached any legitimate expectations. As outlined above,[790] Norway at no point *changed* its position on the designation of snow crab as a sedentary species (which position has been consistent for decades). Neither did Norway change its policy on enforcing its regulations. The fact that no action was taken against North Star or its vessels until the arrest of the *Senator* is demonstrative only of the fact that between Norway's extension of its regulations to the Norwegian continental shelf in the Loop Hole, and June 2016 voyage which the

---

786 **RL-0124-ENG** *EDF (Services) Limited v. Republic of Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶217. See also: **RL-0125-ENG** *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum, 31 August 2020, ¶425; **RL-0126-ENG** *Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021, ¶566 and several others.

787 **CL-0315** *S.D. Myers, Inc. v. Government of Canada*, Partial Award (Merits), 13 November 2000, ¶263; **CL-0216** *Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, **RL-0125-ENG** Partial Award, 17 March 2006 *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum, 31 August 2020, ¶424, by way of example.

788 **RL-0127-ENG** 2013-12-19 *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, 19 December 2013, ¶629; **CL-0316** *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶332 and several others.

789 Memorial, ¶738.

790 See above, paragraph 48.

Senator undertook following which it was arrested, North Star's vessels simply did not harvest snow crab on the Norwegian continental shelf.

6.5.5.3 Conclusion on Legitimate Expectations

750. On a proper examination, none of the evidence relied on by the Claimants contains any representation that foreign vessels had a right to harvest snow crab on the Norwegian continental shelf without authorisation from Norway. To the contrary, Norway stated explicitly that foreign vessels *could not* harvest snow crab on the Norwegian continental shelf. The Norwegian statements could not have generated any "*reasonable and justifiable expectations*" that the Claimants were entitled to harvest snow crab on the Norwegian continental shelf.[791]

6.5.6 Norway did not Violate Standards of Transparency and Consistency

751. The next allegation made by the Claimants is that Norway violated standards of transparency and consistency. The accepted standard when considering whether a lack of transparency in an administrative process is sufficient to breach the FET standard, is whether it was "*a complete lack of transparency and candour*".[792]

752. It is obvious that there has been no such lack of transparency or candour on the part of Norway. The Claimants rely on eight examples of what they call the "*opacity and inconsistency of Norway's actions*".[793] Several of those examples have already been addressed above and, where they have, a short summary is provided below.

---

791 **CL-0300** *Thunderbird v Mexico* (Arbitral Award, 26 January 2006) at ¶147.

792 **CL-0290** *Waste Management v Mexico* ICSID Case No ARB(AF)/00/3 (Award, 30 April 2004) at ¶98 (assessing the FET standard in Article 1105 NAFTA). See also under bilateral investment treaties: **CL-0216** *Saluka v Czech Republic* PCA Case No 2001-04 (Partial Award, 17 March 2006) at ¶288; **RL-0128-ENG** *Biwater Gauff v United Republic of Tanzania* ICSID Case No. ARB/05/22 (Award, 24 July 2008) at ¶602 (citing the decision as authority for the proposition that the conduct of a State must be transparent); **CL-0303** *Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt*, ICSID Case No ARB/04/13 (Award, 6 November 2008) at ¶187; **RL-0121-ENG** *Invesmart v Czech Republic* (UNCITRAL) (Award, 26 June 2009) at ¶201; **CL-0304** *Liman Caspian Oil and NCL Dutch Investment v Kazakhstan*, ICSID Case No ARB/07/14 (Award (Excerpts), 22 June 2010) at ¶285; **RL-0123-ENG** *Frontier Petroleum Services Ltd v Czech Republic*, PCA Case No. 2008-09, (Award, 12 November 2010) at ¶290; **RL-0129** *Paushok and others v the Government of Mongolia* (UNCITRAL) (Award on Jurisdiction and Liability, 28 April 2011) at ¶625; **CL-0142** *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka* ICSID Case No ARB/09/2 (Award, 31 October 2012) at ¶420 (referring to ¶411 and fn 283); **RL-0044-ENG** *RWE Innogy v Spain* ¶660.

793 Memorial, ¶746.

6.5.6.2 The Agreed Minutes

753. There was no lack of transparency or candour about Norway's position regarding snow crab. Norway has since the 1950s always considered snow crab to be sedentary.[794] The Claimants' argument on the so-called 'Malta Declaration', *i.e.* the Agreed Minutes, is predicated upon the premise that Norway *changed* its position. That is wrong.

6.5.6.3 Norway's visits to the Claimants' Båtsfjord Premises

754. The second episode are the visits in September and October 2015 by several politicians and civil servants to Seagourmet's Båtsfjord factory. Those visits have been addressed above in the context of legitimate expectations.[795] Nothing in those visits in fact demonstrates that Norway verified any snow crab harvesting activity undertaken by the Claimants.

6.5.6.4 Norway approves the landing of snow crab harvests

755. The third and fourth points made by the Claimants concern the approval of the landing of snow crab caught on the Russian continental shelf, both of the Claimants' vessels and of the *Juros Vilkas*. That has been addressed above. In the period between the extension of the 2014 snow crab regulation to the Norwegian continental shelf, and the arrest of the *Senator*, there was only one instance where North Star appears to have crabbed on the Norwegian continental shelf, and it was arrested as a result. The acceptance of landings of snow crab caught on the Russian continental shelf plainly says nothing about the legality of harvesting on the Norwegian continental shelf.

6.5.6.5 Snow crab quotas

756. The fifth and sixth points made by the Claimants go to Norway's adoption of snow crab quotas.[796] Norway's adoption of quotas has been addressed in **Chapter 2**.[797] The quotas adopted by Norway are neither opaque nor inconsistent. The Claimants make their arguments with reference to the report provided by Dr Brooks Kaiser, written for the

---

794 See above, **Section 2.2.3.1**

795 See above, **Section 6.5.5**.

796 Memorial, ¶¶751-752.

797 See above, paragraph 117.

Claimants for the purposes of these proceedings. Norway makes four points in this regard:

756.1. First, Norway has since 2017 received quota advice from the Norwegian Institute of Marine Research (IMR), one of the foremost research institutes in the world and arguably the best research institute for marine research in the marine areas in question.

756.2. Secondly, only IMR and its Russian counterpart, PINRO, undertake scientific surveys of the snow crab population in the Barents Sea. And only IMR undertakes targeted studies of the snow crab population on the Norwegian continental shelf in the Barents Sea. Neither the Claimants nor Dr Kaiser undertakes independent scientific surveys or studies of the population.

756.3. Third, IMR has for each year suggested a band (upper and lower level) as part of its quota advice. This quota advice has been publicly available on the web-site of IMR. Norwegian authorities have thereafter set the yearly quota within this band. The Claimants are therefore wrong to suggest (at paragraph 752 of the Memorial) that Norway has consistently set quotas below the recommendations by IMR. As can be seen from Table 10 of the Brooks Kaiser report and discussed in §82 of her report, Norway has set quotas within the range advised by IMR.

756.4. Fourth, only Norway, as the State with sovereign rights over the resource in question, can establish quotas for the species in question. Its quota setting must be respected by all actors.

757. The Claimants' arguments essentially amount to an allegation that Norway should have set snow crab quotas based on the volumes desired by them, or the assumptions presented by Dr Kaiser in her report, rather than based on the scientific advice of IMR. That is neither correct (the IMR being the foremost authority on snow crab in the Loop Hole) nor is it an example of opaque or inconsistent conduct.

6.5.6.6 The actions of Morten Daae

758. The seventh point made by the Claimants concerns actions by the Norwegian police and statements by public prosecutor Morten Daae as published by the newspaper

Dagbladet.[798] It is claimed that the police's actions were intentionally orchestrated to smear the Claimants, and consequently amounts to a breach of the requirement to act consistently and even-handedly. That is a travesty of the true position. Based *inter alia* on a notice of concern from the Norwegian Embassy in Jakarta referring to working conditions set out in contracts for Indonesian crew members of vessels in the snow crab industry. If true, that would have meant that the businesses were involved in serious offences under Norwegian criminal law including human trafficking. In accordance with normal practice the police started gathering relevant information about companies involved in the snow crab business. But plans to investigate matters further were abandoned when those Indonesian crew members left, and when, following the Russian ban on harvesting snow crab on the Russian continental shelf came into force, other activities of vessels engaged in snow crab harvesting ceased.[799]

6.5.6.7 Dagbladet's 'smear campaign'

759. The Claimants allege that Norway conducted a 'smear campaign' against them, focused on a series of articles in the Norwegian newspaper *Dagbladet*. *Dagbladet* is privately owned, with 100% of the shares being held by the Scandinavian Aller Media Group.[800] In November 2018, *Dagbladet* published a series of articles about various aspects of the crab harvesting activities in the Barents Sea. *Dagbladet* is the third largest newspaper in Norway. In the series, *Dagbladet* put a particular focus on working conditions for the Indonesian, Russian and Ukrainian crew on vessels engaged in crab harvesting.[801]

760. The first article was published 11 November 2018 and told the story of a Ukrainian crew member who was lost at sea from the Latvian snow crab vessel *Valka* owned by Latvian company Baltjura-serviss. Dagbladet described the situation for the deceased

---

798 **PP-0203**

799 **PP-0202** Dagbladet 17 December 2018: "Secret slave contracts", in English, last updated 13 December 2019.

800 **R-0159-NOR** Print out from the Norwegian Tax Administration (Skatteetaten) of the shareholder register for Dagbladet AS.

801 **R-0075-ENG** Dagbladet 11 December 2018: "*The deadliest catch*", in English. **R-0137-ENG** Dagbladet 17 December 2018: "*Is this the crab boat's mysterious owner?*", in English, last updated 13 December 2019. **R-0138-ENG** 2017-12-17 Dagbladet 17 December 2018: "*Secret slave contracts*", in English, last updated 13 December 2019. **R-0139-ENG** The BarentsObserver 20 December 2018.

crew member's widow and young child, the extreme working conditions onboard and how the newspaper tried to get comments from the company.

761. *Dagbladet* was referred to the spokesperson for Baltjura-serviss, Mr Didzis Šmits, a Latvian Member of Parliament. He informed *Dagbladet* that two Latvian companies in August 2015 joined forces to establish the European Crabbing Association and gave him the task of speaking for eight vessels (including North Star's vessels), which they called the "*EU fleet*". Mr Šmits stated: "*We believe that crab meat will be worth as much as cod in the future. These riches are so huge that we cannot resist fighting for them. We can earn billions, but Norway is trying to stop us*". He explained that the goal of the European Crabbing Association was to obtain crab quotas in the Loop Hole before the Russian Federation and Norway started regulating the resources. "*We realised that it was a matter of time, that crab fishery would be regulated. It was important for us to get in quickly*", he stated. The article then went on to explain that when Norway and Russia closed the Loop Hole for crab harvesting by vessels of other States in 2015 and 2016 respectively, the Latvians set their sights on the Fisheries Protection Zone around Svalbard. "*This is an asset that Latvia and the EU should fight for*", Mr Šmits was quoted as saying.

762. The subsequent articles in *Dagbladet* included coverage of issues related to the Claimants and Seagourmet as well as interviews with Mr Pildegovics and Mr Levanidov. *Dagbladet* presented *inter alia* a copy of an employment contract which had been submitted to the Norwegian Embassy to Indonesia in order to obtain a visa for entry into Norway for an Indonesian crew member. The document carries the name "SEA & COAST AS" as "Operator/Ship manager" and "M/V SALDUS" as the name of the ship to serve on. It sets out a monthly wage of USD 450, 20 packs of cigarettes per month, and 18 hours working day (6 hours rest). Mr Pildegovics was offered to comment, and stated that the contract was forged. This is reflected in the article.[802] The series of articles in *Dagbladet* about the snow crab industry received an award (twice) by the Foundation for a Critical and Investigative Journalism (SKUP in Norwegian).[803]

802 *Ibid.*

803 The Foundation for Critical and Investigative Journalism (SKUP) was established in 1991 in order to promote critical and investigative journalism in Norway and is a member of the Global Investigative Journalism Network.

763. The Norwegian Embassy in Indonesia had, on request, provided *Dagbladet* with a copy of the document the Embassy had received. The Embassy was obliged to do this, according to the Norwegian Public Information Act.[804] The Norwegian embassy simply disclosed (as it was required to do) information that had been submitted to it by visa applicants pursuant to a Freedom of Information Act request.

764. There is no allegation that Norway itself is responsible for the alleged forgeries. This allegation goes nowhere.

6.5.6.8 Conclusion

765. There are therefore no grounds on which the Tribunal could sensibly conclude that Norway's actions are demonstrative of a lack of transparency and candour.

6.5.7 Norway did not Cause a Denial of Justice

772. The Claimants' final allegation under Article III of the BIT is that Norway committed a denial of justice against the Claimants. The allegations are summarised as follows at paragraph 6 of the Memorial:

> "*Following the arrest of Claimants' vessel, Norway's Supreme Court committed a denial of justice by refusing to adjudicate on one of Claimants' essential defences to the arrest and subsequent fines, namely that the licence was properly issued pursuant to the rights established by the Svalbard Treaty, despite the fact that these rights are directly incorporated in Norwegian law. The Norwegian Supreme Court sidestepped this defense for political reasons. It chose to avoid applying the treaty, which would have necessarily led it to contradict the Norwegian government's (manifestly incorrect) position on the Svalbard Treaty.*"

773. The allegations are elaborated in paragraphs 393-407 and 756-783 of the Memorial, where the Claimants further contend that (i) the Supreme Court of Norway's alleged failure "*to decide on material aspects of the defendants' claim*", thereby "*making them file a civil suit (which is still ongoing) in order to have their contentions properly*

---

804 **R-0165-NOR; R-0166-ENG** Email 26 September 2018 from Dagbladet to the Norwegian Embassy in Jakarta regarding request for public access. **R-0167-NOR; R-0168-ENG** Email 2 October 2018 from the Embassy in Jakarta to Dagbladet. **R-0169-NOR; R-0170-ENG** Email 8 October 2018 from Dagbladet to the Embassy in Jakarta. **RL-0021-NOR; RL-0020-ENG** Act 19 May 2006 No. 16 relating to the right of access to documents held by public authorities and public undertakings ("*lov om innsyn i dokument i offentleg verksemd*"). In Section 3 of the Act the following is stated: "*Case documents, journals and similar registers of an administrative agency are public except as otherwise provided by statute or by regulations pursuant thereto. Any person may apply to an administrative agency for access to case documents, journals and similar registers of that administrative agency*." The Claimants have consistently availed themselves of this Act.

decided on", amounted to an "*unconscionable delay*",[805] and (ii) that the Supreme Court's permitting "*the appointment of Mr. Stabell, a government lawyer, as deputy prosecutor* […] *appears to further have shown subservience to executive pressure, a further ground to find a denial of justice*".[806]

6.5.7.2 There was no denial of justice

6.5.7.2.1 *The Supreme Court's case management decision*

774. The Claimants first claim that there was a denial of justice in the conduct of the criminal proceedings taken against North Star and Mr Uzakov on the basis of the Supreme Court's exercise of case management powers to determine the case in a bifurcated manner. That is wrong.

775. By the time the case reached the Supreme Court, the Court of Appeal had determined three important findings of fact.

> "[T]*he Court of Appeals finds it to have been proved beyond reasonable doubt that both the shipping company and the captain considered it certain or overwhelmingly probable that the Norwegian authorities had not granted the Senator permission to catch snow crab on the Norwegian continental shelf, including in the fishery protection zone around Svalbard, and that the permit/licence issued by the Latvian authorities would be considered invalid by Norwegian supervisory authorities. Both parties were also aware that fishing and catching without a valid permit were criminal offences pursuant to Norwegian legislation.*"[807]

776. There was no appeal from these findings of fact. Indeed, there could have been no appeal. Norwegian law does not permit appeals of fact in criminal cases to be brought from the Court of Appeal to the Supreme Court, the question of conviction being already dealt with by both the District Court and the Court of Appeal.[808] The parties therefore came into the Supreme Court with the following established facts: (1) North Star and Mr Uzakov were *aware* that harvesting snow crab without a valid permit was a criminal offence under Norwegian law; (2) North Star and Mr Uzakov knew that they

---

805 Memorial, ¶¶781-782.

806 Memorial, ¶783.

807 **C-0040**, p.12.

808 **RL-0154-NOR; RL-0153-ENG** The Criminal Procedure Act of 22 May 1981 No. 25 (straffeprosessloven), Section 306, second paragraph: "*Anke til Høyesterett kan ikke grunnes på feil ved bevisbedømmelsen under skyldspørsmålet*. " / "*Error in the assessment of evidence in relation to the issue of guilt cannot be a ground of appeal to the Supreme Court*."

had no such permit; and (3) North Star and Mr Uzakov knew that their so-called Latvian licence would be considered invalid as a matter of Norwegian law.

777. Permission to appeal the decision was granted by the Supreme Court on 4 June 2018. At the same time the Supreme Court determined that the issues in the case should be bifurcated such that the geographical scope of the Svalbard Treaty was only to be determined if there was a need to do so. The relevant part of the decision granting permission to appeal reads as follows:

> "*The hearings in the Supreme Court in chambers are limited to the issues concerning whether the snow crab is a sedentary species so that Norway has an exclusive right to exploit it, cf. Article 77 of the Convention on the Law of the Sea, as well as whether the catching of snow crabs on the Norwegian continental shelf without the vessel having a valid dispensation from the prohibition is punishable regardless of whether the Svalbard Treaty applies in the relevant area, and regardless of whether Section 2 of the regulations relating to the prohibition against catching snow crabs, or application thereof, contravenes the principle of equal treatment. Consideration of the issue of the geographical scope of the Svalbard Treaty will be deferred until there is a need to decide on it.*" [809]

778. This was further amplified by the case preparation Justice in the preparatory meeting held between the parties' legal representatives and the Supreme Court on 30 November 2018,[810] after Supreme Court Chief Justice Øie had decided to refer the case to a grand chamber.[811]

779. It is therefore wrong for the Claimants to characterise the decision as one "*allowing it to avoid considerations of issues related to the Svalbard Treaty*". Rather, the Supreme Court determined that it would consider first whether, *irrespective* of the geographical scope of the Svalbard Treaty, harvesting snow crab without a Norwegian licence was a punishable offence under Norwegian law. If the answer was positive (*i.e.* the penal sanction applied in any event) there was no need to consider the geographical scope of the provisions of the Svalbard Treaty. The point was expressed clearly again in ¶2 of

---

809 **C-0117** Decision 4 June 2018 of the Appeals Committee of the Norwegian Supreme Court, HR-2018-1028-U, Case No. 18-064307STR-HRET. There are several errors in the translation that appears as exhibit C-0117. A more accurate translation is submitted as **R-0136-NOR; R-0135-ENG**.

810 **R-0078-NOR; R-0079-ENG** Preparatory meeting in the Norwegian Supreme Court on 30 November 2018

811 **R-0042-NOR; R-0044-ENG** Decision 23 November 2018 of the Norwegian Supreme Court, HR-2018-2231-J.

the judgment of Justice Berglund (with whom Chief Justice Øie and the other nine Justices agreed):

> "*the case has been limited for the time being only to the issues addressed by the court of appeal. This means that the Supreme Court is only to assess whether the snow crab is a sedentary species and whether catching it is punishable regardless of the application of the Svalbard Treaty in the relevant area, and regardless of whether the legal basis for exemption in section 2 of the Regulations on the Prohibition against* "*Catching of Snow Crab (the Snow Crab Regulations) or the practicing thereof contravenes the Treaty's principle of equal rights.*"

780. The Claimants thus wrongly attempt to portray a *volte face* on the part of the Supreme Court when they assert that the Supreme Court "*nevertheless did, in the end, partially examine the issue*",[812] implying that the Supreme Court said one thing and did another. There was no such *volte face*. The Supreme Court's decision was that it would reserve (solely) the question of the geographical scope of the Svalbard Treaty to a later phase. That did not exclude dealing with or mentioning other aspects of the Svalbard Treaty in the first phase, if the Supreme Court found it pertinent.

781. And that was precisely how the case progressed. The Supreme Court determined that, *regardless* of the geographical scope of the equal treatment provisions of the Svalbard Treaty (*i.e.* whether they apply to the Norwegian continental shelf around Svalbard or not), it was open to Norway to adopt a regulatory system. Thus, at ¶¶66-67, the Court considered (after examining Arts. 1-3 of the Svalbard Treaty):

> "*The Treaty establishes that Norway is to manage the natural resources and assumes that the High Contracting Parties comply with the rules that are implemented to fulfil this task. It is therefore clear that the Treaty gives Norway a right to enforce a regulatory system under which unauthorised catching is punishable, as long as such a system is practiced in a non-discriminatory manner, see the Supreme Court judgment Rt-2006-1498 on the omission to keep a catch log.*
>
> *As it appears from the legal framework I have described, a management system has been established by the Snow Crab Regulations under which a permit is required for anyone who wishes to catch snow crab. Unauthorised catching is punishable, regardless of nationality. No one has a legal right to a permit. To obtain an exemption, various requirements must be met, and the wording of the provision suggests that the granting of such an exemption is left to the authorities' discretion. I add that even if one meets the basic requirements for a commercial licence, which is necessary to*

812 Memorial, ¶403.

obtain a permit to catch snow crab, such a permit is not automatically issued. Previous violation of fishery legislation may, for instance, form a basis for refusal".[813]

782. Further, the Supreme Court applied the principle of Norwegian domestic criminal law that a person who carried on activities that require a permit cannot act without the permit, "*regardless of whether the refusal* [to grant a permit] *contains errors*".[814]

783. In a crucial passage, examining North Star's contention that section 6 of the Marine Resources Act required their acquittals,[815] the Supreme Court considered:

> "*The defendants have emphasised that current case law relates to internal administrative law areas, while the Snow Crab Regulations relate to issues under international law. In my opinion, this cannot be decisive. The principle that no person can, unpunished, act as if a permit had been granted is fundamental in a society based on the rule of law, see Andenæs, Alminnelig strafferett (General criminal law), 6th edition 2016 page 175. In my opinion, this principle also applies in areas governed by international law.*
>
> *As I see it, it cannot be derived from the Svalbard Treaty or other sources of international law that the courts in a criminal case like the one at hand must decide on a preliminary basis whether an exemption should have been granted, as long as there is an alternative legal possibility to obtain an efficient review of the disagreement on the obligations under international law. If there are several acceptable procedures, it must be up to the individual country to decide which procedure to employ. Under Norwegian law, an issue of conflict between Norwegian public administration and international obligations should be solved through a civil action. This is not an unreasonable system. If the party succeeds with a civil claim, the party may – if the general conditions are otherwise met – demand compensation for economic loss and coverage of costs. A civil judgment declaring a regulation invalid will also give Norwegian authorities the possibility to amend the rules in accordance with international law while at the same time taking into account other concerns, such as protection of natural resources.* […]
>
> *Consequently, I agree with the court of appeal that the defendants can be punished irrespective of whether the Svalbard Treaty applies to snow crab catching in the relevant area. Furthermore, it is irrelevant whether the basis for exemption in section 2 of the Snow Crab Regulations is in conflict with the Treaty. What ultimately justifies punishment of the defendants is that the Svalbard Treaty's principle of equal rights has not in any case been violated, since everyone – also Norwegian citizens and companies – can be punished for catching snow crab in the area without a permit from Norwegian fishery authorities. The defendants did not hold such a permit.*"[816]

---

813 **C-0038** Judgment of 14 February 2019 of the Norwegian Supreme Court in Case. No 18-064307STR-HRET, HR-2019-282-S, ¶¶66-67.

814 *Id*., ¶71.

815 Memorial, ¶759.

816 **C-0038** Judgment of 14 February 2019 of the Norwegian Supreme Court in Case. No 18-064307STR-HRET, HR-2019-282-S, ¶¶79-80; 83.

784. There are simply no grounds for a denial of justice claim here. The Claimants clearly disagree with the decision of the Supreme Court, and its legitimate case-management decision to determine their appeals without deciding the issue of the geographical scope of the Svalbard Treaty. That was, however, a simple case management decision, taken for the expeditious disposal of the proceedings. Had the Court held in favour of the Claimants in the first phase, there would have been a second Supreme Court hearing, after which the Court would have decided on the geographical application of the relevant provisions of the Svalbard Treaty. As it turned out, that was not necessary. But that is not a reason to consider that the Supreme Court: "*refused to exercise its functions*". Indeed, not dealing with every argument presented by the parties to a case does not amount to a denial of justice.[817] No court of law is required to consider questions that do not have any bearing on the outcome of the case, and no party to any criminal or civil proceedings has a right to have all their contentions determined. A legitimate case-management decision taken for the expeditious dispensation of the dispute is not the same as a "*refusal to decide*".

785. Further, there was no delay caused by the Supreme Court's actions. The Supreme Court ruled that the appropriate forum to challenge the validity of the snow crab regulations was a civil action. That action was only brought by the Claimants on 19 October 2020,[818] notwithstanding that they had the opportunity to bring it earlier, including:

785.1. On 25 May 2018 when the Directorate of Fisheries denied North Star's application for a dispensation to harvest snow crab on the Norwegian continental shelf;

785.2. On 9 October 2018, when the Directorate of Fisheries denied North Star's request to review the application for dispensation once again.

---

817 **CL-0166** *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, ¶557.

818 See above, paragraph 242.

6.5.7.2.2 *The appointment of Mr Tolle Stabell*

786. The Claimants' second allegation (though they devote only five lines to it in the section of their Memorial discussing breaches of the BIT[819]) is that the appointment of Mr Tolle Stabell, a government lawyer, as deputy prosecutor, demonstrates the Norwegian Supreme Court's "*subservience to executive pressure*".[820] This point can be disposed of easily.

787. The Director of Public Prosecutions on the 14 December 2018 appointed Mr Tolle Stabell as deputy prosecutor for this particular case, to assist Chief Public Prosecutor Lars Fause during the grand chamber hearing.[821] Mr Stabell's impartiality was assessed by the Director General, also in the light of protests presented by the defence:

> "*Attorney Stabell's task during the appeal proceedings will be to assist Fause. As the main prosecutor, Fause is responsible for any position that the prosecution may take. As co-prosecutor, Stabell will be subject to instruction only from the main prosecutor and the superior prosecuting authority, not from the Office of the Attorney General, as the defence counsel also states in his letter of 7 December 2018. The further division of tasks within the framework that this appointment provides will - first of all - be decided by the two prosecutors. The matter will also be discussed with them during a case preparation meeting at the Office of the Director General of Public Prosecutions.*"[822]

788. After the Supreme Court on the 30 November had held its (second) preparatory meeting, the Director General of Public Prosecution decided to ask Mr Stabell to assist the main prosecutor during the Grand Chamber hearing. The topics that needed further elaboration from the parties were indicated during the preparatory meeting. In appointing Mr Stabell, the Director General noted that the case before the Court raised questions of law that intersected criminal law, international law and administrative law. The purpose of the appointment was to provide the Supreme Court with expertise, which the Director General noted was emphasised by the Supreme Court itself during the preparatory meeting and expressed in the record from that meeting.

789. North Star and Mr Uzakov brought an application to the Supreme Court dated 19 December 2018 to disqualify Mr Stabell from acting as deputy prosecutor. That

819 Memorial, ¶783.

820 Memorial, ¶783.

821 **R-171-NOR R-172-ENG**.

822 *Id*.

application was dismissed and the Supreme Court issued a 39-paragraph judgment in which it assessed Mr Stabell's impartiality and independence to act as deputy prosecutor in accordance with the criteria set out in the Criminal Procedure Act and unanimously found him to satisfy them.[823]

6.5.7.3 The high threshold necessary for a breach of natural justice

790. The points raised by the Claimants reflect a disagreement with the Norwegian Supreme Court's decisions, but do not arise to the level of a denial of justice sufficient to engage Norway's international responsibility. A denial of justice requires "*a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice*".[824] It refers to "*an act which shocks, or at least surprises a sense of judicial propriety*".[825]

791. The Claimants have manifestly failed to "*go beyond a mere misapplication of domestic law and* [to] *show that there was a failure of the national system as a whole*".[826] Errors of judicial decision-making must arise to the level that they were decisions that "*no competent judge would reasonably have made*".[827] The Tribunal is not sitting as an appellate court and its function is not to correct errors of national law, but to adjudicate on alleged breaches of the BIT.[828]

---

823 **RL-0170-NOR; RL-0138-ENG** Decision of 9 January 2019 of the Norwegian Supreme Court.

824 **RL-0130-ENG** *Vannessa Ventures Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6 (Award, 16 January 2013), ¶227; **CL-0290** *Waste Management v Mexico* ICSID Case No ARB(AF)/00/3 (Award, 30 April 2004) at ¶98.

825 **CL-0288** *Elettronica Sicula Case (United States of America v Italy)* (1987) ICJ rep 15, [128]. See also **CL-0284** *EBO Invest AS, Rox Holding AS and Staur Eiendom AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award, 28 February 2020, ¶¶472-473.

826 **RL-0131-ENG** *Agility Public Warehousing Company K.S.C. v. Republic of Iraq*, ICSID Case No. ARB/17/7, Final Award, 22 February 2021, ¶212. See also **RL-0089-ENG** *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (II)*, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018, ¶8.36; **RL-0132-ENG** *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, Final Award, 23 April 2012

827 **RL-0131-ENG** *Agility Public Warehousing Company K.S.C. v. Republic of Iraq*, ICSID Case No. ARB/17/7, Final Award, 22 February 2021, ¶213; **CL-0163** *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, ¶94; **CL-0230** *Mr Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶442.

828 **RL-0131-ENG** *Agility Public Warehousing Company K.S.C. v. Republic of Iraq*, ICSID Case No. ARB/17/7, Final Award, 22 February 2021, ¶215; **CL-0270** *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. 079/2005, Final Award, 12 September 2010, ¶275.

792. The alleged defects do not in any sensible manner reach this threshold.

6.6 NORWAY HAS NOT BREACHED THE OBLIGATION TO PROVIDE MFN TREATMENT (ARTICLE IV OF THE BIT)

6.6.1 Introduction

793. The third violation alleged by the Claimants is a violation of the most-favoured nation ("**MFN**") clause of the BIT.

794. Article IV of the BIT provides:

> "*(1). Investments made by investors of one Contracting Party in the territory of the other Contracting Party shall be accorded treatment no less favourable than that accorded to investments made by investors of any third State.*
>
> *(2). The treatment granted under this article shall not apply to any advantage accorded to investors of a third State by the other Contracting Party based on any existing or future customs or economic union or similar international agreement, or free trade agreement to which either of the Contracting Parties is or becomes a party. Neither shall such treatment relate to any advantage which either Contracting Party accords to investors of a third State by virtue of a double taxation agreement or other agreements regarding matters of taxation or any domestic legislation relating to taxation.*"

795. The Claimants assert that Norway has breached its obligation to provide most favoured nation treatment pursuant to Article IV of the BIT in three ways:

795.1. As a matter of fact, Norway has breached Article IV by granting more favourable treatment to Russian snow crab fishing vessels and operators;

795.2. As a matter of law, Norway has breached Article IV of the BIT by failing to grant the Claimants national treatment, which has been granted to Russian investors pursuant to the Norway-Russian Federation BIT; and

795.3. As a matter of law, Norway must also grant the Claimants the better treatment between that set out in the Latvia-Norway BIT and that set out in other international agreements, since such treatment has been granted to Russian investors under the Norway-Russian Federation BIT.[829]

---

829 Memorial, ¶784.

796. Before turning to these particular assertions, it is necessary to make some points regarding the legal effect and application of the MFN obligation imposed by the BIT.

6.6.2 The legal effect and application of Article IV BIT

797. The Claimants assert that this obligation "*requires that Norway provide Claimants the best treatment (in law or fact) Norway has provided to any national of a third State*."[830] The Claimants misread the BIT: that paraphrase of the obligation is incorrect in a number of material respects.

6.6.2.1 "Investments", not "investors"

798. First, Article IV does not require MFN treatment of Latvian *investors*: it requires MFN treatment for "*investments made by*" Latvian investors "*in the territory*" of Norway. As an UNCTAD study on MFN clauses notes, "*investors and investments, although directly interlinked, are formally different subjects and may enjoy different rights under the IIA* [sc., International Investment Agreement]."[831]

799. It is also follows from Article IV of the BIT that the investment must *exist* before the MFN obligation can be engaged. The BIT does not protect *potential investments* (pre-establishment).

6.6.2.2 "Investments made…"

800. The Claimants' complaints all relate to the fact that five Russian vessels were authorised by Norway to take crab from the Norwegian continental shelf and that "*by granting such dispensations to Russian vessels, yet by continuously rejecting North Star's applications for the same, Norway has breached Article IV of the BIT*".[832] Norway has already made the point that the vessels were not 'investments in the territory of Norway' as required by the BIT (see **Chapter 4**) and that, in order to be such an investment, it must be made in accordance with Norwegian law.

---

830 Memorial, ¶786.

831 **RL-0133-ENG** 2011-xx-xx UNCTAD, *Most-Favoured-Nation Treatment: A Sequel*, (2011), p. 19; < https://unctad.org/system/files/official-document/diaeia20101_en.pdf >. See also M M Whiteman, Digest of US Practice in International Law, vol. 14 (1970), p. 760.

832 Memorial, ¶798.

801. There are two points worth mentioning here. First, there *were* no applications by North Star for Norwegian licences until 17 May 2018, well after the alleged date of breach. On the contrary, North Star alleges that it proceeded on the basis of fragments of information given to another (Norwegian) company, Ishavsbruket.

802. Secondly, the Claimants' presentation of the issue demonstrates that their *real* complaint is not that their investments were treated differently, but that their vessels and licenses (as putative investments) were never actually admitted into the territory of Norway *as* investments. That is not a complaint capable of falling within the scope of the MFN provision.

6.6.2.3 Treatment accorded to Investors

803. The Claimants further misread the BIT when they say that treatment is that given to "*any national of a third State*". That is wrong. The relevant standard of treatment is "*treatment no less favourable than that accorded to investments made by investors of any third State*". The Claimants must therefore show (1) that there was treatment; (2) to an investment made by an investor of a third State. It is of course for the Claimants to demonstrate that requirements of Article IV of the BIT are actually met.[833]

804. First, to prove a breach of Article IV of the BIT, the Claimants bear the burden of proving *actual* treatment accorded to investments of investors of a third party by Norway. In the absence of actual treatment, the Claimants cannot satisfy their burden of demonstrating a breach of Article IV. The fact that Norway might provide a hypothetical investment of a hypothetical investor with a different level of treatment is insufficient to engage Article IV.

805. Secondly, the Claimants must demonstrate that the comparative Russian vessels / dispensations were in fact investments in the territory of Norway before the MFN clause is triggered.

6.6.2.4 The comparator

806. Selection of an appropriate comparator is essential to the proper application of an MFN clause. The Claimants compare themselves with the owners of Russian vessels licensed

833 **RL-0135-ENG** *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶401.

to engage in harvesting of snow crab on the Norwegian continental shelf. Norway maintains that this is not an appropriate comparison. In the words of Sir Gerald Fitzmaurice, "the essential object of the most-favoured-nation clause … is to prevent discrimination."[834] It is axiomatic that "the MFN standard does not mean that foreign investors have to be treated equally irrespective of their concrete activity in a given host country. Different treatment is justified vis-à-vis investors from different foreign countries if they are in different objective situations."[835] That is equally true in circumstances where, as here, the MFN obligation is tied to investments, not to investors.

807. As the 1999 UNCTAD study of MFN clauses pointed out, having considered taxation and other matters commonly excluded expressly from the scope of MFN provisions,

> "*There are a number of other investment-related issues that are usually addressed only on a bilateral basis, and thus do not lend themselves to a multilateralization via an MFN provision. Examples are bilateral transportation agreements (involving landing rights for vessels or aircraft) and fishing arrangements. They are all based on the concept of reciprocity.*"[836]

808. MFN clauses have never been regarded as entailing such absurd results, or as precluding such bilateral arrangements. In circumstances where access is granted to a limited resource, it cannot sensibly be maintained that equal access must be given to all investors and/or investments that are covered by an MFN clause in a BIT. Nor is there any basis for suggesting that selection cannot properly be based upon reciprocal benefits – for example, by an auction of landing slots, or by the conclusion of bilateral arrangements with other States that are willing to offer a satisfactory quid pro quo.

809. To conclude that because airlines of State A have been given landing rights at, say, Oslo airport under a bilateral air traffic agreement, so, too, must airlines of every other State that has concluded with Norway a BIT that contains an MFN clause, whether or not those airlines are covered by a bilateral air traffic agreement, is patently absurd.

---

834 **RL-0030-ENG** Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice, (vol. 1. 1986, 1993), p. 329.

835 **RL-0134-ENG** UNCTAD, Most-Favoured-Nation Treatment (1999), p. 7.

836 *Id.*, p.21.

Airports have limited capacity. States must limit and allocate landing slots. That is done by the conclusion of a bilateral air traffic agreements.

810. The same points can be made in relation to bilateral fishery agreements. While the Claimants may be asserting to the contrary,[837] the provisions of UNCLOS Articles 61–70 do not apply to sedentary species,[838] Nonetheless, those provisions do bear directly upon bilateral fishing arrangements and are relevant to the point made here. They stipulate factors to be taken into account by coastal States in fixing catch limits and allocating quotas. The legal rights and duties under UNCLOS presuppose that the coastal State can exercise a controlled discretion in allocating fishing rights and may allocate rights to some States without allocating the same rights to other States. That premise is obstructed – perhaps defeated – if every licence granted to one State automatically generates rights to the same treatment for all other States which have concluded a BIT containing an MFN provision with the coastal State concerned.

811. This point is not an argument for creating exceptions to an MFN obligation or restricting its application. It is a straightforward application of basic principles of treaty interpretation to the MFN clause, and of the need to avoid manifestly absurd interpretations. The Claimants say that "[i]*n Occidental v. Ecuador, the tribunal stated that comparables cannot be interpreted in a narrow sense*."[839] Nor can comparables be interpreted as meaning that everyone must be treated in the same way as everyone else. For the clause to operate, like must be compared with like. The point was made in the context of limitations *ratione materiae* in the Award in *Philip Morris v. Uruguay*:

> "*As explained by the ILC Commentary on the Draft Articles on Most-Favoured Nation Clauses, pursuant to the* eiusdem generis *rule "the clause can only operate in regard to the subject matter which the two States had in mind when they inserted the clause in their treaty" and it "can attract the rights conferred by other treaties (or unilateral acts) only in regard to the same matter or class of matters.*"[840]

---

837 Memorial, ¶41.

838 **CL-0013** UNCLOS, Article 68: "This Part [sc., UNCLOS Part V] does not apply to sedentary species as defined in article 77, ¶4." The exploration and exploitation of sedentary species is governed by UNCLOS Article 77.

839 Memorial, ¶790.

840 **CL-0166** *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on

The same principle applies in the context of limitations *ratione personae*: the MFN principle can operate only where the treatment being compared relates to "*persons or things in the same relationship*" with the States concerned.[841] As the ILC recognized in its work on the MFN clause, that is the very essence of the principle.[842]

812. With those general points made, the three specific claims made by the Claimants[843] can be considered.

6.6.3 Breach in Fact[844]

813. The Claimants say that "*Norway has breached Article IV of the BIT by granting Russian vessels and operators in the snow crab harvesting business better treatment than Claimants*."[845] The 'better treatment' alleged is that five Russian vessels in 2016 were licensed to harvest snow crab pursuant to a bilateral agreement between Norway and the Russian Federation in 2015.[846] The Claimants conclude that "*There is therefore no question that by granting such dispensations to Russian vessels, yet by continuously rejecting North Star's applications for the same, Norway has breached Article IV of the BIT.*"[847]

814. The defects in this claim are manifold. As outlined above, the MFN treatment clause in the BIT applies only to the treatment of *investments*, not to "*treatment of investors*" or to "*treatment*" in the abstract. The Claimants have not established that either the Russian vessels nor the alleged "dispensations" were investments in the territory of Norway made by Russian investors.

815. Secondly, the Claimants were not in the same position as the owners of the Russian vessels. Or, more accurately, their alleged 'licences' or vessels (assuming that they

---

Jurisdiction, 2 July 2013, ¶49. See also **CL-0154** *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, ¶463.

841 **CL-0314** ILC, 'Draft Articles on Most-Favoured-Nation Clauses' (1978), Articles 5, 8–10, and passim.

842 *Id*., p.31, ¶15, and the commentary to Articles 9 and 10 (and, indeed, the entire report).

843 Memorial, ¶¶796–808.

844 Memorial, ¶¶796–798.

845 Memorial, ¶796.

846 Memorial, ¶797.

847 Memorial, ¶798.

were in fact investments, *quod non*) were not in the same position as those granted to Russian vessels. The Claimants are not comparing like with like.[848] The Russian Federation (unlike Latvia) had a relevant bilateral fishing agreement with Norway. The EU (on behalf of Latvia) had declined to negotiate an exchange of catch quotas with Norway; and EU States and investors could not claim the very same rights of access to Norwegian continental shelf resources as States that had negotiated such agreements. Thus it is wrong to compare 'investments' from investors of those two very different classes. A more appropriate comparison would have been if, for example, Norway had chosen to accept licenses purportedly issued under the NEAFC by another NEAFC party, or had authorised vessels flagged and licensed under the jurisdiction of another State that did not have a bilateral arrangement with Norway to crab on the Norwegian continental shelf, but had refused to recognise the licences issued by Latvia. But that did not happen.

816. Thirdly, access granted to Russian investments under the aegis of the 1975 Joint Norwegian-Russian Fisheries Commission falls outside the scope of Article IV MFN as access granted on the basis of a "*similar international agreement*" to a customs or economic union. The Claimants dismiss this point out of hand without providing any argument or reasoning, referring only to the bilateral agreement.[849] The Joint Fisheries Commission was established in 1975 (pre-dating both the Norway-Latvia and Norway-Russia BITs) in order to facilitate and improve the management of living marine resources in the Barents Sea. It is an example of Norway and the Russian Federation fulfilling their obligation under Article 123(a) UNCLOS to "*coordinate the management conservation, exploration and exploitation of the living resources of the sea*" through an "*appropriate regional organization*". A key purpose of the Joint Fisheries Commission is to coordinate the harvesting of resources exclusively within the jurisdiction of the Russian Federation and Norway (*i.e.* those on the continental shelf in the Loop Hole). The joint management of a resources in an enclosed sea area

848 See, for example, **CL-0316** *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, at ¶369 *et seq*.

849 Memorial, ¶798: "*That these dispensations are granted on the basis of a bilateral agreement changes nothing since such an agreement obviously does not come within the exceptions found in Article IV(2)*".

like the Barents Sea is clearly at least "*similar to*" an economic union or customs agreement and advantages granted thereunder fall outside the scope of the MFN clause.

817. Fourthly, this is not a claim that the Claimants' alleged *investments* were not given MFN treatment: it is a claim that the Claimants as potential *investors* could not make the investment that they wished to make in Norway because their vessels could not obtain 'dispensations' (*i.e.*, licences) to harvest snow crab on the Norwegian continental shelf. As the Claimants' vessels were not licensed, they could not harvest crab on the Norwegian continental shelf without violating Norwegian law. Their proposed activity was inconsistent with the "laws and regulations" of Norway, to use the terms of Article III of the BIT.

818. Fifthly, if Latvia, or the EU, has a complaint that the bilateral fishing agreement between Norway and the Russian Federation was concluded in breach of the BIT, that is a matter for one or both of them to pursue in an appropriate forum. In the meantime, the Claimants cannot act as if the EU or Latvia had successfully concluded such a bilateral agreement, or as if they were in the same position as investments made by Russian investors pursuant to the bilateral arrangements between the two States.

6.6.4 Violation of national treatment through the Norway-Russia BIT[850]

819. The Claimants' second allegation is that "*Norway has also breached Article IV of the Latvia-Norway BIT by failing to accord Claimants national treatment granted to investments by Russian investors in Norway pursuant to the Norway-Russian Federation BIT.*"[851] The argument is that investments of Latvian investors are entitled by Article IV of the Norway-Latvia BIT (the MFN provision) to be treated in accordance with the national standard to the extent that Russian investments are entitled by Article 3 the Norway-Russian Federation BIT to be treated in accordance with the national standard.

850 Memorial, ¶¶799–804.

851 Memorial, ¶799.

820. Norway repeats the point that it made above.[852] The MFN clause applies to *actual treatment* in fact. It is applicable on the basis of the possibility that hypothetical treatment might be granted under other treaties.

821. The Claimants have put their point differently between the RFA and the Memorial. In the RFA, the Claimants alleged that the Russia-Norway BIT required the treatment of Latvia investments on a par with *Norwegian* investments. In the Memorial, the position is far less clear, but the Claimants' use of the phrase "*national treatment granted to investments by Russian investors*" suggests that this allegation adds nothing to the allegation of a 'breach in fact'. It simply replays that argument in the context of the 'national treatment' standard in Article 3 of the Norway-Russia BIT.

822. All of the points made above in relation to the 'breach in fact' argument are applicable here: both the Norway-Latvia BIT and the Norway-Russian Federation BIT protect investments and not investors, and the Claimants have not demonstrated that there were any relevant Russian 'investments'; the MFN clause applies to actual treatment in fact, and not hypothetical treatment; and any Russian investments established by the Claimants are inappropriate comparators for any Latvian investments established by the Claimants.

823. Although the Claimants refer to the proviso in Article 3 of the Russia-Norway BIT that national treatment is subject "*other treatment* [being] *required by its legislation*", they dismiss it out of hand, going so far as to premise their argument with the extraordinary phrase "*even if the Norway-Russian Federation BIT subject national treatment to the caveat* […] *in respect of Norwegian legislation*". It does, and clearly so. That is the very purpose of the Regulations.

824. There was no breach of the national treatment standard. It is fundamentally wrong to suggest that an MFN clause can be used to demand access to a finite resource where there are legitimate policy-based reasons for adopting quotas and regulating the use of the resource.

---

852 See above, paragraph 804.

6.6.5 The obligation to provide better treatment as between the BIT and other international treaties[853]

825. The third—and most ambitious—of the Claimants' arguments is that they are entitled to any better treatment set out in other international agreements to which Norway and Latvia are Parties. The argument is based on Article 12 of the Norway-Russian Federation BIT,[854] which reads as follows

> "*If on the basis of the legislation of a Contracting Party or on the basis of an international agreement binding upon both Contracting Parties, investments of an investor of the other Contracting Party is* [sic.] *accorded treatment more favourable than that which is provided for in this Agreement, the more favourable treatment shall apply.*"

6.6.5.1 The Claimants' misplaced invocation of Article 12

826. The Claimants' attempt to invoke Article 12 of the Russia-Norway BIT via the BIT at issue in this case is misplaced and unprincipled. The Claimants have invoked no authority to the effect that the MFN clause in the BIT can be applied in the way that they have suggested. The Claimants ask the Tribunal to adopt a 'double-MFN' provision, leapfrogging from the BIT to UNCLOS and the Svalbard Treaty via the Russia-Norway BIT. That is unprecedented and unprincipled.

827. *First*, the MFN clause in the BIT applies to "*treatment*" clauses. Article 12 of the Norway-Russia BIT is not a clause which obliges Norway and the Russian Federation to accord any particular level of treatment to investors. Rather, it is itself a savings clause that refers to treatment accorded by other treaties, similar to MFN clauses.

828. *Secondly*, it is unprincipled and wrong to suggest that, in a BIT between State A and B with an MFN clause, an investor of State A can take advantage of that MFN clause to invoke *another* MFN or similar clause (e.g. in a BIT between States B and C) in order to "unlock" a further standard of treatment twice-removed from the BIT. Clear and specific wording would be required for such an extension, and there is nothing in the wording of the MFN clause in the BIT to justify such an extension.

---

853 Memorial, ¶¶805–808.

854 It is worth noting that the Claimants appear to have abandoned reliance on (1) the 1992 Romania-Norway BIT (see RFA ¶177); and (2) the 1995 Norway-Peru BIT (see RFA ¶178).

829. *Thirdly* (and to the contrary), the Norway-Latvia BIT specifically *excludes* MFN protection in relation to:

> "*any advantage accorded to investors of a third State by the other Contracting Party based on any existing or future customs or economic union or similar international agreement, or free trade agreement to which either of the Contracting Parties is or becomes a party. Neither shall such treatment relate to any advantage which either Contracting Party accords to investors of a third State by virtue of a double taxation agreement or other agreements regarding matters of taxation or any domestic legislation relating to taxation.*"[855]

It is axiomatic that the right of MFN treatment accorded to investments in the BIT arises from the BIT *itself* and on its terms, not on the terms of the *other* treaty. The above provision strongly militates against the suggestion that either Norway or Latvia intended the protection extended to investors by the MFN clause to be capable of such a wide interpretation as the Claimants suggest.

830. *Fourthly*, even assuming that the BIT *could* be read in such a way as to accord the same treatment to Latvian investors as is accorded by Article 12 of the Norway-Russia BIT, the Claimants themselves make a *further* leap by suggesting that they can take advantage of treaties between *Norway and Latvia*. That is not what Article 12 says. Article 12 refers to treaties between *Norway and Russia*. Nothing in the text of *either* treaty supports the idea that the word "Russia" in Article 12 can simply be replaced by "Latvia". The point has already been made that Article 12 is not a simple treatment clause which might apply, for example, fair and equitable treatment (something of an 'autonomous' standard). It is a clause that refers to specific *further* agreements, each of which will have different clauses and (possibly) standards of treatment. It matters not that both Latvia and the Russian Federation are parties to the treaties relied on (UNCLOS and the Svalbard Treaty). The point is one of principle.

831. It is therefore wrong as a matter of principle for the Claimants to invoke the MFN clause in the BIT to attempt to shoehorn into this dispute international conventions binding between Norway and Latvia. It is an unprecedented and unprincipled extension of the MFN clause which has no support in the text of the BIT. What follows is strictly without prejudice to that position.

---

855 BIT, Article IV(2).

832. The Claimants assert that more favourable treatment is accorded "*under UNCLOS,*[856] *the customary international law principle (or general principle) of acquired rights,*[857] *as well as the Svalbard Treaty*[858]."[859]

833. Of those, the second can be dismissed out of hand. There is clearly no argument that principles of customary international law and general principles of law fall within Article 12 of the Norway-Russia BIT as an "*agreement*".

6.6.5.2 Article 300 UNCLOS

834. As for UNCLOS, the Claimants' argument is that "*Norway's bad faith designation of snow crab as a sedentary species under Article 77 UNCLOS constitutes an abuse of right in violation of Article 300 UNCLOS*."[860]

835. As a preliminary point, the Claimants offer no explanation as to why this claim is not pursued under UNCLOS Part XV, or why, given the EU's competence in respect of fisheries, the claim is not one to be pursued by the EU[861] rather than the Claimants or, indeed, Latvia. Nor do they explain why they consider the relevant provisions of UNCLOS (which does distinguish between provisions conferring direct rights on individuals and companies)[862] to confer any rights on the Claimants or their investments themselves, rather than on the States that are Parties to UNCLOS. That point is of course crucial: Article 12 of the Norway-Russia BIT only applies to *treatment* accorded to *investments* and the Claimants have not demonstrated that Article 300 is such a clause. Without prejudice to those points, Norway addresses the Claimants' argument based on UNCLOS as if, *arguendo*, it might be applicable in the present context.

836. There are several further flaws in this argument. First, species are not "designated" as sedentary species under UNCLOS: species either are or are not sedentary species in

856 Memorial, ¶¶598-613.

857 Memorial, ¶¶614-628.

858 Memorial, ¶¶629-672.

859 Memorial, ¶808.

860 The heading of section VII.A of the Memorial.

861 See **RL-0136-ENG** *The MOX Plant case* (Ireland v the United Kingdom) PCA Case No. 2002-01, Order No. 3, 24 June 2003.

862 See, **CL-0013** e.g., Articles 186-190, 292(2).

accordance with UNCLOS Article 77 (4), depending on whether they are "organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or subsoil."[863] Snow crab are "unable to move except in constant physical contact with the sea-bed or subsoil; and Claimants do not try to even suggest otherwise. That blindingly obvious and indisputable fact is fatal to the Claimants' case.

837. Second, as was explained above,[864] Norway has not changed its position on snow crab at any point since the 1958 Convention on the Continental Shelf established the legal category of "*sedentary species*".

838. Third, as the ITLOS has determined, UNCLOS Article 300 "*cannot be invoked on its own*".[865] It "*becomes relevant only when 'the rights, jurisdiction and freedoms recognised' in the Convention are exercised in an abusive manner*."[866] It creates no free-standing obligation.

839. Article 300 reads as follows:

> "*Article 300 Good faith and abuse of rights*
>
> *States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.*"

840. The ITLOS explained how Article 300 should be applied in the *M/V Norstar* case, where Panama had argued that Italy had not fulfilled in good faith the obligation to permit freedom of navigation under UNCLOS Article 87 and had violated UNCLOS Article 300. The ITLOS said "For a breach of article 300, Panama not only has to prove

863 UNCLOS Article 77(4).

864 See above, paragraph 48.

865 **RL-0097-ENG** The M/V "Norstar" Case (Panama v. Italy), ITLOS Case No. 25, Judgment, 10 April 2019, ¶241, citing The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain), ITLOS Case No. 18, Judgment, 28 May 2013.

866 **RL-0037-ENG** The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain), ITLOS Case No. 18, Judgment, 28 May 2013, ¶137.

that article 87 has been violated but that it has been violated in breach of good faith, as bad faith cannot be presumed and has to be established."[867]

841. The Claimants in this case have not shown that it is a breach of UNCLOS Article 77 to treat snow crab as a sedentary species, or, a fortiori, that there was a violation of Article 77 in breach of good faith. Nor can the Claimants establish either of those propositions.

842. The Claimants raise no arguments based on other UNCLOS provisions, perhaps recognising that UNCLOS Article 68 expressly stipulates that the provisions of UNCLOS Part V, including Articles 51–73 concerning fishing, do not apply to sedentary species.

843. The Claimants do, however, assert that:

> "*the sudden, and clearly arbitrary regime change from non-sedentary to sedentary resulted in injury to the rights of EU Member States with fishing interests in the Barents Sea, in particular Latvia, which had issued snow crab licences under the NEAFC regime*",[868]

and that

> "*until at least July 2016, Norway expressly accepted the legal validity of snow crab fishing licences issued under the NEAFC regime, as recognized by the Norwegian Supreme Court in the Juros Vilkas case.*"[869]

844. As has been explained,[870] the actual sequence of developments in the regulatory regime at that time paints a different picture. There was no "arbitrary regime change". Snow crab remained what they had always been: a sedentary species. It was the detailed regulations applicable to snow crab that changed after they were first reported on the Norwegian continental shelf, in 2004, and again after 2013–2015 when Norway became aware of the first commercial landings from the Loop Hole.[871] Norway did not 'accept' snow crab fishing licences issued by Latvia as authorizations conferring a right to take snow crab from the Norwegian continental shelf: it did not accept that NEAFC or Latvia

---

867 **RL-0097-ENG** *The M/V "Norstar" Case* (Panama v. Italy), ITLOS Case No. 25, Judgment, 10 April 2019, ¶243.

868 Memorial, ¶606.

869 Memorial, ¶607.

870 See above, paragraph 225.

871 FACTUAL ¶¶ 34–55.

had the legal authority to authorize the taking of continental shelf resources over which Norway has sovereign rights. Norway 'accepted' only harvesting for as long as Norway's national legislation did not forbid the activity and consequently could not take any actions against the vessels under Norwegian law. Once commercial landings of snow crab began, Norway did regulate the harvesting of snow crab and the situation obviously changed. Norway adopted new measures to regulate catches of a newly-arrived commercial stock.

845. As both the ITLOS[872] and the Norwegian Supreme Court[873] have noted, mere delay in adopting and enforcing prohibitions is no reason for presuming that a State is acting in bad faith.

846. The argument based on UNCLOS thus fails. UNCLOS does not establish the Claimants' rights; and the disputes over their interpretation and application do not belong in this Tribunal but in dispute settlement processes with jurisdiction over disputes between their respective States (or international organisation) Parties.

6.6.5.3 Svalbard Treaty

847. On any view, the Svalbard Treaty is simply irrelevant in this context. The Claimants do not assert that any Russian vessels were given mutual access to harvest snow crab on the Norwegian continental shelf around Svalbard (whether pursuant to the Svalbard Treaty or otherwise). They were not. Instead, the Protocol from the 45th Session of the Joint Norwegian-Russian Fisheries Commission at §10 granted Russian access only to the Norwegian continental shelf in the Loop Hole.

> "*Based on Norway and Russia's responsibility for initiating efficient measures with the aim of managing and preserving snow crab stocks on their respective continental shelves, the parties confirmed their intention to cooperate on research for preparing measures for the rational management and preservation of these stocks. This research is a necessary prerequisite for obtaining reliable assessments of the status of snow crab stocks on the continental shelves of each of the parties, setting TACs and ensuring sustainable exploitation of these stocks.*
>
> "*The parties agreed that the parties' fishing vessels shall be permitted in 2016 to harvest snow crab in the high seas in the Barents Sea on their parts of the continental*

872 **RL-0097-ENG** The M/V "Norstar" Case (Panama v. Italy), ITLOS Case No. 25, Judgment, 10 April 2019, ¶251.

873 **C-0161** Judgment of 29 November 2017 of the Norwegian Supreme Court in in Case. No 2017/1570, HR-2017-2257-A (Arctic Fishing), ¶34.

shelf as defined in the Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean of 15 September 2010.

The parties will endeavour to stay within the number of vessels that have been permitted by their country's respective authorities to harvest snow crab in this area in 2015."[874]

848. There is therefore no relevant better 'treatment' which was accorded to Russian vessels in the Norwegian continental shelf around Svalbard.

6.7 NORWAY HAS NOT BREACHED THE OBLIGATION TO ACCEPT INVESTMENTS MADE IN ACCORDANCE WITH ITS LAWS

849. The final allegation of breach made by the Claimants is that Norway has refused to "*accept*" the Claimants' investments in accordance with its laws (in this case the Latvian licences purporting to grant rights to harvest snow crab on Norway's continental shelf in the Fisheries Protection Zone around Svalbard).

850. It will be recalled that Article III reads as follows:

"*PROMOTION AND PROTECTION OF INVESTMENTS.*

Each Contracting Party shall promote and encourage in its territory investments of investors of the other Contracting Party and accept such investments in accordance with its laws and regulations and 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."

851. The Claimants' brief argument on this point[875] is elliptical. It appears to be that by failing to allow the Claimants to exercise their alleged rights under "Svalbard licenses" issued by Latvia, on the basis of EU Regulations, to harvest snow crab on the Norwegian continental shelf, Norway has failed to "*accept those licences in accordance with its laws and regulations*" interpreting Norwegian law as the Claimants say it should be applied.[876]

---

874 **R-0100-NOR; R-0099-ENG** Protocol from the 45th Session of the Joint Norwegian- Russian Fisheries Commission, Section 10.

875 Memorial, ¶¶809-812.

876 Memorial, ¶¶809 and 811.

852. There are further difficulties with the Claimants' argument on Article III of the BIT. First, the Claimants assume that when Article III refers to the duty to "*accept … investments in accordance with its laws and regulations*" that means that Norway must "accept" and give legal effect to a Latvian 'authorisation' to harvest snow crab on Norway's continental shelf. It does not. As was pointed out above in **Chapter 5**, the purchase of the Latvian licences was not an investment in Norway. If it was an investment anywhere, it was an investment in Latvia.

853. Article III is referring the 'promotion and protection of investments', and the ordinary (and obvious) meaning of the provision is that it is concerned with each Contracting Party's duty to "accept" — *i.e.*, "receive" — inward investment into its territory by nationals and companies of the other Contracting Party. The duty to give effect to Latvian 'authorizations' as if they were validly issued by the competent Norwegian authorities is not a matter of 'acceptance' within the meaning of Article III, nor can it be reconciled with the explicit reference to Norwegian laws and regulations.

854. Furthermore, Article III is framed differently from Articles IV, V and VI. The latter Articles stipulate how investments or investors shall be treated; and Norway accepts that for present purposes those Articles entail a right on the part of investors who have made an investment in the territory of Norway to pursue a claim alleging a violation of one of those Articles, in accordance with Article IX of the BIT. Norway does not, however, accept that Article III entails a right for each person who wishes to become an investor to institute Article IX proceedings against a Contracting Party. Article III is framed not as a right attaching to an investor or investment, or even as a duty in respect of an investor or investment. It is a bald statement of a duty of a Contracting Party. "Acceptance", along with "promotion" of investments is a matter of general policy.

855. Norway considers that claims of breach of Article III may be pursued under Article X ("Disputes between the Contracting Parties") but does not accept that they may be pursued under Article IX.

856. Furthermore, Article III refers to the duty of a Contracting Party to "accept … investments in accordance with its laws and regulations". It does not refer to "laws and regulations as interpreted and applied by the Article IX tribunal", or even as "laws and regulations 'correctly' interpreted'". Two points flow from that. One is that the natural

meaning of Article III is that the duty is a duty to receive investments that are made in accordance with the laws and regulations of the receiving State. If the laws or regulations violate the BIT, that might furnish the basis of a claim for breach of the relevant Article in the BIT: but it does not alter the fact that Article III is tied to laws and regulations of the receiving State as interpreted and applied by the receiving State.

857. The second point is that even if the Tribunal were competent to review Norwegian law (according to processes and standards that the Claimants do not explain) and to substitute its own interpretation of Norwegian law for that of the Norwegian courts, it would not follow that every "incorrect" interpretation of Norwegian law would amount to a breach of Article III, even assuming that the question had been pursued up to the Supreme Court through all available avenues of appeal. There is no reason to suppose that the BIT intended to give aspiring investors a right to recover damages (presumably, for the monies actually invested — in this case, the cost of the Latvian licences — rather than the value of investments they intended to make or succeeded in making) in every case where courts and/or tribunals take, in good faith and on rational grounds, different views of how a provision should be interpreted and applied. A moment's reflection on the implications for investment arbitration of imposing liability in those circumstances is sufficient to reveal just how improbable such an interpretation of Article III would be.

858. Other points have been made, notably that the Svalbard Treaty confers no rights to harvest snow crab beyond the territorial waters around the Archipelago of Svalbard – and that the interpretation of the Svalbard Treaty is in any event not one that the Tribunal has jurisdiction to determine.

859. The Claimants devoted three short paragraphs to this argument, plus a fourth quoting the text of Article III. They have made no attempt to argue their case. They fall back on assertions that "[t]*he terms of the BIT are clear*" and that "*the only conclusion*" is that the Claimants are correct. If and when the Claimants set out an argument concerning the interpretation and application of Article III and an explanation of the allegation of its breach, Norway will respond more fully.

CHAPTER 7: REPARATION

7.1 INTRODUCTION

860. The Claimants address the topic of reparation in paragraphs 302—305 of their Request for Arbitration, and paragraphs 813—1021 of their Memorial.

861. The basic principle behind their claims is clearly stated:

> "*Claimants seek full reparation of the financial losses caused to them by Norway's breaches of the BIT. Claimants' financial losses are equal to the additional profits North Star would have earned, but for Norway's illegal actions which prevented it from operating its snow crab fishing business.*"[877]

862. Elsewhere the Claimants explain the point in different terms:

> "*Full reparation requires that the amount of financial compensation awarded be sufficient to place the investor in the economic position that it would have enjoyed had the wrongful acts never occurred – that is, the situation that would have existed "but for" those acts.1066 This is accomplished by an award of damages equal to the loss of value sustained by the affected investment, plus any additional losses that would not have been incurred but for the State's unlawful action.*
>
> *It is generally well accepted that full reparation should reflect the "fair market value" of what was lost by an investor*"[878]

863. The Claimants are precise as regards the date at which they allege the breaches of the BIT occurred for the purposes of quantification:

> "*Since Claimants have been prevented by Norway from exercising their snow crab fishing rights in the Loophole since 27 September 2016 (when it issued a fine to North Star on account of Senator's snow crab fishing activities in the Loophole), and from exercising their fishing rights related to the Svalbard zone since 16 January 2017 (when Senator was arrested while fishing in that zone), these two dates are considered as the dates of breach for purposes of quantification of their damages (Dates of Breach). From an economic standpoint, Claimants' snow crab fishing operations have been halted by Norway since the earlier date (27 September 2016) and their damages are therefore calculated starting from that date.*"[879]

---

877 Memorial, ¶813.

878 Memorial, ¶¶846-847.

879 Memorial, ¶814.

864. The Claimants seek, by way of financial compensation for the alleged violations of the BIT, EUR 448,700,000, plus compound interest at the rate of EURIBOR + 4%.[880]

7.2 NORWAY CANNOT SENSIBLY RESPOND ON QUANTUM AT THIS STAGE

865. Norway does not accept that its conduct has violated the BIT in any respect or in any measure and accordingly it offers no alternative assessment of damages due, although that should not be taken to indicate acceptance of the Claimants' methodology in assessing the alleged damages.[881] While it is not uncommon in investment arbitration for respondents to put forward lengthy and detailed expert critiques of the pleadings and expert reports on quantum submitted by the Claimants, that is impractical in the present case.

866. Any detailed critique of the Claimants' calculation of the financial compensation sought would have to address the various permutations of possible answers to each of the points raised under those headings; and that is plainly impractical. That is why Norway proposed that detailed submissions on quantum should be deferred until all the factual evidence has been presented and liability has been determined. At that stage, should it result in any liability attaching to Norway, the Claimants could present a specific and detailed claim, to which Norway could respond with equal specificity. Until that stage is reached, attempts to quantify alleged losses are based upon incomplete information and speculation as to the matters for which Norway might be liable; and that is an inefficient and uneconomical way to proceed.

867. When the detailed claim is presented, it should recognise that it is the *investment* that is protected, and not particular aspects of the investment taken in isolation. The Claimants themselves emphasise this point:

---

880 Memorial, ¶1022(e), (f).

881 At this stage, Norway reserves its rights in particular as to the suitability of the Claimants' methodology to an early-stage investment which had shown no real profitability and, which involves a large degree of speculation. That speculation has, of course, been compounded by the paucity of evidence that the Claimants have put forward. See, in that regard, **RL-0139-ENG** *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10, Final Award, 27 May 2020, ¶209; **RL-0140-ENG** *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Principles of Quantum, 12 March 2019, ¶647; **RL-0152-ENG** *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶759, among others.

> "*The Tribunal must approach Claimants' investments in their totality rather than in separate parts (noting that, in any event, each of Claimants' investments would qualify as a protected investment under both the BIT and the ICSID Convention, as shown in the next section). As shown above, and as further explained, below, the sum of Claimants' investments constitutes a snow crab fishing enterprise, relying on several assets (themselves also "investments"). The Tribunal must consider Claimants' fishing operation as a whole, instead of looking at its constituent parts in isolation.*"[882]

868. It will be recalled that Mr Pildegovics' investments were identified by the Claimants as:

> "*contractual rights in his joint venture agreement with Mr. Levanidov; (ii) 100% of the shares in North Star; and (iii) 100% of the shares in Sea & Coast.*"[883]

North Star's investments were identified by the Claimants as

> "*fishing vessels; "fishing capacity", referring to the right to operate a ship as fishing vessel; fishing licenses authorizing each vessel to catch snow crabs in the "Loophole" area of the NEAFC zone and in waters off the Svalbard archipelago; contractual rights to purchase two additional ships, along with "fishing capacity" for such ships; and supply agreements with purchasers of snow crab products.*"[884]

Those are the investments that, according to the Claimants, must be considered "as a whole."

869. It is not the role or purpose of the BIT to underwrite the profitability of particular initiatives undertaken by an investor in connection with its investment. The North Star–Seagourmet contracts are not the 'investment' in this case; and the BIT offers no guarantee that the expected profitability of those contracts actually made between North Star and Seagourmet, including those made after the alleged breach of the BIT by Norway, would be secured for the investor – *a fortiori* in circumstances where the investor is not pursuing the fulfilment of those contracts because of legal constraints that were in place before the contract was entered into.

870. If, *arguendo*, Norway had violated the BIT, one might think that the proper approach would be to determine the effect of that breach upon the value of the investment:[885] that is, to determine what harm was caused, not to estimate what plans might have been

---

882 Memorial, ¶480.

883 Memorial, ¶166.

884 Memorial, ¶168.

885 See e.g. **CL-0322** *Factory at Chorzów* (Merits), PCIJ Series A. No 17, Judgment, 13 September 1928, page. 47: "*reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed*."

frustrated or what expectations disappointed. That would have required a valuation of the business before and after the breach.

871. The Claimants have not done that. Gaps in the information provided make it practically impossible to estimate the value of the business. For instance, no details of the "contractual rights in the joint venture" are given. There is no basis for attaching any value to them as a component of Mr Pildegovics' investment. Indeed, there is no way of determining whether the joint venture and North Star were Mr Pildegovics' investments or whether, for example, Mr Pildegovics was brought into the alleged 'joint venture' on the basis that he would perform certain limited functions for what was in essence Mr Levanidov's investment. Given the emphasis placed by the Claimants upon the joint venture, and the relevance to the value of North Star of relations with the joint venture and with Mr Levanidov's other businesses, this question bears directly on the issue of quantum. By way of example, the Claimants' "*but for*" scenario assumes that Mr Pildegovics would have retained his 100% shareholdings in North Star and Sea & Coast.[886] That assumption is contradicted by Mr Pildegovics's and Mr Levanidov's agreement to implement a formal profit-sharing mechanism, perhaps within a single corporate structure, when the business reached its potential[887] (as the "*but for*" scenario assumes). An informed discussion of quantum then requires further clarity on how much of the "*but for*" profits would have been allocated to Mr Levanidov if the joint venture had succeeded.

872. Instead, the Claimants have worked out how much North Star expected to make on its supply contracts, and because that venture has been unable to proceed as planned because the harvesting of snow crab on the Norwegian continental shelf would violate Norwegian law, they are asking Norway to pay them the profits that they say they expected to make. But, even taking that rather adventurous claim at face value, the Claimants have not made out their case on quantum; and the gaps and deficiencies in that case preclude a detailed response to it at this stage. That was why the Respondent sought bifurcation, with postponement of questions of quantum until after jurisdiction and liability have been determined.

---

886 Memorial, ¶929.

887 Pildegovic, ¶40, Levanidov, ¶50.

873. The major difficulties arise from questions of causation. Norway's main case on liability is that the Claimants never had either a legal right to harvest snow crab on the Norwegian continental shelf without authorization from Norway or any right (whether deriving from the Latvian licences under which North Star's ships operated, or otherwise) to rely on an expectation that Norway would give them such authorization; and that Norway's exercise of its rights under UNCLOS over the Norwegian continental shelf does not constitute a violation of the rights of the Claimants under the BIT. There is no conduct by Norway in breach of the BIT that could be said to have caused any loss to the Claimants.

7.3 THE CLAIMANTS HAVE NOT PRESENTED EVIDENCE SUFFICIENT TO DETERMINE WHAT LOSSES (IF ANY) THEY HAVE SUFFERED

874. 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.

875. The main losses are said to flow from North Star's inability to harvest snow crab as a result – on the Claimants' case – of Norway's conduct in breach of the BIT. The argument in the Memorial is that but for Norway's action, North Star would have continued to harvest snow crab, in increasing amounts. The Claimants take the harvests of snow crab by their four vessels in 2015 and 2016 and extrapolate[888] to take account of (a) the projected increase from four to six fishing vessels in North Star's fleet, (b) increased productivity resulting in daily catches increasing by 10% year-on-year in 2017, 2018, and 2019 and by 5% in 2020 "reflecting Mr Pildegovics' minimum expectation",[889] and (c) increases in the number of days spent at sea from 82% of their operating days to 92%.

876. Detailed points could be made concerning the estimates for increased in productivity and operating days at sea; but there is a much more fundamental point. Almost none of the snow crab harvested in 2015 and 2016 by North Star's vessels was harvested on the Norwegian continental shelf (whether inside or outside 200 nautical miles). It was noted

888 Memorial, ¶952.

889 Memorial, ¶959.

above that in 2015, for example, more that 99% of North Star's catch in the Loop Hole was caught on the Russian continental shelf, outside Norway's jurisdiction.[890] Approximately 90% of the Loop Hole is Russian continental shelf, and approximately 10% is Norwegian. As a matter of elementary international law, Norway is not responsible for the way in which the Russia chooses to exercise its maritime jurisdiction. Norway's conduct cannot be said to have caused any limitations on North Star's access to the Russian continental shelf. Yet no attempt is made in the Claimant's extrapolation from their 2015 and 2016 catch statistics to separate out that part of the catch that was caught in areas over which Norway, rather than Russia, has sovereign rights. Without that separation, and the calculation of its impact on operating practices and costs, etc, the estimate of North Star's 'lost revenues' for which Norway is said to be responsible is meaningless.

877. To take a related point, the Claimants allege losses of profits resulting from the fact that they have no right to harvest snow crab on the Norwegian continental shelf around Svalbard or in the Loop Hole. The Claimants' legal cases in relation to the areas differ: most obviously, the Claimants' case on access to the maritime areas around Svalbard involves arguments concerning the application of the Svalbard Treaty, whereas access to the Loop Hole does not. Again, at least until liability is determined, it is not enough to lump together all of the Claimants' extrapolated losses. By way of example, the only investment apparently made in direct reliance on a perceived legal possibility to harvest snow crab around Svalbard is the purchase of the factory vessels *Sokol* and *Solyaris* in early 2017[891] (albeit after Norway had made clear that no such possibility existed).

---

890 See above, ¶143.

891 North Star's annual financial statement for 2016, **PP-0221**, page 4: "*In June 2016 the Republic of Latvia officially joined Paris Treaty 1920 (Spitzbergen Treaty) providing for the access rights of the parties to the Treaty to the natural resources in the waters of Spitzbergen Archipelago equal to those of Norway. This will allow the Company to obtain the right to start the snow crab fishing in a new and very perspective fishing district. On the 12th December 2016, during the EU Council of Ministers meeting, the European Regulation on Fishing Rights and Fishing Quotas for 2017 was approved. The Regulation accepts allowing the vessels of 20 Member States to receive national licences for snow crab fishing in Spitzbergen (Svalbard) fishing district. 11 licences have been earmarked for the Republic of Latvia. Because of new fishing perspective, in the beginning of the year the Company decided to purchase 2 more fishing vessels, thus planned to be fishing with 6 fishing vessels. The new fishing vessels would have crab processing plant on board allowing production of products in the sea, in particular, boiled frozen crab claw sections.*"

Nevertheless, the Claimants have not provided any breakdown of the purported losses in respect of each vessel.

878. Norway could only be liable for any damage that it caused by violations of the BIT: but other actors play crucial roles, even on the Claimants' account of events. It is Latvia, not Norway, that issues the licences. Latvia was reminded by Norway on 2 November 2015, and 29 December 2015, and 23 February 2017, that snow crab is a sedentary species subject to the sovereign rights of the coastal State. The EU told its Member States the same thing on 5 August 2015, and advised them to rescind any current licences to harvest crab on the Norwegian continental shelf in the Loop Hole.[892] In assessing the losses 'caused by' Norway, no account is taken of these interventions. Nor is account taken of Russia's decision, in the autumn of 2016, to enforce a ban on harvesting snow crab by foreign vessels on the Russian continental shelf in the Loop Hole – the action that in fact appears to have triggered the sequence of events underlying this case.[893] The Claimants simply assume that Norway and Norway alone is responsible for all of their claimed losses, and make no attempt to consider the extent to which the current situation has been brought about by the actions of others who assert the right to regulate the Claimants' fishing activities and with whom the Claimants have dealt directly.

879. Then there is the question of the two separate Claimants (setting aside Mr Levanidov for the moment). No distinction is drawn between the alleged losses of North Star and the alleged losses of Mr Pildegovics. Yet their losses are, on the Claimants' own case, different. To take one example, it is Mr Pildegovics, and not North Star, that owns Sea & Coast,[894] which is described as one of the three main assets of Mr Pildegovics' fishing enterprise[895] and as part of the alleged 'joint venture'.[896] Despite its sizeable operating revenues – NOK 18–19 million in each of 2015 and 2016[897] – Sea & Coast has been

892 *Ibid*.

893 See above, **Section 2.2.6.3**.

894 RFA, ¶¶37, 87; **C-0035**; Pildegovics, ¶57.

895 Memorial, ¶17.

896 Memorial, ¶246.

897 Memorial, ¶252.

loss-making in both years.[898] Though note that, as explored in **Chapter 1**, although still in negative equity Sea & Coast has had profitable results in both 2018 and 2019 and have referred to shrimp fishing by its clients as a possible new revenue stream.[899] Transactions with the Claimants (including North Star) amounted to only something between 10% and 15% of Sea & Coast's revenues in 2015 and 2016. Presumably Sea & Coast had other customers, though the fact that it seems to have had only one employee[900] may suggest that this is not the case. Whatever the position, the profits and/or losses of Sea & Coast should, as elements of the Mr Pildegovics' investment, be clearly identified.

880. To give another example, the Memorial identifies what it says are various wrongful acts of Norway that entail liability under the BIT. There are, for instance, the claims relating to the 'failure to accept Latvia's licences',[901] which occurred in 2016, and the 'denial of justice' in February 2019.[902] If Norway were to be held liable for the later but not the earlier alleged violation, that would necessarily have an impact upon quantum. This is another example of the difficulties that can arise from the preparation of detailed reports on quantum prior to the determination of liability – though sometimes expert reports anticipate this problem and produce Excel spreadsheets with switches that can be turned on or off to take account of specific claims that are or are not upheld. The Claimants have not (yet) provided a switchable quantum report.

881. Another aspect of the chronology also presents problems. The date of the breach is said to be 27 September 2016.[903] In principle, Norway's conduct by that date must therefore be shown to have constituted a violation, but earlier conduct presumably is not regarded by the Claimants as constituting a violation and later conduct may sustain the existing breach but does not generate a fresh breach. Further, it is the impact upon the Claimants' respective investments as they stood at that time that is to be assessed in the context of

---

898 **PP-0216 PP-0217**.

899 **R-0129-NOR; R-0132-ENG** Annual financial statement 2019 for Sea & Coast and **R-0134-NOR; R-0133-ENG** Annual financial statement 2018 for Sea & Coast.

900 **PP-0216** p.2.

901 Memorial, ¶¶809–812.

902 Memorial, ¶692.

903 Although the Claimants also say that Norway's "*change of attitude … occurred literally overnight*" in July 2016: Memorial, ¶117.

quantum. This raises questions as to why Norway's earlier explicit statements that the harvesting of snow crab on the continental shelf is the exclusive right of the coastal State, such as those made to the EU in October 2015[904] and to Mr Pildegovics on February 2016[905] are not presented as the date of breach, and why the Claimants include in the calculation of their quantum claim investments made after the date of breach – for example, the agreements for the purchase of the *Sokol* and the *Solyaris*, made in January 2017.[906]

882. Further difficulties emerge in the context of the duty to mitigate losses, which the Claimants seem to accept.[907] For example, in 2017, North Star leased the vessel *Saldus* to Seagourmet for one year, for about EUR 679,957,[908] which is approximately 85% of its original purchase price of USD 1,050,000.[909] In 2018, North Star again leased *Saldus* to Seagourmet for about EUR 298,000.[910] This appears to indicate the possibility of deploying assets elsewhere. Indeed, the *Senator* was fitted out for shrimp fishing when it was purchased.[911] There is a need for some account by the Claimants not only of the mitigation measures that were taken (and why further opportunities to mitigate were not taken), but also of why additional money was invested (for example, by the purchase of an additional vessel, *Laima*, in 2020) and further commitments were made (for example, the supply contracts entered into in December 2016 and December 2017) after it became – on the Claimants own case[912] – apparent that North Star would not be allowed to harvest snow crab on the Norwegian continental shelf.

---

904 **C-0109**; Memorial, ¶¶50, 103-109.

905 Pildegovics, ¶204.

906 RFA, ¶98; Expert Report of Versant Partners, ¶¶ 19: the calculation does not include the anticipated investments in the *Sokol* and the *Solyaris* [Versant, ¶61] and appears not to include the fines for cancellation of the agreements were [Versant,¶ 64; **C-0064**] and the two vessels were treated in the 'but for' scenario as having been purchased [Versant, ¶106]

907 Memorial, ¶412.

908 Expert Report of Versant Partners, ¶71 and Table 6.

909 Memorial, ¶264.

910 Pildegovics, ¶267; Expert Report of Versant Partners, ¶71 and Table 6.

911 Memorial, ¶262.

912 See, for example, Memorial, ¶675.

883. The following paragraphs in this Part of the Counter-Memorial turn to more detailed matters concerning the Claimant's current submissions relating to quantum.

884. The Claimants say that "the quantification of the Claimants' damages follows from a comparison between their current economic position (in the "*actual*" scenario) and the position they would have enjoyed but for Norway's breaches of the BIT (in the "*but for*" scenario).[913] That comparison entails consideration of the value of the Claimants' assets, including their legal rights to harvest snow crab, and of their expected profits, and also of their liabilities. In that context, the details of the prices at which assets were bought and sold, and the terms on which loans were made and repaid, and the arrangements for the underwriting of debts and (re)financing of operations, are plainly important.

885. Clarification of the points raised above bears upon the Claimants' quantum calculation and may also cast light upon both the Claimants' current expectation as to future operations, and their earlier appraisal, during the period in which the events at the heart of this case occurred, of the position.

886. At a more detailed level, the difficulties with the Claimants' quantum analysis described above can be attributed to the following deficiencies in the evidence submitted by the Claimants:

886.1. In respect of the alleged *investment as a whole*, there is simply no evidence of the value of the alleged joint venture or of Mr Pildegovics's wholly owned Norwegian company Sea & Coast on file, whether "*actual*" or "*but for*". The Versant Report, said to quantify "*Claimants' losses caused by Norway's breaches of the BIT*"[914] only quantifies the profits allegedly lost by and the terminal value of North Star.[915]

886.2. In respect of the alleged *causality between Claimants' losses and Norway's actions*, there is a lack of evidence of any appreciable snow crab harvesting operations on the Norwegian continental shelf. As outlined in **Chapters 2 and**

913 Memorial, ¶926.

914 Memorial, ¶815(a).

915 Versant Report, ¶¶89, 90 and footnote 139.

6, over 99% of the crab harvested by North Star was harvested on the Russian continental shelf.

886.3. Similarly in respect of the alleged *causality between Claimants' losses and Norway's actions*, the evidence submitted by the Claimants concerning snow crab populations in the Barents Sea, suggests that in early 2014, when the alleged 'joint venture' was set up, commercial snow crab harvesting on the Norwegian continental shelf in the Loop Hole and/or on the Norwegian continental shelf around Svalbard, was not a realistic possibility. Thus, the sources relied upon in the Brooks Kaiser Report show that in the period between 2005 and 2016, a distinct majority of the snow crab population was located in the Russian continental shelf within the Russian Economic Exclusive Zone and the Loop Hole.[916]

887. Many other details are missing from the quantum analysis. For example, there is no record of the penalties under the contracts for the *Sokol* and the *Solyaris* actually having been paid by North Star. There is no detailed account of the amounts paid to Latvia for the North Star licences, or of the reasons for the payment of EUR 1.66 million paid to [redacted] for obtaining permits and licences from the Latvian government.

888. Finally, one particularly difficult set of gaps and uncertainties is concerned with the role of Mr Levanidov and companies associated with him. The questions here are (a) whether this was essentially an investment by Mr Levanidov and his companies and associates or by Mr Pildegovics, and how much of the alleged loss was in fact sustained by one or other of the two Claimants in this case, Mr Pildegovics and North Star, and how much in fact sustained by other individuals or companies, and how it was anticipated that profits and losses would be allocated within the joint venture, (b)

916 **BK-0045**, page 72, figure 3.4.2.1.

917 **PP-0040** and **PP-0004.**

whether the various transactions to which the Claimants case refers, in particular in relation to quantum, were arms-length transactions on market terms.

889. The web of connections is complex and not wholly transparent. Mr Levanidov (a US national, and not a Claimant in this case) is the pivotal figure. It was Mr *Levanidov's* business plans, focused on snow crab, that were communicated to Mr Pildegovics on 2013, and in which, it seems, Mr Pildegovics was invited to participate.[918] North Star purchased the *Solvita,* the *Senator,* the *Saldus*, and the *Solveiga* before the end of 2014, before 15 June 2015, the date on which Mr Pildegovics purchased his 100% shareholding in North Star.

890. The transactions concerning the fishing vessels offer an example. As outlined in **Chapter 3**, above, the loans for the financing (and re-financing) of the vessels came from Mr Levanidov and his related companies.[919] By way of summary: North Star's vessel purchases were apparently made entirely by loans which were funded by companies owned by Mr Levanidov and/or his associates. As well as their initial financing, between 22 and 24 May 2018, [redacted] entered into agreements to purchase North Star's outstanding loans from [redacted] and [redacted]. The outstanding loans amounted to EUR 6.68 million. According to North Star's Annual Report for 2019, there is "*no schedule for either repayment of the principal amount of the loan or the assessed interest*", nor has any security been defined for the loans.[920]

891. In this complex web, Mr Pildegovics appears to occupy a completely marginal place. At the relevant times, he was not a shareholder or officer of North Star, he did not finance the purchase of the vessels, and he appears to have had very little to say about which vessels were purchased for North Star at all. His financial input into the operation was dwarfed by that of Mr Levanidov and his associated companies.

892. For the above reasons, Norway reiterates that the sensible course is to defer detailed submissions on quantum until all the factual evidence has been presented and liability

---

918 Pildegovics, ¶25.

919 See above, **Section 4.3.2**.

920 **R-0129-NOR**; **R-0132-ENG** Annual financial statement 2019 for Sea & Coast.

on quantum has been determined. Norway refers to paragraph 20 of Procedural Order No. 3 and requests the Tribunal to order bifurcation of quantum and related issues and order a postponement of such issues to a later time after its decision on jurisdiction and liability.

PART IV: PRAYER FOR RELIEF

893. For the reasons stated in this Counter-Memorial, Norway respectfully requests the Tribunal:

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

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

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

29 October 2021

Respectfully submitted on behalf of the Kingdom of Norway

KRISTIAN JERVELL
OLAV MYKLEBUST
MARGRETHE R. NORUM
Norwegian Ministry of Foreign Affairs

PROFESSOR VAUGHAN LOWE QC
PROFESSOR ALAIN PELLET
MUBARAK WASEEM
YSAM SOUALHI
Counsel for the Kingdom of Norway