**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**PETERIS PILDEGOVICS**
**SIA NORTH STAR**

**Applicants on Annulment**

**KINGDOM OF NORWAY**

**Respondent on Annulment**

**(ICSID Case No. ARB/20/11 – Annulment Proceeding)**

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# NORWAY'S COUNTER-MEMORIAL ON ANNULMENT

22 April 2025

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## TABLE OF CONTENTS

## CHAPTER 1: INTRODUCTION

1. On 22 December 2023, the tribunal in the underlying arbitration (the "**Tribunal**") rendered the **Award**, following a four-day hearing and extensive briefing by the Parties.

2. The documentary record below was exhaustive. The Applicants[1] sought extensive disclosure, and Norway raised no objection to 83 of the Applicants' 90 document production requests,[2] and disclosed close to 700 documents, which the Applicants deployed as they saw fit.

3. Norway had, and has, nothing to hide. It has always maintained that it has committed no breach of the Agreement of 16 June 1992 between the Government of the Kingdom of Norway and the Government of the Republic of Latvia on the Mutual Promotion and Protection of Investments (the "**BIT**"). As Norway set out in its oral opening before the Tribunal:

> *Norway has no desire whatever to dampen the enthusiasm of bold entrepreneurs. If its government is in the wrong and causes harm, it will accept responsibility. But it does not think that its conduct in this case, which was in line both with Norwegian law and with Norway's sense of what is fair and proper conduct, merits a half billion euro pay-out or indeed any pay-out to the Claimants.*[3]

4. In the 202-page Award the Tribunal dismissed each and every claim brought by the Applicants, both on jurisdiction and the merits. The Applicants are plainly disappointed with the Award. That disappointment takes the shape of their annulment application. It is, in reality, a thinly disguised attempt to appeal the Award.

   4.1. Despite the strict requirements of Article 52 of the ICSID Convention, several of the "*at least*"[4] 22 grounds of annulment simply fail to rise to the required high standard for annulling ICSID Awards.

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1 This Counter-Memorial on Annulment describes Mr Peteris Pildegovics and SIA North Star ("**North Star**") as the "**Applicants**" throughout, including to describe their participation as claimants in the underlying Arbitration.

2 See **A-0064** Procedural Order No. 6 in the Arbitration, Disclosure of Documents, 22 December 2021, Schedule A.

3 **A-0019** Transcript Hearing, Day 1, 31 October 2022, p. 242 ll.17-24 (Professor Lowe KC).

4 Memorial, para. 3

4.2. In fact, the Applicants appear to have taken every point in the Award with which they disagreed and submitted that they are all either manifest excesses of powers or failures to state reasons. Some of the 22 grounds receive only passing or cursory analysis in the Applicants' Memorial on Annulment.[5] Indeed, in respect of many of the grounds, the Applicants simply argue their evident dissatisfaction with the *outcome* of the decision, rather than the process, or any other aspect of the ground that rises to the high threshold necessary to annul an award. In doing so, the Applicants often misstate the meaning or effect of the Award.

4.3. Further, many of the grounds are built entirely on speculation and/or assumption. This includes several of the grounds that deal with the conduct of the Tribunal. For example, the Applicants appear to assume both (a) that there was some procedural decision to which they were not party, when that is not stated in the Award; and (b) that the experienced Arbitrators spent so little time in drafting the Award that it must be considered a nullity. Neither of those alleged grounds is evidenced.

4.4. The purely speculative grounds include those in which serious allegations are made against Norway and its representatives. The Applicants allege that Norway "s*imply lied to the Tribunal*"[6] to obtain bifurcation of damages. That allegation is based on one line in Norway's costs submissions, and is entirely misconceived, as set out below (paragraph 127). There are also serious allegations made regarding Norway's hiring of external counsel. The Applicants have described Norway's conduct as involving "*iniquities* [that] *border on fraud, or at least deceit*".[7] These serious allegations are again based entirely on speculation that Norway hired external counsel to get close to the Applicants or wrongfully obtain their confidential and/or privileged information. However, as set out below (paragraphs 60 *et seq*), nothing of the

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5 See for example: (a) "*The Tribunal exceeded its powers and contracted itself in failing to apply an approach of "Unity" of* [the] *Investment*", dealt with in 11 lines: Memorial, para. 259; (b) "*Discriminatory quotas*", dealt with in 3 paragraphs: Memorial, paras. 302-304; (c) "*The Tribunal's most favoured nation analysis must be annulled*", dealt with in 3 paragraphs: Memorial, paras. 315-317.

6 Memorial, para. 234.

7 Applicants' Document Production Application, 4 February 2025, para. 29.

sort happened, and the Applicants have failed to identify a single piece of confidential and/or privileged information to which Norway has been privy.

5. The Award debtors' unfocused attack on the Award has necessitated Norway spending further public funds to defend this annulment application.

6. In order to deal sensibly with the Applicants' wide-ranging grounds for annulment (several of which are repeated in various forms throughout the Applicant's Memorial), Norway has grouped the various allegations together and will deal with them thematically in this Counter-Memorial.

7. The Counter-Memorial therefore proceeds in the following sections:

   7.1. **Chapter 2** addresses the law regarding annulment, and the high standard that the Applicants must reach in order to impugn the Award.

   7.2. **Chapter 3** addresses the Applicants' complaints relating to the conduct of the Tribunal. That is: (a) the allegation that the members of the Tribunal failed to spend sufficient time on the dispute; (b) the allegation that the Tribunal failed to notify a procedural ruling and should have re-opened the proceedings.

   7.3. **Chapter 4** addresses the Applicants' complaints regarding Norway's conduct. That is: (a) the allegation that Norway "*intentionally retained counsel with a conflict of interest to gain an improper advantage in the arbitration*"; and (b) the allegation that Norway misled the Tribunal to obtain bifurcation of quantum.

   7.4. **Chapter 5** addresses the Applicant's complaints regarding the decisions reached by the Tribunal which, Norway says, amount in substance to an attempted appeal. Chapter 5 deals with the Applicants' numerous and wide-ranging claims regarding:

      (a) the Tribunal's treatment of the *Monetary Gold* principle, including the Tribunal's treatment of the Treaty of 9 February 1920 (the "**1920 Treaty**" or "**Svalbard Treaty**") and the Tribunal's treatment of the actions of third States and international organisations (the Russian Federation, the EU and Latvia);

(b) the Tribunal's decision regarding whether or not there was an investment "*in the Territory of*" Norway for the purposes of the Norway-Latvia BIT;

(c) the Tribunal's decisions on the merits, including: (i) causation; (ii) alleged denial of justice; (iii) alleged acquired rights; (iv) alleged arbitrary conduct; (v) alleged discriminatory quotas; and (vi) most-favoured nation treatment; and

(d) the Tribunal's decisions on costs.

8. In this Counter-Memorial on Annulment, the pleadings before the Tribunal in the underlying arbitration are referred to using the description "in the Arbitration", *e.g.*, the Applicants' Memorial in the Arbitration, *etc.* Where this Counter-Memorial uses the term 'Memorial' alone, it refers to the Applicant's Memorial of 21 January 2025 on Annulment of the Award of 22 December 2023.

## CHAPTER 2: THE LAW REGARDING ANNULMENT

9. The Parties agree that Article 52 of the ICSID Convention sets out the only grounds which can justify the annulment of an ICSID Award. It reads as follows:

> *(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:*
>
> *(a) that the Tribunal was not properly constituted;*
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> *(b) that the Tribunal has manifestly exceeded its powers;*
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> *(c) that there was corruption on the part of a member of the Tribunal;*
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> *(d) that there has been a serious departure from a fundamental rule of procedure; or*
>
> *(e) that the award has failed to state the reasons on which it is based.*

10. Before discussing the annulment grounds alleged by the Applicants, namely manifest excess of power, serious departure from a fundamental rule of procedure and the Award's failure to state the reasons on which it is based,[8] it is necessary to address the fundamental differences between the Parties' understandings of the purpose of the ICSID annulment procedure. Contrary to what is implied by the Applicants' argument in their Memorial, Article 52 of the ICSID Convention establishes a high standard for obtaining the annulment of an ICSID Award (**A**) and does not provide for an appeal of the Award (**B**). Norway also makes here some brief observations on two of the general grounds of annulment relied on by the Applicants: manifest excess of powers, and a failure to state reasons (**C**).

### A. THE ANNULMENT OF AN ICSID AWARD IS AN EXCEPTIONAL REMEDY

11. In their Memorial, the Applicants first rightly point to the high threshold that must be met to obtain the annulment of an ICSID award. For example, the Applicants note that only 11 awards have been annulled for a manifest excess of power[9] (and that ground

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8 Memorial, para. 16.

9 Memorial, para. 23.

has been claimed in over 100 annulment applications)[10] and that a 'manifest' defect is one that "*can be discerned with little effort and without deeper analysis*".[11]

12. This high threshold can be contrasted with the Applicants' list of 22 alleged grounds for annulment of the Award, some of which are purely speculative. None of them justifies annulment of the Award.

13. As established by a former Secretary General of the Centre,

> *The history of the* [ICSID] *Convention makes it clear that the draftsmen intended to: (i) assure the finality of ICSID awards;* […] *(iii) construe narrowly the ground for annulment, so that this procedure remained exceptional.*[12]

This position has been endorsed by several *ad hoc* committees. As the *ad hoc* committee in *CDC v. Seychelles* noted, "*annulment is 'an extraordinary remedy for unusual and important cases'*".[13] It was reiterated by the *ad hoc* committee in *Industria Nacional v. Peru*: "[o]*ne general purpose of Article 52* […] *must be that an annulment should not occur easily*".[14]

14. Thus, "[t]*he annulment system is designed to safeguard the integrity, not the outcome, of ICSID arbitration proceedings*".[15] Speculative arguments, or those challenging the

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10 **RL-0326-ENG** ICSID, *Background Paper on Annulment* (March 2024), Annex 2.

11 Memorial, para. 18. See also **AL-0030** *Hussein Nauman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr. Soufraki, 5 June 2007, para. 38 or **RL-0286-ENG** *(DS)2, S.A., Peter de Sutter and Kristof De Sutter v. Republic of Madagascar (II)*, ICSID Case No. ARB/17/18, Decision on the Annulment Application, 14 October 2022, para. 101.

12 **RL-0316-ENG** Report of Secretary-General Ibrahim F.I. Shihata to the Administrative Council at its Twentieth Annual Meeting 3, 2 October 1986, as cited in *Updated Background Paper on Annulment for the Administrative Council of ICSID*, 5 May 2016, footnote 137.

13 **AL-0041** *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14, Decision of the ad hoc Committee on the Application for Annulment of the Republic of Seychelles, 29 June 2005, para. 34 quoting **RL-0296-ENG** C.H. Schreuer, *Three Generations of ICSID Annulment Proceedings* in ANNULMENT OF ICSID AWARDS 17, 42.

14 **AL-0076** *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.)* v. *Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, 5 September 2007, para. 101. See also another committee affirming that "*annulment is an exceptional, narrowly circumscribed remedy*" (**RL-0288-ENG** *Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud v. Democratic Republic of the Congo*, ICSID Case No. ARB/10/4, Decision on the Application for Annulment of the Democratic Republic of the Congo, 29 March 2016, para. 108).

15 **AL-0030** *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment, 5 June 2007, para. 20 quoting "*L. Reed, J. Paulsson and N. Blackaby, Guide to ICSID Arbitration, The Hague, Kluwer, 2004, p. 99*."

content of a tribunal's reasoning, are not sufficient to justify the annulment of an ICSID award.

## B. THE ANNULMENT PROCEEDING IS NOT AN APPEAL

15. The Award is final, as are all awards rendered by ICSID tribunals. The ICSID Convention does not provide for any appeal mechanism. Article 53 of the ICSID Convention expressly states that "[t]*he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention*." The Applicants' 22 grounds are nevertheless an attempt to use the annulment procedure to appeal against the Award.

16. Thus, the Applicants devote extensive submissions to facts that have been considered and addressed by the Tribunal and to the reiteration of arguments that have already been presented during the merits phase. By way of example, the Applicants argue that "*the Tribunal failed to properly address the fact* [that] *the catches were in international water, not on any State's continental shelf*"[16] and assert that "*the Tribunal specifically doubted the truthfulness and existence of the draft diplomatic note of the EU*".[17] As will be shown below, these assertions are disproved by a simple reading of the Award.

17. It is a fundamental principle of ICSID annulment proceedings that it is not for the *ad hoc* Committee to substitute its own assessment of the facts for that of the Tribunal. The point was made clearly in *Daimler Financial Services A.G. v. Republic of Argentina*:

> *it is not the role of an* ad hoc *committee to verify whether the interpretation of the law by the tribunal was correct, or whether it correctly ascertained the facts or whether it correctly appreciated the evidence. These are issues relevant to an appeal, but not for annulment proceedings in view of the limited grounds provided for under the ICSID Convention.*[18]

18. A similar position was maintained by the *ad hoc* committee in *Fábrica de Vidrios Los Andes C.A v. Bolivarian Republic of Venezuela*, deciding that

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16 Memorial, para. 295.

17 *Ibid*., para. 158

18 **RL-0289-ENG** *Daimler Financial Services A.G. v. Republic of Argentina*, ICSID Case No. ARB/05/1, Decision on Annulment, 7 January 2015, para. 189.

> *annulment committees have been consistent in holding that the nature of the annulment remedy "*forbids an inquiry … on mistakes in analyzing the facts*."*[19] *Similarly, annulment committees cannot review the correctness of an award's findings on facts.*[20] *The role of an annulment committee is limited and should not second guess the evaluation of evidence by the Tribunal.*[21]

19. Nor can an *ad hoc* committee substitute its view of the correct *application* of the law for that of the tribunal. Here, too, annulment committees adopt a clear and consistent position. See, for example, *Industria Nacional v. Peru*:

> [I]*t is no part of the Committee's functions to review the decision itself which the Tribunal arrived at, still less to substitute its own views for those of the Tribunal, but merely to pass judgment on whether the manner in which the Tribunal carried out its functions met the requirements of the ICSID Convention.*[22]

20. A similarly unequivocal stance was taken by the *Daimler ad hoc* committee:

> *If this Committee were to undertake a careful and detailed analysis of the respective submissions of the parties before the Tribunal* […] *and annul the Award on the ground that its understanding of facts or interpretation of law or appreciation of evidence is different from that of the Tribunal, it will cross the line that separates annulment from appeal.*[23]

21. Another *ad hoc* committee, reflecting on the nature and role of the annulment procedure under Article 53 of the ICSID Convention, likewise stated that

> *it is evident that ad hoc committees do not have the authority to substitute their interpretation of the law and/or their appreciation of the facts to the interpretation or appreciation of the tribunals. Competing interpretations and judgment of ad hoc committees over the quality of work of tribunals do not*

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19 Footnote 124: "Joseph C. Lemire v. Ukraine, *ICSID Case No. ARB/06/18, Decision on Ukraine's Application for Annulment of the Award, July 8, 2013, ¶ 233*". (**RL-0317-ENG**)

20 Footnote 125: "Ioan Micula, Viorel Micula and others v. Romania, *ICSID Case No. ARB/05/20, Decision on Annulment, ¶ 122 (AALA-22)*." (**RL-0318-ENG**)

21 **RL-0290-ENG** *Fábrica de Vidrios Los Andes C.A v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Decision on Annulment, 22 November 2019, para. 97. See also **AL-0036** *Amco Asia Corporation and others v. Republic of Indonesia (Amco I)*, ICSID Case No. ARB/81/1, Decision on Annulment, 16 May 1986, para. 23: "*The law applied by the Tribunal will be examined by the ad hoc Committee, not for the purpose of scrutinizing whether the Tribunal committed errors in the interpretation of the requirements of applicable law or in the ascertainment or evaluation of the relevant facts to which such law has been applied. Such scrutiny is properly the task of a court of appeals, which the ad hoc Committee is not*".

22 **AL-0076** *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, 5 September 2007, para. 97.

23 **RL-0289-ENG** *Daimler Financial Services A.G. v. Republic of Argentina*, ICSID Case No. ARB/05/1, Decision on Annulment, 7 January 2015, para. 186.

> *contribute to the integrity of the system and necessarily blur the line between an appeal and an annulment. That is all the more so since the Committee presumes that it is rare that arbitrators, who are appointed on the basis of their "high moral character and recognized competence in the fields of law", as requested in Article 14 of the ICSID Convention. would produce a misinterpretation or misapplication of the proper law which no reasonable person could accept in a tribunal of three* […]
>
> *The Committee agrees with the* Green Power *tribunal that 'the scope of review of an Ad hoc Committee under the ICSID Convention' does not encompass an interpretation of legal provisions in contradiction to the interpretation of the same legal provisions by the tribunal, to the extent that the issues remain open to different interpretations. Such an approach would invariably qualify as an appeal decision for which* ad hoc *committees have no authority*.[24]

22. This opinion was shared by the *ad hoc* committee in *OperaFund v. Kingdom of Spain*:

> [w]*ith respect to the principle that ad hoc committees are not courts of appeal, the Committee agrees with OperaFund and Schwab when they cite Professor Schreuer's commentaries to the ICSID Convention submitting that an implication of this principle is that an annulment proceeding is only "concerned with the legitimacy of the process of the decision, it is not concerned with its substantive correctness"*.[25]

## C. PARTICULAR ASPECTS OF THE RELEVANT GROUNDS

23. Norway sees no need to engage further in a detailed exposition of trite principles of law, but draws the *ad hoc* Committee's attention to the following principles in relation to manifest excesses of power and contradictory reasons.

### C.1 Manifest Excesses of Power

24. Any excess of power must be "*manifest*", in that it must be "*clear, plain, obvious or evident*".[26] Further:

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[24] **RL-0291-ENG** *Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic*, ICSID Case No. ARB/14/16), Decision on Annulment, 30 November 2022, paras. 199 and 246, citing **RL-0319-ENG** *Green Power K/S and SCE Solar Don Benito APS v. Kingdom of Spain*, SCC Case No. V2016/135, Award, 16 June 2022, para. 441.

[25] **RL-0287-ENG** *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Decision on Annulment, 2 March 2023, para. 73.

[26] **RL-0286-ENG** *(DS)2, S.A., Peter de Sutter and Kristof De Sutter v. Republic of Madagascar (II)*, ICSID Case No. ARB/17/18, Decision on the Annulment Application, 14 October 2022, para. 101.

> *The excess of power must be self-evident rather than the product of elaborate interpretations one way or the other. When the latter happens the excess of power is no longer manifest.*[27]

25. 'Manifest' is a "*strong and emphatic term referring to obviousness*".[28] When applied to the question of jurisdiction in particular, *ad hoc* committees have held that:

> *It is widely accepted that, when "reasonable minds" differ as to whether a tribunal has jurisdiction, the "manifest" requirement is not fulfilled, and the excess of powers of the tribunal, even if it exists, does not amount to a ground for annulment.*[29]

26. Further where, as in this case, the claim on jurisdiction is not that the Tribunal *exceeded its jurisdiction*, but manifestly exceeded its powers by *failing* to exercise jurisdiction, the Applicants must cross a further threshold, as set out by the *ad hoc* Committee in *Vivendi v Argentina*:

> *It is settled, and neither party disputes, that an ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have under the relevant agreement or treaty and the ICSID Convention, read together, but also if it fails to exercise a jurisdiction which it possesses under those instruments. One might qualify this by saying that it is only where the failure to exercise a jurisdiction is clearly capable of making a difference to the result that it can be considered a manifest excess of power.*[30] (emphasis added)

27. Where an applicant for annulment claims that the Tribunal has failed to exercise jurisdiction, but that decision is based on a factual finding of the Tribunal not open to review, it is clearly not open to the *ad hoc* Committee to reopen or look behind that factual finding,[31] but only to ask whether, notwithstanding that factual finding, there

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27 **AL-0028** *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Application for Annulment, 5 February 2002, para. 25; **AL-0041** *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment, 29 June 2005, para. 41.

28 **AL-0030** *Hussein Nauman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the Ad Hoc Committee on the Application for Annulment of Mr. Soufraki, 5 June 2007, para. 39.

29 **RL-0292-ENG** *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Decision on Annulment, 22 August 2018, para. 222.

30 **AL-0029** *Compañía de Aguas del Aconquija S.A. (formerly Aguas del Aconquija) and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 86. Footnote omitted.

31 **RL-0332-ENG** Sinclair A. *Article 52*. In: Schill SW, Malintoppi L, Reinisch A, Schreuer CH, Sinclair A, eds. *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Cambridge University Press; 2022:1217-1442, at §§199-202.

was a "*clear, plain, obvious or evident*" failure to exercise jurisdiction such that "*reasonable minds*" would not differ.

### C.2 Contradictory Reasons Amounting to a 'Failure to State Reasons'

28. *Ad hoc* committees have considered that two tests must cumulatively be satisfied before 'contradictory reasons' will be tantamount to 'a failure to state reasons' under ICSID Article 52.

28.1. *First*, the reasons must be genuinely contradictory such that, when read together, they "*cancel each other out*"[32] leading to "*no reasons at all*".[33] The reasons have to be "*appreciated in* [their] *particular context in the Award*".[34] Thus, the mere fact that there are "*certain ambiguities in language*" does not suffice.[35]

28.2. *Secondly*, the contradiction must be serious enough to vitiate the reasoning as a whole and, therefore, the contradictory reasons must have been necessary or "*essential*" for the Tribunal's decision.[36] Thus, "*a lack of reasons for an aspect that has no impact on the eventual outcome* […] *should not be a basis for annulling an award or part thereof*", consistently with the purpose of annulment proceedings.[37]

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32 **AL-0033** *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, para. 116.

33 **RL-0289-ENG** *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment, 7 January 2015, para. 77;

34 **AL-0039** *Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment, 9 March 2017, para. 177.

35 **AL-0033** *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, para. 123.

36 **RL-0289-ENG** *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment, 7 January 2015, para. 77; **AL-0039** *Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment, 9 March 2017, para. 119; **RL-0294-ENG** *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Annulment, 20 March 2024, para. 382.

37 **RL-0295-ENG** *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Decision on Annulment, 21 February 2023, para. 134.

29. This is an undoubtedly high threshold. It is only when the reasons given "*are so incoherent and/or contradictory that they cannot be followed and understood*" that a committee will be "*authorized to find* […] *a failure to state reasons*".[38] The *ad hoc* Committee is "*not empowered to assess the quality, correctness or comprehensiveness of the Tribunal's reasoning*".[39]

30. *Ad hoc* committees should be slow to find such a genuine contradiction in the Award, as noted by the *ad hoc* committee in *Vivendi*:

> *tribunals must often struggle to balance conflicting considerations, and an* ad hoc *committee should be careful not to discern contradiction when what is actually expressed in a tribunal's reasons could more truly be said to be but a reflection of such conflicting considerations.*[40]

31. An *ad hoc* committee must, further, construe awards "*whenever possible, in a way that results in consistency*".[41]

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38 **RL-0291-ENG** *Popular Bank Public Co. Ltd. v. Hellenic Republic*, ICSID Case No. ARB/14/16, Decision on Annulment, 28 November 2022, para. 405, citing **RL-0321-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. 114.

39 **RL-0294-ENG** *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Annulment, 20 March 2024, para. 383; **RL-0297-ENG** *RENERGY S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Decision on Annulment, 14 August 2024, para. 201.

40 **AL-0029** *Compañía de Aguas del Aconquija S.A. (formerly Aguas del Aconquija) and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 65.

41 **AL-0041** *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment, 29 June 2005, para. 81.

## CHAPTER 3: THE CONDUCT OF THE TRIBUNAL

### A. TIME SPENT ON THE DISPUTE

32. According to the Applicants,

> [b]*ased on the amount of time billed to ICSID by the members of the Tribunal, it is simply impossible that they properly considered the case record in advance of drafting the Award. The amount of time billed also raises serious questions as to whether the Tribunal could have drafted the Award itself.*[42]

33. Based on the Tribunal's costs set out in the Award,[43] the Applicants speculate[44] that "*the presiding arbitrator would have spent about 308 hours on the case and the party-appointed arbitrators would have spent about 260 hours and 175 hours each*" to decide the case.[45] From these speculative calculations, the Applicants compare what they assume to be the time allocated by the Tribunal members with the time billed in a few arbitrarily selected cases to conclude that the time spent by the Tribunal members is suspiciously low.[46] They infer that, given the time allegedly spent by the Tribunal members on the case, it was impossible for them properly to have adjudicated the case, and that the Tribunal manifestly "*failed to take into consideration all of the parties' pleadings and arguments*".[47]

34. It is not for Norway to explain or defend the way in which the Tribunal fulfilled its mandate, save to note that it is plain from the detailed reasoning in the text of the Award

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42 Memorial, para. 61.

43 Award, para. 618.

44 That speculation is apparent from footnote 65 of the Memorial: "*See Excel file 'Average time spent by the tribunal adjudicating a case in other ICSID proceedings if compared to the SIA North Star proceedings,' sheet 'Applicable rates,' **A-0146**, or exported PDF file of sheet 'Applicable rates,' **A-0147.** The rate in ICSID proceedings was USD 350/h until 1 July 2022, and thereafter was USD 500/h: see ICSID, 'Memorandum on the Fees and Expenses (2022),' 1 July 2022, **A 0148**. Applicants have taken the total amount of time and assumed that on a pro rata basis, the Tribunal's fees between the beginning of the case, in 2020, and July 2022, which represented 23 months the case lasted, were at USD 375/h, and that time between July 2022 and December 2023, which represented 17 months the case lasted, were at USD 500/h.*".

45 Memorial, para. 63.

46 Memorial, paras. 64-65

47 Memorial, para. 68.

that the Tribunal did indeed fulfil its mandate. Norway will instead make some general observations which are sufficient to dismiss the Applicants' speculative argument.

35. First, it is impossible to infer from the time spent by the Tribunal members on the case that the Tribunal did not properly adjudicate the dispute. If, as the Applicants claim, the Tribunal failed "*to take into consideration all of the parties' pleadings and arguments*" or parts of it necessary to deal with the case, it is for the Applicants to identify such failures and defects in the reasoning. This sort of serious allegation cannot be made *in abstracto* and in such a speculative way. Much is made of the allegations, but very little of any substance is actually presented by the Applicants: this allegation is, like much of the Memorial, an attempt to add weight to the annulment application with baseless speculation.

36. Secondly, in any event, Norway does not consider that the time spent by the Tribunal can be compared with other Tribunals on *different disputes*: they are apples and pears. The time spent by a Tribunal and the resulting cost of handling a case does not follow any specific formula. As repeatedly emphasised by numerous arbitral tribunals,[48] the costs inherent in an arbitration procedure are essentially subject to the complexity of the case. Similarly, the complexity of a case and the plausibility of the arguments advanced are not proportionate to the length of the submissions, written or oral. In the present case, the very experienced members of the Tribunal responded fully and seriously to the string of arguments and allegations of breaches of the BIT presented and re-presented by the Applicants.

[48] See e.g. **RL-0298-ENG** *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Award, 26 June 2019, para. 42; **RL-0299-ENG** *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic*, ICSID Case No. ARB/16/5, Award, 14 September 2020, para. 944; **RL-0300-ENG** *Montauk Metals Inc. (formerly known as Galway Gold Inc.) v. Republic of Colombia*, ICSID Case No. ARB/18/13, Award, 7 June 2024, para. 1010; **RL-0301-ENG** *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Award, 12 July 2024, para. 216; **RL-0302-ENG** *WM Mining Company, LLC v. Mongolia*, ICSID Case No. ARB/21/8, Award, 29 August 2024, para. 211.

37. Thirdly, the Tribunal both:

37.1. bifurcated the proceedings between the merits and quantum, considering that it was "*the most efficient way to conduct the proceedings*";[49] and

37.2. found at the jurisdictional stage that only two of the alleged investments fell within the relevant definition under the BIT and were thus protected Investments: Award paragraph 287.

38. Consequently, quantum (which the *ad hoc* Committee will no doubt appreciate is commonly a lengthy and cost-intensive part of the ICSID arbitration process), was left entirely untouched by the Tribunal, and several alleged investments did not fall within the protections of the BIT in any event. Those important points are clearly relevant to the overall costs of the proceedings.

39. Fourthly, even if the Applicants' arguments in the abstract were permissible or sound as a matter of principle, the time spent by the Tribunal does not depart from the usual standards of investment arbitration. In their Memorial, the Applicants have compared the time spent by the Tribunal members in resolving the dispute with the time spent by members of other arbitral tribunals, resolving other disputes under other treaties.[50] Leaving aside the rigor and relevance of such a comparison, as well as the small sample used as a basis for it,[51] it appears from the very table prepared by the Applicants that the time spent by the members of the Tribunal does not differ significantly from that spent by other arbitral tribunals.[52] More generally, no substantial difference exists between the cost of this arbitration – on which the Applicants base their inference

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49 **A-0063** Procedural Order No. 5 in the Arbitration, Decision on Respondent's Renewed Request for Bifurcation, 6 December 2021, para. 24. See also **A-0061** Procedural Order No. 3 in the Arbitration, Decision on Respondent's Request for Bifurcation, 1 June 2021, para. 16 the Tribunal stating that "*The Tribunal agrees with the Claimants that, in exercising its discretion, it should have regard to whether bifurcation would be likely to reduce the length and cost of the proceedings, whether a bifurcated first phase would be likely to dispose of all or a substantial part of the case and whether the issues in the proposed different stages are so intertwined as to be inseparable*".

50 Memorial, para. 65 and **A-0149** and **A-0150**.

51 The Applicants affirmed in footnote 66 of their Memorial that "*The data was collected viewing time frame from July 6, 2005, until December 24, 2024. Following the noted stationary variables and the available information, 20 cases fit within the defined framework. Due to the limited availability of precise data, underlined outcomes shall be perceived as estimations (not definite results) considering implied variabilities and potential margins of errors*."

52 **A-0149** Exported PDF file of sheet "Main data".

regarding the time spent by the Tribunal members to consider the Parties' submissions – and the cost of other investment arbitrations.[53] Certainly, there is no difference of a magnitude that would be necessary to draw the severe conclusions which the Applicants invite the *ad hoc* Committee to draw.

40. Finally, and in any event, it lies ill in the mouths of the Applicants to attempt to pass judgment on what a reasonable amount of time to have been spent on this dispute was. Their own costs claims demonstrated their tendency to inflate the complexity of the matter. Thus, when awarding Norway its costs of representation in the Award, the Tribunal found that "*the estimate of costs of legal representation submitted by the Claimants is significantly higher than the costs claimed for legal representation by the Respondent*", and that was apparently before considering the Applicants' counsel's "*success fee component*".[54]

41. In light of the above, the Applicants' request that "*the Committee* […] *consider contacting the members of the Tribunal to put Applicants' arguments on this question to them for their response*"[55] lacks any justification. The Applicants have not raised even a sufficient *prima facie* case that could engage the grounds in Article 52 on this issue. Moreover, it is not even clear how such a request would be compatible with the principle of confidentiality surrounding the Tribunal's deliberations. Rule 15 of the ICSID Arbitration Rules provides that:

> *(1) The deliberations of the Tribunal shall take place in private and remain secret.*
>
> *(2) Only members of the Tribunal shall take part in its deliberations. No other person shall be admitted unless the Tribunal decides otherwise.*

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53 **RL-0282-ENG** Matthew Hodgson, Yarik Kryvoi and Daniel Hrck*a, British Institute of International and Comparative Law, 2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration*, p. 13

54 Award, para. 623.

55 Memorial, para. 73.

## B. ALLEGED FAILURE TO NOTIFY A PROCEDURAL RULING

### B.1 There was no failure to notify

42. This ground is dealt with at length by the Applicants, at paragraphs 74-121 and 265-276 of their Memorial.

43. The Applicants' case is built upon the supposition that there was a further decision of 5 December 2023, in which the Tribunal refused to admit the Applicants offered exhibit C-0360 to the record, which neither the Applicants nor Norway received.

44. The relevant facts are addressed in the Parties' letters covering this subject, which the *ad hoc* Committee is invited to read.[56] On 16 October 2023, the Applicants wrote a letter to the Tribunal whose stated purpose was to "*inform the Tribunal of a recent Note Verbale*", but also included three additional exhibits which Applicants' designated C-0357, C-0358, and C-0359. The Tribunal's prior permission was necessary for the submission of further documents, but such permission had neither been sought nor obtained. The Applicants' sent the Tribunal a further letter dated 7 November 2023 requesting permission to submit those documents, C-0357, C-0358 and C-0359, and added an additional request for permission to submit yet another document, which the Applicants designated C-0360.

45. On 1 November 2023, the Tribunal sent a letter to the Parties responding to the Applicants' letter of 16 October 2023, in which it communicated the following message:

> *The Tribunal regrets that the above-mentioned exhibits were submitted so late in the proceeding, at a stage at which the Tribunal was finalizing its ruling.*

46. On 1 December 2023, the Applicants emailed the Tribunal to "*enquir*[e] *on the status of the ruling which the parties were expecting in November*".

47. Later that same day, the Tribunal responded as follows:

> *The Tribunal is mindful of the timing of its forthcoming ruling and aims to render it as soon as practicable. Due to the late-stage request to submit*

[56] **A-0106** Applicants' letter of 16 October 2023; **A-0108** Norway's letter of 23 October 2023; **A-0109** ICSID's letter of 1 November 2023; **A-0110** Applicants' letter of 7 November 2023; and **A-0111** Norway's letter of 15 November 2023.

> *additional documents, the Tribunal's intended dispatch in November had to be moved. The Tribunal intends to render its ruling in the next few weeks and certainly before Christmas.*

48. The key ruling by the Tribunal relating to this episode is in paragraph 70 of the Award, which reads as follows:

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

49. As such, the reference in paragraph 70 of the Award of the Tribunal having "*noted*" the matters stated in that paragraph is plainly a reference to the Tribunal's communications of 1 November 2023 and/or 1 December 2023.

50. Accordingly, Norway respectfully shares the *ad hoc* Committee's view that the decision was communicated in the Award. As the *ad hoc* Committee has already noted in its Procedural Order No. 3 at paragraph 79:

> *In relation to the decision of 5 December 2023 referenced in the Award, which the Applicants indicate was never notified to the Parties, the Committee notes that it is common practice for arbitral tribunals to defer communications regarding their decisions to the award, particularly if the matters to be decided have been introduced late in the proceeding, as was the case in the underlying arbitration. The Committee understands that paragraph 70 of the Award was intended to communicate a decision of the Tribunal that was made earlier that month. Although the Award could have been more artfully drafted in this respect, the Committee is satisfied that there is no further decision of the Tribunal to be unearthed.* (emphasis added)

51. There is, therefore, no ground for inferring that there is some further ruling that the Tribunal improperly failed to communicate to the Parties, and that is sufficient to dispose of this ground entirely. In what follows, Norway briefly summarises its case on the substantive grounds relied upon by the Applicants.

## B.2 The alleged 'missing' decision affords no grounds for annulment

52. The Applicants' arguments for annulment on this ground are wide-ranging but ultimately go nowhere.

53. First, none of the matters raised by the Applicants could have had any impact on the outcome of the Award at all.

53.1. The Applicants' real complaint is that the Tribunal decided not to admit to the record a document which they wished (contingently) to be admitted to the record as exhibit C-0360. This decision is not said to have been outside the range of procedural decisions which Tribunals are entitled to take. Nor, importantly, is the decision *not to admit* said to be an annullable error.

53.2. The proposed exhibit C-0360 was the final version of a draft note verbale which was admitted to the record (as C-0357) and which the Tribunal *did* consider.[57] The Applicants accept that the final version—which they have appended to their Memorial as a new exhibit without seeking the permission of the *ad hoc* Committee, contrary to Procedural Order No. 1 paragraph 15.4—was "*identical to the draft in all relevant respects*".[58]

53.3. The only relevance of the note verbale (both in draft and in its final form) to the substantive issues in this case was said by the Applicants to be that it "*further confirms that the EU and Latvia's position is that the Supreme Court judgment of 23 March 2023 amounts, itself, to a violation of international law*".[59] The Applicants said the note verbale supported thus their "*position on the merits that their investment has been destroyed through Norway's various actions*",[60] but that is, of course, a *non sequitur*.

53.4. The Applicants themselves admitted in their letter of 7 November 2023 that their proposed exhibit C-0360 "*does not necessarily add much to the case,*

57 Award, para, 600.

58 Memorial, para. 268.

59 **A-0110** The Applicants' letter of 7 November 2023.

60 *Ibid*.

*except that the EU position confirms how unusual are Norway's breaches of international law*".[61]

53.5. Norway had made no suggestion that the draft, which was in the record as C-0357, did not represent the views of the EU. The views of the EU, as presented by Applicants, were known to and considered by the Tribunal.[62]

53.6. Moreover, the views of the EU could not, in the circumstances, have affected the Tribunal's decision on the legality of Norway's actions. The Tribunal said of the draft as follows:

> *the Tribunal considers that it cannot attach any weight to this document. Even if it could, however, the draft Note does no more than reiterate that the EU takes a different view of the Svalbard Treaty from the Norwegian Government and the Supreme Court. For the reasons already given the Tribunal cannot rule on that difference. Neither the EU draft nor the article by Justice Skoghøy afford any support to the Claimants' argument that they suffered a denial of justice*.[63]

53.7. Thus, the Tribunal considered the draft and nevertheless decided that, even if the final version of the same document was on the record, there would have been no difference whatsoever to the reasoning of the Tribunal or the outcome of the case.

53.8. *A fortiori*, the 26 October 2023 note verbale concerning the March 2023 judgment of Norway's Supreme Court could not have affected the Tribunal's decision on the legality of the actions of Norway taken in and before January 2017, which Applicants maintained was the date of the last act of Norway's 'expropriation' of their investment.[64]

54. Moreover, nothing that the Tribunal said in the Award was inaccurate. The draft internal document "obtained" (in unexplained circumstances) by the Applicants, and admitted to the record as C-0357 had in fact <u>not</u> been sent to Norway when the

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61 *Ibid.*

62 **A-0003** Applicants' Memorial in the Arbitration and **A-0011** Applicants' Reply in the Arbitration, 28 February 2022, paras. 108-113.

63 Award, para. 600.

64 **A-0011** Applicants' Reply in the Arbitration, 28 February 2022, para 846.

Applicants applied for its admission on 16 October 2023. The Tribunal's description of the situation in the Award does not refer to events after the drafting of C-0357 (dated 2 October 2023) and is accurate.

55. Secondly, the Applicants claim that the failure to notify the alleged procedural ruling violated an alleged right or "*opportunity to react*"[65] or a right to "*debate and comment*" on a procedural ruling.[66] The Applicants themselves acknowledge that these alleged rights are "*never mentioned*" by *ad hoc* committees.[67] That is, of course, because there is no such right to "*react*" to a decision or to debate and comment on it. Tribunals are not obliged to submit their decisions or reasons to the parties so that they have an opportunity to argue about them.[68]

56. The Applicants undoubtedly have a right to be *heard*, to present arguments and to make their case before any decision is rendered. The Applicants were undoubtedly heard. Indeed, they were given significant latitude by the Tribunal to make their case on these documents:

56.1. The Applicants first, and in breach of the Tribunal's PO-1 of 12 October 2020, submitted documents after the filing of their Rejoinder on Jurisdiction in the Arbitration without permission from the Tribunal and without any determination by the Tribunal that the requisite "*special circumstances*" existed.

56.2. When this was pointed out by Norway,[69] the Tribunal *could* simply have put an end to the matter by reason of the Applicants' disregard for the procedural order. Instead, the Tribunal went out of its way to give the Applicants an opportunity to be heard, inviting them "*briefly to address both their case for the admission*

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65 Memorial, para. 93

66 Memorial, para. 107.

67 Memorial, para. 93.

68 See, *e.g.*, **AL-0048** *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Annulment, 12 February 2015, paras. 130-131.

69 **A-0108** Norway's letter of 23 October 2023.

*of the above-mentioned exhibits and the significance which it suggests attach to them*".[70]

56.3. The Applicants then made the application on 7 November 2023, which was accepted by the Tribunal in large part. Notably, in that application, the Applicants asked the Tribunal only to consider C-0360 and associated matters *if* the Tribunal "*is minded to rule that it has no jurisdiction and/or that there are no breaches of the BIT on the merits*".[71] That contingent 'request' – if it was a request – was irregular and improper.

56.4. Further and relatedly, the Applicants complain that they would have reacted to the supposed decision on C-0360 "*considering what appears to have happened*",[72] which Norway understands to be a reference to the fact that the Tribunal ruled in large part that there was no jurisdiction and, in any event, that there was no breach of the BIT. But, if the Applicants had been informed about the outcome of the request for the admission of C-0360 *before* the Award, there would *ex hypothesi* have been no Award and therefore no decision on whether the Tribunal had no jurisdiction or there were no breaches of the BIT.

57. The legal authorities referred to by the Applicants in this context relate to an alleged breach of the right to be heard, for example where the Tribunal solicited further information from *non-parties* without first asking the parties to make representations,[73] or asking them to make submissions where new evidence was received by the Tribunal.[74] None of those cases are relevant to the present facts, where the complaint is that the Tribunal *considered* the Applicants' submissions and *rejected them*, but did not inform the Applicant of that rejection for a short period of time.

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70 **A-0109** ICSID's letter of 1 November 2023.

71 **A-0110** Applicants' letter of 7 November 2023 ("*Response to Tribunal Letter of 1 November 2023 on EU Draft Note Verbale of 2 October 2023 and related documents Response to Tribunal Letter of 1 November 2023 on EU Draft Note Verbale of 2 October 2023 and related documents*"), p. 5. Emphasis omitted.

72 Memorial, para. 76.

73 See e.g. **AL-0069** *Fleetwood Wanderers Ltd (t/a Fleetwood Town Football Club) v AFC Fylde Ltd* [2018] EWHC 3318 (Comm).

74 See e.g. Memorial, para. 99.

58. Ultimately, the Applicants appear to recognise that the authorities all relate only to the right to be *heard*, and thus they submit, at paragraph 105 of their Memorial, that they "*had no opportunity to present their case regarding the EU's draft note verbale*". But that is demonstrably wrong, as set out in the short chronology above. The Applicants fully presented their case – including in breach of the Tribunal's Procedural Order No. 1 – and were given every opportunity to do so by the Tribunal. Their case simply did not persuade the Tribunal.

59. There was therefore no *engagement* of the right to be heard in this case, less still any "*serious departure*" from it.

## CHAPTER 4: COMPLAINTS REGARDING NORWAY'S CONDUCT

### A. ALLEGED CONFLICTS OF INTEREST

60. In Chapter IV, Part C of their Memorial, the Applicants accuse Norway of committing "*fundamentally improper behaviour*" by:

> *intentionally retaining, one after the other, outside counsel and experts with conflicts of interest, as well as by misleading the Tribunal as to the reasons asserted in its request to bifurcate damages, which rendered the proceedings fundamentally unequal between the parties and thus constituted a breach of fundamental rules of procedure.*[75]

61. These are very serious allegations of professional misconduct to which Norway strongly objects. These allegations are little more than an attempt to fabricate a case against Norway based on elements that were never part of the Applicants' claim, but are entirely consistent with the theme of dissatisfaction and disappointment that runs throughout the Applicants' case on annulment. The Applicants are searching with light and lantern after anything that could possibly be used to discredit Norway and the arbitration process.

62. In their Memorial, the Applicants spend no less than 14 pages[76] on what they describe as "*Norway's improper behaviour*". The "*improper behaviour*" consists of two elements: (a) intentionally hiring of external advisers with conflicts of interest (paragraphs 170-232), and (b) misleading the Tribunal with regard to bifurcation of the proceedings (paragraphs 233-241). With respect to the retention of external advisers with alleged conflict of interest, the Applicants allege that Norway's retention of the firms Glimstedt ZAB SIA, KPMG AS and Wikborg Rein Advokatfirma AS was fundamentally improper behaviour that should lead to annulment of the Award. With respect to the issue of bifurcation of the proceedings the Applicants contend that Norway's behaviour "*constituted a serious breach of fundamental rules of procedure which must lead to the annulment of the entire Award*".

63. Norway maintains as it always has done that there is nothing in these serious but entirely speculative allegations. It has addressed them several times and has now provided

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75 Memorial, para. 170.

76 Paras. 170-241.

disclosure to the Applicants on these issues. However, Norway is mindful of the *ad hoc* Committee's express encouragement in Procedural Order No. 3, paragraph 76:

> *The Committee strongly encourages the Respondent to provide as much factual detail as possible in its Counter-Memorial on all third-party engagements discussed in this Order.*

64. In what follows, therefore, Norway sets out in some detail the background to its engagement of external advisers.

### A.1 Norway's engagement of external advisers

65. When Norway first received the Notification of Dispute[77] in the underlying case in March 2019, it soon received several offers from international law firms specialising in representing parties to ICSID disputes. Norway chose to retain as its external counsel Professors Alain Pellet and Vaughan Lowe KC together with Mr Mubarak Waseem and Mr Ludovic Legrand, the latter of whom was replaced by Mr Ysam Soualhi. In addition, Norway chose to perform a substantial amount of work in-house, in the Legal Department of the Norwegian Ministry of Foreign Affairs (the "**Norwegian MFA**"). As shown in Norway's cost submission, the Norwegian MFA spent 5,490 workhours on the case from 2019 to 2022.[78]

66. At various times during the proceedings Norway had a need to engage additional advisers for specialised external assistance and background work. Norway relied on framework agreements it had in place with KPMG AS and Wikborg Rein Advokatfirma AS to purchase services from those two Norwegian firms, and worked with the Norwegian Embassy in Riga to identify the Latvian firm Glimstedt ZAB SIA, which advised Norway specifically on matters regarding Latvian law and assisted with practical matters in Latvia. Further details on the retention and the nature of services provided by the three firms in question is provided below.

67. Norway will first offer its observations on the hiring of external advisers in general, before offering a factual account of the circumstances surrounding its retention of each of the firms listed above.

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77 **A-0001** Notification of Dispute, 8 March 2019.

78 See **A-0023** Norway's cost submission, 2 December 2022, Annex 1.

## A.2 External advisers must be assumed to have conducted a due diligence review of possible conflicts of interest before accepting any assignment

68. The Norwegian Bar Association's Code of Conduct for Norwegian lawyers (which applies to Wikborg Rein), states the following about accepting assignments against a former client:

> *A lawyer must exercise caution before accepting an assignment against a former client.*
>
> *The lawyer must refrain from undertaking assignments against a former client if the lawyer's knowledge of the former client's circumstances could be used in a prejudicial manner to the advantage of the new client or could result in harming the interests of the former client.*[79]

69. Similar regulations and principles apply in other jurisdictions and for other professions e.g. accountants at KPMG.

70. Professional counsel and advisers must be presumed to have systems and procedures in place that enable and require them to conduct a due diligence review and conflicts checks before taking on a specific instruction. It is not the responsibility of the client to undertake those checks. When a large, well-reputed law or accounting firm has accepted an assignment for a client, the client must be able to presume that the firm has performed the necessary checks and found that there is no conflict of interest.

71. This is relevant because the Applicants' allegation is not that Norway engaged external advisers with conflicts of interest, but that Norway *intentionally* did so, with the express aim of securing for itself an unfair advantage in the Arbitration. See the Memorial at paragraph 176: "*Norway acted intentionally in a way to ensure that it would gain an improper advantage over Applicants, trying to access information on them from their former advisers*". According to the Applicants, this "*created a lack of equality between the parties in the proceedings that was so significant that the entire Award should be annulled*".

## A.3 Glimstedt ZAB SIA

72. Immediately after the Applicants submitted their Memorial in the Arbitration in March 2021, Norway started work on its Counter-Memorial. It soon became clear that there

[79] **RL-0320-ENG** The Norwegian Bar Association's Code of Conduct for Norwegian lawyers.

was a need for advice on Latvian law on matters such as fishing licences and business organisations in addition to a possible need for some practical assistance in Latvia such as searching in public registers and making inquiries of Latvian authorities, if needed. At the risk of stating the obvious, the Applicants are a Latvian national and Latvian company, who claimed (among other things): (a) to have Latvian-issued fishing licences; and (b) to have agreed a joint venture by 'handshake' in Latvia, but which was governed by Norwegian law, was subject to the jurisdiction of the Norwegian domestic courts, both of which gave rise to investments "*in the Territory of*" Norway.[80]

73. On 29 March 2021, the Norwegian MFA therefore wrote to request the Norwegian Embassy in Riga to recommend a well reputed, Latvian law firm "*uten forbindelser til motparten*" ("*without connections to the counterpart* [Applicants]") that could undertake an analysis of the alleged Joint Venture between Mr Pildegovics and Mr Levanidov under Latvian law.[81] Should the Committee wish, Norway would be happy to exhibit this email but has not done so yet, mindful of its obligations in Procedural Order No. 1.

74. The following day, the Embassy reported back that they had been in contact with Ms Agnese Medne, a partner in Glimstedt ZAB SIA. The Embassy informed the Norwegian MFA that Ms Medne "*har bekreftet at det ikke vil være noen 'conflict of interest'*" ("*has confirmed that there will be no 'conflict of interest'*").[82] As with the previous email, Norway would be happy to exhibit this email should the Committee wish to see it.

75. The Norwegian MFA reviewed Ms Medne's background and qualifications and considered her well qualified for the task. She had been a member of the Latvian Bar Association since 2006 and a partner in Glimstedt ZAB SIA since 2017. She specialised in litigation, including company and contract law and she had previous experience with

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80 **A-0003** Applicants' Memorial in the Arbitration, 11 March 2021, paras. 204, 209 and 501.

81 Email 29 March 2021 from the Norwegian MFA to the Norwegian Embassy in Riga. This is an internal email between the Norwegian MFA and the Embassy in Riga, and thus was not made available to the Applicants as part of the document production in March 2025.

82 Email 30 March 2021 from the Norwegian Embassy in Riga to the Norwegian MFA. This is an internal email between the Norwegian MFA and the Embassy in Riga, and thus was not made available to the Applicants as part of the document production in March 2025.

ICSID arbitrations. Ms Medne also had a good command of the Norwegian language (B2 level) enabling her to read documents in Norwegian.

76. The Norwegian MFA therefore decided to instruct Ms Medne, and she assisted Norway with answers to certain specific questions on Latvian law that Norway needed to clarify for its work on the Counter-Memorial in the Arbitration, and later its Rejoinder. The precise scope of Ms Medne's work is set out below, but it included obtaining from the Latvian authorities copies of a commercial fishing rights lease agreement that was relevant to the case.

77. When the Applicants learned that Ms Medne had enquired about their fishing licenses on behalf of Norway, they wrote to Norway on 21 June 2022 and made clear that they considered Ms Medne to be conflicted because the Lithuanian law firm Glimstedt Bernotas & Partners had, in 2017, sent a Notice of Dispute to Norway on behalf of North Star and the Lithuanian company UAB Arctic Fishing.[83]

78. In a response letter sent directly from Ms Medne to counsel for the Applicants on 23 June 2022, Ms Medne strongly rejected the allegations that she was conflicted in the case and pointed out that Glimstedt ZAB SIA in Latvia and Glimstedt Bernotas & Partners in Lithuania were "*two separate legal entities operating under the trade mark of Glimstedt*".[84]

79. Pausing there, that email was addressed *to the Applicants' counsel*. In it, Ms Medne expressly rejected the suggestion that she was conflicted. Moreover, Norway has already explained to the Applicants in some detail the precise nature of the services requested from Ms Medne. Thus, the 24 June 2022 letter from Norway to counsel for the Applicants stated that Ms Medne

> *has at the request of Norway provided advice on Latvian law and translations of Latvian legislation, including on contract, company and bankruptcy law, and information from public records on* inter alia *registered mortgages on vessels and the legal protection proceedings that were initiated by SIA North Star. As referred to in your letter, she has also on Norway's behalf requested a copy of a commercial fishing rights lease agreement from the Latvian Ministry of Agriculture. At no time has she provided any confidential or*

83 **A-0078** Letter of 21 June 2022 from the Applicants to Norway.

84 **R-0467-ENG** Letter of 23 June 2022 from Ms Agnese Medne to Mr Pierre-Olivier Savoie.

> *privileged* [*i.e.*, confidential or privileged to the Applicants] *information of any kind*.

Although the Applicants mention this letter in their Memorial, they omit this important paragraph.

80. The Applicants nevertheless persist in their allegations of fraud and misconduct, and that Norway has intentionally sought to obtain information which is privileged or confidential to the Applicants. Their case must therefore be both that Norway *and* Ms Medne were 'in on' and parties to the so-called 'fraud' perpetrated against the Applicants; there would otherwise have been no reason for Ms Medne not to have immediately ceased acting herself and, upon realising that she had been used by Norway to obtain such information, to have returned it to the Applicants.

81. In fact, the obvious reality is that there is no grand conspiracy. Norway's position was, and continues to be, that it did nothing wrong by instructing Glimstedt ZAB SIA and Ms Agnese Medne, who confirmed the absence of conflicts both before and after the issue was raised by the Applicants. However, as a courtesy to the Applicants' strong concern about possible conflict of interest and as a gesture to reassure the Applicants that Norway was in no way seeking to achieve an improper advantage in the proceedings, Norway decided to refrain from further engagement of Glimstedt ZAB SIA for the rest of the proceedings. This was communicated in a letter from Norway to the counsel for the Applicants on 24 June 2022.[85]

82. It is correct, as alluded to by the Applicants, that Norway on 27 February 2017 received a letter dated the same day, titled "*Notice of the* [sic] *Dispute*" from Glimstedt, Bernotas & Partners, Lithuania. The six-page letter cited UAB Arctic Fishing and SIA North Star as claimants in the dispute and offered a very brief outline of the alleged facts of the case. According to the letter's cover email, the respective exhibits indicated in the notice were supposed to be sent promptly in a separate email.

83. The exhibits were never received. On 21 April 2017 Norway responded to Glimstedt, Bernotas & Partners, Lithuania, that in Norway's view, the claimants had not substantiated that they had an investment in Norway and the exhibits referred to in the

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85 **A-0086** Letter of 24 June 2022 from Norway to Mr Pierre-Olivier Savoie.

letter and cover email had never been received. On that basis Norway concluded and gave notice that it did not consider the 27 February 2017 letter from Glimstedt, Bernotas & Partners to be a Notice of Dispute under any of the bilateral investment treaties referred to in the 27 February 2017 letter. After Norway's reply, nothing more was heard about the matter. The 2017 'case' obviously never got out of the starting blocks. To Norway's knowledge, all that was ever done in the case by the Lithuanian law firm was to write and send a six-page letter to Norway with a rudimentary description of an alleged claim against Norway which was not pursued.

84. The Applicants focus their attention on how the various legal arms of the 'Glimstedt' enterprise outwardly describe themselves. That is irrelevant, because the allegation made by the Applicants is that Norway *intentionally* hired Glimstedt *despite* an actual conflict of interest in order to gain an upper hand in bad faith. Clearly, Norway did not. Ms Agnese Medne of Glimstedt ZAB SIA confirmed that there was no conflict of interest and was accordingly instructed.

85. The simple truth is that when the current case materialised several years later, Norway relied, as it was entitled to, on Ms Medne's confirmation that she was not conflicted. To suggest that Norway hired Ms Medne and Glimstedt ZAB SIA in Latvia because it thought she could and would provide Norway with confidential information from Glimstedt, Bernotas & Partners in Lithuania, that could be used in this case, based on the fact that the latter company wrote a single letter from one of the Applicants to Norway four years earlier, is simply absurd.

### A.4 KPMG AS

86. As the Arbitration developed, Norway sought information on the financial circumstances of the Applicants which even to the untrained eye appeared to be strained. In a meeting between Norway and the Applicants in Paris in July 2019, the Applicants were accompanied by a prospective third-party funder. However, in later correspondence the Applicants set out to Norway that no third-party funder was involved and that the Applicants were financing the Arbitration with their own resources.

87. This case was (and is) defended by Norway at the expense of Norwegian taxpayers. It was therefore a legitimate part of Norway's defence of the Arbitration to seek further

insight into the Applicants' financial situation. It was also important to verify whether the Applicants were in fact the real investors, or if the real investor was a person or entity not entitled to protection under the Norway-Latvia BIT.

88. To that end, and to get a better understanding of the financial aspects of the case and the relationship between the different actors, Norway decided it needed to retain a firm with competence in finance and accounting. Such investigations are legitimate and standard practice in investment arbitrations: see the *ad hoc* Committee's Procedural Order No. 3 paragraph. 77.

89. Since at least 2015, the Norwegian MFA has had a succession of framework agreements with KPMG AS that allow the Ministry to purchase services through a simplified procedure without going through a tender process for each agreement. This is done through a purchase order ("*avropsavtale*") by which the desired services are acquired on terms provided by the Framework Agreement. To the extent the Norwegian MFA has a framework agreement that covers the desired service, the use of a purchase order under an applicable framework agreement is the preferred form of acquiring the desired service, including because firms that have entered into framework agreements have already passed relevant public procurement controls.

90. In November 2020, the Norwegian MFA contacted KPMG AS and enquired about services under the then-current Framework Agreement.

91. In the purchase order it was agreed that KPMG AS would perform a limited financial analysis of a number of persons and entities involved in the case and the connections between them based on open sources as well as a mapping of disputes or investigations involving any of the companies based on open sources. The cost of the KPMG report was NOK 148,000 (approximately €13,700 at the time) and the report was to be produced within one month. The scope of the work to be performed by KPMG is detailed in the purchase order, which Norway produced to the Applicants in March this year in accordance with the *ad hoc* Committee's Procedural Order No. 3.

92. KPMG AS delivered its final report in January 2021, two months before the Applicants submitted their Memorial in the Arbitration. They did not perform any further work for Norway in the case.

93. When Norway submitted its statement of costs on 2 December 2022 the invoice for the KPMG report was included. This prompted counsel for the Applicants to write to the Tribunal, Norway and KPMG on 13 December 2022, alleging that KPMG was acting in conflict of interest.[86]

94. The Applicants' allegations of conflict of interest were based on two facts: (1) that KPMG AS in the period 2009-2014 acted as auditor for Seagourmet Norway AS, the company that took delivery of much of North Star's snow crab catches; and (2) that KPMG Eastern and Central Europe in 2018 prepared a preliminary damages assessment for the Applicants. Neither of these facts are disputed by Norway. For the sake of clarity and completeness and having in mind the Tribunal's observations in its Procedural Order No. 9,[87] Norway offers the following factual explanation on both counts. Again, the relevant question is whether Norway *intentionally* retained KPMG AS in order to secure for itself an unfair advantage in the Arbitration.

95. As to the first fact, Seagourmet Norway AS is not a Party to the dispute. Its finances were never a contentious issue in the proceedings. As set out above, KPMG AS delivered its report to Norway well before the Applicants submitted their Memorial in the Arbitration. The purpose of the report was to conduct an initial mapping of the finances and relations between central actors of the case based on open sources. The natural go-to enterprise for this task was KPMG, both due to their expertise and (crucially) the fact that the Norwegian MFA had a Framework Agreement with that company that covered this sort of work. The Tribunal in Procedural Order No. 9 found that KPMG was not conflicted because of its previous role as auditor for Seagourmet Norway AS.

96. As to the second fact, in their 13 December 2022 letters to Norway and the Tribunal[88] the Applicants informed Norway and the Tribunal that KPMG Eastern and Central Europe performed a preliminary damages assessment for North Star in relation to the

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86 **A-0098** Applicants' letter of 13 December 2022 to the Tribunal; **A-0099** Applicants' letter of 13 December 2022 on KPMG Conflict of Interest.

87 **A-0067** Procedural Order No. 9 in the Arbitration, Application Regarding Alleged Conflict of Interests, 23 February 2023.

88 **A-0098** Applicants' letter of 13 December 2022 to the Tribunal; **A-0099** Applicants' letter of 13 December 2022 on KPMG Conflict of Interest.

current dispute under the supervision of its then-partner Michael Peer in 2018. Instead of filing that assessment in the arbitration, the Applicants chose to rely on a damages report prepared by Versant Partners LLC and submitted with the Applicants' Memorial in the Arbitration. For reasons known only to the Applicants, the KPMG report was never referred to or used in the proceedings. Its existence was only made known to Norway in December 2022, which was well after KPMG AS had completed its work for Norway. Before that, Norway had no knowledge of it.

97. Norway notes that the Tribunal in Procedural Order No. 9[89] found that KPMG AS was conflicted and prevented from performing any future work for Norway in this case due to KPMG Central and Eastern Europe's previous work on a preliminary damages report for the Applicants.

98. Norway of course accepts the decision of the Tribunal, but takes no position as to whether KPMG AS should or should not have accepted the assignment from Norway or whether KPMG AS had insufficient internal procedures in place to discover and address possible conflicts of interest.

99. The facts of importance from Norway's perspective, given the allegations that are made against it, are as follows:

    99.1. First, Norway had no knowledge whatsoever that KPMG Eastern and Central Europe had previously been engaged by the Applicants. As such, it could not have acted improperly, or with any intention to acquire confidential or privileged information belonging to the Applicants, by its engagement of KPMG AS.

    99.2. Secondly, in the absence of any actual knowledge by the client of a conflict: (1) it is the primary responsibility of the service provider, not the client, to discover and address any possible conflicts of interest on the side of the service provider; but, in any event, (2) Norway itself was not in a position to assess whether KPMG AS was conflicted, given that it had no knowledge of KPMG Eastern and Central Europe's previous engagement with the Applicants.

89 **A-0067** Procedural Order No. 9 in the Arbitration, Application Regarding Alleged Conflict of Interests, 23 February 2023.

100. In light of the above, Norway considers that the Applicants' allegation that "*Norway acted intentionally in a way to ensure that it would gain an improper advantage over Applicants, trying to access information on them from their former advisers*"[90] is demonstrably wrong.

### A.5 Wikborg Rein Advokatfirma AS

101. The Applicants submitted their Memorial in the Arbitration, including an expert report on quantum in March 2021. As Norway's analysis of those documents progressed it became clear that there were certain issues that ought to be explored in greater detail in the background.

102. As with KPMG AS, the Norwegian MFA has since 2014 had successive framework agreements with the Norwegian law firm Wikborg Rein Advokatfirma AS ("**Wikborg Rein**"). Such framework agreements are subject to tender between interested law firms every four years. The Framework Agreement relevant to this case was entered into by the Norwegian MFA and Wikborg Rein in 2019.

103. The Norwegian MFA contacted Wikborg Rein in early May 2021 to enquire about their availability to perform a more comprehensive assessment of specific financial questions that were relevant to the proceeding.

104. Wikborg Rein confirmed that they had the necessary capacity and expertise to assist, and a purchase order was issued on 27 May 2021. The main tasks for Wikborg Rein according to the purchase order were (1) to assist with an analysis of the flow of funds between the various companies linked to North Star and the beneficial ownership structures of such companies; and (2) to conduct an assessment of the Applicants' damages claim. In separate correspondence with Wikborg Rein the possibility was discussed of Wikborg Rein contributing to a separate damages report for Norway, if such a report should be needed at a later stage, but such contributions were not part of the purchase order.

105. In accordance with the *ad hoc* Committee's Procedural Order No. 3, Norway made the purchase order with description of the work ordered available to the Applicants as part

90 Memorial, para. 176.

of the document production in March 2025 and can exhibit it, if the Committee so desires.

106. As an aside, in July 2021, the Norwegian MFA requested Wikborg Rein to obtain price estimates from four investigative firms in order to explore in greater detail some of the findings made by Wikborg Rein. Kroll was instructed, and prepared a report in September 2021. Kroll was discussed (albeit briefly) in the *ad hoc* Committee's Procedural Order No. 3, and Norway is mindful of the *ad hoc* Committee's instruction to provide as much factual detail on "*all third-party engagements discussed*" in that Order. However, the Applicants have not alleged any conflict of interest with respect to Kroll.

107. Later in the proceedings, Wikborg Rein also contributed with certain limited further input:

107.1. First, Wikborg Rein conducted an independent analysis of certain aspects of Norwegian domestic law *e.g.* the law on joint ventures; and

107.2. Secondly, Wikborg Rein's office in Oslo together with their London office assisted with the administrative tasks of copying and the preparation of digital material during the oral hearings in London in October 2022. This was the last substantive work that Norway requested of Wikborg Rein in this matter.

108. When Norway submitted its statement of costs on 2 December 2022, the statement included several invoices from Wikborg Rein. This prompted the counsel for the Applicants to write to the Tribunal and Norway on 13 December 2022, alleging a conflict of interest, and arguing that Norway should not have instructed Wikborg Rein.

109. The basis for the Applicants' critique was that a former Wikborg Rein partner, who left the firm in 2017, and rejoined it in 2022, represented the Lithuanian company UAB Arctic Fishing in a Norwegian court proceeding concerning fines issued to that company for illegal snow crab harvesting on the Norwegian continental shelf in 2017. The Applicants submitted in their 13 December 2022 letter that as counsel for UAB Arctic Fishing, "*Wikborg Rein obtained confidential information from Arctic Fishing*" and "*may well have obtained information about Peteris Pildegovics, SIA North Star and related persons and businesses.*" These allegations are entirely baseless.

110. First, as far as Norway is aware, Wikborg Rein has never acted for the Applicants, and there are no indications that Wikborg Rein had any confidential or privileged information belonging to the Applicants.

111. Secondly, the allegation proceeds on the assumption that the Applicants and UAB Arctic Fishing are "*related persons and businesses*" with one another. But it is not clear on what basis this allegation is advanced. So far as Norway understands the position, the links are as follows: North Star and UAB Arctic Fishing apparently were being represented by the same Lithuanian law firm in 2017, they later came to be represented by Savoie Laporte (now Savoie Arbitration) in separate arbitration proceedings, and finally they were both involved in illegal snow crab harvesting on the Norwegian continental shelf. There are a number of references to the criminal case against UAB Arctic Fishing in the Applicants' Memorial in the Arbitration, but only as factual references.

112. Thirdly, insofar as the relevant partner is concerned, Mr Oddbjørn Slinning left Wikborg Rein in February 2017. At his new firm, SANDS, he represented UAB Arctic Fishing in its criminal case. It appears that Mr Oddbjørn Slinning did not return to Wikborg Rein until 2022, well after Norway instructed Wikborg Rein. There is therefore no basis to allege that Norway instructed Wikborg Rein *in 2021* in order to elicit this information.

113. Norway was not aware of any alleged conflict of interest related to Wikborg Rein until the Applicants' letters of 13 December 2022.[91]

114. Leaving all that to one side, it can be supposed that, if there had been such a conflict, an international firm like Wikborg Rein would immediately have flagged the potential issue. But they did not. It is certainly not the case that Norway was *aware of* the potential conflict and then intentionally exploited it in order to gain information about UAB Arctic Fishing, let alone about the Applicants.

115. In their Memorial, the Applicants speculate: "*Considering the types of arguments Norway has brought in the arbitration, notably in respect of Mr Levanidov, his role,*

[91] **A-0097** Applicants' letter of 13 December 2022 on Wikborg Rein, **A-0098** Applicants' letter of 13 December 2022 to the Tribunal, **A-0099** Applicants' letter 13 December 2022 on KPMG.

*and whether Mr Pildegovics was a real investor, it seems highly likely that there were some sort of water cooler conversations at Wikborg Rein between the lawyers who worked on the Arctic Fishing case and those who have represented Norway in the ICSID arbitration subject to these annulment proceedings*".[92] Norway does not know why the role of Mr Levanidov appears to be such a sensitive issue in these proceedings; but the Applicants appear to underestimate the perspicacity of experienced lawyers and the obviousness of the defects in the Applicants' case.

116. The Tribunal has already dealt with these allegations, in its Procedural Order No. 9. The Memorial does no more than re-hash them. The Tribunal stated, after reviewing the evidence, that:

> *the Tribunal is not satisfied that the Claimants have made out a case sufficient to justify a decision to exclude Wikborg Rein from the case. UAB Arctic Fishing is not associated with either Mr Pildegovics or North Star in the sense of being a "related person or business". The fact that the prosecution of UAB Arctic Fishing is in some way connected with Baatsfjord and that the company is a client of another of Mr Pildegovics's companies does not appear sufficient to warrant the conclusion that Wikborg Rein's lawyers who acted in the proceedings are likely to have obtained confidential information about Mr Pildegovics or North Star*.[93]

117. Given the above, there is no real need for Norway to engage in counter-speculation. The Applicants' 'water cooler conspiracy' thesis is in any event beside the point. The case against Norway is that Norway sought both *intentionally* and *improperly* to obtain confidential or privileged information relating to the Applicants and hired Wikborg Rein to that end. The Applicants are unable to show that Norway "*intentionally*" retained Wikborg Rein in order to gain an upper hand in the arbitration. That is the end of the matter.

### A.6 Conclusions

118. The simple truth is that Norway instructed Glimstedt ZAB SIA in Latvia only after having received reassurances from the company that they were not conflicted. Norway instructed KPMG AS and Wikborg Rein because the Norwegian MFA had framework agreements with these companies, and the use of purchase orders under an applicable

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92 Memorial, para. 226.

93 **A-0067** Procedural Order No. 9 in the Arbitration, Application Regarding Alleged Conflict of Interests, 23 February 2023, para. 23.

framework agreement is the Ministry's recommended method for acquisition of services in the fields where a framework agreement exists. Neither firm flagged any conflict of interest concerns when instructed by Norway. Norway never received, and importantly never sought, any confidential or privileged information about the Applicants or any other person featuring in this case, or any other undue advantage through the engagement of any of these firms. The equality of the Parties was in no way affected by any of these engagements.

119. Despite their strong language and serious allegations against Norway, the Applicants fail to offer a single example from Norway's hundreds of pages of written pleadings, thousands of pages of disclosure, or hours of submissions on the transcripts from the oral hearings that could possibly underpin their insinuation that Norway has had access to any such information. Similarly, nowhere in the Award is there even a hint that the Tribunal's decision was based on any privileged material, and the Applicants have not even attempted to point to any such examples.

## B. NORWAY'S ALLEGED BREACH OF THE TRIBUNAL'S DIRECTIONS AND MISLEADING OF THE TRIBUNAL TO GAIN BIFURCATION OF DAMAGES

120. At paragraphs 233-241 of their Memorial, the Applicants allege that Norway breached the Tribunal's procedural orders (**B.1**), and "*lied to the Tribunal*" in order to "*gain bifurcation of damages*" (**B.2**). Both of those allegations are wrong, as set out below.

### B.1 Alleged breach of procedural orders

121. The following background is relevant:

121.1. The Applicants first requested (before the submission of their Memorial in the Arbitration) that the Tribunal order a separate jurisdiction phase. This was rejected by the Tribunal in its Decision on Bifurcation and Other Procedural Matters of 12 October 2020.[94]

[94] **A-0133** *Peteris Pildegovics and SIA North Star v. Kingdom of Norway*, ICSID Case No. ARB/20/11, Decision on Bifurcation and Other Procedural Matters, 12 October 2020.

121.2. Following receipt of the Applicants' Memorial in the Arbitration, but before submitting its Counter-Memorial, Norway applied to bifurcate the proceedings as between jurisdiction and merits on the one hand, and quantum on the other.[95]

121.3. In its Procedural Order No. 3, the Tribunal rejected this application.[96] In so doing, the Tribunal held that it would be "*prepared to consider a fresh request from either Party once it has seen the Counter-Memorial*".[97]

122. In Chapter 7 and elsewhere in its Counter-Memorial in the Arbitration[98], Norway explained in detail why it was not at that stage able sensibly to respond on quantum, because of uncertainties regarding the scope of the identity of the investment and other matters. It asked the Tribunal to bifurcate proceedings. In the Applicants' 10 November 2021 letter, the Applicants objected to that course and argued, without evidence, "[i]*t can only be assumed that Norway has long ago retained an expert to review quantum matters, whose work must already be well-advanced*".[99]

123. In its responsive letter, Norway set out that: "*Norway is not reserving its position on quantum, as alleged by the* [Applicants]*. Norway's position is not that no compensation is due to the* [Applicants]".[100] The letter continued as follows:

> *The* [Applicants] *suggest that Norway is holding back a detailed expert report or response on quantum. It is not. Norway has not instructed any expert on quantum to prepare an alternative assessment of damages, and it has at present no intention of doing so.*

124. The Tribunal acceded to Norway's request in its Procedural Order No. 5, and held as follows:

> *The Tribunal does not consider that Norway has acted improperly in the way that it has approached the question of quantum in the Counter-Memorial. A respondent is not obliged to submit evidence or an expert report if it does not wish to do so. Save in a few cases where pertinent information is available only*

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95 **R-0472-ENG** Norway's Request for Bifurcation, 8 April 2021.

96 **A-0061** Procedural Order No. 3 in the Arbitration, Decision on Respondent's Request for Bifurcation, 1 June 2021.

97 *Id*., para. 20.

98 See paras. 13, 478, 537-538, 651-652 and 865-892.

99 **A-0075** Applicants' letter to Norway of 10 November 2021, p. 4.

100 **A-0076** Norway's letter of 24 November 2021, p. 2.

> *to a respondent, it is for the claimant to prove its case, including its case on the amount of damages to which it is entitled. A respondent is free to challenge the claimant's case through argument and cross-examination*[101] (emphasis added).

125. As such, it is demonstrably wrong (and inappropriate) for the Applicants now to argue (as they do in paragraphs 235, 238-239 of their Memorial) that Norway acted in breach of the Tribunal's directions. The Applicants say:

> *235.* […] *despite the Tribunal's instructions to submit the entire case on the merits (which would include quantum)* […] [Norway] *only provided a short section on damages and without submitting an expert report*.
>
> *238. Norway thus intentionally flaunted* [sic: flouted] *the Tribunal's procedural directions to make a full submission on the merits on 29 October 2021* […]
>
> *239. Norway's misrepresentations and failure to respect the Tribunal's Procedural Order No. 4, establishing a procedural schedule, led to a fundamental inequality of the Parties in presenting their case*.

126. In fact, as the Tribunal found, Norway had <u>not</u> acted improperly or failed to respect the Tribunal's procedural directions. Norway did not instruct a quantum expert, and elected not to serve any quantum evidence. It was entitled to do that, as the Tribunal found. The Applicants' case that Norway breached any procedural directions, let alone in a manner which engages Article 52 of the Convention, goes nowhere.

### B.2 Misleading the Tribunal

127. The remainder of the Applicants' complaint under this heading is that Norway lied to the Tribunal.

128. In order credibly to advance such a serious allegation against Norway, the Applicants should have set out precisely *how* Norway is said to have misled the Tribunal. The Applicants have failed to do this. Instead, the allegation appears to be that Norway lied to the Tribunal when it alleged in its Counter-Memorial in the Arbitration that it was unable sensibly to deal with the Applicants' disparate quantum claim. The only

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101 **A-0063** Procedural Order No. 5 in the Arbitration, Decision on Respondent's Request to Address Quantum in a Separate Phase of the Proceeding, 6 December 2021, para. 16.

paragraph that the Applicants refer to is paragraph 874 of Norway's Counter-Memorial in the Arbitration, which said as follows:

> *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.*

129. The Applicants have not said *what* in the above paragraph was a lie or otherwise misleading. Norway's submission was not misleading. In any event, given that the Tribunal decided that it was open to Norway not to submit any evidence on quantum "*if it* [did] *not wish to do so*",[102] it is not clear how it is said that the above could possibly have misled the Tribunal.

130. The Applicants also say that Norway was "*working on a damages report in July 2022* [sic: 2021]".[103] But that is wrong. The only evidence the Applicants present is Norway's costs submissions, which show an entry for Mr Haga for "*report on quantum*".

131. Norway is grateful for the *ad hoc* Committee's permission to append and refer to this document without wider waiver of privilege. As can plainly be seen, it is <u>not</u> an expert report on quantum. It is, rather, an analysis by Norway's then background lawyers, Wikborg Rein, of the Applicants' quantum case as presented in their Memorial in the Arbitration.

132. As set out in paragraphs 1.1 and 1.4 of that document:

> *1.1 The Norwegian Ministry of Foreign Affairs ("MFA") has asked us to conduct <u>an analysis of quantum of the Claimant's alleged claim for damages in the Case</u>, including relevant calculations, assumptions and assertions on which the claim relies.* […]
>
> *1.4 Following the above described exchange with the MFA and the London Team, <u>we understand that the MFA's strategy is to request a bifurcation of the proceedings in the Case, with quantum to be deferred to a later stage</u>. The main argument for bifurcation is that there are gaps in the Claimants' evidence on quantum, also with a bearing on jurisdiction, that render a detailed discussion of quantum premature before the Claimants have further explained and documented their position in the context of the document production procedure scheduled between 12 November 2021 to 14 January 2022, and/or in*

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102 **A-0063** Procedural Order No. 5 in the Arbitration, Decision on Respondent's Request to Address Quantum in a Separate Phase of the Proceeding, 6 December 2021, para. 16.

103 Memorial, para. 236.

> *Claimants' Reply and Counter-Memorial, scheduled for 28 February 2022. Based on the timetable attached to Procedural order No. 4 in the Case, we also understand that Norway effectively will have at least 122 days (from 28 February to 30 June 2022) to prepare a detailed response on quantum. We agree with the MFA's strategy. Consequently, this memo focuses on the gaps in the Claimants' evidence and on arguments which support a bifurcation.*[104] (emphasis added)

133. The remainder of the report demonstrates amply that it was *not* a report on quantum, or a draft thereof, but a document analysing the Applicants' case on quantum. For example, section 3 of the report analyses "*Gaps in the* [Applicants'] *Evidence Relevant for Bifurcation*".

134. Stepping back, the Applicants' case on this point is a hopeless attempt to cast doubt on the way that Norway ran the arbitration. The allegation that Norway breached the Tribunal's directions is contradicted by the Tribunal's own rulings, and the Applicants' only other argument, a serious allegation based entirely on circumstantial evidence, is demonstrably incorrect.

135. The reality is that it was obvious from the outset that Applicants' case might fail in whole or in part. Norway considered that it was very likely to fail, and based its strategy on that assessment. In the event, the Applicants' case failed entirely. Norway sought bifurcation in order to avoid the cost and inefficiency of preparing a detailed report, valuing the losses allegedly caused by Norway's so-called unlawful actions, before the Tribunal had identified the actions from which, and the dates from which, any responsibility of Norway might arise or the identity of the 'investment' that was said to have been damaged. There is nothing wrong, or misleading, with that course of action.

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104 **R-0466-ENG** *ICSID Case No. ARB/20/11 Peteris Pildegovics and SIA North Star ("Claimants") vs Kingdom of Norway (the "Case"), First Analysis of Quantum*, report by Wikborg Rein/Ola Ø. Nisja, 16 July 2021.

## CHAPTER 5: THE APPLICANTS' ATTEMPTED APPEAL AGAINST THE TRIBUNAL'S DECISION

136. It is obvious that the Award cannot be under appeal. There is no right of appeal under the ICSID Convention, as Article 53(1) makes clear: "*The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention*". See also the authorities cited by Norway in Chapter 2, above.

### A. THE 'MONETARY GOLD' PRINCIPLE

137. In their Memorial, the Applicants challenge the Tribunal's treatment of the *Monetary Gold* principle. They allege that:

> *The Tribunal's application of the so-called Monetary Gold principle has caused a denial of justice to Applicants because its application constituted: a) a manifest excess of power; b) breached fundamental rules of procedure; and c) was done in a manner that fails to state reasons (or provides contradictory reasons).*[105]

138. According to the Applicants, both the general "[misapplication of] *the so-called Monetary Gold rule*"[106] by the Tribunal and "[t]*he specific applications of Monetary Gold in respect of the Svalbard Treaty, the acts of the Russian Federation and the rights and obligations of Latvia and the EU*" justify the annulment of the Award rendered by the Tribunal. Norway submits that, contrary to these claims, the general application of the *Monetary Gold* principle was correct (**A.1**). Further, the specific applications of the principle by the Tribunal are unimpeachable. But, in any event, even assuming the Tribunal had misapplied the principle to the case before it (*quod non*), this would not justify the annulment of the Award, either in whole or in part (**A.2**).

#### A.1 The Tribunal's interpretation and application of the *Monetary Gold* principle

139. According to the *Monetary Gold* principle, a court or tribunal may not adjudicate upon a claimant's case if, in so doing, it needs to decide on the rights and obligations of third

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105 Memorial, para. 130.

106 Memorial, para. 135.

parties which would form the very subject matter of the decision. This was made clear by the ICJ in the case of the *Monetary Gold Removed from Rome in 1943*:

> *Where, as in the present case, the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it.*[107]

140. In the *East Timor* case, the ICJ reiterated that

> *Whatever 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.*[108]

141. The same principle has also been applied by other tribunals including ITLOS, which 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.*[109]

142. The Applicants assert that

> *this principle cannot apply in ICSID proceedings, notably because absent states (that are not the proper respondent under an investment treaty) actually cannot consent to an ICSID tribunal in a BIT/investment treaty case to rule on their 'international responsibility' since doing such a thing would be manifestly outside the competence of an ICSID/BIT tribunal.* […] *As such, applying the so-called Monetary Gold principle in an ICSID/BIT case results in a denial of justice because it is a refusal to exercise jurisdiction that otherwise exists, which is improper and must lead to the annulment of the relevant ICSID award.*[110]

143. This argument was, of course, run by the Applicants before the Tribunal. In their Reply in the Arbitration, they argued that

> [I]*nvestors have their own rights, protected under international law, and legal venues are available to them to vindicate those rights and to obtain redress for*

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107 **AL-0090** *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, p. 33**.**

108 **RL-0322-ENG** *East Timor (Portugal* v. *Australia)*, Judgment, 30 June 1995, para. 29.

109 **RL-0304-ENG** ITLOS, 4 November 2016, *The M/V "NORSTAR" (Panama v. Italia)*, Preliminary objections, Judgment, Case No. 25, para. 172.

110 Memorial, para. 133.

> *their violation.* [...] [T]*he existence of such disputes between States* [which could justify the application of the Monetary Gold principle] *cannot deprive the investors of their substantive rights and of the procedural protection they are entitled to under the BIT.*[111]

144. The Tribunal took note of the Applicants' argument and recalled in its Award that

> *the Claimants argue that the Monetary Gold principle is inapposite. According to the Claimants, the source of the Claimants' rights resides in the BIT's substantive protection standards. Even if the Tribunal might have to consider the competence of Latvia to issue the fishing licences, that determination would not fall under the Monetary Gold exception.*[112]

145. Contrary to the Applicants' assertions, there is no authority for the proposition that the *Monetary Gold* principle applies only in inter-State litigation and depends on the availability to the absent State of a tribunal with jurisdiction over the disputed point. Indeed, in their Reply in the Arbitration, the Applicants cited various arbitral awards or annulment decisions, in which tribunals and annulment committees have considered – with approval – and applied the *Monetary Gold* principle in non-inter-State proceedings.

146. Thus, the Applicants' Memorial in the Arbitration notably cited a passage from the *Chevron* v. *Ecuador* case according to which:

> *A decision that the 1995 Settlement Agreement releases Chevron and TexPet from all liability in respect of environmental harm in Ecuador would appear to entail the conclusion that the Lago Agrio plaintiffs could not succeed in their litigation against Chevron in respect of environmental harm in Ecuador. Indeed, this Tribunal is formally requested, in the Claimants' prayer for relief (cited in Part I above), to make a series of decisions that are explicitly or implicitly premised upon a particular view of the legal effect of the 1995 Settlement Agreement. In that sense, if there were a decision by the Tribunal in this arbitration that the 1995 Settlement Agreement releases Chevron from all liability, that might be said to decide the legal rights of the Lago Agrio plaintiffs. But that is something that depends upon the form and content of the decision of this Tribunal: it is not an inevitable consequence of the Tribunal exercising its jurisdiction. The question of form and content of the decision is*

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111 **A-0011** Applicants' Reply in the Arbitration, 28 February 2022, para. 603.

112 Award, para. 194 referring in footnote 249 to "*Cl. Reply, paras. 605-617*" and footnote 250 to "*Cl. Reply, para. 606*".

> *a matter to be addressed during the merits phase of this case.*[113] (emphasis added)

In that case, the tribunal did not deny the applicability of the principle, but noted that it could not properly apply it during the jurisdictional phase in the case at issue.

147. In that same case and in the same award, the tribunal stated that

> *As the Parties to the present dispute have recognized, the Monetary Gold principle draws its strength from, and implements, a number of distinct and fundamental principles of international law. Most obviously, it gives effect to 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.*[114]

148. In *Larsen v Hawaiian Kingdom*, the PCA tribunal stated that

> *11.16. At the invitation of the Tribunal, the parties addressed the issue whether the Monetary Gold principle applies to arbitral proceedings and, if so, what were the limits of that principle. Each party suggested that the Monetary Gold principle should be regarded as confined to proceedings in the International Court of Justice and not as extending to arbitral proceedings of a mixed character, although neither party developed this argument in any detail.*
>
> *11.17. In assessing this argument, it needs to be stressed that, in accordance with the agreement between the parties, the Tribunal is called on to apply international law to a dispute of a non-contractual character in which the sovereign rights of a State not a party to the proceedings are clearly called in question. The position in contractual disputes governed by some system of private law and involving the rights of a third party might conceivably be different. But in proceedings such as the present, the Tribunal is not persuaded that the Monetary Gold principle is inapplicable. On the contrary, it can see no reason either of principle or policy for applying any different rule. As the International Court of Justice explained in the Monetary Gold case (ICJ Reports, 1954, at p. 32), an international tribunal may not exercise jurisdiction over a State unless that State has given its consent to the exercise of jurisdiction. That rule applies with at least as much force to the exercise of jurisdiction in international arbitral proceedings. While it is the consent of the parties which brings the arbitration tribunal into existence, such a tribunal, particularly one conducted under the auspices of the Permanent Court of Arbitration, operates within the general confines of public international law*

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113 **A-0003** Applicants' Memorial in the Arbitration, 11 March 2021, para. 616 quoting **AL-0101** *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. 4.64.

114 *Ibid*., para. 4.64.

> *and, like the International Court, cannot exercise jurisdiction over a State which is not a party to its proceedings.*[115]

149. The assertion of the Applicants that the Tribunal committed a manifest excess of power in "*avoid*[ing] *the applicable law, and avoid*[ing] *deciding part of case, by applying Monetary Gold, even though that doctrine is incompatible with ICSID jurisdiction, which is a specific jurisdiction*" is also inapposite. As affirmed by the ICSID annulment committee in *Orascom*:

> *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.*[116]

150. In its Counter-Memorial in the Arbitration, Norway cited several precedents from non-interstate cases, including ICSID tribunals, which considered the application of the *Monetary Gold* principle but had refused to apply it, finding that the conditions for its application were not met.[117]

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115 **RL-0310-ENG** *Larsen* v. *Hawaiian Kingdom*, PCA Case No. 1999-01, Award, 5 February 2001, paras. 11.16 and 11.17.

116 **RL-0305-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-0306-ENG** *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, para. 160-3; **RL-0289-ENG** *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, para. 175.

117 **A-0010** Respondent's Counter-Memorial in the Arbitration, 29 October 2021, footnote 379: "*See RL-100-ENG* **[RL-0324-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*) **[RL-0325-ENG]**, *ICSID Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ('Bapex') and Bangladesh Oil Gas and Mineral Corporation ('Petrobangla'Case No. ARB/10/11 and No. ARB/10/18, Decision on Jurisdiction, 19 August 2013, paras. 520 et seq.; RL-0089-ENG* **[AL-0101-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* **[AL-0099]** *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia, ICSID Case No. ARB/17/37, Decision on*

151. In the present case, the Tribunal itself explicitly justified the application of the *Monetary Gold* principle by stating that:

> *In the present case, the Monetary Gold principle limits the Tribunal's ability to deal with certain aspects of the Claimants' case but not others. To the extent that the Claimants argue that Norway has violated the BIT by, as they put it, conspiring with, or inciting, the Russian Federation to deprive the Claimants of their access to snow crab in the Loop Hole, that would require the Tribunal to determine that the Russian Federation had acted unlawfully, which the Tribunal cannot do. That aspect of the case appears to fall on the East Timor as opposed to the Nauru side of the line identified by the International Court of Justice.*[118]

152. The Applicants also allege that "[t]*he application of Monetary Gold by the Tribunal thus appears to be in inherent contradiction with the obligation of an ICSID Tribunal to exercise its jurisdiction*"[119] and that

> [t]*he Tribunal applies general international law* [including the Monetary Gold principle] *rather than the BIT, which it should not do. Such an approach, ie applying a customary international law rule over rules of the BIT, has led to the annulment of ICSID awards in the past.*[120]

153. This argument is equally irrelevant. Pursuant to Article 25(1) of the ICSID Convention:

> *(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.*

154. This provision must be read in conjunction with Article 41(1) of the ICSID Convention, which provides that "[t]*he Tribunal shall be the judge of its own competence*" and with Article 42(1) which states 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*

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*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* **[RL-0327-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*." Emphasis in footnote omitted. New references added in brackets.

118 Award, para. 297.

119 Memorial, para. 148.

120 Memorial, para. 148.

> *rules on the conflict of laws) and such rules of international law as may be applicable.*

155. When ascertaining its competence, the Tribunal is called upon to apply any relevant and applicable rule of international law, including the *Monetary Gold* principle as illustrated by the aforementioned authorities.[121]

156. Thus, the application of the *Monetary Gold* principle by the Tribunal, far from constituting a manifest excess of power or a breach of the fundamental rules of procedure, is based on an unimpeachable interpretation of the relevant applicable law. Moreover, the Tribunal justified the application of the *Monetary Gold* principle in its Award. The complaints levelled by the Applicants at the Tribunal's interpretation and application of the *Monetary Gold* principle by the Tribunal cannot lead to the annulment of the Award.

### A.2 The specific applications of the *Monetary Gold* principle by the Tribunal do not warrant the annulment of the Award

157. If the *ad hoc* Committee agrees with Norway on the above, that is the end of this ground for annulment. But even if the *ad hoc* Committee were to consider that the Tribunal incorrectly *applied* the *Monetary Gold* principle, that is plainly insufficient under Article 52 of the ICSID Convention to justify the annulment of the Award. The Applicants state that:

> [i]*n addition to the fact that the general application of the* Monetary Gold *principle is so erroneous as to consist of a manifest excess of power, the* […] *specific applications of the* Monetary Gold*, on their own and together are also separate instances of decisions of an ICSID tribunal that are annullable.*[122]

158. Norway accepts that the application of a wrong system of law is a ground for annulment. However, the *misapplication of the correct system of law*, even "*erroneous*", is not. Although the possibility of allowing the annulment of an award on the grounds of a tribunal's misapplication of the applicable law was at one point

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121 See above, paras. 139-149.

122 Memorial, para. 151.

considered during the drafting of the ICSID Convention, it was clearly excluded, as made expressly clear by the *travaux préparatoires*.[123]

159. The law has been clear on this point from as early as 1986:

> *The law applied by the Tribunal will be examined by the ad hoc Committee, not for the purpose of scrutinizing whether the Tribunal committed errors in the interpretation of the requirements of applicable law or in the ascertainment or evaluation of the relevant facts to which such law has been applied. Such scrutiny is properly the task of a court of appeals, which the ad hoc Committee is not. The ad hoc Committee will limit itself to determining whether the Tribunal did in fact apply the law it was bound to apply to the dispute. Failure to apply such law, as distinguished from mere misconstruction of that law. would constitute a manifest excess of powers on the part of the Tribunal and a ground for nullity under Article 52(1)(b) of the Convention. The ad hoc Committee has approached this task with caution, distinguishing failure to apply the applicable law as a ground for annulment and misinterpretation of the applicable law as a ground for appeal.*[124]

160. The decision in *Amco Asia* has been reiterated by several *ad hoc* committees including in *Duke Energy v Peru*

> *Peru may well disagree with the view that the Tribunal formed as to the correct solution of the issue before it under Peruvian law. But an ad hoc committee may not enter upon an assessment of whether a tribunal made a correct assessment of the content of the applicable law. It must be 'mindful of the distinction between failure to apply the proper law and the error* in judicando *drawn in Klockner I, and the consequential need to avoid the reopening of the merits in proceedings that would turn annulment into appeal'.*[125]

161. In any event, the Tribunal did not misapply the *Monetary Gold* principle, manifestly or otherwise, by allegedly refusing either to "*interpret the Svalbard Treaty and consider whether the March 2023 Norwegian Supreme Court judgment is consistent with international law*" (**a**); "*examine whether Norway acted with the Russian Federation to close the Loophole*" (**b**); "*examine the rights of Latvia and of the EU*"(**c**);[126] and/or

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123 **RL-0323-ENG** *History of the ICSID Convention*, Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington D.C., 1968, vol. II-1, pp. 423, 517 and 518.

124 See also **AL-0036** *Amco Asia Corporation and others v. Republic of Indonesia (Amco I)*, ICSID Case No. ARB/81/1, Decision on Annulment, 16 May 1986, para. 23.

125 **RL-0307-ENG** *Duke Energy v Peru*, ICSID Case No. ARB/03/28, Decision on Annulment, 1 March 2011, para. 213. See also **AL-0028** *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, 5 February 2002, para. 22.

126 Memorial, pp. 51-58.

by failing "*to state reasons as to why it could not hold one of the joint tortfeasors liable while still respecting the Monetary Gold principle*" (**d**).[127]

**(a) The Tribunal did not refuse to apply the 1920 Treaty or to consider whether the 2023 judgment of the Norwegian Supreme Court is consistent with international law**

*i.* The Tribunal did not refuse or fail to apply the 1920 Treaty

162. The Applicants argue that the Award must be annulled because the Tribunal refused or failed to interpret the 1920 Treaty and to determine whether the Judgment of the Norwegian Supreme Court delivered in March 2023 is consistent with international law. These points do not entail the annulment of the Award.

163. Regarding the 1920 Treaty, the Applicants allege that

> *the Tribunal held it could not interpret the Svalbard Treaty. In so concluding, the Tribunal manifestly failed to exercise its powers by failing or refusing to decide several fundamental issues in dispute on the basis of its application of the* Monetary Gold *principle. The Tribunal held that there was a dispute regarding the proper interpretation of the Svalbard Treaty and that it should not opine on it, even though the Svalbard Treaty is incorporated into Norwegian law and under relevant Norwegian law inconsistencies between a treaty and Norwegian law will be decided in favour of the treaty. This was a failure to apply the applicable law.*[128]

164. This is a blatant misreading of the Award delivered by the Tribunal.

165. In reality, the alleged refusal of the Tribunal to interpret the 1920 Treaty does not amount to a refusal to apply the proper law. In fact, by applying the *Monetary Gold* principle, the Tribunal did indeed apply the proper law to reach its conclusion. In a section entitled "*(4) Svalbard Claims*", the Tribunal held as follows:

> *583. Norway's view* [on the interpretation of the 1920 Treaty] *has long been contested by certain other parties to the Svalbard Treaty. The USSR and latterly the Russian Federation have maintained that the provisions of Articles 2 and 3 apply to the continental shelf around Svalbard. The same view has been expressed by Iceland, Spain and the United Kingdom, as well as by the EU.*
>
> *584. The Tribunal doubts that it can adjudicate upon that inter-State dispute. On a purely textual basis, the position taken by Norway cannot be dismissed*

127 Award, para. 284.

128 Memorial, para. 152. Footnotes omitted.

> *out of hand but neither can the different interpretation advanced by other parties to the Treaty. Although the Claimants deny that they are asking the Tribunal to 'rule' on the meaning of the Treaty provisions, in practice that is exactly what the Tribunal would have to do in order to determine whether in excluding North Star's vessels from the Svalbard continental shelf Norway acted contrary to its obligations under the Svalbard Treaty.*[129]

166. In any event, the Tribunal then continued stating that:

> *585. However, even if the Tribunal could make such a determination, that would not mean that Norway had acted in breach of the BIT. The Tribunal agrees with Norway that a breach of the Svalbard Treaty is not automatically a breach of the BIT. In the next section of this Award, therefore, the Tribunal will examine whether, assuming arguendo that the Claimants are correct in their interpretation of the Svalbard Treaty, Norway's actions amounted to a violation of the BIT.*[130]

167. In the 17 paragraphs that followed within the Award's section on the "*Svalbard Claims*", the Tribunal devoted an extensive discussion to the applicability and interpretation of the 1920 Treaty in relation to the dispute before it. These developments, which have given rise to further alleged grounds of annulment, are discussed below.

168. In any case, the Applicants are wrong when they allege that the Tribunal, applying the *Monetary Gold* principle and therefore questioning its power to interpret and apply the 1920 Treaty, refused to apply the applicable law. The Tribunal first decided, on the basis of the applicable law, that it could not determine the so-called "*Svalbard Claims*". It then went further, and developed *in extenso* and *arguendo* the arguments made by the Applicants relating to the 1920 Treaty and concluded that no violations of the BIT had been committed by Norway. There would, in any event, therefore, have been no difference to the outcome of the case, and this argument therefore cannot afford a ground for annulment of the Award.

*ii.* The Tribunal did not refuse to consider whether the March 2023 judgment of the Norwegian Supreme Court is consistent with international law

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129 Award, para. 583 and 584. Footnotes omitted.

130 Award, para. 585. Emphasis added.

169. In their Memorial, the Applicants also allege that:

> *To dismiss Applicants' position that Norway's interpretation of the Svalbard treaty, as echoed by the Norwegian judiciary, is manifestly incorrect, the Tribunal simply stated, without further reasons: 'It is not open to an international tribunal to determine that a country's highest national court has interpreted and misapplied the law of that country.'*[131] *As a matter of law, this statement is manifestly incorrect, as reflected by the following statement from the International Court of Justice in the 2010 judgment in the* Diallo *case*.[132]

170. This argument is also inapposite and fails correctly to capture the reasoning of the Tribunal. The allegedly faulty reasoning of the Tribunal is developed in paragraphs 586-592, in the section of the Award which assumed, *arguendo*, that the Tribunal *could* make a determination on the 1920 Treaty. In a section headed "*c. Did Norway Violate the BIT by Excluding North Star's Vessels from taking Snow Crab on the Svalbard Continental Shelf*", the Tribunal first dealt with the Applicants' argument that if Norway acted contrary to the 1920 Treaty, this was a violation of their obligation to admit their investment. The relevant context is important: the Applicants appear to have obtained their first so-called "Svalbard licence" for the vessel *Senator* on 1 November 2016,[133] after the relevant Norwegian regulations prohibiting this activity came into force. As the Tribunal held at paragraph 277 of the Award:

> *The Tribunal does not consider that the mere grant of licences by Latvia was sufficient to render the vessels an investment in Norwegian territory. Moreover, by the time that the licences were granted and the* Senator *attempted to harvest snow crab off Svalbard, it was well known that Norwegian law prohibited fishing for snow crab within 200 nautical miles of Svalbard* […] *Thus, whatever the dispute regarding the effect of Articles 2 and 3 of the Svalbard treaty, there was no doubt that the taking of snow crab off Svalbard was prohibited by Norwegian law*.

171. As such, the only relevant allegation was an allegation that Norway's conduct amounted to a failure to admit the license as an investment.

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131 Memorial, footnote 171: "*Award, 22 December 2023,* ***A-0068****, para. 592*."

132 Memorial, para. 153. Memorial, footnote 172: "*Case concerning Ahmadou Sadio Diallo, ICJ Judgment, 30 November 2010,* ***A-0153****, para. 70*."

133 **C-0013**.

172. The Applicants allegations essentially amount to an argument that the Tribunal fell into error in considering that the investment was not made in accordance with Norwegian law. That is wrong (and cannot lead to annulment) for several reasons.

173. First, the Tribunal rejected this argument both (a) on the ground that the Tribunal did not have jurisdiction in relation to a proposed investment (as to which see further paragraph 261 below); and (b) because the proposed investment would not have been in accordance with Norwegian laws and regulations. As such, even if the Tribunal determined that the investment would have been made in accordance with Norwegian law as it ought to have been interpreted, that would have made no difference to the outcome of the case.

174. Secondly, the Tribunal considered and rejected the Applicants' argument that "*the proposed investment must be construed in accordance with Norwegian laws and regulations as they* should *be construed, which* [North Star] *takes to mean in accordance with its interpretation of the Svalbard Treaty*". This ground simply amounts to an attempted appeal from the decision. Indeed, the Applicants themselves allege that this was a "*misapplication of the applicable law*" (Memorial, paragraph 155) which does not and cannot justify annulment.

175. Thirdly, and in any event, the decision is correct. An investment Tribunal's duty, when applying national law is to strive to apply the legal provisions as interpreted by the competent judicial authorities and as informed by the State's "interpretative authorities".[134]

176. Other tribunals and *ad committees* have endorsed the same position, including in *Emmis v Hungary*:

> *Where the Tribunal is presented with a question of municipal law essential to the issues raised by the Parties for its decision, the Tribunal, whilst retaining its independent powers of assessment and decision, must seek to determine the content of the applicable law in accordance with evidence presented to it as to*

134 **AL-0030** *Hussein Nauman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the Ad Hoc Committee on the Application for Annulment of Mr. Soufraki, 5 June 2007, para. 96, citing **RL-0337-ENG** *Serbian Loans*, PCIJ Series A. No 20, Judgment, 12 July 1929, page. 46.

> *the content of the law and the manner in which the law would be understood and applied by the municipal courts.*[135]

The Applicants' have failed to mount any real case either (a) that the Norwegian Supreme Court's interpretation of Norwegian law was manifestly incorrect; or (b) that this was a manifest excess of power of the type that would engage Article 52 ICSID Convention.

177. The remainder of the Applicants' claims under this head, dealing with the "*surrounding circumstances*"[136] of the decision of the Tribunal in relation to the proposed exhibit no. C-360, are dealt with above.

### (b) The Tribunal did not refuse to examine whether Norway acted with the Russian Federation to close the Loop Hole

178. The Applicants also assert that the Tribunal "*contradicted itself*" in both deciding that "*it could not examine several issues raised by Applicants*" and stating that "*the record showed there was no 'conspiracy' between Norway and the Russian Federation against EU interests*".[137] They assert that, at the same time, the Tribunal "*entirely failed to examine significant evidence that did show joint intentional action between Norway and the Russian Federation against EU interests in the Loophole*".[138]

179. The Applicants conclude that

> *the Tribunal thus committed a manifest excess of power by refusing to decide these questions and also failed to state reasons and/or provided contradictory reasons for its ruling. It also committed a serious breach of a fundamental rule of procedure, i.e. the right to be heard, by failing to examine important evidence before it, and opining on the issue without actually discussing such evidence.*[139]

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135 **RL-0338-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, para. 175. See also **AL-0045** *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (I)*, ICSID Case No. ARB/03/25, Decision on Annulment, 23 December 2010, para. 236; **RL-0336-SP** *América Móvil S.A.B. de C.V. v. Republic of Colombia*, ICSID Case No. ARB(AF)/16/5, Award, 7 May 2021, para. 334; **RL-0303-ENG** *Yukos Capital SARL v. The Russian Federation*, PCA Case No. 2013-31, Interim Award on Jurisdiction, 18 January 2017, para. 244.

136 Memorial, para. 156.

137 Memorial, para. 162.

138 *Ibid*.

139 Memorial, para. 163.

180. Once again, this argument concerns the Tribunal's interpretation and application of the *Monetary Gold* principle. As Norway has already stated, while an *ad hoc* committee may annul an award for failure to apply the applicable law, it cannot annul an award on the basis of an *incorrect application of the law* by the Tribunal,[140] which is denied in any event, nor may it substitute its own assessment of the facts for that of the Tribunal.[141]

181. In any case, the two statements by the Tribunal are in no way contradictory. It was only in the alternative that the Tribunal stated that nothing in the factual record supported the Applicants' allegation of a conspiracy between Norway and the Russian Federation aimed at preventing them from harvesting snow crab in the Loop Hole. This point was clearly made by the Tribunal at the paragraph 486 of its Award:

> *The Tribunal has already explained, in its discussion of the* Monetary Gold *principle (see paragraphs 294 to 295, above), that, while that principle does not preclude it from exercising jurisdiction in the present case, it does circumscribe what the Tribunal can decide. It is not open to the Tribunal to decide whether or not the Russian Federation was in breach of international law. However, it is unnecessary for the Tribunal to delve deeper into the ramifications of* Monetary Gold, *because the record simply does not support the proposition that Norway was the 'instigator of the idea that the coastal States should begin asserting sovereign rights over snow crab in the NEAFC area'.*

182. The Tribunal reached this conclusion after having read the documents submitted by the Applicants, as demonstrated by paragraph 490 of the Award:

> *The Tribunal does not read these exchanges* [between Norway and the Russian Federation] *as confirming the Claimants' view that Norway instigated the Russian ban. Not only was it Russia which first raised the issue of exercising continental shelf rights with regard to snow crab in the Loop Hole, the Russian concern about acquired rights was understandable given that it was on the Russian continental shelf that most of the harvesting in the Loop Hole had taken place between 2014 and 2016. Moreover, it was Russia which tried to persuade Norway to introduce a landing ban, something which Norway understandably said could not be done in respect of crab which had been lawfully taken on the Russian continental shelf. Russia's reference to its coast guard being unable to act reflected the fact that, at the time that comment was made, Russia had not legislated to ban taking of snow crab in the outer continental shelf.*

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140 See above, para. 158.

141 See above, paras. 17-18.

183. Moreover, the Tribunal dedicated an entire section to the "*Regulation of snow crab harvesting and landing by Norway and the Russian Federation*" in the factual part of the Award.[142] As set out above, the *ad hoc* Committee must be careful not to discern contradiction from what is really the Tribunal deciding a point in the alternative.[143]

184. The Applicants further allege that the Tribunal wrongly reached its conclusions while "*nowhere in its written pleadings or at the oral hearing did the Norway* [sic] *argue that the Monetary Gold principle was applicable to the actions of the Russian Federation*"[144] and that the Applicants had no opportunity to present their view on these questions. According to the Applicants, this would constitute "*a blatant breach of the principle of contradiction for the Tribunal to adopt a fundamentally important reason, not argued by the parties, with effect of precluding a decision on an issue pleaded by Applicants over which the Tribunal otherwise has jurisdiction*".[145]

185. Article 41(1) of the ICSID Convention, reflecting the principle *Kompetenz-Kompetenz*, provides that "[t]*he Tribunal shall be the judge of its own competence*". It is, therefore, for the Tribunal to ascertain that it has jurisdiction to deal with a dispute even in the absence of a jurisdictional challenge. The case-law is well established to that effect. For example, the ICSID tribunal in *Mihaly International Corp. v. Sri Lanka* considered that

> *the question of jurisdiction of an international instance involving consent of a sovereign State deserves a special attention at the outset of any proceeding against a State Party to an international convention creating the jurisdiction. As a preliminary matter, the question of the existence of jurisdiction based on consent must be examined proprio motu, i.e., without objection being raised by the Party.*[146]

186. Another ICSID tribunal endorsed the same position in *Spence and others v. Costa Rica* affirming that

> *225. As a preliminary matter, the Tribunal notes that an assessment of whether jurisdiction exists in respect of a given dispute is required of all tribunals, whether a party raises the issue or not. It is not in the systemic interests of the*

142 See Award, paras. 84-92.

143 See above, paras. 30-31.

144 Memorial, para. 165. Footnotes omitted.

145 Award, para. 168.

146 **RL-0308-ENG** *Mihaly International Corp.* v. *Sri Lanka*, ICSID Case no. ARB/00/2, Award, 15 March 2002, para. 56.

> *effective administration of international justice for a tribunal to adjudicate on matters over which it does not have jurisdiction, whether the parties would wish this to be the case or not. This appreciation does not turn only on issues of consent, although this may be important. It also turns importantly on ratione materiae, ratione temporis and ratione personae considerations, and is a feature of most courts and tribunals, including in the domestic sphere.*
>
> *226. The relevance of this appreciation for present purposes is that, in determining jurisdiction, a tribunal cannot rest simply on how a claimant has formulated its case and the respondent formulated its reply. In an adversarial system, such as operates in investor-State arbitration proceedings, it is the litigation imperative of counsel for each side to formulate their case in the strongest, most uncompromising terms. Their task is not to shine a light on truth. It is to shine a light on the issues, leaving the tribunal to discern the reality of the case.*[147]

187. In this regard, and specifically concerning the principle of *Monetary Gold*, the tribunal in the *Larsen v. Hawaiian Kingdom* award[148] considered that despite the fact that neither party had developed the argument, an international court or tribunal "*cannot exercise jurisdiction over a State which is not a party to its proceedings.*"

188. Moreover, the Tribunal did not deal with this issue without first having the opportunity to hear the arguments of the Applicants and Norway. The Parties developed at length their views on the *Monetary Gold* principle in their written pleadings[149] as well as during the hearings.[150] Even if Norway did not invoke the principle regarding the Russian Federation specifically and explicitly, Norway pointed out that the Russian Federation was the missing party to the dispute submitted to the Tribunal, as most – if not close to all – of the Applicants' snow crab harvesting had taken place on the Russian

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147 **RL-0333-ENG** *Spence International Investments, Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz* v. *Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, paras. 225-226. See also **RL-0334-ENG** *Malicorp Limited* v. *Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, para. 98; **RL-0335-ENG** *Metal-Tech Ltd.* v. *Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, para. 123; **RL-0293-ENG** *Standard Chartered Bank (Hong Kong) Limited* v. *Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Decision on Jurisdiction and Liability, 12 February 2014, paras. 109-114.

148 See *supra*, paragraph 148.

149 See e.g. **A-0010** Respondent's Counter-Memorial in the Arbitration, 29 October 2021, paras. 211-245 and 334-346; **A-0011** Applicants' Reply in the Arbotration, 28 February 2022, paras. 605-617; **A-0016** Respondent's Rejoinder in the Arbitration, 30 June 2022, paras. 137-165; Applicants' Rejoinder in the Arbitration, 28 July 2022, paras. 410-429.

150 **A-0019** Transcript Hearing, Day 1, 31 October 2022, pp. 125-135 (Professor Miron) and pp. 178-192 (Professor Pellet) and Day 4, pp. 161-167 (Professor Pellet)

continental shelf.[151] The question of Russian involvement was specifically discussed by the Applicants during the hearings at the initiative of the President of the Tribunal and the Applicant was indeed heard by the Tribunal as reflected by the following extensive quote of the transcript:

> *THE PRESIDENT: I want to explore a little bit what form protection has to take. Does that take the form in your view of requiring a State to possibly have a dispute with a neighbouring country over that neighbouring country's behaviour in its own territory? And the second question I was going to ask is: are you saying that Norway, because of its actions, is responsible for what the Russian Federation did in its part of the Loophole? I think there is a third question too in my mind, which is: when you said that everyone agreed that snow crab in the NEAFC zone was outside any national State's jurisdiction, does the evidence support the view that Norway said it wasn't within their jurisdiction, or rather that that jurisdiction wasn't at the relevant time being exercised? I think those are the difficulties I am having about this.*
>
> *MS SEERS: I think I'll address them in reverse order, if that's okay with you. I wonder whether anyone has got the binders from yesterday that we used with Mr Pettersen. There we go, we just need one. I believe it was tab 2, or B in our version, I don't have it in front of me, but it's quite possible that the heading -- my apologies, perhaps it was tab C that has the letters, or perhaps both sets of documents have.*
>
> *THE PRESIDENT: Would you like to have this copy?*
>
> *MS SEERS: That would be extremely helpful, thank you. It is not a memory test. 'Norwegian Fisheries Directorate', the letter is dated August 2015, exhibit C-285. 22 versions thereof in this exhibit: 'Registration of Vessels for fishing in waters outside any State's fishery jurisdiction in 2015.' I am sure my partner, Mr Laporte, could produce to you from memory a list of exhibits, it will be a long one, where language like that is included in correspondence from Norway, and you'll recall, it might have been Exhibit C-85, I am going from memory, but I put it to Mr Pildegovics in re-direct, and that was emails between Latvian authorities and the European Commission, where the European Commission used similar language. We say at all relevant times, all relevant actors considered snow crab in the NEAFC zone to be outside of any State's jurisdiction, and that that changed ex post facto. Your second question is whether Norway is responsible for the actions of the Russian Federation. Norway is not responsible for the actions of the Russian Federation. Norway is responsible for what Norway does in reaction to the actions of others, and that's protection. I find the family analogy very simple to understand, so I'll use that; if it's not useful to you, I will use a different one. I protect my family from what others do. I lock my doors at night so people can't break into my house and harm my children. That's protection. I can't control what other people do, but I can control what I do in reaction to what other people do. So the four examples I gave you just now is what Norway should have done if it*

[151] See e.g. **A-0010** Respondent's Counter-Memorial in the Arbitration, 29 October 2021, paras. 124-135, 148-150, 232 and 297; **A-0016** Respondent's Rejoinder in the Arbitration, 30 June 2022, paras. 1, 4, 8, 24-45.

*were motivated to comply with its obligations, faced with any action by Russia to close the commons in NEAFC. But actually, this was all a hypothetical because we know from the evidence that that's not what happened at all, it was Norway who instigated the closure of the commons, not Russia.*

*THE PRESIDENT: Are you saying that that makes Norway liable to the Claimants for all the losses that they sustained as a result of Russia's actions?*

*MS SEERS: I am saying it makes Norway liable to the Claimants for all the losses they sustained as a result of Norway's inactions.*

*THE PRESIDENT: Well, is that different from what I asked you?*

*MS SEERS: I believe so.*

*THE PRESIDENT: Could you explain how, please?*

*MS SEERS: I cannot be responsible for the actions of another person, I'm responsible for my actions and inactions in reaction to the actions of the other person.*

*THE PRESIDENT: Yes, but if you fail in your responsibilities, does that mean that the measure of loss is the loss inflicted by the other party?*

*MS SEERS: They are two sides of the same coin, I would say. I think it's important not to frame it as one State being liable for the actions of another State, because that doesn't seem sensible, they can't control the actions of another State.*

*THE PRESIDENT: That's not quite what I asked. I didn't ask this time whether Norway was responsible for the actions of Russia, I asked whether Norway was liable for the losses occasioned by Russia's actions.*

*MS SEERS: I think the answer is yes. My reasoning to get to yes would perhaps have the nuance that I would attribute the responsibility or the liability for the losses to inaction and the failure to protect, but I think you get to the same place analytically. It's a positive – so the one State is committing, and the other state is omitting, and you get to the same place, right?*[152]

189. This exchange – and in particular the last sentence of the President's question shows that the Tribunal was fully conscious of the *Monetary Gold* principle in relation with the absence of the Russian Federation to the proceedings. Moreover, the Tribunal duly heard the Applicants' views in the course of the proceedings on this issue. The Award cannot be annulled on these grounds raised by the Applicants.

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152 **A-0022** Transcript Hearing, Day 4, 3 November 2022, pp. 76-80 (Ms Seers).

### (c) The Tribunal did not refuse to examine the rights of Latvia and of the EU

190. The Applicants raise yet another argument relating to the Tribunal's application of the *Monetary Gold* principle. They allege that

> *the Tribunal held that it did not have to examine the rights and obligations of Latvia and of the EU in the context of the* Monetary Gold *objection of Norway. However, by not deciding these issues, the Tribunal failed to exercise its jurisdiction, committing manifest excess of power.*[153]

191. Again, the Applicants' argument relates to the *application* of the *Monetary Gold* principle by the Tribunal which cannot justify partial annulment of the Award.[154] Moreover, it is not open to an *ad hoc* committee, which cannot act as an appeals body,[155] to substantiate its own position concerning the application of the law to the application made by the Tribunal.

192. The Applicants argue that the question the Tribunal failed to address, due to its application of the *Monetary Gold* principle, is the following: "*there was a question as to whether Latvia and/or the EU could issue licenses to fish snow crab outside their jurisdiction, possibly in the territory of Norway, for example over its continental shelf*".[156]

193. In this respect, the Applicants are triply wrong: (i) the Tribunal did not refuse to answer this question on the basis of *Monetary Gold*; (ii) the Tribunal did not refuse to answer this question at all; (iii) the Tribunal answered this question without needing to examine the rights and obligations of Latvia and the EU.

194. Paragraph 275 of the Award answers all three arguments:

> *Nor can the Tribunal accept that the fishing licences for the four vessels constituted an investment in Norway. Those licences were granted not by Norway but by Latvia. They did not confer any rights on North Star vis-à-vis Norway. Like the fishing capacity which North Star acquired for its four ships, the licences were necessary for North Star to comply with EU law requirements for fishing in the NEAFC area. Even if North Star had intended, at the time that it applied for and was granted those licences and the capacity*

153 Memorial, para. 169.

154 See above, para. 158.

155 See above, paras. 15-22.

156 Memorial, para. 169.

> *rights, to take snow crab mainly in Norwegian territory, the Tribunal doubts that licences granted by another State in order to satisfy non-Norwegian requirements could be regarded as an investment in Norway. However, at that time, North Star intended to conduct most of its fishing activities in the Russian sector of the Loop Hole. In these circumstances, neither the licences nor the capacity rights can be regarded as an investment in the territory of Norway.*

195. Accordingly, the Applicants cannot have the Award annulled on the grounds that the Tribunal failed to exercise its jurisdiction.

### (d) The argument that the Tribunal should have considered holding Norway solely responsible for damage allegedly caused by a joint Russo-Norwegian conspiracy does not justify the annulment of the Award

196. Later on in their Memorial (at paragraph 284), the Applicants submit a final argument regarding the specific application of the *Monetary Gold* principle, arguing that

> *the Tribunal failed to state reasons as to why it could not hold one of the joint tortfeasors liable while still respecting the* Monetary Gold *principle. The* El Salvador v. Nicaragua *case … certainly reflects how this can be done, amongst other cases having considered the rights and obligations of third States that did not consent to an international court or tribunal's jurisdiction.*[157]

197. Although the Applicants discuss this point in the section of their Memorial dealing with the merits, it can usefully be disposed of alongside the other grounds relating to the *Monetary Gold* principle, because it concerns the application of the applicable law by the Tribunal. The Tribunal considered *inter alia* that:

> *In the present case, the* Monetary Gold *principle limits the Tribunal's ability to deal with certain aspects of the Claimants' case but not others. To the extent that the Claimants argue that Norway has violated the BIT by, as they put it, conspiring with, or inciting, the Russian Federation to deprive the Claimants of their access to snow crab in the Loop Hole, that would require the Tribunal to determine that the Russian Federation had acted unlawfully, which the Tribunal cannot do. That aspect of the case appears to fall on the* East Timor *as opposed to the* Nauru *side of the line identified by the International Court of Justice.*[158]

198. The reasoned and entirely correct application by the Tribunal of the *Monetary Gold* principle is sufficient to dismiss the Applicants' submissions aiming at the annulment of the Award in whole or in part on this ground.

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157 Memorial, para. 284.

158 Award, para. 257.

## B. THE TRIBUNAL'S DECISIONS REGARDING AN INVESTMENT "*IN THE TERRITORY OF*" NORWAY

### B.1 Introduction

199. The Applicants claim that the Tribunal manifestly exceeded its powers and provided contradictory reasons by failing to exercise jurisdiction on six counts. Those allegations are as follows:

199.1. First, the Tribunal manifestly exceeded its powers by "*refusing to decide how the Svalbard Treaty applies to the dispute*".[159] That has been addressed in the section above and Norway will not repeat its arguments.

199.2. Secondly, the Tribunal manifestly exceeded its powers by "*refusing to hold NEAFC and Svalbard licenses were investments in the territory of Norway*".[160]

199.3. Thirdly, the Tribunal manifestly exceeded its powers by "*refusing to hold* [that the] *Joint Venture was an investment in the territory of Norway*".[161]

199.4. Fourthly, the Tribunal manifestly exceeded its powers and adopted contradictory reasons regarding "*whether the Applicants' investment was in the territory of Norway*".[162]

199.5. Fifthly, the Tribunal manifestly exceeded its powers and applied contradictory reasoning in "*failing to apply an approach of "unity" of* [the] *investment*".[163]

199.6. Sixthly, the Tribunal manifestly exceeded its powers by "*holding that it did not have jurisdiction to hear whether Norway breached its admissions obligations under Article III of the BIT*".[164]

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159 Memorial, para. 243.

160 Memorial, paras. 244-248.

161 Memorial, paras. 249-252.

162 Memorial, paras. 253-258.

163 Memorial, para. 259.

164 Memorial, paras. 260-263.

200. All of those grounds are, in reality, attempted appeals against the decision of the Tribunal, as demonstrated below.

## B.2 NEAFC Licenses and the so called "Svalbard Licences"

201. The Applicants claim that the Tribunal exceeded its powers by holding that the Applicants' NEAFC licences and the so called "Svalbard licences" were not investments "*in the Territory of*" Norway and/or that the tribunal failed to state reasons for that conclusion.

### (a) NEAFC Licenses

202. The Applicants deal with these licences in a single paragraph,[165] and two reasons are given for annulment. First, that it is "*incorrect as a matter of jurisdiction*". Secondly that the Tribunal failed to address some of the Applicants' arguments made at the hearing.

203. As to the first, the Tribunal's reasoning was "*incorrect as a matter of jurisdiction*" is wholly inadequate and unparticularised, and not a recognised ground of annulment. The Applicants do not attempt to identify in what respect the Tribunal's reasoning amounts to a "*manifest excess of power*". In several paragraphs, the Tribunal set out its reasoning for dismissing the NEAFC Licences as investments "*in the Territory of*" Norway.[166] In particular, at paragraph 275, the Tribunal reasoned as follows:

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

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165 Memorial, para. 248.

166 Award, paras. 263-264; 270-277.

204. The Applicants have identified no part of that reasoning which is faulty, or the grounds on which the faulty reasoning is said to amount to a manifest excess of power. The Applicants simply disagree with the Tribunal's reasoning, which does not suffice.

**(b) Response to Tribunal Question**

205. The second point also goes nowhere. The Applicants allege that the Tribunal failed to deal with the Applicants' response to a question asked during the proceedings. On the first day of the hearing, the President queried the status of the licences generally (both the NEAFC licenses and the so called "Svalbard licences") as follows:

> *I would also be grateful if you would come back in closing to the question of how a licence granted by another State can be an investment in the territory of Norway, or a licence granted by an organisation can be an investment in the State of Norway, or part of an investment in the State of Norway.*[167]

206. On the final day of the hearing, counsel for the Applicants gave the Applicants' response orally, ranging over nine pages of the transcript.[168] The Tribunal dealt with the response in the Award, as set out below.

207. There are three responses to this complaint by the Applicants:

207.1. *First*, the underlying question was squarely dealt with. The question from the Tribunal went to the issue of whether the NEAFC licenses and the so called "Svalbard licenses", granted by Latvia, could be investments "*in the Territory of*" Norway. As has been shown above (and will be dealt with further below), these broad questions were addressed by the Tribunal.

207.2. *Secondly*, the nub of the Applicants' complaint is that the Tribunal did not address their *particular arguments*. But that is demonstrably wrong as a matter of fact. Their arguments were dealt with. The points made by the Applicants' counsel were as follows:

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167 **A-0019** Transcript Hearing, Day 1, 31 October 2022, p. 24, ll.11-16.

168 **A-0022** Transcript Hearing, Day 4, 3 November 2022, pp. 17-25 (Mr Savoie).

(a) The Tribunal should primarily look at the investment as a unity.[169] This was dealt with extensively by the Tribunal in the Award at paragraphs 260-279.

(b) As an alternative, Norway exercised sovereign rights in the Loop Hole, and therefore its licences formed an investment "*in the Territory of*" Norway under the definition of territory in the BIT.[170] This argument was specifically addressed in the Award, which referred to and footnoted the relevant parts of the transcript: Award paragraphs 263-264 and footnote 348.

(c) The BIT did not require that the licences be granted by Norway in order to be recognised as investments in Norway.[171] This argument was dealt with by the Tribunal at paragraph 275 which referred, among other things, to the fact that the licences were not granted by Norway and decided that they did *not* form an investment "*in the Territory of*" Norway as required by the BIT.

207.3. *Thirdly*, and in any event, tribunals are not obliged specifically to address each and every point raised by the parties.[172] It has been long accepted that the obligation under Article 48 of the ICSID Convention to deal with every "*question*" submitted by the parties does not oblige Tribunals to address every *argument*.[173]

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169 **A-0022** Transcript Hearing, Day 4, 3 November 2022, pp. 17-18 (Mr Savoie).

170 **A-0022** Transcript Hearing, Day 4, 3 November 2022, pp. 18-21 (Mr Savoie).

171 **A-0022** Transcript Hearing, Day 4, 3 November 2022, pp. 21-25 (Mr Savoie)

172 See, e.g., **RL-0315-ENG** *Gambrinus, Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/31, Decision on Annulment, 3 October 2017, para. 208.

173 **AL-0033** *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, para. 131; see also **RL-0332-ENG** Sinclair A. *Article 52.* In: Schill SW, Malintoppi L, Reinisch A, Schreuer CH, Sinclair A, eds. *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Cambridge University Press; 2022:1217-1442, at §§531-542.

### (c) The "Svalbard Licences"

208. The Applicants' points on the licences (purportedly granted by Latvia) under the 1920 Treaty can also be dispensed with.

209. At paragraphs 246-247 the Applicants claim that the Tribunal failed to address its argument that the Norway was misapplying its own law. That is a misreading of the Award. The Tribunal addressed that point in detail at paragraphs 586-602 of the Award. Further relevant detail is provided elsewhere in this Counter-Memorial. For present purposes, the paragraph of principal relevance is 592:

> *North Star responds that the requirement that the proposed investment must be in accordance with Norwegian laws and regulations as they should be construed, which it takes to mean in accordance with its interpretation of the Svalbard Treaty. The Tribunal is not persuaded by this argument. The Norwegian Supreme Court has upheld the convictions in respect of the Senator's attempt to take snow crab in the Svalbard continental shelf. Moreover, in the 2023 civil judgment, the Supreme Court considered in some detail the argument now advanced by the Claimants regarding the interpretation of the Svalbard Treaty and unanimously rejected it. It is not open to an international tribunal to determine that a country's highest national court has misinterpreted and misapplied the law of that country. The Tribunal will return to this issue when it considers the denial of justice argument below* (emphasis in original).

210. As to paragraph 247, which relates to the diplomatic note of 30 October 2023, this matter is addressed at paragraphs 42 *et seq* above.

## B.3 Alleged joint venture

211. The Applicants further allege that the Tribunal manifestly exceeded its powers and adopted contradictory reasons when it refused to hold that Mr Pildegovics' joint venture with Mr Levanidov was an investment "*in the Territory of*" Norway. This point goes nowhere.

212. It is important to trace the Award's findings of fact on the "*threshold issue*"[174] of the alleged joint venture. Those findings of fact are not open to challenge by the Applicants, and dispose of this ground:

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174 Award, para. 240.

212.1. The Award assessed in some detail the evidence before it as to the level of cooperation between Mr Pildegovics and his company North Star (*i.e.*, the Applicants), on the one hand, and Mr Levanidov and his companies, on the other.[175]

212.2. The Tribunal addressed, and *accepted* the evidence of the Applicants' expert on Norwegian law that the oral agreement between Mr Pildegovics and Mr Levanidov would have been an effective agreement under Norwegian law.[176]

212.3. The Tribunal then addressed the *content* of the agreement and considered that whilst Mr Pildegovics and Mr Levanidov agreed to cooperate in setting up an operation, the documentary record was "*not sufficient to establish what rights Mr Pildegovics might have been able to claim under that oral agreement*".[177]

212.4. So far as relevant to the definition of 'Investment' therefore, there was "*no evidence of what, if any, performance Mr Pildegovics could have claimed under the supposed joint venture or what value it might have had*".[178] This was relevant because, under Article I(1)(III) of the BIT, the term 'Investment' included: "[…] *claims to any performance under contract having an economic value*".

212.5. As a result, in analysing whether there was or was not an investment "*in the Territory of*" Norway, the Tribunal concluded that the (geographical) focus of the Applicants' operations "*must be kept separate*" from that of Mr Levanidov and his companies.[179]

213. The Applicants plainly disagree with those conclusions of fact (which are not open to challenge at this stage), but the reality is that they failed to establish their own case before the Tribunal. There are no contradictory reasons in the Tribunal's above findings, and the only example of the alleged 'contradictions', given in footnote 237 of

175 Award, paras. 241-244.

176 Award, paras. 245-246.

177 Award, paras. 247-248 (emphasis added)

178 Award, para. 249.

179 Award, para. 250.

the Applicants' Memorial,[180] shows nothing of the sort. The fact that the two men agreed to set up a seamless operation is not inconsistent with the Tribunal being unable to determine—as a result of the Applicants' own failure to produce sufficient evidence—what *claims to performance* Mr Pildegovics had under that agreement.

214. There is no evidence that the Tribunal "*pretended not to understand what effect there could be from an oral cooperation agreement under Norwegian law*", and no paragraph of the Award is cited by the Applicants for this dismissive criticism. The Award at paragraphs 245-246 *accepted* the evidence of the Applicants' Norwegian law expert, Dr Ryssdal on the recognition and enforceability of an oral agreement.

215. Nevertheless, the "*only evidence of the existence or contents of the supposed joint venture*"[181] was the testimony of Messrs Pildegovics and Levanidov, and the Tribunal ultimately concluded that "*the record before the Tribunal is not sufficient to establish what rights Mr Pildegovics might have been able to claim under that oral agreement*".[182] There was nothing contrary about accepting the Norwegian law evidence and reaching that conclusion. Moreover, Dr Ryssdal himself "*made no separate evidential assessment*" of the testimony of Messrs Pildegovics and Levanidov.[183]

### B.4 Whether the investments were "*in the Territory of*" Norway

216. The Applicants also argue that the Tribunal exceeded its powers and provided contrary reasons when concluding that the Applicants' investments were not in the Territory of

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180 Footnote 237 refers to the para. 248 of the Award, the first sentence of which reads "*The Tribunal accepts that the evidence of Mr Pildegovics and Mr Levanidov establishes that the two of them agreed to co-operate in setting up an operation, designed to be "seamless", under which Mr Pildegovics' company, North Star, would harvest snow crab and deliver it to Seagourmet's facility in Båtsfjord, where it would be processed and then marketed by Seagourmet*." Footnote 237 then asserts: "*For example, compare the first sentence of para. 248 of the Award, 22 December 2023, A-0068, (cited just above) to the next sentence of that same paragraph: "However, the record before the Tribunal is not sufficient to establish what rights Mr Pildegovics might have been able to claim under that oral agreement"*."

181 Award, para 247. Emphasis added.

182 Award, para. 248.

183 **A-0008** Expert Report of Dr Anders Ryssdal, 11 March 2021, para. 5.

Norway. Article I(1) of the BIT required investment to be "*invested in the Territory*" of Norway.[184]

217. It is first said by the Applicants that the Tribunal contradicted itself by finding (a) that the "*Applicants' catches were in Russia*"; whilst (b) recognising that some of the Applicants' catches were in the waters over the Norwegian continental shelf.[185]

218. This is a misrepresentation of the Award. The Award does not say that Applicants' catches were "*in Russia*". The Tribunal found that "*North Star's four vessels took the great majority of their catch in the Russian sector of the Loop Hole*".[186] All Parties recognised that *a minority* of the Applicants' catches were taken whilst the vessel was sailing over the Norwegian continental shelf. But the vast majority were not. That is quite obviously no contradiction, let alone one that rises to the necessary threshold. Moreover, the Applicants cannot, on annulment, overturn the Tribunal's findings of fact.

219. The arguments raised at paragraphs 255-257 of the Memorial are misplaced. The Award contains a detailed and careful analysis of the history of Norway's treatment of snow crab. Norway concluded that snow crab was a sedentary species of the continental shelf, despite Norway having initially considered it to be a species subject to the suprajacent international waters regime: see paragraphs 479-483. In response to the points raised by the Applicants:

219.1. Paragraphs 255 and 256 of the Memorial are not understood. Contrary to the Applicants allegations, the Tribunal did not "*assign*" any catches. It accepted the evidence, set out in the above paragraphs, concerning the geographical location of the Applicants' catches of snow crab. The fact that the Tribunal variously referred to the Russian "*sector*" of the Loop Hole – describing the waters – or the Russian continental shelf – describing the seabed underneath those waters – goes nowhere. That is particularly so given that the Tribunal

184 **CL-0001**.

185 Memorial, para. 254.

186 Award, para. 267. Emphasis added.

accepted that, regardless of the legal characterisation of snow crab as sedentary or otherwise,[187] Norway *treated* snow crab as a sedentary species.

219.2. Paragraph 257 is simply wrong to say that the Tribunal made an annullable error by considering snow crab to be a sedentary species. The Tribunal expressly explained at paragraph 480 of the Award that it was not called upon to decide whether or not snow crab is a sedentary species within the UN Convention of the Law of the Sea of 1982 ("**UNCLOS**") definition and there was therefore no need specifically to address the Applicants' evidence on the point. The Tribunal did not consider snow crab to be sedentary "*for the purposes of the Award*", whatever that is said to mean. The only paragraph that the Applicants point to is paragraph 455, which makes no finding on the status of snow crab, it only identifies it as an issue raised in the claims in the case:

> *the Tribunal considers it necessary to examine two matters which cut across the different claims: the status of snow crab as a sedentary species and the effect of the measures taken by the Russian Federation*.

220. Finally, the fact that Norway accepted landings of crabs taken by the Applicants from the Russian continental shelf as 'lawful' is not inconsistent with Norway's right to ban catches being taken from *its own* continental shelf. The Tribunal expressly addressed this point in the Award.[188] In any event, the Tribunal did not decline jurisdiction in relation to the Applicants' NEAFC licences on the ground that they were not investments made in accordance with Norwegian law but rather on the basis that the Latvian licences were necessary to satisfy EU law requirements and did not confer any rights on North Star vis-à-vis Norway, and that North Star intended to conduct most of its fishing activities on the Russian continental shelf in the Loop Hole.[189] This point therefore goes nowhere as the Applicants cannot show that the Tribunal's view on the 'sedentary species' question would have made any difference to the result in any event.

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187 The Tribunal agreed with Norway that whether the snow crab is a sedentary species is a question of law, namely whether it falls within the definition in UNCLOS Article 77(4), and that no designation is required. Award, para. 459.

188 Award, para. 548.

189 See Award, para. 275. It did decline jurisdiction over the so called "Svalbard licences" for that reason: Award, para. 277.

### B.5 Unity approach

221. The Parties addressed the question of the 'unity' of the investment in detail in their written pleadings,[190] and orally.[191] Over several paragraphs of the Award, the Tribunal dismissed the 'unity' approach in this case,[192] and concluded that Mr Pildegovics' only investment was his shareholding in Sea & Coast AS, and that North Star's only investment was its rights under its contracts with Seagourmet Norway AS.

222. The Applicants' point here is simply an appeal. It is, in large part, a restatement of the joint venture points made above. There is no attempt to establish in what respect the alleged errors amount to an annullable error. Tellingly, although the Applicants refer to "*contradictory reasons*", no paragraphs of the Award are referred to and the Tribunal's reasoning is not subjected to any analysis by the Applicants.

## C. TREATMENT OF THE MERITS

223. The Applicants claim that the Tribunal's handling of the merits of the dispute also warrants the annulment of the Award.

224. Several of the Applicants arguments under this heading are addressed elsewhere in this Counter-Memorial. This Chapter will deal with the arguments not otherwise addressed elsewhere, namely that: "*the Tribunal provided contradictory, false and improper reasons regarding whether Norway and/or the Russian Federation caused Applicants' damages*" (**C.1**), "*the Tribunal provided contradictory reasons regarding whether the 2019 Supreme Court judgment was denial of justice or not*" (**C.2**), "*the Tribunal failed to state reasons to explain why Applicants had no 'acquired rights' that could be vindicated*" (**C.3**), "*failed to state reasons to explain why Applicants were not treated arbitrarily and in bad faith*" (**C.4**), "*the Tribunal failed to state reasons to explain why Norway's adoption of discriminatory quotas were not a breach of the BIT*" (**C.5**), the allegations concerning the Tribunal's analysis of the admission of the investment (**C.6**),

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190 See, for example, **A-0003** Applicants' Memorial in the Arbitration, 11 March 2021, paras. 478-486; **A-0016** Respondent's Rejoinder in the Arbitration, 30 June 2022, paras. 300-330.

191 **A-0019** Hearing Transcripts, Day 1, 31 October 2022, for the Applicants, pp. 112-116 (Ms Kim), for Norway, pp. 203-213 (Mr Waseem).

192 Award, paras. 247-250 and 259-282.

the failure to apply the proper law on the merits (**C.7**), and the Applicants' Most Favoured Nation argument (**C.8**).[193]

225. Most if not all these arguments relate to the alleged misappreciation of the facts or misapplication of the applicable law by the Tribunal, which the *ad hoc* Committee cannot deal with. Several also appear to be challenges to points decided by the Tribunal and, in any case, they do not warrant the annulment of the Award.

### C.1 Alleged "*false and contradictory*" reasons regarding causation

226. According to the Applicants,

> [t]*he Tribunal provided contradictory, false and improper reasons regarding several issues going to whether Norway caused the damages suffered by Applicants. This included whether the Russian Federation ever adopted a snow crab fishing ban and whether Norway and Russia acted jointly to close the Loophole, which must lead at least to annulment of the entire merits section of the Award.*[194]

227. The Applicants consider the Tribunal gave "*false and improper reasons*" when addressing the cause of the Applicants' alleged damages because it "*failed to examine significant evidence of Norway and Russia's joint actions*",[195] it "*failed to state reasons to justify its statement that there was a 'Russian ban'*",[196] "*when finding that there was no conspiracy involving Norway and Russia*" it "*actually failed to state reasons for that finding*".[197]

228. Dealing first with the alleged non-justification of the Russian ban, that is flatly contradicted by the Award. In paragraph 91 of its Award, the Tribunal noted that "[i]*n September 2016, the Russian Federation introduced a ban on foreign fishing vessels harvesting snow crab on the Russian continental shelf*." In the footnotes attached to this statement, the Tribunal mentions "*Resp. Rejoinder, para. 402, citing Notices to*

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193 Memorial, para. 264.

194 Memorial, para. 278.

195 Memorial, para. 279.

196 Memorial, para. 280. The Applicants repeats the same argument considering further that "*the Tribunal also failed to state reasons regarding its factual statements or findings that there would have been a Russian ban of snow crab fishing in the Loophole, which there never was*" (Memorial, para. 283. Footnote omitted.)

197 Memorial, para. 282.

*Mariners, 3 September 2016 (R-0045 (English), R-0046 (Russian))*".[198] Russia thus extended their prohibition of snow crab harvesting applicable to foreign vessels to its continental shelf beyond 200 nautical miles (which therefore captured the Russian continental shelf in the Loop Hole). Thus, the Tribunal duly justified its finding on the existence of a Russian prohibition on snow crab harvesting on the continental shelf under its jurisdiction in the Loop Hole.

229. Moreover, the Applicants argue that

> *while the Tribunal held it could not examine Russia's actions, it then nonetheless proceeded to make comments on them and hold there was no evidence of a conspiracy, while failing to examine Applicants' evidence on the same issue, as shown above. The Tribunal thus provided manifestly contradictory reasons, which also created a substantial inequality between the parties, meaning all parts of the Award that go to causation must be annulled.*[199]

230. Furthermore, as they do on other occasions,[200] the Applicants assert that the Tribunal contradicted itself by asserting, on the one hand, that even if "[i]*t is not open to the Tribunal to decide whether or not the Russian Federation was in breach of international law*", and, on the other hand, that "*the record simply does not support the* [Applicants'] *proposition that Norway was the 'instigator of the idea that the coastal States should begin asserting sovereign rights over snow crab in the NEAFC area'"*.[201]

231. There is not the slightest contradiction here. As is made clear in the preceding quotation from the Award, the Tribunal made this statement after due consideration of the record which was submitted to it,[202] including the Applicants' alleged evidence on the existence of a conspiracy between Norway and the Russian Federation including the Applicants' Reply in the Arbitration at paragraphs 171 to 207.[203]

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198 Award, footnote 28. Emphasis omitted. The significance of R-0045-ENG/R-0046-RUS (**R-0468-ENG** / **R-0469-RUS**) in the arbitration is made clear by R-0047-ENG (**R-0470-ENG**) the letter dated 2 September 2016 from the Russian Federation to the EU.

199 Memorial, para. 281. Footnotes omitted.

200 See *e.g.*, their arguments on the *Monetary Gold* principle addressed in paras. 137-198 above.

201 Award, para. 486.

202 Award, para. 486.

203 Memorial, footnote 252.

232. Moreover, the Tribunal mentions *in extenso* in paragraphs 487 to 490 of its Award the documents referenced in the Applicants' Reply in the Arbitration at paragraphs 171 to 207. In other words, the Tribunal took care to examine all the Applicants' arguments and found, on the one hand, that (as a matter of law) it could not rule on the Russian Federation's responsibility and, on the other hand, that (as a matter of fact) the argument on Norway's responsibility for those actions was in any event devoid of merit.

233. The Applicants then allege that:

> *there are significant contradictions in the Tribunal's reasons regarding what caused Applicants' loss. The Tribunal held:*
>
> > *what caused it to lose its economic value was the action of the Russian Federation in banning the harvesting of snow cab [sic] in the Russian sector of the Loop Hole. Had the Russian Federation not taken that action, there is no evidence that North Star would not have been able to continue delivering large quantities of snow crab to Seagourmet.*[204]

234. However, the Applicants fail to present or substantiate the alleged contradiction, and directly ask the *ad hoc* Committee to substitute its own assessment of the facts for the assessment made by the Tribunal. As already explained, this is not the purpose of annulment proceedings before the *ad hoc* Committee.

### C.2 The Tribunal fully justified its position that the Applicants had not been subjected to a denial of justice before the Norwegian Supreme Court.

235. The Applicants also allege that

> *288. The Tribunal provided contradictory reasons regarding whether the Norwegian Supreme Court committed a denial of justice in 2019 by refusing to decide a matter going to the defense of North Star in a criminal proceeding, which must lead to annulment of the parts of the Award considering that issue*.[205]

236. That is said to be because the Tribunal failed to state reasons regarding "*how a domestic court can refuse to address a defence to criminal liability while respecting international law*".[206]

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204 Memorial, para. 286 referring in footnote 260 to the Award, para. 561.

205 Memorial, para. 288.

206 Memorial, para. 291.

237. As a reminder, the Applicants alleged in their Memorial in the Arbitration that

> *By refusing to give a decision on material aspects of the claims of the defendants, and by making them file a civil suit (which is still ongoing) in order to have their contentions properly decided on, the Supreme Court committed a denial of justice, including by causing unconscionable delay.*[207]

238. This was reiterated by the Applicants in their Reply in the Arbitration:

> *North Star held fishing licences which gave it the right to fish for snow crab in the Svalbard zone. North Star contended that this right was opposable to Norway by virtue of the Svalbard Treaty, hence that Norway could not ignore this right in its snow crab regulations or their enforcement. To the extent that the snow crab regulations made it impossible for North Star to avail itself of the right to fish in the Svalbard zone, they were contrary to the Svalbard Treaty and therefore, they could neither be interpreted nor applied as such. This is what North Star pleaded in defence to Norway's criminal prosecution. The Supreme Court refused to adjudicate on this defence.*[208]

239. In its Award, the Tribunal correctly considered that

> *So far as the claim of a substantive denial of justice is concerned, the Tribunal notes that the Norwegian Supreme Court in the criminal proceedings did not hold that North Star's argument based on the Svalbard Treaty was not justiciable in a Norwegian court but that it had to be advanced in civil proceedings and not as a defence in a criminal case. A State is entitled to determine the means by which a particular issue may be litigated before its courts. The Tribunal finds no denial of justice in the Supreme Court taking the view that it did. Nor does it accept that this approach led to unconscionable delay.*[209]

240. The Tribunal continued, in relation to North Star's civil claim, as follows:

> *Moreover, North Star did pursue civil proceedings which culminated in the ruling of the Supreme Court in 2023 dismissing its claim and rejecting its interpretation of the Svalbard Treaty. There was, therefore, no refusal on the part of the Norwegian justice system to consider and rule upon North Star's claims.*[210]

241. This clearly shows that, contrary to the Applicants' contention, the Tribunal examined their argument concerning the alleged denial of justice committed by the Norwegian

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207 **A-0003** Applicants' Memorial in the Arbitration, 11 March 2021, para. 782.

208 **A-0011** Applicants' Reply in the Arbitration, 28 February 2022, para. 802.

209 Award, para. 599.

210 Award, para. 600. Footnote omitted.

Supreme Court and rejected it after due consideration. No part of the reasoning is contradictory, and this is not a ground for the annulment of any part of the Award.

### C.3 The Tribunal's analysis of acquired rights does not warrant the annulment of the Award

242. The Applicants consider that

> *The Tribunal failed to state reasons and seriously breached fundamental rules of procedure in the way it disposed of the argument that Applicants had 'acquired rights' regarding snow crab fisheries, which requires to annul the parts of the award considering that issue.*[211]

243. According to the Applicants, the *ad hoc* Committee should annul the Award on the merits in light of the following finding of the Tribunal:

> *Although separate from the argument about legitimate expectations, the Claimants' argument that they had an acquired right to take snow crab in the Norwegian sector of the Loop Hole fails for similar reasons. Even if the period of time in which North Star's vessels were engaged in taking snow crab in the Loop Hole was sufficient to give rise to an acquired right, the fact remains that, with minimal exceptions, North Star did not take snow crab in the Norwegian sector. The fact that it was extensively engaged in taking snow crab in the Russian part of the Loop Hole could not give rise to an acquired right to take snow crab in the Norwegian sector once the crab had migrated there.*[212]

244. Bearing in mind the first sentence of that paragraph, the Tribunal relied upon the similar reasoning concerning legitimate expectations which it developed at paragraphs 504-531 of the Award. In those paragraphs (and in summary), the Tribunal held as follows:

244.1. there must exist at least a reasonable expectation of stability in favour of the Applicants' claimed acquired rights (para. 505);

244.2. "*No question of State support arose here*" (para. 507);

244.3. the chronology must be taken into consideration and speaks against the Applicants' thesis. As the Tribunal found: "*until well into 2016 there appears to have been no significant harvesting of snow crab in the Norwegian sector of the Loop Hole. There was, therefore, no particular reason for Norway to have*

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211 Memorial, para. 292.

212 Memorial, para. 293 referring in footnote 262 to "*Award, 22 December 2023, **A-0068**, para. 531*."

*taken a position about banning or regulating such harvesting until comparatively late in the day*" (para. 508);

244.4. therefore, "*the absence of any Norwegian legislation regarding the harvesting of snow crab by foreign vessels in the Norwegian sector of the Loop Hole before December 2015 could not, in itself, have given rise to* [acquired rights]" (para. 509);

244.5. the fishing licences and the fishing capacity invoked by the Applicants were granted respectively by Latvia and the EU. "*Neither could therefore create* [acquired rights] *regarding the treatment by Norway of an investment by the* [Applicants]" (para. 511);

244.6. for reasons duly explained, the Tribunal did not "*accept that the actions of the NEAFC as regards harvesting snow crab in the Loop Hole gave rise* [to acquired rights]" in favour of the Applicants (para. 512).

244.7. nor could "*the different statements and actions of Norway itself*" (to which the Tribunal then turned, and discussed in some detail at paragraphs 513 to 529).

245. All these reasons apply to Applicants' claims concerning acquired rights. In support of their request for annulment based on their alleged acquired rights, the Applicants make other various assertions, none of which is accurate, nor capable of rising to the level necessary to warrant the annulment of the Award.

246. The Applicants assert that "*the Tribunal failed to properly address the fact the catches were in international water, not on any State's continental shelf*".[213] By making such a statement, they clearly attempt to reopen the case and overturn the Tribunal's findings of fact, which they cannot.

247. As to those facts, and during the hearing, the following exchange occurred between Mr Pildegovics and the President of the Tribunal:

> *THE PRESIDENT: Thank you. And one last question: yesterday, counsel for the Respondent said that, if I remember rightly, 98% of the snow crab*

[213] Memorial, para. 295.

> *harvested by your ships in 2015 and 2016 was taken from the Russian part of the Loophole, is that correct?*[214]
>
> *Answer: To the best of my knowledge, I would doubt the accuracy of this calculation, but I need to admit that so-called Russian part of NEAFC was the part where the majority of all catches by all flags were made, including Norwegian.*[215]

248. The Applicants also argue that:

> *the Tribunal contradicted itself and failed to state reasons when taking the position that the fact a species is sedentary is a matter of law, which would justify considering the situation had always taken place on the continental shelf, rather than related to a change of situation. The Tribunal notably failed to explain away the EU and Russian position which does not seem to accord with the Tribunal's conclusion.*[216]

249. This argument is developed by the Applicants in footnote 263 of their Memorial where they expose at some length their position concerning the character of the snow crab as a non-sedentary species, which has been dealt with above.[217] In that footnote the Applicants make much of the report by Mr Terje Løbach of Norway's Directorate of Fisheries regarding a PECCOE meeting "*where it is clearly recognized, by the use of an exclamation mark* […] *that states assert that certain species are sedentary in circumstances where it clearly may not be the case, with the example of Russia asserting that prawns are sedentary*."

250. Concerning Mr Løbach's report specifically, quoted in paragraph 471 of its Award, the Tribunal considered the document in the context of a set of documents introduced by the Parties, after which it concluded:

> *This record shows that, notwithstanding Norway's references to its longstanding and consistent position regarding the inclusion of crabs within the definition of 'sedentary species', Norway initially treated the stock of snow crab in the Loop Hole as being in international waters and falling within the regime established by the NEAFC, which would be the case only if the snow crab was non-sedentary. That was the assumption underlying Norway's replies to inquiries from Mr Levanidov's colleagues (see paragraphs 513 to 523, below), the reference in the 2014 Regulations to the exclusive economic zone*

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214 In fact, the quotation was "*99.8%*": **A-0019** Transcript Hearing, Day 1, 31 October 2022. p. 161, l. 10 (Mr Jervell).

215 **A-0020** Transcript Hearing, Day 2, 1 November 2022. p. 164.

216 Memorial, para. 296.

217 See above, para. 219**.**

> *and the Svalbard Fisheries Protection Zone rather than the continental shelf, and Norway's own practice of licensing its fishing vessels to take snow crab in the Loop Hole. Moreover, when the Russian Federation raised the question in October 2014, there was initially some hesitation in the Norwegian Government regarding whether the snow crab was a sedentary species within the meaning of Article 77(4) of UNCLOS. The Tribunal does not, however, consider that Norway's actions can be regarded as improper or unwarranted.*[218]

251. It is plainly apparent that the Tribunal did not fail to examine the Applicants' allegations concerning their supposed acquired rights. Therefore, the Award cannot be annulled on this ground.

## C.4 The Tribunal's analysis of the Applicants' allegations of Norway's bad faith and arbitrary conduct does not warrant the annulment of the Award

252. Next, the Applicants argue that:

> *The Tribunal failed to state reasons and seriously breached fundamental rules of procedure in the way it disposed of the argument Respondent acted arbitrarily and in bad faith, which requires annulment of parts of the Award considering that issue*.[219]

253. This argument is made in relation to the paragraph 543 of the Award. The Applicants quote only the final sentence of this paragraph. The full paragraph is set out below, and the emphasis is that of the Applicants:

> *The Claimants have argued that Norway acted in order to exclude the EU vessels harvesting snow crab on its continental shelf and reserve the resource for its own fishing industry, but that is exactly what Article 77 provides for. There is nothing extraneous or improper in Norway acting in this way. Nor is there anything wrong with it using its sovereign rights as a bargaining chip with the EU <u>which has done the same in relation to marine resources in the continental shelves and EEZs of its Member States</u>*.[220]

254. The Applicants consider that the emphasised portion of the paragraph "*was not argued and comes from the Tribunal, which did not put this question to the parties*".[221]

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218 Award, para. 479.

219 Memorial, para. 299.

220 Memorial, para. 300.

221 Memorial, para. 301.

255. But, reading the paragraph in full, this is clearly a bad point. Stating that Norway used and uses "*its sovereign rights as a bargaining chip with the EU which has done the same in relation to marine resources in the continental shelves and EEZs of its Member States*" was not the "*reason underlying the decision*" of the Tribunal, as the Applicants allege at paragraph 301 of the Memorial. The Tribunal first found that the behaviour of Norway was neither "*extraneous or improper*" and then provided an illustration of usual practices of UNCLOS Article 77 by States and international organisations parties.

256. There is therefore nothing in this ground.

## C.5 The Tribunal's analysis of alleged discriminatory quotas does not justify the annulment of the Award

257. Additionally, the Applicants argue that

> *[t]he Tribunal failed to state reasons and seriously breached fundamental rules of procedure in the way it disposed of the argument Respondent adopted discriminatory quotas, which requires annulment of that part of the Award.*[222]

258. This allegation is made in connection with paragraph 549 of the Award:

> *The Claimants criticise the quotas for taking snow crab which Norway has adopted since 2016 as too low and environmentally inappropriate, based on the Expert Report of Dr Kaiser. That is not a matter on which the Tribunal needs to opine. Even if that criticism was justified, it would not amount to a breach of the duty of consistency and transparency under Article III of the BIT.*[223]

259. Here again,[224] as noted by the Tribunal, this claim "*recycles the arguments about legitimate expectations and arbitrariness and fails for the same reasons, as explained above*".[225] In other words, the Tribunal considers that the answer to that allegation is contained in its dismissal of the Applicants' arguments in paragraphs 532 to 544 of the Award. For context, several of the Applicants' arguments before the Tribunal made similar points, dressed up in different ways. Their Annulment Memorial is no different. This prompted the Tribunal to add that it "*will, therefore, be brief in addressing this*

222 Memorial, para. 302.

223 Award, para. 549.

224 See e.g. above, para. 244 above in respect of acquired rights.

225 Award, para. 545.

*part of the Claimants' case*".[226] Norway can be similarly brief and relies on the arguments it has already set out at length in earlier parts of this Counter-Memorial. Norway refers the *ad hoc* Committee to the arguments that it has made at paragraphs 242-256 above. The reasoning of the Tribunal was fully explained in paragraphs 545-551 of the Award.

260. Norway's arguments in those paragraphs apply by analogy to points on the alleged discriminatory quotas and the Tribunal's alleged failure to give reasons for its rejection thereof.

### C.6 Admission of the Investment

261. The Applicants also allege that the Tribunal manifestly exceeded its powers by holding that it did not have jurisdiction to hear whether Norway breached its admission obligations under Article III of the BIT. This argument relates solely to the Applicants' so-called "Svalbard licences",[227] and is misplaced for at least three reasons.

261.1. *First*, it misrepresents the Award, which considered and decided the point at paragraphs 587-601. The Applicants' essential complaint is that the Tribunal reached a decision that the Applicants disagree with.

261.2. *Secondly*, the close textual analysis to which the Applicants subject the relevant paragraph of the Award demonstrates that this reasoning is nothing like a "*manifest*" or "*obvious*" excess of power. Norway set out the reasons for its position on the interaction between Articles III and IX of the BIT in its Counter-Memorial.[228] The Applicants did not address Norway's points in their Reply, and Norway's argument was, in the event, preferred by the Tribunal.

261.3. *Thirdly*, the Tribunal gave different reasons for its conclusion. As well as concluding that Article IX gives the Tribunal jurisdiction only with respect to disputes concerning an existing investment, the Tribunal continued at paragraphs 589-592 to provide a further, standalone reason that Article III of the BIT was not breached. The Tribunal decided that "*the proposed investment*

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226 *Ibid*.

227 See **A-0003** Applicants' Memorial in the Arbitration, 11 March 2021, paras. 809-812; Award, para. 442.

228 **A-0010** Respondent's Counter-Memorial in the Arbitration, 29 October 2021, paras. 854-859.

*would not have been in accordance with the laws and regulations of Norway*".[229] There can therefore be no manifest excess of power: even if the Tribunal had obviously been wrong on that point, they would nevertheless have reached the same conclusion because of their reasoning on other points which the Applicants do not impugn.

### C.7 The alleged failure of the Tribunal to apply the proper law on the merits does not warrant the annulment of the Award

262. Still in respect of the treatment of the merits by the Tribunal, the Applicants also argue that

> *The Tribunal failed to state reasons regarding why there was no better treatment under other treaties, meaning that the entire merits analysis must be annulled, or at least regarding why the analysis under the other treaties, including the Svalbard Treaty, must or must not be done, which also constituted a manifest excess of power as where the Tribunal failed to apply the proper law on the merits.*[230]

263. The Applicants add that "[i]*n respect of Applicants' position that various other treaties (Svalbard, UNCLOS, NEAFC) were part of the applicable law, the tribunal appears to have failed to apply the applicable law, by applying it on an arbitrary and incomplete basis*".[231] They then conclude by alleging that "[t]*he Tribunal also fails to state reasons regarding why Applicants could not have benefitted from better treatment under other treaties*".[232]

264. In support of their claim, the Applicants invoke a truncated quotation from paragraph 449 of the Award which, read in full, reads as follows:

> *The Tribunal considers that there is less to this apparent difference than might at first appear. Since the Claimants are claiming only for alleged breaches of the BIT, it is the BIT which the Tribunal must apply. In doing so, it can consider – if it is necessary to do so – the other treaties invoked, as well as other rules of international law. However, whether a provision of one of those treaties is relevant to the determination of whether Norway has breached a provision of the BIT is not a matter on which it is safe to generalise; that question must be considered in the context of the specific facts and allegation raised. In*

229 Award, paras. 589-592.

230 Memorial, para. 311.

231 Memorial, para. 312.

232 Memorial, para. 314 referring in footnote 272 to "*Award, 22 December 2023, **A-0068**, para. 428*.".

> *addition, the Tribunal recalls that, in addressing the Respondent's First Objection to jurisdiction and admissibility (see paragraphs 288 to 298, above), it made clear that there were limits on the extent to which it could rule on a matter involving the rights and obligations of other States.*

265. The passage omitted in the Applicants' Memorial is underlined here. It is, of course, material to understanding the Tribunal's motivation.

266. Generally speaking, these allegations are apt to mislead. First, the Applicants fail to identify precisely the alleged failure by the Tribunal. Second, the Tribunal in fact justified the application or non-application of treaties when it considered it necessary to determine a breach of the BIT.[233] Third, the Tribunal gave reasons as to "*why Applicants could not have benefitted from better treatment under other treaties*" specifying that "*Article IV of the BIT does not prohibit discrimination between Latvian investors and Russian investors. It prohibits* discrimination *between the* investment *of a Latvian investor and the investment of a Russian investor*".[234]

267. These motivations speak for themselves and answer the Applicants' allegation concerning alleged failure of the Tribunal to apply the proper law to the merits.

### C.8 The Tribunal's Most Favoured Nation analysis does not warrant annulment of the Award

268. Finally, the Applicants consider that "[t]*he MFN section of the Award must be annulled for failure to state reasons, as the Tribunal's reasons are contradictory, do not make sense, and fail to address relevant evidence*".[235]

269. This argument is made in relation to paragraph 570 of the Award, which, yet again, has been only partially quoted by the Applicants:

> *The fact that a ship flagged in State A and owned by a company in State A operates for a few months taking snow crab on the continental shelf of State B does not amount to an investment by State A company in the territory of State B. There is no long-term commitment and no apparent benefit to the economy of State B. In the present case, there is no indication of any benefit to the*

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233 See for example regarding Applicants' legitimate expectation and NEAFC quotas, Award, para. 512; Article 300 of the UNCLOS, Award, paras. 532-544; the 1920 Treaty and the allegations of breaches of obligations to admit investment and equitable and reasonable treatment, paras. 586-602.

234 Award, para. 569. Emphasis in the Award.

235 Memorial, para. 315.

> *economy of Norway arising from the fact that those Russian vessels harvested snow crab from the Norwegian outer continental shelf.*[236]

270. In the previous paragraph (569) of the Award, after recalling that it "*has held that North Star's only investment in the territory of Norway was the claim to performance under the agreement with Seagourmet*", the Tribunal noted that. "[t]*he question, therefore, is whether there was during 2016 a Russian investor's investment in Norway which was treated more favourably than North Star's investment*". Paragraph 570 then reads in full as follows (the underlined text below having been omitted from the Applicants' citation):

> *The Tribunal is not persuaded that that was the case. The Tribunal accepts that the Russian flagged vessels which harvested snow crab in the Norwegian sector of the Loop Hole during the second half of 2016 were owned by Russian companies but it does not consider that those vessels were an investment in Norway. The fact that a ship flagged in State A and owned by a company in State A operates for a few months taking snow crab on the continental shelf of State B does not amount to an investment by the State A company in the territory of State B. There is no long-term commitment and no apparent benefit to the economy of State B. In the present case, there is no indication of any benefit to the economy of Norway arising from the fact that those Russian vessels harvested snow crab from the Norwegian outer continental shelf.*[237]

271. It must be recalled that:

271.1. *First*, the Applicants failed to demonstrate that their vessels were indeed investments in the territory of Norway. Only Mr Pildegovics' shareholding in Sea & Coast AS, and North Star's claims to performance under its agreement with Seagourmet Norway AS, fell within the jurisdiction of the Tribunal. There was no allegation that these investments were treated differently than an investment of another investor.[238]

271.2. *Secondly*, the Applicants' allegation under Article IV of the BIT was that Norway granted "*more favourable treatment to Russia snow crab fishing vessels and operators*" (Award, para. 425). However, as the Tribunal set out in paragraph 570 of its Award, whilst it accepted that "*the Russian flagged vessels which harvested snow crab in the Norwegian sector of the Loop Hole* […] *were*

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236 Memorial, para. 316, citing the Award. Applicants' emphasis removed.

237 Award, para. 570.

238 Award, paras. 278-279 and 569.

*owned by Russian companies*", it "[did] *not consider that those vessels were an investment in Norway*".[239] There was therefore no more favourable treatment of any Russian *investment*.

271.3. *Thirdly*, it is not for the *ad hoc* Committee to substantiate its assessment of the facts to that of the Tribunal.[240] This allegation therefore goes nowhere.

## D. COSTS

272. According to the Applicants, "*the Tribunal failed to properly adjudicate Applicants' dispute*"[241] by rendering "*non-sensical rulings on costs*"[242] because the Tribunal "*awarded interest on costs in favour of Respondent even though it did not make such a request*".[243] The Tribunal is also said to have made an error in the calculation of the arbitration costs owed by the Applicants.[244]

273. The Applicants, however, fail to identify under which ground for annulment this argument falls, nor do they explain why this argument, which specifically concerns the costs of arbitration, would justify the annulment of the Award in its entirety.

274. As will be shown below, the Tribunal's decision relating to interest on costs in no way justifies the annulment of the Award, nor does the Tribunal's error in calculating the arbitration costs.

### D.1 Interest on costs

275. The Applicants argue that the costs decision must be annulled because Norway did not request the interest awarded.

276. In its Counter-Memorial in the Arbitration, Norway requested the Tribunal *inter alia*:

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239 Award, para. 570.

240 See above, Chapter 2, paras. 17-18.

241 Memorial, para. 129.

242 Memorial, para. 122: "*c) The Tribunal rendered non-sensical rulings on costs*".

243 Memorial, para. 123.

244 Memorial, para. 128.

> *(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*.[245]

277. The Applicants' Memorial in the Arbitration adopted a similar approach, expressly seeking interest on the principal sums claimed by the Applicants, and seeking costs, but not seeking interest on those costs, instead seeking "*such other and further relief as the Tribunal deems available and appropriate in the circumstances*".[246] The Applicants in their Memorial on Annulment expressly now seek interest on their legal costs, a departure from their previous position,[247] no doubt adopted to ensure consistency with what they now say Norway ought to have done.

278. The Tribunal has the power and discretion to allocate the costs of the proceedings as it sees fit.[248] An ICSID Tribunal enjoys wide discretion in deciding the costs as provided by Article 61(2) of the ICSID Convention, which establishes that

> *(2) In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

279. As was noted long ago by an annulment committee,

> *Article 61(2) of the Convention provides that the Tribunal shall decide how and by whom the costs of proceedings including the expenses incurred by the parties, the fees and expenses of the members of the Tribunal and the charge for the use of the facilities of the Centre shall be paid.*[249]

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245 **A-0010** Respondent's Counter-Memorial in the Arbitration, 29 October 2021, para. 893(2)-(3).

246 **A-0003** Applicants' Memorial in the Arbitration,11 March 2021, para. 1022(e)-(j).

247 Memorial, para. 328.

248 ICSID Convention, Article 61(2). See also **RL-0314-ENG** *Ioan Micula, Viorel Micula and others v. Romania (II)*, ICSID Case No. ARB/14/29, Award, 5 March 2020, para. 455.

249 **AL-0040** *Maritime International Nominees Establishment* v. *Republic of Guinea*, ICSID Case No. ARB/84/4, Annulment Proceedings, Decision on Annulment, 22 December 1989, para. 6.111.

280. As recalled by the Tribunal, "[it] *has a discretion regarding whether to make an award of costs and, if so, on what terms*".[250]

281. Other tribunals have adopted the same position, including the tribunal in *GEA Group Aktiengesellschaft v. Ukraine* affirming that:

> *Article 61(2) does not prescribe a particular test for tribunals to assess costs, nor does it place any restrictions on a tribunal's ability to do so. In light of this, the Tribunal understands the power granted under this Article to be broad, allowing the Tribunal discretion in making its determination.*[251]

282. Moreover, the Applicants themselves argued in their Memorial in the Arbitration at paragraph 900 that "[i]*nterest is an integral component of full reparation under customary international law*",[252] and that

> [t]*herefore, an award of interest is not separate from full reparation under the* Chorzów Factory *standard; it is a component of, and gives effect to, the principle of full reparation.*[253] *The requirement of full reparation must inform all aspects of an interest award, including the determination of the appropriate rate of interest, and of whether such interest should be simple or compound.*[254]

283. The interest due was an inherent part of Norway's costs, and was in any event an "*appropriate*" order for the Tribunal to have made. Ordering interest on costs is a common form of relief ordered by Tribunals. The Applicants therefore cannot now assert either that the Tribunal ruled *ultra petita*, or that they were deprived of their right to be heard, to justify the annulment of the Award.

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250 Award, para. 617.

251 **RL-0311-ENG** *Group Aktiengesellschaft* v. *Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, para. 362. See also e.g. **RL-0312-ENG** *Libananco Holdings Co. Limited* v. *Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, para. 560 or **RL-0313-ENG** *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 316.

252 **A-0003** Applicants' Memorial in the Arbitration, 11 March 2021, para. 898.

253 *Ibid*., footnote 1129: "*Asian Agricultural Products Limited (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, CL-0076 **[RL-0328-ENG]**, para. 114 *('[T]he case-law elaborated by international arbitral tribunals strongly suggests that in assessing the liability due for losses incurred the interest becomes an integral part of the compensation itself')*; *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, CL-0260 **[RL-0329-ENG]**, para. 128; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 Apr 2002, CL-0153 **[RL-0330-ENG]**, para. 174 *('Regarding such claims for expropriation international jurisprudence and literature have recently after detailed consideration concluded that interest is an integral part of the compensation due')*". New references in brackets.

254 *Ibid*., footnote 1130: "*See ILC, Articles on the Responsibility of States for Internationally Wrongful Acts, 2001, CL-0255, Article 38*." **RL-0331-ENG**

## D.2 Norway's Arbitration Costs

284. In addition to the interest associated with the cost of arbitration, the Applicants make much of the amount of the costs of the Arbitration decided by the Tribunal.

285. As noted by the Applicants, the Tribunal asserted that the cost of the arbitration was USD 597,307.04.[255] After pointing out that the costs of arbitration "*have been met by advance payments made on an equal basis by the Parties*",[256] the Tribunal directed the Applicants to "*pay to the Respondent the sum of USD 597,307.04 to cover the entirety of the arbitration costs*".[257] The Applicants conclude that "[t]*he Tribunal's approach to costs is further evidence that it failed to properly adjudicate the manner* [sic], *which justifies annulling the entire Award*".[258]

286. Norway does not challenge the Applicant's calculations. Considering the equal advances of the Applicants and Norway,[259] the Tribunal should have concluded that the Applicants must reimburse the costs advanced by Norway and not returned by ICSID.[260]

287. While Norway agrees with the Applicants' calculations, it disagrees with their conclusion that this demonstrates that the Tribunal "*failed to properly adjudicate the manner* [sic], *which justifies annulling the entire Award*".[261]

288. Errors in the calculation of arbitration costs are not exceptional. Fortunately, they do not warrant the annulment of an arbitral award, which constitutes an "*exceptional remedy*"[262] aimed at safeguarding the integrity of the arbitral process. Other procedures are expressly provided for under the ICSID Convention to correct such errors, in particular Article 49(2) of the Convention, which provides that

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255 Award, para. 618.

256 *Ibid*., para. 619. Footnote omitted.

257 *Ibid*., para. 620.

258 **A-0003** Applicants' Memorial in the Arbitration, 11 March 2021, para. 129.

259 **A-0068** ICSID Financial Table from Award, 22 December 2023, paras. 618-620.

260 **R-0471-ENG** Final Financial Statement of 22 December 2023.

261 **A-0003** Applicants' Memorial in the Arbitration, 11 March 2021, para. 129.

262 See above Chapter 2, paragraphs 11 *et seq*.

> *(2) The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered.*

289. As early as 1989, an ICSID committee held that an error regarding the costs of arbitration cannot justify the annulment of an ICSID award:

> *5.12. The Committee has considered whether Article 49(2) constitutes the only remedy for non-compliance with the obligation to deal with every question submitted to the tribunal. It has concluded that Article 49(2) provides a satisfactory remedy for the case of a tribunal having failed to exercise its jurisdiction in full. For example, in the present case the Tribunal failed to rule on MINE's claim to be reimbursed for the costs and expenses incurred in the United States District Court and in arbitration before the American Arbitration Association in earlier stages of its conflict with Guinea. Article 49(2) would have provided a specific remedy and, not having invoked it, MINE could not have relied on that failure for purposes of annulment.*[263]

290. More generally, the *ad hoc* committee in *Wena Hotels* v. *Egypt* stated that

> *Any other than a limited scope given to this ground [the award has failed to state the reasons on which it is based] for annulment would cause some confusion with other remedies provided by the Convention. Indeed, when the reasons stated in the award give rise to doubts about its meaning, either party may request interpretation of the award under Article 50. In the case where the Tribunal omitted to decide on a question or where the award contains an error, either party may request the award be rectified, according Article 49(2). These remedies confirm the understanding that any challenge as to the substance of reasons given in the award cannot be retained as a ground for annulment under Article 52(1)(e).*[264]

291. In the *Railroad Development Corporation (RDC) v. Republic of Guatemala* case, the Tribunal rectified an award modifying the sum awarded by USD 2 million as follows:

> *a) the amounts in line 7 of para. 277 shall be deleted and replaced by '$6,818,865' and '$5,591,469.30' respectively.*

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263 **AL-0040** *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Annulment Proceedings, Decision on Annulment, 22 December 1989, para. 5.12.

264 **AL-0028** *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 80.

*b) The amounts in line 5 of para. 283(2) shall be deleted and replaced by '$6,818,865' and '$5,591,469.30' respectively.*[265]

292. Norway regrets that the Applicants opted for a costly and complicated annulment proceeding instead of a rectification procedure specifically provided for arithmetic errors of this kind under Article 49 of the ICSID Convention. In any event, this arithmetical error cannot in any way justify the annulment of the Award.

### D.3 Annulment of costs Award

293. The Applicants' final 'ground' for the annulment of the Tribunal's costs order is that, if the Applicants succeed in their grounds for annulment, the *ad hoc* Committee ought to order the annulment of the Tribunal's costs award. If and to the extent that the *ad hoc* Committee annuls the Award *in its entirety*, then it follows that the Tribunal's costs award is also annulled.

294. However, Norway does not accept that in any other circumstance it necessarily follows that the Tribunal's award on costs must also be annulled. A partial annulment of the Award does not necessarily lead to a complete annulment of the Tribunal's costs award, unless those parts that are annulled are inextricably linked to the decision to award costs.[266] There does not ultimately appear to be any difference between the Parties on this point; the Applicants only seek the annulment of the costs award because, on their view, they seek to annul "*parts of the Award without which* [Norway] *would not have won the case*".

### D.4 Annulment Costs

295. The Applicants seek their costs in this annulment application. Norway opposes that and seeks an order that the Applicants pay Norway's entire costs in this annulment application, including interest at such a rate—and with such compounding—as the *ad hoc* Committee considers appropriate in the circumstances. Norway makes this request

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265 **RL-0309-ENG** *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision, 18 January 2013, para. 3((a) and (b)).

266 **RL-0285-ENG** *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Annulment, 22 January 2025, para. 937, citing **AL-0040** *Maritime International Nominees Establishment v. Republic of Guinea (II)*, ICSID Case No. ARB/84/4, Decision for Partial Annulment of the Arbitral Award, 22 December 1989, para. 6.112.

bearing in mind the particularly blatant inadequacy of the Applicants' case for annulment under the provisions of ICSID Article 52.

## CHAPTER 6: PRAYER FOR RELIEF

296. For the reasons stated in this Counter-Memorial, the Respondent respectfully requests the *ad hoc* Committee:

(1) To dismiss the annulment application in its entirety;

(2) To order the Applicants to pay the Respondent its costs, professional fees, expenses and disbursements, inclusive of interest; and

(3) To order such further or other relief as the *ad hoc* Committee deems appropriate.

22 April 2025

**Respectfully submitted on behalf of the Kingdom of Norway**

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