THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

PETERIS PILDEGOVICS AND SIA NORTH STAR

APPLICANTS

V.

THE KINGDOM OF NORWAY

RESPONDENT

APPLICANTS' REPLY FOR ANNULMENT OF THE AWARD OF 22 DECEMBER 2023 AND REQUEST FOR CROSS-EXAMINATION OF MR. JERVELL AND MS. NYGARD AT THE HEARING

8 JULY 2025

Savoie Arbitration s.e.l.a.s.u.
26 rue Vignon
75009 Paris

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I. INTRODUCTION

1. Pursuant to the procedural calendar set by the *Ad Hoc* Committee in its Procedural Order No. 1 of 8 November 2024, the Committee's Procedural Order No. 3 of 6 March 2025, and the Committee extension of 30 June 2024, Mr. Peteris Pildegovics and SIA North Star (***Applicants***), respectfully submit this Reply in support of their Application for Annulment, which includes a request for cross-examination at the hearing.

2. This Reply is submitted in the form of "recapitulative conclusions" or "recapitulative pleading" in the sense that it is structured exactly as the Memorial on Annulment with slight modifications and additions. A redline / compare between the Memorial and this Reply is provided simultaneously so that Respondent and the Committee may see quickly what additions and changes have been made in this version.

3. The Application for Annulment seeks the annulment, in its entirety, of the Award dated 22 December 2023 in the case *Peteris Pildegovics and SIA North Star v. the Kingdom of Norway,* ICSID Case No. ARB/20/11 (the "**Award**"), rendered by an arbitral tribunal (the "**Tribunal**") constituted pursuant to the *Agreement Between the Government of the Kingdom of Norway and the Government of the Republic of Latvia and for the Mutual Promotion and Protection of Investments* (the "**BIT**" or "**Latvia-Norway BIT**").

4. Applicants reserve the right to supplement, modify or otherwise change the grounds for annulment presented herein.

5. In the present Application, Applicants submit at least:

   - **3 (three) grounds** for annulment as to **the proceedings in their entirety**;
   - **6 (six) grounds** for annulment on how the Tribunal exercised its **jurisdiction**;
   - **10 (ten) grounds** for annulment on how the Tribunal examined the **merits**; and
   - **3 (three) grounds** for annulment regarding **costs**.

6. This Application for Annulment is structured as follows:

   (a) **Part II** briefly recalls the facts of the case;

(b) **Part III** addresses the law on annulment of ICSID awards;

(c) **Part IV** discusses the following three grounds for Annulment of the Award:

(i) First, the Tribunal failed to discharge its duty to properly adjudicate the matter by acting well below the standards expected from an ICSID Tribunal, including by spending insufficient time working on the matter, by failing to notify to Applicants an important procedural ruling weeks before the Award was rendered (and/or relying on the fact a certain document did not exist even though Applicants had proposed to submit it into the record), and by rendering a non-sensical and fundamentally unfair award on costs, which constitute serious breaches of fundamental rules of procedure, including that requiring ICSID arbitrators to effectively fulfil their mandate;

(ii) Second, the Tribunal caused a denial of justice to Applicants when it failed to exercise its powers by applying the *Monetary Gold* principle and refusing to decide certain issues before it, while also creating a situation of fundamental inequality between the parties since a State is not affected in the same way as a private person by the *Monetary Gold* principle, in serious breach of a fundamental rule of procedure, amongst other grounds of annulment on this issue;

(iii) Third, Respondent multiplied improper behaviour, notably by retaining intentionally or recklessly, on multiple occasions, outside counsel and experts with conflicts of interest, as well as by misleading the tribunal when requesting bifurcation of damages, rendering the proceedings fundamentally unequal, in serious breach of a fundamental rule of procedure, which may also be explained by the fact some of Respondent's counsel were not independent from the matters in dispute.

(d) **Part V** discusses the following six grounds for annulment of the Award regarding how the Tribunal exercised its jurisdiction:

(i) First, the Tribunal manifestly exceeded its powers by refusing to decide and/or incorrectly deciding how the Svalbard Treaty applied to the dispute;

(ii) Second, the Tribunal manifestly exceeded its powers by incorrectly holding that neither NEAFC nor Svalbard licenses could be investments in Norway;

(iii) Third, the Tribunal manifestly exceeded its powers and/or provided contradictory reasons by incorrectly holding that the joint venture was not an investment in Norway under the BIT;

(iv) Fourth, the Tribunal manifestly exceeded its powers and/or provided contradictory reasons by adopting several improper considerations going to whether the Applicants' investment was in the territory of Norway;

(v) Fifth, the Tribunal manifestly exceeded its powers and/or provided contradictory reasons by failing to apply the approach of "unity" of the investment to the present case;

(vi) Sixth, the Tribunal manifestly exceeded its powers by incorrectly holding that it did not have jurisdiction to hear Applicants' claim that Norway acted in breach of Article III of the BIT with respect to the admission of the investment.

(e) **Part VI** discusses the following ten grounds for annulment of the Award regarding how the Tribunal examined the merits:

(i) First, the Tribunal failed to reopen the proceedings to hear the question of whether the 20 March 2023 judgment of the Supreme Court of Norway constituted a breach of the BIT, notably in the light of the EU's diplomatic note of 30 October 2023 protesting against the judgment, despite Applicants' request to reopen the proceedings, while the Tribunal also failed to notify Applicants of its decision not to reopen the proceedings, in what constituted a manifest, serious, and even shocking, or at least surprising breach of a fundamental rule of procedure;

(ii) Second, Respondent misled the Tribunal when it requested bifurcation of damages, which must lead to the annulment of the entire Award, because it created a fundamental inequality between the Parties in how they were able to put their case to the Tribunal;

(iii) Third, the Tribunal provided contradictory, false and improper reasons regarding several issues going to whether Norway caused the damages suffered by Applicants, including whether the Russian Federation ever adopted a snow crab fishing ban and whether Norway and Russia acted jointly to close the Loophole, which must lead to annulment of the merits section of the Award;

(iv) Fourth, the Tribunal failed to state reasons regarding whether the Norwegian Supreme Court committed a denial of justice in 2019 by refusing to decide a matter going to the defense of North Star in a criminal proceeding, which must lead to annulment of the parts of the Award considering that issue;

(v) Fifth, the Tribunal failed to state reasons and seriously breached fundamental rules of procedure in the way it disposed of the argument Applicants had "acquired rights" regarding snow crab fisheries, which requires to annul the parts of the award considering that issue;

(vi) Sixth, the Tribunal failed to state reasons and seriously breached fundamental rules of procedure in the way it disposed of the argument that Respondent acted arbitrarily and in bad faith, which requires annulment of parts of the Award considering that issue;

(vii) Seventh, the Tribunal failed to state reasons and seriously breached fundamental rules of procedure in the way it disposed of the argument that Respondent adopted discriminatory quotas, which requires annulment of that part of the Award;

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

(ix) Ninth, the Tribunal failed to state reasons regarding why there was no better treatment under other treaties, meaning that the entire merits analysis must be annulled, and also regarding why the analysis under the other treaties, including the Svalbard Treaty, must or must not be

done, which also constituted a manifest excess of power because the Tribunal failed to apply the proper law on the merits;

(x) Tenth, the Tribunal failed to state reasons and otherwise provided contradictory reasons in its application of the Most Favoured Nation standard.

(f) **Part VII** discusses the following three grounds for annulment of the Award regarding costs:

(i) First, the Tribunal awarded interest on Norway's costs even though Norway did not ask for it and the Tribunal did not put the issue to the Parties, in breach of Applicants' right to be heard, which constitutes a serious departure from a fundamental rule of procedure;

(ii) Second, the Tribunal failed to state reasons regarding why it awarded to Norway arbitration costs higher than those Norway had paid, in an amount beyond what Norway asked for, and which contradicted the recognition that Applicants had paid their part of the requested costs, thereby seriously departing from a fundamental rule of procedure;

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

(g) **Part VIII** discusses Applicants' request for costs in the annulment proceedings.

(h) **Part IX** discusses Applicants' request for cross-examination of Mr. Jervell and Ms. Nygård at the hearing.

(i) **Part X** provides Applicants' request for relief.

7. Applicants in no way admit the correctness of any of the legal or factual positions taken by Respondent in its pleadings, whether in the arbitration or in the present annulment proceedings, except if explicitly admitted.

8. Applicants attach to this Reply exhibits **A-0206** to **A-0224** and legal authorities **AL-0123** to **AL-0160**.

II. FACTS

9. The present dispute arises from Norway's multiple breaches of international law, including of the Latvia-Norway BIT which have caused Applicants significant damages to their snow crab enterprise in Norway.

10. The Applicants established in Norway a snow crab fishing enterprise, which had a joint venture and/or cooperation agreement with the business partner of one of the Applicants. The Applicants' vessels started fishing snow crab in international waters in 2014 and offloading their catches in Norway, with full approval of Norway.

11. Starting in July 2015, Norway and the Russian Federation acted in concert to oust EU interests, including Latvian interests such as the Applicants, from the snow crab fisheries occurring in international waters in the Loophole. The Loophole is an area in the Barents Sea beyond Norway and the Russian Federation's exclusive economic zones, but where the extended continental shelf of the two countries meets.

12. As has become clear, and as is relevant to this annulment application, at least two members of Norway's current legal team appear to have had a pivotal role in implementing the measures ousting EU interests from the Barents sea. They are Mr. Kristian Jervell, director general of the legal department of Norway's Ministry of Foreign Affairs, the highest ranking legal officer in the department, and Kristina Kvamme Nygård, adviser in the same department. In 2014 and 2015, Mr. Jervell and Ms. Nygård were at the very center of the strategy, adopted in conjunction with the Russian Federation, to exclude EU crabbers from the snow crab fisheries. This is clear from correspondence in the arbitration record which Norway itself submitted in document production, in particular **C-187**, **C-190**, **C-191**, **C-192** and **C-194**.[1]

13. The snow crab was a new species in the Barents Sea at the time and thus Russian, Norwegian and EU interests started fishing snow crab in what was considered by all as international waters at the time. The hope was that participating in this new fishery would allow the participants to obtain quotas on a 'acquired rights' basis, based on historical catches.

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[1] Those exhibits produced by Norway in the underlying arbitration show that Ms. Nygård provided advice on how to characterize snow crab as a sedentary species as a matter of international law and that Mr. Jervell was actively involved in advising and deciding how to characterize snow crab as a matter of the law of the sea, at a time where he was the director responsible for law of the sea within Norway's Ministry of Foreign Affairs. See generally **C-187**, **C-190**, **C-191**, **C-192**, **C-194**.

14. Latvia and the EU have protested Norway and the Russian Federation's measures excluding EU crabbers ever since 2015. The EU has stated in a regional fisheries organization that EU vessels who had participated in the Loophole snow crab fisheries had "acquired rights" and needed to be compensated.[2] Latvia expressed its surprise to Norway about the measures leading to the closure of the Loophole to EU interests.[3] In October 2023, the EU went so far as making a diplomatic protest against Norway regarding a 20 March 2023 Norwegian Supreme Court decision refusing one of the Applicants, SIA North Star, snow crab fishing licenses.[4]

15. In the face of such manifest breaches of international law, including of the BIT, by Norway, Applicants filed an ICSID claim, which was registered 1 April 2020.

16. Over the course of 2022, Norway proceeded to terminate its BITs with several EU countries, including with Latvia, in an apparent attempt to preclude other claims regarding its closure of the Loophole to snow crab fisheries.[5] The agreement terminating the Latvia-Norway BIT terminates the sunset clause. An initial agreement terminating the Latvia-Norway BIT also appeared to preclude the re-constitution of a tribunal, even following a successful annulment. Following Applicants' lobbying of the Latvian Parliament's foreign relations commission, the Latvian Parliament adopted a law approving the termination with some modifications, which included ensuring that ongoing cases could be continued in a matter that respected Norway's agreement to arbitrate matters in ICSID cases,[6] which agreement is irrevocable once it has been accepted.

17. The Tribunal rendered an Award on 22 December 2023, finding jurisdiction in respect of parts of Applicants' investment in Norway and rejecting the claims on the merits. However, in rejecting the claims on the merits, the Tribunal refused to adjudicate parts of the claim on the basis that it involved States not present before the Tribunal and

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2 Report of the 35th NEAFC Annual Meeting, from 2016-11-14 to 2016-11-18, **C-0214**, p. 18; Claimants' Reply to Respondent Counter-Memorial and Counter-Memorial on Jurisdiction, 28 February 2022, **A-0011**, para. 751.

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

4 EU Diplomatic Note to Norway, 30 October 2023, **A-0120**, referred to in Claimants' Letter of 7 November 2023 to the Tribunal, **A-0110**. Applicants note that the Note Verbale was formally introduced into the record in the current annulment proceedings following their request for admission of factual exhibits into the record by letter to the Ad Hoc Committee of 15 May 2025.

5 *See e.g.* Letter from Claimants to the Tribunal, 24 August 2022, **A-0143**.

6 *See* Claimants' Letter to the Tribunal, 17 March 2023, **A-0105**; Norway's Letter to the Tribunal, 24 March 2023, **A-0144**; Email from Tribunal, 27 March 2023, **A-0145**.

required the interpretation of other international treaties. By doing so, the Tribunal caused a substantive denial of justice to Applicants, who cannot bring their claim elsewhere. As will be seen in this application, the Tribunal made many mistakes in rendering the Award and in conducting the proceedings, which require annulment of the Award in its entirety.

III. THE LAW ON ANNULMENT OF ICSID AWARDS

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

> (1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
>
> (a) that the Tribunal was not properly constituted;
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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;
>
> (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.

19. Applicants invoke grounds under subparagraphs (1)(b), (d) and (e) of Article 52, *ie*: **(A)** where a tribunal has manifestly exceeded its powers; **(B)** where a tribunal has committed a serious departure of a fundamental rule of procedure; and **(C)** where the award fails to state reasons.

A. MANIFEST EXCESS OF POWER

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

21. Article 52(1)(b) of the Convention enshrines two prerequisites to establish this annulment ground: (1) there is an excess of power by the tribunal; (2) such excess of power must be manifest. The existence of a "*manifest*" excess does not necessarily relate to the gravity (or the seriousness) of the excess of power but rather pertains to

how readily it can be recognized.[7] The leading treatise on the ICSID Convention notes that manifest nature can be established if it "*can be discerned with little effort and without deeper analysis*."[8]

22. In *Vivendi I*, the Committee annulled the award based on a manifest excess of the tribunal's power due to the failure to exercise jurisdiction, noting that "[*a]lthough the Tribunal expressed conclusions on certain aspects of the claim, it never expressed a conclusion as to the claim as a whole*."[9] The Committee also held that "*[t]he availability of local courts ready and able to resolve specific issues independently may be a relevant circumstance in determining whether there has been a breach of international law (…). But it is not dispositive, and it does not preclude an international tribunal from considering the merits of the dispute*."[10] Similarly, the Committee in *Soufraki v UAE* underscored that a failure to exercise one's jurisdiction is to be found when the tribunal acts "*too little*".[11] As noted by the leading treatise on the ICSID Convention, excess of power based on a failure to act can exist in cases where a tribunal issues an award on the merits while refusing jurisdiction on certain matters over which it should have.[12]

23. In *Malaysian Salvors*, the Committee annulled the award based on the incorrect interpretation of the term "*investment*" by the tribunal, holding it had approached the matter on the basis of a gross error, namely: "*[i]t follows that, if jurisdiction is found to be absent under the ICSID Convention, the investor is left without international recourse altogether. (…) the Committee finds that the failure of the Sole Arbitrator*

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7 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Annulment Proceedings, Decision on Annulment of the Award, 2 November 2015, **AL-0026**, para. 57; Anthony Sinclair, "*Article 52*" in C. Schreuer and others, 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, 3rd ed., Vol. II, Cambridge University Press, 2022, **AL-0017**, para. 155.

8 Anthony Sinclair, "*Article 52*" in C. Schreuer and others, 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, 3rd ed., Vol. II, Cambridge University Press, 2022, **AL-0017**, para. 155. *See also Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, Annulment Proceedings, Decision on the Application for Annulment, 8 January 2007, **AL-0027**, para. 36; *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Annulment Proceedings, Decision on Annulment of Award, 5 February 2002, **AL-0028**, para. 25.

9 *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Annulment Proceedings, Decision on Annulment, 3 July 2002, **AL-0029**, paras. 112, 115.

10 *Ibid.*, para. 113.

11 *Hussein Nuaman Soufraki v. The United Arab Emirates,* ICSID Case No. ARB/02/7, Annulment Proceedings, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, **AL-0030**, para. 43.

12 Anthony Sinclair, "*Article 52*" in C. Schreuer and others, 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, 3rd ed., Vol. II, Cambridge University Press, 2022, **AL-0017**, para. 202.

even to consider, let alone apply, the definition of investment as it is contained in the Agreement to be a gross error that gave rise to a manifest failure to exercise jurisdiction."[13]

24. In *Enron*, the Committee partly annulled the award based on the improper application of the law, holding that such a holding is proper even where parties themselves have not argued for the correct applicable law.[14]

25. The leading treatise on the ICSID Convention underscores that if parties have not expressly or impliedly agreed on the rules of law to be applied by the tribunal (*inter alia* applicable rules of international law), then the residual rule of Article 42(1) of the Convention applies,[15] where "*[e]ven if an agreement on applicable rules of law contains no reference to international law, it may still govern certain aspects of the relationship*."[16] Consequently, failure to apply such rules of law as are explicitly or impliedly agreed by the parties may constitute a manifest excess of power.[17]

26. There are 11 cases in which an ICSID *ad hoc* Committee annulled an award in full or in part based on a manifest excess of power: *Klöckner*, *Mitchell*, *Malaysian Salvors*, *Sempra*, *Helnan*, *Enron*, *Amco I*, *Agility*, *RSM*, *Mobil*, and *Occidental Petroleum*. Each case is briefly addressed below.

27. In *Klöckner*, the Committee held that assuming the existence of a rule, and then applying such assumed rule, without actually establishing its existence, is a manifest excess of power.[18]

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13 *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia,* ICSID Case No. ARB/05/10*,* Annulment Proceedings, Decision on Annulment, 16 April 2009, **AL-0031**, paras. 62, 74.

14 *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3, Annulment Proceedings, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, **AL-0032**, para. 392.

15 Anthony Sinclair, "*Article 52*" in C. Schreuer and others, 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, 3rd ed., Vol. II, Cambridge University Press, 2022, **AL-0017**, para. 241.

16 *Ibid*., para. 311.

17 *Ibid*., para. 314.

18 *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Annulment Proceedings, Decision on Annulment, 3 May 1985, **AL-0033**, paras. 45-48, 63-67, 71, 73, 79.

28. In *Mitchell*, the Committee held that an error on the notion of investment, a matter of jurisdiction, became an annullable error as a manifest lack of power where it was based on a failure to state reasons and absent premises.[19]

29. In *Malaysian Salvors*, it was held that a failure to consider, let alone apply, the definition of investment in the BIT was considered a failure to exercise jurisdiction and thus an annullable error.[20]

30. In *Sempra*, the Tribunal failed to conduct its enquiry on the basis of the applicable legal norm when it applied customary international law rather than Article XI of the BIT, and thus was held to have manifestly exceeded its powers.[21]

31. In *Helnan*, the Committee held that a conclusion that an ICSID case, which was otherwise within the jurisdiction of the ICSID Convention and the BIT should have been submitted elsewhere (in that case, domestic courts), was held to be an annullable error.[22] Failure to exercise the clear requirements of jurisdiction is a manifest excess of power, the Committee adding that an ICSID tribunal cannot do through the back door what it cannot do through the front door, *ie* a Tribunal cannot substitute another remedy for the one found in the ICSID Convention.[23] In that case, the Tribunal had tried to impose a requirement of exhaustion of domestic remedies to bring an administrative act before an ICSID tribunal, despite the absence of any requirement of exhaustion of domestic remedies.

32. In *Enron*, the Committee held that failure to apply the applicable law (including by jumping steps in the reasoning) is a manifest excess of power.[24]

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19 *Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Annulment Proceedings, Decision on the Stay of Enforcement of the Award, 30 November 2004, 20 ICSID Rev.—FILJ 587 (2005), **AL-0004**, paras. 45-48.

20 *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia,* ICSID Case No. ARB/05/10*,* Annulment Proceedings, Decision on Annulment, 16 April 2009, **AL-0031**, para. 80.

21 *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Annulment Proceedings, Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010, **AL-0034**, paras. 185-210.

22 *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Annulment Proceedings, Decision on Annulment, 14 June 2010, **AL-0035,** paras. 56, 57.

23 *Ibid*., para. 53.

24 *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3, Annulment Proceedings, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, **AL-0032**, para. 393.

33. In *AMCO I*, the Committee held that there was a manifest excess of power where the tribunal failed to apply Indonesian law and failed to state reasons regarding the calculation of PT Amco's investment, in that the reasons were contradictory.[25]

34. In *Agility*, the Committee held that "*the Tribunal did ultimately shield the manner in which the CMC Order was implemented from review as to the consistency with any provision of the BIT alleged by the Applicant and in doing so committed an annullable error by manifestly exceeding its powers (…).*"[26]

35. In *RSM*, the Committee held that the tribunal manifestly exceeded its powers in dismissing the claim with prejudice.[27] The Committee held the Tribunal did not have such power as a matter of procedure since it was a question of the merits and that it could lead to a denial of justice to create *res judicata* on the merits as another tribunal could order security and the payment of all outstanding costs, before the matter could proceed again, which would prevent a denial of justice.[28] This decision stands for the principle that a denial of justice cannot be committed by an ICSID tribunal.

36. In *Mobil*, the Committee held that by infusing customary international law where the BIT's applicable law required to taking into account Venezuelan law for damages purposes (because of limitations of liability in the contract), the Tribunal manifestly exceeded its powers.[29]

37. In *Occidental Petroleum*, the Committee held that it was a manifest excess of power to award damages regarding a portion of the investment which was not held anymore by the claimant and was now held by an investor with a different nationality.[30] As such, the Committee reduced the damages by 40% which was the share of the investment held by a Chinese investor.

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25 *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Annulment Proceedings, Decision on Annulment, 16 May 1986, **AL-0036**, paras. 95, 97, 98.

26 *Agility for Public Warehousing Company K.S.C. v. Republic of Iraq*, ICSID Case No. ARB/17/7, Annulment Proceedings, Decision on Annulment, 8 February 2024, **AL-0037**, para. 119.

27 *RSM Production Corporation v. Saint Lucia,* ICSID Case No. ARB/12/10, Annulment Proceedings, Decision on Annulment, 29 April 2019, **AL-0038**, para. 201.

28 *RSM Production Corporation v. Saint Lucia,* ICSID Case No. ARB/12/10, Annulment Proceedings, Decision on Annulment, 29 April 2019, **AL-0038**, paras. 195-200.

29 *Venezuela Holdings, B.V., et al v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Annulment Proceedings, Decision on Annulment, 9 March 2017, **AL-0039**, paras. 167-188.

30 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Annulment Proceedings, Decision on Annulment of the Award, 2 November 2015, **AL-0026**, paras. 210, 265–269.

B. SERIOUS DEPARTURE OF A FUNDAMENTAL RULE OF PROCEDURE

38. Under Article 52(1)(d) of the Convention the award is to be annulled when there has been a serious departure from a fundamental rule of procedure. This ground involves a two-folded test: (1) there must be a fundamental procedural rule; (2) the Tribunal must have seriously departed from it.[31]

39. As to serious departures of fundamental rules of procedure, such rules of procedure include: a) the right to be heard,[32] including the right to contradict grounds used by a tribunal for its decision; b) the principle of equality of the parties; c) the prohibition against ruling *ultra petita* (i.e. beyond what was asked by the parties); d) the prohibition against awarding double compensation; e) the prohibition against misleading the tribunal; f) the prohibition against threatening the integrity of ICSID proceedings by retaining counsel with a conflict of interest to act against the opposing party; g) the requirement that arbitrators fulfil their contract to provide arbitrator services with their best efforts, in an effective manner and in a way that ensures that the parties' right to be heard has been respected; h) the prohibition of changing the parties "legal framework" by the Tribunal.[33]

40. A departure is serious if the violation of the fundamental rule of procedure potentially produces a material impact on the award. The applicant however is not required to prove that the violation of the rule of procedure was decisive for the outcome, or that the applicant would have won the case if the rule had been applied. As the *Eiser*

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31 *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Annulment Proceedings, Decision on Annulment, 22 December 1989, **AL-0040**, para. 4.06; *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Annulment Proceedings, Decision on Annulment of Award, 5 February 2002, **AL-0028**, para. 56; *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Annulment Proceedings, Decision on Annulment, 29 June 2005, **AL-0041**, para. 48; *Victor Pey Casado and President Allende Foundation v. Republic of Chile (I),* ICSID Case No. ARB/98/2, Annulment Proceedings, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, **AL-0042,** para. 78.

32 The leading treatise on the ICSID Convention notes "*The practice, as outlined above, would indicate that the right to be heard is an important procedural principle, adherence to which in the original proceedings will be scrutinized carefully. (…) But each party must be given the opportunity to address every formal motion before the tribunal and every legal issue raised by the case. This principle must apply, even if the answer appears obvious to the tribunal*." Anthony Sinclair, "*Article 52*" in C. Schreuer and others, 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, 3rd ed., Vol. II, Cambridge University Press, 2022, **AL-0017**, para. 384.

33 Regarding the obligation of the Tribunal to remain within the legal framework established by the parties, the ICSID Convention commentary underlines "What the relevant 'legal framework' may be in the given instance has been construed to include the framework on which the parties based their arguments during the procedure (…)." Anthony Sinclair, "*Article 52*" in C. Schreuer and others, 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, 3rd ed., Vol. II, Cambridge University Press, 2022, **AL-0017**, para. 372.

committee stated, what the applicant must simply demonstrate is "*the impact that the issue may have had on the award*."[34] Notably, the Committee in *Eiser* noted that it is sufficient to establish a potential material effect of the serious breach without a need to establish an actual material effect on the award.[35]

41. There is no discretion not to annul the award when a serious departure of a fundamental rule is established.[36]

42. In *Eiser*, the Committee held that due to the lack of disclosure of the relationship between an arbitrator, his firm, and a damages expert and his firm, "*Spain lost the possibility of a different award.*"[37] Furthermore, it found that: "*The curtailment of the right to an independent and impartial tribunal permeates the Award. The doctrine of severability has no application to a case such as this*."[38]

43. In *Fraport*, the Committee held that the Tribunal had breached the "*right to be heard*" by founding its decision on documents submitted after the hearing and which the parties were unable to comment on.[39] The Tribunal thus annulled the entire award.

44. In *Amco II*, the Committee annulled the Decision on Rectification based on the breach of the right to be heard and equal treatment. The Tribunal took a decision on a request of a one party without giving the other an opportunity to file its observations.[40]

45. In *TECO*, the Committee held that a tribunal cannot surprise the parties with reasoning that was not put to them or that they did not argue. Such reasoning will have to be

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34 *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain,* ICSID Case No. ARB/13/36, Annulment Proceedings, Decision on Annulment, 11 June 2020, **AL-0043**, para. 252, citing *Caratube International Oil Company LLP v. Republic of Kazakhstan (I),* ICSID Case No. ARB/08/12, Annulment Proceedings, Decision on the Annulment Application of Caratube International Oil Company LLP, 21 February 2014, **AL-0044**, para. 99.

35 *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain,* ICSID Case No. ARB/13/36, Annulment Proceedings, Decision on Annulment, 11 June 2020, **AL-0043**, para. 253.

36 *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain,* ICSID Case No. ARB/13/36, Annulment Proceedings, Decision on Annulment, 11 June 2020, **AL-0043**, para. 254, citing *Victor Pey Casado and President Allende Foundation v. Republic of Chile (I),* ICSID Case No. ARB/98/2, Annulment Proceedings, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, **AL-0042,** para. 80.

37 *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain,* ICSID Case No. ARB/13/36, Annulment Proceedings, Decision on Annulment, 11 June 2020, **AL-0043**, para. 251.

38 *Ibid.*, para. 254.

39 *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines,* ICSID Case No. ARB/03/25, Annulment Proceedings, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, 23 December 2010, **AL-0045**, paras. 218-247.

40 *Amco Asia Corporation and others v. Republic of Indonesia ARB/81/1 - Resubmission (Amco II),* Annulment Proceedings, Decision on the Applications for Annulment of the 1990 Award and the 1990 Supplemental Award,17 December 1992, **AL-0046**, paras. 9.08-9.10.

annulled if it is not "*within the legal framework*" of the arguments of the parties.[41] In *TECO*, the tribunal refused to apply interest to claimant's damages claim because it would constitute "*unjust enrichment*", but this finding was annulled because the parties had not argued this issue. The "*right to be heard*" on the "*unjust enrichment*" issue was held to have been breached.

46. In *Pey Casado*, the Committee held that it was a breach of the right to be heard, including of the principle of contradiction, where damages based on a particular theory were granted by the Tribunal but not sufficiently argued. In that case, Chile was held to have been unable to present its arguments on the applicable methodology for damages for a breach of fair and equitable treatment since the parties had only argued on the basis of expropriation. The Committee also recalled that reopening proceedings before reaching a decision may be required under the Convention (as recalled for example in *Klöckner* and as implicit in *Fraport*), where the Tribunal "*goes beyond the legal framework*" of the parties.[42]

C. AN AWARD FAILS TO STATE REASONS ON WHICH IT IS BASED

47. Article 52(1)(e) of the ICSID Convention establishes that an award may be annulled when the Tribunal has failed to state the reasons on which it is based, including contradictory and insufficient reasons. The mandatory duty of the Tribunal to state reasons is enshrined in Article 48(3) of the ICSID Convention[43] and in Arbitration Rule 47(1)(i).[44]

48. The Committee in *MINE* held *"[a] statement of reasons is a valuable element of the arbitration process*."[45] Furthermore, the treatise on the ICSID Convention underlines

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41 *TECO Guatemala Holdings, LLC v. Republic of Guatemala, ICSID Case No. ARB/10/23*, Annulment Proceedings, Decision on Annulment, 5 April 2016, **AL-0047**, para. 184. *See also Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Annulment Proceedings, Decision on Annulment, 12 February 2015, **AL-0048**, para. 141; *Victor Pey Casado and President Allende Foundation v. Republic of Chile (I),* ICSID Case No. ARB/98/2, Annulment Proceedings, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, **AL-0042,** para. 262; *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Annulment Proceedings, Decision on Annulment, 3 May 1985, **AL-0033**, para. 77.

42 *Victor Pey Casado and President Allende Foundation v. Republic of Chile (I),* ICSID Case No. ARB/98/2, Annulment Proceedings, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, **AL-0042,** para. 267.

43 Article 48(3) of the ICSID Convention "*The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based*," **CL-0042**.

44 Rule 47(1)(i) of the Arbitration Rules "*The award shall be in writing and shall contain: the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based*," **CL-0042.**

45 *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Annulment Proceedings, Decision on Annulment, 22 December 1989, **AL-0040**, para. 5.10.

that a reasoned award is a requirement of an orderly adjudication which aim is to ensure not only that "*justice is done, but that it is perceived to be done, by the parties and by the wider public taking account of the award. (…) The purpose of a statement of reasons is to explain to the reader of the award, especially to the parties, how and why the tribunal came to its decision in the light of the facts and applicable law*."[46]

49. It is improbable that the award will have a total absence of reasoning. Thus, the Committee in *Soufraki* held that insufficient or inadequate reasoning, including contradictory, may lead to the annulment, noting "*even short of a total failure, some defects in the statement of reasons could give rise to annulment*."[47]

50. In *Mitchell*, the Committee held that an error on the notion of investment, a matter of jurisdiction, became an annullable error as a manifest lack of power where it was based on a failure to state reasons and absent premises.[48]

51. In *CMS*, the Committee held there was a failure to state reasons where a lacuna in the tribunal's reasoning on how the umbrella clause applies allows CMS to enforce against Argentina obligations contract by Argentina towards another company, TGN, and not directly towards CMS.[49]

52. In *Vivendi I*, the Committee held that a failure to decide a matter under the BIT because it was allegedly contractual was a manifest excess of power.[50] The impugned passage in the award was "*couched in terms not of decision but of the impossibility of decision, the impossibility being founded on the need to interpret and apply the Concession Contract*."[51] The Committee added: "*whether particular conduct involves a breach of a treaty is not determined by asking whether the conduct purportedly involves an*

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46 Anthony Sinclair, "*Article 52*" in C. Schreuer and others, 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, 3rd ed., Vol. II, Cambridge University Press, 2022, **AL-0017**, paras. 424, 457.

47 *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Annulment Proceedings, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, **AL-0030**, paras. 122-126.

48 *Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Annulment Proceedings, Decision on the Stay of Enforcement of the Award, 30 November 2004, 20 ICSID Rev.—FILJ 587 (2005), **AL-0004**, paras. 45-48.

49 *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Annulment Proceedings, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, **AL-0049**, para. 97.

50 *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3*,* Annulment Proceedings, Decision on Annulment, 3 July 2002, **AL-0029**, paras. 108-111.

51 *Ibid.*, para. 110.

exercise of contractual rights."[52] The failure was manifest because it had "*clear and serious implications.*"[53]

53. In *MINE*, the Committee held that a tribunal cannot reject a damages theory as speculative and then award damages based on a similar approach.[54]

54. In *AMCO I*, the Committee held that there was a manifest excess of power where the tribunal failed to apply Indonesian law and failed to state reasons regarding the calculation of PT Amco's investment, in that the reasons were contradictory.[55]

55. In *Perenco*, the tribunal was held to have failed to state reasons regarding a USD 25 million in damages allowed for loss of opportunity in that no reasoning was provided that could be followed regarding why a nominal sum should be allowed, and as to the amount of the nominal sum.[56] Stating that the tribunal had discretion was found to be insufficient and that actual reasons must be provided for the exercise of the discretion.[57] Further, the Committee held that it was "unable to find a single reason" to support OCP ship or pay costs as fully taxable. As such, on this last point the Committee deducted a further USD 9 million from the award.[58]

56. In *Mobil*, the Committee held that the Tribunal had failed to explain, and given contradictory reasons, why certain parts of the contract, as a matter of Venezuelan law, required decreasing the damages as a matter of fair market value, even though this was Venezuela's stated position, which the Tribunal had failed to consider.[59]

57. In *Tidewater*, the Committee held that "genuinely contradictory" parts of the award could not be maintained. The Tribunal was found to have contradicted his own

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52 *Id.*

53 *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3*,* Annulment Proceedings, Decision on Annulment, 3 July 2002, **AL-0029**, para. 115.

54 *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Annulment Proceedings, Decision on Annulment, 22 December 1989, **AL-0040**, paras. 6.105, 6.107.

55 *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Annulment Proceedings, Decision on Annulment, 16 May 1986, **AL-0036**, paras. 95, 97, 98.

56 *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador),* ICSID Case No. ARB/08/6, Annulment Proceedings, Decision on Annulment, 28 May 2021, **AL-0050**, para. 446.

57 *Ibid.*, para. 447.

58 *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador),* ICSID Case No. ARB/08/6, Annulment Proceedings, Decision on Annulment, 28 May 2021, **AL-0050**, para. 527.

59 *Venezuela Holdings, B.V., et al v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Annulment Proceedings, Decision on Annulment, 9 March 2017, **AL-0039**, paras. 167-188.

reasoning in respect of damages and the estimation of the tribunal based on the damages assumptions outlined was "genuinely contradictory" and "not conceivable".[60]

58. In *TECO*, the Committee held that a tribunal must address what parties deem is "*highly relevant*" even though it does not necessarily have to address all arguments and evidence of the parties. Here, the Committee held there is a failure to state reasons where the Tribunal says there is "*no evidence*" on the relevant damages issue (the loss of value claim) but where there actually is such evidence in the record.[61]

59. In *Pey Casado*, the Committee held that it was manifestly contradictory for the tribunal to find only a breach of fair and equitable treatment, while further holding it did not have jurisdiction over an expropriation claim, and nevertheless to adopt an expropriation damages methodology with respect to the quantum for the breach of fair and equitable treament. That part of the award was thus annulled.[62]

D. CONSEQUENCES OF ANNULLING PART OF THE AWARD

60. Where only part of an award is annulled, what cannot exist without what has been annulled must also be annulled. In both *TECO*[63] and *MINE*,[64] the committees annulled the costs award as its existence was intrinsically linked to another part of the award that had been annulled.

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

61. The Applicants have three general grounds which, both individually and together, justify annulment of the Award in its entirety: a) the Tribunal failed to discharge its duty to properly adjudicate the dispute; b) the Tribunal committed a denial of justice by refusing to decide certain issues before it; c) the Respondent committed fundamentally

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60 *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Annulment Proceedings, Decision on Annulment, 27 December 2016, **AL-0051**, paras. 173-196.

61 *TECO Guatemala Holdings, LLC v. Republic of Guatemala, ICSID Case No. ARB/10/23*, Annulment Proceedings, Decision on Annulment, 5 April 2016, **AL-0047**, paras. 128-137.

62 *Victor Pey Casado and President Allende Foundation v. Republic of Chile (I),* ICSID Case No. ARB/98/2, Annulment Proceedings, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, **AL-0042,** paras. 281-287.

63 *TECO Guatemala Holdings, LLC v. Republic of Guatemala, ICSID Case No. ARB/10/23*, Annulment Proceedings, Decision on Annulment, 5 April 2016, **AL-0047**, paras. 358-362.

64 *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Annulment Proceedings, Decision on Annulment, 22 December 1989, **AL-0040**, para. 6.112.

improper behaviour which led to a breach of the principle requiring that the equality of the parties be respected in the proceedings.

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

62. Applicants' first ground for annulment is that the Tribunal failed to discharge its duty to properly adjudicate the matter by acting well below the standards expected of an ICSID Tribunal. This is so for at least three reasons: 1) the Tribunal cannot have spent sufficient time on the matter to fully consider the parties' submissions; 2) the Tribunal failed to notify an important procedural ruling to Applicants in which it also appears to have made rulings beyond the arguments and legal framework of the parties; and 3) the Tribunal rendered non-sensical rulings on costs.

63. There is no question that an ICSID tribunal has a general duty to discharge its mandate – to provide arbitrator services – in a fair and efficient way. A fair adjudicatory process includes that the parties must have been heard. However, here the parties were clearly not heard and/or did not have the chance to make themselves heard on issues the Tribunal ruled on. Where an ICSID tribunal acts in a manner that does not respect these principles, this constitutes a serious breach of a fundamental rule of procedure warranting full annulment of the award.

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

64. Based on the amount of time billed to ICSID by the members of the Tribunal, it is 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.

65. The costs of arbitration are listed as such in the Award:[65]

- ICSID's administrative fees: USD 168,000.00
- Direct Expenses: USD 111,323.15
- Fees and expenses of the Members of the Tribunal:

65 Award, 22 December 2023, **A-0068**, para. 622.

- Sir Christopher Greenwood: USD 131,857.04
- The Hon. L. Yves Fortier: USD 111,076.12
- Professor Donald McRae: USD 75,050.75

- Total: USD 597,307.04

66. Applicants have calculated that the average applicable rate in the proceedings was likely to have been approximately 428 USD/h.[66] Based on such a rate, 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.

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

68. On average for an ICSID tribunal adjudicating a case of similar length,[67] an ICSID tribunal spends substantially more time to adjudicate the case, *ie* approximately 78% more, if compared to the total time spent by the Tribunal adjudicating the *SIA North Star and Pildegovics* case.[68] Moreover, in a certain number of cases, where the length of the proceedings was substantially shorter (on average 28 months, by comparison to 40 months for *SIA North Star and Pildegovics*), the time spent by other ICSID

66 *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.

67 *See* Excel file "Average time spent by the tribunal adjudicating a case in ICSID proceedings if compared to the SIA North Star proceedings," sheet "Main data," **A-0146**, or exported PDF file of sheet "Main data," **A-0149**, and accompanying explanatory note to the analysis of an average time spent by the tribunal adjudicating a case in ICSID proceedings if compared to the SIA North Star proceedings **A-0150.** The comparison is mainly based on the following four variables; (1) the length of the proceedings (months) +/- 5 months to that of 40 months. If the margin of the error is exceeded, the case is marked in green, orange or yellow to underline its correlation with the output of proportionality (see explanation in the accompanying explanatory note); (2) the number of procedural orders; (3) the number of decisions; (4) the time allocated for hearing on jurisdiction and/or merits (days). 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.

68 *Idem.*

tribunals was still 86% greater than the time spent by the Tribunal in the present proceedings.[69]

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

- Drafted nine procedural orders after reviewing the parties' pleadings on relevant matters;
- Reviewed 1,345 pages of merits pleadings (without counting witness statements totalling over 120 pages, expert reports totalling over 175 pages, as well over 1,200 factual exhibits and 848 legal authorities, which exhibits and authorities easily add up to tens of thousands of pages);
- Attended a one-week substantive hearing;
- Conducted deliberations; and
- Drafted a 202-page award.

70. Merely drafting a 202-page award (after one has actually read the pleadings and considered the arguments) should normally take more than the entire 308 hours the president would have billed for the entire case. This is about 1.5 hours for drafting each page of the Award, which would be the time taken by an extremely efficient drafter already fully up to speed on the entire record.

71. On the face of the number of hours billed to ICSID, it is manifest that the Tribunal failed to take into consideration all of the parties' pleadings and arguments. This failure will become obvious when considering more specific annulment grounds.

72. It is also intriguing that ICSID's administrative fees are higher than the fees of any individual arbitrator. Based on these observations, the Applicants assume that the majority of the Award was drafted by the ICSID Secretariat.

73. It is well known that the arbitrator's primary mandate is to adjudicate the case by exercising the decision-making function. As one author has put it: "*Parties are entitled to a decision that is the result of the arbitrator's intellectual analysis of the entire*

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69 *See* Excel file "Average time spent by the tribunal adjudicating a case in ICSID proceedings if compared to the SIA North Star proceedings," sheet "Main data," **A-0146**, or exported PDF file of sheet "Main data," **A-0149**, and accompanying explanatory note to the analysis of an average time spent by the tribunal adjudicating a case in ICSID proceedings if compared to the SIA North Star proceedings **A-0150.**

case."[70] Thus, parties in an international arbitration are rightfully entitled to expect that the arbitrator's quasi-judicial mandate be exercised on an entirely personal basis.[71] An arbitrator cannot delegate this core function to any other person.[72] As noted by one author in respect of the different responsibilities of a tribunal member and of a tribunal secretary: "*[a] central premise of the role of the secretary is that he or she may not assume the tribunal's (or an arbitrator's) functions and may not influence the tribunal's decision.*"[73] The role of tribunal secretaries and administrative secretariats of arbitral institutions is to assist the Tribunal in administrative matters, not to take over the substance of a case. Another global arbitral institution, the ICC, in its note to the parties on the conduct of arbitral proceedings, explicitly confirms the rule.[74]

74. A similar objection was made in the *Yukos* set aside proceedings before Dutch courts, where the respondent submitted that the assistant to the President of the Tribunal overstepped his role by playing a significant substantive role in assessing the evidence, in deliberations of the Tribunal and in preparing the final award.[75]

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70 J. Ole Jensen, "*Permissible Tasks*" in J. Ole Jensen, TRIBUNAL SECRETARIES IN INTERNATIONAL ARBITRATION, Oxford International Arbitration Series, Oxford University Press, 2019, **AL-0052**, para. 5.93.

71 *See e.g.*, *Total Support Management (Pty) Ltd v. Diversified Health Systems (SA)(Pty)Ltd* [2002], Supreme Court of South Africa, **AL-0053**, para. 41 ("*What they [parties] seek is a judgment from the person chosen [the arbitrator]. An arbitrator is not entitled to delegate this function. He alone must perform the duties he has undertaken and with which he has been entrusted, unless the parties agree otherwise.*"); *A. SA v. B. Sàrl*, Federal Supreme Court of Switzerland, 1st Civil Law Chamber, Case No. 4A_709/2014, 21 May 2015, ASA Bulletin, Kluwer Law International 2015, Volume 33, Issue 4, **AL-0054** para. 3.2.2 ("*La mission juridictionelle confiée à l'arbitre est éminemment personelle*").

72 Constantine Partasides, "*The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration*," Arbitration International, Volume 18, Issue 2, 1 June 2002, **AL-0055**, p. 147 ("*In accepting appointment, an arbitator necessarily accepts a duty not to delegate that mandate.*"). *See also Barnard v. National Dock Labour Board* [1953] 2 QB 18, **AL-0056**, pp. 24-25 ("*No one has heard of an Arbitrator who has been agreed upon between the parties to a dispute being allowed to appoint someone to act in his place, because it is of the very essence of his office that he himself is the person who has to deal with the dispute referred to him.*") *See also* practice within international rules, for example, 2023 CAS Code, **AL-0057**, Article S18(2) ("*CAS arbitrators and mediators shall sign an official declaration undertaking to exercise their functions personally (…).*"); HKIAC Guidelines on the Use of a Secretary to the Arbitral Tribunal, **AL-0058**, section 3.2; 2023 SCC Arbitration Rules 2023, **AL-0059**, Article 24(2).

73 Gary Born, "*Chapter 13: Rights and Duties of International Arbitrators (Updated February 2024)*" in Gary Born, INTERNATIONAL COMMERCIAL ARBITRATION, 3rd ed., Kluwer Law International, 2021, **AL-0060**, p. 11.

74 ICC Note to Parties and Arbitral Tribunals on the Conduct of Arbitration, 1 January 2021, **A-0151**, paras. 222-226, notably 222-223 ("*222. Administrative secretaries act upon the arbitral tribunal's instructions and under its strict and continuous supervision. At all times, the arbitral tribunal is responsible for the administrative secretary's conduct during this arbitration. 223. Under no circumstances may the arbitral tribunal delegate its decision-making functions to an administrative secretary or rely on an administrative secretary to perform on its behalf any of the essential duties of an arbitrator. Likewise, the tasks entrusted to an administrative secretary, such as the preparation of written notes or memoranda, will not release the arbitral tribunal from its duty to personally review the file and/or draft itself any arbitral tribunal's decision.*").

75 *The Russian Federation v. Veteran Petroleum Limited, Yukos Universal Limited and Hulley Enterprises Limited*, Case Nos. HA ZA 15-1, 15-2 and 15-112, District Court of The Hague, Judgment, 20 April 2016, **AL-0062**, para. 4.2.(3); *Veteran Petroleum Limited, Yukos Universal Limited and Hulley Enterprises Limited v. The Russian Federation*, Case No. 200.197.079/01, the Court of Appeal of the Hague, Judgement of 18 February 2020, **AL-0063**, paras. 6.6.5.-6.6.12.

75. Domestic courts in highly sophisticated seats of international arbitration, such as France,[76] Switzerland,[77] the United Kingdom,[78] the United States,[79] and Spain,[80] consider it appropriate to contact tribunals in the course of set aside proceedings to give them an opportunity to express themselves on grounds that may go to their conduct, or on which they may have useful input.

76. While Applicants, in their Memorial, respectfully requested the Committee to consider contacting the members of the Tribunal to put Applicants' arguments on this question to them for their response, the Committee held it would not do so.[81] Applicants suggest that the matter can still be raised at the hearing in September 2025.

2. The Tribunal failed to notify an important procedural ruling rejecting inclusion of proposed exhibit C-0360 which was the actual EU Note Verbale of 30 October 2023 and the Tribunal then assumed incorrectly that the note did not exist

77. The Tribunal's failure to properly adjudicate the Applicants' dispute is also shown by the fact the Tribunal did not notify an important procedural ruling that would have been made on 5 December 2023, approximately two weeks before the Award was rendered. Moreover, the failure to do so led the Tribunal to make an incorrect assumption on the evidence, assuming a Note Verbale of the European Union, protesting against the Norwegian Supreme Court judgment of 20 March 2023, was never sent to Norway or did not exist, even though Applicants actually offered to submit the version of the note actually sent to Norway.

78. The Award refers in the following way to this procedural decision of 5 December:[82]

> 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,

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76 *RHV Verwaltungs Gmbh, Eckes-Granini INnternatnational Gmbh, Eckes-Granini Group Gmbh, Eckes Aktiengesellschaft v. Mr Axel Hartmann*, Paris Court of Appeal, Incidental Order of Judge Fabienne Schaller, 13 September 2022, **AL-0064**.

77 Andrea Pinna and Augustin Barrier, "*L'arbitre et le recours en annulation contre la sentence qu'il a rendue : Approche critique du droit français à la lumière du droit compare,*" Les Cahiers de l'arbitrage 2012-2, p.294, **AL-0065**, pp. 304-306 (referring to Swiss, UK, US and Spanish law allowing to receive observations from the arbitrators in set aside proceedings).

78 *Ibid*.

79 *Id*.

80 *Id*.

81 Procedural Order No. 3 on the Applicants' Request for Production of Documents, 6 March 2024, para. 79.

82 Award 22 December 2023, **A-0068**, para. 70.

> 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.

79. However, Applicants' counsel never received this decision, which appears to contain reasons. Applicants were thus unable to react to this decision before the Award, which they would have done considering what appears to have happened.

80. Norway has also confirmed that it never received any such decision.[83]

81. Again, the 5 December 2023 decision of the Tribunal and the reasons that would be stated therein appear to admit the documents sent by Applicants as C-0357 to C-0359, but at the same time to reject a request to re-open proceedings, and, importantly, to also reject inclusion of the actual diplomatic note of the EU of 30 October 2023, which Applicants proposed to include as C-0360. Those decisions were never notified to, was never received by Applicants' counsel.

82. Following initial correspondence by Applicants, and then Norway, of 16 and 23 October 2023,[84] on 7 November 2023, Applicants wrote: [85]

> *The Claimants have now received a document dated October 2023, reflecting a note verbal, under the same terms as the draft note of 2 October 2023, which was transmitted to Norway on 26 October 2023.*
>
> *Should the Tribunal be minded to include **C-0357** to **C-0359** into the record, they should also include this EU note of 30 October 2023, as **C-0360**. The Claimants do not transmit this document at this time, as per Procedural Order No. 1, but will submit it if it is admitted into the record by the Tribunal.*
>
> *The reasons for admitting such document as **C-0360** are essentially the same as to admit **C-0357**, with the addition that **C-0360** shows that Norway has now formally received the note from the EU.*

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83 Respondent's Counter-Memorial on Annulment, paras. 48-51.

84 Claimants' Letter to the Tribunal, 16 October 2023, **A-0106**; Norway's Letter to the Tribunal, 23 October 2023, **A-0108**. *See also* Claimants' Letter to the Tribunal, 7 November 2023, **A-0110**; Norway's Letter to the Tribunal, 15 November 2023, **A-0111**.

85 Claimants' Letter to the Tribunal, 7 November 2023, **A-0110**, p.2.

83. That correspondence aimed at submitting a diplomatic note of the EU protesting to Norway against the judgment of its Supreme Court of 20 March 2023 which refused to issue SIA North Star licences to fish snow crab around the Svalbard Archipelago. Applicants had first obtained a draft note of early October 2023, which Norway alleged it had not received in its letter of 23 October 2023. However, after Applicants' initial letter of 16 October 2023, they obtained the actual submitted note, dated 30 October 2023. Since Norway had protested that on 16 October 2023 Applicants had submitted new evidence without asking for the Tribunal's authorization first, the Applicants, on 7 November requested the Tribunal's permission to submit the 30 October 2023 diplomatic note (in addition to the documents already sent, *ie* **C-0357** to **C-0359**, which included only the draft note). Applicants did not send the 30 October 2023 note with its letter. The Applicants never heard back from the Tribunal on this issue until the 22 December 2023 Award.

84. Nonetheless, in paragraph 70 of the Award it is stated: the "*Tribunal agreed to admit the documents as C-0357 to C-0359*". On its face, this can only mean that only the mentioned exhibits were admitted and not proposed exhibit **C-0360**. Applicants were never made aware of this decision, so they were never able to contest it, or to send **C-0360** to the Tribunal.

85. The Committee now has indicated that perhaps there was no 5 December 2023 procedural decision, and that paragraph 70 of the Award is the result of unfortunate drafting.[86] Applicants do not know where the Committee could have obtained such information. If the Committee informally inquired with ICSID, the parties should have been informed and kept in copy. In any event, on the information Applicants have, the Award states that a procedural decision was issued on 5 December 2023 and both parties have indicated they have never received any such decision, which concerned whether the documents were included in the record.[87] What is established is that by the time the parties received correspondence from ICSID that the record was formally closed, also on 22 December 2023, just before the issuance of the award,[88] the parties had not received any response from the Tribunal on how it intended to address the application to add documents into the record and the application to re-open the proceedings.

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86 Procedural Order No. 3, para. 79.

87 See Respondent's Counter-Memorial on Annulment, paras. 48-51.

88 Email from Govert Coppens to the Parties with Tribunal's Letter attached, 22 December 2023, **A-0152**.

86. On a related but somewhat distinct issue, at paragraph 600 of the Award, the Tribunal writes, in reference to the EU note protesting the 20 March 2023 Norwegian Supreme Court judgment:

> *The second is said to be a draft of a Note Verbale to be sent to Norway by the EU protesting the decision.*[787] *There is no indication that such a Note was ever sent.*
>
> [Emphasis added]

87. At footnote 787 of the award, found at page 194, in paragraph 600, the reference is as follows: "Draft EU Note Verbale to the Kingdom of Norway, 2 October 2023 **(C-0357)**."

88. The Tribunal therefore founded its statement that the Note of 30 October was never sent by disregarding Applicants' request to have that note added into the record in its letter of 7 November 2023. Moreover, by not receiving the 5 December 2023 procedural decision referred to in paragraph 70 of the Award admitting C-0357 to C-0359, but not the proposed C-0360 which was the diplomatic note itself, the Applicants did not know that the Tribunal refused to admit the actual note in the record, but had accepted the draft. Alternatively, the Tribunal simply never responded to Applicants' letter of 7 November 2023.

89. The conclusion at paragraph 600 of the Award that "*There is no indication that such a Note was ever sent*" was made in gross breach of Applicants' right to be heard, in that Applicants did not know the Tribunal would not admit the Note itself, which Applicants had offered to submit. Had the Applicants seen this decision, they would obviously have sent the actual 30 October 2023 note to the Tribunal, as they had it in their possession at the time. The Tribunal needed to render a decision on the issue of documents being entered into the record, before its closure of the record on 22 December 2023, because by rendering no such decision (if this is what happened), the parties did not know what was and what was not admitted in the record.

90. Because of the manner in which the Tribunal proceeded (including by forgetting to notify the decision of 5 December 2023, or failing to render a decision on the application for new documents), Applicants were thus never allowed to present their arguments on such new evidence, including whether it should be admitted, nor address the Tribunal's reasons for its decision before the Award was rendered.

91. The relevant issue was not raised before the Tribunal prior to the correspondence of 16 October 2023 and 7 November 2023 as the Applicants had then just obtained the new evidence. The new evidence not only included the Judgment of the Supreme Court and the critical "*dissenting*" opinion by a Norwegian Supreme Court Justice, but importantly the EU's draft *note verbale* of 2 October 2023 protesting the respective judgment as well as the EU's diplomatic note of 30 October 2023 confirming that the draft *note verbale* was indeed transmitted to Norway on 26 October 2023.[89] Norway contested that they had received such a note in October 2023 and the Tribunal in its award did not recognize that the final note existed nor had been sent to Norway. What Applicants raised was the fact that a diplomatic note had been submitted. While the Tribunal tried to frame the issue differently, by stating it was a matter going to the 20 March 2023 judgment of the Supreme Court of Norway, it was obviously not possible to put to the Tribunal, at any time before, the EU's diplomatic protest of Norway's Supreme Court decision, which was made only in October 2023. In any event, the Tribunal referred to that decision and the possibility the EU had protested in its Award, for example at paragraph 600.

92. The Tribunal's apparent 5 December 2023 decision would also have concerned Applicants' request to reopen the proceedings regarding the EU's diplomatic note of 30 October 2023 protesting the Norwegian Supreme Court decision of 20 March 2023 and its consequences for the case.[90] The Applicants had requested to reopen the proceedings if there was no other ground on which they succeeded on the merits.[91] However, the Tribunal did not reopen the proceedings in the sense of allowing the parties to argue the issue raised by Applicants,[92] nor did it even give the chance to Applicants to react to its procedural decision (if it made one) which, at least in effect (and even if it simply made no decision), refused to further consider the question. Moreover, since the BIT had been terminated by Latvia and Norway, including its

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89 Claimants' Letter to the Tribunal, 7 November 2023, **A-0110**, p.2.

90 Claimants' Letter to the Tribunal, 16 October 2023, **A-0106**; Norway's Letter to the Tribunal, 23 October 2023, **A-0108**; Claimants' Letter to the Tribunal, 7 November 2023, **A-0110**; Norway's Letter to the Tribunal, 15 November 2023, **A-0111**.

91 *See* Claimants' Letter, 7 November 2023, **A-0110** ("*the Claimants underscore that, in order to ensure the efficiency of the proceedings, they do not at this stage seek such a finding, all the while reserving the possibility of raising it in a subsequent phase, if useful, except if the Tribunal is minded to rule that it has no jurisdiction and/or that there are no breaches of the BIT on the merits*").

92 The Tribunal did not need to formally reopen the proceedings under Rules 38(2) of the 2006 ICSID Arbitration Rules as the Tribunal did not formally close the proceedings until just before it rendered the 22 December 2023 Award. See Email from Govert Coppens to the Parties with Tribunal's Letter attached, 22 December 2023, **A-0152**.

sunset clause, as the Tribunal well knew,[93] the Applicants have no other possibility to submit themselves an international claim on this issue, pursuant to the BIT. Finally, despite the Tribunal's attempt to frame the issue differently, it was not possible to put before the Tribunal the EU's actual diplomatic protest of Norway's Supreme Court decision, which was made only on 30 October 2023.

93. By stating that the application was not timely because in respect of the Supreme Court of Norway judgment of 20 March 2023, rather than the 30 October 2023 Note Verbale of the European Union, the Tribunal changed the parties' "*legal framework*"[94], which it cannot do. It also contradicted itself, because the Tribunal at paragraph 600 of the Award referred to what it believed was an absence of proof of such note verbale, to justify its decision. Moreover, Norway did not argue that Applicants' request should be barred because it was untimely.[95] In any event, this issue was obviously part of the case. Moreover, the new fact was the EU's Note Verbale. By apparently changing the terms of the discussion at paragraph 70 of the Award, without giving the parties an opportunity to discuss, notably on whether Applicants' application in October 2023 was untimely or not, the Tribunal further breached Applicants' right to be heard by not submitting to the parties the grounds for decision not to reopen the proceedings. The EU's Note Verbale and the conclusions therein obviously had a material impact on the case, since the Tribunal, at paragraph 600 of the Award, referred to the fact its existence would not be proven, to justify its decision.

94. There is something that shocks, or at least surprises a sense of judicial propriety where a procedural ruling in adjudicatory proceedings is not notified to the parties, and where a document that a party requests be admitted is refused but that party is never informed of the decision and cannot contest it, even though the Award states such a decision was made several weeks before it was rendered. This is especially so where such a ruling has the potential of fully extinguishing not only a party's legal rights but

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93 *See e.g.* Claimants' Letter to the Tribunal, 24 August 2022, **A-0090**.

94 *TECO Guatemala Holdings, LLC v. Republic of Guatemala, ICSID Case No. ARB/10/23*, Annulment Proceedings, Decision on Annulment, 5 April 2016, **AL-0047**, para. 184. *See also Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Annulment Proceedings, Decision on Annulment, 12 February 2015, **AL-0048**, para. 141; *Victor Pey Casado and President Allende Foundation v. Republic of Chile (I),* ICSID Case No. ARB/98/2, Annulment Proceedings, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, **AL-0042,** para. 262; *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Annulment Proceedings, Decision on Annulment, 3 May 1985, **AL-0033**, para. 77.

95 Norway's Letter to the Tribunal, 23 October 2023, **A-0108**; Norway's Letter to the Tribunal, 15 November 2023, **A-0111**.

also the existence of any effective recourse, as it is the case here. This, in and of itself, warrants annulment of the entire Award.

95. The Tribunal had an inherent duty to notify the procedural decision referred to at paragraph 70 of the Award (a); the failure to do so is a serious departure from a fundamental rule of procedure under the right to be heard (b); there was a serious departure from the right to be heard (c); this failure had a material effect on the Award (d); and the Tribunal also had an obligation to reopen the proceedings (e).

(a) The Tribunal had an inherent duty to notify a procedural decision referred to in its Award

96. An ICSID Tribunal's inherent powers to regulate procedure also requires that it notifies its procedural decisions.

97. When arbitrators accept an ICSID appointment, they accept to abide by the terms of the Rules and of the Convention. Those include, for example, Rule 16 of the 2006 ICSID Arbitration Rules and Article 48(1) of the ICSID Convention which establish the Tribunal's discretion to issue procedural decisions. Further, Rule 19 of the ICSID Arbitration Rules establishes the Tribunal's duty to make the procedural orders to establish the framework of the conduct of the proceedings.[96] An ICSID Tribunal's adjudicatory mandate thus encompasses not only its procedural discretion, but also its obligation, to determine arbitral procedure by rendering decisions. However, the procedural decision of 5 December 2023 mentioned at paragraph 70 of the Award forms a part of procedural history which is unknown to the parties. This contradicts the Tribunal's responsibilities under related obligations it has under the ICSID Convention.

98. For parties to be safeguarded from the possibility of arbitrary adjudication, whether in ICSID arbitration or in other international arbitrations generally, fundamental procedural guarantees exist. They consist of "*fundamental rules of procedure*". They include rules such as equality of arms, a right to an independent and impartial tribunal and a right to present the case.[97] Within the right to be heard and the right to present a case is included the "*principle of contradiction*" in the sense that a Tribunal cannot adopt arguments or reasons that are different than what the parties argued without

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96 *See also* Section 5 ("*Rulings of the Tribunal*") of the Procedural Order No. 1, of 12 October 2020, in the original arbitration proceedings, **A-0059**.

97 Ana Lombardía, "*5. Considerations About Procedural Orders*" in Carlos González-Bueno, *ed.*, 40 UNDER 40 INTERNATIONAL ARBITRATION (2021), Dykinson, S.L., 2021, **AL-0066**, p. 2.

putting such possibility to the parties beforehand.[98] Moreover, and while this is so obvious that it is never mentioned, any decision, whether it is a mere procedural direction, a procedural order, or an award, whether partial or final, must be notified to the parties, so they have an opportunity to react, and any final decision obviously cannot be enforced against a party before it is notified, which is one of the most basic international rules of due process.[99] Moreover, for one's right to present a case to be effective, all procedural decisions must be notified, as they are part of what leads to any formal decision having *res judicata*. Furthermore, in the context of final decisions, all systems, including the ICSID Convention, contain an exception to reopen cases for new facts.[100] Thus, there must exist an inherent duty of the Tribunal to notify any procedural decision, whether a direction or order.

99. Otherwise, if a secret decision is later opposed to a party, this breaches the right to a fair trial which includes the right to be heard and to present a case, as well as the principle of contradiction.

100. As noted by one author, the general duties of an arbitrator must include:[101]

> *[A] duty of competence and impartiality, a duty of disclosure,* ***a duty to communicate****, a duty to act professionally and with due care, a duty to act in a fiduciary manner, a duty to uphold the integrity and fairness of the proceeding and a duty to render a decision.*

101. For example, the English High Court decision in *Fleetwood Wanderers Limited v AFC Fylde Limited* allowed a challenge to an arbitral award based on communications to which the parties had not been privy, on the basis of "*serious irregularity*" under section

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98 *TECO Guatemala Holdings, LLC v. Republic of Guatemala, ICSID Case No. ARB/10/23*, Annulment Proceedings, Decision on Annulment, 5 April 2016, **AL-0047**, para. 189-190. *See also Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Annulment Proceedings, Decision on Annulment, 12 February 2015, **AL-0048**, paras. 131, 141; *Victor Pey Casado and President Allende Foundation v. Republic of Chile (I),* ICSID Case No. ARB/98/2, Annulment Proceedings, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, **AL-0042,** para. 269.

99 As per Article 49(1) of the Convention, the award is to be considered rendered once notified to parties, **CL-0042**.

100 Christoph H. Schreuer, et al "*Evidence*" in THE ICSID CONVENTION: A COMMENTARY, 2nd ed., Cambridge: Cambridge University Press, 2009, **AL-0067**, paras. 36–39 ("*Arbitration Rule 38 (see Art. 49, para. 11) provides that, even after the closure of the proceeding, the tribunal may exceptionally reopen the proceeding in order to take new evidence. In Klockner v. Cameroon,the written as well as the oral phase of the proceedings had been completed and the Chairman of the Tribunal declared the proceedings to be at an end pursuant to Arbitration Rule 38(1). Two days later, the arbitrators met and decided under Arbitration Rule 38(2) to ask the parties to respond in writing to an additional question of fact*.").

101 Jeffrey Maurice Waincymer, "*Part I: Policy and Principles, Chapter 2: Powers, Rights and Duties of Arbitrators*" in Jeffrey Maurice Waincymer, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION, Kluwer Law International, 2012), **AL-0068**, p. 10, [emphasis added].

68(2)(a) of the English Arbitration Act 1996. The arbitrator had contacted the English Football Association regarding the interpretation and scope of its rules without notifying the parties and failed to give them an opportunity to address the issues arising from that correspondence.[102] Another example of an arbitral tribunal failing to give an opportunity to react to a tribunal's decision-making process was where French courts annulled an award because a tribunal relied on a translation of an expert report it had not put to the parties.[103]

102. The need for a communicated procedural decision can also be established from ICSID case law deciding when an objection is considered waived, under Rule 27 of the 2006 ICSID Arbitration Rules.[104] In principle, a party will be considered to have waived its right to object to serious procedural irregularity if it failed to make an objection to the Tribunal during the arbitral proceedings.[105] However, as held by the *ad hoc* Committee in *Fraport v Philippines I*, there can be no waiver where a party is unaware of any relevant decision that would affect its rights:[106]

> *[T]he objecting party must know of the conduct of the tribunal and have a reasonable opportunity to raise its objection. This point is, in the view of the Committee, an elementary one, since a party cannot be treated as having waived an objection to a course of action of which it was unaware. (…) A party can only waive an objection if it is reasonably aware of the decision of the tribunal to which it may wish to object.*

103. No waiver to object to the violation of one's rights can thus ever exist where an ICSID Tribunal breached a party's rights in a way that the party was unaware of until the award. It is of course well accepted, under the right to be heard, the right to present one's case and the principle of contradiction, that where a new argument or new document is admitted, that the parties should have the opportunity to be heard on the

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

103 Cour de cassation, civile, Chambre civile 1, 18 mars 2015, 13-22.391, **AL-0070**.

104 ICSID Arbitration Rules, **CL-0042**, Rule 27 ("*A party which knows or should have known that a provision of the Administrative and Financial Regulations, of these Rules, of any other rules or agreement applicable to the proceeding, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed—subject to Article 45 of the Convention—to have waived its right to object*.").

105 *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines,* ICSID Case No. ARB/03/25, Annulment Proceedings, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, 23 December 2010, **AL-0045**, para. 204.

106 *Ibid.*, paras. 207, 234.

matter.[107] In this case, neither party was afforded such an opportunity as the Tribunal failed to notify what is referred to in paragraph 70 of the Award as its procedural decision of 5 December 2023, which also appears to have refused to admit a document proposed by Applicants to be submitted, but which the Tribunal held was not proven to exist.

(b) The failure to notify a procedural decision referred to in an Award is a serious departure from a fundamental rule of procedure under the right to be heard

104. The Tribunal's failure to notify the procedural decision mentioned at paragraph 70 of the Award is a serious departure from a fundamental rule of procedure under the "*right to be heard*". Fundamental rules of procedure are the pillars which uphold the integrity and legitimacy of an arbitral process and thus must be observed by ICSID tribunals,[108] as required by Article 52(1)(d) of the Convention. The procedural rules possessing such special importance include, without being limited to, the right to be heard and the existence of an independent and impartial tribunal.[109] In this context, the right to be heard has been characterized as a basic concept of fair and adversarial arbitral proceedings.[110] Such rights have been recognized as inalienable and forming elements of a right to a fair trial under Article 6(1) of the ECHR[111] and other human

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107 *Victor Pey Casado and President Allende Foundation v. Republic of Chile (I),* ICSID Case No. ARB/98/2, Annulment Proceedings, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, **AL-0042,** para. 263.

108 *Victor Pey Casado and President Allende Foundation v. Republic of Chile (I),* ICSID Case No. ARB/98/2, Annulment Proceedings, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, **AL-0042,** para. para. 73; Anthony Sinclair, "*Article 52*" in C. Schreuer and others, 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, 3rd ed., Vol. II, Cambridge University Press, 2022, **AL-0017**, paras. 330, 333-334.

109 *Victor Pey Casado and President Allende Foundation v. Republic of Chile (I),* ICSID Case No. ARB/98/2, Annulment Proceedings, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, **AL-0042,** para. 73; *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Annulment Proceedings, Decision on Annulment, 22 December 1989, **AL-0040**, para. 5.06; *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Annulment Proceedings, Decision on Annulment of Award, 5 February 2002, **AL-0028**, para. 57; *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines,* ICSID Case No. ARB/03/25, Annulment Proceedings, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, 23 December 2010, **AL-0045**, paras. 197-198; Anthony Sinclair, "*Article 52*" in C. Schreuer and others, 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, 3rd ed., Vol. II, Cambridge University Press, 2022, **AL-0017**, para. 331.

110 Anthony Sinclair, "*Article 52*" in C. Schreuer and others, 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, 3rd ed., Vol. II, Cambridge University Press, 2022, **AL-0017**, para. 363.

111 *See e.g. Suovaniemi and others v. Finland*, App. No. 31737/96, ECtHR, 23 February 1999, **AL-0071**; *Grzęda v. Poland*, App. No. 43572/18 [GC], ECtHR, 15 March 2022, **AL-0072,** para. 301; *Avotiņš v. Latvia*, App. No. 17502/07 [GC], ECtHR, 23 May 2016, **AL-0073,** para. 119.

rights instruments.[112] In *Fraport* v *Philippines I*, the *ad hoc* Committee noted that the right to be heard entails equality of arms and the proper participation of the contending parties in the procedure, including the right to present one's case (sometimes referred to as the "*principle of contradiction*"),[113] which requires:[114]

> *[T]he tribunal to afford both parties the opportunity to make submissions where new evidence is received and considered by the tribunal to be relevant to its final deliberations. It is no answer to a failure to accord such a right that both parties were equally disadvantaged.*

105. In *Lucchetti v Peru* the *ad hoc* Committee held that parties must be offered by the Tribunal to advance all necessary arguments and evidence to support and present their case.[115]

106. The *principle of contradiction* (also referred to as the adversarial principle)[116] has been mostly developed in France.[117] The principle is applied in cases relating to the notification of the request for arbitration – which must be made in such a manner as to make the defendant aware of the arbitral proceedings.[118] For example, the Paris Court of Appeal has refused the recognition of an award where there was no evidence that the defaulting party had been informed of the revised procedural schedule.[119] The violation of the principle of contradiction has been held to exist where a tribunal

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112 *See e.g.* Universal Declaration of Human Rights, 10 December 1948, **AL-0074**, Article 10; International Convenant on Civil and Political Rights, 16 December 1966, **AL-0075**, Article 14.

113 *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines,* ICSID Case No. ARB/03/25, Annulment Proceedings, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, 23 December 2010, **AL-0045**, para. 200.

114 *Ibid.*, para. 44.

115 *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru*, ICSID Case No. ARB/03/4, Annulment Proceedings, Decision on Annulment, 5 September 2007, **AL-0076**, para. 122.

116 Caroline Kleiner, "*Chapter 7: Country Report: France*" in Franco Ferrari, Friedrich Jakob Rosenfeld, et al. (eds), DUE PROCESS AS A LIMIT TO DISCRETION IN INTERNATIONAL COMMERCIAL ARBITRATION, Kluwer Law International, 2020, **AL-0077**, p. 1.

117 *See* French Code of Civil Procedure, **AL-0078**, Article 1520(4). *See also* Swiss Public International Law Act, **AL-0079**, Article 182(3) (which combines a right to be heard and the principle of contradiction) and the following cases: ATF 117 II 346, **AL-0080**, cons 1a; ATF 133 III 139, **AL-0081**, cons 6.1; ATF 142 III 360, **AL-0082**, con. 4.1.1. ("*each party has the right to express itself on the facts essential for the award, to present its legal arguments, to introduce evidence on relevant facts, and to take part in hearings.*").

118 Denis Bensaude, "*Certain Aspects of Judicial Control of Arbitral Awards in France*" in Larry A. DiMatteo, Marta Infantino, and Nathalie M-P Potin, THE CAMBRIDGE HANDBOOK OF JUDICIAL CONTROL OF ARBITRAL AWARDS, Cambridge University Press, 2020, **AL-0083,** p.235.

119 Cour d'appel de Paris, Pôle 1 chambre 1, 15 janvier 2013, n° 11/03911, **AL-0084**.

translates its own motion and extracts parts of the expert report from German to French without allowing parties to discuss the translation, but refers to it in its award.[120]

107. One commentator underscores that an arbitral tribunal is responsible for issuing a reasoned award only on the basis that there is no longer any evidence to be administered.[121] Another author notes that:[122]

> *A way to ensure the respect by the arbitral tribunal of the adversarial principle consists (…) for the arbitral tribunal to read, as soon as it receives them, the submissions of the parties, so that if an issue needs to be clarified, that can be made through a procedural order or during the pleadings.*

108. It has also been stated that the risk of infringing the adversarial principle exists where: "*the tribunal fails to give due consideration to the fact that a duly notified party 'was otherwise unable to present its case'.*"[123]

109. The ICSID *ad hoc* Committee in *Wena Hotels* v *Egypt* also held, in respect of the right to be heard, that: "*[t]his includes the right to state its claim or its defence and to produce all arguments and evidence in support of it.*"[124] To illustrate, the Committee in *Amco II* annulled the Decision on Rectification based on the breach of the equal treatment of parties in conjunction with a right to be heard:[125]

> *[T]he Tribunal, by omitting to fix a time limit to enable INDONESIA to file its observations on AMCO's request, seriously departed from a fundamental rule of procedure. On this ground, the SUPPLEMENTAL AWARD of October 17, 1990, cannot be left unannulled.*

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120 Cour de cassation, civile, Chambre civile 1, 18 mars 2015, n° 13-22.391, **AL-0070**.

121 Anaïs Mallien and Hakim Boularbah, "*The Impact of Default on Post-Arbitration Proceedings*" in Dirk De Meulemeester (ed), DEFAULT IN INTERNATIONAL ARBITRATION: STRIKING THE BALANCE, Wolters Kluwer, 2022, **AL-0085**, p. 4.

122 Caroline Kleiner, "*Chapter 7: Country Report: France*" in Franco Ferrari, Friedrich Jakob Rosenfeld, et al. (eds), Due Process as a Limit to Discretion in International Commercial Arbitration, Kluwer Law International, 2020, **AL-0077**, p. 4.

123 Andrey Kotelnikov, Sergey Anatolievich Kurochkin, et al. (eds), "*Chapter 8: The Arbitration Procedure*" in ARBITRATION IN RUSSIA, Wolters Kluwer, 2019, **AL-0086**, p. 5.

124 *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Annulment Proceedings, Decision on Annulment of Award, 5 February 2002, **AL-0028**, para. 57.

125 *Amco Asia Corporation and others v. Republic of Indonesia ARB/81/1 - Resubmission (Amco II),* Annulment Proceedings, Decision on the Applications for Annulment of the 1990 Award and the 1990 Supplemental Award,17 December 1992, **AL-0046**, para. 9.10.

110. The Applicants' right to be heard in the present case was breached as they had no opportunity to present their case regarding the EU's draft note verbale of 2 October 2023 and the diplomatic note of 30 October 2023, protesting the Norwegian Supreme Court decision of 20 March 2023. This led to the Tribunal's failure to consider Applicants' arguments. Those arguments included contesting Norway's position, found in one of its letters, that it had not received the diplomatic note,[126] implicitly contesting the truthfulness of the existence of such note, which the Tribunal actually agreed with at paragraph 600 of the Award, even though Applicants had offered to submit the actual 30 October 2023 note in their 7 November 2023 letter. This sequence of events is a manifest breach of Applicants' right to present its case.

111. In *Highbury International* v. *Venezuela*, the applicants in ICSID annulment proceedings invoked a breach of the right to be heard based on late allegations presented by Venezuela in conjunction with the absence of an opportunity to debate a particular matter. The applicant also submitted that the Tribunal based its rejection of finding jurisdiction on arguments that were not presented by Venezuela. As a matter of principle, the *ad hoc* Committee held that where an ICSID tribunal rules on arguments not presented by any of the parties, this can be said to leave both sides in a state of defenselessness sufficient to annul an award, regardless of which Party was favoured.[127]

112. In present case, the Tribunal did indeed place the Applicants in a clear situation of procedural defenselessness as there was no opportunity to debate and comment on the Tribunal's reasoning for the rejection to re-open the proceedings in the above-established matter, and the Tribunal's rejection of including **C-0360** (the diplomatic note of 30 October 2023) into the record, where the Tribunal thereafter, at paragraph 600 of the Award, held that it was not established such document existed. Furthermore, the Tribunal clearly altered the parties' "*legal framework*", including by finding that the Applicants' request was submitted too late - an argument that was not formally raised by Norway, and thus that Applicants never had an opportunity to respond to.

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126 Norway's Answer on Claimants Letter on EU Note Verbale, 23 October 2023, **A-0108**, p. 2.

127 *Highbury International AVV and Ramstein Trading Inc. v. Bolivarian Republic of Venezuela*, ICSID Case ARB/11/1 (Annulment Proceedings), Decision on Annulment, 9 September 2019, **AL-0087**, para. 173.

(c) There was a "serious departure" from the "right to be heard"

113. Not only did the Tribunal breach Applicants' right to be heard, which is a fundamental rule of procedure, but there was a "*serious departure*" from this rule, pursuant to the standard existing under Article 52(1)(d) of the ICSID Convention to annul an award.

114. The *ad hoc* Committee in *Wena Hotels* v *Egypt* interpreted the prerequisite of a "*serious departure*" as a breach of a standard of a procedure that would substantially "*deprive a party of the benefit or protection which the rule was intended to provide*."[128] The leading treatise on the ICSID Convention notes:[129]

> *"[I]f a party is deprived of its right to be heard on a particular point, the rule affected would be fundamental. If the point in question concerned more than a formality, the departure is substantial. But if it is clear from the circumstances that the party had not intended to exercise the right, there would be no material effect and the departure would not be 'serious' under this analysis."*
>
> *[emphasis added]*

115. By not receiving the procedural decision of 5 December 2023, Applicants were barred from commenting on the Tribunal's reasoning, or otherwise react, to what appears to have been a refusal to further hear the Applicants on the issue of the EU's diplomatic notes in relation to the Norwegian Supreme Court judgment, and to admit the 30 October 2023 diplomatic note into the record, which the Tribunal held was not proven to exist. The matter was obviously not a mere formality, but as indicated in the 7 November 2023 Letter, was an avenue for the Applicants to argue and make their case on the issue, including by having the case reopened for further argument.[130]

116. It is also the EU's diplomatic note, which triggered the issue. Alleging a breach of international law by reason of the decision of the Supreme court of a State is a highly unusual matter. However, where the European Union, an organization of friendly

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128 *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Annulment Proceedings, Decision on Annulment of Award, 5 February 2002, **AL-0028**, paras. 57-58; Anthony Sinclair, "*Article 52*" in C. Schreuer and others, 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, 3rd ed., Vol. II, Cambridge University Press, 2022, **AL-0017**, para. 339.

129 Anthony Sinclair, "*Article 52*" in C. Schreuer and others, 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, 3rd ed., Vol. II, Cambridge University Press, 2022, **AL-0017**, para. 339.

130 Applicants' Letter, 7 November 2023, **A-0110**.

States, reserves its right to do so, specifically regarding proceedings initiated by one of the two Applicants, this creates a situation where Applicants must raise this new fact with the Tribunal. As unusual as it is, a highly respected investment treaty tribunal, with two former ICJ judges, Judge Tomka and Judge Simma, rendered recently, and after the North Star award, an award in *ELA v. Estonia* underscoring the possibility for an international claim against the decision of State courts, in exactly those circumstances.[131] This also contradicts the reasons in the award stating a supreme court decision cannot be contested in international law – which is manifestly false, and contradicts Judge Greenwood's own individual opinion in the *Diallo* case.[132]

117. The Tribunal's holding at paragraph 600 of the Award that it is not proven the EU diplomatic note was sent proves the material effect of the Tribunal's failure to notify the 5 December 2023 decision referred to in paragraph 70 of the Award. Consequently, the departure was substantial. Moreover, Applicants clearly intended to exercise the right to be heard on this matter, as evidenced by two letters to the Tribunal[133] and as specifically noted by the Applicants' Letter of 7 November 2023.[134]

(d) The failure to notify the decision referred to in paragraph 70 of the Award had a material effect on the Award

118. The *ad hoc* Committee in *Eiser v Spain* held that it is sufficient for a party to establish the breach's potential material effect on the Award without a need to explicit the actual impact of such breach,[135] for example whether without such breach the party would have won the arbitration. In *Eiser*, the simple fact that the Tribunal was not aware of a fundamental issue relating to the independence and impartiality of one arbitrator was held sufficient to require annulling the entire arbitration and award.

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131 *ELA USA, Inc. v. The Republic of Estonia*, PCA Case No. 2018-42, Award, 21 February 2025, **AL-0150**, paras. 1078-1080.

132 *Case concerning Ahmadou Sadio Diallo*, Joint Declaration of Judges Keith and Greenwood, 30 November 2010, **A-0154**.

133 Applicants' Letter, 16 October 2023, **A-0106** and Applicants' Letter, 7 November 2023, **A-0110**.

134 Applicants' Letter, 7 November 2023, **A-0110** ("*[T]he Claimants underscore that, in order to ensure the efficiency of the proceedings they do not at this stage seek such a finding, all the while reserving the possibility of raising it in a subsequent phase, if useful, except if the Tribunal is minded to rule that it has no jurisdiction and/or that there are no breaches of the BIT on the merits.*").

135 *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain,* ICSID Case No. ARB/13/36, Annulment Proceedings, Decision on Annulment, 11 June 2020, **AL-0043** para. 253. Anthony Sinclair, "*Article 52*" in C. Schreuer and others, 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, 3rd ed., Vol. II, Cambridge University Press, 2022, **AL-0017**, para. 346.

119. In respect of the present case, Applicants' Letter of 7 November 2023 to the Tribunal stated as follows:[136]

> *First, while the Claimants' investment was in fact destroyed through a number of measures culminating in late 2016 (closure of the Loophole) and early 2017 (preventing North Star from fishing around Svalbard), the 20 March 2023 Supreme Court judgment is a further measure refusing to recognize, in the Norwegian legal system, Claimants' Latvian-issued licences and related rights, as they should have been. As to the draft note verbale of 2 October, and its final version of 26 October 2023, reflected in the EU note of 30 October 2023 (**C-0360**), this further confirms that the EU and Latvia's position is that the Supreme Court judgment of 2[0] March 2023 amounts, itself, to a violation of international law. This supports Claimants' position on the merits that their investment has been destroyed through Norway's various actions. As characterized by the EU, the judgment is "incoherent"; the Norwegian state apparatus, including its judiciary, is functioning so as to ensure that Claimants' rights to fish snow crab are denied and their investment destroyed. As for the extra-curial "dissenting opinion", it itself is an unusual occurrence. It also shows the judgment itself is considered by some to be so outlandish (or incoherent) that a senior and then sitting Supreme Court judge, who did not sit in the case itself, wished to point it out publicly.*
>
> *Under this first reason, the materiality of the documents confirms Norway's breaches. As such it does not necessarily add much to the case, except that the EU position confirms how unusual are Norway's breaches of international law.*
>
> *Secondly, the Claimants could allege that the decision of 2[0] March 2023, rather than only confirming the destruction of Claimants' investment (and the breaches of equitable and reasonable treatment, as well as the uncompensated expropriation) is, in and of itself, an additional breach of the BIT. While it should be found to be,* ***the Claimants underscore that, in order to ensure the efficiency of the proceedings, they do not at this stage seek such a finding, all the while reserving the possibility of raising it in a subsequent phase, if useful, except if the Tribunal is minded to rule that it has no jurisdiction and/or that there are no breaches of the BIT on the***

[136] Claimants' Letter, 7 November 2023, **A-0110**, pp. 4-5.

***merits**. Only the Tribunal knows what its ruling is and as such only the Tribunal knows whether the parties need to brief that question, which the Tribunal may, if necessary, raise of its own motion. While the 2[0] March 2023 judgment is in and of itself a violation of international law, and of the BIT, arguing this question now is likely to delay the proceedings, which, as shown by their recent letters, neither Claimants nor Norway would want.*

*Thirdly, the materiality of the EU's protest goes to the fact that Claimants should have had access to the snow crab fisheries around Svalbard, ie that the Claimants' rights in that area should have been respected. This goes to the but for scenario on damages. That is, Svalbard waters and fisheries for snow crab are to be considered available in the Claimants' damages scenario. Only the Tribunal knows whether **C-0357** to **C-0360** are relevant at this stage for such purposes, or whether these are issues that can be addressed only at the quantum stage.*

120. This argumentation highlights the decisive nature of the new evidence, for example under Rule 38(2) of the ICSID Arbitration Rules, not only giving the Tribunal grounds to re-open the proceedings, but actually requiring it. Furthermore, materiality was underscored by the Tribunal's apparent decision to admit the evidence found in paragraph 70 of the Award.[137] Indeed, Norway admitted twice, in both its 23 October 2023 letter and in its letter of 15 November 2023 that the evidence must be admitted if the Tribunal found material impact on the case.[138] Further, at paragraph 600 of the Award, the Tribunal held it was not proven the diplomatic note had been sent to Norway. However, Applicants had offered to submit the note as sent to Norway but were never made aware of the Tribunal's decision not to admit this document in the record, *ie* **C-0360**, but only to admit the draft note of 2 October 2023, *ie* **C-0357**.

121. Again, the prerequisite of serious departure under Article 52(1)(d) does not require the Applicants to show an actual or probable impact of the breach on the Award. However, the *ELA v. Estonia* award, penned by Judges Simma and Tomka, the latter being a former ICJ president, shows that the EU note could have established the basis for a

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137 Award 22 December 2023, **A-0068**, para. 70.

138 Norway's Letter to the Tribunal of 23 October 2023, **A-0108**, p. 2 ("*Norway does not think that new evidence should be admitted unless it could have a real material impact upon the case and cannot see which impact the documents would have for the case at this stage, except for possibly delaying the procedure*."); Norway's Letter to the Tribunal of 15 November 2023, **A-0111**, p. 2 ("*As set out in the letter to the Tribunal of 23 October 2023, Norway' s understanding of the Procedural Order is that new evidence may not be admitted unless it could have a real material impact upon the case.*").

finding of liability of Norway in respect of the 20 March 2023 Supreme Court judgment.[139] The substantial nature of an impact is incorporated into the notion of 'serious' departure. Once established, annulment of the award necessarily follows.[140] However, there was an actual and material impact, per the Tribunal's holding at paragraph 600 of the Award that it was not proven that the diplomatic note was sent to Norway, which is false.

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122. With respect to the failure to notify the procedural decision of 5 December 2023, Applicants respectfully request the Committee to consider contacting the members of the Tribunal, and the ICSID Secretariat, to put Applicants' arguments on this question to them for their response. Applicants suggest that the matter be first debated by the parties in the pleadings and discussed at the hearing in September 2025, as to whether to decide whether ICSID and the Tribunal should be asked where this 5 December 2023 procedural decision referred to in the Award is, but that the parties do not appear to have received. The Committee may then decide to ask the Tribunal members to respond to any relevant enquiries, which responses, if any, could be addressed in post-hearing briefs. The Committee may also decide to raise this matter at the time of its choosing on its own motion.

123. As already mentioned, domestic courts in highly sophisticated seats of international arbitration, such as France,[141] Switzerland,[142] the United Kingdom,[143] the United States,[144] and Spain,[145] consider it appropriate to contact tribunals in the course of set aside proceedings where their input as to what happened in the proceedings may be useful, as would appear to be the case for this issue.

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139 *ELA USA, Inc. v. The Republic of Estonia*, PCA Case No. 2018-42, Award, 21 February 2025, **AL-0150**, paras. 1078-1079.

140 *Victor Pey Casado and President Allende Foundation v. Republic of Chile (I),* ICSID Case No. ARB/98/2, Annulment Proceedings, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, **AL-0042,** para. 79.

141 *RHV VERWALTUNGS GMBH, ECKES-GRANINI INTERNATIONAL GMBH, ECKES-GRANINI GROUP GMBH, ECKES AKTIENGESELLSCHAFT v. Mr Axel HARTMANN*, Paris Court of Appeal, Incidental Order of Judge Fabienne Schaller, 13 September 2022, **AL-0064**.

142 Andrea Pinna and Augustin Barrier, "*L'arbitre et le recours en annulation contre la sentence qu'il a rendue : Approche critique du droit français à la lumière du droit compare,*" Les Cahiers de l'arbitrage 2012-2, p.294, **AL-0065**, pp. 304-306 (referring to Swiss, UK, US and Spanish law allowing to receive observations from the arbitrators in set aside proceedings).

143 *Ibid*.

144 *Id*.

145 *Id*.

(e) The Tribunal also had an obligation to reopen the case in the sense requesting further submissions from the parties on the matter raised by Applicants

124. The Tribunal, both under Rule 38(2) of the ICSID Arbitration Rules and its general powers to regulate procedure had the discretion to re-open the proceedings in the light of new evidence concerning the EU's stance protesting the Norwegian Supreme Court decision of 20 March 2023.

125. Moreover, an ICSID tribunal may have the obligation to re-open proceedings, as has been noted by at least three *ad hoc* Committees, in the *Klöckner*, *Sodexo* and *Supervision y Control* cases.[146] This happens when the new evidence can constitute a decisive factor influencing the outcome of the case.[147]

126. In *Sodexo*, Hungary submitted that "*the Award did not even mention Hungary's request to reopen the proceedings nor provide reasons for denying the request*."[148] Furthermore, elaborating on fulfilling the requirements of Rule 38(2) of the Arbitration Rules as "*the Declarations were "new evidence" which satisfied the Rule 38 criteria of being a "decisive factor" for consideration of Hungary's objection to jurisdiction*. (…) *In addition, there was no analysis in the Award as to what the Tribunal meant by saying that Hungary's request to reopen the proceedings came "too late."*"[149]

127. Despite finding that the named relevant document did not constitute new evidence, thus not meeting the requirement under Arbitration Rule 38(2),[150] the Committee in *Sodexo* noted that in determining whether to reopen the proceedings both parties agreed that "*the Tribunal's discretion is not unlimited and may result in a serious departure from a fundamental rule of procedure.*"[151] On whether Hungary's request to reopen was "*too late*", the Committee held that "*the assessment of the timeliness of a request to reopen the procedure requires an evaluation of the facts and circumstances*

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146 *Supervisíon y Control S.A. v. Republic of Costa Rica,* ICSID Case No. ARB/12/4, Award, 18 January 2017, **AL-0088**.

147 For example, see *Supervisíon y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, 18 January 2017, **AL-0088**, paras. 45-47.

148 *Sodexo Pass International SAS v. Hungary*, ICSID Case ARB/14/20, Annulment Proceedings, Decision on Annulment, 7 May 2021, **AL-0089**, para. 121.

149 *Sodexo Pass International SAS v. Hungary*, ICSID Case ARB/14/20, Annulment Proceedings, Decision on Annulment, 7 May 2021, **AL-0089**, paras. 122; 125.

150 *Ibid.*, para. 170.

151 *Ibid.*, para. 167.

of the specific case and lies within the ample discretion of the Tribunal under Arbitration Rule 38(2)."[152]

128. The Applicants submit that the request to reopen the proceedings in the light of new evidence was clearly decisive to the case. The EU diplomatic note took the position that the Norwegian Supreme Court judgment of 20 March 2023 breached international law. As shown by the *ELA v. Estonia* award where two members of the Tribunal were former ICJ judges, including a former ICJ president, the way the diplomatic note described the 20 March 2023 judgment creates a ground for liability of Norway in international law.[153] Moreover, the 20 March 2023 decision concerned the rights of SIA North Star, one of the two claimants in the arbitration. Furthermore, at paragraph 600 of the Award, the Tribunal relied on the fact the October 2023 diplomatic note of the EU was not proven to have been sent to Norway to render its decision. However, this was a mistaken assumption, showing that this evidence was key for the decision and should have been considered. If the Tribunal had heard the issue and agreed that the EU position was the correct one (which it is), the Applicants would have won on the merits of the arbitration.[154] Therefore, the relevant circumstances *ie* the new evidence bearing a decisive character existed in the present case and the proceedings should manifestly have been reopened, at the very least because of the holding found at paragraph 600 in relation to the fact the existence of the diplomatic note was not proven.

3. The Tribunal rendered non-sensical rulings on costs

129. Two aspects of the Tribunal's ruling on costs further support Applicants' conviction that the Tribunal failed to properly adjudicate Applicants' dispute.

130. First, the Tribunal awarded interest on costs in favour of Respondent even though it did not make such a request.[155] The fact that Respondent requested *"such further or other relief as the Tribunal deems appropriate*"[156] is no support for the Tribunal to award interest that was not sought. Awarding something not asked is not only a

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152 *Ibid.*, para. 172.

153 *ELA USA, Inc. v. The Republic of Estonia*, PCA Case No. 2018-42, Award, 21 February 2025, **AL-0150**, paras. 1078-1079.

154 *Ibid*.

155 *See e.g.* Respondent's Rejoinder and Reply on Jurisdiction, 30 June 2022, **A-0016**, para. 631 as well as Norway's Costs Statement of Costs, 2 December 2022, **A-0023**.

156 Respondent's Rejoinder and Reply on Jurisdiction, 30 June 2022, **A-0016**, para. 631.

prohibited *ultra petita* ruling, but also prevents the party against whom such thing is awarded from being heard on that issue.

131. The Tribunal awarded interest on its costs award of SOFR + 2%, compounded twice a year.[157] Awarding compound interest in investment treaty arbitration is highly unusual. Had Norway made such a request, Applicants would have had much to say about it, but no such request was made, nor debated.

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

> 618. The Tribunal considers that it is only just that the unsuccessful Party should meet the entire costs of the arbitration. In the present case, those costs are as follows: …
>
> **Total:** **USD 597,307.04**
>
> 619. These costs have been met by advance payments made on an equal basis by the Parties.
>
> 620. The Tribunal directs that the Claimants pay the Respondent the sum of **USD 597,307.04** to cover the entirety of the arbitration costs. Each Claimant shall be jointly and severally liable for the entirety of this sum.

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

> (3) ORDERS the Claimants to pay the sum of **USD 597,307.04** to the Respondent in respect of the arbitration costs, the Claimants to be jointly and severally liable to make this payment;

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

135. The Tribunal holds that "*the unsuccessful Party should meet the **entire costs of the arbitration***". It then recognizes that each side has already made advance payments on an "*equal basis*", as was the case, meaning that Respondent had paid only half of the advances. According to ICSID's financial table, as of 22 December 2023,[158] Applicants had paid USD 375,000 in arbitration costs advances and Norway had paid

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157 Award, 22 December 2023, **A-0068**, para. 626(5).

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

USD 374,922. Therefore, by ordering Applicants to pay to Norway more than it had paid in arbitration costs advances, the Tribunal is not ordering Applicants to "*meet the entire costs of the arbitration*", but is actually ordering Applicants to pay to Norway more than such costs. The Tribunal thus contradicts itself.

136. The Tribunal's approach to costs is further evidence that it failed to properly adjudicate the manner, which justifies annulling the entire Award.

B. THE TRIBUNAL CAUSED A DENIAL OF JUSTICE TO APPLICANTS BY MANIFESTLY FAILING TO EXERCISE ITS POWERS, IMPROPERLY EXERCISING ITS POWERS, BREACHING A FUNDAMENTAL RULE OF PROCEDURE AND FAILING TO STATE REASONS WHEN FAILING TO DECIDE AND/OR IMPROPERLY DECIDING A NUMBER OF ISSUES BASED ON THE *MONETARY GOLD* PRINCIPLE

137. 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).

138. First, it can be recalled that the *Monetary Gold* principle, as a matter of international law, would, in essence, provide that an international jurisdiction cannot decide a dispute where it would decide on the rights or obligations of a State not present before the tribunal, or the rights of the absentee State would concern the "*very subject-matter*" of the dispute.[159]

139. Second, in the present matter, the ICSID Tribunal held that, while certain matters were perhaps not affected by the *Monetary Gold* rule, nonetheless:

- It could not adjudicate a dispute between different States parties to the Svalbard Treaty, notably as to whether the rights of the parties to the treaty, that Norway share on a non-discriminatory basis the resources of the archipelago, extended to the continental shelf or the exclusive economic zone (which Norway says they do not, while many other states party to the treaty say they do);[160]

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159 ICJ, case of the *Monetary Gold Removed from Rome in 1943*, (*Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America*), judgment, 15 June 1954, **AL-0090**, p. 33.

160 Award, 22 December 2023, **A-0068**, para. 584.

- It could not adjudicate whether Norway had conspired with the Russian Federation or otherwise incited the Russian Federation to exclude EU vessels from the snow crab fisheries in the Loop Hole;[161]

- It did not need to decide the rights and obligations of Latvia or the EU to decide the case;[162]

140. Generally, the Tribunal misapplied the *Monetary Gold* principle in such a manner where the misapplication constitutes a manifest excess of power. It did so in two ways. First, the *Monetary Gold* principle cannot be applied in ICSID proceedings. Second, relatedly and in any event, the Tribunal applied the *Monetary Gold* principle in a manner in which it had never been applied before, well beyond any expected application, which constituted a manifest misapplication of the law. After explaining how the Tribunal misapplied the so-called *Monetary Gold* rule **(1)**, Applicants will explain how the three specific applications of the *Monetary Gold* rule mentioned in the immediately preceding paragraph also constitute conduct that must lead to the annulment of the Award **(2)**.

1. The Tribunal Misapplied the so-called *Monetary Gold* rule in the context of an ICSID arbitration

141. The application of the *Monetary Gold* principle – which provides that a dispute cannot be decided when a State party to such dispute is not present before the Tribunal – cannot serve to deprive an investor from a decision on the issue raised before an ICSID tribunal. Applicants contend that the Tribunal was wrong to apply the Monetary Gold principle in the previous proceedings.[163] In their view, applying this principle to an investor-State arbitration has led to a denial of justice, which calls for the annulment of the entire Award.

142. As will be show, this *Monetary Gold 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 so would be manifestly outside the competence of an ICSID/BIT tribunal. An ICSID/BIT tribunal can

161 *Ibid*., para. 297.

162 *Ibid*., para. 299.

163 Applicants' Memorial on Annulment, para. 130 *et seq*.

only rule on the international responsibility of a respondent State party to a BIT. 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.

143. What a long series of cases has, in reality, held, is that an international tribunal would avoid deciding the rights of an absent State which had not given its consent to the jurisdiction of the relevant tribunal, in respect of a holding that would directly affect and trigger the international responsibility of the absent State.

144. Applicants particularly note an insightful article written by Professor D.H.N. Johson in 1955 in the International Comparative Law Quarterly on the ICJ's *Monetary Gold* decision.[164]

145. As pointed out by Professor Johnson, the genesis of the *Monetary Gold* case appears to stem from the principle that the disputes of States cannot be decided absent their consent, a holding notably made in the PCIJ's advisory opinion in the *Eastern Carelia* case.[165] In that case, in 1923 the PCIJ held it could not decide a matter referred to it by the League of Nations for an advisory opinion because it would be the equivalent of judging a dispute involving the USSR, which at the time was not a member of the League of Nations and as such had not consented to the mechanism for advisory opinions under the Statute of the PCIJ, created within the framework of the League of Nations.[166]

146. However, numerous international jurisdictions, have actually passed on and considered the rights of absent third states, while making holdings that affected only the parties actually in dispute and which in any event had *res judicata* only between the parties present:

- In the *Corfu Channel* case between the United Kingdom and Albania, the ICJ considered charges had been laid by Yugoslavia, a third state, which was not

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164 D.H.N. Johnson, "The Case of the Monetary Gold Removed from Rome in 1943" (1955) 4 ICLQ 93, **AL-0091**.

165 D.H.N. Johnson, "The Case of the Monetary Gold Removed from Rome in 1943" (1955) 4 ICLQ 93, **AL-0091**, p. 105.

166 *Status of Eastern Carelia*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5 (July 23), **AL-0092.**

present in the proceedings, and eventually held that the charge against Yugoslavia was not established.[167]

- In the *Anglo-Iranian Oil Co.* case, the ICJ held that one of the issues was whether the dispute between Iran and the United Kingdom was about situations or facts arising direct or indirectly on the basis of a 1934 Iranian-Danish treaty. The ICJ held in the negative but at no time did Denmark, which was not present in the proceedings, consent to the ICJ being able to determine the matter.[168]

- In the *Ambatielos* case, the ICJ was called upon to interpret various treaties between the United Kingdom, on the one hand, and, on the other, Denmark, Sweden and Bolivia. The court gave a preliminary interpretation but at no time did Denmark, Sweden or Bolivia consent to such preliminary interpretation.[169]

- In the *British Guiana Boundary* case where the arbitrators delimited a boundary between the United Kingdom and Venezuela, the arbitrators added a caveat that the decision was not binding on Brazil, whose rights may have been affected by the award, but this did not prevent the tribunal from rendering the award.[170]

- In the *El Salvador v. Nicaragua* case before the Central American Court of Justice, El Salvador complained that Nicaragua's actions in concluding the Bryan-Chamorro Treaty with the United States on the construction of an interoceanic canal was incompatible with and in breach of previous treaties between Nicaragua and El Salvador. Nicaragua argued the court had no jurisdiction in the absence of the United States over the Bryan-Chamorro Treaty. However, the court rejected the argument and while it did not pronounce the Bryan-Chamorro treaty void, it held that Nicaragua had to re-

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167 ICJ, Corfu Channel (*United Kingdom of Great Britain and Northern Ireland v. Albania*), Judgement of 9 April 1949, **AL-0094,** p. 17; D.H.N. Johnson, "The Case of the Monetary Gold Removed from Rome in 1943" (1955) 4 ICLQ 93, **AL-0091**, p. 107.

168 ICJ, Anglo-Iranian Oil Co. (*United Kingdom v. Iran*), Judgement of 22 July 1952, **AL-0095**; D.H.N. Johnson, "The Case of the Monetary Gold Removed from Rome in 1943" (1955) 4 ICLQ 93, **AL-0091**, 107.

169 ICJ, Ambatielos *(Greece v. United Kingdom*), Judgement of 10 May 1953, **AL-0096**; D.H.N. Johnson, "The Case of the Monetary Gold Removed from Rome in 1943" (1955) 4 ICLQ 93, **AL-0091**, p. 107.

170 *British and Foreign State Papers*, 92, p. 160, **AL-0097**; D.H.N. Johnson, "The Case of the Monetary Gold Removed from Rome in 1943" (1955) 4 ICLQ 93, **AL-0091**, pp. 107-108.

establish the situation between itself and El Salvador as it was prior to the conclusion of the Bryan-Chamorro treaty.[171]

147. Even in other cases before the ICJ and ICSID tribunals, this line of cases appears to have been continued.[172]

148. What the ICJ held in *Monetary Gold* was as follows: [173]

> *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.*

149. It is important to recall the facts of that case to understand how the principle may apply.[174] In essence, the *Monetary Gold* case was about whether certain gold that may belong to Albania, and which had been removed from Rome in 1943, during WWII, should be used to compensate either the United Kingdom, for damages awarded to it by the ICJ, in the amount of GBP 843,947, in the *Corfu Channel* case, in 1949, or whether it should be used to compensate the State of Italy, as the expropriated owner of the National Bank of Albania. The gold was that of the National Bank of Albania which had been in Rome, but removed in 1943, and taken later at the end of WWII. Under agreements related to the peace, the question was which country could have the gold, and to compensate what. The three countries involved (Albania, the United Kingdom and Italy) came to certain agreements, which eventually put the question of ownership of the gold notably to the ICJ, including certain issues of priorities of ownership. The Tripartite Statement of 25 April 1951 which set out the agreement stated that the gold would be delivered to the United Kingdom in partial settlement of the award in the *Corfu Channel* case, except if either Albania or Italy seized the ICJ of

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171 *The Republic of El Salvador v. The Republic of Nicaragu*, American Journal of International Law, Volume 11 (1917), p. 674, **AL-0098**; D.H.N. Johnson, "The Case of the Monetary Gold Removed from Rome in 1943" (1955) 4 ICLQ 93, **AL-0091**, 108-109.

172 *See e.g. Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/37, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis, 12 June 2020, **AL-0099**, para 307; ICJ, Case concerning Certain Phosphate Lands in Nauru (*Nauru v. Australia*), Preliminary Objections, Judgment, 26 June 1992, **AL-0100**, p. 240 at pp. 261-262, para. 55; PCA, *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, **AL-0101***,* para. 4.66.

173 ICJ, case of the *Monetary Gold Removed from Rome in 1943*, (*Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America*), judgment, 15 June 1954, **AL-0090**, p. 33.

174 D.H.N. Johnson, "The Case of the Monetary Gold Removed from Rome in 1943" (1955) 4 ICLQ 93, **AL-0091**, pp. 93-100.

certain questions related to the ownership of the gold, within a certain deadline.[175] Albania did not do so within the deadline, but Italy did so. However, during the proceedings, Italy and the United Kingdom, in effect, asked the Court to hold that, at least for certain questions, it had no jurisdiction to decide the matter, including because of the absence of Albania. This is ultimately what the Court held.

150. However, those bizarre facts can in no way be applied to the present case against the rights of SIA North Star and Mr. Pildegovics to obtain an ICSID award in respect of all their claims. In *Monetary Gold*, Albania could have seized the ICJ, but did not do so. In *East Timor*, Indonesia could have intervened or otherwise seized the ICJ, but did not do so. However, in the present case, the Russian Federation, Latvia, and the EU had no way of seizing the ICSID tribunal. The ICSID Tribunal's limited jurisdiction would also have created an award enforceable only between the parties, *ie* Mr. Pildegovics, SIA North Star, and the Kingdom of Norway. Just like in the five international cases cited above (*Corfu Channel*, *Ambatielos*, *Anglo-Iranian Oil*, *British Guiana Boundary* and *El Salvador v. Nicaragua*) where international tribunals and the ICJ examined the rights and obligations of third states, but without rendering a decision directly on the international responsibility of those third states, the ICSID tribunal in the present case could (and should) have done exactly the same.

151. One fundamentally different variable between *Monetary Gold* and the present case is that Albania had a chance to seize the ICJ, but did not do so. Albania was absent from the proceedings of its own choice, and could have taken a different decision. The same would have applied in *East Timor*, where Indonesia could have intervened but did not. Before the ICJ, where a State intervenes, under the ICJ Statute, the judgment would be binding on it.[176]

152. However, in the present case, there was no mechanism for either the Russian Federation, Latvia or the European Union to make the award binding on themselves, like before the ICJ. What is more, the Tribunal actually held that Latvia had no right to attend the hearing (which, while a dubious conclusion, reinforces Applicants' position on the annulment).[177] The Tribunal's decision on this point shows that it was possibly even impossible for the Russian Federation, Latvia, or the EU to otherwise intervene in the matter and certainly to subject itself to the jurisdiction of the ICSID Tribunal.

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175 *Ibid*., p. 99.

176 ICJ Statute, 26 June 1945, **CL-0217**, Article 63, *see also* Article 59.

177 Letter from Claimant to Tribunal, 30 September 2022, **A-0156**, p. 4; The Tribunal's letter, 26 October 2022, **A-0157**.

There was no mechanism to do so either under the ICSID Convention, the 2006 ICSID Arbitration Rules or the Latvia-Norway BIT.

153. It is well established by ICSID annulment decisions on manifest excess of power that a tribunal cannot avoid applicable law. In its Counter-Memorial on Annulment, Respondent contends that "[w]hen ascertaining its competence, the Tribunal is called upon to apply any relevant and applicable rule of international law, including the *Monetary Gold* principle".[178] However, it provides no convincing reason as to why that particular principle should in fact apply. Here, in essence, the Tribunal avoids the applicable law, and avoids deciding part of case, by applying *Monetary Gold*, even though that doctrine is incompatible with ICSID jurisdiction, which is a specific jurisdiction. The 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. The Tribunal applies general international law 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.[179]

154. The *Monetary Gold* rule exists in a State-to-State world, where even though a State is not present before the relevant jurisdiction, the State bringing the claim still has the possibility of raising the dispute, as matter of international law, with the other State, through diplomatic channels, for example.

155. In Applicants' view, the application of the *Monetary Gold* principle to investor-State arbitrations creates a fundamental inequality between the Parties, in breach of a fundamental rule of procedure. Its application is misguided and has led to a denial of justice which can only be resolved by annulling the entire Award.

156. The principle of equality of the parties is a fundamental principle applicable to all disputes raised in front of international courts and tribunals. As the ICJ explained, the principle follows "from the requirements of good administration of justice".[180] It is also a fundamental rule of procedure which has been specifically recognized in the ICSID context, which aim is to place both parties to a dispute – foreign investors and States

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178 Respondent's Counter-Memorial on Annulment, para. 155.

179 *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Annulment Proceedings, Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010, **AL-0034**, paras. 185-210; *Venezuela Holdings, B.V., et al v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Annulment Proceedings, Decision on Annulment, 9 March 2017, **AL-0039**, paras. 167-188.

180 ICJ, *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O.*, Advisory Opinion, 23 October 1956, **AL-0123**, p. 86.

– "on an equal procedural footing".[181] In the context of international commercial arbitration, Article 18 of the UNCITRAL Model Law on International Commercial Arbitration, following which "[t]he parties shall be treated with equality", has been considered as a fundamental rule of procedure.[182]

157. While the principle of equality of the parties is one of general international law, the particular framework of ICSID disputes opposing a State to an investor, however, calls for particular considerations and nuances.

158. In the specific context of investor-State arbitrations, the distinctive particularities characterizing the parties need to be taken into account before transposing *mutatis mutandis* principles of general international law developed in an inter-State context to disputes opposing actors of different characters: investors (more precisely, non-State actors such as individuals, corporations or companies – since in principle a State could be an investor) and a State (usually as respondent). By applying the *Monetary Gold* principle – which is a principle that was developed and is usually applied by courts and tribunals in the context of inter-State disputes – the Tribunal applied general international law rather than the BIT, which it should not do. Indeed, applying a customary international law rule over rules of the BIT has led to the annulment of ICSID awards in the past.[183] As such, it simply cannot be that all principles of general international law are simply transposed to investor-State disputes, without regard for the particular regimes governing the parties' interactions, and without regard for the existence of the "asymmetrical character of the two parties" in the context of ICSID disputes.[184]

159. The fundamental differences between an investor (be it an individual or a company) on the one hand, and a State, on the other hand, need to be accounted for, especially

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181 Aron Broches, "*The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*," The Hague Academy Collected Courses, Vol. 136, 1972, **AL-0124**, p. 344. See also Institut de droit international, 18th Commission, Session of The Hague – 2019, Report, "Equality of Parties before International Investment Tribunals", 10 December 2018, **AL-0125**, para. 78.

182 *Maritime International Nominees Establishment v. Republic of Guinea*, ICSI Case No. ARB/84/4, Annulment Proceedings, Decision on Annulment, 22 December 1989, **AL-0040**, para. 5.06.

183 *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Annulment Proceedings, Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010, **AL-0034**, paras. 185-210; *Venezuela Holdings, B.V., et al v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Annulment Proceedings, Decision on Annulment, 9 March 2017, **AL-0039**, paras. 167-188.

184 Campbell McLachlan, THE INSTITUTE OF INTERNATIONAL LAW'S RESOLUTION ON THE EQUALITY OF PARTIES BEFORE INTERNATIONAL INVESTMENT TRIBUNALS, CUP, 2021, **AL-0126**, para. 59; Campbell McLachlan, "*Equality of Parties before International Investment Tribunals: The Institute of International Law Resolution 2019*," ICSID Review, Vol. 35(1-2), 2020, **AL-0127**, p. 421.

where this would create a situation of substantial inequality in the proceedings. A respondent State and a claimant investor, in the context of an ICSID proceeding, are obviously parties of a different nature, for example because they serve different functions, considering a State's role in representing the public interest.[185] Such specificities have led the *Institut de droit international* (IDI) to conduct an in-depth analysis of the equality of parties before international investment tribunals. The IDI issued a comprehensive report on 10 December 2018,[186] which was followed by it Resolution concerning the Equality of Parties before International Investment Tribunals of 31 August 2019.[187] In its report, while recognizing that "[t]he equality of the parties is a fundamental element of a fair system of adjudication",[188] the IDI Committee also addressed the valid concerns raised within the international community querying whether investment arbitration is in fact "capable of offering a fair and balanced method for the resolution of international investment disputes".[189] Recital (7) of the Preamble of the Resolution ultimately adopted acknowledges that: [190]

> *…the application of the equality principle requires specific consideration in light of the particular characteristics of international investment disputes, in which the tribunal has before it two parties of a different juridical character: a private investor and a State, whose function it is to represent the public interest.*

160. Additionally, Article 1(2) of the IDI's Resolution points to a specific tension showing the imbalance between the parties to an investment dispute. Referring to the forum that is an international investment tribunal, this provision states that:[191]

> *Such a forum is designed to secure equality between the parties in circumstances where the State has the sovereign power to enforce its own law*

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185 Institut de droit international, 18th Commission, Session of The Hague – 2019, Resolution, "Equality of Parties before International Investment Tribunals", 31 August 2019, **AL-0128**, Preamble, recital (7); Campbell McLachlan, "*Equality of Parties before International Investment Tribunals: The Institute of International Law Resolution 2019*," ICSID Review, Vol. 35(1-2), 2020, **AL-0127**, p. 419.

186 Institut de droit international, 18th Commission, Session of The Hague – 2019, Report, "Equality of Parties before International Investment Tribunals", 10 December 2018, **AL-0125**.

187 Institut de droit international, 18th Commission, Session of The Hague – 2019, Resolution, "Equality of Parties before International Investment Tribunals", 31 August 2019, **AL-0128**.

188 Institut de droit international, 18th Commission, Session of The Hague – 2019, Report, "Equality of Parties before International Investment Tribunals", 10 December 2018, **AL-0125**, paras. 1, 30.

189 *Ibid*., para. 8

190 Institut de droit international, 18th Commission, Session of The Hague – 2019, Resolution, "Equality of Parties before International Investment Tribunals", 31 August 2019, **AL-0128**, Preamble, recital (7).

191 *Ibid*., Article 2(1). See also Institut de droit international, 18th Commission, Session of The Hague – 2019, Report, "Equality of Parties before International Investment Tribunals", 10 December 2018, **AL-0125**, paras. 83, 89.

and adjudicate its claims against investors for breach of its laws before its own courts.

161. As specified in the Commentary to this provision, this second clause of Article 1:[192]

> *serve[s] to underscore the point that, while procedural equality is an essential attribute of a fair system of adjudication which must be applied to investment tribunals, this does not change the fact that, as observed in recital (7) of the preamble, the two parties have a different juridical character.*

162. In Applicants' view, these statements reflect well the fact that if parties to ICSID arbitration are in principle equal in the proceedings, they present a different judicial character, which needs to be accounted for. That difference of character affects the particular avenues accessible to an investor, as opposed to a State, in resolving a dispute. Notably, as stated in the IDI Resolution, States, as opposed to investors, retain access to domestic avenues in order to settle the dispute it may face with an investor.

163. Applicants note that Sir Christopher Greenwood, President of the Tribunal in this case, was a member of the 18th Commission of the IDI, responsible for issuing the comprehensive report on the topic of Equality of Parties before International Investment Tribunals[193] and the Resolution cited above. The Tribunal was thus fully aware of the nuances and difficulties in equating parties of a different character and of the necessity of taking into account the particular characteristics and limited avenues available to investors to uphold their rights, as opposed to those available to States.

164. The imbalance between investors and States is further shown by the fact that investors are not parties to the conclusion of BITs. While they may be granted a procedural right of action in accordance with such a BIT, that right remains limited, and subject to the sovereign decisions of the States having reached an agreement in the conclusion of a particular international investment treaty. Beyond such procedural rights, investors retain very little margin of discretion in making claims against a State. While BITs may confer individualized procedural rights on investors,[194] such rights exist only because the States parties to a BIT have granted them to the individuals in question and are

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192 Campbell McLachlan, THE INSTITUTE OF INTERNATIONAL LAW'S RESOLUTION ON THE EQUALITY OF PARTIES BEFORE INTERNATIONAL INVESTMENT TRIBUNALS, CUP, 2021, **AL-0126**, para. 96.

193 Institut de droit international, 18th Commission, Session of The Hague – 2019, Report, "Equality of Parties before International Investment Tribunals", 10 December 2018, **AL-0125**.

194 See generally Tillmann Rudolf Braun, "*Globalization-Driven Innovation: the Investor as a Partial Subject in Public International Law*," The Journal of World Investment & Trade, Vol. 15, 2014, **AL-0129**, pp. 73-116.

thus circumscribed by the BIT in question. Moreover, States can agree to terminate such rights, including by mutually agreeing to disapply sunset clauses and thus shorten the duration of such rights. This is exactly what happened in the present case where Norway sought from Latvia that it agrees to terminate the BIT, including its sunset clause, which it did.[195] This has made it impossible for Applicants to start a new claim outside potential resubmission proceedings following the present annulment proceedings. In the first iteration of the negotiated termination of the BIT, which Mr. Pildegovics managed to change after his testimony to Latvia's foreign affairs commission of its Parliament, Norway even appears to have managed to include language that appeared to prevent the constitution of a new Tribunal, which agreement would have been manifestly contrary to Applicants' acceptance to arbitrate the present dispute and the terms of Article 25 of the ICSID Convention. Norway's capacity to scuttle Applicants' right of access to justice, which it actually tried to do in the middle of the dispute, and in respect of which it partly succeeded (in respect of new claims), is a vivid reminder of the fundamental inequality between Applicants and Respondent.

165. States, moreover, possess a multitude of avenues and choices when it comes to the dispute settlement options available to them – in a way that is far from comparable to the situation in which an investor finds itself. For any given dispute, a State may have multiple means available to it to attempt to resolve that dispute, while an investor may only have very limited options when it is up against a State, on the international law plane.

166. This is best exemplified by having regard to relevant principles set out in the Charter of the United Nations. As stated in Article 2(3) of the Charter of the United Nations – which, as a "paradigmatic provision" of the Charter and one that is of "universal applicability", reflects customary international –[196] "[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."[197] Article 2(3) needs to be read in combination with Article 33 of the Charter. Article 33 is understood as generally setting

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195 See Letter from Claimants to the Tribunal, 24 August 2022, **A-0143**; Claimants' Letter to the Tribunal, 17 March 2023, **A-0105**; Norway's Letter to the Tribunal, 24 March 2023, **A-0144**.

196 Christian Tomuschat, "*Article 2 (3)*" in Bruno Simma and others, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, OUP, 4th edition, 2024, **AL-0130**, para. 4.

197 Charter of the United Nations, 26 June 1945, **AL-0160**, Art. 2(3).

out the various means available to States in the pacific settlement of their disputes. Article 33(1) of the Charter reads as follows:[198]

> *The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.*

167. The list of means provided in this article is non-exhaustive, as it includes "other peaceful means" of a State's own choice, leaving even more discretion to the State to choose the most appropriate path for dispute resolution. As held by the ICJ, Article 33 "leaves the choice of peaceful means of settlement to the parties concerned and does not single out any specific method".[199] Moreover, "[s]ince Art 33 (1) extends the substantive rule of Art 2 (3) into the procedural terrain, it can be concluded that primarily it covers the same addressees, namely States".[200]

168. Looking at the terms of Article 33(1), it is evident that States possess a multitude of avenues from which they can choose from – many more than those available to other subjects of international law. States do not need to attempt to settle their dispute following a means or method in any particular sequence or hierarchy; they are free to choose the means that correspond the most to their needs and are also free to opt for a combination of means if a particular situation calls for it.[201] They also have additional flexibility in selecting "other peaceful means of their own choice", which is also understood as comprising resort to good offices, as a frequently used method that is not specifically listed in Article 33.[202] All in all – subject to the principle of consent, following which each party to a dispute needs to consent to a particular method of dispute settlement –[203] States are free to resolve their dispute in the way they see fit.

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198 Charter of the United Nations, 26 June 1945, **AL-0160**, Art. 33. Our emphasis.

199 ICJ, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chi*le), Judgment, 1 October 2018, **AL-0131**, p. 562, para. 165.

200 Christian Tomuschat, "*Article 33*" in Bruno Simma and others, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, OUP, 4th edition, 2024, **AL-0132**, p. 1406, para. 9. See also, p. 1409, para. 20.

201 *Ibid*., p. 1410, para. 22; p. 1413, para. 29.

202 *Ibid*., p. 1418, para. 39.

203 As affirmed by the PCIJ, "[i]t is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement." See *Status of Eastern Carelia*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5 (July 23), **AL-0092**.

Indeed, the available procedures of Article 33(1) "are characterized by the absence of unilateral dictatorial action" as well as by the "strict equality of the parties".[204]

169. Each of the means listed in Article 33 may present particular advantages, thereby allowing real freedom of choice and options for States facing a dispute. For example, even though States are under no general obligation to negotiate before raising a claim for judicial settlement,[205] negotiations may consist of a viable option in and of itself, as they offer States a "flexible and effective means of peaceful settlement of their disputes".[206] In choosing to negotiate, States also benefit from various guidelines, such as the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,[207] or the 1998 Principles and Guidelines for International Negotiations of the UNGA,[208] to guide them in their attempt to resolve a dispute.

170. In both these instruments, the sovereign equality between all States is reaffirmed, a crucial principle specific to inter-State relations and dispute settlement, which does not exist in the context of arbitrations opposing parties of a different nature, i.e. an investor (who is a physical person or company) and a State. The principle of sovereign equality between States is a foundational principle of international law, on which the UN Charter rests, pursuant to its Article 2(1).[209] On this basis, all States, as the main subjects of international law, are considered as formally equal, in spite of the different resources, regimes or powers they might present, granting them all a certain level of protection and the opportunity to deal with each other as equals.[210] As an instrument "commonly understood as an authentic interpretation of the Charter",[211] the Friendly Relations Declaration expands on the principle of sovereign equality and describes that all States "have equal rights and duties and are equal members of the international community,

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204 Christian Tomuschat, "*Article 33*" in Bruno Simma and others, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, OUP, 4th edition, 2024, **AL-0132**, p. 1411, para. 25.

205 As stated by the ICJ, notably in *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Judgment on Jurisdiction and Admissibility of 5 October 2016, **AL-0133**, p. 270, para. 35.

206 See Manila Declaration on the Peaceful Settlement of International Disputes, 15 November 1982, **AL-0134**.

207 UNGA, Resolution 2625 (XXV), 24 October 1970, **AL-0135**.

208 UNGA, Resolution A/RES/53/101, 8 December 1998, **AL-0136**.

209 Charter of the United Nations, 26 June 1945, **AL-0160**, Art. 2(1).

210 Juliane Kokott & Lauri Mälksoo, "*States, Sovereign Equality*," Max Planck Encyclopedia of Public International Law, 2023, **AL-0137**, paras. 56, 78.

211 *Ibid*., para. 19.

notwithstanding differences of an economic, social, political or other nature."[212] In particular, they are "juridically equal".[213] The sovereign equality principle also entails that no State is subordinated to another.[214]

171. A person or company, as opposed to a State, is however not granted the same level of recognition in international law. Traditionally, the person (physical or legal) was fully considered to be "under the exclusive control of States".[215] Through the development of various fields of international law, such as human rights law, international criminal law or investment law, individuals have been granted increasingly more rights and agency, but they remain usually perceived as a partial subjects of international law.[216] They are certainly not subjects of international law in the same manner as States. As such, when individuals interact with States, or attempt to assert the claims they may have against them, they do not do so on a level of parity; individuals are not the equals of States.

172. Private persons do not have, as a matter of law, access to diplomatic channels. Indeed, Article 27 of the ICSID Convention shows this inequality reminding that only States can use diplomatic protection, not private persons.[217] As such, private persons using an ICSID arbitration to raise an international wrong do not have the alternative of entering into international negotiations should no adjudicatory avenue be open to them. It is trite to say that Mr. Pildegovics and SIA North Star do not have diplomatic relations with Norway, like Latvia, the Russian Federation and/or the EU do. Applying the *Monetary Gold* principle to Mr. Pildegovics and SIA North Star creates fundamental inequality between Applicants and Norway in ICSID arbitral proceedings. That is because

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212 UNGA, Resolution 2625 (XXV), 24 October 1970, **AL-0135**, point 1. See also Martti Koskenniemi & Ville Kari, "*Sovereign Equality*" in Jorge E. Viñuales, THE UN FRIENDLY RELATIONS DECLARATION AT 50, CUP, 2020, **AL-0138**, pp. 166-188.

213 *Ibid*.

214 Juliane Kokott & Lauri Mälksoo, "*States, Sovereign Equality*," Max Planck Encyclopedia of Public International Law, 2023, **AL-0137**, para. 28.

215 Christian Walter, "*Subjects of International Law*," Max Planck Encyclopedia of Public International Law, 2007, **AL-0139**, para. 15. *See also* PCIJ, *Jurisdiction of the Courts at Danzig*, Advisory Opinion, 3 March 1928, **AL-0140**, pp. 17-18.

216 Christian Walter, "*Subjects of International Law*," Max Planck Encyclopedia of Public International Law, 2007, **AL-0139**, para. 18; Juliane Kokott & Lauri Mälksoo, "*States, Sovereign Equality*," Max Planck Encyclopedia of Public International Law, 2023, **AL-0137**, para. 14.

217 ICSID Convention, Article 27 ("(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute. (2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.").

Norway can still have ongoing diplomatic discussions on the issues, which the Tribunal refused to decide, while Applicants cannot.

173. States may also choose to resort to fact-finding, mediation or conciliation as ways to settle their dispute. Here again, these options are simply unavailable to an investor in the context of its investment relation with the host State. If they choose to use any of these methods, States once again benefit from various models, guidelines and rules to assist and guide them in their settlement.[218]

174. In addition to all these means of peaceful settlement, States may also choose to resort to arbitration or judicial settlement in front of international courts or tribunals. Depending on the type of dispute they face, and assuming that the States have consented to a particular jurisdiction, multiple fora – international but also regional – may be available for the resolution of a dispute. As they are seeking a binding decision to settle their dispute, States may have many different options. As stated by Tomuschat, "[t]hat the parties to a dispute decide at their discretion on the best suited mode of transaction may be directly derived from the principle of sovereign equality."[219] For States, recourse to judicial settlement or arbitration may often be the last resort chosen – although, again, there is no hierarchy of means of settlement imposed on States – but for foreign investors, where an investment treaty is in place, arbitration is usually the only resort to vindicate international law rules, as here, considering notably that Norway is a dualist State and that the Latvia-Norway BIT has no direct application in Norwegian law.

175. All in all, this shows us that States, as the main and central actors of international law, benefit from various types of means to settle their disputes: diplomatically or judicially. The application of the *Monetary Gold* principle, thus, in the context of international litigation of inter-State disputes, serves to preserve the interests of third States – equally sovereign – where a decision may involve the responsibility of those third States. In such cases, a court or tribunal may be justified in upholding an exception to its jurisdiction or the admissibility of a case where the essential interests of third States may be engaged by the proceedings.

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218 See, for example, UNGA, "United Nations Activities in Support of Mediation", Report of the Secretary-General, A/72/115, 27 June 2017, **AL-0141**; UNGA, "United Nations Model Rules for the Conciliation of Disputes between States", A/RES/50/50, 29 January 1996, **AL-0142**.

219 Christian Tomuschat, "*Article 33*" in Bruno Simma and others, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, OUP, 4th edition, 2024, **AL-0132**, p. 1421, para. 46.

176. The situations where a court or tribunal will apply the *Monetary Gold* principle are however exceptional and thus properly circumscribed. As stated above, it is only where the interests of a third State would consist of the "very subject-matter of the decision" that a court may refuse to adjudicate the claims presented to it.[220] As the ICJ affirmed, "[w]here … 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."[221] That a third State could have interests in the dispute, or could be affected by a judgment, is not merely sufficient for a court or tribunal to apply the *Monetary Gold* principle and refuse to exercise its competence on part or the whole of the dispute. Such interests must be at the very core of the dispute, in that it becomes impossible to resolve it without ruling on the responsibility of that other State. As stated by d'Argent, "the *Monetary Gold* principle only applies in the rather exceptional circumstances where the Court cannot adjudicate a claim submitted to it without deciding, as a legal and logical prerequisite, on the rights or obligations of the absent state."[222]

177. In that rare eventuality, however, the States whose dispute will not be heard on the merits by a particular court or tribunal are realistically not left with no further recourse. Other possible avenues of peaceful dispute settlement – those included in the non-exhaustive list of Article 33 of the Charter detailed above – not only remain within their reach but must, legally, be envisaged. In an inter-State system based on the UN Charter where the peaceful resolution of disputes is included as a foundational principle to be upheld at all times (see Article 2(3) reproduced above), it is only knowing that other valid and comprehensive avenues of dispute resolution remain available to States that a court or tribunal may decide to refrain from addressing a particular dispute. Private foreign investors have no such rights in relation to sovereign States.

178. If a particular jurisdiction declines to exercise its jurisdiction to settle a dispute between two States – whether through arbitral or judicial proceedings – these States are bound to continue pursuing the resolution of their dispute through other means, as a matter of legal obligation. By application of the customary principle found in Article 2(3) of the Charter, they are obliged to resume their actions to effectively and peacefully find a

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220 ICJ, *Case of the Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Judgment, 15 June 1954, **AL-0090**, p. 32.

221 ICJ, *Case of the Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Judgment, 15 June 1954, **AL-0090**, p. 33.

222 Pierre d'Argent, "*The Monetary Gold Principle: A Matter of Submissions*," AJIL Unbound, Vol. 115, 2021, **AL-0143**, pp. 149-150.

way to resolve their dispute. They cannot simply leave a dispute unsettled and must attempt, as far as possible, to resolve it through other means.

179. This principle was confirmed by the statement made by the ICJ in *Aerial Incident of 10 August 1999 (Pakistan v. India).* While the Court concluded that it did not have jurisdiction in that particular case, it nonetheless affirmed the following:[223]

> *The Court's lack of jurisdiction does not relieve States of their obligation to settle their disputes by peaceful means. The choice of those means admittedly rests with the parties under Article 33 of the United Nations Charter. They are nonetheless under an obligation to seek such a settlement, and to do so in good faith in accordance with Article 2, paragraph 2, of the Charter*.

180. The same is far from true in the context of relations between an investor and a State. In the case where there is no competence of an arbitral tribunal nor any treaty obligation binding a State to an investor, a State is never obliged to pursue discussions with an investor in case of a dispute opposing one to the other.

181. When transposed to disputes opposing actors of a different nature – investors and States – the application of the *Monetary Gold* principle to a given dispute highlights the fundamental inequality in which the parties find themselves when it comes to the alternative avenues available to them in resolving their dispute. If a tribunal constituted to address the dispute between an investor and a State dismisses a case and refuses to hear the investor's claims, that investor does not have the benefit of being able to bring its claims to another forum, nor does it have access to alternative means of dispute resolution absent the State's explicit consent, which it may withhold. Access to justice thus becomes frustrated by the refusal by a court or tribunal to exercise its jurisdiction by application of the *Monetary Gold* principle where a private person is involved.

182. As recalled by Akande, "the consent principle, from which the Monetary Gold doctrine is derived, is itself derived from the principles of sovereign equality and independence."[224] Applying it between parties that cannot be considered as sovereign

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223 ICJ, *Aerial Incident of 10 August 1999 (Pakistan v. India)*, Judgment on the Jurisdiction of the Court, 21 June 2000, **AL-0144,** p. 33, para. 53.

224 Dapo Akande, "*Introduction to the Symposium on Zachary Mollengarden & Noam Zamir 'The Monetary Gold Principle: Back to Basics,'*" AJIL Unbound, Vol. 115, 2021, **AL-0145**, p. 141, citing Colin Warbrick, "*Chapter 10, The Principle of Sovereign Equality*" in Vaughan Lowe & Colin Warbrick, THE UNITED NATIONS AND THE PRINCIPLES OF INTERNATIONAL LAW, ESSAYS IN MEMORY OF MICHAEL AKEHURST, Routledge, 1st edition, 1994, **AL-0146**, pp. 204-229.

equals due to their different nature illustrates the fundamental inequality that is perpetuated by the application of the *Monetary Gold* principle outside of State-to-State dispute resolution. Sovereign equality, in international law, is the reserved domain of the State.[225] As stated by Warbrick, "[e]quality is the condition of persons or things being similar or identical or being treated similarly or identically. Entities are equal because they are states: they are not states because they are equal."[226]

183. Of course, there are procedural guarantees embodied in fundamental rules of procedure applicable in the context of investor-State arbitrations, which aim to ensure principles such as equality of arms, a right to an independent and impartial tribunal and the right to present claims.[227] The need to treat parties with equality is also asserted in guidelines and rules of arbitral tribunals. For example, Article 15(1) of the PCA Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is a State provides that the parties must be "treated with equality".[228] But in spite of these guarantees, perfect equality between the parties can never be achieved, in the light of the fundamental differences characterizing their respective nature.

184. Throughout the years, and since the surge in the conclusion of BITs and of ensuing investor-State arbitrations proceedings, efforts have been deployed to depoliticize investor-State arbitrations, in order to "elevate disputes away from local, regional & international politics, and into a rule-based, objective system".[229] As affirmed by Broches in 1963, the ICSID Convention was to "offer a means of settling directly, on the legal plane, investment disputes between the State and the foreign investor and insulate such disputes from the realm of politics and diplomacy."[230]

185. All these efforts, however, cannot change the fact that the parties to an investor-State dispute are fundamentally different in nature. Due to these crucial distinctions, the

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225 See Dapo Akande, "*Introduction to the Symposium on Zachary Mollengarden & Noam Zamir 'The Monetary Gold Principle: Back to Basics,'*" AJIL Unbound, Vol. 115, 2021, **AL-0145**, p. 141.

226 Colin Warbrick, "*Chapter 10, The Principle of Sovereign Equality*" in Vaughan Lowe & Colin Warbrick, THE UNITED NATIONS AND THE PRINCIPLES OF INTERNATIONAL LAW, ESSAYS IN MEMORY OF MICHAEL AKEHURST, Routledge, 1st edition, 1994, **AL-0146**, p. 205.

227 Applicants' Memorial, para. 93. See Ana Lombardía, "*5. Considerations About Procedural Orders*" in Carlos González-Bueno, 40 UNDER 40 INTERNATIONAL ARBITRATION, Dykinson, S.L., 2021, **AL-0066**, p. 2.

228 PCA, "Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State", **AL-0147**, Article 15(1).

229 Toby Landau, "*International Investment Arbitration and the Search for Depoliticisation, Outline of Key Points from the Alexander Lecture 2023*", **AL-0148**, p. 8, para. 8.

230 Settlement of Investment Disputes Consultative Meeting of Legal Experts (Bangkok, Thailand, April 27 – 1 May, 1964), Summary Record of Proceedings, 27 April 1964, First Session, Chairman's Opening Address, **AL-0149**.

direct application of general principles of international law elaborated in the context of inter-State judicial litigation proceedings may at times lead to fundamental inequalities, which must be prevented in the light of Article 52 of the ICSID Convention. Nonetheless, this is what happened here. By applying, by analogy, the *Monetary Gold* principle to investment arbitration proceedings, the Tribunal barred Applicants from seeking resolution of their dispute with Norway, even though it was otherwise squarely within the jurisdiction of the tribunal under the BIT and the ICSID Convention, and thus created a fundamental inequality between the parties. As investors and not States, Applicants do not possess the same avenues to peacefully and efficiently resolve their dispute in the same way that States do.

186. Through the decision of the Tribunal to apply the *Monetary Gold* principle to refuse to exercise its jurisdiction, Applicants have been barred from pursuing their case in these ICSID proceedings, the only available forum available to them to uphold their claims. This has left Applicants in a situation of fundamental inequality, in breach of the fundamental rule of procedure aiming to guarantee the equality between the parties. The Tribunal's only jurisdiction under the Latvia-Norway BIT and the ICSID Convention is to apply the BIT, which provides, reciprocally, obligations for Norway and Latvia (in respect of the treatment of investors of the other State). It was impossible for the Tribunal, under the BIT, to have found the Russian Federation liable in any way, or settle its international responsibility, since it was applying only the BIT, which establishes only obligations on Norway and Latvia.[231] The same applies to the European Union and Latvia, as for Latvia the Applicants could not invoke its responsibility as they could only invoke the responsibility of the State in which, as a foreign investor, they made an investment. Furthermore, Applicants were only asking for a finding of a breach of the BIT, and it was impossible for the Tribunal to find anything else in respect of what could be enforced and be legally binding. This is also compounded by Norway and Latvia's bilateral termination of the BIT, including its sunset clause, which the Tribunal was fully aware of, and which prevents Applicants from bringing new or other claims.

187. In the circumstances, the Tribunal manifestly exceeded its powers, committed a serious breach of a fundamental rule of procedure, by creating a fundamental inequality between the parties, and issued contradictory reasons. The Tribunal's decision to apply the *Monetary Gold* principle led to a denial of justice, which can only

231 *See e.g.*, ICSID Convention, 15 April 2006, **CL-0042**, Article 53(1) (stating that the award is binding between "*the parties*").

be corrected through the annulment of the Award in its entirety. All parts of the award related to the application of the *Monetary Gold* principle must thus be annulled, but the fundamental inequality also requires annulment of the entire award.

2. The 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 must lead to the annulment of the Award

188. In 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 three specific applications of *Monetary Gold*, on their own and together are also separate to annul the award.

(a) All parts of the award related to the refusal to interpret the Svalbard Treaty and consider whether the March 2023 Norwegian Supreme Court judgment is consistent with international law must be annulled

189. First, 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.[232] 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.[233] This was a failure to apply the applicable law.

190. 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.*"[234] As a matter of law, this statement is manifestly incorrect, as reflected by

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232 *See e.g.*, Award, 22 December 2023, **A-0068**, paras. 297 ("*In the present case, the Monetary Gold principle limits the Tribunal's ability to deal with certain aspects of the Claimants' case but not others. To the extent that the Claimants argue that Norway has violated the BIT by, as they put it, conspiring with, or inciting, the Russian Federation to deprive the Claimants of their access to snow crab in the Loop Hole, that would require the Tribunal to determine that the Russian Federation had acted unlawfully, which the Tribunal cannot do. That aspect of the case appears to fall on the East Timor as opposed to the Nauru side of the line identified by the International Court of Justice.*"), 584 ("*The Tribunal doubts that it can adjudicate that inter-State dispute. On a purely textual basis, the position taken by Norway cannot be dismissed out of hand but neither can the different interpretation advanced by other parties to the Treaty.*").

233 *See* Article 6 of Marine Resources Act, 6 June 2008, **CL-0012**, cited notably in Claimants' Memorial, 11 March 2021, **A-0003**, para. 587.

234 Award, 22 December 2023, **A-0068**, para. 592.

the following statement from the International Court of Justice in the 2010 judgment in the *Diallo* case:[235]

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

191. The statement that an ICSID tribunal cannot contest, as a matter of Norwegian law, a judgment of the Supreme Court of Norway is extremely problematic and concerning in the light of the extract from the *Diallo* judgment of the ICJ which recognizes an exception to that rule. The exception goes to a "*manifestly incorrect interpretation*" of domestic law – here of the Svalbard Treaty as a matter of Norwegian law – for the purpose of gaining an advantage in an ongoing dispute. This is exactly what is happening: Norway adopts a manifestly untenable position (according to the EU), because it is to its advantage in an ongoing dispute with other States. In such a circumstance, an international jurisdiction is allowed to review and correct the interpretation and application of domestic law. What is particularly problematic about the Tribunal's holding is that the president of the ICSID Tribunal, Judge Greenwood, was a sitting ICJ judge when the Court rendered the *Diallo* judgment cited above in 2010. In the 2010 *Diallo* judgment, Judge Greenwood not only voted with the majority of the Court on all aspects.[236] He also issued a joint declaration,[237] with Judge Keith, disagreeing with some aspects of the Court's reasoning but not making any statement on the question of when judgments of a State's Supreme Court can be reviewed by the ICJ, or an international tribunal, on their consistency with international law regarding a statement as to the true content of that State's domestic law.

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235 *Case concerning Ahmadou Sadio Diallo*, ICJ Judgment, 30 November 2010, **A-0153**, para. 70.

236 *Case concerning Ahmadou Sadio Diallo*, ICJ Judgment, 30 November 2010, **A-0153**, pp. 57-59.

237 *Case concerning Ahmadou Sadio Diallo*, Joint Declaration of Judges Keith and Greenwood, 30 November 2010, **A-0154**.

192. It was therefore a manifest misapplication of the applicable law, and thus a manifest excess of power, for the Tribunal to hold: "*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.*"[238] The surrounding circumstances of this holding are even more problematic and raise serious breaches of Applicants' right to be heard, a fundamental principle of procedure.

193. A distinguished international tribunal, with two members who were also ICJ Judges sitting (alongside Judge Greenwood) in the 2010 *Diallo* ICJ Judgment, *ie* Judge Tomka and Judge Simma, recently held that: [239]

> *1079. As articulated by the tribunal in Azinian, a governmental authority "cannot be faulted for acting in a manner validated by its courts unless the courts themselves are disavowed at the international level." To establish unlawfulness at the international level, it would not suffice for an international tribunal simply to disagree with the determination of the municipal courts. There must be an irregularity of sufficient gravity (see Section VI.A.3.c)iii(II.) above),* ***such as clear incompatibility with a rule of international law****, undue influence from other State organs, an abuse of rights, a serious and fundamental impropriety in the legal process, a denial of justice or a pretense of form, or, in certain exceptional circumstances, a judicial decision contrary to municipal law. The mere fact that a judicial decision is incorrect as a matter of municipal law does not suffice. The possibility of holding the state liable for judicial decisions does not entitle an investor "to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction."*
>
> [Emphasis added]

194. In that case, the Tribunal confirmed that a governmental authority can be faulted for relying on a decision of its national courts if such decision reflects a "clear incompatibility with a rule of international law". It acknowledged that "an international arbitration is required to show deference to the municipal courts", but not at all costs. If a national court is "disavowed at the international level" for having committed "an irregularity of sufficient gravity" such as "clear incompatibility with a rule of international law" in its decision, the State would not be justified in relying on that decision.[240] In such cases where a judicial decision is clearly incompatible with rules of international law, an international tribunal is also entitled to determine that a domestic court has

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238 Award, 22 December 2023, **A-0068**, para. 592.

239 *ELA USA, Inc. v. The Republic of Estonia*, PCA Case No. 2018-42, Award, 21 February 2025, **AL-0150**, para. 1079 (the tribunal was composed of Judge Simma, Judge Tomka and Professor Ruiz-Fabri).

240 *ELA USA, Inc. v. The Republic of Estonia*, PCA Case No. 2018-42, Award, 21 February 2025, **AL-0150**, paras. 1078-180.

misapplied or misinterpreted the applicable law and can substitute to it its own correct interpretation.

195. That the Supreme Court's interpretation of the Svalbard Treaty was manifestly wrong as a matter of international law does not only reflect Applicant's view. It is also the view of the EU as an organization, which is particularly significant in this matter. As an economic and political union of 27 Member States, the EU has particular stakes in ensuring the fair and equal application of fisheries regulations in the region. Moreover, with 22 member States of the EU that are also States parties to the Svalbard Treaty – close to half of all States parties to that Treaty – the EU has a particular interest in ensuring that the provisions of this Treaty are correctly interpreted.

196. As the Tribunal well knew, the EU's position was indeed that Norway and its courts adopted a manifestly incorrect interpretation of the 1920 Svalbard Treaty to gain an advantage both in respect of the present case and also in respect of a longstanding dispute between Norway and, essentially, all other parties to the Svalbard Treaty. This was even further underscored by the documents and correspondence submitted by the Applicants to the Tribunal in October and November 2023, which contained reference to the EU's 30 October 2023 diplomatic note protesting the manifestly incorrect interpretation of the Svalbard Treaty given by the Supreme Court of Norway on 20 March 2023.[241] As argued by the EU, the 20 March 2023 judgment of the Supreme Court of Norway is *clearly incompatible with a rule of international law*:[242]

> *As set out in this and in previous Notes Verbales, the European Union strongly disagrees with the incoherent interpretation and the decisions of the Supreme Court of Norway, in that judgement, according to which Articles 2 and 3 of the 1920 Treaty of Paris would apply only in the territorial waters of the archipelago, and not beyond. … This judgment can therefore in no way, be regarded as reflecting a correct interpretation of the 1920 Treaty of Paris at the international level. Consequently, the European Union reserves the right to qualify this judgement as an internationally wrongful act attributable to Norway*.

197. To recall, in its judgment of 20 March 2023, the Supreme Court of Norway denied SIA North Star fishing licenses for the Svalbard zone. To reach this decision, it based its

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241 Claimants' Letter to the Tribunal of 16 October 2023, **A-0106**; Norway's Letter to the Tribunal of 23 October 2023, A-0108; Claimants' Letter to the Tribunal of 7 November 2023, **A-0110**; Claimants' Letter to the Tribunal of 15 November 2023, **A-0111**.

242 Draft Note Verbale of EU to Norway, 2 October 2023, **C-0357**. *See also* EU Diplomatic Note to Norway, 30 October 2023, **A-0120**.

view on its own interpretation of the 1920 Svalbard Treaty, but the Court's interpretation was manifestly incorrect as a matter of public international law. The Supreme Court misapplied the principles of treaty interpretation found in Articles 31 and 32 of the Vienna Convention on the Law of Treaties reflecting customary international law, as well as provisions of UNCLOS and came to an unfair, unreasonable and manifestly incorrect interpretation of Articles 2 and 3 of the Svalbard Treaty. It wrongly concluded that Norway had exclusive rights of exploitation on the continental shelf and that Article 3 did not give North Star a right to catch snow crab on the continental shelf off Svalbard.[243]

198. Applicants argue that a judicial act can be in violation of a rule of public international law, including when a domestic court adopts a decision that consists of a "clear incompatibility" with a rule of international law (in this case, the Svalbard Treaty). Here, Norway was wrong to rely on a decision of its own Supreme Court that so blatantly misapplies international law, and the Tribunal was misplaced in its decision not to address that decision and not to revise the interpretation for one that would be compliant with international law.

199. The situation in which Applicants find themselves is therefore clearly exceptional and undoubtedly called for action by the Tribunal. Moreover, it is Applicants' position that the 20 March 2023 judgment is indeed one of the extremely rare instances where the judgment of the highest court of a country may constitute an international wrong, as it manifestly misapplies a rule of international law, including to gain an advance in an ongoing international dispute, a relevant factor for the ICJ underscored in the *Diallo* case.

200. It was well established in the record that Norway's position on the Treaty of Svalbard is contrary to essentially that of every other party to the Treaty.

201. Respondent has thus relied in its actions depriving Applicants of their rights and investments in Norway on a decision of its Supreme Court which puts forward "a manifestly incorrect interpretation of its domestic law", to follow the words of the *ELA* tribunal. In this case, the Tribunal, in applying the *Monetary Gold* principle, did not address the decision of the Supreme Court of Norway. It was however its duty, in the light of the apparent breach of international law that this judgment constitutes, to

243 Svalbard judgment Norwegian Supreme Court, 20 March 2023, **C-0358**.

address the Norwegian Court's decision and adopt the proper interpretation of international law in this case, i.e. the proper interpretation of the Svalbard Treaty.

202. In trying to justify its decision to refuse to interpret the Norwegian decision, the Tribunal committed further annullable errors. It did so by underscoring, notably in paragraphs 590[244], 592[245] and 600[246] of the Award, that in March 2023 the Supreme Court of Norway had confirmed Norway's position as to the interpretation of the Svalbard Treaty. As such, the question could not be reopened (as an international tribunal does not question a supreme court of a country on its domestic law). However, when referring to that decision of the Supreme Court of Norway, the Tribunal did so without reopening the proceedings for further submissions on that issue, despite Applicants' request to do so, and despite the manifest position of other States, including that of the EU, that the Supreme Court of Norway's decision was manifestly inconsistent with international law.[247] What is more, the Tribunal specifically doubted the truthfulness and existence of the draft diplomatic note of the EU,[248] which criticized the Norwegian Supreme Court decision of March 2023 as contrary to international law the judgment. What is more, despite Applicants' request, the Tribunal never admitted a further exhibit, requested to be entered into the record by the Applicants, *ie* the 30 October 2023

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244 Award, 22 December 2023, **A-0068**, para. 590 ("*Insofar as North Star sought in 2017 to make a fresh investment by taking snow crab in the Norwegian outer continental shelf in the Loop Hole at the time its vessels were excluded from the Russian sector of the Loop Hole, that proposed investment was contrary to Norwegian regulations which had been in force for several months prior to North Star seeking to make a fresh investment. Those regulations have been upheld by* the Supreme Court of Norway both in the criminal proceedings concerning the Senator *and in the 2023 judgment in the civil proceedings.*").

245 *Ibid*., para. 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 the 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.*").

246 *Ibid*., para. 600 ("*Moreover, North Star did pursue civil proceedings which culminated in the ruling of the Supreme Court in 2023 dismissing its claim and rejecting its interpretation of the Svalbard Treaty. There was, therefore, no refusal on the part of the Norwegian justice system to consider and rule upon North Star's claims. The Claimants have submitted two documents critical of the Supreme Court judgment. The first is an article by a Supreme Court justice who did not take part in the proceedings criticising the reasoning of the Court. While this article shows that there is a degree of controversy about the decision, the views of the justice who wrote it have to be set against the contrary views of the fifteen justices who took part in the judgment. The second is said to be a draft of a Note Verbale to be sent to Norway by the EU protesting the decision. <u>There is no indication that such a note was ever sent</u>.*" [Emphasis added]).

247 EU Diplomatic Note to Norway, 30 October 2023, **A-0120**.

248 Award, 22 December 2023, **A-0068**, paras. 123, 600.

diplomatic note itself as **C-0360** (and Applicants were never told of this decision before the Award, which relied on this decision).[249]

203. In paragraphs 590, 592 and 600 of the Award, when justifying why it was not revisiting the question of how the Svalbard Treaty was to be interpreted, the Tribunal relied on a decision in respect of which it refused to reopen the proceedings, despite Applicants' request, and refused to admit the actual diplomatic note of the EU criticizing such decision, despite Applicants' request to this effect found in their letter of 7 November 2023. This constituted a serious breach of the Applicants' right to be heard, which had manifest and obvious adverse consequences for Applicants.

204. Through what appears to be a series of contrivances, and this refusal to allow Applicants to be heard, and to tell Applicants of this decision, the Tribunal also manifestly exceeded its powers by refusing to interpret the Svalbard Treaty, while also relying on a false statement of the law on the review of domestic Supreme Court decisions, as shown by the fact the president of the Tribunal had voted differently, while on the ICJ, on the same issue, a little more than a decade earlier. This is also shown by the *ELA v. Estonia* decision, which properly reflects the law set out in *Diallo*, and on which sat two other ICJ judges present in *Diallo*.

205. The Applicants submit that the result of the arbitration would have been different if the Tribunal had not refused to consider the decision of the Supreme Court of Norway. By applying international law, the Tribunal would have been able to observe that the decision consisted of a clear incompatibility with a rule of international law. By refusing to interpret the Svalbard Treaty, the Tribunal manifestly failed to apply the applicable law. Consequently, all parts of the award related to the Tribunal's refusal to examine the Svalbard Treaty's relevance, and whether the March 2023 decision of the Supreme Court of Norway breached international law (in not giving licences to SIA North Star), must thus be annulled.

(b) All parts of the award related to the failure to examine whether Norway acted with the Russian Federation to close the Loophole must be annulled

206. The Tribunal also held that it could not examine whether the Russian Federation had committed an international wrong and, as such, held that it could not examine several issues raised by Applicants, which went to the joint actions of Norway and the Russian

249 *See e.g.* Award, 22 December 2023, **A-0068**, paras. 590, 592, 600.

Federation to close the Loophole to EU vessels.[250] The Tribunal then promptly contradicted itself by holding that, in any event, in its view the record showed there was no "conspiracy" between Norway and the Russian Federation against EU interests.[251] However, by coming to that conclusion, the Tribunal also entirely failed to examine significant evidence that did show joint intentional action between Norway and the Russian Federation against EU interests in the Loophole.[252]

207. 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, *ie* the right to be heard, by failing to examine important evidence before it, and opining on the issue without actually discussing such evidence.

208. Further, the Tribunal changed the "*legal framework*" of the parties in applying the *Monetary Gold* principle to refuse to decide the question of whether Norway conspired with the Russian Federation or incited the Russian Federation to close the Loophole to EU vessels. This is a serious breach of the right to be heard, as the Tribunal did not give the parties the possibility to address how it decided the matter.

209. It is particularly notable that nowhere in its written pleadings[253] or at the oral hearing[254] did the Norway argue that the *Monetary Gold* principle was applicable to the actions of the Russian Federation. Norway argued that the issues raised by Applicants concerned disputes with Latvia and the EU. However, Norway never invoked the potential international responsibility of the Russian Federation. As such, Applicants did not argue the matter in respect of the Russia Federation either.[255]

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

251 Award, 22 December 2023, **A-0068**, para. 491 ("*It also rejects the conspiracy argument. There is no evidence that would suggest anything like a conspiracy between the two states.*")

252 *See e.g.* Claimants' Reply, 28 February 2022, **A-0011**, pp. 58-70, paras. 171-207.

253 Respondent's Counter-Memorial and Memorial on Jurisdiction, 29 October 2021, **A-0010**; Respondent's Rejoinder and Reply on Jurisdiction, 30 June 2022, **A-0016**.

254 Hearing Transcript Day 1, Respondent's Opening Submissions, 31 October 2022, **A-0019**, pp. 147-217; Hearing Transcript Day 4, Respondent's Closing Submissions, 3 November 2022, **A-0022**, pp. 120-171.

255 Claimants' Reply, 28 February 2022, **A-0011**, pp. 182-185; Claimants' Rejoinder on jurisdiction, 28 July 2022, **A-0018**, pp. 113-119.

210. The following holding of the Tribunal, at paragraph 297 of the Award, is therefore manifestly made in breach of the right to be heard, right to present one's case and, in particular, of the principle of contradiction:[256]

> *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.*

211. If Norway never argued that *Monetary Gold* applied to the acts of the Russian Federation – for whatever reason – then the Tribunal cannot adopt in its reasons that it cannot decide certain questions because of the potential international responsibility of the Russian Federation. Applicants never had an opportunity to argue why this was not the case. Norway chose to not present any hypotheticals where the Russian Federation could have been found internationally liable, and which would have triggered *Monetary Gold*. Norway made its bed and must lie in it. One can assume that since this case was public, that the pleadings were being published, and that the hearing was being video streamed, Norway consciously chose never to run a hypothetical situation where the Russian Federation could be considered liable under international law, for whatever reason, but that it was important for Norway to do so.

212. At the same time, it would be 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.

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256 *See e.g.*, Award, 22 December 2023, **A-0068**, paras. 297 ("*In the present case, the Monetary Gold principle limits the Tribunal's ability to deal with certain aspects of the Claimants' case but not others. To the extent that the Claimants argue that Norway has violated the BIT by, as they put it, conspiring with, or inciting, the Russian Federation to deprive the Claimants of their access to snow crab in the Loop Hole, that would require the Tribunal to determine that the Russian Federation had acted unlawfully, which the Tribunal cannot do. That aspect of the case appears to fall on the East Timor as opposed to the Nauru side of the line identified by the International Court of Justice.*"), 584 ("*The Tribunal doubts that it can adjudicate that inter-State dispute. On a purely textual basis, the position taken by Norway cannot be dismissed out of hand but neither can the different interpretation advanced by other parties to the Treaty.*").

(c) All parts of the award related to the failure to examine rights of Latvia and of the EU must be annulled

213. At paragraph 299 of the Award, 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. Indeed, 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. The Tribunal actually asked a question on this issue to Applicants during the hearing.[257] Applicants responded to the question during closing arguments.[258] However, the Tribunal failed to address and decide this issue and as such failed to examine Applicants' position on this issue, in breach of the right to be heard, a fundamental principle of procedure. The Tribunal has an obligation to address and discuss important arguments of the parties, such as arguments in answer to a question from the Tribunal. Not doing so is both a serious breach of a fundamental rule of procedure and a failure to state reasons in respect of that argument. For these reasons, all parts of the Award concerning the failure to decide on the rights and obligations of Latvia and the EU in relation to the case must be annulled.

C. RESPONDENT COMMITTED FUNDAMENTALLY IMPROPER BEHAVIOUR

214. Respondent multiplied improper behaviour, notably retaining (whether intentionally or through its failure to conduct proper conflicts checks), 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. This rendered the proceedings fundamentally unequal between the parties and thus constituted a breach of fundamental rules of procedure.

1. Norway's Improper Behaviour Likely Stems from the Lack of Independence of its Counsel in respect of the Dispute

215. The cascade of Respondent's improper behaviour, which became apparent only with the parties' costs submissions in December 2022, may be explained by the fact its

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257 Hearing Transcript, Day 4, 3November 2022, **A-0022**, p. 21 (from line 17) to p. 25 (line 3) (answering the Tribunal's question: "*How can a licence granted by another State or granted by an organisation be an investment in the State of Norway, or part of an investment in the State of Norway?*").

258 *Ibid*., pp. 21-26.

counsel is not independent, in that it is defending itself, or the measures it planned and implemented itself.

216. Applicants raised this matter in their 1 July 2025 letter to the Committee.[259]

217. Applicants had also raised this issue at the hearings on the merits.[260] However, at the time, and before the costs submissions, the Applicants had not seen the extent of the lack of independence of Respondent's counsel and its repercussions on the case.

218. As is apparent from emails from about a decade ago,[261] Respondent's lead counsel and most senior lawyer at the Ministry of Foreign Affairs, its Director General of the Legal Department, Mr. Kristian Jervell, played a key role in elaborating and adopting the restrictive national measures that deprived Applicants of their licenses and thus of their investment in Norway. It also appears that Kristina Nygård, international law advisor at Norway's Ministry of Foreign Affairs, was also involved in the measures that led to the destruction of Applicants' investment in Norway. Exhibits **C-187**, **C-190**, **C-191**, **C-192** and **C-194** show the following story:

- On 22 September 2014, Therese Johansen, an international law adviser at the Ministry of Foreign Affairs writes to Kristina Nygård, another international law adviser, to ask whether the snow crab is a sedentary species (**C-192**);

- On 7 October 2014, Therese Johansen writes to Kristina Nygård to enquire about Russia's extended continental shelf submission at the UN to see what assumptions Russia may have been in respect of the snow crab being a sedentary species or not (**C-191**);

- On 5 November 2014, Kristina Nygård writes to Christine Finbak, an international law adviser at the Ministry of Foreign Affairs, with Kristian Jervell in copy, providing international law sources that may support the view that the snow crab is a sedentary species (**C-190**);

259 Letter to Ad Hoc Committee on Hearing, 1 July 2015, p. 4.

260 Transcript of Hearing, Day 1, p. 29, l. 22-25, p. 30 (in full), p. 31, l. 1-15.

261 For emails in 2014 and 2015 addressed to, from or in which Mr. Jervell and/or Ms. Nygård were in copy, on the issue of Norway's strategy to exclude EU crabbers from the Barents Sea fisheries, see *eg* Email from C. Finbak to E. Gabrielsen**,** 24 June 2015, **C-187**; Email from K. K. Nygård to C. Finbak, 5 November 2014, **C-190**; Email from T. Johansen to K. K. Nygård, 7 October 2014, **C-191**; Email from T. Johansen to K. K. Nygård, 22 September 2014, **C-192**; Internal note of the Norwegian government, 16 November 2016, **C-194**.

- On 24 June 2015, Christine Finbank writes to Elisabeth Gabrielsen to suggest a call with Kristian Jervell to discuss how to amend the Marine Resources Act to include the snow crab as a sedentary species as the matter would now have been decided (**C-187**);

- On 16 November 2016, Ingrid Vikanes, of the Ministry of Trade, Industry and Fisheries, wrote to Kristian Jervell to ask for advice on how to address certain issues during the annual NEAFC meeting in relation to bilateral discussions with the EU on snow crab (**C-194**).

219. What is more is that it is Applicants' understanding that the Legal Department of the Ministry of Foreign Affairs of Norway has policy lead on matters related to the Arctic and/or Svalbard and/or the law of the sea. As such, Mr. Jervell and his team were not only lawyers giving legal advice but actually those conceiving and implementing the policy related to Applicants, putting him at the very middle of the dispute.

220. The fact that Mr. Jervell was significantly involved in the elaboration of policy measures restricting EU vessels from fishing activities in Norway, and that he is now defending such policy measures in the present arbitration proceedings, undoubtedly creates a conflict and raises serious issues of independence as to his quality as lead counsel. His proximity to the issues raised in this case leads to concerns about his impartiality and whether he possesses sufficient distance from decisions to which he has, himself, contributed. The issue of recurring conflicts of interest in outside advisors hired gives a distinct impression that Mr. Jervell was ready to do anything to successfully defend the case even though conduct of Norway was in breach of applicable rules. In Applicants' opinion, this situation mixing lack of independence and recurring conflicts of interest creates an inequality between the Parties that could justify the exclusion of such counsel from future proceedings.

221. It is well accepted that lawyers must have sufficient independence to represent their client.

222. For example, Article 2.1 of the Code of Conduct for Norwegian Lawyers requires lawyers to act with independence and that they must not be "influenced by extraneous considerations".[262] While Applicants understand that members of the legal department of Norway's Ministry of Foreign Affairs are not called to the Norwegian Bar, one would

262 Code of Conduct for Norwegian Lawyers, **AL-0151**.

assume that they try to follow the general rules applicable to lawyers if they are to represent their country in a forum like ICSID. In any event the respect of the equality of the parties, a fundamental rule of procedure, would require it in ICSID proceedings.

223. Independence of legal representatives is also a general principle recognized in the Code of conduct for European Lawyers as developed by the Council of Bars & Law Societies of Europe (CCBE). As noted in Article 2.1.1 of the CCBE code, lawyers must act with "absolute independence" and in a way that is free of any personal interest: [263]

> *The many duties to which a lawyer is subject require the lawyer's absolute independence, free from all other influence, especially such as may arise from his or her personal interests or external pressure. Such independence is as necessary to trust in the process of justice as the impartiality of the judge. A lawyer must therefore avoid any impairment of his or her independence and be careful not to compromise his or her professional standards in order to please the client, the court.*

224. The principle of independence of lawyers is also recognized by the International Principles on Conduct for the Legal Profession of the International Bar Association (IBA). According to the first principle, a lawyer must "maintain independence" and must "exercise independent, unbiased professional judgment in advising a client".[264]

225. The caselaw of the Court of Justice of the European Union (CJEU) also establishes what conduct shows bias or lack of independence of lawyers or counsels in a case. Article 19 of the Statute of the CJEU requires agents, advisers and lawyers' "independent exercise of their duties."[265]

226. In applying Article 19 of its Statute, the CJEU has held that a lawyer must be free from "external pressure or by virtue of any other conflict of interest that is obviously discernible at the level of a reasonable hypothesis based on the given type of (present or past) relationship between the lawyer and the represented party."[266] As such, "personal connection" or "interests" that could alter a lawyer's capacity to act with full

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263 Council of Bars & Law Societies of Europe (CCBE), Code of conduct for European Lawyers, 2019, **AL-0152**.

264 IBA, International Principles on the Conduct for the Legal Profession, 28 May 2011, **AL-0153**.

265 Protocol (No 3) on the Statute of the Court of Justice of the European Union, 2016, **AL-0154**.

266 CJEU, *Uniwersytet Wrocławski v. Research Executive Agency (REA)* and *Republic of Poland v. Uniwersytet Wrocławski, Research Executive Agency (REA)*, Joined Cases C-515/17 P and C-561/17 P, Opinion of Advocate General, 24 September 2019, **AL-0155**, para. 144.

integrity and independence must be given due regard when assessing whether a lawyer is sufficiently distant from his case and client to provide independent legal advice. [267]

227. If it is not a free-standing ground of annulment, Mr. Jervell's lack of independence, as well as that of Ms. Nygård, at the very least seems to explain why Norway has, time and time again, acted in a way which goes well beyond acceptable behaviour with a string of hiring of advisors with manifest conflicts of interest.

2. Norway retained counsel and experts with a conflict of interest (whether intentionally to gain an improper advantage in the arbitration; or improperly through its careless failure to conduct proper conflicts checks)

228. It became obvious with the Respondent's statement of costs, that Norway had engaged intentionally in a practice of hiring outside counsel and experts who had worked previously either with the Applicants themselves or with persons very close to the Applicants in respect of the same dispute (i.e. the dispute between Norway and EU crabbing interests following the closure of snow crab fisheries in the Loophole).[268]

229. Respondent hired lawyers from law firm Glimstedt's Riga office to investigate Applicants even though it is the Vilnius office of Glimstedt which filed the first notice of dispute of Applicant North Star in February 2017. This situation came to Applicants' attention in June 2022. Glimstedt immediately withdrew. Nonetheless, either Norway's counsels have no knowledge whatsoever of conflicts of interest rules, or they acted maliciously and improperly to try to gain information about Applicants by hiring Glimstedt.

230. Applicants discovered two other conflicts of interest through Norway's costs submission.

231. First, Norway had hired KPMG AS (Norway) to provide consulting services while KPMG Eastern and Central Europe provided a preliminary damages assessment in 2018, in the same case. The conflict of interest was so manifest that Norway did not

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267 CJEU, *BikeWorld GmbH v. European Commission*, Case T-702/15, 20 November 2017, Order of the General Court (First Chamber), **AL-0156**, paras. 36-42.

268 *See* Letter of Claimants to Tribunal, 31 January 2023, **A-0102**; Letter of Norway to Tribunal, 10 February 2023, **A-0103**.

even try to defend itself when Applicants applied to have KPMG excluded from the case, which is what the Tribunal ordered in Procedural Order No. 9.[269]

232. Second, Norway hired the Norwegian law firm Wikborg Rein to assist it, in background in the litigation. However, Wikborg Rein represented Arctic Fishing (a Lithuanian company that jointly submitted a notice of dispute regarding the present case with North Star) in criminal proceedings before Norwegian courts regarding fines issued to Arctic Fishing for fishing snow crab in NEAFC waters. Surprisingly, the Tribunal did not find Wikborg Rein had a conflict of interest to act against North Star and Mr. Pildegovics, though it left the door open for another application should Applicants adduce more information that would have pointed to improper sharing of information between Wikborg Rein and Norway. Applicants reserved their rights to seek further documents regarding this issue.

233. The accumulation of such obvious and apparent conflicts can only show that Norway acted intentionally in a way to ensure that it would gain an improper advantage over Applicants, trying to access information on them from their former advisers. The continued conduct of Norway in this manner, despite the fact it was advised by highly respected international law practitioners and barristers, who should have advised against such practices, created a lack of equality between the parties in the proceedings that was so significant that the entire Award should be annulled. Just like in *Eiser* where a breach of the requirement of independence and impartiality of a tribunal was found, where there is a continuous attempt to hire lawyers or professional advisers who manifestly have a conflict, which Norway should have been aware of (and likely was aware of), the inequality of the parties tilted to such an extent that the entire proceedings must be annulled.

234. These three events are further detailed both in the witness statements of Mr. Pildegovics[270] and of Mr. Levanidov[271], as well as immediately below. Moreover, through two rounds of document production, Norway has produced a number of documents that merely confirm Applicants' position.[272] The documents produced

269 Procedural Order No. 9, 23 February 2023, **A-0067**.

270 Procedural Order No. 9, 23 February 2023, **A-0067**.

271 First Witness Statement of Kirill Levanidov (Annulment Proceeding), 21 January 2025; Second Witness Statement of Peteris Pildegovics (Annulment Proceeding), 21 January 2025.

272 In the first round of document production, Respondent produced **A-0158** to **A-0202** and in the second round of document production, respondent produced **A-0206** to **A-0223**.

confirm notably that Respondent and the advisors it hired both failed to conduct any conflicts checks at all (and to establish any ethical walls).[273]

3. GLIMSTEDT

235. On 27 February 2017, the Vilnius office of Glimstedt sent a notice of dispute to Norway, under Latvia-Norway BIT, for SIA North Star about the dispute at issue in the arbitration subject of the present annulment proceedings.[274] The 27 February 2017 notice of dispute, which constituted of one single document, was also sent by Glimstedt, jointly, on behalf of another company, UAB Arctic Fishing, a Lithuanian company, who was subject to the same measures adopted by Norway which Applicants contested in ICSID arbitration ARB/20/11.

236. The notice of dispute of 27 February 2017 was signed by a senior associate of the Glimstedt law firm, Mr. Justinas Poderis, based in the firm's Vilnius office.

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273 For Glimstedt, see: Email from the Norwegian Embassy in Riga to Ms Medne, 11 :46, 30 March 2021, **A-0162**; Email from Ms Medne to the Norwegian Embassy in Riga, 11:51, 30 March 2021, **A-0163;** Email from the Norwegian Embassy in Riga to Ms Medne, 12:12, 30 March 2021, **A-0164;** Email from Ms Medne to the Norwegian Embassy in Riga, 15:15, 30 March 2021, **A-0165;** Email from the Norwegian Embassy in Riga to Ms Medne, 15:53, 30 March 2021, **A-0166;** Email from the Norwegian Embassy in Riga to Ms Medne, 9:35, 31 March 2021, **A-0167;** Email from Ms Medne to the Norwegian Embassy In Riga, 11:06, 31 March 2021, **A-0168**; Email from the Norwegian Embassy in Riga to Ms Medne, 14:24, 31 March 2021, **A-0169**; Email from the Norwegian Ministry of Foreign Affairs to the Norwegian Embassy in Riga**,** 29 March 2021, **A-206**; Email from the Norwegian Embassy in Riga to the Norwegian Ministry of Foreign Affairs, 12:52 and email from the Embassy to Agnese Medne, 13:14, 30 March 2021, **A-0207**; Email from Agnese Medne to the Norwegian Ministry of Foreign Affairs**,** 23 June 2025, **A-0212**. For Wikborg Rein, see: Geir Sviggum email, 13:40, 11 May 2021, **A-0160**; Email of Olav Myklebust to Geir Sviggum, 18:57, 6 May 2021, **A-0161**; Email from Wikborg Rein to the Ministry of Foreign Affairs, 21:16, 6 May 2021, **A-0170**; Email from Wikborg Rein to the Ministry of Foreign Affairs, 13:52, 7 May 2021, **A-0171**; Email from the Ministry of Foreign Affairs to Wikborg Rein, 15:42, 7 May 2021, **A-0172**; Email from the Ministry of Foreign Affairs to Wikborg Rein, 13:41, 10 May 2021, **A-0173**; Email from Wikborg Rein to the Ministry of Foreign Affairs, 15:24, 10 May 2021, **A-0174**; Email from the Ministry of Foreign Affairs to Wikborg Rein, 15:48, 10 May 2021, **A-0175**; Email from Wikborg Rein to the Ministry of Foreign Affairs, 13:40, 11 May 2021, **A-0185**; Framework Agreement for the provision of legal services between the Norwegian Ministry of Foreign Affairs and Wikborg Rein Advokatfirma AS**,** 30 April 2019, **A-0209**; Wikborg Rein - Guidelines for admission and registration of new matters – redacted**,** 18 January 2016, **A-0210**; Wikborg Rein - Ethical guidelines (etiske retningslinjer), 12 December 2019, **A-0211**; Email from Geir Sviggum (Wikborg Rein Advokatfirma AS) to the Norwegian Ministry of Foreign Affairs**,** 25 June 2025, **A-0214**. For KPMG, see: Email from KPMG, 17:06, 3 December 2020, **A-0158**; KPMG purchase order, 3 December 2020, **A-0159**; Email from the Ministry of Foreign Affairs to KPMG, 16:08, 2 December 2020, **A-0177;** Email from KPMG to the Ministry of Foreign Affairs 14:38, 3 December 2020, **A-0178;** Email from the Ministry of Foreign Affairs to KPMG, 12:32, 24 November 2020, **A-0179;** Email from the Ministry of Foreign Affairs to KPMG, 12:32, Attachment to the email, 24 November 2020, **A-0180;** Email from KPMG to the Ministry of Foreign Affairs, 10:51, 25 November 2020, **A-0181;** Email from KPMG to the Ministry of Foreign Affairs, 10:41, 26 November 2020, **A-0182;** Email from the Ministry of Foreign Affairs to KPMG, 10:43, 26 November 2020, **A-0183**; Email from KPMG to the Ministry of Foreign Affairs, 11:44, 26 November 2020, **A-0184**; Email from the Ministry of Foreign Affairs to KPMG, 12:49, 2 December 2020, **A-0186**; Email from the Ministry of Foreign Affairs to KPMG, Order Form, 12:49, 2 December 2020, **A-0187**; Framework Agreement between the Norwegian Ministry of Foreign Affairs and KPMG AS**,** 4 July 2019, **A-208**; Email from Oddbjørn Vegsund (KPMG AS) to the Norwegian Ministry of Foreign Affairs**,** 23 June 2025, **A-213**.

274 Notice of Dispute, 27 February 2017, **C-0002**.

237. On the first page of the notice of dispute, at the bottom of the page, there is a footer which states "VILNIUS RIGA TALLINN STOCKHOLM", which seems to refer to the offices of Glimstedt in those four cities.

238. The coordination of Glimstedt's efforts was mostly organized by UAB Arctic Fishing, though Mr. Pildegovics was kept aware of all developments and approved a draft of the notice of dispute and provided, on behalf of SIA North Star, all relevant information necessary for Glimstedt to file the notice of dispute.

239. At the time, Mr. Levanidov worked closely with UAB Arctic Fishing. That company was owned by US interests, a company called Marine Phoenix, based in Washington State, like Mr. Levanidov. UAB Arctic Fishing was pursuing a similar business venture to SIA North Star in respect of snow crab in the Barents Sea, and had obtained fishing licenses through the Lithuanian authorities. UAB Arctic Fishing's vessels also made several snow crab offloads at the Baatsfjord snow crab transformation factory owned by Seagourmet between 2014 and 2016.

240. Considering the close links between the companies, North Star and Arctic Fishing initially decided to coordinate their efforts with respect to the notice of dispute which culminated in the letter of 27 February 2017 signed by Mr. Poderis of Glimstedt.

241. On 21 April 2017, Norway replied to Glimstedt in respect of the notice of dispute.[275] This document was produced by Norway in the present proceedings on 25 June 2025. Norway's Ministry of Foreign Affairs was thus well aware that Glimstedt had written the first notice of dispute in the present case.

242. In 2018, North Star decided to retain Savoie Arbitration to bring the investment treaty claim against Norway. On 8 March 2019, Savoie Arbitration sent a new notice of dispute to Norway, this time on behalf of not only of SIA North Star, but also of Mr. Pildegovics.

243. Arctic Fishing decided to wait longer than North Star and Mr. Pildegovics to file an ICSID claim. Arctic Fishing did not file an ICSID claim with North Star and Mr. Pildegovics on 18 March 2020. Rather, they filed an arbitration in November 2022, which was shortly before the termination of the Lithuania-Norway BIT came into effect, which termination was also initiated by Norway.

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275 Letter from the Norwegian Ministry of Trade, Industry and Fisheries to Glimstedt Bernotas and partners, 21 April 2017, **A-0221**.

244. In any event, considering the notice of dispute sent jointly with Arctic Fishing on 27 February 2017, Glimstedt was North Star's law firm in the present case, at its outset.

245. It therefore came as a great surprise, in mid-June 2022, some five years later, to discover that Norway had hired Glimstedt's Riga office to investigate SIA North Star, at Latvia's fisheries administration, in the context of the present case.

246. Mr. Pildegovics was informed in June 2022 that a Glimstedt lawyer was asking about SIA North Star's fishing licenses issued by Latvia's Ministry of Agriculture.

247. Mr. Pildegovics was provided with a power of attorney dated 15 June 2022, naming Agnese Medne, a Latvian lawyer working for Glimstedt's Riga office, as enquiring on behalf of Norway, about North Star's licences, in the context of the present arbitration.[276]

248. Upon learning of this, Applicants immediately wrote to Norway and Glimstedt to signal the conflict of interest, on 21 June 2022 (at 6:15pm CET).[277]

249. On 23 June 2022, at 11:20am CET, Applicants received an underwhelming response from Glimstedt's Riga office, signed by Agnese Medne, stating she believed her firm had no conflict as Glimstedt was operating under two different legal entities in Latvia and Lithuania.[278] As such, Glimstedt Latvia was, according to Ms. Medne, not in conflict to represent Norway in the present arbitration because it was not the same firm as Glimstedt Lithuania, which had signed the notice of dispute of 27 February 2017.

250. On 23 June 2022, immediately after we received Glimstedt Riga's response, Applicants sent an email to Norway at 2:46pm CET giving Norway the opportunity to comment on Glimstedt's 23 June 2022 letter, before Applicants seized the Tribunal.[279]

251. On 24 June 2022, at 12:01pm CET, Norway responded to Applicants' invitation to give comments prior to Applicants seizing the tribunal of the matter. While taking the position that it did not realize there was a concern for them to hire Glimstedt's Riga

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276 Exhibit-1 of Claimants' Letter to Norway about the Glimstedt Law Firm, Request for a lawyer from Agnese Medne, 15 June 2022, **A-0079**.

277 Claimants' Letter to Norway about the Glimstedt Law Firm, 21 June 2022, **A-0078** with Letters exhibits from **A-0079** to **A-0084**.

278 Letter from Agnese Medne to Pierre-Olivier Savoie, 23 June 2022, **C-0326**.

279 Email from Claimant to Norway with attached received Letter of Glimstedt Riga's respone, 23 June 2022, **PP-0230**.

office, Norway immediately informed Applicants that it would cease working with Glimstedt for the duration of the proceedings.[280] In that letter, Norway wrote:

> *If Norway had been aware of the concerns about the possibility of a relationship between GLIMSTEDT, Bernotas & Partners, Vilnius, Lithuania and Glimstedt ZAB SIA, it would not have made its assignments to Glimstedt ZAB SIA in this case. In light of those concerns, Norway will abstain from requesting any future advice or assistance from ZAB SIA on this ICSID case during the ongoing proceedings.*

252. In its Counter-Memorial, Norway says that it stopped working with Glimstedt "as a courtesy" and "gesture to reassure the Applicants".[281] It was not, however, a simple matter of courtesy, but rather Norway's obligation to do so, to act properly and not in breach of fundamental rules of procedure.

253. Independently of Norway's letter of 24 June 2022, the letter of 27 February 2017 has a footer on the first page that the firm writing the letter presents itself as being present in the capitals of four countries: "VILNIUS RIGA TALLINN STOCKHOLM". What Norway refers to as "*GLIMSTEDT, Bernotas & Partners, Vilnius, Lithuania*", or Glimstedt Lithuania, seemed to present itself, when it was acting on behalf of SIA North Star, as a firm present in four countries. Moreover, on 21 April 2017, Norway's Ministry of Foreign Affairs respondent to that letter.

254. Second, Glimstedt's website shows the firm advertising itself as being present in Sweden, Latvia, Lithuania and Estonia.

255. Third, in the costs submissions in the arbitration, Norway submitted detailed invoices of numerous services providers.[282]

256. In his first invoice to Norway, dated 29 November 2019, Professor Pellet billed mostly for time spent in 2019, *ie* after Applicants sent the second notice of dispute, signed by Savoie Arbitration.[283] However, that invoiced also included, for 25 and 26 May 2017,

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280 Letter from Norway on Glimstedt conflict, 24 June 2022, **A-0086**.

281 Respondent's Counter-Memorial on Annulment, para. 81.

282 Three Alain Pellet invoices **A-0024**, **A-0028** and **A-0038**; Ludovic Legrand invoice, **A-0025**; Two Glimstedt ZAB invoices, **A-0026** and **A-0037**; Two Ysam Soualhi invoices, **A-0027** and **A-0039**; Ten Wikborg Rein invoices from **A-0029** to **A-0036**, **A-0040** and **A-0041**; Two Sydney Ekiyo payment summary reports **A-0042** and **A-0043**; DLT Legal Translation Inc. invoice, **A-0044**; Seven Semantix Translations Norway AS invoice from **A-0045** to **A-0051**; Opus2 invoice, **A-0052**; KPMG AS invoice, **A-0053**; Totaltekst AS invoice, **A-0054**; The Westin London City proforma, **A-0055**; Norway's expense report, **A-0056**.

283 Alain Pellet invoice, 29 November 2019, **A-0024**.

some 2.5 hours which Professor Pellet billed for preparation of and then attending a meeting in Oslo with the Ministry of Foreign Affairs. The invoice states that the work period for that invoice is "*for the period from 17 April 2017 to 29 November 2019*".

257. Professor Pellet was thus retained shortly after the first notice of dispute and would have met with the Ministry of Foreign Affairs in Oslo to discuss the matter, at the end of May 2017, about three months after such notice of dispute.

258. It is also interesting that Professor Pellet indicates in his time sheets that he started working on the matter "*from 17 April 2017*" which is four days before Norway's response to Glimstedt, on the notice of dispute, was sent out, on 21 April 2017. As such, one assumes Professor Pellet did advise on the draft of the letter sent out the 21 April 2017, while being well aware of the contents of the 27 February 2017 notice of dispute.

259. It would therefore seem that both Professor Pellet and the Ministry of Foreign Affairs of Norway, by the end of May 2017, had read the 27 February 2017 notice of dispute. One can assume they would probably have asked themselves who was representing claimants and, in asking that question, would probably have noticed that the Glimstedt letterhead, in its footer, stated that the firm had offices in Stockholm, Riga, Vilnius and Tallinn.

260. As such, when, on 24 June 2022, the Ministry of Foreign Affairs of Norway wrote to Applicants stating that they were not "*aware of the concerns about the possibility of a relationship between GLIMSTEDT, Bernotas & Partners, Vilnius, Lithuania and Glimstedt ZAB SIA* [the Latvian entity]", that statement should probably be taken with a grain of salt.

261. On 24 June 2022, at 8:27pm CET, Applicants wrote back to Norway asking for the communications between Glimstedt and Norway to ensure that no confidential information of ours was given by Glimstedt to Norway.[284]

262. On 28 June 2022, Norway responded that it would not produce those communications voluntarily, but that it was open to producing them if ordered to do so by the Tribunal.[285]

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284 Letter from Claimant to Norway on Glimstedt law firm, 24 June 2022, **PP-0231**.

285 Letter from Norway on Glimstedt conflict, 28 June 2022, **A-0087**.

263. In the application to the initial tribunal on conflicts of interest of 31 January 2023,[286] Applicants raised the question of Glimstedt's conflict. However, the tribunal did not decide the matter, as it noted Norway had accepted to stop using Glimstedt immediately after Applicants had raised the issue.[287]

264. In the present proceedings, Applicants requested documents establishing whether any conflicts of interest checks were made by Norway and/or Glimstedt.

265. Respondent has stated that it is in exchanges between the Norwegian embassy in Riga and Norway's Ministry of Foreign Affairs of 29 and 30 March 2021 that the absence of conflicts checks were established:[288]

> *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. 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.*
>
> *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'"). As with the previous email, Norway would be happy to exhibit this email should the Committee wish to see it.*

266. It appears true that in correspondence of 29 and 30 March 2021 (A-0206 and A-0207), the Norwegian embassy in Riga sought out a reputable Latvian law firm with no connection to the parties.

267. However the correspondence appears to relate to advice regarding the joint venture between Peteris Pildegovics and Kirill Levanidov and nowhere is SIA North Star mentioned. In the email of 29 March 2021 from the Ministry of Foreign Affairs to the Norwegian embassy in Riga, Mr. Olav Myklebust, who was counsel to Norway in the ICSID arbitration, and an employee of the Ministry of Foreign Affairs, wrote: [289]

> *As mentioned in the telephone conversation between Myklebust and Odegaard on 26 December, we request that the Embassy obtains an assessment of*

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286 Letter from Claimants to Tribunal re Conflicts of interest, 31 January 2023, **A-0102**.

287 Procedural Order No. 9, 23 February 2023, **A-0067**.

288 Respondent's Counter-Memorial on Annulment, paras. 73-74.

289 **A-0206**.

Latvia law from reputable Latvian law firm with no connections to the other party in connection with an alleged agreement on a joint venture between Pildegovics and Levanidov.

268. On 30 March 2021, the Norwegian embassy responded to Mr. Myklebust as such: [290]

Hi Olav,

I have been in contact with lawyer Agnese Medne today and am waiting for an answer as to whether she can take on the assignment. ***She*** *is well known by the embassy and* ***has confirmed that there will be no "conflict of interest".***

[Emphasis added]

269. It is far from clear a proper conflicts check was made, as there is no mention of SIA North Star (one of the claimants in the arbitration) in the email correspondence. However, the fundamental issue is that the Ministry of Foreign Affairs could not take Glimstedt's response at face value in the light of information it had in its possession. Norway knew since February 2017 when Norway received a notice of dispute, and at the very latest April 2017 when it sent a response that Glimstedt was acting for at the time for Claimant North Star. Indeed, Professor Pellet had started advising the Ministry of Foreign Affairs on the matter as of 17 April 2017.

270. The fact that Glimstedt Latvia and Glimstedt Lithuania may be two different entities is no answer. This is certainly what the arbitral tribunal held (correctly) in the case of KPMG AS and KPMG Eastern and Central Europe, which technically were also two distinct legal entities. Conflicts are imputed within a group that provides professional services (whether legal or accounting, forensic, etc.). The question is whether the risk of sharing confidential information had been dealt with properly in advance of arising and through procedures that could be verified. It is useful to recall what the initial tribunal held in respect of KPMG, in Procedural Order No. 9, which is identically applicable to Glimstedt: [291]

The Tribunal accepts that KPMG is a very large enterprise and that Mr Peer, and probably the members of the team which he appears to have led in preparing the damages analysis, belong to a different part of KPMG from KPMG AS. However, the Tribunal does not consider that that fact is sufficient

290 **A-0207**.

291 Procedural Order No. 9, para. 35 ; *see also* Applicants' submission of 31 January 2023 to the Tribunal on conflicts of interest, **A-0102**; *Bolkiah v KPMG*, [1998] UKHL 52 (UK House of Lords), 18 December 1998, **CL-0585**.

> *to remove the real risk of North Star's confidential information coming into the possession of Norway through KPMG or informing KPMG AS's work for Norway. The Tribunal has been given no information about the relationship between different parts of KPMG or what measures have been taken to ensure that information obtained by one part is not communicated to another. Even had it been given such information, a considerable amount of concern would have remained since it is difficult to see how a large accounting enterprise, one of whose specialities is forensic and disputes accounting, can be treated differently from a law firm with branches in different countries.*

271. Indeed, with respect to KPMG, the Tribunal found "*there is a clear conflict of interest and a real risk that Norway, however inadvertently, may have come into possession of confidential information from North Star relating to the present case*."[292] The Tribunal added:[293]

> *The Tribunal agrees with Claimants that working on both sides of the same dispute is a plain conflict of interest of the most blatant form even if the work for one side was of a preliminary character.*

272. Glimstedt in the present case also had a conflict of interest of the most blatant form which, despite Glimstedt's representation to Norway, Respondent was actually well aware of.

273. Moreover, in an email of 23 June 2025, Ms. Medne confirmed to Norway, produced in the second round of document production, that: "*We confirm that no formal documents establishing an ethical wall were produced in this case.*"[294]

274. The confirmation after the fact, in the same email, of June 2025, some four years after the fact, that Glimstedt Lithuania and Glimstedt Latvia function distinctly is no answer to the absence of proper procedures to maintain an ethical wall. Further, the following statement in Ms. Medne's letter of 23 June 2025 is puzzling: "*It should also be noted that Glimstedt (Lithuania) had not received any client mandate and/or been informed about the ICSID dispute, and had no assignments related to the case*."[295] This seems fundamentally contradictory with the obviously established fact that Glimstedt Lithuania sent the notice of dispute to Norway on 27 February 2017. Moreover,

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292 Procedural Order No. 9, para. 34.

293 Procedural Order No. 9, para. 34 (citations omitted).

294 Email from Agnese Medne to the Norwegian Ministry of Foreign Affairs, 23 June 2025, **A-0212**.

295 *Id*.

Glimstedt Latvia does not confirm what type of conflict check it performed in March 2021, nor what terms it would have searched for nor whether a conflicts search within the Glimstedt network was performed.

275. Again, it is clear from all contemporaneous documents from when Glimstedt was hired in 2021 that no proper conflicts checks were made. It is also clear that despite its knowledge of Glimstedt's involvement in the case, the Ministry of Foreign Affairs clearly had no qualms to hire Glimstedt in any event. It is also incontrovertibly established that no ethical wall was established between the Glimstedt entities. An email four years after the fact, and two days before the document production where documents evidencing an ethical wall had to been submitted, trying to justify the situation, is no excuse at all. It is very clear that there was a major breakdown in respect of conflicts of interest checks, and protecting any confidential information of Claimant North Star, on the part of both Glimstedt and Norway.

4. KPMG

276. In Norway's costs submissions of 2 December 2022, one of the invoices was for KPMG AS (a Norwegian entity)'s services for unidentified "research".[296] KPMG AS's invoice was dated January 2021.

277. Whether that was known to Norway of not, in 2018 Applicants hired KPMG Eastern and Central Europe to advise North Star on its damages caused by Norway's closure of the snow crab fisheries to EU vessels. A preliminary damages analysis was performed under the supervision of then-KPMG partner Michael Peer. In the application to exclude KPMG from this arbitration of 31 January 2023, Applicants provided the cover page of that report to confirm its existence and the fact KPMG had provided such services.[297]

278. Only five months after discovering the Glimstedt conflict of interest, Applicants were discovering another manifest conflict of interest, with another firm working on both sides of this dispute, this time KPMG.

279. On 13 December 2022, Applicants wrote to Norway, KPMG and to the Tribunal to register the conflict, asking Norway to disclose all communications between

296 KPMG AS invoice N°4589774, 28 January 2021, **A-0053**.

297 See KPMG Draft Report on Calculation of Damages of SIA North Star, Cover & Front Matter, 3 May 2018, **C-0340**.

themselves and KPMG, and reserving the right to make an application to the Tribunal to exclude KPMG from the proceedings.[298]

280. On 19 December 2022, Norway's only justification for having hired KPMG was that the Ministry of Foreign Affairs had a framework agreement with KPMG for work on various matters since 2015, with the applicable framework agreement for the January 2021 invoice having been concluded in 2019.[299]

281. In its response of 10 February 2023 to Applicants' conflict of interest application of 31 January 2023, Norway simply referred to its 19 December 2022 letter and did not try to justify otherwise its conduct or that of KPMG.[300] Applicants never received any response from KPMG.

282. It is also important to note that it is in the public record that from 2009 to 2014 KPMG AS acted as auditor for Seagourmet, Mr. Levanidov's company which received North Star's snow crab catches.[301] Anyone looking at the Norwegian public record and inquiring who was Seagourmet's auditor could have obtained this information easily. It appears likely that the Ministry of Foreign Affairs may have decided to retain KPMG to try to get close to Mr. Levanidov and obtain further information about him through this retainer.

283. Despite Norway's assertion that Seagourmet was not at issue in the arbitration, the Purchase Order for KPMG AS' services (**A-0159**) required that it investigate financial links of various persons with Mr. Pildegovics and North Star, including those of Mr. Levanidov and Seagourmet. The purchase order of 3 December 2020 stated: [302]

> *The supplier will map basic information about the following companies and persons:*
>
> *North Star SIA (Latvia company)*
>
> ***Seagourmet Norway AS*** *(Norwegian company, production in Batsfjord) Sea & Coast AS (Norwegian company, Batsfjord)*

298 Letter to the Tribunal on Norway's conflicts of interest, 13 December 2022, **A-0098** and Letter on KPMG Conflicts of Interest, 13 December 2022, **A-0099**.

299 Norway's letter on KMPG Conflicts of Interest, 19 December 2022, **A-0100**.

300 Norway's answer re Conflicts of Interest, 10 February 2023, **A-0103**.

301 See Seagourmet Corporate Register, 2009, **C-0341**; Seagourmet Corporate Records, Septmber 2009 to November 2022, **C-0342**.

302 KPMG purchase order, 3 December 2020, **A-0159**, p. 1.

Link Maritime Consulting Inc (US, with possible branches) Dynamic Trading Ltd (Korean, with possible forks)

Batsfjord Fangst (Norwegian company, Batsfjord)

Any other enterprises associated with the persons listed below

Peteris Pildegovics (Plaintiff, Latvian, owner of North Star SIA)

*Kirill Levanidov (alleged part of the Joint Venture, 60% owner of **Seagourmet Norway AS** and sole owner of Batsfjord Fangst AS, resident and citizen of the United States, cousin of Pildegovic) Anastasia Arkhipova (possible owner of Dynamic Trading Ltd., alleged collaborator of Levanidov)*

The mapping will involve:

A limited financial assessment of the companies mentioned herein based on credit ratings, reports and the like from Dun & Bradstreet/BisNode etc.

A mapping of the companies mentioned in the jurisdictions mentioned and mapping the ownership of the companies and the context in which it may be is between the aforementioned companies

A mapping of the people mentioned, and look more closely at what kind of connection there is between them

[Emphasis added]

284. KPMG AS therefore conducted this investigation even though KPMG AS was Seagourmet's auditor between 2009-2014.[303] KPMG AS thus had a manifest conflict of interest in conducting the assignment.

285. In its Procedural Order No. 9, the Tribunal also to exclude KPMG from the proceedings because of a conflict of interest,[304] underscoring that it is the most blatant form of conflict of interest to work on both sides of the same matter. The Tribunal did so on the basis of KPMG Eastern and Central Europe's preliminary damages analysis. The Tribunal did not consider the fact KPMG AS was Seagourmet's auditor between 2009-2014, and that the purchase order asked KPMG AS to conduct financial due diligence on Seagourmet (which Purchase Order was not in the record at the tiem), the very

303 See Seagourmet Corporate Register, 2009, **C-0341**; Seagourmet Corporate Records, Septmber 2009 to November 2022, **C-0342**.

304 Procedural Order No. 9, 23 February 2023, **A-0067**.

same company it had audited. KPMG AS had thus a double conflict of interest and the one relating to Seagourmet could have in no way been resolved with an ethical wall.

286. Moreover, under section 8 ("Ethical Requirements") of the Framework Agreement in force between KPMG AS and the Ministry of Foreign Affairs at the time (**A-0208**) when the purchase order was concluded, KPMG AS had the following obligation:

> The Supplier undertakes at all times to comply with applicable rules, regulations and general ethical guidelines, including but not limited to international and national provisions on corruption, human rights, working conditions (including regulations on wages and working conditions in public contracts), child labour and discrimination.

287. There is no world in which KPMG AS is allowed to both be the auditor of a company and accept an investigative mandate over the same company. This cannot be consistent with any applicable ethical rules, regulations or guidelines.

288. Furthermore, whether it is KPMG AS or the Ministry of Foreign Affairs who failed in its conflicts checks is not an issue for the Committee but one between KPMG and the Ministry of Foreign Affairs. An utter failure of conflicts checks like the ones by KPMG AS (and in particular regarding Seagourmet) vitiates the fairness of the arbitration proceedings and must lead to the annulment of the entire award, in and of itself.

289. Moreover, in the second round of document production of 25 June 2025, Norway included an email of 23 June 2025 from KPMG AS to Norway that would allegedly explain away the situation.[305] In that email, KPMG AS explains its processes to ensure no conflicts of interest arise between different entities within the KPMG network. However, KPMG AS, in that letter, does not actually even try to allege it did not have a conflict of interest, nor that it actually conducted conflicts checks, nor that it adopted an ethical wall specific to the case. The email of 23 June 2025, a mere two days before the document production and some four years after being hired, does not even consider the issue of the conflict of interest in relation to Seagourmet, which is patently apparent from the Purchase Order. KPMG AS does not even try to explain why it accepted a matter to investigate a company which it had audited itself.

290. The arbitral tribunal pointed out correctly that large auditing firms are to be treated as law firms for conflicts purposes. As such, different branches or entities of the same network will presumptively see each others' conflicts be imputed to each other. There

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305 Email from Oddbjørn Vegsund (KPMG AS) to the Norwegian Ministry of Foreign Affairs, 23 June 2025, **A-0213**.

is no question there was such a conflict when KPMG accepted both a damages mandate for SIA North Star and an investigative mandate for Norway, from two different entities within its network. But again, the matter in reality is significantly worse. The same entity, KPMG AS (Norway), both audited Seagourmet (2009-2014), and then a few years later, in December 2020, accepted an investigative mandate specifically related to Seagourmet. KPMG thus accepted to work on both sides of the same dispute not once, but twice.

5. WIKBORG REIN

291. When receiving the 2 December 2022 costs statement of Norway, Applicants discovered yet another instance of what seems like a conflict of interest, and which Applicants consider is a conflict of interest. At the very least, it is another instance of Norway trying to get close to Mr. Pildegovics, Mr. Levanidov and their associates or business partners, by hiring people close to them. Until Respondent shows otherwise, for example through document production, the only reasonable conclusion in the light of this multiplication of conflicts is that Norway was trying to improperly obtain information about Applicants and their business relations through hiring professional advisors close to them.

292. In the costs submissions, Applicants discovered that Norwegian law firm Wikborg Rein had been advising Norway with respect to the ICSID arbitration, in some capacity but in background. Applicants had never heard of Wikborg Rein's involvement throughout the entire arbitration until they received Norway's costs statement.

293. While Wikborg Rein was not the primary counsel of Norway, they still billed about 1,000 hours and provided invoices totalling over NOK 4 million (about EUR 400,000), which is not insignificant.[306]

294. In its Procedural Order No. 9, the Tribunal noted that it was surprised that Norway never notified Wikborg Rein as counsel.[307]

295. What was particularly surprising about Wikborg Rein's involvement as background counsel for Norway is that Wikborg Rein had acted for Arctic Fishing before Norwegian

306 Ten Wikborg Rein invoices from **A-0029** to **A-0036**, **A-0040** and **A-0041**.

307 Procedural Order No. 9, 23 February 2023, **A-0067**.

courts when it was fighting fines Arctic Fishing had received from Norway for fishing snow crab with Lithuanian/EU licenses, in the Loophole.

296. Wikborg Rein represented UAB Arctic Fishing in Norwegian courts in proceedings that led to decisions of the East-Finnmark District Court on 24 January 2017,[308] of the Halogaland Court of Appeal on 28 June 2017[309] and of the Supreme Court of Norway on 29 November 2017,[310] which were all discussed in the arbitration.

297. It seems somewhat incredible that the Ministry of Foreign Affairs was unaware of that and that this was not a red flag for Wikborg Rein in that they had represented in related domestic proceedings a company that had the exact same international law dispute with Norway.

298. Moreover, since Mr. Levanidov had acted as a consultant for Arctic Fishing in 2015 and 2016, he was generally aware that they had hired Wikborg Rein to represent them to contest fines issued by the Norwegian Coast Guard for fishing snow crab with EU/Lithuanian licenses.

299. The proceedings concerned a fine issued on 18 July 2016 by the Superintendent of the East-Finnmark police department in relation to catches of about 80,000 kg of snow crab by Arctic Fishing's vessel Juros Vilkas, in the Barents Sea, between 25 May and 16 July 2016, without a Norwegian licence (but with a Lithuanian/EU licence).

300. A hearing in the case took place on 29 November 2016 before the first instance court and the judgment was issued on 24 January 2017, which was only four weeks before North Star and Arctic Fishing submitted their joint notice of dispute to Norway, on 27 February 2017.

301. Wikborg Rein would likely have started representing Arctic Fishing at least a few months before the 29 November 2016 hearing. The judgment says that Arctic Fishing was represented by Ada Emilie Falch Christiansen, who was an associate at Wikborg Rein at the time.[311] She specialized in maritime cases and international arbitration.

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308 *The Public Prosecutor v. Arctic Fishing and Sergej Triskin*, District Court, Judgment, 24 January 2017, **C-0162**.

309 *The Chief Constable of Finnmark against Arctic Fishing*, Hålogaland Court of Appeal, Judgment, 28 June 2017, **C-0163**.

310 *Arctic Fishing v. The Public Prosecution Authority*, Supreme Court of Norway, Judgment, 29 November 2017, **C-0161**.

311 Emilie Falch LinkedIn page, 20 January 2025, **KL-0064**.

302. Considering Mr. Levanidov had been working as a consultant for Arctic Fishing around that time, and that he had a close relationship with North Star as well, and that Arctic Fishing sent a notice of dispute alongside North Star to Norway on 27 February 2017, it seems highly plausible that, at some point, someone from Wikborg Rein would have said something to someone from the Ministry of Foreign Affairs of Norway or otherwise from the government about Mr. Levanidov in relation to all these matters. It also seems not far-fetched at all that this would have led to the Ministry of Foreign Affairs of Norway's wild goose chase in respect of Mr. Levanidov's role in North Star's investments and, in particular, the allegation that Mr. Pidegovics was not a real investor.

303. With respect to Wikborg Rein's involvement with Arctic Fishing and any potential conflict for Wikborg Rein to act in the ICSID arbitration, in a letter dated 19 December 2022, Norway wrote:

> *Norway had a framework agreement with Wikborg Rein for the acquisition of legal services from 2014 to 2018. In April 2019 a new framework agreement with Wikborg Rein for the acquisition of legal services entered into force. Based on that agreement a purchase order ("avropsavtale") was signed by the Legal Affairs Department of the Norwegian Ministry of Foreign Affairs and Wikborg Rein on 25 May 2021, related to the present dispute.*
>
> *Wikborg Rein's engagement with UAB Arctic Fishing concerned a criminal case against the company for illegal crab catching by its vessel "Juros Vilkas" on the Norwegian Continental Shelf. Norway has been informed by Wikborg Rein that none of the lawyers involved in the present dispute were involved in the criminal case, nor did any of them know about its existence or have at any point in time accessed that case file.*

304. It appears that after the first instance judgment of 24 January 2017, the lead lawyer of record for Arctic Fishing became Mr. Oddbjorn Slinning, replacing Ms. Falch, and that in January 2017 Mr. Slinning left Wikborg Rein for another firm, SANDS Advokat Firma DA. However, in July 2022, Mr. Slinning rejoined Wikborg Rein, where he appears to still be a partner.[312]

305. Norway's letter of 19 December 2022 does not state that the Wikborg Rein lawyers involved in the Arctic Fishing case, *ie* Ms. Emilie Falch, and Mr. Oddbjorn Slinning,

312 Oddbjorn Slinning LinkedIn page, 20 January 2025, **KL-0065**.

never spoke about the case with other Wikborg Rein colleagues. The 19 December 2022 letter only states that Ms. Falch and Mr. Slinning did not work on the ICSID arbitration (which appears correct, at least based on the time sheets submitted by Norway) and that the Wikborg Rein lawyers working on the ICSID arbitration did not access the Arctic Fishing case file. The letter also does not mention any special types of procedures that Wikborg Rein would have implemented to avoid a conflict of interest, such as an ethical wall or other procedure. Wikborg Rein would have 306 lawyers over 5 offices (Oslo, Bergen, London, Singapore and Shangai).[313] This means that most lawyers in the Oslo office (which has 234 employees), for example, would probably know each other, and may well easily discuss any large array of matters. It also means that it is not clear that an ethical wall, should any actually have been created before taking on the ICSID case (and not after the fact), which is not established, could have been effective at all. For certain smaller firms, ethical walls simply do not work.

306. Considering the types of arguments Norway has brought in the arbitration, notably in respect of Mr. Levanidov, his role, 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 represented Norway in the ICSID arbitration subject of these annulment proceedings.

307. When reviewing Norway's costs submissions, Applicants also noticed that on 11 June 2021 there is a time entry by Mr. Aadne Haga which states: "*Correspondence MFA re reasons to engage investigation firm*".[314] A 3 July 2021 time entry, for Mr. Hanne Gundersrud states: "*Emails with investigation firms to obtain costs estimates; reviewing responses from London team to incorporate into scope emails.*"[315] Applicants are thus extremely concerned that Norway would have investigated them as well as Mr. Levanidov in the context of the arbitration, and that ideas for such investigations may well have come from Wikborg Rein (or the other two professional service providers with established conflicts). Wikborg Rein represented Arctic Fishing in 2016 and 2017 with respect to a case having important similarities with North Star's and Mr. Pildegovics in the ICSID arbitration, at a time when Mr. Levanidov was a consultant for Arctic Fishing, and all the while Wikborg Rein had a framework agreement with the Ministry of Foreign Affairs, since 2014 and until today. Wikborg Rein appears to have been playing both sides of the snow crab dispute. It also very

313 IFLR 1000, Wikborg Rein, 21 January 2025, **A-0155**.

314 Wikborg Rein invoice N° 10405825, 3 September 2021, **A-0030**.

315 *Id*.

much seems that there is a high possibility that it is exactly because Wikborg Rein was playing both sides that Mr. Levanidov and/or others may have been investigated by one or more international investigative firms.

308. The various research mandates of Wikborg Rein obtained through document production appear to confirm Applicants' concerns.

309. As stated above, the KPMG purchase order from December 2020 required KPMG to investigate both Mr. Levanidov as well as his various companies, including Seagourmet (which KPMG AS had audited). In an email of 6 May 2021 to Wikborg Rein managing partner Geir Sviggum, Olav Myklebust of the Ministry of Foreign Affairs writes: "*Material prepared by KPMG about the companies involved will be included in a separate email.*" [316]

310. As such, and while Norway has not produced such exchanges, or the various investigative reports, it is established that Wikborg Rein received information from KPMG about the various companies investigated. It is Applicants' position that this information was severely tainted in that it is not established that confidential information of Applicants and related parties in interest (such as Mr. Levanidov and his companies, and in particular Seagourmet) was protected against use by Norway in a manner adverse to Applicants in the arbitration.

311. Moreover, since Wikborg Rein represented Arctic Fishing in 2016 and 2017, and Mr. Levanidov was a consultant for Arctic Fishing in 2015 and 2016, there is also significant risk that within Wikborg Rein information related to Applicants and related parties in interest (in particular Mr. Levanidov and his companies) was shared in breach of confidentiality obligations.

312. This is particularly so in the light of the absence of any ethical wall established by Wikborg Rein in the arbitration and in relation to its lawyers having represented Arctic Fishing.

313. The absence of an ethical wall was confirmed in the email of 25 June 2025, from Mr. Sviggum of Wikborg Rein, to Mr. Jervell.[317] It is interesting that the email was sent at 4:27pm that day, while the Respondent's production was sent to Applicants at

316 Geir Sviggum email, 13:40, 11 May 2021, **A-0160**.

317 Email from Geir Sviggum (Wikborg Rein Advokatfirma AS) to the Norwegian Ministry of Foreign Affairs, 25 June 2025, **A-0214**.

5:18pm and forwarded at 5:44pm to ICSID. Why would Wikborg Rein finally send its email about the absence of an ethical wall (because there simply was never a conflict of interest, in Wikborg Rein's words[318]) in essence minutes before the production of documents? Was Wikborg Rein having second thoughts and withholding the email?

314. In the light of Wikborg Rein's policies, *ie* its Ethical Guidelines (**A-0211**) and Guidelines for Admission and Registration of New Matters (**A-0210**), it is surprising that no ethical wall was ever established, nor that any discussions about any potential conflicts were ever produced by Respondent. Under sections 1 (The Importance of Ethical Lawyer Behaviour)[319], 5 (Duty of Secrecy and Confidentiality)[320], and 7 (Conflict of Interest)[321] of the Ethical Guidelines, one would think that an issue should have arisen for Wikborg Rein. Furthermore, section 3 (Conflict Check)[322] of the Guidelines on new matters would tend to imply that an internal discussion should at least have been had, including

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318 Email from Geir Sviggum (Wikborg Rein Advokatfirma AS) to the Norwegian Ministry of Foreign Affairs, 25 June 2025, **A-0214** ("*Wikborg Rein's routines for handling potential or actual conflicts of interest are in line with the standard rules as enacted by the Norwegian Bar Association. In some cases, where there is a potential conflict of interest but where all parties involved still welcome Wikborg Rein's representation (such as in parallel work relating to one and the same transaction), special routines are established concerning Chinese Walls etc.* ***Such special routines were never established in this matter, simply because Wikborg Rein never had a conflict of interest***." [Emphasis added]).

319 Wikborg Rein - Ethical guidelines (etiske retningslinjer), 12 December 2019, **A-0211**, section 1 ("*We must also maintain such a good distance from the grey zone that our integrity cannot be called into question.*").

320 Wikborg Rein - Ethical guidelines (etiske retningslinjer), 12 December 2019, **A-0211**, section 5 ("*Furthermore, in an individual case, specific partners and employees may be required to sign a separate confidentiality declaration if this is required by the client, organiser(s), public authority(ies) and/or responsible partner/responsible lawyer in the individual case or otherwise follows from legislation and/or the firm's internal guidelines. The special rules that apply to the processing of inside information are set out in our insider regulations.*").

321 Wikborg Rein - Ethical guidelines (etiske retningslinjer), 12 December 2019, **A-0211**, section 7 ("*The rules on when to take a case and when not to take a case due to a conflict of interest are complicated to practise. Moreover, the rules are constantly evolving, for example in terms of who is protected by the client concept. This is far more than the formally registered client. It is also important that the assessment of conflicts of interest is not static, but that it recognises the possibility that a case may develop in such a way that a conflict arises at a later date that is not obvious at the start of the case. For these and other reasons, the responsible partner/responsible lawyer must always make a thorough assessment, and both he/she and the case controller must make individual assessments of actual and potential conflicts of interest before case processing can begin.*").

322 Wikborg Rein - Guidelines for admission and registration of new matters – redacted, 18 January 2016, **A-0210**, section 3 ("*The responsible lawyer must carry out an initial conflict check. Subsequently, the case controller carries out her or his own check to reveal any possible conflicts of interest based on the information received from the responsible lawyer. If a possible conflict of interest has been discovered, this should be summarised in an email to the responsible lawyer. The responsible lawyer is obliged to carry out all necessary measures to clarify any questions with regards to conflict of interest. If in doubt, the responsible lawyer must present the possible conflict of interest to their practice group leader/office manager, and as a last resort to the Managing Partner. Please also refer to Section 6 below. If the doubt concerns the interpretation of the regulations on conflict of interest pursuant to the regulations to chapter 11 of the Norwegian Court's Act ("Advokatforskriften"), the query should be referred to the firm's designated ethics partner.*").

with Respondent, even though nothing was produced in document production, despite the Tribunal's order in the light of Norway's representation.[323]

315. As such, it is manifest that neither Wikborg Rein nor the Ministry of Foreign Affairs conducted proper conflicts checks and certainly did not document them. As for the email of 25 June 2025 produced in the second round of document production where Wikborg Rein provided its conflicts checks policy,[324] this last-minute attempt at a justification is unconvincing. No contemporaneous document was produced in relation to any measures to prevent a conflict of interest and the sharing of confidential information between lawyers having acted for adverse interests, within Wikborg Rein.

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316. This multiplication of conflicts, combined with a clear lack of verification of conflicts of interest, is extremely concerning and appears to have completely changed the equality of the parties in the proceedings.

317. While parties in ICSID proceedings normally have a right to counsel or advisors of their choice, they cannot hire counsel or advisors who threaten the integrity of the proceedings.[325]

318. It is established that this has happened twice, in respect of Glimstedt and KPMG.

319. Applicants believe it happened three times, with respect to Wikborg Rein as well.

320. Like in *Eiser*, Applicants believe that because of these conflicts, Applicants "*lost the possibility of a different award*"[326], notably because of the manner in which Norway argued the case, which appears to have been based on information improperly

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323 See Procedural Order No. 3, Redfern Schedule, for example request 14 ("*Norway agrees (subject to the overarching points made in its Response) to produce documents and communications made between the Norwegian Ministry of Foreign Affairs and Wikborg Rein before entering into the purchase order*").

324 Email from Geir Sviggum (Wikborg Rein Advokatfirma AS) to the Norwegian Ministry of Foreign Affairs, 25 June 2025, **A-0214**.

325 *Hrvatska Elektroprivreda dd v Republic of Slovenia*, ICSID Case No. ARB/05/24, Order Concerning the Participation of Counsel, 6 May 2008, **CL-0581**; Letter to Tribunal re Conflict of Interest, 31January 2023, **A-0102**.

326 *Eiser Infracstructure Limited and Energia Solar Luxembourg S.À.R.L. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on the Kingdom of Spain's Application for Annulment, 11 June 2020, **AL-0043**, para. 251.

obtained about Applicants' and their business partners' business relationships, in respect of the emphasis that Mr. Pildegovics was not a real investor.[327]

321. Moreover, the lack of independence of some of Norway's counsel, first and foremost Mr. Kristian Jervell, because of his implication in the adoption of the measures, if not an annulment ground in and of itself, may well explain why Norway's Ministry of Foreign Affairs so recklessly hired, one after the other, outside legal and other advisors with conflicts of interest.

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322. On another matter of conflicts of interest, Applicants note that after they shared confidential information with Mr. Andrew Flower, as a potential damages expert (who ultimately was not retained by Applicants), he nonetheless contacted Norway to act as their expert in the very same case.[328] While Norway does not appear to have intended to hire Mr. Flower, at least for now, Applicants wish to put on the record that they would oppose Norway's hiring of Mr. Flower, if the award is annulled and reconstituted proceedings go forward. Applicants would do so because Mr. Flower is conflicted as Applicants have shared confidential information with him.

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

323. Norway also misled the Tribunal in order to prevent Applicants from fully arguing their damages case, thereby gaining an improper advantage in the proceedings.

324. To obtain bifurcation of damages, Norway simply lied to the Tribunal. In its Counter-Memorial of 29 October 2021, Respondent wrote:[329]

> Even if all of the conduct by Norway of which the Claimants complain were assumed to violate the BIT, the Claimants have not presented

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327 *See e.g.* Respondent's Counter-Memorial and Memorial on Jurisdiction, 29 October 2021, **A-0010**, paras. 6, 364, 392, 410.

328 *See* Emails between Vaughan Lowe KC and Andrew Flower (redacted) between September 2020 to October 2022, 12 October 2022, **A-0217** (in particular email of 23 August 2021 from Andrew Flower to Mr. Lowe where Mr. Flower admits he had initial discussions with Applicants, was not retained, but that he is wishing to represent the other side: "*we had some initial discussions with the other side and felt they strung us along. I would like to have had a go at them (and at my friend Kieran) whom I have a good record against*"), Emails between Vaughan Lowe KC and Andrew Flower between 20 March 2023 to 22 March 2023, 22 March 2023, **A-0218**, Email from Andrew Flower to Vaughan Lowe, 21 June 2023, **A-0219**, Email from Vaughan Lowe KC to Andrew Flower, 3 January 2024 **A-0220**.

329 Respondent's Counter-Memorial and Memorial on Jurisdiction, 29 October 2021, **A-0010**, para. 874.

> a case on which it is practicable to determine what losses, if any, they have sustained as a result.

325. In that submission, despite the Tribunal's instructions to submit the entire case on the merits (which would include quantum), following Norway's first (failed) attempt at obtaining bifurcation of damages, Respondent only provided a short section on damages and without submitting any expert report.

326. However, in its costs submission, Norway submitted invoices from Wikborg Rein showing it was working on a damages report in July 2022.

327. In a letter of 13 December 2022, Applicants registered the following protest with the Tribunal:[330]

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

328. Norway thus intentionally flaunted the Tribunal's procedural directions to make a full submission on the merits on 29 October 2021 and then falsely argued that it was not in a position to make a submission on quantum.

329. Norway's misrepresentations and failure to respect the Tribunal's Procedural Order No. 4,[331] establishing a procedural schedule, led to a fundamental inequality of the Parties in presenting their case.

330. By not submitting a damages report, Norway avoided giving the Tribunal the benefit of such report to decide bifurcation of damages. Norway also likely preferred to try to minimize as much as possible the risk of having a damages expert cross-examined by Applicants. Such cross-examination would have showed the very high value of snow crab to Norway and the cross-examination may have shown how the closure of the Loophole substantially benefitted Norway financially.

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330 Letter from Claimants to the Tribunal on Norway's conflicts of interest, 13 December 2022, **A-0098**.

331 Procedural Order No. 4, 30 June 2021, **A-0062**.

331. Norway produced of its own motion the July 2022 Wikborg Rein memo on damages.[332] In that memo, Wikborg Rein shows that it is indeed possible to address damages at that stage. In that memo, Wikborg Rein also recommends hiring a damages expert for that phase of the proceedings,[333] which Norway could have done. It was therefore untrue to state, as Norway did: "*the Claimants have not presented a case on which it is practicable to determine what losses, if any, they have sustained as a result*."[334]

332. Norway's improper behaviour regarding the bifurcation of the proceedings thus constituted a serious breach of fundamental rules of procedure which must lead to the annulment of the entire Award, for generally skewing the presentation of the case in favour of Respondent.

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

333. The Award must be annulled in its entirety because the Tribunal manifestly exceeded its powers by: a) refusing to decide and/or incorrectly deciding how the Svalbard Treaty applied to the dispute; b) incorrectly holding that neither NEAFC nor Svalbard licenses could be investments in Norway; c) incorrectly holding that the joint venture was not an investment in Norway under the BIT; d) providing contradictory reasons regarding whether the Applicants' investment was in the territory of Norway; e) providing contradictory reasons by failing to apply the approach of "unity" of the investment to the present case; and f) incorrectly holding it did not have jurisdiction to hear Applicants' claim that Norway acted in breach of Article III of the BIT with respect to the admission of the investment.

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332 Decision by the Norwegian Supreme Court's Appeals Selection Committee, 14 October 2022, **R-0466-ENG**.

333 Decision by the Norwegian Supreme Court's Appeals Selection Committee, 14 October 2022, **R-0466-ENG**, p. 27, para. 6.2.2 ("*In our e-mail of 18 June 2021 following up the 17 June meeting, we recommended to contact Mr Carlos Lapuerta of The Brattle Group for a non-binding conversation and fee estimate. We have worked with Mr Lapuerta in several commercial arbitrations since 2013 and know him as a creative and eloquent expert with vast investment arbitration experience.*").

334 Letter from Claimants to the Tribunal on Norway's conflicts of interest, 13 December 2022, **A-0098**.

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

334. As already explained, it was a manifest excess of powers for the Tribunal to refuse to interpret and apply the Svalbard Treaty,[335] including as a matter of Norwegian law going to jurisdictional issues, such as whether investments were made legally in Norway.

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

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

336. First, the Tribunal failed to state reasons to justify the following conclusion and statement:[336]

> *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*.

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

338. Relatedly, the Tribunal's failure to properly address the diplomatic note of 30 October 2023 and reopen the proceedings[337] went to important jurisdictional issues. That is, it concerned the proper application of Norwegian law since it went to the right

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335 *See e.g.*, Award, 22 December 2023, **A-0068**, para. 584: "*The Tribunal doubts that it can adjudicate that inter-State dispute. On a purely textual basis, the position taken by Norway cannot be dismissed out of hand but neither can the different interpretation advanced by other parties to the Treaty.*"

336 *Ibid*., para. 277.

337 *Ibid.*, para. 70 ("*The Tribunal decided that it should admit the documents in order to ensure that it has the fullest possible picture of what happened. Accordingly, on 5 December 2023, the Tribunal agreed to admit the documents as C-0357 to C-0359. In doing so, the Tribunal noted, however, that the application to submit these documents was made at a very late stage of the proceedings, when the Claimants had already contacted the Tribunal to inquire when the Tribunal would give its ruling.*"); and then the Tribunal noting that Norway denied having received the Note Verbale (para. 123) and thus improperly questioning its existence at para. 600 ("*There is no indication that such a Note was ever sent*."), despite Claimants' statements to the opposite, and eventually failing to decide the matter, again at para. 600 ("*For the reasons already given the Tribunal cannot rule on the difference.*").

interpretation of Svalbard and the effect it may have on the legality of the investment regarding the Svalbard licenses.

339. Moreover, at paragraph 275 of the Award, the Tribunal stated that: "*the Tribunal doubts that licenses granted by another State in order to satisfy non-Norwegian requirements could be regarded as an investment in Norway*." This statement and all relevant consequences must be annulled for at least two reasons. It is incorrect as a matter of jurisdiction and the Tribunal failed to state reasons to address some of Applicants' arguments notably made at the hearing.[338] What is even more surprising is that the Tribunal failed to consider some of Applicants' arguments made specifically in response to a question from the Tribunal at the hearing.[339] At the hearing, Applicants' counsel stated:[340]

> *How can a licence granted by another State or granted by an organisation be an investment in the State of Norway, or part of an investment in the State of Norway?*
>
> *As I mentioned in closing, the BIT does not require a licence or an investment to be issued by Norway to constitute an investment under Article I, though of course there is another requirement to constitute an investment, which is that it must respect Norwegian law, but as I have already mentioned, the example of business concessions according to law in one of the examples of what would constitute an investment does not say who issues the business concession*.
>
> *So international treaties can provide for recognition of licences or companies or other rights created by another country, it is possible, and that is one of the exhibits that we submitted today, which is the US-Norway Treaty of 1928, Treaty of [Friendship], Commerce and Consular Rights. Article 12 of that treaty says that each state, the United States of America and Norway, will recognise the companies of the other*.
>
> *So you have a treaty which says, "I, as Norway, agree that I will recognise a legal entity created under US law", and then there is something below which says, "But the company must act in a way which is respectful of Norwegian law et cetera", but you have the hook or the explanation which it is entirely possible for States to do this.*
>
> *As applied to this specific case, we point to Article 23 of the NEAFC Scheme of Enforcement which, it is Claimants' submission, effects the exact same thing as the general principle I mentioned based on the text of the BIT, and also Article 12 of the US-Norway Treaty from 1928, which is once a NEAFC flagged vessel wants to land some fish in a particular State that is also from NEAFC,*

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338 Hearing Transcript, Day 4, 3 November 2022, **A-0022**, p. 21 (from line 17) to p. 25 (line 3) (answering the Tribunal's question: "*How can a licence granted by another State or granted by an organisation be an investment in the State of Norway, or part of an investment in the State of Norway?*").

339 *Ibid*.

340 *Ibid*.

what happens is that you need to call, you need to give prior notice, and then there will be a verification which occurs, which is:

> *"The fishing vessels declared to have caught the fish had sufficient quotas for the species declared."*

This has to be verified by the State accepting the landing.

So you have -- and there's a process to do that, and once -- in our case, there was no quota in the sense that the fisheries was free, but you still needed a licence, so Norway would have had to accept the landing, verify, "Okay, it is the Solvita, it is the Solveiga, it is the Senator, does it have a licence to catch the snow crab?", and then when it has verified that, it can issue Part B of Annex XV which is basically the PSC1 form, and the PSC1 form will basically confirm -- when the PSC1 form is issued, and that's the landing form, and there are 79 of them that we have put in evidence, when the PSC1 form is issued, this is after the verification by Norway that there was a licence and that Latvia in this case, or Russia, if it was a Russian ship, has confirmed that they have quota. So basically you have Norway which at least de facto says, "I'm fine with your licence, you have quotas, I have verified, through the process that I have agreed to in the international treaty", so you have Norway which accepts the legality of what is happening through the licence.

So you have a similar process to what's in Article 12 of the 1928 Treaty between the US and Norway, which is a process through which the right – whether the creation of a company, the issuance of a licence by another State, is accepted as legal, de facto, by the host State, here the State of the boarding, which is Norway.

So you have the process where there's a business concession issued and you also meet the chapeau of Article I of the BIT which is in accordance with Norwegian law, because they have gone through the process and accepted it.

So that is Claimants' submission that it is entirely possible generally, but also especially specifically when you have had an agreed process between the two states, which is here, and that process was agreed and respected and confirmed 79 times by Norway in respect of all the offloads.

So clearly, the Latvian licences were considered as having a certain value, legal value, de facto, de jure, in Norway, by the Norwegian authority, based on an international treaty they signed.

So our answer is this is how a licence granted by another State can be an investment in Norway as part of an investment in that State.

340. However, nowhere in the Award does the Tribunal address this argument. The fact that the Tribunal "doubts" the Applicants' position is not a response and consists in a manifest failure to state reason on the important question of whether a Latvia-issued licence could constitute an investment in Norway. As per Applicants' argument at the hearing, it can, but the Tribunal failed to respond to this argument.

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

341. The Tribunal recognized there was a cooperation agreement between Mr. Pildegovics and Mr. Levanidov.[341] However, the Tribunal failed to give any effect to this finding as a matter of the Tribunal's jurisdiction. In doing so, the Tribunal issued contradictory reasons and failed to explain how and why it concluded that there was no effect to this agreement, which is contrary to the effect given by Norwegian law to such an agreement.

342. Paragraphs 247-250 and 254 of the Award eloquently show these contradictions, where on the one hand the Tribunal accepts there is an agreement to cooperate, but on the other hands states it does not see any legal consequence to such an agreement and that it cannot identify what could be claimed by the parties to the agreement.[342]

343. Further, the Tribunal in its reasoning also pretended not to understand what effect there could be from an oral cooperation agreement under Norwegian law, even though it was clearly stated by Dr. Ryssdal, Applicants' expert, that such an agreement establish a duty of loyalty and cooperation.[343] This is sufficient to create a claim to performance, but the Tribunal failed to state reasons by feigning not to understand the consequences of the agreement they found existed.

344. If the Tribunal truly wanted to dismiss the existence of an agreement between Mr. Levanidov and Mr. Pildegovics, it had to explain why the obligation of loyalty and cooperation, which arose under Norwegian law under an agreement to cooperate, and thus would have created a claim to performance (and thus an investment) in Norway,

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341 Award, 22 December 2023, **A-0068**, para. 248 ("*The Tribunal accepts that the evidence of Mr Pildegovics and Mr Levanidov establishes that the two of them agreed to co-operate in setting up an operation, designed to be "seamless", under which Mr Pildegovics' company, North Star, would harvest snow crab and deliver it to Seagourmet's facility in Båtsfjord, where it would be processed and then marketed by Seagourmet.*")

342 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.*"

343 *See e.g.* Claimants' Rejoinder on Jurisdiction, 28 July 2022, **A-0018**, para. 529 ("*A joint venture, as the one existing between Mr. Pildegovics and Mr. Levanidov, and established on the facts, and as further confirmed by Dr. Ryssdal in light of Norwegian law, is certainly an "asset" and/or "claim to performance" with "economic value". Obligations of loyalty and cooperation exist and they are enforceable. Such cooperation, as explained, has real economic value in that a guaranteed flow of snow crab catches to Seagourmet's factory guarantees purchases for North Star and Mr. Pildegovics, on the one hand, and guarantees goods to transform, on the other, for Seagourmet and Mr. Levanidov. This is enough to confirm that it is a protected investment under the Latvia-Norway BIT.*").

did not arise and why. The Tribunal entirely failed to engage with the actual substance of the issue, while actually giving contradictory reasons.

345. As such, all aspects of the Award that are impacted by the Tribunal's failure to give effect to the agreement between Mr. Pildegovics and Mr. Levanidov must be annulled.

D. MANIFEST EXCESS OF POWER AND CONTRADICTORY REASONS ON WHETHER APPLICANTS' INVESTMENT WAS IN THE TERRITORY OF NORWAY

346. The Tribunal manifestly exceeded its powers and provided contradictory reasons in concluding that Applicants' investment was not in the territory of Norway, for the most part.

347. Notably, the Tribunal contradicted itself by finding that the dispute concerned Russia and that Applicants' catches were in Russia[344] while at the same time recognizing that some of Applicants' catches were over Norway's continental shelf.[345]

348. The Tribunal also manifestly exceeded its powers by assigning the catches over Russia's continental shelf, which at the time were made in an area considered by all to be international waters.

349. The Tribunal failed to address, and thus state reasons, in respect of the fact that fisheries were in international waters, not in Russia, which in any event goes to an issue of incorrect jurisdictional scope regarding the territorial scope of the investment.[346] There are also references in the Award to the "Russian sector"[347] of the Loop Hole, which further reflects an incorrect approach to the territory in which the

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344 *See e.g.*, Award, 22 December 2023, **A-0068**, para. 270 ("*the focus of North Star's operations was either in Latvia or the Russian Federation*").

345 Award, 22 December 2023, **A-0068**, para. 393 (reference to Respondent stating there was some activity on the "*Norwegian continental shelf*").

346 For the Tribunal's references to fisheries on the Russian side of the Loop Hole, see *e.g.* Award, 22 December 2023, **A-0068**, paras. 267 ("*the Russian sector of the Loop Hole*"), 270 ("*harvested snow crab primarily on the Russian continental shelf*"; "*the focus of North Star's operations was either in Latvia or the Russian Federation*"), 272 ("*Latvian vessels which harvested a natural resource on the continental shelf of the Russian Federation*"), 278 ("*Russian sector of the Loop Hoole*").

347 Award, 22 December 2023, **A-0068**, *e.g.* at paras. 527, 528 ("*That Norway did not aggressively enforce its 2015 Regulations in its own sector of the Loop Hole is understandable in view of the difficult of determining whether a catch had taken place there or in the Russian sector.*"), 548, 556. The references to fisheries in the Russian side of the Loop Hole, and the conclusion that the investment would have possibly been in the Russian Federation (*e.g.* para. 270: "*the focus of North Star's operations was either in Latvia or the Russian Federation*") is a manifest jurisdictional error, as the investment was made with respect to Norway and international waters, not Russia.

investment was situated, as the use of licenses and vessels in the Loophole was in an international area, not in the territory of any particular State.

350. Furthermore, by considering the snow crab as a sedentary species for the purposes of the Award, the Tribunal made an annullable error, with such finding being a manifest excess of power as well as a serious breach of a fundamental rule of procedure, notably because the Tribunal failed to consider Applicants' evidence and position on this issue.[348]

351. The Tribunal made another jurisdictional error, regarding what effect to give to Norway's approval of snow crab landings. The Tribunal erroneously failed to accept that the landings, because they were accepted by Norway, were legal in Norway for jurisdictional purposes. Moreover, the Tribunal failed to state reasons regarding the arguments put at the hearing on the jurisdictional issue, as already explained.[349]

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

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

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348 The Tribunal seems to take for granted the status of snow crab as a sedentary species: e.g. Award, 22 December 2023, **A-0068**, para. 455. However, Claimants' evidence that the crab is not a sedentary species was not considered, which must lead to a failure to state reasons. See e.g. Claimants' Rejoinder on Jurisdiction, para. 31 and evidence cited therein: "*Tanner Crab (Chionocetes bairdi and C. opilio)*," Alaska Department of Fish and Game, Undated, **C-0294**; Sarah Seabrook, Fabio C. De Leo, Andrew R. Thurber, "*Flipping for Food: The Use of a Methane Seep by Tanner Crabs (Chionoecetes tanneri)*," Frontiers in Marine Science, 19 February 2019, **C-0295**; Emmelie K. L. Astrom, Arunima Sen, Michael L. Carroll, JoLynn Carroll, "*Cold Seeps in a Warming Arctic: Insights for Benthic Ecology*," Frontiers in Marine Science, 21 May 2020, **C-0296**, p. 13; The Yomiuri Shimbun, "*Snow crabs found clustered around methane vents at bottom of Sea of Japan*," Taiwan News, 28 August 2010, **C-0297**; Emmelie K.L. Astrom and others, "*Trophic relationships and community structure at cold seeps in the Barents Sea*," The Arctic University of Norway, Undated, **C-0298**; Oregon State University, "*Tanner Crab*," Youtube,19 February 2019, **C-0299**.

349 Hearing Transcript, Day 4, 3 November 2022, **A-0022**, p. 21 (from line 17) to p. 25 (line 3) (answering the Tribunal's question: "*How can a licence granted by another State or granted by an organisation be an investment in the State of Norway, or part of an investment in the State of Norway?*").

holding also constituted a manifest excess of power regarding how the Tribunal approached its jurisdiction.

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

353. It was a manifest excess of power for the Tribunal to hold it could not hear Applicants' claim that Norway breached its obligation under the BIT to admit Applicants' investments in accordance with Norwegian law.[350]

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

> Each Contracting Party **shall** promote and encourage in **its territory investments of investors of the other contracting party** and **accept such investments in accordance with its laws and regulations** and accord them equitable and reasonable treatment and protection. Such investments shall be subject to the laws and regulations of the Contracting Party in the territory of which the investments are made.

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

> 1. This Article shall apply to any legal disputes between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former in the territory of the latter.
>
> 2. If any dispute between an investor of one Contracting Party and the other Contracting Party continues to exist after a period of three months, the investor shall be entitled to submit the case either to:

356. Two things are obvious from these two provisions of the BIT. First, they should be read together, as context to one another. Secondly, it is manifest that Article III is badly drafted in that the obligation to "*accept*" investments applies to "*such investments*" which in turn are "*investments of investors of the other contracting party*" that are '*promoted*' and '*encouraged*' by the other contracting party in its territory. In Article III, there is simply no distinction in the relevant obligations (acceptance, promotion and encouragement) that usefully separate investments that have been made and not made, whereas such distinction exists in a number of other treaties that are drafted more clearly. On one reading of Article III, the obligation to "*accept*" in accordance with domestic law applies only to investments *already made*. This would of course make no

350 Award, 22 December 2023, **A-0068**, para. 588 ("*although Article III imposes a duty to accept a proposed investment, Article IX gives the Tribunal jurisdiction only with regard to a dispute concerning an existing investment.*").

sense and would void the obligation to accept investments according to domestic law of any meaning whatsoever. Therefore, when Article IX states that it allows for disputes to be put to an ICSID tribunal "*in relation to an investment of the former in the territory of the latter*", the only consistent reading with Article III is that the obligation to accept investments is also within the scope of Article IX, because the obligation to accept under Article III concerns "*investments of investors*" that already exist, not "investments" that "*investors*" are "*seeking to make*" like, for example, under NAFTA's investment Chapter.[351]

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

357. Applicants have ten annulment grounds regarding how the Tribunal addressed the merits: a) the Tribunal failed to reopen the proceedings to hear whether the 20 March 2023 judgment of the Supreme Court of Norway constituted a breach of the BIT; b) Respondent misled the Tribunal in the manner it requested and obtained bifurcation of damages; c) the Tribunal provided contradictory, false and improper reasons regarding whether Norway and/or the Russian Federation caused Applicants' damages; d) the Tribunal provided contradictory reasons regarding whether the 2019 Supreme Court judgment was denial of justice or not; e) the Tribunal failed to state reasons to explain why Applicants had no "*acquired rights*" that could be vindicated; f) the Tribunal failed to state reasons to explain why Applicants were not treated arbitrarily and in bad faith; g) the Tribunal failed to state reasons to explain why Norway's adoption of discriminatory quotas were not a breach of the BIT; h) the Tribunal improperly disposed of the argument Norway breached its obligation to admit Latvian investment in accordance with Norwegian law; i) the Tribunal improperly disposed of the argument that Norway had an obligation to provide the better treatment between the BIT and other treaties; and j) the Tribunal improperly disposed of the Applicants' Most Favoured Nation treatment argument.

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

358. First, the Tribunal failed to reopen the question of whether the 20 March 2023 judgment of the Supreme Court of Norway constituted a breach of the BIT, notably in the light of

351 *See e.g.* North American Free Trade Agreement (NAFTA), Chapter 11, Article 1139, **AL-0093**, p. 4 ("***investor of a Party*** *means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment;*").

the EU's diplomatic note of 30 October 2023 protesting the judgment, despite Applicants' request to reopen the matter, and the Tribunal also failed to notify Applicants of its decision not to reopen the proceedings.

359. On 16 October 2023, Applicants wrote to inform the Tribunal that the EU had prepared a diplomatic note making a significant and unusual protest against the Supreme Court of Norway's judgment of 20 March 2023 denying SIA North Star the right to obtain snow crab licenses on the basis of the Svalbard Treaty. The 2 October 2023 draft Note said:[352]

> *As set out in this and in previous Notes Verbales, the European Union strongly disagrees with the incoherent interpretation and the decisions of the Supreme Court of Norway, in that judgement, according to which Articles 2 and 3 of the 1920 Treaty of Paris would apply only in the territorial waters of the archipelago, and not beyond. … This judgment can therefore in no way, be regarded as reflecting a correct interpretation of the 1920 Treaty of Paris at the international level. Consequently, the European Union reserves the right to qualify this judgement as an internationally wrongful act attributable to Norway.*

360. In their 16 October 2023 letter, in respect of the draft Note, the Applicants indicated that they "*cannot confirm whether it has been formally sent to Norway at this time, though assume Norway is aware of its contents*." On 23 October 2023 Norway provided observations and on 1 November 2023 the Tribunal sought further explanations from Applicants.

361. In their letter of 7 November 2023, the Applicants further sought to include in the record the actual Note Verbale of 30 October 2020 from the EU, which was identical to the draft in all relevant respects.[353] Further, the Applicants sought to re-open the proceedings if necessary, writing as follows: [354]

> *Secondly, the Claimants could allege that the decision of 2[0] March 2023, rather than only confirming the destruction of Claimants' investment (and the breaches of equitable and reasonable treatment, as well as the uncompensated expropriation) is, in and of itself, an additional breach of the BIT. While it should be found to be,* ***the Claimants underscore that, in order to ensure the efficiency of the proceedings, they do not at this stage seek such a finding,***

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

353 Note Verbale from EU to Norway, 30 October 2023, **A-0120**. Applicants note that the Note Verbale was formally introduced into the record in the current annulment proceedings following their request for admission of factual exhibits into the record by letter to the Ad Hoc Committee of 15 May 2025.

354 Letter from Claimants to the Tribunal, 7 November 2023, **A-0110**.

> ***all the while reserving the possibility of raising it in a subsequent phase, if useful, except if the Tribunal is minded to rule that it has no jurisdiction and/or that there are no breaches of the BIT on the merits****. Only the Tribunal knows what its ruling is and as such only the Tribunal knows whether the parties need to brief that question, which the Tribunal may, if necessary, raise of its own motion. While the 2[0] March 2023 judgment is in and of itself a violation of international law, and of the BIT, arguing this question now is likely to delay the proceedings, which, as shown by their recent letters, neither Claimants nor Norway would want.*
>
> [Emphasis in original]

362. The Applicants thus clearly requested that the Tribunal re-open the proceedings, in the alternative (should the Tribunal not uphold jurisdiction and/or not find breaches on the merits).

363. The Applicants, however, never received any response prior to the Award.

364. Indeed, the Tribunal did not notify an important procedural ruling on this issue that would have been made on 5 December 2023, approximately two weeks before the Award. Applicants' counsel never received any decision regarding their application to supplement the record and/or re-open the proceedings.

365. Nonetheless, the Award refers in the following way to a procedural decision that appears to go to the matter:[355]

> *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.*

366. Since Applicants' counsel never received this decision, Applicants were thus unable to react to it before the Award.

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355 Award, 22 December 2023, **A-0068**, para. 70.

367. The Tribunal's apparent procedural decision would have necessarily concerned Applicants' request to reopen the proceedings regarding the EU's diplomatic note of 30 October 2023 protesting the Norwegian Supreme Court decision of 20 March 2023, whether implicitly or explicitly. It also concerned the Applicants' request to have C-0360 (the actual 30 October 2023 note) admitted into the record, which the Tribunal apparently refused, while at the same time holding that it was not proven such a note existed or had been sent to Norway, which was extremely unfair to Applicants. What is more, since the BIT had been terminated by Latvia and Norway, including its sunset clause, as the Tribunal well knew, the Applicants have no other possibility to be heard on this issue under the BIT. Moreover, despite the Tribunal's attempt to frame the issue differently as one concerning the 20 March 2023 judgment of the Norwegian Supreme Court, it was not possible to put before the Tribunal, prior to October 2023, the EU's diplomatic protest of Norway's Supreme Court decision, which the Award relied on in any event (*eg* at paragraph 600).

368. As shown above, international law allows an international court or tribunal to review the propriety of a domestic Supreme Court decision when this decision takes a manifestly improper or incorrect position in order to gain an advantage in an ongoing dispute. Considering the ICJ's holding in *Diallo*, the EU's protest in October 2023 was a relevant fact on whether Applicants were entitled to ask the Tribunal to review the propriety of the Norwegian Supreme Court decision on the content of Norwegian law.

369. The failure to re-open the proceedings, despite Applicants' request, and especially in the light of the Tribunal's failure to notify its 5 December 2023 procedural ruling is a ground for annulment, at least in that a reconstituted Tribunal must be able to reconsider whether the 20 March 2023 Supreme Court of Norway constituted a breach of the BIT, though in reality this permeates the entire case. Relatedly, should that be the case and the EU's position found to be the correct one on the interpretation of Svalbard, including as a matter of Norwegian law, this affects all parts of the Award that related to the Svalbard Treaty, which would thus have to be reconsidered.

B. RESPONDENT MISLED THE TRIBUNAL

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

to the Tribunal. Moreover, misleading the Tribunal led to the Applicants' undeveloped position on Sea & Coast, which the Tribunal criticized.[356]

C. FALSE AND CONTRADICTORY REASONS REGARDING CAUSATION

371. The 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.

372. First, the Tribunal failed to examine significant evidence of Norway and Russia's joint actions,[357] thus failing to treat the parties equally by not examining Applicants' evidence as to causation on the merits.

373. Second, the Tribunal failed to state reasons to justify its statement that there was a "Russian ban"[358] (as there never was). As such all parts of the Award which rely on such a finding must be annulled, especially in respect of causation on the merits.

374. Third, while the Tribunal held it could not examine Russia's actions,[359] it then nonetheless proceeded to make comments on them and hold there was no evidence of a conspiracy,[360] while failing to examine Applicants' evidence on the same issue,[361] as shown above. The Tribunal thus provided manifestly contradictory reasons, which

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356 *See e.g.* Award, 22 December 2023, **A-0068**, paras. 452, 604, 605, 608, 610, 613.

357 See notably Claimants' Reply to Respondent's Counter-Memorial on the Merits and Claimant's Counter-Memorial on Jurisdiction, 28 February 2022, **A-0011**, pp. 58-70, paras. 171-207.

358 On the incorrect description of Russian regulations and reference to "Russian ban", *see* Award, 22 December 2023, **A-0068**, para. 91 ("*The 2015 Regulation did not address the catching of snow crab by non-Norwegian vessels on the Russian continental shelf. That remained lawful under Russian law until September 2016.*"), para. 273 ("*after the Russian ban came into effect. The Tribunal does not consider, however, that this attempt alters the basic fact that the North Star fleet had been fishing almost exclusively in the Russian sector of the Loop Hole until Russia enacted its ban.*"), as well as paras 491, 492, 493, 556.

359 *See e.g.*, Award, 22 December 2023, **A-0068**, paras. 297 ("*In the present case, the Monetary Gold principle limits the Tribunal's ability to deal with certain aspects of the Claimants' case but not others. To the extent that the Claimants argue that Norway has violated the BIT by, as they put it, conspiring with, or inciting, the Russian Federation to deprive the Claimants of their access to snow crab in the Loop Hole, that would require the Tribunal to determine that the Russian Federation had acted unlawfully, which the Tribunal cannot do. That aspect of the case appears to fall on the East Timor as opposed to the Nauru side of the line identified by the International Court of Justice.*"), 584 ("*The Tribunal doubts that it can adjudicate that inter-State dispute. On a purely textual basis, the position taken by Norway cannot be dismissed out of hand but neither can the different interpretation advanced by other parties to the Treaty.*").

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

361 See notably Claimants' Reply to Respondent's Counter-Memorial on the Merits and Claimant's Counter-Memorial on Jurisdiction, 28 February 2022, **A-0011**, pp. 58-70, paras. 171-207.

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

375. Fourth, and relatedly, the Tribunal, when finding that there was no conspiracy involving Norway and Russia, actually failed to state reasons for that finding.[362]

376. Fifth, the Tribunal also failed to state reasons regarding its factual statements or findings that there would have been a Russian ban of snow crab fishing in the Loophole,[363] which there never was.

377. Sixth, the Tribunal failed to state reasons as to why it could not hold one of the joint tortfeasors liable while still respecting the *Monetary Gold* principle. The *El Salvador v. Nicaragua* case cited above 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.

378. Seventh, the Tribunal provided contradictory reasons, by first stating it could not deal with several issues on the merits because of the *Monetary Gold* principle,[364] while nonetheless proceeding to hold that there was no evidence of a conspiracy between Russia and Norway.

379. Eighth, there are significant contradictions in the Tribunal's reasons regarding what caused Applicants' loss. The Tribunal held: [365]

> 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.

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362 Award, 22 December 2023, **A-0068**, para. 491 ("*It also rejects the conspiracy argument. There is no evidence that would suggest anything like a conspiracy between the two states.*") This statement is manifestly conclusory.

363 *See e.g.*, Award, 22 December 2023, **A-0068**, para. 493 ("*The real damage to North Star (and, by extension, to Sea & Coast) came about as a result of the September 2016 Russian ban on foreign vessels taking snow crab in the Russian part of the Loop Hole. While Norway understandably maintained close contact with Russia in relation to the snow crab stock in the Loop Hole, Norway cannot be held responsible for the actions of the Russian Federation.*") However, there never was such a ban.

364 *Ibid*., paras. 297-300, para. 584 ("*The Tribunal doubts that it can adjudicate that inter-State dispute. On a purely textual basis, the position taken by Norway cannot be dismissed out of hand but neither can the different interpretation advanced by other parties to the Treaty.*").

365 *Ibid*., para. 561.

380. The Tribunal says it cannot opine on the Russian Federation's liability but it says it is its fault. It also premises its reasoning on a "ban" which never occurred. And it fails to address Norway's necessary participation in what happened, and that the Russian Federation would and could never have acted alone. As such, not only must the whole section on expropriation be annulled, but the entire liability analysis, because it is entirely based on this erroneous, contradictory and manifestly incorrect premise.

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

381. 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.

382. The Tribunal clearly failed to state reasons why there was no denial of justice through the Norwegian Supreme Court's 2019 judgment refusing to examine the Svalbard Treaty as a court to avoid criminal liability for the fines.

383. The Award states: [366]

> So far as the claim for a substantive denial of justice is concerned, the Tribunal notes that the Norwegian Supreme Court in the Criminal proceedings did not hold that North Star's argument based on the Svalbard Treaty was not justiciable in a Norwegian court but that it had to be advanced in civil proceedings and not as a defence in a criminal case. A State is entitled to determine the means by which a particular issue may be litigated before its courts.

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

E. ACQUIRED RIGHTS

385. 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.

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366 Award, 22 December 2023, **A-0068**, para. 599.

386. The Tribunal held: [367]

> 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.

387. This reasoning and all its consequences must be annulled.

388. First, the Tribunal failed to properly address the fact the catches were in international water, not on any State's continental shelf.

389. Second, the Tribunal contradicted itself and failed to state reasons when taking the position that the fact a species is sedentary is a matter of law, which would justify considering the situation had always taken place on the continental shelf, rather than related to a change of situation. The Tribunal notably failed to explain away the EU and Russian position which does not seem to accord with the Tribunal's conclusion.[368]

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367 *Ibid.*, para. 531.

368 On the one hand the Tribunal states that a snow crab as a sedentary species is a matter of law: Award, 22 December 2023, **A-0068**, para. 459 ("*The Tribunal agrees with Norway that whether the snow crab is a sedentary species is a matter of law, namely whether it falls within the definition in Article 77(4), and that no designation is required.*"). On the other hand, the Tribunal fails to explain how this position is consistent with the EU position, cited extensively at para. 475 of the Award, which clearly states that the coastal state always wins on the dispute and/or determination regarding whether a species is sedentary or not. Such a statement by the EU clearly shows that the legal criteria are not necessarily objective, nor particularly legal. Further, the Tribunal refers, at para. 471 of the Award to a report by Mr. Terje Lobach of Norway's Directorate of Fisheries regarding a PECCOE meeting where it is clearly recognized, by the use of an exclamation mark in Mr. Lobach's report, that states assert that certain species are sedentary in circumstances where it clearly may not be the case, with the example of Russia asserting that prawns are sedentary: "*The EU had proposed to define prawns and snow crab as resources managed by NEAFC, including the obligations that follow from this regarding reporting etc. Both Russia and Norway said that they are still considering the status of snow crab and that it is very likely that it is to be defined as a sedentary species, and therefore will be under the jurisdiction of the coastal state in accordance with Article 77(4) of the Convention on the Law of the Sea. Russia put forward the same argument regarding prawns (!). PECCOE will therefore not submit proposals to the Commission regarding either prawns or snow crab.*"

390. Third, the distinction the Tribunal made between the Russian and Norwegian side of the Loophole leads to the Tribunal contradicting itself because it has also stated it was difficult to determine on which side of the Loop Hole catches were made.[369]

391. Moreover, the Tribunal fails to state reasons to explain the apparent lack of value of evidence adduced by Applicants which clearly shows that a State asserting continental shelf rights, and thus changing how a particular species is regulation, must compensate other affected States.[370]

F. ARBITRARY CONDUCT AND BAD FAITH

392. 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.

393. The Tribunal held: [371]

> Nor is there anything wrong with using its sovereign rights as a bargaining chip with the EU which has done the same in relation to marine resources in the continental shelves and EEZs of its Member States.
>
> [Emphasis added]

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

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369 *Ibid*., para. 528 ("*That Norway did not aggressively enforce its 2015 Regulations in its own sector of the Loop Hole is understandable in view of the difficulty of determining whether a catch had taken place there or in the Russian sector.*").

370 See notably Claimants' Reply to Respondent's Counter-Memorial on the Merits and Claimant's Counter-Memorial on Jurisdiction, 28 February 2022, **A-0011**, paras. 729-740, referring to: An Act to prohibit fishing in the territorial waters of the United States and in certain other areas by vessels other than vessels of the United States and by persons in charge of such vessels (Bartlett Act), 78 Stat. 194, 20 May 1964, **CL-0508**; Ko Nakamura, "*The Japan United-States Negotiations concerning King Crab Fishery in the Eastern Bering Sea*," Japanese Annual of International Law, 1965, **CL-0478**, pp. 36, 37, 44; Agreement effected by exchange of notes on Fisheries (King Crab), between Japan and the USA, 25 November 1964, **CL-0479**; Exchange of notes constituting an agreement concerning king and tanner crab fisheries in the eastern Bering Sea, between the USA and Japan, 24 December 1974, **CL-0480**; Exchange of notes constituting an agreement between the Government of Japan and the Government of the United States of America regarding the king and tanner crab fisheries in the eastern Bering Sea, 20 December 1972, **CL-0481**.

371 Award, 22 December 2023, **A-0068**, para. 543.

G. DISCRIMINATORY QUOTAS

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

396. The Tribunal held: [372]

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

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

H. ADMISSION OF INVESTMENT IN ACCORDANCE WITH NORWEGIAN LAW

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

399. The Tribunal held at paragraph 589 of the Award: [373]

> There are two difficulties with this argument. First, although Article III imposes a duty to accept a proposed investment, Article IX gives the Tribunal jurisdiction only with regard to a dispute concerning an existing investment.

400. The Tribunal added, in the same paragraph 589:[374]

> Secondly, both with regard to a proposed investment in the Norwegian sector of the Loop Hole and with regard to a proposed investment in the continental shelf around Svalbard, the proposed

372 *Ibid.*, para. 549.

373 *Ibid.*, para. 588.

374 *Ibid.*, para. 589.

> investment would not have been in accordance with the laws and regulations of Norway.

401. This is in manifest contradiction with what was stated a few paragraphs above, at paragraph 585, where it held:[375]

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

402. As such, at paragraph 589 the Tribunal should have assumed a breach of the Svalbard Treaty by Norway. Then it should have examined the effect of this breach through the lens of the Marine Resources Act which states that international treaties override inconsistent Norwegian law provisions. The Tribunal should have engaged in that analysis (where Applicants argue that this should have led to the licenses being valid under Norwegian law). However, rather than engaging in an analysis of Norwegian law – which the Tribunal definitely could and should have engaged with, both for jurisdictional purposes and liability purposes – the Tribunal invented, in paragraph 589, a false and contradictory reasoning by contrast to the premise of its analysis stated at paragraph 585.

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

I. FAILURE TO APPLY PROPER LAW ON THE MERITS

404. 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.

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375 *Ibid.*, para. 585.

405. In 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, stating: [376]

> whether a provision of one of those treaties is relevant to the determination of whether Norway has breached a provision of the BIT is not a matter on which it is safe to generalise; that question must be considered in the context of the specific facts and allegation raised. In addition, the Tribunal recalls that, in addressing the Respondent's First Objection to jurisdiction and admissibility (see paragraphs 288 and 298, above), it made clear that there were limits on the extent to which it could rule on a matter involving the rights and obligations of other States.

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

407. The Tribunal also fails to state reasons regarding why Applicants could not have benefitted from better treatment under other treaties.[377]

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

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

409. The Tribunal held: [378]

> 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. <u>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.</u>

410. One obvious benefit to the economy of Norway, which does not even require any evidence to establish, was that Norwegian ships could fish on the Russian side of the

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376 Award, 22 December 2023, **A-0068**, para. 449.

377 Award, 22 December 2023, **A-0068**, para. 428.

378 *Ibid.*, para. 570.

Loophole in exchange for allowing Russian ships fish on the Norwegian side, which they certainly did based on Norway's own evidence.[379]

VII. APPLICANTS HAVE THREE ANNULMENT GROUNDS IN RESPECT OF COSTS

411. The entire costs decision must be annulled because: a) the Tribunal awarded interested that was neither requested nor debated on Norway's costs award; b) the Tribunal stated contradictory reasons when awarding Norway more arbitration costs than it had claimed or paid; and c) the entire costs award must be annulled in the light of Applicants' other grounds for annulment.

412. First, the Tribunal awarded interest on the costs awarded in favour of Respondent even though Norway did not make such a request. The fact the Respondent requested the Tribunal to order *"such further or other relief as the Tribunal deems appropriate*"[380] is still no support for the Tribunal to award interest that was not sought. Awarding something not asked is not only a prohibited *ultra petita* ruling, but also prevents the party against whom such thing is awarded from being able to defend itself, and thus be heard, on that issue. The Tribunal awarded interest on its costs award of SOFR + 2%, compounded twice a year. The SOFR has been above 5% since June 2023 and is currently about 5.3%, which yields an annual interest of 7.3% on costs, which is substantial, especially as it would be compounded twice a year. Moreover, an award of compound interest is unusual in investment treaty awards. Had Norway made such a request, Applicants would have had much to say about it, but no such request was made, nor debated.

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

> 618. The Tribunal considers that it is only just that the unsuccessful Party should meet the entire costs of the arbitration. In the present case, those costs are as follows: …
>
> **Total:** **USD 597,307.04**

379 *See e.g.* Witness Statement of Karl Olav Kjile Pettersen, 27 June 2022, **A-0017**; Hearing Transcript Day 3, 2 November 2022, **A-0021**, pp. 41-68.

380 Respondent's Rejoinder and Reply on Jurisdiction, 30 June 2022, **A-0016**, para. 631.

> 619. These costs have been met by advance payments made on an equal basis by the Parties.
>
> 620. The Tribunal directs that the Claimants pay the Respondent the sum of **USD 597,307.04** to cover the entirety of the arbitration costs. Each Claimant shall be jointly and severally liable for the entirety of this sum.

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

> (3) ORDERS the Claimants to pay the sum of **USD 597,307.04** to the Respondent in respect of the arbitration costs, the Claimants to be jointly and severally liable to make this payment;

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

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

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

VIII. APPLICANTS' REQUEST FOR COSTS AND INTERESTS

418. Applicants request their full costs for submitting this annulment application. This includes both the *ad hoc* Committee's and/or ICSID costs and costs related to their representation.

419. Applicants will also request both pre- and post-Decision interest on its costs.

420. Applicants believe non-compound single interest on their costs, at a rate of Secured Overnight Financing Rate plus 1%, from the date of payment of the relevant costs, would be appropriate in the circumstances.

IX. APPLICANTS' REQUEST TO CROSS-EXAMINE MR. JERVELL AND MS. NYGÅRD AT THE HEARING

421. Applicants hereby request the authorization to cross-examine Mr. Kristian Jervell and Ms. Kristina Nygård at the hearing. Applicants would cross-examine Mr. Jervell and Ms. Nygård on: a) their role in the adoption of the measures affecting Applicants with respect to snow crab fisheries in the Barents Sea; b) the policy role of the legal department of the Ministry of Foreign Affairs of Norway in respect of the arctic and snow crab fisheries in the Barents Sea; and c) the conflicts of interest checks made by by Respondent and its advisors in the present case.

422. This request goes to establish that certain of Respondent's counsel, including its lead counsel, had personal involvement in the dispute. If this is not a standalone ground for annulment, then it may well explain why Respondent went on to hire, one after the other, external advisors with an actual or apparent conflict of interest, whether out of a reckless failure of Respondent to conduct conflicts of interests checks, or with the actual intention of gaining an improper advantage over Applicants in the arbitration.

423. In this section, Applicants explain: A) how legal counsel must have the requisite independence from the party it represents, including in ICSID proceedings; B) how Mr. Jervell and Ms. Nygård are not sufficiently independent from Respondent in the present case; C) how the Committee has the power order the cross-examination of Mr. Jervell and Ms. Nygård; and D) why the Committee should exercise its power to have Mr. Jervell and Ms. Nygård cross-examined at the hearing, and in respect of what matters.

A. LEGAL COUNSEL MUST HAVE REQUISITE INDEPENDENT FROM THE PARTY IT REPRESENTS, INCLUDING IN ICSID PROCEEDINGS

424. Again, it is well accepted that lawyers must have sufficient independence to represent their client.

425. Article 2.1 of the Code of Conduct for Norwegian Lawyers requires lawyers to act with independence and that they must not be "influenced by extraneous considerations".[381]

426. Independence of legal representatives is also recognized by the Code of conduct for European Lawyers as developed by the Council of Bars & Law Societies of Europe (CCBE). Article 2.1.1 of the CCBE code provides that lawyers must act with "absolute independence" and in a way that is free of any personal interest: [382]

> *The many duties to which a lawyer is subject require the lawyer's absolute independence, free from all other influence, especially such as may arise from his or her personal interests or external pressure. Such independence is as necessary to trust in the process of justice as the impartiality of the judge. A lawyer must therefore avoid any impairment of his or her independence and be careful not to compromise his or her professional standards in order to please the client, the court.*

427. The principle of independence of lawyers is also recognized by the International Principles on Conduct for the Legal Profession of the International Bar Association (IBA). The first principle states a lawyer must "maintain independence" and must "exercise independent, unbiased professional judgment in advising a client".[383]

428. As for the CJEU, in applying Article 19 of its Statute, which requires agents, advisers and lawyers' to perform an "independent exercise of their duties",[384] it has held that a lawyer must be free from "external pressure or by virtue of any other conflict of interest that is obviously discernible at the level of a reasonable hypothesis based on the given type of (present or past) relationship between the lawyer and the represented party."[385] As such, a "personal connection" or "interests" that could alter a lawyer's capacity to act with full integrity and independence must be given due regard when assessing whether a lawyer is sufficiently distant from his case and client to provide independent legal advice. [386]

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381 Code of Conduct for Norwegian Lawyers, **AL-0151**.

382 Council of Bars & Law Societies of Europe (CCBE), Code of conduct for European Lawyers, 2019, **AL-0152**.

383 IBA, International Principles on the Conduct for the Legal Profession, 28 May 2011, **AL-0153**.

384 Protocol (No 3) on the Statute of the Court of Justice of the European Union, 2016, **AL-0154**.

385 CJEU, *Uniwersytet Wrocławski v. Research Executive Agency (REA)* and *Republic of Poland v. Uniwersytet Wrocławski, Research Executive Agency (REA)*, Joined Cases C-515/17 P and C-561/17 P, Opinion of Advocate General, 24 September 2019, **AL-0155**, para. 144.

386 CJEU, *BikeWorld GmbH v. European Commission*, Case T-702/15, 20 November 2017, Order of the General Court (First Chamber), **AL-0156**, paras. 36-42.

B. MR. JERVELL AND MS. NYGÅRD ARE NOT SUFFICIENTLY INDEPENDENT FROM RESPONDENT IN THE PRESENT CASE

429. Respondent's lead counsel and most senior lawyer at the Ministry of Foreign Affairs, its Director General of the Legal Department, Mr. Kristian Jervell, played a key role in elaborating and adopting the restrictive national measures that deprived Applicants of their licenses and thus of their investment in Norway.[387] It also appears that Kristina Nygård, international law advisor at Norway's Ministry of Foreign Affairs, was also involved in the measures that led to the destruction of Applicants' investment in Norway. [388]

430. The relevant emails dating from September 2014 to November 2016, and produced by Norway in the underlying arbitration, show the following:

- On 22 September 2014, Therese Johansen, an international law adviser at the Ministry of Foreign Affairs writes to Kristina Nygård, another international law adviser, to ask whether the snow crab is a sedentary species (**C-192**);

- On 7 October 2014, Therese Johansen writes to Kristina Nygård to enquire about Russia's extended continental shelf submission at the UN to see what assumptions Russia may have been in respect of the snow crab being a sedentary species or not (**C-191**);

- On 5 November 2014, Kristina Nygård writes to Christine Finbak, an international law adviser at the Ministry of Foreign Affairs, with Kristian Jervell in copy, providing international law sources that may support the view that the snow crab is a sedentary species (**C-190**);

- On 24 June 2015, Christine Finbank writes to Elisabeth Gabrielsen to suggest a call with Kristian Jervell to discuss how to amend the Marine Resources Act

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387 For emails in 2014 and 2015 addressed to, from or in which Mr. Jervell and/or Ms. Nygård were in copy, on the issue of Norway's strategy to exclude EU crabbers from the Barents Sea fisheries, see *eg* Email from C. Finbak to E. Gabrielsen**,** 24 June 2015, **C-187**; Email from K. K. Nygård to C. Finbak, 5 November 2014, **C-190**; Email from T. Johansen to K. K. Nygård, 7 October 2014, **C-191**; Email from T. Johansen to K. K. Nygård, 22 September 2014, **C-192**; Internal note of the Norwegian government, 16 November 2016, **C-194**.

388 For emails in 2014 and 2015 addressed to, from or in which Mr. Jervell and/or Ms. Nygård were in copy, on the issue of Norway's strategy to exclude EU crabbers from the Barents Sea fisheries, see *eg* Email from C. Finbak to E. Gabrielsen**,** 24 June 2015, **C-187**; Email from K. K. Nygård to C. Finbak, 5 November 2014, **C-190**; Email from T. Johansen to K. K. Nygård, 7 October 2014, **C-191**; Email from T. Johansen to K. K. Nygård, 22 September 2014, **C-192**; Internal note of the Norwegian government, 16 November 2016, **C-194**.

to include the snow crab as a sedentary species as the matter would now have been decided (**C-187**);

- On 16 November 2016, Ingrid Vikanes, of the Ministry of Trade, Industry and Fisheries, wrote to Kristian Jervell to ask for advice on how to address certain issues during the annual NEAFC meeting in relation to bilateral discussions with the EU on snow crab (**C-194**).

431. There is therefore no question that Mr. Jervell and Ms. Nygård participated in the adoption of the measures that deprived Applicants of their investment in Norway. When acting as counsel, they are, in essence, defending their own work.

432. Furthermore, it is Applicants' understanding that policy with respect to the arctic and the law of the sea, within the Norwegian Ministry of International Law, is conducted by the legal department. As such, Mr. Jervell and Ms. Nygård were basically instructing themselves. Also, Mr. Jervell, at the time (between 2012 and 2017), was Director and Head of Section for Law of the Sea, Environmental and Treaty Law, and would thus have been the person directly responsible for matters related to Applicants' claim.

C. THE COMMITTEE HAS THE POWER TO ORDER THE CROSS-EXAMINATION OF MR. JERVELL AND MS. NYGÅRD

433. It is well established that an *ad hoc* Committee, like an ICSID arbitral tribunal, can "request" a party to present evidence, whether in the form of documents or witnesses.

434. The Committee has the power to do so notably under Article 43 of the ICSID Convention, which provides:

> *The tribunal may, if it deems it necessary at any stage of the proceedings, (a) call upon the parties to produce documents or any other evidence [...]*

435. According to the leading treatise on the ICSID Convention: [389]

> *There is no doubt that witness testimony is covered by the Convention's term 'other evidence' … Since the tribunal has no power to subpoena witnesses, their appearance will normally be arranged by the parties … The Tribunal may*

[389] "Article 43" in C. Schreuer and others, 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, 3rd ed., Vol. II, Cambridge University Press, 2022, **AL-0157**, p. 934, para. 109; *see also Champion Trading v Egypt*, ICSID Case No. ARB/02/9, Award, 27 October 2006, **AL-0158**, paras 15-16; *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, **AL-0159**, paras 26, 27.

however request the parties to produce witness on its own motion or following a party's request.

436. Various ICSID tribunals have called on parties to present witnesses. [390]

437. Applicants respectfully request that the Committee do so in respect of both Mr. Jervell and Ms. Nygård.

D. WHY THE COMMITTEE SHOULD EXERCISE ITS POWER TO HAVE MR. JERVELL AND MS. NYGÅRD CROSS-EXAMINED AT THE HEARING

438. Applicants believe it is necessary to call Mr. Jervell and Ms. Nygård to be cross-examined.

439. This will allow to ascertain their exact involvement in the dispute, in the light of exhibits **C-187**, **C-190**, **C-191**, **C-192** and **C-194**. It is necessary to ascertain their involvement in the dispute to see what is at play for them in the outcome of the dispute. It is also necessary to ascertain whether and how they were involved in hiring Glimstedt, Wikborg Rein and KPMG AS, and what they knew their conflicts of interest, and whether conflicts of interest checks were conducted and why.

440. We now know, following Norway's failure to produce any documents responsive to request 1 of the second round of document production, that the Ministry of Foreign Affairs had no guidelines for conflicts of interest. This may or may not because legal officers of the Ministry of Foreign Affairs are not lawyers called to the Norwegian bar and who, as such, may not be able to invoke legal privilege, despite the fact this has been done (perhaps improperly) in response to Applicants' requests for document production. Those are all matters which are necessary to clarify under cross-examination.

441. These issues go to notably to the equality of the parties in the proceedings, which Applicants believe was fundamentally tilted in a manner that rendered the proceedings unfair, both because of the repeat conflicts of interest, and because of the lack of independence of Norway's counsel.

390 *Ibid*.

X. CONCLUSION AND PRAYER FOR RELIEF

442. In addition to calling Mr. Jervell and Ms. Nygård for cross-examination in respect of the issues raised in the immediately preceding section, and for the reasons set out above, the Applicants request:

- That the *ad hoc* Committee annul the Award in full;
- Subsidiarily, that the *ad hoc* Committee annul the parts of the Award that are inconsistent with Article 52 of the ICSID Convention;
- That Applicants be granted their costs advanced to pay for the present proceedings before the *ad hoc* Committee;
- That Applicants be granted their costs of representation in the present proceedings;
- That Applicants be awarded pre-decision single, non-compound single interest on their costs at a rate of Secured Overnight Financing Rate plus 1% from the date of payment of the relevant costs;
- That Applicants be awarded post-decision single, non-compound interest on their costs until payment by Respondent at a rate of Secured Overnight Financing Rate plus 1% from the date of the Decision;
- That the *ad hoc* Committee grant any other remedy it deems just.

8 July 2025

Respectfully submitted

[signed]

Mr. Pierre-Olivier Savoie
Ms. Jessica Joly Hébert
Savoie Arbitration, s.e.l.a.s.u.
26 bis, rue Vignon

75009 Paris
France
T +33 1 86 64 17 48
M +33 6 14 37 23 19
F +33 1 76 54 32 57

pierre-olivier.savoie@savoiearbitration.com
jessica.joly.hebert@savoiearbitration.com

[signed]

Professor Mads Andenas KC
University of Oslo
Domus Media
Karl Johans Gate 47
0162 Oslo
Norway
mads.andenas@jus.uio.no