THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE NO. ARB/20/11

PETERIS PILDEGOVICS AND SIA NORTH STAR

CLAIMANTS

v.

THE KINGDOM OF NORWAY

RESPONDENT

CLAIMANTS' REPLY TO RESPONDENT'S COUNTER-MEMORIAL ON THE MERITS AND CLAIMANTS' COUNTER-MEMORIAL ON JURISDICTION

28 FEBRUARY 2022

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I. INTRODUCTION

1. In July 2015, Norway reached an agreement with Russia that fundamentally altered the legal regime applicable to the lucrative snow crab fishery in the area of the Barents Sea known as the "Loophole". Up to that point in time, the Loophole snow crab fishery had been treated by all participating States as a high seas fishery under the purview of the North East Atlantic Fisheries Commission (NEAFC). This meant that the fishery was not under the sovereign jurisdiction of the coastal States, Norway and Russia.

2. Norway and Russia's July 2015 agreement reversed this state of affairs by designating snow crab as a sedentary species. This was no trifling change. It meant an abrupt and unexpected reversal of the legal regime that applied to the Loophole snow crab fishery. It had the effect of "closing the commons" and appropriating the snow crab resource for the exclusive benefit of the coastal States.

3. The documents that Norway produced in this proceeding show that Norway made the decision to close the commons knowingly. Knowing that it was a radical change from the position that Norway had taken before. Knowing that the change of position would have the effect of banning the Claimants' vessels from the lucrative snow crab fishery. Knowing that all of this meant that the fishery would then be reserved for Norwegian vessels and nationals.

4. The consequence of this about-face was the complete destruction of the Claimants' integrated snow crab fishing business in Norway.

5. The Claimants invested in Norway and built their business there on the clear understanding that the snow crab resource upon which it depended could be fished in international waters, beyond any State's fisheries jurisdiction. This was Norway's clear position at the time, as it had confirmed to the Claimants' joint venture partner. This position was broadly known to all participants in the fishery.

6. Norway declared for the first time in July 2015 that snow crab should be treated as a sedentary species of its continental shelf, over which it could assert sovereign rights. This declaration marked a deliberate change in Norway's position. The record shows that, at Russia's invitation, Norway had begun considering such a change merely a few months earlier, in November 2014. Before then, Norway had consistently treated the snow crab (and crustaceans more generally) as a non-sedentary species.

7. What is remarkable in this case is that Norway denies that a change of legal regime even took place. Despite all the evidence to the contrary in its own documents, Norway maintains that, *"since the 1950s*", it has "*always considered snow crab to be sedentary*".[1] This is an attempt at revisionist history intended to rewrite the narrative of the Barents Sea snow crab fishery to match Norway's current conception of the scope of its jurisdiction and support its defence in this case. It is a tale spun by its lawyers: Norway has not put forward any official from its Ministries of Fisheries or Foreign Affairs, or indeed any fact witness at all, to defend before this Tribunal the story its lawyers tell in its Counter-Memorial.

8. According to Norway's revisionist version of events (in which snow crab was "*always*" a species of its continental shelf over which it asserted sovereign rights), the Claimants "*never*" had the right to fish for snow crab in the Loophole.[2] As Norway would have it, at best, the Claimants were adventurers who exploited a regulatory gap and made a failed investment based on a resource to which they never had legal access. At worst, they were "*poachers*" of a valuable Norwegian resource.[3]

9. Consistent with this attitude, Norway systematically refused to recognize the legitimacy of the Claimants' fishing activities. It acted purposefully to destroy their investment in Norway: by banning the Claimants from the Loophole snow crab fishery and refusing to acknowledge their right to fish in the Svalbard zone; by rejecting their applications for dispensations from the ban, while granting them to Norwegian and Russian vessels; by dismissing any effort to recognize the Claimants' acquired rights or to find a reasonable compromise that would allow them to keep their business afloat; by prosecuting them before its courts; and by denying them justice.

10. Norway did all this for a discriminatory political motive: to favour the expansion of the snow crab population in areas under its jurisdiction (all the while ignoring the detrimental impact of this policy on the Barents Sea ecosystem), in order to lay the foundation for the development of a prosperous fishery reserved for its nationals. The Claimants have paid the price of Norway's ambitions in the form of the complete loss of their investment in Norway.

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1 Respondent's Counter-Memorial, 29 October 2021, para. 753.

2 *Ibid*., para. 295.

3 Per Sandberg, "*Snow crab and poaching on the Norwegian shelf*," Regjeringen.no (Ministry of Foreign Affairs), 23 April 2018, **C-0242**.

11. By treating the Claimants' investment in Norway in this manner, Norway has breached its commitments under the Norway—Latvia BIT. It has failed to accord the Claimants' investments in Norway equitable and reasonable treatment and protection. It has indirectly expropriated those investments. It has failed to accord to them most favoured nation treatment.

12. Despite Norway's efforts to deflect attention from the issues in question, this case is not about the existence or scope of Norway's jurisdiction in the Loophole or the Svalbard area under public international law. Rather, this case is about Norway's treatment of the Claimants' investment in choosing how to exercise its jurisdiction (as Norway now asserts it). It is about how that treatment breached Norway's obligations to the Claimants pursuant to the BIT.

13. Given the Tribunal's decision to bifurcate the proceedings, this Reply and Counter-Memorial on Jurisdiction addresses only the questions of jurisdiction and merits.[4] The Claimants reserve the right to respond to Norway's Reply on Jurisdiction. They further reserve the right to respond to the submissions on reparation made in Norway's Counter-Memorial, and to supplement their position on reparation in the next phase of the proceedings, following the Tribunal's decision on jurisdiction and the merits.

14. This Reply and Counter-Memorial on Jurisdiction is structured as follows:

    (a) **Part II** is an array of photographs depicting the Claimants' investments in Norway;

    (b) **Part III** discusses the five main areas of disagreement between the parties with respect to the facts of this case:

        (i) Norway's radical change of position regarding the scope of its fisheries jurisdiction in the Loophole (Section A);

        (ii) Norway's contention that the Claimants' snow crab catches were made "on the Russian continental shelf" (Section B);

        (iii) the political aims pursued by Norway's snow crab regulations (Section C);

[4] Procedural Order No. 5, 6 December 2021.

(iv) Norway's argument that the Claimants are not the "*real*" investors in this case (Section D); and

(v) the existence and effect of the joint venture between Mr. Pildegovics and Mr. Levanidov (Section E).

(c) **Part IV** discusses the law applicable to this arbitration. It is divided into two sections:

(i) the first discusses the law applicable to jurisdiction (Section A); and

(ii) the second discusses the law applicable to the merits (Section B).

(d) **Part V** replies to Norway's arguments presented as objections to the Tribunal's jurisdiction. In reality, these arguments contain both jurisdictional objections and objections to the admissibility of certain claims. These are distinguished and addressed in separate sections:

(i) the first section replies to Norway's jurisdictional objections (Section A); and

(ii) the second section replies to Norway's admissibility objections (Section B).

(e) **Part VI** sets out Norway's violations of the BIT and replies to Norway's arguments regarding them:

(i) the first section establishes that Norway breached its obligation to accord equitable and reasonable treatment and protection to the Claimants' investment, contrary to Article III of the BIT (Section A);

(ii) the second section demonstrates that Norway unlawfully expropriated Claimants' investment, contrary to Article VI of the BIT (Section B); and

(iii) the third section shows that Norway breached its obligation to accord most favoured nation treatment to the Claimants' investment, contrary to Article IV of the BIT (Section C).

(f) **Part VII** presents the Claimants' prayer for relief.

15. In support of this Reply, the Claimants submit second witness statements and expert reports from:

(a) ***Peteris Pildegovics***: Mr. Pildegovics submits a second witness statement that addresses his understanding of Norway's change of position on the characterization of snow crab as a non-sedentary or sedentary species, the context in which certain loans to North Star were made, and the context of the location of North Star's catches within the Loophole. It is accompanied by exhibits **PP-0222** to **PP-0228**.

(b) ***Kirill Levanidov***: Mr. Levanidov submits a second witness statement that provides context about his involvement in helping secure loans for North Star and how his company Link Maritime took over some of these loans. The statement is accompanied by exhibits **KL-0052** to **KL-0063**.

(c) ***Dr. Anders Ryssdal***: Dr. Ryssdal submits an addendum to his expert report of 10 March 2021, which responds to Norway's criticism of his initial expert report on the existence and effect of a joint venture in Norway between Mr. Pildegovics and Mr. Levanidov and confirms his initial conclusions. It is accompanied by exhibits **AR-0024** to **AR-0028**.

(d) ***Dr. Brooks Kaiser***: Dr. Kaiser submits an addendum to her expert report of 11 March 2021, which addresses Norway's allegation that its snow crab management is based on the precautionary principle as well as whether from her perspective as an interested scientist Norway changed its position on whether the snow crab is a non-sedentary or sedentary species. It is accompanied by exhibits **BK-0056** to **BK-0064**.

II. PHOTOGRAPHS OF THE CLAIMANTS' INVESTMENTS IN NORWAY

Figure 1 – North Star's vessels Senator and Solvita docked at Seagourmet's factory, Båtsfjord, Norway **(PP-0150)**

[5]

[5] Annex 1 to Second Witness Statement of Peteris Pildegovics. 28 February 2022.

Figure 3 – Snow crabs being unloaded from North Star's vessel Solvita for processing[6]

Figure 4 – Snow crabs being washed and sorted onboard North Star's vessel Senator[7]

[6] Annex 1 to Second Witness Statement of Peteris Pildegovics. 28 February 2022.

[7] *Ibid.*

Figure 5 – Peteris Pildegovics (first left), Mr. Indulus Abelis, Latvia's Ambassador to Norway (third left), Båtsfjord Mayor Geir Knutsen (center, wearing a medal) and members of the Båtsfjord community standing on Seagourmet's dock at the official inauguration, in June 2015. North Star's vessel Saldus is in the background. (**PP-0145**).

Figure 6 – Latvia's Ambassador to Norway, Mr. Indulus Abelis, giving a speech at the official inauguration of Seagourmet's Båtsfjord factory, in June 2015 (**PP-0145**). Ambassador Abelis attended the inauguration at Mr. Pildegovics' invitation, in recognition of Mr. Pildegovics' and North Star's involvement in the project.[8]

[8] First Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 136-38.

Figure 7 – A smiling Elisabeth Aspaker (center), Norway's then-Minister of Fisheries, flanked by Mr. Pavel Kruglov, Seagourmet's General Manager (to her left) and Båtsfjord Mayor Geir Knutsen (to her right), standing on Seagourmet's dock in front of Solveiga, 8 September 2015 (**C-0080**)

Figure 8 – Co-branded kiosk at the Global Seafood Forum in Brussels attended by Mr. Pildegovics and Mr. Levanidov, hosting customers and contacts in a boat-shaped booth marked "Solvita SIA North Star Ltd.", April 2015 (**PP-0058**)

Figure 9 – Kirill Levanidov and Sergei Ankipov at the Global Seafood Forum in Brussels, together with a chef demonstrating the gourmet nature of the snow crab product to potential customers, April 2015 (**PP-0058**)

Figure 10 – Co-branded kiosk at the Seafood Expo Asia trade fair in Hong Kong, featuring Seagourmet's crab claw-shaped logo and North Star's vessel Solveiga, September 2015 (**PP-0147**).

Figure 11 – Senator arrested by the Norwegian Coast Guard, Port of Kirkenes, Norway, May 2017 (**KL-0050**).

Figure 12 – After Norway banned North Star from the snow crab fishery, Seagourmet's factory came to a halt, as illustrated by this picture of the factory floor in May 2017 (**KL-0050**).

III. FACTS

16. There are five main areas of disagreement between the parties as regards the facts of this case.

17. The first relates to the evolution of Norway's conception of the scope of its jurisdiction over the snow crab fishery in the Barents Sea **(A)**. The Claimants' core submission is that in July 2015, Norway changed its position as to the characterization of snow crab and began designating it as a sedentary species, in order to expand its fisheries jurisdiction and close the Loophole fishery to EU crabbers. Norway disputes this and insists that "*snow crab is, and has always been, a sedentary species subject to the exclusive jurisdiction of the continental shelf State*".[9]

18. The second relates to Norway's repeated assertion that the Claimants' snow crab catches were made "*on the Russian continental shelf*" **(B)**. The Claimants' position in this regard can be summarized as follows:

    (a) Norway's version of events ignores the fact that, when the Claimants made their catches, the snow crab fishery of the Loophole was treated as an *international water fishery* outside any state's jurisdiction. As such, the entire Loophole was open to crabbers from all NEAFC Member States, at a time when no such Member State had taken the view that the snow crab was a species subject to their continental shelf jurisdiction. Vessels were therefore free to fish for snow crabs anywhere in the Loophole, in such locations they considered most promising;

    (b) Norway's submissions regarding the precise location of the Claimants' catches are based on so-called "*analyst reports*",[10] which are in fact unattributed and unsigned opinion pieces that could only have been tendered as expert reports. As such, these reports have no evidentiary weight; and

    (c) In any event, the location of the Claimants' historical catches in the Loophole has no bearing on the outcome of this case. The facts show that Norway and Russia acted in concert to close the Loophole's snow crab fishery to EU vessels. Even accounting for Russia's closure of the part of the Loophole suprajacent to its continental shelf, the Claimants would have been able to

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9 Respondent's Counter-Memorial, 29 October 2021, para. 76.

10 *Ibid*., para. 142; **R-0151**; **R-0152**; **R-0153**; **R-0154**; **R-0155**.

make their catches in other fishing areas for which they held licences, from which Norway had excluded them.

19. The third relates to the political aims pursued by Norway's snow crab regulations. Norway asserts that these regulations were inspired by a "*precautionary approach*".[11] The Claimants maintain the opposite. Norway's policies, including the imposition of artificially low quotas and the exclusion of EU vessels from the fishery, are not precautionary, but seek to appropriate the resource for Norway's fishing industry and to favor its exponential growth, despite the detrimental impacts on the ecosystem **(C)**.

20. The fourth relates to the Claimants' role as investors and rightful owners of the investments at issue in this case **(D)**. Norway concedes that Mr. Pildegovics is a Latvian national and that North Star is a legal person incorporated under the laws of Latvia. However, it argues that the Claimants are not the "*real*" investors in this case, but a mere façade for Mr. Kirill Levanidov.[12] The Claimants refute this characterization, which is exposed for what it is: a fiction invented to suit Norway's case theory.

21. The fifth relates to the joint venture concluded between Mr. Pildegovics and Mr. Levanidov, which is one of the assets composing the Claimants' investment at issue in this case **(E)**. Norway disputes that a joint venture ever existed, while the Claimants maintain that its existence cannot reasonably be doubted.

A. THE RADICAL CHANGE IN NORWAY'S POSITION REGARDING THE SCOPE OF ITS FISHERIES JURISDICTION IN THE LOOPHOLE

22. Norway contends that, since 1958, it has "*consistently*" considered the snow crab as a sedentary species subject to the sovereign rights of the coastal State.[13] Norway repeatedly asserts that it has never changed its position regarding the characterization of snow crab and its legal consequences.[14] "*Norway at no point* changed *its position on the designation of snow crab as a sedentary species (which position has been consistent for decades)*".[15] Norway now goes so far as to assert that the snow crab's allegedly sedentary nature is "*blindingly obvious*".[16]

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11 Respondent's Counter-Memorial, 29 October 2021, paras. 76, 586-588.

12 *Ibid*., para. 392.

13 *Ibid*., para. 48.

14 *Ibid*., paras. 113, 565, 583.

15 *Ibid*., para. 749.

16 *Ibid*., para. 474.

23. Norway's position on this issue is perhaps best summarized in paragraph 753 of its Counter-Memorial:

> *There was no lack of transparency or candour about Norway's position regarding snow crab. Norway has since the 1950s always considered snow crab to be sedentary. The Claimants' argument on the so-called 'Malta Declaration', i.e. the Agreed Minutes, is predicated upon the premise that Norway changed its position. That is wrong.*[17]

24. It can hardly be overstated that the designation of the snow crab as a sedentary species is of critical importance to Norway's case. Indeed, it is the sole legal basis on which Norway can hope to justify its exercise of sovereign jurisdiction over the Loophole's snow crab fishery, upon which it relied to ban North Star's vessels.

25. Yet, even considering for the sake of argument that Norway's characterization is correct (which remains controversial both biologically and legally, and which the Claimants do not concede[18]), the record unmistakably shows that Norway adopted this characterization no earlier than July 2015, and that it did so without any serious scientific basis, for the discriminatory purpose of excluding EU-flagged snow crab fishing vessels from the Loophole.

26. The Tribunal may have noticed that Norway's Counter-Memorial systematically refers (522 times) to the snow crab as a species that is caught or "*harvested*" from a coastal state's continental shelf. Thus, Norway states that "*the first reported catch of snow crab in the Barents Sea was on the Russian continental shelf in 1996*"[19] and that "*the first reported catch of snow crab on the Norwegian continental shelf occurred in the spring of 2003*".[20] The word "*fishing*" does not once appear in Norway's Counter-Memorial to describe the capture of snow crabs.

27. Norway pushes its semantic zeal to the point where it has filed English translations of Norwegian documents where the Norwegian verb "*å fiske*" is (incorrectly) translated

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17 Respondent's Counter-Memorial, 29 October 2021, para. 753.

18 Claimants' Memorial, 11 March 2021, para. 105.

19 Respondent's Counter-Memorial, 29 October 2021, para. 40.

20 *Ibid*., para. 42.

as "*to harvest*",[21] when the correct English translation of this verb is "*to fish*" ("*to harvest*" would be "*å høste*").[22]

28. While the Respondent's current choice of words is certainly consistent with its submission that snow crab has "*always been*" a sedentary species,[23] it also subtly conceals the fact that Norway began to refer to snow crab as being "*harvested*" from the "*continental shelf*" only in the latter half of 2015 – after the Malta Declaration of July 2015. Before that point in time, Norwegian authorities (and Norwegian laws) usually referred to snow crab as being "fished" in "waters": either territorial waters under Norwegian fisheries jurisdiction, or international waters outside of it.[24]

29. This linguistic change is not accidental, nor is it insignificant. It is one of many illustrations of what has been clear to all observers of the Barents Sea snow crab fishery: that Norway and Russia together have orchestrated a change in the legal regime applicable to the Loophole, with the transparent goal to seize control over a snow crab fishery considered until then to fall under the regime of the high seas, and to exclude all European participants, including the Claimants, from this fishery. This change of regime has been described in the academic literature as a "*closure of the commons*" by Norway and Russia.[25]

30. By seeking to re-characterize the snow crab as a sedentary species that is "*harvested*" from the continental shelf instead of "*fished*" from the sea, Norway and Russia saw an opportunity to expand their fisheries jurisdiction to encompass the Loophole, at a time when the snow crab fishery was poised to become highly attractive from a commercial standpoint. This required a change in the practice of both States, which can neither be hidden nor denied.

31. As the record clearly shows, Norway's current position that the snow crab is a sedentary species was initially suggested by Russia in the autumn of 2014 and

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21 Compare, for example, **R-0013-NOR 2014-10-17** ("15 fartøy (NOR-RUS-LIT-ESP) fisket etter snøkrabbe i smutthullet i sept 2014") with **R-0014-ENG 2014-10-17** ("15 vessels (NOR-RUS-LIT-ESP) harvested snow crab in the Loop Hole in Sept 2014").

22 Willy A. Kirkeby, *Engelsk blå ordbok: engelsk–norsk / norsk–engelsk* (3rd edn, Kunnskapsforlaget 1996) "**fiske** (*vb*) fish; angle (for fish)", p. 112 and "**å høste** (*vb*) harvest, reap, p. 199, **C-0282**.

23 Respondent's Counter-Memorial, 29 October 2021, para. 76.

24 Claimants have requested production of "any and all documents predating July 2015 generated by Norway referring to snow crab fishing or "harvesting" in the Loophole as an activity taking place "on the continental shelf" of either Norway or the Russian Federation" (Claimants' Redfern Schedule, 16 November 2021, Request No. 33). Norway has failed to produce any responsive document.

25 **C-0070**, p. 10; Presentation by B. A. Kaiser, L. M. Fernandez, M. Kourantidou, November 2016, slide 16, **C-0240**.

adopted by Norway in July 2015. Norway's change of position was formalized in an agreement between the two States reached at Valletta, Malta, which constituted Norway's first ever official statement declaring snow crab to be sedentary.[26] The "*agreed minutes*" signed on that occasion did not record a mere "*confirmation*" of an earlier position (as alleged by Norway[27]) but reflected the adoption of a *new* position by Norway, which prefigured a fundamental change of legal regime.

32. Before July 2015, Norway treated snow crab as a species of the water column which could be "fished", not "harvested": *i.e.*, a non-sedentary species. This meant that the Loophole snow crab fishery was governed by the regime of the high seas, under the jurisdiction of NEAFC. As late as May 2015, Norwegian media reported that "*the snow crab is managed as a fishing resource when Norwegian and European fishermen fish snow crab in the Loophole*".[28]

33. The record shows that Norway changed its position regarding the designation of the snow crab and the legal regime applicable to this fishery. This is shown by an examination of the following episodes and evidence:

(a) Norway's representations to the Claimants' joint venture partners predating July 2015, before the Claimants decided to make their investments in Norway and as these investments were being planned (**a**);

(b) Contemporaneous documents of the Norwegian government, which show that Norway began considering the possibility of designating the snow crab as a sedentary species in the autumn of 2014, and that Norway still as late as June 2015 had not adopted the position that it should be so characterized (**b**);

(c) The evolution of Norway's position with regard to NEAFC's jurisdiction over the Loophole snow crab fishery (**c**);

(d) The evolution of Norway's domestic legal framework applicable to the snow crab fishery (**d**); and

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26 Claimants have requested production of "Any and all documents recording any official or public communication of Norway's position concerning the sedentary or non-sedentary nature of snow crab predating 17 July 2015" (Claimants' Redfern Schedule, 16 November 2021, Request No. 6). Norway has failed to produce any responsive document.

27 Respondent's Counter-Memorial, 29 October 2021, paras. 50, 564-565.

28 "*Fishing valuable snow crab on the wrong side of the border*," Nord24, 25 May 2015, **C-0234**. [emphasis added].

(e) Norway's coordination with Russia, which reveals the discriminatory motive pursued by Norway in seeking to change the characterization of snow crab (**e**).

34. The Claimants then respond to Norway's argument that the positions it adopted at the 1958 Geneva Conference on the Law of the Sea show that it has "*for decades*" "*consistently*" considered snow crab to be sedentary.[29] Upon closer review, the positions adopted by Norway at that Conference prove the opposite of what Norway is claiming in the present arbitration (**f**).

35. Finally, the Claimants answer Norway's argument that their fishing activities from 2014 to 2016 amounted to nothing more than the "*exploitation*" of a legislative gap (**g**).

a. Norway's Representations to the Claimants' Joint Venture Partners

36. In May 2013 and July 2014, Mr. Levanidov's company Ishavsbruket (later renamed Seagourmet) made enquiries with the Norwegian Directorate of Fisheries in order to obtain all necessary confirmations regarding the legal framework applicable to the Loophole snow crab fishery.[30]

37. The following was communicated to Ishavsbruket by Norway's Directorate of Fisheries:

(a) Norway considered the Loophole's snow crab fishery as taking place in "*international waters*", "*outside any state's fisheries jurisdiction*";[31]

(b) Vessels could "*catch snow crab in international waters*" following registration with "*the NEAFC Secretariat in London*";[32] and

(c) Vessels flying an EU flag could land snow crab in Norway "*on an equal footing with Norwegian fishing vessels*", provided that "*the crab [had] been caught outside the Norwegian Economic Zone*".[33]

38. Despite Norway's attempts to argue otherwise, the exchanges between the Directorate and Ishavsbruket clearly show that Norway did not consider that it had jurisdiction over the Loophole's snow crab fishery.

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29 Respondent's Counter-Memorial, 29 October 2021, para. 749.

30 Claimants' Memorial, 11 March 2021, paras. 186-197.

31 **KL-0016**, **KL-0017**, **KL-0018**.

32 **KL-0017**.

33 **KL-0020**.

39. In June 2013, Ishavsbruket's representative, Mr. Sergei Ankipov, enquired about "*fishing for snow crab*" in the "*NEAFC area*",[34] an area of the high seas beyond state jurisdiction. The Directorate gave the following response:

> *The attached regulations for registration and reporting when fishing in waters outside any state's fisheries jurisdiction are sent for information.*
>
> *As stated in § 2, vessels that are to fish in waters outside any state's fisheries jurisdiction must be registered through notification to the Directorate of Fisheries. Attached is the registration form that can be used.*
>
> *The registration notification will be processed and information about the vessel will be sent to the NEAFC Secretariat in London.*[35]

40. By its plain terms, this response to Ishavsbruket proves that Norway's Directorate of Fisheries did not consider "*fishing for snow crab*" in the "*NEAFC area*" as falling within Norway's fisheries jurisdiction. Norway's argument that the email was "*applicable to Norwegian vessels only*"[36] misses the point: the Directorate (and the regulations it sent to Mr. Ankipov) stated that the Loophole's snow crab fishery was not one falling within Norwegian fisheries jurisdiction. It was a fishery in "*waters outside any state's fisheries jurisdiction*", thus a fishery which no single State could purport to regulate.

41. Norway then selectively quotes from a subsequent exchange between Mr. Ankipov and the Directorate of Fisheries in an apparent attempt to diminish the importance of these communications.[37]

42. In July 2014, Mr. Ankipov wrote specifically to enquire about "*EU vessels that will fish snow crab in the NEAFC area*".[38] This enquiry applied to "*EU vessels*". By its plain terms (and contrary to Norway's assertion[39]), this email does not concern only landing, but also fishing. Mr. Ankipov asks the Directorate "*to describe or present the process regarding the documents to be sent to the Directorate of Fisheries in this case*".[40]

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34 **R-0094-NOR**, **R-0095**.

35 **KL-0017** [emphasis added].

36 Respondent's Counter-Memorial, 29 October 2021, para. 555.

37 *Ibid*., para. 558.

38 **KL-0020** [emphasis added].

39 Respondent's Counter-Memorial, 29 October 2021, para. 738.1.

40 **KL-0020**.

43. The response from the Directorate states that "*no special documentation shall be submitted to the fisheries authorities*" when "*the crab has been caught outside the Norwegian Economic Zone*".[41] The message is clear and consistent with every other communication from the Directorate at the time: Norway did not consider that its fisheries jurisdiction over snow crab extended beyond its Exclusive Economic Zone. As Norway recognizes, the Loophole is not a part of its Exclusive Economic Zone.[42] Therefore, snow crab fished in the Loophole – including by EU vessels – was considered by Norway to fall beyond the scope of its fisheries jurisdiction. Insofar as the crab was "*caught*" outside the Norwegian jurisdiction, EU vessels could land their catch "*on an equal footing with Norwegian fishing vessels*".[43]

44. This communication obviously does not show that Norway "*made it clear that foreign vessels had no right to harvest crab on the Norwegian continental shelf without Norwegian authorization*".[44] The words "*harvesting*" and "*continental shelf*" are simply absent from the Directorate's email, which is readily explicable: the conception of snow crab as a species of the continental shelf had no currency in Norway at that time. Norway simply did not consider that EU vessels that would "*fish snow crab in the NEAFC area*" required its express consent to do so.

45. Norway implicitly appears to accept this position when it states that, in late 2013, "*Mr. Levanidov was aware that Norway would not permit the harvesting of snow crab by foreign vessels in the Economic Zone*".[45] While this correctly summarizes what was conveyed by Norway at the time, it is irrelevant insofar as the Claimants never intended to fish (and never did fish) snow crabs in Norway's Exclusive Economic Zone. Their intention was to fish for snow crab in the Loophole, outside this zone and beyond the scope of Norway's fisheries jurisdiction.

46. In paragraph 562 of its Counter-Memorial, Norway disingenuously blames the Claimants for having "*never directly asked Norwegian authorities about crab harvesting opportunities for their vessels in areas under Norwegian jurisdiction*" before

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41 **KL-0020** [emphasis added].

42 Respondent's Counter-Memorial, 29 October 2021, para. 30. ("*In the middle of the Barents Sea is an area which is more than 200 nautical miles from the baselines of Norway and the Russian Federation, and thus does not form part of the exclusive economic zones of either country. This area is called the Loop hole. Situated more than 200 nautical miles beyond the coastal States, the water column of the Loop Hole is high seas, beyond coastal state jurisdiction*.").

43 **KL-0020**.

44 Respondent's Counter-Memorial, 29 October 2021, para. 738.4.

45 *Ibid*., para. 361.

making their investments.[46] Precisely, the Claimants did not seek Norway's permission because their fishing operations in the Loophole were **not** considered by Norway to take place "*in areas under Norwegian jurisdiction*". There would have been no reason for the Claimants to seek Norway's permission to participate in what was then considered an international waters fishery: Norway would have directed them to seek permission from their flag state Latvia, which is what they did. Latvia registered their vessels under the NEAFC regime, mirroring the exact same practice Norway used to follow in relation to its own vessels (as further discussed below in subsection c).

47. Therefore, while Norway is technically correct to say that "*there was nothing in these emails to verify the legality of snow crab harvesting on the Norwegian continental shelf*", the point is wide of the mark:

(a) Norway did not consider the snow crab as a species of the continental shelf when these emails were exchanged. Naturally, its fisheries officials made no reference to "the Norwegian continental shelf" when discussing the rules applicable to the snow crab fishery.

(b) At the time, Mr. Pildegovics' joint venture partner did not intend to verify the legality of snow crab harvesting "*on the Norwegian continental shelf*". He intended to verify whether EU vessels could fish for snow crab in the international waters of the Loophole (the NEAFC area) and land their catches in Norwegian ports, which Norway duly confirmed.

b. The Position of the Norwegian Government Regarding the Designation of Snow Crab as a Sedentary Species

48. The record shows that the Norwegian government adopted the position that the snow crab is a sedentary species of the continental shelf no earlier than July 2015.

49. In years prior to 2015, records of the Norwegian government systematically referred to the Loophole snow crab fishery as an "international waters" fishery. Foreign vessels were known to participate in this fishery, with no concern being raised by Norwegian authorities.

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[46] Respondent's Counter-Memorial, 29 October 2021, para. 562.

50. In June 2013, researcher Jan H. Sundet of the Norwegian Institute of Marine Research ("**IMR**") produced a note addressed to Norway's Department of Fisheries and Coastal Affairs "*concerning the status of snow crab in the Barents Sea*". The note stated:

> *We are aware that one Norwegian vessel (MS Arctic Wolf) has been on several trips in international waters in the Barents Sea with pot fishing for snow crab and the weekly catches have varied between 20 and 40 tonnes of male crab larger than 100 mm black shell width. Our Russian colleagues can also state that a Spanish registered vessel, owned by Russian interests, is also engaged in crab fishing in the same area, and where the daily catches are as high as 8 tonnes.*[47]

51. In July 2014, the Department of Fisheries and Aquaculture produced a memorandum addressed to Norway's then Minister of Fisheries, Ms. Elizabeth Aspaker, to propose recommendations for the management of snow crab in the Barents Sea.[48] It noted that "*Norwegian vessels that are registered in the register of vessels… can presently fish for snow crab in the Norwegian Economic Zone, the Svalbard Zone and international waters (the Loophole) without quantity restrictions."*[49] The subject of this memorandum is snow crab fisheries management, yet nothing in it suggests that Norway considered the snow crab as a sedentary species of the continental shelf over which it might have been able to claim sovereign rights.

52. In August 2014, Norway's Ministry of Foreign Affairs provided comments as part of a consultation led by the Ministry of Fisheries on a proposal to introduce a ban on the capture of snow crab in all areas under Norwegian jurisdiction. The Ministry agreed that "*until there is a more comprehensive management plan for snow crab, a general ban on catching snow crabs should be established in Norwegian jurisdictions, including the fisheries protection zone off Svalbard*".[50] Among other matters, the letter addressed the position of foreign vessels, with no indication of the snow crab's supposedly sedentary nature or Norway's continental shelf jurisdiction:

> *Although foreign vessels have neither the right nor a legitimate expectation to participate in the capture of snow crab in Norwegian*

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47 Note by J. H. Sundet of IMR, 13 June 2013, **C-0208**, p. 2.

48 **R-0108**.

49 *Ibid.*, p. 1.

50 Letter from the Ministry of Foreign Affairs to the Ministry of Fisheries, 25 August 2014, **C-0199**.

> *waters, it may be desirable to allow this in limited and controlled forms.*[51]

53. The first known reference to the snow crab as a "sedentary species" in records of the Norwegian government appears in an email exchange internal to the Ministry of Foreign Affairs dated 22 September 2014.[52] A Ministry official "*sitting on the eve of the Norwegian-Russian Fisheries Commission meeting*" notes that "*snow crab came up*". She asks: "*Isn't the snow crab a sedentary species […] that is covered by the shelf jurisdiction?".* [53]

54. On 7 October 2014, the same official writes again to her colleagues at the Ministry of Foreign Affairs, apparently recounting discussions between Norway and Russia. Writing about the Russian position, she posits that the Russians "*assume that after the final established outer boundary for the shelf of Norway and Russia, the entire Smutthullet* [Loophole] *in the Barents Sea will be covered by a national [regime] – i.e. there will be no international "area" in the Smutthullet? Russia seems to assume at the meeting that the snow crab is a sedentary species that is covered by their shelf jurisdiction so that the fishing for snow crab in the Smutthullet will not be regulated by NEAFC*".[54]

55. A few weeks later, on 31 October 2014, the Deputy Director General of the Norwegian Department of Fisheries and Aquaculture, Ms. Elisabeth Gabrielsen, sent an email to Ms. Christine Finbak, Senior Advisor to the Ministry of Foreign Affairs, regarding snow crabs.[55] Summarizing the contents of a prior telephone conversation, she wrote:

> *There have been challenges this year relating to gear conflicts between vessels that have been fishing for shrimp and snow crab in the Loop Hole. At the Commission meeting in October, the Russians referred to the fact that snow crab are a benthic species and that fishing in the Loop Hole is regulated by continental shelf jurisdiction. Norway asked whether we should raise the matter at NEAFC, however, did not receive a response.*

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51 *Ibid.*, p. 2.

52 Email from T. Johansen to K. K. Nygard, 22 September 2014, **C-0192**.

53 *Ibid*.

54 Email from T. Johansen to K. K. Nygard, 7 October 2014, **C-0191**.

55 **R-0097**.

> *NEAFC's annual meeting is in 2 weeks and we are currently working on a mandate for the negotiations. What are your views on this issue?* [56]

56. On 4 November 2014, Ms. Finbak of the Ministry of Foreign Affairs replied as follows:

> *Thank you for the email and I refer to the conversation we just had. As mentioned, we have had a preliminary round here.* ***In order to conclude whether snow crab are a sedentary species, it will be necessary to obtain a scientific assessment from the Norwegian Institute of Marine Research****. My understanding is that you will contact the Norwegian Institute of Marine Research to obtain this. The specific issue to be assessed in this context, cf. Article 77 (4) of the United Nations Convention on the Law of the Sea, is whether snow crab are: "organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.*
>
> *With regard to the NEAFC meeting, it will be important to have a flexible mandate which we will not be bound by, because* ***it will probably be difficult to reach a conclusion in the short period of time until the meeting****.*
>
> *As you outlined, it would be beneficial if you would make private contact with the Russians to further determine what assessments they have made, including their views on the upcoming NEAFC meeting and the proposals that could be raised at the meeting.* [57]

57. Following this advice, the Department of Fisheries drafted a NEAFC mandate according to which the Norwegian delegation would "*lie [sic] low*" on the question of snow crab's characterization "*until the case is better clarified on the Norwegian side*". This mandate was recorded in a memorandum which states in relevant parts:

> *Snow crab management*
>
> *Russia signalled during the last meeting of the mixed commission that they considered that the snow crab is a sedentary species and that this in this case means that it is the continental shelf jurisdiction that applies to the management of the crab. It cannot be ruled out that they raise this issue at this meeting.*
>
> ***The Ministry of Foreign Affairs is in the process of investigating the legal aspects and consequences for the***

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56 *Ibid*. [emphasis added].

57 **R-0097** [emphasis added].

> ***management of snow crab as a potentially sedentary species. The Ministry of Foreign Affairs has asked us to "lie low" in this case until the case is better clarified on the Norwegian side****…*
>
> *The delegation as far as possible await the situation. Should there be an initiative regarding snow crab that needs to be decided on, the Delegation will discuss the matter with the department for a further mandate in this area.*[58]

58. Meanwhile, Norway's officials pursued their investigations as to whether snow crabs could, as Russia had suggested, properly be characterized as a sedentary species pursuant to UNCLOS.

59. On 4 November 2014, Ms. Gabrielsen wrote to Mr. Harald Loeng from IMR referring to "*a request related to the designation of snow crab where we want a statement from you on whether snow crab is a sedentary species*"[59]:

> *The starting point for the request is the Convention on the Law of the Sea Article 77 (4) and whether the snow crab can be described as "organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil." It would be good if you can give us a quick feedback on whether the snow crab falls under the description given in article 77.*

60. Within the hour, Mr. Loeng forwarded Ms. Gabrielsen's request to Mr. Sundet, requesting his "*quick feedback on this*".[60] Mr. Sundet gave a somewhat tentative response:

> *The direct meaning of the term "sedentary" in biology is "fixed", and it is not. In the "catchable" stage, it moves, but is completely dependent on having contact with the seabed in order to be able to move. […] Of course, I am not an expert on the Convention on the Law of the Sea, but the text referred to here is as far as I can see unequivocal. The conclusion is therefore that it must be considered sedentary even if the term itself is not particularly good in the description of the snow crab.*[61]

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58 Mandate for the 33rd NEAFC Annual Meeting, 10-14 November 2014, **C-0256** [emphasis added].

59 Email from E. Gabrielsen to H. Loeng, 4 November 2014, **C-0188**.

60 Email exchange between E. Gabrielsen, H. Loeng, J. H. Sundet and C. Finbak, 4 November 2014, **C-0186**.

61 *Ibid*.

61. Ms. Gabrielsen forwarded this response to Ms. Finbak, asking: "*Is this sufficient for you?*"[62]

62. It appears not to have been. The next morning, on 5 November 2014, an official of the Ministry of Foreign Affairs, Ms. Kristina Nygard, conducted legal research to shed additional light on the definition of sedentary species and its possible application to snow crabs. By mid-morning, she had sent a note to Ms. Finbak reproducing excerpts from the legal literature which, according to her, did not "*necessarily give more clarity, but there are some references to sources that may be useful*". One of the excerpts stated that "*the scope of species covered by the term 'sedentary species' is not without controversy'"*.[63]

63. On 7 November 2014, Ms. Finbak wrote to Mr. Sundet, to seek additional clarifications regarding the meaning of sedentary species in biology and to help determine whether snow crabs might fit the definition. "*What is considered a sedentary species in biology. How is the snow crab naturally classified?... How stable is the snow crab?... How does it move? To what extent does it swim or is swept away by ocean currents?*" The same day, Mr. Sundet provided "*a quick and preliminary answer*". He proposed to "*prepare a more comprehensive note on the snow crab in the Barents Sea*", which would, however, "*take a little more time*".[64]

64. On 12 November 2014, Ms. Finbak agreed that "*it would be useful to have a more comprehensive note about the snow crab, which can be the basis of our assessments*".[65]

65. On 15 January 2015, Mr. Sundet delivered the requested "*more comprehensive note*" on the status of snow crab in the Barents Sea.[66] The entire note runs to three pages, two paragraphs of which are devoted to the "*behavioural biology*" of the species. These two paragraphs (which apparently constitute the entire scientific basis for Norway's current position that snow crab is a sedentary species) are integrally reproduced below:

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62 *Ibid*.

63 Email from K. K. Nygard to C. Finbak, 5 November 2014, **C-0190**.

64 Email exchange between C. Finbak and J. H. Sundet, 7 November 2014, **C-0185**.

65 Email from C. Finbak to J. H. Sundet, 12 November 2014, **C-0189**.

66 Note from J. H. Sundet on the status of snow crab in the Barents Sea, 15 January 2015, **C-0254**.

Behavioural biology (sedentary species)

The snow crab eats and lives on the bottom all its life except during the larval phase when the larvae live in the upper water masses for up to several months before hatching. The mature part of the snow crab population makes seasonal migrations that are different for males and females. During the non-mating period, the sexes live separately, which usually also applies to the different size groups.

After bottoming, the snow crab, like most other crab species, depends on the bottom for movement. There are a few species of so-called "swimming crabs" that use transformed walking legs to swim, but one is not aware of such species in our waters. The shore crab has something resembling a "swimming leg", but it lives only in the littoral zone and is not of commercial importance in our areas either.

66. On 19 January 2015, Ms. Finbak provided a written opinion to Ms. Gabrielsen on "*whether the snow crab is to be regarded as a sedentary species*" pursuant to UNCLOS.[67] This opinion indicated that the Ministry of Foreign Affairs had made "*a **preliminary assessment** of the issue with a view to communicating **a preliminary Norwegian position** at the meeting of NEAFC's PECCOE (The Permanent Committee on Control and Enforcement)*". The note recommended "*subsequent contact to elaborate a final position in the run-up to NEAFC's annual meeting in the autumn*".[68]

67. The "*preliminary assessment*" from the Ministry of Foreign Affairs observed that the issue had arisen within NEAFC, notably in connection with a proposal by the EU "*to consider adding snow crab and shrimp to the list of NEAFC regulated species… The proposal requires the Commission to adopt a recommendation related to snow crab and shrimps under Article 5 of the NEAFC Convention, which states that the NEAFC Commission shall make recommendations related to fisheries occurring in areas beyond the jurisdiction of Contracting Parties.*" [69]

68. On this point, the Ministry of Foreign Affairs observed that "*the NEAFC Commission has competence to regulate "resources of fish, molluscs, crustaceans and including sedentary species… This includes crustaceans, which is considered to include snow crab. In fact, NEAFC has the competence to regulate the species. However, this is*

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67 Note from C. Finbak to E. Gabrielsen, 19 January 2015, **C-0249**, pp. 1-2.

68 *Ibid*., p. 1.

69 *Ibid*.

limited by Article 5 of the NEAFC Convention which requires the NEAFC Commission to make recommendations related to fisheries occurring in areas beyond the jurisdiction of the Contracting Parties. Fisheries within national jurisdiction are thus not covered." [70]

69. The question which therefore arose was "***whether the snow crab is a so-called "sedentary species" according to [UNCLOS]***, *which implies that it would be subject to the jurisdiction of the [coastal state] and thus not considered as a resource outside the jurisdiction of the contracting parties in the present case*." [71]

70. The Ministry of Foreign Affairs gave the following assessment and recommendation:

> *It follows from Article 77(4) of the Convention on the Law of the Sea (UNCLOS) that "the natural resources referred to in this Part consist of the mineral and other non-living resources of the sea-bed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil". The central assessment matter in this context is whether the snow crab at the stage when they can be capture are unable to move without being in constant physical contact with the seabed or subsoil. According to IMR per Jan Sundet (see attached note[72]), the snow crab, after bottoming, is dependent on the bottom to move.*
>
> *Historically, it has not been entirely obvious that the crab, including the snow crab, is considered a sedentary species according to Convention on the Law of Sea Article 77(4). The content of the provision was little discussed during the Conference on the Law of the Sea, other than a proposal from several states (including Norway) during the 1958 conference that crustaceans and swimming species should not be included was the subject of discussion and was finally voted down in plenum. There have been several conflicts related to the interpretation of the provision (mainly in the 60s)* […] *Although it seems relatively open for a period whether the crab is to be regarded a sedentary species, recent literature seems quite unambiguous by assuming that the crab is to be considered as a sedentary species that follows shelf jurisdiction.*
>
> *It is the section [of the Ministry of Foreign Affairs]'s preliminary assessment that there are good reasons for considering the snow crab as a sedentary species, which is thus subject to shelf jurisdiction. This means that the snow crab in this case is regulated*

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70 Note from C. Finbak to E. Gabrielsen, 19 January 2015, **C-0249**, pp. 1-2.

71 *Ibid*.

72 The "*attached note*" is the document filed as **C-0254**, quoted above in para. 65.

> *by the relevant shelf state (s). We have understood that the snow crab at the moment is mainly located on Russian shelf. However, we have been informed by IMR that it may move to over to the Norwegian shelf.*
>
> *Recommendation*
>
> *The Ministry of Foreign Affairs, Section for Treaty Law, Environmental Law and Law of the Sea recommends that during the PECCOE meeting the Norwegian side refres to Article 77 (4) of the Convention on the Law of the Sea and that it may be considered that the snow crab is a sedentary species covered by shelf jurisdiction. This means that it is not natural for the species to be including on NEAFC's Annex I. However, it will be useful to clarify with other states how they assess this issue, in particular Russia's assessment will be important in this context. We ask to be informed about the discussions during the PECCOE meeting,* ***so that we on the Norwegian side can prepare a clearer Norwegian position ahead of NEAFC annual meeting****.*[73]

71. On 28 January 2015, an official of the Directorate of Fisheries duly reported on the discussions held at the NEAFC PECCOE meeting on 27 and 28 January 2015:[74]

> *An extraordinary PECCOE meeting was held in London on 27 and 28 of January. The background for the meeting was mainly questions related to fishing in the Loophole…*
>
> *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.*

72. Thus, contrary to Norway's allegation, Norway and Russia did not "*present their position that snow crab is a sedentary species*" at the January 2015 PECCOE

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73 Note from C. Finbak to E. Gabrielsen, 19 January 2015, **C-0249**, pp. 1-2 [emphasis added].

74 **R-0016**.

meeting.[75] What they stated was that they were "*still considering the status of snow crab*", although it was "*likely*" to be defined as a sedentary species.[76]

73. The Norwegian government apparently continued to "*consider the status of snow crab*" through the first half of 2015.

74. By early June 2015, Norway still had not adopted the position that the snow crab is a sedentary species. This is shown by an internal memorandum of the Norwegian government dated 6 June 2015 setting out Norway's position on the issue.[77] This memorandum speaks of the designation of snow crab as a sedentary species as a tentative option "*under evaluation*", which might be adopted in the future with prospective legal effects:

> *The EU has raised the issue of snow crab regulation in the NEAFC, both at the Commission meeting in 2014 and in PECCOE, but so far without success. Russia has stated in the NEAFC that they consider the snow crab as a sedentary species that must be managed under the Convention on the Law of the Sea. From the Norwegian side,* ***it was communicated in PECCOE in January that we currently have the case under consideration*** *but that there is much to suggest that the snow crab is a sedentary species according to UN Convention on the Law of the Sea…*
>
> ***If*** *the snow crab and the red king crab are considered sedentary species,* ***they will be*** *subject to shelf jurisdiction and* ***it will be*** *up to the coastal state to decide… Given that the relevant area where experimental fishing is to be carried out is subject to Russian shelf jurisdiction, it is Russia that has the clearest interest in pointing this out to NEAFC. At the same time, the snow crab will eventually also be able to be on the Norwegian shelf and it will therefore be in Norway's interest to point out to NEAFC that NEAFC here cannot allow experimental fishing without the coastal State's consent.* [78]

75. One month later, on 17 July 2015, representatives of the Norwegian and Russian governments met in Valletta, Malta and came to an agreement on the designation of snow crab as a sedentary species. The "*agreed minutes*" of this meeting state that "*pursuant to paragraph 4 of Article 77 [UNCLOS], both the Russian Federation and Norway* ***will proceed*** *from the fact that harvesting of sedentary species, including*

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75 Respondent's Counter-Memorial, 29 October 2021, para. 57.

76 **R-0016**.

77 Internal memorandum on the status of snow crab, 6 June 2015, **C-0193**.

78 *Ibid*, p. 1 [emphasis added].

*snow crab, in the NEAFC Regulatory Area in the Barents Sea **shall not be** carried out without the express assent of the Coastal State*".[79]

76. The use of the verbs "*will proceed*" and "*shall not be*" in the future tense shows that this agreement was prospective in nature, and not the "*reiteration*" of any previously adopted position (as Norway now argues[80]). Obviously, Norway could not "reiterate" a position it had never before adopted, which indeed remained under consideration by the Norwegian government mere weeks before the Valletta meeting.

77. The fact that the "*agreed minutes*" record an agreement that was reached between Norway and Russia during the Valletta meeting in July 2015 is beyond doubt. The "*agreed minutes*" are referred to as such in the Protocol of the 45th session of the Joint Norwegian-Russian Fisheries Commission of October 2015, which speaks of the "***agreement** during the 20th North Atlantic Fisheries Ministers Conference (Valletta, Malta, 16-17 July 2015) at which [Norwegian and Russian officials] signed agreed minutes about the harvesting of snow crab in the NEAFC Regulatory Area in the Barents Sea*".[81]

78. In September 2016, the Ministry of Fisheries produced a memorandum entitled "*Strategy for the further development of snow crab management*".[82] This memorandum contains a chronology of Norway's management of snow crab, which also confirms that the agreement between Norway and Russia was reached "*at a meeting in Malta*" in July 2015:

> *In July 2015, at a meeting in Malta, a formal agreement was reached between Norway and Russia that snow crab should be managed by the continental shelf states as a sedentary species in accordance with Article 77 of the Convention on the Law of the Sea.*[83]

79. The novelty of the position adopted by Norway and Russia at Valletta is further confirmed by subsequent exchanges between the two States' governments. In August 2015, Arne Røksund, the Head of the Norwegian delegation to the Joint Norwegian-

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79 **C-0106** [emphasis added].

80 Respondent's Counter-Memorial, 29 October 2021, para. 113.

81 **R-0099**, p. 7 [emphasis added].

82 Note entitled "*Strategy for the further development of snow crab management*," Ministry of Fisheries, September 2016, **C-0209**.

83 *Ibid*, p. 7 [emphasis added].

Russian Fisheries Commission, wrote to his Russian counterpart referring "*to the minutes of the meeting… on 17 July in Malta, and the agreement between us that sedentary species in the Barents Sea, including snow crab, are subject to Norwegian and Russian management competence…"*.[84] The letter goes on to state:

> *As there is currently activity from vessels from other countries in the area, I consider it expedient that Norway and Russia will continue to act in a coordinated manner in the further work to gain acceptance for this…*

80. Norway thus saw a need "*to gain acceptance*" of the position it had adopted at Valletta one month earlier in July 2015. The fact that "*further work*" was needed to achieve this shows that the matter remained controversial as far as "*vessels from other countries*" were concerned. At any rate, it defeats Norway's contention that the Malta meeting merely "*reiterated*" a long-held position.[85]

81. It apparently took time for the Norway's new position to be well understood, including within the Norwegian government itself. In February 2016, Mr. Sundet of IMR published an article entitled "*The snow crab – a new and important player in the Barents Sea ecosystem*".[86] This article still referred to snow crab as a species that lived "*in the international waters of the Barents Sea*" and was fished there by vessels of several States:

> *Once the snow crab got to the Barents Sea, it had found an area where it could flourish, and in the years since 1996 the population has grown almost exponentially in terms of both numbers and distribution. While the snow crab's main habitat today is the northerly parts of the Russian Exclusive Economic Zone and in international waters of the Barents Sea (in the Loophole, or "Smutthullet" in Norwegian), it is also working its way into the Fisheries Protection Zone around Svalbard (see map)…*
>
> *In 2013 and 2014, a substantial snow crab fishery developed in the Barents Sea, with up to 15 large vessels from several countries participating. All the fishing takes place in international waters…*

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84 Letter from A. Røksund to the Russian Federal Bureau of Fisheries, 3 August 2015, **C-0196**.

85 Respondent's Counter-Memorial, 29 October 2021, para. 112.

86 **R-0010**.

82. This review demonstrates that Norway's current position on the designation of the snow crab as a sedentary species was adopted no earlier than July 2015. In summary, the evidence discussed above proves the following facts:

(a) Before the autumn of 2014, records of the Norwegian government contain no reference to the snow crab's allegedly sedentary nature. The species was then known to be fished in international waters by vessels flying the flag of various States, and not as a resource belonging to Norway's continental shelf.

(b) Norway's Ministries of Fisheries and Foreign Affairs began considering the possibility of designating snow crab as a sedentary species under UNCLOS in November 2014. Neither Ministry had a position on this issue at the time. The Ministry of Foreign Affairs noted that, before it could "*conclude [as to] whether snow crab are a sedentary species*", a "*scientific assessment*" from IMR would be needed.[87]

(c) In November 2014, no such "*scientific assessment*" had been made, and all the Ministry could obtain from IMR were "*quick and preliminary*"[88] answers. The required "*assessment*" was produced by IMR in January 2015.[89] It was limited to two short paragraphs providing virtually no scientific analysis of the issue.

(d) On 19 January 2015, the Ministry of Foreign Affairs provided a "*preliminary assessment"* that there were "*good reasons to consider the snow crab as a sedentary species*", with the reservation that further consultations with other states would be "*useful… in particular Russia's assessment would be important in this context*". The Ministry of Foreign Affairs asked to be kept apprised to enable it to "*prepare a clearer Norwegian position towards the NEAFC annual meeting*".[90]

(e) In late January 2015, Norway and Russia declared at the NEAFC PECCOE meeting that they were "*still considering the status of snow crab*".[91]

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87 **R-0097**.

88 Email exchange between E. Gabrielsen, H. Loeng, J. H. Sundet and C. Finbak, 4 November 2014, **C-0186**; Email exchange between C. Finbak and J. H. Sundet, 7 November 2014, **C-0185**.

89 Note from J. H. Sundet on the status of snow crab in the Barents Sea, 15 January 2015, **C-0254**.

90 *Ibid*., pp. 1-2.

91 **R-0016**.

(f) In June 2015, internal documents of the Norwegian government still referred to the designation of snow crab as a sedentary species in tentative terms, as implying a decision that would change the legal regime applicable to snow crab prospectively: "*If the snow crab and red king crab are considered sedentary species, they will be subject to shelf jurisdiction and it will be up to the coastal state to decide*".[92]

(g) The first ever official statement of Norway's position that the snow crab is a sedentary species was recorded at Valletta, Malta, on 17 July 2015, where it was agreed that Norway and Russia "*will proceed from the fact that harvesting of sedentary species, including snow crab, in the NEAFC Regulatory Area in the Barents Sea shall not be carried out without the express assent of the Coastal State*".[93]

83. This chronology plainly defeats the Respondent's contention that "*Norway has since the 1950s always considered snow crab to be sedentary*".[94]

84. It will not have gone unnoticed that Norway has declined to provide any witness testimony to support its submission that its current position on the sedentary nature of snow crab "*has been consistent for decades*",[95] thereby preventing any further scrutiny through cross-examination. Be that as it may: the documentary record contains more than enough evidence to cast aside Norway's assurance that "*there was no lack of transparency or candour about Norway's position regarding snow crab*".[96]

c. The Evolution of Norway's Position Regarding NEAFC's Jurisdiction Over the Loophole Snow Crab Fishery

85. Norway claims that fishing licences issued to North Star by Latvia under the NEAFC regime have always been "*invalid*"[97] and that it could not be "*expected that Latvia would purport to grant licences to exploit Norway's marine resources, let alone purport to authorise their exploitation in breach of Norwegian law*".[98] It goes as far as to accuse

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92 Internal memorandum on the status of snow crab, 6 June 2015, **C-0193** [emphasis added].

93 **C-0106** [emphasis added].

94 Respondent's Counter-Memorial, 29 October 2021, para. 753 [emphasis added].

95 *Ibid*., para. 749.

96 *Ibid.*

97 *Ibid*., paras. 14, 291.

98 *Ibid*., para. 505.

Latvia of having "*violated international law by purporting to grant rights on the Norwegian continental shelf without the express consent of Norway*".[99]

86. Norway then purports to explain "*the irrelevance of the North-East Atlantic Fisheries Commission (NEAFC) and the NEAFC Convention to the harvesting of sedentary species*".[100] "*NEAFC's regulatory competence*… only applies in areas beyond national jurisdiction*… NEAFC has never had the competence to regulate snow crab harvesting in the Loop Hole, as snow crab is a sedentary species and is therefore subject to the national jurisdiction of Norway and the Russian Federation*".[101] Thus, "*Norway considers that the Claimants were never entitled to harvest snow crab on the Norwegian continental shelf… in the Loop Hole*" since the Claimants' rights were "*dependent upon Latvia's competence as a matter of international law*" to have issued licenses to North Star.[102]

87. Norway's positions as to NEAFC are closely tied to (and indeed dependent upon) the narrative that it has "*always considered snow crab to be sedentary*".[103] As the record shows, however, Norway began designating snow crabs as a sedentary species only in July 2015. Before then, snow crabs were treated by Norway as a species of the water column: *i.e.*, a non-sedentary species. This meant that the Loophole fishery was considered beyond any State's fisheries jurisdiction and, therefore, within NEAFC's jurisdiction.

88. To begin, it is worth recalling that Norway initially licensed its own vessels under the very same NEAFC regime that it now deems "*irrelevant*".

89. In May 2013, the Norwegian Directorate of Fisheries wrote to Mr. Levanidov's associate that "*[i]f Norwegian vessels are to catch snow crab in international waters, they must be registered for fishing in the NEAFC area*".[104]

90. As the Claimants have explained in their Memorial, Ishavsbruket, Mr. Levanidov's company, originally planned to rely on a Norwegian fishing company, Båtsfjord Fangst

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99 Respondent's Counter-Memorial, 29 October 2021, paras. 19.3, 229, 297.

100 *Ibid*., para. 25.1.

101 *Ibid*., para. 55.

102 *Ibid*., para. 295.

103 *Ibid*., para. 753.

104 **KL-0016**, p. 1

AS, for its supplies of snow crab.[105] In 2013 and 2014, Båtsfjord Fangst obtained licences from the Norwegian Directorate of Fisheries registering its vessel Havnefjell to fish for snow crabs in the NEAFC area.[106] The letters issued by the Directorate confirming this were entitled "*Registration of vessels for fishing in water outside any state fishing jurisdiction*". These letters, which are virtually identical, read as follows:

> *HAVNEFJELL T-179-T LLTI - REGISTRATION OF VESSELS FOR FISHING* ***IN WATER OUTSIDE ANY STATE FISHING JURISDICTION*** *[IN 2013/IN 2014]*
>
> *The Directorate of Fisheries has received registration notification … for the vessel "Havnefjell" T-179-T LLTI for fishing in waters outside any state's fishing jurisdiction ... We have registered the vessel for fishing for snow crab in international waters,* ***the NEAFC area****.*
>
> *Registration is valid for one calendar year... We would also want to note that registration is independent of any quota adjustments. This means that the vessel must comply with such regulations even if the vessel is registered for one calendar year.*
>
> *Furthermore, we would like to remind that vessels that are going to fish in waters outside of any state's fishing jurisdiction, in accordance with reporting regulations implemented in Norwegian regulations, must send a notification on start of fishing (COE), daily catch notification (CAT), transhipment notification (TRA), port call notification (POR) and notification on end of fishing (COX). This is stated in Section 3 of the Regulation of 30 June 1999 on registration and reporting of fishing in waters outside any state's fishing jurisdiction.*
>
> ***Furthermore, the vessel must comply with the regulations that apply specifically to fishing in the NEAFC area****. See the NEAFC Website, http://www.neafc.org. - "NEAFC Scheme of Control and Enforcement" and "Current Management Measures".*[107]
>
> *When fishing in waters outside the fishing jurisdiction of any state, the vessel must also comply with Regulation of 21 December 2009 on location reporting and electronic reporting for Norwegian fishing and trapping vessels. In practice, this implies a requirement for daily catch reporting in the form of DCA notification. It is not necessary to keep a hard copy of catch diary when fishing in the NEAFC area.*[108]

105 Claimants' Memorial, 11 March 2021, paras. 173, 174, 175.

106 **C-0087**, **C-0088**.

107 *Ibid.* [emphasis added].

108 *Ibid.* [emphasis added].

91. In 2013, the Directorate had indicated, in an email to Ishavsbruket, that Norwegian vessel registrations would be "*processed and information about the vessel will be sent to the NEAFC Secretariat in London*".[109] It provided a copy of the Norwegian "*Regulations on registration and reporting when fishing in waters outside any state's fisheries jurisdiction*",[110] which applied "*to NEAFC's regulatory area*".[111]

92. There is no doubt that the letters from Norway's Directorate of Fisheries were issued to authorize Havnefjell to fish for snow crabs in the Loophole, the only part of the "*NEAFC area*" with a known snow crab population.

93. These letters show that Norway, in its capacity as flag state, licensed Norwegian vessels "*to fish for snow crab in international waters*", also described as "*waters outside of any state's fisheries jurisdiction*".[112]

94. These letters also show that Norwegian vessels so licensed were required to "*comply with the regulations that apply specifically to fishing in the NEAFC area*" as adopted by NEAFC, including the NEAFC Scheme of Control and Enforcement and "Current Management Measures" as listed on the NEAFC website.[113]

95. Before issuing such snow crab fishing licences, the Directorate required applicants to submit forms entitled "*Registration notice for fishing in waters outside any state's fishery jurisdiction (International waters, NEAFC area)*".[114] These forms required applicants to specify their target species, as well as "*area(s) to be fished in*".[115]

96. The Claimants have requested production of "*any and all documents, including documents of the Directorate of Fisheries, concerning the registration of Norwegian vessels for fishing (or harvesting) of snow crab in the NEAFC area*".[116] In response, Norway has produced 75 letters issued by the Directorate of Fisheries for the registration of Norwegian vessels for snow crab fishing in the Loophole,[117] and

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109 **KL-0017** [emphasis added].

110 **KL-0017**; **KL-0018**.

111 **KL-0018** (§ 1 Scope).

112 **KL-0017**; **KL-0018** [emphasis added].

113 *Ibid*. [emphasis added].

114 **R-0174** [emphasis added].

115 *Ibid*.

116 Claimants' Redfern Schedule, 16 November 2021, Request No. 33.

117 Letters from the Norwegian Directorate of Fisheries to Norwegian vessels, 2013, **C-0283**; Letters from the Norwegian Directorate of Fisheries to Norwegian vessels, 2014, **C-0284**; Letters from the Norwegian

88 registration forms submitted by Norwegian applicants.[118] These documents confirm the following facts:

(a) Each registration form submitted "*for fishing in waters outside any state's fisheries jurisdiction*" identified snow crab as the target species, and "Smutthullet", "NEAFC area", "NEAFC 1a" or "international waters" as the "*sea area(s) to be fished in*". None referred to Norway's continental shelf.

(b) Every letter issued by the Directorate between 2013 and 2015 was identical in form and substance to the letters issued to Båtsfjord Fangst for the Havnefjell, including the statement that the vessel had been registered "*for fishing snow crab in international waters, the NEAFC area*", subject to its compliance with "*regulations that apply specifically to fishing in the NEAFC area*" as adopted by NEAFC. None referred to Norway's continental shelf.

97. From 2013 to 2015, these letters issued by the Directorate of Fisheries authorized Norwegian vessels to fish for snow crab throughout the "*NEAFC area*", without distinction between areas above Norway's or Russia's continental shelf. Thus, through these licences, Norway authorized its vessels to fish anywhere in the Loophole, including the area suprajacent to the continental shelf of the Russian Federation.

98. The Norwegian food research institute (NOFIMA) reported on this fact in a research paper published in January 2021:

> *The crab's status [as a sedentary or non-sedentary species] was not clarified when the fishing started in 2013. The Norwegian vessels fished in Smutthullett on what is the Russian shelf. It appeared that Norwegian and European fishermen, who also started fishing for the snow crab, regarded the snow crab as an (unregulated) fish. Russian authorities did not react to this either*

Directorate of Fisheries to Norwegian vessels, 2015, **C-0285**; Letters from the Norwegian Directorate of Fisheries to Norwegian vessels, 2016, **C-0286**; Letters from the Norwegian Directorate of Fisheries to Norwegian vessels, 2017, **C-0287**.

[118] Norwegian vessels registration notifications sent to the Norwegian Directorate of Fisheries for fishing in the NEAFC area, 2013, **C-0288**; Norwegian vessels registration notifications sent to the Norwegian Directorate of Fisheries for fishing in the NEAFC area, 2014, **C-0289**; Norwegian vessels registration notifications sent to the Norwegian Directorate of Fisheries for fishing in the NEAFC area, 2015, **C-0290**; Norwegian vessels registration notifications sent to the Norwegian Directorate of Fisheries for fishing in the NEAFC area, 2016, **C-0291**; Norwegian vessels registration notifications sent to the Norwegian Directorate of Fisheries for fishing in the NEAFC area, 2017, **C-0292**.

> *and Russian vessels started snow crab fishing in the same area in 2014.*[119]

99. According the Norwegian government's records, between 2013 and 2015, most snow crabs fished by Norwegian vessels were caught in the area of the Loophole above Russia's continental shelf.[120] Yet, it is equally clear that, for those years, Norwegian vessels did not benefit from Russia's express consent to "harvest sedentary species from the Russian continental shelf".[121] Such consent was first sought by Norway (and first granted by Russia) after the July 2015 meeting at Valletta, during which Norway and Russia agreed "*to proceed from the fact that harvesting of sedentary species, including snow crab, in the NEAFC Regulatory Area in the Barents Sea shall not be carried out without the express assent of the Coastal State*".[122]

100. In a memorandum addressed to Minister Aspaker dated 29 September 2015, the Norwegian Department of Fisheries took stock of the legal consequences of the Valletta agreement for Norwegian snow crab fishing companies, which so far had enjoyed access to the entire Loophole.[123] It noted:

> *The Norwegian industry is concerned in maintaining fishing opportunities in Smutthullet. The Norwegian (and third country fishing) takes place mainly on the Russian shelf and a continuation of this fishing therefore requires consent from Russia.*

101. As further discussed below, Russia and Norway did agree in October 2015 to allow each other's vessels to continue fishing for snow crab above their respective continental shelves during the year 2016.[124] Russia later declined to grant its consent for the year 2017.[125] There is no evidence that Russia ever consented to the "harvesting" of snow crab "on its continental shelf" for any year other than 2016.

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119 **BK-0006**, pp. 9, 13 (Figure 5), 14 (Figure 6) [emphasis added].

120 **R-0117**.

121 Claimants have requested production of "*any and all documents showing any authorization provided by the Russian Federation allowing Norwegian vessels to catch snow crab in the part of the Loophole superjacent to the Russian continental shelf between 2013 and 2016.*" (Claimants' Redfern Schedule, 16 November 2021, Request No. 37). Norway has produced no document predating, 9 October 2015. Documents produced all relate to the consent granted by Russia for the year 2016.

122 **C-0106**.

123 Memorandum from the Department of Fisheries to Minister Aspaker, 29 September 2015, **C-0201** [emphasis added].

124 *See below*, paras. 868, 892, 893.

125 *See below*, paras. 199.

102. In November 2016 – after Norway's change of position on the designation of snow crab – registration letters issued by the Directorate of Fisheries to Norwegian vessels started making reference to the "*the continental shelf in Smutthullet*":

> *The Directorate of Fisheries informs that it has been decided that vessels fishing for snow crab on the continental shelf in Smutthullet* ***will no longer report in accordance with NEAFC rules*** *implemented in Norwegian laws, regulations of 30 June 1999 on registration and reporting when fishing in waters outside any state's fishery jurisdiction.* [126]

103. Norway now argues that contemporaneous communications from its Directorate of Fisheries should be interpreted as meaning that, "*at the time, there were no Norwegian rules applicable to the harvesting of snow crab and it was thus unregulated as a matter of domestic law*".[127] This statement is misleading. Norway correctly states that there were no Norwegian rules applicable to "the harvesting of snow crab" in the Loophole, but this is only because Norway considered the Loophole's snow crab fishery as falling "*outside its fisheries jurisdiction*".

104. Norway did not consider itself (or any other State) competent to regulate this high seas fishery. Consequently, the regulatory competence belonged to NEAFC. Norway recognizes that NEAFC's regulatory competence "*applies in areas beyond national jurisdiction*".[128] The Loophole's snow crab fishery was viewed precisely as such by Norway.

105. The records of the Norwegian Coast Guard prove Norway's recognition of North Star's NEAFC fishing licences. On 1 May 2015 and 15 January 2016, the Coast Guard inspected Solveiga and Saldus respectively.[129] Both reports are titled "*North East Atlantic Fisheries Commission Report of Inspection*". Both identify Norway as the "*contracting party*" and provide the NEAFC reference numbers of the inspectors. In Part B of the reports (titled "Verification"), the inspectors had to indicate whether the vessel had "*authorisation to fish in the NEAFC Regulatory Area*". Both reports checked "Yes". The reports further indicate that the vessels had authorisation to fish for "*unregulated*" resources and that they had "*CRQ*" (snow crab) on board. The type of

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126 Letters from the Norwegian Directorate of Fisheries to Norwegian vessels, 2017, **C-0287** [emphasis added].

127 Respondent's Counter-Memorial, 29 October 2021, para. 550 [emphasis added].

128 *Ibid*., para. 55.

129 **C-0094**; **C-0099**

fishing gear used was "*FPO*", referring to crab pots.[130] No remarks or infringements were noted, which shows that the Norwegian Coast Guard then considered that Solveiga and Saldus were properly authorised to fish for snow crab in the NEAFC zone.

106. Until July 2015, when Norway and Russia concluded their bilateral agreement at Malta, all NEAFC Member States with vessels fishing for snow crab in the Loophole considered this fishery as falling within NEAFC's competence.

107. As shown above, Norway licensed its vessels under NEAFC rules. Russia did the same. In 2014, 2015 and 2016, Russia licensed its vessels for snow crab fishing in the "*NEAFC Barents Sea regulatory area*" while providing that the vessels had to conduct this fishery "*in accordance with the provisions of the NEAFC Scheme of Control and Enforcement and the regulatory norms in force, available at the NEAFC official website (www.neafc.org)*".[131]

108. European vessels received snow crab fishing licences for the NEAFC area on the exact same basis as their Norwegian and Russian counterparts. Contrary to Norway's submissions, this was fully consistent with the position of the European Union.

109. In August 2013, the Latvian Ministry of Agriculture wrote to the European Commission to seek information "*concerning snow crab fisheries in the NEAFC international waters*". It asked whether it was possible to fish for snow crab there and stated that it "*presume[d] that this is unregulated fisheries and after notification our vessels could start fisheries*".[132] In September 2013, the European Commission replied: "*your presumption is correct. Snow crab/opilio is un-regulated as far as NEAFC is concerned and you can start fishing once your vessel is notified*".[133] Latvia's position was certainly not "*at odds with the EU's position*", as Norway asserts: indeed, Latvia issued licences

130 **C-0120**; **C-0121**

131 Fishing Licence for Kopytin, NEAFC, 18 September 2014, **C-0265**; Fishing Licence for Kopytin, NEAFC, 26 January 2015, **C-0266**; Fishing Licence for Kopytin, NEAFC, 13 January 2016, **C-0267**; Fishing Licence for Santana, NEAFC, 27 October 2014, **C-0268**; Fishing Licence for Santana, NEAFC, 26 January 2015, **C-0269**; Fishing Licence for Santana, NEAFC, 13 January 2016, C-0270; Fishing Licence for Selenga, NEAFC, 5 February 2014, **C-0271**; Fishing Licence for Selenga, NEAFC, 26 January 2015, **C-0272**; Fishing Licence for Selenga, NEAFC, 15 January 2016, **C-0273**; Fishing Licence for Sokol, NEAFC, 30 January 2015, **C-0274**; Fishing Licence for Sokol, NEAFC, 13 January 2016, **C-0275**; Fishing Licence for Solyaris, NEAFC, 31 Januray 2014, **C-0276**; Fishing Licence for Solyaris, NEAFC, 26 January 2015, **C-0277**; Fishing Licence for Solyaris, NEAFC, 15 January 2016, **C-0278**; Fishing Licence for Start, NEAFC, 5 February 2014, **C-0279**; Fishing Licence for Start, NEAFC, 26 January 2015, **C-0280**; Fishing Licence for Start, NEAFC, 15 January 2016, **C-0281**.

132 **C-0089**.

133 **C-0090** [emphasis added].

to the Claimants only after the EU had given it confirmation that the Loophole's snow crab fishery took place in international waters, that it was unregulated and that Latvian vessels could "*start fishing*" following notification to NEAFC.[134]

110. In October 2014, NEAFC held an extraordinary meeting to discuss the case of the Juros Vilkas, a Lithuanian crabber that had been arrested by the Russian Coast Guard for fishing for snow crab in the Russian Exclusive Economic Zone.[135] The owners of the vessel protested that they had, in fact, been fishing in the Loophole, in international waters. The episode raised the need to clarify the exact coordinates of the line of demarcation between the coastal State's EEZ and the Loophole. The EU raised the issue in NEAFC and asked it to help resolve the problem. At no point did the EU (or indeed Norway or Russia) question the Juros Vilkas' right to fish for snow crab in the Loophole.

111. In 2015, the European Union submitted proposals to NEAFC for "*exploratory bottom pot fishing in the NEAFC Regulatory Area (international waters of the Barents Sea)*".[136] Accompanying reports made it clear that the project aimed to gain further knowledge about the environmental impact of snow crab on benthic species.[137] The EU noted that these proposals were submitted under a NEAFC recommendation from 2014 and "*should be submitted to [NEAFC] Contracting Parties, as well as to PECMAS, for review. Following this assessment, and should the Commission approve the project, it is the intention that exploratory bottom fisheries would start later in 2015*".[138]

112. While Norway and Russia ultimately voted against this proposal (*after* Norway's change of position at Valletta in July 2015), the simple fact that the EU considered it relevant to submit this proposal to NEAFC suffices to show that it saw NEAFC as the competent body to adopt it.

113. The record therefore shows that, at least until Norway's change of position at Valletta in July 2015, the EU fully recognized NEAFC's jurisdiction over the Loophole's snow crab fishery. Norway disputes this by placing heavy emphasis on a letter dated 5 August 2015 by the European Commission addressed to Spain.[139] This letter, which

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134 Respondent's Counter-Memorial, 29 October 2021, para. 236

135 Report of the extraordinary meeting of NEAFC, 22 October 2014, **PP-0224**.

136 **R-0017**; **R-0018**.

137 **R-0018**; **R-0020**.

138 *Ibid*.

139 **R-0033**.

Norway cites 12 times in its Counter-Memorial and presents as "*crucial*" evidence, is nothing of the sort.[140] This letter was sent on 5 August 2015, a few days after Norway and Russia had taken the position that snow crab was a sedentary species, apparently in reaction to such "*new*" position (which was indeed referred to as such by the EU[141]). It does not change the fact that the EU confirmed on several occasions that it considered the fishery as a high seas fishery under NEAFC purview.

114. There is no question that, since the beginning of the Loophole's snow crab fishery, Norway knew that vessels flying European flags were participating in it. Norway does not deny this, yet it never protested this fact within NEAFC or indeed anywhere else, until after it changed its position on the characterization of snow crab in July 2015.

115. It bears recalling that, from 2014 until 2016, Norway authorized the landing of North Star's snow crab catches in Norwegian ports seventy-nine (79) times by approving NEAFC PSC Forms submitted by North Star through Latvia.[142] It is indeed hard to comprehend why Norway might have accepted these forms if NEAFC had neither competence nor even "relevance" to the fishery. Had it been so, Norway would surely not have accepted documentation issued by NEAFC and governed by NEAFC rules as appropriate to control the landing of snow crab in Norwegian ports.

116. The NEAFC PSC Forms submitted by North Star recorded that the snow crab had been caught in the Loophole, without specifying whether the catch had come from above Norway's or Russia's continental shelves. Each form simply identified the catch area as "*NEAFC CA 1a"*, which encompasses the Loophole as a whole. Norway acknowledges that these forms "*do not indicate whether, within area 1a, the snow crab was caught in the 89% of the Loop Hole that consists of Russian continental shelf or the 11% that consists of the Norwegian continental shelf*".[143]

117. Yet Norway approved every landing without enquiring as to the precise location of the catch within the Loophole. There is no evidence that Norway ever considered the issue at the time, which is readily understandable: the entire Loophole was then considered by Norway as "*international waters*" falling "*outside any state's fisheries' jurisdiction*"[144]

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140 Respondent's Counter-Memorial, 29 October 2021, para. 235

141 Internal note of the Norwegian government, 16 November 2016, **C-0194**.

142 Respondent's Counter-Memorial, 29 October 2021, para. 290; **C-0100**; **C-0101**; **C-0102**; **C-0103**.

143 *Ibid.,* 2021, para. 606.

144 **KL-0017**; **KL-0018**.

and the question whether snow crabs had been fished from above Norway's or Russia's continental shelf simply did not occur.

118. Contemporaneous statements by Norwegian officials also show that Norway's government considered the Loophole snow crab fishery as falling within NEAFC's jurisdiction.

119. In July 2014, the Department of Fisheries submitted a memorandum to Minister Aspaker on the management of snow crab, which stated:

> *The Norwegian Directorate of Fisheries has noted that cooperation with Russia will be beneficial in terms of having a regulatory system in place for the Loophole, possibly under the auspices of the North East Atlantic Fisheries Commission (NEAFC).*[145]

120. In September 2014, Mr. Sundet of IMR gave a presentation which separated the Barents Sea fishery into three zones: the Russian and Norwegian Exclusive Economic Zones, for which he foresaw "*joint or separate management*" and "*organized management structures*" under the Joint Norwegian-Russian Fisheries Commission; the Svalbard fishery protection zone; and "*International waters – NEAFC area*", referring to the Loophole.[146]

121. In October 2014, at the Joint Norwegian-Russian Fisheries Commission, the Norwegian representative Mr. Røksund is reported to have conveyed the following position on behalf of Norway:

> *Røksund: the snow crab has established itself in Norwegian waters and is expected to spread further westwards and northwards. There is increased interest both in Norway and internationally to participate in the harvesting of snow crab. We are working nationally to put in place a management regime and regulations. When it comes to research, we consider it important to have close cooperation with Russia and would like Norway and Russia to contact NEAFC jointly to request them to look at the fishing gear that should be used for this harvesting* [sic: "fiske" in the Norwegian original] *in the Loop Hole.*[147]

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145 **R-0108**, p. 2 (under section 4 : "Cooperation with Russia") [emphasis added].

146 J. H. Sundet, "*Future challenges in research and management of the invasive snow crab (Chionoecetes opilio) in the Arctic Barents Sea,*" IMR presentation, 2014, slide 10, **C-0235**.

147 **R-0014**, **R-0013-NOR** ("*dette fiske i smutthullet*") [emphasis added].

122. The above evidence defeats Norway's contention that "*NEAFC has never had the competence to regulate snow crab harvesting in the Loophole*".[148] The fact is that Norway fully recognized NEAFC's jurisdiction over the snow crab fishery in the Loophole (as well as the legality of the Claimants' catches under the NEAFC regime) until it decided to change its position on the characterization of snow crabs at Valletta in July 2015.

123. It is of course true that NEAFC has never "*regulated*" the snow crab fishery in the Loophole, as this term is understood within that organization. "*Regulated*" in NEAFC terminology means that a recommendation has been adopted by NEAFC Member States, pertaining to quotas or other conservation measures.[149] In that sense, the snow crab has always remained "*unregulated*" within NEAFC. This does not mean that the snow crab was not within NEAFC's *jurisdiction*: it clearly was, for as long as it was treated as a species of the water column (which it was by all Member States with vessels involved in the fishery, including Norway, at least until July 2015).

124. Norway began questioning NEAFC's jurisdiction over the Loophole's snow crab fishery on 23 July 2015, a few days after its agreement with Russia at Malta, when it voted against the EC's proposal for an exploratory bottom snow crab fishery.[150] Russia followed suit a few days later.[151] This episode proves Norway's change of position on the designation of snow crab, not that Norway has "*always*" held its current position.

125. Despite its vote against the EC's proposal, Norway had not yet adopted the view that NEAFC lacked competence over the Loophole snow crab fishery, let alone that it lacked "relevance".

126. An internal note of the Norwegian government dated 26 August 2015 relates the contents of a meeting between Norwegian and Russian officials regarding snow crab management.[152] "*The theme of the meeting was what regulatory measures need to be taken in relation to snow crab*". Options considered included "*management through NEAFC*".[153] This proves that, at least until August 2015, Norway and Russia

148 Respondent's Counter-Memorial, 29 October 2021, para. 55.

149 **CL-0019**, Article 1(d) ("*'regulated resources' are those of the fisheries resources which are subject to recommendations under the Convention and are listed in Annex I*").

150 **R-0025**, **R-0028**, **R-0030**.

151 **R-0026**.

152 Internal note of the Norwegian government, 26 August 2015, **C-0195**.

153 *Ibid*., at p. 1. [emphasis added]

considered the possibility of maintaining the existing NEAFC management regime for snow crab.

127. At the 34th annual meeting of NEAFC in November 2015, as European vessels continued to fish for snow crab throughout the Loophole under NEAFC licences issued by their flag state, participants discussed the "*need for flag states to ensure that any fishing for sedentary species was consistent with their obligations under international law to respect the rights of coastal States*".[154] A question was then raised as to "*whether Norway and the Russian Federation had completed all the relevant procedures for submitting their declarations regarding the extent of their jurisdiction in the Barents Sea to the United Nations*".[155] Russia confirmed "*that the relevant geographic coordinates had been submitted to the UN Office of Legal Affairs and that they were available on the UN website*".[156] Norway read a statement to the same effect, further clarifying that the coordinates of the outer limits of the Norwegian continental shelf had been registered with the Office of Legal Affairs on 1 November 2011.[157] Neither Norway nor Russia protested that EU vessels continued to fish for snow crab in the Loophole.

128. It is worth highlighting that the coordinates of Norway's continental shelf in the Loophole have been clear since well before the beginning of the commercial snow crab fishery there in 2013.[158]

129. Therefore, had Norway considered snow crab as a sedentary species when the fishery began in 2013, it would not have treated the Loophole fishery as one occurring "*outside any state's fisheries jurisdiction*". Instead, it would have treated it as falling within its continental shelf jurisdiction from the start. Yet, Norway did not act as if it possessed sovereign rights over the Loophole's snow crabs when the fishery started, and when the Claimants made their investments in Norway.

130. Norway and Russia began enforcing their newly asserted sovereign rights only in late 2016. This was considered a "*new"* situation by the European Union, as reported in an

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154 Claimants' Memorial, 11 March 2021, para. 333; **C-0118**, agenda item 11.8, p. 7.

155 *Ibid*.

156 *Ibid*.

157 *Ibid*., agenda item 22, p. 14.

158 Norway appears to acknowledge this in Respondent's Counter-Memorial, 29 October 2021, paras. 31-32, 578.

internal note of the Norwegian government dated 16 November 2016 reporting on discussions held during the annual NEAFC meeting:

> *We are now in the annual meeting of NEAFC, and in bilateral consultations with the EU, they have announced that they will address snow crab and* ***what they call the "new" situation*** *that has arisen. By this, they mean the fact that the shelf states (mainly Russia) have now begun to enforce their shelf jurisdiction.*[159]

131. The report of the 35th NEAFC meeting (14-18 November 2016) shows that the EU cast the issue in terms of the "*acquired rights*" of contracting parties which had fished for snow crab in areas now considered by Norway as falling under its continental shelf jurisdiction:

> *…the European Union raised the issue of the rights of Contracting Parties who have fished in areas of seabed that are subject to national jurisdiction beyond 200 nautical mile limits. They suggested that NEAFC should establish a mechanism for addressing the position of those who have conducted fisheries and have thereby acquired rights, without prejudice to the rights of the relevant coastal States.*[160]

132. Norway and Russia opposed this proposal by stating that "*the right to harvest sedentary species is an exclusive right of the coastal State*" and that *"no other State could utilize these resources without the explicit consent of the coastal State*". They expressed the view that "*any historical practices were irrelevant in this context*", and further stated that "*they could not see any role for NEAFC*" or *"support setting up any mechanism in NEAFC to address these issues*".[161]

133. Norway's position that the "*resources*" at issue could not be utilized "*without the explicit consent of the coastal State*" apparently ignored the fact that Norway itself had, until October 2015, consistently registered its own vessels under NEAFC rules to fish for snow crabs in the Loophole, mainly in its area suprajacent to Russia's continental shelf, without ever seeking or obtaining Russia's "*explicit consent*".

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159 Internal note of the Norwegian government, 16 November 2016, **C-0194** [emphasis added].

160 Report of the 35th NEAFC Annual Meeting, 14-18 November 2016, **C-0214**, agenda item 26, p. 18 [emphasis added].

161 *Ibid*.

134. This may help explain Norway's statement that "*historical practices were irrelevant*", which in essence is still Norway's position before this Tribunal.

135. Indeed, in order to accept Norway's submission that "*NEAFC has* never *had the competence to regulate snow crab harvesting in the Loop Hole*",[162] the Tribunal would have to be prepared to ignore the following historical facts:

(a) Norway systematically registered its own vessels to fish for snow crab in the Loophole, an area then described by Norway as "*international waters*" lying "*outside any state's fisheries jurisdiction*", under the NEAFC rules.[163] Norway then sent these registrations "*to the NEAFC Secretariat in London*";[164]

(b) Norway's registrations covered the entire NEAFC area, including the area of the Loophole suprajacent to Russia's continental shelf. Norwegian vessels fished for snow crab in that area between 2013 and 2015 without Russia's consent;[165]

(c) Before July 2015, Norwegian officials made statements recognizing NEAFC's competence over the Loophole snow crab fishery;[166]

(d) Before July 2015, every State with vessels participating in the Loophole's snow crab fishery recognized NEAFC's competence over this fishery, as shown by contemporaneous correspondence[167] as well as submissions made to NEAFC pertaining to the snow crab;[168]

(e) Landings of snow crab by the Claimants' vessels in Norwegian ports were authorized by Norway through its approval of NEAFC PSC Forms, which identified the Loophole as the catch area without reference to any State's continental shelf;[169] and

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162 Respondent's Counter-Memorial, 29 October 2021, para. 55.

163 **C-0087**; **C-0088**

164 **KL-0017**.

165 *See above*, paras. 18, 32.

166 See, **R-0108**, p. 2; J. H. Sundet, "*Future challenges in research and management of the invasive snow crab (Chionoecetes opilio) in the Arctic Barents Sea,*" IMR presentation, 2014, slide 10, **C-0235; R-0014**, **R-0013-NOR** ("*dette fiske i smutthullet*"). See also, "*Fishing valuable snow crab on the wrong side of the border*," Nord24, 25 May 2015, **C-0234**.

167 **C-0090**.

168 **R-0017**, **R-0018**, **R-0020**, at pp. 6-8.

169 Respondent's Counter-Memorial, 29 October 2021, para. 290; **C-0100**; **C-0101**; **C-0102**; **C-0103**.

(f) After Norway and Russia started enforcing their newly asserted sovereign rights in the latter half of 2016, this was considered a "*new*" situation by the European Union, leading the EU to raise the need to address "*the position of those who have conducted fisheries and have thereby acquired rights*" through a mechanism to be established by NEAFC.[170]

136. These facts simply cannot be reconciled with a conclusion that NEAFC "*never*" had any competence over the Loophole snow crab fishery. Instead, what they show is that all States with vessels participating in the fishery – *including Norway* – acknowledged NEAFC's competence until at least July 2015, when Norway and Russia bilaterally decided that the Loophole's snow crab population should henceforth be treated as a sedentary species falling under their continental shelf jurisdiction.

d. The Evolution of Norway's Domestic Legal Framework Applicable to the Snow Crab Fishery

137. The evolution of Norway's domestic regulatory framework also reflects Norway's change of position regarding the characterization of snow crabs, which provided the impetus for Norway's amendment of its snow crab regulations to ban EU-flagged vessels from the Loophole.

138. Before December 2014, Norway had not adopted regulations pertaining specifically to snow crab. In July 2014, the Department of Fisheries and Aquaculture submitted a memorandum to Minister Elisabeth Aspaker describing "*the present management situation*":

> *Since fishing for snow crab is currently unregulated, Norwegian vessels that are registered in the register of vessels (merkeregisteret) can presently fish for snow crab in the Norwegian Economic Zone, the Svalbard Zone and international waters (the Loop Hole) without quantity restrictions. Norwegian vessels do not have the right to harvest snow crab in the Russian zone.*
>
> *In 2013, three Norwegian vessels caught snow crab in the Loop Hole. A Spanish vessel with Russian interests also caught a considerable quantity of snow crab in Norway (506 tonnes).*[171]

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170 Report of the 35th NEAFC Annual Meeting, 14-18 November 2016, **C-0214**, agenda item 26, p. 18.

171 **R-0108**, p. 2.

139. Norway states that it began to regulate the snow crab fishery when it became clear that the population was increasing rapidly and, therefore, that the species had significant potential economic value to Norway.[172]

140. In December 2014, six months before Norway's change of position at Valletta, a first set of regulations prohibiting snow crab fishing in areas under Norwegian jurisdiction were adopted.[173] These regulations entered into force on 1 January 2015.

141. Interestingly, Norway states that these initial regulations "*covered Norwegian continental shelf within 200 nautical miles*".[174] That is not what these regulations provided:

> *§ 1 General prohibition*
>
> *It is prohibited for Norwegian and foreign vessels to catch snow crabs in the territorial waters of Norway (Norges territorialfarvann), including the territorial waters at Svalbard, the economic zone and the fishery protection zone at Svalbard. For Norwegian vessels, the prohibition also applies to international waters.*[175]

142. The words "continental shelf" were absent from these initial regulations, which defined their geographical scope of application as "*the territorial waters of Norway*", "*the territorial waters at Svalbard*", "*the economic zone*", the "*fishery protection zone at Svalbard*", and also "*international waters*" (but with respect only to Norwegian vessels).

143. The actual text of the 2014 regulations makes it clear that Norway then considered snow crab as a fishing resource occurring in "*waters*", not as a resource of the continental shelf. NOFIMA shared this understanding of the 2014 regulations:

> *The ban on catch is formulated as if the snow crab is managed as a fish and thus follows the provisions on fisheries management. It gives the coastal state the right to manage all fishing within the economic zone, as well as its own vessels in international waters. Norway thus established its right as a coastal state to the snow crab, but without addressing the issue of other countries' rights in international waters. This approach nevertheless dictates that the*

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172 Respondent's Counter-Memorial, 29 October 2021, paras. 98, 580, 591.

173 *Ibid.*, para. 581; **C-0104**.

174 *Ibid*, 29 October 2021, para. 585.

175 **C-0104** [emphasis added].

> *fishing in Smutthullet shall be managed in collaboration with other states that have real fishing interests in the snow crab fishery, because Smutthullet is international waters.*[176]

144. Norway states that the 2014 regulations were inapplicable to "*the small part on the Norwegian continental shelf in the Loophole*".[177] Leaving aside the fact that this "*small part*" is larger than the State of Delaware (or roughly five times the size of Greater London[178]), this statement is only half-true. It is correct insofar as the Loophole is outside Norway's "*territorial waters*", "*economic zone*" and "*fishery protection zone*". It is wrong, however, in that the ban did apply in "*international waters"* (*i.e.*, in the entire Loophole), but only for Norwegian vessels.

145. The inclusion of "*international waters*" within the geographical scope of application of the 2014 regulations (as far as Norwegian vessels were concerned) proves that Norway' prohibition was imposed in the Loophole not based on Norway's sovereign jurisdiction on the extended continental shelf but based on its *flag* jurisdiction over its vessels. Indeed, Norway then considered the Loophole snow crab fishery as falling "*outside any state's fisheries jurisdiction*", as shown by the repeated contemporaneous statements to that effect by its Directorate of Fisheries.[179]

146. By their plain language (and as Norway concedes[180]), the 2014 regulations did not apply to fishing activities by EU vessels in the Loophole. This fact suffices to explain why the Claimants did not participate in consultations on these draft regulations.[181] At the time, North Star's vessels fished exclusively in the Loophole and were therefore not impacted by these Norwegian regulations. In fact, no foreign vessel operator submitted observations on the draft regulations, as was to be expected.[182] Indeed, Norway invited only Norwegian stakeholders to participate in these consultations, and Seagourmet was not among them.[183]

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176 **BK-0006**, p. 12 [emphasis added].

177 Respondent's Counter-Memorial, 29 October 2021, para. 585.

178 The area of the Loophole is 67,100 square kilometers. Taking Norway's approximation that the area above its continental shelf amounts to 11% of Loophole (hence 7,381 sq. km), the size of this area is larger than the State of Delaware (6,446 sq. km) or nearly five times the size of Greater London (1,583 sq. km).

179 *See above*, para. 91.

180 Respondent's Counter-Memorial, 29 October 2021, paras. 585, 604.

181 *Ibid*., para. 100.

182 Note from the Department of Fisheries and Aquaculture Department to the from the Department of Fisheries and Aquaculture Department, 2014, **C-0261**.

183 **R-0113**, p. 4-5 (address list).

147. The officially stated purpose of the December 2014 regulations was to regulate all fishing grounds then considered to fall under Norwegian jurisdiction.

148. Norway seemingly accepts this in its Counter-Memorial, where it states: "*On 24 October 2014 a new draft regulation was submitted for public hearing. The Ministry suggested a general ban on the harvesting of snow crab…*"[184]

149. Norway's exhibits are more explicit. The draft regulations were introduced on the recommendation of the Norwegian Ministry of Trade, Industry and Fisheries, which advised that "*a general prohibition is set against catching snow crab in the entire Norwegian jurisdiction*. *A proposal for prohibition in the entire Norwegian jurisdiction must be subject to consultation with the Ministry of Foreign Affairs because it also includes the Svalbard Zone.*"[185]

150. In October 2014, Norwegian media reported on the Ministry's proposal for consultation "regarding a general prohibition on harvesting snow crab in the entire Norwegian jurisdictional area, including the Fishery Protection Zone around Svalbard".[186]

151. The consultation letter issued by the Ministry on 24 October 2014 stated that "*the Ministry proposes the adoption of a general prohibition on the harvesting of snow crab for the entire area falling within Norwegian jurisdiction, including the Fisheries Protection Zone around Svalbard, until such time as a more comprehensive management for snow crab has been drawn up*."[187]

152. Norway therefore clearly intended the 2014 regulations to prohibit snow crab catches in all areas under Norwegian fisheries jurisdiction. Had Norway then considered that its fisheries jurisdiction extended to the Loophole, the regulations would undoubtedly have been made applicable to that area for all vessels, not just for Norwegian vessels.

153. Norway's alternative explanations for the fact that the 2014 regulations were not made applicable to foreign vessels operating in the Loophole are unconvincing.

154. Norway first argues that it *"had not previously regulated any species on its continental shelf beyond 200 nautical miles*".[188] Be that as it may, this argument seemingly ignores

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184 Respondent's Counter-Memorial, 29 October 2021, paras. 100, 598 [emphasis added].

185 **R-0108**, at p. 4 [emphasis added].

186 **R-0111** [emphasis added].

187 **R-0113** [emphasis added].

188 Respondent's Counter-Memorial, 29 October 2021, para. 105.

that the 2014 regulations themselves applied "*in international waters*", beyond 200 nautical miles. This argument does not explain why Norway chose to regulate the species there only with respect to Norwegian vessels.

155. Norway then asserts that "*so far as* [it] *is aware, there had been no commercial landings of snow crab harvested on the Norwegian continental shelf in the Loop Hole as of October 2014*".[189] This statement is both factually incorrect and misleading. Norwegian fisheries statistics show that catches had then already been made from the part of the Loophole suprajacent to Norway's continental shelf.[190] It can be assumed that at least some of these catches were landed in Norway, if not all of them. Norway appears to recognize the existence of these catches when it states that landings of snow crab in Norway "*started in 2013 from vessels primarily harvesting on the Russian continental shelf*".[191] Where else would the balances of catches have come from, if not from "the Norwegian continental shelf"?

156. At any rate, by October 2014, Norway knew full well that the large snow crab population was expanding westward towards waters under Norwegian fisheries jurisdiction.[192] Norway indeed states that "*projections from the IMR that the snow crab would migrate from the Goose Bank area in the Russian part of the south-eastern Barents Sea onto the Norwegian continental shelf led to the recognition that snow crab needed separation regulations*.[193] Norway knew that the snow crabs came from the Loophole and the commercial potential of the fishery was by then obvious.

157. The consultations which preceded the adoption of the 2014 regulations are also instructive. The consultation letter issued by the Ministry of Fisheries referred to the Loophole as "*international waters*".[194] It made no mention of Norway's continental shelf jurisdiction or of snow crab's allegedly sedentary nature.

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189 *Ibid.*, para. 106.

190 Expert Report of Dr. Brooks Kaiser, 11 March 2021, p.24, Figure 14.

191 Respondent's Counter-Memorial, 29 October 2021, para. 591.

192 **R-0108** (Memorandum from the Department of Fisheries, July 2014, at p. 3: "*The potential economic value of snow crab to Norway will depend on its distribution, particularly in the Norwegian Economic Zone and the Svalbard Zone. Based on our knowledge about snow crab existing in cold waters, it is considered less probable that it will spread to the southwest in the Norwegian Economic Zone in large numbers.* ***A growing population in the Svalbard Zone is considered highly probable***."); Respondent's Counter-Memorial, 29 October 2021, para. 98.

193 Respondent's Counter-Memorial, 29 October 2021, paras. 98, 580, 591; **R-0108**.

194 **R-0113**, p. 3.

158. None of the stakeholders who submitted observations on the draft regulations raised the point that Norway could (or should) assert exclusive sovereign rights to the "harvesting" of snow crab from its continental shelf in the Loophole. Norges Råfisklag, the Norwegian fishermen's association, applauded a "*very positive development where a relatively small number of Norwegian and foreign boats have landed over 3,500 tonnes of snow crab*". The Norwegian Institute of Marine Research (IMR) noted that "*to date, most of the snow crab fishery has taken place in international waters (the Smutthullet).* The Finnmark County Council (*Fylkesrådet*) observed that "*vessels from countries other than Norway and Russia are planning to start snow crab fishing in international waters (the Smutthulet)*."[195] None of the stakeholders raised any question or expressed any concern related to the fact that "*foreign boats*" were participating in this "*international waters*" fishery.

159. After the 2014 regulations had entered into force, Norway informed the EU of their adoption through a note verbale dated 24 June 2015.[196] This note, which was sent less than one month before Norway's agreement with Russia at Valletta, made no mention of Norway's continental shelf or the characterization of snow crab as a sedentary species. It contained no reference to the Loophole, despite the fact that EU vessels were, by then, fully engaged in the snow crab fishery.

160. The first reference to the continental shelf was introduced in Norway's regulations through an amendment adopted in December 2015, after the Malta agreement. This amendment changed the geographical scope of application of the regulations as follows:

> *§ 1 General prohibition*
>
> *It is prohibited for Norwegian and foreign vessels to catch snow crabs in the Norwegian territorial sea (norsk sjoterritorium) and inland waters, and on the Norwegian continental shelf. For Norwegian vessels, the prohibition also applies to other countries' continental shelf.*[197]

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195 Response to the consultation on the prohibition of snow crab fishing, Finnmark County Council, 10 December 2014, **C-0258**, p. 8 [emphasis added].

196 **R-0039**.

197 **C-0110** [emphasis added].

161. As acknowledged by Norway,[198] the references to Norway's territorial sea, the territorial sea of Svalbard, the economic zone and the Fishery Protection Zone of Svalbard were removed and replaced by references to "*the Norwegian territorial sea*", "*inland waters*" and the "*Norwegian continental shelf*". For Norwegian vessels, the prohibition now extended to "*other countries' continental shelf*".

162. The central purpose served by this amendment was to incorporate Norway's novel position on the sedentary nature of snow crab as part of its domestic law.

163. On 24 June 2015, the Ministry of Foreign Affairs wrote to the Department of Fisheries to advise it that "*in light of the fact that the snow crab is a sedentary species, the regulation should be changed to reflect that the ban on fishing applies on the Norwegian continental shelf (and not in terrestrial waters and zones as it is now). We assume that this can be done by amending § 1 of the regulations to reflect this*."[199]

164. The Ministry of Foreign Affairs prepared a more detailed note on the subject on 26 November 2015, which reiterated the same advice: "*In the light of the fact that the snow crab is a sedentary species… according to the Ministry of Foreign Affairs' assessment, the regulations on the prohibition of catching for snow crab must be amended to reflect this*."[200]

165. On 10 December 2015, the Department of Fisheries prepared a memorandum providing the Norwegian government's assessment regarding the geographical scope of the regulations. It stated: "*As a consequence of the decision to consider the snow crab as a sedentary species in accordance with the UN Convention on the Law of the Sea, the geographical scope of the regulations prohibiting the capture of snow crabs should be changed so that the prohibition provision applies on the Norwegian continental shelf*."[201]

166. These documents prove that the 2015 amendment resulted from "*the decision to consider snow crab as a sedentary species*", a decision taken in July 2015, six months after the original regulations had been adopted in December 2014. The Norwegian government reasoned that if snow crabs were to be treated as a sedentary species, it

198 Respondent's Counter-Memorial, 29 October 2021, para. 108.

199 Email from C. Finbak to E. Gabrielsen, 24 June 2015, **C-0187**.

200 Note from the Ministry of Foreign Affairs to the Department of Fisheries, 26 November 2015, **C-0210**.

201 Memorandum from the Department of Fisheries to V. Landmark, 11 October 2016, **C-0202** [emphasis added].

would follow that they were no longer a species that occurred in "*waters*", but one that belonged to the continental shelf. This explains the removal of the references to Norway's "territorial sea", "economic zone" and "fishery protection zone" from the regulations, as well as their replacement with references to the "continental shelf".

167. On 22 January 2016, Norway sent another note verbale to the EU to inform it of the adoption of the 2015 amendments.[202] This time, Norway included a letter describing the content of the regulations, which emphasized Norway's novel position on the designation of snow crab as a sedentary species and the legal consequences it derived from this.

168. Norway submits that the 2015 amendments were adopted "*to make the Regulations cover all areas under Norwegian jurisdiction*".[203] However, this had already been the officially stated aim of the initial 2014 regulations, which were introduced by the Ministry of Fisheries as purporting to ban snow crab fishing in "*the entire area falling within Norwegian jurisdiction*".[204]

169. The 2015 amendments did far more than extend the geographical scope of the regulations: they effected a fundamental change in the legal regime applicable to the Loophole snow crab fishery. Whereas the 2014 regulations treated the snow crab as a fish species occurring in "*waters*" (and therefore, one that would fall beyond Norway's fisheries jurisdiction when fished in "*international waters*"), the 2015 amendment brought it within the regime of the continental shelf (and therefore, within Norway's coastal State's jurisdiction). This amendment implemented the goal pursued by Norway through its joint declaration with Russia at Valletta, which was to expand the scope of its snow crab fisheries jurisdiction into the Loophole.

170. The agreement reached between Norway and Russia at Valletta in July 2015 was far more than "*a parallel process*", as Norway asserts.[205] It was the pivotal event which marked the change in Norway's position regarding snow crab and provided the basis for Norway's subsequent amendment of its snow crab regulations to ban snow crab fishing "on its continental shelf".

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202 **R-0040**.

203 Respondent's Counter-Memorial, 29 October 2021, paras. 109, 585.

204 **R-0113**.

205 Respondent's Counter-Memorial, 29 October 2021, para. 112.

e. Norway's Coordinated Efforts with Russia to Close the Loophole's Snow Crab Fishery to EU Vessels

171. Norway's cooperation with Russia with respect to the snow crab has been described as follows in the academic literature:

> *As with the case of the red king crab, Russians and Norwegians have failed to agree on a joint management of the snow crab. They have cooperated, however, where their interests are directly aligned. In 2015, they agreed to a designation of the crab as a sedentary species, effectively transforming the snow crab from a fisheries resource whose international boundaries are determined by 200nm Exclusive Economic Zone (EEZ) borders to a continental shelf resource (sedentary species) whose international boundaries are determined by the extent of the country's continental shelf. In the Barents, the shelf extends considerably beyond the EEZ boundaries, and the re-definition of the snow crab effectively closed the international waters of the Loophole to foreign vessels.* ***Russia and Norway have subsequently excluded EU vessels from the Loophole****.*[206]

172. The evidence considered thus far has established the following facts regarding the coordination between Norway and Russia towards changing the legal regime applicable to the Loophole's snow crab fishery:

(a) The suggestion that snow crabs might be characterized as a sedentary species was initially raised by Russia at a meeting of the Joint Norwegian–Russian Commission in October 2014.[207]

(b) Norway initially sought alignment with the Russian position on snow crab.[208] After having conducted a "*preliminary assessment*" on the characterization of snow crab under UNCLOS in January 2015, the Ministry of Foreign Affairs was of the view that "*Russia's assessment will be important in this context*".[209]

(c) Norway and Russia met in Valletta, Malta, on 17 July 2015, where they jointly decided to designate snow crab as a sedentary species and that the two States would henceforth "*proceed from the fact that harvesting of sedentary species,*

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206 **BK-0008**, p. 5 [emphasis added].

207 Email from T. Johansen to K. K. Nygard, 7 October 2014, **C-0191**; Mandate for the 33rd NEAFC Annual Meeting, 10-14 November 2014, **C-0256**; **R-0097.**

208 **R-0097**.

209 Note from C. Finbak to E. Gabrielsen, 19 January 2015, **C-0249**, p. 2.

including snow crab, in the NEAFC Regulatory Area in the Barents Sea shall not be carried out without the express assent of the Coastal State".[210]

(d) A few days later, in a coordinated fashion, Norway and Russia voted against the EU's proposal to NEAFC to approve an exploratory snow crab fishery in the Loophole.[211]

(e) On 3 August 2015, Mr. Arne Røksund, Norway's representative to the Joint Norwegian-Russian Fisheries Commission, stated in a letter addressed to the Russian Federal Bureau of Fisheries that he "*consider[ed] it expedient that Norway and Russia will continue to act in a coordinated manner in the further work to gain acceptance*" by other States of the position adopted by Norway and Russia at Malta.[212] The same letter proposed that "*in the period leading up to a management regime, we allow Norwegian and Russian vessels to continue the activities they currently have in [the Loophole], so that we avoid disturbing the economic activity unnecessarily*".[213]

(f) Russia proved amenable to Norway's invitation to coordinate. In late August 2015, Russia agreed that it was "*expedient for the Norwegian and Russian sides to act in a coordinated manner when it comes to catching of sedentary species, including snow crab, in the Barents Sea*".[214]

173. Records of the Norwegian government show that, through coordination with Russia, Norway was hoping to achieve two policy goals: (i) to secure continued access for Norwegian vessels to the entire Loophole, including the area then considered to fall under Russia's continental shelf jurisdiction; and (ii) to enforce a coordinated ban of EU vessels from the entire Loophole fishery.

174. In a memorandum dated 29 September 2015, the Fisheries Department summarized Norway's policy goals with respect to snow crab for the 45th Joint Norwegian–Russian Commission in October 2015. These goals were *"to agree with Russia on a snow crab*

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210 **C-0106**.

211 **R-0025**; **R-0026**.

212 Letter from A. Røksund to the Russian Federal Bureau of Fisheries, 3 August 2015, **C-0196**.

213 *Ibid.*

214 Note from the Norwegian Embassy in Moscow, 31 August 2015, **C-0212**; Letter from V.I. Sokolov to A. Roskund, 26 August 2015, **C-0200**.

regime that involves mutual access to snow crab fishing in each other's jurisdiction and ***a common approach to enforcing third country fishing***".[215]

175. This memorandum reveals the state of the Norwegian position on snow crab in September 2015, two months after the designation of snow crab as a sedentary species at Valletta:

> *The snow crab is widespread today in most of the Northern parts of the Russian zone, as well as in parts of international waters (Smutthullet). It is expected that the snow crab will spread further West and North into the areas around and North of Svalbard…".*[216]
>
> *From the Norwegian side, at the meeting at the previous session, we informed that we wanted to manage the snow crab as a national resource and that we want continued research collaboration on the stock. The Russian side was concerned about the handling of snow crab in the NEAFC area and concerns that an unregulated fishing could mean that some countries earned fishing rights. Gear conflicts were also discussed.*
>
> *The Norwegian industry is concerned with retaining fishing opportunities in Smutthullet. The Norwegian (and third country fishing) takes place mainly on the Russian shelf and a continuation of this fishing therefore requires the consent of Russia. In the form of a letter, we have asked the fisheries agency to confirm that we can continue this fishing until Norway and Russia agree on how the snow crab is to be managed, but Russia has not responded to that wording yet.*
>
> *We are little aware of what the attitude to this is on the Russian side, but we cannot rule out that they will want some form of "payment" for continued Norwegian fishing on the Russian shelf in Smuttlhullet. It may nevertheless be that the Russians are interested in a common approach, both because it is expected that the crab will spread North and West in our jurisdictions and because it is probably in the Russia's interest that Norway and Russia will act equally towards third countries.*[217]

176. In conclusion, the memorandum recommended that "*some measures should be implemented immediately*", including a "*joint effort to secure Norwegian and Russian jurisdiction in Smutthullet,* ***meaning that both countries ban activities from third***

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215 Memorandum from the Department of Fisheries to Minister Aspaker, 29 September 2015, **C-0201**, p. 1 [emphasis added].

216 *Ibid.*, p. 5.

217 *Ibid.*, p. 5 [emphasis added].

countries" and an "*agreement that Norwegian and Russian vessels can continue their fishing in each other's jurisdiction areas*".[218]

177. At the meeting of the 45th Joint Norwegian–Russian Fisheries Commission in October 2015, Norway and Russia agreed to circulate the minutes of their agreement at Malta "*to NEAFC's member states and all flag states in the EU to inform them that fishing for sedentary species on Norway and Russia's continental shelves in the Barents Sea shall only be possible with the explicit consent of the coastal state*".[219]

178. Norway and Russia also agreed "*that the parties' fishing vessels shall be permitted in 2016 to harvest snow crab in the high seas in the Barents Sea on their parts of the continental shelf as defined in the Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean of 15 September 2010*".[220]

179. On 22 December 2015, Norway amended its regulations on snow crab, which now included a provision allowing Russian vessels to "*catch snow crabs on the Norwegian continental shelf in the area outside 200 nautical miles of the Norwegian coast in the Barents Sea*".[221]

180. On 30 December 2015, the Russian fisheries authorities communicated a list of "*Russian vessels intending to fish for snow crab in the NEAFC Regulatory Area in the Barents Sea in 2016*" to the Norwegian Directorate of Fisheries.[222]

181. In January 2016, as the amended Norwegian regulations had just come into force, Norway and Russia turned their attention to the fact that EU vessels continued their snow crab fishing activities in the Loophole. The two States' fisheries officials held a meeting on this topic on 19 January 2016.

182. According to the minutes of this meeting, the Russian representative, Mr. Golovanov, noted that "*there were now 6 Latvian and 1 Spanish vessel fishing snow crab in Smutthullet. The Spanish vessel was inspected by the Norwegian Coast Guard and it was revealed that it caught approx. 2500 kg of snow crab per day. He informed that*

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218 *Ibid.*, p. 6 [emphasis added].

219 **R-0099**, p. 7.

220 *Ibid.*, p. 8.

221 **C-0110**, new §3, pp. 2-3.

222 **R-0055**.

Russia had not given any 3rd country special permission to fish snow crab Smutthullet and [his Norwegian counterpart, Ms. Elisabeth Gabrielsen] confirmed that Norway had not given any permits to 3rd country either".[223]

183. The minutes show that Russia was hesitant about the steps to be taken towards EU snow crab fishing vessels. "*Golovanov was a little hesitant and asked what we should do now?... And he asked what Norway thinks about this situation*".[224] Norway recalled "*that Norway there had expressed a wish to include wording that we would enforce the ban* [in notes to EU countries and the protocol text of the Joint Norwegian–Russian Fisheries Commission] *but that the Russians had taken this text out of the notes and the protocol text"*. The Norwegian representative stated that "*the Russian party would be welcome to contact again if they wish on the matter of the case. Mr. Golovanov politely thanked for it and said that there was an opportunity for it after they had internal meetings in Moscow*".[225]

184. Through the first half of 2016, European vessels continued to catch snow crab in the Loophole without interference from either Norway or Russia. Contemporaneous exchanges between the two States show that neither of them was content with the situation, but that they disagreed as to which State should bear the responsibility of adopting enforcement measures against EU vessels.

185. In April 2016, the Deputy Minister of Agriculture of the Russian Federation wrote to his Norwegian counterpart to express his concern that EU vessels continued to fish for snow crabs in the Loophole.[226] The letter noted that Russia had not granted its permission to any vessel of the European Union and asked that Norway consider introducing a ban on the landing of snow crab in its ports, a solution described as "*a suggestion of the Norwegian party*".

186. On 3 June 2016, Mr. Røksund replied on behalf of Norway:

> *We are aware that EU vessels fish for snow crab on the Russian continental shelf in the Loop Hole without permission from the Russian authorities. We do not know whether Russia has introduced a national regulation that prohibits this type of activity or*

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223 Minutes of a meeting between Norway's Department of Fisheries and its Russian counterpart, 19 January 2016, **C-0204**.

224 *Ibid*.

225 *Ibid*.

226 Note from the Norwegian Embassy in Moscow, 31 August 2015, **C-0212**; Letter from I.V. Shestakov to A. Røksund, 27 April 2016, **C-0197**.

> *whether the Russian Coast Guard enforces any ban on the Russian continental shelf in the Loop Hole.*
>
> *Combating illegal, unregulated and unreported fishing is a priority task for Norwegian authorities. However, it is difficult under Norwegian legislation to introduce a landing ban for snow crab harvested on the Russian part of the shelf in the Loop Hole as long as such catches are accepted by the Russian authorities and violations of any Russian fishing regulations are not enforced on the Russian side.*[227]

187. Later that month, the 21st North Atlantic Fisheries Ministerial Conference was held in St. Petersburg. The Norwegian delegation met with counterparts from the European Union and the Russian Federation. The minutes of these meetings recorded the contents of tripartite discussions regarding the state of the snow crab fishery in the Loophole:

> *[Mr. Røksund] pointed out that the Russians are pushing for Norway to introduce a landing ban on snow crabs.*
>
> *[The EU representative Mr.] Vella asked if snow crab was still fished and landed without permission. [The Norwegian Minister of Fisheries Per] Sandberg confirmed. He pointed out that it is Lithuanian interests that are behind both the fishing and landings. He further informed that Russia does not perform enforcement in the Smutthullett and that Norway cannot do anything formal until Russia actively does something against this activity.*[228]

188. During a bilateral meeting between Norway and Russia, snow crabs were the subject of further discussion. The following exchange was recorded in the minutes of the meeting:

> *[Russian Minister of Agriculture] Shestakov pointed out that Russia was in the same situation as before; they had no agreement with the EU, but it was still Baltic countries that fished snow crab on Russian shelf in Smutthullet. He pointed out that this was IUU fishing and that Norway was co-responsible for IUU fishing on the Russian shelf. Shestakov informed that the Russian Coast Guard cannot perform enforcemen,t as the fishing takes place outside the 200-mile zone and that they want to use the Norwegian landing ban to stop this fishing.*

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227 **R-0122**.

228 Minutes of the North Atlantic Fisheries Ministerial Conference in St. Petersburg, June 2016, **C-0207**, p. 2 [emphasis added].

> *[Norwegian Fisheries Minister Per] Sandberg pointed out that we were aware of the illegal fishing by third countries without a permit. He further pointed out that Norway and Russia have for many years stood together in the fight against IUU fishing. He further pointed out that we do not know the Russian regulations and whether this fishing is prohibited by law, and what is done regarding illegal fishing on the Russian side. He pointed out that as long as this activity is tolerated by the Russian side, there is nothing we can do from the Norwegian side.*
>
> *Røksund spoke at the meeting and expressed in clear words that here the Russians asked Norway to do the police job for them. He pointed out that it is /deport vessels when there is no ban in Russian regulations. He pointed out that we need both legal and actual action from the Russian side on this before it is relevant for Norway to consider a possible landing ban of snow crabs.*[229]

189. On 22 June 2016, Minister Shestakov wrote to Minister Sandberg to reiterate his concerns regarding the snow crab fishing activities of European vessels in the Loophole "*without the consent of the Russian Federation*". Taking into consideration "*the common interest of our countries*", he requested that Norway "*further consider to the possibility of imposing a ban on crab unloading by vessels of the European Union member countries fishing in this area in the ports of Norway*".[230]

190. On 6 September 2016, Minister Sandberg replied on behalf of Norway.[231] He reiterated Norway's position that "*as long as such catches are accepted by the Russian authorities and violations of any Russian fishing regulations are not prosecuted on the Russian side, it is difficult to introduce a landing ban for snow crab caught on the Russian part of the shelf in Smutthullet according to Norwegian regulations*".[232]

191. Minister Sandberg also noted that Norway had itself introduced such a ban "*and, on this basis, the Norwegian Coast Guard could therefore seize a Lithuanian vessel for illegal fishing of snow crab on the Norwegian continental shelf in the Smutthullet on 15 July 2016*".[233]

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229 *Ibid*., p. 4 [emphasis added].

230 Note from the Norwegian Embassy in Moscow, 22 June 2016, **C-0211**; Letter from I.V. Shestakov to P. Sandberg, 22 June 2016, **C-0253**

231 Letter from P. Sandberg to I.V. Shestakov (Russian Federation Fisheries Agency), 6 September 2016, **CL-0198**.

232 *Ibid*.

233 *Ibid*.

192. Minister Sandberg's letter happened to coincide with the entry into force of Russia's directions to its Border Service to apply "*as of 4 September 2016 state control measures over the harvesting of sedentary species*".[234] This appeared to fulfil Norway's wish that "*Russian fishing regulations*" be "*prosecuted on the Russian side*".[235]

193. EU vessels were then forced to retreat permanently from the Loophole's snow crab fishery.

194. By then, questions had started to arise as to whether Norwegian vessels would themselves be able to continue fishing above Russia's continental shelf in the Loophole beyond 2016.[236] At a meeting at the Russian embassy on 26 September 2016, a Norwegian representative evoked the "*unclear situation that has now arisen for Norwegian vessels on the Russian shelf*".[237] He also referred to "*new information about Russian enforcement and arrangements for the continental shelf in Smutthullett*", on which Norway expected "*an official explanation from the Russian authorities including information on how to manage enforcement against with third country vessels*".[238]

195. Norway's objective of securing access for Norwegian vessels "*to the Russian continental shelf in the Loophole*" was high on the agenda for the 46th meeting of the Joint Norwegian–Russian Fisheries Commission.[239] An internal memorandum of the Norwegian government summarized the situation as follows:

> *In 2015, Norway and Russia agreed that the snow crab is to be regarded as a sedentary species subject to Norwegian and Russian management expertise on Norwegian and Russian continental shelves respectively.*
>
> *Last year, Norway and Russia agreed on mutual access for each other's fishing vessels for catching snow crab on the Norwegian and Russian continental shelves in Smutthullet. Parties should strive to keep the number of vessels within the number of vessels that had a permit in 2015.*

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234 **R-0047**.

235 Letter from P. Sandberg to I.V. Shestakov, 6 September 2016, **C-0198**.

236 Letter from Fiskebat to the Department of Fisheries, 15 December 2016, **C-0216.**

237 Minutes of the meeting with the Russian embassy, 26 September 2016, **C-0203**.

238 *Ibid*., p. 1.

239 Mandate for the 46th meeting of the Joint Norwegian-Russian Commission, 11 October 2016, **C-0184**.

> *This autumn we have read in the Russian press that Russia has submitted a note to the UN Continental Shelf Commission to update the boundaries of the Russian continental shelf in the Barents Sea and that the Russian Coast Guard has controlled snow crab fishing on the Russian continental shelf in Smutthullet since 4 September 2016. This meant that all third country vessels that had been fishing illegally on the Russian continental shelf withdrew. But it was worrying that this had created great uncertainty about whether the Russian shelf in Smutthullet was closed also to Norwegian fishermen.* [240]

196. According to this memorandum, Norwegian fishermen were "*concerned that [Norway and Russia will] secure the mutual access in 2017*". [241] In addition, they wanted "*clarification of regulation in relation to NEAFC*".[242]

197. At the 46th meeting of the Joint Norwegian–Russian Fisheries Commission in October 2016, no agreement could be reached between Norway and Russia regarding the reciprocal access desired by Norwegian fishermen.[243]

198. In its internal minutes of the meeting, the Norwegian Department of Fisheries reported that, "*based on the protocol text agreed for 2016, approx. 6 Norwegian vessels caught snow crab on the Russian shelf and the same number of Russian vessels had participated in the snow crab fishing on the Norwegian shelf*".[244]

199. The reciprocal agreement between Norway and Russia ended on 31 December 2016 and was never renewed, thus forcing Norwegian vessels to put an end to several years of snow crab fishing operations in the area of the Loophole suprajacent to Russia's continental shelf.

200. This event demonstrated the double-edged nature of Norway's change of position through the designation of snow crab as a sedentary species. In the words of NOFIMA, "*Norway both gained and lost on such a definition of the snow crab. As a sedentary species, Norway was given the exclusive right to fish for snow crab on the Norwegian shelf, on the mainland shelf, in the Smutthullett area and in the Svalbard zone*

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240 Mandate for the 46th meeting of the Joint Norwegian-Russian Commission, 11 October 2016, **C-0184**, p. 3 [emphasis added].

241 *Ibid*.

242 *Ibid*.

243 Protocol of the 46th meeting of the Joint Norwegian-Russian Fisheries Commission, 17-20 October 2016, **C-0213**.

244 Minutes of the 46th meeting of the Joint Norwegian-Russian Fisheries Commission, 21 November 2016, **C-0205**.

(as Norway interprets the Svalbard Treaty). At the same time, Norway lost the right to fish on the Russian shelf in Smutthullet".[245]

201. Snow crab fishing vessels then redirected their activities to the Svalbard area, which became the focus of Norway's enforcement efforts.

202. In January 2017, Norway arrested North Star's vessel Senator to make an example of its "*tough line*" policy against EU vessels in Svalbard waters, leading to Minister Sandberg's declaration that "*we will not give them a single crab*".[246] Norway's uncompromising stance appears to have been encouraged by the Norwegian fishermen's association, which advocated for an effective enforcement of the Norwegian ban "*against all foreign vessels*".[247]

203. One of the consequences of Norway's "*tough line*" policy was the total discontinuation of North Star's snow crab deliveries to Seagourmet, bringing its Båtsfjord factory to a halt. This also brought significant political pressure on the Norwegian government as the local community feared the loss of jobs. Ms. Helga Petersen, the leader of the opposition party and a former Minister of Fisheries, pressed Minister Sandberg for solutions to "*secure deliveries of snow crab to Seagourmet AS in Båtsfjord*".[248]

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245 **BK-0006**, p. 13.

246 **C-0036**.

247 Letter from Fiskebat to the Department of Fisheries, 15 December 2016, **C-2018**; Letter from Fiskebat to the Department of Fisheries, 24 January 2017, **C-0215**.

248 Claimants' Memorial, 11 March 2021. paras. 381-390; **PP-0046**; **KL-0047**; **KL-0044**.

Figure 13 – Senator arrested by the Norwegian Coast Guard, Port of Kirkenes, Norway, May 2017 (**KL-0050**)

Figure 14 – Following North Star's ban from the snow crab fishery, Seagourmet's factory came to a halt, as illustrated by this picture of the factory floor in May 2017 (**KL-0050**)

204. On 15 January 2017, in a media interview, Minister Sandberg washed his hands of the issue and deflected the blame onto Russia. He is reported to have stated: "*Norway is*

not the challenge here. When Russia has imposed a ban, it is because it is them who decide."[249]

205. Given Norway's close coordination with Russia towards closure of the Loophole to EU vessels, the Minister's portrayal of Norway as a powerless bystander to Russia's actions was, to say the least, disingenuous.

206. As the record shows, whereas Norway recognized that its own vessels required continued access to the entire Loophole to "*avoid disturbing the economic activity unnecessarily*",[250] it coordinated with Russia to cause a complete ban of EU-flagged vessels from the Loophole fishery:

(a) By August 2015, Norway had recognized the need "*to act in a coordinated manner*" with Russia "*to gain acceptance*"[251] of the position adopted by the two states at Valletta one month earlier.

(b) In September 2015, Norway reasoned that it would be in the two State's common interest "*that Norway and Russia will act equally towards third countries*". It advocated "*joint efforts to secure Norwegian and Russian jurisdiction in the Smutthullet, meaning that both countries ban activities from 3rd countries*".[252]

(c) By January 2016, as the Russian position on enforcement against EU vessels remained tentative,[253] Norway had already adopted a more hawkish tone. It recalled having expressed the wish "*to include wording that we would enforce the ban*" in official notes, which Russia had been reluctant to do.[254]

(d) Between April and September 2016, Norway and Russia expressed a common intent to ban snow crab fishing activities by EU vessels in the Loophole but disagreed as to the means of enforcing such a ban.[255]

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249 **KL-0051**, p. 3.

250 Letter from A. Røksund to the Russian Federal Bureau of Fisheries, 3 August 2015, **C-0196**.

251 *Ibid*.

252 Memorandum from the Department of Fisheries to Minister Aspaker, 29 September 2015, **C-0201**, p. 5.

253 Minutes of a meeting between Norway's Department of Fisheries and its Russian counterpart, 19 January 2016, **C-0204**.

254 *Ibid*.

255 *See above*, para. 170.

(e) Russia, which apparently doubted its jurisdiction to control fishing taking place beyond 200 nautical miles of its coast, wanted Norway to ban such fishing indirectly by prohibiting landings by EU vessels in Norwegian ports.[256]

(f) Norway was not favourable to this approach (viewing it as "*the Russians [wanting] Norway to do the police job for them"*) and instead advocated for a direct ban imposed by Russia. In the words of Norway's official Mr. Røksund: "*we need both legal and factual action from the Russian side*".[257] Minister Sandberg likewise conveyed that "*Russian fishing regulations*" needed to be "*prosecuted on the Russian side*".[258]

(g) The Norwegian solution ultimately prevailed. In September 2016, Russia directed its authorities to apply "*state control measures over the harvesting of sedentary species*"[259] in the Loophole, following the example set by Norway starting in July 2016.

207. By then, the Loophole was completely closed off to EU snow crab vessel operators. The Russian suggestion that Norway should ban their landing of snow crab in Norwegian ports seemingly became moot, since EU vessels no longer had any crab to land.

f. Norway's Position at the 1958 United Nations Conference on the Law of the Sea

208. Norway's submission that "*since the 1950s*", it has "*always considered snow crab to be sedentary*"[260] is entirely reliant on the claim that it allegedly adopted this position at the 1958 Geneva Conference on the Law of the Sea.[261] Quite apart (as the International Court put it in *Jan Mayen*) "*from the question whether a decision by the Court may be based on the positions expressed by a State at a diplomatic conference*

256 Minutes of the North Atlantic Fisheries Ministerial Conference in St. Petersburg, June 2016, **C-0207**, p. 4 ("*Mr. Shestakov informed that the Russian Coast Guard cannot perform enforcement, as the fishing takes place outside 200 mile zone and that they want to use the Norwegian landing ban to stop this fishing*").

257 *Ibid*., p. 4.

258 Letter from P. Sandberg to I.V. Shestakov, 6 September 2016, **C-0198**.

259 **R-0047**.

260 Respondent's Counter-Memorial, 29 October 2021, para. 753.

261 *Ibid*., paras. 44-48.

for the adoption of a multilateral convention",[262] the events on which this dubious argument is based merit close scrutiny.

209. Norway states that "*going into the 1958 negotiations, positions varied as to whether living marine resources should be included in the coastal State's sovereign rights on the continental shelf*".[263] It acknowledges that, "*at the outset*", Norway did not support such an inclusion, but argues that it "*changed its position during the negotiations and voted in favour of Article 2(4) of the Continental Shelf Convention*".[264]

210. Norway's argument thus appears to be that its vote in favour of Article 2(4) of the Continental Shelf Convention at the Geneva Conference of 1958 proves its adoption of the position that snow crabs (or perhaps crustaceans more generally) qualify as a sedentary species under the meaning of that provision.

211. It is useful to begin with an examination of the position initially taken by Norway at the Geneva Conference. The terms "sedentary species" appeared in the definition of "natural resources" proposed in Article 68 of the International Law Commission's final draft. This definition was the subject of "*much debate and several proposed amendments*" were considered by the Fourth Committee (Continental Shelf) of the Geneva Conference.[265]

212. On the definition of "natural resources", Norway was part of a group, also composed of Australia, Ceylon, Malaya, India and the United Kingdom, which proposed the following draft amendment:

> *The natural resources referred to in these articles consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil; <u>but crustacea and swimming species are not included in this definition</u>.*[266]

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262 ICJ, *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, 14 June 1993, **CL-0511**, pp. 38, 56, para 39.

263 Respondent's Counter-Memorial, 29 October 2021, para. 45.

264 *Ibid*., para. 45.

265 Richard Young, *"Sedentary Fisheries and the Convention on the Continental Shelf,"* The American Journal of International Law, vol. 5, 1961, **CL-0489**, p. 366.

266 United Nations, *"Extract from the Official Records of the United Nations Conference on the Law of The Sea",* Conference on the Law of the Sea*,* A/CONF.13/C.4/L.36, Volume VI, from 24 February to 27 April

213. The Fourth Committee adopted this definition. According to the literature, its sponsors "*stressed in the debate that their text was intended as a compromise based on 'considerations of legal principle and practical utility' and resulting from 'close consultation between lawyers and biologists'*."[267]

214. A contemporaneous memorandum dated 28 March 1958 prepared by Mr. Carl Stabel, Head of the Norwegian delegation, indicates that Norway had reached a similar conclusion.[268] The Norwegian delegation supported a definition of "natural resources" that would

> *…encompass certain biological phenomena which have a permanent connection to the sea-bed, such as e.g. oysters and mussels, but not however crabs etc. This definition, which had been developed in consultation with Dr. Rasmussen, seemed to be well founded scientifically and it drew a clear and unambiguous line around the entitlements, all the while having good chances of gaining a majority in the committee… The delegation expressed its agreement with this.*[269]

215. In subsequent plenary meetings of the Conference, it was agreed that this provision would be incorporated as part of a separate instrument and the definition of "natural resources" became Article 2(4) of the Convention on the Continental Shelf.[270]

216. In plenary, further amendments were proposed and the last phrase ("*but crustacea and swimming species are not included in this definition*") was deleted. The plenary vote[271] was recounted as follows:

> *At the suggestion of El Salvador, the words "crustacea and" were put to the vote, and eliminated. Afraid that the retention of the remaining words "but swimming species are not included" would imply the inclusion of crustacea, the United States, with Australia's*

1958, **CL-0395**, p. 7.; S.V. Scott, *"The Inclusion of Sedentary Species Within the Continental Shelf Doctrine*," The International and Comparative Law Quarterly, Vol. 41 No. 4, October 1992, **CL-0396**, at p. 805.

267 Richard Young, *"Sedentary Fisheries and the Convention on the Continental Shelf,"* The American Journal of International Law, vol. 5, 1961, **CL-0489**, p. 366.

268 Carl Stabel, Memorandum, 28 March 1958**, C-0262.**

269 *Ibid.* [emphasis added].

270 **R-0115**, p. 49-50.

271 *Ibid.*, p. 51- 54.

> *acquiescence, moved that the rest of the phrase be deleted. This was passed.*[272]

217. The words "*crustacea and*" were first put to the vote. Norway voted to retain those words in the definition,[273] which indicates that it still supported a definition specifically excluding crustacea from the definition of "natural resources". A majority of votes was, however, cast against the words "*crustacea and*": those words were removed from the definition.

218. While the phrase that specifically excluded crustacea from the definition of natural resources was removed in plenary, the question whether that definition therefore *included* crustacea remained an open one.[274] Some observers considered the deleted sentence as redundant and still interpreted the remaining definition as excluding crustaceans. As reported by Garcia Amador, the Head of the Cuban Delegation to the Conference, writing in 1959:

> *During the vote in the Committee an amendment to delete the words "crustacea and" from the original joint proposal failed to be adopted, while the text of the proposal as a whole was approved by a substantial majority. When the question came up in Plenary, in two separate votes both the words "crustacea and" and the words "but… the swimming species are not included in this definition" were deleted; a number of delegations who had voted in the Committee in favour of retaining the sentence having now voted for its deletion. The sentence as a whole was, in effect, obviously redundant and therefore unnecessary;* ***for the definition, as stated in the present paragraph of Article 2 of the Convention, unquestionably excludes crustacea*** *as much as it excludes the swimming species which may be found in the super-jacent waters of the shelf.*[275]

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272 S.V. Scott, *"The Inclusion of Sedentary Species Within the Continental Shelf Doctrine*," The International and Comparative Law Quarterly, Vol. 41 No. 4, October 1992, **CL-0396**, at p. 806.

273 **R-0115**, at pp. 52-53.

274 Ko Nakamura, "*The Japan United-States Negotiations concerning King Crab Fishery in the Eastern Bering Sea*," Japanese Annual of International Law, 1965, **CL-0478**, p. 43 ("*Thus the provision… of the International Law Commission draft article 68 and the six-nation proposal submitted to the 4th Committee, that crustacea and swimming species are not included in the natural resources of the continental shelf, has been discarded. It is not possible, however, to judge from the results of the voting on article 2, paragraph 4, whether crustacea is or is not included*") [emphasis added]; Richard Young, "*Sedentary Fisheries and the Convention on the Continental Shelf*," The American Journal of International Law, Vol. 55, 1961, **CL-0489**, p. 365 ("*Of the creatures important to man, only the crustaceans still seem to be in an uncertain position. These had been expressly excluded in the sponsors' original draft of the text; and Dr. Garcia-Amador [the Chairman of the Cuban delegation to the Conference] has affirmed with the authority of first-hand knowledge, that this is still the case. Yet it is submitted, with all respect, that this is not self-evident…*").

275 Garcia Amador, THE EXPLOITATION AND CONSERVATION OF THE RESOURCES OF THE SEA, Leyden, 1959, **CL-0394,** pp. 126-128 [emphasis added].

219. The same interpretation was later adopted by France, which acceded to the Convention in July 1965. In its instrument of accession, France declared, as regards the definition of "living organisms belonging to sedentary species" in Article 2(4), that:

> *The Government of the French Republic considers that the expression "living organisms belonging to sedentary species" **must be interpreted as excluding crustaceans**, with the exception of the species of crab termed "barnacle"…*[276]

220. Therefore, Norway's vote in favour of the 1958 Convention on the Continental Shelf does not prove that Norway "*changed its position during the negotiations*" as to whether crustaceans could be characterized as sedentary species. While Norway voted in favour of the adoption of the Convention, this vote did not evidence an interpretation of Article 2(4) as being inclusive of crustaceans. At best, it remained uncertain whether crustaceans were included in the definition of Article 2(4), and some States, including France, officially interpreted it as excluding crustaceans.

221. The last official position adopted by Norway in 1958 on this subject was its vote in favour of the maintenance of the words "*but crustacea*" as part of the proposed definition of "natural resources".[277] These words were found within the phrase "*but crustacea and swimming species **are not included** in this definition*".

222. Thus, the final public and official position adopted by Norway at the 1958 Geneva Conference showed that it did not consider crustaceans as "living organisms belonging to sedentary species". There is no evidence that Norway ever changed its position on this matter at the 1958 Geneva Conference.

223. Norway has filed an exhibit which it describes as the "*Report by the Norwegian Delegation to the United Nations Conference on the Law of Sea, Geneva 24 February to 27 April 1958*".[278] This exhibit is in fact a confidential memorandum of the Norwegian government dated 23 December 1958. The author of this memorandum states, as regards the definition of sedentary species adopted at the Geneva Conference, that "*the coastal state will therefore be granted exclusive rights to all botanical vegetation*

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276 United Nations, Accession of the Convention on the Continental Shelf, 1965, **CL-0397**, article 2 (4) [emphasis added].

277 **R-0115**, pp. 52-53.

278 **R-0012**.

on the seabed and for the fishing of, for example, oysters, muscles [sic]*, crabs and lobsters…*".[279]

224. This document is obviously insufficient to support Norway's contention that "*since the 1950s*", it has "*always considered snow crab to be sedentary*". The identity of the author of this memorandum is unknown, as is the purpose of its preparation and the scope of its distribution within the Norwegian government. There is no evidence that Norway ever adopted the views stated in the memorandum, let alone that it ever made its content public or notified it to other States or the UN (the document remains marked as "confidential – declassified"). As such, this internal memorandum can be given no weight in this case.[280]

225. At any rate, there is no evidence that this memorandum has ever influenced Norwegian policy with respect to snow crab. In its "*preliminary assessment*" of January 2015 as to whether snow crab could be characterized as a sedentary species,[281] the Ministry of Foreign Affairs was apparently oblivious as to any historical Norwegian position on the subject. It reached its conclusion based on a review of "*recent literature*", noting that the historical position had "*not been entirely clear*":

> ***Historically, it has not been entirely clear that the crab, including the snow crab, is considered a sedentary species in the sense of UNCLOS art. 77 (4)****. The content of the provision was little discussed during the Law of the Sea Conference, other than a proposal by several States (including Norway) during the 1958 Conference that crustaceans and swimming species should not be included was the subject of discussion and eventually voted down*

279 *Ibid*.

280 Internal and confidential memoranda of this kind cannot be given any weight as evidence of the position of the State in international law: PCA, *Eritrea v. Yemen (Territorial Sovereignty)*, Case No. 1996-04, Award, 9 October 1998, **CL-0509,** pp. 31–32, para. 94 ("*One general caveat needs, however, to be made. Some of this material is in the form of internal memoranda, from within the archives of the British Foreign Office, as it then was, and also sometimes of the Italian Foreign Office. The Tribunal has been mindful that these internal memoranda do not necessarily represent the view or policy of any government, and may be no more than the personal view that one civil servant felt moved to express to another particular civil servant at that moment: it is not always easy to disentangle the personality elements from what were, after all, internal, private and confidential memoranda at the time they were made*." [emphasis added]); ICJ, *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)* Judgment, 23 May 2008, **CL-0510**, pp 12, 86, paras 242–243 (*"Malaysia also placed weight on an internal confidential document entitled "Letter of Promulgation" issued on 16 July 1968 by the Chief of the Malaysian navy, attached to which were charts indicating the outer limits of Malaysian territorial waters. One of the charts attached to the letter showed Pedra Branca/Pulau Batu Puteh and also Middle Rocks and South Ledge as within Malaysia's territorial waters. Singapore made a related reference to the 1975 Operations Instructions of the Singapore navy designating a patrol area in the vicinity of Pedra Branca/Pulau Batu Puteh. The Court observes that the Malaysian chart and the Singaporean Instructions were acts of one Party, which were unknown to the other Party, the documents were classified and they were not made public until these proceedings were brought. The Court considers that, like the patrols themselves, neither can be given weight*.") [emphasis added].

281 Note from C. Finbak to E. Gabrielsen, 19 January 2015, **C-0249**.

> *in plenary.* […] *Although for a time it seemed relatively open whether the crab was to be considered a sedentary species, recent literature seems to establish quite unequivocally that the crab is to be considered a sedentary species which follows shelf law*.

226. Thus, if the positions adopted by Norway at the 1958 Geneva Conference revealed any historical Norwegian position that crabs or crustaceans are sedentary species (they do not), Norway's own Ministry of Foreign Affairs was plainly unaware of it as late as January 2015.

g. The Argument that the Claimants "Exploited" an Absence of Regulation

227. Norway submits that, from 2014 to September 2016, the "*Claimants were able to exploit the absence of a Russian prohibition on the harvesting of snow crab on the Russian continental shelf*".[282]

228. According to this narrative, the Claimants were adventurers who took advantage of a regulatory gap while it lasted, knowing that their activities were on the verge of illegality. Thus, it could only be expected that Norway would introduce regulations "*during the period when the snow crab population moved westwards onto the Norwegian continental shelf in the Loophole*" and this "*should have come as no surprise whatsoever to the Claimants*".[283]

229. Here again, Norway's narrative is closely tied to the fiction that it has "*always*" treated snow crab as a sedentary species "*since the 1950s*", which would imply that the Loophole fishery always fell under the jurisdiction of Norway and Russia as the coastal States. If this were true, one might have been able to see the attraction of Norway's portrayal of the Claimants as buccaneering risk takers willing to "*exploit*" an absence of regulation while knowing full well that it could not last.

230. However, Norway has not "*always*" treated snow crab as a sedentary species or held the view that the snow crab fishery of the Loophole fell under its continental shelf jurisdiction. Before July 2015, Norway treated the snow crab fishery in the Loophole as an international water fishery outside any State's fisheries jurisdiction, along with every other State with vessels participating in that fishery. The Claimants made their investments against that legal backdrop.

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282 Respondent's Counter-Memorial, 29 October 2021, para. 2.

283 *Ibid.*, para. 87.

231. The fact that the Loophole snow crab fishery fell under the regime of the high seas was relied upon by the Claimants when making their investments in Norway.[284] Had the fishery then been considered to fall under Norwegian and Russian jurisdiction, Latvia would not have issued fishing licences to North Star. Without the knowledge that it could acquire those licences, North Star would not have purchased vessels and fishing capacity rights. Mr. Pildegovics could not have formed a joint venture with Mr. Levanidov for the supply of Seagourmet's Båtsfjord factory. Indeed, the Claimants' fishing enterprise would never have been constituted.

232. Norway's sudden reversal of its position on snow crab in July 2015 came as a surprise to all observers (with the likely exception of Russia).

233. Dr. Brooks Kaiser confirms, as a member of the scientific community interested in the management of the snow crab fisheries in the Barents Sea since 2013, that she clearly perceived a change in Norway's position.[285]

234. According to the former Mayor of Båtsfjord, Mr. Geir Knutsen, "*it was apparent in Båtsfjord that it was EU vessels that caught the snow crab which Seagourmet refined. I believe everyone knew that*".[286] The Claimants' investments "*meant a great deal for the local economy*",[287] so much so that the town made significant long-term infrastructure investments to support their activities. "*At Båtsfjord we expanded our capacity for cold storage, in part with a view to being able to store more of the snow crab that North Star brought ashore*".[288]

235. Mayor Knutsen further testifies that it was his "*understanding back then that EU vessels (including Latvian ones) were allowed to catch snow crab in the Barents Sea, in the Loophole, and off Svalbard. My understanding was that that was why they were catching and why they brought the crab to Båtsfjord*".[289]

236. Following the expulsion of EU vessels from the Loophole by Norway and Russia, Mayor Knutsen advocated in the Claimants' favour with the Norwegian government and sought to find solutions enabling them to resume their snow crab fishing activities.

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284 First Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 26, 28; Second Witness Statement of Peteris Pildegovics, 28 February 2022, paras. 6-14.

285 Addendum to the Expert Report of Dr. Brooks Kaiser, 28 February 2022, paras. 4-10.

286 Witness Statement of Geir Knutsen, 11 March 2021, para. 6.

287 *Ibid.*, para. 4.

288 *Ibid.*, para. 8.

289 *Ibid.*, para. 10.

"*We sought to facilitate for them by contacting central authorities and to speak on their behalf vis-à-vis the regional authorities, members of Parliament, and the Government. We contacted the Minister and were able to set up conversations*".[290]

237. From the Mayor's perspective, there was no doubt that the Claimants' snow crab fishing activities in the Loophole were perfectly legal. Had the town perceived the Claimants as buccaneers who were "*exploiting*" a regulatory gap, it is hard to imagine why it would have committed significant resources building up its infrastructure in support of their operation. It is further inconceivable that the town's Mayor would have been prepared to take up their case in Oslo with the Norwegian government.

238. Norway's negative portrayal of the Claimants is also difficult to reconcile with the level of recognition and support they received from the Latvian government.

239. It bears recalling that Latvia's Ambassador to Norway, Mr. Indulus Abelis, not only attended the inauguration of Seagourmet's factory in Båtsfjord in June 2015 but gave a speech praising the Claimants' participation in this Norwegian investment.[291]

290 Witness Statement of Geir Knutsen, 11 March 2021, para. 7.

291 First Witness Statement of Peteris Pildegovics, 11 March 2021, para. 138; Photographs taken at the opening ceremony, 10 June 2015, **PP-0145**.

Figure 15 – Latvia's Ambassador to Norway, Mr. Indulus Abelis, giving a speech at the official inauguration of Seagourmet's Båtsfjord factory, June 2015 (**PP-0145**).

Figure 16 – Peteris Pildegovics (first left), Mr. Indulus Abelis, Latvia's Ambassador to Norway (third left), Mr. Geir Knutsen (center, wearing a medal) and members of the Båtsfjord community standing on Seagourmet's dock at the official inauguration, June 2015. North Star's ship Saldus is in the background. (**PP-0145**).

240. Latvia strongly protested Norway's about-turn on the legal regime applicable to snow crab. On 4 November 2015, the Norwegian Ambassador in Riga handed over a note verbale to the Latvian Foreign Ministry to inform it of Norway's position that snow crab could no longer be fished without the express authorization of the coastal State. The Norwegian Embassy's minutes of this meeting show that this caused "*genuine surprise and indignation*" on the Latvian side.[292]

241. The Latvian Foreign Ministry is also reported to have stated its belief that "*if members of NEAFC want changes in the legal regime, this must be communicated to all NEAFC members…*" It tried "*to understand the thinking behind Norway's changed position*" and "*why Norway [was] changing its position now*".[293]

242. In September 2016, as North Star's vessels had been expelled from the Loophole, the Latvian Ambassador to Norway, Mr. Abelis, wrote to Norway's Ministry of Foreign Affairs to request that "*consultations*" be organized between fisheries and foreign affairs experts of Latvia and Norway. The Latvian delegation would be led by the Under-Secretary of State of the Latvian Ministry of Foreign Affairs and would include "*high level officials from the Department of Fisheries and the Ministry of Agriculture*". The Ambassador called the matter "*of high urgency for our fishing industry*".[294]

243. Moreover, following the Claimants' notice of dispute a meeting was held in Paris with Norway on 4 July 2019. A deputy director from Latvia's Ministry of Agriculture and the first secretary of Latvia's embassy to France attended the meeting as part of the delegation.[295]

244. Had the Claimants' business been built on the "exploitation" of a regulatory gap, it is hard to think that they would have been benefitted from such a level of support from the Latvian State.

245. Contrary to Norway's depiction, the Claimants' vessels operated squarely within the legal framework applicable to their activities in the Loophole. Their operations were well known and understood by all the relevant aLenauthorities. When the European Union proposed to NEAFC to approve an exploratory bottom pot fishery targeting snow

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292 Minutes of the meeting between the Norwegian Embassy and the Latvian Foreign Ministry, 4 November 2015, **C-0206**, p. 2.

293 *Ibid*.

294 **R-0082**.

295 Letter from Claimants to Norway, 1 July 2019, **C-0260**.

crab in the Loophole, it was indicated that two of the Claimants' vessels, Solveiga and Senator, would take part in this exploratory fishery.[296] That the Claimants' vessels should have been included in this EU-sponsored project is incompatible with their representation as rogue operators exploiting an absence of legal framework.

246. After Norway's change of position in July 2015, the European Union raised questions about the "*acquired rights*" of contracting parties which had fished for snow crab in areas now considered by Norway as falling under its continental shelf jurisdiction.[297] Russia itself appears to have been concerned that the historical activities of EU vessels in the Loophole "*could mean that some countries acquired fishing rights*".[298]

247. Norway's contention that the Claimants "*exploited*" an absence of regulation is therefore wrong and misleading. The Loophole's snow crab fishery was only "*unregulated*" to the extent that NEAFC had not adopted a recommendation pertaining to such fishery. It nonetheless remained subject to all the rules generally applicable to international water fisheries in the NEAFC area, as Norway's Directorate of Fisheries repeatedly recognized.[299]

248. Since the fishery was considered as an international water fishery, the Claimants never anticipated that Norway could one day purport to regulate it, let alone that it would ever ban them from this fishery. If the Claimants can be said to have "*taken advantage*" of anything, they took advantage of the *freedom of the high seas*, not of an "*absence of legislation*".[300] In that sense, they were no different from their Norwegian or Russian counterparts, who also enjoyed access to the entire Loophole at a time when neither of the coastal States had taken the position that the snow crab fishery in that area of the high seas fell under their continental shelf jurisdiction.

249. It is indeed Mr. Pildegovics' testimony that snow crab was an international waters fishery and that there was no reason to believe otherwise at the time he made his investment in Norway.[301]

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296 Letter from the EC to NEAFC regarding the proposal for an exploratory fishery an accompanying assessment report, 8 July 2015, **C-0232**, pp. 13-15, 21.

297 Report of the 35th NEAFC Annual Meeting, 14-18 November 2016, **C-0214**, agenda item 26, p. 18.

298 Memorandum from the Department of Fisheries to Minister Aspaker, 29 September 2015, **C-0201**, p. 2.

299 *See above,* para. 104.

300 Respondent's Counter-Memorial, 29 October 2021, para. 131.

301 Second Witness Statement of Peteris Pildegovics, 28 February 2022, paras. 6-14.

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250. To conclude under this first heading, the Claimants made their investments in Norway based on the understanding that the Loophole snow crab fishery was an international waters fishery, outside any state's fisheries jurisdiction. This was Norway's clear position at the time, which had been communicated to the Claimants' joint venture partners, and there was no indication that this position would (or could) ever change.

251. Since the fishery was outside any State's fisheries jurisdiction, the Claimants' legitimate expectation was that no single State could purport to regulate it. Any future regulations that might have come would have been set through NEAFC, where the Claimants' interests would have been given weight, and where the Claimants certainly faced no threat of ever being banned from the fishery.

252. It is therefore accurate to say that the Claimants' legitimate expectations were defeated by Norway's sudden expansion of its fisheries jurisdiction into the Loophole, with the discriminatory goal to exclude EU-flagged vessels from the snow crab fishery. the Claimants had no way of foreseeing that Norway would change its position and exercise a newly asserted jurisdiction in a manner that would destroy their investments in Norway, as it undoubtedly did.

B. NORWAY'S ASSERTION THAT NORTH STAR'S SNOW CRAB CATCHES WERE MADE "*ON THE RUSSIAN CONTINENTAL SHELF*"

253. A cornerstone of Norway's case is that North Star's vessels were engaged in the "*harvesting*" of snow crab "*on the continental shelf of the Russian Federation*".[302] This submission has a clear subtext: Norway cannot be blamed for the Claimants' woes.[303]

254. Norway's position in this arbitration is reminiscent of the stance adopted by its former Minister of Fisheries Mr. Sandberg, who is reported to have said in January 2017 that "*Norway is not the challenge here. When Russia has imposed a ban, it is because it is them who decide.*"[304]

255. As shown in the above section, Norway's thesis that the Claimants fished "*on the Russian continental shelf*" is an exercise in historical revisionism. To the Claimants'

302 Respondent's Counter-Memorial, 29 October 2021, para. 1 [emphasis added].

303 *Ibid*., para. 141.

304 **KL-0051**, at p. 3.

knowledge, until July 2015, no State or stakeholder had ever referred to the Barents Sea snow crab fishery as involving the "harvesting" of snow crab from any State's "continental shelf".

256. When North Star began operations in August 2014, it believed that its activity consisted in *fishing* for snow crab in the Loophole, an area of *international waters* falling outside any State's fisheries jurisdiction. The company's NEAFC licences gave it access to the entire Loophole. This meant that its captains could fish in the most promising locations within that area of the high seas. Accordingly, the location of a vessel's catch at any point in time depended on its captain's assessment of the best place to lay its pots at that time. No question arose as to whether the fishing took place above Norway's or Russia's continental shelf.[305]

257. It is a well-documented fact that the snow crab population of the Barents Sea has migrated westward from the Russian Exclusive Economic Zone into the Loophole and the Svalbard zone. According to NOFIMA, "*it was known* [as of October 2014] *that the snow crab density was low in the Norwegian part of the Barents Sea, but that it was expected to spread north and west in the Svalbard zone*".[306] This is in fact what has happened.

258. It is therefore unsurprising that, in the early years of the fishery, the more attractive fishing grounds within the Loophole were found in areas closer to the Russian EEZ, which Norway now describes as "*the continental shelf of the Russian Federation*".

259. As noted above, snow crab fishing by Norwegian vessels was "*mainly carried out on the Russian shelf*",[307] despite the absence of any Russian consent to that effect until the year 2016. It can be presumed that, like North Star's vessels, Norwegian vessels were drawn to the locations they considered most promising within the Loophole, at a time when neither Norway nor Russia had adopted the view that the Loophole's snow crab fishery fell under their continental shelf jurisdiction.

260. While snow crabs were thought to be present in greater numbers nearer the Russian EEZ, snow crab has been present throughout the Loophole since at least 2013,

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305 Second Witness Statement of Peteris Pildegovics, 28 February 2022, paras. 19-20.

306 **BK-0006**, p. 14.

307 Memorandum from the Department of Fisheries to Minister Aspaker, 29 September 2015, **C-0201**; **BK-0006**, p. 9.

including its area suprajacent to the Norwegian continental shelf.[308] Thus vessels of all nations certainly *could* choose to fish for snow crab there, until Norway started enforcing its ban in the summer of 2016.

261. Some vessels undoubtedly did. According to data from Norway's Institute of Marine Research (IMR), catches have been made in the area of the Loophole suprajacent to Norway's continental shelf since 2013:

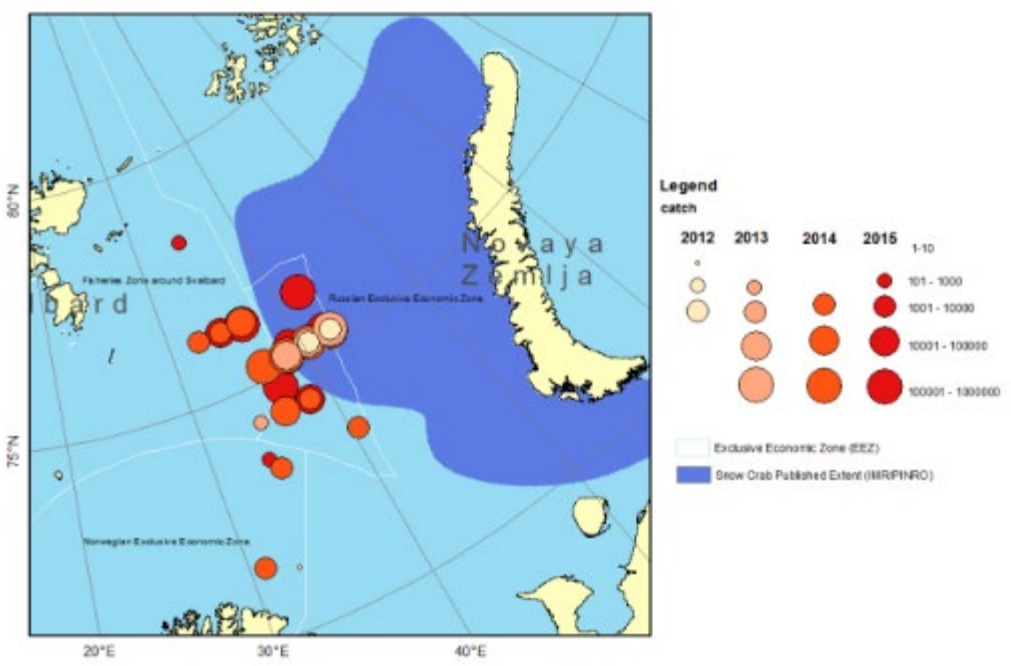

Figure 17 – Map of location and sizes of snow crab catches in the Barents Sea (Expert Report of Dr. Brooks Kaiser, p. 24, Figure 14, based on data from IMR). Circles in the lower-left corner of the Loophole illustrate the size of catches made above the Norwegian continental shelf in 2013, 2014 and 2015.

262. According to records of the Norwegian government, in 2016, six Russian vessels fished for snow crab "*on the Norwegian shelf*", in accordance with the reciprocal agreement between Norway and Russia.[309] It can only be assumed that these vessels chose to fish there because they knew that the snow crab population had by then settled in the area.

263. Despite the fact that snow crab fishing vessels were active on both "sides" of the Loophole when the Claimants made their catches, Norway seeks to create the

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308 **BK-0029**, slides 4 and 12; J. H. Sundet, "*Future challenges in research and management of the invasive snow crab (Chionoecetes opilio) in the Arctic Barents Sea,*" IMR presentation, 2014, **C-0235**, slide 24.

309 Minutes of the 46th meeting of the Joint Norwegian-Russian Fisheries Commission, 21 November 2016, **C-0205**.

impression that the Loophole's snow crab fishery occurred (mainly or even exclusively) "*on the Russian continental shelf*", an area falling beyond its authority where its policies could not possibly have impacted the Claimants' business.

264. To support this thesis, Norway has commissioned a series of "*reports*" prepared by its Section of Analysis in Vardø, which is described as "*a joint unit of the Norwegian Directorate of Fisheries and the Norwegian Coastal Administration*".[310]

265. These "*reports*" were issued on 28 October 2021, one day before Norway's filing of its Counter-Memorial. They were requested by the Ministry of Foreign Affairs,[311] which represents Norway in this proceeding, and prepared by an office of the Norwegian government which owes a duty of loyalty to Norway.

266. There is no doubt that these reports were produced to support Norway's case in this arbitration. With this purpose in mind, the reports were revised heavily by the Ministry of Foreign Affairs[312] and external legal counsel, whose extensive inputs were redacted by Norway on grounds of attorney-client privilege.[313] Certain sections of the reports were drafted by that Ministry itself (as well as Norway's external counsel[314]) and included at its request.[315]

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310 **R-0151**, p. 1.

311 **R-0151**, p. 1.

312 Draft report, Guidance and Summary, 18 October 2021, **C-0251**; Draft report, Guidance and Summary, 21 October 2021, **C-0252**; Draft report, Guidance and Summary, 5 November 2020, **C-0250;** Email from the Ministry of Foreign Affairs to the Fisheries Directorate, 12 October 2021, **C-0223**; Email from the Ministry of Foreign Affairs to the Fisheries Directorate, 2 November 2020, **C-0257**; Email from the Ministry of Foreign Affairs to the Fisheries Directorate, 5 November 2020, **C-0228**.

313 Draft report, Guidance and Summary, 18 October 2021, **C-0251**; Email from the Ministry of Foreign Affairs to the Fisheries Directorate, 1st August 2021, **C-0227** ("[the Ministry of Foreign Affairs] *received some comments from our contributors to the method report*."); Email from the Ministry of Foreign Affairs to the Fisheries Directorate, 16 July 2021, **C-0259** ("*We are now trying to adjust the summary in line with the advisers' wishes as far as we can and will then send a new version to you until you return from holiday*…"); Email from the Ministry of Foreign Affairs to the Fisheries Directorate, 1st August 2021, **C**); Email from the Ministry of Foreign Affairs to the Fisheries Directorate, 12 October 2021, **C-0263** ("*Here is the draft summary of the speed reports with comments and suggestions for changes from one of our lawyers in London*."); Email from the Ministry of Foreign Affairs to the Fisheries Directorate, 25 October 2021, **C-0264** (providing "*one remark*" and "*notes from our colleague in London*").

314 Draft report, Guidance and Summary, 18 October 2021, **C-0251**.

315 Draft report, Guidance and Summary, 18 October 2021, **C-0251**, pp. 3, 8-9, 13-15, 22-30; Email from the Ministry of Foreign Affairs to the Fisheries Directorate, 1 July 2020, **C-0229**; Email from the Fisheries Directorate to the Ministry of Foreign Affairs, 10 August 2021, **C-0226**; Email from the Ministry of Foreign Affairs to the Fisheries Directorate, 10 August 2021, **C-0225**; Email from the Fisheries Directorate to the Ministry of Foreign Affairs, 20 August 2021, **C-0224**.

267. It is also noteworthy that the authors of these reports are unnamed[316] and their qualifications unknown. However, the reports rely on statements of opinion which could be attributed weight only *if made by an expert*.

268. For example, the first report notes that the vessels' voyages have been colour-coded by speed and that "*speeds of below 6 knots suggest that there has been snow crab harvesting activity*".[317] This is a critical assumption underlying the "findings" reached by the reports: that no "snow crab harvesting activity" could have occurred if the vessel was travelling at or above 6 knots. Yet, the reports provide no authority for the "suggestion" that snow crab fishing could only have occurred below 6 knots (let alone prove that *the Claimants' vessels* only did fish for snow crab while travelling under such speed).

269. Documents produced by Norway indicate that this assumption may in fact have been suggested by the Ministry of Foreign Affairs. The Ministry inserted the following language in a November 2020 draft of the report filed as **R-0151**: "*Vessels [usually] cannot conduct snow crab catching activities at speeds higher than 6 knots*".[318] A decision appears to have been made to take the word "usually" out of the final report.[319]

270. Yet, the Ministry did not seem to have much confidence in the validity of its assumption that vessels could not fish for snow crab at speeds above 6 knots. In a comment on the November 2020 draft, the Ministry asked: "*Can this be understood as there has been fishing activity at higher speeds? Can one possibly write that speeds above 6 knots are assumed to be transit between the areas?*".[320]

271. The Ministry of Foreign Affairs' comments on the draft reports also prove that it wanted them to say that North Star's fishing activities had been concentrated "on the Russian continental shelf". For example, a November 2020 draft of the report filed as **R-0151** stated that "*most of the catching activity for the vessels found place in the Russian shelf of the Loop Hole*". The Ministry commented: "*Here it says "most of", but since the picture shows that all fishing activity took place in Smutthullet on the Russian shelf, it*

316 All that is known in this regard is that "*three of the executive officers at the Section of Analysis have been writing the reports regarding the vessels*," **R-0151**, p. 7.

317 **R-0151**, section 4.4, p. 11.

318 Draft report, Guidance and Summary, 5 November 2020, **C-0250,** p. 15.

319 **R-0151**, section 4.7 ("*vessels cannot conduct snow crab harvesting activities at speeds higher than 6 knots*"). Email from the Ministry of Foreign Affairs to the Directorate of Fisheries, 29 June 2020, **C-0230**.

320 Draft report, Guidance and Summary, 5 November 2020, **C-0250,** p. 16

should say this."[321] Later in the same draft, the Ministry of Foreign Affairs asked the drafters to "*emphasize that the catch was on the Russian shelf*".[322]

272. Likewise, the reports were edited to attenuate statements indicating that North Star's vessels had fished "on the Norwegian continental shelf":

(a) The November 2020 draft initially stated that *"[o]n some voyages the vessel also had catching operations, or possible catching operations, in the Norwegian shelf of the Loop Hole*". This draft was edited to read: "*On some voyages the speed and maneuvers of the vessel could indicate catching operations… on the Norwegian shelf*".[323]

(b) On page 16 of the final report (**R-0151**), where Saldus' presence above Norway's continental shelf is discussed, a statement is made that it "*cannot be discerned as a matter of certainty that the* Saldus *was travelling below 6 knots for the entirety of the length of the green line*".[324] While this conclusion is purportedly drawn by the Section of Analysis, this sentence was in fact drafted and inserted in the report by Norway's external counsel.[325]

(c) On the same draft, under a figure providing data regarding Saldus' entry into, and departure from, the area of the Loophole suprajacent to Norway's continental shelf, the Ministry of Foreign Affairs asked whether the following language could be inserted: "*Here, however, the data show that the speed of the vessel has been too high to allow for any snow crab harvesting activities*".[326]

273. The Section of Analysis appears to have been content to accept the Ministry's inputs and to act according to its wishes. As the reports were nearing completion, an advisor of the analysis unit wrote to the Ministry: "*we have made the conclusions you wanted so far*".[327] "A*waiting to hear from you if there is anything for Saldus and Solveiga that needs be changed*".[328]

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321 Draft report, Guidance and Summary, 5 November 2020, **C-0250**, pp. 3, 18.

322 *Ibid.*, pp. 3, 30.

323 *Ibid.*, p. 18.

324 **R-0151**, p. 16.

325 Draft report, Guidance and Summary, 18 October 2021, **C-0251**, p. 25.

326 Draft report, Guidance and Summary, 5 November 2020, **C-0250,** pp. 3, 23.

327 Email from the Directorate of Fisheries to the Ministry of Foreign Affairs, 25 October 2021, **C-0222**.

328 Email from the Directorate of Fisheries to the Ministry of Foreign Affairs, 26 October 2021, **C-0221**.

274. Hence these reports have no evidentiary value: they were drafted at the Ministry's request and partly by the Ministry itself, with a clear purpose: to help shore up Norway's theory that the Claimants' activities were concentrated "*on the Russian continental shelf*".

275. Had these "*reports of analysis*" been proffered as expert reports, and had they been authored by a person with the necessary academic credentials and experience *whose primary duties were owed to the Tribunal*, the Tribunal might have been able to judge the weight to be attributed to their conclusions – after cross-examination of the experts by the Claimants' counsel. There is no such opportunity here, since the purported "experts" are unknown, their sole duties are owed to the Respondent, and there will be no cross-examination of the authors of the "reports".

276. Even leaving aside their inherent unreliability, these reports are – *by their own terms* – plainly speculative. To give but one example:

> *On some voyages the speed and manoeuvres of the vessel could indicate harvesting operations, or possible harvesting operations, on the Norwegian continental shelf in the Loop Hole… On voyages where the vessel had fishing operations, or possible fishing operations on both the Russian continental shelf and the Norwegian continental shelf in the Loop Hole, the report will contain three screen shots of the voyage, the first two indicated above and (3) the possible harvesting activity on the Norwegian continental shelf.*[329]

277. As could be expected, the ambivalence of the reports' findings is reflected in Norway's Counter-Memorial:

(a) *"…the Saldus made 22 voyages, harvesting 652,362 kg of snow crab. Approximately 1,500 kg (0.23%) could theoretically have been harvested on the Norwegian continental shelf*";[330]

(b) "*In total, North Star's vessels made 102 snow crab harvesting voyages to the Loop Hole… While the crab may well have been harvested exclusively on the Russian continental shelf, it is theoretically possible that around 8,500 kg could have been harvested on the Norwegian continental shelf*";[331]

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329 **R-0151**, p. 12.

330 Respondent's Counter-Memorial, 29 October 2021, para. 143.2.

331 *Ibid*., para. 144.

(c) "*It is theoretically possible that the four vessels harvested 8,500 kg from the Norwegian continental shelf, but it is not certain that this in fact occurred*".[332]

278. While the authors of the reports seemed to have their "theories" about such matters, Norway appears unsure what to make of them. According to Norway, the reports stand for the proposition that *"the* Saldus *spent no longer than 17 hours and 38 minutes engaged in snow crab harvesting activity on the Norwegian continental shelf*".[333] Solvita is estimated to have spent *"no longer than 31 hours*" in the same area.[334] Nonetheless, Norway asserts that "*the catch may well have been harvested exclusively on the Russian continental shelf*", seemingly giving short shrift of the above "estimates".[335] Yet elsewhere, it insists that "*there was only one instance where North Star appears to have crabbed on the Norwegian continental shelf*", this time referring *to the Senator* (and not to Saldus or Solvita, the subjects of the above "estimates").[336] Which of course begs the question: were there zero, one, two or three instances of fishing for snow crab on the Norwegian continental shelf by North Star's vessels? The reports do not seem to provide any answer and Norway's position on this point remains unclear.

279. Norway's hesitations, however, prove that, despite the best efforts of the Section of Analysis of Vardø, it has no reliable evidence of the precise location of North Star's catches in the Loophole.

280. They also show, more pertinently, that Norway has no *contemporaneous* evidence of the location of the Claimants' catches within the Loophole. As indicated above, North Star was authorized to land its snow crab catches in Norwegian ports following its submission of NEAFC PSC Forms to Norway. These forms referred to the Loophole *as a whole* as the catch area. As acknowledged by Norway, the forms did not indicate whether the catch had been made from above the Norwegian or Russian continental shelf. There is no evidence that Norway has ever sought this level of detail until it started preparing its response to the Claimants' case in the present arbitration. It appears to have struggled to obtain it even then.

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332 Respondent's Counter-Memorial, 29 October 2021, para. 150.

333 *Ibid*., para. 607.3.

334 *Ibid*., para. 607.4.

335 *Ibid.*, para. 144.

336 *Ibid.*, para. 755.

281. At any rate, the precise location of North Star's historical catches within the Loophole simply does not have the relevance Norway ascribes to it. Since North Star had access to the entire Loophole for its snow crab fishing activities, it is only natural that the captains of its ships fished where snow crabs were known to be found in abundance *at the time*. This was logically presumed to correspond to the areas of the Loophole closest to the Russian EEZ, from where the snow crab population had migrated. Nothing more would be proven by a showing that the Claimants mainly (or even exclusively) fished "on the Russian continental shelf".

282. Yet, according to the Norwegian case, the precise location of North Star's catches is all-important since it means that the Claimants' business was affected only by Russia's efforts to close the Loophole to EU vessels, and not its own. "*Within three days of the Russian ban on snow crab harvesting on its continental shelf, all of North Star's snow crab harvesting activity ceased. There appears to have been – and in fact there was – no impact caused to the Claimants by the earlier Norwegian prohibition on the harvesting of snow crab on the Norwegian continental shelf in the Loop Hole*".[337]

283. This argument fails for several reasons. The first is that it omits to consider the effect of the prior enforcement of Norway's own prohibitions against EU vessels in the Loophole. On 15 July 2016, the Juros Vilkas had received a fine for "harvesting snow crab on the Norwegian continental shelf".[338] North Star's vessel Senator received a fine for the same reason on 27 September 2016.[339] Hence, when Russia started threatening enforcement measures, it merely followed Norway's example, as Norway was itself already enforcing a ban on "its" side of the Loophole.

284. The argument also ignores the fact that Norway and Russia worked in close coordination to close the entire Loophole to EU-flagged snow crab fishing vessels, which Russia only started threatening after repeated requests to that effect had been made by the Norwegian government.[340]

285. Therefore, without Norway's orchestrated efforts to exclude EU vessels from the Loophole – from the re-characterization of the snow crab as a sedentary species in July 2015, to the adoption of a general ban applicable to the Norwegian "*continental shelf*", and Norway's persistent efforts to coordinate with Russia to complete the

337 Respondent's Counter-Memorial, 29 October 2021, para. 145.

338 Claimants' Memorial, 11 March 2021, paras. 116-117.

339 Confiscation order against North Star and Order against Mr. Uzakov, 27 September 2016, **PP-0191**.

340 *See above,* para. 183-194.

closure of the Loophole – the Claimants would still today be operating their snow crab fishing enterprise in Norway.

286. Even if, for the sake of argument, one were to imagine a scenario where Russia would have acted alone in excluding EU vessels from its continental shelf in the Loophole, the Claimants could *still* be operating their enterprise – by fishing in other areas for which they were licensed, which Norway now considers as falling under *its* fisheries jurisdiction.

287. In practical terms, had Norway not changed the legal regime applicable to the snow crab fishery taking place above its own continental shelf in the Loophole, North Star could simply have redirected its vessels there after Russia had banned them. This of course was not possible since Norway acted in concert with Russia and duly closed "its" part of the Loophole, even before Russia did.

288. Norway's argument that its prohibition on the harvesting of snow crab had "*no impact*" on the Claimants' business also ignores that, starting in November 2016, after Norway and Russia together had closed the Loophole to EU vessels, North Star received snow crab fishing licences for the Svalbard zone.[341] Had Norway accepted those licences, even assuming the complete closure of the "Russian side" of the Loophole, there is no doubt that the Claimants could successfully have operated their fishing enterprise by redirecting their vessels to Svalbard.

289. The Claimants attempted to do just that. Their efforts were, however, immediately thwarted by Norway's arrest of the Senator on 14 January 2017, hailed as an example of Norway's "*tough line*" policy against EU crabbers.[342]

290. It cannot be denied that Norway excluded the Claimants' vessels from all snow crab fishing grounds located above its continental shelf. The fact that Russia – *acting in concert with Norway* – did the same cannot possibly mean that the Norwegian measures had "*no impact*" on the Claimants.

291. To conclude under this heading, the precise location of the Claimants' historical catches in the Loophole does not nearly have the relevance Norway wishes it to have. When they were able to fish, North Star's vessels had access to the entire Loophole, a body of international waters beyond any State's fisheries jurisdiction. Naturally, they

341 Claimants' Memorial, 11 March 2021, paras. 136-137, 279.

342 *Ibid*., paras. 373-375.

fished in the most productive locations available to them within the Loophole, which included areas above both Norway's and Russia's continental shelves.

292. Even if Norway could prove that the Claimants' historical catches were made predominantly (or even exclusively) above Russia's continental shelf in the Loophole, this would still not show that the Norwegian measures had "*no impact*" on the Claimants' investment in Norway:

(a) *First*, Norway and Russia together orchestrated the closure of the Loophole's fishery to EU-flagged vessels. Norway cannot deflect the blame on Russia for an outcome it actively advocated for, and which was only made possible by its own participation, support and acquiescence; and

(b) *Second*, even had Russia closed the part of the Loophole above its continental shelf acting alone, the Claimants could simply have redirected their ships in other areas for which they held valid fishing licenses located above Norway's continental shelf, which they were unable to do due to Norway's own actions.

C. THE POLITICAL AIMS PURSUED BY NORWAY'S SNOW CRAB REGULATIONS

293. Norway began regulating the snow crab fishery in December 2014 with the adoption of the Regulations prohibiting the capture of snow crabs.[343] As recalled above, the regulations were amended one year later to make them applicable to Norway's "*continental shelf*",[344] thereby bringing the Loophole's snow crab fishery within their scope and laying the basis for Norway's subsequent closure of the commons.

294. Since their first iteration, the regulations aimed to prohibit snow crab fishing in all areas considered by Norway to fall within its fisheries jurisdiction, subject to the possibility for eligible vessel operators to seek an exemption "*on the conditions laid down by the Directorate of Fisheries*".[345] In practice, these "conditions" made exemptions available to Norwegian vessel operators only (as well as Russian operators in 2016, as noted above).[346]

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343 **C-0104**.

344 **C-0110**.

345 **C-0104**; **C-0110**, s. 2.

346 **C-0160**, p. 60.

295. In July 2017, the regulations were amended to provide that vessels benefiting from an exemption were allowed to "*catch and land up to 4 000 tons of snow crabs in 2017*".[347] The quota was maintained at 4,000 tonnes in 2018 and 2019 and later increased to 4,500 tonnes in 2020 and 6,500 tonnes in 2021.[348]

296. Norway asserts that its adoption of a general ban on snow crab fishing (with exemptions subject to quotas) pursued a "*precautionary approach*" within the meaning of the 1992 Rio Declaration: "*[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation*".[349]

297. Norway submits that "*in its approach to regulating snow crab harvesting on its continental shelf, Norway has been guided by this internationally recognised approach to precaution where new harvesting opportunities emerge*".[350] According to Norway, such an "approach" was mandated by its Marine Resources Act, which requires "*an ecosystem approach that takes into account habitats and biodiversity*",[351] among other management goals.

298. Norway's argument appears to be based on the premise that preserving the snow crab population of the Barents Sea was consistent with the precautionary approach, a "*measure to prevent environmental degradation*". This premise is, however, plainly wrong: it ignores the well-documented fact that snow crab is a *threat* to the Barents Sea ecosystem (as explained in the Claimants' Memorial[352] and Dr. Brooks Kaiser's Expert Report and Addendum[353]). The Norwegian Biodiversity Information Center classifies snow crab as a "*potentially high-risk invasion due to its high invasion potential throughout the Barents Sea combined with its many unknown ecosystem impacts*".[354]

299. Norway has chosen to ignore this fact, which is not mentioned in its Counter-Memorial. Yet the record clearly shows that the tension between the snow crab's nature as an

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347 **C-0114**.

348 Respondent's Counter-Memorial, 29 October 2021, para. 117.

349 *Ibid*., para. 587.

350 *Ibid*., para. 588.

351 *Ibid*., para. 91.

352 Claimants' Memorial, 11 March 2021, para. 76.

353 Expert Report of Dr. Brooks Kaiser, 11 March 2021, p. 10, para. 16; Addendum to the Expert Report of Dr. Brooks Kaiser, 28 February 2022, para. 1-3

354 Expert Report of Dr. Brooks Kaiser, 11 March 2021, p. 10, para. 16.

environmental threat and its substantial commercial potential has been known to Norway since the early days of the fishery.

300. In October 2013, the Norwegian Ministry of Fisheries requested a report from IMR "*on what regime would be appropriate for managing snow crab in the Norwegian part of the Barents Sea*".[355] The Directorate was asked to prepare a proposal for a management plan and regulations:

> *It was requested that the report concerning the management of snow crab include an assessment of whether the snow crab should be treated as a foreign and introduced species with the objective of restricting its distribution and total biomass as much as possible, or whether the species should be accepted as a natural part of the ecosystem and be managed in accordance with the normal principle of sustainable harvesting.*[356]

301. The Department of Fisheries recommended the adoption of a "*general prohibition against catching of snow crab and potentially granting exemptions from this prohibition on certain conditions*".[357] This recommendation relied on the view "*that it should be the economic potential, when viewed in relation to possible, serious ecological consequences, that is decisive to how Norwegian authorities approach the question of management*".[358]

302. In March 2014, Jan Sundet of IMR participated in a workshop on snow crab in the Barents Sea. He described the environmental challenges posed by this species in the following terms:

> *The snow crab has a potential to become a major fishery in the Barents Sea. The crab stock has increased rapidly and developed to be a major player in the Barents Sea ecosystem.* ***Our major concern is therefore what consequences it will have on the recipient ecosystem****. Preliminary results from stomach content analysis show that the snow crab feed on many different prey groups, where bivalves, polychaetes, crustaceans and echinoderms dominate. This reveals that the crab most likely is an opportunistic omnivore predator.*[359]

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355 Letter from Directorate of Fisheries, 1 October 2013, **C-0218**; **R-0108**, p. 1.

356 **R-0108**, p. 1.

357 *Ibid.*, p. 3.

358 **R-0108**, p. 3.

359 **R-0148**, p. 53 [emphasis added].

303. In September 2014, Mr. Sundet gave a presentation entitled "*Future challenges in research and management of the invasive snow crab (Chionoecetes opilio) in the Arctic Barents Sea*".[360] Mr. Sundet's presentation observed that snow crab was an alien species with potential to spread broadly in the Barents Sea. It included a slide entitled "*Fishing or eradicate?*" and noted that the development of the population was "*typical for an invasive non-native species*".[361] It observed that snow crab impacted benthic communities and that Arctic benthic ecosystems were "*particularly vulnerable*".[362]

304. There is no doubt that Norway was (and remains) fully aware of the ecological risks raised by the snow crab's spread in the Barents Sea. In view of such risks, a "*precautionary approach*" would have required limiting the growth and spread of the species through the maintenance of an open access fishery until the effects of snow crab on benthic ecosystems were better understood.[363] Norway knew this, yet it adopted policies which had the exact opposite effect.

305. On 24 October 2014, Norway's Ministry of Fisheries launched a consultation regarding the proposed adoption of a general ban on snow crab fishing. In its consultation letter, the Ministry announced an "*objective to increase knowledge about the spread of the species in Norwegian marine areas and the implications of that for other species in the ecosystem*".[364] While observing that "*[e]ffects on the ecosystem must be expected when snow crab establishes itself in an ecosystem that does not naturally have large crustaceans*", the consultation letter concluded that "*it would be unrealistic and therefore inexpedient to have eradication as a management goal*". The Ministry instead considered it "*expedient to manage this biomass in accordance with the principle of sustainable harvesting*".[365]

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360 Workshop Program, Spatial Issues in Arctic Marine Resource Management, 4-6 September 2014, **C-0236**; J. H. Sundet, "*Future challenges in research and management of the invasive snow crab (Chionoecetes opilio) in the Arctic Barents Sea,*" IMR presentation, 2014, **C-0235**.

361 J. H. Sundet, "*Future challenges in research and management of the invasive snow crab (Chionoecetes opilio) in the Arctic Barents Sea,*" IMR presentation, 2014, **C-0235**, p. 22.

362 *Ibid.*, p. 28.

363 **C-0069**, p.77; Expert Report of Dr. Brooks Kaiser, 11 March 2021, p. 44, para. 94. ("*If environmental factors were the primary motivation, then one should expect to see an open access fishery that aims to push the invasive species to commercial extinction, at least at the invasion frontier, which corresponds to the Loophole and SFPZ. One might even expect a subsidy (bounty) system that pays fishers to remove the crab. If environmental factors were a partial consideration, one would expect to see quota choices that push the higher end of the uncertainty rather than the lower end.*").

364 **R-0113**.

365 *Ibid*.

306. On 10 December 2014, the Norwegian Ministry of Climate and the Environment raised serious concerns about the proposed ban on snow crab fishing, emphasizing that the precautionary approach argued in favour of a free fishery with high quotas to limit the spread of the species:

> ***The Ministry of Climate and the Environment is concerned about the rapid increase of snow crabs in the Barents Sea, not least the possibility of it entering the waters off Svalbard****. A premise for our approach is that we do not know whether this is an introduced species or not. As long as this has not been clarified, we want management that slows down the stock's rapid expansion to the West as much as possible...*
>
> *…we do not see that it is necessary at this time to manage the stock according to the principle of sustainable harvesting. If there are as many snow crabs in the Barents Sea as the researchers say, we believe it is important to let everyone who has the gear for it, get a dispensation. At the same time, quotas should be high. Only when the knowledge platform is broader and it is known with greater certainty whether this species has been introduced or has spread naturally to the Barents Sea, a management plan should be prepared where it is decided what kind of management should apply.*[366]

307. The position of the Ministry of Climate and the Environment was known to the Department of Fisheries prior to the start of consultations. In an internal note to Minister Aspaker dated 16 October 2014, the Department observed that "*[t]he point on which there is the greatest disagreement is whether the snow crab should be regarded as an alien introduced species, or whether it has established itself in Northern sea areas without assistance*".[367] While noting that the Ministry of Fisheries and the Ministry of Climate and the Environment had "*different views on this issue*", the Department did not want "*the regulatory case to stop for that reason now*".[368] It "*therefore prepared a consultation note where the question of whether the snow crab is an introduced species or natural in our areas will not be a topic for this consultation*".[369]

308. The advice from the Ministry of Climate and the Environment to maintain a free fishery to limit the expansion of the snow crab population ultimately was not given any weight by the Department of Fisheries. In a memorandum summarizing the comments

366 Letter from the Ministry of Climate and the Environment, 10 December 2014, **C-0248** [emphasis added].

367 Note from the Department of Fisheries to Minister Aspaker, 16 October 2014, **C-0239**.

368 *Ibid*.

369 *Ibid*. [emphasis added].

received during the consultation, the Department acknowledged the Ministry's concerns, yet maintained its recommendation that a general ban be introduced.[370]

309. Before Norway and Russia closed the Loophole's fishery, catches made there "*operated as a control measure on the invasion by reducing the stock*".[371] Snow crabs caught in the Loophole were taken out of the ecosystem, which reduced the size of the population and limited its geographical expansion. Yet Norway removed this "control measure" by closing the fishery to EU vessels, which caused precisely that which Norway's Ministry of Climate and the Environment wanted to avoid: "*the stock's rapid expansion to the West*" in areas off Svalbard.[372]

310. Norway's adoption of a low fishing quota starting in 2017 also favoured this "*rapid westward expansion*". A lower fishing effort means that fewer specimens are removed from the ecosystem. This favours the expansion of the population both numerically and geographically, through natural reproduction and migration in all suitable habitats.[373]

311. The fact that Norway's adopted quotas were low having regard to the fishery's potential can hardly be disputed. The quota for the entire Norwegian jurisdiction in 2017 was 4,000 tonnes. For comparison, the Claimants' four vessels *alone* fished over 2,500 tonnes annually in 2015 and 2016, which were partial years of operation.[374] Dr. Brooks Kaiser has assessed the maximum sustainable yield for the Svalbard zone alone at over 25,000 tonnes in 2021 growing to over 50,000 tonnes in 2030 (based on Norwegian data).[375]

312. In a September 2014 presentation, Mr. Sundet of IMR included charts forecasting a potential for the Barents Sea fishery of 20,000 tonnes in 2015 growing to 80,000 tonnes in 2035.[376] In 2015, as the snow crab population continued to grow, it was estimated

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370 Note from the Department of Fisheries and Aquaculture Department to the from the Department of Fisheries and Aquaculture Department, 2014, **C-0261**.

371 **C-0079**, p. 9.

372 Letter from the Ministry of Climate and the Environment, 10 December 2014, **C-0248**.

373 Expert Report of Dr. Brooks Kaiser, 11 March 2021, para. 84.

374 First Witness Statement of Peteris Pildegovics, 11 March 2021, para. 252.

375 Expert Report of Dr. Brooks Kaiser, 11 March 2021, p. 27, Table 6.

376 J. H. Sundet, "*Future challenges in research and management of the invasive snow crab (Chionoecetes opilio) in the Arctic Barents Sea,*" IMR presentation, 2014, **C-0235**, p. 9.

that the fishery could sustain annual yields up to 150,000 tonnes and that the Barents Sea would soon be home to the world's largest snow crab population.[377]

313. In September 2016, Norway's Ministry of Fisheries produced a note on its strategy for the further development of snow crab management.[378] Under a heading entitled "*Quota available for Norwegian vessels*", it indicated that "*the stock could provide a future annual catch of around 100,000 tonnes of adult male crabs"*, although this would only be possible if "*Norway and Russia agree on a moderate catch in the years ahead so that the stock can reach such a potential*".[379] On this point, the note added:

> *As of today, it is a fact that the majority of the stock is on the Russian shelf. This will change over time, as the population grows.* ***It should thus be in Norway's interest to keep a low catch rate now****.* [380]

314. The note forecast "*a capacity for year-round operation of approximately 2,000 tonnes per year per vessel*", providing "*an operating basis for up to 25 vessels when the stock is built*".[381]

315. The low level of Norway's initial (and current) snow crab quotas is also apparent when viewed in comparison with the quotas it adopted for red king crab, another invasive species. In 2014, Norway estimated the snow crab population as having ten times the biomass of red king crab in the Barents Sea.[382] Yet, the quotas adopted for snow crab were only *twice* as high as those applicable to red king crab.[383]

316. Norway's decision to adopt low snow crab quotas is inexplicable when viewed from the perspective of a precautionary approach. Such an approach would have militated in favour of *limiting* the size and spread of the snow crab population in the Barents Sea, which would have been achieved by maintaining a free fishery for snow crab and/or adopting high quotas, as advised by Norway's Ministry of Climate and Environment.

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377 "*Fishing valuable snow crab on the wrong side of the border*," Nord24, 25 May 2015, **C-0234**.

378 Note entitled "*Strategy for the further development of snow crab management*," Ministry of Fisheries, 19 September 2016, **C-0209**.

379 *Ibid.*, p. 14.

380 *Ibid.*, p. 14 [emphasis added].

381 *Ibid.*, p. 14.

382 **R-0108**, p. 3; **R-0113**, p. 1.

383 Claimants' Memorial, 11 March 2021, paras. 151-155; **C-0159**, p. 42.

317. Norway has not only chosen to ignore this advice but has in fact pursued the opposite goal: to favour the maximum spread and expansion of the snow crab population by excluding EU vessels from the fishery and setting a (temporarily) low catch ceiling for its own fishing industry.

318. This policy goal is expressed in clear terms in a memorandum dated 5 May 2017, where the Directorate of Fisheries summarized the "*overarching principle*" used by IMR as a basis for its quota recommendations:

> *The Directorate of Fisheries agrees with the overarching principles that IMR has used as a basis. The total allowable catch (TAC)* ***is dependent on how quickly we wish to build up stocks****. The lower the TAC, the faster stocks will increase.*[384]

319. This shows that IMR's quota recommendations were driven by Norway's primary snow crab management goal: to "*build up stocks*" in areas under Norwegian jurisdiction. The only question then became *"how quickly*" Norway wanted to achieve this goal: the lower the quota was set; the faster snow crab stocks would increase.

320. This "*overarching principle*" followed by IMR is consistent with Dr. Kaiser's opinion that the methodology used by IMR to measure the fishery's potential significantly underestimates its productive capacity.[385] IMR's goal is not to provide an accurate estimate of the fishery's productive capacity, but to provide a quota range that will support Norway's goal to allow the continued expansion of the snow crab stock.

321. Norway's defence of the appropriateness of its quotas is primarily reliant on the reputation of IMR, which Norway presents as "*one of the foremost research institute in the world and arguable the best research institute for marine research in the marine areas in question*".[386] Norway appears to believe that IMR's allegedly stellar reputation suffices for the Tribunal to put aside the Expert Report of Dr. Kaiser, "*written for the Claimants for the purposes of these proceedings*".[387]

322. There are two obvious problems with this position. The first is that while Norway will have an opportunity to cross-examine Dr. Kaiser as to her qualifications and the validity of the conclusions presented in her report, the Claimants will have no such opportunity

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384 **R-0117**, p.3 [emphasis added].

385 Expert Report of Dr. Brooks Kaiser, 11 March 2021, paras. 23-24.

386 Respondent's Counter-Memorial, 29 October 2021, para. 756.1.

387 *Ibid*., para. 756.

with regard to the scientific reliability of IMR's quota recommendations. Norway has chosen not to present an expert to testify on this issue before the Tribunal. Its case appears to be that IMR is to be trusted without question, as the alleged "*foremost authority on snow crab in the Loop Hole*".[388]

323. The second problem is that, even if the Tribunal were willing to accept Norway's contention that IMR's analyses can be accepted at face value, the fact remains that IMR is a branch of the Norwegian government. As such, IMR is not immune from political pressures, let alone from directions given by Norway's Ministry of Fisheries. In that light, even without doubting IMR's scientific credentials, the record shows that IMR was asked to apply an "*overarching principle*" as the "*basis*" to its quota recommendations: that the proposed quota range allow Norway "*to build up stocks*".[389] This means that IMR's proposed quota ranges did not seek to maximize fishing yields having regard to the capacity of the fishery, or to protect the Barents Sea ecosystem is application of a "*precautionary approach*". The quota ranges were meant to stimulate the snow crab invasion, which they certainly did.

324. While Norway undoubtedly wanted to "*build up stocks*" quickly, it also considered the economic interests of its own fishermen. As part of its 2017 quota recommendation, the Directorate of Fisheries observed that in 2016, "*about 3,400 tonnes of snow crab were caught on the Norwegian continental shelf*" by the entire Norwegian snow crab fleet. It recommended a quota that "*should not exceed 4,500 tonnes*", comfortably above the 2016 catch.[390] The quota for 2017 was finally set at 4,000 tonnes, below the Directorate's recommendation, yet still higher than the volume caught by Norwegian vessels the previous year.[391]

325. There is no doubt that Norway's policies have achieved its goal of a continued expansion of the snow crab population in the Barents Sea. In its advisory note for the management of snow crab for 2021, IMR observed that "*[t]he snow crab population has increased significantly since 2010*" and that it was "*probably found in all suitable habitats on the Norwegian continental shelf in 2020*".[392]

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388 Respondent's Counter-Memorial, 29 October 2021, para. 757.

389 **R-0117**, p.3.

390 *Ibid*., p.3.

391 **C-0114**, section 3.

392 **R-0150**, p. 4; Expert Report of Brooks Kaiser, 11 March 2021, p. 10, Figure 3.

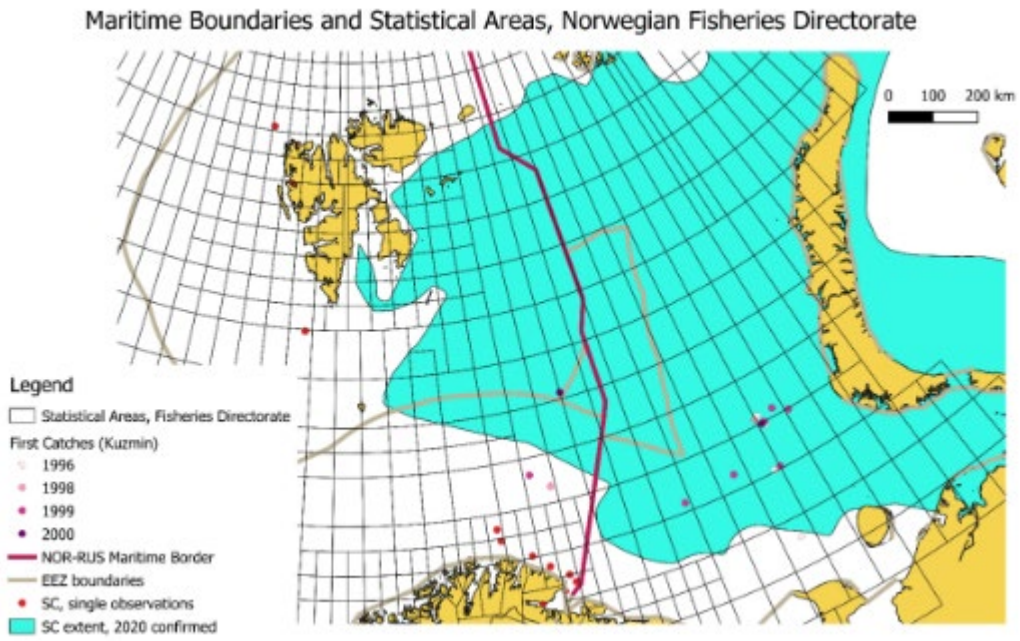

Figure 18 - Spread of snow crab in the Barents Sea, 2020 (Expert Report of Brooks Kaiser, p. 10, Figure 3, based on data from the Norwegian Directorate of Fisheries and Institute of Marine Research)

326. To summarize the key facts regarding the political aims pursued by Norway's snow crab regulations:

(a) The snow crab is an alien invasive species in the Barents See ecosystem. As such, its recent introduction and exponential spread pose a clear threat to this ecosystem. Norway has been aware of this ecological threat since the start of the snow crab fishery.

(b) Norway's decision to ban snow crab fishing in areas considered to fall under its jurisdiction cannot be explained by a "*precautionary approach*", as it argues in its Counter-Memorial. Norway's Ministry of Climate and the Environment indeed opposed the ban on precautionary grounds: "*A premise for our approach is that we do not know whether [snow crab] is an introduced species or not. As long as this has not been clarified, we want management that slows down the stock's rapid expansion to the West as much as possible*".[393]

(c) Norway not only ignored the advice of its Ministry of Climate and Environment: it did the opposite of what a precautionary approach would have required having regard to the snow crab's invasive nature. It adopted a general ban and closed the Loophole to EU crabbers, removing an important control measure

393 Letter from the Ministry of Climate and the Environment, 10 December 2014, **C-0248**.

against the westward expansion of the stock. It later set a low quota on the fishery, with the explicit aim of "*building up*" the stock as quickly as possible, without harming the economic interests of the few Norwegian operators who remained active in the fishery.

327. The political aims pursued by Norway's snow crab regulations explain *why* Norway decided to expand the scope of its fisheries jurisdiction into the Loophole and to close the commons to EU-flagged vessels. Despite the obvious risks of such a policy for the Barents Sea ecosystem, Norway wanted the snow crab population to expand westward in all areas under its jurisdiction, to set the stage for a future prosperous fishery reserved to its nationals. In the words of Dr. Kaiser, Norway's "*hopes for profits, not ecological precaution, has guided [its] snow crab management decisions*".[394] For this, it was willing to sacrifice the interests of EU crabbers and to deprive the Claimants of their snow crab business.

D. THE ARGUMENT THAT THE CLAIMANTS ARE NOT "*THE REAL INVESTORS*"

328. Norway asserts that Kirill Levanidov is "*the main protagonist of the case and the 'real' investor. The snow crab venture was his*".[395] According to this theory, "*Mr. Pildegovics' role appears to have been very limited*",[396] even "*marginal*".[397] The joint venture was "designed to enable the presentation of Mr. Levanidov's investments as 'Latvian'".[398]

329. While Norway apparently has nothing but innuendo to support this theory, it is at least transparent as to why it finds it attractive: "*If, for example, the investments were in fact made by Mr. Levanidov, a US citizen, it cannot be said that claims can be brought under the Latvia–Norway BIT for all losses allegedly suffered, simply because he was assisted by Mr. Pildegovics, a Latvian citizen. There is no bilateral investment treaty between Norway and the USA*".[399]

330. In substance, Norway's contention is that the Claimants merely serve *as a façade* for Mr. Levanidov, whom it portrays as the "*real*" owner of the investment. According to Norway, this is shown by examining factors which show Mr. Levanidov's "*contribution*"

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394 Addendum to the Expert Report of Dr. Brooks Kaiser, 28 February 2022, para. 3

395 Respondent's Counter-Memorial, 29 October 2021, para. 392.

396 *Ibid*., para. 349.

397 *Ibid*., para. 391.

398 *Ibid*., para. 393.

399 *Ibid*., para. 403.

to, and "*control*" over, such investment. On the strength of this analysis, it concludes that Mr. Pildegovics (and perhaps also North Star) acted "*for and on behalf*" of Mr. Levanidov.[400]

331. Norway presents five arguments in support of this theory, none of which is in the least convincing.

332. The first argument is that Mr. Pildegovics is not the originator of the business project at issue. This fact is readily acknowledged by the Claimants: the project was initiated by Mr. Levanidov in February 2009, as explained in the Memorial.[401] Mr. Pildegovics became aware of it in May 2010 and began more serious discussions with Mr. Levanidov in or around June 2013 regarding his eventual participation in the project. Mr. Pildegovics officially joined the project in January 2014, when he concluded a joint venture agreement with Mr. Levanidov.

333. While the Claimants fully acknowledge that Mr. Levanidov was already working on a snow crab venture in Norway when Mr. Pildegovics joined him as a partner, this certainly does not disqualify Mr. Pildegovics as an investor (or even a "*real*" investor). Were it so, any investor acquiring an investment which had already started operations would be deprived of protection under the BIT. Of course, this is absurd.

334. The second argument is that North Star was incorporated by a third party, not by Mr. Pildegovics: "*Mr. Pildegovics did not himself establish North Star, and it is not clear why*".[402]

335. This argument is surprising. There is of course no requirement in the BIT that a person holding shares in a company must be the person who incorporated that company to qualify as an "investor". The BIT also does not require that an investor must be the first holder of a company's shares to qualify as such.

336. Mr. Pildegovics' witness statement explains the circumstances in which North Star was incorporated at his behest in February 2014, as a vehicle for the acquisition of fishing capacity rights from Lat-Salmon LLC:[403]

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400 Respondent's Counter-Memorial, 29 October 2021, para. 369.

401 Claimants' Memorial, 11 March 2021, para. 171 *et seq*.

402 Respondent's Counter-Memorial, 29 October 2021, paras. 365-369.

403 First Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 47-49.

> *At the time, I was negotiating with Lat-Salmon to acquire rights to operate ships as fishing vessels (or "fishing capacity" right, as further explained below). I agreed with Lat-Salmon that its fishing capacity rights would be transferred through the incorporation of a new company, North Star, the assignment of such rights by Lat-Salmon to North Star, and the subsequent transfer of North Star shares.*

337. Norway submits that these facts are "*not inconsistent with a characterization of these actions as having been done* for and on behalf of *Mr. Levanidov*".[404] Yet the question is not whether the facts could possibly be interpreted to fit Norway's case theory, but whether they prove the point Norway is seeking to make. They do not. The process underlying North Star's incorporation shows that it occurred in the context of a negotiation for the purchase of fishing capacity rights which was led by Mr. Pildegovics. There is nothing here to suggest that this was done "*for and on behalf of*" Mr. Levanidov.

338. The third argument is that Mr. Levanidov was involved in the purchase of North Star's vessels: "*Mr. Levanidov had a very close involvement in the purchase and financing of all of North Star's vessels in this case*".[405]

339. The Claimants do not disagree with this statement, which indeed reflects the fact that Mr. Levanidov and Mr. Pildegovics worked closely together as joint venture partners. Mr. Pildegovics testifies that he "*personally led the negotiations for [the vessels'] purchase*" while "*Mr. Levanidov provided strategic advice and guidance based on his experience in the fishing industry*".[406] For his part, Mr. Levanidov confirms that he "*supported Mr. Pildegovics in his efforts… to acquire vessels for [North Star]" and that he "provided ongoing advice to Mr. Pildegovics based on [his] many years of experience in the fishing industry*".[407]

340. The emails adduced by the Claimants relating to the purchase of North Star's vessels show nothing more than the collaboration between two business partners working together. Contrary to what Norway asserts, there is nothing in these emails to suggest

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404 Respondent's Counter-Memorial, 29 October 2021, para. 369.

405 *Ibid*., para. 370.

406 First Witness Statement of Peteris Pildegovics, 11 March 2021, para. 62.

407 First Witness Statement of Kirill Levanidov, 11 March 2021, para. 42.

that Mr. Levanidov was "*directing*" Mr. Pildegovics.[408] Mr. Levanidov clearly had no authority to do so.

341. It should be recalled that, at the time of the purchase of the vessels, Mr. Levanidov had some twenty years of experience in the fishing and seafood business.[409] As the Claimants have acknowledged, Mr. Pildegovics did not have the same experience, instead bringing banking and early-stage venture experience to the project.[410] It should also be recalled that North Star built a fleet of fishing vessels for the specific purpose of supplying Seagourmet's factory at Båtsfjord, which was owned and operated by Mr. Levanidov.[411] In this context, it is unsurprising that Mr. Pildegovics initially relied on the advice of Mr. Levanidov, not only to benefit from his experience, but also to ensure that the vessels to be purchased would satisfy the needs of their joint venture.

342. Against this backdrop, the fact that Mr. Levanidov should have assisted Mr. Pildegovics in finding vessels that might be available for purchase should also come as no surprise. Naturally, Mr. Levanidov could be expected to leverage his network of contacts in the fishing business for this purpose, which he did. Here again, Norway is grasping at straws: the fact that some of the sellers were Russian companies (even ones with South Korean bank accounts[412]) is of no import to the case.

343. The third argument is that North Star relied on financing by third-party companies and that Mr. Pildegovics did not fund the company's operation entirely with his own equity. While North Star undoubtedly did use debt financing,[413] this of course does not entail that its lenders ever had any control over the company's operations, let alone that its sole shareholder Mr. Pildegovics was any less of an "investor".

344. As a matter of law, "*shares, debentures or any other forms of participation in companies*" qualify as investments under the BIT.[414] It follows that equity and debt holders can both qualify as investors in the same company.

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408 Respondent's Counter-Memorial, 29 October 2021, para. 372.

409 First Witness Statement of Kirill Levanidov, 11 March 2021, para. 8.

410 *Ibid*., para. 35; **PP-0002**.

411 First Witness Statement of Peteris Pildegovics, 11 March 2021, para. 30.

412 Respondent's Counter-Memorial, 29 October 2021, para. 389.

413 First Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 118-120; **PP-0118** to **PP-0131**.

414 **CL-0001**, Article I(II).

345. It is a well-known fact that business enterprises often rely on debt to finance their capital structure. Few enterprises are funded solely by their owners' equity. Thus the fact that North Star received loans from different companies is by no means unusual and certainly does not disqualify the company or its sole shareholder as "real" investors.

346. The simple fact that Mr. Levanidov assisted North Star in securing loans (which was never hidden by the Claimants[415]) does not make him "*the real investor*" (indeed does not make him an investor *at all*). Norway's innuendos about Mr. Levanidov's assumed links with North Star's lenders are addressed in Mr. Levanidov's second witness statement.[416]

347. Contrary to Norway's assertion, there is nothing particularly "*complex*"[417] about the financing of the Claimants' investments. Again, the fact that some lenders have "*Russian-sounding*" names[418] or that they have offices in "*various locations*" proves nothing of relevance.

348. The fifth argument (which in fact is a serious accusation) is that Mr. Pildegovics and North Star are nothing but a façade "*designed to enable the presentation of Mr. Levanidov's investments as 'Latvian'*".[419]

349. Leaving aside the complete absence of evidence supporting this allegation, the argument begs an obvious question: *why* would Mr. Levanidov want to present his investments as Latvian?

350. Norway proposes an answer perfectly aligned with its case theory: because he wanted to benefit from the protection accorded to Latvian investors under the Norway–Latvia BIT, which he could not otherwise do as a US citizen.[420] Mr. Levanidov therefore invented a scheme whereby his ownership of investments would be hidden under a Latvian shell (or so goes the argument).

351. There is, however, an obvious problem with this argument: the record contains contemporaneous public documents presenting Mr. Levanidov and Mr. Pildegovics as

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415 First Witness Statement of Peteris Pildegovics, 11 March 2021, para. 122.

416 Second Witness Statement of Kirill Levanidov, 28 February 2022, paras. 5-22

417 Respondent's Counter-Memorial, 29 October 2021, para. 391.

418 *Ibid*., para. 380.

419 *Ibid*., para. 393.

420 *Ibid*., paras. 394-397.

partners dating back at least to early 2015, years before any hint of a potential investment dispute with Norway.[421] It is indeed very hard to imagine the two men structuring their investments so as to secure rights for Mr. Levanidov under the Latvia-Norway BIT, at a time when neither of them were cognizant of the existence of such a treaty.

352. Another question (assuming for a moment that Mr. Levanidov did have a plausible motive to hide behind the Claimants) is why Seagourmet was not put behind the same façade. In other words, if "*the snow crab venture was his*",[422] and if he somehow had an interest in passing it off as Latvian, why would Mr. Levanidov have chosen to keep Seagourmet out of the scheme?

353. It is noteworthy that Seagourmet, a Norwegian company with factory investments in the Norwegian town of Båtsfjord, is not a Claimant in this arbitration and is not asserted to benefit from any protection under the BIT. Seagourmet is therefore unable to claim reparation for the losses it undeniably suffered as a result of Norway's exclusion of the Claimants from the snow crab fishery. It would seem rather strange for Mr. Levanidov to have plotted to hide his true ownership of the Claimants' investments behind a Latvian façade, yet to have neglected to do the same thing with Seagourmet.

354. Yet another problem with Norway's theory is the fact that Mr. Pildegovics played (and continues to play) a central role in the venture. Mr. Pildegovics is North Star's General Manager and he sits on the company's board.[423] He personally built the company, which was founded at his behest and which he manages on a day-to-day basis.[424] Its assets were acquired and financed thanks to his efforts.[425] He also plays a key role at Seagourmet, having been involved in the planning, building and operation of its factory at Båtsfjord and represented the company in various fora. He now also sits on that company's board.[426]

355. Such a role is simply incompatible with the submission that Mr. Pildegovics' involvement was "*marginal*". If Mr. Pildegovics was nothing but a straw man to Mr. Levanidov, one struggles to explain why the two of them met no fewer than

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421 First Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 133-144.

422 Respondent's Counter-Memorial, 29 October 2021, para. 392.

423 First Witness Statement of Peteris Pildegovics, 11 March 2021, para. 6.

424 *Ibid.,* paras. 44-51, 127.

425 *Ibid*., paras. 27, 30, 32, 62, 80-81, 119.

426 *Ibid*., paras. 35, 127(c), 128-129, 132, 137-138, 140-143.

forty-nine (49) times over a period of six years between January 2014 and February 2020, *more than eight times per year*, noting that the two live on separate continents.

356. Perhaps even more obviously, if Mr. Levanidov wished to hide behind a façade, it would be hard to explain why he chose to submit a witness statement in this arbitration, thus placing himself under the spotlight and subjecting himself to cross-examination by Norway. While Mr. Levanidov is indeed "*absent as a party*",[427] he is certainly not absent *before the Tribunal*.

357. Strangely enough, despite seeking to cast Mr. Levanidov as an "*indispensable third party*",[428] Norway does not seem prepared to allow him to attend the hearings in this arbitration (recalling here that Mr. Levanidov is a member of North Star's Board).[429] If the case is about Mr. Levanidov's investments, as Norway pretends, one wonders why it is so adamant to keep him out of sight.

358. Hence Norway's theory raises more questions than it could possibly answer. This is so because it is an invention, built on a vain hope that it might convince the Tribunal to decline jurisdiction over the case.

359. The simple fact is that, while Mr. Levanidov is certainly an investor in his own right, he is not a *Latvian* investor and therefore cannot seek reparation for his losses under the BIT. He is not doing so in this arbitration.

360. The fact that Mr. Levanidov is an investor does not mean that the Claimants cannot *also* be investors. Because the Claimants are themselves Latvian investors with an investment in the territory of Norway, they have standing under the BIT and may seek reparation for the losses *they* have suffered due to Norway's breaches of the BIT.

361. It bears emphasizing that the Claimants are <u>not</u> claiming reparation for Mr. Levanidov's losses, whether such losses might have occurred under the joint venture concluded with Mr. Pildegovics or through his shareholding in Seagourmet. These losses have not been assessed and are not at issue in this case, which is concerned only with the losses sustained by Mr. Pildegovics and North Star as Latvian investors.

362. Norway's "*real investor*" argument leads to a dead end:

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427 Respondent's Counter-Memorial, 29 October 2021, para. 347.

428 *Ibid*., para. 393.

429 *Ibid*., Footnote 387, p. 126.

(a) Under any reasonable definition, the Claimants are undoubtedly the "real" investors in this case. It remains undisputed that the Claimants own title to the investment at issue, and their claims are exclusively tied to the losses sustained by that investment. Norway has patently failed to prove the theory that the Claimants are nothing but a façade to serve an imaginary effort by Mr. Levanidov to "*enable the presentation of his investments as Latvian*".

(b) At any rate, as a matter of law, the BIT does not impose upon the Claimants the burden to prove a certain level of contribution or control in order to be qualified as "investors" (as further set out in **Part V** Section **A** below).

E. THE JOINT VENTURE BETWEEN MR. PILDEGOVICS AND MR. LEVANIDOV

363. The Claimants' investment was part of an integrated snow crab business operating within the framework of a joint venture agreement concluded between Mr. Pildegovics and Mr. Levanidov. This integrated business was based in Norway, more specifically the town of Båtsfjord (which appears to be acknowledged by Norway[430]).

364. Norway disputes the existence of a joint venture. It asserts that the Claimants have presented "*no evidence*"[431] in this regard.

365. Having adopted this position, Norway suggests different explanations for the obvious links between the Claimants' investments and those of Mr. Levanidov. On the one hand, it submits that "*the alleged joint venture consisted in fact of two independent businesses*" "loosely" collaborating with each other.[432] On this view, North Star and Seagourmet were two companies doing business together yet operating at arm's length.

366. On the other hand, Norway describes the joint venture as an "*artifice to describe what was in reality* Mr. Levanidov's *business venture*".[433] This goes back to Norway's theory that Mr. Levanidov was the only "*real*" investor and that "*the snow crab venture was his*".[434]

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430 Section 6.5.6.3 of Norway's Counter-Memorial is titled "*Norway's visits to Claimants' Båtsfjord Premises*".

431 Respondent's Counter-Memorial, 29 October 2021, paras. 416, 418.

432 *Ibid*., paras. 429-430.

433 *Ibid*., para. 412.

434 *Ibid*., para. 392.

367. It will not be lost on the Tribunal that these two versions contradict each other. Either the businesses were independent and operating at arms' length, or they were one and the same, owned and operated solely by Mr. Levanidov. Norway cannot have it both ways.

368. The truth lies in the middle: while Mr. Pildegovics and Mr. Levanidov maintained separate ownership and control of their respective investments (making them "independent" from each other in the legal sense), they agreed to operate these investments in close coordination for a common business purpose, as part of a joint venture.

369. Norway objects that "*no information about the alleged 'joint venture' has been provided*".[435] The Claimants find this objection surprising. Taken together, the Witness Statements of Mr. Pildegovics and Mr. Levanidov contain over 30 pages of testimony regarding the origin, contents, and operations of their joint venture, supported by dozens of contemporaneous documents.[436] The Claimants have also submitted an expert report by Dr. Anders Ryssdal, a highly respected Norwegian lawyer, which provides a detailed analysis of the legal recognition and effect of the joint venture under Norwegian law.[437] Dr. Ryssdal has since then studied Norway's objections to the existence of a joint venture, yet maintains his conclusion that a joint venture agreement was entered into between Mr. Pildegovics and Mr. Levanidov.[438]

370. Given Norway's position that the joint venture is an "*artifice*", it is worth recalling the relevant evidence.

371. The vision for an integrated snow crab business was set out in an email sent by Mr. Levanidov to Mr. Pildegovics in May 2010.[439] The "*main idea*" was "*to take the complete production cycle in the same hands*", which would provide significant competitive advantages over local competitors who either fished or processed but could not do both: "*the ones fishing have no idea about processing, consequently they have no idea what they should catch and how they should store the catch; the ones engaged in processing do not have control over the business from the point of view of*

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435 Respondent's Counter-Memorial, 29 October 2021, section 5.2.1.2.

436 First Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 13-43, 124-144; First Witness Statement of Kirill Levanidov, 11 March 2021, paras. 6-55.

437 Expert Report of Dr. Anders Ryssdal, 10 March 2021, paras. 8-14.

438 Addendum to the Expert Report of Dr. Anders Ryssdal, 28 February 2021, paras. 19-25.

439 **PP-0009**.

stability, quality, quantity and types of delivery; moreover they are not aware of the market demand and often produce products which are not demanded by the market…"[440]

372. There is no doubt that Mr. Pildegovics and Mr. Levanidov agreed to work together (and have actually worked together) to achieve this vision. They have done so not by establishing a "*separate legal entity*",[441] but by concluding a contract or legal agreement generating rights and obligations,[442] chiefly to cooperate with each other in building a snow crab fishing and processing joint enterprise based in Båtsfjord. There is no doubt that they both have acted consistently with this commitment.

373. North Star was built as a company with a single purpose: to provide consistent, high-quality supplies of snow crab to Seagourmet's Båtsfjord factory. Mr. Levanidov assisted Mr. Pildegovics in building a fleet of fishing vessels that could achieve this goal, as shown by contemporaneous exchanges between the two men between June 2013 and February 2014.[443]

374. For his part, Mr. Levanidov built snow crab processing capacity at Seagourmet,[444] for which he benefitted from Mr. Pildegovics' assistance.[445] For example, Mr. Pildegovics led efforts to recruit workers for Seagourmet's factory by placing advertisements in Latvia, which resulted in the hiring of approximately 50 Latvian workers.[446] He was also closely involved in the management of Seagourmet's operations,[447] as shown by contemporaneous documents[448] and media reports.[449]

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440 *Ibid*.

441 Respondent's Counter-Memorial, 29 October 2021, para. 409.

442 First Witness Statement of Peteris Pildegovics, 11 March 2021, para. 14; First Witness Statement of Kirill Levanidov, 11 March 2021, paras. 38-39.

443 **PP-0011** to **PP-0021**.

444 First Witness Statement of Kirill Levanidov, 11 March 2021, paras. 44-47; **KL-0010**, **KL-0022**, **KL-0028**.

445 First Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 127-128.

446 *Ibid*.; **PP-0137**.

447 *Ibid*., para. 129.

448 **PP-0136**, **PP-0137**.

449 **PP-0057**, at p. 28 (where Mr. Pildegovics is identified as Seagourmet's "*marketing manager*").

Figure 19 – North Star's vessel Solvita docked at Seagourmet's factory, Båtsfjord, Norway (**C-0052**)

375. In 2015 and 2016, North Star achieved over 90% of its turnover through sales of snow crab to Seagourmet and [redacted], a seafood distributor associated with Mr. Levanidov.[450] North Star was Seagourmet's exclusive supplier of snow crab.[451] The reason North Star made any sales to companies with no links to the joint venture was that Seagourmet was temporarily unable to absorb 100% of North Star's live catches due to ongoing renovation works at its factory.[452]

376. Since January 2014, Mr. Pildegovics and Mr. Levanidov have spoken about their joint venture almost daily.[453] Over the same period, they met at least forty-nine (49) times, not only in Båtsfjord where the venture is based, but internationally in varied contexts, including meetings with EU fisheries officials in Brussels; NEAFC meetings in London;

450 First Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 157, 159; **PP-0159** to **PP-0167**.

451 *Ibid*., para. 192, 201; First Witness Statement of Kirill Levanidov, 11 March 2021, para. 59.

452 First Witness Statement of Peteris Pildegovics, 11 March 2021, para. 160.

453 *Ibid*., paras. 124-127.

meetings with the Norwegian government in Oslo and other locations in Norway; as well as meetings with business partners internationally.[454]

377. Employees were shared across Mr. Pildegovics and Mr. Levanidov's companies[455] and worked under the same roof in Båtsfjord.[456] Mr. Pildegovics himself had an office within Seagourmet's premises.[457]

378. Mr. Pildegovics and Mr. Levanidov have held seats on each other's companies' Boards, since 2017 and 2020 respectively.[458]

379. Contemporaneous records show that the two men's companies acknowledged the existence of a partnership between them. Seagourmet's website has identified North Star as its "*major partner*" since at least 2015.[459] Mr. Pildegovics referred to North Star as Seagourmet's "*strategic partner*" in an exchange with the Latvian ambassador in May 2015, which also noted that the companies were part of the same "*group*".[460] Mr. Pildegovics and Mr. Levanidov attended trade fairs together where their companies shared co-branded kiosks.[461]

454 First Witness Statement of Peteris Pildegovics, 11 March 2021, para. 126.

455 *Ibid*, para. 130; **PP-0139**.

456 *Ibid*, para. 131; **PP-0140**.

457 **PP-0034**.

458 **PP-0039**, **PP-0141**.

459 First Witness Statement of Peteris Pildegovics, 11 March 2021, para. 135; **C-0052**, **C-0079**.

460 **PP-0144**.

461 First Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 141-143; **PP-0058**, **PP-0147** to **PP-0149**.

Figure 20 – Co-branded kiosk at the Global Seafood Forum in Brussels attended by Mr. Pildegovics and Mr. Levanidov, hosting customers and contacts in a boat-shaped booth marked "*Solvita SIA North Star Ltd.*" (April 2015) (**PP-0058**)

Figure 21 – Co-branded kiosk at the Seafood Expo Asia trade fair in Hong Kong, featuring Seagourmet's crab-shaped logo and North Star's vessel Solveiga (September 2015) (**PP-0147**)

380. The record also contains abundant contemporaneous evidence of third-party recognition of the partnership between Mr. Pildegovics and Mr. Levanidov.[462] To recall but a few examples:

(a) In June 2015, the Norwegian newspaper Fiskeribladet Fiskaren published an article which stated: "*Seagourmet Norway is working to become one of the leading producers and suppliers of snow crab, king crab and other Arctic gourmet seafood. The partner today is Latvian SIA North Star AS, which operates four custom-made crab boats and delivers live crab to their factory*…";[463]

(b) Also in June 2015, Eurofish Magazine published an article which stated: "*A Latvian-Norwegian project is exploiting the newly started fishery for queen crab (Chionoecetes opilio), also called snow crab, found in the Barents Sea… Seagourmet established a collaboration between some Latvian vessels and a Norwegian company to deliver snow crab*…";[464] and

(c) In November 2015, another Norwegian publication noted that Seagourmet had "*an agreement with three vessels from Latvian SIA North Star which ensures weekly deliveries of snow crab*".[465]

381. The testimony given by the former Mayor of Båtsfjord, Mr. Knutsen, is also instructive. It confirms that the relationship between Mr. Pildegovics and Mr. Levanidov was broadly recognized as a joint venture, as shown by the following excerpts of his Witness Statement:

> *This was the backdrop of Kirill Levanidov and Peteris Pildegovics' activities in Båtsfjord: A key company in Båtsfjord had become insolvent, which meant that a large factory was empty. The company that had become insolvent was among the largest ones locally. So we were pleased when Mr. Levanidov and Mr. Pildegovics came and took it over with a view to refurbishing the factory. Levanidov and Pildegovics put tens of millions of kroner into renovating the factory and adjacent housing.*[466]

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462 First Witness Statement of Peteris Pildegovics, 11 March 2021, para. 144 and exhibits cited therein.

463 **PP-0150**, at p. 2 [emphasis added].

464 **PP-0057**, at p. 28 [emphasis added].

465 **PP-0151**.

466 Witness Statement of Geir Knutsen, 8 March 2021, para. 2.

> *"**When they introduced themselves, Levanidov and Pildegovics appeared as one venture in the sense that they worked together as part of the same business venture**. Together they covered both sea and land: they had both the vessels that took the crab on shore and the factory that refined it. It was obvious to me that Seagourmet depended on receiving snow crab from the Latvian company North Star; it was those vessels exactly that delivered the snow crab here in Båtsfjord. Levanidov and Pildegovics appeared as part of the same project: the one depended on the other".*[467]
>
> *"Seagourmet made a very good impression at Båtsfjord. Without that kind of immigration of workers to which Levanidov and Pildegovics contributed, Båtsfjord would have ground to a halt. Båtsfjord is among the municipalities in Norway with the highest level of immigration of workers. Levanidov and Pildegovics sponsored sports and patronized shops, grocers, the cinema; it meant a great deal for Båtsfjord to have such a large factory up and going again. The business they were running was vital to the local community…"*[468]

382. The evidence therefore shows that Mr. Pildegovics and Mr. Levanidov worked together in pursuit of a common business vision. Their collaboration was such that their respective investments were broadly recognized as forming a single business venture.

383. Considering the wealth of contemporaneous documents evidencing these facts, Norway's contention that the joint venture is an "ex post *characterization of the project*"[469] is simply implausible. The Claimants instead submit that in light of the evidence, it is virtually impossible *to deny* the existence of a joint venture between Mr. Pildegovics and Mr. Levanidov.

384. Norway's chief objection appears to revolve around the absence of a written instrument recording the terms of the joint venture. According to Norway, "*that the two men would have entered into such an important and allegedly overarching aspect of their business without having signed a written agreement or having agreed on basic financial obligations is highly unlikely*".[470]

385. Yet is it so unlikely? Norway's submission appears to ignore that Mr. Pildegovics and Mr. Levanidov are cousins who have been personally close to one another since they

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467 Witness Statement of Geir Knutsen, 8 March 2021, para. 3 [emphasis added].

468 *Ibid*, para. 11 [emphasis added].

469 Respondent's Counter-Memorial, 29 October 2021, para. 393.

470 *Ibid.*, para. 415.

were boys. As such, a great deal of trust existed (and continues to exist) between them.[471] It may also be worth mentioning that both men are business executives: neither is a lawyer. In this context, it is unsurprising that their first attention was devoted to building their business, as opposed to negotiating a formal written agreement between them.

386. The alleged absence of an agreement "*on basic financial obligations*" is misleading. As both Mr. Pildegovics and Mr. Levanidov have testified, the decision made between them was to maintain separate ownership of their respective investments and companies.[472] Thus, as an initial matter, there would be no obligation between them to share the proceeds of the joint venture, since each would stand to profit from the result of his own investments (chiefly North Star in the case of Mr. Pildegovics, and Seagourmet in the case of Mr. Levanidov). Norway seems to recognize this, as it acknowledges that the joint venture consisted of two "*branches*" each "*responsible for its own liabilities*" and "*the allocation of its own profits*".[473]

387. There is also nothing surprising in the agreement between them to consider furthering the integration of their investments (including the development of a potential profit-sharing mechanism) only after the enterprise had reached maturity.[474] In January 2014, when the agreement to work as a joint venture was reached between them, Mr. Pildegovics and Mr. Levanidov could not know precisely how the venture would fare, and what the ultimate economics of the business would be. In this context – again emphasizing the level of trust existing between the two – it seemed reasonable to delay consideration of such arrangements until after the business had started generating results.

388. There is no doubt, as a matter of law, that a contract can exist even in the absence of a formal written agreement recording its terms.

389. This is certainly true under Norwegian law, which Norwegian legal expert Dr. Anders Ryssdal views as being applicable to the joint venture agreement between

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471 First Witness Statement of Kirill Levanidov, 11 March 2021, para. 35.

472 First Witness Statement of Peteris Pildegovics, 11 March 2021, para. 40; First Witness Statement of Kirill Levanidov, 11 March 2021, para. 49.

473 Respondent's Counter-Memorial, 29 October 2021, para. 425.

474 First Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 40-41; First Witness Statement of Kirill Levanidov, 11 March 2021, para. 50.

Mr. Pildegovics and Mr. Levanidov.[475] The essence of Dr. Ryssdal's opinion on this point can be summarized as follows:

(a) Norwegian contract law is rooted in three general principles: freedom of contract; freedom of contractual form; and respect and protection of legitimate expectations.[476]

(b) Regarding the freedom of contractual form, Dr. Ryssdal writes that "*there are no specific requirements to the form of a contract for it to be legally binding inter partes. This principle is an undisputed cornerstone of Norwegian contract law. It has been confirmed by the Norwegian Supreme Court on several occasions. Thus, an oral agreement is equally binding as a written contract. This is also the case in more complex areas of business, where one could assume that a formal written and signed contract would be required*".[477]

(c) According to the Norwegian Supreme Court, "*the question of whether a binding agreement has been entered into, rests […] first and foremost on a legal assessment of what has passed between the parties*".[478]

(d) Thus, the assessment of whether a contract has been entered into "*is based on a contextual examination of the parties' relationship and negotiations, their legitimate expectations, and whether they have agreed on what is deemed to be the "significant terms"*".[479]

390. Upon review of the evidence, Dr. Ryssdal concludes that the conduct of Mr. Pildegovics and Mr. Levanidov "*clearly*" gives rise "*to a binding contract under Norwegian law*", noting in this regard that both parties "*have acted in such a way as to give the other party reasonable grounds to believe that an agreement had been reached*. *Further, it is evidence from the witness statements that the parties consider themselves bound by their agreement*".[480]

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475 Expert Report of Dr. Anders Ryssdal, 10 March 2021, para. 88; Addendum to the Expert Report of Dr. Anders Ryssdal, 28 February 2022, para. 24.

476 Expert Report of Dr. Anders Ryssdal, 10 March 2021, paras. 7-16.

477 *Ibid.*, paras. 9, 26.

478 *Ibid*., para. 10, citing **AR-0011** at p. 1210.

479 *Ibid*., para. 14.

480 *Ibid*., paras. 20-21.

391. Having concluded that the facts show the existence of an oral agreement between the parties, Dr. Ryssdal observed that "*it is evident that they have established a contract of cooperation for their joint business activities in the snow crab business in Norway. This binding contract gives them a contractual obligation to cooperate. The duty of cooperation and the principle of mutual loyalty apply to their contractual relationship. These are fundamental obligations between parties to a contract under Norwegian law*".[481]

392. Dr. Ryssdal summarizes the contents and effect of the joint venture agreement between Mr. Pildegovics and Mr. Levanidov in the following terms:

> *The parties have undoubtedly entered a binding contract between them regarding their business activities in the snow crab business in Norway. Under this contract, Mr. Pildegovics and Mr. Levanidov had clear roles. They had also agreed to operate their investments based on continuous consultation and a common strategy. They were to work together on a daily-basis and consult each other on important decisions regarding the companies participating in the joint venture, which I understand consisted of North Star, Seagourmet Norway AS and Sea and Coast AS. The contractual obligation to cooperate and the duty of mutual loyalty apply to this contract.*[482]

393. According to Dr. Ryssdal, "*the essential obligations under the joint venture agreement were for Mr. Pildegovics to ensure deliveries of snow crabs*", while the "*essential obligations of Mr. Levanidov under the joint venture agreement were to ensure sufficient capacity to process – and hence take delivery of – the snow crabs at the said Båtsfjord factory, Seagourmet AS.*"[483] In other words:

> *the right of Mr. Pildegovics was to be able to deliver the snow crab to the Båtsfjord factory for processing which ensured a ready source of demand for the snow crab harvest and the right of Mr. Levanidov was to get deliveries of snow crab for processing at the said factory.*
>
> *The mentioned rights and obligations are connected to Norwegian territory, namely ability to deliver, take delivery and process snow crab at the Båtsfjord factory.* [484]

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481 Expert Report of Dr. Anders Ryssdal, 10 March 2021, paras. 31-32.

482 *Ibid.*, para. 37.

483 Addendum to the Expert Report of Dr. Anders Ryssdal, 28 February 2022, para. 12.

484 *Ibid.*, paras. 13-14.

394. It is worth emphasizing that Dr. Ryssdal's expert testimony remains unopposed by Norway. Were his legal analysis in any way mistaken, Norway might easily have submitted an expert report of its own to rebut Dr. Ryssdal's conclusions. It has, however, chosen not to do so. Dr. Ryssdal's testimony thus stands as the sole and undisputed expert evidence in the record regarding the existence and effect of the joint venture agreement under Norwegian law.

395. Norway's assertion that "*there is no indication of what [the] legal rights and obligations*" are under the joint venture agreement is baseless. As is evident from the nature of their relationship, the contract between Mr. Pildegovics and Mr. Levanidov generates an obligation to cooperate and a duty of mutual loyalty, which indeed captures the essence of their joint venture in the Norwegian snow crab industry.

396. These obligations had great economic value to each party to the joint venture, who could count on the other party to provide an ingredient critically required for success: Mr. Levanidov would be guaranteed sufficient supplies of snow crab to operate his factory, while Mr. Pildegovics would benefit from an exclusive outlet to sell his snow crab catches.

397. Evidently had Mr. Levanidov chosen to source his snow crabs from another fishing company or had Mr. Pildegovics decided to sell all his catches to one of Seagourmet's competitors, the obligation to cooperate and duty of loyalty generated by the joint venture agreement would have been breached, giving rise to a legal claim under that agreement.

398. The confidence of each party that such a scenario would not (indeed, could not legally) occur was an essential factor in their decision to invest in the venture. Mr. Pildegovics testifies that his conclusion of a joint venture agreement with Mr. Levanidov "*was an essential precondition*"[485] for all his other investments in the project, while Mr. Levanidov likewise views the joint venture as "*an essential asset*"[486] of his seafood business in Norway. The critical importance of this asset was unfortunately demonstrated by Seagourmet's collapse after North Star's deliveries of snow crab had stopped.[487]

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485 First Witness Statement of Peteris Pildegovics, 11 March 2021, para. 43.

486 First Witness Statement of Kirill Levanidov, 11 March 2021, para. 54.

487 *Ibid*., paras. 54, 63-66.

399. The Claimants submit that the existence of a joint venture between Mr. Pildegovics and Mr. Levanidov cannot seriously be disputed. The Claimants' key role in this integrated venture was to deliver supplies of snow crab to Seagourmet's factory in Båtsfjord. Each component of Claimant's investment must be understood as serving this single, overarching goal (as further discussed in **Part V**).

IV. APPLICABLE LAW

400. There are as regards applicable law two main areas of disagreement between the parties:

(a) the first relates to the law applicable to jurisdiction, where the Respondent takes the view that Norwegian domestic law must be "*considered when establishing the jurisdiction of the Tribunal*";[488] and

(b) the second relates to the law applicable to the merits and the extent to which the Tribunal is empowered, in ruling on the Claimants' claims on the basis of the BIT, to consider and interpret other international treaties binding on Norway (as well as Latvia), *i.e.*, the Svalbard Treaty, UNCLOS and NEAFC. (The term "consider" is used advisedly: "consider" is different from "rule on" or "find".)

401. This chapter proceeds in two parts: it deals first with the law applicable to jurisdiction (**A**) and secondly with the law applicable to the merits (**B**).

A. THE LAW APPLICABLE TO JURISDICTION

402. Article 42(1) of the ICSID Convention provides that:

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

403. The Parties agree that Article 42(1) does not have a bearing on the question of the law applicable to jurisdiction.[489] Article 42 applies only to the substantive law. As Professor Schreuer has observed, *"[i]t does not apply to questions of procedure or jurisdiction*."[490]

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488 Respondent's Counter-Memorial, 29 October 2021, paras. 182, 187.

489 *Ibid.*, para. 184.

490 Christoph Schreuer, "*International Law and Domestic Law in Investment Disputes*," vol. 1, 1996, Austrian Review of International and European Law, **CL-0398**, pp. 89, 90.

404. It is worth pausing at the reasoning why this must be the case. This is because "*questions of the Centre's jurisdiction are not governed by the domestic law that may otherwise be applicable by virtue of Art. 42(1)*".[491]

405. Article 1(1) of the BIT provides that "[t]he term 'investment' shall mean every kind of asset invested in the territory of one contracting party in accordance with its laws and regulations". Norway's argument is that it follows from Article 1 that "Norwegian domestic law must also be considered when establishing the jurisdiction of the Tribunal".[492] But the Norwegian laws and regulations which in Norway's argument are supposed to be fatal to the jurisdiction of the Tribunal (which of course is denied) are among the very things the Claimants hold out as breaches of the BIT. To accede to Norway's interpretation would, therefore, to use the words of the ICSID tribunal in *Desert Line v. Yemen*, "*constitute an artificial trap depriving investors of the very protection the BIT was intended to provide*".[493] As the ICSID tribunal observed in *Adamakopoulos v. Cyprus*,

> *it would undermine the whole purpose of establishing an international investment regime if ultimately jurisdiction could be defeated by provisions of the domestic law of one or both of the parties."*[494]

406. In any event, there are important temporal limitations to an allegation that a claimant has violated the law of the host state. Such an allegation can be raised only in respect of the acquisition or establishment of the investment, not as regards the subsequent conduct of the claimant in the host State. The broad manner in which the Respondent has pleaded its case as to the requirement "*in accordance with its laws and regulations*" fails to recognize these limitations.[495]

407. The Norway–Latvia BIT refers (as do many other BITs) to the legality requirement in the past tense.[496] The term the Contracting Parties chose is "invested". The Claimants

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491 Christoph Schreuer et al., THE ICSID CONVENTION: A COMMENTARY, 2nd ed., Cambridge University Press, 2009, **CL-0060**, p. 171.

492 Respondent's Counter-Memorial, 29 October 2021, para. 187.

493 *Desert Line Projects v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, **CL-0399**, para. 106.

494 *Theodoros Adamakopoulos and others v. Republic of Cyprus,* ICSID Case No. ARB/15/49, Decision on Jurisdiction, 7 February 2020, **CL-0400**, para. 158.

495 Respondent's Counter-Memorial, 29 October 2021, paras. 187, 401.

496 *See*, for another example, *Quiborax S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/02, Decision on Jurisdiction, 27 September 2012, **CL-0401**, para. 266.

initiated their investments in Norway in January 2014 (and continued investing until early 2017).[497] Norway does not claim that, at that moment, the investment was not in accordance with its domestic law. Norway would, however, go on to change its laws and regulations. Those changes in Norway's laws and regulations do not concern the establishment of the investment. The changes therefore can in no way operate to deprive the Tribunal of jurisdiction.

408. This is apparent from the authorities:

(a) As the tribunal observed in *Quiborax v. Bolivia*, "*the temporal scope of the legality requirement is limited to the establishment of the investment; it does not extend to the subsequent performance*".[498]

(b) The tribunal in *Fraport v. Philippines* similarly observed that: "*the effective operation of the BIT regime would appear to require that jurisdictional compliance be limited to the initiation of the investment. If, at the time of the initiation of the investment, there has been compliance with the law of the host state, allegations by the host state of violations of its law in the course of the investment … could not deprive a tribunal acting under the authority of the BIT of its jurisdiction*."[499]

(c) The position has been well encapsulated by Douglas: there are temporal limitations to the allegation that the claimant has violated the law of the host state, as "*it can only be raised in respect of the acquisition or establishment of the investment and not with regard to the subsequent conduct of the claimant in the host state, even in relation to the expansion or development of the original investment*."[500]

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497 Joint venture entered into on 29 January 2014 (see Claimants' Memorial, 11 March 2021, para. 204); the joint project was launched at an opening ceremony on 10 June 2015 (Claimants' Memorial, 11 March 2021, para. 231).

498 *Quiborax S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/02, Decision on Jurisdiction, 27 September 2012, **CL-0401**, para. 266.

499 *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, **CL-0402**, para. 345. *See also*, *Saba Fakes v. Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, **CL-0403**, para. 119 (such a legality requirement "*concerns the question of the compliance with the host State's domestic laws governing the admission of investments in the host State. This is made clear by the plain language of the BIT, which applies to* 'investments … established in accordance with the laws and regulations *….'*").

500 Zachary Douglas, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS, Cambridge University Press, 2009, Excerpts **CL-0404**, pp. 53–54.

B. THE LAW APPLICABLE TO THE MERITS

409. The claims in this proceeding have been made on the basis of the Norway–Latvia BIT.[501] In that regard, it is by way of introduction necessary to make a preliminary comment that relates to jurisdiction.

410. The tribunal in *Eurotunnel* stated that the "distinction between the scope of the rights and obligations which an international tribunal has jurisdiction to enforce and the law which it will have to apply in doing so is a familiar one".[502] That distinction between, on the one hand, a tribunal's jurisdiction to hear a case and, on the other, the law to be applied by the tribunal in deciding a case which is within its jurisdiction, is elementary but nevertheless important.[503] The fact that a BIT gives a tribunal jurisdiction does not mean that only that treaty makes up the law to be applied by the tribunal, nor does it mean that the applicable law is "circumscribed by the applicable BIT only".[504] As Professor Schreuer has observed in the context of investment law:

> *concordance of jurisdiction with the treaty's substantive standards is by no means the norm. Many BITs, in their consent clauses, contain phrases such as 'all disputes concerning investments' or 'any legal dispute concerning an investment' (…) These provisions do not restrict a tribunal's jurisdiction to claims arising from alleged violations of the BITs' substantive standards. By their own terms, these consent clauses encompass disputes that go beyond the interpretation and application of the BIT itself and would include disputes that arise from a contract and other rules of law in connexion with the investment.*[505]

411. The Tribunal in this proceeding is, according to Article IX of the BIT, empowered to rule on:

> *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 in the latter.*

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501 *See also*, Request for Arbitration, 18 March 2020, para. 306 (a); Claimants' Memorial, 11 March 2021, para. 1022(b)–(d).

502 *Eurotunnel (Channel Tunnel Group v. UK and France*), PCA 2003-06, Partial Award, 30 January 2007, **CL-0405**, para. 152.

503 Michael Wood, "*The International Tribunal for the Law of the Sea and General International Law*," International Journal of Marine and Coastal Law, vol. 22, 2007, **CL-0406**, pp. 351, 356.

504 *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina*, ICSID Case No. ARB/07/26, Award, 8 December 2016, **CL-0407**, para 1202.

505 Christoph Schreuer, "*Jurisdiction and Applicable Law in Investment Treaty Arbitration*," McGill Journal on Dispute Resolution, vol. 1, 2014, **CL-0082**, p. 7.

412. The wording of jurisdictional provisions in BITs vary. Each treaty is an agreement in its own right and great care must be taken in interpreting the exact words chosen in the BIT in question.[506] As Kriebaum has observed:

> *[t]he wording of compromissory clauses vary across investment protection treaties. In some cases, jurisdiction is restricted to violations of the treaty (most often a Bilateral Investment Treaty (BIT)) containing the applicable jurisdiction clause. Other treaties, however, contain broad clauses that provide tribunals with significantly wider jurisdiction. Consider, for example, the Norway–Lithuania BIT which provides for jurisdiction in respect of '[a]ny dispute which may arise between an Investor of one Contracting Party and the other Contracting Party in connection with an investment'.*[507]

413. The broad wording of Article IX of the Norway–Latvia BIT goes beyond restricting jurisdiction to violations of the BIT itself. Article IX, to use the words of the annulment committee in *Vivendi v. Argentina*, "*does not use a narrower formulation, requiring that the investor's claim allege a breach of the BIT itself*."[508] Instead it provides the Tribunal with the wider jurisdiction to rule on "*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 in the latter*". Article IX is a general provision that provides the basis for the Tribunal's competence over such disputes related to an investment as might arise.[509]

414. A similarly broad jurisdictional clause was at issue in *Vivendi*, where Article 8 of the Argentina–France BIT gave (in English translation) the tribunal in an investor–State claim jurisdiction over *"[a]ny dispute relating to investments made under this Agreement between one Contracting Party and an investor of the other Contracting Party*". The annulment committee in *Vivendi* observed that the provision dealt:

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506 Christopher Greenwood, "*Unity and Diversity in International Law*" in M. Andenas & E. Bjorge (eds), A FAREWELL TO FRAGMENTATION: REASSERTION AND CONVERGENCE IN INTERNATIONAL LAW, CUP 2015, **CL-0408**, p. 37, 53: "To approach each BIT in that light is to respect a diversity that is the product of the specific wills of the parties to each BIT; it is quite wrong to treat the language of BITs simply as 'boilerplate' texts which must necessarily be given a single, unified meaning."

507 Ursula Kriebaum, "*Human Rights and International Investment Arbitration*" in T. Schultz & F. Ortino (eds), THE OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION, OUP, 2020, **CL-0409**, pp. 150, 153.

508 *Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment, 3 July 2002, **CL-0269**, para. 55.

509 *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No ARB/05/8, Award, 11 September 2007, **CL-0316**, para. 261: "*The phrase 'any dispute* […] *in connection with the investment' as provided by Article IX(1) of the BIT is a general provision that provides the basis for an international Arbitral Tribunal's competence over any disputes related to an investment*".

> *generally with disputes 'relating to investments made under this Agreement between one Contracting Party and an investor of the other Contracting Party'. It is those disputes which may be submitted, at the investor's option, either to national or international adjudication. Article 8 does not use a narrower formulation, requiring that the investor's claim allege a breach of the BIT itself. Read literally, the requirements for arbitral jurisdiction in Article 8 do not necessitate that the Claimant allege a breach of the BIT itself: it is sufficient that the dispute relate to an investment made under the BIT. This may be contrasted, for example, with Article 11 [the provision relating to inter-State proceedings], which refers to disputes 'concerning the interpretation or application of this Agreement,' or with Article 1116 of the NAFTA, which provides that an investor may submit to arbitration under Chapter 11 'a claim that another Party has breached an obligation under' specified provisions of that Chapter.*[510]

415. "*There is a contrast*", the tribunal in *UPS v. Canada* (jurisdiction) observed, "*between a relatively general grant of jurisdiction over 'investment disputes' and the more particularised grant in article 1116 which is to be read with the provisions to which it refers*".[511]

416. The tribunal in *Metal-Tech v. Uzbekistan* observed that a comprehensive jurisdictional clause allows the investor to go beyond the standards of protection contained in the treaty that confers jurisdiction. In relation to the Israel–Uzbekistan BIT, the tribunal held that:

> *Article 8 of the Treaty contains the consent of the Contracting Parties to submit to ICSID 'any legal dispute … concerning an investment of the latter in the territory of the former.' Article 8 is thus a broad dispute resolution clause not limited to claims arising under the standards of protection of the BIT.*[512]

417. Professor Schreuer has commented that the practice of arbitral tribunals

> *overwhelmingly supports the conclusion that a tribunal, whose jurisdiction is based on an offer of consent in a treaty, will not be restricted to applying the substantive protections of that treaty if the clause circumscribing its jurisdiction is broad and refers to*

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510 *Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, **CL-0269**, para. 55.

511 *United Parcel Service of America v. Canada,* ICSID Case No. UNCT/02/1, Award on jurisdiction, 22 November 2002, **CL-0410**, para. 34.

512 *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, **CL-0411,** para. 378.

> *investment disputes in general terms. Under a wide jurisdictional clause of this nature the tribunal is authorised to entertain claims based on other sources of law, such as domestic law, other treaties and customary international law.*[513]

418. It is worth keeping in mind that even if the wording of Article IX had been limited (which it is not) to "*the interpretation and the application*" of the BIT, as is the case with Article X, the Tribunal would still have been empowered to consider the Svalbard Treaty, UNCLOS, and NEAFC. The more limited jurisdictional clause in Article X is similar to the type of compromissory clause found in conventions such as e.g. numerous UN human rights conventions in that it gives a tribunal in an inter-State proceeding jurisdiction with regard to disputes relating to "*the interpretation and application*" of the treaty. In relation to one such "*interpretation and application*" compromissory clause, Article IX[514] of the Genocide Convention,[515] the International Court of Justice in *Croatia v. Serbia* explained that the fact that Article IX of the Genocide Convention was so phrased, and thus empowered it to rule only on violations of the Genocide Convention,[516] did

> *not prevent the Court from considering, in its reasoning, whether a violation of international humanitarian law or international human rights law has occurred to the extent that this is relevant for the Court's determination of whether or not there has been a breach of an obligation under the Genocide Convention.*[517]

419. In fact, the breadth of provisions such as Article IX of the Norway–Latvia BIT and Article IX in the Norway–Lithuania BIT occasioned Norway in 2007 to seek to enter into investment treaties with narrower jurisdictional clauses. As a working group of senior officials from the Norwegian Ministry of Foreign Affairs and other relevant departments

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513 Christoph Schreuer, "*Jurisdiction and Applicable Law in Investment Treaty Arbitration,*" McGill Journal on Dispute Resolution, vol. 1, 2014, **CL-0082**, p. 10.

514 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, **CL-0412**, Article IX ("*Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute*.").

515 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, **CL-0412**.

516 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, 3 February 2015, **CL-0413,** p. 3, 68, para. 153; see also *ibid.* p. 45, para. 85, p. 60, para. 124.

517 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, 3 February 2015, **CL-0413**, pp. 3, 45, 45–46, para. 85.

observed in the document "*Comments on the Model for Future Investment Agreements*":

> *In future Norwegian agreements, the states' prior consent to dispute settlement will be limited to claims based on the provisions in the agreement concerned.*[518]

420. In other words, differently from the latitudinarian wording in, for example, the Norway-Latvia BIT and the Norway–Lithuania BIT, both from 1992, it was thought in 2007 that, under future BITs, tribunals would be authorized to entertain claims based only on the provisions of the BIT in question.

421. That preliminary comment having been made, the balance of this part makes good the contention that the Svalbard Treaty, UNCLOS, and NEAFC (to all of which both Norway and Latvia are parties) are applicable to the extent that it becomes necessary to consider and interpret them for the purpose of ruling on whether or not there has been a breach of the BIT. This is in response to the Respondent's contention that the Tribunal cannot consider and cannot interpret the Svalbard Treaty, UNCLOS, and NEAFC.[519]

422. There is a measure of agreement between the Parties in this regard. The Claimants have observed that Article 42(1) of the ICSID Convention applies.[520] The Respondent has observed that, as Article IX of the BIT does not specify the law applicable to the merits, "*the second sentence of Article 42(1) applies*".[521] The Claimants agree. The Parties are thus agreed that, as there is no agreement between them as to the rules of law applicable to the merits, the second sentence of Article 42(1) applies.

423. The rules of applicable law identified in the final sentence of Article 42(1) instruct the Tribunal on the law which it is to apply in determining the issues within its jurisdiction. As mentioned above, there is a distinction between, on the one hand, the scope of the rights and obligations which the Tribunal has jurisdiction to enforce (here: the BIT) and, on the other hand, the law which it will have to apply in doing so (here: "*the law of the*

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518 Comments on the Model for Future Investment Agreements, annexed to the since discontinued Norwegian Draft Model Investment Agreement, 19 December 2007, **CL-0414**, para. 4.3.2.

519 Respondent's Counter-Memorial, 29 October 2021, paras. 193–200, 216.

520 Claimants' Memorial, 11 March 2021, para. 444.

521 Respondent's Counter-Memorial, 29 October 2021, para. 192.

Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable": Article 42(1)).[522]

424. The Tribunal has jurisdiction *ratione materiae* over the BIT. That in no way prevents the Tribunal in its reasoning from considering rules of international law contained in other treaties, to the extent that this is necessary for the Tribunal's ruling or finding of whether there has been a breach of the BIT.[523]

425. The Respondent is wrong to contend that "*the Claimants request the Tribunal to find that Norway has allegedly violated other rules of international law, including UNCLOS and the Svalbard Treaty*".[524] The Claimants do not request the Tribunal to "find" (or "rule") that other rules of international law have been breached: the Claimants only request the Tribunal to "find" (or "rule" on) breaches of the BIT and to order consequent compensation.

426. The proposition that the Tribunal is not prevented from considering rules of international law contained in other treaties, to the extent that this is necessary in order to rule on a point in regard to which it has jurisdiction has been confirmed by international courts and arbitral tribunals in numerous decisions. It goes back at least to the judgment in *German Interests in Polish Upper Silesia*, where the Permanent Court of International Justice held that:

> *the interpretation of other international agreements is indisputably within the competence of the Court if such interpretation must be regarded as incidental to a decision on a point in regard to which it has jurisdiction.*[525]

427. The arbitral tribunal in *Gold Looted by Germany from Rome in 1943* similarly held that:

> *an international judge or arbitrator is competent, not only to interpret the treaty which sets out his terms of reference, but also any other*

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522 As to this distinction: *Eurotunnel (Channel Tunnel Group v. UK and France*), PCA 2003-06, Partial Award, 30 January 2007, **CL-0405**, paras. 151–152.

523 Claimant's Memorial, 11 March 2021, para. 455.

524 Respondent's Counter-Memorial, 29 October 2021, para. 193, which refers to Claimants' Memorial, para. 455 (underlined here).

525 ICJ, *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Judgment, 25 August 1925, **CL-0415,** p. 18.

> *international agreement, if its interpretation must be regarded as incidental to the decision of an issue he is competent to deal with.*[526]

428. As Cassese observed in connection with this principle of jurisdiction over incidental questions:

> *[a]ny international court charged with applying a specific body of international law (human rights law, the law of the sea, humanitarian law, international criminal law, etc.) is authorized to apply rules belonging to other bodies of international law, or even municipal law, incidenter tantum, that is for the purpose of construing or applying a rule that is part of the corpus of legal rules on which it has primarily to pronounce (on which it therefore adjudicates principaliter). This authority stems from the inherent jurisdiction of any court or tribunal.*[527]

429. The general principle was well explained by the ICSID(AF) tribunal in *Waste Management v. Mexico No. 2* (which concerned not other treaties but whether the tribunal could consider a concession agreement):

> *The Tribunal begins by observing that—unlike many bilateral and regional investment treaties—NAFTA Chapter 11 does not give jurisdiction in respect of breaches of investment contracts such as the Concession Agreement. Nor does it contain an "umbrella clause" committing the host State to comply with its contractual commitments. This does not mean that the Tribunal lacks jurisdiction to take note of or interpret the contract. But such jurisdiction is incidental in character, and it is always necessary for a claimant to assert as its cause of action a claim founded in one of the substantive provisions of NAFTA referred to in Articles 1116 and 1117.*[528]

430. On that basis the tribunal in *Waste Management (No 2)* went on, in its reasoning as to whether there was a breach of NAFTA, to observe that it was "*clear that the City failed*

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526 *Gold Looted by Germany from Rome in 1943*, Award, 20 February 1953, **CL-0416**, pp. 458-459; *Archiduc Frédéric de Habsbourg-Lorraine v. Etat roumain*, Recueil des décisions des tribunaux arbitraux mixtes, 1927, **CL-0518**, pp. 136–137; International Tribunal for Former Yugoslavia, *Prosecutor v. Tadić,* Jurisdiction, 1995, **CL-0519**, pp. 461-463, paras. 20-22; *Chagos Islands (Mauritius v. UK)*, PCA Case No. 2011-03, 18 March 2015, **CL-0417**, para. 220; *Enrica Lexie (Italy v. India*), PCA Case No. 2015-28, Award, 21 May 2020, **CL-0418**, paras. 808-811; Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, Stevens & Sons 1953, **CL-0419**, p. 266; Maarten Bos, "*Les conditions du procès en droit international public*", Bibliotheca Visseriana, vol. 36, 1957, **CL-0420**, pp. 313–315; Carlos Santulli, DROIT DU CONTENTIEUX INTERNATIONAL, LDGJ, 2nd ed.,2015, **CL-0421**, pp. 156–158.

527 Antonio Cassese*,* "*The* Nicaragua *and* Tadić *Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*", European Journal of International Law, vol. 18, 2007, **CL-0422,** pp. 649, 662.

528 *Waste Management, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, **CL-0290**, para. 73.

in a number of respects to fulfil its contractual obligations to Claimant under the Concession Agreement".[529] It concluded that it was "*not satisfied that the City's breaches of contract rose to the level of breaches of Article 1105(1) of NAFTA*".[530]

431. The ICSID tribunal in *Telefónica v. Argentina* was presented with a claim relating to the Spain–Argentina BIT and upheld its jurisdiction in that regard, adding that:

> *[t]his would not prevent the Tribunal, when dealing with the merits, from examining* incidenter tantum *whether there have been breaches of the Transfer Agreement, should this be relevant in order to ascertain whether Argentina has committed the BIT breaches that Telefónica alleges.*[531]

432. More examples still could be given from the decisions of ICSID tribunals and annulment committees.[532]

433. There are numerous examples of ICSID tribunals considering and interpreting other treaties with a view specifically to ruling on whether there was a breach of the instrument on the basis of which the tribunal had jurisdiction:

(a) The ICSID tribunal in *CMC v. Mozambique* considered and interpreted the Cotonou Agreement between African, Caribbean and Pacific States and the European Community and its Members States.[533]

(b) The ICSID tribunals in *Saipem v. Bangladesh* and *Bayindir v. Pakistan* considered and interpreted the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[534]

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529 *Waste Management, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, **CL-0290**, para. 109.

530 *Ibid*., para. 117.

531 *Telefónica v. The Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the tribunal on objections to jurisdiction, 25 May 2006, **CL-0423**, para 87, footnote 36.

532 *Total v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on annulment, 1 February 2016, **CL-0424,** para 85, footnote 50; *Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment, 3 July 2002, **CL-0269**, para. 105.

533 *CMC v. Mozambique*, ICSID Case No. ARB/17/23, Award, 24 October 2019, **CL-0425,** paras. 266–295.

534 *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009, **CL-0426,** paras. 163–170; *Bayindir Insaat Turzm Ticaret Ve Sanari A.S. v. Islamic Republic of Pakistan*, ICSID ARB/03/29, Decision on Jurisdiction, 14 November 2005, **CL-0282,** paras. 174–179.

(c) The ICSID tribunal in *SPP v. Egypt* observed that there was no question that "the UNESCO Convention is relevant"[535] in ruling on whether the claimants' rights had been breached. The tribunal accordingly went on, in its reasoning, to consider and interpret that Convention,[536] concluding that it did not justify Egypt's measures.

434. UNCITRAL tribunals, too, have taken this approach. In its reasoning as to whether there was a breach of fair and equitable treatment in a proceeding based on the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference, the UNCITRAL tribunal in *Al Warraq v. Indonesia* undertook a thorough examination of the right to a fair trial under the UN Covenant on Civil and Political Rights (ICCPR).[537]

435. The proposition that a tribunal must have such incidental jurisdiction is eminently sensible. It has, in a different context, been adopted by Norway as well. As the Norwegian Government's Comments on the Model for Future Investment Agreements explained in general terms in 2007:

> *Pursuant to article 42 of the ICSID Convention, a dispute brought before an ICSID tribunal shall be settled according to the legal provisions decided by the parties. If this is not agreed, it is the legal provisions of the host country (including provisions concerning choice of law) that will apply, together with applicable provisions of international law. In future Norwegian agreements, the states' prior consent to dispute settlement will be limited to claims based on the provisions in the agreement concerned. A claim by an investor may thus not be based on violation of national law or on the principles of international law/customary public international law. It will be necessary to interpret the provisions of the agreement and it will be necessary to consider the underlying legal situation.* ***In this situation, both other international law (outside the agreements) and national law may be relevant***.[538]

436. There can be no doubt that this Tribunal is empowered to consider and interpret those other international law obligations whose violation by Norway would have a relevant

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535 *Southern Pacific Properties (Middle East) Limited (SPP) v. Arab Republic of Egypt*, ICSID Case No ARB/84/3, Award on the Merits, 20 May 1992, **CL-0266**, para. 78.

536 *Ibid*., paras. 150–154.

537 *Hesham Talaat M. Al-Warraq v. Indonesia*, UNCITRAL, Final Award, 15 December 2014, **CL-0427**, paras. 556–621.

538 Comments on the Model for Future Investment Agreements, annexed to the since discontinued Norwegian Draft Model Investment Agreement, 19 December 2007, **CL-0414,** para. 4.3.2 [emphasis added]

bearing the Claimant's claims as to breaches of the BIT. If it is necessary to its finding of whether there is a breach of the BIT, the Tribunal is empowered to consider the Svalbard Treaty, UNCLOS, or NEAFC.

437. For the Tribunal to engage in such incidental considerations would not be to "rule" or to "find". That being the case, the considerations would not feature in the *dispositif* of the Tribunal's Award. This in turn means that they do not have any *res judicata* effect, as *res judicata* attaches only to rulings made by a tribunal in the *dispositif* of any judgment or award.[539] As Judge Anzilotti observed:

> *It is, moreover, clear that, under a generally accepted rule which is derived from the very conception of res judicata, decisions on incidental or preliminary questions which have been rendered with the sole object of adjudicating upon the Parties' claims (incidenter tantum) are not binding in another case.*[540]

438. Similarly, law external to an international treaty being interpreted and applied, whether other international treaties or domestic law, has at times been considered as a "fact"[541] and considered incidentally on that basis. This well-established approach can be said to have been used exactly for this purpose: to avoid giving the impression that a binding interpretation or application of such external law has been given.

439. The general proposition set out in the preceding paragraphs is further reinforced by the operation of two more specific rules, which will be set out in turn:

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539 As Judge Anzilotti observed, "binding effect attaches only to the operative part of the judgment and not to the statement of reasons": PCIJ, *Interpretation of Judgments Nos 7 and 8 (Factory at Chorzów)*, Diss. Op. Judge Anzilotti, 16 December 1927, **CL-0428.**

540 PCIJ, *Interpretation of Judgments Nos 7 and 8 (Factory at Chorzów)*, Dissident Opinion of Judge Anzilotti, 16 December 1927, **CL-0428,** para. 74.

541 For domestic law treated as fact, see: ICJ, *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Judgment, 25 May 1925, **CL-0415**, p. 19 ("*From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts […]. The Court is certainly not called upon to interpret the Polish law as such ; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention*"); ICJ, *Case Concerning The Frontier Dispute (Benin/Niger),* PCIJ 1927, Series A, No 13, Judgment, 12 July 2005, **CL-0429**, para. 28; ICJ, *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, 22 December 1986, **CL-0430**, para. 30. For international treaties treated as fact, see: World Trade Organization, *"European Communities-Measures Affecting the Approval and Marketing of Biotech Products,"* Report of the panel, WT/DS291/R WT/DS292/R WT/DS293/R, 29 September 2006, **CL-0506**, p. 341, para. 7.94.; World Trade Organization, *"United States-Import Prohibition of Certain Shrimp and Shrimp Products,"* Report of the Appellate Body, WT/DS58/AB/R, 12 October 1998, **CL-0505**, para. 130; Gabrielle Marceau, "*A Call for Coherence in International Law – Praises for the Prohibition Against 'Clinical Isolation' in WTO Dispute Settlement,"* Journal of world Trade, October 1999, **CL-0504**, p. 133 (arguing that a multilateral environmental agreement to which not all WTO Members are party nevertheless "*could be used as part of the factual analysis of the circumstances of a dispute and the reasons why a Member adopted that particular trade measure and why it applied it that way*").

(a) First, it follows from the reference in Article 42(1) ICSID to "such rules of international law as may be applicable" that, to the extent that the undertaking is relevant for its determination of whether or not there has been a breach of an obligation under the BIT, the Tribunal is not prevented from considering or interpreting other treaties (this relates to the Svalbard Treaty, UNCLOS, and NEAFC alike). In this regard there is a disagreement between the Parties as to the interpretation of the words "such rules of international law as may be applicable" in Article 42(1) for the purpose of this proceeding[542] (**subsection a.**); and

(b) Second, it follows from the fact that the domestic law of the Contracting State (enumerated in Article 42(1)) incorporates into domestic law the treaties in question, so that the Tribunal is instructed to consider the Svalbard Treaty, UNCLOS, and NEAFC under the heading of domestic law as well. In this regard there is a disagreement between the Parties as to the relationship between Norwegian law and international law under Article 42(1) for the purpose of this proceeding[543] (**subsection b.**).[544]

a. Article 42(1) Mandates the Application of all Relevant Rules of International Law

440. First, it follows from the reference in Article 42(1) to "*such rules of international law as may be applicable*" that, to the extent that this is relevant for its determination of whether there has been a breach of an obligation under the BIT, the Tribunal can consider and interpret the Svalbard Treaty, UNCLOS, and NEAFC.

441. The English wording of Article 42(1) is "*such rules of international law as may be applicable*".[545] The French version is "*en la matière*". Article 42(1) is cast in broad terms: it makes it apparent that it is not only the applicable BIT which circumscribes what are the applicable rules of international law. As the tribunal in *Urbaser v. Argentina* observed:

> *… Article 42(1) of the ICSID Convention, stat[es] that in the absence of an agreement on the choice of applicable rules of law, the Tribunal shall apply the law of the host State 'and such rules of*

542 Respondent's Counter-Memorial, 29 October 2021, para. 194.

543 *Ibid*., paras. 201–207.

544 The Respondent has contended forcibly that its domestic law must apply in the present proceeding: Respondent's Counter-Memorial, 29 October 2021, para. 193.

545 Underlined here.

> *international law as may be applicable.' The ICSID Convention does not provide for any restriction in respect of these 'applicable rules of international law,' which are not circumscribed by the applicable BIT only; they necessarily include all such rules which according to their self-determined scope of application cover the legal issue arising in the particular case.*[546]

442. According to Article 42(1), therefore, the rules of international law applicable in the present proceeding necessarily include the relevant rules of the Svalbard Treaty, UNCLOS, and NEAFC on the basis that they are "rules which according to their self-determined scope of application cover the legal issue arising in the particular case".[547] This is in keeping with the broader point, made by the annulment committee in *EDF v. Argentina*, that "[w]*hich of the various applicable laws determines the answer to any particular question will depend on the nature of that question*".[548]

443. As the tribunal observed in *LG&E v. Argentina*, the wording of Article 42(1) "*simply means that the relevant rules of international law are to be applied*".[549] The tribunal also observed that it was apparent from Article 42(1) that the provision:

> *should not be understood as if it were in some way conditioning application of international law. Rather, it should be understood as making reference, within international law, to the competent rules to govern the dispute at issue.*[550]

444. In the context of the case before it, where the parties had made no specific submissions on the applicable law, the tribunal in *Micula v. Romania (No 2)* interpreted Article 42(1) to mean that:

> *The law relevant to this case is found in the BIT between Sweden and Romania, the relevant provisions of the ICSID Convention and any relevant rules of international law applicable to the interpretation and application of the BIT as well as any rules of international law applicable in the relationship between Sweden and*

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546 *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, **CL-0407,** para. 1202 (underlined here).

547 *Ibid*., **CL-0407,** para. 1202.

548 *EDF International SA and others v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision on Annulment, 5 February 2016, **CL-0431**, para. 219.

549 *LG&E v. Argentine Republic, ICSID Case No. ARB/02/01,* Decision on Liability, 3 October 2006, **CL-0432,** para. 88, which cites the *ICSID Commentary* for this proposition: the citation is, in the 2009 edition: **CL-0077**, p. 617.

550 *LG&E v. Argentine Republic, ICSID Case No. ARB/02/01,* Decision on Liability, 3 October 2006, **CL-0432,** para. 88.

> *Romania [footnote reference to: "ICSID Convention, Article 42(1)"].*[551]

445. The ICSID tribunal in *Philip Morris v. Uruguay* determined, on the basis of Article 42(1), that: "*The governing law in this case is the BIT, supplemented by such rules of international law as may be applicable*."[552] The tribunal added that: "whether a violation has in fact occurred is a matter to be decided on the basis of the BIT itself and other applicable rules of international law, taking into account every pertinent element, including the rules of Uruguayan law applicable to both Parties."[553] In order to rule on whether the Uruguay–Switzerland BIT had been breached, the tribunal in *Philip Morris* went on to consider and interpret the World Health Organization Framework Convention on Tobacco Control.[554]

446. As the annulment committee in *Vivendi* observed, whether there has been a breach of the BIT "*will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law*".[555] Where the matter is governed by the ICSID Convention and the parties have entered into a BIT, therefore,

> *the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID Convention, by the BIT and by applicable international law.*[556]

447. According to the annulment committee in *MTD v. Chile*, "the Tribunal had to apply international law as a whole to the claim, and not the provisions of the BIT in isolation".[557]

448. The tribunal in *Emmis v. Hungary* similarly observed that "the choice of law rule in Article 42(1) of the ICSID Convention includes reference to 'such rules of international

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551 *Ioan Micula, Viorel Micula and others v. Romania* (No. 2), ICSID Case No. ARB/14/29, Award, 5 March 2020, **CL-0433,** para. 348 [emphasis added].

552 **CL-0311,** para. 177 [emphasis added].

553 *Ibid*.**,** para.179 [emphasis added].

554 Though it noted that Switzerland was not a party to the treaty: paras. 85, 401. Elsewhere, in connection with the TRIPS Agreement (para. 262, footnote 334), the tribunal stated that: "Switzerland is not a party to this Agreement, which makes its applicability to the present dispute questionable." As set out above, both Norway and Latvia are parties to the Svalbard Treaty, UNCLOS, and NEAFC.

555 *Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment, 3 July 2002, **CL-0269**, para. 96.

556 *Ibid*., **CL-0269**, para. 102 (underlined here).

557 *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007, **CL-0434,** para. 61.

law as may be applicable.' This means that the Tribunal has to apply international *as a whole* to the claim, and not the provisions of the BIT in isolation."[558]

449. The position has been confirmed by authoritative writings on the ICSID Convention. Broches observed in 1967 that the point of the wording chosen in Article 42(1) was "*to preserve the freedom of the tribunal to apply international law*".[559] Professor Schreuer has commented that the phrase was "*not designed to limit the rules of international law by declaring some of them inapplicable. It simply means that those rules of international law are to be applied that are relevant to the case*."[560]

450. According to the Report of the Executive Directors,[561] *"[t]he term 'international law' as used in this context [i.e., Article 42(1)] should be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes*".[562] It is correct to say, therefore, as the *ICSID Convention Commentary* puts it, that the Tribunal is "*directed to look at the full range of sources of international law*".[563]

451. In conclusion, it follows from the reference in Article 42(1) to "*such rules of international law as may be applicable*" that the Tribunal is empowered to consider and interpret such rules in the Svalbard Treaty, UNCLOS, and NEAFC which cover the legal issues arising in the present case.

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558 *Emmis International Holding, Emmis Radio Operating, MEM Magyar Electronic Media Kereskedelmi es Szolgaltato Kft. v. The Republic of Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent's Objection under ICSID Arbitration Rule 41(5), 11 March 2013, **CL-0435,** para. 78.; Campbell McLachlan, *"Investment Treaties and General International Law*", International and Comparative Law Quarterly 361, 2008, **CL-0436,** p. 399: "*when, by virtue of Article 42 of the ICSID Convention or otherwise, tribunals are directed that the applicable law to the particular issue before them is international law, that is a reference to the whole of international law, and not merely the specific treaty before them*".

559 Aron Broches, "*The Convention on the Settlement of Investment Disputes between States and Nationals of Other States: Applicable Law and Default Procedure*" in LIBER AMICORUM MARTIN DOMKE, Nijhoff 1967, **CL-0437**, pp. 12, 16.

560 Christoph Schreuer, "*International Law and Domestic Law in Investment Disputes*," vol. 1, 1996, Austrian Review of International and European Law, **CL-0398**, p. 110.

561 An instrument on which the Respondent itself places reliance: Respondent's Counter-Memorial, 29 October 2021, paras. 250, 331.

562 Report of the Executive Directors of the International Bank for Reconstruction and Development, 18 March 1965, **CL-0438**, para. 40.

563 **CL-0077**, p. 604.

b. The Svalbard Treaty, UNCLOS, and NEAFC Apply as Domestic Law since they Are Incorporated into Norwegian Law

452. Second, the domestic law of the Contracting State, as enumerated in Article 42(1), incorporates into Norwegian law the provisions of the Svalbard Treaty, UNCLOS, and NEAFC. This means that the relevant rules contained in those treaties are also part of the applicable law in these proceedings on the basis that the treaties have been incorporated into Norwegian law.

453. Section 6 of the Marine Resources Act incorporates into Norwegian law "agreements with foreign states".[564]

454. The preparatory work to the section states that: *"[t]he provision shows that the provisions of the statute, or secondary legislation passed pursuant to the statute, cannot be applied in breach of an international agreement binding on Norway or international law more generally. … The provision thus means that the statute must be interpreted restrictively, or set aside, if it is in breach of international law*."[565] On this basis, domestic Norwegian courts apply the Svalbard Treaty, UNCLOS, and NEAFC as a matter of course.[566]

455. It should be added that there is not in Norwegian law a doctrine of Act of State or Political Question or similar, that might otherwise have rendered more complicated the application by the domestic courts of incorporated treaties (or adjudicating on other similar questions of foreign relations law).

456. The relevant rules contained in the Svalbard Treaty, UNCLOS, and NEAFC therefore apply also under the heading of domestic law. It is well established that, under Article 42(1), international law and domestic law "*have a complementary role to perform*"[567] and that "*the law of the host State can indeed be applied in conjunction with international law if this is justified*".[568] As has been pointed out by leading

564 **CL-0012**.

565 Act relating to the management of wild living marine resources (The Marine Resources Act), Section 6, 2007-2008, **CL-0512**, p. 181.

566 e.g. *Public Prosecutor v. Haraldsson,* Supreme Court, Judgment of 7 May 1996, 140 ILR 559, **CL-0439** (application of the Svalbard Treaty and UNCLOS*);* **C-0161** (application of NEAFC and UNCLOS).

567 *Enron v. Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007, **CL-0440**, para. 207.

568 *Wena v. Egypt*, ICSID Case No. ARB/98/4, Annulment decision, 5 February 2002, **CL-0441**, para. 40.

commentators, "*in situations falling under Art. 42(1), second sentence, international law is applicable also by virtue of its incorporation into domestic law*".[569]

457. The annulment committee in *Wena v. Egypt* observed that when international legal obligations are incorporated into domestic law, *"[t]his amounts to a kind of renvoi to international law by the very law of the host State*".[570] In such a situation, the international treaty in question applies both as international law and by reason of being incorporated into domestic law.[571]

458. That is the case here: the Tribunal is empowered to consider and interpret the Svalbard Treaty, UNCLOS, and NEAFC on the basis that they are part of the domestic law of the Contracting State, where that is necessary in order to rule on whether there has been a breach of the BIT.

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569 Christoph Schreuer et al., THE ICSID CONVENTION: A COMMENTARY, 2nd ed., Cambridge University Press, 2009, **CL-0060**, p. 616.

570 *Wena v. Egypt*, ICSID Case No. ARB/98/4, Annulment decision, 5 February 2002, **CL-0441**, para. 42.

571 *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, **CL-0432,** para. 90; *Antoine Goetz v. Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999, **CL-0442**, para. 98.

V. JURISDICTION AND ADMISSIBILITY

459. Part II of Norway's Counter-Memorial, entitled "Objections to Jurisdiction", consists of two chapters: Chapter 4 ("*The Tribunal Has no Jurisdiction over the Core Issues at Stake*") and Chapter 5 ("*The Dispute Does not Relate to Investments Made by the Claimants*").

460. While both chapters purport to deal with objections to the Tribunal's jurisdiction, the arguments presented in Chapter 4 in fact pertain to the admissibility of some of the Claimants' submissions. Indeed, the main point made by Chapter 4 is that "*the core issues at stake in this case are Norway's sovereign rights in its maritime areas around Svalbard and in the Loop Hole, which lie outside the jurisdiction of the Tribunal*".[572] While Norway presents this argument as a jurisdictional objection, its substance makes it clear that it instead challenges the admissibility of certain issues raised by the Claimants, and not the jurisdiction of the Tribunal as established under Article IX of the BIT and Article 25 of the ICSID Convention. Indeed, this provision of the BIT is neither referred to, nor analyzed, in Chapter 4 of Norway's Counter-Memorial.

461. Bearing in mind this important distinction, this part is divided in two sections: the first responds to Norway's jurisdictional objections proper, as set out in Chapter 5 of its Counter-Memorial (**A**). The second part responds to Norway's admissibility objections, as set out in Chapter 4 of its Counter-Memorial, emphasizing that these objections would not in any event affect the Tribunal's jurisdiction over this arbitration (**B**).

A. NORWAY'S JURISDICTIONAL OBJECTIONS SHOULD BE REJECTED

462. The Parties agree that Article IX of the BIT defines the jurisdictional criteria applicable to this case: [573]

> *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.* [574]

463. Moreover, Article 25(1) of the ICSID Convention provides:

> *The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State*

572 Respondent's Counter-Memorial, 29 October 2021, para. 210.

573 *Ibid*., paras. 398-399.

574 **CL-0001**, Article IX(1).

> *(or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting state.*

464. The Claimants maintain that the Tribunal's jurisdiction is established because the case relates to a continuing legal dispute between Latvian investors and Norway, a contracting party to the BIT, in relation to an investment of such Latvian investors in the territory of Norway.

465. Norway accepts that a legal dispute exists between the Parties.[575] It also accepts that "*Mr. Pildegovics and North Star are respectively a national of Latvia and a company incorporated in Latvia, in accordance with the terms of Article I(3) of the BIT*",[576] thereby conceding that the Claimants are Latvian "investors" under the terms of Article IX of the BIT.[577]

466. In view of this concession, Norway's insistence that the Tribunal should determine "*who the real investor is in this case*" is irrelevant.[578] As a matter of law, it should be noted that Norway has failed to cite any authority supporting the need for such an analysis under the BIT.

467. Article I(3) of the BIT defines the term "investor" as follows:

> *The term "investor" shall mean with regard to each contracting party:*
>
> *(A) A natural person having status as a national of that contracting party in accordance with its laws,*
>
> *(B) Any legal person such as any corporation, company, form, enterprise, organization or association incorporated or constituted under the law in force in the territory of that contracting party*

468. Nowhere in the BIT does one find a requirement for an investor to prove a certain level of "*contribution*" to, or "*control*" over, the investment in relation to which the dispute exists. Norway is therefore attempting to impose an additional evidentiary burden on

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575 Respondent's Counter-Memorial, 29 October 2021, paras. 400.1, 400.2.

576 *Ibid*., paras. 400.3.

577 Norway's contention that Claimants are not the "*real*" investors has been answered in Section D above and will not be discussed further in this section.

578 Respondent's Counter-Memorial, 29 October 2021, para. 364.

the Claimants which they need not carry. Such arguments are also inapposite under the ICSID Convention.

469. At any rate, on any reasonable understanding of the term, Mr. Pildegovics and North Star are undoubtedly the "*real*" investors in this case. This matter has been dealt with above (**Part III**, **Section D**) and does not require further discussion in this section.

470. Norway's remaining objections to the jurisdiction of the Tribunal fall into three categories:

(a) the dispute is allegedly not "*in relation to an investment*" **(subsection a.)**;

(b) the investment at issue is allegedly not "*in the territory of Norway*" **(subsection b.)**; and

(c) the investment is allegedly not "*in accordance with"* the laws and regulations of Norway, as required by Article I(1) of the BIT **(subsection c.)**.

471. For the reasons set out below, each of these objections is without merit.

a. The Dispute Is "In Relation to an Investment"

472. Norway has presented its jurisdictional objections by considering each asset comprising the Claimants' investment in isolation, as if these assets existed on their own, divorced from any common economic operation.

473. While the Claimants have indeed shown that the assets individually meet the definition of "*investment*" under Article I(1),[579] Norway's approach is fundamentally flawed. As long held by ICSID tribunals (quoting from the *Holiday Inns* award), "*investment is accomplished by a number of juridical acts of all sorts. It would not be consonant either with economic reality or with the intention of the parties to consider each of these acts in complete isolation from the others*".[580]

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579 Claimants' Memorial, 11 March 2021, paras. 491-527.

580 **CL-0114**, para. 197; *see* Claimants' Memorial, 11 March 2021, paras. 478-486.

474. In *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, the tribunal held that, while an investment venture can be composed of different types of assets, these assets cannot be viewed in isolation from one another:[581]

> *The Tribunal considers that in practice, an investment may be composed of several contracts, and different types of assets, which together form the "venture" that constitutes the investment. In the Tribunal's view, determining whether there is an investment is a matter of substance and not form. In the present case, the MOC and the alleged Option to buy together formed such a venture. The question of whether the Option to Buy constitutes an investment is a matter that cannot be viewed in isolation from the MOC.*

475. Professor Schreuer has observed that "*tribunals, when examining the existence of an investment for the purposes of their jurisdiction, have not looked at specific transactions but at the overall operation. Tribunals have refused to dissect an investment into individual steps taken by the investor, even if these steps were identifiable as separate legal transactions. What mattered for the identification and protection of the investment was the entire operation directed at the investments' overall economic goal*".[582]

476. The "*entire operation*" at issue in this case is the Claimants' snow crab fishing business. This operation had an "*overall economic goal*": to deliver consistent supplies of snow crab to Seagourmet and other distribution partners at Båtsfjord, for their subsequent processing, marketing, and sale on the international seafood market.[583]

477. The Claimants' snow crab business was built to fulfil Mr. Pildegovics' commitment as part of the joint venture agreement he concluded with Mr. Levanidov in January 2014. This commitment was to build capacity to fish large quantities of snow crab and to deliver them to Seagourmet's factory and other distribution partners at the port of Båtsfjord, Norway.[584]

478. The investment in relation to which a dispute exists in this case is the Claimants' snow crab fishing business. In the words of the *Holiday Inns* tribunal, this investment was

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581 *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Decision on Respondent's Objections to Jurisdiction, 5 June 2012, **CL-0443**, para. 42.

582 **CL-0135**, p. 272.

583 Respondent's Counter-Memorial, 29 October 2021, para. 400.

584 First Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 30-39, 160.

"*accomplished by a number of juridical acts*"[585] and was composed of several "*assets*" within the definition of Article I(1) of the BIT. The nature of these assets has been covered in detail in the Claimants' Memorial.[586]

479. Norway, however, insists that some of the Claimants' assets comprising their investment in Norway do not fall within the categories listed under Article I(1). Norway notably submits that "*in order for the alleged joint venture to form a relevant element in the dispute, the existence, characteristics, and terms of the joint venture must be established by the Claimants and shown to fall within the category of "*claims to performance" *under Article I(1)(iii) of the BIT*".[587]

480. This argument ignores that Article I(1) of the BIT defines "*investment*" as "*every kind of asset*", "*in particular, though not exclusively*" assets falling within the categories listed in subsections (I) through (V).[588] The plain meaning of the terms "*in particular, though not exclusively*" is that these categories do not define the concept of investment exhaustively. The relevant question under Article I(1) BIT is whether the elements comprising the investment qualify as "*assets*", which includes, but is not limited to, the categories of assets listed in that provision.

481. In a recent arbitral award interpreting a similar provision, the tribunal found that the definition of "investment" *"show[ed] the Treaty drafters' intention to adopt an open definition of the investments covered thereby"*.[589] Therefore, the tribunal applied *"the general maxim of interpretation whereby where the text makes no distinction, the interpreter should make no distinction as well".*[590]

482. The existence and legal effect of the joint venture agreement between Mr. Pildegovics and Mr. Levanidov has been covered above in **Part III**, **Section E**. While Mr. Pildegovics' contractual rights under this agreement certainly qualify as an "*asset*" (and therefore as an "*investment*" in their own right under Article I(1) of the BIT), these

585 **CL-0114**, para. 197.

586 Claimants' Memorial, 11 March 2021, paras. 488 *et seq*.

587 Respondent's Counter-Memorial, 29 October 2021, para. 417.

588 **CL-0001**, Article I.

589 *Michael Anthony Lee-Chin v. The Dominican Republic*, ICSID Case No. UNCT/18/13, Partial Award on Jurisdiction, 15 July 2020, **CL-0444**, para. 211.

590 *Ibid*.

rights do not exist in a vacuum, but as one of several "*juridical acts*" constituting the Claimants' snow crab business.[591]

483. In *Vento Motorcycles Inc. v. Mexico*, the tribunal found that a joint venture between the US claimant and its Mexican joint venture partner was an "investment" within the meaning of the NAFTA, even though it had no separate legal personality. The respondent had argued "*that the Joint Venture was nothing more than a contract for the sale of goods, namely motorcycles, in Mexico*" and that it was therefore expressly excluded from the definition of "investment" in the NAFTA. Rejecting this argument, the tribunal found that the joint venture "*was much more than that*". It involved "*joint efforts, cooperation and the commitment of resources, skills and know-how [...] to the development of an economic activity*", and the contribution by Vento of capital and services of various types. The tribunal found that both joint venture partners "*cooperated throughout the life of the venture and contributed time and efforts to develop a business and achieve its goals (even if they ultimately did not succeed)*." As such, the joint venture qualified as an "enterprise" and met the definition of "investment" under the NAFTA, even though it was not a corporation and did not have any separate legal personality.[592]

484. Mr. Pildegovics' contractual rights under the joint venture are properly characterized as "*claims to performance under contract having an economic value*", further confirming their qualification as an "*investment*" under Article I(1)(iii). By concluding the joint venture agreement, Mr. Pildegovics acquired claims to Mr. Levanidov's performance of the latter's contractual commitments under this agreement, including a commitment to source Seagourmet's supplies of snow crab from North Star, to find markets for the catches, and to help arrange financing for the venture,[593] as well an obligation to cooperate and a duty of loyalty.[594]

485. These claims undoubtedly had economic value to Mr. Pildegovics, as described in his witness statement. The joint venture ensured a consistent and reliable source of

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591 **CL-0114**, para. 197.

592 *Vento Motorcycles, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/17/3, Award, 6 July 2020, **CL-0445**, paras. 185-86.

593 First Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 29-34.

594 Expert Report of Dr. Anders Ryssdal, 10 March 2021, paras. 31-32.

demand for North Star's catches, as well as significant operational benefits, which greatly reduced the level of risk associated with his investment.[595]

486. Norway's submission that there is no economic value in the joint venture reveals a fundamental misunderstanding of the arrangement.[596] As noted above, the joint venture was not set up as a separate legal entity. As such, the joint venture *itself* had no profits or losses. The joint venture was instead designed to *enable* the profitability of the companies partaking in it, chiefly North Star and Seagourmet.

487. There can be no doubt that the joint venture was affected by the measures taken by Norway, even if the Claimants have not calculated losses of cash flows suffered by the joint venture itself.[597] The impact on the joint venture is shown by the undisputed fact that Seagourmet's business collapsed almost immediately after Norway started enforcing its ban against North Star.[598] Since Seagourmet is neither a Latvian investor nor a party to this arbitration, the Claimants are not seeking damages for Seagourmet's losses.

488. It cannot seriously be disputed that the assets composing the Claimants' investment were established and acquired by the Claimants to form a single business with a common economic purpose:

(a) By entering into a joint venture agreement with Mr. Levanidov, the owner of Seagourmet, Mr. Pildegovics secured a dedicated source of demand for his snow crab catches as well as key operational benefits tied to the close coordination between supplier (North Star) and customer (Seagourmet).[599]

(b) Through his sole shareholding in North Star, Mr. Pildegovics controlled a fishing company with the capacity to catch and deliver the snow crab supplies required by Seagourmet and other customers related to the joint venture. North Star was the main operational arm of Mr. Pildegovics' snow crab fishing business, and

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595 First Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 36-37, 39.

596 Respondent's Counter-Memorial, 29 October 2021, paras. 443-446.

597 *Ibid*., paras. 443-446. As noted by Professor Schreuer, "[a]t *the quantum stage, the calculation of damages will normally look at the value of the entire investment and not just at the value of its separate components*". *See* Christop Schreuer, "*The Unity of an Investment*," ICSID Reports, Vol. 19, 2021, **CL-0446**, p. 23.

598 First Witness Statement of Kirill Levanidov, 11 March 2021, paras. 63-66.

599 First Witness Statement of Peteris Pildegovics, 11 March 2021, para. 39.

the main conduit through which he fulfilled his commitments under the joint venture with Mr. Levanidov.

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

(d) North Star's vessels, fitted and equipped for snow crab fishing in the Barents Sea, gave the company the material means to catch and deliver large quantities of snow crabs to Seagourmet and other customers of the joint venture – North Star's *raison d'être*. North Star's fishing capacity rights enabled its ships to operate as fishing vessels for this purpose.

(e) North Star's fishing licences gave the company the legal right to engage in snow crab fishing in the Barents Sea, first in the international waters of the NEAFC area (from 1 July 2014) and later in waters off the Svalbard archipelago (from 1 November 2016), fishing grounds with a large and growing snow crab population.[600]

(f) North Star's contracts for the purchase of additional vessels (Sokol and Solyaris) were concluded to enable the company to expand its fishing capacity, in response to growing demand including Seagourmet's increased absorption capability.[601] The vessels were already operating in the Barents Sea snow crab fishery, were suited to the needs of the joint venture, and were available for delivery to the port of Båtsfjord. North Star also acquired fishing capacity rights to allow these ships to operate as fishing vessels under the Latvian flag.[602]

(g) Finally, North Star concluded supply agreements to formalize the terms of its snow crab sales to Seagourmet and other seafood distributors linked to the joint venture.[603]

489. The above assets, forming a single economic operation, <u>together</u> define the investment at issue in this case.

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600 First Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 85 *et seq*.

601 *Ibid*., paras. 98 *et seq*.

602 *Ibid.*, paras. 98-108.

603 *Ibid.*, paras. 109-116.

490. The dispute between the Claimants and Norway is clearly "*in relation to*" the investment so defined (or, in other words, "*arising directly out of an investment*"). Norway's actions have caused North Star to become banned from the snow crab fishery. Since it was therefore prevented to fish for snow crab, the company was unable to pursue deliveries to Seagourmet: this in turn prevented Mr. Pildegovics from fulfilling his core commitment under the joint venture.

491. While some of the assets forming the investment could be put to alternative uses (as some were, in an effort to mitigate the Claimants' losses[604]), the investment itself was indisputably affected by the Norwegian measures. Norway's ban of North Star's snow crab fishing activities was a death sentence for the Claimants' broader snow crab business, which inflicted substantial economic harm upon the Claimants.

492. The fact that certain assets comprising an investment have the potential of being used for purposes other than the investment itself is immaterial. The Claimants readily concede that their ships had the potential of being converted "*into fishing vessels optimized for taking a different catch*".[605] In the long run, any asset can be converted into financial capital and used for any economic purpose. However, the definition of "*investment*" is not limited to single-purpose assets: most investments will obviously rely on assets (machinery, tools, land, financial capital) that can be put to varied uses, yet still qualify as investments (or assets forming part of an investment). The question is not how an asset could hypothetically be used, but how it was intended to be used (and how it was actually used) as part of an investment operation.

493. The Claimants are unaware of a single precedent in which a tribunal would have refused to consider an asset as a component of an investment operation for the sole reason that it could hypothetically be used for other purposes. The cases dealing with financial assets are obviously apposite: financial capital can often quickly be reallocated to alternative investment opportunities by being traded on the global markets.[606] The tradability of an asset is obviously no bar to its recognition as forming part of an investment. Provided that the specific asset is actually used as part of the

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604 *Ibid*., para. 266.

605 Respondent's Counter-Memorial, 29 October 2021, para. 488.

606 **CL-0115** (dealing with bonds and security entitlements); **CL-0040** (involving a series of bonds, including sovereign bonds); **CL-0106** (involving promissory notes); **CL-0110** (involving a loan).

overall economic operation, the asset is relevant to the determination of the existence of an investment.[607]

494. In light of the above, the record clearly shows that:

(a) the Claimants owned assets which, taken individually, fall under the definition of "*investment*" in Article I(1) of the BIT;

(b) these assets together formed a snow crab business with a single economic goal, which as a whole constitutes the Claimants' investment in Norway; and

(c) the dispute between the Claimants and Norway is related to this investment since its operations and value were destroyed by Norway's measures in breach of the BIT.

495. Thus, the dispute is "in relation to an investment".

b. The Investment Is "In the Territory of Norway"

496. In the same way that the assets forming the Claimants' investment must be viewed as an entire operation pursuing a single economic goal, the question of the territoriality of this investment must also be considered looking at the investment as a whole.[608]

497. In the words of the *Inmaris v. Ukraine* tribunal, "*it is not necessary to parse the territorial nexus of each and every component of the Claimants' investment; it is the investment as a whole that has that nexus*".[609]

498. The investment as a whole is the Claimants' snow crab business. The question is therefore whether this business – viewed in its entirety – has sufficient nexus to the territory of Norway to fulfil the territorial requirement of Article IX of the BIT. It does.

499. The logical starting point in this analysis is the economic goal pursued by the investment: to supply snow crabs to Seagourmet and other distribution partners in Båtsfjord, in particular to satisfy the demands of Seagourmet's Båtsfjord snow crab processing factory.

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607 **CL-0126**, para. 5.44 ("*all the elements of the Claimant's operation must be considered for the purpose of determining whether there was an investment under Article 25* [of the ICSID Convention]").

608 Claimants' Memorial, 11 March 2021, paras. 571-575.

609 **CL-0118**, para. 125.

500. This economic goal was accomplished through the delivery of a resource (snow crab) at a specific location in Norway (the port of Båtsfjord), predominantly to a Norwegian partner (Seagourmet), resulting in sales generated by North Star at that same location in Norway. The entire economic goal of the investment was therefore to be achieved in Båtsfjord, in the territory of Norway.

501. This is also the conclusion of Norwegian legal expert Dr. Anders Ryssdal, who concludes the following regarding the rights and obligations arising under the joint venture between Mr. Pildegovics and Mr. Levanidov:

> *The mentioned rights and obligations are connected to Norwegian territory, namely* ***ability to deliver, take delivery and process snow crab at the Båtsfjord factory***.[610]

502. In 2015 and 2016, when the Claimants were able to operate their investment in pursuit of this economic goal, over 90% of North Star's snow crab sales were made to Seagourmet and [redacted], a seafood distributor associated with Mr. Levanidov.[611] No other fishing company supplied snow crab to Seagourmet. The only reason why North Star made sales to companies without links to the joint venture was that Seagourmet, owing to ongoing renovation works at its factory, was temporarily unable to absorb 100% of North Star's live catches.[612] Nevertheless, more than 98% of North Star's snow crab catches were delivered and sold in Norwegian ports during the same period.[613]

503. While the economic goal of the investment was meant to be achieved (and was in fact achieved) almost exclusively within the territory of Norway, the operations of the investment also reveal a very strong territorial nexus to Norway. To recall the relevant undisputed facts:

(a) the Claimants managed their investment from the port of Båtsfjord, where North Star and Sea & Coast employees (including Mr. Pildegovics) shared office

610 Addendum to the Expert Report of Dr. Anders Ryssdal, dated 28 February 2022, para. 14.

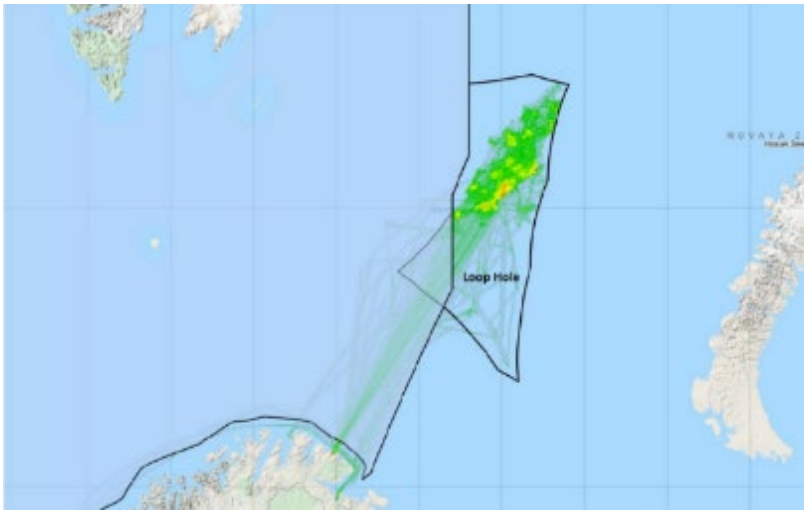
611 First Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 157, 159; **PP-0159**; **PP-0160**; **PP-0161**; **PP-0162**; **PP-0163**; **PP-0164**; **PP-0165**; **PP-0166**; **PP-0167**.

612 First Witness Statement of Peteris Pildegovics, 11 March 2021, para. 160.

613 *Ibid.*, para. 145; **PP-0155**; **PP-0156**.

space with employees of Seagourmet.[614] Norway's Counter-Memorial refers to this location as the "*Claimants' Båtsfjord Premises*".[615]

(b) Consistent with their core mission to supply Seagourmet with snow crabs, North Star's vessels operated exclusively from the port of Båtsfjord. This meant that every fishing trip started and ended in Båtsfjord, and the ships were berthed there between trips. The figure provided by Norway at paragraph 150 of its Counter-Memorial (reproduced below) helpfully illustrates this fact: every green line representing trips by North Star's vessels to and from the Loophole is connected to the Norwegian territory. This is explained by the fact that the Claimants' business consisted fundamentally in bringing a resource (snow crab) to Norway.



(c) North Star's vessels were serviced by a Norwegian company owned by Mr. Pildegovics, Sea & Coast, based in the port of Båtsfjord, which served as its local agent "*in ports of call and on fishing ground in Norway*".[616]

(d) At its operational peak in 2016, North Star employed over 90 seafarers and administrative staff who were based in or operated from Båtsfjord. This compared to no more than four employees at the company's headquarters in Riga.[617]

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614 First Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 42(f), 131, 166; **PP-0033**; **PP-0034**; **PP-0140**.

615 Respondent's Counter-Memorial, 29 October 2021, Title of section 6.5.6.3.

616 **PP-0029**, art. 1; **PP-0030**, art. 1; **PP-0031**, art. 1; **PP-0032**, art. 1.

617 First Witness Statement of Peteris Pildegovics, 11 March 2021, para. 42(g).

(e) Mr. Pildegovics and his joint venture partner Mr. Levanidov met at the venture's Båtsfjord premises at least 20 times over a period of seven years[618] (noting that the former lives in Riga while the latter is based in Seattle).

(f) Mr. Pildegovics' claims arising from the joint venture agreement pertained to Mr. Levanidov's performance in Norway: chiefly to build capacity to process North Star's snow crab catches at Seagourmet's factory in the port of Båtsfjord, and to purchase large supplies of snow crabs to be delivered there by North Star.[619]

504. In light of this evidence, the nexus between the Claimants' snow crab business – the investment at issue in this case – and the territory of Norway is strong and unequivocal.

505. The fact that certain aspects of the investment also had links to other territories certainly does not preclude a finding that the territorial requirement is met with regard to the investment as a whole.

506. For example, in *Ambiente Ufficio v. Argentina*, the respondent argued that government bonds had been issued outside the territory of Argentina, that they were not physically held in Argentina and that they were subject to foreign laws and jurisdictions.[620] The Tribunal nonetheless considered the territorial requirement to have been met upon consideration of the totality of the investment.

507. Similarly, in *SGS v. Philippines*, the respondent State contested the territorial nexus of the investment by arguing that some activities carried out by the investor were under the jurisdiction of Switzerland and not the Philippines. In particular, it noted that inspection services were performed outside of the Philippines, and that the investment was funded by an SGS affiliate in Geneva.[621] The tribunal nevertheless concluded that a sufficient territorial nexus with the Philippines existed given the extent of the

618 *Ibid.*, para. 126

619 First Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 30, 160.

620 **CL-0115**, para. 497.

621 **CL-0205**, paras. 101-105.

investor's activities there.[622] The same conclusion was reached by the tribunal in *SGS v. Pakistan*, which had to consider similar facts.[623]

508. In *BIVAC v. Paraguay*, the tribunal considered that activities carried outside Paraguay and activities that took place in the territory of Paraguay could not be dissociated. It stated:[624]

> *Activities cannot be subdivided in a way as to distinguish between claims for non-payment of services abroad and claims for services in Paraguay: in practice the services were treated as inseparable and the overall objective was to increase national State revenue and to transfer knowledge to Paraguay, so that the State could pursue the import duty assessment and certification at the end of the Contract with BIVAC.* ***Activities that were internal and external to the territory of Paraguay formed a whole*** *for which a single ad valorem fee was paid.*

509. In the same vein, the tribunal in *Hydro and others v. Albania* found that an investment in the territory of the host State (Albania) was constituted of two entities, one physically located in the territory of Albania, and another located in Italy. It considered that the entity in Italy, which fell under the Italian jurisdiction, was still part of the overall investment because the two entities were "*conceived as an integrated whole*".[625]

510. As noted by Professor Schreuer, "*[t]ribunal practice indicates that the performance of the relevant activity need not take place in the territory of the host State, at least not in its entirety. Neither is a physical transfer of assets into the host State's territory necessary."*[626]

511. In this case, the "*performance of the relevant activity*" – the delivery and sale of snow crab – took place almost exclusively in the territory of Norway. There is no doubt that a "physical transfer of assets" (snow crabs) took place in Norway. It is also clear that the economic value resulting from this activity (the economic proceeds from the sales

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622 **CL-0205**, paras. 111-112, *see also*, para. 106 ("*The fact that the bulk of the cost of providing the service was incurred outside the Philippines is not decisive. Nor is it decisive that SGS was paid in Switzerland.*").

623 *See also*, *SGS Société Générale de Surveillance v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, **CL-0447**, para. 136.

624 **CL-0232**, para. 103. [emphasis added]

625 *Hydro S.R.L., Costruzioni S.R.L., Francesco Becchetti, Mauro de Renzis, Stefania Grigolon, Liliana Condomitti v. Republic of Albania*, ICSID Case No. ARB/15/28, Award, 24 April 2019, **CL-0448**, para. 575.

626 Christoph Schreuer, "*The Unity of an Investment*," ICSID Reports, Vol. 19, 2021, **CL-0446**, pp. 16-17.

of snow crab) was generated in Norway, more specifically at the port of Båtsfjord where the vast majority of the Claimants' sales took place.

512. It may be asked whether the origins of the *resource* (snow crabs) delivered by North Star as part of its economic operation impacts the territorial nexus of the investment. This question is in fact raised by Norway, which submits that the Claimants' fishing operations took place "*practically entirely on the* Russian *continental shelf*"[627] and therefore that they "*are self-evidently not investments in the territory of Norway*".[628] This question therefore deserves closer examination.

513. To recall the facts, when North Star began its snow crab fishing operations in August 2014, it did so based on NEAFC licences issued by Latvia for the international waters of the Barents Sea, covering the entire Loophole. As discussed above, snow crabs at that time were treated by all NEAFC Member States with vessels involved in the fishery as a species occurring in waters, not as a natural resource of the continental shelf. It follows that this species was then considered to belong to the high seas – not the Russian or Norwegian continental shelf.

514. From the start of the investment's operation until Norway's change of position on the designation of snow crab as a sedentary species, the Claimants' core investment operation thus consisted in the delivery and sale in Norway of a resource fished in international waters.

515. While the fishing activity so described does show that the operation had a link to an area outside Norway (the international waters of the Loophole), this does not change the fact that the investment was "*in the territory of Norway*". The Claimants' *economic activity* – indeed their sole mission – was to deliver and sell snow crab at the port of Båtsfjord within the framework established by the joint venture agreement between Mr. Pildegovics and Mr. Levanidov.

516. The act of fishing does not, in and of itself, qualify as an economic activity. It is but the first step of the economic process. For fishing to become a commercial enterprise, the catch must be stored on the vessel according to strict specifications; it must either be processed onboard or delivered ashore; in the latter case, it must be kept alive and in good shape through the return journey (a particular technical challenge in the case of the snow crab); a customer willing to take the catch must be found; and a sale must

627 Respondent's Counter-Memorial, 29 October 2021, para. 491.

628 *Ibid.*, para. 507.

be made to that customer.[629] The economic value is generated at the point of delivery and sale.[630] The economic value is in the selling of the catch, not the fishing.

517. In determining the territoriality of an investment operation, the origin of the resource used to perform the economic activity is not decisive: what matters is the location of the economic activity itself. While the snow crabs were fished by North Star in the Loophole, they were not delivered or sold there, but at the port of Båtsfjord in Norway. The Claimants' business was to sell snow crab: Båtsfjord is where that business was located.

518. In that sense, the Claimants' snow crab business can be analogized to a business whose operation in a host country depends on importing raw materials from outside the country. The fact that such an operation relies on externally sourced materials does not preclude its recognition as an investment in the host country. For example, in *Saar Papier v. Poland (I)*, the investment's operation depended on imports of waste paper from Germany to Poland. The waste paper was then transformed in Poland into finished products which were then exported to Denmark. The tribunal found that it had jurisdiction over the investment and ordered Poland to compensate the investor "*for the loss of value of its investment due to the fact that [the waste paper] could not be imported into Poland"*.[631]

519. Even were the Tribunal to believe that Norway's current view of the world applied when the Claimants initiated their investment (*i.e.*, that they were already then "harvesting" snow crab on the coastal States' "continental shelves"), the conclusion that this investment was fundamentally linked to Norway would not change:

(a) If – as Norway claims – the Claimants' catches were then seen as being made "on the Russian continental shelf", the position is the same. The origin of the raw materials used in the Claimants' business would be the Russian continental shelf instead of the international waters of the Loophole. Either way, the snow crabs came from outside the territory of Norway, yet these catches were still systematically delivered in Norway, which is where the economic activity occurred, and what ties their investment to the territory of Norway.

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629 First Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 19, 36-37, 245

630 Ibid., paras. 42(b), 115, 146, 150, 156-160, 177

631 *Saar Papier Vertriebs GmbH v. Republic of Poland (I)*, Ad hoc Arbitration, Final Award, 16 October 1995, **CL-0449**, para. 94.

(b) However, any snow crab catches made "on the Norwegian continental shelf" would then be viewed as coming from the territory of Norway according to the definition of the BIT, which includes "*the continental shelf over which the state concerned exercises, in accordance with international law, sovereign rights for the purpose of exploration and exploitation of the natural resources of such areas.*"[632] With respect to those catches, the entire operation of the Claimants' investment would then take place within Norwegian territory: from the fishing to the delivery and sale of the catch.

520. Norway then points to various aspects of the Claimants' operations which, in its view, demonstrate the lack of a nexus between their investment and the territory of Norway.[633] While these aspects show that the Claimants' operations were in some ways linked to jurisdictions outside Norway, these elements are tangential and fail to change the conclusion that the Claimants' investment was "*in the territory of Norway*".

521. It is immaterial that the marketing and sale of end products by Seagourmet was not focused primarily on the Norwegian market.[634] The Claimants acknowledge that the main end markets for snow crab products are found in Asia, the United States, and the EU. They also acknowledge that Seagourmet produced mainly for these exports markets, as opposed to the Norwegian internal market. Leaving aside the fact that Seagourmet's sales are distinct from the Claimants' (there is no question that North Star sold to Seagourmet in Norway), this fact is common to all export-oriented businesses. If only companies selling primarily to the Norwegian market could meet the territoriality requirement under the BIT, virtually no mining, energy or manufacturing operation based in Norway could ever qualify. Following this reasoning, Norway's domestic oil industry (which sells its products predominantly outside of Norway[635]) could not be qualified as an investment "*in the territory of Norway*". For that matter,

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632 **CL-0001**, Article I(4) ("*The territory of the Kingdom of Norway and territory of the Republic of Latvia, including the territorial sea, as well as the continental shelf over which the state concerned exercises, in accordance with international law, sovereign rights for the purpose of exploration and exploitation of the natural resources of such areas*"); *See also*, Claimants' Memorial, 11 March 2021, paras. 546-568.

633 Respondent's Counter-Memorial, 29 October 2021, paras. 447 *et seq*.

634 *Ibid*., para. 455.

635 Norskpetroleum.no website, *Exports of oil and gas*, *Table of Norwegian oil deliveries in 2020*, 13 January 2022, **C-0237**.

Norway's domestic seafood industry (which sells its products primarily to the EU[636]) would also not be "*in the territory of Norway*".

522. The location of the end consumer of products manufactured in the territory of the host country (the people who ultimately eat the snow crabs) is irrelevant. This has been confirmed by the tribunal in *Hydro and others v. Albania* mentioned above, in which the territorial requirement was challenged by the respondent. In this case the end consumer of the television programming produced in Albania was located in Italy.[637] The tribunal found that the investment had a territorial nexus with Albania because the Italian and Albanian entities were part of an integrated whole.[638]

523. Likewise, the fact that the joint venture agreement was concluded "*in Latvia, by a U.S. and a Latvian citizen*"[639] has no bearing on the territoriality of the investment. The Claimants' snow crab business would have had no greater territorial nexus to Norway had that agreement been concluded in Båtsfjord instead of Riga or had Mr. Levanidov been Norwegian instead of American. The fact that he lives in Seattle instead of Oslo[640] is also irrelevant.

524. The same conclusion applies to Norway's arguments that Mr. Pildegovics' acquisition of his shares in North Star "*was a domestic Latvian transaction*";[641] that North Star's ships were not "*bought in Norway or from a Norwegian company*";[642] that these ships "*could have been used practically anywhere*";[643] that the fishing capacity rights were

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636 Jason Holland, "*Norway breaks seafood export records in 2021*," Seafood Source, 5 January 2022, **C-0238**.

637 *Hydro S.R.L., Costruzioni S.R.L., Francesco Becchetti, Mauro de Renzis, Stefania Grigolon, Liliana Condomitti v. Republic of Albania*, ICSID Case No. ARB/15/28, Award, 24 April 2019, **CL-0448**, para. 575 ("*Here, the two companies were, from the outset, conceived as an integrated whole. This was the delocalized production model which the two companies were established to implement: production in Albania of programming to be broadcast in the lucrative Italian market. That model was reflected in a contractual relationship, under which Agonset.Shpk sold television rights to Agonset.it, and Agonset.it transferred a portion of the Italian advertising revenues to Agonset.Shpk*.").

638 *Hydro S.R.L., Costruzioni S.R.L., Francesco Becchetti, Mauro de Renzis, Stefania Grigolon, Liliana Condomitti v. Republic of Albania*, ICSID Case No. ARB/15/28, Award, 24 April 2019, **CL-0448**, paras. 579-580 ("*It is only due to the substantive integration of these two companies in the particular business model they implemented that the Tribunal finds they constitute a single investment.* […] *Finally, as the Claimants' example of a pipeline that crosses the border between two States demonstrates, there is nothing absurd about investments of this kind qualifying as an investment in the territory of each contracting party*.").

639 Respondent's Counter-Memorial, 29 October 2021, para. 458.

640 *Ibid*., 29 October 2021, para. 458 ("*the two parties to [the joint venture agreement] are domiciled in jurisdictions other than Norway (and none, it seems, is domiciled in Norway*").

641 *Ibid*., para. 463.

642 *Ibid*., para. 481.

643 *Ibid*., para. 489.

conferred by Latvia "*in order to meet an obligation imposed by the EU*";[644] that the sellers of Sokol and Solyaris are companies based in Russia;[645] or that supply agreements concluded by North Star are governed by Latvian law and subject to the jurisdiction of Latvian courts.[646] None of these points has any meaningful impact on the territoriality of the investment.

525. In the final analysis, the test of whether an investment is sufficiently linked to a territory comes down to its economic impact on that territory. In the words of Professor Schreuer, *"what matters is that the economic effect of the investment is felt in the host State's territory."*[647]

526. In *Ambiente Ufficio*, the tribunal adopted a similar reasoning:[648]

> *The Tribunal is convinced that, in order to identify in which State's territory an investment was made, one has to determine first which State benefits from this investment. Most observers will agree that the criterion which may be taken from the ICSID Convention itself when it comes to determining the nature of an investment under this Convention, is that of a contribution "for economic development", as referred to in the first preambular paragraph of the ICSID Convention. Accordingly, to assess where an investment was made, the criterion must be to whose economic development an investment contributed.*

527. Here again, the record clearly shows that the investment contributed to the economic development of Norway. Along with their joint venture partner, the Claimants helped create 67 jobs in the Norwegian town of Båtsfjord out of a population of about 2,200. They spent tens of millions of Norwegian kroner with Norwegian suppliers, gave substantial business to Norwegian shipyards for the repair and maintenance of their vessels, helped justify infrastructure investments in Båtsfjord and contributed to the social and cultural development of the municipality.[649] These economic benefits stopped to accrue to Norway when North Star's ships were deprived of the right to fish for snow crab by Norway.

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644 Respondent's Counter-Memorial, 29 October 2021, para. 503.

645 *Ibid*., para. 509.

646 *Ibid*., para. 525.

647 Christoph Schreuer, "*The Unity of an Investment*," ICSID Report, Vol. 19, 2021, **CL-0446**, pp. 16-17.

648 **CL-0115**, para. 499.

649 First Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 177-183; First Witness Statement of Kirill Levanidov, 11 March 2021, paras. 67-86.

528. The fact that the former Mayor of Båtsfjord, Mr. Geir Knutsen, has agreed to submit a Witness Statement in support of the Claimants' case in this arbitration is testament to the importance of the Claimants' investment to the local community. His Witness Statement tells the story from the perspective of a Norwegian elected official:

> *2. A key company in Båtsfjord had become insolvent, which meant that a large factory was empty. The company that had become insolvent was among the largest ones locally. So we were pleased when Mr. Levanidov and Mr. Pildegovics came and took it over with a view to refurbishing the factory. Levanidov and Pildegovics put tens of millions of kroner into renovating the factory and adjacent housing…*
>
> *4. We were pleased that the factory was once more going: it employed a great number of workers. At the height of its activity, the new concern employed 50–60 persons all year. The concern had the potential of growing further yet. Their investment and activity in Båtsfjord meant employment opportunities for the local community. Their investment in Båtsfjord therefore meant a great deal for the local economy. This was the case both during its first phase and, obviously, when they were really up and running (Latvian and other workers came, with their families, to Båtsfjord). The broader impact of the new factory and its workers and their families was important for a small community. Those employed by the factory and their families patronized local shops, local grocers, eateries, the cinema, and so on.*
>
> *5. Whilst they were up and running, Levanidov and Pildegovics were good at trading with local businesses. Furthermore, Seagourmet participated actively in the community by supporting local sports; for example they built a playground and supported sporting events. They were a part of local life. But the employment they brought to the municipality remains the most important thing.*
>
> *6. It was apparent in Båtsfjord that it was EU vessels that caught the snow crab which Seagourmet refined. I believe everyone knew that. We sought to have Norwegian vessels deliver too. But they process on board, whereas the model of the Latvians was to create employment opportunities ashore as the crab was refined there rather than on the vessels. That was the whole point: Seagourmet brought the crab ashore and created activities on land and in the local economy…*
>
> *8. At Båtsfjord we expanded our capacity for cold storage, in part with a view to being able to store more of the snow crab that North Star brought ashore. The expansion of the cold storage capacities was paid for by the limited liability company Båtsfjord Sentralfryselager, in which Båtsfjord municipality is a majority shareholder; it was the shareholders who decided that the cold storage capacities were to be expanded…*

> *11. Seagourmet made a very good impression at Båtsfjord. Without that kind of immigration of workers to which Levanidov and Pildegovics contributed, Båtsfjord would have ground to a halt. Båtsfjord is among the municipalities in Norway with the highest level of immigration of workers. Levanidov and Pildegovics sponsored sports and patronized shops, grocers, the cinema; it meant a very great deal for Båtsfjord to have such a large factory up and going again. The business they were running was vital to the local community. Snow crabs were a new and exciting product that they brought ashore: everyone in Båtsfjord was of the view that it was very important for the municipality that they had established themselves here.*

529. This testimony speaks for itself, as does the fact that Norway has chosen to ignore it in its Counter-Memorial.

530. To conclude under this heading, the Claimants' snow crab business, which is the investment at issue in this case, was an investment "*in the territory of Norway*". The economic goal of this business, to deliver and sell large quantities of snow crab to Seagourmet and other partners at Båtsfjord, was meant to be accomplished (and was accomplished) almost exclusively in Norway. The operations of the investment were also closely tied to the territory of Norway. Consequently, the state which felt the economic effect of the investment, and which benefitted from it in terms of economic development, was Norway. The territorial requirement of Article IX of the BIT is satisfied.

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

531. The question of the conformity of the Claimants' investment with the laws and regulations of Norway arises as a jurisdictional question, since the concept of "*investment*" under Article I(1) of the BIT is defined as "*every kind of asset invested in the territory of one contracting party in accordance with its laws and regulations*".[650]

532. Norway's main objection under this heading appears to be that North Star's snow crab fishing licences were illegal. "*Norway considers that these licences – put forward by Claimants as investments – are not valid and Latvia has no authority to issue them*".[651] "*Norway does not accept the validity of these licenses and considers them to be contrary to UNCLOS, the NEAFC Convention and the Svalbard Treaty as well as*

650 **CL-0001**, Article I(1).

651 Respondent's Counter-Memorial, 29 October 2021, para. 291.

domestic law. And since Norway has acted against North Star and its vessels and temporarily arrested one of its vessels precisely because in its view those licenses are unlawful, the legality of the licences and, consequently, Latvia's right to issue them, are at the heart of the dispute".[652]

533. The legality of the Claimants' investment must be assessed with reference to domestic law as it existed at the time the investment was established. This position is well supported by the jurisprudence:

(a) In *Fraport AG Frankfurt v. Philippines*, the tribunal observed that "*the effective operation of the BIT regime would appear to require that jurisdictional compliance be limited to the initiation of the investment*".[653]

(b) In *Vannessa Ventures Ltd. v. Venezuela*, the tribunal found that the "*jurisdictional significance of the 'legality requirement' in the definition of investment […] is exhausted once the investment has been made*".[654]

(c) In *Copper Mesa v. Ecuador*, interpreting a provision similar to Article I(1) of the BIT, the tribunal noted that "*the wording of the Treaty is confined, at most, to a jurisdictional bar applying to the time when the Claimant first made its investment […] it does not extend to the subsequent operation, management or conduct of an investment*".[655]

534. These principles are important in this case, since Norway has changed the legal regime applicable to the Loophole's snow crab fishery following its designation in July 2015 of snow crab as a sedentary species. Norway's change of position and the regulatory amendments that ensued have been covered in **Part III**, **Section A** above.

535. However, as held by the tribunal in *Phoenix Action v. Czech Republic*, "*the analysis of the conformity of the investment with the host State's laws has to be performed taking into account the laws in force at the moment of the establishment of the investment. The State is not at liberty to modify the scope of its obligations under the international*

652 Respondent's Counter-Memorial, 29 October 2021, para. 300.

653 *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 16 August 2007, **CL-0402**, para. 345.

654 **RL-0130**, para. 167.

655 *Copper Mesa Mining Corporation v. Republic of Ecuador,* PCA Case No. 2012-2, Award, 15 March 2016, **CL-0450**, para. 5.54.

treaties on the protection of foreign investments, by simply modifying its legislation or the scope of what it qualifies as an investment that complies with its own laws".[656]

536. The underlined statement describes exactly what Norway is purporting to do in the present case. Norway's submissions that the Claimants' fishing licences are "not valid", that "Latvia has no authority to issue them", and that they are contrary to various international instruments are all dependent on Norway's position that snow crab is a sedentary species falling under its continental shelf jurisdiction. However, as set out in detail above, this was not Norway's position when the Claimants' investment was established.

537. North Star began its snow crab fishing operations in the Loophole in August 2014 relying on a NEAFC licence, issued by Latvia for the vessel Solvita, valid from 1 July 2014 to 31 December 2014.[657] Solvita landed its first snow crab catch in Norway the same month.[658]

538. At that time, nothing in Norwegian law prevented EU-flagged vessels from fishing for snow crab in the international waters of the Loophole or from landing their catch in Norway, and Norway recognized the validity of snow crab fishing licences issued under the NEAFC regime. As shown above:

(a) The Loophole's snow crab fishery was considered by Norway's Directorate of Fisheries as an "*international waters*" fishery, which fell "*outside the fisheries jurisdiction of any State*".[659]

(b) Like Latvia, Norway licensed its vessels under the NEAFC Scheme to participate in this "*international waters*" fishery, which no State then considered as falling under its continental shelf jurisdiction.[660]

(c) The Norwegian government was still several months away from even starting to contemplate the possibility of designating snow crab as a sedentary species

656 **CL-0171**, para. 103.

657 First Witness Statement of Peteris Pildegovics, 11 March 2021, para. 89; **C-0023**.

658 First Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 64, 151; **PP-0168**.

659 *See above*, paras. 36-47.

660 *See above*, paras. 90-97.

under UNCLOS (its assessment of this issue began no earlier than November 2014).[661]

539. Norway adopted its first set of regulations prohibiting snow crab fishing in all areas under Norwegian jurisdiction in December 2014, four months after the start of North Star's fishing operations in the Loophole.[662] These regulations did not apply to EU-flagged vessels fishing there, since in "*international waters*", they applied only *"[f]or Norwegian vessels*".[663] NOFIMA, the Norwegian food research institute, summarized the effect of these initial regulations as follows: "*the ban on catch is formulated as if the snow crab is managed as a fish*".[664] The words "continental shelf" were nowhere to be found in these initial regulations, which applied in "*waters*".[665]

540. These first Norwegian regulations pertaining to snow crab entered into force in January 2015. The Claimants' investment in the territory of Norway was by then established and operational. The joint venture agreement between Mr. Pildegovics and Mr. Levanidov had been concluded a full year earlier in January 2014.[666] North Star had taken delivery of its four ships[667] and acquired sufficient fishing capacity rights to operate them as fishing vessels.[668] All four vessels held NEAFC licences authorizing them to fish for snow crab in the Loophole.[669]

541. At the beginning of January 2015, Norway's Institute for Marine Research was still working on its "*more comprehensive note*" on the behavioural biology of the snow crab.[670] Norway's Ministry of Foreign Affairs had yet to deliver a "*preliminary assessment*" as to "*whether the snow crab is a so-called "sedentary species" in accordance with The Convention on the Law of the Sea*".[671] Norway was six months

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661 *See above*, paras. 48 to 85.

662 Respondent's Counter-Memorial, 29 October 2021, para. 581; **C-0104**.

663 *Ibid*.

664 **BK-0006**, p. 12.

665 Respondent's Counter-Memorial, 29 October 2021, para. 581; **C-0104**.

666 *See above*, para. 364 *et seq*.; First Witness Statement of Peteris Pildegovics, 11 March 2020, paras. 40-41; First Witness Statement of Kirill Levanidov, 11 March 2020, para. 49.

667 First Witness Statement of Peteris Pildegovics, 11 March 2020, paras. 63-72.

668 *Ibid*., paras. 75 *et seq*.

669 *Ibid*., 11 March 2020, para. 86.

670 *See above*, paras. 66 to 69; Email exchange between C. Finbak and J. H. Sundet, **C-0185**; Email from C. Finbak to J. H. Sundet, **C-0189**.

671 *See above*, paras. 66 to 67, Note from C. Finback to E. Gabrielsen, 19 January 2015, **C-0249**, pp. 1-2.

away from designating snow crab as such through its Valletta agreement with Russia in July 2015.

542. Hence, when the Claimants' investment was established in 2014, this investment was fully in accordance with the laws and regulations of Norway:

(a) Norway's first regulations prohibiting snow crab fishing were adopted in December 2014, after the establishment of the investment. They did not apply to EU-flagged vessels operating in the Loophole. The Claimants' operations were unconcerned by these regulations and were certainly not in breach of any law or regulation of Norway. There was, at the time, simply nothing in Norwegian law that might have cast doubt upon the legality of the licences.

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

543. The Claimants' investment was also fully in accordance with the NEAFC regulatory framework which was recognized by Norway. The NEAFC regulatory framework requires that the vessels wanting to fish unregulated species, such as the snow crab, to be registered through notification to the NEAFC Secretariat in London.[672] It also requires that the vessel complies with NEAFC's specific regulations, *i.e.,* the NEAFC Scheme of control and enforcement, and the current management measures as published in the NEAFC website.[673] The Claimants' fishing licences were issued by Latvia through notifications pursuant to the NEAFC's regulations and thus, in accordance with NEAFC regulatory framework.

544. It was only in July 2015 that Norway adopted the position that snow crab was to be designated as a sedentary species falling under its continental shelf jurisdiction. Norway then waited until December 2015 to amend its regulations, which then prohibited snow crab fishing on Norway's "*continental shelf*".[674]

672 Claimants' Memorial, 11 March 2021, paras. 278-281.

673 *Ibid*., para. 49.

674 *Ibid*., paras. 111-112.

545. Therefore, Norway's contention that the Claimants' NEAFC licences are illegal *under international law* relies on a position taken by Norway in July 2015, eleven months after the start of the Claimants' fishing activities under such licences. Its contention that the licences are illegal *under domestic law* relies on amendments to its regulations adopted in December 2015, seventeen months after the Claimants had started fishing under the same licences.

546. In other words, Norway is seeking to do precisely that which the *Phoenix Action* tribunal held that a State may not do: "*to modify the scope of its obligations under the international treaties on the protection of foreign investments, by simply modifying its legislation or the scope of what it qualifies as an investment that complies with its own laws*".[675]

547. While Norway's main objection to the legality of the Claimants' investment relates to the fishing licences, Norway also argues that North Star's *vessels* were not investments made in accordance with Norwegian law.[676] This argument is yet another remarkable specimen of Norway's alternative take on history:

> *The Claimants cannot simply announce that they have bought vessels with the intention of using them to fish in Norwegian waters and therefore have rights to fish in Norwegian waters that are protected under the BIT because their vessels are 'investments in the territory of Norway'. Had the Claimants in fact "operated" their vessels in Norwegian territory (i.e., had they harvested snow crab on the Norwegian continental shelf and were that sufficient to satisfy the territoriality threshold) the investment would patently have been made in direct contravention of Norwegian law.*

548. The problem with this argument is that it reaches the wrong conclusion based on false premises. When they established their investment in 2014, the Claimants did not have an intention "*to fish in Norwegian waters*", nor did they pretend to "*have rights to fish in Norwegian waters*". However, they certainly *did* operate their vessels in Norwegian territory; the vessels were based in the port of Båtsfjord and landed 98% of their catches in Norwegian ports with Norway's authorization.[677] The catches were made in the international waters of the Loophole, before any State involved in that fishery had

675 **CL-0171**, para. 103.

676 Respondent's Counter-Memorial, 29 October 2021, paras. 493-496.

677 First Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 147-148; **C-0100**; **C-0101**; **C-0102**; **C-0103**.

even suggested that the Loophole's snow crabs were resources of Norway's (or Russia's) continental shelf.

549. Given that North Star's vessels started and ended each and every one of their fishing trips in Båtsfjord, and that they were inspected there at least four times by the Norwegian Coast Guard, which never found any infringement,[678] it is difficult to fathom how the vessels could possibly have been "*in direct contravention of Norwegian law*". Norway fails to identify the source of any such "*contravention*", since of course there is none.

550. The conclusion under this heading is therefore that the Claimants' investment (as well as every asset comprising it) was "*in accordance with the laws and regulations*" of Norway when it was established in 2014. Norway began to challenge the legality of this investment under Norwegian law only after it amended its domestic regulations in December 2015, which itself followed Norway's change of position on the designation of the snow crab under UNCLOS in July 2015.

551. However, the position and prohibition Norway adopted in July and December 2015 are in any event irrelevant to the jurisdictional question at issue, since the legality requirement under the BIT was "*exhausted once the investment ha[d] been made*" in 2014.[679]

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552. The Claimants therefore maintain their submission that the Tribunal has jurisdiction over the present dispute under Article IX of the BIT. In short:

(a) This matter relates to a continuing legal dispute between Latvian investors and Norway, a contracting party to the BIT;

(b) The legal dispute is "*in relation to an investment*" made by the Claimants, namely a snow crab business composed of various assets owned by Mr. Pildegovics and North Star (also "*investments*" under the meaning of Article I(1) of the BIT);

678 First Witness Statement of Peteris Pildegovics, 11 March 2021, para. 162; **C-0099**.

679 **RL-0130**, para. 167.

(c) The investment at issue was "*in the territory of Norway*": the *economic goal* of the investment – the delivery and sale of snow crab at the port of Båtsfjord primarily to Seagourmet, a Norwegian company, was achieved almost exclusively in Norway, while the *operations* of that investment were also closely tied to the territory of Norway;

(d) The investment made by the Claimants was fully "*in accordance with [the] laws and regulations*" of Norway at the time of its establishment in 2014, which preceded Norway's change of position on the designation of snow crab as a sedentary species in July 2015 and its subsequent ban against fishing for the species on its "continental shelf" in December 2015.

B. NORWAY'S ADMISSIBILITY OBJECTIONS SHOULD BE REJECTED

553. Norway's arguments presented in Chapter 4 of its Counter-Memorial, while ostensibly submitted as *jurisdictional objections*, in fact pertain to the admissibility of certain claims made by the Claimants.

554. The distinction between jurisdiction and admissibility is well established in international law in general,[680] and in investment arbitration in particular. As acknowledged by the arbitral tribunal in *Carlos Ríos and Francisco Ríos v. Republic of Chile*, referred to by Norway,[681]

> *in general, it is possible to draw a distinction between questions of jurisdiction, which concern the existence of a court's adjudicative power, and questions of admissibility. which concern the exercise of that power.*[682]

555. The distinction has also been summarized as follows:

> *A plea of incompetence consists, in international law, in arguing that the parties, for one reason or another, have not consented to the exercise by the court seised of its jurisdiction over them; a plea of inadmissibility consists, for its part, in requesting the dismissal of*

680 ICJ, *Case Concerning certain questions of mutual assistance in criminal matters (Djibouti v. France),* Judgment, 4 June 2008, **CL-0451**, para. 48.

681 Respondent's Counter-Memorial, 29 October 2021, para. 212, fn 223.

682 **RL-0070**, para. 173. Our translation from the original: *"En general, es posible trazar una distinción entre las cuestiones de jurisdicción, que conciernen la existencia del poder adjudicativo de un tribunal, y las cuestiones de admisibilidad, que se refieren al ejercicio de dicho poder". See also* **CL-0040**, para. 248; *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case Nos. ARB/08/1 and ARB/09/20, Award, 16 May 2012, **CL-0452**, para. 29.

> *the claim for another reason, as a preliminary matter, before any examination of the merits*.[683]

556. In short, a jurisdictional objection is based on a *"requirement contained in the text on which the consent is based"*.[684] If the objection is rejected, the Tribunal has jurisdiction, as there is no consent-related obstacle. However, the Tribunal may choose not to exercise its jurisdiction, in respect to some or all of the claims, for reasons based on their inherent characteristics, which would make them improper for judicial adjudication. Indeed, as it has been repeatedly acknowledged, "*[j]urisdiction is an attribute of a tribunal and not of a claim, whereas admissibility is an attribute of a claim but not of a tribunal*".[685]

557. The Claimants are aware that a few ICSID tribunals have considered that

> *the distinction between admissibility and jurisdiction does not appear to be necessary in the context of the ICSID Convention, which deals only with jurisdiction and competence.*[686]

558. On that basis, some tribunals have refrained from qualifying the objections with which they were dealing. Such a pragmatic choice may be opportune on account that "*the practical consequences in the […] case are the same*."[687] However, the practical consequences are not the same in this case, for several reasons.

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683 Y. Banifatemi and E. Jacomy, *"Compétence et recevabilité dans le droit de l'arbitrage en matière d'investissements"* in Ch. Leben (ed), DR.OIT INTERNATIONAL DES INVESTISSEMENTS ET DE L'ARBITRAGE TRANSNATIONAL, Pedone, 2015, **CL-0453** p. 774. Our translation from the original : *"Une exception d'incompétence consiste, en droit international, à soutenir que les parties, pour une raison ou une autre, n'ont pas consenti à ce que la juridiction saisie exerce son pouvoir juridictionnel à leur égard ; une exception d'irrecevabilité consiste pour sa part à solliciter le rejet de la demande pour une autre raison, à titre liminaire, avant tout examen du fond". See also*, August Reinisch and others, *"Jurisdiction and Admissibility in International Investment Law,"* The Law and Practice of International Courts and Tribunals 16, 2017, **CL-0454**, pp. 21-43.

684 *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C., Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, **CL-0455**, para. 64; *See also*, **RL-0091**, para. 260.

685 *Hochtief AG v. The Argentine Republic,* ICSID Case No ARB/07/31, Decision on Jurisdiction, 24 October 2011, **CL-0456**, para. 90; *See also, Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C., Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 Sept 2008, **CL-0455**, para. 63.

686 **CL-0117**, para. 33; *See also* **CL-0111**, para. 41 or *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 Dec. 2012, **CL-0457,** para.117.

687 *Mobil Investments Canada Inc. v. Government of Canada,* ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility,13 July 2018, **CL-0458**, para. 136.

559. First, as shown in above, all the conditions established by Article IX of the BIT, which establishes the Tribunal's jurisdiction in this case, are met.

560. Norway's characterization of its objection related to the legality of the Claimants' fishing licenses as a *jurisdictional* objection is an impermissible attempt to read additional conditions for the establishment of the Tribunal's jurisdiction into Article IX of the BIT. Other investment tribunals have refused to go down that road, considering that

> *Once a Claimant investor has established its entitlement to the protection guaranteed under an investment treaty…, it becomes simply a matter as to whether the facts which the investor alleges, if they can be substantiated, do or do not constitute contraventions of those standards of protection, and, if they do, what the consequences are in terms of remedies. It would not, in the Tribunal's view, be consistent with the established norms for the interpretation of treaties to read into a given investment protection treaty additional conditions or limitations that could readily have been incorporated into the treaty text had the parties so wished, but are not there.*[688]

561. This is a specific application of the general principle that, while the Tribunal must not exceed the jurisdiction conferred upon it by the Parties, "*it must also exercise that jurisdiction to the full*".[689] Commenting on that principle, McLachlan has observed that:

> *"[t]he duty of an international court or tribunal in jurisdictional matters is to determine, as a matter of law, the scope of its jurisdiction as conferred upon it by the parties. Its decision would be as much open to criticism for an under exercise of jurisdiction as for an excess of jurisdiction, since its decision always affects the rights of both parties to the dispute."*[690]

562. Second, Norway's admissibility objections do not target the entire case submitted to the Tribunal, but only the legality of the fishing rights asserted by the Claimants to form part of their investment. However, as shown above,[691] the case referred to the Tribunal concerns a snow crab business with a single economic goal, which as a whole constitutes the Claimants' investment. Norway would wish to have the whole case

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688 *The Rompetrol Group N.V. v. Romania,* ICSID Case No. ARB/06/3, Award. 6 May 2013, **CL-0459**, para. 113. [emphasis added]

689 ICJ, *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta),* Judgment, 3 June 1985, **CL-0460**, pp. 13, 23, para. 19.

690 Campbell McLachlan, "*The Assault on International Adjudication and the Limits of Withdrawal*," International and Comparative Law Quarterly, vol. 68, 2019 **CL-0461**, pp. 499, 516.

691 *See above*, paras. 364 to 399.

rejected *in limine litis*, on account that some of the Claimants' submissions should not be considered by the Tribunal.[692] There is no basis in investment jurisprudence for doing so and Norway indeed fails to cite a single precedent in which a case was rejected in similar circumstances. On the contrary, the admissibility of any given claim must be analyzed on its own and does not entail consequences on the Tribunal's jurisdiction to hear the case as a whole. In the words of the *Micula* tribunal, objections to jurisdiction and objections to admissibility differ in their effects, as "*an objection relating to admissibility will not necessarily bar the Tribunal from examining the case"*.[693]

563. Third, Norway's objection is based on a recharacterization of the Claimants' claims, indeed of the dispute as a whole, based on a partial and selective reading of the Request for Arbitration and of the Memorial.[694] Norway thus portrays the case put forward before the Tribunal as being a dispute between Norway, on the one hand, and Latvia and the European Union, on the other hand, with regards to "*Norway's sovereign rights in its maritime areas*".[695]

564. But this is not the case put by the Claimants before the Tribunal. The Claimants claim that they held snow crab fishing rights in the maritime areas over which Norway (now) asserts jurisdiction, in the Loophole and off the Svalbard archipelago. These rights formed part of their investment in the territory of Norway, which is protected under the terms of the BIT. They claim reparation for the losses they suffered as the result of Norway's breaches of its obligations under the BIT.

565. It is not possible, without misrepresenting the claims formulated in the Claimants' pleadings, to conclude that the very subject matter of the case is Norway's sovereign rights in the Loophole and around Svalbard. The Respondent is seeking, through its misrepresentation of the Claimants' case, to expand the Claimants' cause of action beyond what it actually is, and on that spurious basis to convince the Tribunal that it cannot entertain the case submitted to it.[696]

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692 Respondent's Counter-Memorial, 29 October 2021, para. 246.

693 *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C., Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 Sept 2008, **CL-0455**, para. 64.

694 Respondent's Counter-Memorial, 29 October 2021, paras. 222-224.

695 Respondent's Counter-Memorial, 29 October 2021, para. 210.

696 In line with what the International Court of Justice observed in *Alleged Violations of the 1955 Treaty of Amity*, the Tribunal's duty to isolate the real issue in the case and to identify the object of the claim does

566. Fourth, the Claimants agree that the Tribunal might need to address, in an ancillary manner, the interpretation of other international law instruments such as UNCLOS, the Svalbard Treaty or the NEAFC Convention, so as to determine the existence and scope of the fishing rights forming part of the investment protected under the BIT. But this is a question of applicable law, not of admissibility, let alone of jurisdiction.

567. Norway's arguments under this heading go to the merits. Indeed, they require an examination of the principles governing the equitable and reasonable treatment of the Claimants' investment, which imposed upon Norway the duty to exercise any sovereign rights in the maritime areas under its jurisdiction in a manner respectful of that investment. This requires consideration of whether, after closing the Loophole to European fishing vessels, Norway had an obligation to consider favourably the Claimants' requests for snow crab fishing off Svalbard, among other issues.

568. These questions are not preliminary questions based on which the Tribunal might reject the case *in limine litis*. Norway itself recognizes that they arise under the merits, and it does so on a superficial basis in its Chapter 4.[697] These are nonetheless broad substantive issues, which need to be thoroughly examined, not superficially hovered over. As held by the arbitral tribunal in *CMS Gas Transmission Company v. The Argentine Republic*

> *in practice whether a given claim falls under one or the other heading can only be established in light of the evidence which the parties will produce and address in connection with the merits phase of the case […] This means in fact that the issue of what falls within or outside the Tribunal's jurisdiction will be subsumed in the determination of whether a given claim is or is not directly connected with specific measures affecting the investment*.[698]

569. Upon these preliminary considerations, the Claimants will now address the various grounds of inadmissibility put forward by Norway in its Counter-Memorial under two sub-headings: the first will deal with arguments to the effect that the subject-matter of the dispute places it beyond the scope of issues to be determined by the Tribunal (**subsection a.**). The second will address arguments related to the alleged existence

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"*not permit it to modify the object of the submissions, especially when they have been clearly and precisely formulated*". **RL-0067**, para. 59.

697 Respondent's Counter-Memorial, 29 October 2021, paras. 293-301, 321-326.

698 **CL-0111**, para. 34.

of a "larger" dispute involving States that are not present before the Tribunal (**subsection b.**).

a. The Subject-Matter of the Dispute

570. According to Norway, "*the subject-matter of the dispute does not relate to questions directly related to the alleged investments*"[699], but "*depends on a preliminary decision clarifying the legal regime applicable to the harvesting of snow crab on the Norwegian continental shelf both around Svalbard and in the Loop Hole*"[700]. Therefore, Norway argues that "*to define the existence or the scope of the Claimants' rights, the Tribunal should interpret and apply UNCLOS, the NEAFC Convention and the Svalbard Treaty*"[701] and that this would render the entire case inadmissible. Norway's argument fails on more than one account.

(i) *The Subject-Matter of the Dispute and Jurisdiction* Ratione Materiae

571. First, it is doubtful whether the ground for inadmissibility relied upon by Norway exists at all in investment arbitration. Norway portrays its argument as concerning the "*definition of the dispute*"[702] and the identification of the "*very subject-matter of the case*" based on the theory of the "*preponderance of questions*"[703] relied upon by tribunals dealing with inter-State cases introduced under UNCLOS.

572. This theory has only been applied in inter-State cases, in which the applicant was invoking a particular convention – mostly UNCLOS – to seek a ruling on a larger dispute with the respondent, which did not necessarily concern the interpretation and application of the law of the sea, but mostly questions of territorial sovereignty.

573. Norway relies essentially on three cases[704] – the *Chagos* arbitration (*Mauritius v. United Kingdom*)[705], the *South China Sea* case (*Philippines v. China*)[706] and the

699 Respondent's Counter-Memorial, 29 October 2021, p. 80, title 4.1.

700 *Ibid.*, para. 217.

701 *Ibid.*, para. 216.

702 *Ibid.*, para. 213.

703 *Ibid.*, paras. 2268-283.

704 *Ibid.*, paras. 268-270, 275.

705 **RL-0081**.

706 **RL-0073**; **RL-0082.**

Coastal States Rights case (Ukraine v. Russia)[707] to argue that the claims in relation to fishing should not be entertained by the Tribunal.

574. Furthermore, the analogy with those three arbitrations is inapposite. The Claimants have not – could not have – a dispute with Norway over the latter's sovereign rights, nor does this arbitration raise a challenge to Norway's jurisdiction over the Loophole or in the maritime areas off Svalbard. In this arbitration, the Claimants are disputing Norway's exercise of its jurisdiction in the Loophole and off the Svalbard archipelago, insofar as this exercise amounts to a violation of their rights under the BIT.

575. As the Swiss Federal Court ruled in the set aside proceeding in *Russian Federation v. A et al.*,[708] where the Russian Federation had argued that a claim under the Russia-Ukraine BIT 1998 actually concerned the territorial status of Crimea:

> *Contrary to what the Appellant appears to assume, the subject matter of the arbitration was not the status of Crimea with regard to the 1998 BIT nor its status under international law, but rather a claim asserted by the Respondents for compensation payments in the amount of USD 40'406'455, plus interest, as a result of the Appellant's alleged expropriation of the Respondents' investments.*[709]

576. Similarly, questions of sovereignty are not the subject matter of this arbitration. The subject-matter of this arbitration is a claim for reparation on account of breaches of the BIT assessed by the Claimants in the amount of EUR 448.7 million plus interest.

577. In those cases, the arbitral tribunals relied on this theory of the preponderance of questions to determine whether they had jurisdiction *ratione materiae*, in a context in which their jurisdiction was limited to the interpretation and application of UNCLOS. However, Norway omits to mention that none of those tribunals dismissed the case for lack of jurisdiction. At most – as Norway acknowledges[710] – one tribunal directed the applicant to redefine the scope of some of its claims.[711]

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707 **RL-0066**.

708 First Civil Law Court, *Russian Federation v. A et al.,* 4A 246/2019, Judgment, 12 December 2019, **CL-0463**, pp. 8-9.

709 *Ibid*., pp. 8-9, para. 4.2.

710 Respondent's Counter-Memorial, 29 October 2021, p. 101, fn 101.

711 **RL-0066**, paras. 197-198.

578. In any event, the theory of the preponderance of questions has not been imported in investment arbitration. Norway's Counter-Memorial indeed cites no precedent indicating that it has. The fact that Norway casts its arguments as an objection to jurisdiction *ratione materiae*[712] does not change their nature. Under the BIT, which is the instrument upon which rests the jurisdiction of the present Tribunal, as Norway insists,[713] the *ratione materiae* condition is covered by the requirement of the existence of an investment made by the Claimants according to the provisions of Article IX of the BIT and Article 25 of the ICSID Convention. Norway's arguments under that heading have been answered in **Section A** above.

579. Norway tries to expand the ambit of the question by arguing that the Claimants' submissions related to their fishing rights fall outside the scope of the BIT. Relying on the theory of the "preponderance of questions", Norway challenges the arbitrability of the dispute, highlighting that the "*notion of (objective) arbitrability relates to whether a particular subject-matter is lawfully susceptible to decision by arbitration.*"[714]

580. However, this argument is not independent from the one concerning jurisdiction *ratione materiae*. Indeed, under Article 25 of the ICSID Convention, a dispute is arbitrable if it is "*arising directly out of an investment*". And under Article IX of the Norway–Latvia BIT the arbitrability criterion is even broader, since a dispute is arbitrable if it is "*in relation to an investment*". The arbitrability of the claim (or jurisdiction of the Tribunal to entertain it) is therefore established if there is an investment "*in relation to*" which a dispute exists.[715] As shown above in **Section A**, there is no doubt that there is.

581. If the condition *ratione materiae* is met – and it is – no further inquiry is needed:

> *Pursuant to Article 9 of the BIT, the subject-matter scope of the Tribunal's jurisdiction extends to "any dispute [...] in relation to an investment". For the Tribunal to establish subject-matter jurisdiction, it suffices for this dispute to be "in relation to an investment". (…) Absent an exclusion by the terms of the relevant treaty or a derogation by a subsequent treaty, the Contracting*

712 Respondent's Counter-Memorial, 29 October 2021, paras. 246, 248, 267 and 283.

713 *See also*, Respondent's Counter-Memorial, 29 October 2021, para. 261.

714 *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India*, UNCITRAL Case PCA 2016-7, 21 December 2020, **CL-0464**, para. 817.

715 **CL-0175**, para. 52; **CL-0352,** para. 239.

> *States should be deemed to have agreed to arbitrate all matters that fall under the scope of the Treaty.*[716]

(ii) The Subject-Matter of the Dispute and the Exercise of Sovereign Rights

582. Although the legal reasoning could stop here, the Claimants will address in more detail, out of an abundance of caution, the Respondent's objection based on the exclusion of the existence of fishing rights from the scope of the BIT. Norway claims that, in order to consider the Claimants' submissions as to the existence of their fishing rights, the Tribunal would have to consider an underlying dispute over "*Norway's sovereign rights in its maritime areas around Svalbard and in the Loop Hole*".[717]

583. As mentioned above,[718] this is an inaccurate characterization of the dispute. The Tribunal is not requested to decide upon the existence of Norway's sovereign rights in the Loophole and in the maritime areas off Svalbard. Instead, the Tribunal is asked to find that, in the exercise of its asserted sovereign rights, Norway has breached its obligations towards the Claimants as Latvian investors, as further demonstrated below.

584. Although Norway seems to acknowledge this distinction,[719] it nevertheless appears to challenge the power of any arbitral tribunal to decide on whether the exercise by a State of its sovereign rights breached their international obligations. This would be a far-reaching proposition, considering that most (if not all) investment treaty cases rest upon a claim impugning the exercise by the host State of its regulatory authority, which is one of the ways in which the sovereign exercises its jurisdiction. As recently held by a tribunal:

> *Investment treaty tribunals are tasked with scrutinising State measures in different fields of sovereign activity for their compliance with the treaty standards.*[720]

585. While tribunals have been mindful of the State's power to conduct its economic policy and adopt measures according to its sovereign choices, the extent to which such

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716 *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India*, UNCITRAL PCA Case 2016-7, Final Award, 21 December 2020, **CL-0464**, paras. 745-746, 820.

717 Respondent's Counter-Memorial, 29 October 2021, para. 210.

718 *See above,* paras. 12, 463 *et seq.*

719 Respondent's Counter-Memorial, 29 October 2021, paras. 275-276.

720 *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India*, UNCITRAL PCA Case 2016-7, Final Award, 21 December 2020, **CL-0464**, para. 794.

measures might have violated the State's commitments towards foreign investors does fall squarely within the jurisdiction of a tribunal constituted according to an investment treaty:

> *27. [Q]uestions of general economic policy not directly related to the investment, as opposed to measures specifically addressed to the operations of the business concerned, will normally fall outside the jurisdiction of the Centre. A direct relationship can, however, be established if those general measures are adopted in violation of specific commitments given to the investor in treaties, legislation or contracts. What is brought under the jurisdiction of the Centre is not the general measures in themselves but the extent to which they may violate those specific commitments. […]*
>
> *33. On the basis of the above considerations the Tribunal concludes on this point that it does not have jurisdiction over measures of general economic policy adopted by the Republic of Argentina and cannot pass judgment on whether they are right or wrong. The Tribunal also concludes, however, that it has jurisdiction to examine whether specific measures affecting the Claimant's investment or measures of general economic policy having a direct bearing on such investment have been adopted in violation of legally binding commitments made to the investor in treaties, legislation or contracts.*[721]

586. The object of the Claimants' challenge in this case is Norway's "*specific measures affecting [their] investment*". As further discussed below, these measures consist of Norway's exercise of its sovereign jurisdiction, by means of agreement with Russia[722] and the enactment of domestic legislation,[723] the purpose and effect of which was to exclude European vessels from the Barents Sea snow crab fishery. The Claimants also consider that Norway violated its legally binding commitments by adopting specific enforcement measures towards North Star's vessels[724] and by prosecuting North Star before domestic courts.[725]

(iii) The Subject-Matter of The Dispute and Applicable Law

587. The "*distinction between the scope of the rights and obligations which an international tribunal has jurisdiction to enforce and the law which it will have to apply in doing so is*

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721 **CL-0111**, paras. 27, 29, 33.

722 *See above,* para. 207; Respondent's Counter-Memorial, 29 October 2021, paras. 132-140, 819-824.

723 *See above,* paras. 138 *et seq*; Respondent's Counter-Memorial, 29 October 2021, paras.117-123.

724 *See above,* paras. 202; Respondent's Counter-Memorial, 29 October 2021, paras. 159-180.

725 *See above,* paras. 797-814; Respondent's Counter-Memorial, 29 October 2021, paras. 159-180.

a familiar one".[726] Accordingly, applicable law clauses do not establish or affect the scope of that tribunal's jurisdiction.

588. As explained in **Part IV** above on applicable law, the extent to which external rules need to be taken into consideration is a question for the merits[727] which does not affect the Tribunal's jurisdiction, or the admissibility of claims related to fishing rights. This interplay – or rather independence – between the jurisdictional aspects and the merits, as well as the continuous relevance of the external rules, was highlighted in the *Eurotunnel* award:

> *The conclusion that the Tribunal lacks jurisdiction to consider claims for breaches of obligations extrinsic to the provisions of the Concession Agreement (and the Treaty as given effect by the Concession Agreement) does not mean that the rules of the applicable law identified in Clause 40.4 are without significance. They instruct the Tribunal on the law which it is to apply in determining issues within its jurisdiction. They provide the legal background for the interpretation and application of the Treaty and the Concession Agreement, and they may well be relevant in other ways.*[728]

589. The cases to which the Respondent refers do not support its request that the case be rejected *in limine litis*. The *Plechkov* case before the European Court of Human Rights[729] concerned the measures taken by Romania against a Bulgarian fisherman in what Romania considered to be its exclusive economic zone. The Court first made it clear that:

> *It cannot [...] determine the extent or existence of Romania's exclusive economic zone within the meaning of UNCLOS and the rights and obligations of Romania with respect to such a zone.*[730]

590. This, however, did not deprive the Court of jurisdiction to consider whether a violation of UNCLOS had occurred, to the extent relevant for its determination of whether or not

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726 *Eurotunnel (Channel Tunnel Group v. UK and France*), PCA 2003-06, Partial Award, 30 January 2007, **CL-0405**, para.152; **RL-0136**, para. 19; *Achmea B.V. v. The Slovak Republic*, UNCITRAL PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, **CL-0462**, paras. 288-290.

727 *See above,* para. 400 *et seq.*

728 *Eurotunnel (Channel Tunnel Group v. UK and France*), PCA 2003-06, Partial Award, 30 January 2007, **CL-0405**, para. 151.

729 **RL-0075**, para. 262.

730 *Ibid*., para. 67 [our translation from the official French].

there had been a breach of the ECHR. The Court thus observed that there were inconsistencies between the provisions of UNCLOS and the respondent's legislation:

> *The Court also notes certain contradictions between the provisions of UNCLOS and Romanian legislation, for example, with regard to the rights and obligations of the coastal State to impose penalties for breaches of its legislation, in particular as regards the possibility of imposing a prison sentence.*[731]

591. On a closer look, *Plechkov* fully supports the Claimants' position. It is a case where the European Court of Human Rights found that it had jurisdiction, that the matter before it was admissible, and that there was a breach of the European Convention on Human Rights (Article 7) and its First Protocol (Article 1).[732] The same line of reasoning can be followed here: the Tribunal is not called upon to determine the existence and extent of Norway's sovereign rights; it is requested to determine whether, in the exercise of those rights, Norway violated the Claimants' rights under the applicable investment standards. In the course of that examination, the Tribunal may examine external applicable law to the extent necessary to decide the issues put before it.

592. In analyzing the merits of the Claimants' case, the Tribunal will have to consider whether Norway had an obligation towards the Claimants, in light of their particular position as investors in the territory of Norway, to protect their investment and not expropriate them without compensation. Norway had several means at its disposal to comply with its binding commitments towards the Claimants. If the Tribunal considers it necessary to address the question of the legality of the Claimants' fishing licenses in order to determine the extent of the Claimants' rights and of Norway's correlative obligations, it has the power to do so by considering the interpretation of UNCLOS, NEAFC and of the Svalbard Treaty.

593. The Tribunal may also consider Norway's obligations under the Svalbard Treaty and other relevant international legal instruments in order to determine whether there was a breach of the standard of equitable and reasonable treatment or whether the Claimants' investment was unlawfully expropriated. These are not questions of admissibility (let alone jurisdiction), but of applicable law going to the determination and interpretation of standards of investment protection.

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731 *Ibid*., para. 75 [our translation from the official French].

732 **RL-0075**, paras 39, 69-73. Similarly, in its reasoning as to whether or not there was a breach of Article 8 ECHR, the Court examined whether there had occurred violations of the Aarhus Convention. *Grimskovskaya v. Ukraine*, ECHR Case, Final Judgment, 21 July 2011, **CL-0465**, paras. 39, 69–73.

594. The same can be said about the sedentary or non-sedentary character of snow crab: this question is not a necessary predetermination, as Norway argues,[733] and the Claimants have certainly not requested a ruling on this issue. The Claimants' core submission is that Norway has changed its position on the designation of snow crabs, thus changing the legal regime applicable to the Loophole's snow crab fishery and impacting the Claimants' investment in the territory of Norway.[734] Norway's change of position is a question of fact. The broader question of the legality of Norway's recharacterization of snow crab as a sedentary species pursuant to UNCLOS is a question of law that may be examined by the Tribunal, if it considers it necessary to reach a decision as to whether Norway has acted in breach of its obligations under the BIT. Again, all these are matters relating to the law applicable to the meris and not to the admissibility of the claims.

(iv) The Subject-Matter of the Dispute and Forum Non Conveniens

595. Norway further argues that the Tribunal is not the convenient forum for dealing with "*questions about the legality of Claimants' licenses to harvest snow crab on the Norwegian continental shelf*".[735] By contrast, "*the ICJ or the ITLOS would be the only convenient – and competent – fora to deal with such issues*".[736]

596. Even if some of the ancillary questions arising in this arbitration could in theory be dealt with by the ICJ or ITLOS within the framework of inter-State proceedings, they could simply not be seised of the same cause of action by the same parties. Obviously, the Claimants do not have access to those tribunals. If Norway wishes to return to the golden age of diplomatic protection, where private rights could be enforced only indirectly, after endorsement by the State of nationality, it should be observed that Article 27 of ICSID Convention closes the door of diplomatic protection for the case submitted by the Claimants.[737]

597. Furthermore, that the violation of the Claimants' fishing rights may *also* be analysed as a violation of UNCLOS, the NEAFC Convention or the Svalbard Treaty, and that such an analysis might *theoretically* be made by the ICJ or by ITLOS, certainly does

733 Respondent's Counter-Memorial, 29 October 2021, para. 264.

734 *Ibid.*, paras. 44-84.

735 *Ibid.*, para. 249.

736 *Ibid*.

737 **CL-0042**.

not render the claims submitted by the Claimants inadmissible before the present Tribunal. The same set of facts may be covered by different sets of legal rules and submitted to different tribunals. As the International Court of Justice observed

> *Certain acts may fall within the ambit of more than one instrument and a dispute relating to those acts may relate to the "interpretation or application" of more than one treaty or other instrument.*

b. The Existence of a "Larger" Dispute

598. Another argument of inadmissibility put forward by Norway relies on the existence of a "larger" inter-State dispute involving parties that are not present before the Tribunal. According to Norway, since the Claimants' case relies upon fishing licences issued by Latvia on the basis, *inter alia*, of European regulations, and since Norway disputes the validity of those licences, the Tribunal cannot settle the present dispute without "*impermissibly involving itself in matters of contention between Norway, Latvia and the EU concerning (among other things) the exercise of Norway's sovereign rights and the proper interpretation of UNCLOS, the NEAFC Convention, and the Svalbard Treaty*".[738]

599. However, the existence of an underlying public international law dispute involving the EU and Latvia does not prevent the Tribunal from adjudging the case submitted to it based on the applicable law. Norway's arguments under this heading fail for several reasons.

600. First, this objection is itself inadmissible. To borrow the wording of the International Court of Justice:

> *never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them*.[739]

601. Second, if Norway's position were accepted, it would be enough for States to create disputes with other States to deprive investors not only of the substantive investment protections afforded to them, but also of their procedural right to seise an arbitral tribunal.

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738 Respondent's Counter-Memorial, 29 October 2021, paras. 7, 228-245.

739 ICJ, *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran),* Judgment, 24 May 1980, **CL-0466**, para. 37.

602. Investors continue to enjoy substantive investment protection even in cases involving public international law disputes between States. One may consider that such protection becomes all the more necessary in a context when private persons are caught in the opposition between sovereign States. This is particularly the case when territories and maritime areas are disputed or the legal regime applicable to a territory or maritime area is disputed between States.

603. Third, investors have their own rights, protected under international law, and legal venues are available to them to vindicate those rights and to obtain redress for their violation. A host State may create a public international law dispute by deciding to change its international policy unilaterally – as Norway did in relation to snow crab fishing in the Loophole, thus depriving the Claimants of their investment. It may also choose to remain deaf to the calls made by other States to redress those violations – as Norway also did in relation to the EU's proposal to create a mechanism to recognize the Claimants' acquired rights and to uphold the validity of Svalbard licences granted to the Claimants by Latvia. However, the existence of such disputes between States cannot deprive the investors of their substantive rights and of the procedural protection they are entitled to under the BIT.

604. Fourth, the Tribunal is not required to make determinations as to the legal rights of Latvia and or EU; nor is it called to decide on Norway's obligations towards Latvia and EU; or to determine whether there is a dispute between Latvia and EU (as Norway wrongly asserts[740]). The Tribunal is requested to rule upon Norway's violations of the rights of the Claimants protected under the BIT.

605. Fifth, for the reasons stated above, Norway's reliance on the *Monetary Gold* principle, according to which the Tribunal cannot rule upon the case submitted to it if the rights and obligations of third parties form the very subject matter of the decision is likewise inapposite.[741]

606. Norway claims that Latvia and EU are indispensable parties, inasmuch the Claimants' rights are dependent on "*the competence of Latvia/EU to issue the licences*".[742] The argument fails: first, the source of the Claimants' rights, opposable to Norway, resides in the substantive standards for the protection of their investment, as enshrined

740 Respondent's Counter-Memorial, 29 October 2021, paras. 235, 302-314.

741 *Ibid.*, para. 284.

742 *Ibid.*, paras. 285, 291.

in the BIT. Second, even if the Tribunal might have to consider the competence of Latvia to issue the fishing licences, that determination would not fall under the *Monetary Gold* exception.

607. The facts from the *Monetary Gold* case were helpfully summarized in the *Larsen* case:

> *In the Monetary Gold case, ICJ Reports 1954, p. 19, the Court was faced with proceedings instituted by Italy against France, the United Kingdom and the United States of America concerning a consignment of monetary gold looted by German forces from Rome in 1943. The gold was held by the Tripartite Commission constituted by the three Respondent States. An arbitrator had already advised the three Respondents that the gold had been the property of the National Bank of Albania. The three States had agreed that they would deliver the gold to the United Kingdom (in partial satisfaction of the judgment of the International Court in the Corfu Channel case, ICJ Reports 1949, p. 4, awarding the United Kingdom damages against Albania which Albania had not paid) unless Italy or Albania made an application to the International Court. Italy made such an application, Albania did not. In its application, Italy maintained that Albania had incurred international responsibility towards Italy as a result of an allegedly unlawful act and that Italy was entitled to the gold as reparation for that act. Italy further argued that her claim to the gold should take priority over any claim by the United Kingdom.*[743]

608. Since Italy was asking the ICJ to rule upon Albania's responsibility while Albania was not a Party, the Court established the test of inadmissibility of such claims in the following terms:

> *To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent.*[744]

609. The fact that the interests of a State which was not party to the proceedings could be affected by the decision of the Court was not enough to preclude the exercise of jurisdiction. The decisive factor was that "*Albania's legal interests would not only be affected by a decision, but would form the very subject matter of the decision*".[745]

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743 **RL-0098,** para. 11.9.

744 **RL-0083**, p. 32 [emphasis added]

745 *Ibid*.

610. This is the reading made by other investment tribunals of the *Monetary Gold* principle. The tribunal in *Addiko Bank AG v. Croatia* observed that

> *the concerns that the ICJ stated in Monetary Gold relate to a situation in which the very subject matter of the dispute involves a determination of a third State's international legal responsibility, such as where that determination is a necessary prerequisite for decision on the claimant's claims.*[746]

611. Nothing in this proceeding requires the Tribunal to determine whether Latvia (or another other absent State party) has committed any international wrong against Norway, thus engaging its international legal responsibility (or vice-versa). The Tribunal is asked to determine whether the Claimants are entitled to the remedies they have claimed under the BIT.

612. The question of the legality of the licences issued by Latvia on the basis of NEAFC and EU regulations is a question relating to Latvia's exercise of its jurisdiction as a flag State, not to Latvia's responsibility for any wrongful act. As such, it would not fall under the *Monetary Gold* exception.

613. Furthermore, none of the possible conclusions would negatively affect Latvia's position in international law. Any of the conclusions reached by the Tribunal would only concern Norway's obligations towards the Claimants. Latvia's position in international law would remain substantially unaffected, whether the licences it granted to the Claimants are held valid or not.

614. If it considers it necessary to address those issues, the Tribunal may rely on the fact that Norway itself did not challenge Latvia's competence when the investment was made and when fishing was taking place in the Loophole.[747] It might also consider that Latvia's licences enjoy a presumption of validity, under the NEAFC regime[748] and the Svalbard Treaty.[749] It could also consider that compensation for the loss of the Claimants' investment is not dependent on an analysis of the validity of Latvia's licences. In none of these hypotheses is Latvia's responsibility declared or its rights under international law affected, inasmuch as the Tribunal would not put them into question. The Tribunal may even conclude that Latvia's licences granted to the

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746 **RL-0041**, para 307.

747 *See above,* para. 86.

748 *See above,* para. 539; Respondent's Counter-Memorial, 29 October 2021, paras. 286-292.

749 *See above,* para. 603; Respondent's Counter-Memorial, 29 October 2021, paras. 302-326.

Claimants are invalid (*quod non*). Even in such a case, the Tribunal's conclusion would only affect the Claimants' rights under the BIT, and certainly not Latvia's competence to issue licences in the Loophole and/or in the maritime areas off the Svalbard archipelago.

615. *Monetary Gold* therefore provides no basis upon which the Tribunal could decline jurisdiction in the present case. The *Nauru* case is more apposite:

> *In the present case, a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia. Accordingly, the Court cannot decline to exercise its jurisdiction.*[750]

616. All may ultimately turn on the way in which the Tribunal deals with the relevant issue as a matter of the merits. The situation is therefore similar with the one in the *Chevron* case, where the Claimants relied on an agreement whose application in the arbitration could affect the legal rights of other plaintiffs in domestic proceedings, addressing the legal effect of the same agreement:

> *A decision that the 1995 Settlement Agreement releases Chevron and TexPet from all liability in respect of environmental harm in Ecuador would appear to entail the conclusion that the Lago Agrio plaintiffs could not succeed in their litigation against Chevron in respect of environmental harm in Ecuador. Indeed, this Tribunal is formally requested, in the Claimants' prayer for relief (cited in Part I above), to make a series of decisions that are explicitly or implicitly premised upon a particular view of the legal effect of the 1995 Settlement Agreement. In that sense, if there were a decision by the Tribunal in this arbitration that the 1995 Settlement Agreement releases Chevron from all liability, that might be said to decide the legal rights of the Lago Agrio plaintiffs. <u>But that is something that depends upon the form and content of the decision of this Tribunal: it is not an inevitable consequence of the Tribunal exercising its jurisdiction. The question of form and content of the decision is a matter to be addressed during the merits phase of this case</u>.*[751]

617. For these reasons, Norway's admissibility objections must fail.

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750 **RL-0094**, p. 240 at pp. 261-262, para. 55.

751 **RL-0089***,* para. 4.66.

VI. MERITS

A. NORWAY HAS BREACHED ITS OBLIGATION TO ACCORD EQUITABLE AND REASONABLE TREATMENT AND PROTECTION TO THE CLAIMANTS' INVESTMENT

618. Norway has failed to accord "*equitable and reasonable treatment and protection*" to the Claimants' investment, contrary to Article III of the BIT.

619. Starting in July 2015, Norway abruptly reversed its position that the Loophole's snow crab fishery was a high seas fishery lying outside its jurisdiction, adopting a series of measures designed to "close the commons" for snow crab fishing in the Loophole. This reversal was motivated by a clear political purpose: to appropriate the fishery for Norwegian nationals and favour the continued expansion of the snow crab resource in areas under Norwegian jurisdiction.

620. The fact that the Loophole's snow crab fishery was a high seas fishery, recognized as such by all NEAFC Member States, was a critical basis upon which the Claimants decided to invest in their integrated snow crab fishing business in Norway. It was on that basis that the Claimants operated their business over a period of nearly two years. This was known to Norwegian authorities, including the local Mayor, who welcomed their investments emphatically.

621. Following Norway's change position on snow crab in July 2015, Norway acted as if it had always asserted sovereign rights over the snow crab resource in the Loophole, even though it had explicitly stated the opposite for many years.

622. Norway's suggestion that its snow crab management policies were driven by a "*precautionary approach*" or the exercise of a legitimate right to regulate cannot be reconciled with the evidence. Norway's own government recognized that snow crab is an invasive species in the Barents Sea, a threat to the ecosystem. Yet Norway's policies favoured the continued exponential expansion of this invasive species in the Barents Sea, despite its awareness of the environmental costs and risks. This is not a case of regulation of a protected species of wildlife. It is a case of appropriation of an extremely valuable economic resource.

623. Having closed the commons and acted to prevent the Claimants from being able to fish snow crabs throughout the Loophole, Norway then prevented them from exercising their lawful fishing rights offshore of Svalbard. It arrested one of North Star's vessels and prosecuted North Star in legal proceedings that denied it justice.

624. All of this had the effect of destroying the Claimants' integrated snow crab fishing business in Norway. The measures rendered that business substantially worthless. The Claimants made every effort to save the business, but to no avail.

625. Through this course of conduct – which destroyed the Claimants' business for the purpose of appropriating the snow crab fishery to the benefit of the Norwegian industry – Norway failed to accord to the Claimants' investment equitable and reasonable treatment and protection, contrary to Article III of the BIT.

626. The balance of this section first briefly addresses the legal standard applicable under Article III of the BIT (**subsection a.**). Second, it sets out the facts that should lead the Tribunal to find that Norway has failed to afford Claimant's investments equitable and reasonable treatment, contrary to Article III (**subsection b**). Third, it responds to Norway's arguments regarding Claimants' submission that Norway committed a denial of justice (**subsection c.**). Fourth, it demonstrates that Norway also failed to promote, encourage and accept the Claimants' investment, in further breach of Article III (**subsection d.**).

a. Interpretation of the Equitable and Reasonable Treatment and Protection Standard in Article III of the BIT

627. Article III of the BIT provides, in relevant part, that Norway must accord to the investments of Latvian investors "*equitable and reasonable treatment and protection*".

628. Pursuant to customary international law principles reflected by Article 31 of the Vienna Convention on the Law of Treaties ("VCLT"),[752] the Norway–Latvia BIT must be interpreted "*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.*"

629. The standard of treatment set out in Article III of the BIT is drafted in a clear and unambiguous manner. Its ordinary meaning is easily ascertainable and does not require extensive interpretation. Thus, Norway's obligation under Article III is to:

752 **CL-0082**, pp. 16-17; **CL-0083**, pp. 265–266 ("*In reality, the summary very remarkable made by articles 31 to 33 of the Vienna convention, reflects quite accurately the general tendencies of practice, even if they could not embrace all its nuances*." [free translation]; "*En réalité, la synthèse très remarquable effectuée par les articles 31 à 33 de la Convention de Vienne, traduit assez fidèlement des tendances générales de la pratique, même s'ils ne pouvaient rendre compte de toutes ses nuances*." [French original]); **CL-0084**, Conclusion No. 2, p. 17 ("*Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the recourse to supplementary means of interpretation. These rules also apply as customary international law.").* Customary principles apply to the interpretation of the Latvia-Norway BIT as Norway is not a party to the VCLT.

(a) accord the Claimant's investment equitable treatment and protection; and

(b) accord the Claimant's investment reasonable treatment and protection.

630. Without saying so explicitly, Norway appears to accept that the "*equitable and reasonable treatment*" standard encompasses in full the more generally used "*fair and equitable treatment*" standard.[753] This is the Claimants' position,[754] as recognized by Norway,[755] which has also generally been that of tribunals applying the "*equitable and reasonable treatment*" standard.[756] For instance, in *Saluka v. Czech Republic,*[757] the tribunal interpreted identically the notion "*equitable and reasonable*" and the standard "*fair and equitable.*" The tribunal declined to distinguish between the two standards.

631. In addition to requiring that Norway treat the Claimants' investments equitably and reasonably, the standard set out in Article III also includes the requirement that Norway protect the Claimants' investment in an equitable and reasonable manner. The requirement to accord "*protection*" to Article III means that Norway must take positive steps to prevent the Claimants' investments from harm and damage, whether tangible or intangible in nature. To "*protect*" means "*to cover or shield from exposure, injury, damage or destruction*", "*to maintain the status or integrity of especially through financial or legal guarantees*" or to "*defend*".[758] Thus, the state must exercise due diligence and take positive steps to shield the investment from harm.[759]

632. Tribunals have found breaches of the fair and equitable treatment standard in a myriad of circumstances that are analogous to the treatment that the Claimants received at the hands of Norway in this case. For example, investment arbitration tribunals have found breaches of the fair and equitable treatment standard where:

(a) the state reversed a position previously held, causing harm to the investor;[760]

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753 Respondent's Counter-Memorial, 29 October 2021, paras. 696, 697 (*e.g.*, citing to the *Vivendi II* tribunal's definition of "*fair and equitable treatment*" regarding the scope of "*equitable and reasonable treatment*").

754 Claimants' Memorial, 11 March 2021, para. 701.

755 Respondent's Counter-Memorial, 29 October 2021, para. 696.

756 Claimants' Memorial, 11 March 2021, para. 701; **CL-0284**, para. 416.

757 **CL-0216**.

758 Merriam-Webster Dictionary, *sub.* "protect", Undated, **C-0241**.

759 *Waguih Elie George Siag & Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, **CL-0467**, paras. 445-448.

760 **CL-0302,** para. 254; *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Quantum, 9 September 2021, **CL-0468**, paras. 847-849; *MTD Equity*

(b) the state began exerting control over a resource in circumstances in which it had not previously asserted such control;[761]

(c) the state stood by and knowingly allowed the investor to engage in a certain activity, and then abruptly stopped allowing the investor to do so;[762]

(d) the state took measures in pursuing its own interests and those of its nationals that caused disproportionate harm to the foreign investor's protected interests (and corresponding gain to the state itself or its domestic industry);[763] and

(e) the state justified its measures using one rationale, but the true reason for the measure was political expediency.[764]

633. The facts of those cases, to the extent analogous and relevant, are explained by reference to the facts of the present case in **Section B** below.

634. Tribunals have also recognized that the fair and equitable treatment standard entails a duty to comply with the following requirements, among others: refrain from taking measures that have a disproportionate impact on the protected investment;[765] provide predictability and stability;[766] respect the investor's legitimate expectations;[767] act in

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Sdn. Bhd. & MTD Chile S.A. v. Chile, ICSID Case No. ARB/01/7, Award, 25 May 2004, **CL-0285**, paras. 188-189.

761 *Muszynianka v. Slovakia*, PCA Case No. 2017-08, Award, 7 October 2020, **CL-0469**, paras. 457-621.

762 *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, **CL-0285**, paras. 104, 163, 166, 188-189.

763 *Saluka Investments BV v. The Czech Republic*, UNCITRAL Case, Partial Award, 17 March 2006, **CL-0216**, paras. 175, 263, 407, 419, 460; *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/10/16,* Award, 1 November 2013**, CL-0470**, paras. 361-362, 403-412; *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on jurisdiction, liability and certain issues of quantum, 30 December 2019, **CL-0471**, paras. 550-600.

764 *Eureko B.V. v. Republic of Poland*, Ad Hoc Arbitration, Partial Award, 19 August 2005, **CL-0281,** para. 233; *Eastern Sugar v. Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, **CL-0472,** paras. 335, 337.

765 *Saluka Investments BV v. The Czech Republic*, UNCITRAL Case, Partial Award, 17 March 2006, **CL-0216**, paras. 175, 263, 407, 419, 460; *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/10/16,* Award, 1 November 2013**, CL-0470**, paras. 361-362, 403-412*; RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on jurisdiction, liability and certain issues of quantum, 30 December 2019, **CL-0471**, paras. 550-600.

766 *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16*,* Award, 1 November 2013**, CL-0470,** para. 314; **CL-0347,** para. 125; **CL-0263,** para. 277.

767 Claimants' Memorial, 11 March 2021, paras. 711-714; **CL-0293**, para. 509; **CL-0323,** para. 557. *See also*, *Frontier Petroleum v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010, **CL-0473**, para. 287; *Eco Oro v. Colombia*, Decision on Jurisdiction, ICSID Case No. ARB/16/41, Liability and Directions on Quantum, 9 September 2021, **CL-0468**, paras. 544, 715; *Muszynianka v. Slovakia*, PCA Case No. 2017-08, Award, 7 October 2020, **CL-0469**, para. 473.

good faith (and refrain from acting in bad faith);[768] act in a transparent manner;[769] respect the investor's acquired rights;[770] refrain from acting in a discriminatory manner;[771] refrain from denying justice to the investor;[772] and refrain from taking arbitrary measures, which includes refraining from taking measures for reasons that are different from those put forward.[773]

635. These applications of the more general standard of equitable and reasonable treatment and protection create helpful guideposts. However, they do not limit or modify the clear test set out in the treaty.[774] It is beyond question that conduct that is arbitrary or taken in bad faith qualifies as inequitable and unreasonable. As already demonstrated in the Claimants' Memorial and further evidenced by the documents produced since, Norway's conduct vis-à-vis the Claimants did in fact breach these facets of equitable and reasonable treatment. [775] But this does not have the effect of limiting the standard to those egregious types of conduct, or to any other specific category or reformulation. To hold otherwise would torture the interpretation of Article III and insert terms into it that the drafters did not intend or use, contrary to the customary international law principles of treaty interpretation codified in Article 31 VCLT.

636. Moreover, this is not a case in which the Tribunal must ascertain the content of the minimum standard of treatment under customary international law, or to interpret a reference to the "*principles of international law*". Contrary to the statement at paragraphs 689 and 695 of Norway's Counter-Memorial, Article III is not "*based on the minimum standard of treatment for aliens in customary international law*" and does not "*reflect obligations of the sort contained in the 'international minimum standard.'*"[776]

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768 **RL-0128**, para. 602; *Deutsche Bank v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, **CL-0474**, para. 588; *Frontier Petroleum v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010, **CL-0473**, paras. 297-301.

769 Claimants' Memorial, 11 March 2021, paras. 717-722; **CL-0233**, para. 533; **CL-0262**, para. 178; **CL-0229**, para. 110; **CL-0261**, paras. 185-186; **CL-0290**, para. 98; **RL-0128**, para. 602.

770 **CL-0233**, para. 667; *RREEF v. Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, **CL-0475**, para. 328; **CL-0127,** paras. 343-347, 349-350.

771 Claimants' Memorial, 11 March 2021, paras. 705-708; **CL-0216**, para. 297; **CL-0263**, para. 290.

772 Claimants' Memorial, 11 March 2021, paras. 723-728; **CL-0303**, para. 188; **CL-0304**, para. 268; **CL-0305**, para. 8.23; **CL-0310**, para. 102; **CL-0311**, para. 557.

773 *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Quantum, 9 September 2021, **CL-0468**, paras. 847-849.

774 **CL-0302,** para. 239.

775 Claimants' Memorial, 11 March 2021, paras. 700-783.

776 Respondent's Counter-Memorial, 29 October 2021, paras. 689, 695.

It is an autonomous standard of treatment provision drafted without reference to other principles of international law or to the minimum standard of treatment, and must be interpreted in accordance with its ordinary meaning in the broader context of the BIT, and its object and purpose.

637. The NAFTA tribunal in *Windstream Energy LLC v. Canada* was faced with a similar invitation to interpret "fair and equitable treatment" to be a more stringent standard than it is, by redefining the terms and replacing them with other, more qualified terms. Rejecting such an invitation, the tribunal observed the following: "*just as the proof of the pudding is in the eating (and not in its description), the ultimate correctness of an interpretation is not in its description in other words, but in its application to the facts*."[777]

638. In this spirit, the following section sets out the facts, together with relevant and analogous investment treaty arbitration jurisprudence, that demonstrate Norway's breach of its obligation to accord to the Claimants' investment equitable and reasonable treatment and protection.

b. Norway Breached its Obligation to Accord to the Claimants Equitable and Reasonable Treatment and Protection

639. Norway has engaged in a series of actions which constitute breaches of Norway's obligation to accord equitable and reasonable treatment and protection to the Claimants' investment (both individually and cumulatively, contrary to Norway's allegation that "*a single, cumulative violation of Article III*" is being alleged[778]).

640. These actions have prevented the Claimants from exercising their legal fishing rights in the Loophole and waters off Svalbard, in effect destroying their snow crab business in the territory of Norway and causing them to sustain substantial economic losses.

641. In short, Norway's actions were the *but for* cause that led to the closure of the entire Loophole to EU crabbers including the Claimants. Norway refused to recognize the legality of the Claimants' fishing licenses thereafter and the legitimacy of their fishing activities, thus failing to give effect to their acquired rights. These actions were taken for discriminatory and politically motivated reasons that aimed at capturing the snow

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777 *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award, 27 September 2016, **CL-0476**, para. 362.

778 Respondent's Counter-Memorial, 29 October 2021, para. 691.

crab fishery for Norwegian interests. In an effort to justify its actions, Norway has made material misrepresentations as to the nature of its actions and motives.

642. Norway's actions fall well short of the legal requirements of Article III of the BIT, as shown by an examination of the following facts:

(a) The Claimants invested in Norway on the clear understanding that the Loophole's snow crab fishery was a *high seas* fishery (***i***);

(b) Norway abruptly reversed its position on the characterization of snow crab to expand the scope of its fisheries jurisdiction into the Loophole, "close the commons" and exclude EU crabbers (including the Claimants) from this area of the high seas (***ii***);

(c) Norway then behaved as if it had "*always*" considered snow crab as a sedentary species of its continental shelf. It negated the legitimacy of EU fishing activities in the Loophole predating its change of position (***iii***);

(d) Norway refused to respect the Claimants' acquired rights derived from their historical fishing activities in the Loophole (***iv***);

(e) Norway acted in concert with Russia to close *the entire* Loophole to EU crabbers including the Claimants (***v.***);

(f) Norway refused to recognize the legality of the Claimants' Svalbard licences or to grant them otherwise equivalent fishing rights (***vi***); and

(g) Norway acted in a discriminatory and politically motivated manner justified by neither economic nor environmental goals, and was not exercising any legitimate right to regulate (***vii***).

(i) The Claimants Invested in Norway on the Clear Understanding that the Loophole's Snow Crab Fishery Was a High Seas Fishery

643. The Claimants made their investment in the territory of Norway based on their knowledge that the Loophole's snow crab fishery was a *high seas* fishery. This was a critical condition for their decision to invest, without which Mr. Pildegovics would not (indeed could not) have entered into a joint venture agreement with Mr. Levanidov

pursuant to which he committed to build capacity to supply snow crab to the latter's Båtsfjord factory.

644. The fact that the Loophole's fishery was an international water fishery under the purview of NEAFC was well known to all observers when the Claimants first made their investment in 2014. Mr. Levanidov understood this clearly after the Norwegian Directorate of Fisheries confirmed that snow crabs could be fished in the "*international waters*" of the Loophole, "*outside any state's fisheries jurisdiction*", upon simple registration with NEAFC.[779]

645. In 2014, the Norwegian Food Safety Authority informed him that "*EU-registered fishing boats can deliver crab freely in Norwegian crab reception points*".[780] The Directorate of Fisheries also confirmed this.[781]

646. In response to an enquiry related to "*EU vessels that will fish snow crab in the NEAFC area*", the Directorate stated that "*no special documentation*" needed to be submitted to the Norwegian fisheries authorities provided that "*the crab has been caught outside the Norwegian Economic Zone*" – *i.e.*, in the Loophole.[782]

647. Contrary to Norway's arguments, the Directorate's response clearly pertained to both fishing and landing.[783] It certainly never "*made it clear that foreign vessels had no right to harvest crab on the Norwegian continental shelf without Norwegian authorization*".[784]

648. The point of these exchanges is not to show "*whether Norway represented to the Claimants that they had a right to harvest snow crab on the Norwegian continental shelf*", as Norway suggests.[785] Their purpose is to prove that Norway did not, at that

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779 First Witness Statement of Kirill Levanidov, 11 March 2021, para. 23-26. Email exchange between the Norwegian Directorate of Fisheries, K. Levanidov and S. Ankipov, 9-21 May 2013, **KL-0016**; Email from the Norwegian Directorate of Fisheries (H.M. Jensen) to S. Ankipov, 12 June 2013, **KL-0017**; Regulations on registration and reporting when fishing in waters outside any state's fishing jurisdiction, 18 April 2013, **KL-0018**, s. 1; **C-0087**; **C-0088**.

780 First Witness Statement of Kirill Levanidov, 11 March 2021, para. 28; **KL-0019**. See above, para. 114.

781 First Witness Statement of Kirill Levanidov, 11 March 2021, paras. 30-33; Email exchange between the Norwegian Directorate of Fisheries and S. Ankipov, 20-25 July 2014, **KL-0020**; Email exchange between the Norwegian Directorate of Fisheries, K. Levanidov and S. Ankipov, 9-21 May 2013, **KL-0016**; **C-0087**; **C-0088**. See above, para. 538.

782 **KL-0020**. [emphasis added]

783 Respondent's Counter Memorial, 29 October 2021, para. 738.

784 *Ibid.*, para. 738.4.

785 Claimants' Counter Memorial, 11 March 2021, para. 741.

time, refer to snow crab as being "harvested" from any State's "continental shelf". According to the words used by the Directorate, the crabs were then caught "*in international waters*", "*outside the fisheries jurisdiction of any State*".[786]

649. It should be recalled that when these exchanges occurred (and when the Claimants initiated their investment in Norway), Norway systematically licenced its own vessels for the Loophole's snow crab fishery under the NEAFC regime, using language confirming its designation as a high seas fishery.[787] Mr. Levanidov was also aware of this given his earlier association with Båtsfjord Fangst, a Norwegian fishing company, whose vessel the Havnefjell had been licensed for snow crab fishing under such terms.[788]

650. These NEAFC licences issued by Norway authorized Norwegian vessels to fish throughout the Loophole, including the area suprajacent to the continental shelf of the Russian Federation. There is no doubt that Norwegian vessels did fish for snow crab there.[789] It is also clear that this activity was authorized by Norway based on the understanding that the Loophole's snow crab fishery was a high seas fishery, and not one subject to coastal State's jurisdiction. This is shown by the fact that Norway had never sought or obtained Russia's consent to such fishing by Norwegian vessels at the time.[790]

651. The Claimants were aware of and understood the legal framework applicable to the Loophole's snow crab fishery when they made their investment.[791] Mr. Pildegovics was aware of the communications between Norway and Mr. Levanidov's company, which had confirmed that the Loophole's snow crab fishery took place in international waters under NEAFC rules and that EU boats could participate in this fishery and deliver snow crabs to Norway on an equal footing with their Norwegian counterparts.[792]

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786 **KL-0016**; **KL-0017**; **KL-0018**; **C-0087**; **C-0088**

787 *See* above, para. 133; Letters from the Norwegian Directorate of Fisheries to Norwegian vessels, 2013, **C-0283**; Letters from the Norwegian Directorate of Fisheries to Norwegian vessels, 2014, **C-0284**; Letters from the Norwegian Directorate of Fisheries to Norwegian vessels, 2015, **C-0285**; Letters from the Norwegian Directorate of Fisheries to Norwegian vessels, 2016, **C-0286**; Letters from the Norwegian Directorate of Fisheries to Norwegian vessels, 2017, **C-0287**.

788 First Witness Statement of Kirill Levanidov, 11 March 2021, para. 26; **C-0087**; **C-0088**

789 *See* above, para. 135

790 *Ibid.*

791 First Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 23-24, 184-185; Second Witness Statement of Peteris Pildegovics, 28 February 2022, paras. 6-14.

792 First Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 23-27; Second Witness Statement of Peteris Pildegovics, 28 February 2022, paras. 8, 11.

Mr. Pildegovics approached Latvia for further confirmation of this. Latvia confirmed that it could issue fishing licences allowing its flag vessels to fish for snow crab in the Loophole under NEAFC rules, after it had received the same confirmation from the European Commission.[793]

652. Mr. Pildegovics conducted further due diligence regarding the legality of his activities in Norway. This included verifying official public registries regarding whether the port of Båtsfjord accepted landing of catches made under NEAFC licences, which it did.[794]

653. The Claimants fished snow crabs in the international waters of the Loophole under NEAFC licences issued by Latvia between August 2014 until September 2016, which Norway knew and accepted. Over this period, North Star fished over 5,200 tonnes of snow crab from the Loophole, 98% of which were delivered to Norwegian ports.[795] Norway accepted at least 79 landings of snow crabs by North Star in its ports following submission by North Star of NEAFC PSC forms which identified the origin of the catches as the Loophole, without ever asking *where* within the Loophole the catches had been made.[796] The Norwegian Coast Guard made several inspections of North Star's vessels with snow crab onboard, without ever noting any infringement.[797]

654. The record clearly shows that, when their investment was made, the Claimants operated in full compliance with the legal framework as it existed at the time. Their investment was warmly welcomed by Norwegian authorities and the local community,[798] including by the Mayor of Båtsfjord, the town in which the Claimants' offices and the processing facility is located. In his witness statement, the Mayor states that "*back then… EU vessels (including Latvian ones) were allowed to catch snow crab in the Barents Sea, in the Loophole, and off Svalbard*".[799]

655. The Claimants' right to fish for snow crab in the Loophole, as derived from the freedom of the high seas and established through NEAFC licences issued by Latvia, was clear and uncontroversial at the time they made their investment. There is no question that this right was a critically important component of their investment: without access to

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793 First Witness Statement of Peteris Pildegovics, 11 March 2021, para. 28; **C-0089**; **C-0090**.

794 Second Witness Statement of Peteris Pildegovics, 28 February 2022, para. 11.

795 First Witness Statement of Peteris Pildegovics, 11 March 2021, para. 145

796 *Ibid.*, para. 186. *See above*, para. 280.

797 *Ibid.*, para. 161-164

798 *Ibid.*, paras. 184-204.

799 Witness Statement of Geir Knutsen, 11 March 2021, para. 10.

snow crabs, Mr. Pildegovics simply could not commit to building a fishing enterprise that would supply Seagourmet's processing operation at Båtsfjord. The fact that the snow crab population was located in international waters guaranteed such access for the long term, without risk of exclusion due to regulation by any single State.

656. At the time the Claimants made their investment, Norway had not even remotely suggested that it was about to overhaul the legal regime applicable to the Loophole's snow crab fishery, in a way that would destroy the Claimants' snow crab business.[800]

657. The fact that Norway abruptly reversed its position with respect to the Claimants' rights to fish for snow crab in the Loophole, after having explicitly confirmed that the Loophole's fishery occurred in "*international waters*", "*outside of any state's fisheries jurisdiction*" over the course of several years, was inequitable and unreasonable, contrary to Article III of the BIT. It constituted a breach of their legitimate expectations, as argued at paragraphs 737 to 745 of the Claimants' Memorial.

658. The Claimants disagree with Norway's position which appears to be that in no case can a foreign investor ever have a general legitimate expectation as to the stability of the investment framework.

659. Norway's position appears to be that in the absence of "*specific*" undertakings by the State to an investor there can never be more general expectations of stability.[801] Norway cites a number of cases which do not stand for such a proposition.

660. For example, *EDF v. Romania* warns of "*an overly-broad and unqualified formulation*" of "*legitimate expectations*" that would "*imply the stability of the legal and business framework*". It adds that an investor "*may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host Stat's legal and economic framework*".[802] Norway further refers to decisions that hold that States must enjoy a "*high measure of deference*" in adopting regulations.[803]

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800 Second Witness Statement of Peteris Pildegovics, 28 February 2022, paras. 6-14.

801 Respondent's Counter-Memorial, 29 October 2021, paras. 747-748 ("*absent a specific undertaking on the part of the host State to stabilise or freeze the regulatory framework, the Claimants cannot make out a claim for a general legitimate expectation about Norway's regulatory framework. No such specific undertaking has been identified (and none exists). The Claimants therefore could not have held any legitimate* "general expectation of stability" *in the regulatory framework.*").

802 Respondent's Counter-Memorial, 29 October para. 746; **RL-0124**, para. 217.

803 *Ibid.*, para. 747; **RL-0125**, para. 424.

661. The Claimants do not contend that foreign investors have an absolute right to legal and economic stability, and they recognize that States are owed a measure of deference in how they regulate in the public interest.

662. At the same time, however, Norway entirely fails to address the consistent body of decisions cited by the Claimants that, in certain cases, there will arise general expectations in relation to a particular legal framework and that such expectations can be breached and thus lead to a violation of the fair and equitable treatment standard.[804] Several tribunals have recognized the existence of such general expectations, both in principle and by finding of breach of the applicable investment treaty. Some have found that there can be a general expectation of stability of the legal framework.[805]

663. The *OperaFund* tribunal, for example, held that "*a regulatory regime … cannot be radically altered – i.e. stripped of its key features – as applied to existing investments in ways that affect investors who invested in reliance on those regimes.*"[806] This is precisely what happened in the present case. Norway radically altered the Loophole fishery's legal regime by stripping it of a "key feature" upon which the Claimants placed reliance: its nature as a high seas fishery beyond the fisheries jurisdiction of Norway.

664. Tribunals have found breaches of such general expectations in several cases against Spain concerning major changes in the legislative framework for investment in renewable energy.[807] Tribunals have also found such breaches in radical changes of the existing legal regime made by Argentina during its financial crisis two decades ago.[808] These are cases in which the regulation pursued by the State was indeed in the public interest and did not pursue a discriminatory finality. Norway's reversal of position does not meet these conditions.

665. Norway's position is that two elements must be established for the Claimants to be able to succeed in asserting specific legitimate expectations:

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804 Claimants' Memorial, 11 March 2021, paras. 711-714.

805 **CL-0261**, para. 183 ("*[t]he stability of the legal and business framework is thus an essential element of fair and equitable treatment.*").

806 Claimants' Memorial, 11 March 2021, Memorial, para. 714; **CL-0293**, para. 509.

807 *Ibid.*, para. 714.

808 **CL-0229**, para. 117-122, 309, 333.

> *The Claimants must first demonstrate that Norway's conduct objectively gave rise to the pleaded expectation on the part of the Claimants and that that expectation was legitimate.*[809]

666. The Claimants' position is indeed that Norway's conduct objectively gave rise to their expectation that the Loophole's snow crab fishery was an international waters fishery under the jurisdiction of NEAFC, in which they could legally participate based on the freedom of the high seas. This expectation was certainly legitimate: it was based on a position held by all States with vessels participating in the fishery, including Norway, Russia and the States represented by the EU. The Mayor of Båtsfjord readily confirms that this was also his understanding.[810] There is simply nothing in the record to suggest that any participant in the Loophole's snow crab fishery had ever taken the view that this fishery fell under Norway's jurisdiction at the time the Claimants made their investment in 2014.

667. Norway, however, submits that, since the correspondence from its Directorate of Fisheries was not addressed to the Claimants directly, it is legally impossible for them to have relied on any relevant representations found therein.[811] This argument is artificial, for two reasons. The first is that the statements contained in this correspondence reveal Norway's general position regarding the legal framework applicable to the fishery. This position was no secret: it was known to <u>all</u> industry participants and conveyed in every letter issued by the Directorate to the Norwegian fleet.[812] Contrary to Norway's assertion, there is no reason why such statements, available to the Claimants through their joint venture partner, could not allow them to form legitimate expectations about the nature of such legal framework.[813]

668. The second reason is that, even had Mr. Pildegovics personally sought the same confirmations as had been provided by the Directorate of Fisheries to his joint venture partner in 2013 and 2014, the answer would evidently have been no different. The Directorate would have given him the same information it had already given to

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809 Respondent's Counter-Memorial, para. 733.

810 Witness Statement of Geir Knutsen, 11 March 2021, para. 10.

811 Respondent's Counter-Memorial, 29 October 2021, para. 745.

812 **C-0087**; **C-0088**; Letters from the Norwegian Directorate of Fisheries to Norwegian vessels, 2013, **C-0283**; Letters from the Norwegian Directorate of Fisheries to Norwegian vessels, 2014, **C-0284**; Letters from the Norwegian Directorate of Fisheries to Norwegian vessels, 2015, **C-0285**; Letters from the Norwegian Directorate of Fisheries to Norwegian vessels, 2016, **C-0286**; Letters from the Norwegian Directorate of Fisheries to Norwegian vessels, 2017, **C-0287**.

813 Respondent's Counter-Memorial, 29 October 2021, para. 736; *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, **CL-0477**, para. 378 (referring to various types of statements and acts of states and how they can establish expectations).

Mr. Ankipov: that Norway's considered the Loophole's snow crab fishery as being outside its fisheries jurisdiction and within NEAFC's jurisdiction. There was no reason for Mr. Pildegovics to re-do the work already done by Mr. Levanidov and his associate. Norway's position was clear and there was nothing further to confirm.

669. At the time the Claimants made their investment in Norway, nothing suggested that Norway would (or could) take the view that the Loophole's snow crab fishery fell under its national fisheries jurisdiction. In light of the multiple statements by Norway to the opposite effect, there is no reasonable way to argue that the Claimants could have foreseen the change of legal regime that would unfold after the July 2015 Malta declaration.

670. Norway's failure to recognize and to uphold the Claimants' legitimate expectation, created by Norway, that the Loophole's snow crab fishery was a high sea fisheries in which they could legally participate as EU vessel operators, qualifies as inequitable and unreasonable treatment, as well as a failure to accord to the Claimants' investment equitable and reasonable protection. It therefore amounts to a breach of Article III of the BIT.

(ii) Norway Changed its Position on the Characterization Of Snow Crab to Expand the Scope of its Fisheries Jurisdiction into the Loophole and Exclude EU Crabbers from the Loophole

671. When the Claimants started their fishing operations in the Loophole in August 2014,[814] Norway treated snow crab as a non-sedentary species occurring in "*waters*", not as a species of its continental shelf. It had not even started analysing the possibility of characterizing snow crab as a sedentary species under UNCLOS, a process that started in November 2014 and concluded in July 2015, when Norway agreed with Russia that snow crab should be so designated.[815] Norway's change of position thus occurred well after the Claimants' integrated snow crab fishing business had been established.

672. The documents produced by Norway in this arbitration show that it was Russia, in October 2014, that first brought to Norway's attention the idea that snow crab could be

814 First Witness Statement of Peteris Pildegovics, 11 March 2021, para. 151.

815 *See above*, para. 22 *et seq.*

characterized as a sedentary species.[816] They also show that the Norwegian government did not hold the position that snow crab was a sedentary species at that time.[817]

673. In November 2014, Norway began the thought process that would ultimately lead it to adopt this position. Norway's Ministry of Foreign Affairs was not then ready to conclude that snow crab was a sedentary species. Before it could reach such a conclusion, it first needed "*to obtain a scientific assessment from the Norwegian Institute of Marine Research*".[818]

674. Norway's documents establish that, at the time, Norway's Institute of Marine Research had not yet considered the question of snow crab's potential designation as a sedentary species under the UNCLOS definition. All IMR could provide were tentative assessments given through brief email communications.[819]

675. Norway's Ministry of Foreign Affairs was not satisfied by these assessments and requested a "*more comprehensive note*" on the characterization of snow crab in mid-November 2014.[820] This "*more comprehensive note*" was delivered by IMR in mid-January 2015.[821] It contained two paragraphs vaguely related to the issue which came short of reaching any clear conclusion as to snow crab's sedentary or non-sedentary nature.

676. Despite the lack of probative scientific evidence supporting the designation of snow crab as a sedentary species, Norway's Ministry of Foreign Affairs soon opined that there were "*good reasons for considering the snow crab*" as such.[822] However, by January 2015, this view was still a "*preliminary*" one in need of validation from other States, in particular Russia.[823]

677. Over the following months, the Norwegian government continued its deliberations as to the possibility of designating snow crab as a sedentary species. Instead of

816 *See above*, paras. 29 to 31.

817 *See above*, paras. 22 to 226.

818 **R-0097**.

819 *See above*, paras. 302; to 308; **R-0148**.

820 Email from C. Finbak to J. H. Sundet, 12 November 2014, **C-0189**.

821 Note from J. H. Sundet on the status of snow crab in the Barents Sea, 15 January 2015, **C-0254**.

822 Note from C. Finbak to E. Gabrielsen, 19 January 2015, **C-0249**, p. 1-2 [emphasis added].

823 *Ibid.*, **C-0249**, pp. 1-2 [emphasis added].

concentrating on the legal and scientific issues raised by such a designation, Norway's attention was focused on the political interests at stake:

> *If the snow crab and the red king crab are considered sedentary species, they will be subject to shelf jurisdiction and it will be up to the coastal state to decide… Given that the relevant area where experimental fishing is to be carried out is subject to Russian shelf jurisdiction, it is Russia that has the clearest interest in pointing this out to NEAFC. At the same time, the snow crab will eventually also be able to be on the Norwegian shelf and it will therefore be in Norway's interest to point out to NEAFC that NEAFC here cannot allow experimental fishing without the coastal state's consent.*[824]

678. As snow crabs migrated westward in the Barents Sea, Norway saw an opportunity to assert its jurisdiction over a resource which it had, until then, managed as a fish species hence one belonging to the high seas in the Loophole.[825] For this reason, Norway concluded it would be politically expedient to recharacterize snow crab as a sedentary species of its continental shelf, over which it could assert sovereign rights. It did so through an agreement with Russia which was reached at Valletta, Malta, in July 2015.[826]

679. Given this recharacterization of snow crab, Norway's Ministry of Foreign Affairs advised the Ministry of Fisheries to amend its newly adopted snow crab regulations to prohibit snow crab fishing "*on the Norwegian continental shelf*".[827] The Department of Fisheries adopted this recommendation and confirmed that the ensuing amendment was adopted "*[a]s a result of the decision to regard the snow crab as a sedentary species in accordance with the UN Convention on the Law of the Sea*".[828]

680. The amendment extending the scope of Norway's regulations throughout its "*continental shelf*" was passed in December 2015. This amendment radically changed the legal regime applicable to the Loophole's snow crab fishery: while Norway (and all other NEAFC Member States) had until then treated it as a high seas fishery, Norway was now recharacterizing it as a *continental shelf* fishery under its national jurisdiction.

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824 Internal memorandum on the status of snow crab, 6 June 2015, **C-0193**.

825 **BK-0006**, p. 12.

826 *See above*, para. 169.

827 *See above*, paras. 137 *et seq*.; **R-0108**; **R-0111**; **R-0113**.

828 Memorandum from the Department of Fisheries to V. Landmark, 11 October 2016, **C-0202**. [emphasis added]

681. This legislative change laid the basis for Norway's exclusion of North Star's vessels from the Loophole starting in September 2016, thus cutting off their access to their sole available source of snow crab at that time.

682. A key objective of the international protection of foreign investments is to avoid unforeseen, abrupt changes in circumstances with unfavourable legal effects for foreign investors.[829]

683. Hence, legislative or regulatory changes that are abrupt beyond a certain threshold, causing the foreign investor significant prejudice, will constitute a violation of the standard of equitable and reasonable treatment. In *Muszynianka v. Slovakia*, the tribunal found a breach of the fair and equitable treatment standard where a constitutional amendment rendered unlawful the investor's previously lawful business transporting mineral water via pipeline from Slovakia to Poland.[830]

684. Likewise, Norway abruptly changed its position as to whether the Claimants were permitted to fish for snow crabs in the Loophole, contrary to its earlier position and in breach of the Claimants' legitimate expectations. The consequence of Norway's change of position on the characterization of snow crab under UNCLOS was to render unlawful the Claimants' previously lawful investment. This radical change amounted to a failure to accord this investment equitable and reasonable treatment and protection contrary to Norway's obligations under Article III of the BIT.

(iii) Norway Behaved as if it Had "Always" Considered Snow Crab as a Sedentary Species Belonging to its Continental Shelf and Denied the Legitimacy of EU Fishing Activities in the Loophole Predating its Change Of Position

685. There is no doubt that Norway's recharacterization of snow crab as a sedentary species belonging to its continental shelf radically changed the legal framework applicable to the Claimants' investment in Norway. This abrupt reversal is sufficient for the tribunal to find that Norway breached its obligations to accord equitable and reasonable treatment and protection to the Claimants' investments.

686. But there is much truth in the old adage that the cover-up is worse than the crime. The inequitable and unreasonable nature of Norway's abrupt reversal of position is

829 **CL-0263**, para. 277.

830 *Muszynianka Spolka z Ograniczona Odpowiedziallnoscia v. The Slovak Republic*, PCA Case No. 2017-08, Award, 7 October 2020, **CL-0469**, paras. 63 *et seq*., para. 621.

aggravated by the fact that Norway has refused (and continues to refuse) to acknowledge the reversal, and in fact goes to substantial lengths to hide that there was ever a reversal at all.

687. Norway attempted to change the legal regime applicable to the Loophole's snow crab fishery without acknowledging a change – indeed by actively denying that it had ever changed its position on snow crab. Norway continues to maintain this stance, as shown by repeated statements made its Counter-Memorial (the following being but a few examples taken from a much larger sample):

- *"Snow crab is, and has always been, a sedentary species subject to the jurisdiction of the continental shelf State"*;[831]
- *"Norway has since the 1950s always considered snow crab to be sedentary"*;[832]
- *"There was no change in Norway's position regarding the designation of snow crab*"; [833]
- *"… Nor did Norway ever purport or attempt to change the characterisation of snow crab under UNCLOS. Norway's position on the legal characterisation of crustaceans has not changed in the past 63 years*"; [834]
- *"What the Claimants represent as a change of position by Norway was nothing of the sort"*;[835]
- *"The alleged 'change of position' simply did not occur*".[836]

688. As shown in Section III.A above, these statements are false: Norway's own documents establish the fact that Norway adopted the position that snow crab is a sedentary species no earlier than July 2015. The fact that Norway continues to deny it shows the

831 Respondent's Counter-Memorial, 11 October 2021, para. 76.

832 *Ibid*., para. 753.

833 *Ibid*., para. 702.

834 *Ibid*., para. 566.

835 *Ibid*., para. 578.

836 *Ibid*., para. 583.

extent of its determination to hide its abrupt imposition of a new legal regime on the snow crab fishery.

689. From July 2015 onward, Norway started behaving as if snow crab had "*always*" been considered as a sedentary species of its continental shelf, subject to its coastal State jurisdiction. It pretended as though the Loophole's high seas fishery under the NEAFC regime had never existed.

690. On 23 July 2015, a few days after the Valletta agreement with Russia, Norway raised its first ever objection to NEAFC's jurisdiction over snow crab by voting against the EU's proposal to undertake exploratory snow crab fishing in the Loophole.[837] The letter conveying Norway's vote is remarkable not so much for what it says, but for what it omits. Explaining its vote against the proposal, Norway "*underline[d] that the NEAFC Commission cannot at this stage give its approval to the proposed exploratory fishery, as an express consent from the relevant coastal state is needed*". The letter added that "*the above-mentioned crab species are regarded as sedentary species*" and therefore, the proposed exploratory fishery required "*the express consent of the coastal state*".[838]

691. Nothing in this letter makes any reference to the fact that, until then, Norway had recognized NEAFC's jurisdiction over the snow crab fishery by licensing its own flag vessels for this fishery under NEAFC rules. The letter also ignores that Norway's Directorate of Fisheries had up to that point systematically referred to the Loophole's fishery as one occurring "*outside any state's fisheries jurisdiction*".[839]

692. Of course, when Norway sent this letter to NEAFC on 23 July 2015, it knew that it had adopted the position that snow crab was to be "*regarded as a sedentary species*" only days before, on the strength of a recent cursory analysis by its Ministry of Foreign Affairs. Norway failed to mention this highly important and relevant fact in its letter to NEAFC.

693. After its change of position, Norway started to misrepresent the effect of its 2014 prohibition against snow crab fishing, which had been applicable from 1 January 2015 in the "*territorial waters of Norway*", "*the territorial waters at Svalbard*", "*the economic zone*", "*the fishery protection zone at Svalbard*" and "*[f]or Norwegian vessels… [in]*

837 **R-0025**.

838 **R-0025**.

839 *See*, for example, **R-0174**; **KL-0017**; **C-0087**; **C-0088**.

international waters".[840] These initial regulations made no reference to Norway's continental shelf. Yet talking points prepared in 2017 by the Ministry of Foreign Affairs stated that "*[f]rom 1 January 2015, there has been a general ban on catching snow crab* ***on the Norwegian shef****"*.[841]

694. The same misrepresentation appears in Norway's Counter-Memorial, where Norway states that the original regulations "*covered Norwegian continental shelf within 200 nautical miles*".[842] Elsewhere, Norway states that "*[t]he regulations applicable specifically to the harvesting of snow crab on the Norwegian continental shelf were first introduced in December 2014*".[843]

695. This is wrong, and Norway cannot possibly ignore it: its own Supreme Court has confirmed that its Regulations were "*not applicable for the continental shelf until 22 December 2015*".[844]

696. In 2018, as Norway's prosecution of North Star was being tried in Norwegian courts, a journalist asked the Norwegian government:

> *What is the background and purpose of Norway wanting to reclassify the snow crab as a sedentary species?*[845]

697. The Ministry of Foreign Affairs proposed an answer which not only denied any such "reclassification", but also sought to discredit foreign snow crab vessel operators:

> *The snow crab was a sedentary species even before the snow crab regulations from 2015, but the need to regulate the species only came with a growing prevalence. Therefore, the species was unregulated in Norway before 2015. Virtually all actors, including the EU and an overall research community, agree that snow crab is a sedentary species. Norwegian courts have also used this as a basis in criminal cases against foreign snow crab vessels.*
>
> *Norway is concerned with sound and sustainable regulation of resources and defending Norwegian rights. Therefore, we obviously*

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840 Respondent's Counter-Memorial, 29 October 2021, para. 581; **C-0104**.

841 Documents from Ministry of Foreign Affairs, 23 January 2017, **C-0255**.

842 Respondent's Counter-Memorial, 29 October 2021, para. 585.

843 *Ibid.*, para. 581.

844 Claimants' Memorial, 11 March 2021, para. 130; **C-0161**, para. 34.

845 Internal email Ministry of Foreign Affairs, 16 April 2018, **C-0219**.

> *respond if someone commits a theft. The Svalbard Treaty is not relevant to snow crab fishing on the Norwegian shelf.*[846]

698. Another similar question was put to the Ministry of Foreign Affairs by Norwegian journalists, who asked whether Norway had made a consistent argument about rights to resources such as the snow crab.[847] The Ministry of Foreign Affairs submitted the following response:

> *Norway is clear and consistent. Only the Norwegian authorities can grant permission to catch snow crab on the Norwegian shelf.* ***Foreign investors must take responsibility for any failed investments based on a resource to which they do not have legal access****. Several of the Baltic vessels have a history of illegal fishing.*[848]

699. It did not appear to be enough for the Ministry of Foreign Affairs to disparage "*foreign investors*" (here implicitly targeting North Star, which was the subject of the journalist's enquiry) for having made "*failed investments*" based on a resource to which they did not *"have legal access*". The Ministry of Foreign Affairs also thought it fit to portray them as criminals with a "*history of illegal fishing*".[849]

700. Norway began spreading this narrative in January 2017, when Norwegian politicians started referring to the Barents Sea's snow crabs as a Norwegian resource stolen by unscrupulous foreign operators. Minister Sandberg posed as a strong defender of Norway's national interests and declared that "*we will not give them a single crab*",[850] apparently encouraged by the Norwegian fishermen's lobby.[851]

701. In 2018, Minister Sandberg described the historical fishing activities of Europeans as "*poaching*", depicting them as lawbreakers against which Norway had to "*react*":

> *The most active EU vessels have a long history of illegal fishing, and have been caught several times, both in Norway and in other countries. When they fish on Norwegian shelf, we react. The government defends*

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846 *Ibid*.

847 Internal email Ministry of Foreign Affairs, 15 February 2018, **C-0220**.

848 *Ibid.*

849 *Ibid*.

850 **C-0036.**

851 Letter from Fiskebat to the Department of Fisheries, 15 December 2016, **C-0216**; Letter from Fiskebat to the Department of Fisheries, 24 January 2017, **C-0215**.

> *Norwegian rights to natural resources and ensures responsible and sustainable management.*[852]

702. Norway thus sought to rewrite the history of the Loophole's snow crab fishery in two ways: first, by insisting that it had "*always*" held the position that snow crab was a sedentary species of its continental shelf (hence that it was a resource over which it had "*always*" asserted sovereign rights); and second, by depicting European crabbers as villains who were "*poaching*" this valuable Norwegian resource and needed to be stopped.

703. As the Norwegian government was spreading derogatory remarks against EU crabbers, the Claimants' reputation was smeared in a series of articles published in Dagbladet, a well-known Norwegian publication.[853] These articles were based on forged documents, a fact that remains undisputed by Norway. Norway admits that these documents were provided to Dagbladet by its embassy in Jakarta, yet it conspicuously fails to explain how these forged documents might have come in the embassy's possession in the first place.[854]

704. Following publication of Dagbladet's defamatory articles, Mr. Pildegovics and Mr. Levanidov were contacted by the Finnmark police.[855] No investigation followed, no doubt due to the complete lack of evidence supporting Dagbladet's accusations. The public prosecutor appointed to the case, Mr. Morten Daae, nonetheless declared: "*we were able to stop their activities in Norway if nothing else*".[856]

705. Norway attempts to explain this episode in the following terms: had Dagbladet's allegations been true (which they were not), "*that would have meant that the businesses were involved in serious offences under Norwegian criminal law including human trafficking*".[857] However, plans to investigate such a serious matter were allegedly dropped when the "*Indonesian crew members left*" and when "*activities of vessels engaged in snow crab harvesting ceased*".[858]

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852 Per Sandberg, "*Snow crab and poaching on the Norwegian shelf*," Regjeringen.no (Ministry of Foreign Affairs), 23 April 2018, **C-0242**.

853 First Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 225-235.

854 Respondent's Counter-Memorial, 29 October 2021, paras. 727, 763.

855 First Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 234-235.

856 *Ibid.*

857 Respondent's Counter-Memorial, 29 October 2021, para. 758.

858 *Ibid*., para. 758.

706. There are two problems with Norway's story. The first is that there are no known "*Indonesian crew members*". The documents purporting to set their employment conditions are counterfeits. There is no evidence that these people ever existed or that they ever set foot in Norway.

707. The second is that it is utterly implausible. Human trafficking is an extremely grave accusation. One simply cannot imagine Norwegian prosecutors abandoning a human trafficking case simply because some unidentified "*crew members*" had left, let alone because the accused had stopped their business activity. The latter part of the explanation likely reveals the true motivation at play: to ensure that "*activities of vessels engaged in snow crab harvesting ceased*", which is indeed consistent with Morten Daae's declaration to Dagbladet.[859]

708. The record shows that Norway attempted to delegitimize the fishing activities of EU crabbers who had participated in the Loophole's fishery, prior to Norway's decision to appropriate it in concert with Russia. Instead of recognizing the plain fact that vessels from several states (including the Claimants') had legitimately partaken in this high seas fishery and done so for a number of years, Norway took the stance that the snow crabs had "*always*" been a Norwegian resource reserved to Norwegians. On that basis, Norway claims "*that the Claimants were never entitled to harvest snow crab on the Norwegian continental shelf, either around Svalbard or in the Loophole*", which of course is a travesty.[860]

709. The fact that Norway is not being forthright about the plain fact that it changed its position with respect to its sovereign rights over snow crab fishing in the Loophole amounts to further inequitable and unreasonable treatment by Norway. This is particularly the case since this course of conduct evinces a lack of transparency and candour of the type that investment arbitration tribunals have often held to breach the equitable and reasonable treatment standard.

710. Apparently intent on raising the bar for Claimants as high as possible, Norway states that:[861]

> *The accepted standard when considering whether a lack of transparency in an administrative process is sufficient to breach the*

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859 Respondent's Counter-Memorial, 29 October 2021, para. 758.

860 *Ibid*., para. 295.

861 *Ibid*., para. 751.

> *FET standard, is whether it was "a complete lack of transparency and candour"*

711. However, the standard of transparency, including in the cases cited by Norway, is not as exacting as what Norway presents it to be. In *Biwater Gauff v. Tanzania*, the tribunal articulated it as follows:[862]

> *Transparency, consistency, non-discrimination: the standard also implies that the conduct of **the State must be transparent, consistent and non-discriminatory**, that is, not based on unjustifiable distinctions or arbitrary.*

712. It is unclear whether Norway is actually arguing that conduct towards an investor which lacks transparency and candour yet does not amount to a *"complete*" lack of transparency and candor, can meet the requirements of Article III of the BIT. This matters little in this case, since Norway's conduct at any rate falls short even of the more demanding standard.

713. Norway's persistent attempt to hide its abrupt change in position also evidences a failure to act in good faith, which is another facet of its failure to provide equitable and reasonable treatment and protection to the Claimant's investment.

714. It is well recognized that the fair and equitable treatment standard requires States to act in good faith towards foreign investors. This is illustrated by the tribunal's decision in *Biwater Gauff v. Tanzania*, which found that while bad faith is not required to find a breach of the fair and equitable standard, the State is under a duty to act in good faith:[863]

> *the standard includes the general principle recognised in international law that **the contracting parties must act in good faith**, although bad faith on the part of the State is not required for its violation.*

715. As noted by the ICSID tribunal in *CMS v. Argentina*, "*deliberate intention*" or "*bad faith*" in adopting the inconsistent measures is not required to finding a breach of fair and

862 **RL-0128**, para. 602.

863 *Ibid*., para. 602.

equitable treatment though, of course, "*such an intention and bad faith can aggravate the situation*".[864]

716. Here again, Norway attempts to raise the bar (hence to dilute the content of its obligation):[865]

> *Even where the course of action adopted is capable of criticism there is no showing of bad faith* ***absent egregious intent****.*

717. Once more, the Claimants can only wonder whether Norway's submission is that its conduct, while amounting to bad faith, is not "*egregious*" enough to breach the standard.

718. Of course, for a finding of a breach of Article III no "*bad faith*", "*deliberate intent*" or "*egregious intent*" is required. However, as discussed above, there is sufficient evidence in the record that would allow the Tribunal to conclude that, in all the circumstances, Norway did in fact fail to act in good faith vis-à-vis the Claimant's investment by systematically denying the change of legal regime and the legitimacy of their investment established under the prior regime. For this reason as well, Norway failed to accord them equitable and reasonable treatment and protection, contrary to Article III of the BIT.

(iv) Norway Refused to Give Due Consideration to Claimants' Acquired Rights Derived from their Fishing Activities in the Loophole

719. Norway had a reason to engage in revisionist history. It wanted to avoid the consequences that would inevitably flow from its recognition of the legitimacy of the Claimants' fishing activities in the Loophole.

720. At the 35th annual NEAFC meeting in November 2016, after the change of regime imposed by Norway, the EU raised the issue "*of the rights of [NEAFC] Contracting Parties who have fished in areas of seabed that are subject to national jurisdiction beyond 200 nautical mile limits*".[866] The EU suggested that "*NEAFC should establish a mechanism for addressing the position of those who have conducted fisheries* ***and***

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864 Claimants' Memorial, 11 March 2021, para. 709, fn 907; **CL-0290**, para. 280. *See also*, **RL-0123**, para. 301.

865 Respondent's Counter-Memorial, 29 October 2021, para. 729; **RL-0121**, para. 430. [emphasis added]

866 Report of the 35th NEAFC Annual Meeting, 14-18 November 2016, **C-0214**, agenda item 26, p. 18.

have thereby acquired rights*, without prejudice to the rights of the relevant coastal States*".[867]

721. While the EU's intervention was cast in general terms, there is no doubt that it referred to the position of the EU snow crab vessel operators whose activities in the Loophole had been halted weeks earlier due to the concerted enforcement efforts by Norway and Russia.[868]

722. In response to the EU's proposal, Norway and Russia acted in denial. They issued a joint statement that "*the right to harvest sedentary species is an exclusive right of the coastal State. No other State could utilise these resources without the explicit consent of the coastal State, and any historical practices were irrelevant in this context*".[869] As such, "*they could not see any role for NEAFC*" and did not "*support setting up any mechanism in NEAFC to address these issues*".[870]

723. This episode is yet another illustration of Norway's high-handed attitude towards the rights of EU crabbers (including the Claimants) who participated in the Loophole's snow crab fishery when it was treated by all NEAFC Member States (including Norway) as a high seas fishery, before Norway took the view that it fell under its jurisdiction as a coastal State.

724. Norway apparently believed that its decision to designate snow crab as a sedentary species allowed it to ignore these rights. This is apparent from an email exchange between Norway's Department of Fisheries and its Ministry of Foreign Affairs which took place during the NEAFC meeting.[871] The Department of Fisheries sought the Ministry of Foreign Affairs' feedback as to how to respond to the EU's proposal.[872] The Ministry of Foreign Affairs quickly recommended a position that stressed snow crab's sedentary nature and emphasized that the species was managed by the coastal

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867 *Ibid*.

868 *See above*, para.121; Internal note of the Norwegian government, 16 November 2016, **C-0194** ("*We are now at the annual meeting of NEAFC, and in bilateral consultations with the EU, they have announced that they will address snow crab… More specifically, they will raise the following question: "how NEAFC could contribute to mechanisms for cooperation for these new situations where a party asserts its legitimate rights in the Regulatory Area*".).

869 *Ibid*.

870 Report of the 35th NEAFC Annual Meeting, 14-18 November 2016, **C-0214**, agenda item 26, p. 18.

871 Internal note of the Norwegian government, 16 November 2016, **C-0194**; Email from Ministry of Foreign Affairs to Ministry of Fisheries, 17 November 2016, **C-0231**.

872 Internal note of the Norwegian government, 16 November 2016, **C-0194**.

States. The question of acquired rights was conspicuously absent from the Ministry of Foreign Affairs' analysis.[873]

725. This episode proves that Norway never seriously considered the EU's proposal to address the acquired rights of EU fishing vessels and nationals.[874] Norway's position that "*historical practices were irrelevant*" was seemingly adopted on the floor of the NEAFC meeting, without any substantive analysis of the issue.[875] The EU's proposal was shot down by Norway virtually as soon as it was made.

726. As discussed above in **Part III**, **Section C**, Norway's political goal was to close the commons and appropriate the fishery for its own nationals.[876] This may explain the haste with which it ended the discussion on the recognition of acquired rights and why it closed the door to any NEAFC involvement in this respect.

727. For the purpose of this arbitration, the question is whether Norway's offhand refusal to give any serious attention to the Claimants' acquired rights can be reconciled with its obligation to accord equitable and reasonable treatment and protection to their investments under Article III of the BIT. It cannot.

728. At a minimum, Norway should have seriously considered whether the Claimants' fishing activities in the Loophole gave rise to acquired rights to continue fishing for snow crab in the Barents Sea. It obviously never did so.

729. Had Norway taken stock of the Claimants' fishing activities and their legal consequences, it may have considered the example set by the Japan-United States negotiations concerning the king crab and snow crab fishery in the Eastern Bering Sea. This example is informative and deserves discussion as exemplifying an approach that could be viewed as "equitable and reasonable", in a comparable situation where a coastal State (the United States) started asserting sovereign rights over a crab fishery until then considered to belong to the high seas, in which vessels of another nation (Japan) historically participated.

730. In May 1964, following its accession to the 1958 Convention on the Continental Shelf, the Unites States of America adopted the Bartlett Act, which provided that "*the taking*

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873 Email from Ministry of Foreign Affairs to Ministry of Fisheries, 17 November 2016, **C-0231**.

874 Email from Ministry of Foreign Affairs to Ministry of Fisheries, 17 November 2016, **C-0231**.

875 Internal note of the Norwegian government, 16 November 2016, **C-0194**; Email from Ministry of Foreign Affairs to Ministry of Fisheries, 17 November 2016, **C-0231**.

876 *See above*, paras. 327.

of any continental shelf fishery resource… is, in principle, reserved to nationals and fishing boats of the United States, and that fishing by foreign vessels in such areas is unlawful".[877]

731. The adoption of the Bartlett Act challenged the established legal framework applicable to the king crab fishery of the Eastern Bering Sea. This fishery took place in an area of the high seas suprajacent to the Unites States' continental shelf. Japanese fishing vessels, which then participated in this fishery, were concerned about the risk of being excluded from it by the United States.

732. This situation placed the positions of Japan and the United States at odds:

> *[T]he Japanese Government holds the view that the king crab is a high seas fishery resource, and that nationals and vessels of Japan are entitled to continue fishing king crab in the Eastern Bering Sea. The United States Government is of the view that the king crab is a natural resource of the continental shelf, over which the coastal state has exclusive jurisdiction, control and rights of exploitation*.[878]

733. Soon after the adoption of the Bartlett Act, the Governments of Japan and the United States held consultations to look for a compromise. While no agreement could be reached "*as to whether the king crab is a high seas fishery resource or a continental shelf resource*", the two Governments found a solution according to which Japanese vessels could continue to fish while complying with conservation measures adopted by mutual agreement between the two States.[879]

734. In November 1964, Japan and the Unites States reached an agreement in which each State reaffirmed its position on the characterization of king crab.[880] However, recognizing the fishing activities of Japanese nationals and vessels, the agreement allowed them to continue fishing:

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877 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**, p. 36.

878 *Ibid*., p. 37.

879 *Ibid*., p. 37.

880 Agreement effected by exchange of notes on Fisheries (King Crab), between Japan and the USA, 25 November 1964, **CL-0479**.

> *1. The Government of Japan holds the view that king crabs are a high seas fishery resource, and that nationals and vessels of Japan are entitled to continue fishing for king crab in the eastern Bering Sea.*
>
> *2. The Government of the United States of America is of the view that the king crab is a natural resource of the continental shelf over which the coastal state (in this case the United States of America) has exclusive jurisdiction, control and rights of exploitation).*
>
> *3. However, the two Governments, having regard to the historical fact that nationals and vessels of Japan have over a long period of years exploited the king crab resource in the eastern Bering Sea, have agreed, without prejudice to their respective positions as described above, as follows:*
>
> > *1) **The king crab fishery by nationals and vessels of Japan in the eastern Bering Sea will continue** in and near the waters which have been fished historically by Japan; …*

735. In December 1972 and December 1974, Japan and the United States reached similar agreements applicable to both king crab and tanner crab (or snow crab).[881]

736. Two features of this episode are worth mentioning in the present context. The first is that the United Stated considered it necessary to reach a compromise with Japan after it first decided to adopt the position that crustaceans were a natural resource of the continental shelf. As noted by a commentator writing soon after the 1964 agreement:

> *The [Bartlett] Act has made it clear that the United States' position now treats king crab as being included in the continental shelf resources. It is suggested, however, that from a biological and legal point of view the United States considered crustacea to which king crab belong as a high seas fishery resources, then reserved its position in the voting at Geneva, and now deals with them as appertaining to the continental shelf resources.*[882]

737. The United States did not pretend "*always*" to have held the view that crabs were continental shelf resources. It acknowledged the change in legal regime brought about by its new position and reached a sensible compromise with Japan, whose crab fishermen would otherwise have been forced out of their economic activity.

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881 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**.

882 Ko Nakamura, "*The Japan United-States Negotiations concerning King Crab Fishery in the Eastern Bering Sea*," Japanese Annual of International Law, 1965, **CL-0478**, p. 44.

738. The second point of note is that the Convention on the Continental Shelf (on which the United States relied to adopt the position that crustaceans could be characterized as a natural resource under its jurisdiction) did not expressly provide an obligation to respect the rights of aliens. Yet the United States considered it appropriate to reach a compromise with Japan having regard to such rights:

> *Clearly, it is to the advantage of the coastal state, from the point of view of exclusive exploration and exploitation, to consider fishery resources as appertaining to the continental shelf rather than high seas resources requiring conservation. But high seas fishery, if conducted over the continental shelf, can be maintained and grow normally depending on the balance of interests of fishing nations, in accordance with their fishing effort on the one hand and with their conservation efforts on the other. In this sense, it should not be overlooked that the United States has assured Japan of a certain quantity of catches in the agreement between the two countries, taking into account the past fishing operations of Japan. This is an instance of respect for acquired interests of aliens for which the Convention on the Continental Shelf does not expressly provide the obligation to respect.*[883]

739. Norway's attitude towards the Claimants' investment appears in stark contrast to the approach taken by the United States towards Japanese crabbers:

(a) Norway has systematically refused to acknowledge the change in legal regime brought by its designation of snow crab as a sedentary species at Valletta in July 2015. It has pretended – and continues to pretend – that snow crab "*always*" was a sedentary species.

(b) Since its change of position, Norway has refused to recognize the legitimacy of snow crab fishing activities in the Loophole by vessels of EU nations including Claimants'. It now goes as far as to accuse Latvia of having breached international law by issuing fishing licences to its flag vessels – for what was then considered as a high seas fishery governed by NEAFC rules.[884]

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883 *Ibid*., pp. 44-45.

884 Respondent's Counter-Memorial, paras. 19.3, 229, 297 ("*The [Loophole] licences were granted by Latvia in blatant disregard of the provisions of the NEAFC Convention, and without either Norway's or Russia's express consent…*").

(c) As a result of this uncompromising stance, Norway has rejected all attempts by Latvia to find a solution allowing the Claimants' vessels to continue their snow crab fishing activities.[885]

(d) On the strength of its position that snow crab is a sedentary species, Norway has shut the door to proposals to recognize and give effect to the acquired rights of EU vessel operators such as the Claimants which had participated in the Loophole's snow crab fishery prior to Norway's change of position. While NEAFC would have been a natural forum to consider this issue, Norway refused to "*see any role for NEAFC in this context*".[886]

740. Viewed in contrast with the compromises reached between the United States and Japan in a closely comparable situation, Norway's approach is all the more untenable that Norway ***was under a legal duty*** to accord equitable and reasonable treatment and protection to investments made by the Claimants in its territory of Norway. Regardless of its position vis-à-vis EU vessels more generally, Norway could not ignore its obligations towards investments of Latvian investors engaged in the fishery.

741. Norway appears to have started considering the interests of foreign participants in the Loophole fishery only in preparation of its defence to the Claimants' case. In May 2021, an official of the Norwegian government wrote to the Government of the United States seeking its assistance with reference to the present arbitration.[887] It sought clarifications of "*a number of aspects related to the management of tanner crab/snow crab… in the waters off Alaska, as well as the treatment of crab and crustacea as a sedentary species under the legislation of the United States*".[888]

742. Among other questions, Norway asked:

> *Is it possible to describe the effect [of US law] on crabbing performed by non-US vessels, in particular what restrictions were applied to participation by foreign flagged vessels, over what period of time such restrictions were phased in, and if compensation was paid to foreign flagged vessels that were prevented from continuing their fishing activity?*

885 *See above*, paras. 240-242.

886 Report of the 35th NEAFC Annual Meeting, 14-18 November 2016, **C-0214**, agenda item 26, p. 18; Internal note of the Norwegian government, 16 November 2016, **C-0194**.

887 Email from Norway to the US, 27 May 2021, **C-0233**.

888 *Ibid.*

> *[H]ow did changes in USA's fishing regulations affect foreign flagged vessels that were already engaged in fishing/catching activities in US jurisdictional areas?* [889]

743. These questions, which are no doubt relevant, were raised far too late for the Claimants' sake. Had Norway given earlier attention to the treatment of the Claimants' vessels engaged in high seas fisheries now claimed to fall under Norwegian jurisdiction – in particular in light of its duties under the BIT – it may have acted differently.

744. Norway argues that its offer of a quota exchange with the EU demonstrates "*that Norway and the EU were engaged in bilateral negotiations to find a mutually acceptable solution*".[890] In reality, these "negotiations" were stillborn, and Norway could not seriously have thought that they could lead to a solution acceptable to the EU:

(a) First, Norway offered to grant the EU a minutely small 500-tonne quota for the entire European snow crab fishing fleet.[891] To place this number in context, North Star's vessels alone fished more than 10 times this amount in their start-up years.[892] Seagourmet's factory would have absorbed the entire EU quota offered by Norway in less than one month.[893] Norway's Ministry of Fisheries forecast that Norwegian vessels would be able to catch 2,000 tonnes *each* annually.[894]

(b) Second, the snow crab fishery was known to be able to accommodate a far larger volume of catches than what was suggested by Norway's low quota of 4,000 tonnes for the fishery.[895] Norway's offer to the EU thus amounted to a minutely small proportion of the *actual* fishery, when EU crabbers had historically taken a far more significant share.[896] Norway's offer gave no weight whatsoever to their past fishing activities.

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889 *Ibid.*

890 Respondent's Counter-Memorial, 29 October 2021, para. 724.

891 Claimants' Memorial, 11 March 2021, paras. 141-142; 389-390.

892 First Witness Statement of Peteris Pildegovics, 11 March 2021, para. 145.

893 First Witness Statement of Kirill Levanidov, 11 March 2021, para. 85.

894 Note entitled "*Strategy for the further development of snow crab management*," Ministry of Fisheries, 19 September 2016, **C-0209**, p. 21.

895 *See above*, paras. 295 *et seq*.

896 Claimants' Memorial, 11 March 2021, para. 1007. Expert Report of Dr. Brooks Kaiser, 11 March 2021, paras. 81-82.

(c) Third, Norway expected to receive EU fishing quotas in exchange.[897] This caused the EU to reject Norway's offer "*immediately*"[898], for two reasons: the EU had no available quota it could offer, and the EU still maintained the position that its vessels had a *legal right* to fish in the Svalbard zone, without needing to "pay" Norway to exercise it.[899]

745. Norway could not lawfully ignore the Claimants' fishing activities or refuse to acknowledge their legitimacy. Norway's obligations under the BIT at a minimum required it to recognize that the Claimants' fishing activities in the Loophole were a fact, that they were not only legal, but legitimate.

746. Had it done so, Norway would have recognized the need to accept the existence of the Claimants' acquired rights, either by allowing them to continue fishing in areas now asserted to fall under the Norwegian jurisdiction or by compensating them for the loss of their investment due to an eventual decision not to give effect to their fishing rights (in accordance with Article VI of the BIT). Norway has manifestly failed in this duty and thereby breached the BIT.

747. The concept of "*acquired rights*" is well recognized at international law, as already set out in the Claimants' Memorial.[900]

748. The fundamental principle is simple: States cannot take or otherwise injure foreign investors' acquired rights without providing adequate (and prompt) compensation. The traditional international caselaw has recognized this principle. More recently, investment treaty decisions have done the same.[901]

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897 *See above*, para. 293 *et seq.*

898 **KL-0046**, cited in Respondent's Counter-Memorial, 29 October 2021, para. 723.

899 Claimants' Memorial, 11 March 2021, paras. 389, 627.

900 Claimants' Memorial, 29 October 2021, paras. 615 *et seq*.

901 *Saudi Arabia v. Aramco*, Award, 23 August 1958, para. 117 *et seq*., cited in **CL-0127**, para. 343 ("*The principle of respect of acquired rights is one of the fundamental principles both of Public International Law and of the municipal law of most civilized States.*"). *See also*, **CL-0225**, p. 22; PCIJ, *German Settlers in Poland*, Advisory Opinion, 10 September 1923, **CL-0516**, p. 362; Pierre Lalive, "*The Doctrine of Acquired Rights*," in RIGHTS AND DUTIES OF PRIVATE INVESTORS ABROAD,1965, **CL-0515**, p. 165; Rosalyn Higgins, "*The Taking of Property by the State: Recent Developments in International Law*," Recueil des Cours, Vol. 176, 1982, **CL-0517**, p. 347 (writing that the principles of *pacta sunt servanda* and acquired rights "*emphasize the protection that the private party has been given against either a later change of mind by the State or against the exercise of the State's regulatory powers*"); *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020, **CL-0482**, paras. 578 (holding that retroactive legislation may "*depending on the context, be relevant to unreasonableness, breach of legitimate expectation or destruction of acquired rights*"); *Teinver v. Argentina*, ICSID Case No. ARB/09/1, Award, 21 July 2017,

749. If a State has taken a foreign investor's acquired rights, this will normally constitute a direct or indirect expropriation that must be compensated. If, however, a State has injured such acquired rights, without necessarily amounting to the level of a "*taking*", then the equitable and reasonable treatment standard will have been breached.

750. Examples of recent investment treaty cases where breaches of acquired rights were actually held to have occurred included *RREEF v. Spain*[902] and *Magyar Farming v. Hungary*.[903]

751. At the same time, there can certainly be a breach of the "*equitable and reasonable*" or of the "*fair and equitable*" treatment standard without resorting to an "*acquired rights*" analysis.[904] Such an analysis remains nevertheless of interest in this case considering the documentary record establishes that the EU considers snow crab fishing by EU vessels in the Barents Sea led to "*acquired rights*".[905] Moreover, the Russian

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CL-0514, paras 781, 1010 (holding that claimant had an acquired right to a DCF valuation regarding the sale of their shares based on legislation); *El Paso v. Argentina* ICSID Case No. ARB/03/15, Award, 31 October 2011, **CL-0477**, para. 431, 439 (holding that claimant had a vested right in respect of the free disposal of hydrocarbons including their exportation and that disrespect of that right was a breach of the FET standard); *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, **CL-0440**, 269 (referring to the principle of acquired rights and Judge Higgins' writings on the same and then finding of breach of the BIT); *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, **CL-0513**, paras. 305, 332 (referring to the principle of acquired rights and Judge Higgins' writings on the same and then finding of breach of the BIT, further adding that "[*e*]*ven if emergency legislation became necessary in this context, legitimately acquired rights could still have been accommodated by means of temporary measures and renegotiation.*")

902 *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.àr.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, **CL-0475**, para. 328 ("*the Respondent's New Regime applies only for future remuneration, but it subtracts past remuneration (remuneration that was due under the previous regime) from the future remunerations. The Tribunal agrees with the Claimants that this measure has the effect of clawing-back past remuneration that is shareholders' acquired rights when this remuneration was realised*.").

903 *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019, **CL-0127**, paras. 343-362 (finding a breach of vested rights relating to pre-lease farming rights removed by legislative change and further adding "*while the State may change general statutes based on its policy decisions, where the statute provided for a possibility of acquiring rights with economic value and a private party availed itself of this possibility, subsequent regulatory changes must respect that vested right*" and "*if an individual has acquired rights … the detrimental legislative change must comply with this vested right*").

904 *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020, **CL-0482**, para. 694.

905 Report of the 35th NEAFC Annual Meeting, 14-18 November 2016, **C-0214,** agenda item 26, p. 18 ("…*the European Union raised the issue of the rights of Contracting Parties who have fished in areas of seabed that are subject to national jurisdiction beyond 200 nautical mile limits. <u>They suggested that NEAFC should establish a mechanism for addressing the position of those who have conducted fisheries and have thereby acquired rights</u>, without prejudice to the rights of the relevant coastal States*.").

Federation expressly told Norway of its concerns regarding the crystallization of such "*acquired rights*".[906]

752. Norway acted specifically to prevent any recognition of the Claimants' acquired rights. Had it done otherwise, it would have needed to accept their continued participation in the Barents Sea snow crab fishery, which Norway, however, intended to appropriate for its nationals to the fullest extent possible. This political vision left no room for the Claimants' vessels, which needed to be excluded from the fishery entirely.

(v) Norway Acted in Concert with Russia to Close the Entire Loophole to EU Snow Crab Fishing Vessels Including the Claimants'

753. Norway's documents prove that Norway's decision to designate snow crab as a sedentary species was made through an agreement with Russia reached at Valletta in July 2015. This decision was the starting point of a coordinated effort by Norway to close the *entire* Loophole to EU snow crab fishing vessels.

754. The Norwegian representative to the Joint Norwegian-Russian Fisheries Commission, Mr. Arne Røksund, referred to this effort euphemistically as "*the further work to gain acceptance*"[907] by other States of the new legal regime imposed by Norway and Russia upon the Barents Sea snow crab fishery.

755. Using another euphemism, Norwegian officials described the underlying goal of this coordination as *"to agree with Russia on a snow crab regime which involves mutual access to snow crab fishing in each other's jurisdictions and a common approach to enforcing third country fishing*".[908]

756. In plain terms, the policy followed by Norway aimed to exclude EU crabbers (including the Claimants) from the entire Loophole (and not only from the part of the Loophole suprajacent to Norway's continental shelf) while also maintaining the right of Norwegian crabbers to continue fishing for snow crab everywhere in the Loophole (including in the area suprajacent to Russia's continental shelf).

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906 Memorandum from the Department of Fisheries to Minister Aspaker, 29 September 2015, **C-0201**, p. 2.

907 Letter from A. Røksund to the Russian Federal Bureau of Fisheries, 3 August 2015, **C-0196**.

908 Memorandum from the Department of Fisheries to Minister Aspaker, 29 September 2015, **C-0201**, p. 1; *See above*, para. 100.

757. The records produced by Norway at the Claimants' request show that Russia was initially reluctant to ban EU snow crab fishing vessels from the Loophole, as it believed that the Russian coast guard "*cannot perform enforcement, as the fishing was outside the 200 mile zone*".[909] Norway was apparently more confident in the strength of its position: it wanted to include wording in notes to EU States to the effect that the two states "*would enforce the ban*", a proposal rejected by Russia.[910]

758. Norway then pressed Russia to "*prosecute*" EU crabbers who continued to fish in areas of the Loophole above Russia's continental shelf.[911] Norway's Minister of Fisheries Per Sandberg complained that "*Russia does not perform enforcement in the Smutthullet*".[912] Mr. Arne Røksund was more explicit: Norway would not do "*the police job*" for Russia and "*need[ed] both legal and factual action from the Russian side*".[913] Russia eventually acted according to Norway's wishes and instructed its Border Service to enforce measures against EU vessels.[914]

759. This episode demonstrates Norway's resolve to close the entire Loophole to EU crabbers including the Claimants. Not content to exclude them from fishing on "*the Norwegian continental shelf*" in the Loophole, Norway pressed Russia to adopt a similar ban applicable to its own continental shelf. At the same time, it worked to secure continued access to the Norwegian fleet to the entire Loophole.[915]

760. The episode also reveals the extent of Norway's bad faith towards the Claimants and its wanton disregard of their investment. In the autumn of 2015, just as Norwegian fisheries' officials were busy developing a joint policy with Russia requiring "*that both countries ban activities from third countries*" in the Loophole[916], three delegations of the Norwegian government paid a visit to the Claimants' Båtsfjord premises to express their support for the Claimants' business project.[917]

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909 Minutes of the North Atlantic Fisheries Ministerial Conference in St. Petersburg, June 2016, **C-0207**, p. 4; Minutes of a meeting between Norway's Department of Fisheries and its Russian counterpart, 19 January 2016, **C-0204**.

910 Minutes of a meeting between Norway's Department of Fisheries and its Russian counterpart, 19 January 2016, **C-0204**.

911 Minutes of the meeting with the Russian embassy, 26 September 2016, **C-0203**.

912 Minutes of the North Atlantic Fisheries Ministerial Conference in St. Petersburg, June 2016, **C-0207**, p. 2.

913 *Ibid*., p. 4.

914 **R-0047**.

915 *See above*, paras. 194-200.

916 Memorandum from the Department of Fisheries to Minister Aspaker, 29 September 2015, **C-0201**, p. 3.

917 First Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 192-194.

761. These delegations were of course well aware that the factory at Båtsfjord depended on supplies of snow crab delivered by North Star, a Latvian fishing company, and that these crabs came from the Loophole. This was known to "*everyone*" in the community.[918] The delegations could not plausibly have ignored that their parallel efforts *to exclude* EU crabbers from the entire Loophole would inevitably cause the demise of the operation they were visiting.

762. Since a picture is worth a thousand words, the following photograph shows a smiling Norwegian Minister of Fisheries, Ms. Elisabeth Aspaker, flanked by the Mayor of Båtsfjord and Mr. Pavel Kruglov, the Director General of Seagourmet, in front of Solveiga, North Star's vessel, flying the Latvian flag. This picture was taken on 8 September 2015, just as the Minister's staff was busy making plans with Russia for the eviction of that very same vessel from the snow crab fishery:[919]

Figure 22 – A smiling Minister Aspaker (center), flanked by Mr. Pavel Kruglov, Seagourmet's General Manager (to her left) and Mayor Geir Knutsen (to her right), standing on Seagourmet's dock in front of Solveiga, 8 September 2015 (**C-0080**).

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918 Witness Statement of Geir Knutsen, 11 March 2021, para. 10.

919 **C-0080**.

763. Minister Aspaker was shown how snow crabs were unloaded from Solveiga to be processed by Seagourmet. She is said to have been impressed by the results achieved since the launch of the factory.[920] This apparently did not suffice to change the course of her government's policy to close the Loophole to the Claimants' ships.

764. Norway's objection that the facts do not say whether the Claimants specifically told Minister Aspaker that "*any of their harvesting [was] taking place in the area of the Loop Hole that comprised Norwegian continental shelf*" falls flat.[921] In light of the facts, Minister Aspaker was clearly unconcerned about the precise location of North Star's catches when this picture was taken: her Ministry's goal was to exclude the company from the entire Loophole.

765. Norway's strategy of cooperation with Russia backfired in at least two ways. First, after Russia had resolved to close the part of the Loophole above its continental shelf to EU crabbers, it soon decided to apply the same measures to their Norwegian counterparts, who were no longer allowed to "harvest" snow crabs "on the Russian continental shelf".[922]

766. Second, the full closure of the Loophole pursued by Norway meant the end of snow crab deliveries to Seagourmet's factory at Båtsfjord, which wreaked havoc on the local community through the loss of jobs and economic activity.[923] This caused the Norwegian government to face serious criticism from within Norway as the opposition pressed it to find solutions to "*secure deliveries of snow crab to Seagourmet AS in Båtsfjord*".[924]

767. Always quick to react, Minister Sandberg disingenuously declared that "*Norway is not the challenge here. When Russia has imposed a ban, it is because it is them who decide.*"[925] Yet clearly, Russia's decision was entirely consistent with the Minister's repeated encouragements that it "*prosecute*" EU crabbers.[926]

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920 **C-0052**, p. 6.

921 Respondent's Counter-Memorial, 29 October 2021, para. 743.2.

922 *See above*, paras. 194-199.

923 First Witness Statement of Kirill Levanidov, 11 March 2021, paras. 75, 82, 86.

924 Claimants' Memorial, 11 March 2021, paras. 381-390; **PP-0046**; **KL-0047**; **KL-0044**.

925 **KL-0051**, p. 3.

926 Letter from P. Sandberg to I.V. Shestakov, 6 September 2016, **C-0198**.

768. Norway's effort to exclude EU vessels (and the Claimants' vessels in particular) from the *entire* Loophole – including its part above Russia's continental shelf – cannot be explained by a purported wish to uphold Norway's sovereign rights. Norway obviously never had any sovereign rights to the Russian continental shelf. Norway's insistence that Russia adopt a ban of its own reveals its ulterior political motive: to limit to the fishing effort in the Loophole to the maximum extent to favour the spread of the snow crab population westward in areas under Norwegian jurisdiction (as further discussed below).

769. This is yet another manifestation of Norway's unreasonable and inequitable treatment of the Claimant's investment in breach of Article III of the BIT. Investment arbitration tribunals in several cases have found that conduct taken for an ulterior political motive to be a breach of the fair and equitable treatment standard, often conducting their analysis under the rubric of arbitrariness.

770. In *Eureko v. Poland*,[927] a case arising under the Netherlands-Poland BIT, the claimant had acquired a 30 percent interest in a state-owned insurance company that was in the process of being privatized, relying upon Poland's commitment to sell the remaining stock, which would enable the claimant to acquire a majority interest. The privatization, however, became politically controversial and Poland decided not to complete it. The tribunal found that Poland had violated the fair and equitable treatment standard by refusing to honour its commitment for "*purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character.*"[928]

771. In *Eastern Sugar v. Czech Republic*,[929] a case arising under the Netherlands–Czech Republic BIT, the Czech Republic, as part of the process of joining the European Union, issued two decrees to regulate the sugar market by reducing imports and allocating quotas among domestic producers. One of the decrees was later held unconstitutional and both were ineffectively implemented. Moreover, they allowed new producers to obtain quotas, a decision that the tribunal found to be illogical in light of the decrees' avowed purpose and that the tribunal believed to have been politically motivated. The tribunal nevertheless found no violation, holding that the host state is

927 **CL-0281**.

928 *Ibid.*, para. 233.

929 *Eastern Sugar B.V. v. Czech Republic,* UNCITRAL SCC Case 088/2044, Partial Award, 27 March 2007, **CL-0472**.

entitled to some measure of interest balancing, inefficiency, trial and error, and imperfection. After the European Union reduced the Czech Republic's country sugar quota, however, the government reduced the claimant's quota by more than the entire reduction in the country quota, thus forcing one company to bear the entire effect of the country quota reduction. The disproportionate reduction appeared to have been in retaliation for a politically unpopular decision to close a plant. The tribunal found the reduction to be unreasonable and discriminatory and, therefore, a violation of the BIT.[930]

772. While Norway's efforts to exclude the Claimants from the entire Loophole may be considered to be rationally linked to its political goal to appropriate the snow crab fishery for the benefit of the Norwegian industry, they are inexplicable from the perspective of Norway's obligation to accord equitable and reasonable treatment and protection to the Claimants' investment. A duty to "protect" means a duty "*to cover or shield from exposure, injury, damage or destruction*".[931] Norway did exactly the opposite: it not only banned the Claimants from areas under its newly asserted jurisdiction in the Loophole, but pressed Russia to do the same on "its" side of the Loophole, thereby bringing North Star's entire fishing operation to a halt. Norway's coordination with Russia thus reveals a further breach of Article III of the BIT.

(vi) Norway Refused to Recognize the Legality of the Claimants' Svalbard Licences or to Grant them Otherwise Equivalent Fishing Rights

773. After the concerted closure of the Loophole imposed by Norway and Russia, the Claimants attempted to salvage their investment in Norway by looking for other available snow crab fishing grounds in the vicinity of their Båtsfjord investment. This led them to apply for Svalbard fishing licences, which were granted to North Star by Latvia starting in November 2016.[932] However, Norway improperly refused to recognize the legality of the Claimants' Svalbard licences.

930 *Ibid.*, paras. 335.

931 Merriam-Webster Dictionary, *sub.* "protect", Undated, **C-0241**.

932 First Witness Statement of Peteris Pildegovics, 11 March 2021, para. 87.

774. Two days after setting sail for Svalbard, on 16 January 2017, North Star's vessel Senator was arrested by the Norwegian Coast Guard.[933] North Star was never allowed by Norway to fish for snow crab in the Svalbard zone.

775. As set out in the Claimants' Memorial, Norway has violated the Svalbard Treaty by failing to recognize the validity of North Star's fishing licences in the Svalbard zone, and by discriminating against their vessels by refusing to grant them dispensations under Norwegian law while issuing the same dispensations to Norwegian vessels. [934] Norway has chosen not to provide substantive arguments in response to this submission, which therefore requires no further discussion in this Reply yet is maintained by the Claimants.

776. Norway's refusal to allow the Claimants to exercise their fishing rights in the Svalbard zone is all the more egregious that the Claimants obtained these rights in an effort to mitigate the impact of their loss of access to the Loophole caused by Norway's efforts.

777. Viewed in that light, Norway's exclusion of the Claimants from the Loophole fishery created an existential challenge to their investment, forcing them to stop their fishing activities in September 2016 and to consider available alternatives. Norway's refusal to allow them to redirect their operations to Svalbard, where they also held valid fishing rights, dealt the fatal blow to their investment.

778. The fact that the Claimants may have had a "*general awareness of Norway's position*" that their Svalbard licences were invalid certainly did not mean that they could not, or should not, attempt to avail themselves of these rights.[935] The Claimants did not agree with Norway's position on the law, which as already noted, does not make it the law.[936] The Claimants' position in this regard is in line with the position of the European Union and indeed every State party to the Svalbard Treaty, while Norway is alone in its interpretation of the Svalbard Treaty.[937]

779. North Star attempted to avail itself of its fishing rights in the Svalbard zone before Norwegian courts, as a defense against Norway's prosecution for illegal fishing. This

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933 First Witness Statement of Peteris Pildegovics, 11 March 2021, para. 208.

934 Claimants' Memorial, 11 March 2021, para. 63 *et seq*.

935 Respondent's Counter-Memorial, 29 October 2021, paras. 713-715.

936 Claimants' Memorial, 11 March 2021, paras. 644 *et seq*.

937 **CL-0002.**

effort proved fruitless as the Claimants suffered a denial of justice. Norway's denial of justice is further discussed below (in **subsection c**).

780. Starting in May 2018, North Star submitted requests for dispensations under the Norwegian regulations to enable it to resume its fishing activities. These requests were systematically denied by Norway's Directorate of Fisheries.[938]

781. Norway's refusal to recognize the legality of the Claimants' Svalbard licences, to grant them otherwise equivalent fishing rights, or even to allow them to rely on their Svalbard licences to defend against criminal prosecution in Norway – is a further breach of Norway's duty to accord equitable and reasonable treatment and protection to their investment under Article III of the BIT.

(vii) Norway Acted in a Discriminatory and Politically Motivated Manner Justified by Neither Economic Nor Environmental Goals, and Was not Exercising any Legitimate Right to Regulate

782. Despite Norway's effort to justify its actions under the guise of the "*precautionary approach*",[939] the record shows that Norway's measures were motivated by a discriminatory motive: to exclude EU vessels (including Claimants') from the Loophole's snow crab fishery in order to favour the maximum westward expansion of the stock in waters under Norwegian jurisdiction.

783. Through this policy, Norway hoped to create the basis for a prosperous fishery reserved to its vessels and nationals. In 2016, the Norwegian Ministry of Fisheries forecast a fishery accommodating annual catches of 100,000 tonnes annually, representing "*approximately 2,000 tonnes per year per vessel*" as "*an operational basis when the stock is built up for 25 vessels*".[940] Using the average 2020 price for snow crab, such a fishery would generate revenues of approximately NOK 15 billion (nearly EUR 1.5 billion) annually.[941]

784. There is no doubt that Norway is now well on its way to achieve its goal: since its assertion of jurisdiction over the fishery, the snow crab stock has spread throughout

938 Claimants' Memorial, 11 March 2021, paras. 412-419.

939 *Ibid*., para. 587.

940 Note entitled "*Strategy for the further development of snow crab management*," Ministry of Fisheries, 19 September 2016, **C-0209**, p. 21.

941 Expert Report of. Kiran Sequeira, 11 March 2021, para. 119, Table 17.

the northern parts of the Norwegian Barents Sea and grown exponentially. There is also little doubt that Norway's national fishing industry will soon be able to reap the benefits of Norway's policies. The Claimants have paid a steep price for this result, in the form of the destruction of their snow crab business in Norway.

785. Norway implemented its policy of exponential growth of the snow crab stock in its waters by pursuing a repressive approach to the fishery. First, it adopted measures which led to the exclusion of EU crabbers from the entire Loophole. This removed "*a control measure on the invasion*"[942] which used to limit the growth of the stock west of the Loophole towards Norway's shores. Second, it adopted the lowest possible quotas on the fishery to "*build up stock*"[943] without harming the interests of the few active Norwegian crabbers – while of course ignoring the interests of Claimants as Latvian investors.[944] According to a memorandum of the Norwegian Department of Fisheries, IMR relied on this "*overarching principle*" as the basis for its quota recommendations.[945]

786. Norway's submission that its measures were inspired by a "precautionary approach" ignores the alien and invasive nature of snow crab in the Barents Sea. While well-established scientifically and known to Norway,[946] the environmental challenges posed by the spread of snow crab in the Barents Sea ecosystem were completely ignored by Norway's Ministry of Fisheries.[947]

787. Had Norway been serious about pursuing a precautionary approach to snow crab, it would have maintained an open access fishery in the Loophole and would not have changed the legal regime applicable to it. Norway's Ministry of Climate and the Environment advocated for just such a policy given its concern about the "*rapid increase of snow crabs in the Barents Sea*": reducing the environmental risk called for granting dispensations to "*everyone who has the equipment*" to participate in the fishery. "*At the same time, quotas should be high*".[948] This, of course, would have

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942 *See above*, para. 323; **C-0079**, p. 9.

943 *See above*, para. 324; **R-0117**, p.3.

944 *See above*, para. 327.

945 **R-0117**, p.3.

946 *See above*, para. 303 *et seq*.

947 *See above*, para. 306 *et seq*.; Note from the Department of Fisheries to Minister Aspaker, 16 October 2014, **C-0217**.

948 Letter from the Ministry of Climate and the Environment, 10 December 2014, **C-0248**.

frustrated Norway's goal of quickly "building up the stock" to the future benefit of Norwegian fishermen.

788. Norway's measures raise a proportionality issue: can a State's policy to appropriate a fishery resource and to favour its expansion for the future benefit of its national industry justify the destruction of foreign investments reliant upon access to the same resource? The answer must be no.

789. The measures adopted by Norway were not necessary to achieve any legitimate public policy objective. That is reason enough for the tribunal to find a breach of the equitable and reasonable treatment standard. However, even if Norway's argument that it was exercising a legitimate right to regulate were accepted, the Tribunal should still find that Norway failed to accord to the Claimants' investment equitable and reasonable treatment, because the measures have had a disproportionally adverse impact on the Claimants' investment.

790. Tribunals have found a breach of the fair and equitable treatment standard where the application of the measure to the investment is disproportionate to the alleged public interest pursued. Thus, a measure that has a disproportionate impact on the investor breaches the fair and equitable treatment standard, even if the investor does not have legitimate expectation of regulatory stability.[949]

791. For example, in *RWE Innogy v. Spain*, the tribunal found that Spain's unilateral changes to its renewable energy incentives scheme had a substantial financial impact on some of the claimant's power plants, and that "*this burden is excessive and disproportionate*" on those investments, "*such as to give rise to a breach of the FET standard under Article 10(1)"* of the Energy Charter Treaty. The impact on these plants was to bring their rates of return below a reasonable threshold. This financial burden was "*excessive relative to the policy objective of the Respondent, i.e. is disproportionate.*"[950] The *Infinito Gold v. Costa Rica* tribunal also found a breach of the fair and equitable treatment standard where the measure caused disproportionate harm to the claimant, even though the measure pursued a legitimate public policy

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949 *Infinito Gold Ltd. v. Republic of Costa Rica,* ICSID Case No. ARB/14/5, Award,3 June 2021, **CL-0483**, paras. 561-63, 573; *Rwe Innogy Gmbh and Rwe Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Award, 18 December 2020, **CL-0484**, paras. 550-551, 598-600.

950 *Rwe Innogy Gmbh and Rwe Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Award, 18 December 2020, **CL-0484**, paras. 598-600.

objective (environmental protection) and the claimant had no legitimate expectation of regulatory stability.[951]

792. The Claimants' position in the present case is far worse from a proportionality standpoint. By contrast to *RWE Innogy*, the impact on the Claimants' snow crab business was not a reduced rate of return, but its destruction. Unlike in *Infinito*, Norway did not pursue a legitimate environmental objective, and the Claimants certainly did have a legitimate expectation of a high degree of regulatory stability, given the fact that the fishery they depended upon was a high seas fishery, in principle beyond State jurisdiction.

793. Finally, the discriminatory nature of Norway's measures also render them inequitable and unreasonable, contrary to Article III.

794. For example, in *Saluka Investments v. Czech Republic*[952] a case arising under the Netherlands–Czech Republic BIT, four major banks in the Czech Republic were in the process of privatization. The Czech government provided financial assistance to three of the banks, which were locally owned, but not to the one in which the claimant had invested, which was foreign owned (a subsidiary of Japanese bank Nomura). The tribunal found no reasonable basis for the discrimination and lack of financial assistance only to the foreign-owned bank, which acts thus violated the fair and equitable treatment standard.

795. In *Eureko v. Poland*,[953] the tribunal held that Poland violated the fair and equitable treatment standard by failing to adhere to its privatization commitments. That failure was attributable to what the tribunal referred to as "*purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character*".

796. Likewise in the present case, Norway's efforts to close the entire Loophole to EU crabbers while securing a continued access for Norwegian vessels should be seen for what they are: political measures motivated by nationalistic reasons of a discriminatory character.[954] This again supports a finding that Norway breached Article III of the BIT.

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951 *Infinito Gold Ltd. v. Republic of Costa Rica,* ICSID Case No. ARB/14/5, Award,3 June 2021, **CL-0483**, paras. 561-63, 573.

952 **CL-0216**.

953 **CL-0281**.

954 *See above*, para. 293 *et seq*.

c. Norway Denied the Claimants Justice

797. There is a measure of agreement between the Parties as regards denial of justice:

(a) First, there is no disagreement between the Parties that the fair and equitable standard encompasses the prohibition of denial of justice.[955]

(b) Second, the Parties seem to be agreed that denial of justice includes the rule spelled out in *Fabiani*: denial of justice includes "*a judicial authority's refusal to perform its duties, including its refusal to rule on claims submitted to it*".[956]

(c) Third, the Respondent does not take issue with the statement by the tribunal in *Philip Morris*[957] to the effect that it is incumbent on the domestic tribunal, in substance, "to decide on material aspects" of the foreign national's claim.[958]

798. As the Respondent observes,[959] the Claimants' case on denial of justice consists in the first instance of (i) the allegation that the Supreme Court refused to adjudicate on the Claimants' defence that they had a valid and properly issued Latvian licence to fish snow crabs. The denial of justice allegations were elaborated in two further limbs:[960] (ii) the unconscionable delay caused by the Supreme Court's alleged failure to decide on material aspects of the claim; and (iii) that the Supreme Court's permitting the appointment of Mr. Tolle Stabell as a deputy prosecutor in the case evidenced subservience to executive pressure.

799. Whilst the part of the Counter-Memorial that concerns denial of justice seeks to address (***ii***) and (***iii***) above, it entirely avoids addressing the Claimants' primary contention as regards denial of justice (***i***). The Supreme Court's failure to address this part of the defence of the defendants before it is, in other words, mirrored by the Respondent's failure now to address this part of the Claimants' case on denial of justice. The reason the Supreme Court and in turn the Respondent have sought to ignore the contention is not far to seek: there is no answer to it.

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955 Claimants' Memorial, 11 March 2021, para. 723; Respondent's Counter-Memorial, 29 October 2021, para. 772 *et seq*.

956 **CL-0307**, p. 4895 [our translation from the original French].

957 **CL-0311.** An award cited both by the Claimants and the Respondent; Respondent's Counter-Memorial, 29 October 2021, para. 784.

958 **CL-0311**, para. 557.

959 Respondent's Counter-Memorial, 29 October 2021, para. 772.

960 *Ibid*., para. 773.

(i) The Supreme Court Refused to Adjudicate on the Claimants' Defence that they Had a Valid and Properly Issued Latvian Licence

800. The argument that the Claimants now allege was not dealt with in the judgment was brought to the Supreme Court's attention by the defendants. It is mentioned in the Supreme Court's judgment, which noted that, as a matter of fact, the Senator had "*had a permit from the EU represented by Latvian authorities*".[961]

801. Norway's Marine Resources Act contained a provision to the effect that the provisions of the statute, or secondary legislation passed pursuant to it, could not be applied in breach of an international agreement binding on Norway or international law more generally. On this basis, the Marine Resources Act (and its regulations) could not in breach of the Svalbard Treaty create a criminal offence for North Star.[962]

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

803. The Supreme Court's refusal to adjudicate on one of the Claimants' essential defences (the defence that they had a valid permit issued by Latvia) is all the more striking in light of the fact that it is Norway's position that

(a) The very "*key to the Claimants' case is a series of 'licences' issued by Latvia which they say granted North Star the right to engage in snow crab harvesting*";[963]

961 **C-0038**, para 62. During the oral hearing in the Supreme Court (which was not recorded), one of the court's members, Justice Matningsdal, asked a question of the prosecution relating to the contention by the defendants that they had had valid permits issued by Latvia.

962 *See above*, paras. 453-454

963 Respondent's Counter-Memorial, 29 October 2021, para. 7.

(b) "*the central issue which is before the Tribunal requires a decision on the validity of licences issued by Latvia*";[964] and

(c) "*the legality of the licences and, consequently, Latvia's right to issue them, are at the heart of the dispute*".[965]

804. Without the Supreme Court considering this essential defence, SIA North Star was convicted and sentenced to pay a fine of NOK 150,000 and was made to accept confiscation by the Norwegian government of NOK 1,000,000 (and the ship's captain was convicted and sentenced to pay a fine of NOK 40,000).

805. The "*key to the Claimants' case*",[966] "*the central issue*",[967] "*the heart of the dispute*"[968] – that is the Respondent's own characterization of the claim that the Supreme Court refused to address. The Supreme Court refusal to decide this (even on the Respondent's own case) vital aspect of the defendants' claim amounted to a refusal by a domestic tribunal to decide on material aspects of the contentions brought before it.[969]

806. Norway cannot explain a refusal to adjudicate a defence as a "*simple case management decision, taken for the expeditious disposal of the proceedings*".[970] While Norway correctly states that "*no court of law is required to consider questions that do not have any bearing on the outcome of the case*", the Claimants submit that under any definition, a defence to a criminal prosecution certainly does qualify as a "question having bearing on the outcome of the case".[971]

(ii) The Unconscionable Delay Caused by the Supreme Court's Failure to Decide on Material Aspects of the Claim

807. The refusal by the Supreme Court to decide on the question of the defendants' permits also led to wrongful delays in breach of the principle of denial of justice. Unconscionable delay is, in common with refusal to decide, among the denials of

964 Respondent's Counter-Memorial, 29 October 2021, paras. 291–292.

965 *Ibid*., para. 300.

966 *Ibid*., para. 7.

967 *Ibid*., paras. 291-292.

968 *Ibid*., para. 300.

969 **CL-0307**, p 4895; **CL-0311**, para. 557.

970 Respondent's Counter-Memorial, 29 October 2021, para. 784.

971 *Ibid*.

justice that "may be readily recognised".[972] There is no doubt that a denial of justice will have been committed where the courts subject a suit to unconscionable or undue delay.[973] By making the Claimants file fresh civil claims[974] in order to have material aspects of their claim decided on by the Norwegian courts, the Norwegian Supreme Court committed a readily recognizable denial of justice: unconscionable delay.

(iii) By Permitting the Appointment of Mr. Tolle Stabell as Prosecutor in the Case, the Supreme Court Evidenced Subservience to Executive Pressure

808. Mr. Tolle Stabell is the Deputy Attorney General at the Office of the Attorney General (Civil Affairs), second in seniority only to the Attorney General himself (who now personally represents the government in the ongoing civil suit). The Office of the Attorney General reports to the Office of the Prime Minister. As the Claimants have explained,[975] and the Respondent has not refuted, Mr. Stabell's appointment as prosecutor in the criminal proceedings before the Supreme Court was the first time *ever* that a lawyer from the Office of the Attorney General was deputed to act as prosecutor in a criminal case. The Norwegian legal system is far removed in this sense from e.g. that of England and Wales (and some other common law jurisdictions) where the same self-employed barrister may well one day find him- or herself instructed to represent the government in a civil suit and then prosecute the next, or where indeed the Attorney General him- or herself might do both of those things. In the context of the Norwegian legal system, the unprecedented move of making the Deputy Attorney General prosecutor in a criminal case meant that the prosecution in the criminal proceeding before the Supreme Court was no longer independent of the executive branch.

809. There is a close affinity between denial of justice and international human rights standards.[976] Especially the lack of impartiality aspect of the concept of denial of justice has found more concrete expression in international human rights law.[977] According to international human rights law, the public prosecutor "must be an organ independent

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972 **CL-0309**, pp. 204–205.

973 **CL-0307**, p 4895; **CL-0310**, para. 102; **CL-0312**, p. 397.

974 Judicial review of administrative action goes before the general courts under the rules of civil procedure.

975 Claimants' Memorial, 11 March 2021, para. 406.

976 ICJ, *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain),* Judgment, 5 February 1970, **CL-0485**, p. 47, para. 91.

977 Campbell McLachlan et al, "*International Investment Arbitration: Substantive Principles,"* Oxford University Press, Second Edition, 2017, **CL-0486**, p. 298.

of the executive branch and must have the attributes of irremovability and other constitutional guarantees afforded to members of the judicial branch".[978] This is because the proper exercise of prosecutorial functions requires "autonomy and independence from the other branches of government".[979]

810. The UN Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, reported to the Human Rights Council in 2012, that an

> *important element that should exist within their conditions of service is the irremovability of prosecutors. The undue use of the transfer may lead to unjustifiable interference as the threat of transferring prosecutors between posts can be used as an instrument for putting pressure on a prosecutor or be a means for removing them from sensitive cases. … States have an obligation to provide the necessary safeguards to enable prosecutors to perform their important role and function in an objective, autonomous, independent and impartial manner.*[980]

811. The problem is exacerbated when, as is the case in Norway, the criminal justice system is based upon principles and legislation to the effect that:

(a) *"The Office of the Director of Public Prosecutions is independent as regards the management of any given criminal case. No one may instruct the Office of the Director of Public Prosecutions in any given case*";[981]

(b) *any public prosecutor acting in a criminal proceeding "must act objectively in every aspect of his or her activity*".[982]

812. Related to this is the fact, not commented upon by the Respondent, that the Office of the Attorney General must already have been briefed on aspects of the matter before the Supreme Court. As the Claimants have explained, North Star had filed a notice of dispute under the BIT on 27 February 2017.[983] The Office of the Attorney General is the office that deals with such notices of dispute. This is apparent from other similar

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978 Inter-American Commission of Human Rights, "*Report on the Situation of Human Rights in Mexico*, *Chapter V – Right to Justice*," OEA/Ser.L/V/II.100, Doc. 7 rev. 1, 24 September 1998, **CL-0487**, para. 372.

979 *Ibid.*, para. 381.

980 Gabriela Knaul, *"Report of the Special Rapporteur on the independence of judges and lawyers,"* General Assembly United Nations, A/HRC/20/19, 7 June 2012, **CL-0488**, paras. 68, 95.

981 **RL-0154**, section 55.

982 **RL-0154**, section 55a.

983 Respondent's Counter-Memorial, 29 October 2021, para. 406; *See also*, "*Norway put on notice of BIT dispute,*" IAReporter, 12 October 2017, **C-0243**.

cases, such as the recent matter *Tidal v. Norway*, where the reply to Tidal's notice of intent came from the Office of the Attorney General (from the Deputy Attorney General Stabell himself).[984]

813. There is, of course, nothing unsurprising in the fact that a government's Office of the Attorney General is instructed to work on investment matters relating to the State in question. Indeed, the Office of the Attorney General has, since the criminal proceeding in the Supreme Court, continued to work on the present proceeding. During the Tribunal's first session, on 28 September 2020, the Office of the Attorney General participated in the session, represented by one of its lawyers[985] (Ms. Hilde Ruus, who also assisted Mr. Stabell during the criminal proceeding in the Supreme Court).[986]

814. By allowing the Deputy Attorney General to act as prosecutor before it, the Supreme Court committed the denial of justice of "*subservience to executive pressure*".[987]

d. Norway Has Breached its Obligation to Accept The Claimant's Investment in Accordance with its Laws

815. As set out in paragraphs 809 to 812 of the Claimants' Memorial, Norway further breached Article III by failing to accept the Claimant's investment in accordance with its laws. It did so by failing to allow the Claimants to exercise their rights to fish offshore of Svalbard under the Svalbard licences issued by Latvia, on the basis of EU Regulations, the 1920 Svalbard Treaty and section 6 of Norway's Marine Resources Act.

816. Norway's five responses to the Claimant's arguments on this point are unavailing.

817. First, Norway argues that the acceptance requirement does not apply in this case because the Claimants do not have an investment in Norway.[988] As already amply demonstrated in the Claimants' argument on jurisdiction above, there is no merit to this argument. The Claimants had an integrated snow crab business in Norway.

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984 *Tidal Poland v. Kingdom of Norway*, Notice of Intent from Norway, 3 June 2019, **C-0244**.

985 List of Participants – First Session (ARB/20/11), 28 September 2020, **C-0245**.

986 Norway Supreme Court, *SIA North Star Ltd v. Public Prosecuting Authority*, 14 February 2019, **C-0293** p. 199, footnote 1.

987 **CL-0309**, pp. 204-205.

988 Respondent's Counter-Memorial, 29 October 2021, para. 852.

818. Norway's position on this point is particularly surprising given that the Claimants' Svalbard licences pertain to an area considered by Norway as the continental shelf over which it asserts sovereign rights. Indeed, as already explained, Article I(4) of the BIT explicitly provides that "*the territory of the Kingdom of Norway*" includes "*the territorial sea, as well as the continental shelf over which the state concerned exercises, in accordance with international law, sovereign rights for the purpose of exploration and exploitation of the natural resources of such areas.*" On Norway's own case that snow crabs in the Svalbard zone are a species of the Norwegian continental shelf, Claimants' Svalbard licences squarely fall within the territory of Norway under the BIT's definition.

819. Second, Norway argues that it did not have the obligation to accept the Claimants' investment by allowing them to fish pursuant to the licences, because it disagrees that they were validly issued by Latvia.[989] As already explained above, Norway was required, pursuant to art. 6 of its own Marine Resources Act, the Svalbard Treaty and EU Regulations to give effect to those licences.[990]

820. Third, Norway argues that this aspect of the Claim may not be the subject of an investor-state arbitration claim, which may only be brought by existing investors, and not by prospective investors.[991] Whatever the merits of this argument in cases in which the claimant does not yet meet the definition of "investor" with an "investment" in the territory of the Contracting Party, it does not apply here. As demonstrated above, the Claimants meet that definition. There is nothing in either Article III or Article IX that would deprive the tribunal of jurisdiction to hear this aspect of the Claimants' claim.

821. Fourth, Norway argues that this part of Article III "*is tied to laws and regulations of the receiving State as interpreted and applied by the receiving State*" and even appears to suggest that those laws need not be correctly interpreted by the receiving State's authorities.[992] That is not what the language of Article III says. In relevant part, Article III provides "…*and accept such investments in accordance with its laws and regulations*…". Had the Contracting Parties intended that the reference to the "laws and regulations of the receiving State" be ascertainable only by the subjective determinations of the authorities of the receiving State, it was open to them to draft the

989 Respondent's Counter-Memorial, 29 October 2021, para. 853.

990 *See above*, paras. 773 *et seq*.

991 Respondent's Counter-Memorial, 29 October 2021, paras. 854-855.

992 *Ibid*., para. 856.

language accordingly. Rather, the provision refers to compliance with Norwegian law and regulations, which is an objective standard, not a subjective one to be determined exclusively by Norwegian authorities and rendered immune from review by an arbitral tribunal seised of the matter pursuant to Article IX. As set out in **Part IV**, this tribunal can, and indeed must, make the determinations of Norwegian law that are relevant to deciding whether Norway has breached its obligations to the Claimants under the BIT.

822. Fifth, Norway suggests that "*there is no reason to suppose that the BIT intended to give investors a right to recover damages … in every case where courts and tribunals take, in good faith and on rational grounds, different views of how a provision should be interpreted and applied*."[993] It is unclear on what basis Norway proposes that the Tribunal would depart from the *Chorzów Factory* standard for quantifying the Claimants' damages if it finds that Norway breached this part of Article III. There is no principled reason to treat this substantive breach of the BIT any differently than any of the other heads of liability under the BIT. In any event, this argument is premature, now that the quantification of damages has been bifurcated. Any damages that flow specifically from a breach of this part of Article III will be determined in the next phase of the proceeding.

823. Thus, in addition to failing to afford to the Claimants' investment equitable and reasonable treatment, contrary to Article III, Norway has also breached Article III by failing to accept the Claimant's investment as it relates to exercising their fishing rights pursuant to their Svalbard licences.

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824. To summarize the Claimants' position under this heading, Norway failed to accord their investment equitable and reasonable treatment and protection, in violation of its obligations under Article III of the BIT:

(a) The Claimants invested in Norway on the clear understanding that the Loophole's snow crab fishery was a high seas fishery. This understanding was based in part on Norway's communications to the Claimants' joint venture partners, which confirmed Norway's broadly known position that the Loophole's snow crab fishery fell "*outside its fisheries jurisdiction*".[994] The Claimants' reliance on this position was frustrated by Norway's abrupt and unforeseeable

993 Respondent's Counter-Memorial, 29 October 2021, para. 857.

994 *See above*, para. 103.

change of position which defeated their legitimate expectation that they could build a snow crab business reliant upon access to a resource found in international waters, which they could fish legally under an EU flag.

(b) In July 2015, Norway changed its position on the characterization of snow crab pursuant to UNCLOS, designating it for the first time as a sedentary species.[995] This change of position was decided without any serious biological analysis supporting snow crab's supposedly sedentary nature, for reasons of political expediency. In December 2015, Norway amended its snow crab regulations which then banned snow crab fishing on Norway's "*continental shelf*".[996] The purpose and effect of this amendment was to seize control over the fishery taking place in the area of the Loophole suprajacent to Norway's continental shelf, and to lay the basis for the eventual exclusion of the Claimants from the Loophole's snow crab fishery.

(c) Despite the fact that Norway's reversal of position was readily apparent to all observers, Norway attempted to deny that any change had occurred. It started behaving as if snow crab had "*always*" been sedentary and that Norway had considered it as such "*for decades*".[997] The corollary of this revisionist approach was that Claimants and other EU crabbers who had fished in the Loophole in years prior to the change were now being viewed as criminals who had "*poached*" Norwegian resources.[998] This justified their arrest, exclusion and prosecution. Norway lacked transparency and candour towards the Claimants and acted in bad faith towards them.

(d) Consistent with its denial of the legitimacy of the Claimants' fishing activities, Norway refused to give due consideration to their acquired rights. In fact, Norway refused even to *consider* the possibility that acquired rights might have accrued to EU crabbers, who had for years built businesses based upon their legal access to the Loophole's high seas snow crab fishery. Norway immediately rejected the EU's proposal to that effect and refused Latvia's invitations to find a compromise that would have allowed a continuation of the Claimants' fishing activities.

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995 *See above*, para. 75;

996 *See above*, paras. 163-170.

997 Respondent's Counter-Memorial, 29 October 2021, para. 749

998 *See above*, paras. 701-702.

(e) Not content to deny to the Claimants access to Barents Sea areas which Norway then considered to fall under its continental shelf jurisdiction, Norway coordinated with Russia to close the entire Loophole to EU crabbers. Norway's efforts to ensure that "*both countries put a ban on activity from 3rd countries*" unfolded just as Norway officially reconfirmed its support for the Claimants' investment, as shown by three visits by senior Norwegian officials to their Båtsfjord premises.

(f) After having successfully excluded the Claimants' vessels from the entire Loophole through close coordination with Russia, Norway blocked their access to the Svalbard zone, for which they had acquired fishing licences issued by Latvia in an effort to salvage their business. Norway should have recognized the legality of these licences under the Svalbard Treaty, or at the very least proposed to issue dispensations equivalent to those it had granted to its own nationals (as well as Russian nationals). Norway failed to do both, further breaching its obligations to accord equitable and reasonable treatment and protection to the Claimants' investment.

(g) The above measures taken by Norway were motivated by discriminatory political motives, none of which could serve to justify the destruction of the Claimants' snow crab fishing enterprise. Norway had the Claimants pay the price of its ambition for the future development of a large and prosperous snow crab fishery in areas under Norwegian jurisdiction. The impact of the Norwegian measures on the Claimants' investment was disproportionate and cannot be justified by the exercise of any legitimate regulatory authority.

(h) When Norway prosecuted North Star for its fishing activities in the Svalbard zone, its Supreme Court refused to rule on its defence that its Svalbard licences made their activities legal under Norwegian law; caused unconscionable delay by failing to decide on a material aspect of the claim; and permitted the appointment of the Deputy Attorney General as prosecutor, evidencing subservience to executive pressure. As a result of these acts, North Star was denied justice.

(i) Finally, Norway has breached its obligation to accept the Claimants' investment in accordance with its laws, by failing to allow the Claimants to exercise their rights to fish offshore of Svalbard under the Svalbard licences issued by Latvia,

on the basis of EU Regulations, the 1920 Svalbard Treaty and art. 6 of Norway's Marine Resources Act.

B. NORWAY HAS UNLAWFULLY EXPROPRIATED THE CLAIMANTS' INVESTMENT, CONTRARY TO ARTICLE VI OF THE BIT

825. As set out in Section VIII.A of the Claimants' Memorial, the measures taken by Norway between July 2015 and January 2017 amount to an unlawful expropriation of the Claimants' snow crab fishing business. Taken together, the measures substantially deprived the Claimants of the value of their snow crab business, and therefore amount to an indirect, creeping unlawful expropriation of that business, contrary to Article VI of the BIT.

826. The parties agree that the applicable test to determine whether Norway has indirectly expropriated the Claimants' investment is the "substantial deprivation" or "effects" test. (**subsection a.**). As a result of Norway's closure of the commons in the Loophole and of its failure to allow the Claimants to fish snow crabs off the shores of Svalbard, the Claimants' integrated snow crab fishing business was substantially deprived of its economic value and could no longer generate a commercial return (**subsection b.**).

827. By deciding to close the commons and prevent the Claimants from fishing either in the Loophole or off the shores of Svalbard, Norway was not exercising legitimate regulatory authority, and therefore cannot invoke a police powers defence. In any event, its actions were discriminatory, disproportionate, and contrary to the Claimants' legitimate expectations, and therefore cannot amount to a legitimate exercise of police powers (**subsection c.**).

a. The Parties Agree that the "Substantial Deprivation" or "Effects" test for Indirect Expropriation Applies

828. In paragraphs 681–683 of their Memorial, the Claimants relied on the well-accepted "substantial deprivation" or "effects" test for indirect expropriation, as set out in *Metalclad* and widely cited by subsequent tribunals. According to that test, an indirect expropriation takes place where measures taken by the host State have the effect of "*depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of property even if not necessarily to the obvious benefit of the host state*."[999]

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999 **CL-0260**, para. 103. *See also*, **CL-0048**, para. 240; **CL-0253**, paras. 7.5.11-7.5.16.

829. Norway agrees in principle with this test, though it falls short of applying it in section 6.4.3.2 of its Counter-Memorial. At paragraph 634 of its Counter-Memorial, Norway acknowledges that expropriation requires "*that there should be conduct on the part of the respondent that implies a non-ephemeral taking of an asset, or a substantial deprivation of the economic value and enjoyment of the asset*".[1000]

830. Indeed, arbitral tribunals have consistently applied the substantial deprivation test to assess whether a State's measures constitute an indirect expropriation. In *Glamis Gold v. USA*, the tribunal explained how such substantial deprivation can occur. It considered that the measures must have substantially impaired claimants' "*economic rights, i.e. ownership, use, enjoyment or management of the business, by rendering them useless*".[1001] Not only is the use of the investment taken into account in assessing the deprivation: so too are the benefits of the investment.[1002]

831. Moreover, under the "substantial deprivation" test, the fact that the claimant may retain formal title to the expropriated assets is not relevant. Indeed, arbitral tribunals have recognized that substantial deprivation amounting to expropriation occurs where the investment's economic value has been neutralized or destroyed, as if the rights related thereto had ceased to exist.[1003] What is relevant is that the claimant has been deprived of the use and benefit of the investment as a whole. As Professor Schreuer has observed in his article "The Unity of an Investment", "*whether an expropriation has occurred can only be determined by examining the fact of the investment as a whole and not by looking at its component parts.*"[1004]

832. As explained by the tribunal in *Middle East Cement v. Egypt*:[1005]

> *As also Respondent concedes that, at least for a period of 4 months, Claimant was deprived, by the Decree, of rights it had been granted under the License, there is no dispute between the Parties that, in principle, a taking did take place. When measures are taken by a*

1000 Counter-Memorial, 29 August 2021, para. 634.

1001 *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, **CL-0490**, para. 357. *See also*, **CL-0048**, para. 246.

1002 *Mobil Exploration and Development Argentina Inc. Suc. Argentina and Mobil Argentina Sociedad Anónima v. Argentina*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013, **CL-0491**, para. 828 ("the investor should be substantially deprived not only of the benefits but also the use of the investment").

1003 **CL-0252**, para. 115; **CL-0126**, para. 6.62; **CL-0265**, para. 604.

1004 Christoph Schreuer, "*The Unity of an Investment*," ICSID Report, Vol. 19, 2021, **CL-0446**, p. 20.

1005 **CL-0153**, para. 107. See also, *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Award, 5 November 2021, **CL-0492**, para. 330.

> *State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as a "creeping" or "indirect" expropriation […]. As a matter of fact, the investor is deprived by such measures of parts of the value of his investment. This is the case here […].*

833. In determining whether a substantial deprivation has taken place, the tribunal must consider the impact on the investment as a whole. In the words of the *Grand River* tribunal:[1006]

> *An act of expropriation must involve "the investment of an investor," not part of its investment. This is particularly so in these circumstances, involving an investment that remains under the investor's ownership and control and apparently prospered and grew throughout the period for which the Tribunal received evidence.*

834. Similarly, the tribunal in *Telenor Mobile* held:[1007]

> *The Tribunal considers that, in the present case at least, the investment must be viewed as a whole and that the test the Tribunal has to apply is whether, viewed as a whole, the investment has suffered substantial erosion of value.*

835. In the same vein, the *Burlington Resources* tribunal stated:[1008]

> *Most tribunals apply the test of expropriation, however, it is phrased, to the investment as a whole. Applied to the investment as a whole, the criterion of loss of the economic use or viability of the investment implies that the investment as a whole has become unviable. The measure is expropriatory, whether it affects the entire investment or only part of it, as long as the operation of the investment cannot generate a commercial return.*

1006 **CL-0125**, para. 155 [Emphasis added].

1007 *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. AB/04/15, Award, 13 September 2006, **CL-0493**, para. 67 [Emphasis added].

1008 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, **CL-0494**, para. 398.

836. It is especially important to look at the impact of the measures on the investment as a whole where the individual parts of the investment do not have a stand-alone character.[1009]

837. Norway's response to the Claimants' expropriation case focuses heavily on the fact that the Claimants' have retained title to individual assets that are sub-components of their investment in Norway, such as the vessels. Yet the fact that the investor has retained title to individual assets is not relevant when the impugned measures have led to the destruction of the investor's integrated business. For example:

(a) the *Burlington Resources* tribunal found an unlawful expropriation of the whole investment where the seizure of physical assets rendered the claimant's integrated oil extraction business worthless, even though the claimant retained title to other physical assets, shares, and contractual rights;[1010]

(b) the *Bear Creek* tribunal found an unlawful expropriation of the whole investment where a decree revoking the claimant's mining authorizations rendered its mining project worthless, even though the claimant retained title to the physical assets associated with its project;[1011]

(c) the *Casinos Austria* tribunal found an unlawful expropriation of the whole investment where the revocation of a casino operation licence had the effect of rendering the claimant's casino business worthless, even though the claimant retained title to its physical assets associated with that business and to the shares in the business.[1012]

838. Thus, the relevant question is whether the Claimants have been substantially deprived of the value of their integrated snow crab fishing business. It is irrelevant that the Claimants retain title to individual elements of that business.

1009 *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010, **CL-0495**, para. 144 ("*In this regard, as was also concluded in Pope & Talbot, the business of the investor has to be considered as a whole and not necessarily with respect to an individual or separate aspect,* ***particularly if this aspect does not have a stand-alone character.*** *It could happen that a certain aspect is so fundamental to the business concerned that interference with it might result in a kind of compensable expropriation*." [emphasis added]).

1010 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, **CL-0494**, paras. 257, 545.

1011 *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, **CL-0496**, para. 415.

1012 *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Award, 5 November 2021, **CL-0492**, para. 428.

b. The Claimants' Investment Has Been Indirectly Expropriated

839. As set out above, the relevant test (with which Norway ostensibly agrees) is whether the Claimants were substantially deprived of the economic benefit or use of their investment as a whole. And yet, contrary to that test, Norway bases the majority of its response to the Claimants' expropriation case on an argument that the Claimants retain legal title and the ability to use individual sub-components of their investments in Norway.[1013] This is no answer to the Claimants' expropriation case. The question is whether the Claimants have been substantially deprived of their investment in their integrated snow crab business in Norway, not whether they retain title to the sub-components of that investment.

840. This is evident in Norway's observations that it has "*not interfered in any way with the rights of Sea & Coast itself*",[1014] or that the four vessels "*remained the property of North Star immediately after the completion of the alleged 'creeping expropriation'*".[1015]

841. Again, the question is not whether the Claimants retain legal title or the use of individual assets, but whether Norway's measures have substantially deprived the Claimants of the value of their investment – *the snow crab business* – by preventing the investment from generating a commercial return. They have.

842. Owing to Norway's actions, the Claimants' investment cannot be used for its intended purpose and generate any commercial return. Norway's measures targeted the fishery of snow crabs in the Loophole and off Svalbard. The measures indeed deprived the Claimants of their fishing *rights*, which Norway mischaracterizes as an "*entitlement*".[1016] Norway fails to accept that the Claimants had a legally valid right to fish for snow crabs through their NEAFC and Svalbard licences, and ignores the fact that the fishery in the Loophole was an international one when the Claimants made their investment. It also conspicuously ignores the fact that Norway itself explicitly recognized the validity of that right when the Claimants started their business and sought to determine Norway's position on their fishing snow crabs in the Loophole.

1013 Respondent's Counter-Memorial, 29 October 2021, pp. 216-226.

1014 *Ibid*., para. 650.

1015 *Ibid*., para. 656.

1016 *Ibid*., para. 663 ("*That 'entitlement to apply' is not an 'Investment' within the meaning of Article 1 of the BIT, protected by the BIT against expropriation. The 'entitlement to apply' is not an 'Investment' that could possibly be taken. Even less so as it is an 'entitlement to apply' for fishing opportunities allocated by the EU and not by Norway*.").

It also ignores the fact that Norway implicitly accepted that legality when it controlled the ships and their cargo and found no reason to complain.[1017]

843. Norway's taking of the Claimants' fishing rights substantially destroyed the economic value of their snow crab business, viewed as a whole:

(a) Without access to the resource, North Star became unable to supply snow crabs to Seagourmet at Båtsfjord; hence Mr. Pildegovics was unable to fulfil his commitments to Mr. Levanidov as part of their joint venture agreement.[1018] This effectively destroyed the value of the joint venture and Mr. Pildegovics' rights under it.

(b) Since North Star's vessels were fitted and equipped for snow crab fishing, these vessels could not easily be put to other uses (although North Star did attempt to use them in other fisheries).[1019] Likewise, since Seagourmet was mainly equipped for snow crab processing, it could not easily pivot towards other seafood products.[1020] As a consequence, North Star had no choice but to sell some of its vessels.[1021] Neither of the Claimants' companies were able to earn a commercial return after Norway's taking of North Star's snow crab fishing rights.[1022]

844. Norway misstates the period over which its creeping expropriation occurred.[1023] As shown above,[1024] the Claimants were prevented from exercising their snow crab fishing rights in the Loophole starting in September 2016, not as the result of some unilateral act from Russia, but as a consequence of Norway's and Russia's concerted decision to close the Loophole to EU-flagged vessels. While the loss of access to the Loophole's snow crab fishery dealt a serious blow to the Claimants' investment, this was not the straw that broke the camel's back.

1017 Claimants' Memorial, 11 March 2021, para. 339-342

1018 First Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 264-266; First Witness Statement of Kirill Levanidov, 11 March 2021, para. 63.

1019 First Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 239, 246-248.

1020 First Witness Statement of Kirill Levanidov, 11 March 2021, para. 64.

1021 First Witness Statement of Peteris Pildegovics, 11 March 2021, para. 73.

1022 *Ibid*., paras. 263-266.

1023 Respondent's Counter-Memorial, 29 October 2021, paras. 636-641.

1024 *See above*, paras. 53-136.

845. The investment – i.e. the snow crab business – became substantially worthless in January 2017, when Norway arrested the Senator and thereby prevented North Star from exercising its fishing rights in the Svalbard zone. By then, Norway had already closed the Loophole to North Star's vessels. This meant that the company had lost all access to snow crab fishing grounds near its Båtsfjord operation.

846. Losses to the investment started accruing in October 2016, since the Claimants' snow crab fishing activities were effectively stopped in September 2016 when Norway and Russia together completed the closure of the Loophole. Since Norway never again allowed the Claimants' vessels to fish for snow crab in the Barents Sea, the Claimants' losses are calculated as of 1 October 2016.[1025] This does not mean that the last act causing the expropriation occurred in September 2016; it occurred in January 2017 when Norway took North Star's Svalbard's fishing rights.

847. The economic value of the Claimants' investment depended upon their ability to exercise their snow crab fishing rights. Without such rights, the Claimants were simply unable to operate their business. It is immaterial that the Claimants still maintained possession of the tangible assets that are also required to run this business: what was lost was not the assets *per se*, but the opportunity to operate them as part of a snow crab business with a given economic goal.

848. In that sense, the Claimants found themselves as a result of Norway's measures in the same position as a mining operator whose mining licence is taken away: still in possession of physical assets required for the exploitation (land, mine shafts, machinery, vehicles) but unable to use those assets to generate a commercial return.

849. The export report of Mr. Kiran Sequeira demonstrates that, while the Claimants continued to own their vessels and other assets composing their investment, the loss of North Star's fishing rights owing to Norway's actions caused their snow crab business to become substantially worthless. This consequence is shown by a comparison between the cash flows actually realized by the Claimants after the loss of their snow crab fishing rights, and the cash flows that would have been realized by them had they been able to continue to exercise those rights.

850. From 1 October 2016 to 31 December 2020 (the valuation date), North Star realized total free cash flows to the firm (FCFF) of negative 3.2 million EUR.[1026] As of

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1025 Expert Report of. Kiran Sequeira, 11 March 2021, para. 22.

1026 *Ibid*., para. 101, Table 7.

31 December 2020, North Star was therefore a loss-making enterprise with no investment value as a going concern.

851. As shown by Mr. Sequeira's report, in a "but for" scenario where the Claimants would have been allowed to exercise their snow crab fishing rights (i.e. to operate their snow crab business), North Star would have been expected to deliver between [redacted] and [redacted] of snow crab based on delivered weight.[1027] This would have allowed the company to realize over [redacted] EUR in free cash flow in 2017, which would have grown to [redacted] EUR in 2020 owing to increasing delivery volumes and sales prices generated on a relatively stable cost structure.[1028] In this "but for" scenario, North Star would have been valued as a going economic concern, not on the basis of its asset liquidation value.[1029] This value would have been substantial: over [redacted] EUR as at 1 January 2021.[1030]

852. The comparison between the actual and the "but for" scenarios reveals the extent of the value destruction imposed upon the Claimants by Norway's expropriation of their investment. This loss of value resulted neither from operational mishaps nor from the vagaries of the business cycle. It was caused by the loss *of the snow crab business*, the existence of which depended entirely upon the Claimants' ability to exercise their snow crab fishing rights.

853. This comparison also shows that the value of the Claimants' investment did not lie in the value of the tangible assets of which it was composed. The Claimants are not arguing that their vessels sustained a loss due to Norway's measures, in the same way that a mining company losing its licence would not argue that its haul trucks had lost any value. What was lost was the ability to use those assets as part of a given economic venture. The value was in the economic venture as a whole, not in the tangible assets used in its operation.

854. There can therefore be no doubt that the measures taken by Norway had the effect of substantially depriving the Claimants of their investment in their integrated snow crab fishing business. The measures amount to an unlawful indirect expropriation of the Claimants' investment.

1027 Expert Report of. Kiran Sequeira, 11 March 2021, para. 113, Table 12.

1028 *Ibid*., para. 146, Table 22.

1029 *Ibid*., para. 198.

1030 *Ibid*., para. 200, table 28.

c. Norway Cannot Rely on the Police Powers Defence

855. Norway next attempts to avoid liability for expropriation by asserting that the substantial deprivation test "*is subject to the well-established limitation deriving from the undisputed power of States to regulate their economies and public affairs in the public interest*."[1031] It contends that *"[t]he Claimant's real complaint is that Norway exercised its undoubted regulatory competence in a manner that adversely affected their business. That is not expropriation, nor is it a measure having similar effect*."[1032]

856. These arguments can best be understood as a "police powers" defence to expropriation. This defence should be rejected because the police powers defence:

(a) is a narrow defence inapplicable in the circumstances, because Norway is not exercising legitimate regulatory authority or acting in the public interest (***i***);

(b) is not available in cases where the expropriation is discriminatory or disproportionate (***ii***); and

(c) is not applicable where the measures are contrary to the investor's legitimate expectations (***iii***).

(i) The Police Powers Defence Is A Narrow One, Inapplicable In The Circumstances Because Norway Is Not Exercising Legitimate Regulatory Authority Or Acting In The Public Interest

857. Norway cites no authority for its expansive interpretation of its so-called "right to regulate" as a putative defence to expropriation. That is undoubtedly because numerous tribunals have rejected respondent States' arguments that the police powers doctrine should be extended into a broad public purpose exception to expropriation for regulatory measures. They have recognized that "*a blanket exception for regulatory measures would create a gaping loophole in international protections against expropriation*."[1033] For example, the tribunal in *Vivendi II* recognized that a public-purpose exception to expropriation would be inconsistent with the plain language of the expropriation provision of the Argentina–France BIT. The tribunal stated: "*If public*

1031 Respondent's Counter-Memorial, 29 October 2021, para. 634.

1032 *Ibid*., para. 688.

1033 *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Interim Award, 26 June 2000, **CL-0507**, para. 99.

purpose automatically immunises measures from being found to be expropriatory, then there would never be a compensable taking for a public purpose."[1034]

858. Tribunals have consistently confirmed that the police powers doctrine is a narrow doctrine.[1035] It has been applied only in exceptional circumstances where the respondent State provided clear evidence that there was imminent or serious risk to human health or financial stability.[1036] The tribunals have also held that the doctrine will apply only in the following circumstances: when the measure is truly necessary and proportionate to its stated rationale,[1037] is not contrary to the investor's legitimate expectations,[1038] does not otherwise breach international obligations,[1039] or is not contrary to domestic law.[1040]

859. The *Tecmed* and *Santa Elena* tribunals rejected the application of a broad principle that would immunize regulatory administrative actions from being expropriatory, "*even if they are beneficial to society as a whole – such as environmental protection*."[1041] While the tribunal in *BG Group v. Argentina* recognised states' sovereign power in adopting regulatory measures that affect private property for the benefit of the public welfare, it held that "*compensation for expropriation is required if the measure adopted by the State is irreversible and permanent and if the assets or rights subject to such measure have been affected in such a way that '… any form of exploitation thereof …' has disappeared*."[1042] Thus, regulatory measures of states that pursue a public policy

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1034 **CL-0253**, para. 7.5.21.

1035 *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplun v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, **CL-0497**, para. 200; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, **CL-0494**, para. 506; **CL-0252**, para. 119; **CL-0216**, paras. 258, 263.

1036 **CL-0311**, paras. 284-286; **CL-0216**, paras. 262-265, 270-275; *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award, 2 August 2010, **CL-0498**, para. 266.

1037 **CL-0252**, para. 122; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, **CL-0494**, paras. 519, 528-529; **CL-0142**, para. 522; **CL-0058**, para. 311; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, **CL-0432**, paras. 189, 195.

1038 **CL-0142**, para. 523.

1039 *Ibid*.

1040 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, **CL-0494**, para. 529; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplun v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, **CL-0497**, paras. 214, 221, 227.

1041 **CL-0252**, para. 121; *Compañía del Desarrollo de Santa Elena S.A. v. Republico of Costa Rica,* OCSID Cas No. ARB/96/1, Award, 17 February 2000, **CL-0499,** para. 72.

1042 *BG Group Plc. v. The Republic of Argentina (BG Group v. Argentina)*, UNCITRAL IIC 327, Final Award, 24 December 2007, **CL-0500** para. 268.

objective can be considered expropriatory, and give rise to compensation, if they result in a substantial deprivation of the foreign investment.

860. The language of Article VI of the BIT provides that expropriation will be lawful only when three conditions are met, including that it is made in the public interest. Therefore, it is already a prerequisite to a lawful expropriation that the measures be made in the public interest. If, however, Norway's arguments were accepted, the public purpose requirement would be transformed from a prerequisite of a lawful expropriation to a complete defence of a finding an expropriation, regardless of whether or not the other preconditions in the provision were met. This interpretation is inconsistent with the language of the BIT and should be rejected.

861. In any event, there is no evidence whatever that Norway's measures meet the stringent test applicable to the "police powers" exception to expropriation.

862. Norway did not exercise "*its undoubted regulatory competence*".[1043] The closure of the Loophole was not an exercise of regulatory authority, but rather an *expansion of jurisdiction* to a fishery previously considered as falling under the regime of the high seas: in other words, a closure of the commons.

863. Norway's argument is effectively that its assertion of sovereign rights over the snow crab resource justifies its expropriatory acts. This argument is without merit. All expropriations involve the exercise of sovereignty or sovereign rights. A state can only expropriate land if the land is located on its territory, over which it exercises sovereignty. It can only expropriate minerals if those minerals are within its territory. If the exercise of sovereignty or sovereign rights were a defence to expropriation, no taking could ever be found to be expropriatory. Whatever its legitimacy, Norway's exercise of sovereign rights over snow crab fishing in the Loophole is not a defence to expropriation.

864. A regulatory measure (which of course assumes the existence of a regulatory authority) would be for example the restriction of fishing during mating season or permitting a certain size of crab to be fished to protect juveniles in waters under the state's jurisdiction. Such a measure might be an example of an exercise of legitimate regulatory authority; appropriating an international resource is not.

1043 Respondent's Counter-Memorial, 29 October 2021, para. 688.

865. Norway's attempt to justify under the police powers doctrine its expropriatory measures to "*regulate the exploitation of the exponentially-growing snow crab population on its continental shelf*[1044]" cannot stand. Even if that policy reason could constitute a ground for expropriation without compensation in the context of the police powers (*quod non*), this is not the real reason for which Norway adopted its measures. First, as recognized by Norway, snow crabs are an invasive species "*with potentially significant impacts on the Barents Sea ecosystem*", which, to quote Norway, "*was listed as a species with 'severe ecological risk', the highest impact category on the Norwegian blacklist of alien species*".[1045] This was also recognized by the Norwegian Ministry of Climate and the Environment in its letter of 10 December 2014 in which it said that it "*was concerned about the rapid increase of snow crabs in the Barents Sea*", wanting "*management that slows down the stock's rapid expansion to the West as much as possible*".[1046] Thus, it is difficult to see how its measures could possibly have been adopted with a view to pursuing an environmental interest. An environmentally-focused strategy to the "*exponentially-growing snow crab*" issue would be to invite more fishing of the resource, not appropriating the commons.

866. No public interest served as the basis for Norway's decision to declare its jurisdiction over the Loophole's snow crab fishery and to exclude the Claimants from this fishery. The record shows that Norway's decision to designate snow crabs as a sedentary species was not taken on any serious scientific basis.[1047] On the contrary, the evidentiary record shows that Norway adopted this decision to "close the commons", *i.e*. to deny to EU vessels access to a promising economic resources, while at the same time securing a continued access for Norwegian vessels to the entire Loophole.[1048] Norway's actions were never made for the purpose of advancing any public interest. Appropriating resources for national economic gain is not an exercise of police powers.

1044 Respondent's Counter-Memorial, 29 October 2021, para. 688. *See also*, Respondent's Counter-Memorial, 29 October 2021, paras. 756-757.

1045 Respondent's Counter-Memorial, 29 October 2021, para. 74.

1046 Letter from the Ministry of Climate and the Environment, 10 December 2014, **C-0248**.

1047 *See above*, paras. 59-65.

1048 *See above*, paras. 293 *et seq*. *See also*, First Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 209-211.

(ii) The Police Powers Defence Is Not Available where the Expropriatory Measures Are Discriminatory or Disproportionate

867. Contrary to what Norway appears to imply, States' police powers, even if exercised in the public interest, are not absolute. The police powers defence is not available if the measure is discriminatory or disproportionate. As the tribunal in *Philip Morris v. Uruguay* held:[1049]

> *As indicated by earlier investment treaty decisions, in order for a State's action in exercise of regulatory powers not to constitute indirect expropriation, the action has to comply with certain conditions. Among those most commonly mentioned are that the action must be taken bona fide for the purpose of protecting the public welfare, [and] must be non-discriminatory and proportionate.*

868. Arbitral tribunals also consider that a measure may be discriminatory even if the State did not intent to discriminate against the claimant. For example, the tribunal in *Parkerings v. Lithuania* explained:[1050]

> *Discrimination is to be ascertained by looking at the circumstances of the individual cases. Discrimination involves either issues of law, such as legislation affording different treatments in function of citizenship, or issues of fact where a State unduly treats differently investors who are in similar circumstances. Whether discrimination is objectionable does not in the opinion of this Tribunal depend on subjective requirements such as the bad faith or the malicious intent of the State […]. However, to violate international law, discrimination must be unreasonable or lacking proportionality, for instance, it must be inapposite or excessive to achieve an otherwise legitimate objective of the State.*

869. Proportionality is also a well-recognized limit to a State's exercise of police powers. The *Casinos Austria* tribunal recently summarized the test as follows:[1051]

> *Proportionality requires that a host State's measures i) pursues a legitimate goal (public purpose); ii) is suitable to achieve that goal; iii) is necessary to achieve that goal in the sense that less intrusive, but equally feasible and effective measures do not exist; and iv) is proportionate stricto sensu, that is, that the benefit for the public of*

1049 **CL-0311**, para. 305. *See also*, *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, **CL-0501**, Part IV, Chapter D, p. 4, para. 7.

1050 **CL-0316**, para. 368.

1051 *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Award, 5 November 2021, **CL-0492**, para. 351.

> *the measure in question stands in an adequate and acceptable relationship to the negative impact of the measure on the investment.*

870. Not only do Norway's measures discriminate against the Claimants as a matter of fact: they were adopted with the intent to discriminate. Indeed, Norway imposed a general ban on snow crab fishing in the Loophole, with a possibility for vessels to apply for a dispensation.[1052] Only Russian vessels, however, succeeded in acquiring such permits from the Norwegian authorities.[1053] In spite of the Claimants' best efforts, their applications were all rejected, each time on a different basis.[1054] This applies to all EU vessels to which the Loophole is now closed.

871. Moreover, the measures are not proportionate to any legitimate public interest. As set out above, Norway's measures were not justified on the basis of any scientific reasons. On the contrary, since snow crab is an invasive species, the measures have actually had a detrimental effect on the environment. They have the intent and the effect of excluding EU vessels, and the Claimants, from an economic resource while appropriating the resource for Norwegian and Russian vessels.

872. There is no legitimate public interest to protect (beyond, perhaps, the Norwegian government's own economic interests and those of the Norwegian fishing industry, which is not a legitimate interest from the perspective of foreign investment protection law). Even if there were a legitimate public interest worthy of protection, the means chosen – excluding EU vessels, and therefore, the Claimants' vessels – were not a proportionate means of achieving such purpose. As set out above, those measures had the impact of destroying the Claimants' snow crab fishing business. That was neither a necessary nor proportionate outcome for achieving any legitimate public interest.

1052 *See above*, paras. 138 *et seq*.

1053 **C-0040**, p. 17.

1054 **C-0044**; **PP-0198**; **PP-0199**; **PP-0200**.

(iii) The Police Powers Doctrine Is not Available where the Measures Are Inconsistent with the Claimants' Legitimate Expectations

873. Moreover, arbitral tribunals applying the police powers doctrine have accepted that the doctrine does not apply where its application is inconsistent with specific commitments made to the investor or with the investor's legitimate expectations.[1055]

874. As demonstrated above in the context of Norway's breach of fair and equitable treatment, Norway has violated the Claimants' legitimate expectations. This is yet another reason why Norway cannot invoke the police powers doctrine to absolve itself of liability for unlawful expropriation.

C. NORWAY HAS BREACHED ITS OBLIGATION TO ACCORD TO THE CLAIMANTS MOST FAVOURED NATION TREATMENT (ARTICLE IV OF THE BIT)

875. As already established in paragraphs 784 to 808 of the Claimants' Memorial, Norway has breached its obligation to accord to the Claimants most-favoured nation treatment (***MFN***) by allowing Russian vessels to fish for snow crab in the Loophole and offshore of Svalbard, while preventing the Claimants from doing so.

876. In response, Norway raises technical arguments, none of which addresses the essence of the wrong that was done here: after Norway's change of position regarding the scope of its jurisdiction in the Loophole, it allowed Russian vessels to fish for snow crab "on its continental shelf" while prohibiting the Claimant's vessels from doing so. This is quintessential preferential treatment that is the very *raison d'être* of MFN provisions like the one set out in Article IV. Norway's arguments would substantially erode the protections afforded by Article IV, contrary to the ordinary meaning of the text and its object and purpose, and should therefore be rejected.

877. That being said, the Claimants agree with Norway that Article IV applies to:

(a) "*investments made by*" Latvian investors "*in the territory of*" Norway, rather than to the "*investors*" themselves;

(b) treatment "*accorded to investments made by investors of any third State*";

1055 *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, **CL-0501**, Part IV, Ch. D., para. 7; **CL-0078**, para. 151; **CL-0260**, para. 107; **CL-0058**, para. 318; *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Award, 5 November 2021, **CL-0492**, para. 336.

(c) actual investments, rather than potential investments; and

(d) actual treatment, rather than hypothetical treatment.

878. The balance of this section addresses the areas on which the parties disagree.

879. First, Norway's argument regarding Article IV relies heavily on the premise that it should be permitted to treat Russian vessels more favourably because the resource is scarce and because it has entered into a bilateral fishery agreement with Russia.[1056]

880. This argument cannot be reconciled with the "*essential object*" of an MFN provision, which is to "*prevent discrimination*", in the words of Sir Gerald Fitzmaurice, as cited by Norway. Nor can it be reconciled with the ordinary meaning of the text of Article IV, which provides no exception in cases in which the treatment in question is concerned with a scarce resource or one that is the subject of another bilateral agreement.

881. It is difficult to conceive of a situation in which an MFN or national treatment provision would be breached, if it were true that the scarcity of a resource could be invoked to justify favouritism or protectionism. In is indeed the very fact that a resource is scarce that makes it prone to being appropriated by the state, whether for its own use or that of its nationals, or to being allocated on a discriminatory basis.

882. Thus, a state faced with allocating rights to a resource can do so in compliance with its MFN obligations by refraining from giving preferential access to that resource to investors from a particular third state, including to those from third states with which the state has a bilateral agreement.

883. In support of its argument on this point, Norway gives the example of landing rights at the Oslo airport. It would be "*patently absurd*", according to Norway, to conclude that "*because airlines of State A have been given landing rights at, say, Oslo airport under a bilateral air traffic agreement, so, too must airlines of every other State that has concluded with Norway a BIT that contains an MFN clause, whether or not those airlines are covered by a bilateral air traffic agreement*". This is because "*[a]irports have limited capacity*", states "*must limit and allocate landing slots*" and that this "*is done by the conclusion of a bilateral air traffic agreements*."[1057]

1056 Respondent's Counter-Memorial, 29 October 2021, paras. 806-812, 815.

1057 *Ibid*., para. 809.

884. There is no absurdity here at all. In such a situation, landing slots would need to be available on an equal, non-discriminatory basis to airlines from State A and all airlines from other states with which Norway has a BIT that contains an MFN clause. This does not mean that Norway must grant a larger total number of landing slots than are available at the Oslo airport. It means that airlines from state A cannot be given more favourable access to the available slots than the access given to airlines from the states which benefit from MFN provisions.

885. The same is true under UNCLOS. The fact that the coastal state has certain discretion to allocate fishing rights to some states does not mean that Norway can ignore the MFN obligations entered into with other states. An MFN obligation means that investors from the state which benefits from the MFN provision must be granted access on the same footing as investors from third states. To hold otherwise would render the MFN obligation both meaningless and toothless.

886. Moreover, there is no merit to Norway's argument that the existence of a bilateral fisheries agreement between Norway and Russia somehow absolves Norway of its obligation to accord MFN treatment to Latvian investors.[1058] The International Law Commission has recognized explicitly that the existence of an international agreement, whether multilateral or bilateral does not affect the application of the MFN treatment:[1059]

> *The acquisition of rights by the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, under a most-favoured-nation clause* ***is not affected by the mere fact that the treatment by the granting State of a third State or of persons or things in the same relationship with that third State has been extended under an international agreement, whether bilateral or multilateral****. […]*
>
> *[i]t would seem obvious that, unless the clause otherwise provides or the parties to the treaty otherwise agree,* ***the acquisition of rights by the beneficiary of the clause is not affected by the mere fact that the granting State extended the favoured treatment to a third State under an international agreement, whether bilateral or multilateral****.*

1058 *Ibid*., paras. 806, 810-811, 815.

1059 **CL-0314**, p. 44.

887. Thus, *"[t]his regime of unconditional equality [established by the operation of an unconditional most-favoured-nation clause] cannot be affected by the contrary provisions of […] conventions establishing relations with third States*".[1060]

888. Of course, parties to a BIT are free to limit the application of an MFN provision by excluding certain areas from its purview, as Norway and Latvia did by excluding from the scope of Article IV advantages granted pursuant to a customs or economic union, free trade agreement or double-taxation treaty. Treaty practice shows that sectors such as fisheries and aviation are sometimes excluded from the application of MFN provisions. This is the case, for example, in Canada's schedule to the NAFTA and in the 1995 Canada—Latvia BIT.[1061] It was open to Norway and Latvia to exclude such industries from the scope of Article IV. They chose not to do so.

889. Therefore, the fact that snow crabs are not an unlimited resource and that Norway and Russia have entered into a bilateral fishery agreement is not relevant to determining whether Norway breached Article IV.

890. Second, Norway argues that comparables cannot "*be interpreted as meaning that everyone must be treated in the same way as everyone else*", but rather that *"[f]or the clause to operate, like must be compared with like*."[1062] The tribunal should reject Norway's invitation to read into Article IV a limitation which its drafters did not include.

891. In support of its argument, Norway cites the *Philip Morris v. Uruguay* case. The cited paragraph is taken from the section of the decision summarizing the respondent's argument, and not the tribunal's analysis. In that paragraph, the respondent argued that the MFN clause could only apply to the same matters or classes of matters that the Contracting Parties contemplated when they entered into the MFN clause.[1063] This was part of the respondent's argument that an 18-month domestic litigation requirement was a mandatory pre-condition to arbitration and could not be dispensed with by applying the MFN clause. This argument had nothing to do with any requirement that investors must be in like circumstances. The tribunal dismissed the

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1060 **CL-0314**, p. 42. French original: « *Ce régime d'égalité inconditionnelle ne saurait être affecté par les dispositions contraires du droit interne ou des conventions fixant les rapports avec les États tiers*. ».

1061 North American Free Trade Agreement between the Government of Canada, United States and Mexico, 1 January 1994, **CL-0502;** Agreement between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments, 5 May 2009, **CL-0503**, Article III (1)-(2).

1062 Respondent's Counter-Memorial, 29 October 2021, para. 811.

1063 **CL-0166**, para. 49.

respondent's jurisdictional argument without considering the MFN clause, and therefore made no findings about the scope or application of the clause.[1064]

892. Unlike certain other MFN provisions, such as Article 1103 of the NAFTA, Article IV does not include an "*in like circumstances*" qualifier. Therefore, there is no need to establish that the investors or that the investments were in like circumstances with each other. Rather, the only relevant question is whether the treatment received by the Claimants was less favourable than that received by the third-state investors.

893. In any event, there is no principled basis on which North Star's vessels fishing for snow crab in areas asserted to fall under Norway's jurisdiction can be distinguished from Russian vessels engaging in the same fishing activities. Norway refused to allow the Claimants to fish for snow crabs in those areas, while allowing Russian vessels to engage in the exact same activity in 2016. For that year, the Claimants' vessels were subject to NEAFC licences issued by Latvia,[1065] while several Russian vessels also had NEAFC licences, issued by Russia.[1066] The only material difference between them is the very difference on the basis of which according less favourable treatment is prohibited: nationality. Thus, even if there were a "*like circumstances*" requirement in Article IV, it would be met here.

894. Third, Norway states that the Claimants "*have not established that either the Russian vessels nor* [sic] *the alleged 'dispensations' were investments in the territory of Norway made by Russian investors*."[1067] On the contrary, there is ample evidence in the record that Russian-flagged vessels, owned by Russian companies, fished for snow crabs in the area of the Loophole suprajacent to Norway's continental shelf in 2016:

(a) Norway admits this at paragraph 114 of its Counter-Memorial, where it states "*[a]fter the ban on snow crab harvesting on the Norwegian continental shelf, no*

1064 **CL-0166**, paras. 149-50.

1065 **C-0005**; **C-0012**; **C-00191**; **C-0025.**

1066 Fishing Licence for Kopytin, NEAFC, 18 September 2014, **C-0265**; Fishing Licence for Kopytin, NEAFC, 26 January 2015, **C-0266**; Fishing Licence for Kopytin, NEAFC, 13 January 2016, **C-0267**; Fishing Licence for Santana, NEAFC, 27 October 2014, **C-0268**; Fishing Licence for Santana, NEAFC, 26 January 2015, **C-0269**; Fishing Licence for Santana, NEAFC, 13 January 2016, C-0270; Fishing Licence for Selenga, NEAFC, 5 February 2014, **C-0271**; Fishing Licence for Selenga, NEAFC, 26 January 2015, **C-0272**; Fishing Licence for Selenga, NEAFC, 15 January 2016, **C-0273**; Fishing Licence for Sokol, NEAFC, 30 January 2015, **C-0274**; Fishing Licence for Sokol, NEAFC, 13 January 2016, **C-0275**; Fishing Licence for Solyaris, NEAFC, 31 Januray 2014, **C-0276**; Fishing Licence for Solyaris, NEAFC, 26 January 2015, **C-0277**; Fishing Licence for Solyaris, NEAFC, 15 January 2016, **C-0278**; Fishing Licence for Start, NEAFC, 5 February 2014, **C-0279**; Fishing Licence for Start, NEAFC, 26 January 2015, **C-0280**; Fishing Licence for Start, NEAFC, 15 January 2016, **C-0281**.

1067 Respondent's Counter-Memorial, 29 October 2021, para. 814.

foreign flagged vessels have been permitted to harvest on the Norwegian continental shelf, except certain Russian flagged vessels that could access the Norwegian continental shelf in the Loop Hole in 2016 under the terms of a special one-year agreement for reciprocal access to continental shelf resources";

(b) together with its Counter-Memorial, Norway filed a letter from Russian authorities identifying 17 Russian vessels which intended to fish for snow crab in the NEAFC Regulatory Area in the Barents Sea in 2016;[1068]

(c) as stated in the letter, each of the 17 Russian-flagged vessels is owned by Russian companies;[1069]

(d) Norway's Department of Fisheries confirmed, in its minutes of the 46th meeting of the Joint Norwegian-Russian Fisheries Commission, that "*based on the protocol text agreed for 2016, approx. 6 Norwegian vessels caught snow crab on the Russian shelf and the same number of Russian vessels had participated in the snow crab fishing on the Norwegian shelf*";[1070] and

(e) as set out in paragraph 797 of the Claimant's Memorial, the East Finnmark Court of Appeal found that dispensations had been granted to five Russian vessels that caught snow crabs in 2016 pursuant to a bilateral agreement between Norway and Russia.[1071]

895. Like the Claimants' vessels, these Russian vessels were engaged in catching snow crabs for commercial purposes. They had dispensations issued by Norway allowing them to fish snow crabs "*on the Norwegian continental shelf*". Therefore, there is no basis in the record to conclude that they were anything other than investors from a third State (Russia) with investments within the meaning of Article IV (vessels engaging in the economic activity of fishing snow crabs).

896. Fourth, Norway invokes the exclusion under Article IV(2), which provides in relevant part:

1068 **R-0055**.

1069 *Ibid*.

1070 Minutes of the 46th meeting of the Joint Norwegian-Russian Fisheries Commission, 21 November 2016, **C-0205**.

1071 **C-0040**, p. 17.

> *The treatment granted under this article shall not apply to any advantage accorded to investors of a third state by the Contracting Party based on any existing or future customs or economic union or similar international agreement, or free trade agreement to which either of the Contracting Parties is or becomes a party.*

897. Norway argues that "*access granted to Russian investments under the aegis of the 1975 Norwegian-Russian Fisheries Commission*" falls within the scope of this exclusion because it is a "*similar international agreement to a customs or economic union*."[1072] A fisheries commission is plainly not similar to either a customs union or an economic union. The OECD defines "*customs unions*" as "*arrangements among countries in which the parties do two things: (1) agree to allow free trade on products within the customs union, and (2) agree to a common external tariff (CET) with respect to imports from the rest of the world*."[1073] It defines an "*economic union*" as "*a common market with provisions for the harmonisation of certain economic policies, particularly macroeconomic and regulatory*." It gives the European Union as an example of both a customs union and an economic union.[1074] The Norwegian-Russian Fisheries Commission coordinates fishing activities. It has nothing in common with either a customs or an economic union, and therefore the advantages it confers are not "*accorded … under a similar international agreement*" to a customs or economic union. The exception in Article IV(2) therefore does not apply.

898. Fifth, Norway argues that the Claimants were mere potential investors, and therefore that Article IV cannot apply. As set out in detail in **Section V.A** above, the Claimants are actual investors in Norway, not potential investors.

899. Norway defends its less favourable treatment of the Claimant's vessels relying on the argument that "*there were no applications by North Star for Norwegian licenses until 17 May 2018, well after the alleged date of breach*."[1075] Those applications were rejected by Norway. But the point is that Norway refused to allow the Claimants to fish for snow crabs pursuant to its NEAFC licences in areas asserted to fall under its jurisdiction, while allowing Russian vessels to engage in the exact same activity in 2016.

1072 Respondent's Counter-Memorial, 29 October 2021, para. 816.

1073 OECD, Glossary of statistical terms, "*Customs union*", 22 April 2013, **C-0246**.

1074 OECD, Glossary of statistical terms, "*Economic union*", 6 December 2001, **C-0247**.

1075 Respondent's Counter-Memorial, 29 October 2021, para. 801.

900. Therefore, the Tribunal should find that Norway has breached its obligation to the Claimants to provide MFN treatment by allowing Russian vessels to fish for snow crab in the Loophole and offshore of Svalbard, while preventing the Claimants from doing so.

VII. RELIEF REQUESTED

901. For the reasons stated in this Reply and Counter-Memorial on jurisdiction, and having regard to the Tribunal's decision on bifurcation[1076], the Claimants request an award in their favour:

(a) finding that the Tribunal has jurisdiction over the entire dispute involving the Claimants and the Respondent;

(b) finding that Norway has breached Article III of the BIT by failing to accord to the Claimant's investments equitable and reasonable treatment and protection, and by failing to accept such investments in accordance with its laws;

(c) finding that Norway has breached Article IV of the BIT by failing to accord to the Claimants' investments treatment no less favourable than that accorded to investments made by investors of third states;

(d) finding that Norway has breached Article VI of the BIT by unlawfully expropriating the Claimants' investments in Norway;

(e) deciding that a second phase of the proceeding devoted to reparation shall be held;

(f) granting the Claimants leave to amend their requests for reparation, if and to the extent necessary, having regard to the Tribunal's decision on jurisdiction and the merits; and

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

1076 Procedural Order No. 5, Decision on Respondent's renewed Request for Bifurcation, 6 December 2021.

28 February 2022

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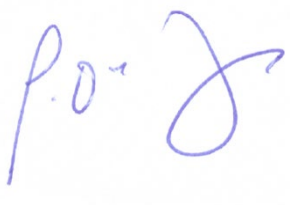

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