

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

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**CLAIMANTS' MEMORIAL**

**11 MARCH 2021**

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I.	INTRODUCTION	6
II.	THE PARTIES	9
	<b>A. The Claimants</b>	<b>9</b>
	a. Peteris Pildegovics	9
	b. SIA North Star	10
	<b>B. The Respondent</b>	<b>10</b>
III.	OVERVIEW OF THE LEGAL FRAMEWORK	11
	<b>C. The Agreement between the Government of the Kingdom of Norway and the Government of the Republic of Latvia on the Mutual Promotion and Protection of Investments of 1992 (the Latvia-Norway BIT)</b>	<b>11</b>
	<b>D. The ICSID Convention, Regulations and Rules</b>	<b>12</b>
	<b>E. The United Nations Convention on the Law of the Sea of 1982 (UNCLOS)</b>	<b>13</b>
	<b>F. The Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries of 1980 (NEAFC)</b>	<b>15</b>
	<b>G. The 1920 Svalbard Treaty</b>	<b>17</b>
IV.	FACTS	21
	<b>A. The Barents Sea snow crab fishery</b>	<b>21</b>
	a. The arrival of snow crabs in the Barents Sea and the development of a new commercial fishery	21
	b. Norway's shifting snow crab policies	26
	<b>B. Claimants' investments in the territory of Norway</b>	<b>43</b>
	a. Background to Claimants' investments	45
	b. Investments by Peteris Pildegovics in the territory of Norway	53
	c. Investments by North Star in the territory of Norway	69
	d. Claimants' investments supported Norway's economic development	81
	<b>C. Norway's acknowledgement and acceptance of Claimants' investments in its territory</b>	<b>86</b>
	<b>D. Norway's adverse actions against Claimants' investments</b>	<b>94</b>
	a. Norway's enforcement actions against Claimants' investments	96
	b. Norway's prosecution of North Star	102
	c. The adverse consequences of Norway's actions against Claimants' investments and Claimants' mitigation efforts	106

d. Norway's smear campaign against Claimants _____	109
V. APPLICABLE LAW AND PRINCIPLES OF INTERPRETATION _____	112
A. The Law Applicable to Jurisdiction _____	112
B. The Law Applicable to the Merits _____	114
C. Rules Governing the Interpretation of the BIT and of the ICSID Convention_	115
VI. THE TRIBUNAL HAS JURISDICTION OVER THE DISPUTE _____	119
A. The case concerns a " <i>legal dispute</i> " _____	120
B. The dispute is between an " <i>investor</i> " of one contracting party to the BIT and " <i>national</i> " of an ICSID Contracting Party (Latvia) on the one hand, and another contracting party to the BIT and another ICSID Contracting Party (Norway) on the other hand _____	121
C. The dispute is " <i>in relation to</i> " and " <i>arising directly out of</i> " investments ____	123
a. " <i>Arising directly out of</i> " (in the ICSID Convention) and " <i>in relation to</i> " (in the BIT) require that a reasonably close connection exist between the dispute and the investments _____	123
b. The Tribunal must view Claimants' investments as a whole based on the principle of the unity of the investment _____	125
D. The dispute relates to " <i>investments</i> " _____	128
a. Claimants' investments are within the terms of the BIT _____	128
b. Claimants' investments are within the terms of the ICSID Convention _____	139
E. The investment was made within the <i>ratione temporis</i> scope of the BIT ____	144
F. The territorial requirement under the BIT and the ICSID Convention is met _	145
a. Claimants' investments are in the territory of Norway within the definition of the BIT 145	
b. The territoriality requirement under an investment treaty must be examined in respect of the whole of the investment _____	154
c. Any territoriality requirement found in the ICSID Convention has been met ____	158
G. Claimants " <i>Invested</i> " their investments in Norway _____	158
H. Claimants' investments were invested in accordance with the laws and regulations of Norway _____	159
I. The present dispute is one which the parties have consented in writing to submit to ICSID _____	161

<b>J. The three-month waiting period found in Article IX(2) of the BIT has been respected _____</b>	<b>161</b>
<b>VII. NORWAY'S ILLEGAL ASSERTION OF SOVEREIGNTY OVER THE BARENTS SEA SNOW CRAB FISHERY _____</b>	<b>162</b>
<b>A. Norway's bad faith designation of snow crab as a sedentary species under Article 77 UNCLOS constitutes an abuse of right in violation of Article 300 UNCLOS _____</b>	<b>163</b>
<b>B. Norway has acted in breach of Claimants' acquired rights _____</b>	<b>167</b>
<b>C. Norway's violations of the Svalbard Treaty _____</b>	<b>171</b>
<b>VIII. NORWAY'S VIOLATIONS OF THE BIT _____</b>	<b>186</b>
<b>A. Norway has breached the obligation to provide compensation in the case of expropriation (Article VI of the BIT) _____</b>	<b>187</b>
a. The law on expropriation _____	187
a. Norway's acts constitute an expropriation _____	193
b. Norway's acts constitute an unlawful expropriation _____	201
<b>B. Norway has breached the obligation to provide equitable and reasonable treatment and protection (Article III of the BIT) _____</b>	<b>201</b>
a. The law on equitable and reasonable treatment and protection _____	201
(i) <i>The obligation not to act arbitrarily</i> _____	203
(ii) <i>The obligation to refrain from acting in bad faith</i> _____	204
(iii) <i>The obligation to respect specific and general legitimate expectations of an investor</i> _____	204
(iv) <i>The obligation to respect certain standards regarding transparency and consistency of the State's actions and its investment framework</i> _____	207
(v) <i>The obligation not to cause a denial of justice</i> _____	209
b. Norway's Acts Have Breached the Obligation to Provide Equitable and Reasonable Treatment and Protection found in Article III of the BIT _____	211
(i) <i>The obligation not to act arbitrarily</i> _____	211
(ii) <i>The obligation to refrain from acting in bad faith</i> _____	214
(iii) <i>The obligation to respect specific and general legitimate expectations of an investor</i> _____	214
(iv) <i>The obligation to respect certain standards regarding transparency and consistency of the State's actions as well as of its investment framework</i> _____	219
(v) <i>The obligation not to cause a denial of justice</i> _____	221

<b>C.</b>	<b>Norway has breached the obligation to provide most favoured nation treatment found in Article IV of the BIT (Article IV of the BIT)</b>	<b>229</b>
a.	The Law on Most Favoured Nation Treatment	229
b.	Norway's Acts Have Breached the Obligation to Provide Most Favoured Nation Treatment (Article IV of the BIT)	233
<b>D.</b>	<b>Norway has breached the obligation to accept investments in accordance with its laws (Article III of the BIT)</b>	<b>236</b>
<b>IX.</b>	<b>REPARATION</b>	<b>237</b>
<b>A.</b>	<b>Overview of Claimants' position on reparation</b>	<b>237</b>
<b>B.</b>	<b>Restitution</b>	<b>238</b>
<b>C.</b>	<b>Financial Compensation</b>	<b>244</b>
a.	Standard of compensation	244
b.	Valuation methodologies	252
<b>D.</b>	<b>Quantification of Claimants' damages</b>	<b>267</b>
a.	The Actual and the "But for" Scenarios	267
b.	Calculation of Claimants' lost profits predating the valuation date	272
c.	Calculation of the loss of value sustained by Claimants' investments as of the valuation date: the DCF method and the market approach	280
d.	Conclusion on the quantification of Claimants' damages	289
<b>E.</b>	<b>Pre-award and post-award interest</b>	<b>290</b>
<b>X.</b>	<b>PRAYER FOR RELIEF</b>	<b>291</b>

## I. INTRODUCTION

1. This case concerns Norway's illegal destruction of Claimants' investments in a snow crab fishing, processing and distribution enterprise in Norway.
2. A joint venture was established in January 2014 between Claimants' snow crab fishing interests and the interests of a snow crab processing company with a factory in Baatsfjord Norway, Seagourmet Norway AS. This was a creative and market-leading initiative that gave Claimants a very strong competitive foothold in the nascent snow crab fishing industry in the Barents Sea. Claimants and their partners developed a fleet that was the leading operator in the Barents Sea at the time. The venture also led to the creation of about 60 jobs at Seagourmet's factory in Baatsfjord, a small northern community of 2,300 people in the Norwegian province of East Finnmark. The venture between Claimants and their partners was blessed by numerous Norwegian politicians as a positive contribution to the economic development of Norway.
3. Nevertheless, after Claimants had made significant investments to develop this venture, starting in July 2015, Norway adopted a series of manifestly arbitrary, discriminatory, unreasonable and unfair measures to exclude Claimants (and EU vessels more generally) from the snow crab fisheries in the Barents Sea. Norway's measures were in violation of multiple obligations under the Latvia-Norway BIT as well as in violation of important international obligations binding upon Norway, notably under the 1982 United Nations Convention on the Law of the Sea and the 1920 Treaty of Paris (***Svalbard Treaty***, also known as the Spitzbergen Treaty).
4. Norway's measures were animated by various political goals, including gaining the upper hand in fisheries negotiations with the EU and protecting its unprofitable domestic snow crab fishing fleet, which was lagging behind the EU fleet in the Barents Sea. North Star was among the most successful operators within the EU fleet, until the company's snow crab fishing business was destroyed by Norway's measures. Norwegian politicians and officials also specifically and egregiously targeted North Star and EU operators by making discriminatory and outright false statements to destroy their reputation.
5. Norway relied on its position in respect of the 1920 Svalbard Treaty (which is incorrect and contrary to the views of the other parties to the treaty) to create further impediments to Claimants' investments. These included Norway's refusal to recognize the validity of snow crab fishing licences around the archipelago issued by Latvia on the basis of

an EU Regulation and the consecutive arrest of one of Claimants' vessels. This EU Regulation was adopted only after Norway had failed to withdraw a discriminatory regulation regarding snow crab fishing adopted 22 December 2015, following the EU's protest against such regulation.

6. Following the arrest of Claimants' vessel, Norway's Supreme Court committed a denial of justice by refusing to adjudicate on one of Claimants' essential defences to the arrest and subsequent fines, namely that the licence was properly issued pursuant to the rights established by the Svalbard Treaty, despite the fact that these rights are directly incorporated in Norwegian law. The Norwegian Supreme Court sidestepped this defense for political reasons. It chose to avoid applying the treaty, which would have necessarily led it to contradict the Norwegian government's (manifestly incorrect) position on the Svalbard Treaty.
7. Before Norway turned against them, Claimants' investments had been acknowledged and welcomed on numerous occasions by Norway. Over a period of nearly two years, Norwegian authorities formally approved their landings of snow crab in Norwegian ports, and the Norwegian coast guard inspected North Star's vessels with snow crab onboard without finding fault. Several Norwegian politicians also gave their blessings to Claimants' investments, which enabled the creation of over 60 factory jobs in the small northern community of Baatsfjord.
8. While excluding EU vessels from the snow crab fisheries, Norway has granted exemptions to a number of Russian vessels, a clearly discriminatory practice. Now, Norway also imposes artificially low quotas for the snow crab fishery, with no economic or environmental justification. As shown below, Norway's quotas are discriminatory and arbitrary measures, which can only be seen as yet another instrument supporting Norway's efforts to control the resource by discouraging any attempts by foreigners to exercise their legitimate rights by making the fishery uneconomic while Norway consolidates its grip and its domestic industry builds its capacities.
9. As such, for a mix of nationalistic and protectionist reasons, Norway has adopted a number of arbitrary and otherwise improper measures that, together, have caused the destruction of Claimants' investments in Norway. For taking Claimants' snow crab business in the pursuit of its political goals, Norway must fully compensate Claimants for the loss of what was sure to become a very successful and profitable business, and likely the preeminent snow crab enterprise in the Barents Sea. Claimants request compensation in the amount of EUR 448.7 million.

10. Pursuant to the calendar established in the Tribunal's Procedural Order No. 1 of 12 October 2020, Claimants hereby submit their Memorial.
11. The Memorial is structured as follows:
  - Part I: Introduction
  - Part II: The Parties
  - Part III: Overview of the Legal Framework
  - Part IV: Facts
  - Part V: Applicable Law and Principles of Interpretation
  - Part VI: The Tribunal has Jurisdiction over the Dispute
  - Part VII: Norway's Illegal Assertion of Sovereignty Over the Barents Sea Snow Crab Fishery
  - Part VIII: Norway's Violations of the BIT
  - Part IX: Reparation
12. The Memorial is accompanied by the Witness Statement of Peteris Pildegovics (accompanied by exhibits PP-0001 to PP-0221), the Witness Statement of Kirill Levanidov (accompanied by exhibits KL-0001 to KL-0052), the Witness Statement of Geir Knutsen, the Expert Report of Dr. Brooks Kaiser (accompanied by exhibits BK-0001 to KL-0055), the Expert Report of Dr. Anders Ryssdal (accompanied by exhibits AR-0001 to KL-0023) and the Expert Report of Kiran Sequeira (accompanied by exhibits VP-0001 to VP-0103), along with legal authorities CL-0060 through CL-0363 and exhibits C-00151 to C-0182.
13. For ease of reference, **Annex A** contains a chronology of the pertinent facts related to this matter.
14. Claimants contest all of Respondent's allegations made in the proceedings or in any correspondence or submissions, except where admitted herein. Claimants also reincorporate all of their previous submissions in this Memorial.



## II. THE PARTIES

### A. THE CLAIMANTS

#### a. Peteris Pildegovics

15. Mr. Peteris Pildegovics (**Mr. Pildegovics**) is a national of the Republic of Latvia by birth, which citizenship has been formally in effect since Latvia's restoration of independence in 1991.<sup>1</sup> The Republic of Latvia is a Contracting State to the ICSID Convention since 7 September 1997.<sup>2</sup>
16. Mr. Pildegovics is not, and never was, a national of Norway, the Contracting State party to this dispute, and which is party to the ICSID Convention since 15 September 1967.<sup>3</sup>
17. As further detailed below, Mr. Pildegovics is the owner and operator of a fishing enterprise, which is composed of three main assets:
  - (a) contractual rights in a joint venture agreement between Mr. Pildegovics and his cousin Mr. Kirill Levanidov, the majority shareholder of Seagourmet Norway AS (**Seagourmet**), pertaining to their joint operation of a snow crab fishing and processing enterprise in Norway;
  - (b) 100% of the shares in SIA North Star, a Latvian fishing company headquartered in Riga, Latvia; and
  - (c) 100% of the shares in Sea & Coast AS, a Norwegian company providing services to fishing crews based in Baatsfjord, East Finnmark, Norway (**Sea & Coast**).<sup>4</sup>

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<sup>1</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 5; Passport of Mr. Peteris Pildegovics, 23 February 2016, **C-0047**; Former Latvian passports of Mr. Peteris Pildegovics, 1992-2016, **PP-0001**.

<sup>2</sup> List of Contracting States and Other Signatories of the ICSID Convention, 12 April 1919, **C-0048**.

<sup>3</sup> *Ibid.*

<sup>4</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 7.

## **b. SIA North Star**

18. SIA North Star is a limited liability company incorporated under the laws of Latvia on 27 February 2014 and registered on Latvia's Commercial Register on 4<sup>th</sup> March 2014 (**North Star**).<sup>5</sup> Its head office is located at:

Jāņa Dikmaņa iela 4 - 35,  
LV-1013 Rīga  
Latvia

19. North Star is a Latvian ship owner and operator. It currently owns two fishing vessels equipped to catch snow crab: Saldus and Senator.<sup>6</sup> North Star used to own two more vessels: Solveiga, which was sold in October 2017, and Solvita, which was sold in March 2021.<sup>7</sup> Over the same period, North Star also concluded agreements for the purchase of two additional vessels, Sokol and Solyaris, which it had to cancel due to Norway's adverse actions against Claimants' investments.<sup>8</sup>
20. North Star was founded for a single purpose: to participate in the Norwegian snow crab fishing industry, within the framework established by the joint venture agreement concluded between Mr. Pildegovics and Mr. Levanidov.
21. Between February 2015 and September 2016, North Star delivered more than 5,000 tons of snow crab to Norway, predominantly to Seagourmet, Mr. Levanidov's company, at the port of Baatsfjord. As further explained below, North Star's operations over the same period relied on significant investments in the territory of Norway.

## **B. THE RESPONDENT**

22. Norway is a sovereign state that is a Contracting State to the ICSID Convention since 15 September 1967.<sup>9</sup> Norway also concluded, with Latvia, the Agreement between the Government of the Kingdom of Norway and the Government of the Republic of Latvia,

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<sup>5</sup> *Ibid.*, para. 8; North Star Ltd. Reference, Latvia Register of Enterprises, 20 January 2021, **PP-0003**; **C-0075**; Resolution No. 6-12/33212 of the Register of Enterprises of the Republic of Latvia, 4 March 2014, **PP-0004**; North Star's Merchant's Registration Certificate, 4 March 2014, **PP-0005**.

<sup>6</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 10. North Star also currently owns a third ship, Laima, which is a shrimp trawler that was never used as part of the snow crab fishery.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Id.*, para. 11.

<sup>9</sup> **C-0048**.

on the Mutual Promotion and Protection of Investments (**Latvia-Norway BIT** or **BIT**), which was signed on 16 June 1992 and came into force on 1 December 1992.<sup>10</sup>

### III. OVERVIEW OF THE LEGAL FRAMEWORK

23. The legal framework relevant to the present case is first and foremost comprised of the BIT **(A)** and the ICSID Convention **(B)**. International law and international treaties in force between Latvia and Norway are also relevant. Three international treaties have special relevance for Claimants' investments in the snow crab fisheries in Norway: the 1982 United Nations Convention on the Law of the Sea **(C)**; the 1980 NEAFC Convention **(D)**; and the 1920 Svalbard Treaty **(E)**.

#### C. THE AGREEMENT BETWEEN THE GOVERNMENT OF THE KINGDOM OF NORWAY AND THE GOVERNMENT OF THE REPUBLIC OF LATVIA ON THE MUTUAL PROMOTION AND PROTECTION OF INVESTMENTS OF 1992 (THE LATVIA-NORWAY BIT)

24. On 16 June 1992, Latvia and Norway concluded the BIT. One of its stated objectives was to “*develop economic cooperation between the two States*”.<sup>11</sup> Another objective underscored the importance of “*encouraging and creating favourable conditions for investments by investors of one contracting party in the territory of the other contracting party on the basis of equality and mutual benefit*”.<sup>12</sup> A further objective of the BIT underscored that the parties were “*conscious that the mutual promotion and protection of investments, according to the present agreement will stimulate the initiative in this field*”.<sup>13</sup>
25. This objective is achieved by the BIT through the establishment of standards of protection for Latvian investors investing in Norway and vice versa. The BIT also creates an investor-State dispute settlement mechanism allowing investors to sue the host State via international arbitration, using the ICSID Convention and its Arbitration Rules, to vindicate any breach of these standards. As seen below, the most relevant standards to this case are those of equitable and reasonable treatment, most favoured

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<sup>10</sup> **CL-0001.**

<sup>11</sup> *Ibid.*, Preamble.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

nation treatment, compensation in the case of expropriation and acceptance of investments in accordance with domestic law.

26. The year 1992 was a busy one for both Norway and Latvia as to the conclusion of investment treaties. While Norway had concluded a number of such treaties starting in the 1960s, Norway concluded more than half of its investment treaties between 1990 and 1993.
27. As for Latvia, it concluded its first investment treaty in March 1992 with Finland, a few months following Latvia's restoration of independence on 21 August 1991. Latvia's BIT with Norway signed on 16 June 1992, only a few months later, was Latvia's fifth of 46 such treaties that have been concluded. The Latvia-Norway BIT followed those with Finland, Sweden, Denmark and France, other countries with close ties to Latvia, showing the perceived importance of the economic relationship between Latvia and Norway.
28. Indeed, since then there has been relatively significant Norwegian investment in Latvia, though less Latvian investment in Norway.<sup>14</sup> Nevertheless, for the years 2014, 2015 and 2016, the investments of Mr. Pildegovics and North Star in Norway represented 25% to 30% of Latvian investment in Norway.

#### **D. THE ICSID CONVENTION, REGULATIONS AND RULES**

29. The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (**ICSID Convention**) was negotiated within the aegis of the World Bank and was made open to signature on 18 March 1965.<sup>15</sup>
30. The Preamble underscores the importance of foreign investment, noting that in certain circumstances, the appropriate dispute resolution forum is an international rather than a domestic one. The Preamble states, in relevant part:<sup>16</sup>

***Considering*** the need for international cooperation for economic development, and the role of private international investment therein;

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<sup>14</sup> Norwegian Embassy in Riga Website, "Norway and Latvia," 8 March 2021 [date of access], **C-0151**; News Release, "Latvia-Norway Business Forum," Oslo, 18 March 2015, **C-0152**.

<sup>15</sup> **CL-0042**.

<sup>16</sup> **CL-0042**, Preamble of the Convention.

***Bearing in mind** the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States;*

***Recognizing** that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases;*

31. In essence, the ICSID Convention sought to create a forum where foreign investment disputes could be heard without being politicized, as happens in domestic fora.<sup>17</sup>
32. Norway signed the ICSID Convention on 24 June 1966 and deposited its instrument of ratification on 16 August 1967. Latvia signed the Convention and deposited its instrument of ratification on 8 August 1997. As of 9 June 2020, 163 States had signed the ICSID Convention and 155 States had ratified it.<sup>18</sup>
33. As will be seen, the ICSID Convention is clearly the most appropriate dispute resolution mechanism for the present case, in light of how Norway has deeply politicized its relationship with the Claimants, whether through administrative, executive or judicial action. ICSID arbitration was created exactly for this type of dispute.

#### **E. THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA OF 1982 (UNCLOS)**

34. The 1982 United Nations Convention on the Law of the Sea (UNCLOS) is important to this case. It sets out the multilateral rules governing the rights and duties of States (and indirectly of their nationals) with respect to the sea, including the high seas, a State's continental shelf or its exclusive economic zone.
35. The conclusion of UNCLOS and its opening for signature in 1982 was the conclusion of decades of negotiations, followed by gradual signature and acceptance by States.
36. While Norway signed UNCLOS on 10 December 1982, it ratified the convention only on 24 June 1994. As for Latvia, it acceded to UNCLOS on 23 December 2004. UNCLOS currently has 168 parties.<sup>19</sup>

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<sup>17</sup> "Article 25," in C. Schreuer and others, *THE ICSID CONVENTION: A COMMENTARY*, 2<sup>nd</sup> ed., Cambridge University Press, 2009, **CL-0060**, p. 187 ("One of the Convention's objective is to depoliticize disputes. This objective is expressed most clearly in Article 27 prohibiting diplomatic protection in favour of the investor.").

<sup>18</sup> UN Treaty Series, ICSID Convention, 4 March 2021 [date of access], **C-0153**.

<sup>19</sup> UN Treaty Series, United Nations Convention on the Law of the Sea, 4 March 2021 [date of access], **C-0154**.

37. As will become clear, one of the core issues to the present case is the manner in which Norway exercised certain purported rights it believes it has under Article 77(4) UNCLOS.<sup>20</sup> Under that provision, resources of the continental shelf belong to the coastal state, here Norway, which includes so-called “*sedentary species*” of the ocean floor, as defined in UNCLOS. The relevant resource, snow crab, was considered and treated as non-sedentary by all those concerned in the Barents Sea until at least July 2015. However, Norway then arbitrarily changed its position in a manner that led to the exclusion of EU vessels from international waters in the NEAFC Regulatory Area in the Barents Sea, or FAO27 Ila, also known as “*the Loophole*”.
38. UNCLOS is relevant to understand the present dispute on three levels.
39. First, whether or not Norway has certain rights over snow crab as a purportedly sedentary species (which Claimants believe is not a question the Tribunal need determine), any such rights must be exercised in good faith and without abuse of right.<sup>21</sup> As further explained below, Claimants’ position is that Norway’s actions have fallen well short of these standard, whether or not Norway had a basis to designate snow crabs as a sedentary species.
40. Second, if snow crab is a non-sedentary species, then Norway has obligations to cooperate with other States in respect of this species.<sup>22</sup> These obligations relate to information sharing about stocks,<sup>23</sup> the setting of quotas based on a maximum sustainable yield,<sup>24</sup> as well as having “*due regard*” for the rights of other States.<sup>25</sup>
41. Third, UNCLOS creates requires States to cooperate on fisheries management in regional or plurilateral organizations.<sup>26</sup> As shown in the next section, there is one such organization of relevance to the present dispute, the North East Atlantic Fisheries Commission (**NEAFC**). Norway’s actions have shown a complete disregard for the role of NEAFC with respect to the snow crab fishery and thus a failure to cooperate.

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<sup>20</sup> **CL-0013**, Article 77(4).

<sup>21</sup> *Ibid.*, Article 300.

<sup>22</sup> *Id.*, Article 56 (Rights and obligations of the coastal State in the exclusive economic zone), Article Article 61 (Conservation of living resources), Article 62 (Exploitation of living resources).

<sup>23</sup> *Id.*, Article 61(5) (Conservation of living resources).

<sup>24</sup> *Id.*, Article 61(3) (Conservation of living resources).

<sup>25</sup> *Id.*, Article 56(2) (Rights, jurisdiction and duties of the coastal State in the exclusive economic zone).

<sup>26</sup> *Id.*, Article 61(3) (Conservation of living resources).

**F. THE CONVENTION ON FUTURE MULTILATERAL COOPERATION IN NORTH-EAST ATLANTIC FISHERIES OF 1980 (NEAFC)**

42. On 18 November 1980, 13 States or parties entered into the Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries (**NEAFC Convention**).<sup>27</sup> The 1980 NEAFC Convention replaced the 1959 North-East Atlantic Fisheries Convention.<sup>28</sup>
43. The preamble of the 1980 NEAFC Convention, adopted before the conclusion of UNCLOS, nevertheless recognized that NEAFC existed in the context of the larger work done in response to the legal environment that would stem from UNCLOS.<sup>29</sup> Following amendments to the NEAFC Convention in 2006, which entered into force towards all parties on 29 October 2013, the preamble now makes reference to UNCLOS itself and various other fisheries conventions that apply in the North East Atlantic area.<sup>30</sup>
44. The initial parties to the 1980 NEAFC Convention were Bulgaria, Cuba, Denmark in respect of the Faroe Islands, the European Economic Community (**EEC**), Finland, the German Democratic Republic, Iceland, Norway, Poland, Portugal, Spain, Sweden and the USSR.<sup>31</sup>
45. Over time, the membership of NEAFC has changed, notably to reflect changes in the composition of the EEC and now the European Union. There are currently six contracting parties to NEAFC: Denmark in respect of the Faroe Islands, the European Union, Iceland, Norway, the Russian Federation and the United Kingdom.<sup>32</sup>
46. The UK applied for membership in NEAFC on 8 January 2019,<sup>33</sup> in advance of Brexit, and acceded to NEAFC in October 2020.<sup>34</sup>

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<sup>27</sup> *Id.*, pp. 23-27 (signatures).

<sup>28</sup> *Id.*, Preamble (“*Considering that the North-East Atlantic Fisheries Convention of 24 January 1959 should accordingly be replaced*”).

<sup>29</sup> *Id.*, Preamble (“*Taking into account the work of the Third United Nations Conference on the Law of the Sea in the field of fisheries*”).

<sup>30</sup> North-Atlantic Fisheries Convention, as Amended in 2006, 18 November 1980, **CL-0061**, Fn. 1.

<sup>31</sup> **CL-0025**, pp. 23-27 (signatures).

<sup>32</sup> NEAFC website, home page, 7 March 2021 [date of access], **C-0155**. See also, NEAFC Announcement, “*The United Kingdom becomes the 6<sup>th</sup> Contracting Party to. NEAFC,*” 7 October 2020, **C-0156**.

<sup>33</sup> Council Decision (EU) on the position to be taken on behalf of the European Union in the framework of the Convention on multilateral cooperation in the North-East Atlantic fisheries as regards the application for accession to that Convention submitted by the United Kingdom (repealed), 25 March 2019, **CL-0062**, (2).

<sup>34</sup> NEAFC Announcement, “*The United Kingdom becomes the 6<sup>th</sup> Contracting Party to. NEAFC,*” 7 October 2020, **C-0156**.

47. NEAFC is a forum for cooperation in the Barents Sea and North East Atlantic where members notably adopt quotas and engage in fisheries management in the region.<sup>35</sup>
48. NEAFC is concerned with so-called “*regulated*” and “*unregulated*” species with respect to which NEAFC members assume certain obligations.<sup>36</sup> So-called “*regulated*” species are those for which NEAFC members fix quotas, while “*unregulated*” species are those for which no quota is fixed. Nevertheless, an “*unregulated*” species within the jurisdiction of NEAFC remains regulated in the sense that multiple rules stemming from that international organization apply to the fisheries of such an “*unregulated*” species.
49. The most important set of such rules is the NEAFC Scheme of Control and Enforcement (**NEAFC Scheme**),<sup>37</sup> which establishes how NEAFC members are to patrol and regulate fisheries within NEAFC jurisdiction. Notably, the NEAFC Scheme establishes rules requiring that fishing be conducted only with a valid NEAFC licence (which is issued by the vessel’s flag State)<sup>38</sup> and further requires that significant violations of the NEAFC Scheme (which includes fishing without a licence) be reported.<sup>39</sup> NEAFC Member States’ maritime enforcement personnel, including the Norwegian Coast Guard, have the right and duty to conduct inspections of vessels fishing in international waters with NEAFC licences in the capacity of NEAFC inspectors at sea and port.<sup>40</sup> NEAFC Member States also confirm catches landed at port using NEAFC forms through the Port State Control (or PSC) system.<sup>41</sup>
50. In the context of NEAFC, the snow crab has remained an “*unregulated*” species and no quotas were set. Starting at least in 2013, various NEAFC members started issuing licences for snow crab fishing (under the FAO code “CRQ”).<sup>42</sup> Norway has confirmed that

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<sup>35</sup> See e.g., EC Press Release, “North-East Atlantic: Conservation and Enforcement Measures Agreed for 2021,” 20 November 2020, **C-0157**.

<sup>36</sup> **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”).

<sup>37</sup> *Ibid.*

<sup>38</sup> *Id.*, Article 4(1) (“Each Contracting Party shall: a. authorise the use of fishing vessels flying its flag for fishing activities only where it is able to exercise effectively its responsibilities in respect of such vessels; b. ensure that only authorized fishing vessels flying its flag conduct fishing activities; c. ensure that fishing vessels flying its flag comply with applicable recommendations adopted under the Convention; d. undertake to manage the number of authorized fishing vessels and their fishing effort commensurate to the fishing opportunities available to that Contracting Party [...]”).

<sup>39</sup> *Id.*, Article 29 (Serious Infringements), Article 30 (Follow up in the Case of Serious Infringements).

<sup>40</sup> *Id.*, Chapter IV (Inspections at Sea), Chapter V (Port State Control of Foreign Fishing Vessels).

<sup>41</sup> *Id.*, Annex XV – Port-State Control Forms.

<sup>42</sup> **C-0090** (“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.”).



such licences issued by EU Member States were valid to fish snow crab in the Loophole<sup>43</sup>, until it later changed its position on the subject by asserting purported sovereign rights over the crab by designating it as a “sedentary species” in 2015 (as further discussed below).

51. However, prior to such designation, NEAFC members had agreed that they could regulate together both sedentary and non-sedentary resources in the context of NEAFC.<sup>44</sup> This happened on the basis of an amendment proposed by Iceland in 2006 which came into force in respect of all NEAFC members in 2013.
52. Regarding the adoption of quotas for fisheries in international waters (such as the Loophole) regulated by NEAFC, such quotas are adopted on the basis of a qualified majority vote of members,<sup>45</sup> which is defined as a vote of 2/3 of the members.<sup>46</sup>
53. Prior to the UK’s accession to NEAFC in October 2020, and at all relevant times in relation to the present dispute, there were five members of NEAFC,<sup>47</sup> meaning that a qualified majority required an affirmative vote of four of the five NEAFC members. At this time, a qualified majority can be obtained on the basis of the agreement of four of the six current NEAFC members.

## G. THE 1920 SVALBARD TREATY

54. The 1920 Treaty of Paris (or Svalbard Treaty) concluded on 9 February 1920 which came into force on 14 August 1925,<sup>48</sup> is also of special relevance to the present dispute. While granting Norway formal sovereign title over the Archipelago, this treaty also grants

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<sup>43</sup> Norway was aware that foreign vessels were fishing for snow crab in the NEAFC area since 2014, yet never objected to this during NEAFC annual meetings. See, **C-0118**; **C-0119**.

<sup>44</sup> **C-0108** (“[...] the EC and Norway have not questioned rights of Coastal States to delegate their rights to manage certain stocks to those International Fisheries organisations where they are Contracting Parties, including the North East Atlantic Fisheries Commission (hereinafter -NEAFC). Neither Norway, nor any other concerned Party until July 2015 had questioned the fact that Norway and Russian Federation have delegated these rights (on management of sedentary species in NEAFC waters) to NEAFC by supporting amendments of 2006 of NEAFC Convention that came into force in 2013 (long after UNCLOS entered into force in 1994).”).

<sup>45</sup> North-Atlantic Fisheries Convention, as Amended in 2006, 18 November 1980, **CL-0061**, Article 3(9) (“Each Contracting party shall have one vote in the Commission. Decisions of the Commission shall be taken by a simple majority, or, if this Convention specifically requires a qualified majority, by a two-thirds majority of the votes of all Contracting Parties present and casting affirmative or negative votes, provided that no vote shall be taken unless there is a quorum of **at least two thirds** of the Contracting Parties. If there is an even division of votes on any matter which is subject to a simple majority decision, the proposal shall be regarded as rejected.”).

<sup>46</sup> *Ibid.*

<sup>47</sup> NEAFC website, home page, 7 March 2021 [date of access], **C-0155**. See also, NEAFC Announcement, “The United Kingdom becomes the 6<sup>th</sup> Contracting Party to. NEAFC,” 7 October 2020, **C-0156**.

<sup>48</sup> **CL-0002**.

nationals of all signatory parties, which include Latvia, a non-discriminatory right of equal access and equal treatment to the resources of and around the Archipelago.<sup>49</sup> Norway improperly refuses to acknowledge this right, as discussed below.

55. Following World War I, Norway requested that it be granted sovereignty over what is now known as the Svalbard Archipelago in the Arctic.<sup>50</sup>
56. Between the 1870s and the end of World War I, the archipelago was generally viewed as *terra nullius* under international law. Activities on the archipelago were jointly or concurrently undertaken by several States. Until the early twentieth century, various states had tried to establish their sovereignty over Svalbard. At times, the archipelago was used as a base for fishing, whaling and mining. At other times, it was seen as having military or strategic interest.<sup>51</sup>
57. After World War I, the initial signatories to the Svalbard Treaty, namely the United States, Denmark, France, Italy, the Netherlands, Sweden, and the United Kingdom agreed to recognize Norwegian sovereignty over Svalbard. In exchange for such recognition, all contracting parties would be granted non-discriminatory access to Svalbard's resources, and the treaty would remain open to ratification by any other State. Latvia is one of the 46 States currently party to the treaty.
58. For Norway, a newly independent country following the dissolution of its union with Sweden in 1905, this acquisition of territory was a significant and important political victory.
59. The unique character of the treaty and of such acquisition of formal sovereign title, was well understood at the time by Norway's representative at the Paris conference, Baron Fritz Wedel Jarlsberg (despite Norway's more recent attempts to back out of such an understanding). That is, the *quid pro quo* for Norway's formal sovereign title over the archipelago was the equal treatment and access to the archipelago and its resources accorded to non-Norwegian nationals, in perpetuity.

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<sup>49</sup> *Id.*, Article 2.

<sup>50</sup> G. Ulfstein, "*Spitsbergen/Svalbard*," Max Planck Encyclopedia of International Law, January 2008, **CL-0063**, para. 11. Spitsbergen (or Spitzbergen) is the older English and Dutch name of the archipelago. It is also the name used in the 1920 Treaty concerning the Archipelago of Spitsbergen ["Treaty concerning Spitsbergen", "Traité concernant le Spitzberg"]. Svalbard is the modern Norwegian name of the territory.

<sup>51</sup> *Ibid.*, para. 14.

60. The Italian representative to the 1920 Paris conference (conducted in French) asked Baron Wedel Jarlsberg the following question:<sup>52</sup>

*Italie : Alors le Spitsberg restera éternellement ouvert à tout le monde ?*

61. To which the Norwegian representative gave the following unambiguous answer:<sup>53</sup>

*Wedel (Norvège) : Oui et aux norvégiens comme aux autres. Nous désirons que tout le monde puisse comme nous-mêmes, venir au Spitsberg, mais que les Norvégiens ou autres personnes qui restent au Spitsberg puissent devenir propriétaires après un certain temps dans les mêmes conditions pour tous.*

62. However, in the following decades, Norway's position has progressively moved away from this initially clear statement of intent. Following important developments in the law of the sea starting in the 1950s (or with the United States' 1945 declaration asserting sovereignty over a continental shelf), Norway started taking positions meant to exclude as many resources as possible from the scope of the Svalbard Treaty's equal treatment provisions.
63. Towards this goal, Norway has adopted the position that such equal treatment and access provisions apply only to the archipelago's land mass and its territorial sea (*i.e.*, 12 miles from land since 2003<sup>54</sup> and 4 miles prior to that<sup>55</sup>). Norway takes the position that the equal access and treatment obligations do not apply to the archipelago's continental shelf nor to its exclusive economic zone (or fisheries protection zone (**FPZ**), as Norway has called it since 1977). As shown in more detail below, Norway's position is manifestly incorrect as a matter of international law, while also being contradictory. Moreover, every

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<sup>52</sup> Conférence de la Paix, Commission du Spitsberg, *Travaux Préparatoires, Procès-Verbal de la Commission*, No. 3, *Recueil des actes de la conférence*, Partie VII, Préparation et Signature des Traités et Conventions, Paris, 1924, **CL-0064**, p. 15 ("*Italy: So Spitsbergen will remain open to everyone for ever?*" [Free translation]).

<sup>53</sup> *Ibid.* ("*Wedel (Norway): Yes, and to Norwegians as well as to others. We want everyone to be able to come to Spitsbergen like us, but we want the Norwegians or other people who remain in Spitsbergen to be able to become owners after a certain time under the same conditions for everyone.*" [Free translation]).

<sup>54</sup> *Royal Decree of 25 September 1970 concerning the Delimitation of the Territorial Waters of Parts of Svalbard*, UN Division for Ocean and the Law of The Sea, FAOLEX Database, No. LEX-FAOC032718, 25 September 1970, **CL-0065** referring to Royal Decree of 22 February 1812, 22 February 1812, **CL-0066**.

<sup>55</sup> *Deposit of the list of geographical coordinates of points defining the outer limits of the territorial sea around mainland Norway, Svalbard and Jan Mayen*, M.Z.N. 45. 2003, LOS, UN Maritime Zone Unification, 3 December 2003, **CL-0067**; *Deposit of the list of geographical coordinates of points as specified in the Regulations relating to the baselines for determining the extent of the territorial sea around mainland Norway, as laid down by Royal Decree of 14 June 2002, as amended by Crown Prince Regent's Decree of 10 October 2003*, M.Z.N. 40. 2002. LOS, UN Maritime Zone Unification, 20 September 2002, **CL-0068**.

other concerned State disagrees with Norway. The Russian Federation,<sup>56</sup> the EU<sup>57</sup> and the United Kingdom<sup>58</sup> have all firmly protested against Norway's position for decades, and continue to do so even today, as have many other States.<sup>59</sup>

64. Since 2017, the EU has issued 20 snow crab fishing licences on an annual basis,<sup>60</sup> some of which are owned by North Star, based on the rights of the EU and its Member States under the Svalbard Treaty. This followed Norway's acts leading to the exclusion of EU vessels from fishing snow crab in the Loophole, and Norway's refusal to negotiate an alternative arrangement. Norway has also specifically refused to grant Claimants access to Svalbard waters, arresting one of North Star's vessels in January 2017<sup>61</sup> even though the Svalbard Treaty clearly establishes such right of access.
65. Since the 1970s, there have been intermittent disputes about fisheries in the Svalbard FPZ, following which Norway has eventually agreed to allocate quotas to other States.<sup>62</sup> Regarding the continental shelf, Norway's position has been more unyielding, likely because of the significant oil resources contained within the continental shelf around the archipelago. By making the snow crab dispute with the EU one pertaining to the resources of the continental shelf rather than to non-sedentary resources of the water column, Norway may well be using the snow crab fisheries dispute to test its position (or as a bargaining chip) regarding oil rights.<sup>63</sup>
66. Finally, in light of Norway's obligation to grant equal access and treatment to Latvian nationals in respect of the resources of the Svalbard archipelago, the amount of snow crab

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<sup>56</sup> Note Verbale from USSR to Norway, 15 June 1977, reproduced in A.N. Vylegzhanin, V.K. Zilanov, W.E. Butler (eds), SPITSBERGEN: LEGAL REGIME OF ADJACENT MARINE AREAS; FOREIGN TRANSLATION PROGRAM, Eleven International Publishing, 2006, Annex 14, **CL-0246**.

<sup>57</sup> **C-0071**; see also, Note Verbale of the European Union to Norway, 25 October 2016 and Note Verbale of the European Union to Norway, 24 February 2017, cited in **CL-0003**, para. 42.

<sup>58</sup> Note Verbale from the British Government to the Government of Norway, 11 March 2006, as incorporated in M. Apostolaki, E. Methymaki, C. Musto, A. Tzanakopoulos, "*United Kingdom Material on International Law*," British Yearbook of International Law, Vol. 87, Issue 1, 2007, **CL-0069**, p. 794.

<sup>59</sup> See e.g., Spain and Iceland's positions: Note Verbale from Iceland to Norway, 30 March 2006, reproduced in A.N. Vylegzhanin, V.K. Zilanov, W.E. Butler (eds), SPITSBERGEN: LEGAL REGIME OF ADJACENT MARINE AREAS; FOREIGN TRANSLATION PROGRAM, Eleven International Publishing, 2007, Annex 21, **CL-0249**; Note verbale from Spain to the Secretary General of the United Nations, 2 March 2007, **C-0078**.

<sup>60</sup> **CL-0005**, p.155; **CL-0004**, p. 151; **CL-0003**, p. 149; Council Regulation (EU) 2020/123 fixing for 2020 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters, 27 January 2020, **CL-0070**, p. 141.

<sup>61</sup> **C-0039**; **C-0040**.

<sup>62</sup> See e.g., Agreement on fisheries between European Economic Community and the Kingdom of Norway, 29 June 1980, **CL-0071**; Norway and Union of Soviet Socialist Republics, Agreement on co-operation in the fishing industry, 11 April 1975, **CL-0072**; Denmark (also on behalf of Greenland) and the Kingdom of Norway, Agreement concerning mutual fishery relations, 9 June 1992, **CL-0073**.

<sup>63</sup> **C-0045**; **C-0046**.

in the Svalbard zone is also relevant to the amount of snow crab that should generally have been available to Claimants regarding the operation of their investments in Norway.

#### **IV. FACTS**

67. This part of the Memorial presents the facts underlying Claimants' claims for reparation resulting from Norway's illegal destruction of their investments in the Norwegian snow crab industry.
68. *Section A.* begins with an overview of the Barents Sea snow crab fishery, including the historical development of this fishery starting in the early 2010's (*subsection a.*) and Norway's shifting policies towards the species (*subsection b.*).
69. *Section B.* presents Claimant's investments in the territory of Norway, through which Claimants were able to become significant players in the Norwegian snow crab fishery starting in 2014.
70. *Section C.* shows how Norway initially acknowledged, accepted and indeed welcomed Claimants' investments in its territory.
71. *Section D.* finally explains how Norway started taking adverse actions against Claimants' investments, excluding them from the fishery from September 2016, which led to the destruction of these investments.

#### **A. THE BARENTS SEA SNOW CRAB FISHERY**

##### **a. The arrival of snow crabs in the Barents Sea and the development of a new commercial fishery**

72. Snow crab (*chionoecetes opilio*, also known as queen crab) is a relatively new species in the Barents Sea. Snow crabs were first identified there in 1996 and first caught by Norwegian fishermen in 2003.<sup>64</sup>

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<sup>64</sup> Harald S. B. Hansen, "Snow crab (*Chionoecetes opilio*) in the Barents Sea – Diet, Biology and management, Master thesis in International fisheries management," Norwegian College of Fishery Science, The Arctic University of Norway, May 2015, **C-0069**, p. 7.

73. Snow crabs had previously been found primarily in Eastern Canada, Alaska and in Russia's Far East, in the Sea of Okhotsk.<sup>65</sup> It remains unclear how snow crabs migrated to the Barents Sea.<sup>66</sup>
74. Snow crab is an invasive species with potentially significant impacts on the Barents Sea ecosystem. In 2012, snow crab was listed as a species with "*severe ecological risk*", the highest impact category on the Norwegian blacklist of alien species.<sup>67</sup> Snow crab is a benthic predator that feeds on crustaceans, polychaetes and fish, potentially causing competition with other bottom feeding fish and benthic species. Scientists believe that the presence of snow crab in the Barents Sea ecosystem could lead to the elimination of some species.<sup>68</sup>
75. As an invasive species, snow crab has been compared with another predatory crustacean, the red king crab (*Paralithodes camtschaticus*), which also settled in Norwegian waters after its introduction in the Barents Sea by Russian scientists in the 1960s.<sup>69</sup>
76. While snow crab constitutes a potentially serious ecological threat for the Barents Sea, it is also a species that has sparked the development of lucrative fisheries around the world. The snow crab fishery is among the most valuable in Canada and the United States.<sup>70</sup> For this reason, the emergence of a large and growing snow crab population in the Barents Sea is viewed as creating an exceptional economic opportunity.<sup>71</sup>
77. It is estimated that the population of snow crabs in the Barents Sea is now considerable and capable of sustaining a large-scale commercial fishery. In 2013, PINRO, the Russian institute of marine fisheries and oceanography, estimated the commercial stock at 370

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<sup>65</sup> *Ibid.*

<sup>66</sup> *Id.*, p. 71 ("*One possibility is that snow crab was unintentionally introduced to the Barents Sea through human activities; it is, however the leading perception that snow crab has migrated to the Barents Sea on its own, perhaps because of changed environmental conditions.*").

<sup>67</sup> *Id.*, p. 8; B. A. Kaiser, M. Kourantidou, L. Fernandez, "A case for the commons: The Snow Crab in the Barents," *Journal of Environmental Management*, 3 January 2018, **C-0070**, p. 5.

<sup>68</sup> **C-0070**, p. 8.

<sup>69</sup> **C-0069**, p. 36; G. Dickie, "Crab-22: how Norway's fisheries got rich – but on an invasive species," *The Guardian*, 20 December 2020, **C-0158**, p. 2.

<sup>70</sup> **C-0069**, p. 8, 27; **C-0070**, p. 5.

<sup>71</sup> **C-0069**, p. 9.

million individuals, for a total biomass of 188,260 tons.<sup>72</sup> Today, this number is estimated to be considerably larger, with median estimates of approximately 447,000 tons.<sup>73</sup>

78. Scientists have estimated that over time, the Barents Sea snow crab population would be able to sustain a fishery that could challenge cod in importance, as expectations for sustainable yearly landings have ranged from 50,000 to 150,000 tonnes.<sup>74</sup>
79. It is currently believed that the snow crab population has settled in the northern parts of the Russian exclusive economic zone (**EEZ**), the Svalbard fisheries protection zone (**SFPZ**) and in the area of international waters known as the “Loophole”. It has expanded its territory westwards into Norwegian areas and is expected to expand further to occupy most parts of the northern Barents Sea, including all Svalbard waters.<sup>75</sup>
80. Within this area, the water column of the Loophole (also known as *Smutthullet* in Norwegian) is high seas: the area is situated beyond a 200-mile distance over which a coastal state can claim either an EEZ or an FPZ pursuant to the United Nations Convention on the Law of the Sea (**UNCLOS**).

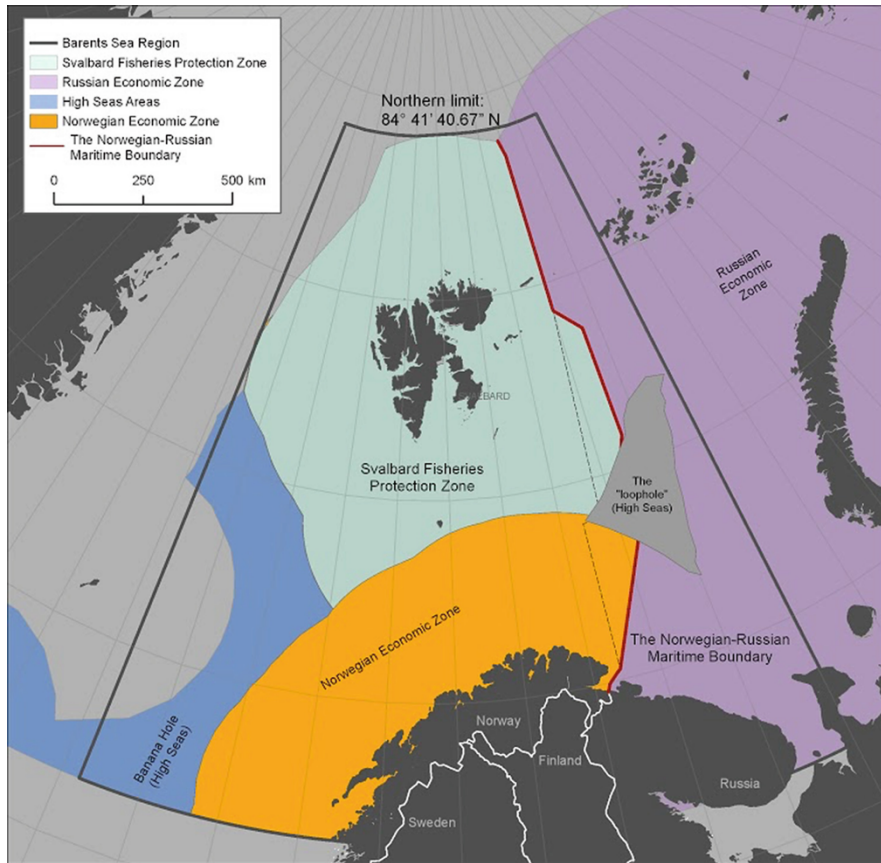
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<sup>72</sup> *Id.*, p. 13.

<sup>73</sup> Expert Report of Dr. Brooks Kaiser, Table 5, p. 24.

<sup>74</sup> Expert Report of Brooks Kaiser, Figure 9, p. 18; A. Fenstad, “*This could become a billion-dollar industry within ten years*,” *Fiskeribladet*, 4 May 2015, **KL-0015; C-0070**, p. 6.

<sup>75</sup> G. Lorentzen et al., “*Current Status of the Red King Crab (*Paralithodes camtchaticus*) and Snow Crab (*Chionoectes opilio*) Industries in Norway*,” *Reviews in Fisheries Science & Aquaculture*, Vol. 26, No. 1, 2018, **C-0159**, p. 43.



Map 1: Svalbard Fisheries Protection Zone, and Exclusive Economic Zones of Norway and Russia. Source: A. N. Vylegzhanin, O. R. Young & P. A. Berkman, “*Governing the Barents Sea Region: Current Status, Emerging Issues, and Future Options*,” *Ocean Development and International Law*, 2018, p. 54.

81. The seabed under the water column in the Loophole consists of the extended continental shelves of Norway and the Russian Federation.
82. In 2010, Norway and the Russian Federation agreed on the delimitation of their respective maritime areas, including areas of the Loophole’s extended continental shelf, after 50 years of negotiation.<sup>76</sup>
83. The Commission on the Limits of the Continental Shelf (**CLCS**) established under UNCLOS has confirmed that both Norway and the Russian Federation could claim the seabed under the Loophole as part of their extended continental shelf.<sup>77</sup> Both states

<sup>76</sup> CL-0015; CL-0016.

<sup>77</sup> Commission on the Limits of the Continental Shelf, “*Summary of the Recommendations of the Commission on the Limits of the Continental Shelf in regard to the Submission made by Norway in respect of Areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea on 27 November 2006*,” 27 March 2009, C-0072.



have submitted such claims to the CLCS. Norway was granted its request in 2009 while the Russian Federation's request is still pending.<sup>78</sup>

84. While Norway does not have sovereign rights over the water column in the Loophole, it does over parts of the continental shelf on its side of the delimitation line with Russia. Even if the water column of the Loophole is high seas, Norway claims to exercise jurisdiction over the maritime zones of the Loophole located above its continental shelf.<sup>79</sup> Norway's sovereignty is exercised notably through the Joint Norwegian-Russian Fisheries Commission and bilateral agreements between the two coastal states, which purport to regulate the high seas in the Loophole.<sup>80</sup>
85. In 2013, European Union vessels started delivering catches of snow crabs from the Loophole, taking part in what was then considered by all States involved as an international fishery. By 2015, out of total landings of 18,140 tonnes in Norway for the Barents Sea fishery, European vessels (including North Star's) landed 5,763 tonnes, up from 2,300 tonnes in 2014<sup>81</sup> (which excludes landing numbers made outside Norway). EU landing numbers collapsed starting in 2016 as a direct result of actions taken by Norway and Russia.
86. In July 2015, Norway and the Russian Federation bilaterally attempted to change the regime applicable to snow crab fishing in the Loophole. In the context of a joint declaration, they adopted the position that snow crab is a sedentary species, namely a resource of the continental shelf, over which each state enjoys sovereign and exclusive rights. On the basis of this new position regarding the sedentary nature of snow crab, starting in late 2016, Norway started excluding European vessels from the snow crab fishery.
87. Since 2017, the snow crab fishery in waters suprajacent to the Norwegian continental shelf has been officially closed to all but Norwegian vessels.

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<sup>78</sup> Commission on the Limits of the Continental Shelf, "Summary of the Recommendations of the Commission on the Limits of the Continental Shelf in regard to the Submission made by Norway in respect of Areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea on 27 November 2006," 27 March 2009, **C-0072**; Norwegian Executive Authorities, "Partial Revised Submission of the Russian Federation to the Commission on the Limits of the Continental Shelf in respect of the Continental Shelf of the Russian Federation in the Arctic Ocean," 2015, **C-0073**.

<sup>79</sup> **CL-0017**, p. 56 (referring to a 2006 note verbale of the United Kingdom).

<sup>80</sup> *Ibid.*

<sup>81</sup> Expert Report of Dr. Brooks Kaiser, Table 1, p. 5.

88. It is believed that as of 2019, approximately 45 Norwegian vessels held a license to fish for snow crab in waters above the Norwegian continental shelf. According to industry research, the operators of these vessels did not previously possess experience with snow crab fishing, and the vessels themselves had generally not been fitted for this purpose.<sup>82</sup> Among these vessels, only ten were thought to be actively fishing for snow crab, eight of which had taken the majority of the volume.<sup>83</sup>
89. According to industry reports, the majority of Norwegian holders of snow crab fishing licenses have no current interest to fish for the species but are simply “*waiting in line*” for an eventual distribution of quotas by Norway. In the words of an industry participant: “*historically everyone that has entered and been engaged in a fishery, when the fishery is closed, they have gained an individual right to fish that eventually is sellable*”.<sup>84</sup> It is believed that some vessels are “*pretending to fish just to gain a track record so that they can get into a position for a historic right to a quota*”.<sup>85</sup> Some of these vessels apparently report annual deliveries as low as 5 kg.<sup>86</sup>
90. Since 2017, total catches achieved by the Norwegian fishing fleet have been low compared to the volumes landed when European vessels participated in the fishery, remaining within a range between 2,800 and 4,000 tonnes.<sup>87</sup> This collapse in catch numbers occurred despite the continued progression of the snow crab population, both geographically and in terms of biomass.<sup>88</sup>

## **b. Norway’s shifting snow crab policies**

91. Until the end of 2014, Norway had not adopted regulations pertaining to the Barents Sea snow crab fishery. The Norwegian Directorate of Fisheries considered the species “*unregulated*”.<sup>89</sup>

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<sup>82</sup> B.A. Berteussen, B.H. Nøstvold, I. Ruiken, “*Fishing for an institution-based first-mover advantage: The Norwegian snow crab case*,” *Ocean and Coastal Management*, Vol. 194, 2020, **BK-0004**, p. 6.

<sup>83</sup> *Ibid.*, p. 3.

<sup>84</sup> *Id.*, p. 4.

<sup>85</sup> *Id.*, p. 4.

<sup>86</sup> *Id.*, p. 4.

<sup>87</sup> Expert Report of Dr. Brooks Kaiser, Table 1, p. 5.

<sup>88</sup> Expert Report of Dr. Brooks Kaiser, paras. 1, 3, 10, 19-22, 26, 68.

<sup>89</sup> Email exchange between the Norwegian Directorate of Fisheries, K. Levanidov and S. Ankipov, 9-21 May 2013, **KL-0016**.

92. At the time, Norway treated snow crab as a non-sedentary species, namely a species falling outside the UNCLOS definition of “sedentary species” (“*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*”).<sup>90</sup>
93. This had been Norway’s position for several decades, going back at least to the 1958 drafting of the Geneva Convention on the Continental Shelf.<sup>91</sup> Since snow crabs were viewed as non-sedentary, they were treated as a fishing resource belonging to the water column as opposed to the seabed.
94. Until December 2014, Norway allowed registered Norwegian vessels freely to fish for snow crabs in Norway’s EEZ, Svalbard zone and international waters.<sup>92</sup> Snow crab fishing in the Loophole was then treated by Norway as a fishery taking place in the high seas.<sup>93</sup> Norwegian vessels could take part in this international fishery by registering through NEAFC.<sup>94</sup> Norwegian vessels were thereby allowed to catch snow crabs everywhere in the Loophole, including above Russia’s continental shelf.
95. In the words of Norway’s Directorate of Fisheries, Norway considered the Loophole snow crab fishery as taking place “*in international waters*” “*outside any state’s fishing jurisdiction*”.<sup>95</sup> It thus recognized that vessels flying an EU flag could participate in this fishery on the same terms as Norwegian vessels.
96. Norway allowed EU-registered fishing boats to catch snow crabs in the Loophole and to deliver their catches in Norwegian ports on an “*equal footing with Norwegian fishing vessels*”.<sup>96</sup> Norwegian authorities required “*no special documentation*” from EU fishing vessels wishing to deliver snow crabs in Norway, provided that their catch had been

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<sup>90</sup> **CL-0013**, Article 77(4).

<sup>91</sup> United Nations Conference on the Law of the Sea, Summary Records of the 21<sup>st</sup> to 25<sup>th</sup> Meetings of the Fourth Committee, A/CONF.13/C.4/SR.21-25, 24 February-27 April 1958, **CL-0074**, p. 55.

<sup>92</sup> 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**.

<sup>93</sup> 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**.

<sup>94</sup> 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**; **C-0087**; **C-0088**; Regulations on registration and reporting when fishing in waters outside any state’s fishing jurisdiction, 18 April 2013, **KL-0018**, s. 1.

<sup>95</sup> *Ibid.*

<sup>96</sup> Email exchange between the Norwegian Directorate of Fisheries and S. Ankipov, 20-25 July 2014, **KL-0020**; Email exchange between Mattilsynet and S. Ankipov, 3-5 February 2014. **KL-0019**.

made “*outside the Norwegian Economic Zone*”.<sup>97</sup> Like Norwegian vessels, EU vessels conducted their snow crab fishing operations under a NEAFC license.

97. On 18 December 2014, Norway adopted regulations pursuant to its Marine Resources Act<sup>98</sup> prohibiting Norwegian and foreign vessels from catching snow crab “*in Norway’s territorial waters, including the territorial waters at Svalbard*” and “*the economic zone and the fishery protection zone at Svalbard*” (**Regulations**).<sup>99</sup>
98. These Regulations entered into effect on 1 January 2015. Their adoption was explained by Norway’s desire to “*gain control of the activity*” and to “*acquire greater knowledge and data on the spread of the stock*”.<sup>100</sup>
99. The ban against snow crab fishing was however not absolute. The Regulations provided that exemptions could be granted on conditions adopted by the Directorate of Fisheries. Criteria for the granting of such exemptions were added to the Regulations through amendments adopted by the Ministry of Trade and Fisheries on 19 February 2015.<sup>101</sup>
100. While these exemptions were (officially) only granted to Norwegian vessels<sup>102</sup>, the Regulations in any event did not preclude EU vessels from conducting snow crab fishing operations in the Loophole. Because snow crabs were considered by Norway as a non-sedentary species and therefore a fishing resource of the water column, the Regulations could not have any application in the Loophole, an area in international waters beyond “*Norway’s territorial waters ... or exclusive economic zone*”.<sup>103</sup>
101. Hence, Norway’s Regulations did not prohibit snow crab fishing in the Loophole. This understanding was confirmed by Norway’s consistent practice (as Norway continued to recognize the legality of snow crab catches made in the Loophole by foreign vessels

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<sup>97</sup> Email exchange between the Norwegian Directorate of Fisheries and S. Ankipov, 20-25 July 2014, **KL-0020**.

<sup>98</sup> **CL-0012**.

<sup>99</sup> **C-0104**, Section 1.

<sup>100</sup> A. Osthagen, A. Raspotnik, “*Crab! How a dispute over snow crab became a diplomatic headache between Norway and the EU*”, Marine Policy, Vol. 98, 2018, **C-0160**, p. 60.

<sup>101</sup> Regulations prohibiting the capture of snow crabs, J-34-2015, 19 February 2015, **C-0105**.

<sup>102</sup> A. Osthagen, A. Raspotnik, “*Crab! How a dispute over snow crab became a diplomatic headache between Norway and the EU*”, Marine Policy, Vol. 98, 2018, **C-0160**, p. 60.

<sup>103</sup> Regulations prohibiting the capture of snow crabs, J-280-2014, 18 December 2014, **C-0104**, Article 1.

under the NEAFC regime well after 1 January 2015<sup>104</sup>) and was also accepted by Norway's Supreme Court.<sup>105</sup>

102. In his witness statement, the former Mayor of Baatsfjord, Mr. Geir Knutsen, also confirms 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 where they were catching and why they brought the crab to Baatsfjord"*.<sup>106</sup>
103. On 17 July 2015, Norway issued a joint declaration with the Russian Federation in Valletta, Malta, whereby it suddenly changed its longstanding position regarding the legal characterization of snow crabs.<sup>107</sup>
104. Overturning decades of consistent practice, Norway reached an agreement with Russia that declared that snow crabs would henceforth be treated as a sedentary species. In what became known as the Malta Declaration, Norway and Russia declared that they would *"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."*<sup>108</sup>
105. It is important to emphasize that Norway's sudden recharacterization of snow crab as a sedentary species did not follow from a recent breakthrough in marine biology. The biological nature of snow crab did not change in July 2015 and Norway did not suddenly become aware of the species' supposedly "sedentary" nature.

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<sup>104</sup> See below, paras. 326, 338, 341, 342, 352, 369.

<sup>105</sup> *Arctic Fishing v. The Public Prosecution Authority*, Supreme Court of Norway, Judgment, 29 November 2017, **C-0161**, para. 34.

<sup>106</sup> Witness Statement of Geir Knutsen, para. 10.

<sup>107</sup> **C-0106** ("In accordance with Article 77 of the United Nations Convention on the Law of the Sea of 1982 (UNCLOS), the two Coastal States, the Russian Federation and Norway, exercise their sovereign rights in respect of the continental shelf of the Barents Sea for its exploration and development of its natural resources. Therefore, only these two Coastal States have the exclusive rights to harvest sedentary species on the continental shelf of the Barents Sea. Pursuant to paragraph 4 of Article 77 of the Convention, both the Russian Federation and Norway will proceed from the fact that harvesting of sedentary species, including snow crab, in the NEAFC Regulatory Area in the Barents Sea shall not be carried out without the express assent of the Coastal State.").

<sup>108</sup> Minutes of the Meeting between Ilya V. Shestakov, Deputy Minister of Agriculture of the Russian Federation – Head of the Federal Agency for Fisheries, and Elisabeth Aspaker, Minister of Fisheries of the Kingdom of Norway, 17 July 2015, **C-0106** (emphasis added). See also, Note to Delegations No. 26/16 from the EU Commission, 1 February 2016, **C-0107**, p. 6; *The Public Prosecuting Authority v. Rafael Usakov SIA North Star LTD*, District Court, Judgment, 22 June 2017, **C-0039**, p. 6.

106. In fact, science is at best inconclusive as to the proper characterization of snow crab. In the words of a marine biologist:<sup>109</sup>

*in nature there is no simple line of demarcation between sedentary organisms and other, rather a long series of gradations from the unquestionably fixed to the sea floor at one extreme to the unquestionably free from the sea floor at the other. While some species, such as corals and clams, clearly fit into the category, there is a gray area surrounding organisms such as crabs...*

107. From a biological standpoint, designating snow crab as a “sedentary” species is considered “intriguing”:<sup>110</sup>

*Snow crab is not attached to the seafloor and migrates throughout life. It may even have migrated to the Barents Sea. Following from this, few biologists would conclude that snow crab is sedentary.*

108. Viewed in that light, Norway’s decision to designate snow crab as a “sedentary species” in July 2015 was without a doubt a political one. For Norway, this designation would justify a “closure of the commons”<sup>111</sup> and ground a legal claim that a species that had hitherto been treated as a common resource, available to all, would henceforth be treated as belonging to Norway alone.

109. This sudden change of attitude on the part of Norway appears to have been triggered (at least in part) by political pressures from Norwegian fishermen, who did not appreciate being exposed to foreign competition in the Loophole, notably from EU vessels. A recent Norwegian research paper reports that “according to a key informant, the profitability [of Norwegian snow crab fishing vessels] was good, until the Norwegians were exposed to foreign competition. ‘We were 2-3 boats in the Barents Sea and were doing ok alone, but suddenly 30 boats came and that isn’t sustainable at all’ ”.<sup>112</sup> The same paper also reported that Norwegian fishermen have been “actively using their organization Fiskebat (The Norwegian Deep-Sea fishing fleet organization) to influence the government toward closing the fisheries for newcomers.”<sup>113</sup>

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<sup>109</sup> Harald S. B. Hansen, “Snow crab (*Chionoecetes opilio*) in the Barents Sea – Diet, Biology and management, Master thesis in International fisheries management,” Norwegian College of Fishery Science, The Arctic University of Norway, May 2015, **C-0069**, p. 39.

<sup>110</sup> *Ibid.*, p. 81.

<sup>111</sup> B. A. Kaiser, M. Kourantidou, L. Fernandez, “A case for the commons: The Snow Crab in the Barents,” *Journal of Environmental Management*, 3 January 2018, **C-0070**, p. 10.

<sup>112</sup> B.A. Berteussen, B.H. Nøstvold, I. Ruiken, “Fishing for an institution-based first-mover advantage: The Norwegian snow crab case,” *Ocean and Coastal Management*, Vol. 194, 2020, **BK-0004**, p. 6.

<sup>113</sup> *Ibid.*, p. 6.

110. On 11 September 2015, the Latvian Minister of Agriculture protested against this attempted closure of the commons, highlighting Norway's and the Russian Federation's previous recognition that snow crabs found in international waters should be managed as a common fishing resource through NEAFC. According to Latvia, Norway's consistent practice predating the Malta Declaration had made it clear that Norway had "*delegated*" the management of this species to NEAFC. The Malta Declaration did not invalidate this delegation, but merely emphasized the purported rights of shelf countries:<sup>114</sup>

*Neither Norway, nor any other Party until July 2015 had questions [about] the fact that Norway and the Russian Federation have delegated these rights (on management of sedentary species in NEAFC waters) to NEAFC by supporting amendments of 2006 of NEAFC Convention that came into force in 2013 (long after UNCLOS came into force in 1994). Also the Note does not invalidate this as it only emphasizes the rights of the shelf countries.*

111. On 22 December 2015, Norway's Ministry of Trade and Fisheries amended the Regulations to provide that Norway's prohibition of snow crab harvesting would now apply to the "*Norwegian territorial sea and inland waters, and on the Norwegian continental shelf*". References to the "*territorial waters at Svalbard*" were at the same time dropped from the provision.<sup>115</sup>
112. The amendments also introduced a rule providing that, with respect to Norwegian vessels, the ban would also apply to other States' continental shelves, and that exemptions allowing catches on another State's continental shelf would only be possible "*when there is explicit consent from that country*".<sup>116</sup> Lurking behind this change was the novel Norwegian position to the effect that its own "*explicit consent*" would also be required before any foreign vessel could harvest snow crabs from Norway's own continental shelf.
113. In spite of the Malta Declaration and the subsequent entry into force of the amended Regulations now banning all snow crab fishing "*on the Norwegian continental shelf*" (therefore now including the area of the Loophole suprajacent to Norway's continental

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<sup>114</sup> Letter of Latvian Minister of Agriculture (Janis Duklavs) to Mr. Karmenu Vella (European Commissioner on Environment, Maritime Affairs and Fisheries), 11 September 2015, **C-0108** (referring to the 2006 amendments that came into force in 2013, and further protesting on the diplomatic note of Norway and the Russian Federation of 15 July 2015).

<sup>115</sup> Regulations prohibiting the capture of snow crabs, J-298-2015, 22 December 2015, **C-0110**, Section 1 (emphasis added).

<sup>116</sup> *Ibid.*, Section 2, para. 1.

shelf), the situation on the ground did not change. Norway continued for several months to accept the validity of NEAFC fishing licenses authorizing EU vessels to fish for snow crabs in the entire Loophole, as well as the landing of such snow crabs in Norwegian ports.<sup>117</sup>

114. In 2016, the European Commission initiated informal talks with Norway to try to come to an agreement that would secure access for EU vessels to the Barents Sea snow crab fishery. Norway demanded that all snow crab catches be landed in Norway and that the EU provide quotas in return. The Commission refused and negotiations stalled.<sup>118</sup>
115. Nonetheless, through the first half of 2016, Norway continued to accept snow crab fishing activities by EU vessels in the Loophole.<sup>119</sup>
116. Then, in July 2016, seemingly without any prior warning or notice, Norway started arbitrarily enforcing its amended Regulations by issuing sanctions against some EU fishing vessels for catching snow crabs in the Loophole, while allowing others to continue doing the same without hindrance.
117. This change of attitude on the part of Norway occurred literally overnight. On 14 July 2016, Juros Vilkas, a vessel flying the Lithuanian flag, obtained permission from the Norwegian authorities to unload its snow crab harvest at the port of Baatsfjord.<sup>120</sup> The permission indicated that the snow crabs had been caught in the Loophole in accordance with a valid

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<sup>117</sup> NEAFC Port State Control Forms – PSC 1 for Saldus, 2015-2016, **C-0100**, NEAFC/PSC/12340, NEAFC/PSC/13583, NEAFC/PSC/14744; NEAFC Port State Control Forms – PSC 1 for Solveiga, 2015-2016, **C-0101**, NEAFC/PSC/12857, NEAFC/PSC/13775, NEAFC/PSC/14871, NEAFC/PSC/16156, NEAFC/PSC/17640, NEAFC/PSC/18772, NEAFC/PSC/19667, NEAFC/PSC/20823, NEAFC/PSC/21979, NEAFC/PSC/23249, NEAFC/PSC/24944; NEAFC Port State Control Forms – PSC 1 for Solvita, 2015-2016, **C-0102**, NEAFC/PSC/12501, NEAFC/PSC/13271, NEAFC/PSC/14332, NEAFC/PSC/15590, NEAFC/PSC/16791, NEAFC/PSC/17835, NEAFC/PSC/19075, NEAFC/PSC/20598, NEAFC/PSC/21693, NEAFC/PSC/23145, NEAFC/PSC/24653, NEAFC/PSC/2547; NEAFC Port State Control Forms – PSC 1 for Senator, 2015-2016, **C-0103**, NEAFC/PSC/14335, NEAFC/PSC/17637, NEAFC/PSC/19865, NEAFC/PSC/22098.

<sup>118</sup> A. Osthagen, A. Raspotnik, “Crab! How a dispute over snow crab became a diplomatic headache between Norway and the EU,” *Marine Policy*, Vol. 98, 2018, **C-0160**, p. 60.

<sup>119</sup> B. A. Kaiser, M. Kourantidou, L. Fernandez, “A case for the commons: The Snow Crab in the Barents,” *Journal of Environmental Management*, 3 January 2018, **C-0070**, p. 9 (“Norwegian enforcement accommodated EU fishing vessels through most of 2016 in the Loophole in pursuit of the crab”).

<sup>120</sup> Notice of Dispute from “Arctic Fishing” and SIA North Star to the Kingdom of Norway, 27 February 2017, **C-0002**, p. 3.



NEAFC licence. The next day, on 15 July 2016, Juros Vilkas was arrested by the Norwegian coast guard for alleged illegal catching of snow crabs in the Loophole.<sup>121</sup>

118. By contrast, between July and September 2016, North Star's vessels, all of which were still fishing for snow crab in the Loophole, landed over 500 tonnes of snow crabs at the Norwegian port of Baatsfjord, with Norway's full knowledge and assent.<sup>122</sup> On 10 August 2016, the Norwegian Coast Guard inspected North Star's vessel Saldus with snow crab onboard, without reporting any infringement.<sup>123</sup>
119. The owner and captain of the Juros Vilkas were prosecuted by Norwegian authorities. However, on 24 January 2017, the East Finnmark District Court issued judgment dismissing the case against them.<sup>124</sup>
120. The owners of the vessel and its captain were accused of conducting snow crab harvesting operations on the Norwegian continental shelf, in violation of Article 61 of the Marine Resources Act and the Regulation's ban on snow crab harvesting. The defendants pleaded non-guilty. While the Court considered the facts underlying the accusation to have been proven without a doubt, it nonetheless acquitted the defendants on the grounds that the Juros Vilkas held a valid NEAFC licence allowing it to fish for snow crabs in the Loophole. Norway's international obligations compelled it to recognize the validity of this licence. Norway therefore could not prosecute the owner and captain of the Juros Vilkas as Norway's international obligations took precedence over its Regulations.<sup>125</sup>

*North Eastern Atlantic fisheries Commission is a responsible administrative instance within the area of Smutthullet [Loophole] (see no. 2 of article 3 of the NEAFC convention and item (b) or*

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<sup>121</sup> *Ibid.*, p. 2.

<sup>122</sup> **C-0100**, NEAFC/PSC/25572, NEAFC/PSC/26447, NEAFC/PSC/27438, NEAFC/PSC/28294, NEAFC/PSC/75816, NEAFC/PSC/29272; **C-0101** NEAFC/PSC/25954, NEAFC/PSC/26785, NEAFC/PSC/27873, NEAFC/PSC/28619, NEAFC/PSC/29742, NEAFC/PSC/30282; **C-0102**, NEAFC/PSC/26311, NEAFC/PSC/27130, NEAFC/PSC/28082, NEAFC/PSC/29202, NEAFC/PSC/30279; **C-0103**, NEAFC/PSC/30291; Rafisklaget Sales Notes for Saldus, 2016, **PP-0160**, Nr. 70-10582907, Nr. 70-10585473, Nr. 70-10588299, Nr. 70-10592091, Nr. 70-10596895, Nr. 70-10599258; Rafisklaget Sales Notes for Solvita, 2016, **PP-0162**, Nr. 70-10584971, Nr. 70-10587548, Nr. 70-10590623, 70-10595727, Nr. 70-10601015; Rafisklaget Sales Notes for Solveiga, 2016, **PP-0164**, Nr. 70-10583738, Nr. 70-10586320, Nr. 70-10589433, Nr. 70-10597691, Nr. 70-10594219, Nr. 70-10600092; Rafisklaget Landing Notes for Senator, 2016, **PP-0166**, Nr. 714511686, Nr. 714511712, Nr. 714511762.

<sup>123</sup> Witness Statement of Peteris Pildegovics, para. 164; Norwegian Coast Guard Inspection Form, Saldus, Port of Baatsfjord, 10 August 2016, **PP-0172**.

<sup>124</sup> *The Public Prosecutor v. Arctic Fishing and Sergej Triskin*, District Court, Judgment, 24 January 2017, **C-0162**.

<sup>125</sup> *The Public Prosecutor v. Arctic Fishing and Sergej Triskin*, District Court, Judgment, 24 January 2017, **C-0162**, p. 5 (emphasis added).

*the article 1 of the Scheme of Control and Enforcement). Norway has adopted the NEAFC Scheme of Control and Enforcement and, thus, must honour licences and permits issued in accordance with the administrative procedures of the NEAFC within the area of Smutthullet of the Norwegian Continental Shelf as well. The court declares their ruling which is not subject to be a basis of a doubt or to appeal that the vessel “Jūros Vilkas” conducted fishery operations for snow crabs within the area of Smutthullet having obtained licence for conducting said operations in accordance with the regulations of NEAFC convention and NEAFC Scheme of Control and Enforcement. The Court concludes that the national restriction to conduct fishery operations for snow crabs within the area of Smutthullet of the Norwegian Continental Shelf is not applicable in the present case because the said restriction infringes on the undertaken obligations of Norway in accordance with NEAFC convention and NEAFC Scheme of Control and Enforcement (see article 2 of criminal code (2005).*

121. The chief constable of Finnmark appealed the decision of the District Court to the Hålogaland Court of Appeal. The Court of Appeal issued its judgment on 28 June 2017, overturning the judgment of the lower court.<sup>126</sup>
122. The Court of Appeal based its decision on Norway’s new assertion of sovereign rights over the natural resources of its continental shelf, which according to the Norwegian position include snow crabs. The Court found that NEAFC could not “give recommendations to harvest sedentary species on the continental shelf in the Loop Hole without permission from the coastal state”.<sup>127</sup> NEAFC did not “limit the rights that have been established through the Convention of the Law of the Sea”.<sup>128</sup>
123. Ignoring the fact that Norway itself had for years relied on the NEAFC management regime for the licensing of its own snow crab fishing vessels, and that it had also systematically recognized the validity of NEAFC licenses issued by other NEAFC member States, the Court simply concluded that “there is no conflict between the prohibitions against harvesting snow crabs on the Norwegian continental shelf in the Loop Hole and international agreements or international law in general”.<sup>129</sup> On that basis, it restored the penalties imposed against the Jūros Vilkas’ owner and captain.

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<sup>126</sup> *The Chief Constable of Finnmark against Arctic Fishing*, Hålogaland Court of Appeal, Judgment, 28 June 2017, **C-0163**.

<sup>127</sup> *Ibid.*, p. 6.

<sup>128</sup> *Id.*, p. 6.

<sup>129</sup> *Id.*, p. 7.

124. The defendants appealed to the Supreme Court of Norway, which rendered its judgment on 29 November 2017.<sup>130</sup> The Supreme Court dismissed their appeal.
125. The Supreme Court first agreed with the District Court and the Court of Appeal that the fact of catching snow crabs on the Norwegian continental shelf was a punishable offense under the Regulations. Since the facts underlying the offense had been proven, the question before the Court was “*whether the act committed was not punishable nevertheless, because the rules are contrary to Norway’s obligations under international law...*” It was “*therefore necessary to verify if there are rules in international law preventing Norway*” from punishing the owner and captain of the Juros Vilkas for having caught snow crab in the Loophole.<sup>131</sup>
126. Adopting the novel position of the Norwegian government as its own, the Court found that “*Norway, under UNCLOS, has a sovereign and exclusive right to exploit the snow crab – a “sedentary species” – on the Norwegian side of the Loophole... The consequence is, pursuant to Article 77 no. 2, that no one may catch snow crab in this part of the Loophole without “express consent” from Norway*”.<sup>132</sup>
127. The Court then went on to consider the interplay between UNCLOS and NEAFC. NEAFC’s preamble suggested that the “*NEAFC Convention must be read so as to imply that the rights of the parties under the UNCLOS to natural resources on their respective continental shelves are maintained*”.<sup>133</sup> The Court continued by noting that “*the purpose of the NEAFC Convention is, pursuant to Article 2, to ‘ensure the long-term conservation and optimum utilisation of the fishery resources’ in the Convention Area*” and that such fishery resources “*include sedentary species... Snow crab catching in the Loophole is thus within the Convention’s area of application*”.<sup>134</sup>
128. However, according to the Court, NEAFC itself “*contains no rules on fishing activities*” but instead allows the Commission to give recommendations. Since “*no binding recommendation [had been] provided regarding snow crab catching*” and “*Norway has never requested that a recommendation must be given with respect to such fishing*”,

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<sup>130</sup> *Arctic Fishing v. The Public Prosecution Authority*, Supreme Court of Norway, Judgment, 29 November 2017, **C-0161**.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Id.*, para. 20.

<sup>133</sup> *Id.*, para. 23.

<sup>134</sup> *Id.*, para. 24.

*“Norway, on these grounds, has not consented to any vessel fishing snow crab in the Loophole under a Lithuanian permit.”*<sup>135</sup>

129. The Court then went on to examine the effect of the NEAFC Scheme, under which Norway had previously licensed its own vessels.<sup>136</sup> The Court acknowledged the possibility that *“the NEAFC Scheme, according to its contents, is applicable in the Loophole, also to catching of snow crab”*. Yet, the Court decided not to *“take a final stand with respect to this issue”*, which was *“not necessary”* to reach the Court’s conclusion. In any event, the NEAFC Scheme *“did not give the consent required under the UNCLOS Article 77 no. 2 in order for anyone to exploit natural resources on their respective continental shelves”*.<sup>137</sup>
130. Finally, the Court did not *“see that state practice exists, changing this understanding of the NEAFC Scheme”*. While the Court recognized that the Regulations were *“not applicable for the continental shelf until 22 December 2015”* and that *“some catching did take place before that on the Norwegian side of the Loophole, also from foreign vessels”*, this did not *“oblige Norway or other Contracting Parties to continue to accept such catching without the coastal State’s consent”*.<sup>138</sup> On these grounds, Norway was *“not bound by any obligation under international law to accept catching of snow crab in the Loophole from a Lithuanian vessel without a Norwegian permit”*.<sup>139</sup>
131. In its decision, the Supreme Court of Norway confirmed what had long been plain to all industry participants, namely that Norway had *“accepted”* that EU-licensed vessels could legally catch snow crabs *“on the Norwegian side of the Loophole”*. However, according to the Court, international law did not oblige Norway *“to continue to accept such catching”* (in the case of Juros Vilkas, beyond 14 July 2016) in view of its newly asserted sovereign rights in relation to the continental shelf.<sup>140</sup> In other words, while Norway had previously consented to snow crab fishing in the Loophole by European vessels, it could withdraw this consent.

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<sup>135</sup> *Id.*, para. 27.

<sup>136</sup> **C-0087; C-0088.**

<sup>137</sup> *Arctic Fishing v. The Public Prosecution Authority*, Supreme Court of Norway, Judgment, 29 November 2017, **C-0161**, para. 29.

<sup>138</sup> *Ibid.*, para. 34 (emphasis added).

<sup>139</sup> *Id.*, para. 35.

<sup>140</sup> *Id.*, para. 34.

132. The Court stopped short of considering whether the withdrawal of Norway's consent was subject to any legal conditions, or whether such withdrawal carried any legal consequences for Norway (indeed issues that are central to the present case, as discussed in more ample detail below).
133. Nevertheless, even after the arrest of the *Juros Vilkas*, Norway continued to “accept” (namely to consent to) snow crab fishing activities by European vessels in the Loophole. Between 15 July 2016 and 6 September 2016, Norway formally authorized at least 15 landings of snow crabs by North Star’s vessels at the port of Baatsfjord, amounting to over 500 tonnes of crab, without any form of warning or protest.<sup>141</sup>
134. On 27 September 2016, Norway started enforcing its Regulations against North Star, issuing fines of NOK 81,000 “*for having caught snow crab in the Norwegian sea territory and inland waters, and on the Norwegian continental shelf without the necessary permission*”, more specifically in the Loophole.<sup>142</sup> Senator was later arrested for fishing for snow crabs in the Svalbard zone on 16 January 2017.<sup>143</sup>
135. From that date onwards, Norway threatened to take similar enforcement actions against any and all EU vessels that would venture to fish snow crab in waters overlapping its continental shelf (including in the Loophole and the Svalbard zone) effectively closing the fishery for these vessels.<sup>144</sup>
136. By December 2016, as no agreement had been reached between Norway and the European Commission, the EU proposed to authorise up to 20 vessels to catch snow crab on the continental shelf around Svalbard.<sup>145</sup> This proposal was accepted by the Council in January 2017<sup>146</sup> and five EU countries were accorded to right to issue these

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<sup>141</sup> For Saldus, See **C-0100**, NEAFC/PSC/27438, NEAFC/PSC/28294, NEAFC/PSC/75816, NEAFC/PSC/29272, NEAFC/PSC/30158. For Solveiga, See **C-0101**, NEAFC/PSC/26785, NEAFC/PSC/27873, NEAFC/PSC/28619, NEAFC/PSC/29742. NEAFC/PSC/30282. For Solvita, See **C-0102**, NEAFC/PSC/27130, NEAFC/PSC/28082, NEAFC/PSC/29202, NEAFC/PSC/30279. For Senator, See **C-0103**, NEAFC/PSC/30291.

<sup>142</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 205; Confiscation order against North Star and Order against Mr. Uzakov, 27 September 2016, **PP-0191**.

<sup>143</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 208.

<sup>144</sup> **C-0107**; Note verbale from Norway to the European Union, 18 January 2017, **C-0164**; Note verbale from Norway to the European Union, 8 February 2017, **C-0165**.

<sup>145</sup> Proposal for a Council Regulation, fixing for 2017 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters, the European Commission, 27 October 2016, **CL-0075**.

<sup>146</sup> **CL-0005**.

licenses for 2017 (Estonia, Latvia, Lithuania, Poland and Spain).<sup>147</sup> Eleven of those licenses were awarded to Latvia. The European Council has awarded the same licenses for 2018 and subsequent years.

137. However, the Svalbard licenses issued by EU countries were never utilised as Norway's actions against Senator effectively deterred all other EU vessels from fishing for snow crabs in Svalbard waters.<sup>148</sup>
138. On 5 July 2017, the Ministry of Trade and Fisheries adopted a further round of amendments to the Regulations, this time limiting snow crab catches made above the Norwegian continental shelf to a yearly catch limitation of 4,000 tonnes.<sup>149</sup>
139. This 4,000-tonne catch limitation set a surprisingly low ceiling on a fishery that was thought to be able to accommodate significantly larger catches.<sup>150</sup> Nonetheless, since Norway had excluded EU vessels from the fishery, the quota proved comfortably above the catches Norwegian vessels were able to make in 2017 (3,153 tonnes) and 2018 (2,804 tonnes).<sup>151</sup>
140. Per the numbers available for 2020, it appears that Norwegian catches have once again fallen short of the quota, with 4,363 tonnes landed for a 4,500 tonnes quota.<sup>152</sup>
141. In an ostensible effort to settle the dispute, Norway offered the European Union a grant of 500 tonnes out of its 4,000 tonnes yearly catch limitation<sup>153</sup> (representing but a small fraction of what EU vessels had been catching in prior years) in exchange for the reciprocal assignment to Norway of EU quotas over other species.

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<sup>147</sup> *Ibid.*, p. 155; A. Osthaugen, A. Raspotnik, "Crab! How a dispute over snow crab became a diplomatic headache between Norway and the EU," *Marine Policy*, Vol. 98, 2018, **C-0160**, p. 60.

<sup>148</sup> A. Osthaugen, A. Raspotnik, "Crab! How a dispute over snow crab became a diplomatic headache between Norway and the EU," *Marine Policy*, Vol. 98, 2018, **C-0160**, p. 61.

<sup>149</sup> Regulations prohibiting the capture of snow crabs, J-110-2017, 5 July 2017, **C-0114**, Section 3.

<sup>150</sup> Expert Report of Dr. Brooks Kaiser, paras. 82-83.

<sup>151</sup> Expert Report of Dr. Brooks Kaiser, para. 69; B.A. Berteussen, B.H. Nøstvold, I. Ruiken, "Fishing for an institution-based first-mover advantage: The Norwegian snow crab case," *Ocean and Coastal Management*, Vol. 194, 2020, **BK-0004**, p. 3; N. Ramsden, "Norway unlikely to fulfill 4,000t snow crab quota," *Undercurrent News*, 22 June 2017, **C-0037**.

<sup>152</sup> Expert Report of Dr. Brooks Kaiser, para. 1, Table 1 (showing catches of 3,405 tonnes as at October 2020), para. 83, Table 11 (regarding the 4,500t quota); Rafisklag statistics for snow crab catches, 1 January 2020 to 31 December 2020, **C-0167** (totaling 4,362,528kg for the full year).

<sup>153</sup> B.A. Berteussen, B.H. Nøstvold, I. Ruiken, "Fishing for an institution-based first-mover advantage: The Norwegian snow crab case," *Ocean and Coastal Management*, Vol. 194, 2020, **BK-0004**, p. 3; N. Ramsden, "Norway unlikely to fulfill 4,000t snow crab quota," *Undercurrent News*, 22 June 2017, **C-0037**.

142. In view of the minimal quota offered by Norway and the fact that EU vessels already held the legal right to harvest snow crabs without requiring an exchange of quotas with Norway, no agreement was reached.
143. Since 2017, Norway's management objective for the snow crab fishery has officially been described as "*sustainable harvesting, which provides a basis for value creation for society, and based on the knowledge base on how the species affect each other in the ecosystem.*" This objective is achieved by "*balancing*" two "*sub-goals*": "*maximizing long-term catch yields*" and "*minimizing the risk of unwanted ecosystem effects*".<sup>154</sup> Thus, Norway's management policies are supposed to pursue both economic and ecological objectives.
144. However, the very low level at which Norway has set its snow crab quotas since 2017 is explained by neither of these objectives<sup>155</sup>, raising serious questions about the actual policy goals pursued by Norway in setting these low quotas.
145. Norway's stated goal of "*minimizing the risk of unwanted ecosystem effects*" would have called for an open-access fishery or at the very least, a high quota.<sup>156</sup> According to scientific studies, "*without a doubt snow crab affects the benthic community through predation and foraging behavior*".<sup>157</sup> From an ecological perspective, snow crab's invasive and predatory behaviour argues for efforts to control the spread of the species, if not for its complete removal from the Barents Sea ecosystem. Indeed, observers expect that environmental non-governmental organizations will advocate for such removal.<sup>158</sup> While the effects of snow crab on the ecosystem are still not fully known, a precautionary approach would call for setting a limit to the biomass and adapting fishing efforts to this limit.<sup>159</sup>
146. Norway's exclusion of EU vessels from the snow crab fishery and its subsequent adoption of low quotas cannot be viewed as pursuing an ecological goal<sup>160</sup>, since these measures are thought to have contributed to the exponential growth in the population of snow crab since 2017. They have "*exacerbate[d] the invasion aspects of the snow*

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<sup>154</sup> C. Hvingel, J.H. Sundet, A.M. Hjelset, "*Snow crab in Norwegian management zone: Biological advice 2017*," Institute of Marine Research, February 2017, **BK-0030**, p. 2; Written question and answer between Helga Pedersen, Member of Parliament, and Per Sandberg, Minister of Fisheries, 21 June 2017, **KL-0048**.

<sup>155</sup> Expert Report of Dr. Brooks Kaiser, paras. 94-96.

<sup>156</sup> *Ibid.*, para. 94.

<sup>157</sup> Harald S. B. Hansen, "*Snow crab (Chionoecetes opilio) in the Barents Sea – Diet, Biology and management, Master thesis in International fisheries management*," Norwegian College of Fishery Science, The Arctic University of Norway, May 2015, **C-0069**, p. 72.

<sup>158</sup> *Ibid.*, p. 75.

<sup>159</sup> *Id.*, p. 77.

<sup>160</sup> Expert Report of Dr. Brooks Kaiser, para. 97.

*crab rather than alleviate[d] them*".<sup>161</sup> According to Norway's own Institute of Marine Research, as of 2017, limiting catches to 4,000 tonnes implied a very high probability (between 78% and 91%) that the snow crab stock would continue to increase.<sup>162</sup>

147. Observers have noted that catches made in international waters between 2013 and 2016 "*operated as a control measure on the [snow crab] invasion by reducing the stock*", particularly on the western frontier of the Loophole adjacent to the Svalbard FPZ.<sup>163</sup> By closing the fishery to EU vessels, Norway has effectively removed this control measure, potentially causing significant damage to the Barents Sea ecosystem.
148. Thus, had Norway been serious about limiting the snow crab's environmental effects, it would have neither prevented EU vessels from participating in the fishery, nor adopted low catch limitations which effectively ensure the continued expansion of snow crabs in the Barents Sea, both geographically and in terms of biomass.
149. Norway's quotas are likewise inexplicable from an economic perspective.<sup>164</sup> If economic considerations were the primary motivation, the quota-setting exercise would strive to support the fishermen in the fleet. Norway's quotas have the opposite effect, preventing the resurgence of a profitable fishery despite the important expansion of the fishing stock.<sup>165</sup>
150. As suggested by a scientific observer, a "*precautionary approach*" pursuing both ecological and economic goals would lead to the implementation of a "*regime of high utilization, with the risk of overfishing. The worst-case scenario of such an approach would be a collapse of the snow crab population, which could be considered acceptable by some, as it might bring the ecosystem back to a more 'native' state. It seems likely that a management regime will seek both biological and economic sustainability*".<sup>166</sup> Yet, Norway's low catch limits have so far achieved neither control of the snow crab

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<sup>161</sup> B. A. Kaiser, M. Kourantidou, L. Fernandez, "A case for the commons: The Snow Crab in the Barents," *Journal of Environmental Management*, 3 January 2018, **C-0070**, "Abstract".

<sup>162</sup> C. Hvingel, J.H. Sundet, A.M. Hjelset, "Snow crab in Norwegian management zone: Biological advice 2017," Institute of Marine Research, February 2017, **BK-0030**, p. 2.

<sup>163</sup> B. A. Kaiser, M. Kourantidou, L. Fernandez, "A case for the commons: The Snow Crab in the Barents," *Journal of Environmental Management*, 3 January 2018, **C-0070**, p. 9.

<sup>164</sup> Expert Report of Dr. Brooks Kaiser, para. 95.

<sup>165</sup> *Ibid.*

<sup>166</sup> Harald S. B. Hansen, "Snow crab (*Chionoecetes opilio*) in the Barents Sea – Diet, Biology and management, Master thesis in International fisheries management," Norwegian College of Fishery Science, The Arctic University of Norway, May 2015, **C-0069**, p. 81.



population, nor the establishment of an economically sustainable fishery. They have in fact defeated both objectives.

151. Norway's snow crab policies are also difficult to reconcile with its very different approach to the management of another comparable crustacean, red king crab.<sup>167</sup> Like snow crab, red king crab is an invasive non-native species with damaging impacts on the Barents Sea ecosystem.<sup>168</sup> The World Wide Fund for Nature (WWF) has demanded that Norway adopt a policy of removal of all red king crabs from the ecosystem.<sup>169</sup>
152. As the red king crab population grew in importance, starting from the early 2000s, the species became an important economic resource for small Norwegian communities along Norway's northern coast.<sup>170</sup> Hence, Norway had an economic interest in adopting policies that would sustain its nascent red king crab industry.
153. In 2004, Norway and Russia agreed to limit the westward spread of red king crab by establishing a geographical limit to the expansion of the species at the 26°E meridian (North Cape) in the Norwegian zone. West of this longitude, Norway would allow free fishing of the species with a view to its eradication. In 2007, Norway and Russia ended their joint management of the species and Norway has since adopted a management regime applicable between the 26°E and 31°E meridians. The goal of this management regime is to establish viable, long-term red king crab harvests to protect the economic interests of the coastal communities.<sup>171</sup>
154. Since 2014, Norway has adopted quotas applicable to the management zone allowing yearly catches of about 2,000 tonnes<sup>172</sup> – for a species with a population thought to be

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<sup>167</sup> *Ibid.*, p. 35.

<sup>168</sup> G. Lorentzen et al., "Current Status of the Red King Crab (*Paralithodes camtschaticus*) and Snow Crab (*Chionoectes opilio*) Industries in Norway," *Reviews in Fisheries Science & Aquaculture*, Vol. 26, No. 1, 2018, **C-0159**, p. 43-44; L.L. Jorgensen, "The Invasive History, Impact and Management of the Red King Crab *Paralithodes camtschaticus* off the Coast of Norway," Institute of Marine Research, Norway, February 2011, **C-0166**; G. Dickie, "Crab-22: how Norway's fisheries got rich – but on an invasive species," *The Guardian*, 20 December 2020, **C-0158**.

<sup>169</sup> **C-0069**, p. 36.

<sup>170</sup> *Ibid.*, p. 36.

<sup>171</sup> G. Lorentzen et al., "Current Status of the Red King Crab (*Paralithodes camtschaticus*) and Snow Crab (*Chionoectes opilio*) Industries in Norway," *Reviews in Fisheries Science & Aquaculture*, Vol. 26, No. 1, 2018, **C-0159**, p. 42; L.L. Jorgensen, "The Invasive History, Impact and Management of the Red King Crab *Paralithodes camtschaticus* off the Coast of Norway," Institute of Marine Research, Norway, February 2011, **C-0166**.

<sup>172</sup> G. Lorentzen et al., "Current Status of the Red King Crab (*Paralithodes camtschaticus*) and Snow Crab (*Chionoectes opilio*) Industries in Norway," *Reviews in Fisheries Science & Aquaculture*, Vol. 26, No. 1, 2018, **C-0159**, p. 42.

at least ten times smaller than the population of snow crabs.<sup>173</sup> Quotas have been set higher than the recommendation from the Institute of Marine Research to limit the crab's negative environmental impacts and sustain the fishery's economics. For the same reasons, in addition to the quotas, Norway still allows free fishing of red king crab west of the 26°E meridian.<sup>174</sup>

155. In 2014, Norway's Minister of Fisheries, Ms. Elizabeth Aspaker, is reported to have stated that the management of the red king crab, including the targeted fishing of king crabs west of North Cape, was a success.<sup>175</sup> If so, one might ask why Norway has chosen not to follow this successful precedent in the case of snow crab.
156. As shown by numerous declarations made by Norwegian officials, the answer is that Norway's snow crab policies are pursuing different political goals: to appropriate the resource for Norway's national fishing industry and to use it as a "*bargaining chip*" in quota negotiations with external partners.<sup>176</sup> Lurking in the background is also Norway's purported assertion of exclusive sovereign rights on the continental shelf around the Svalbard archipelago.
157. In the words of a Norwegian diplomat: "*the snow crab is an exclusive resource to us and Russia, and we do not give away a resource for free*".<sup>177</sup> Norway's Minister of Fisheries Per Sandberg has put it even more bluntly: "*we will not give them a single crab*"<sup>178</sup> ("*them*" referring to European fishermen). Norwegian politicians have seemingly forgotten that until at least September 2016, snow crabs were treated as a resource of the high seas "belonging" to fishermen of all nations.
158. The obvious differences in Norway's management approaches in the case of red king crab and snow crab are explained by the fact that the two crustaceans do not raise the same political imperatives. The red king crab population mainly occurs in the coastal

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<sup>173</sup> E. Lieungh, "Ten times more snow crab than king crab," NRK, 29 April 2013, **KL-0014**; T. Emberland, "The snow crab is new in Norwegian waters: Has doubled in value in one year," iFinnmark, 12 January 2016, **PP-0152**, p. 3.

<sup>174</sup> G. Dickie, "Crab-22: how Norway's fisheries got rich – but on an invasive species," The Guardian, 20 December 2020, **C-0158**, p. 2.

<sup>175</sup> **C-0069**, p. 37.

<sup>176</sup> T. Abelsen, E. Lieungh, "Big politics has put the snow crab industry down," NRK, 3 May 2017, **KL-0050**.

<sup>177</sup> A. Osthagen, A. Raspotnik, "Crab! How a dispute over snow crab became a diplomatic headache between Norway and the EU," Marine Policy, Vol. 98, 2018 **C-0160**, p. 63.

<sup>178</sup> **C-0036**.

waters of Finnmark, within Norway's EEZ.<sup>179</sup> Norway's legal control over the species is clear and uncontroversial. Furthermore, the red king crab fishery is dominated by Norwegian fishermen, whose economic interests have political weight in Oslo.<sup>180</sup> Norway's red king crab quotas thus pursue their officially stated goal, which is to strike an appropriate balance between ecological and economic interests.

159. Norway's snow crab quotas only pretend to achieve the same goals. In reality, the Norwegian snow crab fishing industry is nascent and relatively underdeveloped.<sup>181</sup> Norway has no national economic interests to protect – yet. Norway's immediate interest is to “*gain control*” over the resource<sup>182</sup>, based on an assertion of sovereignty which remains criticized and highly controversial from a legal standpoint. In that light, Norway's catch limitations are relatively painless for its national industry (which has so far struggled to catch even the yearly maximum) yet is set at such a low point that it would prevent any economic exploitation by the more sophisticated EU players. The existence of quotas on snow crabs at such a low level also serves as an additional deterrent to EU actors who would wish to assert their rights to participate in the fishery.
160. Limiting catches to a low level also achieves a longer-term objective for Norway: allowing the snow crab population to grow exponentially throughout the Norwegian Barents Sea to create the basis for a future industry<sup>183</sup> which (Norway hopes) will by then be exclusively exploited by Norwegians.
161. The pursuit of these political objectives was the end that justified the means taken by Norway against EU snow crab fishermen in the Barents Sea, which caused the destruction of Claimants' investments in the territory of Norway.

## **B. CLAIMANTS' INVESTMENTS IN THE TERRITORY OF NORWAY**

162. Between late 2014 and early 2017, Claimants were successful European participants in the Barents Sea snow crab fishery, with significant investments in the territory of

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<sup>179</sup> G. Lorentzen et al., “*Current Status of the Red King Crab (*Paralithodes camtschaticus*) and Snow Crab (*Chionoectes opilio*) Industries in Norway*,” *Reviews in Fisheries Science & Aquaculture*, Vol. 26, No. 1, 2018, **C-0159**, p. 42-43.

<sup>180</sup> G. Dickie, “*Crab-22: how Norway's fisheries got rich – but on an invasive species*”, *The Guardian*, 20 December 2020, **C-0158**.

<sup>181</sup> Expert Report of Brooks Kaiser, para. 89.

<sup>182</sup> A. Osthagen, A. Raspotnik, “*Crab! How a dispute over snow crab became a diplomatic headache between Norway and the EU*,” *Marine Policy*, Vol. 98, 2018, **C-0160**, p. 60.

<sup>183</sup> Expert Report of Brooks Kaiser, para. 83.

Norway enabling their fishing operations. Claimants' operations were brought to an abrupt halt when Norway started enforcing its Regulations against North Star in September 2016 and January 2017.

163. While Claimants first landed snow crabs in a Norwegian port in August 2014, their fishing enterprise originates from a business project initiated several years earlier by Peteris Pildegovics' cousin, Kirill Levanidov. Mr. Levanidov is an investor and entrepreneur with over twenty-five years of experience in international fishery and seafood projects.<sup>184</sup>
164. *Subsection a.* below presents the background to Claimants' investments in the territory of Norway and explains how these investments emerged from Mr. Pildegovics' business association with Mr. Levanidov.
165. In January 2014, Mr. Pildegovics and Mr. Levanidov concluded a joint venture agreement pursuant to which they both committed to invest in a collaboratively managed snow crab fishing and processing enterprise based in the town of Baatsfjord, Norway. All investments at issue in this case were made and operated within the framework of this joint venture agreement and in support of its goals.<sup>185</sup>
166. *Subsection b.* presents the relevant investments made by Peteris Pildegovics in the territory of Norway, namely (i) contractual rights in his joint venture agreement with Mr. Levanidov; (ii) 100% of the shares in North Star; and (iii) 100% of the shares in Sea & Coast.
167. North Star, a fishing vessel owner and operator based in Riga, was incorporated, built and operated to serve as Mr. Pildegovics' main vehicle for his investments in the Norwegian snow crab industry. It was likewise managed within the framework of Mr. Pildegovics' joint venture with Mr. Levanidov.
168. *Subsection c.* presents the various investments made and operated by North Star in the territory of Norway, namely (i) fishing vessels; (ii) fishing "*capacity*"; (iii) fishing license rights; (iv) contractual rights for the acquisition of additional fishing vessels; and (v) supply agreements.

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<sup>184</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 8.

<sup>185</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 13.

169. *Subsection d.* finally explains how Claimants' investments supported the economy of Norway, the country that received the most economic benefits from these investments.
170. Claimants' investments at issue in this case were funded by Mr. Pildegovics' household's personal equity and loans contracted by North Star.<sup>186</sup> These investments together formed an actively managed commercial enterprise through which Claimants assumed various risks of a commercial nature, including risks related to fluctuations of the market price of snow crab; risks related to the fluctuation of the price of inputs; risks related to the fishing productivity of North Star ships; market risks; financial risks; and operational risks.<sup>187</sup>

**a. Background to Claimants' investments**

171. Following a career as an executive in the Japan seafood industry, Kirill Levanidov has worked as a seafood consultant and strategic advisor since the early 2000s. He has launched several ventures in the fishing and seafood industries, including in Norway.<sup>188</sup>
172. In May 2007, Mr. Levanidov founded Link Maritime Consulting Inc., a company organized under the laws of the State of Washington, United States (**Link Maritime**).<sup>189</sup> Link Maritime provides consulting services related to commercial fisheries, including strategic planning and realization of seafood projects; seafood product development, marketing and trading; design of fishery processing equipment and fishing gear; and management of fishing vessel conversion projects. Link Maritime also acts as an investor in seafood projects globally.<sup>190</sup>
173. In February 2009, Mr. Levanidov started providing consultancy services to a newly formed Norwegian fishing company, Batsfjord Fangst AS (**Batsfjord Fangst**). Batsfjord Fangst's goal was to participate in the Norwegian red king crab fishery.<sup>191</sup> Mr.

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<sup>186</sup> *Ibid.*, para. 118.

<sup>187</sup> *Id.*, 11 March 2021, para. 169.

<sup>188</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 8.

<sup>189</sup> *Ibid.*, 11 March 2021, para. 9; Washington State Corporate Registry, Link Maritime, 8 September 2020, **KL-0002**.

<sup>190</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 9.

<sup>191</sup> Norwegian Commercial Registry, Batsfjord Fangst, 6 August 2009, **KL-0003**.

Levanidov supported this company by developing its strategic plan and providing marketing, technical and financial advice to help it launch its operations.<sup>192</sup>

174. In July 2009, Batsfjord Fangst acquired a fishing vessel, Havnefjell (formerly Jørn Hauge)<sup>193</sup>, which started catching red king crab in October 2009.<sup>194</sup>
175. In August 2009, Mr. Levanidov founded Ishavsbruket AS, a company incorporated under the laws of Norway (***Ishavsbruket***)<sup>195</sup> (later to be renamed Seagourmet Norway AS).<sup>196</sup>
176. Ishavsbruket was established to build and operate a factory in the port of Baatsfjord that would be equipped to process and transform the red king crab harvests supplied by Batsfjord Fangst. The idea to build an onshore factory came from the need to expand processing capacity in the Baatsfjord area, which was then insufficient to receive significant additional supplies of red king crab. This scarcity created challenges for Batsfjord Fangst's vessel Havnefjell and placed a low ceiling on the volume of red king crabs that could be landed in Baatsfjord.<sup>197</sup>
177. In February 2010, Ishavsbruket purchased a property located in the port of Baatsfjord at Havnegata 18, 9990 Baatsfjord, Norway, to host its factory.<sup>198</sup> Renovation and refitting works started in March 2010 based on plans which had been prepared at Mr. Levanidov's request in June 2009.<sup>199</sup>
178. Ishavsbruket purchased and installed high performance crab storage and processing equipment, for which it spent over [REDACTED].<sup>200</sup> Mr. Levanidov personally planned

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<sup>192</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 10.

<sup>193</sup> Technical specification for Havnefjell, 25 October 2008, **KL-0004**; Certificate of nationality for Havnefjell, 8 September 2009, **KL-0005**.

<sup>194</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 11.

<sup>195</sup> Norwegian Commercial Registry, Ishavsbruket, 23 September 2009, **KL-0003**.

<sup>196</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 12.

<sup>197</sup> *Ibid.*, paras. 13-14.

<sup>198</sup> Letter from Hegg & Co Advokatfirma regarding transfer of property at Havnegata 18 (GNR. 1 BNR.8), with attached deed, 17 February 2010, **KL-0007**; Photographs of Ishavsbruket's premises before renovation works, February 2010, **KL-0008**.

<sup>199</sup> Plans for a crab processing factory, 30 June 2009, **KL-0009**.

<sup>200</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 16; Table regarding purchase of equipment for the factory since 2010, **KL-0010**; Marel Food Systems Proposal, 23 February 2010, **KL-0011**.

every detail of the factory's operations, from the choice of each piece of equipment to the factory's layout and workflows.<sup>201</sup>

179. In May 2010, Mr. Levanidov had a meeting with his cousin Peteris Pildegovics in Oslo during which they discussed Mr. Levanidov's business projects in Norway. Mr. Levanidov's plan was to set up an integrated crab fishing, processing and trading enterprise. The two cousins continued their exchange over email, where Mr. Levanidov further explained his business project.<sup>202</sup>
180. Meanwhile, Ishavsbruket continued to make investments at its Baatsfjord factory. In September 2010, it purchased a second property adjoining the first at Havnegata 16, 9990 Baatsfjord along with residential properties to host employees.<sup>203</sup> This adjoining property was partly rebuilt and joined with Ishavsbruket's property at Havnegata 18, the whole forming a seafood processing factory of approximately 8,300 square meters.<sup>204</sup>
181. Mr. Levanidov's original project revolved around red king crab, which was the species targeted by his consulting client Batsfjord Fangst. Ishavsbruket's factory investments had been made to create capacity to process this particular species.<sup>205</sup> However, red king crab proved less attractive than hoped from a commercial standpoint and the project was not initially successful.<sup>206</sup>
182. In 2010, Mr. Levanidov became aware that a number of fishing vessels had reported bycatches of another large crustacean, snow crab. Batsfjord Fangst's vessel Havnefjell had itself caught small volumes of snow crab as by-catch. While the catches were at first modest, the scientific community was united in its opinion that the stock of snow crab would eventually grow to a commercial scale. For Mr. Levanidov, this raised the prospect that snow crab could eventually replace red king crab as part of his business projects.<sup>207</sup>

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<sup>201</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 16.

<sup>202</sup> *Ibid.*, para. 17; Email from K. Levanidov to P. Pildegovics, 14 May 2010 11:30 PM, **PP-0009**; Email from K. Levanidov to P. Pildegovics, 14 May 2010 8:43 PM, **PP-0008**; Email from K. Levanidov to P. Pildegovics, 3 June 2010, **PP-0010**.

<sup>203</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 18.

<sup>204</sup> *Ibid.*, para. 18.

<sup>205</sup> *Id.*, para. 19.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

183. In 2012 and 2013, Norwegian vessel Arctic Wolf and Spanish vessel Adexe Primero reported snow crab catches.<sup>208</sup> The size of these catches made it clear that snow crabs were now present in sufficient numbers to support the development of a very large fishery.<sup>209</sup>
184. As awareness of the arrival of snow crabs in the Barents Sea started growing, the media reported that the snow crab population could be significant, possibly ten times greater than the population of king crabs.<sup>210</sup> Industry analysts commented that snow crabs could become a “*billion-dollar industry*”, with the potential to fish “*somewhere between 50- and 150,000 tonnes*” per year creating a fishery that could eventually challenge cod as Norway’s largest.<sup>211</sup>
185. In 2013, to be ready to take advantage of this exceptional opportunity, Mr. Levanidov decided to re-launch the works at Ishavsbruket’s factory to make it suitable to receive and process large volumes of snow crab. At the same time, his team started researching available options to bring supplies of snow crabs to the factory.<sup>212</sup>
186. In May 2013, the Norwegian Directorate of Fisheries advised Ishavsbruket that:<sup>213</sup>
- catching of snow crab is unregulated. Norwegian fishing vessels (i.e. vessels entered in the Norwegian Register of Fishing Vessels (Merkeregisteret) can fish for this species in the NOS/Svalbard zone [or Norwegian Economic Zone]. If Norwegian vessels are to catch snow crab in international waters, they must be registered for fishing in the NEAFC area.*
187. In June 2013, the Directorate sent an email to Ishavsbruket to which it appended the “*regulations for registration and reporting when fishing in waters outside any state’s fisheries jurisdiction*” which were applicable to snow crab fishing in the NEAFC area.<sup>214</sup>

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<sup>208</sup> *Id.*, para. 20; Email exchanges between Seagourmet (A. Kazakov) and Norges Rafisklag (G. Johnsen) regarding snow crab landings, 21 January – 2 February 2021, **KL-0013**.

<sup>209</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 20.

<sup>210</sup> E. Lieungh, “*Ten times more snow crab than king crab*”, NRK, 29 April 2013, **KL-0014**; T. Emberland, “*The snow crab is new in Norwegian waters: Has doubled in value in one year*,” iFinnmark, 12 January 2016, **PP-0152**, p. 3.

<sup>211</sup> A. Fendstad, “*This could become a billion-dollar industry within ten years*,” Fiskeribladet, 4 May 2015, **KL-0015**.

<sup>212</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 22.

<sup>213</sup> *Ibid.*, para. 23; Email exchange between the Norwegian Directorate of Fisheries, K. Levanidov and S. Ankipov, 9-21 May 2013, **KL-0016**.

<sup>214</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 24; 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.



188. In the same email, the Directorate explained that “*vessels that are to fish in waters outside any state’s jurisdiction must be registered through notification to the Directorate of Fisheries*” and that “*the registration notification will be processed and information about the vessel will be sent to the NEAFC Secretariat in London*”. The “*processing of registration notifications*” would “*normally take 2-3 days*”, indicating that registration was a mere formality.<sup>215</sup>
189. On 5 July 2013, Batsfjord Fangst applied to register Havnefjell for snow crab fishing in the NEAFC area. On 18 July 2013, the Directorate acknowledged receipt of its registration notification and indicated that “*we have registered the vessel for fishing for snow crab in international waters, the NEAFC area*”, an area falling “*outside any state’s fishing jurisdiction*”. The vessel would be required to comply “*with the regulations that apply specifically to fishing in the NEAFC area*”.<sup>216</sup> Havnefjell’s registration was renewed on the same basis in July 2014.<sup>217</sup>
190. In 2013, Havnefjell caught 1.4 tonnes of snow crab, a small volume which increased slightly in 2014 to 4.6 tonnes.<sup>218</sup> These modest catches were a disappointment and meant that Batsfjord Fangst would likely not be able to supply the large volumes of snow crab Ishavsbruket was hoping to process. Mr. Levanidov’s team therefore kept looking for alternative options to supply Ishavsbruket with snow crabs, including the possibility of relying on EU fishing companies for this purpose.<sup>219</sup>
191. In September 2013, the European Commission confirmed that vessels flying EU flags could catch snow crabs in the NEAFC area following a simple notification process.<sup>220</sup>
192. In February 2014, the Norwegian Food Safety Authority (*Mattilsynet*) informed Ishavsbruket that “*EU-registered fishing boats can deliver crab freely in Norwegian crab*

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<sup>215</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 25; Email from the Norwegian Directorate of Fisheries (H.M. Jensen) to S. Ankipov, 12 June 2013, **KL-0017**.

<sup>216</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 26; **C-0087**.

<sup>217</sup> *Ibid.*, para. 26; **C-0088**.

<sup>218</sup> Email exchanges between Seagourmet (A. Kazakov) and Norges Rafisklag (G. Johnsen) regarding snow crab landings, 21 January – 2 February 2021, **KL-0013**.

<sup>219</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 27; Letter from Norwegian Directorate of Fisheries, 21 July 2014, **C-0088**.

<sup>220</sup> Email of Latvian Ministry of Agriculture (Janis Laguns) to the European Union/DG MARE (Michele Surace), 19 August 2013, **C-0089**; Email of European Union/DG MARE (Pernille Skov-Jensen) to Latvian Ministry of Agriculture (Janis Laguns), 30 September 2013, **C-0090**.

reception points. If the catch is quota-regulated (king crab, for example), the boats must possess a quota”.<sup>221</sup>

193. This note from the Norwegian Food Safety Authority confirmed what Mr. Levanidov had already noticed in the market, namely that vessels flying EU flags could deliver snow crab to Norwegian ports without facing any legal difficulty. Snow crab was not quota-regulated, and ships delivering snow crab to Norway therefore did not need to possess a quota.<sup>222</sup>
194. In July 2014, Ishavsbruket sought further information from the Norwegian Directorate of Fisheries regarding the framework applicable to “*EU vessels that will fish snow crabs in the NEAFC area*”.<sup>223</sup> In an email exchange entitled “*Landing a snow crab*”, Ishavsbruket’s project coordinator, Mr. Sergei Ankipov, explained to the Directorate that he was seeking information in relation to “*a project where a fishing vessel under the EU flag will land live snow crabs at approved Norwegian reception stations (factories).*” He asked the Directorate to “*describe or present the process regarding the documents to be sent to the Directorate of Fisheries in this case*”.<sup>224</sup>
195. On 25 July 2014, the Norwegian Directorate of Fisheries provided the following reply:<sup>225</sup>

1. In principle, EU vessels can land fish, including snow crab to Norway on an equal footing with Norwegian fishing vessels. There are therefore no other rules for EU vessels when it comes to fresh and live goods. All registered buyers in Finnmark have a good overview of the conditions for landing.

2. In principle, no special documentation shall be submitted to the fisheries authorities when the crab is to be landed alive at a Norwegian reception centre, and the crab has been caught outside the Norwegian Economic Zone.

3. The catch shall be landed to the buyer who is registered with the Directorate of Fisheries Register of Buyers. Regulations on the duty to provide information:

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<sup>221</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 28; Email exchange between Mattilsynet and S. Ankipov, 3-5 February 2014. **KL-0019**.

<sup>222</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 29.

<sup>223</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 30.

<sup>224</sup> *Ibid.*, para. 30; Email exchange between the Norwegian Directorate of Fisheries and S. Ankipov, 20-25 July 2014, **KL-0020**.

<sup>225</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 31; Email exchange between the Norwegian Directorate of Fisheries and S. Ankipov, 20-25 July 2014, **KL-0020** [emphasis added].

*<http://www.fiskeridir.no/fiske-og-fangst/j-meldinger/gjeldende-j-meldinger/j-45-2014> determines the procedures for landing.*

*4. If the vessel is to deliver frozen products, this must be reported 24 hours in advance in accordance with regulations on fishing by foreigners <http://www.fiskeridir.no/fiske-og-fangst/j-meldinger/gjeldende-j-meldinger/j-38-2014>. Vessels that are to fish in the Norwegian Economic Zone are also subject to reporting according to the same regulations. As the activity is described, it does not fall under these regulations.*

*According to the Norwegian Food Safety Authority, it should also be okay to land live crabs at Norwegian reception centres.*

196. The statement from the Norwegian Directorate of Fisheries that EU vessels were being treated “*on an equal footing with Norwegian fishing vessels*” confirmed Ishavsbruket’s understanding that it could legally rely on an EU-based fishing company for its supplies of snow crabs, provided that the crabs were caught “*outside the Norwegian Economic Zone*”. Since the Loophole area of the NEAFC zone was considered by the Directorate as “*international waters*” falling “*outside any state’s fisheries jurisdiction*”<sup>226</sup>, EU-registered vessels could catch snow crabs there in full compliance with Norwegian laws and regulations.<sup>227</sup>
197. Ishavsbruket’s various inquiries with the Norwegian authorities clearly highlighted that the company was looking to supply its factory with snow crabs caught by EU vessels. As part of these exchanges, Norwegian officials expressed no concerns or doubts about the legality of such fishing activities by EU vessels, or about the right of such vessels to catch snow crabs in the NEAFC zone.<sup>228</sup>
198. Against this backdrop, in or around June 2013, Mr. Levanidov resumed his conversation with his cousin Mr. Pildegovics and informed him that his project now focussed on seizing the snow crab opportunity.<sup>229</sup>
199. Due to the demands associated with building and running Ishavsbruket’s factory, Mr. Levanidov was hoping to find a trustworthy partner who would be willing to work on the fishery side of the project. While Mr. Pildegovics had no prior formal experience in the fishing industry, his family had worked in fisheries and marine biology research for two

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<sup>226</sup> Email exchange between the Norwegian Directorate of Fisheries, K. Levanidov and S. Ankipov, 9-21 May 2013, **KL-0016; C-0087; C-0088**.

<sup>227</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 32.

<sup>228</sup> *Ibid.*, para. 33.

<sup>229</sup> *Id.*, para. 34.

generations, giving him a good general understanding of the field. Mr. Levanidov also considered that Mr. Pildegovics' background in senior banking roles, contacts in Latvia and experience with early-stage companies made him a strong candidate who would be able to quickly learn the ropes of the fishing trade and possibly be interested in building a fishing enterprise from Latvia. Finally, Mr. Pildegovics and Mr. Levanidov are cousins and personally close to each other, which meant that a high level of trust already existed between them.<sup>230</sup>

200. In mid-to-late 2013, Mr. Levanidov and Mr. Pildegovics had several exchanges regarding the possible launch of a joint venture between them.<sup>231</sup> As part of this joint venture, Mr. Pildegovics would launch a new fishing company that would bring snow crab supplies to Ishavsbruket's Baatsfjord factory.<sup>232</sup>
201. Mr. Pildegovics conducted research in Latvia to learn about the regulatory and licensing requirements to build a fishing company based on Mr. Levanidov's plan. For this purpose, he built a network of contacts within the Latvian Ministry of Agriculture; sought financing for the acquisition of fishing vessels; and researched the market for such vessels as well as the regulatory requirements for their operation under the Latvian flag.<sup>233</sup>
202. In late 2013, Mr. Pildegovics and Mr. Levanidov started discussing the possibility of setting up a joint venture for their common operation of an integrated snow crab fishing and processing enterprise based in Baatsfjord. As part of this joint venture, Mr. Pildegovics would be responsible for building a fishing company to deliver supplies of snow crab, while Mr. Levanidov would build capacity to process these supplies in Baatsfjord. Mr. Levanidov would also leverage his contacts in the international seafood

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<sup>230</sup> *Id.*, para. 35.

<sup>231</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 26; Witness Statement of Kirill Levanidov, 11 March 2021, para. 36; Email from K. Levanidov to P. Pildegovics, 4 June 2013, **PP-0011**; Email exchange between P. Pildegovics and K. Levanidov, 8 July 2013 – 2 August 2013, **PP-0012**; Email exchange between P. Pildegovics and K. Levanidov, 30 September 2013 – 1 November 2013, **PP-0013**; Email exchange between P. Pildegovics and K. Levanidov, 21-23 December 2013, **PP-0014**; Email exchange between P. Pildegovics and K. Levanidov, 10-11 January 2014, **PP-0015**; Email exchange between P. Pildegovics and K. Levanidov, 17-20 January 2014, **PP-0016**; Email exchange between P. Pildegovics and K. Levanidov, 20 January 2014, **PP-0017**; Email exchange between P. Pildegovics and K. Levanidov, 22-23 January 2014, **PP-0018**; Email exchange between P. Pildegovics and K. Levanidov, 12 February 2014, **PP-0019**; Email exchange between P. Pildegovics and K. Levanidov, 19-21 February 2014, **PP-0020**; Email exchange between P. Pildegovics and K. Levanidov, 24-25 February 2014, **PP-0021**.

<sup>232</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 36; Witness Statement of Peteris Pildegovics, 11 March 2021, para. 30.

<sup>233</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 27; Witness Statement of Kirill Levanidov, 11 March 2021, para. 36.

markets to find outlets for the joint venture's snow crab products and help arrange financing for the project.<sup>234</sup>

203. In late 2013, Mr. Pildegovics informed Mr. Levanidov that he was interested in taking part in the project and the cousins arranged a meeting in Riga in January 2014 to seal their agreement.<sup>235</sup>
204. On 29 January 2014, Mr. Pildegovics and Mr. Levanidov agreed to coordinate their business efforts as part of a joint venture spanning the fishing, processing and sale of snow crabs in Norway. Their joint venture agreement, which was concluded through a handshake, marked the launch of Claimants' investments in Norway.

#### **b. Investments by Peteris Pildegovics in the territory of Norway**

205. For Mr. Pildegovics, the conclusion of a joint venture agreement with Mr. Levanidov was an "*essential precondition*" for his other investments at issue in this case, including those made by North Star.<sup>236</sup>
206. Mr. Levanidov also testifies that his Baatsfjord-based snow crab processing enterprise could not have succeeded without a strategic fishing partner (North Star), and that he would not have made the substantial investments in factory capacity required by this enterprise in the absence of a such joint venture.<sup>237</sup>
207. This section therefore begins with a presentation of the joint venture agreement between Mr. Pildegovics and Mr. Levanidov (*Subsection i*) and follows with Mr. Pildegovics' other investments at issue in this case, namely his shareholdings in North Star (*Subsection ii*) and Sea & Coast (*Subsection iii*).

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<sup>234</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 30; Witness Statement of Kirill Levanidov, 11 March 2021, para. 43.

<sup>235</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 29; Witness Statement of Kirill Levanidov, 11 March 2021, para. 37; Meeting schedule, 26-30 January 2014, **PP-0022**; Email exchange between P. Pildegovics and K. Levanidov, 22-23 January 2014, **PP-0018**.

<sup>236</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 43.

<sup>237</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 41.

i) *Joint venture agreement between Peteris Pildegovics and Kirill Levanidov*

208. Mr. Pildegovics first learned about Mr. Levanidov's business projects in Norway during a meeting in Oslo in May 2010.<sup>238</sup> This meeting was followed by an email exchange, in which Mr. Levanidov laid down his vision of a vertically integrated king crab enterprise that would span the full value chain covering fishing, processing and distribution of crab products. This vision would provide the foundation of the joint venture later to come.<sup>239</sup>

*...the main idea is to take the complete production cycle in the same hands, starting from the organization of the business up to the sales of ready products. This is the main competitive advantage in relation to local competitors who, first, only deal with one element of the complete cycle, i.e. the ones fishing have no idea about processing, consequently 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 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 or do not follow the quality requirements; the ones dealing with sales are forced to offer what is available to the market and not what is demanded by the market, and second, they just do not have sufficient experience, know-how and possibilities to fully use the potential of this business in Norway (vessels are small, their equipment is not professional, factories are primitive, there are no deep processing possibilities, etc.).*

209. The joint venture agreement between Mr. Pildegovics and Mr. Levanidov was concluded with a handshake during a meeting between the two cousins which took place in Riga on 29 January 2014.<sup>240</sup> While no written agreement was drawn to formalize this agreement, its existence is acknowledged by Mr. Pildegovics and Mr. Levanidov, both of whom recognize that the agreement generates legal rights and obligations between them.<sup>241</sup> They also agree on the contents of the agreement and its effects.<sup>242</sup>

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<sup>238</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 16; Witness Statement of Kirill Levanidov, 11 March 2021, para. 17.

<sup>239</sup> Email from K. Levanidov to P. Pildegovics, 14 May 2010 11:30 PM, **PP-0009**.

<sup>240</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 31; Witness Statement of Kirill Levanidov, 11 March 2021, para. 38.

<sup>241</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 14; Witness Statement of Kirill Levanidov, 11 March 2021, para. 39.

<sup>242</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 15; Witness Statement of Kirill Levanidov, 11 March 2021, para. 6.

210. The joint venture agreement between Mr. Pildegovics and Mr. Levanidov established an integrated snow crab fishing, processing and distribution enterprise based in, and operating from, Baatsfjord, Norway. Pursuant to this agreement, the two cousins undertook to operate their respective investments in a coordinated and collaborative manner, for the common benefit of their joint enterprise.<sup>243</sup>

211. The joint venture pursued a strategic goal: to achieve a seamless integration between Mr. Pildegovics' fishing enterprise and Mr. Levanidov's processing operations. This integration offered important competitive advantages to both parties to the joint venture.

212. [REDACTED]

213. [REDACTED]

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<sup>243</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 34; Witness Statement of Kirill Levanidov, 11 March 2021, para. 41.

<sup>244</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 36; Witness Statement of Kirill Levanidov, 11 March 2021, para. 56.

<sup>245</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 37.





operated within the framework of the joint venture in 2015 and 2016; acquired the shares to a Norwegian company, Sea & Coast, in October 2015 and operated this company as a service provider to North Star's snow crab fishing activities; and caused North Star to deliver large volumes of snow crab to Seagourmet and other companies related to Mr. Levanidov in 2015 and 2016.<sup>249</sup>

- (b) On the other hand, Mr. Levanidov invested substantial sums to build a state-of-the-art snow crab processing facility in Baatsfjord through Seagourmet; caused Seagourmet to purchase the vast majority of North Star's snow crab supplies in 2015 and 2016; helped arrange financing for both Seagourmet and North Star; and found end-market purchasers for snow crab products with which both Seagourmet and North Star entered into supply agreements.<sup>250</sup>

216. A key goal of the joint venture was to establish North Star as the exclusive supplier of snow crabs to Seagourmet and other seafood distributors associated with Mr. Levanidov.<sup>251</sup> From the start of North Star's operations until Norway brought them to a halt, Mr. Pildegovics duly caused North Star to fulfil this role:

- (a) Over [REDACTED] % of North Star's 2015 sales of snow crab were made to Seagourmet and to [REDACTED], a company involved in seafood distribution in which Mr. Levanidov owned shares.<sup>252</sup> These sales occurred at the port of Baatsfjord. North Star's remaining sales were made to three Norwegian seafood companies ([REDACTED] [REDACTED] at the ports of Baatsfjord and Vardo, Norway) at times when Seagourmet was unable to receive North Star's catches due to ongoing renovation and refitting works.<sup>253</sup>
- (b) Over [REDACTED] % of North Star's 2016 sales were made to Seagourmet and [REDACTED] [REDACTED] in Baatsfjord. The balance of sales was made to [REDACTED]

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<sup>249</sup> *Ibid.*, paras. 42, 57; Witness Statement of Kirill Levanidov, 11 March 2021, para. 48.

<sup>250</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 114; Witness Statement of Kirill Levanidov, 11 March 2021, para. 48.

<sup>251</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 192; Witness Statement of Kirill Levanidov, 11 March 2021, para. 60.

<sup>252</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 48; [REDACTED]

KL-0024

<sup>253</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 245; Witness Statement of Kirill Levanidov, 11 March 2021, para. 46; North Star sales invoices, 2015, **PP-0219**; Rafisklaget Sales Notes for Saldus, 2015, **C-0159**; Rafisklaget Sales Notes for Solvita, 2015, **PP-0161**; Rafisklaget Sales Notes for Solveiga, 2015, **PP-0163**; Rafisklaget Landing Notes for Senator, 2015, **PP-0165**.

██████████ in Vardo, when Seagourmet was again undergoing renovations. A sample sale for a very small amount of snow crab was also made to a Polish company, ██████████ at the port of Baatsfjord.<sup>254</sup>

217. For his part, through Seagourmet, Mr. Levanidov made substantial investments to transform the company's Baatsfjord property into a state-of-the-art snow crab processing factory.<sup>255</sup> Seagourmet invested over ██████████ to increase its factory's processing capabilities through the purchase and installation of high-performance equipment specifically designed for snow crab processing and transformation.<sup>256</sup>
218. Thanks to these investments, Seagourmet built the capacity to process ██████████ tonnes of live crab annually, and to store and sell a further ██████████ tonnes of live or chilled crab, for a total annual absorption capacity of ██████████ tonnes of raw snow crab.<sup>257</sup>
219. Mr. Levanidov was also tasked to find markets for the joint venture's snow crab production.<sup>258</sup> In addition to sales made by North Star to Seagourmet and ██████████ ██████████ he helped arrange supplier agreements for North Star with Link Maritime and ██████████, a company based in ██████████ owned and operated by one of Mr. Levanidov's associates.<sup>259</sup>
220. The existence of a joint venture agreement between Mr. Pildegovics and Mr. Levanidov is further evidenced by the closely cooperative and coordinated manner in which the two cousins ran their respective companies and investments.
221. Since January 2014, Mr. Pildegovics and Mr. Levanidov have spoken or otherwise communicated regarding their joint project almost on a daily basis. Over the same period, they have met in person at least forty-nine (49) times to discuss the operations

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<sup>254</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 159; Witness Statement of Kirill Levanidov, 11 March 2021, para. 48; North Star sales invoices, 2016, **PP-0153**; Rafisklaget Sales Notes for Saldus, 2016, **PP-0160**; Rafisklaget Sales Notes for Solvita, 2016, **PP-0162**; Rafisklaget Sales Notes for Solveiga, 2016, **PP-0164**; Rafisklaget Landing Notes for Senator, 2016, **PP-0166**.

<sup>255</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 63.

<sup>256</sup> *Ibid.*, paras. 16, 63; Table regarding purchase of equipment for the factory since 2010, **KL-0010**.

<sup>257</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 63; A. Fenstad, N. Torsvik, "Hope Supreme Court reopens crab production," *Fiskeribladet*, 8 November 2017, **PP-0036**.

<sup>258</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 48.

<sup>259</sup> *Ibid.*

of their joint venture, make decisions and attend events of a strategic or cross-cutting import to their respective companies.<sup>260</sup>

222. From January 2014 onward, Mr. Levanidov and Mr. Pildegovics together made all the strategic decisions concerning North Star, Sea & Coast and Seagourmet within the framework of their joint venture.<sup>261</sup> While Mr. Pildegovics was responsible for the day-to-day operations of North Star and Sea & Coast and Mr. Levanidov for managing Seagourmet, the two cousins consulted with each other before making any decision of importance.<sup>262</sup>
223. The following examples illustrate the close cooperation between Mr. Pildegovics and Mr. Levanidov in the management of their respective investments:
- (a) Mr. Pildegovics was closely involved in the planning and building of Seagourmet's factory in Baatsfjord.<sup>263</sup>
  - (b) Mr. Pildegovics assisted Mr. Levanidov in his efforts to recruit workers for Seagourmet's factory. In total, approximately fifty (50) Latvian workers were hired by Seagourmet and resettled to Baatsfjord.<sup>264</sup> Mr. Pildegovics was also involved in the management of Seagourmet's factory in Baatsfjord.<sup>265</sup>
  - (c) Mr. Pildegovics played an active role in the marketing of Seagourmet's products, representing the company under the title of marketing manager.<sup>266</sup>

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<sup>260</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 125; Witness Statement of Kirill Levanidov, 11 March 2021, para. 51.

<sup>261</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 34; Witness Statement of Kirill Levanidov, 11 March 2021, para. 42.

<sup>262</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 127; Witness Statement of Kirill Levanidov, 11 March 2021, para. 49.

<sup>263</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 35.

<sup>264</sup> *Ibid.*, para. 128; Seagourmet work advertisements, March – October 2015, **PP-0137**.

<sup>265</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 129; Photograph showing P. Pildegovics giving instructions to Seagourmet staff, 8 January 2016, **PP-0138**; Email from P. Pildegovics to K. Levanidov, 2 February 2015, **PP-0136**.

<sup>266</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 129; Email exchange between P. Pildegovics and A. Laville, 29 April 2015, **PP-0023**; "Seagourmet is introducing queen crab to European markets," Eurofish Magazine, June 2015, **PP-0057**, p. 28.

- (d) Mr. Levanidov was consulted on all the decisions made with respect to the purchase and operation of North Star's fleet of fishing vessels.<sup>267</sup>
  - (e) Mr. Pildegovics has been a member of Seagourmet's board since 2017, while Mr. Levanidov has sat on North Star's board since December 2020.<sup>268</sup>
224. Employees of North Star, Seagourmet and Sea & Coast worked together in the same office throughout these years, previously located at Strandvegen 14 and Strandvegen 17 and finally at Havnegata 16-18, Baatsfjord. This office was owned by Seagourmet and partially leased to North Star and Sea & Coast.<sup>269</sup> Mr. Pildegovics had an office at Seagourmet.<sup>270</sup> North Star and Sea & Coast also rented accommodation in Baatsfjord for some of their staff from Seagourmet.<sup>271</sup>
225. Some of these employees had roles with various companies involved in the joint venture. Between June 2014 and September 2015, Mr. Sergei Ankipov acted both as Director of Sea & Coast and Project Coordinator for Seagourmet. Employees of North Star (Olegs Kravcenko) and Seagourmet (Sergei Kruglov, Nikita Sinianskii and Sergei Ankipov) were also issued powers of attorney authorizing them to represent Sea & Coast and to act on its behalf.<sup>272</sup>

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<sup>267</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 35; Witness Statement of Kirill Levanidov, 11 March 2021, para. 42; Email from K. Levanidov to P. Pildegovics, 4 June 2013, **PP-0011**; Email exchange between P. Pildegovics and K. Levanidov, 30 September 2013 – 1 November 2013, **PP-0013**; Email exchange between P. Pildegovics and K. Levanidov, 21-23 December 2013, **PP-0014**; Email exchange between P. Pildegovics and K. Levanidov, 10-11 January 2014, **PP-0015**; Email exchange between P. Pildegovics and K. Levanidov, 17-20 January 2014, **PP-0016**; Email exchange between P. Pildegovics and K. Levanidov, 20 January 2014, **PP-0017**; Email exchange between P. Pildegovics and K. Levanidov, 20-23 January 2014, **PP-0018**; Email exchange between P. Pildegovics and K. Levanidov, 12 February 2014, **PP-0019**; Email exchange between P. Pildegovics and K. Levanidov, 19-21 February 2014, **PP-0020**; Email exchange between P. Pildegovics and K. Levanidov, 24-25 February 2014, **PP-0021**.

<sup>268</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 52, 132; Witness Statement of Kirill Levanidov, 11 March 2021, para. 52; General meeting resolution of Seagourmet's shareholders, 17 September 2017, **PP-0141**; North Star's Articles of Incorporation, 8 December 2020, **PP-0038**; Statement from the Latvian Register of Enterprises, 22 December 2020, **PP-0039**.

<sup>269</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 131; Witness Statement of Kirill Levanidov, 11 March 2021, para. 57; Sample invoice from Seagourmet to Sea & Coast for rental of office space and accommodation, 5 July 2016, **PP-0140**.

<sup>270</sup> Photograph of Peteris working at his desk at Seagourmet, undated, **PP-0034**.

<sup>271</sup> Sample invoice from Seagourmet to Sea & Coast for rental of office space and accommodation, 5 July 2016, **PP-0033**.

<sup>272</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 130; Sea & Coast Powers of Attorney, 2015-2018, **PP-0139**.

226. Mr. Levanidov supported Mr. Pildegovics and North Star in their efforts to obtain financing for their investments.<sup>273</sup> North Star funded most of its asset purchases through loans or other credit facilities obtained from four companies: [REDACTED].<sup>274</sup> As a shareholder of Link Maritime and [REDACTED], Mr. Levanidov was instrumental in helping obtain loans for North Star from these companies. Mr. Levanidov also introduced Mr. Pildegovics to North Star's other lenders and assisted in arranging debt financing with them.<sup>275</sup> In 2018, as North Star had stopped generating the cash flows necessary to enable it to service its loans, [REDACTED], agreed to purchase North Star's outstanding loans from its creditors [REDACTED].
227. The close relationship between North Star and Seagourmet was publicly acknowledged by both companies. It was formally noted in North Star's 2018 Annual Report, which refers to Seagourmet as North Star's "*cooperation partner in Norway*".<sup>278</sup> Seagourmet's website and marketing materials have identified North Star as Seagourmet's "*major partner*" supplying live crabs to its factory since at least 2015.<sup>279</sup>

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<sup>273</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 122; Witness Statement of Kirill Levanidov, 11 March 2021, para. 43.

<sup>274</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 120; Contract of Loan For Vessel Purchase between SIA North Star and [REDACTED], 14 April 2014, **PP-0118**; Contract of Loan For Vessel Purchase between SIA North Star and [REDACTED], 25 June 2014, **PP-0119**; Contract of Loan For Vessel Purchase between SIA North Star and [REDACTED], 19 November 2014, **PP-0120**; Contract of Loan For Vessel Purchase between SIA North Star and [REDACTED], 5 December 2014, **PP-0121**; Contract of Loan For Vessel Purchase between SIA North Star and [REDACTED], 19 December 2014, **PP-0122**; Contract of Loan For Vessel Purchase between SIA North Star and [REDACTED], 20 December 2014, **PP-0123**; Contract of Loan For Vessel Purchase between SIA North Star and [REDACTED], 23 January 2015, **PP-0124**; Contract of Loan For Vessel Purchase between SIA North Star and [REDACTED], 28 February 2015, **PP-0125**; Contract of Loan For Vessel Purchase between SIA North Star and [REDACTED], March-April 2015, **PP-0126**; Contract of Loan For Vessel Purchase between SIA North Star and [REDACTED], 10 August 2014, **PP-0127**; Contract of Loan For Vessel Purchase between SIA North Star and [REDACTED], 19 November 2014, **PP-0128**; Contract of Loan For Vessel Purchase between SIA North Star and [REDACTED], 07 July 2017, **PP-0129**; Contract of Loan For Vessel Purchase between SIA North Star and [REDACTED], 15 February 2015, **PP-0130**; Contract of Loan For Vessel Purchase between SIA North Star and [REDACTED], 01 June 2016, **PP-0131**.

<sup>275</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 122; Witness Statement of Kirill Levanidov, 11 March 2021, para. 43.

<sup>276</sup> Debt transfer notices from [REDACTED] Ltd. to North Star, 23-24 May 2018, **PP-0132**; Agreement between North Star and [REDACTED] regarding debt transfers, 24 May 2018, **PP-0133**.

<sup>277</sup> Debt transfer notices from [REDACTED] to North Star, 22-24 May 2018, **PP-0134**; Agreement between North Star and [REDACTED] regarding debt transfers, 24 May 2018, **PP-0135**.

<sup>278</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 134; SIA North Star's Annual Report 2018, **PP-0124**, p. 4.

<sup>279</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 135; Witness Statement of Kirill Levanidov, 11 March 2021, para. 53; **C-0079**; **C-0052**.

228. The relationship between North Star and Seagourmet within the framework of Mr. Pildegovics' joint venture with Mr. Levanidov was also well known to the international seafood community, the general public, and Latvian and Norwegian authorities.<sup>280</sup>
229. In May 2015, Seagourmet announced that it would hold an opening event at its Baatsfjord factory on 10 June 2015.<sup>281</sup> A press release was issued by Seagourmet indicating that "*our major partner that supplies live crab to our factory is a Latvian company – SIA North Star Ltd – that operates four tailor-made crab boats...*".<sup>282</sup> The opening announcement was sent to Mr Frank Bakke-Jensen, a member of the Norwegian Parliament; Mr Geir Knutsen, the mayor of Baatsfjord; and Mr. Indulus Abelis, the Ambassador of Latvia to Norway, among several other dignitaries.<sup>283</sup>
230. On 27 May 2015, Mr. Pildegovics wrote to Ambassador Abelis to invite him to Seagourmet's opening ceremony. Mr. Pildegovics noted that "*we – SIA NORTH STAR LTD. – are strategic partners of the mentioned company*" (referring to Seagourmet) and that North Star's fleet of vessels provided raw materials and live snow crabs to Seagourmet's factory.<sup>284</sup> In a subsequent email exchange, Mr. Pildegovics informed the Ambassador that the Seagourmet factory, which was in North Star's "*group*", then employed approximately twelve Latvian nationals.<sup>285</sup>
231. On 10 June 2015, the ceremony was held at Seagourmet's facility to celebrate the launch of Mr. Pildegovics' and Mr. Levanidov's joint project. In Mr. Levanidov's absence, Mr. Pildegovics hosted the ceremony with Mr. Pavel Kruglov, Seagourmet's general manager. Guests who attended this ceremony included Ambassador Abelis, Mayor Knutsen and several representatives of the local business community.<sup>286</sup> At the ceremony, Mr. Abelis gave a speech highlighting the fact that North Star, a Latvian company, was a key business partner in the project. All attendees were informed that

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<sup>280</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 133.

<sup>281</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 136; News release entitled "*Seagourmet Norway cuts the ribbon*," 26 May 2015, **PP-0142**; Announcement entitled "*Grand opening!*," 2015, **PP-0143**.

<sup>282</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 136; Press release entitled "*Seagourmet Norway cuts the ribbon*," 26 May 2015, **PP-0142**.

<sup>283</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 136

<sup>284</sup> *Ibid.*, para. 137; Email exchange between P. Pildegovics and I. Abelis, 27 May – 5 June 2015, **PP-0144**.

<sup>285</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 137; Email exchange between P. Pildegovics and I. Abelis, 27 May – 5 June 2015, **PP-0144**.

<sup>286</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 138; **C-0052**; Photographs taken at the opening ceremony, 10 June 2015, **PP-0145**; T.K. Kristoffersen, "*Opened crab factory in Batsfjord*," Nord24, 12 June 2015, **PP-0146**.

Seagourmet and North Star were part of a joint Latvian-Norwegian project, North Star being responsible for bringing snow crab supplies ashore and Seagourmet for processing and marketing them. Throughout the event, North Star's vessel Saldus was docked at Seagourmet's pier and provided the background to many of the pictures that were taken.<sup>287</sup>

232. In September and October 2015, Seagourmet hosted visits by Ms. Elizabeth Aspaker, Norway's Minister of Fisheries; a Norwegian Parliamentary delegation headed by Mr. Frank Bakke-Jensen; and a delegation of Norway's Ministry of Trade, Industry and Fisheries.<sup>288</sup> On each occasion, Norway's officials were informed of North Star's strategic relationship with Seagourmet.<sup>289</sup>
233. Norway's awareness of this relationship is further demonstrated by a statement made by Mr. Per Sandberg, Norway's Minister of Fisheries, in January 2017, in which he acknowledged that *"the factory of Seagourmet AS in Baatsfjord was opened in June 2015, and from then on the operation was based on raw materials almost exclusively delivered by boats from the Latvian shipping company North Star."*<sup>290</sup>
234. In his witness statement, former Mayor Knutsen testifies that Mr. Pildegovics and Mr. Levanidov *"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 crabs from the Latvian company North Star; it was those vessels exactly that delivered the snow crabs here in Baatsfjord. Levanidov and Pildegovics appeared as part of the same project: the one depended on the other"*.<sup>291</sup>
235. Since 2015, Mr. Pildegovics and Mr. Levanidov have attended trade fairs and industry events together, where they presented themselves as being part of a joint venture involving Seagourmet and North Star:

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<sup>287</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 138; Photographs taken at the opening ceremony, 10 June 2015, **PP-0145**.

<sup>288</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 139.

<sup>289</sup> *Ibid.*

<sup>290</sup> Written question and answer between Helga Pedersen, Member of Parliament, and Per Sandberg, Minister of Fisheries, 9 January 2017, **PP-0046**.

<sup>291</sup> Witness Statement of Geir Knutsen, para. 3.

- (a) At the Global Seafood Forum held in Brussels in April 2015, Seagourmet and North Star shared a co-branded kiosk, which featured a dining booth in the shape of a boat bearing the inscription “*Solvita – SIA North Star Ltd*”.<sup>292</sup> Mr. Pildegovics attended this kiosk together with Mr. Levanidov, where they met various clients and business contacts from the seafood community.<sup>293</sup>
  - (b) North Star and Seagourmet were also represented together at the Seafood Expo Asia trade fair in Hong Kong in September 2015, where the two companies shared a stand. Behind that stand was a sign with the Seagourmet logo placed next to the drawing of a ship named “*Solveiga*”, referring to North Star’s ship bearing the same name.<sup>294</sup>
  - (c) In April 2016, Mr. Pildegovics and Mr. Levanidov returned to the Global Seafood Forum in Brussels, where the boat-shaped dining booth bearing the inscription “*Solvita – SIA North Star Ltd*” was again featured. They both wore badges identifying them as “*Partner – Seagourmet Norway AS*”.<sup>295</sup>
236. Several Norwegian and European media reported on the close strategic relationship existing between North Star and Seagourmet.<sup>296</sup>
- (a) In June 2015, Fiskeribladet Fiskaren, a specialized Norwegian publication on fisheries, reported on the official launch of Seagourmet’s facility in Baatsfjord. The article noted that Seagourmet’s “*main supplier is the Latvian firm SIA North Star AS, which operates four customized crab boats that deliver live crab to Seagourmet’s factory*”.<sup>297</sup> In another article, the same publication identified North Star as Seagourmet’s “*partner*”.<sup>298</sup>

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<sup>292</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 141; Witness Statement of Kirill Levanidov, 11 March 2021, para. 54; Photographs taken at the Brussels fair, April 2015, **PP-0058**.

<sup>293</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 141; Witness Statement of Kirill Levanidov, 11 March 2021, para. 54; Photographs taken at the Brussels fair, April 2015, **PP-0058**.

<sup>294</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 142; Witness Statement of Kirill Levanidov, 11 March 2021, para. 54; Photograph taken at the Hong Kong fair, September 2015, **PP-0147**.

<sup>295</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 143; Witness Statement of Kirill Levanidov, 11 March 2021, para. 54; Photographs taken at the Brussels fair, April 2016, **PP-0148**; T.M. Martinussen, “*80 Norwegian exhibitors at the Brussels fair*,” Fiskeribladet Fiskaren, 25 April 2016, **PP-0149**.

<sup>296</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 144.

<sup>297</sup> **C-0082**.

<sup>298</sup> J. J. M. Hagen, “*Seagourmet will introduce more crabs on the world market*,” Fiskeribladet Fiskaren, 10 June 2015, **PP-0150**.



- (b) Another Norwegian news outlet, Nord 24, also reported on the opening ceremony and noted that Ambassador Abelis had attended it *“because the raw material for the factory in Baatsfjord is mainly supplied by the Latvian company SIA North Star, which owns and operates the crab boats that deliver crabs”*.<sup>299</sup>
  
- (c) In June 2015, Eurofish magazine published an article describing the joint venture. The article stated that *“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.”*<sup>300</sup> Referring to Seagourmet, the article noted that *“the company has harvested 40-60 tonnes per week using pots on the seabed”*. While this statement was factually incorrect (as it should have referred to North Star as the fishing company instead of Seagourmet), it illustrates how North Star and Seagourmet were perceived as being part of a single business project.
  
- (d) In November 2015, Kyst og Fjord, a specialized Norwegian publication on fisheries, published an article on the launch of Seagourmet.<sup>301</sup> The article noted that *“the company has an agreement with three vessels from Latvia SIA North Star which ensures weekly deliveries of snow crab”*. The same article featured a picture of Solveiga harboured at Seagourmet’s dock.
  
- (e) In January 2016, iFinnmark reported that *“Latvian investors have created 30 jobs of king and snow crab in Baatsfjord”*, referring to Seagourmet, *“an important player”*, which relied on *“snow crab delivered by the fleet of Latvian SIA North Star Ltd.”*<sup>302</sup>
  
- (f) In November 2017, Fiskeribladet reported on the state of affairs at Seagourmet after Norway had excluded EU vessels from the snow crab fishery. The article

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<sup>299</sup> T.K. Kristoffersen, “Opened crab factory in Batsfjord,” Nord24, 12 June 2015, **PP-0146**.

<sup>300</sup> “Seagourmet is introducing queen crab to European markets,” Eurofish Magazine, June 2015, **PP-0057**, p. 28.

<sup>301</sup> B.T. Forberg, “Has created 35 new jobs,” Kyst og Fjord, November 2015, **PP-0151**.

<sup>302</sup> T. Emberland, “The snow crab is new in Norwegian waters: Has doubled in value in one year,” iFinnmark, 12 January 2016, **PP-0152**, pp. 1-2.

noted that “*the Seagourmet factory and the shipping company SIA North Star have largely the same owners and board.*”<sup>303</sup>

237. The high degree of integration and dependence between Claimants’ investments and those made by Mr. Levanidov under the joint venture agreement was unfortunately demonstrated by the events. When Norway started preventing North Star from exercising its snow crab fishing rights, Seagourmet also collapsed almost immediately.<sup>304</sup> The company’s sales fell from NOK 58.8 million in 2016 to NOK 9.4 million in 2017<sup>305</sup> and its headcount fell from 67 to three employees. Since the stop of North Star’s snow crab fishing activities, Seagourmet has struggled to remain in business and has shown financial losses in each operating year.<sup>306</sup>
238. The record therefore abundantly demonstrates that the relationship between Mr. Pildegovics and Mr. Levanidov goes well beyond a standard commercial relationship between a seller and a buyer of raw materials operating at arms’ length. As they both acknowledge, Mr. Pildegovics and Mr. Levanidov have created an integrated enterprise through the framework of a joint venture agreement, enabling each party to be consulted and closely involved in the management of the other party’s investments, thus ensuring the coordinated operation of these investments.
239. As a party to a joint venture agreement with his cousin Kirill Levanidov, Mr. Pildegovics has contractual rights or claims against Mr. Levanidov pertaining to the performance of his duties as a party to the joint venture.<sup>307</sup>

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<sup>303</sup> A. Fenstad, N. Torsvik, “*Hope Supreme Court reopens crab production*”, Fiskeribladet, 8 November 2017, **PP-0036**.

<sup>304</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 182; Witness Statement of Kirill Levanidov, 11 March 2021, para. 55.

<sup>305</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 183; Seagourmet Annual Report, 2016, **KL-0036**; Seagourmet Annual Report, 2017, **KL-0037**.

<sup>306</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 65; Seagourmet Annual Report, 2017, **KL-0037**; Seagourmet Annual Report, 2018, **KL-0038**; Seagourmet Annual Report, 2019, **KL-0039**.

<sup>307</sup> Expert Report of Dr. Anders Ryssdal, para. 31-32.

*ii) Shares in North Star*

240. On 27 February 2014, North Star was incorporated as a Latvian limited liability company.<sup>308</sup> North Star was entered on the Latvian Commercial Register on 4 March 2014.<sup>309</sup>
241. North Star's capital is divided into 100 shares, all of which have been owned by Mr. Pildegovics since 15 June 2015.<sup>310</sup> North Star's board is composed of two members: Mr. Pildegovics and Mr. Levanidov.<sup>311</sup>
242. While Mr. Pildegovics acquired North Star's shares in June 2015, the company was incorporated at his behest in February 2014 to serve as the main vehicle for his investments under the framework of his joint venture with Mr. Levanidov. Between 25 February 2014 and 15 June 2015, North Star's shares were owned by Mr. Pildegovics' wife, Ms. Nadezda Bariseva.<sup>312</sup>

*iii) Shares in Sea & Coast*

243. Sea & Coast is a limited liability company incorporated under the laws of Norway on 26 June 2014 and registered on the Norwegian corporate register on 16 July 2014.<sup>313</sup>
244. Sea & Coast's head office is located at.<sup>314</sup>

Havnegata 16  
9990 Baatsfjord  
Norway

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<sup>308</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 8.

<sup>309</sup> **C-0075**; Resolution No. 6-12/33212 of the Register of Enterprises of the Republic of Latvia, 4 March 2014, **PP-0004**.

<sup>310</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 51.

<sup>311</sup> *Ibid.*, para. 52.

<sup>312</sup> *Id.*, para. 50.

<sup>313</sup> Norwegian Commercial Registry, Sea & Coast AS, 11 November 2015, **PP-0048**.

<sup>314</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 54.

245. According to Sea & Coast's articles of incorporation<sup>315</sup>, the company's fixed capital is divided into 30 shares. The company's board is composed of a single director, Mr. Pildegovics.<sup>316</sup>
246. Sea & Coast was incorporated by Mr. Sergei Ankipov, Seagourmet's Project Coordinator, in preparation for the launch of the joint venture's operations, in late 2014. Mr. Ankipov initially held all of Sea & Coast's shares and acted as the company's sole director.<sup>317</sup>
247. On 15 October 2015, Mr. Pildegovics acquired all of Sea & Coast's shares from Mr. Ankipov.<sup>318</sup> He was appointed as Sea & Coast's sole director on the same date and remains the sole director and shareholder of the company.<sup>319</sup>
248. Since June 2014, Sea & Coast operated as a service agent for North Star, its vessels and its crews. Its mission was to procure goods and services needed for the operation of North Star's vessels, notably by building commercial relationships with suppliers from the local community.
249. On 1<sup>st</sup> February 2015, North Star and Sea & Coast concluded a local agency agreement whereby Sea & Coast was appointed as North Star's local agent for Solvita, Saldus, Senator and Solveiga "*in ports of call and on fishing ground in Norway*" (**Local**

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<sup>315</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 55; Norwegian Commercial Registry, Sea & Coast AS, 11 November 2015, **PP-0048**; Minutes of Sea & Coast's board meeting, 15 October 2015, **PP-0049**.

<sup>316</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 55.

<sup>317</sup> *Ibid.*, para. 56.

<sup>318</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 57; Share purchase agreement between S. Ankipov and P. Pildegovics, 14 October 2015 **PP-0050** Minutes of Sea & Coast's board meeting, 15 October 2015, **PP-0049**; Norwegian Commercial Registry, Sea & Coast AS, 11 November 2015, **PP-0048**.

<sup>319</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 57; Share purchase agreement between S. Ankipov and P. Pildegovics, 14 October 2015, **PP-0050**; Minutes of Sea & Coast's board meeting, 15 October 2015, **PP-0049**; Norwegian Commercial Registry, Sea & Coast AS, 11 November 2015, **PP-0048**; Minutes of Sea & Coast's board meeting, 15 October 2015, **PP-0049**.

**Agency Agreement**).<sup>320</sup> A Local Agency Agreement was again signed between the two companies in January 2017<sup>321</sup>, January 2019<sup>322</sup> and January 2021<sup>323</sup>.

250. Within the terms of the Local Agency Agreements, Sea & Coast provided various services to North Star and its crews from its sole office located at Seagourmet's facilities in the port of Baatsfjord, including the following:<sup>324</sup>
- (a) Supporting North Star's vessel's operations, including facilitating vessel entry and departure from port and assisting with custom, emigration, sanitary and other procedures;
  - (b) Procuring various supplies for North Star's vessels, including fresh water, food, baits, spare parts, and fishing gears upon confirmation from North Star; and
  - (c) Arranging for vessel repairs and technical maintenance.
251. Sea & Coast invoiced North Star for the value of its services, including the cost of goods and services sold to North Star plus agent and administration fees<sup>325</sup>, totalling over NOK 1.7 million in 2015 and NOK 2.7 million in 2016.<sup>326</sup>
252. In 2015 and 2016, Sea & Coast generated operating revenues of NOK 19.3 million and NOK 18.5 million respectively.<sup>327</sup> Starting in 2017, Sea & Coast's revenues collapsed as a result of Norway's actions impacting the snow crab fishery.<sup>328</sup>

### **c. Investments by North Star in the territory of Norway**

253. From North Star's incorporation until January 2017, when its snow crab fishing operations were brought to a halt by Norway, all of North Star's assets were operated

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<sup>320</sup> Local Agency Agreement between North Star and Sea & Coast, 1 February 2015, **PP-0029**.

<sup>321</sup> Local Agency Agreement between North Star and Sea & Coast, 1 January 2017, **PP-0030**.

<sup>322</sup> Local Agency Agreement between North Star and Sea & Coast, 1 January 2019, **PP-0031**.

<sup>323</sup> Local Agency Agreement between North Star and Sea & Coast, 1 January 2021, **PP-0032**.

<sup>324</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 166.

<sup>325</sup> Local Agency Agreement between North Star and Sea & Coast, 1 February 2015, **PP-0029**, art. 5.5; Sample invoice from Sea & Coast to North Star, 3 October 2016, **PP-0033**.

<sup>326</sup> Table of Sea & Coast's invoices to North Star, 2015-2016, **PP-0173**.

<sup>327</sup> Sea & Coast Annual Report, 2014, **PP-0215**; Sea & Coast Annual Report, 2015, **PP-0216**; Sea & Coast Annual Report, 2016, **PP-0217**

<sup>328</sup> Sea & Coast Annual Report, 2017, **PP-0218**

within the framework of the joint venture agreement concluded between Mr. Pildegovics and Mr. Levanidov in January 2014.

254. As contemplated by this joint venture, between February 2015 and September 2016, North Star's vessels Solvita, Senator, Solveiga and Saldus delivered more than 5,200 tons of snow crabs to Norway. More than 98% of these catches were delivered to Norwegian ports, primarily to Seagourmet's factory at the port of Baatsfjord, with the balance transhipped at sea to transport vessels for delivery to the Netherlands.<sup>329</sup>
255. In 2015, North Star achieved total sales of approximately EUR 6.1 million from its snow crab fishing operations.<sup>330</sup> This turnover was achieved over a partial year of operation as North Star's vessels progressively commenced operations through the year: in February 2015 in the case of Solvita, April 2015 in the cases of Saldus and Solveiga, and June 2015 in the case of Senator.<sup>331</sup>
256. In 2016, North Star's total sales increased to approximately EUR 6.9 million.<sup>332</sup> This result was also achieved over a partial year of operation. In February 2016, Saldus was damaged following an accident at the port of Baatsfjord. It then underwent repairs which kept it in port until June 2016 and was back fishing on 15 June 2016. In September 2016, Norway commenced taking adverse actions against North Star and as a result, the last snow crab catches by North Star vessels were landed in Baatsfjord in September 2016.<sup>333</sup>
257. Several assets owned by North Star contributed to the achievement of its operating results, all of which constitute investments by North Star in the territory of Norway: fishing vessels (*subsection i*); "fishing capacity", referring to the right to operate a ship as fishing vessel (*subsection ii*); fishing licenses authorizing each vessel to catch snow crabs in the "Loophole" area of the NEAFC zone and in waters off the Svalbard archipelago (*subsection iii*); contractual rights to purchase two additional ships, along with "fishing capacity" for such ships (*subsection iv*); and supply agreements with purchasers of snow crab products (*subsection v*).

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<sup>329</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 145; Declaration of catch by R. Uzakov with accompanying transshipment form, 11 August 2015, **PP-0155**; Declaration of catch by R. Uzakov with accompanying transshipment form, 1 September 2015, **PP-0156**.

<sup>330</sup> SIA North Star's Annual Report, 2015, **PP-0220**.

<sup>331</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 156.

<sup>332</sup> SIA North Star's Annual Report, 2016, **PP-0021**.

<sup>333</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 158.

*i) Fishing vessels*

258. Between April and December 2014, North Star acquired four ships<sup>334</sup> for a single business purpose: to catch snow crabs in the Barents Sea and to deliver these snow crabs to Seagourmet's Baatsfjord factory. Mr. Pildegovics lead the negotiations for these purchases, following extensive consultations with Mr. Levanidov.<sup>335</sup>
259. On 15 April 2014, North Star acquired the fishing vessel **Solvita** (formerly Ivangorod) for a price of USD 1,075,000.<sup>336</sup> North Star took delivery of Solvita at the port of Baatsfjord in June 2014. The same month, North Star registered the vessel under the Latvian flag.<sup>337</sup>
260. Solvita was fitted for snow crab fishing at the time of its purchase. It commenced catching snow crabs in the Loophole in August 2014.
261. On 25 August 2014, North Star acquired the factory vessel **Senator** (formerly Otto) for a price of EUR 900,000.<sup>338</sup> North Star took delivery of Senator at the port of Hajnarfjordur, Iceland, in September 2014. The same month, North Star registered the vessel under the Latvian flag.<sup>339</sup>
262. At the time of its purchase, Senator was fitted as a shrimp trawler with onboard processing capacities. It needed refitting to make it suitable for snow crab fishing and processing. For this purpose, following its delivery to North Star, Senator sailed to the port of Gdansk, Poland, where it was refitted over a period of several months. North

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<sup>334</sup> Vessel specifications for Senator, Saldus, Solvita and Solveiga, **PP-0051**.

<sup>335</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 62; Email from K. Levanidov to P. Pildegovics, 4 June 2013, **PP-0011**; Email exchange between P. Pildegovics and K. Levanidov, 8 July 2013 – 2 August 2013, **PP-0012**; Email exchange between P. Pildegovics and K. Levanidov, 30 September 2013 – 1 November 2013, **PP-0013**; Email exchange between P. Pildegovics and K. Levanidov, 21-23 December 2013, **PP-0014**; Email exchange between P. Pildegovics and K. Levanidov, 10-11 January 2014, **PP-0015**; Email exchange between P. Pildegovics and K. Levanidov, 17-20 January 2014, **PP-0016**; Email exchange between P. Pildegovics and K. Levanidov, 20 January 2014, **PP-0017**; Email exchange between P. Pildegovics and K. Levanidov, 22-23 January 2014, **PP-0018**; Email exchange between P. Pildegovics and K. Levanidov, 12 February 2014, **PP-0019**; Email exchange between P. Pildegovics and K. Levanidov, 19-21 February 2014, **PP-0020**; Email exchange between P. Pildegovics and K. Levanidov, 24-25 February 2014, **PP-0021**.

<sup>336</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 63; **C-0061**; Invoice for purchase of Solvita, 15 April 2014, **PP-0052**; **C-0062**.

<sup>337</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 63; Certificates of registry for Solvita, 10 June 2014 – 2 December 2020, **PP-0053**.

<sup>338</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 65; **C-0057**; Bill of sale IMO n°6812986, 28 August 2014, **PP-0054**; Invoice for purchase of Senator, 8 September 2014, **PP-0055**; Vessel delivery and acceptance certificate, 8 September 2014, **PP-0056**; **C-0058**.

<sup>339</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 63; Certificates of registry for Senator, 12 September 2014 – 7 November 2020, **PP-0059**.

Star invested over EUR 1.63 million towards Senator's refitting to make it suitable for snow crab fishing and processing.<sup>340</sup>

263. Following completion of Senator's refitting, Senator sailed to Baatsfjord in May 2015. It commenced catching and processing snow crabs in the Loophole the same month.
264. On 20 November 2014, North Star acquired the fishing vessel **Saldus** (formerly Iskander) for a price of USD 1,050,000.<sup>341</sup> North Star took delivery of Saldus at the port of Busan, South Korea, in December 2014. The same month, North Star registered the vessel under the Latvian flag.<sup>342</sup> Saldus then sailed for the port of Baatsfjord.
265. Saldus was fitted for snow crab fishing at the time of its purchase. It commenced catching snow crabs in the Loophole in April 2015.
266. On 22 December 2014, North Star acquired the fishing vessel **Solveiga** (formerly Saratoga) for a price of USD 1,150,000.<sup>343</sup> North Star took delivery of Solveiga at the port of Busan, South Korea, in January 2015. The same month, North Star registered the vessel under the Latvian flag.<sup>344</sup> Solveiga then sailed for the port of Baatsfjord.
267. Solveiga was fitted for snow crab fishing at the time of its purchase. It commenced catching snow crabs in the Loophole in April 2015.
268. Between August 2014 and September 2016, Solvita, Senator, Saldus and Solveiga were operated to catch snow crabs in the Loophole and to unload them in Norwegian ports, mainly at Seagourmet's Baatsfjord factory.
269. In October 2017, as Norway continued to oppose North Star's snow crab fishing operations, North Star decided to sell Solveiga to raise liquidities. Solveiga's sale was concluded on 19 October 2017 and the vessel was delivered to its buyer at the port of

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<sup>340</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 66; Contract No. Remontowa / 14-1156, 22 October 2014, **PP-0060**; Final invoice from Remontowa, 12 May 2015, **PP-0061**.

<sup>341</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 68; **C-0055**; Invoice for purchase of Saldus, 20 November 2014, **PP-0062**; **C-0056**.

<sup>342</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 68; Certificates of registry for Saldus, 5 December 2014 – 2 December 2020, **PP-0063**.

<sup>343</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 70; **C-0059**; **C-0060**; Invoice for Purchase of Solveiga, 22 December 2014, **PP-0064**.

<sup>344</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 70; Certificates of registry for Solveiga, 5 January 2015- 6 December 2018, **PP-0065**.



Baatsfjord.<sup>345</sup> As North Star has continued to struggle since then, it also sold Solvita in March 2021.<sup>346</sup>

270. Had North Star been allowed to exercise its fishing rights, it would not have sold Solveiga and Solvita and would have continued to operate it as it had in 2014, 2015 and 2016.<sup>347</sup>

*ii) Fishing capacity*

271. In order to build a fleet of fishing vessels, a new fishing company must acquire not only physical ships, but also fishing “*capacity*”, referring to the right to operate ships as fishing vessels. In the European Union, fishing capacity is constrained by a management scheme which seeks to balance the fishing capacity of the total fleet and available fishing opportunities.<sup>348</sup> The goal of the scheme is to reduce the risk of overfishing by limiting the number of EU ships that can fish at any given time.
272. For each EU country, a fishing fleet capacity ceiling is established with respect to maximum total engine and cargo capacity, calculated in kilowatts (kW) and gross tonnage (GT). Since the total kW and GT ceiling is fixed, a new fishing vessel may only enter a country’s fishing fleet if an existing vessel is removed from the fleet.<sup>349</sup>
273. The fishing capacity management scheme creates a significant barrier to new entrants in the fishing industry because incumbent fishing companies own all existing fishing capacity. Fishing capacity may therefore only become available to a new entrant if an incumbent fishing company decommissions a fishing vessel without replacing it with a new one, in effect reducing its fishing capacity.<sup>350</sup>
274. In 2014, North Star acquired 2,809 kW and 1,954 GT of fishing capacity, allowing North Star to operate Solvita, Saldus and Solveiga as fishing vessels, at a total cost of [REDACTED]. These acquisitions were completed through the transfer of fishing capacity from a third-party company to North Star, which were approved by the Latvian Ministry

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<sup>345</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 73; Contract for the sale of Solveiga and deed of conveyance, 19 October 2017, **PP-0066**.

<sup>346</sup> Bill of sale for Vessel (sale of Solvita), 2 March 2021, **PP-0067**.

<sup>347</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 74.

<sup>348</sup> European Commission website, “*Management of fishing capacity - fishing fleet*,” 1 March 2021 [date of access], **PP-0068**.

<sup>349</sup> *Ibid.*

<sup>350</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 78.

of Agriculture.<sup>351</sup> North Star acquired the fishing capacity to enable its operation of Senator through its purchase of the vessel from its prior Latvian owner.<sup>352</sup>

275. Because of fishing capacity ceilings, which effectively limit the number of European vessels allowed to be used for fisheries, North Star's fishing capacity is a rare and valuable intangible asset.<sup>353</sup>
276. Between August 2014 and January 2017, North Star's fishing capacity was used exclusively to enable North Star's fishing operations as part of Mr. Pildegovics' joint venture with Mr. Levanidov for the purpose of delivering snow crabs to Norway.<sup>354</sup>

*iii) Fishing license rights*

277. On 11 June 2014, North Star received a special permit issued by Latvia providing it with the right to engage in fishing business operations in international waters and waters of other countries outside the Baltic Sea.<sup>355</sup> This permit was renewed in 2017 and 2019 and is currently valid until January 2023.<sup>356</sup>
278. Since 1<sup>st</sup> July 2014, North Star has owned fishing licenses issued by the Republic of Latvia authorizing each of its ships to engage in snow crab fishing in the international waters of the NEAFC zone (including the Loophole).<sup>357</sup> In 2013, Latvia had confirmed with the European Commission that it was possible to issue snow crab fishing licences if they were registered with the NEAFC Secretariat.<sup>358</sup>

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<sup>351</sup> *Ibid.*, para. 79.

<sup>352</sup> *Id.*, para. 82.

<sup>353</sup> *Id.*, para. 83.

<sup>354</sup> *Id.*, para. 84.

<sup>355</sup> *Id.*, para. 85; Special permit (License) No. ZS000023, 11 June 2014, **PP-0074**.

<sup>356</sup> Special permit (License) No. ZS000193, 1 March 2017, **PP-0075**; Special permit (License) No. ZS000348, 9 December 2019, **PP-0076**.

<sup>357</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 86; **C-0023**; **C-0024**; **C-0025**; **C-0027**; **C-0029**; Fishing License for Solvita, NEAFC, 1 January 2019, **PP-0077**; Fishing License for Solvita, NEAFC, 9 December 2019, **PP-0079**; Fishing License for Solvita, NEAFC, 1 January 2020, **PP-0081**; **C--0011**; **C-0012**; **C-0014**; **C-0016**; Fishing License for Senator, NEAFC, 1 January 2019, **PP-0085**; Fishing License for Senator, NEAFC, 1 January 2020, **PP-0089**; **C-0004**; **C-0005**; **C-0007**; **C-0010**; Fishing License for Saldus, NEAFC, 1 January 2019, **PP-0087**; Fishing License for Saldus, NEAFC, 9 December 2019, **PP-093**; Fishing License for Saldus, NEAFC, 1 January 2019, **PP-0091**; Fishing License for Saldus, NEAFC, 1 January 2020, **PP-0095**; **C-0018**; **C-0019**; **C-0021**.

<sup>358</sup> **C-0090** ("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.").

279. Since 1<sup>st</sup> November 2016, North Star has also owned fishing licenses issued by the Republic of Latvia authorizing its ships to catch snow crabs in waters off the Svalbard archipelago.<sup>359</sup>
280. While the NEAFC licenses were issued for “*unlimited*” or “*unregulated*” species, the licenses were issued by Latvian authorities based on the representation that North Star would be fishing for snow crabs in international waters, without quota restrictions.<sup>360</sup>
281. For each year in which licenses were issued, Latvia notified the European Commission that each of North Star’s vessel held a license to fish for “*unregulated species*” targeting “*snow crab*”.<sup>361</sup> These notifications were in turn provided by the EC to NEAFC<sup>362</sup>, which then posted the list of all notified vessels and authorisations on its public website.<sup>363</sup>
282. Moreover, under Latvian law, fishing licences, once obtained, are automatically renewable thereafter (absent any failure to respect certain *pro forma* requirements).<sup>364</sup> Moreover such licenses are also freely transferable and thus constitute property.<sup>365</sup>
283. Snow crabs are an unregulated species pursuant to the NEAFC Scheme, meaning a species that is not the subject of regulation under the Scheme regarding the amount of catch.<sup>366</sup> The NEAFC licenses issued to North Star authorized it to fish for any unregulated species, including snow crab.

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<sup>359</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 87; **C-0023; C-0024; C-0025; C-0027; C-0029**; Fishing License for Solvita, NEAFC, 1 January 2019, **PP-0077**; Fishing License for Solvita, NEAFC, 9 December 2019, **PP-0079**; Fishing License for Solvita, NEAFC, 1 January 2020, **PP-0081; C-0011; C-0012; C-0014; C-0016**; Fishing License for Senator, NEAFC, 1 January 2019, **PP-0085**; Fishing License for Senator, NEAFC, 1 January 2020, **PP-0089; C-0004; C-0005; C-0007; C-0010**; Fishing License for Saldus, NEAFC, 1 January 2019, **PP-0087**; Fishing License for Saldus, NEAFC, 9 December 2019, **PP-0093**; Fishing License for Saldus, NEAFC, 1 January 2019, **PP-0091**; Fishing License for Saldus, NEAFC, 1 January 2020, **PP-0095; C-0018; C-0019; C-0021**.

<sup>360</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 93.

<sup>361</sup> *Ibid.*, para. 94; **C-0091; C-0092; C-0093**; Letter from the EC DG Mare (B. Friess) to NEAFC (S. Asmundsson), 31 December 2015, **PP-0099**; Email of the Latvian Ministry of Agriculture and Fisheries (Ričards Derkačs) to the European Union/DG MARE (Pernille Skov-Jensen) (notification of Solvita, Senator, Saldus, Solveiga for 2017), 7 December 2016 **PP-0100**.

<sup>362</sup> Letter from the EC DG Mare (B. Friess) to NEAFC (S. Asmundsson), 31 December 2015, **PP-0099**.

<sup>363</sup> NEAFC website, “*Register of Notified Vessels and Authorisations 2021*,” 8 March 2021 [date of access], **PP-0101**.

<sup>364</sup> Regulation No. 1015, Procedures for the Issue of Special Permits (Licences) for Commercial Activities in Fishery and Payment of the State Fee for the Issue of Special Permits (Licence), 8 September 2009, **CL-0235**, Article 16.

<sup>365</sup> *Ibid.*, Article 13.

<sup>366</sup> **CL-0019**, Article 1(d) (“*regulated resources*’ are those of the fisheries resources which are subject to recommendations under the Convention and are listed at Annex I”).

284. The Svalbard licenses issued from 2017 onward specifically identified snow crabs ("*sniega krabis (CRQ)*") as the target species.
285. Starting in 2017, the NEAFC licenses identified the gear as "*FPO*", which is the international code for pots and traps, to be used by North Star's vessels to fish snow crab ("*Krabju kratini NEAFC*"). The Svalbard licenses also refer to the same or similar fishing gear.
286. North Star exercised its fishing license rights between August 2014 and January 2017, which allowed it to land more than 5,000 tonnes of snow crab in Norwegian ports.
287. As further detailed below, the validity and legality of North Star's license rights was systematically recognized and accepted by Norway, until Norway changed its policy and started preventing North Star from exercising its fishing rights.<sup>367</sup>
288. North Star's catch numbers are proven by official records accounting for each landing of snow crab by North Star vessels in Norway:
- (a) NEAFC Port State Control Forms (***NEAFC PSC Forms***);
  - (b) Sales notes (*Sluttseddel*) issued by Norges Rafisklag (which translates as the Norwegian Raw Fish Association), a Norwegian sales organization regulated under Norway's Fisheries Act responsible for controlling all first-hand sales of fish and shellfish in Norwegian ports (***Rafisklag Sales Notes***); and
  - (c) European Community Catch Certificates (***EC Catch Certificates***) and Certificates of Origin (***EC Certificates of Origin***).
289. NEAFC PSC Forms are issued in accordance with the NEAFC Scheme requiring reporting of information about catches made in the NEAFC zone.<sup>368</sup> A NEAFC PSC Form must be filled before a foreign vessel can enter a port to unload a catch made in the NEAFC zone. The form reports the species on board, the estimated weight of the catch and the requested port of entry. Once filled, the form is submitted to the flag state (in North Star's case, Latvia), which must confirm that the vessel reporting the catch had sufficient quota for the species declared (where a quota applies) and that the vessel had authorization to fish in the area declared. The form is then presented to the

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<sup>367</sup> See below, paras. 326, 338, 341, 342, 352, 369.

<sup>368</sup> **CL-0019**, Article 10 (Reporting of Catch and Fishing Effort), Article 12 (Communication on Catches).

port state (in North Star's case, Norway), whose permission is sought to allow the vessel to commence landing of its catch.

290. Between August 2014 and September 2016, North Star vessels submitted at least seventy-nine (79) NEAFC PSC Forms to Latvia and Norway declaring catches of snow crab (using the code for snow crab "CRQ") and seeking permission to enter Norwegian ports. In each case, Latvia confirmed that North Star's vessels were authorized to fish for snow crabs in the NEAFC area and Norway gave North Star permission to land its snow crab catches in Norwegian ports, thus also confirming the legality of North Star's licences.<sup>369</sup>
291. EC Catch Certificates<sup>370</sup> and EC Certificates of Origin<sup>371</sup> are issued by fishing companies and validated by flag states to certify the origin of a catch. They include information about the fishing vessel, the license under which the catch was made, the species and estimated and verified landed weight. These certificates were issued to accompany North Star's sales of frozen snow crab clusters.<sup>372</sup>
292. Rafisklag Sales Notes record sales of snow crab catches by North Star to purchasers in Norwegian ports. They contain the following information: date of purchase; name of the purchaser; dates of catch; dates of unloading; weight unloaded; and price paid by the purchaser. All sales of snow crabs by North Star in Norway have been recorded through such notes.<sup>373</sup>
293. In August 2014, Solvita delivered its first catch of snow crabs at the Norwegian port of Kjollefjord.<sup>374</sup> The catch was delivered to Norway Seafoods AS, a Norwegian seafood processing company, as Seagourmet's factory was undergoing renovation. The delivery was organized with the assistance of Mr. Levanidov, who helped in the

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<sup>369</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 186; NEAFC Port State Control Forms – PSC 1 for Saldus, 2015-2016, **C-0100**; NEAFC Port State Control Forms – PSC 1 for Solveiga, 2015-2016, **C-0101**; NEAFC Port State Control Forms – PSC 1 for Solvita, 2015-2016, **C-0102**; NEAFC Port State Control Forms – PSC 1 for Senator, 2015-2016, **C-0103**.

<sup>370</sup> EC Catch Certificates issued by North Star and validated by Latvia, June 2015 to September 2016, **PP-0158**.

<sup>371</sup> *Ibid.*

<sup>372</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 149.

<sup>373</sup> *Ibid.*, para. 150; Rafisklaget Sales Notes for Saldus, 2015, **PP-0159**; Rafisklaget Sales Notes for Saldus, 2016, **PP-0160**; Rafisklaget Sales Notes for Solvita, 2015, **PP-0161**; Rafisklaget Sales Notes for Solvita, 2016, **PP-0162**; Rafisklaget Sales Notes for Solveiga, 2015, **PP-0163**; Rafisklaget Sales Notes for Solveiga, 2016, **PP-0164**; Rafisklaget Landing Notes for Senator, 2015, **PP-0165**; Rafisklaget Landing Notes for Senator, 2016, **PP-0166**.

<sup>374</sup> Norwegian Coast Guard Inspection Form, Solvita, Port of Kjollefjord, 13 August 2014, **PP-0169**; N. Torsvik, "Delivers 33 tonnes of snow crab", Fiskeribladet Fiskaren, 29 August 2014, **PP-0168**.

negotiation of the delivery with the owners of the Kjollefjord factory as well as to clarify the technical reporting requirements since this was the first delivery of live snow crab by an EU vessel to Norway.<sup>375</sup>

294. Between August 2014 and September 2016, Solvita caught over 1,142 tonnes of snow crabs, which were landed and sold at the Norwegian ports of Baatsfjord, Kjollefjord and Vardo.<sup>376</sup>
295. Between June 2015 and September 2016, Senator caught approximately 2,000 tonnes of snow crabs, which were landed and sold at the Norwegian port of Baatsfjord.<sup>377</sup> On two occasions, in August and September 2015, Senator made deliveries of snow crab clusters at sea to a transport vessel for shipment to the Netherlands, equivalent to approximately 101 tonnes of raw crab.<sup>378</sup>
296. Between April 2015 and September 2016, Saldus caught over 686 tonnes of snow crabs, which were landed and sold at the Norwegian port of Baatsfjord.<sup>379</sup>
297. Between April 2015 and September 2016, Solveiga caught over 1,388 tonnes of snow crabs, which were landed and sold at the Norwegian ports of Baatsfjord and Vardo.<sup>380</sup>

*iv) Contractual rights to purchase additional fishing vessels*

298. On 23 July 2015, North Star signed letters of intent for the purchase of Sokol<sup>381</sup> and Solyaris<sup>382</sup>, two factory vessels fitted for snow crab fishing and processing that were already active in the Barents Sea snow crab fishery.<sup>383</sup>
299. North Star had been planning on acquiring Sokol and Solyaris since October 2014, when it first sought consent from the Ministry of Agriculture of Latvia to the purchase

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<sup>375</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 151.

<sup>376</sup> *Ibid.*, para. 152; **C-0102**.

<sup>377</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 153; **C-0103**.

<sup>378</sup> Declaration of catch by R. Uzakov with accompanying transshipment form, 11 August 2015, **PP-0155**; Declaration of catch by R. Uzakov with accompanying transshipment form, 1 September 2015, **P-0156**.

<sup>379</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 154; **C-0100**.

<sup>380</sup> *Ibid.*, para. 155; **C-0101**.

<sup>381</sup> Letter of intent regarding performance of a purchase-sale transaction for Sokol, 23 July 2015, **PP-0102**.

<sup>382</sup> Letter of intent regarding performance of a purchase-sale transaction for Solyaris, 23 July 2015, **PP-0103**.

<sup>383</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 98; Sokol and Solyaris vessel specifications, **PP-0104**.

and import of these ships. The Ministry consented to these acquisitions following North Star's acquisition of the necessary fishing capacity (kW and GT).<sup>384</sup>

- 300. On 5 January 2017, after all needed approvals and confirmations had been received from the Ministry, North Star signed a definitive agreement for the purchase of Sokol at a price of EUR 1,500,000, for delivery at the port of Baatsfjord.<sup>385</sup>
- 301. The same day, North Star signed a definitive agreement for the purchase of Solyaris at a price of EUR 1,700,000, for delivery at the port of Baatsfjord.<sup>386</sup>
- 302. In late January 2017, after Norway's arrest of Senator, North Star communicated with the sellers of Sokol and Solyaris to ask them to suspend the delivery of the two ships while North Star hoped for a prompt resumption of its fishing activities.<sup>387</sup>
- 303. In May 2017, as a consequence of Norway's adverse actions against its investments, North Star took the decision to cancel its purchase of Sokol and Solyaris. North Star became liable to the sellers for USD 640,000 in penalties for the rescission of the purchase agreements.<sup>388</sup>

*v) Supply agreements*

- 304. In 2016 and 2017, North Star entered into supply agreements with three buyer companies pursuant to which the buyers committed to purchase specified volumes of snow crab from North Star at predetermined prices.<sup>389</sup>
- 305. On 29 December 2016, North Star entered into a supply agreement with Seagourmet.<sup>390</sup> Pursuant to this agreement, North Star agreed to supply, and Seagourmet agreed to purchase, up to 100 tonnes of live snow crab per week until 31

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<sup>384</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 99; Letter from North Star to the Ministry of Agriculture, 27 October 2014, **PP-0105**; Letter from the Ministry of Agriculture to North Star, 6 November 2014, **PP-0106**.

<sup>385</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 104; Vessel purchase and sale contract for Sokol, 5 January 2017, **PP-0112**; Additional agreement to the purchase-sale contract for Sokol, 5 January 2017, **PP-0113**.

<sup>386</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 105; Vessel purchase and sale contract for Solyaris, 5 January 2017, **PP-0114**; Additional agreement to the purchase-sale contract for Solyaris, 5 January 2017, **PP-0113**.

<sup>387</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 106.

<sup>388</sup> *Ibid.*, para. 107; Invoice for penalties payable by North Star for the cancellation of the purchase and sale contracts for Sokol and Solyaris, 6 May 2017, **PP-0116**.

<sup>389</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 109.

<sup>390</sup> *Ibid.*, para. 110; Witness Statement of Kirill Levanidov, 11 March 2021, para. 60; **C-0053**.

December 2017. The agreement specified the grade and quality of snow crabs to be delivered and prices to be paid by Seagourmet. Deliveries were to be made by North Star at Seagourmet's factory at the port of Baatsfjord. A similar agreement was signed between North Star and Seagourmet on 27 December 2017 for deliveries in 2018.<sup>391</sup>

306. On 29 December 2016, North Star signed a long-term supply agreement with Link Maritime concerning the sale by North Star to Link Maritime of cooked frozen snow crab clusters to be produced by North Star's factory ships (Senator, but also Sokol and Solyaris which were then expected to commence operations in January 2017).<sup>392</sup> North Star was to deliver the goods "*on the basis of CFR Norway port of delivery indicated by the Buyer*".<sup>393</sup> The agreement set quantity and quality requirements as well as price and terms of payment.
307. On 29 December 2016, North Star signed a supply agreement with [REDACTED].<sup>394</sup> The agreement specified the grade and quality of snow crabs to be delivered and the price to be paid by [REDACTED]. Deliveries were to be made by North Star at the port of Baatsfjord.<sup>395</sup>
308. On 27 December 2017, another similar supply agreement was signed by North Star with [REDACTED].<sup>396</sup>
309. All supply agreements were concluded within the framework of the joint venture agreement between Mr. Pildegovics and Mr. Levanidov. Mr Levanidov is the majority owner and sole operator of Seagourmet and Link Maritime.<sup>397</sup> He caused both companies to enter into supply agreements with North Star. Through his business

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<sup>391</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 110; Supply agreement between North Star and Seagourmet for 2018, 27 December 2017, **C-0054**.

<sup>392</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 111; Supply agreement between North Star and [REDACTED] for 2017, 29 December 2016, **C-0054**.

<sup>393</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 111; Supply agreement between North Star and [REDACTED] for 2017, 29 December 2016, **C-0054**, art. 5.1.

<sup>394</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 112; Supply agreement between North Star and [REDACTED] for 2017, 29 December 2016, **C-0066**.

<sup>395</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 112; Supply agreement between North Star and [REDACTED] for 2017, 29 December 2016, **C-0066**, art. 2.3.

<sup>396</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 113; Supply agreement between North Star and [REDACTED] for 2017, 27 December 2017, **C-0067**.

<sup>397</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 114.



connections with [REDACTED], Mr. Levanidov presented North Star with the opportunity to conclude a supply agreement with this company.<sup>398</sup>

310. These supply agreements gave North Star valuable contract rights to sell its snow crab catches. These sales would have occurred in Norway, at the port of Baatsfjord, where the economic value of North Star's harvests would have been realized.<sup>399</sup>
311. Because of Norway's actions preventing North Star from conducting its snow crab fishing operations, North Star was unable to honour its commitments under these supply agreements and lost the sales contemplated therein.<sup>400</sup>

#### **d. Claimants' investments supported Norway's economic development**

312. Claimants' investments were (and remain) located within and closely tied to the territory of Norway:
- (a) North Star's vessels were licensed to catch snow crabs in the Loophole and in waters off the coast of Svalbard.<sup>401</sup> North Star's vessels thus caught snow crabs in areas where Norway (now) claims to be sovereign or to enjoy sovereign jurisdiction.
  - (b) North Star's vessels landed and sold virtually all of their snow crab catches in Norwegian ports, mainly at Seagourmet's factory for processing at the port of Baatsfjord.<sup>402</sup> Thus, the economic value of North Star's fishing activities was realized almost exclusively within the territory of Norway.

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<sup>398</sup> *Ibid.*

<sup>399</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 115.

<sup>400</sup> *Ibid.*, para. 116.

<sup>401</sup> **C-0023; C-0024; C-0025; C-0026; C-0027; C-0028; C-0029; C-0030**; Fishing License for Solvita, NEAFC, 1 January 2019, **PP-0077**; Fishing License for Solvita, Svalbard, 1 January 2019, **PP-0078**; Fishing License for Solvita, NEAFC, 9 December 2019, **PP-0079**; Fishing License for Solvita, Svalbard, 9 December 2019, **PP-0080**. Fishing License for Solvita, NEAFC, 1 January 2020, **PP-0081**; Fishing License for Solvita, Svalbard, 25 February 2020, **PP-0082; C-0011; C-0012; C-0013; C-0014; C-0015; C-0016; C-0017**; Fishing License for Senator, NEAFC, 1 January 2019, **PP-0085**; Fishing License for Senator, Svalbard, 1 January 2019, **PP-0086**; Fishing License for Senator, NEAFC, 1 January 2020, **PP-0087**; Fishing License for Senator, Svalbard, 25 February 2020, **PP-0088; C-0004; C-0005; C-0006; C-0007; C-0008; C-0010; C-0009**; Fishing License for Saldus, NEAFC, 1 January 2019, **PP-0091**; Fishing License for Saldus, Svalbard, 1 January 2019, **PP-0092**; Fishing License for Saldus, NEAFC, 9 December 2019, **PP-0093**. Fishing License for Saldus, Svalbard, 9 December 2019, **PP-0094**; Fishing License for Saldus, NEAFC, 1 January 2019, **PP-0091**; Fishing License for Saldus, NEAFC, 1 January 2020, **PP-0095; C-0018; C-0019; C-0020; C-0021; C-0022**.

<sup>402</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 42.

- (c) North Star entered into supply agreements with purchasers of its snow crab catches providing that North Star's catches would be delivered in Norwegian ports.<sup>403</sup> North Star also concluded definitive agreements for the purchase of two additional vessels (Sokol and Solyaris) which would have been delivered to North Star in the port of Baatsfjord.<sup>404</sup>
- (d) In the course of North Star's fishing operations, in order to reach Norwegian ports from the Loophole or the waters off Svalbard, North Star ships travelled through the Norwegian Economic Zone and the Norwegian territorial sea.<sup>405</sup> The ships were subject to inspections by the Norwegian coast guard and underwent at least six such inspections.<sup>406</sup>
- (e) North Star's catches were processed in Norway, primarily by Seagourmet in Baatsfjord, but also by other Norwegian seafood processing companies based in the nearby Norwegian port of Vardo. Virtually all of North Star's catches were sold onshore in Norway.
- (f) North Star's vessels were serviced by Sea & Coast, a Norwegian company based and operating in Baatsfjord.<sup>407</sup> North Star relied on Sea & Coast for a broad variety of onshore services.
- (g) All companies participating in the joint venture, including North Star and Sea & Coast, were operated from Seagourmet's premises located at Havnegata 16-18, in the port of Baatsfjord. North Star and Sea & Coast rented office space from Seagourmet for this purpose.<sup>408</sup> Mr. Pildegovics had an office at Seagourmet's premises<sup>409</sup>, which he visited regularly.
- (h) At the joint project's peak in 2016, North Star employed over 90 seamen and administrative staff who were based in or operated from Baatsfjord. By

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<sup>403</sup> *Ibid.*, para. 115.

<sup>404</sup> *Id.*, para. 250; Contract for the acquisition of fishing capacity for Sokol, 8 February 2015, **PP-0107**; Contract for the acquisition of fishing capacity for Solyaris, 19 June 2015, **PP-0108**.

<sup>405</sup> Vessel Track of Saldus, 3 January – 25 November 2020, **PP-0025**; Vessel Track of Senator, 3 January 2012 – 25 November 2020, **PP-0026**; Vessel Track of Solveiga, 1 January 2014 – 3 November 2017, **PP-0027**; Vessel Track of Solvita, 1 July 2012 – 26 December 2020, **PP-0028**.

<sup>406</sup> See *below*, para. 339.

<sup>407</sup> Local Agency Agreement between North Star and Sea & Coast, 1 February 2015, **PP-0029**, art. 1.

<sup>408</sup> Sample invoice from Seagourmet to Sea & Coast for rental of office space and accommodation, 5 July 2016, **PP-0033**.

<sup>409</sup> Photograph of Peteris Pildegovics working at his desk at Seagourmet, **PP-0034**.

comparison, since its incorporation in March 2014, North Star never had more than four employees based at its headquarters in Riga. Thus, while the company is incorporated under the laws of Latvia and based in Riga, North Star's operations were (and remain) located in Norway.<sup>410</sup>

- (i) When the joint venture's activities were stopped by Norway's adverse actions, Senator was arrested and kept at the Norwegian port of Kirkenes, while North Star's three other ships remained moored in Baatsfjord.<sup>411</sup>

- 313. Norway was by far the State that most directly benefitted from Claimants' investments. Virtually all of the economic value created by these investments was generated in Norway.<sup>412</sup>
- 314. In 2015 and 2016, North Star spend over NOK 24 million yearly with Norwegian suppliers.<sup>413</sup>
- 315. North Star gave business to Norwegian shipyards for repairs and routine maintenance work including Kristiansund Fiskeindustri AS in Kristiansund; Barents Skipsservice AS in Baatsfjord and Kimek AS in Kirkenes. Between 2015 and 2017, North Star spent over EUR 850,000 for repair and maintenance services performed by these Norwegian shipyards.<sup>414</sup>
- 316. Claimants' business operations also brought significant indirect economic benefits to Norway as they enabled the development of their joint venture partner Seagourmet, which would not have been possible without North Star's supplies of snow crabs.<sup>415</sup>
- 317. Seagourmet had a major impact on the economy of Baatsfjord, notably through the creation of up to 67 local jobs (out of a total population of about 2,300) and total

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<sup>410</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 42.

<sup>411</sup> T. Abelsen, S. Vik, "*Jobs are at risk while Norway and the EU quarrel*," NRK, 14 February 2017, **PP-0035**; A. Fenstad, N. Torsvik, "*Hope Supreme Court reopens crab production*", Fiskeribladet, 8 November 2017, **PP-0036**.

<sup>412</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 177.

<sup>413</sup> *Ibid.*, para. 179; Table of North Star's spending with Norwegian Suppliers, 2015-2016, **PP-0174**.

<sup>414</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 180; Table of invoices from Barents Skipsservice to North Star, 2015-2016, **PP-0175**; Table of invoices from Kimek to North Star, 2015-2016, **PP-0176**; Sample invoices by Kimek to North Star, 2015-2016, **PP-0177**.

<sup>415</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 181; Witness Statement of Kirill Levanidov, 11 March 2021, para. 73.

spending of over NOK 109 million in the local economy.<sup>416</sup> At its peak in 2016, Seagourmet provided employment to about 3% of the town's total population.<sup>417</sup>

318. Seagourmet paid significant fees, dues and taxes to Norwegian authorities and trade bodies, including over NOK 4 million to Norges Rafisklag, a Norwegian sales organization regulated under Norway's Fisheries Act which controls first-hand sales of fish and shellfish in Norwegian ports; over NOK 1.9 million in customs duties; over NOK 770,000 to the Baatsfjord commune; and over NOK 5.1 million in Norwegian taxes.<sup>418</sup>
319. Seagourmet also made significant contributions and investments into the social and cultural development of Baatsfjord. For example, it co-hosted a local fishery industry event in 2015, catering with its own products and co-sponsored the Baatsfjord summer festival in July 2016. In the summer of 2016, Seagourmet also financed the upgrade and reconstruction of two local playgrounds for children.<sup>419</sup>
320. Seagourmet's presence in Baatsfjord positively impacted every segment of the local economy, from transportation to hospitality, from local real estate to retail and services to the population, all of which suffered indirectly from the significant decline in Seagourmet's activities since late 2016.<sup>420</sup>
321. The presence of North Star and Seagourmet in the Baatsfjord business community also sparked infrastructure investments by Norway. Seagourmet's needs were a major contributing factor in the expansion of Baatsfjord's central freezer warehouse, which made significant freezing capacity investments to serve Seagourmet's seafood storage needs.<sup>421</sup> In order to serve large seagoing vessels including North Star's, Norway also approved investments of NOK 100 million in Baatsfjord's port infrastructure.<sup>422</sup>

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<sup>416</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 69; Witness Statement of Peteris Pildegovics, 11 March 2021, para. 183.

<sup>417</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 68.

<sup>418</sup> *Ibid.*, para. 70.

<sup>419</sup> *Id.*, para. 72; Witness Statement of Geir Knutsen, para. 5; **C-0052**, p. 12.

<sup>420</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 73.

<sup>421</sup> *Ibid.*, para. 70; Witness Statement of Geir Knutsen, para. 8; "The central freezer storage gets more space", Fiskerihovedstaden, 4 September 2015, **KL-0040**.

<sup>422</sup> Witness Statement of Geir Knutsen, para. 9; A. Trellevik, "Batsfjord and Mehamn get millions for harbours," NRK, 18 January 2020, **PP-0185**; "Making Batsfjord Harbor Deeper," The Norwegian Coastal Administration, 22 December 2016, **PP-0186**; "Inauguration of the "new" Batsfjord Harbour," Kystsverget.no, 21 August 2019, **PP-0187**.

322. These economic benefits would not have accrued to Norway without Claimants' investments, since Seagourmet simply could not have run its factory without North Star's supplies of snow crabs.<sup>423</sup>
323. The critical importance of Claimants' investments for Seagourmet was unfortunately demonstrated by the collapse of Seagourmet's operations after Norway prevented North Star from delivering snow crabs to its Baatsfjord factory. In August 2016, Seagourmet employed 67 employees in Baatsfjord to process and transform snow crab supplies delivered by North Star. Starting in November 2016, after North Star's deliveries had stopped and Seagourmet's inventory had been depleted, Seagourmet's operations were severely curtailed, leaving it no choice but to start laying off employees.<sup>424</sup>
324. Between August 2016 and December 2017, Seagourmet's headcount at Baatsfjord fell to 3 employees and its revenues plunged from over NOK 58 million to less than NOK 10 million.<sup>425</sup> Seagourmet struggled to maintain minimal operations without North Star's supplies of snow crab, causing tens of families in Baatsfjord to lose their livelihood.<sup>426</sup>
325. The former Mayor of Baatsfjord, Mr. Geir Knutsen, testifies that Claimants' investments, along with those of their joint venture partner Mr. Levanidov, "*meant a great deal for the local economy... 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... Seagourmet made a very good impression at Baatsfjord. Without that kind of immigration of workers to which Levanidov and Pildegovics contributed, Baatsfjord would have ground to a halt.*"<sup>427</sup>

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<sup>423</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 41.

<sup>424</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 182; Witness Statement of Kirill Levanidov, 11 March 2021, para. 67.

<sup>425</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 183.

<sup>426</sup> *Ibid.*, para. 183; Witness Statement of Kirill Levanidov, 11 March 2021, para. 74.

<sup>427</sup> Witness Statement of Geir Knutsen, para. 4, 10.

**C. NORWAY’S ACKNOWLEDGEMENT AND ACCEPTANCE OF CLAIMANTS’ INVESTMENTS IN ITS TERRITORY**

326. Until at least July 2016, Norway acquiesced to, and thus recognized and accepted, the legality of snow crab fishing by EU vessels in the Loophole, including North Star’s vessels operating under Latvian-issued NEAFC licences.
327. When Claimants made their investments in the territory of Norway starting in January 2014, Norway did not prohibit snow crab fishing by European vessels in the Loophole’s international waters (*supra*, paras. 91-97). Norway recognized that vessels flying EU flags which were registered under the NEAFC Scheme could fish for snow crabs in the Loophole and land their catches in Norwegian ports “*on an equal footing with Norwegian fishing vessels*”.<sup>428</sup>
328. It was on the basis of this longstanding and consistent position taken by Norwegian authorities that Claimants made their investment in Norway. Claimants put faith and reliance in the clear Norwegian position that they were allowed to catch snow crabs as specified above.
329. Norwegian authorities confirmed on numerous occasions that Claimants’ investments were operated in compliance with Norwegian policies, laws and regulations. Norway indeed welcomed Claimants’ investments, until it abruptly changed course and decided to stop snow crab fishing by EU vessels operating in the Barents Sea.<sup>429</sup>
330. On 19 August 2013 the Latvian Ministry of Agriculture wrote to the European Union to ask about the possibility for Latvian fishermen to fish for snow crabs in NEAFC waters.<sup>430</sup> The European Union confirmed on 30 September 2013 that snow crab fishing could be started immediately following the appropriate notification to NEAFC, writing:<sup>431</sup>

*Snow crab/Opilio is un-regulated as far as NEAFC is concerned and you can start fishing as soon as your vessel is notified.*

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<sup>428</sup> Email exchange between the Norwegian Directorate of Fisheries and S. Ankipov, 20-25 July 2014 (emphasis added), **KL-0020**; Witness Statement of Geir Knutsen, para. 10

<sup>429</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 184.

<sup>430</sup> **C-0089**.

<sup>431</sup> **C-0090**.

331. Since July 2014, Latvia has issued fishing licenses to North Star authorizing its vessels to catch snow crabs in the NEAFC area.<sup>432</sup> The issuance of licenses by Latvia to North Star was notified to NEAFC on a yearly basis starting in December 2014.<sup>433</sup> Norway – and indeed the general public – could find out about these licences by simply consulting the NEAFC website.<sup>434</sup>
332. Norway, which is a NEAFC member State, did not object to the issuance of these licenses by Latvia under the NEAFC Scheme, notwithstanding its position with respect to the sedentary nature of snow crabs and its designation as a natural resource of the continental shelf. At the 34<sup>th</sup> Annual NEAFC Meeting in November 2015, the rights of coastal states with respect to sedentary species appeared on the agenda, as the Contracting Parties 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. In this context, there was also a discussion... on whether Norway and the Russian Federation had completed all the relevant procedures for submitting their declaration regarding the extent of their jurisdiction in the Barents Sea to the United Nations”*.<sup>435</sup>
333. This discussion occurred after the Malta Declaration of July 2015, through which Norway had announced its new position that snow crab is a sedentary species. Yet, when Norway spoke about the *“rights of coastal states”* over their continental shelf at the November 2015 NEAFC meeting, it merely confirmed that the coordinates of the outer limits of its continental shelf had been settled and notified to the United Nations in 2011.<sup>436</sup> It made no mention of the fact that several vessels flying the flag of other NEAFC member states had been issued NEAFC licenses allowing them to catch snow

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<sup>432</sup> **C-0023; C-0024; C-0025; C-0027; C-0029**; Fishing License for Solvita, NEAFC, 1 January 2019, **PP-0077**; Fishing License for Solvita, NEAFC, 9 December 2019, **PP-0079**; Fishing License for Solvita, NEAFC, 1 January 2020, **PP-0081; C-0011; C-0012; C-0014; C-0016**; Fishing License for Senator, NEAFC, 1 January 2019, **PP-0085**; Fishing License for Senator, NEAFC, 1 January 2020, **PP-0087; C-0004; C-0005; C-0007; C-0010**; Fishing License for Saldus, NEAFC, 1 January 2019, **PP-0091**; Fishing License for Saldus, NEAFC, 9 December 2019, **PP-0093**; Fishing License for Saldus, NEAFC, 1 January 2019, **PP-0091**; Fishing License for Saldus, NEAFC, 1 January 2020, **PP-0095; C-0018; C-0019; C-0021**.

<sup>433</sup> **C-0091; C-0092; C-0093**; Letter from the EC DG Mare (B. Friess) to NEAFC (S. Asmundsson), 31 December 2015, **PP-0099**; Email of the Latvian Ministry of Agriculture and Fisheries (Ričards Derkačs) to the European Union/DG MARE (Pernille Skov-Jensen) (notification of Solvita, Senator, Saldus, Solveiga for 2017), 7 December 2016 **PP-0100**.

<sup>434</sup> NEAFC website, *“Register of Notified Vessels and Authorisations 2021,”* 8 March 2021 [date of access], **PP-0101**.

<sup>435</sup> **C-0118**, p. 7.

<sup>436</sup> *Ibid.*, p. 14.

crabs in the Loophole (an area suprajacent to Norway's continental shelf), a fact that was of course well known to Norway by that time.

334. On the fishing grounds and in its ports, Norway also consistently confirmed its acceptance of Claimants' snow crab fishing operations, until it decided to stop them in September 2016.
335. In the course of its operations, North Star had to request permission from Norway every time it unloaded a snow crab catch in a Norwegian port. North Star did so through the submission of NEAFC PSC forms, indicating that North Star had caught snow crabs in the Loophole and that it wished to land these catches in Norway.
336. On at least seventy-nine (79) occasions between July 2015 and September 2016, Norwegian authorities gave North Star's vessels permission to enter the Norwegian ports of Baatsfjord, Kjollefjord and Vardo and consented to North Star's landing of snow crabs in these ports. This consent was given through Norway's approval of NEAFC Port State Control forms clearly indicating that North Star's catches had been made in the Loophole.<sup>437</sup>
337. Norges Rafisklag, a Norwegian sales organization regulated under Norway's Fisheries Act, recorded each sale of snow crab by North Star in Norwegian ports.<sup>438</sup> The data collected by Norges Rafisklag was at all times available to the Norwegian government, which regularly accesses this data.<sup>439</sup>
338. It is noteworthy that Norway did not stop providing its consent after the Malta Declaration following which snow crabs were designated as a "*sedentary species*". On the fishing grounds and at port, Norway's practice did not change, and Claimants' business operations continued undisturbed until September 2016, when Norway suddenly decided to withdraw its consent.

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<sup>437</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 186; NEAFC Port State Control Forms – PSC 1 for Saldus, 2015-2016, **C-0100**; NEAFC Port State Control Forms – PSC 1 for Solveiga, 2015-2016, **C-0101**; NEAFC Port State Control Forms – PSC 1 for Solvita, 2015-2016, **C-0102**; NEAFC Port State Control Forms – PSC 1 for Senator, 2015-2016, **C-0103**.

<sup>438</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 187; Rafisklaget Sales Notes for Saldus, 2015, **PP-0159**; Rafisklaget Sales Notes for Saldus, 2016, **PP-0160**; Rafisklaget Sales Notes for Solvita, 2015, **PP-0161**; Rafisklaget Sales Notes for Solvita, 2016, **PP-0162**; Rafisklaget Sales Notes for Solveiga, 2015, **PP-0163**; Rafisklaget Sales Notes for Solveiga, 2016, **PP-0164**; Rafisklaget Landing Notes for Senator, 2015, **PP-0165**; Rafisklaget Landing Notes for Senator, 2016, **PP-0166**.

<sup>439</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 187.



339. During their fishing operations in the NEAFC zone, North Star ships underwent routine inspections by NEAFC coastal states Norway and the Russian Federation pursuant to the NEAFC Scheme.<sup>440</sup> While all of these inspections found snow crab onboard the ship, none of them resulted in any infringement finding against North Star.
340. On 1<sup>st</sup> May 2015, the Norwegian Coast Guard inspected Solveiga. It completed a NEAFC report of inspection which confirmed that Solveiga held a valid licence to fish in the NEAFC regulatory area. The Norwegian inspectors also reviewed Solveiga's fishing logbook, including information about fishing gear used, total catches by species and fishing zones. Their report noted that Solveiga held 23,206 kg of snow crab on board, caught with crab fishing gear ("FPO"). Solveiga was confirmed to be in good standing and no infringement was reported by the Norwegian coast guard.<sup>441</sup>
341. On 15 January 2016, the Norwegian coast guard inspected Saldus. It completed a similar NEAFC report of inspection. The report confirmed that Saldus held a valid licence to fish in the NEAFC regulatory area and that it held 9,415 kg of snow crab on board caught with crab fishing gear ("FPO"). Again, no infringement was reported.<sup>442</sup>
342. In addition to these NEAFC inspections, between August 2014 and August 2016, North Star vessels were inspected at least four times by the Norwegian Coast Guard in Norwegian harbours.<sup>443</sup> In each of its reports, the Coast Guard noted the name of the ship, its nationality (Latvian), its cargo (snow crab) and the place of inspection. During these inspections, the Norwegian Coast Guard never raised any concerns regarding the fact that North Star's vessels had been catching snow crabs.<sup>444</sup>
343. Norwegian public officials initially supported and welcomed Claimants' investments in Norway. In May 2015, Seagourmet announced its opening event through a press release which indicated that *"our major partner that supplies live crab to our factory is a Latvian company – SIA North Star Ltd – that operates four tailor-made crab boats... We expect international guests including our friends from Latvia to join the ceremony. The Mayor of Baatsfjord and other honorary local decision makers are also on the guest*

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<sup>440</sup> *Ibid.*, para. 161; **C-0094**; **C-0095**; **C-0096**; **C-0097**; **C-0098**; **C-0099**.

<sup>441</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 162; **C-0099**.

<sup>442</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 163; **C-0094**.

<sup>443</sup> Norwegian Coast Guard Inspection Form, Solvita, Port of Kjollefjord, 13 August 2014, **PP-0169**; Norwegian Coast Guard Inspection Form, Solvita, Port of Baatsfjord, 6 August 2015, **PP-0170**; Norwegian Coast Guard Inspection Form, Solveiga, Port of Baatsfjord, 27 January 2016, **PP-0171**; Norwegian Coast Guard Inspection Form, Saldus, Port of Baatsfjord, 10 August 2016, **PP-0172**.

<sup>444</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 164.

list".<sup>445</sup> Invitations to the opening ceremony were sent to Mr Frank Bakke-Jensen, a prominent member of the Norwegian Parliament (currently Norway's Minister of Defense), and Mr Geir Knutsen, then mayor of Baatsfjord.<sup>446</sup>

344. On 10 June 2015, the opening ceremony was held. Guests who attended this ceremony included Mr. Knutsen, the mayor of Baatsfjord and Mr. Abelis, the Ambassador of Latvia to Norway.<sup>447</sup> Mayor Knutsen gave a speech praising the project and cut the ceremonial ribbon marking the official opening of the factory.<sup>448</sup>
345. Norwegian media enthusiastically reported about the launch of the joint venture.<sup>449</sup> Mayor Knutsen said that it marked a *"big day in the fishing community of Baatsfjord"* and that he was *"incredibly happy and not least proud that they chose Baatsfjord to establish themselves"*. He cited the Claimants' joint project as *"a welcome addition to the industry in Baatsfjord."*<sup>450</sup>
346. In his witness statement in support of Claimants' memorial, Mayor Knutsen confirms that the municipality was pleased that Seagourmet's factory *"was once more going: it employed a great number of workers"* and *"had the potential of growing further yet. The investment and activity in Baatsfjord meant employment opportunities for the local community"*. He adds that *"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."*<sup>451</sup>
347. On 4 September 2015 – a few months after the Malta Declaration – a delegation of Norwegian members of parliament headed by Mr. Bakke-Jensen visited Seagourmet.<sup>452</sup> The delegation was given a tour of the factory and piers and was duly informed that North Star was Seagourmet's exclusive supplier of snow crab and

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<sup>445</sup> *Ibid.*, para. 189; News release entitled "Seagourmet Norway cuts the ribbon", 26 May 2015, **PP-0142**.

<sup>446</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 189

<sup>447</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 190; Photographs taken at the opening ceremony, 10 June 2015, **PP-0145**.

<sup>448</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 190; Photographs taken at the opening ceremony, 10 June 2015, **PP-0145**.

<sup>449</sup> B. Wormdal and A. Foleide, *"The 'fishing capital' is expanding with a new snow crab factory,"* NRK Finnmark, 10 June 2015, **PP-0178**.

<sup>450</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 191; B. Wormdal and A. Foleide, *"The 'fishing capital' is expanding with a new snow crab factory,"* NRK Finnmark, 10 June 2015, **PP-0178**.

<sup>451</sup> Witness Statement of Geir Knutsen, para. 4, 7.

<sup>452</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 192; Email exchange between Seagourmet and a representative of Norway's Parliament, September 2015, **PP-0179**; Photographs taken during the visit of Segourmet by the Norwegian Parliament's delegation, 4 September 2015, **PP-0180**.

strategic partner. Mr. Bakke-Jensen gave his blessings and best wishes of success to the project. At no point did the delegation express any concern about the fact that Seagourmet relied on North Star's catches for its snow crab supplies.<sup>453</sup>

348. On 8 September 2015, Seagourmet hosted a visit by Ms. Elizabeth Aspaker, the then Minister of Fisheries of Norway.<sup>454</sup> Mr. Pildegovics hosted this event, which Mayor Knutsen also attended. Minister Aspaker was informed of the integrated nature of the fishing and processing enterprises and more specifically that Seagourmet relied on supplies of snow crabs delivered by North Star, a Latvian company. She visited Seagourmet's factory and docks, posed for a picture in front of North Star's vessel Solveiga flying the Latvian flag<sup>455</sup> and witnessed the offloading of snow crabs from that same ship. Minister Aspaker assured Mr. Pildegovics of her support for their joint project. She expressed no reservations regarding the fact that North Star, an EU-based company, was responsible for the delivery of snow crabs to Seagourmet.<sup>456</sup>
349. On 23 October 2015, a delegation of Norway's Ministry of Trade and Industry visited Seagourmet's factory.<sup>457</sup> The delegation enquired about the business vision underlying the project and was informed about Seagourmet's dependence on North Star's deliveries of snow crabs caught in the Loophole. Members of the delegation appeared enthusiastic about the project and gave their encouragements. Again, the delegation gave no indication that the Norwegian government was in any way opposed to snow crab fishing by EU-based companies in the NEAFC zone.<sup>458</sup>
350. Beyond these expressions of support and interest for Claimants' investments on the part of Norwegian authorities, Norway also approved major investments in Baatsfjord's port infrastructure to facilitate the operations of large vessels wishing to use Baatsfjord as a port of call. In September 2015, Minister Aspaker announced the launch of

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<sup>453</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 192.

<sup>454</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 193; **C-0080**; Facebook post mentioning Minister Aspaker's visit of Seagourmet, 23 September 2015, **PP-0181**.

<sup>455</sup> Photographs taken during the visit of Seagourmet by Minister Aspaker, 8 September 2015, **PP-0182**.

<sup>456</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para.193.

<sup>457</sup> Program of Norway's Ministry of Trade and Industry delegation's visit to Baatsfjord, 22-23 October 2015, **PP-0183**; Photographs taken during the visit of Seagourmet by the Ministry of Trade and Industry delegation, 23 October 2015, **PP-0184**.

<sup>458</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 193.

dredging works to increase the depth of the harbour and increase the area where large vessels could be moored.<sup>459</sup> These investments amounted to NOK 100 million.<sup>460</sup>

351. The large vessels that would have benefited from these works (including North Star's<sup>461</sup>) were overwhelmingly foreign snow crab fishing vessels operating from Baatsfjord, since the local fleet of Norwegian vessels is composed of small and medium-sized ships which would not have required these major investments.<sup>462</sup> Norway's investments were thus mainly or solely motivated by the desire to attract these foreign vessels to Baatsfjord. In particular, North Star would have been a direct beneficiary of the works in Baatsfjord's Foma Bay, Neptune Bay and Steamship quay, through increased access to moorings for its ships and faster unloading times at Seagourmet's factory.<sup>463</sup>
352. Norway's acknowledgement and acceptance of Claimants' investments is also shown by the degree of public support received by Claimants and their strategic partner Seagourmet after the Norwegian government stopped North Star's snow crab fishing activities, which was broadly understood as the cause of Seagourmet's collapse and its negative impacts on the community.<sup>464</sup>
353. In September 2016, after North Star has been fined by Norway for catching snow crab in the Loophole, Mayor Knutsen stated in a media interview that *"Seagourmet has gradually become one of the cornerstone companies here in the municipality with great potential for further ripple effect. It has simply become a model company with great local significance. So, here we will do everything we can to try and find a solution that can secure raw materials for the company"*.<sup>465</sup>
354. In late 2016, Mr. Geir Knutsen, the Mayor of Baatsfjord, met with Mr. Per Sandberg, the Norwegian Minister of Fisheries, and Mr. Ronny Berg, Norway's State Secretary, to advocate for a resumption of snow crab fishing activities by EU ships to save the

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<sup>459</sup> A. Trellevik, "Batsfjord and Mehamn get millions for harbours," NRK, 18 January 2020, **PP-0185**; "Making Batsfjord Harbor Deeper," The Norwegian Coastal Administration, 22 December 2016, **PP-0186**; "Inauguration of the "new" Batsfjord Harbour," Kystsverget.no, 21 August 2019, **PP-0187**.

<sup>460</sup> *Ibid.*

<sup>461</sup> Witness Statement of Geir Knutsen, para. 9.

<sup>462</sup> A. Trellevik, "Batsfjord and Mehamn get millions for harbours," NRK, 18 January 2020, **PP-0185**; "Making Batsfjord Harbor Deeper," The Norwegian Coastal Administration, 22 December 2016, **PP-0186**; "Inauguration of the "new" Batsfjord Harbour," Kystsverget, 21 August 2019, **PP-0187**.

<sup>463</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 196.

<sup>464</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 74.

<sup>465</sup> "Negotiator with the Russians," Fiskeribaldet Fiskaren, 21 September 2016, **KL-0041**, p. 2.

jobs created by Seagourmet's factory.<sup>466</sup> He proposed a pilot project that would have allowed North Star to benefit from temporary permits allowing it to continue its activities.<sup>467</sup> Unfortunately, these efforts were to no avail.<sup>468</sup>

355. Norwegian Member of Parliament Ms. Helga Pedersen also pressed the Government of Norway to find political solutions to enable to resumption of Claimants' snow crab fishing activities.<sup>469</sup> These efforts have also failed to change the Norwegian government's opposition to Claimants' investments.
356. Support for Claimants' investments in Norway continues to this date. On 1<sup>st</sup> March 2021, the Finnmark Council, representing the coastal communities of Finnmark, wrote to the new Minister of Fisheries, Mr. Odd Emil Ingebrigtsen, to advocate for a solution to Seagourmet's supply problems, highlighting the large economic cost suffered by the town of Baatsfjord due to Norway's actions against North Star.<sup>470</sup> The very fact that the former Mayor of Baatsfjord has agreed to submit a witness statement in support of Claimants' memorial is, in itself, ample proof of the support enjoyed by Claimants in the local community.
357. Unfortunately, while Claimants have certainly been grateful for this support, the Norwegian Government in Oslo has remained steadfast in its position and refusal to acknowledge the consequences of its actions for Claimants' enterprise and investments in Norway.

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<sup>466</sup> Witness Statement of Geir Knutsen, para. 7; *"Three week deadline"*, Kyst og Fjord, 9 December 2016, **KL-0042**; *"Will have its own Baatsfjord quota"*, Kyst og Fjord, 14 February 2017, **KL-0043**.

<sup>467</sup> Witness Statement of Geir Knutsen, para. 7; O. Pedersen, *"Seagourmet fights overtime against bankruptcy – Gets no response from the authorities,"* iFinnmark, 12 January 2017, **KL-0044**.

<sup>468</sup> Witness Statement of Geir Knutsen, para. 7; Witness Statement of Kirill Levanidov, 11 March 2021, para. 76.

<sup>469</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 79; Written question and answer between Helga Pedersen, Member of Parliament, and Per Sandberg, Minister of Fisheries, 9 January 2017, **KL-0046**; H. Pedersen, *"Government on a cushion"*, Finnmark Dagblad, 13 January 2017, **KL-0047**; O. Pedersen, *"Seagourmet fights overtime against bankruptcy – Gets no response from the authorities,"* iFinnmark, 12 January 2017, **KL-0044**.

<sup>470</sup> Finnmark's letter to the Minister of Fisheries and Seafood, 1 March 2021, **C-0178**.

#### D. NORWAY'S ADVERSE ACTIONS AGAINST CLAIMANTS' INVESTMENTS

358. In the fall of 2015, Claimants started perceiving a change in the Norwegian government's political tone towards EU companies involved in the Barents Sea snow crab fishery.<sup>471</sup>
359. While there was of course some initial surprise about the Malta Declaration of July 2015, Claimants understood that Norway was not opposed to a continuation of fishing activities by EU vessels in the Loophole, since Norway indeed derived significant economic benefits from these activities. The Malta Declaration had emphasized Norway's position that it needed to consent to snow crab fishing on its continental shelf. Yet, while knowing that EU vessels conducted snow crab fishing operations in the Loophole under the NEAFC Scheme, Norway had raised no issue in this regard within NEAFC. After July 2015, Norway had also continued to provide its formal consent to Claimants' fishing operations, through its approval of North Star's multiple snow crab landing requests.<sup>472</sup> The several visits of Norwegian officials at Claimant's factory premises in Baatsfjord in September and October 2015 gave Claimants further comfort and confirmation that Norway consented to (and indeed supported) their operations.<sup>473</sup>
360. However, in November 2015, Minister Aspaker gave an interview to NRK, the Norwegian government-owned radio and television broadcaster, in which she attacked foreign snow crab fishing companies for allegedly failing to uphold adequate working conditions aboard their ships. She vowed to "*crack down and also fight*" alleged illegalities aboard such ships<sup>474</sup> while not calling the fishing operations to halt.
361. The communications manager of Seagourmet, Mr. Andrei Kazakov, was interviewed for NRK's article and asked to comment on these allegations. Mr. Kazakov assured the journalist that North Star's vessels were operated in accordance with applicable legislation and that there had been no complaints from the crews.<sup>475</sup>
362. While the Minister was ostensibly concerned about working conditions on certain foreign ships, NRK's article concluded on a rather different note: "*Stopping foreign*

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<sup>471</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 198.

<sup>472</sup> *Ibid.*, para. 186.

<sup>473</sup> *Id.*, paras. 192-194.

<sup>474</sup> J.H. Tomassen and K. Helsa, "*Cannot intervene against illegalities in international waters*," NRK, 10 November 2015, **PP-0188**.

<sup>475</sup> *Ibid.*

vessels from delivering [snow crabs] in Norway is basically impossible. If the Minister of Fisheries can do nothing, then the wish is at least clear".<sup>476</sup>

363. Minister Aspaker's reported "wish" to "stop foreign vessels from delivering" snow crabs in Norway came as a surprise to Claimants, since only a few weeks before, the same Minister had visited Seagourmet's factory and expressed her unambiguous support for Claimants' joint project, while simultaneously announcing the refurbishment of the port of Baatsfjord.<sup>477</sup>
364. In December 2015, a representative of Seagourmet, Mr. Sergei Ankipov, wrote to the Minister's office to thank her for her recent visit. He noted the company's contributions to the local community and emphasized its dependence on snow crab supplies provided by North Star, a Latvian company. However, Seagourmet had by then grown concerned about Norway's intentions that could seemingly compromise the company's access to snow crab supplies in 2016. Mr. Ankipov therefore requested a meeting with the Minister.<sup>478</sup>
365. On 8 January 2016, a representative of the Ministry of Fisheries responded to Mr. Ankipov. The representative indicated that there had been "*a change in the political leadership just before Christmas*" and offered a meeting with the new Minister, Mr. Per Sandberg. He also asked Mr. Ankipov to clarify the meeting's purpose, apparently unaware of any news that would cast doubt about Seagourmet's ability to source snow crabs from EU vessels.<sup>479</sup>
366. On 27 January 2016, Minister Sandberg visited Baatsfjord to meet with seafood producers.<sup>480</sup> In the press release announcing his visit, he was quoted as saying that "*the government is concerned with increasing the profitability of the fishing industry*" and that he would be there to "*have a good dialogue*".<sup>481</sup> In advance of the Minister's

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<sup>476</sup> *Id.*, emphasis added.

<sup>477</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 193.

<sup>478</sup> *Ibid.*, para. 201; Email exchange between S. Ankipov and the Norwegian Ministry of Fisheries, 9 December 2015 – 8 January 2016, **PP-0189**.

<sup>479</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 202; Email exchange between S. Ankipov and the Norwegian Ministry of Fisheries, 9 December 2015 – 8 January 2016, **PP-0189**.

<sup>480</sup> Press Release, "*The Minister of Fisheries visits Båtsfjord*," 20 January 2016, **PP-0190**

<sup>481</sup> *Ibid.*

visit, Seagourmet invited him to visit its factory, like it had done for Minister Aspaker. Unlike his predecessor, however, Minister Sandberg refused the invitation.<sup>482</sup>

367. On 22 February 2016, Mr. Ankipov and Mr. Pildegovics visited Minister Sandberg in Oslo, accompanied by Mayor Knutsen and factory manager Mr. Pavel Kruglov. During the meeting, they explained how Seagourmet was entirely dependent on North Star's deliveries of snow crab. Mayor Knutsen stressed the importance of their joint enterprise for the economy of Baatsfjord.<sup>483</sup> Minister Sandberg emphasized Norway's position that EU vessels were not allowed to catch snow crabs in waters above Norway's continental shelf without Norway's consent. Mr. Pildegovics and his colleagues reiterated to the Minister that North Star held valid licenses to catch snow crab in the NEAFC area and the meeting ended on that note.<sup>484</sup>

#### **a. Norway's enforcement actions against Claimants' investments**

368. Claimants were allowed to continue their snow crab fishing operations undisturbed through the spring and summer of 2016.
369. Between January and September 2016, North Star unloaded more than 2,900 tonnes of snow crab caught in the Loophole in Norwegian ports through no less than 49 landings made by its four ships.<sup>485</sup> Norway formally consented to each one of these landings through the NEAFC PSC Form system.<sup>486</sup>
370. In September 2016, Norway notified its first enforcement action against Claimants' investments. On 27 September 2016, North Star received a fine of NOK 81,000 from the Norwegian coast guard *"for having caught snow crab in the Norwegian sea territory and inland waters, and on the Norwegian continental shelf without the necessary permission"*, more specifically in the Loophole.<sup>487</sup>

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<sup>482</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 203.

<sup>483</sup> *Ibid.*, para. 204.

<sup>484</sup> *Id.*

<sup>485</sup> Rafisklaget Sales Notes for Saldus, 2016, **PP-0160**; Rafisklaget Sales Notes for Solvita, 2016, **PP-0162**; Rafisklaget Sales Notes for Solveiga, 2016, **PP-0164**; Rafisklaget Landing Notes for Senator, 2016, **PP-0166**; Sample English translation of a Rafisklaget Sales Note, Undated, **PP-0167**.

<sup>486</sup> **C-0100**, pp. 10-19; **C-0101**, pp. 10-26; **C-0102**, pp. 9-25; **C-0103**, pp. 5-9.

<sup>487</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 205; Confiscation order against North Star and Order against Mr. Uzakov, 27 September 2016, **PP-0191**.



371. While Senator held a valid license to catch snow crab in the Loophole, North Star decided to pay the fine to avoid the costs of defending a likely legal action from Norway if it chose not to pay. North Star paid the fine on 28 September 2016.<sup>488</sup>
372. After this incident, North Star decided to redirect its vessels to the waters off the Svalbard archipelago, an area for which the vessel held a snow crab harvesting licence.<sup>489</sup>
373. On 14 January 2017, the Senator entered the Svalbard FPZ (*i.e.* within 200 nautical miles of the Svalbard archipelago). The next day, the Senator started putting out pots in the Svalbard FPZ waters. On 16 January 2017, two days after entering Svalbard waters, the Senator was arrested by the Norwegian coast guard. When the Senator set out from Baatsfjord on 14 January, the Norwegian Coast Guard knew that Senator was heading towards Svalbard FPZ with the intention to fish snow crab, but instead of sending warnings immediately, it let it reach the SFPZ and install its pots before arresting it. The Senator was then escorted to the Norwegian port of Kirkenes, where it was kept in custody by Norwegian authorities until early 2020.<sup>490</sup>
374. On 18 January 2017, two days after Senator's arrest, Norway's Minister of Fisheries Mr. Per Sandberg wrote to Seagourmet in response to its inquiries "*about shortage of raw materials for snow crab*".<sup>491</sup> His letter emphasized Norway's newly asserted right "*to regulate the resources on the Norwegian continental shelf, including snow crab*" and argued that Latvian vessels did not have a legal right to catch snow crab therein. It further noted that "*in the bilateral negotiations for 2016 and 2017, Norway has offered the EU a quota for snow crab as part of the current account in the annual negotiations... In order to reach such an agreement, the EU must compensate Norway for this by allocating quotas for other species to Norway. So far, the EU has not wanted to pay for such a quota change on snow crab.*" For this reason, it was said that the Latvian

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<sup>488</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 206; Excerpt from North Star's bank account statement, 28 September 2016, **PP-0192**.

<sup>489</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 207.

<sup>490</sup> **C-0039; C-0040**.

<sup>491</sup> Letter from P. Sandberg to Seagourmet, 18 January 2017, **PP-0193**.

vessels which Seagourmet relied on for its operations could not be given “access to snow crab fishing on the Norwegian continental shelf”.<sup>492</sup>

375. The Senator’s arrest was reported in the Norwegian media as an example of Norway’s “tough line” policy against the EU in Svalbard waters. In a subsequent media interview, Minister Sandberg declared that “if there will be more ships in the area, they will be arrested”.<sup>493</sup> He again acknowledged that Norway was using snow crab as a bargaining chip in fisheries negotiations with the EU, declaring that “we will not give them a single crab” (“them” referring to EU fishing companies including North Star).<sup>494</sup> Since then, Norway has continued to maintain the same policy.<sup>495</sup>
376. On 20 January 2017, North Star was issued a penalty notice by the Chief of Police of Finnmark for alleged illegal snow crab catching on the Norwegian continental shelf in the Svalbard Fisheries Protection Zone without a permit issued by Norwegian authorities. North Star was given a corporate fine of NOK 150,000 and a confiscation order of NOK 1,000,000. The captain of the Senator, Mr. Rafael Uzakov, was given a fine of NOK 150,000.<sup>496</sup>
377. This time, North Star and Mr. Uzakov refused payment of the fines as a matter of principle, since Senator held a legally valid licence to catch snow crabs in the Svalbard area, and to try to save Claimants’ fishing enterprise, which had by then been completely deprived of its snow crab fishing rights by Norway. Both North Star and Mr. Uzakov were prosecuted before the Norwegian courts.<sup>497</sup>
378. The Norwegian government’s enforcement actions targeting Claimants’ investments were far from uncontroversial amongst Norwegian politicians.
379. By late 2016, Mayor Knutsen had already met with Mr. Per Sandberg, the Norwegian Minister of Fisheries, and Mr. Ronny Berg, Norway’s State Secretary, to advocate for a resumption of snow crab fishing activities by EU ships to save the jobs created by

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<sup>492</sup> *Ibid.*

<sup>493</sup> **C-0036.**

<sup>494</sup> *Ibid.*

<sup>495</sup> **C-0113.**

<sup>496</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 212; **C-0039**; Invoices for payment of confiscation, case costs and fine, 31 January 2020, **PP-0194**.

<sup>497</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 213; *See below*, para. 392-406.

Seagourmet's factory.<sup>498</sup> He had proposed a pilot project that would have allowed North Star to benefit from temporary permits allowing it to continue its activities.<sup>499</sup> Unfortunately, these efforts were to no avail.<sup>500</sup>

380. On 10 January 2017, Norway's Ministry of Trade, Industry and Fisheries addressed a letter to the municipality of Baatsfjord. It acknowledged *"that investment had been made in a new snow crab factory in Baatsfjord which has employed 40 people and had major positive ripple effects in the local community."* However, the letter fell short of offering any tangible solution, essentially brushing aside the municipality's request that *"the four Latvian vessels that have delivered to Seagourmet Baatsfjord are allowed to fish in the Svalbard zone, possibly in the Norwegian part of Smutthullet [or the Loophole]"*. To this request, the Ministry answered that catches by EU vessels *"on the Norwegian continental shelf can only take place by agreement with Norway"* and that the matter was one between Norway and the EU Commission.<sup>501</sup>
381. On 9 January 2017, Ms. Helga Pedersen, the leader of the opposition party and a former Minister of Fisheries, submitted a written question to Minister Sandberg: *"What will the government do to secure deliveries of snow crab to Seagourmet AS in Baatsfjord?"*<sup>502</sup>
382. Ms. Pedersen's written question was accompanied by a section entitled *"context"*, which established a clear link between Norway's adverse actions against North Star and Seagourmet's demise, and insisted that the government needed to find *"political solutions"*:<sup>503</sup>
383. *In the autumn of 2016, the company Seagourmet AS in Baatsfjord had to lay off almost 50 employees, due to the Latvian vessels that delivered snow crabs to the company being banned from fishing. In Norway, several vessels have been granted permission*

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<sup>498</sup> "Three week deadline," Kyst og Fjord, 9 December 2016, **KL-0042**; "Will have its own Baatsfjord quota," Kyst og Fjord, 14 February 2017, **KL-0043**.

<sup>499</sup> O. Pedersen, "Seagourmet fights overtime against bankruptcy – Gets no response from the authorities," iFinnmark, 12 January 2017, **KL-0044**.

<sup>500</sup> Witness Statement of Geir Knutsen, para. 7.

<sup>501</sup> Letter from the Ministry of Trade, Industry and Fisheries to the Baatsfjord municipality, 10 January 2017, **KL-0045**.

<sup>502</sup> Written question and answer between Helga Pedersen, Member of Parliament, and Per Sandberg, Minister of Fisheries, 9 January 2017, **PP-0046**; H. Pedersen, "Government on a cushion," Finnmark Dagblad, 13 January 2017, **KL-0047**; O. Pedersen, "Seagourmet fights overtime against bankruptcy – Gets no response from the authorities," iFinnmark, 12 January 2017, **KL-0044**.

<sup>503</sup> Written question and answer between Helga Pedersen, Member of Parliament, and Per Sandberg, Minister of Fisheries, 9 January 2017, **PP-0046**.

*to fish for snow crab, but it is said that only one vessel delivers on land. For the affected economy, the employees and the boating fjord community, this is a challenging situation, and political solutions are necessary.*

384. On 16 January 2017, Minister Sandberg gave a reply that unfortunately did not answer Ms. Pedersen's question. He reiterated Norway's position that snow crab is a sedentary species managed according to the rules of the continental shelf, with the consequence that those who wish "*to catch snow crab on the Norwegian shelf must have permission from the Norwegian authorities*". He stressed that Norway would only grant its permission to vessels flying EU flags if Norway were "*compensated in the form of [a transfer of EU] quotas for blue withing, blue halibut sprat and other species*"<sup>504</sup>, in effect taking Claimants' investments for hostage in negotiations with the EU.
385. While Minister Sandberg acknowledged that he had "*long been aware of the situation around the lack of raw materials for Seagourmet AS's factory in Baatsfjord*", he deflected the blame on the EU and on Seagourmet itself, emphasizing that "*every player who establishes a business is responsible for ensuring that operations have a sufficient resource base*".<sup>505</sup>
386. Minister Sandberg's statement ignored the fact that, from the launch of Mr. Pildegovics' joint venture with Mr. Levanidov until Norway itself decided to end North Star's snow crab fishing operations, Seagourmet had indeed secured ample supplies of snow crab through North Star, relying on confirmations from the Norwegian Directorate of Fisheries that this was consistent with Norwegian regulations.<sup>506</sup> Seagourmet had since then been unable to find alternative supplies of snow crab because of the very low catch numbers reported by the remaining Norwegian vessels, as well as the fact that virtually all of them processed their catches onboard.<sup>507</sup>
387. In another statement reported by the media on 15 January 2017, Minister Sandberg attempted to put the blame on Russia while again insisting that granting access to the

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<sup>504</sup> *Ibid.*

<sup>505</sup> *Id.*

<sup>506</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 81.

<sup>507</sup> Witness Statement of Geir Knutsen, para. 6; B.A. Berteussen, B.H. Nøstvold, I. Ruiken, "*Fishing for an institution-based first-mover advantage: The Norwegian snow crab case*," Ocean and Coastal Management, Vol. 194, 2020, **BK-0004**, p. 3 ("*Only two Norwegian vessels have tried live catch and delivery at shore, but this has never reached a significant amount. In 2018, no snow crab was delivered live onshore, and in 2019, only 16 tons were delivered live*").

“Norwegian zone” to EU vessels required an assignment of other EU quotas to Norway.<sup>508</sup>

*Norway is not the challenge here. When Russia has imposed a ban, it is because it is them who decide. It is the relationship between the EU and Russia, not Norway.*

*I work towards the EU. But I cannot give them access to the Norwegian zone without us getting something back. Then we would have been in a completely different political situation, and then Helga would probably come and blame me for that.*

388. In June 2017, Ms. Pedersen came back to the issue and pressed Minister Sandberg to explain whether Norway’s quota setting had taken into account the need “to secure deliveries to Seagourmet’s production in Baatsfjord and thereby secure important jobs there”?<sup>509</sup>
389. Minister Sandberg replied that Norway’s quota setting had “no connection to the snow crab factory in Baatsfjord”.<sup>510</sup> He indicated that Norway had “set aside” 500 tonnes “for agreements with other countries”, on the condition that bilateral quota exchange agreements were reached with these other countries.<sup>511</sup>
390. However, as the Minister undoubtedly knew, even had such a bilateral agreement been reached with the EU allowing North Star to resume fishing for snow crabs, the proposed quota would have been far insufficient to support Seagourmet’s operations. Even assuming that Seagourmet could have been able to purchase the *entire* proposed foreign quota of 500 tonnes (a highly unrealistic prospect), such a volume would have allowed its factory to run for less than a month at full capacity.<sup>512</sup> Moreover, in reality the Norwegian snow crab regulation banning the fishery, but allowing for dispensations, allowed for such dispensations only for Norwegian vessels, showing Norway never intended to give EU vessels any snow crab.<sup>513</sup>

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<sup>508</sup> Ole-Tommy Pedersen, “How dare you Helda! No one has ever received such close follow-up from a Minister of Fisheries as Baatsfjord,” iFinnmark, 15 January 2017, **KL-0051**.

<sup>509</sup> Written question and answer between Helga Pedersen, Member of Parliament, and Per Sandberg, Minister of Fisheries, 21 June 2017, **KL-0048**; T. Antonsen, “Answered about snow crab,” Kyst og Fjord, 30 June 2017, **KL-0049**.

<sup>510</sup> Written question and answer between Helga Pedersen, Member of Parliament, and Per Sandberg, Minister of Fisheries, 21 June 2017, **KL-0048**; T. Antonsen, “Answered about snow crab,” Kyst og Fjord, 30 June 2017, **KL-0049**.

<sup>511</sup> T. Antonsen, “Answered about snow crab,” Kyst og Fjord, 30 June 2017, **KL-0049**.

<sup>512</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 85.

<sup>513</sup> **C-0110; C-0114**; Regulations prohibiting the capture of snow crabs, J-213-2020, 1 January 2021 (in force), **C-0168**.

391. The media reported that “*big politics*”<sup>514</sup> were the motivating factor behind the Norwegian government’s decision to stop North Star’s fishing activities, and therefore to shut down the joint venture between Mr. Pildegovics and Mr. Levanidov. Minister Sandberg openly admitted to NRK that he was “*using the snow crab as a strong bargaining chip*” to obtain other fishing quotas from the EU.<sup>515</sup> He also admitted that he only felt “*reasonably comfortable*” with Norway’s legal position, but that he nonetheless believed that his efforts would soon bring the EU “*to the negotiating table*”.<sup>516</sup>
392. In another illustration of Norway’s internal conflicts about the merits of the government’s political strategy, NRK reported that “*in Baatsfjord, the perception is different. The mayor believes that the Latvian ship that is now in custody should be allowed to deliver fish.*” As the mayor noted, “*the 50 jobs [in Baatsfjord] would amount to 20,000 in Oslo. I think the government has not done enough*”.<sup>517</sup>

#### **b. Norway’s prosecution of North Star**

393. North Star has faced criminal court proceedings in Norway following the arrest of the Senator in January 2017. These proceedings culminated in a verdict adverse to North Star, delivered by the Norwegian Supreme Court on 14 February 2019.<sup>518</sup>
394. In these proceedings, charges were brought against North Star and the Senator’s captain, Mr. Rafael Uzakov (a Russian national) for violations of the Marine Resources Act (specifically provisions of the Regulations prohibiting the harvesting of snow crabs) on account of the vessel’s operations on the Norwegian continental shelf without dispensation from the Norwegian authorities.<sup>519</sup>
395. North Star and Mr. Uzakov pleaded not guilty to all counts of the indictment. Counsel for the defendants argued *inter alia* that the prohibitions under which North Star and Mr. Uzakov were being tried violated the Svalbard Treaty’s provisions on equal access to the

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<sup>514</sup> T. Abelsen, E. Lieungh, “*Big politics has put the snow crab industry down*,” NRK, 3 May 2017, **KL-0050**; T. Abelsen, S. Vik, “*Jobs are at risk while Norway and the EU quarrel*,” NRK, 14 February 2017, **PP-0035**.

<sup>515</sup> T. Abelsen, E. Lieungh, “*Big politics has put the snow crab industry down*,” NRK, 3 May 2017, **KL-0050**.

<sup>516</sup> *Ibid.*

<sup>517</sup> *Id.*

<sup>518</sup> *Rafael Uzakov and SIA North Star LTD v. The Public Prosecuting Authority*, Supreme Court of Norway, Judgment, 14 February 2019, **C-0038**.

<sup>519</sup> *Rafael Uzakov and SIA North Star LTD v. The Public Prosecuting Authority*, District Court, Judgment, 22 June 2017, **C-0039**.

resources of the archipelago. This violation resulted from Norway's refusal to issue exemptions other than to Norwegian vessels, thus discriminating against foreign vessel owners. Norway's violation of its international obligations justified acquittal of the accused under Norwegian law.

396. The District Court accepted that, while the wording of the Regulations was not considered discriminatory on its face, the Fisheries Directorate's practice was to apply it "to establish exclusivity for Norwegian vessels. The court finds that this practice conflicts with the principle of non-discrimination established by the Svalbard Treaty, provided the treaty is applicable in this case".<sup>520</sup>
397. The District Court however found that the Svalbard Treaty did not apply. Following earlier precedents set by Norwegian courts (and effectively siding with the Norwegian government's isolated position on the matter), the court ruled that the Svalbard Treaty had no application beyond Svalbard's territorial sea, which extends up to 12 nautical miles from the coasts. Hence, Norwegian authorities were within their right to prohibit foreign vessels from harvesting snow crabs from the Norwegian continental shelf.<sup>521</sup>
398. The District Court found North Star and Mr. Uzakov guilty. Both were sentenced to fines and North Star was further ordered to suffer forfeiture of property in an amount of NOK 1,000,000.<sup>522</sup>
399. North Star and Mr. Uzakov appealed the District Court's judgment. The Norwegian Court of Appeal considered the question of the Regulations' conformity with the Svalbard Treaty's requirement of equal treatment. Contrary to the District Court, the Court of Appeal found "*no evidence to support the assertion that the prohibition was introduced in order to favour Norwegian citizens by means of a dispensation scheme*". In reaching this conclusion, the Court held:<sup>523</sup>

*In connection with the case, the Ministry has stated that dispensations for snow crab catching at present have only been granted to vessels owned by Norwegian citizens, with the exception of five Russian vessels that caught snow crabs in 2016 pursuant to a bilateral agreement between Norway and Russia...*

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<sup>520</sup> *Ibid.*, p. 8 (emphasis added).

<sup>521</sup> *Id.*

<sup>522</sup> *Id.*

<sup>523</sup> *Rafael Uzakov and SIA North Star Ltd. v. The Public Prosecuting Authority*, Court of Appeal, Judgment, 7 February 2018, **C-0040**, p. 17.

400. Still, the Court was not convinced of the existence of a discriminatory practice (despite the dispensation to Russian vessels) and did not “*find it necessary to discuss the matter of the extent to which section 2 of the Regulations is contrary to the principle of equal treatment in the Svalbard Treaty, as the act in any circumstance is a criminal offence according to the general principles of criminal law*”.<sup>524</sup> The Court dismissed the appeal.
401. North Star and Mr. Uzakov appealed the judgment to the Norwegian Supreme Court. Their appeal was finally dismissed in a decision rendered on 14 February 2019.<sup>525</sup>
402. On 4 June 2018, the Supreme Court rendered a procedural decision allowing it to avoid consideration of issues related to the Svalbard Treaty, holding:<sup>526</sup>

*The discussions in the Supreme Court are limited to the questions about the snow crab being a sedentary species so that Norway has an exclusive right to exploit it (cf. Article 77 of the Convention on the Law of the Sea) and on whether the snow crabs fishing on the Norwegian continental shelf without the vessel holding a valid exemption from the prohibition, is punishable irrespective or whether the Svalbard Treaty applies in the area in question, regardless of whether the regulations prohibiting snow crab fishing on the Norwegian continental shelf without the vessel holding a valid exemption from the prohibition is punishable irrespective of whether the Svalbard Treaty applies in the area in question, and regardless of whether Paragraph 2 of Regulations on snow crab fishing, or its practice, is contrary to the principle of equal treatment. The resolution of the issue of the Svalbard Treaty’s geographical scope stays pending until there is a need to decide on it.*

403. The procedural decision dividing the case of 4 June 2018 shows that the Supreme Court wished to avoid the issue of the interpretation and application of the Svalbard Treaty. One of the justifications for avoiding the issue was that Norway cannot abuse its rights by taking an incorrect position on the interpretation of the Svalbard Treaty.<sup>527</sup> At the same time, while deciding in that procedural decision that it would not address the issue, the Supreme Court nevertheless did, in the end, partially examine the issue.
404. In its judgment, the Supreme Court had to apply provisions of Norwegian law that provide that Norway’s international law obligations (such as the Svalbard Treaty)

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<sup>524</sup> *Ibid.*

<sup>525</sup> *Rafael Uzakov and SIA North Star LTD v. The Public Prosecuting Authority*, Supreme Court of Norway, Judgment, 14 February 2019, **C-0038**.

<sup>526</sup> **C-0117**.

<sup>527</sup> *Ibid.*, para. 73.



override inconsistent provisions of Norwegian law (such as the provisions on which were based the fines against North Star and the Senator's captain).<sup>528</sup> In discussing these provisions, the Supreme Court held that the issue should have been adjudicated in the context of a civil claim brought by the defendants.<sup>529</sup>

405. On this rationale, the Court declined to rule on this issue, despite the fact that the defendants had pleaded it as a defense to criminal liability. The Court instead determined that the criminal offence was established on the sole basis that Norwegian law required an exemption to be issued by Norwegian authorities, thus declining to rule on whether the Regulations (or their application by Norwegian authorities) violated the principle of equal treatment under to the Svalbard Treaty. The requirement for a vessel to hold a dispensation applied whether the vessel was foreign or Norwegian; as such, the requirement was not discriminatory. North Star and Mr. Uzakov had fished without a dispensation and were therefore guilty of an indictable offence. The fact that EU vessels in practice stood no chance whatsoever of obtaining a dispensation was not seen by the Court as a relevant consideration.
406. In the course of the proceedings, the Supreme Court also allowed a government lawyer, Mr. Tolle Stabell (who, as he works in the Office of the Attorney General (Civil Affairs), reports to the Office of the Prime Minister), to act as deputy prosecutor, in order allegedly to assist the prosecutor on matters of international law. Such a deputation from the Office of the Attorney General (Civil Affairs) in a criminal case had never before occurred before the Supreme Court. The Supreme Court allowed this lawyer, Mr. Stabell, to act over North Star's objections to the effect the deputy prosecutor was not independent, per the requirements of Norwegian law.<sup>530</sup> One of the reasons given to support the Supreme Court's view that there was nothing to establish the lawyer's lack of independence was that the Norwegian government had no involvement in this matter in respect of its international law obligations.<sup>531</sup> This was incorrect as North Star had already filed a notice of dispute under the BIT on 27 February 2017.<sup>532</sup> Moreover, the

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<sup>528</sup> **CL-0012; C-0038**, paras. 77 ff.

<sup>529</sup> **C-0038**, para. 80.

<sup>530</sup> **C-0041**, para. 18 (*"The prosecutor's jurisdiction is regulated in more detail in the Criminal Procedure Act, g 60. The first paragraph reads as follows: "An official belonging to the prosecuting authority or acting on behalf of it is biased when he has relations with the case as denied in the Court Act, para. 106, no. 1-5. He is also incompetent when other special circumstances exist that are likely to weaken confidence in his impartiality. In particular, this applies when the action for voidness is raised by a party."*).

<sup>531</sup> *Ibid.*, para. 25 (*"according to the information, the Attorney General does not have any civil law assignments related to the case to be dealt with by the Supreme Court in Grand Chamber, nor has the office."*).

<sup>532</sup> Notice of Dispute from "Arctic Fishing" and SIA North Star to the Kingdom of Norway, 27 February 2017, **C-0002**.

Supreme Court's observation that there could not be a conflict because the attorney's involvement was "*limited purely to legal issues*"<sup>533</sup> was hardly reassuring considering that the central issue before the Supreme Court (which it avoided and refused to decide through various contrivances) should have been the scope of application of the Svalbard Treaty, certainly a legal issue.

407. In these circumstances, the Supreme Court's decision allowing the Deputy Attorney General, who throughout continued to have his physical office within the Office of the Attorney General (Civil Affairs), which as mentioned above reports to the Prime Minister's Office, to assist the prosecution on international law issues even though North Star had already issued a notice of dispute under the BIT, can only be considered as incompatible with Norway's obligations under the BIT.

**c. The adverse consequences of Norway's actions against Claimants' investments and Claimants' mitigation efforts**

408. Following the arrest of Senator and Norway's antagonistic attitude towards EU crabbers, Claimants had no choice but to suspend their operations in Norway, for fear of incurring additional fines or arrests.<sup>534</sup>
409. Norway's actions have deprived Claimants of their fishing rights to catch snow crabs in the NEAFC zone and in maritime areas around Svalbard. The economic impact of Norway's interference with the Claimants' investments was catastrophic, causing among other financial losses an instant collapse in North Star's revenues and profits from which the company has not so far recovered.<sup>535</sup>
410. In May 2017, North Star cancelled its contracts for the purchase of two additional vessels, Sokol and Solyaris, incurring EUR 640,000 in fines.<sup>536</sup> In October 2017 and March 2021, it had to sell two of its fishing vessels to raise liquidities.<sup>537</sup>

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<sup>533</sup> *Rafael Uzakov and SIA North Star LTD v. The Public Prosecuting Authority*, Supreme Court of Norway, Order, 9 January 2019, **C-0041**, para. 29.

<sup>534</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 211.

<sup>535</sup> *Ibid.*, para. 268; SIA North Star's Annual Report, 2015, **PP-0020**; SIA North Star's Annual Report, 2016, **PP-0221**; SIA North Star's Annual Report, 2017, **PP-0213**; SIA North Star's Annual Report, 2018, **PP-0214**; SIA North Star's Annual Report, 2019, **PP-0212**.

<sup>536</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 107; **C-0064**.

<sup>537</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 73.

411. Seagourmet, Claimants' strategic partner, was also severely impacted because of the unavailability of replacements for North Star's supplies of live snow crabs.<sup>538</sup>
412. In May 2018, in an effort to mitigate its losses and despite the fact that it already held valid fishing licences, North Star enquired with the Norwegian Directorate of Fisheries as to the possibility of obtaining a dispensation under the Regulations enabling it to resume snow crab fishing. North Star offered to fulfil every condition imposed by Norway for the issuance of such a dispensation.<sup>539</sup>
413. Norway's Directorate of Fisheries responded that the Regulations prohibited the harvesting of snow crab on the Norwegian continental shelf "*unless an exemption has been granted*". According to the Directorate, while "*a limited number of Norwegian vessels*" had been granted such an exemption, none had been granted to a foreign vessel.<sup>540</sup>
414. The same letter added that:<sup>541</sup>
- if vessels from EU member states shall be allowed to harvest snow crab on the Norwegian continental shelf, this must be based on a bilateral agreement between Norway and the EU. Since no such agreement is in place, vessels flying the flag of EU member state cannot be granted permission to harvest snow crab on the Norwegian continental shelf.*
415. In June 2018, North Star submitted another application for an exemption. The Directorate of Fisheries answered in a letter dated 9 October 2018 reiterating that the fishing of snow crabs on the Norwegian continental shelf is prohibited "*unless an exemption has been granted. No such exemption has been granted to any foreign vessel*".<sup>542</sup>
416. The repeated statements by the Norwegian Fisheries Directorate that no foreign vessel had been issued an exemption was surprising (and apparently incorrect), considering

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<sup>538</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 55; **C-0115**.

<sup>539</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 218; **C-0042**.

<sup>540</sup> Letter from the Norwegian Directorate of Fisheries to North Star, 25 May 2018, **C-0043**.

<sup>541</sup> *Ibid.*

<sup>542</sup> Letter from the Norwegian Directorate of Fisheries to North Star, 9 October 2018, **C-0044**.

that Norway's own Court of Appeal had issued judgment a few months earlier in which it had found that "*five Russian vessels*" had received a dispensation.<sup>543</sup>

417. Nonetheless, Norway refused to grant North Star an exemption that would have allowed it to fish snow crabs in areas where Norway exercises jurisdiction.
418. On 28 February 2019, North Star again applied for dispensation from the prohibition to catch snow crab for its three vessels Senator, Solvita and Saldus. Having received no reply, North Star wrote again on 22 March 2019.<sup>544</sup>
419. In its rejection letter of 13 May 2019, the Directorate provided a different rationale to explain its decision to reject North Star's application:<sup>545</sup>

*Pursuant to section 2 of the snow crab regulations the Directorate of Fisheries may grant exceptions from the prohibition for vessels which are granted a commercial fishing licence in accordance with the Act of 26 March 1999 no. 15 relating to the right to participate in fishing and hunting.*

*The vessels mentioned in your application do not possess such a licence, and the requirements for obtaining a permit to harvest snow crab in accordance with the snow crab regulations are therefore not met. Consequently, your application is rejected.*

420. On 31 May 2019, North Star filed a complaint to the Ministry of Fisheries against the rejection of its application for dispensation by the Directorate.<sup>546</sup>
421. On 14 November 2019, the Ministry dismissed North Star's complaint.<sup>547</sup> The Ministry's decision was based on the finding that North Star's vessels did not meet the requirements according to which the Directorate could grant snow crab fishing permits.

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<sup>543</sup> *The Prosecuting Public Authority v. Rafael Uzakov and SIA North Star LTD*, Court of Appeal, Judgement, 7 February 2018, **C-0040**, p.17; "Norway's most modern crab plant closed as opilio quota launched," Undercurrent News, 30 June 2017, **C-0115**.

<sup>544</sup> Letter from North Star to the Norwegian Directorate of Fisheries, 28 February 2019, **PP-0198**; Letter from North Star to the Norwegian Directorate of Fisheries, 22 March 2019, **PP-0199**.

<sup>545</sup> Letter from the Norwegian Directorate of Fisheries to North Star, 13 May 2019, **PP-0200**.

<sup>546</sup> Submissions by North Star to the Ministry of Fisheries, 2019-2020, **PP-0201**, p. 16 (complaint dated 31 May 2019).

<sup>547</sup> **C-0116**.

It stated that: “None of the three vessels – Senator, Solvita and Saldus – meet the requirements of § 6-2, and thus cannot be granted a license under § 6-1”.<sup>548</sup>

422. On 19 October 2020, North Star filed a claim in a civil suit against the Norwegian government, represented by the Ministry of Trade, Industry, and Fisheries. The claim is a judicial review claim that asks the court to declare null and void the decision of 13 May 2019 not to grant dispensation to catch snow crabs on the continental shelf of Spitzbergen.<sup>549</sup> The government has filed a reply on 11 December 2020.<sup>550</sup> The case continues to follow its course.

#### **d. Norway’s smear campaign against Claimants**

423. In late 2018, when the Claimants’ case was being argued before the Norwegian Supreme Court, Claimants, Mr. Levanidov and Seagourmet became the target of a defamation campaign in the Norwegian media. Norwegian newspaper Dagbladet published a series of articles in November 2018<sup>551</sup> which were transparently written to smear Claimants’ reputation. These articles reported the outrageous accusation that Sea & Coast had given “*slave contracts*” to crew members hired on North Star’s ships and deceitfully stated that the companies participating in Claimants’ joint venture were being suspected of “*human trafficking, tax evasion, social dumping and illegal capture*” by Norwegian authorities.<sup>552</sup>
424. Some of the documents presented in the articles as the alleged “*slave contracts*” were shown to Mr. Pildegovics by the journalist prior to publication.<sup>553</sup> These documents had obviously been forged, since Sea & Coast has never entered into an employment contract with any crew member.<sup>554</sup> The purported employment agreements were not

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<sup>548</sup> *Ibid.*

<sup>549</sup> *SIA North Star v. the Norwegian Royal Ministry of Trade, Industry and Fishery*, Submission to Oslo District Court, 19 October 2020, **C-0170**.

<sup>550</sup> *SIA North Star v. the Norwegian Royal Ministry of Trade, Industry and Fishery* Government’s Reply, 11 December 2020, **C-0169**.

<sup>551</sup> S. Gedde-Dahl, G. Thorenfeldt, L. Stang, O. Stromman, H. A. Vedlog, “*The Hidden Slave Contracts*,” Dagbladet, 17 November 2018, **PP-0202**; Gedde-Dahl, G. Thorenfeldt, L. Stang, O. Stromman, H. A. Vedlog, “*Plan A Crab Raid In Batsfjord*,” Dagbladet, 29 November 2018, **PP-0203**; S. Gedde-Dahl, G. Thorenfeldt, L. Stang, O. Stromman, H. A. Vedlog, “*Crab drama in Finnmark*,” Dagbladet, 28 November 2018, **PP-0204**.

<sup>552</sup> S. Gedde-Dahl, G. Thorenfeldt, L. Stang, O. Stromman, H. A. Vedlog, “*The Hidden Slave Contracts*,” Dagbladet, 17 November 2018, **PP-0203**.

<sup>553</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 226; Sample forged employment contracts obtained by Dagbladet, Undated, **PP-0211**.

<sup>554</sup> *Ibid.*

on Sea & Coast's letterhead. They bore a false corporate seal identifying the company as "Sea & Coast AS LIMITED", when Sea & Coast has never used the term "*limited*" within its corporate name. They were purportedly signed by Mr. Sergei Ankipov, but the signature appearing on the documents had no resemblance to his true signature.<sup>555</sup>

425. Mr. Pildegovics and Mr. Levanidov communicated this information to the journalist. Their efforts to set the record straight were not given credence and Dagbladet chose to publish the false accusations against them.<sup>556</sup>
426. On 20 November 2018, Dagbladet's journalist admitted in an email exchange that he had no evidence that the alleged "*slave contracts*" were genuine but stated that he "[knew] for a fact that the contracts were used to invite Indonesians to work in Baatsfjord."<sup>557</sup> He added that the forged documents had been obtained "from the Norwegian embassy in Indonesia" which had apparently disclosed them to Dagbladet pursuant to a freedom of information request.<sup>558</sup>
427. The next day, Mr. Pildegovics wrote to the Norwegian embassy in Jakarta to seek confirmation that the forged documents obtained by Dagbladet had in fact been provided by the embassy.<sup>559</sup> He also asked the embassy to send him any documents in the embassy's possession bearing the name of Sea & Coast, in an attempt to find out who had been fraudulently using his company's identity.<sup>560</sup>
428. On 27 November 2018, the embassy confirmed that it had provided "*some copies of employment agreements with the Sea & Coast AS stamp to the journalists (the name of the sailors were deleted)*".<sup>561</sup> It however declined to provide other documentation purportedly issued by Sea & Coast, explaining that "*the Embassy processes thousands*

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<sup>555</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 226; Share purchase agreement between S. Ankipov and P. Pildegovics, 14 October 2015, **PP-0050**, pp. 3-4, (sample of Sergei Ankipov's genuine signature).

<sup>556</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 227.

<sup>557</sup> Email from G. Thorenfeldt to K. Levanidov and P. Pildegovics, 20 November 2018, **PP-0205**.

<sup>558</sup> *Ibid.*, [Emphasis added].

<sup>559</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 229.

<sup>560</sup> Email exchange between P. Pildegovics, K. Levanidov and the Norwegian embassy in Jakarta, November-December 2018, **PP-0206**, p. 1.

<sup>561</sup> *Ibid.*, p. 2.

*of visas annually” and “regrettably do[es] not have the possibility to go through two years of applications”.*<sup>562</sup>

429. In subsequent exchanges, despite his insistence, the embassy continued to refuse to provide the requested information and documentation. It also declined to confirm whether anyone had actually been issued visas to Norway on the basis of the forged Sea & Coast employment contracts.<sup>563</sup>
430. When questioned regarding its policy when faced with documents of dubious authenticity, the Embassy stated that *“it is possible for the applicant to be granted a visa even though the conditions in the contract are questionable. If we are in doubt about the validity of documents in an application, we will normally consult with the issuer of the document, or the applicant”*.<sup>564</sup> The embassy did not explain why, in this particular case, it had made no attempt to contact Sea & Coast<sup>565</sup> (but nevertheless thought it appropriate to provide the documents to journalists).
431. The embassy did however acknowledge that it had concerns about the documents at issue. Instead of contacting Sea & Coast to confirm the authenticity of the documents, the embassy chose to send them to Dagbladet, the Norwegian police and even Norway’s Ministry of Foreign Affairs: *“Because of the questionable conditions reflected in the contracts, the embassy reported these cases to the Ministry of Foreign Affairs and KRIPOS”*.<sup>566</sup> There is no indication that the forged documents served any other purpose, since the unidentified seamen who purportedly presented visa applications on the basis of these documents never reported to Sea & Coast.<sup>567</sup>
432. Following this episode, Mr. Levanidov and Mr. Pildegovics were contacted by the Finnmark police. Since the allegations against their companies were baseless, no charges were pressed, and the police took no official action against them.<sup>568</sup>
433. Still, the Norwegian authorities felt confident enough to provide comments to Dagbladet. While no formal investigation had been opened against Claimants, the

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<sup>562</sup> *Id.*

<sup>563</sup> *Id.*

<sup>564</sup> *Id.*

<sup>565</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 232.

<sup>566</sup> Email exchange between P. Pildegovics, K. Levanidov and the Norwegian embassy in Jakarta, November-December 2018, **PP-0206**, p. 6.

<sup>567</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 232.

<sup>568</sup> *Ibid.*, para. 234.

prosecutor investigating the case, Mr. Morten Daae of the East Finnmark police office, who had falsely declared that Claimants had been “*suspected of human trafficking, tax evasion, social dumping and illegal capture*”, concluded his declaration to Dagbladet by saying that “*we were able to stop their activities in Norway if nothing else*”.<sup>569</sup>

## V. APPLICABLE LAW AND PRINCIPLES OF INTERPRETATION

434. To determine the law applicable to the present dispute, the Tribunal must examine distinctly the question in respect of its jurisdiction and of the merits: first, the law applicable to jurisdiction is established by Article IX of the BIT and Article 25 of the ICSID Convention (**A**); second, the law applicable to the merits is the BIT itself, as per Article 42 of the ICSID Convention (**B**).
435. After an overview of the applicable law in sections A and B, Claimants recall the rules on interpretation applicable to the BIT and the ICSID Convention (**C**).

### A. THE LAW APPLICABLE TO JURISDICTION

436. The law applicable to jurisdiction consists of the relevant terms of the BIT, and in particular its Article IX, as well as Article 25 of the ICSID Convention.
437. Article IX of the BIT provides:

*1. This article shall apply to any legal disputes between an investor of one contracting party and the other contracting party in relation to an investment of the former in the territory of the latter.*

*2. If any dispute between an investor of one contracting party and the other contracting party continues to exist after a period of three months, the investor shall be entitled to submit the case either to:*

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See, paras. 422-433 above; Gedde-Dahl, G. Thorenfeldt, L. Stang, O. Stromman, H. A. Vedlog, “*Plan A Crab Raid In Batsfjord*,” Dagbladet, 29 November 2018, **PP-0203** (“*In collaboration with Kripas [Norwegian National Criminal Investigation Service], we launched an intelligence report which in turn became the basis for a major action against companies that we suspected of human trafficking, tax evasion, social dumping and illegal capture,*” says prosecutor Morten Daae in Finnmark police district. He emphasized that the police intelligence went against all companies that engaged in activity in catching snow crabs. “*Before the plan for the joint action was ready, we meanwhile chose to arrest the ship “Senator” for serious resource crime. The ship caught snow crab in the Norwegian zone without valid permits,*” Daae explains. “*The arrest led to us also being able to stop the rest of the fleet that was engaged in snow crab fishing. The companies we were to take action against then resigned, the employees graduated and left Norway. So that way, we could stop the business.*” ... “*Even though we would like to be able to prosecute the companies further, we were able to stop their work in Norway if nothing else. We have important knowledge that can be useful in later investigations,*” says Daae. [Emphasis added]).



- (A) *The International Centre for Settlement of Investment Disputes having regard to the applicable provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington D.C. on 18 March 1965, or in case both contracting parties have not become parties to this convention,*
- (B) *An arbitrator or international ad hoc tribunal established under the arbitration rules of the United Nations Commission on International Trade Law. The parties to the dispute may agree in writing to modify these rules. The arbitral awards shall be final and binding on both parties to the dispute.*

438. Article 25 of the ICSID Convention provides:

*(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.*

*(2) "National of another Contracting State" means:*

*(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and*

*(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.*

439. In the light of the requirements of the BIT and of the ICSID Convention, and as further discussed below, the Tribunal has jurisdiction over the dispute put forth by the Claimants because jurisdiction arises in respect of : a) a "*legal dispute*"; b) between, on the one hand, an "*investor*" of one contracting party to the BIT and a "*national*" of an ICSID Contracting Party (Latvia), and, on the other hand, another contracting party to

the BIT and another ICSID Contracting Party (Norway); c) “*in relation to*” and/or “*arising directly out of*” ; d) “*investments*” of the Claimants; e) “*in the territory*” of Norway; and f) “*which the parties to the dispute consent in writing to submit to the Centre*”. Finally, the three-month waiting period found in Article IX (2) of the BIT was respected (g).

## **B. THE LAW APPLICABLE TO THE MERITS**

440. On the law applicable to the merits of the dispute, Article 42(1) of the ICSID Convention provides that, first, the Tribunal must look at any agreement of the parties on applicable law:

*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.*

441. While the BIT does not provide an explicit applicable law clause for an investor-State dispute under Article IX, there is such an applicable law provision for disputes on the “*interpretation or application*” of the BIT, as between Norway and Latvia, under Article X,<sup>570</sup> which states:

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

442. While the extent of applicable law for a dispute under Article IX may well be wider than for disputes under Article X (e.g., it may include a contract where such contract was entered into between the State and the investor), the applicable law to a dispute under Article IX must certainly include “*the provisions of the present agreement and the general principles and rules of international law*”, should the investor wish to invoke them. This is confirmed by the decisions of investment treaty tribunals<sup>571</sup> and doctrine<sup>572</sup>, which confirm that a dispute resolution clause like Article IX of the BIT will

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<sup>570</sup> In such cases, the dispute is to be decided by an arbitral tribunal that “*reaches its decision on the basis of the provisions of the present agreement and of the general principles and rules of international law.*” See, **CL-0001**, Article X, para. 5.

<sup>571</sup> *Asian Agricultural Products Ltd. V. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, **CL-0076**, para. 20 (“*Under these special circumstances, the choice-of-law process would normally materialize after the emergence of the dispute, by observing and construing the conduct of the Parties throughout the arbitration proceedings.*”).

<sup>572</sup> “Article 42,” in C. Schreuer and others, *THE ICSID CONVENTION: A COMMENTARY*, 2<sup>nd</sup> ed., Cambridge University Press, 2009, **CL-0077**, p. 569.

have as the applicable law the BIT itself if Claimants have framed the dispute in such a manner.

443. To date, Claimants have indeed argued their “*legal dispute*” with Norway as a matter concerning breaches of the BIT. The BIT thus provides the primary source of the obligations that Respondent must fulfil to avoid liability. Relatedly, the BIT must also be considered as a *lex specialis* instrument that governs the relationship between Claimants and Respondent.<sup>573</sup>
444. Further, as seen in the next section, when a tribunal interprets an international treaty, like the BIT, general principles and rules of international law are also part of the applicable law<sup>574</sup> as per the principles applicable to the interpretation of an international treaty. This is also consistent with the applicable law clause for State-to-State disputes found in Article X of the BIT. In respect of the law applicable to the merits, the Tribunal therefore has no need to go beyond the first sentence of Article 42(1) of the ICSID Convention to determine its applicable law to the merits, which is the BIT and general principles and other applicable rules of international law.

### C. RULES GOVERNING THE INTERPRETATION OF THE BIT AND OF THE ICSID CONVENTION

445. The interpretation of an international treaty between States, whether the BIT or the ICSID Convention, follows the rules of interpretation applicable to such a treaty. Even though Norway is not a party to the 1969 Vienna Convention on the Law of Treaties (*VCLT*), the VCLT reflects customary international law generally and, specifically, its Articles 31-32 reflect customary international law of treaty interpretation.<sup>575</sup> As such,

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<sup>573</sup> See e.g., *National Grid P.L.C. v. The Argentine Republic*, UNCITRAL Case, Award, 3 November 2008, **CL-0078**, para. 86; *BG Group Plc. v. Argentina*, UNCITRAL Case, Final Award, 24 December 2007, **CL-0079**, paras. 91, 95; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, **CL-0080**, para. 78. See also, “Chapter 2 Applicable Substantive Law and Interpretation,” in A. Newcombe, L. Paradell, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT*, Kluwer, 2009, **CL-0081**, p. 91 (“[...] the substantive standards of the IIA are *lex specialis* and the primary source of applicable law.”).

<sup>574</sup> *Ibid.*

<sup>575</sup> C. Schreuer, “Jurisdiction and Applicable Law in Investment Treaty Arbitration,” *McGill Journal on Dispute Resolution*, Vol. 1:1, 2014, **CL-0082**, pp. 16-17; P. Daillier, A. Pellet, *DROIT INTERNATIONAL PUBLIC*, LGDJ, 7<sup>th</sup> ed., 2002, Excerpts, **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]); ILC, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties with commentaries, 2018, **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.*”).

the principles found in those provisions apply to the interpretation and application of both the BIT and the of the ICSID Convention.

446. Such rules of international law on treaty interpretation provide that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>576</sup> Further, “together with the context” of a treaty provision, the Tribunal also “shall ... take ... into account ... any relevant rules of international law applicable in the relations between the parties”.<sup>577</sup> This principle of systemic integration<sup>578</sup> aims at ensuring harmony as between a State’s various international obligations and requires examination of both customary international law and international treaties applicable between Latvia and Norway. As such, the taking into account of these other treaty provisions is not an exercise that comes *after* the application of the general rule of interpretation found in paragraph 1 of Article 31, but rather something that happens “together” with the balancing exercise of paragraph 1.
447. As will be seen in this Memorial, while the applicable law to the merits of the present dispute is only the BIT itself, its interpretation and application requires that the Tribunal *take into account* a number of other international instruments relevant to the dispute (which will further confirm that Norway has manifestly breached the BIT).
448. Good faith interpretation requires that the treaty’s provisions be interpreted to follow the principle of effectiveness (or *effet utile*).<sup>579</sup> Treaty provisions cannot be interpreted

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<sup>576</sup> **CL-0021**, Article 31 (“A treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”).

<sup>577</sup> *Ibid.*, Article 31(3)(c).

<sup>578</sup> ILC, Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, 2006, **CL-0085**, para. 17 (“Systemic integration. Article 31 (3) (c) VCLT provides one means within the framework of the VCLT, through which relationships of interpretation (referred to in conclusion (2) above) may be applied. It requires the interpreter of a treaty to take into account ‘any relevant rules of international law applicable in relations between the parties. The article gives expression to the objective of ‘systemic integration’ according to which, whatever their subject matter, treaties are a creation of the international legal system and their operation is predicated upon that fact.”).

<sup>579</sup> See J.-M. Sorel, V. Boré Eveno, “Article 31” in O. Corten, P. Klein, THE VIENNA CONVENTIONS ON THE LAW OF TREATIES [:] A COMMENTARY, Oxford University Press, Vol. 1, 2011, Excerpt, **CL-0086**, p. 816 (“Effectiveness is not mentioned as it is considered implicit in good faith, as well as in the statement on interpretation in the light of the object and purpose of the treaty – an absence that leaves the possibility open for an interpretation with a teleological learning.”); WTO Appellate Body, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Report of the Appellate Body, 29 April 1996, **CL-0087**, p. 23; WTO Appellate Body, *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report of the Appellate Body, 4 October 1996, **CL-0088**, p. 12; WTO Appellate Body, *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/AB/R, Report of the Appellate Body, 10 February 1997, **CL-0089**, p. 16; WTO Appellate Body, *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products*,

*“in such a manner that whole clauses or paragraphs of a treaty would be reduced to redundancy or inutility”.*<sup>580</sup>

449. In interpreting investment treaties like the BIT, their “*object and purpose*” also provides vital guidance in construing the treaty’s substantive provisions.<sup>581</sup> The object and purpose of investment treaties is generally to encourage foreign investment by ensuring a heightened level of fairness and predictability in the economic, regulatory, and legal systems of host States.<sup>582</sup>
450. A number of these objectives are found in the preamble of the Latvia-Norway BIT, which provides:

*Desiring to develop the economic cooperation between the two States,*

*Preoccupied with encouraging and creating favourable conditions for investments by investors of one contracting party*

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WT/DS103/AB/R, WT/DS113/AB/R, Report of the Appellate Body, 13 October 1999, **CL-0090**, para. 133; WTO Appellate Body, *Argentina - Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, Report of the Appellate Body, 14 December 1999, **CL-0091**, paras. 81, 95; WTO Appellate Body, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, Report of the Appellate Body, 14 December 1999, **CL-0092**, para. 81; WTO Appellate Body, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, Report of the Appellate Body, 2 January 2002, **CL-0093**, para. 338; WTO Appellate Body, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, Report of the Appellate Body, 16 January 2003, **CL-0094**, para. 271; WTO Appellate Body, *United States - Subsidies on Upland Cotton*, WT/DS267/AB/R, Report of the Appellate Body, 3 March 2005, **CL-0095**, para. 549; WTO Appellate Body, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, Report of the Appellate Body, 15 August 2006, **CL-0096**, para. 99.

<sup>580</sup> WTO Appellate Body, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, Report of the Appellate Body, 16 January 2003, **CL-94**, para. 271.

<sup>581</sup> **CL-0021**, Article 31 (“A treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”). Greece and Yugoslavia became parties to the Vienna Convention on the Law of Treaties in 1974 and 1969, respectively, and Serbia succeeded to the Convention in 2001. See, United Nations Treaty Series, Vienna Convention on the Law of Treaties, 15 February 2021 (accessed date), **C-0171**; United Nations Treaty Series, Historical Information, 15 February 2021 (accessed date), **C-0172**, “Yugoslavia (former)”.

<sup>582</sup> R. Dolzer, C. Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW*, 2<sup>nd</sup> ed., Oxford University Press, 2008, Excerpts, **CL-0097**, p. 22 (“It is reasonable to assume that the object and purpose of investment treaties is closely tied to the desirability and to the nature of foreign investments, to the benefits for the host state and for the investor, to the conditions necessary for the promotion of foreign investment, and, conversely, to the removal of obstacles that may stand in the way of allowing and channelling more foreign investment into the host states. Thus, the purpose of investment treaties is to address the typical risks of a long-term investment project, and thereby to provide for stability and predictability in the sense of an investment-friendly climate”).

*in the territory of the other contracting party on the basis of equality and mutual benefit,*

*Conscious that the mutual promotion and protection of investments, according to the present agreement will stimulate the initiative in this field,*

451. Further, and as shown by the preamble of the BIT, the application of the protections of the BIT itself can help fulfil such purposes, including through an award of this Tribunal, to ensure the successful “*economic cooperation*” between Latvia and Norway, as well as to ensure that the creation of “*favourable conditions for investments*” occurs on the basis of “*equality*” and “*mutual benefit*.” The tribunal in *CME v. Czech Republic* confirmed the same:<sup>583</sup>

*A purpose of an international investment treaty is to grant arbitral recourse outside the host country’s domestic legal system. The clear purpose is to grant independent judicial remedies on the basis of an international, accepted legal standard in order to protect foreign investments. An investment treaty therefore may even grant indemnification in case of expropriation where the domestic law does not...*

452. An investment treaty award granting damages against Norway (as is warranted in the present case) can thus serve the purpose of ensuring that the economic cooperation between Norway and Latvia is fulfilled on the basis of equality and mutual benefit, as promised by Norway to Latvia.
453. As will be seen in this Memorial, Norway has taken a series of actions which have caused the destruction of Claimants’ investments in Norway, in violation of Norway’s specific obligations under the BIT having regard to its object and purpose. Norway has clearly disregarded the objectives it had committed to pursue, namely to ensure “*economic cooperation*” with Latvia in respect of Claimants’ investments, “*favourable conditions*” for these Latvian investments in Norway; and treatment of these investments for the “*mutual benefit*” of Latvia and Norway on a basis of “*equality*”. Instead, Norway has simply ignored its obligations with respect to Claimants’

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*CME Czech Republic B.V. v. Czech Republic*, UNCITRAL Case, Partial Award, 13 September 2001, **CL-0098**, para. 417. See also, G. Sacerdoti, “*The Admission and Treatment of Foreign Investment under Recent Bilateral and Regional Treaties*,” *The Journal of World Investment & Trade*, Vol. 1, Issue 1, 1 January 2000, **CL-0099**, p. 119; G. Sacerdoti, “*Investment Arbitration under the ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards*,” *ICSID Review – Foreign Investment Law Journal*, Vol. 19, Issue 1, 1 March 2004, **CL-0100**, p. 16 (“*The purpose and features of BITs explain the prominent role of international law as the law to be applied in case of investor-State arbitration of disputes under the treaty [...].*”).

investments, seemingly blinded by the pursuit of its political goals with respect to its asserted rights over its continental shelf and over the Svalbard archipelago.

454. Norway's ignorance of its obligations under the BIT is all the more apparent when *taking into account* other relevant rules of international law in force between Latvia and Norway, which this Tribunal must do in the process of interpreting the provisions of the BIT, as per the applicable rule of interpretation reflected by VCLT Article 31(3)(c).
455. Indeed, Norway's actions adversely affecting Claimants' investments are not only in violation of several provisions of the BIT, but also in violation of the provisions of other international treaties to which both Latvia and Norway are parties, including UNCLOS and the Svalbard Treaty.

## **VI. THE TRIBUNAL HAS JURISDICTION OVER THE DISPUTE**

456. This Tribunal has jurisdiction over Claimants' claim because all jurisdictional requirements of the BIT and of the ICSID Convention are met.
457. In the present case, jurisdiction exists because the claim concerns : a) a "*legal dispute*"; b) between an "*investor*" of one contracting party to the BIT and a "*national*" of an ICSID Contracting Party (Latvia), on the one hand, and another contracting party to the BIT and another ICSID Contracting Party (Norway), on the other hand; c) "*in relation to*" and/or "*arising directly out of*" ; d) "*investments*" of the Claimants; e) made during the temporal scope of application of the BIT; f) "*in the territory*" of Norway; g) "*invested*"; h) "*in accordance with [...] [the] laws and regulations*" of Norway; i) "*which the parties to the dispute consent in writing to submit to the Centre*". Finally, the three-month waiting period of Article IX(2) of the BIT has been respected (j).
458. It is trite law that the jurisdictional requirements of both the BIT and the ICSID Convention must be met. As such, Claimants examine them together.

**A. THE CASE CONCERNS A “LEGAL DISPUTE”**

459. There is no question that Claimants’ claim concerns a “*legal dispute*” between Claimants and Respondent, as required by both the BIT<sup>584</sup> and the ICSID Convention.<sup>585</sup>

460. The International Court has defined a dispute as “*a disagreement on a point of law or fact, a conflict of legal views or interests between parties.*”<sup>586</sup> ICSID Tribunals have adopted similar descriptions of “*disputes*,” often relying on the ICJ’s definition.<sup>587</sup>

461. According to the Report of the Executive Directors on the ICSID Convention:<sup>588</sup>

*The expression 'legal dispute' has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interest are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.*

462. This definition has been followed by ICSID tribunals such as the *Fedax*<sup>589</sup> and *Saur*<sup>590</sup> tribunals and further confirmed by doctrine<sup>591</sup>.

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<sup>584</sup> **CL-1**, Article IX (1) (“*This Article shall apply to any **legal disputes** between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former in the territory of the latter.*” [Emphasis added]).

<sup>585</sup> **CL-0042**, Article 25(1) of the Convention (“*The jurisdiction of the Centre shall extend to any **legal dispute** arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.*” [Emphasis added]).

<sup>586</sup> P.C.I.J., *The Mavrommatis Palestine Concessions* (Greece v. Great Britain), Judgment, 30 August 1924, **CL-0101**, p. 11.

<sup>587</sup> *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, **CL-0102**, para. 106; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, **CL-0103**, paras. 159-160; *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, **CL-0104**, paras. 43-44.

<sup>588</sup> Report of the Executive Directors on the ICSID Convention, International Bank for Reconstruction and Development, V – Jurisdiction of the Centre, 18 March 1965, **CL-0105**, para. 26.

<sup>589</sup> *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, 11 July 1997, **CL-0106**, para. 15. See also, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, **CL-0107**, para. 58; *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005, **CL-0108**, para. 21.

<sup>590</sup> *SAUR International v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Objections to Jurisdiction, 27 February 2006, **CL-0109**, para. 71.

<sup>591</sup> “Article 25,” in C. Schreuer and others, *THE ICSID CONVENTION: A COMMENTARY*, 2<sup>nd</sup> ed., Cambridge University Press, 2009, **CL-0060**, p. 99, para. 60.



463. Claimants' claim relates to a "*conflict of rights*" concerning the "*existence or scope of a legal right*" as well as the "*extent of the reparation to be made for a breach of a legal obligation*." Claimants and Norway are at odds on the interpretation and application of several provisions of the BIT (as shown by this very Memorial, as well as the RFA and notice of dispute) as well as the extent of reparation Norway should make for its breaches of the BIT, which the Claimants value at EUR 448.7 million.

**B. THE DISPUTE IS BETWEEN AN "INVESTOR" OF ONE CONTRACTING PARTY TO THE BIT AND "NATIONAL" OF AN ICSID CONTRACTING PARTY (LATVIA) ON THE ONE HAND, AND ANOTHER CONTRACTING PARTY TO THE BIT AND ANOTHER ICSID CONTRACTING PARTY (NORWAY) ON THE OTHER HAND**

464. There is no question that both Mr. Pildegovics and North Star meet the requirements of an "*investor*" or "*national*" of one contracting party to the BIT or the ICSID Convention regarding a legal dispute with another contracting party, Norway.

465. Article I (3) of the BIT defines a Latvian "*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, firm, enterprise, organization or association incorporated or constituted under the law in force in the territory of that contracting party*

466. Article 25(2) of the ICSID Convention defines "*national*" of another contracting party as follows:

*(2) "National of another Contracting State" means:*

*(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and*

*(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute*

*on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.*

467. First, Mr. Pildegovics is a Latvian national, having formally held Latvian nationality since the country's restoration of independence on 21 August 1991,<sup>592</sup> which is also his only nationality,<sup>593</sup> thus fulfilling the requirements of both Article I(3)(A) of the BIT and Article 25(2)(a) of the ICSID Convention.
468. Second, North Star is a Latvian limited liability company (SIA) formed on 27 February 2014<sup>594</sup> and as such a legal person constituted under Latvian law, again fulfilling the requirements of both Article I(3)(B) of the BIT and Article 25(2)(b) of the ICSID Convention.
469. In light of the fact both Mr. Pildegovics and North Star have been (and remain) a Latvian national and a company constituted under the laws of Latvia since 21 August 1991 and 2014 respectively, and the breaches of the BIT by Norway started occurring thereafter, as of July 2015, and that Latvia and Norway have been parties to the ICSID Convention since 1997 and 1967 respectively, Mr. Pildegovics and North Star therefore have had the relevant nationality at all relevant times.

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<sup>592</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 5; Passport of Mr. Peteris Pildegovics, 23 February 2016, **C-0047**; Former Latvian passports of Mr. Peteris Pildegovics, 1992-2016, **PP-0001**.

<sup>593</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 5; Passport of Mr. Peteris Pildegovics, 23 February 2016, **C-0047**.

<sup>594</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 8; North Star Ltd. Reference, Latvia Register of Enterprises, 20 January 2021, **PP-0003**; North Star Ltd. Reference, Latvia Register of Enterprises, 28 August 2015, **C-0075**; Resolution No. 6-12/33212 of the Register of Enterprises of the Republic of Latvia, 4 March 2014, **PP-0004**; North Star's Merchant's Registration Certificate, 4 March 2014, **PP-0005**; Application for Recording of a Capital Company in the Commercial Register, 27 February 2014, **PP-0006**; North Star Founder Registry Schedule No. 1, 27 February 2014, **PP-0007**.

**C. THE DISPUTE IS “IN RELATION TO” AND “ARISING DIRECTLY OUT OF” INVESTMENTS**

470. The current dispute is without question “*in relation to*”<sup>595</sup> or “*arising directly out of*”<sup>596</sup> Claimants’ investments in Norway, as per the respective terms of the BIT and of the ICSID Convention. These terms, which arise under the BIT and the ICSID Convention respectively have the same effective meaning and require a “*reasonably close connection*” between the dispute and the investment **(a)**. Moreover, this “*reasonably close connection*”, which in this case applies from both the perspective of the ICSID Convention and of the BIT, requires the application of the principle of unity of the investment and thus that the investment be examined as a whole, by this Tribunal, for purposes of jurisdiction **(b)**.

**a. “Arising directly out of” (in the ICSID Convention) and “in relation to” (in the BIT) require that a reasonably close connection exist between the dispute and the investments**

471. The terms “*arising directly out of*” from Article 25(1) of the ICSID Convention have a well-established meaning, which is that a “*reasonably close connection*” must exist between a dispute and a protected investment to come within the jurisdiction of an ICSID tribunal.

472. According to the leading commentary on the ICSID Convention:<sup>597</sup>

*The requirement of directness is one of the **objective criteria for jurisdiction** and is, therefore, independent of the parties’ consent. This means that, no matter what the parties have agreed, the dispute must not only be connected to an investment but must also be **reasonably closely connected**. In practical terms, the objective and the subjective elements may be related. Disputes arising from ancillary or peripheral aspects of the investment operation are likely to give rise to the objection that they do not arise directly from the investment and that they are not covered by the consent agreement.*

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<sup>595</sup> **CL-1**, Article IX(I) (“This Article shall apply to any legal disputes between an investor or one Contracting Party and the other Contracting Party **in relation to an investment** of the former in the territory of the latter.” [Emphasis added]).

<sup>596</sup> **CL-0042**, Article 25(1) of the Convention (“The jurisdiction of the Centre shall extend to any legal dispute **arising directly out of an investment**, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.” [Emphasis added]).

<sup>597</sup> “Article 25,” in C. Schreuer and others, *THE ICSID CONVENTION: A COMMENTARY*, 2<sup>nd</sup> ed., Cambridge University Press, 2009, **CL-0060**, p. 99, para. 60.

473. Professor Schreuer has further written that “*the requirement of directness [i.e. the word “directly”] refers to the relation of the dispute to the investment*” and not to the investment as such.<sup>598</sup> This was further confirmed by caselaw.<sup>599</sup>
474. It is notable that Article IX (1) of the BIT provides that it applies to legal disputes between an investor of one contracting Party and the other contracting party “*in relation to*” an investment, which tracks the wording of directness and connection of the dispute in a manner that other BITs do not.
475. For the interpretation of relevant terms, reference can be made to the ordinary meaning of “*in relation to*”, which is identical to the interpretation given to “*arising directly out of*” found in Article 25(1) of the ICSID Convention. Indeed, the ordinary meaning of the word “*relation*” as it is defined by the Oxford English Dictionary, is: “*the way in which two or more people or things are connected; a thing’s effect on or relevance to another.*”<sup>600</sup>
476. As such, under both the ICSID Convention and the BIT, the meaning of a dispute “*arising directly out of*” an investment and a dispute “*in relation to*” an investment means a dispute “*reasonably closely connected*” to an investment. As seen in the next section, the implication of this is that an investment must be seen as a whole, or as one operation, rather than as various distinct parts, for the purpose of the Tribunal’s jurisdiction, *both* under the BIT and the ICSID Convention.
477. In the present case, there is no question that the dispute is reasonably closely connected to Claimants’ investments. These investments, including contractual rights in a joint venture, shares in companies, vessels, license rights, and various contractual

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<sup>598</sup> “Article 25,” in C. Schreuer and others, *THE ICSID CONVENTION: A COMMENTARY*, 2<sup>nd</sup> ed., Cambridge University Press, 2009, **CL-0060**, p. 107, para. 88.

<sup>599</sup> *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, 11 July 1997, **CL-0106**, para. 24 (“It is apparent that the term “directly” relates in this Article to the “dispute” and not to the “investment”. It follows that jurisdiction can exist even in respect of investments that are not direct, so long as the dispute arises directly from such transaction”); *Ceskoslovenska Obchodni Banka A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, **CL-0110**, paras. 71, 72; *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, 17 July 2003, **CL-0111**, para. 52; *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006, **CL-0112**, para. 29 (“Article 25(1) requires a connection of a sufficient degree of directness between a dispute submitted to ICSID and a claimant’s investment. [...] The disagreement between Claimants and the Respondent arises directly out of Claimants’ investments in the water distribution and waste water systems in the Province of Santa Fe, since the disagreement is specifically about the legality under international law of the treatment accorded to those investments by the measures taken by the Respondent and its subdivisions.”).

<sup>600</sup> Oxford English Dictionary, Definition of “relation”, 6 March 2021 [date of access], **C-0173**.

rights, together forming a snow crab fishing enterprise, were directly affected by Norway's various measures banning vessels flying EU flags from catching snow crabs from the Loophole and waters off the Svalbard archipelago.

**b. The Tribunal must view Claimants' investments as a whole based on the principle of the unity of the investment**

478. The principle of directness between a dispute and the investment has led ICSID and other investment treaty tribunals to apply the principle that investments must be considered as a whole in assessing whether the jurisdictional requirement is met.
479. The consideration of investments in terms of their unity means that it is irrelevant if some components of the general operation do not qualify as investments themselves,<sup>601</sup> whether under the ICSID Convention or the BIT. This holistic approach reflects the “*economic realities*”<sup>602</sup> of investments which often constitute “*complex operations*.”<sup>603</sup> The need to consider investments as a whole has been widely recognized by ICSID tribunals.<sup>604</sup>
480. In application of this principle, the Tribunal must approach Claimants' investments in their totality rather than in separate parts (noting that, in any event, each of Claimants' investments would qualify as a protected investment under both the BIT and the ICSID Convention, as shown in the next section). As shown above, and as further explained

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<sup>601</sup> *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL Case, Partial Award on Jurisdiction, 8 September 2006, **CL-0113**, para. 120 (“Even if one doubted whether the Agreements looked at in isolation would constitute investments by themselves, it seems clear that the combined effect of these agreements amounts to an investment.”).

<sup>602</sup> *Holidays Inns v. Morocco*, ICSID Case No. ARB/72/1, Decision on Jurisdiction, 12 May 1974, not available but cited in *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, **CL-0114**, para. 197; *Ambiente Ufficio SpA and Others v. Argentina*, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/08/9, 8 February 2013, **CL-0115**, para. 425.

<sup>603</sup> *Československa obchodní banká, A.S. v. Slovakia*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, **CL-0110**, para. 72; *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 30 July 2004, **CL-0116**, para. 54; *Ambiente Ufficio SpA and Others v. Argentina*, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/08/9, 8 February 2013, **CL-0115**, para. 428; See also, *Enron corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, **CL-0117**, para. 70.

<sup>604</sup> *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, **CL-0118**, para. 92 (“It is not necessary to parse each component part of the overall transaction and examine whether each, standing alone, would satisfy the definitional requirements of the BIT and the ICSID Convention.”); *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, **CL-0119**, para. 288 (“The Tribunal does not have to decide whether one of the items such as the lease contract, looked at in isolation qualifies as an investment. It is a part of a unity that the Tribunal must appraise in its totality.”); *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 30 July 2004, **CL-0116**, para. 54 (“The requirement mentioned above, that a given element of a complex operation should not be examined in isolation because what matters is to assess the operation globally or as a whole, is a perfectly reasonable one in the view of the Tribunal.”).

below, the sum of Claimants' investments constitutes a snow crab fishing enterprise, relying on several assets (themselves also "investments"). The Tribunal must consider Claimants' fishing operation as a whole, instead of looking at its constituent parts in isolation.

481. Several ICSID tribunals have confirmed that the doctrine of general unity of the investment operation stems from the requirement that disputes must be "*arising directly*"<sup>605</sup> out of an investment. In this context, several ICSID Tribunals have held that, for the criterion to be fulfilled, the governmental measure need not to have been specifically directed to the investment.<sup>606</sup>
482. The principle of unity of the investment has been recognized and applied consistently by arbitral tribunals since 1974 with the *Holidays Inns v. Morocco* case in which the tribunal stated that "[i]t is well known [...] that 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."<sup>607</sup> Since the *Holidays Inn* award, at least 20 arbitral tribunals have considered investments as a whole to meet the relevant requirements under Article 25 of the ICSID Convention.<sup>608</sup>

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<sup>605</sup> *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction, 4 June 2004, **CL-0120**, paras. 106–124; *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award, 6 August 2004, **CL-0121**, para. 54; *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction, 21 March 2007, **CL-0122**, paras. 112–114.

<sup>606</sup> *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, **CL-0102**, para. 91 ("For a dispute to arise directly out of an investment, the allegedly wrongful conduct of the government need not be directed against the physical property of the investor. The requirement of directness is met if the dispute arises from the investment itself or the operations of its investment, as in the present case."); *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Jurisdiction, 22 February 2006, **CL-0123**, para. 71 ("A measure of the host State can affect directly an investment, so that the dispute as to the international legality of that measure arises directly out of that investment, even if the measure is not specifically aimed at that investment."); *Telefónica S.A v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006, **CL-0124**, paras. 62–65.

<sup>607</sup> *Holidays Inns v. Morocco*, ICSID Case No. ARB/72/1, Decision on Jurisdiction, 12 May 1974, not available but cited in *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, **CL-0114**, para. 197.

<sup>608</sup> *Československa obchodní banká, A.S. v. Slovakia*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, **CL-0110**, paras. 72–88; *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, **CL-0118**, paras. 92, 123–125; *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, **CL-0119**, 30 March 2015, paras. 285–288, 365–369; *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL Case, Award, 12 January 2011, **CL-0125**, para. 122; *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 30 July 2004, **CL-0116**, para. 45; *Vestey Group Ltd v. Bolivarian*

483. The validity of this principle has been confirmed by various authors and commentators on the ICSID Convention<sup>609</sup>, including Professor Schreuer:<sup>610</sup>

*It follows from this consistent case law 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 investment's overall economic goal.*

484. The ICSID tribunal in *COSB v. Slovakia* also helpfully re-stated the doctrine:<sup>611</sup>

*An investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the*

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*Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, **CL-0114**, paras. 196-198; *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006, **CL-0113**, paras. 120-123; *Saipem SpA v. Bangladesh*, ICSID Case No. ARB/05/7, Decision on jurisdiction, 21 March 2007, **CL-0122**, para. 110; *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable law and Liability, 30 November 2012, **CL-0126**, para. 544; *Magyar Farming Company Limited and Others v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019, **CL-0127**, paras. 274-276; *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, ICSID Case No. ARB/03/25, Decision on Application for Annulment, 23 December 2010, **CL-0128**, para. 113; *Ambiente Ufficio SpA and Others v. Argentina*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, **CL-0115**, 8 February 2013; *Duke Energy International Peru Investments No. 1, Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Jurisdiction, 1 February 2006, **CL-0129**, paras. 119-133; *Niko Resources (Bangladesh) Ltd. v. People's Republic of Bangladesh and Others*, ICSID Case No. ARB/10/11 and ICSID Case No. ARB/10/18, Decision on Jurisdiction, 19 August 2013, **CL-0130**, paras. 364-372; *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, **CL-0117**, paras. 70-71; *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016, **CL-0131**, paras. 201-202; *Fedax N. V. v. Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, **CL-0106**, para. 26; *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, **CL-0114**, paras. 196-198.

<sup>609</sup> "Article 25," in C. Schreuer and others, *THE ICSID CONVENTION: A COMMENTARY*, 2<sup>nd</sup> ed., Cambridge University Press, 2009, **CL-0060**, pp. 108-112; M. Sattorova, "Defining Investment Under the ICSID Convention and BITs: Of Ordinary Meaning, Telos, and Beyond," *Asian Journal of International Law*, 5 April 2012, **CL-0132**, p. 276; C. Schreuer, "Investment, International Protection," *Max Planck Encyclopedia of International Law*, June 2013, **CL-0133**, p. 7; J. M. Boddicker, "Whose Dictionary Controls?: Recent Challenges to the Term 'Investment' in ICSID Arbitration," *American University International Law Review*, Vol. 25, Issue 5, 2010, **CL-0134**, p. 1039.

<sup>610</sup> C. Schreuer, U. Kriebaum, "At What Time Must Legitimate Expectations Exist?," in Jacques Werner, Arif Hyder Ali (eds.), *A LIBER AMICORUM: THOMAS WÄLDE. LAW BEYOND CONVENTIONAL THOUGHT*, 2010, **CL-0135**, p. 272.

<sup>611</sup> *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, **CL-0110**, para. 72.

*particular transaction forms an integral part of an overall operation that qualifies as an investment.*

485. Arbitral tribunals have therefore considered various assets as being part of an overall investment such as loans,<sup>612</sup> contracts and licences,<sup>613</sup> sales,<sup>614</sup> funds,<sup>615</sup> lease contracts,<sup>616</sup> individual assets,<sup>617</sup> a warranty, and even an ICC arbitration,<sup>618</sup> without the need of finding that they necessarily constitute an investment within the terms of the ICSID Convention or the BIT.
486. This Tribunal must therefore look at Claimants' investments in Norway as a whole.

#### **D. THE DISPUTE RELATES TO "INVESTMENTS"**

487. Claimants' assets comprising its business operation in Norway are covered investments under both the BIT **(a)** and the ICSID Convention **(b)**.

##### **a. Claimants' investments are within the terms of the BIT**

488. The term "*investment*" is broadly defined under Article I (1) BIT as "every kind of asset invested in the territory of one contracting party in accordance with its laws and regulations by an investor of the other contracting party".<sup>619</sup>
489. The same Article provides that the term "*investment*" "*shall mean in particular, though not exclusively: movable and immovable property and any other property rights...; shares, debentures or any other forms of participation in companies; ...claims to any*

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<sup>612</sup> *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016, **CL-0131**, paras. 201-202; *Ambiente Ufficio SpA and Others v. Argentina*, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/08/9, 8 February 2013, **CL-0115**, paras. 425-429; *Československá obchodní banka, A.S. v. Slovakia*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, **CL-0110**, paras. 72-88.

<sup>613</sup> *Enron corporation and Ponderosa Assets, L.P. v. the Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, **CL-0117**, para. 70.

<sup>614</sup> *Niko Resources (Bangladesh) Ltd. V. People's Republic of Bangladesh and others*, ICSID Case No. ARB/10/11 and ICSID Case No. ARB/10/18, Decision on Jurisdiction, 19 August 2013, **CL-0130**, paras. 364-372.

<sup>615</sup> *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, **CL-0118**, paras. 92, 123-125.

<sup>616</sup> *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, **CL-0119**, paras. 285-286, 366.

<sup>617</sup> *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, **CL-0114**, para. 196.

<sup>618</sup> *Saipem SpA v. Bangladesh*, ICSID Case No. ARB/05/7, Decision on jurisdiction, 21 March 2007, **CL-0122**, para. 110.

<sup>619</sup> **CL-0001**, Article I(1); emphasis added.



*performance under contract having an economic value” and “business concessions conferred by law or under contract including concessions to search for, cultivate, extract and exploit natural resources”.*<sup>620</sup>

490. A number of investment treaty tribunals, such as in *Alpha v. Ukraine*<sup>621</sup> and *Tokios Tokelés v. Ukraine*,<sup>622</sup> interpreting the Austria-Ukraine BIT and Lithuania-Ukraine BIT, which both contain non-exhaustive definitions of an investment based on any kind of “asset”,<sup>623</sup> confirmed that investments need not come within the illustrative list provided thereafter. They need only be property of any kind, in tangible or intangible form.<sup>624</sup> In any event, Claimants’ investments in the present case certainly do come within the illustrative list referred to above.
491. While this dispute relates to Claimants’ investment operation as a whole, this operation is made up of several different parts, all of which constitute “investments” made by Claimants within the BIT’s above definition.
492. Together, these investments have contributed to the development of Norway, creating jobs in the town of Baatsfjord where North Star’s snow crab catches were being offloaded and transformed by North Star’s Norwegian strategic partner, Seagourmet.

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<sup>620</sup> *Ibid.*, Article I(1), paras. (I), (II), (III) and (V).

<sup>621</sup> *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, **CL-0136**, para. 307.

<sup>622</sup> *Ibid.*; *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, **CL-0102**, para. 75 (“Thus, an investment under the BIT is read in ordinary meaning as “very kind of asset” for which “an investor of one Contracting Party” caused money or effort to be expended and from which a return or profit is expected in the territory of the other Contracting Party.”).

<sup>623</sup> Agreement Between the Republic of Austria and Ukraine for the Promotion and Reciprocal Protection of Investments, 8 November 1996, **CL-0137**, Article 1(1) (“The term “investment” means every kind of asset invested in connection with the economic activity of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter Contracting Party and, in particular but not exclusively: a. Movable and immovable property as well as any other rights in rem, such as mortgages, liens, pledges, usufructs and similar rights; [...]”); Agreement Between the Government of the Republic of Lithuania and the Government of Ukraine for the Promotion and Reciprocal Protection of Investments, 8 February 1994, **CL-0138**, Article 1(1) (“The term “investment” shall comprise every kind of asset invested by an investor of the Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter and shall include, in particular, though not exclusively: /a/ movable and immovable property as well as any other property rights such as mortgages, liens, pledges, and similar rights; [...]”).

<sup>624</sup> *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award, 26 November 2009, **CL-0139**, para. 177, Fn. 153 (“‘Asset. (16c) 1. An item that is owned and has value. 2. (pl.) The entries on a balance sheet showing the items of property owned, including cash, inventory, equipment, real estate, accounts receivable, and goodwill. 3. (pl.) All the property of a person (esp. a bankrupt or deceased person) available for paying debts or for distribution.” *Black’s Law Dictionary. Ninth Edition. WEST.*); see also, D. A. Pentsov, “Contractual Joint Ventures in International Investment Arbitration,” *Northwestern Journal of International Law & Business*, Vol. 38, Issue 3, 2018, **CL-0140**, p. 414 (“The ordinary meaning of “asset” can be established on the basis of the analysis of the non-exclusive lists of assets in the definitions of “investment.” This analysis reveals that the term “asset” in both European and U.S. bilateral investment treaties means property of all kinds, both in tangible and intangible form.”).

- (i) *Mr. Pildegovics has a contractual interest in a joint venture to develop and operate a snow crab harvesting, processing and sales enterprise*

493. Mr. Pildegovics' contractual interest in a joint venture to develop and operate a snow crab enterprise in Norway constitutes an investment under the BIT as a "*claim [...] to any performance under contract having an economic value.*"<sup>625</sup>
494. Several investment treaty tribunals have confirmed that claims to performance under BITs are indeed covered investments.<sup>626</sup> This includes private contractual rights, as confirmed, for example, in *European Media Ventures v. The Czech Republic*.<sup>627</sup> This was further confirmed in respect of a contract to renovate a hotel,<sup>628</sup> contracts for sales, services and loans between commercial partners,<sup>629</sup> and a bareboat charter contract.<sup>630</sup>

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<sup>625</sup> **CL-0001**, Article I(1), para. (III).

<sup>626</sup> *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, **CL-0141**, paras. 60-61 (contract to find and salvage wrecked boat); *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, **CL-0142**, para. 285 (hedging agreement); *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Decision on Jurisdiction and Admissibility, 29 July 2008, **CL-0143**, paras. 75-81 (debts originated in relation to construction contracts reassigned to another company. Tribunal held that elements related to an investment such as "rights of execution having an economic value" are investments); *European Media Ventures S.A. v. The Czech Republic*, UNCITRAL Case, Partial Award, 8 July 2009, **CL-0144**, para. 43 (contractual right to use and transfer the TV licence); *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, **CL-0118**, para. 84 (Boat charter contract); *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL Case, Partial award on Jurisdiction, 8 September 2006, **CL-0113**, paras. 109, 124-125 (contract between private parties regarding cooperation in the mineral extraction and metallurgy business); *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, **CL-0145**, para. 136 (contract to build a \$100 million international terminal for Yemen's main airport, in Sana'a); *British Caribbean Bank Limited v. The Government of Belize*, UNCITRAL, PCA Case No. 2010-18, Award, 19 December 2014, **CL-0146**, paras. 199-200 (Loan and Security Agreements); *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017, **CL-0147**, paras. 6.52-6.55 (Off-take Agreement). For a decision in which an off-take agreement was not deemed an investment (even if a holistic approach was taken) but only a commercial arrangement, see *Tenaris S.A. and Talta - Trading E Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016, **CL-0148**, para. 291; *Fleming DutyFree Shop Private Limited v. Republic of Poland*, UNCITRAL Case, Award, 12 August 2016, **CL-0149**, para. 300 ("*Lease Agreements obtained by BH Travel, and the expenses to install and promote the shops*").

<sup>627</sup> *European Media Ventures SA v. The Czech Republic*, UNCITRAL Case, Partial award, 8 July 2009, **CL-0144**, paras. 37, 40, 43 (concerning the contractual right to use and transfer a TV licence).

<sup>628</sup> *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, **CL-0136**, para. 303.

<sup>629</sup> *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL Case, Partial Award on Jurisdiction, 8 September 2006, **CL-0113**, paras. 109, 124-125.

<sup>630</sup> *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, **CL-0118**, para. 84.

495. In January 2014, Mr. Pildegovics concluded a joint venture agreement with Mr. Levanidov, following several months of preparatory work to lay the foundations of their joint business enterprise.<sup>631</sup>
496. The goal of this joint venture agreement was to build a vertically integrated enterprise spanning snow crab fishery; the processing of raw snow crab catches and their transformation into end products; and the marketing and sale of such products to customers.<sup>632</sup> To that end, Mr. Pildegovics and Mr. Levanidov agreed to cooperate with each other, to make coordinated strategic investments and to share economic risks and benefits flowing from their joint enterprise.
497. In their witness statements, Messrs Pildegovics and Levanidov extensively describe the content, framework and operation of this joint venture, which creates contractual rights and obligations.<sup>633</sup>
498. As part of this joint venture agreement, directly or indirectly through North Star, Mr. Pildegovics invested or committed at least EUR 12.7 million for the purchase, repair, equipment and maintenance of a fleet of vessels fitted to harvest snow crabs; the acquisition of shares in a Norwegian company, Sea & Coast, to act as agent for North Star's vessels in Norway; and, the acquisition of various rights authorizing North Star to operate its ships as fishing vessels and to catch snow crabs in the NEAFC and Svalbard areas of the Barents Sea.<sup>634</sup>
499. For his part, Mr. Levanidov, directly or indirectly through Seagourmet, a Norwegian company in which he acquired a majority shareholding, also made substantial investments to build a state-of-the-art snow crab processing facility in the town of Baatsfjord.<sup>635</sup>
500. The existence of a joint venture agreement between Mr. Pildegovics and Mr. Levanidov is supported by abundant evidence:

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<sup>631</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 31; Witness Statement of Kirill Levanidov, 11 March 2021, para. 38.

<sup>632</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 34; Witness Statement of Kirill Levanidov, 11 March 2021, para. 53.

<sup>633</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 14; Witness Statement of Kirill Levanidov, 11 March 2021, para. 39.

<sup>634</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 117.

<sup>635</sup> Witness Statement of Kirill Levanidov, 11 March 2021, paras. 58 *et seq.*

- (a) Both Mr. Pildegovics and Mr. Levanidov acknowledge the existence of a joint venture agreement between them and agree that this agreement generates legal rights and obligations for each of them. The goals, purposes, competitive advantages and business rationale underpinning the joint venture are clearly laid out in their respective witness statements.<sup>636</sup>
- (b) Mr. Pildegovics and Mr. Levanidov have clearly fulfilled their respective undertakings under their joint venture agreement, as demonstrated by their business operations in 2015 and 2016. Their behaviour is therefore fully consistent with the existence of an agreement between them.<sup>637</sup>
- (c) Mr. Pildegovics and Mr. Levanidov have managed their respective investments in a collaborative and integrated manner.<sup>638</sup>
- (d) North Star and Seagourmet, the companies at the heart of the joint venture, have both publicly acknowledged their strategic relationship. This relationship was also reported in several contemporaneous media publications.<sup>639</sup>
- (e) Claimants, Mr. Levanidov and Seagourmet have presented themselves to the public (including to Norwegian authorities) as being part of a single integrated business project.<sup>640</sup>
- (f) Finally (and unfortunately), Norway's adverse actions against Claimants have destroyed the entire joint venture's economic operations, including not only North Star's fishing operation, but also Seagourmet's processing enterprise, again demonstrating the high degree of integration and interdependence amongst the companies participating in the joint venture.<sup>641</sup>

501. The joint venture agreement between Mr. Pildegovics and Mr. Levanidov is recognized as a contract under Norwegian law, as confirmed by the Expert Report of Dr. Anders

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<sup>636</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 36 *et seq.*; Witness Statement of Kirill Levanidov, 11 March 2021, paras. 55-56.

<sup>637</sup> *See above*, paras. 203-204.

<sup>638</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 34; Witness Statement of Kirill Levanidov, 11 March 2021, para. 42.

<sup>639</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para.144.

<sup>640</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 136 *et seq.*; Witness Statement of Kirill Levanidov, 11 March 2021, para. 53.

<sup>641</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 182; Witness Statement of Kirill Levanidov, 11 March 2021, para. 55.

Ryssdal.<sup>642</sup> Moreover, Norwegian law would be applicable to it, and it would come under the jurisdiction of Norwegian courts.<sup>643</sup>

502. As a party to a contractual joint venture, Mr. Pildegovics holds claims to performance by Mr. Levanidov, notably to build and maintain capacity to process snow crabs at the port of Baatsfjord, thereby providing a ready source of demand for North Star's harvests, and to cooperate in the joint venture.

503. Mr. Pildegovics' claims to performance have obvious economic value for Claimants<sup>644</sup> since the economic success of Claimants' investments is entirely dependent upon their ability to find demand for their supplies of snow crabs. This demand is ensured by the joint venture agreement with Mr. Levanidov.

504. Since Mr. Pildegovics' contractual interest in the joint venture agreement with Mr. Levanidov certainly includes "*claims to any performance under contract having an economic value*"<sup>645</sup>, this contractual interest constitutes an "*investment*" pursuant to Article I(1) BIT.<sup>646</sup>

(ii) *Mr. Pildegovics's shares in a Norwegian company, Sea & Coast AS*

505. Mr. Pildegovics' shares in Sea & Coast, a Norwegian company, are also without a doubt an "*investment*" pursuant to Article I (1) BIT, which defines the term as including "*shares, debentures or any other forms of participation in companies*".<sup>647</sup>

506. It is uncontroversial that shares in a company are an investment within the meaning of a BIT, as confirmed by numerous investment treaty tribunals.<sup>648</sup> This is in any event confirmed by the very terms of the Latvia-Norway BIT, which includes "*shares,*

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<sup>642</sup> Expert Report of Anders Ryssdal, paras. 24-25, 31-39.

<sup>643</sup> *Ibid.*, paras. 40-88.

<sup>644</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 36-39, 43; Expert Report of Dr. Anders Ryssdal, para. 93.

<sup>645</sup> **CL-0001**, Article I(1), para. (III).

<sup>646</sup> Expert Report of Anders Ryssdal, paras. 89-93.

<sup>647</sup> **CL-0001**, Article I(1), para. (II); emphasis added.

<sup>648</sup> *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, **CL-0150**, para. 182 ("*There is also no question that Mr Gavrilović owns an asset in Croatia, namely, Gavrilović d.o.o. This asset is the shareholding of a Croatian company*").; *Enkev Beheer B.V. v. Republic of Poland*, UNCITRAL, PCA Case No. 2013-01, Partial Award, 29 April 2014, **CL-0151**, para. 310 ("*The Tribunal also accepts on the facts of this case that the Claimant's shareholding in Enkev Polska from 2001 onwards is an 'investment' under Article I(a)(ii) of the Treaty [Netherlands-Poland BIT]*").

*debentures or any other forms of participation in companies*” within the definition of “investment”.<sup>649</sup>

507. Mr. Pildegovics acquired 100% of the shares of a Norwegian company, Sea & Coast, in November 2015. Sea & Coast is a company incorporated under the laws of Norway which is based in Baatsfjord.<sup>650</sup>
508. Between 2014 and 2017, Sea & Coast acted as local ship agent and provided onshore assistance and services for local crab fishing crews. Services were provided to vessels of North Star as well as those of other fishing companies operating from Baatsfjord.
509. As such, Mr. Pildegovics’ shares in Sea & Coast are undoubtedly an investment pursuant to the BIT.

(iii) *North Star’s fleet of fishing vessels and fishing capacity rights*

510. North Star’s vessels are also investments under the BIT. Vessels fall under the category of “*movable property*”, which is another protected category of investment under Article I(1).<sup>651</sup>
511. At least two investment treaty tribunals have held that vessels are indeed movable property constituting investments within the definition of an investment treaty, namely the *Karkey Karadeniz v. Pakistan*<sup>652</sup> and *Middle East Cement v. Egypt*<sup>653</sup> ICSID tribunals. Any other movable property on the vessels (or otherwise within Claimants’ investments) may also additionally be considered an investment. Investment treaty

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<sup>649</sup> **CL-0001**, Article I(1).

<sup>650</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 57.

<sup>651</sup> **CL-0001**, Article I(1), para. (I).

<sup>652</sup> *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, **CL-0152**, para. 638 (“*The same applies to the Vessels, which were necessary to the performance of the Contract by Karkey and qualify as “movable or immovable property” under Article I(2)(d) of the Treaty*”).

<sup>653</sup> *Middle East Cement Shipping and Handling Co. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, **CL-0153**, paras. 134, 135 (“*According to Art. 1.1 of the BIT “movable and immovable property” qualifies as “investment.” The Tribunal notes that GAFI, in its letter of April 22, 1991 to the Suez Court (C30), expressly refers to “the Vessel owned by Middle East Cement Co (under liquidation), one of the Free Zone projects pursuant to Investment Law No. 43/1974 and Law No. 230/1989.” And still the Minutes of Lodging of the Suez Court of First Instance of January 18, 2000, for a claim of the General Authority for Ports of the Red Sea, identify the lodged amount as “this amount being the remainder of the outcome collected from the sale of M.Vessel/ Poseidon 8 - which is the amount lodged in favor of Owners of the M. Vessel, i.e., Middle East Cement Co.” (R12). If an authority and the courts of the Respondent treat Claimant as the owner of the Poseidon when collecting the auction price, they are barred from disputing its ownership under the BIT.*”).

tribunals have held that various forms of “*physical infrastructure*”<sup>654</sup>, “*equipment*”<sup>655</sup> and even “*documents*”<sup>656</sup> were protected investments.

512. Between April 2014 and 2016, Claimants invested or committed at least EUR 12.7 million<sup>657</sup> for the purchase, repair, equipment, maintenance and operation of a fleet of six vessels for the purpose of harvesting snow crabs: Saldus<sup>658</sup>, Senator<sup>659</sup>, Solveiga<sup>660</sup>, Solvita<sup>661</sup>, Sokol<sup>662</sup> and Solyaris<sup>663</sup>.
513. Four of these vessels (Saldus, Senator, Solveiga and Solvita) were delivered to and operated by North Star to catch and deliver snow crabs in Norway. Between February 2015 and September 2016, more than 5,200 tons of snow crabs were caught by these four vessels. The vast majority of these catches were unloaded in Norway, primarily to Seagourmet at the port of Baatsfjord.<sup>664</sup>

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<sup>654</sup> *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, **CL-0154**, paras. 279-280 (holding that “*physical infrastructure and equipment at the quarry*” was “*other tangible or intangible, movable or immovable property*” within the terms of Articles 1.3 and 10.27(h) of the US-Oman BIT).

<sup>655</sup> *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, **CL-0155**, para. 234 (equipment and material resources, including leaving behind a number of bridges); *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9, Decision on Annulment, 15 January 2016, **CL-0156**, paras. 38-39, 124; *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, **CL-0150**, para. 182.

<sup>656</sup> **CL-0050**, para. 48 (holding that “*movable property and any documents, like files, records and similar items*” were protected investments under Article I(c)(i) of the US-DRC BIT); *Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on annulment, 1 November 2006, **CL-0157**, para. 36 (“*With the exception of the payments, to which the ad hoc Committee will return later, the elements identified by the Award for purposes of affirming the existence of an investment fall well within the scope of application of the Treaty as they are “included” in the term “investment” pursuant to Article I(c) of the Treaty.*”).

<sup>657</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 117.

<sup>658</sup> Vessel purchase and sale contract of Saldus, 20 November 2014, **C-0055**; Certificate of ownership of Saldus, 5 December 2014, **C-0056**.

<sup>659</sup> Vessel purchase and sale contract of Senator, 25 August 2014, **C-0057**; Certificate of ownership of Senator, 12 September 2014, **C-0058**.

<sup>660</sup> Vessel purchase and sale contract of Solveiga, 22 December 2014, **C-0059**; Certificate of ownership of Solveiga, 5 January 2015, **C-0060**.

<sup>661</sup> Vessel purchase and sale contract of Solvita, 15 April 2014, **C-0061**; Certificate of ownership of Solvita, 4 June 2014, **C-0062**.

<sup>662</sup> Confirmation of purchase of Sokol and Solyaris, 11 April 2016, **C-0063**.

<sup>663</sup> *Ibid.*

<sup>664</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 152 *et seq.*

514. The remaining two vessels, Sokol and Solyaris, were purchased by North Star but were not delivered, as North Star was forced to cancel the related vessel purchase agreements in 2017<sup>665</sup> owing to Norway's actions.
515. The four ships owned by North Star, including their equipment and fishing gear, are "*movable property*"<sup>666</sup> and therefore constitute investments under Article I(1) BIT.
516. North Star's contracts for the purchase of Sokol and Solyaris included "*claims to any performance under contract having an economic value*"<sup>667</sup>, notably claims for the delivery of the two vessels to North Star. These contracts thus also fall within the definition of "*investment*" under Article I(1) BIT.
517. In order to operate its fleet of ships as fishing vessels, North Star also acquired fishing capacity rights from third-party companies, for which it spent over EUR 1.6 million. Without these fishing capacity rights, a ship cannot engage in fishing activities under an EU flag.<sup>668</sup>
518. These rights, which are strictly limited and thus constitute valuable assets, are in the nature of "*business concessions conferred by law... to search for... [and] extract... natural resources*" and therefore also fall within the definition of "*investment*" under Article I(1) BIT.

(iv) *North Star's snow crab fishing rights*

519. North Star was issued several snow crab fishing licences which are clearly assets as well as "*business concessions conferred by law*"<sup>669</sup> and/or claims to performance having economic value within the terms of Article I(1) of the BIT.
520. That a State-conferred licence is an asset is trite law. Licences have been confirmed to be investments protected by investment treaties in numerous cases.<sup>670</sup>

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<sup>665</sup> Fines imposed on SIA North Star, Invoice No. 85, 6 May 2017, **C-0064**.

<sup>666</sup> **CL-0001**, Article I(1), para. (I).

<sup>667</sup> *Ibid.*, Article I(1), para. (III).

<sup>668</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 75.

<sup>669</sup> **CL-0001**, Article I(1), para. (V).

<sup>670</sup> *Middle East Cement Shipping and Handling Co. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, **CL-0153**, paras. 95-101 ("*there can be no doubt that the "License" qualifies as an "Investment" under the [Egypt-Greece] BIT*").



521. As of 2014, these licences were issued by the Republic of Latvia in respect of waters regulated under NEAFC.<sup>671</sup> The licences specifically authorized North Star to harvest snow crabs in the Loophole area of the Barents Sea, an area of high seas suprajacent to the extended continental shelf of Norway.
522. Since 2016, North Star has also acquired licences authorizing it to harvest snow crabs in waters off the Svalbard archipelago,<sup>672</sup> a territory that is under Norwegian sovereignty but subject to important stipulations of the Svalbard Treaty, which include rights of equal access by nationals of contracting parties to the Treaty.<sup>673</sup> These licences were also issued by the Republic of Latvia, a party to the Svalbard Treaty, based on its allocation of fishing opportunities determined by European Council Regulations adopted with reference to the rights of the parties to the Svalbard Treaty.<sup>674</sup>
523. Again, North Star's licences are assets in the nature of "*business concessions conferred by law*"<sup>675</sup> and/or claims to performance having economic value, namely licences to catch a natural resource (snow crabs), issued under enabling provisions of European law, Latvian law, NEAFC and the Svalbard Treaty, and which Norwegian authorities have an obligation to respect. Such licences for unregulated species, which include snow crab, continue to be issued to North Star to this day. As such, North Star's licences are "*investments*" pursuant to Article I(1) BIT.

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<sup>671</sup> Fishing Licence for Saldus, NEAFC, 1 January 2015, **C-0004**; Fishing Licence for Saldus, NEAFC, 1 January 2016, **C-0005**; Fishing Licence for Saldus, NEAFC (Unregulated), 1 January 2017, **C-0007**; Fishing Licence for Saldus, NEAFC (Unregulated), 1 January 2018, **C-0010**; Fishing Licence for Senator, NEAFC, 1 January 2015, **C-0011**; Fishing Licence for Senator, NEAFC, 1 January 2016, **C-0012**; Fishing Licence for Senator, NEAFC (Unregulated), 1 January 2017, **C-0014**; Fishing Licence for Senator, NEAFC (Unregulated), 1 January 2018, **C-0016**; Fishing Licence for Solveiga, NEAFC, 20 January 2015, **C-0018**; Fishing Licence for Solveiga, NEAFC, 1 January 2016, **C-0019**; Fishing Licence for Solveiga, NEAFC (Unregulated), 1 January 2017, **C-0021**; Fishing Licence for Solvita, NEAFC and NAFO, 1 July 2014, **C-0023**; Fishing Licence for Solvita, NEAFC, 1 January 2015, **C-0024**; Fishing Licence for Solvita, NEAFC, 1 January 2016, **C-0025**; Fishing Licence for Solvita, NEAFC (Unregulated), 1 January 2017, **C-0028**; Fishing Licence for Solvita, NEAFC (Unregulated), 1 January 2018, **C-0029**.

<sup>672</sup> Fishing Licence for Saldus, Svalbard, 1 November 2016, **C-0006**; Fishing Licence for Saldus, Svalbard, 1 January 2017, **C-0008**; Fishing Licence for Saldus, Svalbard, 1 January 2018, **C-0009**; Fishing Licence for Senator, Svalbard, 1 November 2016, **C-0013**; Fishing Licence for Senator, Svalbard, 1 January 2017, **C-0014**; Fishing Licence for Senator, Svalbard, 1 January 2018, **C-0017**; Fishing Licence for Solveiga, Svalbard, 1 November 2016, **C-0020**; Fishing Licence for Solveiga, Svalbard, 1 January 2017, **C-0022**; Fishing Licence for Solvita, Svalbard, 1 November 2016, **C-0020**; Fishing Licence for Solvita, Svalbard, 1 January 2017, **C-0027**; Fishing Licence for Solvita, Svalbard, 1 January 2018, **C-0030**.

<sup>673</sup> **CL-0002**, Article 2 ("*Ships and nationals of all the High Contracting Parties shall enjoy equally the rights of fishing and hunting in the territories specified in Article 1 and in their territorial waters.*").

<sup>674</sup> **CL-0005**, para. 35; **CL-0004**, para. 37; **CL-0003**, para. 42.

<sup>675</sup> **CL-0001**, Article I(1), para. (V).

(v) *North Star's supply agreements*

524. Various supply agreements concluded between, on the one hand, North Star, and on the other, Seagourmet, as well as other companies, regarding snow crabs, are also investments within the terms of the BIT, because they are assets as well as claims to performance having economic value or as moveable property. These contracts have been entered into in the context of the joint venture agreement between Mr. Pildegovics and Mr. Levanidov.
525. Investment treaty tribunals have confirmed that supply contracts are protected investments,<sup>676</sup> especially in the context of larger investment operations, as held for example by the *GEA v. Ukraine*<sup>677</sup> and *Mytilineos v. Serbia*<sup>678</sup> tribunals.
526. From 2014 onward, North Star and Seagourmet have maintained supply agreements between them for the sale and delivery of snow crabs by North Star at Seagourmet's factory at the port of Baatsfjord.<sup>679</sup> In 2016 and 2017, North Star and Seagourmet have concluded written agreements for this purpose, both of which were concluded at Baatsfjord.<sup>680</sup>

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<sup>676</sup> See, *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003, Award, 29 March 2005, **CL-0158**, pp. 71- 72 ("It is thus not unusual that claims to money, even if not based on any long-term involvement in a business in another country, are included in treaties within the concept of "investment". Such a broad definition of that concept has been accepted by the Kyrgyz Republic in its BITs with, for instance, the USA [...], the United Kingdom [...] and Sweden [...] The Arbitral Tribunal thus concludes on this point that Petrobart was an investor having an investment in the Kyrgyz Republic and that the Republic owed Petrobart protection under the Treaty."). See also, *Enkev Beheer B.V. v. Republic of Poland*, PCA Case No. 2013-01, Partial Award, 29 April 2014, **CL-0151**, para. 310 ("contracts, assets and monies (including profits)" in principle within the definition of "movable property" of the NL-Poland BIT).

<sup>677</sup> *GEA Group Aktiengesellschaft v. Ukraine*, Award, ICSID Case No. ARB/08/16, Award, 31 March 2011, **CL-0159**, para.149 ("the Conversion Contract was more than just goods against a tolling fee – it established a relationship of "common interest" whereby KCH (and, ultimately GEA) would, among other things, assist with delivery of logistics and pay for Ukrainian domestic freight, resolve customs issues, and supply the Oriana plant with necessary materials").

<sup>678</sup> *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL Case, Partial Award on Jurisdiction, 8 September 2006, **CL-0113**, para. 109 ("Indeed, it has been pointed out that language including "claims to money or any other claim under contract having an economic/a financial value" suggests that "investment" may embrace contractual rights for the performance of services. Read literally there is also no reason why claims arising from pure commercial activities, such as sales contracts, should be excluded from such a broad definition of investment."), 124-125 ("Therefore, the combined effect of the Agreements is clearly more than an ordinary commercial transaction. As a result, the Tribunal finds, by a majority, that the business engagement of Claimant in RTB-BOR constituted an investment.").

<sup>679</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 110; Witness Statement of Kirill Levanidov, 11 March 2021, para. 59.

<sup>680</sup> Contracts between SIA North Star and Seagourmet for 2017, 29 December 2016, **C-0053**; Contract between SIA North Star and Seagourmet for 2018, 27 December 2017, **C-0054**. North Star also concluded similar agreements, in Baatsfjord once again, with two other companies, [REDACTED], a company also controlled by Mr. Levanidov, as well as with [REDACTED], a company controlled by a long-time associate of Mr. Levanidov. See, Contract between SIA North Star Ltd. and [REDACTED]

527. North Star acquired, through these supply agreements, claims to performance by Seagourmet having economic value, namely claims for payment against delivery of snow crabs at Baatsfjord. North Star's supply agreements with Seagourmet and other business partners ( [REDACTED] )<sup>681</sup> are therefore also "investments" pursuant to Article I(1) BIT.

**b. Claimants' investments are within the terms of the ICSID Convention**

528. In an ICISD investment treaty arbitration, where an investment is within the terms of the BIT, it is also automatically within the terms of Article 25 of the ICSID Convention, as underscored notably by the *Malicorp v. Egypt*,<sup>682</sup> *SGS v. Paraguay*<sup>683</sup> and *GEA v. Ukraine*<sup>684</sup> tribunals.
529. In any event, Claimants' investments also possess all the characteristics that some ICSID tribunals have considered needed to meet the definition, such as economic development of the host State, contribution, duration and risk.

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[REDACTED], for 2016-2017, 29 December 2017, **C-0065**; Contract between SIA North Star Ltd. and [REDACTED], 29 December 2016, **C-0066**; Contract between SIA North Star Ltd. and [REDACTED], 27 December 2017, **C-0067**.

<sup>681</sup> *Ibid.*

<sup>682</sup> *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, **CL-0160**, paras. 109, 113 ("Consequently, in its widest, albeit disputed, meaning, there must be (i) a contribution, (ii) of a certain duration, (iii) of a nature such as to generate returns, (iv) presenting a particular risk, and (v) such as to promote the economic development of the host country. Such criteria are not at all absolute and must be regarded as attempts to pin down the notion. [...] The contribution aspect is, however, regularly mentioned in the definitions suggested in relation to Article 25 of the ICSID Convention. There has to have been a contribution."). See also, **CL-0040**, paras. 362-367.

<sup>683</sup> *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, **CL-0161**, para. 97.

<sup>684</sup> *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, **CL-159**, paras. 143, 151. See also, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, **CL-0136**, para. 311; *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010, **CL-0162**, para. 55 ("The Tribunal does not consider it necessary to analyze each of those arbitral decisions in detail. The existing case law has thrown up no uniform approach as to the identification and respective importance of the criteria that may be resorted to by ICSID tribunals having to define an investment for the purposes of Article 25(1)."); *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on jurisdiction, 8 March 2010, **CL-0118**, para. 131 ("The Salini test may be useful in the event that a tribunal were concerned that a BIT or contract definition of investment was so broad that it might appear to capture a transaction that would not normally be characterized as an investment under any reasonable definition. These elements could be useful in identifying such aberrations."); *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, **CL-0163**, paras. 42-48.

530. While Claimants submit that these criteria are not formal requisites or jurisdictional criteria<sup>685</sup>, it would in any event be very clear that Claimants' investment in Norway would meet each one of them.

(i) *The significant contribution of Claimants' investment to the economic development of Norway*

531. Norwegian politicians themselves have underscored the significant contribution of Claimants' investments to the economic development of Norway, which is one of the criteria (albeit a controversial one<sup>686</sup>) considered by some ICSID tribunals to determine whether an investment is covered by Article 25 of the ICSID Convention.

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<sup>685</sup> *Ceskoslovenska Obchodni Banka A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, **CL-0110**, para. 90 ("The Tribunal notes, however, that these elements of the suggested definition, while they tend as a rule to be present in most investments, are not a formal prerequisite for the finding that a transaction constitutes an investment as that concept is understood under the Convention."); *M.C.I. Power Group L.C. and New Turbine, Inc. v. Ecuador*, ICSID ARB/03/6, Award, 31 July 2007, **CL-0164**, para. 165 ("The Tribunal states that the requirements that were taken into account in some arbitral precedents for purposes of denoting the existence of an investment protected by a treaty (such as the duration and risk of the alleged investment) must be considered as mere examples and not necessarily as elements that are required for its existence."); *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Award, 13 March 2009, **CL-0165**, para. 241 ("The Tribunal recognizes the soundness of those general characteristics, while noting that they do not constitute 'the jurisdictional criteria in Article 25(1) of the ICSID Convention' or 'the Article 25(1) test' as the Respondent refers to them. 19 Thoroughly absent from Article 25, they are but benchmarks or yardsticks to help a tribunal in assessing the existence of an investment, and their proponents or users rightly insist on the flexibility with which they should be used by a tribunal."); *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013, **CL-0166**, para. 206 ("In the Tribunal's view, the four constitutive elements of the Salini list do not constitute jurisdictional requirements to the effect that the absence of one or the other of these elements would imply a lack of jurisdiction. They are typical features of investments under the ICSID Convention, not 'a set of mandatory legal requirements'. As such, they may assist in identifying or excluding in extreme cases the presence of an investment but they cannot defeat the broad and flexible concept of investment under the ICSID Convention to the extent it is not limited by the relevant treaty, as in the present case.").

<sup>686</sup> For ICSID Tribunals entirely disregarding this criterion, see, *Consortium Groupement L.E.S.I.- DIPENTA v. République Algérienne Démocratique et Populaire*, ICSID Case No. ARB/03/08, Award, 10 January 2005, **CL-0167**, p. 19; *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. République Algérienne Démocratique et Populaire*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 12 July 2006, **CL-0168**, para. 72(iv); *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award of 8 November 2010, **CL-0136**, para. 312; *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplun v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, **CL-0169**, paras. 220-225; *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, **CL-0170**, paras. 232-233; *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, **CL-0171**, para. 85; *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, **CL-0172**, paras. 110-111; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, **CL-0126**, para. 5.43; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, **CL-0142**, paras. 295, 306; *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, **CL-0173**, para. 171 ("In the Tribunal's opinion, such a contribution may well be the consequence of a successful investment. However, if the investment fails, and thus makes no contribution at all to the host State's economy, that cannot mean that there has been no investment").

532. Claimants' contributions to the economic development of Norway have been covered under Part IV, Section B.d (paras. 312-325) above. They may be summarized as follows:

- (a) The economic value generated by North Star was realized almost entirely within Norway. Over 98% of North Star's snow crab catches were sold in Norwegian ports, predominantly to Seagourmet, North Star's sister company, at the port of Baatsfjord.<sup>687</sup> The delivery of live catches by North Star created many onshore processing jobs, as was acknowledged numerous times by Norwegian public officials.<sup>688</sup>
- (b) In each of 2015 and 2016, North Star and Sea & Coast, its Norwegian local service agent, spent over NOK 24 million with Norwegian suppliers, a significant amount in a small northern coastal economy. Within this amount, the two companies spend over EUR 850,000 with Norwegian shipyards for repair and maintenance works.<sup>689</sup>
- (c) The joint venture between Mr. Pildegovics and Mr. Levanidov enabled the development of Seagourmet's factory at the port of Baatsfjord, which would not have been possible without North Star's snow crab supplies. There is no doubt that Seagourmet had a major impact on the Baatsfjord economy when North Star was able to supply it with snow crabs, employing approximately 3% of the town's entire population at its peak in 2016 and spending over NOK 109 million in the local economy.<sup>690</sup> Seagourmet also paid significant amounts to Norwegian public authorities in the form of fees, dues, taxes and duties.<sup>691</sup>
- (d) The joint venture's presence and activities was undoubtedly one of the factors that sparked significant infrastructure investments in Baatsfjord, including the

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<sup>687</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 145.

<sup>688</sup> Witness Statement of Geir Knutsen, para. 4-11; *"Negotiator with the Russians,"* Fiskeribaldet Fiskaren, 21 September 2016, **KL-0041**, p. 2 (*"Seagourmet has gradually become one of the cornerstone companies here in the municipality with great potential for further ripple effect. It has simply become a model company with great local significance. So, here we will do everything we can to try and find a solution that can secure raw materials for the company"*); *"Three week deadline,"* Kyst og Fjord, 9 December 2016, **KL-0042**; *"Will have its own Baatsfjord quota,"* Kyst og Fjord, 14 February 2017, **KL-0043**; Written question and answer between Helga Pedersen, Member of Parliament, and Per Sandberg, Minister of Fisheries, 9 January 2017, **KL-0046**.

<sup>689</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 180.

<sup>690</sup> *Ibid.*, para. 181; Witness Statement of Kirill Levanidov, 11 March 2021, para. 68.

<sup>691</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 70.

expansion of the town's central freezer warehouse and investments in its port infrastructure.<sup>692</sup>

533. There can therefore be no doubt that Claimants' investments significantly contributed to the Norwegian economy, in particular the economy of Baatsfjord and East Finnmark.

(ii) *Claimants' significant economic contributions to the investment*

534. Some ICSID tribunals required that an investor show a contribution in respect of the investment, which has been held to include "*funds, equipment, personnel and know how*"<sup>693</sup> or something else "*having economic value*."<sup>694</sup>
535. There is again no question that Mr. Pildegovics and North Star have made significant financial and other contributions to the investments at issue in this case. Together, they have invested or committed over EUR 12.7 million to acquire the investments constituting their snow crab fishing enterprise in Norway.<sup>695</sup> This amount does not include North Star's and Sea & Coast operating expenses, which have been considerable in both 2015 and 2016. In addition, Mr. Pildegovics himself has spent countless hours managing North Star and Sea & Coast and working as Mr. Levanidov's business associate as part of their joint venture agreement.
536. In view of the fact that Claimants' investments were made as part of a going concern and were therefore not passive investments, there can be no doubt that Claimants have made significant economic contributions to their investments at issue in this case.

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<sup>692</sup> Witness Statement of Geir Knutsen, para. 8-9; Witness Statement of Peteris Pildegovics, 11 March 2021, para. 181; Witness Statement of Kirill Levanidov, 11 March 2021, para. 69.

<sup>693</sup> *Consortium RFCC v. Royaume du Maroc*, ICSID Case No. ARB/00/6, Decision on Jurisdiction, 16 July 2001, **CL-0174**, para. 61. See also, *Consortium Groupement L.E.S.I.- DIPENTA v. République algérienne démocratique et populaire*, ICSID Case No. ARB/03/08, Award, 10 January 2005, **CL-0174**, p. 19; *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction, 21 March 2007, **CL-0122**, para. 100.

<sup>694</sup> *Consortium Groupement L.E.S.I.- DIPENTA v. République algérienne démocratique et populaire*, ICSID Case No. ARB/03/08, Award, 10 January 2005, **CL-0167**, p. 19; *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. République Algérienne Démocratique et Populaire*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 12 July 2006, **CL-0168**, paras. 72-73; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, **CL-0142**, para. 297.

<sup>695</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 117.

(iii) *The indefinite duration of Claimants' investments in Norway*

537. Some ICSID tribunals have required that an investor show that the investments made had a certain duration.<sup>696</sup> The duration requirement is certainly met by investments of indefinite duration and many ICSID tribunals have also held that projects of short duration were also protected by the ICSID Convention.<sup>697</sup>
538. The facts of this case show that Claimants' investments in Norway originated in project dating back to 2009.<sup>698</sup> Mr. Pildegovics and Mr. Levanidov initiated discussions about their joint project in 2013 and concluded a joint venture agreement in January 2014. Between January 2014 and January 2017, Claimants actually operated their snow crab fishing enterprise within the framework of this joint venture. Since then, in view of Norway's adverse actions, Claimants continue to cooperate with Mr. Levanidov and Seagourmet in pursuit of alternative business ventures.<sup>699</sup>
539. Not only were Claimants' investments operational for several years, but they also constituted a snow crab fishing operation which was a going concern with an indefinite duration and would undoubtedly still be in operation but for Norway's adverse measures against EU vessels. The duration requirement (assuming one might be found to exist) is therefore certainly met in this case.

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<sup>696</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001, **CL-0175**, para. 55; *Consortium RFCC v. Royaume du Maroc*, ICSID Case No. ARB/00/6, Decision on Jurisdiction, 16 July 2001, **CL-0174**, para. 62; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, **CL-0176**, paras. 94-95; *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. République Algérienne Démocratique et Populaire*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 12 July 2006, **CL-0168**, paras. 72-73.

<sup>697</sup> *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, **CL-0142**, para. 303 ("With respect to duration, the Tribunal once again agrees with Schreuer that "[duration] is a very flexible term. It could be anything from a couple of months to many years"); *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award, 26 November 2009, **CL-0139**, para. 225 ("The Arbitral Tribunal does not consider that, as a matter of principle, there is some fixed minimum duration that determines whether assets qualify as investments. Short-term projects are not deprived of "investment" status solely by virtue of their limited duration. Duration is to be analyzed in light of all of the circumstances, and of the investor's overall commitment"); *Vladislav Kim and Others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, **CL-0177**, para. 343 ("The Tribunal agrees that there might be circumstances in which it would be appropriate for an "investment" to lose the protection of a BIT on the grounds that it was "short term". Those circumstances might include, for example, where investors in a stock exchange briefly hold shares in an undertaking, in the midst of buying and selling.").

<sup>698</sup> See above, paras. 173-175.

<sup>699</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 266, 267; Witness Statement of Kirill Levanidov, 11 March 2021, paras. 64.

(iv) *Claimants have undertaken risk in making the investment*

540. Another criterion applied by some ICSID tribunals is whether an investor has undertaken risk in making the investment,<sup>700</sup> which is sometimes referred to as an “operational risk” requirement.<sup>701</sup>
541. It is obvious that Mr. Pildegovics and North Star have undertaken significant risks of a commercial nature with direct impact on the value and performance of their investments. These risks have been described in detail in Mr. Pildegovics’ witness statement and include risks related to fluctuations of the market price of snow crab; risks related to the fluctuation of the price of inputs; risks related to the fishing productivity of North Star ships; market risks, including the risk of finding insufficient demand for North Star’s harvests; financial risks related to the financial instruments of the company; and operational risks.<sup>702</sup>
542. For the above reasons, Claimants’ investments clearly fall within the scope of Article 25 of the ICSID Convention, which in the first instance are met if the investment is within the terms of the BIT. In any event, Claimants’ investments certainly have the characteristics of an “investment” within the meaning of Article 25. In particular, as underscored by Norwegian politicians themselves, including before Parliament and by the former Mayor of Baatsfjord, North Star and Mr. Pildegovics significantly contributed to the development of Norway.

**E. THE INVESTMENT WAS MADE WITHIN THE *RATIONE TEMPORIS* SCOPE OF THE BIT**

543. Claimants’ investment in Norway was also made within the temporal scope of the BIT. Article II of the BIT provides:

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<sup>700</sup> *Ceskoslovenska Obchodni Banka A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, **CL-0110**, para. 90; *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, 11 July 1997, **CL-0106**, para. 40; *Consortium RFCC v. Royaume du Maroc*, ICSID Case No. ARB/00/6, Decision on Jurisdiction, 16 July 2001, **CL-0174**, para. 63.

<sup>701</sup> *Raymond Charles Eyre and Montrose Developments (Private) Limited v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/16/25, Award, 5 March 2020, **CL-0178**, paras. 293-294; *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award, 6 August 2004, **CL-0121**, para. 57. See also, *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, **CL-0179**, para. 117; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, **CL-0142**, para. 301; *Ambiente Ufficio S.p.A. and Others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on jurisdiction, 8 February 2013, **CL-0115**, para. 485.

<sup>702</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 169-176.



*The present Agreement shall apply to investments made after 1 January 1987 in the territory of a Contracting Party in accordance with its laws and regulations.*

544. Claimant's investments in the territory of Norway were initiated with the conclusion of the joint venture agreement between Mr. Pildegovics and Mr. Levanidov in January 2014.<sup>703</sup> There is therefore no doubt that their investments fall within the temporal scope of investments protected by the BIT.

**F. THE TERRITORIAL REQUIREMENT UNDER THE BIT AND THE ICSID CONVENTION IS MET**

545. The BIT requires that Claimants' investments must be "*in the territory*" of Norway within the terms of Article I(1), I(4) and II of the BIT **(a)**. In interpreting similar requirements, investment treaty tribunals have looked to the investment operation as a whole to determine whether the territorial requirement was met **(b)**. The ICSID Convention provides no specific requirement that the investor's investment be in the host State's territory, other than the requirement to show that the investment as a whole has a reasonably close connection with the host State's territory **(c)**.

**a. Claimants' investments are in the territory of Norway within the definition of the BIT**

546. Article I(4) of the BIT defines the term "*territory*" in the following manner:

*The term "territory" shall mean: the territory of the Kingdom of Norway and the 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.*

547. Such territory of Norway "*over which*" Norway "*exercises, in accordance with international law, sovereign rights for the purpose of exploration and exploitation of the natural resources of such areas*" includes: Norway's land mass; Norway's territorial sea; Norway's continental shelf; Norway's exclusive economic zone, including the Svalbard Fisheries Protection Zone; as well as any *other* area where Norway "*exercises*" what it believes to be its "*sovereign rights for the purpose of exploration and exploitation of natural resources*". The territory as defined by the BIT therefore goes beyond the strict territory (as international law may define it) and includes all

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<sup>703</sup> *Ibid.*, para. 31; Witness Statement of Kirill Levanidov, 11 March 2021, para. 38.

“areas” where Norway exercises “sovereign rights” in relation to natural resources. Further, the list of such areas which follow the term “including” is thus non-limitative and merely a list of examples.

548. In interpreting the BIT, and here in respect of the definition of territory found in Article I(4), the Tribunal must apply the rule on interpretation found in Articles 31 and 32 of the Vienna Convention, which is consistently considered to be reflective of customary international law.<sup>704</sup> As summarized by the International Court of Justice:<sup>705</sup>

*Article 31, paragraph 1, of the Vienna Convention provides that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. These elements of interpretation — ordinary meaning, context and object and purpose — are to be considered as a whole. Paragraph 2 of Article 31 sets out what is to be regarded as context. Article 31, paragraph 3, provides that there shall be taken into account, together with the context, any subsequent agreement between the parties regarding the interpretation or application of the treaty, any subsequent practice which establishes such an agreement, and any relevant rules of international law applicable in the relations between the parties*

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<sup>704</sup> *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, **CL-0180**, para. 55 referring to *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, **CL-0102**, para. 27, itself referring to *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, **CL-0181**, para. 43; *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/17, Decision on Jurisdiction, 25 January 2000, **CL-0182**, para. 27; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Award, 2 June 2000, **CL-0183**, para.9; *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, **CL-0164**, para.43; *Enron Corp and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 7 October 2008, **CL-0184**, para. 25; *Cambodia Power Company v. Kingdom of Cambodia*, ICSID Case No. ARB/09/18, Decision on Jurisdiction, 22 March 2009, **CL-0185**, para. 222; ICJ, *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Judgment on the Preliminary Objections, 2 February 2017, **CL-0186**, para. 63; ICJ, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Judgment on the Preliminary Objections, 17 March 2016, **CL-0187**, para. 33; ICJ, *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment on the Merits, 13 July 2009, **CL-0188**, para. 47, referring to ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment on the Merits, 26 February 2007, **CL-0189**, para. 160 and ICJ, *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment on the Merits, 3 February 1994, **CL-0190**, para. 41; ICJ, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment on the Preliminary Objections, 12 December 1996, **CL-0191**, para. 23.

<sup>705</sup> ICJ, *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Judgment on the Preliminary Objections, 2 February 2017, **CL-0186**, para. 64.

549. The Salmon *Dictionnaire de Droit International* further defines the term “territory” in the following way:<sup>706</sup>

*In its most usual sense, that of a constituent element of the State, [the term] refers to the geographical space over which a State exercises the plenitude of its competences to the exclusion of any other State.*

550. However, the BIT clearly retains a larger definition of territory, covering not only the land territory, but also the maritime areas pertaining to the coastal State by virtue of international law, where Norway exercises “sovereign rights.” Concerning the latter maritime areas, the territorial scope of the BIT is equally large, since it applies to both the maritime spaces over which the coastal State enjoys sovereignty in the stricter sense, as well as those over which it exercises, functionally, sovereign rights.

551. As the International Court of Justice recalled in *Nicaragua v. Colombia*:<sup>707</sup>

*In accordance with long-established principles of customary international law, a coastal State possesses sovereignty over the seabed and water column in its territorial sea (...). By contrast, coastal States enjoy specific rights, rather than sovereignty, with respect to the continental shelf and exclusive economic zone.*

552. It is apparent from the wording and the structure of Article I(4) of the BIT that the intention of the drafters was to include all the maritime areas over which Norway and Latvia enjoy sovereignty *and* sovereign rights. This article refers expressly to the territorial sea and the continental shelf only. Yet, after a proper interpretation made according to the VCLT’s general rule of interpretation, there is little doubt that the parties intended the BIT to apply it to any other maritime areas, over which the coastal State enjoys full sovereignty or sovereign rights.

553. Indeed, these specific examples of the maritime areas coming within the territorial scope of the BIT are preceded by the word “including”. The ordinary meaning of the preposition “including” is that it is “used for saying that a person or thing is part of a particular group.”<sup>708</sup> It introduces examples of components of such group. As the ICJ

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<sup>706</sup> J. Salmon (ed.), *Dictionnaire de Droit International*, 2001, Excerpts, **CL-0192**, p. 1076. (« *Au sens le plus habituel d’élément constitutif de l’Etat, [le terme ‘territoire’] désigne l’espace géographique sur lequel un Etat exerce l’intégralité de ses compétences, à l’exclusion de tout autre Etat.* »).

<sup>707</sup> ICJ, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment on the Merits, 19 November 2012, **CL-0193**, para.177.

<sup>708</sup> Definition of “Including”, *Cambridge Advanced Learner’s Dictionary & Thesaurus*, Cambridge University Press, 6 March 2021, **C-0174**.

held in *Somalia v. Kenya*, “[t]he use of the word ‘including’ implies that the Parties intended something more to be encompassed”.<sup>709</sup>

554. In the case of the Latvia-Norway BIT, this “*something more*” refers to the other maritime spaces over which the Parties exercise sovereign rights in accordance with international law. The list is therefore not only open, but also dynamic and intended to follow the evolutions of international law. It must also be added that Article I(4) of the BIT refers to “*sovereign rights for the purpose of exploration and exploitation of the natural resources of such areas*”. The plural “*areas*” thus suggests that it is not only the continental shelf that is encompassed, but also the other maritime spaces over which the coastal State enjoys the sovereign rights.
555. Therefore, the BIT applies to all the maritime spaces over which Norway and Latvia exercise their sovereignty and sovereign rights. As it is well known:<sup>710</sup>

*The sovereignty of the coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.*

556. Furthermore, the BIT also applies to the exclusive economic zone (or any existing fisheries protection zone) and to the continental shelf, including the continental shelf beyond 200 nautical miles from the baselines, since these are areas over which Norway and Latvia enjoy “*sovereign rights for the purpose of exploration and exploitation of the natural resources*” as per the terms of the BIT.<sup>711</sup> It is over all such land and maritime areas that Norway exercises its sovereignty and sovereign rights.
557. Specifically, Claimants’ investments were made, located and operated both on land territory and in some maritime areas over which Norway claims and exercises sovereignty and sovereign rights. They are thus clearly covered by the territorial scope of the BIT.
558. The relevant land territory is both continental and insular. To be recalled, apart from its continental territory, by virtue of the Svalbard Treaty, Norway also has sovereignty over

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<sup>709</sup> ICJ, *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Judgment on the Preliminary Objections, 2 February 2017, **CL-0186**, para. 83.

<sup>710</sup> **CL-0013**, Article 2.

<sup>711</sup> See also, **CL-0013**, Articles 56(1) and 77(1).

the islands of the Svalbard archipelago and claims the full maritime areas which are generated by the islands forming the archipelago.

559. In 2001, Norway established *straight baselines* around the various islands composing the Svalbard archipelago:<sup>712</sup> it has enclosed the main islands (along with their adjacent islands and islets) of this mid-ocean archipelago within one baseline system, while the more remote islands have their own straight baselines system.<sup>713</sup> In accordance with Article 8 of UNCLOS, the waters on the landward side of the straight baselines form part of Norway's internal waters. It is from these baselines that Norway's other maritime areas are measured.
560. Norway has traditionally claimed a *territorial sea* extending up to 4 nautical miles, outside the Norwegian mainland, including around Svalbard.<sup>714</sup> In 2003, Norway extended to 12 nautical miles the territorial sea around all its territories, including Svalbard.<sup>715</sup>
561. Norway's Act No. 91 of 1976 sets forth provisions for declaring an *economic zone* that extends up to 200 nautical miles from the territorial sea baselines, but not beyond the median line in relation to other States.<sup>716</sup> By a Royal Decree of 1976 Norway established an exclusive economic zone with respect to mainland Norway,<sup>717</sup> and in 1977 it established a 200-nautical-mile economic zone for Svalbard,<sup>718</sup> which Norway

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<sup>712</sup> *Regulations of 1 June 2001 relating to the limit of the Norwegian territorial sea around Svalbard (Royal Decree of 1 June 2001)*, UN Division for Ocean and the Law of The Sea, LOS Bulletin, No. 46, 1 June 2001, **CL-0194**, pp. 72-80; *Deposit of the list of geographical coordinates of points for drawing the baselines for measuring the width of the territorial sea around Svalbard, as contained in: Regulations of 1 June 2001 relating to the limit of the Norwegian territorial sea around Svalbard*, M.Z.N. 38. 2001. LOS, UN Maritime Zone Unification, 8 June 2001, **CL-0195**.

<sup>713</sup> Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs in the U.S. Department of State, *Limits in the Sea*, No. 148, Norway, Maritime Claims and Maritime Boundaries, 28 August 2020, **CL-0196**, pp. 8-22.

<sup>714</sup> *Royal Decree of 25 September 1970 concerning the Delimitation of the Territorial Waters of Parts of Svalbard*, UN Division for Ocean and the Law of The Sea, FAOLEX Database, No. LEX-FAOC032718, 25 September 1970, **CL-0197** referring to the Royal Decree of 22 February 1812, 22 February 1812, **CL-0198**.

<sup>715</sup> *Deposit of the list of geographical coordinates of points defining the outer limits of the territorial sea around mainland Norway, Svalbard and Jan Mayen*, M.Z.N. 45. 2003, LOS, UN Maritime Zone Unification, 3 December 2003, **CL-0199**; *Deposit of the list of geographical coordinates of points as specified in the Regulations relating to the baselines for determining the extent of the territorial sea around mainland Norway, as laid down by Royal Decree of 14 June 2002, as amended by Crown Prince Regent's Decree of 10 October 2003*, M.Z.N. 40. 2002. LOS, UN Maritime Zone Unification, 20 September 2002, **CL-0200**.

<sup>716</sup> *Act No. 91 of 1976 relating to the Economic Zone of Norway*, UN Division for Ocean and the Law of The Sea, FAOLEX Database, No. LEX-FAOC002033, 17 December 1976, **CL-0201**.

<sup>717</sup> *Royal Decree of 17 December 1976 relating to the establishment of the Economic Zone of Norway*, UN Division for Ocean and the Law of The Sea, FAOLEX Database, No. LEX-FAOC013825, 17 December 1976, **CL-0202**.

<sup>718</sup> *Decree No. 6 of 1977 relative to the fishery protection zone of Svalbard*, UN Division for Ocean and the Law of The Sea, FAOLEX Database, No. LEX-FAOC012764, 23 May 1977, **CL-0203**.

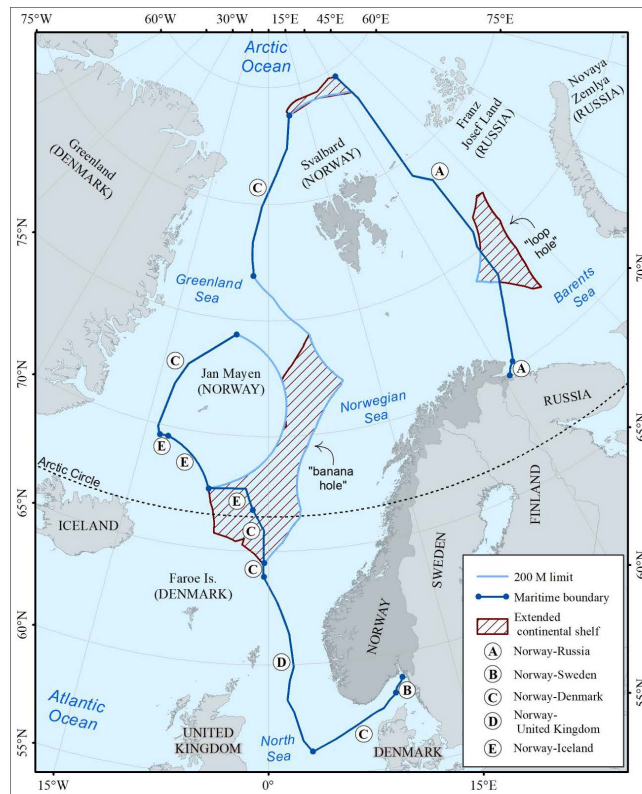
calls the Svalbard Fisheries Protection Zone (**Svalbard FPZ** or **SFPZ**). The 1976 Act and Royal Decree established restrictions on fishing and hunting within the economic zone and authorized the government of Norway to issue further regulations on fishing and hunting. The Act states that the issuance of such regulations is “[s]ubject to the rules of international law”.

562. As far as the continental shelf is concerned, Act No. 72 of 1996 provides that Norway has a continental shelf “*extending beyond the Norwegian territorial sea, throughout the natural prolongation of the Norwegian land territory to the outer edge of the continental margin.*”<sup>719</sup> Significantly, Norway claims and enjoys a continental shelf extending beyond 200 nautical miles from the baselines off its continental coast and the baselines around the Svalbard archipelago.
563. In 2006, Norway submitted to the Commission on the Limits of the Continental Shelf (CLCS) information on the limits of its continental shelf beyond 200 nautical miles. This submission concerned the outer limits of the continental shelf of Norway in three separate areas of the North East Atlantic and the Arctic: (1) the Loophole (or *Smuthullet*) in the Barents Sea; (2) the Western Nansen Basin in the Arctic Ocean; and (3) the Banana Hole in the Norwegian Sea.
564. In 2009, the CLSC adopted its recommendations pertaining to all three areas, and these recommendations were generally consistent with the outer limits claimed by Norway in 2006. Specifically, the CLCS confirmed that the seabed under the Loophole meets the definition and the criteria of Article 77 of UNCLOS and that Norway could establish the outer limits of its extended continental shelf so as to encompass the Loophole in its sovereign jurisdiction.<sup>720</sup>

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<sup>719</sup> Act No. 72 of 29 November 1996 relating to Petroleum Activities, UN Division for Ocean and the Law of The Sea, LOS Bulletin, No. 45, 29 November 1996, **CL-0204**, pp. 14-37.

<sup>720</sup> Commission on the Limits of the Continental Shelf, *Summary of the Recommendations of the Commission on the Limits of the Continental Shelf in regard to the Submission made by Norway in respect of Areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea on 27 November 2006*, 27 March 2009, **C-0072**.

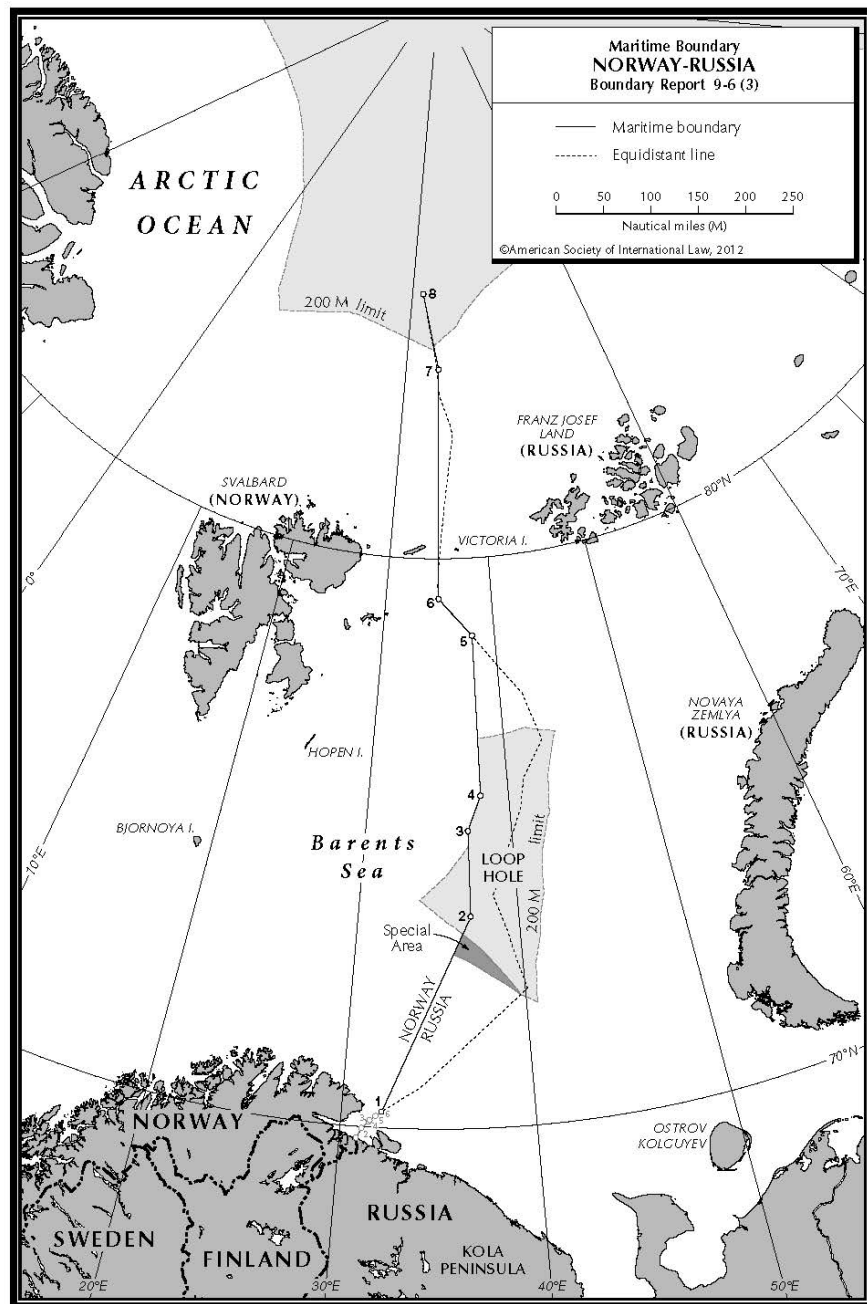


**Map 6.** Norway's 200 M limits, extended continental shelf areas, and maritime boundaries. The extended continental shelf areas and limits depicted are those that are reflected in Norway's submission and recommendations and not those of neighboring States. Map scale: 1:18,500,000.

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**Figure 1.** Norway's Maritime Jurisdiction Including the Continental Shelf Beyond 200 nautical miles (from US Department of State, series *Limits in the Seas*, No. 148 (Norway), 28 Aug. 2020, p. 27)

565. As the CLCS acknowledged, Norway and the Russian Federation had overlapping claims in the Barents Sea, including over the Loophole. On 15 September 2010, after more than 40 years of negotiations, Norway and the Russian Federation concluded a treaty establishing an all-purpose maritime delimitation line in the Barents Sea and the Arctic Ocean, including the continental shelf areas beyond 200 nautical miles in the Loophole (see **Figure 2** hereafter). This delimitation line departs from equidistance and leaves the vast majority of the continental shelf of the Loophole on the Russian side of the boundary. The agreement, on the other hand, cannot and does not affect the status of the water column, which remains that of the high seas, in which all States enjoy the freedoms of the high seas.



**Figure 2.** The Boundary in the 2010 Agreement between Norway and Russia (from C. Lathrop (ed)., *International Maritime Boundaries online*, R.E. Fife, "Report 9-6 (3), p. 22)



566. The definition by Norway of its territorial jurisdiction, within the meaning of the BIT, thus seems “*in accordance with international law*” as per the terms and requirement of Article I(4) of the BIT. For example, no State has objected to Norway’s claimed entitlements to maritime spaces based on sovereignty over the Svalbard archipelago. On the contrary, several States, as well as the European Union, expressly or at least implicitly acknowledged the situation. For example, the EU has stated: <sup>721</sup>

*the Svalbard archipelago, including Bear Island, generates its own maritime zones, separate from those generated by other Norwegian territory, in accordance with the 1982 United Nations Convention on the Law of the Sea. It follows therefore that there is a continental shelf and an exclusive economic zone, which pertain to Svalbard.*

567. However, these States also insisted that this recognition was based on Norway’s obligation to exercise its sovereignty and sovereign rights in accordance with the Svalbard Treaty, “*which grants, by virtue of its Articles 2 and 3, an equal and non-discriminatory access to resources for all Parties to the Treaty, in particular with respect to fishing activities, including fishing for sedentary species on the continental shelf around Svalbard.*” <sup>722</sup> The manner in which Norway exercises its sovereign jurisdiction (sovereignty and sovereign rights) around Svalbard, including in the Loophole, remains a question of merits, not a question relating to the territorial scope of the BIT, and is treated as such below. <sup>723</sup>
568. The BIT therefore applies to the land and insular territory under the sovereignty of Norway, as well as to all maritime spaces falling under its sovereign jurisdiction (internal waters, territorial sea, water column within 200 nautical miles from the baselines and continental shelf within and beyond 200 nautical miles).
569. As will be shown below, there is therefore no question that the whole of Claimants’ integrated investment (as well as its separate parts), including both the NEAFC and Svalbard licences (independently of whether snow crab is a sedentary or non-sedentary species) comes within the terms of Article I(4).

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<sup>721</sup> Note Verbale of the European Union to Norway, 1 November 2016, **C-0071**; See also Note Verbale from Spain to the Secretary General of the United Nations, 2 March 2007, **C-0078**; Note Verbale from Russia to the Secretary General of the United Nations, 21 February 2007, **C-0175**.

<sup>722</sup> Note Verbale of the European Union to Norway, 1 November 2016, **C-0071**.

<sup>723</sup> See below, paras. 597-613 (Loophole), 629-672 (Svalbard) and also eg 804-807.

**b. The territoriality requirement under an investment treaty must be examined in respect of the whole of the investment**

570. Investment treaty tribunals have consistently held that to fulfil the territoriality requirement of an investment treaty, the investment must be looked at as one whole operation, not in respect of its various parts.

571. In *CSOB v. Slovakia*, the ICSID tribunal held that the investment as a whole has been made in Slovakia even if “CSOB’s loan did not involve any spending or outlay of resources in the territory of the Slovak Republic.”<sup>724</sup> The CSOB tribunal held that:<sup>725</sup>

*[the] contractual scheme embodied in the Consolidation Agreement shows [...] that the CSOB loan to the Slovak Collection Company is closely related to and cannot be disassociated from all other transactions involving the restructuring of CSOB.*

572. In *Ambiente Ufficio*, the ICSID Tribunal adopted a similar approach to establish that an investment existed in Argentina had been met, as required by the Argentina-Italy BIT.<sup>726</sup>

573. The *Inmaris v. Ukraine* ICSID tribunal also held:<sup>727</sup>

*The division of labor among the Claimants does not affect the nature of the integrated investment in which they participated. Likewise, it does not affect the fact that the investment as a whole was ultimately undertaken in relation to property belonging to the Ukrainian state, and thus sufficiently in the territory of Ukraine. 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.*

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<sup>724</sup> *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, **CL-0110**, para. 79.

<sup>725</sup> *Ibid.*, para. 80.

<sup>726</sup> *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, **CL-0115**, para. 429 (“[...] the Tribunal is convinced that the process of issuing bonds and their circulation on the secondary, i.e. financial, markets in the form of security entitlements are to be considered an economic unity and must be dealt with as such a unity for the purpose of deciding whether disputes relating to financial instruments of this kind “aris[e] directly out of an investment” and are therefore covered by Art. 25 of the ICSID Convention and Art. 1 of the Argentina-Italy BIT.”), para. 500 (“The present Tribunal thus cannot come to any other conclusion than identifying the Respondent as the beneficiary of the investment as stake in the present proceedings. It would like to recall, in this context, the importance to conceive of the investment in question as a unified economic operation. The whole bond issuing process, notably including the circulation of security entitlements on the secondary market, was devised – and specifically intended by the Respondent itself – to raise money for the budgetary needs of Argentina and thus to further the development of that State.”).

<sup>727</sup> *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, **CL-0118**, para. 125.

[Emphasis added]

574. This approach was further confirmed by the ICSID tribunal in *SGS v. Philippines*<sup>728</sup> and by the UNICTRAL tribunal in *Apotex*.<sup>729</sup>
575. Further, the investment treaty tribunal decisions in *Cargill v. Mexico*<sup>730</sup> and the recent Crimea cases<sup>731</sup> against the Russian Federation show that the territorial requirement

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<sup>728</sup> *SGS Société Générale de Surveillance S.A. v. Republic of Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, 29 January 2004, **CL-0205**, paras. 111-112 (holding that “SGS made an investment “in the territory of” the Philippines under the CISS Agreement, considered as a whole”, and that [t]here was no distinct or separate investment made elsewhere than in the territory of the Philippines but a single integrated process of inspection arranged through the Manila Liaison Office, itself unquestionably an investment “in the territory of” the Philippines”).

<sup>729</sup> *Apotex Inc. v. The Government of the United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013, **CL-0206**, para. 230 (“In the Tribunal’s view, none of the items identified under NAFTA Article 1139(h) amounts to an “investment” within NAFTA Chapter eleven, and whether considered separately or together, none changes the analysis under NAFTA Article 1139(g).”), para. 241 (“Overall Conclusion on “Investment”: It follows from the Tribunal’s conclusions above that no “investment” has been made by Apotex in the territory of the United States, within the scope of NAFTA Chapter Eleven.”).

<sup>730</sup> *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, **CL-0207**, para. 136 (“Chapter 11 [of NAFTA] is designed to afford protection to investments of persons of a Party in the territory of another Party. [...] Claimant’s HFCS manufacturing facilities are in the United States and not Mexico.”), para. 154 (“It is not in dispute that there is an investment in Mexico in the form of Cargill de Mexico. As the Tribunal holds there to be a violation of NAFTA Chapter 11 provisions by a measure relating to that investment and Claimant as an investor, Claimant is entitled to claim for the loss or damage incurred “by reason of, or arising out of, that breach.” **Whether such damages encompass losses to Cargill within its business operations in the United States is a question of interpretation of these damages provisions and is not essentially a jurisdictional question.** Consequently, it will be discussed below when the Tribunal addresses Claimant’s Article 1110 claim and, again, in the calculation of damages.”), para. 523 ([...] the profits generated by Cargill’s sales of HFCS to its subsidiary, Cargill de Mexico, for CdM’s marketing, distribution and re-sale of the HFCS, were so associated with the claimed investment, CdM, as to be compensable under the NAFTA. Cargill’s investment in Mexico involved importing HFCS and then selling it to domestic users, principally the soft drink industry. Thus, supplying HFCS to Cargill de Mexico was an inextricable part of Cargill’s investment. As a result, in the view of the Tribunal, losses resulting from the inability of Cargill to supply its investment Cargill de Mexico with HFCS are just as much losses to Cargill in respect of its investment in Mexico as losses resulting from the inability of Cargill de Mexico to sell HFCS in Mexico.).

<sup>731</sup> There are 9 cases in total, which arbitral awards are not public: *Stabil LLC and others v. The Russian Federation*, PCA Case No. 2015-35, UNCITRAL; *Limited Liability Company Lugzor and others v. The Russian Federation*, PCA Case No. 2015-29, UNCITRAL; *PJSC CB PrivatBank and Finance Company Finilon LLC v. The Russian Federation*, PCA Case No. 2015-21, UNCITRAL; *Everest Estate LLC, Edelweis-2000 PE, Fortuna CJSC and others v. The Russian Federation*, PCA Case No. 2015-36, UNCITRAL; *Aeroporto Belbek LLC and Mr. Igor Valerievich Kolomoisky v. The Russian Federation*, PCA Case No. 2015-30, UNCITRAL; *PJSC Ukrnafta v. The Russian Federation*, PCA Case No. 2015-34, UNCITRAL; *Oschadbank v. Russian Federation*, PCA Case No. 2016-14, UNCITRAL; *Ukrenergo v. The Russian Federation*, Ad hoc arbitration, UNCITRAL; *NJSC Naftogaz of Ukraine and Others v. The Russian Federation*, PCA Case No. 2017-16, UNCITRAL. In these cases, tribunals had to determine whether the investments were “carried out [...] on the territory of the other Contracting Party”, with “territory” defined in the BIT as “the territory of the Russian Federation or the territory of the Ukraine and also their respective exclusive economic zone and the continental shelf as defined in conformity with the international law”; see, Agreement between the Government of the Russian Federation and the Cabinet of Ministers of the Ukraine on the Encouragement and Mutual Protection of Investments, 27 November 1998, **CL-0208**, Article 12, 1(4). Tribunals have found jurisdiction in all cases except *Ukrenergo v. The Russian Federation*, where the request for arbitration was submitted only in August 2019. While the awards are not public, their result has been reported on generally: L. E. Peterson, “In Jurisdiction Ruling, Arbitrators Rule that Russia is Obligated under BIT to Protect Ukrainian Investors in Crimea Following Annexation,” *IA Reporter*, 9 March 2017, **CL-0209**; J. Hepburn, “Investigation: Full Jurisdictional Reasoning Comes to Light in Crimea-Related BIT

will be met where the effects of a State's exercise of sovereign jurisdiction affect the investor's investment, even if such effect is in part outside the host State's territory (as in *Cargill v. Mexico*) or where the effect is on an investment situated in a territory where the exercise of a State's jurisdiction is contested or illegal (as in the Crimea cases).

576. In the present case, to the extent the situs of Claimants' investment within the territory of Norway is contested by Respondent, there is absolutely no question that Norway has exercised its sovereign power to significantly affect, and in fact destroy, Claimants' investments. Notably, should Norway try to argue that Claimants' NEAFC licences or Svalbard licences are not in whole or in part investments on the territory of Norway within the terms of the BIT (which would be incorrect, as shown above), then the Tribunal in any event has jurisdiction because Norway has used its sovereign power to destroy Claimants' investments. This is not entirely unlike how the Russian Federation illegally occupied Ukraine in respect of Crimea and then illegally took several investments – for which it has been held liable by multiple tribunals, the decisions of which have also been confirmed by courts of the seat of arbitration.<sup>732</sup> The same reasoning is further supported by the consistent line of cases holding that whether or not an investment is in the host State's territory must be evaluated in respect of the investment as a whole.
577. There is therefore no question that, whether viewed as a whole or through its distinct parts, all of Claimants' investments are located in the territory of Norway for purposes of the BIT. As already shown above, Claimants' investments established an integrated enterprise deeply rooted in the territory of Norway:
- (a) Claimants' investments have been made within the framework of a joint venture between Mr. Pildegovics and Mr. Levanidov, the operations of which were almost entirely contained within the territory of Norway. The joint venture agreement is itself a contract (i) recognized as such under Norwegian law; (ii)

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*Arbitration vs. Russia*," IA Reporter, 9 November 2017, **CL-0210**; J. Hepburn, R. Kabra, "Investigation: Further Russia Investment Treaty Decisions Uncovered, Offering Broader Window into Arbitrators' Approaches to Crimea Controversy," IA Reporter, 17 November 2017, **CL-0211**.

<sup>732</sup> *Everest Estate LLC, Edelveis-2000 PE, Fortuna CJSC and others v. The Russian Federation*, PCA Case No. 2015-36, UNCITRAL, Judgment, the Hague Court of Appeal, 11 June 2019, **CL-0212**; *Stabil LLC and others v. The Russian Federation*, PCA Case No. 2015-35, UNCITRAL, Judgment, the Swiss Federal Tribunal, 12 December 2019, **CL-0213**; *PJSC Ukrnafta v. The Russian Federation*, PCA Case No. 2015-34, UNCITRAL, Judgment, the Swiss Federal Tribunal, 12 December 2019, **CL-0214**.

over which Norwegian courts would recognize their jurisdiction; and (iii) to which Norwegian law would likely be found applicable.<sup>733</sup>

- (b) The joint venture had three main activities: snow crab fishing; processing; and distribution. All three activities took place within Norway's "*territory*" as defined above. All companies partaking in the joint venture were operated from Seagourmet's offices in Baatsfjord, Norway.<sup>734</sup>
- (c) North Star's fishing activities occurred within the Loophole area of the NEAFC zone, an area of the high seas partly suprajacent to Norway's continental shelf for which it held valid NEAFC fishing licenses. North Star also held licenses to fish in the Svalbard zone, an area over which Norway enjoys sovereignty.<sup>735</sup>
- (d) The vast majority of North Star's deliveries of snow crabs occurred within Norway, mainly to Seagourmet's factory at Baatsfjord.<sup>736</sup> Thus, North Star's core economic activity – the act of selling snow crabs – took place almost entirely on Norwegian land. These deliveries were framed by supply agreements which specifically designated Norway as the place of delivery.<sup>737</sup>
- (e) North Star's fishing vessels, while obviously movable and therefore susceptible of being used anywhere in the world, were actually (and exclusively) used by North Star to support its snow crab fishing operations as part of the joint venture. The vessels moored in Norwegian ports, were refuelled, repaired and maintained in Norway, and were serviced by a Norwegian company, Sea & Coast. They caught snow crabs in areas over which Norway is either sovereign or claims sovereign rights, travelled through Norwegian waters and were subjected to routine inspections by the Norwegian coast guard.<sup>738</sup>
- (f) The vessels' catches were processed in Norway, primarily by Seagourmet in Baatsfjord, but also by other Norwegian seafood processing companies based

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<sup>733</sup> Expert Report of Anders Ryssdal, para. 88.

<sup>734</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 166.

<sup>735</sup> *Ibid.*, para. 42.

<sup>736</sup> *Id.*

<sup>737</sup> *Id.*, para. 115.

<sup>738</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 42.

in the nearby Norwegian port of Vardo.<sup>739</sup> They enabled the development of Seagourmet's factory and thereby had significant economic impacts over the Baatsfjord economy.

578. In short, virtually every aspect of Claimants' investment operation was located in the territory of Norway, and Norway has certainly exercised its jurisdiction over most if not all aspects of this operation – ultimately to destroy it. By contrast, it is indeed hard to find any nexus between Claimants' investments and any territory other than Norway (omitting the fact that Claimants are based and headquartered in Latvia).

**c. Any territoriality requirement found in the ICSID Convention has been met**

579. The ICSID Convention has no explicit territoriality requirement though the terms of Article 25(1) of the Convention do imply the need for a connection between an investor's investment and the host State if there is to be a legal dispute arising directly out of the investment with the host State.<sup>740</sup>
580. From the case law concerning whether a legal dispute arises directly out of an investment, it is clear that the investment must be considered as a whole.<sup>741</sup> The same would therefore apply to any implicit territoriality requirement (even though Claimants contests one actually exists), just as is the case in the case law regarding the territoriality requirement under BITs. In the same manner, there is no question Claimants' investments are sufficiently linked to the territory of Norway to pass any test under Article 25 of the ICSID Convention.

**G. CLAIMANTS “INVESTED” THEIR INVESTMENTS IN NORWAY**

581. Article I(1) of the BIT states that investments are assets that are “invested” by the investor in the territory of the host State. Tribunals, such as in *Mytilineos v. Serbia*,<sup>742</sup>

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<sup>739</sup> *Ibid.*, para. 159.

<sup>740</sup> M. Waibel, “Investment Arbitration: Jurisdiction and Admissibility,” Legal Studies Research Paper Series, University of Cambridge, Paper No. 9/2014, February 2014, **CL-0215**, p. 39 (“The premise underlying Article 25’s conception of an investment is that the investor is physically present in the host country.”).

<sup>741</sup> See above, paras. 477-485.

<sup>742</sup> *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL Case, Partial Award on Jurisdiction, 8 September 2006, **CL-0113**, para. 129 (“According to Respondents any assets specifically mentioned in Article 1(1)(a) – (e) of the BIT do not constitute investments in themselves but must be “invested” in order to qualify as “investments”. In their view, the Contracting Parties of the BIT must be considered as having “intended to protect only claims to money and other claims under contract which are related to or associated with an investment. In the view of the Tribunal, Respondents’

have held that a requirement that an investment be “*invested*” does not add to other jurisdictional requirements under an investment treaty beyond the existence of an investment. In any event, Claimants have certainly actively invested their investment in Norway, through extensive efforts and injection of funds over the years, as should be clear from the Witness Statements of Mr. Pildegovics and Mr. Levanidov. Claimants’ investments can in no way be described as a passive investment that may raise questions as to the Tribunal’s jurisdiction.

#### **H. CLAIMANTS’ INVESTMENTS WERE INVESTED IN ACCORDANCE WITH THE LAWS AND REGULATIONS OF NORWAY**

582. Claimants’ investments in Norway were also made “*in accordance with [Norway’s] laws and regulations*” as per Article I(1) of the BIT.

583. When Mr. Pildegovics and North Star made their investments in Norway, these investments were fully compliant with Norwegian law. The snow crab fishery taking place in the Loophole was then considered by Norway as occurring in international waters “*outside any state’s fishing jurisdiction*”<sup>743</sup> Norwegian authorities confirmed that EU vessels could take part in this fishery and deliver their catches in Norwegian ports “*on an equal footing with Norwegian fishing vessels*”.<sup>744</sup> Norway registered its own vessels under the NEAFC Scheme<sup>745</sup>, and these vessels relied on NEAFC licenses to catch snow crabs from the Loophole, just like Claimants. There can be no doubt that Claimants relied on these facts in making the decision to launch the joint venture and make their investments in their snow crab fishing enterprise in Norway.<sup>746</sup>

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*interpretation would, however, unduly restrict and unpredictably limit the meaning of an otherwise clear and straightforward investment definition. The Tribunal finds that the core of the definition lies in the characterization of “every kind of asset” as an “investment.” The examples of assets added in an illustrative fashion to this definition in Article 1(1)(a) – (e) of the BIT and the verb “invested” do not add to it. Rather, the verb “invested” appears necessary for the further qualification that the investments must be made “in accordance with the [host State’s] legislation.”*; see also, *Saluka Investments BV v. The Czech Republic*, UNCITRAL Case, Partial Award, 17 March 2006, **CL-0216**, para. 211.

<sup>743</sup> 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.

<sup>744</sup> Email exchange between the Norwegian Directorate of Fisheries and S. Ankipov, 20-25 July 2014, **KL-0020**; Email exchange between Mattilsynet and S. Ankipov, 3-5 February 2014, **KL-0019**.

<sup>745</sup> **C-0087; C-0088**.

<sup>746</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 197; Witness Statement of Peteris Pildegovics, 11 March 2021, para. 33.

584. The prohibitions under Norwegian law prohibiting the catch of snow crabs in the Loophole area of NEAFC zone first came into force in December 2015<sup>747</sup>, almost two years after the start of Claimants' investment operation in January 2014. Norway obviously cannot rely on its subsequent prohibition of Claimants' entirely legal activities (which were lauded by Norwegian public figures such as Geir Knutsen<sup>748</sup> and Helga Pedersen<sup>749</sup> as contributing to the economic development of Norway) to try to argue that the Tribunal has no jurisdiction over them.
585. There can also be no question that the other investment operations activities pertaining to Claimants' snow crab fishing enterprise, including notably the acquisition of shares in Norwegian company Sea & Coast and the conclusion of a joint venture agreement, were conducted in conformity with Norwegian law.
586. Norway cannot rely on its position that Claimants' Svalbard licences are contrary to Norwegian law (as per the Norwegian Supreme Court's judgment maintaining fines against the Senator), since this position is incorrect as a matter of international law.
587. Section 6 of the Marine Resources Act, which governs the issuance of snow crab licences, provides that should that legislation be inconsistent with Norway's international obligations, these international obligations shall prevail. Section 6 (*Relationship to international law*) provides: <sup>750</sup>
- This Act applies subject to any restrictions deriving from international agreements and international law otherwise.*
588. While the current Norwegian position is undoubtedly that Claimants' Svalbard licences, issued by the Republic of Latvia on the basis of an EU Regulation (itself adopted based on the EU and Latvia's rights under the Svalbard Treaty) are without legal effect, Norway's *position* on international law does not make it international law.<sup>751</sup>

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<sup>747</sup> Regulations prohibiting the capture of snow crabs, J-298-2015, 22 December 2015, **C-0110**, Section 1.

<sup>748</sup> "Negotiator with the Russians," Fiskeribaldet Fiskaren, 21 September 2016, **KL-0041**, p. 2. (the Mayor of Baatsfjord, Mr. Geir Knutsen, stated that "Seagourmet has gradually become one of the cornerstone companies here in the municipality with great potential for further ripple effect. It has simply become a model company with great local significance. So, here we will do everything we can to try and find a solution that can secure raw materials for the company").

<sup>749</sup> Written question and answer between Helga Pedersen, Member of Parliament, and Per Sandberg, Minister of Fisheries, 9 January 2017, **KL-0046**.

<sup>750</sup> **CL-0012**, Chapter 1, Section 6.

<sup>751</sup> Statute of the International Court of Justice, 26 June 1945, **CL-0217**, Article 38(1).



589. This means that for this Tribunal to properly interpret Article I(1) of the BIT – which is clearly within its jurisdiction and competence – the Tribunal must also come to its own view as to the correct interpretation of Section 6 of the Marine Resources Act, and thus the extent of Norway’s international obligations under the Svalbard Treaty as they relate to Claimants’ Svalbard Licences. The question is dealt with in Section VII.D below.

590. For these reasons, Claimants submit that their investments were undoubtedly made “*in accordance with [Norway’s] laws and regulations*” as required by the BIT.

**I. THE PRESENT DISPUTE IS ONE WHICH THE PARTIES HAVE CONSENTED IN WRITING TO SUBMIT TO ICSID**

591. By submitting the Request for Arbitration on 18 March 2020, which was registered by ICSID on 1 April 2020, the Claimants accepted, in writing, Norway’s offer to arbitrate at ICSID found in Article IX of the Latvia-Norway BIT. The requirement found in the ICSID Convention that the offer to arbitrate under the Convention has been accepted in writing has thus been met.

**J. THE THREE-MONTH WAITING PERIOD FOUND IN ARTICLE IX(2) OF THE BIT HAS BEEN RESPECTED**

592. Claimants submitted a notice of dispute relating to Norway’s multiple breaches of the BIT on 8 March 2019, more than one year before submitting the Request for Arbitration on 18 March 2020. Claimants have therefore respected the three-month waiting period found in Article IX(2) of the BIT, from the time the dispute is notified, to the time when it can be submitted to ICSID arbitration.

## VII. NORWAY'S ILLEGAL ASSERTION OF SOVEREIGNTY OVER THE BARENTS SEA SNOW CRAB FISHERY

593. Before addressing Norway's multiple violations of the BIT in the next section, Claimants deem it relevant to begin by considering Norway's actions impacting the Barents Sea snow crab fishery from the lens of Norway's international obligations beyond the BIT.
594. The assessment of the international legality of Norway's actions is important since the interpretation of the BIT must take into account "*any relevant rules of international law applicable in the relations between the parties*".<sup>752</sup> Following this principle, if a State's conduct has violated international law beyond the BIT, such violation may inform the Tribunal's assessment as to whether the BIT itself may have been breached.
595. Rules of international law applicable in the relations between the parties to the BIT are the rules applicable as between Latvia and Norway. Besides from customary international law, this includes other relevant bilateral treaties in force between the two countries as well as multilateral agreements to which Latvia and Norway are both party.
596. The Tribunal's consideration of Norway's violations of other treaties will comfort it in its findings that Norway has breached a large number of BIT provisions. Even though the breach of provisions of other international treaties does not in and of itself, *in principle*,<sup>753</sup> trigger a breach of an investment treaty, it can certainly suggest the existence of such a breach, as it does here.
597. Secondly, in the present case, Claimants invoke a particular investment treaty provision to which Norway has subjected itself which states that where the obligations of another international agreement concluded between Norway and its investment treaty partner provides a standard of protection *higher* than that investment treaty itself, then provisions of that other international agreement shall prevail.<sup>754</sup> Therefore, if the Tribunal finds a breach of the Latvia-Norway BIT that yields to full reparation of Claimants' damages, then the Tribunal need not examine Norway's violations of these other treaties. However, if the Tribunal finds that Norway has acted consistently with the BIT taken in isolation (even though it obviously has not), then the Tribunal must examine the provisions of these other international agreements to see if Norway has

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<sup>752</sup> **CL-0021**, Article 31(3)(c).

<sup>753</sup> In this case, this is subject to the applicability of Article 12 of the Norway-Russian Federation BIT, which Claimants can benefit from on the basis of the BIT's Article III (most favoured nation treatment).

<sup>754</sup> See Article 12 of the Norway-Russian Federation BIT, which Claimants can benefit from on the basis of the BIT's Article III (most favoured nation treatment), discussed below, at paras. 804-807.

breached them and in consequence caused harm to Claimants, which must be compensated. In this case, this includes (though it is not limited to): (A) Norway's breach of Article 300 of UNCLOS; (B) Norway's breach of Claimants' acquired rights; and (C) Norway's breach of the Svalbard Treaty.

**A. NORWAY'S BAD FAITH DESIGNATION OF SNOW CRAB AS A SEDENTARY SPECIES UNDER ARTICLE 77 UNCLOS CONSTITUTES AN ABUSE OF RIGHT IN VIOLATION OF ARTICLE 300 UNCLOS**

598. Whether or not snow crabs are a sedentary or non-sedentary species is not a live issue for this Tribunal.<sup>755</sup> It suffices to conclude for purposes of the present case that Norway has asserted rights over snow crab as a purportedly sedentary species in an abusive manner falling well short of the requirements of good faith.
599. Even assuming that Norway could make a convincing case that snow crab is a sedentary species under the definition of UNCLOS (which is at least doubtful), Norway cannot escape the fact that its redesignation of snow crab from a non-sedentary to a sedentary species in July 2015, overturning more than 50 years of consistent practice, constituted a radical regime change which would inevitably disrupt an already well-established fishery in the Loophole.
600. In July 2015, the biological nature of snow crab did not change, and the legal definition of sedentary species pursuant to UNCLOS did not change. Norway's decision to change the characterization of snow crabs from non-sedentary to sedentary must therefore be seen as arbitrary and motivated by purely political reasons.
601. At a minimum, good faith would have required that Norway acknowledge this change in its legal position and that it be willing to face its legal consequences in an open and transparent manner. Instead, in an apparent attempt to rewrite history, Norway has behaved as if snow crabs had *always* been considered as a sedentary species and therefore, that any foreign nationals participating in the snow crab fishery in the Loophole had somehow been "stealing" from Norway. Of course, the political goal

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<sup>755</sup> Of course, if snow crabs are a non-sedentary species, then Norway has breached a large number of other obligations found in UNCLOS that require cooperation with other States regarding fisheries resources occurring in international waters. In that light, it remains incumbent upon Norway to convince the Tribunal of the sedentary nature of snow crab.

underlying the redesignation of snow crab was precisely to give Norway a legal argument to expel these foreign nationals from the fishery.

602. The manner in which Norway has proceeded to change the characterization of the snow crab in the Barents Sea from a non-sedentary resource to a sedentary resource pursuant to Article 77 UNCLOS, and thereafter to expel EU vessels from the snow crab fisheries is a manifest breach of Article 300 of UNCLOS. This provision states:<sup>756</sup>

*States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of rights.*

603. In light of the extensive discretion of States under UNCLOS, Article 300 is a fundamental provision of the Convention:<sup>757</sup>

*...the large number of discretionary rights afforded to States in the Convention seems to suggest the necessity of attaching great importance to the principle of good faith as being a potential instrument of control over excessive use of such discretionary powers...*

604. Article 300 comes into play when a right, jurisdiction or freedom recognised under UNCLOS is exercised in an abusive manner.<sup>758</sup> According to one author, an abuse of rights can occur in one of the following three circumstances:<sup>759</sup>

*First, the concept of abuse of rights serves to balance the interests of the parties where a State exercises a right and by so doing hinders another State from exercising its right which then results in an injury to the rights of the second State*

*Second, an abuse of rights can be present where a right is exercised for a purpose other than that for which it was initially created*

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<sup>756</sup> **CL-0013**, Article 300.

<sup>757</sup> "Part XVI - General Provisions," in A. Proelss (ed.), UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY, Bloomsbury Collections, 2017, **CL-0218**, Article 300, p. 1938.

<sup>758</sup> ITLOS, *M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, 28 May 2013, **CL-0219**, para. 137 ("it is apparent from the language of article 300 of the Convention that article 300 cannot be invoked on its own. It becomes relevant only when 'the rights, jurisdiction and freedoms recognised' in the Convention are exercised in an abusive manner"); ITLOS, *M/V "Virginia G" Case (Panama v. Guinea-Bissau)*, Judgment, 14 April 2014, **CL-0220**, para. 399 ("it is the duty of an applicant when invoking article 300 of the Convention to specify the concrete obligations and rights under the Convention, with reference to a particular article, that may not have been fulfilled by a respondent in good faith or were exercised in a manner which constituted an abuse of rights").

<sup>759</sup> "Part XVI - General Provisions," in A. Proelss (ed.), UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY, Bloomsbury Collections, 2017, **CL-0218**, Article 300, p. 1942.

*Third, an arbitrary exercise of a right by one State resulting in an injury to a second State, though without clearly violating that second State's rights, can also amount to an abuse of rights...*

605. Norway's actions constitute an abuse of right under each of the above definitions.
606. Even if Norway could show that it holds exclusive rights over snow crab as a purportedly sedentary species, the sudden, and clearly arbitrary regime change from non-sedentary to sedentary resulted in injury to the rights of EU Member States with fishing interests in the Barents Sea, in particular Latvia, which had issued snow crab licences under the NEAFC regime. It also of course severely injured the actual persons and companies holding those licences, such as North Star and, indirectly, Mr. Pildegovics.
607. Until at least July 2016, Norway expressly accepted the legal validity of snow crab fishing licenses issued under the NEAFC regime, as recognized by the Norwegian Supreme Court in the *Juros Vilkas* case.<sup>760</sup> Norway relied on the very same NEAFC licenses to register its own vessels for the Loophole fishery and acknowledged that the snow crab fishery in the Loophole took place in international waters "*outside any state's jurisdiction*".<sup>761</sup>
608. As noted by Latvia in September 2015, Norway's designation of snow crab as a sedentary species did not change the fact that it had delegated the management of the fishery to NEAFC.<sup>762</sup> The East Finnmark District Court was convinced by a similar argument in the *Juros Vilkas* case as it concluded that "*the national restriction to conduct fishery operations for snow crabs within the area of Smutthullet of the Norwegian Continental Shelf is not applicable in the present case because the said restriction infringes on the undertaken obligations of Norway in accordance with NEAFC convention and NEAFC Scheme of Control and Enforcement*".<sup>763</sup> While it ultimately reached a different conclusion, the Norwegian Supreme Court also accepted that snow crab fishing in the Loophole was "*within the [NEAFC] Convention's area of*

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<sup>760</sup> *Arctic Fishing v. The Public Prosecution Authority*, Supreme Court of Norway, Judgment, 29 November 2017, **C-0161**.

<sup>761</sup> **C-0087; C-0088**

<sup>762</sup> **C-0108** (referring to the 2006 amendments that came into force in 2013, and further protesting on the diplomatic note of Norway and the Russian Federation of 15 July 2015).

<sup>763</sup> *The Public Prosecutor v. Arctic Fishing and Sergej Triskin*, District Court, Judgment, 24 January 2017, **C-0162**, p. 5 (emphasis added).

*application*” since NEAFC is also concerned with the management of sedentary species.<sup>764</sup>

609. At the very least, since Norway undoubtedly recognized the legal validity of licenses issued pursuant to the NEAFC Scheme, Norway’s obligation to act in good faith under Article 300 UNCLOS would have required it to discuss its intention to change the characterization of snow crab and the consequences that would follow within NEAFC itself, thereby allowing other NEAFC member states to share their views and debate the matter.
610. Instead of raising the issue within NEAFC, Norway chose to act bilaterally with Russia. When the rights of coastal states over sedentary species were discussed within NEAFC in November 2015, Norway simply said nothing about the fact that several EU states continued to issued licenses under the NEAFC Scheme authorizing their nationals to catch snow crabs in the Loophole.<sup>765</sup> On the fishing grounds, Norway continued to act as if it still recognized the validity of these licenses.
611. In the background, however, Norway was preparing amendments to its Regulations that would make it illegal to catch snow crabs in the Loophole. Starting in July 2016, Norway suddenly started enforcing these new Regulations against EU fishing vessels, effectively withdrawing the consent it had granted until then through its recognition of NEAFC licenses and destroying their economic operation in the process.
612. Norway then adopted artificially low quotas for the snow crab fishery over which it now asserted jurisdiction, pursuing neither of the goals it had officially set. The only plausible purpose for these low quotas is to discourage attempts by foreigners to exercise their legitimate rights by making the fishery uneconomic while Norway consolidates its control over the fishery and its domestic industry builds its capacities
613. At the same time, Norway tried to bargain with the EU for rights that already belong to the EU, as implicitly recognized by Minister of Fisheries Per Sandberg when he said he was only “*reasonably comfortable*” with Norway’s strategy. This shows Norway’ protectionist and thus improper intent in asserting purported rights under Article 77(4) of UNCLOS, the existence of which has in any event is not established.

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<sup>764</sup> *Arctic Fishing v. The Public Prosecution Authority*, Supreme Court of Norway, Judgment, 29 November 2017, **C-0161**, para. 24.

<sup>765</sup> **C-0118**, p. 14.

614. In light of these events, Norway has failed to act in a good faith manner and has abused its right in changing the regime applicable to the Loophole's snow crab fishery in a sudden and arbitrary manner, in pursuit of improper political goals. Norway has therefore acted in violation of its obligations under Article 300 UNCLOS.

**B. NORWAY HAS ACTED IN BREACH OF CLAIMANTS' ACQUIRED RIGHTS**

615. Norway's exclusion of EU vessels from the Barents Sea snow crab fishery has also been made in violation of Claimants' acquired rights as recognized by customary international law and general principles of international law.
616. Almost a century ago, the PCIJ held that "*the principle of respect of vested rights [...] forms part of generally accepted international law*".<sup>766</sup> Another international tribunal from the same era further held that:<sup>767</sup>

*Respect for private property and the acquired rights of aliens undoubtedly forms part of the general principles recognized by the law of nations.*

[Free translation]

617. Acquired (or vested) rights come to exist either through domestic law<sup>768</sup> or on the basis of international treaties that may confer and recognize on nationals of a contracting State the capacity to acquire and hold certain property or patrimonial rights.<sup>769</sup> Claimants' licences derive from both.
618. Once a right is "*acquired*" or "*vested*," there is an obligation under international law to respect those rights. This has been shown in the context of territorial change and in the case of rights acquired by foreign private individuals under a State's own legislation.<sup>770</sup>

*This obligation to abide by the principle of respect for such rights of aliens assumes cases of State succession, and in those that*

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<sup>766</sup> PCIJ, *Case concerning certain German interests in Polish Upper Silesia (Germany v. Poland)*, Judgement on the Preliminary Objections, 25 August 1925, **CL-0221**, p. 42.

<sup>767</sup> Special German-Romanian Arbitral Tribunal, *Goldenberg Case (Germany v. Romania)*, Award, 27 September 1928, **CL-0222**, p. 909 ("*Le respect de la propriété privée et des droits acquis des étrangers fait sans conteste partie des principes généraux admis par le droit des gens.*" [French original]).

<sup>768</sup> ILC, Fourth Report on State Responsibility by Mr. F.V. Garcia-Amador, Special Rapporteur, A/CN.4/119, 26 February 1959, **CL-0223**, p. 3, para. 6 ("*Under international law, the acquisition of private rights of a patrimonial nature is governed entirely by municipal law*").

<sup>769</sup> *Ibid.*, paras. 6-8.

<sup>770</sup> G. Kaeckenbeeck, "*La Protection internationale des droits acquis*," Collected Courses of the Hague Academy of International Law, Vol. 59, 1937, **CL-0224**, para. 9.

*arrive in a given State in consequence of some acts or omissions which are attributable to its authorities and affect those rights.*

619. While the existence of acquired rights will be a question for each case,<sup>771</sup> and States do of course have a right to expropriate rights and assets should they wish to do so,<sup>772</sup> the corollary to that power is that the exception to acquired rights is a strict one.
620. In 1929 already, the PCIJ recognized that the expropriation of a factory is “a *derogation from the rules generally applied in regard to the treatment of foreigners and the principle of respect for vested rights. As this derogation itself is strictly in the nature of an exception, it is permissible to conclude that no further derogation is allowed.*”<sup>773</sup>
621. This means that if a State takes vested rights, it must pay prompt, adequate and effective compensation, as has long been recognized by customary international law<sup>774</sup> (and as reflected by Article VI of the BIT).
622. The obligation to respect acquired rights has been argued in the context of expropriation in most investment treaty cases.<sup>775</sup> Many investment treaty tribunals have further recognized the link between customary international law (whether under the minimum standard of treatment or the obligation to compensate takings) and the doctrine of acquired or vested rights, including in *Total v. Argentina*,<sup>776</sup> *OKO v.*

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<sup>771</sup> ILC, Fourth Report on State Responsibility by Mr. F.V. Garcia-Amador, Special Rapporteur, A/CN.4/119, 26 February 1959, **CL-0223**, paras. 15-16 (“the scope of the international protection, and consequently also the existence and imputability of responsibility, will in each case depend both on the “acquired right” at issue and on the conditions and circumstances in which the act or omission on the part of the State takes place.”).

<sup>772</sup> *Ibid.*, para. 41 (“The right of “expropriation”, even in its widest sense, is recognized in international law, irrespective of the patrimonial rights involved or of the nationality of the person in whom they are vested.”).

<sup>773</sup> PCIJ, *Case concerning certain German interests in Polish Upper Silesia (Germany v. Poland)*, Judgement on the Merits, 25 May 1926, **CL-0225**, p. 22.

<sup>774</sup> C. Hull, *The Secretary of State to the Mexican Ambassador (Castillo Najera)*, Foreign Relations of the United States Diplomatic Papers, The American Republics, Vol. V, 21 July 1938, **CL-0226**.

<sup>775</sup> See for example, *9REN Holding v. Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019, **CL-0227**, paras. 348, 352, 361; *Tradex Hellas S.A. v. Albania*, ICSID Case No. ARB/94/2, Award, 29 April 1999, **CL-0228**, para. 134.

<sup>776</sup> *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, **CL-0229**, para. 112 (“UNCTAD has followed such an approach in its publication on the topic, besides referring to arbitral practice, in order: “to identify certain forms of behaviour that appear to be contrary to fairness and equity in most legal systems and to extrapolate from this the type of State action that may be inconsistent with fair and equitable treatment, using the plain meaning approach. Thus, for instance, if a State acts fraudulently or in bad faith, or capriciously and wilfully discriminates against a foreign investor, or deprives an investor of acquired rights in a manner that leads to the unjust enrichment of the State, then there is at least a prima facie case for arguing that the fair and equitable standard has been breached.”). See also, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, **CL-230**, paras. 237, 524.



Estonia,<sup>777</sup> *Bureau Veritas v. Paraguay*,<sup>778</sup> *Micula v. Romania*<sup>779</sup> and *Amco v. Indonesia*<sup>780</sup>.

623. Claimants certainly have acquired or vested rights recognized by both domestic and international law. Claimants hold NEAFC and Svalbard fishing licenses for snow crab issued by Latvia, pursuant to the NEAFC Scheme and Convention in respect of NEAFC and pursuant to EU Regulations in respect of Svalbard. Further, under Latvian law, existing fishing licences are both automatically renewable and transferable rights.<sup>781</sup>

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<sup>777</sup> *OKO Pankki Oyj and others v. The Republic of Estonia*, ICSID Case No. ARB/04/6, Award, 19 November 2007, **CL-0231**, para. 238 (“Whilst, in the Tribunal’s view, its meaning significantly overlaps with the minimum standard under customary international law, this FET standard clearly provides a greater protection for the foreign investor. **According to the minimum standard under customary international law, an investor is protected against the host state’s fraud, bad faith, capricious and wilful discrimination or where the host state “deprives an investor of acquired rights in a manner that leads to the unjust enrichment of the State”. The FET standard in the Estonia-Finland BIT must therefore give greater protection than this; but it is plain that it is easier to apply this FET standard case than to define it. [...]**” [Emphasis added]).

<sup>778</sup> *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009, **CL-0232**, para. 18 (“Article 3(1) of the Treaty provides:

“Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals.”

According to BIVAC, Paraguay’s failure to pay the amounts due to it under the Contract and pursuant to the Decree are acts made in bad faith, in breach of the Contract and contrary to the investment-backed legitimate expectations and acquired rights of BIVAC. BIVAC considers that Paraguay’s conduct amounts to unfair and inequitable treatment of BIVAC’s investment in Paraguay, being objectively unreasonable, in the sense that it is without any justifiable basis, and that it impairs the investment by unreasonable and discriminatory measures, which also ignore BIVAC’s rights.”).

<sup>779</sup> *Ioan Micula and others v. Romania I*, ICSID Case No. ARB/05/20, Award, 11 December 2013, **CL-0233**, para. 665.

<sup>780</sup> *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 20 November 1984, **CL-0234**, para. 248 (“Moreover, independently from pacta sunt servanda and its logically and morally necessary extension in the present case, another principle of international law can be considered to be the basis of the Republic’s international liability: it is the principle of respect of acquired rights (see, e.g. PCIJ, Judgment of May 25, 1926, *German Interest in Polish Upper Silesia (Merits)*, Series A, No. 7 (1926) at 22 and 44; *Aramco Award*, cited above, at 168, 205, *Starret Housing Corp v. Iran*, (1984), decision of the Iran-United States Claims Tribunal, *Iranian Assets Lit. Rep.* 1685 (1983) ; Award in the *Shufeldt Claim*, July 24, 1930, UN Reports of International Arbitral Awards, vols II, XXVII, at 1081, 1097). Indeed, by receiving the authorization to invest, Amco was bestowed with acquired rights (to realize the investment, to operate it with a reasonable expectation to make profit and to have the benefit of the incentives provided by law). These were transmitted to the Indonesian entity, PT Amco, created in conformity with said authorization and with Indonesian law, and then partially, upon authorization by the competent authority, to Pan American. These acquired rights could not be withdrawn by the Republic, except by observing the legal requisites of procedural conditions established by law, and for reasons admitted by the latter. In fact, the Republic did withdraw such rights, not observing the legal requisites of procedure, and for reasons which, according to law, did not justify the said withdrawal. The principle of respect of acquired rights was thus infringed, and the Republic has committed its international liability also in this respect.”).

<sup>781</sup> After the end of the period of validity of licenses issued for a period of one year for vessels fishing in international waters and waters of the other States outside the Baltic Sea, a new application can be filed in order to receive a new license. In such case, the relevant authority, i.e. the Ministry of Agriculture, cannot refuse to grant a new license if this rejection is not based on the strict grounds set out in Article 16 of

624. The historic case law from the 1920s that recognizes acquired and vested rights in the context of sovereignty changes is of great relevance to this case. Independently of whether a snow crab is sedentary or non-sedentary, the effect of Norway's change of characterization of snow crab, at least with respect to the Loophole, is a fundamental change of regime governing snow crab.
625. Until July 2015, there was no question that snow crabs in the Barents Sea were considered non-sedentary and that EU vessels could freely harvest them in the Loophole. This was recognized by the Norwegian Directorate of Fisheries in a number of communications, for example in 2013 and 2014, which Claimants relied on and that are in the record. Norway's 2014 fisheries regulation allowed such fishing. Both the EU and Norway thus recognized that Claimants (and other EU vessels) had rights to harvest snow crabs in the Loophole.
626. However, Norway's 2015 fisheries regulation, which came into force on 22 December of that year, radically changed this previous regime. Nevertheless, Norway continued to "accept" (in the words of Norway's Supreme Court), and thus expressly consent to EU vessels fishing snow crabs, including in the Norwegian part of the Loophole, until September 2016, notably by accepting North Star's offloads at Baatsfjord until then.
627. After Norway changed the characterization from non-sedentary to sedentary, the EU tried, throughout 2016, to negotiate with Norway so that EU vessels could continue harvesting snow crabs in the Barents Sea. After such negotiations failed, the EU adopted in effect the position that the rights of EU vessels fishing in the Loophole were vested rights, which allowed these same vessels and operators to continue harvesting snow crab in the Barents Sea. The recognition of such rights came in the form of the grant, under the EU fishing regulation, of 20 snow crab licences to EU vessels, including 11 to Latvia, regarding the Svalbard waters.<sup>782</sup> As such, the EU's actions, equating existing rights to the NEAFC licences with its issuance of Svalbard licences, was a confirmation that the rights existing in 2016 based on licences issued in previous

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Regulation No. 1015. See, Regulation No. 1015, Procedures for the Issue of Special Permits (Licences) for Commercial Activities in Fishery and Payment of the State Fee for the Issue of Special Permits (Licence), 8 September 2009, **CL-0235**, Article 16. Fishing licenses under Latvian law constitutes a property, which can be transferred under Article 13 of the Regulation. See, Regulation No. 1015, Procedures for the Issue of Special Permits (Licences) for Commercial Activities in Fishery and Payment of the State Fee for the Issue of Special Permits (Licence), 8 September 2009, **CL-0235**, Article 13 ("*If the name or legal status of the owner of a permit (licence) changes, the owner of the permit (licence) shall, within 10 working days after setting in of the relevant conditions submit to the Ministry of Agriculture or the relevant local government an application for re-registration and documents justifying the making of amendments to the permit (licence) issued.*").

years by EU Member States regarding the snow crab fishery in the Barents Sea, were vested rights. Moreover, in respect of NEAFC licences, the EU continued transmitting them to the NEAFC Secretariat after 2015.

628. Norway therefore cannot unilaterally change the regime governing snow crab fisheries without facing the consequences, even if it is in the right regarding such change (which Claimants do not admit). The rights under the prior regime, which is the NEAFC regime where all parties, including Norway, treated the snow crab as non-sedentary, must be given effect. This is especially so in light of Norway's actions which recognized and legitimated this regime time and again, both administratively and judicially. Norway did so through inspections of snow crab vessels at sea, inspections of snow crab offloads at Norwegian ports, and the failure to make any objection within NEAFC as the NEAFC Scheme required should Norway have believed that EU vessels were illegally catching snow crab in the Loophole. The EU's position is also relevant, as it has opposed continuously Norway's attempts to prevent EU vessels to catch snow crab in the Barents Sea. Latvia's position, which has opposed Norway's re-characterization of snow crab as a sedentary species from the start, and continuously supported its interests regarding snow crab licences it issued in the Barents Sea, is also relevant. As is the fact that, under Latvian law, once a fishing licence is issued it will be continuously renewed if *pro forma* requirements are respected and that such licences are transferable property.
629. In the circumstances, Norway's acts constitute a failure to respect Claimants' acquired rights to catch snow crab in the Barents, the violation of which requires full reparation, as per applicable international law principles.

### **C. NORWAY'S VIOLATIONS OF THE SVALBARD TREATY**

630. Norway has also acted in violation of the 1920 Svalbard Treaty by failing to uphold the rights of equal access and treatment that benefit Claimants within the territory covered by that treaty, which includes its economic zone, or the SFPZ, as well as its continental shelf.<sup>783</sup> Notably, Norway has refused to recognize validly issued fishing licences issued by Latvia, a party to the Svalbard Treaty, on the basis of an EU Regulation.
631. After World War I, the initial signatories to the Svalbard Treaty, namely the United States, Denmark, France, Italy, the Netherlands, Great Britain and Sweden, agreed to

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<sup>783</sup> Signed in Paris on 9 January 1920; entered into force on 14 August 1925.

recognize Norwegian sovereignty over Svalbard. In exchange for such recognition, all contracting parties would be granted non-discriminatory access to Svalbard's resources, and the treaty would remain open to ratification by any other state, which Latvia acceded to on 13 June 2016.

632. The particular character of the Svalbard Treaty stems not so much from the recognition of sovereignty over what was once considered *terra nullius* as from the servitudes under which Norway can exercise such sovereignty, in particular those stipulated in Articles 2 and 3. The preamble of the Treaty embodies this fundamental *quid pro quo*, as it states that its signatories were:<sup>784</sup>

*Desirous, while recognising the sovereignty of Norway over the Archipelago of Spitsbergen, including Bear Island, of seeing these territories provided with an equitable regime, in order to assure their development and peaceful utilisation.*

633. The object and purpose of the Treaty is to grant to Norway sovereignty over the archipelago. This is further confirmed by Article 1, according to which the Parties “undertake to recognise, subject to the stipulations of the present Treaty, the full and absolute sovereignty of Norway over the Archipelago of Spitsbergen”, including its various islands “great or small and rocks appertaining thereto”.
634. The *travaux préparatoires*, which were conducted in French at the Paris Peace Conference (and are thus quoted in the original in the Memorial text with English translations in footnote), confirm that the Treaty grants to Norway its sovereignty over the archipelago, the other option on the table being at that time the one of a mandate under the League of Nations:

*L’archipel étant actuellement sur un territoire n’appartenant à personne, tout le monde se trouve d’accord sur la nécessité de mettre fin à cet état de choses en lui donnant un statut défini.*

*Deux solutions ont été envisagées à cet effet: Une première solution, proposée par diverses Puissances et par certains membres de la Commission, consistait à confier à la Norvège un mandat au nom de la Société des Nations. Une seconde solution, demandée par la Norvège prévoyait l’attribution de la*

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<sup>784</sup> According to Article 10 of the Treaty, the French and English Texts are both authentic. The English version will be generally quoted hereafter, while the French version of some provisions will be referred to give the proper meaning of the English text, pursuant to Article 33 of the Vienna Convention on the Law of Treaties.

souveraineté de l'archipel à cette Puissance sous réserve de certaines garanties stipulées en faveur des autres pays.<sup>785</sup>

L'expérience des pourparlers qui se sont succédés et les travaux de la Conférence de 1914 semblent avoir pleinement démontré que les difficultés d'arriver à déterminer, en partant de la conception de terra nullius, une administration internationale des îles du Spitsberg (y compris l'île aux Ours) sont pour ainsi dire insurmontables, et que la seule solution satisfaisante et viable sera de rendre cet archipel à la Norvège.<sup>786</sup>

La Norvège, dans un mémoire remis à la Conférence en avril dernier, par son ministre à Paris demande que des droits de souveraineté lui soient reconnus sur le Spitsberg, sous réserve de garanties à accorder par elle concernant le régime des concessions minières.<sup>787</sup>

L'Hon. C. H. Tufton (Empire Britannique) [...] La solution pratique semble être celle de l'octroi de la souveraineté. La société des Nations aura des questions de bien autre importance à examiner.

M. Nielsen (États-Unis d'Amérique) partage cette opinion. L'idée du mandat a déjà été examinée ; elle présente certains des caractères de fantasmagorie administration internationale qui avait été aussi considérée. Au surplus, ici, il s'agit en réalité d'un archipel d'icebergs, et il n'y a pas les mêmes raisons que dans d'autre cas de faire appel à la Société des Nations.

M. Tufton (Empire britannique) croit également que la meilleure solution consiste dans la concession de la souveraineté à la Norvège. Le gouvernement britannique désire uniquement que

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<sup>785</sup> Conférence de la Paix, Commission du Spitsberg, *Travaux Préparatoires*, Annexe au Procès-Verbal de la Commission, No. 16, Rapport de la Commission du Spitsberg au Conseil Suprême au sujet du Spitsberg, *Recueil des actes de la Conférence*, Partie VII, Préparation et Signature des Traités et Conventions, Paris, 1924, **CL-0064**, pp. 89-90 ("As the archipelago is currently in a territory belonging to nobody, everyone agrees on the need to put an end to this state of affairs by giving it a defined status. Two solutions were considered to this effect: One solution, proposed by various Powers and by some members of the Commission, was to give Norway a mandate on behalf of the League of Nations. A second solution, requested by Norway, provided for the attribution of sovereignty over the archipelago to that Power subject to certain guarantees stipulated in favour of other countries." [Free translation]).

<sup>786</sup> *Ibid.*, p. 118 ("The experience of successive talks and the work of the 1914 Conference seem to have fully demonstrated that the difficulties of arriving at an international administration for the Spitsbergen islands (including Bear Island) on the basis of the terra nullius concept are virtually insurmountable, and that the only satisfactory and viable solution will be to return this archipelago to Norway." [Free translation]).

<sup>787</sup> *Id.*, p. 4 (: "Norway, in a memorandum submitted to the Conference last April by its Minister in Paris, requests that it be granted sovereignty rights over Spitsbergen, subject to guarantees to be given by Norway concerning the regime of mining concessions." [Free translation]).

*les intérêts de certaines Compagnies anglaises soient convenablement sauvegardés.*<sup>788</sup>

635. However, the other Parties acceded to Norway's request on condition that their rights and the rights of their nationals be protected *ad vitam aeternam* and that they would accrue whenever new rights would be granted to private persons:

*Toutes les questions concernant les droits acquis antérieurement au traité actuel ayant été ainsi réglées, la Commission a estimé qu'en ce qui a trait aux droits nouveaux à acquérir et à la jouissance de ces droits, le principe à appliquer était un traitement de parfaite égalité entre les ressortissants de toutes les Hautes Parties contractantes. C'est sur cette base que toutes les clauses du traité ont été rédigées.*<sup>789</sup>

*Point de vue des Pays-Bas : Le ministre des Pays-Bas à Paris a fait à la Conférence une communication dans laquelle il signalait que si les Grandes Puissances se proposaient de régler la question du Spitsberg par un arrangement définitif, le Gouvernement de la Reine désirait prendre part aux délibérations qui pourraient avoir lieu.*

*Point de vue suédois : Actuellement, le Gouvernement suédois ne fait pas d'objection à ce que le Spitsberg soit norvégien, si les Grandes Puissances délèguent la Norvège et pourvu que les droits particuliers des Suédois soient sauvegardés.*

*Point de vue anglais : Le Gouvernement anglais a toujours eu l'intention de soutenir la demande de la Norvège, tout en défendant les droits de ses ressortissants sur les mines du Spitsberg.*<sup>790</sup>

*Point de vue russe : En ce qui concerne les droits historiques de la Norvège, le Gouvernement russe est obligé de formuler des*

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<sup>788</sup> *Id.*, p. 16 ("The Hon. C. H. Tufton (British Empire) ... The practical solution seems to be the granting of sovereignty. The practical solution seems to be the granting of sovereignty. The League of Nations will have matters of much other importance to consider. Mr. Nielsen (United States of America) agreed. The idea of the mandate had already been discussed; it had some of the characteristics of whimsical international administration that had also been considered. Moreover, this was in reality an archipelago of icebergs, and there were not the same reasons as in other cases for appealing to the League of Nations. Mr. Tufton (British Empire) also believed that the best solution was to grant sovereignty to Norway. The British Government only wants the interests of certain English companies to be properly safeguarded." [Free translation]).

<sup>789</sup> *Id.*, p. 90 ("All questions concerning rights acquired prior to the present treaty having been thus settled, the Commission considered that, as regards the new rights to be acquired and the enjoyment of those rights, the principle to be applied was one of full equality of treatment between nationals of all High Contracting Parties. It was on this basis that all the clauses of the Treaty were drafted." [Free translation; Emphasis added]).

<sup>790</sup> *Id.*, p. 4 ("The Minister of the Netherlands in Paris made a communication to the Conference in which he pointed out that if the Great Powers proposed to settle the Spitsbergen question by a final arrangement, the Queen's Government wished to take part in any deliberations that might take place. Swedish view: At present, the Swedish Government has no objection to Spitsbergen being Norwegian, if the Great Powers delegate Norway and provided that the special rights of the Swedes are safeguarded. English point of view: It has always been the intention of the Government of England to support Norway's request, while at

*réserve en rappelant les anciennes expéditions et colonies russes dans l'archipel. Le Gouvernement russe ne méconnaît cependant pas l'intérêt économique tout particulier que présente le Spitsberg pour la Norvège et serait prêt à reconnaître la souveraineté de la Norvège sur l'archipel, en subordonnant toutefois cette reconnaissance à quelques conditions susceptibles de sauvegarder les intérêts légitimes des nationaux russes.*

*Ces conditions se traduiraient, dans l'esprit du Gouvernement russe, par le maintien de quelques principes et stipulations sur lesquels l'accord s'est fait à la Conférence de 1914 de Christiana, à savoir:*

*1) Le Spitsberg (toutes les îles situées entre le 10° et 35° de longitude Est de Greenwich et entre les 74° et 81 de la latitude Nord), avec les eaux et glaces qui les entourent, jusqu'à une étendue de cinq milles marins, sera ouvert aux nationaux russes dans les mêmes conditions qu'aux nationaux norvégiens.*

*La chasse et la pêche ainsi que la récolte des œufs et du duvet des oiseaux sauvages seront partout libres aux nationaux russes sauf les dispositions du Règlement sur le régime immobilier.<sup>791</sup> [Emphasis added].*

636. Norway's representative to the Conference confirmed that Norway fully understood the *quid pro quo* was recognition of its sovereignty by the other Parties in exchange for its undertaking to grant the treatment reserved to Norwegians to the nationals of the other Parties. This obligation would last as long as the Treaty would be in force and would benefit all States who would subsequently ratify the Treaty, pursuant to Article 10:<sup>792</sup>

*M. Marchetti Ferrante (Italie) : Alors le Spitsberg restera éternellement ouvert à tout le monde?*

*M. de Wedel (Ministre de Norvège à Paris) : Oui et aux norvégiens comme aux autres. Nous désirons que tout le monde*

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*the same time defending the rights of its citizens over the mines in Spitsbergen."* [Free translation; Emphasis added]).

<sup>791</sup> *Id.*, p.7 ("Russian perspective: With regard to Norway's historical rights, the Russian Government is obliged to make reservations by recalling the former Russian expeditions and colonies in the archipelago. However, the Russian Government does not disregard the special economic interest of Spitsbergen for Norway and would be prepared to recognise Norway's sovereignty over the archipelago, subject however to a few conditions which could safeguard the legitimate interests of Russian nationals. These conditions would, in the mind of the Russian Government, be reflected in the maintenance of some of the principles and stipulations on which agreement was reached at the Christiana Conference of 1914: (1) Spitsbergen (all islands between 10° and 35° East Longitude of Greenwich and between 74° and 81° North Latitude), together with the waters and ice surrounding them, up to a distance of five nautical miles, shall be open to Russian nationals under the same conditions as to Norwegian nationals. Hunting and fishing as well as the collection of eggs and down of wild birds shall be free everywhere to Russian nationals except for the provisions of the Regulations on Property Regime." [Free translation; Emphasis added]).

<sup>792</sup> See, **CL-0002**. According to the relevant paragraph of this provision, "Third Powers will be invited by the Government of the French Republic to adhere to the present Treaty duly ratified. This adhesion shall be effected by a communication addressed to the French Government, which will undertake to notify the other Contracting Parties."

*puisse comme nous-mêmes, venir au Spitsberg, mais que les Norvégiens ou autres personnes qui restent au Spitsberg puissent devenir propriétaires après un certain temps dans les mêmes conditions pour tous.*<sup>793</sup>

*La Président répond que l'on peut prendre comme point de départ un Traité basé sur la reconnaissance de la souveraineté norvégienne, moyennant certaines conditions. Ce Traité, après études des observations présentées par les autres pays intéressés, serait conclu entre les cinq Grandes Puissances et la Norvège. Il resterait ensuite ouvert à l'adhésion des autres Puissances. Cette procédure semble être la seule qui permette de résoudre une question qui, sans cela, n'aboutira pas plus aujourd'hui qu'en 1914.*<sup>794</sup> [Emphasis added].

*Le Président : En somme, une fois ce traité signé, avec ou sans la Suède, l'accès en sera indéfiniment ouvert et ceux qui y adhéreront se trouveront reconnaître la souveraineté de la Norvège.*<sup>795</sup> [Emphasis added].

637. Latvia ratified the Treaty on the 13 June 2016. Its nationals, including M. Pildegovics and North Star, enjoy therefore the rights provided for the nationals of the Parties to the 1920 Treaty.
638. Article 2(2) of the Svalbard Treaty provides that the ships and nationals of all Parties enjoy the same rights as those reserved by Norway to its nationals:<sup>796</sup>

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<sup>793</sup> Conférence de la Paix, Commission du Spitsberg, *Travaux Préparatoires, Procès-Verbal de la Commission*, No. 3, *Recueil des actes de la conférence*, Partie VII, Préparation et Signature des Traités et Conventions, Paris, 1924, **CL-0064**, p. 15 (“Mr. Marchetti Ferrante (Italy): So Spitsbergen will remain open to everyone for ever? Mr. de Wedel (Minister of Norway in Paris): Yes, and to Norwegians as well as to others. We want everyone to be able to come to Spitsbergen like us, but we want the Norwegians or other people who remain in Spitsbergen to be able to become owners after a certain time under the same conditions for everyone.” [Free translation; Emphasis added].

<sup>794</sup> *Ibid.*, p. 16 (“The Chairman replied that a Treaty based on the recognition of Norwegian sovereignty could be taken as a starting point, subject to certain conditions. This Treaty, after studying the observations submitted by the other interested countries, would be concluded between the five Great Powers and Norway. It would then remain open for accession by the other Powers. This procedure seems to be the only one which would make it possible to resolve a question which would otherwise be no more successful today than it was in 1914.” [Free translation; Emphasis added].).

<sup>795</sup> *Id.*, p. 22 (“The Chairman: In short, once this treaty is signed, with or without Sweden, access to it will be open indefinitely and those who adhere to it will find themselves recognising the sovereignty of Norway.” [Free translation; Emphasis added].).

<sup>796</sup> **CL-0002**, Article 2(2) (“Les navires et ressortissants de toutes les Hautes Parties Contractantes seront également admis à l'exercice du droit de pêche et de chasse dans les régions visées à l'article premier et leurs eaux territoriales. Il appartiendra à la Norvège de maintenir, prendre ou édicter les mesures propres à assurer la conservation et, s'il y a lieu, la reconstitution de la faune et de la flore dans lesdites régions et leurs eaux territoriales, étant entendu que ces mesures devront toujours être également applicables aux ressortissants de toutes les Hautes Parties Contractantes sans exemptions, privilèges et faveurs quelconques, directs ou indirects, au profit de l'une quelconque d'entre elles.” (French version; Emphasis added].



*Ships and nationals of all the High Contracting Parties shall enjoy equally the rights of fishing and hunting in the territories specified in Article 1 and in their territorial waters.*

*Norway shall be free to maintain, take or decree suitable measures to insure the preservation and, if necessary, the re-constitution of the fauna and flora of the said regions, and their territorial waters; it being clearly understood that these measures shall always be applicable equally to the nationals of all the High Contracting Parties without any exemption, privilege or favour whatsoever, direct or indirect to the advantage of anyone of them.*

[Emphasis added].

639. Article 3(3) reinforces Norway's obligation of non-discrimination. In its relevant part, this provision states that:<sup>797</sup>

*The nationals of all the High Contracting Parties shall have equal liberty of access and entry for any reason or object whatever to the waters, fjords and ports of the territories specified in Article 1; subject to the observance of local laws and regulations, they may carry on there without impediment all maritime, industrial, mining and commercial operations on a footing of absolute equality.*

*They shall be admitted under the same conditions of equality to the exercise and practice of all maritime, industrial, mining or commercial enterprises both on land and in the territorial waters, and no monopoly shall be established on any account or for any enterprise whatever.*

640. In the face of such a clear provision, which gives content to the rights that the other signatories of the 1920 Treaty sought to preserve, there would be no need to resort to the *travaux préparatoires*. Yet, they fully confirm this right to a national treatment for all the nationals of the other Parties:

*Sur une question de M. Nielsen, le Président précise que la Norvège s'oblige à ne réserver aucun traitement de faveur à ses nationaux ; elle peut seulement apporter des restrictions au droit de chasse dans l'intérêt de la conservation de la flore et de la faune. Ces restrictions doivent s'appliquer également à ses nationaux. Il est entendu que pour éviter toute équivoque les juristes seront interrogés sur le point de savoir si la rédaction de l'article est suffisamment nette et s'il résulte bien du texte que*

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**CL-0002**, Article 3(3) ("Les ressortissants de toutes les Hautes Parties Contractantes auront une égale liberté d'accès et de relâche pour quelque cause et objet que ce soit, dans les eaux, fjords et ports des régions visées à l'article premier ; ils pourront s'y livrer, sans aucune entrave, sous réserve de l'observation des lois et règlements locaux, à toutes opérations maritimes, industrielles, minières et commerciales sur un pied de parfaite égalité. Ils seront admis dans les mêmes conditions d'égalité à l'exercice et à l'exploitation de toutes entreprises maritimes, industrielles, minières ou commerciales, tant à terre que dans les eaux territoriales, sans qu'aucun monopole, à aucun égard et pour quelque entreprise que ce soit, puisse être établi". [French version; Emphasis added]).

toutes les restrictions seront applicables dans les mêmes conditions aux Norvégiens et aux ressortissants des signataires du traité.<sup>798</sup>

A l'article 3, M. Fromageot estime indispensable de maintenir la phrase 'une égale liberté d'accès et de relâche pour quelque cause et objet que ce soit', 'clause de style' qui a pour but d'empêcher que le Gouvernement norvégien, sus un prétexte quelconque, ne discute les relâches et ne fasse des difficultés au navires qui viennent aborder.<sup>799</sup>

641. On their own terms, Articles 2 and 3 grant to the nationals of the other Parties an important number of specific rights, among which:

1. a right to enjoy the rights of fishing and hunting on a foot of equality with Norwegian nationals;
2. any restriction to these rights by Norway must be justified by conservationist reasons and applied in a non-discriminatory manner;
3. an unconditional liberty of access and entry to the ports of the archipelago and to its waters;
4. a liberty to undertake all maritime and commercial operations, “without any impediment” other than “the observance of local laws and regulations”;
5. a right of admission to such activities “on a footing of absolute equality” with Norwegian nationals.

642. By refusing to recognize the fishing licences granted to North Star’s vessels by Latvia pursuant to Article 2 of the 1920 Treaty and the relevant EU regulations,<sup>800</sup> by rejecting the applications made by Claimants to snow-crabs quotas reserved by Norway to its

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<sup>798</sup> Conférence de la Paix, Commission du Spitsberg, *Travaux Préparatoires, Procès-Verbal de la Commission*, No.5, *Recueil des actes de la conférence*, Partie VII, Préparation et Signature des Traités et Conventions, Paris, 1924, **CL-0064**, p. 22 (“On a question from Mr. Nielsen, the President clarified that Norway undertakes not to give any special treatment to its nationals; it can only make restrictions on hunting rights in the interest of the conservation of flora and fauna. Such restrictions must also apply to its nationals. It is understood that in order to avoid any ambiguity lawyers will be asked whether the wording of the article is sufficiently clear-cut and whether it follows from the text that all restrictions will be applicable under the same conditions to Norwegians and nationals of the signatories to the treaty.” [French translation; Emphasis added]).

<sup>799</sup> *Ibid.*, p. 25 (“In Article 3, Mr Fromageot considers it essential to maintain the phrase “equal freedom of access and release for any cause and purpose whatsoever”, a “style clause” whose purpose is to prevent the Norwegian Government, on any pretext whatsoever, from discussing releases and making difficulties for vessels which come to board the vessel.” [Free translation; Emphasis added]).

<sup>800</sup> See above, paras. 372-374, 392-406.

nationals,<sup>801</sup> by harassing, arresting, fining North Star and its vessels and by convicting North Star and one of its captains, Mr. Uzakov,<sup>802</sup> Norway has violated each and every one of the obligations listed above.

643. Norway's only justification for these violations is to claim that Articles 2 and 3 of the Treaty of Svalbard do not cover maritime areas beyond the territorial sea. This position was last recalled in a *Note Verbale* sent by Norway to the European Union, on 8 February 2021:<sup>803</sup>

*Furthermore, the Ministry would like to reiterate that there is no basis in the Treaty of 9 February 1920 for a claim that any of its provisions granting rights to nationals of the contracting Parties apply on the Norwegian continental shelf beyond the territorial waters of Svalbard.*

*The Ministry therefore rejects the claims made in the Delegation's note verbale of 20 July 2020 that the continental shelf should be open to Parties to the Treaty on an equal and non-discriminatory basis. The equal treatment provision in Article 2 of the Treaty only applies to the territorial waters.*

644. Norway's position is however at odds with the proper interpretation of the phrase "*territorial waters*" ("*eaux territoriales*") found in the Svalbard Treaty and concerning its scope, taken in its context and in the light of the object and purpose of the Treaty. It is indeed important to establish the geographical scope of the Treaty of Svalbard taking into account all the elements of interpretation referred to in the general rule of Art. 31 of the VCLT.
645. The terms used in Articles 2 and 3 are "*territorial waters*" ("*eaux territoriales*"). It is not instead "*mer territoriale*" ("*territorial sea*"). Norway's argument is that the terms of Article 2 and 3 must be interpreted so as to cover only the territorial sea. To make such an interpretation would, however, be to disregard the clear wording of the Svalbard Treaty.
646. The terms chosen were "*territorial waters*". Such terms did not in 1920 indicate what is now called the "*territorial sea*". The terms "*territorial waters*" are of more general scope.
647. In other words, the terms "*territorial waters*" are more general, and wider in scope, than the more specific "*territorial sea*". As the Preparatory Committee of the League of

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<sup>801</sup> See above, paras. 411-421.

<sup>802</sup> See above, paras. 392-406.

<sup>803</sup> Note Verbale of Norway to the European Union on snowcrabs, 8 February 2021, **C-0176**. See also, Note Verbale from the European Union to Norway, 26 February 2021, **C-0177**, responding to Norway's position set out in its Note verbal of 8 February 2021.

Nations observed in 1930, comparing the expressions “*territorial waters*” and “*territorial sea*”: “*The use of the first term [“territorial waters”] ... may be said to be more general and it is employed in several international conventions.*”<sup>804</sup>

648. According to Basdevant’s 1960 *Dictionnaire de la terminologie du droit international*, the expression “*eaux territoriales*” is an “[e]xpression qui dans la doctrine et la pratique n’a pas reçu un sens nettement déterminé”; one of its meanings is “*l’ensemble des eaux comprises entre le territoire d’un État et la haute mer*”, which at the time meant “*à la fois les eaux intérieures et les eaux territoriales au sens étroit ou mer territoriale*”.<sup>805</sup>
649. Salmon’s 2001 *Dictionnaire* also defines “*eaux territoriales*” as the “[e]nsemble des eaux maritimes baignant les côtes d’un État, c’est à dire des eaux situées entre le territoire d’un État et la haute mer, comprenant donc à la fois les eaux intérieures et les eaux territoriales stricto sensu.”<sup>806</sup>
650. Finally, the International Court of Justice explained in 1992, in commenting on the wording chosen in a 1917 judgment by the Central American Court:<sup>807</sup>

*the term ‘territorial waters’ was, 75 years ago, not infrequently used to denote what would now be called ‘internal’ or ‘national’ waters, as the legal literature of the time abundantly shows. Accordingly, the term ‘territorial waters’ did not necessarily, or even usually, indicate what would now be called ‘territorial sea’. So, by ‘territorial waters’, in this context, the Central American Court means waters claimed à titre de souverain.*

651. According to the ICJ, in that specific case, the phrase “*territorial waters*” did not refer exclusively either to the “*territorial sea*” or to “*internal waters*” and it further noted that at the time, in 1917, that is three years before the drafting of Treaty of Svalbard, the term “*territorial waters*” was not habitually used to mean the same as the modern term “*territorial sea*”.

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<sup>804</sup> League of Nations, Acts of the Conference for the Codification of International Law, No. C.351.M.145, Series of League of Nations Publications, Vol.14, V, Legal, 1930, **CL-0236**, p.126.

<sup>805</sup> C. Basdevant, *DICTIONNAIRE DE LA TERMINOLOGIE DU DROIT INTERNATIONAL*, Sirey, 1960, Excerpts, **CL-0237**, p. 245 (“[e]xpression which in doctrine and practice has not been given a clearly defined meaning”; one of its meanings is “the whole of the waters between the territory of a State and the high seas”, which at the time meant “both internal waters and territorial waters in the narrow sense or territorial sea” [Free translation]).

<sup>806</sup> J. Salmon (ed), *DICTIONNAIRE DE DROIT INTERNATIONAL PUBLIC*, Bruylant, 2001, Excerpts, **CL-0192**, pp. 406–407 (“[a]ny maritime waters bathing the coasts of a State, i.e. waters between the territory of a State and the high seas, thus including both internal waters and territorial waters in the strict sense of the term.” [Free translation]).

<sup>807</sup> ICJ, *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras; Nicaragua intervening)*, Judgment on the Merits, 11 September 1992, **CL-0238**, para. 392 [Emphasis added].

652. What matters in respect of the reference to “*territorial waters*” is that such waters were claimed “à titre de souverain”. In the case of Svalbard, it is precisely what Norway is doing: it invokes its “*full and absolute sovereignty*” over the Svalbard Archipelago to justify a right to extend the exert its sovereign jurisdiction well beyond the “*territorial sea*” (i.e. to the EEZ and the CS off the archipelago). Norway thus claims these two maritime areas “à titre de souverain”, as a corollary of its sovereignty over the archipelago’s territory.
653. It matters little that, pursuant to the modern law of the sea, Norway does not enjoy full sovereignty over these areas, but only “*sovereign rights*”, the nature and extent of which are specified by the relevant rules of UNCLOS (and of customary law).
654. Interpreted in its context, the phrase “*territorial waters*” found in the Svalbard Treaty is clearly not restricted to a particular maritime category. The text refers alternatively to “*territorial waters*” and to “*waters*” *tout court*, without any qualifying adjective: according to Article 2, these rights apply on the land territory, but also in the “*territorial waters*” off the archipelago. According to Article 3, the Parties’ nationals “*shall have equal liberty of access...and may carry on...all maritime operations*” in “**the waters** of the territories specified in Article 1”. The nature and the extent of these waters are not specified in the Treaty. If Norway’s sovereign jurisdiction over the waters off the Svalbard archipelago increases due to subsequent developments in the law of the sea, so does the scope of application of the other Parties’ rights under the Treaty.
655. Furthermore, Norway’s interpretation frustrates the object and purpose of the Treaty, as identified above.<sup>808</sup> In particular, Norway ignores that the other signatories intended not only to preserve the acquired rights of the nationals of the other parties, but also the new rights which they should enjoy,<sup>809</sup> in exchange for their renunciation to the rights granted by them by the status of *terra nullius*. These rights must necessarily cover the liberties of the high seas, including the liberty of fishing, which applied to the maritime space around the archipelago and are no longer valid today, in maritime areas over which the coastal State enjoys sovereign jurisdiction by virtue of subsequent development of international law.
656. The question whether a treaty should be interpreted in light of the legal context of the time of the adoption (the method of *renvoi fixe*) or according to the one in force at the

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<sup>808</sup> See above, paras. 631-635.

<sup>809</sup> See above, para. 634.

time of its application (method of the *renvoi mobile*) depends on the will of the Parties. There is no general principle to that effect.

657. However, concerning treaties providing a special territorial regime, the ICJ expressed a preference for the *renvoi mobile*.<sup>810</sup>

*where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is 'of continuing duration', the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.*

658. The same goes for the terms “*territorial waters*” or simply “*waters*” in the Treaty of Spitzbergen: they are generic and intended to adapt to the evolutions of the law of the sea. Thus, Norway’s sovereignty and sovereign jurisdiction extends in time over the waters off the archipelago, the geographical scope of other Parties stipulated rights extend equally.
659. Furthermore, Norway itself is inconsistent in defending the method of *renvoi fixe*, since it admitted that the servitudes in Articles 2 and 3 would apply to the territorial sea, not as it existed in 1920 (when it extended only to 3 or 4 nautical miles), but for the whole of the area currently recognized under the modern law of the sea (which is of 12 nautical miles) and as specifically applied by Norway as well.<sup>811</sup>
660. Unsurprisingly, Norway is isolated in its position on the interpretation of the Svalbard Treaty. It has not been accepted by any other Party, which have all constantly reaffirmed their rights under the Treaty, whenever Norway seeks to extend its sovereign maritime rights off the archipelago.
661. This has been true with regards to the USSR and the Russian Federation, as shown by various *notes verbales* sent to Norway.
662. On 15 June 1977, the USSR took the following position:<sup>812</sup>

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<sup>810</sup> ICJ, *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment on the merits, 13 July 2009, **CL-0188**, para. 66; ICJ, *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment on Jurisdiction and admissibility, 19 December 1978, **CL-0239**, para. 77.

<sup>811</sup> On the extension of Norway’s territorial sea, see above, para. 559.

<sup>812</sup> Note Verbale from USSR to Norway, 15 June 1977, reproduced in A.N. Vylegzhanin, V.K. Zilanov, W.E. Butler (eds), *SPITSBERGEN: LEGAL REGIME OF ADJACENT MARINE AREAS; FOREIGN TRANSLATION PROGRAM*, Eleven International Publishing, 2006, Annex 14, **CL-0246**.

*On 3 June 1977 the State Council of Norway adopted a decision to establish a 200mile fisheries protection zone around Spitsbergen. In the text of the Royal Resolution received by the Embassy, attention is attracted by its clear failure to conform to the obligations assumed by Norway under the 1920 Treaty on Spitsbergen.*

663. On 14 June 1988, the USSR wrote:<sup>813</sup>

*In this connection the Soviet side expresses regret on the occasion of the said actions of the Norwegian authorities and refers to its position of principle with respect to the legal status of the shelf of Spitsbergen set out in the aide memoire of the Embassy of the USSR in Norway of 27 August 1970. In so doing the Soviet side considers it necessary on the basis of the legal argumentation well-known to the Norwegian side to additionally set out the following basic provisions of the position of the USSR:*

- 1. The legal regime established by the 1920 Treaty on Spitsbergen wholly extends to the shelf of the Archipelago.*
- 2. The external boundaries of the shelf of Spitsbergen coincide with the limits of operation of the 1920 Treaty as established in Article 1 of the said Treaty.*
- 3. In the absence of the procedure for access and conducting of economic activity on the shelf of the Archipelago worked out in accordance with the 1920 Treaty on Spitsbergen, such activity must be effectuated on the principles of the said Treaty and be regulated by the Mining Regulations for Spitsbergen.*

664. On 17 July 1998, the Russian Federation wrote:<sup>814</sup>

*The position of Russia with respect to the fisheries protection zone around the Spitsbergen Archipelago set out in the Note of the Embassy of the USSR in Norway, No. 60, of 15 June 1977 remains unchanged. In this connection the prohibition against fishing established by the Norwegian authorities in June of this year in the area westward from Bear Island is regarded as unlawful and contrary to the 1920 Treaty on Spitsbergen. Enforcement measures taken by the Norwegian side against Russian fishing vessels in this area as consequently qualified as being without legal grounds.*

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<sup>813</sup> Note Verbale from USSR to Norway, 14 June 1988, reproduced in A.N. Vylegzhanin, V.K. Zilanov, W.E. Butler (eds), SPITSBERGEN: LEGAL REGIME OF ADJACENT MARINE AREAS; FOREIGN TRANSLATION PROGRAM, Eleven International Publishing, 2006, Annex 17, **CL-0247**.

<sup>814</sup> Note Verbale of Russia to Norway, 17 July 1998, reproduced in A.N. Vylegzhanin, V.K. Zilanov, W.E. Butler (eds), SPITSBERGEN: LEGAL REGIME OF ADJACENT MARINE AREAS; FOREIGN TRANSLATION PROGRAM, Eleven International Publishing, 2006, Annex 18, **CL-0248**.

665. Iceland expressed a similar position, for instance in a *note verbale* of 30 March 2006.<sup>815</sup>

*In the view of Iceland, the sole basis for any sovereign rights of Norway in maritime areas around Svalbard, including an exclusive economic zone and the continental shelf, is the Svalbard Treaty of 1920. The sovereign rights of Norway are subject to important limitations provided for in the Svalbard Treaty, including the principle of equality. These limitations apply equally on Svalbard, within the territorial sea, within an exclusive economic zone and on the continental shelf. The rights of Norway in an exclusive economic zone and on the continental shelf around Svalbard can obviously not be greater than the rights of Norway on Svalbard from which the first mentioned rights are derived.*

666. The United Kingdom reiterated its position in a *note verbale* of 11 March 2006, in the following terms:<sup>816</sup>

*[T]he United Kingdom considers that maritime zones generated by Svalbard are subject to the provisions of the Treaty of Paris, in particular Article 7, which requires that Svalbard should be open on a footing of equality to all parties to the Treaty and Article 8, which inter alia specifies the tax regime which applies to the exploitation of minerals in Svalbard. The United Kingdom expects that the Norwegian authorities will fully comply with the obligations of Norway under the Treaty of Paris, as set out above.*

667. Spain expressed a similar position, for instance in a *note verbale* of 2 March 2007.<sup>817</sup>

*Not intending to make any pronouncement whatsoever concerning Norway's competence to establish new maritime zones from the Svalbard, Spain wishes to reiterate that the above-mentioned principle of liberty of access and non-discrimination are applicable to any maritime zone that might be defined from Svalbard, including, as appropriate, the continental shelf, both within and beyond a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.*

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<sup>815</sup> Note Verbale from Iceland to Norway, 30 March 2006, reproduced in A.N. Vylegzhanin, V.K. Zilanov, W.E. Butler (eds), SPITSBERGEN: LEGAL REGIME OF ADJACENT MARINE AREAS; FOREIGN TRANSLATION PROGRAM, Eleven International Publishing, 2007, Annex 21, **CL-0249**.

<sup>816</sup> Note Verbale from the British Government to the Government of Norway, 11 March 2006, as incorporated in M. Apostolaki, E. Methymaki, C. Musto, A. Tzanakopoulos, "United Kingdom Material on International Law," British Yearbook of International Law, Vol. 87, Issue 1, 2007, **CL-0069**, p. 794.

<sup>817</sup> Note Verbale from Spain to the Secretary General of the United Nations, 2 March 2007, **C-0078**.



668. The European Union, which succeeds to some of its Members' rights under the 1920 Treaty, has equally expressed strong opposition to Norway's depriving European vessels of their rights under the 1920 Treaty<sup>818</sup> (as has the Faroe Islands<sup>819</sup>).
669. In a *note verbale* to Norway dated 1 November 2016, the European Union presented its position regarding the interpretation of the Treaty of Svalbard as follows:<sup>820</sup>

*The European Union considers that the Svalbard archipelago, including Bear Island, generates its own maritime zones, separate from those generated by other Norwegian territory, in accordance with the 1982 United Nations Convention on the Law of the Sea. It follows that there is a continental shelf and an exclusive economic zone, which pertain to Svalbard.*

*The European Union also considers that the maritime zones generated by Svalbard are subject to the provisions of the Treaty of Paris of 1920, which grants, by virtue of its Articles 2 and 3, an equal and non-discriminatory access to resources for all Parties to the Treaty, in particular with respect to fishing activities, including fishing for sedentary species on the continental shelf around Svalbard.*

670. Through the same note, the EU notified Norway that EU acceptance of “fishery regulations proposed by Norway pertaining to the maritime zones around Svalbard has been conditional on the regulations being applied in a non-discriminatory manner; based on scientific advice; and respected by all interested Parties.”<sup>821</sup> The EU considered that the Norwegian Regulations as amended on 22 December 2015 “disregard the specific provisions of the Treaty of Paris, and in particular those laid down in Articles 2 and 3, which grant equal and non-discriminatory access to fishing in the maritime zones in question”.<sup>822</sup>
671. To the extent that exemptions issued under the Regulations “are only granted to Norwegian vessels, this confers an unjustified privileged access to vessels flying the flag of Norway and is thus not consistent with the obligations of Norway under the

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<sup>818</sup> Note Verbale of the European Union to Norway, 1 November 2016, **C-0071** [Emphasis added]; see also, Note Verbale of the European Union to Norway, 25 October 2016 and Note Verbale of the European Union to Norway, 24 February 2017, cited in **CL-0003**, para. 42.

<sup>819</sup> Note Verbale of the Faroe Islands to Norway, 11 January 2016, **C-00XX**.

<sup>820</sup> Note Verbale of the European Union to Norway, 1 November 2016, **C-0071** [Emphasis added]. In a similar vein, see also Note Verbale of the European Union to Norway, 25 October 2016 and Note Verbale of the European Union to Norway, 24 February 2017, cited in Council Regulation (EU) 2019/124 fixing for 2019 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters, 30 January 2019, **CL-0003**, para. 42.

<sup>821</sup> Note Verbale of the European Union to Norway, 1 November 2016, **C-0071**.

<sup>822</sup> *Ibid.*

*Treaty of Paris*". The note added that the European Union was "not aware of any scientific study in support of the prohibition or limitation of the catch of snow crab or justifying a differential treatment within or outside territorial waters".<sup>823</sup>

672. The European Council expressed this opposition in fishing regulations:<sup>824</sup>

*As regards the fishing opportunities for snow crab around the area of Svalbard, the Treaty of Paris of 1920 grants equal and non-discriminatory access to resources for all parties to that Treaty, including with respect to fishing. The view of the Union concerning that access, as regards fishing for snow crab on the continental shelf around Svalbard, has been set out in two notes verbales to Norway dated 25 October 2016 and 24 February 2017. In order to ensure that the exploitation of snow crab within the area of Svalbard is made consistent with such non-discriminatory management rules as may be set out by Norway, which enjoys sovereignty and jurisdiction in the area within the limits of the said Treaty, it is appropriate to fix the number of vessels that are authorised to conduct such fishery. The allocation of such fishing opportunities among Member States is limited to 2020. It is recalled that in the Union primary responsibility for ensuring compliance with applicable law lies with the flag Member States.*

673. In conclusion, the phrase "territorial waters" found in the Treaty of Svalbard is wide enough to cover, and ought today to be considered to cover, the exclusive economic zone and the continental shelf pertaining to the territory over which Norway was granted sovereignty and/or sovereign rights in 1920. Therefore, Norway's justification for not recognizing the legitimate rights enjoyed by Claimants under this Treaty does not have any legal justification.

## VIII. NORWAY'S VIOLATIONS OF THE BIT

674. Through its conduct, Norway has breached the following provisions of the BIT: A) the obligation to compensate in the case of expropriation (Article VI); B) the obligation to provide "equitable and reasonable" treatment (Article III); C) the obligation to provide most favoured nation treatment (Article IV); and, D) the obligation to accept Claimants' investments in Norway in accordance with Norwegian laws (Article III).

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<sup>823</sup>

*Id.*

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Council Regulation (EU) 2020/123 fixing for 2020 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters, 27 January 2020, **CL-0070**, para. 49; **CL-0005**, para. 35; **CL-004**, para. 37; **CL-0003**, para. 42 (referring to the Note Verbale of the European Union to Norway of 25 October 2016 and the Note Verbale of the European Union to Norway of 24 February 2017).

**A. NORWAY HAS BREACHED THE OBLIGATION TO PROVIDE COMPENSATION IN THE CASE OF EXPROPRIATION (ARTICLE VI OF THE BIT)**

675. Norway's measures constitute an expropriation of Claimants' snow crab fishing enterprise. Taken together, Norway's actions starting in July 2015 and concluding in September 2016 (and further confirmed in January 2017 and later) effected a creeping and illegal expropriation of Claimants' investment.

**a. The law on expropriation**

676. Article VI of the BIT establishes a process for a legal expropriation. At the same time, it creates a protection for qualifying investments against an unlawful expropriation:

*Investments made by investors of one Contracting Party in the territory of the other Contracting Party cannot be expropriated, nationalized or subjected to other measures having a similar effect (all such measures hereinafter referred to as "expropriation") except when the following conditions are fulfilled:*

- (I) The Expropriation shall be done for public interest and under domestic legal procedures;*
- (II) It shall not be discriminatory;*
- (III) It shall be done only against prompt, adequate and effective compensation.*

677. The BIT therefore requires that any expropriatory act be (a) done in the public interest and under domestic legal procedures; (b) not be discriminatory; and (c) accompanied by prompt and adequate compensation. It follows that an expropriation failing to meet any of these cumulative conditions is unlawful.<sup>825</sup>

678. To illustrate, in *ADC v. Hungary*, the tribunal found that measures revoking an airport management contract were not in the public interest where unsubstantiated allegations of public interest were made (*i.e.*, that the measures would ensure harmonization of Hungary's transportation laws).<sup>826</sup> An expropriation made under domestic legal

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<sup>825</sup> See, *Amoco International Finance Corp v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited*, IUSCT Case No. 56, Partial Award, 14 July 1987, **CL-0240**, para. 341 (where expropriation found to be lawful, Iran nevertheless ordered to pay compensation). See also, *Compañía de Aguas de Aconquija, S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No ARB/97/3, Award, 21 November 2000, **CL-241**, paras. 71-72; *Phillips Petroleum Company Iran v. The Islamic Republic of Iran, The National Iranian Oil Company*, IUSCT Case No. 39, Award, 29 June 1989, **CL-0242**, para. 110.

<sup>826</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, **CL-0243**, para. 433. See also, **CL-0058**, paras. 310-311.

procedures requires that a legal process be followed, meaning that any creeping or indirect expropriation will likely never meet this standard. A discriminatory expropriation will be one where there is a distinction, based on nationality, regarding the application of expropriatory measures to comparable investments or investors. Finally, an expropriation requires the payment of prompt, adequate and effective compensation, that is financial compensation reflecting the fair market value of the investment within a reasonably short period of time. Again, in the case of an indirect or creeping expropriation, this criterion will never be met either. When any one of these requirements is not met, the expropriation becomes an unlawful expropriation.<sup>827</sup>

679. The BIT also endorses the well-accepted principle in international law that expropriations may occur either directly or indirectly.<sup>828</sup> The BIT's protection thus covers a direct expropriation as well as any other measuring having equivalent effect even if they do not affect formal title to the investment.<sup>829</sup>
680. Included in the concept of indirect expropriation is "*creeping*" expropriation.<sup>830</sup> Such an expropriation occurs through "*composite acts*",<sup>831</sup> *i.e.* a series of acts or omissions over time that cumulatively result in an unlawful expropriation, even if each individual

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<sup>827</sup> See, R. Dolzer, C. Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW*, 2<sup>nd</sup> ed., Oxford University Press, 2012, Excerpts, **CL-0097**, pp. 99-101.

<sup>828</sup> *Ibid.*, p. 104 ("In recent jurisprudence, the formula most often found is that an expropriation will be assumed in the event of a 'substantial deprivation' of an investment."), citing *Société Générale v. Dominican Republic*, LCIA Case No UN 7927, Award, 19 September 2008, **CL-0244**, para. 64. See also, UNCTAD, "Taking of Property," Series on Issues in International Investment Agreements, UNCTAD/ITE/IIT/15, 2000, **CL-0245**, p. 2 ("Takings can also result from official acts that effectuate the loss of management, use or control, or a significant depreciation in the value, of the assets").

<sup>829</sup> See, R. Dolzer, C. Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW*, 2<sup>nd</sup> ed., Oxford University Press, 2012, Excerpts, **CL-0097**, p. 92. See also, L. B. Sohn, R. R. Baxter, "Responsibility of States for Injuries to the Economic Interests of Aliens: II. Draft Convention on the International Responsibility of States for Injuries to Aliens," *The American Journal of International Law*, Vol. 55, No. 3, July 1961, **CL-0250**, pp. 554, 555; *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, IUSCT Case No. 7, Award, 29 June 1984, **CL-0251**, p. 223; *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, **CL-0252**, para. 116; *Compañía de Aguas de Aconquija, S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No ARB/97/3, Award, 20 August 2007, **CL-0235**, paras. 7.5.11-7.5.17.

<sup>830</sup> **CL-0059**, paras. 20.22, 20.26. See also, *Spyridon Roussalis v. Romania*, ICSID Case No ARB/06/1, Award, 7 December 2011, **CL-0254**, para. 329 ("Expropriation may occur in the absence of a single decisive act that implies a taking of property. It could result from a series of acts and/or omissions that, in sum, result in a deprivation of property rights").

<sup>831</sup> ILC, Articles on Responsibility of States for Internationally Wrongful Acts, 2001, **CL-0255**, Article 15 ("1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act. 2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.").

measure would not constitute an expropriation standing alone.<sup>832</sup> Professors Reisman and Sloane explain that a creeping expropriation consists of expropriating property “only indirectly, but furtively, through often seemingly trivial acts of sometimes nebulous legality or propriety”.<sup>833</sup>

681. A State’s intention is normally irrelevant when assessing if its measures have resulted in an expropriation.<sup>834</sup> Rather, an accepted criterion for determining whether the conduct of a State constitutes an expropriation is the extent of economic impact on the investment, as a measure of the extent of the interference on the core attributes of the investment.<sup>835</sup> The *Metalclad* tribunal provided the classic formulation in this regard:<sup>836</sup>

*[E]xpropriation ... includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.*

<sup>832</sup> See, M. Reisman, R. Sloane, “Indirect Expropriation and Its Valuation in the BIT Generation,” British Yearbook of International Law, Vol. 75, 2004, **CL-0256**, pp. 123-125; UNCTAD, “Taking of Property,” Series on Issues in International Investment Agreements, UNCTAD/ITE/IIT/15, 2000, **CL-0245**, pp. 9-10, 11-12. See also, UNCTAD, *World Investment Report, FDI Policies for Development: National and International Perspectives*, 2003, **CL-0257**, p. 110.

<sup>833</sup> M. Reisman, R. Sloane, “Indirect Expropriation and Its Valuation in the BIT Generation,” British Yearbook of International Law, Vol. 75, 2004, **CL-0256**, p. 127.

<sup>834</sup> R. Dolzer, C. Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW*, 2<sup>nd</sup> ed., Oxford University Press, 2012, Excerpts, **CL-0097**, p. 112 (“The effect of the measure upon the economic benefit and value . . . is the key question when it comes to deciding whether an indirect expropriation has taken place”); *Siemens A.G. v. The Argentine Republic*, ICSID Case No ARB/02/8, Award, 6 February 2007, **CL-0258**, para. 270; *Antoine Biloune and Marine Drive Complex Ltd. v Ghana Investments Centre*, UNCITRAL Case, Award on Jurisdiction and Liability, 27 October 1989, **CL-0259**, p. 209; *Metalclad Corporation v. The United Mexican States*, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000, **CL-0260**, para. 111; *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, **CL-0252**, para. 116; *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No UN3467, Final Award, 1 July 2004, **CL-0261**, para. 186; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, **CL-0262**, para. 459; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No ARB/97/3, Award, 20 August 2007, **CL-0253**, para. 7.5.20; *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, IUSCT Case No. 7, Award, 29 June 1984, **CL-0251**, para. 22 (“The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact”); *Phillips Petroleum Company Iran v. The Islamic Republic of Iran*, IUSCT Case No. 39, Award, 29 June 1989, **CL-0242**, paras. 97-98.

<sup>835</sup> *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No ARB/01/8, Award, 12 May 2005, **CL-0263**, paras. 262-263.

<sup>836</sup> *Metalclad Corporation v. The United Mexican States*, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000, **CL-0260**, para. 103 (emphasis added; finding expropriation for the wrongful denial of a construction permit that resulted in the termination of investment activities).

682. Many tribunals have since endorsed the *Metalclad* standard.<sup>837</sup> The tribunal in *CME v. Czech Republic* held that expropriation claims properly cover measures “that effectively neutralize the benefit of the property of the foreign owner”.<sup>838</sup> The *Middle East Cement v. Egypt* tribunal similarly held that indirect expropriation may have occurred where “the investor is deprived by such measures of parts of the value of his investment”.<sup>839</sup> And the *Vivendi II* tribunal applied this standard to hold that Argentina had expropriated the claimants’ investment because the conduct of an Argentine province “had the effect of putting an end to the investment”.<sup>840</sup>
683. The tribunal in *RosInvest v. Russia* also endorsed this standard, holding that a finding of expropriation may stem from “a substantial or total deprivation of (i) the economic value of an investment ... (ii) fundamental ownership rights, in particular, control of an ongoing business, or (iii) deprivation of legitimate investment-backed expectations.”<sup>841</sup>
684. This formulation of the “effects test” reflects that tribunals have also found expropriation to result from the vitiation of an investor’s legitimate expectations. The tribunals in *Biloune*, *Metalclad*, and *Vivendi II* all found the investor’s justified reliance on host State representations relevant to their findings of expropriation.<sup>842</sup> The tribunal in *Tecmed* also found legitimate expectations relevant to its analysis by premising its finding of

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<sup>837</sup> See e.g., *Occidental Petroleum Corporation, Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No ARB/06/11, Award, 5 October 2012, **CL-0264**, para. 455; *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL Case, Partial Award, 13 September 2001, **CL-0265**, para. 604; *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. 168; *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, **CL-0253**, para. 113, fn. 125; *Tokios Tokelés v. Ukraine*, ICSID Case No ARB/02/18, Award, 26 July 2007, **CL-0267**, para. 119; **CL-0048**, para. 247; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No ARB/05/16, Award, 29 July 2008, **CL-0268**, para. 701; *Alpha Projectholding GmbH v. Ukraine*, ICSID Case No ARB/07/16, Award, 8 November 2010, **CL-0136**, paras. 408-410.

<sup>838</sup> *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL Case, Partial Award, 13 September 2001, **CL-0265**, para. 604.

<sup>839</sup> *Middle East Cement Shipping and Handling Co. S.A. v. Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, **CL-0153**, para. 107.

<sup>840</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No ARB/97/3, Award, 20 August 2007, **CL-0253**, para. 7.5.29, quoting *Compañía 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. 114.

<sup>841</sup> *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010, **CL-0270**, para. 624.

<sup>842</sup> See, *Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre*, UNCITRAL Case, Award on Jurisdiction and Liability, 27 October 1989, **CL-0259**, pp. 201-211 (finding that failure to award a construction permit to a local-operating entity in contravention of the investor’s justified reliance on host State representations constituted a constrictive expropriation because it resulted in the “irreparable cessation” of investment activity). See also, *Metalclad Corporation v. The United Mexican States*, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000, **CL-0260**, paras. 107-108; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No ARB/97/3, Award, 20 August 2007, **CL-0253**, paras. 7.5.26-7.5.28, 7.5.33.

expropriation on Mexico's repudiation of the investor's legitimate expectation of an economic return on its investment.<sup>843</sup>

685. Where States have argued that the expropriatory measures were justified by an overriding public interest, tribunals have adopted a proportionality requirement balancing the effects of the measure with the alleged public interest. In *Deutsche Bank v. Sri Lanka*, the tribunal held:<sup>844</sup>

*The Tribunal does not agree with Sri Lanka that it has an extremely broad discretion to interfere with investments in the exercise of "legitimate regulatory authority". A number of tribunals, including Tecmed v. Mexico, Azurix v. Argentina, and LG&E v. Argentina have adopted a proportionality requirement in relation to expropriatory treatment. It prevents the States from taking measures which severely impact an investor unless such measures are justified by a substantial public interest.*

686. The BIT's protection of investments from the types of expropriatory conduct thus described is not limited to tangible rights. It extends to all investments covered under the BIT's broad definition of investment.<sup>845</sup> The BIT's protection of both tangible and intangible rights, including "*claims to any performance under contract having an economic value*"<sup>846</sup> and "*business concessions conferred by law*"<sup>847</sup>, is consistent with the proposition under international law that "[p]rotection from expropriation relates not only to tangible property or physical assets but to a broad range of rights that are economically significant to the investor".<sup>848</sup>

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<sup>843</sup> *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, **CL-0252**, paras. 149-150. See also, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary*, Award, 2 October 2006, **CL-0243**, paras. 423-424; *Metalclad Corporation v. Mexico*, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000, **CL-0260**, paras. 100, 103.

<sup>844</sup> *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/09/02, Award, 31 October 2012, **CL-0142**, para. 522 [footnotes omitted]; See also, *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, **CL-0252**, para. 122; **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-0271**, para. 189.

<sup>845</sup> See, **CL-0001**, Article 1.

<sup>846</sup> *Ibid.*, Article 1(1)(III).

<sup>847</sup> *Id.*, Article 1(1)(IV).

<sup>848</sup> C. Schreuer, "The Concept of Expropriation under the ECT and Other Investment Protection Treaties," 20 May 2005, **CL-0272**, p. 19. See also, R. Dolzer, C. Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW*, 2<sup>nd</sup> ed., Oxford University Press, 2012, Excerpts, **CL-0097**, pp. 115-116; S. Alexandrov, "Breaches of Contract and Breaches of Treaty: The Jurisdiction of Treaty-based Arbitration Tribunals to Decide Breach of Contract Claims in *SGS v. Pakistan* and *SGS v. Philippines*," *Transnational Dispute Management*, Vol. 5, 2006, **CL-0273**, p. 559; J. Paulsson, Z. Douglas, "Indirect Expropriation in Investment Treaty Arbitrations," in N. Horn, S. Kroll (eds.), *ARBITRATING FOREIGN INVESTMENT DISPUTES: PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS*, Kluwer, 2004, **CL-0274**, pp. 145, 152-153; T. Waelde, A. Kolo, "Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law," *The*

687. In cases of creeping expropriation, as here, the date on which the expropriation will crystallize is always fact-specific<sup>849</sup> and occurs with “*the last step ... that tilts the balance ... the straw that breaks the camel’s back*”.<sup>850</sup> The expropriation will be held to have occurred where the situation is not “*merely ephemeral*”,<sup>851</sup> or has become a “*persistent or irreparable obstacle to the Claimant’s use, enjoyment or disposal of its investment*”.<sup>852</sup>
688. Thus, Norway was obligated to refrain from adopting expropriatory measures of all kinds that do not meet the cumulative legality requirements established in Article VI of the BIT (including the payment of full compensation). Such measures are identified by their effects on the Claimant’s investment, and may concern “*every kind of asset*”,

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International and Comparative Law Quarterly, October 2001, **CL-0275**, p. 835; G. Sacerdoti, “*Bilateral Treaties and Multilateral Instruments on Investment Protection*,” Collected Courses of the Hague Academy of International Law, Vol. 269, 1997, **CL-0276**, pp. 254, 381-382; R. Higgins, “*The Taking of Property by the State; Recent Developments in International Law*,” Collected Courses of the Hague Academy of International Law, Vol. 176, 1982, **CL-0277**, pp. 263, 270-272; C. F. Amerasinghe, “*Status Breaches of Contracts with Aliens and International Law*,” The American Journal of International Law, Vol. 58, No. 4, October 1964, **CL-0278**, pp. 908-910; UNCTAD, “*Taking of Property*,” Series on issues in International investment Agreements, UNCTAD/ITW/IIT/15, 2000, **CL-0245**, p. 36; OECD, “*‘Indirect Expropriation’ and the ‘Right to Regulate’ in International Investment Law*,” OECD Working Papers on International Investment, No. 2004/04, September 2004, **CL-0279**, p. 3, fn. 6; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, **CL-0181**, para. 98; PCIJ, *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Judgement on the Merits, 25 May 1926, **CL-0225**, p. 44; *Amoco International Finance Corp v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited*, IUSCT Case No. 56, Partial Award, 14 July 1987, **CL-0240**, para. 108; *Phillips Petroleum Company Iran v. The Islamic Republic of Iran*, IUSCT Case No. 39, Award, 29 June 1989, **CL-0242**, para. 76; *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992, **CL-0266**, paras. 163-164; *Wena Hotels v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, **CL-0080**, para. 98; *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, **CL-0280**, para. 274; *Eureko B.V. v. Republic of Poland*, Ad Hoc Arbitration, Partial Award, 19 August 2005, **CL-0281**, para. 241; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID ARB/03/29, Decision on Jurisdiction, 14 November 2005, **CL-282**, para. 255; **CL-0058**, para. 314; *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, **CL-0118**, para. 66; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, **CL-0258**, paras. 267, 269.

<sup>849</sup> **CL-0059**, para. 20.32; *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, Award, 29 June 1984, **CL-0251**, p. 225; *Phelps Dodge Corp. and Overseas Private Investment Corp. v. The Islamic Republic of Iran*, IUSCT Case No. 99, Award, 19 March 1986, **CL-0283**, paras. 11-12; R. Dolzer, C. Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW*, Oxford University Press, 2<sup>nd</sup> ed, 2012, Excerpts, **CL-0097**, p. 124; *Phillips Petroleum Co Iran v. Islamic Republic of Iran, the National Iranian Oil Co*, IUSCT Case No. 39, Award, 29 June 1989, **CL-0242**, p. 116; **CL-0058**, para. 313.

<sup>850</sup> *Siemens A.G. v. The Argentine Republic*, ICSID Case No ARB/02/8, Award, 17 January 2007, **CL-0258**, para. 263.

<sup>851</sup> *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, Award, 29 June 1984, **CL-0251**, p. 225; *Phelps Dodge Corp. and Overseas Private Investment Corp. v. The Islamic Republic of Iran*, IUSCT Case No. 99, Award, 19 March 1986, **CL-0283**, paras. 22.

<sup>852</sup> **CL-0059**, para. 20.32. See also, R. Dolzer, C. Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW*, OUP, 2<sup>nd</sup> ed, 2012, Excerpts, **CL-0097**, p. 124; *Phillips Petroleum Co Iran v. Islamic Republic of Iran, the National Iranian Oil Co*, IUSCT Case No. 39, Award, 29 June 1989, **CL-0242**, p. 116; **CL-0058**, para. 313.



which includes Claimants' investment in Norway relating to a joint venture to fish, transform and sell snow crabs.

**b. Norway's acts constitute an expropriation**

689. Norway's cumulative actions until September 2016 (and further confirmed in January 2017 and later) constitute a creeping (or indirect) expropriation of Claimants' snow crab enterprise in Norway.<sup>853</sup> They include:

- **17 July 2015:** Norway unexpectedly and arbitrarily changes the characterization of the snow crab from a non-sedentary to a sedentary species pursuant to Article 77(4) of UNCLOS<sup>854</sup>;
- **22 December 2015:** Norway amends the 18 December 2014 snow crab regulations and shifts the prohibition on snow crab fisheries from "*Norway's territorial waters, including the territorial waters at Svalbard*" and "*the economic zone and the fishery protection zone at Svalbard*"<sup>855</sup> to "*Norwegian territorial sea and inland waters, and on the Norwegian continental shelf*" (dropping references to "*territorial waters at Svalbard*"<sup>856</sup>), in effect legally closing off the Loophole, in addition to Svalbard waters;
- **July 2015-July 2016:** Nonetheless, Norway "*accepts*" fishing of snow crab by EU vessels, independently of its position that they may be a sedentary species (and of the 22 December 2015 snow crab regulation), as recognized by the 29 November 2017 decision of the Norwegian Supreme Court in the *Juros Vilkas*<sup>857</sup> matter, which is also supported by Norway's express consent of such catches through numerous onboard inspections of EU vessels, including those of North

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<sup>853</sup> See, paras. 358-370 above, as well as paras. 371-406 for further related actions. See also paras. 91-161 above on Norway's shifting snow crab policies.

<sup>854</sup> See, paras. 103-105 above; **C-0106** ("*In accordance with Article 77 of the United Nations Convention on the Law of the Sea of 1982 (UNCLOS), the two Coastal States, the Russian Federation and Norway, exercise their sovereign rights in respect of the continental shelf of the Barents Sea for its exploration and development of its natural resources. Therefore, only these two Coastal States have the exclusive rights to harvest sedentary species on the continental shelf of the Barents Sea. Pursuant to paragraph 4 of Article 77 of the Convention, both the Russian Federation and Norway will proceed from the fact that harvesting of sedentary species, including snow crab, in the NEAFC Regulatory Area in the Barents Sea shall not be carried out without the express assent of the Coastal State.*").

<sup>855</sup> See, para. 98 above.

<sup>856</sup> See, para. 112 above.

<sup>857</sup> See, para. 131 above.

Star and a large number of acceptances of snow crab offloads at Norwegian ports<sup>858</sup>;

- **15 July 2016:** Norway starts issuing fines to EU vessels, notably to the Juros Vilkas on 15 July 2016, a Lithuanian vessel that had been authorized by the Norwegian coastguard the day before, 14 July 2016, to offload snow crabs caught with NEAFC licences at the Norwegian port of Vardo<sup>859</sup>;
- **July-September 2016:** Norway continues to consent to North Star's snow crab catches, caught with NEAFC licences, until its last offload, on 6 September 2016, as shown by the approvals of such offloads on NEAFC forms<sup>860</sup>;
- **27 September 2016:** North Star receives a fine from Norwegian authorities for fishing snow crab in the Loophole during the month of June 2016.<sup>861</sup>

690. From September 2016, it therefore became clear that Norway would no longer allow the fishing of snow crab in the Loophole by EU vessels holding NEAFC licences, or the landing of their catches in Norwegian ports.

691. These actions constitute, together, an expropriation, since they have substantially deprived Claimants of the value of their snow crab harvesting enterprise. Indeed, after the last snow crab landing allowed in Baatsfjord, on 6 September 2016, Claimants have been unable to generate any revenues at all from snow crab fisheries, due to Norway's actions. Claimants' snow crab enterprise having been entirely halted, it can only be considered to have been expropriated. Indeed, under the "*effects test*", Norway's actions effectively put an end to the investment.

692. Norway adopted a number of subsequent acts which further confirmed Norway's position and intentions:

- **16 January 2017:** Norway arrests the Senator, two days after it entered Svalbard waters, to fish snow crabs pursuant to rights granted by the Svalbard Treaty as implemented by the EU fisheries regulation and Latvian law<sup>862</sup>;

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<sup>858</sup> See, paras. 326, 338, 341, 342, 352, 369 above.

<sup>859</sup> See, para. 118 above.

<sup>860</sup> See, para. 369 above.

<sup>861</sup> See, para. 370 above.

<sup>862</sup> See, para. 373 above.

- **18 January 2017:** Minister Per Sandberg writes to Seagourmet, in response to enquiries “*about shortage of raw materials for snow crab*”, that Norway is asserting rights based on its continental shelf and that “*in the bilateral negotiations for 2016 and 2017, Norway has offered the EU a quota for snow crab as part of the current account in the annual negotiations*”, adding that “*in order to reach such an agreement, the EU must compensate Norway for this by allocating quotas for other species to Norway*” and that “*so far, the EU has not wanted to pay for such a quota change on snow crab*”. For that reason, Minister Sandberg wrote that Latvian vessels on which Seagourmet relied for its operations could not be given “*access to snow crab fishing on the Norwegian continental shelf*”.<sup>863</sup>
- **20 January 2017:** North Star is issued a penalty notice by the Chief of Police of Finnmark relating to the arrest of Senator, in the amount of a NOK 150,000 corporate fine to North Star, as well as NOK 1,000,000 confiscation order, and a further NOK 150,000 fine to the Senator’s captain<sup>864</sup>;
- **25 January 2017:** Minister Per Sandberg’s declares “*we will not give them a single crab*” in reference to European vessels and operators in the snow crab business, showing Norway’s discriminatory intentions towards existing rights to harvest snow crabs in the Barents Sea<sup>865</sup>;
- **3 May 2017:** Minister Sandberg admits that he is only “*reasonably comfortable*” with the strategy of preventing EU vessels from fishing snow crab as a “*bargaining chip*” to obtain additional quotas from the EU<sup>866</sup>;
- **22 June 2017:** the East Finnmark District Court renders a judgment upholding the fine against the Senator and its captain<sup>867</sup>;
- **30 June 2017:** Minister Sandberg’s statement that Norway had “*set aside*” 500 tonnes of snow crab quota “*for agreements with other countries*” (ie the EU) is reported,<sup>868</sup> showing Norway had no real intention of coming to an agreement

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<sup>863</sup> See, para. 374 above.

<sup>864</sup> See, para. 376 above.

<sup>865</sup> See, para. 375 above.

<sup>866</sup> See, para. 390 above.

<sup>867</sup> See, paras. 393-397 above.

<sup>868</sup> See, para. 388 above.

with the EU, since EU landings of snow crabs in Norway were more than 11 times that amount in 2015<sup>869</sup> ;

- **June 2017:** Norway adopts a first quota for snow crab, set a 4,000 tonnes,<sup>870</sup> which is significantly lower than the more than 9,000 tonnes caught per year in 2015 and 2016 by Norwegian and EU vessels together,<sup>871</sup> which quota is based neither on a rational economic or environmental basis,<sup>872</sup> and which the Norwegian fleet did not even meet, catching only 3,153 tonnes that year<sup>873</sup>; the Norwegian quota is thereafter kept at an artificially low level;
- **7 February 2018:** the East Finnmark Court of Appeal confirms the District Court's ruling,<sup>874</sup> while noting that at least five Russian vessels were granted exemptions to fish snow crab in Norwegian waters,<sup>875</sup> showing that Norway was ready to advantage Russian vessels to the detriment of EU vessels;
- **25 May 2018:** Norway's Directorate of Fisheries rejects North Star's request for an exemption<sup>876</sup> (which would have allowed to fish snow crab in Norwegian waters), stating a bilateral agreement between the EU and Norway would be necessary for the granting of such exemption from the fishing prohibition, adding that only Norwegian vessels, and no foreign vessels had to date been granted such an exemption (contradicting the finding of the East Finnmark Court of Appeal that at least five Russian vessels had been granted such an exemption<sup>877</sup>), showing Norway was more interested in shutting down North Star's operations than in providing rational and true reasons for the refusal;
- **9 October 2018:** Norway's Directorate of Fisheries rejects another request by North Star for an exemption to fish snow crab, reiterating that fishing snow crab

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<sup>869</sup> Kaiser report, Table 1, p. 5.

<sup>870</sup> *Ibid.*, Table 10, p. 40.

<sup>871</sup> *Id.*, Table 1, p. 5.

<sup>872</sup> *Id.*, paras. 94-96.

<sup>873</sup> *Id.*, Table 1, p. 5.

<sup>874</sup> See, paras. 398-399 above.

<sup>875</sup> **C-0040**, p. 17.

<sup>876</sup> See, paras. 411-413 above.

<sup>877</sup> **C-0040**, p. 17.

on the Norwegian continental shelf is prohibited “*unless an exemption is granted. No such exemption has been granted to any foreign vessel.*”<sup>878</sup>

- **29 November 2018:** Norwegian newspaper Dagbladet publishes grossly vindictive, baseless, and demonstrably false statements made by Norwegian public prosecutor Morten Daae, of the Finnmark police district, that showed that Norway’s actions against North Star were not based on any *bona fide* reasons, but on an egregiously discriminatory intent to find any reason to exclude North Star and other EU vessels fishing snow crab from the Barents Sea, writing:<sup>879</sup>

*“In collaboration with Kripas [Norwegian National Criminal Investigation Service], we launched an intelligence report which in turn became the basis for a major action against companies that we suspected of human trafficking, tax evasion, social dumping and illegal capture,” says prosecutor Morten Daae in Finnmark police district. He emphasized that the police intelligence went against all companies that engaged in activity in catching snow crabs.*

*“Before the plan for the joint action was ready, we meanwhile chose to arrest the ship “Senator” for serious resource crime. The ship caught snow crab in the Norwegian zone without valid permits,” Daae explains.*

*“The arrest led to us also being able to stop the rest of the fleet that was engaged in snow crab fishing. The companies we were to take action against then resigned, the employees graduated and left Norway. **So that way, we could stop the business.**” ...*

*“Even though we would like to be able to prosecute the companies further, **we were able to stop their work in Norway if nothing else.** We have important knowledge that can be useful in later investigations,” says Daae.*

[Emphasis added]

The sweeping and obviously baseless nature of the allegations of “*human trafficking, tax evasion, social dumping and illegal capture*” against North Star is shown by the fact that after North Star and Seagourmet were in contact with the Finnmark police following the article, no formal criminal proceedings or other official actions were ever initiated or taken<sup>880</sup>;

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<sup>878</sup> See, para. 414 above.

<sup>879</sup> See, paras. 422-433 above; Gedde-Dahl, G. Thorenfeldt, L. Stang, O. Stromman, H. A. Vedlog, “*Plan A Crab Raid In Batsfjord*,” Daglabet, 29 November 2018, **PP-0203**.

<sup>880</sup> Witness State of Peteris Pildegovics, para. 234.

- **14 February 2019:** the Norwegian Supreme Court confirms the lower court rulings but refuses to decide the question of whether Claimants' licences are valid under the Svalbard Treaty even though this argument was a central part of the defendants' defense to criminal liability (thus causing a denial of justice),<sup>881</sup>
- **13 May 2019:** Norway's Directorate of Fisheries provides a different rationale for once again refusing another request for an exemption to fish snow crab by North Star, this time that exemptions are granted only to vessels with fishing licences awarded under Norwegian law<sup>882</sup>;

693. There was no legitimate regulatory goal that could somehow justify Norway's taking. Norway's actions were discriminatory in that they excluded EU vessels from the snow crab fisheries while allowing Norwegian vessels to continue to partake in it. The objective was a protectionist one, to help Norway's underperforming industry. Making things even worse, Norway granted dispensations to Russian vessels to fish snow crab in Norwegian waters, making Norway's actions especially discriminatory towards EU crabbers. The Directorate of Fisheries mislead Claimants on this issue. Norway's actions also aimed at creating a legally dubious "*bargaining chip*" with the EU to obtain fishing quotas for other species, as openly recognized by the Minister of Fisheries himself, Mr. Per Sandberg. Norway also adopted unjustifiably low quotas, based neither on economic nor environmental reasons, posturing that these quotas are conservation measures, even though their real purpose is to be able to argue that there is not enough snow crab to share with the EU on an economically viable basis. Finally, Norway's actions also serve its interests regarding contested issues under the Svalbard Treaty, which again cannot be a *bona fide* public policy reason.

694. Claimants also had a number of investment-backed expectations which further support a finding of expropriation, both at the time the investment was initiated and throughout the life of the investment. These expectations were founded on the following facts:

- Norway is perceived as a stable country with a regulatory and legal framework that can be trusted;

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<sup>881</sup> See, paras. 401-406 above.

<sup>882</sup> See, para. 418 above.

- Norway had a longstanding practice, since at least 1958, to consider snow crab as a non-sedentary species,<sup>883</sup> which was abruptly and surprisingly changed, as of 17 July 2015, after Claimants had made their investments in Norway;
- Prior to Claimants' making of their investments, in 2013 and 2014, Norway's Directorate of Fisheries confirmed that snow crab could be caught in the Loophole with NEAFC licences, by EU vessels, which could then offload their cargo in Norway<sup>884</sup>;
- Between July 2015 and July 2016, Norway "accepts" fishing of snow crab by EU vessels, independently of its position that they may be a sedentary species (and of the 22 December 2015 snow crab regulation), as recognized by the 29 November 2017 decision of the Norwegian Supreme Court in the *Juros Vilkas*<sup>885</sup> matter. Norway's acceptance is further supported by its express consent to such catches through numerous onboard inspections of EU vessels, including those of North Star and a large number of acceptances of snow crab offloads at Norwegian ports.<sup>886</sup> Specifically, Norway's express consent is demonstrated by the following facts:
  - Norway's multiple inspections at sea of North Star vessels holding NEAFC snow crab licences, confirming such licences were legal, between 2014 and 2016<sup>887</sup>;
  - Norway's issuance of multiple NEAFC inspection forms authorizing offload of snow crab in Norwegian ports, between 2014 and 2016<sup>888</sup>;
  - The visit of a delegation of Norwegian parliamentarians, led by Mr. Frank Bakke-Jensen, Norway's current defence minister, at Baatsfjord, on 4 September 2015, who gave a message of encouragement to North Star and Seagourmet about their joint project,<sup>889</sup> after Norway's declaration

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<sup>883</sup> See, United Nations Conference on the Law of the Sea, Summary Records of the 21<sup>st</sup> to 25<sup>th</sup> Meetings of the Fourth Committee, A/CONF.13/C.4/SR.21-25, 24 February-27 April 1958, **CL-0074**, p. 55.

<sup>884</sup> See paras. 95-97 above.

<sup>885</sup> See, para. 131 above.

<sup>886</sup> See, paras. 326, 338, 341-342, 352, 369 above.

<sup>887</sup> *Ibid.*

<sup>888</sup> *Id.*

<sup>889</sup> See para. 347 above.

that snow crabs were a sedentary species, thus showing that Norway continued to be supportive of the project;

- The visit of Norway's Minister of Fisheries of Seagourmet's factory on 8 September 2015, co-hosted by North Star,<sup>890</sup> *after* Norway's declaration that snow crabs were a sedentary species, thus showing that Norway continued to be supportive of North Star's fishing efforts in the Barents Sea and of the joint venture with Seagourmet;
- The approval, by Minister Aspaker, in September 2015, of large-scale investments for the refurbishment of the port of Baatsfjord to allow for easier docking and offloading of large vessels, such as those of North Star, at the time of her visit in Baatsfjord<sup>891</sup>;
- The visit of a delegation from the Ministry of Trade, Industry and Fisheries on 23 October 2015 of the premises of the joint venture at Baatsfjord, once again giving their encouragements to the joint venture partners<sup>892</sup>;
- Various inspections of North Star's vessels by the Norwegian Coast Guard while they had snow crab on board, including in January 2016, none of which reported any violation of NEAFC rules, thus confirming the legality of Claimants' NEAFC licences from Norway's perspective<sup>893</sup> (despite Norway's change of the fishing regulations on 22 December 2015);
- The approval of North Star's offloading of snow crab in the port of Baatsfjord, on NEAFC forms, by the Norwegian coast guard, until September 2016.<sup>894</sup>

695. Considering that Claimants invested in Norway prior to its change in policy arising on 17 July 2015, the continued encouragement by a large number of Norwegian politicians, and the consent of the Norwegian administration to North Star's activities

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<sup>890</sup> See para. 348 above.

<sup>891</sup> See para. 350 above.

<sup>892</sup> See para. 349 above.

<sup>893</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 163; NEAFC inspection report for Saldus, 15 January 2016, **C-0094**.

<sup>894</sup> See paras. 326, 338, 341-342, 352, 369 above.



until September 2016, the only possible conclusion is that, together, Norway's actions must be considered as an expropriation of Claimants' investment.

**c. Norway's acts constitute an unlawful expropriation**

696. Norway's actions constitute an unlawful expropriation. Indeed, none of the criteria for a lawful expropriation found in Article VI of the BIT are met.
697. First, it cannot be contested that Norway has failed to provide "*prompt, adequate and effective compensation*" to Claimants since no compensation has been provided. Moreover, there was obviously no legal process for such expropriation.
698. It also cannot be contested that the expropriation was discriminatory since Norway has allowed its own fleet to continue harvesting snow crabs in the Barents Sea and has even granted exemptions to Russian vessels (which in any event were granted in breach of Norway's own regulation, allowing such dispensations only for Norwegian vessels<sup>895</sup>). However, as per the words of Norway's Minister of Fisheries himself, Mr. Per Sandberg, in respect of EU fishermen, Norway's position is simple: "*we will not give them a single crab.*" Moreover, as recognized by Finnmark police district prosecutor Morten Daae, the objective of the Norwegian government was, in respect of North Star and other EU vessels: "*we were able to stop their work in Norway if nothing else*"<sup>896</sup>. These statements show clear discriminatory intent permeating various branches of the Norwegian government.
699. There is therefore no question that the expropriation was unlawful.

**B. NORWAY HAS BREACHED THE OBLIGATION TO PROVIDE EQUITABLE AND REASONABLE TREATMENT AND PROTECTION (ARTICLE III OF THE BIT)**

**a. The law on equitable and reasonable treatment and protection**

700. Article III of the BIT provides that Norway must accord the Claimants' investment equitable and reasonable treatment and protection:

*Each Contracting Party shall promote and encourage in its territory investments of investors of the other Contracting Party*

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<sup>895</sup> C-0110, para. 2.

<sup>896</sup> See, paras. 422-433 above; Gedde-Dahl, G. Thorenfeldt, L. Stang, O. Stromman, H. A. Vedlog, "*Plan A Crab Raid In Batsfjord*," Dagbladet, 29 November 2018, **PP-0203**.

*and accept such investments in accordance with its laws and regulations and accord them equitable and reasonable treatment and protection.*

701. The BIT does not define what constitutes “*equitable and reasonable treatment*,” which is nonetheless considered to equate the more commonly used expression “*fair and equitable treatment*.”<sup>897</sup>
702. It is generally accepted that this standard of conduct cannot be summarized in a single statement of legal obligation, although there are well-known aspects of the discrete duties incumbent on states by virtue of this obligation.<sup>898</sup> Pursuant to Article 31(1) of the VCLT, the “*equitable and reasonable treatment*” or “*fair and equitable treatment*” provisions of the applicable treaty must be interpreted in good faith in accordance with ordinary meaning to be given to their terms in their context and in light of the object and purpose of the BIT.
703. Applying this approach, the *Saluka* tribunal concluded that the “*ordinary meaning*” of “*fair*” and “*equitable*” is “*just*”, “*even-handed*”, “*unbiased*”, or “*legitimate*”,<sup>899</sup> which must equally apply to “*reasonable*” and “*equitable*”. The *Saluka* tribunal then observed that the immediate context of the fair and equitable treatment provision is its inclusion in the general (first order) level of treatment to be accorded to foreign investors in the bilateral investment treaty, while the broader context includes other treaty provisions, such as the preamble.<sup>900</sup> It further noted that the “*object and purpose*” of the treaty could be discerned from its preamble.<sup>901</sup>

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<sup>897</sup> *Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award, 28 February 2020, **CL-0284**, para. 416 (“*In considering the Claimants’ claim that Latvia has failed to accord their investments equitable and reasonable treatment and protection in breach of Article III of the BIT, the Tribunal starts from the position that, as agreed by the Parties and noted earlier, the “equitable and reasonable treatment protection” standard in Article III does not differ materially from the FET standard referred to in other BITs.*”).

<sup>898</sup> R. Dolzer, C. Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW*, 2<sup>nd</sup> ed., Oxford University Press, 2012, **CL-0097**, pp. 133-134, (“[t]he lack of precision may be a virtue rather than a shortcoming. In actual practice it is impossible to anticipate in the abstract the range of types of infringements upon the investor’s legal position. The principle of FET allows for independent and objective third party determination of this type of behaviour on the basis of a flexible standard”).

<sup>899</sup> *Saluka Investments BV v. The Czech Republic*, UNCITRAL Case, Partial Award, 17 March 2006, **CL-0216**, para. 297. See also, *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, **CL-0285**, para. 113; *Siemens AG v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, **CL-0258**, para. 390; *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, **CL-0233**, para. 504.

<sup>900</sup> *Saluka Investments BV v. The Czech Republic*, UNCITRAL Case, Partial Award, 17 March 2006, **CL-0216**, para. 298; **CL-0021**, Article 31(2)(a).

<sup>901</sup> *Saluka Investments BV v. The Czech Republic*, UNCITRAL Case, Partial Award, 17 March 2006, **CL-0216**, para. 298; *MTD Equity Sdn. Bhd. & MTD Chile SA v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May

704. Through the decisions of numerous investment treaty tribunals applying this approach,<sup>902</sup> the contours of the fair and equitable treatment standard have been developed. A non-exhaustive list of states' obligations under this standard includes the obligation: a) to refrain from acting arbitrarily; b) to refrain from acting in bad faith; c) to respect the specific or general legitimate expectations of an investor; d) to respect certain standards regarding the transparency and consistency of a state's actions as well as of its investment framework; and e) to refrain from causing a denial of justice.

(i) *The obligation not to act arbitrarily*

705. A fundamental aspect of the obligation to provide fair and equitable is the prohibition on arbitrary conduct by state organs. As a matter of ordinary meaning, "*if there is discrimination on arbitrary grounds, or if the investment has been subject to arbitrary or capricious treatment by the host State, the fair and equitable standard has been violated*".<sup>903</sup> According to the award in *CMS v Argentina*: "[a]ny measure that might involve arbitrariness . . . is in itself contrary to fair and equitable treatment."<sup>904</sup>

706. The International Court of Justice gave an oft-cited definition of arbitrariness in the *ELSI* case:<sup>905</sup>

*Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law ... It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.*

707. Several tribunals have followed this definition, including in *Azurix v Argentina*:<sup>906</sup>

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2004, **CL-0285**, para. 113; *Siemens AG v. The Argentine Republic*, ICSID Case No ARB/02/8, Award, 6 February 2007, **CL-0258**, para. 290.

<sup>902</sup> **CL-0058**, para. 360; *MTD Equity Sdn. Bhd. & MTD Chile SA v. Chile*, ICSID Case No ARB/01/7, Award, 25 May 2004, **CL-0285**, para. 113; *Siemens AG v The Argentine Republic*, ICSID Case No ARB/02/8, Award, 6 February 2007, **CL-0258**, para. 290; *Joseph Charles Lemire v. Ukraine*, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, **CL-0286**, paras. 256-264.

<sup>903</sup> UNCTAD, "*Fair and Equitable Treatment*," Series on Issues in International Investment Agreements, UNCTAD/ITE/IIT/11, 1999, **CL-0287**, p. 37. See also, *Joseph Charles Lemire v Ukraine* (ICSID Case No ARB/06/18), Decision on Jurisdiction and Liability, 14 January 2010, **CL-0286**, para. 259.

<sup>904</sup> *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No ARB/01/8, Award, 12 May 2005, **CL-0263**, para. 290.

<sup>905</sup> ICJ, *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgement, 20 July 1989, **CL-0288**, para. 128.

<sup>906</sup> **CL-0058**, para. 392. See also, C. Schreuer, "*Protection against Arbitrary or Discriminatory Measures*," in C. A. Rogers, R. P. Alford (eds.), *THE FUTURE OF INVESTMENT ARBITRATION*, Oxford University Press, 2009, **CL-0289**, pp. 184-188; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, **CL-0142**, para. 420; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, **CL-0290**, para. 136.

*In its ordinary meaning, “arbitrary” means “derived from mere opinion”, “capricious”, “unrestrained”, “despotic.” Black’s Law Dictionary defines the term, inter alia, as “done capriciously or at pleasure”, “not done or acting according to reason or judgment”, “depending on the will alone.” . . . The Tribunal finds that the definition in ELSI is close to the ordinary meaning of arbitrary since it emphasizes the element of wilful disregard of the law.*

708. It is well established that arbitrary conduct will constitute a violation of the fair and equitable treatment (or reasonable and equitable treatment) standard.

(ii) *The obligation to refrain from acting in bad faith*

709. Bad faith on the part of a state will clearly constitute a violation of the fair and equitable treatment standard even though “*what is unfair or inequitable need not equate with the outrageous or the egregious [or] acting in bad faith.*”<sup>907</sup>

710. In *Deutsche Bank v. Sri Lanka*, the tribunal found that the Governor of Sri Lanka’s Central Bank acted in bad faith and that this constituted a violation of the fair and equitable treatment standard.<sup>908</sup> The bad faith was established by elements in the record showing that an investigation to determine whether Deutsche Bank had followed proper procedures in relation to a hedging agreement (which Sri Lanka wanted to exit) was a foregone conclusion.

(iii) *The obligation to respect specific and general legitimate expectations of an investor*

711. Another well-recognized aspect of fair and equitable treatment is the protection of an investor’s legitimate expectations.<sup>909</sup> Such expectations can arise from a variety of

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<sup>907</sup> *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, **CL-0181**, para. 116; *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, **CL-0233**, para. 524; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, **CL-0183**, para. 93; *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No ARB/01/8, Award, 12 May 2005, **CL-0290**, para. 280 (“*The tribunal believes [fair and equitable treatment] is an objective requirement unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question. Of course, such an intention and bad faith can aggravate the situation but are not an essential element of the standard.*”).

<sup>908</sup> *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, **CL-0142**, paras. 483-484, 491.

<sup>909</sup> *Saluka Investments BV v. The Czech Republic*, UNCITRAL Case, Partial Award, 17 March 2006, **CL-0216**, paras. 301-302 (calling legitimate expectations the “dominant element” of the fair and equitable treatment standard); *MTD Equity Sdn. Bhd. & MTD Chile SA v. Chile*, ICSID Case No ARB/01/7, Award, 25 May 2004, **CL-0285**, para. 113; *Siemens AG v. The Argentine Republic*, ICSID Case No ARB/02/8, Award, 6 February 2007, **CL-0258**, para. 290; *Joseph Charles Lemire v. Ukraine*, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, **CL-0286**, para. 64.

sources and “can be defined on a general and on a specific level”, as observed the tribunal in *Lemire v Ukraine*.<sup>910</sup>

712. On a general level, an investor may reasonably rely on the fact a government will normally apply the law for its intended purposes, as well as on legislation and general statements and actions of the government in respect of the investment climate. For example, in *Tecmed v Mexico*, the tribunal held:<sup>911</sup>

*Upon making its investment, the fair expectations of the Claimant were that the Mexican laws applicable to such investment, as well as the supervision, control, prevention and punitive powers granted to the authorities in charge of managing such system, would be used for the purpose of assuring compliance with environmental protection, human health and ecological balance goals underlying such laws.*

713. In *Electrabel*,<sup>912</sup> *Saluka*,<sup>913</sup> *Total*,<sup>914</sup> and *Glencore*,<sup>915</sup> investment treaty tribunals confirmed the same. Moreover, the tribunal in *Lemire* held:<sup>916</sup>

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<sup>910</sup> *Joseph Charles Lemire v. Ukraine*, ICSID Case No ARB/06/18, Award, 28 March 2011, **CL-0291**, para. 69; *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Cases No. ARB/05/18 and ARB/07/15, Award, 3 March 2010, **CL-0292**, para. 441 (distinguishing between “specific assurances” to the investor and the investor’s legitimate expectations for the investment environment provided by the State).

<sup>911</sup> *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No ARB (AF)/00/2, Award, 29 May 2003, **CL-0252**, para. 157.

<sup>912</sup> *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable law and Liability, 30 November 2012, **CL-0126**, para. 7.78 (“Fairness and consistency must be assessed against the background of information that the investor knew and should reasonably have known at the time of the investment and of the conduct of the host State. While specific assurances given by the host State may reinforce the investor’s expectations, such an assurance is not always indispensable: *MTD v Chile* (ICSID Case No. ARB/01/7), Award 25 May 2004; *GAMI Investments v Mexico*. UNCITRAL, Final Award, 15 November 2004; and *SD Myers v Canada*, Second Partial Award, 21 October 2002. Specific assurances will simply make a difference in the assessment of the investor’s knowledge and of the reasonability and legitimacy of its expectations.”).

<sup>913</sup> *Saluka Investments BV v. The Czech Republic*, UNCITRAL Case, Partial Award, 17 March 2006, **CL-0216**, para. 329 (“The Tribunal finds that the Claimant’s reasonable expectations to be entitled to protection under the Treaty need not be based on an explicit assurance from the Czech Government. It is sufficient that Nomura (and subsequently Saluka), when making its investment, could reasonably expect that, should serious financial problems arise in the future for all of the Big Four banks equally and in case the Czech Government should consider and provide financial support to overcome these problems, it would do so in a consistent and even-handed way.”).

<sup>914</sup> *Total S.A. v. Argentine Republic*, ICSID Case No ARB/04/1, Decision on Liability, 27 December 2010, **CL-0229**, para. 117-122, 309, 333.

<sup>915</sup> **CL-0032**, para. 1368 (“A State can create legitimate expectations vis-à-vis a foreign investor in two different contexts. In the first context, the State makes representations, assurances, or commitments directly to the investor (or to a narrow class of investors or potential investors). But legal expectations can also be created in some cases by the State’s general legislative and regulatory framework: an investor may make an investment in reasonable reliance upon the stability of that framework, so that in certain circumstances a reform of the framework may breach the investor’s legitimate expectations.”).

<sup>916</sup> *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, **CL-0286**, para. 267.

*On a general level, Claimant could expect a regulatory system for the broadcasting industry which was to be consistent, transparent, fair, reasonable, and enforced without arbitrary or discriminatory decisions. ... Mr. Lemire could equally expect that, once he had been awarded the necessary administrative authorization to invest in the Ukrainian radio sector, there would be a level playing field, and the administrative measures would not be inequitable, unfair, arbitrary or discriminatory.*

714. More recently, the investment treaty tribunals in *OperaFund*, *Antin*, *Masdar*, *Novenergia*, *Charanne* and *Eiser* held that fair and equitable treatment included “an obligation to provide fundamental stability of the economic and legal regime in place” which protects “against changes in the essential characteristics of the regulatory regime relied upon by investors”.<sup>917</sup> The *OperaFund* tribunal held that this “means 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.”<sup>918</sup>

715. Legitimate expectations of an investor will also arise where specific statements of a government are directed at an investor. In the words of the tribunal in *Thunderbird v Mexico*:<sup>919</sup>

*Having considered recent investment case law and the good faith principle of international customary law, the concept of 'legitimate expectations' relates ... to a situation where a contracting party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure ... to honour those expectations could cause the investor (or investment) to suffer damages.*

716. As such, the violation of an investor's general or specific legitimate expectations will lead to a finding of a breach of Article III of the BIT.

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<sup>917</sup> *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, 6 September 2019, **CL-0293**, para. 508; *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Arbitration No. 2015/063, Final Arbitral Award, 15 February 2018, **CL-0294**, paras. 652, 686; *Charanne and Construction Investments v. Spain*, SCC Case No. V062/2012, Award, 21 January 2016, **CL-0295**, paras. 517-518, 536; *Isolux Infrastructure Netherlands, B.V. v. Spain*, SCC Case No. V2013/153, Award, 17 July 2016, **CL-0296**, para. 823; *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018, **CL-0297**, paras. 536-538, 569-570; *Eiser Infrastructure Limited and Energia. Solar Luxembourg S.À r.L. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, **CL-0298**, paras. 371, 382; *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, **CL-0299**, paras. 504, 507.

<sup>918</sup> *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, 6 September 2019, **CL-0293**, para. 509.

<sup>919</sup> *International Thunderbird Gaming Corp. v. The United Mexican States*, UNCITRAL Case, Award, 26 January 2006, **CL-0300**, para. 147.

- (iv) *The obligation to respect certain standards regarding transparency and consistency of the State's actions and its investment framework*

717. The fair and equitable treatment obligation also creates an obligation to provide an appropriate investment environment that is transparent and where state authorities act consistently. At a general level, Professors Reisman and Sloane have written:<sup>920</sup>

*[I]n a BIT regime, the host State must do far more than open its doors to foreign investment and refrain from overt expropriation. It must establish and maintain an appropriate legal, administrative, and regulatory framework, the legal environment that modern investment theory has come to recognize as a conditio sine qua non of the success of private enterprise.*

718. The preamble to the BIT echoes this observation by listing among its goals the creation of “favourable conditions for investments”.<sup>921</sup> In any event, the tribunal in *Total v Argentina* found that all BITs should be found to contain such a requirement:<sup>922</sup>

*Irrespective of their specific wording, undoubtedly these treaties [BITs] are meant to promote foreign direct investment and reflect the signatories' commitments to a hospitable investment climate. Imposing conditions that make an investment unprofitable for a long term investor (for instance, compelling a foreign investor to operate at a loss) is surely not compatible with the underlying assumptions of the BIT regime...*

719. The *Micula* and *LG&E* tribunals further agreed that “the stability of the legal and business framework in the state party is an essential element in the standard of what is fair and equitable treatment.”<sup>923</sup>

720. A particular underpinning of the requirement to provide a stable and predictable investment environment is that States cannot fail to act transparently or consistently with an investor if this would be unfair or inequitable in the circumstances.<sup>924</sup> This

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<sup>920</sup> M. Reisman, R. Sloane, “*Indirect Expropriation and Its Valuation in the BIT Generation*,” *British Yearbook of International Law*, Vol. 75, 2004, **CL-0256**, p. 117.

<sup>921</sup> **CL-0001**, Preamble (Third Recital).

<sup>922</sup> *Total S.A. v Argentine Republic*, ICSID Case No ARB/04/1, Decision on Liability, 27 December 2010, **CL-0229**, para. 167.

<sup>923</sup> *Ioan Micula and others v. Romania*, ICSID Case No ARB/05/20, Award, 11 December 2013, **CL-0233**, para. 528; *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-0271**, para. 125.

<sup>924</sup> *Ioan Micula and others v. Romania*, ICSID Case No ARB/05/20, Award, 11 December 2013, **CL-233**, para. 533.

obligation of transparency and consistency has been recognized by numerous tribunals.<sup>925</sup> For example, the tribunal in *Waste Management v Mexico* remarked that “a complete lack of transparency and candour in an administrative process” would certainly result in a violation of the fair and equitable treatment standard.<sup>926</sup> Further, in a statement that has been cited approvingly,<sup>927</sup> the tribunal in *Tecmed v Mexico* held:<sup>928</sup>

*The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations ... The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that*

<sup>925</sup> *Ibid.*, para. 519; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, **CL-0262**, para. 178; *Total S.A. v. The Argentine Republic*, ICSID Case No ARB/04/01, Decision on Liability, 27 December 2010, **CL-0229**, para. 110; *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004, **CL-0261**, paras. 185-186.

<sup>926</sup> *Waste Management, Inc. v. United Mexican States*, ICSID Case No ARB(AF)/98/2, Award, 30 April 2004, **CL-0290**, para. 98.

<sup>927</sup> *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile*, ICSID Case No ARB/01/7, Award, 25 May 2004, **CL-0285**, paras. 114-115 (“This is the standard that the Tribunal will apply to the facts of this case.”); *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004, **CL-0261**, paras. 185-186 (“[...] this is an objective requirement that does not depend on whether the Respondent has proceeded in good faith or not.”); *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-0271**, para. 127 (“[...] this view is reflected in the *Tecmed* decision, that has been adopted by a succession of tribunals”); *L.E.S.I., S.p.A. and ASTALDI, S.p.A. v. People’s Democratic Republic of Algeria*, ICSID Case No ARB/05/3, Award, 4 November 2008, **CL-0168**, para. 151 (“The *Tecmed v. Mexico* Award of 29 May 2003 has precisely recalled the content of the obligation, for a State, resulting from the commitment to provide to investors a fair and equitable treatment [...]” [Free translation]; “La sentence *Tecmed c. Mexique* du 29 mai 2003 a justement rappelé le contenu de l’obligation résultant, pour un Etat, de l’engagement de réserver aux investisseurs un traitement juste et équitable [...]” [French original]); *Spyridon Roussalis v. Romania* ICSID Case No ARB/06/1, Award, 7 December 2011, **CL-0254**, para. 316 (“This view, reflected in the *Tecmed* decision, has been adopted by a succession of tribunals”); *Ioan Micula and others. v. Romania I*, ICSID Case No ARB/05/20, Award, 11 December 2013, **CL-0233**, para. 532 (“The Tribunal agrees with the general thrust of these statements.”); *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No ARB/01/8, Award, 12 May 2005, **CL-0263**, paras. 279-280 (“The Tribunal believes this is an objective requirement unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question.”); *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, **CL-0136**, Fn. 592; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction, 14 November 2005, **CL-0282**, paras. 237-241 (“The contents of the obligation to provide fair and equitable treatment were described in *Tecmed v. Mexico*, to which both Parties refer [...]”).

<sup>928</sup> *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No ARB (AF)/00/2, Award, 29 May 2003, **CL-0252**, para. 154. See also, *Saluka Investments BV v. The Czech Republic*, UNCITRAL Case, Partial Award, 17 March 2006, **CL-0216**, para. 309 (“A foreign investor whose interests are protected under the Treaty is entitled to expect that the [host state] will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (ie unrelated to some rational policy), or discriminatory (ie based on unjustifiable distinctions).”).



*govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments...*

721. Several tribunals have found this principle to be violated in situations where domestic political considerations led States to leave foreign investors hanging to their detriment, through ambiguous and/or non-transparent conduct, until a locally popular measure was adopted through deceptive means. This was particularly the case in *Nordzucker*,<sup>929</sup> *Tecmed*,<sup>930</sup> *Micula*,<sup>931</sup> *Saluka*<sup>932</sup> and *PSEG*.<sup>933</sup>
722. Moreover, this aspect of fair and equitable treatment may also be breached where a state continuously changes its legislation or regulations in a manner that has a “roller-coaster effect”.<sup>934</sup> In *PSEG v Turkey*, the tribunal held that such behaviour “seriously breached”<sup>935</sup> this obligation.

(v) *The obligation not to cause a denial of justice*

723. The tribunal in *Jan de Nul* observed that the fair and equitable treatment standard “encompasses the notion of denial of justice”.<sup>936</sup> The standard of “fair treatment implies that there is no denial of justice”.<sup>937</sup> As the PCA tribunal observed in *Chevron*, “[t]here is a consistent line of awards over many years, amounting to a jurisprudence constante, deciding that a denial of justice in violation of customary international law will also

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<sup>929</sup> *Nordzucker AG v. The Republic of Poland*, UNCITRAL Case, Second Partial Award (Merits), 28 January 2009, **CL-0301**, paras. 28-85 (respondent failing to respond to an investor and provide relevant information about a privatization process it was participating in).

<sup>930</sup> *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No ARB (AF)/00/2, Award, 29 May 2003, **CL-0252**, paras. 159-164 (respondent failing to renew a landfill permit, despite investor’s understanding it would be renewed, and failing from informing the investor of the real reasons for the non-renewal).

<sup>931</sup> *Ioan Micula and others v. Romania I*, ICSID Case No ARB/05/20, Award, 11 December 2013, **CL-0233**, paras. 864-871 (respondent failing to inform investors that job-creation subsidies would have to be cut six years earlier than planned in light of Romania’s planned accession to the European Union).

<sup>932</sup> *Saluka Investments BV v. The Czech Republic*, UNCITRAL Case, Partial Award, 17 March 2006, **CL-0216**, para. 499 (respondent failing to negotiate with the investor in an “objective, transparent, unbiased and even-handed way” by contrast to Czech investors in the same sector).

<sup>933</sup> *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey*, ICSID Case No ARB/02/5, Award, 19 January 2007, **CL-0302**, para. 246 (respondent failing to handle negotiations with an investor “competently and professionally” where “important communications were never looked at”, civil servants failed inform the investor of significant points of disagreement and to end negotiations that could not succeed, resulting in “serious administrative negligence and inconsistency”).

<sup>934</sup> *Ibid.*, para. 250.

<sup>935</sup> *Id.*, para. 250.

<sup>936</sup> *Jan de Nul N.V. v. Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008, **CL-0303**, para. 188.

<sup>937</sup> *Liman Caspian Oil and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, 22 June 2010, **CL-0304**, para. 268.

amount to a breach of an FET standard in a treaty".<sup>938</sup> Judge Schwebel has recently commented that it is generally accepted that States' obligations under customary international law include "an obligation not to deny justice to foreign nationals, and it is also generally accepted that the standard of fair and equitable treatment typically found in investment treaties encompasses the same obligation".<sup>939</sup>

724. The same thus applies to the "equitable and reasonable treatment and protection" standard found in Article III of the Norway–Latvia BIT.

725. As the tribunal held in *Fabiani (France v. Venezuela)*, denial of justice includes:

*"le refus d'une autorité judiciaire d'exercer ses fonctions et notamment de statuer sur les requêtes qui lui sont soumises"*<sup>940</sup>

*("the refusal of a judicial authority to exercise his functions and, in particular, to give a decision on the request submitted to him").*

<sup>941</sup>

726. As Paulsson has observed, such a "refusal to decide" is among the most readily recognizable types of denial of justice:<sup>942</sup>

*[s]ome denials of justice may be readily recognised: refusal to access to court to defend legal rights, **refusal to decide**, unconscionable delay, manifest discrimination, corruption, or subservience to executive pressure.*

[Emphasis added]

727. More recently the tribunal in *Azinian v Mexico* observed that, "[a] denial of justice could be pleaded if the relevant courts refuse to entertain a suit".<sup>943</sup> The tribunal in *Philip*

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<sup>938</sup> *Chevron Corporation & Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018, **CL-0305**, para 8.23.

<sup>939</sup> S. Schwebel, L. Sobota, R. Manton, *INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS*, 2<sup>nd</sup> ed., Cambridge University Press, 2020, Excerpts, **CL-0306**, p. 66.

<sup>940</sup> *Fabiani Case (No 1) (France v. Venezuela)*, Award, 30 December 1896, in J. B. Moore, *HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY*, Washington Government Printing Office, 1898, Excerpts, **CL-0307**, pp. 4878-4895.

<sup>941</sup> English translation by: A. V. Freeman, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE*, Longmans, 1970, Excerpts, **CL-0308**, p. 242.

<sup>942</sup> J. Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW*, CUP, 2005, Excerpts, **CL-0309**, pp. 204–205.

<sup>943</sup> *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, **CL-0310**, para. 102.

*Morris v Uruguay* held that “the refusal of courts to address a claim can clearly amount to a denial of justice”.<sup>944</sup> It is not, of course, incumbent on the domestic tribunal “to deal with every argument presented in order to reach a conclusion”: the question is whether the domestic tribunal has failed, in substance, “to decide on material aspects” of the foreign national’s claim.<sup>945</sup>

728. The denial of justice standard applies as much to a case of criminal proceedings (as here) as it does to a civil one.<sup>946</sup> As de Visscher observed, the responsibility of the State in this connection “*embrasse tous les cas où l’étranger s’est vu refuser une protection judiciaire adéquate aux droits qui doivent lui être reconnus*”.<sup>947</sup> Paulsson observes that denial of justice encompasses situations where the alien “*is the victim of a miscarriage of justice as a defendant*”.<sup>948</sup>

**b. Norway’s Acts Have Breached the Obligation to Provide Equitable and Reasonable Treatment and Protection found in Article III of the BIT**

729. Norway’s actions constitute a gross and manifest breach of the equitable and reasonable treatment standard found in the BIT.

*(i) The obligation not to act arbitrarily*

730. Norway has breached the requirement not to act arbitrarily. There is no question that, together, Norway’s conduct “*shocks, or at least surprises, a sense of judicial propriety*” as per the words used by the ICJ chamber in *ELSI*. The succession of events is simply shocking. After the Directorate of Fisheries had confirmed that EU vessels could legally catch snow crabs in the Loophole and unload them in Norway, after Norway had inspected North Star’s vessels and approved a large number of offloads of snow crab in 2014 and 2015, after Norwegian officials had welcomed this Latvian investment in Norway with a large economic impact for Baatsfjord, Norway purposely chose to

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<sup>944</sup> *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, **CL-0311**, para. 557.

<sup>945</sup> *Ibid.*

<sup>946</sup> A. V. Freeman, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE*, Longmans, 1970, Excerpts, **CL-0308**, p. 247, 506 which gives the example (*inter alia*) of “*improper arrests or prolonged detention of an alien pending investigation of criminal charges against him*”.

<sup>947</sup> C. de Visscher, “*Le déni de justice en droit international*,” *Collected Courses of the Hague Academy of International Law*, Vol. 52, 1935, **CL-0312**, p. 393.

<sup>948</sup> J. Paulsson, “*Issues arising from findings of denial of justice*,” *Collected Courses of the Hague Academy of International Law*, Vol. 405, 2020, **CL-0313**, p. 26.

destroy Claimants' investment and to engage in what appears to be a harassment campaign against them.

731. As Claimants were contemplating investing in Norway, Norway's Directorate of Fisheries confirmed that snow crab could be harvested in the Loophole with NEAFC licences, by EU vessels, which could then unload them in Norway.<sup>949</sup>
732. In 2014 and until July 2015, Norway conducted multiple inspections of North Star vessels at sea and accepted a large number of its snow crab landings, thereby confirming the validity of North Star's fishing licences.<sup>950</sup>
733. Then, starting in July 2015, Norway's policies towards the snow crab fishery commenced shifting in arbitrary, unpredictable and inconsistent ways, ultimately leading to the destruction of Claimants' snow crab fishing enterprise:
- **17 July 2015:** Norway unexpectedly and arbitrarily changes the characterization of the snow crab from a non-sedentary to a sedentary species pursuant to Article 77(4) of UNCLOS<sup>951</sup>, contradicting Norway's longstanding practice to the contrary dating back to at least 1958;
  - **22 December 2015:** Norway amends the 18 December 2014 snow crab regulations and shifts the prohibition on snow crab fisheries from "*Norway's territorial waters, including the territorial waters at Svalbard*" and "*the economic zone and the fishery protection zone at Svalbard*"<sup>952</sup> to "*Norwegian territorial sea and inland waters, and on the Norwegian continental shelf*" (dropping references to "*territorial waters at Svalbard*"<sup>953</sup>), in effect legally closing off the Loophole, in addition to Svalbard waters;
  - **July 2015-July 2016:** Nonetheless, Norway "*accepts*" fishing of snow crab by EU vessels, independently of its position that they may be a sedentary species

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<sup>949</sup> See paras. 95-97 above.

<sup>950</sup> See paras. 290-297, 312(d) above.

<sup>951</sup> See, paras. 103-105 above; **C-0106** ("*In accordance with Article 77 of the United Nations Convention on the Law of the Sea of 1982 (UNCLOS), the two Coastal States, the Russian Federation and Norway, exercise their sovereign rights in respect of the continental shelf of the Barents Sea for its exploration and development of its natural resources. Therefore, only these two Coastal States have the exclusive rights to harvest sedentary species on the continental shelf of the Barents Sea. Pursuant to paragraph 4 of Article 77 of the Convention, both the Russian Federation and Norway will proceed from the fact that harvesting of sedentary species, including snow crab, in the NEAFC Regulatory Area in the Barents Sea shall not be carried out without the express assent of the Coastal State.*").

<sup>952</sup> See, para. 98 above.

<sup>953</sup> See, para. 112 above.

(and of the 22 December 2015 snow crab regulation), as recognized by the 29 November 2017 decision of the Norwegian Supreme Court in the *Juros Vilkas*<sup>954</sup> matter (*supra*, para. 130). Norwegian officials visit Claimants' joint venture partners Seagourmet and show support for their economic operation;

- **15 July 2016:** seemingly without prior notice, Norway starts issuing fines to EU vessels, notably to the *Juros Vilkas* on 15 July 2016, a Lithuanian vessel that had been authorized by the Norwegian coastguard the day before, 14 July 2016, to offload snow crabs caught with NEAFC licences at the Norwegian port of Vardo<sup>955</sup>;
- **July-September 2016:** Norway still continues to consent to North Star's snow crab catches, caught with NEAFC licences, until its last offload, on 6 September 2016, as shown by the approvals of such offloads on NEAFC forms<sup>956</sup>;
- **27 September 2016:** North Star receives a fine from Norwegian authorities for fishing snow crab in the Loophole during the month of July 2016;<sup>957</sup>
- **16 January 2017:** Norway arrests the Senator, two days after it entered Svalbard waters, to catch snow crabs pursuant to rights granted by the Svalbard Treaty as implemented by the EU fisheries regulation and Latvian law;<sup>958</sup>
- **2017-2019:** Norwegian Minister Per Sandberg issues a number of public declarations showing his discriminatory intent against EU fishermen. North Star is prosecuted, denied justice in Norwegian courts and ordered to pay fines on account of Senator's arrest. The company's reputation is smeared in the Norwegian media.<sup>959</sup>
- **2017-2021:** Norway adopts quotas which are set at an artificially low level, justified by neither economic nor environmental goals. The Norwegian snow crab fishery is effectively brought to its knees and is now but a shadow of what it was

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<sup>954</sup> See, para. 131 above.

<sup>955</sup> See, para. 118 above.

<sup>956</sup> See, paras. 133, 369 above.

<sup>957</sup> See, para. 370 above.

<sup>958</sup> See, para. 373 above.

<sup>959</sup> See, para. 691 above.

in 2015-2016, the whole in support of the Norwegian government's "*big politics*".<sup>960</sup>

734. The way in which Norway has treated Claimants' significant investment in Norway was discriminatory, arbitrary and capricious and thus not only contrary to a rule of law, but also to *the* rule of law.
735. For these reasons, Norway's actions described above have breached the prohibition on arbitrariness encapsulated in Article III of the BIT.

(ii) *The obligation to refrain from acting in bad faith*

736. The same actions as those listed in the preceding section show that Norway was egregiously acting in bad faith. It is simply outrageous for Norway to use various contrivances to change the regime governing Claimants' investment so that Norway can assert its unilateral control over the hitherto common snow crab resource, which Claimants were exploiting for the benefit of their enterprise in Norway.

(iii) *The obligation to respect specific and general legitimate expectations of an investor*

737. Claimants had legitimate expectations that were both general and specific in respect of its investment in Norway and which Norway has breached. Indeed, Norway "*radically altered*" the framework applicable to Claimants' investment and on which Claimants had relied to invest.<sup>961</sup> Norway did not only "*strip [...] [that framework] of its key features*"<sup>962</sup>, but completely destroyed that framework as it applied to North Star.
738. Generally, Claimants made investments in a country that has consistently ranked amongst the safest countries in terms of political or other types of risk. There was therefore a general expectation of stability and that their investments would be welcomed by Norway, an expectation which indeed was fulfilled initially.
739. The existence of the BIT between Norway and Latvia, since 1992, also promotes the existence of general stability regarding investments from investors of one Party in the territory of the other. This is reflected by the terms of the preamble, which shows the

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<sup>960</sup> See, paras. 156, 390 above.

<sup>961</sup> *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, 6 September 2019, **CL-0293**, para. 509.

<sup>962</sup> *Ibid.*

two States' intention to "*create favourable conditions*" for investment amongst themselves as well as "*cooperation*" in this respect.

740. Specifically, Claimants' investments of at least EUR 12.7 million in a snow crab fishing enterprise were made on the basis of Norway's position that it recognized NEAFC snow crab licences issued by EU Member States allowing their vessels to participate in the snow crab fisheries in the Loophole. When Mr. Pildegovics entered into his joint venture agreement with Mr. Levanidov in January 2014, and when the initial steps of Claimants' investments were made, Mr. Pildegovics and North Star were well aware of Norway's general position on this matter:

- In May 2013, the Norwegian Directorate of Fisheries wrote that "*catching of snow crab is unregulated. Norwegian fishing vessels (i.e. vessels entered in the Norwegian Register of Fishing Vessels (Merkeregisteret) can fish for this species in the NOS/Svalbard zone. If Norwegian vessels are to catch snow crab in international waters, they must be registered for fishing in the NEAFC area.*"<sup>963</sup>
- In June 2013, the Directorate sent an email to which it appended the "*regulations for registration and reporting when fishing in waters outside any state's fisheries jurisdiction*" which were applicable to snow crab fishing in the NEAFC area.<sup>964</sup>
- In the same email, the Directorate explained that "*vessels that are to fish in waters outside any state's jurisdiction must be registered through notification to the Directorate of Fisheries*" and that "*the registration notification will be processed and information about the vessel will be sent to the NEAFC Secretariat in London*". The "*processing of registration notifications*" would "*normally take 2-3 days*", indicating that registration was a mere formality.<sup>965</sup>
- In February 2014, the Norwegian Food Safety Authority (*Matilsynet*) wrote that "*EU-registered fishing boats can deliver crab freely in Norwegian crab reception*

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<sup>963</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 23; Email exchange between the Norwegian Directorate of Fisheries, K. Levanidov and S. Ankipov, 9-21 May 2013, **KL-0016**.

<sup>964</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 24; 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.

<sup>965</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 25; Email from the Norwegian Directorate of Fisheries (H.M. Jensen) to S. Ankipov, 12 June 2013, **KL-0017**.

points. If the catch is quota-regulated (king crab, for example), the boats must possess a quota".<sup>966</sup>

- In July 2014, in an email exchange entitled "*Landing a snow crab*", Mr. Sergei Ankipov explained to the Directorate of Fisheries that he was seeking information in relation to "*a project where a fishing vessel under the EU flag will land live snow crabs at approved Norwegian reception stations (factories).*" He asked the Directorate to "*describe or present the process regarding the documents to be sent to the Directorate of Fisheries in this case*".<sup>967</sup>
- On 25 July 2014, the Norwegian Directorate of Fisheries provided the following reply:<sup>968</sup>

1. *In principle, EU vessels can land fish, including snow crab to Norway on an equal footing with Norwegian fishing vessels. There are therefore no other rules for EU vessels when it comes to fresh and live goods. All registered buyers in Finnmark have a good overview of the conditions for landing.*

2. *In principle, no special documentation shall be submitted to the fisheries authorities when the crab is to be landed alive at a Norwegian reception centre, and the crab has been caught outside the Norwegian Economic Zone.*

3. *The catch shall be landed to the buyer who is registered with the Directorate of Fisheries Register of Buyers. Regulations on the duty to provide information: <http://www.fiskeridir.no/fiske-og-fangst/j-meldinger/gjeldende-j-meldinger/j-45-2014> determines the procedures for landing.*

4. *If the vessel is to deliver frozen products, this must be reported 24 hours in advance in accordance with regulations on fishing by foreigners <http://www.fiskeridir.no/fiske-og-fangst/j-meldinger/gjeldende-j-meldinger/j-38-2014>. Vessels that are to fish in the Norwegian Economic Zone are also subject to*

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<sup>966</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 28; Email exchange between Mattilsynet and S. Ankipov, 3-5 February 2014, **KL-0019**.

<sup>967</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 30; Email exchange between the Norwegian Directorate of Fisheries and S. Ankipov, 20-25 July 2014, **KL-0020**.

<sup>968</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 31; Email exchange between the Norwegian Directorate of Fisheries and S. Ankipov, 20-25 July 2014, **KL-0020** [emphasis added].



*reporting according to the same regulations. As the activity is described, it does not fall under these regulations.*

*According to the Norwegian Food Safety Authority, it should also be okay to land live crabs at Norwegian reception centres.*

- The statement from the Norwegian Directorate of Fisheries that EU vessels were being treated “on an equal footing with Norwegian fishing vessels” confirmed the understanding that it could legally rely on an EU-based fishing company for its supplies of snow crabs, provided that the crabs were caught “outside the Norwegian Economic Zone”. Since the Loophole area of the NEAFC zone was considered by the Directorate as “international waters” falling “outside any state’s fisheries jurisdiction”<sup>969</sup>, EU-registered vessels could catch snow crabs there in full compliance with Norwegian laws and regulations.<sup>970</sup>

741. Claimants would never have made the substantial investments they made in Norway without having verified the legality of North Star’s fishing activities with regards to Norwegian law, as confirmed by the above exchanges with Norwegian authorities in 2013 and 2014.

742. Moreover, throughout 2015, Norwegian officials made a number of additional representations further encouraging Claimants’ investments:

- Attendance of the launch of Seagourmet in Baatsfjord, co-hosted by North Star, on 10 June 2015, by the Mayor of Baatsfjord, who personally cut the ribbon marking the official launch of the factory;
- The visit of a delegation of Norwegian parliamentarians, led by Mr. Frank Bakke-Jensen, Norway’s current defence minister, at Baatsfjord, on 4 September 2015, who gave a message of encouragement to North Star and Seagourmet about their joint project,<sup>971</sup> after Norway’s declaration that snow

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<sup>969</sup> Email exchange between the Norwegian Directorate of Fisheries, K. Levanidov and S. Ankipov, 9-21 May 2013, **KL-0016; C-0087; C-0088**.

<sup>970</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 32.

<sup>971</sup> See para. 347 above.

crabs were a sedentary species, thus showing that Norway continued to be supportive of the project;

- The visit of Norway's Minister of Fisheries of Seagourmet's factory on 8 September 2015, co-hosted by North Star,<sup>972</sup> after Norway's declaration that snow crabs were a sedentary species, thus showing that Norway continued to be supportive of North Star's fishing efforts in the Barents Sea and of the joint venture with Seagourmet;
- The approval, by Minister Aspaker, in September 2015, of substantial investments for the refurbishment of the port of Baatsfjord to allow for easier docking and offloading of large vessels, such as those of North Star, simultaneous with her visit in Baatsfjord<sup>973</sup>;
- The visit of a delegation from the Ministry of Trade, Industry and Fisheries on 23 October 2015 of the premises of the joint venture at Baatsfjord, once again giving their encouragements to the joint venture partners<sup>974</sup>;

743. Until July 2016, Norway systematically "*accepted*" that EU vessels holding NEAFC licenses issued by EU Member States could catch snow crabs in the Loophole, irrespective of its position that they may be a sedentary species (and of the 22 December 2015 snow crab regulation), as recognized by the 29 November 2017 decision of the Norwegian Supreme Court in the *Juros Vilkas*<sup>975</sup> matter. This acceptance is also supported by Norway's formal approval of such catches through numerous onboard inspections of EU vessels, including those of North Star, and approval of snow crab landings in Norwegian ports.<sup>976</sup>

744. Norway's issuance of a fine to North Star in September 2016 for having engaged in an activity that Norway had systematically "*accepted*" over a period of years was a blatant breach of Claimants' legitimate expectations, both general and specific, that their investments in Norway were welcome and that they could be operated legally. Norway's acts leading to the closure of the Loophole and the general exclusion of

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<sup>972</sup> See para. 348 above.

<sup>973</sup> See para. 350 above.

<sup>974</sup> See para. 349 above.

<sup>975</sup> See, para. 131 above.

<sup>976</sup> See, para. 326, 338, 341-342, 352, 369 above.

Claimants from the snow crab fishery in the Barents Sea was also a breach of those legitimately held expectations.

745. Without the existence of a welcoming investment environment and Norway's longstanding position on the fact snow crab was non-sedentary, as well as the Directorate of Fisheries' confirmations that NEAFC licences allowed for the harvesting of snow crab in the Loophole by Latvian vessels, Claimants would never have made the extensive investments they made in Norway, which benefitted Norway greatly with the creation of an important number of jobs in a northern town of East Finnmark.

*(iv) The obligation to respect certain standards regarding transparency and consistency of the State's actions as well as of its investment framework*

746. The opacity and inconsistency of Norway's actions towards EU vessel owners engaged in the Barents Sea snow crab fishery constitute further breaches of Article III of the BIT. The relevant actions have already been set out above,<sup>977</sup> but can be recalled in the following manner.
747. First, despite clear statements by the Directorate of Fisheries in 2013 and 2014 that EU vessels could catch snow crab in the international waters of the Loophole and land them in Norway, in July 2015 Norway proceeded to re-characterize snow crabs as a "sedentary species" despite decades of practice to the contrary. Not only was such re-characterization deeply surprising, but it was also wholly inconsistent with years of statements and practice to the contrary. Moreover, there was no scientific development that justified such a change,<sup>978</sup> which was therefore motivated by purely political reasons aimed at asserting control over a resource that was previously considered accessible to all.
748. Second, in September and October 2015, several Norwegian politicians and civil servants visited the premises of the joint venture in Baatsfjord, encouraging the project. This showed Claimants that Norway continued to fully support Claimants' project, despite the 17 July 2015 Malta declaration.

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<sup>977</sup> See, paras. 732, 739, 741 above.

<sup>978</sup> See, paras. 105-107 above.

749. Third, between July 2015 and at least July 2016, despite the snow crab regulations of 22 December 2015 which seemed to prescribe otherwise, Norway consistently provided its express consent to snow crab fishing activities by EU vessels in the Loophole. Norway expressed such consent notably by formally approving the landing of catches in Norway through the NEAFC PSC system, at least until 6 September 2016 in the case of North Star.<sup>979</sup>
750. Fourth, on 14 July 2016, Norway accepted the unload of snow crab by Lithuanian vessel Juros Vilkas, but on the very next day, it issued a fine to the very same vessel for fishing without a permit. Still, Norway continued formally to approve landings by North Star's vessels in the port of Baatsfjord for almost two months thereafter, until 6 September 2016.
751. Fifth, starting in June 2017, Norway adopted snow crab quotas which were neither economically nor environmentally justifiable, as shown by the expert report of Dr. Kaiser.<sup>980</sup> Norwegian vessels simply cannot catch enough snow crab for the fishery to sustain itself economically within the current Norwegian quota environment.<sup>981</sup> At the same time, the very low fishing effort does little to prevent the spreading of the snow crab, an invasive species that could destabilize the Barents Sea ecosystem.<sup>982</sup>
752. Sixth, the manner in which the Norwegian quota is adopted also significantly lacks transparency. It is generally admitted that it is based on political rather than scientific considerations.<sup>983</sup> With respect to snow crab, this is shown by the fact adopted quotas are consistently below IMR's recommendations,<sup>984</sup> even though by contrast, red king crab quotas are consistently above IMR recommendations.<sup>985</sup> This is inconsistent since both snow crab and king crab are invasive species which should be fished as much as possible to limit their invasion of the ecosystem.<sup>986</sup>
753. Seventh, the East Finnmark public prosecutor Morten Daae has made statements that breach the requirement for State officials to act consistently and even-handedly by

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<sup>979</sup> **C-0100; C-0101; C-0102; C-0103.**

<sup>980</sup> Report of Dr. Brooks Kaiser, paras. 94-96.

<sup>981</sup> *Ibid.*, para. 69.

<sup>982</sup> *Id.*, para. 84.

<sup>983</sup> *Id.*, paras. 73-74.

<sup>984</sup> *Id.*, para. 82.

<sup>985</sup> Report of Dr. Brooks Kaiser, para. 83.

<sup>986</sup> *Ibid.*, para. 84.

giving statements to the media that were intentionally orchestrated to smear Claimants. His allegations of “*human trafficking, tax evasion, social dumping and illegal capture*”<sup>987</sup> against North Star were manifestly baseless, as shown by the fact that no criminal proceedings or investigation were ever initiated. Furthermore, as Prosecutor Daae candidly admitted, the real purpose of the so-called allegations was not law enforcement but simply “*to stop the business*”<sup>988</sup>, which Norway certainly did through other means.

754. Eighth, Dagbladet’s smear campaign against Claimants was supported by a series of forged documents which the newspaper obtained *from the Norwegian government itself*, namely through its Indonesian embassy. Despite Claimants’ best efforts, the Norwegian embassy has so far steadfastly refused to disclose the origin of these forged documents, which appear to have served strictly no other purpose than to defame Claimants.<sup>989</sup> It is particularly ridiculous that the embassy refused to disclose information to Claimants on the basis that it would be too cumbersome to do so while simultaneously leaking such information to the press. It is also entirely inconsistent with proper government administration for an embassy to respond to apparent concerns regarding the validity or contents of a document by leaking it to the press instead of contacting the concerned company in Norway (in this case Sea & Coast). Moreover, the submission of documents by the Norwegian embassy to Dagbladet in no way respects the obligation to act consistently or even-handedly, but rather seems to show yet more evidence of a concerted campaign to drive foreign snow crab investors out of Norway.
755. For the above reasons, Norway’s acts breach the requirement to act consistently and transparently encompassed by Article III of the BIT.

(v) *The obligation not to cause a denial of justice*

756. In the present case, there was a denial of justice, by reason of the manner in which the Supreme Court allowed the criminal appeal in the Supreme Court proceedings to be conducted.

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<sup>987</sup> See, paras. 422-433 above; Gedde-Dahl, G. Thorenfeldt, L. Stang, O. Stromman, H. A. Vedlog, “*Plan A Crab Raid In Batsfjord*,” Dagbladet, 29 November 2018, **PP-0203**.

<sup>988</sup> *Ibid.*

<sup>989</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 229; see paras. 425-432 above.

757. The Supreme Court refused to decide on material aspects of the contentions of the defendants and, by so doing, caused them to suffer unconscionable delay.
758. Charges had been brought in these proceedings against North Star and the Senator's captain for violations of the Marine Resources Act (specifically provisions of the Regulations prohibiting the harvesting of snow crabs) on account of the vessel's operations on the Norwegian continental shelf without licence from Norwegian authorities<sup>990</sup>.
759. The defendants pleaded not guilty. A material aspect of the defendants' defence was that the prohibitions under which the defendants were being tried violated the Svalbard Treaty's provisions on equal access to the resources of the archipelago. This violation was a result of Norway's refusal to issue exemptions other than to Norwegian vessels, thus discriminating against foreign vessels. Norway's violation of its international obligations justified (in the argument of the defendants) acquittal.
760. The District Court accepted that, while the wording of the Regulations was not in its view discriminatory on its face, the Fisheries Directorate's practice was to apply it "*to establish exclusivity for Norwegian vessels. The court finds that this practice conflicts with the principle of non-discrimination established by the Svalbard Treaty, provided the treaty is applicable in this case*".<sup>991</sup> The District Court found, however, that the Svalbard Treaty did not apply: it ruled that the Treaty had no application beyond the territorial sea of the Svalbard Archipelago (which has always been the position of the Norwegian government). Norwegian authorities were hence within their right to prohibit foreign vessels from harvesting snow crabs from the Norwegian continental shelf.<sup>992</sup> The District Court found the defendants guilty: both were sentenced to fines and North Star was further ordered to suffer forfeiture of property in an amount of NOK 1,000,000.<sup>993</sup>
761. The defendants appealed the District Court's judgment. The Court of Appeal in turn considered the question of the Regulations' conformity with the Svalbard Treaty: i.e. the requirement of equal treatment. The Court of Appeal found "*no evidence to support the*

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<sup>990</sup> *Rafael Uzakov and SIA North Star LTD v. The Public Prosecuting Authority*, District Court Judgment, 22 June 2017, **C-0039**.

<sup>991</sup> *Ibid.*, p. 8 [emphasis added].

<sup>992</sup> *Id.*

<sup>993</sup> *Id.*

assertion that the prohibition was introduced in order to favour Norwegian citizens by means of a dispensation scheme". In reaching this conclusion, the Court held:<sup>994</sup>

*In connection with the case, the Ministry has stated that dispensations for snow crab catching at present have only been granted to vessels owned by Norwegian citizens, with the exception of five Russian vessels that caught snow crabs in 2016 pursuant to a bilateral agreement between Norway and Russia...*

762. Therefore, the Court was not convinced of the existence of a discriminatory practice (despite the permit given to Russian vessels) and did not "*find it necessary to discuss the matter of the extent to which section 2 of the Regulations is contrary to the principle of equal treatment in the Svalbard Treaty, as the act in any circumstance is a criminal offence according to the general principles of criminal law*".<sup>995</sup> The Court dismissed the appeal.

763. Throughout the proceedings, Claimants were vilified by the Norwegian media, especially in the Norwegian daily newspaper Dagbladet, one of Norway's leading newspapers, which published numerous articles relating to Claimants and their case.<sup>996</sup>

764. In a case management conference on 20 June 2018, Judge Høgetveit Berg of the Supreme Court decided that:<sup>997</sup>

*the appeal was allowed in their entirety, but that the Supreme Court, in the first instance, will hear the question of whether, according to Article 77 of the United Nations Convention on the Law of the Sea, snow crabs are a sedentary species, and whether catching snow crab on the Norwegian continental shelf in a situation where the vessel does not have a valid permit, is a criminal offence whether or not the Spitsbergen Treaty applies in the territories in question, and whether or not the regulation prohibiting the catching of snow crab,*

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<sup>994</sup> *Rafael Uzakov and SIA North Star LTD v. The Public Prosecuting Authority*, Court of Appeal Judgment, 7 February 2018, **C-0040**, p. 17.

<sup>995</sup> **C-0040**.

<sup>996</sup> See e.g., S. Gedded-Dahl, G. Thorenfeldt, L. Stang, O. Stromman, H. A. Vedlog, "Crab drama in Finnmark: Brought at least 50 Indonesians to Båtsfjord on slave contracts," Dagbladet, 28 November 2018, **PP-0204**; the article is also (unusually) published in English, see, S. Gedded-Dahl, G. Thorenfeldt, L. Stang, O. Stromman, H. A. Vedlog, "Secret slave contracts," Dagbladet, 17 December 2018, **C-0179**.

<sup>997</sup> *Rafael Uzakov and SIA North Star LTD v. The Public Prosecuting Authority*, Supreme Court of Norway, Judgment, 20 June 2018, **C-0180**.

*or the manner in which it is practised, in in breach of the principle of non-discrimination.*

765. There was then an oral hearing, on 30–31 October 2018, before five Justices of the Supreme Court.<sup>998</sup> The Supreme Court concluded, on 22 November 2018, that it would be necessary for the case to be heard again, by a panel consisting of more than five Justices.
766. In the case management conference, on 30 November 2018, for the new hearing before an expanded bench of the Supreme Court, Justice Bergh of the Supreme Court “*emphasized that the manner in which the questions to be heard had been determined for the chamber hearing would also apply for the hearing before the enlarged panel*”.<sup>999</sup>
767. The criminal proceedings culminated in an adverse judgment, handed down, on 14 February 2019, by a unanimous Norwegian Supreme Court sitting as an expanded eleven-judge-strong bench.<sup>1000</sup>
768. As the Supreme Court correctly observed, the Norwegian government “*on a general basis has considerable interests in the administration of the relevant sea area, and in relations concerning the Svalbard Treaty*”.<sup>1001</sup> The Supreme Court was confronted with provisions of Norwegian law that provide that Norway’s international law obligations (such as the Svalbard Treaty) override inconsistent provisions of Norwegian law (such as the provisions on which were based the fines against North Star and the captain of the Senator).<sup>1002</sup> The Supreme Court held that the better way to adjudicate the issue would be on the basis of the defendant having brought a civil claim.<sup>1003</sup>
769. The defendants contended that they had a valid European Union permit granted by Latvian authorities to catch snow crab, which was produced by the captain when the

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<sup>998</sup> See, **C-0038**, para. 18.

<sup>999</sup> *Rafael Uzakov and SIA North Star LTD v. The Public Prosecuting Authority*, Supreme Court of Norway, Judgment, 30 November 2018, **C-0181**.

<sup>1000</sup> *Rafael Uzakov and SIA North Star LTD v. The Public Prosecuting Authority*, Supreme Court of Norway, Judgment, 14 February 2019, **C-0038**.

<sup>1001</sup> *Rafael Uzakov and SIA North Star LTD v. The Public Prosecuting Authority*, Supreme Court of Norway, Order, 9 January 2019, **C-0041**, para 24.

<sup>1002</sup> Act relating to management of wild living marine resources (*The Marine Living Resources Act*), 6 June 2008, Section 6; *Rafael Uzakov and SIA North Star LTD v. The Public Prosecuting Authority*, Supreme Court of Norway, Judgment, 14 February 2019, **C-0038**, paras. 77 *et seq.*

<sup>1003</sup> *Ibid.*, para. 80.



Senator was inspected.<sup>1004</sup> The defendants claimed that “*they must be acquitted because the Snow Crab Regulations, as they are worded and practised by Norwegian authorities, contravene the principle of equal rights in the Spitsbergen Treaty*”.<sup>1005</sup> As the Supreme Court noted “[s]pecial emphasis” had been placed by the Claimants “*on the fact that exemption from the prohibition in the Regulations can only be granted to Norwegian citizens and to foreign nationals residing in Norway*”.<sup>1006</sup> The Claimants had not applied for an exemption, but argued that an application would have been rejected “*according to the way in which the Regulations are worded and practised, and that such a rejection would have been in contravention of international law*”, which was incorporated into Norwegian law through section 2 of the Penal Code and section 6 of the Marine Resources Act, which thus precluded punishment in such cases.<sup>1007</sup>

770. The Supreme Court gave a short description of the Svalbard Treaty: it mentioned its Article 1 and then set out its Article 2(1) and (3) and Article 3.
771. The Supreme Court refused to decide on the defendants’ contention that it had a valid European Union permit issued by Latvia. This refusal to decide on a material aspect of the defendants’ claim is linked to another aspect of the Supreme Court’s reasoning that was defective (as regards the denial of justice standard).
772. The Supreme Court then shifted the focus away from the principle of equal rights in the Spitsbergen Treaty, as incorporated into Norwegian law, which was also prominently pleaded by the Claimants. Rather than deciding on whether that principle was breached, (including whether it applied in the waters in which the Claimants had been fishing snow crab), the Supreme Court focused instead on what it reasoned was Norway’s right “*to manage the natural resources*” and its understanding of the Svalbard Treaty to the effect that the States Parties must “*comply with the rules that are implemented to fulfil this task*”.<sup>1008</sup> The Supreme Court stated that “*the Treaty gives Norway a right to enforce a regulatory system under which unauthorised catching is*

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<sup>1004</sup> There seems to be an error in the ILR report of the case, which at paragraph 5 states: “*The captain presented a Russian permit to catch snow crab.*” The Norwegian original has “*Latvian*” rather than “*Russian*”: “*Kaptein A fremla en latvisk tillatelse til å fangste snøkrabbe.*”.

<sup>1005</sup> *Rafael Uzakov and SIA North Star LTD v. The Public Prosecuting Authority*, Supreme Court of Norway, Judgment, 14 February 2019, **C-0038**, para. 62.

<sup>1006</sup> *Rafael Uzakov and SIA North Star LTD v. The Public Prosecuting Authority*, Supreme Court of Norway, Judgment, 14 February 2019, **C-0038**, para. 62.

<sup>1007</sup> *Ibid.*

<sup>1008</sup> *Id.*, para. 66.

*punishable, as long as such a system is practised in a non-discriminatory manner*".<sup>1009</sup>

The Supreme Court refused to engage with whether, as had been a material aspect of the Claimant's defence, the Norwegian system of permits was discriminatory under the Svalbard Treaty given the "*way in which the Regulations are worded and practised*".<sup>1010</sup>

The Claimants had argued that the Regulations were discriminatory as only Norwegian vessels could be given authorization. The Supreme Court, refusing to give judgment on that material part of the Claimants' defence, reasoned that "*a permit is required for anyone who wishes to catch snow crab*" and that "*[u]nauthorised catching is punishable, regardless of nationality*".<sup>1011</sup> It is readily comprehensible why the Supreme Court refused to decide on this aspect of the defendants' contention. There is, of course, no justification under the non-discrimination principle of the Svalbard Treaty, for a system of authorizations that makes Norwegian ownership of the vessel a legal requirement for the granting of authorization.

773. On the basis of this sleight of hand, the Supreme Court went on to hold that there was a principle of Norwegian law according to which any person who has not applied for a necessary permit cannot, as a matter of self-help, do the thing for which he or she would have needed the permit.<sup>1012</sup> The principle developed in case-law was that "*a person who has an obligation to apply for a permit cannot, unpunished, act as if a licence or a permit were granted, regardless of whether the refusal contains errors*".<sup>1013</sup> Here too, the Supreme Court refused to countenance the contention by the defendants that they had valid European Union licenses issued by Latvia.
774. However, this of course fails to account for the particularity of the Svalbard Treaty regime. The defendants knew that, if they had applied for a Norwegian permit, their application would have been rejected, as only vessels owned by Norwegian nationals

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<sup>1009</sup> *Id.*

<sup>1010</sup> *Id.*, para. 62 ("*The defendants claim they must be acquitted because the Snow Crab Regulations, as they are worded and practiced by Norwegian authorities, contravene the principle of equal rights in the Svalbard Treaty. Special emphasis is placed on the fact that exemption from the prohibition in the Regulations can only be granted to Norwegian citizens and to foreign nationals residing in Norway. The defendants have not applied for an exemption, but argue that an application would have been rejected the way the Regulations are worded and practiced, and that such a rejection would have been in contravention of international law. It is held that section 2 of the Penal Code and section 6 of the Marine Resources Act preclude punishment in such cases.*").

<sup>1011</sup> *Id.*, para. 67.

<sup>1012</sup> *Id.*, para. 69 *et seq.*

<sup>1013</sup> *Id.*, para. 71.

qualify. (When the Claimants, after the judgment in the Supreme Court, applied for a Norwegian permit, the application was duly rejected.)<sup>1014</sup>

775. The Supreme Court went on to determine “*whether the principle of equal rights precludes the application of the Norwegian rules such that they must be considered to contravene international law*”.<sup>1015</sup> The Supreme Court held that:<sup>1016</sup>

*It cannot be derived from the Spitsbergen Treaty or other sources of international law that the courts in a criminal case like the one at hand must decide on a preliminary basis whether an exemption should have been granted, as long as there is an alternative legal possibility to obtain an efficient review of the disagreement on the obligations under international law. If there are several acceptable procedures, it must be up to the individual country to decide which procedure to employ. Under Norwegian law, an issue of conflict between Norwegian public administration and international obligations should be solved through a civil action. This is not an unreasonable system. If the party succeeds with a civil claim, the party may—if the general conditions are otherwise met—demand compensation for economic loss and coverage of costs. A civil judgment declaring a regulation invalid will also give Norwegian authorities the possibility to amend the rules in accordance with international law while at the same time taking into account other concerns, such as protection of natural resources.*

776. The question is not whether this is “*an unreasonable system*” from the perspective of Norwegian authorities. The Claimants have exercised their rights under international law as incorporated under Norwegian law. Norwegian authorities and courts are not free to interpose administrative law mechanisms to limit international law rights, and most certainly not in this arbitrary and discretionary manner.
777. The principle that is supposed to have developed in case-law about punishing acts for which Norwegian authorities impose “*an obligation to apply for a permit*”, is applied in a way in which renders the Claimants’ rights ineffective. The Claimants have been

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<sup>1014</sup> Letter from the Norwegian Directorate of Fisheries to North Star, 13 May 2019, **PP-0200**.

<sup>1015</sup> *Rafael Uzakov and SIA North Star LTD v. The Public Prosecuting Authority*, Supreme Court of Norway, Judgment, 14 February 2019, **C-0038**, para. 76.

<sup>1016</sup> *Ibid.*, para. 80.

made to suffer unconscionable delay in a way which would bar effective remedies in that case and in other similar cases.

778. The Supreme Court refused to exercise its functions and to give a decision on the claims of the Claimants (as defendants in the criminal proceedings).
779. The Supreme Court refused in substance to decide on material aspects of the Claimants' claims. This allowed the Supreme Court to uphold the criminal convictions without properly responding to the Claimants' defence as to the European Union permit and the principle of discrimination under the Svalbard Treaty. The manner in which the Supreme Court conducted the case allowed it to disregard that the Norwegian system of permits was discriminatory under the Svalbard Treaty, as incorporated into domestic law. Under international law, and as incorporated in Norwegian law, this would have required an acquittal. It constituted procedural unfairness to such a degree that the process amounted to a denial of justice.
780. As such, the Supreme Court's application of the principle about punishing acts for which Norwegian authorities impose "*an obligation to apply for a permit*", constitutes a denial of justice as it constituted a failure to decide an important part of North Star's defense in the proceedings.
781. The Supreme Court failed in substance to decide on material aspects of the defendants' claims, which in turn led to justice being delayed. The denial of justice standard "*comprend non seulement le refus d'une autorité judiciaire d'exercer ses fonctions, et, notamment, de statuer sur les requêtes qui lui sont soumises, mais aussi les retards obstinés de sa part à prononcer ses sentences*"<sup>1017</sup>.
782. By refusing to give a decision on material aspects of the claims of the defendants, and by making them file a civil suit (which is still ongoing) in order to have their contentions properly decided on, the Supreme Court committed a denial of justice, including by causing unconscionable delay.
783. Finally, this denial of justice is further confirmed by the appointment of Mr. Stabell, a government lawyer, as deputy prosecutor.<sup>1018</sup> By allowing this appointment which blurs the lines between the executive and the independent position of State prosecutor, the

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<sup>1017</sup> *Fabiani Case (No 1) (France v. Venezuela)*, Award, 30 December 1896, in J. B. Moore, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY, Washington Government Printing Office, 1898, Excerpts, **CL-0367**, p. 4878, at p. 4895.

<sup>1018</sup> See paras. 405-406 above.

Supreme Court appears to further have shown “*subservience to executive pressure*”<sup>1019</sup>, a further ground to find a denial of justice.

**C. NORWAY HAS BREACHED THE OBLIGATION TO PROVIDE MOST FAVOURED NATION TREATMENT FOUND IN ARTICLE IV OF THE BIT (ARTICLE IV OF THE BIT)**

784. Norway has breached its obligation to provide most favoured nation (**MFN**) treatment pursuant to Article IV of the BIT in multiple ways. The MFN obligation requires Norway to grant Latvian investors, both in fact and in law (such as under other investment treaties), more favourable treatment it has granted to investors of third states **(a)**. As a matter of fact, Norway has breached Article IV by granting more favourable treatment to Russian snow crab fishing vessels and operators **(b)**. As a matter of law, Norway has breached Article IV of the BIT by failing to grant Claimants national treatment, which has been granted to Russian investors pursuant to the Norway-Russian Federation BIT **(c)**. As a matter of law, Norway must also grant Claimants the better treatment between that set out in the Latvia-Norway BIT and that set out in other international agreements, since such treatment has been granted to Russian investors under the Norway-Russian Federation BIT, which must lead to a finding of breach of the present BIT or, in the absence of such a finding, whether Claimants are granted better treatment under a number of other international treaties, which Norway has failed to accord **(d)**.

**a. The Law on Most Favoured Nation Treatment**

785. Article IV of the BIT provides:

*Investments made by investors of one Contracting Party in the territory of the other Contracting Party shall be accorded treatment no less favourable than that accorded to investments made by investors of any third State.*

*The treatment granted under this article shall not apply to any advantage accorded to investors of a third State by the other Contracting Party based on any existing or future customs or economic union or similar international agreement, or free trade agreement to which either of the Contracting Parties is or becomes a party. Neither shall such treatment relate to any advantage which either Contracting Party accords to investors of a third State by virtue of a double taxation agreement or other agreements regarding matters of taxation or any domestic legislation relating to taxation.*

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<sup>1019</sup>

J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW, CUP, 2005, Excerpts, **CL-0309**, pp. 204–205.

786. This obligation requires that Norway provide Claimants the best treatment (in law or fact) Norway has provided to any national of a third State.<sup>1020</sup> To establish a violation of this obligation, there must be treatment by Norway applied to Claimants and this treatment must be less favourable than treatment to another investor of a third State.
787. The term “*treatment*” is not defined in the BIT. According to the International Law Commission’s 1978 Draft Articles on MFN,<sup>1021</sup> treatment can be based upon “*a treaty, another agreement or a unilateral, legislative, or other act, or mere practice*”.<sup>1022</sup> The mere fact of favourable treatment is enough to raise the claim,<sup>1023</sup> the extent of which will be determined by the actual favours extended by the granting State to the third State.<sup>1024</sup> In *Bayindir v Pakistan* the tribunal held that “*treatment*” is not limited only to “*regulatory treatment*” and can include the way the investor is treated as compared to local or third country investors.<sup>1025</sup>
788. Less favourable treatment (discrimination) can be either *de jure* or *de facto*. In the context of a national treatment claim, the tribunal in *SD Myers v Canada* held that two factors have to be taken into consideration to establish *de facto* less favourable treatment:<sup>1026</sup>
- whether the practical effect of the measure is to create a disproportionate benefit for nationals over non-nationals [and] whether the measure, on its face, appears to favour its nationals over non-nationals who are protected by the relevant treaty.*
789. The text of Article III does not require a protectionist intent to establish the existence of less favourable treatment. This has been confirmed by several tribunals applying similar provisions.<sup>1027</sup> In *Siemens v Argentina*, the tribunal stated:<sup>1028</sup>

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<sup>1020</sup> *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467, Award, 1 July 2004, **CL-0261**, paras. 167-179.

<sup>1021</sup> ILC, Draft Articles on most-favoured-nation clauses with commentaries, 1978, **CL-0314**.

<sup>1022</sup> *Ibid.*, Article 8, Commentary (1).

<sup>1023</sup> *Id.*, Article 5, Commentary (6).

<sup>1024</sup> *Id.*, Article 8, Commentary (7).

<sup>1025</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction, 14 November 2005, **CL-0282**, para. 206.

<sup>1026</sup> *S.D. Myers, Inc. v. Canada*, UNCITRAL Case, Partial Award, 13 November 2000, **CL-0315**, para. 252. See also, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No ARB/05/8, Award, 11 September 2007, **CL-0316**, para. 368.

<sup>1027</sup> *S.D. Myers, Inc. v. Canada*, UNCITRAL Case, Partial Award, 13 November 2000, **CL-0315**, para. 254.

<sup>1028</sup> *Siemens A.G. v. The Argentine Republic*, ICSID Case No ARB/02/8, Award, 6 February 2007, **CL-0258**, para. 321. See also, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1,

*The Tribunal concurs that intent is not decisive or essential for a finding of discrimination, and that the impact of the measure on the investment would be the determining factor to ascertain whether it had resulted in non-discriminatory treatment.*

790. Determining whether various investors can be compared to determine whether one has been less favourably treated than the other is a factual determination that will depend on the circumstances. In *Occidental v. Ecuador*, the tribunal stated that comparables cannot be interpreted in a narrow sense. That tribunal held that “*the purpose of national treatment [or most favoured nation treatment] is to protect investors as compared to local producers [or investors of third countries], and this cannot be done by addressing exclusively the sector in which that particular activity is undertaken.*”<sup>1029</sup> In *Occidental*, the tribunal held that a US investor being refused VAT rebates was treated less favourably than an Ecuadorian producer from another economic sector that had received the same VAT rebates.
791. This is generally recognized by authors: “*The weight of authority clearly supports the view that an MFN rule grants a claimant the right to benefit from substantive guarantees contained in third treaties.*”<sup>1030</sup> In the French international law dictionary directed by Professor Salmon, an MFN clause is defined as a “*provision frequently used, especially in trade treaties, by which parties guarantee to each other more important benefits that one of them latterly grants to a third State by another treaty on the same subject matter.*”<sup>1031</sup>

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Award, 16 December 2002, **CL-0317**, para. 181 (“Not self-evident that any departure from national treatment must be explicitly shown to be a result of the investor’s nationality... There is no such language in Article 1102. Rather, Article 1102 by its terms suggests that it is sufficient to show less favorable treatment for the foreign investor than for domestic investors in like circumstances . . . the Tribunal is prepared to assume that the differential treatment is a result of the Claimant’s nationality, at least in the absence of any evidence to the contrary.”); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, **CL-0262**, para. 390.

<sup>1029</sup> *Occidental Exploration and Production Company v. Republic of Ecuador*, UNCITRAL Case, Final Award, 1 July 2004, **CL-0261**, paras. 174-176.

<sup>1030</sup> R. Dolzer, C. Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW*, Oxford University Press, 2<sup>nd</sup> ed., 2012, **CL-0097**, p. 211.

<sup>1031</sup> J. Salmon (ed.), *DICTIONNAIRE DE DROIT INTERNATIONAL*, 2001, **CL-0192**, p. 178 (« *Disposition fréquemment utilisée, spécialement dans les traités de commerce, par laquelle les parties se garantissent le bénéfice d’avantages plus importants que l’une d’entre elles viendrait à accorder ultérieurement à un État tiers par un autre traité portant sur la même question.* » [French original]).

792. In investment arbitration, the first case in which the arbitral tribunal imported a substantive clause from a treaty concluded with a third state via MFN was *MTD v. Chile* in 2004. It was followed by the *LESI* tribunal and others.<sup>1032</sup>
793. This view is also supported by the International Court of Justice which held in 1952 that: “*These treaties show that the intention of the most-favoured-nation clauses was to establish and to maintain at all times fundamental equality without discrimination among all of the countries concerned.*”<sup>1033</sup>
794. Furthermore, it is commonly considered that “*MFN clauses are designed to import standards of treatment unless specific treaty text expresses a clear intent to specifically restrict that practice.*”<sup>1034</sup>
795. Article IV of the Latvia-Norway BIT therefore requires not only Norway to grant Latvian investors the more favourable treatment granted to third country investors as a matter of fact, but also the same standards of treatment granted to third country investors under other investment treaties, such as, in the present case, the Norway-Russian Federation BIT.

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<sup>1032</sup> L.E.S.I. S.p.A. and ASTATLDI S.p.A. v. République algérienne démocratique et populaire, ICSID Case No. ARB/05/3, Award, 12 November 2008, **CL-0318**, p. 44 (“*Despite that it is included in Chapter II of the Agreement entitled “Promotion of the investment”, the MFN clause, both by its spirit and its letter, is designed to be applicable to all aspects of the “treatment” of foreign investments, whether it concerns their promotion or their protection. The arbitral Tribunal, who is not bound by the titles of the different sections of the bilateral Agreement, but only to the real common intention of the Contracting Parties, considers that it would be contrary to that intention to limit the application of the MFN clause, as interpreted in light of the object and purpose of the treaty, and of the idea of promotion of investments, by adding to the clause an element that it does not include. The application of the MFN clause provides to the Claimants fair and equitable treatment ensured by more favourable bilateral investment treaties concluded by Algeria.*” [Free translation]; See also, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, **CL-0268**, para. 575.

<sup>1033</sup> ICJ, *Case concerning rights of nationals of the United States of America in Morocco (France v. United States of America)*, Judgment, 27 August 1952, **CL-0319**, p. 192.

<sup>1034</sup> S. Batifort, J. Benton Heath, “*The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization,*” *The American Journal of International Law*, Vol. 111, No. 4, 2018, **CL-0320**, p. 895.



**b. Norway's Acts Have Breached the Obligation to Provide Most Favoured Nation Treatment (Article IV of the BIT)**

*i) Breach in fact*

796. Norway has breached Article IV of the BIT by granting Russian vessels and operators in the snow crab harvesting business better treatment than Claimants.
797. It is a judicially admitted fact that Norway has granted a number of dispensations (*i.e.*, fishing authorizations) to Russian vessels to harvest snow crabs in Norwegian waters since 2016. This was recognized by the East Finnmark Court of Appeal in its judgment concerning North Star, where it cited a statement by the Norwegian government to that effect:<sup>1035</sup>

*In connection with the case, the Ministry has stated that dispensations for snow crab catching at present have only been granted to vessels owned by Norwegian citizens, with the exception of five Russian vessels that caught snow crabs in 2016 pursuant to a bilateral agreement between Norway and Russia...*

[Emphasis added]

798. There is therefore no question that by granting such dispensations to Russian vessels, yet by continuously rejecting North Star's applications for the same, Norway has breached Article IV of the BIT. Furthermore, the statements from Norway's Directorate of Fisheries stating that Norway has never granted such exemption for foreign vessels blatantly contradicts the judicial finding of the East Finnmark Court of Appeal and records of the 45<sup>th</sup> Norway Russia Joint Fishery Commission of October 2015<sup>1036</sup>. This further compounds Norway's breach of Article IV, as a matter of fact. That these dispensations are granted on the basis of a bilateral agreement changes nothing since such an agreement obviously does not come within the exceptions found in Article IV(2).<sup>1037</sup>

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<sup>1035</sup> *Rafael Uzakov and SIA North Star Ltd. v. The Public Prosecuting Authority*, Court of Appeal, Judgment, 7 February 2018, **C-0040**, p. 17.

<sup>1036</sup> *Ibid.*; Norway-Russia Joint Fishery Commission, Minutes of the Meeting, 45<sup>th</sup> Session, 6-9 October 2015, **C-0182**.

<sup>1037</sup> BIT, **CL-0001**, Article IV(2) ("The treatment granted under this article shall not apply to any advantage accorded to investors of a third State by the other Contracting Party based on any existing or future customs or economic union or similar international agreement, or free trade agreement to which either of

ii) *Violation of national treatment through the Norway-Russian Federation BIT*

799. Norway has also breached Article IV of the Latvia-Norway BIT by failing to accord Claimants national treatment granted to investments by Russian investors in Norway pursuant to the Norway-Russian Federation BIT.

800. Article 3 of the Norway-Russian Federation BIT provides that:

*Each Contracting Party will accord in its territory for the investments made by investors of other Contracting Party fair and equitable treatment.*

*The treatment referred to in paragraph 1 of this Article shall as a minimum not be less favourable than that which is granted with regard to investments by investors of any third state.*

*Subject to paragraphs 1 and 2 of this Article each Contracting Party shall, unless other treatment is required by its legislation, accord in its territory to investments made by investors of the other Contracting Party treatment no less favourable than that which it accords to investments by its own investors.*

[Emphasis added]

801. The purpose of a national treatment clause is to “*oblige a host state to make no negative differentiation between foreign and national investors when enacting and applying its rules and regulations and thus to promote the position of the foreign investor to the level accorded to nationals.*”<sup>1038</sup> It usually applies once the business is established on the territory of the host state, if not expressly stated otherwise in the treaty.<sup>1039</sup>

802. Even if the Norway-Russian Federation BIT subjects national treatment to the caveat “*unless other treatment is required by its legislation*” in respect of Norwegian legislation, Norway’s relevant legislation regarding access to the snow crab fisheries in the Barents Sea is the Marine Resources Act. Again, section 6 of the Act states that the act will be overridden by Norway’s international obligations should the act (or Norway’s application of the act) be inconsistent with these obligations.

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*the Contracting Parties is or becomes party. Neither shall such treatment relate to any advantage which either Contracting Party accords to investors of a third State by virtue of a double taxation agreement or other agreements regarding matters of taxation or any domestic legislation relating to taxation.”).*

<sup>1038</sup> R. Dolzer, C. Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW, Oxford University Press, 2<sup>nd</sup> ed., 2012, **CL-0097**, p. 198.

<sup>1039</sup> *Ibid.*, p. 199.

803. As shown above, Norway expressly recognized the legality of Claimants' NEAFC licences and has the obligation to grant access to the snow crab fishery in the Svalbard Zone pursuant to the Svalbard Treaty.
804. By allowing Norwegian vessels to catch snow crab in the zones subject to these international obligations binding upon itself (*i.e.*, by granting dispensations for Norwegian vessels<sup>1040</sup> but not for EU vessels), Norway has violated the national treatment obligation it has given to Claimants under Article IV of the Latvia-Norway BIT.

*iii) The obligation to provide better treatment as between the BIT and other international treaties*

805. Norway has also the obligation to ensure that it grants Latvian investors and their investments the better treatment as between the Latvia-Norway BIT and other international treaties in force between Latvia and Norway, pursuant to Article IV of the Latvia-Norway BIT, which incorporates substantive commitments made under Norway's other investment treaties.
806. As such, Article 12 of Russia-Norway BIT reads as follow:<sup>1041</sup>

*If, on the basis of the legislation of a Contracting Party or on the basis of an international agreement binding upon both Contracting Parties, investments of an investor of the other Contracting Party, is accorded treatment more favourable than that which is provided for in this Agreement, the more favourable treatment shall apply.*

807. The correct application of such a clause is that the Tribunal should first establish whether Norway has breached the BIT and that full reparation of Claimants' losses is required. If such a breach and an obligation to fully compensate are established, there is no need to examine other international law obligations binding as between Norway and Latvia.
808. However, in the unlikely event that the Tribunal should find no independent breach of the BIT, then the Tribunal must examine other relevant international obligations in force between Norway and Latvia to determine if such obligations may have been breached and, if so, apply these obligations as granting Claimants more favourable treatment. Claimants have shown above the extent of such other obligations being breached,

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<sup>1040</sup> Expert Report of Dr. Brooks Kaiser, para. 70, indent 1.

<sup>1041</sup> **CL-0022**, Article 3.

under UNCLOS,<sup>1042</sup> the customary international law principle (or general principle) of acquired rights,<sup>1043</sup> as well as the Svalbard Treaty.<sup>1044</sup> Should the Tribunal find no independent breach of the BIT, the Tribunal must, as a matter of applicable law, examine these other treaties (and any other relevant treaty in force between Latvia and Norway). When it does it will find a breach of these treaties, as explained above, causing Claimants a loss identical to the loss caused by the breach of the BIT's provisions, which requires full reparation of Claimants' loss.

**D. NORWAY HAS BREACHED THE OBLIGATION TO ACCEPT INVESTMENTS IN ACCORDANCE WITH ITS LAWS (ARTICLE III OF THE BIT)**

809. By failing to allow Claimants to exercise their rights under Svalbard licenses issued by Latvia, on the basis of EU Regulations, to fish snow crab around the Svalbard Archipelago, Norway has committed a further violation of the BIT. That is, it has failed to accept those licences in accordance with its laws and regulation. Indeed, pursuant to Article 6 of Norway's Marine Resources Act, international obligations relating to fisheries and licences, which must include the 1920 Svalbard Treaty, override any inconsistent aspect of the Marine Resources Act.

810. Article III of the BIT provides:

*Each Contracting Party shall promote and encourage in its territory investments of investors of the other Contracting Party and accept such investments in accordance with its laws and regulations and accord them equitable and reasonable treatment and protection. Such investments shall be subject to the laws and regulations of the contracting party in the territory of which the investments are made.*

[Emphasis added]

811. The terms of the BIT are clear. Where Norway fails to “accept” a Latvian investment in Norway in accordance with Norwegian law (as Norwegian law *should* be applied), this becomes not only a violation of Norwegian law but also a violation of the BIT. This provision, which is within the Tribunal's jurisdiction to interpret and apply, means that the Tribunal can review whether Norway has properly applied its own laws. As such, where Norway has made an international commitment to apply its laws to accept

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<sup>1042</sup> See paras. 597-613 above.

<sup>1043</sup> See paras. 614-628 above.

<sup>1044</sup> See paras. 629-672 above.

Latvian investments, no particular deference should be given to how the Norwegian administration or judiciary has applied its laws, since Norway has consented to such a review by an ICSID tribunal.

812. As shown above,<sup>1045</sup> Norway has failed to accept the properly issued Svalbard licences of Claimants even though Norwegian law, which is subject to the proper application of the Svalbard Treaty in this respect, and requires their acceptance. The only conclusion is therefore that Norway, in violation of Article III of the BIT, has failed to “*accept such investments in accordance with its laws and regulations*”.

## IX. REPARATION

### E. OVERVIEW OF CLAIMANTS’ POSITION ON REPARATION

813. Claimants seek full reparation of the financial losses caused to them by Norway’s breaches of the BIT. Claimants’ financial losses are equal to the additional profits North Star would have earned, but for Norway’s illegal actions which prevented it from operating its snow crab fishing business.
814. Since Claimants have been prevented by Norway from exercising their snow crab fishing rights in the Loophole since 27 September 2016 (when it issued a fine to North Star on account of Senator’s snow crab fishing activities in the Loophole), and from exercising their fishing rights related to the Svalbard zone since 16 January 2017 (when Senator was arrested while fishing in that zone), these two dates are considered as the dates of breach for purposes of quantification of their damages (***Dates of Breach***). From an economic standpoint, Claimants’ snow crab fishing operations have been halted by Norway since the earlier date (27 September 2016) and their damages are therefore calculated starting from that date.
815. Claimants’ submissions on reparation are supported by two expert reports:
- (a) The expert report of Mr. Kiran Sequeira of the firm Versant Partners, LLC (***Versant***), which quantifies Claimants’ losses caused by Norway’s breaches of the BIT;

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<sup>1045</sup> See paras. 372-406 above.

- (b) The expert report of Dr. Brooks Kaiser, which presents the scientific data regarding snow crab populations in relevant areas of the Barents Sea and discusses potential scenarios for the management of the snow crab fishery in the “*but for*” scenario;
816. In *Section B*, Claimants present their position as to whether restitution in kind is possible or appropriate in this case, explaining their election of an award of financial compensation.
817. In *Section C*, Claimants lay down the principles applicable to the determination of financial compensation payable by Norway as a result of the breach of its obligations under the BIT. In accordance with customary international law, the applicable standard of compensation is full reparation of the loss suffered by the successful claimant as the result of the internationally wrongful act, calculated as of the date of payment (*subsection a*). The relevant methodologies applied by arbitral tribunals to establish the amount of full reparation are thereafter discussed (*subsection b*).
818. In *Section D*, Claimants present the quantification of their damages, as established by Versant’s report. The quantification exercise depends on a comparison between Claimants’ current economic position (the “*actual*” scenario) and the economic position they would have enjoyed in the absence of Norway’s breaches of the BIT (the “*but for*” scenario). The section therefore begins with a presentation of the differences between the “*actual*” and the “*but for*” scenarios (*subsection a*). It then proceeds to an examination of Claimants’ calculations of their lost profits from the Date of Breach up to the valuation date of 1<sup>st</sup> January 2021 (*subsection b*) and of the loss of value sustained by their investments as of that date (*subsection c*). The section is concluded by an overview of Claimants’ quantification of their damages (*subsection d*).
819. In the final sections, Claimants lay down the principles applicable to the award of interest (*Section E*) and costs (*Section F*) by the Tribunal and present their position in this regard.

## **F. RESTITUTION**

820. The BIT does not provide a standard of compensation other than for a lawful expropriation.<sup>1046</sup> In the absence of a *lex specialis* applicable in the event of a breach of the treaty, the standard of compensation is governed by customary international law,

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<sup>1046</sup>

CL-0001.

which requires that a State that has breached its obligations must make reparation to the victim that is “*sufficient to compensate the affected party fully and to eliminate the consequences of the state’s action.*”<sup>1047</sup>

821. In the *Case Concerning The Factory At Chorzów*, the Permanent Court of International Justice provided an authoritative description of this principle:<sup>1048</sup>

*The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it.*

822. The full reparation principle has more recently been codified in the International Law Commission Articles, which reflect customary international law on State responsibility.<sup>1049</sup> Under Article 1 of the ILC Articles, every “*internationally wrongful act*” of a State entails the “*international responsibility*” of that State.<sup>1050</sup> An “*internationally wrongful act*” is defined under Article 2 as an act or omission which is (i) attributable to the State under international law, and (ii) constitutes a breach of an international obligation of that State.<sup>1051</sup>
823. ILC Article 31 embodies *Chorzów’s* holding that the “*responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.*”<sup>1052</sup> ILC Article 34 (“*Forms of reparation*”) gives further guidance to the form that full reparation may take by providing that “[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and

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<sup>1047</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, **CL-0253**, para. 8.2.7.

<sup>1048</sup> PCIJ, *Case Concerning The Factory At Chorzów*, Judgment on the Merits, 13 September 1928, **CL-0322**, p. 47.

<sup>1049</sup> See, e.g., *ConocoPhillips v. Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, 3 September 2013, **CL-0321**, para. 339 (listing and concurring with a number of tribunals and authorities declaring the ILC Articles to codify or declare customary international law).

<sup>1050</sup> ILC, Articles on Responsibility of States for Internationally Wrongful Acts, 2001, **CL-0255**, Article 1.

<sup>1051</sup> *Ibid.* Part 1, Ch. 1, Article 2.

<sup>1052</sup> *Ibid.* Part 2, Ch. 1, Article 31.

*satisfaction, either singly or in combination.*"<sup>1053</sup> The full reparation standard applies to all internationally wrongful acts by the State, including any breach of an investment treaty.<sup>1054</sup>

824. Following *Chorzów*, the starting point is to consider whether restitution in kind is “possible” in the circumstances of the present case. The possibility of restitution in kind must be assessed in light of the practice of arbitral tribunals in investment treaty cases.
825. In *CMS v. Argentina*, the tribunal considered the possibility of ordering “restitution by negotiation of the parties” in order to rebalance contractual relations between Argentina and the claimants.<sup>1055</sup> Ultimately, the tribunal decided to award financial compensation as it did not want to let the claimant wait for an agreed settlement of the dispute between the parties.<sup>1056</sup>
826. The lack of an agreement between the parties to an investment treaty has also been found to support an award of financial compensation instead of restitution. For example, in *Enron v. Argentina*, the Tribunal found that the relevant bilateral investment treaty did not contain a provision governing the standard of reparation. “Absent an agreed form of restitution by means of renegotiation of contracts or otherwise, the appropriate standard of reparation under international law is compensation [...]”.<sup>1057</sup>

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<sup>1053</sup> *Ibid.* Part 2, Ch. 1, Article 34.

<sup>1054</sup> See e.g., *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, **CL-0323**, para. 846 (“Because the Tribunal has found breaches of FET (in addition to an expropriation), the Tribunal considers that the “full reparation” principle under customary international law must be applied as a consequence of its decision on liability”).

<sup>1055</sup> *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, **CL-0263**, para. 407.

<sup>1056</sup> *Ibid.*, paras. 407-408.

<sup>1057</sup> *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007, **CL-0184**, para. 359. Compare: *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, **CL-0117**, paras. 75-81.



827. In *Nykomb v. Latvia*, even though the tribunal confirmed the possibility of restitution, it opted for financial compensation since there would be no difference for the claimant, who was in any event entitled to the payment of certain sums of money.<sup>1058</sup>
828. Restitution in kind has been perceived as creating tensions with the State's sovereignty when restitution would call for a change in legislative acts or administrative policies. As noted by Professor Steffen Hindelang:<sup>1059</sup>

*[...] as soon as an author State has brought about the wrongful act by legislative or administrative acts, the possibility of restitution is seriously called in question – allegedly due to an illegitimate interference with its sovereignty.*

829. Based on his analysis of the case law, the same author distinguishes two situations encountered in investment treaty cases, both of which ultimately justify a preference for financial compensation over restitution in kind:<sup>1060</sup>

*If one wants to sum up and attempt a rough categorisation of the case law [...], one could form two broad groups.*

*The first and larger one comprises all those cases in which the claimant opted for compensation. The validity of such election – when accompanied by some reasoning – was justified by the tribunals by taking recourse to the general law of State responsibility.*

*The second group relates to those cases where there was no election or an election which referred to the “hierarchy of the forms of reparation”. The tribunals equally tried to base their reasoning – more or less closely – on the general rules on State responsibility thereby affirming – in principle – their continuing validity and applicability within the context of investment treaties. However, some awards seem to deviate from the general rules on State responsibility insofar as legal restitution is involved. Decisions display patterns of arguments put forward to restrict or even rule out the admissibility of restitution in favour of compensation as the preferred form of reparation*

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<sup>1058</sup> “An award obliging the Republic to make payments to Windau in accordance with the Contract would also in effect be equivalent to ordering payment under Contract No. 16/07 [- which would amount to the juridical restitution of the contract -] in the present Treaty arbitration. The Arbitral Tribunal therefore finds the appropriate approach, for the time up to the time of this award, to be an assessment of compensation for the losses or damages inflicted on the Claimant's investments.” Cf. *Nykomb Synergetics Technology Holding AB v. Latvia*, Arbitration Institute of the Stockholm Chamber of Commerce, Award, 16 December 2003, **CL-0324**, Section 5.1.

<sup>1059</sup> S. Hindelang, “Restitution and Compensation Reconstructing the Relationship in Investment Treaty Law” in *INTERNATIONAL INVESTMENT LAW AND GENERAL INTERNATIONAL LAW: FROM CLINICAL ISOLATION TO SYSTEMIC INTEGRATION*, Hofmann/Tams (eds.), Nomos, Walter Hallstein-Institut (WHI) Paper No. 02/11, 16 November 2011, **CL-0325**, p. 11.

<sup>1060</sup> *Ibid.* p. 11-13.

*within the context of international responsibility flowing from the breach of an investment treaty.*

830. Claimants' position is consistent with arbitral practice as shown by the above authorities: restitution in kind in the present case would either be indistinguishable from financial compensation; impracticable (or impossible) due to Norway's legislative acts and consistent administrative practices; or in any event unlikely to achieve full reparation and therefore unsuitable. For these reasons, as further explained below, Claimants seek financial compensation instead of restitution in kind.
831. It has been established that due to Norway's breaches of the BIT, Claimants have been unable to operate their snow crab fishing enterprise since the earlier Date of Breach (27 September 2016). This has caused them to incur losses of profits (or cash flows) over the past period from the Date of Breach until the Valuation Date (1<sup>st</sup> January 2021). What Claimants have lost over this period is profit, namely a sum of money. There is no practical difference between "*restitution in kind*" of a sum of money and financial compensation.
832. As of the valuation date, Norway continues to prevent Claimants from exercising their snow crab fishing rights pertaining to the Loophole and the waters off the Svalbard archipelago. Norway's policy relies on its domestic legislation banning snow crab fishing above Norway's continental shelf, as well as Norway's administrative practice of denying applications for dispensations submitted for vessels flying an EU flag. While Claimants continue to challenge this policy using available domestic legal means, their past attempts to assert their rights before the Norwegian judiciary have been frustrated.
833. In the course of the present dispute, Norway has given no indication that it will ever be prepared to recognize Claimants' fishing rights. In view of the positions publicly taken by Norway's politicians regarding Claimants and EU snow crab fishermen, as well as Norway's various diplomatic notes to the EU and Latvia, such a prospect appears remote at best.
834. As explained above, Norway's actions have caused a complete overhaul of the management regime applicable to the Barents Sea snow crab fishery. More specifically, Norway has replaced the former international system with a regime predicated on the notion that Norway has exclusive rights over the species, destroying the value of Claimants' investments in the process.

835. Claimants submit that, regardless of the outcome of the present arbitration, Norway will not accept a return to the former system. The most that Norway could plausibly do within the context of its existing laws is to grant Claimants *new* fishing rights rooted in Norwegian law. However, such a prospect is both unlikely and unsatisfactory for Claimants.
836. It is unlikely because it assumes an about-turn in Norway's regulatory and administrative practice of systematic denial of applications for dispensations for EU vessels. According to Norway, such a change could only occur if Norway were able to come to an agreement with the EU on an exchange of quotas. Negotiations on this basis have failed and are not expected to resume.
837. In any case, such a solution would fall well short of constituting restitution in kind. If Norway were to issue any kind of new fishing rights to Claimants under its current domestic regime, such rights would be limited to waters above Norway's continental shelf (excluding the Loophole, as Norwegian vessels are not currently authorized by Norway to catch snow crabs there). Claimants would thus have access to more limited fishing grounds than those they were (and are) authorized to fish under their past and current licenses.
838. In addition, Norway has adopted a very low catch ceiling for the snow crab fisheries under its domestic management regime, justified by political as opposed to scientific imperatives. By contrast, Claimants' fishing rights were (and remain) unregulated as to the volume of permitted catches and could plausibly be expected to remain so for the foreseeable future.
839. In these circumstances, even were Norway to grant Claimants some fishing rights under its domestic regime, these rights would bear little resemblance to the rights that Claimants have lost due to Norway's breaches of the BIT. Such rights would not allow Claimants to achieve the same level of catches that could realistically have been achieved but for these breaches. Claimants' losses would therefore not be fully repaired by such a grant.
840. For these reasons, Claimants submit that financial compensation is the appropriate means of achieving full reparation of their losses sustained by reason of Norway's breaches of the BIT.

## G. FINANCIAL COMPENSATION

### a. Standard of compensation

841. The standard of compensation under customary international law is full reparation (*subsection i*). Before moving to an assessment of the amount of financial compensation required to achieve full reparation, applicable principles regarding the date of valuation (*subsection ii*), the burden and standard of proof (*subsection iii*) and causation (*subsection iv*) are examined.

#### *i) Full reparation*

842. To quote the Permanent Court of International Justice in *Chorzów*, “*reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed*”.<sup>1061</sup>

843. Where restitution in kind is not a possible or suitable means of re-establishing the situation that would have existed but for the breach, an award of financial compensation must take its place. Financial compensation is defined by ILC Article 36, which provides:<sup>1062</sup>

*1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.*

*2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.*

844. According to this provision, financial compensation must cover the “*damage caused*” by the international wrongful act. The “*damage*” is to be assessed by reference to what existed prior to the breach. In other words, the internationally responsible state must

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<sup>1061</sup> PCIJ, *Case Concerning The Factory At Chorzów*, Judgment on the Merits, 13 September 1928, **CL-0322**, p. 47.

<sup>1062</sup> ILC, *Articles on Responsibilities of States for Internationally Wrongful Acts*, 2001, **CL-0255**, Article 36.

repair what was unlawfully taken or destroyed, requiring an evaluation of the situation that existed before the international wrongful act.

845. The standard of full reparation enjoys universal recognition amongst arbitral tribunals, whether for cases of unlawful expropriation or for other investment treaty violations such as equitable and reasonable treatment or the most favoured nation treatment for which no compensation standard is explicitly provided.<sup>1063</sup> The *Vivendi v. Argentina* tribunal concluded that “[t]here can be no doubt about the vitality of [Chorzow’s] statement of the damages standard under customary international law”.<sup>1064</sup> The *ADC v. Hungary* tribunal came to a similar conclusion: “[i]t is generally accepted today that, regardless of the type of investment, and regardless of the nature of the illegitimate measure”, compensation must be “sufficient to compensate the affected party fully and to eliminate the consequences of the state’s action”.<sup>1065</sup>
846. Full reparation requires that the amount of financial compensation awarded be sufficient to place the investor in the economic position that it would have enjoyed had the wrongful acts never occurred – that is, the situation that would have existed “but for” those acts.<sup>1066</sup> This is accomplished by an award of damages equal to the loss of

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<sup>1063</sup> See, e.g., ICJ, *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgement, 25 September 1997, **CL-0326**, para. 152 (the International Court of Justice noting that the *Chorzow Factory* standard reflects a “well established rule” of customary international law); *S.D. Myers Inc. v. Canada*, ICSID Case No. ARB/03/16, Partial Award, 13 November 2000, **CL-0315**, para. 311 (finding that the “principle of international law stated in the *Chorzow Factory* case is still recognised as authoritative on the matter of general principle”); *ADC Affiliate Ltd. v. Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, **CL-0243**, para. 493 (reviewing numerous decisions and concluding that “there can be no doubt about the present vitality of the *Chorzow Factory* principle, its full current vigor having been repeatedly attested by the International Court of Justice”).

<sup>1064</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, **CL-0253**, para. 8.2.5.

<sup>1065</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, **CL-0243**, paras. 484–492.

<sup>1066</sup> See, e.g., *Petrobart Limited v. Kyrgyzstan*, SCC Case No. 126/2003, Award, 29 March 2005, **CL-0158**, p. 77–78 (“The Arbitral Tribunal agrees that, insofar as it appears that Petrobart has suffered damage as a result of the Republic’s breaches of the Treaty, Petrobart shall so far as possible be placed financially in the position in which it would have found itself, had the breaches not occurred.”); *Sapphire International Petroleum Ltd. v. National Iranian Oil Company* Award, 15 March 1963, **CL-0327**, pp. 185–86 (“[T]he object of damages is to place the party to whom they are awarded in the same pecuniary position that they would have been in if the contract had been performed in the manner provided for by the parties at the time of its conclusion.”); *Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre*, UNCITRAL Case, Award on Jurisdiction and Liability, 27 October 1989, **CL-0259**; *Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre*, UNCITRAL Case, Award on Damages and Costs, 30 June 1999, **CL-0328**, p. 228 (“The standard for compensation in cases of expropriation is restoration of the claimant to the position he would have enjoyed but for the expropriation. This principle of customary international law is stated in many recent awards of international arbitral tribunals.”).

value sustained by the affected investment, plus any additional losses that would not have been incurred but for the State's unlawful actions.<sup>1067</sup>

847. It is generally well accepted that full reparation should reflect the “fair market value” of what was lost by an investor.<sup>1068</sup> As explained by the Commentary to the ILC Articles, “[c]ompensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the ‘fair market value’ of the property lost.”<sup>1069</sup>
848. The Iran-US Claims Tribunal has defined fair market value as “the price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat. [The expert] appropriately assumed that the willing buyer was a reasonable businessman”.<sup>1070</sup> Subsequent investment treaty tribunals have adopted similar formulations of the fair market value concept.<sup>1071</sup>
849. Where the investment was a “going concern”<sup>1072</sup> prior to the unlawful act, an assessment of fair market value must take future profitability into consideration in order to provide full compensation.<sup>1073</sup> In *Chorzów*, the Permanent Court of International

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<sup>1067</sup> PCIJ, *Case Concerning The Factory At Chorzów*, Judgment. on the Merits, 13 September 1928, **CL-0322**, pp. 47, 49.

<sup>1068</sup> *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, **CL-0323**, para. 850.

<sup>1069</sup> James Crawford, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES*, Cambridge University Press, 2002, **CL-0329**, p. 225.

<sup>1070</sup> *Starrett Housing Corporation, Starrett Systems, Incorporated, Starrett Housing International, Incorporated v. The Government of the Islamic Republic of Iran, Bank Markazi Iran, Bank Omran, Bank Mellat*, IUSCT Case No. 24, Final Award, 14 August 1987, **CL-0330**, para. 277. See also, American Society of Appraisers, *THE INTERNATIONAL GLOSSARY OF BUSINESS VALUATION TERMS*, 2009, **CL-0331**, p. 27 (defining fair market value as “the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.”).

<sup>1071</sup> See, e.g., *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, **CL-0260**, para. 118; *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL Case, Final Award, 14 March 2003, **CL-0332**, paras. 496–99; *CMS v. Argentina*, Final Award, 12 May 2005, **CL-263**, para. 402; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, **CL-0323**, paras. 850–853.

<sup>1072</sup> For a definition of a “going concern,” see, The World Bank Group, *THE WORLD BANK GUIDELINES ON THE TREATMENT OF FOREIGN DIRECT INVESTMENT*, Vol. 2, 1992, **CL-0333**, p. 304 (“[A]n enterprise consisting of income-producing assets which has been in operation for a sufficient period of time to generate the data required for the calculation of future income and which could have been expected with reasonable certainty, if the taking had not occurred, to continue producing legitimate income over the course of its economic life in the general circumstances following the taking by the State.”).

<sup>1073</sup> See, e.g., *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, **CL-0263**, paras. 402–403; *American International Group, Inc. and American Life Insurance*

Justice made it clear that future profitability and prospects were an essential part of the valuation of the German factory expropriated by Poland. Aiming to guide expert calculations of the value of the factory, the Permanent Court of International Justice listed the factors that it deemed material to the valuation, including “*future prospects*,” “*probable profit*” and future “*financial results*”.<sup>1074</sup> As noted above, the future profitability prospects of the going concern must be assessed as they existed before the internationally wrongful act.

*ii) Valuation date*

850. The appropriate valuation date to be applied is a question of fact for the Tribunal to determine with reference to the particular circumstances and characteristics of each case.<sup>1075</sup>
851. In *Chorzów*, the Court ruled that the State bears “*the obligation to restore the undertaking and, if this is not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible*.”<sup>1076</sup> The “*time of the indemnification*” technically refers to the date of full payment. Since that future date is unknown, a common practice is to determine a current valuation date, to which pre- and post-award interest are added to compensate the successful claimant for the lost value at the time of the indemnification.
852. In addition to its compelling logic, this approach has the benefit of ensuring that the Tribunal has at its disposal all relevant evidence pertaining to the value of the assets in the “*but for*” scenario at the time of the award.<sup>1077</sup>
853. Tribunals have favoured this approach, particularly where the value of the affected asset increases after seizure by the State due to objective factors, such as improving

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*Company v. The Islamic Republic of Iran and Central Insurance of Iran (Bimeh Markazi Iran)*, IUSCT Case No. 2, Award, 19 December 1983, **CL-0334**, p. 109; *Phillips Petroleum Company Iran v. The Islamic Republic of Iran, The National Iranian Oil Company*, IUSCT Case No. 39, Award, **CL-0242**, paras. 111–112.

<sup>1074</sup> PCIJ, *Case Concerning The Factory At Chorzów*, Judgment on the Merits, 13 September 1928, **CL-0322**, pp. 51–52.

<sup>1075</sup> *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, **CL-0268**, para. 788.

<sup>1076</sup> PCIJ, *Case Concerning The Factory At Chorzów*, Judgment on the Merits, 13 September 1928, **CL-0322**, p. 48.

<sup>1077</sup> See, e.g., *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, **CL-0243**, paras. 496–499; *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, **CL-0263**, paras. 441–447.

market conditions.<sup>1078</sup> As the tribunal explained in *ADC v. Hungary*, where an expropriated asset increases in value after the expropriation, calculating the quantum of reparation due as at the date of the award “is necessary to put the Claimants in the same position as if the expropriation had not been committed”.<sup>1079</sup>

854. Permitting a State to retain the increase in value of an expropriated and subsequently appreciating asset not only under-compensates the injured investor (which, absent the unlawful measure, would have been able to benefit from the increase in value), but also creates perverse incentives, financially rewarding a State for its own unlawful conduct. As noted by Dr. Manuel A. Abdala, a director with Compass Lexecon, the consultancy, “since States are tempted to act opportunistically precisely when business conditions are expected to improve or have already improved, the use of valuation dates at the time of award and the use of hindsight information is an important element to prevent opportunistic takings”.<sup>1080</sup>
855. In *Texaco Overseas Petroleum Company v. Government of the Libyan Arab Republic* sole arbitrator Dupuy cited a number of authorities on the contours of the principle of *restitutio in integrum* as set out in the *Chorzów Factory* case. He cited in particular the view of former ICJ President Jiménez de Aréchaga :<sup>1081</sup>

*As a consequence of the depreciation of currencies and of delays involved in the administration of justice, the value of a confiscated property may be higher at the time of the judicial decision than at the time of the unlawful act. Since monetary compensation must, as far as possible, resemble restitution, the value at the date when indemnity is paid must be the criterion.*

856. A current valuation date is therefore appropriate in this case, allowing Claimants to rely on all relevant information that became available after the Date of Breach for the purpose of quantifying their loss.<sup>1082</sup> For purposes of calculating Claimants’ losses

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<sup>1078</sup> See, e.g., *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, **CL-0243**, para. 496; *Siemens AG v. Argentina*, ICSID Case No. ARB/02/8, Award, 6 February 2007, **CL-0258**, paras. 352–360.

<sup>1079</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, **CL-0243**, paras. 496–97.

<sup>1080</sup> M. A. Abdala, “Key Damage Compensation Issues in Oil and Gas International Arbitration Cases,” *The American University journal of international law and policy*, Washington College of Law, January 2009, **CL-335**, p. 559.

<sup>1081</sup> *Texaco Overseas Petroleum Company v. Government of the Libyan Arab Republic*, Ad hoc Arbitration, Award, 19 January 1977, Excerpts, **CL-0336**.

<sup>1082</sup> Expert Report of Kiran Sequeira, para. 21.



since the date of breach, Claimants have adopted a current valuation date of 1<sup>st</sup> January 2021.<sup>1083</sup>

*iii) Burden and standard of proof*

857. As already noted, the *Chorzów* decision stands for the principle that reparation is designed to “re-establish the situation which would, in all probability, have existed if that act had not been committed”.<sup>1084</sup>
858. It is generally accepted that a claimant bears the burden of proving the “*situation*” that would have existed but for a State’s breach of an investment treaty, including how the claimant’s economic position would have been different in the “*but for*” scenario as compared with its current position. The question then becomes: to what standard of proof must these elements be proven?
859. ICSID Arbitration Rule 34(1) provides that the Tribunal “*shall be the judge of the admissibility of any evidence adduced and of its probative value*”.<sup>1085</sup> The Tribunal therefore enjoys discretion in evidentiary matters.
860. In *Gold Reserve v. Venezuela*, the tribunal determined that the standard of proof for damages is not higher than the standard of proof applicable to the merits. In both cases, the tribunal considered that facts must be established on a balance of probabilities.<sup>1086</sup>

*The Tribunal finds no support for the conclusion that the standard of proof for damages should be higher than for proving merits, and therefore is satisfied that the appropriate standard of proof is the balance of probabilities. This, of course, means that damages cannot be speculative or merely “possible”, as both Parties acknowledge. In the Tribunal’s view, all of the authorities cited by the Parties – including by Respondent in relation to its claim that a degree of certainty is required – accord with the principle that the balance of probabilities applies, even if some tribunals phrase the standard slightly differently. In particular, those cases that discuss the requirement for “certainty” do so in the context of distinguishing “proven” damages from speculative damages,*

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<sup>1083</sup> *Ibid.*, para. 22.

<sup>1084</sup> PCIJ, *Case Concerning The Factory At Chorzów*, Judgment on The Merits, 13 September 1928, **CL-0322**, p. 47.

<sup>1085</sup> **CL-0042**, para. 863.

<sup>1086</sup> *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, **CL-0337**, para. 685.

*rather than suggesting that a higher degree of proof is applied to damages than to liability.*

861. In *Crystallex v. Venezuela*, the tribunal distinguished between a claimant's burden of proving the "*fact*" and the "*amount*" of the loss. The tribunal held that while a claimant bears both burdens, the standard of proof applicable to each is different.<sup>1087</sup>
862. The tribunal first noted that the "*fact (i.e the existence) of the damage needs to be proven with certainty*".<sup>1088</sup> Read in light of the *Gold Reserve* award, this statement should be taken to mean that a claimant must establish that it has suffered an actual loss, which is not merely speculative or possible, on a balance of probabilities. The *Crystallex* tribunal indeed acknowledged that "*there is no reason to apply any different standard of proof than that which is applied to any other issue of merits (e.g. liability)*".<sup>1089</sup>
863. With respect to the quantification of the loss, the *Crystallex* tribunal found that a lower degree of certainty was needed.<sup>1090</sup>

*[...] once the fact of the damage has been established, a claimant should not be required to prove its exact quantification with the same degree of certainty. This is because any future damage is inherently difficult to prove.*

864. The tribunal then went on to cite the decision in *Lemire v. Ukraine*, which observed that once it has been proven that a claimant "*has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss*".<sup>1091</sup>
865. In *SPP v. Egypt*, the tribunal similarly noted that "*it is well-settled that the fact that damages cannot be assessed with certainty is no reason not to award damages when*

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<sup>1087</sup> *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, **CL-0323**, para. 865 *et seq.*

<sup>1088</sup> *Ibid.*, para. 867.

<sup>1089</sup> *Id.*, para. 867.

<sup>1090</sup> *Id.*, para. 868.

<sup>1091</sup> *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, **CL-0291**, para. 246.

*a loss has been incurred*".<sup>1092</sup> Other tribunals have likewise held that difficulties in the quantification of damages do not preclude an assessment of compensation.<sup>1093</sup>

866. Following these precedents, the *Crystallex* tribunal concluded along the same lines and further emphasized that such an approach is particularly warranted where the difficulty results from the wrongdoing of the respondent State.<sup>1094</sup>

*Thus, an impossibility or even a considerable difficulty that would make it unconscionable to prove the amount (rather than the existence) of damages with absolute precision does not bar their recovery altogether. Arbitral tribunals have been prepared to award compensation on the basis of a reasonable approximation of the loss, where they felt confident about the fact of the loss itself. In the Tribunal's view, this approach may be particularly warranted if the uncertainty in determining what exactly would have happened is the result of the other party's wrongdoing.*

*These principles should also be applied with regard to the proof of loss of profits, which is the crucial issue in this case as far as the determination of quantum is concerned.*

#### *iv) Causation*

867. Proof of causation requires that cause, effect, and a logical link between the two be established.
868. Regarding the first element of causation (cause), the internationally wrongful acts attributable to Norway constitute the cause. As discussed above, the facts of the present case plainly show that Norway's breaches of the BIT prevented Claimants from exercising their snow crab fishing rights in the Loophole and the waters off the Svalbard archipelago.
869. Regarding the second element of causation (effect), it has been established that Claimants have been forced to stop their economic operations after Norway started taking enforcement actions against them in the form of fines and the arrest of North

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<sup>1092</sup> *Southern Pacific Properties (Middle East) Ltd. v. Egypt*, ICSID Case No. ARB/06/18, Award, 20 May 1992, **CL-0266**, para. 215.

<sup>1093</sup> See e.g. *Técnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, **CL-0252**, para. 190; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, **CL-0253**, paras. 8.3.16.

<sup>1094</sup> *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, **CL-0323**, para. 871.

Star's vessel Senator. The economic consequence of this cessation of operations (the effect) has been the loss of Claimants' profits that would have resulted therefrom.

870. Regarding the third element of causation (causal link), under international law, compensation for violation of a treaty will only be due from a respondent State "*if there is a sufficient causal link between the treaty breach by that state and the loss sustained by the claimant*".<sup>1095</sup>
871. In the case submitted to the Tribunal, the losses suffered by Claimants have undoubtedly resulted from Norway's actions in breach of the BIT preventing them from operating their snow crab fishing enterprise. The evidence clearly shows that, but for those breaches, Claimants would have exercised those rights, exploited their snow crab fishing enterprise and earned profits, as quantified below.
872. The valuation methodologies employed by Claimants fulfil the requirement of a causal link between the treaty breaches and the losses they have suffered through a comparison between the actual and "*but for*" scenarios.
873. Stated differently, in each of the valuation methodologies proposed to the Tribunal, Claimant's losses for which Norway is liable to make reparation are assessed through a comparison between their existing economic position and the economic position they would have enjoyed "*but for*" Norway's breaches of the BIT. This methodology ensures that the claimed reparation covers the full losses caused by Norway's unlawful acts, and only such losses.

## **b. Valuation methodologies**

874. Arbitral tribunals have wide discretion in the choice of an appropriate methodology to quantify the loss suffered by a claimant. This principle was recognized in *Rumeli Telekom v. Kazakhstan*, where the tribunal explained that its basic task regarding quantum assessment is to "*apply the method or methods of valuation which will most closely reflect the value of the expropriated investment to the investor at the relevant time*".<sup>1096</sup>

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<sup>1095</sup> *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, **CL-0323**, para. 860.

<sup>1096</sup> *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, **CL-0268**, para. 786.

875. In *Crystallex v. Venezuela*, the tribunal likewise recognized its discretion in such matters and noted that the choice of an appropriate valuation methodology depends on the circumstances of each case.<sup>1097</sup>

*Tribunals may consider any techniques or methods of valuation that are generally acceptable in the financial community, and whether a particular method is appropriate to utilize is based on the circumstances of each individual case.*

876. The following sections present the relevant legal principles underlying the valuation methodologies employed by Versant, which Claimants submit are appropriate in view of the relevant circumstances of the case.
877. For valuation purposes, Claimants' losses are separated into four categories: lost profits and loss of investment value (*subsection i*); interest (*subsection ii*); excess taxes (*subsection iii*); and costs (*subsection iv*).

*i) Lost profits and loss of investment value*

878. Lost profits represent the difference between the earnings or cash flows generated by an investment with or without the wrongful act during the damage period.<sup>1098</sup> The damage period is the period in which the defendant behaved in an injurious manner or the period in which the plaintiff suffered a loss of profits.<sup>1099</sup>
879. Article 36(2) of the ILC Articles provides that compensation "*shall cover any financially assessable damage including loss of profits insofar as it is established*".<sup>1100</sup> The commentary to the ILC Articles notes that a loss of profit cannot be inherently speculative but should possess "*sufficient attributes to be considered a legally protected interest of sufficient certainty to be compensable*".<sup>1101</sup> Contractual arrangements or a "*well-established history of dealings*" may serve to meet this sufficient level of certainty.<sup>1102</sup>

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<sup>1097</sup> *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, **CL-0323**, para. 886.

<sup>1098</sup> K. M. Kolaski, M. Kuga, "Measuring Commercial Damages via Lost Profits or Loss of Business Value: Are these Measures Redundant or Distinguishable?," *Journal of Law and Commerce*, 1998, **CL-0338**, p. 4.

<sup>1099</sup> *Ibid.*

<sup>1100</sup> ILC, Draft Articles on Responsibilities of States for Internationally Wrongful Acts, with commentaries, 2001, **CL-0339**, Article 36 (2).

<sup>1101</sup> *Ibid.*

<sup>1102</sup> *Id.*

880. In *Crystallex*, the tribunal explained the standard that must be met by a claimant seeking compensation for lost profits:<sup>1103</sup>

*In the Tribunal's view, [...] authorities show that, once the fact of future profitability is established and is not essentially of a speculative nature, the amount of such profits need not be proven with the same degree of certainty. In other words, the Claimant must prove that it has been deprived of profits that would have actually been earned. This requires proving that there is sufficient certainty that it had engaged or would have engaged in a profitmaking activity but for the Respondent's wrongful act, and that such activity would have indeed been profitable.*

*With those principles in mind, the question thus is whether in this case (i) it is sufficiently certain that the Claimant would have made a profit; and (ii) if yes, whether the Claimant has provided the Tribunal with a reasonable basis to assess such loss of profits.*

881. Applying these principles, the *Crystallex* tribunal found that the claimant had proven with sufficient certainty that it would have made a profit, despite the fact “that it did not have a proven record of profitability” as the claimant had never operated the mine at the time of its expropriation by Venezuela. Profits were sufficiently certain because of the nature of the investment and the development stage of the project.<sup>1104</sup>
882. The loss of investment value is determined as the difference between the present value of all future earnings or cash flows of the business with and without the wrongful act (by comparison of the two business values).<sup>1105</sup>
883. In the present case, in view of the valuation date adopted by Claimants (1<sup>st</sup> January 2021) and since Norway's breaches of the BIT prevented Claimants from operating a going concern, full reparation requires that Claimants be compensated for profit losses sustained in two distinct periods:
- (a) the “*historical period*”, namely the period from the Date of Breach until the valuation date, during which Claimants' profits would have differed in the “*actual*” and “*but for*” scenarios; and

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<sup>1103</sup> *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2 Award, 4 April 2016, **CL-0323**, para. 875.

<sup>1104</sup> *Ibid.*, para. 877.

<sup>1105</sup> John A. Trenor, *THE GUIDE TO DAMAGES IN INTERNATIONAL ARBITRATION*, 2018, **CL-0340**, p. 213.

- (b) the future period starting from the valuation date, in which Claimants would have continued to generate cash flows which will not be generated due to Norway's breaches, causing a present reduction in the value of their investments.
884. In *Burlington Resources Inc. v. Republic of Ecuador*, an ICSID tribunal awarded damages that compensated claimants for both their historical losses of profit (losses until the date of the award, with an interest factor applied to actualize the cash flows to their present value) and projected future lost profits that would have been generated by the investment (losses from the date of the award until the expiry of the revenue-generating contracts, discounted to their present value).<sup>1106</sup> Because the time periods over which these calculations are made is different, no problem of double-counting arises.<sup>1107</sup>
885. Lost profits predating the date of valuation must be brought forward to such date by the addition of an appropriate interest rate.<sup>1108</sup> This follows from the principle that the duty to make reparation arises as soon as an internationally wrongful act is committed.<sup>1109</sup> This interest is itself part of the lost profits as of the valuation date and is distinct from pre-award interest in the period that it covers: it applies to the period *prior to* the valuation date, whereas pre-award interest applies to the period from the valuation date until the date of the award.
886. The calculation of the present value of future lost cash flows is done through the discounted cash flow (DCF) method. The DCF method is designed to ascertain an asset's value at a particular moment in time on the basis of its expected future cash

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<sup>1106</sup> *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/97/3, Decision on Reconsideration and Award, 7 February 2017, **CL-0341**, para. 336.

<sup>1107</sup> *Himpurna California Energy Ltd v PT (Persero) Perusahaan Listrik Negara (PLN)*, UNCITRAL Case, Ad Hoc Arbitration, Award, 4 May 1999, Excerpts, **CL-0342**, 13 *et seq.*

<sup>1108</sup> Expert Report of Kiran Sequeira, para. 86.

<sup>1109</sup> ILC, Draft Articles on Responsibilities of States for Internationally Wrongful Acts, with commentaries, 2001, **CL-0339**, Article 31.

flows, taking into account the risk involved in generating those cash flows and the time value of money.<sup>1110</sup>

887. The World Bank Guidelines define “discounted cash flow value” as:<sup>1111</sup>

*[T]he cash receipts realistically expected from the enterprise in each future year of its economic life as reasonably projected minus that year’s expected cash expenditure, after discounting this net cash flow for each year by a factor which reflects the time value of money, expected inflation, and the risk associated with such cash flow under realistic circumstances.*

888. The DCF approach is the preferred valuation method for calculating the fair market value of a going concern, both in the world of finance and under customary international law.<sup>1112</sup> Indeed, the DCF methodology has been applied by most recent international tribunals to ascertain the value of going concerns.<sup>1113</sup>

889. For instance, the tribunal in *CMS v. Argentina* declared that it had “no hesitation” in endorsing the DCF method as the most appropriate valuation methodology for assessing the value of a going concern: “DCF techniques have been universally adopted, including by numerous arbitral tribunals, as an appropriate method for valuing business assets.”<sup>1114</sup> According to the tribunal in *Walter Bau v. Thailand*, “[t]he only

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<sup>1110</sup> See, *Phillips Petroleum Company Iran v. The Islamic Republic of Iran and NIOC*, IUSCT Case No. 39, Award, 29 June 1989, **CL-0242**, para. 112.

<sup>1111</sup> The World Bank Group, *THE WORLD BANK GUIDELINES ON THE TREATMENT OF FOREIGN DIRECT INVESTMENT*, Vol. 2, 1992, **CL-0333**, p. 304.

<sup>1112</sup> See, e.g., The World Bank Group, *THE WORLD BANK GUIDELINES ON THE TREATMENT OF FOREIGN DIRECT INVESTMENT*, Vol. 2, 1992, **CL-0333**, pp. 303–304.

<sup>1113</sup> See, in particular, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, **CL-0264**, para. 779; *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, **CL-0243**, para. 502; *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, **CL-0260**, para. 119; **CL-0054**, paras. 372–75; *Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, UNCITRAL Case, Award on Jurisdiction and Liability, 27 October 1989, **CL-0259**; *Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, UNCITRAL Case, Award on Damages and Costs, 30 June 1999, **CL-0328**, p. 228; *Phillips Petroleum Company Iran v. The Islamic Republic of Iran and NIOC*, IUSCT Case No. 39, Award2, 29 June 1989, **CL-0242**, paras. 111–12; *Starrett Housing Corporation, Starrett Systems, Incorporated, Starrett Housing International, Incorporated v. The Government of the Islamic Republic of Iran, Bank Markazi Iran, Bank Omran, Bank Mellat*, IUSCT Case No. 24, Final Award, 14 August 1987, **CL-0330**, paras. 279–80.

<sup>1114</sup> *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, **CL-0263**, para. 416.



*method that can accurately track value through time is the Discounted Cash Flow (DCF) method”.*<sup>1115</sup>

890. The DCF method is based on a projection of future expected cash flows, which are then discounted to their present value through the use of an appropriate discount rate (effectively the converse of an interest rate) used to project the future value of a sum of money. The amount of risk incurred by the investment and the size of the discount rate are inversely related to the present value of the projected future cash flows: the higher the risk, the higher the discount rate necessary to adjust for the likelihood that the projected cash flows may not be realized, and the lower the present value of the projected stream; the lower the risk, the lower the discount rate and the higher the present value.<sup>1116</sup>
891. In financial analysis, the choice of a discount rate results from the calculation of a firm's (or a project's) weighted average cost of capital (“WACC”). The WACC is now universally accepted in commercial arbitration practice as the correct figure to use as the discount rate in DCF models.<sup>1117</sup> The WACC reflects the firm's cost of debt (interest) and cost of equity, which are then weighted in proportion to the debt and equity financing available to the firm.
892. In *Gold Reserve v. Venezuela*, the quantification of the claimant's damages required a valuation of a future stream of cash flows expected from a gold mining project which had been expropriated before the start of its exploitation. The tribunal applied a 10.09 % discount rate based on the project's WACC, having considered the risks facing the project and the realization of its future expected cash flows:<sup>1118</sup>

*Having considered the various premiums used by analysts in 2008, the Tribunal decides to adopt a country risk premium of 4% as used in the RBC Capital Markets Report, which was one of the reports referenced by Mr Kaczmarek (i.e., a 2.5% increase). The Tribunal accepts Dr Burrows' (CRA) explanation that this premium appropriately considers political risks, together with other risks, but has not been over-inflated on account of*

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<sup>1115</sup> *Walter Bau AG v. Kingdom of Thailand*, UNCITRAL Case, Award, 1 July 2009, **CL-0343**, para. 14.12.

<sup>1116</sup> A. Damodaran, *INVESTMENT VALUATION, TOOLS AND TECHNIQUES FOR DETERMINING THE VALUE OF ANY ASSET*, Wiley Finance, 2<sup>nd</sup> ed., 2002, p. 12, cited in W. H. Knull, III, S. T. Jones, T. J. Tyler, R. D. Deutsch, “Accounting for Uncertainty in Discounted Cash Flow Valuation of Upstream Oil and Gas Investments,” *Compensation and Damages in International Investment Arbitration*, 2007, **CL-344**, p. 9.

<sup>1117</sup> John A Trenor, *THE GUIDE TO DAMAGES IN INTERNATIONAL ARBITRATION*, 2018, **CL-0340**, p. 237.

<sup>1118</sup> *Gold Reserve, Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, **CL-0337**, paras. 840-842.

*expropriation risks. The Tribunal calculates that using a 4% country risk premium results in a cost of equity of 11.92%, with a resulting WACC rate of 10.09% (rather than 8.22% as used by Claimant).*

893. In *Burlington Resources Inc. v. Republic of Ecuador*, the Tribunal selected a 12.5% discount rate based on a calculation of the WACC:<sup>1119</sup>

*The Tribunal takes note of Fair Links' objections to the use of the WACC as discount rate but notes once more that the experts essentially agree with the use of a discount rate of 12% to 12.5% and that neither of them objects to using the discount rate proposed by the other. The Tribunal notes in particular that Fair Links accepts that this range is "about quite the right level". The Tribunal will therefore use Compass Lexecon's proposed 12.5%, which corresponds to the WACC, a widely used parameter for discounting cash flows. It observes that Compass Lexecon's proposed rate is higher than Fair Links', thereby reducing future cash flows.*

894. In *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, the Tribunal had to determine an appropriate discount rate as part of a DCF analysis.<sup>1120</sup> The experts of the two parties did not agree on the proper discount rate. One expert had proposed a 15% discount rate and the other had used a rate of 9.18%, representing the WACC of the company in its worldwide operations.<sup>1121</sup> The Tribunal found that a 12% discount rate was appropriate in the circumstances because the claimant, in both its 2007-2011 and 2008-2012 Five Year Plans filed with the *Ecuadorian Ministerio de Minas y Petróleos*, had used a discount rate of 12% which, it stated, reflected the financial, country and industry risks related to the project at issue.<sup>1122</sup>

895. While WACC calculations appropriately incorporate a country risk premium reflecting the risk inherent in doing business in a certain location, the risk of unlawful action by the State (such as the risk of an unlawful expropriation of the investment) must not be considered as part of such calculation. In *Flughafen Zürich*, the tribunal agreed with the claimant's assessment that a state should not be able to rely on "*new political*

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<sup>1119</sup> *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/97/3, Decision on Reconsideration and Award, 7 February 2017, **CL-0341**, para. 512.

<sup>1120</sup> *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador ("Occidental II")*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, **CL-0345**, para. 759.

<sup>1121</sup> *Ibid.* para. 760.

<sup>1122</sup> *Id.* para. 762.

*attitudes*” adopted after an investment has been made, if they lead to unlawful acts that increase country risk and reduce the compensation the state would have to pay.<sup>1123</sup>

896. In the *Gold Reserve* case, the tribunal accepted a similar view:<sup>1124</sup>

*It is not appropriate to increase the country risk premium to reflect the market's perception that a State might have a propensity to expropriate investments in breach of BIT obligations.*

897. Finally, it is worth noting that the DCF appropriately captures the full value of an investment. Thus, Claimants are not claiming the value of their sunk costs in addition to the loss of value sustained by their investments as calculated using the DCF method. As noted in *Himpurna California v PLN*, the DCF method already captures the value of these sunk costs.<sup>1125</sup>

*ii) Interest*

898. Interest is an integral component of full reparation under customary international law.<sup>1126</sup> This principle is recognized under Article VI(2) of the BIT, the treaty's sole provision dealing with compensation, which is applicable in the case of a lawful expropriation:<sup>1127</sup>

*2. Such compensation [as is payable under Article VI(1)(III)] shall amount to the market value of the investment immediately before the date of expropriation and shall be paid without delay. The compensation shall include interest, computed from the first day following the date of expropriation until the date of payment, at a rate based on LIBOR for the appropriate currency and corresponding period of time. The payment of such compensation shall be effectively realizable and freely transferable.*

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<sup>1123</sup> *Flughafen Zürich A.G. y Gestión e Ingeniería IDC S.A. v. República Bolivariana de Venezuela*, ICSID Case No. ARB/10/19, Award, 18 November 2014, **CL-0346**, paras. 904-907.

<sup>1124</sup> *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, **CL-0337**, para. 841.

<sup>1125</sup> *Himpurna California Energy Ltd v PT (Persero) Perusahaan Listrik Negara (PLN)*, UNCITRAL Case, Ad hoc Arbitration, Award, 4 May 1999, **CL-0342**, para. 240.

<sup>1126</sup> ILC, Articles on the Responsibility of States for Internationally Wrongful Acts, 2001, **CL-0339**, Article 38; *Siemens AG v. Argentina*, ICSID Case No. ARB/02/8, Award, 6 February 2007, **CL-0258**, paras. 396–401; *LG&E Energy Corp., LG&E Capital Corp. And LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007, **CL-0347**, para. 5; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, **CL-0253**, paras. 8.3.20, 9.2.1; *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, **CL-0348**, para. 308. Interest is also a requirement for a lawful expropriation under Article VI (2) of the Treaty.

<sup>1127</sup> **CL-0001**, Article VI.

899. A State's duty to make full reparation arises immediately after its unlawful act causes harm; to the extent that payment is delayed, the claimant loses the opportunity to use the compensation for productive ends.<sup>1128</sup> An award of interest thus serves the objective of placing the claimant in the position that it would have occupied had the state not acted wrongfully.
900. Therefore, an award of interest is not separate from full reparation under the *Chorzów Factory* standard; it is a component of, and gives effect to, the principle of full reparation.<sup>1129</sup> The requirement of full reparation must inform all aspects of an interest award, including the determination of the appropriate rate of interest, and of whether such interest should be simple or compound.<sup>1130</sup>
901. Claimants are entitled to two forms of interest: pre-award interest, covering losses accruing up to the date of the Tribunal's final award; and post-award interest on the full amount of damages awarded by the Tribunal until the date of payment. Pre-award interest is applied to losses that have been quantified prior to the award date (i.e., prior to the date of valuation), in order to reflect the time value of money and to "actualize" the value of those losses. Post-award interest, on the other hand, is applied to the entire sum of damages awarded by the Tribunal to ensure that Claimants are not harmed further by delay in the payment of the award. In practice, pre- and post- award interest are often applied at the same rate.<sup>1131</sup>
902. The principle of full reparation informs all aspects of an interest award, including the rate of interest. In other words, the rate at which interest should accrue must ensure full reparation.<sup>1132</sup> In practice, tribunals predominantly have recourse to LIBOR,

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<sup>1128</sup> *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, **CL-0260**, para. 128.

<sup>1129</sup> *Asian Agricultural Products Limited (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, **CL-0076**, para. 114 ("[T]he case-law elaborated by international arbitral tribunals strongly suggests that in assessing the liability due for losses incurred the interest becomes an integral part of the compensation itself"); *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, **CL-0260**, para. 128; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, **CL-0153**, para. 174 ("Regarding such claims for expropriation, international jurisprudence and literature have recently, after detailed consideration, concluded that interest is an integral part of the compensation due").

<sup>1130</sup> See, ILC, Articles on the Responsibility of States for Internationally Wrongful Acts, 2001, **CL-0255**, Article 38.

<sup>1131</sup> *Ioan Micula v. Romania (I)*, ICSID Case No. ARB/05/20, Award, 11 December 2013, **CL-0233**, para. 1269. *Hrvatska Ekelktroprivreda D.D. v. Slovenia*, ICSID Case No. ARB/05/24, Award, 16 December 2015, **CL-0349**, para. 554; *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award, 23 September 2003, **CL-0350**, paras. 882-883.

<sup>1132</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, **CL-0253**, para. 9.2.3.

EURIBOR or EONIA as a rate of reference.<sup>1133</sup> These average rates are those at which banks can borrow from other banks on the London interbank market (for LIBOR) or on the Eurozone interbank market (EURIBOR, EONIA).

903. Indeed, investment tribunals have often found that 12-month LIBOR plus a 4% premium is a normal commercial rate for corporations.<sup>1134</sup> This vision also dominates in commercial arbitration, as illustrated by the case *Frontera v. Socar*, where the tribunal stated that “the rate of interest shall be LIBOR plus four percent from the date of the breach or other violation to the date when the award is paid in full”.<sup>1135</sup>
904. The same approach can be transposed to the application of EURIBOR. In particular, in *UP and CD Holding v. Hungary*, the tribunal applied 12-month EURIBOR plus a 6% premium as a normal commercial rate for corporations in EMEA Regions. In this case, the Tribunal noted that (i) interest should be set at a rate so as to give effect to the principle of full reparation; (ii) the guidance may be taken from the BIT provision for lawful expropriation directing that an “applicable market rate” should be applied; and (iii) EURIBOR plus 6.01% is an “appropriate” rate.<sup>1136</sup>
905. In *Strabag v. Libya*, the tribunal decided also to award simple interest at the EURIBOR annual rate plus 4% on the sums awarded with respect to Claimant’s claims under the Treaty and on the sums awarded to Claimant in respect of its legal costs and expenses and the costs of arbitration.<sup>1137</sup> In *OTE International Solutions S.A. v. Medcom LLC and QT Talk*, the tribunal applied an annual rate of Euribor plus 4%.<sup>1138</sup>

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<sup>1133</sup> *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, **CL-0291**, para. 351; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, **CL-0323**, para. 934; **CL-0050**, para. 95; *M Meerapfel Söhne AG v. Central African Republic*, ICSID Case No. ARB/07/10, Award, 12 May 2011, **CL-0351**, paras. 405-407.

<sup>1134</sup> *Rusoro Mining v. Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, **CL-0352**, para. 838 (awarding compound interest at rate of LIBOR plus 4%). See also *Murphy Exploration v. Ecuador*, PCA Case No. 2021-16, Award, 10 February 2017, **CL-0353**, paras. 516-518 (awarding compound interest at a rate of LIBOR plus 4%); *Flughafen Zürich A.G. y Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award 18 November 2014, **CL-0346**, para. 965 (awarding compound interest at a rate of LIBOR plus 4%); *Mobil Investments v. Canada*, ICSID Case No. ARB(AF)/07/4, 20 February 2015, **CL-0347**, para. 170 (awarding compound interest at a rate of LIBOR plus 4%).

<sup>1135</sup> *Frontera v. SOCAR*, Ad Hoc Arbitration, Award, 16 January 2006, **CL-0355**, p. 3.

<sup>1136</sup> See, *UP and CD Holding v. Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018, **CL-0356**, para. 597.

<sup>1137</sup> *Strabag v. Libya*, ICSID Case No. ARB(AF)/15/1, Award, 29 June 2020, **CL-0357**, para. 963.

<sup>1138</sup> *OTE International Solutions S.A. v. Medcom LLC and QT Talk*, ICC Case, Award, 20 December 2012, **CL-358**, para 121.

iii) *Excess taxes*

906. In assessing the amount of compensation needed to achieve full reparation, a tribunal should also anticipate the effect of taxation. Where a claimant's losses are calculated on an after-tax basis (as is the case here), these losses reflect the *net amounts* that would have been available to claimants after payment of all applicable taxes "*but for*" the State's breaches of the investment treaty. However, once an award is made, a claimant then faces the prospect of taxation *on the award itself*, which may effectively result in double taxation:
- (a) First, taxes that would have been paid by the claimant on the lost cash flows in the "*but for*" scenario are deducted from the quantification of its losses – effectively amounting to a first taxation of the claimants' profits (i.e., the taxation that would have occurred in the "*but for*" scenario);
  - (b) Second, the tribunal's award of compensation – representing full reparation of the claimants' net after-tax losses – is then itself subject to taxation, resulting in a second taxation of the claimants' profits.
907. An arbitral award may be subject to two forms of taxation: taxes imposed by the State liable for payment of the award (in the present case, Norway); and taxes imposed by the State where the investor's profits are subject to taxation (in the present case, Latvia).
908. The first situation (taxation of awards by the State liable to effect compensation) automatically results in double taxation. If the quantification of a loss relies on lost profit calculations made on an after-tax basis, implied taxes are already deducted from the award. The effect of an after-tax quantification is to allow the State to retain amounts equivalent to the taxes that would have been paid by the claimant in the "*but for*" scenario. If the same State then also taxes the award itself, the claimant is effectively being taxed twice by the same State for the same income. This is generally viewed as incompatible with full reparation. As stated by the tribunal in *ConocoPhillips v. PDVSA*,

*“any additional taxes applying to the amount granted under this award would undermine the principle of full compensation of the damage incurred.”*<sup>1139</sup>

909. To avoid this problem of double taxation, in *Siemens v. Argentina*, the Tribunal ordered that the amount of compensation be paid net of any taxes imposed by Argentina.<sup>1140</sup>

*Any funds to be paid pursuant to this decision shall be paid in dollars and into an account outside Argentina indicated by the Claimant and net of any taxes and costs.*

910. In the claim for recovery of lost profits suffered by *Saudi Arabia Texaco (SAT)* due to Iraq’s interference with its operations, the Panel achieved a similar result by declining to deduct taxes potentially payable to Iraq from the award and instead calculating the loss on a pre-tax (or “gross”) basis, thus accounting for the fact that the award itself would be treated as taxable income by Iraq.<sup>1141</sup>

*The Panel has found no basis either in international law or in the practice of courts of major legal systems in cases such as this for deducting taxes potentially due from awards to an injured party. Iraq has not provided any legal authority in support of its position in this matter. Further, SAT has produced some evidence that suggests that Saudi Arabia would view any award on this claim as taxable income to SAT. Therefore, the recommendation is made on a gross basis.*

911. The same problem of double taxation arises with respect to taxes levied by the State in which the investor is usually subject to taxation on its profits or capital gains (in the present case, Latvia). As noted, a quantification of a claimant’s losses relying on after-tax numbers already incorporate a deduction of taxes that would have been paid by the claimant in the “but for” scenario. Such a quantification thus reflects the net amounts that would have been available to the claimant after payment of all taxes. Yet, in many cases, the receipt of payment under an arbitral award by a successful claimant will, in and of itself, constitute a taxable event. In such cases, the claimant is again effectively taxed twice and is left with an amount representing less than full reparation.
912. The appropriate mechanism to avoid this form of double taxation is to include a tax gross-up in the quantification of losses sustained by a claimant. Such a tax gross-up

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<sup>1139</sup> *Phillips Petroleum Company Venezuela Limited & ConocoPhillips Petrozuata B.V. v. Petróleos de Venezuela, S.A.*, ICC Case No.16848/JRF/CA C-16849/JRF, Award, 17 September 2012, **CL-0359**, para. 313.

<sup>1140</sup> *Siemens AG v. Argentina*, ICSID Case No. ARB/02/8, Award, 6 February 2007, **CL-0258**, para. 403.

<sup>1141</sup> Report and Recommendations of the Panel of Commissioners Concerning the Second Instalment of E1 Claims, S/AC.26/1999/10, 24 June 1999, **CL-0360**, p. 404.

should be equal to the taxes that would be payable by the investor on the award, thus leaving the investor in the same situation it would have enjoyed “*but for*” the State unlawful acts.

913. Where the fact and amount of taxation on an eventual award are proven to the required standard, the inclusion of a tax gross-up within the quantification of financial compensation is not only consistent with the principle of full reparation but should indeed be viewed as its necessary corollary.
914. To recall, the Permanent Court of International Justice stated in *Chorzow* that the purpose of reparation is to “*re-establish the situation which would, in all probability, have existed if that act had not been committed*”.<sup>1142</sup> If the State had not committed an unlawful act, the investor would have been taxed on its profits only once, not twice. There would have been no need to seek an arbitral award, and no taxation would have resulted therefrom. In the “*but for*” scenario, the investor would have been able to retain the full after-tax profits generated by its investments. Such is the “*situation which would, in all probability, have existed*” and this situation can only be re-established if the liable State is made to compensate the investor for any excess taxes incurred stemming from the award itself. In that sense, the inclusion of a tax gross-up in loss quantifications follows from the full reparation principle to the same extent as an order of costs.
915. It is worth emphasizing that, from an accounting perspective, where the quantification of a loss is made based on after-tax lost profit figures, the liable State effectively retains an implicit tax equivalent to the tax deductions incorporated as part of the quantification. These deductions reduce the size of the award, since the investors’ losses are calculated on a net after-tax basis (instead of being calculated on a gross basis like in the *Saudi Arabia Texaco* (SAT) case).<sup>1143</sup> Thus, adding a tax gross-up on top of an after-tax lost profit quantification does not leave the liable State worse off than if the quantification had been based on pre-tax numbers. Simply, the effect of the tax gross-up is that the State must “*give back*” the implicit tax to the investor, which can then use it to pay taxes where they are actually due.

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<sup>1142</sup> PCIJ, *Case Concerning The Factory At Chorzów*, Judgment on the Merits, 13 September 1928, **CL-0322**, p. 47.

<sup>1143</sup> Report and Recommendations of the Panel of Commissioners Concerning the Second Instalment of E1 Claims, S/AC.26/1999/10, 24 June 1999, **CL-0360**, p. 404.



916. In the present matter, Versant has calculated North Star's lost profits and loss of investment value by reference to the company's lost "free cash flows to the firm" (FCFF), which is an after-tax accounting figure. The deduction of taxes from Versant's calculation represents an implicit tax retained by Norway (through a reduction of the size of the award as compared to a damage quantification relying on pre-tax profits). However, an award of financial compensation by the Tribunal would be subject to taxation in Latvia, resulting in double taxation and defeating the objective of full reparation.
917. To remedy this issue, Claimants request a tax gross-up as part of the quantification of their losses, equivalent to the amount of taxes expected to be payable by Claimants to Latvia on the Tribunal's award.<sup>1144</sup> Following the precedent set by the *Siemens v. Argentina* award, Claimants also request that the award (including the tax gross-up) be paid by Norway net of any taxes and costs.

*iv) Costs*

918. Pursuant to the ICSID Convention and Arbitration Rules, the Tribunal's Award must allocate the costs of the arbitration between the parties, including ICSID's administrative charges, the Tribunal's fees and expenses, and the legal and other expenses incurred by the parties.<sup>1145</sup>
919. An award of costs is also consistent with the principle of full reparation, insofar as costs are required to wipe out the consequences of the unlawful acts and to place the investor in the economic position that it would have enjoyed had the wrongful acts never occurred.
920. In *ADC v. Hungary*, the tribunal expressly linked the award of costs to the principle of full reparation:<sup>1146</sup>

*[T]he Tribunal can find no reason to depart from the starting point that the successful party should receive reimbursement from the unsuccessful party. This was a complex, difficult, important and lengthy arbitration which clearly justified experienced and expert legal representation as well as the engagement of top quality*

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<sup>1144</sup> Expert Report of Kiran Sequeira, para. 212.

<sup>1145</sup> See, **CL-0042**, Article 61(2), Article 47(1)(j) of the Convention.

<sup>1146</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, **CL-0243**, para. 533. The tribunal awarded the claimants approximately US\$7.6 million in respect of their costs and expenses.

*experts on quantum. Were the Claimants not to be reimbursed their costs in justifying what they alleged to be egregious conduct on the part of Hungary it could not be said that they were being made whole.*

921. Although ICSID tribunals were once reluctant to award costs to the prevailing party, recent tribunals have reversed the trend and now apply the “costs follow the event” principle.<sup>1147</sup>
922. For instance, in *Gemplus SA v Mexico*, the tribunal awarded the Claimants, who had “broadly prevailed”, their entire claimed costs in the amount of US\$5.3 million.<sup>1148</sup> The tribunal took as its “starting point the general principle that the successful party should have its reasonable costs paid by the unsuccessful party, in accordance with the general position in other forms of transnational commercial arbitration”.
923. In *Kardassopoulos v. Georgia*, the prevailing claimants argued that “there is an increasing trend towards outcome-based recovery in investment treaty arbitration”, while Georgia argued that “the prevalent approach in investment treaty arbitration has been to avoid the ‘loser pays’ principle”. The tribunal cited *ADC v Hungary*<sup>1149</sup> and held as follows:<sup>1150</sup>

*ICSID arbitration tribunals have exercised their discretion to award costs which follow the event in a number of cases, demonstrating that there is no reason in principle why a successful claimant in an investment treaty arbitration should not be paid its costs. For example, the tribunal in ADC found no reason “to depart from the starting point that the successful party should receive reimbursement from the unsuccessful party”. In that case, the tribunal found relevant to its costs award the fact that the respondent State had made no attempt to honour its obligations under the BIT in issue and had acted throughout with callous disregard of the claimants’ contractual and financial rights.*

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<sup>1147</sup> See, eg. *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18, ARB/07/15, Award, 3 March 2010, **CL-0292**; *Gemplus SA, SLP SA, Gemplus Industrial SA de CV v. The United Mexican States*, ICSID Case No. ARB(AF)04/3-5, Award, 16 June 2010, **CL-0361**.

<sup>1148</sup> *Gemplus SA, SLP SA, Gemplus Industrial SA de CV v. The United Mexican States*, ICSID Case No. ARB(AF)04/3-5, Award, 16 June 2010, **CL-0361**, paras. 17-24.

<sup>1149</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, **CL-0243**, para. 533.

<sup>1150</sup> *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 ARB/07/15, Award, 3 March 2010, **CL-0292**, paras. 680, 683 and 689-692. The *Kardassopoulos* Tribunal awarded the Claimants all of their claimed costs (almost US\$9 million).

924. In addition, Tribunals have exercised discretion to award costs against parties that have abused the arbitral process.<sup>1151</sup>

## H. QUANTIFICATION OF CLAIMANTS' DAMAGES

925. The quantification of Claimants' damages depends on a comparison between Claimants' current economic position (the "*actual*" scenario) and the economic position they would have enjoyed in the absence of Norway's breaches of the BIT (the "*but for*" scenario). This section thus begins with a presentation of the differences between the "*actual*" and the "*but for*" scenarios (*subsection a*). It then examines Claimants' calculations of their lost profits from the Date of Breach up to the valuation date of 1<sup>st</sup> January 2021 (*subsection b*) and of the loss of value sustained by their investments as of that date (*subsection c*). It is concluded by an overview of Claimants' quantification (*subsection d*).

### a. The Actual and the "But for" Scenarios

926. The quantification of Claimants' damages follows from a comparison between their current economic position (in the "*actual*" scenario) and the position they would have enjoyed but for Norway's breaches of the BIT (in the "*but for*" scenario). It is therefore necessary to begin our analysis by presenting the differences between these two scenarios.
927. In the "*but for*" scenario, all factors pertaining to the quantification of Claimants' losses are kept the same as they exist in the actual scenario, except for those affected by Norway's breaches of the BIT, which are changed to what they would have been in the absence of such breaches.<sup>1152</sup>

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<sup>1151</sup> *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, **CL-0170**, paras. 729–730, where the Tribunal held that Chile's arbitration strategy, which was found to be incompatible with international arbitration practice, had caused considerable delays and costs. See also, *RSM Production Corporation and Others v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, **CL-0362**, paras. 8.3.1–8.3.6; *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009, **CL-0363**, paras. 177–178; **CL-0054**, p. 378.

<sup>1152</sup> Expert Report of Kiran Sequeira, para. 20.

928. As noted by the tribunal in *Crystallex*<sup>1153</sup>, Claimants do not carry a burden of proving the “*but for*” scenario to an absolute degree of certainty since by definition, the emergence of this scenario was prevented by Norway’s unlawful acts. The standard is one of reasonableness, requiring Claimants to prove the “*but for*” world to a degree sufficient to provide “*reasonable confidence*”<sup>1154</sup> to the Tribunal, or allowing it to come to a “*reasonable approximation*”<sup>1155</sup> of their loss.
929. In the actual scenario, as of the date of valuation, Mr. Pildegovics retains a 100% shareholding in North Star and Sea & Coast, as well as contractual rights in the joint venture with Mr. Levanidov. There is no reason to doubt that Mr Pildegovics would have retained these investments in the “*but for*” scenario and that these would have been operated in support of Claimants’ snow crab fishing enterprise.
930. North Star’s investments in the actual scenario differ from the company’s investments in the “*but for*” scenario in two important respects: the composition of the company’s fleet; and the effect and value of its snow crab fishing rights.
931. In the actual scenario, North Star currently owns two ships: Saldus and Senator.<sup>1156</sup> In the “*but for*” scenario, North Star would have owned six ships: its current two plus Solvita, Solveiga, Sokol and Solyaris.
932. On 19 October 2017, North Star sold Solveiga to raise liquidities, at a time when its fishing operations had been halted by Norway.<sup>1157</sup> Solvita was sold for a similar reason in March 2021.<sup>1158</sup> But for Norway’s breaches of the BIT, it is virtually certain that North Star would have kept Solvita and Solveiga as part of its fleet and continued to use them for its snow crab fishing operations.<sup>1159</sup>
933. On 5 January 2017, North Star signed definitive agreements for the purchase of Sokol and Solyaris. These agreements were signed based on letters of intent signed some eighteen months earlier on 23 July 2015. In the intervening period, North Star acquired

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<sup>1153</sup> *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, **CL-0323**, paras. 868, 871.

<sup>1154</sup> *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, **CL-0291**, para. 246.

<sup>1155</sup> *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, **CL-0323**, para. 871.

<sup>1156</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 10.

<sup>1157</sup> *Ibid.*, para. 73.

<sup>1158</sup> *Id.*

<sup>1159</sup> *Id.*, para. 74.

the necessary fishing capacity to operate these ships as fishing vessels and obtained all needed administrative approvals from the Latvian Ministry of Agriculture to complete its purchase of the ships.<sup>1160</sup>

934. In mid-January 2017, Sokol and Solyaris were ready to be delivered to North Star. North Star expected to be able to start operating both ships as part of its fleet shortly thereafter.<sup>1161</sup>
935. The purchase of Sokol and Solyaris was only cancelled by North Star because of Norway's actions preventing it from operating its snow crab fishing business.<sup>1162</sup> But for these actions, North Star would have received delivery of the two ships as planned in January 2017 and used them as part of its snow crab fishing operations shortly thereafter, at the latest starting on 1<sup>st</sup> February 2017.
936. North Star's position in the actual and "*but for*" scenarios also differs with respect to the nature of the company's fishing rights. In the actual scenario, while North Star has continued to be issued licenses by Latvia allowing it to fish for snow crab in the international waters of the Loophole and in the Svalbard zone<sup>1163</sup>, Norway prevents the company from exercising these fishing rights. Practically speaking, these rights are therefore without effect or value. Norway has also systematically refused to grant similar rights to North Star as part of its own snow crab fisheries management regime. Consequently, in the actual scenario, North Star holds no usable snow crab fishing licenses and is effectively prevented from fishing snow crabs.
937. North Star's position in the "*but for*" scenario would have been significantly different in this regard. But for Norway's breaches of the BIT, North Star would have relied (and would continue to rely) on its NEAFC and Svalbard license rights in support of its snow crab fishing operations in the Loophole and the Svalbard zone. In the "*but for*" scenario, these license rights would have enabled North Star to catch significant volumes of snow crab and to sell these crabs to Seagourmet and other customers in Norway. North Star would continue to benefit from the same license rights for future periods as of the valuation date.<sup>1164</sup>

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<sup>1160</sup> *Id.*, para. 98.

<sup>1161</sup> *Id.*, para. 239.

<sup>1162</sup> *Id.*, para. 107.

<sup>1163</sup> *Id.*, para. 185.

<sup>1164</sup> *Id.*, paras. 85 *et seq.*

938. The issuance of the NEAFC and Svalbard licenses to North Star from the Date of Breach to the date of this memorial is a fact. There is no doubt that the company would have benefitted from these licenses but for Norway's breaches. In view of the systematic renewal of these licenses – even in spite of the fact that North Star is unable to fish – there is no reason to doubt that these licenses would be (and indeed will be) renewed by Latvia in future periods.
939. The NEAFC and Svalbard licenses issued to North Star since 2014 have authorized the company to catch an unlimited amount of snow crab. None of these licenses are subject to any quotas or catch limitations. These unregulated fishing rights were in effect on the Date of Breach and North Star relied upon them for its ongoing snow crab fishing operations until that date. Until Norway's assertion of jurisdiction over the Barents Sea snow crab fishery, there was no indication that this would change in the foreseeable future (although the prospect of eventual quotas or catch limitations could not be ruled out in the longer term, as further discussed below; *infra*, para. 992(b)).
940. In summary, in the “*but for*” scenario, North Star would have been a fully operating snow crab fishing company benefitting from a fleet composed of six ships including three factory vessels (Senator, Sokol and Solyaris) and three live catchers (Solvita, Saldus and Solveiga), all of them holding unregulated licenses to fish for snow crab in the international waters of the Loophole and the Svalbard zone. North Star would also have benefitted from the joint venture established by its principal Mr. Pildegovics with his cousin Mr. Levanidov, whereby North Star was the exclusive supplier to Seagourmet, the operator of a recently equipped, state-of-the-art snow crab processing factory in the port of Baatsfjord. By contrast, in the actual scenario, North Star's business enterprise has been destroyed and the company is prevented from catching snow crabs, the species it was set up to fish.
941. The above comparison between the actual and “*but for*” scenarios relies on facts proven by concrete evidence, providing an unusually high degree of confidence in the reasonableness of the proposed “*but for*” scenario. In most investment arbitrations, Claimants must rely on business plans to establish the position they would have held but for the State's violations of the treaty. Indeed, business plans are generally viewed by tribunals as providing a strong evidentiary foundation: the *ADC v. Hungary* tribunal stated that a business plan constitutes “*the best evidence before the Tribunal of the*

*expectations of the parties*”<sup>1165</sup>, and the *Crystallex* tribunal accepted a business plan as a sufficient foundation to base the expected profitability of the claimants’ pre-operational mining project.<sup>1166</sup>

942. In the present case, Claimants had far more than a business plan when Norway destroyed their investments. They had been operating their snow crab fishing business for more than two years and were ready for a significant increase in its production following the addition of two factory vessels to their fleet. All the assets required for this purpose had been acquired and were ready (or virtually ready) to be deployed. Their joint venture partner Seagourmet had completed a two-year round of investments at its Baatsfjord factory giving it capacity to process up to [REDACTED] per year of raw snow crab, [REDACTED].<sup>1167</sup> Claimants were not merely planning to launch a business project: their project was up-and-running, and ready to operate at scale after years of investments.

943. Thus, to summarize the key factual distinctions between the actual and “*but for*” scenarios:

(a) In the actual scenario, North Star owns two vessels, neither of which is allowed by Norway to fish for snow crabs in the Barents Sea. The company has attempted to redirect its activities to other projects but has so far failed to generate a profit.

(b) In the “*but for*” scenario, North Star would have owned six vessels, all of which would have held unregulated licenses to fish for snow crabs in the Loophole and the Svalbard zone, and all of which would have been operated for this purpose. As shown by Versant’s report, the company would have been strongly profitable – notably given the large increases in snow crab prices from 2017 onward.

944. While Claimants’ snow crab fishing enterprise would have relied on each component of Claimants’ investments in the “*but for*” scenario, North Star is the entity that would have generated the cash flows that were lost as a consequence of Norway’s breaches of the BIT. Claimants’ quantification of their damages is therefore based on an

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<sup>1165</sup> *ADC Affiliate Limited, et al. V. Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, **CL-0243**, para. 507.

<sup>1166</sup> *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, **CL-0323**, para. 878.

<sup>1167</sup> Witness Statement of Kirill Levanidov, 11 March 2021, para. 62.

assessment of the value of North Star's lost cash flows caused by Norway's breaches as of the date of valuation.

945. For valuation purposes, North Star's damages are partitioned into two components:

(a) The first component relates to the historical period between the Date of Breach and the valuation date, where the performance of the investment would have been different from its actual performance. For this period, Claimants have calculated the additional free cash flows to the firm (FCFF) that North Star would have generated "*but for*" Norway's breaches (*subsection b*).<sup>1168</sup>

(b) The second component relates to the future period extending forward from the valuation date wherein Claimants' investments would continue operating and generating cash flows but for Norway's breaches of the BIT. This second component assesses the diminution of value sustained by Claimants' investments resulting from their inability to operate their snow crab fishing enterprise in the future period. This diminution of value (or "*but for*" value of Claimants' investments) is calculated by discounting North Star's future lost cash flows to the date of valuation through the DCF method. The market approach is also used to support the reasonableness of the DCF valuation (*subsection c*).<sup>1169</sup>

#### **b. Calculation of Claimants' lost profits predating the valuation date**

946. The first component of Claimants' damages calculates the difference between the profits they would have received in the "*but for*" scenario and the profits they did receive in the actual scenario during the historical period (between the Date of Breach and the valuation date).

947. This difference is measured by calculating the additional free cash flows to the firm (**FCFF**) that Claimants would have received "*but for*" Norway's breaches of the BIT. FCFF represents the funds available to the owners of the firm after paying operating expenses and taxes, addressing the changing working capital needs, and funding long-term investments. In other words, FCFF represents the amount of cash that can be paid out, or is "*free*" to be paid out, to the investors after other cash needs of the

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<sup>1168</sup> Expert Report of Kiran Sequeira, para. 85.

<sup>1169</sup> *Ibid.*, para. 85.



business are met.<sup>1170</sup> FCFF is therefore an accurate and fair measure of profit for purposes of Claimants' quantification of their damages.

948. Since free cash flows from Claimants' operations would have accrued to North Star, North Star's free cash flows are the subject of this analysis.
949. According to Versant's calculations based on North Star's financial statements for the period 2016-2019, North Star's actual FCFF for the historical period is *negative* EUR 3.2 million.<sup>1171</sup> Following Norway's actions in breach of the BIT, North Star has not been allowed to catch snow crabs. In an effort to reposition its business in this highly challenging context, North Star agreed with Seagourmet to experiment with shrimp fishing in the Barents Sea. These efforts have allowed North Star to generate modest revenues; yet the company has suffered losses in every financial year since 2017.<sup>1172</sup>
950. North Star's "*but for*" FCFF during the historical period have been calculated by Versant based on a determination of the following variables: (i) North Star's earnings before interests and taxes (**EBIT**), calculated as North Star's revenues less its cost of goods sold, administrative expenses and depreciation relying on "*but for*" facts; (ii) the taxes that would have been paid by North Star on its EBIT; (iii) the company's depreciation and amortization; and (iv) changes in its net working capital. These variables are explained and discussed in detail in Versant's report.<sup>1173</sup> The following sections highlight the key elements to facilitate the Tribunal's understanding of Versant's analysis.

*i) "But for" revenues*

951. Versant's revenue projections in the "*but for*" scenario are based on an estimation of the quantities of snow crab that would have been caught and delivered by North Star's six ships, and the market prices that would have been obtained by North Star for its snow crab deliveries.<sup>1174</sup>
952. In order to estimate the quantities of snow crabs that would have been caught and delivered by North Star, Versant has relied on the catch numbers shown by North Star's

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<sup>1170</sup> *Id.*, para. 97.

<sup>1171</sup> *Id.*, para. 101.

<sup>1172</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 268.

<sup>1173</sup> Expert Report of Kiran Sequeira, paras. 102 *et seq.*

<sup>1174</sup> *Id.*, paras. 105 *et seq.*

four vessels in 2015 and 2016. These numbers were then adjusted for the following factors<sup>1175</sup>:

- (a) The number of fishing vessels in North Star's fleet, which would have grown from four in 2015 and 2016 (Solvita, Senator, Solveiga and Saldus) to six starting from 1<sup>st</sup> February 2017 (the previous four plus Sokol and Solyaris);
- (b) The quantity of snow crabs that each vessel would have been able to catch per day at sea; and
- (c) The number of days that each vessel would have spent at sea catching snow crabs (as opposed to days spent at port for landing of catches, repairs and maintenance).

953. These factors impact the estimation of North Star's catches in the following ways. A higher number of vessels means more fishing capacity, hence higher expected catches. The total catches reported by each vessel is then a function of the vessels' catch productivity per day fishing at sea, and the number of days each vessel would have spent at sea.

954. Regarding the first factor (number of fishing vessels in the fleet), Versant's analysis relies on the assumption that North Star would have completed its purchase of Sokol and Solyaris and received delivery of both ships before the end of January 2017.<sup>1176</sup> As discussed above, this assumption relies on solid documentary and testimonial evidence<sup>1177</sup> and is therefore established to high degree of certainty.

955. Regarding the second factor (quantity of snow crabs that each vessel would have caught per day at sea), Versant has used as a baseline the catch productivity numbers shown by Saldus, Senator, Solveiga and Solvita in 2015 and 2016. These catch productivity numbers are evidenced by North Star's sales invoices, vessel statistics from the Latvian Ministry of Agriculture, port data for North Star's vessels and catch data for Sokol and Solyaris under their previous owners.<sup>1178</sup>

956. Using this data as its starting point, Versant's analysis assumes that Solveiga and Senator would have caught snow crabs at the same daily catch rate as they had achieved in 2016. Solveiga and Senator had both improved their daily catch rate from

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<sup>1175</sup> *Id.*, para. 105.

<sup>1176</sup> *Id.*, para. 106.

<sup>1177</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 239.

<sup>1178</sup> *Ibid.*, para. 101.

2015 to 2016. Versant's analysis reasonably assumes that these productivity improvements would have been maintained in future years.

957. Versant then assumes that Saldus and Solvita would have achieved similar catch rates as Solveiga as from 1<sup>st</sup> October 2016. This assumption is based on the fact that the three vessels are "*live catchers*" with similar characteristics, and nothing would explain wide divergences in their catch productivity over time.<sup>1179</sup>
958. As explained in Mr. Pildegovics' witness statement, the divergence in the actual catch productivity of Saldus and Solvita as compared with Solveiga in 2015 and 2016 is explained by two factors: the ships used different equipment; and they experimented with different fishing techniques.<sup>1180</sup> In June 2016, North Star installed new equipment on Saldus, which meant that from that date onward, the ship was as well-equipped as its siblings Solvita and Solveiga. It is important to note that the years 2015 and 2016 were start-up years for North Star. The company had learned from its experiences and would have applied best practices across its ships in 2017 and subsequent years, leading to an expectation that the three live catchers would at least perform on par with Solveiga, the most productive ship during the first two years.<sup>1181</sup>
959. Starting in 2017, Versant assumes that the company's four ships in operation in 2015 and 2016 would have continued to improve their daily catch productivity: by 10 percent in each of 2017, 2018 and 2019, and by 5 percent in 2020, reflecting Mr. Pildegovics' minimum expectation.<sup>1182</sup>
960. While these catch productivity assumptions cannot possibly be proven to a high degree of certainty (which however is entirely due to Norway's breaches, which prevented North Star from building a snow crab catch history in 2017 onward), their reasonableness is supported by the following facts and evidence, which are more amply discussed in Versant's report and Mr. Pildegovics' witness statement:
- (a) North Star's catch productivity numbers showed an actual increase of ■% in 2016 as compared to 2015.<sup>1183</sup> The fleet's catch productivity was therefore on a strongly

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<sup>1179</sup> Expert Report of Kiran Sequeira, para. 62.

<sup>1180</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 247.

<sup>1181</sup> *Ibid.*, para. 247(b).

<sup>1182</sup> Expert Report of Kiran Sequeira, para. 110; Witness Statement of Peteris Pildegovics, 11 March 2021, para. 252.

<sup>1183</sup> Expert Report of Kiran Sequeira, para. 108; Witness Statement of Peteris Pildegovics, 11 March 2021, para. 251.

increasing trend when Norway halted its operations, which is explained by various factors (as described below). There is no reason to believe that this trend could not have continued.

(b) North Star planned to increase the number of crab pots deployed by its ships. While in 2015 and 2016, North Star's ships fished with [REDACTED] to [REDACTED] pots, Norwegian fishing vessels used up to [REDACTED] pots, implying a large potential to increase the ships' catch productivity through the increase in the number of pots.<sup>1184</sup> Each pot creates an opportunity to catch crabs. It is therefore reasonable to assume that deploying more pots would lead to higher catches.

(c) North Star had made (and was planning to make) productivity enhancing investments aboard its factory vessels.<sup>1185</sup>

(d) The company's crews would have continued to improve their knowledge of the fishing grounds and mastery of snow crab fishing techniques. By 2017, its captains had become familiar with seasonal changes and migration patterns of snow crab populations, allowing them to optimize the selection of fishing grounds based on the time of year.<sup>1186</sup>

961. Consistent with the approach taken for North Star's three live catchers, Versant's model assumes that Sokol and Solyaris would have achieved the same catch productivity as Senator.<sup>1187</sup> The three ships are technically comparable factory vessels. Sokol and Solyaris have processing and storage capacities comparable to Senator's. They would have relied on equipment of a similar quality and been manned by a similar number of crew members as Senator. Their skippers would have benefitted from the snow crab fishing experience acquired by North Star in 2015 and 2016.<sup>1188</sup>

962. While Sokol and Solyaris showed lower actual productivity numbers than Senator under their previous ownership in 2015 and 2016, this is explained by the different regulatory regime under which the two vessels operated under their previous owner, when they flew the Russian flag.<sup>1189</sup> Given their technical similarities to Senator, after

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<sup>1184</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 252(a).

<sup>1185</sup> *Ibid.*, para. 252(b).

<sup>1186</sup> *Id.*, para. 252(d).

<sup>1187</sup> Expert Report of Kiran Sequeira, para. 109.

<sup>1188</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 247.

<sup>1189</sup> *Ibid.*, para. 249.

Sokol and Solyaris would have been moved to the Latvian flag and operated under Latvian fishing licenses, it is reasonable to assume that their productivity would have caught up to Senator's.

963. Regarding the third factor (number of days spent at sea by each vessel), Versant has analysed the breakdown of operating days between sea days and days at port for each of North Star's ships, based on Claimants' records as well as port authority statistics.<sup>1190</sup> Relying on this data, Versant's model assumes that the three live catcher vessels (Saldus, Solvita and Solveiga) would have spent █% of their operating days at sea, which is consistent with the statistics shown by Solvita and Solveiga in 2016.<sup>1191</sup> Following a similar approach, the three factory vessels (Senator, Sokol and Solyaris) would have spent █% of their operating days at sea, consistent with Senator's statistics in 2016. Operating days are calculated by subtracting expected repair and maintenance days at port from total available days.<sup>1192</sup>
964. Versant's assumptions for this third factor are based on actual vessel usage statistics. They are otherwise reasonable (and indeed conservative) based on the detailed explanations provided by Mr. Pildegovics in his witness statement.<sup>1193</sup>
965. The following facts support Versant's conclusion that North Star's vessels would have spent a greater number of days at sea in 2017 than in 2015 or 2016:
- (a) North Star's plans to operate its fleet throughout the year<sup>1194</sup>;
  - (b) Expected vessel repair and maintenance requirements<sup>1195</sup>;
  - (c) The fact that North Star vessels were not available to fish throughout 2015 and 2016, but would have been fully available starting in 2017<sup>1196</sup>;
  - (d) Non-recurring factors explaining why some of North Star's ships needed to be kept

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<sup>1190</sup> Expert Report of Kiran Sequeira, para. 111; Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 242 *et seq.*

<sup>1191</sup> Expert Report of Kiran Sequeira, para. 111.

<sup>1192</sup> *Ibid.*, para. 112; Witness Statement of Peteris Pildegovics, 11 March 2021, para. 241.

<sup>1193</sup> Witness Statement of Peteris Pildegovics, 11 March 2021, para. 241.

<sup>1194</sup> *Ibid.*, para. 244.

<sup>1195</sup> *Id.*, para. 245.

<sup>1196</sup> *Id.*, para. 246.

at port for longer than expected in 2015 or 2016<sup>1197</sup>; and

(e) The positive impact of Seagourmet's capacity investments on expected landing times in subsequent years.<sup>1198</sup>

966. Based on the above assumptions regarding the number of ships in the fleet, their daily catch productivity, and the number of days they would have spent at sea, Versant has calculated the quantities of snow crab that would have been caught by North Star's vessels in the historical period, namely between 1<sup>st</sup> October 2016 and 31 December 2020. These expected catch numbers fall within a range of [REDACTED] to [REDACTED] tonnes per year based on delivered weight.<sup>1199</sup>
967. Having established the "*but for*" catches that would have been made by North Star over the historical period, Versant then calculates the lost sales that would have resulted from these catches. These sales are forecast based on an analysis of North Star's supply agreements with two companies, Seagourmet and [REDACTED], which demonstrate that North Star had purchase commitments in place for its snow crab catches.<sup>1200</sup> In addition, the evidence shows that Seagourmet, North Star's joint venture partner, had built capacity to process up to [REDACTED] tonnes of raw snow crab per year.<sup>1201</sup> These facts make it clear that North Star would have faced no difficulty to sell the catches forecast in Versant's model, largely thanks to Mr. Pildegovics' joint venture with Mr. Levanidov.
968. Versant then analyses the prices that would have been realized by North Star on these sales. This analysis starts from a review of the prices actually realized by North Star in 2015 and 2016 for different snow crab size classifications. The actual prices realized in 2016 are used as a basis to forecast North Star's sales between 1<sup>st</sup> October and 31 December 2016.<sup>1202</sup>
969. For the years 2017 through 2020, Versant has applied the changes in the average Euro prices for Norway's frozen snow crab exports (the **reference market prices**) to North

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<sup>1197</sup> *Id.*, para. 244.

<sup>1198</sup> *Id.*, para. 245.

<sup>1199</sup> Expert Report of Kiran Sequeira, para. 113 (Table 12).

<sup>1200</sup> *Ibid.*, para. 114; Witness Statement of Peteris Pildegovics, 11 March 2021, paras. 112-116.

<sup>1201</sup> Expert Report of Kiran Sequeira, para. 115; Witness Statement of Kirill Levanidov, 11 March 2021, para. 62.

<sup>1202</sup> Expert Report of Kiran Sequeira, para. 117.

Star's historical prices. The reference market prices have been supplied by a specialized seafood consultancy firm, Urner Barry.<sup>1203</sup>

970. Urner Barry's data shows that the reference market prices increased by 40.3% in 2017, 0.9% in 2018, 6.3% in 2019, and 0.9% through September 2020, as measured in Euros. Versant's report notes that these percentage increases were even higher in Norwegian kroner/NOK, due to fluctuations in the EUR:NOK exchange rate over the period.<sup>1204</sup> Versant's reference to price variations calculated in Euro terms is therefore conservative, since it assumes that North Star's sales would have occurred in euros as opposed to Norwegian kroners throughout the historical period.
971. North Star's "*but for*" revenues are finally calculated by multiplying the projected sales volumes by the prices of snow crab in each period, based on assumed size classifications aligned with North Star's historical figures and supply agreements. The results of these calculations show "*but for*" revenues of EUR [REDACTED] million in 2017 growing to EUR [REDACTED] million in 2020.<sup>1205</sup>

*ii) "But for" FCFF*

972. Having established North Star's lost revenues, Versant then calculates North Star's lost FCFF by deducting North Star's expected costs of goods sold, administrative expenses, taxes and capital expenditures from the revenue figures<sup>1206</sup>, further adjusting for depreciation and amortization and working capital changes.<sup>1207</sup>
973. The assumptions underlying these calculations are based on North Star's actual cost figures in 2015 and 2016, with appropriate adjustments to account for variables including the addition of two ships to the fleet (Sokol and Solyaris); the forecast increases in the number of operating days for the vessels; the forecast increases in

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<sup>1203</sup> *Ibid.*, para. 119.

<sup>1204</sup> *Id.*, para. 119.

<sup>1205</sup> *Id.*, para. 121 (Figure 13).

<sup>1206</sup> *Id.*, para. 122.

<sup>1207</sup> *Id.*, para. 170.

catch volumes; and actual variations in the price of marine gas oil, a key cost input in North Star's operations.<sup>1208</sup>

974. Versant concludes that, in the “*but for*” scenario, North Star would have been able to generate annual FCFF between EUR [REDACTED] million and [REDACTED] million annually during the historical period, for a total of EUR [REDACTED] million.<sup>1209</sup>
975. Claimants' lost FCFF are finally calculated as the difference between the actual scenario (negative EUR [REDACTED] million) and the “*but for*” scenario (EUR [REDACTED] million), which equals a loss of profits of EUR [REDACTED] million over the historical period.<sup>1210</sup>

**c. Calculation of the loss of value sustained by Claimants' investments as of the valuation date: the DCF method and the market approach**

976. In the first part of its analysis, Versant calculated Claimants' lost profits during the historical period, namely between the Date of Breach and the valuation date (1<sup>st</sup> January 2021). This calculation does not capture the loss of value sustained by Claimants' investments *as a going concern* on the valuation date, which is significant based on a comparison between the actual and “*but for*” scenarios.
977. In the “*but for*” scenario, North Star would have commenced 2021 as the owner of a solidly profitable snow crab fishing enterprise. This business enterprise would have caught a substantial share of snow crabs from the Loophole and Svalbard waters over the preceding years, allowing the company to be valued as a going concern.
978. In the actual scenario, North Star owns a business which has effectively been decimated by Norway and which has failed to turn a profit over the historical period due to its incapacity to fish for snow crabs. The company currently has no business operation generating any free cash flow. In that light, it is plain that Claimants' investments have suffered significant value destruction as the result of Norway's breaches of the BIT, which must be compensated to achieve full reparation.
979. Versant's report calculates the loss of present value of Claimants' investments as the difference between (i) the sum of the discounted FCFF which would be realized by these investments in future years starting from the valuation date in the “*but for*”

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<sup>1208</sup> *Id.*, para. 126.

<sup>1209</sup> *Id.*, para. 208.

<sup>1210</sup> *Id.*, para. 147 (Table 23).



scenario; and (ii) the sum of the discounted FCFF that are currently expected to be realized by these investments in the actual scenario. Because North Star's projected FCFF in the actual scenario are currently negative (implying a lack of current investment value of their business enterprise as a going concern), the loss of value of Claimants' investments is equal to the value of these investments in the "*but for*" scenario.

980. Versant's calculation of the loss of value sustained by Claimants' investments as of the valuation date is based on the fundamental financial principle that the value of an investment is equal to the sum of its future cash flows discounted to their present value at an appropriate discount rate.<sup>1211</sup> This value is calculated through the discounted cash flow (or DCF) method. It is then subjected to a reasonableness check through the market approach.
981. The DCF method assesses the value of a future stream of cash flows by discounting these cash flows to their present value. It requires three steps: (i) an estimation of the investment's future cash flows over a projection period; (ii) a calculation of the discount rate using market and company-specific data that reflects the level of risk associated with the investment, as compared to other possible investments; and (iii) an estimation of the ongoing/terminal value of the investment. The sum of the discounted cash flows over the projection period and the discounted terminal value equals the total discounted value of the investment.<sup>1212</sup>
982. The market approach seeks to value an investment by using valuation data for comparable companies or transactions. It involves four steps: (i) identifying comparable companies or transactions to the valuation subject; (ii) computing appropriate valuation ratios; (iii) determining which of these ratios is most appropriate to apply to the subject company; and (iv) applying the multiple to the subject company's financial and operational metrics to determine the valuation conclusions.<sup>1213</sup>
983. As noted above, because future lost cash flows in the "*but for*" scenario would have accrued to North Star, the loss of value sustained by Claimants' investments caused by Norway's breaches of the BIT is properly assessed by calculating the loss of value

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<sup>1211</sup> *Id.*, paras. 177-179.

<sup>1212</sup> *Id.*, para. 93.

<sup>1213</sup> *Id.*, para. 95.

sustained by North Star's enterprise in the actual scenario as compared to the "but for" scenario.<sup>1214</sup>

*i) The DCF method*

984. Versant's expert report notes that the DCF method is appropriate in this case because it is possible to reasonably project the future revenues that North Star would generate from its snow crab fishing operations in the "but for" scenario, as well as the costs that North Star would reasonably incur in conducting its commercial activities.<sup>1215</sup>
985. The first step required by the DCF method is a projection of North Star's cash flows going forward from the valuation date. Building on its analysis of North Star's lost FCFF in the historical period, Versant has prepared projections of future FCFF over the 10-year period from 1<sup>st</sup> January 2021 to 31 December 2030.
986. Versant's projections begin with its estimate of North Star's catches in 2020. They assume no further productivity increases after 2020 (namely, no increase in the daily catch rate or catch volumes).<sup>1216</sup> Versant's report notes that this projection is potentially conservative in light of the expected growth in the snow crab population in the Loophole and the Svalbard zone during the projection period.<sup>1217</sup>
987. Versant then conservatively assumes that prices for snow crabs will grow in line with inflation after 2020 and maintains the same overall approach for cost projections as for the historical period, allowing it to calculate projected FCFF from 2021 to 2030.<sup>1218</sup>
988. Versant's analysis then discounts the sum of the projected future FCFF at a discount rate of [REDACTED]%. This discount rate was calculated based on North Star's WACC, which is the weighted average of North Star's cost of equity and cost of debt capital available to finance the business.<sup>1219</sup>
989. Versant's cost of equity calculation reflects the risk-free rate and a risk premium appropriate for North Star's operations. The risk-free rate is the return on a security that

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<sup>1214</sup> *Id.*, para. 20.

<sup>1215</sup> *Id.*, para. 25.

<sup>1216</sup> *Id.*, para. 153.

<sup>1217</sup> *Id.*, para. 154; Expert Report of Dr. Brooks Kaiser, para. 48.

<sup>1218</sup> Expert Report of Kiran Sequeira, para. 157.

<sup>1219</sup> *Ibid.*, para. 195.

has no default risk and no reinvestment risk. For this risk-free rate, Versant has used the yield on the 10-year Norwegian government bond converted to a Euro-denominated rate.<sup>1220</sup>

990. The risk premium applicable to North Star measures the additional rate of return that would be required by an investor to invest in the share capital of the company. This is composed of the equity risk premium (or the premium required by investors for taking the risk of investing in equity securities as opposed to risk-free government bonds), the country risk premium (or the premium returns required by equity investors to invest in a certain country) and the company-specific risk premium (or the premium returns required by equity investors to invest in a certain company).<sup>1221</sup>
991. The equity risk premium is calculated by Versant by reference to market studies regarding the premium generally demanded by equity investors in European markets over the rate of return offered by European government bonds.
992. Versant's calculation does not incorporate a country risk premium, since investors do not require a premium to invest in Norway, based on the general understanding that an investment in Norway is not considered to expose an investor to any particular country-specific risks.<sup>1222</sup>
993. Versant's report provides a detailed discussion of company-specific risks that would be considered by an investor contemplating an investment in North Star's equity. Following this discussion, it concludes that a company-specific risk premium of ■ % is appropriate in view of these risks, which are classified under two categories:
- (a) Risks related to the fact that North Star is a small and relatively young company;<sup>1223</sup>  
and
- (b) The risk that future catches could be limited by potential future catch limitations (or quotas) applicable to the fishing grounds where North Star held license rights, namely the Loophole and Svalbard.<sup>1224</sup>

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<sup>1220</sup> *Id.*, para. 182.

<sup>1221</sup> *Id.*, para. 186.

<sup>1222</sup> *Id.*, para. 185.

<sup>1223</sup> *Id.*, para. 187.

<sup>1224</sup> *Id.*, para. 190.

994. In determining an appropriate premium to account for this latter risk, one must put oneself in the position of a hypothetical investor contemplating an investment in North Star. Such an investor would consider the known facts pertaining to the issue at hand and make reasonable assumptions regarding any unknown (or unknowable) facts.
995. It is useful to recall at this stage that the following analysis is carried out in the “*but for*” world, namely with reference to the situation that existed prior to Norway’s breaches of the BIT. The purpose of this exercise is to value Claimants’ investments in this “*but for*” world. The analysis should therefore omit reference to risks related to anticipated or actual wrongful acts on the part of Norway – including the fact that Norway has illegally expelled EU fishermen from the fishery or that it has adopted prohibitively low quotas for protectionist reasons.
996. Also recalling that the goal of reparation is to “*re-establish the situation which would, in all probability, have existed if that act had not been committed*”<sup>1225</sup>, since the value of what was taken or destroyed by Norway is intimately tied to the “*situation*” that existed before Norway’s breaches, the risk analysis performed by a reasonable investor in the “*but for*” scenario must be based on the assumption that the legal environment which existed in this anterior situation would have been maintained.
997. As a starting point to this analysis, a reasonable investor in the “*but for*” scenario would consider the fact that North Star’s license rights for the NEAFC and Svalbard zones allowed the company to catch unlimited amounts of snow crabs. In the situation prevailing before Norway’s breaches, there was no indication that this would change in the foreseeable future.
998. The key question for a hypothetical investor would have been whether snow crab catches could be capped at some point in the future and if so, at what level. This latter question could have been answered based on a consideration of two sets of facts: (i) available scientific observations related to the Barents Sea snow crab population; and (ii) officially stated fisheries management goals and mechanisms. Both are discussed in the expert report of Dr. Brooks Kaiser.<sup>1226</sup>

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<sup>1225</sup> PCIJ, *Case Concerning The Factory At Chorzów*, Judgment on the Merits, 13 September 1928, **CL-0322**, p. 47.

<sup>1226</sup> Expert Report of Brooks Kaiser, paras. 71-78, 84-86.

999. Dr. Kaiser's report first shows that the Barents Sea population is expected to grow and to expand significantly throughout the projection period. By 2030, snow crabs are expected to populate the entire Loophole and Svalbard area.<sup>1227</sup>
1000. In view of the expanding population of snow crab (both numerically and geographically), two management goals could plausibly be pursued by decision-makers contemplating a quota for the fishery in the "*but for*" scenario. The first would aim to limit the expansion of the population for ecological reasons, to mitigate the ecosystemic risks associated with snow crab as an invasive species. Dr. Kaiser notes in this regard that "*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 [the Svalbard FPZ]. 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*".<sup>1228</sup>
1001. The second plausible management goal would seek to maximize the economic output of the fishery by establishing quotas set to the maximum sustainable yield (or MSY), which is the highest catch volume that can repeatedly been harvested each year without leading to a depletion of the species.<sup>1229</sup> MSY would argue in favour of lower quotas than a purely environmental approach, since a goal of the management regime would then be to ensure that the snow crab population can sustain itself, instead of driving it towards extinction.
1002. Dr. Kaiser's report notes that these two goals "*are in many ways incompatible. Maximizing the long term harvest yield requires allowing the spread of the species to its full extent and then harvesting at MSY for the indefinite future. Minimizing the risk of unwanted ecosystem effects from the invasion requires putting effort into damping down both the population and the spread of the crab, through intensive harvest. To attempt a balance, as the Norwegian government proposes, one may re-phrase the goals into a single objective: to maximize the net benefit of the crab's presence*".<sup>1230</sup>

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<sup>1227</sup> *Ibid.*, paras. 48-49.

<sup>1228</sup> *Id.*, para. 94.

<sup>1229</sup> *Id.*, para. 25.

<sup>1230</sup> *Id.*, para. 80.

1003. In that light, a hypothetical investor would consider MSY as a conservative assumption for an appropriate quota level for the fishery (while also acknowledging that higher catch ceilings could apply if the management regime was more serious about ecological goals).<sup>1231</sup> Since North Star held snow crab fishing licenses for the Loophole and the Svalbard area, the hypothetical investor would then attempt to establish the total level of catches that could constitute MSY for these two fishing grounds.
1004. For both fishing grounds, Dr. Kaiser's expert report presents MSY estimates based on Norwegian and Russian data. The median mean MSY estimates for the Loophole and the Svalbard FPZ are 42,760 tonnes for 2021, growing to 67,387 tonnes for 2030.<sup>1232</sup>
1005. Our hypothetical investor would then consider the quota share that North Star could reasonably expect to obtain out of an eventual quota set at MSY. While it would not be possible to know the details of an eventual quota allocation scheme, the hypothetical investor would certainly look to North Star's historical share of the snow crab fishery as of valuation date as a valid starting point.
1006. Without knowing the level of catches that might have been achieved by other vessels in 2020 in the "*but for*" scenario, it is not possible to assess precisely the market share that North Star could have captured by 2020. This market share can however be estimated by looking at North Star's share in 2015 and 2016, when the company was able to exercise its fishing rights.
1007. In 2015, North Star caught [REDACTED] MT out of total Barents Sea landings of 18,140 MT ([REDACTED] %). In 2016, it caught [REDACTED] MT out of total landings of 16,500 MT ([REDACTED] %).<sup>1233</sup> These numbers understate North Star's true market share of Loophole and Svalbard catches in two important ways. First, the above percentages show North Star's share of the entire Barents Sea fishery, including the Russian EEZ. Second, North Star's catches were achieved over partial years of operation, thus understating the company catch potential over a full year.
1008. By February 2017, North Star would have added two factory vessels to its fleet, Sokol and Solyaris. By doing so, North Star would also have added market share since these two ships were former competitors (they caught snow crabs in the Barents Sea snow crab fishery for competing companies). The addition of these ships to the fleet can

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<sup>1231</sup> *Id.*, para. 52.

<sup>1232</sup> *Id.*, para. 55 (Figure 15).

<sup>1233</sup> Expert Report of Kiran Sequeira, para. 108 (Table 8); Expert Report of Dr. Brooks Kaiser, Table 1, p. 5.

therefore safely be assumed to increase North Star's share of the market in subsequent years.

1009. If we take Versant's estimates of North Star's catches for 2020 and assume that North Star's four original ships would have maintained their 2016 market share<sup>1234</sup>, the following estimate of North Star's 2020 market share (*of the total Barents Sea fishery*) could be made:

- (a) By Versant's estimate, the original four ships would have caught [REDACTED] tonnes of snow crab in 2020.<sup>1235</sup> Assuming an [REDACTED]% market share would imply total industry landings of [REDACTED] tonnes.
- (b) Sokol and Solyaris' expected catches of [REDACTED] tonnes<sup>1236</sup> would capture approximately [REDACTED]% market share assuming the same total level of catches.
- (c) Adding the market share of North Star's original four ships ([REDACTED]%) to that of Sokol and Solyaris ([REDACTED]%), the company could have been expected to achieve approximately [REDACTED]% market share.

1010. If our hypothetical investor were to assume that North Star would be able to maintain its historical share of the market after 2020 and apply this share to the median MSY to approximate North Star's eventual quota share, he or she would reach the conclusion that North Star could realistically be attributed a quota between [REDACTED] tonnes (for 2021) and [REDACTED] tonnes (by 2030), representing [REDACTED]% of the median mean estimated MSY for the Loop hole and Svalbard. These numbers are significantly above Versant's catch projections for the period 2021-2030, showing the reasonableness of these projections, or at least the existence of a significant margin of safety before any potential quota could negatively impact the company's catch projections. In fact, a hypothetical investor could reasonably consider that North Star had the potential to invest in further capacity growth in subsequent years (e.g., by investing in additional vessels or further productivity enhancing equipment).

1011. Nonetheless, considering the relative uncertainty regarding the evolution of the snow crab population and its management in the "*but for*" scenario, Versant has

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<sup>1234</sup> Dr. Kaiser notes that there is "*no evidence of progress in the fishery that the market share of North Star should decrease per unit of effort*"; Expert Report of Brooks Kaiser, p. 91.

<sup>1235</sup> Expert Report of Kiran Sequeira, Table 12, para. 113.

<sup>1236</sup> *Ibid.*, Table 12, para. 113.

conservatively applied an additional 2.5% risk premium to the discount rate to account for such uncertainty.<sup>1237</sup>

1012. Adding the different components discussed above, Versant calculates a cost of equity for North Star of 12.74%. Accounting for North Star's cost of debt and weighting of equity and debt, Versant calculates a WACC of 11.78% for North Star, which is used as the discount rate in its DCF analysis.
1013. Versant's DCF valuation conclusion, relying on its projections of FCFF to be generated by North Star over the projection period, the selected discount rate and North Star's terminal value, is that North Star's fair market value as of the valuation date would have been EUR 263.1 million in the "but for" scenario.<sup>1238</sup> This amount represents the loss of investment value suffered by Claimants as of the valuation date.

*ii) The market approach*

1014. Versant has used the market approach to confirm the reasonableness of the conclusions of its DCF analysis. Its report refers to valuation evidence from recent market transactions in comparable snow crab fishing rights, as well as valuation multiples for comparable publicly traded companies.<sup>1239</sup>
1015. First, Versant discusses the results of a 2019 Russian auction for lots of snow crab fishing rights in the Barents Sea.<sup>1240</sup> The winners of these lots paid EUR 33.6 million for an allocated catch of 978 tonnes per year over a 15-year period (namely approximately 15,000 tonnes over the period). These winning bids imply a cost per metric ton of EUR 2,294 only for the acquisition of the *right* to catch snow crabs.
1016. Based on its snow crab fishing rights, Versant projects that North Star would have been able to catch at least [REDACTED] tonnes each year between 2021 and 2030, or over [REDACTED] tonnes over a 15-year period. Using the Russian auction results as a proxy, Versant calculates that North Star's fishing rights alone would have been worth over

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<sup>1237</sup> *Id.*, para. 192.

<sup>1238</sup> *Id.*, para. 200.

<sup>1239</sup> *Id.*, para. 96.

<sup>1240</sup> *Id.*, para. 26.



EUR [REDACTED] million as of the valuation date, showing the reasonableness of Versant's DCF-based valuation.<sup>1241</sup>

1017. Versant has also compared North Star's EV/EBITDA multiple with the multiples at which comparable publicly traded companies are valued by the market. While Versant's valuation implies an 8.1x EV/EBITDA for North Star, all comparable publicly traded companies trade at higher multiples:<sup>1242</sup>

- (a) International harvesting/fishing companies reviewed by Versant have a median EV/EBITDA multiple of 9.8x, representing a [REDACTED]% premium to North Star's valuation as calculated by Versant.
- (b) European publicly traded seafood companies have a median EV/EBITDA multiple of 16.4x – nearly [REDACTED]% higher than North Star. The same multiple has been noted for Western European food processing companies.

1018. The market approach therefore confirms the reasonableness of Versant's DCF-based valuation of North Star.

#### **d. Conclusion on the quantification of Claimants' damages**

1019. To conclude, Claimants have suffered damages caused by Norway's breaches of the BIT in an amount of four hundred forty-eight million seven hundred thousand euros (EUR 448.7 million), calculated as follows:<sup>1243</sup>

- Lost profits in the historical period (from the Date of Breach until the valuation date) inclusive of interests up to the valuation date: EUR 73.3 million;
- Loss of investment value as of the valuation date: EUR 263.1 million;
- Tax gross-up: EUR 112.3 million;

**Total: EUR 448.7 million**

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<sup>1241</sup> *Id.*

<sup>1242</sup> *Id.*, para. 26.

<sup>1243</sup> *Id.*, para. 211 (Table 29).

## **I. PRE-AWARD AND POST-AWARD INTEREST**

1020. The above quantification of Claimants' damages is current as of the valuation date, namely 1<sup>st</sup> January 2021. It therefore represents the amount that would have achieved full reparation if it had been paid on that date.
1021. As noted above, Claimants are also entitled to pre- and post-award interest calculated from the valuation date, which are claimed separately and will be calculated in due course. In accordance with precedent and for the reasons set out in Versant's report<sup>1244</sup>, Claimants submit that pre- and post-award interest should compound annually at a rate of EURIBOR + 4%.

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<sup>1244</sup> *Id.*, para. 211.

## **X. PRAYER FOR RELIEF**

1022. For the reasons stated in this memorial, Claimants respectfully request an award in their favour:

- (a) Finding that the Tribunal has jurisdiction over the entire dispute involving Claimants and the Respondent;
- (b) Finding that Norway has breached Article III of the BIT by failing to promote and encourage Claimants' investments in its territory, to accept such investments in accordance with its laws, and to accord them equitable and reasonable treatment and protection;
- (c) Finding that Norway has breached Article IV of the BIT by failing to accord to 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 Claimants' investments in Norway;
- (e) Ordering Norway to pay to Claimants damages amounting to four hundred forty-eight million seven hundred thousand euros (EUR 448.7 million);
- (f) Ordering Norway to pay to Claimants pre-award interest on the amount specified in subparagraph (e) above at the rate of EURIBOR + 4%, compounded annually, calculated from 1<sup>st</sup> January 2021 until the date of the award;
- (g) Ordering Norway to pay to Claimants post-award interest on the amounts specified in subparagraphs (e) and (f) above at the rate of EURIBOR + 4%, compounded annually, calculated from the date of the award until the date of full payment;
- (h) Ordering Norway to pay to Claimants their costs, professional fees, expenses and disbursements, in an amount to be specified at the end of this arbitration;
- (i) Ordering Norway to pay the amounts specified in subparagraphs e) through h) net of any taxes and costs;
- (j) Ordering such other and further relief as the Tribunal deems available and appropriate in the circumstances.

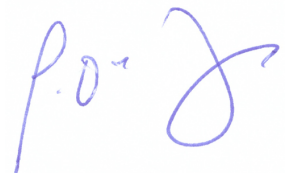
11 March 2021

Respectfully submitted



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