INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

PETERIS PILDEGOVICS
SIA NORTH STAR

Claimants

v

THE KINGDOM OF NORWAY

Respondent

(ICSID Case No. ARB/20/11)

NORWAY'S REJOINDER AND REPLY ON JURISDICTION

30 June 2022

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CHAPTER 1: INTRODUCTION

1. The factual basis of this case is simple enough. The Claimants obtained licences from Latvia which they hoped would enable them to harvest snow crab from a newly-established stock in the Loop Hole, an area beyond the 200 nautical mile zones of Russia and Norway, in the exercise of the 'freedom of the high seas'. Virtually all snow crab were being harvested by Russian, Norwegian and EU vessels on the Russian continental shelf, which constitutes approximately 90% of the seabed of the Loop Hole; the remaining 10% is Norwegian continental shelf. Norway exercised its right under international law to regulate access to this new crab stock on the Norwegian continental shelf, and the Claimants did not qualify for access thereafter because their flag State (and purported licensing State), Latvia, had made no agreement with Norway giving them any right of access.

2. The Claimants blame Norway for their inability to exercise what they claim are their "rights" to harvest snow crab in the Loop Hole, but Norway did not issue the licences on which the Claimants rely and did not at any time represent or accept that the Claimants had any legal right to harvest snow crab on the Norwegian continental shelf.

3. In fact, the Claimants never had any such legal *right*, nor were they given any expectation that they would acquire such a right. For some months, before Norway enacted its regulations for the new stock, the harvesting of snow crab on the Norwegian continental shelf in the Loop Hole was not subject to criminal liability under Norwegian law. The Claimants do not appear to have taken advantage of this temporary regulatory lacuna as their harvesting activities took place on the Russian continental shelf. After the regulations were adopted, the Claimants (in common with everyone else) were no longer free under national law to harvest snow crab on the Norwegian continental shelf. They had no right to harvest them unless they were authorised by Norway to do so. They were not so authorised.

4. There is no doubt that Norway has the right to regulate access to sedentary species on its continental shelf. There is no doubt that snow crab "*at the harvestable stage* […] *is unable to move except in constant physical contact with the seabed or subsoil*". It is therefore a sedentary species under the UN Convention on the Law of the Sea

("**UNCLOS**").[1] Norway exercised its right to regulate the new crab stock, which Norway has consistently treated as a 'sedentary species'. Norway introduced its Regulations after due process and following extensive consultation, when the resource became commercially viable to exploit on the Norwegian continental shelf. They had no impact on the Claimants, who were still free to conduct their business, which was harvesting snow crab on the Russian continental shelf and landing it in Norway. And indeed that business continued to increase until Russia banned the harvesting of snow crab on its continental shelf.

5. That is enough to dispose of this case, but the Claimants have put in detailed submissions on a range of issues and they require a response. This Rejoinder accordingly proceeds to address those submissions, pointing out the defects in the Claimants' case.

6. The remainder of this Rejoinder proceeds as follows:

   6.1. **Chapter 2** addresses a summary of factual matters.

   6.2. **Chapters 3** and **4** deal with the Tribunal's lack of jurisdiction over what Norway has called the "core issues" at stake.

   6.3. **Chapters 5** and **6** deal with the (non-)existence of the alleged 'joint venture' and jurisdictional arguments on the investments more generally.

   6.4. **Chapters 7** to **10** deal with the Claimants' complaints as to Norway's conduct, both as a matter of fact and as to the allegations of breaches of the BIT.

[1] **CL-0013** UNCLOS, Article 77(4).

CHAPTER 2: FACTUAL MATTERS

7. In this chapter, certain factual issues are addressed. Much of the factual basis of the case is not in dispute between the Parties, and the key areas of agreement are summarised below (**2.1**). That summary is followed by some additional observations on two matters that appear to remain in dispute or uncertain from the Claimants' Reply: Norway's position on the character of the snow crab as a 'sedentary species' (**2.2**), and the location of the Claimants' harvesting activity in the Loop Hole (**2.3**). The more substantial factual and legal dispute relating to the existence of the alleged 'joint venture' is addressed below.[2]

2.1 AREAS OF AGREEMENT

8. Norway believes that the following important factual points, presented chronologically, are not in dispute between the parties:

- In 2009, Mr Levanidov began his activities in Båtsfjord connected to the harvesting of red king crab.[3]

- In 2013, Latvian companies began harvesting snow crab in the Barents Sea.[4]

- On 1 July 2014, North Star was issued with a licence by Latvia.[5]

- On 24 October 2014, the Norwegian Minister of Trade, Industry and Fisheries initiated consultations with a view to regulating the harvest of snow crab and intending "*to increase knowledge about the spread of the species in Norwegian marine areas and the implications of that for other species in the ecosystem*".[6]

- On 19 December 2014, Norway adopted its Regulations on the prohibition of harvesting of snow crab. At the time, the Regulations were applicable to

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2 **Chapter 5**.

3 Memorial, ¶¶172–176; **R-0190-NOR; R-0191-ENG** (page 5) Annual financial statement 2009 of 18 June 2010 for Ishavsbruket AS (later Seagourmet Norway AS).

4 **C-0206**.

5 **C-0023**.

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

Norway's territorial waters, the Norwegian continental shelf within 200 nautical miles, in the Economic Zone around mainland Norway and the Fisheries Protection Zone around Svalbard, and entered into force on 1 January 2015.[7]

- On 1[8] and 20 January 2015,[9] Latvia issued North Star with further licences.

- On 15 June 2015, Mr Pildegovics purchased his shares in North Star.[10]

- On 5 August 2015, the European Commission wrote a letter advising Member States to rescind any current licences authorising their vessels to harvest snow crab in the Loop Hole because of its classification as a sedentary species, not to be exploited without the express consent of the coastal State.[11]

- In October[12] or November 2015,[13] Mr Pildegovics acquired his shares in Sea & Coast.

- On 4 November 2015, the Norwegian Ambassador in Riga delivered a note verbale[14] to the Latvian Foreign Ministry setting out Norway's position that snow crab could not be harvested on the continental shelf without the express authorisation of the coastal State.[15]

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7 **RL-0156-NOR; RL-0157-ENG** Historic version of Regulations FOR-2014-12-19-1836 as it was adopted on 19 December 2014 and entered into force on 1 January 2015. The Claimants provided the 18 December 2014 regulations as exhibit **C-0104**. It does not state where the text and translation are taken from.

8 **C-0004**; **C-0011**; **C-0024**.

9 **C-0018**.

10 Pildegovics 1, ¶¶50-51; **C-0076**.

11 **R-0033**; Reply, ¶113.

12 Memorial, ¶¶215, 247; **PP-0050**.

13 RFA, ¶¶37, 87; **C-0035**.

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

15 **C-0206**.

- On 22 December 2015, Norway amended the Regulations on the prohibition on harvesting snow crab so that they applied expressly to "*the Norwegian territorial sea and inland waters and on the Norwegian continental shelf*".[16]

- Between 22 December 2015 and September 2016, North Star's catches of snow crab continued to increase.

- On 1 January 2016, Latvia issued North Star with further licences.[17]

- On 22 February 2016, Mr Pildegovics met Norwegian Minister of Fisheries Per Sandberg who told Mr Pildegovics that snow crab could not be harvested on the Norwegian continental shelf without the permission of Norway.[18]

- On 13 June 2016, France, as the depositary, received a note verbale on Latvia's adherence to the Svalbard Treaty.[19]

- On 3 September 2016, Russia' prohibition on the harvesting of snow crab on its continental shelf in the Loop Hole entered into force.[20]

- On 9 September 2016, North Star landed its last catch of snow crab in Båtsfjord.[21]

- On 17 September 2016, North Star's vessel *Senator* was arrested for unlawfully harvesting crab on the Norwegian continental shelf in the Loop Hole.[22]

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16 **C-0110**.

17 **C-0005** and **C-0006** (*Saldus*); **C-0012** and **C-0013** (*Senator*); **C-0019** and **C-0020** (*Solveiga*) and **C-0025** and **C-0026** (*Solvita*).

18 Memorial, ¶367; Pildegovics, ¶204.

19 **R-0192-FR; R-0193-ENG** Note verbale 28 June 2016 from France, as the depositary for the Svalbard Treaty of 9 February 1920, regarding the adherence of Latvia to the Treaty.

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

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

22 RFA, ¶131; **R-0058-ENG**.

- In a contract dated 29 December 2016, North Star agreed to sell snow crab during the calendar year 2017, to Mr Levanidov's company Seagourmet.[23]

- In 2016 and 2017, Norway offered to enter into negotiations with the EU for access to snow crab; that offer was rejected.[24]

- On 1 January 2017, Latvia issued further licences to North Star.[25]

- In a contract dated 29 December 2017, North Star agreed to sell snow crab during the calendar year 2018, to Mr Levanidov's company Seagourmet.[26]

- On 1 January 2018, Latvia issued further licences to North Star.[27]

- North Star did not apply to the Norwegian Government for permission to harvest snow crab on the Norwegian continental shelf until May 2018.[28]

2.2 THE CHARACTER OF SNOW CRAB AS A 'SEDENTARY SPECIES'

9. The sedentary nature of snow crab under UNCLOS is an important issue for understanding various aspects of this case, including any expectations the Claimants may have had concerning snow crab harvesting in the Loop Hole as well as the introduction of Norwegian and Russian regulations of such activity in 2015 and 2016, respectively.

10. The Claimants argue that the characterisation of snow crab as sedentary under UNCLOS is "*controversial both biologically and legally,* […] *which the Claimants do not concede*".[29] The Claimants also argue that Norway's reference to the capture of

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23 **C-0053**.

24 Counter-Memorial, ¶¶722-724; Reply, ¶744.

25 See **C-0007** and **C-0008** (*Saldus*); **C-0014** and **C-0015** (*Senator*); **C-0021** and **C-0022** (*Solveiga*) and **C-0027** and **C-0028** (*Solvita*).

26 **C-0054**.

27 See **C-0009** and **C-0010** (*Saldus*); **C-0016** and **C-0017** (*Senator*); and **C-0029** and **C-0030** (*Solvita*).

28 Memorial, ¶412.

29 Reply, ¶25.

snow crab using pots as "*harvesting*" is tendentious and "*semantic zeal*".[30] What Norway does or does not call the capture of snow crab obviously does not change whether or not snow crab is a sedentary species. But there seems to be agreement on at least two points: the international law regime for sedentary species has not changed since 1958, and neither has the basic biology of snow crab.[31] Snow crab therefore either is, or is not a sedentary species. It is a binary choice, and an obvious one: snow crab is sedentary.

11. To briefly recollect: according to Article 2 of the 1958 Convention on the Continental Shelf and Article 77(4) of UNCLOS, the coastal State has exclusive rights in respect of natural resources on its continental shelf, including:

> "*organisms which, at the harvestable stage* […] *are unable to move except in constant physical contact with the seabed or the subsoil*".[32]

12. This is a legal – not biological – definition and the interpretation must therefore be based on Article 31(1) of the Vienna Convention on the Law of Treaties ("**VCLT**") (as representative of customary international law).[33]

13. The biological features are, however, relevant to determine the status of snow crab under UNCLOS.

14. A brief look at snow crab biology reveals that is does not have a swim bladder, fins or any other physical feature which could enable it to stay or move in the water column without contact with the seabed.[34] As it is subject to gravity, it has negative buoyancy and sinks to the bottom before its harvestable stage and uses its legs to move around on the seafloor. Snow crab travel by walking over the seabed. The point is simple but

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30 Reply, ¶¶26-27. Norway notes, though, that "fiske" ("fish"), "fangste" ("catch") and "høste" ("harvest") are all synonyms in Norwegian and can in this context be used for the act of getting crab out from the seabed and into a vessel. One was chosen for consistency. Also, "harvesting" is often preferred when talking about management of marine resources, because it is considered wider and more general. Only fish can be fished, but a range of other resources, like e.g. marine genetic resources and sedentary species can be harvested.

31 Memorial, ¶105.

32 **CL-0013** UNCLOS, Article 77(4).

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

34 **RL-0175-NOR; RL-0176-ENG** *Snøkrabben som «sedentær art» etter FNs havrettstraktat - et tilsvar*, Robin Churchill, Jan Sundet and Geir Ulfstein, Lov og rett, 6 August 2018.

important. As stated by marine scientist Jan H. Sundet and quoted by the Claimants at paragraph 60 of their Reply:

> "*In the "catchable" stage, it moves, but is completely dependent on having contact with the seabed in order to be able to move* […] *the text referred to here is as far as I can see unequivocal. The conclusion is therefore that it must be considered sedentary* […]".[35]

15. State practice is uniform and has been for decades. Among others, Russia (at least since 1975), the United States (at last since 1976), Canada (at least since 1995),[36] and the EU (since 2015)[37] in line with Norway have all explicitly taken the position that the snow crab is sedentary according to UNCLOS. To Norway's knowledge, no State currently opposes the view that snow crab is sedentary and subject to continental shelf jurisdiction under international law.

16. The Claimants have offered one independent source to support their argument that defining snow crab as sedentary under UNCLOS is "*controversial both biologically and legally*".[38] That source is a Masters thesis by a then student at the Norwegian College of Fishery Science. Omitted from the Claimants' quotes from that paper, however, is the conclusion presented slightly later in the same paragraph:[39]

> "*From this it seems that there may be a consensus* [that snow crab is a sedentary species]."

17. There is a further support from 2018 in one article in a Norwegian legal journal – *Lov og Rett* – arguing that snow crab is not sedentary, but that article was written by one of the Claimants' Counsel, Eirik Bjørge[40] after an earlier 'notice of dispute', and is therefore of little value in this case. And it was quickly rebutted in an article in the same

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35 **C-0186**.

36 Counter-Memorial, ¶74.

37 Counter-Memorial, ¶68, **RL-0033-ENG**.

38 Memorial, ¶¶105, 106.

39 **C-0069**, p. 40.

40 **RL-0173-NOR; RL-0174-ENG** *Er snøkrabben en «sedentær art» etter FNs havrettstraktat?*, Eirik Bjørge, Lov og rett, 4 May 2018.

journal by law professors Robin Churchill and Geir Ulfstein and marine researcher Jan H. Sundet:[41]

> "*We read Eirik Bjørge's (EB) article in Lov og Rett on the snow crab as a sedentary species with great interest. However, we disagree with his conclusion that the snow crab is not a sedentary species in accordance with Article 77(4) of the UN Convention on the Law of the Sea (UNCLOS),* […]
>
> […]
>
> *We agree with EB that the assessment of whether or not the snow crab is a sedentary species under Article 77(4) has to be made on the basis of the Vienna Convention on the Law of Treaties (VCLT), Article 31(1),4)* [sic] *where the starting point is the text of Article 77(4). However, we are not convinced by EB's follow-up from this starting point. The question is whether or not the snow crab falls under the definition in Article 77(4) of what is to be considered a sedentary species. This entails that the decisive aspect is whether the snow crab "at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil".*
>
> […]
>
> *Snow crab can spread to new areas in two ways: in contact with the sea-bed or by drifting of larvae. After hatching, the larvae stay in the upper layers of the water 0–50m) for up to three months, depending on the temperature of the water and will move with the ocean currents. However, during all developmental stages of the crab after settling (after the larval stage), i.e., including upon harvesting in the form of capture, it needs to be in contact with the sea-bed in order to be able to move.*

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41 **RL-0175-NOR; RL-0176-ENG** *Snøkrabben som «sedentær art» etter FNs havrettstraktat - et tilsvar*, Robin Churchill, Jan Sundet and Geir Ulfstein, Lov og rett, 6 August 2018. In Norwegian (Fns omitted): "*Vi har lest artikkelen til Eirik Bjørge (EB) i Lov og Rett om snøkrabben som sedentær art med stor interesse.1) Men vi er uenige i hans konklusjon om at snøkrabben ikke er en sedentær art i henhold til artikkel 77(4) i FNs havrettskonvensjon (UNCLOS),* […]*Vi er enige med EB i at vurderingen av om snøkrabben er en sedentær art etter artikkel 77(4), må skje på grunnlag av Wienkonvensjonen om traktatretten (VCLT) artikkel 31(1),4) hvor utgangspunktet er teksten til artikkel 77(4). Men vi er ikke overbevist av EBs oppfølgning av dette utgangspunktet. Spørsmålet er om snøkrabben faller inn under definisjonen i artikkel 77(4) av hva som skal anses som en sedentær art. Det innebærer at det avgjørende er om snøkrabben «at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil»*."». […] *Snøkrabber kan spre seg til nye områder på to måter: enten ved vandring langs (eller i kontakt med) bunnen, eller ved larvedrift. Etter klekking opprettholder larvene seg i de øvre vannmassene (0–50 m) i opptil tre måneder, avhengig av temperaturen i vannet, og vil forflyttes med havstrømmene. Men i alle utviklingsstadier av krabben etter bunnslåing (etter larvestadiet), altså også ved høsting i form av fangst, må den ha kontakt med underlaget for å kunne flytte seg. EB hevder også at det er «ingen tvil om at snøkrabben kan løfte seg opp fra havbunnen». Men han gir ingen henvisninger som bekrefter dette. Påstanden rimer ikke med det faktum at snøkrabben har negativ oppdrift. Det vil si at den synker ned til bunnen i sjøvann. Den har heller ingen svømmeblære eller liknende organer som kan bidra til at oppdriften i sjøvann blir positiv eller nøytral, slik mange fiskearter har. Vi kan heller ikke finne noen referanser i publisert litteratur om at snøkrabben er i stand til å «løfte seg» fra bunnen. Generelt mener vi at ordboksdefinisjonen ikke er avgjørende, og absolutt ikke kan overstyre definisjonen av sedentære arter som er gitt i artikkel 77(4).*"

> *EB also claims that there is "no doubt that the snow crab is capable of lifting itself up from the sea-bed". However, he does not provide any references that confirm this. This claim does not correspond with the fact that the snow crab has negative buoyancy. This means that it sinks down to the bottom in seawater. Furthermore, it does not have a swim bladder or similar organs that can contribute to positive or neutral buoyancy in seawater, in the way that many species of fish have. We also cannot find any references in published literature on the snow crab being able to "lift itself" from the sea-bed. Generally, we do not believe the dictionary definition is decisive and believe that it absolutely cannot override the definition of sedentary species that is set out in Article 77(4).*"

18. A more recent article, "*Crawling Jurisdiction: Revisiting the Scope and Significance of the Definition of Sedentary Species*", confirms the sedentary status of snow crab under UNCLOS and sums it up well:

> "*The presented outcomes of the various disputes concerning access to crab fisheries located in areas of continental shelf with superjacent high seas, as well as the State practice revealed in their context, illustrate the process of consolidation of various key species of crabs as sedentary species. They show that the original opposition to this classification by some important distant water fishing nations has largely ceased. Therefore, most crabs (including, e.g. red king crabs and snow crabs) can safely be considered sedentary species within the meaning of Article 77(4) of UNCLOS*".[42]

19. During the negotiations on the Geneva Convention on the Continental Shelf 1958 (the "**Continental Shelf Convention**"), Norway voted in favour of Article 2(4) which defined sedentary species in respect of continental shelf jurisdiction. Norway has consistently maintained that view. The report by the Norwegian Delegation from the conference adopting the text from the Continental Shelf Convention[43] expressly states that:

> "*The coastal state will therefore be granted exclusive rights to all botanical vegetation and for the fishing of, for example, oysters, muscles, crabs and lobsters, however, these exclusive rights will not include, for example shrimp and, of course, all fish in the usual sense*".[44]

An abstract of this report was later submitted as a White Paper by the Government to the Norwegian Parliament prior to the Norwegian Parliament's approval of the

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42 **RL-0177-ENG** *'Crawling Jurisdiction': Revisiting the Scope and Significance of the Definition of Sedentary Species*, Valentin J. Schatz, Ocean Yearbook Online, Online Publication Date: 23 May 2022.

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

44 Counter-Memorial, ¶45.

ratification of the Continental Shelf Convention. In this annexed abstract, the status of crabs as sedentary species subject to continental shelf jurisdiction was confirmed.[45]

20. The position that crabs are covered by the exclusive continental shelf jurisdiction was thus adopted by Norway when the Continental Shelf Convention was agreed. And that was Norway's understanding and interpretation when it ratified the Convention.

21. During the UNCLOS negotiations, the definition of sedentary species provided by the Continental Shelf Convention was supported and upheld by Norway and other states. At no time has any authoritative statement by any representative of the Government of Norway stated the opposite – that crabs are non-sedentary species under international law.

22. As no sedentary species were present in commercially interesting quantities on the Norwegian continental shelf beyond 200 nautical miles (Norway's "outer continental shelf") until the last decade, there was, however, no reason for Norway to enact legislation or make official statements to reconfirm that position. That is because, for living resources inside 200 nautical mile zones, the coastal State has sovereign rights for the purpose of exploration and exploitation of both the sedentary and non-sedentary living resources.

23. That situation changed as snow crab arrived in the Loop Hole and foreign vessels started exploiting the resource. Representatives of Norway and the Russian Federation then reconfirmed the position of the respective coastal states, that snow crab is a sedentary species covered by their exclusive continental shelf jurisdiction.[46]

2.3 THE LOCATION OF THE CLAIMANTS' HARVESTING ACTIVITY IN THE LOOP HOLE

24. In its Counter-Memorial, Norway submitted detailed evidence concerning the location of the Claimants' snow crab harvesting activities, which were conducted almost entirely (over 99%) on the Russian continental shelf. Although minute amounts *may* have been harvested on the Norwegian continental shelf, there has only ever been <u>one</u> confirmed

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45 **R-0419-NOR; R-0420-ENG** Report to the Storting No. 42 (1959). See further below, section 9.2.3.

46 **C-0106**.

instance of North Star harvesting snow crab on the Norwegian continental shelf in the Loop Hole, at a time when doing so was illegal beyond.

25. In their Reply, the Claimants do not raise a positive case against this. Norway disclosed to the Claimants the actual underlying AIS data points demonstrating the location of their snow crab harvesting activities, and those are exhibited to this Rejoinder.[47] Instead, the Claimants' half-hearted response takes various points about Norway's proof (without positively saying that the reports were wrong) and even goes so far as to argue on the basis that Norway is correct[48] or that the location of their harvesting activities "*does not have the relevance Norway ascribes to it*".[49]

26. The Claimants assertions[50] concerning the location of their snow crab harvesting activities in the Barents Sea are problematic in two respects: first, the lack of clarity regarding the areas where they claim that they were authorised to engage in harvesting; and second, the lack of clarity regarding the areas in which and dates at which they actually did engage in harvesting.

27. As to the first, it is not clear what the actual meaning and effect of the documents produced as Exhibits **C-0004** to **C-0030** – the purported Latvian licences – is. Norway has not accepted the Claimants' descriptions of those licences or their purported effect, and the Claimants will be required to prove that the Latvian licences actually mean what the Claimants say that they mean (irrespective of Norway's jurisdictional and merits arguments regarding the effect of those alleged licences). Some examples will serve to illustrate the point.

28. Licences such as Exhibit **C-0004** refer to a "*Fishing permit (licence) for open sea fishery*" and to "*Fishing ground (zone) NEAFC NEAFC*". Norway can only suppose that the term "*open sea fishery*" is intended to refer to a fishery in international waters, that is, beyond any 200 nautical mile zone. But it is unclear whether the reference to "*NEAFC*" refers to the NEAFC Convention area (which includes both national fishing

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47 **R-0194-ENG; R-0195-ENG; R-0196-ENG; R-0197-ENG** AIS-positions received from the Section of Analysis for *Saldus, Senator, Solveiga* and *Solvita* for the period 1 January 2015 to 1 January 2017.

48 Reply, ¶519(a).

49 Reply, ¶281.

50 Reply, ¶256.

zones and areas of high seas) or the NEAFC Regulatory Area, which is defined in NEAFC Scheme of Control and Enforcement Article 1 as "*the waters of the Convention Area, which lie beyond the waters under the fisheries jurisdiction of Contracting Parties*".[51] The heading on **C-0004**, "*Fishing permit (licence) for open sea fishery*", suggests that it is a reference to the NEAFC Regulatory Area: but, on the other hand, Exhibit **C-0006** (which also refers to the "open sea fishery"), indicates the sea areas around Svalbard as the fishing ground, and thus apparently purports to apply to waters under the fisheries jurisdiction of Norway.

29. Other licences specify fishing grounds by reference to ICES areas that include both international waters and States' national fishing zones, maintaining the uncertainty. Exhibit **C-0009**, for example, refers to "*I, IIb zvejas rajoni (UNREGULATED, CRQ)*" ('zvejas rajoni' can be translated as 'fishing areas') . "I" and "IIb" appear to be the statistical fishing regions I and IIb defined by the International Council for the Exploration of the Sea – ICES.[52] Areas I and IIb include parts of Norwegian, Russian and Greenlandic (Danish) fishing zones, plus international waters in the Barents Sea, the Norwegian Sea and even in the Central Arctic Ocean north of the Fisheries Protection Zone around Svalbard as shown in the map below.[53] Exhibit **C-0009** is a licence for 2018, and at that time it was well known to Latvia that harvesting of snow crab on the Norwegian continental shelf, both within and beyond 200 nautical miles, actually *was* regulated by Norway. It was also well known that by 2018 there would be no recommendation from NEAFC on the harvesting of snow crab, following the discussions that had been taking place in NEAFC in 2015-2016 as outlined in the Counter-Memorial.[54] One might therefore assume that "I, IIb" was meant as a reference to the continental shelf in the Loop Hole area (area II.b.1) in the Barents Sea and the 'Banana Hole' area (area I.a) in the Norwegian Sea, the water columns of which "*lie beyond the waters under the fisheries jurisdiction of Contracting Parties*", and that the

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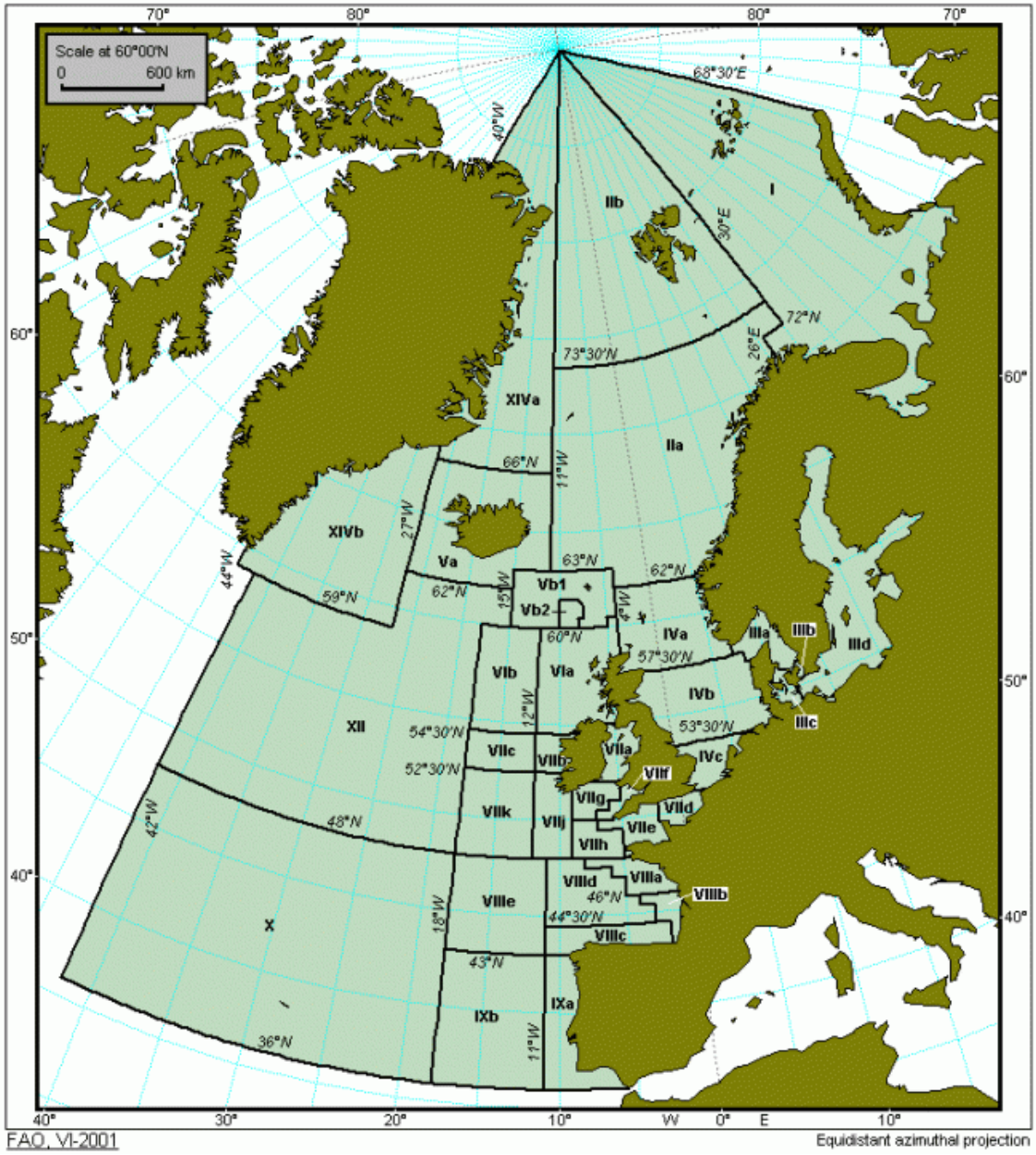
51 Counter-Memorial, ¶51, map of the area covered by the NEAFC Convention.

52 See, e.g., **RL-0220-ENG** EU Commission Regulation (EC) No 448/2005 of 15 March 2005 amending Council Regulation (EEC) No 3880/91 on the submission of nominal catch statistics by Member States fishing in the north-east Atlantic

53 Counter-Memorial, ¶160. Sub-area I ("the Barents Sea") and division IIb ("Spitzbergen and Bear Island") of the UN Food and Agricultural Organisation's (FAO) Major Fishing Area 27 are indicated on the maps provided as exhibit **R-0131-ENG**.

54 Counter-Memorial, ¶¶56-67.

word "Unregulated" was a reference to the fact that there were no recommendations adopted in NEAFC for this activity in 2018. But of course (as Norway outlined in its Counter-Memorial), NEAFC was not competent to regulate the harvesting of snow crab, and by that point both Russia and Norway *had* regulated the harvesting of snow crab on their continental shelves.



Map of ICES areas as reproduced from exhibit ***R-0131-ENG***

30. Those assumptions are, however, called into question if one looks at Exhibits **C-0005** and **C-0006**, both of them licences for the vessel *Saldus* for the year 2016, and each of them, according to their headings, being a "*Fishing permit (licence) for open sea*

fishery". **C-0005** states that the "*Fishing ground (zone)*" is "NEAFC"; while **C-0006** states that the "*Fishing ground (zone)*" is "*ap Svalbaru esosas juras zonas*" (which may be translated as "the sea around Svalbard"). But how are these purported licences to be reconciled? Either one considers that the sea around Svalbard is "open sea", not under the jurisdiction of Norway, in which case it does not make sense to issue two separate licences, or one considers this area to be under Norwegian jurisdiction, in which case it does not make sense to issue a licence for an open sea fishery at all.

31. Then there is the question of the fish species covered by the licences. Exhibit **C-0009** is a licence for 2018. The "fish species" to which it applies is said to be "as "*Sniega krabis (CRQ); UNREGULATED (UNREGULATED)*". Does that mean that snow crab are unregulated, or that the document refers to snow crab *to the extent* that its harvesting is unregulated? And what is one to make of **C-0004**, which refers to "*UNREGULATED (UNREGULATED)*" as the species? And whichever of those meanings was intended, unregulated by whom? By NEAFC? Or by the EU or Latvia? Or by the State that has jurisdiction over the stock?

32. Furthermore, as was noted above, at that time that the licence that is Exhibit **C-0009** was issued it was well known to Latvia that harvesting of snow crab on the Norwegian continental shelf actually *was* regulated by Norway.[55] The EU had, in a letter dated 5 August 2015,[56] instructed that Member States should rescind any licences authorising

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55 See, e.g., **R-0039-ENG** Note verbale 24 June 2015 from Norway to EU dated 24 June 2015 including an unofficial translation of the regulations, **R-0040-ENG** Note verbale 22 January 2016 from Norway to the EU, and **R-0088-ENG** Note verbale 18 January 2017 from Latvia to Norway. Furthermore, Latvia was notified, consistently with UNCLOS Article 73(4) of arrests of Latvian fishing vessels, including those engaged in harvesting of crabs. Latvia was thus informed of the arrests of **R-0431-ENG** *Senator* on 19 September 2016, **R-0430-ENG** *Dubna* on 4 October 2016, and **R-0065-ENG** *Senator* on 17 January 2017, for example. The latter arrest gave rise to several exchanges between Norway and Latvia/EU: see **R-0065** Note verbale 17 January 2017 from Norway to Latvia, **R-0088** Note verbale 18 January 2017 from Latvia to Norway, **C-0164** Pro Memoria 18 January 2017 from Norway to the EU and **R-0089** Note verbale 8 February 2017 from Norway to Latvia.

56 Norway has exhibited a version of the letter addressed to Spain as **R-0033**. A version of the letter was published in **R-0433-ENG** "*Oil lurks beneath EU-Norway snow crab clash*" by Politico on 18 June 2017, available at https://www.politico.eu/article/of-crustaceans-and-oil-the-case-of-the-snow-crab-on-svalbard/. The following paragraph is included in the article: "*Brussels only recently made a major U-turn to refute Norway's sovereignty over the seabed and its resources. Lowri Evans, the former director general of maritime affairs and fisheries at the European Commission, sent a letter in 2015 requesting EU countries to stop issuing licenses for snow crab*." The article included a link to a version of the letter exhibited as **R-0432-ENG**.

their vessels to harvest snow crab. How do those facts bear upon an understanding of what effect the licence was intended to have?

33. The Claimants present their case as if it is clear that Latvia authorised them to catch Norwegian snow crab. Quite apart from the question whether Latvia had any legal competence to give such authorisation – which it quite plainly did not[57] – it is not clear that the licences on their face even purported to do so.

34. Then there is the second aspect of this question. What is the factual basis of suggestions that the Claimants had some sort of acquired right to take snow crab? Where in fact did the Claimants try to harvest snow crab in the relevant period, prior to the date of the alleged breach of the BIT, which the Claimants fix as 27 September 2016 and/or 16 January 2017?[58] (The confusion arises from the fact that the Claimants say that their business was expropriated on 27 September 2016,[59] which they say is the valuation date for their claim to compensation, but that they were further prevented from engaging in snow crab operations on 16 January 2017.[60] It is not clear how preventing a business that has already been expropriated can be said to amount to a further breach of the rights of the owners of that business.[61] Norway reserves the right to address this question further in the context of quantum, if necessary.)

35. Norway has documented the location of the Claimants' vessels and activities in the Barents Sea, using globally-recognised Automatic Identification System (AIS) geographical data which is mandatory for certain vessels under International Maritime Organization rules.[62] The reports submitted, which were based on this data,[63] also took into account the Claimants' own landingnotes reporting on their harvests of snow crab.

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57 See below, ¶163.

58 Memorial, ¶¶814, 831.

59 Memorial, ¶¶820, 831.

60 Memorial, ¶814.

61 Counter-Memorial, ¶640. See also below, **Chapter 10**.

62 **R-0194-ENG; R-0195-ENG; R-0196-ENG; R-0197-ENG** AIS-positions received from the Section of Analysis for *Saldus, Senator, Solveiga* and *Solvita* for the period 1 January 2015 to 1 January 2017.

63 **R-0151-ENG** to **R-0155-ENG**.

36. It is notable that the Claimants do not assert that the conclusions of the Norwegian reports are wrong.

37. Instead, the Claimants suggest that the reports produced by Norway's Section of Analysis[64] have "inherent unreliability"[65] and that they rely on "*statements of opinion which could be attributed weight only if made by an expert*".[66]

38. The Claimants do not (and could not realistically) dispute the underlying data as to the location and speed of their Vessels. AIS data is a well-recognised system of tracking vessels, regularly used as evidence of the location of Vessels in domestic courts.[67]

39. As regards the accuracy of the geographical data provided by the AIS system, showing the location of Claimants' vessels during their operations in the Barents Sea, according to the International Maritime Organization's Performance Standards, the AIS transponder on board the vessel should

> "*have dynamic accuracy such that the position of the ship is determined to within 35 m (95%) in non-differential mode and 10 m (95%) in differential mode with HDOP ≤ 4 or PDOP ≤ 6 under the conditions of sea states and ship's motion likely to be experienced in ships* […]".[68]

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64 The Section of Analysis (Analyseenheten) in Vardø is a joint unit of the Norwegian Directorate of Fisheries and the Norwegian Coastal Administration.

65 Reply, ¶276.

66 Reply, ¶267.

67 See, by way of example only, **RL-0178** *The "Tian E Zuo"* [2018] SGHC 93; [2018] 2 Lloyd's Rep 297 (Singapore High Court) at p.301: "*an AIS is a device that transmits information regarding a ship's position to a network to allow maritime authorities to track and monitor vessel movements.*" See also: **RL-0179** *Nautical Challenge Ltd v Evergreen Marine (UK) Ltd (the "Alexandra 1" and "Ever Smart")* [2021] UKSC 6 (UK Supreme Court) at [71]: "*AIS is based not on radar but on the GPS system. When in operation it transmits a vessel's name, position, course and speed, whence it can be received by other AIS-fitted vessels and, again, used to generate its range and bearing, and also its likely course, CPA (closest point of approach) and even an audible collision warning*"; **RL-0180** *Strong Wise Ltd v Esso Australia Resources Pty Ltd (the "APL Sydney")* [2010] FCA 240; [2010] 2 Lloyd's Rep 555 (Federal Court of Australia) at [91]: "*An important record that was used frequently in the trial was the Automatic Identification System computer record which the parties described, as will I, as "the AIS video" of APL Sydney's movements. This was in the form of a computer disk recording a video display of information relayed automatically by many seagoing ships. The AIS video depicted a physical shape of the ship on the Admiralty chart background as she moved in Port Phillip Bay. This was an approximation by the computer program of where the ship appeared to be, based on the location of the transmitter (in the stern superstructure) and other AIS data transmitted, such as the heading, speed over the ground (in knots), latitude, longitude, course over the ground, rate of turn and time. The AIS video display was available to, and used by, harbour control contemporaneously with the events as they occurred*."

68 **R-0198** IMO Resolution MSC.74(69) (adopted on 12 May 1998).

40. So it is for the ship owner to ensure that the accuracy of the ship's positions is within 35 metres for at least 95% of the time when moving. When it comes to the lines interpolated between these points, scientific research has found an average accuracy of around 100 meters.[69] The accuracy of the points and lines presented in the reports of the Section of Analysis should thus be well within 150 meters.

41. The Claimants have questioned the assumption that harvesting cannot take place at speeds exceeding 6 knots. One would have thought that if that assumption were wrong, the Claimants would have expressly said so. But in any case, Norway has submitted with this Rejoinder a witness statement given by Mr Karl Olav Kjile Pettersen, Captain of the *Tromsbas*, a vessel currently engaged in the harvesting of snow crab on the Norwegian continental shelf. His evidence is that four knots is the maximum speed at which pots used for snow crab harvesting can be pulled, during favourable conditions.

> "*I have been asked specifically about the speed that a vessel can be travelling at to conduct this process. Tromsbas is among the most efficient snow crab vessels, but this can vary enormously. The speed of setting pots can range from 2 to 10 knots. However, in my experience a vessel cannot be travelling above 4 knots when it pulls the pots. In good conditions* Tromsbas *normally does 3-3,5 knots. If there is ice or difficult conditions, there will be occasional stoppages and the speed will have to be reduced.*"[70]

42. The Claimants put a lot of emphasis on the fact that the reports of the Section of Analysis do not establish with certainty what activities were carried out onboard or from the vessels during the periods where they were moving at under six knots.[71] Norway has simply given the Claimants the benefit of the doubt and has assumed that they *may* have harvested snow crab during these periods.

43. At the time the Claimants were moving at less than 6 knots they may also have had rough seas, technical problems, or other reasons to slow down. The vessels' logbooks might have shed light on this, but the Claimants have not disclosed them, perhaps

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69 **R-0199** *Determination of AIS Position Accuracy and Evaluation of Reconstruction Methods for Maritime Observation Data*, by Dennis Jankowski, Arne Lamm and Axel Hahn, IFAC PapersOnLine 54-16 (2021) 97-104

70 Witness statement of 27 June 2022 given by Mr Karl Olav Kjile Pettersen, skipper on the snow crab vessel *Tromsbas*. **R-0424-ENG** Picture of *Tromsbas*.

71 Claimants' Reply *inter alia* ¶277.

because they do not suggest that any harvesting activity was taking place at the relevant time.

44. As recognised in the Counter-Memorial, the AIS data submitted by the vessels clearly show that well over 99% of the snow crab harvesting of the Claimants' vessels in the Barents Sea took place from the Russian continental shelf. While minute amounts *may* have been harvested from the Norwegian continental shelf without prosecution by Norwegian authorities, this remains unsubstantiated. The Claimants have offered no evidence to this effect.

45. As far as Norway is aware, the only instance of the Claimants harvesting snow crab on the Norwegian continental shelf in the Loop Hole was the *Senator*'s voyage in May-September 2016, which occurred after harvesting was made illegal on the Norwegian continental shelf in the Loop Hole and for which it was arrested. The reports from the Section of Analysis detail that there *may* have been other instances which involved *de minimis* harvesting on the Norwegian continental shelf; in all likelihood though, they did not and the Claimants have submitted no evidence that there were any other harvests on the Norwegian continental shelf.

PART I: THE DISPUTE
CHAPTER 3: APPLICABLE LAW

3.1 APPLICABLE LAW FOR THE PURPOSES OF ESTABLISHING JURISDICTION

46. While Norway expressed in its Counter-Memorial its agreement with the Claimants' position on the law applicable for the purposes determining the Tribunal's jurisdiction, the Claimants returned to the question in their Reply.[72]

47. In particular, they discuss Norway's contention that "*Norwegian domestic law must also be considered when establishing the jurisdiction of the Tribunal*"[73] and affirm that "[t]*o accede to Norway's interpretation would, therefore, to use the words of the ICSID tribunal in* Desert Line v. Yemen*, 'constitute an artificial trap depriving investors of the very protection the BIT was intended to provide'*."[74]

48. In paragraph 187 of its Counter-Memorial, Norway confined itself to submitting that "[t]*he validity of the 'investment' within the meaning of Article 25 of the ICSID Convention and Article IX of the BIT must therefore be assessed under Norwegian law*". Since the basis of the Tribunal's jurisdiction is the BIT, the Tribunal must be satisfied that the Claimants have made one or more investments, which is defined in Article I(1) of the 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*…".[75] That the Tribunal has to take into account Norwegian law in order to qualify an investment by the Claimants is supported by the cases quoted by the Claimants.

49. In the *Desert Line* case, the BIT between Oman and Yemen which was the basis of the tribunal's jurisdiction provided that "[t]*he term 'Investment' shall mean every kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the legislation of the host state and* after

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72 Reply, ¶¶402-408.

73 Reply, ¶405 quoting Respondent's Counter-Memorial, 29 October 2021, ¶187.

74 Reply, ¶405 quoting **CL-0399** *Desert Line Projects v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, ¶106.

75 **CL-0001** Norway-Latvia BIT (1992), Article 1(1).

receiving an investment certificate."[76] In the extract quoted by the Claimants, the *Desert Line* tribunal only ruled on the necessity to obtain an investment certificate: it took no position on the condition that the investment ought to be made "in accordance with the legislation of the host state", which is the only condition relevant for the purposes of this discussion. The tribunal clarified that the need to obtain an investment certificate and the need to invest in accordance with the national legislation of the host State were two different elements within the meaning of Article 1(1) of the Oman-Yemen BIT. This is reflected in a more extensive quotation from the tribunal's decision:

> "*106. As far as concerns the issue of the certificate, the threshold inquiry is whether Article 1(1) corresponds to mere formalism or to some material objective. The Arbitral Tribunal has no hesitation in opting for the second alternative. A purely formal requirement would by definition advance no real interest of either signatory State; to the contrary, it would constitute an artificial trap depriving investors of the very protection the BIT was intended to provide. Such an idea must give way – in the absence of an explicit and compelling demonstration to the contrary – when there is, as we shall see, an obvious substantive justification for the requirement under general international law, which forms the context in which the BIT is called upon to operate.*
>
> *107. It is striking with regard to this limb of the Respondent's objection that the notion of 'investment certificate,' as opposed to that of 'accepted,' is not qualified by the words 'according to its laws and regulations* "'.[77]

50. The award therefore does not support the Claimants' case: insofar as the arbitral tribunal takes a position on the meaning of the expression "according to its laws and regulations", it follows *a contrario* from this last sentence that unlike the "investment certificate", which is not subject to conditions of compliance with domestic law, the constitution of the investment is subject to them.

51. The Claimants also quote *Adamakopoulos v. Cyprus*, stating that

> "*it would undermine the whole purpose of establishing an international investment regime if ultimately jurisdiction could be defeated by provisions of the domestic law of one or both of the parties*."[78]

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76 **RL-0181-AR; RL-0182-ENG** Agreement 20 September 1998 for the Reciprocal Promotion and Protection of Investments between the Government of the Sultanate of Oman and the Government of the Republic of Yemen, Article 1(1) (emphasis added).

77 **CL-0399** *Desert Line Projects v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, February 2008, ¶¶106-107.

78 **CL-0400** Reply, ¶405 quoting *Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction, 7 February 2020, ¶158.

52. This quotation is not relevant. It is not Norway's case that Norwegian law by itself can bar the Tribunal's jurisdiction. Norway only contends that "[t]*he validity of the 'investment' within the meaning of Article 25 of the ICSID Convention and Article IX of the BIT must therefore be assessed under Norwegian law*" as recalled above.[79]

53. In implementing this provision, the Tribunal must consider Norwegian law in applying Article 1 of the BIT, which is entirely consistent with the extract quoted by the Claimants in *Adamakopoulos v. Cyprus*,[80] and with the statement of the same tribunal when it considered that

> *"The jurisdiction of a tribunal established under international agreements has to be determined by international law and although the domestic law of the parties may be relevant for determining certain matters, such as whether a claimant is in fact a national of one of the parties to the BIT, it is not a basis for determining whether a tribunal has jurisdiction over the dispute."*[81]

54. The Claimants also affirm that:

> "[s]*uch an allegation* [that an investment was not made in accordance with Norwegian law] *can be raised only in respect of the acquisition or establishment of the investment, not as regards the subsequent conduct of the claimant in the host State*".[82]

55. However, the Claimants affirm that "[t]*he broad manner in which the Respondent has pleaded its case as to the requirement "in accordance with its laws and regulations" fails to recognize these limitations*."[83] and "*Norway does not claim that, at that moment* [sc., when the investment was made]*, the investment was not in accordance with its domestic law*."[84] That is wrong and addressed below (**Chapter 6**, Section 6.4).

56. Even if the Tribunal were to find that the Claimants' investments were made in accordance with Norwegian law, *quod non*,[85] this is without prejudice to the continuing substantive legality of those investments and the possible consequences for the merits

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79 See above Section 3.1

80 *Ibid*.

81 **CL-0400** *Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction, 7 February 2020, ¶157.

82 Reply, ¶406.

83 Reply, ¶406. Fn 495: "*Respondent's Counter-Memorial, 29 October 2021, ¶¶187, 401*.".

84 Reply, ¶407.

85 See below, Section 6.4.

– for example, the consequences for any alleged contractual obligation to catch snow crab and deliver them to the Båtsfjord factory. In this respect, Norway agrees with the Claimants' mention, albeit truncated, of *Fraport v. Philippines*:

> "*If, at the time of the initiation of the investment, there has been compliance with the law of the host state, allegations by the host state of violations of its law in the course of the investment, as a justification for state action with respect to the investment, might be a defense to claim substantive violations of the BIT, but could not deprive a tribunal acting under the authority of the BIT of its jurisdiction.*"[86]

3.2 APPLICABLE LAW FOR THE PURPOSES OF DETERMINING THE MERITS

57. In their Reply, the Claimants return at length to the question of the applicable law and the use the Tribunal should make of the rules of international law, in particular UNCLOS, the Svalbard Treaty and the NEAFC Convention.[87] They assert that "[i]*f it is necessary to its finding of whether there is a breach of the BIT, the Tribunal is empowered to consider the Svalbard Treaty, UNCLOS, or NEAFC*."[88] This is not disputed by Norway, it being understood that these treaties (or any others) are not free-standing sources of substantive obligations owed by Norway to the Claimants, they do not establish the existence of alleged rights of harvesting of Claimants, and a breach of these treaties is not an *ipso facto* breach of the BIT. In other words, the Claimants must establish that an obligation *under the BIT* has been breached, taking into consideration - if necessary - the treaties in question in order to interpret *the BIT*. But this is not at all what the Claimants do: they attempt to prove that Norway has violated other treaties and conventions *per se* and that constitutes a violation of the BIT in and of itself.

58. In doing so, they fail to demonstrate that Article IX of the BIT between Norway and Latvia, dealing with disputes between a State Party to the BIT and a national of the other contracting State, would allow the application, lock, stock and barrel, of international law to the merits of the dispute.

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86 **RL-0183-ENG** *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, ¶345 – the truncated quote appears in ¶408(b).

87 Reply, ¶¶409 *et seq*.

88 Reply, ¶436. See also ¶566.

59. As Norway has already pointed out in its Counter-Memorial,[89] Article IX of the BIT coexists with Article X on disputes between the Contracting Parties. Article X provides *expressis verbis* that "*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". Nothing comparable is contained in Article IX of the BIT on disputes between an investor and a Contracting Party. It must be inferred from this difference that the Parties to the BIT agreed not to apply "the general principles and rules of international law" in disputes covered by Article IX of the BIT. Therefore, international rules would be applicable to the merits of the dispute only to the extent that they are necessary to interpret the BIT, as set out above.

60. Without prejudice to this position, Norway notes that in their Memorial, the Claimants asked the Tribunal to consider that

> "*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*."[90]

61. In response to Norway's arguments, the Claimants now claim that they

> "*do not request the Tribunal to 'find' (or 'rule') that other rules of international law have been breached: the Claimants only request the Tribunal to "find" (or 'rule' on) breaches of the BIT and to order consequent compensation*"[91]

62. However, the Claimants remain unclear as to the scope they intend to give to the rules of international law in the context of the dispute as illustrated by several other vague statements such as: "*That in no way prevents the Tribunal in its reasoning from considering rules of international law contained in other treaties, to the extent that this is necessary for the Tribunal's ruling or finding of whether there has been a breach of the BIT*",[92] or "[i]*n conclusion, it follows from the reference in Article 42(1)* [of the ICSID Convention] *to 'such rules of international law as may be applicable' that the*

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89 Counter-Memorial, ¶¶189-192.

90 Memorial, ¶408 (emphasis added).

91 Reply, ¶425.

92 Reply, ¶424.

Tribunal is empowered to consider and interpret such rules in UNCLOS, the Svalbard Treaty and the NEAFC Convention which cover the legal issues arising in the present case."[93]

63. In view of the ambiguity of the Claimants' statement, it is necessary to look at the Claimants' actual use of UNCLOS, the Svalbard Treaty and the NEAFC Convention in the context of the merits of the dispute to clarify the place it gives to these conventions in the present dispute.

64. The Claimants say that:

> "*the Tribunal might need to address, in an ancillary manner, the interpretation of other international law instruments such as UNCLOS, the Svalbard Treaty or the NEAFC Convention, so as to determine the existence and scope of the fishing rights forming part of the investment protected under the BIT. But this is a question of applicable law, not of admissibility, let alone of jurisdiction*."[94]

65. This insistence on the word "ancillary" should not obscure the fact that what the Claimants are really asking the Tribunal to do is to *apply* these instruments and find that Norway has failed to fulfil its obligations *under them*. They invite the Tribunal to "consider" UNCLOS, the Svalbard Treaty and the NEAFC Convention,[95] but by no means do they confine themselves to asking the Tribunal to interpret the provisions of the BIT in the light of these instruments. They ask the Tribunal to find violations of these treaties by Norway,[96] and even to decide on the existence of pre-existing rights which are said to belong to the Claimants on the basis of these instruments.[97]

66. In view of the broad formulation of the Claimants' position it appears that there is still a disagreement between the Parties as to the applicable law, particularly in regard with the rules of international law, in the context of the settlement of the dispute on the merits. Contrary to the Claimants' position, it is not within the jurisdiction of the Tribunal to

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93 Reply, ¶421.

94 Reply, ¶566.

95 Reply, ¶¶424, 433-440, or 451.

96 See e.g. Memorial, ¶¶300 *et seq*. or ¶802. See also Reply, ¶775.

97 See e.g. Reply, ¶¶566 or 592.

establish violations by Norway of these instruments or the existence of the Claimant's alleged rights under them.

67. As shown below, UNCLOS, the Svalbard Treaty and the NEAFC Convention do not constitute rules of international law "as may be applicable" in the present dispute (**3.2.1**); and even if it were accepted that they do, these instruments cannot be used to establish the existence of alleged rights belonging to the Claimants, or violations of these instruments by Norway (**3.2.2**); nor does Norwegian domestic law require their application (**3.2.3**).

3.2.1 Rules of international law that may be applicable to the dispute

68. In order to transform this dispute into a dispute about UNCLOS, the Svalbard Treaty and the NEAFC Convention, the Claimants rely on a large number of precedents; however, their presentation of these precedents is misleading and often distorted. The Tribunal cannot *apply* the provisions of these instruments as such.

69. As the Claimants recall, Article 42(1) of the ICSID Convention provides that "*the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.*" (emphasis added)[98]

70. In their reply, the Claimants do not explain why UNCLOS, the Svalbard Treaty or the NEAFC Convention "may be applicable". Of the many cases they cite, without always quoting the allegedly relevant paragraphs, only a few give some explanation as to whether a rule of international law may or may not be applicable to a dispute; and those few tend to disprove the Claimants' interpretation.

71. The Claimants refer in particular to "the interpretation and application" of the Cotonou Convention in *CMC v. Mozambique*.[99] However, this award is irrelevant since in that case the Tribunal merely asked itself whether the Cotonou Convention dealt with the same subject matter as the BIT between Italy and Mozambique in order to determine

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98 Reply, ¶441. And in its French version: "*le Tribunal applique le droit de l'État contractant partie au différend – y compris les règles relatives aux conflits de lois – ainsi que les principes de droit international en la matière*".

99 Reply, ¶433.

whether "*the Cotonou Convention operates to cut off the access to ICSID arbitration*".[100] The same applies to the *Bayindir v. Pakistan* case – Pakistan only invoked the New York Convention at the stage of preliminary objections and with the sole purpose of establishing that, in view of a "convention conflict", the application of the BIT should be set aside[101] – a very different situation from that envisaged by the Claimants.

72. The Claimants also refer to *Saipem v. Bangladesh*[102] but in that case the BIT between Bangladesh and Italy expressly provided that:

> *"Article 12 – Application of other Provisions*
>
> *Whenever any issue is governed both by this Agreement and by another International Agreement to which both the Contracting Parties are parties, or whenever it is governed otherwise by general international law, the most favourable provisions, case by case, shall be applied to the Contracting parties and to their investors*".[103]

In that case, the BIT expressly provided for the *application* of the provisions of the other agreements by which the parties were bound. The Latvia/Norway BIT does not contain such a provision.

73. The Claimants also assert that "[t]*he ICSID tribunal in* SPP v. Egypt *observed that there was no question that 'the UNESCO Convention is relevant'*."[104] They fail to acknowledge the entire sentence: "*Nor is there any question that the UNESCO Convention is relevant: the Claimants themselve*s acknowledged *during the proceedings before the French* Cour d'Appel *that the Convention obligated the Respondent to abstain from acts or contracts contrary to the Convention*". But, in so doing, the Tribunal took note of *the Parties' agreement* on the law applicable to their dispute in conformity with Article 42 of the ICSID Convention.[105] In the present case

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100 **CL-0425** *CMC v. Mozambique*, ICSID Case No. ARB/17/23, Award, 24 October 2019, ¶266.

101 **RL-0185-ENG** *Bayindir Insaat Turzm Ticaret Ve Sanari A.S. v. Islamic Republic of Pakistan*, ICSID ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶¶174 and following.

102 Reply, ¶433.

103 **RL-0248-ENG**. Italy - Bangladesh BIT (1998), entered into force on 20 September 1994.

104 Reply, ¶433. Fn omitted.

105 **CL-0266** *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, ¶¶76-78.

there is no such agreement; and the UNCLOS and other treaties do not require Norway to abstain from any of the acts on which the Claimants base their case.

74. The Claimants cite among other examples the decisions of the PCIJ in the case of *German Interests in Polish Upper Silesia* and of the ICJ in the case concerning *Gold Looted by Germany from Rome in 1943*.[106] In these cases, the Court considered the interpretation of conventions other than those on which its jurisdiction was based to the extent that such interpretation was "incidental" to the dispute.[107]

75. In order to resolve the present dispute, the Claimants ask the Tribunal to interpret and apply UNCLOS, the Svalbard Treaty and the NEAFC Convention to determine whether Latvia and the EU could allow the Claimants to harvest snow crabs on the Norwegian continental shelf without Norwegian's consent. These issues form the basis of the dispute before the Tribunal and can by no means be considered as "incidental" to the present dispute.[108]

76. The Claimants also quote from *Waste Management v. Mexico No. 2*; but in that case the Tribunal also stressed that "*such jurisdiction is incidental in character*",[109] and that the instrument which the Tribunal was called upon to interpret was a "*concession agreement*" between the parties to the dispute[110] and not an international convention to which only States could be parties, as is the case in respect of UNCLOS, the Svalbard Treaty or the NEAFC Convention.

77. The objective of the NEAFC Convention is not the protection of investors and investments. The Convention deals with "*the long term conservation and optimum utilisation of the fishery resources*" and not the protection of investors.[111] It is an inter-State agreement for the balancing and definition of the rights and duties of States.

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106 Reply, ¶¶426-427.

107 **CL-0221** PCIJ, Judgment, 25 August 1925, *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, p. 18; *Gold Looted by Germany from Rome in 1943*, Award, 20 February 1953, pp. 458-459.

108 See below, **Chapter 4**. See also Counter-Memorial, Section 4.1.2.

109 **CL-0290** *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶73.

110 *Ibid*., ¶40.

111 **CL-0018** NEAFC Convention, Preamble.

78. As for the Svalbard Treaty, it is also an inter-State agreement. Even if its equal treatment provisions were applicable, they could only be applied in the area defined by Articles 2 and 3 of the Treaty, i.e. in the territorial waters within 12 nautical miles around the Svalbard archipelago, but the dispute does not concern anything that took place within the territorial waters around Svalbard.[112]

79. Moreover, these instruments, even if they were considered as applicable, are international conventions concluded between States which do not, in themselves, give any rights directly to individuals, who consequently cannot invoke them as the basis of their claimed rights.

80. In the words of a decision of the CJEU, already referred to by Norway in its Counter-memorial,[113] and not disputed by the Claimants, "*UNCLOS does not establish rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States*".[114] Here again the same holds true for the Svalbard Treaty and the NEAFC Convention.

3.2.2 Application of the relevant international rules by the Tribunal

81. In view of the above, there is no reason why UNCLOS, the Svalbard Treaty or the NEAFC Convention should be accepted by the Tribunal as international law that "may be applicable" in this case. In all the cases invoked by the Claimants, courts and Tribunal considered the interpretation of conventions other than those on which its jurisdiction was based only insofar as this interpretation was "incidental" to the claims before them and the instruments on which those claims were based.

82. To support their position, the Claimants quote from the *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic* case.[115] They omit to mention that in that case, the Tribunal had to determine the obligations of a private party (not of the State) and carefully distinguished between the

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112 See e.g. **R-0005-ENG** Note verbale 6 August 1986 from Norway to the European Communities.

113 Counter-Memorial, ¶199.

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

115 Reply, ¶¶441-442.

inter-State effect of international law obligations on the one hand and the rights and obligations of private parties on the other.[116]

83. The Claimants also invoke the *LG&E v. Argentina* case. In that case also, the Tribunal stated that

> "*Likewise, applying the rules of international law is to be understood as comprising the general international law, including customary international law, to be used as an instrument for the interpretation of the Treaty. For example, where a term is ambiguous, or where further interpretation of a Treaty provision is required, the Tribunal will turn to its obligations under Articles 31 and 32 of the Vienna Convention on the Law of Treaties, signed in 1969*."[117]

84. Nor are the extracts from *Micula v. Romania (No. 2)* and *Vivendi* quoted by the Claimants[118] persuasive in defending the Claimants' position. These quotations merely recall the wording of Article 42(1) of the ICSID Convention and are not useful in determining why UNCLOS, the Svalbard Treaty or the NEAFC Convention "may be applicable" to the dispute, or in explaining how the Tribunal could use these treaties to determine the validity of the Claimants' alleged harvesting rights.[119]

85. In *Philip Morris v. Uruguay*, also cited by the Claimants, the tribunal considered the use of the World Health Organization Framework Convention on Tobacco Control only to assist in the interpretation of other provisions, and eventually declined to do so.[120]

86. In *MTD v. Chile*, the Tribunal simply interpreted the terms of the BIT "*in accordance with the norms of interpretation established by the Vienna Convention on the Law of the Treaties, which* [was] *binding on the State Parties to the BIT*."[121]

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116 **RL-0050-ENG** *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, ¶¶1208-1210.

117 **CL-0271** *LG&E v. Argentine Republic*, ICSID Case No. ARB/02/01, Decision on Liability, 3 October 2006, ¶89.

118 Reply, ¶¶444-446.

119 **CL-0253** *Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment, 3 July 2002, ¶102; **CL-0233** *Ioan Micula, Viorel Micula and others v. Romania (No. 2)*, ICSID Case No. ARB/14/29, Award, 5 March 2020, ¶348.

120 **CL-0166** *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, ¶¶262, 264 and 290.

121 **CL-0285** *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶112; see also ¶113.

87. The same conclusion must be drawn from *Emmis v. Hungary* where the Tribunal considered that other applicable rules of international law could only be used for the purpose of interpreting the BIT[122] or from *Hesham Talaat M. Al-Warraq v. Indonesia* where the Tribunal used the ICCPR for the sole purpose of interpreting the standard of fair and equitable treatment.[123]

88. The WTO cases mentioned by the Claimants are not different, as the panels have used other international legal rules only for the purpose of *interpreting* the terms of the agreements concluded under WTO auspices, and not to *establish* the rights of the Parties. Thus, in one of the cases referred to by the Claimants, the Appellate Body relied on the Convention on International Trade in Endangered Species (CITES) to interpret the meaning of "exhaustible natural resources" as included in GATT Article XX g) which provides a general exception "relating to the conservation of exhaustible natural resources".[124] In no way does this case support the Claimants' position. UNCLOS, the NEAFC Convention and the Svalbard Treaty do not shed any light on the correct *interpretation* of any terms used in the BIT.[125]

89. The Claimants also argue that Norway's position as set out in the document "Comments on the Model for Future Investment Agreements" supports their interpretation of the BIT between Latvia and Norway concerning the application of the international rules to the dispute.[126] In this document, Norway stated that "[i]*n future Norwegian agreements, the states' prior consent to dispute settlement will be limited to claims based on the provisions in the agreement concerned*"[127] without mentioning the

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122 **RL-0054-ENG** *Emmis International Holding, Emmis Radio Operating, MEM Magyar Electronic Media Kereskedelmi es Szolgaltato Kft. v. The Republic of Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent's Objection under ICSID Arbitration Rule 41(5), 11 March 2013, ¶74, fn 54.

123 **CL-0427** *Hesham Talaat M. Al-Warraq v. Indonesia*, UNCITRAL, Final Award, 15 December 2014, ¶520.

124 **RL-0238-ENG** GATT, Article XX g); World Trade Organization, **CL-0505** *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R, 12 October 1998, ¶¶130-132; see also **CL-0506** World Trade Organization, *European Communities-Measures Affecting the Approval and Marketing of Biotech Products*, Report of the panel, WT/DS291/R WT/DS292/R WT/DS293/R, 29 September 2006, ¶.7.94.

125 Reply, ¶592.

126 Reply, ¶¶419 and 435.

127 **CL-0414** Comments on the Model for Future Investment Agreements, annexed to the since discontinued Norwegian Draft Model Investment Agreement, 19 December 2007, ¶4.3.2.

previous BITs concluded, including the BIT concluded with Latvia. The document was made as part of a public consultation procedure for a potential Norwegian model BIT[128] which was not only occasioned by "*the breadth of provisions such as Article IX of the Norway–Latvia BIT and Article IX in the Norway–Lithuania BIT*"[129]. The quote set out by the Claimants in paragraph 419 of the Reply does not address the interpretation of any existing agreements. The statement, which applies to the understanding of potential future treaties based on the proposed draft Model BIT, cannot be understood to mean that the contrary understanding is true for any existing treaty.

90. The Tribunal therefore cannot "consider" international law as understood by the Claimants as a source of substantive obligations for Norway which they could rely upon to bring forward alleged BIT breaches. In particular, it is not possible to proceed to "*the interpretation of other international law instruments such as UNCLOS, the Svalbard Treaty or the NEAFC Convention, so as to determine the existence and scope of the fishing rights forming part of the investment protected under the BIT*." [130] The Tribunal's application of the relevant rules of international law, pursuant to Article 42(1) of the ICSID Convention, can only be for the purpose of interpreting the provisions of the BIT, as provided by Article 31(3)(c) of the Vienna Convention on the Law of Treaties, and as the numerous examples cited by the Claimants themselves illustrate.

3.2.3 The incorporation of international law into Norwegian domestic law

91. As Norway primarily has a dualist legal system, any international law obligation has to be incorporated in order to be applied as domestic law. In their reply, the Claimants argue that:

> "*the domestic law of the Contracting State, as enumerated in Article 42(1), incorporates into Norwegian law the provisions of the Svalbard Treaty, UNCLOS, and NEAFC. This means that the relevant rules contained in those treaties are also part of the applicable law in these proceedings on the basis that the treaties have been incorporated into Norwegian law*."[131]

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128 Norway has not negotiated any new BITs since the mid-90ies. There have been two public consultation procedures on potential new Model BIT since then, one in 2008 and one in 2015.

129 Reply, ¶419.

130 Reply, ¶566.

131 Reply, ¶452.

92. Without prejudice to the general position regarding the taking into consideration of international law as to the merits of the dispute, the precise wording of Section 6 invoked by the Claimants must be kept in mind when considering to what extent international law may be applied. Section 6 provides that "[the Marine Resources Act] *applies subject to any restrictions deriving from international agreements and international law otherwise*".

93. Three observations can be made:

- First, that the Claimants are wrong to broadly state that Section 6 "*means that the relevant rules contained in those treaties are also part of the applicable law in these proceedings*".[132] Section 6 of the Marine Resources Act provides for the application of the provisions of the Act subject to those rules of international law by which Norway is bound for the limited purpose of ensuring the compatibility of that Act with those rules – when applicable and only for domestic law purposes. The Norwegian legal system firmly builds on the principle of dualism, so any legislative act seeking to alleviate possible tensions between the domestic system and Norway's international legal obligations are construed with this principle in mind.

- Second, a number of Norwegian acts contain the type of interpretational reference to international law which can be found in the Marine Resources Act. The effect of these provisions is that the relevant act must be applied subject to international obligations, but those sorts of interpretational references stop short of *incorporating* those obligations into domestic law as a source of Norwegian law. The incorporation of international law into domestic Norwegian law is a difference concept entirely. An example of the latter is Section 2 of the Human Rights Act [133] which expressly *incorporates* five central human rights

132 *Ibid*.

133 **RL-0237-NOR; RL-0261-ENG** Lov 1999-05-21-30 Act relating to the strengthening of the status of human rights in Norwegian law (The Human Rights Act).

conventions[134] and makes them part of domestic law using the following language:

> "*The following conventions shall have the force of Norwegian law insofar as they are binding for Norway* […]".[135]

The EEA Agreement and the Lugano Convention are other examples of international conventions that have been expressly incorporated into Norwegian law. There is no such incorporation in respect of the treaties invoked by the Claimants.

- Third, in the event that the Tribunal were to accept the Claimants' contention that the Marine Resources Act incorporates international law for the purpose of the handling of the present dispute, this would not allow the Claimants to invoke a breach of those international obligations as such before the Tribunal. As illustrated by the extract from the preparatory work to Section 6 of the Act quoted by the Claimants:

> "*the provisions* [of the Marine Resources Act] *in or pursuant to the law cannot be used in violation of an international agreement to which Norway has acceded or international law otherwise. However, this does not mean that a duty under international law constitutes an independent legal basis for various measures in those cases where legal basis is required by law in accordance with the principle of legality. [The provision] thus suggests that the law must be interpreted restrictively or set aside if it is in conflict with international law*".[136]

94. Preparatory works constitute a significant source of law in the Norwegian legal tradition.[137] Here they simply affirm that any international law obligation to which Norway was bound at the time of the enactment of the Marine Resources Act (which includes the Norway-Latvia BIT and the Svalbard Treaty) would necessitate individual legislative measures for them to be of consequence for the present dispute. The

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134 The European Convention on Human Rights with Protocols, International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political rights, Convention on the Rights of the Child and Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979.

135 **CL-0512**.

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

137 **RL-0256-ENG** Features of the Norwegian legal system, article published 24 June 2021 by the Norwegian Bar Association.

Norwegian legislature has not, however, enacted such laws. Consequently, the Claimants' reference to and reliance on Section 6 of the Marine Resources Act is not instructive in the present case.

95. If the Tribunal were to accept that international law applies to the merits of the dispute, through Norwegian law,[138] the rules of international law would have to be applied within the strict framework set by Section 6 of the Marine Resources Act. The Tribunal should furthermore give consideration to Norway's interpretation of these international agreements.

96. In conclusion:

96.1. When deciding on its jurisdiction, the Tribunal must rely on the rules of international law establishing its jurisdiction in this case, that is the ICSID Convention and the BIT: it can also refer to Norwegian law insofar as it is necessary to establish its jurisdiction in conformity with the ICSID Convention and the BIT;

96.2. In dealing with the merits of the dispute the Tribunal cannot apply international law as such;

96.3. UNCLOS, the Svalbard Treaty and the NEAFC Convention are not treaties that "may be applicable";

96.4. The Tribunal could only take those conventions into consideration in order to interpret the respective obligations of the Parties, not to find breaches of the obligations of Norway under the BIT.

138 See above, Section 3.2.

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

97. As Norway has demonstrated in its Counter-Memorial,[139] the dispute presented by the Claimants principally and mainly involves considerations far removed from the investment issue.

98. In their submissions, the Claimants argue that they have or had harvesting rights on the Norwegian continental shelf in Loop Hole and in the maritime areas around Svalbard. The Claimants assert that these alleged rights are derived from Latvia's issuance of licences[140] or from an EU regulation.[141]

99. The rights alleged by the Claimants, which are said to have been expropriated by Norway,[142] thus derive from the participation of Latvia in the Svalbard Treaty (but only since June 2016[143] – at a time when Norway already had prohibited the harvesting of snow crab on its entire continental shelf) and of the EU in the NEAFC. Moreover, the harvesting of snow crab on the Norwegian continental shelf is subject to its consent in accordance with Article 77 of UNCLOS. And, according to Article 6 of the NEAFC Convention, any NEAFC recommendation concerning the harvesting of snow crab on the Norwegian continental shelf is subject to the procedure in the article outlined in Article 6 ("*the Contracting Party in question so requests and the recommendation receives its affirmative vote*"). Therefore, "*Latvia not being a State party to NEAFC, its position as regards licences for snow crab harvesting in the Loop Hole puts it at odds with the EU's position, given that its licences – on which the Claimants rely in this proceeding – were issued despite agreement between Norway and the EU that there was no right to do so under NEAFC*."[144]

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139 Counter-Memorial, Section 4.1.

140 See e.g. Memorial, ¶521 and Reply, ¶513.

141 See e.g. Memorial, ¶5 and Reply, ¶621.

142 Reply, ¶843.

143 **R-0192-FR; R-0193-ENG** Note verbale 28 June 2016 from France, as the depositary for the Svalbard Treaty of 9 February 1920, to the State Parties regarding the adherence of Latvia to the Treaty.

144 Counter-Memorial, ¶236.

100. In order to decide the dispute submitted by the Claimants, the Tribunal would thus have to decide:

> *"- first, in relation to the Svalbard Treaty, whether the harvesting of snow crab outside the territorial waters is covered by Article 2 of the Svalbard Treaty;*
>
> *- secondly – if the Svalbard Treaty applies beyond the territorial waters – whether any state Party to it may unilaterally regulate exploitation of snow crab regardless of Article 77 of UNCLOS and Norwegian legislation;*
>
> *- thirdly, whether the snow crab is a sedentary species in accordance with Article 77 of UNCLOS and thus falls under the jurisdiction of the coastal State on the continental shelf, or whether snow crab is not a sedentary species and harvesting falls under the regime of the high seas and is covered by the NEAFC Convention in the Loop Hole."*[145]

All these questions are far removed from ICSID's jurisdiction, which only concerns investments, and would require the Tribunal to take a position on the legal interests and responsibility of third States not party to the proceedings.[146]

101. In the same way that "*ICSID Tribunals are not empowered to delimit maritime boundaries*", [147] ICSID tribunals are not empowered to make determination on Norway's sovereign rights on its continental shelf and on the scope of application of the provisions of the Svalbard Treaty.

102. While repeatedly stating that they claim a finding from the Tribunal that Norway's actions "*had the effect of destroying the Claimants' integrated snow crab harvesting business in Norway*",[148] the Claimants, more surreptitiously but indisputably admit that the very subject-matter of the dispute concerns alleged rights to harvest snow crab founded on the NEAFC Convention, the Svalbard Treaty and UNCLOS.

103. Thus:

> "*the Claimants agree that the Tribunal might need to address, in an ancillary manner, the interpretation of other international law instruments such as UNCLOS, the*

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145 Counter-Memorial, ¶278.

146 Counter-Memorial, ¶¶250 *et seq.*

147 **CL-0165** *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Award, 13 March 2009, ¶333.

148 Reply, ¶624. See also Memorial, ¶¶4, 500 (f) or 576.

Svalbard Treaty or the NEAFC Convention, so as to determine the existence and scope of the fishing rights forming part of the investment protected under the BIT".[149]

104. In doing so, the Tribunal would necessarily have to take a position on the existence of Latvia and the EU's rights (or the absence thereof) to authorise the harvesting of snow crab by the Claimants in the Loop Hole and in the maritime areas around Svalbard.

105. But, as further addressed below, the Tribunal is not competent to take a position on these issues which constitute the very subject matter of the dispute presented to the Tribunal (**4.1**) and necessarily imply that the Tribunal must take a position on the legal interests and responsibility of third parties who have not expressed their consent to the jurisdiction of the Tribunal (**4.2**).

4.1 THE SUBJECT MATTER OF THE DISPUTE

106. In their Reply, the Claimants comment on the characterisation of the objection raised by Norway. They state that the objection relating to the fact that the Tribunal does not have jurisdiction to decide the dispute with regard to the subject-matter of the dispute "*pertain*[s] *to the admissibility of some of the Claimants' submissions*"[150] and does not constitute a jurisdictional objection. This assessment mischaracterises Norway's argument.

107. As Norway has recalled, it is a fundamental principle of international law that an international court or tribunal only has jurisdiction to decide a dispute if all the States involved in the dispute have consented to its jurisdiction.[151] By ratifying the ICSID Convention Norway accepted (subject of course to written consent, e.g. in a BIT) the jurisdiction of the Centre regarding its investment disputes, not to give ICSID tribunals general and unlimited jurisdiction to apply international law rules.[152]

108. In this respect, the Claimants are wrong to assert that the Norwegian argument "*is an impermissible attempt to read additional conditions for the establishment of the*

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149 Reply,¶566.

150 Reply,¶460.

151 Counter-Memorial, ¶327 *et seq*.

152 *Ibid*.

Tribunal's jurisdiction into Article IX of the BIT".[153] On the contrary, Norway maintains that the conclusion of a BIT with Latvia for the protection of investments cannot in any way be understood as constituting consent to the determination of the extent of its sovereign rights over its continental shelf, including in the Loop Hole and in the maritime areas around Svalbard. As the Tribunal is not competent to decide this question, it cannot in any event rule on the existence or legality of the Claimants' alleged investments, insofar as they derive from the equally alleged rights of Latvia and the EU under UNCLOS, the Svalbard Treaty or the NEAFC Convention.

109. In the *Kerch Strait* case, where a similar objection by Russia was considered by the Tribunal, the Tribunal considered that it was an objection to its jurisdiction and not a question of admissibility:

> "*492. For these reasons, the Arbitral Tribunal unanimously*
>
> *Upholds the Russian Federation's objection that the Arbitral Tribunal has no jurisdiction over Ukraine's claims, to the extent that a ruling of the Arbitral Tribunal on the merits of Ukraine's claims necessarily requires it to decide, directly or implicitly, on the sovereignty of either Party over Crimea;*"[154]

110. Therefore, the Tribunal does not have an "adjudicative power"[155] to decide the dispute (that is to exercise its jurisdiction) and these are not "questions of admissibility, which concern the exercise of that power"[156] which are raised by Norway.

111. The Claimants further try to limit, albeit without apparent conviction, the consequences implied by the objections raised by Norway. They argue that "Norway's admissibility objections do not target the entire case submitted to the Tribunal, but only the legality of the fishing rights asserted by the Claimants to form part of their investment."[157] But if, as the Claimants now suggest, there is only one investment, then the objection targets *the* investment and therefore the whole case.

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153 Counter-Memorial, ¶250 *et seq.*

154 **RL-0066-ENG** *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, PCA Case No. 2017-06, Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020, ¶492.

155 Reply, ¶554.

156 *Ibid*.

157 Reply, ¶562.

112. Besides being incompatible with the Claimants' (new) position that their investments in fact constitute a single unified investment,[158] the presentation of their case contrasts with this statement. According to the Claimants, their objective was to harvest snow crab and build a business based on snow crab harvesting.[159] Using the alleged harvesting rights as an (incorrect) premise, North Star claims to have purchased vessels to harvest snow crab, entered into snow crabs sale contracts, etc. The economic purpose of the business was precisely to profit from alleged harvesting rights, which never existed; yet, these alleged harvesting rights were an essential precondition to the economic goal of their business.

113. According to the Claimants, Norway's argument that the Tribunal should refrain from ruling on the dispute since the cornerstone of the dispute is unrelated to matters directly linked to alleged investments should in any case be dismissed.[160] In challenging Norway's position, the Claimants rely mainly on two elements: first, the Claimants consider without real justification that the argument is not susceptible of being accepted by an investment arbitral tribunal (**4.1.1**), and second, the Claimants wrongly affirm that the very subject-matter of the dispute does not concern the exercise of sovereign rights (**4.1.2**).

4.1.1 The Tribunal must refuse to decide on a dispute the very subject matter of which is unrelated to the investments

114. In their Reply, the Claimants argue that the Tribunal should consider that the subject-matter of this dispute is directly connected with their investments. That is wrong. The very subject-matter of this dispute relates to matters not directly connected to investments and the Tribunal should accordingly decline to decide the dispute.

115. The first argument advanced by the Claimants is that

> "[t]*his theory* [i.e., the 'preponderance of questions' as the method for determining the 'very subject-matter' of a case] *has only been applied in inter-State cases, in which the applicant was invoking a particular convention – mostly UNCLOS – to seek a ruling on a larger dispute with the respondent, which did not necessarily concern the*

158 See below, Section 6.2.

159 Reply, ¶488.

160 Reply, ¶¶570-597.

interpretation and application of the law of the sea, but mostly questions of territorial sovereignty."[161]

116. There is no basis for this "argument of principle", but a few words can be said about it.

117. That this "theory" has been mainly resorted to in inter-State disputes by no way precludes its application by an investment tribunal. On the contrary, like many other aspects of international law, it can be used by both inter-State and permanent international courts and tribunals, as well as in investment disputes. Investment law is replete with borrowings from public international law. And there is no doubt that the Tribunal, under the "*Kompetenz-kompetenz*" principle, has the necessary latitude to determine whether the argument advanced by Norway should cause the Tribunal to refuse to decide on the dispute submitted to it, in accordance with Article 41(1) of the ICSID Convention.[162]

118. To establish their position, the Claimants invoke a decision[163] – neither from the PCA nor the ITLOS – in which the Swiss Federal Court had to deal with this argument. The decision in fact fails to support their position. In the case, the Tribunal did not refuse to consider the objection – on the contrary, it examined this objection and considered that, on the facts of the dispute, the objection could not be accepted. As the Claimants point out, the Federal Court analysed the elements at its disposal and considered that "*the subject matter of the arbitration was not the status of Crimea with regard to the 1998 BIT nor its status under international law, but rather a claim asserted by the Respondents for compensation payments*".[164] In other words, the Swiss court dismissed the objections because it considered that the subject-matter only concerned investments.

119. The Claimants rely on these few lines, and without demonstrating it, affirm that "[s]*imilarly, questions of sovereignty are not the subject matter of this arbitration*."[165]

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161 Reply, ¶572.

162 See e.g. *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, ¶¶148-150; **RL-0185-ENG** *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Procedural Order No. 2 (Provisional Measures), 16 October 2002, ¶22.

163 Reply, ¶575.

164 Reply, ¶575 quoting "*First Civil Law Court, Russian Federation v. A et al., 4A 246/2019, Judgment, 12 December 2019, CL-0463, pp. 8-9, ¶4,2'*".

165 Reply, ¶576.

In doing so, the Claimants overlook the differences between the case presented to the Tribunal and the case presented to the Swiss Federal Court. In that case, the Swiss Federal Court was asked about the definition of Russia's territory under the 1998 BIT between Russia and Ukraine. The Swiss Federal Court considered, on the basis of the facts at its disposal, that Russia had *de facto* control over Crimea. It stated that:

> "*The Arbitral Tribunal found that the 1998 Investment Protection Agreement is to be interpreted with reference to Art. 31 et seq. of the Vienna Convention on the Law of Treaties of May 23, 1969 (hereinafter: VCLT; SR 0.111). Applying this basis of interpretation, the Arbitral Tribunal concluded, regarding the territorial scope of the agreement, that the term 'territory' as used in the agreement also includes an area over which a Contracting State exercises de facto control*." [166]

The Swiss Federal Court thus made a factual assessment of the situation in the context of the interpretation and application of a term – 'territory' – in the BIT. It did not have to identify legal titles that would have justified Russian sovereignty over Crimea, nor did it have to apply rules of international law on the delimitation of territory between Russia and Ukraine. In the present case, a preliminary decision on matters clearly outside the jurisdiction of the Arbitral Tribunal is an absolute pre-requisite to a decision on the Claimants' submissions. The case *Russian Federation v. A* et al. invoked by the Claimants is therefore irrelevant.

120. On the contrary, it was because it was faced with the difficulty of determining *legally* which State had sovereignty over a territory and could not evade it that, in the *Kerch Strait* case, the Tribunal found that it could not resolve the dispute as submitted by Ukraine:

> "*The Arbitral Tribunal is of the view that, in the present case, the Parties' dispute regarding sovereignty over Crimea is not a minor issue ancillary to the dispute concerning the interpretation or application of the Convention. On the contrary, the question of sovereignty is a prerequisite to the Arbitral Tribunal's decision on a number of claims submitted by Ukraine under the Convention*."[167]

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166 See **CL-0463** First Civil Law Court, *Russian Federation v. A* et al., 4A 246/2019, Judgment, 12 December 2019, p. 7, ¶4.2 referring to **CL-0463** First Civil Law Court, *Russian Federation v. PJCS Urknafta*, 4A_396/2017, Judgment, 16 October 2018, p. 7, ¶4.2.

167 See Memorial, ¶275, Fn 305: "*RL-0066-ENG Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation), PCA Case No. 2017-06, Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020, para. 195. In that case, as a consequence, the Tribunal found that it had no jurisdiction over the Ukrainian claims inasmuch as Ukraine's submissions explicitly or implicitly required a prior answer to the question of*

121. In the present case, the Claimants ask the Tribunal to rule on *legal questions* – not *factual considerations* – outside the scope of the ICSID Convention. But this does not change the nature of the problem: the Tribunal would be *obliged* to answer those questions, which constitute the very basis of the dispute, in order to give a decision.

122. The Claimants consider that Norway's argument is related to Article 25 of the ICSID Convention. In its Counter-Memorial, Norway has already demonstrated that Article 25 of the ICSID Convention is not intended to bring every type of dispute within the jurisdiction of the Tribunal.[168] Article 25 provides that the Centre should have jurisdiction over "any legal dispute *arising directly out of an investment*". The question of the subject matter of the dispute is therefore crucial for establishing the jurisdiction of the Tribunal: if it does not directly relate to investments, the Tribunal has no jurisdiction.

123. It should also be noted that even if the dispute submitted to the Tribunal were primarily a dispute "arising directly out of an investment" – *quod non*, this would not deprive the Tribunal of the obligation to refuse to rule on the dispute. In a situation where an investor chooses to invest in a disputed territory, the dispute could be seen as *prima facie* directly related to an investment. However, this would not be the end of the question: if it were obliged to decide first on the territorial or delimitation dispute, the Tribunal should abstain from deciding on the transnational dispute. The opposite result would in fact create an incentive and an opportunity to (mis)use investment tribunals as a vehicle for addressing contentious inter-state disputes.

124. Thus, even if the Tribunal were to consider that the dispute submitted by the Claimants is directly related to investment issues, this would not eliminate the need first to deal with the fundamental question of the sovereign rights of Norway, the EU and Latvia, to establish the existence of the alleged investments of the Claimants. In the light of these preponderant and preliminary issues, therefore, the Tribunal should not decide the dispute.[169] Finally, the Claimants, betraying the little confidence they have in their

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sovereignty and ordered the Applicant to go back over its Memorial accordingly." In the present case, as noted above, the issues outside the jurisdiction of the Arbitral Tribunal require prior answers to *all* the Claimants' submissions.

168 Counter-Memorial, ¶¶251-260.

169 See above, **Chapter 4**.

argument, state that "Norway omits to mention that none of those tribunals dismissed the case for lack of jurisdiction. At most – as Norway has recalled[170] – one tribunal directed the Applicant to "redefine the scope of some of its claims"[171]. This seems hardly applicable in the present case, as the settlement of the dispute submitted to the Tribunal entirely depends on the prior resolution of law of the sea and territorial issues: to demonstrate the existence and legality of the Claimants' harvesting right, which is the cornerstone of all the Claimants' alleged investments, the Tribunal would have to determine the existence of Latvia's and the EU's right to allow the harvesting of snow crab in the Loop Hole and in the maritime areas around Svalbard.[172]

4.1.2 The very subject matter of the dispute concerns sovereign rights in the Loop Hole and in the maritime areas around Svalbard

125. As Norway explained in its Counter-Memorial and above,[173] the very subject matter of the dispute concerns matters unrelated to investments issues.

126. In their Reply, the Claimants continue to assert that

> "[t]*he Tribunal is not requested to decide upon the existence of Norway's sovereign rights in the Loophole and in the maritime areas off Svalbard. Instead, the Tribunal is asked to find that, in the exercise of its asserted sovereign rights, Norway has breached its obligations towards the Claimants as Latvian investors*".[174]

127. At the same time, however, the Claimants argue that Latvia granted them fishing licences in 2014 to harvest snow crab on the Norwegian continental shelf in the Loop Hole or that they have a right to harvest snow crab in the maritime area around Svalbard on the basis of EU regulations.[175] Since the Claimants' alleged rights derive from the equally alleged rights of Latvia and the EU, the Claimants in effect ask the Tribunal to base its reasoning on asserted existence of the respective sovereign rights of Latvia and the EU as well as on those of Norway in the maritime area around Svalbard and in the

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170 Reply, ¶577. Footnotes omitted: "*710. Respondent's Counter-Memorial, 29 October 2021, p. 101, fn 101." and "711. RL-0066, paras. 197-198*."

171 Reply, ¶577 (footnote omitted): "*711. RL-0066, paras. 197-198*."

172 See above, **Chapter 4**.

173 See above, **Chapter 4**. See also Counter-Memorial, **Chapter 4**.

174 Reply, ¶583 (emphasis in the original).

175 Memorial, ¶¶278, 588 and 623; Reply, ¶¶592 and 819.

Loop Hole. They ask the Tribunal to decide or assume that Latvia had the right under international law to grant authority to take snow crab from what is indisputably (and indeed agreed to be) the Norwegian continental shelf. This is best illustrated by the Claimants themselves who, when discussing the merits of the dispute, invite the Tribunal to take a position on the existence and legality of their alleged fishing rights.[176]

128. The Claimants also refer to the distinction between "jurisdiction" and "applicable law" and affirm that "applicable law clauses do not establish or affect the scope of that tribunal's jurisdiction".[177] Norway agrees that the question of the jurisdiction of the Tribunal and the admissibility of an application are questions different from that of the applicable law. However, these elements are not unrelated.

129. As Norway has demonstrated, UNCLOS, the Svalbard Treaty or the NEAFC Convention do not constitute the law applicable to the merits of the dispute.[178] These three Conventions could only serve to assist the interpretation of the terms of the BIT, and not to establish the existence and legality of the alleged harvesting rights of the Claimants. The latter issues are mostly covered by the law of the sea, which the Tribunal cannot address.[179]

130. The Claimants also refer to the *Plechkov* case before the European Court and argue that

> *"[o]n a closer look, Plechkov fully supports the Claimants' position. It is a case where the European Court of Human Rights found that it had jurisdiction, that the matter before it was admissible, and that there was a breach of the European Convention on Human Rights (Article 7) and its First Protocol (Article 1)."*[180]

131. The Claimants misinterpret the *Plechkov* decision. As Norway has already pointed out in its Counter-Memorial:

> "*the Court considered that it is not for it to pronounce* [...] *on the interpretation of UNCLOS or of the relevant Romanian laws* [...]. *It cannot, therefore, rule on the extent*

176 Reply ¶¶592, 597, 775 or 802.

177 Reply, ¶587.

178 See above, **Chapter 3**.

179 See above, **Chapter 4**: 100

180 Reply, ¶591.

> *or existence of Romania's exclusive economic zone within the meaning of UNCLOS and the rights and obligations that Romania would have in respect of such a zone*."[181]

132. In that case the Court limited itself to finding that

> "*Article 9 of Law no. 17/1990, as amended by Law no. 36/2002, which was in force at the time of the events - and which the courts had to substitute ex officio for the obsolete legal basis used in the indictment in order to examine the Applicant's guilt - did not determine the width of the Romanian exclusive economic zone with the necessary precision. Moreover, the determination of the 'extent' of the exclusive economic zone was expressly left by the same article to an agreement to be concluded between Romania and the States with coasts adjacent or facing the Romanian coast, including Bulgaria*"
>
> "*in view of the criminal consequences which may result in the event of violation of the sovereign rights attaching to it by any vessel.*"[182]

The Court concluded that Article 9 of Romanian Law no. 17/1990 defining Romanian maritime waters "*could not reasonably be expected to apply, in the absence of an agreement with Bulgaria*" "in view of the criminal consequences that could result from the violation of the sovereign rights attached to it by any vessel".[183] In that case, the ECtHR rightly refused to read in provisions of UNCLOS or give them direct application. Moreover, unlike the case presently before the Tribunal, the Court was not called upon to, and did not, delimit either the extent of Romanian sovereign spaces or the extent of its sovereign rights.

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181 Counter-Memorial, ¶262 quoting ECtHR, judgment, 16 September 2014, *Plechkov v. Romania*, req. no 1660/03, para. 67. See also Reply, para. 589. French original: "*La Cour estime qu'il ne lui appartient de se prononcer* […] *sur l'interprétation de la CNUDM ou des lois roumaines pertinentes […]. Elle ne saurait, dès lors, se prononcer sur l'étendue ou l'existence de la zone économique exclusive de la Roumanie au sens de la CNUDM et des droits et obligations qu'aurait la Roumanie à l'égard d'une telle zone"*.

182 **RL-0075-FR** ECtHR, judgment, 16 September 2014, *Plechkov v. Romania*, req. no 1660/03, ¶7.1. Our translation - French original: *"l'article 9 de la loi no 17/1990, telle que modifiée par la loi no 36/2002, en vigueur au moment des faits – et que les tribunaux ont dû substituer d'office, pour examiner la question de la culpabilité du requérant, à la base légale obsolète retenue par l'acte d'accusation – ne fixait pas avec la précision nécessaire la largeur de la zone économique exclusive roumaine. En outre, la détermination de 'l'étendue' de la zone économique exclusive était dévolue expressément par le même article à un accord qui devait être conclu entre la Roumanie et les États aux côtes adjacentes ou faisant face aux côtes roumaines, dont la Bulgarie*."

183 *Ibid*. Original: "*ne pouvait raisonnablement passer pour être d'application prévisible, en l'absence d'accord conclu avec la Bulgarie*" "*au vu des conséquences pénales susceptibles d'en résulter en cas de violation des droits souverains s'y attachant par un quelconque navire"*.

133. The Claimants also quote from paragraph 75 of the decision which reads as follows:

> "*The Court also notes certain contradictions between the provisions of UNCLOS and Romanian legislation, for example, with regard to the rights and obligations of the coastal State to impose penalties for breaches of its legislation, in particular as regards the possibility of imposing a prison sentence*."[184]

Again, the Court did not apply UNCLOS in any way. The Court merely noted that Romanian law provided for imprisonment in contrast to UNCLOS. In doing so, the Court only underlined the resulting unpredictability for the applicants in that case, in the light of Article 7 of the ECHR on the principle of legality of offences and penalties, but it refrained from applying UNCLOS and from confirming the incompatibility of the Romanian law with UNCLOS.

134. As Norway has also demonstrated, the Tribunal cannot apply UNCLOS, the Svalbard Treaty or the NEAFC Convention to the dispute. Thus, without establishing the alleged existence and legality of the Claimants' harvesting rights, the Tribunal cannot in any event render a decision in the case before it.

135. While jurisdiction and admissibility on the one hand, and applicable law on the other, are different concepts, the invocation by the Claimants of UNCLOS, the Svalbard Treaty and the NEAFC Convention is one among other elements showing that the very subject-matter of the dispute is not the alleged investment(s) of the Claimants or, at the very least, that the Tribunal cannot in any event render a decision in the case before it without establishing the alleged existence and legality of the Claimants' snow crab harvesting rights under UNCLOS, the Svalbard Treaty and the NEAFC Convention.

136. In view of the above, the dispute as presented by the Claimants involves considerations relating to the law of the sea requiring a determination on the extent of Norway's sovereign rights over its continental shelf. The Tribunal would have to rule on the legality or validity of Latvia's harvesting licences on the Norwegian continental shelf in the Loop Hole, as well as the possibility for the EU to authorise the harvesting of snow crabs on the Norwegian continental shelf in the maritime areas around Svalbard

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184 Reply, ¶590 quoting **RL-0075-FR** ECtHR, judgment, 16 September 2014, *Plechkov v. Romania*, req. no 1660/03, ¶75. – translation by the Claimants; French original "*La Cour relève par ailleurs certaines contradictions entre les dispositions de la CNUDM et la législation roumaine, par exemple quant aux droits et obligations de l'État côtier en matière de sanction des manquements à sa législation, notamment en ce qui concerne la possibilité d'infliger une peine d'emprisonnement*."

and the consequential breaches of UNCLOS, the Svalbard Treaty and the NEAFC Convention that might ensue. In addition to not being able to take a position on these issues, which do not concern investment law, the Tribunal cannot take a position on the legal interests and responsibility of Latvia and the EU, as they have in no way consented to have these issues decided by the Tribunal.

4.2 THE TRIBUNAL LACKS JURISDICTION TO RULE ON THE CLAIMANTS' ACCESS TO SNOW CRAB HAVING REGARD TO THE *MONETARY GOLD* PRINCIPLE

137. In their Reply, the Claimants responded to Norway's argument that the Tribunal cannot decide the dispute because of the impossibility of resolving the dispute without deciding on the legal rights and interests of Latvia and the EU and/or engaging the responsibility of Latvia and/or the EU.

138. Norway notes that the Claimants recognise the possibility for the Tribunal to apply the *Monetary Gold* principle.[185] However, the Claimants allege that the Tribunal cannot, in this case, refuse to decide the dispute on this ground. None of the arguments put forward by the Claimants are persuasive.

139. Whatever the Claimants may say, the disputes between Norway and the EU on the one hand, and Norway and Latvia on the other hand, concerning the harvesting of snow crab in the Barents Sea were obviously not artificially created in order to avoid the settlement of the dispute before the Tribunal (**4.2.1**) and if the Tribunal were to decide on the merits of the dispute, it would first have to decide on the legal rights and interests of Latvia and the EU (**4.2.2**).

4.2.1 Disputes between Norway and Latvia and the European Union are not "artificial" disputes

140. In their five-point argument,[186] the Claimants repeatedly suggest that the disputes between Norway and Latvia and the EU could have been "created"[187] to hamper the Claimants' access to investor-State dispute resolution. There is simply no evidence on the record to support such baseless aspersions.

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185 Reply, ¶¶605 *et seq.*

186 Reply, ¶¶600 *et seq.*

187 Reply, ¶601.

141. The plain facts of the chronology of the dispute submitted to the Tribunal, put in perspective with the disputes between Norway on the one hand, and Latvia and the EU on the other hand, suffices to rule out the Claimants' insinuations.

142. The Claimants allege that "it would be enough for States to create disputes with other States to deprive investors not only of the substantive investment protections afforded to them, but also of their procedural right to seise an arbitral tribunal."[188] or more broadly that

> "*A host State may create a public international law dispute by deciding to change its international policy unilaterally – as Norway did in relation to snow crab fishing in the Loophole, thus depriving the Claimants of their investment. It may also choose to remain deaf to the calls made by other States to redress those violations – as Norway also did in relation to the EU's proposal to create a mechanism to recognize the Claimants' acquired rights and to uphold the validity of Svalbard licences granted to the Claimants by Latvia. However, the existence of such disputes between States cannot deprive the investors of their substantive rights and of the procedural protection they are entitled to under the BIT*."[189]

This argument cannot be accepted by the Tribunal.

143. *First*, and simply put, the ICJ, ITLOS and the investment tribunals that have dealt with the application of the *Monetary Gold* principle have never declined to apply the principle on the basis that the dispute was artificially created (which in any event is pure speculation by the Claimants in the present dispute).

144. The Claimants' assertion that a decision by the Tribunal not to resolve the dispute pending resolution of the inter-State dispute would result in depriving "investors not only of the substantive investment protections afforded to them, but also of their procedural right to seise an arbitral tribunal"[190] is similarly thin. The Tribunal's declining to decide this dispute would not remove the Claimants' substantive rights to the protection of their alleged investments or their right to bring a case before a Tribunal under the BIT between Latvia and Norway when the inter-State disputes are solved. On the other hand, the Claimants' assertion is by no means an answer to an objection based on the *Monetary Gold* principle, whose outcome is precisely to achieve that result. In

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188 Reply, ¶601.

189 Reply, ¶603.

190 Reply, ¶601.

this respect, reference is made to the words of the PCA in the *Larsen* case when it stated that "an international tribunal may not exercise jurisdiction over a State unless that State has given its consent to the exercise of jurisdiction. That rule applies with at least as much force to the exercise of jurisdiction in international arbitral proceedings".[191]

145. *Second*, the other side of the Claimants' reasoning would be that, in the context of an inter-State dispute, nationals could knowingly claim to be investing in another State in order to have inter-State disputes between the investor's national State and the host State resolved by an arbitral tribunal on the basis of an investment treaty. Thus, it is possible to envisage that in a disputed territory between State A and State B, a national of State B establishes his/her investments in the disputed territory. He or she could then ask an arbitral tribunal, in a dispute with State A, to determine who owns the disputed area, without the States ever having agreed to a legal and contentious settlement of the delimitation dispute. This too would call into question the necessity of the consent of States to have their disputes settled by international courts and tribunals.

146. *Third*, it should be noted that the chronology precisely illustrates that the inter-State disputes the settlement of which are pre-requisites for the exercise of jurisdiction of the Tribunal in the present case were not "fashioned" with the purpose of preventing the Tribunal from deciding.

147. Norway has always considered that Articles 2 and 3 of the Svalbard Treaty only apply in the territorial waters around Svalbard and that it has exclusive rights to exploit natural resources in the water column and on the Norwegian continental shelf outside the territorial waters. Thus, for example, in a note verbale dated 6 August 1986, Norway stated in response to the note No. 2237 of 30 July 1986 from the Directorate General of Fisheries of the European Communities that "[t]*he provisions of the* [Svalbard] *Treaty apply only to land areas in Svalbard an to the territorial sea and could not, in the Norwegian view, be interpreted extensively to preclude the establishment of an exclusive economic zone for Norway around the Archipelago*."[192] Norway's position

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191 **RL-0098-ENG** PCA, 5 February 2001, *Lance Paul Larsen v. Hawaii*, Award, ¶11.23.

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

has been reiterated on numerous occasions, as illustrated by the abundant material already on the case file, including Norway's note verbale to the EU of 9 August 2011.[193]

148. Norway's position has been consistent for decades, and it has also been set out in several official publications, including in white papers to the Norwegian Parliament (Stortinget). The following excerpt is from Meld. St. 32 (2015–2016) Report to the Storting (white paper) Chapter 3.2.4:

> *"The Svalbard archipelago is defined geographically as all of the islands; great and small, and rocks between the geographical coordinates 10° and 35° E longitude and 74° and 81° N latitude. The wording makes clear that only the actual islands within these coordinates are covered; that is, the land territory, and not the surrounding waters.*
>
> *It is clear from the wording of certain provisions in the Treaty that they apply both to land territory and to territorial waters.*
>
> *At the time the Treaty entered into force, Norway had territorial sea extending to four nautical miles. Norway's territorial sea was extended in 2004 to 12 nautical miles from the baseline. After that, the Treaty provisions applicable in territorial waters also became applicable in the area between four and 12 nautical miles.*
>
> *The special rules stipulated in the Treaty do not apply on the continental shelf or in zones that were created in accordance with provisions in the United Nations Convention on Law of the Sea governing exclusive economic zones. This follows from the wording of the Treaty and is underpinned by the Treaty's prehistory and by its development and system*."[194]

149. It is obvious from the chronology that the dispute between Norway on the one hand and Latvia and the EU on the other hand has not been created in order to prevent the Tribunal from deciding the dispute submitted by the Claimants.

150. Nor can Norway's dispute with Latvia with regard to the Norwegian continental shelf in the Loop Hole be described as artificial. It must be stressed in particular that Norway clearly envisaged regulating the harvesting of snow crab on its continental shelf even

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193 See e.g. **R-0005-ENG** Note verbale 6 August 1986 from Norway to the European Communities; **R-0086-ENG** Note verbale 9 August 2011 from Norway to the EU;. **R-0089-ENG** Note verbale 8 February 2017 from Norway to Latvia; **R-0087-ENG** Note verbale 23 February 2017 from Norway to the EU; **C-0176** Note verbale 8 February 2021 from Norway to the EU; **R-0411-ENG** Note verbale 6 May 2022 from Norway to the EU.

194 **R-0407-NOR; R-0408-ENG** Meld. St. 32 (2015–2016) Report to the Norwegian Parliament (Stortinget) (white paper).

before it was aware that the Claimants intended to harvest snow crab on the Norwegian continental shelf in the Loop Hole.[195]

151. The Claimants state that as of 1 July 2014 Latvia had granted North Star licences which "*gave the company the legal right to engage in snow crab fishing in the Barents Sea*",[196] but do not provide any evidence of Norway's knowledge of the existence of these licences when they were issued – and indeed it had no such knowledge – or knowledge that the Claimants used these 'licences' – *quod non* – to harvest snow crabs on the Norwegian continental shelf.[197] It should be noted that as the Claimants had been harvesting snow crab virtually exclusively on the Russian continental shelf in the Loop Hole prior to Norway's prohibition of snow crab harvesting in the area, in view of the newly emerging commercial potential due to the increase in stocks, on 22 December 2015. Norway was not notified of these licences granted by Latvia, or that the Claimants purported to use it for the purpose of harvesting crabs on Norwegian continental shelf. Norway therefore had no reason to object.

152. In the meantime, the EU, which, unlike Latvia, is a party to the NEAFC Convention, proposed an "exploratory bottom fisheries of snow crab"[198] under the NEAFC Convention. Following a vote on exploratory snow crab harvesting by Latvian vessels on the Russian continental shelf in the Loop Hole,[199] Norway, along with a majority of States, explicitly opposed any possibility of harvesting snow crab in the Loop Hole without its prior consent.[200]

153. The EU consequently, in a letter dated 5 August 2015, informed its Member States after the vote of the need to "*rescind any current licences authorising their vessels to fish for snow crab and any other sedentary species such as king crab in the NEAFC Regulatory Area and* […] *not* [to] *issue any new licences to this effect and, as appropriate, re-call*

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195 See e.g. **R-0015-NOR; R-0016-ENG** Norwegian report in email 28 January 2015 from Terje Løbach. See also Counter-Memorial, ¶57.

196 Reply, ¶488(e).

197 Memorial, ¶281.

198 Memorial, ¶58.

199 Counter-Memorial, ¶60.

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

the vessels concerned." [201] If the Claimants are right about what those licences purported to authorise, Latvia clearly did not comply.

154. When on 22 September 2016 Latvia attempted to enter into consultations with Norway concerning "*the possibilities/procedures of snow crab harvesting in the Svalbard maritime area and NEAFC Regulatory Area*",[202] Norway recalled to Latvia that the harvesting of snow crab on the Norwegian continental shelf was subject to its prior consent and that for this purpose the NEAFC Convention was irrelevant.[203] Norway also took the obvious position that any negotiations relating to snow crab would need to be conducted between Norway and the EU given the EU's fisheries competence. As Norway stated in a note verbale dated 8 February 2017 to Latvia:

> "[i]*f Latvia wishes to make it possible for vessels flying its flag to take part in harvesting snow crab on the Norwegian continental shelf, this must be based on Norwegian consent in form of a bilateral agreement as part of the regular system of exchange of quotas between the EU and Norway. Norway remains open for discussions with the EU on the question of an exchange of quotas so that vessels from EU member states can take part in legal and regulated harvesting of snow crab* […]".[204]

155. Without going further into the factual aspects, explained earlier in Norway's Counter-Memorial[205] and in this Rejoinder,[206] the Claimants cannot decently suggest that the disputes between Norway and Latvia and the EU could have been artificially "created" in order to prevent a decision on the dispute presently before it.

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

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

203 **R-0083-ENG** Email 30 September 2016 from the Norwegian Ministry of Foreign Affairs to the Ambassador of Latvia in Oslo. See Counter-Memorial, ¶236.

204 **R-0089-**ENG. See also the EU's UNCLOS declaration "*The Community points out that its Member States have transferred competence to it with regard to the conservation and management of sea fishing resources. Hence, in the field of sea fishing it is for the Community to adopt the relevant rules and regulations (which are enforced by the Member States) and to enter into external undertakings with third states or competent international organisations*." (**C-0185**).

205 Counter-Memorial, ¶¶228-245.

206 See above, **Chapter 4**: 99and also Counter-Memorial, **Chapter 4**.

4.2.2 The Tribunal cannot rule on the dispute without first deciding on the juridical interests and international responsibility of Latvia and the European Union

156. In its Counter-Memorial, Norway explained at length the need for the Tribunal to apply the *Monetary Gold* principle. Norway noted that:

> "*285. The Claimants' case relies heavily on rights supposedly granted to North Star by licences issued by Latvia as a Member State of the EU. The existence of such a right depends upon the competence of Latvia to issue such licences. It also follows that, in the case of the licences purportedly granted by Latvia in respect of the Loop Hole, the Tribunal cannot determine those claims without determining whether the EU (as the NEAFC Convention party) has been placed in breach by Latvia's actions. The Claimants rely on the fact that the EU is a party to the NEAFC Convention to argue that the licences granted by Latvia are valid. But the EU itself objects to European vessels harvesting snow crab in the Loop Hole. With regard to Svalbard, the EU considers that Norway cannot object to harvesting in the Svalbard area beyond 12 nautical miles. It was on those bases—the NEAFC Convention (through the EU) and the Svalbard Treaty—that Latvia issued licences to North Star. And those licences form the basis of the Claimants' claim to an entitlement to harvest snow crab on the Norwegian continental shelf. Thus in order to determine the dispute as submitted by the Claimants, the Tribunal will be required to decide on the legal rights and obligations of two absent indispensable Parties, Latvia and the EU, which it cannot do by virtue of the Monetary Gold principle*."

157. The Claimants return to these aspects very briefly in their Reply. They state that

> "*the Tribunal is not required to make determinations as to the legal rights of Latvia and or EU; nor is it called to decide on Norway's obligations towards Latvia and EU; or to determine whether there is a dispute between Latvia and EU (as Norway wrongly asserts). The Tribunal is requested to rule upon Norway's violations of the rights of the Claimants protected under the BIT*."[207]

And that "*the source of the Claimants' rights, opposable to Norway, resides in the substantive standards for the protection of their investment, as enshrined in the BIT*".[208]

158. Norway does not dispute that "investors" with "investments" are entitled to protection under the BIT. However, in order to establish whether that protection applies in any given case, the Tribunal must (*inter alia*) establish that the rights said to constitute the investment actually exist. In the case of the licences, that (again, *inter alia*) requires a determination of whether or not they *actually* granted the Claimants any rights capable

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207 Reply, ¶604 (emphasis added, footnote omitted).

208 Reply, ¶606.

of protection as "investments" under the BIT. The Claimants are being disingenuous when they say that:

> "*Tribunal might need to address, in an ancillary manner, the interpretation of other international law instruments such as UNCLOS, the Svalbard Treaty or the NEAFC Convention, so as to determine the existence and scope of the fishing rights forming part of the investment protected under the BIT*."[209]

159. The Claimants necessarily assume in their submissions that the Tribunal will *have to* rule on the existence of their alleged harvesting rights when they assert that "Norway then prevented [the Claimants] from exercising *their lawful fishing rights offshore of Svalbard*." and "*the Claimants' fishing activities in the Loophole were a fact, that they were not only legal, but legitimate*".[210] This would require in particular that in relation to Svalbard, the Tribunal should decide, among other issues, on the meaning of the EU regulations relied upon by the Claimants concerning "*fishing opportunities for snow crab around the area of Svalbard*".[211] Opposing the EU's thesis, Norway has publicly and consistently held that the scope of Articles 2 and 3 of the Svalbard Treaty is limited to the territorial waters of Svalbard and does not extend beyond it.[212]

160. It also important to recall that Latvia has taken legal action against the European Commission[213] in an attempt to compel the EU (which has exclusive competence regarding the conservation of marine biological resources) to "*require the Commission to adopt measures relating to the defence of the fishing rights and European Union interests in the Svalbard fishing area (Norway) and, second, to order the Commission to adopt a position in that regard which is not the source of legal effects unfavourable to the Republic of Latvia*." Latvia's legal action was declared inadmissible.[214]

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209 Reply, ¶¶566.

210 Reply, ¶¶623, 745 (emphasis added).

211 **RL-0014-ENG** EU Regulation 2017/127, ¶35. See also **RL-0163-ENG** EU Regulations 2018/120, ¶37, **RL-0164-ENG** 2019/124, ¶42 **RL-0165-ENG** 2020/123, ¶49, **RL-0221-ENG** 2021/92, ¶45, and **RL-0222-ENG** 2022/110, ¶43.

212 **R-0147-NOR; R-0148-ENG** Meld. St. 32 (2015–2016) Report to the Storting (white paper) regarding Svalbard.

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

214 *Ibid*.

161. The Claimants also emphasise the centrality of this issue to their overall investments when they state that "[Norway's actions] *have prevented the Claimants from exercising their* legal fishing rights *in the Loophole and waters off Svalbard, in effect destroying their snow crab business in the territory of Norway and causing them to sustain substantial economic losses*."[215] But in order to decide on the validity (or what the Claimants call the 'legality' or 'lawfulness') of said rights, the Tribunal would, unavoidably, have first to determine whether Latvia could grant the said licences.[216] This involves a dispute between Norway and Latvia concerning fishing rights in the NEAFC area. It also involves a dispute regarding the scope of the legal authority of the EU and its Member States in this context, given that the EU has made a declaration under UNCLOS stipulating that "*its Member States have transferred competence to it with regard to the conservation and management of sea fishing resources. Hence, in the field of sea fishing it is for the Community to adopt the relevant rules and regulations (which are enforced by the Member States) and to enter into external undertakings with third states or competent international organisations*."[217] It also involves an international dispute as to whether third States have any right in the 200-nautical miles zone or on continental shelf in the maritime areas around Svalbard (disputes between Norway on the one hand, the EU and Latvia on the other hand).[218]

162. In this regard, the Claimants argue that "even if the Tribunal might have to consider the competence of Latvia to issue the fishing licences, that determination would not fall under the Monetary Gold exception".[219] However, the legality of the Claimants' licences and the existence of their alleged rights is conditioned by the legality of the conduct of Latvia and/or the EU: if the Claimants have harvesting rights in the maritime areas around Svalbard, they exist only to the extent that they *derive from* Latvian licences delivered on the basis of Latvia's participation in the Svalbard Treaty. And if the Claimants have snow crab harvesting rights in the Loop Hole, they could exist only

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215 Reply, ¶640.

216 Or, as Norway put it in its Counter-Memorial, ¶677: "*nemo dat quod non habet*".

217 **C-0185.**

218 **RL-0085-ENG**.

219 Reply, ¶606.

to the extent that they *derive from* the European Union rights under the NEAFC Convention (or from a non-existent agreement between the EU and Norway).

163. Norway has repeatedly warned the EU and Latvia that they have no right under the NEAFC Convention or the Svalbard Treaty to grant licences or permit snow crab harvesting on Norway continental shelf. A decision by the Tribunal that the EU and Latvia are unable to issue snow crab harvesting licences or permit such harvesting would engage their international responsibility for failure to comply with their obligations under treaties in force including UNCLOS.[220]

164. The Claimants point to the *Chevron* decision in which the Tribunal stated that the possible infringement of the *Monetary Gold* principle, in light of the implications of its decision for the "legal rights" of other private persons not party to the proceedings,

> "*is something that depends upon the form and content of the decision of this Tribunal: it is not an inevitable consequence of the Tribunal exercising its jurisdiction. The question of form and content of the decision is a matter to be addressed during the merits phase of this case.*"

165. By contrast, in the case before the Tribunal, a decision on the responsibility of Latvia and the EU is inevitable in order to resolve the dispute. This is because the Tribunal cannot resolve the dispute without deciding on the lawfulness of acts attributable to third parties – an obstacle to its jurisdiction under the basic principles of consent to jurisdiction in international law. Unlike the situation in other cases where courts have been able to resolve the dispute before them without violating this peremptory rule, in the present case there is no alternative but for the Tribunal to rule on the legal rights and responsibilities of Latvia and the EU before being able to decide the Claimants' claims. The Tribunal should therefore decline to hear this case.

220 Counter-Memorial, ¶¶231-245 and 340.

PART II: THE ALLEGED INVESTMENTS

CHAPTER 5: THE ALLEGED 'JOINT VENTURE'

5.1 INTRODUCTION

166. A key focus for the Claimants, both in their Memorial and their Reply has been on an alleged oral contract between Mr Pildegovics and Mr Levanidov, the so-called 'joint venture'.

167. On the one hand, the Claimants argue that Mr Pildegovics' rights *vis-à-vis* Mr Levanidov for the performance of the alleged 'joint venture' are an investment because they are 'claims to performance' that Mr Pildegovics has *vis-à-vis* Mr Levanidov, thus falling within the BIT.[221]

168. On the other hand, the Claimants appear to treat the alleged 'joint venture' as something more. In a slightly cryptic paragraph, the Claimants write:

> "*There can be no doubt that the joint venture was affected by the measures taken by Norway, even if the Claimants have not calculated losses of cash flows suffered by the joint venture itself. The impact on the joint venture is shown by the undisputed fact that Seagourmet's business collapsed almost immediately after Norway started enforcing its ban against North Star. Since Seagourmet is neither a Latvian investor nor a party to this arbitration, the Claimants are not seeking damages for Seagourmet's losses*".[222]

169. The Claimants allege that losses were "*suffered by the joint venture*". That short phrase deserves some attention. The alleged 'joint venture' is not itself an alleged investment; the Claimants themselves do not say that it is. It is Mr Pildegovics' rights in the alleged joint venture – if it exists and if those rights are proven – *vis-à-vis* Mr Levanidov which are said to form the relevant investment. Nor, importantly, is the "joint venture" posited as an investor (despite the Claimants saying that it has "*suffered*" losses). The 'joint venture' cannot be an investor, because it has no legal personality;[223] a fact that the parties are agreed on.[224]

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221 Memorial, ¶¶239 and 493; Reply, ¶484.

222 Reply, ¶487.

223 **CL-0001** Norway-Latvia BIT, Article I(3)(b).

224 See for example, Reply, ¶487.

170. Further to seeking to prove the existence of an alleged 'joint venture', the Claimants also take a point on the so-called "unity" of their investments, relying on the alleged 'joint venture' to demonstrate that the dispute arises directly out of one investment. The 'unity' question is dealt with in the next chapter. Norway rejects the Claimants' analysis, and does not accept their categorisation of Norway's jurisdictional objections in relation to the Claimants' investments made at paragraph 470 of the Reply. In seeking to limit Norway's jurisdictional objections in the way that they have done, the Claimants have failed to respond to several jurisdictional arguments made by Norway, which are addressed in **Chapter 6**.

171. Norway will demonstrate that the Claimants have not proven the existence of the alleged 'joint venture' (**5.2**), that the alleged 'joint venture' cannot be considered as an investment under the BIT (**5.3**), and that Mr Levanidov (and/or his associates and companies) alone is at the origin of the investments alleged by the Claimants (**5.4**).

5.2 THE CLAIMANTS HAVE NOT PROVEN THE EXISTENCE OF THE ALLEGED 'JOINT VENTURE'

172. The Claimants undoubtedly bear the burden of proving that alleged 'joint venture' exists. Norway submitted in its Counter-Memorial that the Claimants had failed to discharge that burden. The first question to be determined by the Tribunal, based on the evidence presented to it, is whether Mr Pildegovics and Mr Levanidov did in fact create a joint venture agreement and, if so, whether the terms of such an agreement have been sufficiently particularised and proven so as to be able to create legally binding rights and obligations on the respective parties.

173. In order to determine these questions, the Tribunal cannot simply accept the assertions of Mr Pildegovics and Mr Levanidov as established facts. While the Tribunal is bound by the factual evidence adduced by the Parties and cannot add its own evidence without putting it to the Parties for comment, in assessing the evidence it is free to – and indeed must – take into consideration all relevant facts submitted by the Parties, with particular emphasis on contemporaneous and objective evidence.[225] This is of particular

[225] **RL-0228-NOR; RL-0229-ENG** Judgment of 12 November 2015 of the Norwegian Supreme Court, in case HR-2015-2268-A, ¶¶44-52, **RL-0230-NOR; RL0231-ENG** Judgment of 9 October 2008 of the Norwegian Supreme Court, in case HR-2008-1748-A.

importance where the outcome of the assessment could have significant consequences for a third party (in this case Norway).

5.2.1 There is a presumption against the formation of the alleged 'joint venture' by oral agreement as a matter of Norwegian law

174. Norway has shown in its Counter-Memorial that the alleged 'joint venture' would likely have been governed by Latvian law.[226] That point is maintained. For their part, the Claimants' case is that the alleged 'joint venture' is governed by Norwegian law. What follows assumes *arguendo* that the Claimant's proposition is correct – *quod non*.

175. According to the Claimants, they entered into a 'joint venture' by way of an oral agreement – a "handshake" – in Riga, supposedly in 2009, 2013 or in January 2014.[227] Although Norway does not dispute that there are no absolute requirements as to contractual form under Norwegian contract law, Norwegian courts have displayed considerable caution when faced with claims that complex or high value contracts have been concluded orally.

176. A leading authority on Norwegian contract law, professor Geir Woxholth, summarises the case law on contract formation as follows: "*In short, it could be said that the more important and far-reaching the alleged agreement is, the more the courts seem to require in terms of formalities.*"[228] Another leading authority, professor Jo Hov states: "*the fact that there is no written contract document, can be quite compelling evidence that no agreement has been reached*".[229] More specifically, the Norwegian Supreme Court has considered that there is a high evidentiary threshold for finding that a limited

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226 Counter-Memorial, Section 5.2.1.5.2.

227 See RFA, ¶27, Witness Statement of Kirill Levanidov, 11 March 2021, ¶¶37-38, Pildegovics, ¶13, Reply, ¶332, Counter-Memorial, ¶418.

228 **RL-0015-NOR; RL-0016-NOR** Geir Woxholth, *Avtalerett*, 11th ed (Oslo, Norway: Gyldendal, 2021) at p. 115 , see. also **RL-0196-NOR; RL-0197-ENG** Judgment of 5 November 1990 of the Norwegian Supreme Court, published in Rt. 1990 p. 1060, page 1066.

229 **RL-0198-NOR; RL-0199-ENG** Jo Hov, *Avtaleslutning og ugyldighet: Kontraktsrett* I, 3rd ed (Bergen, Norway: Papinian, 2002), p. 109.

partnership – one way to organise a joint venture – is established by oral agreement or acts of *quasi ex contractu*.[230]

177. In his Addendum, Mr Ryssdal seeks to counter Norway's point[231] that "*the simple (contractual) form is a factor which indicates that the parties have not intended to commit themselves in an extensive way*."[232] He does this by attempting to distinguish the present case – where the two alleged contracting parties agree and a third party is disputing the terms, and other cases where the dispute arises between the contracting parties.

178. In fact, it is irrelevant that the existence (and terms) of the purported 'joint venture' agreement is being disputed by a third party (Norway). The contract either exists as the Claimants have alleged or it does not. The fact that Norway is now disputing the terms and existence of the contract logically cannot have any impact on what the contract was or was not when it was allegedly agreed. It is notable that Dr Ryssdal in his Addendum limits himself to making this distinction, but does not attempt to explain why the distinction should limit the Tribunal's ability to examine and test the Claimants' assertions relating to the existence of the alleged 'joint venture' (and, if relevant, its terms).

179. The Tribunal also cannot base a determination of the existence of such agreement solely on after-the-fact statements setting out the alleged intentions of the parties. In such cases it is necessary to conduct a more objective examination of all relevant facts. This has also been noted by the Norwegian Supreme Court.[233] Dr Ryssdal's attempted distinction is therefore missing the point.

180. The decisions of the Norwegian Supreme Court referred to in Dr Ryssdal's report, give illustrations of what constitutes sufficient and necessary evidence to establish the

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230 **RL-0200-NOR; RL-0201-ENG** Judgment of 19 September 1981 of the Norwegian Supreme Court, published in Rt. 1981 p. 1047, page 1056 ("[…] *there are quite strict evidentiary requirements for proving that this is the case*.").

231 Counter-Memorial, ¶450.

232 **RL-0015-NOR** Geir Woxholth, Avtalerett, 11th ed. (Oslo, Norway: Gyldendal, 2021) at pp. 500–501 (emphasis added). **RL-0016-ENG** English translation of the relevant paragraph.

233 **RL-0202-NOR; RL-0203-ENG** Judgment of 30 April 1981 of the Norwegian Supreme Court, published in Rt. 1981 p. 595, page 598.

existence of an agreement. For example, in its decision of 16 October 1987, when considering the existence of an oral agreement concerning the sale of a hotel the Norwegian Supreme Court relied on the existence of a written proposal made by one individual to another to conclude that an oral agreement had been made:

> *"The decisive factor is whether the broker's letter of 25 August 1982 must be regarded as a legally binding counter-offer on the part of Mrs A. There is no doubt that in that case a final agreement has been made by the offer being accepted in time.*
>
> *I find that the actual negotiation situation suggests that the letter must be regarded as a binding counter-offer. Stenberg had submitted an offer with an acceptance deadline, which clearly showed that he had left the pure negotiation stage and aimed to reach a binding agreement. If Mrs. A had readily accepted the offer, at least very strong grounds would have to be required to assume that a binding agreement had not been entered into."*[234]

181. As set out by Dr Ryssdal himself in his book "*Joint Venture – en konkurranserettslig analyse*", "*most juridical literature describes two typical features of a joint venture; firstly, the operation of the joint venture is at the joint cost and risk for the owners (at least for a certain period) and secondly, the relationship between the owners is regulated for the lifespan of the joint venture*".[235] No proof has been presented by the Claimants to substantiate that these issues have been agreed between Mr Levanidov and Mr Pildegovics.

182. In the present case, the question before the Tribunal is whether the evidence submitted by the Claimants is sufficient to conclude that there was a joint venture agreement between Mr Levanidov and Mr Pildegovics. And the answer to the question clearly is in the negative. In examining this evidence, it should be considered, in particular, that it is highly unusual, to say the least, that a joint venture agreement would be concluded by an oral agreement when this joint venture is supposed to cover assets of high economic value. The Claimants have not substantiated the existence of the alleged 'joint venture'

183. The Norwegian Supreme Court has in multiple cases confirmed that contemporaneous evidence is of far greater weight than statements from parties and witnesses after the

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234 **K-0011**.

235 **RL-0249-NOR; RL-0250-ENG** Anders Ryssdal, *Joint Venture – en konkurranserettslig analyse* ("Joint Venture – a competition law analysis"), Oslo, Norway: Universitetsforlaget, 2003) at p. 21.

event which "*to a considerable extent will be affected by the dispute and the interests of those involved in the outcome of the case*."[236] The point is of course also one of eminent common sense.

184. Bearing the above points on Norwegian law in mind, and notwithstanding Claimants' latest efforts in this regard, no clear contemporaneous evidence in support of the existence of the alleged 'joint venture' has been provided (and the evidence that has been provided has suggested—by way of example—three totally different dates for the actual agreement between the cousins).[237] As outlined below, not only does the contemporaneous evidence fail to corroborate the existence of a joint venture agreement, but it also lends support to Norway's position that the snow crab venture was in fact Mr Levanidov's project.

185. The alleged 'joint venture' is said to have been an oral contract concluded by way of a "handshake".[238] Dr Ryssdal has produced a report in which he addresses the issue of the recognition of an oral agreement under Norwegian law. He responds by stating that:

> "*A second fundamental principle of Norwegian contract law is the freedom of contractual form. There are no specific requirements to the form of a contract for it to be legally binding inter partes. This principle is an undisputed cornerstone of Norwegian contract law. It has been confirmed by the Norwegian Supreme Court on several occasions. Thus, an oral agreement is equally binding as a written contract*."[239]

186. He also refers to various decisions of the Norwegian Supreme Court which recognise similar effects for written and oral agreements. In these decisions, as in the present case, one of the issues at stake was precisely that of proving the existence of this oral agreement. Norway accepts that oral agreements can indeed be concluded and that such an agreement could be legally binding. But this possibility does not establish the actual

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236 See *inter alia* **RL-0204-NOR; RL-0205-ENG** Judgment of 12 May 1995 of the Norwegian Supreme Court, in case HR-1995-75-B, Rt. 1995 p. 821, on page 828, **RL-0206-NOR; RL-0207-ENG** Judgment of 28 October 1998 of the Norwegian Supreme Court, in case HR-1998-69-B, page 1570, **RL-0208-NOR; RL-0209-ENG** Judgment 27 January 1999 of the Norwegian Supreme Court, published in Rt. 1999 p. 74, **RL-0210-NOR; RL-0211-ENG** Judgment 17 June 2009 of the Norwegian Supreme Court, published in Rt. 2009 p. 813 and **RL-0212-NOR; RL-0213-ENG** Judgment 22 December 2009 of the Norwegian Supreme Court, published in Rt. 2009 p. 1632.

237 Counter-Memorial, ¶418.

238 See for example Memorial, ¶204.

239 Expert Report of Dr Anders Ryssdal ("Ryssdal"), ¶9. Footnotes omitted.

existence of the alleged joint venture agreement between Mr Pildegovics and Mr Levanidov. The dispute between the parties is not whether this is possible but whether it in fact happened in this case.

187. Since the doubts expressed by Norway regarding the existence of a 'joint venture' the Claimants have had the opportunity to submit documents in response to the requests made by Norway. However, the Claimants did not provide any documentation whatsoever in response to the Norwegian requests relating to the issue of the existence of a joint venture (5.2.1.1). Taking the date of 29 January 2014 – the most recent date provided by the Claimants regarding the existence of a 'joint venture' – the conduct of Mr Levanidov and Mr Pildegovics prior to this date (5.2.1.2) as well as afterwards (5.2.1.3) supports Norway's position that no 'joint venture' agreement was ever concluded.

5.2.1.1 Response to document requests

188. In its Counter-Memorial[240] Norway noted the serious lack of evidence supporting the existence of the alleged 'joint venture', illustrated in particular by the lack of evidence submitted to the Tribunal by Mr Pildegovics and Mr Levanidov concerning the creation, the terms and the operation of their alleged joint venture.[241] The fact that the cousins exchanged a few emails shortly after the alleged establishment of their joint venture, and that they met "*at least forty-nine (49) times*",[242] without having produced any minutes of the meetings and without any convincing evidence of the existence of a contract and of the issues discussed during these meetings – including the meeting in which they allegedly orally concluded a joint venture agreement of high economic expectations – is remarkable.

189. That practically no contemporaneous documentation has been provided to support the existence and terms of the alleged 'joint venture' is undeniable. Of particular interest are the Claimants' responses (or lack thereof) to Norway's document requests.[243]

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240 Counter-Memorial, ¶¶365, 369 and 414-431.

241 Counter-Memorial, ¶¶369 and 375.

242 Counter-Memorial, ¶376 and Pildegovics, ¶126.

243 The documents that the Claimants did produce are at **R-0200** to **R-0406**. Translations from Russian and Latvian are provided by Norway.

190. The table below summarises the relevant document requests left unanswered by the Claimants:

Request No.	Document(s) or Category of Documents Requested	Objection by Claimants to the request for documents	Response
Request No. 9	All correspondence between Mr Pildegovics and Mr Levanidov and other documents relating to the alleged joint venture, their respective roles, the envisaged geographical and temporal extent of harvesting snow crab and/or any other marine species, and the manner in which any failure or indebtedness of any component of the alleged joint venture would be handled.	**No objection**	No responsive documents
Request No. 11	All documents that set out or refer to the agenda for and what transpired at (a) the meeting in Riga on 29 January 2014 and (b) any other meetings between Mr Pildegovics and Mr Levanidov (in person, or via telephone or other remote link) at which the terms of the alleged joint venture between them and any related investments in fishing or crab harvesting activity in the Barents Sea made, or envisaged as possibly being made, by Mr Pildegovics and/or Mr Levanidov, whether acting individually or jointly.	**No objection**	No responsive documents

191. Norway's requests were broadly drafted, intended to capture all documents relating to the alleged 'joint venture', and the Claimants did not object to these requests. However, no document was produced in response to these requests. Nor was any privilege log

produced explaining that documents existed but could not be disclosed for one reason or another.

192. It is disconcerting that there are no responsive documents which would go to proving the existence of what Pildegovics himself alleges was the "*essential precondition*" for all his other investments.[244] The Claimants were content in their Reply to recall the 'proof' provided in their Memorial,[245] which in no way demonstrates the existence of an alleged joint venture.[246] If there was such a contract (sealed by a handshake), as opposed to an *ex post facto* description of the way in which the two men allege that they worked together, it is difficult to reconcile it with the fact that the self-proclaimed partners appear never to have recorded the definition of their respective roles in the organisation of their alleged joint venture, or, for example, that they apparently never discussed how any failure or indebtedness of any component of the alleged joint venture would be handled. It is also difficult to suppose that since 2010, the Claimants only exchanged very few emails concerning the organisation of their alleged joint venture or the conduct of their allegedly joint activity, or that after their alleged joint venture contract was supposedly sealed no contemporaneous documents actually referred to that contract or to anything more than a vague sense of the two men (or their underlying companies) being in business together.

193. The Tribunal must evaluate the evidence in order to determine whether such a contract ever existed. In order to decide on the existence of a legally-binding oral agreement (as the Claimants' reliance on 'claims to […] performance' as an 'investment' requires), "[t]*he case should be decided after a concrete evaluation of the evidence.*"[247] As outlined by the Borgarting Court of Appeal:

> *"The Court of Appeal assumes that, according to case law, strict requirements are set for when an oral agreement can be considered to exist. Anyone who claims that there is an oral agreement has the burden of proof for this. The larger the amount and the more atypical a possible agreement appears based on the facts of the case or the normal situation in the industry in question, the*

244 Pildegovics, ¶43.

245 Reply, ¶¶370. *et seq.*

246 Counter-Memorial, ¶¶362 *et seq.*

247 **RL-0214-NOR; RL-0215-ENG** Judgment of 20 October 2008 of Borgarting Court of Appeal, in case LB-2007-192106. Norwegian original: "*Saken må avgjøres etter en konkret bevisvurdering*".

stronger evidence is required. In the case of extensive transactions, the presumption would be that there is no oral agreement. Lack of an exact date for entering into an agreement is also a factor that speaks against the existence of an agreement."[248]

194. In the present case these "strict requirements",[249] which must be established by the Claimants, are far from fulfilled.

195. Mr Levanidov, or the companies to which he is linked (including [redacted]), has contributed around [redacted], which, allegedly represent his part in the joint venture, against approximatively [redacted] by Mr Pildegovics.[250]

196. As above, "the larger the amount (…), the stronger evidence is required".[251] In the present case, Mr Levanidov's share in the so-called 'joint venture' is indeed large enough to require strong evidence.

197. In view of the extensive transactions carried out by Mr Levanidov, the presumption must be that there was no oral agreement; and Claimants bear the burden of demonstrating otherwise. According to well-settled Norwegian contract law,[252] the parties' conduct – before, during and after the alleged contract formation – is a relevant factor when determining whether or not a contract has been concluded.

198. Yet there is nothing in the material provided by the Claimants, either from the period prior to the conclusion of the alleged joint venture, or from the period after the alleged

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248 **RL-0251-NOR; RL-0252-ENG** Judgment 20 January 2014 of Borgarting Court of Appeal, in case LB-2011-175564. Norwegian original: "*Lagmannsretten legger til grunn at det etter rettspraksis stilles strenge krav til når muntlig avtale kan anses å foreligge. Den som påstår at det foreligger en muntlig avtale, har bevisbyrden for dette. Jo større beløp og jo mer atypisk en eventuell avtale fremstår ut fra sakens faktum eller normalsituasjonen i den aktuelle bransjen, jo sterkere bevis kreves det. Ved omfattende transaksjoner har det formodningen mot seg at det foreligger muntlig avtale. Manglende tidfesting av inngåelse av avtale er også et moment som taler mot at det foreligger en avtale.*"

249 **RL-0251-NOR; RL-0252-ENG** Judgment 20 January 2014 of Borgarting Court of Appeal, in case LB-2011-175564.

250 **R-0200-LV; R-0201-ENG** List of North Star's creditors as of 22 October 2021, produced by the Claimants in response to Norway's requests.

251 **RL-0251-NOR; RL-0252-ENG** Judgment 20 January 2014 of Borgarting Court of Appeal, in case LB-2011-175564.

252 **RL-0202-NOR; RL-0203-ENG** Judgment of 30 April 1981 of the Norwegian Supreme Court, published in Rt. 1981 p. 595, page 598.

date advanced by the Claimants to suggest that the Claimants had planned to enter into a joint venture on 29 January 2014 or at any other time.

199. Determining when the "before, during, and after" periods are in this case is not easy, because the Claimants have been inconsistent in the information they have provided regarding the conclusion of this alleged joint venture. They have variously claimed to have entered into a joint venture agreement in 2009, 2013, and in January 2014.

- As Norway recalled in its Counter-Memorial without being contradicted by the Claimants:

  > "*In a handout received by Norway in a meeting of 4 July 2019 in Paris, attended by Mr Pildegovics, Mr Levanidov and others, it is said that the 'joint venture' was established in 2009 (p. 8). In the same document it is asserted that Mr Levanidov and Mr Pildegovics started discussions 'to establish a joint project regarding snow crabs in Norway' in 2009/2010 (p. 4). There is no mention of the alleged oral agreement or any handshake under the presentation of 'Significant events over the course of 2010 - 2016' in the document whether in 2013, 2014 or at any time.*"[253]

- In their Request for Arbitration, the Claimants say that: "In 2013, Mr Pildegovics concluded a joint venture agreement with Mr Kirill Levanidov, a national of the United States (Mr Levanidov) following several years of discussion. Mr Pildegovics and Mr Levanidov are cousins."[254];

- In their Reply, the Claimants allege: "Mr Pildegovics officially joined the project in January 2014, when he concluded a joint venture agreement with Mr Levanidov."[255].

- Such contradictory statements raise strong doubts about the true existence of the joint venture. If the two experienced businessmen had actually entered into a contract, one would assume that they were able to recall when;

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253 Counter-Memorial, ¶418. On the contrary, the document mentions the conclusion of a "*strategic alliance/joint venture*" in 2009 without further supporting details.

254 RFA, ¶27 (footnote omitted): "*17. Passport of Mr Kirill Levanidov, 29 November 2012, C-51*".

255 Reply, ¶332.

- As the Norwegian Court of Appeal has noted, the "[l]*ack of an exact date for entering into an agreement is also a factor that speaks against the existence of an agreement.*"[256]

- In any case, it is necessary to take into account these contradictions in considering the Claimants' allegations.[257]

5.2.1.2 The contemporaneous material pre-dating the alleged joint venture is insufficient to demonstrate the existence of an oral agreement founding a joint venture in January 2014

200. The sparse and inconsistent evidence provided by the Claimants does not establish the existence of an oral agreement constituting a joint venture between Mr Levanidov and Mr Pildegovics.

201. In its Counter-Memorial, Norway commented on the evidence provided by the Claimants, and showed that it was clearly insufficient. In their Reply, the Claimants attempt to construct a credible narrative to support their theory of a joint venture between Mr Levanidov and Mr Pildegovics, without more success.

202. The Claimants refer to the period prior to the alleged conclusion of their joint venture. In particular, they claim that "[t]*he vision for an integrated snow crab business was set out in an email sent by Mr Levanidov to Mr Pildegovics in May 2010*"[258]. However, as Norway has already noted,[259] in this email Mr Levanidov only informs Mr Pildegovics of "*his*" project, which both gentlemen acknowledge in the testimony they provided to the Tribunal.[260]

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256 **RL-0251-NOR; RL-0252-ENG** Judgment 20 January 2014 of Borgarting Court of Appeal, in case LB-2011-175564. Norwegian original: *"Lagmannsretten legger til grunn at det etter rettspraksis stilles strenge krav til når muntlig avtale kan anses å foreligge. Den som påstår at det foreligger en muntlig avtale, har bevisbyrden for dette. Jo større beløp og jo mer atypisk en eventuell avtale fremstår ut fra sakens faktum eller normalsituasjonen i den aktuelle bransjen, jo sterkere bevis kreves det. Ved omfattende transaksjoner har det formodningen mot seg at det foreligger muntlig avtale. Manglende tidfesting av inngåelse av avtale er også et moment som taler mot at det foreligger en avtale."*

257 See for example **CL-0165** *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Award, 13 March 2009, ¶440.

258 Reply, ¶371 quoting from **PP-0009**.

259 Counter-Memorial, ¶352.

260 Levanidov, ¶17; Pildegovics, ¶18. See also **PP-0008**.

203. The Claimants further state that the exchanges between the Mr Pildegovics and Mr Levanidov from June 2013 to February 2014 illustrate the willingness of the two men to work together. In particular, they argue that "Mr Levanidov assisted Mr Pildegovics in building a fleet of fishing vessels that could achieve this goal, as shown by contemporaneous exchanges between the two men between June 2013 and February 2014."[261]

204. However, as Norway has demonstrated in its Counter-Memorial, none of the exchanges that took place between the Claimants on these dates shows that they worked together in the framework of a joint venture. There are many ways of "working together" and the mails produced by the Claimants appear to indicate that Mr Pildegovics worked for and under the direction of Mr Levanidov. Various examples of this agent-principal relationship were provided in Norway's Counter-Memorial.[262]

205. Furthermore, there is no mention of the conclusion of any kind of contract (or any meeting to conclude any contract), let alone a joint venture between the "partners", either in the exchanges purporting to have proven such an agreement or in subsequent exchanges.

206. From January 2014 until January 2015, Mr Pildegovics and Mr Levanidov reportedly met only five times: to proceed with the purchase of the vessel *Senator*, to meet with Latvian officials, and to participate in the NEAFC annual conference.[263] The Claimants' assert that the supposed partners spoke about their joint venture "almost daily" from January 2014 onwards. But the evidence demonstrates that the term "joint venture" remains strangely absent in the few exchanges on the record.

207. The second witness statements of Mr Pildegovics and Mr Levanidov go to great lengths to claim that North Star's financing was obtained on purely commercial terms, in accordance with the industry practice.[264] Regardless of whether advance payments for

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261 Reply, ¶373.

262 Mr Levanidov and Mr Pildegovics can be considered as "*two independent businesses acting in collaboration with one another*" (Counter-Memorial, ¶429). See more generally Counter-Memorial, ¶¶428 *et seq*. See also **PP-0008** to **PP-0021**.

263 Pildegovics, ¶126.

264 Pildegovics 2, ¶¶16 *et seq*.; Levanidov 2, 28 February 2022, ¶¶5 *et seq*.

products are a common financing model or not, the financing scheme described by Mr Levanidov in paragraph 20 of his second witness statement and which is also apparent from the documents produced by the Claimants in response to Norway's disclosure requests,[265] makes the "lenders" more akin to equity investors than partners in a joint venture. The loans are made without any fixed payment schedules and are often interest-free. The loans are then allegedly repaid by way of reduced payments for catch purchased by the "lenders".

208. The Claimants also argue that they did not find it necessary to enter into a written joint venture agreement because "*both men are business executives: neither is a lawyer*".[266]

209. But the importance of having in place adequate documentation and a written agreement prior to embarking on a joint venture of such alleged scale and international scope is hardly a point that requires a lawyer. It is one of good business common sense. As was noted in Norway's Counter Memorial,[267] Mr Pildegovics' omission to have any record of the joint venture is all the more surprising that he describes himself as an experienced business executive;[268] and the same holds true concerning Mr Levanidov, who has founded and managed multiple companies.[269]

210. Contemporaneous evidence also suggests that both Mr Pildegovics and Mr Levanidov understood the importance of written agreements, as illustrated by the numerous written agreements that were in fact concluded between relevant persons and entities in this case (including between Mr Pildegovics and his wife for the purchase of shares in North Star).[270] Tellingly, in an email dated 4 April 2015, Mr Levanidov even notes that "[w]e should probably make a sales agreement between North Star and Seagourmet".[271] Similarly, the fact that Mr Pildegovics and Mr Levanidov, through their respective

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265 See, in particular, **R-0394-RUS; R-0395-ENG** The loans granted by [redacted] and [redacted] as described in the document "NS Loans 2014" attached to the Native format of **PP-0136** provided by the Claimants in response to Norway's Request for Disclosure No. 10.

266 Reply, ¶387.

267 Counter-Memorial, ¶¶414-415.

268 Pildegovics, ¶6.

269 Levanidov, ¶9.

270 Counter-Memorial, ¶414.

271 **PP-0024**.

companies, entered into specific written agreements for the delivery and sale of snow crab, even after the alleged collapse of their business, makes the absence of a written agreement relating to the alleged 'joint venture' even more difficult to understand.

211. The assertion concerning the legal ignorance of the "partners" to the alleged joint venture is even more incomprehensible because, according to Mr Pildegovics, his lawyers were available during his discussions with Mr Levanidov in the last week of January 2014,[272] and the lawyers even participated in at least some of those meetings.[273]

5.2.1.3 The contemporaneous evidence after the conclusion of the alleged joint venture is insufficient to demonstrate the existence of the alleged joint venture

212. As explained in Norway's Counter Memorial, "*very few emails between Mr Pildegovics and Mr Levanidov from after the date of the alleged 'joint venture' have been disclosed. There are therefore no contemporaneous documents by which the Tribunal can establish whether certain things were done by Mr Pildegovics qua joint venture partner, or on behalf of Mr Levanidov*".[274] Norway goes on to explain how Mr Pildegovics' role is further called into question by the fact that it was through Mr Levanidov[275] – who, as noted above, is also supposed to have advanced the idea of a joint venture[276] – that the snow crab operations were able to find financing (including the financing of vessels) and trading partners, arguably the two most important aspects for ensuring an operational success.

213. In their Reply, the Claimants return to the role of Mr Pildegovics in the joint venture he allegedly formed with Mr Levanidov. To this end, Mr Levanidov and Mr Pildegovics have provided new statements to adjust and supplement their previous ones.[277] The

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272 **PP-0022**.

273 Pildegovics, ¶126.

274 Levanidov, ¶¶11 and 17.

275 See below, Section 4.3.2 The Role of Mr Levanidov (and his Associated Companies) in the 'Investments'.

276 See above, ¶21.

277 Pildegovics 2, Levanidov 2.

absence of third-party or documentary evidence appears to support the view that no one except the two protagonists were aware of the existence of the alleged joint venture.

214. The Claimants argue that certain contemporaneous documents demonstrate the existence of the alleged joint venture.[278] Apart from the fact that these documents date from 2015 – more than a year *after* the alleged conclusion of the joint venture – none of them really demonstrates the existence of a joint venture.

215. The Claimants refer in particular to press articles presenting Seagourmet and North Star as partners, or the existence of a "Latvian-Norwegian project" in which "Seagourmet established a collaboration between some Latvian vessels and a Norwegian company to deliver snow crab".[279] The Claimants also refer to the testimony of the Mayor of Båtsfjord according to which "[w]hen they introduced themselves, Levanidov and Pildegovics appeared as one venture in the sense that they worked together as part of the same business venture".[280]

216. However, the perception that Mr Pildegovics and Mr Levanidov worked together is not convincing to demonstrate the existence of a joint venture. As reported in newspapers published at the same time, the two men were as well perceived as not working in a joint venture.[281]

217. The Claimants also say that "*Seagourmet's website has identified North Star as its 'major partner' since at least 2015*" or that "*Mr Pildegovics referred to North Star as a 'strategic partner' of Seagourmet in an exchange with the Latvian Ambassador in May 2015*".[282] Two observations can be made: First, these elements do not call into question Norway's claim that the two companies may have been two independent businesses acting in collaboration with one another in the past[283] and/or that Mr

278 Reply, ¶379 *et seq.*

279 Reply, ¶380 (emphasis in the original).

280 Witness Statement of Geir Knutsen, 8 March 2021, ¶3.

281 See for example **R-0412-NOR; R-0413-ENG** "*Ny snøkrabbefabrikk i Båtsfjord – NRK Troms og Finnmark*", published by NRK on 10 June 2015.

282 Reply, ¶379.

283 Counter-Memorial, ¶¶429 *et seq.*

Pildegovics was acting as agent to Mr Levanidov[284]. Second, the documents provided in no way justify the Claimants' claim: they do not formalise a joint venture with a specific content, rights and obligation. These documents are therefore irrelevant.

218. The lack of evidence supporting the Claimants' version of the events remains even after the disclosure phase in these proceedings, when the Claimants were asked to provide all correspondence and other documents relating to the alleged 'joint venture'.[285] In their letter to Norway dated 10 December 2021 regarding production of documents, the Claimants stated that there were no documents in their possession that were not already in the record that would be responsive to the requests for documentation relating to the alleged 'joint venture'. The obvious point is that no such documentation actually exists. Neither option lends credibility or support to the Claimants' contention.

219. As Norway showed in its Counter-Memorial, the cousins conspicuously failed to agree on any real terms regarding the conduct of the alleged 'joint venture' between themselves for over two years post-inception (2014).[286] Norway does not share the notion as set out by the Claimants in the Reply that this is not "unlikely" or "surprising", as they are cousins and personally close and that neither of them are lawyers.[287] As argued in the Counter-Memorial there are still a number of important reasons to why it seems both unlikely and surprising that the terms of the alleged 'joint venture' are not agreed and formalised, e.g. that it is supposedly an extensive multi-jurisdictional operation with a considerable turnover, involving multiple entities, that both Mr Pildegovics and Mr Levanidov portray themselves as experienced businessmen as well as there being a number of written contracts between relevant entities in the case, including between Mr Pildegovics and his wife.[288]

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284 *Ibid*, e.g. ¶¶397 and 427.

285 See above, Section 5.2.2.1.

286 Counter-Memorial ¶¶414-415, 449-450 and 455, see also e.g. ¶¶415, 425, 435.

287 Reply ¶¶385 and 387.

288 Counter-Memorial ¶¶414 and 415.

5.2.2 The report prepared by Dr Anders Ryssdal does not prove the existence of the alleged 'joint venture'

220. The Claimants rely heavily on the report prepared by Dr Ryssdal,[289] to justify the credibility of their allegation that a joint venture exists and to dismiss Norway's objections.

221. Dr Ryssdal's assessment is limited to the facts presented to him, without further investigation.[290] Dr Ryssdal states that his first report is based on "*the witness statements of Mr. Pildegovics and Mr. Levanidov, the Request for Arbitration, and the relevant factual exhibits referenced in the RFA*".[291]

222. In his Addendum of 28 February 2022, Dr Ryssdal states that his assessment is exclusively based on "[his First] *expert report and the relevant documentation referred to in paragraph 5,* [... on] *Respondent's counter-memorial and memorial on jurisdiction as well as Mr. Pildegovics' and Mr. Levanidov's second witness statements dated 28 February 2022*".[292]

223. An expert report based on incomplete evidence must be treated with caution. For the reasons outlined below, the Dr Ryssdal's Report and his Addendum must be viewed in this light and their conclusions accorded limited weight.[293]

224. By way of example, in his Addendum, Dr Ryssdal concludes that the "essential obligations under the joint venture agreement" were for Mr Pildegovics to ensure deliveries of snow crab and for Mr Levanidov to ensure sufficient capacity to take delivery of and process these snow crab deliveries.[294] Correspondingly, the alleged right of Mr Pildegovics was to be able to deliver the snow crab to Mr Levanidov's Båtsfjord factory for processing, and for Mr Levanidov to receive deliveries of such snow crab for processing.

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289 Ryssdal, 10 March 2021, ¶2.

290 *Ibid*., ¶7.

291 *Ibid*, ¶4, See also ¶5.

292 *Ibid*, ¶5.

293 See also Counter-Memorial ¶438 and ¶¶453-454

294 Second Report of Anders Ryssdal, 28 February 2022, ¶12.

225. Dr Ryssdal, based on Mr Pildegovics' witness statement,[295] and an assertion – made in paragraph 29 of the Request for Arbitration – concludes that Mr Pildegovics "*invested at least EUR 10 million*" to put his alleged obligations under the purported 'joint venture' into effect. As Norway has outlined in its Counter-Memorial, the reality is that these sums were in fact provided by Mr Levanidov,[296] and the evidence demonstrates that the working relationship was more akin to agent-principal than as between equal joint venture partners.[297]

226. Applying Dr Ryssdal's interpretation to this fuller set of facts necessarily leads to the conclusion that Mr Levanidov financed both his own and the vast majority of Mr Pildegovics' shares under the alleged 'joint venture' agreement.

227. As Mr Pildegovics did not himself establish North Star (and in fact did not acquire the shares in North Star until shortly before the June 2015 "launch" of the "project"[298]), and relied on instructions from Mr Levanidov rather than acting in his own right,[299] Dr Ryssdal's conclusion as to the rights and obligations allegedly pertaining to Mr Pildegovics definitely appears as being unsupported by the facts.

228. Indeed, Dr Ryssdal's conclusions in his Report and Addendum are based on highly subjective evidence taken from Mr Pildegovics' and Mr Levanidov's testimonies, including but not limited to the following statements:

- The joint venture was concluded by way of *oral agreement*;[300]
- Both Mr Pildegovics and Mr Levanidov *consider themselves* bound by the agreement and the rights and obligations it generates;[301]

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295 Pildegovics, ¶¶29-30.

296 See above, ¶195; **R-0200-LV**, **R-0201-ENG**.

297 Counter-Memorial, ¶423 and **Chapter 4**.

298 **C-0076**; Memorial, 11 March 2021, ¶231.

299 Counter-Memorial, ¶424.

300 Ryssdal, 10 March 2021, ¶18.

301 *Ibid*., ¶¶18-21.

- Both Mr Pildegovics and Mr Levanidov had a clear *intention* to enter into an agreement regarding a joint venture;[302]

- The joint venture spans "the harvest, processing and sale of snow crabs in Norway";[303]

- Mr Pildegovics and Mr Levanidov *had agreed* to operate their investments based on continuous consultation and a common strategy.[304]

Reliance on this type of subjective evidence is problematic in a context, such as the present case, in which the Claimants clearly have an after-the-fact interest in seeking to substantiate the existence of an alleged 'joint venture' agreement which is not established by any objective evidence. Without going back to the Norway's arguments above, these elements alone significantly qualify the usefulness of the report presented by Dr Ryssdal.

229. To conclude:

- Under Norwegian law, there is a presumption against the conclusion of a contract such as the alleged 'joint venture' orally;

- the events preceding 29 January 2014, the date of the conclusion of the alleged joint venture, do not show that the Parties were prepared to conclude a joint venture agreement;

- subsequent events must be taken with caution given the common interest of Mr Pildegovics and Mr Levanidov in having an alleged joint venture recognised now in order to support their claim to have made a (Latvian) investment 'in Norway';

- the documentary evidence provided by the Claimants does not demonstrate the existence of a joint venture agreement.

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302 *Ibid*., ¶20.

303 *Idem*.

304 *Ibid*., ¶37.

5.2.3 Involvement of others in the alleged 'joint venture'

230. In its Counter-Memorial, Norway referred to the potential involvement of other actors in the Claimants' alleged 'joint venture' and to the possibility that the 'joint venture', if it in fact existed, was part of a broader enterprise of which Mr Levanidov, and companies such as [redacted] were part.[305] The doubts expressed by Norway become even more substantive after the production of certain documents by the Claimants following Norway's Request for disclosure.

231. Norwegian request No. 10 was for the Claimants to disclose "[n]*ative format documents for* [6] *emails already forming part of the documentary record or disclosed pursuant to this document production request*". From the documents provided by the Claimants in response to this request, it can be concluded that some of the documents provided as an annex to their Memorial omitted significant information.[306]

232. As part of the disclosure following Procedural Order No. 6, Claimants produced a further five native format emails which differ from the emails previously provided by the Claimants which omit the mention of a so-called 'Andron'.[307]

233. Norway had noted the mention of 'Andron' in an email of 10 January 2014 in its Counter-Memorial:

> "*Mr Levanidov suggests that someone referred to as 'Andron' may advise on the possibility of purchasing a vessel under Lithuanian or Latvian flag, but that he does not want to write or call him directly, to avoid 'harm[ing] him by chance'. In a response e-mail of 11 January 2014, Mr Pildegovics says that he will talk to Andron. (PP-0015)*".[308]

234. An email dated 8 June 2013 not previously provided supports the case that Mr Pildegovics was not initially involved in the 'Norwegian project' (as it is referred to in the email), and that this project originally was that of Mr Levanidov and Andron/Andr/Andrei. In this email, Mr Pildegovics asks Mr Levanidov why "*your*

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305 Counter-Memorial, ¶427.

306 See for example **R-0394-RUS; R-0395-ENG**, Native format of **PP-0136**.

307 See for example **R-0384-RUS; R-0385-ENG**, Native format of **PP-0014**.

308 Counter-Memorial, fn 486.

Norwegian project has stopped".[309] In the original Russian, the word "your" is in the plural, seemingly referring back to the project of Mr Levanidov and "Andr". Mr Pildegovics asks whether a vessel with a Latvian flag may help.

235. Another email sent by Mr Pildegovics to Mr Levanidov dated 2 February 2015 is also revealing. This email, which had already been communicated to Norway, has now been enriched with its attachments.[310]

236. The first attachment is titled "NS Loans 2014.xlsx". This is a spreadsheet specifying seven loans to North Star from [redacted] and [redacted] relating to vessel purchases and repairs, as well as North Star's operating costs. The loan amounts are consistent with information previously provided by the Claimants. Three of the loans (two from [redacted], one from [redacted])[311] – all stated to be for vessel purchases – are expressly described as being interest-free. These interest-free loans further support the position that the real investors in the Norwegian snow crab venture were not Pildegovics and North Star, but Mr Levanidov and his companies.

237. Mr Levanidov claims that the loans from [redacted] and [redacted] "*were ordinary course of business transactions, which reflect the way that fishing operations are actually financed in the seafood and fisheries sectors*".[312] He goes on to say that this is because "*loans in the seafood business are often made as advances on product sales* […]".[313] This assertion must be viewed against the context in which the loans were actually made.

238. The three interest-free loans described in the above-mentioned spreadsheet were all allegedly for the purpose of financing North Star's purchase of fishing vessels. Mr Levanidov's statement, however, suggests that such loans are commonly made as advances on product sales. An interest-free loan of [redacted] to finance the purchase of the vessel *Senator* was granted to North Star from [redacted] in August 2014. This was the same month that North Star landed its first catch of snow crab in

309 **R-0384-RUS; R-0385-ENG**, Native format of **PP-0014**.

310 **R-0394-RUS; R-0395-ENG,** Native format of **PP-0136**.

311 See Memorial, Section 4.3.2.2.

312 Levanidov 2, ¶22.

313 *Ibid.*, ¶20.

Norway.[314] It seems unlikely that a customer operating on purely commercial terms, including in fishing/harvesting sector, would lend [redacted] to a business that had yet to land its first catch, even if the prospective customer was "*interested in North Star's products*".[315]

239. Regardless of whether or not advance payments for products are a common financing model the financing scheme described by Mr Levanidov,[316] and which is otherwise apparent from the documents, arguably makes the "lenders" more akin to equity investors.

240. Thus, the loans are made without any fixed payment schedules, and often interest-free. The loans are then allegedly repaid by way of reduced payments for catch purchased by the "lenders". In this scheme, the profits of the "lenders" are then apparently derived from their resales of catch. In summary then, although the loan agreements in principle require repayment, the actual repayments of and in particular any return that the "lenders" make on the "loan" appear to depend much more directly on the commercial success of the "borrower" than would be the case for a normal loan agreement. Again, the point is that the real investors in North Star and its assets appear to be North Star's purported customers (i.e. Mr Levanidov's companies), not Pildegovics or the company itself.

241. As to [redacted] specifically, which does not appear to have been a customer of North Star, it seems unlikely that a company involved in 'financial and trading services' would grant interest-free loans if the transactions were arm's-length and on purely commercial terms.

5.3 THE ALLEGED 'JOINT VENTURE' AS AN 'INVESTMENT' UNDER THE BIT

242. As expressed by Norway in its Counter-Memorial, even if the joint venture existed (*quod non*), the Claimants would have to show that Mr Pildegovics' rights in it are an "investment" under the scope of the BIT: i.e. those rights have to be considered an asset

314 Memorial, ¶163.

315 Levanidov 2, ¶20.

316 *Ibid.*, ¶20.

invested in the territory of Norway in accordance with its laws and regulations.[317] According to the Claimants it is not the joint venture itself that is said to be the investment, but rather Mr Pildegovics' 'contractual rights in his joint venture agreement' insofar as those rights constitute 'claims to performance having an economic value'.[318] "*Claims to performance under contract having an economic value*" is listed as an example of possible investments in the non-exhaustive list in Article I(1) of the BIT.[319]

243. The Claimants concede in their Reply that "*Mr. Pildegovics' contractual rights under the joint venture are properly characterized as 'claims to performance under contract having an economic value', further confirming their qualification as an 'investment' under Article I(1)(iii)*".[320]

244. However, despite the submission made by the Claimants in their reply, there are still large areas of mystery as to what these claims to performance might be (5.3.1); it also follows that even if Pildegovics did hold claims to performance as against Mr Levanidov, any such claim was not an investment in Norway (5.3.2).

5.3.1 The lack of clarity about the alleged claims to performance

245. As noted above and previously detailed in Norway's Counter-Memorial, the documentation provided by Claimants does not support the existence of the alleged 'joint venture',[321] and certainly does not particularise any "significant terms" or rights and obligations of such an agreement.[322]

246. It follows that, even were the Tribunal to find that a 'joint venture' actually existed between the two men, it would then have to decide what the terms of that contract were and therefore what the content of any claims to performance were.

247. A more natural interpretation of any claims to performance under a joint venture agreement between the parties (the existence of which Norway continues to dispute)

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317 **CL-0001** Norway-Latvia BIT, Article I(1).

318 Memorial, ¶502.

319 Cf. Article I(1)(iii).

320 Reply, ¶484. Emphasis in the original.

321 See above, Section 1.2.

322 Counter-Memorial, Section 5.2.1.

might, for instance, be based upon Mr Levanidov's financing and Mr Pildegovics' purported research and subsequent establishment of a Latvian company and the acquisition of vessels etc. neither of which has a link with Norway.

248. In his Addendum, Dr Ryssdal notes that, "*when applying Section 4-5 no. 2 of the Norwegian Dispute Act the court must place emphasis on the claimant's pretensions*". He goes on to quote the Appeal Committee of the Supreme Court:

> "*It does not prevent application of Article 5 no. 1 that the respondent disputes that a contract exists. It is assumed to be sufficient to make probable to a certain degree that a contractual obligation in fact exists*".[323]

249. Norway does not disagree with this legal principle. Rather, Norway's position is that it is not made out on the facts that it is "*probable to a certain degree that a contractual obligation in fact exist*s" and, if it does, that it is closely connected to Norway. As noted above, the evidence provided by Claimants in support of the existence of a purported 'joint venture' is highly subjective. No court, Norwegian or otherwise, can rely solely on Claimants' pretensions that a purported agreement exists.

250. Further, and as noted by the Norwegian Supreme Court, it is not sufficient that there is reason to presume that a contractual obligation exists. In other words, a higher threshold is required for the existence of a contractual obligation to have been made probable to a certain degree. This threshold can only be met following an objective assessment of the facts.[324]

5.3.2 Any claim to performance under the alleged 'joint venture' is not an investment in Norway

251. The parties appear to be in agreement that the basis for deciding where the place of performance of any joint venture—should it be found to exist—would depend upon an

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323 Addendum to Report of Dr Anders Ryssdal, 28 February 2022, ¶24 quoted the Norwegian Supreme Court's decision published in Rt. 2008 p. 1207.

324 **RL-0240-NOR; RL-0241-ENG** Decision (order) of 27 November 2019 of the Norwegian Supreme Court (HR-2019-2206-A). Section 89 translated from Norwegian: "*I find that the Court of Appeal has taken a correct legal starting point when it comes to criteria for hearing when stating that the allegation that Volvo Norge AS is jointly and severally liable is* not *sufficient, but that the claimant must substantiate such an allegation to a reasonable extent – also formulated as a requirement of «a certain substantiation», as I have previously accounted for*."

interpretation of that agreement.[325] Even on the Claimants' case, there were several places of performance. As no agreement has been set out in writing, the terms of the alleged joint venture are highly unclear, and so therefore are the place(s) of performance of those terms.[326]

252. There is no allegation that, even if the cousins agreed to enter into a joint venture contract, that they decided on the venue and applicable law of that contract. As noted above, Dr Ryssdal's conclusion that "*Norwegian courts are more likely than not to assume Norwegian jurisdiction*"[327] over the alleged 'joint venture' agreement[328] is premised on an incomplete understanding of the facts.[329] Given the uncertainty and limited factual basis which the Tribunal has before it to determine the existence of the joint venture itself, it follows that it is even more difficult to ascertain the appropriate venue and proper governing law of the contract.

253. From the outset, Mr Pildegovics' role was focused on matters pertaining to Latvia. Mr Levanidov notes himself that Mr Pildegovics' background made him a "*strong candidate*" who would "*possibly be interested in building a fishing enterprise from Latvia*".[330]

254. Further, Mr Levanidov affirms that:

> "*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. For this purpose, Mr Pildegovics researched the possibility of establishing such a company in Latvia and reviewed the regulatory and licensing requirements for the operation of Latvian fishing vessels. Together, we also started looking for suitable ships that could be available for purchase*."[331]

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325 **RL-0239-ENG** *Zelger v. Salinitri,* EUCJ, Decision of 17 January 1980, C-56/79, ECLI:EU:C:1980:15, ¶¶5 and 6, **RL-0266-ENG** Electrosteel Europe SA v. Edil Centro SpA., EUCJ, Decision of 9 June 2011, C-87/10, ECLI:EU:C:2011:375, ¶22.

326 Lugano Convention article 5 (1) a. See also Norwegian Disputes Act, Section 4-5 (2).

327 Addendum to Report of Dr Anders Ryssdal, 28 February 2022, ¶21.

328 Addendum to Report of Dr Anders Ryssdal, 28 February 2022, ¶21.

329 See above, Section 5.2.

330 Levanidov, ¶35.

331 Levanidov, ¶36.

255. The majority of these tasks, which purportedly fell to Mr Pildegovics – launching a new fishing company, researching the establishment of such a company in Latvia, reviewing regulatory and licensing requirements in Latvia – relate to Latvia.[332] The vessels subsequently acquired by North Star all sailed under the Latvian flag.[333] Similarly, Mr Levanidov's more plausible obligation – to finance the Latvian fishing company–[334] would be – and essentially was – performed in Latvia.

256. The snow crab venture's lack of connection to Norway is further evident in the context of the harvesting as well as marketing and sales of the end products, as already described in detail in Norway's Counter-Memorial.[335]

257. Given the uncertainty of the terms and scope of the alleged 'joint venture' agreement, and the fact that each of the self-proclaimed parties to the alleged 'joint venture' is domiciled in jurisdictions other than Norway, it is in Norway's view highly unlikely that Norwegian courts would determine that the matter has a sufficiently close connection to Norway for the purposes of finding jurisdiction, and in any case this would depend on the precise matter disputed.[336] Norway further notes that several elements referred to by the Claimants are subject to Latvian law.[337]

258. This uncertainty is also recognised by Dr Ryssdal in his Report, where he notes that "*as Mr. Pildegovics and Mr. Levanidov are nationals of Latvia and the United States respectively and domiciled in these countries, a claim based on their contract regarding their joint business activity of harvesting, processing, marketing and sale of snow crab in Norway, would be considered a dispute of an international character*".[338]

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332 See below, ¶341.

333 *Ibid*.

334 See above, Section 5.3.1.

335 Counter-Memorial, ¶¶142, 143 and 455.

336 By way of examples, any of the following disputes would clearly not be under Norwegian jurisdiction: a dispute between the parties as to whether Mr Pildegovics' has breached his alleged obligations to acquire the Latvian vessels, or to apply for the Latvian licences, or to purchase the EU-based fishing capacity, or indeed to establish North Star.

337 See **PP-0040; PP-0070; C-0057**. See also Counter-Memorial, ¶502.

338 Ryssdal, 10 March 2021, ¶57.

259. Dr Ryssdal goes on to conclude that, since the performance of the obligations took place in Norway, "[i]*t must then be concluded that the place of performance of the contractual obligations between the parties belongs in Norway*".[339] This conclusion is again premised on Dr Ryssdal's assumption that any obligations under a purported joint venture between Mr Pildegovics and Mr Levanidov relate to the delivery and offtake of snow crab in Norway. It ignores the fact that, even on the Claimants' case, the alleged 'joint venture' had several places of performance. As has been shown above, that assumption is highly uncertain and premised on an incomplete picture of the relevant facts.

260. And even if there were a contractual relationship between Mr Levanidov and Mr Pildegovics that could give rise to claims to performance, there is no claim actually made in respect of any of these losses, as the Claimants' expert has noted.[340] The contractual relationship would, in any event, not be "most closely related" to Norway and could not be considered as an asset invested in Norwegian "territory".

5.4 MR LEVANIDOV AS THE "REAL" INVESTOR

261. The question of the position of Mr Levanidov already raised in Norway's Counter-Memorial is far from being merely anecdotal, as the Claimants argue in their Reply.[341] It must be considered together with that of Mr Pildegovics.

262. Neither Norway nor the Claimants dispute that Mr Pildegovics is a Latvian national or that North Star is a company incorporated in Latvia. The Claimants interpret this as Norway conceding that the Claimants are Latvian "investors" under the terms of Article IX of the BIT, and that it follows from this "concession" that "[N]*orway's insistence that the Tribunal should determine 'who the real investor is in this case' is irrelevant*." They further state that "[a]*s a matter of law, it should be noted that Norway has failed to cite any authority supporting the need for such an analysis under the BIT*."[342]

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339 Ryssdal, 10 March 2021, ¶61.

340 Sequiera, footnote 139: "*by North Star being put back in the economic position it would have been in but for the Measures, Claimant Mr. Pildegovics would similarly be put back in the economic position he would have otherwise been in but for the Measures*".

341 Reply, ¶¶464-466.

342 Reply, ¶466 (footnote omitted): "*578. Respondent's Counter-Memorial, 29 October 2021, ¶364*".

263. The Claimants' interpretation of Norway's argument is wrong. As provided for in the BIT, Article IX applies to "any legal disputes between an investor of one contracting party and the other contracting party *in relation to an investment of the former* in the territory of the latter."[343] It is also clear that "investments of investors of the other contracting party"[344] or "investments made by investors of one contracting party"[345] benefit from the protection provided by the BIT and can claim compensation for damage to their investments. The question therefore is whether the 'investments' identified in this case were investments made by Mr Pildegovics or North Star, or by someone else.

264. Further, arbitral case-law is replete with awards in which tribunals have checked whether the Claimants were the 'real' investors within the meaning of the applicable BIT. Thus, among many other examples, an ICSID tribunal recalled that "there still needs to be some economic link between that capital and the purported investor that enables the Tribunal to find that a given investment is an investment of that particular investor."[346]

265. One of the questions raised must therefore be whether the case before the Tribunal relates to an investment of a Latvian "investor" within the meaning of Article I(3) of the BIT:

> "*3. 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*".[347]

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343 **CL-0001** BIT between Norway and Latvia (1992), Article IX, ¶1 (emphasis added).

344 Norway-Latvia BIT, Article III.

345 Norway-Latvia BIT, Articles IV and VI.

346 **RL-0184-ENG** *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Award, 5 June 2012, ¶355. See also **RL-0186-ENG** *Yukos Capital SARL v. The Russian Federation*, PCA Case No. 2013-31, Interim Award on Jurisdiction, 18 January 2017, ¶461.

347 Norway-Latvia BIT., Article I(3).

266. The question then remains whether Mr Pildegovics and/or North Star has/have made investments in the territory of Norway which would then make Mr Pildegovics and/or North Star an "investor" or investors within the meaning of the BIT. Conversely, the question arises as to whether Mr Levanidov, who was finally appointed to the Board of North Star in December 2020[348] and who is a factual witness, is not in fact acting as a "hidden claimant" while he is not protected by the Norway-Latvia BIT.

267. The Claimants affirm that "[a]*ll investments at issue in this case were made and operated within the framework of this joint venture agreement and in support of its goals*."[349] They assert that Norway's emphasis on Mr Levanidov's predominant role is a 'theory' aimed at underestimating the role played by Mr Pildegovics.[350] The Claimant's allegation is belied by numerous and consistent proven facts. It also misunderstands Norway's position, which is not postulating a theory, but legitimately questioning the clear lack of information supporting the Claimants' own 'theory' that Mr Pildegovics and Mr Levanidov had entered into a joint venture. It follows from what Norway has argued above that there was no 'joint venture' as alleged at all, and that Mr Pildegovics therefore had no claims to performance *vis-à-vis* Mr Levanidov.

268. In any case, neither Mr Pildegovics' nor Mr Levanidov's statements, nor the scant factual "evidence" on the record in the Reply shed any light on the role played by Mr Pildegovics in the alleged joint venture formed in 2009, 2013, or in 2014.[351] Mr Pildegovics' involvement served to bring a 'Latvian' flavour to Mr Levanidov's enterprise: but it is not clear what more it did.

269. In their Reply, the Claimants return in particular to Norway's questions about the role of Mr Pildegovics. The various elements of proof are dealt with by the Claimants in isolation, one after the other, with the hope of showing that in themselves they do not

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348 See Counter-Memorial, fn 397: "*Norway's position as to whether Mr Levanidov has a right to sit in on hearings is reserved. That applies to "officers, officials or employees of a Party whose presence is necessary to enable instructions". Mr Pildegovics, the sole shareholder, Chairman of the Board, and person "with a right of sole representation" (PP-0039), will no doubt be present at the hearings, rendering Mr Levanidov's presence (save in the capacity of witness) unnecessary*."

349 Memorial, ¶165.

350 Reply, ¶328.

351 See above, ¶199.

discredit the Claimants' case when viewed alone. For example, the Claimants assert that:

> "*While the Claimants fully acknowledge that Mr Levanidov was already working on a snow crab venture in Norway when Mr Pildegovics joined him as a partner, this certainly does not disqualify Mr Pildegovics as an investor (or even a "real" investor). Were it so, any investor acquiring an investment which had already started operations would be deprived of protection under the BIT. Of course, this is absurd*".[352]

270. Norway's point is not that Mr Pildegovics could not be an investor because he joined an ongoing project. Rather, Mr Pildegovics' alleged participation, taken as a whole, demonstrates the minimal role actually played by him in terms of decision-making or financial commitment, especially in light of, and by contrast with, the role played by Mr Levanidov.

271. As demonstrated in the Counter-Memorial through the very few exchanges between Mr Pildegovics and Mr Levanidov, the former often acted as an executor of decisions taken by Mr Levanidov (5.4.1). Mr Levanidov himself or through his companies also bears a disproportionate financial risk compared to the much smaller financial risk borne by Mr Pildegovics (5.4.2).[353] Mr Pildegovics' actions appear to have been done for and on behalf of Mr Levanidov and/or his associates and related companies, but not in his own right.

5.4.1 The minimal role played by Mr Pildegovics

272. In its Counter-Memorial, Norway pointed out that initially Mr Levanidov was the sole investor in the alleged snow crab harvesting project.[354]

273. In their Reply, the Claimants answer that "*Mr Pildegovics became aware of* [the business project] *in May 2010 and started more serious discussions with Mr Levanidov in or around June 2013 regarding his eventual participation in the project. Mr Pildegovics officially joined the project in January 2014, when he concluded a joint venture agreement with Mr Levanidov*."[355] In other words, the "project" which was at

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352 Reply, ¶333.

353 See below ¶¶79 *et seq.*

354 Reply, ¶¶364-390.

355 Reply, ¶332.

the origin of the so-called joint venture was created by Mr Levanidov and then joined on quite a modest scale by Mr Pildegovics.

274. Mr Pildegovics' allegedly increasing involvement in Mr Levanidov's project is not borne out by the documents produced by the Claimants. Apart from the oral agreement allegedly leading to a joint venture in January 2014, the "more serious discussions" initiated by Mr Pildegovics and Mr Levanidov in June 2013[356] are illustrated only by a single and short email exchange in June 2013[357] followed by sparse exchanges until January 2014.[358] All of these emails point to the minimal role played by Mr Pildegovics, as is explained in the Counter-Memorial[359] and recalled in the paragraphs that follow. Moreover, the implication of other mysterious individuals, notably the man named 'Andron', as explained above, is likely to further reduce the role played by Mr Pildegovics.[360]

275. To demonstrate the existence of their alleged joint venture, the Claimants highlight in particular the role played by Mr Pildegovics in the establishment of North Star, which in fact had already been established by Ms Irina Fiksa.[361] The Claimants would have the Tribunal believe that because Mr Pildegovics conducted certain negotiations, his role is established and that "[t]*here is nothing here to suggest that this was done 'for and on behalf of' Mr Levanidov*".[362] However, the situation remains the same: there is still no evidence that this process was conducted in the context of a joint venture between the so-called "partners", especially in view of the instructions given by Mr Levanidov to Mr Pildegovics as to how to conduct these negotiations,[363] and of the

356 *Ibid*.

357 **R-0140-ENG** and **R-0141-ENG**.

358 See the few communications in **PP-0008** to **PP-0024**.

359 Reply, Section III(D).

360 See above, Section 5.2.4.

361 Counter-Memorial, ¶¶367 and 476.

362 Reply, ¶330.

363 Counter-Memorial, ¶372.

instructions requested by Mr Pildegovics from Mr Levanidov asking him to "tell me how to proceed".[364]

276. The same reasoning applies to the search for and the purchase of North Star's vessels. In its Counter-Memorial, Norway stated that "Mr Levanidov had a very close involvement in the purchase and financing of all of North Star's vessels in this case",[365] which is admitted by the Claimants in their Reply.[366] According to the Claimants, this is justified on the grounds that "Mr Levanidov had some twenty years of experience in the fishing and seafood business. As the Claimants have acknowledged, Mr Pildegovics did not have the same experience, instead bringing banking and early-stage venture experience to the project."[367]

277. Though it is not understood why Mr Levanidov's experience necessitated that he himself would fund the vessels, the above statements are not disputed by Norway; nor are Mr Pildegovics' statements that "he 'personally led the negotiations for [the vessels'] purchase' while 'Mr Levanidov provided strategic advice and guidance based on his experience in the fishing industry'".[368] However, the question remains: in what way does this prove that Mr Pildegovics and Mr Levanidov had entered into a joint venture? What does point to anything other than relationship between a principal and an assistant or advisor?

278. Norway has previously noted that the nature of the interaction between Mr Pildegovics and Mr Levanidov does not point to the existence of a joint venture. Legal ownership of the various parts of the alleged joint venture clearly remained separated; and there are no indications that Mr Pildegovics received any profit or took any economic risks in connection with the parts of the alleged joint venture that do not belong to him (or indeed in those that did, considering that the financing *and* re-financing was all done by Mr Levanidov, whose companies appear to have purchased North Star's debt)[369].

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364 **PP-0012**.

365 Counter-Memorial, ¶¶371 *et seq.*

366 Reply, ¶339.

367 Reply, ¶441 (footnote omitted): "*409. First Witness Statement of Kirill Levanidov, 11 March 2021, para. 8*."

368 Reply, ¶339 quoting Pildegovics, ¶62.

369 See Counter-Memorial, Section 4.3.3.

Sharing of profits and economic risks are intrinsic characteristics of a typical joint venture. This point appears to be accepted by Dr Ryssdal, who notes in his Report that Mr Pildegovics and Mr Levanidov "had agreed to operate their investments based on continuous consultation and a common strategy".[370] At the same time, however, Mr Pildegovics and Mr Levanidov are at pains to establish, in their respective second witness statements, that Mr Levanidov had no control over North Star's operations – despite Mr Levanidov being by far the biggest (indirect) creditor of North Star and being one of its directors (though he was only appointed in 2020, that is after the alleged date of the alleged breach, and after Norway's question as to why he needed to be present during the procedural hearing).

5.4.2 North Star's financial situation

279. In its Counter-Memorial, Norway also referred to the uneven financial risks taken by Mr Levanidov and Mr Pildegovics as another indication undermining the suggestion that there was a joint venture. In particular, the complex financing of the Claimants' business involving numerous companies around the world was pointed out.[371] The Claimants respond to this by stating that "[i]*t is a well-known fact that business enterprises often rely on debt to finance their capital structure. Few enterprises are funded solely by their owners' equity. Thus the fact that North Star received loans from different companies is by no means unusual and certainly does not disqualify the company or its sole shareholder as 'real' investors*."[372]

280. Following Norway's Request for Disclosure, the Claimants provided various documents in response to Norway's Request No. 2 for "[d]*ocumentation on North Star's current financial situation, including assets and debts*". In response to that request, the Claimants have provided a copy of North Star's balance sheet dated 18 October 2021. The document shows that North Star owes a total of EUR 13.43 million to its short-and long-term creditors.[373]

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370 Ryssdal, 10 March 2021, ¶37

371 Counter-Memorial, ¶291.

372 Reply; ¶345.

373 **R-0377-LV; R-0376-ENG** North Star balance sheet, 18 October 2021. Document provided in response to Norway's Request No. 2 for disclosure.

281. The list of North Star's creditors as of 22 October 2021, shows [redacted] owed to [redacted] (out of a total debt of [redacted]), a company funded and owned 100% by Mr Levanidov.[374] This is unsurprising, given that [redacted] has been North Star's main creditor since the company stepped in to purchase North Star's outstanding loans to [redacted] and [redacted] in May 2018.[375]

282. In North Star's 2018 Annual Report, the amount of North Star's long-term outstanding loans as of 31 December 2018 is stated to be EUR 3.43 million.[376] In 2019, this debt had increased to EUR 4.25 million.[377] By October 2021, an amount of nearly EUR 10 million was owed to three companies owned by or otherwise linked to Mr Levanidov ([redacted] and Seagourmet). In contrast, the creditor list shows that only around [redacted] is owed to Mr Pildegovics or companies linked to him.[378]

283. Other documentation provided by the Claimants suggests that the amounts owed to Mr Levanidov and related companies are the result of Mr Levanidov having stepped in to provide emergency financing to support North Star's struggling operations (or lack thereof). This is supported by Mr Levanidov himself in his second witness statement.[379] This further supports Norway's position that the relevant investments purportedly made by Claimants, in fact are Mr Levanidov's investments.

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374 Counter-Memorial, ¶385.

375 Counter-Memorial, ¶890.

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

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

378 **R-0377-LV; R-0376-ENG** North Star balance sheet, 18 October 2021.

379 Levanidov 2, ¶18.

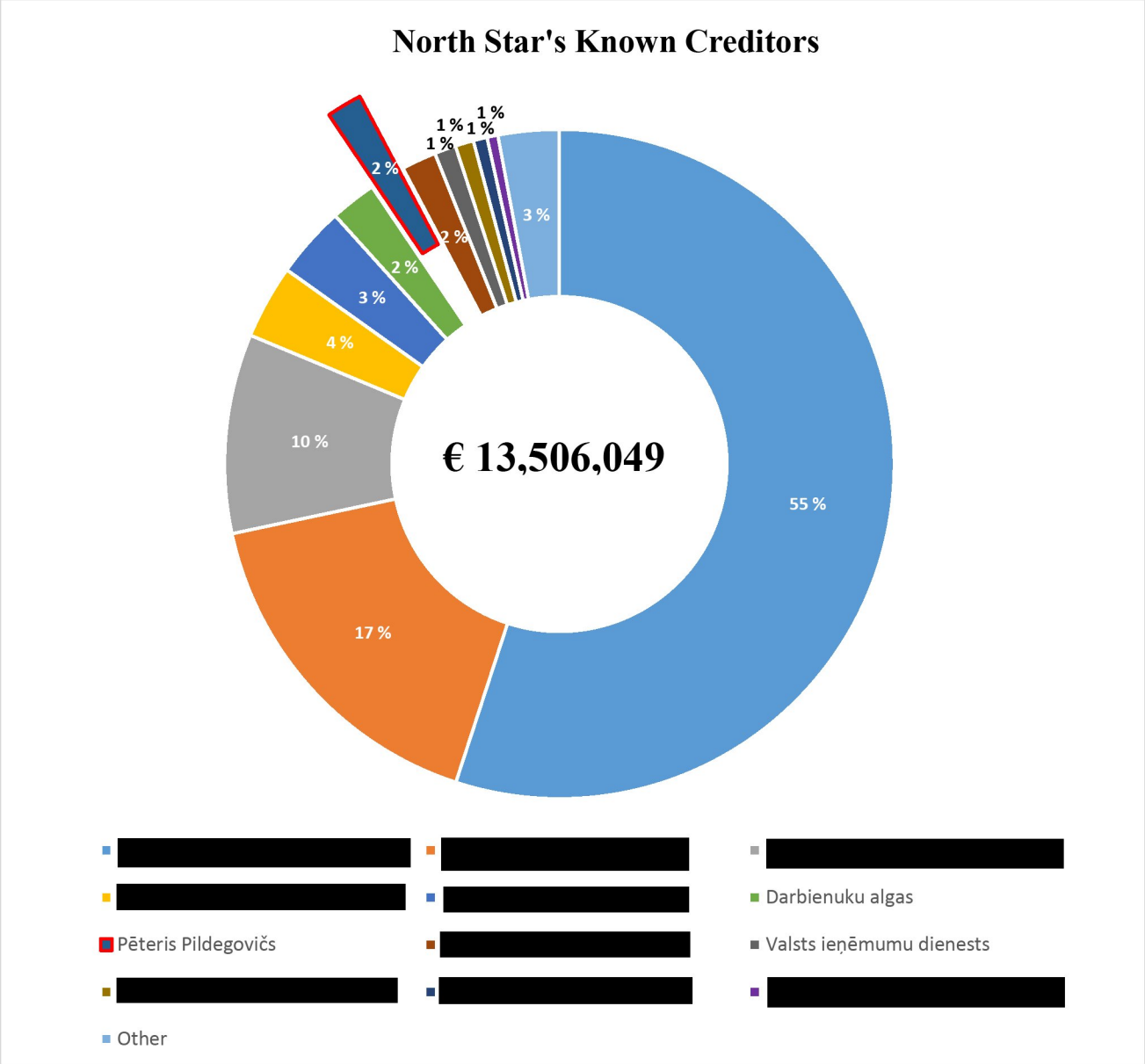

Figure: North Star's Known Creditors[380]

284. To counter this assertion, in their Reply, the Claimants no longer seek to exaggerate the role of Mr Pildegovics but, now, to minimise the role of Mr Levanidov.

285. In his second witness statement, Mr Levanidov emphasises that, even though [redacted] remains the most important creditor of North Star, he has no control over

380 **R-0200-LT**; **R-0201-ENG**. North Star had (at the time that this document was disclosed) 59 creditors. Of those, the Claimants redacted the identities of five creditors, and the levels to which North Star was indebted to them. They are therefore not included in this graph. The total amount of North Star's indebtedness at the time was EUR 13,649,868.79 (including to those debtors who are redacted). "Darbinieku algas" and "Valsts ieņēmumu dienests" are understood to be Latvian tax authorities.

North Star's operations.[381] Mr Pildegovics naturally makes a statement to the same effect.[382]

286. These assertions stand in stark contrast to the position in the Claimants' Memorial that, from January 2014 onwards, "*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" and that they consulted with each other "before making any decision of importance*"[383] – though that position is not evidenced by the documents provided by the Claimants.

287. Corporate documentation previously provided by the Claimants also show that Mr Levanidov, as a member of North Star's board since 2020, has a right of sole representation to act on behalf of the company.[384] Mr Pildegovics has the same (and no more extensive) right which also strongly contradicts the Claimants' new assertions.

288. In the Claimants' argument, North Star thus seems to be controlled and operated by both Mr Levanidov and Mr Pildegovics in equal measure when this suits the Claimants (e.g. to support the existence of the purported 'joint venture'), and controlled and operated solely by Mr Pildegovics when this version is more convenient to the Claimants (e.g. in an attempt to show that Mr Levanidov is not the real investor behind North Star). How this actually works in practice is far from clear: but what is clear is that there is no evidence that Mr Pildegovics and Mr Levanidov operated on the basis of "continuous consultation and a common strategy".[385] In reality, there appears to have been limited consultation of Mr Pildegovics by Mr Levanidov, and the strategy appears to have been solely that of Mr Levanidov.[386]

289. It is also worth noting a point made in Mr Pildegovics' second witness statement, where he states "[i]*f I had not been the genuine owner of North Star, my wife and I would not*

381 Levanidov 2, ¶22.

382 *Id.*, ¶18.

383 Memorial, ¶222.

384 Pildegovics 1, ¶¶133-144.

385 Reply, ¶37.

386 See **PP-0136**.

have made these loans to North Star".[387] Exhibits to the statement show that these loans, granted in the period 2015-2019, have amounted to [redacted][388] If, as on Mr Pildegovics' own admission, only genuine owners of North Star are likely to lend to the company, this raises the question of Mr Levanidov's status vis-à-vis North Star: [redacted], a company 100% owned by Mr Levanidov, has over the same period provided over [redacted] in financing to North Star.[389] Mr Levanidov's contribution in this respect is 40 times greater than that of Mr Pildegovics.

290. Moreover, in this purported scheme, the profits of the "lenders" are then apparently derived from their resales of catch; as noted above, the returns that "lenders" could make on the "loan" are particularly dependent on the commercial success of the borrower compared to traditional loan contracts.[390] This further supports Norway's case that Mr Pildegovics has played only a marginal role in Mr Levanidov's snow crab venture, and that the real investors in North Star and its assets appear to be its customers and creditors including Mr Levanidov through his companies, not Mr Pildegovics or the company itself.

291. To conclude, both from the point of view of the control and management of the company and from the point of view of the financial situation of North Star taken in isolation and together cast doubt on the real nature of the Claimants' alleged investments. They seem to indicate more clearly that in view of his role in the decision-making, the control he exercised over Mr Pildegovics in the performance of his tasks and the financial risk he took directly or through his companies, Mr Levanidov is the real investor while the fable of the joint venture was invented to "Latvianise" the alleged investments, including the purchases of the four ships, which were really made by or on behalf of Mr Levanidov or his companies.[391]

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387 Pildegovics 2, ¶17.

388 **PP-0117** to Mr Pildegovics' witness statement claims that Mr Pildegovics and his wife have lent a total of [redacted] of their personal funds to North Star. See also **PP-0226** and **PP-0227**.

389 See Overview of fund transfers to and from North Star, January 2014 – November 2021 consolidated with documentation provided in response to Norway's disclosure Request No. 14.

390 See above, ¶5.2.3240

391 Counter-Memorial, Section 4.3.2.2.1. and see above Section 5.4.1.

292. That the Claimants' evidence is not sufficient to rule out this possibility itself demonstrates the paucity of evidence on the record about the alleged 'joint venture' and therefore the existence of an investment in Norway by a legal person constituted in Latvia. Consequently, the Tribunal cannot consider it to have been established that Mr Pildegovics is an investor in Norway within the meaning of Article III(1) of the BIT.

293. Norway accordingly maintains its objection that Mr Levanidov is the "real" investor in this case. On that basis, the Tribunal does not have jurisdiction to determine the dispute.

CHAPTER 6: THE CLAIMANTS' INVESTMENTS - JURISDICTION

6.1 INTRODUCTION

294. Norway now turns to the question of whether the Claimants have made 'investments' within the meaning of and protected by the BIT. This chapter addresses whether or not the alleged "joint venture" and the other assets the Claimants put forward as "investments" meet the threshold set out under the BIT.[392]

295. Norway notes at the outset that the Claimants have not dealt with all of the arguments set out in Norway's Counter-Memorial. Norway took several principled points on *ratione materiae* jurisdiction in its Counter-Memorial,[393] addressing (as the Claimants did)[394] each of the alleged investments in the case, from each investor.

296. The Claimants have not engaged with that point-by-point analysis, and have instead let several of Norway's arguments go unanswered and uncontested.[395] Rather than deal with all of those points, the Claimants have marshalled their arguments under three headings:

- Whether there is a dispute in relation to "an investment";
- Whether any "investment" was made in the territory of Norway; and
- Whether any "investment" was made in accordance with Norwegian law.

297. Norway maintains the jurisdictional objections set out in its Counter-Memorial in relation to the Claimants' alleged investments and notes in particular that the following points have not been dealt with by the Claimants:

297.1. That the reason the Claimants have adopted their 'non-committal' stance on the sedentary nature of snow crab is because neither position helps them. Either:

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392 The previous chapter addressed the threshold issue of whether there was any joint venture at all. This chapter is based on the assumption – *quod non* – that there was a joint venture between Mr Pildegovics and Mr Levanidov.

393 Counter-Memorial, Section 5.2.

394 Memorial, section IV(B). Claimants' investments in the territory of Norway.

395 As to which all of Norway's rights—including to address any new points raised in the Claimants' forthcoming Rejoinder on Jurisdiction—are reserved.

297.1.1. Snow crab is a sedentary species (which Norway says it obviously is – see **Chapter 2** above) and the Claimants' Latvian licences are invalid and valueless and incapable of authorising them to harvest snow crab from the Norwegian continental shelf; or

297.1.2. Snow crab is a species of the water column and therefore the Claimants' alleged rights to harvest them fall outside of the Tribunal's jurisdiction because the territorial scope of the BIT does not encompass investments in the high seas. (Counter-Memorial, paragraphs 474-475).

297.2. That there appears to be no dispute in relation to Mr Pildegovics' shareholding in Sea & Coast AS because (a) no losses are presented in respect of it; and (b) it was acquired after Mr Pildegovics became aware of what the Claimants call Norway's change of position (Counter-Memorial, paragraphs 467-472).

297.3. That there are simply no grounds for arguing (as the Claimants do/did) that Norway's "*exclusive economic zone*" is part of Norway's "*territory*" for the purposes of the BIT (Counter-Memorial, paragraphs 482-484). It appears that the Claimants have dropped this point.

297.4. That the Claimants' alleged investment in "fishing capacity"[396] did not entail—nor did it purport to entail—any right to obtain marine living resources anywhere under Norway's sovereignty or sovereign rights (Counter-Memorial, paragraph 501).

297.5. That North Star's contracts for the *Sokol* and *Solyaris* do not constitute investments but were simply contracts for the sale and delivery of goods (Counter-Memorial, paragraph 511).

297.6. That North Star's contracts with the purchasers of snow crab cannot be investments under either the ICSID Convention or the BIT, because they are contracts for the sale of goods (Counter-Memorial, paragraphs 516-521).

396 As to which, see the Counter-Memorial, ¶¶500-502.

297.7. That in any event there are no established or identified "*claims to performance*", i.e. contractual rights or obligations which are said to form the relevant investment, under those contracts (Counter-Memorial, paragraphs 522-524).

297.8. That those contracts, insofar as they envisaged the taking of action which was illegal as a matter of either Russian or Norwegian law, would have been void as a matter of Latvian law (Counter-Memorial, paragraphs 528-532).

297.9. That those contracts were all entered into after the alleged date of breach, and so in any event there is no dispute in relation to them (Counter-Memorial, paragraph 533).

298. Instead of answering those points, the Claimants have placed great reliance on the so-called principle of the unity of the investment under the heading "*a. The Dispute Is 'In Relation to an Investment'*".[397] It is not entirely clear why the Claimants consider the point so important. It may be noted that although the Claimants zealously use the term "*investment*" in the singular in their Reply, they did not adopt this position in their Memorial, which uses the term "investments" over 323 times. The Claimants adopted the same position in their Request for Arbitration.[398] The corresponding heading in the Claimants' Memorial was: "*C. The dispute is 'in relation to' and 'arising directly out of' investments*".[399]

299. The Claimants' position that their investments should be considered as a "unity" is hardly defensible under the BIT and in view of the facts of this case (see **6.2** below). Whether or not the Tribunal adopts the "unity" analysis, it remains the case that the Claimants' alleged investments were not made in the territory of Norway (**6.3**) and that certain alleged investments – including those presented as key elements of their snow crab business – were not made in compliance with Norwegian laws and regulations (**6.4**).

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397 Reply, ¶¶473 *et seq*.

398 See Request for Arbitration, section titled "*The dispute relates to 'investments' of Claimants*".

399 Memorial, ¶¶470 *et seq*.

6.2 THE "UNITY" APPROACH

6.2.1 Introduction

300. In their Memorial, the Claimants referred to the "unity" approach only in relation to the requirement of "*directness*" of the link between the Claimants' investments and the dispute, and briefly in relation to the question of territoriality.[400] The former was under Section VI.C of the Memorial ("*The dispute is "in relation to" and "arising directly out of" investments*"). Paragraph 470 of the Memorial stated that:

> "*this 'reasonably close connection'* [being the alleged test for the nexus between an investment and a dispute under both the BIT and the ICSID Convention] *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 the purposes of jurisdiction*".

301. The Claimants separately addressed in some detail whether each alleged investment met the test under Article 25 ICSID Convention and the BIT for an investment under Section VI.D of the Memorial ("*The dispute relates to "investments"*"). Sub-sections (a) and (b) of that chapter dealt with the investments falling under the BIT and the ICSID Convention respectively. In particular, at paragraph 491 of the Memorial, the Claimants alleged:

> "*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*".(emphasis added)

302. The Claimants were at that stage suggesting that the Tribunal should look at the commercial operation as a whole to determine if the dispute "*related to*" or arose "*directly out of*" an investment, but addressed the question of whether there were any "*investments*" looking at each individually. The Claimants also suggested that there should be a global analysis for the question of territoriality, and that is addressed below.[401] What now appears to be argued is that all of the Claimants investments must be considered as one for *all jurisdictional purposes*, and that even if some investments fall outside the jurisdiction of the Tribunal, that is irrelevant so long as the operation

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400 Memorial, ¶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 assessment whether the jurisdictional requirement is met*".

401 See below, section 6.3.

constitutes "an" investment.[402] The point seems to be that if one aspect of the Claimants' "investment" (i.e. one of their investments) falls outside the established limits of the BIT and the ICSID Convention, that can be saved insofar as it forms part of "a" unified investment. There are, however, uncertainties regarding vital issues in the Claimants' new approach. In particular, the Claimants do not spell out with any precision what the alleged effect of their unity analysis would be.

303. Moreover, the concept of the "*snow crab business*"[403] itself is vague. On the Claimants' case (which Norway does not accept) the "business venture" seems to include Mr Levanidov's part in the joint venture, as well as well as at the production facility and the distribution and sales end (Seagourmet).[404] They were (on the Claimants' case) all part of the same broad venture.[405] But the Claimants do not—and could not—suggest that *Mr Levanidov's* losses form part of the compensation sought by the Claimants or that *his assets* are part of the relevant "unity". There is no dispute between the parties that Mr Levanidov is not an investor and this ICSID case is not about any losses that he or his businesses have suffered. That is because the Claimants recognise, as they must, that he is not an "investor" under the BIT.

304. Norway considers that the approach adopted by the Claimants is inconsistent with the wording of Article I(1) of the BIT and is not appropriate to the facts of the present dispute. Furthermore, even if the unity-based approach is adopted by the Tribunal, it would not change that the "investment"/"investments" lacks the territorial nexus to Norway and are not made in accordance with Norwegian laws and regulations, that is, the alleged "investment"/"investments" are not protected under the BIT. Alternatively, Norway considers that if the Tribunal were to adopt a unitary approach, the key element of the Claimants' investment would be the fishing licences, and this has important consequences when the Tribunal considers questions such as whether the "investment" (as it is now being portrayed) was made in accordance with Norwegian laws and regulations.

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402 See Reply, e.g. ¶494.

403 See Reply, e.g. ¶¶327, 363 or 498.

404 Reply, e.g. ¶363.

405 Reply, e.g. ¶382.

6.2.2 The Claimants' position regarding their 'investment' is inconsistent with Article I(1) of the BIT

305. It is for the Claimants to demonstrate that their approach is permissible under the BIT itself. They have not done this. The Claimants' analysis at paragraphs 479-480 is remarkable. They say:

> "*479. Norway, however, insists that some of the Claimants' assets comprising their investment in Norway do not fall within the categories listed under Article I(1). Norway notably submits that "in order for the alleged joint venture to form a relevant element in the dispute, the existence, characteristics, and terms of the joint venture must be established by the Claimants and shown to fall within the category of "claims to performance" under Article I(1)(iii) of the BIT".*
>
> *480. This argument ignores that Article I(1) of the BIT defines 'investment' as 'every kind of asset', 'in particular, though not exclusively' assets falling within the categories listed in subsections (I) through (V). The plain meaning of the terms 'in particular, though not exclusively' is that these categories do not define the concept of investment exhaustively. The relevant question under Article I(1) BIT is whether the elements comprising the investment qualify as 'assets', which includes, but is not limited to, the categories of assets listed in that provision.*" (emphasis in the original)

306. The relevant question is not whether "*the elements comprising the investment qualify as "assets"*". That reverses the wording of the BIT. The BIT says: "*The term "investment" shall mean every kind of asset invested in the territory of one contracting party in accordance with its laws and regulations* […]" (emphasis added). This is an important nuance, that the Claimants do not seem to recognise; "asset" is in the singular, not in plural as set out by the Claimants purportedly as a quotation from the BIT.

307. The BIT must of course be interpreted in line with the VCLT. Adopting that approach, the proper interpretation is clear. To qualify as an "*investment*" each "*asset*" is subject to the requirements of Article I(1) (including that they have to be "*invested in the territory of* [Norway] *in accordance with its laws and regulations*"). There is no scope within the BIT for the suggestion that one looks at a broad business operation as a whole to determine whether, looked at in the round, several assets can constitute "*an*" investment. The Claimants' attempt to blur the picture in order to overcome the real jurisdictional hurdles that they face simply does not pass muster under the BIT.

6.2.3 The facts of this dispute preclude a unitary approach

308. But in any event, even were the unity approach permissible here on the terms of the BIT, there is no factual basis for considering the Claimants' assets as "*an*" investment for jurisdictional purposes. In cases where Tribunals have considered various assets as one unified "investment", there has been a clear reason for doing so on the facts.

309. The Claimants quote the decision *Holiday Inns v Morocco*. As this decision is not public, the Claimants cite **CL-0114**, the decision in *Vestey Group Limited*, which provides the following small excerpt from the *Holiday Inns* award:

> "*It 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.*"

310. That quotation itself is taken from an article by the late Professor Pierre Lalive, who acted as counsel in the arbitration for the claimants.[406] The full quotation is instructive

> "*It is well known, and it is being particularly shown in the present case, 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. It is particularly important to ascertain which is the act which is the basis of the investment and which entails as measures of execution the other acts which have been concluded in order to carry it out*".

311. Two points in response to that paragraph are noteworthy. First, the claim was *not* based on a bilateral investment treaty, but on a contract known as the "Basic Agreement", signed between the Government of the Kingdom of Morocco on the one hand, and two companies, Holiday Inns Inc and the Occidental Petroleum Corporation, on the other.[407] It is not clear whether that contract had any definition of the term "*investment*" which was "asset-based" like in the present BIT. Secondly, the above-cited excerpt of the case appears to have been made in response to the facts that (as outlined at pp.156-157 of the article): (1) the 'Basic Agreement' provided that separate loan agreements would be entered into between the Credit Immobilier et Hôtelier bank in Morocco and locally-incorporated subsidiary companies; (2) those local subsidiaries were not parties to the

406 **RL-0242-ENG** Pierre Lalive, *The First "World Bank" Arbitration (Holiday Inns v Morocco)—Some Legal Problems*, 1981 51 BYBIL 123 at p.159.

407 *Id*., pp.125-126

claim; (3) those loan contracts provided a choice of forum clause; and (4) the "*main claims*" were for cessation of those loans.

312. Seen in the light of those facts, that the tribunal considered that it had jurisdiction is uncontroversial. That it considered that it was "*particularly important to ascertain which is the act which is the basis of the investment and which entails as measures of execution the other acts which have been concluded in order to carry it out*" is equally uncontroversial. Tribunals have permitted losses from locally incorporated subsidiaries whether by way of direct action or injury to shareholding. In the present dispute, there is no question of a similar situation.

313. The *Holiday Inns* award is therefore not authority for the proposition that an investor can gather together a wide range of disparate activities and assets and address them all as though they are 'an' investment, ignoring the fact that several of those assets simply do not meet the jurisdictional thresholds set out in the BIT and/or the ICSID Convention. In fact, when one reads the text of the Award itself (as opposed to the gloss put on it by counsel for the Claimants), it appears simply to be an uncontroversial statement of fact: investments can be complex operations accomplished by several different acts.

314. The Claimants also quote from *Vento Motorcycles v United Mexican States*[408] in relation to the joint venture. But that case is inapposite in response to Norway's criticism that under the BIT every asset must individually fulfil the definitional requirements of an investment; that case was governed by NAFTA which contains a different definition of "*investment*" in Article 1139, which is not a typical "asset-based" definition of 'investment'.[409]

315. Further, the ultimate point the Tribunal was deciding in *Vento* was different. There, Mexico argued that the joint venture was "*nothing more than a commercial contract for the sale of goods*". The Tribunal rejected that argument, in the passage cited by the Claimants.[410] That is not the jurisdictional objection taken by Norway. Norway's

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408 **CL-0445** *Vento Motorcycles, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/17/3, Award, 6 July 2020.

409 **RL-0255-ENG** NAFTA, Article 1139.

410 **CL-0445** *Vento Motorcycles, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/17/3, Award, 6 July 2020, ¶¶185-186.

primary position is that the joint venture simply does not exist. That has been dealt with above.[411] Secondly, Norway's alternative position is that the 'joint venture' does not meet the definition of an investment because there are no identified claims to performance, nor any economic value in such claims, nor do any such claims constitute an investment in the territory of Norway.[412]

316. As the *Vento* tribunal outlined, there was no dispute that the joint venture in that case existed.[413]

317. Before leaving *Vento*, it is noteworthy that the Tribunal in that case separately assessed whether the other alleged investment (two loans) constituted an "*investment*" without adopting any "*unity*" based analysis. That is the case even though the joint venture agreement in that case specifically provided for the making of the loans as one of its terms.[414] The Tribunal noted that the loans were entered into "pursuant to" the joint venture[415] but still treated the loans separately.

318. Where they have analysed several assets as "*an*" investment Tribunals have often done so because some key or head agreement specifically envisages the entering into of other ancillary or executionary elements of the operation.[416] This requirement could be met, for example, where the investors had concluded a main contract and ancillary contracts for the expansion of an airport,[417] or where directly interdependent contracts had been concluded.[418]

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411 See above, Section 5.2

412 See above, Section 5.3

413 **CL-0445** *Vento Motorcycles, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/17/3, Award, 6 July 2020, ¶177.

414 **CL-0445** *Vento Motorcycles, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/17/3, Award, 6 July 2020, ¶¶187.

415 *Id.*, ¶188.

416 See for example **CL-0281** Eureko B.V. v. Republic of Pol, 12 ICSID Rep. 335. 19 August 2005, Partial Award, ¶145; **RL-0224-ENG** *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award, 30 November 2011, ¶7.4.19; **CL-0136** *Alpha Projektholding v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, ¶¶272-273.

417 **CL-0243** *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, Award of the Tribunal, 2 October 2006, 15 ICSID Rep 539, ¶¶325 and 331.

418 **CL-0443** *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award, 8 March 2016, ¶293. See also quoted by the Claimants **CL-0442** *H&H Enterprises Investments, Inc. v. Arab*

319. The Claimants seem to claim that the alleged 'joint venture' is the relevant head agreement. But there is no sufficient evidence that the alleged joint venture was actually entered into. Once the alleged 'joint venture' falls away, the "unity" point falls with it.

320. Leaving those points aside, the Claimants' proposition is stark: the Claimants now make the argument that they have "*an*" investment, and therefore the Tribunal should ignore the fact that aspects of "*the investments*" (or various assets) fall outside the Tribunal's jurisdiction.

321. Assets which do not qualify as investments cannot sidestep established jurisdictional limits simply because they are all allegedly pointed in the same broad commercial direction. For example, a line of case law has determined that the parties to the ICSID Convention did not intend contracts for the sale of goods to be protected 'investments'.[419] The Claimants have not engaged with that case law.

322. The Claimants also do not address the limits of the principle for which they are advocating, or how far a "unity" approach should be taken. They do not, for example, address how much of "an" investment (made up of multiple assets) must fulfil the jurisdictional requirements of the BIT before the remainder (which does not) is dragged within the jurisdiction of the Tribunal. There is no clear principled basis for the point.

323. Whether or not a "unity" approach is adopted must depend on the facts of the case. It is certainly not true that any collection of assets can be "unified" together. For example, in *Khan Resources v Mongolia*, the Tribunal found on the facts (though there for breach purposes) that there was no basis for finding that mining and exploration licences constituted a single investment.[420] In *White Industries v India*,[421] the Claimant's assets consisted of a contract, a bank guarantee and an ICC award. The Claimant argued that

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Republic of Egypt, ICSID Case No. ARB/09/15, Decision on Respondent's Objections to Jurisdiction, 5 June 2012, ¶42.

419 See the authorities cited in the Counter-Memorial at ¶516, to which the Claimants have provided no answer.

420 **RL-0223-ENG** *Khan Resources Inc., Khan Resources B.V. and Cauc Holding Company Ltd. v. the Government of Mongolia and Monatom Co., Ltd.*, PCA Case No. 2011-09, Award, 2 March 2015, ¶291.

421 **RL-0224-ENG** *White Industries Australia Limited v. The Republic of India*, Final Award, 30 November 2011 (UNCITRAL).

it had "*made an investment*" consisting of all three of those assets.[422] The Claimant had alleged that its rights to the bank guarantee were a "*sub-set of the rights under the Contract*".[423] India therefore took the position that: "*if, as submitted above, the Contract was not an investment, neither were the Bank Guarantees*".[424] Nevertheless, the Tribunal, addressed each separately, and concluded that the 'Contract' was an investment but the bank guarantees were not.[425]

324. In this case, there are no grounds for suggesting that the Tribunal should approach the question of its jurisdiction on the basis that there is "*an*" investment. The Claimants have presented the Tribunal with a disaggregated plurality of assets, as evidenced above in relation in particular with the way in which the alleged joint venture was contributed to by Mr Pildegovics and Mr Levanidov.

325. But the unity analysis (even if possibly acceptable as a matter of principle) cannot as a matter of fact apply for all jurisdictional purposes, as the Tribunal in *CSOB* noted, in a decision rendered shortly after its decision on jurisdiction:

> "*In the First Decision, the Tribunal has held that the CSOB's claim and the related loan facility made available to SI qualify as investments within the meaning of the ICSID Convention and the BIT (paragraph 91). This does not mean, however, that the Tribunal thereby automatically acquires jurisdiction with regard to each agreement concluded to implement the wider investment operation. Other requirements have to be met for such jurisdiction to be established. That is, the fact that the agreement to arbitrate referred to in the First Decision must be construed in good faith does not necessarily mean that the interpretation of the consent of the parties under Article 25 (1) of the ICSID Convention must in each case be deemed to extend to any and all agreements comprising the entire transaction*".[426]

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422 *Id*., ¶4.1.6.: "*White says that its investment pursuant to the BIT comprises: (a) all of its contractual rights under the Contract; (b) all of its rights in relation to the Bank Guarantee; and (c) all of its rights under the Award*.

423 *Id*., ¶5.1.13.

424 *Ibid*.

425 *Id*,. ¶¶7.4.19; 7.5.7.

426 **CL-0110** *Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Respondent's Further and Partial Objection to Jurisdiction, 1 December 2000, ¶28.

326. As in *CSOB*, the fact that there is – or may be – a commercial operation or single business venture does not operate as a jurisdictional panacea so that each and every element of a transaction can be caught within the Tribunal's jurisdiction.

6.2.4 If the Tribunal were to apply a "unity" analysis, the key element of the Claimants' investment would be the fishing licences granted by Latvia

327. But in any case, if it is correct that the Tribunal should adopt a "unity" analysis, Norway says that that actually works *against* the Claimants. The Claimants say little about the nature of their alleged "*economic operation to be considered as a whole*". If the Tribunal is to conduct a search for the lynchpin or "head" 'investment', it should look towards the importance placed by the Claimants on the Latvian-issued licences. The place that they occupy in the Claimants' overall business operation is best summarised by the Claimants' claims about the overall impact of Norway's alleged actions in this case:

> "*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.*"[427]

328. From the Claimants' own presentation of their alleged investments – a presentation with which Norway does not agree – it appears that their so-called "fishing licences" occupy a special place. According to the Claimants, they would not have purchased vessels, entered contracts for the sale of snow crab, or set up a crab processing plant in Båtsfjord if they had not been "able" to harvest snow crab in the Loop Hole.[428] And the importance that the Claimants place on those licences in relation to their allegation of breach is clear:

> "*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 licencses and destroying their economic operation in the process*".[429]

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427 Memorial, ¶409.

428 See Reply, ¶231.

429 Memorial, ¶611.

329. The Tribunal must take this into account when considering the dispute. If, as Norway has shown, the licences are manifestly outside the jurisdiction of the Tribunal, it follows that the whole "unified" investment must be.

330. With those points in mind (and reserving its rights given that several matters are not entirely clear to Norway at this stage), Norway addresses the two broad points made in the Claimants' Reply: territoriality and in accordance with law.

6.3 TERRITORIALITY

6.3.1 The Tribunal should not adopt a "unity" approach to territoriality

331. For the reasons given above, Norway disagrees with the Claimants that the relevant question is whether the business operation as a whole has sufficient nexus to the territory of Norway. Norway submits that the question of whether the territoriality threshold under the BIT is met must be assessed in respect of each investment individually, as required by the BIT.

332. But, as above, if there is "an" investment, its core are the Claimants' so-called licences and if they fall outside the territorial scope of the BIT, so too does "the investment" as a whole.

333. The Claimants cite the decision of *Inmaris* for the proposition that "*it is not necessary to parse the territorial nexus of each and every component of the Claimants' investment*".[430] But that decision was based on the 1993 Germany Ukraine BIT[431] which as the Tribunal noted:

> "*does not include an explicit territoriality requirement in the provision of the Treaty that most directly defines the scope of its application: Article 2(2) provides only that "[i]nvestments, which have been undertaken by nationals or companies of the other Contracting Party in accordance with the legal regulations of a Contracting Party in the field of application of its legal system, shall enjoy the full protection of the Treaty." Likewise, "investment" is not defined in Article 1(1) by reference to the territory in which the investment is made*".[432]

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430 Reply ¶497.

431 **RL-0244-DE; RL-0269-ENG** Agreement Between Germany and Ukraine for the Promotion and the Protection of Investments, adopted on 15 February 1993.

432 **CL-0118** *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010 ¶114.

334. The Tribunal interpreted the BIT as requiring a territorial link (para. 121), but they did not interpret it as requiring every asset to be in the territory. But that is precisely what the BIT requires here. The correct approach is therefore to address in respect of each alleged investment whether they fulfil the territorial requirements of the BIT.

335. Norway has, in its Counter-Memorial, conducted this analysis and outlined which of those investments do not fulfil the territoriality threshold established by the BIT.[433] Those have not been individually addressed by the Claimants and they therefore do not require repetition in this Rejoinder. They are maintained in full. What follows is strictly without prejudice to that point.

6.3.2 If the Tribunal were to adopt a "unity" analysis, the Claimants' investments are distinct and severable and should be addressed individually with regard to territoriality

336. Where tribunals have examined groups of individual investments as a whole for the purpose of determining whether together they amount to 'an investment' which has a sufficient territorial nexus with the host State, they have recognised that the relevant question is whether there is a substantial and non-severable aspect of the investment which qualifies under the territoriality threshold.[434]

337. In *SGS v Philippines*, SGS was obliged under a contract to carry out exclusive pre-shipment inspection in any country of export to the Philippines, and was required as part of the contractual arrangement to maintain a liaison office in the Philippines. As such:

337.1. All services were being provided under the 'CISS Agreement' by which SGS was to provide a complete set of services "*both within and outside the*

433 Counter-Memorial, **Chapter 5**.

434 See: **CL-0205** *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, ¶102; cited in **CL-0232** *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009, ¶102

Philippines, with a view to improving and integrating the import services and associated customs revenue gathering of the Philippines".[435]

337.2. The services included the issuance of a certificate within the Philippines on the basis of which import clearance could be expedited.[436]

337.3. The Tribunal noted in that case that the position might well have been different if SGS had performed some of its services abroad.[437]

338. In that case, therefore, although the inspections themselves took place abroad (in the exporting State) certificates were issued in the Philippines. As the Tribunal noted (at [102]):

> "*The position might have been different if SGS had provided the certificates and issued its reports abroad, e.g. to a Philippines trade mission in each country of export. But it did not perform the service in that way, nor did the CISS Agreement envisage that it would do so. A substantial and non-severable aspect of the overall service was provided in the Philippines, and SGS's entitlement to be paid was contingent on that aspect.*" (emphasis added)

339. Similarly, in *SGS v Paraguay*:

> "*And because the Claimant's investment is not divisible in the way Paraguay contends, the suggestion also fails that this dispute does not arise directly out of an investment in the territory of Paraguay. The services provided by SGS in Paraguay were not severable or ancillary; they were part and parcel of the services for which SGS expected to be paid under the Contract. Even if it were possible to segregate the services in the manner Respondent suggests, on the facts presented, it is not plausible to maintain that Paraguay's alleged nonpayment relates solely to SGS's services abroad. SGS claims that its invoices for the periods after June 1996 (with only one exception) went unpaid in their entirety. There has been no suggestion by Paraguay that it paid some portions of those invoices that were attributable to in-country services while leaving unpaid only those portions attributable to services rendered outside Paraguay. Thus, for purposes of ICSID Convention Article 25(1)'s jurisdictional requirement, the Tribunal holds that Claimant's claims give rise to the requisite "legal dispute arising directly out of an investment*".[438]

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435 **CL-0205** *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, ¶101.

436 *Ibid*.

437 *Id.*, [102].

438 **CL-0161** *SGS Société Générale de Surveillance SA v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction (12 February 2010), ¶115 (emphasis added).

340. The Claimants rely on the *SGS* cases as being supportive of their position.[439] But in those cases, the respondent State tried to sub-divide services provided under a single contract. By contrast, in this case it is clear that the Claimants' plurality of investments are logically and practically severable and can be analysed separately. Individual elements (such as the vessels and Sea & Coast) could and did function independently of one another. When that analysis is done, it is clear that they are not investments in the territory of Norway.

341. Fishing licences and fishing capacity rights: In relation to North Star's "fishing licence rights" and "fishing capacity" (which were presented in the Memorial as distinct investments)[440] it is clear that those licences and that capacity are severable and distinct from other aspects of the case, and cannot be considered as part of any investment(s) in the territory of Norway.

341.1. First, the fishing permits were issued by Latvia to North Star, and fishing capacity is an EU-based right to operate fishing vessels, acquired from a third party in Latvia, and then approved by Latvia;[441] Norway was entirely unconnected with their issuance or maintenance in any way whatsoever. The Claimant sought them from Latvia (not Norway) and obtained them from Latvia (not Norway). That is in stark contrast to the position in the *SGS* cases.

341.2. Second, both are entirely unopposable to Norway. On the Claimants' own case, the Latvian fishing licences gave the Claimants "*the right to engage in fishing operations in international waters*".[442] A licence, issued by a third State, allegedly permitting the Claimants to undertake an activity in the water column of international waters, is in no way connected to Norwegian "territory" as defined in the BIT. In relation to the fishing capacity, Mr Pildegovics' own evidence is that the goal of the scheme is "*to limit the number of EU ships that can fish at any given time*".[443] If the tribunal in *SGS v Philippines* considered

439 Claimants' Reply, ¶507.

440 Memorial, ¶¶271-297.

441 Pildegovics 1, ¶¶79-80.

442 Claimants' Memorial, ¶277.

443 Pildegovics 1, ¶76.

that the position "*might have been different*" if SGS issued its certificates – under a contract with the Philippines – in third States, the position is *a fortiori* in this case. Neither the fishing capacity nor the Claimants' Latvian licences were geared towards anything other than fishing in international waters in accordance with a domestic Latvian and EU regime.

341.3. Third, neither the licences nor the fishing capacity are capable of granting, and nor do they on their face appear to grant, North Star any legal right to exploit resources on the Norwegian continental shelf (see **Chapter 2** above) – which forms part of Norway's "territory" for the purposes of the BIT. The Claimants never had such a legal right.[444] The BIT defines the territory of Norway as <u>including</u> its continental shelf in the Loop Hole but <u>excluding</u> the suprajacent waters thereto (which as the parties are agreed,[445] are international waters). The Claimants are caught in a jurisdictional quandary for which they have provided no convincing answer: either (1) snow crab is sedentary (which Norway says it is) and the licences obtained by the Claimants from Latvia were invalid insofar as they permitted the harvesting of snow crab (which the Claimants say that they did); or (2) snow crab is not sedentary in which case the activity was done in international waters and the licences purportedly authorising that activity are in no way an investment (or *part* of an investment) within the protection of the BIT since they are not in Norway's "territory" as defined by the BIT.

341.4. In their Memorial at paragraph 537 the Claimants asserted (without argument or citation of authority) that the definition of territory included "*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* […]". It is not clear if the Claimants maintain this position: it is obviously wrong for the reasons outlined in Norway's Counter-Memorial (at paragraph 482 *et seq*).

444 Nor does it appear that the Claimants believed that they did. They say that they did not "*pretend to "have rights to fish in Norwegian waters"*" (Reply, ¶548).

445 Memorial, ¶79, Counter-Memorial § 2.2.1.2.

341.5. Fourthly, the licences are entirely severable from the remainder of the Claimants' alleged business operations. They do not (as in *SGS*) form part of an activity governed by a contract with Norway. They are an authorisation which the Claimants believed that they needed to obtain – *as a matter of EU law* – in order to 'fish' for snow crab in international waters.

341.6. The Claimants cite *Saar Papier v Poland (I)*[446] and state that "*the Claimants' snow crab business can be analogized to a business whose operation in a host country depends on importing raw materials from outside the country*".[447] The analogy is not accepted by Norway. In any event, it cannot be suggested that in such a case a claimant's licences issued and obtained outside the host State, complying with a pre-requisite (again, applicable outside the host State) to enable the claimant to harvest the raw materials outside the host State, could be an investment within the country in which the raw materials are eventually imported. In *Saar* itself the Claimants put forward no such point. The BIT does not – and should not be held to – protect every single stage of any cross-border business. Its purpose is to protect investments *in* the host State.

341.7. It is not quite clear what the Claimants are getting at when they say in paragraph 517 of the Reply that "*the origin of the resource used to perform the economic activity is not decisive*". The origin of the Claimants' harvests of snow crab is quite clearly at the centre of this case. Norway has at no point prevented the Claimants from what they now describe as their business "*to sell snow crab*" (emphasis in original).

342. Vessels: Norway maintains the position that it set out in its Memorial on the lack of any territorial connection with the Claimants' vessels *vis-à-vis* the harvesting of snow crab.[448] It is notable that the Claimants accept that their harvesting of snow crab was not an economic activity in and of itself.[449]

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446 **CL-0449** *Saar Papier Vertriebs GmbH v. Republic of Poland (I)*, Ad hoc Arbitration, Final Award, 16 October 1995.

447 The Claimants' Reply, ¶518,

448 Memorial, ¶¶480-498.

449 The Claimants' Reply, ¶516. Norway itself expresses no view on that position.

343. The Claimants have noted that the vast majority of their catch was unloaded in Norway. Norway accepts that the unloading and delivery of a resource (here, snow crab) to ports in Norway is an economic activity that took place in Norway. That economic activity is covered by the Claimants' sales contracts. Norway's position on those sales contracts has been outlined in its Counter-Memorial (paragraphs 513-533) and is also summarised below (paragraph 349). In relation to the vessels, they are not investments in Norway simply because they unloaded a resource in Norway. Vessels are not 'investments' in every country in whose ports they load or unload cargo.

344. Sea & Coast: Although Norway accepts that Mr Pildegovics' shares in Sea & Coast are shares in a Norwegian company and therefore *prima facie* "an" investment,[450] it does not accept that they are part of "the" investment now alleged by the Claimants. Although Sea & Coast is said to have provided services as a shipping agent to North Star and its vessels, the Claimants themselves acknowledge that Sea & Coast's business was far broader.[451] In its Counter-Memorial, Norway demonstrated that Sea & Coast's revenues from North Star only encompassed some 14% of Sea & Coast's revenue in 2015, and less than 10% in 2016.[452] It is not the case that Sea & Coast was a business established wholly (or even, as it appears, mainly) to service the "business venture" which has been alleged. It was, at best, an ancillary bolt-on and can therefore be set aside and examined individually.

345. Additional vessels: Norway similarly maintains its territorial objection in relation to the contractual rights to purchase additional vessels.[453] Even if North Star were right (contrary to Norway's case) that its four vessels actually in operation in the Barents

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450 See Pildegovics 2, ¶12. However, Norway notes one point as to which its rights are reserved. Sea & Coast's 2014 accounts suggest that a short-term loan of NOK 30,000 was made to a shareholder. At the time, the only shareholder was Mr Ankipov (**C-0031; PP-0215**). Pursuant to Norwegian accounting regulations (**RL-0254-NOR; RL-0243-ENG**), a "*short term loan*" is one that is repayable within one year. But the same amount appears in the 2015 accounts (**R-0144-NOR; R-0143-ENG**), when Mr Pildegovics was the sole shareholder. The Norwegian Company Act (**RL-0253-NOR; RL-0271**) requires that such loans are either backed by security (Section 8-7) or that they are provided in the ordinary course of business (see e.g. Section 3-8). It is also noteworthy that the amount of the loan (which was either transferred from Mr Ankipov to Mr Pildegovics or paid back and remade) corresponds precisely to Sea & Coast's paid up shareholder capital (which is the minimum required under Norwegian law).

451 Memorial, ¶508.

452 Counter-Memorial, ¶156.

453 Counter-Memorial, ¶511.

were investments in the territory of Norway because "*every fishing trip started and ended in Båtsfjord, and the ships were berthed there between trips*",[454] the same cannot be said for the vessels which the Claimants did not have in their possession at any material time. They are said to be investments because they are claims to performance in the delivery of vessels.

346. The letters of intent do not specify the place of delivery, only that the vessel:

> "*will be conveyed on the basis of the Deed of Conveyance of the sea vessel at the port where the vessel is*".[455]

347. The Claimants' argument amounts to suggesting that a contract for the delivery of an asset which they planned to use (at least in part) in Norway is itself an investment in the territory of Norway. That cannot be right, and makes a nonsense of the intention of the parties to the BIT to limit the protection of investments to those "*invested in the territory*" of Norway or Latvia.

348. The Claimants' rights for the future delivery of vessels are therefore not investments within the territory of Norway and in any case are distinct and severable. Indeed, the Claimants' themselves premise their arguments on the fact that they had not yet brought these vessels to bear in their business operation (and therefore these contingent assets were no part of that business).

349. Supply contracts: North Star's supply contracts are also not investments in the territory of Norway, and in any case are distinct and severable from its other investments. They are separate contracts, containing their own clauses and claims to performance which need to be addressed independently from other contracts in the case. In its Counter-Memorial,[456] Norway outlined that there were no identified claims to performance under those supply contracts; and that any claims to performance that North Star had would have been claims for payment from Seagourmet, [redacted] presumably to North Star's Latvian bank account. In the case of Seagourmet,

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454 Reply, ¶503(b).

455 **PP-0102; PP-0103**.

456 Counter-Memorial, ¶¶522, 525-527.

those payments were in Euros.[457] In the case of [redacted], they were in US Dollars.[458] No payments were in Norwegian Kroner. The Claimants have not provided any sufficient response to that point.

350. Norway also identified[459] that the contracts were governed by Latvian law and subject to Latvian court jurisdiction. The Claimants have responded to that point, arguing that it does not "*have any meaningful impact*" on the territoriality of the Claimants' alleged single investment.[460] That is wrong; taken together with the other factors it is clear that North Star's investment (*i.e.* its claims—if any—to money from its contractual counterparties) would have been a claim for money in Latvia and therefore not an investment in Norway and severable and distinct from any investment in Norway.

351. Mr Pildegovics' shares in North Star: Mr Pildegovics' shareholding in North Star is clearly not an investment in Norway. That argument has been dealt with by Norway at paragraphs 461-465 of its Counter-Memorial and does not need to be repeated. Mr Pildegovics' shareholding is plainly severable and separate from activities conducted by North Star in Norway.

352. Joint venture: Finally, it follows that Mr Pildegovics' claims as against Mr Levanidov under the alleged 'joint venture' are also distinct and severable. The fact that—on the Claimants' case—the alleged 'joint venture' is said to have encompassed some of the other alleged investments in the case (notably, Mr Pildegovics' claim to performance against Mr Levanidov of the latter's alleged obligation to "*source Seagourmet's supplies of snow crab from North Star*"[461]) is insufficient to suggest that it should be addressed with those other elements for the purpose of determining its territoriality. Its territoriality must be addressed individually. It is a separate contract allegedly entered into between the two men (and not their companies).

353. The Claimants are wrong to suggest that Dr Ryssdal's testimony is "*unopposed*" by Norway. It is opposed (though not by way of expert testimony) and Norway's detailed

457 **C-0053**; **C-0054**.

458 **C-0066**; **C-0067**.

459 Counter-Memorial, ¶525.

460 Reply, ¶524.

461 Reply, ¶484.

submissions on the Norwegian law position have been set out in its Counter-Memorial at paragraphs 447-460.

6.3.3 In any event, even considered as a whole, the Claimants' investments are not made in the territory of Norway

354. But even if the Tribunal were to consider, contrary to Norway's position, that it would be of assistance to address the territoriality of the various investments considered as a single "investment", the Claimants investments simply fail to cross the relevant threshold. Even when looked at in that way, it is clear that the relevant territorial link was not to Norway.

354.1. The key cornerstone of the Claimants' alleged rights in this case and the source of their alleged right to harvest snow crab was their fishing licences. These were applied for by North Star in Latvia,[462] issued in Latvia by the Latvian Environmental Service. Norway has addressed those licences and their purported content in more detail above (**Chapter 2**, above).

354.2. The Claimants also allege that their "fishing capacity" was an investment. This is a purely internal EU requirement to introduce their fleet into the Latvian shipping registry.[463] That 'fishing capacity' entailed no right whatsoever to engage in fishing or crabbing in Norway.[464]

354.3. The activity conducted by the Claimants was the taking of snow crab from the Russian continental shelf. That activity was conducted by the Claimants' vessels, which were Latvian flagged.

354.4. It is true that the Claimants landed their Russian catches in Båtsfjord. But that was pursuant to sale of goods contracts with Seagourmet and others. The "*economic goal*" of North Star was not to "*supply snow crabs*".[465] It was obviously to be *paid* for that supply. And that payment—the actual "claims to performance" that North Star has in relation to those contracts—are claims to

462 **C-0004** to **C-0030**.

463 Counter-Memorial, ¶19.2.

464 Counter-Memorial, ¶501.

465 Reply, ¶499.

payment in Euro or US Dollars and to North Star's bank account in Latvia.[466] Unlike the bonds in the case of *Ambiente Ufficio* referred to by the Claimants,[467] the benefit of North Star's 'investment' in those contracts actually accrued to Latvia, where North Star presumably received payment and paid (or was supposed to pay) its taxes.

354.5. Norway also accepts that Sea & Coast AS entered into agency agreements with North Star to act for its four Vessels "*in ports of call* […] *in Norway*". But this point of contact with Norway is insufficient. And in any case no claim is being made in respect of Sea & Coast's contracts with North Star. Nor does it appear that any losses are being advanced on behalf of Sea & Coast.[468]

355. When the entirety of the Claimants' alleged investments are viewed as a whole, therefore, the vast majority of the relevant points of contact with territory are not with Norway.

356. The Claimants attempt to skirt around these points by focusing on the "*activities*" of the joint venture[469] and of Mr Levanidov's company Seagourmet, and relying on the fact that Seagourmet was established in Båtsfjord. The benefit to Båtsfjord that the Claimants rely on in the witness testimony of Mayor Geir Knutsen relates exclusively to the benefit brought by Mr Levanidov's factory. That is clearly the wrong approach:

356.1. There can be no real debate that the territoriality of Mr Levanidov's business (Seagourmet) has no impact on the territoriality of the Claimants' business. It is therefore totally irrelevant that "*the joint venture had three main activities*". What matters are the *Claimants'* activities. Norway notes again that the alleged 'joint venture' has no legal personality and therefore no "activities" belong to it. The question is where the Claimants' assets are. The Claimants assets are not in the Båtsfjord processing facility.

466 Counter-Memorial, ¶¶525-527.

467 Reply, ¶506.

468 Counter-Memorial, ¶471.

469 Memorial, ¶577.

356.2. Nor can the fact that there is a Båtsfjord processing facility really assist the Claimants anyway as a matter of fact. Seagourmet itself, in an input to a public consultation in 2017, stated as follows in relation to its 2016 work:

> "*In 2016 factory purchased around 1 500 000 kg of live snow crab and 40 000 kg of live king crab. It was 40 times unloading from 3 Latvian fishing vessels and 96 times unloading from 19 Norwegian fishing vessels*".[470]

356.3. So less than 30% of Seagourmet's unloadings were from Latvian vessels, and the remainder from Norwegian vessels. Add to that that Mr Levanidov established the Båtsfjord processing facility in 2009 (five years before the new date of the alleged 'joint venture'), and the obvious conclusion is that the Claimants cannot prove their assertion that the Båtsfjord processing facility was an integral part of some 'joint venture' and therefore the Claimants' investments are in Norway. That factory existed long before the North Star was even incorporated.

356.4. The Claimants allege that the companies were operated from Båtsfjord[471] and that "*North Star & Sea & Coast also rented accommodation in Baatsfjord for some of their staff from Seagourmet*".[472] But the only invoice presented is one addressed to Sea & Coast, described as a sample.

6.3.4 Conclusion

357. Norway therefore maintains its arguments on the lack of a territorial connection between various of the Claimants investments.

6.4 IN ACCORDANCE WITH LAW

358. The next question is whether investments were made "*in accordance with* [Norway's] *laws and regulations*". The Claimants have cited several cases on the requirement of legality, in which Tribunals are broadly of the view that illegality post-inception of an investment does not bear upon the scope of the Tribunal's jurisdiction. Tribunals have

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470 **R-0410-ENG** Remark from Seagourmet Norway AS on 29 June 2017 to a public consultation from the Norwegian Ministry of Trade, Industry and Fisheries. Note that the document also refers to a playground built by Seagourmet not (as Knutsen, ¶5) suggests by both cousins.

471 Memorial, ¶577(b).

472 Memorial, ¶224.

of course stated that illegality in the operation of the investment bears upon questions of merits, and Norway addresses that in the chapters that follow. Norway does not disagree with those authorities; the disagreement between the parties is one of the application of principle to the facts of this case.

359. The Claimants do not expressly state under this Section that their "unity" analysis goes so far as to cover the question whether the investments were made in accordance with law. At paragraph 531 of their Reply the Claimants note the way in which the question of legality arises as it applies to the *ratione materiae* jurisdiction of the Tribunal. They say (emphasis in original):

> "*The question of the conformity of the Claimants' investment with the laws and regulations of Norway arises as a jurisdictional question, since the concept of "investment" under Article I(1) of the BIT is defined as "every kind of asset invested in the territory of one contracting party in accordance with its laws and regulations*"

360. But why not? The Claimants own sources indicate that this is the proper conclusion of the so-called "unity" analysis. Thus, in an article by Christoph Schreuer regarding the concept of unity, cited by the Claimants, it is said:

> "*In some cases, tribunals have used the concept of the unity of the investment to extend the consequences of an illegality to the entire investment. An illegality that tainted one aspect of the investment's formation had the consequence of withdrawing protection from the entire investment. This included the negation of jurisdiction over the investment.*"[473]

361. The Claimants attempt to have their cake and eat it by picking and choosing at what points to apply their so-called unity analysis. Norway is clear that there should be no unity analysis for any purposes.

362. In *Mamidoil Jetoil Greek Petroleum Products Société Anonyme S.A. v. Republic of Albania*, the Tribunal held the Claimants' investments involved shareholding in a local construction company, and the construction of oil storage facilities supported by a lease agreement. The Tribunal considered that these different activities could not be considered in isolation. Examining the legality of the construction of the storage plant, it stated that "*the components of the investment form an inseparable whole and that the*

473 **CL-0446**.

determination of the legality of the construction and/or operation of the tank farm would affect its totality."[474]

363. That point is particularly important in relation, for example, to Latvian licences that Claimants say gave them rights to harvest snow crab on the Norwegian continental shelf despite such harvesting being unlawful under Norwegian law. Below, Norway therefore addresses the position in respect of each asset individually, as Norway maintains that the unity approach is inappropriate in this case. But, were the Tribunal to apply it, Norway's position is that the illegality of one aspect would infect the remainder.

6.4.1 'Fishing licences'

364. The Claimants have focused their arguments on the question of the legality of North Star's 'fishing licences', which Norway considers invalid. The Claimants say that these licences were issued before either the 2015 Agreed Minutes or any enforcement action that was taken by Norway against the Claimants.[475] The Claimants then say that, when Norway introduced its legislation preventing the harvesting/fishing of snow crab on its continental shelf, it was a retroactive reclassification of the Claimants' "investment" (singular) as unlawful.[476]

365. Before addressing this point, Norway notes the absurdity to which the Claimants have pushed their point that there was a single investment, describing North Star's Latvian licences (which do not and have at no time belonged to Mr Pildegovics) as "*the Claimants' fishing licences*"[477] and "*the Claimants' NEAFC licences*"[478] which authorised "*the Claimants' fishing activities*".[479] These are assets which have only ever been said to have been owned by North Star. The concept of 'unity' cannot be taken so far as to override the question of actual ownership of each investment.

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474 **CL-0119** *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, ¶369

475 Reply, ¶¶531 *et seq*.

476 Reply, ¶¶544-546.

477 Reply, ¶543.

478 Reply, ¶545.

479 *Ibid*.

366. Turning to the point itself, the chronology appears to be broadly a matter of common ground:[480]

366.1. North Star's first "licence" appears to have been issued on 1 July 2014 (**C-0023**) in respect of the *Solvita*.

366.2. North Star began harvesting snow crab in July 2014 on the Russian continental shelf. Its first voyage was the *Solvita*'s voyage between 24 July and 24 August 2014.[481]

366.3. Further licences were issued from 1 January 2015 onwards as per the table produced in Norway's Counter-Memorial at paragraph 669.

366.4. A meeting between Norway and Russia took place on 17 July 2015, the Agreed Minutes of which the Claimants say (and Norway denies) represented a change in Norway's position on snow crab.

366.5. As a matter of Norwegian law, Norway extended the prohibition on the harvesting of snow crab to the Norwegian continental shelf in the Loop Hole from 22 December 2015 onwards.[482]

366.6. The Claimants' first confirmed attempt to harvest snow crab on the Norwegian continental shelf was in June 2016 in respect of the *Senator*.[483] It was arrested for this activity.

367. The Claimants' argument that Norway cannot rely on illegality because Latvia had issued the Claimants with 'fishing licences' before the 2015 Agreed Minutes misses the mark.

368. First, the licences were null and void as a matter of Norwegian law, insofar as they permitted the Claimants to harvest snow crab (a resource on the Norwegian continental

480 Save, of course, that Norway does not agree that the Norway "changed its position" at any time.

481 **R-0155**, pp.13 et seq.

482 Counter-Memorial, ¶108.

483 **R-0153**, pp.31 et seq.

shelf over which Norway has exclusive sovereign rights).[484] The issue of the lawfulness of those licences is a matter between Norway and Latvia (and see **Chapter 4** above in that regard).

369. Secondly, and in any event, there was no attempt by the Claimants to actually use those licences to harvest snow crab on the Norwegian continental shelf (as opposed to the Russian continental shelf) before it was illegal as a matter of Norwegian law. It is the legality of harvesting which is at issue, not the legality of landing. Norway has never prohibited the landing of snow crab, as it has already explained.[485] As of October 2014, as far as Norway is aware there had been no commercial landings of snow crab harvested on the Norwegian continental shelf .[486] The simple fact is that the Claimants did not attempt to harvest snow crab on the Norwegian continental shelf until June 2016, at a time when it had been clear for months that doing so was illegal as a matter of Norwegian law.[487]

370. To put the point another way, Norway considers that the Latvian licences held by the Claimants had no legal effect whatever insofar as they purported to authorise the exploitation of resources on the Norwegian continental shelf. The Latvian licences were nullities, of no significance whatever from Norway's perspective: what *was* legally significant was the actual attempt by the Claimants to harvest snow crab on the Norwegian continental shelf in breach of Norwegian law.

371. The contemporaneous AIS data for the Claimants' vessels show that that North Star's licences were not actually used in Norway until it was unlawful to do so as a matter of Norwegian law. The Claimants have not opposed the correctness of that data. The Claimants obtained new licences for their vessels on 1 January 2016;[488] 1 January

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484 And of course before deciding that it does do that, the Tribunal would need to actually construe those licences (see **Chapter 2**, above).

485 Counter-Memorial, ¶4.

486 *Id.*, ¶106.

487 Counter-Memorial, ¶¶705; 749; 755.

488 See **C-0005** and **C-0006** (*Saldus*); **C-0012** and **C-0013** (*Senator*); **C-0019** and **C-0020** (*Solveiga*) and **C-0025** and **C-0026** (*Solvita*).

2017[489] and 1 January 2018[490] — after Norway's December 2015 amendments prohibiting the harvesting of snow crab on the Norwegian continental shelf beyond 200 nautical miles came into effect. There can be no dispute that *those* licences (including those authorising the harvesting of snow crab on the continental shelf in the maritime areas around Svalbard) were not made in accordance with Norwegian law.

372. The Claimants' view is that their claim is analogous to those in which an investor undertakes an activity for several years and then the legislation changes to prevent or outlaw that activity. That analogy must fail. Fishing and crabbing at sea is not comparable to a long-term mining contract. It is obvious that it is an activity licensed year by year, and that the terms (and even the availability) of an annual licence will vary according to the state of the stocks and the fisheries policies being pursued by the licensing State (and of course here, the purportedly licensing State was not even the State doing the legislating). Furthermore, in the present case the activity in which the Claimants had in fact been engaged and which they lost the opportunity to continue was the harvesting of snow crab on Russia's continental shelf. That was an action that Russia – and Russia alone – took. The Claimants did not harvest snow crab on the Norwegian continental shelf save for a *possible* (but unlikely and unproven) *de minimis* amount (<0.2%).[491] The other action in Norway – the landing, processing and sale of snow crab – has not at any relevant time been prohibited by Norway. For all the reasons stated in Norway's Counter-Memorial and in this Rejoinder those matters are obviously separate.

373. The particular mischief that the cases cited by the Claimants sought to prevent is a State permitting an activity for several years, and then *retroactively* making it unlawful. There was no such mischief in this case. What is clear, however, is that when the Claimants attempted—for the first time—to use their 'fishing licences' *in* Norway (on its continental shelf), it was (and had for some months been) completely illegal. The

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489 See **C-0007** and **C-0008** (*Saldus*); **C-0014** and **C-0015** (*Senator*); **C-0021** and **C-0022** (*Solveiga*) and **C-0027** and **C-0028** (*Solvita*).

490 See **C-0009** and **C-0010** (*Saldus*); **C-0016** and **C-0017** (*Senator*); and **C-0029** and **C-0030** (*Solvita*).

491 Counter-Memorial, ¶144.

Claimants knew this. Further and as has been stated above (**Chapter 2**), Norway always had the exclusive sovereign right to regulate the harvesting of snow crab in any event.

6.4.2 Vessels

374. The position is much the same in relation to the four Vessels belonging to North Star. The Claimants complain that Norway has not "*identif*[ied] *the source of any such "contravention", since of course there is none*".[492] Norway did indeed identify its laws and regulations at paragraphs 494-496 of its Counter-Memorial. To restate, as a matter of Norwegian law (and notwithstanding Norway's sovereign rights as a matter of international law over snow crab):

374.1. Norway's laws (in particular, the Participation Act) provide that commercial fishing requires permission (Section 4). That permission can only be granted to companies which are owned at least 60% by Norwegian citizens (Section 5).[493]

374.2. Mr Levanidov made Mr Pildegovics aware of this requirement of Norwegian law in 2010.[494] Thus, both Mr Pildegovics and North Star were well aware of it.

374.3. Mr Pildegovics and North Star therefore knew that no harvesting could take place in areas of Norwegian jurisdiction without Norwegian permission, or Norwegian consent based on an agreement between Norway and the flag state (or, in the case of Latvian-flagged vessels, with the EU).

374.4. That is no doubt part of the reason why the Claimants initially made no attempt to harvest snow crab on the Norwegian continental shelf once it was regulated by Norway. As stated in Norway's Counter-Memorial,[495] the Claimants first attempted to harvest snow crab on the Norwegian continental shelf <u>months</u> after it had become illegal under Norwegian law.

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492 Reply, ¶549.

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

494 **PP-0009**.

495 Counter-Memorial, ¶705.

374.5. It was not until 17 May 2018 that North Star applied *to Norway* for a permit to harvest snow crab on the Norwegian continental shelf. The application was rejected because the Claimants did not possess the requisite licence according to the Participation Act. This is a matter which they had known for several years at this point.

375. Norway's position in relation to the Claimants' vessels is not therefore that the vessels themselves were an unlawful investment by their acquisition. Norway instead says that the Tribunal has no jurisdiction over any alleged breach of the BIT relating to the actions of those vessels on the Norwegian continental shelf, because the first utilisation of them on the Norwegian continental shelf (i.e. the first time that the Claimants in fact attempted to operate their vessels in the harvesting of snow crab in Norway) was after that harvesting had already been forbidden by Norwegian law. It matters not, in Norway's submission, that the Claimants had been for months been operating their vessels in Russia without penalty. The point can be analogised to a *ratione temporis* point. Norway says that, if the vessels and licences were in fact "investments", they were made (i.e., invested) in Norway at a time when it was unlawful for the Claimants to have done so as a matter of Norwegian law.

6.5 CONCLUSION

376. Norway maintains its jurisdictional objections in relation to the non-existence of an investment protected by the BIT at the relevant times. Norway furthermore does not accept that the Claimants' investments can be presented as a single whole, pursuant to a "unity" analysis in this case.

PART III: NORWAY'S CONDUCT

CHAPTER 7: NORWAY'S ALLEGED COLLUSION / COORDINATION WITH RUSSIA

7.1 INTRODUCTION

377. In their Memorial, the Claimants asserted that "*whether or not snow crabs are a sedentary or non-sedentary species is not a live issue for this Tribunal*".[496] According to the Claimants' Reply, their "*core submission is that Norway has changed its position on the designation of snow crabs, thus changing the legal regime applicable to the Loop Hole's snow crab fishery and impacting the Claimants' investment in the territory of Norway*."[497] These broad allegations of breach are dealt with in greater detail in **Chapters 8-11** below.

378. But there is one particular factual allegation made by the Claimants that merits separate attention before turning to breach of the BIT more generally. Under the headings "*Norway's Coordinated Efforts with Russia to Close the Loophole's Snow Crab Fishery to EU Vessels*"[498] and "*Norway Acted in Concert with Russia to Close the Entire Loophole to EU Snow Crab Fishing Vessels Including the Claimants*",[499] the Claimants' try to create an impression that Norway conspired or colluded with Russia in order to illegitimately exclude them from the emerging snow crab harvesting in the Loop Hole.

379. There is nothing illegitimate, conspicuous or conspiratorial about Norway and Russia's fisheries cooperation.

7.2 NORWAY AND RUSSIA'S FISHERIES COOPERATION IN THE BARENTS SEA

380. The Barents Sea is one of the richest and most productive ocean areas in the world. The vast majority of it is covered by Norwegian and Russian 200 nautical mile zones. All

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496 Memorial, ¶598.

497 Reply, ¶594.

498 Reply, Section III(A)(e), ¶¶171-207.

499 Reply, Section VI(A)(b)(v).

of the most commercially important fish stocks[500] straddle between the zones, and effective and sustainable management depend upon cooperation between the coastal States Norway and Russia.

381. Norway and the Soviet Union concluded an agreement on fisheries cooperation in 1975 which established the Norwegian-Soviet Fisheries Commission (from 1992 the Norwegian-Russian Joint Fisheries Commission). The year after, an additional agreement was concluded that provided for reciprocal zonal access.[501]

382. In its Counter-Memorial,[502] Norway referred to the 2010 Treaty between Norway and Russia concerning the Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean, which constitutes the legal framework for Norwegian-Russian cooperation in the Barents Sea. The treaty was signed after 40 years of negotiations and delimited all the maritime areas between the two States, including the continental shelf.[503] In the preamble of this agreement, the Parties recall their primary interest and responsibility as coastal States for the conservation and rational management of the living resources of the Barents Sea and in the Arctic Ocean, in accordance with international law.

383. Article 2 of that treaty makes it clear that each of the Parties are fully responsible for management decisions affecting areas on their respective side of the delimitation line.

384. In Article 4(2) of the 2010 delimitation agreement the Parties commit themselves to "*pursue close cooperation in the sphere of fisheries*" and in Article 4(3) "*to apply the precautionary approach widely* […]" The agreement further has an integrated annex

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500 E.g. cod, haddock, capelin, redfish and Greenland halibut.

501 **RL-0257-NOR; RL-0258-ENG** Agreement between the Government of the Kingdom of Norway and the Government of the Union of Soviet Socialist Republics on co-operation in the fishing industry of 11 April 1975 and **RL-0259-NOR; RL-0260-ENG** Agreement between the Government of the Kingdom of Norway and the Government of the Union of Soviet Socialist Republics concerning mutual relations in the field of fisheries of 15 October 1976.

502 At ¶32.

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

on Fisheries matters, ensuring the continuation of the fisheries cooperation established by the 1975 and 1976 agreements and providing further details to this cooperation.

385. In a semi-enclosed sea like the Barents Sea, UNCLOS Article 123 obliges both Russia and Norway to cooperate in the management of marine living resources.

386. The above-mentioned agreements provide the legal and institutional framework for a fisheries cooperation that over decades has produced remarkable results in terms of sustainable management and long-term yield. While important fish stocks in many other parts of the world have been over-exploited, in some instances leading to collapse of the stock, the stocks managed jointly by Norway and Russia have generally remained in good shape, to the benefit not only to the coastal States themselves but also to other actors that fish on the same stocks.

387. The EU has expressly recognised this in the Norway-European Union political understanding in relation to the fisheries in ICES areas 1 and 2 of 28 April 2022, which reads

> "*The established fisheries management regime in the ICES areas 1 and 2 in waters north of the 62°N line has over decades secured the sustainable management of marine living resources and been beneficial for the coastal States and vessels from other States through different arrangements.*" [504]

388. In an understanding between Norway and the United Kingdom from December 2021 this is recognised in the same manner:

> "*The United Kingdom also acknowledges that the established fisheries management regime in the ICES areas 1 and 2 in waters north of the 62 degree line over decades has secured the sustainable management of marine living resources, thus ensuring the interests of the fishing vessels, including vessels from states harvesting from these resources on the basis of quotas allocated by the coastal States*". [505]

7.3 COOPERATION BETWEEN RUSSIA AND NORWAY ON SNOW CRAB

389. Thus, when snow crab started to become available in commercially exploitable quantities in the Barents Sea and it became clear that it would spread from the Russian part of the shelf westwards across the delimitation line nothing was more natural (and

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504 **R-0146-ENG**.

505 **R-0421-ENG** Political understanding between Norway and United Kingdom regarding cod.

in accordance with the two States' legal obligations) than Russia and Norway discussing the prospects of coordinated management of the species in the well-established format of the Joint Fisheries Commission.

390. Indeed, given how obvious and natural that cooperation was, it is not entirely clear what the point of the Claimants' allegation is, in particular of the suggestion of an anti-EU conspiracy between Norway and Russia. On the one hand it is said, in a passage that does scant justice either to Norway's legal knowledge or to its imagination, that "*it was Russia, in October 2014, that first brought to Norway's attention the idea that snow crab could be characterized as a sedentary species.*"[506] On the other hand, it is also said that "*Russia was initially reluctant to ban EU snow crab fishing vessels from the Loophole, as it believed that the Russian coast guard "cannot perform enforcement, as the fishing was outside the 200 mile zone".*"[507]

391. As has been pointed out by the Claimants themselves,[508] Russia initially raised the point that snow crab was a sedentary species at a meeting of the Joint Norwegian–Russian Fisheries Commission in October 2014.[509] That Russia was the one to raise the issue is entirely logical and natural, as the harvesting of snow crab was at the time taking place exclusively on the Russian continental shelf. This is documented for example in the Nofima report cited on five different occasions in the Claimant's Reply. On page 1 in the report, Nofima writes:

> "*The major portion of the snow crab was located in the part of the Loop Hole subject to Russian continental shelf jurisdiction, and that was where everybody fished.*" (emphasis added)

392. The allegation of the Norway-Russia conspiracy confers on the coastal States a competence which they do not have. Snow crab's status as a sedentary or a non-sedentary species is determined by whether its biological meet the definition in Article 77(4) UNCLOS. Either snow crab has the characteristics making it a sedentary species, or it does not. It is not up to Norway or Russia to change either the biological

506 Reply, ¶672.

507 Reply, ¶757.

508 Reply, ¶172 (a).

509 Reply, ¶172; **C-0191**.

characteristics of snow crab or the definition of sedentary species in UNCLOS. And it is clear that snow crab are indeed sedentary (see **Chapter 2** above).

393. The factual basis of the Claimants' allegation that Norway and Russia colluded to 'close off access' to snow crab is largely built on the vast records produced by Norway at the Claimants' request in this arbitration, including large volumes of internal Government files. The Claimants made very broad and sweeping document requests, most of them of the "*any and all documents*" variety, spread over 90 different categories of documents. Norway protested against only seven of the requested categories or documents and submitted 694 documents in response to the Claimants requests. The Claimants quote quite selectively from the acquired documents in their Reply. Despite the access to huge amounts of contemporary Government records, the Claimants paint a distorted picture of Norway's actions in the process that led up to the regulation of snow crab harvesting in the Loop Hole, and manifestly fail to prove their allegation that Norway and Russia conspired to "*close the commons*".

394. By quoting selectively from this material and taking passages out of context, the Claimants paint a one-sided picture of Norway's actions and Norway's role in determining Russia's management measures for snow crab on its continental shelf. As has become standard in these proceedings, Norway invites the Tribunal to read the documents themselves, rather than the Claimants' presentation of them.[510]

395. In paragraph 757 of the Reply, the Claimants state that "*Russia was initially reluctant to ban EU snow crab fishing vessels from the Loophole, as it believed that the Russian coast guard "cannot perform enforcement, as the fishing was outside the 200 mile zone"*". In paragraph 758 the Claimants go on to allege that Norway "*then pressed Russia to "prosecute" EU crabbers who continued to fish in areas of the Loophole above Russia's continental shelf*". It is then alleged in paragraph 759 that Norway was "*not content to exclude them* [EU-crabbers] *from fishing on "the Norwegian continental shelf" in the Loophole*". Norway apparently then "*pressed Russia to adopt a similar ban applicable to its own continental shelf*." Russia then, again according to the

510 The documents that the Claimants did produce are at **R-0200** to **R-0406**. Translations from Russian and Latvian are provided by Norway.

Claimants, "*eventually acted according to Norway's wishes and instructed its Border Service to enforce measures against EU vessels*".

396. The idea that Norway could (or would) bend Russia to its will on a question of fisheries despite the States having cooperated successfully for several decades is implausible on its face, and not borne out on the documents. Aside from the geopolitical and historical realities:

(1) 89.19% (69,766 km^2) of the Loop Hole is subject to Russian jurisdiction, 10.81% (8,454 km^2) to Norwegian;

(2) The vast majority of the snow crab stock was located on the Russian part of the shelf, and that was where the commercial harvesting was actually taking place; and

(3) It was Russia, not Norway, that had a considerable unregulated harvesting of snow crab on its continental shelf in the Loop Hole.

397. And this was not a new point to Russia. As Norway alluded to in its Counter-Memorial (footnote 62) in 1975 Russia and the USA signed the "*Agreement between the United States and the Union of Soviet Socialist Republics relating to fishing for king and tanner crab*".[511] Paragraph 1 states:

> "*The king and tanner crab are natural resources of the continental shelf over which the coast state exercises sovereign rights for the purposes of exploration and exploitation in accordance with the provisions of Article 2 of the Convention on the Continental Shelf*".

A World Wildlife Fund Report from 2014 (publicly available and online) outlines Russia's 2014 TAC (Total Allowable Catch) for several of its maritime regions, and notes that the "Peanut Hole", which forms part of the Russian continental shelf beyond 200 nautical miles, is also regulated. It also notes that illegal crab harvesting has been a considerable problem on the Russian Pacific Rim and Russia has taken a number of measures to combat illegal, unreported and unregulated harvesting of snow crab on its

511 **RL-0104-ENG**. Tanner crab, as Norway outlined at footnote 23 of its Counter-Memorial, is another term that has been used to refer to snow crab.

Pacific coast.[512] The point being that the suggestion that Norway was the one to tip Russia off as to the possibility of regulating the harvesting of snow crab is simply not borne out.

398. Russia therefore had greater reason for concern over unregulated snow crab harvesting than Norway. Russia had strong incentives and a considerable self-interest in getting regulations in place and placing the unregulated harvesting that was about to develop under control.

399. Examining the actual sources cited by the Claimants in their Reply (and some others disclosed by Norway but not exhibited by the Claimants), a different picture emerges.

400. As recognised by the Claimants[513] it was Russia, that in a Joint Fisheries Commission meeting in October 2014 informed Norway that it was preparing regulations regarding the harvesting of snow crab on the Russian continental shelf. The Russian Federation already then made it clear that they considered the crab "*a sedentary species belonging to the Russian shelf jurisdiction*".[514] Norway adopted its first regulations on snow crab harvesting in December 2014 and extended the regulations to cover the entire Norwegian continental shelf beyond 200 nautical miles in December 2015. For its part, Russia took almost two years (October 2014 to September 2016) to implement domestic regulations on the harvesting of snow crab in areas beyond 200 nautical miles. In the meantime, Russia was concerned about the unregulated harvesting taking place on the Russian continental shelf in the Loop Hole. Most of the snow crab harvested there by EU-vessels, taking advantage of the absence of Russian regulations, were landed in Norway by the Claimants and others. Russia in this period, in the absence of domestic regulations allowing them to take action against this IUU activity, on several occasions appealed to Norway to ban landings of snow crab harvested on the Russian continental shelf without a Russian licence. However, as the records show, Norway refused to take

512 **R-0425-ENG** *Illegal Russian Crab - An Investigation of Trade Flow*, Report from 2014, WWF.

513 Reply, ¶172.

514 Counter-Memorial, 2.2.6.2, **R-0013-NOR; R-0014-ENG.**

such action as long as Russia had not explicitly prohibited the harvesting of snow crab for foreign vessels without a Russian licence.[515]

401. When the Ministers of Fisheries of Norway and Russia stated in the Agreed Minutes from their meeting 17 July 2015 in Malta that the two coastal States would proceed from the fact that the snow crab is a sedentary species subject to coastal State jurisdiction according to UNCLOS Article 77, they simply indicated that management of snow crab in the Barents Sea would be brought in line with the management regimes in place for snow crab everywhere else in the world where snow crab occurs. The snow crab would be managed according to continental shelf jurisdiction and harvesting would be reserved for crabbers of the coastal State or subject to agreement with the coastal State. As further explained **Chapter 9**, this is the norm globally and not an exception.

402. Domestic Russian legislation finally prohibiting the harvesting of sedentary species on the Russian continental shelf in the Loop Hole was published in a "Notice to Mariners" Editions No. 36, Nos 4801-4932 and enforced from 4 September 2016 onwards.[516]

403. This sequence of events is clearly documented by the records. A telling example is a report from a meeting between the representative (Mr Golovanov) of Rosrybolovstva (the Russian Fisheries Agency) and the Ministry of Trade, Industry and Fishery dated 26 August 2015. The Claimants have exhibited this document as **C-0195**. However, in two aspects Norway disagrees with the Claimants' translations (indicated below in squared brackets):[517]

> "*Golovanov then referred to a meeting between the Fisheries Agency and the MID*[518] *in Moscow next week about snow crab. The theme of the meeting was which regulatory technical measures must be taken in relation to snow crab.*
>
> *- bilaterally between Norway and Russia, with a reference to UNCLOS*

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

516 **R-0045-ENG; R-0046-RUS**.

517 "Ta seg til rette" = take the law in one's own hands, not "take action", "ymte" = to suggest, not "agreement".

518 MID: Russian Ministry of Foreign Affairs (Ministyerstvo Inostranykh Del).

- management through NEAFC

Russia is concerned about enforcement over third countries in the Smutthullet, as they expect third countries to take the law in their own hands [Claimants' translation: "*take action*"]*, in the area of the Russian zone that is disputed, and suggested* [Claimants' translation: "*agreement*"] *on joint enforcement. Otherwise, he was a bit searching and expressed that this was complicated."*

404. The issue was also raised in a meeting between the Russian ambassador to Norway and Minister of Fisheries Mr Per Sandberg on 24 February 2016.[519] In the report from the meeting it is recalled that: "Sandberg then addresses the situation that has arisen in connection with Latvian vessels delivering snow crab in Finnmark, harvested on the Russian continental shelf in the Loop Hole area. He noted that it will be of interest for our assessment of whether these landings are to be stopped to learn whether there is dialogue between Russia and the EU regarding possible licences for such harvesting".

405. Minister Sandberg's question in the meeting with the ambassador might have been misinterpreted by the Russian side as an offer to stop landings of snow crab harvested on the Russian shelf in Norway without awaiting the adoption of domestic Russian regulations. On 27 April 2016, the Russian Minister of Agriculture, I.V. Shestakov, wrote the following in a letter to Minister Sandberg[520]:

"*Taking into consideration the common interest of our countries in preventing illegal, unreported and unregulated fishery of marine living resources, we support the suggestion of the Norwegian Party to ban discharge*[521] *of snow crab by vessels of member states of the European Union, carrying out fishery in the mentioned region, at the ports of Norway.*"

406. The suggestion of Norway banning landings of snow crab harvested on the Russian continental shelf without Russia first implementing domestic regulations prohibiting such harvesting was quickly rejected by Norway. In a letter from Deputy Secretary General in the Ministry of Fishery, Mr Arne Røksund, to Rosrybolovstva (The Russian Federal Fisheries Agency) Mr Røksund writes:

"*Combatting illegal, unreported and unregulated fishing is a prioritised task of the Norwegian authorities. However, under the Norwegian regulatory framework, it is*

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519 **R-0422-NOR; R-0423-ENG** Report from meeting 24 February 2016 between the Russian ambassador to Norway and Minister of Fisheries Per Sandberg.

520 **C-0197.** Letter 27 April 2016 from Russian Minister of Agriculture, I.V. Shestakov to the Norwegian Minister of Fisheries Per Sandberg

521 "*Discharge*" in this context is better translated as "*landing*".

> *difficult to introduce a prohibition against landing of snow crab harvested on the Russian part of the continental shelf in the Loop Hole as long as such harvesting is accepted by Russian authorities and breaches of possible Russian fishery regulations are not enforced on the Russian side.*"[522]

407. In the margins of the North Atlantic Fisheries Minister's Conference in June 2016 snow crab was discussed bilaterally both between Norway and the EU and between Norway and Russia. According to the report from the meeting[523] the EU Commissioner responsible for fishery, Mr Karmenu Vella told Minister Sandberg that "*the member countries were very interested in establishing a swap agreement on snow crab*". Vella also informed Sandberg that "*the EU was in talks with Russia about the snow crab.*". This clearly shows that the EU acknowledged that EU vessels could only legally harvest snow crab on the continental shelf of Norway and Russia subject to an agreement with one or both coastal States. This acknowledgement is also evident in an internal memorandum dated 1 September 2016 and set up by Ms Ingrid Vikanes of the Ministry of Fishery after a meeting with fisheries attaché Sergey Golovanov, disclosed to the Claimants by Norway but curiously not cited by the Claimants.[524]

408. In that meeting, Mr Golovanov informed Ms Vikanes that the EU Commission had been in contact with Russia regarding snow crab, and that the EU had offered to pay for snow crab harvested on the Russian continental shelf, both for crab already harvested and for future catches. However, Russia had turned down the offer.

409. Snow crab was also the topic for bilateral consultations between Norway and Russia in the margins of the June 2016 Ministerial conference. In these consultations the parties reiterated and elaborated their positions. Mr Shestakov complained to Minister Sandberg that there were

> "*still Baltic countries that fished snow crab on the Russian shelf in the Loop Hole. He pointed out that this was IUU fishing and that Norway was co-responsible for IUU fishing on the Russian shelf. Shestakov informed that the Russian Coast Guard cannot perform enforcement, as the fishing takes place outside the 200-mile zone, and that they want to use the Norwegian landing ban to stop this fishing."*

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522 **R-0426-NOR; R-0247-ENG** Letter 3 June 2016 from Deputy Secretary General in the Ministry of Fishery, Mr Arne Røksund, to Rosrybolovstva (The Russian Federal Fisheries Agency).

523 **C-0207**.

524 **R-0428-NOR; R-0429-ENG** Email 1 September 2016 consultations between Norway and Russia.

Minister Sandberg responded that "*as long as this activity is tolerated by the Russian side, there is nothing we can do from the Norwegian side*".[525]

410. Examining the record fully, it is clear that the reason why the Russian Coast Guard could not take enforcement measures against this activity was because there were no Russian domestic regulations in force at the time. For that reason, Mr Shestakov and Russia appealed to Norway to assist in stopping the unregulated harvesting by prohibiting landings in Norwegian ports. It was in this context that Deputy Secretary General Mr Røksund "*expressed in clear words*" in the same meeting that the Russians were asking Norway "*to do the police job for them*".[526] He also made it clear that Norway would not take any steps to prevent landings of snow crab in Norway as long as there was no explicit prohibition against such harvesting in place on the Russian continental shelf.

411. In a further letter dated 21 June 2016 from Deputy Minister Shestakov to Minister Sandberg,[527] Mr Shestakov again appealed to Norway to consider introducing a ban on landings of snow crab harvested on the Russian continental shelf by unlicensed EU-flagged vessels. Mr Shestakov referred to the exclusive rights of the coastal States to carry out harvesting of snow crab in the Loop Hole, as communicated to the flag states and announced at the 34th session in NEAFC. "*However*", he continued:

> "*vessels of some European Union Member States, without the consent of the Russian Federation, continue to fish for sessile species*[528] *on the Russian continental shelf in the open part of the Barents Sea.*
>
> *Taking into account the common interest of our countries in the conservation and rational use of this stock, we ask you to further consider the possibility of imposing a ban on crab unloading by vessels of the European Union member countries fishing in this area in the ports of Norway*".[529]

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525 **R-0435-NOR; R-0436-ENG** Report from bilateral consultations between Norway and Russia in St Petersburg.

526 See also Reply, ¶¶187-188

527 **C-0253** Letter 21 June 2016 from Deputy Minister Shestakov to the Norwegian Minister of Fisheries Per Sandberg. The Claimants date this letter 22 June 2016.

528 The translation "*sessile species*" is inaccurate. In the original Russian seen in exhibit **C-0253** the Russian term used is "сидячим видам". This is the same term as is used in Article 77(4) of the Russian language version of UNCLOS, i.e. it means "*sedentary species*".

529 Again, the word translated as "*discharge*" is better translated as "*landing*" or "*offloading*".

412. Minister Sandberg responded to Mr Shestakov's letter on 6 September 2016.[530] In his response, Mr Sandberg referred to Mr Shestakov's 21 June 2016 letter, and again rejected the Russian request for a ban on landings of snow crab harvested on the Russian continental shelf. He refers to the fact that no information had been provided from the Russian side that such harvesting was actually prohibited by Russia. Mr Sandberg wrote:

> "*As long as such catches are accepted by the Russian authorities and violations of any Russian fishing regulations are not prosecuted on the Russian side, it is difficult to introduce a landing ban for snow crab caught on the Russian part of the shelf in Smutthullet* [the Loop Hole] *according to Norwegian regulations*."

413. Interestingly enough, that very same passage from Mr Sandberg's letter is quoted in the Claimant's Reply paragraph 190, but, taken out of context, it is presented as evidence of a Norwegian-orchestrated plot to strike a blow against EU crabbers in the Loop Hole. The reality is unfortunately far more benign as the evidence shows. Though one point should be mentioned. If Norway *had* acceded to Russian requests and closed its ports to landing of snow crab on the Norwegian continental shelf, it would have brought an end to the Claimants harvesting activities far earlier. But Norway did not do that, because the harvesting on the Russian continental shelf was not illegal as a matter of Russian law.

414. By the time Mr Sandberg wrote his response to the latest Russian request for closure of Norwegian ports on 6 September 2016, his renewed rejection of Russia's request was already overtaken by events: three days earlier the Russian prohibition against foreign harvesting of snow crab on the Russian continental shelf in the Loop Hole entered into force. Three days later the Claimants' vessels landed their last snow crab in Båtsfjord.

415. In their summary of facts and events[531] the Claimants contend that Russia "*apparently doubted its jurisdiction to control fishing taking place beyond 200 nautical miles off its coast*". There is nothing in the contemporaneous documents or Russian statements to support this contention.

416. To the contrary and as has been thoroughly documented, Russia on numerous occasions confirmed its view that snow crab on the continental shelf in the Loop Hole were subject

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

531 Reply, ¶206(e).

to coastal State jurisdiction. Russia informed Norway already in October 2014 that it was preparing regulations regarding harvesting of snow crab on the Russian continental shelf.[532] The reality is that Russia took some time to bring those regulations into existence. In the meantime, the Claimants took advantage of this absence of Russian regulations to continue their harvesting operations in the Russian part of the Loop Hole and landing their catches in Norway. Norway never interfered with this activity, despite repeated Russian appeals to close Norwegian ports for landing of snow crab harvested on Russia's continental shelf without a Russian licence. This episode can therefore be set aside, despite the prominence the Claimants attempt to give it. The records clearly show that the first initiative to regulate foreign snow crab harvesting on the continental shelf in the Loop Hole was taken by Russia. Russia actively pursued the matter *vis-à-vis* Norway with a view to make Norway prohibit landings of snow crab harvested on the Russian shelf even before a ban against such harvesting was even adopted by Russia, but Norway rejected these requests (to the Claimants' benefit). There was no grand conspiracy and no collusion. In the meantime, Norway prohibited the harvesting of snow crab, first within its territorial waters, the Norwegian Economic Zone around mainland Norway and the Fisheries Protection Zone around Svalbard, then a year later on the entire Norwegian continental shelf, including in the Norwegian part of the Loop Hole. Of course, as the Tribunal is now well aware, those Norwegian regulations did not affect the Claimants' snow crab catches, which steadily increased. But when Russia acted and finally got their domestic regulations in place, the Claimants' harvesting activities came to an end.

417. In response to Norway pointing out in its Counter-Memorial that the alleged investments were verifiably unaffected by the changes in Norwegian snow crab regulations, the Claimants now try to construe a violation of the BIT by Norway, by trying to hold Norway responsible for changes in Russia's regulations. Norway cannot be held responsible for those changes, and they certainly did not amount to any breaches of the BIT.

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532 Counter Memorial, section 2.2.6.2, **R-0013-NOR; R-0014-ENG**.

CHAPTER 8: BREACH OF THE BIT - INTRODUCTION

418. The Claimants turn to the merits of their claim on page 186 of their 263-page Reply. The most salient feature of their response is that it is entirely based upon a single proposition:

> "*619. Starting in July 2015, Norway abruptly reversed its position that the Loophole's snow crab fishery was a high seas fishery lying outside its jurisdiction, adopting a series of measures designed to "close the commons" for snow crab fishing in the Loophole. This reversal was motivated by a clear political purpose: to appropriate the fishery for Norwegian nationals and favour the continued expansion of the snow crab resource in areas under Norwegian jurisdiction.*
>
> *620. The fact that the Loophole's snow crab fishery was a high seas fishery, recognized as such by all NEAFC Member States, was a critical basis upon which the Claimants decided to invest in their integrated snow crab fishing business in Norway. It was on that basis that the Claimants operated their business over a period of nearly two years. This was known to Norwegian authorities, including the local Mayor, who welcomed their investments emphatically.*
>
> *621. Following Norway's change position on snow crab in July 2015, Norway acted as if it had always asserted sovereign rights over the snow crab resource in the Loophole, even though it had explicitly stated the opposite for many years.*"

419. That proposition is false. The Claimants do not, and cannot, point to any instances of Norway "explicitly stating" that it had no sovereign rights over the snow crab resource. The proposition is, moreover, based on some fundamental misunderstandings.

420. First, it conflates two distinct legal concepts. It conflates (i) resources that *have not (yet) been made* the subject of regulations enacted by a State with (ii) resources that *cannot* be regulated by that State because they are beyond the jurisdiction of that State.

421. It is accepted by both Parties that the bed of the Loop Hole consists of continental shelf. Most of it belongs to Russia, and some of it – around 10% – belongs to Norway.

422. There is no doubt that the snow crab is a sedentary species and therefore a 'natural resource' of the continental shelf under international law.[533] It falls squarely within the definition of a sedentary species in Article 77(4) of UNCLOS, which includes Norway,

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533 **CL-0013** UNCLOS Article 77(4).

Latvia, Russia, and the EU among its 168 Parties:[534] it is an organism "*which, at the harvestable stage*, [… is] *unable to move except in constant physical contact with the sea-bed or the subsoil.*" That is a matter of fact which Norway has addressed in detail in its Counter-Memorial[535] and above (**Chapter 2**) and the Claimants have not presented any evidence whatsoever to suggest that snow crabs can "*move except in constant physical contact with the sea-bed or the subsoil.*"

423. There is no doubt that as a matter of international law Norway has exclusive sovereign rights over its continental shelf for the purpose of exploring it and exploiting its natural resources. That has been the firmly-established position under international law for more than half a century.[536] Norway has permanent sovereignty over its natural resources and, as UNCLOS explicitly stipulates, no one may take those resources without Norway's "*express consent*".[537]

424. The arrival of snow crab in the Loop Hole created a new situation for Norway. Never before had a new harvestable species emerged on the Norwegian continental shelf beyond 200 nautical miles from the baselines and thus outside Norway's 200 nautical mile zones. As soon as exploitation of the snow crab became commercially viable in the areas under Norwegian jurisdiction, Norway decided to regulate the harvesting of snow crab.

425. Norway publicly began the process of specifically regulating the harvesting of snow crab in 2014,[538] the year in which snow crab catches on Norway's continental shelf reached a level that was no longer zero or minimal,[539] and only 11 years after the first known catch of any snow crab on the Norwegian continental shelf.[540] Norway held a public consultation process on the proposed regulations in the autumn of 2014 to which

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534 **CL-0154**.

535 At ¶¶44-76.

536 **RL-0216-ENG** *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgment, 20 February 1969, *ICJ Reports 1969,* p. 3 at ¶19.

537 **CL-0013** UNCLOS Article 77(2). See e.g. UNGA Resolution 1803 (XVII) of 14 December 1962, "Permanent Sovereignty over Natural Resources".

538 Counter-Memorial, ¶¶98–101.

539 Counter-Memorial, ¶96-100

540 Counter-Memorial, ¶42. Two (2) snow crab were caught on the Norwegian continental shelf in 2003.

further reference is made below.[541] As was stated in an uncontested passage in the Counter-Memorial, "[s]*o far as Norway is aware, there had been no commercial landings of snow crab harvested on the Norwegian continental shelf in the Loop Hole as of October 2014, the time of public hearings on the Regulations*."[542]

426. Norway had the right to regulate the harvesting of snow crab on its continental shelf before 2014, but there were no known commercial catches that required regulation. That is why there were no regulations specifically on the harvesting of snow crab before 2014. As Norway outlined in its Counter-Memorial (at paragraph 587), the FAO Code of Conduct for Responsible Fisheries (1995) urges Member States to apply the precautionary approach for new and exploratory fisheries.

427. Second, the Claimants' position is based on a mistake as to the facts. It is true that prior to December 2014, Norway did not specifically regulate the harvesting of snow crab.[543] But, contrary to the allegations set out by the Claimants,[544] at no stage, before or after 2014, did Norway state that snow crab were anything other than a sedentary species and at no stage, before or after 2014, did Norway state that it would refrain from exercising its legal rights over snow crab on its continental shelf. Norway has never renounced or circumscribed its right to regulate the harvesting of snow crab on the Norwegian continental shelf as and when it might consider it appropriate to do so.

428. The problem is that the Claimants did not, and apparently still do not, understand the difference between the absence of regulations and the absence of a right to make and enforce regulations.

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541 See below, section 9.2.1.

542 Counter-Memorial, ¶106.

543 Counter-Memorial, ¶581.

544 Claimants' Reply, e.g. ¶621; "*Following Norway's change position on snow crab in July 2015, Norway acted as if it had always asserted sovereign rights over the snow crab resource in the Loophole, even though it had explicitly stated the opposite for many years*." (emphasis added). The Claimants have presented no exhibits to substantiate this statement.

429. Contrary to the Claimants' repeated assertions, this is not a case of Norway "*having closed the commons*"[545] or of the "*appropriation*" of snow crab by Norway.[546] It is a case of Norway regulating the exploitation of a resource to which it had[547] and has[548] exclusive sovereign right in a manner that it considered appropriate and in complete conformity with its rights and its obligations under international law.

430. Furthermore, the Claimants' alleged investments were unaffected by the Norwegian regulations. The Claimants' landings increased even after the entry into force of the very Norwegian Regulations about which the Claimants now complain. In fact, they describe 2016 (the year after those regulations came into force) as North Star's "*operational peak*".[549] Nowhere is this more clearly illustrated than by the Claimants' own expert in Table 15 of his report:

Table 15 – Historical Sale Weight of Snow Crabs Sold by North Star – 2015-2016[177]

(amounts in kilograms)

Year	Customer	Saldus	Solveiga	Solvita	Senator	Total
2015	[redacted]					
Subtotal						
2016						
Subtotal						
Total						

431. The date of the final landing (September 2016) is no coincidence: The Russian ban on harvesting on the Russian continental shelf in the Loop Hole was enforced from 4 September 2016.

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545 Counter-Memorial, ¶623. Indeed, since at least 1958 the resources of the Continental Shelf have not been part of "*the commons*".

546 Counter-Memorial, ¶622.

547 Continental shelf Convention, 1958, Article 2(4); *North Sea Continental Shelf* cases, *ICJ Reports 1969*.

548 **CL-0013** UNCLOS Article 77.

549 Reply, ¶3(d).

432. In their Reply,[550] the Claimants alleged that "*fishing does not, in and of itself, qualify as an economic activity*", that "[t]*he economic value is in the selling of the catch, not the fishing*" (emphasis in original) and that "*The Claimants' business was to sell snow crab*" (emphasis in original).

433. To quote from Norway's Counter-Memorial:

> "*Norway has at no point restricted the* landing *of snow crab in Norwegian ports, insofar as it had not been harvested illegally on Norwegian or foreign continental shelves*"[551]

434. Norway has also not restricted what the Claimants now describe as their "business", the *selling* (or indeed the processing) of snow crab.

435. Furthermore, North Star retained most of its vessels, which are free to engage in lawful fishing or crabbing wherever they might choose, or to be sold.[552] Sea & Coast, which apparently derived around 90% of its operating revenues from companies other than North Star,[553] still remains free to function as a shipping agent.

436. That, in essence, is Norway's response. The following paragraphs respond point by point to the arguments of the Claimants set out in their Reply in support of their claims under Articles III (Equitable and Reasonable Treatment), VI (Expropriation) and IV (MFN) of the BIT.

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550 Reply, ¶¶516-517.

551 Counter-Memorial, ¶4.

552 It is true that the *Solveiga* was sold on 19 October 2017, and the *Senator* has been anchored in the port of Båtsfjord. But that was the decision of the Claimants, not of Norway.

553 Counter-Memorial, ¶¶156.

CHAPTER 9: EQUITABLE AND REASONABLE TREATMENT

437. The section of the Reply dealing with the obligation to accord equitable and reasonable treatment is much the largest part of the section of the Reply dealing with merits questions. After an introduction (paragraphs 618–626) it addresses the "*interpretation of the equitable and reasonable treatment and protection standard in Article III of the BIT*", setting out a series of general observations that are not germane to the key issues in dispute between the Parties (paragraphs 627–638).

9.1 THE SUPPOSED FACTUAL BASIS OF THE CLAIMANTS' CASE

438. Paragraphs 639–670 of the Reply elaborate on the Claimants' assertion that "*Norway Breached its Obligation to Accord to the Claimants Equitable and Reasonable Treatment and Protection*." The assertion is based on seven 'facts', set out in paragraph 642 as follows:

438.1. The Claimants invested in Norway on the clear understanding that the Loophole's snow crab fishery was a *high seas* fishery (9.1.1);

438.2. Norway abruptly reversed its position on the characterisation of snow crab to expand the scope of its fisheries jurisdiction into the Loophole, "*close the commons*" and exclude EU crabbers (including the Claimants) from this area of the high seas (9.1.2482);

438.3. Norway then behaved as if it had "*always*" considered snow crab as a sedentary species of its continental shelf. It negated the legitimacy of EU fishing activities in the Loop Hole predating its change of position (9.1.3);

438.4. Norway refused to respect the Claimants' acquired rights derived from their historical fishing activities in the Loop Hole (9.1.49.1.4);

438.5. Norway acted in concert with Russia to close *the entire* Loop Hole to EU crabbers including the Claimants (9.1.59.1.5);

438.6. Norway refused to recognise the legality of the Claimants' licences or to grant them otherwise equivalent fishing rights (9.1.6); and

438.7. Norway acted in a discriminatory and politically motivated manner justified by neither economic nor environmental goals, and was not exercising any legitimate right to regulate (9.1.7).

9.1.1 The supposed factual basis of the Claimants' case: (1) the Claimants' alleged understanding that the Loop Hole's snow crab harvesting was a *high seas* fishery

439. The first 'fact' is an assertion concerning the Claimants' state of mind from 2013 or 2014 onwards,[554] and appears from paragraphs 643–670 of the Reply to be an assertion concerning the "clear understanding" of Mr Pildegovics. There is no explanation of what understanding might be imputed to North Star, after it was incorporated on 27 February 2014.

440. Mr Pildegovics' understanding is based largely on facts said to be "*known to all observers*" and to Mr Levanidov.[555] Mr Pildegovics' inquiries appear to have been confined to discussions with Mr Levanidov, approaches to the Latvian authorities,[556] and "*due diligence regarding the legality of his activities in Norway*" including "*verifying official public registries regarding whether the port of Båtsfjord accepted landing of catches*".[557]

441. Norway is not generally in a position to offer observations on what Mr Levanidov said or did not say to Mr Pildegovics concerning the legal regime for the harvesting of snow crab on the Norwegian continental shelf. It can and does take the position that the obvious likelihood is that the Claimants' understanding and expectations were based primarily, and perhaps exclusively, on what Mr Levanidov said to Mr Pildegovics but not on anything said by Norway. The Claimants never contacted the Norwegian authorities regarding the legality of harvesting snow crab by Latvian vessels in the Loop Hole.[558] To the extent that any information was sought, it was Mr Levanidov and/or his companies seeking information from Norwegian authorities concerning the *landing* and

554 Reply, ¶668.

555 Reply, ¶¶644–649, 651.

556 Reply, ¶651.

557 Reply, ¶652.

558 They did contact the Norwegian authorities in 2017 regarding the legality of harvesting on continental shelf in the maritime areas around Svalbard. They were told that this was illegal: Counter-Memorial, ¶¶159-165.

not the *harvesting* of snow crab, see e.g. **KL-0019**. In any event, the fact that there were no restrictions in place for the harvesting of snow crab in Norwegian jurisdictional areas at one point in time does not give rise to any legitimate expectations that that the situation will remain unchanged.

442. Further, if the Claimants were proceeding under the subjective assumption (despite having no evidence for it, and despite Mr Levanidov anticipating regulatory change) that snow crab were not sedentary, that assumption was wrong and cannot in any event form the basis of a breach of this BIT. As stated in *Saluka v. Czech Republic*:

> "*the scope of the Treaty's protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors' subjective motivations and considerations. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances.*"[559]

A number of other Tribunals have made statements to the same effect regarding the objective element that must form part of the basis for an expectation by an investor in order for such expectation to be considered legitimate and protected under the BIT.[560]

443. As Norway has documented in its Counter-Memorial at section 2.2.3.4 and above (**Chapter 2**), all States that have crab harvesting activity in areas under their jurisdiction consider crab species as sedentary within Article 77(4) of UNCLOS. This fact is not disputed by the Claimants.

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559 **CL-0216** *Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Ad hoc Arbitration, Partial Award, 17 March 2006

560 **RL-0187-ENG** *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Award, 4 September 2020, ¶452: "[…] *this is not a situation where Eskosol was affirmatively led by Italy to expect that its prior land use regime would remain in place for a particular period of time, or would be phased out only with a grace period of a particular length. There is no evidence of a representation or assurance in either regard. Yet it is axiomatic that legitimate expectations must be based on some form of State conduct, and not simply on the investor's own subjective expectations. Absent any evidence of such conduct, the Tribunal is unable to accept that Eskosol had an objectively legitimate expectation regarding the longevity of the prior agricultural land regime, and therefore that by changing its regime with a grace period of one year, Italy contravened any such legitimate expectation in violation of* Article 10(1) of the ECT." (emphasis added). See also **RL-0121-ENG** *Invesmart v. Czech Republic Ad hoc Arbitration*, Award, 26 June 2009: "*First, although an investor's expectation is subjective, i.e., what the investor believed to be the import of its dealings with government officials on which it claims to have relied, for the Tribunal, the test of whether such an expectation can give rise to a successful claim at international law is an objective one. It is not enough that a claimant have sincerely held an expectation; the expectation must be reasonable and the Tribunal must make the determination of reasonableness in all of the circumstances.* If the expectation was unreasonable (for example, ill-informed or overly optimistic), it matters not that the investor held it and it will not form the basis for a successful claim." (emphasis added).

444. Against this backdrop, one may indeed wonder on what basis the Claimants were convinced that the legal regime for snow crab harvesting in the Barents Sea would remain different from the regime for such harvesting on all other fishing grounds in the world. For example, the Claimants state in their reply paragraph 655 that "*The fact that the snow crab population was located in international waters guaranteed such access for the long term, without risk of exclusion due to regulation by any single State.*" And further in paragraph 643 that "[they] *made their investment in the territory of Norway based on their knowledge that the Loop Hole's snow crab fishery was a high seas fishery. This was a critical condition for their decision to invest,* […]" (emphasis added)

445. The Claimants have not cited any examples from anywhere in the world where coastal States with large populations of snow crab on their continental shelf has refrained from regulating the harvesting of snow crab or has managed this resource as an international fishery, open for all. At no point has Norway committed itself to refrain from regulating the harvesting of snow crab, neither in areas inside nor beyond 200 nautical miles from the baselines.

446. But turning away from what the Claimants *should* have expected, to what they *actually* thought was going to happen, one significant point is evident. It is that Mr Levanidov was well aware that fisheries regulations change and communicated this view to Mr Pildegovics in an exchange of emails in the summer of 2013.[561] Mr Pildegovics wrote to Mr Levanidov on 28 July 2013 to say that he had located a fishing vessel "*which can meet your* [i.e. Mr Levanidov's] requirements", but asked Mr Levanidov to "*clarify – more accurately the zones in which you* [i.e. Mr Levanidov] *wanted to catch and more accurate info about the species*". He then said to Mr Levanidov "*tell me how to proceed*". Mr Pildegovics was apparently at this stage acting as the agent for Mr Levanidov, not as an independent joint investor;[562] and Mr Levanidov understood the position well. On 2 August 2013 Mr Levanidov replied saying that "[t]*he catch of snow crabs in the area (open part of the Barents Sea)* [sc., the Loop Hole] *is a new object, it's still not regulated by quotas or anything else.*" Later that day Mr Levanidov added, in another email, "*sooner or later there will be introduced quotas*".[563] The same point

561 **PP-0012**.

562 See above, section 5.4.

563 **PP-0012**.

was made even more plainly in remarks reported by the Norwegian newspaper *Dagbladet* to have been made by Mr Didzis Šmits, a prominent lobbyist for the Latvian snow crab industry: their goal, he said, "*was to obtain crab quotas in the Loophole before Russia and Norway started regulating the resources. We realised that it was a matter of time, that crab fishery would be regulated*."[564]

447. Given Mr Levanidov's role as a consultant in the industry,[565] it could scarcely be doubted that he would understand this point, which is a characteristic of fisheries regulation worldwide. In fact, change was a possibility expressly acknowledged by Mr Levanidov from the outset and communicated to Mr Pildegovics.

448. The Reply claims that the Norwegian Directorate of Fisheries confirmed that snow crab could be fished in the "*international waters*" of the Loop Hole, "*outside any state's fisheries jurisdiction*", upon simple registration with NEAFC.[566] As support for that claim the Reply refers to several communications from Norway, annexed to Mr Levanidov's witness statement and to the Memorial. As Norway pointed out in paragraphs 542–562 of its Counter-Memorial, none of the communications does in fact support the Claimant's case.

449. The first communication is exhibit **KL-0016**, an email of 16 May 2013 responding to an inquiry concerning Russian and Norwegian vessels from Sergei Ankipov, CEO of the Norwegian company Ishavsbruket AS and forwarded by him to Mr Levanidov on 21 May 2013. Norway drew attention to the wording and significance of that communication and showed why it does not support Claimants' case, in paragraphs 547–551 of its Counter-Memorial. The Claimants have reasserted their claim but have not answered those points.

450. The second communication is **KL-0017** and concerns the registration of Norwegian vessels for fishing in the NEAFC area. In paragraphs 552–556 of its Counter-Memorial Norway referred to the inquiry that elicited Norway's communication, which had been omitted from Claimants' pleadings. Norway showed why the correspondence does not

564 **R-0075**, at p. 26 (emphasis added).

565 Levanidov, ¶10; Memorial, ¶171.

566 Reply, ¶644.

support Claimants' case. Again, the Claimants have reasserted their claim but have not answered those points.

451. The Reply also cites exhibits **C-0087** and **C-0088**, two of the annual registrations (2013, 2014) of the Norwegian vessel *Havnefjell* T-179-T LLTI, authorising it to fish in areas outside any State's fishing jurisdiction and outlining the then-current requirements under Norwegian law to which it was subject while doing so. It has no bearing on the right of foreign vessels to harvest snow crab on the Norwegian continental shelf. Moreover, the fact that it was expressly stated that the registrations were "*valid for one calendar year*", and were "*independent of any quota adjustments* [... T]*he vessel must comply with such regulations even if the vessel is registered for one calendar year*"[567] plainly indicated that registration was not the basis of a permanent and unregulated right to fish in waters that were then "*outside any state's fishing jurisdiction*."

452. Exhibit **KL-0019**, quoted in paragraph 645 of the Reply, relates only to the *landing* of snow crab in Norwegian ports, as Norway pointed out in paragraph 557 of its Counter-Memorial.

453. In paragraph 646 of the Reply, which refers to **KL-0020,** the Claimants assert that:

> "*the* [Norwegian Fisheries] *Directorate stated that "no special documentation" needed to be submitted to the Norwegian fisheries authorities provided that "the crab has been caught outside the Norwegian Economic Zone" – i.e., in the Loophole.*"

454. As Norway pointed out in paragraphs 558-559 of its Counter-Memorial, the passage and quotation from **KL-0020** refer to the *landing* of snow crab: it reads in full:

> "*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.*"

455. At the time of that exchange (July 2014) no Norwegian or Russian regulations specifically on harvesting snow crab on the Norwegian or Russian continental shelves had been adopted. While the absence of such regulations had no effect on Norway's exclusive sovereign rights over snow crab as a matter of international law, it did mean that the harvesting of snow crab on the Norwegian continental shelf outside 200

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567 **C-0087, C-0088**.

nautical miles was not unlawful as a matter of Norwegian law. The *landing* of lawfully caught snow crab was—and remains—lawful as a matter of Norwegian law.

456. That is the evidential basis on which the Claimants' assertion that "*the Norwegian Directorate of Fisheries confirmed that snow crabs could be fished in the "international waters" of the Loophole, "outside any state's fisheries jurisdiction", upon simple registration with NEAFC*" rests. The members of the Tribunal will of course read those documents in full and reach their own conclusions. Norway's submission is that this evidential basis does not support the Claimants' case. The documents do not say that snow crab was a high seas fish resource, situated beyond Norway's jurisdiction and which Norway had no right to regulate. They say only – and correctly – that under Norwegian law *as it then stood* Norway had made no regulations specifically regulating the harvesting of snow crab on its continental shelf.

457. Furthermore, *none* of these statements was made to either of the Claimants. The Claimants accept this. The Reply says that Norway's position "*was no secret: it was known to all industry participants*",[568] and that "*even had Mr. Pildegovics personally sought the same confirmations as had been provided by the Directorate of Fisheries to his joint venture partner in 2013 and 2014, the answer would evidently have been no different.*"[569] That cannot alter the fact that there is no evidence that either Claimant relied on the statements made by the Norwegian Fisheries Directorate and that the evidence that has been submitted indicates that the substance of the Norwegian statements to which the Claimants refer was passed on to them by Mr Levanidov giving his understanding of the position in conversations with Mr Pildegovics. There is no evidence that Norway by its conduct gave rise to any legitimate expectations whatsoever that were relied on by the Claimants.

458. Apart from the uncertainty as to exactly what was said by Mr Levanidov to Mr Pildegovics, this point is important for another reason. It is repeatedly claimed that Mr Pildegovics invested in a joint venture – an 'integrated investment'[570] – with Mr Levanidov. But Mr Levanidov had established the factory in which the crab caught in

568 Reply, ¶667.

569 Reply, ¶668.

570 RFA, ¶1.

the Barents Sea could be processed, and had done so several years earlier – before snow crab was being harvested from the Norwegian continental shelf,[571] and before the Norwegian statements of 2013 and 2014 on which the Claimants rely.

459. If, as the Claimants assert (and Norway does not accept), there was really an 'integrated investment', the business plan under which that factory had been operating and was intended to operate was, presumably, a crucial factor in Mr Pildegovics' calculations and decision to make his alleged investment.

460. Mr Levanidov had founded Ishavsbruket AS (later renamed Seagourmet Norway) as a crab storage and processing facility early in 2010.[572] Claimants' table of 'total industry catches' of snow crab from the Barents Sea "since the beginning of the fishery starts with an entry of two (2) tonnes in 2012.[573] The catch for 2010 and for 2011 was zero.[574]

461. It is evident that Mr Levanidov could not have relied upon any of the cited Norwegian statements before "*the project was initiated by Mr Levanidov in 2009*",[575] because the earliest of those statements dates from 2013. Further, it seems clear that Mr Levanidov cannot have based his venture on projections of the snow crab catch, which even in 2013 had reached only 189 tonnes according to the Claimants,[576] less than half of what the Claimants refer to as the "minutely small 500-tonne quota" that Norway offered the EU in 2017.[577] Indeed, the Claimants note that "[e]*ven 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*."[578]

462. The business plan for Ishavsbruket AS (disclosed pursuant to document requests from Norway) was somewhat different. It envisaged a four-vessel fishing operation

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571 See Levanidov, ¶10 *et seq*.

572 Memorial, ¶¶177–178.

573 Kaiser, Expert Report, p. 5 table 1.

574 Kaiser, Expert Report, p. 5 table 2.

575 Reply, ¶332.

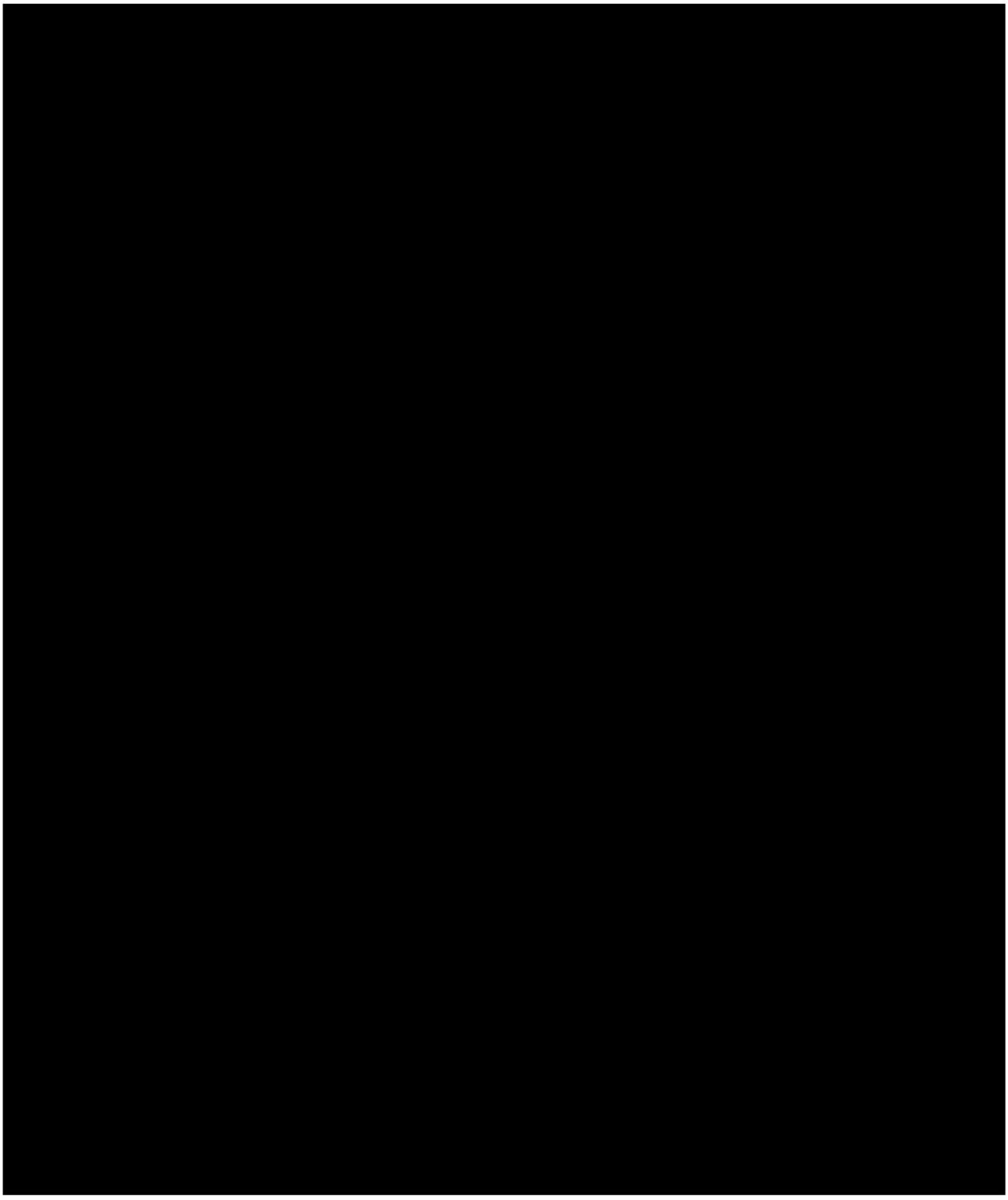
576 Kaiser, Expert Report, p. 5 table 1.

577 Reply ¶744; Memorial ¶¶389-390.

578 Memorial, ¶390; Reply ¶744.

organised under [redacted] with 51% a Norwegian shareholding, probably in an attempt to meet the Norwegian requirement for ownership of Norwegian-flag fishing vessels. It envisaged deliveries from the vessels of [redacted] per month. The scheme was depicted on a diagram:[579]

[579] **R-0371-RUS; R-0406-ENG** Business Scheme IHB1.



463. There is no indication of any Latvian connection in the above. In particular, there is no sign of any reliance on suppositions about the way in which Norway would treat foreign vessels.

464. But no business plan has been produced for what the Claimants describe as the "*integrated investment in a snow crab fishing, transformation and sales enterprise.*"[580] From the evidence the Tribunal has available to it of how Mr Levanidov intended in 2010 to run Ishavsbruket / Seagourmet as a profitable business, it appears not to have relied at all on the basis of catches of snow crab, much less on the basis of snow crab caught on Norway's (rather than Russia's) continental shelf.

465. In fact, there were more landings at Båtsfjord from Norwegian than from Latvian vessels, even in 2016.[581]

466. By contrast, there is no evidence of the suppositions and projections in any business plan that underlay Mr Pildegovics' subsequent investments. There is no evidence of whether, when, or how the initial business plan for Ishavsbruket changed and morphed into the 'integrated investment' and the alleged joint venture. The idea that the joint venture was launched in reliance on Norwegian statements about the present and/or future legal status of snow crab harvesting on the Norwegian continental shelf beyond 200 nautical miles lacks any supporting evidence. All the evidence points to the conclusion that there was no initial conception of an "*integrated investment*": rather, as a result of conversations with Mr Levanidov, Mr Pildegovics became involved in various transactions that may have been undertaken for and on behalf of Mr Levanidov or which at any rate were essentially adjuncts to the Båtsfjord business that Mr Levanidov had planned and established some years before.[582]

467. The remainder of this section of the Reply (paragraphs 652-670) consists of further legal submissions made on the basis of this same evidential record: no additional factual evidence is adduced.[583] The Claimants' central theme is that they had a legitimate

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580 RFA, ¶1.

581 **R-0410-ENG** Remark from Seagourmet Norway AS on 29 June 2017 to a public consultation from the Norwegian Ministry of Trade, Industry and Fisheries. Seagourmet reported that in 2016 its facility received "*40 times unloading from 3 Latvian fishing vessels and 96 times unloading from 19 Norwegian fishing vessels*".

582 See **Chapter 5** above.

583 Additional exhibits are cited in Reply ¶667 fn 812, but they are duplicate instances of documents already discussed.

expectation that Norway would not adopt measures to regulate the harvesting of snow crab on its continental shelf, which by 2014 had reached significant commercial levels.

468. The short answer to these submissions is that the Claimants had no right to believe or expect that Norway would refrain from exercising its right to regulate a sedentary species on its continental shelf. None of the communications referred to above contain any such representation. To the contrary, they show that the Claimants and Mr Levanidov knew that there was a high probability that such a regulation would be brought in. Moreover, there is no general right under international law to rely on the assumption that a State will not change its laws. Put another way, there is no duty under international law on States to give notice of forthcoming legislative changes.

469. The cases cited by the Claimants do not establish any such duty. Cases where legitimate expectations have been established have all focused on the actual representations made by the State, with particular attention to representations made specifically in order to attract investments. After considering the case law, the tribunal in the *Philip Morris* case summarised the position as follows:

> "*It clearly emerges from the analysis of the FET standard by investment tribunals that legitimate expectations depend on specific undertakings and representations made by the host State to induce investors to make an investment. Provisions of general legislation applicable to a plurality of persons or of category of persons, do not create legitimate expectations that there will be no change in the law.*"[584]

470. There were no such representations in this case. There was, on the other hand, clear public notice given of the possibility of a change in Norway's approach to the harvesting of snow crab on its continental shelf. There was public consultation on the proposed changes, conducted in accordance with the requirements set out in chapter VII of Norway's Public Administration Act of 10 February 1967[585] and the Instructions for Official Studies of Central Government Measures.[586]

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584 **CL-0166** *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, ¶426.

585 **RL-0245-NOR** Act of 10 February 1967, last amended by LOV-2021-06-11-79. **RL-0246-ENG** Translation to English last updated on 16 June 2017.

586 **R-0409-ENG** Instructions concerning consequence assessment, submissions and review procedures in connection with official studies, regulations , propositions and reports to the Storting, as adopted by Royal Decree of 18 February 2000 and amended on 24 June 2005.

471. On 24 October 2014. Norway sent out a 'consultation letter' concerning the management of snow crab, in accordance with normal procedures.[587] The consultation was also made publicly available on the Government's web page and was announced by 'Fiskebåt' – the Norwegian fishing vessel owners' association; and a newspaper article on it was published by 'Fiskeribladet', the main Norwegian newspaper concerned with fisheries, on 28 October 2014.[588]

472. The opening paragraphs of that important paper read as follows:

> "***Consultation letter – management of snow crab1. Introduction***
>
> *For a number of years the Norwegian Institute of Marine Research (Havforskningsinstituttet) has attempted to ascertain the snow crab's habitat range, growth conditions and size of biomass. According to Russian researchers, the snow crab's biomass is approximately ten times that of king crab in the Barents Sea. Although it is most prevalent on Goose Bank on the Russian side, it has been observed increasingly in the Norwegian part of the Barents Sea. The aim, therefore, is to draw up a management plan for snow crab in Norwegian waters.*
>
> *In this consultation letter, the Ministry proposes the adoption of a general prohibition on the harvesting of snow crab for the entire area falling within Norwegian jurisdiction, including the Fisheries Protection Zone around Svalbard, until such time as a more comprehensive management plan for snow crab has been drawn up. It is further proposed that exemptions be granted from that prohibition on conditions stipulated by the Norwegian Directorate of Fisheries until such time as there is a comprehensive management plan.*
>
> *The time-limit for consultation input has been set at 10 December 2014.*
>
> ***2. Background – current regulatory scheme and state of the law***
>
> *A ban on discarding snow crab is currently in place in the Regulations on the exercise of fishing in the sea of 22 December 2004 (forskrift om utøvelse av fisket i sjøen av 22. desember 2004). For Norwegian vessels it is permitted until further notice to harvest snow crab, including for research purposes, without a specific permit.*
>
> *Research permits for non-Norwegians are regulated in the 'foreigner regulations' (Regulations of 30 March 2001 on scientific ocean research by foreign nationals in Norwegian internal waters, territorial waters, Economic Zone and on the continental shelf) (forskrift av 30. mars 2001 om utenlandsk vitenskapelig havforskning i Norges indre farvann, sjøterritorium, økonomisk sone og på kontinentalsokkelen). The Regulations requires notification/expedition application from the research State, followed by consent from Norwegian authorities.*

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587 **R-0113**.

588 **R-0110**; **R-0111**.

As there have not hitherto been any particular restrictions on fishing for snow crab in Norwegian areas, registered Norwegian vessels may currently harvest snow crab without quantitative limits in the Economic Zone, the Fisheries Protection Zone around Svalbard and in international waters (the Loop Hole). Norwegian vessels are not permitted to harvest snow crab in the Russian Zone.

We have observed increasing interest from Norwegian and foreign players in fishing for snow crab in the Barents Sea. In 2013 three Norwegian vessels landed snow crab caught in the Loop Hole. Furthermore, a Spanish vessel with Russian interests landed a significant quantity of snow crab in Norway (506 tonnes). We are now seeing a development in which more vessels are being rigged to harvest snow crab. There have also been reports of areal / equipment-related conflicts between vessels engaged in harvesting snow crab and other fisheries activities".[589]

473. Subsequent paragraphs in the consultation letter spelled out clearly Norway's intended course of action:

"*The draft entails the introduction of a general prohibition on the harvesting of snow crab for the entire area falling within Norwegian jurisdiction, including the Fisheries Protection Zone around Svalbard, until such time as there is a more comprehensive management plan.* […]

The draft entails that all those wishing to harvest snow crab need to have an exemption, irrespective of whether they have previously harvested king crab. This means inter alia that, if the draft is adopted, vessels holding commercial licences restricted to the harvesting of snow crab and possibly king crab and edible crab pursuant to the circular letter of 16 February 2012 from the Ministry of Fisheries and Coastal Affairs need to have an exemption in order to continue harvesting snow crab. The circular letter of 16 February 2012 has, moreover, been replaced by a new circular letter that does not allow for allocation of commercial licences restricted to snow crab. […]

6. Proposal for a regulatory scheme

In the light of the foregoing, the Ministry of Trade, Industry and Fisheries proposes the adoption of a general prohibition on the harvesting of snow crab for the entire area falling within Norwegian jurisdiction, including the Fisheries Protection Zone around [Svalbard]*, with temporary exemptions from the prohibition being granted on certain conditions stipulated by the Directorate of Fisheries.*"[590]

474. The consultation paper was published on the website of the Norwegian Ministry of Trade, Industry and Fisheries and also sent directly to the Norwegian Directorate of Fisheries, the Norwegian Fishermen's Association, the Norwegian Seafood Federation, the Norwegian Coastal Fishermen's Association, the Norwegian Pelagic Association, the Sámi Parliament of Norway, the Norwegian Ministry of Climate and Environment,

589 **R-0113**.

590 **R-0113**.

the Norwegian Environment Agency, the Norwegian Ministry of Finance, the Norwegian Ministry of Foreign Affairs, the Norwegian Ministry of Local Government and Regional Development, the Norwegian Seafarers' Union, the Norwegian Seafood Council, Fish Buyers' Association, the Norwegian Fishermen's Sales Organization, the Norwegian Society for the Conservation of Nature, WWF Norway, the Norwegian Union of Food, Beverage and Allied Workers, the Norwegian Institute of Marine Research, Nofima, the Norwegian Maritime Officers' Association, the Norwegian Directorate for Nature Management, the Labour and Welfare Service, and the Norwegian Food Safety Authority.[591] To borrow Claimants' phrase, the plan was "*known to <u>all</u> industry participants*".[592]

475. By the end of the deadline for comments, 17 comments had been received: 14 supporting the proposal, two with no comments, and one negative comment (from *Norges Kystfiskarlag* – the Norwegian association for coastal fishermen– which argued that the snow crab should be eradicated). Neither Claimant made any response to the consultation paper. Notice of the public consultation was given on 24 October 2014. Among the notable events that occurred *after* the plan to adopt a general prohibition on the harvesting of snow crab for the entire area falling within Norwegian jurisdiction was made public and notified directly to the industry organisations, are the following:

475.1. The purchase by Claimants of the vessel *Saldus* on 20 November 2014;[593]

475.2. The adoption of Regulation J-280-2014, "*Regulations on the prohibition of catching snow crabs*", on 19 December 2014';[594]

475.3. The purchase by Claimants of the vessel *Solveiga* on 22 December 2014;[595]

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591 The list of addressees appears at the end of **R-0113**.

592 Reply, ¶667.

593 **C-0055**.

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

595 **C-0059**.

475.4. The appointment of Sea & Coast as North Star's local agent for the *Solvita*, *Saldus*, *Senator*, and *Solveiga* "in ports of call and on fishing ground in Norway", on 1 February 2015;[596]

475.5. The purchase by Mr Pildegovics of 100% of the shares in North Star, on 15 June 2015;[597]

475.6. The statement by Ilya Shestakov, Deputy Minister of Agriculture of Russia, and Elisabeth Aspaker, Minister of Fisheries of Norway, recording their mutual understanding that snow crab is a sedentary species and that its harvesting in the NEAFC area can only be conducted with the consent of the coastal State, on 17 July 2015;[598]

475.7. The signature by North Star of letters of intent for the purchase of the vessels *Sokol* and *Solyaris*, on 23 July 2015;[599]

475.8. The circulation by the European Commission of its letter to Member States advising them to rescind any current licenses authorising their vessels to harvest snow crab because of its classification as a sedentary species, on 5 August 2015;[600]

475.9. The acquisition by Mr Pildegovics of shares in Sea & Coast, on 15 October 2015;[601]

475.10. The issuance by Norway of notes verbale to the EU and separately to Latvia stating that snow crab is a sedentary species on the continental shelf over which

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596 Memorial, ¶249.

597 **C-0076**.

598 **C-0106**.

599 Memorial, ¶298.

600 **R-0033**.

601 Memorial, ¶¶215, 247. Cf., RFA ¶¶37, 87.

the coastal State exercises sovereign rights of exploitation, on 30 October 2015[602] and 2 November 2015[603] respectively;

475.11. The adoption of Regulation J-298-2015, amending Regulation J-280-2014, on 22 December 2015;[604]

475.12. The meeting between Per Sandberg, the Norwegian fisheries minister, and Messrs Ankipov and Pildegovics at which it is reaffirmed that no crabbing on the Norwegian continental shelf is allowed without Norway's authorisation;[605] and

475.13. The approval of North Star's purchase of *Sokol* and *Solyaris* by the Latvian Ministry of Agriculture, on 11 April 2016.[606]

476. New regulations prohibiting the harvesting of snow crab by any vessel in Norway's territorial waters, in the Economic Zone around mainland Norway and in the Fisheries Protection Zone around Svalbard, and by Norwegian vessels also in international waters, were adopted on 19 December 2014[607] and entered into force on 1 January 2015.[608] The Regulations provided that "[v]*essels that have harvested snow crab in 2014 may continue such harvesting also after 1 January 2015, but are required to apply for dispensation no later than by 15 February 2015*." Neither Claimant made any application for dispensation by 15 February 2015.

477. On 22 December 2015 an amendment to the regulations extended the 2014 Regulations to the entire Norwegian continental shelf, including the area in the Loop Hole.[609]

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602 **C-0109**.

603 **R-0081**.

604 **C-107; C-110.**

605 Memorial, ¶367.

606 **C-0063**.

607 **C-0104**

608 **C-0104**.

609 **RL-0148-ENG; RL-0147-NOR** Regulations FOR-2015-12-22-1833 amending Regulations FOR-2014-12-19-1836, adopted on and entered into force on 22 December 2015.

478. Between that date and July 2016 there was no unlawful activity of which Norway was aware on the Norwegian continental shelf in the Loop Hole (the Claimants were harvesting snow crab on *Russia*'s continental shelf). Breaches were detected in July 2016, in the circumstances outlined in Norway's Counter-Memorial.[610] The first arrest by Norway of one of North Star's vessels for illegally harvesting snow crab on the Norwegian continental shelf occurred on 17 September 2016, shortly after the ban on snow crab harvesting on the Russian continental shelf entered into force.[611] North Star and the vessel's captain, Russian national Rafael Uzakov, accepted the fines, NOK 61,000 and NOK 20,000 respectively.[612]

479. After the date when Norway began to detect violations of its snow crab Regulations by North Star,[613] and after the date of the arrest of the *Senator* for illegally harvesting snow crab in the Loop Hole (17 September 2016)[614] the following event among others, occurred:

479.1. North Star contracted with Seagourmet, with [redacted] and with [redacted] on 29 December 2016 to deliver snow crab;[615]

479.2. North Star contracted to buy the vessels *Sokol* and *Solyaris*, on 5 January 2017.

479.3. North Star contracted with Seagourmet on 27 December 2017 to deliver snow crab.[616]

480. These events, like those described above relating to the Claimants' actions after the October 2014 consultation, lack any clear explanation. When North Star contracted to deliver snow crab in December 2016 it had not offloaded a single crab since 9 September (approximately 10 months after the Norwegian ban and a few days after the Russian ban) and had no prospect of being able to harvest snow crab lawfully from

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610 Counter-Memorial, ¶159.

611 RFA, ¶131.

612 Counter-Memorial, ¶705.

613 RFA, ¶129.

614 RFA, ¶131.

615 **C-0053; C-0065; C-0066**.

616 **C-0054**.

the Norwegian continental shelf. Even more striking is the decision a year later to buy two additional vessels. Whatever the thinking behind that decision, it cannot have been based on expectations created by Norway's conduct.

481. This pattern of events does not indicate investments made in reliance on supposed representations (which were not in fact made) about a continuing freedom to harvest snow crab on the Norwegian continental shelf. That account fails at both ends. Norway made no statement assuring the Claimants of the continuity of unregulated access to snow crab; and the investments continued after the date (September 2016)[617] on which the Claimants say their business was expropriated and by which they were beyond any doubt clear that they had no right of access to snow crab on the Norwegian continental shelf unless they were authorised by Norway.

482. Similarly, the idea that the first instances of enforcement of Norway's exclusive rights over snow crab on its continental shelf in July or September 2016 came as a bolt from the blue is untenable. Norway had exclusive rights over sedentary species on its continental shelf and had the right to regulate them, under customary international law, under Article 2(4) of the 1958 Continental shelf Convention and under Article 77(4) of UNCLOS. It had never said that it would not exercise that right; and in any event in October 2014, it gave explicit public notice of its planned "*general prohibition on the harvesting of snow crab for the entire area falling within Norwegian jurisdiction*" and launched a public consultation on the matter. In what way can Norway be said to have breached its international obligations?

9.1.2 The supposed factual basis of the Claimants' case: (2) Norway's alleged change of position

483. The next section of the Reply (paragraphs 671– 684) presents the proposition that "*Norway Changed its Position on the Characterization Of Snow Crab to Expand the Scope of its Fisheries Jurisdiction into the Loop Hope and exclude EU Crabbers from the Loop Hole*."

617 Memorial, ¶¶675, 699; Counter-Memorial, ¶¶637–641.

484. The Claimants assert in their Reply that "*the Norwegian government did not hold the position that snow crab was a sedentary species*" in October 2014[618] (emphasis in original). The Claimants' supporting authority for that proposition reads "*See above, paras. 22 to 226*".[619] Norway can find nothing in those paragraphs of the Reply (or anywhere else) that supports the Claimants' assertion. The Claimants' assertion has no basis in fact.

485. This point has been addressed above, where it was explained that Norway had jurisdiction on the continental shelf and exclusive sovereign rights over its exploration and the exploitation of its natural resources for more than half a century, and that Norway exercised those rights in order to regulate snow crab harvesting as soon as it was economically viable resource.[620]

486. Importantly, provided that a coastal State has established 200 nautical mile zone, the question of whether a certain species is sedentary or not is only of practical relevance in areas beyond 200 nautical miles from the baselines of the coast. For living resources inside 200 nautical miles, the coastal State has sovereign rights to explore and exploit the non-sedentary living resources with the use of its 200 nautical mile zone jurisdiction and the sedentary species under the continental shelf jurisdiction. To determine whether a species is sedentary or not is therefore not of any regulatory importance if the fishing or harvesting takes place exclusively inside 200 nautical miles. As opposed to the snow crab, the larger king crab *(Paralithodes camtschaticus)* for example only thrives close to the coast and is not harvested beyond 200 nautical miles. The question of whether it is sedentary or not is therefore not of any regulatory significance. Norway has never held the position that snow crab is not a sedentary species. It has referred to snow crab as an 'unregulated' species, in circumstances where Norwegian legislation had not yet been passed to prohibit the harvesting of snow crab from the Norwegian continental shelf and Norwegian authorities had no basis in Norwegian law to forbid the activity. That is not disputed. But that is not at all the same thing as referring to snow crab as a

618 Reply, ¶672.

619 Reply, ¶672 fn 817.

620 See above, **Chapter 2**.

non-sedentary species or a resource over which, as a matter of international law, Norway has no right to exercise jurisdiction beyond its 200 nautical mile zones.

487. The Claimants have placed great weight on internal emails disclosed during the course of this arbitration.[621] The fact that internal emails suggest that certain Norwegian officials wished to check on the status of snow crab is both unsurprising and irrelevant. Unsurprising, because public officials do indeed sometimes take the trouble to check on facts before they give firm answers to questions. Irrelevant, because the Claimants cannot have relied on or in any way been influenced by internal government communications of which they were wholly unaware, until Norway provided them with the documents in the course of this arbitration. Irrelevant also because statements of and positions taken by civil servants during internal discussions are not externally expressed positions of Norway as a State. That is the point of engaging in policy discussions within government. A Government position is decided after due consideration and deliberation: it does not emerge automatically every time a civil servant puts pen to paper.

488. Norway did not change its position on the characterisation of crabs, including snow crabs as being a sedentary species, when it exercised its long-standing rights under international law and expanded the scope of Norwegian regulations to prohibit the unauthorised harvesting of snow crab in the Loop Hole. This element of the Claimants' case must be rejected.

9.1.3 The supposed factual basis of the Claimants' case: (3) Norway's treatment of snow crab as a sedentary species

489. The third part of this section of the Reply (paragraphs 685-718) is headed "*Norway Behaved as if it Had "Always" Considered Snow Crab as a Sedentary Species Belonging to its Continental Shelf and Denied the Legitimacy of EU Fishing Activities in the Loophole Predating its Change Of Position.*" That statement is half correct.

490. It is broadly true that Norway "*behaved as if it had 'always' considered snow crab as a sedentary species belonging to its continental shelf*." That is because Norway never took the position that snow crab was not a sedentary species and never took the position

621 Reply, ¶¶672–677.

that Norway had no jurisdiction over snow crab on its continental shelf. The flaw in the Claimants' case is the assumption that because Norway had not in fact exercised the jurisdiction that it possessed under international law in order to regulate snow crab catches before 2014, it follows that Norway regarded itself as legally unable to do so. The fallacy is obvious and the Claimants' argument totally overlooks Norway's inherent sovereign rights over the resources of the continental shelf.[622]

491. The argument that Norway did not object to "*NEAFC's jurisdiction over snow crab*"[623] misrepresents the position. NEAFC itself has no "jurisdiction" in the sense of a sovereign power to impose regulations on vessels engaging in catching marine living resources.

492. The organisation of NEAFC was explained in the Counter-Memorial and the Claimants have not contested that explanation.[624] The NEAFC Commission has the power, under Article 5(1) of the NEAFC Convention,[625] to "*make recommendations concerning fisheries conducted beyond the areas under fisheries jurisdiction of Contracting Parties*" and, under Article 6(1), "*to make recommendations concerning fisheries conducted within an area under fisheries jurisdiction of a Contracting Party, provided that the Contracting Party in question so requests and the recommendation receives its affirmative vote.*" Thus, the NEAFC Commission can only ever make recommendations to its Contracting Parties: it has no authority to impose regulations itself. Moreover, the NEAFC Commission cannot even make recommendations concerning fisheries conducted "*within an area under fishing jurisdiction of a Contracting Party*" unless that Contracting Party requests the Commission to do so.

493. The NEAFC Convention applies to all fishery resources, including sedentary fisheries, in the NEAFC 'Convention area'. That area is defined by geographical coordinates, and occupies a sector of the north-east Atlantic situated, in broad terms, north of 36° north latitude and between 42° west longitude and 51° east longitude, but excluding the Baltic

622 See above, **Chapter 2**.

623 Reply, ¶690.

624 Counter-Memorial, ¶¶51–67.

625 **CL-0018** Convention of 18 November 1980 on future multilateral cooperation in North-East Atlantic fisheries NEAFC Convention.

and Mediterranean Seas.[626] As was noted above, the competence of the NEAFC Commission is defined with reference to areas that are "*within an area under fishing jurisdiction of a Contracting Party*." That includes the 200 nautical mile zones of Contracting Parties. The "*fishing jurisdiction*" of a State is defined by UNCLOS, whose provisions were recognised by the 'Declaration on the Interpretation and Implementation of the Convention on the Future Multilateral Cooperation in North-East Atlantic Fisheries', drafted by the NEAFC Contracting Parties in 2005.[627]

494. In 2015 the OSPAR Commission and the North-East Atlantic Fisheries Commission drafted a statement on the 'Collective arrangement between competent international organisations on cooperation and coordination regarding selected areas in areas beyond national jurisdiction in the North-East Atlantic'.[628] The 'selected areas in areas beyond national jurisdiction' are specified in Annex 1 to the Collective Arrangement. Paragraph 6.f of that Collective Arrangement refers to "*cases where the areas listed in Annex 1 are superjacent to areas under national jurisdiction*." That can only refer to areas of high seas superjacent to the continental shelf beyond 200 nautical miles of Contracting Parties. It is thus evident that NEAFC (like OSPAR) does *not* regard the seabed of such areas – the continental shelf in areas such as the Loop Hole beyond 200 nautical miles – as being 'beyond national jurisdiction'. The water column of such areas is beyond national jurisdiction: the subjacent continental shelf is not.

495. That position has been specifically applied in the context of snow crab. As was explained in some detail in the Counter-Memorial,[629] NEAFC members rejected proposals to include snow crab in the list of NEAFC-regulated species.

496. It is true that for a matter of months, after the arrival of commercially-exploitable quantities of snow crab on the Norwegian continental shelf and before Norway prohibited the harvesting of snow crab on its shelf in the Loop Hole, vessels were not subject to criminal liability under Norwegian law when harvesting snow crab. Such vessels were, by definition, operating in the NEAFC Convention area, and were

626 **CL-0018.** The exact boundary of the NEAFC area is defined in Article 1 of the NEAFC Convention.

627 **CL-0018**.

628 **CL-0018**.

629 Counter-Memorial, ¶¶56–67.

accordingly obliged to register under the NEAFC scheme and to comply with NEAFC inspection procedures and so on.[630] That is not at all the same as a situation in which NEAFC, or any NEAFC Contracting Party other than Norway as the continental shelf State, was issuing licences conferring a legal right to harvest snow crab on the Norwegian continental shelf in the Loop Hole. The Claimants misunderstand or mis-state the legal position.

497. The Claimants, in their Reply at paragraph 105, state that "*The records of the Norwegian Coast Guard prove Norway's recognition of North Star's NEAFC fishing licences. On 1 May 2015 and 15 January 2016, the Coast Guard inspected Solveiga and Saldus respectively.*" They offer as evidence two reports from the Norwegian Coast Guard covering these inspections.[631] It is necessary to understand what NEAFC inspections are, and what the inspectors look for. NEAFC does not have its own Coast Guard or its own inspectors, it is the Member States, among them Norway, that carry out NEAFC inspections on behalf of NEAFC. The inspectors will then inspect according to the NEAFC scheme on control and enforcement.[632] This scheme provides for the regulation of the manner in which the otherwise lawful exploitation of marine resources is conducted. It does not in itself give any right to harvest those resources. The inspectors accordingly check that the vessel carries the appropriate documentation and records and is carrying appropriate fishing gear etc. The range of inspection activity can be seen from the annual Compliance Reports issued by NEAFC.[633]

498. When the Norwegian Coast Guard inspected *Saldus* and *Solveiga qua* NEAFC inspectors, they did not find any violation of the NEAFC scheme of control and enforcement. Norway does not dispute that. However, and more crucially, as Norway pointed out in paragraphs 79-84 its Counter-Memorial, the inspections effected by the Norwegian Coast Guard on which the Claimants rely occurred not on the Norwegian continental shelf but on the Russian continental shelf and at the relevant times Russia

630 For a fuller account of the NEAFC system see Norway's Counter-Memorial, ¶¶51–67.

631 **C-0094, C-0099**.

632 See also the Counter Memorial, Section 2.2.4

633 See e.g., **R-0417-ENG** Compliance Report 2020, at p.14, Table 11 ("Infringements detected in 2020 by type on CP vessels").

had not imposed any prohibitions on the harvesting of snow crab on its shelf in the Loop Hole. The Claimants have no response to that critical point.

499. To revert to the heading of this section of the Reply, it is wrong to say that Norway "*denied the legitimacy of EU fishing activities in the Loop Hole predating its change of position*". Norway does not deny that the harvesting of snow crab on the Norwegian continental shelf in the Loop Hole was not illegal before Norway passed the new regulations. What Norway denies is that there was a legal *right* or a legal *entitlement* to harvest snow crab and that Norway had no legal right to make regulations governing the harvesting of snow crab on its continental shelf. Under international law, as set out in Article 77 of UNCLOS, Norway had at all times sovereign rights and jurisdiction over the sedentary species on its continental shelf and the exclusive legal right to make regulations governing their exploitation. No other State had the right to exploit or authorise the exploitation of Norway's continental shelf resources without the express consent of Norway.

500. This section of the Reply contains a range of accusations of deception, lack of candour, lack of transparency, malice, etc. For example, in paragraph 685 it is said that Norway's statements that it did not change its position on the sedentary character of snow crab "*are false*", and that "*Norway's own documents establish the fact that Norway adopted the position that snow crab is a sedentary species no earlier than 2015.*" That ignores the 1958 Norwegian report, referred to in paragraph 48 of the Counter-Memorial, explicitly stating that under the 1958 Continental Shelf Convention crab would be considered a sedentary species and would be subject to the sovereign rights of the coastal State.[634] Or perhaps the Claimants, for reasons not explained, considered that snow crabs are not to be regarded as 'crabs' in this context.

501. In their Reply[635] the Claimants try to downplay the importance of the 1958 report by referring to it as a "*confidential memorandum*" and stating that "*the identity of the author is unknown as is the purpose of its preparation and the scope of distribution* […]" and further that "[T]*here is no evidence that Norway ever adopted the views stated*

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

635 Reply, ¶¶223-225.

in the memorandum, let alone that it ever made its content public". It is true that the report was marked "Confidential" probably because it contained rather detailed information about Norway's and other States' positions in the negotiations. However, major parts of the report were submitted to the Norwegian Parliament as an Annex to "St. Meld. nr. 42 (1959)" Concerning Norway's Participation in the United Nations Conference on the Law of the Sea in Geneva from 24 February to 27 April 1958. The review of the individual articles in the 1958 convention as submitted to Parliament is identical with what is found in the internal report marked "Confidential". Of most interest for our case is that the explicit reference to crabs as a sedentary species being subject to continental shelf jurisdiction is also to be found in the public report submitted to Parliament in 1959.

The Report to Parliament says on page 37:

> "*The adopted definition [of the natural resources on the continental shelf] is based on the coastal state's special rights over living organisms only including organisms that at the stage when they can be exploited ("at the harvestable stage") are stationary ("sedentary"), in the sense that they are either immobile on or the seabed or are unable to move except in constant physical contact with the seabed or the subsoil. The coastal state will therefore be granted exclusive rights to all botanical vegetation on the seabed and for the fishing of, for example, oysters, muscles,* ***crabs*** *and lobsters, however, these exclusive rights will not include, for example, shrimp and, of course, all fish in the usual sense.*
>
> *Article 2 as a whole was adopted in the plenary session by 59 votes to 5, with 6 abstentions. Norway voted in favour*"[636] (emphasis added).

502. The public records show that the Norwegian Government informed its Parliament about the sedentary nature of crabs and the implications of this already in April 1959. This should be enough to dispose of the Claimants' accusation that Norway changed its position and only characterised snow crab as a sedentary species no earlier than July 2015.

503. Paragraphs 693-695 of the Reply assert that, "[a]*fter its change of position, Norway started to misrepresent the effect of its 2014 prohibition against crab fishing* […] [which] […] *made no reference to Norway's continental shelf*." It is true that one internal memorandum prepared the Ministry of Foreign Affairs for the Governor of Svalbard in January 2017 contains a list of speaking points, one of which says that there

[636] **R-0419-NOR; R-0420-ENG** Report to the Norwegian Parliament (Stortinget) No. 42 (1959).

had been a general ban on catching snow crab on the Norwegian continental shelf since 1 January 2015.[637] That bullet point was simplified for practical reasons.[638] The accurate position was that the general ban on harvesting snow crab on the continental shelf within 200 nautical miles had been in force since January 2015, and that the Norwegian continental shelf beyond 200 nautical miles, including in the Loop Hole was only brought within the scope of the prohibition by an amendment adopted in December 2015.[639] By the time that this simplified speaking point was passed to the Governor (but not made public – it was disclosed to the Claimants by Norway during the course of this arbitration), the prohibition had indeed extended to the entire Norwegian continental shelf for more than a year.

504. There are accusations that Norway 'disparaged' foreign investors and portrayed them as criminals,[640] and even an implication that there was some sort of connection between these "*derogatory remarks*" by the Norwegian Government and allegedly defamatory newspaper articles based on forged documents.[641] Norway denies all of these accusations and insinuations. The Claimants' submissions and the 'evidence' that they adduce are themselves sufficient to demonstrate the vacuity of these scurrilous suggestions.

505. The same section of the Reply also contains references to passages in various arbitral awards. There is, however, no point of law in issue. Allegations that Norway acted in bad faith or with lack of candour, etc., fail on the facts. There is no need to engage in detailed exegesis of the phrase "*equitable and reasonable treatment*", but one point may be emphasised. The Claimants suggest that Norway has sought to raise threshold for finding a breach of the standard of fair and equitable treatment (or, as in the BIT in this case, "*equitable and reasonable treatment*"), so that Norway's conduct is, as it were, bad but not bad enough to breach the BIT obligation.[642] Norway's submissions

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637 **C-0255**.

638 Internal Norwegian Government "speaking notes" are generally short and simplified documents intended to brief government officials on high level 'talking points'.

639 **R-0148**.

640 Reply, ¶699.

641 Reply, ¶703.

642 Reply, ¶¶710–718.

were directed to an accurate statement of the law. The question was considered in some detail by the tribunal in *Biwater Gauff*, on which the Claimants rely, and analysed in paragraphs 586-603 of its Award.[643] The tribunal's view was clear:

> "*596. Relevant Threshold : Whilst the Tribunal in Mondev v. United States, concluded that:*
>
> *"a judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case"*
>
> *This is not to say that the general threshold for finding a violation of the standard cannot be articulated.*
>
> *597. This threshold is a high one. As stated by the tribunal in Waste Management v. Mexico (No. 2) :*
>
> *"Taken together, the S.D. Myers, Mondev, ADF and Loewen cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety–as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."*"

506. That standard has also been applied by several other Tribunals.[644] The real point, however, is that whatever discussions there might be over the precise phrasing of the test, Norway's conduct comes nowhere near the threshold for a violation of the duty to accord equitable and reasonable treatment to the Claimants' investments.

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643 **RL-0128**.

644 **RL-0268-ENG** *Jorge Luis Blanco, Joshua Dean Nelson and Tele Fácil México, S.A. de C.V. v. United Mexican States*, ICSID Case No. UNCT/17/1, Final Award, 5 June 2020, paras. 358-359; **CL-0351** *M. Meerapfel Söhne AG v. Central African Republic*, ICSID Case No. ARB/07/10, Excerpts of Award, 12 May 2011, para. 359; **RL-0135-ENG** *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, para. 501; **CL-0501** *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, para. 12; **CL-0445** *Vento Motorcycles, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/17/3, Award, 6 July 2020, para. 276; **CL-0154** *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, para. 384; **RL-0172-ENG** Campbell McLachlan, Laurence Shore, Matthew Weiniger (eds) *International Investment Arbitration: Substantive Principles* (2nd Ed OUP) at Sections 7.175-7.176.

9.1.4 The supposed factual basis of the Claimants' case: (4) Norway's refusal to consider the Claimants' alleged 'acquired rights'

507. The fourth part of this section of the Reply (paragraphs 719–752) is headed "*Norway Refused to Give Due Consideration to Claimants' Acquired Rights Derived from their Fishing Activities in the Loophole*." Here, the Claimants' argument fails both on the law and on the facts.

508. Under the comprehensive provisions of UNCLOS, the Claimants had no 'acquired rights' of access to snow crab on the Norwegian continental shelf. As a matter of law, UNCLOS (by which Norway, Latvia and the EU are bound) sets out the circumstances under which fishers from foreign States must be given access to a State's marine living resources. UNCLOS Article 62(3) requires that States "*shall take into account* […] *the need to minimize economic dislocation in States whose nationals have habitually fished*" in the State's exclusive economic zone when deciding which States may share in any surplus remaining in circumstances where the State "*does not have the capacity to harvest the entire allowable catch.*"[645] That is only one factor to be taken into account: others include, for example, the requirements of developing States in the region and the contribution of States to fishery research and identification of stocks, and significantly for Norway "*the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests*."

509. There is no *right* for fishers of any State to access to any part of the surplus. There is no prohibition on the coastal State seeking a *quid pro quo* for such access. And in any event, Article 62(3) does not apply to sedentary species: it is disapplied by UNCLOS Article 68. There is no right under UNCLOS for 'habitual' fishers of sedentary species to maintain their fishing activity within the fisheries jurisdiction of another State. There is a provision concerning 'traditional fishing rights': but that is applicable only in archipelagic waters, and even then under limited conditions under UNCLOS Article 51(1). Those provisions are clearly irrelevant here.

510. The Claimants refer to the 1964 Agreement between the USA and Japan concerning Alaskan king crab,[646] under which "*having regard to the historical fact that nationals*

645 **CL-0013** UNCLOS, Article 62(2).

646 **CL-0479**.

and vessels of Japan have over a long period of years exploited the king crab resource in the eastern Bering Sea" it was agreed that the Japanese would continue for two years to take crab in the areas exploited historically by Japan. That Agreement was made "*without prejudice to* [the] *respective positions*" of the USA and Japan – Japan at that time considered that "*king crabs are a high seas resource*", and the USA considered that "*the king crab is a natural resource of the continental shelf over which the coastal State* […] *has exclusive jurisdiction, control and rights of exploitation*."[647]

511. In that case, however, crab fishery in the Bering Sea had been developed since 1930 and predated the emergence of the very concept of the continental shelf.[648] The supervention of US legislation that included Alaskan king crab among the regulated continental shelf resources was an unforeseeable occurrence during the most of the time for which crab harvesting had been pursued in the Bering Sea, it affected a practice pursued over decades, and it was accommodated by agreement between the States concerned. As Professor O'Connell (writing in 1982) noted, the Japan-US Agreement provided for "*limitation of catch, conservation measures, and machinery for performance*", and while "*the legislation of other countries has likewise expanded the catalogue of living natural resources* [...] *unlike the case with the Alaskan king crab, provision has not usually been made for 'historic rights'*."[649] Neither the Alaskan king crab episode of the 1960s, long overtaken by developments in international law, nor State practice supports the Claimants' argument that in the course of 2015 they somehow gained 'acquired rights' to harvest snow crab on the Norwegian continental shelf without needing Norway's permission.

512. The Claimants cite one of the PCIJ judgments in the *Upper Silesia* case for the proposition that "*the principle of respect of vested rights* [...] *forms part of generally accepted international law.*"[650] Neither that judgment nor any of the other authorities

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647 **RL-0262-ENG** M.M. Whiteman, *Digest of International Law*, vol 4 (1965) p. 864.

648 See **R-0418-ENG** 'The Japanese Tanner Crab Industry' delivered by Shoji Ono to the North Pacific Fishery Management Council.

649 **RL-0263-ENG** D.P. O'Connell, *The International Law of the Sea*, vol. 1 (1982), p. 502.

650 Reply, ¶747 referring to Memorial, ¶615ff. The reference is to "*PCIJ, Case concerning certain German interests in Polish Upper Silesia (Germany v. Poland), Judgment on the Preliminary Objections, 25 August 1925, CL-0221, p. 42*". In fact the phrase occurs in a different judgment, **CL-0225** *Case concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Merits, 25 May 1926, p. 42.

cited explain what are the criteria in international law for the creation of an acquired right. In *Upper Silesia* the right was established by registration of a legal interest by the State. As the PCIJ explained:

> "[…] *the Oberschlesische's right of ownership of the Chorzów factory must be regarded as established, its name having been duly entered as owner in the land register. If Poland wishes to dispute the validity of this entry, it can, in any case, only be annulled in pursuance of a decision given by the competent tribunal ; this follows from the principle of respect for vested rights, a principle which, as the Court has already had occasion to observe, forms part of generally accepted international law* […]".[651]

513. No such registration by Norway of a legal interest of the Claimants in catching snow crab on the Norwegian continental shelf exists in the present case.

514. As a matter of fact, the Claimants have no basis whatever in fact for a claim to 'acquired rights' in the sense of right based on a long-term practice. Most, if not all, of the snow crab was harvested on Russia's continental shelf.[652] The Claimants were engaged in the catching of snow crab for only a matter of months, prior to the entry into force of the regulations introduced by Norway, and then Russia. The Claimants have not set out a case on how they can be said to have acquired rights given the very short time for which their activity lasted.[653] The Claimants' first "licence" is said to have been issued on 1 July 2014.[654] Norway's first regulation entered into force in January 2015 and in the same year Norway's regulations were extended its continental shelf in the Loop Hole. For the establishment of historic rights, practice over many years – decades rather than months – is necessary.[655] Even assuming that habitual fishing may perhaps be

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651 **CL-0225** *Case concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Merits, 25 May 1926, p. 42.

652 Counter-Memorial, ¶¶141-144.

653 Nor has the EU, which sought to cast the issue in terms of the "acquired rights" of those who have fished for snow crab in areas "subject to national jurisdiction beyond 200 nautical mile limits": Reply, ¶131.

654 **C-0023**.

655 See e.g., **RL-0247-ENG** Clive R. Symmons, *Historic Waters and Historic Rights in the Law of the Sea*, (2nd ed., 2019), p. 254, and ch. 17 *passim*, and pp. 26–28, 56–57. Cf., **RL-0217-ENG** *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Judgment of 21 April 2022, pp. 75–76, ¶¶220–221: "*Some affiants refer to fishing expeditions beyond the Colombian islands being limited to "a few times a year", while others claim to have carried out fishing in those areas since the 1980s and 1990s, a time span which the Court does not consider, in the circumstances of the present case, long enough to qualify such fishing as "a long-standing practice" or to support Colombia's claim concerning the existence of a local custom or of "a local customary right to artisanal fishing*".

established over a shorter period of time; the Claimants offer no indication of the minimum period required. Article 4 of the 1964 London Fisheries Convention[656] refers to fishing vessels that "*have habitually fished* [in certain waters] *between 1st January, 1953 and 31st December, 1962*"; and that gives some idea of how the concept of "habitual fishing" has been understood in that context. 'Traditional' rights plainly require a period sufficient for a 'tradition' to arise.[657] But in any case it is evident that North Star, which was incorporated in March 2014 could scarcely have built up an historic / habitual / traditional right to catch crab by the time that Norway brought into effect its new snow crab regulations in 2015.

515. There is a further point. Norway not only considered offering a quota to EU vessels: it actually did so. As the Counter-Memorial made clear, Norway offered the EU a quota for harvesting snow crab for 2016 and 2017.[658] As it was put in one of the Claimants' own exhibits:

> "*As the EU has so far not wanted to enter into an agreement with Norway on the exchange of a quota for snow crab for other species, the Latvian vessels cannot be given access through a pilot project. It is an absolute precondition for the Latvian vessels to have access to snow crab fishing on the Norwegian continental shelf that an agreement is entered into between the EU Commission and Norway.*" [659]

516. This component of the Claimants' case does not get off the ground.

9.1.5 The supposed factual basis of the Claimants' case: (5) Norway's alleged collusion with Russia

517. In the fifth section of this point in the Reply (paragraphs 753-772), Claimants say that "*Norway acted in Concert with Russia to close the entire Loophole to EU Snow Crab Fishing Vessels Including the Claimants*". More specifically, the Claimants say that:

> "*Norway's documents prove that Norway's decision to designate snow crab as a sedentary species was made through an agreement with Russia reached at Valletta in*

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656 **RL-0272-ENG** London Fisheries Convention of 1964.

657 See **CL-0509** *Sovereignty and Maritime Delimitation in the Red Sea (Eritrea / Yemen)*, PCA Case No. 1996-04, Award of the Arbitral Tribunal in the Second Stage - Maritime Delimitation, 17 December 1999, ¶¶87-112.

658 Counter-Memorial, ¶¶722-724.

659 **PP 0193** Letter of 18 January 2017 from the Norwegian Ministry of Trade, Industry and Fisheries to Seagourmet.

> *July 2015. This decision was the starting point of a coordinated effort by Norway to close the entire Loophole to EU snow crab fishing vessels.*"[660]

The documents do not show that, as Norway has already addressed in **Chapter 7**. They show that Norway regulated natural resources in an area under its jurisdiction, and that in line with obligations under international law, this was done in cooperation with Russia.[661]

518. The seabed of the Loop Hole consists entirely of Norwegian and (overwhelmingly) Russian continental shelf. The snow crab is a sedentary species, subject to the exclusive jurisdiction of the coastal State on whose continental shelf it is found. Even if the coastal State has not yet regulated exploitation of a resource, other States are not entitled to give their vessels access to the resource without the express consent of the coastal State: UNCLOS Article 77(2). As Norway said, in an uncontested passage in the Counter-Memorial,

> "[s]*o far as Norway is aware, all States that have crab harvesting activity in areas under their jurisdiction consider crab species as sedentary within Article 77 of UNCLOS, and have done so since UNCLOS was adopted (if not since the conclusion of the Continental shelf Convention). This includes all States with significant snow crab activity in areas under their jurisdiction (Canada, Denmark/Greenland, Russian Federation. United States of America). It also includes other States with significant crab populations of other species on their continental shelf, such as Australia.*"[662]

519. The snow crab is a common population (i.e., a common stock) between the Norwegian and Russian continental shelves. Norway and Russia, thus necessitating collaboration, including joint research and harmonisation of management measures.[663] Norway and Russia are two of the five States (along with Denmark (on behalf of the Faroe Islands and Greenland), Iceland, and the United Kingdom) and the EU that are Contracting Parties to NEAFC and its Permanent Committee on Control and Enforcement ('PECCOE'). It was to be expected that there will be consultations between Norway and Russia regarding regulation of fishing activity in the area. In **Chapter 2** of the

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660 Reply, ¶753.

661 See, e.g., **CL-0013** UNCLOS Article 123.

662 Reply, ¶74. Footnotes omitted.

663 **C-0209**, Section 4.2.1."*Snøkrabben er en felles bestand mellom sokkelstatene Norge og Russland*".

Counter-Memorial, Norway recounted in some detail [664] the key steps in these consultations.

520. The factual position is clearly evident from the previous pleadings in this case. It is much less clear what legal consequences the Claimants wish to draw from it. Nothing in the BIT suggests any prohibition or limitation on the right of a State Party to consult with neighbouring States and discuss matters of common concern. Nothing in UNCLOS suggests it. Indeed, Article 123 of UNCLOS actually requires cooperation and coordination between States in these circumstances.

521. The Claimants do refer to "*Norway's bad faith towards the Claimants and its wanton disregard of their investment*",[665] reproducing a photograph of one of the three visits paid by Norwegian government officials to Mr Levanidov's factory at Båtsfjord, though without explaining how it is supposed to relate to Norway's alleged 'conspiracy' with Russia.[666] There are three points to be made. First, Norway's consultations with Russia are irrelevant. Norway's actions are no more and no less lawful if conducted with consultation with Russia than they are if undertaken without it, unilaterally. Second, the gratuitous allegation of bad faith adds nothing to the point made repeatedly by Claimants in the previous sections of the Reply. It is redundant. Third, regardless of the flag of vessels that harvested crab (of any species) in the Barents Sea, the Båtsfjord facility remained a very convenient shore-based destination for processing it. It was and is a welcome facility in the area.

9.1.6 The supposed factual basis of the Claimants' case: (6) Norway's non-recognition of the Claimants' Latvian 'licences'

522. The sixth sub-section (paragraphs 773–781) of this part of the Reply is headed "*Norway Refused to Recognize the Legality of the Claimants' Svalbard Licences or to Grant them Otherwise Equivalent Fishing Rights.*" As this allegation is closely linked to the claim that Norway's 'failure' to accept Latvia's purported licences violated the

664 Counter-Memorial, **Chapter 2**.

665 Reply, ¶760.

666 Reply, ¶762.

Svalbard Treaty and hence violated Article III of the BIT, reference is made to **Section 9.4** in this Rejoinder.

523. In so far as the allegation is that Norway refused to recognise licences issued by Latvia as creating a legal entitlement to snow crab on the Norwegian continental shelf without the express consent of Norway it is correct. It is the inevitable consequence of Norway's exclusive sovereign rights over sedentary species on its continental shelf.[667]

524. UNCLOS, by which Norway, Latvia and the EU are bound, addresses the point quite explicitly in Article 77. The Claimants' assertion that Norway should have recognised that *Latvia* could authorise Latvian vessels to catch sedentary species on the *Norwegian* continental shelf is so obviously and startlingly incompatible with Article 77 that it is unnecessary to do more than set out its plain terms once more:

> "*Article 77*
>
> *Rights of the coastal State over the continental shelf*
>
> *1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.*
>
> *2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.*
>
> *3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.*
>
> *4. The natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil*".[668]

667 **CL-0013** UNCLOS, Article 77.

668 *Ibid.*

525. Norway did not give its consent, express or otherwise, for Latvian vessels to harvest snow crab on the Norwegian continental shelf, and – as set out in the Counter-Memorial[669] and in this Rejoinder[670] – Norway was under no obligation to do so.

526. The Claimants refer to the Svalbard Treaty.[671] Latvia became one of the State Parties to the Svalbard Treaty after notifying France, as the depositary, on 13 June 2016, of its adherence shortly after North Korea. Article 2 of the Svalbard Treaty provides that "*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*." Article 3 provides that nationals of all High Contracting Parties "*shall be admitted under the same conditions of equality to the exercise and practice of all maritime, industrial or commercial enterprises both on land and in the territorial waters*".[672] The wording of the Treaty is clear, it gives no equal rights beyond the territorial waters.

527. The Claimants have referred to an inter-State dispute concerning the interpretation of the 1920 Svalbard Treaty. As further detailed in **Chapter 4** it goes beyond the scope of an investment dispute to settle inter-State differences on interpretation of the geographical scope of application of the equal treatment provisions in Articles 2 and 3 of the Svalbard Treaty. What is crucial in the context of this investment dispute is that Norway has consistently held the position that none of the Svalbard Treaty's equal treatment provisions apply beyond the territorial waters. This position has been clearly communicated and consistently applied for decades. It has been described in detail in several white papers to the Norwegian parliament by successive governments[673] and it has been at issue in high profile fisheries cases before the Norwegian Supreme Court[674] The Claimants could not possibly base their investment on an assumption that Norway would change its interpretation of the Svalbard Treaty. Furthermore, when the

669 Counter-Memorial, Sections 6.5.2 and 6.7.

670 See below, Section 9.4.

671 Rejoinder, ¶775.

672 **CL-0002**.

673 **R-0147-NOR; R-0148-ENG** Meld. St. 32 (2015–2016) Report to the Storting (white paper) regarding Svalbard.

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

Claimants made their investments, Latvia was still not a party to the Treaty and irrespective of the geographical scope of application of its provisions, the Claimants would have been unable to derive *any* expectations from the Svalbard Treaty at the time that their investments were made. This is all the more so if the Claimants' argument that they in fact made one single "investment" is accepted. Norway upholding its longstanding (pre-investments) and publicly-known position on the interpretation of the Svalbard Treaty can not be a breach of the 'reasonable and equitable treatment' provision of the BIT.

9.1.7 The supposed factual basis of the Claimants' case: (7) Norway's 'discriminatory' and 'political motivation'

528. The final sub-section (paragraphs 782–796) of this part of the Reply is headed "*Norway Acted in a Discriminatory and Politically Motivated Manner Justified by Neither Economic Nor Environmental Goals, and Was not Exercising any Legitimate Right to Regulate*."

529. It is unsurprising that Governments act in a political manner. The European Commission identified the political implications of action over the Svalbard Treaty as one of the reasons for it not taking the steps sought by Latvia.[675] That element of the Claimants' complaint may perhaps be set aside.

530. The theme of the Claimants' argument in this sub-section is that economic and environmental goals should have driven Norway to seek to establish a free-for-all 'open fishery' for snow crab, an "*invasive non-native species*",[676] that would "*push the invasive species to commercial extinction*."[677] Norway did not adopt that approach and therefore, say the Claimants, its actions were discriminatory and politically motivated.

531. Norway has the same right as all other States to pursue its own environmental and developmental policies. That right is reflected in instruments such as the UN General

675 **RL-0085-ENG** *Republic of Latvia v European Commission,* Case T 293/18, Order 30 January 2020, ¶¶1–5.

676 Reply, ¶303

677 Reply, ¶304 and fn 363.

Assembly's resolution on Permanent Sovereignty over Natural Resources,[678] and the Rio Declaration.[679] Principle 2 of the Rio Declaration stipulates that

> "*States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.*"

532. Norway's environmental and developmental policies relating to snow crab are entirely rational and in line with this principle. Norway's aim was to regulate a species previously of no commercial interest which, in 2014 became the focus of commercial interest and activity.[680] Norway's aim was to manage the resource in an optimal manner consistent with Norway's environmental and economic obligations and goals. Its management goal, and the reasoning behind it, was set out explicitly in the *Strategy for the further development of snow crab management* (the "**2016 Strategy**"), published by the Resources Department of the Norwegian Directorate of Fisheries in September 2016.[681] It was summarised thus:

> "*Snow crabs are managed with the aim of achieving the highest possible long-term, sustainable financial return. A revision of the management goal may be relevant if significant negative ecological consequences of the stock are identified.*"[682]

533. Norway chose not to pursue an 'open fishery' approach to snow crab management. Its reasons for rejecting the possible objectives of the extinction or decimation of the snow crab stock were set out in the 2016 Strategy, as were its plans for ensuring compliance with international obligations such as those under the Convention on Biological Diversity.

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678 **RL-0236-ENG** UNGA Resolution 1803 (XVII) of 14 December 1962, "Permanent Sovereignty over Natural Resources".

679 **RL-0267-ENG** UN Doc. A/CONF.151/26/Rev 1(vol.1), Report of the United Nations Conference on Environment and development

680 Counter-Memorial, ¶106.

681 **C-0209**.

682 **C-0209**, Section 4.1.

534. The 2016 Strategy sought an overall quota for the common snow crab stock. The Strategy noted that:

> "*A total quota will have to be divided between Norway and Russia, quotas to any third countries included.* […] *If third countries are to be granted quotas on the Norwegian continental shelf, this will reduce Norwegian vessels' quota basis accordingly.*
>
> *As a pure calculation example, we can envisage a future catch potential of 100,000 tonnes of snow crab a year in the Barents Sea, and that, for example, half of this will be available to Norwegian vessels.* […]
>
> *As of today, it is difficult to conclude whether it is most economically and socio-economically profitable for the crab stock to be caught by a small number of specially equipped vessels based on more or less year-round operation, or by a larger number who may have snow crab as part of their operating scheme.* […]
>
> *Against this background, it may make sense to avoid the risk of over-establishment now, while keeping the options open to the extent of future participation until more experience has been gained. This could also conform to the fact that there should be a gradual increase in the catch as the stock builds up.*"[683]

535. The possibility of third country access to the stocks was expressly envisaged. The Claimants' complaint is that Norway decided not to give that access away, but to seek a *quid pro quo*. In the case of the EU, Norway sought "*something in return*" for snow crab quotas, "*for example fish quotas*."[684] Norway also wanted to stipulate that "*all snow crab fished by EU vessels on the Norwegian continental shelf must be landed in Norway*" – a stipulation that would have benefited Mr Levanidov's Båtsfjord processing facility.[685]

536. The EU has so far refused to offer fish quotas in return. Consequently, EU vessels, like all other vessels that have no authorisation from Norway to harvest snow crab on the Norwegian continental shelf under a quota arrangement with the flag State, are prohibited from harvesting snow crab. Norway makes no apology for this position. It is indeed a matter of 'policy', and it does indeed distinguish between authorised and unauthorised vessels. But it does not violate the BIT and it does not violate any of Norway's other international obligations. It is how fisheries are managed, worldwide.

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683 **C-0209**, Section 4.

684 **C-0036**. Counter-Memorial, ¶722.

685 **C-0036**. Counter-Memorial, ¶722.

537. The Claimants tack on two additional complaints to the claim of a breach of the duty under BIT Article III not to treat investments equitably and reasonably: a claim of a denial of justice,[686] and a claim that Norway failed to accept the Claimants' investment in accordance with its laws.[687]

9.2 DENIAL OF JUSTICE

538. The Claimants maintain that they have been the victims of denial of justice by the Supreme Court of Norway.[688] There is nothing in the Claimants' Reply which causes Norway to resile from the position set out in its Counter-Memorial,[689] that there was no denial of justice in this case.

539. The Claimants' Reply distorts the denial of justice standard (9.3.1), and presents an unfair picture of the facts of the case insofar as they have a bearing on this aspect of the fair and equitable and reasonable treatment claim (9.3.2). The inaccuracies are briefly addressed in the following.

9.2.1 The Claimants distort the denial of justice standard

540. First, the Claimants construe an agreement between the Parties as to the denial of justice standard to be applied where no such understanding exists. They state that the Parties "seem to be agreed that denial of justice includes the rule spelled out in *Fabiani*; denial of justice includes "*a judicial authority's refusal to perform its duties, including its refusal to rule on claims submitted to it*".[690] They further suggest that Norway – by not taking issue with a statement by the tribunal in *Philip Morris* to the effect that it is incumbent on the domestic tribunal, in substance, "to decide on material aspects" of the foreign national's claim – has agreed that this statement takes a central stage in the denial of justice standard to be applied in the present case.[691]

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686 Reply, ¶¶797–814.

687 Reply, ¶¶815–823.

688 Reply, ¶¶797-814; see also Memorial, ¶¶6, 393-407 and 756-783.

689 Counter Memorial, Section 6.5.7.

690 Reply, ¶797(b).

691 Reply, ¶797(c).

541. For the avoidance of doubt, Norway does not agree with those comments. As Norway stated in the Counter-Memorial, the threshold is set extremely high, and the alleged defects in the present case do not on any view reach this threshold even if they were actually present as a matter of fact.[692] The Claimants rely entirely on individual statements taken from two arbitral decisions without any contextualisation and ignore the great body of case law that commands an overall assessment as to whether justice has been denied. This reasoning is unconvincing.

542. Second, the Claimants further misrepresent the denial of justice standard when they argue for a "close affinity" between denial of justice and what they loosely refer to as "international human rights standards".[693] In *Barcelona Traction*, the ICJ unsurprisingly stated, in the paragraph of the judgment relied upon by the Claimants, that "*human rights* […] *also include protection against denial of justice*".[694] This is a trite observation that may have some merit depending on which human rights treaty provision that is at issue in any given case. There is however nothing to suggest that the ICJ by saying this has accepted some form of unreserved correlation between the denial of justice standard and "human rights" norms. Norway further fails to see how a single statement by one of the United Nations' numerous Special Rapporteurs on human rights, relied upon by the Claimants,[695] can be of any consequence for the denial of justice standard to be applied here.

9.2.2 North Star has not demonstrated that it has been denied justice

543. The Claimants continue to argue that three aspects of the Supreme Court of Norway's handling of their case amount to denial of justice.[696] They still fail to specify whether their case is that the three aspects only reach the standard individually, as opposed to in combination. In any event, the Reply demonstrates that the Claimants have not

692 Counter-Memorial, ¶¶790-792.

693 Reply, ¶¶809-810.

694 **CL-0485** *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment 5 February 1970, ¶91.

695 Reply, ¶809.

696 Reply, ¶¶789-814.

successfully demonstrated any breach of denial of justice, either in the claim's individual parts or the three of them together.

544. Norway refers at the outset to the arguments laid out in the Counter-Memorial, as there is nothing in the Reply that changes Norway's position. The Reply however contains some matters that for the sake of good order should not stand uncommented upon.

545. First, it is incorrect – and in contradiction to the Claimants' own Reply – that Norway in the Counter-Memorial "*entirely avoids addressing*" what is now said to be the Claimants' "primary contention" that the Supreme Court in not deciding on "*the Claimants' defence that they had a valid and properly issued Latvian licence to fish snow crabs*" demonstrates denial of justice.[697] Norway's Counter-Memorial indeed addresses the issue in detail. Reference is made to the relevant parts, and they are not restated here in their entirety.[698]

546. What is crucial, however, is that there is no merit in the Claimants' view that one "*cannot explain a refusal to adjudicate a defence as a 'simple case management decision, taken for the expeditious disposal of the proceedings*'".[699] The Supreme Court decided on bifurcation based on very reasonable grounds relating to judicial economy, and there is evidence for it in the court documents that Norway has exhibited.[700]

547. The Supreme Court in its subsequent judgment in the criminal case further explicitly mentioned the possibility for the Claimants to initiate a civil action to pursue their claim regarding the validity of the snow crab regulations.[701] It is however important to note that this course of action had been available to the Claimants from the moment the Directorate of Fisheries issued its first decision not to grant North Star a licence to harvest snow crab on 25 May 2018. Their next opportunity came on 9 October 2018, when the Directorate of Fisheries denied North Star's request to review the application

697 Reply, ¶¶798-803.

698 Counter-Memorial, ¶¶777-784.

699 Reply, ¶806.

700 Counter-Memorial, ¶¶777-781 and 169 with references to the relevant Norwegian Supreme Court decisions.

701 Counter-Memorial, ¶173, referring to paragraph 80 of the Supreme Court judgment in the criminal case.

for dispensation once again.[702] Norwegian law unambiguously states that private parties are entitled immediately to challenge, by means of civil proceedings, the validity of administrative decisions, even first instance decisions.

548. The Claimants chose however not to do so at the first opportunity. Instead, they applied for a new dispensation on 28 February 2019, which was rejected by the Directorate of Fisheries as a first instance on 13 May 2019.[703] The Claimants, rather than immediately issuing a civil action against this new rejection, chose to appeal it to the Ministry of Trade, Industry and Fisheries, which upheld the Directorate's decision on 14 November 2019. North Star issued a writ of summons to the Oslo District Court as late as 19 October 2020, where they referred to the Supreme Court judgment's mention of the possibility of a civil action as a pretext for its belated legal steps and demanded that the refusal to grant them permission to harvest snow crab be set aside as it violates Norway's obligations under Articles 2 and 3 of the Svalbard Treaty.[704]

549. At the time of submission of the Counter-Memorial the case had been decided by the Oslo District Court and North Star's appeal to the Court of Appeal was pending.[705] The Borgarting Court of Appeal delivered its judgment 15 June 2022. The Court of Appeal, as the District Court before it, comprehensively considered North Star's claim but ultimately found that the decision of 14 November 2019 and the Snow Crab Regulations were valid even having regard to Articles 2 and 3 of the Svalbard Treaty. An English translation of the Court of Appeal's judgment is enclosed herewith.[706] Counsel for North Star has publicly indicated that the judgment will be appealed to the Supreme Court.[707]

550. The fact that the Claimants actively pursue this course of action through all three available court instances, including the Supreme Court, effectively undercuts the validity of their argument that North Star has been denied justice. The Supreme Court

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702 Counter-Memorial, ¶¶785 and 175.

703 Counter-Memorial, ¶¶176-177.

704 Counter-Memorial, ¶178.

705 Counter-Memorial, ¶¶179-180.

706 **RL-0218-NOR; RL-0219-ENG** Judgment of 15 June 2022 of the Borgarting Court of Appeal.

707 **R-0414-NOR; R-0415-ENG** "*Latvisk rederi tapte - Borgarting ga staten medhold i prinsippsaken om Svalbard-ressurser*" published by Rett24 on 16 June 2022.

has not in any manner refused to perform its duties or refused to rule on claims submitted to it. Due process has been thoroughly observed by the Norwegian judiciary at all stages. There are simply no faults at issue. The first item said to constitute denial of justice is accordingly flawed.

551. Second, there is no merit in the second contention that the Supreme Court of Norway, in not considering in 2019 what the Claimants allege to be the material aspects of the claim, caused unconscionable delay.[708] The argument that there was a denial of justice merely because the Claimants had to file a civil suit in Norwegian courts builds on the false premise that the Norwegian legal system did not permit the filing of such a claim at an earlier stage. As Norway made clear in the Counter-Memorial,[709] and above, any unconscionable delay is due to the Claimants' own inaction.

552. Third, the Claimants maintain that the participation in the case before the Supreme Court of Norway of Mr Tolle Stabell constitutes denial of justice.[710] There is no merit in the allegation. Norway recalls its Counter-Memorial, where it laid out in detail – with requisite documentary evidence – how Mr Stabell, acting as prosecutor before the Supreme Court, was not under the instruction of the Office of the Prime Minister but under the sole instruction of the Prosecutor General and, indeed, Mr Fause as the lead prosecutor in the case.[711] In the light of protests from the Claimants, Mr Stabell's impartiality was first assessed by the Director General of Public Prosecution,[712] and subsequently unanimously affirmed by the Supreme Court in a comprehensive decision.[713] The Claimants' continued emphasis on the presence of a co-prosecutor in the criminal case is demonstrative of the thinness of their case. It does not amount to denial of justice that a Supreme Court after careful consideration – having had regard to the arguments of both sides – decided in open court to permit a well-qualified lawyer to act as assistant to the chief prosecutor.

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708 Reply, ¶807.

709 Counter-Memorial, ¶785.

710 Reply, ¶808.

711 Counter-Memorial, ¶787.

712 Counter-Memorial, ¶788.

713 Counter-Memorial, ¶789.

9.3 ACCEPTANCE OF THE CLAIMANTS' INVESTMENTS

553. The Claimants allege Norway's 'failure' to accept Latvia's purported licences violated the Svalbard Treaty and hence violated Article III of the BIT.[714] The Claimants assert that:

> "*Norway further breached Article III by failing to accept the Claimant's investment in accordance with its laws. It did so by failing to allow the Claimants to exercise their rights to fish offshore of Svalbard under the Svalbard licences issued by Latvia, on the basis of EU Regulations, the 1920 Svalbard Treaty and section 6 of Norway's Marine Resources Act.*[715] […] *Norway was required, pursuant to art. 6 of its own Marine Resources Act, the Svalbard Treaty and EU Regulations to give effect to those licences.*"[716]

554. Norway's position is that alleged breaches of Article III of the BIT are not subject to the Article IX procedure invoked here, and that the interpretation of the Svalbard Treaty which Norway has consistently adopted is correct.[717] It wrote in the Counter-Memorial that where it was said that the Claimants

> "*have made no attempt to argue their case. They fall back on assertions that "[t]he terms of the BIT are clear" and that "the only conclusion" is that the Claimants are correct. If and when the Claimants set out an argument concerning the interpretation and application of Article III and an explanation of the allegation of its breach, Norway will respond more fully.*"[718]

555. It will be appreciated that this element of the Claimants' case refers to their 'investment' in the licences purchased in Latvia from the Latvian Government and in the purchase outside Norway of Latvian-flagged vessels, under contracts governed by Latvian law, with a view to using them to harvest snow crab in an area which, on the Claimants' own account, is to be regarded as an area outside Norway's jurisdiction. Norway does not accept that this amounts to an investment "*in the territory of Norway*".[719] It notes,

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714 Memorial, ¶¶809–812.

715 Reply, ¶815.

716 Reply, ¶819.

717 See, e.g., Counter-Memorial, ¶¶849–859.

718 Counter-Memorial, ¶859.

719 Memorial, Section IV(B).

too, that this supposed 'investment in Norway' was made some years after Mr Levanidov had established his factory in Båtsfjord, in 2009–2010.[720]

556. In its Counter-Memorial at paragraphs 854-856 Norway contested the view that the Tribunal had the jurisdiction to consider a breach of Article III of the BIT under the investor-State dispute settlement provision in Article IX of the BIT. The Claimants interpreted Norway's argument as follows:

> "*Norway argues that this aspect of the Claim may not be the subject of an investor-state arbitration claim, which may only be brought by existing investors, and not by prospective investors*".[721]

557. Under Article IX of the BIT Norway has given its consent to investor-state dispute settlement (ISDS) "*in relation to an investment* […] *in the territory of the latter"* [here; Norway]. *"Investment" is defined, as addressed earlier in this Reply and in the Counter-Memorial, in Article I(1) of the BIT as an "asset invested"*" (emphasis added). The consent to ISDS *does not* extend to potential investors that seek to access the Norwegian market.

558. Even if the Tribunal had the jurisdiction to consider breach of this part of Article III (*quod non*), no such breach has taken place. The obligation to accept investments of investors from Latvia is to subject to Norway's legislation. Hence, the acceptance of the investment does not extinguish the obligation to comply with Norwegian law, including the requirement of having an authorisation from Norway in order to be able to legally harvest snow crab on the Norwegian continental shelf.

559. Section 6 of the Norwegian Marine Resources Act simply states that the Act applies with the limitations following from international agreements and public international law in general.[722] The proper interpretation of the Marine Resources Act has been set out above.[723] Norway was not under an international obligation to accept the Latvian licences (which impermissibly sought to authorise the taking of a sedentary species

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720 Memorial, ¶¶175–178.

721 Reply, ¶820.

722 See above, **Chapter 3**.

723 See above, Section 3.2.3.

subject to Norway's exclusive jurisdiction). The Marine Resources Act Section 6 is therefore not of any relevance for the case at hand.

560. Nor was Norway required to accept those licences under the Svalbard Treaty, either viewed as a treaty[724] or as a part of Norwegian law.[725]

561. Irrespective of one's view on the geographical scope of application of the provisions of the Svalbard Treaty, it is undisputed that even in areas where the Treaty applies only Norway can issue regulations and authorise the exploitation of natural resources. Licences cannot be issued unilaterally by another State Party.[726] The jurisdictional leap from the BIT to the Svalbard Treaty via the Norway-Russia BIT, which seemed to be the basis of the claim that the provisions of the Svalbard Treaty is applicable,[727] was addressed in the Counter-Memorial, and appears not to be defended by Claimants in their Reply.[728]

562. This component of the Claimants' case lacks any factual or legal basis. Norway was at no relevant time required to accept North Star's Latvian licences under national or international law and indeed it would not have been in accordance with Norwegian legislation to have accepted them.

9.4 THE CASE LAW

563. The Reply invokes various cases in support of the proposition that Norway failed to treat the Claimants' investment in an equitable and reasonable manner.

564. As is apparent, all of the Claimants' complaints are rooted in the proposition that Norway was not entitled to 'reverse' its position on snow crab and to prohibit the Claimants' vessels from harvesting snow crab on the Norwegian continental shelf without authorisation from Norway. This Rejoinder has demonstrated that there was no such 'reversal', but rather a decision to make regulations applicable to a previously

724 Reply, ¶¶409–451.

725 Reply, ¶¶452–458.

726 **R-0146-ENG** Political understanding of 28 April 2022 between Norway and the EU regarding cod. **R-0434-ENG** Note verbale 23 June 2022 from Norway to the EU.

727 Memorial, ¶¶597, 805; 808.

728 Counter-Memorial, ¶¶826–831, 847–848.

unregulated Norwegian resource at a point in time when commercial exploitation of that resource was first about to become a reality.

565. *None* of the cases cited by the Claimants address the question of the right of a State to introduce regulations applicable to a previously unregulated resource that had previously not been commercially exploited, in circumstances where (as here) no specific undertaking was given to the investor, and no provision in or associated with the laws of the State represented that no such new regulations would be introduced, and the host State's dealings with the investor are not characterised by negligence and inconsistency or abusive behaviour.

566. Some cases are cited for uncontroversial propositions, such as "*the state must exercise due diligence and take positive steps to shield the investment from harm*."[729]

567. Other cases do indeed address reversals of position by a State. The *PSEG* case[730] was an instance where breach of the FET standard was found. It was based on the finding that:

> *"246.* […] *there is in the present case first an evident negligence on the part of the administration in the handling of the negotiations with the Claimants. The fact that key points of disagreement went unanswered and were not disclosed in a timely manner, that silence was kept when there was evidence of such persisting and aggravating disagreement, that important communications were never looked at, and that there was a systematic attitude not to address the need to put an end to negotiations that were leading nowhere, are all manifestations of serious administrative negligence and inconsistency.*[…]
>
> *247.* […] *Secondly, there is a breach of the obligation to accord fair and equitable standard of treatment in light of abuse of authority* […]
>
> *250. Thirdly, the Tribunal also finds that the fair and equitable treatment obligation was seriously breached by what has been described above as the "roller-coaster" effect of the continuing legislative changes. This is particularly the case of the requirements relating, in law or practice, to the continuous change in the conditions governing the corporate status of the Project, and the constant alternation between private law status and administrative concessions that went back and forth. This was also the case, to a more limited extent, of the changes in tax legislation.*"

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729 **CL-0467** *Waguih Elie George Siag & Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶¶445-448, cited in Reply ¶632.

730 **CL-0302** *PSEG Global Inc and Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi v Republic of Turkey*, ICSID Case No. ARB/02/5, ¶254, cited in Reply ¶632.

568. Nothing of the sort occurred here. Norway introduced regulations for snow crab after public consultations in 2014. Those regulations entered into force for Norway's 200 nautical mile zones in 2015 and Norway and extended their application to the 0.5% of its continental shelf in the North Atlantic that lies in the Loop Hole at the end of 2015. Those regulations have remained materially unchanged.

569. *Eco Oro Minerals* [731] concerned the nullification of what were, under the law of the host State, "*acquired rights*" (i.e., a right that "*can be transferred to a third party and is immune to subsequent laws or regulations*"[732] obtained under a specific contract in 2007 between the investor and a body (INGEOMINAS) exercising administrative functions delegated to it by the Ministry of Mines).[733] The decision (by a majority) contains a lengthy analysis of the *indicia* of an acquired right. In the present case there are no such acquired rights. Any snow crab that may have been harvested on the Norwegian continental shelf prior to the regulations, were harvested as a result of an absence of a national Norwegian prohibition – rather than a legal right.

570. The *MTD* Award[734] is also materially different from the present case in a way that goes to the heart of this case. In *MTD*, Chile expressly authorised a specific project and then nullified that authorisation by rejecting an application made only weeks later for a necessary zoning change on the ground that it violated the government's development policy. As the tribunal put it,

> "*what is unacceptable for the Tribunal is that an investment would be approved for a particular location specified in the application and the subsequent contract when the objective of the investment is against the policy of the Government.*"[735]

571. In the present case Norway, as opposed to Latvia, had no role whatever in authorising the acquisition of North Star's vessels, their "fishing capacity" or the 'licences'; and

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731 **CL-0468** *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Quantum, 9 September 2021, ¶¶847-849, cited in Reply ¶632.

732 **CL-0468** *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Quantum, 9 September 2021, ¶406.

733 **CL-0468** *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Quantum, 9 September 2021, ¶¶98, 104, 401, 406, 416– 440.

734 **CL-0285** *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶¶188-189., cited in Reply ¶362.

735 **CL-0285** *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶189.

Norway did not 'authorise' the harvesting of snow crab on the Norwegian continental shelf. The figures of snow crab actually harvested on the Norwegian continental shelf by North Star hardly need to be restated.[736]

572. The Reply cites paragraphs 457–621 of the 7 October 2020 Award in *Muszynianka v Slovakia* as authority for the proposition that a breach of the FET standard can be found where a State "*began exerting control over a resource in circumstances in which it had not previously asserted control*".[737] That case appears to be the closest to the facts of the present case, and the Award rewards close scrutiny. The Tribunal is respectfully invited to read the passage cited by the Claimants.

573. In *Muszynianka* the claim arose from a constitutional amendment in Slovakia that prohibited the exportation of water. Muszynianka intended to pipe water from Slovakia to Poland and to bottle and sell it there. The constitutional amendment prevented it, and Muszynianka made a claim against Slovakia based *inter alia* on the FET clause in the applicable BIT, and in particular on arguments relating to legitimate expectations.

574. The tribunal began by affirming that "*absent specific assurances, FET does not protect expectations in relation to the stability of a State's legal framework, at least when the legal framework was not adopted to attract foreign investments*."[738] It noted that "[t]*he Claimant does not identify any specific assurances that the Respondent would maintain its laws on water exploitation. Nor did the Claimant rely on any Slovak legislation or regulation adopted to encourage investments*."[739] It observed that

> "*Contrary to the Claimant's submissions, the foreseeability or predictability of a State measure is not a yardstick to determine whether a legislative or regulatory change is FET-compliant. While the Tribunal is familiar with the often-repeated formula that*

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736 Counter-Memorial, ¶¶141-144.

737 Reply ¶632, citing *Muszynianka v. Slovakia*, PCA Case No. 2017-08, Award, 7 October 2020, **CL-0469**, ¶¶457-621.

738 **CL-0469** *Muszynianka v. Slovakia*, PCA Case No. 2017-08, Award, 7 October 2020, ¶466, citing **CL-0316** *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶332; **RL-0127-ENG** *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, 19 December 2013, ¶629; g. **CL-0271** *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006, ¶139; **RL-0235-ENG** *Murphy Exploration and Production Company International v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award, 6 May 2016, ¶¶252-253; **CL-0298** *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award, 4 May 2017, ¶365.

739 **CL-0469** *Muszynianka v. Slovakia*, PCA Case No. 2017-08, Award, 7 October 2020, ¶466.

predictability is central to FET, it also notes that this assertion is rarely, if at all, substantiated. The Tribunal is unaware of a generally accepted principle requiring changes in the legal framework of a State to be predictable or foreseeable, and the Claimant has pointed to none."[740]

575. The *Muszynianka* tribunal examined a series of acts including the issuance of permits and decisions that Claimants said amounted to "*specific assurances*" relating to their particular project.[741] It found no such assurances,[742] and proceeded to consider whether the constitutional amendment was discriminatory (including by targeting the Claimants' investment), unreasonable, disproportionate or inconsistent.[743] It found that it was not.[744]

576. In one passage the tribunal addressed allegations that a Slovak Government Minister had indicated that the purpose of the constitutional amendment was to protect the local economy. The tribunal said:

> "*555. However, looking at the record as a whole, these statements do not appear to the Tribunal to be representative of the Constitutional Amendment's purposes. State intent is often the product of a mix of factors, including political compromises, partisan considerations, and competing interests. Accordingly, when a particular actor voices a distinct and perhaps arguably improper purpose, it does not mean that such motive is reflective of the State's intention, nor does it indicate per se a breach of the international obligation at issue* […]
>
> *556. In this context, the Tribunal finds that, aside from Minister Ziga's statements* […] *nothing else during the legislative process indicates that the creation of jobs or wealth in the country, or the generation of tax revenues, were central to the Constitutional Amendment's rationale or its objectives. Therefore, while an intent of developing the local economy may well have been involved, it is not such as to undermine the Constitutional Amendment's declared policy objectives of protection of the environment, public health, and water resources. In any event, the Claimant does not challenge the creation of jobs and wealth retention within Slovakia as unlawful, and rightly so. There is no question that value creation within its territory is a legitimate State policy. In and of itself, such a policy cannot constitute a breach of the BIT.*"[745]

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740 **CL-0469** *Muszynianka v. Slovakia*, PCA Case No. 2017-08, Award, 7 October 2020, ¶466, fn 973.

741 **CL-0469** *Muszynianka v. Slovakia*, PCA Case No. 2017-08, Award, 7 October 2020, ¶475.

742 **CL-0469** *Muszynianka v. Slovakia*, PCA Case No. 2017-08, Award, 7 October 2020, ¶¶477, 481, 493, 496, 506–509 and fn 1064, 575

743 **CL-0469** *Muszynianka v. Slovakia*, PCA Case No. 2017-08, Award, 7 October 2020, ¶514.

744 **CL-0469** *Muszynianka v. Slovakia*, PCA Case No. 2017-08, Award, 7 October 2020, ¶¶516, 522, 523, 544, 557-559, 565, 567, 572, 576, 582, 589

745 **CL-0469** *Muszynianka v. Slovakia*, PCA Case No. 2017-08, Award, 7 October 2020, ¶¶555, 556.

That answer also holds good as a response to the Claimants' assertion that Norway was not exercising a 'legitimate right to regulate' the exploitation of the snow crab.[746]

577. Having examined various statements by Slovakia the *Muszynianka* tribunal concluded that

> "*None of these statements could have suggested to GFT Slovakia or Muszynianka that the regulatory void on cross-border exploitation of water that existed before the Constitutional Amendment would remain unchanged. Nor could they have indicated that the Slovak Republic would forego its right to dispose of its own untapped natural resources in a legitimate manner by imposing pre-Exploitation Permit conditions.*"[747]

578. The one breach that was found by the *Muszynianka* tribunal was a breach of the FET provision "*by the manner in which* [Slovakia] *conducted the latter part of the Exploitation Permit proceedings. However, this breach was inconsequential* […]".[748]

579. The *Muszynianka* Award is a valuable analysis of the legal consequences for BIT protections of filling a 'regulatory void'. It is wholly supportive of Norway's case.

580. Many other of the 519 legal authorities adduced by the Claimants appear in footnotes attached to the discussion of the merits in the Reply. None is as close to the facts of the present case as the *Muszynianka* Award. None concerned licences issued by State A that purported to authorise the exploitation of resources of State B. None of the authorities has established that action of the kind taken by Norway in this case amounts to a breach of an FET obligation under a BIT.

581. Norway notes that the position that it has set out here is also the position taken by Latvia, the other Party to the BIT. In the recent *EBO Invest* case the tribunal recorded that Latvia had argued that

> "[n]*o investor is entitled to expect that a general legislative measure will remain static, or that any regulatory change that adversely affects its economic position creates a*

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746 Reply, ¶642(g).

747 **CL-0469** *Muszynianka v. Slovakia*, PCA Case No. 2017-08, Award, 7 October 2020, ¶588.

748 **CL-0469** *Muszynianka v. Slovakia*, PCA Case No. 2017-08, Award, 7 October 2020, ¶621.

cause of action under international law," in the absence of specific undertakings of the State to the contrary."[749]

All of the claims in the *EBO Invest* case were dismissed.

[749] **CL-0284** *EBO Invest AS, Rox Holding AS and Staur Eiendom AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award, 28 February 2020, ¶384, and see ¶¶383-395.

CHAPTER 10: EXPROPRIATION

582. The Reply addresses the Claimants' case regarding expropriation in paragraphs 825-874. It alleges an indirect expropriation of the Claimants' "*investment*" (in the singular) – its "*integrated business*"[750] – which has no justification under the 'police powers' doctrine. The problems with the Claimants' attempts to portray themselves now as a joint venture of which no contemporary evidence exists have already been explained (**Chapter 5**), as have the difficulties with portraying the Claimants' investments as a single integrated whole (**Chapter 6**). Norway struggles to see how any investments (or even the whole "snow crab business") protected under the BIT can be considered to be expropriated.[751]

583. The parties seem to agree that no "direct" expropriation has occurred. The parties further seem to agree that the relevant issues to consider is whether *measures by Norway* have led to the *substantial deprivation* of the Claimants alleged investments, and hence amount to a "creeping" or "indirect" expropriation in breach of article VI of the BIT. [752] The parties appear to disagree on the relevance and effect of the measures listed by the Claimants. Norway further does not generally accept the interpretations of the standard set out by the Claimants in the Reply.

584. Norway does not accept that there was any 'expropriation' of the Claimants' alleged investments in Norway. As set out in paras. 430 *et seq*. of this Rejoinder, the Claimants' "investments" were in fact unaffected by the Norwegian regulations. It seems that the Claimants, too, did not consider that they had been deprived of their business. The Claimants entered into contracts for the delivery of snow crab to Seagourmet and to [redacted] on 27 December 2017,[753] implying that they still had a viable business in December 2017. The Claimants stipulate that the date of the breach of the BIT by Norway was 27 September 2016, fifteen months earlier. Even on the later date (January 2017) the best part of a year had passed following the "*straw that broke the*

750 Reply, ¶¶837, 838, 841, 843.

751 Reply, ¶¶825 and 853

752 Reply, ¶825. and Counter Memorial, ¶829.

753 **C-0054; C-0067**.

camel's back"[754] when the Claimants decided to enter into further contracts[755] How, if at all, the various elements that the Claimants presented as "investments" in the Memorial are affected is set out in detail in the Counter-Memorial.[756]

585. What is said by the Claimants to have been lost is "*the value of their snow crab business.*"[757] They refer to "*Norway's taking of North Star's snow crab fishing rights*".[758] They even compare their position to "*a mining operator whose mining licence is taken away* […]"[759], though the "licences" that the Claimants base their claim on are issued by another state than the alleged host-state, in an area believed to be outside its territory, in a sector that licenses activities on a yearly basis on terms (and availability) that will vary.[760]

586. The value of the business could only exceed the value of the assets if the Claimants' business had indeed held a right to harvest snow crab on the Norwegian continental shelf. If the Claimants had possessed such a right, that right would indeed have had a cash value, and could be counted as part of the value of the business, just as any other concession or contractual right would be counted.

587. But the Claimants had no such right. As set out above in this Reply,[761] as a matter of international law, the coastal State has exclusive sovereign rights for the purpose of exploiting sedentary species, including crabs, on its continental shelf. The Claimants began by exploiting the fact that Norway and Russia had not yet regulated the harvesting of snow crab in the Loop Hole – a regulatory lacuna – that was soon filled, as Mr Levanidov and Mr Pildegovics had foreseen.[762]

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754 Reply, ¶¶844-845.

755 Memorial, ¶831.

756 Counter-Memorial, ¶¶642-683

757 Reply, ¶825.

758 Reply, ¶843.

759 Reply, ¶848.

760 See above, ¶372.

761 For example in Section 2.2.

762 **PP-0012**; see above ¶446.

588. As the previous chapter of this Rejoinder showed, they did not have any legitimate expectation that the regulatory lacuna would persist. The 'asset' that the Claimants allege was taken never existed. The Norwegian regulations filled the lacuna with respect to the harvesting of snow crab on the Norwegian continental shelf in the Loop Hole.

589. This is clear from the Claimants insistence that "*the fishery in the Loophole was an international one when the Claimants made their investment.*"[763] This points to the conclusion that the Claimants invested in the high seas rather than Norway, and gives rise to jurisdictional problems for the Claimants which Norway explained in the Counter-Memorial, and which have gone unanswered.[764] In the present context, however, it underlines the fact that the snow crab were harvested because they could exploited without risking a penalty under Norwegian law – and not in the exercise of what the Claimants try to present as a 'vested right.'[765]

590. The Claimants also suggest that it was the denial of access to snow crab in the "*Svalbard zone*" that was part of the indirect expropriation.[766] The- first reference to Claimants attempting to harvest snow crab in those waters is to the incident on 16 January 2017,[767] two years after the ban had entered into force; and on that occasion the Claimants' vessel *Senator* was promptly denied access and arrested. The Claimants' were told that this was illegal. The Claimants have never had any permission from Norway to harvest snow crab on the Norwegian continental shelf in the maritime area around Svalbard. Nor did they have any such right under the Svalbard Treaty.

591. The Claimants' submit that an indirect expropriation takes place where measures taken by the host State have the effect of "*depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of property even if not*

763 Reply, ¶842.

764 See above, Section 4.1.3.

765 Memorial, ¶¶615–618.

766 Reply, ¶845.

767 Request for Arbitration, ¶¶156-164.

necessarily to the obvious benefit of the host state.'"[768] The short answer to that submission is that even if it is accepted as an accurate statement of the law (which it is not),[769] the Claimants have not been deprived of the use or reasonably-to-be expected economic benefit of any "property" at all.[770]

592. The Claimants suggest that Norway's action in regulating the harvesting of snow crab on its continental shelf was not a legitimate exercise of Norway's regulatory competence because (i) Norway is "*not exercising legitimate regulatory authority or acting in the public interest*", (ii) "*the expropriation is discriminatory or disproportionate*", and (iii) "*the measures are contrary to the investor's legitimate expectations*."[771]

593. As to the first of those three points, the Claimants say that the "police powers' doctrine (which is the label under which they respond to Norway's argument that it was exercising its undoubted regulatory competence) "*has been applied only in exceptional circumstances where the respondent State provided clear evidence that there was imminent or serious risk to human health or financial stability*."[772]

594. As a preliminary point, Norway has not, contrary to the impression created in the Claimants' Reply,[773] invoked a "police powers defence". There are no measures made by Norway that individually or taken together can be considered to amount to a *substantial deprivation* of the Claimants alleged investments and hence, there is no need for a "police powers defence". In its Counter-Memorial, Norway refers to "*the undisputed power of States to regulate their economies and public affairs in the public interest*" once and in a footnote to that sentence Norway refers there is a reference to some passages in a book which *inter alia* include some text on "Police powers". [774]

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768 Reply, ¶828.

769 The failure to achieve a "*reasonably-to-be expected economic benefit*" does not *ipso facto* constitute an expropriation.

770 **CL-0483** *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021, ¶705.

771 Reply, ¶¶855-856.

772 Reply, ¶858.

773 Reply, ¶827.

774 Counter-Memorial, ¶634 and fn 707.

595. Sovereign States have an inherent power to regulate in the public interest.[775] As described by Professor Ian Brownlie:

> "*State measures, prima facie a lawful exercise of powers of government, may affect foreign interests considerably without amounting to expropriation. Thus foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation.*"[776]

596. Norway does not take a position as to whether the States' right to regulate and the "Police powers doctrine" refer to the same standards, but as the Claimants have argued extensively regarding the "police powers doctrine" in their Reply, Norway will comment on the basis of said doctrine.

597. Norway observes that the Claimants ignore two factors contributing to the relative paucity of cases decided on the basis of police powers. First, it is widely considered to be easier to make out (and to decide) a case on the basis of a breach of an FET clause than on the basis of an allegation of expropriation, and FET clauses obviate the need for recourse to the 'police powers' doctrine.[777] Second, investors see little prospect of success in bringing expropriation claims in circumstances where what is complained of is a general and non-discriminatory regulatory or taxation measure, and consequently do not press such claims.

598. Taking the question of police powers directly, however, it is incorrect to suggest that it is limited to measures that address human health and financial stability. The application of the doctrine has been recognised by tribunals in circumstances of the disposition of

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775 **RL-0264-ENG** Crawford, J., *Brownlie's Principles of Public International Law*, (9th ed OUP 2019), p. 604. **RL-0265-ENG** Brownlie, I., *Public International Law*, Oxford University Press, 6th ed., 2003, p. 509. See also: **RL-0120-ENG** *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, para. 128; **RL-0270-ENG** *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Award, 5 November 2021, para. 332; **RL-0048-ENG** *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 238; *Invesmart v. Czech Republic*, Award, 26 June 2009, para. 498; **CL-0216** *Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006, para. 254.

776 Ian Brownlie, *Principles of Public International Law* at p.532, cited in **RL-0048-ENG** *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶238.

777 **RL-0188-ENG** *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award, 21 June 2019, ¶767.

abandoned property,[778] the administration and liquidation of a business,[779] the licensing of casinos,[780] offering discounts on postal services,[781] for example. One might also point to other common practices, such as the limitations imposed by States on the development and use of property where archaeological remains or bat nests are discovered. States often adopt measures that impact upon the value or enjoyment of property, without it constituting an 'expropriation'.

599. Tribunals have adopted very general statements of the scope of police powers, referring for example to "*police powers, that is ordinary measures of a State and its agencies in the proper execution of the law*",[782] and to "*normes d'application générale, de manière non discriminatoire, de bonne foi et en défense de l'intérêt général, et sans que l'État ne se soit préalablement soustrait à ses obligations*",[783] and "*a non-discriminatory regulation for a public purpose*".[784] Beyond the requirement of a 'public purpose'. there is no established limitation on the subject-matter of the regulation.

600. In the present case, the snow crab regulations patently serve a public purpose. They establish the legal framework within which all commercial exploitation of snow crab, a resource belonging to the Norwegian State and for whose management Norway holds

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778 **RL-0189-ENG** *Emanuel Too v. Greater Modesto Insurance Associates and The United States of America*, IUSCT Case No. 880, Award (Award No. 460-880-2), 29 December 1989, ¶¶26, 28.

779 **RL-0190-ENG** *Bank Melli Iran and Bank Saderat Iran v. The Kingdom of Bahrain*, PCA Case No. 2017-25, Final Award, 9 November 2021, ¶¶6631, 34.

780 **RL-0191-ENG** *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018, ¶132.

781 **RL-0192-ENG** *B3 Croatian Courier Coöperatief U.A. v. Republic of Croatia*, ICSID Case No. ARB/15/5, Award (Excerpts), 5 April 2019.

782 **RL-0233-ENG** *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt (I)*, PCA Case No. 2012-07, Final Award, 23 December 2019, ¶221, citing **CL-0494** *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, ¶¶200-07; and cf., **CL-0265** *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award of 13 September 2001, ¶603.

783 **RL-0193-ENG** *SAUR International v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012, ¶401, citing **CL-0216** *Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006, ¶255.

784 **CL-0166** *Philip Morris Brand SARL, 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, ¶¶291-301; Cf., e.g. **CL-0501** *Methanex Corporation v. USA,* Final Award, 3 August 2005 (UNCITRAL) IV:D, ¶7; **CL-0496** *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, ¶¶463–469; **RL-0234-ENG** *Sedco, Inc. v. National Iranian Oil Company and The Islamic Republic of Iran*, IUSCT Case Nos. 128 and 129, Interlocutory Award (Award No. ITL 55-129-3), 17 September 1985, ¶90.

international responsibility,[785] takes place. As was noted in an Award relied upon by the Claimants, "*There is no question that value creation within its territory is a legitimate State policy*"[786] There is no 'private' purpose served by the regulations.

601. The regulations require *all* persons exploiting snow crab on the Norwegian seabed to have express permission from Norway to do so. Permission is granted in the form of licences. The Claimants had no licences and were prohibited from harvesting snow crab on the Norwegian continental shelf, as were all other persons who had no licences. Making an activity the subject of a licensing requirement is not discriminatory *per se*. The purpose of a licensing regime is usually to distinguish between actors that qualify for a licence and actors who don't. Awarding a licence to some actors but not to others, is perfectly legitimate as long as the criteria for awarding the licences are in themselves legitimate and not illegal or non-objective. In this case one of the requirements in order to qualify for a snow crab licence was that the applicant met the nationality criteria in the Participation Act.[787] There is nothing illegal or non-objective with that criteria. Reserving the right to exploit natural resources for a State's own nationals is a logical and natural consequence of the exclusive rights of the coastal State as embodied in UNCLOS, and is part of the fabric of the law of the sea. This is how fisheries are managed worldwide, and the Claimants knew that.

602. The Claimants had no right to such a licence, either under international law or under Norwegian law. Nor did they have any legitimate expectation of being granted a licence.

603. Moreover, the flag State in which the Claimants chose to register their vessels had no right under international law to access to Norwegian snow crab. No such right exists under UNCLOS. UNCLOS imposes no duty on Norway to grant third States access to its snow crab.

604. As for the proportionality of the Norwegian measures, there are two points to be made. First, international tribunals accord a degree of deference to decisions of national

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785 See, e.g., **CL-0013** UNCLOS Article 193.

786 *Muszynianka v. Slovakia*, PCA Case No. 2017-08, Award, 7 October 2020, **CL-0469**, ¶556.

787 **RL-0010-NOR; RL-0011-ENG**.

regulatory bodies,[788] even in the case of errors or inefficiencies.[789] Second, Norway provided a substantial explanation of the justification for the measures in its 2014 consultation paper[790] and in the 2016 Strategy.[791]

605. The Claimants offer no substantial arguments against this position. They say that "[t]*he closure of the Loophole was not an exercise of regulatory authority, but rather an expansion of jurisdiction to a fishery previously considered as falling under the regime of the high seas*."[792] But in the case of the snow crab there was no such expansion of jurisdiction. Norway's rights under international law over the sedentary species of its continental shelf, within and beyond 200 miles from its baselines, had existed at least since the time of the 1958 Continental Shelf Convention.[793] The only thing that changed was the way in which Norway exercised that jurisdiction, in the face of changes in the nature, and location of the resources.

606. The Claimants also deny that Norway's measures sought to "*regulate the exploitation of the exponentially-growing snow crab population on its continental shelf*", saying that "*this is not the real reason for which Norway adopted its measures*".[794] What the Claimants mean by this is that they would have regulated it differently, "*invit*[ing] *more fishing of the resource, not appropriating the commons*."[795]

607. The Claimants argue that

> "*the evidentiary record shows that Norway adopted this decision to "close the commons", i.e. to deny to EU vessels access to a promising economic resources, while at the same time securing a continued access for Norwegian vessels to the entire*

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788 See, e.g., **CL-0492** *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Award, 5 November 2021, ¶¶307, 340–343, 377; **CL-0468** *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶¶751–753, citing **RL-0227-ENG** *S.D. Myers, Inc*. v. Government of Canada, UNCITRAL, Partial Award, 13 November 2000, ¶263.

789 **RL-0190-ENG** *Bank Melli Iran and Bank Saderat Iran v. The Kingdom of Bahrain*, PCA Case No. 2017-25, Final Award, 9 November 2021, ¶636.

790 **R-0113**.

791 **C-0209**.

792 Reply, ¶862.

793 **RL-0216-ENG** *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgment, 20 February 1969, *ICJ Reports 1969,* p. 3 at ¶19.

794 Reply, ¶865.

795 *Ibid*.

> *Loophole. Norway's actions were never made for the purpose of advancing any public interest. Appropriating resources for national economic gain is not an exercise of police powers.*"[796]

608. The wording is careful. It is not suggested that the 'evidentiary record' shows that Norway acted *in order* to deny EU vessels access to a promising economic resource while securing continued access for Norwegian vessels – and rightly so. The evidence shows that Norway intended to have a quota for foreign vessels and offered it to the EU, but that that the EU insisted on being given a quota free of charge, with no *quid pro quo.* Norway was not prepared do that; and there is no reason why it should have been.

609. The claim that the Norwegian measures amounted to an indirect expropriation cannot withstand scrutiny. It was a classic exercise of the regulatory powers of the State.

[796] Reply, ¶866.

CHAPTER 11: MOST FAVOURED NATION TREATMENT

610. The Claimants appear to have abandoned their claims that Norway breached an alleged national treatment obligation under the BIT[797] and that Norway breached an obligation to provide better treatment provided for under other treaties to which Norway and Latvia are parties.[798] The final claim addressed in the Reply (paragraphs 875–900) is that "*Norway has breached its obligation to accord to the Claimants most-favoured nation ("**MFN**") treatment by allowing Russian vessels to fish for snow crab in the Loophole and offshore of Svalbard, while preventing the Claimants from doing so*."[799] While the Claimants now seem to share Norway's understanding of some (but not all) of the key elements in the legal standard provided for in article IV of the BIT,[800] they still argue that allowing the Russian vessels to harvest snow crab while not extending the same right to North Stars' vessels amounts to a breach of the BIT.

611. The first point to be made is that the Claimants' argument is factually incorrect. As was pointed out in the Counter-Memorial, Russian vessels only had access to harvesting snow crab on the continental shelf in the Loop Hole, not on the continental shelf in the maritime areas around Svalbard.[801]

612. The second point is that the Claimant's argument is given no legal foundation. The MFN provision in the BIT applies to *investments* made by Latvian investors in the territory of Norway, rather than to the *investors* themselves:[802]

> "*ARTICLE IV. MOST FAVOURED NATION TREATMENT*
>
> *1. Investments made by investors of one Contracting Party in the territory of the other Contracting Party shall be accorded treatment no less favourable than that accorded to investments made by investors of any third State.*"

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797 Memorial, ¶799; Counter-Memorial, ¶¶825-828. Similarly, the alleged "better treatment" obligation (Memorial, ¶¶805-808; Counter-Memorial, ¶¶825–848) is not pursued in the Reply.

798 Memorial, ¶¶805-808; Counter-Memorial, ¶¶825-848.

799 Reply, ¶875.

800 Reply, ¶877 (a)-(d)

801 Counter-Memorial, ¶¶847–848.

802 As the Claimants accept: Reply, ¶877.

613. The Claimants submit that in applying the MFN provision

> "*there is no need to establish that the investors or that the investments were in like circumstances with each other. Rather, the only relevant question is whether the treatment received by the Claimants was less favourable than that received by the third-state investors.*"[803]

614. That is not accurate. An MFN clause does not bar *different* treatment: it bars *less favourable* treatment, and that implies and requires that there is no rational, objective basis for treating the cases differently. If, for example, a specific tax provision is made for investments in renewable energy facilities and it happens to benefit an investor of State X, that does not mean that investors of State Y must be given equivalent tax treatment in respect of their investment, not in renewable energy facilities but in fisheries facilities. One point where the Claimants do not share Norway's views is in relation to the requirement for a comparator. The Claimants argue[804] that the fact that Article IV of the BIT does not include the words "in like circumstances" means that there: "*is no need to establish that investors or that investments were in like circumstances with each other*".

615. That is wrong. Several investor-State tribunals have held that the absence of the wording "*in like circumstances*" does not obviate the need to find such a comparator, as the tribunal in almost identically-worded Norway-Lithuania BIT decided.[805] The same is true of Article IV of the BIT.

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803 Reply ¶892.

804 *Ibid*.

805 **CL-0316** *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶369: "*The essential condition of the violation of a MFN clause is the existence of a different treatment accorded to another foreign investor in a similar situation. Therefore, a comparison is necessary with an investor in like circumstances. The notion of like circumstances has been broadly analyzed by Tribunals*". See also: **RL-0194-ENG** *Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award, 1 November 2021, ¶309. See also **RL-0225-ENG** *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, ¶175; **CL-0216** *Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006, ¶313; **CL-0477** *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶305; **RL-0226-ENG** *Iurii Bogdanov and Yulia Bogdanova v. Republic of Moldova (IV)*, SCC Case No. 091/2012, Final Award, 16 April 2013, ¶218.

616. The point of an MFN clause is that it "*is a relative standard, which means that it implies a comparative test*."[806] The issue is always whether A is or is not treated more favourably than B; and that necessarily implies that A and B must be commensurable. It is not a breach of an MFN obligation to prefer to sell something to A, who is prepared to pay USD 100 for it, rather than to B, who is prepared to pay only USD 1 or not prepared to pay at all. The important question is what the focus and the object of the similarity between the Claimants and their comparator must be.

617. What are the 'investments' to be compared in the present case? What is the Russian "*investment*" in Norway with which the Claimant's alleged investment is compared? The Claimants do not explain. They have not argued a legal case; they simply assert that 'the Russians had (if only for a year) something that we did not' – access to snow crab on the Norwegian continental shelf.

618. The Claimants' position is based on two false premises. First, it is assumed that the Russians in question had invested in the territory of Norway. But on what basis? Russian-flag vessels operating out of Russian ports and delivering their catches to Russian processing facilities are clearly not investors in Norway. The Claimants have presented no evidence that there were any Russian investments made in Norway – let alone a comparable "*snow crab business*" or an integrated "*economic venture*" as the Claimants now insist that make up their own investment.

619. Second, it is also assumed that Russian vessels were in the same position as Latvian vessels. They were not. Norway allowed Russian vessels to harvest snow crab in the Loop Hole for so long as, and to the extent that, there was in force between Norway and Russia an agreement under the aegis of the 1975 Norwegian-Russian Fisheries Agreement, allowing Russian vessels access to the Norwegian continental shelf and Norwegian vessels access to the Russian continental shelf. Norway concluded that agreement with Russia because Russia offered a *quid pro quo*. Had the EU entered into an agreement with Norway exchanging quotas, as Norway repeatedly offered to the EU, the Latvian vessels would have been in a similar situation as the Russian vessels and

806 **RL-0195-ENG** *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013, ¶88, citing **RL-0232-ENG** UNCTAD, *Most-Favoured-Nation Treatment*, UNCTAD Series on Issues in International Investment Agreements II 2010.

could have been granted (legal) licences to harvest snow crab on the Norwegian continental shelf.

620. The Norway-Russia agreement was a special one-year agreement between the two States for reciprocal access to snow crab in the Loop Hole.[807] The exception allowing Russian vessels access to snow crab in the Loop Hole was removed in January 2017,[808] although Norway retained at that time an element within its annual catch quota for snow crab that could be allocated pursuant to possible agreements with other States, including the EU.[809] From 2017 onwards Russian vessels have not been permitted to catch Norwegian snow crab, and Norwegian vessels have not been permitted to catch Russian snow crab.

621. The Claimants' alleged investments have not been subjected to discrimination simply because they were required to obtain a licence in order to harvest snow crab.[810] In fact, in that way, their alleged investments were treated in the same way as investments of all other operators whose vessels are not permitted under Norwegian law or under an international agreement made in exercise of Norway's rights under international law and UNCLOS (binding also upon Latvia) to harvest snow crab on the Norwegian continental shelf. And neither Latvia nor the EU was treated any less favourably than Russia in having the possibility of access to a Norwegian snow crab quota. The simple fact is that Russia was prepared to give *the quid pro quo* that Norway sought, and the EU (and hence Latvia) was not.

622. The Claimants did not apply for Norwegian licences until 2018, at which stage there were no exceptions made for the Russian vessels. They made no application for permission from Norway to harvest snow crab on the Norwegian continental shelf at

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807 Counter-Memorial ¶114. **R-0100-NOR; R-0099-ENG** Protocol from the 45th Session of the Joint Norwegian- Russian Fisheries Commission, Section 10. This agreement was initiated by Norway in letter of 3 August 2015 from Mr Arne Røksund, Assistant Secretary General of Norway's Ministry for Trade, Industry and Fisheries, to the Federal Agency for Fisheries on mutual access **R-0146-ENG; R-0147-NOR**. In letter of 30 December 2015 from Russia's Federal Agency for Fisheries to the Norwegian Directorate of Fisheries **R-0055-ENG** Norway was notified of Russian vessels intending to fish snow crab in the NEAFC Regulatory Area in the Barents Sea in 2016

808 Counter-Memorial, ¶115. **RL-0025-NOR; RL-0024-ENG** Regulations FOR-2017-01-04-7 amending Regulations FOR-2014-12-19-1836.

809 Counter-Memorial, ¶¶118, 120.

810 See above, ¶601.

the time that the Russian vessels were given temporary permission to do so in the Norwegian part of the Loop Hole: the Claimants were relying at that time on their Latvian licences to give them access to the Norwegian continental shelf.

623. Furthermore, though it is not strictly relevant to the application of Article IV of the BIT, Norway notes that neither Latvia nor the EU was treated any less favourably than Russia in having the possibility of access to a Norwegian snow crab quota. Indeed, there is no evidence – nor even a suggestion – that Norway discriminated against Latvia or the EU and in favour of Russia in its willingness to allow them access to a share of the quota of snow crab that it had decided to make available to non-Norwegian vessels.

624. As for the Claimants' argument that Norway "*raises technical arguments*",[811] and their point that Norway "*relies heavily on the premise that it should be permitted to treat Russian vessels more favourable because the resource is scarce*",[812] that appears to refer to Norway's point that "[i]*n circumstances where access is granted to a limited resource, it cannot sensibly be maintained that equal access must be given to all investors and/or investments that are covered by an MFN clause in a BIT*":[813] That is not a 'technical' argument: it is a logical argument making an obvious point. An MFN clause could not require all unsuccessful bidders in an auction to be treated no less favourably than the winning bidder, or all potential buyers of a specific asset to be treated no less favourably that the person who actually bought it, in the sense that all bidders must be said to have won or all buyers to have bought the asset, and each of them entitled to have the asset as their own. That is not possible.

625. Quite apart from the fact that UNCLOS imposes no duty whatever on a coastal State to allow non-national vessels to exploit continental shelf resources, the manifest impracticability of trying to apply the Claimants' conception of an MFN clause to exercises such as the licensing of offshore petroleum prospecting and exploitation, or to auctions or other procedures for allocating annual fishing quotas, defeats any argument that the Parties to the BIT (and to the hundreds of comparable BITs) intended otherwise. In its Counter-Memorial, Norway quoted from a 1999 UNCTAD study of

811 Reply, ¶876.

812 Reply, ¶¶876; 879.

813 Counter-Memorial, ¶808.

MFN clauses that suggested that some types of bilateral treaties "*do not lend themselves to multilateralization via an MFN provision*".[814] A bilateral agreement for reciprocal access to a crab stock is an example of the sort of treaty that should not and cannot sensibly be multilateralised by an MFN clause.

626. For completeness, it is noted that the Claimants also argue that that the "*regime of unconditional equality* [established by the operation of an unconditional most-favoured-nation clause] *cannot be affected by the contrary provisions of* […] *conventions establishing relations with third States*" and that the existence of the one-year Norway-Russia bilateral access agreement in 2016 cannot affect their rights to MFN treatment.[815]

627. It is indeed stated in the 1978 ILC Draft Articles on MFN clauses that

> "*The acquisition without compensation of rights by the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, under a most-favoured-nation clause not made subject to a condition of compensation is not affected by the mere fact that the treatment by the granting State of a third State or of persons or things in the same relationship with that third State has been extended against compensation.*"[816]

That position was adopted by the ILC in the face of "*contradictory practice*"[817] because the Commission found it "*in conformity with modern thinking*" and "*appropriate*".[818] It stated that "*the use of the phrase 'is not affected by the mere fact'* […] *is intended to underline the 'irrelevance' aspect of* [the] *provisions, which alone justifies their inclusion in the draft.*"[819]

628. That does not, however, overcome the point made above: that the Claimants' investments *were* treated in the same manner as other investments. The Claimants'

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814 **RL-0134-ENG**; Counter-Memorial, ¶807.

815 Reply, ¶887.

816 **CL-0314** *Draft Articles on most-favoured-nation clauses with commentaries*, (1978) *Yearbook of the International Law Commission, 1978*, vol. II, Part Two.Draft Article 15.

817 **CL-0314** *Draft Articles on most-favoured-nation clauses with commentaries*, (1978) *Yearbook of the International Law Commission, 1978*, vol. II, Part Two.Draft Article 15, Commentary, ¶2.

818 **CL-0314** *Draft Articles on most-favoured-nation clauses with commentaries*, (1978) *Yearbook of the International Law Commission, 1978*, vol. II, Part Two.Draft Article 15, Commentary, ¶¶7, 8.

819 **CL-0314** *Draft Articles on most-favoured-nation clauses with commentaries*, (1978) *Yearbook of the International Law Commission, 1978*, vol. II, Part Two.Draft Article 15, Commentary, ¶8.

vessels were treated in the same way as all other vessels that had no permission from Norway to harvest snow crab on the Norwegian continental shelf; and they had no permission because their flag State had not made any agreement with Norway on access to the stock, though it was free to do so, via the EU.

629. As for the Claimants assertion that this response misses the point and that "*the point is that Norway refused to allow the Claimants to fish for snow crabs pursuant to its* [i.e. North Star's] *NEAFC licences in areas asserted to fall under its jurisdiction, while allowing Russian vessels to engage in the exact same activity in 2016*",[820] the answer has already been given. Neither NEAFC nor Latvia had any legal competence to authorise the exploitation of sedentary species on the Norwegian continental shelf.[821]

630. The Claimants' claim based on the MFN clause must be rejected.

820 Reply, ¶899.

821 Counter-Memorial, Section 2.2.3.

PART IV: CONCLUSION AND PRAYER FOR RELIEF

631. For the reasons stated in this Rejoinder, Norway respectfully requests the Tribunal:

(1) To dismiss all of the Claimants' claims;

(2) To order the Claimants to pay Norway its costs, professional fees, expenses and disbursements; and

(3) To order such further or other relief as the Tribunal deems appropriate.

30 June 2022

Respectfully submitted on behalf of the Kingdom of Norway

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