CASE REPORT

TDM OGEMID

IACL International Arbitration Case Law

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Case Report by: Riva Gjecaj*** **Editor**: Ignacio Torterola*****

Award Name and Date: Peteris Pildegovics and Sia North Star v. Kingdom of Norway, ICSID Case No. ARB/20/11 – Award, dated 22 December 2023 (the "Award")

Summary: This arbitration arose from a dispute between Latvian investors Mr. Peteris Pildegovics, a natural person, and North Star SIA, a company (the "Claimants"), and the Kingdom of Norway ("Norway" or the "Respondent") (collectively referred to as the "Parties") on the basis of the Agreement Between the Government of the Kingdom of Norway and the Government of the Republic of Latvia on the Mutual Promotion and Protection of Investments (the "BIT"). The Claimants argued that the Respondent's alleged restriction of the fishing of snow crab in certain zones over which Norway exercises certain sovereign rights, undermined the Claimants' investments in snow crab fishing thereby resulting in a loss of their investment.

Tribunal: Sir Christopher Greenwood, GBE, CMG, KC (President of the Tribunal); The Honourable L. Yves Fortier, CC, OQ, KC (Arbitrator); Prof. Donald M. McRae, CC, ONZM, FRSC (Arbitrator); Mr. Govert Coppens (Tribunal Secretary).

Claimants' Counsel: The Claimants, Peteris Pildegovics and SIA North Star, were represented by Savoie Arbitration S.E.L.A.S.U. (France), Prof. Alina Maron of FAR Avocats (France), Prof. Mads Andenas of Brick Court Chambers (UK), and Prof. Eirik Bjorge (USA).

Respondent's Counsel: Norway was represented by the Legal Affairs Department of the Norwegian Ministry of Foreign Affairs, in collaboration with Prof. Vaughan Lowe, KC and Mr.

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Mubarak Waseem of Essex Court Chambers (UK), Professor Alain Pellet (France), and Mr. Ysam Soualhi (France).

1. Procedural History

The Claimants filed their Request for Arbitration to ICSID on 18 March 2020 and supplemented by letters of 25 and 26 March 2020 in answer to a question posed by the ICSID Secretariat (Award, ¶6). The case was registered by ICSID on 1 April 2020 (Award, ¶7). The arbitral tribunal was constituted on 10 August 2020 with Sir Christopher Greenwood, GBE, CMG, KC as President of the Tribunal, The Honourable L. Yves Fortier, CC, OQ, KC and Prof. Donald M. McRae, CC, ONZM, FRSC as Co-Arbitrators (Award, ¶12).

On 12 October 2020, the Tribunal issued Procedural Order No.1 in which it provided that the applicable ICSID Arbitration rules would be those in effect from 10 April 2006, that the procedural language would be English, and that the place of proceedings would be Paris, French Republic (Award, ¶14). On the same day, the Tribunal rejected the Claimants' request to address bifurcation as a preliminary matter and rejected the Claimants' request to allow Mr Kirill Levanidov, a cousin and business partner of Mr. Pildegovics, to attend the hearing prior to testifying as a witness (Award, ¶¶15-16).

On 12 March 2021, the Claimants filed their Memorial on the Merits dated 11 March 2021 (the "Claimants' Memorial") (Award, ¶22).

On 8 April 2021, the Respondent filed a Request for Bifurcation requesting to address the quantum stage in a separate phase of the proceedings (Award, ¶23) which the Tribunal rejected on 1 June 2021 in its Procedural Order No.3 (Award, ¶25).

On 29 October 2021, the Respondent filed its Counter-Memorial on the Merits and Memorial on Jurisdiction (the "Respondent's Counter-Memorial") and a Request for Bifurcation requesting to address the quantum stage in a separate phase of the proceedings (Award, ¶27). The Tribunal in its Procedural Order No. 5 on 6 December 2021, granted the Respondent's request (Award, ¶28).

On 10 December 2021, the Parties submitted their requests for production of documents in the form of Redfern Schedules on which the Tribunal issued Procedural Order No.6 according to which the Parties were to produce certain documents to the other Party by 14 January 2022 (Award, ¶29).

On 28 February 2022, the Claimants filed their Reply on the Merits and Counter-Memorial on Jurisdiction (Award, ¶30). On 30 June 2022, the Respondent submitted its Rejoinder on the Merits and Reply on Jurisdiction (the "Respondent's Rejoinder") (Award, ¶36).

The Hearing was held from 31 October to 4 November 2022 in London (Award, ¶52).

On 2 December 2022, the Parties submitted their respective Statements of Costs (Award, ¶58).

On 23 February 2023, the Tribunal issued Procedural Order No.9 regarding alleged conflicts of interest by the Claimant in which it directed the Respondent not to make any further use of the KPMG network and in particular KPMG AS in the present arbitration (Award, ¶64).

2. The Parties' Requests

2.1 Claimants' Requests

The Claimants requested the Tribunal to declare that it had jurisdiction over the dispute and admit their claims in their entirety (Award, ¶124). On the merits, the Claimants requested the Tribunal to declare that Norway had breached its obligation under the FET (Article III), MFN (Article IV), expropriation provisions of the BIT (Award, ¶124(b)-(d)). They also requested that a second phase of the proceeding would be devoted to reparation (Award, ¶124(e)).

2.2 Respondent's Requests

The Respondent requested the Tribunal to dismiss the Claimants' claims and order the Claimants to pay Norway the costs of arbitration (Award, ¶125).

3. Jurisdiction and Admissibility

3.1 The Respondent's Position that the Tribunal lacks ratione materiae jurisdiction over the dispute

3.1.1 Respondent's Position

The Respondent objected to the jurisdiction of the Tribunal and/or the admissibility of the (Award, ¶126). First, the Respondent argued that the dispute did not concern the Claimants' alleged investments in Norway but Norway's sovereign rights in its maritime areas around Svalbard and in the Loop Hole and as a result the Tribunal had no jurisdiction over the dispute ("First Objection") (Award, ¶126). According to the Respondent, the Tribunal must first clarify the legal regime applicable to the harvesting of snow crab on the Norwegian continental shelf around Svalbard and in the Loop Hole by interpreting and applying UNCLOS, the NEAFC Convention and the Svalbard Treaty, for which it has no jurisdiction (Award, ¶131). Additionally, the Respondent argued that the *Monetary Gold* principle prevents the tribunal from adjudicating upon a claim if doing so requires it to decide on the rights and obligations of third parties not present in these proceedings, in this instance Latvia and the EU (Award, ¶136). The Respondent contended that these absent parties' legal interests would form the "very subject matter" of the Tribunal's decision. According to the Respondent, since neither Latvia nor the EU had consented to the Tribunal's jurisdiction, the Tribunal could not rule on the claims (Award, ¶140).

The Claimants' alleged harm is subsequent and ancillary to this initial determination (Award, ¶131). According to the Respondent, the Tribunal may not adjudicate upon the Claimants' claims in this arbitration (Award, ¶136).

3.1.2 The Claimants' Position

The Claimants first question the existence in international law of the Respondent's objection that the dispute does not relate to questions directly related to the alleged investments and depends on a preliminary decision on the legal regime applicable to the harvesting of snow crab (Award, ¶133). The Claimants argue that this is a matter of admissibility rather than jurisdiction (Award, ¶¶135, 179). According to the Claimants, inadmissibility based on the

existence of a "larger" inter-State dispute involving parties not present before the investment treaty tribunal would hamper claimants' access to investor-State dispute resolution. The Claimants argued that the application of Norwegian law would deprive investors of the protection granted by the BIT (Award, ¶177).

They also alleged that the very subject matter of the dispute does not concern the exercise of sovereign rights as argued by the Respondent (Award, ¶¶134, 181). However, according to the Claimants, the Tribunal was not requested to determine the existence and extent of such rights but to determine whether in "the exercise" of those rights, the Respondent violated the Claimants' rights under the BIT (Award, ¶188). However, according to the Claimants, the Tribunal was not requested to determine the existence and extent of such rights but to determine whether in "the exercise" of those rights, the Respondent violated the Claimants' rights under the BIT (Award, ¶188).

Furthermore, the Claimants argued that the *Monetary Gold* principle does not apply in this arbitration as it is inevitable for the Tribunal to rule on the conduct of Latvia and/or the EU (Award, ¶142). The existence of an underlying public international law dispute involving Latvia and the EU does not prevent the Tribunal from adjudicating this case (Award, ¶191).

The Claimants further argued that the interpretation of UNCLOS, the Svalbard Treaty or the NEAFC Convention is a question of applicable law, not of admissibility or jurisdiction (Award, ¶182).

3.1.3 The Tribunal's Position

The Tribunal rejected the First Objection and agreed with the Claimants that this objection goes to the admissibility of the claim rather than the jurisdiction of the Tribunal (Award, ¶¶293, 300). The Tribunal found that the dispute arose directly out of the investments which it found the Claimants to have possessed as an investment tribunal is not deprived of the jurisdiction granted to it by the BIT and the ICSID Convention to rule on issues of interpretation of the ICSID Convention which are is contested between different State Parties (Award, ¶294).

The Tribunal also held that the International Court of Justice has made clear that the *Monetary Gold* principle is applicable only when the rights and obligation of a third State form the very subject of the matter before it (Award, ¶296). Therefore, it found that this principle limited its ability to deal with aspects of the Claimants' case that concern States other than the Respondent (Award, ¶297).

The Tribunal did not consider that the Claimants' case required it to rile on the rights and obligations of Latvia and the EU (Award, ¶298).

3.2 The Respondent's Position that the claim is not admissible

The Respondent argued that the dispute does not relate to the investments made by the Claimants as they were not investments "in the territory of Norway" and were not made "in accordance with its laws and regulations" as required by Articles I(1) and IX(1) of the BIT ("Second Objection") (Award, ¶127).

3.2.1 The Respondent's Position on the alleged investment of Mr Pildegovics

It disputed that Mr Pildegovics had any joint venture agreement with Mr Levanidov and denies that he had any contractual rights under the alleged agreement and that his shareholdings in North Star qualify as investments (Award, ¶144).

The Respondent alleged that the Claimants have provided "practically no contemporaneous documentation" to support the existence and terms of the joint venture (Award, ¶147). It also argued that the alleged joint venture cannot be considered as an investment under the BIT and that if the claims to performance exist, they are nonetheless not a qualifying investment in the territory of Norway (Award, ¶¶149-150). If shareholding can qualify as a protected asset under the BIT if must nonetheless be invested in the territory of the other State Party to the BIT (Award, ¶158). Since Mr Pildegovics is a shareholder of North Star, a Latvian company, the investment cannot qualify as having been made in the territory of Norway, according to Respondent (Award, ¶158).

3.2.2 The Respondent's Position on the alleged investments of North Star

The Respondent submitted that North Star's four fishing vessels are not investments made in the territory of the Respondent as the definition of territory in Article 1(4) of the BIT includes land territory, territorial sea and its continental shelf but does not include its 200 nautical mile zones which includes the Norwegian Economic Zone outside mainland Norway, the Fisheries Protection Zone around Svalbard and the Fisheries Zone around Jan Mayen (Award, ¶¶162-163). Additionally, the four vessels were Latvian-flagged and had no necessary connection to Norway (Award, ¶164). The Respondent argued that if the Claimants had operated their vessels in Norwegian territory, the investment would not have been made "in accordance with" Norwegian law (Award, ¶165).

3.2.3 The Claimants' Position

The Claimants argued that under the BIT, Mr Pildegovics' contractual rights under the joint venture are properly characterized as "claims to performance under contract having an economic value" and that their assets were acquired to form a single business with a common economic purpose (Award, ¶200). According to the Claimants, such assets define the investment at issue in this case (Award, ¶201). The Claimants allege that the Respondent's actions have cause North Star to become banned from the snow crab fishery (Award, ¶201).

According to the Claimants, their investment must be viewed as a whole as the ICSID convention allows for a unitary approach to an investment (Award, ¶204).

On the question of the territoriality of the investment, the Claimants alleged that the question is whether the business in its entirely has sufficient nexus to the territory of Norway to fulfil the territorial requirement under Article IX of the BIT (Award, ¶208). The Claimants submit that the operation of the investment reveals "a very strong territorial nexus to Norway" (Award, ¶210).

As to whether the investment was made "in accordance with" the Laws and Regulations of Norway, the Claimants submitted that regulations prohibiting snow crabbing did not apply to EU-flagged vessels operating in the Loop Hole and did not concern the Claimants' operations (Award, ¶215). Additionally, the investment was legal at the time of investment and that Norway's prior acts prevent it from invoking legality (Award, ¶2180).

3.2.3 The Tribunal's Analysis

The Tribunal identified a threshold issue, which was the precise relationship between the Claimants and Mr Levanidov, including its companies (Award, ¶240). In that respect, it accepted that Mr Pildegovics had some kind of joint venture agreement with Mr Levanidov (Award, ¶254). The Tribunal noted that during the two or more years of the alleged joint venture, there was not a single document that confirms its existence or terms (Award, ¶247). It accepted the evidence of Mr Pildegovics and Mr Levanidov which established that the two of them agreed to cooperate in setting up an operation under which the former's company, North Star, would harvest snow crab and deliver it to Seagourmet's facility in Båtsfjord, where it would be processed and then marketed by Seagourmet (Award, ¶248). The Tribunal could not identify what rights Mr Pildegovics might have been able to claim under such an agreement (Award, ¶¶248-249). It nevertheless found that it was North Star which enjoyed any economic benefit (Award, ¶254).

According to the Tribunal, Mr Pildegovics shareholding in North Star is not an investment in Norway (Award, ¶255). However, the Tribunal held that Mr Pildegovics' investment in Sea& Coast, a Norwegian company based in Norway, qualified as an investment in Norway (Award, ¶257).

The Tribunal found that there was a dispute between the Parties in relation to the investment in that Mr Pildegovics claims, and Norway denies, that Norway's actions resulted in Sea & Coast's business drying up as North Star and its other customers ceased harvesting snow crab and thus no longer required the services of Sea & Coast (Award, ¶257).

The Tribunal accepted the Claimants' unitary approach when referring to the alleged investments (Award, ¶¶258-260). It noted however that all vessels were registered in Latvia, that there was no evidence that they were purchased from an owner in Norway, that the licences issued to North Star from the Government of Latvia authorized the harvesting of snow crab in international waters, outside Norwegian waters (Award, ¶261).

As according to the Tribunal, the 2010 Delimitation Treaty effect is that just under 11% of the Loop Hole falls within the Norwegian continental shelf while the remaining 89% is part of the continental shelf of the Russian Federation (Award, ¶262). The consideration here the Tribunal noted was where North Star's four vessels harvested snow crab for the purposes of Article IX of the BIT (Award, ¶264). The Tribunal found that based on the evidence before it, North Star's four vessels took the great majority of their catch in the Russian sector of the Loop Hole (Award, ¶267).

The Tribunal, taking a holistic view, determined that North Star lacked an investment in Norway, as the focus of its operations was in Latvia or the Russian Federation (Award, ¶270). Analyzing the specific assets, the Tribunal concluded that the fishing vessels, the Latvian-issued fishing licences and capacity, and the contracts to purchase two more ships did not constitute investments in Norway under the BIT (Award, ¶279). The Tribunal nonetheless concluded that North Star had an investment within the meaning of Article I(1)(iii) of the BIT in Norway in the form of its rights under the contract or contracts with Seagourmet (Award, ¶281).

The Tribunal ultimately dismissed the Respondent's Second Objection insofar as it related to the rights of Mr Pildegovics in respect of his shareholding in Sea & Coast, an investment dating from October 2015; and the rights of North Star under its agreements with Seagourmet, an investment dating from the beginning of 2015 (Award, ¶287).

4. Liability

4.1 The Alleged Illegal Assertion of Sovereignty over the Barents Sea Snow Crab Fishery

4.1.1 The Claimants' Position

The Claimants contended that if a State's conduct has violated international law beyond the BIT, such violation may inform the Tribunal's assessment as to whether the BIT may have been breached (Award, ¶312). Additionally, the Claimants invoked the MFN clause under Article IV of the BIT, which they allege would mean that if the Tribunal finds that the Respondent has acted in accordance with the BIT, the Tribunal must still examine whether Norway has breached other international agreements and in consequence caused harm to the Claimants, which must be compensated (Award, ¶313).

The Claimants argued that the Respondent violated Article 300 of UNCLOS as it asserted rights over snow crab as a purportedly sedentary species in an abusive manner falling well short of the requirements of good faith (Award, ¶314). The Claimants submitted that the change from non-sedentary to sedentary designation by the Respondent was sudden, arbitrary and resulted in injury to the rights of EU Member States and severely injured North Star and indirectly, Mr Pildegovics (Award, ¶315).

4.1.2 The Respondent's Position

The Respondent argued that the designation of sedentary versus non-sedentary is fixed and that it was not changed its position on snow crab at any point since the 1958 Convention on the Continental Shelf established the legal category of "sedentary species" (Award, ¶317). The Respondent rejected the Claimants' bad faith allegations (Award, ¶318).

4.2 The Respondent's Alleged Breach of the Claimants' Acquired Rights

4.2.1 The Claimants' Position

The Claimants alleged that their acquired rights are the NEAFC and Svalbard fishing licences for snow crab issued by Latvia (Award, ¶319). As such, they argued that the exclusion of EU vessels from the Barents Sea snow crab harvesting through the Respondent's 2015 fisheries regulation violated these acquired rights and radically changed the previous regime (Award, ¶¶319-321). This violation according to the Claimants requires full reparation (Award, ¶322).

4.2.2 The Respondent's Position

The Respondent argued that the Claimants failed to explain what the public international law criteria are for the creation of an acquired right (Award, ¶323). It pointed out that the licences in question were granted by Latvia without Norway's consent and contrary to UNCLOS, the NEAFC Convention, the Svalbard Treaty as well as domestic law (Award, ¶324). The

Respondent rejected the claim that the right to harvest crab in the waters at issue was habitual (Award, ¶325).

4.3 The Respondent's Alleged Breach of the Svalbard Treaty

4.3.1 The Claimants' Position

The Claimants argued that the Respondent acted in violation of the Svalbard Treaty by failing to uphold the rights of equal access and treatment that benefit the Claimants within the territory covered by that treaty, which includes its economic zone, the Svalbard Fisheries Protection Zone ("**Svalbard FPZ**"), as well as Svalbard's continental shelf (Award, ¶326).

4.3.2 The Respondent's Position

The Respondent asserted that the Svalbard Treaty was irrelevant in this case and that in any event, no vessels of other nationalities were given mutual access to harvest snow crab on the Norwegian Continental shelf around Svalbard (Award, ¶331).

4.4 The Respondent's Alleged Breach of the Obligation to Provide Compensation in Case of Expropriation (Article VI of the BIT)

4.4.1 The Claimants' Position

The Claimants asserted that the Respondent's actions from July 2015 to September 2016, confirmed in January 2017 and subsequently, constituted an illegal expropriation of the Claimants' investments under Article VI of the BIT (Award, ¶332). According to the Claimants, following the actions by the Respondent, the Claimants were substantially deprived of the value of their snow crab harvesting enterprise (Award, ¶334).

The Claimants alleged that the losses to the investment started accruing in October 2016 as the snow crab harvesting activity was stopped in September 2016 when Norway and Russian completed the closure of the Loop Hole (Award, ¶335).

According to the Claimants, their investment-backed expectations with regards to the Respondent further support a finding of expropriation since, among others, Norway was perceived a stable country from a regulatory and legal framework perspective and that its practice since 1958 was to consider snow crab non-sedentary (Award, ¶336).

The Claimants argued that there was no legitimate regulatory goal and that the Respondent cannot rely on "police powers" to justify the exclusion EU vessels from the snow crab fisheries while allowing Norwegian vessels to continue as such exclusion was discriminatory and contrary to an investor's legitimate expectations (Award, ¶338). Finally, the Claimants asserted that the Respondent had failed to provide "prompt, adequate and effective compensation", there was no legal process for such expropriation, and the expropriation was discriminatory (Award, ¶339).

4.4.2 The Respondent's Position

The Respondent denied that the Claimants' alleged investments have been expropriated or subjected to measures having similar effect as it contended that there was no support to conclude that a denial of opportunity or failure to grant a concession, license or other legal authorization can in itself amount to expropriation (Award, ¶340).

The Respondent argued that between the date of their acquisition and the alleged expropriation date, 27 September 2016, there has been neither a taking of an investment nor an expropriatory act (Award, ¶341). It further noted that Mr Pildegovics did not make a claim for compensation in respect of injury to his alleged right under the joint venture or his shareholding in North Star (Award, ¶¶343-344). Moreover, the Respondent argued that there was no attempt to establish any injury to Mr Pildegovics' investment in Sea & Coast (Award, ¶345).

The Respondent asserted that the four vessels' expectation of profitable employment in a specific trade could not amount to an investment and therefore could not be expropriated (Award, ¶347). Additionally, it argued that the fishing capacity issued by Latvia remained unaffected by Norway's actions (Award, ¶348). According to the Respondent, Latvia had no legal power to grant fishing licenses for the Look Area of the NEAFC zone and in maritime zones around Svalbard (Award, ¶349). Furthermore, the contractual rights to purchase two additional ships were acquired after the date of the alleged expropriation (Award, ¶350). Similarly, the Respondent also argued that the supply agreements were entered into after the date of the alleged expropriation (Award, ¶351).

In the Respondent's view, the causing of a financial loss or the loss of an opportunity to make profit is relevant to a claim for a breach of the FET standard but do not amount to expropriation (Award, ¶352).

4.5 The Respondent's Alleged Breach of the Obligation to Provide Equitable and Reasonable Treatment and Protection to the Claimants' Investment (Article III of the BIT)

4.5.1 The Claimants' Position

The Claimants alleged that the Respondent breached its obligation to provide "*equitable and reasonable treatment and protection*" to the Claimants' investment pursuant to Article III of the BIT which it argued equated to the FET standard (Award, ¶353). The Claimants argued that this obligation also entailed the protection of the Claimants' investments in an equitable and reasonable manner (Award, ¶354).

The Claimants argued that the Respondent had violated this obligation as, among other things, it had reversed its position on the characterization of snow crabs while acting as if it had always considered snow crabs as sedentary, it had refused to recognize the legality of the Claimants' licenses and had not advanced any economic or environmental goals when exercising its legitimate right to regulate (Award, ¶356).

The Claimants asserted that the Respondent's acts were "discriminatory, arbitrary and capricious" and "contrary [...] to the rule of law" thereby the prohibition on arbitrariness in Article III of the BIT (Award, ¶360). They moreover argued that the Respondent had

egregiously acted in bad faith and that it had not respected the specific or general legitimate expectations of an investor (Award, ¶¶361-362).

According to the Claimants, the opacity and inconsistency of the Respondent's actions towards EU vessels constituted a breach of Article III of the BIT (Award, ¶373).

4.5.2 The Respondent's Position

The Respondent rejected the Claimants' arguments, asserting that its conduct had come nowhere near a violation (Award, ¶383).

4.6 MFN

4.6.1 The Claimants' Position

The Claimants alleged that the Respondent has breached Article IV of the BIT by granting more favourable treatment to Russian snow crab fishing vessels and operators (Award, ¶425). They also alleged that the Respondent has breached Article IV of the BIT by having failed to grant the Claimants national treatment, a standard which was granted to Russian investors pursuant to the Norway-Russian Federation BIT (Award, ¶426). The Claimants further asserted that the Respondent also had the obligation to ensure that it granted Latvian investors and their investments the better treatment as between the Latvia-Norway BIT and other international treaties in force between Latvia and Norway (Award, ¶428). According to the Claimants, there is ample evidence that Russian-flagged vessels, owned by Russian companies, fished for snow crabs in the area of the Loop Hole suprajacent to Norway's continental shelf in 2016 (Award, ¶431).

5.6.2 The Respondent's Position

The Respondent disagrees with the Claimants' reading of the MFN standard under Article IV of the BIT as it protects only investments and not investors (Award, ¶433). With regards to the Russian vessels authorized to take crab from the Norwegian continental shelf, the Respondent argued that these were not investments in the territory of Norway (Award, ¶434).

According to the Respondent, the "like must be compared with like", further arguing that the licenses granted to Russian vessels were not akin to those granted to the Claimants as the Russian vessels' licences derives from Russia's bilateral fishing agreement with Norway (Award, ¶438). Latvia did not have a similar agreement (Award, ¶438).

The Respondent disputed the Claimants' proposition that they can rely on the MFN clause to invoke either Article 300 of UNCLOS or the Svalbard Treaty (Award, ¶441).

4.7 The Respondent's Alleged Breach of the Obligation to Accept Investments in Accordance with its Laws (Article III of the BIT)

4.7.1 The Claimants' Position

The Claimants submitted that the by failing to allow the Claimants to exercise their rights under Svalbard licences issued by Latvia, the Respondent violated the obligation to "accept such

investments in accordance with its laws and regulations" in Article III of the BIT (Award, ¶442).

4.7.2 The Respondent's Position

The Respondent submitted that the obligation in Article III of the BIT cannot mean, as the Claimants argue, that Norway must accept and give legal effect to an alleged Latvian authorization to harvest snow crab on Norway's continental shelf as that would be incompatible with Article 77 of UNCLOS regarding the rights of the coastal State over the continental shelf (Award, ¶444).

4.8 The Tribunal's Analysis

The Tribunal agreed with Norway that whether the snow crab is a sedentary species is a matter of law and requires no designation (Award, ¶459). The Tribunal held that while Norway's position had not been as consistent as alleged, its actions could nonetheless not be regarded as improper or unwarranted (Award, ¶479). It held that Norway's consideration of snow crab as a sedentary species could not be regarded as an outlier as the same position was shared by the EU Commission (Award, ¶480). Additionally, according the Tribunal, this is further supported by the fact that scientific assessment tends to support the consideration of snow crab as a sedentary species (Award, ¶481).

The Tribunal rejected the proposition of the Claimants that Norway had instigated the idea that the coastal States should begin asserting sovereign rights over the snow crab in the NEAFC area (Award, ¶486).

The Tribunal further held that to the extent that it was the Russian ban on foreign vessels taking snow crab in the Russian part of the Loop Hole that had caused the Claimants' loss, there had been no breach of the BIT by Norway (Award, ¶493).

The Tribunal maintained that despite its slightly different language, Article III of the BIT represents the FET standard (Award, ¶497).

The Tribunal disagreed with the Claimants that the obligation to accord the investment equitable and reasonable protection entailed the Respondent's obligation to protect the Claimants' investment from the effects of the Russian Federation's ban (Award, ¶500).

With regards to legitimate expectations, the Tribunal rejected the claim that there was a legitimate expectation of a general character (Award, ¶509). It noted that no question of State support arose in this case and that Norway did not sell permits for exploitation of snow crab (Award, ¶507). Additionally, the Tribunal considered that there was no particular reason for Norway to have taken a position about regulating the harvesting of snow crabs as up until 2016 there had been no significant harvesting of snow crabs in the Norwegian sector of the Loop Hole (Award, ¶508). Additionally, the Latvian fishing licences and fishing capacity were considered irrelevant by the Tribunal as only the actions and statements of Norway could give rise to a legitimate expectation (Award, ¶511).

The Tribunal considered that correspondence with the Norwegian Food Safety Authority was nowhere near sufficient to create a legitimate expectation that Norway would not change its

law (Award, ¶527). The lack of prosecutions on EU vessels for fishing in the Loop Hole at the relevant times was not deemed by the Tribunal as enough to give rise to a legitimate expectation that North Star would be permitted to take snow crab from the Norwegian sector (Award, ¶528).

The Tribunal therefore rejects the Claimants' argument that they had a legitimate expectation that Norway would permit them to take snow crab in the Norwegian sector of the Loop Hole after June 2016 (Award, ¶530).

The Tribunal did not accept that Norway's treatment of the status of snow crab was arbitrary or that it demonstrated a lack of good faith (Award, ¶536). It further held that there was nothing extraneous or improper in Norway exercising its sovereign rights under Articles 77(1) and (2) of UNCLOS (Award, ¶543).

The Tribunal rejected the claim that Norway displayed a lack of consistency or transparency such as would rise to the level of a violation of Article III of the BIT (Award, ¶551).

Finally, the Tribunal rejected North Star's Loop Hole claims that it had been the victim of a violation of Article III of the BIT (Award, ¶552).

With regards to expropriation, the Tribunal held that Norway had granted no permit to North Star and that North Star had commenced operations at a time when there was no regulation of snow crab in the Loop Hole (Award, ¶564). It therefore dismissed the expropriation claim (Award, ¶565).

With regards to the MFN obligation, The Tribunal accepted that the Russian flagged vessels which harvested snow crab in the Norwegian sector of the Loop Hole during the second half of 2016 were owned by Russian companies but it did not consider that those vessels were an investment in Norway (Award, ¶570). It therefore dismissed the Article IV claim (Award, ¶571).

With regards to the Svalbard claims, the Tribunal found that at the time that North Star had made its investment in Norway and began operations in the Loop Hole, it could not have claimed any right to harvest snow crab in the Svalbard FPZ as Latvia was not a party to the Treaty and it could not have claimed rights for its nationals under it (Award, ¶574). Furthermore, the Tribunal held that it could not adjudicate upon the interpretation of the territorial application of the Svalbard Treaty (Award, ¶585). Even if it were able to do so, it decided that the violation of the Svalbard Treaty did not automatically amount to a violation of the BIT (Award, ¶585).

The Tribunal disputed the allegation that the refusal of Norway to permit North Star's vessels to take snow crab on the Svalbard continental shelf when North Star subsequently attempted to do so, violated Norway's Article III obligation to accord North Star's claim to performance under its earlier agreement with Seagourmet equitable and reasonable treatment (Award, ¶595). The Tribunal rejected the Article III part of the Svalbard claims (Award, ¶601).

With regards to Sea & Coast claim, the Tribunal concluded that there is nothing in the record on which a finding of a breach of the BIT with regard to Sea & Coast could possibly be based and dismissed the First Claimant's claim in respect of his shareholding in that company (Award, ¶614).

5. Costs

The Tribunal ordered the Claimants to pay to the Respondent the sum of USD 597,307.04 to cover the entirety of the arbitration costs where each Claimant shall be jointly and severally liable for the entirety of this sum (Award, ¶620).

6. Award

For the reasons set out above, the Tribunal:

(1) DECIDES that it has jurisdiction over the Claimants' claims to the extent, and only to the extent, set out in Part IV.C of this Award;

(2) DISMISSES the Claimants' claims in their entirety;

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

(4) ORDERS the Claimants to pay the sum of EUR 809,724.07 to the Respondent in respect of the latter's Representation Costs, the Claimants to be jointly and severally liable to make this payment; and

(5) ORDERS the Claimants to pay the Secured Overnight Financing Rate ("SOFR") plus 2%, compounded twice yearly, from 60 days after the date of dispatch of this Award to the Parties.