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To fish, or not to fish?

The Norwegian Supreme Court and marine resources in the Barents Sea

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1 Introduction

Under the deep frigid waters around the Svalbard Archipelago lives *Chionoecetes opilio*, colloquially known as the snow crab. This is a relatively new species in the Barents Sea, with commercial catching only starting a decade ago.[1] It is smaller in size than the king crab with thinner legs, but 'slightly sweeter and more succulent flesh'.[2] The 'tasty, snow white meat'[3] has almost overnight transformed the snow crab into a very sought after delicacy in many of the world's restaurants.

Catching takes place all year round 'using crab pots, which are placed on the seabed for a few days before they are retrieved'.[4] It has been argued that 'if current predictions are realised, the snow crab industry is likely to be much greater than each of the mackerel, saithe, and herring fisheries, and has the potential to be larger than the renowned cod fishery – the most valuable fishery in Norwegian waters'.[5]

This is the reason why, besides many delicious culinary recipes, this newly beloved crustacean has also proven to be the recipe for legal dilemmas. Decades long conflicting fishing interests and an ever more complex legal framework, with plenty of grey areas to exploit, have all come to surface in three recent Norwegian Supreme Court cases, all having the seemingly innocuous snow crab at the forefront.[6] Environmental considerations clash with the commercial ones, and Norwegian interests come in conflict with growing interest from international actors.

These factors, together with the wider legal and commercial ramifications in relation to exploitation of other resources in the area (such as Arctic cod, oil, gas, and minerals), warrant a comprehensive analysis on the topic. As opposed to other pieces of legal literature, which adopt a theoretical approach, this thesis will provide such an analysis by discussing the Norwegian Supreme Court practice on the matter, as seen in the three main cases connected to snow crabs, and two earlier decisions on Arctic cod fishing.[7]

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[1] HR-2019-282-S, para 33
[2] https://fromnorway.com/seafood-from-norway/snow-crab/ accessed 15 May 2023
[3] ibid
[4] ibid
[5] R Steenkamp, 'Svalbard's 'Snow Crab Row' as a Challenge to the Common Fisheries Policy of the European Union' (2020) 35 International Journal of Marine and Coastal Law 106, 107
[6] HR-2017-2257-A; HR-2019-282-S; HR-2023-491-P
[7] HR-1996-45-B; HR-2006-1997-A

To this end, the thesis will have a tripartite structure. Chapters 2 and 3 will provide a comprehensive overview of the relevant legal framework, which underpins the conflicts, and which the Supreme Court has used in deciding upon the three cases. This will enable the reader to have a consolidated legal 'inventory' for further reference, and to then focus entirely on the legal discussion of each case. Chapters 4 to 7 will analyse the facts, legal arguments and conclusions the Supreme Court reached in five relevant decisions. Chapter 8 will be an attempt at tying everything together, by analysing what the current legal situation after these decisions is, and also how satisfactory it is, in terms of clarity and fairness.

2 History, geography, and law

2.1 Svalbard Treaty (ST)

2.1.1 History

The Parliament Bill relating to the implementation of the ST provides a detailed history of the Svalbard Archipelago (earlier called Spitsbergen),[8] whilst a more condensed version can be found in the 2023 Supreme Court decision.[9] The most important aspect is that, since its discovery, Svalbard has been, for the majority of the time, what was described as *terra nullius*, a no-man's-land.[10] Different nations exploited the rich resources on land and in the waters around Svalbard, but multiple attempts to claim sovereignty failed. The beginning of the 20th century and the rapidly increasing opportunities for coal mining brought to the forefront the disadvantages caused by the absence of a clear and permanent legal order.

In the wake of the Paris Conference following WWI, the ST was drafted, where the Contracting Parties recognised Norway's sovereignty over the Archipelago, subject to some conditions. The Treaty was signed on 9 February 1920 and entered into force 14 August 1925. Implementation into Norwegian domestic legislation was achieved through the adoption of the Svalbard Act 1925.[11] Section 1 states that 'Svalbard belongs to the Kingdom of Norway'. At the time of writing, 46 states have signed the Treaty, the latest one being Latvia, which acceded in 2016. These historical details are crucial when understanding the

[8] St.prp.nr.36 (1924)
[9] HR-2023-491-P, paras 71-86
[10] Geir Ulfstein, *The Svalbard Treaty: From Terra Nullius to Norwegian Sovereignty* (Scandinavian University Press 1995)
[11] LOV-1925-07-17-11

different arguments put forward in relation to the interpretation of the ST, as shown by the cases discussed below.

2.1.2 Treaty provisions

The Preamble states that, with regards to the purpose of the ST, the Contracting Parties were 'desirous, while recognising the sovereignty of Norway over the Archipelago of Spitsbergen, including Bear island, of seeing these territories provided with an equitable regime, in order to assure their development and peaceful utilisation'. Article 1 states that 'the High Contracting Parties undertake to recognize, subject to the stipulations of the present Treaty, the full and absolute sovereignty of Norway over the Archipelago of Spitsbergen.'

Article 2 establishes an important equality principle. It is provided in paragraph 1 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'. Nevertheless, paragraph 2 imposes a crucial caveat. Norway is to remain 'free to maintain, take or decree suitable measures to ensure the preservation and, if necessary, the re-constitution of the fauna and flora of the said regions, and their territorial waters; it being clearly understood that these measures shall always be applicable equally to the nationals of all the High Contracting Parties without any exemption, privilege or favour whatsoever, direct or indirect to the advantage of any one of them'.

Article 3 also provides a similar equality principle. Paragraph 1 states that 'the nationals of all the High Contracting Parties shall have equal liberty of access and entry for any reason or object whatever to the waters, fjords and ports of the territories specified in Article 1; subject to the observance of local laws and regulations, they may carry on there without impediment all maritime, industrial, mining and commercial operations on a footing of absolute equality'. Paragraph 2 further provides that 'they shall be admitted under the same conditions of equality to the exercise and practice of all maritime, industrial, mining or commercial enterprises both on land and in the territorial waters, and no monopoly shall be established on any account or for any enterprise whatever.

The other Articles are less relevant for the present discussion, but do warrant a quick recap. Article 4 provides for equal access to communication infrastructure, Article 5 relates to scientific research, Article 6 talks about rights predating the Treaty, Article 7 regulates

property ownership, Article 8 provides rules concerning mining, Article 9 establishes military restrictions and Article 10 creates a system for accession from other countries.

2.2 United Nations Convention on the Law of the Sea (UNCLOS)

2.2.1 History

UNCLOS was concluded in December 1982 after 14 years of negotiations following the four UN conventions on the law of the sea signed in Geneva in 1958. It entered into force in November 1994 and was ratified by Norway in June 1996.[12] The Preamble states that the main aims of the Convention are to establish 'with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilisation of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment'. Furthermore, it is stated that 'the codification and progressive development of the law of the sea achieved in this Convention will contribute to the strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the principles of justice and equal rights and will promote the economic and social advancement of all peoples of the world'.

2.2.2 Territorial sea

The baseline (what is colloquially known as 'coastline') is the point of reference for all other legally defined marine areas. Article 8 of UNCLOS establishes that 'waters on the landward side of the baseline [...] form part of the internal waters of the State'. Article 2(1) states that 'the sovereignty of a coastal State extends, beyond its land territory and internal waters [...] to an adjacent belt of sea, described as the territorial sea'. Paragraph 2 goes on to establish that 'this sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil'. Article 3 explains that the breadth of the territorial sea shall not extend 12 nautical miles from the baseline. The expression 'territorial sea' was getting more legal traction in the decades after the conclusion of the ST, because previously 'territorial waters' had been used inconsistently, either for the internal waters or the territorial sea, or as a collective term encompassing both of them.[13]

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[12] https://snl.no/Havrettskonvensjonen accessed 3 May 2023

[13] HR-2023-491-P, para 165

2.2.3 Territorial Waters Act 2003[14]

After Norway acceded to UNCLOS in 1996, domestic legislation was implemented in order to extend the Norwegian territorial sea from 4 to 12 nautical miles. As an important consequence of this extension, it was noted that Norwegian law will become applicable in a bigger area, with special benefits in the fields of environmental protection and maritime security.[15]

The Territorial Waters Act entered thus into force in January 2004. Section 1 states that 'Norwegian territorial waters consist of the territorial sea and the internal waters. The baselines form the outer limit of the internal water and the starting point for the establishment of the territorial sea and the different areas of jurisdiction in accordance with international law'. Section 2(1) establishes that 'the territorial sea stretches 12 nautical miles from the baselines'. Section 2(2) mirrors Article 17 of UNCLOS in that foreign ships are given the right of innocent passage through the territorial sea. Section 3 provides that 'the internal waters are all waters which are found inside the baselines'.

Section 6 makes the Act also applicable to Svalbard and, in this regard, the Parliament Bill explained that the ST 'gives special rights to citizens of the contracting parties to important commercial activities on Svalbard's land and sea territory. These rights concern the islands and "their territorial waters". The breadth of the territorial sea is not defined in the Treaty, but is established within the framework which is at any moment applicable in Norway as sovereign state over the area as a consequence of international law. Expansion of the territorial sea adjacent to Svalbard will entail a corresponding expansion of the geographical scope of the ST. The restrictions set by the ST on the exercise of Norwegian authority will thus be applied in a larger area than today. Similarly, the area where the equality principle applies will be expanded'.[16]

2.2.4 Exclusive economic zone

Article 57 of UNCLOS establishes that 'the exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured'. Importantly, Article 56(1)(a) states that 'in the exclusive economic zone, the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and

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[14] LOV-2003-06-27-57

[15] Ot.prp.nr.35 (2002-2003), page 11

[16] ibid, page 13

managing the natural resources, whether living or nonliving, of the waters superjacent to the seabed and its subsoil'.

2.2.5 Norway's economic zones

2.2.5.1 Economic Zone Act 1976[17]

Norway legislated to impose an exclusive zone measuring 200 nautical miles even before UNCLOS was signed, with the decision based on clear signals from numerous states and from the negotiation process surrounding the text of the Convention.[18] It was pointed out that the 'creation of an economic zone will involve an expansion of Norway's fisheries jurisdiction, based on priority for the coastal population. This has become necessary as a result of the threat to the fish stocks in the waters off the Norwegian coast that economic/technological development has created over the past decades'.[19]

Regarding the UNCLOS draft text which was debated at the time (and which remained the final text), the Government emphasised that the compromise 'reflected in these provisions involves a balance between conflicting interests. It involves taking care of the need to give authority and preferential rights to the coastal state when it comes to resource utilisation, and at the same time imposes obligations on the coastal state to use this authority in a way that secures the fish stocks and their rational exploitation'.[20]

By virtue of section 1 of the Economic Zone Act, 'an economic zone shall be established in the seas adjacent to the coast of the Kingdom of Norway. The King shall determine the date for the establishment of the economic zone and the waters to which it shall apply'. By Royal Decree of 17 September 1976 an economic zone measuring 200 nautical miles was established in the ocean areas off the Norwegian mainland coast.[21]

Section 3 of the Economic Zone Act states that 'it is forbidden to fish, catch, or exploit in any other way living marine resources within the economic zone for a person which does not have a permit within the meaning of section 5 of the Participation Act. The provisions in Chapter 4a of the Marine Resources Act are accordingly applicable to the economic zone.'

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[17] LOV-1976-12-17-91
[18] Ot.prp.nr.4 (1976-1977), pages 4-5
[19] ibid, page 2
[20] ibid, page 4
[21] FOR-1976-12-17-15

More information about the Participation Act[22] and the Marine Resources Act[23] can be found below in Chapter 3, but the main aspect is that foreigners are generally barred from fishing in Norwegian waters.

2.2.5.2 Fisheries Protection Zone (FPZ) around Svalbard

Section 5 of the Economic Zone Act states that 'prior to the implementation of the Norwegian Economic Zone, the King may, for areas referred to in section 1, lay down interim provisions for the protection of fish stocks, for the limitation of foreign fishing and for the rational and proper conduct of fishing activities'.

By Royal Decree of 3 June 1977, the Svalbard FPZ was thus established.[24] Section 1 of the Regulation on the FPZ around Svalbard establishes that this area also extends 200 nautical miles away from Svalbard's shores and aims to conserve marine living resources, and regulate fishing and catching. Crucially, section 2 of this Regulation states that the provisions of section 3 of the Economic Zone Act (ie. prohibition against exploiting marine resources by foreigners) 'shall not apply for the time being to the FPZ around Svalbard'.

2.2.5.3 Loophole

Norway's economic zone stretching from the mainland and Svalbard's FPZ, together with Russia's economic zones stretching from the mainland and the islands of Novaya Zemlya and Franz Josef land, create a patch of water in the Barents Sea called the Loophole (*Smutthullet* in Norwegian). A map is provided further below at 2.2.7.

2.2.6 Continental shelf

2.2.6.1 Introduction

Article 76(3) provides that 'the continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof'.

[22] LOV-1999-03-26-15
[23] LOV-2008-06-06-37
[24] FOR-1977-06-03-6

Article 76(1) states that 'the continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.'

2.2.6.2 Rights of the coastal State over the continental shelf

Article 77 paragraph 1 states that 'the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources'. Paragraph 2 goes on to explain that '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'.

2.2.6.3 Recommendation on the limits of the continental shelf from the Commission on the Limits of the Continental Shelf (CLCS)

If the edge of the continental margin extends beyond 200 nautical miles, then the coastal State has a right to establish its outer edge and therefore, the outer edge of the continental shelf, in accordance with Article 76 paragraphs 4-8. Norway made such a submission in November 2006 and the CLCS adopted its recommendation in March 2009.

Following a similar submission by Russia in 2001, the Commission held that 'the entire area of seabed and subsoil within the Loophole located beyond 200 M limits of Norway and the Russian Federation is part of the continental shelf of these coastal States'.[25] Finally, 'the Commission recommends that Norway proceed with the delimitation of the continental shelf beyond 200 M in the Loophole by agreement with the Russian Federation with the assurance that both coastal States share entitlement to the seabed and subsoil located beyond 200 M in this part of the Barents Sea as the natural prolongations of their land territories'.[26]

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[25] Summary of the Recommendations of the Commision on the Limits of the Continental Shelf in regard to the Submission made by Norway in respect of areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea on 27 November 2006, para 21, available at https://www.un.org/depts/los/clcs_new/submissions_files/nor06/nor_rec_summ.pdf accessed 24 April 2023

[26] ibid, para 23

2.2.6.4 Treaty between Norway and Russia concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean

Following an agreement between Russia and Norway on the maritime delimitation in the Varangerfjord area (July 2007) and the CLCS recommendation, the two parties wanted to provide further certainty in relation to maritime affairs in the Barents Sea. The Delimitation Treaty was signed in September 2010 and entered into force in July 2011, marking the end of 40 years of negotiations.[27]

Article 1 lists 8 pairs of coordinates in the Barents Sea and the Arctic Ocean and establishes that the maritime delimitation line between the Parties in this area shall be defined as geodetic lines connecting these 8 points. Article 2 then states that 'each Party shall abide by the maritime delimitation line as defined in Article 1 and shall not claim or exercise any sovereign rights or coastal State jurisdiction in maritime areas beyond this line'.

2.2.6.5 Continental Shelf Act 2021[28]

A recent Parliament Act was passed in 2021 in order to account for all these legal developments concerning the continental shelf. Moreover, there was also a need to offer a legal basis for further Regulations concerning this particular area, similar to the Economic Zone Act and the Territorial Waters Act.[29] Section 1 of the Continental Shelf Act uses the UNCLOS definition to establish what the Norwegian continental shelf is, section 2 deals with CLCS recommendations, and section 3 provides a basis for bilateral delineating agreements.

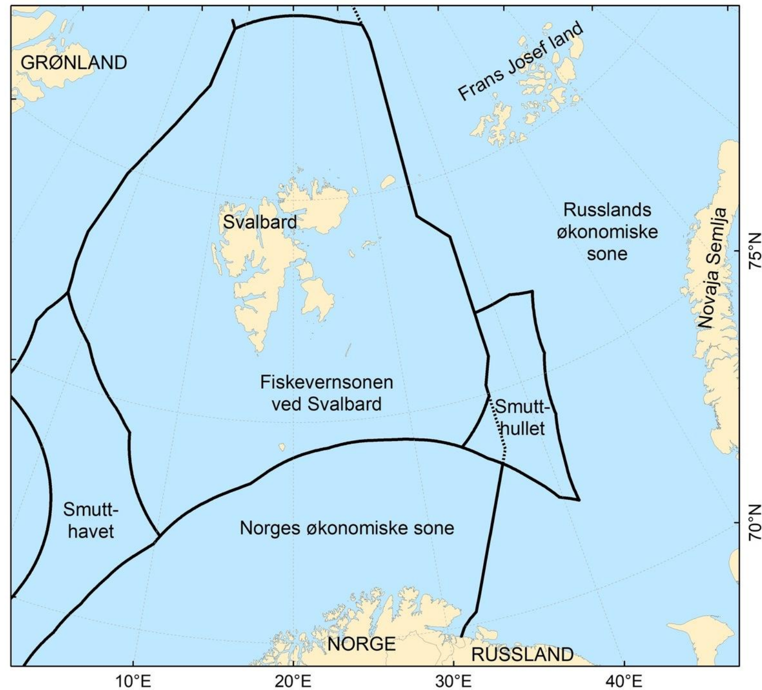
2.2.7 Map

The map below illustrates Norway's mainland economic zone, Svalbard's FPZ, the Loophole, and Russia's economic zones (mainland and the two archipelagos). The dotted line in the Loophole represents the border established by the 2010 Delimitation Agreement with Russia.

[27] Overenskomst mellom Norge og Russland om maritim avgrensning og samarbeid i Barentshavet og Polhavet, available at https://www.regjeringen.no/no/tema/utenrikssaker/folkerett/innsikt_delelinje/delelinjeavtalen-med-russland/id2008645/ accessed 25 April 2023

[28] LOV-2021-06-18-89

[29] Prop.185L (2020-2021)



Source: Institute of Marine Research[30]

2.3 Vienna Convention on the Law of Treaties

Article 31 of the Vienna Convention on the Law of Treaties provides the general interpretation rule in relation to treaty provisions. Paragraph 1 states that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

Paragraph 2 explains that the context which treaty provisions shall be read into consists of the text of the treaty (including its preamble and annexes), but also any agreement or instrument regarding the treaty made by the parties in relation to the conclusion of the treaty. Paragraph 3 emphasises that weight should also be placed on any subsequent agreement or practice relating to the interpretation and application of the treaty, together with any relevant applicable rules of international law. Lastly, paragraph 4 states that, provided clear evidence of the parties' intention, a special meaning can be given to a particular term.

Article 32 establishes that 'recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the

[30] https://snl.no/Barentshavet accessed 13 June 2023

meaning when the interpretation according to article 31: (*a*) leaves the meaning ambiguous or obscure; or (*b*) leads to a result which is manifestly absurd or unreasonable'.

Even though Norway has not yet acceded to the Vienna Convention, this body of rules has long been considered to be part of customary international law, both on a domestic,[31] but also on a global level.[32] It is important to note that the International Court of Justice (ICJ) has held that the treaty interpretation principles found in the Vienna Convention are to be applied also to treaties older than the Convention itself (such as the ST).[33] Article 30(3) of the Convention states that 'when all the parties to the earlier treaty are parties also to the later treaty [...], the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty'.

3 Snow crab and the law

3.1 Participation Act 1999[34]

For the sake of clarity, it is useful to mention that the full name of this piece of legislation is the Act on the right to participate in fishing and hunting. Its purpose, as set out in section 1 is to ensure a sustainable exploitation of marine resources, boost the profitability of this industry, and ensure stable jobs in the coastal regions from which the local population can benefit.

Section 4 states that 'a vessel cannot be employed in commercial fishing or catching without a commercial licence from the authorities'. Section 5 provides that a 'commercial licence can only be granted to a Norwegian citizen or to a person who can be considered equal to a Norwegian citizen'. Such a person is described as a foreign citizen who is a Norwegian resident or a shipping company which can be considered Norwegian, as per certain requirements in section 5(2) of the Participation Act (based on section 1 of the Norwegian Maritime Code).[35]

There are also additional requirements. Firstly, at least half of the crew on the vessel in question has to reside in a coastal municipality.[36] Secondly, the vessel needs to have been

[31] HR-2012-667-A, para 33
[32] *Costa Rica v Nicaragua*, ICJ-2009-133j, para 47
[33] ibid
[34] LOV-1999-03-26-15
[35] LOV-1994-06-24-39
[36] LOV-1999-03-26-15, section 5a

previously engaged in commercial fishing or catching.[37] Thirdly, the vessel needs to meet a certain standard in terms of suitability and equipment for fishing and catching.[38]

3.2 Marine Resources Act 2008 (MRA)[39]

This Act applies to all catching and other exploitation of wild marine resources and associated genetic material (with the exception of salmon),[40] and its purpose is to ensure sustainable and economically wise management of these resources and to contribute to ensuring employment and housing in the coastal communities.[41] The Act is applicable to Norwegian ships in Norwegian territorial waters and internal waters, the Norwegian continental shelf and in areas established on the basis of the Economic Zone Act.[42]

Chapter 4a of the MRA was added in 2017 and regulates the access foreigners have to fishing in the territorial waters.[43] Section 23b prohibits fishing, catching and any other form for exploitation of living marine resources for a person or company who is not Norwegian, as per section 5 of the Participation Act. Crucially, section 23a states that the provisions in Chapter 4a apply in Norwegian territorial waters, but not in the territorial waters around Svalbard.

3.3 Regulation against snow crab catching 2014 (SC Regulation)[44]

3.3.1 General

Section 16(2)(c) of the MRA provides that ‘the Ministry can issue regulations regarding catching, in relation to, amongst others, a ban against catching in specific areas, of specific species or with specific tools’. Such a regulation, as provided by the MRA, entered into force on 1 January 2015.[45] Section 1 of the SC Regulation states that ‘it is forbidden for Norwegian and foreign vessels to catch snow crabs in the Norwegian territorial sea and internal waters, and on the Norwegian continental shelf’.

Snow crab is ‘a relatively new species in the Barents Sea where it was first registered by Russian scientists in 1996. Eight years later, it was caught for the first time in the Norwegian

[37] ibid, section 6
[38] ibid, section 8
[39] LOV-2008-06-06-37
[40] ibid, section 3
[41] ibid, section 1
[42] ibid, section 4
[43] LOV-2017-06-16-73
[44] FOR-2014-12-19-1836
[45] SC Regulation, section 9

part of the Barents Sea, while commercial catching was initiated around 2013'.[46] Regulation is thus necessary 'due to the need for a proper system, until more knowledge on the snow crab's effect on the ecosystem has been obtained and a comprehensive management plan can be produced'.[47]

Section 8 states that intentional or negligent breach of the provisions laid out in the Regulation will be punished in accordance with section 61 of the MRA, namely 'with fines or imprisonment for up to one year if the situation does not fall under stricter criminal provisions.'

3.3.2 Exemption/licence

The legal history of how a vessel could still legally catch snow crab on the Norwegian continental shelf is interesting to explore. The original text of the SC Regulation provided in section 2 the possibility of applying for and obtaining an exemption from the ban against snow crab catching from the Directorate of Fisheries. Certain requirements, such as reporting obligations regarding catching and locations, and area and seasonal limitations, needed to be met.

In 2015, section 2 was amended to provide that an exemption could only be awarded provided the requirements of the Participation Act were met,[48] namely the applicant needs to be a Norwegian citizen or company. Later in 2015, section 2 was again amended,[49] clarifying that the exemption could only be 'for the area outside territorial waters'. Furthermore, it was also added that 'for catching on another state's continental shelf, the exemption is valid only insofar as the state in question has expressly consented to such catching'. In 2017 (after the first snow crab case began), the 2015 amendment about snow crab catching on another state's continental shelf was removed.[50]

Finally, in 2019 (after the second snow crab case was concluded), section 2 of the Regulation was repealed and a new system was put in place.[51] A vessel has now a possibility of obtaining a licence for snow crab catching under the newly established Chapter 6 of the Licensing

[46] HR-2019-282-S para 33
[47] ibid, para 36
[48] FOR-2015-02-19-137
[49] FOR-2015-12-22-1833
[50] FOR-2017-01-04-7
[51] FOR-2019-03-22-276

Regulation.[52] A snow crab catching licence can now only be granted to vessels which already have a commercial licence under the Participation Act for other species, such as seals, whales, shrimps, or other types of crabs.[53] The requirement of another state's express consent to snow crab catching on their continental shelf was also reintroduced.[54]

3.4 Public law limitations

It is nonetheless important to point out that Norwegian legislation is generally subject to certain limitations. As a general rule, section 2 of the Penal Code[55] states that 'the criminal legislation applies subject to the limitations that follow from agreements with foreign states or otherwise by public law'. Relevant for this particular discussion, this principle is also repeated in section 6 of the MRA.

3.5 Sedentary species?

Perhaps not intuitive at a first glance, but the way in which snow crabs move proved to be crucial in this series of cases. This is because the exclusive right given by Article 77 of UNCLOS to exploit the natural resources on the continental shelf is limited to only some types of marine resources. Paragraph 4 states that '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'.

3.6 North East Atlantic Fisheries

3.6.1 NEAFC Convention

The Convention on Multilateral Cooperation in North East Atlantic Fisheries (NEAFC Convention) was first adopted in 1980 and entered into force in 1982. The Convention Area is one of the most abundant fishing areas in the world, and 'stretches from the southern tip of Greenland, east to the Barents Sea, and south to Portugal'.[56] Inside this area, fishing vessels must abide by both the current management measures and the NEAFC Scheme of Control and Enforcement. Vessels which fail to do so can be considered to be participating in illegal,

[52] FOR-2006-10-13-1157
[53] ibid, section 6-2
[54] ibid, section 6-3
[55] LOV-2005-05-20-28
[56] https://www.neafc.org/ accessed 20 April 2023

unregulated or unreported fishing'.[57] The NEAFC Convention was amended in 2006 with effect from 2013. Relevant for the present discussion, sedentary species were included in the list of protected 'fishery resources' under Article 1(b).

The NEAFC Convention does not in and of itself contain rules on fishing activities. By virtue of Article 3 however, a Commission is established whose role is to fulfil the objective of the Convention by making recommendations concerning fisheries. Article 6 refers to recommendations linked to fishing inside the jurisdiction of a Contracting Party when such a recommendation was requested by the Party itself. Article 12 provides that such recommendations will become binding on the Contracting Parties and establishes a timeframe and mechanism for objections.

3.6.2 NEAFC Scheme

The NEAFC Scheme of Control and Enforcement was adopted by the Commission in 2007. The Supreme Court held that this body of rules has its legal basis in Article 8 of the NEAFC Convention, which 'authorises the Commission to give recommendations «concerning measures of control relating to fisheries», which become binding under the procedure set out in Article 12. This implies that although the NEAFC Scheme is not a convention in itself, Norway becomes bound under international law by its rules to the extent they are implemented within the scope and procedures established by the NEAFC Convention'.[58]

As a short summary, the Court explains that 'the NEAFC Scheme contains a number of rules on the information cooperation between the Contracting Parties, various measures of control the Contracting Parties must implement, as well as requirements for their surveillance and inspection of the fishing activities that are being carried out and the catch delivered. Rules are also provided on which measures the Contracting Parties must implement if they suspect illegal fishing activities'.[59]

Article 4(1) provides rules regarding authorisation of fishing vessels. 'Each Contracting Party shall authorise the use of fishing vessels flying its flag for fishing activities only where it is able to exercise effectively its responsibilities in respect of such vessels; ensure that only authorised fishing vessels flying its flag conduct fishing activities; ensure that fishing vessels flying its flag comply with applicable recommendations adopted under the Convention;

[57] ibid
[58] HR-2017-2257-A, para 28
[59] ibid, para 30

undertake to manage the number of authorised fishing vessels and their fishing effort commensurate to the fishing opportunities available to that Contracting Party'.

4 Prologue

4.1 HR-1996-45-B

Norway and Russia agreed every year on fishing quotas for the Norwegian Sea and Barents Sea, with the possibility for third countries to fish 4% of this total amount in the Svalbard FPZ. A Norwegian Regulation[60] provided that this access is to be reserved to states which have traditionally fished in the area, namely EU countries, Poland, and the Faroe Islands. Two Icelandic shipping companies were thus fined in September 1994 for illegal fishing in the Svalbard FPZ, since Iceland was not included in the above mentioned list. They argued amongst others that the Regulation amounted to discrimination on grounds of nationality, which would contravene the equality principles in Articles 2 and 3 of the ST.

The shipping companies contended that the Treaty was applicable in the entire 200 nautical miles FPZ, whilst the public prosecution authority argued that the application area is only the 12 nautical miles territorial sea (see Chapter 2). Nevertheless, the Supreme Court considered that Norway's obligations under the Treaty are not violated by the Regulation concerning cod fishing, regardless of the geographical application of the ST.[61] This issue would remain unaddressed by the Court for almost another 30 years, until the 2023 snow crab case (see Chapter 7).

The Supreme Court recognised that the equality principle in Articles 2 and 3 of the ST represents indeed a prohibition against discrimination on the grounds of nationality. Nevertheless, it was held that these provisions 'do not amount to a prohibition against rationing - including discrimination - motivated by other objective criteria for selection'.[62]

The Court argued that the intended purpose, and the actual effect, of the Regulation which granted access to cod fishing only to countries which have traditionally fished in the Svalbard FPZ, was to protect established business. It was held that since the target was not to

[60] FOR-1994-08-12-801
[61] HR-1996-45-B, page 635
[62] ibid, page 636

discriminate against companies based on their affiliation, or lack thereof, with certain countries, the Regulation cannot be in conflict with the equality principle in the ST.[63]

The Court explained that the shipping companies' view, namely that Norway can set a total quota, but cannot exclude any country that has acceded to the ST, cannot be valid. Since the Treaty is open for accession by all of the world's states, 'all countries that wanted to open fishing at Svalbard for their vessels would be able to achieve this by acceding to the treaty and demanding a quota for their fishermen. Such an arrangement would not be practicable, and it could lead to the individual third country's quota having to be so small that fishing for third countries was practically excluded'.[64]

4.2 HR-2006-1997-A

The case concerned 'appeals by two Spanish fishing vessel captains who were fined for failing to keep catch logbooks for cod and, for one of them, also for incorrect reporting of cod caught in the Svalbard FPZ'.[65] Three important aspects relating to this zone were in discussion in the case, namely the legal basis, relationship to UNCLOS, and relationship to the ST.

Firstly, the judgement addresses the unclear legal basis of the Regulation on the FPZ around Svalbard. It was held that the Economic Zone Act is 'an enabling act that in its section 1 authorises the establishment of an economic zone, while in section 5 it grants authority to lay down interim provisions'[66] for the protection of fisheries related issues.

The judgement explains that 'the Act uses the term "interim provisions", and statements in the preparatory works to the Act also indicate that it is interim arrangements that are referred to. But this was also the thinking behind the establishment of the zone'.[67] In the speech introducing the Royal Decree, 'it is stated that, "at least initially", the intention is to establish a FPZ',[68] as reflected by section 2 of the Svalbard FPZ Regulation which suspends the application of section 3 of the Economic Zone Act. It was further added that 'the fact that this arrangement has for political reasons been maintained for as long as it has cannot result in a

[63] ibid
[64] ibid, page 637
[65] HR-2006-1997-A, para 1
[66] ibid, para 43
[67] ibid, para 50
[68] ibid

weakening of the legal authority for it. It must necessarily be the responsibility of the political authorities to balance conflicting considerations against each other'.[69]

Secondly, the defendants also argued that the establishment of a FPZ instead of an exclusive economic zone contravenes Articles 55 and 56 of UNCLOS.[70] Quoting the Parliament Bill relating to the ratification of UNCLOS in Norway,[71] the judgement explains that 'it is now beyond doubt that the concept of the economic zone, independently of the Convention on the Law of the Sea, is warranted by general international law based on the customary international law that evolved, particularly during and after the third United Nations Conference on the Law of the Sea'.[72] Since the Economic Zone Act and the Regulation on the FPZ around Svalbard were introduced before the adoption of UNCLOS, it is clear 'from a Norwegian perspective, the Convention on the Law of the Sea has not been deemed to be a necessary legal basis for the establishment of the FPZ'.[73]

Taking into consideration that section 2 of the Regulation on the FPZ around Svalbard is an exemption from the ban for foreigners in section 3 of the Economic Zone Act, the Supreme Court held that this area is thus 'designated a non-discriminatory zone'.[74] It was recognised that such an arrangement is 'a different type of regulation of fisheries than the point of departure under'[75] UNCLOS, and that there is only another example of such non-discriminatory fisheries zone, namely around the Falklands Islands. Nevertheless, it was held that 'the establishment of the Svalbard FPZ must also be considered to be warranted by international customary law'[76] and that type of zone does not contravene UNCLOS. Considering that the Svalbard FPZ and UNCLOS have the same protective objective,[77] 'the decisive factor must be how the regulation is implemented, and not whether it is the coastal state or other nations that carry out the actual fishing. By establishing a non-discriminatory FPZ around Svalbard, Norway has endeavoured to avoid forcing the issue of the applicability of the ST in the zone. That the Convention of the Law of the Sea should constitute an obstacle to such an arrangement seems to me to be a rather unreasonable notion'.[78]

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[69] ibid, para 51
[70] ibid, para 53
[71] Ot.prp.nr.37 (1995-1996)
[72] HR-2006-1997-A, para 57
[73] ibid, para 54
[74] ibid, para 38
[75] ibid, para 60
[76] ibid, para 61
[77] ibid, para 63
[78] ibid, para 64

Finally, it was recognised that the application of the ST in the FPZ is a disputed issue. 'Norway's view is that the ST – with its requirements for equal treatment – does not apply outside the land territories and territorial waters'.[79] However, this view is contested by many other states. In this particular case, it was nevertheless held that 'it was not necessary for the Supreme Court to take a stance on this issue because the Court concluded that Norway's obligations under the Treaty were not under any circumstances set aside through the regulation of the cod fishery that had been implemented'.[80]

5 HR-2017-2257-A

5.1 Facts and lower instances[81]

Juros Vilkas was a vessel owned and operated by Arctic Fishing, a Lithuanian shipping company. Between 25 May and 16 July 2016, 80.340kg of snow crabs had been caught on the ship. This was done on the Norwegian continental shelf, on the Norwegian side of the Loophole in the Barents Sea, without a permit from Norwegian relevant authorities. The value of the catch was estimated to NOK 2 530 710. In July 2016, the Finnmark Police Commissioner issued fines for both the captain of the ship and Arctic Fishing, amounting in total to NOK 2 515 000. The legal basis was section 61 of the MRA, building on breach of section 16 of the MRA and section 1 of the SC Regulation (see Chapter 3).

Neither Arctic Fishing, nor the captain accepted the fines, and the dispute was then forwarded to Øst-Finnmark District Court. No question of fact was disputed in the case. Moreover, it was never disputed that the catching that took place on Juros Vilkas was contrary to the prohibition in section 1 of the Regulation and that the ship had not been granted an exemption under section 2. Finally, the parties were also in agreement that the snow crab is a sedentary species,[82] as per paragraph 4 of Article 77 of UNCLOS (see 3.5).

Both the captain and Arctic Fishing were acquitted by the District Court in January 2017.[83] The judgement focused on the fact that Juros Vilkas had a permit to catch snow crabs issued by Lithuanian authorities. Lithuania is a part of the European Union, which is a contracting party to the NEAFC Convention. The NEAFC Scheme Article 4 would thus limit the

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[79] ibid, para 67
[80] ibid
[81] HR-2017-2257-A, para 2-7
[82] ibid, para 17
[83] TOSFI-2016-127201

application of the catching prohibition in the SC Regulation, as a matter of public law, as per section 2 of the Penal Code (see 3.4).

The Commissioner appealed the judgement to Hålogaland Court of Appeal. In a judgement from June 2017,[84] the Court of Appeal set aside the judgement of the District Court, considering it an incorrect application of the law. The Court argued that the NEAFC Convention does not take precedence over the rights granted to states under UNCLOS. The Regulation was therefore considered in line with Norway's exclusive right under Article 77 to exploit natural resources on its continental shelf.

5.2 Supreme Court

The case was then appealed to the Supreme Court, with Arctic Fishing in favour of the outcome from the District Court and the prosecution authority wishing for the Court of Appeal judgement to remain in place. By this stage, the parties were in agreement that, under Article 77 of UNCLOS, Norway has indeed exclusive rights to exploit natural resources on its continental shelf, including sedentary species such as the snow crab.[85]

Furthermore, the Court notes that 'the NEAFC Convention must be read so as to imply that the rights of the parties under the UNCLOS to natural resources on their respective continental shelves are maintained, unless otherwise clearly stated in the NEAFC Convention or in rules provided in accordance therewith'.[86] The focal point of the case thus became whether Norway had given its express consent for exploitation by other States (as required by Article 77(2) - see 2.2.6) by being a party to the NEAFC Convention and Scheme.[87] Both bodies of rules were held to be applicable to fishing activities related to sedentary species in the Loophole.[88]

With regards to the NEAFC Convention, the Court notes that a recommendation from the NEAFC Commission under either Article 5 or 6, that then becomes binding under Article 12 (see 3.7.1) would amount to such express consent.[89] Nevertheless, the judgement goes on to point out that no such recommendation was either made by the Commission or requested by Norway.

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[84] LH-2017-45056
[85] HR-2017-2257-A, para 21
[86] ibid, para 23
[87] ibid, para 22
[88] ibid, paras 24 and 29
[89] ibid, para 26

In relation to the NEAFC Scheme, the Court held that the Article 4 (see 3.7.2) ‘gives no exhaustive regulation of the Contracting Parties' right to issue catch permits in the Regulation Area. The restrictions to which the parties might otherwise be bound, such as the UNCLOS, are not affected’.[90] Furthermore, the Court did not find any state practice that would change this understanding of the NEAFC Scheme, with statements from Norway, Russia and the EU actually reaffirming sovereignty over the continental shelf.[91]

Lastly, the judgement explains that although snow crab catching by foreign vessels had been taking place before 2015, when the Regulation entered into force, ‘this does clearly not oblige Norway or other Contracting Parties to continue to accept such catching without the coastal State's consent’.[92] This is in line with the fact that Norway’s rights to exploit marine resources on the continental shelf derived from UNCLOS long before the SC Regulation.

As a final conclusion, the Supreme Court thus held that Norway was not bound by any obligation under public law to accept otherwise illegal snow crab catching, and the Regulation was held applicable in its entirety. The District Court judgement was indeed reaffirmed as an incorrect application of the law, and the appeal to the Supreme Court was therefore dismissed.[93]

6 HR-2019-282-S

6.1 Facts and lower instances[94]

Even before the first snow crab case reached the Supreme Court, another case with an almost identical set of facts had begun. SIA North Star Ltd. (SIA) was a Latvian shipping company, which had three vessels equipped for snow crab catching. On 15 January 2017, snow crab pots started being deployed in the Svalbard FPZ, from Senator, one of the three vessels owned by the company. A day later, the Svalbard Coast Guard boarded the ship for inspection. A total of 13 chains and 2594 pots had been put in place by that point. The captain presented a Latvian permit to catch snow crabs, but the vessel did not have a Norwegian permit.

[90] ibid, para 33
[91] ibid, para 34
[92] ibid
[93] ibid, paras 35-36
[94] HR-2019-282-S, paras 3-14

The Coastguard was of the opinion that snow crab catching can only take place by virtue of a Norwegian permit and ordered the catching stopped and the vessel brought to shore in Kirkenes. On 20 January 2017, the Finnmark Police Commissioner issued fines against SIA and the captain of Senator amounting to a total of NOK 1 200 000, as per section 61 of the MRA, for breach of section 16 of the MRA and section 1 of the SC Regulation.

Neither SIA, nor the captain accepted the fines and the case was similarly sent to Øst-Finnmark District Court. In a judgement from June 2017,[95] both parties were found guilty of breaching the relevant provisions concerning illegal catching of snow crabs and ordered to pay the fines. The District Court found that snow crab is a sedentary species under Article 77(4) of UNCLOS and that Norway thus has an exclusive right to exploit it, under paragraphs 1 and 2 of the same provision. The Court went on to argue that, in principle, the Regulation contravenes the equality principle in the ST. Nevertheless, it was held that the Treaty only applies to the territorial waters within 12 nautical miles of Svalbard's shores. Since Senator was outside of that area at the time of the Coast Guard inspection, the prohibition found in the Regulation was given full force.

The case was appealed to Hålogaland Court of Appeal, which upheld in February 2018 the judgement from the District Court.[96] Snow crab was considered this time as well a sedentary species under Article 77 of UNCLOS. Nevertheless, the Court of Appeal did not analyse whether the equality principle in the ST had been violated. This was because the Court concluded that catching snow crab 'without a permit on the Norwegian continental shelf is punishable under general criminal law principles even in the absence of a valid legal basis for rejecting a permit application'.[97] The defendants also argued that they had acted in excusable ignorance of the law, but the Court of Appeal held that they 'had wilfully acted without a Norwegian permit, and that they knew that this was an offence under Norwegian law'.[98]

6.2 Supreme Court

6.2.1 Introduction and the parties' arguments

The case was further appealed to the Supreme Court with regards to the application of the law. As was established by the findings of the lower instances, there was no doubt that the

[95] TOSFI-2017-57396
[96] LH-2017-144441
[97] HR-2019-282-S, para 14
[98] ibid, para 16

prohibition found in section 1 of the SC Regulation had been violated, no exemption under section 2 had been granted and that the necessary requirements for determining guilt had been met. 'The question is whether there is still a basis for exempting the defendants from punishment'.[99]

SIA and the captain of Senator submitted they should be acquitted on the basis of three arguments.[100] Firstly, they argued that snow crab is not a sedentary species, as Article 77(4) must be read in light of the provisions found in the Vienna Convention on the Law of Treaties, the preparatory works of UNCLOS, and state practice. Further, they contended that the SC Regulation only applies on the Norwegian continental shelf and not in the FPZ. Since they alleged the snow crab is not a sedentary species, then the SC Regulation would not apply to Senator.

Finally, it was submitted that the SC Regulation would contravene the equality principle in the ST, since exemptions can only be granted to Norwegian vessels. 'The defendants have not applied for an exemption, but argue that an application would have been rejected the way the Regulation is worded and practiced, and that such a rejection would have been in contravention of international law'.[101] Section 6 of the MRA and section 2 of the Penal Code should thus give precedence to international law, regardless of whether a Norwegian person would not be able to invoke it and would therefore be punished under domestic law.

On their side, the public prosecution authority contended that the appeal should be dismissed.[102] They argued that the Vienna Convention actually supports the view that the snow crab is a sedentary species under Article 77. It was submitted that the SC Regulation applies to the FPZ around Svalbard, where Norway has exclusive rights over marine resources both in the water column and on the continental shelf. Finally, it was argued that long-standing case law dictates that the Court in a criminal case cannot decide on a preliminary basis whether an exemption (such as the one in section 2 of the SC Regulation) should have been granted. Since this legal practice also applies to international law, it was submitted that the defendants can thus be punished in this case, regardless of whether the Regulation would violate the equality principle under the ST.

[99] ibid, para 61
[100] ibid, paras 21-25
[101] ibid, para 62
[102] ibid, paras 26-30

6.2.2 The Supreme Court’s findings

6.2.2.1 Sedentary species

With regards to whether the snow crab is a sedentary species for the purpose of Article 77(4) of UNCLOS, the Court recognised the defendants’ argument that ‘the central term in UNCLOS Article 77(4) is “sedentary species”, which, in semantic terms, means that the organism stays in one place - it is immobile. It is pointed out that «sedentary» is included in the text for a reason, and must be given weight. Material from Russian and Canadian scientists shows that the snow crab each year is able to move across large areas’.[103]

Nevertheless, the Court argued that the word ‘sedentary’ cannot be read in isolation. The judgement explains that ‘UNCLOS Article 77(4) gives a further explanation – «that is to say» – of what the term sedentary includes. According to the wording, it includes species that are either immobile or unable to move without being in constant physical contact with the seabed or the subsoil. This is what sedentary species means under the Convention. The biological definition of sedentary or the general semantic meaning of the term is therefore of less interest’.[104]

Building upon an expert witness statement in the Court of Appeal hearing,[105] it was held that ‘it is not disputed that the crab mainly wanders on the seabed. The crab's ability to climb on rocks and pots – and on other crabs – and the fact that it during short periods may drift with the water flows if it should slide off rocks etc., does not change the fact that the crab, by nature, is dependent on being in constant physical contact with the seabed in order to move’.[106]

Referring back to the wording of Article 77, it was pointed out that ‘nothing in the wording suggests that the mobile species must be stationary. It is therefore irrelevant if individuals of a species, at the time of harvesting, are able to move across large areas, as long as they are then in constant physical contact with the seabed. This must apply even if they move from the jurisdiction of one coastal state to that of another’.[107]

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[103] ibid, para 51
[104] ibid, para 52
[105] ibid, para 50
[106] ibid, para 53
[107] ibid, para 54

Finally, the judgement explains that the defendant's interpretation of Article 77 is not consistent with the wording of the provision. Paragraph 4 'sets out expressly that both immobile species and species that move in constant contact with the seabed are sedentary. It is difficult to see which species would be comprised other than the entirely immobile ones, if such a narrow interpretation as the appellants promote should be taken into account. The option "constant physical contact with the seabed" would then be superfluous'.[108]

The justice thus concluded that 'considering the snow crab's natural pattern of movement in conjunction with the wording in UNCLOS Article 77(4), I find it clear that the snow crab is a sedentary species comprised by the coast states' exclusive right to exploit the natural resources on the continental shelf'.[109]

6.2.2.2 ST and the SC Regulation

In relation to the second question regarding the defendant's guilt regardless of the application of the ST or the SC Regulation, the Court took a broader approach in examining the situations which fall under section 2 of the Penal Code or section 6 of the MRA. It was held that 'the basis for exemption under criminal law must, if any, be either that there exists a general reason for exemption or that specific act is not illegal because the regulation in question contravenes international law'.[110]

The judgement explains that Norwegian legal practice[111] supports the view that 'a person who has an obligation to apply for a permit cannot, unpunished, act as if a licence or a permit were granted, regardless of whether the refusal contains errors'.[112] It was also added that 'the same principles must apply if a permit has not been sought. A hypothetical refusal cannot lead to a better legal position than an actual refusal'.[113]

The Court analysed nullity,[114] abuse of power,[115] and self-enforcement,[116] and ruled them out as ways of escaping criminal liability in this particular case. As a preliminary conclusion, the Court held therefore that 'it can be derived from this review of Norwegian internal law, that if

[108] ibid, para 55
[109] ibid, para 58
[110] ibid, para 63
[111] Rt-1953-1382; Rt-1954-354; Rt-1954-923; Rt-1961-494
[112] HR-2019-282-S, para 71
[113] ibid
[114] ibid, para 72
[115] ibid, para 73
[116] ibid, para 74

the defendants had been Norwegian, they would have been punished for having caught snow crab without a valid exemption from the prohibition. They could not have invoked any general grounds for exemption or other basis for impunity'.[117]

The justice expressed thus that 'the question is whether the result must be a different one, because the case relates to foreign nationals claiming that the principle of equal rights in the ST has been violated. In my view, it must be determined whether the principle of equal rights precludes the application of the Norwegian rules such that they must be considered to contravene international law'.[118]

The Supreme Court answered in the negative. The judgement firstly explains that the ST 'establishes that Norway is to manage the natural resources and assumes that the High Contracting Parties comply with the rules that are implemented to fulfil this task'.[119] Citing HR-2006-1997-A, the Court held that 'it is therefore clear that the Treaty gives Norway a right to enforce a regulatory system under which unauthorised catching is punishable, as long as such a system is practised in a non-discriminatory manner'.[120] 'A management system has been established by the SC Regulations under which a permit is required for anyone who wishes to catch snow crab. Unauthorised catching is punishable, regardless of nationality [...] To obtain an exemption, certain requirements must be met, and the wording of the provision suggests that the granting of such an exemption is left to the authorities' discretion'.[121]

It was held that 'it cannot be derived from the ST or other sources of international law that the courts in a criminal case like the one at hand must decide on a preliminary basis whether an exemption should have been granted, as long as there is an alternative legal possibility to obtain an efficient review of the disagreement on the obligations under international law. If there are several acceptable procedures, it must be up to the individual country to decide which procedure to employ. Under Norwegian law, an issue of conflict between Norwegian public administration and international obligations should be solved through a civil action. This is not an unreasonable system. If the party succeeds with a civil claim, the party may – if the general conditions are otherwise met – demand compensation for economic loss and coverage of costs. A civil judgement declaring a regulation invalid will also give Norwegian

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[117] ibid, para 75
[118] ibid, para 76
[119] ibid, para 66
[120] ibid
[121] ibid, para 67

authorities the possibility to amend the rules in accordance with international law while at the same time taking into account other concerns, such as protection of natural resources'.[122]

As a conclusion, the Court argued that 'neither section 6 of the MRA, section 2 of the Penal Code, nor the ST can be interpreted to mean that Norway – in a case like this – is precluded from punishing foreign nationals who, for commercial purposes, act without a permit where a permit is required for everyone. Nor does it appear from international law that a decision on a preliminary basis must be given on the question of exemption in a criminal case'.[123] It was emphasised that 'in a case like the one at hand, where both the shipowner and the captain would have been punished also if they had been Norwegian, there is no discriminatory treatment based on nationality'.[124]

7 HR-2023-491-P

7.1 Facts and lower instances[125]

On 28 February 2019 (two weeks after losing the legal battle), SIA, the same Latvian shipping company, followed the 'recommendation' from the Supreme Court. They applied for an exemption from the snow crab catching ban on the Norwegian continental shelf under section 2 of the Regulation, for their three vessels equipped for such practice. Whilst the application was being processed, the exemption system was replaced by the possibility of obtaining a licence under the Licencing Regulation (see 3.3), so the application was treated as an application for a licence, but this did not affect the result.[126]

The Directorate of Fisheries rejected the application on 13 May 2019. SIA appealed this decision to the Ministry of Trade, Industry and Fisheries, which also dismissed the appeal in a decision dated 14 November 2019. It was held that the requirements in the Licensing Regulation were not met. The view of the authorities was that the 'underlying reality is that only Norwegian vessels and Norwegian citizens and companies can be awarded a licence to catch snow crab on the Norwegian continental shelf',[127] as the equality principle in the ST applies only to the 12 nautical miles territorial waters.[128]

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[122] ibid, para 80
[123] ibid, para 82
[124] ibid
[125] HR-2023-491-P, paras 28-36
[126] ibid, para 29
[127] HR-2023-491-P, para 30
[128] LB-2021-140840, page 2

As the Supreme Court previously argued in the criminal case, SIA pursued then the route of a civil case in order to assess the validity of the Regulation. In October 2020, they sued the Ministry of Trade, Industry and Fisheries, arguing that the two decisions and the Regulation contravene Articles 2 and 3 of the ST. Oslo District Court found in July 2021 that the Ministry was not liable.[129] The decision was appealed to the Borgarting Court of Appeal, which dismissed the appeal in June 2022.[130] Both instances found that neither the decisions from the Directorate and the Ministry, nor the Regulation are invalid. The Courts held that the ST is not applicable on the continental shelf, and thus, its equality principle is not applicable for snow crab catching in this area.[131]

7.2 Supreme Court

7.2.1 Introduction and the parties' arguments

The case was further appealed to the Supreme Court regarding the application of the law. The shipping company's main argument was that the Articles 1, 2 and 3 of the ST support SIA's view that they should have access to snow crab catching on the Norwegian continental shelf.[132] With regards to Article 1, it was argued that it establishes a direct right to non-discrimination on the continental shelf.[133] 'With the other Contracting Parties' recognition, Norway gained limited sovereignty over Svalbard's land territory, as the citizens of the Contracting Parties have equal rights to resource exploitation. [...] As Norway derives its exclusive rights to the natural resources on the continental shelf outside Svalbard from its sovereignty over Svalbard's land territory, the same restrictions on sovereignty must be applied when exploiting the resources on the continental shelf'.[134]

As for Articles 2 and 3, they recognised that the ST only mentions 'territorial waters' and 'waters' as the geographic scope of application of the equality principle for fishing and commercial activities. Moreover, the fact that the Treaty is to be interpreted in line with the Vienna Convention was not disputed. However, SIA contended that even though the Treaty's wording is important, so are the context, the Treaty's object and purpose, and the requirement for good faith.[135] The contextual approach supported by Article 31 of the Vienna Convention

[129] TOSL-2020-149327
[130] LB-2021-140840
[131] ibid, page 14
[132] HR-2023-491-P, para 45
[133] ibid, para 129
[134] ibid, para 130
[135] ibid, para 42

and international law in general would warrant a dynamic interpretation (contrary to the Court of Appeal decision and earlier decisions by the Supreme Court in other cases).[136]

They argued that 'when legal developments result in a coastal state's rights being extended to new maritime areas and the continental shelf, a dynamic interpretation must lead to all the maritime areas over which a state exercises jurisdiction by virtue of its sovereignty over the land territory to fall under the concept of "territorial waters"'.[137] When Norway 'gained rights over the continental shelf in accordance with Article 77 of UNCLOS, the other Contracting Parties' right to equal treatment follows'.[138]

'The purpose of the ST was to resolve previous disagreements about resource utilisation on Svalbard and to ensure access as before for everyone regardless of nationality, based on a principle of absolute equal treatment in all areas, both on land and in the sea areas. The recognition of Norway's sovereignty was only a means to achieve this purpose. Exclusive rights for Norway to exploit resources linked to Svalbard are not compatible with this'.[139] Furthermore, SIA argued that 'the public authorities interpretation leads to an absurd result, considering Norway's rights on the continental shelf outside Svalbard would be greater than on land and in the territorial sea'.[140]

Finally, it was added that no one, other than Norway, supports the view that the equality principle in Articles 2 and 3 only applies to the 12 nautical miles territorial sea. State practice, particularly from Contracting Parties to the ST, confirms that this principle is also applicable on the continental shelf.[141] Moreover, since the treaty text was written by Norway, the international law principles dictate that it shall be interpreted in favour of the other parties.[142] They asked the Court to declare the rejection of their application to the Ministry for a snow crab licence as invalid and to recognise the Regulation as contravening the ST.[143]

On the other hand, the Ministry of Trade, Industry and Fisheries argued that the Court of Appeal decision is correct and in line with clear and consistent practice from Norwegian authorities. The Ministry argued that the Treaty does not set out a general equality principle,

[136] ibid
[137] ibid, para 48
[138] ibid, para 46
[139] ibid, para 44
[140] ibid, para 51
[141] ibid, para 49
[142] ibid, para 50
[143] ibid, para 54

with Article 1 merely recognising Norway's full and unrestricted sovereignty over the Archipelago.[144]

It was submitted that the specific equality principles laid out in Articles 2 and 3 are applicable to the maritime areas where the coastal state's sovereignty is equal to the one enjoyed on the land, namely in the internal waters and the 12 nautical miles territorial sea. Since UNCLOS does not provide a state with full sovereignty on the continental shelf, the equality principle cannot be applied to areas which are subject to a different legal regime.[145]

They contended that the focus of Article 31 of the Vienna Convention is the wording, as supported by the view of the Supreme Court in a 2017 decision[146] which held that there was 'little room for dynamic interpretation'.[147] They argued that 'territorial waters' in Article 2 and 'waters' in Article 3 are not generic terms, so there is no basis to give them 'extended or analogical application to the continental shelf through dynamic interpretation'.[148] Moreover, it was argued that snow crab catching is regulated by Article 2 alone, and not also Article 3, as SIA contended.[149]

It was submitted that 'the purpose of the treaty was to recognize Norway's full sovereignty with specific limitations in the exercise of sovereignty, particularly with a view to securing existing business interests. Another possible independent purpose was to create a clear and predictable legal regime for Norway and the other treaty parties'.[150]

Finally, the Ministry contended that 'an application of the equal treatment rule on the continental shelf will make resource management more difficult, have a destabilising effect and have the potential for conflicts and disputes. This is not compatible with the purpose of the Treaty to ensure the peaceful exploitation of resources. When interpreting, emphasis must also be placed on the Treaty's asymmetric and unilaterally open nature'.[151] They asked the Court to dismiss the SIA's appeal.

[144] ibid, para 58
[145] ibid, para 59
[146] HR-2017-569-A, para 44
[147] HR-2023-491-P, para 57
[148] ibid, para 60
[149] ibid, para 61
[150] ibid, para 187
[151] ibid, para 62

7.2.2 The Supreme Court's findings

7.2.2.1 Introduction

The central question relating to the geographical scope of the ST entailed thus an analysis of how the terms 'territorial waters' (Article 2) and 'waters' (Article 3) are to be interpreted in the context of the Treaty, and whether they could encompass the Svalbard continental shelf.[152] Despite both parties arguing for and against the Treaty's application in the Svalbard FPZ, all three instances refused to address this point. This was because the licence SIA applied for, was for snow crab catching on the Norwegian continental shelf.[153] This is in turn because section 1 of the SC Regulation does not explicitly mention the FPZ as an area where snow crab catching is prohibited.

7.2.2.2 Interpretation considerations relating to the ST

The Court firstly acknowledged that the legal difficulties that arise in relation to the ST are due to its uniqueness in terms of its legal structure,[154] as a multilateral treaty where a state's sovereignty is recognised, and where citizens of other Contracting Parties are guaranteed non-discrimination in certain business practices.[155]

The Supreme Court embarked subsequently on a detailed analysis of the principles laid down in Articles 31 and 32 of the Vienna Convention in order to establish what the interpretation process envisioned there actually entails.[156] It affirmed that 'the wording is the starting point for the interpretation. However, the individual words and concepts do not stand alone and cannot be interpreted in isolation, but must be read in the context of the treaty's object and purpose, and in their proper context'.[157] This is also in accordance with the good faith requirement and, simply put, means that the treaty must be able to achieve its purpose.[158]

The rationale behind placing so much weight on the words the parties have chosen, is that they are 'considered to give the clearest expression of what they agree on'.[159] Nevertheless, the Supreme Court emphasised that 'this does not mean that the meaning the words have later

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[152] HR-2023-491-P, paras 95-96
[153] LB-2021-140840, page 7; HR-2023-491-P, para 17
[154] ibid, para 99
[155] ibid, para 98
[156] ibid, para 100
[157] ibid, para 115
[158] ibid, para 124
[159] ibid, para 111

acquired as a result of international legal developments or societal developments must always be disregarded. The parties may have meant - and this may follow from the wording itself - that the content is not fixed once and for all, but that it will be able to develop in step with time'.[160] This is what is commonly understood as dynamic or evolutive interpretation. In such a case, the ICJ has affirmed that 'it is indeed in order to respect the parties' common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied'.[161]

The case of *Greece v. Turkey*[162] from 1978 is used as an example where the question of dynamic interpretation of the term 'territorial' was raised. The ICJ held that 'once it is established that the expression "the territorial status of Greece" was used in Greece's instrument of accession as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time'.[163]

7.2.2.3 Article 1

In interpreting Article 1, the Supreme Court held that 'the Contracting Parties' recognition of Norway's full and unrestricted sovereignty is given on the terms imposed on Norway in the Treaty's provisions. In other words, the reservation does not limit Norway's sovereignty as such, but, in its exercise of authority, Norway is obliged to respect the rights that the citizens of the Contracting Parties are guaranteed through the provisions of the Treaty'.[164]

'The conclusion so far is that the Contracting Parties' right to equal treatment must be derived from the individual Treaty provision. There is no general rule under Article 1 on non-discrimination that limits Norway's exercise of sovereignty. The right to equal treatment when catching snow crab - to which our case applies - therefore extends no further than what follows - factually and geographically - from Article 2 and possibly from Article 3'.[165]

[160] ibid, para 117
[161] *Costa Rica* (n 32), para 64
[162] *Aegean Sea Continental Shelf Case*, ICJ Reports 1978, page 3
[163] ibid, para 77
[164] HR-2023-491-P, para 135
[165] ibid, para 140

7.2.2.4 Article 2

(i) Historical analysis

The starting point of the Court's analysis regarding the geographical scope of application of Article 2 was the meaning of 'territorial waters' in the years around 1920, when the ST was drafted and signed. In analysing the relevant legal sources,[166] but also other pieces of legislation and relevant case law,[167] the Supreme Court noted that 'overall, this shows that the term "territorial waters" in 1920 had acquired a core legal content which basically equated control over these waters with sovereignty over the land territory, and that these waters were a geographically delimited maritime area that lay separate from the open sea'.[168]

This view is also supported by a contextual approach of the Treaty. In Article 1, the Contracting Parties recognise Norway's full and unrestricted sovereignty over the archipelago, building 'on the fact that sovereignty extended into "territorial waters", and that for that reason there was a need to provide a rule that ensured equal treatment in this area as well'.[169] The fact that different states had different opinions about the breadth of the territorial waters (such as 3 or 4 nautical miles), was irrelevant. The crucial element was the clear agreement with regards to the nature of the zone itself.[170]

The negotiations surrounding the ST itself reveal that 'at the time there was an awareness of the possibilities for a differentiation between the territorial waters and a regulatory area for fisheries outside'.[171] Coupled with the fact that there was a nearly complete absence of relevant legal sources from SIA which would point to the contrary,[172] the jugement concludes that '"territorial waters" in 1920 denoted the delimited part of the maritime area outside the coast where the coastal state has sovereignty'.[173]

[166] ibid, paras 156-159
[167] ibid, paras 160-166
[168] ibid, para 168
[169] ibid, para 176
[170] ibid, para 169
[171] ibid, para 171
[172] ibid, paras 172-173
[173] ibid, para 174

(ii) Dynamic interpretation

a. Wording

Whether a treaty opens for dynamic interpretation must be based on the wording of the treaty.[174] The Court argued that since there had not been any broad agreement with regards to the content and breadth of the territorial waters in 1920, the wording of the Treaty opened for dynamic interpretation strictly with regards to this particular area. As a consequence of the adoption and implementation of UNCLOS, the territorial waters are now defined in Norwegian legislation as the internal waters and the territorial sea, which was extended from 4 to 12 nautical miles.[175] It was held that these terms exhaustively codified what was understood as 'territorial waters' at the time of the conclusion of the ST.[176] 'In addition to this, the development of law or society does not indicate that "territorial waters" is a "generic term" that can be given an expanded content'.[177]

b. Object and Purpose

The Supreme Court proceeded to analyse the object and purpose of the Treaty (as stated in its Preamble - see 2.1.2), in order to ascertain whether these would suggest the opportunity for dynamic interpretation of 'territorial waters' beyond the 12 nautical miles area, as established by UNCLOS. Even though the treaty's object and purpose can be helpful in clarifying the text of the treaty and shedding a light 'on whether the parties intended it to be interpreted dynamically',[178] the Court repeated its earlier remark that they 'cannot provide a basis for deviating from a clear wording'.[179]

'The stated purpose was thus to ensure Svalbard's development and peaceful exploitation. The means to achieve this was for the archipelago to be subject to an equitable regime. The recognition of Norway's sovereignty and the equality principles were important elements in this context'.[180] The Court emphasises however that 'the purpose of the Treaty does not provide a clear answer to the question of interpretation. The ST does not establish a general rule of equal treatment for all future resource exploitation. The Contracting Parties could

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[174] ibid, para 180
[175] ibid, para 181
[176] ibid, para 182
[177] ibid
[178] ibid, para 184
[179] ibid
[180] ibid, para 189

have chosen to make this a condition for the recognition of Norway's sovereignty, but instead chose to regulate the right within the framework of the individual treaty provisions, linked to specific forms of activity'.[181]

As regards Article 2, it was held that 'when the Treaty was drafted, the Contracting Parties secured the right to equal treatment for the resources and activities that were then known within the areas that could be covered by the sovereignty of the coastal state under international law'.[182] Nevertheless, since the Treaty was concluded for an indefinite period, 'there can be no doubt that the parties believed that the right to equal treatment in Article 2 should facilitate a fair distribution of fishing and hunting resources also in the future'.[183]

It was accepted that 'to the extent that Norway's sovereign rights on the continental shelf are derived from sovereignty over Svalbard, it would not be compatible with the arrangement of an equitable regime for Norway alone to reap the benefits of the resources on the shelf'.[184] This is why the Court then addressed SIA's argument that an interpretation which entails that the equality principle in Article 2 does not apply on the continental shelf outside Svalbard's territorial waters is 'an anomaly which will lead to an absurd result'.[185]

The Supreme Court considered nonetheless that this argument is not decisive for the interpretation of Article 2, since 'the stated anomaly does not arise within the Treaty, but as a result of a later legal development outside its scope of application'.[186] Furthermore, it was held that 'the opposite solution would also be a deviation from the normal arrangement of UNCLOS, as the coastal state - Norway - would then not have exclusive rights as a result of Article 77(2)'.[187]

The Court emphasised that 'it is not unusual for legal developments to upset the balance between parties, but this does not in itself provide a basis for amending a treaty through interpretation. In that case, the parties must agree on this, cf. the Vienna Convention, article 31 no. 3 letters a and b and article 39',[188] and such agreement does not exist.

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[181] ibid, para 195
[182] ibid, para 191
[183] ibid, para 193
[184] ibid, para 194
[185] ibid, para 196
[186] ibid, para 198
[187] ibid, para 199
[188] ibid, para 200

With regard to the aim of ensuring the peaceful exploitation of Svalbard, it was held that this 'cannot necessarily be said to support that all Contracting Parties should have equal rights to exploit the resources on the continental shelf'.[189] The Court stated that 'future exploitation of the potentially large and vital resources on the continental shelf may create conflicts related to resource access and regulation, and that the problems and conflicts will become greater if all interested Contracting Parties can invoke the right to equal treatment'.[190] The Court emphasised thus that the consideration for stability is best safeguarded by one country having exclusive rights over the continental shelf, as the UNCLOS system provides.[191]

The judgement thus concluded that 'the Treaty's object and purpose do not provide clear and unequivocal support for an interpretation result that deviates from the interpretation alternative that follows from a natural understanding of the Treaty's wording'.[192]

c. Other factors

In terms of subsequent practice between Contracting Parties (as per Article 31(3) of the Vienna Convention), it is actually their disagreement that the Court has placed emphasis on. Licences awarded by other countries and the subsequent legal disputes with Norwegian authorities is indicative of a lack of common understanding which would support an interpretation result diverging from the wording of the Treaty.[193]

With regard to international case law, the Supreme Court addressed the case of *Greece v. Turkey* where the term 'territorial' was interpreted dynamically, and concluded that it does not provide guidance for the interpretation of Article 2.[194] The case concerned 'the content of a reservation relating to the court's jurisdiction in disputes about "the territorial status of Greece". It was therefore about a term that was used in a completely different form of regulation than that applied in Article 2 of the ST'.[195] The Court also considered that 'although the terms "territorial waters" and "territorial status" both contain the word "territorial", "territorial status" in contrast to "territorial waters" is an open wording which, according to its content, is suitable to capture a legal development'.[196]

[189] ibid, para 201
[190] ibid, para 202
[191] ibid, para 203
[192] ibid, para 204
[193] ibid, paras 205-207
[194] ibid, para 209
[195] ibid
[196] ibid

Finally, the Court considered the body of legal literature that the parties submitted and found the same disagreement, with some writers arguing for analogous interpretation in the economic zone and on the continental shelf, whilst others placing decisive emphasis on the wording and the historical considerations.[197] 'The literature therefore does not provide a basis for a conclusion in one direction or the other'.[198]

(iii) Concluding remarks with regard to Article 2

The Court's conclusion regarding the interpretation of 'territorial waters' was that 'Article 2 of the ST applies in Svalbard's internal waters and territorial sea, but not on the continental shelf outside Svalbard, where, according to Article 77 of UNCLOS, Norway has exclusive rights to exploit the natural resources'.[199]

7.2.2.5 Article 3

With regards to 'territorial waters' in Article 3(2), the Supreme Court held that it must be understood analogically to the expression's content in Article 2, namely internal waters and territorial sea. In terms of 'waters' in Article 3(1), it was held that 'the geographical area for the right to equal treatment is the archipelago's "waters", fjords and harbours, which in the first part of the provision are linked to the right of access and residence. The question has been raised as to whether "waters" in this context refers to the internal waters, but there is no evidence that the expression includes the waters outside the territorial sea. In 1920, such an opinion would also have made little sense as this was the open sea.'.[200] The Court did not address whether Article 3 encompasses snow crab catching, as this was clearly not necessary.

7.2.2.6 Final conclusion

At last, the Supreme Court concluded that 'the shipping company does not have the right to catch snow crab on the continental shelf outside Svalbard. This follows from the fact that the right to equal treatment for the Contracting Parties' citizens, companies and vessels for fishing and hunting according to Article 2 of the ST is geographically limited to Svalbard's internal waters and territorial sea. Nor can Article 1 or Article 3 be interpreted as applying to

[197] ibid, para 211
[198] ibid
[199] ibid, para 220
[200] ibid, para 223

a right to equal treatment on the continental shelf outside Svalbard. The Ministry of Trade, Industry and Fisheries' decision is therefore based on a correct interpretation of the ST'.[201]

8 Reality check

8.1 The knowns

In the aftermath of the legal cases discussed above, there are a few conclusions to be drawn, which can be regarded as clear and uncontroversial. Firstly, in regard to snow crabs, in the absence of any specific NEAFC recommendations or regulations, the rights granted to Norway as a coastal state by UNCLOS are not overridden. Secondly, snow crab is a sedentary species, giving Norway exclusive rights of exploitation on the continental shelf, according to Article 77(4) of UNCLOS.

Thirdly, in the 12 nautical miles territorial sea around Svalbard, the ST's signatories benefit from the right to equal treatment to fish, hunt, carry commercial operations etc. Fourthly, the Svalbard FPZ has a legitimate legal basis in Norwegian legislation, UNCLOS and customary international law.

With regards to the interpretative process around Articles 2 and 3 of the ST, the arguments for and against equal treatment outside Svalbard's territorial sea are extensively accounted for in the 2023 decision and multiple texts from legal authors.[202] Furthermore, it is indeed accurate that the case law on this topic is not conclusive, with decisions from different courts pointing in different directions.[203] Even though these aspects do not contribute a great deal to bringing clarity, they are part of the 'knowns' and do not require further investigation.

8.2 The unknowns - Questions for reflection

How the Supreme Court chose to navigate these arguments and use the existing legal framework, especially in the 2023 decision, is however a slightly different issue. A condensed version of that decision is that the wording of the ST is very clear, whereas all of the other supplementary means of interpretation are vague and do not point towards a

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[201] ibid, para 227

[202] Ulfstein (n 9) 421-441; EJ Molenaar, 'Fisheries Regulation in the Maritime Zones of Svalbard' (2012) 27 The International Journal of Marine and Coastal Law 3, 13-17; Peter Ørebech, 'The Geographic Scope of the Svalbard Treaty and Norwegian Sovereignty: Historic - or Evolutionary - Interpretation?' (2017) 13 Croatian Yearbook of European Law and Policy 53; Øystein Jensen, 'The Svalbard Treaty and Norwegian Sovereignty' (2020) 11 Arctic Review on Law and Politics 82, 98-102

[203] Ulfstein (n 9) 434-438; Ørebech (n 205) 78-82

particular result. Whether this is convincing enough is still perhaps the big 'unknown' which necessitates a closer discussion.

8.2.1 Wording

The Court started its analysis with the wording of the ST, according to Article 31 of the Vienna Convention. It was shown that 'territorial waters' had a very clear legal regime and rationale behind it in 1920, which was also similar to the one existing today, and considerable emphasis was placed on this argument.

Nevertheless, the maritime law developments, namely economic zones and rights over the continental shelf, which make the interpretation of the ST difficult now, began to take place only 50 years after the conclusion of the Treaty. Bearing this in mind, it then becomes quite obvious that 'territorial waters', namely an adjacent zone of a few nautical miles in breadth, was the only tool the Contracting Parties could choose at the time. They had no 'no opportunity for anticipating the maritime law developments that occurred in the second half of the 20th century, and which expanded the coastal state's rights in the sea areas'.[204] This is further supported by the fact that, as the Court has pointed out, 'there is nothing in the ST that limits Norway's right to claim new maritime areas around Svalbard outside the territorial boundary, in line with developments in international law'.[205]

The argument that the wording of the Treaty is clear and it should be given considerable weight because this upholds the will of the Parties is therefore rather shallow, when considering the wording in that regard could not have been different. For example, paragraphs 1 and 4 of Article 8 envision a fully functioning mechanism for the drafting, conflict-resolution and amending of the Mining Code,[206] an important activity at the time, but less so nowadays. Although only a speculation exercise nowadays, Jensen points out that 'it is not unlikely that the sphere of application might have been extended if international law in 1920 had allowed states to establish maritime zones such as a continental shelf or economic zone'.[207]

In terms of wording, considerable emphasis is also placed on the fact that the there is no general equality principle in the ST and that 'the Contracting Parties could have chosen to

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[204] HR-2023-491-P, para 193
[205] ibid, para 90
[206] LOV-1925-08-07
[207] Jensen (n 205), 102

make this a condition for the recognition of Norway's sovereignty, but instead chose to regulate the right within the framework of the individual treaty provisions, linked to specific forms of activity'.[208] This statement is perhaps framed in a confusing manner, placing more weight on the text of the Treaty, than the legal reality imposes, and diverging from the interpretative debate about 'territorial waters'.

Article 1 clearly indicates there are particular 'stipulations' in the body of the Treaty on which the recognition of Norwegian sovereignty over Svalbard depends. This is also clear when the Treaty's prehistory is taken into consideration. An all encompassing equality principle, without any particular information on its scope would make little sense, as it would essentially entail no change from the old *terra nullius* regime. Furthermore, when discussing fishing, hunting or other commercial activities, the right to equal treatment is very much present in Articles 2 and 3.

8.2.2 Purpose

The Court took into consideration the object and purpose of the ST, as presented in its Preamble and argued that this supported the view that the 'territorial waters' cannot be interpreted dynamically. Two aspects are worth further discussion.

8.2.2.1 Anomalies

The Court addresses the two anomalies in relation to the interplay between the ST and UNCLOS.[209] If the equality principle is only applicable to the Svalbard territorial waters, Norway ends up enjoying more rights on the continental shelf than in the territorial waters, which is contrary to the usual maritime legal regime.

It was held that the open endedness of the ST suggested 'there can be no doubt that the parties believed that the right to equal treatment in Article 2 should facilitate a fair distribution of fishing and hunting resources also in the future'.[210] Nonetheless, the Supreme Court considered, albeit not very convincingly, that this argument is not decisive for the interpretation of these provisions, since 'the stated anomaly does not arise within the Treaty, but as a result of a later legal development outside its scope of application'.[211]

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[208] HR-2023-491-P, para 195
[209] ibid, paras 196-199
[210] ibid, para 193
[211] ibid, para 198

It has also been pointed out that the other solution would also be a divergence from the default situation. If all Contracting Parties enjoy equal treatment on the continental shelf, then Norway would not have exclusive rights of exploitation, as prescribed by Article 77(2) of UNCLOS. However, crucially, even the Court recognises that UNCLOS provides that a coastal state can consent to such limitation of its own rights in relation to the continental shelf.[212] As Jensen points out, UNCLOS 'contains no prohibition against equal treatment. Despite being a party to UNCLOS, a coastal state is not required to favour its own citizens'.[213] Moreover, the Licencing Regulation clearly opens for snow crab catching on another state's continental shelf, provided that state's consent is obtained.

As shown in the 2017 decision, it is quite uncontroversial that there are (yet) no binding recommendations or regulations as a result of the NEAFC Convention and Scheme which may amount to Norway's consent under Article 77(2). But the essence of the ST is that Norwegian sovereignty over Svalbard was recognised, in return for Norway consenting that the other Contracting Parties enjoy amongst others 'equally the rights of fishing and hunting in the territories specified in Article 1 and in their territorial waters'. Does this not amount to a valid consent? Is it not fair to say that the introduction of the opportunity for a coastal state's consent to sharing resources on the continental shelf was motivated by cases where a state had a similar form of arrangement with other states?

This is much less of an anomaly than the current undisputed position that the Treaty is applicable in the territorial waters, which indeed clashes directly with Article 30(3) of the Vienna Convention (see 2.3). As all ST signatories are also parties to UNCLOS, it could be argued that an arrangement awarding more rights in the territorial waters than what is prescribed in UNCLOS should not be given effect at all. If this is to be applied, as the Supreme Court held it should, then Norway, from a ST perspective, becomes 'more equal than other Contracting Parties'.[214]

What is more, the 2006 decision points out that the FPZ, as a 'non-discriminatory zone',[215] is an arrangement which is 'a different type of regulation of fisheries than the point of departure under'[216] UNCLOS exclusive economic zones. Nevertheless, it was held that 'the establishment of the Svalbard FPZ must also be considered to be warranted by international

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[212] ibid, para 199
[213] Jensen (n 205), 101
[214] Molenaar (n 205), 53
[215] HR-2006-1997-A, para 38
[216] ibid, para 60

customary law'[217] and that type of zone does not contravene UNCLOS. Considering that the Svalbard FPZ and UNCLOS have the same protective objective,[218] 'the decisive factor must be how the regulation is implemented, and not whether it is the coastal state or other nations that carry out the actual fishing'.[219] The conclusion is thus that UNCLOS is not considered an obstacle to a broader interpretation of the ST, even when the Convention does not by default open for coastal states to forfeit their sovereignty in their economic zones.

Even though the provisions relating to the economic zone in UNCLOS do not apply to sedentary species (Article 68), it is important to note that the Convention, as a matter of principle, does open, however, for some form for flexibility. Article 59 which provides that conflicts between interests of different states in the economic zone shall 'be resolved on the basis of equity and in the light of all the relevant circumstances', which would most likely include ST considerations. Furthermore, a coastal State has a duty, under Article 62(2) to give access to other states to fishing and catching in the economic zone 'where the coastal state does not have the capacity to harvest the entire allowable catch'.

8.2.2.2 Peaceful utilisation

The Supreme Court also addresses the issue of peaceful utilisation as one of the purposes of the Treaty.[220] This concept has more to do with Svalbard being a demilitarised area, as per Article 9,[221] but the Court decided to link it to natural exploitation. Considering the large resources in the area and the potential for conflict if all Contracting Parties could invoke the right to equal treatment, the Court considered that stability is best safeguarded by only one country having exclusive rights over the continental shelf, as the system established in Article 77 of UNCLOS provides.

This may indeed be true, but blatantly contravenes the clear wording of the ST, which the Court was otherwise very eager to uphold. Article 2 balances the need for access to fishing and hunting on equal terms for all Contracting Parties (a key prerequisite of recognition of Norway's sovereignty) and Norway's mandate to establish and enforce environmental protection measures. Denying access and imposing sensible measures are two completely different things, which the Contracting Parties were clearly fully aware of, when envisioning

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[217] ibid, para 61
[218] ibid, para 63
[219] ibid, para 64
[220] HR-2023-491-P, paras 201-203
[221] Ulfstein (n 9), 343-389

‘an equitable regime’. As Molenaar points out, the intention behind the ST was to replace the *terra nullius* regime with Norwegian sovereignty, whilst maintaining the pre-existing *status quo* where this was possible and practical.[222]

What is more, as recent history has shown (see below), the long list of sharp diplomatic exchanges, clashes with Norwegian authorities and decisions from the Norwegian Supreme Court insisting on a narrow interpretation of the Treaty is perhaps the opposite of ‘peaceful’, and has indeed rather fueled conflict.

8.2.3 State practice

8.2.3.1 Other countries

The Court placed emphasis on the differences in interpretation between Norway and other countries which would render state practice as an interpretation tool as irrelevant. Nevertheless, the consistency of all other countries’ opposition and the inherent bias in Norway’s stance could actually point towards state practice as being an argument for dynamic interpretation.

A broader interpretation in relation to the right to equal treatment is widely supported amongst ST signatories.[223] Coordinated efforts in the 21st century have seen stronger positions by many countries which have always opposed Norway’s view on the ST, such as Spain, Iceland and Russia. Furthermore, Finland withdrew its earlier expressed support, whilst the bilateral fisheries agreement, where Canada endorsed the Norwegian position, never entered into force.[224] In the third case on snow crabs, SIA argued that the fact that all other Contracting Parties support this view should be of considerable importance in the interpretative process.[225]

It is interesting to also note that, in recent years, the EU has also become part of this row, despite not being part of the ST, because Article 10 only opens for accession from states, not international organisations.[226] Nevertheless, 23 of its Member States are signatories to the ST

[222] Molenaar (n 205), 53
[223] Torbjørn Pedersen, ‘The Dynamics of Svalbard Diplomacy’ (2008) 19 Diplomacy and Statecraft 236; Molenaar (n 205), 17-26
[224] ibid
[225] HR-2023-491-P, para 49
[226] Steenkamp (n 4), 117-118

and they have tried using the political and diplomatic impetus of a bigger entity to try to put pressure on Norway to accept a broader geographic scope for Articles 2 and 3.[227]

In the wake of the second Supreme Court case on snow crabs, Latvia sent in 2017 a letter to the European Commission demanding an agreement with Norway which would allow greater access for EU countries to the waters around Svalbard, and, if this was not feasible, then starting legal proceedings towards Norway.[228] The Commission agreed in principle with Latvia's position, but explained that neither solution could be realistic in the near future, as Norway seems unabated in its narrow interpretation and the diplomatic and commercial ties are way too valuable to be risked.[229] This cautious approach is 'understandable given its delicate positions as representing Member States to a treaty to which it is not a party'.[230]

Nevertheless, acting under the EU's exclusive competence to the conservation of marine biological resources under the Common Fisheries Policy, the EU Council issued in 2018 20 licences for snow crab catching around Svalbard.[231] This has thus 'cemented the EU's position. namely that Member States, who are also Contracting Parties to the ST, are entitled to non-discriminatory access to snow crabs on Svalbard's continental shelf'.[232]

8.2.3.2 Norway

Secondly, if Norwegian practice were to be taken into consideration, it is interesting to see that this does not actually present the consistency the Norwegian authorities and courts would perhaps like to claim. The Supreme Court decisions are indeed in line with the position of the Government as stated in the 2016 Svalbard White Paper. There it is stated that '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 UNCLOS 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'.[233]

Nevertheless, the legal reality is simply different, especially in relation to the Svalbard FPZ, which is clearly outside the territorial waters. Section 23a of the MRA provides that Chapter

[227] ibid, 119; Jensen (n 205), 97
[228] Republic of Latvia v European Commission, T-293/18 (2020), para 1
[229] ibid, paras 2-4
[230] Steenkamp (n 4), 128-129
[231] ibid, 119-120
[232] ibid, 120
[233] Meld. 32 (2015-2016), 20

4a (prohibiting fishing by non-Norwegian citizens) is to apply to the territorial waters, but not the Svalbard territorial waters. Section 3 of the Economic Zone Act (imposing the same prohibition) states that MRA Chapter 4a is also applicable in the economic area. An inference can be thus drawn that the prohibition is applicable in Norway's economic zone, but not Svalbard's. This is also clearly supported by the fact that section 2 of the Svalbard FPZ Regulation states that the provisions of section 3 of the Economic Zone Act 'shall not apply for the time being to the FPZ around Svalbard'.

The 2006 decision points out that the FPZ is a 'non-discriminatory zone',[234] as 'Norway has endeavoured to avoid forcing the issue of the applicability of the ST'.[235] Quoting the 1977 speech introducing the Royal Decree concerning its establishment, the Court in that case explains that Norway considers the equality principles in the ST to only be applicable in the territorial waters.[236] Nevertheless, since the purpose at the time was to 'bring under control and limit the fisheries in the area',[237] it was deemed sufficient 'to regulate fisheries by means of provisions that do not discriminate between Norwegian and foreign fishermen'.[238] Granting access to more entities to exploit the same amount of resources could be considered the opposite of protecting natural resources, but this allowed Norway to effectively enforce the regime envisioned under the ST, but 'maintaining a different position with regards to the legal basis for that non-discriminatory regime'.[239]

In order to regulate fisheries in the FPZ, quotas have been subsequently put in place. But these quotas were indeed discriminatory, as the 1996 decision shows. The Court considered that the equality principles in the ST 'do not amount to a prohibition against rationing - including discrimination - motivated by other objective criteria'.[240] The criteria to participate in the fishing quota for third countries negotiated by Norway and Russia was however 'countries which have traditionally fished in the area', and it is perhaps difficult to understand this as not amounting to discrimination based on nationality. The purpose of the Regulation was indeed to protect fisheries, and not to actively and directly restrict access, but the means of achieving the ultimate goal did amount to this which was clearly discriminatory.

[234] HR-2006-1997-A, para 38
[235] ibid, para 64
[236] ibid, para 39
[237] ibid
[238] ibid
[239] M Sobrido, 'The Position of the European Union on the Svalbard Waters' in E Conde and S Iglesias Sánchez (eds), *Global Challenges in the Arctic Region: Sovereignty, Environment and Geopolitical Balance* (Routledge 2017) 75, 79
[240] HR-1996-45-B, page 636

Nevertheless, there is some support in the legal literature[241] and in the ECJ case law[242] which would see non-discrimination in relation to fisheries and traditional fishing based quotas reconciled.

Almost another three decades later, in the 2023 decision, the Court went on to argue that the UNCLOS system, where Norway has exclusive rights in the economic zone and on the continental shelf is indeed the best suited, in terms of environmental and stability purposes.[243] Whilst a few decades back Norway was willing to diverge from the UNCLOS based on ST considerations and opening up for non-discrimination in the FPZ, nowadays, the tendency seems to be that UNCLOS is given more and more weight, all the while the prohibition against fishing by foreigners is still in theory legally not applicable to this area.

Lastly, the SC Regulation is also problematic, regardless of which interpretation solution in relation to the ST is chosen. The prohibition applies to internal waters, the territorial sea and the continental shelf. Even if the equality principles in the ST do not apply outside the territorial sea, it is as shown undisputed that they are applicable inside the 12 nautical miles limit.

The Supreme Court argued in the 2019 decision that the fact that both Norwegian and foreign citizens would be punished for lack of permit means that ‘there is no discriminatory treatment based on nationality’.[244] This is nonetheless not a strong enough argument to overcome the fact that, following the mechanism set out in the Regulation, it is still only Norwegian citizens that can obtain a snow crab licence, which makes them the only who would be able to escape punishment. This is in clear contravention of Article 2 of the ST, as the District Court in that case held.[245]

Furthermore, even though not present in the new Licencing Regulation, the 2015 amendment clarified that exemptions could only be granted ‘for the areas outside territorial waters’ (see 3.3.2). This suggests an arrangement similar to the UNCLOS system, rather than the one advocated by the Supreme Court and one which is reconcilable with the ST. In conclusion,

[241] Ulfstein (n 9), 450-453
[242] Case C-287/81 *Anklagemyndigheten v Jack Noble Kerr* [1982] ECR 4053; Case C-46/86 *Albert Romkes v Officier van Justitie for the District of Zwolle* [1987] ECR 2671
[243] HR-2023-491-P, para 203
[244] HR-2019-282-S, para 82
[245] ibid, para 10

the Norwegian position and practice is quite inconsistent, motivated most likely by political considerations rather than legal or environmental ones.

8.2.4 Hidden suggestion?

The Norwegian courts have avoided the question of the ST's geographical scope of application for nearly 30 years, employing different arguments at different levels in the judicial process, in order to circumvent what has always been an ongoing political conflict. When the Supreme Court did finally address this issue, it is difficult to not to remark the ease with which the Court dismisses what itself considers strong arguments, especially in the light of all nuances, as discussed above in this Chapter.

There is also the unspoken, yet unavoidable consideration of other very important resources, such as oil, gas, and minerals, which may exist in the waters around Svalbard. For example, in 2015, Russia claimed that oil licences awarded for three blocks in the Barents Sea were on the Svalbard continental shelf and thus should be governed by the ST.[246]

In June 2023, the Government introduced a Parliament Bill which opens for mineral extraction on the Norwegian continental shelf.[247] Terje Aasland, minister for Petroleum and Energy, stated that the initiative was taken in order 'to discover whether extraction can take place profitably, sustainably and responsibly'.[248] The area measures 281.200km^2 and is roughly the size of Germany, with a third overlapping the continental shelf and the FPZ around Svalbard.[249] Merely a week later, it was announced that a Russian vessel had been granted a licence to research the seabed east for Svalbard.[250]

In light of all these factors, the decisions from the Norwegian Supreme Court can thus be seen as having a deflectionary character, perhaps suggesting an unwillingness to address issues which it considers outside of its competence and more political in nature. In the 2023 judgement, the Court emphasised that 'it is not unusual for legal developments to upset the balance between parties, but this does not in itself provide a basis for amending a treaty

[246] https://www.vg.no/nyheter/innenriks/i/K0vne/russland-protesterer-mot-oljeboring-i-svalbard-sonen accessed 5 June 2023
[247] Meld.St.25 (2022-2023)
[248] https://www.dn.no/politikk/terje-aasland/store-regjeringen/havbunnsmineraler/regjeringen-apner-for-gruvedrift-pa-havbunnen-sjokkerende-uansvarlig/2-1-1470182 accessed 26 June 2023
[249] https://www.aftenposten.no/meninger/kronikk/i/WRXvJa/er-gruvedrift-paa-havbunnen-naer-svalbard-en-god-ide accessed 26 June 2026
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through interpretation. In that case, the parties must agree on this, cf. the Vienna Convention'.[251]

The Court's general dismissive attitude in past decisions and this statement in particular could indeed be interpreted as suggesting that it would be best for the ST's signatories to politically agree on the geographical scope of the equality principles. This is akin to how the the Supreme Court held in the 2019 decision that, rather than a criminal case, 'under Norwegian law, an issue of conflict between Norwegian public administration and international obligations should be solved through a civil action'.[252] In cases concerning rights over extensive natural resources in a state, dynamic interpretation from a national court of that particular state is perhaps not the best tool to be employed.

One possible solution, which would impose a higher degree of legitimacy to the interpretative process would be to obtain a judgement from an international court. In this regard, one of the biggest drawbacks of the ST is that it does not establish any system of settling disputes between signatories. After the 2019 Supreme Court decision, SIA did however sue Norway in a case submitted before the International Centre for Settlement of Investment Disputes (ICSID).[253] The arbitration case revolves around a damages claim based on an investment agreement between Norway and Latvia dating back to 1992,[254] but the geographic scope of application of the ST is one of the core issues.[255] At the time of writing (June 2023), the case is still ongoing.

On a political level, a Conference of Parties could be convened in order to break the deadlock surrounding the geographical application of the ST, such as the one proposed by Iceland at the beginning of the 21st century.[256] Churchill and Ulfstein argue that one desirable solution would be full Norwegian sovereignty, as this 'would prevent conflicts over the interpretation of the ST and it would make it easier to implement effective regulatory measures and enforce them, both on the continental shelf and in the 200-mile zone'.[257]

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[251] HR-2023-491-P, para 200
[252] HR-2019-282-S, para 80
[253] ICSID Case No. ARB/20/11
[254] Agreement between Norway and Latvia on the mutual promotion and protection of investments, 16-06-1992 nr 1 Bilateral, available at https://lovdata.no/dokument/TRAKTATEN/traktat/1992-06-16-1 accessed 13 June 2023.
[255] HR-2023-491-P, para 27
[256] Molenaar (n 205) 55
[257] R Churchill and G Ulfstein, *Marine Management in Disputed Areas: The Case of the Barents Sea* (Routledge 1992), 150

9 Conclusion

In the span of 10 years, the snow crab has managed to travel from the depths of the Barents Sea up to the highest court in Norway three times. This achievement is only outclassed by the complexity surrounding this small crustacean's journey, with a convoluted legal framework and diverging commercial and political interests.

Reconciling the legal *zeitgeist* from 1920, with the maritime law developments of the second half of the 20th century, and the ever more pressing environmental concerns of the 21st century has proven to be the root of a 50 years old conflict between Norway, on one side, and all the others ST Contracting Parties, on the other. Considering the recent Supreme Court decisions affirming the Norwegian stance, and the coordinated efforts of other ST signatories and the EU to pressure Norway into more access to its waters, this conflict does not seem to be resolved in the slightest, especially in the light of the high international demand for snow crabs.

The fact that this dilemma has existed since the 1970's proves perhaps that both sides put forward powerful arguments, as the Supreme Court itself recognised. Thus, it could be argued that rather than interpreting the law, the five Court's decisions could have indeed been motivated by other factors. Indeed, there could arguably be an unwillingness to address a very controversial topic, which has been an international conflict for many decades, and which has vast economic and environmental ramifications, for many nations. A conservative approach was therefore chosen, with the Court effectively confirming the view of the Norwegian authorities, every time the opportunity presented itself. It has thus become clear that a diplomatic approach is perhaps the only way of ever resolving the issue of fishing rights in the Barents Sea.

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