# The disputed scope of the svalbard treaty offshore

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# The Disputed Scope of the Svalbard Treaty Offshore: A New Approach to Resolving the Issue[1]


## Abstract

The 1920 Treaty concerning the Archipelago of Spitsbergen confers sovereignty over Svalbard on Norway. It also provides that all parties to the Treaty enjoy equal rights of fishing and mining on Svalbard and in its 'territorial waters'. Norway and various other States parties to the Svalbard Treaty disagree as to whether the Treaty applies to the continental shelf and Fisheries Protection Zone (FPZ) of Svalbard. There has been much discussion as to the merits of each side's legal position. This article does not contribute further to that discussion. Instead, it examines the three current principal issues where it makes a practical difference whether or not the Treaty applies – oil and gas exploration and exploitation, the catching of snow crab, and Norway's fisheries jurisdiction in the FPZ – and suggests how disputes relating to those issues could be resolved without having to determine whether the Treaty applies to Svalbard's continental shelf and FPZ.



## Key words

Barents Sea; climate emergency; European Union; fisheries; Norway; oil and gas; snow crab; Svalbard


## 1. Introduction

[1] This paper is a revised version of a presentation given at a seminar in honour of Professor Geir Ulfstein on 6 September 2021. The subject matter of this paper was particularly appropriate for that occasion, given the outstanding contribution of Professor Ulfstein to the literature on the legal regime of Svalbard, some of which is referred to below. I am grateful to Erik Molenaar and the anonymous reviewer for their helpful comments on the previous draft of this paper and to Alf Håkon Hoel and for assistance with certain information for section 4 of the present draft. The usual disclaimer applies.

Before the First World War, Svalbard (or Spitsbergen, as it was then generally known) was a *terra nullius*. Nevertheless, it was the scene of economic activity by nationals from a number of States, notably hunting for animal furs and, from the end of the nineteenth century, coal mining. At the Versailles Peace Conference that followed the First World War, the Norwegian government lobbied for Norway to be awarded sovereignty over Svalbard. Its efforts resulted in the adoption of the Treaty concerning the Archipelago of Spitsbergen (hereafter the Svalbard Treaty) in 1920.[2] Under Article 1 the original parties to the Treaty other than Norway (Denmark, France, Italy, Japan, Netherlands, Sweden, the United Kingdom and the USA) "undertake to recognise, subject to the stipulations of the present Treaty, the full and absolute sovereignty of Norway over the Archipelago of Spitsbergen". The principal "stipulations" referred to in Article 1 are set out in Articles 2 and 3. Article 2(1) provides that "[s]hips and nationals of all the High Contracting Parties shall enjoy equally the rights of fishing and hunting in the territories specified in Article 1 [i.e. the various islands making up the archipelago] and in their territorial waters". Article 3(1) provides that "[t]he 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". Article 3 (2) adds that "[t]hey [i.e. the nationals of the parties] shall be admitted under the same conditions of equality to the exercise and practice of all maritime, industrial, mining, and commercial enterprises both on land and in the territorial waters". It is generally considered that the term 'mining' as used in Article 3 includes exploring for and exploiting oil and gas.[3] Articles 1-3 essentially preserve the previous *terra nullius* rights of

[2] *League of Nations Treaty Series*, Vol. 2, p. 8.
[3] G. Ulfstein, *The Svalbard Treaty. From Terra Nullius to Norwegian Sovereignty* (Scandinavian University Press, Oslo, 1995) pp. 193–194.

the original parties to the Treaty in return for their recognition of Norway's sovereignty over Svalbard. The Treaty is open to accession by States other than the original parties. Currently, the Treaty has 46 parties.[4]

As seen, the rights in Articles 2 and 3 apply to the land territory of Svalbard and its 'territorial waters'. It is generally accepted that the latter term equates to the modern-day term 'territorial sea'.[5] Svalbard has a territorial sea extending to 12 nautical miles (nm) from the baselines, in line with general international legal practice and Article 3 of the UN Convention on the Law of the Sea, 1982 (UNCLOS).[6] It is not disputed that the rights in Articles 2 and 3 apply within this zone. What is uncertain, however, is whether they apply to coastal State maritime zones beyond the territorial sea, namely the continental shelf and any exclusive economic zone (EEZ) or fishing zone that might be claimed. Not surprisingly, the Svalbard Treaty provides no direct answer to this question as those zones were unknown in international law at the time when the Treaty was drafted. The continental shelf did not become recognised by international law as a coastal State maritime zone until the 1950s, and the EEZ, which extends up to 200 nm from the baselines, not until some 20 or so years after that. A (legal) continental shelf does not have to be claimed, but exists automatically in respect of any territory.[7] An EEZ, on the other hand, has to be claimed. While Norway claimed an EEZ in respect of its mainland coast with effect from the beginning of 1977,[8] that

[4] The Norwegian government website lists 44 parties: *see* <https://lovdata.no/dokument/TRAKTATEN/traktat/1920-02-09-1> (all websites referred to in this article were visited on 1 September 2022). However, that total does not include Ireland and Latvia, which, according to the Dutch Foreign Ministry, acceded to the Treaty in 1976 and 2016, respectively: *see* <https://verdragenbank.overheid.nl/en/Verdrag/Details/004293>.

[5] In *SIA North STAR Ltd.* v. *Nærings- og Fiskeridepartementet*, Oslo District Court (*Tingrett*), in a judgment given on 5 July 2021, emphatically rejected the applicant's argument that the term 'territorial waters' had a wider meaning than 'territorial sea' and extended to waters beyond the current 12-mile territorial sea: *see* <https://lovdata.no/dokument/TRSIV/avgjorelse/tosl-2020-149327>. On appeal, the District Court's finding was endorsed by Borgarting Court of Appeal (*Lagmannsrett*): *see* Case 140840, *SIA North STAR Ltd.* v. *Nærings- og Fiskeridepartementet*, Judgment of 13 June 2022, <https://lovdata.no/dokument/LBSIV/avgjorelse/lb-2021-140840>.

[6] *United Nations Treaty Series* (*UNTS*), Vol. 1833, p. 397.

[7] UNCLOS, Art. 77(3).

[8] Law No. 91 of 17 December 1976 relating to the Economic Zone of Norway, English translation at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_1976_Act.pdf>.

legislation did not apply to Svalbard. Instead, in order not to provoke a dispute as to whether the Svalbard Treaty applied beyond the territorial sea,[9] it established a non-discriminatory 200 nm fishery protection zone (FPZ) off Svalbard in June 1977.[10]

Views differ as to whether the Svalbard Treaty, and in particular its rights for all parties to engage equally in fishing and mining, apply to the continental shelf and FPZ. Since the 1970s, successive Norwegian governments have consistently taken the view that the Treaty does not apply to maritime zones beyond the territorial sea, arguing that the Treaty should be interpreted literally so as to limit its application to 'territorial waters' only, and that restrictions on Norwegian sovereignty are limited to those expressly set out in the Treaty.[11] Although the Supreme Court has not (yet) pronounced definitively on the question, a number of lower Norwegian courts have held that the Treaty does not apply to Svalbard's continental shelf and/or FPZ.[12]

In contrast to Norway, some parties to the Svalbard Treaty (including Iceland, the Netherlands, Russia, Spain and the United Kingdom) consider that the Treaty does apply to

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[9] K. Frydenlund, *Lille Land – Hva Nå?* (Universitetsforlaget, Oslo, 1982) p. 56. Frydenlund was Norwegian Foreign Minister at the time.

[10] Royal Decree, 3 June 1977, *Norsk Lovtidend* 1977, Part 1 p. 508; for the text of the Royal Decree as amended, *see* <https://www.fiskeridir.no/Yrkesfiske/Regelverk-og-reguleringer/J-meldinger/Gjeldende-J-meldinger/J-139-2001>. In practice, much of the FPZ is less than 200 nm in breadth. Where the distance between Svalbard and mainland Norway is less than 400 nm, the FPZ extends as far as to the 200 nm limit of the EEZ of mainland Norway: see Art. 1 of the Royal Decree. To the east and west, the FPZ extends only to the agreed boundaries between Svalbard and Greenland and between Svalbard and Russia.

[11] This view has been set out in a succession of Norwegian government papers over the years. *See*, most recently, Meld. No. 32 (2015–2016) *Svalbard* p. 20, <www.regjeringen.no/no/dokumenter/meld.-st.-32-20152016/id2499962/> and Annex to the *Note Verbale* from the Norwegian Ministry of Foreign Affairs to the Eurpoean Union of 4 May 2021, pp. 2–4, <https://www.regjeringen.no/contentassets/83930993ec23456092199fcc9ed9de51/vedlegg-til-note-til-eu-torsk-og-snokrabbe.pdf>. The Norwegian government's position has been amplified by a former Director-General of Legal Affairs of the Norwegian Ministry of Foreign Affairs, H. E. Rolf Einar Fife, and a former special consultant to the Ministry, Professor Carl August Fleischer, writing in a personal capacity: *see* R. E. Fife, 'L'objet et le but du traité du Spitsberg (Svalbard) et le droit de la mer', in V. C. Coustère and L. Lucchini (eds), *La mer et son droit: mélanges offerts à Laurent Lucchini et Jean-Pierre Quéneudec* (Pedone, Paris, 2003) p. 241; R. E. Fife 'Folkerettslige spørsmål i tilknytning til Svalbard og de omkringliggende havområder' (2014), <www.regjeringen.no/no/tema/utenrikssaker/folkerett/svalbard/id2350955/>; C. A. Fleischer, *Petroleumsrett* (Universitetsforlaget, Oslo, 1983) chapters 6 and 7; and C. A. Fleischer , 'The New International Law of the Sea and Svalbard' (paper given at the Norwegian Academy of Science and Letters, 150th Anniversary Symposium, 2007) (copy on file with the author).

[12] *See*, most recently, the judgment of the Borgarting Court of Appeal in the *North STAR* case, *supra* note 5.

all maritime zones beyond the territorial sea. Those States have generally not made the legal arguments to support their position public, but their main argument would seem to be as follows. Over time, Norway has gained a continental shelf and an FPZ (and potentially an EEZ) around Svalbard as a result of developments in the law of the sea. That has resulted from Norway's sovereignty over Svalbard, which derives from the Svalbard Treaty. Just as Norway's sovereign rights and jurisdiction have extended seawards, so the rights of other States under the Treaty must be taken also to have extended seawards, in parallel with Norway's rights.[13] The parties to the Svalbard Treaty other than those mentioned above appear either to have reserved their position as to whether the Treaty applies beyond the territorial sea (notably the USA), or not to have taken a position publicly (which is probably the case with a majority of the parties to the Treaty).[14] No party publicly supports Norway's position, although at one time Canada and Finland appeared to do so.[15]

The position of the European Union (EU) is also of interest. The EU is not a party to the Svalbard Treaty, and cannot become a party because participation is open only to States. However, 22 of its 27 Member States are parties to the Treaty. The vessels of a number of those States have traditionally fished in the FPZ, as explained in section 4 below. The conduct of EU fisheries relations with third States is a matter within the exclusive competence of the EU.[16] Thus, in relation to EU fishery activities within the FPZ, it is the EU that deals with Norway, even though it is not a party to the Svalbard Treaty, and not the individual Member States that are parties. The EU has made it very clear on numerous occasions that as far as fisheries are concerned, it considers that the Svalbard Treaty applies

[13] For fuller exploration of the arguments for the extension of the Svalbard Treaty to maritime zones beyond the territorial sea, *see* the literature in note 18.
[14] T. Pedersen, 'The Dynamics of Svalbard Diplomacy', 19:2 *Diplomacy & Statecraft* (2008) pp. 238–51.
[15] *Ibid*.
[16] Treaty on the Functioning of the European Union (2007), Art. 3, *Official Journal of the European Union* (OJ) 2016 C202/47.

to Svalbard's maritime zones beyond the territorial sea.[17] However, in relation to matters for which the EU does not possess exclusive competence, such as exploring for and exploiting oil and gas, individual EU Member States that are parties to the Svalbard Treaty remain competent under EU law to assert their rights under the Treaty.

The question of whether the Svalbard Treaty, and in particular the equal rights provisions of Articles 2 and 3, apply beyond the territorial sea is not just an interesting theoretical question. At the present time, there are three principal issues where it makes a practical difference whether or not the Treaty applies, all of which are the subject of actual or potential dispute. These issues are: (1) exploration for and exploitation of oil and gas; (2) the exploitation of snow crab; and (3) Norway's exercise of jurisdiction and its practice in allocating fish catches in the FPZ. This paper will not examine which is the more convincing interpretation of the Svalbard Treaty to resolve those issues, that of the Norwegian government or that of States taking the opposite standpoint. This matter has already been discussed extensively in the literature,[18] and there is little or nothing that can usefully be added to that discussion. Instead, this paper will take a quite different approach, and suggest how each of the three issues identified above could be resolved without needing to decide whether the Treaty applies beyond the territorial sea. The following three sections of this paper put forward such a solution for each of those three issues.

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[17] *See*, *e.g.*, European Commission letter to Latvia of 12 March 2018, para. 1, <www.politico.eu/wp-content/uploads/2018/06/SPOLITICO-18061416103-1.pdf>; and European Union *Note Verbale* No. 08/21 of 28 June 2021 to Norway pp. 1–3, <https://ec.europa.eu/oceans-and-fisheries/system/files/2021-07/2021-06-28-Note-verbale_en.pdf>.

[18] *See*, *inter alia*, D. H. Anderson, 'The Status under International Law of the Maritime Areas around Svalbard', 40 *Ocean Development and International Law* (2009) p. 373; R. Churchill and G. Ulfstein, 'The Disputed Maritime Zones around Svalbard', in M. H. Norquist, J. N. Moore and T. H. Heidar (eds.), *Changes in the Arctic Environment and the Law of the Sea* (Martinus Nijhoff Publishers, Leiden, 2010) p. 551; R. Churchill and G. Ulfstein, 'The Application of the Svalbard Treaty Offshore', in I. Dahl and Ø. Jensen (eds.), *Svalbardtraktaten 100 År* (Fagbokforlaget, Bergen, 2020) p. 277; E. J. Molenaar, 'Fisheries Regulation in the Maritime Zones of Svalbard', 27:1 *International Journal of Marine and Coastal Law* (2012) pp. 10–26; C. R. Rossi, '"A Unique International Problem": The Svalbard Treaty, Equal Enjoyment, and *Terra Nullius*: Lessons of Territorial Temptation from History', 15 *Washington University Global Studies Law Review* (2016) p. 99; Ulfstein, *supra* note 3, chapter 7; and P.T. Ørebech, 'The Geographic Scope of the Svalbard Treaty and Norwegian Sovereignty: Historic – or Evolutionary – Interpretation?', 13 *Croatian Yearbook of European Law and Policy* (2017) p. 53.

## 2. The Exploration for and Exploitation of Oil and Gas

The bed of the northern Barents Sea is believed to contain commercially significant quantities of oil and gas.[19] How much of that seabed constitutes Svalbard's (legal) continental shelf is uncertain, mainly because no boundary has ever been delimited between the continental shelf around Svalbard and the shelf of mainland Norway. While there has been a fair amount of exploration for oil and gas in the Barents Sea to date, and some exploitation is ongoing in the southernmost part the Sea, there has been little or no exploration in areas that could reasonably be considered to comprise Svalbard's continental shelf.

If exploration for, and eventually exploitation of, oil and gas were to take place on Svalbard's continental shelf, it would make a considerable difference whether or not the Svalbard Treaty applied to that area. If, as Norway argues, the Treaty does not apply, Norway would be free to reserve exploration and exploitation to Norwegian companies. If, on the other hand, the Treaty does apply, oil and gas companies having the nationality of any State party would have an equal right to exploration and exploitation. Furthermore, such exploration and exploitation would be subject to a very favourable tax regime, as Article 8(2) of the Treaty provides that "[t]axes, dues and duties levied shall be devoted exclusively to the said territories [i.e. Svalbard] and shall not exceed what is required for the object in view". There are obviously considerable limits on the amount of tax revenue that could be spent for legitimate purposes on Svalbard,[20] and therefore the taxation of any oil and gas activities would be likely to be at a far lower rate than elsewhere in the world.

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[19] According to the Norwegian Petroleum Directorate, around a quarter of the petroleum resources of the Norwegian continental shelf are so far undiscovered, of which 36 per cent are believed to lie in the northern Barents Sea: *see* government report to the Storting, *Meld. St.* 11 (2021–2022) pp. 46-47, <https://www.regjeringen.no/no/dokumenter/meld.-st.-11-20212022/id2908056/>.

[20] On the scope and implications of Art. 8(2), *see* Ulfstein, *supra* note 3, pp. 284–298.

However, the issue of what conditions would apply to any oil and gas activities on Svalbard's continental shelf could be resolved without having to decide whether or not the Svalbard Treaty applies there if Norway were to introduce a moratorium on all future exploration for oil and gas on Svalbard's continental shelf. Under UNCLOS, States are not obliged to explore and exploit their continental shelf.

There are compelling environmental reasons for imposing a moratorium on Svalbard's (and mainland Norway's) shelf. In a report published in 2018, the Intergovernmental Panel on Climate Change (IPCC) warned that if there was to be any hope of keeping increases in global temperature within the target of 1.5° C set out in the Paris Agreement,[21] the burning of fossil fuels would have to be very substantially reduced by 2050.[22] That warning was repeated in a further report, published in April 2022, which calculates that to limit an increase in warming to 1.5° C, global use of oil and gas by 2050 would have to decline by 60 and 70 per cent, respectively, compared with such use in 2019: with carbon capture storage, which is currently not in commercial use, the figures would be 60 and 45 per cent, respectively.[23] Given the life expectancy of an offshore oil or gas field of typically at least 20–30 years, and the elapse of time between discovery and production, the implication of the IPCC's reports is that exploration for new offshore oil and gas fields ought now to come to an end. That implication was confirmed and starkly spelt out in two authoritative pronouncements in 2021. First, in a report published in May 2021, the International Energy Agency put forward a comprehensive net-zero emissions scenario under which "no new oil and gas fields are required beyond those that have already been approved

[21] Paris Agreement, 12 December 2015, Art. 2(1), <https://unfccc.int/sites/default/files/english_paris_agreement.pdf>.
[22] IPCC, *Global Warming of 1.5° C* (2018), chapter 2, <www.ipcc.ch/sr15/>.
[23] IPCC, *Climate Change 2022: Mitigation of Climate Change. Summary for Policymakers* (2022), p. 28 (and *see also* sections C3 and C4), <https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_SPM.pdf >.

for development".[24] Second, in introducing an IPCC report of 2021,[25] the UN Secretary-General stated: "This report must sound a death knell for coal and fossil fuels . . . Countries should end all new fossil fuel exploration and production."[26] In addition to climate emergency considerations, a further environmental reason for introducing a moratorium on oil and gas activity on Svalbard's continental shelf is that it would remove the risk of pollution being caused by such activity, especially from a blow-out: the latter would result in a major escape of oil into an environment rich in biodiversity and one where natural bacterial processes break down oil very slowly because of the coldness of the waters there.

There are a number of possible legal objections to a moratorium that might be raised. First, it might be argued that a moratorium would be contrary to the Svalbard Treaty, if it applies. That objection has no merit. The introduction of a moratorium would be an exercise of the sovereignty conferred on Norway by the Treaty. As long as the moratorium applied equally to Norwegian and foreign nationals, it would not breach the equal rights provisions of the Treaty. Furthermore, a moratorium could be justified by Norway's right to adopt measures to conserve fauna and flora under Article 2(2) of the Treaty.

A second possible objection is that a moratorium would make it necessary to delimit the boundary between the continental shelves of Svalbard and mainland Norway, and that both the substantive rules and the procedure for effecting such a delimitation are uncertain.[27] Furthermore, if Norway delimited the boundary unilaterally, its delimitation would risk being contested by the other parties to the Svalbard Treaty. The answer to that objection is that

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[24] International Energy Agency, *Net Zero by 2050: A Road Map for the Global Energy Industry* (2021) p. 99 (and *see also* pp. 101, 102 and 160), <https://iea.blob.core.windows.net/assets/deebef5d-0c34-4539-9d0c-10b13d840027/NetZeroby2050-ARoadmapfortheGlobalEnergySector_CORR.pdf>.
[25] IPCC, *Climate Change 2021: The Physical Science Basis* (2021), <www.ipcc.ch/report/sixth-assessment-report-working-group-i/>.
[26] UN Secretary-General's Statement of 9 August 2012, <www.un.org/sg/en/content/secretary-generals-statement-the-ipcc-working-group-1-report-the-physical-science-basis-of-the-sixth-assessment>. The Secretary-General repeated his plea in even starker terms in June 2022: see *The Guardian*, 18 June 2022, p. 4.
[27] On this issue, *see* Ø. Jensen, 'Defining Seaward Boundaries in a Domestic Context: Norway and the Svalbard Archipelago', 50:2-3 *Ocean Development and International Law* (2019), p. 243.

whatever problems there might be in delimiting a boundary could be avoided if Norway applied a moratorium to the whole of its continental shelf. The climate emergency reasons for a moratorium on Svalbard's continental shelf obviously apply equally strongly to the whole of mainland Norway's continental shelf.

A third possible legal objection to a moratorium is that it would risk Norway being sued by oil and gas companies under the Energy Charter Treaty.[28] That objection also has no force. Norway has not ratified the Treaty, nor has it accepted its provisional application in accordance with Article 45 of the Treaty.[29] Furthermore, as long as Norway has not entered into an exploration contract with an oil or gas company, which by definition it would not have done as the proposed moratorium would apply only to future exploration, there would be no risk of it being sued under Norwegian, or any other national, law.

However good the environmental reasons for a moratorium on future exploration for oil and gas on the continental shelves of Svalbard and mainland Norway may be, and even though there are no legal obstacles to the introduction of such a moratorium, it seems unlikely that the Norwegian authorities will introduce one in the short to medium term. Before the elections to the Norwegian Parliament (*Storting*) held in September 2021, the policy of the former centre-right coalition government was to continue with unabated exploration for oil and gas on the Norway's continental shelf, with such activity decreasing only as demand declined.[30] The Labour Party/ Centre Party minority coalition government that succeeded it following the election is continuing that policy. In a report to Parliament published six weeks after the Russian invasion of Ukraine in February 2022, the government stated that the Norwegian petroleum industry would continue to develop and licences to explore new areas

[28] Energy Charter Treaty, 17 December 1994, *UNTS* Vol. 2080, p. 95.
[29] *See* <https://www.energycharter.org/who-we-are/members-observers/countries/norway/>.
[30] *See*, *e.g.*, government reports to the Storting, *Meld. St.* 13 (2020–2021) (*Climate Plan for 2021-2030*); and *Meld. St.* 36 (2020-2021) (on Norway's energy resources), <https://www.regjeringen.no/no/dokumenter/meld.-st.-13-20202021/id2827405/> and <https://www.regjeringen.no/no/dokumenter/meld.-st.-36-20202021/id2860081/>, respectively.

of continental shelf would still be granted.[31] Nevertheless, production is expected to decline from the mid-2020s onwards because existing fields will become depleted and will not be fully compensated by new fields, and because of a decrease in demand consequent upon States taking measures to try to achieve the Paris Agreement's goals.[32] In the report, the government gives unqualified support to those goals.[33] It appears to see no contradiction between that position and its policy of continuing to explore and exploit the petroleum resources of Norway's continental shelf. The reason is presumably because the overwhelming proportion of oil and gas produced is exported, with the emissions of greenhouse gases from burning Norwegian-produced fossil fuels very largely counting in the emissions of other States, not those of Norway.

Nevertheless, over time there is likely to be pressure on the Norwegian government to modify its position. Such pressure will come from a variety of sources, including environmental campaigners and the minor political parties in Norway, five of which (*Sosialistisk Venstreparti* (Socialist Left Party), *Venstre* (Left), *Kristelig Folkeparti* (Christian People's Party), *Miljøpartiet de Grønne* (the Greens) and *Rødt* (Red)) campaigned for an end to further exploration for oil and gas during the 2021 election:[34] together they won 35 of the 168 seats in the *Storting*.[35] Pressure will also come from international organisations. For example, in a 2021 communication to the other EU institutions, the European Commission stated that it is "committed to ensuring that oil, coal and gas stay in the ground . . . in Arctic regions", and to that end will "work with partners towards a multilateral legal obligation not to allow any further hydrocarbon development in the Arctic or contiguous regions, nor to

[31] *See* government report to the Storting, *Meld. St.* 11 (2021–2022), *supra* note 19, pp. 5-7, 9-10 and 38-39. The report is described as a supplement to *Meld. St.* 36 (2020-2021), *supra* note 30.
[32] *Ibid*., pp. 47-48.
[33] *Ibid*., pp. 5-6.
[34] *See* <www.nrk.no/valg/2021/partiguiden/nb/tema/olje/>.
[35] *See* <www.nrk.no/valg/2021/resultat/>.

purchase such hydrocarbons if they were to be produced".[36] In a report published in 2021, UNEP and a number of other organizations criticised the future petroleum production plans of Norway and other leading fossil fuel producers as being "dangerously out of sync with Paris Agreement limits".[37] Costa Rica, Denmark, France, Ireland and Sweden have already declared that they are terminating fossil fuel exploration on their continental shelves;[38] and if more countries join them, Norway will come under further pressure to change its policy. In due course it may be forced to change by the European Court of Human Rights. In June 2021, various Norwegian environmental groups, having unsuccessfully argued before the Norwegian courts, including the Norwegian Supreme Court,[39] that exploration licences issued for the Barents Sea were unlawful because they breached both the Norwegian Constitution and the European Convention on Human Rights, instituted proceedings against Norway before the European Court of Human Rights.[40] The case is one of a number concerning the climate emergency currently before the Court. It remains to be seen how the Court will deal with such cases.[41] Finally, the divergence between current Norwegian government policy and the fact that Norway's sovereign wealth fund is in the course of

[36] European Commission, *A Stronger EU Engagement for a Peaceful, Sustainable and Prosperous Arctic* p. 10, JOIN (2021) 27, 13.10.21, <https://eeas.europa.eu/sites/default/files/2_en_act_part1_v7.pdf>.
[37] SEI, IISD, ODI, E3G and UNEP, *The Production Gap Report 2021* (2021) pp. 12–23 and 49, <https://www.unep.org/resources/emissions-gap-report-2021?gclid=EAIaIQobChMI7bWFvs3w-QIVz-vtCh1jEwR6EAAYASAAEgKLJfD_BwE>.
[38] In 2021, these and other like-minded countries established the Beyond Oil and Gas Alliance. *See further* <www.beyondoilandgasalliance.com>. Associate members of the Alliance, which include New Zealand and Portugal, have taken 'significant concrete steps to reduce production of oil and gas'; while Friends of the Alliance, which include Finland, Italy and Luxembourg, have agreed to 'facilitate appropriate measures' to align such production with the objectives of the Paris Agreement. As can be seen, Norway is out of step with most of its fellow Nordic States.
[39] *Natur og ungdom et al.* v. *Staten v/Olje- og energidepartmentet*, Judgment of 22 December 2020, HR-2020-2472-P, <www.domstol.no/globalassets/upload/hret/avgjorelser/2020/desember-2020/hr-2020-2472-p.pdf>.
[40] Application 34068/21, *Greenpeace Nordic and Others* v. *Norway*, <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-214943%22]}>. *See also* <www.greenpeace.org/static/planet4-norway-stateless/2021/06/0392a3c0-people-vs.-arctic-oil-%E2%80%93-application-to-the-ecthr-%E2%80%93-for-distribution_skjult-innhold.pdf>.
[41] Further on such cases, see H. Keller and C. Heri, 'The Future is Now: Climate Cases before the ECtHR' *Nordic Journal of Human Rights*, published online 27 April 2022, <https://www.tandfonline.com/doi/full/10.1080/18918131.2022.2064074>.

divesting from certain fossil fuel companies may become increasingly embarrassing for the government, which sets the fund's investment policy.[42]

### 3. The Exploitation of Snow Crab[43]

A second issue that has given rise to dispute over the scope of the Svalbard Treaty offshore is the catching of snow crabs. The latter is not a species that is native to the Barents Sea. It was first detected there by Russian scientists in 1996. Since then, snow crabs have spread westwards and northwards, including to the seabed around Svalbard. Commercial fishing for snow crab began around 2013, not only by Norwegian and Russian vessels but also by a few vessels from States outside the Barents Sea, mainly Latvia, Lithuania and Spain (all members of the EU). Initially, EU vessels focussed their efforts on the so-called 'Loophole', an enclave of high seas in the central Barents Sea but the seabed of which is part of the continental shelves of Norway and Russia. In 2015, Norway and Russia, which had previously treated snow crabs as a fishery resource, agreed that they were a 'sedentary species' within the meaning of Article 77(4) of UNCLOS, and therefore a continental shelf resource subject to the sovereign rights of the coastal State. That decision seems justified on the basis of the snow crab's biological characteristics, reflects the practice of other States where snow crabs are found, and has been considered correct by the Norwegian Supreme Court.[44]

The decision that snow crabs were a continental shelf resource put an end to the catching of snow crabs by EU vessels in the Loophole. Instead, they switched their activities to Svalbard's continental shelf. Their view was that the Svalbard Treaty applied there and

[42] SEI et al., *supra* note 37, 49.
[43] The factual information in this section is largely based on the *North Star* case, *supra* note 5; *I and SIA North Star Ltd* v. *Public Prosecution Authority*, HR-2019-282-S (discussed below), English translation at <https://lovdata.no/dokument/HRENG/avgjorelse/hr-2019-282-s-eng>, visited on 8 October 2021; and the articles referred to in the following footnotes. The snow crab dispute has generated a considerable literature.
[44] *North Star* case, *supra* note 43, paras. 45–58.

that they therefore had the same right to catch snow crabs as Norwegian vessels. However, in December 2014 Norway adopted a regulation under which, with effect from the beginning of 2015, snow crabs could only be caught under licence: the granting of such licences was limited to Norwegian nationals.[45] EU vessels initially ignored that regulation and continued to fish for snow crabs around Svalbard. However, after a Latvian vessel, the *Senator*, was arrested in January 2017 and convicted of a breach of the regulation,[46] fishing for snow crabs around Svalbard by EU vessels more or less ceased.

Since then, the EU (and Latvia) have continued to assert that the Svalbard Treaty applies to the Svalbard's continental shelf and that Norway's prohibition on the catching of snow crabs there by vessels from other States parties to the Treaty is a breach of the equal rights provisions of the Treaty.[47] The EU has given effect to that view by providing in its annual 'fishing opportunities' regulations adopted since 2017 that 20 EU vessels (including 11 from Latvia) may fish under licence for snow crabs around Svalbard each year.[48] The number of licences was determined so as "to ensure that exploitation of snow crab within the area of Svalbard is made consistent with such non-discriminatory management rules as may be set out by Norway".[49] The regulations also state that these EU measures are "without prejudice to the rights and obligations deriving from" the Svalbard Treaty. However, the licences have apparently not been utilised since the arrest of the *Senator* in January 2017.

To date, the dispute over snow crab has been framed in terms of whether the Svalbard Treaty, and in particular its equal treatment provisions, apply to the continental shelf around

[45] Reg. No. 1836 of 19 December 2014 prohibiting the catching of snow crabs, <https://lovdata.no/dokument/SF/forskrift/2014-12-19-1836/%C2%A73#%C2%A73>. Challenges to the legality of the regulation by the Latvian company, North Star, have been rejected by both the civil and criminal courts in Norway: *see* the cases, *supra* notes 5 and 43.
[46] The conviction was upheld on appeal by the Norwegian Supreme Court in the *North Star* case, *supra* note 43.
[47] *See*, *e.g.*, the EU's *notes verbales* to Norway of October 2016 and February 2017, referred to in EU Reg. 2018/120, recital 37, OJ 2018 L27/1.
[48] See originally EU Reg. 2017/127, Annex III, OJ 2017 L24/1; and, most recently, Reg. 2022/109, Annex VA, OJ 2022 L21/1.
[49] Reg. 2017/127, *supra* note 48, recital 35. There is an equivalent recital in later Regs. (recital 43 in Reg. 2022/109, *supra* note 48).

Svalbard. In those terms, the dispute also has obvious implications for the exploration and exploitation of oil and gas around Svalbard. It is thus not surprising that attempts to settle the dispute by negotiation have failed, and that to date the dispute remains unresolved. However, the dispute could be resolved without having to determine whether the Treaty applies to Svalbard's continental shelf if snow crabs were categorised as an alien or invasive species.

There is uncertainty as to whether snow crab is an alien species as far as Norwegian waters are concerned. In 2018, Norway's Species Data Bank (*Artsdatabanken*) concluded that snow crabs were an alien species and a "very high risk" ("*svært høy risiko*") to Svalbard's marine environment.[50] At that time there was uncertainty as to how snow crabs had entered the Barents Sea. One possibility was that they were introduced through discharges of ships' ballast water; another was that they had migrated naturally over time westwards from the Bering Sea along the north coast of Russia to the Barents Sea.[51] A note added to the website of the Species Data Bank at some point between visits in November 2021 and August 2022 states that recent (apparently so far unpublished) research,[52] based on genetic studies, suggests that snow crabs have naturally migrated to the Barents Sea and that therefore the species should no longer be regarded as 'alien' ('*fremmed*') in Norwegian waters. However, even if the snow crab is not technically an alien species, it is nevertheless a non-native species and has been described as an invasive species;[53] and it still remains a threat to the marine environment around Svalbard.

[50] Artsdatabanken, 'Snøkrabbe *Chionoecetes opilio*', <https://artsdatabanken.no/fremmedarter/2018/S/2>.
[51] T. Henriksen, 'Snow Crab in the Barents Sea: Managing a Non-Native Species in Disputed Waters', 11 *Arctic Review on Law and Politics* (2020) p. 110.
[52] The research is described as 'submitted'.
[53] J. H. Sundet and S. Bakanev, 'Snow Crab (Chionoecetes Opilio): A New Invasive Crab Species becoming an Important Player in the Barents Sea Ecosystem', ICES document CM 2014/F:04, <https://www.ices.dk/sites/pub/CM%20Doccuments/CM-2014/Theme%20Session%20F%20contributions/F0414.pdf>. *See also* University of Oslo Centre for Ecological and Evolutionary Synthesis, 'EISA: Ecology and Management of Invasive Snow Crab', <https://www.mn.uio.no/cees/english/research/projects/461626/>, which describes a research project that was due to be completed after this article was submitted for publication.

There are three treaties containing obligations relating to alien/non-native/invasive species that are potentially relevant. Both Norway and the EU are parties to all three of them. The first treaty is UNCLOS, Article 196 of which provides that "States shall take all measures necessary to prevent, control and reduce . . . the intentional or accidental introduction of species, alien or new, to a particular part of the marine environment, which may cause significant and harmful changes thereto". Whether Article 196 is applicable depends on whether snow crabs have been introduced to the Barents Sea intentionally or accidentally, and on whether they may cause "significant and harmful changes" to the marine environment around Svalbard. While the latter condition is probably satisfied, the former is probably not. Snow crabs were not introduced intentionally into the Barents Sea, and it now appears that they were not introduced accidentally either. Thus, Article 196 is probably not applicable.

The second treaty containing obligations relating to alien species is the Convention on Biological Diversity (CBD).[54] Article 8(h) provides that "[e]ach Contracting Party shall, as far as possible and as appropriate . . . prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species". The Convention does not define 'alien species'. The Guiding Principles on Alien Species adopted by the Conference of the Parties to the CBD in 2002 define an 'alien species' as a species "*introduced* outside its natural past or present distribution" (emphasis added).[55] It is clear that 'introduction' is the crucial element as Guiding Principles 10 and 11 address the intentional and unintentional introduction of species. It follows, therefore, that if the latest research is correct, snow crabs in the Barents Sea are not an alien species for the purposes of the CBD.

[54] Framework Convention on Biological Diversity, 5 June 1992, *UNTS* Vol. 1760, p. 79.
[55] CBD, Guiding Principles on the Prevention, Introduction and Mitigation of Impacts of Alien Species that threaten Ecosystems, Habitats or Species, attached to Decision VI/23 of the Conference of the Parties to the Convention (2002), footnote 57 to the Principles, <https://www.cbd.int/decision/cop/?id=7197 >.

The third treaty that is potentially relevant is the European Convention on the Conservation of European Wildlife and Natural Habitats, 1979.[56] Article 11(2)(b) of the Convention provides that "[e]ach Contracting Party undertakes . . . to strictly control the introduction of non-native species". The Convention does not define the term 'non-native species'. Taken literally, it would appear to cover snow crabs in the Barents Sea. However, the Standing Committee of the Convention equates 'non-native species' with alien species, for which it adopts the CBD definition quoted above.[57] Thus, the European Wildlife Convention is also not relevant.

Although none of the three conventions discussed above applies to snow crabs in the Barents Sea as they are technically not an alien species, the fact remains that snow crabs are a non-native species and a serious threat to biodiversity in the waters and seabed around Svalbard. A precautionary approach, which incidentally is one of the CBD's guiding principles for addressing alien species,[58] would require Norway to take measures to control the spread of snow crabs and reduce their abundance around Svalbard. According to the Norwegian Institute of Marine Research, the only way to reduce the impact of snow crabs on the marine environment is through extensive harvesting.[59] However, the Norwegian government's policy has to date been very different. In 2017, it adopted a management plan whose main objective was the sustainable exploitation of snow crabs.[60] In practice, the total allowable catch (TAC) for snow crabs has been set well below the maximum sustainable yield, and catches have generally been less than the TAC, thus allowing snow crabs to

[56] European Convention on the Conservation of European Wildlife and Natural Habitats, 19 September 1979, *UNTS* Vol. 1284, p. 209.
[57] European Strategy on Invasive Alien Species, adopted by the Standing Committee to the Convention in 2003, pp. 6 and 9 respectively, <https://rm.coe.int/1680746529>.
[58] Guiding Principles, *supra* note 55, principle 1. On a precautionary approach to controlling snow crabs, *see also* H. S. Brøvig Hansen, 'Three Major Challenges in Managing Non-Native Sedentary Snow Crab (*Chionoecetes opilio*)', 71 *Marine Policy* (2016) p. 38.
[59] Henriksen, *supra* note 51, p. 113.
[60] *Ibid*., pp. 114–115

spread.[61] Norway's management plan also called for the effects of snow crabs on the marine ecosystem to be taken into account. However, that aspect of the plan had, at least as of 2020, not been put into effect.[62] That should now be done. Norway should also inform the EU that snow crabs are no longer an exploitable resource, but instead are the subject of a programme of control/eradication, with the consequence that the equal exploitation rights of the Treaty (if they apply to Svalbard's continental shelf) are no longer relevant. Norway could as a goodwill gesture, if it so wished, invite the EU to join in that programme, without prejudice to either party's position on the application of the Treaty.

There could, however, potentially be a very different outcome to the snow crab dispute. The Latvian company, North Star, having unsuccessfully challenged Norway's snow crab regulations before both Norway's civil and criminal courts,[63] together with the company's sole shareholder, Mr. Pildegovics, instituted arbitration proceedings against Norway under the International Convention for the Settlement of Investment Disputes in 2020. The claimants allege that Norway's refusal to allow North Star's vessels to fish for snow crabs caused substantial losses to the claimants' investments in Norwegian companies established in the north of Norway for the purposes of servicing vessels catching snow crabs and processing their catches, and that this amounted to a breach of the Norway-Latvia Bilateral Investment Treaty.[64] In their memorial the claimants argue, *inter alia*, that the Svalbard Treaty applies to Svalbard's continental shelf and that consequently Latvian vessels have the same right as Norwegian vessels to catch snow crabs there.[65] It is possible that the tribunal could rule on that question, although it has been suggested that that is unlikely.[66] If the

[61] See the claimants' memorial in *Pildegovics and North Star v. Norway*, *infra* note 65, paras. 78–90.
[62] Henriksen, *supra* note 51, pp. 114–115.
[63] *See supra* note 45.
[64] *Pildegovics and North Star v. Norway*, ICSID Case No. ARB/20/11. All the documents in the case may be found at <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/20/11>.
[65] Memorial of the Claimants, paras 630-673, <https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C8394/DS16254_En.pdf >.
[66] V. Schatz, 'Testing the Limits of Jurisdiction in Investor-State Arbitration in Svalbard's Waters: *Peteris Pildegovics and North Star v. Kingdom of Norway*', 12 *Arctic Review on Law and Politics* (2021), p. 167.

tribunal were to rule on the question, it is unclear what consequences (if any) its ruling, as that of a State-investor arbitral tribunal, would have for parties to the Svalbard Treaty (other than Norway) and their nationals. Whatever ruling the tribunal eventually makes, including the question of whether it has jurisdiction (which Norway disputes), its award is not expected before 2023 at the earliest.

## 4. Norway's Jurisdiction over Fisheries in Svalbard's Fishery Protection Zone

The third issue where the application offshore of the Svalbard Treaty has been in dispute concerns Norway's jurisdiction in respect of fisheries in the FPZ. This issue has three distinct aspects: (1) whether Norway has enforcement jurisdiction in the FPZ; (2) if so, whether Norway is required to exercise that jurisdiction in a way that does not discriminate between parties to the Svalbard Treaty; and (3) whether Norway is also required to exercise its legislative (or prescriptive) jurisdiction without discrimination.

In the past, a number of States parties to the Svalbard Treaty, including Iceland, Portugal, Russia and Spain, took the position that Norway had no enforcement jurisdiction in the FPZ.[67] Until around 2012, the EU was of the same view.[68] However, both the EU and nearly all the other States mentioned now accept that Norway does have fisheries enforcement jurisdiction in the FPZ.[69] The exception is Russia, which still appears to challenge Norway's enforcement jurisdiction from time to time. There is little legal justification for Russia's position. It is true that the Svalbard Treaty does not explicitly confer enforcement jurisdiction on Norway in respect of fisheries. However, if the Treaty applies in

[67] Churchill and Ulfstein (2010), *supra* note 18, pp. 584–87.
[68] Molenaar, *supra* note 18, p. 23.
[69] T. Pedersen, "Norsk Svalbardpolitikk: Utfordret av Naboer og Allierte", in Dahl and Jensen (eds.), *supra* note 18, p. 232. For the position of the EU, *see*, for example, the European Commission's letter to Latvia, *supra* note 17, para. 10.

the FPZ, enforcement jurisdiction may be implied from the legislative jurisdiction conferred on Norway by Article 2(2), which stipulates that "Norway shall be free to . . . take suitable [conservation] measures . . . [which] shall always be applicable equally to the nationals of all [Treaty parties]". That could be read as including enforcement jurisdiction,[70] especially as the distinction between legislative (or prescriptive) jurisdiction and enforcement jurisdiction was less clearly understood and articulated in 1920 when the Treaty was drafted than in contemporary international law. Moreover, it would be absurd if Norway could legislate for fisheries conservation but not enforce that legislation.

If the Svalbard Treaty does not apply in the FPZ, the basis for Norwegian enforcement jurisdiction there is paragraph 4 of the regulations establishing the FPZ.[71] Those regulations are based on the 1976 Law relating to the Economic Zone of Norway.[72] The international legal basis for that law was, at the time of its enactment, customary international law. Today, of course, it is UNCLOS. Any possible doubt that Norway has enforcement jurisdiction in the FPZ would be removed if Norway replaced the FPZ with an EEZ in accordance with Part V of UNCLOS, Article 73 of which explicitly confers enforcement jurisdiction in respect of fisheries on a coastal State in its EEZ. Should Russia (and possibly other parties) object that Norway has no right to establish an EEZ in respect of Svalbard (as they have done in the past), Norway could refute that objection by pointing out that it has extended Svalbard's territorial sea from three to 12 nm and established the outer limit of the continental shelf north of Svalbard beyond 200 nm in accordance with Articles 3 and 76 of UNCLOS, respectively, without objection from other States. It must therefore follow that it is entitled to establish an EEZ around Svalbard in accordance with UNCLOS.

[70] That was also the view of the Norwegian Supreme Court in the *North Star* case, *supra* note 43, para. 66.
[71] *Supra* note 10.
[72] *Supra* note 8.

A second question is whether Norway must exercise its fisheries enforcement jurisdiction in the FPZ in a way that does not discriminate between States parties to the Svalbard Treaty. The EU, in particular, has protested that Norway treats Russian vessels that have violated Norwegian law in the FPZ more leniently than the vessels of other parties in relation to reporting requirements, and that this is a breach of Article 2 of the Svalbard Treaty.[73] There is no doubt that this has happened.[74] Norway argues that reporting requirements do not affect the right to fish and therefore are not subject to the equal treatment provisions of the Svalbard Treaty,[75] a view emphatically rejected by the EU.[76]

There are a number of ways that this dispute could be resolved without having to determine whether the Svalbard Treaty applies to the FPZ. First, and most obviously, Norway could change its policy and apply its enforcement jurisdiction to Russian vessels in the same way as it does to other vessels, without conceding that Article 2 of the Treaty applies. That could come at some political cost, such as Russia threatening to end its co-operation over the management of Barents Sea fish stocks. As explained in more detail below, most stocks in the FPZ are managed as part of the shared stocks of the Barents Sea, which since the late 1970s have been managed by the Joint Norwegian-Russian Fisheries Commission.[77] The tense relations between NATO States (which include Norway) and Russia following the latter's invasion of Ukraine in 2022 may also make Norway reluctant to risk what it might regard as an unnecessary provocation by changing its enforcement practice towards Russian vessels.

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[73] EU *Note Verbale* No. 08/21, *supra* note 17, p. 6. The EU has also complained that Norwegian reporting requirements introduced in 2020 discriminate between vessels from the EU and vessels from the Faroe Islands, Iceland and Norway: *see* EU *Note Verbale* No. 02/21 to Norway of 26 February 2021, p.3, <https://ec.europa.eu/oceans-and-fisheries/system/files/2021-07/2021-02-26-Note-verbale_en.pdf>.
[74] For details, *see* Churchill and Ulfstein (2010), *supra* note 18, p. 587.
[75] Annex to Norway's *Note Verbale* of 4 May 2021, supra note 11, p. 9.
[76] EU Note Verbale No. 08/21, *supra* note 17, p. 4.
[77] The Joint Commission was established by the Norway-USSR Agreement on Co-operation in the Fishing Industry, 1975, *UNTS* Vol. 983, p. 7.

Alternatively, if Norway should prefer not to change the way in which it enforces its legislation against Russian vessels fishing in the FPZ, it could argue that its different treatment was justified by the fact that Russia is a co-manager of stocks in the FPZ, rather than simply arguing that the Svalbard Treaty does not apply, as it currently does. The Norwegian Supreme Court has adopted a somewhat similar argument, holding that Norway's treatment of Russian vessels was justified because the quotas allocated to Russia related to the whole of the Barents Sea, not just to the FPZ.[78] A possible flaw with such an argument is that Norway exercises enforcement jurisdiction in respect of Norwegian vessels in the FPZ in the same way as it does for other non-Russian vessels, and therefore more strictly than in respect of Russian vessels.

Turning to the third question, whether Norway is required to exercise its legislative jurisdiction within the FPZ without discriminating between parties to the Svalbard Treaty, this did not really become a matter of dispute until 2021. From the establishment of the FPZ in 1977 until 1985, Norway applied only non-quantitative measures in the FPZ, such as closed seasons and minimum mesh sizes, applicable equally to the vessels of all the parties to the Svalbard Treaty. In 1986, it introduced a system of quotas for several species, including cod. The basis for allocating quotas between Svalbard Treaty parties was past catches, the reference period being 1967–1976,[79] i.e. the decade before the establishment of the FPZ. Norway argued that that was in accordance with the equal rights principle of Article 2 of the Treaty, but without accepting that the Treaty applied. Norway's principle of allocation was broadly accepted by the other Treaty parties, especially by those with an interest in the FPZ. As far as the EU is concerned, the principal third party with a cod quota in the FPZ, it has been suggested that in 1986 there was an agreement to disagree between the EU and Norway

[78] *A, B and C* v. *Public Prosecution Authority*, Rt-2006-1496.
[79] *Note Verbale* of 8 February 2021 from the Norwegian Ministry of Foreign Affairs to the European Union, p. 3, <https://www.regjeringen.no/contentassets/83930993ec23456092199fcc9ed9de51/note-til-eu-torsk.pdf>.

under which the EU unilaterally limited its fishing in the FPZ to historic levels, while Norway refrained from seeking compensatory catches in EU waters as a quid pro quo for allowing EU fishing in the FPZ. In practice Norway set a quota for EU vessels, while the EU set its own quota for its vessels, which happened to be identical. That was not a coincidence.[80] This practice functioned without significant problems until the end of 2020.

At the beginning of 2021, the United Kingdom (UK) ceased to be subject to the EU's Common Fisheries Policy with the expiry of the transitional period that followed its withdrawal from the EU in January 2020. For 2021, Norway set a quota for cod in the FPZ for the EU (excluding the UK) of 17, 885 tonnes and a quota for the UK of 5,500 tonnes.[81] Together, those quotas equated to about 2.7 per cent of the of the total allowable catch (TAC) set by the Joint Norwegian-Russian Fishery Commission for cod stocks in the whole of the Barents Sea for 2021. That compared with an EU share (including the UK) of 3.77 per cent of the TAC in previous years. Norway allocated the resulting difference equally between itself and Russia.[82] It explained that the EU's share of the TAC in 2021 was based on catches by EU vessels (excluding those from the UK, which took nearly half the EU catch) during the 1967–1976 reference period.[83] The EU strongly objected to the reduction in its share of the TAC, claiming that it amounted to a breach of Article 2 of the Svalbard Treaty because Norwegian and Russian vessels fishing in the FPZ were not subject to any limitation.[84] In

[80] T. Bjørndal, T. Foss, G. R. Munro and M. Schou, 'Brexit and Consequences for Quota Sharing in the Barents Sea Cod Fishery', 131 *Marine Policy* (2021), article 104622.
[81] Regulation of 18 December 2020 on Fishing for Cod in Svalbard's Fishery Protection Zone during 2021, <https://lovdata.no/dokument/LTI/forskrift/2020-12-18-3032>. A number of EU and UK fishing companies challenged the validity of this regulation in proceedings instituted against the Norwegian Ministry of Trade, Industry and Fisheries before Oslo District Court in July 2021, arguing that the regulation breached the equal treatment provisions of the Svalbard Treaty. However, the companies withdrew their action following the reaching of the agreed understanding between the EU and Norway in April 2022, discussed *infra* note 93 et seq.: information from Erik Molenaar (on file with the author).
[82] Bjørndal et al., *supra* note 80.
[83] Norway's *Note Verbale* of 8 February 2021, *supra* note 79, p. 3; and Annex to Norway's *Note Verbale* of 4 May 2021, *supra* note 11, pp. 5-7.
[84] EU *Note Verbale* 02/21, *supra* note 73, pp. 2–3. The EU also argued that Barents Sea cod is a straddling stock in relation to which Norway has failed to co-operate as required by Art. 63(2) of UNCLOS: *see ibid*., p. 1; and EU *Note Verbale* No. 08/21, *supra* note 17, pp. 5–6.

response, Norway explained that Norwegian and Russian vessels received quotas for cod that covered the whole of the Barents Sea, including the FPZ.[85] Nevertheless, the EU marked its objection to the perceived reduction in its quota by unilaterally setting a quota for 2021 of 28,431 tonnes of cod for EU vessels fishing in the FPZ,[86] subsequently reduced in April 2021 to 24, 645 tonnes,[87] compared with Norway's quota for the EU of 17, 885 tonnes. Norway complained, with some justification, that the EU's action violated Norway's right under international law to be the sole regulator of fisheries in waters under its jurisdiction.[88] The EU's response to that was to assert that in the absence of fisheries management measures for the FPZ taken by Norway in compliance with the Svalbard Treaty, the EU was entitled to take measures applicable only to its vessels in order to avoid an absence of valid conservation measures in the FPZ.[89]

If there was discrimination in Norway's allocation of cod quotas in the FPZ for 2021, it would seem to be between the EU and the UK, rather than between the EU and Norway. If the UK's 2021 cod quota in the FPZ had been based on the 1967–1976 reference period, as the EU's quota apparently was, it should have received a quota in the region of 15,000 tonnes, rather than the 5,500 tonnes that it actually received. The Norwegian government does not appear to have given any public explanation for this discrepancy. However, at a meeting with the EU in June 2021, Norway explained that the UK's 2021 cod quota was based on a later, unspecified, reference period, compared with the 1967–1976 reference period used for the EU's quota.[90] Norway's treatment of the UK probably reflects the fact that UK catches in the FPZ declined significantly in the years following the 1967–1976

[85] Norway *Note Verbale* of 4 May 2021, p.2, <https://www.regjeringen.no/contentassets/83930993ec23456092199fcc9ed9de51/note-til-eu-torsk-og-snokrabbe.pdf>.
[86] EU Reg. 2021/92, Annex 1B, OJ 2021 L31/31.
[87] EU Reg. 2021/703, Annex 1B, OJ 2021 L146/1.
[88] Norway's *Note Verbale* of 8 February 2021, *supra* note 79, pp. 1–2; and Annex to Norway's *Note Verbale* of 4 May 2021, *supra* note 11, pp. 4–5.
[89] EU *Note Verbale* No. 08/21, *supra* note 17, p. 4.
[90] *Ibid*., p. 5

reference period as a result of the sharp reduction in its distant-water fishing fleet caused by the introduction of 200-mile fishing limits in the North Atlantic from the mid-1970s onwards.[91]

Despite the war of words between Norway and the EU during 2021,[92] there were signs at the beginning on 2022 that the dispute over cod quotas in the FPZ might be settled through negotiation. In its 2022 'fishing opportunities' regulation adopted towards the end of January 2022, the EU noted that as "discussions with Norway on equal and non-discriminatory access to Svalbard waters" for EU vessels fishing for cod "are ongoing and should be concluded in the beginning of 2022, it is appropriate that the Union establishes for the first quarter of 2022 a provisional Union quota": that provisional quota was 4,500 tonnes, which took "into account the seasonality of the fishery".[93] That was the same as the quota that Norway had earlier set for EU vessels for the same period.[94]

The 'ongoing discussions' referred to in the EU regulation successfully concluded in April 2022 with an agreed understanding between the EU and Norway on arrangements for cod for 2022 and the following years.[95] According to the understanding, which is without prejudice to each party's interpretation of the Svalbard Treaty, Norway will set a cod quota for the EU in ICES Areas 1 and 2 (which include the FPZ) "calculated as 2.8274 per cent of the reference TAC for the relevant year". For 2022, that equates to 19,636 tonnes. Norway will continue to set such a quota for future years "on the basis that the EU carries out the provisions of this understanding". The understanding is similar to one that Norway reached

[91] Bjørndal et al., *supra* note 80.
[92] *See* their various *Notes Verbales*, *supra* notes 11, 17, 73, 79 and 85.
[93] EU Reg. 2022/109, OJ 2022 L21/1, recital 44. The substantive provision is in Annex IB (OJ p. 104).
[94] Regulation of 21 December 2021 on Fishing for Cod in Svalbard's Fishery Protection Zone during 2022, <https://lovdata.no/dokument/SF/forskrift/2021-12-21-3788>.
[95] Ad hoc Exploratory Consultations in relation to Fisheries in ICES Areas 1 and 2, 28 April 2022, <https://www.regjeringen.no/contentassets/70a18c8e8d7542558dbffdc76e95ca55/ad-hoc-exploratory-consultations-in-relation-to-the-fisheries-in-ices-areas-1-and-2.pdf>.

with the UK in December 2021.[96] Under that understanding, the UK's share of the cod TAC is 0.9432 per cent, equating to 6,550 tonnes in 2022. Together, the two percentages come to 3.7706 per cent. That compares with figures of 2.7 per cent for 2021 and 3.77 per cent for 2020 and earlier years. There is no indication in the two understandings as to how the new percentages of the cod TAC have been calculated. However, the EU percentage is almost exactly 75 per cent of the combined EU-UK percentage. In the agreement concluded between the EU and the UK following the latter's departure from the EU, the parties agreed that they would divide the previous EU cod quota in the FPZ between them in the ratio 75:25.[97] Although that agreement is not binding on it, Norway appears to have gone along with it in the two understandings. As to why the combined EU-UK share of the cod TAC amounts to 3.77 per cent, that appears to be a pragmatic return to the *status quo ante*.

The EU-Norway understanding also states that the parties "bear in mind Norway's rights and duties as a coastal State to regulate, in accordance with international law, the conservation and management of marine living resources in areas where it has sovereign rights, including in the Fishery Protection Zone around Svalbard". That is something that the EU seemingly did not accept during the war of words of 2021.[98]

To the outsider, the EU-Norway understanding appears to be a very reasonable compromise between the parties, putting an end to what was becoming an increasingly bitter dispute, and, despite its modest title, a solid basis for future co-operation over fisheries in the FPZ. Indeed, the final sentence of the understanding reads: "The European Union and Norway are looking forward to continuing and further strengthening their mutually beneficial cooperation". The shared understandings between Norway and the EU and between Norway

[96] UK-Norway Arrangement, 20 December 2021, <https://www.regjeringen.no/contentassets/8e674a19756e44518c4641287b28e4db/uk-norway-arrangement-20.12.2021-fpz.pdf>.
[97] Trade and Cooperation Agreement between the European Union and the United Kingdom 2020, Annex 36, Table E, OJ 2021 L149/10.
[98] See text at *supra* note 88.

and the UK have put an end, at least for the time being, to the dispute over whether Norway is required to exercise its fisheries jurisdiction in the FPZ without discriminating between the parties to the Svalbard Treaty. Moreover, the understandings do so without determining whether the Treaty applies in the FPZ. In that, they encapsulate the approach suggested in this paper for resolving all the disputes discussed above concerning Svalbard's continental shelf and FPZ.

## 5. Conclusions

There is a sharp difference of view between Norway and some other States parties to the Svalbard Treaty as to whether the Treaty applies to the continental shelf and FPZ (or possible future EEZ) of Svalbard. Each side's position is supported by plausible legal arguments. However, there seems little likelihood in the foreseeable future of an authoritative determination of this matter by an independent third party.

The aim of this article has been to suggest how the principal issues that are impacted in practice by this difference of legal view could all be resolved without having to determine whether the Svalbard Treaty applies to maritime zones beyond the territorial sea. In the case of exploration for, and exploitation of, oil and gas on Svalbard's continental shelf, it is argued that the climate emergency demands that Norway introduces a moratorium on any future such activity. That should be done, not just for Svalbard's continental shelf, but for the whole of Norway's continental shelf. As regards the catching of snow crabs on Svalbard's continental shelf, Norway should treat them as an invasive non-native species that are a serious threat to biodiversity in the waters around Svalbard. Thus, rather than currently setting permitted catches of snow crabs at sustainable levels and reserving that catch to Norwegian vessels, Norway should fish down the number of snow crabs, if necessary with the assistance of

vessels from other States, to a level where they are no longer a (potential) threat. The final issue concerns Norway's fisheries jurisdiction in the FPZ. If any other States parties continue to assert that that the Svalbard Treaty does not endow Norway with enforcement jurisdiction in the FPZ, Norway could settle the matter once and for all by replacing the FPZ with an EEZ. That would leave no doubt that Norway had enforcement jurisdiction over foreign vessels fishing in that zone. In addition, Norway should respond to complaints that it currently treats Russian vessels alleged to have violated its fisheries regulations in the FPZ more leniently than the vessels of other States parties, either by ending such difference of treatment or by arguing that its current practice is justified because Russia is a co-manager of Barents Sea fish stocks, rather than simply arguing that the Svalbard Treaty does not apply, as it currently does.

These suggestions, if adopted, would resolve ongoing disputes in the waters around Svalbard without prejudicing any party's views as to the extent of the application of the Svalbard Treaty offshore. The suggested solutions are underpinned by strong arguments of law and policy. They offer a constructive, realistic and practical alternative to the interminable and unresolved debate as to whether the Svalbard Treaty applies beyond the territorial sea.