# OSLO DISTRICT COURT

**JUDGMENT**

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| **Rendered:** | 5 July 2021 in Oslo District Court |
| **Case no.:** | 20-149327TVI-TOSL/01 |
| **Presiding Judge:** | District Court Judge Audgunn Syse |
| **Subject matter of the case:** | Invalidity action – Rejection of application for exemption to harvest snow crab in Svalbard |

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| SIA North STAR Ltd | Attorney Hallvard Østgård<br>Attorney Mads Andenæs |
| **versus** | |
| Norwegian Ministry of Trade, Industry and Fisheries | Attorney Marius Kjelstrup Emberland |

**No restrictions on the right to public disclosure.**

**JUDGMENT**

**Subject matter of the case**

The case concerns the validity of a decision handed down by the Norwegian Ministry of Trade, Industry and Fisheries on 14 November 2019. In the decision, the Ministry upheld the decision by the Norwegian Directorate of Fisheries of 13 May 2019, which rejected an application from the plaintiff, SIA North Star Ltd, for an exemption to harvest snow crab on the Norwegian continental shelf with its three vessels: Senator, Solvita and Saldus.

The case also concerns the validity of Section 3 of Regulations no. 1836 of 12 December 2014 relating to the prohibition against harvesting of snow crab (Snow Crab Regulations).

For both claims, the plaintiff has asserted invalidity on the grounds of error in the application of the law. It was asserted that the decision and Section 3 of the Regulations, which entails that only Norwegian vessels can harvest snow crab on the continental shelf, are in violation of Articles 2 and 3 of the Svalbard Treaty.

A key legal issue is whether or not Articles 2 and 3 of the Svalbard Treaty apply on the Norwegian continental shelf.

**Presentation of the case**

SIA North Star Ltd is a Latvian shipping company that engages/engaged in the harvesting of snow crab in the Barents Sea. The shipping company owns three vessels that are equipped for harvesting snow crab: Senator, Solvita and Saldus. According to the plaintiff, the shipping company started harvesting snow crab in international waters east of the 200 nautical mile zone around Svalbard in 2014. As the snow crab migrated towards the west, the harvesting activities moved in that direction.

In January 2017, the vessel Senator caught snow crab on the Norwegian continental shelf in the Fisheries Protection Zone around Svalbard. The vessel had a permit from the EU, represented by Latvian authorities, but not from Norwegian authorities. Senator was arrested by the Norwegian Coast Guard and criminal charges were brought against the shipping company and Senator's Russian captain. The Court of Appeal convicted the plaintiff and captain for violation of Section 61 of the Norwegian Marine Resources Act, cf. Section 4, cf. Section 16, cf. Section 5 of the Regulations relating to harvesting of snow crab, cf. Section 1. The criminal case was concluded when a Grand Chamber of the Supreme Court of Norway heard the case and dismissed the appeals in the judgment of 14 February 2019. In the judgment, the Supreme Court considered whether the snow crab is a sedentary species and concluded that it is. It was not necessary for the Supreme Court to consider whether or not the Svalbard Treaty applies on the continental shelf.

On 28 February 2019, SIA North Star Ltd applied for an exemption from the prohibition against harvesting snow crab for its three vessels (Senator, Solvita and Saldus). The application specifically applied to "dispensation to harvest the snow crab on *Norwegian continental shelf*" (italicized by the court). The shipping company sent a reminder on 22 March 2019. The Norwegian Directorate of Fisheries rejected the application in its decision of 13 May 2019.

Attorney Hallvard Østgård appealed the decision on behalf of the plaintiff on 31 May 2019 and a reminder was sent on 26 August 2019.

The Ministry of Trade, Industry and Fisheries dismissed the appeal in a decision of 14 November 2019. The following grounds were given for the decision:

> Pursuant to Article 77 of the United Nations Convention on the Law of the Sea, as a coastal state, Norway has an exclusive right to exploit snow crab on the Norwegian continental shelf. The wording of the Svalbard Treaty, as well as its negotiating history and general rules relating to the interpretation of treaties clearly indicate that the rules relating to equal rights in the treaty only apply in territorial waters, i.e. within 12 nautical miles.
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> The Ministry does not agree with the appellant's assertion that snow crab is not a sedentary species. Our view is supported by the Supreme Court in Rt. 2019, page 282, and we consider it sufficient to make reference to the discussions of the Supreme Court in paragraphs 45 to 58 of the judgment. In the decision Rt. 2019, page 272, which is cited in the appeal, the Supreme Court did not consider whether the treaty applies on the continental shelf nor did it consider the general scope of the treaty.
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> Section 1 of the Snow Crab Regulations states that it is "prohibited for Norwegian and foreign vessels to harvest snow crab in the Norwegian territorial sea and internal waters, and on the Norwegian continental shelf."
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> On the date the shipping company submitted their application, the harvesting of snow crab was regulated by an exemption scheme in Section 2 of the Snow Crab Regulations which entailed that a vessel could be granted an exemption from the prohibition against harvesting snow crab if a commercial licence was issued pursuant to the Norwegian Participation Act to harvest outside of territorial waters.
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> The exemption scheme in Section 2 of the Snow Crab Regulations was repealed effective from 1 July 2019. It is still prohibited to harvest snow crab, however the exemption scheme has been replaced by a requirement for a license to engage in the harvesting of snow crab pursuant to Regulations No. 1157 of 13 October 2006 relating to special permits to conduct certain forms of fishing and hunting (Licencing Regulations). The rules relating to the harvesting of snow crab otherwise remained unchanged, and the purpose of the amendment was to include the harvesting of snow crab in more traditional forms for regulating fishing and hunting.
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> The shipping company SIA North Star applied for an exemption before the rules were amended, however since vessels with an exemption pursuant to the Snow Crab Regulations must still apply for a snow crab licence in accordance with the Licencing Regulations, it is now natural to consider the application in relation to the conditions in the Licencing Regulations. This is of no significance to the outcome of this case.
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> Section 6-1 of the Licencing Regulations states that the Norwegian Directorate of Fisheries can issue licenses for the harvesting of snow crab in the Barents Sea. The conditions for being issued a license are stipulated in Section 6-2.
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> Pursuant to Section 6-2, subsection 1, the vessel must be registered in the Norwegian Register of Fishing Vessels and be suitable and equipped for the harvesting of snow crab. Subsection 2 also states that "a snow crab license can only be granted to vessels that have a different basis for operations in the form of a special permit or participation access rights."
>
> None of the three vessels (Senator, Solvita and Saldus) satisfy the conditions in Section 6-2 and can therefore not be issued a licence pursuant to Section 6-1 of the Licencing

Regulations, cf. Section 6-2. Section 6-2 lists certain other factors that may also result in a snow crab license being issued, however none of these are applicable in this case.

Sia North Star Ltd issued a writ of summons to the court on 19 October 2020, claiming that the decision by the Ministry of Trade, Industry and Fisheries of 14 November 2019 was invalid. The statement of claim has since been amended, and the court makes reference to what is stated regarding this in the Court Record and below under the "court's assessment". The State submitted a timely defence on 11 December 2020, claiming that the court find in the State's favour.

The main hearing was held on 21 and 22 June 2021. Representative for the plaintiff (Peteris Pildegovics) attended via videolink from Latvia and testified in English. The plaintiff was represented by attorney Hallvard Østgård and assistant counsel Mads Andenæs.

The State was represented by attorney Marius Emberland. Attending on behalf of the State were Kristian Jervell (Deputy Director General of the Legal Department of the Ministry of Foreign Affairs), Vidar Landmark (Director General of the Ministry of Trade, Industry and Fisheries), Ingrid Vikanes (Special Advisor at the Ministry of Trade, Industry and Fisheries) and Kristina Kvamme Nygård (Senior Advisor at the Ministry of Foreign Affairs). Jervell testified to the court.

Reference is otherwise made to the Court Record.

**The plaintiff's grounds for the prayer for relief**

The decision that does not grant the plaintiff the right to harvest snow crab on the continental shelf and Section 3 of the Snow Crab Regulations are invalid because both the decision and the Regulations contravene the principle of equal rights in Articles 2 and 3 of the Svalbard Treaty. The Snow Crab Regulations discriminate against foreign vessel by exclusively permitting Norwegian vessels to harvest snow crab on the continental shelf. There is no doubt that the exploitation of snow crab is not in compliance with the principle of equal rights in the Treaty if this is applied to the continental shelf.

Pursuant to Articles 31-33 of the Vienna Convention on the Law of Treaties (Vienna Convention), the wording must be used as the starting point when interpreting the relevant articles in the Svalbard Treaty. The English text uses the term "territorial waters" and the French text uses the term "eaux territoriales". The English term used in international law is "territorial sea" and the French term is "mer territoriale". "Territorial waters", which is the term used in Article 2 of the Svalbard Treaty, is something different to "territorial seas".

It is asserted that "territorial waters" in the Svalbard Treaty extend outside of the border of the "territorial sea" and include the territorial sea, exclusive economic zone up to 200 nautical miles and the continental shelf, which is what this case applies to. Among other things, this is supported by the International Court of Justice's (ICJ) decision in *El Salvador/Honduras (1992*). That judgment, which refers to a judgment from 1917, clearly states that the term "territorial waters" in 1917 was not what is now considered to be "territorial sea". The Central American court established in 1917 that "territorial waters" extended outside the then border for the "territorial sea", which was three nautical miles at that time. Therefore, "territorial waters" is not synonymous with what was then and is now referred to as "territorial sea". With further reference to the judgment from 1917, the judgment explicitly states that "territorial waters" *meant maritime zones that a state lays claim to by virtue of its sovereignty*, cf. "á tiltre de souverain". Among other things, this includes the continental shelf, fisheries protection zone, and economic zone up to 200 nautical miles.

With regard to the understanding of "territorial waters", which is the term used in the Svalbard Treaty, the term must be interpreted "in accordance with the intention of the parties at the time of its conclusion", i.e. upon its conclusion in 1920, cf. ICJ's decision in *Namibia* from 1971.

It is no coincidence that the Svalbard Treaty uses the term "territorial waters" and not "territorial sea". The Norwegian delegation that negotiated the Svalbard Treaty deliberately used "territorial waters" precisely because this was intended to be something different to the so-called territorial sea. The Norwegian delegation had significant knowledge about "mer territorial/territorial sea" at that point in time, including through Doctor of Laws Arnold Ræstad from the Ministry of Foreign Affairs. Ræstad used the term "mer territorial" in the texts he wrote at that time. If, when they negotiated the treaty, the Norwegian authorities had intended for this to be restricted to internal waters and the territorial sea, it is incomprehensible as to why this was not directly clarified in the treaty. The wording "territorial waters" clearly states that it is not restricted to the territorial sea/internal waters, but rather includes all maritime areas Norway lays claim to by virtue of Norway's sovereignty over Svalbard.

It is further asserted that it is of no significance that the continental shelf and exclusive economic zones did not exist in 1920 when the Svalbard Treaty was adopted. The fact that the parties to the treaty did not consider circumstances that would not occur until after the treaty had been concluded does not mean that there must be a restrictive interpretation of the wording. It must be subject to an evolutionary interpretation. The term "territorial waters" is a general term that encompasses the evolution that takes place over time. Reference is made to *Iron Rhine (Belgium/Netherlands)* (2004), paragraph 80. It is asserted that the parties had the future in mind by the very fact that they used the term "territorial waters" and not "territorial sea".

The wording must be interpreted in light of the other interpretive factors stipulated in Article 31 of the Vienna Convention, including "its objective and purpose". The terms "territorial waters" and "waters" were used because they do not represent a fixed size. The purpose of the Svalbard Treaty was to achieve a peaceful development, with equal rights for all of the citizens of the parties to the treaty, cf. the preamble and Articles 1, 2 and 3 of the Svalbard Treaty. The preamble underpins the notion that all citizens shall have equal opportunities to exploit Svalbard's resources for commercial purposes – and that no resources should be reserved for Norway alone. This is confirmed in Proposition no. 36 to the Storting (Norwegian Parliament) from 1924. There are no grounds for a restrictive interpretation of the wording. This principle only applies when a state relinquishes sovereignty on certain conditions.

Subsequent state practice supports this purpose and that "territorial waters" was intended to include any area outside of land territory. There are no states that support the Norwegian view of the scope of the Svalbard Treaty. There has also been "equal treatment" since the protection zone was introduced, which means that Norway has also accepted that the Svalbard Treaty applies within the 200 nautical mile zone. Norway's "protest" is equivalent to a "paper protest" and does not carry the same weight as actual protests.

The proposition to the Storting from 1924 also states that, when the Svalbard Treaty was concluded, Norway accepted activities that extended beyond the territorial sea and "further and further into the high seas". This indicates that commercial activities on the high seas were part of the reason for Articles 2 and 3 of the Svalbard Treaty and that by using "territorial waters" the parties to the treaty meant any area outside of land territory that Norway could lay claim to by virtue of its sovereignty over Svalbard. The preparatory works to the treaty, which are only available in French, specified that the head of the Norwegian delegation (Wedel Jarlsberg) stated that Svalbard should be open to

everyone. Both the proposition to the Storting and preparatory works to the treaty are strong sources because they express Norway's understanding of the treaty when it was signed and Norwegian recognition of Norway's obligations.

*If the court should find that the Svalbard Treaty applies on the continental shelf*, it is still disputed that the decision is valid due to Norway having a system of sector monism.

The Snow Crab Regulations are founded on the Marine Resources Act and Section 6 of the Marine Resources Act states that this applies with the restrictions stipulated in international agreements and international law in general. This is general sector monism. It is otherwise asserted that the Svalbard Treaty applies independently of Section 6 of the Marine Resources Act due to the unique nature of the treaty.

It is specifically stated in the wording of the Svalbard Treaty that the right to hunt and fish is granted to individual citizens. Both Article 2 and Article 3 of the Svalbard Treaty grant the citizens individual rights and these are easy to enforce. In paragraph 80 of its decision in HR-2019-282, the Supreme Court found that the exact same issue that this case gives rise to, i.e. the scope of the Svalbard Treaty, can be reviewed in a civil action. This was also tacitly accepted in Rt-1996-624. The Svalbard Treaty differs from all of the treaties Norway has signed both before and since 1920 and contains individual rights that are strongly enforceable. The Svalbard Treaty grants Norway sovereignty in return for the state being obligated to treat everyone equally.

In this instance, a judgment can be sought for violation of the treaty. If the position of the state is accepted, foreign citizens who are currently on Svalbard, including citizens from Thailand and Russia, will not be able to contest a decision to expel them if Norway decides to expel them on the grounds that, for example, they are from Thailand.

The decision also contravenes the provision relating to discrimination in Article 98 of the Constitution of Norway and the requirement for equal treatment laid down in this provision. The purpose of the constitutional provision is to provide an "overarching norm for protecting individual citizens in all government production of rules that infringe upon citizens' freedom of action." It does not state that the desire was to restrict this to Norwegian citizens. On the contrary, this was from a time when concepts such as human rights were of great importance in Norway and largely applied to non-Norwegian citizens, for example, internment of asylum seekers etc. The provision is part of the Constitution's human rights catalogue and forms the basis for declaratory judgments.

Both Article 98 of the Constitution and the Svalbard Treaty prohibit discrimination and express fundamental rights with a strong need for protection. The provisions in the Constitution and treaty together provide effective protection for the plaintiff and a judgment can be sought for this.

The conditions in Section 1-3 of the Dispute Act are satisfied in order for a judgment to be rendered that Section 3 of the Regulations contravenes the Svalbard Treaty. There is a "legal claim". If the court finds that the Regulations contravene the treaty, this may both provide grounds for a new application and for a claim for damages against the state. It is therefore of importance to the plaintiff's legal status, cf. Rt-2005-1104. The other conditions in Section 1-3 of the Dispute Act are also satisfied.

*In the alternative*, if the court should find that the Svalbard Treaty does not apply on the continental shelf, it is asserted that the decision is invalid because it does not have a legal basis. The Licencing Regulations, which grant permits to harvest snow crab, are founded on the Participation Act. Section 2 of the Participation Act specifies the actual scope of the Act and the Act exclusively applies to

"Norwegian vessels". Since the applicable legislation does not regulate the right of foreign vessels to harvest snow crab in Norway, the decision also has no legal basis. The Licencing Regulations cannot be included in the legal basis for the decision that is being examined, because the Regulations "cannot be given a scope that extends beyond the framework stipulated in the Act."

If the decision does not have a legal basis then this is a material defect in the contents of the decision which entails that the decision is automatically invalid.

**The plaintiff's prayer for relief**

In principal:

1. The decision by the Norwegian Directorate of Fisheries of 13 May 2019 and decision by the Ministry of Trade, Industry and Fisheries of 14 November 2019 are invalid.
2. Regulations 2014-12-12-1836 relating to the prohibition against harvesting of snow crab and the decisions of 13 May and 14 November 2019 are in violation of Article 98 of the Constitution of Norway and Articles 2 and 3 of the Svalbard Treaty.
3. The Ministry of Trade, Industry and Fisheries is ordered to pay Sia North Star Ltd's costs associated with the case within two weeks.

*In the alternative:*

1. The decision by the Norwegian Directorate of Fisheries of 13 May 2019 is invalid.
2. The decision by the Ministry of Trade, Industry and Fisheries of 14 November 2019 is invalid.
3. Regulations 2014-12-12-1836 relating to the prohibition against harvesting of snow crab is in violation of Articles 2 and 3 of the Svalbard Treaty.
4. Regulations 2014-12-12-1836 relating to the prohibition against harvesting of snow crab is in violation of Article 98 of the Constitution of Norway.
5. The decision of 13 May 2019 is in violation of Articles 2 and 3 of the Svalbard Treaty.
6. The decision of 14 November 2019 is in violation of Articles 2 and 3 of the Svalbard Treaty.
7. The decision of 13 May 2019 is in violation of Article 98 of the Constitution of Norway.
8. The decision of 14 November 2019 is in violation of Article 98 of the Constitution of Norway.
9. The Ministry of Trade, Industry and Fisheries is ordered to pay Sia North Star Ltd's costs associated with the case within two weeks.

*Further in the alternative:*

1. The decision by the Norwegian Directorate of Fisheries of 13 May 2019, the decision by the Ministry of Trade, Industry and Fisheries of 13 May 2019, and the decision by the Ministry of Trade, Industry and Fisheries in the appeal case of 14 November 2019 are invalid.
2. Section 3 of Regulations 2014-12-12-1836 relating to the prohibition against harvesting of snow crab is in violation of the Svalbard Treaty.

**The defendant's grounds for the prayer for relief**

The State asserts that both the decision of 14 November 2019 and the Regulations relating to the prohibition against harvesting of snow crab are valid.

*The following is asserted with regard to the plaintiff's claim no. 1 that the decision of 14 November 2019 is invalid:*

The decision was handed down pursuant to and in compliance with the rules of domestic law. The decision expresses the correct understanding and application of domestic law rules. The starting

point is that, pursuant to Norwegian law, Norwegian and foreign vessels are prohibited from harvesting snow crab, cf.

Section 1 of the Snow Crab Regulations. Section 6-2, subsection 1 of the Licencing Regulations states that a snow crab licence can only be issued if the vessel is "registered in the Norwegian Register of Fishing Vessels (letter a). Furthermore, subsection 2, first sentence states that a snow crab licence can only be issued for vessels "that have a different basis for operations in the form of a special permit or participation access rights." Section 13 of the Participation Act states that "there must be a commercial licence for a special permit to be granted." Section 5 of the Participation Act states that a commercial licence may only be granted to a party that is a Norwegian citizen. The plaintiff is not Norwegian and the plaintiff's vessels are not Norwegian pursuant to the Act. These are prerequisites for being able to be issued a licence to harvest snow crab on the Norwegian continental shelf and the decision is based on these prerequisites.

It is further asserted that Articles 2 and 3 of the Svalbard Treaty do not apply in this case. These provisions only apply for internal waters and territorial sea, within 12 nautical miles, and not in the area outside of this, which is where the plaintiff applied to harvest snow crab. This is an interpretation of the provisions in the treaty that is in accordance with the rules of customary international law for interpreting treaties.

It is established law that the rules of international law for interpreting treaties must be applied by Norwegian courts and the interpretation of Articles 2 and 3 of the Svalbard Treaty must take place in accordance with the general rule for interpretation in Article 31, subsection 1 of the Vienna Convention. The wording constitutes not only the starting point but also the framework for the interpretation, cf. "in accordance with the ordinary meaning to be given to the terms of the treaty". It is generally the "understanding from that time" which is the starting point for the interpretation, however an evolutionary approach can apply for specific types of words and expressions, cf. *Aegean Sea Continental Shelf*, ICJ Reports 1978, paragraph 77. In this instance it is of no significance as to the point in time that the interpretation is based on because both approaches support the State's view that the Svalbard Treaty does not apply outside of the territorial sea, including on the continental shelf.

It is asserted that, pursuant to established international law, the area referred to as "their territorial waters" in Articles 2 and 3 of the Svalbard Treaty is understood as being internal waters and territorial sea connected to the islands in the Svalbard archipelago. It does not refer to areas beyond this, including the continental shelf. The Norwegian territorial sea is measured from 12 nautical miles from the baseline in accordance with Section 2 of Act no. 57 of 27 June 2003 relating to Norway's territorial waters and contiguous zone and this also applies for Svalbard. This understanding of the term "territorial waters" follows from the wording of the treaty and is supported by the treaty's previous history and its design and system.

Article 2 and Article 3 refer to "the territories specified in Article 1" and "in their territorial waters". The geographical area that is specified in Article 1 of the Svalbard Treaty is restricted to the islands, i.e. land, in the Svalbard archipelago. The wording indicates that this is part of the state's territory and contrasts this with the maritime areas located outside territorial waters, including the continental shelf and the exclusive economic zone.

The general understanding pursuant to international law is that "territorial waters" include the so-called internal waters and the additional territorial sea that extends from the baseline and that it does not refer to areas beyond this, including the continental shelf. Article 3 of the United Nations

Convention on the Law of the Sea (UNCLOS), which also expresses customary international law, stipulates that coastal states can establish the breadth of their territorial sea up to a limit not exceeding 12 nautical miles, measured from the baselines. The Norwegian territorial sea is calculated at 12 nautical miles from the baselines in accordance with Section 2 of Act no. 57 of 27 June 2003 relating to Norway's territorial waters and contiguous zone, and this also applies for Svalbard, cf. Section 5. Pursuant to Article 76, subsection 1 of UNCLOS, the continental shelf is a specifically determined area that comprises the seabed and subsoil of the submarine areas that extend beyond the territorial sea. The authentic English version of the Convention states the following:

> *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.*

As a matter of form, it is noted that "territorial waters" also does not include other maritime areas that extend beyond the borders of the territorial sea, such as the contiguous zone (Article 33 of UNCLOS and Section 4 of the Territorial Waters Act) and the exclusive economic zone (Article 55 et seq of UNCLOS and Section 1 of Act no. 91 of 17 December 1976 relating to Norway's economic zone).

A normal linguistic understanding of "territorial waters"/"eaux territoriales" in connection with the creation of the Svalbard Treaty expresses the same understanding, which is specified in sources of internal law. Treaty practice at that time entailed a consistent understanding of territorial waters as being a specific and (in terms of scope) restricted maritime area. A number of conventions that were entered into around the time the Svalbard Treaty was created show that "territorial waters" was consistently used to denote internal waters and territorial sea. The same applies to other relevant international law practice from that time.

ICJ's judgment in *El Salvador/Honduras* (1992), which the plaintiff has cited to support its argument, does not suggest a different understanding of "territorial waters". The paragraphs in the judgment that the plaintiff has cited were taken out of context and cannot be interpreted in the manner interpreted by the plaintiff. The judgment also concerns a historic bay and not the same type of maritime area as in this case.

With regard to the need for clarifying the content of the terms, this exclusively related to whether "territorial waters" only applied to "internal waters" or "internal waters *and* the territorial sea combined", cf. among others, Report of the International Law Commission in connection with the negotiations for the Geneva Convention on the Territorial Sea and Contiguous Zone (1956). It has *never* been the case that the term "territorial waters" includes maritime areas outside of the territorial sea.

Reading the wording in context and in light of the object and purpose of the Convention does not change the understanding of the term "territorial waters". The purpose of the Svalbard Treaty was that other states would recognise Norwegian sovereignty over Svalbard in return for Norway recognising that the other parties to the treaty would be granted certain rights over the archipelago and "their territorial waters". "Territorial waters" has a clear legal content, and there is little scope for a dynamic interpretation in international law.

Furthermore, Article 31, subsection 3 (c) of the Vienna Convention states that any relevant rules of international law applicable in the relations between the parties shall be taken into account in the interpretation. The terms used in UNCLOS clearly indicate that Articles 2 and 3 of the Svalbard Treaty only apply to territorial waters, and that the aim was to codify already applicable customary law. The same applies to subsequent agreements entered into between Norway and other individual state parties to the Svalbard Treaty relating to the exploitation of resources etc. in areas other than territorial waters.

If the court should find that the interpretation pursuant to Article 31 is unclear, ambiguous or unreasonable, the supplementary sources in Article 32 of the Vienna Convention will also confirm that the State's position is the correct one. Among other things, reference is made to the circumstances relating to the actions of the parties in connection with the signing, entry into force and negotiating history, cf. the official minutes from the Spitsbergen Commission's negotiations. It is also not correct, as the plaintiff has asserted, that there was a uniform view among the parties to the treaty that supports the plaintiff's interpretation. It is also incorrect that Norway is alone in its view of this issue and there are, under all circumstances, different opinions in the legal theory.

In summary: The plaintiff's claim is grounded upon Articles 2 and 3 of the Svalbard Treaty entailing that the Ministry's decision is invalid. These provisions only apply in internal waters and the territorial sea, within 12 nautical miles, and not in the area outside of this, which is the area where the plaintiff applied to harvest snow crab. The decision can therefore not be deemed invalid on these grounds.

*In the alternative, if the court should find that the Svalbard Treaty applies on the continental shelf:* In all circumstances, the domestic law solution shall take precedence in this case.

It is established law that Norwegian law and international law constitute two different legal systems, and in the event of any conflict on the rules between the two systems, Norwegian law shall take precedence. When concerning the Participation Act and Licencing Regulations, the Svalbard Treaty has not been incorporated into Norwegian law. The dualism principle will therefore be the deciding factor when there are conflicting issues. The presumption principle cannot eliminate the contradiction in this case because it was clearly the desire of legislators that the rules of domestic law will take precedence.

Under no circumstances do Articles 2 and 3 of the Svalbard Treaty express individual and justiciable rights for the individual – they are not "self-executive".

If one accepts the perspective in the Marine Resources Act and Snow Crab Regulations, then Section 6 of the Marine Resources Act cannot be understood as Articles 2 and 3 of the Svalbard Treaty being incorporated into Norwegian law. The preparatory works do not provide grounds for the view that Articles 2 and 3 of the Svalbard Treaty are domestic law provisions for the rights of individuals as a result of Section 6. Under no circumstances do Articles 2 and 3 of the Svalbard Treaty express individual and justiciable rights for the individual and they cannot serve as grounds for invalidity in this case.

*The plaintiff's claim no. 2 – that Section 3 of Regulations no. 1836 of 12 December 2014 relating to a prohibition against harvesting snow crab is in violation of the Svalbard Treaty:*

It is unclear whether the plaintiff has a "genuine need" to have this claim reviewed by the court, cf. Section 1-3 of the Dispute Act. Pursuant to Section 1-3 of the Dispute Act, there is a certain scope for obtaining a judgment regarding the validity of regulations, however only if this involves a "review of

legality" and only if there is a "genuine need" for such a judgment. The court may independently consider the claim that there is a need for legal clarification, cf. HR-2018-1463-U, paragraph 25.

*In the alternative, if the court should find that it can review the plaintiff's claim that Section 3 of the Snow Crab Regulations are in violation of the Svalbard Treaty,* the claim can still not succeed. Reference is again made to Articles 2 and 3 of the Svalbard Treaty not applying outside of the territorial sea. Even if the provisions in the treaty should apply for this area, Section 3 of the Regulations must take precedence.

The decision/regulations that set national requirements for harvesting snow crab are not in violation of the prohibition against discrimination in Article 98 of the Constitution of Norway. The discrimination provision only applies to natural persons and it is established law that legal entities are not included.

*With reference to the new legal basis for invalidity in the pleading of 18 June 2021 (asserted legal basis for the decision):*

The State asserts that the decision has an adequate legal basis. Contrary to what the plaintiff has asserted, Section 2 of the Participation Act does not suggest that the decision has no legal basis. The provision in Section 2 of the Participation Act only stipulates what the Act concerns and is of no significance to the legal basis for the decision to not grant the plaintiff the right to harvest snow crab.

**The defendant's prayer for relief:**

1. The court finds in favour of the State (Ministry of Trade, Industry and Fisheries).
2. The State (Ministry of Trade, Industry and Fisheries) is awarded costs.

**The court's assessment**

Introduction – subject matter of the case

The case applies to the validity of the decision handed down by the Ministry of Trade, Industry and Fisheries of 14 November 2019 in which the plaintiff's application for an exemption from the prohibition against harvesting snow crab on the Norwegian continental shelf was rejected. The application was rejected on the grounds that the plaintiff does not satisfy the requisite conditions, because only Norwegian vessels have the right to harvest snow crab on the continental shelf. SIA North Star Ltd has asserted that the Norwegian regulation which the decision is based on, and which is expressed in the Snow Crab Regulations, is in violation of the principle of equal treatment in Articles 2 and 3 of the Svalbard Treaty.

A crucial question for the court is whether the Svalbard Treaty applies in the maritime area where the plaintiff has caught snow crab, or more specifically, on the Norwegian continental shelf. In several decisions, the Supreme Court has stated that administrative decisions can be examined in relation to Norway's obligations under international law. Reference is also made to the statement from the Supreme Court in paragraph 80 of HR-2019-282-S (the criminal case against the shipping company) that, pursuant to Norwegian law, "an issue of conflict between Norwegian public administration and international obligations should be solved through a civil action."

Brief summary of the preparatory proceedings and the plaintiff's prayer for relief/grounds for the prayer for relief

The Court considers there to be grounds to remark on the preparatory proceedings and the plaintiff's grounds for the prayer for relief and the prayer for relief.

The plaintiff amended the grounds for the prayer for relief/the prayer for relief shortly before the main hearing. Since the State protested the amendments and requested that the main hearing be rescheduled, cf. Section 9-16 of the Dispute Act, the court had to hand down a decision regarding this. In the decision of 17 June, which is included in its entirety in the Court Record, the court accepted the following prayer for relief:

1. The decision by the Norwegian Directorate of Fisheries of 13 May 2019 and decision by the Ministry of Trade, Industry and Fisheries of 14 November 2019 are invalid.
2. Regulations 2014-12-12-1836 relating to the prohibition against harvesting of snow crab are in violation of the Svalbard Treaty.
3. The Ministry of Trade, Industry and Fisheries is ordered to pay Sia North Star Ltd's costs associated with the case within two weeks.

On Friday 18 June, the plaintiff submitted new grounds for the prayer for relief, which stated that the Ministry's decision had no legal basis. On the same day as the main hearing commenced, i.e. Monday 21 June 2021, the plaintiff again amended/expanded the prayer for relief in a new prayer for relief, cf. the prayer for relief cited under the section on the plaintiff's prayer for relief above, and therefore did not act in accordance with the court's decision. The plaintiff stated in court that the reason for this was that the plaintiff did not agree with the court's decision and wanted to ensure that the key legal question of whether the Svalbard Treaty applies on the continental shelf would be examined. As stated in the court's decision of 17 June, this will be considered regardless.

The court found reason to remark on this because the prayer for relief that the plaintiff submitted during the main hearing went beyond what the court had permitted and what the State had prepared for. However, it is the court's view that the amendment to the prayer for relief has been of minor importance to the issues of dispute that the court has had to consider. The court notes that the court is responsible for applying the law, and must therefore still apply applicable rules of law at its own initiative within the framework stipulated in Section 11-2 of the Dispute Act, cf. Section 11-3 of the Dispute Act, irrespective of the parties' opinions on this. In addition, several of the points in the plaintiff's amended prayer for relief which the State protested against did not become applicable, given the result the court has arrived at below.

Regulating the harvesting of snow crab

The harvesting of snow crab was regulated for the first time in 2015 in the Regulations relating to the prohibition against harvesting of snow crab (REG-2014-12-19-1836 "Snow Crab Regulations"), which were laid down pursuant to Section 16, paragraph one (c) of the Marine Resources Act. The purpose of this Act is to ensure the sustainable and socioeconomically profitable management of wild living marine resources, cf. Section 1 of the Marine Resources Act. The Regulations entered into force on 1 January 2015 and were amended in 2016 to include the continental shelf. The starting point is that, pursuant to Norwegian law, it is "prohibited for Norwegian and foreign vessels to harvest snow crab in Norwegian territorial sea, in internal waters, and on the Norwegian continental shelf", cf. Section 1 of the Regulations.

On the date the application was submitted and when the first instance (Norwegian Directorate of Fisheries) handed down its decision, Section 2 of the Snow Crab Regulations permitted an exemption from the prohibition "for vessels that have been issued a commercial licence under the Participation Act to harvest outside of the territorial waters". Section 5 of the Participation Act states that a

commercial licence can only be issued "to a person who is a Norwegian citizen or equal to a Norwegian citizen."

The exemption scheme in Section 2 of the Snow Crab Regulations was repealed effective from 1 July 2019 and was replaced with a requirement for a licence to harvest snow crab in accordance with the new Chapter 6 in Regulations No. 1157 of 13 October 2006 relating to special permits to conduct certain forms of fishing and hunting (Licencing Regulations). The legal basis for stipulating rules for issuing "special permits" is Section 12 of the Participation Act. Section 6-2, subsection 1 of the Licencing Regulations states that a snow crab licence can only be issued if the vessel is "registered in the Norwegian Register of Fishing Vessels" (letter a) and is "suitable and equipped for the harvesting of snow crab" (letter b). The

"Norwegian Register of Fishing Vessels" applies to "Norwegian vessels" that "have been issued a commercial licence pursuant to Section 4", cf. Section 22, subsection 2, first sentence of the Participation Act. Furthermore, Section 6-2, subsection 2, first sentence states that a snow crab licence can only be issued to vessels that "have a different basis for operations in the form of a special permit or participation access rights." Section 13 of the Participation Act stipulates that there must be a "commercial licence" pursuant to Section 4 of the Act in order for a so-called "special permit" – including permission to harvest snow crab – to be issued. As mentioned, Section 5 of the Participation Act stipulates that a commercial licence can only be issued to a person who is a "Norwegian citizen".

In summary, the regulation entails that only Norwegian vessels can be issued with a permit to harvest snow crab on the continental shelf pursuant to the rules of domestic law cited above. It is clear that the plaintiff's three vessels are not "Norwegian vessels".

Brief summary of the transition from an exemption scheme to a licencing scheme in this case

At the time the plaintiff applied for permission to harvest snow crab, this was regulated through an exemption scheme in Section 2 of the Snow Crab Regulations, cf. above, whereby a vessel could be granted an exemption from the prohibition against harvesting snow crab if "a commercial licence is issued pursuant to the Norwegian Participation Act to harvest outside of territorial waters". As mentioned, pursuant to Section 5 of the Participation Act, a commercial licence may only be issued to a person who is a Norwegian citizen or equal to a Norwegian citizen. The Norwegian Directorate of Fisheries rejected the application on 13 May 2019 on the grounds that the plaintiff's vessels did not have a commercial licence as referred to in the now repealed Section 2, subsection 2 of the Snow Crab Regulations. Therefore, the conditions for granting an exemption from the general prohibition were not satisfied.

The exemption scheme in Section 2 of the Snow Crab Regulations was repealed effective from 1 July 2019. It is still the general rule that it prohibited to harvest snow crab, however the exemption scheme was replaced by a requirement for a licence to harvest snow crab. The decision by the Ministry of Trade, Industry and Fisheries of 14 November 2019 states that the purpose of the amendment to the rule was that harvesting of snow crab would take more traditional forms for regulating fishing and hunting. The decision stated the following:

> *The shipping company SIA North Star applied for an exemption before the rules were amended, however since vessels with an exemption pursuant to the Snow Crab Regulations still have to apply for a snow crab licence pursuant to the Licencing Regulations, it is now natural to assess the application in relation to the conditions in the Licencing Regulations. This is of no significance to the outcome of this case.*

Since there is still a nationality requirement for harvesting snow crab on the continental shelf, i.e. that the vessels have to be Norwegian, the Ministry concluded that none of the plaintiff's three vessels satisfied the conditions in Section 6-2 of the Licencing Regulations for being issued a (special) permit for harvesting snow crab in the Barents Sea, cf. Section 6-1 of the Licencing Regulations.

SIA North Stat Ltd has asserted that the decision is in violation of Articles 2 and 3 of the Svalbard Treaty which state 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 I and in their territorial waters".

Therefore, the question for the court is whether or not "territorial waters" in Articles 2 and 3 of the Svalbard Treaty include the continental shelf, because it is in this area that the plaintiff has applied to harvest snow crab.

Below, the court will first provide some general remarks regarding the Svalbard Treaty before addressing the legal issues that the case gives rise to.

The Svalbard Treaty and its scope

The Svalbard Treaty was signed on 9 February 1920 and entered into force on 14 August 1925. Through the Svalbard Treaty, the parties to the treaty undertook to recognize Norway's "full and absolute sovereignty" (English version) and "la pleine et entière souveraineté" (French version) over the Archipelago of Svalbard, under the conditions laid down in the treaty. The conditions that are important in this case are Articles 2 and 3, and particularly Article 3, which, among other things, regulate the fishing rights of the parties to the treaty.

Only the states that have signed the Svalbard Treaty have rights under this treaty, and it is undisputed that Latvia signed the treaty in 2016. In connection with this, it is noted that all states can declare themselves to be a party to the Svalbard Treaty – without reciprocity, cf. concluding text of the Svalbard Treaty.

As mentioned, the most important question for the court is whether "territorial waters" and/or "waters", as stipulated in Articles 2 and 3 of the Svalbard Treaty, include the continental shelf (as the plaintiff asserts) or whether they are limited to internal waters and territorial sea connected to the islands in the archipelago of Svalbard (which is the State's position). This requires an interpretation of the Svalbard Treaty.

It is established law that the rules of domestic law for interpreting treaties shall be applied by Norwegian courts. This was recently established by the Supreme Court in HR-2021-1243-A, paragraph 36:

> Since tax treaties are international treaties, they must be interpreted in accordance with the rules of international law pertaining to the interpretation of treaties. Rules for this are established in Article 31 of the Vienna Convention on the Law of Treaties. Norway is not a signatory to the Vienna Convention, however Article 31 is generally considered to express customary international law, cf. Rt-2011-1581, paragraph 41, with reference to previous case law […].

Article 31, subsection 1 of the Vienna Convention stipulates the following starting point for interpreting a treaty:

> 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.

Therefore, the most important interpretive factor is the text of the treaty interpreted in accordance with the ordinary meaning of the words in their context and in the light of the object and purpose of the treaty, cf. HR-2021-1243-A, paragraph 37. The court also refers to HR-2019-282-S, paragraph 48, with further reference to HR-2017-569-A, in which the principles for interpreting treaties are summarised as follows (the court's emphasis):

> The starting point is the natural understanding of the wording when read in context and in the light of the purpose of the convention, cf. Rt-2012-494, paragraph 33. Articles 31 and 32 of the Convention state that other sources will have limited significance in the interpretation. This entails that there is little scope for a dynamic interpretation.

The authentic versions of the treaty are in French and English and the French and English wording is therefore decisive to the legal content of the treaty. The court has used the English version as a starting point. Article 1 of the Svalbard Treaty states the following (the court's emphasis):

> The High Contracting Parties undertake to recognise, subject to the stipulations of the present Treaty, the full and absolute sovereignty of Norway over the Archipelago of Spitsbergen, comprising, with Bear Island or Beeren-Eiland, all the islands situated between 10° and 35° longitude East of Greenwich and between 74° and 81° latitude North, especially West Spitsbergen, North-East Land, Barrents Island, Edge Island, Wiche Islands, Hope Island or Hopen-Eiland, and Prince –Charles Foreland, together with all islands great or small and rocks appertaining thereto.

Article 2 of the Svalbard Treaty states the following (the court's emphasis and italicization):

> Ships and nationals of all the High Contracting Parties shall enjoy equally the rights of fishing and hunting in the territories specified in article I and in *their territorial waters*. Norway shall be 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 of the Svalbard Treaty states the following (the court's emphasis and italicization):

> 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 […] 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. […]

Pursuant to Article 31, subsection 1 of the Vienna Convention, the wording will form both the starting point and framework for the interpretation, cf. that the treaty must be interpreted "in good faith in accordance with the *ordinary meaning to be given to the terms of the treaty*". In connection with this, the court refers to Dörr et al., page 580-581 *Vienna Convention of the Law of Treaties article 31, 32 and 33*, page 580, where it states that "as the ICJ underlines in its jurisprudence, interpretation must be based "above all" upon the text of the treaty."

Article 2 of the Svalbard Treaty states that rights of fishing and hunting apply in "the territories specified in article 1 (i.e. islands of Svalbard/land area) and in *their* territorial waters". Article 3 states that the parties to the treaty 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" and to

"practice of all maritime, industrial, mining or commercial enterprises both on land and in *the territorial waters*".

The court notes that the term "territorial sea" in Articles 2, 3 and 4 of UNCLOS is defined as an adjacent belt of sea that cannot extend further than 12 nautical miles from the baseline. However, pursuant to Article 76, subsection 1 of UNCLOS, the continental shelf is a specific area that comprises the seabed and subsoil of the submarine areas *that extend beyond its territorial sea.* The fact that this is the currently the general linguistic understanding of the term "territorial sea" is supported by Wolf, "Territorial Sea", Max Planck Encyclopaedia of International Law (2013):

> The territorial sea (also called territorial waters) is a maritime area beyond and adjacent to the → *internal waters*, and shall not extend beyond twelve nautical miles ('nm') from the→ *baselines*.

However, the current definition of "territorial sea" pursuant to international law is not decisive to the question that the court has to address. Firstly, the term "territorial waters" is used in Articles 2 and 3 of the Svalbard Treaty and it must be considered as to whether this is something different to what is now understood as being "territorial sea". Secondly, the principles for interpreting treaties in international law indicate that the treaty must be interpreted "in accordance with the intention of the parties at the time of its conclusion", cf. among others, ICJ's judgment in *Namibia* (1971), paragraph 53. In connection with this, the court also makes reference to Dörr et al, page 572-573 *Vienna Convention of the Law of Treaties article 31, 32 and 33*, where it states that the time when the treaty was concluded is the starting point for the interpretation (the court's emphasis and italicization):

> Both temporal concepts [static and dynamic approach] can be found in international judicial practice, which, on the whole, seems to follow the static approach as a basic rule and as a particular application of the doctrine of inter-temporal law. As such, it has been - 19 - 20-149327TVI-TOSL/01 applied by the ICJ at several occasions, eg. when the Court looked into linguistic usages *at the time when the treaty was concluded or into the intention of the parties at that same moment in time*.

The court notes that it is correct that an evolutionary interpretation may apply for a specific type of word and expression, which both the plaintiff and defendant emphasised when referring to, among others, ICJ's decision in *Aegean Sea Continental Shelf* (1978), paragraph 77. The court will assess whether there are grounds for this below.

Based on the principles for interpreting treaties cited above, the court must consider the importance of "territorial waters" in the context in which the term is used in the treaty, and in light of the Svalbard Treaty's object and purpose. The starting point for the interpretation is "the ordinary meaning" of "territorial waters" when the Svalbard Treaty was concluded,

The plaintiff has asserted that "territorial waters" meant something other than "territorial sea" at that time, and that this also includes the outer maritime areas that Norway lays claims to by virtue of its sovereignty, including the territorial sea and what are today the exclusive economic zone and continental shelf. To support its position, the plaintiff made particular reference to ICJ's judgment in El Salvador/Honduras (1992) and the fact that the Norwegian delegation that negotiated the treaty had extensive knowledge of the term "territorial sea" at that time, yet still chose to use the term "territorial waters". The plaintiff also emphasised that the purpose of the Svalbard Treaty, i.e. that all parties to the treaty would have equal access to the waters around Svalbard for commercial purposes, also argues in favour of equal treatment in the waters outside of the territorial sea.

The State disagrees with this and maintains that the consistent linguistic understanding at that time, which is expressed in treaty practice and other relevant international law practice from that time, was that the term "territorial waters" referred to a specific and (in terms of scope) restricted marine area, i.e., more specifically, internal waters and territorial sea.

In relation to this, the court considers there to be a need to briefly note the following: The plaintiff has asserted that other treaties are of no significance to the interpretation of the Svalbard Treaty. It was asserted that any bilateral treaties or other treaties that not all parties to the Svalbard Treaty are signatories to, cannot be used in the interpretation. Reference was made to the importance of the terms in a multilateral treaty having to be the same for all parties to the treaty. The court disagrees with this. It is the court's opinion that treaties that were concluded at the time of the Svalbard Treaty help to shed light on and clarify "the ordinary meaning" and the legal content of "territorial waters", cf. Article 31, subsection 1 of the Vienna Convention, and that this legal approach is in accordance with the rules in the Vienna Convention pertaining to the interpretation of treaties. Reference is again made to Dörr page 581 (the court's emphasis):

> Therefore, as the ICJ underlines in its jurisprudence, interpretation must be based "above all" upon the text of the treaty. <u>The point of departure in the process of interpretation is the linguistic and grammatical analysis of the text of the treaty, looking for the ordinary meaning, i.e. the meaning that is "regular, normal or customary".</u>

It is the court's assessment that the sources of international law from when the treaty was negotiated and concluded lend support to the term "territorial waters" having a legal content that was restricted to internal waters and the territorial sea. Among other things, in treaty practice from that time, the term was used for a limited maritime area. In connection with this, the court makes reference to, for example, *Article 1 of the International Convention for regulating the police of the North Sea fisheries outside territorial waters (1882),* which regulates "the police of the fisheries in the North Sea <u>outside</u> territorial waters." Article 2 states that fisherman "of each country" have an exclusive right to fish "within the distance of 3 miles from low-water mark. When read in connection with the 3 mile limit in Article 2, "outside territorial waters" indicates that "territorial waters" constitutes the waters adjacent to land with limited geographical range – and which represent a contrast to the maritime areas outside of this. Equivalent regulation can be found in *Article 1 of the Convention between Denmark and Great Britain for regulating the Fisheries outside Territorial Waters in the Ocean surrounding the Faröe Islands of 24 June 1901.*

*Article 1 of the Paris Convention for the Protection of Submarine Telegraph Cables of 14 March 1882* also uses the term "outside territorial waters" as a contrast to the maritime area within. The same is stipulated in the *London Convention on equal rights to fishing around Newfoundland of 8 April 1904* in "the territorial waters", cf. Article II, which states the following:

> France retains for her citizens, on a footing of equality with British subjects, the right of fishing in the territorial waters on that portion of the coast of Newfoundland comprised between Cape St. John and Cape Ray […]

*Article 1 of the Treaty between Norway and the United States of America of 24 May 1924 on alcoholic beverages brought in and the right of visitation outside territorial waters, Article 3 of the Peace Treaty between Finland and Russia of 14 October 1920, and Article 2, no. II and III of the Åland Convention of 20 October 1921* all point in the same direction

The court is of the view that these treaties, which were signed around the time that the Svalbard Treaty was concluded, support the argument that the term "territorial waters" had a specific legal

content at that time and included the marine area closest to land and not the waters outside of this (referred to as "outside the territorial waters").

The same can be deduced from other international law practice from that time. For example, the court refers to *Article 1 of the Cancelli-Promemoria of 25 February 1812, the American Supreme Court's judgment in Cunard v. Mellon in 1923 and the Statement of Lord Curzon to the House of Lords* regarding the American Supreme Court judgement rendered in the Whiteman Digest of International Law, Vol. 4 Department of State 1965, page 2 et seq. *Fisheries Case 1951 (United Kingdom – Norway, ICJ 1951) and The Alaska Boundary Case (Great Britain – United States, 1893)* all point in the same direction. The court also makes reference *to Article 7 of the UK Territorial Waters Jurisdiction Act of 1878*, in which the following definition of "territorial waters" was given (the court's emphasis):

> "The territorial waters of Her Majesty's dominions', in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed by international law to he within the territorial sovereignty of Her Majesty."

In the view of the court, these sources of international law demonstrate a more or less consistent and uniform use of the term "territorial waters" when concerning the waters that are closest to land (waters adjacent/appurtenant to the land/territory/dominion) and which constitute part of the states' territory (exclusive dominion of the State). These waters are delimited in relation to the outer maritime areas, i.e. the maritime areas "outside the territorial waters".

It is therefore the court's assessment that the international and international law context relating to the conclusion of the Svalbard Treaty appears to have been a more or less uniform consensus regarding the legal content of the term "territorial waters". Under no circumstances have any clear sources been presented that support the plaintiff's claim that "territorial waters" include the maritime areas outside the territorial waters.

The plaintiff has asserted that paragraphs 390 and 392 in ICJ's judgment in *El Salvador/Honduras* (1992), which again makes reference to a judgment from 1917, clearly indicate that "territorial waters" extend beyond what is deemed to be "territorial sea". The court finds reason to include paragraph 392 in its entirety because the plaintiff considers this to be a vital source of law that supports its opinion of the law (the court's emphasis and italicization):

> 392. It may be as well at this stage to deal with a possible source of misunderstanding about the terminology of the period. It has sometimes been suggested that the Judgement is confused because it speaks, as in the above quotation and elsewhere of the waters of the Gulf outside the 3-mile littoral maritime belts as "territorial waters"; and in the argument before the Chamber, the 1917 Judgement did not escape criticism on that ground. But the term territorial waters was 75 years ago, not infrequently used to denote what would now be called *internal or national waters*, as the legal literature of the time abundantly shows. Accordingly, the term territorial waters did not necessarily, or even usually indicate what would now be called 'territorial sea". So, by 'territorial waters', in this context,… means waters claimed à titre de souverain. To have recognized exclusive "maritime belts" alone the littoral *inside* those "territorial waters", the property of the three States in common, was no doubt an anomaly in terms of the modern law of the sea; but it was in accord with what had emerged from actual practice of the coastal States in the Gulf of Fonseca at that time, and was perhaps also a remnant of the view, to be mentioned below, that the maritime belt in a

> pluri-State bay, followed the sinuosities of the coast, the remainder of the bay waters being high seas. At any rate, the 3-mile maritime belts were firmly established by practice.

The plaintiff's reference to this paragraph does not alter the court's understanding of the term "territorial waters" in connection with the conclusion of the Svalbard Treaty. Firstly, the court does not share the plaintiff's assessment that paragraph 392 of the judgment can be understood in the manner the plaintiff claims it should be understood. Among other things, the court cannot see that the paragraph *establishes*, as the plaintiff asserts, that waters *outside* what is now defined as the "territorial sea" are included under the term "territorial waters". The court notes that the paragraph states that the judgment (from 1917) is "confused" because it refers to "waters of the Gulf outside 3-mil" as "territorial waters" and that the judgment has been criticised for this. The court further notes that the judgment states that the term "territorial waters" "75 years ago not infrequently" was used to denote what are now "internal" and "national" waters. In the view of the court, this supports the notion that treaty practice from that time and other relevant practice from international law precisely demonstrate a consistent understanding of "territorial waters" as being a specific and (in terms of scope) limited maritime area adjacent to the land area – as opposed to the outer maritime areas. The court would also note that this paragraph in the judgment (which is also 269 pages in length and of which two paragraphs contain the term "territorial waters") cannot unquestionably be assigned weight in the matter the court is now considering, namely whether the Svalbard Treaty applies on the continental shelf. The judgment concerns a historic bay in Central America, i.e. a completely different maritime area to what this case concerns and where other considerations may apply. The court makes reference to paragraph 391 in the judgment (the court's emphasis):

> 391. It should be added that, in another part of the Judgement (AJIL trans., p. 717), the Court refers to the Gulf as "… an historic or vital bay…" ("… *Bahia historica o vital*…) thus importing a further reason - the strategic and defence requirements of the coastal States - why the waters of the bay could not be international waters. […] In this connection the Court also attached importance to the famous passage in that Award that "the character of a bay is subject to conditions that concern the interests of the territorial sovereign to a more intimate and important extent than those connected with the open coast."

It is otherwise noted that the judgment from 1917 has not been presented and that the court has not deemed it necessary to obtain this itself in order to consider the legal issues the case gives rise to.

The court can agree with the plaintiff that paragraph 392 can possibly be accepted as an argument for there having been a certain lack of clarity in relation to the terms "territorial waters" and "territorial sea" at that time. However, it is the view of the court that any lack of clarity relates to whether "territorial waters" include "internal waters" *and* "territorial sea" or simply "internal waters". There has also been disagreement as to how far "territorial waters" extend.

However, the court does not share the plaintiff's view that, when the treaty was concluded, this term included the maritime area that a state lays claim to by virtue of its sovereignty and which also includes maritime zones *outside* of what are now referred to as "internal waters and territorial sea", including the exclusive economic zone and continental shelf. In connection with this, the court makes reference to the Report of the International Law Commission rendered in the *Yearbook of the International Law Commission 1956 volume II page 265*, which concerns the negotiations for the Geneva Convention on the Territorial Sea and Contiguous Zone. Particular reference is made to the remarks to Article 1 (the court's emphasis):

> The Commission preferred the term "territorial sea" to "territorial waters". It was of the opinion that the term "territorial waters" might lead to confusion, since it is used to describe both internal waters only, and internal waters *and* the territorial sea combined. For the same reason, the Codification Conference also expressed a preference for the term "territorial sea". Although not yet universally accepted, this term is becoming more and more prevalent.

This understanding was confirmed by Whiteman in *Digest of International Law, Vol. 4, Department of State 1965*, page 2, et seq, cf. the following paragraph on the terms "territorial waters" and "territorial sea" ( the court's emphasis and italicization), and where it also states that the use of "territorial sea" is becoming increasingly more common:

> "(2) The Commission preferred the term 'territorial sea' to 'territorial waters'. It was of the opinion that the term 'territorial waters' might lead to confusion, since it is used to describe *both internal waters only, and internal waters and the territorial sea combined*. For the same reason, the Codification Conference also expressed a preference for the term 'territorial sea'. Although not yet universally accepted, this term is becoming more and more prevalent.

In the view of the court, the quotes above support the argument that any lack of clarity relating to the term "territorial waters" was whether this included internal waters *and* the territorial sea or only internal waters. The court does not find that the sources of international law that have been presented support the claim that, around the time the Svalbard Treaty was concluded, the term "territorial waters" also included maritime areas outside of the territorial sea.

The court also cannot see that the fact Doctor of Laws Arnold Ræstad, (who was part of the Norwegian delegation that negotiated the Svalbard Treaty), was strongly familiar with the term "territorial sea" indicates that "territorial waters" also includes waters that a state lays claim to by virtue of its sovereignty, including *outside* internal waters and the territorial sea. The plaintiff has also asserted that it is "incomprehensible" that "internal waters" and "territorial sea" were not directly stated in the treaty if this is what the parties to the treaty had meant when the Svalbard Treaty was negotiated and signed. To this, the court is content to refer to the court being of the view, based on the overview above, that "territorial waters" had a specific legal content at that time, and which also appears to have been consistently used in treaty practice and other relevant international law practice at that time.

The plaintiff has also asserted that the interpretation of the wording that the plaintiff considers to be correct "is confirmed by an evolutionary interpretation" of the treaty. Reference was made to the fact that the development in international law suggests that nation states can now assert claims further out to sea than in 1920 and that the term cannot have a "fixed content regardless of the subsequent evolution of international law", cf. ICJ's judgment in Aegean Sea (1978), paragraph 77. Reference was also made to ICJ's judgment in Iron Rhine (2004), paragraph 80 and ICJ's judgment in Costa Rica vs. Nicaragua (2009), paragraph 64. There was also no continental shelf when the Svalbard Treaty was signed and the purpose of the treaty was to create "an equitable regime for peaceful utilisation" and that all parties to the treaty would have equal opportunities to exploit Svalbard's resources, including the right to fish, for commercial purposes. An evolutionary interpretation would ensure an application of the treaty that is effective in relation to its purpose.

The court notes that the entire convention must be read in context when the purpose of the treaty is to be clarified, cf. Dörr et al, page 585-586 *Vienna Convention of the Law of Treaties*. It is the court's view that the purpose of the Svalbard Treaty appears to be interpreted in several ways, something

that is also supported by legal theory. Irrespective of this, it is the view of the court that, when viewed in light of the object and purpose of the convention, the wording does not indicate that "territorial waters" includes the maritime areas *outside* of the internal waters/territorial sea, including the continental shelf. The Svalbard Treaty gave Norway sovereignty over Svalbard, including both the islands in the archipelago and the territorial waters around the archipelago, in return for Norway pledging, under international law, to treat the parties to the treaty equally within certain commercial areas, including for fishing ("ships and national of all the High Contracting Parties shall enjoy equally the rights of fishing"). However, the wording of the treaty stipulates that this equal treatment was geographically delimited to apply in "their territorial waters". As demonstrated by the above review, it is the view of the court that, in legal terms, "territorial waters" is delimited to internal waters and territorial sea. The court finds no ground for an expansive interpretation of the wording in light of any considerations of the purpose or as a result of principles relating to an evolutionary interpretation. In connection with this, the court also makes reference to McNair "The law of the treaties", page 1272, which states the following:

> The terms of a treaty are to be given their ordinary meaning, unless to do so results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained […].

In 2014, Hålogaland Court of Appeal considered the question of whether the Svalbard Treaty applied in the fisheries protection zone (LH-2013-50194), which is a similar question to what the court is now considering. With regard to the issue of an evolutionary/dynamic interpretation, the Court of Appeal made the following conclusion (the Court of Appeal's emphasis and italicization):

> To support an expansive interpretation, reference has been made in legal literature to "the object and purpose of the Treaty", dynamic principles of interpretation and international legal decisions etc., cf. among others, Churchill/ Ulfstein "The disputed maritime Zones around Svalbard". They summarised their position as follows (page 582):
>
> *According to a literal reading of the Treaty (which is favoured by the Norwegian government) the rights in Articles 2 and 3 do not apply beyond the territorial sea. Some support for this position can also be found in the travaux préparatoires of the Svalbard Treaty and the Abu Dhabi and Qatar cases. On the other hand, the opposite conclusion can be drawn from the object and purpose of the Treaty, an evolutionary interpretation, the anomalies that would be created if the Treaty did not extend beyond the territorial sea, and, to some degree, from the Aegean Sea and Oil Platforms cases. Thus, the various elements of treaty interpretation do not point to a clearcut and definite conclusion.*
>
> In the view of the Court of Appeal, no documentation has been presented that would suggest that the provisions in the treaty concerning rights for the citizens of other nations, including Article 2, had a different or additional purpose other than to protect pre-existing rights as formulated by Churchill/ Ulfstein op.cit. page 572:
>
> *"The second observation is that the object and purpose of the Treaty relating to the rights of parties other than Norway, it was suggested, concerns the preservation of preexisting rights. Fishing and mining beyond the territorial sea were not preexisting rights under Svalbard's terra nullius regime."*
>
> Carl August Fleischer's view of the intention of the parties to the treaty, as this is worded in "The New International Law of the Sea and Svalbard" page 4, was as follows:

*"(t)he intention (was) that the sovereignty according to art. 1 should be absolute and in principle unlimited, with only those restrictions which were set out and agreed upon in the other articles of the Treaty.."*

To support this view, Fleischer made reference to, among other things, a statement from the president of the Spitsbergen Commission, Laroche, in response to a question from the Italian representative to the commission, whereupon:

*" .. toutes les dèrogations à la souverainetè se trouvent dans le Traitè en prèparation; pour le surplus, il y a lieu d'appliquer la souverainetè de la Norvège. (Commission du Spitsberg, procèsverbal no. 10 page 60)."*

The court agrees with the Court of Appeal's assessment on this point. In addition, the court makes reference to the Supreme Court having stated in HR-2019-282-S, with reference to previous Supreme Court case law, that there is little scope for a dynamic interpretation of treaties. The court is of the view that there is also no evidence that the parties to the treaty jointly intended for the rights to extend beyond "territorial waters". In the judgment cited above, the Court of Appeal concluded that the Svalbard Treaty does not apply in the fisheries protection zone.

Finally, the court makes reference to Article 31, subsection 3 (c) of the Vienna Convention, which states that any relevant rules of international law applicable in the relations between the parties "shall be taken into account". The terms used in UNCLOS clearly indicate that the Svalbard Treaty only applies in internal waters and territorial sea. The same applies to subsequent agreements entered into between Norway and other individual nation states in the Svalbard Treaty for the exploitation of resources in areas other than territorial waters. For example, the court makes reference to the agreement between Norway and the Soviet Union of 15 October 1976 concerning mutual relations in the field of fisheries and agreement between Denmark and Norway/Greenland of 9 June 1992 concerning mutual fishery relations.

As a matter of form, it is noted that the court is the view that, based on its wording, the content of the provision does not lead to a result that is "manifestly absurd or unreasonable". It is therefore not necessary to address Article 32 of the Vienna Convention and "supplementary means of interpretation", including the preparatory works to the treaty.

Based on this, it is the court's opinion that the term "territorial waters" in Articles 2 and 3 of the Svalbard Treaty, include internal waters and the territorial sea up to 12 nautical miles, and that the Svalbard Treaty therefore does not apply on the continental shelf.

Since the court has concluded that the Svalbard Treaty does not apply on the continental shelf, the treaty's principle of equal rights also does not apply for the harvesting of snow crab in this maritime area. The decision is therefore not invalid on these grounds and Section 3 of the Snow Crab Regulations is also not in violation of the Svalbard Treaty.

<u>The other grounds for the prayer for relief that were asserted</u>

Since the court has concluded that the Svalbard Treaty does not apply on the continental shelf, it is not necessary for the court to consider the State's alternative assertion that, due to the dualism principle, the domestic law solution will always take precedence.

It is also not necessary for the court to assess whether there is a legal right to seek a judgment for the regulations being in violation of the treaty, cf. Section 1-3 of the Regulations.

With regard to the plaintiff's assertions that the decision and regulations are in violation of the principles of equality and non-discrimination in Article 98 of the Constitution of Norway, the court is content to refer to the preparatory works to the constitutional provision, cf. Proposition 81 L (2016-2017), section 4.3:

> Article 98, paragraph two of the Constitution of Norway states that "No human being must be subject to unfair or disproportionate differential treatment." […] Article 98, paragraph two only protects natural persons from discrimination, cf. the expression "no human being". Legal entities (businesses and organisations) are not protected.

The plaintiff is a company and is therefore not protected by Article 98 of the Constitution of Norway.

The plaintiff has also claimed that the decision by the Norwegian Directorate of Fisheries of 13 May 2019 was invalid. Since the court has concluded that the Svalbard Treaty does not apply on the continental shelf, it is not necessary for the court to consider this. However, the court sees reason to note that general administrative law stipulates that if a decision is appealed to a higher body which has overruled the decision by the lower body, it is the decision by the higher body, and not the first instance, that is brought before the courts for examination.

<u>The question of whether the decision has no legal basis</u>

The plaintiff has asserted that the decision has no legal basis and that the decision is therefore invalid. Since the court is responsible for the application of the law, cf. Section 11-3 of the Dispute Act, including for determining whether the decision has an adequate legal basis, the court will have to assess this despite the grounds for the prayer for relief having been submitted at too late a stage.

The plaintiff has noted that the Licencing Regulations, which set conditions for being issued a permit for harvesting snow crab, are founded on the Participation Act, and not the Marine Resources Act. Section 2 of the Participation Act specifies the substantive scope of the Act and the provision states that it is restricted to Norwegian vessels. On this basis, the plaintiff has asserted:

> The vessel which this case applies to is not "Norwegian" pursuant to the statutory provision. The Regulations can therefore not be included in the legal basis for the decision that is to be examined in this case. This is because regulations that are founded on an act cannot be assigned a scope that extends beyond the framework stipulated in the act.

The court notes that when the Norwegian Directorate of Fisheries considered the plaintiff's application to harvest snow crab on the continental shelf, exemptions from the general prohibition were regulated in Section 2 of the Snow Crab Regulations. The Snow Crab Regulations are founded on the Marine Resource Act and there is no doubt that the decision by the Norwegian Directorate of Fisheries – if one follows the plaintiff's legal argument – had an adequate legal basis. Therefore, the question for the court is whether the decision "lost" its legal basis when the exemption scheme transitioned to a licencing scheme.

It is the court's assessment that the decision has an adequate legal basis. The court makes reference to Section 1 of the Snow Crab Regulations, which stipulates that neither foreign nor Norwegian vessels have the right to harvest snow crab. Section 3 of the Snow Crab Regulations states that "*vessels with a snow crab licence pursuant to the Licencing Regulations* [can] harvest and land up to 6,500 tonnes of snow crab outside of territorial waters in 2021" without being hindered by the prohibition in Section 1.

In other words, the Licencing Regulations grant *Norwegian vessels* the right to harvest snow crab on specific conditions. It is clear that the rules of domestic law do not permit an equivalent right for foreign vessels. It is therefore the view of the court that Section 1 of the Snow Crab Regulations directly stipulates that the plaintiff does not have the right to harvest snow crab. As mentioned, these regulations are founded on the Marine Resources Act. The fact that *Norwegian vessels* can be granted a permit to harvest snow crab through the Licencing Regulations, cf. Participation Act, is not synonymous with the decision relating to the plaintiff (that is a foreign vessel) not having a legal basis.

Since Section 1 of the Snow Crab Regulations prohibits foreign (and Norwegian) vessels from harvesting snow crab, the court is of the view that there is no doubt that the Ministry of Trade, industry and Fisheries has a *legal basis* to deny foreign vessels, including the plaintiff, the right to harvest snow crab. In the view of the court, that fact that the Ministry cited the Licencing Regulations and Participation Act in its rejection of the application is of no significance to the question of legal basis. The Ministry could have directly cited Section 1 of the Snow Crab Regulations and the general prohibition in this provision, however, chose to elaborate on/explain the rejection by referring to the provisions in the Licencing Regulations, cf. Participation Act, and that these conditions were not satisfied. In the view of the court, the fact that the Ministry made reference to a system of rules in the decision that exclusively apply for Norwegian vessels is of no significance to the question of legal basis. The court sees no reason to comment on whether it could have been more appropriate for the Ministry to word its decision differently, because this is regardless of no importance to the validity of the decision, cf. Section 41 of the Public Administration Act.

It is also the court's opinion that the Licencing Regulations do not, as the plaintiff has asserted, have a "scope" that extends outside the framework of the Participation Act. Both systems of rules grant rights to Norwegian vessels. It is clear that the transition from an exemption scheme to a licencing scheme did not result in a change in the conditions for harvesting snow crab. The court makes reference to the following statement on www.regjeringen.no (the court's emphasis):

> "These amendments "tidy up" the system of rules for harvesting snow crab. The rules for harvesting snow crab have now been adapted to the traditional system of rules for engaging in fishing and hunting. This will also facilitate future restrictions on who can harvest snow crab if there should be a need for this," says Ministry of Fisheries Harald T. Nesvik.
>
> An exemption is currently required for being able to harvest snow crab. This scheme has now been repealed and replaced with an open licence group in the Licencing Regulations. <u>The conditions that presently apply for being granted an exemption have largely been continued unchanged as conditions for being issued a snow crab licence.</u>

In accordance with this, it is the view of the court that the decision is not invalid because it does not have a legal basis.

<u>Summary</u>

The court has found that both the decision of 14 November 2019 and Section 3 of the Regulations relating to the harvesting of snow crab are valid. The court therefore finds in favour of the State.

**Costs**

The State has won the case and is entitled to coverage of its costs from the plaintiff, cf. Section 20-2 of the Dispute Act. There are no compelling grounds for derogating from the general rule, cf. Section 20-2, subsection 3 of the Dispute Act.

The State has submitted a statement of costs totalling NOK 232,000. There were no objections to the statement of costs. The court finds that the claim submitted represents necessary costs for the case. In the view of the court, based on the importance of the case, it was reasonable to incur costs of this scale.

The judgment has been rendered by the statutory deadline.

**CONCLUSION OF JUDGMENT**

1. The court finds in favour of the State (Ministry of Trade, Industry and Fisheries).

2. SIA North STAR Ltd is ordered to pay costs to the State (Ministry of Trade, Industry and Fisheries) of NOK 232,000 (two hundred and thirty-two thousand) Norwegian kroner within two (2) weeks from when the judgment is pronounced.

Court adjourned

Audgunn Syse