

Towards an Historic Svalbard Judgment in Norway’s Supreme Court

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Abstract

The Supreme Court of Norway has heard the parties in a case that a Latvian shipping company filed against Norwegian authorities because the company was not permitted to catch snow crab on the continental shelf around the Svalbard archipelago. This article provides a short comment on the court proceedings, placing emphasis on the international legal questions that the Supreme Court shall decide.

Keywords: *Svalbard Treaty, snow crab, continental shelf*

Is Norway obliged to share rights to fish, crabs and oil with other countries in the waters near Svalbard? The Supreme Court of Norway has now heard the parties in a case that the Latvian shipping company SIA North STAR Ltd. filed against Norwegian authorities because the company was not permitted to catch snow crab on the continental shelf around the Svalbard archipelago. This was the last chance for the Latvians to convince Norwegian courts that the Svalbard Treaty¹ – which prohibits discrimination against foreigners in the conduct of certain commercial activities – also applies to the seabed outside Svalbard’s territorial waters.

The Latvians caught snow crab without permission. They have already received their punishment – a hefty fine.² The Svalbard Treaty does not restrict Norway’s right to punish those who exploit natural resources in Norwegian maritime zones without permission where such is required.

However, the issue that has been pending before the Supreme Court of Norway is of a civil-legal nature: Did Norway violate its international legal obligations by

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permitting only Norwegians to catch snow crab on the continental shelf around Svalbard? Should the Latvian shipping company also have received such permission?

The international law in question is the Svalbard Treaty. The Treaty states that nationals of all the contracting parties shall enjoy equally the rights of fishing (Article 2) as well as the exercise and practice of maritime business (Article 3) on Svalbard and in Svalbard's territorial waters. Thus, it would appear that, according to the Treaty, a regulation that grants only Norwegian vessels the right to catch snow crab is illegal. But does the Svalbard Treaty also apply on the continental shelf, where the snow crab is found?

According to the Norwegian authorities – and following the court proceedings before the Supreme Court – law of the sea normality applies on the continental shelf around Svalbard. That would mean sovereign rights for Norway on the shelf, with no obligation under the Svalbard Treaty to grant crab licenses to Latvians or any other non-Norwegians. This is backed by the wording of the Svalbard Treaty, which does not specify that its provisions apply on the continental shelf or in the sea beyond the archipelago's territorial waters.

The Latvian shipping company, however, has held that the Svalbard Treaty must be applied further out to sea than the wording of the Treaty indicates. In its proceedings before the Norwegian Supreme Court, the company has stressed that the Svalbard Treaty's concept of 'territorial waters' must be interpreted dynamically, to include the continental shelf as well. They also put some emphasis on the object and purpose of the Treaty, in support of a view that its Articles 2 and 3 should be interpreted extensively or analogically to include the continental shelf. In that regard, the company's main argument has been that the sea areas around Svalbard 'belong' naturally to the archipelago, and that the purpose of the Svalbard Treaty was not only to give Norway sovereignty over Svalbard – citizens of other states were to be allowed to continue their traditional fishing, hunting, mining and other commercial activities on and around the archipelago.

Politically, both positions are understandable. It is a question of maximizing self-benefit. Norway is not willing to share the crab with other states. If the continental shelf outside Svalbard's territorial waters is seen as being included in the Svalbard Treaty regime, that would also restrict Norway's right to tax commercial activities on the shelf – as is also stated in the Treaty.³ Basically, then, if the Svalbard Treaty is also applicable to the continental shelf and in the sea around the archipelago, there can be no new Norwegian 'North Sea-adventure' in the waters near Svalbard.

The shipping company, on the other hand, has had little to lose by claiming the opposite – that the Svalbard Treaty applies. That would give them the right to participate, on equal terms with Norwegians, in the potentially lucrative exploitation of maritime resources.

As regards the legal aspects, the answer boils down to treaty interpretation. There can be good arguments for both solutions. In interpreting the Svalbard Treaty, emphasis must be placed not just on the wording of the Treaty, but also on its object and purpose, as well as certain other factors.

A particular challenge with the Svalbard Treaty is that it dates back to 1920. Only decades later did the rights of coastal states to manage the natural resources on the continental shelf and extensive fisheries zones become constructions under international law. Therefore there is nothing in the Svalbard Treaty about continental shelves or extended fishing zones beyond territorial waters.

As the district court and the court of appeals have agreed with the Norwegian authorities,⁴ the Latvian shipping company has already lost in two rounds of litigation. Now it is the Norwegian Supreme Court that is to interpret the Treaty. And although the Court managed to avoid taking a position on the geographical scope of the Svalbard Treaty in previous criminal cases concerning illegal fishing in the waters near Svalbard, the issue cannot be circumvented this time: in order to be able to answer whether Norway has violated international law by allowing only Norwegians to catch snow crab, the Court must decide whether the Svalbard Treaty applies in the area where harvesting snow crab takes place.

The fact that the case was heard by the Norwegian Supreme Court in plenary shows that it is of principle importance. The court is very rarely set with all judges. However, a plenary session has hardly been more appropriate than now: for decades, the Svalbard issue has engaged and generated legal as well as foreign policy debate.

This was also the final opportunity for the Latvian shipping company to present its case in the Norwegian legal system. However, the question of the Svalbard Treaty's scope of application can be tested as a dispute before an international court or tribunal. But then the shipping company must get its home state, Latvia, to instigate legal action against Norway. The decision of an international court or tribunal will weigh more heavily for the question of how to interpret the Svalbard Treaty than a judgment from a domestic court. But the road to such litigation is long, at least for Latvia. As an EU member, Latvia is bound by the Union's Common Fisheries Policy. And the EU has already decided that it will not – for the time being at least – be involved in any international legal proceedings against Norway where the Svalbard issue is at stake.⁵

Back to the Supreme Court. Interpreting the Svalbard Treaty and deciding on its scope of geographical application is not an easy task. The Court proceedings also indicated that some of the actors in the case found the delicate issues relating to the Svalbard Treaty and its interpretation difficult. Or in the words of the Latvian shipping company's main litigator during the trial: "I'm not really an expert in international law". But will Norway's Supreme Court deal correctly with the complex issues of international law brought before them?

NOTES

1. Published in *League of Nations Treaty Series*, Vol. 2, 8–19.
2. Judgment of the Norwegian Supreme Court, 14 February 2019.
3. Article 8 of the Svalbard Treaty.
4. Verdict from Borgarting Court of Appeal, 13 June 2022.
5. Order of the General Court (Fourth Chamber) of 30 January 2020.