

This article has been published in:  
*Marine Policy*, Vol 98, 2018, pp. 58-64  
DOI: [10.1016/j.marpol.2018.09.007](https://doi.org/10.1016/j.marpol.2018.09.007)

This is the post print version of the article.

# Crab!

## How a dispute over snow crab became a diplomatic headache between Norway and the EU

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### 1. Introduction

In 2017, the European Union (hereafter ‘EU’) decided to award licences to catch snow crab in the Fisheries Protection Zone around the Arctic Archipelago of Svalbard – despite not having jurisdiction to manage snow crab licences in these waters. The snow crab is a relatively new species in the Barents Sea, first discovered in 1996 as it moved westwards from Russian waters. Despite limited Norwegian fisheries of this resource, conflict ensued, as the Norwegian Minister of Fisheries Per Sandberg vowed that Norway would not ‘give away one crab!’.[1] A Member of the European Parliament (hereafter ‘MEP’) followed up, characterising the Norwegians as ‘pirates’ of the Arctic.[2]

There are more dimensions to this dispute than just catching *Chionoecetes opilio*, as ‘Oil lurks beneath EU-Norway snow crab clash’.[3] It is particularly the applicability of the Spitsbergen Treaty from 1920 in the maritime zones beyond the territorial waters of the archipelago, where Norway and the EU hold differing views, that spark such statements.[4,5] Further, general Norway-EU relations come to play. This article aims to explore the interests of the ‘EU’ in the present case, as well as the complexities of this specific case that involves legal, political and economic considerations; all spurred by the introduction of a new species in Norwegian Arctic waters.

Why is the EU pursuing a relatively minor issue over the right to catch snow crab in the Barents Sea? Is the EU using snow crabs to challenge Norway’s Svalbard-regime?[6] If so, what are the interests of related European actors driving this challenge? Or is this purely an economic concern, with a few commercial actors that stand to benefit from upholding their rights? If so, why would the EU allow a relatively minor issue to complicate its overall positive relationship with Norway? A common fallacy in academic literature on Arctic politics, as well as in popular media is to simplify the EU down to one single interest.[7] Recognising that the ‘EU’ is not simply the ‘EU’, a final question concerns the matter of EU-coherence: does one coherent interest exist within the EU-system that explains the Union’s ‘actions’ concerning snow crab?

Any dispute has at least two sides. This article focuses specifically on the EU’s interests and policy-process, searching beneath over-simplified headlines. The Norwegian viewpoint and why this diverges from that of the EU is outlined; however, it is up others to attempt to

explain why Norway has remained unrelenting on this issue. The aim of this article is to add a first, but crucial, building-block to the understanding of the EU's interests concerning snow crab specifically, and the EU as a fisheries actor more generally. Furthermore, this article will unpack a case of high complexity that involves a legal and political dispute in place since 1977. There have been few attempts at describing and understanding exactly *what* motivates this ongoing dispute.[8,9]

The analysis draws on a previous scholarly work concerned with Svalbard and the disputes surrounding the Archipelago, diplomatic notes and statements by Norwegian and EU officials, as well as a series of interviews conducted with the relevant branches of the EU system in Brussels: officials in the European Commission (hereafter 'Commission') and the European External Action Service (EEAS), politicians and staffers in the European Parliament (EP), and EU Member-State officials dealing with the issue under study here.<sup>1</sup>

This article begins by outlining the standpoint of EU and its Member States regarding the Spitsbergen Treaty, and then unpacking the complexities of the 'snow-crab dispute'. It then applies the information regarding the dispute to explain the EU's interests concerning snow crab.

## 2. The EU and Svalbard: what position?

To understand the Norway/EU dispute over snow crab, one must understand the related dispute over the maritime zones around the Svalbard archipelago. Located approximately 650 kilometres north of the Norwegian mainland and a mere 1000 kilometres from the North Pole,[10] Svalbard has a resident population of only 2,700.[11] Initially named 'Spitsbergen' by the Dutch explorer Willem Barentsz in the late 16<sup>th</sup> century, Spitsbergen is today the name of the largest island in the archipelago; the whole archipelago bears the Norwegian name 'Svalbard'.

Controversy surrounding Svalbard's maritime zones stems from the Treaty concerning the status of Spitsbergen, signed in Paris in February 1920, as part of the settlements after World War I.[12] Norway was granted full sovereignty over the archipelago in 1920, and the Treaty came into force in 1925. According to Art. 3 of the Treaty, Norwegian exercise of its sovereignty is subject to certain conditions (concerning taxation and use of the islands for military purposes), as well granting equal access to specified economic activities to nationals from the signatory countries:

may carry on there without impediment all maritime, industrial, mining and commercial operations on a footing of absolute equality. They shall be admitted under the same conditions of equality to the exercise and practice of all maritime, industrial, mining or commercial enterprises both on land and in the territorial waters, and no monopoly shall be established on any account or for any enterprise whatever.[12]

Despite this early 20<sup>th</sup>-century diplomatic compromise[13], diverging views on the geographical scope of the Treaty have persisted, also among legal experts, concerning the status of the maritime zones beyond Svalbard's territorial sea. While some argue that the Treaty applies in these maritime areas, others say it does not.[4,5,14,15] Norway considers the 200-mile maritime zone including the continental shelf around Svalbard as being exempt from the Treaty.[16] Other countries, however, have claimed that the principles of the Treaty apply to

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<sup>1</sup> In total 12 semi-structured interviews were conducted in February 2018 in Brussels and Oslo. As every interviewee was given the right to remain anonymous, the full name of the interviewee and his/her respective position within his/her workplace stays with the authors. All interviews usually lasted between 45 and 80 minutes with 'semi-structured' referring to the method of having a set of open questions as the basis of the conversation.

the 200-mile zone and shelf as well, although this was not explicitly stated when the Treaty was formalised in 1920.[16] The latter reading of the Treaty would grant all signatories equal rights to economic activity in the water column and on the continental shelf around Svalbard, albeit still governed by Norway.[4]

This article will not attempt to ascertain which position is more valid. The presentation here builds on the conclusion reached by Churchill and Ulfstein: '[i]t is ... not possible to reach a clear-cut and unequivocal conclusion as to the geographical scope of the non-discriminatory right of all parties to the Spitsbergen Treaty to fish and mine in the waters around Svalbard.'[14] Diverging legal positions, however, are one thing. Political actions are something different.

Although claiming to have a right to establish an Exclusive Economic Zone (EEZ) around Svalbard, Norway has not yet done so. In 1977, as Norway had established its full EEZ along its coast, it decided to 'only' establish a Fisheries Protection Zone (FPZ) around Svalbard for the purpose of the conservation and management of living marine resources.[5] Under the argument that this was needed to protect and manage what is the central nursery area for the Northeast Arctic cod stock, this avoided a potential outright challenge to the Norwegian claim.[16]

The other Treaty signatories have accepted this, although Iceland and Russia have been outspokenly critical of Norwegian efforts to manage related fisheries.[5,17,18] According to the Soviet Union, later Russia, Norway has no right to take the measure of establishing the FPZ unilaterally. However, for all practical purposes, Russia has accepted the Norwegian regulatory and enforcement regime in the FPZ, as it has been in its own interest to manage fish stocks sustainably and get a considerable share of the quota.[19,20]

Further, Norway claims that the Treaty does not apply to the continental shelf around the Archipelago.[16] In 2006, Norway submitted its claim to an extended continental shelf in accordance with the United Nations Convention on the Law of the Sea (UNCLOS); the Commission on the Limits of the Continental Shelf (CLCS) gave its final recommendations in 2009.[16] The CLCS found that the continental shelf around Svalbard indeed was contiguous to that of the Norwegian mainland, but – per its mandate – did not discuss whether or not the Treaty is applicable to the continental shelf areas around Svalbard explicitly.

The EU's position concerning the Treaty and the Archipelago's maritime zone has been somewhat unclear. The EU is not party to the Spitsbergen Treaty, but 21 of its Member States are parties.<sup>2</sup> In recent decades, several Member States have had diplomatic encounters of varying degree with Norway over the maritime zones around Svalbard.[17] All these incidents were related to specific actions of Norway in the FPZ, either fisheries enforcement measures or general issues concerning oil and gas exploration. The Member States have also held varying positions with regards to the zones around Svalbard, ranging from considering it international waters to arguing that the Spitsbergen Treaty applies. In 2006, the UK arranged a meeting concerning Svalbard and its maritime zones in London.<sup>3</sup> This meeting, Molenaar further believes, 'may have led several of these states to align their positions on the Spitsbergen Treaty closer to that of the United Kingdom.'[5]

The current position of the Commission is confined to the domain of fisheries, stressing the acceptance of the Norwegian fisheries regulations concerning the maritime areas of Svalbard (and its FPZ) as long as they are applied in a non-discriminatory manner and are

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<sup>2</sup> These are: Austria, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Romania, Sweden, Spain, the United Kingdom. It is assumed that the EU could become a signatory if an invitation of accession is backed by all contracting parties, see [5].

<sup>3</sup> Attended by representatives from Canada, Denmark, France, Germany, Iceland, the Netherlands, Russia, Spain and the United States.

respected by all parties to the Treaty.[5] Accordingly, the EU neither accepts Norway's claim to unrestricted sovereign rights in the FPZ, nor does it accept conservation measures that amount to access restrictions for the EU. However, as long as these measures are applied in a non-discriminatory manner and are scientifically based, the EU will abide by them.[21]

Despite the Commission's rather straightforward position, the Svalbard issue resurfaces in Brussels from time to time, usually through statements made by MEPs.[22] Most recently, and in the fourth resolution of the EP on an *Integrated European Union Policy for the Arctic* (March 2017), reference was made to Svalbard in connection with fisheries and access for EU Member States.[23] This must be seen as directly related to then-ongoing dispute over the catching of snow crab, described below.

### 3. The Snow Crab Dispute

#### 3.1. Banning fisheries except...

Snow crab was first recorded in the eastern Barents Sea in 1996. According to the Norwegian Institute of Marine Research, the total biomass today in these waters is considerable: '[r]ough estimates by Russian scientists indicate that snow crab biomass is approximately ten times higher than that of red king crab, and about half the biomass of shrimp.'[24] In Canada and the USA, snow crab fishery ranks among the most valuable fisheries.[25] Thus, expectations in Norway have been high concerning the economic potential of this new species, even that it might surpass cod – the most valuable fisheries in the Norwegian EEZ.[26]

Starting in 2015, however, Norway introduced a ban on the catching of snow crab on the Norwegian continental shelf (which, according to Norway, includes Svalbard).[27] According to the Norwegian Minister of Fisheries, the regulation was introduced to gain control of the activity, as well as greater knowledge and data on the spread of the stock.[28] This ban was still in place in early 2018.

In practice, however, in the regulation implementing the ban the Norwegian government opened for a limited number of licenses to Norwegian fishermen exclusively, through special requests.[28] It was this separation between Norwegian and EU fishermen that lies at the heart of the dispute between Norway and the EU.[21] *If* the continental shelf around Svalbard is not subject to the Spitsbergen Treaty, as Norway argues, Norway has exclusive rights to the resources and may award licenses/quotas as it prefers. However, *if* the Treaty applies, Norway manages the licensing of fishing rights but cannot discriminate against vessels from signatory states, many of which are EU members.

A few vessels from EU Member States, predominantly Latvia, Poland and Spain, had already engaged in snow crab fisheries on the continental shelf from 2013 onwards.[29] However, Norway notified the EU that these vessels would be evicted from both the Loophole and the waters around Svalbard[28]; and in 2015, the Director-General of DG MARE<sup>4</sup>, Lowri Evans, wrote a note to Member States requesting a halt in catching of snow crab:

... Member States are advised that they should rescind any current licenses authorising their vessels to fish for snow crab and any other sedentary species such as king crab in the NEAFC Regulatory Area and should not issue any new licenses to this effect and, as appropriate, re-call the vessels concerned.[30]

This note was concerned with two things. First, it targets the 'Loophole'. Although these are international waters, fisheries are regulated by the North East Atlantic Fisheries

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<sup>4</sup> DG MARE is the Directorate-General of the Commission responsible for Fisheries, the Law of the Sea and Maritime Affairs.

Commission (NEAFC), established between the coastal states.<sup>5</sup> Moreover, as the note highlights, the *continental shelf* in the Loophole is under national jurisdiction by either Norway or Russia, as extended continental shelf claims have been proved and accepted by the CLCS. The note also engages in the debate concerning the status of snow crab: is it to be defined as a sedentary species (hence, belonging to the seabed) or as a fish, and thus subject to regulations covering fisheries resources? Norway and Russia – which cooperate on the management of marine living resources in the Barents Sea – decided to treat the crab as a sedentary resource, *not* as a shared stock.[9]

On behalf of the EU, the Commission argued in its 2015 note as following:

With regard to snow crab, it appears that this species is “unable to move except in constant physical contact with the seabed or the subsoil” and it thus falls within the definition of “sedentary species” of Article 77(4) of UNCLOS.[30]

It is thus reasonable to assume that both the EU and Norway define the species as belonging to the continental shelf regime. Therefore, the broader legal ramifications of this dispute concern not only the right to catch snow crab on the continental shelf around Svalbard, but also relate to other sedentary resources, such as oil and gas and seabed minerals. Although there has been no oil/gas drilling on the continental shelf around Svalbard, the outcome of the dispute over snow crab might set a precedent for such industrial activity in the future.[3,4,8]

To sum up: the Norwegian ban on catching a new Arctic resource – snow crab – brought the diverging positions held by Norway and the EU on Svalbard’s maritime zones and continental shelf to the forefront in (fisheries) relations between the two actors. Although still of limited economic importance to EU Member States, the prospects of a profitable new resource, together with the disagreement over the Spitsbergen Treaty’s applicability to the continental shelf around Svalbard, brought this dispute into the spotlight.

### **3.2. Consolidating positions**

In 2016, the Commission took the initiative to informal talks on swapping of quotas for snow crab. Norway demanded that all catches be landed in Norway and that the offer concerning crab be applied to the entire Norwegian shelf, not just Svalbard, as well as reciprocal quotas in return from the EU. The Commission refused, and negotiations stalled.[21,28] By December 2016, as no agreement had been reached between Norway and the Commission, the latter proposed to the Council of the European Union (hereafter ‘Council’) to authorise up to 20 vessels to catch snow crab on the continental shelf around Svalbard.[31] In January 2017, the Council adopted this proposal and accorded five EU Member States – Estonia, Latvia, Lithuania, Poland and Spain – the right to issue 20 licences.[21]

Norway reacted to the decision by the Commission and the Council with public statements[32], as well as diplomatic notes. Several *notes verbales* were sent to the EU in early January 2017, outlining Norway’s position:

There is no basis in the 1920 Treaty for a claim that any of its provisions granting rights to nationals of the contracting Parties apply to the continental shelf of the archipelago beyond its territorial waters.[33]

As the coastal State, Norway has the exclusive right under the Convention to regulate and exercise jurisdiction over catches of snow crab on its entire continental shelf, including around Svalbard. Such jurisdiction includes any necessary enforcement action in conformity with the Convention.[33]

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<sup>5</sup> These states are Denmark in respect of the Faroe Islands and Greenland, the EU, Iceland, Norway and Russia.

In February 2017, Norway reiterated these points, this time referring to the Council regulation of late January 2017:

The EU and its member States have no right under international law to license any exploitation of snow crab or any other natural resources on the Norwegian continental shelf without the express consent of Norway as the coastal State. No such consent has been granted. In this situation, any licensing by the EU or a member State of the EU constitutes a breach of an international obligation and infringes Norway's rights as a coastal State.[34]

### **3.3. Arrests, re-licensing and end of negotiations**

Consequently, the Norwegian Coast Guard arrested the EU-registered vessels *Juros Vilkas* from Lithuania (with licence from Latvia) in the Loophole in late 2016, and *Senator* from Latvia (with licence from Latvia) in waters around Svalbard in January 2017. Both cases were tried before Norwegian courts. In November 2017, the Norwegian Supreme Court ruled that Norway has the right to regulate fisheries of snow crab in the Loophole, as this is a sedentary species and Norway has sovereign rights to resources on the continental shelf.[35] This is in line with the position stated by DG MARE in August 2015.[30] In February 2018, the Hålogaland Court of Appeal in Tromsø upheld the decision against *Senator*, as Norway also has the right to regulate fisheries of snow crab on the continental shelf around Svalbard.[36] In none of these decisions, however, was the actual status of the maritime zones and shelf around Svalbard up for discussion.

It is particularly the arrest in 2017 that irritates EU actors and has put the issue of snow-crab fisheries on the agenda. In a parliamentary question to the Commission from 5 April 2017, three MEPs criticized the Norwegian refusal to 'recognise the legitimate right of EU vessels to sustainably and legally operate in these areas [Barents Sea and Svalbard]', further emphasising that 'EU operators are losing an average of EUR 1 million per month each' by being stuck in port, for fear of being arrested.[37] In a follow-up and a major interpellation from October 2017, MEP Cadec – on behalf of the EP's Committee on Fisheries (PECH) – criticized the Commission's negotiation effort as not 'resolute enough'.[38]

In December 2017, the Council again awarded licenses for 20 vessels to catch snow crab in waters around Svalbard, divided amongst the same five Member States.[39] This was done to uphold the EU's position concerning the dispute and Svalbard: the 20 licenses for 2017 had never been utilised, as no vessel apart from *Senator* ventured north.[21] As a Commission non-paper, distributed by the Council to the Member States on 8 December 2017, explains:

...in order to preserve the rights of those Member States which are Contracting Parties to the Treaty of Paris to exploit snow crab in Svalbard on the basis of equal access, it is suggested to maintain for 2018 the same regime regarding the number of fishing authorisations as in 2017.

However, the position of Norwegian authorities on this matter is unlikely to change in the near future and therefore, operators wishing to engage in this fishery in 2018 should be duly informed of the risks that this may entail. Therefore, until a practical agreement exists with Norway on this matter, Member States should carefully warn interested operators of the risks involved before issuing the licences for this fishery.[40]

The related Council Regulation 2018/120 from 23 January 2018 reads as follows:

In order to ensure that the exploitation of snow crab within the area of Svalbard is made consistent with such non-discriminatory management rules as may be set out by Norway, which enjoys sovereignty and jurisdiction in the area within the limits of the said Treaty, it is appropriate to fix the number of vessels that are authorised to conduct such fishery. The allocation of such fishing

opportunities among Member States is limited to 2018. It is recalled that in the Union primary responsibility for ensuring compliance with applicable law lies with the flag Member States.[41]

In response to this second round of licensing by the EU, the Norwegian Minister of Fisheries announced that Norway would not negotiate this issue further with the Commission, thus ending official talks aimed at finding a solution.[42] Around the same time, the snow crab became the source of a debate in the EP plenary session on 18 January 2018. As MEP Wałęsa stated:

European fishermen continue to lose out and Norway is still disrespecting the European Union as a partner

and:

... maybe it is time to move forward with legal action against Norway. I would like to avoid this situation, but maybe it will be the only way to convince our partners in Norway to respect and uphold the law.[43]

Wałęsa additionally argued that the EU should help efforts to catch crab for *environmental* reasons, beyond political or business interests, as the spread of the crab could harm the ‘fragile benthic ecosystem’ of the Barents Sea.[43] That, however, is not a universally agreed conclusion. As Hansen writes: ‘[w]ithout doubt snow crab affects the benthic community through predation and foraging behavior, but it is currently difficult to assess the magnitude of this influence.’[9]

The EU Commissioner in charge of Maritime Affairs, Karmenu Vella, responded diplomatically, noting that the Commission had been attempting to find a solution with Norway through negotiations, albeit stalled at the moment.[44] In the written answer to the EP question from 5 April 2017, Commissioner Vella similarly highlighted the Commission’s efforts at finding a ‘practical solution’.[45]

Thus, the dispute between Norway and the EU over snow-crab fisheries in the Barents Sea is relatively complex and multi-faceted. From the EU side, several actors and institutions are engaged. This leads to the final point in this article and the attempt to understand ‘the EU’ as an actor as regards the snow-crab dispute.

## **4. Understanding EU interests**

### **4.1. Special interests and agenda-setting**

Returning to a key question posed in this article, where did the EU’s interests in engaging Norway over snow crabs originate? An issue can find its way to the EU agenda by many routes. As a bare minimum, this can be simplified to either a top–down issue initiated by the Commission and/or the European Council in order to improve EU policies and align the work done by the EU and its Member States – or a bottom–up issue initiated by special interests within and among European actors.[46–48] Kingdon has identified what he deems ‘policy entrepreneurs’ and ‘policy windows’.[49] Howlett et al. describes four types of windows: (1) routinized political windows defined by institutionalised and procedural events, (2) discretionary political windows defined by individual initiative, (3) spill-over problem windows defined by issues drawn into already existing open windows, and (4) random problem windows defined by random events or crises.[50]

In this case, all three core EU institutions have been involved: the Commission, the Council, and the EP. Fisheries policy is one policy area where the EU has supranational authority under the Common Fisheries Policy (CFP) (TFEU, ART. 3).[51] Under the Treaty of

Lisbon, the Commission has sole competence to negotiate with third countries on fisheries agreements, including access to fishing in each other's jurisdictions.[52,53] The Commission participates in negotiations with third countries like Norway in determining quotas, before proposing the final total allowable catches (TACs) for each stock to the fisheries ministers of the Member States in the Council. As quotas are awarded, it is each individual Member State that is responsible for its share of quotas and licenses. Although generally being a co-legislator in the CFP, the EP is excluded from adopting measures on the 'fixing and allocation of fishing opportunities' (TFEU, Art. 43.3).[51]

However, interviews with officials working in or with the EU on this issue indicate that the initial driver came from the interests of specific Member States. As one EU-institution official put it: [t]his issue [snow crab] is clearly driven by continuous pressure by Member States who have entitlements'.[21] In this case the Commission and its DG MARE are thus operating at the behest of Member States and their interests. Where do these interests derive from?

The answer to this question is relatively straightforward, as it was the industry concerned with a potentially new snow crab industry that acted as the instigator. Or as put by an EU official: 'we initially became engaged in this issue because of industry interests that contacted us.'[54] Similarly, as stated by MEP Wałęsa:

I was contacted by business men from Poland conducting business in Norway who wanted to conduct business on snow crab as well. That's how it started. But now, my colleague from Latvia wants me to be involved in that [snow-crab issue], and other countries from other countries also.[55]

Thus, what has been argued to be a Brussels-based initiative[3,6], was in fact initially driven by very specific interest groups in a few countries – Latvia and Poland in particular.[54] These interests were worried about being evicted from the Russian continental shelf and the then-infant industry of catching snow crab which had led to investments in equipment and vessels.[54] It seems clear that these interests managed to find some key actors to speak on their behalf, as for example MEP Wałęsa.

Already back in January 2014, without making any reference to the snow crab, Wałęsa – on behalf of PECH – had urged the Commission to take steps concerning Norway and its claim to unilateral management of waters in the Svalbard FPZ located east of the maritime delimitation line, as agreed by Norway and Russia in 2010.[56] The issue of Norway's fisheries management 'style' in Svalbard's maritime zones and the EU-perceived lack of equality recur in discussions within the EP. 'Within PECH we hear and discuss Svalbard-related issues every other month. Moreover, Norwegian representatives, who participate in these meetings, aim to sweep any Svalbard discussions under the table', said MEP Wałęsa.[55] To that effect, he also drafted related questions to the Commission on Greenland halibut and haddock in March and July 2011.[57,58]

In general, the EU-Norway fisheries relationship is regulated by a bilateral agreement, which was developed and signed in 1977 and eventually entered into force in 1981. With quotas worth over €2 billion, it provides for the joint management of shared stocks in the North Sea and Skagerrak areas and includes an annual reciprocal exchange of fishing possibilities in each other's waters. Quotas are negotiated annually between DG MARE and the Norwegian counterpart, the Ministry of Fisheries.[59] The Commission then proposes the final TACs for each stock, for consideration by the Council's Agriculture and Fisheries configuration (AGRIFISH).[53]

When the specific issue of snow crabs was put on the EU agenda sometime in late 2015 and early 2016, a few Member States actively worked towards the Commission to ensure that their interests would be represented. According to multiple sources, Latvia was a major driver in pursuing licenses to catch snow crab.[21,54,60,61] Although Latvia had only two companies



interested in this activity, it became a key issue for the government in Riga.[62] In 2016, Latvia became the 44<sup>th</sup> party to the Treaty, consolidating its claims to equal access around Svalbard. However, a Latvian representative interviewed for this study stressed that the country's interests concern *only* fisheries, and not oil and gas.[62]

Other EU diplomats as well as diplomats working for third countries express surprise at the willingness of some Member States to create a dispute with Norway over an issue they consider minor.[21,54,60,61] As argued by MEP Wałęsa: 'we are so close to Norway. We share common values. We share a common market... If we can't find a solution with Norway, then what does that say about other countries?'[55] From being a relatively minor issue concerning quotas and access discussed informally between the Commission and Norway, active engagement by MEPs in the PECH Committee brought the issue higher on the EU agenda. Suddenly, the topic also concerned international law. As Wałęsa declares:

I don't want to create conflict. I want to be understood. I respect the sovereign authority of Norway over these waters. Sovereign rights to govern these waters anyway they please. But as long as we have international agreement in place, we should try to respect them.[55]

A few MEPs and Member States saw it as being in their interest that this issue should come to the forefront of Norway–EU relations over fisheries. In turn, this complicated the workings of the Commission in trying to find a solution with Norway.[21] The Norwegian media ensured that the Norwegian Minister of Fisheries became engaged in a case where it is relatively easy to be seen as standing up for local fishermen.[31,32] Being seen as protecting your country's own fisheries can have great political appeal, as demonstrated by Canadian Minister of Fisheries Torbin during the 'Turbot War' with Spain in the 1990s.[63] The same goes for MEPs and ministers intent on re-election. As MEP Wałęsa himself admitted: 'when I talk about fish I can tell them [voters] exactly, listen, this is what's going to happen to you.'[55]

Thus, it seems we can quite clearly classify this as a case of a few 'policy entrepreneurs' having utilised a 'policy window'. Initially, the policy window seemed to be defined by individual initiative. Following, a so-called spill-over problem transformed the issue from a relatively limited issue to a larger concern of EU and Norwegian decision-makers. As a case study, this highlights the relevance of special interests and how – given the right conditions – these can hijack single issues and raise them on the agenda.

As theories about path dependence, or so-called issue stickiness, make clear, 'the set of decisions one faces for any given circumstance is limited by the decisions one has made in the past, even though past circumstances may no longer be relevant.'[64] From a legal point of view, it was argued that the Commission had to uphold the licences for the following year (2018), so as not to be seen as yielding in its overall position on Svalbard.[41,54] From an economic point of view, the 2017 licenses were never utilised, apart from the vessel *Senator*, which was arrested. From a political point of view, when EU Member States and MEPs had become sufficiently engaged in the issue, raising it on the agenda and investing resources and reputations, it became difficult to abandon.[54,55,62] The end-result was that the Council adopted the continuation of the 20 licenses, which in turn resulted in Norway walking away from the negotiations. By late 2017, the issue had thus become 'stuck'.

#### **4.2. Finding a solution?**

This dispute between Norway and the EU can be said to concern two related issues. First, Norway disputes the EU's interpretation of the applicability of the Spitsbergen Treaty to the 200-nautical mile continental shelf zone around the Archipelago. Norway argues the Treaty does not apply, whereas the EU (both the Commission and the Council) have argued, directly or indirectly, that the Treaty infers equal access/non-discrimination concerning the archipelago's resources, including snow crab. The Commission demands that Norway adhere

to three rules regarding the maritime zone around Svalbard. First, access to resources must be non-discriminatory, as per Articles 2 and 3 in the Spitsbergen Treaty. Second, Norwegian management must be based on sound scientific advice. Third, the management scheme must be respected by all interested parties. According to the Commission, Norway was ‘possibly in breach of all principles’.[21] However, the EU’s position concerning Svalbard has not been fully consistent and has changed somewhat in recent decades, from arguing along the lines of ‘international waters’ to a position that the ‘Treaty applies’.[4,5,17]

Second, and related, Norway argues that *even if* the Treaty were to apply despite Norwegian reservations, Norway is *still* the sole regulator of the continental shelf around Svalbard. Such actions on the part of the EU are in violation of both UNCLOS (Art. 77) and the Spitsbergen Treaty, as Norway – regardless of the outcome of the dispute on the status of the maritime zone – has the undisputed right to *manage* economic activity in this area. Thus, any licensing of vessels to catch snow crab must be done by the Norwegian authorities and subject to Norwegian laws: the Council’s licensing is a violation of international law.

As to solving the dispute, similar disputes over quotas are generally settled by swapping of quotas between the negotiating parties. From the Norwegian side, a quota swap with the EU on snow crab would suffice to allow EU vessels to catch snow crab on its continental shelf.[28] On several occasions Norway offered the EU to swap snow-crab quotas in connection with the ordinary fisheries quota.[28] Offers to swap snow crab were first presented by the Norwegian side during negotiations with the EU in November 2015. The EU rejected the offer, claiming it had no available means of ‘payment’ (i.e. other fishing quotas).[28] The reason lies in two separate relationships.

The Member States that traditionally benefit most from the fisheries quota with Norway have not considered expanding the scheme to include more species, as that would be at the expense of their other quotas from Norway. Generally, the fisheries agreement with Norway is deemed politically sensitive, as it must be carefully balance with the varying interests of the Member States. While the quotas the EU obtains for fishing in Norwegian waters are of interest to certain Member States, the resources Norway obtains in EU waters can be of interest for other Member States.[52] The countries actively working to get snow-crab quotas – mainly the three Baltic states and Poland – are newcomers to the European table and have otherwise few other quotas to offer.[54]

Furthermore, by accepting the Norwegian position on snow crab quotas for the *entire* Norwegian continental shelf and having to ‘pay’ for these quotas by swapping with something else, the EU would implicitly recognise the Norwegian position and weaken its own concerning the Spitsbergen Treaty.[21] As argued by Norwegian officials: ‘the snow crab is an exclusive resource to us and Russia, and we do not give away a resource for free’.[65] Several Member States consider that, however, under the Spitsbergen Treaty, they are entitled to quotas on the continental shelf around Svalbard without any form of compensation to Norway.[62] As accepting the Norwegian offer would weaken the EU’s position concerning Svalbard, the EU has deemed it necessary to license its own vessels, so as to force the issue.

In sum, the EU position is that EU Member States, by being parties to the Treaty, have right to equal access regarding these resources. EU fishermen are entitled to catch snow crab under the Spitsbergen Treaty: a right that Norway ignored by awarding licenses only to its own fishermen. The Commission consequently had to award licenses to EU Member States ‘in order to claim EU rights’.[21]

#### **4.3. Only about fisheries... for now**

The EU has multiple interests and voices, even within a policy domain like fisheries where the Member States have ceded competence and authority to the supranational level. In fisheries, the EU does speak with one voice. But, as this case study has shown, that voice can be hijacked

by special interests, if there are few counter-positions and – as in this case – the issue is seen as being of limited importance. In fact, it seems that a window opened for greater dialogue between Norway and the EU/Commission on this matter – but then it attracted widespread attention and positions became entrenched. Given Norway’s sensitivity to debates over Svalbard and opposing legal views, it might have been fruitful to engage directly with these special interests in the EU Member States, to prevent the issue from rising higher on the EU agenda. As argued by MEP Wałęsa:

What is surprising is that knowing that Europe or individual member states can push going to court, they [Norway] are not trying to find other solutions to avoid going through the Svalbard Treaty.[55]

However, this limited dispute has still been kept separate as an issue pertaining solely to fisheries. From 2007/2008 onwards, the EU has engaged increasingly in Arctic affairs. At times, questions of Svalbard and/or larger governance issues have arisen, especially in the EP.<sup>6</sup> And yet the snow-crab issue has been deliberately kept as a fisheries issues – by the DG MARE and the EEAS, the EU Member States, and Norway. Again, it is predominantly the EP and some of its MEPs who would (still) like to see a broader debate on Arctic governance. As put by MEP Wałęsa: ‘discussions about Arctic governance are long overdue. The EU should talk about the Arctic’s future.’[55] Similarly, as MEP Pietikäinen has noted: ‘we need to work to preserve the Arctic. In the longer run I think we should work for a regime in the Arctic like what we have for the Antarctic.’[66]

If these political interests can be combined with economic interests that spur Member States, there might be more impetus for a debate over Svalbard. With elections to the EP due in May 2019, MEPs are becoming more active in articulating the concerns of their constituents. Given the generally high unemployment among fishermen, concerns over the EU ‘losing out’ of potential access around Svalbard are (politically and economically) comprehensible.[15,67] As this study has pointed out, however, the EU at large (through those of its Member States that are parties to the Spitsbergen Treaty) seems to have opted to adhere to the FPZ and the Norwegian jurisdiction it implies.

This issue ties in with the EU’s overarching aspiration of being seen as a sensible and responsible actor as regards the Arctic, whether through its still-pending observer status in the Arctic Council, or its relations with relevant European Arctic states.[68] Norway and the Commission could still manage to find a practical ‘under the table’ solution that would safeguard the interests of both parties.[54] It is therefore of considerable interest to see the trajectory taken by this relatively minor dispute in the near future.

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<sup>6</sup> Over the last ten years of EU-Arctic policymaking it has often been the EP and its elected representatives that have rocked the EU’s Arctic boat, see [69].

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