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Why is the European Union Challenging Norway over snow crab? Svalbard, Special Interests and Arctic Governance

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Abstract:

Why is the European Union pursuing a relatively minor issue over the right to catch snow crab in the Barents Sea? The issue has highlighted an underlying disagreement between Norway and the EU over the status of the maritime zones around the archipelago of Svalbard, stemming from the 1920 Spitsbergen Treaty. Is the EU using the snow crab to challenge Norway's Svalbard regime? The answer is that the EU is a multi-faceted animal, where special interests can hijack the machinery and bring issues to the table, given the right circumstances. This article outlines these circumstances, as well as the evolution and the sources of the dispute over the snow crab, as it not only relates to economic interests, but international politics as well as law.

Keywords: Spitsbergen Treaty, European Union, Norway, snow crab, maritime dispute, Arctic

I. Introduction

In 2017, the European Union (EU) decided to award licences to catch snow crab in the maritime zones around Svalbard in the Barents Sea¹ despite having neither the jurisdiction nor the authority to award licences in these waters. Snow crab is a relative newcomer in the Barents Sea, first discovered in 1996 on its journey westwards from Russian waters. Although Norwegian fishers caught little of this resource, conflict arose with the EU, with the Norwegian Minister of Fisheries Per Sandberg vowing never to “give away a single crab!”² A Member of the European Parliament (MEP) responded in kind, characterising the Norwegians as “pirates” in the Arctic.³

There are more aspects to this dispute than the simple fishing of *Chionoecetes opilio*. As the newspaper *Politico* wrote in June 2017, “Oil lurks beneath EU-Norway snow crab clash.”⁴ The genesis of opinions like this can be traced to the 1920 Spitsbergen Treaty,⁵ and its applicability to the maritime zones beyond the territorial waters of the archipelago, an issue about which Norway and the EU hold differing views. Of course, wider Norway–EU relations also come into play, since the dispute ties into another topic: the growing prominence of the EU’s Arctic policy and actions. A staple of the EU Arctic policy has been the idea of the EU as a “responsible” actor, favouring a sustainable, and even a restrictive, approach to marine resource development in northern waters.⁶

This article tackles a simple yet timely question: why is the EU spending time and energy pursuing such a relatively minor issue – the right to catch snow crab in the Barents Sea? Is the EU using snow crabs to challenge Norway’s Svalbard regime? If so, what are the interests of the European actors that are behind this campaign? Or is the EU interest a purely economic concern, where a few commercial actors stand to benefit from exercising what they perceive as their rights? And if it is, why would the EU allow a relatively minor issue to complicate its overall positive relationship with Norway?

The Norwegian media has portrayed the EU awarding of licences to harvest snow crab as an EU plot hatched to gain access to the Arctic’s resources more broadly.⁷ Here however, the aim is to identify the interests of the EU. A common mistake in the academic literature on Arctic politics, as well as in the popular media, is to conflate the EU’s (and other State’s) various interests into a single interest and institutional point of view, as a way of explaining why various actors – like the EU, China or Japan – have any interest in the Arctic at all. By asking why the EU is pursuing anything, there is a risk of falling into the same trap. Hence, the more fundamental question: *is there a coherent interest within the EU system that explains its actions concerning the snow crab?*

Although all disputes have at least two sides, this article focuses only on the EU’s interests and policy-formulation process, and seeks to dig beneath simplified headlines. The Norwegian point of view and why it diverges from the EU’s, will be outlined but it will be left to others to explain Norway’s relentless defence of its standpoint. The analysis herein is based on information obtained through a series of interviews with officials in all the relevant branches of the EU in Brussels in 2018. Of particular interest are the views of EU officials in the various parts of the European Commission (hereafter Commission) and the European External Action Service (EEAS), politicians (MEPs) and staffers in the European Parliament, and EU Member States’ officials dealing with the issue. The purpose of this article is to add a small, yet crucial, brick to our understanding of the EU as a foreign policy actor more generally, as well as its northern engagement.

This article has three layers. First, the various ways of conceiving of the EU as a foreign policy actor will be briefly outlined. This section leans on the general theoretical approaches to the EU as an object of study. Second, we outline the issue being explained: (1) the EU’s and its Member

States' respective standpoints regarding the Spitsbergen Treaty; and (2) the specific dispute concerning the snow crab in the period 2015-2018. The first point relies on academic studies and statements that describe the EU's approach regarding Svalbard. In second part, the information obtained regarding the dispute will inform a better understanding of the EU as a foreign-policy decision-maker and an Arctic actor.

II. Dispute over Svalbard's Maritime Zones

The snow crab dispute is tied to dispute over the maritime zones around the Svalbard archipelago. Located approximately 650 kilometres north of the Norwegian mainland and just 1,000 kilometres from the North Pole,⁸ only 2,700 people reside on Svalbard.⁹ Initially named Spitsbergen by the Dutch explorer Willem Barentsz in the Sixteenth Century, Spitsbergen is the name of the largest island in the archipelago while the archipelago as such goes by the Norwegian name of Svalbard. Controversy surrounding Svalbard's maritime zones stems from the 1920 Spitsbergen Treaty concluded in Paris, as part of the settlements after World War I. Pursuant to the Treaty, Norway was granted full sovereignty over the archipelago. The recognition of Norwegian sovereignty over the islands is subject to certain conditions (e.g., limitations on Norway's ability to tax and use the islands for military purposes) implemented by simultaneously assigning a right of access – governed by Norway – for commercial operations (i.e. non-discrimination) to nationals of all the contracting parties.¹⁰

Despite this early Twentieth Century diplomatic compromise,¹¹ diverging views on the geographical scope of the Treaty persist. These concern the status of the maritime zones and continental shelf beyond Svalbard's territorial sea, where some argue that the Treaty applies in these maritime areas, others hold the opposite view.¹² Norway considers that the 200-mile maritime zones, as well as the continental shelf around Svalbard, are exclusively Norwegian.¹³ Other countries, however, have claimed that the principles of the Treaty should apply to the 200-mile zone and shelf.¹⁴ This reading of the Treaty would provide to all signatories equal rights to pursue economic activity in the water column and on the continental shelf around Svalbard, albeit still being governed by Norway.¹⁵ As concluded 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.”¹⁶

Diverging legal positions, however, are one thing. Political action is something else. Although claiming to have a right to establish an Exclusive Economic Zone (EEZ) around Svalbard,¹⁷ Norway has yet to do so. In 1977, when Norway established its EEZ in the Barents Sea, it decided to “only” establish a Fisheries Protection Zone (FPZ) around Svalbard for the purpose of the conservation and management of living marine resources.¹⁸ This avoided potential challenges from other interests parties to the Norwegian claim, leaving Norway to protect and manage what is the main nursery of the Northeast Arctic cod stock.¹⁹ The other Treaty signatories have so far acquiesced, although Iceland and Russia have been particularly outspoken in their criticism of what they perceive to be discrimination by Norway against their fishing vessels in the area.²⁰ The Soviet Union and later Russia have further argued that Norway had no right to take such a measure unilaterally, although for all practical purposes Russia has acquiesced in the Norwegian regulatory and enforcement regime in the FPZ as it has been in Russia's own interest to manage fish stocks sustainably and get a share of the quota.²¹

Further, Norway claims that the Spitsbergen Treaty does not apply to the continental shelf around the archipelago. Norway argues that Svalbard does not even have a continental shelf in its own right politically, as that the adjacent shelf falls within the scope of Norwegian sovereign

rights.²² In 2006, Norway submitted its proposed outer limits of its continental shelf, in accordance with the United Nations Convention on the Law of the Sea (UNCLOS)²³ to the Commission on the Limits of the Continental Shelf (CLCS), which gave its recommendations in 2009.²⁴ While the CLCS found that Norway's continental shelf in relation to Svalbard extended beyond 200 nautical miles, there was no direct discussion of Svalbard or the 1920 Treaty applicability.

The EU's position concerning the Spitsbergen Treaty and the archipelago's maritime zones has been unclear. The EU is not party to the 1920 Treaty, but 21 of its Member States 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).²⁵ During the last few decades, several of the Member States have had various diplomatic confrontations or interactions with Norway concerning the maritime zones around Svalbard.²⁶ All these incidents have been related to specific actions taken by Norway in the FPZ, either through fisheries enforcement measures or general discussions concerning oil and gas exploration.

Before the FPZ was established, the United Kingdom had reserved its rights in a 1974 note to Norway.²⁷ By 1978, France, Spain and West Germany had followed the British lead. Moreover, a number of the Warsaw Pact countries asserted the same reservations.²⁸ A year earlier, in 1977, the Directorate-General for Fisheries, as part of the Commission of the European Community (today's Directorate-General for Maritime Affairs and Fisheries, DG MARE, in the Commission), also asserted its fishing rights on behalf of the EU Member States.²⁹ The Netherlands, however, agreed with the Norwegian assertion of jurisdiction in the maritime zones around Svalbard in 1977, although it argued that the Spitsbergen Treaty's clause on non-discrimination applied.³⁰ Throughout the 1980s and 1990s, several diplomatic clashes occurred between Norway and European States, in particular with Spain and the United Kingdom. Yet all these incidents were again reactions to specific actions taken by Norway in the FPZ, being either enforcement of fisheries legislation or discussions concerning oil and gas exploration.

At the turn of the Millennium, questions concerning Svalbard were brought into the larger Arctic context. In 2004, the Norwegian Coast Guard arrested two Spanish fishing vessels, which led to statements by both the EU and Spain.³¹ As described by Wolf,

[b]oth [EU and Spain] hold the view that the Svalbard Treaty neither restricts access to the maritime areas around Svalbard nor does it grant Norway the right to enforce measures, especially arresting and seizing foreign ships. In their view, only the flag State has the right to such enforcement measures in the FPZ. In addition, Spain holds Norway's enforcement policy in the FPZ, especially with regard to the more lax approach towards Russian vessels, as fundamentally discriminatory violating the non-discriminatory rights of the Svalbard Treaty.³²

As Molenaar highlights, the *note verbale* sent by the Commission to Norway in 2004 is identical to the note sent in 2009 when Norway arrested a Portuguese vessel.

The European Community restates its position that, under the Treaty of Paris of 1920, Norway has no right to take either measures to restrict access to the waters around Svalbard or enforcement measures with respect to vessels flying the flag of a Member State of the European Community operating in those waters. Enforcement measures should only be taken by the Flag State and any wrongdoing by a vessel from a Member State of the European Community should be prosecuted within the legal system of the Flag State.³³

Some of the strongest opposition to the Norwegian FPZ has come from the United Kingdom. In 2006, the United Kingdom arranged a meeting concerning Svalbard and its maritime zones in London attended by representatives from Canada, Denmark, France, Germany, Iceland, the Netherlands, Russia, Spain and the United States. Norway was not invited, to ensure the participants “could speak freely on the issue.”³⁴ Interest in petroleum resources was said to inform the British position.³⁵ Offerdal argues that the 2006 meeting came as an unintended consequence of the Norwegian government’s active engagement with Arctic policy, with the issue of diverging positions concerning Svalbard being raised.³⁶ This meeting, Molenaar believes, “may have led several of these states to align their positions on the Spitsbergen Treaty closer to that of the United Kingdom.”³⁷

Both Molenaar and Pedersen describe the imperceptible changes in the Commission’s position over the last decades – from being along the line of the Spanish argument whereby Norway has no rights in the FPZ and cannot arrest vessels, to the view that the principles of the Spitsbergen Treaty apply to Svalbard’s maritime zones (giving Norway jurisdiction but inferring equal access for and non-discrimination of EU vessels).³⁸ The Commission’s current position 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 respected by all parties to the 1920 Treaty.³⁹ Accordingly, the EU neither accepts the Norwegian claim of unrestricted sovereign rights in the FPZ, nor conservation measures restricting access in practice for the Community. However, if these measures are applied in a non-discriminatory manner and are scientifically based, the EU will abide by them.⁴⁰ This position was confirmed by some of the interviewees.⁴¹

Despite the Commission’s straightforward position, the issue concerning Svalbard re-surfaces in Brussels from time to time, usually in statements by members of the European Parliament. In 2011, MEP Wallis launched a report debating the relevance of the Spitsbergen Treaty in a changing Arctic.⁴² This led to a strong reaction from Norwegian officials.⁴³ In January 2014, MEP Wałęsa submitted a written question to the Commission on the legal status of Svalbard’s maritime areas and its fisheries resources,⁴⁴ which was discussed in the plenary session of European Parliament on 26 February 2014. The Commission’s response⁴⁵ highlighted an understanding of the complexity of the matter and how an apparently small issue, at least from an EU perspective, could have a ripple effect across the EU’s wider Arctic engagement.

It is not surprising to see little reference to the dispute concerning the FPZ around Svalbard in any official EU Arctic documents. However, in the European Parliament’s fourth resolution on an EU Arctic policy in March 2017, Svalbard was referred to in regard of fisheries and access for EU Member States.⁴⁶ This must be seen as being in direct relation to the then on-going dispute over the fishing of snow crab, which will be described in the following section.

III. The Snow Crab Dispute

Snow crab was first recorded in the eastern Barents Sea in 1996. As stated by the Norwegian Institute of Marine Research, the total biomass today in these waters is considerable: “[r]ough estimates by Russian scientist indicate that snow crab biomass is approximately ten times higher than that of red king crab, and about half the biomass of shrimp.”⁴⁷ In Canada and the United States, the snow crab fishery has been a valuable fishery for decades.⁴⁸ Expectations in Norway have thus been high concerning the economic potential of this new species, with some saying it might surpass the most valuable fishery in the Norwegian EEZ, namely cod.⁴⁹

The snow crab are currently predominantly found in the most northern parts of the Russian EEZ as well as in certain international waters (on the seabed beneath of the so-called “Loop Hole”).⁵⁰ The crab will probably spread further west and north into areas around and north of Svalbard, as well as Franz Josef Land.⁵¹ In 2013, Norwegian fishermen caught snow crab for the first time, although the total catch did not exceed 500 tons.⁵² Forecasts, however, predict annual catches of up to 20–50 000 tons.⁵³ In North America, annual catches have at times exceeded 100,000 tons in both the Canada and the United States.⁵⁴ In 2014, Norwegian vessels harvested 4,000 tons at a value of more than 100 million NOK (approx. 12 million EUR),⁵⁵ and this new industry started to attract increased international investment attention.

On 1 January 2015 Norway introduced a ban on snow crab fishing on the Norwegian continental shelf which, according to Norway, includes Svalbard.⁵⁶ Norway and Russia, which have joint management responsibilities for marine living resources in the Barents Sea, decided to treat the crab as a sedentary resource, i.e. not as a shared stock. The purpose of introducing the 2015 regulation, according to the Norwegian Minister of Fisheries, was the need to gain control of the activity along with the knowledge and data on the spread of the stock.⁵⁷ The regulation requires all fishermen to obtain licences from Norway to catch snow crab on the continental shelf. However, the Norwegian government has restricted the licenses to Norwegian fishermen only.⁵⁸ It is this special treatment of Norwegian fishermen that lies at the heart of the dispute between Norway and the EU.⁵⁹ If the continental shelf around Svalbard is not subject to the Spitsbergen Treaty, Norway has exclusive rights to the resources and can give licenses/quotas to whomever it likes. However, if the Spitsbergen Treaty applies, Norway cannot discriminate against vessels from the signatory States, irrespective of whether it has the authority to grant licenses.

A limited number of vessels from the EU Member States, predominantly Latvia, Poland and Spain, had been engaged in snow crab fisheries on the continental shelf adjacent to Svalbard from 2013 onwards.⁶⁰ Norway notified the EU that these vessels would be evicted from both the Loop Hole and the waters around Svalbard.⁶¹ In 2015, the Director-General of DG MARE, Lowri Evans, wrote to the Member States requesting a halt in the 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.⁶²

The 2015 Note was concerned with two things. First, it targets the “Loop Hole,” international waters in which fisheries are regulated by the North East Atlantic Fisheries Commission (NEAFC), set up between the relevant coastal states, Denmark (in relation to Greenland), the EU, Iceland, Norway and Russia. Moreover, as the Note highlights, the continental shelf in the Loop Hole is under national jurisdiction of either Norway or Russia, insofar as extended continental shelf claims have been verified and accepted. The Note also engages in the debate concerning the status of snow crab: is it a sedentary species (i.e., unable to move unless in physical contact with the seabed) or is it a fish, and thus subject to regulations covering fisheries resources? Despite diverging opinions, most of the relevant actors define the crab as a sedentary species.⁶³ On behalf of the EU, the Commission argued similarly in its 2015 note:

With regards 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.⁶⁴

It is not within the scope of this article to examine whether the snow crab is or is not a sedentary species. This is both a matter of international law and marine biology, which may or may not coincide. Based on the various opinions, it is assumed that both the EU and Norway define the species as being subject to the continental shelf regime. Therefore, the broader legal ramifications of the dispute regarding the category of the crab do not only concern the right to catch snow crab on the continental shelf around Svalbard but could also relate to other sedentary resources, such as oil and gas and seabed minerals. Although no oil or gas drilling has occurred on the continental shelf around Svalbard, the outcome of the dispute over the snow crab could set a precedent for such industrial activity in the future. As *Politico* stated somewhat sensationally in a headline in June 2017: “Oil lurks beneath EU-Norway snow crab clash.”⁶⁵

The ban on harvesting a new sedentary resource – the snow crab – introduced by Norway in 2015, brought the diverging positions held by Norway and the EU (through some of its Member States) on Svalbard’s maritime zones and continental shelf to the forefront of relations between the two actors. Albeit of limited economic importance to both EU Member States and Norwegian fishermen (as yet), the prospects of a new profitable resource together with the disagreement over Svalbard’s continental shelf has drawn attention to the dispute.

In Norway’s opinion, a quota swap with the EU on snow crab would be sufficient to allow EU vessels to catch crabs on the Norwegian continental shelf.⁶⁶ Fisheries policy is one of the policy areas where the EU has supranational authority under the Common Fisheries Policy (CFP).⁶⁷ It is the Commission that participates in negotiations with third countries like Norway to determine quotas, before proposing final total allowable catches (TACs) for each stock to the fisheries ministers of the Member States in the Council of the European Union (hereafter Council).⁶⁸

A solution to disputes over quotas is the swapping of quotas between the negotiating parties. Offers to swap snow crab were first presented by Norway during the negotiations with the EU in November 2015. The EU rejected the offer claiming it had no available means of payment (i.e., no swappable fishing quotas).⁶⁹ In 2016, the Commission took the initiative on informal talks on quotas for snow crab. Norway’s position was that all crab catches should be landed in Norway and the offer concerning crab would apply to the whole Norwegian continental shelf, not just Svalbard. As well, reciprocal quotas were demanded in return for fishing rights from the EU.⁷⁰ The Commission rejected Norway’s offer and accordingly negotiations stalled.⁷¹ By December 2016, as no agreement had been reached, the Commission proposed to the Council to authorise up to 20 vessels to catch snow crab on the continental shelf around Svalbard.⁷² This the Council did in January 2017, giving five EU Member States – Estonia, Latvia, Lithuania, Poland and Spain – the right to issue 20 licences altogether.⁷³

However, here the EU acted in violation of both UNCLOS, Article 77 and the Spitsbergen Treaty, given Norway’s undisputed right, regardless of the outcome of the dispute concerning the status of the maritime zones, to manage, legislate and enforce compliance of any economic activity in this area.⁷⁴ From the Norwegian point of view as already stated, the Spitsbergen Treaty only applies to the territory and territorial waters as specified in the text and that Norway has the sole competence to manage any resources in the maritime zones exclusively. 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.”⁷⁵ By accepting the Norwegian position on quotas to catch snow crab on the entire Norwegian continental shelf and having to pay for these quotas by swapping them for something else, the EU would have implicitly recognised the Norwegian position and might have weakened its own position concerning the Spitsbergen Treaty.⁷⁶

As the EU's position is that EU Member States, by virtue of being signatories to the Spitsbergen Treaty, have equal rights of access regarding these resources, the Commission has demanded that Norway adhere to three rules regarding the maritime zones around Svalbard.⁷⁷ First, access to resources needs to be non-discriminatory in accordance with Article 2 and 3 of the Spitsbergen Treaty. Second, Norwegian management needs to be based on sound scientific advice. Third, the management scheme needs to be respected by all interested parties. Norway was, therefore, in breach of at least the first principle, according to the Commission and EU fishermen have the right to fish snow crab under the Spitsbergen Treaty, a right Norway was ignoring by awarding licenses only to its own fishermen. Licenses, albeit illegal, were therefore given to EU Member States "in order to claim EU rights."⁷⁸

Norway reacted to the January 2017 EU authorizing of 20 licences to catch snow crab on the continental shelf around Svalbard in public statements, such as that of the Minister of Fisheries who stated that Norway, given the EU's unlawful actions, would not "give away a single crab."⁷⁹ Several *note 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.⁸⁰

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.⁸¹

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

In the preamble of Regulation 2017 /127, paragraph 35, reference is made to Svalbard and the Treaty of Paris of 1920. The EU is not a party to this Treaty. Moreover, none of the provisions of the Treaty granting rights to nationals of the contracting parties applies beyond the territorial waters of Svalbard.

Furthermore, it should be noted that Norway, as part of its undisputed sovereignty over the archipelago, also has the sole regulatory power in areas to which the Treaty grants rights to nationals of the contracting parties.

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.⁸²

The Norwegian Coast Guard arrested the EU-registered vessels *Juros Vilkas* from Lithuania (with a licence from Latvia) in the Loop Hole in late 2016, and the *Senator* from Latvia (also with a licence from Latvia) in waters around Svalbard in January 2017. Both cases were tried before Norwegian courts. In November 2017, the Norwegian Supreme Court found that Norway has the right to regulate fisheries of snow crab in the Loop Hole, since it is a sedentary species and Norway

has sovereign rights to resources on the continental shelf.⁸³ This accorded with the August 2015 position of DG MARE.⁸⁴ In February 2018, the Hålogaland Court of Appeal upheld the decision against the *Senator*, inasmuch as Norway also has the right to regulate snow crab fisheries in waters around Svalbard.⁸⁵ In none of these decisions, however, was the actual status of the maritime zones and shelf around Svalbard up for discussion.

It is the latter arrest in 2017 that put the issue of snow crab fisheries on the EU's agenda. In a 5 April 2017 parliamentary question to the Commission, three MEPs criticised Norway's 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" because they remain in port for fear of being arrested.⁸⁶ In a follow up in October 2017, MEP Cadec, on behalf of the European Parliament's Committee on Fisheries (PECH), criticised the Commission's negotiations effort as not "resolute enough."⁸⁷

In December 2017, the Council again awarded licenses for 20 vessels to catch snow crab in waters around Svalbard, divided among the same five Member States.⁸⁸ This was done to uphold the EU's position concerning both the dispute and Svalbard, as the 20 licenses for 2017 had not been utilised as no vessel other than the *Senator* had ventured into the contested waters.⁸⁹ Accordingly, a Commission non-paper, distributed by the Council to the Member States on 8 December 2017, explained that:

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.⁹⁰

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

As regards the fishing opportunities for snow crab around the area of Svalbard, the Treaty of Paris of 1920 grants equal and non-discriminatory access to resources for all parties to that Treaty, including with respect to fishing. The Union's view of that access, as regards fishing for snow crab on the continental shelf around Svalbard, has been set out in two notes verbales to Norway dated 25 October 2016 and 24 February 2017. 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.⁹¹

In response to this second round of licensing by the EU, the Norwegian Minister of Fisheries announced that Norway would not be negotiating this issue further with the Commission,⁹² thus ending official talks to find a solution.

Around the same time, again the snow crab also became the source of a debate in the European Parliament plenary session. As MEP Walesa argued, “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.”⁹³ Walesa additionally argued that the EU should help catch the crab for environmental reasons, beyond political or business interests, as its spread could harm the Barents Sea’s “fragile benthic ecosystem.”⁹⁴ This conclusion, however, is not widely endorsed. 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.”⁹⁵

Other MEPs took an even harder stance. MEP Mato held the opinion that “[t]he aggressive attitude and intimidation of Norway, which provocatively refuses to comply with international agreements, are politically and legally unacceptable,” and MEP Mamikins labelled the Norwegians as “pirates.”⁹⁶ MEP Kelly argued:

This is ridiculous and I think that there must be some way outside of the confines of Commissioner Vella’s portfolio to broaden this issue, and to say to Norway “you have benefits in the European Union, now if you don’t comply with this agreement, we’re going to have to look at those.”⁹⁷

The Commissioner in charge of Maritime Affairs, Karmenu Vella, responded diplomatically, stating that the Commission is attempting to find a solution with Norway through negotiations, albeit that they are stalled at the moment.⁹⁸ In the written answer to the European Parliament question of 5 April 2017, Commissioner Vella similarly highlighted the Commission’s efforts to find a “practical solution.”⁹⁹ The Commissioner’s oral response also concerned the wider consequences of the dispute, possibly involving taking Norway to an international court over the Spitsbergen Treaty:

We were not able to conclude successfully, partly because of the narrow margins of manoeuvre defined by Member States, and partly because Norway focused on one single solution, which is a quota exchange for the entire Norwegian continental shelf.

You should nevertheless appreciate that we managed to preserve our position on Svalbard, as requested by Member States, and that we managed to avoid an escalation. In particular, we were able to conclude successful bilateral fisheries arrangements for 2018 to the satisfaction of Member States and Norway.

I think a number of you, including Mr Wałęsa, asked why the European Union was not taking Norway to court. Here I would like to underline, as MEP Krupa, mentioned that the European Union is not party to the Paris Treaty and therefore it cannot take Norway to court for non-compliance with that treaty.¹⁰⁰

What all this amount to is that, despite the fact of the dispute being of a minor economic concern, it is relatively complex and multi-faceted. At the end of the day, the crab dispute is not only about a certain species and related quotas and licences to catch it; it is also about the complexity of international law and the power/interests of international actors. From the EU’s side, several actors and institutions are engaged, with different opinions that are sometimes controversially

communicated. This leads to the last point of the article and the attempt to understand the EU as an international actor with regards to this dispute.

IV. Svalbard, the Arctic and the EU

There are multiple ways in which an issue can find its way on to the Union's agenda. The simplest is either as a top-down issue initiated by the Commission and/or the European Council to improve EU policies and align the work done by the EU and Member States or as a bottom-up issue initiated by special interests within and among European actors. In the snow crab situation, all the core EU institutions are playing a role.¹⁰¹ Yet, as seems apparent based on interviews with officials working in or with the EU on this issue, that the initial drivers were the interests of specific Member States. As an EU-institution official put it: "This issue [snow crab] is clearly driven by continuous pressure by Member States who have entitlements."¹⁰² In this case, the Commission and its DG MARE operated at the behest of a Member State's interests. Where do these interests originate?

Paraphrasing a former U.S. president (or more precisely, his presidential campaign's lead strategist), the answer might be straightforward and obvious – "it is the industry, stupid." Or, as put by an EU official, "We initially became engaged in this issue because of industry interests that contacted us."¹⁰³ Similarly, as stated by MEP Walesa:

I was contacted by the 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.¹⁰⁴

What might be perceived by some journalists as a Brussels-based initiative,¹⁰⁵ was in fact driven by very specific interest groups in a few countries, Latvia in particular.¹⁰⁶ These fishing interests were concerned with their eviction from the Russian continental shelf and the slowly growing snow crab fishing industry which had led to investments in equipment and vessels.¹⁰⁷ It seems clear that these interests found some key actors to speak on their behalf, such as, for example, MEP Walesa. In January 2014, without any reference to the snow crab, Walesa, on behalf of the Committee on Fisheries (PECH), urged the Commission to take steps respecting Norway and the country's claim to have the authority to unilaterally manage waters in the Svalbard FPZ located east of the maritime delimitation line, as agreed by Norway and Russia in 2010.¹⁰⁸ The issue of Norway's fisheries management in Svalbard's maritime zone and the EU-perceived lack of equality were re-occurring points of contention, at least within the European Parliament. "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 Walesa.¹⁰⁹ To the same effect, Walesa drafted questions to the Commission on Greenland halibut and haddock in March and July 2011.¹¹⁰

When the snow crab dispute with Norway was raised within the EU sometime in late 2015 and early 2016, certain Member States actively lobbied the Commission to ensure their interests were represented. Latvia, according to multiple sources, was an essential driver in pursuing licenses to catch snow crab.¹¹¹ Despite having only two companies involved in this activity, it became a high-profile issue for the government in Riga.¹¹² In 2016, Latvia also became the 44th party to the Spitsbergen Treaty, which solidified its claims to equal access to waters around Svalbard. Yet, according to the Latvian representatives, the country's interests only concern fisheries and not oil and gas.¹¹³

Other EU diplomats, as well as diplomats working for third countries, expressed surprise at the readiness of some Member States to create and engage in a dispute with Norway over an issue

they deem as minor.¹¹⁴ As argued by MEP Walesa: “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?”¹¹⁵

From being a relatively minor issue about quotas and access discussed informally between the Commission and Norway, the active engagement of MEPs on the PECH Committee forced the issue up the EU’s agenda. Suddenly, snow crab also became a matter of international law.

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.¹¹⁶

A few MEPs and Member States saw it in their interest to bring the issue to the forefront of Norwegian–EU fisheries relations. But in doing so, it complicated the workings of a Commission that had been trying to find a solution with Norway.¹¹⁷ The Norwegian media ensured that the Norwegian Minister of Fisheries got involved to defend and standing for local fishermen.¹¹⁸ Being seen as the protector of your own fisheries industry can do wonders for your political appeal.¹¹⁹ The same goes for MEPs and Ministers intent on re-election. As MEP Walesa said, “when I talk about fish I can tell them [the voters] exactly, listen, this is what’s going to happen to you.”¹²⁰

By late 2017, efforts to resolve the problem had arguably reached an impasse. As theorists of “path dependence” say, “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.”¹²¹ 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 concede its overall position on Svalbard.¹²² From an economic point of view, the impact of the 2017 EU licenses was minimal, because, apart from the *Senator*, which was arrested, they were never utilized. From a political point of view, by the time the EU Member States and MEPs had become sufficiently engaged in the issue, investing, it became difficult to avoid,¹²³ the Council chose to extend the 20 licenses, prompting Norway to walk away from the negotiations.

V. Separating Fisheries from the Arctic?

As set out above, the snow crab dispute between Norway and the EU concerns two related issues. First, Norway disputes the EU’s interpretation of the Spitsbergen Treaty’s applicability to the 200-nautical mile continental shelf zone around the archipelago. While the Treaty does not apply in Norway’s view, the EU (both the Commission and Council) directly or indirectly through the issuing of licenses asserts that the Treaty provides for equal access to and non-discrimination concerning the archipelago’s resources, including snow crabs. Yet, the EU’s own position concerning Svalbard has not been fully consistent and has changed somewhat over recent decades; from arguing along the lines of “international waters” to a position that the “Treaty applies.”¹²⁴ Second, and related, Norway argues that even if the Spitsbergen Treaty were to apply, Norway is the sole regulator of Svalbard’s continental shelf. Thus, any licensing of vessels to catch snow crab would still be done by Norwegian authorities and subject to Norwegian laws. Thus, the issuing of licences by the Council is in violation of international law.

In seeking an amicable solution, Norway has several times offered to swap snow crab quotas as part of the ordinary fishing quotas.¹²⁵ So far, however, the EU has declined the offers. The swapping of snow crab quotas is controversial within the EU. The Member States that have traditionally benefitted most from the fishing quotas distributed by Norway are not interested in have new species included in the scheme, since it would probably be at the expense of their other

quotas from Norway. The countries that are actively seeking access to snow crab are mainly the Baltic States and Poland, all relative newcomers to the European “fishing” table. Several EU Member States believe that the Spitsbergen Treaty gives them the right to fishing quotas on the continental shelf around Svalbard without any form of compensation to Norway. If they accepted Norway’s offer to swap quotas, it would, in their opinion, weaken the EU’s position on Svalbard. To force the issue, they have found it necessary to license their own vessels.

While the EU ostensibly speaks with one voice on fishery-related issues, as this case study shows, that voice can be hijacked by special interests, not least when there are few counter-positions and – as in this case – the issue is essentially of limited importance. Before the issue received popular attention and the positions became entrenched, there may have been a window for dialogue between Norway and the EU/Commission. It might have been fruitful for Norway to have engaged directly with these special interests in the EU to prevent the issue from it ascending on the EU agenda. Nevertheless, this limited dispute has been kept separate from other issues pertaining to fisheries.

If the above discussed political interests combine with the economic interests of Member States, there might be a greater impetus behind calls for a debate over Svalbard within the EU. With elections to the European Parliament around the corner (2019), and that the proportion of jobs in the fishing industry is high in some Member States, it is understandable (politically and economically) that there are concerns of the EU “losing out” of potential access around Svalbard.¹²⁶ As this article points out, however, the EU per se (through the Member States that are signatories of the Spitsbergen Treaty) seems to have chosen to adhere to the FPZ and the Norwegian jurisdiction it implies. This can be seen as being tied to the EU’s more urgent aspiration to be perceived as a sensible and responsible Arctic actor. Norway and the Commission may still find a practical solution “under the table” that safeguards the interests of both parties.

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- ² Bjørn Haugan, “Fiske-Sandberg: Vi Gir Ikke Bort En Krabbe,” *VG*, January 24, 2017, <www.vg.no/nyheter/innenriks/eu/fiske-sandberg-vi-gir-ikke-bort-en-krabbe/a/23906465/>.
- ³ European Parliament, Debates, Thursday, 18 January 2018, EU-Norway dispute on snow crab fisheries in Svalbard.
- ⁴ Kait Bolongaro, “Oil Lurks beneath EU-Norway Snow Crab Clash,” *Politico*, June 18, 2017, <www.politico.eu/article/of-crustaceans-and-oil-the-case-of-the-snow-crab-on-svalbard/>.
- ⁵ Treaty concerning the Archipelago of Spitsbergen, 2 *L.N.T.S.* 7.
- ⁶ Andreas Raspotnik, *The European Union and the Geopolitics of the Arctic* (Cheltenham & Northampton: Edward Elgar, 2018), 131-39.
- ⁷ Per Anders Madsen, “Norge Og EU Krangler Om Krabbefangst. Egentlig Handler Det Om Svalbardtraktaten,” *Aftenposten*, February 2, 2017, <www.aftenposten.no/meninger/kommentar/i/GELAQ/Norge-og-EU-krangler-om-krabbefangst-Egentlig-handler-det-om-Svalbardtraktaten--Per-Anders-Madsen>.
- ⁸ Alan Taylor, “Svalbard: Halfway Between Norway and the North Pole,” *The Atlantic*, March 8, 2016, <www.theatlantic.com/photo/2016/03/svalbard-halfway-between-norway-and-the-north-pole/472785/>.
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- ¹⁰ As of 27 June 2017, 44 states are parties to the Treaty, the latest being North Korea and Latvia in 2016, *see* <emeritus.lovdata.no/traktater/>.
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- ¹² See for example, Torbjørn Pedersen and Tore Henriksen, “Svalbard’s Maritime Zones: The End of Legal Uncertainty?,” *The International Journal of Marine and Coastal Law* 24, (2009): 141-61; Robin Churchill and Geir Ulfstein, “The Disputed Maritime Zones around Svalbard,” in *Changes in the Arctic Environment and the Law of the Sea*, ed. Myron H. Nordquist, John Norton Moore, and Thomas H. Heidar (Leiden: Martinus Nijhoff Publishers, 2010), 551-93; Erik J. Molenaar, “Fisheries Regulation in the Maritime Zones of Svalbard,” *The International Journal of Marine and Coastal Law* 27, (2012): 3-58; and Andreas Raspotnik and Andreas Østhagen, “From Seal Ban to Svalbard - The European Parliament Engages in Arctic Matters,” The Arctic Institute, March 10, 2014, <www.thearcticinstitute.org/seal-ban-svalbard-european-parliament/>.
- ¹³ Øystein Jensen, *Norge Og Havets Folkerett* (Trondheim: Akademia Forlag, 2014), 102.
- ¹⁴ *Ibid.*, 102-5.
- ¹⁵ Pedersen and Henriksen, *supra* note 12, 160.
- ¹⁶ Churchill and Ulfstein, *supra* note 12, 593.
- ¹⁷ Jensen, *supra* note 13, 102-104.
- ¹⁸ Molenaar, *supra* note 12, 14-15.
- ¹⁹ Jensen, *supra* note 13, 103.
- ²⁰ See Molenaar, *supra* note 12, 18 and 41; Torbjørn Pedersen, “The Constrained Politics of the Svalbard Offshore Area,” *Marine Policy* 32, (2008): 913-19; and Torbjørn Pedersen, “The Dynamics of Svalbard Diplomacy,” *Diplomacy & Statecraft* 19, (2008): 236-62.
- ²¹ See Geir Hønneland, *Making Fishery Agreements Work: Post-Agreement Bargaining in the Barents Sea* (Cheltenham: Edward Elgar, 2012); and Kristian Åtland and Kristin Ven Bruusgaard, “When Security Speech Acts Misfire: Russia and the Elektron Incident,” *Security Dialogue* 40, (2009): 333-53.
- ²² Jensen, *supra* note 13, 110-11.
- ²³ United Nations Convention on the Law of the Sea, 1833 *U.N.T.S.* 331.
- ²⁴ See Jensen, *supra* note 13, 46.
- ²⁵ It is assumed that the EU could become a signatory if an invitation of accession is backed by all contracting parties. Molenaar, *supra* note 12, 10.
- ²⁶ Pedersen, “The Constrained Politics of the Svalbard Offshore Area,” *supra* note 20, 915 and Molenaar, *supra* note 12.
- ²⁷ Pedersen, *supra* note 20, 916.
- ²⁸ *Ibid.*, 241.
- ²⁹ *Ibid.*
- ³⁰ Pedersen and Henriksen, *supra* note 12, 145-46.

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- ³³ Molenaar, *supra* note 12, 23.
- ³⁴ Pedersen, *supra* note 20, 251.
- ³⁵ Torbjørn Pedersen, “Endringer I Internasjonal Svalbard Politikk,” *Internasjonal Politikk* 67, (2008): 37.
- ³⁶ Kristine Offerdal, “The Politics of Energy in the European High North: Norway and The ‘petroleum Dialogue’ with the USA and the EU”, PhD-thesis (University of Oslo, 2010).
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- ³⁹ Molenaar, *supra* note 12, 26.
- ⁴⁰ *Official Journal of the European Union*, C 329, 30 December 2006, answer given by Borg on behalf of the Commission, 11 December 2006; *Official Journal of the European Union*, C 138 E, 7 May 2011, Joint answer given by Ms Damanaki on behalf of the Commission, 11 May 2010; and *Official Journal of the European Union*, C 294 E, 6 October 2011, answer given by Ms Damanaki on behalf of the Commission, 7 June 2011.
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- ⁴² Diana Wallis and Stewart Arnold, “The Spitsbergen Treaty: Multilateral Governance in the Arctic,” August 30, 2011, <dianawallis.org.uk/en/document/spitsbergen-treaty-booklet.pdf>.
- ⁴³ See Andreas Østhagen, “Debating the EU’s Role in the Arctic: A Report from Brussels,” The Arctic Institute, October 19, 2011, <www.thearcticinstitute.org/european-arctic-ambiguity/>; Norges offentlige utredninger (NOU), “Utenfor Og Innenfor: Norges Avtaler Med EU” (Oslo: Utenriksdepartementet, January 17, 2012), 747.
- ⁴⁴ Jarosław Leszek Wałęsa, “Question for Oral Answer to the Commission Pursuant to Rule 115 by Jarosław Leszek Wałęsa, on Behalf of the Committee on Fisheries on Legal Status of the Svalbard Archipelago and Its Fisheries Resources, O-000001/2014, 6 January 2014,” 2014.
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- ⁴⁶ European Parliament, “European Parliament Resolution of 16 March 2017 on an Integrated European Union Policy for the Arctic (2016/2228(INI)),” 2017.
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- ⁴⁹ Fiskeribladet, “Snøkrabbe: Fra Null Til Hundre Millioner I Fangstverdi,” *Fiskeribladet*, December 6, 2014, <fiskeribladet.no/nyheter/?artikkel=39119>.
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- ⁵⁹ Interview with Commission Officials, Brussels February 2018.
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- ⁶³ H.S.B. Hansen, “Three Major Challenges in Managing Non-Native Sedentary Barents Sea Snow Crab (*Chionoecetes Opilio*),” *Marine Policy* 71 (2016): 38.
- ⁶⁴ European Commission, “Snow Crab Fisheries,” *supra* note 63, 1.
- ⁶⁵ Bolongaro, “Oil Lurks beneath EU-Norway Snow Crab Clash,” *supra* note 4.
- ⁶⁶ Norwegian Parliament, Written Question from Helga Pedersen, *supra* note 58.
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- ⁶⁸ Griffin Carpenter, et al., “Landing the Blame: The Influence of EU Member States on Quota Setting,” *Marine Policy* 64 (2016): 9-15.
- ⁶⁹ Norwegian Parliament, Written Question from Helga Pedersen, *supra* note 58.
- ⁷⁰ Interview with Commission Officials, Brussels, February 2018.
- ⁷¹ *Ibid.* and Interview with Commission Officials, Brussels, February 2018.
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