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Uncertainty under Norway's claimed exclusive rights over the Snow crabs in the Archipelago of Svalbard

BACHELOR THESIS

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I declare that this thesis is my own work and that all references to, or quotations from, the work of others are fully and correctly cited.

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Abstract

This thesis explains the legal framework in the Archipelago of Svalbard with an emphasis on the Loophole area. The author will answer the question on what is regulating the Svalbard archipelago and can Norway claim exclusive rights over snow crab. Snow Crab as a resource residing also in the Loophole area has already attracted attention and brought two fishing ships before the Supreme Court of Norway. This thesis explains how the situation has evolved by giving the historical background of the area of Svalbard, provide an overview of the current legal framework, lastly, a case law analyses.

SUMMARY

Chapter I will consist of a historical overview of the situation. The archipelago of Svalbard has been under disputes from the beginning of the 20th century. First whale hunters, then coal miners were interested in the region. Coal mines were held by the United States, Iceland, and Russia, Great Britain, European states. After Norway- Swedish union broke down Sweden did not want Svalbard to be part of the territory of Norway. Russia also claimed to have parts of Svalbard under its control and was not willing to give them to Norway. Control over Svalbard was ensured by Norway, Sweden, and Russia having their coal mining factories there. No regulation was active and governing this region, only by having parts of land in their possession states could argue of having rights over the Archipelago. The resources available raised the necessity to have a common agreement on this territory and states by the 1920 concluded Svalbard Treaty.

Chapter II explains the legal background of the situation. Starting from the Svalbard Treaty that granted sovereignty over Svalbard to Norway and at the same time allowed other states free access to the resources. Then such measures for access were important because states held their coal mines in Svalbard. Whale hunting in the region lost its popularity, cod fishery was next to that raised the discussion of the nautical zone around Svalbard, not the land itself. Disputes over the area have arisen all the time, most recent being the snow crab catch.

In the Svalbard Treaty regarding the nautical applicability, there is set an area of 4m zone around the land. The zone of 4nm back then was set as a maximum nautical mile zone around the land that could be claimed by the state under which possession is the land. Currently, this zone is enlarged to 12nm. Disputes arise around what was the intent from the signatories of the Svalbard Treaty- to set this zone around land and to establish free access over it for all the signatory states or to give exclusive rights to Norway. In the NEAFC Convention states came to the conclusion that control of the region must be accessed by all state actions and that each state should be able to control its ships and also provide certain rights for them. This Scheme of enforcement has been also interpreted from the EU in the Regulation for the control and enforcement of the NEAFC Convention. EU lays out rights for each EU member state for issuing of permits with regards to the NEAFC. Norway insists that this Convention and more exactly the Scheme of Control and Enforcement cannot be interpreted in a way that it would let all the signatories provide their vessels with shipping permits without any separation of the location where the ship is going to perform its actions. In the Supreme Court Judgement against Lithuanian ship permit issued by Lithuania according to the EU Regulation (that according to the NEAFC allowed member states to issue shipping permits) was viewed as a misinterpretation of the law. The court ruled that the Lithuanian ship did not have a valid permit. Similar argumentation is found in Latvian case. Case law analyse is provided in the Chapter III.

Norway and Russia have faced difficulties with regards to the division and how to set the delimitation line between both states, as this line goes through the Loophole area. The area itself is desirable from each state because of its natural resources. If a state has this area considered its territory it can also govern the resources and get benefits from such resources. More valuable and desirable resources that are becoming more and more important are natural gas and fuels that also are located under the seabed of the disputed area. By allowing access and granting all the signatory states under the Svalbard Treaty to catch sedentary species in the Loophole area, Norway would also allow access to all the other natural gas and fuel reserves, meaning a great economic loss for Norway. After the research author has come to

the conclusion that derives from the following findings: Based on the Svalbard Treaty its signatory states can claim only a limited part of Svalbard's nautical zone. The nautical zones around Svalbard are governed by Norway. An important role in this territorial dispute is for the continental shelf division. This division has been established in the Treaty on "Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean" between Russia and Norway. And prior this, Commission on the Limits of the Continental Shelf had accepted Norway's claim over the Loophole area. Meaning, that Norway has the continental shelf of Svalbard and also the Loophole area under its control.

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INTRODUCTION

Conflicts about the catching of snow crabs broke out in 2016 between the fishermen from Lithuania and Norway authorities. This conflict was followed by another one year later when Latvian ship carried out similar activities in almost the same place. The dispute regarding the region arises because there exists an old Treaty from 1920 which has been interpreted variously and due to the change of international laws there cannot be a clear example how to deal with such situation. The complexity of the situation arises in both political and legal aspects. In the Svalbard Treaty, it is stated that all the signatory states can access the regulated territory and shall be treated the same as the nationals with no discrimination. At the time when Treaty was signed no Exclusive Economic Zone nor Continental Shelf area was disputed, the only limitation regarding the sea territory around the land discussed the zone of 4 nautical miles (hereinafter nm) around the shore, that in the current situation would be enlarged to 12nm. Then what should be done with EEZ and Continental Shelf- how can those elements be applied to this situation? Can they be applied to the Treaty regulations and thus signatory states would share common rights as nationals in up to 200nm zone around the island. Another important factor that cannot be left undisputed in this situation is another resource at the place in this area, that is natural gas and fuel and such regulation that would open access for snow crabs could potentially open access to other natural resources under the seabed.

Research question – Can Norway claim its rights over the area of 200nm around Svalbard and exclude Svalbard Treaty signatories from catching snow crabs in this area?

Hypothesis – Norway can claim its rights over the area of 200nm around Svalbard but it has to acknowledge the free access and no-discrimination that has been set in the Svalbard Treaty thus it cannot exclude signatory states from the snow crab catching by not excluding its own nationals.

Structure and Scope – The structure of the thesis is designed to test the set hypotheses, as well as to achieve the goal and tasks set by the author. The thesis is structured in three chapters and several sub-chapters to ensure a comprehensive examination of the proposed hypotheses as well as to complete the set goal and tasks. The methodology used in this thesis is a combination of theoretical and empirical analysis and case study.

Chapter I will consist of a historical overview of the situation because already prior Snow Crabs territory claims were in place. The historical overview will explain the basis of creation of the Svalbard Treaty in 1920, which currently regulates the area and gives the basis for this dispute. In Chapter II of Thesis author will access other legislation documents regarding Svalbard area that the involved parties have signed and that governs the Svalbard area. Chapter III will explain the situation with snow crabs, how this species started to live in the Barents Sea, when it was first caught and where exactly the disputed catches by Latvian and Lithuanian ships happened. It is important to provide a basic understanding of the situation in order to understand the dispute. The second part of this chapter will consist of Case law analyze, there the author will describe cases where Latvian and Lithuanian ships were fined because of snow crab catching in Svalbard's area. In this part author mainly wants to address which arguments and which of the legislation documents involved parties used to prove their position. In the conclusion, the author will summarize all the applicable legislation documents, their effect on this dispute, provide an answer to the research question and based on previous findings give an opinion of the possible future resolution of this dispute.

Aim for this research is to find legal ground for Norway to claim its rights over the Svalbard archipelago and zones around it where the snow crab catch took place. This thesis will look at the academic discussions, the case law of Latvia and Lithuania before the Norway national court and describe other legislation documents that have been on effect in this area. Svalbard has already been a subject for academic researchers because of the unclarity of regulation in this area.

CHAPTER I: HISTORY OF THE SVALBARD ARCHIPELAGO

In this chapter, the author will explain the most significant historical events and disputes that have been around the Svalbard Archipelago. Important to mention is that Svalbard Archipelago has been desired by many states already from the moment of its discovery regarding the resources and potential economic benefits. States that have claimed over the archipelago have not changed a lot and thus the author will use the historical background for the explanation of current disputes because they have roots already long ago.

The archipelago of Svalbard¹ is in the Arctic Cycle and it is one of the most north-located areas that is being inhabited. It is in the Barents Sea North from Norway and South from the North Pole.² In 1596 William Barents first discovered the Svalbard Archipelago and from this time interest regarding nature and possible value that could be gained from this area has increased. In the 17th century because of rich and previously un-touched resources, several nations engaged in active hunting in the Svalbard region that was mostly concentrated on sea mammals including whales. In the end, there was a treat that all species would be led to extinction because of such uncontrolled actions.³ In the 19th century this area was dominated by the Norwegian hunters and Europeans and big part from them from Sweden, at the same time started to explore the archipelago's unique ecosystem with a possible thought of also economic benefits that could be gained from there. In the 20th century, a new industry bloomed- coal mining as the coal prices peaked internationally and Norwegians were first to open the Cole mines in Svalbard. Norwegians due the economic problems sold their mines to American and British miners, who built even greater all-year around working mines and in the 20th-century coal mining in Svalbard only kept growing. After the Swedish – Norwegian union broke in 1905, Norway was interested to make Svalbard an official part of its territory, but Sweden opposed this incorporation as it also claimed the territories of Svalbard. In order to ensure their rights over Svalbard, all three interested states kept and even strengthened their positions there. Russia had Svalbard as its hunting territory, while Sweden did not want Norway to have more after their union broke down and Norway did not want to lose its territorial rights. If the situation would come to negotiating over the territory status, then each of them would have their part and their reason for having rights over this territory. Later Norway bought back its mine and one of the mining sites- Longyearbyen till now is Svalbard's administrative capital. Such mining activity was done by many states, including, Russia, Great Britain, Sweden, and other European states. Actions in the area were possible because of Svalbard's legal status – 'Terra Nullius' meaning that it was no-one's property. The Status of Terra nullius was established over the territory as a result of ongoing conferences and seeking for a solution for this unclarity internationally. At Christiania,⁴ in June 1914 a conference was held where the matter about Svalbard's political status was discussed. Involved parties in the conference came to a common decision, that the best

¹ *In addition* - the Archipelago has also been called the 'Archipelago of Spitzbergen', 'Svalbard Archipelago' was the name given by the Norwegians and became popular also by other nations when recalling to this archipelago

² Churchill, Robin, and Geir Ulfstein. "The Disputed Maritime Zones Around Svalbard". In *Changes in the Arctic Environment and the Law of the Sea*, (Leiden, Nederland: Brill | Nijhoff, 2010): p1-4 doi: <https://doi.org/10.1163/ej.9789004177567.i-594.156>. Accessed April 8, 2019

³ Torbjorn Pedersen (2006) *The Svalbard Continental Shelf Controversy: Legal Disputes and Political Rivalries*, *Ocean Development & International Law*, 37:3-4, 339-358, doi: 10.1080/00908320600800960. Accessed April 8, 2019

⁴ *In addition*: Christiania is a part of Oslo, that was founded by the King Christian IV, this name for the city was used from 17th till the beginning of 20th century.

solution for ongoing dispute would be by providing equal access (or as 'Terra Nullius') and by that all the previously claimed sovereignty arguments by Great Britain and Norway were declared void.⁵ Anyone under the 'Terra Nullius' had the rights to collect resources without any taxes or restrictions imposed. The status of Terra Nullius marked the first intention that involved parties shared a common solution for this problem- that it would be a shared territory, not a one state's property. Even at the beginning of the 20th century the dispute was very complex and included both economic and political aspects and interests of states involved. By the signing of the Svalbard Treaty in 1925, the situation was solved in a way that Norway got to establish control over the whole Svalbard's Archipelago. Mining activities by the time of signing of the Treaty were already lower as the price for coal rapidly went down and Sweden was not as active in keeping its territories there. After the signing of Treaty in 1925 Russians continued their action in Svalbard, in 1926 they bought one of the mining cities in Svalbard called 'Pyramiden'. The only two substantial actors left were the Soviet Union and Norway. Because of Norway's position and Russia's interests in other parts of the world, Norway had a possibility to solve this ongoing dispute in its favor, but at the same time giving rights of free access to others. The first plan as it was set for the discussions was to establish international governing organ for this region that would be elected every six years and would consist of the representatives elected by and from the signatory states of the treaty.⁶

Already for decades, there have been ongoing disputes regarding the Svalbard archipelago. Starting from the coal mining, whale and seal catching till current disputes regarding the Cod and snow crab catch. Some of those disputes have been solved by agreements, but some require concrete regulations as none of the involved states are willing to give away its possible economic benefit that could be achieved by those resources. Due to the unclear division and the fact that it is rich with resources Svalbard archipelago has been on interest of the major powers and in order to solve them, a clear legal regulation is necessary. This is a serious dispute that cannot be solved quickly, long and ongoing history proves that and due to such problems the author in the following research will address the most important regulations active in this area and explain why even with regulations the disputes cannot be solved and which is the most current resources states want from the Archipelago.

⁵ R. N. Rudmose Brown. "Spitsbergen, Terra Nullius." *Geographical Review* 7, no. 5 (1919): 311-21. doi:10.2307/207588. available on: Academic Search Complete, JStor. Accessed April 26, 2019.

⁶ Dag Avango, Svalbard Archaeology, Royal Institute of Technology, Stockholm, Sweden, available on: <http://www.svalbardarchaeology.org/history.html>. Accessed April 9, 2019.

CHAPTER II: LEGAL FRAMEWORK

As one of the richest seas for fishing Barents Sea are often discussed as consisting of problem areas because of the unclear division of those fishing areas and governing jurisdictions. Snow crabs are one of the invasive species that has come to the Barents Sea because of the climate change and previous was not there at all. Such species are appealing more and more fishermen because their worth is high and fishing activity is not strictly regulated. For such conditions, restrictions are necessary in order to control the situation as fishing can come together with various other circumstances as pollution or overfishing for example.

2.1. International Legal Framework

2.1.1. Svalbard Treaty of 1920

Treaty of Svalbard of 1920 (hereinafter Svalbard Treaty or Treaty of Svalbard)⁷ was first drafted because of the necessity for control. As there was overfishing threat in the region and species were endangered, a new kind of international governance was necessary. Norway by the Treaty of Svalbard has sovereign rights over Svalbard and other islands discussed⁸, but at the same time, this Treaty guarantees non-discriminatory rights for every signatory state of the treaty. Principle of non-discrimination or ‘absolute equality’ for access to resources in means for the hunting, fishing, maritime, mining, and commercial and other activities. Treaty was signed in 1920’s and came into force by 1925.

Treaty consists of 10 articles and two annexes. Article 1 of the treaty sets the territory on which this Treaty is applicable and sets sovereign rights for these territories to Norway. Article 2 sets equal rights for all the parties of the Treaty for fishing and hunting in the area, at the same time allowing Norway to take necessary measures for the protection of flora and/or fauna if such measures are to be set equally for nationals of all the contracting parties. Hence, Article 3 is giving rights for the parties to: “access and entry for any reason ... to the waters, fjords, and ports.”⁹ in the area and with subject to local laws carry out any activity there. Article 4: Regarding wireless telegraph. Article 5: for establishing an international meteorological station. Article 6: regarding possession or occupation of the land. By Article 7

Norway undertakes to grant to all nationals of the High Contracting Parties treatment based on complete equality and in conformity with the stipulations of the present Treaty.¹⁰

Article 8 sets that any tax income from Svalbard can only be exploited in the area of the archipelago and in no means for Norway directly. Article 9 is that Norway undertakes not to create any naval base in the area. Article 10 Russian nationals shall have common rights as the contracting parties till the signing of this treaty and becoming one of the signature parties of the Treaty of Svalbard.

⁷ Treaty on Status Of Spitsbergen (signed in Paris 9th February 1920) S.D.N., vol. 2, p. 8. Available on: https://basedoc.diplomatie.gouv.fr/exl-php/recherche/mae_internet_traites. Accessed May 3, 2019

⁸ *In addition*: the Archipelago of Spitsbergen, comprising, with Bear Island or Beeren Eiland, all the islands situated between 100 and 350 longitude East of Greenwich and between 740 and 81 0 latitude North, especially West Spitsbergen, North-East Land, Barents Island, Edge Island, Wiehe Islands, Hope Island or Hopen-Eiland, and Prince Charles Foreland, together with all islands great or small and rocks appertaining thereto.

⁹ *Ibid.* 7 Art.3

¹⁰ Svalbard’s Treaty, *supra* note 7, Art 7

The dispute arises because of the 200 nm Exclusive Economic Zone. Not only from Norwegian land zone but also the from Svalbard's archipelago Norway argues this zone as a part of its territory. Norway insists Svalbard being part from its territory and to be considered as located on Norway's continental shelf. Other states argue against such division and insist that Svalbard cannot be considered as part of Norway but as a separate Island with its own continental shelf. Signatory states of the 1920's Treaty of Svalbard are against Norway's claim of the 200nm zone around Svalbard, thus future disputes about the development of fisheries and oil and gas in this zone are about to come in future.¹¹

Treaty of Svalbard has been drafted about 100 years ago. Treaty still regulates the area, has a significant impact on state actions as it has set the territorial sovereignty rules. The reason why there arise disputes is that by the time of the drafting of the Treaty of Svalbard there was neither such regulation nor provision of Exclusive Economic Zones (hereinafter EEZ). Norway was free to set its territory in the means of sea miles around Svalbard as it was set by custom, till 4 nm of sea area around the land.

Currently, by the establishment of United Nations Convention on the Law of the Sea in 1982¹², the nautical mile zone is set to be at a maximum of 12nm, that is three times the larger area around the land territories. Additional 12nm of the contiguous zone, up to 200nm EEZ and 200nm continental shelf zone (continental shelf can even be till 350nm). As it can be seen, then in this situation, a zone that first was only 4nm around the shore can now be claimed as being about 200nm zone under the state control.¹³ Regarding such difference, state disputes arise and the solution of whether such amendment of size for territory should be made for the Treaty of Svalbard or such difference should be considered as being out of the scope of the Treaty and the Treaty of Svalbard should be considered as being separate document not affected by later UN Convention.

Regarding the climate change that stimulates melting of arctic ice, newly opened territories are also opened for all kind of resource harvesting. Reason for interest there is based on not only fisheries and hunting but also natural gas and fuels. Two of the most valuable resources available in the Barents Sea is natural gas and fuels and snow crabs. The snow crab situation will be analyzed further as one kilo of snow crabs are on the same value as one kilo of natural fuel.¹⁴

Location of prospective reserves of natural gas and petroleum is located under the seabed of the Barents Sea between Norway and Svalbard.¹⁵ In case such resources would be considered as located in the 200nm zone and regulated by the Svalbard Treaty of 1920 then each signatory state of the Treaty should enjoy free access and have the rights of exploitation of such resources. For Norway such division would cause a potential loss, considering the fact

¹¹ Dr. Lotta Numminen, "A history and functioning of the Spitsbergen Treaty", *The Spitsbergen Treaty Multilateral Governance in The Arctic* Edt. Diana Wallis MEP and Stewart Arnold, Arctic Papers, volume 01, available on: <https://dianawallis.org.uk/en/page/spitsbergen-treaty-booklet-launched>, accessed April 7, 2019

¹² United Nations, *United Nations Convention on the Law of the Sea* ILM 1261 (1982), Date of entry into force 16 November 1994, available on:

https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf, accessed May 7, 2019

¹³ *supra* note 12, Art 3; Art 33; Art 57; Art 76

¹⁴ A Severe Case of The Crabs: Lawsuit About Illegal Fishing In Svalbard Really About Oil Drilling Rights, available on: <http://icepeople.net/2017/07/10/a-severe-case-of-the-crabs-lawsuit-about-illegal-fishing-in-svalbard-really-about-oil-drilling-rights-experts-say/>. Accessed May 7, 2019.

¹⁵ Norwegian Petroleum Directorate. *Doubling the Resource Estimate for the Barents Sea*, available on: <https://www.npd.no/en/facts/news/general-news/2017/Doubling-the-resource-estimate-for-the-Barents-Sea/>. Accessed May 7, 2019.

that resources located in the Barents Sea composes 65% of the total available jet not discovered oil and gas resources in the territory of Norway. Furthermore, one-fifth part of the whole world's oil and gas resources are positioned in the area of Arctic Circle.¹⁶ Provisionally, the dispute regarding the oil and gas in the region could start in the time of 50 years. And if the climate change will continue in its current tempo, then the availability of the resources could be controlled only by territorial means, not climate difficulties as ice, because the ice will continue to melt, that is because of the fossil fuel disposal.¹⁷

Svalbard Treaty that has been concluded in 1920 includes provisions regarding the equal rights of fishing and hunting in those territories. At the same time, Norway keeps the power to ensure the preservation and if it is necessary, also a reconstruction of flora and fauna there, meaning that it can impose measures that parties shall recognize. When imposing its rights over Svalbard Norway has introduced other regulations and acts regarding this area and resources. The dispute arises because there is a lack of regulation on how to interpret the Treaty and how to evaluate the Supremacy in this situation. How far can Norway go in its regulations and can it act over Svalbard as its territory or can other States that were the signatories of the Svalbard Treaty claim their rights over the area. It is important to understand how the Treaty of Svalbard 1920 should be interpreted. Whether treaty provisions should stay the same or the nautical mile zone that in the Treaty is set of 4nm should be changed according to current zones and provisions, hence, should be enlarged to 200nm zone, that would grant free access for signatory states in this zone. Currently, there is no clarity on how the current law affected the Svalbard Treaty and whether they are open to all the contracting parties for them to harvest resources in those areas and achieve profit. By the time when the fossil resources including oil and gas reserves in the Barents Sea will become more necessary in the world market, it is crucial to set whether the area is in the scope of the Svalbard Treaty, or is the treaty applies only to the 4nm area as it is set originally. This would then conclude whether all signatory states would have equal free access rights to the resources in the 4nm area or in the 200nm area around Svalbard.

2.1.2. NEAFC Convention of 1980

The first version of the convention was from 1946, which back then was called the Convention for the Regulation of Meshes and Fishing Nets¹⁸. This NEAFC Convention¹⁹ was signed in London, November 18, 1980, and entered into force by March 17, 1982. Convention contracting parties are European Economic Community, Faeroes, Greenland, Iceland, Norway, and Russia. Later on the framework of this Convention also the NEAFC²⁰ as a body was set for fishing control and cooperation in the region. This Convention includes two areas-regulatory and convention areaⁱ. NEAFC in yearly meeting agrees on the necessity to impose measures in the regulatory area. Since 2006 NEAFC has established a scheme of control and enforcement on ships fishing in the Regulatory area. By measures, the Commission can

¹⁶ Ibid 15

¹⁷ Hannah Ritchie and Max Roser, Fossil Fuels, *When will we run out of fossil fuels?*, available on: <https://ourworldindata.org/fossil-fuels#note-4>. Accessed May 7, 2019.

¹⁸ *Convention For The Regulation Of The Meshes Of Fishing Nets And The Size Limits Of Fish*. Available on: <http://www.oceanlaw.net/texts/mesh.htm>. Accessed May 9, 2019

¹⁹ North-East Atlantic Fisheries Commission *Convention on future multilateral cooperation in North-East Atlantic fisheries (NEAFC Convention)* Date of entry into force 17 March, 1982, available on: <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=503>. Accessed May 9, 2019

²⁰ North-East Atlantic Fisheries Commission, available on: <https://www.neafc.org/>, accessed May 10, 2019

impose quotas on a concrete fish stock (also sedentary species²¹) or even ban for a time for scientific and protection purpose. Also, the contracting parties can request for regulation not only in the regulatory area but also for the area in one of the parties national fisheries jurisdiction. For control, the NEAFC has two active schemes of action, the first Scheme of Control and Enforcement is for the control and surveillance of fishing activities in the zones that are outside the Coastal State control area but in the Regulatory area of the Convention. Another scheme is for the control of an action taken by the non-contracting state of the convention that acts in the Regulatory area. According to Art.5 of the Convention, the Commission can also address recommendations for fisheries in the Contracting Party jurisdiction areas. The Commission has to ensure consistency between the measures party has been taken in order to regulate fish stocks in its area of control and so that those measures would be appropriate with the necessity of control. The party taking any measures and/or decisions regarding the control in its fisheries jurisdiction shall inform the Commission in order to guarantee efficiency and compliance within the area.²² In this research important to mention is Art 4 of the Scheme of Enforcement, as this article sets rights for contracting parties to authorize ships to fish in the areas where the state giving authorization is able to exercise responsibilities over the authorized ship. This Article 4 can be interpreted differently as the state may want to authorize ships for fishing activities in far located areas. The NEAFC Convention is being adopted according to the relevant provisions of the UN Convention on the Law of the Sea 1982. In 2010 EU Regulation regarding the control and enforcement of the NEAFC Convention was enacted²³. This Regulation implements the Scheme of Enforcement and Control and according to this Regulation also the ships from the EU according to the Art4 can be granted rights to carry out fishing activities in all the Regulatory area of the Convention.

2.1.3. Oslo Declaration of 2015

Multilateral negotiations have taken place between Norway, Russian Federation, United States, Canada, and Denmark. Those five states in Oslo on July 2015 have signed the Declaration for the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean²⁴ (hereinafter the Oslo Declaration) it's called the 'Oslo Declaration'. Because of the climate change, global warming, the Arctic ice is melting and thus creating new possible fisheries, by this declaration all the signatory states have agreed on measures for control. Because of such changes that were not controlled prior and together with changes comes also actions from interested parties there is a high necessity for new regulation. The main goal is for keeping and securing the marine systems that are newly revealed from uncontrolled benefitting from all the possible activities, including fishing, catching or in any other way harvesting the flora or fauna in this area. This regulation should be applicable for both the areas included in coastal state jurisdiction and closest areas from high seas. More precisely, in the Oslo Declaration, the relevant territory is set, that in this Declaration high seas area will

²¹ See *supra* note 18. Art.1, section 2 "'Fishery resources" means resources of fish, molluscs, crustaceans and including sedentary species"

²² NEAFC Convention, *supra* note 19, Art.5

²³ Regulation (EC) No 1236/2010 on the Control and enforcement system for the north-east Atlantic fisheries area No 1236/2010, OJ L 348, 15 December, 2010, available on: <http://data.europa.eu/eli/reg/2010/1236/oj>

²⁴ Declaration Concerning The Prevention Of Unregulated High Seas Fishing In The Central Arctic Ocean, 16 July 2015, available on: <https://www.regjeringen.no/globalassets/departementene/ud/vedlegg/folkerett/declaration-on-arctic-fisheries-16-july-2015.pdf>, accessed April 25, 2019

not be regulated, as in the nearest future the high sea areas are not expected to be under relevant change and there will not be a possibility of harvesting fish stocks for commercial means there. However, the Oslo Declaration holds that the signing States are bound by international law obligations to cooperate and wisely manage the fauna resources in order to ensure the safekeeping of the ecosystem in the long term if any commercial action becomes possible and uncontrolled. There are concrete measures and actions that states undertake by signing this regulation. Thus, the signatory states

... will authorize our vessels to conduct commercial fishing in these high seas area only pursuant to one or more regional or subregional fisheries management organizations or arrangements that are or may be established to manage such fishing in accordance with recognized international standards.²⁵

Furthermore, the Oslo Declaration and its measures cannot conflict either undermine any of the already existing international regulations, mechanisms, etc. that are for the regulation of fisheries and in no situation can these measures from the Oslo Declaration allow states to act against international law provisions.²⁶

The negotiations continued till December 2017 when 5 more actors joined- China, Japan, Korea, Iceland, and the European Union. The newly joined signatory states for the Oslo declaration also undertakes the safeguarding of this area. European Union as one of the signatories also takes part in the actions for protecting the area and the EU has a policy document composed for Integrated European Union policy for the Arctic²⁷. In this document, there are a set of major principles, actions that are and could be done from the EU in order to protect the Arctic Ocean. These actions include allocation of funds, participation in further discussion and provision of the necessary resources for research means. On the other hand, vessels from the EU have enjoyed rights for fishing in the Arctic Ocean including the parts of Norwegian and Barents Sea, as well as the loophole area while none of the EU member states are coastal states of the Arctic Ocean. Meaning, which rights provided for fisheries in the Arctic, is only based on international law and agreements giving equal access. EU cannot claim its access rights on territorial base, but at the same time, Arctic Ocean is one of the largest sources for EU's fishery industries, as already back in 2014, 24 % of all the EU's imported fish products came from Norway.²⁸

It must be taken into account that the Svalbard Treaty is already 100 years old, the regulations have to be adjusted to the current actualities. In order to adjust the Treaty, it is important to come to the consent from the involved signatories. EU wants to interpret this Treaty as a provision for all the signatories to have their share in the region with no restriction from Norway, at the same time Norway address its sovereignty issue and from its point of view this Treaty has to stay more for the protection of the Archipelago of Svalbard and Norway can impose any measures on keeping it and controlling from any other state action. NEAFC Convention and the body itself was created to ensure cooperation and shared action in the region, but at the same time, the Convention got interpreted by the EU Regulation that creates a possibility for misunderstanding. Here again, the states use the possibility of

²⁵ *Ibid* 24

²⁶ *Ibid* 24

²⁷ Joint Communication (EC) Joint Communication To The European Parliament And The Council An integrated European Union policy for the Arctic, 8 June, 2016, JOIN/2016/029, available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=JOIN%3A2016%3A29%3AFIN>. Accessed March 15, 2019.

²⁸ *Ibid* 27

interpretation to work on their favor. By signing the Oslo declaration it can also be concluded that EU signed it so it would have common quotas to share between its member states and that it would do the same for all the signatories, while Norway is using this Declaration as a control tool and possibility to restrict other states from intervening by fishery or other action that could possibly affect fauna of the region.

2.2. Norway and the Russian Federation bilateral legal framework

In the second part, the author will address the bilateral situation between Norway and the Russian Federation. This problem most directly is positioned between Norway and the Russian Federation. Considering geographical location and necessity to include these bilateral relations for more precise accession of the problem, the author will explain the historical division of the territory and previous disputes between Norway and Russia.

It is important to understand those bilateral relations because Norway and Russia currently are governing the region according to their national laws and only by the base have been taken the international regulations. As already previously author has addressed, the Treaty of Svalbard of 1920 is already in force for 100 years and the provisions laid out are old. In order to adjust it to the modern situation and other principles existing currently, consent firstly, from Norway is necessary as it has its sovereignty over the region. Russia and Norway are dividing the region between themselves and this cooperation could influence which part is or would be accessible for others.

2.2.1 Agreement on Cooperation in the Fishing Industry 1975

Regarding Russia and Norway and their shared part in the Barents Sea, there are bilateral agreements discussing the fisheries in the Barents. Cooperation regarding the fishing activity and its control started already in the 1900s when the first Russian ship ‘Andrey Pervozvanny’ with scientists from Russia visited Norwegian scientists. Those relations broke up by the Russian Revolution and later also by the Second World War. Considering that the interest in the fishery only enlarged, cooperation was again necessary as other non-border states engaged in fishing activity. In Murmansk, 1957 was held the first conference between Russia and Norway regarding the control of fishing activity in the region. Representatives from both states agreed, on the necessity of regular meetings for successful control of the fish stocks and ensuring the sustainability of the ecosystem. Starting from 1968 annual meetings by scientists from both states were held.

In 1975 an agreement was reached, and Norway and Russia signed an Agreement on co-operation in the fishing industry (hereinafter Agreement on co-operation in the fishing industry)²⁹ by this agreement both states came to consent of creation of Fisheries Commission for three kinds of fishing stocks, most popular at that time; cod, haddock, and capelin. Fisheries Commission aim was to regulate fisheries of those stocks in the area by setting yearly quotas for each of the species that both states are free to then allocate further to any third state. This Commission also was established to regulate and stipulate the research for

²⁹ Agreement between the Government of the Kingdom of Norway and the Government of the Union of Soviet Socialist Republics on Co-operation in the Fishing Industry (11 April, 1975). Available on: <https://treaties.un.org/doc/Publication/UNTS/Volume%20983/volume-983-I-14331-English.pdf>. Accessed April 26, 2019

scientific means in the region as this supervision function was previously carried out in the annual meetings.³⁰

Agreement on cooperation in the fishing industry also gives rights to perform a fishing activity in the 200-mile zone on the other state's territory but nevertheless meeting with quotas and licenses provided by the coastal state, when necessary.³¹

In 1967 Norway was first to open dialogue with Union of Soviet Socialist Republics (hereinafter Soviet Russia). Already back then the issue was the unclarity of borders and possession of the continental shelf in the Barents Sea. Parties found it hard to agree on the demarcation line in the Barents, Norway wanted the borderline to follow the median line, this principle was set in the 1958 Convention on Continental Shelf.³² Soviet Russia held a different opinion, that the demarcation line should coincide with its Arctic possessions, and due to safety circumstances and other special restrictions letting to step away from provisions set out in 1958 Convention on Continental Shelf, Soviet Union allowed to insist the border necessary being further west. Considering that both Soviet Russia and Norway kept their positions they were unable to reach a consensus. Thus, this area was controlled by temporary agreements concluded between both states. Norwegian authorities tried to implement such division in all the disputed areas, including Fisheries Protection Zone³³ around Svalbard. Fisheries Protection Zone around Svalbard was introduced by Norway in 1977, where Norway again set its common Continental Shelf and regulations regarding the protection of resources in the Svalbard area. Later both, Norway and Russia signed in the 1982 UN Convention on the Law of the Sea³⁴ that came into force in 1994. In this Convention also the question about borders and delimitation line was set, but as Norway and Russia could not agree on a common solution, the question could not be settled. Finally, in April 2010 Russian President S. Medvedev together with Russian Foreign minister in an official visit to Norway, both state Foreign ministers signed a joint statement on delimitation.³⁵ On September 15, 2010, Treaty for "Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean"³⁶ was finally signed and borders between states in the Barents Sea defined. In the Treaty it is set, that delimitation line corresponds with the geodetic line connecting points, and, that such delimitation line is set for both, the continental shelf and the water areas. The delimitation line in the Treaty is a compromise between both states claimed territories-between Norway's median line and Russia's line of its arctic possessions^{ii 37}.

³⁰ Joint Russian-Norwegian Fisheries Commission, *The Fisheries Commission*, available on : <http://www.jointfish.com/eng/THE-FISHERIES-COMMISSION/HISTORY.html>, accessed April 26, 2019

³¹ Olav Schram Stokke, *Management Of Shared Fish Stocks In The Barents Sea*, available on: <http://www.fao.org/3/y4652e/y4652e0e.htm#fn60>. Accessed April 12, 2019

³² Convention (UN) Convention on the Continental Shelf, in force 10 June 1964, available on http://legal.un.org/ilc/texts/instruments/english/conventions/8_1_1958_continental_shelf.pdf. Accessed April 25, 2019

³³ Geir Hønneland (1998) Compliance in the fishery protection zone around Svalbard, *Ocean Development & International Law*, 29:4, 339-360, DOI: 10.1080/0090832980954613. Accessed April 27, 2019

³⁴ UN Convention on the Law of the Sea *supra* note 12

³⁵ Joint Statement on maritime delimitation and cooperation in the Barents Sea and the Arctic Ocean, available on: https://www.regjeringen.no/globalassets/upload/ud/vedlegg/folkerett/030427_english_4.pdf. Accessed April 27, 2019

³⁶ *Full text of the treaty*: Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean, available on https://www.regjeringen.no/globalassets/upload/ud/vedlegg/folkerett/avtale_engelsk.pdf. Accessed April 22, 2019

³⁷ Øystein Jensen, "Current Legal Developments, The Barents Sea: Treaty between Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean

2.2.2. Grey Zone Agreement of 1978

Another agreement for a specific area is The Grey Zone Agreement of 1978³⁸, there both states have agreed that any dispute and action is controlled by the coastal states that they have the rights to issue licenses for also third-party vessels, in accordance with the quotas agreed upon. Grey zone is located under the Loophole area, closer to the shore of states. But these are not the only agreements regulating this area, as there are also agreements with third states (that are not coastal states of the Barents Sea) giving rights for the accession of the sea and rights to hold fishing activities there. For example, the European Union has fishing rights in specified zones in Barents and Lithuania as well as other states holds a special permit for shrimp fishery in the Svalbard zone.³⁹

Most noticeable action in 'Loophole' was carried out by the European Union, Greenland, the Faroe Islands, Norway tried to solve this problem and potential overfishing by allowing them to carry out fishing activities in Norwegian EEZ at the same time with the agreement from those third- states that fishery in the 'Loophole' would be diminished. This approach by Norway was successful and catches were between the set limits and quotas for the region. Problems were caused by Iceland, as their action in the Loophole area increased drastically, for example in 1994 5, 5% of the total exports for Iceland consisted of the catches from the Loophole. Catches by Island was far greater than any other third state- catches in the area, moreover, considering that Iceland carried out fishing activity only in the Loophole area not as the other states, also in the waters of Norway. As the blacklisting was impossible only for fishing carried out in the EEZ, the actions in the Loophole could not be controlled according to this practice. On May 15, 1999 states firstly came to a multilateral agreement of all three regional states regarding the 'Loophole' area called "the Loophole Agreement"⁴⁰. Iceland, which was previously not connected with Norway and Russia regarding the cod fishery now, had to open also its waters for international cod fishing and in return, its blacklisted vessels were taken out of this list and given full rights of carrying out the fishing activity within the limitations set by the quotas. The agreement is not in force by now

2.2.3. Blacklist 1998

Norwegian-Russian Fisheries commission introduced another tool for control of the region -the blacklist⁴¹ it was for the ships that breached regulations regarding fishery protection. This blacklisting was first opened on November 27, 1998. There are two major breaches for which a ship can be put in the blacklist- Breaching the quotas that have been accepted by the Norwegian fisheries commission for a concrete stock. Secondly, for Illegal,

International Journal of Marine and Coastal Law", Vol 26, No 1, 2011, pp. 151-168, available on: <https://www.fni.no/getfile.php/131499-1467549392/Filer/Publikasjoner/OYJ-ESTU-2011.pdf>. Accessed April 22, 2019

³⁸ The Grey Zone Agreement of 1978. Available on: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.732.3729&rep=rep1&type=pdf>. Accessed April 25, 2019

³⁹ Olav Schram Stokke *supra* note 31

⁴⁰ Agreement between the Government of Norway, the Government of Iceland, and the Government of the Russian Federation concerning certain aspects of cooperation in the area of fisheries, Entry into force 15 July, 1999. Available on: <https://www.ecolex.org/details/treaty/agreement-between-the-government-of-norway-the-government-of-iceland-and-the-government-of-the-russian-federation-concerning-certain-aspects-of-cooperation-in-the-area-of-fisheries-tre-001817/>. Accessed April 29, 2019

⁴¹ Directorate of fisheries, *Norwegian Black List*, available on: <https://www.fiskeridir.no/English/Fisheries/Norwegian-Black-List>. Accessed April 29, 2019

unreported and unregulated (hereinafter IUU) international fishing activity listed ships, meaning that any ship that has been listed internationally as carried out IUU fishing activity in the areas now regulated by the Norwegian fisheries commission is also included in the blacklist. Regarding the consequences of being blacklisted, the ship would be refused to have a permit for fishing in the Norwegian Economic Zone and refused to be registered under Norwegian flag as a fishing vessel. If any of the ships were once put in blacklist it is impossible to start any fishing activity in this area in the future, as there is no de-listing possible/ planned. Latvian ship 'Senator' also is included in the blacklist. The information available regarding the concrete ship is about its previous names, 'Senator' has had 4 different names previously, secondly, its current flag that is Latvian and its previous flags, that are the Faroe Islands, Iceland, and Panama, also, that its first inclusion in the blacklist was already in November 27, 1998, that is the date when Norway opened the blacklisting approach. From this list, it also can be seen that there is another ship included that is currently under Latvia's flag with the name 'Arnaborg'.⁴²

Nevertheless, sanctions and blacklisting did not solve the problem and Norway together with Russia needed a more reliable and concrete solution for this problem of the uncontrolled fishery. As previously mentioned, when both states established their EEZ of 200nm that they could claim under their control, the Loophole area was still regarded as international waters, included in the none-state territory. Notably, the conflicts around this area have been not only about snow crabs. As in the 1990s, the most interest was concentrated on cod (Atlantic Cod, a fish) fishery.

Throughout most of the 1990s, vessels from a number of states, especially Iceland, targeted cod in these high seas area without having been allocated quotas by the regional management regime.⁴³

The cod fishery due to territorial disputes and uncertainty was led so far without any control that overfishing of the cod endangered the existence of species. Because of such conditions, Norway and the EU concluded an agreement regulating the cod fishery by setting concrete yearly quotas. In 2008 this agreement was renewed and till now the cod fishery can be held only in accordance with the quotas.

⁴² Norwegian black list, *supra* note 41

⁴³ Olav Schram Stokke, *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes*. Oxford University Press, 2001, pp. 273-301, available on: <http://www.fao.org/tempref/FI/DOCUMENT/ec-sfs/2002/Stokke-Barents-FAO-Bergen.pdf>. Accessed April 20, 2019

CHAPTER III - SNOW CRAB DISPUTE IN SVALBARD

Currently, there is one the most important dispute around the area of Svalbard and it is regarding the snow crabs. Snow crabs as a resource are comparably new in this area, but due to its value this resource has been desired by many states and because of such broad legislation, this area each interprets it in its favor and possibility to find a loophole exists. Norway is not willing to share its resources and regarding the specifics of the snow crab that it is a sedentary species Norway wants to protect its gulf and close any possible free access to its current and potential resources.

The dispute is based on a specific crab- Snow Crabs (lat.: *Chionoecetes Opilio*). In the Barents Sea that is also the area of the dispute, this species was first discovered in 1996. Catching of them started only in 2013 and from then on it fast became popular and was called “the gold of the Arctic”. As the prices for the crabs were high, more and more fishers started to join this exact business. First, the catching took place in both areas- the one that is under the possession of Norway and the other that is under Russia’s control.

In 2014, after sanctions unconnected to this area were imposed on Russia by the other states, the area that was under Russia’s control was closed for any kind of cross-border fishing vessels that previously was able to catch snow-crabs. Then, the fishers in order to continue their businesses were left with only the other part of the Barents Sea, meaning the small area that consists of international waters and the disputable area of Svalbard. Then the next ban came from Norway in 2015 on the snow crab catch, by the explanation that research is necessary and there is no clear and enough information regarding those crabs. In order to keep and support local fishers Norway created specific licenses that allowed such catching of snow crabs, but each license had a limited amount of crabs allowed to catch.⁴⁴

The snow crab population is located between Norway and Russia, meaning that the continental shelf is shared between both states. Unclear is the territory where most of the snow crab fishing is carried out is the so-called ‘Loophole area’ that is located on the continental shelf but not under the state economic area. This complex situation causes disputes and unclarity whether and how to control such a fishing area. Norwegians are not allowed to catch snow-crabs in the Russian waters of their EEZ, but they can catch them in the ‘Loophole area’.

In the concrete case with snow crabs, it all started as a new invasive species that came into the territory because of the climate change. Firstly, snow crabs in the Barents Sea were spotted in 1996 when a prawn fishing ship caught some crabs in their nets together with prawns. Theories how snow crabs get to the Barents Sea differ- one speculation is, that they have been shipped there together with ballast waters and because of the well-suited climate were able to live there. The other theory is that the

If in other cases invasive species creates a problem because they cause losses, in this case, the invasive species created benefits for those who have them. If for some period the catching of the crabs was not regulated specifically, as it was for all kind of fishing activity in the Arctic Ocean, then with more and more fishermen enlarged the necessity for control. For this case, the primary would be applicable the international agreements regarding the invasive

⁴⁴ Andreas Østhagen and Andreas Raspotnik, Highnorthnews, “*Op-Ed: Crabtaclular! Snow crabs on their march from Svalbard to Brussels?*”. Available on: <https://www.highnorthnews.com/en/op-ed-crabtaclular-snow-crabs-their-march-svalbard-brussels>. Accessed March 15, 2019

species, but considering the economic benefits, the case is too difficult for such resolution. The fact also, that the waters are to be considered international, but the Svalbard zone is complex because Norway is claiming its rights over the territory. From Norway's position, it is clearly understood that the crabs are sedentary species. That means Norway can claim its rights over it based on the Norwegian continental shelf where it is located.⁴⁵

In case if the snow crabs as species would be considered as being a sedentary species, then also Russia would have the legal means of excluding Norway from their fishing activities carried out in the loophole area in the parts located on Russia's continental shelf. And, as the snow crab population first started and was discovered in the continental shelf of Russia the restriction could impose a loss also for fishing activities of Norway.⁴⁶ Currently fishing in the loophole area are carried out by both states – Russia and Norway, with their national quotas but no common restrictions regarding this area, taking into account that the Loophole area is in none of the state's exclusive economic zones and as everyone else also they have the rights to catch snow crabs. From Norwegian side, the Ministry of Trade, Industry, and Fisheries have banned catching of snow crabs in the Exclusive Economic zone, Svalbard fisheries protection zone and with addition for all Norwegian vessels ban to catch snow crabs in international waters. The only allowance to catch snow crabs in those areas/ escape for those restrictions is to have an exemption provided by the Directorate of Fisheries. From Russia's side, there is a different approach as it set the total amount of crabs that can be caught in their Exclusive economic zone and continental shelf. Both states are accessing the situation differently and from the legal point of view, there is no clarity of how to control the situation. The continental shelf zones on which the Loophole area is situated can be claimed as being under control in part of Norway and in part of Russia but in none of their Exclusive Economic Zone. (See in attached the map displaying geographical situation)ⁱⁱⁱ

There exists a 'loophole' regarding the law applicable to this area. One question that needs to be clarified is the termination of what a snow crab is – how actively it moves around the territory and how does it move. If snow crabs are sedentary species, then there is a possibility to grant an exclusive right to national fishermen to catch them. If the snow crabs would not be considered sedentary species then, of course, there would not be a place for such exclusions. According to the Art.77, part 4 of the United Nations Convention on the Law of the Sea (hereinafter: UNCLOS):

[..] natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil⁴⁷.

The author wants to put attention to the official webpage of Svalbard, even there the regulation and information regarding the fishing and hunting are discussed as only for residents of Svalbard. Furthermore, when the author searched for the exact fees and detailed

⁴⁵ Brooks A. Kaiser, Melina Kourantidou, Linda Fernandez, "A Case for the Commons: The Snow Crab in the Barents". Available on: http://www.bioecon-network.org/pages/19th_2017/Kaiser.pdf. Accessed March 15, 2019

⁴⁶ Harald Sakarias Brøvig Hansen, Master thesis in International fisheries management: 'Snow crab (Chionoecetes opilio) in the Barents Sea'. Available on <https://pdfs.semanticscholar.org/d711/fd89f34e24fb7587bbb3e073d1ae6158627a.pdf>,. Accessed April 16, 2019

⁴⁷ Convention (UN) United Nations Convention on the Law of the Sea. Date of entry into force November 16, 1994. Available on: https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Accessed April 17, 2019

information for all the possible fishing/ hunting options there are some of the positions which are meant for non-residents and, that

Visitors may only fish with hand-held equipment. In all cases, you need to obtain a fishing license, which is issued at the Governor's office.⁴⁸

Despite those few sentences, there are many positions with asterisks, which have been explained afterward as such rights being only for residents. In this webpage there is no further discussion concretely regarding snow crabs and the author will not further discuss it in this research because of the lack of relevance.

Snow crabs are considered the gold of arctic, but it is not the only reason why Norway protects the gulf-fauna. If unlimited access to the gulf would be granted to all the ships, then potential resources under the seabed would in probability be next. If Norway in the future would have to also share its natural gas and fuel reserves, economic losses that would go to another state benefit would be great.

3.1. Latvia and Lithuania cases

There are a lot of laws and regulations where this area is discussed. In the current situation, Norwegian fishermen can catch snow crabs and continue their businesses, while foreigners cannot access the area.

The author will analyze judgments in two cases where Latvian and Lithuanian ships were caught on illegal fishing activity in the Svalbard area. The author will compare similarities and seek for differences. It is interesting to compare both cases because of the different permits issued. Lithuanian ship had a permit from Lithuania that is in accordance with the EU Declaration regarding the NEAFC Convention, Latvian ship also had a permit issued by Latvian authorities⁴⁹. According to the case with the ship from Lithuania interesting is to analyze the complaint that was addressed to the European Free Trade Association. The author uses this complaint in order to show all the steps states have tried in order to get access to the area and what has been the outcome and how the outcome in any situation differed in order to find if there are possible any other solution than Norway's sovereignty.

3.1.1. Lithuanian case

A ship called "Juros Vilkas" owned by a Lithuanian fishing company "Arctic Fishing" in the period from May 25, 2016, till July 16, 2016, caught snow crabs in the Barents Sea, Loophole area. The location if looking from a Norwegian point of interpretation is on the Norwegian Continental shelf and the catching was held without having a permit from Norway respective authorities. On July 18, 2016, Finnmark Police Commissioner issued a fine against the company "Arctic fishing" of confiscation for the breach of Regulation on the Prohibition against Catching of Snow Crab.⁵⁰ Secondly, another fine to the captain of the fishing ship was imposed for the same breach. According to Section 2 of the Regulation on the Prohibition

⁴⁸The Governor of Svalbard, "Hunting and fishing - for residents", available on: <https://www.sysselmannen.no/en/Residents/Hunting-and-Fishing/>. Accessed April 8, 2019

⁴⁹ Ārlietu komisijas vadītājs: Domstarpības ar Norvēģiju par sniega krabju zveju skar visu ES, available on: <https://www.lsm.lv/raksts/zinas/latvija/arlietu-komisijas-vaditajs-domstarpibas-ar-norvegiju-par-sniega-krabju-zveju-skar-visu-es.a226095/>. Accessed May 14, 2019

⁵⁰ Norway, *Regulation No. 1836 of 2014 on the prohibition to fish for snow crab*, Date of entry into force March 2, 2017. Available on: <https://www.ecolex.org/details/legislation/regulation-no-1836-of-2014-on-the-prohibition-to-fish-for-snow-crab-lex-faoc169496/>. Accessed May 7, 2019

against Catching of Snow Crab, there could also be an exception from the prohibition, but in this case, an exception was not granted. Fines were not accepted by both parties- nor were the captain nor the fishing company and the case brought before the District Court of Øst-Finnmark. On November 29, 2017, the court gave judgment regarding the case, the District Court ruled in favor of the fishermen and held that the imposed fines are not applicable. District court in its judgment found that the Lithuanian ship held a valid permit that was issued by Lithuanian state and thus cannot be fined. Norway cannot fine a ship if it held a valid permit and the Prohibition to fish for snow crab cannot be applicable.⁵¹

District court judgment was appealed by Commissioner before the Hålogaland Court of Appeals, regarding the application of the law. Judgment by the Court of Appeals said that the District Court judgment must be upheld because of incorrect application of the law. Court of appeals raised attention to the UN Convention on the Law of the Sea as there are regulated the area of the continental shelf, which is not restricted in the NEAFC convention on which the District Court based its ruling. Hence, if the continental shelf area is under the control of Norway and by that has exclusive rights over the area, then, it also can impose sanctions and regulations in this area regarding ships from any other state. Both defendants appealed the Supreme Court's judgment concerning the application of the law. The argument for defendants' position was that the NEAFC Convention and Scheme of Control Enforcement are applicable on areas of the continental shelf which are located outside the EEZ and in this concrete state. In this case, according to Art.4 of the Scheme of Control Enforcement, Lithuania had the authority to issue a permit to Lithuanian fishing ship as this ships flag state. Nevertheless, the prosecution authority concluded that the appeals must be dismissed as Norway has sovereignty over the continental shelf as it is prescribed in the Art.77 of UNCLOS. As described, there was no dispute that the catching would be punishable under the Norwegian rules, but whether in this case there should be an exception since Lithuanian ship had a valid permit from Lithuanian authority and is the permit application in this situation.⁵² Also according to Marine Resources Act, either will full or negligent breach of provisions is liable and the Regulation on the prohibition to fish for snow crab is adopted according to this Act. Furthermore, court recalls on Section 2 of the Penal Code and Section 6 of the Maritime Resources Act, wherein the Act is stated that it is applicable: "*to any restrictions deriving from international agreements and international law otherwise*"⁵³.

Next, in the appeal, it was examined whether according to international law provisions Norway is prohibited from applying previously mentioned regulations. Lithuanian ship had set its snow crab pots in the Loophole area in Norway's part of the established demarcation line with Russia (see page 11). In this case, parties have agreed that the snow crab is to be considered sedentary species. According to UNCLOS Norway can claim exclusive rights over its continental shelf, including rights on natural resources and sedentary species. In the judgment the location of the continental shelf of Norway are set as follows:

⁵¹ NEAFC Scheme of Control and Enforcement, in force from February 13, 2019, available on: <https://www.neafc.org/mcs/scheme>, Accessed May 2, 2019

See Article 4 - Authorisation to Fish, in this Article it is stated that each Contracting party can authorize fishing vessels.

⁵² See Regulation on the Prohibition against Catching of Snow Crab *supra* note 50, Section 1: "This Regulation, made under the Marine Resources Act and The Svalbard Act of 1925, prohibits Norwegian and foreign vessels to catch snow crabs in the Norwegian territorial sea and inland waters, and on the Norwegian continental shelf"

⁵³ Norway, The marine resources act, (6 June 2008), Section 6. Available on:

<https://www.fiskeridir.no/English/Fisheries/Regulations/The-marine-resources-act>., Accessed May 7, 2019

Norway's continental shelf extends through and beyond the Norwegian part of the Loophole, see Article 76 and the recommendation of the Commission on the Limits of the Continental Shelf from 2009.⁵⁴

The Commission on the Limits of the Continental Shelf (hereinafter CLCS) have accepted Norway's claim over the continental shelf territory that is located under the Loophole area and thus Norway can claim its exclusive rights over the continental shelf and seabed resources.⁵⁵

According to previously mentioned, Norway has exclusive rights of snow crab catch in their part of the Loophole. Disagreement, in this case, arises about the Art.77 part 2, where it is stated that in the Norwegian continental shelf's part of the Loophole no other state can catch snow crabs if they have not received an 'expressed consent' from Norway. Fishers from Lithuania explained that such consent has been already given by the signing of the NEAFC Convention. Norway together with Russia, EU, Denmark, and Iceland has ratified this Convention. Norway became the party of UNCLOS in 1996, while the NEAFC Convention entered into force in 1980, with amendments in 2006 that entered into force only in 2013. Nevertheless, the court when accessing the interpretation of both conventions found, that: "in the NEAFC Convention's preamble, the Contracting Parties are "recognizing" the relevant provisions of the UNCLOS."⁵⁶ Meaning, that parties held the rights for their natural resources on their continental shelf area as it is said in the UNCLOS. Such rights can be challenged only if in the NEAFC Convention or on another respective rule there are clearly stated exceptions. Regarding the area of application for the NEAFC Convention, the Barents Sea and concretely Svalbard's archipelago is included and by the amendments of 2006 also snow crab as a sedentary species is included, meaning that this NEAFC Convention regulates snow crab catching in the Loophole area, but no rules have been set for governing such activities. Convention also includes that Northeast Atlantic Fishery Commission can issue a recommendation for governing the activities in the Convention Area of Application. Regarding snow crabs, there is not any recommendation issued. The recommendation can be issued in two ways- either by states request if such recommendation issue is in its territory, or

"The Commission shall as appropriate, make recommendations concerning fisheries conducted beyond the areas under fisheries jurisdiction of Contracting Parties. Such recommendations shall be adopted by a qualified majority."⁵⁷

The court finds that there is not been such request nor any other Recommendation regarding snow crabs and from that, it derives to a conclusion that Norway has not allowed any other ship for snow crab fishing in the Loophole on its continental shelf.

Also, the court, when accessing the appellant's argument of Lithuania's rights to issue permits as in Chapter 2, Art 4 of the NEAFC Scheme of Control and Enforcement it is stated that state can issue permits to their shipping vessels to carry out fishing activities only in the area where itself can exercise also control over those activities. The court interprets this wording as a restriction for the state to be able to control the areas of fishing action not as the rights to issue permits as those are 'control measures' not rights of the states. Also, one argument from the fishers was that till 2015, before the Prohibition against Catching of Snow

⁵⁴ The Supreme Court of Norway, HR-2017-2257-A, (case no. 2017/1570), *criminal case, appeal against judgment*. Available on: <https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2017-2257-a-snow-crab.pdf>. Accessed May 5, 2019

⁵⁵ Suzette V.Suarez. "Commission on the Limits of the Continental shelf". Available on: http://www.mpil.de/files/pdf3/mpunyb_04_suarez_14.pdf. Accessed May 10, 2019

⁵⁶ Judgement v Lithuania *supra* note 54

⁵⁷ NEAFC Convention, *supra* note 19. Art.5

Crab was applicable for the continental shelf, everyone was free to harvest snow crabs in the same region. Nevertheless, the court concluded that such previous allowance does not oblige Norway to continue the same practice and the Regulation should be applied. The court based its opinion on the previously explained reasons finds Norway free to enjoy its exclusive rights over Svalbard and declares District Court's judgment is based on an incorrect application of the law. Appeals have been declared dismissed.

3.1.2. Complaint to EFTA in 2016

On September 30, 2016, enterprises of the EU member states that are engaged in snow crab fishing in the Barents Sea and Svalbard area, submitted a complaint to European Free Trade Association (hereinafter EFTA) Surveillance Authority.⁵⁸ This complaint was submitted regarding the Prohibition against Catching of Snow Crab as breaching a breach of fundamental principles of the Agreement on the European Economic Area (hereinafter EEA).⁵⁹ Arguments for this complaint are based on NEAFC Convention on the provision that on the competence of the NEAFC is the establishment total allowable catches and allocation of such permits within the Contracting Parties. Secondly, that Svalbard Treaty of 1920 and its provisions on non-discrimination for fishing rights of all its signatory states must be considered. The third argument for this complaint is according to Treaty on Maritime delimitation and cooperation in the Barents Sea of September 15, 2010, Art.4 where Norway and Russia have given shared rights for allocation of allowable catches. Also, the complaint was that by such legislation on prohibition rights of establishment, the freedom to provide services, the principle of non-discrimination, and the principle of proportionality were widely breached. The last argument is made according to the EU Community law principles that are also in accordance with the NEAFC provision of allowable catches, which by the EU Regulation No1380/2013 Art.16 are given to EU Member states.

This complaint is challenging the legality of the Provisions of the prohibition of Snow Crab catching of 2015, by granting at the same time exclusive rights for Russian vessels and vessels with permits granted from Norway, that are accordingly to the Act on the Right to Participate in Fishing and Catching for commercial fishing outside territorial waters.⁶⁰ According to this Act of Participation, no other than Norway ships can be granted such permit and exclusion is that only a ship of which half of the crew are Norway citizens can be granted such permission. Also, the complaint comprises that there can be no objective justification for such access restriction, here, a reference to a case law Judgement on Regina v Kent Kirk 1984⁶¹ were equal access that cannot be discriminated based on nationality are discussed. In this case, also the court is stressing the necessity for active conservation measures that are taken by the state that established the excluding law and similar measures has to be established in the community level. If there is no conservation active by state and no community measure on conservation, then no exclusion can be imposed. Nevertheless, the complaint was closed. EFTA Surveillance authority concluded that based on the fact that already previously Norway has controlled the fishing in the region and the snow crab

⁵⁸ Complaint to the EFTA on failure of the Kingdom of Norway to comply with EEA law , September 30, 2016, available on: <http://www.eftasurv.int/da/DocumentDirectAction/outputDocument?docId=2261>. Accessed May 6, 2019.

⁵⁹ *In addition*: This complaint was represented by Lithuanian Law firm and it is believed to be in accordance with the previous case of Lithuanian crab ship.

⁶⁰ Norway Ministry of Trade and Fisheries, Law on the right to participate in fishing and catching (the Participation Act). Available on: <https://lovdata.no/dokument/NL/lov/1999-03-26-15>. Accessed May 7, 2019

⁶¹ CJEU. Judgment on 10 July 1984, Regina v Kent Kirk ECR1984, 2689, para.7

regulation is to be considered as a specification for previous regulations, which it is according to the Act on the Right to Participate in Fishing and Catching of 26 March 1999. Hence, the Surveillance authority considered such limitations by the side of Norway legitimate and holds that Norway can continue the application of the restrictions.

3.1.3. Latvian case

In this part, the author will analyze the Supreme Court judgment in the case of Latvian ship that carried out snow crab catching in the Barents Sea without the permit from Norwegian authorities. This case was held in three courts- district court- the court of appeals and the Supreme Court.⁶²

The conflict about the one concrete fishing ship started on January 16, 2017. Latvian ship named Senator was catching snow crabs in the Svalbard, Norwegian Arctic Archipelago from January 15, 2017, till the time of the inspection by the Norwegian Coastguard. Senator is a Latvian ship that is registered under SIA (LLC) North Star Ltd. Limited liability company; North Star Ltd. is a Latvian company and has two other ships meant for crab- catching. At the time of inspection by Norwegian Coastguard, the ship was led by a Russian citizen. Also, the fishermen had a permit issued by Latvian authorities for catching of snow crabs. This permit was issued according to the EU Regulation of 2016 when EU issue 20 permits for fishing in Svalbard and 11 of them were issued for Latvian ships, one of them to “Senator”.⁶³ After the inspection, the ship was brought to Kirkenes port and stayed there without any further action. At the time Norway intercepted the Senator, the ship had 2,600 crab pots at that moment that were put in the waters of Svalbard Archipelago. On January 20, 2017 the issue was brought to Chief of Police in Finnmark, where the penalties were issued for SIA North Star Ltd. and the Senator’s captain, based on Marine Resources Act (Act of 6 June 2008 no. 37 relating to the management of wild living marine resources) and Regulation No. 1836 of 2014 on the prohibition to fish for snow crab (hereinafter Regulation No.1836). The additional penalty was issued to the captain of the ship as for the violation of Coastguard Act regarding the disrespect for the Coastguard’s order to remove all the snow crab pots from the water.

The concrete location of the ship when the inspection by the Norwegian Coast guard was carried out was fixed in the Svalbard Fisheries Protection Zone with the additional information that is written in the Judgement of the Supreme Court of Norway- that it was on the Norwegian continental shelf. Norway sees the waters as being protected under the Svalbard Fisheries Protection Zone and because of that confiscated crabs and imposed an additional fine for such illegal actions.⁶⁴

In the Norwegian Supreme court, the only question that was discussed was whether snow crab is sedentary species or not. In the lower instance courts also the question of

⁶² Appeal of the judgment A, SIA North Star Ltd (Counsel Hallvard Østgård) v. The public prosecution authority (Public prosecutors Lars Fause and Tolle Stabell); judgement No. HR-2019-282-S, (case no. 18-064307STR-HRET), available on: <https://www.domstol.no/contentassets/9f4cda47c4dc4497a966e9dba990be78/hr-2019-282-s.pdf>. Accessed April 23, 2019

⁶³ LSM “Norvēģi arestējuši Latvijas zvejas kuģi ar 30 cilvēku apkalpi”, available on: <https://www.lsm.lv/raksts/zinas/latvija/norvegi-arestejusi-latvijas-zvejas-kuģi-ar-30-cilveku-apkalpi.a220562/>, accessed May 10, 2019, according to Regulation (EU) 2016/2336 — rules protecting deep-sea fishing stocks, see <https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:32016R2336>

⁶⁴ Barents Observer, *Snow Crabs Raise Conflict Potential Around Svalbard*, (published Jan. 23, 2017).

Available on: <https://thebarentsobserver.com/en/arctic/2017/01/snow-crabs-raises-conflict-potential-svalbard>. Accessed March 15, 2019

whether the rights of the fishermen under the Art.2 of the 1920 Svalbard Treaty were violated was addressed. In the court of appeal the argument whether snow crabs is a sedentary species was the matter of appeal and because of such judgment by the court of appeal that discussed only the issue about sedentary species, also, the Supreme court did not look at the issue of equal treatment under the Art.2 of the 1920 Svalbard Treaty. Also, the Regulation No.1836 and concretely, its possible contra version with the Svalbard Treaty was not discussed nor in the Court of Appeal nor in the Supreme court. The Supreme Court's judgment discusses only whether the snow crabs are to be considered sedentary species.

District court in their judgment concluded that snow crabs are to be considered sedentary and because of that Norway should have an exclusive right for their exploitation. Also, district court in their judgment found that the Regulation No.1836 would contravene with the 1920 Svalbard treaty but at the same time held that the Svalbard Treaty does not apply anywhere that is more than 12 nautical miles from Svalbard's territorial border, as in this case, the catching is to be considered as held outside the controlled area under Svalbard's Treaty.

The case was brought before the court of appeal by SIA North Star Ltd. and ship's captain. The appeal was "against the findings of fact and the application of the law in the determination of guilt."⁶⁵ The court of appeal ruled in favor of public prosecution authority and concluded that snow crab is to be considered sedentary species. In addition, the court of appeal found that if any snow crab catching on the Norwegian continental shelf is to be carried out without a permit, issued by the Norwegian authority "is punishable under general criminal law principles even in the absence of a valid legal basis for rejecting a permit application".⁶⁶

Further again SIA North Star Ltd. and ship's captain appealed the court of appeals judgment and this dispute went to the Supreme Court of Norway. This appeal was brought based on whether the snow crab is sedentary species and whether there has been a violation of the principle of equal rights put in the Svalbard Treaty. Court of appeal in its judgment also included that the fishermen did not act inexcusable ignorance of the law but knowing the fact that the permit is necessary from Norway continued their illegal catching of snow crabs. This was not appealed before the Supreme Court, while in the lower instance courts the fishermen held to the argument that they did not act wilfully against the law.

Supreme Court looked only whether snow crab is to be considered sedentary species and by that whether Norway has exclusive rights of their exploitation. With attention to whether a vessel that is catching snow crabs in the area of Norwegian continental shelf without a valid permit is punishable. This question was looked at without accessing the applicability Svalbard Treaty, without clarifying whether the Regulation No.1836 is in contravention with the equal rights set in the Svalbard Treaty. As well, the Supreme Court made clear that

[..] There will be no hearing of the issue regarding the Svalbard Treaty's geographic area of application until such clarification is required.

The case was first to be heard by 6 judges, but due to the complicated and unique situation, the number was enlarged to 8 judges.

⁶⁵ Regina v Kent Kirk, *Supra* note 61

⁶⁶ Regina v Kent Kirk, *Supra* note 61

SIA North Star Ltd and A argued that snow crabs are not to be considered a sedentary species. They based their argument on the facts, based on Vienna Convention on Law of the Treaties⁶⁷ the interpretation, the meaning of wording, context leads to the conclusion that snow crab is not included and considered sedentary species. Also, following the Art.2, part 4 of the Convention on the Continental Shelf 1958, where the view that snow crab is not a sedentary species, as it could not be considered

“immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil”⁶⁸.

Regarding the Regulation No.1836, it is only applicable on the continental shelf of Norway and not in the Exclusive economic zone of Norway neither the Svalbard Fisheries Protection zone. Another argument from Latvia’s side is for the principle of equal rights that are provided in the Svalbard Treaty, In this case, following the Regulation No.1836 there exists a straight breach of this right as the ships from Norway exclusively can obtain such permits for catching snow crabs. Marine Resources Act, Section 6 “This Act applies subject to any restrictions deriving from international agreements and international law otherwise.” And, regarding the Penal Code Section 2 “The criminal legislation applies subject to the limitations that follow from agreements with foreign states or otherwise by international law.” Regarding the previously mentioned arguments, Latvia asked for relief and for them to be acquitted from the accused breach of law.

Norway argues that snow crab is and should be considered sedentary species based on Art.77 of UNCLOS that also corresponds with the Vienna Convention. Also, it is not important in this case if the snow crabs are to be considered sedentary species or not. The argument under this is that the pots were put in the waters of Svalbard Fisheries Protection Zone and that it is an area of Norway’s exclusive rights and there it can regulate all species both in water (that are not sedentary) and on the continental shelf (that are sedentary). Because of that Norway are free to apply the Regulation No.1836 for the means of providing control over the area. Furthermore, because of the exclusive rights that Norway has over this territory it also has the power to issue permits guaranteeing the possibility to catch snow crabs.⁶⁹

Regarding this territory, in 1977 Norway established a Fisheries Protection Zone, including, that Svalbard is to be considered as part of the Norwegian continental shelf. In the Treaty of Spitsbergen that came in to force already in 1920 Norway holds the rights of Svalbard’s maritime zone and also the continental shelf, the other treaty signatory states did not had any problems with such restriction because the only concern included is about the necessity to protect fauna this area, no economic or other benefits. Nevertheless, because of such restriction, Norway can claim it has the jurisdiction over this area and the signing states

⁶⁷ Convention (UN) Vienna Convention on the law of treaties. Available on: <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>. Accessed April 27, 2019

⁶⁸ United Nations, Convention on Continental Shelf 1958. Date of entry into force on 10 June 1964, available on: http://legal.un.org/ilc/texts/instruments/english/conventions/8_1_1958_continental_shelf.pdf. Accessed April 23, 2019

⁶⁹ Appeal of the judgment A, SIA North Star Ltd (Counsel Hallvard Østgård) v. The public prosecution authority (Public prosecutors Lars Fause and Tolle Stabell); judgement No. HR-2019-282-S, (case no. 18-064307STR-HRET), available on: <https://www.domstol.no/contentassets/9f4cda47c4dc4497a966e9dba990be78/hr-2019-282-s.pdf>. Accessed April 23, 2019

of the treaty on the other side wants to keep equal access to economic activity as the Treaty guarantees to all states.⁷⁰

According to the UNCLOS Norway also argues that the area of Svalbard is located on the Norway continental shelf and that if Svalbard does not have its own- separate continental shelf from Norway then it cannot be claimed to be a separate part or as not being under Norway's jurisdiction. And in this case, the dispute which of the international law should govern the situation does not need to be discussed.⁷¹ Norway compares its rights in this situation with Novaya Zemlya that is under Russia's control and the Shetland Islands being under the control of Great Britain. If the catch of the snow crabs happens in their territory, then they have the rights to control that and they also have the rights to fine other who are enjoying free catching of such valuable resource without any right issued by Norway under whose control they are.⁷² Latvia's position, together with the EU and its member states holds to the 1920 Svalbard Treaty and interprets that for the necessity of equal treatment, meaning, equal access and non-discrimination regarding this area.^{73 74}

3.2. EU and Norway position deriving from the case law

3.2.1 Norway Position

Norway holds the position that the Treaty should not be changed by the current limitations for maritime zones, but on the contrary, should be kept as it is with the 4nm zone within the scope of a treaty. While full control over EEZ is kept by Norway and no other state action in this 200nm zone should be considered as a subject for equal access. Norway acts according to its belief that the continental shelf zone is under Norway's solely control and actively opens new exploration blocks in the Barents Sea and other territories.⁷⁵ Svalbard Treaty signatory states are against such actions from Norway, also Russia strongly argues that Norway actions are a breach of Svalbard's treaty provisions. Russia's diplomatic service reached Norway in order to come to an agreement on the control for the disputed area, but here the dispute comes back to the views on the continental shelf. If as previously mentioned, Norway sees Svalbard as a part of its continental shelf and that it is governed by the Continental Shelf Convention of 1958, contrary Russia suggests Svalbard being on a separate continental shelf and thus Norway cannot claim its rights over the parts of Svalbard's

⁷⁰ Māris Klūga, "Ārlietu komisijas vadītājs: Domstarpības ar Norvēģiju par sniega krabju zveju skar visu ES". Available on: <https://www.lsm.lv/raksts/zinas/latvija/arlietu-komisijas-vaditajs-domstarpibas-ar-norvegiju-par-sniega-krabju-zveju-skar-visu-es.a226095/>. Accessed March 15, 2019

⁷¹ UNCLOS, *supra* note 47, Art48 (establishing archipelagic baselines for measurement of the breadth of the territorial sea, contiguous zone, EEZ, and continental shelf), art. 121(1) -- (3) (defining an island and ascribing to them characteristics involving the determination of their territorial sea, contiguous zone, EEZ and continental shelf).

⁷² Christopher R. Rossi, Norway's Imperiled Sovereignty Claim Over Svalbard's Adjacent Waters, German Law Journal, 18 German L.J. 1497, Academic search complete Westlaw database. Accessed March 15, 2019

⁷³ *Ibid* 72

⁷⁴ Nkeiru Scotcher, "The Sovereignty Dilemma, in The Spitsbergen Treaty: Multilateral Governance In the Arctic 21, 22" (Diana Wallis & Stewart Arnold eds., 2011), available on: <https://docplayer.net/31538991-The-spitsbergen-treaty-multilateral-governance-in-the-arctic-edited-by-diana-wallis-mep-and-stewart-arnold.html>, Accessed March 15, 2019

⁷⁵ *In addition*: Minister of Petroleum and Energy Kjell-Borge Freiberg: "We propose to add 90 new blocks to the [Awards in Predefined Areas] APA area, this time in all our sea areas, available on: <https://www.offshoreenergytoday.com/norway-plans-to-add-90-new-blocks-for-offshore-exploration-48-in-barents-sea/>. Accessed May 4, 2019

continental shelf zones and carry out unilateral governance over the territories. Norway has declined all the proposals on an agreement regarding the territory as it does not see the necessity to agree on the area that it considers under its control and where Norway can enjoy the economic benefit without the necessity to share.⁷⁶ Regarding such action from Norway, or not- responding to Russia's intent for coming to agreement Russia has even stated Svalbard as one of the possible reasons for breaking up a war with Norway.⁷⁷

3.2.2. EU Position

European Union holds the opinion that the Svalbard Treaty of 1920 was drafted because of the necessity of control in the region. If now a dispute arises on the area of Svalbard the provisions from the Treaty should be considered. As the Treaty grants equal rights of access and allow to exploit resources in the Svalbard area then it should not change during the years, but at the same time, it should be modified following current international law practice. Also, with a reference to the UN Convention on the Law of the Sea regarding the management and regulation of resource exploitation, that should be achieved by the cooperation of states. According to those views, the European Commission states that the non-discriminatory rules from the 1920 Treaty of Svalbard are applicable in the Svalbard area. Snow crab fishing in this area can be carried out as follows: European Union has set a concrete number how many permits for how many vessels can be issued, then the Member States are authorized to issue national licenses for snow crab fishing in Svalbard. Norway by not recognizing such action from the EU side has already fined and prevented from continuing fishing.⁷⁸ In 2016 Lithuanian ship by the name "Juras Vilkas" carried out fishing of snow crabs in the 'Loophole area', where fined from the Norway authorities and brought to the court. The case received judgments from district till Supreme Court and in one of the judgments the case was judged in favor of Lithuania, hence in the Supreme Court's judgment, it was held that Norway has the rights to impose fines on illegal catches on its continental shelf and appeals were dismissed. One year later similar actions by Latvian fishing ship "Senators" were carried out in the same area and the outcome also led to the Supreme Court judgment in favor of Norway.

3.2.3. Conclusions regarding the case law

Interpretation of the Svalbard Treaty has been a significant problem that has arisen disputes over the area. As can be concluded from the judgments, Norway excludes itself from the developments of law according to the Svalbard Treaty. Supreme court judgments have been based on the following factors: Snow crab is to be considered a sedentary species, meaning it is located on the seabed. Sedentary organisms and their affiliation are governed by the continental shelf. Considering that Norway perceives Svalbard being on its continental shelf and not on a separate one, it also sets the continental shelf zone around Svalbard as its own. The concept of territorial waters and also the sovereignty claims that are under the

⁷⁶ Trude Pettersen, Russia protests drilling in Svalbard zone, available on: <http://www.rcinet.ca/eye-on-the-arctic/2015/05/05/russia-protests-drilling-in-svalbard-zone/>. Accessed May 4, 2019

⁷⁷ see Aftenposten, Nilsen, "Kommersant: Russia Lists Norway's Svalbard Policy as Potential Risk of War.", available on <https://thebarentsobserver.com/en/security/2017/10/kommersant-russia-lists-norways-svalbard-policy-potential-risk-war>, Accessed April 24, 2019

⁷⁸ Alain Cadec, Question for oral answer, EU-Norway dispute over snow crab fishing in Svalbard. Available on: http://www.europarl.europa.eu/doceo/document/O-8-2018-000076_EN.pdf. Accessed May 8, 2019

Svalbard Treaty of 1920 are not discussed because of Norway as it holds Treaty applicable only to the 12nm area around Svalbard but also considers Regulation No.1836 applicable and regulating the catch of snow crab in the region by giving Norway priority and control over the resource. In both cases, judgment was in favor of Norway. Lithuanian fishermen had a favorable judgment in first instance court but later in appeals also it was declared invalid because of the wrong interpretation of the law and the court ruled in favor of Norway.

In Case of Lithuania, the judgment was more detailed, and the Supreme Court accessed concretely the reasons why and which international law should be applied and how should it be interpreted in this case. If looking at the judgment in Latvia's case, then the judgment does not explain the international law challenges that exist in this situation, in Latvian fishing ship the court only accessed whether the crab is to be considered a sedentary species and whether the catching of the snow crab can be punished from the Norwegian state.

Norway in both judgments holds to the argument that the Treaty of Svalbard 1920 can only be applicable to the zone of 12 nm not to the whole continental shelf zone of 200nm. As also other authors have addressed those court judgments, this case cannot be solved by the national court judgments and the further solution must be found. The interpretation of international law and applicability for this case will be on great importance as in the following years also the necessity for natural resources will remain on high level and taking into account the oil reserves that are located in Svalbard area, if there will not be a clear regulation, then more and more disputes would arise.

CONCLUSIONS

Regarding the Continental Shelf Norway claims it has common Continental Shelf with Svalbard and thus there cannot be any dispute of whether Svalbard archipelago should have its own continental shelf and provisions of its control. If Svalbard would have its own continental shelf, then it would have been arguing to be governed under the Svalbard Treaty and that would diminish Norway's sovereignty claim on Svalbard. Snow crabs are to be considered a sedentary species, meaning they are in continuous contact with the seabed. State under which control is the Continental shelf also would have exclusive control over sedentary resources. Regarding the sedentary species, it is important to stress their common with the seabed and continental shelf. If Svalbard's continental shelf would be questioned of free access then also other resources as natural oil and gas would be on the interest of other states.

Regarding the division as it has been discussed Russia and Norway in 2010 have signed a Treaty on delimitation line which crossing the Loophole area. Regarding this line, both states had ongoing disputes and views on how this delimitation zone should be drawn because none of the states were willing to step away from part of the territory. The fact that this delimitation line has been set only demonstrates where the zone between both states is divided and not how other states can access and use those areas. By setting the Fisheries Protection Zone in 1977 Norway also underlined its common Continental shelf with Svalbard. Fisheries Protection Zone is 200nm width around Svalbard. It is still questionable whether such protection measures that are enacted in the Svalbard Fisheries protection area should also be in accordance with the Treaty of 1920.

According to the Svalbard Treaty, if there is a necessity for the protection of flora and/or fauna then Norway is free to implement its national law and take necessary measures. Norway can impose governing measures that in this case are protection measures for the region and also the regulation on the prohibition against Catching of Snow Crab. If by any of the measures Norway has given its national priority and at the same time discriminated other signatory states of the Svalbard Treaty, then such measures would be in contradiction with the Treaty. Norway insists that the Svalbard Protection Zone is and also the Regulation on Prohibition against Catching of Snow Crab (Regulation No.1836) is not to be considered being under the Scope of the Svalbard Treaty. As well as Norway insists that Svalbard is part of its continental shelf, according to Continental Shelf Convention of 1958, deriving from that the sedentary species are under its exclusive control, and that the Svalbard Protection Zone also is corresponding to the continental shelf zone of Norway and even stretches in the Loophole area. By claiming its rights over snow crabs Norway also ensures its rights over the seabed resources and economic advantage in the future.

The author concludes that there is no limitation on the Sovereignty, meaning that if in the Treaty of Svalbard sovereign rights over Svalbard has given to Norway then it can enjoy these rights. If looking at the historical aspect of that problem, then most of the disputes by the time of signing the Treaty of Svalbard and afterward was regarding the Coal mining that is located on land. Historically the intent could be to regulate and grant access to the mines but ensure the safekeeping of the land, by that giving the 'governing rights' to one of the states. If there was not an active dispute over the sea territories then it cannot be applied directly, this situation needs a separate regulation.

Author concludes that Norway can claim its rights over the area of 200nm around Svalbard and exclude Svalbard Treaty signatories from catching snow crabs in this area

because there is no restriction regarding the sea territories in the Treaty and if the Treaty would include current division, then 12nm zone around the land would also mean that the fishing activities carried out by both states was governed by Norway and not under the Treaty provisions.

The Loophole area cannot be considered under the Svalbard Treaty regulations and thus states cannot claim free access and non-discrimination under the Svalbard Treaty. At the same time, the Loophole is not a part of 200nm zone from Svalbard and thus Norway cannot impose restrictions based on Fishery protection zone, but it can according to its continental shelf area that by the CLCS Recommendation of 2009 stretches also under the Loophole impose Regulation No.1836 on Prohibition against catching of snow crabs in this part of the Loophole area.

The hypothesis of the research was not verified, Norway can claim its rights over the 200nm area over Svalbard and it also can limit the free access and non-discrimination provision. According to the Svalbard Treaty, the greatest territory that currently could be claimed by the signatory states is 12nm around Svalbard, meaning that the 200nm is under the control of Norway jurisdiction. Nevertheless, regarding the Loophole area, there is no clear distinction which legal system should govern this area, Norway can claim it as being part of its continental shelf and all the sedentary resources or seabed as being under its exclusive control.

For future study, the author addresses the necessity for the more precise geological part to prove the exact division of the continental shelf – whether Svalbard is to be considered to have its own continental shelf or it is located on Norway's continental shelf. If there would be clarity regarding how the continental shelf of Svalbard should be divided either as part of Norway or as an independent territorial zone, then research would have more concrete grounds for argumentation, also with a concrete width regulations to understand if continental shelf area can be claimed to be also under the Loophole, or it ends by the 200nm zone. Another research from the geological part would include the definition of what is snow crabs- is it a sedentary resource as it is being regarded currently, or is it possible for it not to categorize as sedentary. If by both of those researches it would be proven that first, Norway certainly possesses the Svalbard continental shelf and its enlargement under the Loophole and secondly, that snow crabs are to be considered a sedentary species then this paper would have more significant theoretical bases. Also, future study should address Treaty interpretation and possibility for new provisions set that would regulate the ongoing disputes. A more precise inspection on how Russia addresses the situation and what laws govern the Loophole from Russia, if there have been any similar cases before the national courts.

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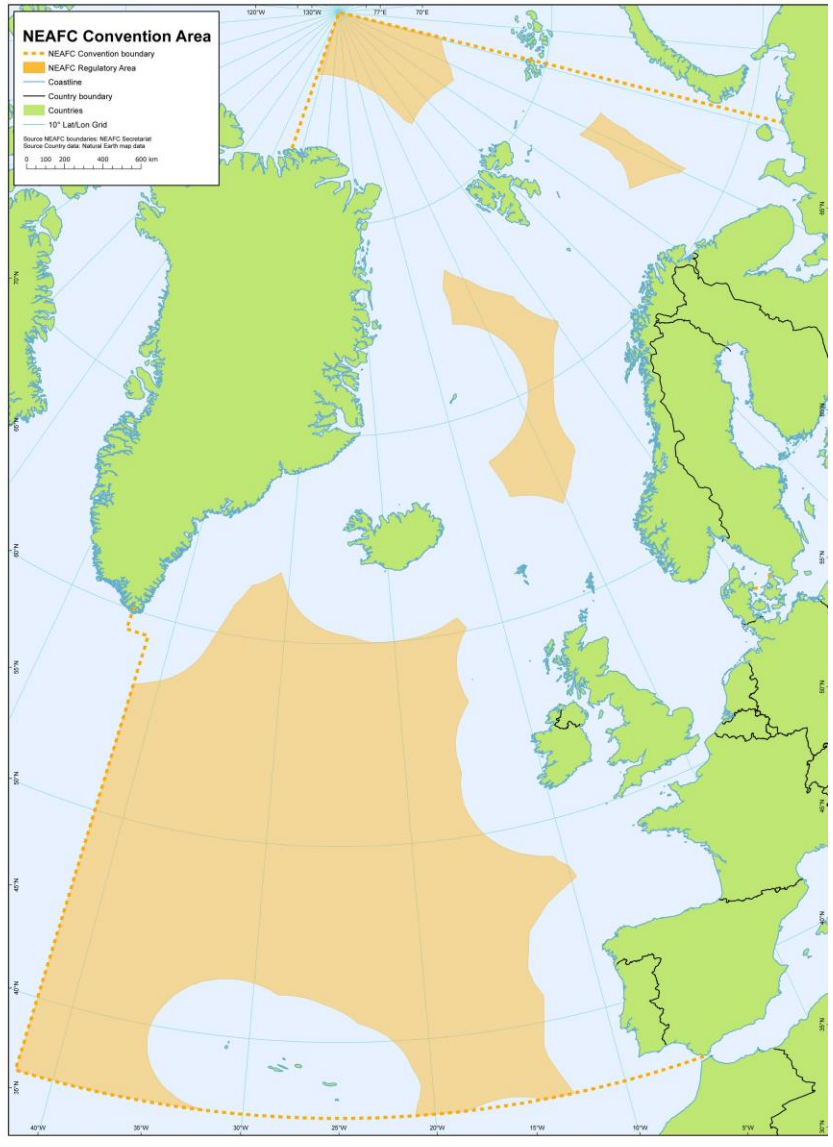
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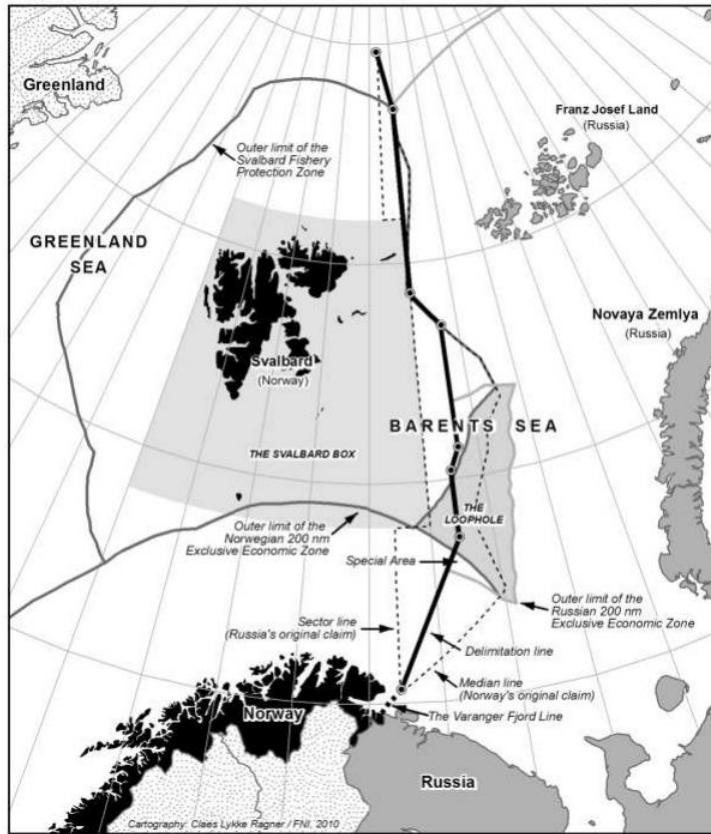
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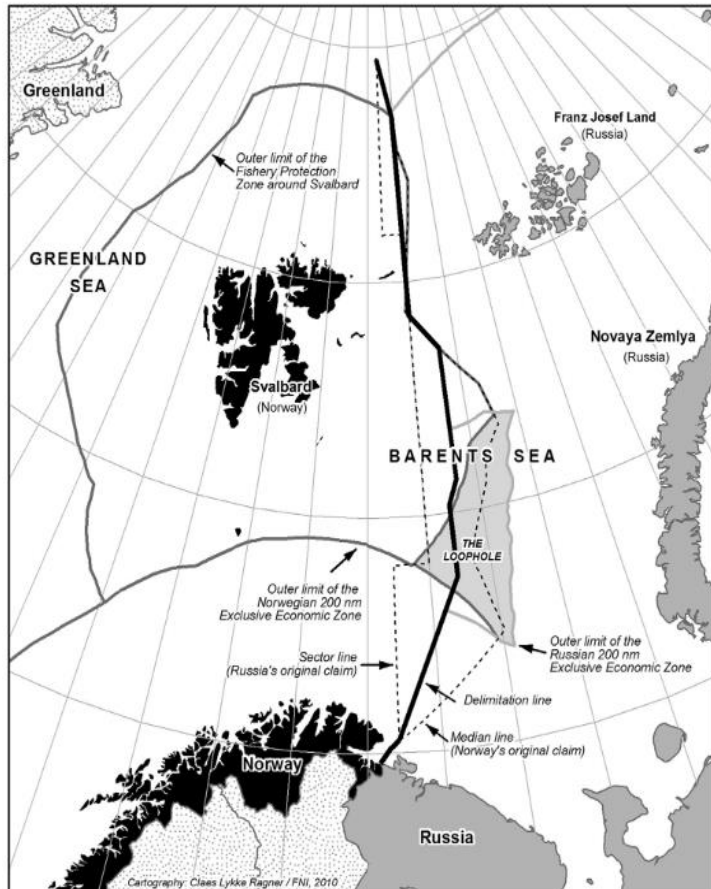
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