# Norway just like Turkey? ICSID Arbitration/s against Norway over Svalbard's Natural Resources: A Wider Picture

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Recently, the first-ever treaty-based arbitration against Norway was registered with ICSID. The Request for Arbitration was submitted by a Latvian investor, Mr. Peteris Pildegovics, and his company, SIA North Star. This post provides a background to the dispute, outlines possible claims, elaborates on its ramifications, and predicts further arbitrations.

The dispute at hand is similar to the one dealt with in a previous post, where licences granted by a EU Member-State (Cyprus) were disregarded by a neighbouring country of the EU (Turkey) because of a disagreement as to which State may have access to the contended natural resources. That disagreement has resulted in an ongoing and even wider diplomatic stalemate. The ultimate goal of this post is to show, once again, why the EU should reconsider its anti-ISDS policy, since Investor-State arbitration is an effective tool to resolve conflicts and protect the legitimate interests of the nationals of EU Member-States abroad.

**Point of Contention**

The EU and Norway are disputing fisheries rights for catching snow-crabs, a very lucrative delicacy found in the continental shelf surrounding the archipelago of Svalbard.

The crux of the dispute lies in the conflicting interpretations of the Svalbard Treaty signed in Paris in 1920. That Treaty bestowed sovereignty upon Norway over the back-then *terra nullius* of Svalbard, but at the same time granted the 45 signatories to the Treaty – which includes 23 countries that today are part of the EU – equal rights and non-discriminatory access for commercial purposes to the resources on the archipelago and in the surrounding waters.

Norway and the EU disagree on the geographical scope of the Treaty and the extent to which all signatory States enjoy such right to equal access to natural resources. Norway maintains that the equal enjoyment of commercial rights expressed in the Treaty is only applicable on land and up to the 12 nautical miles limit of the territorial waters surrounding Svalbard, but not to the 200-nautical mile Fishery Protection Zone (FPZ) instituted by Norway around the islands, nor to Svalbard's continental shelf stretching throughout and beyond the 200 nm. The EU adopts an evolutive interpretation of the Treaty. It contends that the Treaty applies on land and up to the 200 nautical miles around Svalbard, in keeping with the concept of exclusive economic zone (EEZ) that did not exist at the time when that Treaty was drafted. The EU's understanding of the Treaty's territorial application is that the areas in which equal access rights apply basically overlaps with the FPZ. This is consistent with Article 121(2) of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), according to which islands generate the same maritime zones as other landmasses, including a territorial sea, contiguous zone, EEZ, and continental shelf.

Consequently, the EU has issued licences for fishing activities covering the 200 nautical miles around the Svalbard archipelago, while Norway deems that in any case (either within the 12 nm or within the 200 nm) such activities constitute illegal fishing if not accompanied by a Norwegian permit.

**Norwegian Legislation and its Enforcement**

The relevant Norwegian legal framework – the Act on the Right to Participate in Fishing and Catching of 26 March 1999 (Participation Act) and the Regulation on

Prohibition of Snow-Crab Catching of 19 December 2014 (hereafter the "Regulation") – establishes a general prohibition to fish snow-crabs unless the vessel holds a Norwegian licence. However, such licence can only be issued to Norwegian citizens or to foreigners as long as they reside in Norway and partner up with other Norwegian citizens who hold the majority of the ownership interests (Section 5 of the Participation Act), and to vessels where half of the crew on board and the ship-master reside in the Norwegian coastal municipalities.

So far, the Norwegian Supreme Court has applied this legislation in two different cases, in both occasions ruling against vessels flying an EU Member State's flag. Both cases resulted in the application of the criminal provision in the Marine Resources Act section 61, according to which such illegal fishing is punishable with a confiscation and a fine or imprisonment up to one year.

The *Senator case* is particularly significant since it prompted the Norwegian courts to interpret the Svalbard Treaty. This case involved a Latvian-flagged vessel owned by the company SIA North Star. In 2017, the vessel was intercepted by the Norwegian Coastguard while catching snow crabs in the Svalbard FPZ with a Latvian permit to catch snow-crabs, but without a Norwegian licence.

The company was issued a fine, which it challenged before the Øst-Finnmark District Court. The Court confirmed that the snow-crab is a sedentary species under the UNCLOS, and that Norway has an exclusive right to exploit it, in conformity with Article 77 UNCLOS. The court noted that the Snow-Crab Regulations would contravene the principle of equal rights under the Svalbard Treaty "if the Treaty [could] be invoked in the case". However, it found that the Svalbard Treaty does not apply beyond Svalbard's territorial waters (*viz.* 12 nm from the baseline), hence, it does not apply where the catching took place, within the 200-nm of the Svalbard FPZ.

The company appealed to the Court of Appeal, which reiterated that the snow-crab is a sedentary species, but deemed it unnecessary to consider whether the principle of equal rights in the Svalbard Treaty had been violated. It concluded that snow-crab catching without a Norwegian permit on the Norwegian continental shelf is punishable under criminal law, even in the absence of a valid legal basis for rejecting a permit application. The company appealed against the Court of Appeal's judgment to the Supreme Court.

On 14 February 2019, the Supreme Court dismissed the appeal concluding that: 1) the snow crab is a sedentary species pursuant to Article 77(4) UNCLOS because of its natural pattern of movement in constant physical contact with the seabed, so the Regulation did apply; 2) the Svalbard Treaty's principle of equal rights has not in any case been violated, since everyone – also Norwegians – can be punished for catching snow-crab in the area without a permit from Norwegian fishery authorities.

**Possible ICSID claims**

It is possible that the above circumstances could provide the basis for an investor-State arbitration claim under the Latvia-Norway BIT. The Latvian investor may rightly claim that it has an investment – either in the form of a vessel falling under the term "movable property" under Article 1(1)(I) of Norway-Latvia BIT, or in the form of an EU license (which may fit under Article 1(1)(V)'s reference to "business concessions…to exploit natural resources"). The fact that the vessel is registered and licensed in its home-State (Latvia) and so is not "an asset invested in Norway with a permanent presence" would like not constitute a jurisdictional hurdle, according to the ICSID precedents set in SGS vs Philippines, SGS vs Pakistan, and Air Canada vs. Venezuela.

The BIT imposes on Norway certain international obligations, specifically applicable also to the continental shelf over which Norway exercises – in accordance with Article 1(4) – sovereign rights for the purpose of exploration and exploitation of natural resources. Under its BIT obligations, Norway must accord protected investors fair and equitable treatment (FET), compensation in case of direct or indirect expropriation, and most-favoured-nation's treatment (MFN). For this latter obligation Norway's other treaties may become relevant to any dispute under the Latvia-Norway BIT. For example, the Norway-Russia BIT has a national treatment (NT) clause, which precludes the Contracting Parties from making negative differentiations between foreign and national investors. The claimant may be able to combine the MFN clause contained in the Norway-Latvia BIT to import this obligation to accord NT contained in the Norway-Russia BIT.

Arguably, Norway has breached its international obligations vis-à-vis the Latvian investor. By disregarding its license and demanding a Norwegian permit – despite

the equal right to access to natural resources of Svalbard by the State Parties to the 1920 Treaty – Norwegian authorities have discriminated against the Latvian investor on the basis of its nationality, thus violating the NT obligation. All the nationality-based requirements contained in the Norwegian Participation Act and Regulation may constitute a breach of the NT. The Latvian investor could also argue that Norway has breached the FET obligation by failing to protect its legitimate expectations based on the Svalbard Treaty, which forms part of Norwegian legal framework and is a relevant legal basis against which Norway's international responsibility will be assessed. The Latvian company may have invested heavily on the basis of that Treaty. Moreover, the investor could argue that Norway violated the MFN standard by exempting Russian vessels from the prohibition from catching snow- crabs without a Norwegian permit, while requiring EU companies to apply for a Norwegian permit. By seizing the Latvian vessel and fining its profits, the investor might also argue that Norway's Supreme Court unlawfully expropriated SIA North Star's investment (reportedly, the Latvian investor is losing about 20 million euros a year).

So, the investor may rightly claim that Norway did not comply with its international obligations stemming from the Latvia-Norway BIT and the 1920 Svalbard Treaty. This latter Treaty could be invoked either through Article 31(3)(c) of the VCLT ("any relevant rules of international law applicable in the relations between the parties") or, alternatively, by relying on the MFN clause contained in the Latvia-Norway BIT in combination with Article 12 of the Norway-Peru BIT ("application of the more favourable international or national rules binding upon the Parties"). Under the Svalbard Treaty, ships and nationals of all the High Contracting Parties shall enjoy equally the rights of fishing in the waters around Svalbard. This entails that if Norwegian ships are allowed to fish snow crabs in those waters, then Latvia-registered ships shall have the same right.

**Further Possible Arbitrations**

Other than Latvia, among the EU States that have been authorized by the EU Commission to issue snow-crabs catching licenses and that are a Party to the Svalbard Treaty, Norway has BITs also with Estonia, Lithuania and Poland. Consequently, snow-crab fishing companies from these countries also may initiate arbitration claims against Norway for having indirectly expropriated their

investments (importantly, the underlying BITs cover indirect expropriation). Indeed, the measures enacted by the Norwegian Parliament and implemented by the Norwegian Coastguard and Supreme Court had similar effects of expropriation on all EU licence-holders. Because of the Norwegian restrictions on snow-crab fishing, Latvian, Estonian, Lithuanian, and Polish vessels cannot exercise rights under their snow-crab licences, which are essentially only of practical and legal use around Svalbard's waters. Hence, the property rights vested in the EU licenses have been indirectly expropriated by Norway's legislation and enforcement acts.

## Conclusion

The dispute for snow crabs in Svalbard may set the stage for another dispute concerning the abundant hydrocarbon reserves located in the same waters.

The Norwegian courts interpreting Article 77(4) UNCLOS have found that the snow-crab is a sedentary species. This would apply also to the other natural resources of the seabed and subsoil of the continental shelf, including mineral resources.

In June 2018, the Norwegian Ministry of Petroleum and Energy has granted new oil licenses that extend in the contentious area of Svalbard. Should non-Norwegians be allowed to catch snow- crabs with EU licences on the basis of the Svalbard Treaty, it could also be argued that they should enjoy equal mining rights as those enjoyed by Norwegians in respect of these undeveloped oil and gas reserves on the shelf around Svalbard through EU licences.

In the meantime, Tribunal/s established under the BITs between Norway and Latvia, Estonia, Lithuania, and/or Poland may determine the breadth of the territorial scope of the Svalbard Treaty by applying it either up to the 12 nm from the baseline or up to the 200 nm of the economic zone, thus putting an end to this contentious issue.