SUPREME COURT OF NORWAY

J U D G M E N T

given on 20 March 2023 by the plenary of the Supreme Court composed of

Chief Justice Toril Marie Øie
Justice Hilde Indreberg
Justice Bergljot Webster
Justice Wilhelm Matheson
Justice Kristin Normann
Justice Henrik Bull
Justice Knut H. Kallerud
Justice Per Erik Bergsjø
Justice Arne Ringnes
Justice Wenche Elizabeth Arntzen
Justice Ingvald Falch
Justice Espen Bergh
Justice Cecilie Østensen Berglund
Justice Borgar Høgetveit Berg
Justice Erik Thyness

HR-2023-491-P case no. 22-134375SIV-HRET
Appeal against Borgarting Court of Appeal's judgment 13 June 2022

Sia North Star Ltd.	(Counsel Mads Andenæs, Hallvard Østgård) (Assisting counsel Brynjar Østgård)
v.	
The State of Norway represented by the Ministry of Trade, Industry and Fisheries	(The Office of the Attorney General represented by Fredrik Sejersted) (Assisting counsel Marius Kjelstrup Emberland)

(1) Justice **Ringnes:**

Background and proceedings

Issue and parties

(2) The case concerns the validity of a decision refusing to issue a foreign shipping company a permit to catch snow crab on the Norwegian continental shelf. In particular, it raises questions regarding the geographical scope of the Svalbard Treaty. The key issue is whether the provisions on equal rights for nationals of the High Contracting Parties in Article 2 and Article 3 apply on the continental shelf outside Svalbard.

(3) The appellant, SIA North Star Ltd., is a Latvian shipping company that, according to information provided, had been engaging in crab catching in the Barents Sea from 2014 until its vessel *Senator* was ordered to shore by the coast guard in 2017 while catching snow crab on the continental shelf outside Svalbard. The respondent is the State of Norway represented by the Ministry of Trade, Industry and Fisheries, the issuer of the decision in dispute.

(4) Before I explain the background to the case in more detail, I will give an outline of the provisions in the UN Convention on the Law of the Sea on the rights of the coastal State, as they provide necessary context for the issues at hand and the terms used. In continuation of this, I will also address the regulation of Norway's rights as a coastal State under Norwegian law.

The regulation of the coastal State's rights in the Convention on the Law of the Sea

(5) Historically, a relatively narrow strip outside a coastal State's land territory has been subject to the jurisdiction of that State, while the exploitation of resources in the waters beyond – the high seas – has been free for all. After the Second World War, there was a development in maritime law, which first manifested itself by four Conventions adopted at the first UN Conference on the Law of the Sea in 1958. One of these was the Continental Shelf Convention, which established sovereign rights for the coastal State to explore and exploit the natural resources on its continental shelf.

(6) Further international discussions instigated by the UN lead to the United Nations Convention on the Law of the Sea – UNCLOS – of 10 December 1982. UNCLOS entered into force on 16 November 1994 and was ratified by Norway on 24 June 1996. It regulates, among other things, the various sea areas off a coastal State.

(7) A coastal State has *sovereignty* over its "internal waters" and its "territorial sea", see UNCLOS Article 2. Sovereignty means that the coastal State has full legislative power, jurisdiction and enforcement authority in, above and beneath these zones. An important limitation is the right of other States' ships to "innocent passage" through the territorial sea, see Article 17. The breadth of the territorial sea cannot exceed 12 nautical miles, measured from the baselines, see Article 3. The baselines normally follow the low-water line along the coast, see Article 5.

(8) The outer limit of the territorial sea is hereafter referred to as the territorial limit.

(9) UNCLOS Part V regulates the coastal State's right to an exclusive economic zone, described in Article 55 as an area beyond and adjacent to the territorial sea. The zone may not extend beyond 200 nautical miles from the baselines, see Article 57.

(10) Article 55 describes the economic zone as a specific legal regime governed by the relevant provisions of the Convention. The coastal State's rights, jurisdiction and duties in this zone are specified in Article 56. The coastal State does not have sovereignty over the economic zone, but certain specific *sovereign rights*. Most important are the exclusive rights to explore, exploit and manage both living and non-living natural resources in the territorial waters.

(11) UNCLOS Part VI contains provisions on the continental shelf, and between the States Parties, these provisions prevail over the Continental Shelf Convention, see Article 311 (1). The continental shelf comprises the seabed and subsoil of the submarine areas that extend beyond the coastal State's territorial sea, see Article 76, which specifies the geographical limits of the shelf.

(12) Like in the economic zone, the coastal State does not have sovereignty over the continental shelf, but *certain sovereign rights*. These are, according to Article 77, exclusive rights to explore the continental shelf and to exploit its natural resources. Article 77 – Rights of the coastal State over the continental shelf – reads:

> "1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
> 2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.
> 3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.
> 4. The 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, that 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 subsoil."

The various sea areas outside Svalbard and the regulation under Norwegian law

(13) Section 1 of the Svalbard Act of 17 July 1925 sets forth that "Svalbard is a part of the Kingdom of Norway."

(14) According to Act of 27 June 2003 no. 57 on Norway's territorial waters and contiguous zone, the territorial sea comprises the sea area extending 12 nautical miles from the baselines, see section 2 subsection 1. Internal waters are any waters within the baselines, see section 3 subsection 1. Section 1 subsection 1 sets forth that "Norway's territorial waters consist of the territorial sea and the internal waters".

(15) The Territorial Waters Act also applies to *Svalbard*, see section 5. However, in the internal waters and the territorial sea around Svalbard, Norway's exercise of power is limited under national law, as Norway has an obligation under Article 2 and Article 3 of the Svalbard Treaty to ensure that the nationals of the High Contracting Parties enjoy equal rights to fish,

hunt and to carry out other activities as specified in these provisions. The main question in our case is whether these equality rules also apply on the continental shelf outside Svalbard. As mentioned, it follows from UNCLOS Article 76 that the continental shelf of a coastal State comprises the seabed and subsoil outside the territorial limit.

(16) According to section 1 subsection 1 first sentence of the Act of 17 December 1976 no. 91 on Norway's economic zone, "an economic zone shall be established in the seas adjacent to the coast of the Kingdom of Norway" with an outer limit of 200 nautical miles from the baselines, see section 1 subsection 2. In the seas adjacent to the coast of *Svalbard*, a special fisheries protection zone was established by Royal decree of 3 June 1977, which extended 200 nautical miles from the baselines. The prohibition of foreign fishing in section 3 subsection 1 of the Economic Zone Act has not been invoked for the fishing protection zone. It is therefore referred to as a non-discrimination zone, see the Supreme Court judgment in Rt-2006-1498 paragraph 38.

(17) The Norwegian authorities' view is that the equality rules in the Svalbard Treaty are not applicable in the fishing protection zone. Several High Contracting Parties contest the position held by the Norwegian authorities, and this raises issues of international law corresponding to those at hand. However, as our case concerns the rights of exploitation of resources on the continental shelf, I will not elaborate on the fishing rights in the fisheries protection zone.

(18) Norway's rights to explore and exploit submarine natural resources on the Norwegian continental shelf were codified by Act of 21 June 1963 no. 12. Act of 18 June 2021 no. 89 provides further rules related to Norway's continental shelf.

(19) Geologically, a continuous continental shelf extends northwards from Norway's mainland and past Svalbard. However, the State of Norway has not argued that this is decisive for the issue at hand. Should the shipping company prevail, a demarcation must be made to establish on which part of this shelf the Svalbard Treaty applies.

The Supreme Court judgment HR-2019-282-S snow crab

(20) Snow crab catching from vessels is generally prohibited under Norwegian law and requires a special permit from Norwegian authorities.

(21) The predecessor to our case is the criminal case decided by a grand chamber of the Supreme Court in HR-2019-282-S *snow crab*. The Court of Appeal had convicted SIA North Star Ltd. and the Russian captain on the company's ship *Senator* of having engaged in snow crab catching on the Norwegian continental shelf in the fishery protection zone outside Svalbard without a permit from Norwegian authorities, see section 61 of the Marine Resources Act, see section 4, see section 16, see section 5, see section 1 of the Regulations on the Prohibition of Snow Crab Catching.

(22) *Senator* had obtained a permit from the EU through Latvian authorities to catch snow crab on the eastern part of the continental shelf outside Svalbard, but Norwegian authorities did not accept this permit.

(23) Prior to the grand chamber hearing, the Supreme Court's Appeals Selection Committee decided to defer the issue of the geographical scope of the Svalbard Treaty "until called for at a later stage", see HR-2018-1028-U.

(24) The Supreme Court found that the snow crab is a so-called sedentary species, covered by the coastal State's exclusive right to exploit the natural resources on the continental shelf, see UNCLOS Article 77 (4). The Snow Crab Regulations (Regulations 19 December 2014 no. 1836) were thus applicable, and the international law reservation in section 6 of the Marine Resources Act did not prevent snow crab catching from being subject to a permit from Norwegian authorities.

(25) Furthermore, the Supreme Court concluded that Norway's obligations under international law could not result in impunity. As stated in paragraphs 82 and 83 of the judgment:

> "Overall, I find that neither section 6 of the Marine Resources Act, section 2 of the Penal Code nor the Svalbard Treaty can be interpreted to mean that Norway – in a case like this – is precluded from punishing foreign nationals who, for commercial purposes, act without a permit where a permit is required for everyone. Nor does it appear from international law that a decision on a preliminary basis must be given on the question of exemption in a criminal case. I emphasise that in a case like the one at hand, where both the shipowner and the captain would have been punished also if they had been Norwegian, there is no discriminatory treatment based on nationality.
>
> Consequently, I agree with the Court of Appeal that the defendants can be punished irrespective of whether the Svalbard Treaty applies to snow crab catching in the relevant area. Furthermore, it is irrelevant whether the basis for exemption in section 2 of the Snow Crab Regulations is incompatible with the Treaty. What ultimately justifies punishment of the defendants is that the Svalbard Treaty's principle of equal rights has not in any case been violated, since everyone – also Norwegian citizens and companies – can be punished for catching snow crab in the area without a permit from Norwegian fishery authorities. The defendants did not hold such a permit."

(26) According to the *snow crab* judgment, the underlying question of whether the Norwegian regulations are incompatible with international obligations must be solved through a civil action, see in particular paragraphs 71 and 80. Therefore, the Supreme Court did not consider whether the Svalbard Treaty's provisions on equal rights of fishing and hunting only apply within the territorial limit of 12 nautical miles – as the State of Norway contends – or whether they also apply on the continental shelf outside Svalbard – as the shipping company contends.

(27) In the wake of the *snow crab* judgment, arbitration proceedings are pending, raised by the shipping company and its owner against the State of Norway at the International Centre for Settlement of Investment Disputes – ICSID, under a bilateral investment treaty between Norway and Latvia. No award has yet been handed down. The case concerns a claim for damages, but the scope of the Svalbard Treaty is among the issues raised by the claimants.

The decision in dispute

(28) On 28 February 2019, SIA North Star Ltd. applied for a dispensation from the prohibition of snow crab catching on the Norwegian continental shelf outside Svalbard for its three vessels *Senator*, *Solvita* and *Saldus*. The Directorate of Fisheries rejected the application by decision of 13 May 2019. The decision was appealed to the Ministry of Trade, Industry and Fisheries,

which dismissed the appeal by decision of 14 November 2019.

(29) At the time of the shipping company's application, a dispensation scheme applied under the Snow Crab Regulations. While the application was being processed, the dispensation scheme was abolished and replaced by a requirement of a licence under the Licence Regulations of 13 October 2006 no. 1157. The appeal was therefore treated as an application for a licence. The decision states that this had no significance for the outcome of the case.

(30) The rejection is based on the prohibition on snow crab catching in section 1 of the Snow Crab Regulations and on the non-fulfilment of the conditions for issuing a permit in section 6-2, see section 6-1, of the Licence Regulations. The underlying reality is that only Norwegian vessels, nationals, and enterprises may be permitted to catch snow crab on the Norwegian continental shelf.

The court proceedings

(31) On 19 October 2020, SIA North Star Ltd. issued a writ of summons against the State of Norway represented by the Ministry of Trade, Industry and Fisheries. In the District Court, the shipping company claimed that the decisions of 13 May and 14 November 2019 were invalid, and that they, as well as section 3 of the Snow Crab Regulations, were inconsistent with Article 98 of the Constitution and Article 2 and Article 3 of the Svalbard Treaty.

(32) On 5 July 2021, Oslo District Court ruled as follows:

> "1. The Court rules in favour of the State of Norway represented by the Ministry of Trade, Industry and Fisheries.
> 2. SIA North STAR Ltd is to pay costs to the State of Norway represented by the Ministry of Trade, Industry and Fisheries of 232 000 – twohundredandthirtytwothousand – Kroner within two weeks of the service of the judgment."

(33) SIA North Star Ltd appealed to Borgarting Court of Appeal, challenging the application of the law. The shipping company submitted a new claim in the Court of Appeal for a declaratory judgment stating that the Snow Crab Regulations in their entirety are inconsistent with the Svalbard Treaty.

(34) On 13 June 2022, Borgarting Court of Appeal ruled as follows:

> "1. The appeal is dismissed.
> 2. The Court rules in favour of the State of Norway in the claim that Regulations 12 December 2014 no. 1836 on the Prohibition of Snow Crab Catching are inconsistent with the Svalbard Treaty.
> 3. SIA North Star Ltd is to pay costs to the State of Norway in the Court of Appeal of 411 200 – fourhundredandeleventhousandtwohundred – Kroner within two weeks of the service of the judgment."

(35) The Court of Appeal did not consider whether the appellant had legal interest to have its new claim decided, see section 1-3 of the Dispute Act, as, in the Court of Appeal's view, it would not have succeeded in any case.

(36) SIA North Star Ltd. has appealed to the Supreme Court. The appeal challenges the application of the law. The case remains mainly the same as in the previous instances.

(37) On 14 October 2022, the Chief Justice decided to refer the case to the plenary of the Supreme Court, see section 5 subsection 4 of the Courts of Justice Act, cf. section 6 subsection 2, and the Supreme Court ruling HR-2022-1995-J.

(38) Justices Skoghøy and Noer, who are both absent; Justice Sæther, who is disqualified, see HR-2022-2360-P; and Justice Falkanger, who is on a study leave, have not participated in the hearing of the case.

(39) According to section 5 subsection 5 second sentence of the Courts of Justice Act, the justice with the least seniority must abstain from voting when this is necessary to avoid an even number of justices. This means that Justice Steinsvik abstains from voting.

The parties' contentions

(40) The appellant – *SIA North Star Ltd.* – contends:

(41) The appellant is entitled under the Svalbard Treaty to catch snow crab on the continental shelf outside Svalbard. This follows from the Treaty's application in all maritime areas that are subject to national jurisdiction due to Norway's sovereignty over the Svalbard archipelago.

(42) The Svalbard Treaty must be interpreted in accordance with international rules on the interpretation of treaties, see the Vienna Convention on the Law of Treaties. The text of the treaty is an important starting point. In international law, however, "the text of the treaty" does not only, or mainly, indicate the text in itself, but also the context in which it is given, as well as the object and purpose of the Treaty and the requirement of a loyal interpretation – "in good faith". A contextual interpretation must also include a dynamic – evolutive – interpretation. The Supreme Court's statement in HR-2017-569-A paragraph 44 that "there is little room for a dynamic interpretation", is not correct.

(43) The State of Norway's emphasis on the Svalbard Treaty being an "asymmetric and unilaterally open Treaty" has no support in international law, and is also an incorrect characterisation of the relationship between Norway and the other Contracting Parties.

(44) The purpose of the Svalbard Treaty was to resolve previous disagreements regarding the exploitation of resources on Svalbard and to ensure access as before for everyone, regardless of nationality, based on a principle of absolute equality in all areas, both on land and in the sea areas. The recognition of Norway's sovereignty was only a means to achieve this purpose. Exclusive rights for Norway to exploit resources connected to Svalbard, is not consistent with this.

(45) The shipping company's right to catch snow crab on the Svalbard continental shelf can be derived from Articles 1, 2 and 3 of the Treaty, both individually and after an overall assessment.

(46) According to *Article 1*, Norway's sovereignty is generally limited by the other High Contracting Parties' right to equality. The limitations are detailed in the subsequent Articles, prohibiting, among other things, any discrimination based on nationality when it comes to entry and commercial operations. When Norway, by virtue of its sovereignty, has been afforded rights on the continental shelf in accordance with UNCLOS Article 77, the other Contracting Parties' right to equality follows along.

(47) *Article 3* gives the shipping company rights on the seabed around Svalbard, and this includes snow crab catching. The geographic scope of the equality rule is "waters". This general term comprises any maritime zone and is not limited to internal waters and the territorial sea.

(48) *Article 2* concerns fishing and hunting in the "territorial waters", and these activities, also, include snow crab catching. The Court of Appeal's interpretation of the term "territorial waters" is incorrect. "Territorial waters" is a generic term that is not limited to the territorial sea. When developments in the law have the effect that the coastal State's rights are expanded to new sea areas and the continental shelf, a dynamic interpretation must imply that all maritime areas over which a coastal State has jurisdiction by virtue of its sovereignty over the land territory, fall within "territorial waters".

(49) No other High Contracting Parties support the Norwegian view that the rights under Article 2 and Article 3 only cover internal waters and the territorial sea. Also, the great powers that originally signed the Treaty, as well as the EU, have maintained a practice under which the Treaty's equality rules apply on the continental shelf. It is significant for the interpretation that the majority of the High Contracting Parties share this view. It is also significant that a number of renowned experts on international law have arrived at the same conclusion.

(50) In addition, it was Norway that drafted the text of the Treaty, and according to principles of international law, it must therefore be interpreted to Norway's disadvantage.

(51) The interpretation by the State of Norway leads to an absurd result, as Norway's rights on the Svalbard continental shelf would then exceed those on land and in the territorial sea. For this reason, also, this interpretive option cannot be applied.

(52) In support of its contentions, the appellant invokes the prohibition of discrimination in Article 98 subsection 1 of the Constitution.

(53) The Svalbard Treaty confers rights on the individual, and the appellant may invoke the Treaty with the effect that the decision is ruled invalid. In response to the State of Norway's contentions in this regard, the appellant contends that the decision in any case is invalid as it lacks a basis in domestic law.

(54) SIA North Star Ltd. asks the Supreme Court to rule as follows:

> "1. The Ministry of Trade, Industry and Fisheries' decision in the appeal case of 14 November 2019 is invalid.
>
> 2. Regulations 2014-12-12-1836 on the Prohibition of Snow Crab Catching and The Ministry of Trade, Industry and Fisheries' decision in the appeal case of 14 November 2019 are inconsistent with the Svalbard Treaty.

Principally on costs:

3. The Ministry of Trade, Industry and Fisheries is to compensate the costs of SIA North Star Ltd.'s in the District Court, the Court of Appeal and the Supreme Court.

Alternatively on costs:

4. The Ministry of Trade, Industry and Fisheries is to compensate the costs of SIA North Star Ltd.'s in the District Court and the Court of Appeal and the costs of SIA North Star Ltd. and the public authorities' costs in the Supreme Court."

(55) The respondent – *the State of Norway represented by the Ministry of Trade, Industry and Fisheries* – contends:

(56) The Court of Appeal's judgment is correct. Norwegian authorities have maintained a clear and consistent state practice in that the equality rules apply in the land territory, in internal waters and in the territorial sea, but not in the zone outside and on the continental shelf.

(57) According to Article 31 of the Vienna Convention, the text of a treaty holds a special position. As the Supreme Court states in HR-2017-569-A paragraph 44, there is little room for dynamic interpretation in international law.

(58) A central purpose of the Svalbard Treaty was to recognise Norway's full and absolute sovereignty and thereby obtain final clarification of all outstanding issues of international law. According to *Article 1*, it is the full and absolute sovereignty that is recognised, subject to the stipulations of the Treaty. The Treaty does not establish a general principle of equality.

(59) The equality rule in *Article 2* applies in the sea areas that, in terms of sovereignty, are equal to the land territory, i.e. the internal waters and the territorial sea. However, the coastal State does not have sovereignty in the economic zone and on the continental shelf, see UNCLOS, and the equality rule in Article 2 cannot be extended to areas governed by a different legal regime.

(60) "Territorial waters" is not a generic term, and there is no basis for an extended or analogous application of Article 2 on the continental shelf through a dynamic interpretation.

(61) The most natural meaning of the term "waters" in Article 3 is internal waters, but it does not in any case encompass more than this and the territorial sea. Catching of snow crab is regulated by Article 2 and not by Article 3, without this being decisive in the case at hand.

(62) Application of the equality rule on the continental shelf would complicate the management of resources, have a destabilising effect, and potentially create conflicts and disputes. This is not consistent with the purpose of the Treaty, which is to ensure peaceful utilisation of resources. The interpretation must also take into account the Treaty's asymmetric and unilaterally open nature.

(63) The request for a declaratory judgment stating that the decision of 14 November 2019 and the Snow Crab Regulations are inconsistent with Article 2 and Article 3 of the Svalbard Treaty must be rejected under section 1-3 of the Dispute Act. In the alternative, it cannot succeed.

(64) Furthermore, the respondent maintains its alternative contention that Article 2 and Article 3 of the Svalbard Treaty are, under any circumstances, rules of international law between states that, by nature, cannot prevail over domestic law and confer rights on private legal subjects in conflict with Norwegian law.

(65) The State of Norway represented by the Ministry of Trade, Industry and Fisheries asks the Supreme Court to rule as follows:

> "1. The appeal is dismissed.
>
> 2. The State of Norway represented by the Ministry of Trade, Industry and Fisheries is awarded costs in the Supreme Court."

My opinion

The regulation of snow crab catching under Norwegian law

(66) Catching of snow crab is regulated in the Snow Crab Regulations, issued with a legal basis in section 16 subsection 2 (c) of the Marine Resources Act. In the Supreme Court judgment HR-2019-282-S *Snow crab* paragraph 36, the following is set forth regarding the purpose of the Marine Resources Act and the regulation of snow crab catching:

> "The purpose of this Act is to ensure sustainable and economically profitable management of wild living marine resources, see section 1. Snow crab catching is regulated due to the need for a proper system until more knowledge on the snow crab's effect on the ecosystem has been obtained and a comprehensive management plan can be prepared. The exploitation of snow crab is based on the principle of sustainable harvesting, see the circular letter of 24 October 2014 from the Ministry of Trade, Industry and Fisheries on the regulation of snow crab catching."

(67) Section 1 of the Snow Crab Regulations lays down a general prohibition for Norwegian and foreign vessels to catch snow crab in the Norwegian territorial sea and internal waters, and on the Norwegian continental shelf. In the preparatory works to the Act – Proposition to the Odelsting no. 20 (2007–2008) page 25 – a reference is made to the coastal State's sovereign rights under UNCLOS Article 77 (1) and (2). The preparatory works also address the application of the law in the waters around Svalbard, see page 26:

> "The Maritime Resources Act applies with the limitations that follow from international law, see section 6. Regulation under the Maritime Resources Act thus implies that the equality principle in relation to 'fishing and hunting' in Article 2 of the Svalbard Treaty must be observed in the territorial waters outside Svalbard."

(68) Vessels may be issued a permit under the Licence Regulations to catch snow crab outside the territorial waters, see section 3 subsection 1 of the Snow Crab Regulations. However, what is essential to note is that the regulations establish a nationality requirement. Only Norwegian vessels and enterprises may be permitted to catch snow crab.

(69) Here, I note that according to section 6-2 of the Licence Regulations, the vessel must have been entered in the Norwegian Register of Fishing Vessels and have "other operational basis in the form of a special permit or right of participation". According to section 22 subsection 1, cf. section 4 of the Participation Act, the vessel must have a commercial licence. Such a

licence must also be in place in order to obtain a special permit, see section 13. According to section 5 subsection 1, a commercial licence can only be issued to a Norwegian national or a person equivalent to a Norwegian national. For this reason, the shipping company's application for a permit to catch snow crab could not be granted.

(70) The relationship to international law is regulated in section 6 of the Marine Resources Act. It states that the Act applies subject to any restrictions deriving from international agreements and other international law. This includes restrictions deriving from the Svalbard Treaty.

The Svalbard Treaty – its history and main content

History

(71) The history of Svalbard – previously known as Spitsbergen – and the background to the Svalbard Treaty are described in several places, including in Proposition to the Storting no. 36 (1924) "On the approval of the Treaty of Spitsbergen (Svalbard)" and in Report to the Storting no. 32 (2015–2016).

(72) Svalbard was discovered during the Dutchman Willem Barentsz' expedition in 1596. The rich natural resources led to significant hunting by people from several nations, and to international conflicts.

(73) The King of England demanded sovereignty, and Norway's possession over the archipelago was claimed by Dano-Norwegian Kings in the 17th and 18th century. The area was eventually considered a no man's land – *terra nullius*.

(74) The increasing economic activity on Svalbard in the early 1900s called for a clarification of the status of the archipelago.

(75) During the period prior to World War I, Norway instigated three international treaty conferences, and presented a proposal based on the idea that the archipelago would be subject to an international joint administration, where Norway, Sweden and Russia were to have prominent roles. A fundamental principle in the draft submitted by Norway in 1912 was Svalbard's status as a no man's land with open and equal access for all nations' nationals to exploit the archipelago's economic possibilities and engage in scientific research. The joint administration was meant to have wide authority, including issuing rules for hunting and fishing. The subsequent discussions related in particular to dispute resolution and judicial jurisdiction.

(76) No agreement was reached before the War broke out in 1914. In Proposition to the Storting no. 36 (1924) page 19, the Norwegian government stated that the difficulties achieving a satisfactory international system based on Svalbard being a no man's land were "practically insurmountable".

(77) During the Paris Conference in 1919, Norway once more addressed the issues related to Svalbard, stating that "the only satisfactory and lasting solution would be to return the archipelago to Norway".

(78) A Commission of members from the United Kingdom, France, the United States and Italy presented a draft treaty. The draft was based on a proposal from Norway and statements from other interested States.

(79) The Commission considered two solutions: The first was to give Norway a management mandate under the League of Nations. The second was to give Norway sovereignty over Svalbard, subject to certain stipulated guarantees for the benefit of the other States. The Commission chose the second option, and the report to the Supreme Council of the Paris Peace Conference of 5 September 1919 set forth:

> "L'archipel étant actuellement sur un territoire n'appartenant à personne, tout le monde se trouve d'accord sur la nécessité de mettre fin à cet état de choses en lui donnant un statut défini. Deux solutions ont été envisagées à cet effet: Une première solution, proposée par diverses Puissances a par certains membres de la Commission, consistait à confier à la Norvège un mandat au nom de la Société des Nations. Une seconde solution demandée par la Norvège, prévoyait l'attribution de la souveraineté de l'archipel à cette Puissance sous réserve de certaines garanties stipulées en faveur des autres pays. Considérant les grands intérêts possédés par la Norvège au Spitsberg, sa proximité de l'archipel, a l'avantage d'une solution définitive, la Commission s'est-elle ralliée unanimement au second système, contre lequel les Puissances les plus directement intéressées ne formulent aucune objection."

(80) The statement is reproduced in Norwegian translation in Report to the Storting no. 32 (2015–2016) page 19:

> "*Siden øygruppen nå er ingenmannsland, er alle enige om behovet for å bringe denne tilstanden til opphør, ved å avklare øygruppens status. Med dette siktemålet har to løsninger vært vurdert: Det første alternativet ble foreslått av noen stater og enkelte av kommisjonens medlemmer, og besto i å gi Norge et mandat under Folkeforbundet. En annen løsning, som Norge tok til orde for, besto i å tilstå suvereniteten til sistnevnte stat, under forutsetning om enkelte avtalte garantier til fordel for de andre statene. Tatt i betraktning at Norge har de største interessene i forhold til Spitsbergen, samt Norges geografiske nærhet til øygruppen, og fordelen ved en endelig løsning, har kommisjonen enstemmig sluttet opp om det andre systemet, som ikke har møtt på noen innvendinger fra noen av de mest berørte statene*."
>
> [The archipelago currently being a no man's land, everyone agrees on the need to bring to an end this state of affairs, by providing it with a defined status. To this end, two solutions have been considered: The first solution was proposed by various powers and certain members of the Commission, and consisted in granting Norway a mandate under the League of Nations. A second solution, requested by Norway, consisted in attributing sovereignty over the archipelago to the latter Power subject to certain stipulated guarantees for the benefit of the other States. Considering the major interests that Norway has with regard to Spitsbergen, its proximity to the archipelago, and the advantage of a definitive solution, the Commission rallied unanimously behind the second system, which has met no objections from any of the most directly interested Powers.]

(81) Hence, the chosen solution was to recognise sovereignty for Norway over Svalbard subject to "certain stipulated guarantees for the benefit of the other States."

(82) For several of the States participating in the Commission, it was important that the Treaty protected the existing commercial interests of their nationals. This is reflected in the message by the US Commission to Negotiate Peace to the Unites States' Secretary of State of 2

September 1919, after a draft Svalbard Treaty had been finalised. Here, it is set out that Norway's full sovereignty is recognised, that the draft contains provisions generally included in treaties on commercial activities to secure nationals of contracting parties equality in all important matters, and that existing rights are recognised:

> "Full sovereignty is recognized in Norway. Stipulations similar to those found in commercial treaties secure to nationals of contracting parties equality in all important matters. Existing rights are recognized, and a procedure is prescribed for arbitration conflicting claims."

(83) A central topic in this context was the protection of mining activities. This is set forth in an article written by the US chief negotiator Fred K. Nielsen shortly after the Treaty had been signed – "*The Solution of the Spitsbergen Question*" in *The American Journal of International Law*, 1920, page 233. The article states that the United States participated in the negotiations only to protect the "rather extensive American mining interests". The United Kingdom was also concerned with the protection of the mining activities.

(84) On 25 September 1919, the Supreme Council of the Paris Peace Conference adopted a draft Treaty, which was signed on 9 February 1920 by the United States, the United Kingdom, Denmark, France, Italia, Japan, Norway, the Netherlands and Sweden. The Treaty entered into force on 14 August 1925.

(85) The Soviet Union was not among the original contracting Powers, but recognised Norwegian sovereignty in 1924 and adhered to the Treaty in 1935. Russia is currently a High Contracting Party.

(86) All States may enter the Treaty, see Article 10, and there are currently 44 High Contracting Parties. Latvia entered in 2016.

(87) For Norway's part, the ratification of the Treaty lead to the Svalbard Act of 17 July 1925, which states in section 1 that "Svalbard is a part of the Kingdom of Norway".

An overview of the content of the Svalbard Treaty

(88) In accordance with Article 1, the High Contracting Parties recognise the *full and absolute sovereignty* of Norway over Svalbard subject to the stipulations of the other provisions in the Treaty.

(89) The recognition of Norway's sovereignty under Article 1 concerns "the Archipelago of Spitsbergen", which is defined as Bear Island and all the islands situated within a geographical area specified in longitudes and latitudes. The sovereignty over the sea areas around the islands is not regulated in the Treaty, but by general rules of international law on a coastal State's sovereignty over internal waters and the territorial sea. This is currently regulated in UNCLOS Article 2 et seq., see previous comments in this regard.

(90) In this regard, I note that the Svalbard Treaty imposes no limitations on Norway's right to claim new maritime areas around Svalbard outside the territorial limit, in line with developments in international law. Nor has this been contended in the case.

(91) The conditions referred to in Article 1, and to which the recognition is linked, are laid down, among others, in Article 2 and Article 3, establishing that nationals of the High Contracting Parties have equal rights to carry out the activities as specified. Article 2 also mentions the vessels of the High Contracting Parties. This *equality* principle forms the basis for the shipping company's claim for the right to catch snow crab on the continental shelf outside Svalbard.

(92) Article 2 regulates fishing and hunting, and it is not disputed between the parties that this includes snow crab catching.

(93) However, the parties disagree as to whether Article 3 is also applicable. This provision includes maritime activities, industry, as well as mining industry and trade. The shipping company's view is that snow crab catching on the seabed falls within the substantive area of application of the provision. The State of Norway's view is that snow crab catching is exhaustively regulated in Article 2.

(94) It is not necessary for me to conclude on this, to which I will return.

(95) The key issue in the case is *the geographical scope* of the right to equality – the extent in the sea areas. Article 2 subsection 1 sets forth that the right applies in the areas specified in Article 1, and in the archipelago's "territorial waters". Article 3 subsection 1 states that the equality rule applies in "the waters", fjords and ports of the territories specified in Article 1. There is also an equality rule in Article 3 subsection 2, where the term "territorial waters" is used.

(96) Consequently, the interpretative questions in the case are which areas are covered by the terms "*territorial waters"* and "*waters*".

(97) I note that the Svalbard Treaty also has other provisions with requirements of equality, including Article 8 on mining operations. The Treaty also regulates the right to collect taxes and duties, see Article 8 subsection 2, and Article 9 contains a provision on military installations.

(98) The Svalbard Treaty may be characterised as a multilateral treaty, under which the High Contracting Parties have recognised the full and absolute sovereignty of Norway, with the rights and obligations conferred on Norway as a result of this, and under which the nationals of the other High Contracting Parties, in accordance with the provisions of the Treaty, are guaranteed certain forms of commercial activities on non-discriminatory terms.

(99) According to information provided to the Supreme Court, this structure is unique in the context of international law, and no other conventions are known to have a similar regulation.

Legal bases for the interpretation of the Svalbard Treaty

(100) The content of the Svalbard Treaty must be established in accordance with the rules and principles on treaty interpretation in international law. This is regulated in Article 31 and Article 32 of the Vienna Convention on the Law of Treaties. Norway is not a party to the Vienna Convention, but Article 31 and Article 32 are generally considered to express customary international law, see judgment by the International Court of Justice (ICJ) of 13

July 2009 *Costa Rica v. Nicaragua* paragraph 47. In the same paragraph, the ICJ states that these principles also apply in the interpretation of treaties older than the Vienna Convention.

(101) Article 31 lays down the "General rule of interpretation". Article 31 (1) provides the starting point:

> "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

(102) Article 31 (2) and (3) provide detailed rules on contextual interpretation and on what should be taken into consideration along with the context:

> "2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties."

(103) As I will return to, there is no agreement or practice mentioned in (2) (a) and (b) and (3) (a) and (b) of relevance for our case. However, Article 31 (3) (c) is relevant due to the significance of UNCLOS.

(104) Article 31 (4) sets forth that if the parties agree on a special meaning of a term, that meaning must be applied:

> "4. A special meaning shall be given to a term if it is established that the parties so intended."

(105) This provision is also not relevant to the case at hand.

(106) Article 32 contains rules on supplementary means of interpretation in support of the meaning derived from the application of Article 31, or to use when the interpretation under Article 31 leads to an ambiguous or obscure result that is manifestly absurd or unreasonable:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable."

(107) In other words, the preparatory works to the Treaty and the circumstances of the conclusion of the Treaty are subsidiary means of interpretation.

(108) I note that Article 38 (1) (d) of the statute of ICJ sets forth that also judicial decisions and the teachings of the most highly qualified publicists in international law are subsidiary means for the determination of rules of law. In ICJ case law, the courts' precedents carry great weight. I also mention – due to its relevance to the interpretation of the term "territorial waters" in Article 2 of the Svalbard Treaty – that other treaties using the same terminology may contribute to clarifying the customary international law meaning of the words and expressions in a treaty.

(109) According to Article 31 (1) of the Vienna Convention, the key interpretive factor is the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. "Ordinary meaning" refers to the general linguistic understanding, including the meaning of terms in international law. The reference to "good faith" indicates, among other things, that the interpretation must be loyal. One must choose the result that corresponds to the parties' common intentions – to the extent that this provides guidance. "Good faith" also expresses that the interpretation must seek to realise the object and purpose of the treaty.

(110) In ICJ case law, it is emphasised that the mentioned factors are included in a single and combined interpretive process, see judgment of 2 February 2017 *Somalia v. Kenya* paragraph 64, where the principles of interpretation in Article 31 are described as follows:

> "Article 31, paragraph 1, of the Vienna Convention provides that
> '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. These elements of interpretation - ordinary meaning, context and object and purpose – are to be considered as a whole."

(111) The interpretation must start with the words chosen by the parties, because these are considered to express most clearly what they have agreed upon. In several rulings, the ICJ has emphasised the particular significance of the text. In judgment of 3 February 1994 *Libya v. Chad* the following is set forth in paragraph 41:

> "The Court would recall that, in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion…."

(112) I also refer to the ICJ judgment of 4 February 2021 *Qatar v. The United Arab Emirates* paragraph 81, reiterating the following:

> "As the Court has recalled on many occasions, '[i]nterpretation must be based above all upon the text of the treaty'…".

(113) I add some other statements from this judgment, as they illustrate the principles of interpretation. In paragraph 88, the Court summarises its view as follows:

> "Consequently, the term 'national origin' in Article 1, paragraph 1, of CERD [Committee on the Elimination of Racial Discrimination], in accordance with its ordinary meaning, read in its context and in the light of the object and purpose of the Convention, does not encompass current nationality."

(114) Next, in paragraph 89, it is set forth that "[i]n light of the conclusion above, the Court need not resort to supplementary means of interpretation".

(115) When the ICJ in the quoted paragraphs states that the interpretation "above all" must be based on the text of the treaty, I understand this to mean that the text is the starting point for the interpretation. However, individual words and expressions do not stand alone and cannot be interpreted in isolation, but must be read in conjunction with the object and purpose of the treaty, and in their proper context. As mentioned, it is the final result of the single and combined interpretive process that is decisive. However, the text sets limits for the interpretation, in the sense that the result must be rooted therein. An amendment of a treaty presupposes agreement between the parties, see Article 31 (3) (a) and (b) and Article 39 of the Vienna Convention.

(116) Another starting point is that the meaning of the text must be determined based on the meaning of the words at the time of the treaty's conclusion, because that is what most naturally expresses the parties' common understanding of the treaty's content. Here, I reference the ICJ judgment of 13 July 2009 *Costa Rica v. Nicaragua* paragraph 63:

> "…It is true that the terms used in a treaty must be interpreted in light of what is determined to have been the parties' common intention, which is, by definition, contemporaneous with the treaty's conclusion. That may lead a court seised of a dispute, or the parties themselves, when they seek to determine the meaning of a treaty for purposes of good-faith compliance with it, to ascertain the meaning a term had when the treaty was drafted, since doing so can shed light on the parties' common intention. The Court has so proceeded in certain cases requiring it to interpret a term whose meaning had evolved since the conclusion of the treaty at issue, and in those cases the Court adhered to the original meaning …"

(117) However, this does not mean that one should always disregard the meaning given to the words at a later stage due to developments in international law or in society. The parties may have meant – which might be derived from the text itself – that the content is not fixed once and for all, but that it may evolve with time. The basis for such a dynamic – evolutive – interpretation is stated in paragraph 64 of the judgment:

> "This does not however signify that, where a term's meaning is no longer the same as it was that the date of conclusion, no account should ever be taken of its meaning that the time when the treaty is to be interpreted for purposes of applying it. On the one hand, the subsequent practice of the parties, within the meaning of Article 31 (3) (b) of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement between the parties. On the other hand, there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used – or some of them – a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law. In such instances it is indeed in order to respect the parties' common intention that the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied."

(118) In paragraph 65, the ICJ refers to the judgment of 19 December 1978 *Greece v. Turkey*. That case raised the question whether a reservation related to the court's jurisdiction in disputes on "the territorial status of Greece", which used the term "territorial status", limited the ICJ's competence to issue a ruling concerning the continental shelf in the Aegean Sea. In paragraph

77, the Court stated that it had to be presumed that the State intended for the meaning of "territorial status" to follow the evolution of the law:

> "…Once it is established that the expression 'the territorial status of Greece' was used in Greece's instrument of accession as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time…."

(119) The question of dynamic interpretation in *Costa Rica v. Nicaragua* related to whether Costa Rica had a right of free navigation on the San Juan River in connection with transport of persons and goods. The term used in the treaty was "comercio" – which in Norwegian may translate to *handel* [trade] or *kommersiell virksomhet* [commercial operation]. The treaty was concluded in 1858, and the issue was whether the current meaning of the term had to apply. In paragraph 67, the ICJ described it as "a generic term, referring to a class of activity". Then, in paragraph 71, it is set forth that the transport of persons for profit-making purposes "can be commercial in nature nowadays". However, transport not carried out in exchange for money or for commercial purposes was not covered by the expression. In particular, this related to governmental activities and public services.

(120) When assessing whether a term can be interpreted dynamically, it is significant whether the treaty is concluded for an unlimited duration, see the arbitration award of 17 July 1986 *Canada v. France*. In paragraph 37, it is stated that the term "fishery regulations" had to be interpreted in accordance with the development of international law within this area, because the parties could not have intended to give the term an invariable content:

> "… as this expression was embodied in an agreement concluded for an unlimited duration, it is hardly conceivable that the Parties would have sought to give it an invariable content."

(121) The rulings I have now discussed illustrate, in my view, some central aspects of dynamic interpretation. Firstly, such an interpretation must follow from the ordinary interpretive process under Article 31 and Article 32. Secondly, a dynamic interpretation must be rooted in the understanding the parties had or must be assumed to have had at the time of the conclusion of the treaty. Thirdly, the text will determine to the extent to which it may be dynamically interpreted. In *Costa Rica v. Nicaragua*, as mentioned, "comercio" was interpreted to encompass what was considered commercial activities at the time; however, the text did not allow for the inclusion of non-commercial activities.

(122) The Supreme Court states in HR-2017-569-A paragraph 44 that "there is little room for dynamic interpretation" in international law. As it appears from what I have already said, this brief statement must be nuanced and elaborated.

(123) The shipping company contends that the purpose is of great importance for the interpretation of the Svalbard Treaty.

(124) The object and purpose of a treaty – as set forth in Article 31 (1) – are included in the single and combined interpretive process. As I understand, this may also be viewed as a reflection of a treaty being interpreted "in good faith" and of the so-called effectiveness principle – that the treaty must be suited to fulfil its purpose. One may say that the "object" of the treaty refers to

its content, while the "purpose" refers to what the parties intend to achieve. In practice, however, these two factors will often overlap and be assessed as a whole.

(125) The object and purpose of the treaty are not independent interpretive factors that may be applied regardless of what the text implies – the starting point must be that the text best reflects the parties' agreement. While these central factors may help to clarify the text, they cannot provide a basis for deviating from a clear text. This was stated in the ruling from the Iran-United States Claims Tribunal *Federal Reserve Bank of New York v. Bank Markazi* (2000), paragraph 58:

> "Even when one is dealing with the object and purpose of a treaty, which is the most important part of the treaty's context, the object and purpose does not constitute an element independent of that context. The object and purpose is not to be considered in isolation from the terms of the treaty; it is intrinsic to its text. It follows that, under Article 31 of the Vienna Convention, a treaty's object and purpose is to be used only to clarify the text, not to provide independent sources of meaning that contradict the clear text."

The interpretation of Article 1 of the Svalbard Treaty

(126) The question at hand is whether Norwegian authorities may reject the shipping company's application to catch snow crab on the continental shelf outside Svalbard because it is not a Norwegian company. The starting point of my analysis is Article 1 of the Treaty, which stipulates the general premises for the Treaty.

(127) First, I note that the Treaty is written in French and English. Only these versions of the Treaty may be used in the interpretation. As no differences of importance for the case at hand have been identified between the French and the English text, I mainly refer to the English version.

(128) Article 1 reads:

> "The High Contracting Parties undertake to recognise, subject to the stipulations of the present Treaty, the full and absolute sovereignty of Norway over the Archipelago of Spitsbergen, comprising, with Bear Island or Beeren-Eiland, all the islands situated between 10° and 35° longitude East of Greenwich and between 74° and 81° latitude North, especially West Spitsbergen, North-East Land, Barents Island, Edge Island, Wiche Islands, Hope Island or Hopen-Eiland, and Prince Charles Foreland, together with all islands great or small and rocks appertaining thereto (see annexed map)."

(129) *The shipping company* contends that the right to equality on the continental shelf follows directly from Article 1. The core of the argumentation is as follows:

(130) Through the other Contracting Parties' recognition, Norway was given a limited sovereignty over Svalbard's land territory, as the nationals of the High Contracting Parties have equal rights of exploitation of resources. The subsequent Articles prohibit any form of discrimination based on nationality regarding entry and commercial operations. Since Norway derives its exclusive rights to the natural resources on the continental shelf outside Svalbard from its sovereignty over Svalbard's land territory, the same limitations on the sovereignty must apply to the exploitation of resources on the shelf.

(131) I will now present *my view* on the content of Article 1.

(132) The provision contains three elements, all of which are relevant to our case. *The first element* is that the High Contracting Parties recognise Norway's sovereignty, which is "full and absolute". The acceptance of Norway's sovereignty in the form of a recognition was due to Svalbard's status as a no man's land. Thus, it was not a matter of transferring sovereignty from one state to another.

(133) This recognition implies that Norway has the same sovereignty over the archipelago Svalbard as states have over their territory according to international law.

(134) *The second element* is that the recognition is given "subject to the stipulations of the present Treaty". The word "stipulation" in this context can be translated to *bestemmelse* [provision], *vilkår* [term] or *betingelse* [condition]. The meaning of the words "subject to" is that the recognition is given under the condition of – with a reservation for – what is otherwise specified. The reference to "the present Treaty" means that the reservation applies to the terms of this Treaty.

(135) In summary, I read this to mean that the High Contracting Parties have recognised Norway's full and absolute sovereignty subject to the conditions imposed on Norway under the provisions of the Treaty. In other words, the reservation does not limit Norway's sovereignty as such, but Norway is obliged, in its exercise of power, to respect the rights that the nationals of the High Contracting Parties are ensured under the Treaty. Other limitations on Norway's exercise of sovereignty cannot be derived from the Treaty. This means that the residual rights lie with Norway.

(136) My understanding of Article 1 is also supported by the preparatory works to the Treaty. Here, I refer to the Spitsbergen Commission's report to the Supreme Council of the Paris Peace Conference of 5 September 1919, which I previously cited in its original French text and in Norwegian [and English] translation. As set forth therein, the Commission rejected a solution that would have granted Norway a management mandate from the League of Nations. The other solution, which was chosen, consisted in "attributing sovereignty over the archipelago to the latter Power [Norway] subject to certain stipulated guarantees for the benefit of the other States". The Commission referred to "the advantage of a definitive solution", stating that "the Commission rallied unanimously behind the second system, which has met no objections from any of the most directly interested Powers". In other words, Norway was ultimately given sovereignty while the other High Contracting Parties were guaranteed specific rights.

(137) The State of Norway has highlighted that the President of the Spitsbergen Commission stated during the negotiations in 1919 that "all exceptions from the sovereignty are found in the Treaty under preparation; for the surplus, Norway's sovereignty must apply:

> "Le Président estime que, la justice norvégienne pouvant s'exercer sur un territoire devenu norvégien, il n'y a pas lieu de parler de l'extradition des criminels. D'ailleurs des traites, les traités d'extradition se trouveront fatalement étendus au Spitsberg; toutes les dérogations à la souveraineté se trouvent dans le Traité en préparation; pour le surplus, il y a lieu d'appliquer la souveraineté de la Norvège."

(138) This can be translated into Norwegian as follows:

> "*Presidenten vurderer at siden norsk rettsvesen vil kunne utøve sin myndighet på et territorium som er blitt norsk, er det ingen grunn til å tale om utlevering av forbrytere. For øvrig vil utleveringsavtaler uvegerlig utvides til å gjelde på Spitsbergen; alle unntak fra suvereniteten er å finne in traktaten under forberedelse; for det overskytende, er det Norges suverenitet som må komme til anvendelse."*
>
> [The President finds that since the Norwegian judiciary will be able to exercise its power in a territory that has become Norwegian, there is no reason to talk about the extradition of criminals. Furthermore, extradition agreements will inevitably be extended to apply on Spitsbergen; all exceptions from the sovereignty are found in the Treaty under preparation; for the surplus, Norway's sovereignty must apply.]

(139) I agree that this statement, also, supports the meaning that I have derived from the text. The crucial factor for me is nonetheless that the text in Article 1 is clear.

(140) My conclusion thus far is that the High Contracting Parties' right to equality must derive from the individual provisions of the Treaty. There is no general rule under Article 1 on non-discrimination that limits Norway's exercise of power. The right to equality with regard to snow crab catching – which our case concerns – thus extends no further than what follows – substantially and geographically – from Article 2 and possibly Article 3.

(141) *The third element* is that the recognition of the sovereignty relates to the land territory constituted by the archipelago. Norway's sovereignty in internal waters and the territorial sea follows from general rules of international law. Outside the territorial limit, the coastal State does not have sovereignty, which is what Article 1 regulates according to its wording.

(142) The continental shelf regime, under which the coastal State has certain limited sovereign – in the sense of exclusive – rights, is a specific legal regime that has emerged after the conclusion of the Svalbard Treaty, and is a result of developments in maritime law in the second half of the 20th century. I refer to what I have previously said regarding UNCLOS.

(143) The question is then whether it follows from Article 2 or Article 3 that the right to equality also applies on the continental shelf outside Svalbard.

The interpretation of Article 2 of the Svalbard Treaty

Initial remarks

(144) Article 2, subsections 1 and 2, of the Svalbard Treaty reads:

> "Ships and nationals of all the High Contracting Parties shall enjoy equally the rights of fishing and hunting in the territories specified in Article 1 and in their territorial waters.
>
> Norway shall be free to maintain, take or decree suitable measures to ensure the preservation and, if necessary, the reconstitution of the fauna and flora of the said regions, and their territorial waters; it being clearly understood that these measures shall always be applicable equally to the nationals of all the High Contracting Parties without any

> exemption, privilege or favour whatsoever, direct or indirect to the advantage of any one of them."

(145) The right to fish and hunt under subsection 1 includes snow crab catching, and the ships and nationals of all the High Contracting Parties "shall enjoy equally" these rights. According to subsection 2, Norway is free to take all suitable measures to ensure the preservation of resources, and it follows from the text, also here, that Norway in its exercise of power related to fishing and hunting may not discriminate based on nationality.

(146) The geographical scope of the right to equality in Article 2 is "in the territories specified in Article 1 and in their territorial waters", which means on the archipelago as it is defined in Article 1, and in the "territorial waters" of the islands. In the French text, the expression is "eaux territoriales".

(147) The interpretive question is what is meant by "*territorial waters"/"eaux territoriales*".

(148) *The shipping company's view* is that this is a generic term that comprises all maritime areas in which a state by virtue of its sovereignty over the land territory has rights.

(149) *The State's view* is that "territorial waters" means the internal waters and the territorial sea outside Svalbard – where Norway has sovereignty.

The ordinary meaning of "territorial waters" at the time of the conclusion of the Svalbard Treaty in 1920

(150) The starting point for interpretation, as I have previously explained, is the ordinary meaning of the terms at the time of the conclusion of the treaty.

(151) The term "territorial waters"/"eaux territoriales" indicates that it comprises a sea area that is part of the coastal State's territory.

(152) The State has presented extensive treaty practice to support that there was consensus during the period around 1920 that "territorial waters" was the area extending to and including the outer limit of the territorial sea, where the costal State had sovereignty, but never the sea area beyond.

(153) As mentioned, the ordinary meaning in international law of terms used in a treaty may be clarified by other treaties using the same words and expressions.

(154) The treaties presented by the State of Norway are the International Convention of 6 May 1882 for regulating the police of the North Sea fisheries, the Paris Convention of 14 March 1884 for the Protection of Submarine Telegraph Cables, the Anglo-Danish Convention of 24 June 1901 regulating the fisheries outside territorial waters surrounding the Faroe Islands and Iceland, the Anglo-French Newfoundland Fisheries Convention of 8 April 1904, the Paris Convention of 13 October 1919 relating to Aerial Navigation, the Peace Treaty between Finland and Russia of 14 October 1920 and the Åland Convention of 20 October 1921.

(155) The State has also presented more recent conventions to shed light on the terminology used in 1920. These are a Convention between the United States and Norway of 24 May 1924 on the right for Norwegian ships to bring alcoholic beverages into the territorial waters of the United States and the United States authorities' right of visitation of Norwegian vessels, and a convention between Italy and Turkey of 4 January 1932 for the delimitation of the territorial waters between the coast of Anatolia and the island of Castellorizo.

(156) I have particularly noted the following treaties:

(157) The Conventions regulating the police of the fisheries in the North Sea (1882) and the Faroe Islands and Iceland (1901) use the term "territorial waters" to refer to a maritime zone outside the coast. In the 1882 Convention between Germany, Belgium, France, Denmark and the Netherlands, the object was thus to regulate fisheries "outside territorial waters", see the Preamble and Article 1. Article 2 stipulated that the costal State had an exclusive right to fish "within the distance of 3 miles from low-water mark along the whole extent of the coasts of their respective countries, as well as of the dependent islands and banks". Based on the context, "territorial waters" must be understood as the zone where the coastal State had exclusive fishing rights. The 1901 Convention between Denmark and the United Kingdom had a similar content.

(158) The Paris Convention on the regulation of aerial navigation between several nations including the United States, the United Kingdom, France and Japan was signed in Paris on 13 October 1919 – around at the same time as the Svalbard Treaty. It regulated, among other things, the freedom of passage above another contracting State's territory, registration and certification of aircrafts, military aircrafts etc. In Chapter I "General principles", it is set forth in Article 1 subsection 2 that "territorial waters" are part of the national territory:

> "For the purpose of the present Convention, the territory of a State shall be understood as including the national territory, both that of the mother country and of the colonies, and the territorial waters adjacent thereto."

(159) Another convention close in time to the Svalbard Treaty is the Peace Treaty of 14 October 1920 between Finland and Russia. With regard to the determination of the borders between the two countries, it was set out in Article 3 that "the territorial waters of the contracting Powers" extended four nautical miles in the Gulf of Finland. In this context, I also highlight the Convention on the neutrality of Åland of 20 October 1921. Among the parties to this convention were Denmark, the United Kingdom, Italy and Sweden. The Convention is written in French and Swedish. In Article 2 II, "eaux territoriales" is used, and "territorialvatten" in Swedish, and this is set to three nautical miles.

(160) Also of interest is that the United Kingdom's Territorial Waters Jurisdiction Act 1878 defines "territorial waters" as a territorial sea adjacent to the coast that is subject to the sovereignty of the Queen:

> "'The territorial waters of Her Majesty's dominions,' in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty;…"

(161) I also mention that the Supreme Court of the United States in a judgment of 30 April 1923 *Cunard S. S. Co. Ltd. v. Mellon* stated that it was established in the United States and acknowledged elsewhere that the territory subject to the sovereignty of the United States includes a belt of sea extending "three geographic miles" from the coast.

(162) As for the perception in Norwegian law of the territorial sea, I note that it was decided by Royal decree of 22 February 1812, reproduced in Cancelli-Promemoria of 25 February 1812, that Norway's territorial sea was "*den sædvanlige Sø-Mils Afstand*" [the ordinary distance of a sea mile], corresponding to approximately four nautical miles.

(163) As set forth in R.R. Churchill and A.V. Lowe "*The Law of the Sea*", 1999, page 71 et seq, the views differed in the early 20th century as to the "juridical nature" of the territorial waters: Some states claimed that this was an area where the coastal State had sovereignty, while others claimed that the coastal State merely had jurisdictional competence in this area for specific purposes, typically defence, customs control and regulation of fishing. Towards 1930, there was growing support of the coastal State's sovereignty over what was eventually referred to as the "territorial sea". A step in this development – as highlighted by the authors – was the work of the 1919 Paris Conference on Aerial Navigation. At the League of Nations' Hague Conference in 1930 on codification of international law, the Territorial Waters Committee presented a draft provision stating that the coastal State has sovereignty over "the territorial sea". Churchill and Lowe state that the discussions that had previously been held about the juridical status of the term "territorial sea" were finally dispelled at this Conference.

(164) At the 1930 Conference, an agreement was thus reached on the legal meaning of the term "territorial sea", and on the coastal State's sovereignty in this area. The reasons given for the draft treaty stressed that the sovereignty over the "territorial sea" was "in nature" the same as that held by the States over their land territory, and that this term is more precise than "territorial waters":

> "The idea which it has been sought to express by stating that the belt of territorial sea forms part of the territory of the State is that the power exercised by the State over this belt is in its nature in no way different from the power which the State exercises over its domain on land. This is the reason why the term 'sovereignty' has been retained, a term which better that any other describes the judicial nature of this power….
>
> There was some hesitation whether it would be better to use the term 'territorial waters' or the term 'territorial sea'. The use of this term, which was employed by the Preparatory Committee, may be said to be more general and it is employed in several conventions. There can, however, be no doubt that this term is likely to lead – and indeed has led – to confusion, owing to the fact that this is also used to indicate inland waters, or the sum total of inland waters and 'territorial waters' in the restricted sense of this latter term. For these reasons, the expression 'territorial sea' has been adopted."

(165) Here, it is set forth that that the term "territorial waters" was used in several conventions, but had given rise to misunderstandings because it was sometimes used only to refer to internal waters or the territorial sea and other times as a joint term for internal waters and the territorial sea. For that reason, "territorial sea" was considered a more precise and suitable term, as it indicates the sea area outside the internal waters. As I have mentioned, this is also the term used in UNCLOS. What is essential to our case is that the Conference found that "territorial waters" referred to a delimited zone adjacent to the land territory subject to the sovereignty of the coastal State.

(166) In this context, it is of interest what the International Law Commission stated in Yearbook of the International Law Commission 1956 in connection with a draft treaty provision on the "Judicial status of the territorial sea", under which "[t]he sovereignty of a State extends to a belt of sea adjacent to its coast, described as the territorial sea". Here, it is stated that the rights of the coastal State over the territorial sea did not differ in nature from the rights of sovereignty over other parts of its territory. The Commission also stated that the proposal at the Hague Conference in 1930 and the States' almost unanimous support thereof, confirm that this legal understanding of the law is in accordance with existing international law. It is also set forth that the Commission, in the same way as in the reasons for the proposed treaty in 1930, preferred the term "territorial sea" to "territorial waters":

> "(1) Paragraph 1 brings out the fact that the rights of the coastal State over the territorial sea do not differ in nature from the rights of sovereignty which the State exercises over other parts of its territory. There is an essential difference between the regime of the territorial sea and that of the high seas since the latter is based on the principle of free use by all nations. The replies from Governments in connexion with The Hague Codification Conference of 1930 and the report of the Conference's Committee on the subject confirmed that this view, which is almost unanimously held, is in accordance with existing law. It is also the principle underlying a number of multilateral conventions – such as the Air Navigation Convention of 1919 and the International Civil Aviation Convention of 1944 – which treat the territorial sea in the same way as other parts of State territory.
>
> (2) The Commission preferred the term 'territorial Sea' to 'territorial waters'. It was of the opinion that the term 'territorial waters' might lead to confusion, since it is used to describe both internal waters only, and internal waters and the territorial sea combined. For the same reason, the Codification Conference also expressed a preference for the term 'territorial sea. Although not yet universally accepted, this term is becoming more and more prevalent."

(167) I will recapitulate: The treaties and the other material I have discussed support that the perception around 1920, was that the term "territorial waters" was associated with specifically defined areas outside the coast where the coastal State had mainly the same sovereignty as over its land territory. As mentioned, towards 1930, there was growing support among the states that the coastal State had sovereignty over its territorial sea. Furthermore, at the 1930 Hague Conference – only ten years after the Svalbard Treaty was concluded – it was agreed that a coastal State's sovereignty over "territorial waters" "in nature" was no different from a State's sovereignty over its land territory.

(168) Overall, this shows that, in 1920, the term "territorial waters" had acquired a core legal meaning that essentially equated rights over these waters with sovereignty over the land territory, and that the waters were a geographically delimited sea area that lay within the high seas.

(169) At the time, the States had not yet reached an agreement on the extent of the territorial sea. However, this is without significance for the interpretation of Article 2 of the Svalbard Treaty.

(170) If we look at the negotiation history, it is of interest that the sea areas outside Svalbard were discussed during the treaty negotiations between 1910 and 1914. At the 1910 Conference, Russia proposed a separately regulated area for fishing within the longitudes and latitudes later determined in Article 1 of the Svalbard Treaty. A system regulating the fisheries outside

the territorial waters was known from the Conventions of 1882 and 1901, as I have previously explained. Norway had proposed that the territorial waters should extend to four nautical miles, which was opposed by Russia. During the subsequent negotiations, Russia expressed willingness to waive its proposal if Norway's proposal of four-mile territorial waters was dropped.

(171) This shows that there was awareness at the time of the possibilities of a distinction between the territorial waters and a regulation area for fisheries beyond this.

(172) The shipping company has not invoked any treaties where "territorial waters" comprise sea areas beyond what is currently referred to as the territorial sea. However, it has emphasised the ICJ's judgment of 11 September 1992 *El Salvador v. Honduras*, which concerned rights over the Fonseca Gulf. In paragraph 392, the ICJ mentions a previous judgment from 1917:

> "It may be as well at this stage to deal with a possible source of misunderstanding about the terminology of the period. It has sometimes been suggested that the Judgement is confused because it speaks, as in the above quotation and elsewhere of the waters of the Gulf outside the 3-mile littoral maritime belts as 'territorial waters'; and in the argument before the Chamber, the 1917 Judgement did not escape criticism on that ground. But the term territorial waters was 75 years ago, not infrequently used to denote what would now be called internal or national waters, as the legal literature of the time abundantly shows. Accordingly, the term territorial waters did not necessarily, or even usually indicate what would now be called 'territorial sea'. So, by 'territorial waters', in this context,… means waters claimed *à titre de souverain*. …"

(173) In my view, from this statement it can only be derived that "territorial waters", at that time, was also used to indicate internal waters, as I have already mentioned. These waters were subject to the coastal State's sovereignty – they were "waters claimed à titre de souverain". In any case, the statement does not support the notion that "territorial waters" extended further than the territorial sea.

(174) My summary thus far is that, in 1920, "territorial waters" denoted the delimited part of the sea area off the coast where the coastal State has sovereignty.

The text in Article 2 read in its context

(175) According to the wording of Article 2 – "in the territories specified in Article 1 and in their territorial waters" – the right to fishing and hunting is to be the same in the archipelago's territorial waters as on the land territory.

(176) The original contracting Powers recognised, as I have shown, Norway's full and absolute sovereignty over the archipelago, see Article 1. A reasonable contextual inference is that the contracting Powers assumed that the sovereignty extended to the "territorial waters", and, therefore, that there was a need to establish a rule that ensured equality in this area as well.

(177) This is also the interpretation that is consistent with the recognition of Norway's sovereignty being subject to the provisions of the Treaty. It would have made little sense to have a provision on the right to fish and hunt in the sea areas beyond the territorial waters, where fishing and hunting were already accessible to everyone under the international law at the time.

(178) The context therefore supports that the intention of the contracting Powers in 1920 was that "territorial waters" meant the sea area over which Norway's sovereignty was recognised.

(179) The question thus remains whether there is room for an *extended interpretation* of "territorial waters" in line with the shipping company's contention. The answer depends on the extent to which Article 2 must be interpreted dynamically in the light of the object and purpose of the Treaty. I will first consider the text of the Treaty and then what may be derived from its object and purpose.

Does the text provide a basis for dynamic interpretation?

(180) I have already accounted for the principles of dynamic interpretation. In summary, there is room for a dynamic interpretation if this can be rooted in the established or presumed understanding between the parties at the time of the signing of the treaty. Such a presumption may be based on the parties having chosen words and expressions that, according to their content, may be given new meanings due to developments in law or in society. However, the text sets limits for how dynamically it can be interpreted.

(181) In one regard, the term "territorial waters" has been dynamically applied: In 1920, the extent of the territorial sea was not clarified. Norway, for instance, considered the limit to be four nautical miles, while other States claimed that the limit was three nautical miles. As a result of the regulation in UNCLOS, the territorial sea outside Svalbard was expanded to twelve nautical miles on 1 January 2004.

(182) Otherwise, developments in law or in society do not suggest that "territorial waters" is a "generic term" that can be given an extended meaning. Today, the scope of a coastal State's sovereignty is determined through the UNCLOS terms "internal waters" and "the territorial sea". In my view, these terms largely codify the meaning of "territorial waters", as this was understood around 1920.

(183) Therefore, the text does not support the shipping company's contention that "territorial waters" must be interpreted dynamically also to comprise areas where the coastal State under modern maritime law exercises certain sovereign rights.

The object and purpose of the Treaty

(184) First, I reiterate the principles for the interpretation: The object and purpose of a treaty are not independent interpretive factors that may be applied regardless of the text – the starting point must be that the text best expresses the agreement between the parties. However, the object and purpose may clarify the text and to which extent the parties have meant for it to be interpreted dynamically, but these factors cannot give a basis for departing from a clear text.

(185) The question to be considered next is whether "territorial waters" in the light of the object and purpose of the Treaty must be interpreted to comprise areas beyond the internal waters and the territorial sea. As mentioned, there is no sharp distinction between a treaty's object and a treaty's purpose, as these two factors will often overlap and be assessed as a whole.

(186) *The shipping company* asserts that the Treaty had two purposes: Firstly, to resolve disagreements that had existed in the area, and secondly, to ensure access for all citizens who so desired, regardless of nationality. Norway's sovereignty was only a means to realise these purposes.

(187) *The State's* view is that the purpose of the Treaty was to recognise Norway's full sovereignty with certain limitations on the exercise of power, particularly with the aim of ensuring existing commercial interests. Another possible independent purpose was to create a clear and foreseeable legal regime for Norway and the other Contracting Parties.

(188) The object of the Treaty is described in the Preamble: The original contracting Powers – the United States, the United Kingdom, Denmark, France, Italia, Japan, Norway, the Netherlands and Sweden – state:

> "Desirous, while recognising the sovereignty of Norway over the Archipelago of Spitsbergen, including Bear Island, of seeing these territories provided with an equitable regime, in order to assure their development and peaceful utilisation,
> Have appointed as their respective Plenipotentiaries with a view to concluding a Treaty to this effect;…"

(189) The expressed purpose was thus to secure Svalbard's development and peaceful exploitation. The means to achieve this was to subject the archipelago to an equitable regime. The recognition of Norway's sovereignty and the equality rules were important factors in this regard.

(190) When interpreting Article 2, the key factors are the purpose of equality between the nationals of the High Contracting Parties when it comes to commercial operations, and the purpose of securing peaceful utilisation of Svalbard.

(191) When the Treaty was drafted, the contracting Powers secured equal rights to the resources and activities known at the time within the areas that could be subject to the sovereignty of the coastal state under international law. Furthermore, it was important for the contracting Powers to protect existing property interests, which is regulated in several of the Treaty's provisions, including in Article 2 subsection 3, which secure exclusive rights for previous occupants to hunt on their base land.

(192) The negotiation history contributes to clarifying the parties' intention by the reference to an equitable regime, see the Vienna Convention Article 32. The primary aim was to maintain existing commercial interests. As I have previously accounted for, the United States and the United Kingdom were particularly concerned about their mining industry, which was to be regulated under a separate mining system in accordance with Article 8 subsection 1 of the Treaty.

(193) However, the Treaty was concluded for an indefinite period, and there can be no doubt that the parties intended that the right to equality under Article 2 would facilitate a fair allocation of fishing and hunting resources also in the future. The parties had no basis for anticipating the developments of maritime law that occurred in the second half of the 20th century, which expanded the coastal state's rights in the maritime areas.

(194) It may be argued that to the extent Norway's sovereign rights on the continental shelf are derived from its sovereignty over Svalbard, it would be inconsistent with an "equitable

regime" if Norway alone should harvest the benefits of the resources on the shelf. The purpose of an "equitable regime" can thus be said to favour the interpretive option argued by the shipping company.

(195) The purpose of the treaty, however, does not provide a clear answer to the question of interpretation. The Svalbard Treaty does not establish a general rule on equal rights to all future exploitation of resources. The contracting Powers could have chosen to make this a condition for recognising Norway's sovereignty, but they chose instead to regulate the right within the scope of each of the Treaty's provisions, related to specific forms of activities.

(196) According to the shipping company, an interpretation having the result that the equality rule in Article 2 does not cover the right of the ships and nationals of the other High Contracting States to catch snow crab on the Svalbard continental shelf, is an anomaly that gives an absurd result. I find it most natural to discuss this consequential consideration in connection with the purpose of the Treaty.

(197) The reason for this contention is that such a result would imply that Norway's rights on the shelf would be more extensive than in the internal waters and in the territorial sea. This deviates from the general system of UNCLOS, where the coastal State's rights decrease in the areas beyond its territorial sea.

(198) I cannot see that this consequential consideration is decisive for the interpretation of Article 2. The alleged anomaly does not arise within the Treaty, but as a result of a subsequent developments in the law outside its scope. The interpretive result is also rooted in the text.

(199) Moreover, the opposite would also have been inconsistent with the general system under UNCLOS, as the coastal State – Norway – would not have had exclusive rights under Article 77 (2), although it must be added that the coastal State may consent to the exploitation by others. In my view, it is hard to see that the anomaly argument supports one particular interpretive result.

(200) I also note that it is not unusual that developments in the law may alter the balance between parties, but this in itself does not give a basis for amending a treaty through interpretation. In that case, this must be agreed between the parties, see Article 31 (3) (a) and (b), and Article 39 of the Vienna Convention.

(201) Finally, the purpose of securing peaceful utilisation of Svalbard cannot necessarily be deemed to support that all the High Contracting Parties enjoy equal rights to exploit the resources on the continental shelf.

(202) The sea areas around Svalbard have extensive marine ecosystems and must be considered highly vulnerable areas. Considerable superpower and security policy interests are also prominent in this area. Norway is the regulatory authority that maintains the interests related to resources and environment through various regulations and enforcement, also if the other Contracting Parties have equal rights of exploitation. In principle, Norway would be able to prohibit such operations. Nonetheless, one cannot ignore that future exploitation of the potentially large and vital resources on the continental shelf may create conflicts related to access to resources and regulation, and that the problems and conflicts may increase if all interested Contracting Parties were to assert the right to equality.

(203) As such, it may be claimed that the consideration of stability is best maintained by one country holding the rights, see Article 77. Here, I mention that the purpose of UNCLOS according to its Preamble is, among other things, to establish an international judicial system that "will promote the peaceful uses of the seas and oceans" and "the equitable and efficient utilization of their resources".

(204) *In summary,* the object and purpose of the Treaty do not clearly and unambiguously support a result departing from the interpretive option that follows from a natural understanding of the text of the Treaty.

State practice

(205) Article 31 (3) (b) of the Vienna Convention establishes that any subsequent practice in the application of a treaty, which establishes the agreement of the parties regarding its interpretation, must be taken into account.

(206) In the case at hand, such a practice does not exist. Norway and other High Contracting Parties disagree on the Treaty's application in the economic zone and on the continental shelf. This disagreement has been expressed in a large number of written declarations – so-called verbal notes. No agreement on the interpretation may be derived from these notes.

(207) As mentioned, the EU, through Latvian authorities, has issued licences to catch snow crab on the continental shelf, but this has taken place under the protest of Norwegian authorities.

International case law

(208) The international law literature on the Svalbard Treaty has referred to several international rulings. My view is that international case law has limited relevance to the interpretive question in our case. I will, however, mention something about the ICJ's judgment of 18 December 1978 *Greece v. Turkey*, as it concerned the interpretation of a reservation containing the word "territorial".

(209) I have previously discussed this judgment. The ICJ found that the term "territorial status" had to be dynamically interpreted. More specifically, the judgment concerned the meaning of a reservation relating to the courts' jurisdiction in disputes on "the territorial status of Greece". Hence, it involved a term that had been employed in a completely different form of regulation than that prescribed by Article 2 of the Svalbard Treaty. In addition, I note that although "territorial waters" and "territorial status" both contain the word "territorial", "territorial status" as opposed to "territorial waters" is an open formulation that is suited to capture legal developments. Therefore, I cannot see that the judgment provides guidance to our case.

Literature on international law

(210) As mentioned, according to Article 38 of the ICJ's statutes, statements by renowned publicists in international law are relevant interpretive means.

(211) The Supreme Court has been presented with a large number of legal works addressing the issue at hand. However, literature on international law gives no clear guidance for the

interpretation of the Svalbard Treaty. Some publicists argue that Article 2 must be given a more expansive and analogous application in the economic zone and on the continental shelf, basing this on teleological considerations and dynamic interpretation. Others hold an opposite view and place decisive weight on the text, the history and the preparatory works to the Treaty. In other words, the literature does not give a basis for a conclusion in one direction or another.

Overall assessment

(212) When the Svalbard Treaty was drafted in 1919, the archipelago was a no man's land – *terra nullius*. The steadily increasing commercial operations on Svalbard by citizens of several nations made it more pressing to clarify the status of the archipelago. The Spitsbergen Commission, that prepared the draft Treaty, assessed two options: The first was to give Norway a mandate to manage Svalbard, and the second was to recognise Norway's sovereignty on the condition that the other States were guaranteed specific rights. The second option was chosen and supported by all the contracting Powers.

(213) The solution is enshrined in Article 1, which states that the High Contracting Parties recognise Norway's full and absolute sovereignty subject to conditions imposed on Norway under the provisions of the Treaty. This reservation does not limit Norway's sovereignty as such, but in its exercise of power, Norway is obliged to respect the rights guaranteed for the nationals of the other Contracting Parties through the provisions of the Treaty. Other restrictions on Norway's exercise of sovereignty cannot be derived from the Treaty, and the residual rights consequently lie with Norway.

(214) Article 2 must be interpreted in this context. The connection with Article 1 further shows that the intention was for "territorial waters" to comprise the sea area where Norway has the same sovereignty as on its land territory.

(215) In 1920, when the Svalbard Treaty was concluded, the term "territorial waters" had been given a core legal meaning that largely equated the right over these waters with sovereignty over the land territory. "Territorial waters" encompassed a geographically delimited sea area where the coastal State has sovereignty.

(216) The text, as it was understood at the time of the conclusion of the Treaty, does not allow for an extended or analogous interpretation that may give the equality rule in Article 2 application on the continental shelf outside Svalbard. There have been no developments in international law that would extend the concept of "territorial waters" to areas beyond the territorial sea. On the contrary, it follows from UNCLOS Article 2 that this area is a geographically delimited sea area that comprises internal waters and the territorial sea.

(217) The Treaty does not lay down a general equality rule, and its purpose does not unambiguously and clearly support an expansive interpretation, but may support the views of both the shipping company and the State of Norway.

(218) The consequence of the equality rule in Article 2 not being applicable on the continental shelf, is that Norway's rights are more extensive on the shelf than in Svalbard's internal and territorial waters. This deviation from the system in UNCLOS does not create an anomaly that is decisive for the interpretation.

(219) The interpretive result argued by the shipping company – that the equality rule in Article 2 applies on the continental shelf outside Svalbard – is not covered by the text interpreted in accordance with Articles 31 and 32 of the Vienna Convention, and would constitute an amendment of the Treaty subject to agreement between the parties, see Article 31 (2) (a) and (b) and Article 39. Such agreement does not exist.

(220) The conclusion is that Article 2 of the Svalbard Treaty applies in Svalbard's internal waters and territorial sea, but not on the continental shelf outside Svalbard where Norway has exclusive rights to exploitation of the natural resources under UNCLOS Article 77.

The interpretation of Article 3 of the Svalbard Treaty

(221) The Svalbard Treaty Article 3 subsections 1 and 2 reads:

> "The nationals of all the High Contracting Parties shall have equal liberty of access and entry for any reason or object whatever to the waters, fjords and ports of the territories specified in Article 1; subject to the observance of local laws and regulations, they may carry on there without impediment all maritime, industrial, mining and commercial operations on a footing of absolute equality.
>
> They shall be admitted under the same conditions of equality to the exercise and practice of all maritime, industrial, mining or commercial enterprises both on land and in the territorial waters, and no monopoly shall be established on any account or for any enterprise whatever."

(222) *The shipping company* contends that "waters" in subsection 1 is a generic term, and that the right to equality under the provision applies in all sea areas where Norway has rights.

(223) I do not share this view. The geographical area for the right to equality comprises the "waters, fjords and ports" of the archipelago, which in the first part of the provision is mentioned together with the right to access and entry. It has been questioned whether "waters" in this context refers to the internal waters, but, in any event, there is no evidence that the term covers the waters outside the limits of the territorial sea. In 1920, such a perception would also not have made sense, since this concerned the high seas.

(224) In support of its view, the shipping company has mentioned that Norway's original treaty proposal used the term "eaux adjacentes", and that this was later removed. I cannot see that this in itself implies that the intention was to include sea areas beyond the internal waters or, alternatively, outside the limits of the territorial sea.

(225) There are no legal sources supporting that Article 3 subsection 1 has a wider area of application than Article 2. In summary, my conclusion is thus that Article 3 subsection 1 does not give the shipping company a right to catch snow crab on the continental shelf outside Svalbard.

(226) Article 3 subsection 2 also contains an equality rule. This applies in the "territorial waters". The term must be interpreted in the same way as in Article 2. Hence, nor Article 3 subsection 2 gives the shipping company a right to catch snow crab on the continental shelf.

Conclusion and costs

(227) Against this background, I conclude that the shipping company does not have a right to catch snow crab on the continental shelf outside Svalbard. This follows from the equal rights of the nationals and ships of the High Contracting Parties to fish and hunt under Article 2 of the Svalbard Treaty being geographically limited to Svalbard's internal waters and territorial sea. Nor may Article 1 or Article 3 be interpreted to mean that a right of equality applies to the continental outside off Svalbard. The decision of the Ministry of Trade, Industry and Fisheries is thus based on a correct interpretation of the Svalbard Treaty.

(228) The State has succeeded with its view on the interpretation, and there is no basis for invalidating the decision by the Ministry of Trade, Industry and Fisheries. This means that it is not necessary for me to assess the other issues in the case. Similar to the Court of Appeal, I will not consider whether parts of the appellant's contentions should have been rejected, see section 29-14 subsection 1 final sentence of the Dispute Act, cf. section 9-6 subsection 3 final sentence.

(229) The State has won the case and the appeal is dismissed. The case has raised significant issues of principle, and the shipping company is therefore exempt from liability for costs in all instances, see section 20-2 subsection 3 of the Dispute Act.

(230) I vote for this

J U D G M E N T :

1. The appeal is dismissed.

2. Costs are not awarded in any instance.

(231) Justice **Indreberg:** I agree with Justice Ringnes in all material respects and with his conclusion.

(232) Justice **Webster:** Likewise.

(233) Justice **Matheson:** Likewise.

(234) Justice **Normann:** Likewise.

(235) Justice **Bull:** Likewise.

(236) Justice **Kallerud:** Likewise.

(237) Justice **Bergsjø:** Likewise.

(238) Justice **Arntzen:** Likewise.

(239) Justice **Falch:** Likewise.

(240) Justice **Bergh:** Likewise.

(241) Justice **Østensen Berglund:** Likewise.

(242) Justice **Høgetveit Berg:** Likewise.

(243) Justice **Thyness:** Likewise.

(244) Chief Justice **Øie:** Likewise.

(245) Following the voting, the Supreme Court gave this

J U D G M E N T :

1. The appeal is dismissed.

2. Costs are not awarded in any instance.