

The Norwegian snow crab regime and foreign vessels – a commentary on the *Juras Vilkas* decision of the Øst-Finnmark District Court

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Decision Commented On: [Acquittal pronounced by the District Court of Øst-Finnmark 24.01.2017. Case: 16-127201MED-OSFI.](#)

The Latvian vessel *Juras Vilkas*, owned by the shipping company Arctic Fishing, was licensed by the Latvian Ministry of Agriculture to catch snow crab on the Norwegian side of the delimitation line in the high seas area (the Loop Hole) of the Barents Sea. The license was granted pursuant to a letter from the EU Commission of 22 December 2016, authorizing licenses for 16 vessels to fish snow crab in the Barents Sea under the terms of the [Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries](#) (NEAFC Convention). In the period 16 May – 25 July 2016 the captain of *Juras Vilkas* caught 80,340 kilos of snow crab (worth NOK 2 500 000) on the Norwegian continental shelf in the Loop Hole. The captain was prosecuted for violation of the Norwegian prohibition on snow crab catching and fined NOK 18 000. The shipping company was subject to a confiscation order of NOK 2 500 000 (the catch value). In the Decision of the District Court of Øst-Finnmark on 24 January 2017, both the captain and the company were acquitted on the grounds that the NEAFC Convention prevails over the Norwegian prohibition against catching snow crab on the Norwegian continental shelf.

This blog post provides an introduction to the Norwegian snow crab regime and analyzes the Court's decision.

Background

The snow crab (*chionoecetes opilio*) is a relatively new species in the Barents Sea. According to the [Norwegian Institute of Marine Research \(IMR\)](#), the snow crab is a northerly species with several areas of distribution, such as the Pacific and the Atlantic. However, unlike the red king crab, the snow crab was not deliberately introduced into the Barents Sea. IMR studies indicate that the snow crab either extended its range naturally or by way of ballast water. After test-fishing in 2013, IMR predicted that the snow crab could be of commercial interest for the fishing fleets of the Barents Sea. That prediction seems to have been fulfilled. The Norwegian Fishing Commodities Association (NFCA) reports that 11 Norwegian vessels were registered to fish for snow crab in 2016 for a total catch of 9300 tons. USA and Japan are the main markets for export, and the prices increased by 33 % between September 2015 and September 2016. Nofima (a Norwegian institute for research on food and development within the aquaculture and fisheries sectors) estimates that in five to ten years the value of the catch could be as much as 3 billion NOK. Consequently, the potential for employment is significant. Despite uncertainties in the estimation of future catches, the registered amount caught to date indicates that snow crab has great potential as a future new fishing resource. For the Svalbard community the snow crab is viewed as a potential new industry that can replace the mining industry.

In 2014, after a period of increasing unregulated fishing conducted by both Norwegian and foreign vessels, the Norwegian Ministry of Fisheries regulated the catching of snow crab. The regulation prohibits the catching of snow crab in Norwegian territorial sea, internal waters and on the continental shelf by both Norwegian and foreign vessels. However, the authorities may exempt Norwegian vessels from this prohibition on prescribed conditions. Certain foreign vessels have quite recently been prosecuted for violations of the prohibition.

The District Court's Decision

The starting point for examining the decision of the District Court is the [Norwegian Marine Resource Act](#) (MRA) § 61, cf § 16, of the snow crab prohibition regulation § 1, which provides

that the intentional or negligent violation of the prohibition on catching of snow crab on the Norwegian continental shelf results in penalty or imprisonment up to one year. Further, pursuant to MRA § 65, the catch may be confiscated. The court concluded that the state had proven that *Juras Vilkas* and its captain Sergej Triskin had committed the offence but nevertheless gave judgment in favor of the defendants on the basis of Norway's international obligations.

Pursuant to MRA § 6, international agreements and international law in general prevail over the MRA in case of conflict. The same principle is enshrined in the Norwegian Criminal Code § 2. The Court references the NEAFC Convention of 1980 as a relevant international agreement. The Court stresses the objective of the NEAFC Convention which is to "... ensure the long-term conservation and optimum utilization of the fishery resources in the Convention Area, including the Loop Hole, providing sustainable economic, environmental and social benefits" (art. 2). Norway ratified the Convention in 1981.

The crucial step in the Court's reasoning lies in its assessment of NEAFC's administrative authority in the Loop Hole. Art. 3 (2) of NEAFC provides that the Commission shall have legal personality and shall enjoy in its relation with other international organizations and in the territories of the Contracting Parties such legal capacity as may be necessary to perform its functions and achieve its ends. The Court points out the NEAFC [Scheme of Control and Enforcement](#) (which Norway has adopted) art. 1 (b), defines the "Regulatory Area" for the purpose of the Scheme as "The waters of the Convention Area, which lies beyond the waters under the fisheries jurisdiction of Contracting Parties." Based on this, the Court concludes that Norway has a duty to respect the licenses issued pursuant to NEAFC's management regime, including on the Norwegian continental shelf in the Loop Hole.

The Court finds that *Juras Vilkas* was catching snow crab pursuant to a license issued in accordance with the recommendations laid down by the NEAFC Convention and the NEAFC Scheme of Control and Enforcement. Further, the Court concludes that the Norwegian prohibition of catching of snow crab on the continental shelf in the Loop Hole does not apply to this case, because the prohibition is inconsistent with Norway's obligations according to the NEAFC Convention and the NEAFC Scheme of Control and Enforcement, cf. the Norwegian Criminal Code § 2. Accordingly, the Court gave judgment for the defendants.

Commentary

The Court bases its judgment on the grounds that Norwegian snow crab regulation is subject to the NEAFC Convention and the NEAFC Scheme of Control and Enforcement. However, the judgment fails to discuss some fundamental questions relating to the law of the sea. The activity took place on the Norwegian continental shelf. According to the [United Nations Law of the Sea Convention](#) (LOSC) art. 77 (1) the Coastal State exercises sovereign rights over the continental shelf for the purpose of exploring and exploiting its natural resources. Art. 77 (2) expressly states that *no one* may undertake these activities without the express consent of the coastal State, if the coastal State itself does not carry out exploring or exploiting of the resources. In 2009, the [Commission on the Limits of the Continental Shelf](#) (CLCS) approved the Norwegian application of the outer limits of the Norwegian continental shelf, as a prolongation from the shelf under the Norwegian mainland out to the Barents Sea and the Arctic Ocean. Furthermore, in 2010 Norway and Russia [agreed upon](#) the delimitation line in the Barents Sea. There is no doubt that *Juras Vilkas* was engaged in catching of snow crab on the Norwegian continental shelf. The snow crab is an organism that is unable to move except in constant physical contact with the sea-bed. Accordingly, it is a sedentary species, cf. LOSC art. 77 (4), subject to the coastal State's sovereign rights over the continental shelf, cf. LOSC art. 77 (1). Hence, the resources are subject to Norwegian continental shelf jurisdiction. Accordingly, the Court's interpretation of NEAFC's authority is not correct. As a regional fisheries management organization (RFMO), NEAFC's principal mandate and objective is to promote the long-term conservation and optimum utilization of the fishery resources of the North-East Atlantic area, in particular to ensure consistency between the management of

stocks occurring both within an area of the jurisdiction of a coastal State/several coastal States and beyond (the high seas). NEAFC's regime is based on cooperation between States. While LOSC imposes a duty to cooperate with respect to shared and straddling/migrating stocks, it does not result in a cession of sovereign rights, (which seems to be the basis of the Court's decision). The LOSC presupposes that the legal regime of the continental shelf can coexist with another legal regime in the same area, the high seas in this case. This was stated clearly by the [International Tribunal for the Law of the Sea](#) (ITLOS) in its judgment in the maritime delimitation case between Bangladesh and Myanmar (the "Bay of Bengal" case; see paragraph 475 in particular of the [judgment](#)) when discussing the status of the so-called "grey area", concluding that the co-existence of different legal regimes with corresponding different legal rights and obligations can occur and that each must be exercised with due regard to the rights and duties of the other. It should be stressed that the NEAFC Convention includes *sedentary species* in its definition of "fishery resources". This may afford the NEAFC some potential competence but only if Norway consents. Norway has not consented.

Further process

The prosecuting authority has appealed the acquittal on a point of law. There is good reason to believe that the appeal will be allowed based on the arguments presented above. A similar case is set down before the District Court of Øst-Finnmark for trial in May. This case is based upon the arrest of the Latvian vessel *Senator* on suspicion of illegally catching snow crabs on the Norwegian shelf in the Svalbard fishery protection zone. This case also concerns snow crab traps placed on the Norwegian continental shelf, although in this case on that part of the Norwegian continental shelf within the Svalbard Fisheries Protection Zone. This trial may therefore raise some fundamental questions on the understanding of the geographical scope and interpretation of the [Svalbard Treaty](#).

The EU's understanding of the Svalbard Treaty's applicability is clear. In December 2016, the EU issued licenses for 16 EU vessels to fish for snow crab in areas over which Norway claims jurisdiction. Even though the EU licenses can be described as no more than an allocation of fishing rights between EU member states and not a right to fish per se, the signal from the EU is clear: the EU is challenging the Norwegian exercise of authority on the basis that this is an area governed by the Svalbard Treaty. By allowing only Norwegian vessels to participate in the capture of snow crabs, the EU argues that Norway violates the non-discrimination principle enshrined in the Svalbard Treaty.

The official Norwegian view is that the non-discrimination principle does not apply outside Svalbard's territorial waters. The arrest of the Latvian vessel is a clear demonstration of Norway's position on this matter. The disagreement on the applicability of the Svalbard Treaty is based on the parties' different approach to the interpretation and understanding of the terms "territories" and "territorial waters". The question is thoroughly discussed in the academic literature on the Treaty but without a clear-cut conclusion. Concluded in 1920, the Svalbard Treaty does not deal with activities beyond the territorial sea because additional maritime zones were not established until much later. The majority of the parties to the Treaty, including the EU, seem to take the stance that the terms "territories" and "territorial waters" should be interpreted based on the object and purpose of the Treaty, an evolutionary interpretation, and the claim that anomalies would be created if the Treaty did not extend beyond the territorial sea. Norway on the other hand relies on a literal reading of the Treaty. Norway also relies on the argument that Svalbard does not generate its own, separate geological continental shelf. The continental shelf of Svalbard constitutes a part of the continuous shelf extending from the Norwegian mainland, a fact that may weaken the claim that the Svalbard Treaty applies to the shelf.

The Norwegian Supreme Court has so far avoided these questions (see, for example a blog by Tore Henriksen discussing this issue [here](#)). There are reasons to believe that the case set down for May will be appealed all the way to the Supreme Court.