

## Norway's Imperiled Sovereignty Claim over Svalbard's Adjacent Waters

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### Abstract

The invasive but highly profitable snow crab has made its way into the waters of the High Arctic, precipitating a direct confrontation between the EU and Norway over the interpretation of the 1920 Svalbard Treaty. Norway claims the Treaty does not apply due to its strict interpretation of the Treaty's terms, which pertain only to the archipelago's terra firm and territorial sea. The EU claims the Treaty's equal access and non-discrimination provisions follow the evolution of the international law of the sea, and make the living (and mineral) resources of Svalbard's surrounding continental shelf and waters open to all states parties to the Treaty. The dispute has gone on for decades, but this Article maintains, through a review of Norway's increasingly isolated legal and political stance that time is out of joint for Norway and its long-term appropriative design and strategy to territorialize this area of the High North.

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## A. Introduction

On January 16, 2017, the Norwegian Coast Guard vessel *KV Svalbard* intercepted the *Senator*, a Latvian trawler, off the Norwegian Arctic archipelago of Svalbard.<sup>1</sup> Norwegian authorities alleged that the ship had put out 2,600 crab pots in Norwegian waters protected by the Svalbard Fishery Protection Zone (FPZ).<sup>2</sup> The Norwegian Coast Guard escorted the *Senator* into the Norwegian port at Kirkenes, where authorities contemplated additional steps,<sup>3</sup> having already assessed a fine and confiscated the catch.<sup>4</sup> The detention set up an immediate confrontation between Norway and Latvia,<sup>5</sup> which diplomacy may resolve,<sup>6</sup> but larger questions remain and will likely put Norway and the European Union (EU) “on a direct collision course”<sup>7</sup> over the legal status of the FPZ and the continental shelf surrounding Svalbard.

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<sup>1</sup> See Atle Staalesen, *Snow Crabs Raise Conflict Potential Around Svalbard*, BARENTS OBSERVER, (Jan. 23, 2017), <https://thebarentsobserver.com/en/arctic/2017/01/snow-crabs-raises-conflict-potential-svalbard>.

<sup>2</sup> Royal Decree of June 3, 1977, No. 6 on the Fisheries Protection Zone Off Svalbard, pursuant to § 1 of the Act of Dec. 17, 1976, No. 9 on Norway’s Economic Zone.

<sup>3</sup> See Eskil Mehren & Tarjei Abelsen, *Fisker ulovlig på norsk sokkel med EUs velsignelse*, NRK (Jan. 20, 2017), <https://www.nrk.no/troms/fisker-ulovlig-pa-norsk-sokkel-med-eus-velsignelse-1.13333132> (“Nå ligger skipet i Kirkenes i påvente av en reaksjon fra norske myndigheter”).

<sup>4</sup> See Nils Mehren & Eskil Mehren, *EU fikk klar beskjed fra europaministeren i fastlåst konflikt*, NRK (Jan. 23, 2017), <https://www.nrk.no/troms/eu-fikk-klar-beskjed-fra-europaministeren-i-fastlast-konflikt-1.13338024> (detailing the monetary penalty).

<sup>5</sup> See *Foreign Ministry Asks Norway to Release Latvian Fishing Ship*, BALTIC NEWS NETWORK (Latvia) (Jan. 25, 2017), <http://bnn-news.com/foreign-ministry-asks-norway-to-release-latvian-fishing-ship-159087> (noting the Latvian Foreign Ministry’s request that Norway release the ship and its crew of thirty).

<sup>6</sup> Norwegian Minister of EEA [European Economic Area Agreement] and EU Affairs, Frank Bakke-Jensen and Fisheries Minister Sandberg engaged EU Commissioner for the Environment, Maritime Affairs and Fisheries, Karmenu Vella in a series of bilateral negotiations at the Arctic Frontiers Conference in Tromsø on Jan. 22–27, 2017. See Mehren & Mehren, *supra* note 4.

<sup>7</sup> *EU and Norway in Heated Conflict Over Svalbard Snow Crab*, FRIDTJOF NANSEN INSTITUTE (Jan. 25, 2017), <https://www.fni.no/news/eu-and-norway-in-heated-conflict-over-svalbard-snow-crab-article1246-330.html>.

Because some of the EU members, including Latvia,<sup>8</sup> are parties to the Svalbard Treaty,<sup>9</sup> “the EU automatically assumes certain community competences in relation to fisheries.”<sup>10</sup> In late November 2016, the Executive Committee of the EU’s Long Distance Advisory Council (LDAC), a stakeholder-led EU advisory body on long distance fleet fishing, approved recommendations that the EU “make a strong statement” about allowing the EU fishing fleets access to the area to sustainably exploit a fair distribution of snow crab and other fish.<sup>11</sup> The LDAC noted economic losses incurred by more than twenty Lithuanian, Latvian, and Spanish vessels tied up for months in European ports while awaiting permission and quota information from the EU.<sup>12</sup> Total allowable catch limits in the European Union conform to annual assessments of stock status, or biannual assessments for deep-sea stocks, based on scientific advice by the Council of Fisheries ministers.<sup>13</sup> “For stocks that are shared and jointly managed with non-EU countries, the [total allowable catches] are agreed with those (groups of) non-EU countries.”<sup>14</sup> No agreement with Norway had been reached.<sup>15</sup> Nevertheless, the EU issued licenses to harvest the snow crab to the *Senator* and fifteen other EU vessels in these contested waters.<sup>16</sup> The LDAC had recommended that sustainable

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<sup>8</sup> Latvia ratified the Svalbard Treaty on June 13, 2016. For a complete list of signatories, see *Svalbard Treaty*, THE GOVERNOR OF SVALBARD, SYSSELMANNEN, <http://www.syssemmannen.no/en/Toppmeny/About-Svalbard/Laws-and-regulations/Svalbard-Treaty/>.

<sup>9</sup> Treaty Between Norway, the United States of America, Denmark, France, Italy, Japan, the Netherlands, Great Britain and Ireland and the British overseas Dominions and Sweden concerning Spitsbergen signed in Paris Feb. 9, 1920 [Svalbard Treaty]. See Treaty Concerning the Archipelago of Spitsbergen, Feb. 9, 1920, 2 L.N.T.S. 8. Spitsbergen is the name of the largest island of the archipelago, and the islands commonly and collectively were called by that name until officially renamed Svalbard by Norway’s king in 1925. Act of July 17, 1925 Relating to Svalbard, No. 11 (the Svalbard Act), <http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19250717-011-eng.pdf>. Svalbard is an old Norsk word meaning ‘cold coast.’ See FRIDTJOF NANSEN, IN NORTHERN MISTS VOL. II: ARCTIC EXPLORATION IN EARLY TIMES 166 (Arthur G. Charter trans., 1911).

<sup>10</sup> Nkeiru Scotcher, *The Sovereignty Dilemma*, in THE SPITSBERGEN TREATY: MULTILATERAL GOVERNANCE IN THE ARCTIC 21, 22 (Diana Wallis & Stewart Arnold eds., 2011). For a more in-depth discussion of the conferral of competence principle within the framework of the EU and Svalbard, see E.J. Molenaar, *Fisheries Regulation in the Maritime Zones of Svalbard*, 27 INT’L J. MARINE & COAST. L. 3, 22–26 (2012).

<sup>11</sup> E.U. Long Distance Advisory Council Position on Snow Crab in Svalbard, R-12-16/WG2 (Nov. 24, 2016), 1, 3, <http://ldac.chil.me/download-doc/125733>. Other fishing stock specifically identified include cod, haddock, redfish, Atlanto Scandian herring, and capelin or Greenland halibut. *Id.* at 2 [hereinafter E.U. Long Distance Advisory Council Position].

<sup>12</sup> *Id.* at 3.

<sup>13</sup> See *Multi-Annual Plans, Fisheries*, EUROPEAN COMMISSION, [https://ec.europa.eu/fisheries/cfp/fishing\\_rules/tacs\\_en](https://ec.europa.eu/fisheries/cfp/fishing_rules/tacs_en) (last visited Mar. 3, 2017).

<sup>14</sup> *Id.*

<sup>15</sup> See EU Long Distance Advisory Council Position, *supra* note 11, at 2.

<sup>16</sup> See Mehren & Abelsen, *supra* note 3 (reporting the Norwegian Broadcasting Corporation (NRK) had gained access to EU documentation allowing for sixteen vessels, including the *Senator*, to fish for crab in the disputed Svalbard

exploitation be undertaken in compliance with the Svalbard Treaty “in equal terms of access and management strategy” enjoyed by Norway and other non-EU vessels.<sup>17</sup>

Sensitive issues of the Anthropocene age arise against this backdrop.<sup>18</sup> Snow crabs are an invasive crustacean and may pose an ecological risk.<sup>19</sup> They first appeared in the Barents Sea in 1996.<sup>20</sup> By 2012, their numbers had exploded in the pristine and cold environment of the High Arctic,<sup>21</sup> contributing to broader debates about the need for a new global governance regime to protect the commons.<sup>22</sup> Calamitous overfishing elsewhere in the 1990s resulted

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zone). In December 2016, the Latvian Agriculture Ministry representative secured licenses from the EU Agriculture and Fisheries Council, which distributed eleven crabbing licenses to Latvian fishing boats for 2017 Svalbard archipelago activities. *See also Norwegian Authorities Arrest Latvian Crab Trawler with Crew of 30 People*, THE BALTIC COURSE (Latvia) (Jan. 24, 2017), [http://www.baltic-course.com/eng/baltic\\_states/?doc=127127](http://www.baltic-course.com/eng/baltic_states/?doc=127127).

<sup>17</sup> E.U. Long Distance Advisory Council Position, *supra* note 11, at 1.

<sup>18</sup> *See generally* Kristian Åtland, *Security Implications of Climate Change in the Arctic*, Norwegian Defence Research Establishment, FFI-RAPPORT 2010.01097 (May 18, 2010), <https://www.ffi.no/no/Rapporter/10-01097.pdf> (discussing climate change and security implications in the High North).

<sup>19</sup> *See* Harald Sakarias Brøvig Hansen, *Three Major Challenges in Managing Non-Native Sedentary Barents Sea Snow Crab (Chionoecetes opilio)*, 71 MARINE POL'Y 38, 38 (2016) (noting their placement on the 2012 Norwegian blacklist of alien species as posing “severe ecological risk.”).

<sup>20</sup> Scientists ponder their presence in the Barents Sea, hypothesizing they either migrated from original nesting grounds in the Bering Strait and the coasts of eastern Canada and western Greenland in search of colder water, or were brought into the High Arctic in ballast water. *See* Meld St. 20 (2014–15) Report to the Storting (White Paper) – Update of the Integrated Management Plan for the Barents Sea-Lofoten Area Including an Update of the Delimitation of the Marginal Ice Zone, <https://www.regjeringen.no/contentassets/d6743df219c74ea198e50d9778720e5a/en-gb/pdfs/stm201420150020000engpdfs.pdf> (noting the invasive spread of snow crabs in the Barents Sea but expressing uncertainty as to their introduction by human activity); *see also* Trude Pettersen, *Snow Crabs Have Found Niche in Barents Sea Ecosystem*, BARENTS OBSERVER (Mar. 12, 2014), <http://barentsobserver.com/en/nature/2014/03/snow-crabs-have-found-niche-barents-sea-ecosystem-12-03>; J. Alvsvåg et al., *Evidence for a Permanent Establishment of the Snow Crab (Chionoecetes opilio) in the Barents Sea*, 11 BIOLOGICAL INVASIONS 587 (2009) (speculating about their introduction to the eastern Barents Sea through ballast water).

<sup>21</sup> *See* Hansen, *supra* note 19, at 39 (quoting 2013 biomass estimates of Barents Sea snow crab stock at 188,260 tons); *see also* Pettersen, *supra* note 20 (noting their exploding population in the colder waters of the Barents Sea).

<sup>22</sup> *See, e.g.*, UN General Assembly, Development of an internationally legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, A/RES/69/292 (July 6, 2015); Christian Prip, *Towards A New Legally Binding Instrument on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction*, JCLOS Blog, K.G. Jebsen Center for the Law of the Sea (Oct. 21, 2016), <https://site.uit.no/jclos/2016/10/21/towards-a-new-legally-binding-instrument-on-the-conservation-and-sustainable-use-of-marine-biodiversity-of-areas-beyond-national-jurisdiction/>.

in management regimes world-wide.<sup>23</sup> Today—more than ever before—the crabs are a valuable commodity in a world of depleting fishing stock.<sup>24</sup>

Because snow crabs are relatively new to the Barents Sea, Norway has not yet established a management regime,<sup>25</sup> and indeed, in 2015, Norway suspended harvests until administrative standards could be promulgated.<sup>26</sup> Nevertheless, Norway granted—as exceptions—licenses to 50 Norwegian trawlers.<sup>27</sup> Norway's Deputy Minister of Foreign Affairs explained that the 1958 Continental Shelf Treaty granted Norway sovereign rights to

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<sup>23</sup> See, e.g., *Bering Sea and Aleutian Islands (BSAI) Crab Fisheries*, NOAA Fisheries, <https://alaskafisheries.noaa.gov/fisheries/crab> (last visited Mar. 3, 2017) (listing notices of overfished stock pertaining to snow crab (*Chionoecetes opilio*) and other stock in U.S. waters). In U.S. waters of the Bering Sea and Aleutian Islands, crab fisheries are managed by total allowable catch quotas established by a variety of agencies, including the Federal Fishery Management Plan, the State of Alaska, the National Marine Fishing Service and the North Pacific Fishery Management Council. See generally *id.* For information on snow crab management in Canada, the world's largest supplier, see *Snow Crab*, FISHERIES AND OCEANS CANADA, GOVERNMENT OF CANADA, <http://www.dfo-mpo.gc.ca/fm-gp/sustainable-durable/fisheries-peches/snow-crab-eng.htm> (last visited Mar. 17, 2017).

<sup>24</sup> Extensive bibliographic research on snow crab attest to their commercial value. See generally A.J. PAUL, ED., *BIBLIOGRAPHY OF RESEARCH ON SNOW CRAB (CHIONOECETES OPIILIO)* (2000) (containing 1,050 scientific entries on research published since 1995 on snow crabs in Japan, Russia, Canada, the United States, and other countries). Snow crabs are the second most valuable Canadian fishery export. See FISHERIES AND OCEANS CANADA, GOVERNMENT OF CANADA (date modified: Mar. 6, 2015), <http://www.dfo-mpo.gc.ca/fm-gp/sustainable-durable/fisheries-peches/snow-crab-eng.htm>. Hansen estimates the yearly landed value of snow crab may total NOK 7.5 billion. Hansen, *supra* note 19, at 38. Most of the world's snow crabs come from eastern Canada, followed by Russia. Alaska produces about ten percent of the world's supply, with market prices at record levels in the U.S. and Japan. See Laine Welch, *As Crab Prices Soar Across Alaska, McDonald's Tests New Snow Crab Sandwich*, ALASKA DAILY NEWS (Mar. 3, 2017), <https://www.adn.com/business-economy/2017/03/03/as-crab-prices-soar-across-alaska-mcdonalds-tests-new-snow-crab-sandwich/>.

<sup>25</sup> Hansen, *supra* note 19, at 38 ("Norway has not yet established a management regime."). See also *EU krev krabbefiske*, NATIONEN (Jan. 23, 2017), <http://regimes.b.uib.no/files/2017/02/Nationen-Monday-23.1.2017.pdf> (quoting University of Oslo Professor Finn Arnesen ("*Snøkrabbe er ikkje blant produkta som er omfatta av EØSavtalen, så spørsmålet har ikkje noko i ESA å gjere.*").).

<sup>26</sup> See Provisions for Prohibition of Snow Crab (*Chionoecetes opilio*) Catching, Ministry of Trade, Industry and Fisheries, LOV-2008-06-06-37-§ 16, LOV-1925-07-17-11-§ 4, LOV-1999-03-26-15-§ 20, art. 1. Entered into force Jan. 1, 2015 (official translation from Norwegian). The author thanks Harald Sakarias Brøvig Hansen of the Fridtjof Nansen Institute for locating this reference.

<sup>27</sup> See Harald Sakaris Brøvig Hansen, *EU krev krabbefiske*, NATIONEN (Jan. 23, 2017), <https://www.fni.no/getfile.php/133713/Dokumenter/Sn%C3%B8krabbe%201.pdf>. (noting: "*Norske styresmakter har innført mellombels forbod mot fiske, til dei har fått på plass eit forvaltingsregime for snøkrabben. Det er likevel opna for dispensasjon for til saman 50 norske fartøy.*").).

exploit resources in this area without consulting or taking into account the interests of other states,<sup>28</sup> although Norway also granted exceptions to Russian trawlers.<sup>29</sup>

Norway's legal justification for restricting access to the snow crabs impliedly conflated the regimes of the FPZ and the continental shelf, indicating some grey area or overlap between the two, partly due to the fast-emerging predominance of the species and partly due to snow crabs' peculiar spatial dynamics.<sup>30</sup> Snow crabs populate the seabed of the continental shelf, and are considered a sedentary species.<sup>31</sup> Like lobsters and scallops, there is debate about this classification.<sup>32</sup> If they adhere to the continental shelf, Svalbard's FPZ would not apply, as it pertains to the living resources of the superjacent water column.<sup>33</sup> The United Nations Convention on the Law of the Sea (UNCLOS)<sup>34</sup> defines sedentary species as living organisms "which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil."<sup>35</sup> Constant physical contact with the seabed raises an important issue in addition to the administration of living resources of Norway's FPZ. Norway's Minister of Fisheries, Per Sandberg, confirmed

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<sup>28</sup> See Rachel Tiller & Elizabeth Nyman, *The Clear and Present Danger to the Norwegian Sovereignty of the Svalbard Fisheries Protection Zone: Enter the Snow Crab*, 137 OCEAN & COASTAL MANAGEMENT 24, 24 (2017) (quoting Norwegian Foreign Ministry official, Bård Glad Pedersen). Art. 2(1) of the Continental Shelf Convention holds: "The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources." Norway acceded to the Convention on September 9, 1971. See *Law of the Sea, Status of Treaties*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXI-4&chapter=21&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-4&chapter=21&clang=_en) (last visited Mar. 17, 2017).

<sup>29</sup> See *supra* note 26, art.3 (excepting Russian vessels from the prohibition "in the zone of Norwegian continental shelf 200 nautical miles from the Russian coast in the Barents Sea").

<sup>30</sup> See generally Carolina Parada et al., *Spatial Dynamics of Snow Crab (*Chionoectes opilio*) in the Eastern Bering Sea – Putting Together the Pieces of the Puzzle*, 86 BULL. OF MARINE SCI. 413 (2010) (studying the migratory patterns of snow crabs and climate change).

<sup>31</sup> See Hansen, *supra* note 19, at 38 (noting the sedentary nature of the species). *But cf.*, Richard Bailey, *The Atlantic Snow Crab*, UNDERWATER WORLD 2, 4 (Dep't. Fisheries & Oceans, Government of Canada, 1981) <http://www.dfo-mpo.gc.ca/Library/118973.pdf> (noting that tagging experiments indicated that the snow crab "is not at all a sedentary species").

<sup>32</sup> See Tiller & Nyman, *supra* note 28, at 28 (noting the sedentary species classification of crabs, lobsters, and scallops constitute a "contentious and . . . gray area").

<sup>33</sup> Harald Sakarias Brøvig Hansen, *EU and Norway in Heated Conflict over Svalbard Snow Crab*, FRIDTJOF NANSEN INSTITUTE (Jan. 25, 2017), <https://www.fni.no/news/eu-and-norway-in-heated-conflict-over-svalbard-snow-crab-article1246-330.html>.

<sup>34</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

<sup>35</sup> *Id.* at art. 77.

as much: "This [dispute] is about the Norwegian continental shelf,"<sup>36</sup> meaning: The right to harvest snow crabs affects the right to extract oil and gas deposits beneath the seabed. Vast quantities of oil and gas exist in this area,<sup>37</sup> informing Norway's position that sedentary species conform as much to oil and gas management as they do to fisheries management.<sup>38</sup> The disposition of the status of Svalbard's continental shelf also affects continental shelf extension claims.<sup>39</sup> Consequently, "we will not give them a single crab,"<sup>40</sup> said Sandberg.

The dispute over snow crabs reduces to a fundamental question about the geo-spaces surrounding the archipelago: Who owns them? The EU contends the Svalbard Treaty allows states parties—including Latvia—equal and non-discriminatory access to resources for all parties to that Treaty, including with respect to fishing.<sup>41</sup> Norway claims sovereign rights

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<sup>36</sup> Atle Staalesen, *Norway Takes Tough Line Against EU in Svalbard Waters*, BARENTS OBSERVER (Jan. 25, 2017), <https://thebarentsobserver.com/en/industry-and-energy/2017/01/norway-takes-tough-line-against-eu-svalbard-waters> (quoting the Norwegian Fisheries Minister, Sandberg).

<sup>37</sup> Offshore oil and gas production in the Barents Sea began in the early 1980s with Norway's Snøhvit field. By 2016, four billion barrels of oil equivalent (BBOe) had been discovered in undisputed Norwegian sectors and 130 wildcat and appraisal wells had been drilled. Predictions indicate that Barents Sea oil production will "grow considerably," with annual investments for Barents Sea concessions surpassing eight billion dollars annually. See Espen Erlingsen, *Barents Sea: Norway's Emerging Oil Province*, OFFSHORE (Nov. 8, 2016), <http://www.offshore-mag.com/articles/print/volume-76/issue-8/northwest-europe/barents-sea-norway-s-emerging-oil-province.html>. Norway opening up its 23<sup>rd</sup> licensing round for exploration projects an extension of this activity to the Northern and Eastern parts of the Barents Sea, close to the ice ridge. See Odd Jarl Borch et al., *Maritime Activity in the High North – Current and Estimated Level up to 2025*, MARPART Project Report 1, 5–6 (Nord Universitet Utredning nr. 7, 2016), <https://brage.bibsys.no/xmlui/bitstream/handle/11250/2413456/Utredning72016.pdf?sequence=5>.

<sup>38</sup> A Norwegian Foreign Ministry overview referred to the Barents Sea's undiscovered oil and gas potential as "huge," possibly as much as 43% of undiscovered oil and gas resources. *Norway's Arctic Policy* 1, 7, NORWEGIAN MINISTRY OF FOREIGN AFFAIRS (2014), [https://www.regjeringen.no/globalassets/departementene/ud/vedlegg/nord/nordkloden\\_en.pdf](https://www.regjeringen.no/globalassets/departementene/ud/vedlegg/nord/nordkloden_en.pdf).

<sup>39</sup> See *infra* Part C (I).

<sup>40</sup> See Per Anders Madsen, *Norge og EU krangler om krabbefangst. Egentlig handler det om Svalbardtraktaten*, AFTENPOSTEN (Feb. 4, 2017), <http://www.aftenposten.no/meninger/kommentar/Norge-og-EU-krangler-om-krabbefangst-Egentlig-handler-det-om-Svalbardtraktaten--Per-Anders-Madsen-613953b.html> (quoting Sandberg as saying: "Vi gir ikke bort en krabbe.>").

<sup>41</sup> Council Regulation (EU) 2017/127 of 20 January 2017 fixing for 2017 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters, ¶ 35, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32017R0127>. See also Council Regulation Fixing for 2017 the Fishing Opportunities for Certain Fish Stocks and Groups of Fish Stocks, Applicable in Union Waters and, for Union Fishing Vessels, in Certain Non-Union Waters, Interinstitutional File: 2016/0344 (NLE) Brussels, Jan. 13, 2017, Council of the European Union, ¶ 35, <http://data.consilium.europa.eu/doc/document/ST-15706-2016-INIT/en/pdf> (referencing the EU's *Note Verbale* to Norway (Oct. 25, 2016) contesting Norway's regulation of snow crab fishing around Svalbard and noting the non-discriminatory management rules of the Svalbard Treaty).

established by the 1958 Continental Shelf Convention<sup>42</sup> and UNCLOS' grant of exclusive control.<sup>43</sup> These treaties establish, for coastal states, maritime zones beyond their territory and provide, for coastal states, sovereign rights to explore and exploit living and non-living resources. Moreover, Norway claims the Svalbard Treaty does not apply because its terms limit the Treaty's application only to the island chain and its adjoining territorial sea.<sup>44</sup> Other maritime regimes did not exist in 1920, when the Treaty was created.

This collision course puts at risk Norway's managerial strategy over resources of the High Arctic, which it has promoted diplomatically since the 1970s. Since that time, Norway has pursued dual aims of incrementally laying the foundation for creating a property regime under Norwegian sovereignty and nuancing arrangements when required to minimize confrontation. The consistent and firm enforcement of sovereignty interests over Svalbard and its surrounding waters remains a state priority.<sup>45</sup> This incident implicates the Svalbard Treaty, on which Norwegian sovereignty claims may depend, and foreshadows debates about governance over the High North and the future of the dwindling global commons.

This Article investigates the sovereign rights dispute over the waters surrounding Svalbard. It frames the legal questions within the context of a changing Arctic environment,<sup>46</sup> holding that territorializing disputes over emerging resources expose increasingly problematic legal ambiguities. Historically, these incidences have been kept in check by the relative remoteness of the area and by the political dispositions of key states, which have managed

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<sup>42</sup> See Convention on the Continental Shelf arts 1,2, Apr. 29, 1958, 499 U.N.T.S. 7302, 312, (defining the term continental shelf as referring to the seabed and subsoil of the submarine areas adjacent to the coast and granting coastal states sovereign rights for the purpose of exploring it and exploiting its natural resources).

<sup>43</sup> See UNCLOS, *supra* note 34, at Part VI, arts. 76–85 (on the continental shelf).

<sup>44</sup> See *infra* note 65 and accompanying text.

<sup>45</sup> Meld. St.32 (2015–2016), Svalbard, Regjeringen.no, <https://www.regjeringen.no/no/dokumenter/meld.-st.-32-20152016/id2499962/sec1> ([Norwegian White Paper] detailing *Svalbardpolitik*, including “*En konsekvent og fast håndhevelse av suvereniteten*” and “*Korrekt overholdelse av Svalbardtraktaten og kontroll med at traktaten blir etterlevd.*”). See also *Norway's Arctic Policy for 2014 and Beyond – A Summary*, Ministry of Foreign Affairs (Oct. 11, 2014), [https://www.regjeringen.no/en/dokumenter/report\\_summary/id2076191/](https://www.regjeringen.no/en/dokumenter/report_summary/id2076191/) (detailing priorities for expanding Norwegian presence in the High North through knowledge and business development and international cooperation).

<sup>46</sup> On the rapid pace of Arctic environmental change, see Qinghua Ding et al., *Influence of High-Latitude Atmospheric Circulation Changes on Summertime Arctic Sea Ice*, 7 NATURE CLIMATE CHANGE 1 (2017).

disputes when they did arise,<sup>47</sup> but rapidly receding polar ice and a lengthening polar sailing and fishing season<sup>48</sup> add new pressures that may outpace diplomatic management.

Norway's foreign policy historically benefitted from the Arctic Ocean's ice-covered, remote significance.<sup>49</sup> Spitsbergen's legal status was not of major significance to the powers controlling the 1919 Paris Peace Conference,<sup>50</sup> where the disposition of Spitsbergen's sovereign status began to take shape—but it was important to Norway.<sup>51</sup> Since that time, the law of the sea has changed dramatically, and Norway has pursued a managerial practice that associates Norwegian stewardship with a course of dealing that intends to incrementally convert into an uncontested sovereign rights claim certain changes to the evolving law of the sea regime.<sup>52</sup> This snow crab dispute with the EU generates unwanted attention on Norway's incomplete territorializing designs, particularly given criticisms of "lenient policing" with regard to Russia.<sup>53</sup> The dispute implicates transatlantic NATO relations, continental European dynamics, the Anthropocene age, the economic value of the living and non-living resources of this area, and now involves revanchist intonations from Russia—Norway's most imposing bilateral relation.<sup>54</sup> It exposes to international scrutiny

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<sup>47</sup> See Rachael Tiller & Elizabeth Nyman, *Having the Cake and Eating it Too: To Manage or Own the Svalbard Fisheries Protection Zone*, 60 MARINE POL'Y 141, 141–42 (2015) (noting disturbances involving Norway's FPZ but also decades of de facto cooperation).

<sup>48</sup> See STEPHANIE PEZARD ET AL., MAINTAINING ARCTIC COOPERATION WITH RUSSIA ch. 3 (Rand Corporation, 2017) (examining maritime access issues due to changes in climate and ice melt in the Arctic).

<sup>49</sup> See Øystein Jensen & Svein Vigeland Rottem, *The Politics of Security and International Law in Norway's Arctic Waters*, 46 POLAR REC. 75, 76 (2009) (noting polar regions were not primary interests in establishing the law of the sea).

<sup>50</sup> See Elen C. Singh & Artemy A. Saguirian, *The Svalbard Archipelago: The Role of Surrogate Negotiators*, in POLAR POLITICS: CREATING INTERNATIONAL ENVIRONMENTAL REGIMES 54, 79 (Oran R. Young & Gail Oserenko eds., 1993) (noting Spitsbergen's legal status at the Paris Peace Conference did not preoccupy Allied attention). For background, see generally OLAV RISTE, *THE NEUTRAL ALLY: NORWAY'S RELATIONS WITH BELLIGERENT POWERS IN THE FIRST WORLD WAR* (1965).

<sup>51</sup> See Singh & Artemy, *supra* note 50, at 65 (noting Norwegian Ambassador F. Wedel-Jarlsberg's lobbying efforts at the Paris Peace Conference to secure for Norway sovereignty over Spitsbergen).

<sup>52</sup> See Torbjørn Pedersen, *Norway's Rule on Svalbard: Tightening the Grip on the Arctic Islands*, 45 POLAR RECORD 147, 152 (2009) (noting Norway's small step approach is informed by avoiding the unwanted attention of foreign powers via "unconstrained leaps" in policy towards Svalbard).

<sup>53</sup> Jensen & Rottem, *supra* note 49, at 80.

<sup>54</sup> See *id.* at 75–76 (framing Norwegian Arctic waters foreign policy in the geopolitics of *Realpolitik*); see also Børge Brende, *Norway's Foreign Minister Travels to Russia to Assure Arctic Relations*, EYE ON THE ARCTIC (Feb. 17, 2017), <http://www.rcinet.ca/eye-on-the-arctic/2017/02/17/norways-foreign-minister-travels-to-russia-to-assure-arctic-relations/> (reviewing incidences contributing to a deterioration in relations between the two countries since Russia's annexation of Crimea). Historically, Geir Hønneland's 1998 empirical study of compliance in the FPZ concluded a "tacit agreement" characterized Norwegian-Russian management measures, with Russia ceding

Norway's political isolation and Achilles Heel—its tenuous long-term objectives of controlling the continental shelf and waters adjacent to Svalbard's territorial sea.<sup>55</sup> It forces consideration of the area's legal status and “irregular patchwork of ‘alliances,’”<sup>56</sup> which diplomacy has never resolved. And it raises questions about global governance over the Arctic and the stability of the law of the sea regime as an expression of legal pluralism and as a bulwark against diminutions to the global commons.

To investigate the legal issues surrounding this incident, Part B of this Article will discuss antecedents to the problem, focusing on the problematic construction of sovereignty imparted by the Svalbard Treaty. Part C will problematize Norwegian sovereign entitlement arguments, juxtaposing them against competing claims and inconsistent or ambiguous practices and doctrinal assessments that question the Norwegian position. Part D concludes with an assessment of Norway's strategic aims set against the broader backdrop of climate change and the management of sea resources. Norway professes an Arctic policy that prioritizes international cooperation.<sup>57</sup> Nevertheless, its strategy for securing its high latitude interests resembles, in part, China's piecemeal and intentionally ambiguous sovereignty claim in the South China Sea<sup>58</sup>—minus the militarism—leading to a generalized conclusion about the nature of sovereignty that propinquity to unsecured, emerging, or disputed resources tempts.

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practical issues to the Norwegians while maintaining the appearance of outward opposition. See Geir Hønneland, *Compliance in the Fishery Protection Zone Around Svalbard*, 29 OCEAN DEV. & INT'L L. 339, 347 and 353 (1998).

<sup>55</sup> Tarjei Kramviken, *Dette er grunnene til at Norges Svalbard-politikk er så omstridt*, AFTENPOSTEN (Feb. 2, 2017), <http://www.aftenposten.no/verden/Dette-er-grunnene-til-at-Norges-Svalbard-politikk-er-sa-omstridt-614356b.html> (“Svalbard er Norges utenrikspolitiske akilleshæl.”).

<sup>56</sup> See Jensen and Rottem, *supra* note 49, at 81. For an interesting study of shifting foreign policy relations between Denmark and Norway on policies toward the Svalbard area, shifting from supportive, to reserved, to confrontational, see Pedersen, *infra*, note 120.

<sup>57</sup> See Minister of Foreign Affairs Børge Brende, *Foreign Policy Address to the Storting 2016*, MINISTRY OF FOREIGN AFFAIRS, GOVERNMENT.NO (Mar. 1, 2016), [https://www.regjeringen.no/en/aktuelt/address\\_storting/id2477557/](https://www.regjeringen.no/en/aktuelt/address_storting/id2477557/) (claiming Norway gives priority to the Arctic “to make sure [it] remains a region of cooperation.”); *Norway's Arctic Policy for 2014 and Beyond – A Summary*, MINISTRY OF FOREIGN AFFAIRS, GOVERNMENT.NO (Oct. 11, 2014) [https://www.regjeringen.no/en/dokumenter/report\\_summary/id2076191/](https://www.regjeringen.no/en/dokumenter/report_summary/id2076191/) (listing international cooperation in the Arctic as a priority area of its foreign policy).

<sup>58</sup> See Robert Beckman, *‘Deliberate Ambiguity’ and the Demise of China’s Claim to Historic Rights in the South China Sea*, 1 ASIA-PAC. J. OCEAN L. & POL’Y 164, 165 (2016) (discussing “China’s policy of ‘deliberate ambiguity’ on the nature and scope of its historic rights” claims over the South China Sea and on the significance of its so-called nine-dash line).

## B. A Problem Long in the Making: The Svalbard Treaty and Sovereignty Implications

The involved history and politics behind the creation of the Svalbard Treaty have been explored elsewhere.<sup>59</sup> But the Treaty's most unusual feature—that Norway obtained sovereignty over the islands by mutual agreement—requires continuing attention. The Treaty's curious application of sovereignty granted Norway “full and absolute sovereignty” over the archipelago.<sup>60</sup> But it also granted states parties to the Treaty equal enjoyment and “liberty of access” rights to fish, hunt, and conduct other activities.<sup>61</sup> The Treaty's *ratione loci* extended these non-discrimination features only to Svalbard's territorial water and *terra firma*.<sup>62</sup> According to Norway, the application of the Svalbard Treaty extends no farther.<sup>63</sup> While the concept of the high seas existed at this time, along with the concept of the historic bay,<sup>64</sup> no other pelagic regimes currently impacting the debate existed, including, for instance, the contiguous zone, the continental shelf, the extended continental shelf, the EEZ, FPZ, the Area, or geo-spatial distinctions pertaining to ice-bound areas and marginal ice zones.

### I. Norway's View: Avoiding Anachronistic and Retrospective Application

Norway contends that the Treaty cannot be imbued with ambulatory, organic, or extrapolated significance. Such reasoning would require a retrospective reading back into the original agreement.<sup>65</sup> Re-reading original intentions from the perspective of modern law of the sea developments would embrace the worst form of anachronistic reasoning: It would

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<sup>59</sup> Presentations of the history and politics of Svalbard include, Christopher R. Rossi, ‘A Unique International Problem’: *The Svalbard Treaty, Equal Enjoyment, and Terra Nullius: Lessons of Territorial Temptation from History*, 15 WASH. U. GLOB. STUD. L.R. 93 (2016); THILO NEUMANN, DIE NORWEGISCHE ARKTIS IM VÖLKERRECHT: LANDGEBIETE – SEEGBIETE – GRENZGEBIETE (2013); Torbjørn Pedersen, *The Svalbard Continental Shelf Controversy: Legal Disputes and Political Rivalries*, 37 OCEAN DEV. & INT'L L. 339 (2006); Thor B. Arlov, *The Discovery and Early Exploitation of Svalbard. Some Historiographical Notes*, 22 ACTA BOREALIA 3 (2005); Geir Ulfstein, *THE SVALBARD TREATY: FROM TERRA NULLIUS TO NORWEGIAN SOVEREIGNTY* (1998); S.E. Albrethsen & T.B. Arlov, *The Discovery of Svalbard – A Problem Reconsidered*, FENNOSCANDIA ARCHAEOLOGICA V, 105 (1988); R.N. Rudmose Brown, *Spitsbergen in 1914*, 46 THE ROYAL GEOGRAPHICAL SOC'Y (WITH THE INSTITUTE OF BRITISH GEOGRAPHERS) 10 (1915).

<sup>60</sup> Svalbard Treaty, *supra* note 8, at art. 1.

<sup>61</sup> *Id.* at arts. 2–3.

<sup>62</sup> *Id.* at art. 2 (“in the territories specified in Article 1 and in their territorial waters.”).

<sup>63</sup> *See infra*, note 65.

<sup>64</sup> *See* Land, Island and Maritime Frontier Dispute (El Sal. V. Hond.; Nicar. Intervening), Judgment, 1992 I.C.J. REP. 351, 733, ¶ 11 (Sept. 11) (dissenting opinion of Judge Oda) (noting the limited legal divisions of the sea during the first part of the twentieth century but noting the idea of the historic bay arose around 1910).

<sup>65</sup> *See* Jensen & Rottem, *supra* note 49, at 80 (noting the argument that “one cannot apply the treaty's provisions on a presumption that the state would have widened the treaty's scope of application to the continental shelf and adjacent waters had they been aware of these legal arrangements in 1920”).

shade the context of the original agreement in terms most propitious to modern beneficiaries in terms essentially unreflective of the past.<sup>66</sup> It would foist presumptions onto the intentions of original signatories that conform to a mythology about what they would have done had they been aware of law of the sea developments in 1920.<sup>67</sup> Consequently, Norway restricts the Treaty to the “natural linguistic meaning” of its text,<sup>68</sup> making it inapplicable to the snow crab incident because the harvest took place outside of Svalbard’s territorial waters. This interpretation finds legal support from the *travaux préparatoires* of the Spitsbergen Commission, which reserved to Norway unqualified sovereignty over the remainder of Svalbard not subject to communal conditions,<sup>69</sup> and from Lord Asquith’s award in the famous *Abu Dhabi Arbitration*.<sup>70</sup> There, the geographic scope of an oil concession contract granted by the sheikh of Abu Dhabi came into play when the question arose whether the exclusive rights to drill extended to Abu Dhabi’s continental shelf, which did not legally exist at the time of the creation of the concession contract. Lord Asquith rejected the extension, reasoning that “it would be a most artificial refinement” to read an agreement in this way.<sup>71</sup>

Norway also argues that Svalbard does not have its own continental shelf—a point at odds with UNCLOS’ treatment of islands.<sup>72</sup> Instead, Norway compares Svalbard’s geological situation to Great Britain’s Shetland Islands or Russia’s Novaya Zemlya and Franz Josef Land. Norway claims its continental shelf extends uninterrupted from its continental landmass up

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<sup>66</sup> On the problem of historical anachronism, see Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HISTORY AND THEORY 3, 7 (1969).

<sup>67</sup> See Jensen & Rottem, *supra* note 49, at 80.

<sup>68</sup> Ministry of Justice and the Police, Report No. 9 to the Storting (1999–2000) § 4.1.1 (holding as a matter of international law that any restriction of sovereignty must be clearly based on treaty law according to provisions interpreted “on the basis of their natural linguistic meaning. . . . In cases of doubt, the interpretation that entails the least restriction of the exercise of authority is to be adopted”).

<sup>69</sup> See Sarah Wolf, *Svalbard’s Maritime Zones, their Status under International Law and Current and Future Disputes Scenarios*, 7 SWP WORKING PAPER FG2, 2013/NR. 02 (Jan. 2013), at 15 n. 20 (quoting The Spitsbergen Commission’s 1919 Paris Peace Conference preparatory work – “pour le surplus il y a lieu d’appliquer la souveraineté de la Norvège.”).

<sup>70</sup> See *Petroleum Dev. Ltd. v. Sheikh of Abu Dhabi*, 18 I.L.R. 141 (1951).

<sup>71</sup> *Id.* at 152.

<sup>72</sup> See UNCLOS, *supra* note 34, at art. 48 (establishing archipelagic baselines for measurement of the breadth of the territorial sea, contiguous zone, EEZ, and continental shelf), art. 121(1)–(3) (defining an island and ascribing to them characteristics involving the determination of their territorial sea, contiguous zone, EEZ and continental shelf).

to, around, and beyond Svalbard.<sup>73</sup> “Accordingly, the shelf areas around Svalbard are part of the Norwegian continental shelf.”<sup>74</sup>

## II. The EU's View: A Package Deal and Permutations on Sovereignty

The EU's view, however, emphasizes extending the treaty based on developments in the law of the sea. This argument finds support in *sui generis* attributes of the Svalbard Treaty, attributes that “made Svalbard distinct from the remainder of Norway.”<sup>75</sup> Three permutations on sovereignty support this *sui generis* argument. *Economically*, the Treaty restricts Norwegian fiscal policy, limiting imposts or taxes, which cannot favor the state above others in any way.<sup>76</sup> Norway's *ratione decidendi* to tax cannot “exceed what is required for the object in view,”<sup>77</sup> nor may taxes support Norway's mainland but instead must remit exclusively to the archipelago.<sup>78</sup> Norway also agreed to apply most favored nation status to all nationals of contracting parties, which, unusually, applies as well to “Norwegian nationals, ships or goods being for this purpose assimilated to those of the other High Contracting Parties.”<sup>79</sup> *Administratively*, the Treaty contained *pacta de contrahendo* provisions—essentially agreements to agree in the future<sup>80</sup>—which, for instance, required Norway to promulgate mining regulations, equally applicable to all, to regulate the principal, and historically turbulent, coal mining activity on Svalbard's largest island, Spitsbergen.<sup>81</sup>

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<sup>73</sup> See CARL AUGUST FLEISCHER, FOLKERETT 112 (1994).

<sup>74</sup> *Continental Shelf – Questions and Answers*, Ministry of Foreign Affairs, GOVERNMENT.NO, <https://www.regjeringen.no/en/topics/foreign-affairs/international-law/continental-shelf-questions-and-answers/id448309/> (last updated Apr. 11, 2009).

<sup>75</sup> D.H. Andersen, *The Status Under International Law of the Maritime Areas Around Svalbard*, 40 OCEAN DEV. & INT'L L. 373, 374 (2009).

<sup>76</sup> Svalbard Treaty, *supra* note 8, at art. 8.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*; see also *Svalbard Treaty*, SYSSELMANNEN, THE GOVERNOR OF SVALBARD, <http://www.sysselmannen.no/en/Toppmeny/About-Svalbard/Laws-and-regulations/Svalbard-Treaty/> (restating Norwegian obligations under the Svalbard Treaty) (last modified Aug. 2, 2016).

<sup>79</sup> Svalbard Treaty, *supra* note 8, at art. 3.

<sup>80</sup> For more discussion of *pactum de contrahendo*, see *Obligation to Negotiate Access to the Pacific Ocean* (Bol. v. Chile), Preliminary Objection, 2015 I.C.J. REP., 656 (Sep. 24) (discussing preliminary aspects on whether Chile was obligated to negotiate in good faith Bolivia's sovereign access to the Pacific Ocean).

<sup>81</sup> For discussions of the labor strife among coal miners that beset Spitsbergen's mining communities from 1906 to 1920, see BARBARA KEMPEN, DER VÖLKERRRECHTLICHE STATUS DER INSELGRUPPE SPITZBERGEN 17 (1995); and THOR B. ARLOV, A SHORT HISTORY OF SVALBARD 58 (1989). Norway honored its pledge, creating a Mining Code for Svalbard, which ended years of labor strife. See *The Mining Code (the Mining Regulations) for Spitsbergen (Svalbard)*, laid down by Royal Decree of Aug. 7, 1925 as amended by Royal Decree of June 11, 1975, *available at* Regulations [C], THE GOVERNOR OF SVALBARD, <http://www.sysselmannen.no/en/Toppmeny/About-Svalbard/Laws-and-regulations/Regulations/> (last modified Mar. 17, 2016). The Treaty required the parties to establish by subsequent convention the organization

*Politically*, the Treaty requires that Svalbard remain demilitarized.<sup>82</sup> It also contained an ambulatory feature: It expressly granted standing to stateless Russian nationals, who were afforded the same enjoyment rights as nationals of High Contracting Parties. This provision extended a placeholder status to Russia until that time when conditions permitted recognition of Russia's accession to the agreement.<sup>83</sup> Victorious World War I powers had diplomatically refused to recognize Bolshevik Russia at that time, but did not overlook Russia's historical involvement with Svalbard, which dated to Pomor hunters of the early Middle Ages.<sup>84</sup>

None of these features reflects a Westphalian interpretation of sovereignty. Indeed, the Svalbard Treaty's peculiar qualifiers impart oxymoronic nuance to Norway's "full and absolute sovereignty," making the Treaty stand out in sovereignty's modern genealogy. In his highly regarded text, *Statsforvalningen i Norge*, Johs Andenæs, concluded "Svalbard does not have the same exclusive character as sovereignty over territory elsewhere."<sup>85</sup>

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and conditions for establishing meteorological stations and scientific investigations (Art. 5) and conditioned the establishment of communications systems and environmental controls on a footing open and absolutely equal to all (art. 4 (communications) and art. 2 (fauna and flora)). Molenaar noted these administrative regulations implicitly amounted to stipulations conditioning Norway's "unrestricted" territorial jurisdiction. Molenaar, *supra* note 10, at 11–12.

<sup>82</sup> Svalbard Treaty, *supra* note 8, at art. 9 (requiring Norway not to create nor allow naval bases or fortifications, "which may never be used for warlike purposes"). For an assessment of the Treaty's demilitarization provision, see Timo Koivurova & Filip Holiencin, *Demilitarisation and Neutralisation of Svalbard: How Has the Svalbard Regime Been Able to Meet the Changing Security Realities During Almost 100 Years of Existence?*, 53 POLAR REC. (published online Jan. 25, 2017) <https://doi.org/10.1017/S0032247416000838>.

<sup>83</sup> Svalbard Treaty, *supra* note 8, at art. 10 ("Until the recognition by the High Contracting Parties of a Russian Government shall permit Russia to adhere to the present Treaty, Russian nationals and companies shall enjoy the same rights as nationals of the High Contracting Parties").

<sup>84</sup> See A.N. VYLEGZHANIN & V.K. ZILANOV, SPITSBERGEN: LEGAL REGIME OF ADJACENT MARINE AREAS 1–2 (W.E. Butler ed. and trans., 2017) (referring to Spitsbergen as Grumant). When the Svalbard Treaty had been opened for signature in 1920, the Allied powers had adopted a policy of diplomatic non-recognition against Bolshevik Russia in retaliation for their early exit from World War I and later for expropriating western concession contracts. The Bolsheviks lost their representation at the 1919 Versailles Peace Conference because earlier, in 1918, they had signed a separate peace with Germany, the Brest-Litovsk Treaty, to pursue their socialism in one country policy and to tend exclusively to the unfolding civil war in Russia following the 1917 revolution. The Brest-Litovsk Treaty contained a *pactum de contrahendum* provision that meant to place Russia and Germany on equal footing in the future settlement of the status of Spitsbergen. Germany's defeat in the war nullified the Brest-Litovsk Treaty, forcing the Soviets in 1924 to recognize Norway's sovereignty in exchange for Norway's recognition of Soviet Russia. The special status conferred to Russian nationals and the possibility of joining the convention were Allied concessions made in recognition of the established Russian historical presence on Spitsbergen in the mining community of Barents, which has since also expanded to the settlement at Pyramiden. See Rossi, *supra* note 59, at 128–32.

<sup>85</sup> See Torbjørn Pedersen, *The Continental Shelf Controversy*, 37 OCEAN DEV. & INT'L L. 339, 345 (quoting Johs Andenæs' "classic" text, *STATSFORVALTNINGEN I NORGE* 84 (1990)).

Absolute sovereignty formed as an indivisible sixteenth century idea.<sup>86</sup> Divisible sovereignty, involving the delegation and/or pooling of sovereignty to agents or international organizations, developed during intervening centuries, but it arose as a delegation of authority from within the state,<sup>87</sup> as part of the structuration of emerging global, political, and economic exchange networks. Norway's sovereignty over Svalbard spawned with internal and external stipulations, even mandating condominium-like arrangements establishing open and free scientific and meteorological exchange.<sup>88</sup> This hybridized sovereignty reworked the limits of legal pluralism, which ushered in the modern age of state relations by establishing the internal autonomy of states (*domaine réservé*) bounded by voluntary, external relations.<sup>89</sup> Svalbard's taken-for-granted status as a "no-man's land" also admitted to a hybridized interpretation. The arrival of permanent inhabitants in the late nineteenth century, linked to the emerging coal-mining industry, produced a need for political administration.<sup>90</sup> A loose-knit regulatory regime arose, but it was independent of any one state's possessory claim of title (*à titre de souverain*). In the midst of pre-World War I international conferences designed to shore up this regime,<sup>91</sup> J.H.W. Verzijl, the eminent Dutch historian of international law, labeled Svalbard's unfolding political arrangement an "artificial *territorium nullius*."<sup>92</sup> These conferences intended to reach international agreement over Svalbard's administration,<sup>93</sup> initiated in 1872 between Russia and the United Kingdoms of Sweden-Norway, but instead sought to inhibit any one state's

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<sup>86</sup> The classical exposition of absolute or indivisible sovereignty traces to JEAN BODIN, *LES SIX LIVRES DE LA RÉPUBLIQUE*, I.VIII (1576) ("*La souveraineté est la puissance absolue et perpétuelle d'une République*").

<sup>87</sup> See, e.g., David A. Lake, *Delegating Divisible Sovereignty: Sweeping a Conceptual Minefield*, 2 REV. INT'L ORG. 219 (2007) (discussing the divisibility of sovereignty as distinct activities arising from delegating and pooling authority from within domestic political systems).

<sup>88</sup> Svalbard Treaty, *supra* note 9, at art. 5; see generally Jacek Machowski, *Scientific Activities on Spitsbergen in the Light of the International Legal Status of the Archipelago*, 16 POLISH POLAR RES. 13–35 (1995). For more information on science exchange, see *Svalbard Science Forum*, RESEARCH COUNCIL OF NORWAY, <http://www.forskingsradet.no/prognett-ssf/Documents/1253977852390>.

<sup>89</sup> See I E. de Vattel, *Le Droit De Gens ou Principes de la loi Naturelle: Appliqués à la Conduite et aux Affaires des Nations et des Souverains* 9 (with an Introduction by Albert de Lapradelle, 1916) [1758] (*De cette Liberté & indépendance, il suit que c'est à chaque Nation de juger de ce que sa conscience exige d'elle, de ce qu'elle peut ou ne peut pas, de ce qu'il lui convient ou ne lui convient pas de faire*).

<sup>90</sup> See Robert Lansing, *A Unique International Problem*, 11 AM. J. INT'L L. 763, 764 (1917) (noting the extraordinary circumstance of Spitsbergen's settlement following the coal-rush and its lack of political administration).

<sup>91</sup> See generally Fred K. Nielsen, *The Solution of the Spitsbergen Question*, 14 AM. J. INT'L L. 232 (1920) (discussing the history of the 1910, 1912, and 1914 Spitsbergen conferences).

<sup>92</sup> J.H.W. VERZIJL, *IV INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE* 269 (1971). Two draft treaties were put forth but no agreement was reached before the outbreak of World War I. See Wolf, *supra* note 69, at 7 (noting at the 1914 conference Germany and the U.S. insisted on participating in the future governance structure of Svalbard, but "[n]o agreement was reached before the outbreak of World War I").

<sup>93</sup> See generally Nielsen, *supra* note 91.

annexation of the territory<sup>94</sup> while maximizing economic opportunities for Dutch, British, American, Russian, and Swedish-Norwegian mining stakeholders.<sup>95</sup>

If the Treaty is interpreted holistically or with these peculiarities in mind, Norway's sovereignty amounts to a qualified sovereignty—qualified in the sense that its benefits were borne out of extant conditions that admitted to shared and reciprocated allowances and understandings pertaining to pelagic space and solid ground. According to D.H. Anderson, the wording reads like a “package deal,” where “[e]ach party gave something and received something in return.”<sup>96</sup> Were one party to receive a subsequent benefit, owing to the extension of the Treaty, the benefit would apply to all based on the Treaty's non-discrimination provisions. E.J. Molenaar came to the same conclusion with an *a contrario* argument: Not to uphold this position “would make Norway ‘more equal than’ other contracting parties.”<sup>97</sup>

Consideration of the Treaty's *chapeau* supports these views. The Treaty's preamble specifically intended to create an equitable regime that would allow states parties to develop and peacefully utilize Svalbard and its surrounding water, supporting the EU's claim that the Treaty's equitable objects and purposes and its non-discrimination features extend beyond the Treaty's original scope and textual terms.<sup>98</sup>

The general rule of interpretation of agreements—contained in the Vienna Convention on the Law of Treaties<sup>99</sup>—offers support for both perspectives. “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty [the textual or restrictive canon of interpretation; Norway's view] in their context [the contextual canon of interpretation; which arguably supports both Norway's and the EU's view] and in light of its object and purpose [the teleological canon of interpretation; EU's view].”

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<sup>94</sup> See James Brown Scott, *Arctic Exploration and International Law*, 3 AM. J. INT'L L. 928, 941 (1909) (noting that the international conference initiated in 1910 regarding Spitzbergen attempted “to establish a system of administration, without, however, appropriating the islands to any one of the participating powers or changing the status as *terra nullius*.”).

<sup>95</sup> See Dag Avango, SVALBARD ARCHAEOLOGY (2005), <http://www.svalbardarchaeology.org/history.html>.

<sup>96</sup> D.H. Anderson, *The Status Under International Law of the Maritime Areas Around Svalbard*, 40 OCEAN DEV. & INT'L L. 373, at 374–75 (2009).

<sup>97</sup> Molenaar, *supra* note 10, at 53.

<sup>98</sup> *Cf. id.* at 11 (noting the equitable provisions of the Treaty's preamble).

<sup>99</sup> Vienna Convention on the Law of Treaties art. 31, Jan. 27, 1980, 1155 U.N.T.S. 331.

How this rule applies to this dispute remains uncertain. Leading law of the sea scholars, Robin Churchill and Geir Ulfstein, referred to the restrictive cannon as “old-fashioned.”<sup>100</sup> So, too, did Arnold McNair. As he noted, treaties impart obligations on both parties and they limit sovereign power.<sup>101</sup> Undue attention to restrictive interpretations reduces the reciprocal benefit or consideration owed the other party, thus defeating the intentions of the parties.<sup>102</sup> Norway has not acceded to the Vienna Convention,<sup>103</sup> and even if the general rule on treaty interpretation were to comport with customary state practice, respected legal authorities express uncertainty as to the outcome, should the interpretation of Svalbard's sovereignty provision end up the subject of an international adjudication.<sup>104</sup>

In contrast to the *Abu Dhabi Arbitration*, the EU's position finds support from the *Aegean Sea Continental Shelf* case.<sup>105</sup> There, Greece attached a reservation to the compulsory jurisdiction of the International Court of Justice (ICJ), removing from the ICJ's purview disputes pertaining “in particular” to the “territorial status of Greece.”<sup>106</sup> This reservation was made before establishment of the continental shelf doctrine.<sup>107</sup> Greece later instituted proceedings against Turkey in respect of a dispute concerning the delimitation of the continental shelf appertaining to each of the two states, and specifically due to disputed oil exploration activity initiated by a Turkish petroleum company. Turkey refused to appear, but

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<sup>100</sup> Robin Churchill & Geir Ulfstein, *The Disputed Maritime Zones Around Svalbard*, in *CHANGES IN THE ARCTIC ENVIRONMENT AND THE LAW OF THE SEA* 551, 566 (Myron Nordquist et al. eds., 2010).

<sup>101</sup> LORD ARNOLD MCNAIR, *THE LAW OF TREATIES* 765 (Clarendon Press ed. 1961).

<sup>102</sup> See *id.* (referring to the outcome as “absurd” and holding: “It is difficult to believe that this [result] could accord with the intention of contracting parties).

<sup>103</sup> See Vienna Convention on the Law of Treaties, *supra* note 99.

<sup>104</sup> Churchill and Ulfstein concluded it is “not possible to reach a clear-cut and unequivocal conclusion as to the geographical scope of the non-discriminatory right of all parties to the Svalbard Treaty to fish and mine in the waters around Svalbard.” Churchill & Ulfstein, *supra* note 100, at 593.

<sup>105</sup> *Aegean Sea Continental Shelf* (Gr. V. Turk.), Judgment, 1978 I.C.J. REP. 3 (Dec. 19).

<sup>106</sup> The text of the reservation (b) excluded from the procedures of the General Act “disputes concerning questions which by international law are solely within the domestic jurisdiction of States, and in particular disputes relating to the territorial status of Greece . . . .” See *id.* at ¶¶ 39, 48–49 (having “*et, notamment*” in the original French of the reservation). The basis of jurisdiction stemmed from application of Article 17 of the General Act of 1928 for the Pacific Settlement of International Disputes, which pertained to the ICJ's predecessor, the Permanent Court of International Justice, which was then read in conjunction with Articles 36 and 37 of the ICJ's Statute of the Court. See *id.* at ¶¶ 32–34.

<sup>107</sup> See *id.* ¶¶ 77–80 (noting Greece's argument that the very idea of the continental shelf was wholly unknown in 1928 when the General Act was concluded, and in 1931, when Greece acceded to the Act).

the ICJ, *proprio motu*, examined the question of its own jurisdiction,<sup>108</sup> and took notice of Greece's reservation, which it determined Turkey had properly invoked in an earlier communication.<sup>109</sup> Greece maintained that a restrictive view of its reservation applied by virtue of the historical context—meaning the “territorial status of Greece” at that time—related to territorial settlements established by peace treaties after World War I.<sup>110</sup> The Court disagreed. The expression “territorial status” used in the Greek reservation in 1931—when Greece acceded to the Act containing the term<sup>111</sup>—“did not have the very specific [restrictive] meaning attributed to it by the Greek Government . . . it was a generic term.”<sup>112</sup> This generic usage denoted “any matters properly to be considered as comprised within the concept of territorial status under general international law.”<sup>113</sup> Moreover, as a generic term, “its meaning was intended to follow the evolution of the law [and ‘international relations’]”<sup>114</sup> and to correspond with the meaning attached to the expression by the law in force at any given time.<sup>115</sup> The Court held that disputes relating to the territorial status of Greece, absent a plain showing to the contrary at that time,<sup>116</sup> “must be interpreted in accordance with the rules of international law as they exist today, and not as they existed in 1931.”<sup>117</sup>

### C. Norway's 'Bold Gamble': Balancing Two Tracks

If the Vienna Convention's general rule of interpretative rule contains conflicting, perhaps concessionary viewpoints (due to innate characteristics of multilateral decision-making), Norway's interpretation of its sovereign rights regarding the Svalbard Treaty nevertheless

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<sup>108</sup> Aegean Sea Continental Shelf, *supra* note 105, at ¶ 15. In the case of a non-appearing party, the Statute of the ICJ requires that the Court satisfies itself that it has jurisdiction. See Statute of the International Court of Justice, art. 53, [http://www.icj-cij.org/documents/?p1=4&p2=2#CHAPTER\\_III](http://www.icj-cij.org/documents/?p1=4&p2=2#CHAPTER_III).

<sup>109</sup> Aegean Sea Continental Shelf, *supra* note 105, at ¶ 43 (“In the view of the Court, [Turkey's invocation of reservation (b) in a] formal statement, made in response to a communication from the Court, must be considered as constituting an ‘enforcement’ of the reservation”).

<sup>110</sup> See *id.* at ¶¶ 69–76 (contemplating the expression “territorial status” restrictively within the context of usages during the League of Nations period and in the General Act of 1928).

<sup>111</sup> See *id.* at ¶ 77 (noting 1931 as the year of Greece's accession to the Act).

<sup>112</sup> *Id.* at ¶ 75.

<sup>113</sup> *Id.* at ¶ 76.

<sup>114</sup> *Id.* at ¶ 79.

<sup>115</sup> *Id.* at ¶ 77.

<sup>116</sup> See *id.* at ¶ 79.

<sup>117</sup> *Id.* at ¶ 80.

contributes to its increasing political isolation on this issue of *Nordpolitik*.<sup>118</sup> Inconsistencies in defense of its interpretation aggregate to weaken Norway's long-term objective. And there have been costs. Principal NATO allies have kept their distance;<sup>119</sup> Iceland, Denmark, and Spain have confronted Norway directly,<sup>120</sup> so, too has Russia;<sup>121</sup> Finland withdrew its support and Canada's support has waned;<sup>122</sup> the EU foreshadowed its opposition in an "unprecedented and hostile" *Note Verbale* in 2004,<sup>123</sup> and in 2006, Great Britain hosted Arctic stakeholders in discussions about Svalbard's continental shelf, but Norway was not invited to attend.<sup>124</sup>

<sup>118</sup> See *Norway and EU Lock Claws in Crabbing Dispute*, THE LOCAL (Norway) (Feb. 14, 2017), <http://www.thelocal.no/20170214/norway-and-eu-lock-claws-in-crabbing-dispute> (quoting Geir Ulfstein: "No country is yet to support Norway's view on this matter"); see also RYSZARD M. CZARNY, *THE HIGH NORTH: BETWEEN GEOGRAPHY AND POLITICS* 118 (2015) (noting that no foreign country agrees with Norway's position on the maritime zone around Svalbard).

<sup>119</sup> CZARNY, *supra* note 118, at 139 ("Norway's allies emphasize that they do not support its claims (the case in point is the UK's diplomatic note) while the EU refrains from commenting on disputes between States which are not members of the Community, while the U.S. maintains strict neutrality"); see also *Note Verbale* (Mar. 11, 2006), reprinted in 78 BRIT. Y.B. INT'L L. 794 (2007) (informing that "[t]he United Kingdom considers that the Svalbard archipelago, including Bear Island, generates its own maritime zones, separate from those generated by other Norwegian territory. . . . It follows therefore that there is a continental shelf and an exclusive economic zone which pertain to Svalbard"); Torbjørn Pedersen, *International Law and Politics in U.S. Policymaking: The United States and the Svalbard Dispute*, 42 OCEAN DEV. & INT'L L. 120 (2011) (noting the U.S. is keeping its options open).

<sup>120</sup> See Heather A. Conley, *Lessons for the Arctic: Developing an International Normative Framework for a New Ocean*, in HISTORY LESSONS FOR THE ARCTIC 1, 19–20 (Heather A. Conley ed., 2016) (labeling Spain "the most persistent and vocal opponent of Norway's" FPZ, and noting the 1994 *Hagangur II* incident involving the Icelandic trawler's refusal to leave the FPZ); Torbjørn Pedersen, *Denmark's Policies Toward the Svalbard Area*, 40 OCEAN DEV. & INT'L L. 319 (2009) (noting Denmark's shift toward a policy of confrontation with Norway). Other notable confrontations included the Kiel Case (Mar. 21, 2014), <https://lovdata.no/dokument/HRSTR/avgjorelse/hr-2014-577-a> (involving a German vessel penalized by Norway for violating by-catch haddock regulations within Svalbard's FPZ; holding that the penalty did not violate non-discrimination provisions of the Svalbard Treaty); the detention of the Spanish vessels, *Monte Meixueiro* and *Garoya Segundo* in 2005, [http://www.savethehighseas.org/publicdocs/GP\\_IUUBriefing\\_Spanishvessels.pdf](http://www.savethehighseas.org/publicdocs/GP_IUUBriefing_Spanishvessels.pdf); and the *Olazar* and *Olaberrri* (involving detention of Spanish trawlers in the FPZ; holding in favor of Norway). See Rachel Tiller & Susanne Therese Hansen, *International Regime Analyses in the Northeast Atlantic*, 3 J. ENVIRON. STUD. SCI. 217, 221 (2013).

<sup>121</sup> See, e.g., Kristian Åtland & Kristin Ven Bruusgaard, *When Security Speech Acts Misfire: Russia and the Elektron Incident*, 40 SECURITY DIALOGUE 333 (2009) (involving the hot pursuit of the Russian trawler, *Elektron*, accused of illegally fishing in the FPZ, with two Norwegian coast guard inspectors aboard).

<sup>122</sup> See Churchill & Ulfstein, *supra* note 100, at 564.

<sup>123</sup> See Torbjørn Pedersen, *The Dynamics of Svalbard Diplomacy*, 19 DIPL. & STATECRAFT 237, 250 (2008).

<sup>124</sup> See Torbjørn Pedersen, *International Law and Politics in U.S. Policymaking: The United States and the Svalbard Dispute*, 42 OCEAN DEV. & INT'L L. 120, 131 (2011).

*I. Norway's Appropriative Design*

Norway began formalizing its appropriative designs over Svalbard's continental shelf in 1970, the year before it ratified the Continental Shelf Convention.<sup>125</sup> One part of this initiative dealt with opening negotiations with the Soviet Union to demarcate the boundary between the two countries' adjacent continental shelves.<sup>126</sup> Another part related to fixing Svalbard's territorial sea.<sup>127</sup> In that year, by Royal Decree, Norway drew straight baselines around Svalbard, distinguishing internal waters from territorial sea, marking coordinates from eighty-three points surrounding the outermost headlands of Svalbard.<sup>128</sup> The straight baselines enclosed islands and bays in a surrounding four nautical mile territorial sea,<sup>129</sup> in accordance with Norway's claim established in 1920.<sup>130</sup> But the use of the straight baseline technique affixed to the islands' outermost headlands also had the twin effect of increasing the extent of internal waters and territorial waters, thus converting the territorial sea into something other than what was understood in 1920.<sup>131</sup> Norway, it appears, was the first to imbue the Treaty with ambulatory significance.

A declassified Norwegian intelligence report unveiled that this measure intended to secure "unrestricted Norwegian jurisdiction" over the seabed from the tip of Norway's continental

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<sup>125</sup> See *Convention on the Continental Shelf, Status*, UNITED NATIONS TREATY COLLECTION, (Sept. 9, 1971), [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXI-4&chapter=21&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-4&chapter=21&clang=_en) (recording that Norway ratified the treaty on Sept. 9, 1971).

<sup>126</sup> See Odd Gunnar Skagestad, *De Norske Besittelser i Nord-Ishavet: En Sikkerhetspolitisk Analyse* (Utarbeidet i 1971 på oppdrag av E-staben (Dorsvarets Overkommando (declassified on May 27, 2004), <http://ogskagestad.net/NordishavetSikkerhetspolAnalyse71.pdf> (relating to the first of two important initiatives undertaken in 1970: "Det ene gjaldt å forhandle med SSSR for å få fastlagt grenselinjen mellom de to lands kontinentalsokler").

<sup>127</sup> See *id.* at 25 (noting "[the second initiative] fra norsk side var at myndighetene våren 1970 fastsatte en sjøterritorialgranse på 4 n. mil for Svalbard.>").

<sup>128</sup> Royal Decree of Sept. 25, 1970 Concerning the Delimitation of the Territorial Waters of Parts of Svalbard, [http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR\\_1970\\_DelimitationDecree.pdf](http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_1970_DelimitationDecree.pdf).

<sup>129</sup> *Id.*

<sup>130</sup> See Anderson, *supra* note 96, at 376 (noting "[i]n 1920, Norway claimed [four] nautical miles of territorial sea").

<sup>131</sup> See *id.* (noting because of the employment of strait baseline the 1920 Treaty "must now be interpreted as applying . . . not as it was, but rather as it is today"). UNCLOS values the use of straight baselines but limits their application other than from measuring the breadth of the territorial sea using the low-water line (art. 5) to localities where the coastline is deeply indented or if a fringe of islands exists in the immediate vicinity along the coast (art. 7). The I.C.J. has affirmed that employment of the method of straight baselines is an exception to the normal rule and is contingent on circumstances enumerated above and must be applied restrictively. See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahr.), Judgment, 2001 I.C.J. REP. 40, ¶ 212 (Mar. 16).

landmass and around Svalbard, except from the areas within the four nautical mile zone.<sup>132</sup> It described Norway's strategy as a "bold gamble" ("*høyt spill*").<sup>133</sup> Significantly, in 2004, Norway extended the breadth of Svalbard's territorial sea again to twelve nautical miles to bring into conformity that Treaty's territorial sea parameter with the new territorial sea limit established by UNCLOS.<sup>134</sup> The decree also acceded to and specifically recognized the extension of Svalbard's contiguous zone, a twelve nautical band adjacent to the territorial sea established for purposes of coastal state police power.<sup>135</sup> Both extensions breathed ambulatory significance into otherwise static features of the Svalbard Treaty.

## II. Additional Inconsistencies

Nuancing the bold gamble to secure the geo-space surrounding the donut-hole of Svalbard has generated additional inconsistencies for Norway. Central to the law of the sea is the proposition that maritime zones generate from land territory.<sup>136</sup> In familiar legal terms, the land dominates the sea.<sup>137</sup> This terrestrial emphasis stood behind the establishment of the canon shot rule,<sup>138</sup> the first sovereign encroachment into pelagic space, and it reinforced the rapid coalescence of continental shelf doctrine, formally introduced the Truman

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<sup>132</sup> See Skagestad, *supra* note 126, at 25 ("*Formålet med fastsettelsen av 4 mils-grensen for Svalbards sjøterritorium var åpenbart å legge det formelle grunnlaget for et eventuelt krav om uinnskrenket norsk råderett over havbunnen såvel fra Nordkapp til Svalbard som omkring Svalbard, bortsett fra de områder som faller innenfor den nevnte 4 mils-grense, og som blir å omfatte av Svalbardtraktatens bestemmelser*").

<sup>133</sup> *Id.* at 26 ("*I korthet kan man altså si at det ser ut som om Norge satser på et høyt spill hvor målet er det dobbelte: (1) Norsk kontroll over kontinentalsokkelen nord for Norge og omkring Svalbard, og (2) en avtalefestet og for Norge gunstig avgrensning av det norske sokkelområdet mot øst*") (footnote omitted).

<sup>134</sup> Act No. 57 Relating to Norway's Territorial Waters and Contiguous Zone, 27 June 2003, 54 LAW OF THE SEA BULLETIN 97 (2004), [http://www.un.org/Depts/los/doalos\\_publications/LOSBulletins/bulletinpdf/bulletin54e.pdf](http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin54e.pdf). For maps of Norway's extension of Svalbard's territorial sea—except Bjørnøya—see *id.* at 94–95.

<sup>135</sup> *Id.* at 97.

<sup>136</sup> Robert Beckman, *The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea*, 107 AM. J. INT'L L. 142, 149 (2013).

<sup>137</sup> See Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. REP. 1, ¶ 140 (Nov. 19); Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangl. v. Myan.), I.T.L.O.S. Case No. 16, ¶ 185 (Mar. 12, 2012); Maritime Delimitation in the Black Sea (Rom. v. Ukr.), Judgment, 2009 I.C.J. REP. 40, ¶ 77 (Feb. 3); North Sea Continental Shelf Cases (F.R.G. v. Den., F.R.G. v. Neth.), Judgment, 1969 I.C.J. REP. 30, ¶ 39 (Feb. 20); Aegean Sea Continental Shelf Case, *supra* note 105, at 36. For doctrinal exposition, see Bing Bing Jia, *The Principle of the Domination of the Land Over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New Challenges*, GER. Y.B. INT'L L. 1 (2014); and Lea Brilmayer, *Land and Sea: Two Sovereignty Regimes In Search of a Common Denominator*, 33 N.Y.U.J. INT'L L. & POL. 203 (2000–01).

<sup>138</sup> See generally H.S.K. Kent, *Historical Origins of the Three-Mile Limit*, 48 AM. J. INT'L L. 537 (1954) (on Danish-Norwegian, later Swedish, and Dutch claims to sea space that a sovereign could command with a cannon from shore, later enshrined in doctrinal form by Cornelius van Bynkershoek).

Proclamations of 1945.<sup>139</sup> Norway embraced this consolidation through a series of Royal Decrees in 1963,<sup>140</sup> 1965,<sup>141</sup> 1969,<sup>142</sup> and 1970.<sup>143</sup> The ICJ affirmed coastal states' right of exclusive sovereign enjoyment of the resources of the continental shelf as "exist[ing] *ipso facto* and *ab initio*, by virtue of sovereignty over the land, and as an extension of it."<sup>144</sup> The Court interpreted the *ab initio* application of coastal state sovereignty over the continental shelf as an inherent right, needing "no special legal process" or act to invoke or operationalize.<sup>145</sup> The continental shelf assimilates into the territory of the coastal state because it is an emanation of and appurtenant to that territory.<sup>146</sup> But Norway rejected application of the *ab initio* doctrine in Svalbard's case,<sup>147</sup> despite historically embracing it through Royal Decree for extending its mainland continental shelf. Anderson noted the incongruity, referring to it as "problematic," and noted Svalbard has its own natural

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<sup>139</sup> Proclamation No. 2667, Sept. 28, 1945, Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, 13 DEP'T ST. BULL. 485 (1945). A second proclamation (No. 2668) issued the same day related to the establishment of a conservation and fishery protection resource zone contiguous to the coasts of the U.S. See *id.* at 486 (Proclamation No. 2688, Sept. 28, 1945, Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas).

<sup>140</sup> See Royal Decree of May 31, 1963 Relating to the Sovereignty of Norway over the Sea-Bed and Subsoil outside the Norwegian Coast, [http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR\\_1963\\_Decree.pdf](http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_1963_Decree.pdf); Act of June 21, 1963 Relating to Exploration and Exploitation of Submarine Natural Resources, [http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR\\_1963\\_Act.pdf](http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_1963_Act.pdf).

<sup>141</sup> See Royal Decree of Apr. 9, 1965 Relating to Exploration for the Exploitation of Petroleum Deposits in the Sea-Bed and its Subsoil on the Norwegian Continental Shelf, [http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR\\_1965\\_Decree.pdf](http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_1965_Decree.pdf).

<sup>142</sup> See Royal Decree of Jan. 31, 1969 Establishing Rules Relating to Scientific Research for Natural Resources on the Norwegian Continental Shelf, etc., [http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR\\_1969\\_Decree.pdf](http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_1969_Decree.pdf).

<sup>143</sup> See Royal Decree of June 21, 1970 Establishing Provisional Rules Concerning Exploration for Certain Submarine Natural Resources other than Petroleum on the Norwegian Continental Shelf, etc., [http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR\\_1970\\_Exploration\\_Decree.pdf](http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_1970_Exploration_Decree.pdf).

<sup>144</sup> North Sea Continental Shelf Cases (Ger./Den.; Ger./Neth.), Judgement, 1969 I.C.J. REP. 3, ¶ 19 (Feb. 20); Aegean Sea Continental Shelf Case, *supra* note 105, at ¶ 86.

<sup>145</sup> North Sea Continental Shelf Cases, *supra* note 144, at ¶ 19. See also Vladimir Golitsyn, *Continental Shelf Claims in the Arctic Ocean: A Commentary*, 24 INT'L J. MARINE & COST. L. 401, 402 (2009) (discussing interpretation of the *ab initio* doctrine).

<sup>146</sup> See Anderson, *supra* note 96, at 377.

<sup>147</sup> See Molenaar, *supra* note 10, at 14 (quoting Norway's Director-General of Legal Affairs in its Ministry of Foreign Affairs, Rolf Einar Fife's article, *Svalbard and the Surrounding Maritime Areas*, in HIGH NORTH STUDY TOUR 18–26: "[I]n accordance with established international law, the notion of the continental shelf cannot be assimilated to the concept of territory of a State").

prolongation, unconnected to the Norwegian mainland, as might be expected for islands larger than Belgium or the Netherlands.<sup>148</sup>

### 1. *The FPZ: Almost an EEZ*

Early into the third United Nations Conference on the Law of the Sea (UNCLOS III; 1973-1982), it became clear that the emerging convention would embrace the establishment of the EEZ.<sup>149</sup> This zone establishes sovereign rights over the living resources superjacent to the seabed and out to a distance of 200 nautical miles from the coastal state.<sup>150</sup> Anticipating that outcome, Norway intended to declare a 200 nautical mile EEZ around its mainland in 1976.<sup>151</sup> In principle, the domestic law applied to Svalbard, but facing protests,<sup>152</sup> Norway opted instead to establish a FPZ around Svalbard.<sup>153</sup> Norway modeled its claim after a similar FPZ established by Denmark around the Faroe Islands,<sup>154</sup> but UNCLOS does not contemplate such a regime. Norway then extended the Svalbard Treaty's non-discrimination feature to other fleets that had an historical presence in these waters,<sup>155</sup> but reserved the right to exclusive future use.<sup>156</sup> Critics viewed Norway as maneuvering to preserve future

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<sup>148</sup> Anderson, *supra* note 96, at 377.

<sup>149</sup> See Hønneland, *supra* note 54, at 341 (noting adoption of the EEZ principle at the beginning of UNCLOS III meetings in 1975); Pedersen, *supra* note 120, at 323 (noting UNCLOS III's embrace of the concept of a 200-nautical-mile zone was "firmly established" by 1975).

<sup>150</sup> See Pedersen, *supra* note 120, at 323 (noting UNCLOS III's embrace of the concept of a 200-nautical-mile zone was "firmly established" by 1975).

<sup>151</sup> Act No. 91 of Dec. 17, 1976 Relating to the Economic Zone of Norway (establishing outer limits at a distance of 200 nautical miles from applicable baselines), [http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR\\_1976\\_Act.pdf](http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_1976_Act.pdf); Royal Decree of Dec. 17, 1976 Relating to the Establishment [sic] of the Economic Zone of Norway, [http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR\\_1976\\_Decree.pdf](http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_1976_Decree.pdf).

<sup>152</sup> See Andrew Yerkes, *Whose Fish? Looking at Svalbard's Fisheries Protection Zone*, POLAR CONNECTION (Dec. 4, 2016), <http://polarconnection.org/svalbard-fisheries-protection-zone/> (noting NATO member reservations, including the U.S., U.K., France, and West Germany, and Warsaw Pact reservations to Norway's unilateral extension of a maritime zone adjacent to Svalbard in 1977); see also Hønneland, *supra* note 54, at 342 (noting Norway refrained from claiming an EEZ around Svalbard due to protests from other Svalbard Treaty signatories).

<sup>153</sup> Robin R. Churchill, *Claims to Maritime Zones in the Arctic – Law of the Sea Normality or Polar Peculiarity?* in THE LAW OF THE SEA AND POLAR MARITIME DELIMITATION AND JURISDICTION 105, 117–18 (Alex G. Oude Elferink & Donald R. Rothwell eds., 2001) [hereinafter Churchill, *Polar Peculiarity*].

<sup>154</sup> See Petersen, *supra* note 120, at 323.

<sup>155</sup> Royal Decree of June 3, 1977 (Regulations on the Fishery Protection Zone around Spitsbergen. *Norsk Lovtidend*, 1977, Part 1, 508). See Tiller & Nyman, *supra* note 28, at 27 (noting Norway's non-discriminatory allocation of quotas were based on prior history of traditional fishing in the Svalbard area).

<sup>156</sup> Hansen, *supra* note 19, at 41 (noting Norway's non-discriminatory management practice for FPZ fishing, its claim of a legal right to restrict that practice, as well as the general compliance relating to Norwegian management

appropriative designs over Svalbard's continental shelf and EEZ while sidestepping controversy by converting the area into an outright property regime.<sup>157</sup> China has been accused, until recently (when it has become much more bold), of employing a similar "cabbage strategy"—wrapping the South China Sea in layers of appropriative design, consolidating claims when able to, and otherwise peeling away controversies with deliberately ambiguous rhetoric designed either to buy time to manage disagreements on a bilateral basis or to shore up incremental gains to forestall any overt reaction among a united opposition.<sup>158</sup> Norway's two-track policy suggests an effort to institutionalize intentions while biding time to build up political support.<sup>159</sup> Absent the coalescence of that support, however, a constructed course of dealing indicated a potential solution, whereby the artifice of Norwegian sovereign interest could be maintained while recognizing the extension of the Svalbard Treaty's equal access provisions to the geo-space regime beyond Svalbard's territorial sea.<sup>160</sup> "Norway adjusted its policy once again in the 1980s by increasingly inviting other states and actors to the region—specifically international oil companies in the Barents Sea—but purposefully avoided discussion of the exploitation of potential energy resources on the shelf around Svalbard."<sup>161</sup> For purposes of maintaining Norway's two-track High North policy, it appears that "too much attention" became "too much of a good thing." Balancing those interests in the current globalizing age of heightened interests in the High North—with, for instance, North Korea now the most recent signatory to the Svalbard Treaty<sup>162</sup>—appears increasingly unlikely.

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practices in the FPZ). Within the zone, Norway's managerial practice has included total allowable catch restrictions, declarations on areas off limits, regulations on mesh size, reporting requirements, and record keeping. See Churchill, *Polar Peculiarity*, *supra* note 153, at 118.

<sup>157</sup> See also ROBIN CHURCHILL & GEIR ULFSTEIN: MARINE MANAGEMENT IN DISPUTED AREAS: THE CASE OF THE BARENTS SEA 101 (1992) (noting Norway's creation of the FPZ intended to signal its right to establish an EEZ without provoking confrontation with other states). See generally Tiller & Nyman, *supra* note 47, at 141 (noting Norway's FPZ straddles a contradiction between stable, unofficial cooperation with Russia and the potential for conflict caused by that association).

<sup>158</sup> See Harry Kazianis, *China's Expanding Cabbage Strategy*, THE DIPLOMAT (Oct. 29, 2013), <http://thediplomat.com/2013/10/chinas-expanding-cabbage-strategy/>; Beckman, *supra* note 58 (noting China's deliberately ambiguous approach).

<sup>159</sup> See Tiller & Nyman, *supra* note 157, at 143 (discussing Norway's adaptive institutional trajectory for converting the FPZ into a Norwegian property regime depending on political winds).

<sup>160</sup> See Conley, *supra* note 113, at 19 (noting something of an informal "consensus" among the U.S., U.K., West Germany, and France).

<sup>161</sup> *Id.*

<sup>162</sup> See *DPRK Accedes to Svalbard Treaty*, KOREA CENTRAL NEWS AGENCY (Jan. 30, 2016), <http://www.kcna.kp/kcna.user.article.retrieveNewsViewInfoList.kcmsf#this> (announcing the Democratic People's Republic of Korea (DPRK)'s accession to the Svalbard Treaty on Jan. 25, 2016).

## 2. Svalbard's Continental Shelf

Norway's FPZ nevertheless advanced its own logic. Norway asserted that Svalbard generated an FPZ, and an EEZ (if so declared<sup>163</sup>), but not a continental shelf. This view "contradicts" UNCLOS,<sup>164</sup> and perhaps Norwegian practice. In 2006, when Norway and Denmark delimited the area between western Greenland and eastern Svalbard,<sup>165</sup> Norway extended base points to establish the median line not from its mainland, but from western Svalbard,<sup>166</sup> indicating that Norway viewed Svalbard as generating its own maritime zone.<sup>167</sup> Norway did the same thing in 2010, when it ended a forty-year dispute with Russia over an area in the eastern Barents Sea half the size of Germany (the "Loophole").<sup>168</sup> There, Norway again relied on baselines drawn not from the mainland, but from Svalbard base points off the coasts of Hopen, Kong Karls Land, and Kvitøya.<sup>169</sup> In the *Libya/Malta Case*, the ICJ framed the regime of the EEZ as "defined by reference to the regime" of the continental shelf.<sup>170</sup> While a state may have a continental shelf without declaring an EEZ, "there cannot be an [EEZ] without a corresponding continental shelf."<sup>171</sup> Presumably, the latter construction applies to Norway's expedient creation of Svalbard's FPZ.

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<sup>163</sup> See Churchill & Ulfstein, *supra* note 100, at 561 (noting an EEZ must be explicitly proclaimed, although not directly stated in UNCLOS).

<sup>164</sup> See UNCLOS, *supra* note 34, at arts. 48 & 121.

<sup>165</sup> Agreement between the Government of the Kingdom of Norway on the one hand, and the Government of the Kingdom of Denmark together with the Home rule Government of Greenland on the other hand, concerning the delimitation of the continental shelf and the fisheries zones in the area between Greenland and Svalbard (with chart), Feb. 20, 2006, 2378 U.N.T.S. 21, *entered into force* June 2, 2006.

<sup>166</sup> *Id.* at art. 1 (determining the boundary "on the basis of the median line between relevant coastlines of Greenland and Svalbard"); see also Anderson, *supra* note 96, at 377 ("The boundary agreement . . . between Denmark (Greenland) and Norway (Svalbard) appears to be based on the method of equidistance between the nearest basepoints in Greenland and Svalbard").

<sup>167</sup> See Churchill & Ulfstein, *supra* note 100, at 567 ("It is difficult to see how Svalbard can provide basepoints for determining an equidistance line if it does not have a continental shelf").

<sup>168</sup> See Konstantin Rozhnov, *Norway and Russia "Open Up for Business" in the Barents Sea*, BBC NEWS (Sep. 15, 2010), <http://www.bbc.com/news/business-11299024> (detailing the agreement).

<sup>169</sup> See Anderson, *supra* note 96, at 377 (concluding the basepoints Norway employed to close the Loophole lay off eastern Svalbard).

<sup>170</sup> Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, 1985 I.C.J. Rep. 18, ¶ 34 (June 3).

<sup>171</sup> *Id.*

### 3. Continental Shelf Extensions

A final inconsistency involving Norway's non-ambulatory interpretation of the Svalbard Treaty relates to continental shelf extension claims. In 2006, Norway submitted extension claims to the Commission on the Limits of the Continental Shelf (CLCS)<sup>172</sup> involving three separate areas in the Northeast Atlantic and the Arctic; one claim included the Western Nansen Basin north of Svalbard.<sup>173</sup> Norway's official position, presented to the CLCS, maintained that the outer limits of the continental shelf around Svalbard have no bearing on the question of what rules apply to the shelf within those limits.<sup>174</sup> Because a continuous continental shelf extends north from mainland Norway, "it would . . . not be appropriate to talk about Svalbard having its own, continental shelf."<sup>175</sup> But the continental shelf extension submitted by Norway measured from Svalbard towards the north (the Western Nansen Basin) and east (toward the Loophole),<sup>176</sup> made it "difficult to see how Svalbard can provide base points for determining" boundary delimitations if it does not have a continental shelf.<sup>177</sup> "[T]he map accompanying that part of Norway's submission [to the CLCS]" was measured from Svalbard to maximize the scope of Norway's extended continental shelf submission, even though it would have had to have been delimited from the Norwegian mainland, not Svalbard, if indeed Norway rejected the claim that Svalbard generates no continental shelf.<sup>178</sup>

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<sup>172</sup> Done in accordance with UNCLOS, *supra* note 34, at art. 76 (8).

<sup>173</sup> The other two claims extended into the Loophole region of the Barents Sea and the Banana Hole in the Norwegian Sea. See *Commission on the Limits of the Continental Shelf (CLCS): Outer Limits of the Continental Shelf Beyond 200 Nautical Miles from the baselines: Submissions to the Commission: Submission by the Kingdom of Norway, Oceans & Law of the Sea*, UNITED NATIONS (Nov. 27, 2006), [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_nor.htm](http://www.un.org/Depts/los/clcs_new/submissions_files/submission_nor.htm) [updated Aug. 20, 2009].

<sup>174</sup> See *Note Verbale, Permanent Mission of Norway to the United Nations*, Mar., 28, 2007, [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/nor06/note28march2007.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/note28march2007.pdf) (referring to the note dated Mar. 3, 2007 from Spain, maintaining that issues pertaining to certain provisions of the 1920 Treaty "do not affect in any manner the interpretation or application of the rules contained in article 76 of the Convention nor its Annex II, and have no bearing on the work of the Commission").

<sup>175</sup> *The Continental Shelf- Questions and Answers*, UTENRIKSDEPARTEMENTET, REGJERINGEN.NO, *supra* note 74.

<sup>176</sup> Churchill & Ulfstein, *supra* note 100, at 567.

<sup>177</sup> *Id.*

<sup>178</sup> See *id.* at 568.

The CLCS accepted Norway's submission and made its recommendations pertaining to the Western Nansen Basin area north of Svalbard.<sup>179</sup> While Norway professed close cooperation with its neighbors, and specifically noted that the Russian Federation, Iceland, and Denmark (with Greenland and the Faroe Islands) had "consented to the consideration of the submission by the [CLCS],<sup>180</sup> those countries submitted *notes verbales* reserving their rights to free and non-discriminatory access to the maritime zones on the same conditions of equality afforded Norway."<sup>181</sup> Norway has emphasized the CLCS' approval,<sup>182</sup> but the commission itself has only recommendatory power (albeit "final and binding" on the state if it agrees with the recommendations,<sup>183</sup> and the proceedings are closed, unilateral, and made in accordance with scientific (Annex II), not legal, specialists).<sup>184</sup> Russia has much to gain by upholding the CLCS process, having presented its own massive claims before the CLCS to

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<sup>179</sup> See Summary of the Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Submission Made by Norway in Respect of Areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea on 27 November 2006, COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF 1, 15–16 (Mar. 27, 2009) (recommending that Norway proceed to establish the outer limits of the continental shelf" from certain fixed points of the Western Nansen Basin area).

<sup>180</sup> *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission*, COMMISSION ON THE LIMITS ON THE CONTINENTAL SHELF, CLCS/62, ¶ 18 (Apr. 20, 2009), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N09/307/58/PDF/N0930758.pdf?OpenElement> (noting the overview presented to the Commission's subcommission by Rolf Einar Fife, Director General of Legal Affairs for Norway's Ministry of Foreign Affairs).

<sup>181</sup> See Note dated Jan. 24, 2007, Ref. No. 119.N.8, Permanent Mission of Denmark to the United Nations, [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/nor06/dnk07\\_00218.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/dnk07_00218.pdf) (acknowledging Denmark did not object to Norway's submission, provided the Commission not prejudice Denmark's delimitation interests in the area); Note dated Jan. 29, 2007, Permanent Mission of Iceland to the United Nations, Ref.: FNY07010008/97.B.512, [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/nor06/isl07\\_00223.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/isl07_00223.pdf) (registering no objection to the CLCS rules of procedure regarding documentation consideration but reserving Iceland's rights relating to delimitation issues in the area); Note dated Jan. 29, 2007, Permanent Mission of the Russian Federation to the United Nations, No. 82/n, [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/nor06/rus\\_07\\_00325.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/rus_07_00325.pdf) (informing that the Russian Federation regards as "unresolved" the delimitation issues in the Barents Sea) [unofficial translation]; *Nota Verbal, Ministerio de Asuntos Exteriores y de Cooperación a la Embajada Real de Noruega en Madrid* (Mar. 2, 2007), [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/nor06/esp\\_0700348.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/esp_0700348.pdf) ("*En la medida en que la extensión de la plataforma continental presentada por Noruega se pretende efectuar desde las Svalbard hacia el norte – en la región de la "Western Nansen Basin" – y hacia el este – en el llamado "Loop Hole" –, España considera plenamente aplicable el Tratado de París a esos espacios y se reserve sus derechos sobre los recursos pertenecientes a la plataforma continental que se pudiese generar desde las Svalbard, incluye la ampliada.*").

<sup>182</sup> See *The Continental Shelf - Questions and Answers*, UTENRIKSDEPARTEMENTET, REGJERINGEN.NO, *supra* note 74 (holding "[t]his information is submitted to [the CLCS], which has to give its approval. Only then can the coastal state establish the outer limits of its continental shelf with final and binding effect.").

<sup>183</sup> See UNCLOS, *supra* note 34, at Part IV, Art. 76 (8)

<sup>184</sup> See *Commission on the Limits of the Continental Shelf (CLCS): Purpose, Functions and Sessions*, OCEANS & LAW OF THE SEA, UNITED NATIONS, [http://www.un.org/depts/los/clcs\\_new/commission\\_purpose.htm](http://www.un.org/depts/los/clcs_new/commission_purpose.htm) (last visited Mar. 28, 2017) (detailing the purpose and function of the CLCS).

secure extended continental shelves in the Barents and Okhotsk seas.<sup>185</sup> Its declaratory policy on Arctic issues emphasizes negotiation to settle Arctic continental shelf issues.<sup>186</sup> But its alternate inflammatory and conciliatory rhetoric, its history,<sup>187</sup> and its renewed militarization of the High North create uncertainty regarding its intentions.<sup>188</sup> Norway appears confident that Russia will play by the rules,<sup>189</sup> begging two questions: (1) What rules? and (2) what if the rules are on Russia's side?

Disturbing signals from Russia further complicate Norway's *Nordpolitik*. In 2015, Norway solicited bids to develop three sectors of the Barents Sea for energy exploration adjacent to Svalbard's territorial waters.<sup>190</sup> Russia challenged the legality of that announcement.<sup>191</sup> One month later, Russia's Deputy Prime Minister, Dmitry Rogozin, visited Svalbard unannounced,

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<sup>185</sup> See *Submissions, Through the Secretary-General of the United Nations, to the commission on the Limits of the Continental Shelf, Pursuant to Article 76, Paragraph 8, of the United Nations Convention on the Law of the Sea of Dec. 10, 1982*, OCEANS & LAW OF THE SEA, UNITED NATIONS, (last updated Oct. 28, 2016), [http://www.un.org/depts/los/clcs\\_new/commission\\_submissions.htm](http://www.un.org/depts/los/clcs_new/commission_submissions.htm), (detailing Russian submissions in submission 1, 1a, and 1b respecting the Okhotsk Sea and the Arctic Ocean).

<sup>186</sup> See Foreign Policy Concept of the Russian Federation (Approved by President of the Russian Federation Vladimir Putin on Nov. 30, 2016), Министерство иностранных дел Российской Федерации, ¶ 76, [http://www.mid.ru/ru/foreign\\_policy/news/-/asset\\_publisher/cKNonkJE02Bw/content/id/2542248?p\\_p\\_id=101\\_INSTANCE\\_cKNonkJE02Bw&\\_101\\_INSTANCE\\_cKNonkJE02Bw\\_languageId=en\\_GB](http://www.mid.ru/ru/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2542248?p_p_id=101_INSTANCE_cKNonkJE02Bw&_101_INSTANCE_cKNonkJE02Bw_languageId=en_GB) (noting the existing international legal framework "is sufficient to successfully settle any regional issue through negotiation, including the issue of defining the outer limits of the continental shelf in the Arctic Ocean").

<sup>187</sup> Russia negotiated a provision on Spitsbergen in the 1918 Brest-Litovsk Treaty, when it signed a separate peace with Germany. It expected to be placed on equal footing with Germany in any future disposition on the status of the archipelago. Norway was requested to host such a conference "as soon as possible." See Peace Treaty of Brest Litovsk art. 33, Apr. 30, 1918, available at The Avalon Project, [http://avalon.law.yale.edu/20th\\_century/bl34.asp#art33a](http://avalon.law.yale.edu/20th_century/bl34.asp#art33a). No element of this provision survived Germany's defeat in World War I, but Russia's efforts to be placed on an equal footing with Norway has created tensions. Soviet Foreign Minister Vyacheslav Molotov suggested in the 1940s that the Treaty be thrown in the trash can and that Russia and Norway administer the archipelago. See Pedersen, *supra* note 123, at 237.

<sup>188</sup> Pezard, *supra* note 48, at 59-60 (discussing uncertainty regarding Russia's intentions in the High North).

<sup>189</sup> See Randall Hyman, *Arctic Treaty Nears 100 in Heated Climate*, THE ALICIA PATTERSON FOUNDATION (2015).

<sup>190</sup> See Trude Pettersen, *Russia Protests Drilling in Svalbard Zone*, BARENTS OBSERVER (May 5, 2015), <http://barentsobserver.com/en/energy/2015/05/russia-protests-drilling-svalbard-zone-05-05> (noting Russia's diplomatic protest of Norway's decision during the 23<sup>rd</sup> licensing round to open up three blocks for oil drilling in disputed waters near the Arctic archipelago).

<sup>191</sup> See Rolf Stange, *Russia Protests Against Norwegian Oil Development in the Barents Sea*, SPITSBERGEN/SVALBARD ARCTIC BLOG (May 12, 2015), <https://www.spitsbergen-svalbard.com/2015/05/12/russia-protests-against-norwegian-oil-development-in-the-barents-sea.html> (noting Russia's diplomatic note to the Norwegian Foreign Ministry protesting the opening of oil and gas blocks in the Barents Sea).

infuriating Norway's Foreign Ministry. Rogozin proclaimed the Arctic a Russian Mecca,<sup>192</sup> comparing Russia's historical connection to Svalbard to Russia's 2014 annexation of Crimea.<sup>193</sup> In less irredentist tones, Russia has coordinated opposition to Norway's High Arctic policy,<sup>194</sup> generating support for an international condominium arrangement while posturing for future access to energy resources it currently cannot finance or secure by itself.<sup>195</sup> Opening the archipelago to mass tourism generates additional tension between Norway and Russia,<sup>196</sup> further complicating the legal milieu of Svalbard's landscape and surrounding seascape. Norway's legal claims involving Svalbard are increasingly questioned in an age of rapid ice melt and territorializing, if not globalizing, interest in the resources of this historically icebound and inaccessible region. An assessment of Norway's unyielding position, in the face of substantial opposition, raises questions about whether Norway is pursuing the anachronistic strategy regarding the Svalbard Treaty's interpretation.

#### D. Conclusion

The emerging global Arctic challenges governance structures and international legal norms. Arctic political interests are increasing as agendas spread. Dynamics now involve non-state actors and various economic, cultural, and environmental considerations. The global Arctic landscape continues to flatten despite the claims of a select group of Arctic circumpolar states that they alone are the Arctic's unique stewards and safeguards.<sup>197</sup> This flattening

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<sup>192</sup> See Ishaan Tharoor, *The Arctic is Russia's Mecca, Says Top Moscow Official*, WASH. POST (Apr. 20, 2015), [https://www.washingtonpost.com/news/worldviews/wp/2015/04/20/the-arctic-is-russias-mecca-says-top-moscow-official/?utm\\_term=.9c825ab7428c](https://www.washingtonpost.com/news/worldviews/wp/2015/04/20/the-arctic-is-russias-mecca-says-top-moscow-official/?utm_term=.9c825ab7428c) (quoting Rogozin).

<sup>193</sup> See Erik Lund, *When Dmitry Rogozin Speaks, People Worry*, ARCTIC J. (May 7, 2015), <http://arcticjournal.com/politics/1562/when-dmitry-rogozin-speaks-people-worry> (quoting Rogozin's reference to Crimea's annexation on his unannounced visit to Svalbard).

<sup>194</sup> *Svalbard's Oil Casts a New Chill Between Arctic Nations*, SPUTNIK (July 1, 2016), <https://sputniknews.com/business/201607011042273972-norway-svalbard-russia-oil/> (quoting Pavel Baev of Norway's Peace Research Institute).

<sup>195</sup> See *id.* (referencing Baev's claim that present-day Russia possesses neither the finances nor technology to exploit the riches in Arctic waters).

<sup>196</sup> See Atle Staalesen, *Russian Tourism on Svalbard Up 500%*, BARENTS OBSERVER (Nov. 1, 2016), <https://thebarentsobserver.com/en/arctic/2016/11/russian-tourism-svalbard-500> (noting revenue from tourism exceeded for the first time revenue from coal mining in the Russian settlement of Barentsburg, Svalbard, and that Russian tourism had risen by 500 percent since 2014 to about 35,000 tourists); Trudde Pettersen, *Russia Boosts Tourism on Svalbard*, BARENTS OBSERVER (Mar. 3, 2015), <http://barentsobserver.com/en/arctic/2015/03/russia-boosts-tourism-svalbard-03-03> (noting renovations to establishments in Barentsburg to accommodate tourism). Norway's government policy also identifies tourism as a principal focus of development. See St.meld. [Stortingsmelding] nr. 22 (2008–2009) (Apr. 17, 2009), Svalbard, Regjeringen.no ¶1.3.1, <https://www.regjeringen.no/no/dokumenter/stmeld-nr-22-2008-2009-/id554877/sec1>.

<sup>197</sup> See Ilulissat Declaration, Arctic Ocean Conference, Ilulissat, Greenland (May 28, 2008), [http://www.oceanlaw.org/downloads/arctic/Ilulissat\\_Declaration.pdf](http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf) (asserting that the five coastal states of the

already finds expression in the European Arctic focus of its Northern Dimension Policy,<sup>198</sup> in conversations on reforming or expanding the Arctic Council,<sup>199</sup> in the movement behind the creation of the Arctic Circle Assembly,<sup>200</sup> in the work of indigenous communities,<sup>201</sup> in the expanding number of countries maintaining or planning icebreaker fleets,<sup>202</sup> and among the more statist regional councils in the North, including the Barents Euro-Arctic Council,<sup>203</sup> the Council of the Baltic Sea States,<sup>204</sup> and the Nordic Council of Ministers.<sup>205</sup> Eleven countries now maintain permanent research bases on Svalbard, including South Korea, Japan, China, and India.<sup>206</sup> Denmark, the U.S., Japan, and Singapore, as examples, have created Arctic

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Arctic Ocea—Canada, Denmark, Norway, the Russian Federation, and the U.S.—by virtue of their sovereignty, are in a unique position to manage developments regarding the Arctic Ocean).

<sup>198</sup> See, e.g., *Northern Dimension*, EUROPEAN UNION EXTERNAL ACTION (May 2, 2016), [https://eeas.europa.eu/headquarters/headquarters-homepage\\_en/347/Northern%20Dimension](https://eeas.europa.eu/headquarters/headquarters-homepage_en/347/Northern%20Dimension) (discussing the joint and European Arctic policy focus of the Northern Dimension).

<sup>199</sup> See, e.g., Heather A. Conley & Matthew Melino, *An Arctic Redesign: Recommendations to Rejuvenate the Arctic Council*, CSIS (Feb. 2016), [https://csis-prod.s3.amazonaws.com/s3fs-public/legacy\\_files/files/publication/160302\\_Conley\\_ArcticRedesign\\_Web.pdf](https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/160302_Conley_ArcticRedesign_Web.pdf); *Andreas von Uexküll Institutional Reform of the Arctic Council*, *Regeringskansliet*, MINISTRY OF FOREIGN AFFAIRS SWEDEN, [https://www.arctic-council.org/images/PDF\\_attachments/Observer\\_DMM\\_2012/ACOBSDMMSE01\\_Stockholm\\_2012\\_Observer\\_Mee ting\\_Presentation\\_Institutional\\_Reform.pdf](https://www.arctic-council.org/images/PDF_attachments/Observer_DMM_2012/ACOBSDMMSE01_Stockholm_2012_Observer_Mee ting_Presentation_Institutional_Reform.pdf) (presenting ideas to strengthen the capacity of the Arctic Council).

<sup>200</sup> See, e.g., *Icelandic President Ólafur Ragnar Grímsson Speaks at Apr. 17, 2013 National Press Club Luncheon*, YouTube (Apr. 18, 2013), [https://www.youtube.com/watch?v=wW0p\\_Eh94PI](https://www.youtube.com/watch?v=wW0p_Eh94PI) (announcing Arctic Circle Assembly initiative).

<sup>201</sup> See, e.g., INUIT CIRCUMPOLAR COUNCIL CANADA, <http://www.inuitcircumpolar.com/> (representing 160,000 Inuit of Alaska, Canada, Greenland, and Chukotka (Russia) in matters of their circumpolar homeland).

<sup>202</sup> The United States Coast Guard Office of Waterways and Ocean Policy began charting world-wide icebreaker production in 2010, listing seventeen countries with vessels and seventeen more planned or under construction. Countries with icebreakers include: Russia, Sweden, Finland, Canada, USA, Denmark, China, Argentina, Australia, Chile Estonia, Germany, Japan, South Korea, South Africa, Latvia, and Norway. See *Major Icebreakers of the World*, USCG, <https://www.uscg.mil/hq/cg5/cg552/docs/20130718%20Major%20Icebreaker%20Chart.pdf> (charting the global fleet of major icebreakers).

<sup>203</sup> See generally BARENTS EURO-ARCTIC COUNCIL, <http://www.barentscooperation.org/en> (providing comprehensive information on the intergovernmental and interregional initiatives of the Barents Euro-Arctic Council).

<sup>204</sup> See generally Council of Baltic Sea States, <http://www.cbss.org/council/> (detailing activities of the eleven states of the Baltic Sea Region as well as the European Commission).

<sup>205</sup> See generally NORDIC CO-OPERATION, <http://www.norden.org/en/nordic-council-of-ministers> (presenting introductory and current information about the official inter-governmental body for cooperation in the Nordic Region).

<sup>206</sup> See *Ny-Ålesund, Svalbard*, INTERNATIONAL ARCTIC SYSTEMS FOR OBSERVING THE ATMOSPHERE, <https://www.esrl.noaa.gov/psd/iasoa/stations/nyalesund> (last visited Mar. 7, 2017) (other countries maintaining permanent research bases at Ny-Ålesund include Norway, Sweden, Germany, France, Italy, The Netherlands, and England).

ambassadorships in the last five years.<sup>207</sup> Poland now identifies as a near-Arctic neighbor.<sup>208</sup> The Arctic is no longer the subject matter jurisdiction of the circumpolar few.

Significant changes to the Arctic Ocean environment expose formerly ice-encased resources to territorial temptations. Emerging maritime technologies, scientific discoveries, and commercial realities spur human interest northward as polar ice recedes. And now the invasive, highly profitable snow crab emerges as the latest complication, a complication that threatens to destabilize Norway's managerial practice and long-term design.

Extending the principle of non-discrimination—even as an acclaimed act of comity—to states with traditional or historical fishing practices in the FPZ once may have forestalled escalation of disputes regarding interpretation of the Svalbard Treaty. And lenient inspection practices vis-à-vis Russian trawlers once may have reflected a similar course of dealing. Although episodically violated,<sup>209</sup> that practice produced its own form of dramaturgy: High North theatrics allowed Russia to shift to Norway the burdens of FPZ administration while maintaining the artifice of objecting to Norway's practice. As payment, Russia assumed neither the costs nor consequences of police responsibilities, and benefitted from Norway's exemplary management policies. In return, Norway incrementally extended its managerial presence vis-à-vis the extended fishing fleets of less powerful countries, taking advantage of

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<sup>207</sup> See Trude Pettersen, *Denmark Appoints Arctic Ambassador*, BARENTS OBSERVER (Jan. 17, 2012); *Secretary Kerry Announces Department Will Establish a Special Representative for the Arctic Region*, U.S. DEP'T ST. (Feb. 14, 2014), <https://2009-2017.state.gov/secretary/remarks/2014/02/221678.htm>; *Charting Japan's Arctic Strategy*, BROOKINGS (Oct. 19, 2015), <https://www.brookings.edu/events/charting-japans-arctic-strategy/> (noting creation of the Japanese Arctic ambassadorship position in 2013); *MFA Press Statement: Presentation of Credentials of Singapore's Plenipotentiary Representative to the Caribbean Community*, MINISTRY OF FOREIGN AFFAIRS, SINGAPORE (Mar. 16, 2012), [https://www.mfa.gov.sg/content/mfa/media\\_centre/press\\_room/pr/2012/201203/press\\_20120316.printable.html?status=1](https://www.mfa.gov.sg/content/mfa/media_centre/press_room/pr/2012/201203/press_20120316.printable.html?status=1) (noting Ambassador Kemal Siddique's co-appointment as Singapore's Special Envoy for Arctic Affairs from January 2012).

<sup>208</sup> See *Poland in Arctic Council*, MINISTRY OF FOREIGN AFFAIRS, REPUBLIC OF POLAND, [http://www.msz.gov.pl/en/foreign\\_policy/baltic/arctic/poland\\_in\\_arctic\\_council/](http://www.msz.gov.pl/en/foreign_policy/baltic/arctic/poland_in_arctic_council/) (noting the Arctic's increasing importance); *Arctic & Baltic – Joint Meeting on Sustainable Development*, MINISTRY OF FOREIGN AFFAIRS, REPUBLIC OF POLAND (Nov. 17, 2015), [http://www.msz.gov.pl/en/foreign\\_policy/baltic/arctic/arctic\\_baltic\\_joint\\_meeting\\_on\\_sustainable\\_development;jsessionid=93F1321AE23F2203F1B0EAA8854C9CB0.cmsap6p](http://www.msz.gov.pl/en/foreign_policy/baltic/arctic/arctic_baltic_joint_meeting_on_sustainable_development;jsessionid=93F1321AE23F2203F1B0EAA8854C9CB0.cmsap6p), (associating the impact of climate change in the Arctic with the Baltic Sea region); Michał Łuszczuk et al., *Poland's Policy Towards the Arctic: Key Areas and Priority Actions*, POLICY PAPER, PISM No. 11 (112) (May 2015), [https://www.pism.pl/files/?id\\_plik=19746](https://www.pism.pl/files/?id_plik=19746) (advocating the development of a comprehensive Arctic policy for Polish engagement in the region).

<sup>209</sup> Episodic ruptures between Norway and Russia, involving Russian vessels in the FPZ, include the *Novokubyshevsk* incident (1998), the *Chernigov* incident (2001), the *Severomorsk* incident (2002), the *Elektron* incident (2005) and the *Sapphire II* incident (2011). See Kristine Offerdal, *The 1920 Svalbard Treaty*, in *HISTORY LESSONS FOR THE ARCTIC* 13, 20–21 (Heather A. Conley ed., 2016); Thomas Nilsen, *Sapphire-II Sails Towards Svalbard Again*, BARENTS OBSERVER (Oct. 7, 2011) (reporting on the 2011 Norwegian detention of the Russian trawler).

the geo-strategic station that proximity to the High North provides.<sup>210</sup> If Russia casts a dark shadow over Norway's ultimate sovereignty design, Norway's world-leading acumen in the field of offshore drilling held out the prospect that Norway had leverage of its own.

But time appears increasingly out of joint for Norway. The Anthropocene age may outpace the intended tempo of Norway's century-old territorializing design. As an absurd indication of fast-paced changes, recreational yachtsmen, and adventurers, now ply the exceedingly dangerous east-west currents of the Arctic Ocean, sailing in pursuit of the course charted by Fridtjof Nansen's *Fram* voyage 125 years ago, creating in their wake an international incident that invokes their right to equal access and enjoyment of Svalbard and its waters.<sup>211</sup>

Perhaps the biggest threat to Norway's narrow interpretation of the Svalbard Treaty appears to be Norway's inconsistent practice involving Svalbard's surrounding geo-space. These inconsistencies may be noticed in a judicial setting, possibly making Norway's inconsistencies opposable to Norway. Norway has breathed life into the expansion of Svalbard's territorial sea to bring that otherwise static feature of the Treaty into conformity with emerging regime features of UNCLOS. In delimitations of opposite maritime zones with Denmark and Russia, and in submissions before the CLCS, Norway has attempted to maximize its pelagic claims by reliance on the very continental shelf features of Svalbard that it steadfastly denies to Svalbard Treaty signatories. While biding time to perfect its sovereign interests over Svalbard's FPZ, Norway has forwarded a two-track policy of asserting its categorical interests while making accommodations when necessary. Its legal approach has been likened to the aphorism complaining against "eating one's cake and having it, too," but it is also reminiscent of a mutant version of Aesop's "Dog in the Manger" fable.<sup>212</sup> The moral to that story holds that people often grudge others what they cannot enjoy themselves. In Norway's case, the object seems to be to prevent others from having something that you have no interest in sharing.

Such a territorializing policy, inexactly and inconsistently applied, poses new risks to Norway for securing its century-old objective of securing High Arctic objectives. An increasingly impatient world, prompted by what is fast becoming a global Arctic, puts pressure on Norway's High Arctic *politik*. A stratagem that formerly relied on the ice-bound remoteness

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<sup>210</sup> See Randall Hyman, *Arctic Treaty Nears 100 in Heated Climate*, THE ALICIA PATTERSON FOUNDATION (2015), <http://aliciapatterson.org/stories/arctic-treaty-nears-100-heated-climate>, (noting the decades-long practice among Russian trawler captains fishing in Svalbard waters to refuse signing Norwegian fisheries inspection papers).

<sup>211</sup> See Jesper Nordahl Finsveen, *Den franske polfareren nektet å vedta boten for å legge til på Svalbard. Nå er han dømt*, DAGBLADET (Mar. 22, 2017), <http://www.dagbladet.no/nyheter/den-franske-polfareren-nektet-a-vedta-boten-for-a-legge-til-pa-svalbard-na-er-han-domt/67418767> (detailing the conviction of French explorers for anchoring their vessel, *Arktika*, in an environmentally protected area on Svalbard, notwithstanding his defense invoking the equal access provision of the Svalbard Treaty).

<sup>212</sup> AESOP'S FABLES, <http://www.taleswithmorals.com/> (last visited Oct. 21, 2017).

of a resource-rich region to eventually and incrementally convert managerial stewardship into *dominium* is fracturing. A constellation of inconsistent practices on Norway's part, matched by coordinated opposition from the EU, irredentist threats from Russia, bombastic distractions from a new, untested, and increasingly distrusted US administration, creates fissures in Arctic politics that only exacerbate Norway's isolation on the future of Svalbard's surroundings. Increasingly, some sort of condominium solution based on the extension of the Svalbard Treaty to its surrounding waters and resources appears to be Norway's likely, if not only, legal and political solution. On reflection, it may have always been the only option. What other outcome could possibly reconcile the indeterminacy enshrined in a quixotic, centuries-old agreement on Svalbard that conferred full and absolute sovereignty on the condition that it be shared?

