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# The protection of energy investments in two Arctic territories, Svalbard and Greenland

The legal issues associated with the development and use of Arctic energy resources

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# Content

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- What are the drivers and opportunities for energy investments in Svalbard and Greenland?
- What political and regulatory risks may affect such investments?
- What legal framework is available for protection of energy investments and is it adequate to provide stable and predictable investment conditions?

# Svalbard

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## Opportunities for Energy Investments

- Reduced opportunities onshore:
  - No population growth or industrial activity that requires an increase of electricity generation capacity or the construction of new transmission and distribution grids;
  - Most areas of Svalbard are protected nature reserves, natural parks and sanctuaries;
  - There is national finance capacity and know how to conduct some necessary investments – e.g. upgrade and substitution of coal fired power plant;
  - Potential for shale gas after discovery by Store Norske coal company but viability not yet confirmed;



■ Potential for offshore hydrocarbon activities  
but:

- Areas around Svalbard not open for activity;
- Dispute around the Interpretation of the Svalbard Treaty and the status of the maritime zones – continental shelf of Svalbard.

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## Political and Regulatory Risks

- Always the possibility of a number of interferences with the investments but most likely would result from *ex post* modifications of the legal framework in force at the time when the investment was made or interference with the investment in response to external pressures (e.g. public opinion);

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## Legal Framework for Protection of Energy Investments

- **Energy Charter Treaty (ECT)** - Norway has signed but not ratified due to constitutional incompatibilities with the Investor-Host State dispute settlement regime (arguable). Norway has also Provisional application of ECT is also not applicable. This means that ECT regime is not applicable to investments made in Svalbard.
- **Svalbard Treaty**
- **Bilateral Investment Treaties**

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- **Svalbard Treaty**

Article 3

“The nationals of all the High Contracting Parties [...] shall be **admitted under the same conditions of equality to the exercise and practice** of all maritime, industrial, mining or commercial enterprises both on land and in the territorial waters, **and no monopoly shall be established** on any account or for any enterprise whatever.”

Article 7

“With regard to methods of acquisition, enjoyment and exercise of the right of **ownership of property**, including mineral rights, in the territories specified in Article 1, Norway undertakes to grant to all nationals of the High Contracting Parties **treatment based on complete equality** and in conformity with the stipulations of the present Treaty. **Expropriation may be resorted to only on grounds of public utility and on payment of proper compensation.**”

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- Norway has in force 14 **Bilateral Investment Treaties** (BITs) all of them applicable to investments in Svalbard since this territory has not been excluded from the scope of application.

Investors covered by these BITs enjoy protection:

- **against direct and indirect expropriation;**
- **against unfair and discriminatory treatment - FET, MFN, NT;**
- **investor-host state dispute settlement;**

14 States enjoy added protection in comparison to the other parties to the Svalbard Treaty. Note also that 5 countries that are not parties to the Svalbard Treaty (Slovakia, Sri Lanka, Latvia, Peru and Madagascar) also enjoy from this protection.



# Greenland

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## Drivers and Opportunities for Energy Investments

- Rich in natural resources – hydrocarbons, hydro, wind, geothermal, uranium;
- Wish to create a self-sustaining economy and to potentially gain independence from Denmark are major drivers to investments in the energy sectors, particularly in the oil and gas sector;
- Increased electricity demand will require the construction of more power plants and the upgrade of electricity grid;
- Substitution of diesel power plants and generators for environmental friendly alternatives;
- Lacks capital and skilled professionals to exploit these resources and is therefore dependent on foreign investment;

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## Political and Regulatory Risks

- Related to Greenland's government relative infancy - *Act on Greenland Self-Government 2009* – Greenland secured extended legislative, executive and judicial powers (Chapter 1 of the Act), including in the management of its natural resources (Chapter 2 of the Act and respective Schedule);
- Related to the fact that Greenland has some latitude to adopt protectionist measures in respect of investments - Greenland is a member of WTO via DK but is not a member of the EU and as such its not bound to the much stricter commitments on liberalization of markets;
- *Ex post* modifications of the legal framework in force at the time when the investment was made (e.g. more onerous taxes, withdrawal of subsidies, environmental regulation precluding some activities);
- Governmental interference with the investment (e.g. interference with management of operations, conditions of the licenses, prices, unjustified administrative delays on required authorizations, etc.)

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- Uncertainties regarding protection of property rights (there is no private land ownership in Greenland – it is commonly owned by the population of Greenland through the State);
  - Questionable judicial system capable of dealing with eventual disputes related to energy investments;
  - Government and policy changes; (e.g. change triggered by China investment pressures).

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## Legal Framework for Protection of Energy Investments

- None of Denmark's Bilateral Investment Treaties (BITs) is applicable to investments made in Greenland;
- Denmark has ratified the Energy Charter Treaty (ECT) but it is also not applicable to Greenland:

Article 40 of the ECT requires the deposit of a declaration stating that the Treaty shall be binding upon the territory for which the State is responsible for. No declaration in respect of Greenland has been made.



**Reduced protection of foreign investors and their investments.**

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## Final thoughts:

- **Is it necessary to have international investment law instruments applicable to investments in these territories?**
- Svalbard: Already some protection in place.
- Greenland: seems to be able to attract investors even without the protection of international investment law.

For Investors such instruments would certainly contribute to greater transparency, stability, predictability and protection of their legitimate expectations.

Advantage would be the creation of a level-playing field.

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- **Do those instruments conflict with government regulatory powers, particularly in respect of environmental protection and climate change mitigation?**



Not necessarily.

International investment law allows latitude for regulation in public interest and national security that can affect the economic value of the investment without the need to compensate the investor.

As long as such measures are legitimate, proportional to their objective, non-discriminatory and not disguised interferences that amount to a total loss of the investment made.

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# Thank You!

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