

THE DISPUTED MARITIME ZONES AROUND SVALBARD

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Abstract

Before the First World War the Arctic archipelago of Svalbard was a terra nullius. Under a treaty of 1920 Norway's sovereignty over Svalbard was recognised, while the other States parties to the Treaty were accorded equal rights to carry on certain economic activities, including fishing and mining, in Svalbard's territorial waters. By virtue of its sovereignty, Norway is entitled to establish the full range of maritime zones in respect of Svalbard. It has established a 12-mile territorial sea and a 200-mile fishery protection zone (rather than an Exclusive Economic Zone) around Svalbard. Svalbard also has a continental shelf, extending beyond 200 miles in places. The Norwegian government argues that the equal rights of fishing and mining do not apply beyond the territorial sea, whereas a number of other States parties take the opposite view. This paper examines both sets of arguments, and reaches the conclusion that there is no clear-cut answer to the question. The final part of the paper suggests various ways in which the dispute between Norway and other States parties over the geographical application of the Treaty could be resolved.

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1. Introduction

Svalbard is an Arctic archipelago lying in the Barents Sea, midway between Norway and the North Pole, and includes all the islands situated between 74° and 81°N and 10°E and 35°E. The southernmost island of the archipelago, Bear Island, is situated some 220 miles¹ north of mainland Norway, and the southernmost point of the main group of islands in the archipelago (South Cape) lies some 350 miles north of the Norwegian mainland. The Russian archipelagos of Novaja Zemlya and Franz Josef Land lie to the east and north, whereas Greenland is in the west. Svalbard's land mass is 62,400 km², roughly the size of Belgium and the Netherlands combined. While Spitsbergen (or Spitzbergen) is the older English (and Dutch) name of the archipelago, and the name used in the 1920 Treaty concerning the Archipelago of Spitsbergen,² Svalbard is the modern Norwegian name of the territory, and is increasingly used by non-Norwegians. In this paper, "Svalbard" will be used to refer to the archipelago and the "Svalbard Treaty" to the 1920 Treaty concerning the Archipelago of Spitsbergen.

The diplomatic history of Svalbard started when the archipelago was discovered by the Dutchman Willem Barents in 1596, on his expedition to find the northern sea route to the Far East. Reports about Svalbard's rich resources resulted in extensive hunting, especially for walrus and whales, by several nations. Sovereignty over the archipelago was claimed both by the Danish-Norwegian and the English King, whereas the Netherlands, together with the French and the Spanish, maintained that they had the right to hunting according to the principle of *mare liberum*, as advocated by the Dutchman Hugo Grotius (1609). No state was able to enforce authority over the resource exploitation and so the unregulated hunting resulted in the collapse of the resources. During the 19th century Svalbard acquired a new legal status, under the common assumption that it was *terra nullius*, i.e. no man's land, territory not subject to any state's sovereignty.³

¹ All references to miles in this paper are to nautical miles unless otherwise indicated.

² LNTS, Vol. 2, No. 1, 1920 at 7-19; USTS, No. 686, 1924 at 1-16; AJIL, Vol. 18 Suppl., 1924, at 199-208.

³ The information in this paragraph is based on G. Ulfstein, *The Svalbard Treaty. From Terra Nullius to Norwegian Sovereignty* (Oslo, Scandinavian University Press, 1995), pp. 34-38 and the sources referred to there.

Prospecting and mining for coal from the beginning of the 20th century resulted in new and increasing conflicts. After gaining independence from Sweden in 1905, Norway suggested in a notification to other states the establishment of a new legal regime based on Svalbard's *terra nullius* status. However, negotiations before World War I on such a regime failed. Norway requested in 1919 that the Paris Peace Conference should examine the legal status of Svalbard and that Norway be granted sovereignty. The conference established a Spitsbergen Commission that agreed on a treaty based on Norwegian sovereignty, while preserving earlier *terra nullius* rights by allowing equal rights for other states to access, hunting and fishing, mining, etc. The peaceful utilization of Svalbard was to be ensured through a prohibition against the establishment of naval bases and fortifications and its use for warlike purposes. The Svalbard Treaty was signed on 9 February 1920 and entered into force on 14 August 1925. There are currently 40 States parties to the Svalbard Treaty, including all States members of the Arctic Council, China, Japan and most of the larger EU Member States.

Svalbard has no indigenous population. The most important settlements are Longyearbyen (about 2000 people), which is also the administration centre with the Norwegian Governor, and Barentsburg (about 450). Both settlements have traditionally been based on coal mining, with Norwegians in Longyearbyen and Russians in Barentsburg. Svalbard is an attractive tourist destination and tourism has increased significantly in recent years. The archipelago is also well-suited for scientific research, being an easily accessible Arctic area with a tolerable climate and well-developed infrastructure. Many nations have research stations in Ny-Ålesund, and Poland has a station in Hornsund. Svalbard has also become a centre for university education with its University Centre on Svalbard (UNIS), based in Longyearbyen. One of the objectives in the Norwegian management of Svalbard is that the islands should be among the world's best managed wildlife preserves. 65 per cent of Svalbard's land territory and 87 per cent of its territorial sea have been designated as national parks or nature reserves, and there are strict environmental regulations.⁴

⁴ Norwegian Government Paper, St. meld. No 22 (2008-2009), *Svalbard*, pp. 54-56.

The maritime areas around Svalbard attract increasing international attention. They contain rich fisheries resources,⁵ there may be a potential for oil discoveries,⁶ and ice-melting in the Arctic as a consequence of climate change may open new sea routes for shipping. Norwegian sovereign rights on the continental shelf and in the 200-mile Exclusive Economic Zone (EEZ) are, however, disputed. Norway claims that the rights of other States parties under the Svalbard Treaty do not apply in these maritime areas, whereas many of those states have either protested against the Norwegian view or reserved their position. The disputed status of the maritime areas creates problems for fisheries management in the 200-mile zone and for the commencement of petroleum activities on the continental shelf around Svalbard.

This paper will first provide an overview of the Svalbard Treaty and the maritime zones around Svalbard (sections 2 and 3). It will then discuss in more detail the views presented by different States parties on the application of the Svalbard Treaty on the continental shelf and in the 200-mile zone (sections 4 and 5), and then put forward some possible solutions to these legal issues (section 6).

2. *The Svalbard Treaty*

Article 1 of the Svalbard Treaty establishes that the States parties “undertake to recognise, subject to the stipulations of the present Treaty, the full and absolute sovereignty of Norway over the Archipelago of Spitsbergen.” Norwegian sovereignty applies to “all islands great or small and rocks appertaining thereto” within the area bounded by 74° and 81°N and 10°E and 35°E.

The “full and absolute sovereignty” means that Norway exercises the same sovereignty as any state exercises over its territory, only “subject to the stipulations of the present Treaty.” There are no ‘stipulations’ affecting sovereignty as such. Norway’s sovereignty implies the right to adopt laws and

⁵ See further section 3 below.

⁶ More than 35% of the total undiscovered petroleum reserves on the Norwegian continental shelf are expected to be found in the Norwegian Sea and the Barents Sea, see Norwegian Government Paper, St. meld. No. 8 (2005-2006), *Om helhetlig forvaltning av det marine miljø i Barentshavet og havområdene utenfor Lofoten (forvaltningsplan)*, p. 36.

regulations on Svalbard, and their enforcement. Norway therefore has no more duty to consult with other states on the government of Svalbard than any other state has about the management of its territory. Norway may also act on the external level, to deal with foreign policy affairs relating to Svalbard, including entering into treaties relating to Svalbard, and its defence. What is unique about the Svalbard Treaty is that while Norway enjoys “full and absolute sovereignty,” all states of the world may become parties to the Treaty and thereby enjoy certain non-discriminatory rights.

Norwegian sovereignty over Svalbard must be considered binding also on non-Parties to the Svalbard Treaty under customary international law, as a consequence of Norwegian effective occupation and exercise of sovereignty and the lack of protest from any state. Non-Parties cannot claim rights under the Svalbard Treaty. They are, however, free to ratify the Treaty and thereby benefit from its provisions, first and foremost the right of non-discriminatory access to economic exploitation of the archipelago.

It is strictly speaking not correct to call non-discrimination a principle in the Svalbard Treaty. Non-discrimination is required under several provisions of the Treaty in respect of specific substantive matters, but there is no general requirement of non-discrimination. Hence, the substantive scope of non-discrimination must be determined in relation to each of these provisions. Among the subject matter covered by non-discrimination are nature conservation, hunting, fishing, mining, industrial, maritime and commercial activities.⁷ This means that most of the important activities are covered.

The prohibition is limited to discrimination on the basis of nationality. This is consistent with the purpose of this requirement, i.e. to preserve the previous *terra nullius* rights. Both direct and indirect discrimination must be considered prohibited (see section 5 below). The requirement of non-discrimination does not, however, entail a prohibition against regulating or even prohibiting activities. Norwegian sovereignty means, for example, a discretionary right to determine the degree and form of environmental protection on the archipelago.

Article 5 of the Svalbard Treaty provides that “Conventions shall also be concluded laying down the conditions under which scientific investigations may

⁷ Svalbard Treaty, Arts. 2 and 3. See further sections 4 and 5 below.

be conducted in the said territories.” No such conventions have been negotiated. Since there is no provision in the Treaty dealing explicitly with discrimination in relation to scientific research, Norwegian sovereignty should accordingly prevail, at the expense of non-discrimination. Norway has, however, practised non-discrimination in relation to foreign scientific research.

Coal mining was the most important activity on Svalbard at the time of the adoption of the Treaty. Article 8 of the Treaty contains the procedure governing the adoption of mining regulations, including a process for resolving objections by other States parties. The Mining Code was adopted by Norwegian Royal Decree of 7 August 1925. But while the Treaty is silent on the procedure for modification of the Mining Code, it may be argued that it can only be modified by the same procedure as its adoption.⁸

The Mining Code contains regulations about the procedure for acquiring mining rights, rights of the property owner to participate in mining activities, and obligations imposed upon the mining companies as regards both the mining process and the protection of workers. The Code does not, however, prevent Norway from adopting additional requirements for the mining activity, such as safety regulations and rules concerning environmental protection, as long as such regulations do not violate the requirement of non-discrimination and the specific provisions of the Mining Code.

Article 8 provides that taxes levied in relation to activities on Svalbard “shall be devoted exclusively to the said territories and shall not exceed what is required for the object in view.” This means that Norway may not impose higher taxes and fees than what is required for the administration of the archipelago. The purpose of this requirement is closely connected to that of non-discrimination: Norway should not profit from its sovereignty. In practice, Svalbard has not been a source of Norwegian tax revenue and the monetary flow actually runs in the opposite direction. The establishment of profitable enterprises, particularly oil and gas industry, may, however, mean that the tax limitation can become effective in the future.

Article 9 of the Svalbard Treaty establishes that “Norway undertakes not to create nor to allow the establishment of any naval base in the territories specified in Article 1 and not to construct any fortification in the said territories,

⁸ See further Ulfstein, *The Svalbard Treaty*, *op. cit.*, pp. 155-157.

which may never be used for warlike purposes.” This provision may be seen to serve two purposes: one is an extension of non-discrimination by preventing Norway from benefiting strategically by its sovereignty, and the other is to preserve the peaceful utilization of the archipelago. It should be noted that Article 9 does not contain a complete demilitarization of Svalbard. The provision sets out specific prohibitions against the establishment of any “naval base” or “fortification,” and prohibits Svalbard’s use for “warlike purposes.”

3. Svalbard’s Maritime Zones

Before considering what maritime zones Norway has claimed in respect of Svalbard, a preliminary question is whether Svalbard may generate maritime zones at all. The Svalbard Treaty refers to Svalbard’s “territorial waters” in several places,⁹ so it is clear that Svalbard is entitled to a territorial sea. The Treaty does not mention any other maritime zones for the very good reason that no such zones were recognised in international law at the time that the Treaty was concluded. There is, however, nothing in the Svalbard Treaty that explicitly limits Norway’s right to claim maritime zones in respect of Svalbard beyond the territorial sea, and such a right in principle flows from its sovereignty over Svalbard. It is very doubtful that the drafters of the Treaty intended that the term “sovereignty” in Article 1 of the Treaty should have the same scope for all time as it had in 1920. If that were so, it would mean not only that Norway could not claim maritime zones in respect of Svalbard that have become recognised in international law since 1920 but also that the limitations attaching today to state sovereignty as a result of post-1920 developments in customary international law, such as the obligation on states not to engage in torture on territory over which they have sovereignty and to ensure that activities on their territory do not damage the environment of other states, would not apply to Norwegian sovereignty over Svalbard. That would clearly be nonsense. Furthermore, the International Court of Justice has on a number of occasions held that conceptual or generic terms in treaties should be given the scope that they have at the time that the case is referred to the Court, not the scope that they had when the treaty in question was concluded. The Court has applied this principle, for example, in respect of the

⁹ See Art. 2(1) and (2) and Art. 3(2).

terms “territorial status” in the *Aegean Sea* case¹⁰ and “commerce” in the *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* case.¹¹ A similar approach has been taken by other international tribunals.¹² It thus follows that by virtue of its sovereignty over Svalbard, Norway has the same right to claim maritime zones in respect of Svalbard as that of any other state in respect of territory over which it has sovereignty.¹³

Under the contemporary law of the sea, as represented in the 1982 UN Convention on the Law of the Sea (UNCLOS),¹⁴ a state may claim in respect of its land and insular territory, in addition to a territorial sea, a contiguous zone, an EEZ or exclusive fishing zone (EFZ), and a continental shelf. The one exception is that an EEZ (and probably EFZ) and continental shelf may not be claimed in respect of “rocks which cannot sustain human habitation or economic life of their own.”¹⁵ Thus, Norway is entitled (but not required) to claim a contiguous zone, EEZ or EFZ, and continental shelf in respect of Svalbard, other than for those islands in the archipelago that fall into the category of uninhabitable rocks. There are no doubt a number of islets and rocks in the archipelago that come into this category, but their location is such that they have no significant impact on the

¹⁰ *Aegean Sea Continental Shelf (Greece v. Turkey)* case, [1978] ICJ Rep. 3 at 32-34 (paras. 77-80).

¹¹ *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* case, Judgment of 13 July 2009 (not yet reported), paras. 63-70 (available on the ICJ’s website at <<http://www.icj-cij.org/docket/files/133/15321.pdf>>. See also *Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia*, [1971] ICJ Rep. 3, especially at 31 (para. 53).

¹² See, for example, *Arbitration regarding the Iron Rhine (“Ijzeren Rijn”) Railway (Belgium v. Netherlands)* (2005), paras 79-81 (available on the website of the Permanent Court of Arbitration at <<http://www.pca-cpa.org/upload/files/BE-NL%20Award%20corrected%20200905.pdf>>) and the report of the WTO Appellate Body in *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, paras. 129-131 (available on the website of the WTO at <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm>).

¹³ This conclusion is, however, rejected by two Russian writers. See A. N. Vylegzhanin and V. Z. Zilanov, *Spitsbergen: Legal Regime of Adjacent Marine Areas* (Utrecht, Eleven International Publishing, 2007), pp. 42-57, as quoted in T. Pedersen and T. Henriksen, “Svalbard’s Maritime Zones: The End of Legal Uncertainty,” 24 *International Journal of Marine and Coastal Law*, 2009, 141 at 144.

¹⁴ 1833 UNTS 396.

¹⁵ UNCLOS, Art. 121(3).

outer limits of Svalbard's maritime zones. The Norwegian Supreme Court has specifically held that Abel Island, which is an outlying island in the north-eastern part of the archipelago and measures 13.2 km², is not an uninhabitable rock within the meaning of Article 121(3) of UNCLOS.¹⁶ The only other islands lying at any distance from the main archipelago which possibly require discussion in the context of Article 121(3) are Bear Island and Hope Island. Bear Island is 178 km² in area and has teams of meteorologists and scientists living on it all the year round, even though they would not qualify as being a permanent population. Even on the most wide-ranging interpretation of Article 121(3), Bear Island would not qualify as an uninhabitable rock. The same would also seem to be true of Hope Island, especially if the view in the Norwegian Supreme Court's judgment referred to above is accepted, since it is 46 km² and, like Abel Island, is capable of supporting hunters.

That Svalbard is entitled to a full suite of maritime zones is recognised by other states. Those States parties to the Svalbard Treaty that take the view that the Treaty applies to Svalbard's maritime zones beyond the territorial sea (see section 4 below) must implicitly accept that Svalbard is entitled to generate such zones. Indeed, one such State party, the United Kingdom, has explicitly said so.¹⁷ Secondly, Denmark has concluded a maritime boundary agreement with Norway that delimits the boundary between the parties' continental shelves "in the area between Greenland and Svalbard" and between Greenland's EEZ and Svalbard's fishery protection zone (FPZ).¹⁸

¹⁶ *Public Prosecutor v. Haraldson et al.*, Rt. 1996 p. 624. For a discussion (in English) of this case, see R. Churchill, "Norway: Supreme Court Judgment on Law of the Sea Issues," 11 *International Journal of Marine and Coastal Law*, 1996, 576. It is noteworthy that the defendants in this case, Icelandic fishermen accused of fishing illegally in Svalbard's fishery protection zone (on which, see below), did not contest the entitlement of Norway to claim such a zone in respect of Svalbard.

¹⁷ Government Answer to Written Question in the House of Lords, HL Debs., Vol. 476, col. 22 (2 July 1986); UK Non-Paper on Svalbard, 5 January 1993, para. 4 (on file with authors); and Note No. 11/06, 11 March 2006, reproduced in 78 *British Yearbook of International Law*, 2007, 794.

¹⁸ 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, concerning the Delimitation of the Continental Shelf and the Fisheries Zones in the Area between Greenland and Svalbard, 2006, Art. 1. 2378 UNTS.

Turning now to the maritime zones that Norway has in fact claimed in respect of Svalbard, Norway traditionally claimed a 4-mile territorial sea off the Norwegian mainland and around Svalbard. However, under sections 2 and 5 of the Act on Norway's territorial sea and contiguous zone of 27 June 2003 No. 57,¹⁹ the territorial sea, including the territorial sea around Svalbard, was extended to 12 miles. As far as Svalbard is concerned, it follows from the discussion above that such an extension was a legitimate exercise of Norwegian sovereignty and not contrary to Treaty, given that states are entitled in international law to claim a territorial sea up to 12 miles in breadth.²⁰ Sections 4 and 5 of Law No. 57 authorise the establishment of a contiguous zone around Svalbard, but such a zone has not yet been established. Straight baselines around Svalbard were established by Royal Decree of 1 June 2001 No. 556.²¹

In 1976 Norway established a 200-mile EEZ off its mainland coast. Norway has not, however, challenged the other States parties' views on the geographical application of the Svalbard Treaty beyond the territorial sea by establishing a 200-mile EEZ off Svalbard, with preferences for Norwegian fishermen. Instead, by Royal Decree of 3 June 1977, it established a 200-mile non-discriminatory fisheries protection zone (FPZ).²² The Decree provides for the establishment of quotas, closed areas, minimum mesh size in trawl and minimum size of fish, and reporting (section 3).

International law contains no rules on the drawing of maritime boundaries between different parts of a state's territory, where one of the parts is subject to a special international legal regime, such as between the Norwegian mainland and Svalbard. Although an analogy from delimitation between states could be applied, Norway has chosen to give full effect to its mainland 200-mile EEZ.²³ One possible argument in favour of such a delimitation is that Norway should not be

¹⁹ An English translation is available in 54 *Law of the Sea Bulletin* (LOS B), 2004, 97.

²⁰ UNCLOS, Art. 3.

²¹ An English translation is available on the website of DOALOS at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_2001_DecreeTS.PDF>.

²² Royal Decree of 3 June 1977. Regulations on the Fishery Protection Zone around Spitsbergen. *Norsk Lovtidend*, 1977, Part 1, 508.

²³ *Ibid*, Art. 1.

entitled to a smaller mainland zone as a result of having acquired sovereignty over Svalbard.

Under international law a state's territory automatically generates a continental shelf: it is not necessary for a state expressly to claim a continental shelf,²⁴ unlike an EEZ, which must be explicitly claimed.²⁵ Thus, it is not necessary for Norway to make a specific claim to a continental shelf in respect of Svalbard, and it has not in fact done so.²⁶ Unlike with the FPZ, Norway has not attempted to delimit the boundary between the continental shelf of the Norwegian mainland and the continental shelf of Svalbard, something that would be necessary if the Svalbard Treaty applied beyond the territorial sea (see further section 4 below). To the west and east Svalbard's continental shelf is bounded by the continental shelves of Greenland and Franz Josef Land and Novaya Zemlya (discussed below). To the north Svalbard has an uninterrupted continental shelf. In 2006 Norway made a submission to the Commission on the Limits of the Continental Shelf in respect of, *inter alia*, the continental shelf beyond 200 miles to the north of Svalbard.²⁷ In 2009 the Commission addressed its recommendations to Norway in respect of that submission.²⁸ Thus, the outer limit of the continental shelf to the north of Svalbard has been determined, subject to Norway's acceptance of the Commission's recommendations and its western and eastern limits being agreed with Denmark/Greenland and Russia, respectively.

The delimitation between the 200-mile zones and continental shelves of Svalbard and the Russian islands of Novaya Zemlja and Franz Josef Land forms part of the general boundary delimitation of the 200-mile zones and continental shelves of Norway and Russia in the Barents Sea. Whereas Norway claims that the boundary should be the equidistance (or median) line, Russia claims the so-

²⁴ UNCLOS, Art. 77(3).

²⁵ This is not directly stated in UNCLOS, but is generally assumed to be the case.

²⁶ The current Norwegian legislation setting out Norway's continental shelf rights expressly does not apply to Svalbard: see Act relating to Petroleum Activities of 29 November 1996 No 72, Art. 1-4 (available in English at <<http://www.npd.no/en/Regulations/Acts/Petroleum-activities-act/#Section%201-4>>).

²⁷ Continental Shelf: Submission of Norway in respect of areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea. Executive Summary. Available at <http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/nor_exec_sum.pdf>.

²⁸ The Commission's recommendations are available at <http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/nor_rec_summ.pdf>.

called sector line, i.e. a line of longitude running from the terminus of the existing boundary outside the mainland towards the North Pole, but modified in an easterly direction in the Svalbard area so as to avoid cutting through the area defined in Article 1 of the Svalbard Treaty. Negotiations between the two countries have been conducted since the 1970s, but no agreement has been reached.

As mentioned briefly above, Norway and Denmark entered into an agreement on 20 February 2006 delimiting the continental shelf boundary between, and within 200 miles of, Svalbard and Greenland and the boundary between Svalbard's FPZ and Greenland's EEZ. Delimitation is based in principle upon the equidistance line. The area of overlapping claims delimited by the agreement measures about 150 000 km², and the boundary line is some 800 km in length.²⁹

The Barents Sea is one of the world's most important fishing areas, and includes fish stocks such as cod, haddock, saithe, redfish, capelin, herring and shrimp. The fish stocks migrate between the 200-mile mainland zones of Norway and Russia, the remaining area of high seas (the 'loophole') in the middle of the Barents Sea and the 200-mile FPZ around Svalbard. Norway and Russia are the principal fishing nations in the Barents, but fishing quotas are also allocated by these two coastal states to the EU, the Faroe Islands, Greenland and Iceland.

These maritime areas may also contain considerable quantities of the world's undiscovered petroleum resources. The gas field Snøhvit ('Snow White') is already in production on the Norwegian mainland shelf and the Russian shelf contains one of the greatest maritime gas fields, the Shtokman field. Drilling for petroleum has not yet commenced on the continental shelf around Svalbard.

These developments call for effective management of the Barents Sea, including the maritime areas around Svalbard, not least to protect the living resources against over-exploitation and pollution. However, the possibility of such management is made more difficult because of the dispute between Norway and other States parties as to whether the provisions in the Svalbard Treaty on non-discrimination apply in the 200-mile zone and on the continental shelf around Svalbard, and whether the Treaty's tax limitations and the Mining Code apply to petroleum activities on the continental shelf.

²⁹ Norwegian Government Paper, St. prp. No. 51 (2005-2006), pp. 2-3.

4. What Rights do the Parties to the Treaty Have in Svalbard's Maritime Zones?

We come now to the central question in this paper: what rights (if any) do States parties to the Svalbard Treaty other than Norway have to fish or to exploit the natural resources of the seabed and subsoil (such as oil and gas) in the maritime zones around Svalbard?³⁰

Let us begin with the territorial sea. Fishing in Svalbard's territorial sea is dealt with by Article 2 of the Treaty. Paragraph 1 provides that "[s]hips and nationals of all the High Contracting Parties shall enjoy equally the rights of fishing and hunting in the territories specified in Article 1 and in their territorial waters." Thus, all parties have an equal right to fish in Svalbard's territorial sea. What is meant by "equal" in this context is explored in section 5 below. As regards exploitation of the natural resources of the seabed of Svalbard's territorial sea, the most relevant provision of the Treaty is Article 3. Paragraph 1 provides that "[t]he nationals of all the High Contracting Parties shall have equal liberty of access and entry for any reason or object whatever to the waters, fjords and ports of the territories specified in Article 1; subject to the observance of local laws and regulations, they may carry on there without impediment all maritime, industrial, mining, and commercial operations on a footing of absolute equality." Paragraph 2 adds that "[t]hey [i.e. the nationals of the parties] shall be admitted under the same conditions of equality to the exercise and practice of all maritime, industrial, mining, and commercial enterprises both on land and in the territorial waters." It is generally considered that "mining" on Svalbard's land territory includes exploring for and exploiting oil and gas (although so far no commercial finds have been made).³¹ That would mean that exploration for and exploitation of oil and gas in the seabed of Svalbard's territorial sea would fall under Article 3 and

³⁰ The authors have discussed this issue at some length in their earlier writings. See R. R. Churchill, "The Maritime Zones of Spitsbergen," in: W.E. Butler (ed.), *The Law of the Sea and International Shipping: Anglo-Soviet Post-UNCLOS Perspectives* (New York, Oceana, 1985), pp. 189-234; R. Churchill and G. Ulfstein, *Marine Management in Disputed Areas: The Case of the Barents Sea* (London, Routledge, 1992), Chapter 2; and Ulfstein, *The Svalbard Treaty, op. cit.*, Chapter 7.

³¹ Ulfstein, *The Svalbard Treaty, op. cit.*, pp. 193-194.

so be open to all States parties on a basis of equality. Even if such exploration and exploitation did not fall within the concept of “mining,” they would arguably be regarded as “industrial” and/or “commercial” operations.

We turn now to fishing and the exploration and exploitation of the natural resources of the seabed in the maritime zones of Svalbard beyond the territorial sea. This matter is not dealt with, at least explicitly, in the Svalbard Treaty for the very good reason that international law did not recognise any maritime zone beyond the territorial sea, except possibly for a zone resembling today’s contiguous zone,³² at the time that the Svalbard Treaty was concluded in 1920. The parties to the Treaty are deeply divided on the question of whether the Treaty applies beyond the territorial sea, and specifically whether the equal rights of all Treaty parties to fish in, and exploit the submarine resources of, the territorial sea apply beyond the latter zone. Norway takes the view that the Treaty does not apply.³³ The only parties to the Treaty publicly to support that view, at least for a time in the past, are Canada and Finland. A bilateral fisheries treaty that Canada signed with Norway in 1995 states, in its preamble, that “Norway is entitled to exercise exclusively the sovereign rights and jurisdiction accorded to the coastal State under the United Nations Conference on the Law of the Sea . . . in the Fisheries Protection Zone and on the continental shelf around the Archipelago, and that the Treaty concerning Spitsbergen of 9 February 1920 does not apply to those areas.”³⁴ However that treaty has not been ratified and entered into force. It is therefore unclear whether Canada still endorses the view expressed in the treaty’s preamble. Finland gave its support to the Norwegian view in 1976, but in

³² R. R. Churchill and A. V. Lowe, *The Law of the Sea*, (3rd edition, Manchester, Manchester University Press, 1999), pp. 132-135.

³³ Its views have been expressed in a succession of government papers over the years. See, *inter alia*, St. meld. No. 30 (1973-74), *Virksomheten på den norske kontinentalsokkelen m.v.*, p. 67; St. meld. No. 39 (1974-75), *Vedrørende Svalbard*, pp. 6-8; St. meld. No. 40 (1985-86), *Svalbard*, p. 9; St. meld. No. 9 (1999-2000), *Svalbard*, p. 27; St. meld. No. 30 (2004-2005), *Muligheter og utfordringer i nord*, p. 23; and St. meld. No. 22 (2008-2009), *Svalbard*, p. 21.

³⁴ Agreement between the Government of Norway and the Government of Canada on Fisheries Conservation and Enforcement, 1995. Norwegian Parliamentary Paper, Ot. prp No 3 (1995-96), as quoted in T. Pedersen, “The Dynamics of Svalbard Diplomacy,” 19 *Diplomacy & Statecraft* 2008, 236 at 247.

2005 appears to have withdrawn it.³⁵ On the other hand, contrary to Norway, a number of States parties have stated that they consider that the Treaty does apply beyond the territorial sea. Those parties include Iceland,³⁶ the Netherlands,³⁷ Russia,³⁸ Spain³⁹ and the United Kingdom.⁴⁰ The other parties to the Treaty appear either to have reserved their position on the question (for example, France, Germany and the USA)⁴¹ or not to have taken a position publicly (which is probably the case with a majority of the parties to the Treaty).

Not surprisingly, most of those States parties that have expressed a view on the question of whether the equal rights of all Treaty parties to fish in, and exploit the submarine resources of, the territorial sea apply beyond that zone, appear not to have publicly spelt out the legal arguments in support of their position. The only States parties to have done so to any degree are Norway and the United Kingdom. The Norwegian government has put forward two main arguments in support of its position in a number of government publications.⁴² The first argument is that the Svalbard Treaty should be interpreted literally and restrictively. The Treaty says only that the equal rights to fish and mine apply on Svalbard and in its territorial sea. To extend the geographical application of the rights concerned beyond the territorial sea, to the continental shelf and the 200-mile zone, would not only go against the clear wording of the Treaty, according to the Norwegian government, but would also go against the principle of treaty interpretation that restrictions on sovereignty are not to be presumed (a principle particularly prevalent at the time of the drafting of the Treaty in 1920). The

³⁵ Pedersen, *op. cit.*, pp. 242 and 251.

³⁶ *Ibid.*, pp. 246-7.

³⁷ *Ibid.*, p. 241.

³⁸ *Ibid.*, pp. 238-245.

³⁹ *Ibid.*, pp. 250-1; and *Note Verbale* of the Spanish Ministry of Foreign Affairs and Cooperation to the Royal Norwegian Embassy in Madrid, 2 March 2007 (*available at* <http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/esp_0700348.pdf>).

⁴⁰ *See, inter alia*, Government Answer to Written Question in the House of Lords, HL Debs., Vol. 476, col. 22 (2 July 1986); Aide Memoire from the British Embassy in Oslo to the Norwegian Ministry of Foreign Affairs, 14 October 1986 (on file with authors); UK Non-Paper on Svalbard, 5 January 1993, para. 4 (on file with authors); Note No. 67, 10 August 1995 (on file with authors); and Note No. 11/06, 11 March 2006, reproduced in 78 *British Yearbook of International Law*, 2007, 794.

⁴¹ Pedersen, *op. cit.*, pp. 239-43.

⁴² See the publications listed in note 33 above.

second argument of the Norwegian government is that Svalbard has no continental shelf of its own and that the continental shelf of mainland Norway extends to, around and beyond Svalbard. In other words, Svalbard simply sits on the Norwegian mainland continental shelf. These two arguments have been developed in more detail by two Norwegian writers who have close connections with the Norwegian Ministry of Foreign Affairs, but who write in a personal capacity, Professor Carl August Fleischer, special consultant to the Ministry,⁴³ and Mr Rolf Einar Fife, currently the Director General of the Legal Affairs Department of the Ministry.⁴⁴

As regards the first argument, the so-called restrictive approach to treaty interpretation is now widely regarded as reflecting a rather old-fashioned view of international law according to which state sovereignty is the predominating principle. It is significant that two recent cases concerned with the interpretation of 19th century treaties that gave one state rights on the territory of another, were fairly dismissive of the restrictive principle as a method of treaty interpretation.⁴⁵ As regards a literal interpretation of the Svalbard Treaty, the wording of a treaty is only one element in treaty interpretation. The basic principle of treaty

⁴³ Professor Fleischer has written extensively on this issue. His most detailed writings are in Norwegian: *see*, for example, *Petroleumsrett* (Oslo, Universitetsforlag, 1983), chapters 6 and 7; and “Norges rettigheter i 200 mils sonen ved Svalbard” in: G. Ulfstein (ed), *Fiskevernsonen ved Svalbard* (Tromsø, Universitetet i Tromsø, 1983), pp. 2-24. For his views in English (which are less fully argued) *see*, for example, “Oil and Svalbard,” 45 *Nordisk Tidsskrift for Internasjonal Ret*, 1976, 7-13; “The Question of Earlier Treaty Rights applied to the New Maritime Zones – Spitsbergen and the Law of the Sea” *Iranian Review of International Relations*, 1978, 245-262; and “The New International Law of the Sea and Svalbard,” paper given at the 150th Anniversary Symposium of the Norwegian Academy of Science and Letters, available at <<http://www.dnva.no/c26889/binfil/download.php?tid=27095>>.

⁴⁴ *See*, in particular, “L’objet et le but du traité du Spitsberg (Svalbard) et le droit de la mer” in *La mer et son droit: mélanges offerts à Laurent Lucchini and Jean-Pierre Quéneudec* (Paris, Pedone, 2003), pp. 241-262; and “Folkerettslige spørsmål i tilknytning til Svalbard og de omkringliggende havområder,” available on the website of the Norwegian Ministry of Foreign Affairs at <<http://www.regjeringen.no/nb/dep/ud/tema/folkerett/spesiell-folkerett/olkerettslige-sporsmal-i-tilknytning-til.html?id=537481>>.

⁴⁵ *See* the *Iron Rhine arbitration*, *supra*, paras 50-56; and the *Costa Rica v. Nicaragua* case, *supra*, para. 48. *See also* the *Lac Lanoux arbitration*, 24 *International Law Reports*, 1957, 101 at 120.

interpretation, according to Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT), is that there are three elements to take into account when interpreting a treaty—"the ordinary meaning to be given to the terms of the treaty," the context of the treaty, and the latter's object and purpose. The Norwegian government's argument ignores the second and third of those elements. It is true that the Vienna Convention does not apply to the Svalbard Treaty because the Convention does not have retrospective application,⁴⁶ and, besides, Norway is not a party to the Convention. However, its provisions concerning interpretation have been held by international courts on numerous occasions also to represent customary international law.⁴⁷

As for the Norwegian Government's second argument, the proposition that Svalbard has no continental shelf contradicts Article 121 of UNCLOS, under which (as pointed out above) every island, apart from an uninhabitable rock, has a continental shelf. The Norwegian government's argument is also contradicted by some of its own recent practice. The boundary established by the 2006 maritime boundary agreement between Norway and Denmark/Greenland (referred to earlier) is based on the principle of equidistance, such equidistance being determined by basepoints on Greenland and Svalbard.⁴⁸ It is difficult to see how Svalbard can provide basepoints for determining an equidistance line if it does not have a continental shelf. Secondly, the map accompanying that part of Norway's submission to the Commission on the Limits of the Continental Shelf relating to the area north of Svalbard, the Western Nansen Basin, shows an area marked as

⁴⁶ Art. 4.

⁴⁷ See, for example, the following judgements of the International Court of Justice: the *Arbitral Award of 31 July 1989 (Guinea Bissau v. Senegal)* case, [1991] ICJ Rep. 52 at 70 (para. 48); the *Territorial Dispute (Libya/Chad)* case, [1994] ICJ Rep. 6 at 21-22 (para. 41); the *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)* case (Jurisdiction and Admissibility), [1995] ICJ Rep. 6 at 18 (para. 33); the *Oil Platforms (Iran v. USA)* case (Preliminary Objections), [1996] II ICJ Rep. 803 at 812 (para. 23); the *Kasikili/Sedudu Island (Botswana/Namibia)* case, [1999] II ICJ Rep. 1045 at 1059, 1060 and 1075 (paras. 18, 20 and 48); and the *Costa Rica v. Nicaragua* case, *supra*, para. 47. See also the judgements of the European Court of Human Rights in *Golder v. United Kingdom* and *James v. United Kingdom*, Series A No. 18 (1975), para. 29 and No. 98 (1986), para. 42, respectively; and the *Iron Rhine arbitration*, *supra*, para. 45.

⁴⁸ Norwegian Government Paper, St. prp. No. 51 (2005-2006), p. 3.

“Continental Shelf beyond 200 miles.”⁴⁹ The area shown is beyond 200 miles as measured from Svalbard. But if Svalbard has no continental shelf (as the Norwegian government argues), the “Continental Shelf beyond 200 miles” would have to be delimited from the Norwegian mainland, not Svalbard. Finally, it is difficult to see how Svalbard could generate a 200-mile FPZ, as Norway claims, but not a continental shelf.⁵⁰ Of the other Treaty parties, one at least, namely the United Kingdom, has explicitly rejected the Norwegian government’s argument that Svalbard has no continental shelf of its own.⁵¹ The Norwegian government has not referred to this argument in its more recent papers dealing with Svalbard, so it is possible that the argument has been abandoned, and that therefore Norway’s submission to the Commission on the Limits of the Continental Shelf and its agreement with Denmark/Greenland should be seen as confirmation of such a development rather than as a contradiction of Norway’s (previous) position.

As mentioned, the VCLT refers to three principal elements to be applied when interpreting a treaty. Each of these will now be examined. The first is “the ordinary meaning to be given to the terms of the treaty.” The terms that are relevant in the context of the issue under discussion (namely, whether the Svalbard Treaty parties’ rights of fishing and the exploitation of seabed resources in the territorial sea extend to the zones beyond) are those used in Article 2 (on fishing) and in Article 3 (on mining and other activities): the provisions of these two Articles were outlined at the beginning of this section. In the case of Article 2, the terms that need to be examined are “the territories specified in Article 1” and “their territorial waters.” “The territories specified in Article 1” are the various islands referred to in that Article. The ordinary meaning of the word “territory,” and the distinction made between “territories” and “territorial waters” in Article 2, strongly imply that the “territories” of the various islands mean their

⁴⁹ Submission, *supra*, p. 15.

⁵⁰ Cf. the *Libya/Malta* case where the ICJ states that a State may have a continental shelf without an EEZ, but cannot have an EEZ without a continental shelf: *Continental Shelf (Libyan Arab Jamahiriya /Malta)* case, [1985] ICJ Rep. 18 at 33 (para. 34).

⁵¹ See, for example, Government Answer to Written Question in the House of Lords, HL Debs., Vol. 476, col. 22 (2 July 1986); UK Non-Paper on Svalbard, 1993, *supra*, para. 4; and Note No 11/06, *supra*.

land territory.⁵² The term “territorial waters” is less straightforward. In 1920 there was considerable controversy over the legal nature of territorial waters, with a division of opinion between those states that regarded territorial waters as an area subject to the coastal State’s sovereignty and those states that took the view that territorial waters were a zone or zones (often of varying widths) where the coastal State had jurisdictional competence for specific and varied purposes.⁵³ This controversy was not settled until the Hague Codification Conference in 1930, although that Conference produced no treaty. Since the 1958 Convention on the Territorial Sea and Contiguous Zone, at least, there has been no doubt that under international law the territorial sea (the term now preferred to territorial waters) is a single zone subject to the coastal State’s sovereignty, and since the entry into force of UNCLOS in 1994, at the latest, it has been equally clear that the territorial sea may not extend more than 12 miles from the baseline. If the evolutionary approach to the interpretation of generic terms in treaties, as exemplified in the *Aegean Sea* and *Costa Rica v. Nicaragua* cases (see above), is applied, the term “territorial waters” in Article 2 of the Svalbard Treaty must be considered to have the same meaning as the term “territorial sea” has in UNCLOS. This means that “territorial waters” cannot include areas beyond 12 miles from Svalbard’s baselines.

The interpretation of the relevant terms in Article 3 of the Svalbard Treaty is a little more complicated. Article 3 is not the most happily drafted of provisions because of the apparent substantial overlap between its first two paragraphs. Paragraph 1 provides that the nationals of all parties may “carry on” all maritime, industrial, mining and commercial operations “there.” “There” refers back to “the waters, fjords and ports of the territories specified in Article 1” in the earlier part of Article 3(1). Paragraph 2 of Article 3 provides that the nationals of the parties “shall be admitted under the same conditions of equality to the exercise and practice” of all maritime, industrial, mining and commercial enterprises both “on

⁵² But note that Anderson argues that “territories” in Art. 1 includes the territorial waters of the islands there mentioned. See D. H. Anderson, “The Status under International Law of the Maritime Areas around Svalbard,” paper given at the 150th Anniversary Symposium of the Norwegian Academy of Science and Letters, available at <<http://www.dnva.no/c26889/binfil/download.php?tid=27096>>. See also the discussion at note 81 below.

⁵³ Churchill and Lowe, *The Law of the Sea*, *op. cit.*, pp. 71-75.

land and in the territorial waters.” The terms that call for interpretation are “waters,” “the territories specified in Article 1,” and “territorial waters.” The last two terms must have the same meaning as when used in Article 2. The meaning of “waters” is less obvious. It could be argued that it includes waters beyond the territorial sea. However, it seems most unlikely that the drafters of the Treaty would have given nationals of all parties the right to carry on maritime and other activities in an area which under the law of the sea at the time would have been high seas, or that they intended Article 3(1) to apply to a considerably wider geographical area than Article 3(2). Furthermore, “waters” is in a group of three terms that also includes the “fjords and ports of the territories specified in Article 1.” These last two terms belong to a category that under the contemporary law of the sea would be labelled as internal waters. It is therefore reasonable to regard “waters” as also referring to internal waters. This would give a reading whereby Article 3(1) applies to all maritime and other activities in internal waters, while Article 3(2) applies to the land and territorial sea. This therefore avoids any duplication between Article 3(1) and 3(2): there is arguably a presumption in treaty interpretation that treaty provisions do not duplicate each other.

Thus far, only the English text of Articles 2 and 3 has been considered. But the Svalbard Treaty is drafted in two languages, French being the other authentic language. Of the terms considered above, the French text is very similar to the English when it comes to “waters” and “territorial waters,” using the terms “*eaux*” and “*eaux territoriales*,” respectively. However, there is possibly a significant difference when it comes to the term “the territories specified in Article 1,” where the French text speaks of “*les régions visées à l'article 1^{er}*”. It could be argued that the French text is wider than the English and includes not only all the islands mentioned in Article 1 but also all the waters within the points of longitude and latitude specified in Article 1. However, Article 1 makes no references to waters, but only to islands and rocks. Furthermore, as mentioned earlier, it is very doubtful that the drafters of the Svalbard Treaty would have intended to give Norway and the other treaty parties rights in waters beyond the territorial waters explicitly referred to in Articles 2 and 3. Applying Article 33 of the VCLT, it must be presumed that in using the expression, “*les régions visées à l'article 1^{er}*”, the drafters intended it to have the same meaning as the English text.

We turn now to look at a second principal element of treaty interpretation, the object and purpose of a treaty. Determining such object and purpose is not

always easy and carries a risk of subjectivity. In the case of the Svalbard Treaty, its object and purpose appear to be as follows. A first purpose is to provide an orderly regime for Svalbard, in place of the previous and potentially anarchic *terra nullius* status, by providing for Norway to have sovereignty over Svalbard. A second purpose, suggested by the preamble of the Treaty, is to lay down “an equitable regime, in order to assure [the] development and peaceful utilisation” of Svalbard. It is not clear what is meant by “equitable” in this context. It may refer to preserving the rights that the parties had under the previous *terra nullius* regime to carry on economic activities. Anderson argues that “equitable” refers to what he describes as a “package deal” under which the parties to the Treaty other than Norway gave up their potential claims to sovereignty over Svalbard and free access there under the previous *terra nullius* regime and recognised Norwegian sovereignty (subject to the stipulations mentioned in the Treaty): in exchange they obtained non-discriminatory rights to exercise a variety of economic activities.⁵⁴ If not included in the concept of an “equitable regime,” the preservation of the pre-existing rights of parties other than Norway would appear to be a further object and purpose of the Treaty, as evidenced by Articles 2, 3, 4 (on equal access to wireless telegraphy stations), 6 (on the acquired rights of the nationals of Treaty parties), 7 (on equality in the ownership of property) and 8 (non-discrimination in the application of mining regulations). The fact that such rights were pre-existing complicates the issue. As mentioned above, the Treaty may be ratified by any state at any time. It hardly seems in keeping with the original bargain represented by the Svalbard Treaty and the “equitable regime” referred to in the Treaty’s preamble that a state should be able to ratify the Treaty today and claim the same rights as the original Treaty parties—unless the original parties took it upon themselves to act on behalf of the whole community of states.

The object and purpose of the Treaty would support an argument for the extension of the rights in Articles 2 and 3 to the 200-mile zone and continental shelf. If, by establishing a 200-mile zone and continental shelf around Svalbard, Norway extends the geographical scope of the sovereignty over Svalbard accorded to it as one of the objects and purposes of the Treaty, then, it may be argued, the geographical scope of the equal rights of the other parties to the Treaty (also an object and purpose of the treaty) should be likewise extended.

⁵⁴ Anderson, *op. cit.*, pp. 3 and 14.

Such an argument may be buttressed by pointing to the frequent statements of the International Court of Justice that there is a close nexus between land territory and appurtenant maritime zones,⁵⁵ from which it arguably follows that the limitations on Norway's sovereignty over the land territory of Svalbard should apply to the appurtenant zones. Four observations may be made about this line of argument. The first is that it may be debatable whether today Norway's sovereignty over Svalbard derives (entirely) from the Svalbard Treaty. For non-parties, as noted earlier, Norway's sovereignty over Svalbard derives from its practical exercise over more than 80 years. For states (such as Iceland) that have ratified the Treaty in recent years, it can be argued that the same should also be true. It would be highly artificial to say that for such states Norway's sovereignty derives from their recognition of it by becoming parties to the Svalbard Treaty decades after that Treaty was concluded and such recognition originally took place. However, the Treaty does not distinguish between the rights of the original and later parties. The second observation is that the object and purpose of the Treaty relating to the rights of parties other than Norway, it was suggested, concerns the preservation of pre-existing rights. Fishing and mining beyond the territorial sea were not pre-existing rights under Svalbard's *terra nullius* regime. It is true that the parties to the Treaty would have had the right to fish and mine in the waters concerned under the freedom of the high seas, but then so would any state not a party to the Treaty. The third observation is that an extension of the rights in Articles 2 and 3 to maritime zones beyond the territorial sea could conceivably defeat the object and purpose of the Treaty of assuring the peaceful utilisation of Svalbard because such an extension might lead to conflict.⁵⁶ A final observation concerns the reference above to the other parties' equal rights as being limitations on Norway's sovereignty. Fife and Fleischer argue that there are no limitations on Norway's sovereignty; it is the recognition of Norway's sovereignty that is subject to the

⁵⁵ See, for example, *Anglo-Norwegian Fisheries* case, [1951] ICJ Rep. 116 at 133; *North Sea Continental Shelf* case, [1969] ICJ Rep. 3 at 23 and 52; *Aegean Sea* case, *supra*, p. 36; and *Libya/Malta* case, *supra*, p. 41. Cf. also UNCLOS Art. 76(1), which speaks of the continental shelf as being "a natural prolongation" of a coastal State's land territory. See further Churchill and Ulfstein, *Marine Management in Disputed Areas: The Case of the Barents Sea*, *op. cit.*, p. 46.

⁵⁶ For an exploration of this argument, see Churchill and Ulfstein, *Marine Management in Disputed Areas: The Case of the Barents Sea*, *op. cit.*, pp. 43-46.

“stipulations” in the Treaty (“*conditions*” in the French text).⁵⁷ This is without doubt literally what Article 1 provides. However, the distinction between sovereignty being subject to conditions, and the recognition of sovereignty being subject to conditions, seems a distinction without a difference. If Norway breaches one of the stipulations of the Treaty, the other parties would be entitled to withdraw their recognition. That appears to be tantamount to saying that Norway must exercise its sovereignty in accordance with the Treaty’s stipulations, and that its sovereignty is subject to conditions. Fleischer seems, in fact, to recognise this, because later in the same paper he speaks of restrictions on Norway’s sovereignty and Norway exercising its rights subject to the rights of other parties.⁵⁸

The final principal element in treaty interpretation is the context of a treaty. The VCLT lists various matters that are to be regarded as the context of a treaty (Article 31(2)) or that are “to be taken into account, together with the context” (Article 31(3)). As far as the Svalbard Treaty is concerned, there seems to be nothing in its context that is helpful to the issue being considered here. There are, however, some arguably relevant matters to be taken into account under Article 31(3) of the VCLT. Article 31(3)(b) refers to “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.” It could be argued that practice relating to the FPZ establishes the agreement of the parties that the non-discrimination provisions of Article 2 apply to fishing in the 200-mile zone around Svalbard. Against this must be set the fact that Norway denies that Article 2 applies to the 200-mile zone and that its operation of the FPZ is subject to an implicit ongoing “without prejudice” clause. It may perhaps be questioned whether a “without prejudice” clause can be maintained for more than 30 years, but practice elsewhere suggests that this is indeed possible. As well as practice, Article 31(3) refers, in sub-paragraph (c), to “any relevant rules of international law applicable in the relations between the parties.” The main such rules of relevance to the issue under discussion here are those contained in UNCLOS. According to Fife and Fleischer, the Norwegian Government takes the view that the rights that

⁵⁷ Fife, “Folkerettslige spørsmål,” *op. cit.*; Fleischer, “The Question of Earlier Treaty Rights,” *op. cit.*, pp. 3-4.

⁵⁸ Fleischer, “The Question of Earlier Treaty Rights,” *op. cit.*, pp. 4 and 8.

UNCLOS gives to coastal States in respect of the EEZ and continental shelf are not only to be taken into account but are incompatible with application of Articles 2 and 3 of Svalbard Treaty beyond the territorial sea. Reference is made in this context to Article 30 of the VCLT (which provides that in the case of “successive treaties relating to the same subject matter,” an earlier treaty applies only to the extent that its provisions are compatible with the later treaty) and Article 311(2) of UNCLOS (which implies that UNCLOS prevails over prior incompatible treaties). It is debatable whether in fact there is the incompatibility alleged by the Norwegian government (or at least by Fife and Fleischer). If the Svalbard Treaty applied beyond the territorial sea, it would not prevent Norway from exercising the legislative and enforcement jurisdiction that coastal States have in respect of their EEZs and continental shelves under UNCLOS (see section 5 below). Secondly, there is nothing in UNCLOS that prevents a coastal State from sharing the exploitation of the resources of its EEZ and continental shelf with other states, as is notably evidenced by the practice of EU Member States. In any case, if there is the incompatibility that the Norwegian government alleges, it must apply to (and in fact be even greater in) the territorial sea, but Norway appears never to have sought to argue that UNCLOS makes the Svalbard Treaty inapplicable in the territorial sea.

Article 32 of the VCLT provides that supplementary means may be used to confirm the meaning resulting from the application of Article 31 or to determine the meaning if such application leaves the meaning ambiguous, obscure, absurd or unreasonable. In the case of the Svalbard Treaty, the terms, object and purpose, and context of the Treaty do not lead to a clear-cut conclusion as to whether the rights in Article 2 and 3 apply beyond the territorial sea. The terms of the Treaty suggest that the rights concerned do not apply beyond the territorial sea, the object and purpose can support the opposite conclusion, while the context offers little guidance either way. It therefore seems permissible to resort to supplementary means of interpretation since the application of Article 31 has left the meaning of the relevant aspects of the Treaty ambiguous and obscure. The only supplementary means of interpretation referred to in Article 32 are the preparatory work of a treaty and the circumstances of its conclusion. In the case of the Svalbard Treaty, the former are of limited help, although there are a couple of matters worth mentioning. First, the proposed application of equal rights of fishing and mining to the territorial sea was uncontroversial at the Paris Peace

Conference that drafted the Svalbard Treaty, and such application was, in fact, included in the draft treaty that Norway presented to the Spitsbergen Commission.⁵⁹ It may therefore be that given their willingness to include equal rights of fishing and mining in the one maritime zone known to international law at the time, the drafters would readily have included such rights in any other maritime zones, had they known of their future development. Secondly, the chairman of the Spitsbergen Commission stated during the negotiation of the Treaty that the only restrictions on Norway's sovereignty over Svalbard were those expressly referred to in the (draft) Treaty, and that therefore that any matter not falling within the rights of the other parties was subject to the sovereignty of Norway.⁶⁰ It is doubtful whether this statement does any more than make explicit what is surely implicit in the Treaty. Nevertheless, Professor Fleischer attaches considerable weight to it in order to support his argument that as the Svalbard Treaty makes no mention of the 200-mile zone and continental shelf, other states can have no rights there, and therefore these areas are subject to the full and absolute sovereignty of Norway—in other words, a purely literal interpretation of the Treaty.⁶¹

As for the circumstances of the conclusion of the 1920 Treaty, they were to bring order to the anarchy of a *terra nullius* by determining that Norway should have sovereignty over Svalbard and to preserve the existing rights of other states active on Svalbard at the time. This adds little or nothing to the object and purpose of the Svalbard Treaty.

A further supplementary means of treaty interpretation may be consequentialist arguments. There is one that is particularly relevant to the present context. If the equal rights of fishing and mining in Articles 2 and 3 of the Svalbard Treaty did not apply beyond the territorial sea, this would have the anomalous consequence that States parties other than Norway would have greater rights of fishing and mining on the land territory and territorial sea of Svalbard than they had in the 200-mile zone or continental shelf around Svalbard. Normally, of course, the position is the converse, with states having fewer rights

⁵⁹ *Commission du Spitsberg. Recueil des actes de la Conférence, pt VII, Conférence de la paix, 1919-1920*, Paris, 1924, pp. 17-19.

⁶⁰ *Commission du Spitsberg, supra*, procès-verbal, No. 10, p. 60, as quoted in Fleischer, "The Question of Earlier Treaty Rights," *op. cit.*, p. 4.

⁶¹ Fleischer, "The Question of Earlier Treaty Rights," *op. cit.*, pp. 4-6.

in a coastal State's territorial sea than they have in its maritime zones beyond. This anomaly is underlined by the extension of Svalbard's territorial sea in 2003, when suddenly States parties other than Norway acquired equal rights to mine in the area between 4 and 12 miles from Svalbard's baselines, whereas (on the supposition that Article 3 does not apply beyond the territorial sea) they had previously had no right to mine in that area. Normally states extend their territorial seas to reduce the rights of other states, not to increase them. Had the Third UN Conference on the Law of the Sea heeded the calls of the most territorialist group of states and decided on a 200-mile territorial sea rather than an EEZ, there is no doubt that Articles 2 and 3 of the Svalbard Treaty would have applied out to 200 miles. It therefore seems odd, to say the least, that they do not apply in a zone that gives coastal States fewer rights. Nevertheless, the fact that anomalies result from the Norwegian position does not in itself mean that that position is wrong.

Before attempting a conclusion as to whether the rights of equal fishing and mining contained in Articles 2 and 3 of the Svalbard Treaty apply beyond the territorial sea, it is worth examining the practice of courts and tribunals that have been faced with the question of whether a treaty or similar instrument may be extended or applied to maritime areas that were not in the contemplation of the parties at the time of the treaty's conclusion. The writers are aware of five such cases. In chronological order of the date of the judgment, they are: the *Abu Dhabi* and *Qatar* arbitrations, the *Aegean Sea Continental Shelf* case, the *Guinea-Bissau/Senegal* arbitration, the *Oil Platforms* case, and the *Guyana/Suriname* arbitration. Each of these will be considered in turn.

In the *Abu Dhabi* case (1951)⁶² the sole arbitrator, Lord Asquith, had to decide whether a concession granted in 1939 by the Sheikh of Abu Dhabi to Petroleum Development Ltd, whereby the Sheikh purported to transfer the exclusive right to drill for oil in the "whole of the lands which belong to the rule of the Ruler of Abu Dhabi and its dependencies and all the islands and the sea waters which belong to the area," extended to the continental shelf. Lord Asquith held that the concession did not so extend on the ground that even if the continental shelf had become part of customary international law at the time of his

⁶² *Petroleum Development Ltd. v. Sheikh of Abu Dhabi*, 18 *International Law Reports*, 1951, 144.

award (which he did not believe that it had), “it would be a most artificial refinement to read back into the contract the implication of a doctrine not mooted till seven years later, and . . . not even today admitted to the canons of International Law.”⁶³ The facts of the *Qatar* case⁶⁴ were similar and the arbitrator, Lord Radcliffe, reached the same conclusion as Lord Asquith, although his decision contains no reasons. There are some obvious parallels between these two cases and the issue under consideration here, and in his many writings on the matter Professor Fleischer has always relied heavily on these cases when arguing in support of Norway’s position. However, there are some features of the cases that lessen their value as precedents for the Svalbard issue. First, the two cases involved concessions to an oil company rather than a treaty—and a treaty, moreover, whereby some states recognised the sovereignty of another state over a territory in return for the preservation of their pre-existing rights. Secondly, Lord Asquith’s finding that the concession did not extend to the continental shelf was in a sense *obiter* as he found that the continental shelf did not exist as a legal concept at the time of his award—although if it had done, Lord Asquith’s decision might well have been no different. Thirdly, his decision was based not on international law as such, but on “principles rooted in the good sense and common practice of the generality of civilized nations—a sort of ‘modern law of nature’.”⁶⁵

The next case is the *Aegean Sea Continental Shelf* case (1978)⁶⁶ in which Greece asked the International Court of Justice to adjudicate on its continental shelf boundary dispute with Turkey in the Aegean Sea. One of the bases for the Court’s jurisdiction put forward by Greece was the 1928 General Act for the Pacific Settlement of Disputes, to which both Greece and Turkey were parties. Greece had, however, made a reservation to the Court’s jurisdiction under the General Act in respect of disputes “relating to the territorial status of Greece.” Greece sought to argue that this reservation did not apply to the dispute because the concept of the continental shelf was unknown in 1931 when Greece made its reservation. The Court rejected this argument, holding that as the phrase “the

⁶³ *Ibid.*, p. 152.

⁶⁴ *Petroleum Development Ltd. v. Ruler of Qatar*, 18 *International Law Reports*, 1951, 161.

⁶⁵ *Petroleum Development Ltd. v. Sheikh of Abu Dhabi*, p. 149.

⁶⁶ *Aegean Sea Continental Shelf* case (*Greece v. Turkey*), [1978] ICJ Rep. 3.

territorial status of Greece” was used in the Greek reservation as a “generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time.”⁶⁷ The Court was, however, influenced by the fact that it was dealing with a jurisdictional clause in a treaty and that Greece was invoking a dispute over its rights under this clause. Since those rights were continental shelf rights, they did not exist in 1931. Greece was therefore in effect arguing that its rights had evolved since 1931. It is therefore easy to understand that the Court was unwilling to accept that Greece could invoke the jurisdictional clause on the basis of the evolution of international law without at the same time its reservation being subject to a similar evolutionary interpretation. The Court also distinguished the *Abu Dhabi* case, on which Greece sought to rely, noting that there was “an essential difference between a grant of rights of exploration and exploitation over a specified area in a concession,” where there might well be “a presumption that a person transferring valuable property rights to another intends only to transfer the rights which he possesses at that time,” and “the wording of a reservation to a treaty by which a State excludes from compulsory procedures of pacific settlement disputes relating to its territorial status.”⁶⁸ Given the Court’s emphasis on the particular nature of jurisdictional clauses, and its distinction between such clauses and the grant of rights (at least of the kind that were at issue in the *Abu Dhabi* case), the case is perhaps of limited relevance to the Svalbard question. Nevertheless, the Court’s decision that just as Greece’s maritime rights had changed over time to include the continental shelf, so had there been a corresponding change in the scope of Greece’s acceptance of jurisdiction under the 1928 Act, offers a parallel to the Svalbard situation. In the same way as Norway’s right to claim maritime zones in respect of Svalbard by virtue of its sovereignty has increased over time, so, it can be argued, there has been a corresponding increase in the limitations on that sovereignty (including Articles 2 and 3).

⁶⁷ *Ibid.*, p. 32 (para. 77).

⁶⁸ *Ibid.*

In the next case, the *Guinea-Bissau/Senegal Maritime Boundary* arbitration (1989),⁶⁹ an arbitral tribunal had to decide whether a treaty of 1960 between the two previous colonial rulers, Portugal and France, that delimited the territorial sea, contiguous zone and continental shelf boundaries between Guinea-Bissau and Senegal was still in force as between Guinea-Bissau and Senegal, and, if so, whether the maritime boundary delimited by the treaty could be considered also to be the boundary for the EEZ (which did not exist as a legal concept when the treaty was concluded in 1960). The tribunal held that the treaty was in force between Guinea-Bissau and Senegal. It also decided that the treaty should be interpreted according to international law at the time of its conclusion. Thus, as the EEZ did not exist in 1960, the treaty could not, and did not, establish an EEZ boundary between the two states.⁷⁰ The situation in this case is not directly comparable to the Svalbard situation. Furthermore, states have not generally considered that existing maritime boundaries should automatically also be EEZ boundaries (although this has often turned out eventually *de facto* to be the case), as there may be good reasons for selecting a different boundary for the EEZ.

In the *Oil Platforms* case (2003),⁷¹ the International Court of Justice was faced with interpreting a treaty of 1955 that provided for freedom of commerce between “the territories” of Iran and the USA. The USA argued that this did not cover trade in oil produced from platforms outside Iran’s territorial sea. The Court dealt with this point extremely briefly. It simply observed that it did not “consider tenable an interpretation of the treaty that would have differentiated, for the purposes of ‘freedom of commerce’, between oil produced on the land territory or in the territorial sea of Iran and oil produced on the continental shelf, in the exercise of its sovereign rights of exploration and exploitation of the shelf, and the parallel rights over the exclusive economic zone.”⁷² The Court’s decision offers some support for the argument that the rights in Article 2 and 3 of the Svalbard Treaty apply beyond the territorial sea. However, the fact that the Court’s conclusion that the expression “territories,” as used in the 1955 Iran-USA treaty,

⁶⁹ *Case concerning the Delimitation of Maritime Boundary between Guinea-Bissau and Senegal* (1989), XX *Reports of International Arbitral Awards* 119.

⁷⁰ *Ibid.*, pp. 151-152 (para. 85).

⁷¹ *Case concerning Oil Platforms (Islamic Republic of Iran v USA)*, [2003] ICJ Rep. 161.

⁷² *Ibid.*, p. 200 (para. 82).

included the continental shelf and EEZ is so briefly argued and unsupported by any authority, reduces its value as a precedent for the Svalbard issue.

In the *Guyana/Suriname case* (2007)⁷³ an arbitral tribunal had to determine the maritime boundary between Guyana and Suriname. In relation to the territorial sea boundary, the Tribunal found that the previous colonial rulers, the Netherlands and the United Kingdom, had agreed on a particular azimuth as the *de facto* line of delimitation for the then three-mile territorial sea. However, the tribunal declined to extend that line out to 12 miles (the outer limit of the parties' territorial seas) because of the special circumstances of the case and the need to find a principled method to join the terminus of the existing line to the starting point of the continental shelf/EEZ boundary determined by the tribunal (which was based on equidistance).⁷⁴ The tribunal held that Suriname's invocation of the inter-temporal law principle to claim that references to the territorial sea in earlier instruments and conduct should be regarded as references to the limits of the territorial sea as established by the parties at any given time, was not relevant in this case where the issue turned on adjusting the territorial sea boundary to meet special circumstances.⁷⁵ The tribunal also observed that there appeared to be no international jurisprudence, state practice or academic commentary on how an existing territorial sea boundary was to be extended, in the absence of an agreement to do so, when states enlarged their territorial seas from three to 12 miles. As with the *Guinea- Bissau v. Senegal* case, the situation in this case is not directly comparable to that of Svalbard.

This survey of cases where courts and tribunals have been faced with the question of whether a treaty or concession should be extended to maritime zones not in existence at the time of the treaty's conclusion suggests that there is no uniformity of approach, and that whether a treaty will be so extended appears to depend on the nature of the treaty provision in question and the circumstances of the case. None of the treaties with which the cases were concerned appears directly comparable to the Svalbard Treaty. The cases therefore do not offer any

⁷³ *Arbitration between Guyana and Suriname*, available on the website of the Permanent Court of Arbitration at <<http://www.pca-cpa.org/upload/files/Guyana-Suriname%20Award.pdf>>.

⁷⁴ *Ibid.*, para. 315.

⁷⁵ *Ibid.*, para. 318. It should be noted that the tribunal uses the term "inter-temporal" in the opposite sense to that in which it is usually used, and as it is used elsewhere in this paper.

particularly helpful precedents, although, as suggested, the *Aegean Sea* and *Oil Platforms* cases offer some support for an argument that the rights in Articles 2 and 3 extend beyond the territorial sea, while the *Abu Dhabi* and *Qatar* cases support the opposite view.

Perhaps as helpful as the above cases are two recent cases which discuss in more general terms how older treaties should be interpreted. In the *Iron Rhine* arbitration, which was concerned with the interpretation of a treaty of 1839 under which Belgium was accorded certain rights of transit across the territory of the Netherlands, the tribunal noted that “various changes could not have been foreseen by the Parties. At the same time this rule [i.e. the inter-temporal rule] does not require the Tribunal to be oblivious either to later facts that bear on the effective application of the treaty, nor indeed to all later legal developments.”⁷⁶ The tribunal decided that “an evolutive [sic] interpretation, which would ensure an application of the treaty that would be effective in terms of its object and purpose, will be preferred to strict application of the inter-temporal rule.”⁷⁷ The tribunal found support for such a position in a dictum of the International Court of Justice in the *Gabčíkovo-Nagymaros* case that a treaty “is not static, and is open to adapt to emerging norms of international law”; a decision of the District Court of Rotterdam that the 1884 Convention on the Protection of Submarine Cables should be interpreted to include telephone cables, even though they had not been developed at the time of the Convention’s conclusion; and the views of several distinguished writers.⁷⁸ The tribunal was also influenced in its approach by the fact that the 1839 treaty had an object that was not of fixed duration.⁷⁹ The second case is the *Costa Rica v. Nicaragua* case, in which the International Court of Justice had to interpret a treaty of 1858 that gave Costa Rica certain rights on a river in the territory of Nicaragua. The Court’s discussion is in the context of interpreting specific terms in a treaty. It observed that

there are situations in which the parties’ intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used—or some of them—a meaning or content capable of

⁷⁶ *Iron Rhine* arbitration, *supra*, para. 79.

⁷⁷ *Ibid.*, para. 80.

⁷⁸ *Ibid.*, paras. 80 and 81.

⁷⁹ *Ibid.*, paras. 82-84.

*evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law. In such instances it is indeed in order to respect the parties' common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied.*⁸⁰

Although the Court's discussion relates to terms in a treaty, the dictum just quoted would seem capable of a more general relevance to the interpretation and application of older treaties.

The two cases, by downplaying the inter-temporal rule, point away from interpreting the Svalbard Treaty according to international law as it was in 1920 and giving it a more evolutionary interpretation. This would suggest not only that Norway's right to establish maritime zones beyond the territorial sea has increased over time, but so also has the geographical scope of the non-discriminatory rights of the other parties under the Treaty. Furthermore, Norway's preferred literal interpretation is one that is more consonant with the inter-temporal rule than an evolutionary interpretation.

In the light of the above discussion, we must now try to reach a conclusion about whether the equal rights of fishing and mining in Articles 2 and 3 of the Svalbard Treaty apply to maritime zones beyond the territorial sea. According to a literal reading of the Treaty (which is favoured by the Norwegian government) the rights in Articles 2 and 3 do not apply beyond the territorial sea. Some support for this position can also be found in the *travaux préparatoires* of the Svalbard Treaty and the *Abu Dhabi* and *Qatar* cases. On the other hand, the opposite conclusion can be drawn from the object and purpose of the Treaty, an evolutionary interpretation, the anomalies that would be created if the Treaty did not extend beyond the territorial sea, and, to some degree, from the *Aegean Sea* and *Oil Platforms* cases. Thus, the various elements of treaty interpretation do not point to a clear-cut and definite conclusion.

Finally, it remains to consider whether the Mining Code and the limitations on Norway's powers of taxation in Article 8 of the Treaty, outlined in section 2 above, apply beyond the territorial sea. An obvious preliminary point is

⁸⁰ *Costa Rica v. Nicaragua*, *supra*, para. 64

that this issue is only relevant if Article 3 applies beyond the territorial sea. Under Article 8 of the Svalbard Treaty Norway undertakes to provide mining regulations “for the territories specified in Article 1.” On a literal reading of the Treaty, this obligation would apply only on land. However, the territory of a state is often regarded as including the appurtenant territorial sea.⁸¹ Furthermore, Article 8 must be read in context. Part of that context is that Article 3 gives an explicit right to mine in the territorial sea. It would be odd if Norway was obliged to regulate mining on land but not in the territorial sea. If the power to regulate mining applies to the territorial sea, and if the equal rights of Treaty parties to mine given by Article 3 apply to the continental shelf, it would seem to follow that Norway’s obligation to regulate mining also applies to the continental shelf. Indeed, any other solution risks poorly or unregulated oil and gas exploitation on Svalbard’s continental shelf. As seen in section 2 above, Norway has fulfilled its obligation under Article 8 to provide mining regulations by adopting the Mining Code in 1925. *Ratione loci*, the Code applies to the islands referred to in Article 1 of the Treaty.⁸² In effect, that is the same as the geographical scope of Article 8. Thus, by the same process of reasoning that led to the conclusion that the obligation to produce mining regulations extends to the territorial sea, the Mining Code should be considered to apply to the territorial sea. The Norwegian government has, in fact, acknowledged that that is the case.⁸³ If the obligation to produce mining regulations also extends to the continental shelf (as argued above), so should the Mining Code. Whether, however, the Mining Code is suited to regulating mining at sea, and specifically the exploration and the exploitation of oil and gas, is another matter, and one that falls outside the ambit of this paper.⁸⁴

As for the limitations on Norway’s powers of taxation, they form the second paragraph of Article 8, immediately after the paragraph dealing with Norway’s obligation to draw up mining regulations that has just been discussed.

⁸¹ Cf. UNCLOS, Art. 2(1): “the sovereignty of a coastal State extends beyond its land territory . . . , to an adjacent belt of sea, described as the territorial sea.”

⁸² Mining Code, section 1.

⁸³ Ulfstein, *The Svalbard Treaty*, *op. cit.*, p. 418.

⁸⁴ For a fuller discussion of the application of the Mining Code to Svalbard’s maritime zones, and its suitability for use there, see Churchill and Ulfstein, *Marine Management in Disputed Areas: The Case of the Barents Sea*, *op. cit.*, pp. 36-38 and 51-52; and Ulfstein, *The Svalbard Treaty*, *op. cit.*, pp. 415-418 and 444-446.

Article 8(2) says nothing about its geographical scope. Arguably, it should have the same geographical scope as Article 8(1), and therefore apply beyond the territorial sea. Any other interpretation would undermine the purpose of the provision because it would allow Norway unlimited powers to tax foreign oil companies operating on Svalbard's continental shelf.⁸⁵

5. Particular Issues Relating to the FPZ

We turn now from the general question of the geographical scope of the Svalbard Treaty to consider some specific issues relating to the FPZ. The first such issue concerns claims by some parties to the Svalbard Treaty, notably Iceland, Spain and Russia, as well as by the EU (even though it is not a party to the Treaty), that Norway is not entitled to exercise jurisdiction over non-Norwegian vessels fishing in Svalbard's 200-mile FPZ.⁸⁶

To assess the validity of these claims, it is helpful to begin by considering the position in the territorial sea. The question of Norwegian jurisdiction over non-Norwegian vessels fishing in Svalbard's territorial sea is addressed in Article 2 of the Svalbard Treaty. After providing in paragraph 1 that all parties to the Svalbard Treaty have an equal right to fish and hunt in the territorial sea, Article 2 goes on, in paragraph 2, to state that

Norway shall be free to maintain, take or decree suitable measures to ensure the preservation and, if necessary, the reconstitution of the fauna and flora of the said regions [i.e. the islands referred to in Article 1], and their territorial waters; it being clearly understood that these measures shall always be applied equally to the nationals of all the High Contracting Parties (emphasis added).

Despite its rather old-fashioned wording, this provision clearly gives Norway legislative jurisdiction to adopt fishery conservation measures for the territorial sea, provided those measures apply equally to the nationals of all States parties. It is not clear whether Article 2 expressly gives Norway enforcement jurisdiction.

⁸⁵ Further on this issue, see Ulfstein, *The Svalbard Treaty*, pp. 413-415 and 442-443.

⁸⁶ See further Pedersen, *op. cit.*, pp. 245-252.

Although the words “maintain, take or decree” are all concerned with legislative jurisdiction, it is arguable that “applied” refers to enforcement jurisdiction. But even if it does not, it would seem that Norway must have jurisdiction to enforce the measures that it may adopt under Article 2(2) both because this follows from Norway’s general sovereignty over Svalbard and because it would be absurd to give Norway a power to make fisheries conservation measures but no means of enforcing them. In practice, Norway’s exercise of fisheries jurisdiction in the territorial sea (both legislative and executive) appears to be uncontested by the other States parties.

As suggested above, it is not clear whether the equal right to fish in the territorial sea, given in Article 2(1), extends beyond that zone to the FPZ, but if it does, it must logically follow that Norway’s competence under Article 2(2) to enact fisheries conservation measures, together with its concomitant power to enforce such measures, must also so extend.⁸⁷ The other State parties cannot pick and choose. Either the whole of Article 2, including Norway’s jurisdictional competence, applies to the FPZ, or none of the Article’s provisions apply. If the vessels of other states fish in the FPZ by virtue of Article 2, it must follow that Norway has the right to exercise jurisdiction over such vessels. If, on the other hand, such fishing takes place because it is permitted by the Norwegian authorities, it must follow *a fortiori* that Norway has jurisdiction over non-Norwegian fishing vessels, unless it has specifically agreed to forego the exercise of such jurisdiction, which in fact it has not.

Notwithstanding this apparently clear conclusion, Norwegian regulations and their enforcement have been challenged both by foreign fishing vessels and other States parties to the Svalbard Treaty, especially by Iceland, Spain and Russia. The most recent example was the Russian trawler *Elektron*, which escaped from the Norwegian Coast Guard to Russian territorial waters with two Norwegian inspectors on board.⁸⁸ The various legal issues involved in such

⁸⁷ This has been expressly recognised by one State party to the Svalbard Treaty, namely Denmark. See Agreement between Norway and Greenland/Denmark on Mutual Fisheries Relations, 1992, Art. 4(2). Norwegian text available at <<http://www.lovdato.no/traktater/>>.

⁸⁸ See Pedersen, *op. cit.*, p. 252; and K. Åtland and K. V. Bruusgaard, “When Security Speech Acts Misfire: Russia and the Elektron Incident,” 40 *Security Dialogue*, 2009, 333.

challenges are illustrated principally by two cases before the Norwegian Supreme Court, discussed below.

A second issue concerns the allocation of quotas in the FPZ. Since 1994, third states, i.e. states other than the two coastal States Norway and Russia, have been allocated quotas for cod fishing in the FPZ based on their traditional fishing in the area. This has meant that, except for Norway and Russia, only fishing vessels from EU Member States and the Faroe Islands have been given quotas. Quota regulations have also been implemented for herring fishing, and regulations concerning the maximum number of vessels and fishing days have been established in fishing for shrimp.

The quota regulation in the cod fishing led to conflicts with Icelandic fishermen, who were not accorded quotas. In a judgment by the Norwegian Supreme Court in 1996 concerning fishing by Icelandic fishermen in the FPZ, the Court did not consider the geographical application of the Svalbard Treaty. The Court held, however, that exclusion of the Icelanders did not violate the principle of non-discrimination, since allocation of fishing quotas based on traditional fishing was deemed to be justifiable.⁸⁹

The reliance on traditional fishing as the basis for allocating quotas may be considered to be in conformity with the requirement to avoid indirect discrimination on the basis of nationality. As the Permanent Court of International Justice held already in 1932: “It should be remarked in this connection that the prohibition against discrimination, in order to be effective, must ensure the absence of discrimination in fact as well as in law.”⁹⁰ While equal quotas would be formal equality, it would discriminate in fact since certain fishing vessels—and coastal communities—have made fishing around Svalbard part of their livelihood. The allocation of quotas on the basis of traditional fishing is a way of treating

⁸⁹ Rt. 1996 p. 624 at 634-636.

⁹⁰ *Treatment of Polish Nationals in the Danzig territory*, PCIJ, Ser. A/B, No. 44, 1932 at p. 28. A similar approach has been applied in international human rights law and EU law, see e.g. P. van Dijk, F. van Hoof, A. van Rijn and L. Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights* (4th ed., Antwerp/Oxford, Intersentia, 2006) at 1035-1036; and P. Craig and G. de Burca, *EU Law. Text, Cases and Materials*, (4th ed., Oxford, Oxford University Press, 2007) at 758-760. See also Ulfstein, *The Svalbard Treaty*, *op. cit.*, pp. 450-453.

equal cases equally and different cases differently, corresponding to the obligation to prevent indirect discrimination.

A third issue relating to the FPZ relates to reporting requirements. In a case before the Norwegian Supreme Court in 2006 concerning Spanish fishing in the FPZ, it was claimed by the Spanish fishermen that the fact that Russian fishing vessels did not report according to the regulations violated the non-discrimination requirement in the Svalbard Treaty. The Court found, however, that the need for control of Russian fishing through reporting from its fishing vessels was less important than for other fishing nations in the area since Russian quotas related to the entire migration area of the fish stock, and not merely to the FPZ. Russia provided instead monthly catch reports to Norway. Furthermore, Norwegian authorities had tried through diplomatic means to persuade Russia to fulfil the reporting requirement, and the Court held that the lack of success could not be regarded as a breach of the non-discrimination requirement. The Court did not, however, find it necessary to determine whether Norway had implemented non-discrimination correctly in all respects. The reason was that a possible violation of this requirement would be too distantly related to the Spanish non-reporting to establish a basis for acquittal of the Spaniards.⁹¹ It should be noted that the Court did not find it necessary to determine the geographical application of the Treaty.

The reasoning of the Supreme Court is not entirely convincing. First, the fact that Norwegian authorities had tried to convince Russia to respect the reporting requirements indicates that there is a need for reporting also from Russian fishing vessels. Furthermore, the regulations apply formally also to Russian vessels. It is reasonable to require Norway to enforce such regulations in a non-discriminatory way even if the need may be considered less important in relation to Russia. These observations should, however, not be taken as arguments to the effect that violations of the Svalbard Treaty's requirements of non-discrimination should necessarily lead to exoneration under Norwegian law.

⁹¹ Rt. 2006 p. 1498 at 1513.

6. Possible Solutions

The dispute over the Svalbard Treaty's application to the continental shelf and the 200-mile zone has lasted for over 30 years and there are no signs of a solution. It will in the following be discussed six possible approaches to resolving the dispute and addressing the management issues in these maritime areas: Norway accepts the application of the Treaty beyond the territorial sea; other Treaty parties accept that the Treaty does not so apply; convening of a new Svalbard Conference; resolution through international dispute settlement; a negotiated informal interpretation; or preservation of the status quo.

- Norway accepts the application of the Svalbard Treaty

There seem to be little prospect that Norway will accept the application of the Svalbard Treaty to the continental shelf and the 200-mile zone around Svalbard. First, the present fisheries management is working relatively well and it is not seen as a great sacrifice by Norway that third states are allocated limited fishing quotas in the 200-mile FPZ. Furthermore, although petroleum production on the Norwegian shelf in the North Sea will start to decline in the fairly near future, there is no immediate need to start drilling on the continental shelf around Svalbard. The economic loss by accepting the Treaty regime on the continental shelf, particularly the limitation on taxation, would, however, be considerable.

- The other treaty parties accept that the Svalbard Treaty does not apply

There is no indication that the other treaty parties are willing to accept the Norwegian view. On the contrary, it has been argued that Norwegian efforts to convince them about the benefits of the non-application of the Treaty beyond the territorial sea around Svalbard have strengthened their resistance against the Norwegian view.⁹² The other treaty parties can live with the current fisheries regime, and they have nothing to lose—and potentially much to gain—by claiming that they have rights under the Svalbard Treaty also on the continental shelf.

⁹² T. Pedersen, "Endringer i internasjonal Svalbard-politikk," *Internasjonal Politikk*, 2009, 31 at 38.

- A new Svalbard Conference

A new Svalbard Conference would have the potential to resolve all outstanding legal questions with binding effect, including the geographical application of the Svalbard Treaty, through formal amendments to the Treaty. But, first, such amendments would require agreement between all 40 States parties to the Treaty. Second, such a Conference could provide the basis for new controversies about interpretation of the Treaty, and may also exacerbate existing disputes.

- International dispute settlement

Norway has accepted the compulsory jurisdiction of the International Court of Justice (ICJ) under the Article 36(2) of the Statute of the Court. Such jurisdiction may also follow from bilateral agreements between Norway and other states, such as the agreement on peaceful dispute settlement between Norway and Iceland of 1930.⁹³ A judgment from the ICJ (or another international court) would be legally binding. But not all parties to the Svalbard Treaty have accepted the ICJ's compulsory jurisdiction, among them Russia and the United States. Moreover, while states may threaten to bring the dispute about the geographical application of the Svalbard Treaty before international courts, it seems that no state is willing to actually do so—they may also risk losing the case. Any judgment would furthermore only be formally binding for the parties to the case. It may be noted that it would not be possible for any state to utilise the dispute settlement machinery of UNCLOS, which provides for the unilateral referral by one party to a dispute to binding third party adjudication, because that machinery applies only to disputes concerning the interpretation and application of UNCLOS, and does not cover disputes relating to the Svalbard Treaty.

- A negotiated informal interpretation

Instead of organizing a formal Conference to clarify or amend the disputed issues, Norway could initiate informal consultations with the other parties to the Treaty aimed at a common understanding of the relevant provisions, possibly including a compromise concerning the unresolved issues.

⁹³ Avtale millom Norig og Island um fredeleg løysing av tvistemål, 27 June 1930, *Norges Traktater I*, 908 and *Overenskomster*, 1932, 166.

The adoption of the Mining Code provides an early example of Norway's use of informal understandings between the parties to the Svalbard Treaty. The Treaty provides in Article 8(1) that "Norway undertakes to provide" mining regulations, and sets out certain requirements as to the contents of such regulations. Article 8(4) provides that three months before the date fixed for their entry into force, the draft regulations should be presented to the other Treaty parties. In case of objections to the substance of the regulations, a commission, consisting of one representative from each of the Treaty parties, would "come to a decision" by a simple majority. Norway secured, however, that such objections were raised through prior consultations with the parties before the draft was formally transmitted to the Treaty parties. The regulations, under the title of "Mining Code," were then finally adopted by Norwegian Royal Decree of 7 August 1925.⁹⁴

Another example of a practical arrangement, where Norway approached the relevant companies, not the States parties to the Svalbard Treaty, concerns the right of participation by the land owner in mining operations. Article 19(1) of the Mining Code establishes a right for the land owner to participate to an extent not exceeding one-fourth. This right is undisputed as concerns owners of "treaty land", i.e. land whose ownership is acknowledged through a special procedure established by the Treaty. Section 22 of the Svalbard Act, adopted by Norway in 1925, establishes, however, that land areas which are not recognized as treaty land belong to the Norwegian State. It has been discussed to what extent the Norwegian State may claim a right of participation for land which it owns by virtue of section 22. Instead of insisting on state participation at 25 per cent for both incomes and costs, the right of participation by the Norwegian government has been resolved by agreement between the state and the companies, establishing a royalty at 10 per cent on possible incomes.⁹⁵

A possible informal understanding concerning the geographical application of the Svalbard Treaty raises questions as to its substantive content, the addressees (mining (including oil and gas) companies, fishing vessel owners and operators, and/or states), the procedure, and the political and legal viability of such an approach.

⁹⁴ Ulfstein, *The Svalbard Treaty*, *op. cit.*, pp. 54-55 and 136-155.

⁹⁵ Ulfstein, *The Svalbard Treaty*, *op. cit.*, pp. 331-337.

The substantive components would include the application of non-discrimination in the 200-mile zone and on the continental shelf, and, in addition, the tax regime and the application of the Mining Code on the continental shelf. As already stated, it seems that Norway can live with non-discrimination as regards fishing in the 200-mile zone. It would probably be more difficult to accept non-discrimination on the continental shelf, although it may be noted that Norway has already accepted the application of this principle to the mainland shelf in respect of States parties to, and by virtue of, the Agreement on the European Economic Area (the EEA Agreement).⁹⁶ Even if Norway should accept the application to the Svalbard shelf of the principle of non-discrimination between the parties, the Mining Code should not apply there as it is not designed for continental shelf activities.

It would, however, seem that an accommodation is necessary with respect to the interpretation of the tax limitation in Article 8 requiring that taxes “shall be devoted exclusively to the said territories and shall not exceed what is required for the object in view.” This means that Norway shall not benefit from taxation, but that expenses incurred in the administration of Svalbard may be covered. The Svalbard budget proposed for 2009, based on Article 8, was NOK 231.7 million (about US \$37 million), with a deficit covered by the Norwegian State at NOK 129.9 million (about \$ 21 million).⁹⁷ This deficit would be recoverable through taxation of petroleum activities on the continental shelf around Svalbard. In addition, costs related to the management of petroleum activities on the continental shelf around Svalbard should be financed through taxation. It may be difficult to assess the overall costs to be covered by taxation of the oil companies. It could, however, be envisaged that the parties to the Svalbard Treaty agreed to a percentage acceptable both to Norway and the other States parties.

Such an agreement should be negotiated between the States parties rather than between Norway and the oil companies, the reason being that the Svalbard Treaty grant rights to states, not to companies. But it would be difficult to consult all the 40 States parties, and the convening of a Conference is hardly a good idea.

⁹⁶ OJ No L1, 3.1.1994, p. 3. See Finn Arnesen, *Statlig Styring og EØS-rettslige Skranker* (Oslo, Universitetsforlaget, 1996), pp. 81-82.

⁹⁷ Norwegian Government Paper St. prp. No. 1 (2008-2009), *Svalbardbudsjettet*.

Accordingly, Norway should only consult the most relevant Treaty parties, including Russia, EU Member States, and the US—and possibly China and Japan.

But if agreement were reached with such states, it would not be formally binding, and it would not commit the other Treaty parties. In political terms, an agreement between Norway and the major involved states would, however, carry great political weight. Furthermore, it could be seen as “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation,” according to Article 31(3)(b) of the Vienna Convention on the Law of Treaties.

- Preservation of the status quo

It would seem that preservation of the status quo is acceptable from a fisheries point of view. Management would be based on non-discrimination, and management measures and their enforcement would continue to be developed over time. This option would not, however, be the best solution for petroleum interests, and there might be increasing pressure to find a solution as petroleum activities expand in the Arctic. But the status quo would be preferable from an environmental point of view since it would avoid potential pollution from petroleum activities, and because no petroleum production in the area might in the longer term mean reduced emissions of carbon dioxide from burning fossil fuel.

7. Conclusions

The 1920 Svalbard Treaty brought to an end Svalbard’s previous *terra nullius* status by its parties recognising that Norway had sovereignty over the archipelago. The Treaty also gave other parties the right to carry on certain activities, including fishing and mining, on Svalbard and in its territorial waters on an equal footing with Norway. Norway has established a 12-mile territorial sea and a 200-mile FPZ (rather than an EEZ) in respect of Svalbard. The establishment of these maritime zones is undoubtedly a legitimate exercise of Norway’s sovereignty over Svalbard. Furthermore, contrary to the contentions of some States parties to the Svalbard Treaty, Norway clearly has full legislative and enforcement jurisdiction over foreign vessels fishing in the FPZ by virtue of its sovereignty in general and Article 2 of the Treaty in particular. Norway has not

claimed a continental shelf in respect of Svalbard. Nevertheless, Svalbard undoubtedly has a continental shelf, since under international law every island (except for an uninhabitable rock) automatically has a continental shelf, without the need for any express claim to be made. Contrary to what has been argued by the Norwegian government (at least in the past), the continental shelf around Svalbard is Svalbard's own shelf, not an extension of the continental shelf of mainland Norway.

Whether the rights to fish and engage in mining on a footing of equality that all parties to the Treaty expressly enjoy in the territorial sea under Articles 2 and 3 extend to Svalbard's maritime zones beyond the territorial sea, is uncertain and the subject of dispute between Norway and the other parties to the Svalbard Treaty. On the one hand, it can be argued (as the Norwegian government does) that on a literal reading of the Treaty, the rights in question do not apply beyond the territorial sea. On the other hand, the object and purpose of the Treaty, an evolutionary interpretation, and the anomalies that would be created if the Treaty did not extend beyond the territorial sea all point to the opposite conclusion. Decisions of international courts and tribunals that in the past have been faced with comparable situations do not show a uniformity of view as to how the matter should be resolved: there are cases to support both arguments just outlined. It is therefore 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.

The authors have suggested various ways in which the dispute between the parties to the Svalbard Treaty over the latter's geographical reach could be resolved. However, barring an unexpected reference by one of the parties to the International Court of Justice, the dispute is unlikely to be resolved in the near to medium term future. All, or nearly all, the parties to the Treaty seem fairly content to live with the current arrangements relating to the FPZ, which keep the question of the Treaty's geographical application open. Only if, or when, there becomes a pressing desire to explore for and exploit any oil or gas reserves on the continental shelf around Svalbard will the parties be faced with a real need to resolve the dispute.