

The Svalbard Treaty and the Exploitation of Non-Living Resources on the Continental Shelf

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Abstract

The resources in the Arctic are mostly divided among the Arctic coastal states who claim various areas based on their rights under the Law of the Sea. This leaves only limited possibilities for non-Arctic states to explore and exploit the resources of the Arctic. However, Svalbard, an archipelago north of Norway, can provide a gateway into the High North. These various islands of different sizes have attracted economic interest for centuries, as they function as a supplier for European raw materials. However, the absence of any governing authority, the so-called terra nullius status of Svalbard, led to overhunting and overexploitation. Finally, at the peace conference after World War I, it was decided to solve the problem once and for all. Norway was granted the sovereignty over Svalbard, while preserving certain terra nullius rights for the other states if they would become a party to the Svalbard Treaty.

With the agreement being made nearly a century ago, it does not include any maritime zones beyond the territorial sea nor a continental shelf. Therefore, the extent of Norway's sovereignty rights in the maritime areas beyond the territorial sea and the geographical scope of the treaty parties' rights are disputed. Solving this will enable to solve the stalemate on whether Norway may claim maritime zones and a shelf adjacent of Svalbard and whether the treaty provisions expand along with the sovereignty, enabling all treaty parties to exploit the resources of the sea and shelf. Taking the fact that sovereignty over land generates sovereignty over adjacent maritime areas and Norway's successful occupation of Svalbard for nearly a century, it can be argued that Norway can claim these maritime zones. In addition, Norway has successfully, without any resistance by the international community, established the limit of its outer continental shelf beyond Svalbard and concluded bilateral maritime delimitations agreements covering areas around Svalbard. At the same time, this also proves that Svalbard generates a continental shelf, as a coastal state can have a shelf without maritime zones, but not the other way around. Regarding the legal regime that governs those areas, Norway favors a strict interpretation of the Svalbard Treaty, only making it applicable to the areas especially mentioned in it. The other treaty parties argue in favor of extending their rights parallel to Norway's sovereignty. Since 1920, Norway's sovereignty has been restricted by some rights possessed by the treaty parties, both being closely glued together in a kind of package deal. The whole idea behind the treaty was to deliver a reciprocal approach, consequently interpreting Norway's sovereignty broadly and the treaty parties' rights narrowly, cannot deliver a balanced result. In the same way that the Norwegian right to claim sovereignty over areas beyond the territorial sea has increased over time, the rights of the treaty parties have expanded as well.

Yet, Norway still applies a double standard, basing its claim to maritime zones and a shelf on the development of international law, even though those areas were not mentioned in the treaty, while denying the signatory states any rights in those zones because they were not mentioned in the treaty. Consequently, Norway applies national legislation on the shelf, even though the Treaty and especially the Mining Code cover exploitation of mineral resources on land and in water. Should Norway ever accept the applicability of the Treaty, it would no longer be allowed to allocate licenses unilaterally, but all treaty parties would have the right to exploit the shelf. Until now, Norway has not tried to exploit the shelf closely around Svalbard. Norway would probably have been able to avoid further discussions by simply staying out of the area, but a sedentary species, called the snow crab, changed the game. Because sedentary species are closer to minerals than fish in classification terms, allocating rights for crab harvesting can be used as a precedent for mineral exploitation. A disagreement about the granting of licenses between the EU and Norway, led to a court case in 2016. Following close to similar incidents on fisheries around Svalbard in the past, the Supreme Court avoided to make a clear ruling on the geographical scope of the Svalbard Treaty. Nevertheless, future cases must be monitored closely, considering the importance for both hydrocarbon exploration in general and to determine the scope of the Svalbard Treaty in particular. Norway will need to find a sustainable way to deal with the issue of the Svalbard Treaty, to prevent the emergence of any major conflict, facing the global run for resources. There exist different way doing so, but no solution displays itself yet.

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“You can change what you do, but you can’t change what you want.”

Thomas Shelby in ‘The Peaky Blinders’.

Thank you,

Lea.

Abbreviations

CLCS	Commission on the Limits of the Continental Shelf
EC	European Community
ECHR	European Court of Human Rights
EEA	European Economic Area
EEZ	Exclusive Economic Zone
EFZ	Exclusive Fishing Zones
EU	European Union
FPZ	Fisheries Protection Zone
ICJ	International Court of Justice
ILC	International Law Commission
ISA	International Seabed Authority
ITLOS	International Tribunal for the Law of the Sea
MAGE	Marine Arctic Geological Expedition
NATO	North Atlantic Treaty Organization
NCS	Norwegian Continental Shelf
NEAFC	Convention on Future Multilateral Cooperation in Northeast Atlantic Fisheries
NGL	natural gas liquids
NGO	non-governmental organizations
NM	Nautical Miles (1NM = 1.852 KM)
NOK	Norwegian Krone
PCIJ	Permanent Court of International Justice
PDO	Plan for Development and Operation
R2P	Responsibility to Protect
Sm ³ o.e.	Standard cubic meters of oil equivalents
SNSK	Store Norske Spitsbergen Kulkompani
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
USA	United States of America
USSR	Union of Soviet Socialist Republic
WTO	World Trade Organization

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1 INTRODUCTION

With the retreat of the sea ice and the overall influence of global warming, the eyes of the international community have shifted their focus to the High North. Resources that have been hidden and inaccessible under the ice, slowly start to become valuable for states and companies working in the sector of mineral and hydrocarbon exploration. However, not anyone can begin drilling for resources just anywhere in Arctic, as the region is governed by law as is every other place on earth. The Arctic is an ocean surrounded by nations and governed under the Law of the Sea, diving it into different maritime zones coming with different rights and responsibilities. For the exploration and exploitation of mineral resources, the seabed is of importance. The Arctic coastal states, namely Canada, the Kingdom of Denmark, Norway, the United States of America and the Russian Federation, all claim different parts of the Arctic's seabed as part of their continental shelf, shown in Figure 1. In this area, the state has the exclusive right to explore and exploit the non-living and living resources of the shelf¹, leaving only minor areas behind that are not claimed under national sovereignty. Norway has the largest sea claim in the world, claiming maritime zones and a continental shelf covering a region six times the size of mainland Norway.² The seabed and subsoil beyond national jurisdiction are known as the 'Area' and administered by the International Seabed Authority.³

¹ *United Nations Convention on the Law of the Sea*, Montego Bay, 10 December 1982, *United Nations Treaty Series*, Vol. 1833, 3 (available at http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf). Hereinafter: UNCLOS. Art 76, 77.

² Torbjørn Pedersen, "The Svalbard Continental Shelf Controversy: Legal Disputes and Political Rivalries", *Ocean Development and International Law*, Vol. 37 (3-4) (2006), 339.

³ UNCLOS Part XI.

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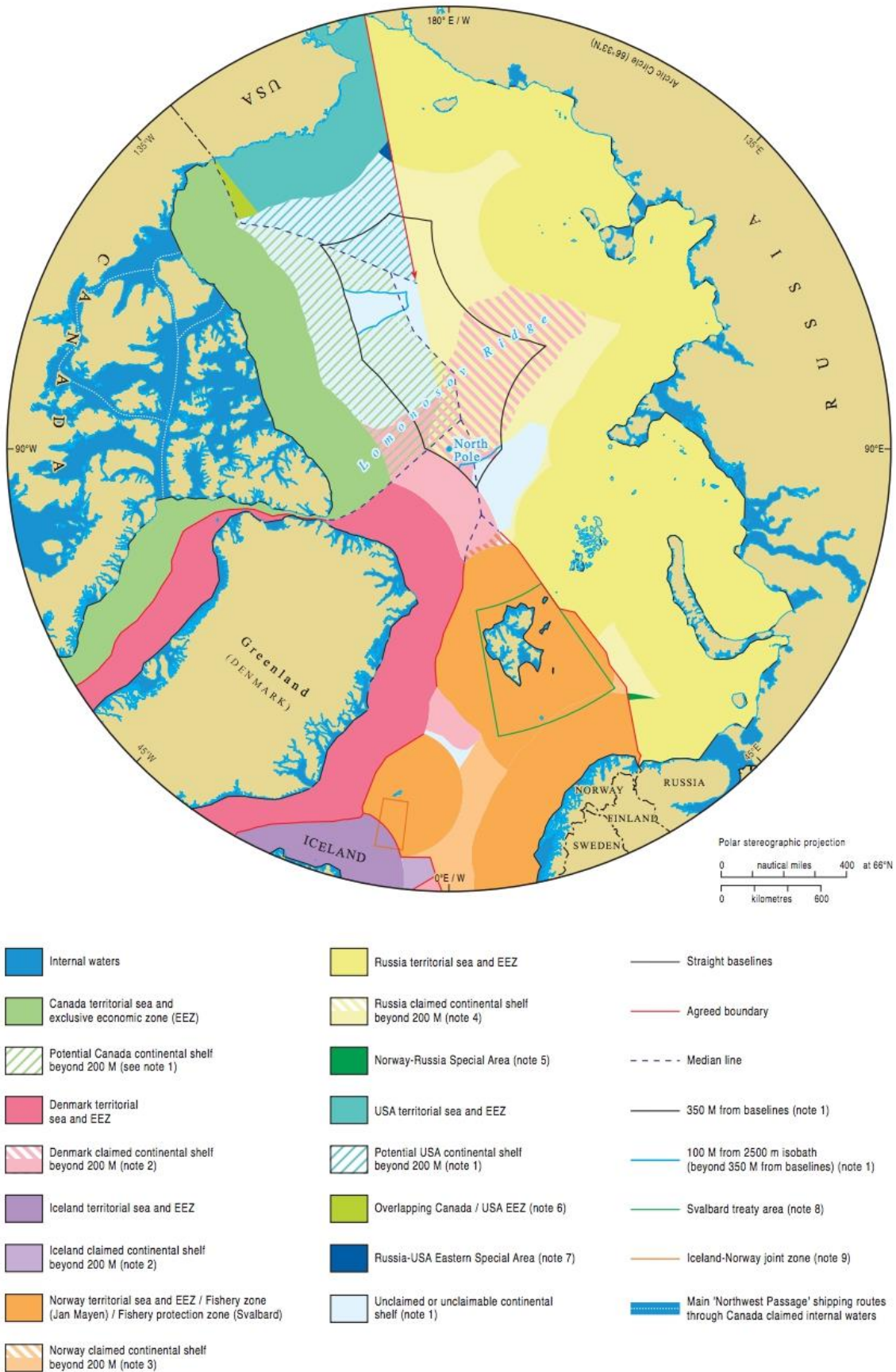


Figure 1 Maritime jurisdiction and boundaries in the Arctic region

Source: Levon Sevunts, "Canada to submit its Arctic continental shelf claim in 2018", RCInet.ca, 03 May 2016 (available at <http://www.rcinet.ca/en/2016/05/03/canada-to-submit-its-arctic-continental-shelf-claim-in-2018/>).

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Yet, there is an archipelago located North of Norway called Svalbard, which provides a chance to some states to get their foot into the door of resource exploration in the Arctic. Svalbard is governed by a unique treaty under international law, the Svalbard Treaty⁴, which was the first internationally binding agreement ever made on the Arctic. While Norway is the sovereign of the archipelago, signatory states to the Treaty enjoy certain privileges, including equal rights in fishing, hunting, mining and other economic activities. And this certain treaty could be the way of non-Arctic states to start exploring the continental shelf around Svalbard. However, there is a problem, namely that the treaty only mentions the land territory and the territorial sea, because it was made in 1920, prior to the establishment of any maritime zones or the thought about a continental shelf. For nearly 50 years there has been an ongoing, and still unresolved discussion, on the geographical applicability of the Svalbard Treaty. While Norway tries to protect its natural resources, both living resources in the maritime areas adjacent of Svalbard and the non-living and living on the shelf, the signatory states push for a widening of the geographic scope of their rights. In the past, most of the political and academic consideration has been on fisheries around Svalbard, as the Barents Sea surrounding the archipelago has a highly productive ecosystem, making commercial fishing extremely beneficial.⁵ Yet, over the past decade, the non-living resources hidden under the seabed have increasingly caught attention. Now, a stalemate rules the region, because neither Norway nor the treaty parties yield.

The current disputes the Svalbard Treaty are based on different interpretations of

- a) *the extent of Norway's sovereign rights in maritime areas beyond the territorial sea,*
and
- b) *the geographical scope of the rights of the treaty parties,*

whose answer will provide the conclusion as to

- a) *whether Norway can claim new maritime areas based on UNCLOS due to its sovereignty over the archipelago, and*
- b) *whether treaty provisions, and particularly the equality regime, the Mining Code and the limitation of taxation, are applicable to the maritime areas located beyond the territorial sea, especially to the continental shelf.*

⁴ *Treaty between Norway, The United States of America, Denmark, France, Italy, Japan, the Netherlands, Great Britain and Ireland and the British overseas Dominions and Sweden concerning Spitsbergen signed in Paris 9th February 1920*, United States of America, Denmark, France, Italy, Japan, the Netherlands, Great Britain and Ireland and the British overseas Dominions and Sweden, 09 February 1920 (available at https://www.sysselmannen.no/globalassets/sysselmannen-dokument/english/legacy/the_svalbard_treaty_9ssfy.pdf). Hereinafter: Svalbard Treaty.

⁵ Thilo Neumann, "Norway and Russia agree on maritime boundary in the Barents Sea and the Arctic Ocean", *insights*, Vol 14(34) (2010).

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To provide a basis of information about the dispute, more data about the archipelago followed by a presentation of the Svalbard Treaty provision will be given, connected with an explanation of the maritime zones and their legal framework that exist under the Law of the Sea. The main part of the thesis will cover the interpretation of the Svalbard Treaty, to give an answer to the research questions whether Norway can exercise coastal state sovereignty beyond the territorial sea and whether the treaty parties' rights granted by the Svalbard Treaty expand along with it, especially with regard to the non-living resources of the shelf. While the aim of this thesis is to give an (at least theoretical) solution to the dispute, the reality needs to be considered as well. Therefore, an overview of petroleum activities in the region will be given and the influence of a species called snow crab will be explained, leading to an overall conclusion combined with an outlook in the future and potential solutions to solve the dispute.

2 SVALBARD

2.1 HISTORY

The archipelago of Svalbard is one of the northernmost land areas in the world, being situated between 74 and 81 degrees North and between 10 and 35 degrees East. Until the beginning of the 20th century, the archipelago was also known under the term 'Spitsbergen'. However, since it has been included into the Kingdom of Norway, the old Norse term Svalbard, meaning 'cold coast'⁶ is widely used⁷. It consists of islands of different sizes, with a total area of around 61,000 km², with over 50% covered in ice and snow. The largest islands are Spitsbergen, Nordaustlandet, Edgeøya, Barentsøya and Prins Karls Forland.⁸ 65% of the land territory and 87% territorial sea form national parks or nature reserves, where strict environmental regulations apply since the 1990s.⁹ The archipelago was most likely discovered by the Dutch seafarer Willem Barents in 1596. Still, Denmark claimed sovereignty during the 17th and 18th century which was rejected by English King James, who then tried to unilaterally declare English sovereignty over the archipelago in 1614. However, he was unable to enforce the claim due to the superiority of the Dutch naval fleet. Parallel, the Netherlands, France and Spain claimed their right to hunt whales based on the principle of *mare liberum*, which was developed by Hugo Grotius in 1609 and is basically about the freedom of the high seas.¹⁰ In the end, no state was able to enforce sovereignty, leading to unregulated exploitation of the natural resources.

⁶ Christopher R. Rossi, "A Unique International Problem: The Svalbard Treaty, Equal Enjoyment, and Terra Nullius: Lessons of Territorial Temptation from History", *Washington University Global Studies Law Review*, Vol 15(1) (2015), 113.

⁷ In this thesis the newer and internationally mostly used term Svalbard will be used when talking about the archipelago

⁸ Sysselmannen på Svalbard, „About Svalbard”, *The Governor of Svalbard*, 27 September 2016 (available at <https://www.sysselmannen.no/en/Toppmeny/About-Svalbard/>).

⁹ Robin Churchill, Geir Ulfstein, *The disputed maritime zones around Svalbard*, in: Tomas H. Heidar, John Norton Moore, Myron H. Nordquist (ed.), *Changes in the Arctic Environment and the law of the sea*, 2010, 553. *Lov om miljøvern på Svalbard (svalbardmiljøloven)*, Klima- og miljødepartementet, 15 June 2001, last amendet on 09 December 2016. (available at <https://lovdata.no/dokument/NL/lov/2001-06-15-79?q=Svalbardmilj%C3%B8loven>).

¹⁰ Pedersen, *supra* note 1, 341.

M.C.W. Pinto, *Hugo Grotius and the Law of the Sea*, in: Lilian del Castillo and Hugo Caminos (ed.), *Law of the Sea, from Grotius to the International Tribunal for the Law of the Sea*, 24

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Figure 2 Map of Svalbard

Source: "Where in the World", The Ocean Adventure, available at <http://www.theoceanadventure.com/PBIE/PBSvalbardmap.html>

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During the 19th century, the archipelago was considered *terra nullius* (no man's land). In legal terms this means that there was no state who had the monopoly of violence, authority nor jurisdiction over the archipelago, allowing all states to avail themselves of the resources, risking overexploitation.¹¹ Several other Arctic islands, such as Greenland, Jan Mayen, Franz Josef Land and Wrangel Island were also considered no man's land at the beginning of the 20th century, with Greenland being the only one possessing an indigenous population when the European discoverers reached the island for the first time.¹² The International Court of Justice (ICJ) defined *terra nullius* as "territory belonging to no one" in its *Western Sahara Advisory Opinion*.¹³ *Terra nullius* should not be confused with *res communis*, describing a common property of all mankind which cannot be occupied, like the high seas.¹⁴

In 1871, the Swedish-Norwegian government claimed sovereignty, which was rejected by Russia. After gaining independency of Sweden, the newly formed Norwegian government wished to expand its influence in the North in 1907, arguing that the (non)existing legal regime had proven to be insufficient.¹⁵ The Kingdom initiated a series of conferences in Christiania (Oslo) in 1910, 1912 and 1914. During the early discussions between Norway, Sweden and Russia in 1910, the nationality principle of jurisdiction was used, as they argued that only the state of which a person is a national of, can exercise jurisdiction over that person.¹⁶ Together with Sweden and Russia, Norway initially proposed that Svalbard should continue to be *terra nullius*, while governed under a *condominium*, so "a territory over which two or more states formally agree to share sovereignty and exercise sovereignty jointly".¹⁷ This was driven by an urgent need for sustainable management of the natural resources, but also conflicts between different mining companies underlined the need for establishing maintainable conditions for economic development through effective governance.¹⁸ A strike by Norwegian coal miners, employed by foreign mining companies, was the first dangerous development caused by the lack of authority. The labor unrest continued until the establishment of the so-called Mining Code in 1920.¹⁹ The conference of 1914 included

¹¹ Lotta Numminen, *A History and Functioning of the Spitsbergen Treaty*, in: Diana Wallis MEP and Steward Arnold (ed.), *The Spitsbergen Treaty*, Arctic Papers Vol 1 (2011), 7f.

¹² Maria Ackrén, Adam Grydehøj, Anne Grydehøj, „The Globalization of the Arctic: Negotiating Sovereignty and Building Communities in Svalbard, Norway”, *Island Studies Journal*, Vol 7(1) (2012), 100.

¹³ *Western Sahara*, Advisory Opinion, International Court of Justice, 16 October 1975 (available at <http://www.icj-cij.org/files/case-related/61/061-19751016-ADV-01-00-EN.pdf>), para. 79

¹⁴ Ida Cathrine Thomassen, *The Continental Shelf of Svalbard: Its Legal Status and the Legal Implications of the Application of the Svalbard Treaty regarding Exploitation of Non-Living Resources*, Small Master's Thesis, The Arctic University of Norway, 2013, 11.

¹⁵ Numminen, *supra* note 11, 8.

¹⁶ Rossi, *supra* note 6, 127.

¹⁷ Sarah Wolf, "Svalbard's Maritime Zones, their Status under International Law and Current and Future Dispute Scenarios", *Stiftung Wissenschaft und Politik Working Paper* FG2 Nr. 2 (2013), 7.

¹⁸ Numminen, *supra* note 11, 7f.

¹⁹ *Kongelig resolusjon bergverksordning for Svalbard*, Nærings- og fiskeridepartementet, 07 August 1925, last amended by Royal Decree of 11 June 1975 (available at <https://lovdata.no/dokument/NL/lov/1925-08->

German, Belgian, American, Danish, French, British and Dutch representatives.²⁰ Germany and the United States of America (USA) wanted to be included in the *condominium*, but Russia was against it. Norway has been in favor of joint management among all powers, while Sweden only wanted to share the management between themselves, Norway and Russia. The USA sought a veto power to protect their economic claims but were mostly in favor of the Swedish position. Germany instead wanted to be included in the administrative commission, which Russia and Sweden opposed. Consequently, it seems to be the composition of the commission and not the idea of a *condominium* itself that had formed the major sticking point.²¹ The discussions were disrupted by World War I without any agreement reached. Following the end of the Great War, the Spitsbergen Commission was established at the negotiations at Versailles, with the task to resolve the issue of Svalbard.²²

The archipelago was included in some sporadic fighting during World War II. In 1941, the residents were evacuated by Allied forces and all infrastructure and resource stocks were destroyed to pre-empt German occupation. The Soviet Union tried to place Svalbard unsuccessfully under joint Soviet-Norwegian military control in 1944, when Soviet Foreign Minister Molotov suggested that the treaty should be “thrown in the trashcan”.²³ He proposed that Bear Island should be put under Soviet sovereignty, while the rest of the archipelago should be governed under a Norwegian-Soviet condominium.²⁴ Svalbard was included into the NATO command structure in 1951, damaging the Soviet-Norwegian relations. The USSR (Union of Soviet Socialist Republic) commented on the move as being “unfriendly” and “unable to recognize as legal”.²⁵ Nevertheless, Svalbard constituted the only Western territory with Soviet presence during the Cold War.²⁶

2.2 ECONOMIC DEVELOPMENT

Svalbard has functioned as a supplier for European raw materials during the last centuries. Due to its large whale population, parallel to high blubber, oil and baleen prices, up to 300 ships were actively engaged in whaling during the 17th century. Smeerenburg at the North-West coast is the best-known whaling station, but it is still possible to find remains of around

07?q=Kongelig%20resolusjon%20[bergverksordning%20for%20Svalbard]). Hereinafter the Mining Code or the Mining Regulations.

Rossi, *supra* note 6, 120.

²⁰ Rossi, *supra* note 6, 127.

²¹ Rossi, *supra* note 6, 128.

²² Detailed information on the negotiations and the outcome can be found under Chapter 3

²³ Ackrén, Grydehøj, Grydehøj, *supra* note 12, 109.

²⁴ Torbjørn, Pedersen “The Dynamics of Svalbard Diplomacy”, *Diplomacy and Statecraft*, Vol. 19(2) (2008), 237.

²⁵ *Ibid.*

²⁶ Troy Bouffard, Morgane Fert-Malka, “The Unique Legal Status of an Arctic Archipelago”, *World Policy Blog*, 06 December 2017 (available at <http://www.worldpolicy.org/blog/2017/12/06/eyes-svalbard>).

50 others. The bowhead whale was the most hunted species and suffered from near extinction. After a drastic decrease in the whale population and the emergence of commercial substitutes for whale oil²⁷, Svalbard became uninteresting for the whaling industry.²⁸ From 1700 to 1850, the archipelago was mostly used by Russian hunters from the White Sea Area, called the Pomors. They hunted mainly for walrus, but also took fur from reindeer, seal and polar bear. Many of their settlements were operating all year around and it is still possible to find ruins of around 70.²⁹ Following the Pomors, the Norwegian hunters, using a whole network of sheds and cabins to cover large areas, were hunting on Svalbard. Their main species were fox and polar bear for their fur, but also seal, reindeer and fowl. At the peak time, around 50 hunters were spending their winter in the area, leading to a serious decrease of the animal population.³⁰

The Svalbard Treaty³¹ allowed the archipelago to become an international hub of scientific research. Already since the middle of the 19th century many expeditions and ‘races for the North Pole’ took their starting point on the archipelago. “During the first international polar year 1882-83, Swedish researchers from the international latitude measurement expedition spent the winter at Kapp Thordsen in Isfjord. In 1899-1901, the earth's exact shape was determined on the basis of data collected by that very expedition.”³²

The only commercial activity that has survived the last century, along with research, is mining for coal, parallel to an interest in other minerals as Sulphur, gold, zinc, copper, gypsum and marble. Norway initiated the first commercial mining project in 1899, soon followed by English-Norwegian, American-Norwegian, Russian, Swedish and Dutch mining towns.³³ Mining has formed the basis for permanent settlements in Longyearbyen, Sveagruva, Pyramiden, Barentsburg and Ny-Ålesund.³⁴ However, since World War II, only Norway and the USSR, followed by its successor Russia, continued to mine, even though all signatory states of the Svalbard Treaty have the option. Although, the mining operations have proven to be unprofitable and run on state subsidies, mining is continued based on the political need to maintain settlements. These villages underline the claim to sovereignty, also as “history shows that Norway has good reason to believe that its jurisdiction over Svalbard requires

²⁷ Rossi, *supra* note 6, 116.

²⁸ Sysselmannen på Svalbard, “Historical Background”, *The Governor of Svalbard*, 17 March 2016 (available at <https://www.sysselmannen.no/en/Toppmeny/About-Svalbard/Historical-background/>).

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ More on the Svalbard Treaty can be found in Chapter 3.

³² Sysselmannen på Svalbard, “Historical Background”, *The Governor of Svalbard*, 17 March 2016 (available at <https://www.sysselmannen.no/en/Toppmeny/About-Svalbard/Historical-background/>).

³³ Rossi, *supra* note 6, 119.

³⁴ Sysselmannen på Svalbard, “Historical Background”, *The Governor of Svalbard*, 17 March 2016 (available at <https://www.sysselmannen.no/en/Toppmeny/About-Svalbard/Historical-background/>).

constant reaffirmation".³⁵ Since the 60s, oil drilling has become more important as well, even though the first drilling was already carried out in 1920 by British citizens. The interest in oil exploration grew during the 60s and 70s, with around 20 oil wells being located on the archipelago's islands. However, no resources that would be commercially exploitable have been found. The last major drilling projects have taken place in 1991 and 1994 by Norsk Hydro and Store Norske, with disappointing results.³⁶ However, the sea around the archipelago seems to be resourceful, as the Norwegian Petroleum Directorate has estimated that around 290 Mio. Sm³ o.e. (standard cubic meters of oil equivalents) are in the Northern Barents Sea.³⁷

2.3 SETTLEMENTS

Human settlements have not been continuous most of the time, the development of permanent settlement first started with the discovery of Svalbard's coal resources. Longyearbyen is the largest settlement and the administrative center of the archipelago. It is located at a latitude of 78°North and forms a modern community with schools, kindergartens, a university, a newspaper, shops, restaurants, a hospital and a church. Until the early 90s, Longyearbyen has been a mining community, but other business sectors as tourism, research and education have developed since. The city has around 2,100, mostly Norwegian, inhabitants with around 40 nationalities presented and locates the only all year-round operating airport of Svalbard.³⁸ The Governor, called 'Sysselmannen', is located in the city and responsible for the administration of the archipelago, including environmental protection, policing, transport, tourism and the contact to Svalbard's foreign settlements.³⁹ Barentsburg is still a mining community with around 500, mostly Ukrainian and Russian, inhabitants, located around 40 km South-West of Longyearbyen at Grønfjorden. The village has a coal fired power station, a hospital, hotel, school, kindergarten, a culture and sports center and locates the Russian consulate of Svalbard as well as the research center of the Russian Academy of Science. It is the second largest settlement of Svalbard and operated by the Russian state-owned mining company Trust Arktikugol. The company runs the mine and the community since it purchased the mining facilities from the Dutch company

³⁵ Adam Grydehøj, "Informal Diplomacy in Norway's Svalbard Policy: The Intersection of Local Community Development and Arctic International Relations", *Global Change, Peace and Security*, Vol. 26(1) (2013).

³⁶ Wolf, *supra* note 17, 7.

"Written in the rocks", *Norwegian Petroleum Directorate*, 10 October 2006 (available at <http://www.npd.no/en/news/News/2006/Written-in-the-rocks/>).

³⁷ Pedersen, *supra* note 1, 348.

³⁸ Sysselmannen på Svalbard, "Settlements", *The Governor of Svalbard*, 18 March 2016 (available at <https://www.sysselmannen.no/en/Toppmeny/About-Svalbard/Settlements/>).

³⁹ Grydehøj, *supra* note 35.

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Nederlandsche Spitzbergen Companie in 1932. Until 1998, Trust Arktikugol also operated the mining town Pyramiden, which has been transformed into a tourist attraction.⁴⁰ Ny-Ålesund, located at Kongsfjord, at the North-West Coast, is the world's northernmost permanently inhabited settlement. The public corporation Kings Bay A/S owns the land and facilities of this unique research hub. Here, the Norwegian, German, British, Italian, Japanese and Chinese research centers of Svalbard are located. During summer, many researchers are living in Ny-Ålesund, while there's only a small crew of 25 operating the settlement during winter. The Polish research station for seismology, meteorology, biology and glaciology is in Hornsund on South Spitsbergen, while Hopen and Bjørnøya form the basis for two Norwegian Meteorological Institute Stations.⁴¹ There are no roads or other infrastructure between the villages. Both Ny-Ålesund and Barentsburg are connected to Longyearbyen by air, having an airport and a helicopter pad respectively. In addition, it is possible to reach the communities on Spitsbergen via boat during summer, and by snow mobile in winter.⁴²

⁴⁰ Sysselmannen på Svalbard, "Settlements", *The Governor of Svalbard*, 18 March 2016 (available at <https://www.sysselmannen.no/en/Toppmeny/About-Svalbard/Settlements/>).

⁴¹ Ibid.

⁴² Ibid.

3 SVALBARD TREATY

3.1 THE SPITSBERGEN COMMISSION

During the peace negotiations after World War I, the issue of Svalbard should be solved. While the Netherlands argued that they possessed a special claim for the archipelago based on Barents' discovery, Russia disagreed, claiming that the Russian hunting population, the Pomor, had reached Svalbard before Barents.⁴³ However, Bolshevik Russia was excluded from the Versailles Peace Conference in 1919 due to a bilateral treaty with Germany on a separate peace in 1918, the so-called Brest-Litovsk Treaty⁴⁴ as well as the allied powers' non-recognition of the Bolshevik Russia.⁴⁵ To find an adequate solution, the *Spitsbergen Commission* was formed by American, French, British and Italian representatives in July 1919.⁴⁶ Two proposals were presented, one providing Norway with a mere managerial or administrative role on behalf of the international community and the other one granting Norway sovereignty over Svalbard while preserving certain *terra nullius* rights for the international community.⁴⁷ From the two solutions the latter was preferred by the Commission, as it would create a permanent solution. Other reasons for granting Norway sovereignty were American declining economic interest, a post-war disempowerment of Germany, a non-recognized Russian government and the general desire to reward Norway for its engagement during World War I. Great Britain and the USA actually approved the treaty proposal in advance. Even though Russia was opposed to Norwegian sovereignty, the opposition was dropped, and sovereignty recognized in exchange for Norway's recognition of the USSR in 1924.⁴⁸ Then Foreign Minister Ihlen of Norway also managed to secure the pledge by Denmark to recognize Norway's sovereignty over Svalbard in exchange for Norwegian recognition of the Danish claim for sovereignty over Greenland.⁴⁹

In the beginning, the Norwegian press and parliament argued against the Svalbard Treaty, as they felt that too many obligations were put on the Kingdom and that the Norwegian

⁴³ Ackrén, Grydehøj, Grydehøj, *supra* note 12, 101.

⁴⁴ *The Peace Treaty of Brest-Litovsk*, Germany, Austria-Hungary, Bulgaria, Turkey, Russia, 03 March 1918 (available at <http://www.uintahbasintah.org/usdocuments/doc46.pdf>).

⁴⁵ Christopher R Rossi., "Norway's Imperilled Sovereignty Claim over Svalbard's Adjacent Waters", *German Law Journal*, Vol. 18(06) (2017),1510.

⁴⁶ Rossi, *supra* note 6, 131.

⁴⁷ Unknown author, "*The Non-Discrimination Requirement and Geographical Application of the Svalbard Treaty*", The University of Bergen, 2015, 6.

⁴⁸ Ackrén, Grydehøj, Grydehøj, *supra* note 12, 101.

Carl August Fleischer, "The New International Law of the Sea and Svalbard", *The Norwegian Academy of Science and Letters 150th Anniversary Symposium* (2007).

Pedersen, *supra* note 1, 342.

Rossi, *supra* note 6, 131.

Note from the Soviet Union to Norway cited in: Rolf Einar Fife, "Forkerrettslige spørsmål i tilknytning til Svalbard", *Regjeringen.no*, 12 December 2014 (available at <http://www.regjeringen.no/no/dep/ud/id833/>), 8.

⁴⁹ Ackrén, Grydehøj, Grydehøj, *supra* note 12, 101.

Rossi, *supra* note 6,131.

sovereignty was too restricted. However, the legal status of Svalbard was a major foreign policy objective for Norway. The Svalbard Treaty was signed on February 9, 1920 and entered into force on August 14, 1925. Svalbard became part of the Kingdom of Norway on July 17, 1925 by the Svalbard Act.⁵⁰ Currently, there are 43 registered state parties to the Svalbard Treaty, including all permanent member countries of the Arctic Council⁵¹, China, Japan and many EU (European Union) member states.⁵²

3.2 TREATY PROVISIONS

The Svalbard Treaty was revolutionary, as it was the first international treaty dealing with an issue in the Arctic and it already contained modern concepts as environmental protection, no use for military purposes and non-discriminatory treatment of treaty parties.

3.2.1 Object and Purpose

The object of the Svalbard Treaty was to provide Svalbard with an “equitable regime in order to assure their development and peaceful utilization”⁵³ which was to be achieved by handing Norway the sovereignty over Svalbard and at the same time establishing the principle of non-discrimination under the equitable regime. By giving the sovereignty to Norway, an orderly regime was to be established.

3.2.2 Sovereignty

Sovereignty over a territory implies that the state has the right to use all types of authority and power not explicitly “excluded from the source of which the sovereignty is consolidated in”.⁵⁴ So, normally the state has the exclusive right to legislate and enforce jurisdiction, independent of other states, as long as those rules are in line with the framework of international law. While one could acquire sovereignty through discovery in ancient times, the effective control principle has replaced it.⁵⁵ This was laid down in the *Berlin General Act*⁵⁶ of

⁵⁰ *Lov om Svalbard (Svalbardloven)*, Justis- og beredskapsdepartementet, 15 July 1925, last amended on 01 January 2018 (available at <https://lovdata.no/dokument/NL/lov/1925-07-17-11>), para. 1. Hereinafter: Svalbard Act.

⁵¹ Denmark, Norway, Sweden, Iceland, Finland, USA, Russia, Canada.

⁵² Syssemmannen på Svalbard, “Svalbard Treaty”, *The Governor of Svalbard*, 02 August 2016 (available at <https://www.syssemmannen.no/en/Toppmeny/About-Svalbard/Laws-and-regulations/Svalbard-Treaty/>).

⁵³ Preamble, Svalbard Treaty.

⁵⁴ Thomassen, *supra* note 14, 12f

⁵⁵ “The fact of discovery gradually lost its function of conferring a sort of right of primacy to occupy a territory, or of right to reserve the occupation of the territory within a certain time.” In Ida Caracciolo, “*Unresolved controversy: the legal situation of the Svalbard Islands maritime areas; an interpretation of the Paris Treaty in light of UNCLOS 1982*”, paper presented at the International Conference on Disputed Territory and Maritime Space, Durham University, 2010 (available at https://www.dur.ac.uk/resources/ibru/conferences/sos/ida_caracciolo_paper.pdf), 4.

February 26, 1885 on colonial expansion in Africa and confirmed in the *Treaty of Saint Germain*⁵⁷ as well as by the *Ruling on the Legal Status of the South-Eastern Territory of Greenland* by the Permanent Court of International Justice (PCIJ) in 1933.⁵⁸ Yet, despite from the fact that no state could credibly show that they were the first to discover Svalbard, none of the states claiming sovereignty over Svalbard could demonstrate that they exercised effective control. Hence, no state was able to establish a legal basis for their claim.⁵⁹ Therefore, sovereignty was 'given' to Norway by recognition of the other treaty parties through the Treaty. Art. 1 of the Svalbard Treaty does not recognize any preexistent sovereignty but allows Norway to exercise sovereignty in the future under the conditions laid down in the Treaty. Furthermore, Norwegian sovereignty has also been established due to effective Norwegian occupation and exercising of sovereignty during the past nearly 100 years.

Although Norway was granted sovereignty, it should not be able to benefit from the archipelago, this is highlighted in the Treaty. Art. 8 says that "Taxes, dues and duties levied shall be devoted exclusively to the said territories and shall not exceed what is required for the object in view", so Norway is not allowed to impose higher taxes than it needs for governing Svalbard and thereby generate an income source. Art. 9 contains a prohibition to use the archipelago for warlike purposes to prevent Norway from profiting strategically.⁶⁰ Norway may also act on the external level, including entering into treaties about Svalbard, and has no duty to consult other states on how to govern or manage Svalbard. "Agreements concluded by Norway will [always] comprise Svalbard, unless Svalbard is excluded by the Treaty or Norway has made a reservation as to its geographical application. For example, Protocol 40 on Svalbard to the 1992 Agreement on the EEA [European Economic Area] excludes Svalbard from its application."⁶¹ The Svalbard Act states that Norwegian civil and

⁵⁶ *General Act of the Conference at Berlin of the Plenipotentiaries of Great Britain, Austria- Hungary, Belgium, Denmark, France, Germany, Italy, the Netherlands, Portugal, Russia, Spain, Sweden-Norway, Turkey and the United States respecting: (1) freedom of trade in the basin of the Congo; (2) the slave trade; (3) neutrality of the territories in the basin of the Congo; (4) navigation of the Congo; (5) navigation of the Niger; and (6) rules for future occupation on the coast of the African continent*, Great Britain, Austria- Hungary, Belgium, Denmark, France, Germany, Italy, the Netherlands, Portugal, Russia, Spain, Sweden-Norway, Turkey and the United States 26 February 1885 (available at <https://loveman.sdsu.edu/docs/1885GeneralActBerlinConference.pdf>), Preamble, Chapter VI.

⁵⁷ *Convention of Saint-Germain-En-Laye Revising the General Act of Berlin, February 26, 1885, and the General Act and Declaration of Brussels, July 2, 1890 (relating to Congo River Basin)*, United States of America, Belgium, the British Empire, France, Italy, Japan and Portugal, 10 September 1919 (available at <http://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0261.pdf>).

⁵⁸ *Legal Status of Eastern Greenland*, Judgment, Permanent Court of International Justice, 05 April 1933 (available at http://www.worldcourts.com/pcij/eng/decisions/1933.04.05_greenland.htm), paras. 254, 309.

⁵⁹ Caracciolo, *supra* note 54, 4.

⁶⁰ More on Non-Military Use of Svalbard can be found in Chapter 3.2.6.

⁶¹ *Protocol 40 on Svalbard to Agreement on the European Economic Area*, 01 January 1994 (available at <http://www.efta.int/sites/default/files/documents/legal-texts/eea/the-eea-agreement/Protocols%20to%20the%20Agreement/protocol40.pdf>). Hereinafter EEA Agreement. Wolf, *supra* note 17, 9.

penal law and any legislation relating to the administration of justice apply to the archipelago, if nothing contrary has been stated.⁶² Other rules do not apply to Svalbard, unless specified. Similarly, general regulations on mining, fishing and other industries as well as environmental protection may be issued.⁶³

In exchange for the concessions of the other parties by abandoning their sovereignty claims, they received the benefits of the equitable regime, as each state had to give something up to receive something in return, creating a balanced and fair result.⁶⁴ However, that only applies for the treaty parties. For all other states Norway's sovereignty is always full and absolute. Consequently, non-party states cannot claim rights under the treaty framework, underlined in all Articles, as always the "High Contracting Parties" or "nationals of all the High Contracting Parties" are mentioned. The scope of this equitable regime and the accompanying rights have been the trigger to the current dispute. While Norway wants to protect its full sovereignty, the treaty parties want to widen the geographical scope of the treaty to encompass maritime areas beyond the territorial sea.

3.2.3 Geographical Scope

Art. 1 refers to two lines of latitude and longitude including land and sea areas, called the Svalbard Box, forming a trapezoid, indicated in yellow in Figure 3. The archipelago's territory is identified through this reference. This was the standard method of identifying territories including islands in old treaties as by that "all territorial features, however small, lying within the limits of the box were clearly included".⁶⁵ However, this reference does not have any judicial purpose, neither does it determine any boundaries of maritime zones. Instead general international law still applies, as the sides of the box do not create any sort of jurisdictional boundary.⁶⁶ Therefore, it cannot be argued that the Svalbard Treaty should automatically apply to all areas covered by the Svalbard Box. While some Articles, like Art. 8(1) and Art. 4(1), refer to "the territories specified in Art. 1" which only cover land territory as Art. 1 refers to islands and rock only, the waters adjacent of Svalbard's coast must be included as well. By referring to "territorial waters" in Art. 2(1), 2(3) and 3(2), it is obvious that Svalbard is entitled to a territorial sea. In addition, maritime sovereignty is generated via territorial sovereignty, as argued by the ICJ in its judgement on the *Case Concerning the*

⁶² Svalbard Act, Sect. 2.

⁶³ Svalbard Act, Sect. 4.

⁶⁴ D.H Anderson, "The Status under International Law of the Maritime Areas around Svalbard", *Ocean Development and International Law*, Vol. 40(4) (2009), 375.

⁶⁵ Ibid.

⁶⁶ Some Asian and Pacific states as the Philippines and Tonga tried to defend their claim over maritime territories on that argument, but it has not been accepted, cf. *ibid.*

Continental Shelf between Tunisia and Libya.⁶⁷ However, the length of the territorial sea had not been defined, therefore, Norway limited it in the same way as done with its mainland's territorial sea, as extending "the distance of the customary sea mile from the outermost islands or islet, not washed over by the sea".⁶⁸ A reason for not mentioning territorial waters continuously in the whole Svalbard Treaty could be that not all activities, as mining in Art.8, were regarded to be applicable to maritime areas at the time of drafting. Consequently, the Svalbard Treaty's provisions can at least be applied to the territorial sea, still leaving the dispute about the areas beyond the territorial sea to be settled.

⁶⁷ "The coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it" in *Case Concerning the Continental Shelf* (Tunisia v. Libyan Arab Jamahiriya), Judgment, International Court of Justice, 24 February 1982 (available at <http://www.icj-cij.org/files/case-related/63/063-19820224-JUD-01-00-EN.pdf>), para. 73.

⁶⁸ *Cancelli-Promemoria*, Utenriksdepartementet, 25 February 1812, last amended on 01 January 2014 (available at <https://lovdata.no/dokument/NL/lov/1812-02-25?q=Cancelli-Promemoria>).

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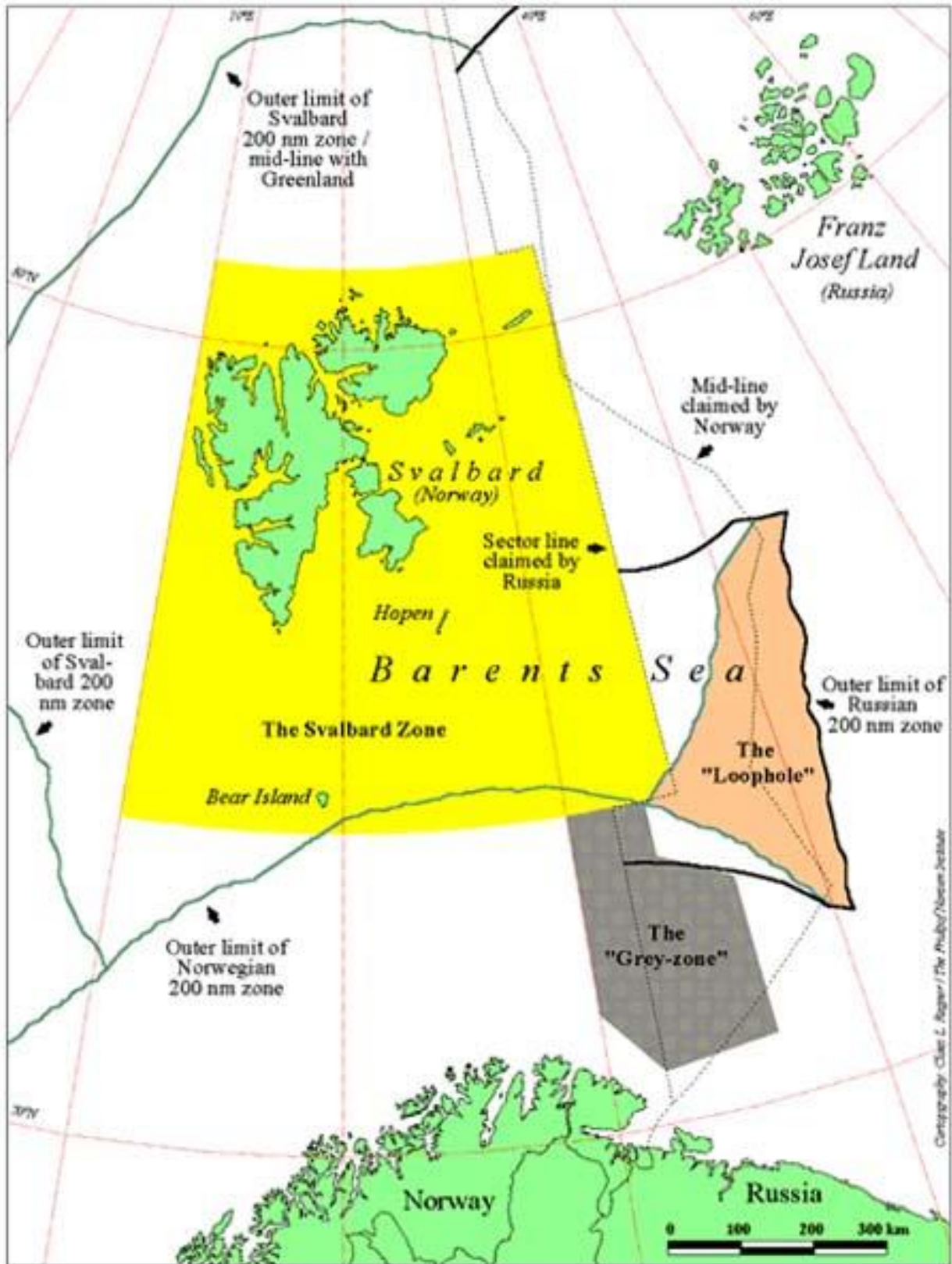


Figure 3 The Svalbard Box

Source: Olav Schram Stokke, "Management of Shared Fish Stocks in the Barents Sea", Food and Agriculture Organization of the United Nations (available at <http://www.fao.org/docrep/006/y4652e/y4652e0e.htm#fn60>).

Since the editing of the map, the Russian-Norwegian dispute has been settled through a bilateral agreement in 2010 and a delimitation line has been established.

3.2.4 An Equitable Regime

The Svalbard Treaty prohibits discrimination based on nationality to preserve the past *terra nullius* rights, as laid out in the Preamble of the Svalbard Treaty. Norway can impose any legislation that is not discriminating directly or indirectly by nationality, so discrimination in law or in fact. Different treatment that is explicitly stated, in for example laws or regulations, can be identified as direct discrimination. Indirect discrimination occurs when the rules are the same but lead to a different outcome due to various prerequisites, for instance requirements for safety equipment that can potentially be hard to acquire for some countries.⁶⁹ The equitable regime must only be applied to certain economic activities, for example hunting and fishing as well as maritime, industrial, mining and commercial operations. Consequently, it is not a general requirement of non-discrimination but one with a substantive scope. Measures in areas that are not specifically covered by the Treaty can discriminate between nationals of contracting parties without any restriction by the Svalbard Treaty. However, 'industrial' and 'commercial operations' should cover most economic activities.⁷⁰ The regime applies to natural and legal persons and not states. Nevertheless, the equitable regime is still part of an international treaty, meaning that any violation provides both the person and its national state with the right to act, but on different levels: national or international respectively. Should a person argue that his or her rights have been violated by Norway, he or she needs to present the case to a national court, yet not a court in their home country but a Norwegian one, as Norway is the country that had been violating the treaty. Once all the legal remedies in Norway's court system have been used, the person can seek assistance from its national state to make an international claim for compliance with the Svalbard Treaty through diplomatic protection. Under diplomatic protection, a state has the right to enforce international law for one of its nationals, it is not a right of its nationals. This means that a state may also decide not to act.⁷¹ This treaty provision also applied to Russia, as laid down in Art. 10, even though no Russian government was recognized at the time of drafting. The victorious powers of World War I were still acknowledging Russia's historical involvement in Svalbard with the Pomor hunters, as well as the mining community with its settlements at Barentsburg and Pyramiden.⁷² Therefore, Russian nationals were to be included under the Treaty even if their national state was no party to it.

⁶⁹ "Direct and Indirect Discrimination", *Icelandic Human Rights Centre* (available at <http://www.humanrights.is/en/human-rights-education-project/comparative-analysis-of-selected-case-law-achpr-iachr-echr-hrc/the-right-to-equality-and-non-discrimination/direct-and-indirect-discrimination>).

⁷⁰ Achrén, Grydehøj, Grydehøj, *supra* note 12, 110.

See also Churchill, Ulfstein, *supra* note 9, 555.

⁷¹ Marta Sobrido, *The Position of the European Union on the Svalbard waters* in Elena Conde and Sara Iglesias Sánchez (ed) *Global Challenges in the Arctic Region*, 2017, 77.

⁷² Rossi, *supra* note 45, 1510.

The question of the applicability of the equitable regime to the shelf of Svalbard is the reason for the ongoing dispute between Norway and the other treaty parties. An in-depth analysis of this issue will be presented in Chapter 6.

3.2.5 Ratification of Third Powers

Third powers can ratify the Treaty after it has entered into force based on Art. 10, without any distinction between original and later treaty parties. In the historical context, a power was equal with a state, so, for instance, no international organization like the EU could become a contracting party. However, things have changed over time and the EU has started to develop a legal personality comparable to a state. With the Lisbon Treaty, the EU created a legal personality based on Art. 47 TEU (Treaty of the European Union)⁷³, enabling it to conclude agreements with third states or international organizations as well as to become party to international treaties (Art. 216 TFEU (Treaty on the Functioning of the European Union)).⁷⁴ Nevertheless, until now no move has been made yet by the EU to become party to the Treaty, even though it has some shared competences with its member states in economic activities relevant for the Treaty, like fishing.⁷⁵

3.2.6 Non-Military Use

Art. 9 of the Svalbard Treaty prohibits the use of the archipelago for warlike purposes. Often the concept of this article is wrongly stated as ‘demilitarization’, but the treaty explicitly names certain activities that are prohibited. Norway hereby has the responsibility to prevent any establishment of naval bases or fortifications on the territories named in Art. 1, as well as any use for warlike purposes. Norway’s military presence is very limited and it mainly constitutes coast guard surveillance.⁷⁶ Art. 9 has two purposes; firstly, it is an extension of the equitable regime, as Norway shall not benefit strategically from sovereignty over Svalbard and secondly, it helps to fulfil the overall object and purpose of peaceful utilization.

⁷³ „The Union shall have legal personality”, European Union, *Consolidated version of the Treaty on European Union*, 13 December 2007, 2008/C 115/01 (available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12012M/TXT>). Hereinafter: Treaty on European Union (TEU), Art. 47.

⁷⁴ “1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.”, European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13-12-2007, 2008/C 115/01 (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12012E/TXT>). Hereinafter: Treaty on the Functioning of the European Union (TFEU), Art. 216.

⁷⁵ Inter alia TFEU Art. 38 – 43.

Priit Ojamaa, “Fisheries control and enforcement”, *European Parliament*, January 2018 (available at http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuld=FTU_3.3.3.html).

⁷⁶ Numminen, *supra* note 11, 16.

As the concept of warlike purpose is not further defined, a debate was started in 2010 whether the American use of photos of Iraq taken by a Norwegian satellite station operated on Svalbard formed a breach of the treaty.⁷⁷ Also, Norway has been criticized for calls of its warships and cargo aircraft at Longyearbyen and the inclusion of the archipelago in the NATO command structure.⁷⁸ Furthermore, Russia has accused Norway of operating systems of dual purposes, as satellites that shall can transmit military signals, radar stations and weather rocket test sites apparently being able to track the Russian Northern Fleet's ballistic missiles and a communication line compatible with NATO (North Atlantic Treaty Organization) systems. However, there has not been evidence presented for this.⁷⁹

3.2.7 Mining and Taxation

Based on Art. 8 of the Svalbard Treaty, Norway had to create mining regulations for the archipelago and is not allowed to collect more taxes than it needs to govern the territory. The Mining Code was established by Royal Decree on August 7, 1925 and contains rules on the procedure to acquire mining rights, the rights of property owners, obligations of the mining companies regarding the process and their workers. Norway is still allowed to adopt additional requirements for mining, as regulations on safety and environmental protection, if those rules comply with the equitable regime and the Mining Code in general. More information on the Mining Code, taxation and the connection to resource exploration on the continental shelf can be found in Chapter 7.1.

⁷⁷ Ackrén, Grydehøj, Grydehøj, *supra* note 12, 109.

⁷⁸ Numminen, *supra* note 11, 16.

„The Norwegian Parliament, however, has now decided that the navy should send one large naval vessel to Svalbard every year to ensure Norwegian sovereignty in the area.“ in Thomas Nilsen, “Norwegian frigate on voyage to Svalbard waters”, *The Barents Observer*, 20 September 2017 (available at <https://thebarentsobserver.com/en/security/2017/09/norwegian-frigate-voyage-svalbard-waters>).

See also Thomas Nilsen, “Kommersant: Russia lists Norway's Svalbard policy as potential risk of war”, *The Barents Observer*, 04 October 2017 (available at <https://thebarentsobserver.com/en/security/2017/10/kommersant-russia-lists-norways-svalbard-policy-potential-risk-war>).

⁷⁹ Elisabeth Braw, “The Tip of the Iceberg”, *Politico*, 17 May 2015 (available at <https://www.politico.eu/article/svalbard-iceberg-tourism-travel-ban/>).

4 MARITIME ZONES AND THEIR LEGAL FRAMEWORK

At the beginning of the 20th century, there existed the territorial sea, subject to coastal state jurisdiction, and the high seas that were open for everyone. Through developments in economics and technology, the ability to access and harvest water and seabed resources has increased. Accompanied with the emerged need for conservation and protection of the marine environment, the International Law Commission (ILC) decided to take a closer look at the regime of the territorial sea and the high sea, as both were seen as topics in need for codification. The idea behind it was to clearly define where a single state had control and jurisdiction and where not. This led to a series of conferences, beginning with the 1958 Geneva Conventions on the Law of the Sea (UNCLOS I), followed by the Second United Nations Conference on the Law of the Sea in 1960 (UNCLOS II). The first conference produced several conventions⁸⁰ which reflected custom in part, but still left some key issues open, as for instance, the breadth of the territorial sea. UNCLOS II showed the increasing demand for a total review of the law of the sea, especially due to the rising interest in resources.⁸¹ In 1967, the United Nations General Assembly (UNGA), under the Maltese Permanent Representative to the UN (United Nations), adopted resolutions covering the recognition of the resources of the seabed in areas beyond national jurisdiction as 'Common Heritage of Mankind' whose exploitation should happen for the benefit of the international community.⁸² The final UNCLOS III conference (1974-82) led to the UN *Convention on the Law of the Sea* known today, of which much is considered customary law.⁸³ During the early 90s, there have been little support for UNCLOS from developed states, leading to the amendment of Part XI dealing with seabed mining and the attempt to declare it 'Heritage of Mankind'. The *Implementation Agreement* of July 1994⁸⁴ made it more acceptable for the broad mass of states to ratify UNCLOS, especially because states being party to both the

⁸⁰ *Convention on the Territorial Sea and Contiguous Zone*, Geneva, 29 April 1958, *United Nations Treaty Series*, Vol. 516, 205 (available at https://www.gc.noaa.gov/documents/8_1_1958_territorial_sea.pdf).

Convention on the High Seas, Geneva, 29 April 1958, *United Nations Treaty Series*, Vol. 450, 11, 82 (available at https://www.gc.noaa.gov/documents/8_1_1958_high_seas.pdf).

Convention on the Continental Shelf, Geneva, 29 April 1958, *United Nations Treaty Series*, Vol. 499, 311 (available at https://www.gc.noaa.gov/documents/8_1_1958_continental_shelf.pdf). Hereinafter *Convention on the Continental Shelf*.

Convention on Fisheries and Conservation of the Living Resources of the High Seas, Geneva, 29 April 1958, *United Nations Treaty Series*, Vol. 559, 285 (available at https://www.gc.noaa.gov/documents/8_1_1958_fishing.pdf).

⁸¹ Malcolm D Evans., *The Law of the Sea*, in: Malcolm D. Evans (ed.), *International Law*, 4th Edition, 2014, 652.

⁸² Evans, *supra* note 81, 653.

⁸³ *Ibid.*

See also J. Ashley Roach, "Today's Customary International Law of the Sea", *Ocean Development & International Law*, Vol. 45(3) (2014), 239-259, listing various court cases by both ICJ and International Tribunal for the Law of the Sea (ITLOS) as well as other arbitration tribunals in which international tribunals have addressed the customary international law status of laws that have been codified in UNCLOS.

⁸⁴ United Nations, General Assembly, *Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, UN Doc. A/RES/48/263, 17 August 1994 (available at https://treaties.un.org/doc/source/docs/A_RES_48_263-E.pdf).

agreement and UNCLOS have never been bound by the former UNCLOS version of Part XI. On November 16, 1994, the Convention entered into force, closely followed by the Implementation Agreement in July 1996.⁸⁵

4.1 MARITIME ZONES UNDER UNCLOS

Precisely because there were no maritime zones beyond the territorial sea at the time of making the Svalbard Treaty, the current dispute has emerged, as these areas are not mentioned in the treaty. Today, different maritime zones exist: the internal waters, the territorial sea, the contiguous zone, the Exclusive Economic Zone (EEZ), the continental shelf and the high seas. In general, coastal states have the greatest degree of rights and jurisdiction in areas closest to them, clearly visible in Figure 4.

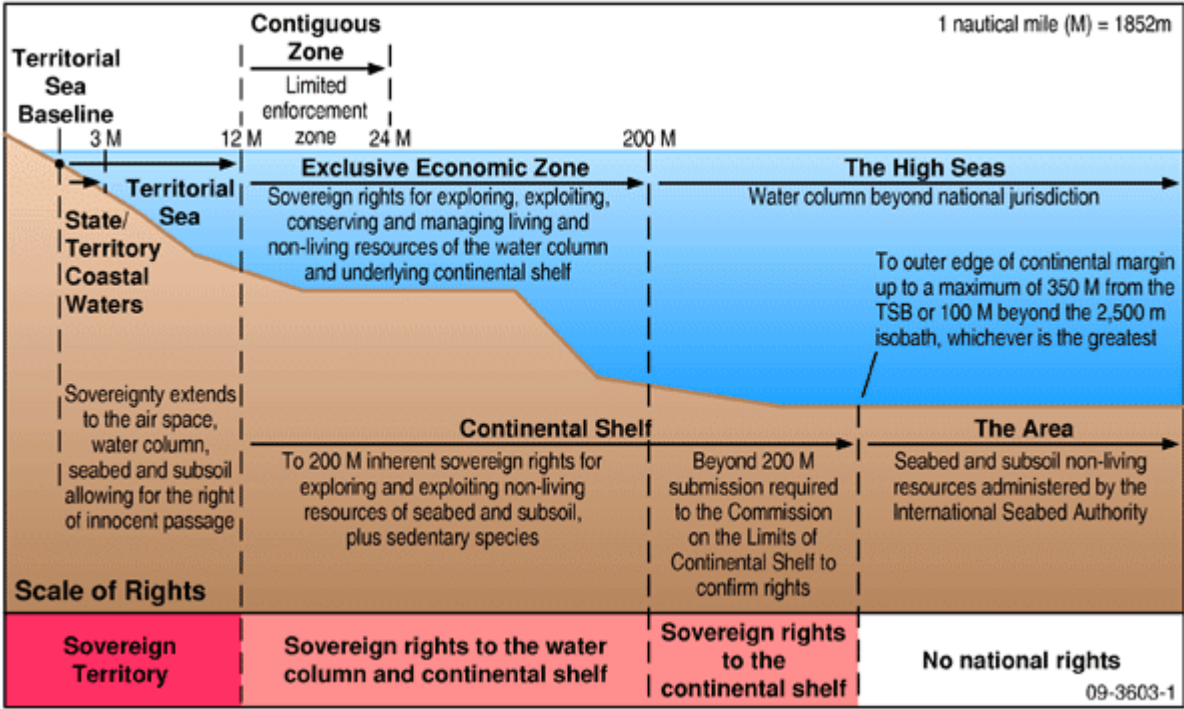


Figure 4 The Maritime Zones under UNCLOS

Source: Evangelia Balla, Rik Wouters, "Marine Cadastre in Europe: State of Play", paper presented at 2017 World Bank Conference on Land and Property, 9.

⁸⁵ Evans, *supra* note 81, 653.

Internal waters cover lakes, rivers and harbors, as well as other areas of waters being landward of the territorial sea baselines that are used as a measurement point for the different maritime zones. In internal waters, the state possesses full sovereignty and must not allow foreign vessels to enter its internal waters, including ports. Once a foreign vessel (except warships⁸⁶) has entered that maritime zone, it is subject to the domestic legislation and the state can keep a ship at port when it has breached health and safety regulations or has caused pollution in the territorial sea.⁸⁷ Rules for the determination of baselines were set out in the *Convention on the Territorial Sea and Contiguous Zone* of 1958 and further developed in UNCLOS under Art. 5, which most of it being regarded as custom.⁸⁸ Consequently, when a state can push its baselines seawards, it expands its jurisdiction. In case of geographical complicated circumstances, a state can establish so called straight baselines, instead of using the low water mark. The ICJ concluded in the *Anglo-Norwegian Fisheries Case* “that it might be inconvenient to use the low-water mark as the baselines in such geographically complicated circumstances”.⁸⁹ The United Kingdom had challenged Norway’s practice to draw artificial lines linking the outermost points of the ‘Skaergaard’, as a replacement for using the low water mark. This was further codified with UNCLOS Art. 7 setting out certain criteria when straight baselines may be used.⁹⁰

In the territorial sea, the sovereign state’s jurisdiction covers also the airspace, the seabed and subsoil.⁹¹ The jurisdiction is restricted to a certain extent by international law, for example the right to innocent passage⁹² and the prohibition to arrest warships or other vessels used for governmental purposes.⁹³ The territorial sea has usually a breadth of 12 NM (nautical miles) which is considered custom, as around 140 states apply that rule and it is further codified by Art. 3 UNCLOS.⁹⁴ Furthermore, the coastal state is permitted to arrest vessels outside its territorial sea in the contiguous zone which can be up to 24 NM from the baseline. For doing so, the vessel needs to be involved or suspected to be involved in an offence in the territorial sea.⁹⁵

⁸⁶ UNCLOS Art. 32.

Ara Libertad Case (Argentina v. Ghana), Order, International Tribunal for the Law of the Sea, 15 December 2012 (available at

https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/published/C20_Order_151212.pdf), para 95.

⁸⁷ UNCLOS Art. 218-20.

⁸⁸ Evans, *supra* note 81, 654.

⁸⁹ *Fisheries Case* (United Kingdom v. Norway), Judgment, International Court of Justice, 18 December 1951 (available at <http://www.icj-cij.org/files/case-related/5/005-19511218-JUD-01-00-EN.pdf>), 128.

⁹⁰ UNCLOS Art. 7(1), 7(4), 13.

⁹¹ UNCLOS Art. 2(2).

⁹² UNCLOS Art. 27(1).

⁹³ UNCLOS Art. 30.

⁹⁴ Evans, *supra* note 81, 658.

⁹⁵ UNCLOS Art. 33.

Both the 1958 Geneva Declaration and UNCLOS state that the high seas are free and open to all vessels and contain a non-exhaustive list of freedoms as navigation, fishing, overflight, cable laying, construction of artificial islands and marine scientific research.⁹⁶ With the expansion of the territorial sea and the creation of other maritime zones, the high seas have become more restricted during the past decades. The basic principle ruling the high seas is that the flag state has jurisdiction.⁹⁷

With the technological developments in fishing, fish stocks were threatened from extinction and increased coastal state control began to seem more beneficial than high sea freedoms. Exclusive Fishing Zones (EFZ) are not mentioned as a separate concept under UNCLOS, but custom recognizes an EFZ of up to 200 NM. They form a further development from sole jurisdiction over fisheries within 12 NM of the baselines, recognized as custom in the *1974 Fisheries Jurisdiction Case*.⁹⁸ The EFZ “is subject to a unique form of limited jurisdiction aimed at ensuring the effective conservation of the stocks”.⁹⁹ The current concept, the Exclusive Economic Zone (EEZ), has overruled the EFZ. The EEZ was established to reflect custom during UNCLOS III, as explained in the *Continental Shelf Judgement* of 1985.¹⁰⁰ It has been codified in Art. 57 UNCLOS that states may claim an EEZ up to 200 NM, which is not considered as territorial sea nor high sea and has its own jurisdictional framework covering exploration, exploitation, conservation and management of living and nonliving resources. Furthermore, harvesting of wind and wave power is enclosed as well, due to coastal state jurisdiction over establishment and use of artificial islands, installations, marine scientific research and preservation of the marine environment. Navigation, overflight, laying cables and pipelines and related activities must happen in accordance with the legal framework of the high seas. The coastal state has a wide legislative and enforcement jurisdiction including boarding, inspection, arrest and judicial proceedings seen necessary to enforce its right to explore, exploit, conserve and manage living resources in the EEZ. In cases of violation, “the International Tribunal on the Law of the Sea enjoys an automatic jurisdiction over claims concerning the prompt release of vessels arrested for contravening coastal state law relating to the exploitation of living resources of the EEZ”.¹⁰¹

⁹⁶ Evans, *supra* note 81, 665.

UNCLOS Part VII.

⁹⁷ UNCLOS Art. 94(1).

⁹⁸ *Fisheries Jurisdiction Case* (United Kingdom v. Iceland), Judgment, International Court of Justice, 25 July 1974 (available at <http://www.icj-cij.org/files/case-related/55/055-19740725-JUD-01-00-EN.pdf>), para. 53.

Evans, *supra* note 81, 673.

⁹⁹ Anderson, *supra* note 64, 378.

¹⁰⁰ *Case concerning the Continental Shelf* (Libyan Arab Jamahiriya v. Malta) Judgment, International Court of Justice, 03 June 1985 (available at <http://www.icj-cij.org/files/case-related/68/068-19850603-JUD-01-00-EN.pdf>), 13.

¹⁰¹ UNCLOS 55, 56, 58, 63, 73, 292.

While the coastal state needs to claim the mentioned maritime zones, every coastal state has the right to a continental shelf of at least 200 NM.¹⁰² This shelf of 200 NM usually coincides with the EEZ. The idea about the coastal state having the sole control and jurisdiction over the continental shelf has been presented for the first time in the so-called *Truman Proclamation* in 1945.¹⁰³ In the 1958 *Convention on the Continental Shelf*, it is stated that “the coastal state exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources”¹⁰⁴ and it has been further codified in UNCLOS Art. 77. Minerals and other non-living resources as well as sedentary species are defined as natural resources. Also, the *Convention on the Continental Shelf* describes a rule on how to establish the outer limits of the continental shelf¹⁰⁵, but with the growing development in technology, it is not suitable anymore. The definition permitted states to claim increasingly larger areas with the development of technologies, to an extent that even resources beyond the natural prolongation of the continental shelf could theoretically be claimed by a state. This was fixed with Art. 76(1) UNCLOS defining the extent of the shelf as “(a) to the outer edge of continental margin (this being seen as the natural prolongation), or (b) to a distance of 200 [NM] from the baselines from which its territorial sea is measured, whichever is further”.¹⁰⁶ In addition to the inner shelf of 200 NM, some coastal states can have an outer shelf, where the continental margin extends beyond that limit. Art. 76(2) to (7) set out further detail on how to calculate the outer edge, limited by the fact that it is impossible to draw the edge “more than 350 miles from the baselines of a state, or more than 100 miles from a point at which the depth of the water is 2,500 meters”.¹⁰⁷ In case of overlapping claims and to define the limits of the outer shelf, the Commission on the Limits of the Continental Shelf (CLCS) has been established. “Under the current arrangements, resource exploration and exploitation of the seabed and subsoil beyond the limits of national jurisdiction, known as the ‘Area’, is administered by the International Seabed Authority (ISA) to which applicants must submit ‘plans of work’. They must identify two areas of roughly equal mining potential, one of which is to be mined by the applicant whilst the other will be

¹⁰² UNCLOS Art. 3, 33, 55, 77.

¹⁰³ “the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control” *Policy of the United States with respect to the natural resources of the subsoil and sea bed of the continental shelf*, Proclamation 2667, 28 September 1945 (available at <http://www.presidency.ucsb.edu/ws/?pid=12332>).

¹⁰⁴ Convention on the Continental Shelf, Art. 2(1) and 2(3).

¹⁰⁵ „For the purpose of these articles, the term “continental shelf” is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.” Convention on the Continental Shelf Art. 1.

¹⁰⁶ Evans, *supra* note 81, 672.

¹⁰⁷ *Ibid.*

'reserved' for exploitation by the international community."¹⁰⁸ So, a state is highly profiting from a long shelf, because it is going to be the sole state that has the right to explore its resources without further consultation necessary.

4.2 DELIMITATION OF THE CONTINENTAL SHELF

To establish the outer limits of the continental shelf beyond 200 NM, the Commission on the Limits of the Continental Shelf has been formed under UNCLOS. A submission to the CLCS is a sign for exercising sovereign rights while reflecting the "submitting state's sovereignty over the territory to which the adjacent maritime zone is claimed".¹⁰⁹ The CLCS has 21 members, all being experts in geology, geophysics or hydrography. A submission to the CLCS must be made within 10 years after a state becoming a party to UNCLOS.¹¹⁰ The coastal state needs to hand in scientific and technical data to support its claim for the limit of its outer shelf, via the Secretary General of the UN. The state can request help by the CLCS during the preparation of this data, based on Art. 3(b) of Annex II to UNCLOS. Simultaneously, the Secretary General publishes it for consideration or reaction by the international community. Should there be overlapping claims that have not been solved at the time of submission, the relevant neighboring states need to give their consent. Otherwise Art. 76(10) UNCLOS excludes the binding effect of the outer limits on neighbors with overlapping claims and the outer limits set by the coastal state would not be binding on neighboring coastal states. The CLCS creates a sub commission that takes a closer look at the submission considering data and other material. The coastal state can freely choose between two methods based on the topography of the seabed to support its claims: the outer boundary as established 60 NM from the base of the continental slope or the thickness of the deposits.¹¹¹ In the end, the commission makes a recommendation in accordance with Art. 76

¹⁰⁸ Evans, *supra* note 81, 675.

¹⁰⁹ Tore Henriksen, Torbjørn Pedersen, "Svalbard's Maritime Zones: The End of Legal Uncertainty", *The International Journal of Marine and Coastal Law*, Vol. 24 (2009), 153.

¹¹⁰ UNCLOS Annex II Art. 4.

The deadline has been extended in 2001 to May 2009 for those state parties that became party to UNCLOS before May 1999 through United Nations Convention on the Law of the Sea, Meeting of State Parties, *Decision regarding the date of commencement of the ten-year period for making submissions to the Commission on the Limits of the Continental Shelf set out in article 4 of Annex II to the United Nations Convention on the Law of the Sea*, UN Doc. SPLOS/72, 29 May 2001 (available at <https://undocs.org/SPLOS/72>).

The deadline was further extended in 2008, stating that it would be sufficient to submit preliminary information to the Secretary General, including a discretion of the status of preparation as well as the intended date of making the submission.

United Nations Convention on the Law of the Sea, Meeting of State Parties, *Decision regarding the workload of the Commission on the Limits of the Continental Shelf and the ability of States, particularly developing States, to fulfil the requirements of article 4 of Annex II to the Convention, as well as the decision contained in SPLOS/72, paragraph (a)*, UN Doc. SPLOS/183, 20 June 2008 (available at <https://undocs.org/SPLOS/183>), para. 1(a).

¹¹¹ Utenriksdepartementet, "The continental Shelf- questions and answers", *Regjeringen.no*, 04 November 2009, available at <https://www.regjeringen.no/en/topics/foreign-affairs/international-law/continental-shelf--questions-and-answers/id448309/>.

UNCLOS, while considering the so-called *Statement of Understanding*.¹¹² Should the recommendation be favorable, the limit of the outer shelf is established by a legal act of the coastal state and published as final and binding, but shall not prejudice matters "relating to the delimitation of boundaries between States with opposite or adjacent coasts".¹¹³ In case that the recommendations should not be favorable, the state can hand in a new or revised submission and only the limit of the inner shelf, viz. the shelf stretching 200 NM, is established by a legal act. The re-submission follows the same procedure as the initial submission.¹¹⁴

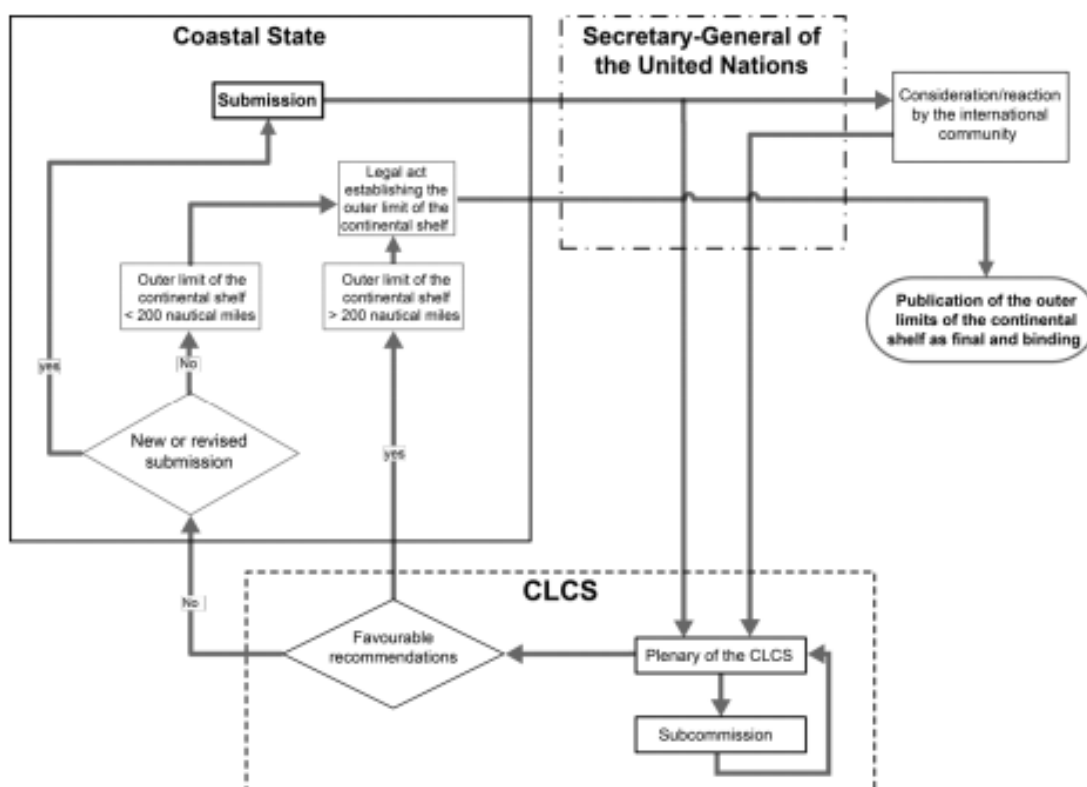


Figure 5 Brief Description of the Procedure before the Commission on the Limits of the Continental Shelf

Source: Paulo Neves Coelho, "What is the Commission on the Limits of the Continental Shelf", Institut Océanographique, July 2013 (available at <http://www.institut-ocean.org/images/articles/documents/1374481543.pdf>).

¹¹² Third United Nations Conference on the Law of the Sea, *Final Act of the Third United Nations Conference on the Law of the Sea*, UN Doc. A/CONF.62/121, 27 October 1982, Annex II (available at http://www.un.org/depts/los/clcs_new/documents/final_act_annex_two.htm).

¹¹³ UNCLOS Annex II Art. 9.

Commission on the Limits of the Continental Shelf (CLCS) Purpose, functions and sessions, *Ocean & Law of the Sea United Nations*, 2012 (available at http://www.un.org/depts/los/clcs_new/commission_purpose.htm).

¹¹⁴ UNCLOS Annex II.

4.2.1 Overlapping Claims

In the case of overlapping claims, there is the need for a delimitation agreement to set the limits of the continental shelf or maritime zones. UNCLOS does not provide for an exact method, but rather refers in Art. 74(1) and 83(1) UNCLOS to “that such delimitations are to be ‘effected by agreement on the basis of international law, as referred to in Art. 38 [ICJ Statute] (...) in order to achieve an equitable solution’”.¹¹⁵ Art. 15 UNCLOS states that “in the absence of agreement to the contrary, states may not extend their territorial seas beyond the median, or equidistance line, unless there are historic or other ‘special’ circumstances that dictate otherwise”. This has been considered as custom by the ICJ in its ruling on *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*¹¹⁶ and the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*¹¹⁷. Only in exceptional cases, the equidistance line does not form the basis of a boundary between overlapping claims. This has been stated in the *Jan Mayen Case* in 1993, as “Prima facie, a median line delimitation between opposite coasts results in general in an equitable solution”¹¹⁸ and reaffirmed in the *Eritrea-Yemen Arbitration*¹¹⁹ and in the *Case on Land and Maritime Boundary between Cameroon and Nigeria*¹²⁰. Therefore, the equidistance and special circumstances approach can be considered custom in cases of territorial sea, shelf or EEZ delimitation or while drawing a single delimitation line.¹²¹ However, it “appears that ‘equity’ rather than ‘equidistance’ may be re-emerging, yet again, as the dominant approach.”¹²²

¹¹⁵ Evans, *supra* note 81, 677.

See also Thomassen, *supra* note 14, 28f.

¹¹⁶ *Case concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* (Qatar v. Bahrain), Judgement, International Court of Justice, 16 March 2001 (available at <http://www.icj-cij.org/files/case-related/87/087-20010316-JUD-01-00-EN.pdf>), paras. 175f.

¹¹⁷ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicaragua v. Honduras), Judgement, International Court of Justice, 08 October 2007 (available <http://www.icj-cij.org/files/case-related/120/120-20071008-JUD-01-00-EN.pdf>), paras. 268, 281.

¹¹⁸ *Case concerning Maritime Delimitation in the area between Greenland and Jan Mayen* (Denmark v. Norway), Judgement, International Court of Justice, 14 June 1993 (available at <http://www.icj-cij.org/files/case-related/78/078-19930614-JUD-01-00-EN.pdf>), para. 64.

¹¹⁹ *Award of the Arbitral tribunal in the second stage of the proceedings between Eritrea and Yemen* (Maritime Delimitation), Decision, Permanent Court of Arbitration, 17 December 1999 (available at http://legal.un.org/riaa/cases/vol_XXII/335-410.pdf), para 131.

¹²⁰ *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria: Equatorial Guinea Intervening), Judgment, International Court of Justice, 10 October 2002, para. 288.

¹²¹ *Territorial sea: Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicaragua v. Honduras), Judgement, International Court of Justice, 08 October 2007 (available <http://www.icj-cij.org/files/case-related/120/120-20071008-JUD-01-00-EN.pdf>), paras 262-298.

Shelf, EEZ delimitation or single delimitation line: *Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname*, Decision, Permanent Court of Arbitration, 17 September 2007 (available at http://legal.un.org/riaa/cases/vol_XXX/1-144.pdf), paras. 376-392.

Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, International Court of Justice, 02 March 2009 (available at <http://www.icj-cij.org/files/case-related/132/132-20090203-JUD-01-00-EN.pdf>), para 116, 120, 122.

¹²² Evans, *supra* note 81, 678.

5 LITERATURE REVIEW

When conducting research on a topic under international law, the most important sources are the relevant treaties, followed by case law (if available) and other publications. In this case, the Svalbard Treaty, accompanied by the Mining Code, as well as UNCLOS are the relevant international agreements. The Svalbard Treaty does not contain any direction on how to interpret the treaty in case of ambiguity. A possibility would be to use UNCLOS as a means of interpretation, as UNCLOS can provide information on which maritime zones exist and which rights and obligations states have in them. However, to determine the scope of the treaty parties' rights and the geographical applicability of the treaty, the Vienna Convention on the Law of Treaties¹²³ should be used. Using the Vienna Convention to interpret the Svalbard Treaty, makes it possible to determine the scope of the rights and obligations of the different treaty parties in general, instead of focusing too much on the maritime part. Yet, UNCLOS needs of course still be taken into account while considering the establishment of potential maritime zones adjacent of Svalbard and any rights therein. Those articles relevant in the Vienna Convention are regarded as customary international law and thereby applicable to all states. This has been confirmed by the ICJ in several cases.¹²⁴ UNCLOS has not been ratified by all states, even though some parts of it are considered as customary law.¹²⁵

A part of interpreting using the Vienna Convention is to consider the so-called state practice. There can be a difference between official statements by a country and its actual behavior. National legislation, court documents from national or international courts, reports of the government and verbal and written notes exchanged between states can be used to find evidence for both state policy and state practice. Most of the official documents used are originating from Norway, because it is national Norwegian legislation and state behavior that

¹²³ *Vienna Convention on the Law of Treaties*, Vienna, 23 May 1969, *United Nations Treaty Series*, Vol. 1155, No. 18232, 331 (available at <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>). Hereinafter Vienna Convention.

¹²⁴ *Case concerning the territorial dispute (Libyan Arab Jamahiririya v. Chad)*, Judgment, International Court of Justice, 03 February 1994 (available at <http://www.icj-cij.org/files/case-related/83/083-19940203-JUD-01-00-EN.pdf>), para 41.

Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, International Court of Justice, 12 December 1996 (available at <http://www.icj-cij.org/files/case-related/90/090-19961212-JUD-01-00-EN.pdf>), para. 23.

Case concerning Kasikili/ Sedudu Island (Botswana v. Namibia), Judgment, International Court of Justice, 13 December 1999 (available at <http://www.icj-cij.org/files/case-related/98/098-19991213-JUD-01-00-EN.pdf>), para 18.

Case concerning the arbitral award of 31 July 1989, (Guinea Bissau v. Senegal), Judgment, International Court of Justice, 12 November 1991 (available at <http://www.icj-cij.org/files/case-related/82/082-19911112-JUD-01-00-EN.pdf>), 69ff.

Legal consequences of the construction of a wall in the occupied Palestinian territory, Advisory Opinion, International Court of Justice, 09 July 2004 (available at <http://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>).

¹²⁵ Evans, *supra* note 81, 653.

Roach, *supra* note 83.

mostly influences the situation on Svalbard. Official reports on Svalbard published by the government can provide a good overview of the current situation and function as an excellent source for Norwegian state practice. Also, information available on the websites of the various Norwegian Ministries and Directorates, like the Office of the Governor of Svalbard, the Mining Directorate or the Svalbard Tax Office, dealing with Svalbard and or Mining have been of importance. In addition, personal contact to those ministries has been made either by e-mail or phone to gather further information. Official documents by other states are typically found as a reaction to Norwegian legislation or activities, like notes verbal to Norway directly or to the Secretary General of the UN. In addition to those documents having a mere official character, newspaper articles can function as evidence for actual state behavior. The Arctic is covered mostly by two newspapers, *The Barents Observer*, a journalist owned online newspaper¹²⁶ and *High North News*, an independent newspaper published by the High North Center at the Nord University.¹²⁷ Both put out articles on Svalbard rather often, because developments on the topic, especially about fisheries and snow crab fishing, are important for the economy of the region.

There is no case law on the topic of the geographical extent of the Svalbard Treaty itself, as the case has not yet been referred to any international tribunal. In 1996, the Norwegian Supreme Court made a judgement concerning fishing by Icelandic fishermen in the 200 NM zone around Svalbard, but the court did not consider the geographical application of the treaty. Followed by a case in 2006 when the Supreme Court, in a case against Spanish fishing in the 200 NM zone, did not regard it as necessary to determine the geographic applicability of the treaty.¹²⁸ The latest one has been on snow crab fishing in a region called Loop Hole, a situation Chapter 7.2.3 will set into perspective. Nevertheless, it can be helpful to look at international jurisprudence on treaty interpretation, in cases similar to the one mentioned. However, the relevant international judgments do not point in one particular direction.¹²⁹ The arbitration court concluded in the *Abu Dhabi Oil Arbitration*¹³⁰ that oil licenses granted before the legal establishment of the continental shelf could not expand to the shelf. The court in the *Aegean Sea Case*¹³¹ concluded instead that a declaration on jurisdiction given in the 1920s also applied to the shelf, even though there did not exist any

¹²⁶ The Independent Barents Observer, "About us", *The Barents Observer*, 05 April 2017 (available at <https://thebarentsobserver.com/en/about-us>).

¹²⁷ Arne O. Holm, "High North News", *High North News* (available at <http://www.highnorthnews.com/>).

¹²⁸ Geir Ulfstein, "Spitsbergen/Svalbard", *Oxford Public International Law*, 01-2008 (available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1356>).

¹²⁹ *Ibid.*

¹³⁰ *Abu Dhabi Oil Arbitration*, Decision, Arbitration, September 1951 (available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e84>).

¹³¹ *Aegean Sea Continental Shelf Case* (Greece v. Turkey), Judgment, International Court of Justice, 19 December 1978 (available at <http://www.icj-cij.org/files/case-related/62/062-19781219-JUD-01-00-EN.pdf>).

legal concept of a shelf at that time. On the other hand, the arbitral award, whose judgment was confirmed by the ICJ three years later, ruled in the *Guinea Bissau v Senegal Case*¹³² that an agreement from 1960 about the delimitation of the territorial sea, the contiguous zone and the shelf did not apply to the EEZ. Contradicting again with the *Oil Platforms Case*¹³³ in 2003 in which the ICJ did not distinguish between land and sea territory, including the shelf and the EEZ, in a treaty that entered into force in 1955 being applicable on “the territories of the two High Contracting Parties”.¹³⁴¹³⁵

Both the topic of Svalbard in terms of security relevance, due to its strategic geographical location, and the legal side of the Svalbard Treaty’s application can be regarded as a niche topic. While there are some publications on the geographical extent of the Treaty in general as well as on the legal framework of the Fisheries Protection Zone (FPZ), the question of the exploitation of non-living resources is not widely researched yet. However, more publications can be expected, as the current issue of the snow crabs entering the area increases awareness of the topic, because they are regarded as belonging to the continental shelf like hydrocarbon and petroleum resources. Articles about Svalbard appear mostly in northern newspapers, as *The Barents Observer* and *High North News*, so the problem is probably not known to the wider public. For this thesis, there has been no selection of publications, caused by the limited number of literature available. There are only five authors who have published to a wider extent on the topic: Pedersen, Churchill and Ulfstein, as well as Anderson and Fleischer.

Pedersen, who has lived on Svalbard for two time periods, is the best-known author on the social science perspective of Svalbard. He is a Professor at the Faculty of Social Science at Nord University, Norway and wrote his PhD on Svalbard.¹³⁶ He has published analysis on different states’ policies about Svalbard as well as the FPZ. All his publications include a basic part of international law, but he concentrates mostly on aspects covered by national and foreign policy, as well as security studies. Fleischer is the only one advocating for

¹³² *Case concerning the arbitral award of 31 July 1989*, (Guinea Bissau v. Senegal), Judgment, International Court of Justice, 12 November 1991 (available at <http://www.icj-cij.org/files/case-related/82/082-19911112-JUD-01-00-EN.pdf>).

¹³³ *Case concerning Oil Platforms* (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, International Court of Justice, 12 December 1996 (available at <http://www.icj-cij.org/files/case-related/90/090-19961212-JUD-01-00-EN.pdf>).

¹³⁴ *Case concerning Oil Platforms* (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, International Court of Justice, 12 December 1996 (available at <http://www.icj-cij.org/files/case-related/90/090-19961212-JUD-01-00-EN.pdf>), para. 82.

¹³⁵ Cf Geir Ulfstein, „Spitsbergen/Svalbard“, Oxford Public International Law, 01-2008 (available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1356>).

¹³⁶ Svalbard Science Forum, “Conflict and order in Svalbard waters”, *The Research Council of Norway*, 13 September 2016 (available at https://www.forskningsradet.no/prognett-ssf/Nyheter/Conflict_and_order_in_Svalbard_waters/1253978331715&lang=en).

”Torbjørn Pedersen”, *Nord Universitet*, (available at <https://www.nord.no/no/ layouts/15/uin.internet/userprofilepage.aspx?pid=nord%5C03205451>).

Norway's interpretation of the Svalbard Treaty. He has worked for both Oslo University as a professor of jurisprudence and as a long-term consultant for the Norwegian Foreign Ministry. The first topic he consulted the Ministry on was fishery zones, the topic he also wrote his PhD in. He participated in various international negotiations on behalf of Norway, inter alia, UNCLOS III, on oil and gas fields in the North Sea and in bilateral consultations between Norway, Denmark and Great Britain in the late 60s.¹³⁷ Churchill and Ulfstein have both written several papers, supporting the widely accepted interpretation that the Svalbard Treaty extends beyond the territorial waters. Churchill works as a professor of international law at the University of Dundee since 2006, with previous work experience at Cardiff University and the University of Tromsø. Furthermore, he has been employed as an advisor to several NGOs (non-governmental organizations), especially environmental or fisheries organizations, various foreign governments, the European Commission and the European Parliament.¹³⁸ Ulfstein is a professor of international law at the University of Oslo since 1998 and has also worked for the University of Tromsø. In addition, he has been a judge at Tromsø City Court and Hålogaland Appeals Court.¹³⁹ Anderson, who is a former legal counselor of the UK Foreign and Commonwealth Office and a former judge at the International Tribunal for the Law of the Sea¹⁴⁰, supports the same view as Churchill and Ulfstein.

¹³⁷ Marit Halvorsen, "Carl August Fleischer", *Norsk Biografisk Leksikon*, 13 February 2009 (available at https://nbl.snl.no/Carl_August_Fleischer).

¹³⁸ Law Staff, "Robin Churchill", *University of Dundee* (available at <https://www.dundee.ac.uk/law/staff/details/churchillrobin.php#tab-bio>).

¹³⁹ Geir Ulfstein, "Biographical sketch", *ulfstein.net* (available at <http://ulfstein.net/biographical-sketch/>).

¹⁴⁰ Håvard Figenschou Raaen, Hydrocarbons and Jurisdictional Disputes in the High North: Explaining the Rationale of Norway's High North Policy, *FNI Report*, No 11 (2008) (available at <https://www.fni.no/publications/hydrocarbons-and-jurisdictional-disputes-in-the-high-north-explaining-the-rationale-of-norway-s-high-north-policy-article793-290.html>), 30.

6 INTERPRETATION OF THE SVALBARD TREATY

The stalemate between the parties is caused by the different interpretations of Norway's sovereign rights in the maritime areas adjacent of Svalbard's territorial sea and the geographical scope of the treaty parties' rights. The answer to these disputes will provide the conclusion to whether Norway is allowed to claim these areas at all and whether the Svalbard Treaty with all its provisions must apply to them. The question whether Norway can claim maritime zones adjacent of Svalbard is going to provide the answer to whether the Svalbard Treaty can be applied to a continental shelf as well. Every land territory that has adjacent waters has the right to a continental shelf of 200 NM, which must not be claimed by the coastal state.¹⁴¹ So when there is water, where maritime zones can be claimed, there must be a shelf underneath. As this shelf, like the maritime zones, originates from the land, the sovereignty of all three is connected, meaning that the continental shelf and potential maritime zones are under the sovereignty of the coastal state.¹⁴²

Norway argues that the Svalbard Treaty is only applicable to the land territory of the archipelago and the territorial sea, so only those geographical areas especially mentioned in the Treaty. Based on that interpretation, the country is entitled to exercise unlimited coastal state rights, like every other state under international law, so also to establish maritime zones beyond the territorial sea. Norway is thereby relying heavily on the wording of the Treaty and argues in favor of the *restrictive interpretation* approach, by stating it to be a recognized principle of international law.¹⁴³ Therefore, in case of any doubt on Norway's right to exercise its full sovereignty, one must use the interpretation that limits it to the least extend possible. Consequently, only those limits that are explicitly stated in the Treaty can be applied and the treaty parties' rights are only applicable to the land territory and the territorial sea.

The Norwegian position is opposed by the international community; while Spain, Iceland and the EU¹⁴⁴ argue that Norway may not exercise coastal state jurisdiction beyond the territorial

¹⁴¹ UNCLOS Art. 77(3).

¹⁴² Inter alia UNCLOS Art. 2 on the territorial sea, Art. 56 on the EEZ, Art. 77 on the continental shelf.

¹⁴³ "It is an accepted principle of international law relating to treaty interpretation that any significant restriction of sovereignty over land territory must be clearly based on a treaty. Such provisions are to be interpreted on the basis of their natural linguistic meaning of the exercise of authority is to be adopted. Article 1 of the Treaty grants Norway the full and absolute sovereignty over the archipelago, and the Treaty does not provide for any general restriction of Norway's sovereignty. Therefore, unless otherwise specifically provided in the Treaty, Norway has complete jurisdiction in accordance with the general rules of public international law" in Anderson, *supra* note 64, 379.

¹⁴⁴ Spain had been supported by the EU after the Spanish trawlers Olazar and Olaberri and Garoya Segundo and Monte Meixuerio were accused of illegal fishing in the FPZ in 2004 and 2005 respectively. The Spanish Minister of Fisheries raised the issue in the Council of the European Union. The European Commission stated that it accepts Norway's right to regulate fishing in the FPZ, but disputed that Norway had enforcement jurisdiction. However, after some states, especially the United Kingdom, were raising their voice against the European Commission's actions, it avoided further statements on the Norwegian competence on exercising jurisdiction. More information, including a short summary of the EU's position on Svalbard's waters and especially the fisheries question can be found in: Sobrido, *supra* note 71, 75-106.

sea, Russia questions the Norwegian right to establish maritime zones without a consensus by the treaty parties. The interpretation that seems to be the prevailing international opinion¹⁴⁵ assumes that Norway has the right to establish maritime zones and exercise coastal state jurisdiction, but that the Svalbard Treaty applies to all of them at the same time. This argument is based on the *evolutionary treaty interpretation* approach, which takes developments of norms and standards into account, most important in this case are UNCLOS and other relevant customary law that has emerged since 1920. If the Treaty should be applicable beyond the territorial sea, all living and non-living resources on the shelf and in the adjacent maritime zones would be accessible by all treaty parties on equal footing.

While interpreting an international treaty, one needs to apply the principles of treaty interpretation laid down in Art. 31 to 33 of the Vienna Convention. Norway has not ratified the Convention, but the ICJ has stated in several cases¹⁴⁶ that those articles form customary law and are thereby applicable also to those state that have not ratified the Convention. The Court even concluded in the *Kasikili v Sedudu Case* that the relevant treaty provisions had already been established as custom in 1890.¹⁴⁷ Moreover, Norway has officially stated that even though “Norway is not a party to the Vienna Convention, (...) the rule of interpretation expresses customary law by which all states are bound”.¹⁴⁸ According to the Convention, a treaty needs to be interpreted in good faith, following the principle *pacta sunt servanda* (agreements must be kept), by giving the ordinary meaning of the words used in their context and in the light of the treaty’s object and purpose.¹⁴⁹ In case there are two languages, as in the Svalbard Treaty, they are assumed to carry the same meaning. The context of a treaty is composed by the articles, the preamble and annexes and any document made by a party in connection with the conclusion of the treaty and accepted by the other treaty parties as an

See also Raaen, *supra* note 140, 27.

¹⁴⁵ Numminen, *supra* note 11, 11.

Rossi, *supra* note 6, 105.

¹⁴⁶ *Case concerning the territorial dispute* (Libyan Arab Jamahiririya v. Chad), Judgment, International Court of Justice, 03 February 1994 (available at <http://www.icj-cij.org/files/case-related/83/083-19940203-JUD-01-00-EN.pdf>), para 41.

Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, International Court of Justice, 12 December 1996 (available at <http://www.icj-cij.org/files/case-related/90/090-19961212-JUD-01-00-EN.pdf>), para. 23.

Case concerning Kasikili/ Sedudu Island (Botswana v. Namibia), Judgment, International Court of Justice, 13 December 1999 (available at <http://www.icj-cij.org/files/case-related/98/098-19991213-JUD-01-00-EN.pdf>), para 18.

Case concerning the arbitral award of 31 July 1989, (Guinea Bissau v. Senegal), Judgment, International Court of Justice, 12 November 1991 (available at <http://www.icj-cij.org/files/case-related/82/082-19911112-JUD-01-00-EN.pdf>), 69ff.

Legal consequences of the construction of a wall in the occupied Palestinian territory, Advisory Opinion, International Court of Justice, 09 July 2004 (available at <http://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>).

¹⁴⁷ *Case concerning Kasikili/ Sedudu Island* (Botswana v. Namibia), Judgment, International Court of Justice, 13 December 1999 (available at <http://www.icj-cij.org/files/case-related/98/098-19991213-JUD-01-00-EN.pdf>).

¹⁴⁸ Government of Norway, “Meld. St. 32 (2015-2016)”, *Regjeringen.no* (available at <https://www.regjeringen.no/no/dokumenter/meld.-st.-32-20152016/id2499962/sec1>), Sect. 3.2.3.

¹⁴⁹ Vienna Convention Art. 31.

instrument related to the treaty. Also, subsequent practice and any relevant rules of international law applicable to the relations between the parties can be considered. In case that the interpretation should still be unclear, it is allowed to take the preparatory work into account, as supplementary means for interpretation.¹⁵⁰

6.1 IN GOOD FAITH

Today, sovereignty over land generates greater maritime sovereignty than it did in 1920. What was considered as high seas before, including other states' rights to exploit the resources, has entered under Norwegian jurisdiction. This is especially true since the enlargement of the territorial sea around Svalbard in 2003.¹⁵¹ When applying the principle of good faith, it must be paid attention to the fact that Norway's sovereignty and the applicability of the Svalbard Treaty are not defined to a certain specific and geographically determined area, as explained earlier, but over islands "great or small, and rocks".¹⁵² As Norway's sovereignty over Svalbard has always been subject to the stipulations of the Treaty, it would be logical that while enlarging Norway's sea bound sovereignty, the scope of the Svalbard Treaty is increasing as well, if it is suitable of being applied to the areas in question. By adopting Norway's interpretation, it would give the kingdom greater rights beyond the limits of the territorial sea than within it, because it would not be forced to share the living and non-living resources in the EEZ and on the shelf with the contracting parties, like it needs to in the territorial sea. However, under the framework of the Law of the Sea, territorial state's rights decrease, not increase, when moving away from the coast. A state has the largest sovereign rights in its internal waters, followed by the territorial sea. In both, national laws apply which are only restricted by a few constraints as the right to innocent passage.¹⁵³ In the EEZ, the coastal state can manage, conserve, explore and exploit the living resources.¹⁵⁴ On the shelf, the state has the right to explore and exploit the natural resources of the seabed and subsoil.¹⁵⁵ Therefore, the Norwegian interpretation would contradict the principle of good faith.

¹⁵⁰ Vienna Convention Art. 31, 32, 33.

¹⁵¹ *Lov om Norges territorialfarvann og tilstøtende sone [territorialfarvannsloven]*, Utenriksdepartementet, 27-06-2003 (available at <https://lovdata.no/dokument/NL/lov/2003-06-27-57?q=Lov%20om%20Norges%20territorialfarvann%20og>).

¹⁵² Svalbard Treaty, Art. 1.

¹⁵³ UNCLOS Art. 218-20, 27(1).

¹⁵⁴ UNCLOS Art. 55, 56, 57, 58, 63, 73, 292.

¹⁵⁵ UNCLOS Art. 77.

6.1.1 Evolutionary Interpretation

Interpretation and application of international law is affected by time¹⁵⁶, a fact that should be considered while interpreting in good faith. For instance, around a century ago, a state's sovereignty and territorial integrity were predominant, but with the time concepts that could override it, like the Responsibility to Protect (R2P) were developed by the international community.¹⁵⁷ The same way as sovereignty is seen differently today than 100 years ago, the Law of the Sea has evolved since the drafting of the Svalbard Treaty. An approach taking this development into account is the evolutionary interpretation which considers the development of norms and standards, seeing treaties as a 'living instrument' or as "victims like everyone else of the passage of time".¹⁵⁸ This approach assumes that the goal of treaty interpretation should be "to give effect to the intention of the parties as fully and fairly as possible"¹⁵⁹, meaning interpreting in good faith, as stated by the first Special Rapporteur on the Law of Treaties of the International Law Commission. Therefore, the meaning of treaty terms could change over time to match to the intention of the parties, without a specific amendment or modification, simply by taking the subsequent practice of the treaty parties into consideration.¹⁶⁰ The jurisprudence of the European Court of Human Rights (ECHR)¹⁶¹

¹⁵⁶ See also Eirik Bjorge, "Introducing the Evolutionary Interpretation of Treaties", *EJIL Talk*, 15 December 2014 (available at <https://www.ejiltalk.org/introducing-the-evolutionary-interpretation-of-treaties/>).

¹⁵⁷ In the beginning of the 20th century, the so called Westphalian approach to sovereignty was governing the relations of states. The concept is based on the equality and independence of states which have the ultimate authority over their people and territory. This excludes any kind of interference from external powers in its domestic affairs and protects the territorial integrity of the state.

The Responsibility to Protect has been internationally recognized for the first time in the World Summit Document in 2005. It arises in cases of war crimes, crimes against humanity, genocide and ethnic cleansing. It is based on three pillars, the protection responsibilities of the state (Pillar I), international assistance and capacity building (Pillar II) and timely and decisive response (Pillar III). Basically, in case that a state is not fulfilling its obligation to protect its own people, the international community has the obligation to step in and can thereby override the principle of territorial integrity and the sovereignty of the state.

G. John Ikenberry, *The logic of order: Westphalia, liberalism, and the evolution of international order in the modern era*, in: G. John Ikenberry (ed.), *Power and Change*, 83-106.

Henry Kissinger, *World Order*, 2014, Chapter I.

United Nations Office on Genocide Prevention and the Responsibility to Protect, "Responsibility to Protect", *United Nations* (available at <http://www.un.org/en/genocideprevention/about-responsibility-to-protect.html>).

United Nations, General Assembly, *2005 World Summit Outcome*, UN Doc. A/RES/60/1, 24 October 2005 (available at

http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf), Art. 138, 139.

¹⁵⁸ Alyson Bailes, *Spitsbergen in a sea of change*, in: Diana Wallis MEP and Steward Arnold (ed.), *The Spitsbergen Treaty*, Arctic Papers Vol 1 (2011), 35.

¹⁵⁹ Andrew Clapham, *Brierly's Law of Nations*, 7th Edition, 2012, 349.

¹⁶⁰ "Conclusion 3

Interpretation of treaty terms as capable of evolving over time

Subsequent agreements and subsequent practice under articles 31[3] and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time." In United Nations, General Assembly, *Report of the International Law Commission*, UN Doc. A/68/10, 2013 (available at <http://legal.un.org/docs/?symbol=A/68/10>). 12.

¹⁶¹ Case Examples

Case of Tyrer v. the United Kingdom, Judgment, European Court of Human Rights, 25 April 1978 (available at <https://de.scribd.com/document/189561016/Case-of-Tyrer-v-the-United-Kingdom>).

Case of Golder v. the United Kingdom, Judgment, European Court of Human Rights, 21 February 1975 (available at <https://www.juridice.ro/wp-content/uploads/2018/03/Golder.pdf>).

has developed this approach which has for example been applied within the World Trade Organization (WTO).

Fleischer argues that the rights of the parties to the Svalbard Treaty “do not comprise rights which derive from the development of new rules which has taken place at a much later stage in legal history”.¹⁶² Johan Jørgen Holst, the Norwegian Foreign Minister in 1993/94, backs Fleischer’s argument, pointing to “the fruitlessness of making assumptions about how the Svalbard Treaty would have been designed in 1919–20 if the drafters had knowledge of future legal developments, since it presupposes that Norway would have accepted sovereignty over the archipelago even if it meant a relinquishment of rights to its ab initio extensive and now promising continental shelf”.¹⁶³ In general, evolutionary interpretation has been heavily criticized for overriding intention and introducing a certain level of uncertainty.¹⁶⁴ However, the ICJ has stated several times that conceptual or generic terms should be given the scope they have while referring the case to court and not the scope they had when the treaty was made.¹⁶⁵ Examples are ‘territorial state’ in the *Aegean Sea Case*¹⁶⁶, ‘commerce’ in *Dispute regarding navigational and related rights*¹⁶⁷ and in the *Iron Rhine Case*¹⁶⁸. In *Dispute regarding navigational and related rights*, the ICJ concluded in 2009 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 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“ (emphasis added).¹⁶⁹ Therefore, one needs to reflect that sovereignty over a certain part of the earth comes with more rights (and

Case of Marckx v. Kingdom of Belgium, Judgment, European Court of Human Rights, 13 June 1979 (available at <http://www.womenslinkworldwide.org/en/files/2896/gjo-echr-marckx-en-pdf.pdf>).

¹⁶² Fleischer, *supra* note 48, 3.

¹⁶³ Johan Jørgen Holst, *Norsk havretts-og nordpolitik*, in Johan Jørgen Holst and D. Heradstveit (ed.), *Norsk Utenrikspolitikk*, 1985, 362.

¹⁶⁴ Malgosia Fitzmaurice, *The Practical Working of the Law of Treaties*, in: Malcom D. Evans (ed.), *International Law*, 4th Edition, 2014, 183.

¹⁶⁵ Churchill, Ulfstein, *supra* note 9, 557.

¹⁶⁶ *Aegean Sea Continental Shelf Case* (Greece v. Turkey), Judgment, International Court of Justice, 19 December 1978 (available at <http://www.icj-cij.org/files/case-related/62/062-19781219-JUD-01-00-EN.pdf>), paras. 77-80.

¹⁶⁷ *Dispute regarding navigational and related rights* (Costa Rica v. Nicaragua), Judgement, International Court of Justice, 13 July 2009 (available at <http://www.icj-cij.org/files/case-related/133/133-20090713-JUD-01-00-EN.pdf>), paras. 63-70.

¹⁶⁸ *Award in the Arbitration regarding the Iron Rhine Railway between the Kingdom of Belgium and the Kingdom of the Netherlands* (Belgium v. Netherlands), Decision, Permanent Court of Arbitration, 24 May 2005 (available at http://legal.un.org/riaa/cases/vol_XXVII/35-125.pdf), paras. 79-81.

¹⁶⁹ *Dispute regarding navigational and related rights* (Costa Rica v. Nicaragua), Judgement, International Court of Justice, 13 July 2009 (available at <http://www.icj-cij.org/files/case-related/133/133-20090713-JUD-01-00-EN.pdf>), para. 64.

responsibilities) than it did in 1920. Today, sovereignty over a land territory that has adjacent maritime areas, allows the state to claim various maritime zones, in which it has certain sovereign rights. Furthermore, Churchill and Ulfstein put a valid argument forward by stating that “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 times as it had in 1920”.¹⁷⁰ So, Fleischer’s interpretation would mean that all developments in international law since 1920 would not be applicable to Svalbard, like the prohibition of torture on sovereign territory and the prevention of environmental damage of own actions to other states¹⁷¹. Actually, Norway would neither be allowed to claim maritime zones based on its sovereignty over Svalbard as that possibility had also first developed later on. In 1920, there only existed high seas beyond a way narrower territorial sea and no coastal state jurisdiction in any maritime zones beyond it. Therefore, Norway has applied to principle of evolutionary interpretation itself. First, by establishing the FPZ beyond the territorial sea and second in terms of the breadth of the territorial sea. Starting with a territorial sea of 4 NM, Norway has extended it to 12 NM¹⁷², which would not have been possible without evolutionary interpretation, as the territorial sea would need to remain the at the same size as in 1925. Summing up, the area a state can claim sovereign rights over has increased over the last century. Therefore, Norway has received the right to establish maritime zones based on its sovereignty over Svalbard. At the same time, that sovereignty originates from a treaty which combines this sovereignty with some restrictions, namely the rights of the treaty parties. Consequently, “[i]n 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”¹⁷³

¹⁷⁰ Churchill, Ulfstein, *supra* note 9, 557.

¹⁷¹ UN General Assembly resolution 217 A, *The Universal Declaration of Human Rights*, UN Doc. 217 (III) A, 10 December 1948 (available at http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf), Art. 5. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, International Court of Justice, 8 July 1996 (available at <http://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>), para. 29.

¹⁷² *Forskrift om fiskevernsonen ved Svalbard*, Utenriksdepartementet, 15 June 1977, last amended on 02 March 2001 (available on <https://lovdata.no/dokument/SF/forskrift/1977-06-03-6?q=fiskeri%20sone>). *Lov om Norges territorialfarvann og tilstøtende sone [territorialfarvannsløven]*, Utenriksdepartementet, 27-06-2003 (available at <https://lovdata.no/dokument/NL/lov/2003-06-27-57?q=Lov%20om%20Norges%20territorialfarvann%20og>).

¹⁷³ Churchill, Ulfstein, *supra* note 9, 578.

6.2 WORDING

According to Norway's official view, the Svalbard Treaty only applies to those areas expressly mentioned in the treaty¹⁷⁴, so the land territory and the territorial waters, because "if signatories maintained strict limitations on Norway's supremacy, they should have put them in writing".¹⁷⁵ Also, the non-existence of any maritime zones beyond the territorial sea in 1920 does not alter that fact, according to Norway. Constructs like the EEZ and the continental shelf are simply not covered by the terms of the treaty as they are not mentioned in it. Therefore, the Norwegian sovereignty is only restricted in those areas stated in the Treaty and without any limitations beyond those. Contradicting Norway's argument that the restrictions only apply to the territories acknowledged in Art. 1 is the fact that the territory identified through the Svalbard Box does not serve any judicial purposes, instead general international law applies.¹⁷⁶ Based on the evolutionary interpretation approach, the territory under Norwegian sovereignty that originated from Svalbard has widened since 1920 with the introduction of adjacent maritime zones. As the Norwegian sovereignty has been introduced with some limitations, those limitations have followed the geographical expanse of the sovereignty.

Nevertheless, Fleischer argues that only the recognition and not sovereignty itself has been subject to the treaty provisions, as "[t]he wording 'subject to...etc (dans les conditions)' is here connected to the obligation to 'recognize' [and not] (...) to the term 'sovereignty', which has its own adjectives connected to it, [namely] 'full' and 'absolute'".¹⁷⁷ The signatory parties recognize Norway's 'full and absolute' sovereignty in Art. 1 and only because Norwegian sovereignty was established, the country could effectively fulfil its obligations set out in the following articles. Based on its sovereignty, Norway could introduce binding rules protecting equal access, which enable the signatory states to enjoy their advantages, according to Fleischer.¹⁷⁸ Geir and Ulfstein oppose this, calling it a "distinction without a difference"¹⁷⁹, as the other parties could simply withdraw their recognition. Yet, there exists no withdrawal mechanism in case of that Norway is not fulfilling its 'part of the deal', instead the existence of Norwegian sovereignty was acknowledged with the unconditional ratification of the Svalbard Treaty, making the transfer of sovereignty a 'one-time thing'. Even when one party of the Treaty is going to withdraw from it, the sovereignty will not be taken from Norway.¹⁸⁰

¹⁷⁴ Rolf Einar Fife, "Forkerrettslige spørsmål i tilknytning til Svalbard", *Regjeringen.no*, December 2014 (available at <http://www.regjeringen.no/no/dep/ud/id833/>), 21.

¹⁷⁵ Peter Thomas Örebech, "The Geographic Scope of the Svalbard Treaty and Norwegian Sovereignty: Historic - or Evolutionary - Interpretation?", *Croatian Yearbook of European Law & Policy*, (2017), Vol. 13(13), 60.

¹⁷⁶ Anderson, *supra* note 64, 375

¹⁷⁷ Fleischer, *supra* note 48, 4.

¹⁷⁸ Fleischer, *supra* note 48, 8.

¹⁷⁹ Churchill, Ulfstein, *supra* note 9, 573.

¹⁸⁰ Örebech, *supra* note 175, 69, 86.

However, as sovereignty is usually considered to be without limitations, it is remarkable that the authors of the Svalbard Treaty have specially mentioned it to be 'full and absolute'. Consequently, it is possible to argue that the sovereignty is 'full and absolute' as long as it is not limited by the treaty provisions. Already in Chapter 1, it was explained that sovereignty can be restricted by the source it originates from.¹⁸¹ While a state usually has the exclusive jurisdiction, only restricted by international law, Norway's sovereignty over the archipelago, and all areas beyond under the sovereignty originating from there, is limited.

6.3 CONTEXT

Considering the context of the treaty provisions, there can be found certain *sui generis*¹⁸² attributes, which distinguish Svalbard from the rest of Norway. The restrictions on Norway's fiscal policy through the limitation on taxation, the need to establish certain mining regulations distinct of those used on the mainland and the political requirement to sustain the non-military use of Svalbard, do not reflect a Westphalian approach for sovereignty. The Westphalian approach is based on the equality and independence of states, which have the ultimate authority over their people and territory. This excludes any kind of interference from external powers in domestic affairs and protects the states' territorial integrity.¹⁸³ The sovereignty over Svalbard does not have the same exclusive character as sovereignty over territory in the rest of the world. This is recognized by those arguing in favor of the Norwegian position and those against. In contrast to Fleischer's argument that the Treaty established sovereignty to which exceptions were made, other authors, especially Anderson, argue in favor of a 'package deal' because sovereignty over Svalbard went hand in hand with a special regime for the archipelago.¹⁸⁴ The treaty parties gave up their claim to sovereignty and all rights to free access under the *terra nullius* regime, recognized Norwegian sovereignty subject to the treaty provisions and in exchange they received certain rights protected under the treaty regime. As Norwegian sovereignty and its stipulations were presented in the same sentence, they are fused together and do not form a sovereignty with exceptions. As explained earlier, Fleischer argues that it is only the recognition and not the sovereignty itself that is restricted, but when looking at the context of the Treaty, it becomes

¹⁸¹ Thomassen, *supra* note 14, 12f.

¹⁸² Latin for "of its own kind", used to describe something that is similar but has a fundamental distinct feature which prevents it from being grouped with others.

Cornell Law School, "sui generis", Legal Information Institute (available at https://www.law.cornell.edu/wex/sui_generis).

¹⁸³ Ikenberry, *supra* note 157.

Kissinger, *supra* note 157.

¹⁸⁴ Anderson, *supra* note 64, 374.

Caracciolo, *supra* note 54, 11.

clear that preserving the treaty parties' rights forms the main objective. All following articles underline that the signatory states enjoy certain rights that restrict Norway's sovereignty. So, as soon as Norway extends the geographical scope of its sovereignty by establishing additional maritime zones, the rights of the treaty parties should extend to the same geographic area, because they are fused together with the Norwegian sovereignty. Yet, Fleischer argues that the granting of the sovereignty to Norway and the rights of the other treaty parties are not on the same level. Following his argument, general international law allows a state to take all steps which have not been excluded by provisions of a treaty, so the sovereignty should be interpreted broadly. At the same time, the rights granted to other states should be interpreted restrictively, limited to those rights expressly mentioned in the treaty. Therefore, no new rules can develop over time. Fleischer and Norway hereby rely on the principle of restrictive interpretation.¹⁸⁵

6.3.1 Restrictive Interpretation

According to the approach of restrictive interpretation, the provision of a treaty should be interpreted in favor of the state with obligations, as it is presumed that a state would not make itself subject to stronger obligations than explicitly stated in a treaty. Therefore, in cases of doubt, an interpretation protecting the sovereignty to the strongest degree possible must be chosen. This principle has its origins in classical international law, when only few limits to state sovereignty existed which were always applied restrictively.¹⁸⁶ When the Svalbard Treaty was signed, this was the prevailing interpretation approach. Norway is arguing in favor of restrictive interpretation and has clearly stated that in a *White Paper on Treaty Interpretation* published in 1999¹⁸⁷, naming it "an accepted principle of international

¹⁸⁵ Fleischer, *supra* note 48, 2.

¹⁸⁶ *Case of the S.S. "Wimbledon"* (United Kingdom v Germany), Judgment, Permanent Court of International Justice, 17 August 1923 (available at http://legal.un.org/PCIJsummaries/documents/english/5_e.pdf), Chapter IV A.

Interpretation of the Statute of the Memel territory (United Kingdom, France, Italy, Japan v. Lithuania), Judgment, Permanent Court of International Justice, 11 August 1932 (available at http://www.worldcourts.com/pcij/eng/decisions/1932.08.11_memel.htm).

Case relating to the Territorial Jurisdiction of the International Commission of the River Oder (United Kingdom, Czechoslovakia, Denmark, France, Germany, Sweden v. Poland), Judgment, Permanent Court of International Justice, 10 September 1929 (available at http://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_23/74_Commission_internationale_de_l'Oder_Arret.pdf), 26.

Polish Postal Service in Danzig, Advisory Opinion, Permanent Court of International Justice, 16 May 1925 (available at http://www.icj-cij.org/files/permanent-court-of-international-justice/serie_B/B_11/01_Service_postal_polonais_a_Danzig_Avis_consultatif.pdf), 39f.

¹⁸⁷ "It is an accepted principle of international law relating to treaty interpretation that any significant restriction of sovereignty over land territory must be clearly based on a treaty. Such provisions are to be interpreted on the basis of their natural linguistic meaning. In case of doubt, the interpretation that entails the least restriction of the exercise of authority is to be adopted. Article 1 of the Treaty grants Norway the full and absolute sovereignty over the archipelago, and the Treaty does not provide for any general restriction of Norway's sovereignty. Therefore, unless otherwise specifically provided in the Treaty, Norway has complete jurisdiction in accordance with the general rules of public international law" Ministry of Justice and the Police, *Report No. 22 (2008-2009) to the Storting – Svalbard* (available at

law". As Art. 1 of the Svalbard Treaty grants full and absolute sovereignty to Norway and no general restrictions to Norwegian sovereignty are provided in the Treaty, Norway enjoys full sovereign rights unless specifically provided in the Treaty. Therefore, the Svalbard Treaty should be interpreted in a way that puts least restraints on Norwegian sovereignty. This is further supported by Fleischer, who states: "if there is a new development in international law beyond what was known to the international community at the time of the treaty deliberations, one must apply the principle of sovereignty laid down in Art.1".¹⁸⁸

However, the principle of restrictive interpretation is not autonomous, and every interpretation must start from the general rule of interpretation laid down in the Vienna Convention. Taking the object and purpose as well as the context into account, the Svalbard Treaty is reciprocal. The restrictive interpretation would favor one side too much making it inapplicable as it would alter the mediation achieved. Additionally, modern international law recognizes the existence of limits to sovereignty to protect the fundamental interests of the international community. These limits are not seen as exceptions anymore and can therefore not be applied restrictively.¹⁸⁹ Churchill and Ulfstein argue that the restrictive approach is regarded as old fashioned. While referring to the *Iron Rhine Case*¹⁹⁰ and *Dispute regarding navigational and related rights*¹⁹¹, they state 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".¹⁹² The *Iron Rhine Case* identifies the object and purpose of the treaty as well as the intentions of the parties as the prevailing elements for interpretation. The tribunal further referred to the rules of interpretation stated in Art. 31 and 32 of the Vienna Convention.¹⁹³ All in all, recent case law and conventional law are dismissive of the Norwegian position.

https://www.regjeringen.no/contentassets/e70b04df32ad45f483f2619939c5636d/en-gb/pdfs/stm200820090022000en_pdfs.pdf, Sec. 4.1.1.

¹⁸⁸ Fleischer, *supra* note 48, 6.

¹⁸⁹ *Lake Lanoux Arbitration* (France v. Spain), Decision, Permanent Court of Arbitration, 11 November 1957 (available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e154>).
Dispute regarding navigational and related rights (Costa Rica v. Nicaragua), Judgement, International Court of Justice, 13 July 2009 (available at <http://www.icj-cij.org/files/case-related/133/133-20090713-JUD-01-00-EN.pdf>). See also Caracciolo, *supra* note 54, 11.

¹⁹⁰ *Award in the Arbitration regarding the Iron Rhine Railway between the Kingdom of Belgium and the Kingdom of the Netherlands* (Belgium v. Netherlands), Decision, Permanent Court of Arbitration, 24 May 2005 (available at http://legal.un.org/riaa/cases/vol_XXVII/35-125.pdf), paras. 50-56.

¹⁹¹ *Dispute regarding navigational and related rights* (Costa Rica v. Nicaragua), Judgement, International Court of Justice, 13 July 2009 (available at <http://www.icj-cij.org/files/case-related/133/133-20090713-JUD-01-00-EN.pdf>), para. 48.

¹⁹² Churchill, Ulfstein, *supra* note 9, 566.

¹⁹³ *Award in the Arbitration regarding the Iron Rhine Railway between the Kingdom of Belgium and the Kingdom of the Netherlands* (Belgium v. Netherlands), Decision, Permanent Court of Arbitration, 24 May 2005 (available at http://legal.un.org/riaa/cases/vol_XXVII/35-125.pdf), para. 53.

6.4 OBJECT AND PURPOSE

The object and purpose of the Treaty is to provide Svalbard with an “equitable regime in order to assure their development and peaceful utilization”.¹⁹⁴ This regime ensures that each party gave something up and received something in return to make it a fair and balanced result. It was included to preserve some of the pre-existing *terra nullius* rights of the other states and can be found in all provisions of the Svalbard Treaty; as equal access (Art. 2, 3 and 4), acquired rights of the nationals of signatories (Art. 6), equality in ownership of property (Art. 7) and non-discrimination under mining regulations (Art. 8). Also, an orderly regime for Svalbard, in contrast to the previous *terra nullius* status, should be established by handing the sovereignty to Norway. Fleischer argues that “any hypothesis as to whether or not the parties would have said something concerning the shelf or the zone if they had foreseen such a development is irrelevant”.¹⁹⁵ Nevertheless, it can reasonably be said that if the drafter would have foreseen the development of other maritime zones than those known at that time, they would probably have mentioned them to prevent any disagreement, while aiming for the permanent settlement of Svalbard’s legal status and the creation of a comprehensive territorial treaty. Also, applying Norwegian sovereignty to the new maritime zones broadly and at the same time interpreting the treaty parties’ rights restrictively to those explicitly named in the Treaty, can hardly be equitable or balanced. Moreover, as the drafters had the intention to establish a comprehensive territorial regime, giving Norway sovereign rights beyond the territorial sea, without applying the treaty provisions to this, would contradict it.

6.4.1 Principle of Effectiveness

When interpreting a treaty, the norms must be interpreted in a way that gives them meaning and effect, starting from the assumption that the authors used that specific norm to reach the object and purpose of the treaty. Simply said, in case of different potential meanings, it must be chosen the one that permits the effective application. However, this does not allow a search for meaning at all costs, supported by the *Advisory Opinion on the Interpretation of Peace Treaties*¹⁹⁶ and *South West Africa Cases (second phase)*¹⁹⁷. Thus, if the Norwegian interpretation would be accepted, it would limit the equality principle and thereby probably lead to conflict, contradicting the object and purpose of a peaceful development and the

¹⁹⁴ Preamble, Svalbard Treaty.

¹⁹⁵ Fleischer, *supra* note 48, 3.

¹⁹⁶ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)*, Advisory Opinion, International Court of Justice, 18 July 1950 (available at <http://www.icj-cij.org/files/case-related/8/008-19500718-ADV-01-00-EN.pdf>), 229.

¹⁹⁷ *South West Africa Cases (Ethiopia v. South Africa, Liberia v. South Africa)*, Judgment, International Court of Justice, 18 July 1966 (available at <http://www.icj-cij.org/files/case-related/47/047-19660718-JUD-01-00-EN.pdf>), 48.

equitable regime. Therefore, every expansion of Norwegian sovereignty must go hand in hand with the expansion of the treaty parties' rights.

6.5 PRACTICE

It has been widely debated, how to define the scope of state practice, as the Vienna Convention does not further explain it. Since 2012, the International Law Commission has worked to define further the subsequent agreements and subsequent practice in relation to the interpretation of treaties. Four reports have been made by the Special Rapporteur to establish the difference between 'agreed subsequent practice' and 'other subsequent practice'.¹⁹⁸ The first one refers to practice that establishes the agreement between the parties and would fall under Art. 31(3)b of the Vienna Convention¹⁹⁹, the latter covers other subsequent practice in a broad sense of every party to a treaty. "Other subsequent practice as a supplementary means of interpretation under Article 32 consists of official conduct in the application of the treaty, after its conclusion".²⁰⁰ Therefore, it is important to look at how the state parties and especially Norway apply the Svalbard Treaty in their actions. Many state parties have remained silent on their view on the interpretation of the Treaty, but no country is officially supporting Norway's interpretation.²⁰¹ All countries are profiting of the actions of those that fight against the Norwegian understanding, as they have much to gain and nothing to lose. Norway cannot take the existing rights away from the signatory parties, instead it can only be forced to provide them with more rights in case that the Treaty would expand to the adjacent maritime areas. Several of Norway's important allies have raised their voice by handing in reservations or officially stating a different interpretation than Norway. In the following a closer look at Norway as well as Russia, Great Britain, Spain, the EU and Iceland will be taken, as those countries are important partners to Norway and have been most active in protesting against the Norwegian understanding of the Treaty.

¹⁹⁸ Béatrice I Bonafé., Paolo Palchetti, "Subsequent practice in treaty interpretation between Article 31 and Article 32 of the Vienna Convention", *Questions of International Law*, 31 January 2018 (available at <http://www.qil-gdi.org/subsequent-practice-in-treaty-interpretation-between-article-31-and-article-32-of-the-vienna-convention/>).

¹⁹⁹ "Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", Vienna Convention Art. 31(3)b.

²⁰⁰ Béatrice I Bonafé., Paolo Palchetti, "Subsequent practice in treaty interpretation between Article 31 and Article 32 of the Vienna Convention", *Questions of International Law*, 31 January 2018 (available at <http://www.qil-gdi.org/subsequent-practice-in-treaty-interpretation-between-article-31-and-article-32-of-the-vienna-convention/>). United Nations, General Assembly, *Fourth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties*, UN Doc. A/CN.4/694, 2016 (available at <http://legal.un.org/docs/?symbol=A/CN.4/694>), paras 118ff.

²⁰¹ Finland withdrew its initial support for the Norwegian position on the interpretation of the Svalbard Treaty during a meeting of the BEAC (Barents Euro Arctic Cooperation) on November 9 - 10 2005. Canada signaled support for the Norwegian claim for the shelf and maritime zones through an agreement in 1995 which never entered into force. Since then, no further support has been announced. Both Henriksen, Pedersen, *supra* note 109, 145.

6.5.1 Norway

The Norwegian sovereignty has not always been as absolute as the government would like it to be.²⁰² After the conclusion of the Svalbard Treaty there had been a kind of *laissez-faire* period when Norway lacked the ability to exercise jurisdiction. For instance, the first governor had no own transportation means and always needed a lift by private vessels and the Soviet settlements of Barentsburg and Pyramiden were virtually closed for the Norwegian authorities.²⁰³ It was not until the 70s that Norway was finally able to exercise national jurisdiction, a development probably solely made possible due to the *détente* between East and West, opening the Russian settlements for the Norwegian authorities.²⁰⁴ This led to the establishment of the airport in Longyearbyen in 1971, an own helicopter for the governor and the implementation of far reaching environmental legislation in 1973. The budget increased drastically by over 5300% from 0.7 million NOK (Norwegian krone) in 1960 to 37.2 million NOK in 1980. In 1975, the government published its first white paper²⁰⁵ on Svalbard, followed by a second one²⁰⁶ in 1986, stating the explicit political objective to exercise consistent sovereignty, maintain peace and stability, conserve the wilderness, maintain Norwegian settlements and make everyone comply with the treaty obligations.²⁰⁷ Today, the kingdom must still continually reassert their claim to sovereignty through for example economic activity and judicial decisions. Although this has been made easier by a large active governor presence with two helicopters and around 30 full time employees, exercising jurisdiction is still restricted caused by low taxes, the need to subsidize settlements and limited military presence.²⁰⁸ Furthermore, the degree of Norwegian involvement in internal affairs at the Russian settlements is still inadequate and Russia is reinforcing uncertainty about the legal status of the archipelago, by trying to constrain the Norwegian effort of exercising absolute sovereignty through its settlement in Barentsburg. Many other signatory parties are tolerating Russia's actions as they depend on Russian resistance to Norway's sovereignty to retain their own rights.

In general, Norway's Svalbard policy is strongly influenced by other states' interests in the region. Thus, even though Norway argues that it is the only state allowed to make decisions

²⁰² Ackrén, Grydehøj, Grydehøj, *supra* note 12, 100.

Overview over the different periods of Norwegian governance (Laissez fair Period (1925-50), Verbal Period (1950-65) and Period of Action (since 1965)) can be found in Willy Østreg, *Politics in High Latitudes*, 1977, 79ff.

²⁰³ Torbjørn Pedersen, "Norway's rule on Svalbard: tightening the grip on the Arctic islands", *Polar Record*, Vol.45(233) (2009), 147f.

²⁰⁴ Pedersen, *supra* note 203, 150.

²⁰⁵ Ministry of Justice and the Police, *Report No. 39 (1974- 1975) to the Storting in Stortingsforhandlinger*, 1974/75 Vol. 119 Nr. 3c (available at <https://www.nb.no/statsmaktene/nb/45615976d5e5bff65500f7f8bb7fcf87?index=2#927>).

²⁰⁶ Ministry of Justice and the Police, *Report No. 40 (1985-1986) to the Storting in Stortingsforhandlinger*, 1985/86 Vol. 130 Nr. 3c (available at <https://www.nb.no/statsmaktene/nb/d19b08c3277714c069c68e2e6a1640f5?index=5#931>).

²⁰⁷ Pedersen, *supra* note 203, 148.

²⁰⁸ Pedersen, *supra* note 203, 148f.

on Svalbard matters, it is not as independent as a sovereign state should be. For instance, due to past failed bilateral negotiations, Norway chose to establish a different maritime regime, the FPZ, around Svalbard than it uses on the mainland's coast, as "an exclusive economic zone would have caused infinite dispute and conflict".²⁰⁹ Still, the Norwegian government stresses that the FPZ should be regarded as "for the time being"²¹⁰ and defends its right to create an EEZ at any time. Based on the Royal Decree of 1977 that established the FPZ, the Ministry of Fisheries is competent to stipulate the fishing regime to apply to Svalbard waters.²¹¹ When Norway established the FPZ, it served as a tool to show the Norwegian claim for sovereignty, without exactly calling it an EEZ. During the past years, Norway acted proactively to institutionalize its claim by keeping a strong coast guard presence and exercise coastal state jurisdiction, probably hoping to gain acceptance through practice. Yet, Norway has not succeeded as the status of the waters around Svalbard is still disputed and even acknowledges these disagreements in its *High North Strategy* itself.²¹² There actually are different thresholds when operating in the FPZ compared to other maritime areas under Norwegian jurisdiction to avoid unnecessary confrontations with foreign powers. During the Supreme Court proceedings against a Spanish ship-owner and captain in 2006, public prosecutor Lars Fause confirmed this higher threshold for arrestments in the FPZ.²¹³ Furthermore, Norway is more cautious toward Russia than to other states, when it comes to arresting those violating the Norwegian fisheries regulations.²¹⁴ Summing up, even though Norway claims that it has the full sovereign rights over the waters around Svalbard, it is not acting like a full sovereign. Instead all its actions are designed to, at least to some degree, comply with demands of foreign powers and it is careful in enforcing its jurisdiction. All this underlines that Norway's sovereignty is limited and not 'full and absolute', also outside the territorial waters of the archipelago.

To defend the Norwegian claim for sovereignty, the main aim of the Norwegian Svalbard Policy is to uphold the presence of the Norwegian society on the archipelago, especially

²⁰⁹ Frydenlund in Pedersen *supra* note 24, 243.

²¹⁰ Torbjørn Pedersen, "The Constrained Politics of the Svalbard Offshore Area", *Marine Policy*, Vol.32(6) (2008), 916.

²¹¹ *Forskrift om fiskevernsonen ved Svalbard*, Utenriksdepartementet, 15 June 1977, last amended on 02 March 2001 (available on <https://lovdata.no/dokument/SF/forskrift/1977-06-03-6?q=fiskeri%20sone>). See also Sobrido, *supra* note 71, 79f.

²¹² Elizabeth Nyman, Rachel Tiller, "Having the cake and eating it too: To manage or own the Svalbard Fisheries Protection Zone", *Marine Policy*, Vol. 60 (2015), 143.

Ministry of Foreign Affairs, "The Norwegian Government's High North Strategy", 2006, (available at <https://www.regjeringen.no/globalassets/upload/UD/Vedlegg/strategien.pdf>), 17.

²¹³ Pedersen *supra* note 210, 916.

²¹⁴ "It was also on the advice from the Ministry of Foreign Affairs in 2004 that the Russian trawler Okeanator got a second warning, rather than being arrested, after violating Norwegian fisheries regulations in the territorial sea of Svalbard, while the Spanish trawlers Olazar and Olaberri were seized and brought to a Norwegian port for further prosecution the same year on advice from the Ministry of Foreign Affairs." In Pedersen *supra* note 210, 918.

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through the settlement of Longyearbyen.²¹⁵ Already when debating the Svalbard Treaty, the Norwegian mining presence had been highly relevant in granting Norway the sovereignty. Therefore, the Norwegian state had the objective to continue the mining business as long as coal prices justified it, even though coal production is decreasing since it reached its peak in 2007, visible in Figure 6.²¹⁶

Coal mining. Svalbard (SY 379)									
	Coal shipped, total, tonnes	Coal shipped - Russian mines, tonnes ¹	Norwegian mines						
			Production of coal		Coal shipped		Persons employed ²	Compensation of employees, NOK 1 000	
			Quantity, tonnes	Value, NOK 1 000	Total, tonnes	To Norway, tonnes			
1991	770 183	482 798	329 849	90 112	287 385	59 197	358	90 849	
1992	665 171	438 000	358 878	77 104	227 171	39 640	339	107 593	
1993	691 948	414 000	266 734	71 553	277 948	60 900	299	106 464	
1994	776 932	485 600	301 190	79 566	291 332	136 600	296	114 368	
1995	674 060	412 488	292 094	73 275	261 572	100 740	287	106 334	
1996	610 670	378 171	229 636	58 863	232 499	93 241	269	93 559	
1997	618 077	362 834	386 440	76 954	255 243	88 660	246	99 503	
1998	601 998	245 835	328 170	113 799	356 163	79 598	201	90 437	
1999	755 477	355 538	403 940	72 208	399 939	122 436	226	91 156	
2000	1 050 928	361 002	631 926	169 828	689 926	91 870	223	98 506	
2001	1 717 184	151 682	1 787 784	530 442	1 565 502	84 413	248	141 812	
2002	2 243 448	110 000	2 131 691	683 263	2 133 448	98 905	225	130 839	
2003	3 186 765	377 533	2 943 548	935 772	2 809 232	116 399	233	158 668	
2004	2 991 166	132 077	2 904 301	1 303 502	2 859 089	125 612	265	230 530	
2005	1 863 337	95 077	1 470 818	871 156	1 768 260	101 211	314	221 557	
2006	2 419 745	88 140	2 394 940	1 096 672	2 331 605	62 451	315	256 309	
2007	3 690 075	106 923	4 073 345	1 871 527	3 583 152	178 106	396	338 777	
2008	3 468 901	39 756	3 430 243	3 353 487	3 429 145	53 084	387	495 293	
2009	2 436 821	-	2 640 521	2 012 809	2 436 821	48 701	368	440 002	
2010	1 684 513	-	1 934 000	1 477 070	1 684 513	66 423	337	369 038	
2011	1 774 775	110 000	1 386 000	1 415 736	1 664 775	39 998	370	277 391	
2012	1 392 132	66 478	1 229 000	926 000	1 325 654	17 733	396	391 931	
2013	2 246 334	111 913	1 855 000	1 319 000	2 134 421	41 638	336	376 818	
2014	1 787 038	112 038	1 675 000	1 021 000	1 660 063	23 501	356	333 300	
2015	1 299 088	67 921	1 098 000	885 025	1 231 167	77 200	207	262 588	
2016	1 077 909	117 528	818 000	584 000	960 381	0	106	171 346	

¹ It has not been any coal shipping from Russian mines in Barentsburg in 2009 and 2010 due to fire spring 2008.
² Including construction workers.

Source: Directorate of Mining with Commissioner of Mines at Svalbard, Store Norske Spitsbergen Kulkompani and Manufacturing statistics, Statistics Norway.

Figure 6 Coal Mining on Svalbard from 1991 to 2016 covering exports, production rates, employment.

Source: "Industry statistics for Svalbard", Statistics Norway, 30 June 2017 (available at <https://www.ssb.no/en/virksomheter-foretak-og-regnskap/statistikker/sts/aar>).

²¹⁵ Government of Norway, "Meld. St. 32 (2015-2016)", *Regjeringen.no* (available at <https://www.regjeringen.no/no/dokumenter/meld.-st.-32-20152016/id2499962/sec1>).

See also Ministry of Foreign Affairs, "Norway's Arctic Policy for 2014 and beyond – a Summary", *Government.no*, 10 November 2014 (available at https://www.regjeringen.no/en/dokumenter/report_summary/id2076191/) on the intention to expand Norway's presence in the Arctic through knowledge, economic development and international cooperation.

²¹⁶ Government of Norway, "Meld. St. 32 (2015-2016)", *Regjeringen.no* (available at <https://www.regjeringen.no/no/dokumenter/meld.-st.-32-20152016/id2499962/sec1>).

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In 1975, the Norwegian government purchased all shares of the mining company Store Norske to secure Norwegian ownership and control over Longyearbyen.²¹⁷ However, the end seems to be reached now; in October 2017 the cabinet announced that it has no continuous interest in further subsidizing coal mining. The fiscal budget for 2017/2018 proposes the closure of the mines Svea and Lunchefjell, with only Mine 7, located 15 km outside of Longyearbyen, being kept in operation to provide supply to the local power plant.²¹⁸ The mines have had significant economic problems during the past, relying on external investments.²¹⁹ From a geopolitical perspective, this decision seems paradox, as Norway is under increasing pressure from the international community for its Svalbard policy. Additionally, there is the risk of other, non-Norwegian, businesses taking over the activities, as “mining companies from other signatory countries can raise demands for the licenses and start up mining in the former of [Store Norske Spitsbergen Kulkompani] SNSK”²²⁰, the Norwegian state-owned mining company. A possibility to prevent such a development would be to prohibit all coal mining on Svalbard, by using the Svalbard Environmental Protection Act²²¹, as that would also circumvent any discrimination based on nationality. However, that would probably lead to conflict with Russia which has been protesting against Norway’s environmental regulations before.²²²

With the decreasing reliability of the coal production, the kingdom’s activities in the settlement and the effort in creating more public jobs by moving them to Svalbard have

²¹⁷ Torbjørn Pedersen, “The Politics of Presence: The Longyearbyen Dilemma”, *Arctic Review on Law and Politics*, Vol. 8 (2017), 96f.

²¹⁸ Ministry of Justice and the Police, *Proposisjon til Stortinget (forslag til stortingsvedtak) (2017-2018)*, *Svalbardbudsjettet* (available at https://www.statsbudsjettet.no/upload/Statsbudsjett_2018/dokumenter/pdf/sva.pdf), 24.

“Store Norske Spitsbergen Grubekompani AS (SNGS)”, *Store Norske Spitsbergen Kulkompani AS* (available at <http://www.snsk.no/gruvedrift/>).

“Gruve 7”, *Store Norske* (available at <http://snsk.custompublish.com/gruve-7.145618.no.html>).

²¹⁹ Government of Norway, “Meld. St. 32 (2015-2016)”, *Regjeringen.no* (available at <https://www.regjeringen.no/no/dokumenter/meld.-st.-32-20152016/id2499962/sec1>).

“Rapport 3. Kvartal 2017”, *Store Norske Spitsbergen Kulkompani AS* (available at http://docs.wixstatic.com/uqdc9d0a5_9486070610f447ad84035cc169c2700f.pdf).

In the beginning of May, it was announced that the Board of Store Norske wants to reopen Svea Mine to extract up to 1 million tons of coal parallel to running the cleanup process. Apparently, exploiting the coal could be rather profitable, but it still not sure whether the government will agree to Store Norske’s plans. Cf. Arne Finne, “Store Norske wants to reopen the Svea Mine, Norwegian Government is hesistant”, *High North News*, 08 May 2018 (available at <http://www.highnorthnews.com/store-norske-wants-to-reopen-the-svea-mine-norwegian-government-is-hesitant/>).

²²⁰ Atle Staalesen, “End comes to 100 years of Norwegian coal mining at Svalbard”, *The Barents Observer*, 12 October 2017 (available at <https://thebarentsobserver.com/en/arctic/2017/10/end-comes-100-years-norwegian-coal-mining-svalbard>).

Mining Code Chapter III.

²²¹ *Lov om miljøvern på Svalbard (svalbardmiljøloven)*, Klima- og miljødepartementet, 15 June 2001, last amendet on 09 December 2016. (available at <https://lovdata.no/dokument/NL/lov/2001-06-15-79?q=Svalbardmilj%C3%B8loven>).

²²² Arne F. Finne, “Svalbardkjenner: - Svekker Norges posisjon”, *High North News*, 12 October 2017 (available at <http://www.highnorthnews.com/svalbardkjenner-svekker-norges-posisjon/>).

Kristian Åtland, Torbjørn Pedersen, *The Svalbard Archipelago in Russian Security Policy: Overcoming the Legacy of Fear – or Reproducing It?*, *European Security*, Vol.17(2), 238ff.

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intensified.²²³ Tourism, research and higher education have been identified as those economic branches that need to be supported in the future. The government does not want to invest in those kinds of businesses that require a huge investment in infrastructure, but instead tries to develop already existing possibilities.²²⁴ An example is the wish to progress the present research community at Ny-Ålesund into a platform for international cooperation with Norway as a strong partner. Furthermore, old mining facilities are getting reused, for instance by the World Arctic Archive that uses the old 'Mine 3' to offer storage for important national documents on film.²²⁵ While working hours in mining have decreased by over 40% in 2016 compared with the previous year, other business activities like real estate activities and arts, entertainment and recreation have increased drastically in man hours by 81% and 52.8% respectively, as shown in Figure 7. This shows that Norway is successful in establishing and promoting other business sectors than mining.

Svalbard. Industry statistics, by main industry (SIC2007)				
	Man-years		Turnover (NOK 1 000)	
	2016	Percentage change from last year	2016	Percentage change from last year
Svalbard total	1 589.2	-3.8	3 499 362	9.9
Mining and quarrying	152.8	-41.8	671 313	15.6
Manufacturing: Electricity, gas, steam and air conditioning supply; Water supply; sewerage, waste management and remediation activities	53.6	-3.2	154 415	14.9
Construction	172.3	-12.2	532 900	3.6
Wholesale and retail trade; repair of motor vehicles and motorcycles	154.4	17.6	420 142	-6.0
Transportation and storage	91.8	6.6	360 516	78.2
Accommodation and food service activities	232.8	-10.6	351 147	5.2
Information and communication	53.9	-2.4	419 742	-5.5
Real estate activities	11.4	81.0	114 117	21.6
Professional, scientific and technical activities	40.0	-2.2	32 061	-3.7
Administrative and support service activities	131.7	25.2	225 480	15.2
Public administration and defence	83.5	3.2	7 971	20.8
Education	192.3	-3.2	62 563	-8.3
Human health and social work activities	59.1	-10.9	12 931	3.1
Arts, entertainment and recreation	146.1	52.8	126 037	14.6
Other service activities	13.5	12.5	8 027	-1.3
Corrected 30 June 2017.				

Figure 7 Main Industries on Svalbard as by June 30, 2017.

Source: "Industry statistics for Svalbard", Statistics Norway, 30 June 2017 (available at <https://www.ssb.no/en/virksomheter-foretak-og-regnskap/statistikker/sts/aar>).

²²³ Government of Norway, "Meld. St. 32 (2015-2016)", *Regjeringen.no* (available at <https://www.regjeringen.no/no/dokumenter/meld.-st.-32-20152016/id2499962/sec1>).

²²⁴ Government of Norway, "Meld. St. 32 (2015-2016)", *Regjeringen.no* (available at <https://www.regjeringen.no/no/dokumenter/meld.-st.-32-20152016/id2499962/sec1>).

²²⁵ Christine Karijord "National Treasure from Italy, Mexico, Brazil to be stored in Svalbard Mine", *High North News*, 07 February 2018 (available at <http://www.highnorthnews.com/national-treasures-from-italy-mexico-brazil-to-be-stored-in-svalbard-mine/>).

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However, this increase has attracted many non-Norwegian nationals, leading to an overall increase of Svalbard's population.²²⁶ As the number of Norwegian nationals is decreasing, this trend could make Norwegians the minority by 2020. Over the past decade, the overall population has risen by around 7%, with shifting the relation between Norwegians and foreigners from 70:30 to 57:43, clearly indicated in Figure 8. This development could further undermine the Norwegian claim for absolute sovereignty over the archipelago, creating the impression that the islands are getting 'internationalized' and thereby slowly moving out of Norwegian jurisdiction.

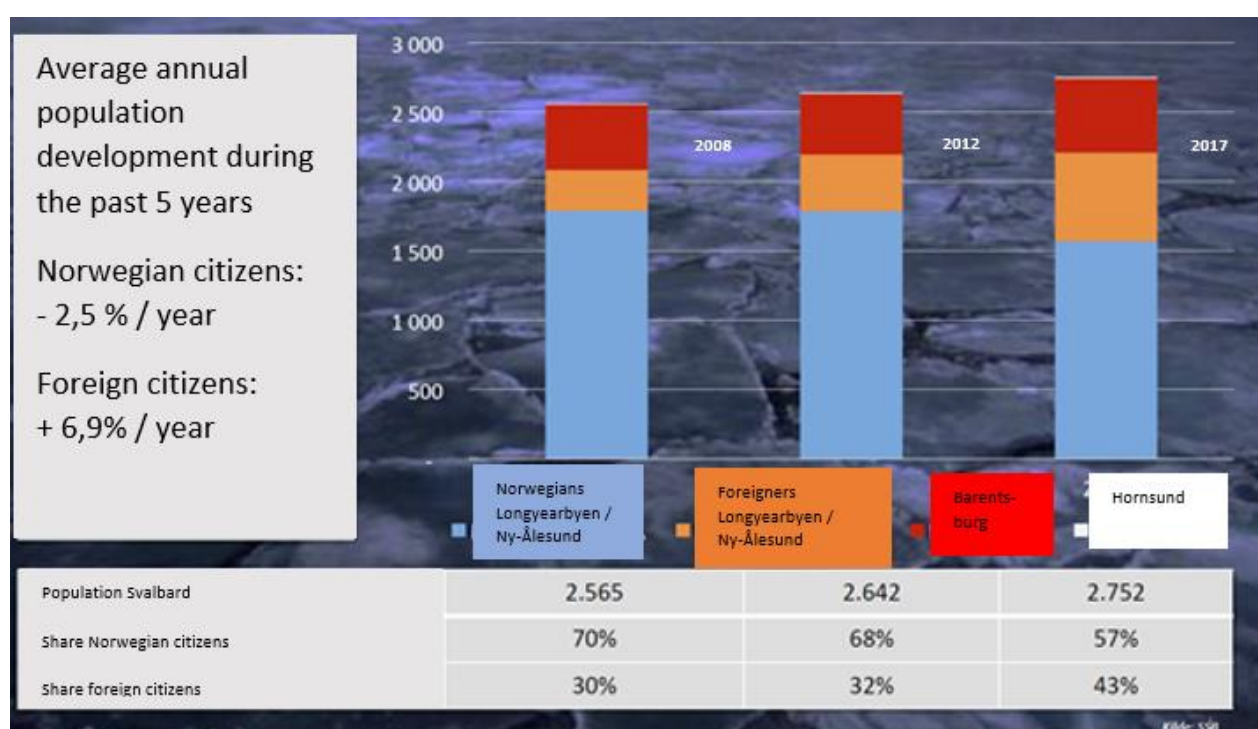


Figure 8 Average annual population development during the past five years in Svalbard

Source: Presentation given by Per Arne Totland at an event organized by the Oslo Militære Samfund on January 15, 2018 (available at <https://www.oslomiltsamfund.no/wp-content/uploads/2018/01/Svalbard-OMS-150118.pdf>) own translation.

The biggest threat to the Norwegian interpretation is the inconsistent state practice on Svalbard's geo-space. Norway first ratified UNCLOS on June 24, 1996, as the 98th state party²²⁷ and the convention entered into force for Norway a month later. This is often seen as

²²⁶ Pedersen, *supra* note 217, 96.

²²⁷ Division for Ocean Affairs and the Law of the Sea, "Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements", *Oceans & Law of the Sea United Nations*, 03 April 2018 (available at http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm).

an indicator “of a desire to avoid expansion of its sovereignty to new maritime areas in a manner that would also lead to the application of the ‘equitable regime’ (...) to these zones”.²²⁸ For example, only in 2003, Norway expanded Svalbard’s territorial sea from 4 NM to 12 NM to put it into conformity with UNCLOS.²²⁹ This was possible because the Svalbard Treaty only refers to territorial waters without a certain limit. Here, Norway has itself benefited from the evolutionary approach to treaty interpretation. By taking the development in international law into account that allows states to establish a territorial sea with the width of 12 NM, it could easily expand the maritime areas covered under Norwegian jurisdiction. Moreover, it was possible to bind the treaty parties by the concept of a maritime management system, the FPZ, that has not been existing in 1920, as all areas behind the territorial sea were considered as high seas with all nations having the possibility to fish. Norway is applying a certain double standard in its actions, denying the signatory states the use of those international law provisions that have developed since the beginning of the last century while using some of them itself to increase the area under Norwegian sovereignty.

6.5.1.1 Norway’s Submission to the CLCS

The same applies to a continental shelf around Svalbard; since the 1960s Norway has been arguing that the country has one continental shelf originating from the mainland, on which Svalbard simply ‘sits’.²³⁰ This was officially stated in the so called *Norwegian Continental Shelf Doctrine* of 1974. Consequently, Norway did not accept that the archipelago generates its own continental shelf, which is distinct from the mainland’s. The reason behind this argumentation is that Norway tries to protect its claim on the shelf around Svalbard by denying its existence. In a letter from the Norwegian Ministry of Foreign Affairs to the Ministry of Industry, it was referred to common sense and argued that an absurd situation would occur if Norway, the sovereign of the mainland, would have to negotiate with Norway, the sovereign of Svalbard.²³¹ However, recently there have been several cases of federal states

²²⁸ Thomassen, *supra* note 14, 14.

²²⁹ *Lov om Norges territorialfarvann og tilstøtende sone [territorialfarvannsloven]*, Utenriksdepartementet, 27-06-2003 (available at <https://lovdata.no/dokument/NL/lov/2003-06-27-57?q=Lov%20om%20Norges%20territorialfarvann%20og>).

²³⁰ Henriksen, Pedersen, *supra* note 109, 144.

Resolusjon om norsk statshøyhet over visse undersjøiske områder, Olje- og energidepartementet, 31 May 1963 (available at <https://lovdata.no/dokument/SF/forskrift/1963-05-31-1?q=31%20mai%201963>, English version available at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_1963_Decree.pdf). Ministry of Justice and the Police, *Report No. 39 (1974- 1975) to the Storting in Stortingsforhandlinger*, 1974/75 Vol. 119 Nr. 3c (available at <https://www.nb.no/statsmaktene/nb/45615976d5e5bff65500f7f8bb7fcf87?index=2#927>).

²³¹ Ministry of Foreign Affairs, *Letter to the Norwegian Ministry of Industry* (12834/I 64), 25 May 1964 cited in Anderson, *supra* note 64, 377.

where internal maritime borders had to be determined and rules of international law were applied by analogy.²³²

To prove that Svalbard can generate an own continental shelf, it is worth taking a closer look at Norway's submission to the CLCS for the establishment of the limits of its continental shelf in November 2006.²³³ The application covered three areas: the Loop Hole in the Barents Sea, the Western Nansen Basin in the Arctic Ocean and the Banana Hole in the Norwegian Sea, indicated in Figure 9 with grey grid. However, further applications covering other areas can be expected.²³⁴ Important for answering whether Svalbard can generate a continental shelf and thereby also maritime zones, are those areas that use Svalbard's baselines as a starting point.

²³² *Arbitration between Newfoundland and Labrador and Nova Scotia Concerning Portions of the limits of the offshore areas as defined in the Canada- Nova Scotia offshore petroleum resources accord implementation act and the Canada- Newfoundland Atlantic accord implementation act*, Award of the Tribunal in the Second Phase, 26 March 2002 (available at https://www.cnsopb.ns.ca/sites/default/files/pdfs/phaseii_award_english.pdf). Anderson, *supra* note 64, 377.

²³³ Norway has been required to hand in this submission based on its obligation under Art. 76 and Art. 4 of the Annex II of UNCLOS.

²³⁴ *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), 6. Hereinafter Continental Shelf Submission.

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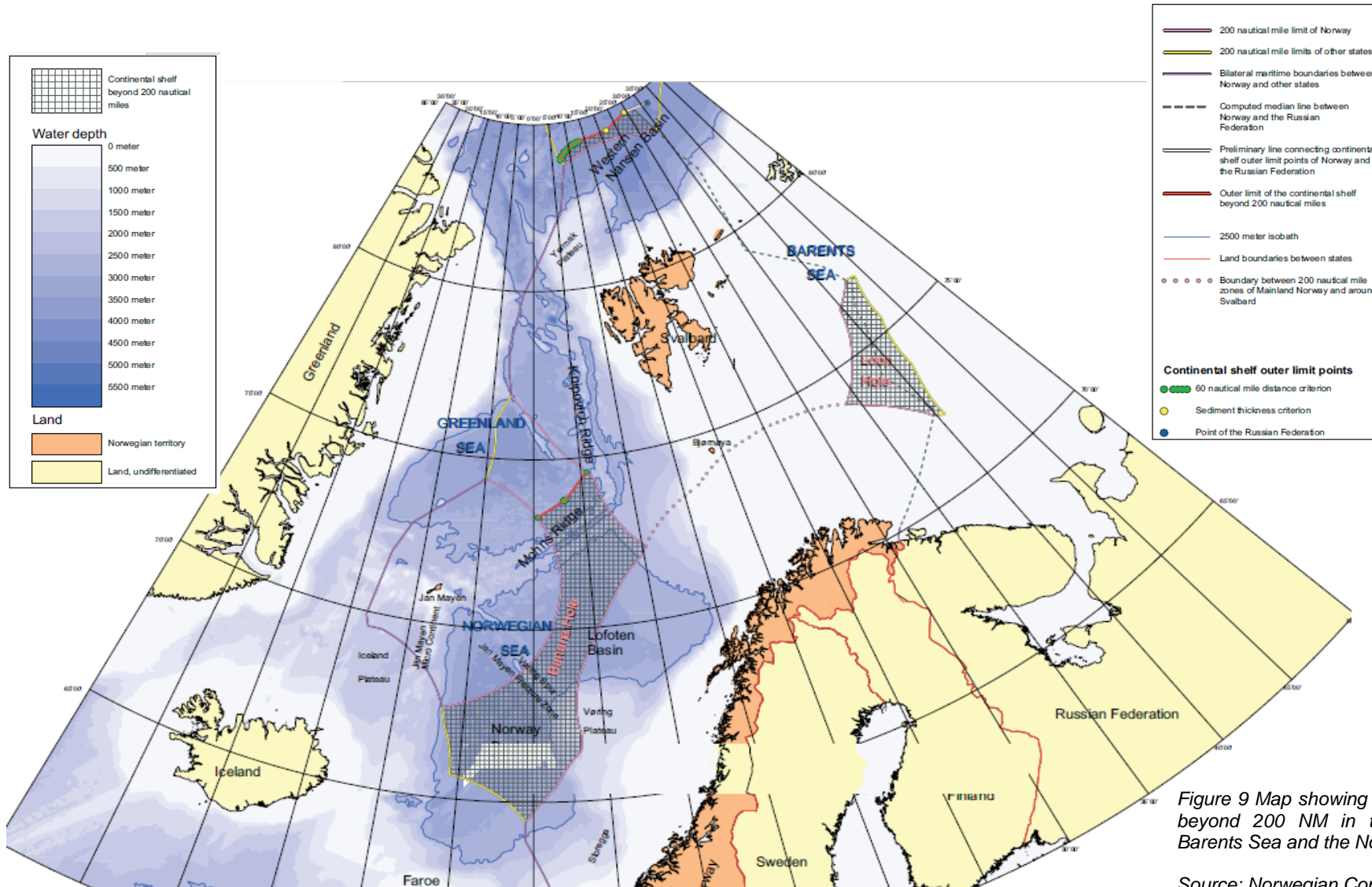


Figure 9 Map showing the outline for the shelf beyond 200 NM in the Arctic Ocean, the Barents Sea and the Norwegian Sea.

Source: Norwegian Continental Shelf Submission, Part of Figure 2

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The Norwegian submission for an extended continental shelf beyond 200 NM North and East of Svalbard, covering the Western Nansen Basin and the Loop Hole, takes its starting point from the archipelago. No reference has been made in the submission whether the claim to the extended continental shelf is based on Norwegian sovereignty over the archipelago or because it is seen as a prolongation of the shelf originating from mainland Norway. However, when taking a closer look at the submission, the former seems to be the case, because the Western Nansen Basin claim is based on Svalbard's baselines. In case that the outer limit of the Western Nansen Basin would derive from the Norwegian mainland, it would be over 800 NM away and therefore not possible to establish. The outer shelf may be either a maximum of 350 NM from the baselines or not further away than 100 NM from the 2,500 m isobath, the line connecting those areas with a depth of 2,500 m.²³⁵ The CLCS has arrived at the conclusion that the "Loop Hole (...) forms part of the submerged prolongation of the landmasses of Mainland Norway and *Svalbard*" (emphasis added).²³⁶ Also, the Commission agrees with the way Norway applied the distance constraint criteria in the Western Nansen Basin which takes its starting point from the baselines of Svalbard.²³⁷ Likewise, the Banana Hole has been delimited by using "points located on Norway's 200 [NM] limit lines associated with Svalbard".²³⁸ Although Norway argues that Svalbard does not have its own continental shelf, it still bases its argumentation for the outer limits of its continental shelf on basepoints deriving of Svalbard. Yet, the archipelago cannot provide basepoints for determining the limits of the outer shelf if it does not have a continental shelf.²³⁹ Consequently, when taking Norway's initial argument into account that Svalbard does not have its own continental shelf, the outer continental shelf would need to be delimited from the Norwegian mainland.²⁴⁰ Here, Norway tries to maximize its claims based on the same continental shelf features of Svalbard that the kingdom itself steadily denies accepting for the good of the signatory states. It seems paradox how the country can argue that it can enlarge the territorial sea and establish an FPZ based on UNCLOS but deny Svalbard its own continental shelf at the same time, which it should possess based on the very same treaty. The whole idea of UNCLOS is based on the assumption that every state that has a coast and adjacent waters, has some sort of continental shelf, stated in Art. 77(3), above which certain maritime zones can be

²³⁵ UNCLOS Art. 76(5).

²³⁶ *Summary of the recommendations of the commission on the limits of the continental shelf in regard to the submission made by Norway in respect of areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea on 27 November 2006*, 27 March 2009 (available at http://www.un.org/depts/los/clcs_new/submissions_files/nor06/nor_rec_summ.pdf), 7. Hereinafter CLCS Recommendation

²³⁷ CLCS Recommendation, 15.

²³⁸ CLCS Recommendation, 29.

²³⁹ Numminen, *supra* note 11, 12.

²⁴⁰ *Ibid.*

Rossi, *supra* note 6, 107.

Rossi, *supra* note 45, 1522.

established. The reason behind Norway's actions are probably the wish to protect the resources from any exploitation by the treaty parties. When the country steadily denies that Svalbard has a shelf, no treaty parties can assume that it has rights in that area without further clarification. However, the Norwegian position seems to have changed during the last decade. With the acceptance of the CLCS recommendation²⁴¹ and the establishment of maritime zones accordingly, visible in Figure 10, Norway implicitly accepts that Svalbard generates its own continental shelf. In addition, none of the more recent national papers on Svalbard have put forward the argument that the archipelago does not generate a continental shelf.²⁴² In a publication by the Norwegian Foreign Ministry, it is actually argued that Svalbard's coast generates a continental shelf, like all other land territories. Nevertheless, that shelf is defined as being the prolongation of the mainland's shelf, as it is the case for the British Shetland Islands or Russian Franz Josef Land.²⁴³ Consequently, Norway still tries to protect its claim on the resources on the shelf around Svalbard. While it has been demonstrated that Svalbard generates a continental shelf, the dispute must focus on which legal regime governs Svalbard's shelf. The fact that the continental shelf around Svalbard is geologically the same as the Norwegian mainland's does not prohibit a different legal regime.

²⁴¹ Ministry of Foreign Affairs, "Extend of Norway's continental shelf in the High North clarified", Press release No: 025/09, *Government.no*, 15 April 2009 (available at https://www.regjeringen.no/en/aktuelt/shelf_clarified/id554718/).

²⁴² Churchill, Ulfstein, *supra* note 9, 568.

²⁴³ Rolf Einar Fife, "Forkerettslige spørsmål i tilknytning til Svalbard", *Regjeringen.no*, 12 December 2014 (available at <http://www.regjeringen.no/no/dep/ud/id833/>), 18f. This publication reflects the Norwegian viewpoints, but does not function as a argumentation for official Norwegian statements.

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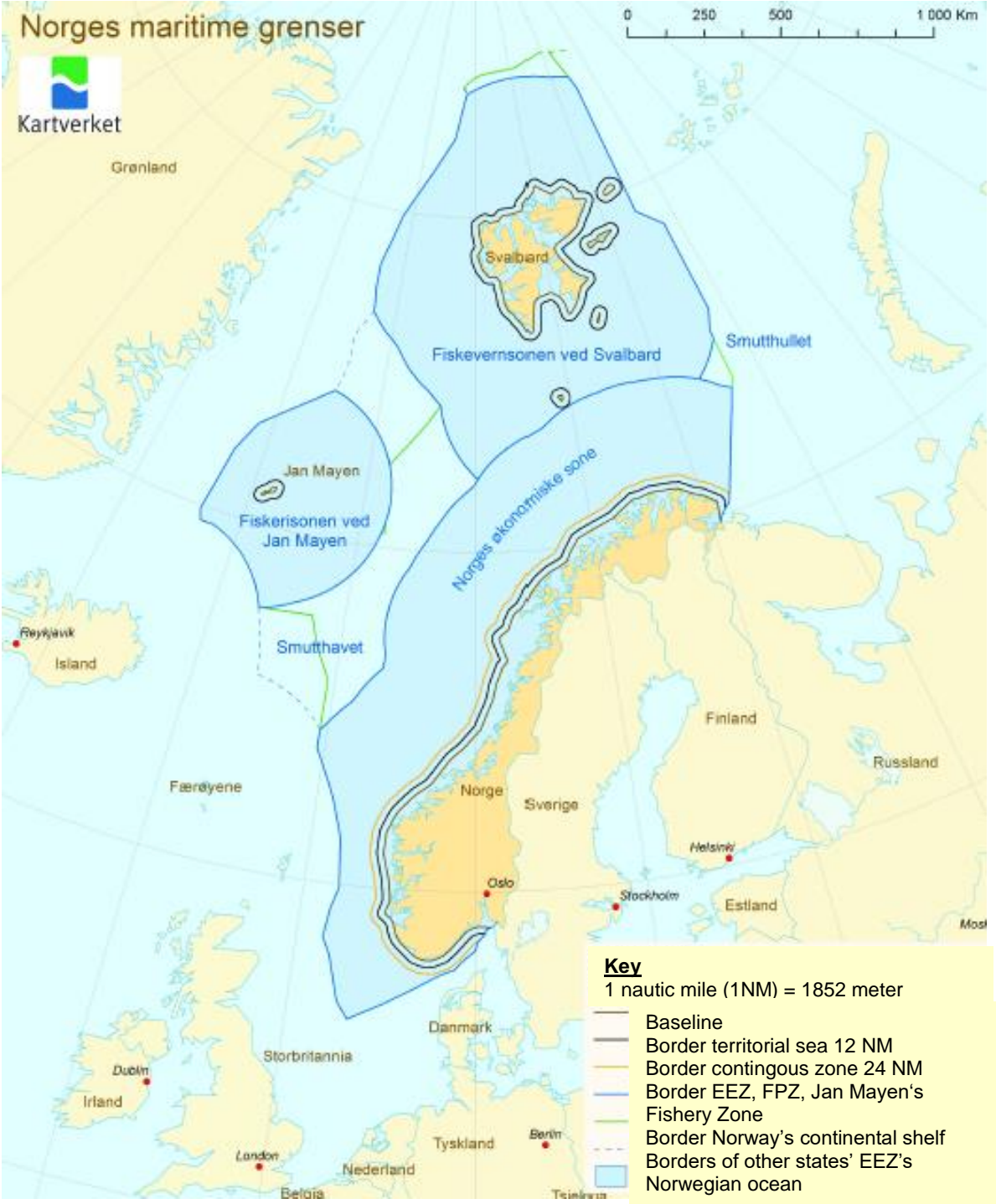


Figure 10 Map Showing Norway's current Maritime Borders

Source: Norges maritime grenser, Kartverket (available at https://www.kartverket.no/globalassets/kart/grenser/norges_maritime_grenser_havomrader_2015.pdf), own translation of the key.

In addition to the Norwegian submission and the CLCS recommendation, it is also of importance to consider the reactions of other states to it. Those reactions can show whether a state acknowledges the Norwegian sovereignty to the extent that Norway has the right to unilaterally delimit the outer shelf in the area adjacent of Svalbard. Acceptance of this supports the Norwegian claim for sovereignty, because it underlines that Norway is not restricted in its decision making other than by the provisions of the Svalbard Treaty. Solely Denmark, Iceland, Russia and Spain have reacted to the Norwegian submission, but none of them questioned Norway's right to establish a continental shelf around Svalbard nor the length of it beyond 81° latitude North. This indicates that it seems to be accepted that Svalbard can create a continental shelf of which Norway, as the sovereign, can establish the outer limits. Denmark²⁴⁴ and Iceland²⁴⁵ made not even a specific reference to Svalbard. Spain underlined its interest in fisheries, highlighting that Norway's sovereignty is combined with the equitable regime and specifically reserved its rights to the resources on the shelf, while raising questions on the delimitation of the shelf between Svalbard and mainland Norway.²⁴⁶ Russia stated in a note to the Secretary General of the United Nations that "nothing in this note shall prejudice the position of the Russian Federation towards the Spitsbergen archipelago and its continental shelf. The recommendations of the Commission in regard to the submission made by Norway shall be without prejudice to the provisions of the Treaty concerning Spitsbergen of 1920 and, accordingly, to the regime of the maritime areas adjacent to Spitsbergen".²⁴⁷ This can be understood as a recognition of the right to establish a continental shelf and acceptance of the generation of maritime zones, but it is certainly ambiguous on the legal basis of the zones. This is probably based on the Russian position that the right to establish these zones must be based on the consent of the treaty parties to the Svalbard Treaty. The silence by the other states parties is seen as consent, as "under general international law, inaction or silence of other states may be interpreted as acquiescence in or tacit recognition of the legal positions of a state".²⁴⁸ This is probably due

²⁴⁴ Permanent Mission of Denmark to the United Nations, *Reaction of States to the submission made by Norway to the Commission on the Limits of the Continental Shelf*, Diplomatic Note of January 24, 2007 (available at http://www.un.org/depts/los/clcs_new/submissions_files/nor06/dnk07_00218.pdf).

²⁴⁵ Permanent Mission of Iceland to the United Nations, *Reaction of States to the submission made by Norway to the Commission on the Limits of the Continental Shelf*, Diplomatic Note of January 29, 2007 (available at http://www.un.org/depts/los/clcs_new/submissions_files/nor06/isl07_00223.pdf).

²⁴⁶ "(...) principles of liberty of access and non-discrimination are applicable to any maritime zone that might be defined from Svalbard, including, as appropriate, the continental shelf, both within and beyond a distance of 200 nautical miles (...)"

"(...) Spain considers that the Paris treaty fully applies to those regions and reserves its right to the resources of the continental shelf that may be defined around Svalbard, including the extension thereof."

Permanent Mission of Spain to the United Nations, *Reaction of States to the submission made by Norway to the Commission on the Limits of the Continental Shelf*, Diplomatic Note of March 3, 2007 (available at http://www.un.org/depts/los/clcs_new/submissions_files/nor06/esp_0700348.pdf).

²⁴⁷ Permanent Mission of the Russian Federation to the United Nations, *Reaction of States to the submission made by Norway to the Commission on the Limits of the Continental Shelf*, Diplomatic Note of February 21, 2007 (available at http://www.un.org/depts/los/clcs_new/submissions_files/nor06/rus_07_00325.pdf).

²⁴⁸ Wolf, *supra* note 17, 20.

to the main interest being on the geographical applicability of the Svalbard Treaty. It is in the interest of the treaty parties to establish a shelf – and maritime zones – adjacent of and connected to Svalbard, as this enlarges the area in which treaty rights can be claimed.

6.5.2 Other Countries' Practice

Norway has repeatedly tried to gain support or understanding for its interpretation of the Svalbard Treaty by foreign governments, but its efforts have usually been counterproductive.²⁴⁹ While fishing nations have responded to a tougher Norwegian management of the living maritime resources, others have reacted to Norwegian efforts to gain international support for its position on the continental shelf. States have tended to change their positions or to clarify them further, after Norway had put out new legislative or enforcement acts.²⁵⁰ Norway raised the awareness of the USA already in the 70s. Although, the American reservation was meant to be preliminary, while the government waited for a comprehensive analysis, it developed into a policy of non-involvement. Actually, the reservation has remained through the years, besides a number of assessments and several US presidencies.²⁵¹ In 1978, the USA, Great Britain, France and West Germany declared in the so called *Consensus Declaration* “that the Spitsbergen treaty’s scope was to extend beyond the territorial waters”²⁵² and “warned that Norway was not to negotiate away their interests on an offshore Svalbard to the Soviet Union”.²⁵³ Other states like the Netherlands²⁵⁴, Italy²⁵⁵ and Denmark²⁵⁶ have adjusted their position towards Great Britain’s, which openly argues that the Svalbard Treaty must apply to all maritime zones and the shelf adjacent to Svalbard.²⁵⁷ In 2007, a report by the Norwegian government identified Russia, Great Britain, Spain and Iceland as those states mostly disagreeing with Norway’s view.²⁵⁸ All are important fishing nations with a strong interest in fisheries around Svalbard. In addition to those states, the EU is an important player in the field as well, because fisheries

²⁴⁹ Pedersen, *supra* note 210, 913.

²⁵⁰ Pedersen, *supra* note 24, 254f.

²⁵¹ Torbjørn Pedersen, “International Law and Politics in U.S. Policymaking: The United States and the Svalbard Dispute”, *Ocean Development & International Law*, Vol.(42(1-2) (2011), 131.

²⁵² Raaen, *supra* note 140, 26.

²⁵³ Pedersen, *supra* note 24, 241.

²⁵⁴ *Diplomatic Note of the Netherlands to Norway*, No. 2238 (3 August 1977) cited in Pedersen *supra* note 251, 123.

²⁵⁵ *Diplomatic Note of Italy on the Legal Interpretation of Svalbard Treaty to Norway* (2 July 1975) cited in Pedersen *supra* note 251, 123

²⁵⁶ Torbjørn Pedersen, “Denmark’s Policies Toward the Svalbard Area,” *Ocean Development and International Law*, Vol. 40 (2009), 319–332.

²⁵⁷ Torbjørn Pedersen, “Endringer i internasjonal Svalbard-politikk”, *Internasjonal Politikk*, Vol. 67(1) (2009), 37. Pedersen, *supra* note 251, 123.

²⁵⁸ Raaen, *supra* note 140, 29.

are under shared competences in the EU framework, giving both member states and EU institutions a say.²⁵⁹

6.5.2.1 Denmark and Greenland

Prior to the Norwegian submission to the CLCS, Norway had already used basepoints originating from Svalbard for a maritime delimitation agreement. In February 2006, Norway concluded a bilateral agreement with Denmark that was acting on behalf of Greenland to delimit its extended continental shelf in the West towards Greenland.²⁶⁰ To construct the equidistance line, the headlands and outermost islands were used, the usual way of doing so, but the basepoints used to determine the equidistant line are not located between mainland Norway and Greenland.²⁶¹ Instead the nearest basepoints of Greenland and Svalbard were used, although the archipelago cannot provide basepoints to determine an equidistant line if it does not have its own continental shelf.²⁶² Thus Norway's actions back in 2006 can be seen as implicit acceptance of Svalbard's ability to generate a continental shelf, when it established the maritime border indicated in purple in the map below. In addition, no state contested Norway's right to conclude such an agreement even though areas around Svalbard were included, this is a sign for that the states accept the Norwegian sovereignty in that case.

²⁵⁹ Inter alia TFEU Art. 38 – 43.

Priit Ojamaa, "Fisheries control and enforcement", European Parliament", January 2018 (available at http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuld=FTU_3.3.3.html).

²⁶⁰ *Agreement between the Government of the Kingdom of Norway on the one hand, and the Government of the Kingdom of Denmark together with the Home Rule Government of Greenland on the other hand, concerning the delimitation of the continental shelf and the fisheries zones in the area between Greenland and Svalbard*, Copenhagen, 20-02-2006, *United Nations Treaty Series*, Vol. 2378, No. 42887, 21 (available at <https://treaties.un.org/doc/Publication/UNTS/Volume%202378/v2378.pdf>). Hereinafter Norwegian – Danish Maritime Delimitation Treaty.

²⁶¹ Rossi, *supra* note 6, 107.

²⁶² Numminen, *supra* note 11, 12.

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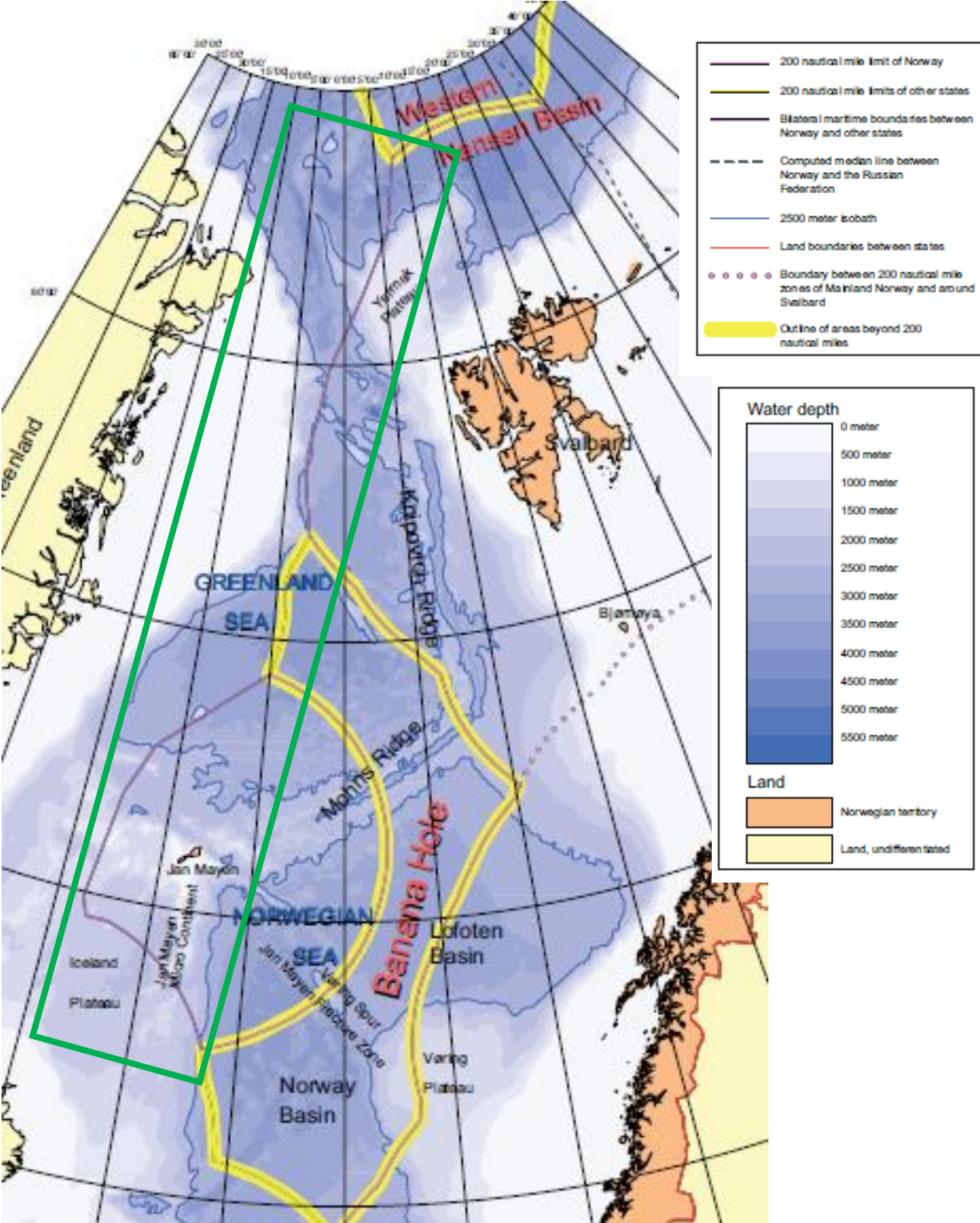


Figure 11 Map showing the Norwegian – Greenlandic Delimitation Line based on the Norwegian – Danish Maritime Delimitation Treaty.

Source: Norwegian Continental Shelf Submission, Part of Figure 1.

6.5.2.2 *Russia*

The Russian (and prior the Soviet) official position has changed several times, from trying to put Svalbard under a Norwegian – Russian *condominium* in 1944, over declaring the waters beyond the territorial sea as international and the interpretation that the Svalbard Treaty must apply to the Svalbard Box, towards that Norway is not allowed to claim any maritime zones beyond the territorial sea.²⁶³ Russia argues that Norwegian sovereignty is based on international agreement and thereby limited to the provisions mentioned in the exact same agreement. As the Svalbard Treaty establishes a special territorial regime, Norway is not allowed to unilaterally claim any maritime zones or a shelf adjacent of Svalbard but must do so in cooperation and under consent with the state parties.²⁶⁴

With the Russian nonacceptance of Norway's unilateral establishment of maritime zones, Russia has never officially recognized the Norwegian claim to manage the fishing stocks in the FPZ. This view is supported by the scholars Vylegzhanin and Zilanov who argue that “there is no legal problem of classifying the status of waters beyond the limits of the territorial waters of Spitsbergen. (...) It is high seas”.²⁶⁵ They argue that the Svalbard Treaty has not provided Norway with the right to establish a FPZ, as the treaty is regarded as *lex specialis* to UNCLOS, depriving Norway from the right to claim maritime zones. Therefore, all areas beyond the territorial sea must be considered as high sea governed by Art. 86 UNCLOS, with all states enjoying the freedom of fishing (Art. 87(1)e UNCLOS).²⁶⁶ The scholars argue that the concept of ‘territorial waters of territories’ would be different from the ordinary concept of territorial sea under international law, allowing the treaty parties to establish a special institution on maritime zones of Svalbard.²⁶⁷ However, the concept of territorial waters is not special only to the Svalbard Treaty, but a concept used widely in international law, also in 1920. At the beginning of the 20th century, then called territorial waters could either encompass internal waters or both internal waters and the territorial sea, as referred to at the 1930 *Hague Codification Conference*.²⁶⁸ When Norway established the FPZ, the Soviet Union declared the establishment of the FPZ an “illegal expansion of Norwegian rights (...) in defiance of the articles in the Treaty”.²⁶⁹ As an alternative to the unilateral Norwegian

²⁶³ Pedersen, *supra* note 24, 237.

Pedersen, *supra* note 257, 34.

Åtland, Pedersen, *supra* note 222, 227-251

²⁶⁴ “Appropriation of exclusive rights to this continental shelf cannot be done by unilateral actions, as this would be an attempt to change the treaty regime that governs the Spitsbergen islands”, Aide Mémoire from the USSR Ministry of Foreign Affairs to the Royal Ministry of Foreign Affairs of Norway (27 August 1970), cited in Kristina Schönfeldt, *The Arctic in International Law and Policy*, 2017, 1426f.

²⁶⁵ A.N. Vylegzhanin, V.K. Zilanov, *Spitsbergen: Legal Regime of Adjacent Marine Areas*, 2006, 42.

²⁶⁶ *ibid.*

²⁶⁷ Henriksen, Pedersen, *supra* note 109, 144.

²⁶⁸ Hunter Miller, “The Hague Codification Conference”, *The American Journal of International Law*, Vol. 24(4) (1930), 674-693.

²⁶⁹ Note Verbale from the USSR Ministry of Foreign Affairs to the Royal Ministry of Foreign Affairs of Norway (15 June 1977) cited in Schönfeldt, *supra* note 264, 1431.

legislative process, fishery regulations should be determined through bilateral negotiations. However, Russia did not further challenge the FPZ until the late 90s, following the first arrest of a Russian trawler in the zone.²⁷⁰ The country warned that the “though [enforcement] actions by Norway attract attention” and referred to the enforcement practice as a “breach on good interstate relations”.²⁷¹ When the Norwegian coast guard arrested a Russian trawler, the *Chernigov*, for illegal fishing in 2001, Russia protested and demanded its release. The country accused Norway of having broken a 20 years old gentlemen-agreement of merciful law enforcement towards Russian vessels.²⁷² “[A] chairman on the Russian State Fisheries Committee [even] suggested that the Russian Northern Fleet should ‘shoot at and sink’ Norwegian Coast Guard vessels if something similar happened again, and ‘do nothing to save their crews’”.²⁷³ Furthermore, Russia deployed an antisubmarine warfare destroyer, the *Severomorsk*, in 2002 as a high-power demonstration, closely linked to the incident. This act caused concern in Oslo, but Moscow explained later that the ship was doing routine maneuvers with the intent to only inspect its own vessels.²⁷⁴ In 2005, another fishing trawler, the *Elektron*, was inspected by the Norwegian coast guard, but instead of complying, the trawler fled with two Norwegian fishing inspectors still on board. Four coast guard ships, two helicopters and a P-3 Orion military plane²⁷⁵ chased it for four days until it managed to reach the Russian territorial sea. The Norwegians could not fire at the trawler, as the inspectors were held as hostages. Norway and Russia made a deal that the captain would be prosecuted in the Russian court system.²⁷⁶ In general, Russian vessels officially refuse to report to Norwegian authorities when entering the zone; despite having the obligation to do so, because based on the Norwegian Royal Decree of 1977 on the FPZ, foreign ships entering the zone for fishing purposes must be granted authorization and must be

²⁷⁰ Iceland’s foreign minister actually argued in the same way during his annual speech to parliament in 1994 stating: “With declaring unilaterally the establishment of a fishery protection zone surrounding Svalbard Norway has hijacked the power to pass fishery protection rules and distribute quota as she pleases, without consulting other State Parties.” Cited in Bjarni Már Manússon “The Loophole Dispute from an Icelandic Perspective”, *Centre for Small State Studies Publication Series*, University of Iceland, Working Paper 1-2010 (2010), 22.

Henriksen, Pedersen, *supra* note 109, 146.

Pedersen, *supra* note 24, 247.

Nyman, Tiller, *supra* note 212, 145.

²⁷¹ Note Verbale of the Embassy of the Russian Federation in Norway to the Ministry of Foreign Affairs of Norway (17 July 1998) cited in Schönfeldt, *supra* note 264, 1436.

²⁷² Raaen, *supra* note 140, 27.

“Russisk tråler tatt i arrest ved Svalbard”, *VG Nyheter*, 22 April 2001 (available at <https://www.vg.no/nyheter/innenriks/russisk-traaler-tatt-i-arrest-ved-svalbard/a/9540338/>).

²⁷³ Andrew Yerkes, “Whose Fish? Looking at Svalbard’s Fisheries Protection Zone”, *Polar Connection*, 04 December 2016 (available at <http://polarconnection.org/svalbard-fisheries-protection-zone/>).

²⁷⁴ Pedersen, *supra* note 1, 347.

Andrew Yerkes, “Whose Fish? Looking at Svalbard’s Fisheries Protection Zone”, *Polar Connection*, 04 December 2016 (available at <http://polarconnection.org/svalbard-fisheries-protection-zone/>).

²⁷⁵ „P-3 Orion”, *Lockheed Martin* (available at <https://www.lockheedmartin.com/en-us/products/p-3.html>).

²⁷⁶ Raaen, *supra* note 140, 27.

“Fleeing trawler in Russian waters”, *BBC News*, 19 October 2005 (available at <http://news.bbc.co.uk/2/hi/europe/4351136.stm>).

registered.²⁷⁷ “Since September 1994, all fishing vessels are obliged to report on their catches and the Norwegian coast guard is allowed to control and inspect all vessels and their cargo.”²⁷⁸ Instead the Russian authorities send collected reports directly to Norway²⁷⁹ and frequently deploys its own patrol vessels to inspect vessels flying the Russian flag in the FPZ.²⁸⁰ This is a middle way that allows Russia to not formally acknowledge the Norwegian authority but at the same times permits peaceful cooperation and increases Norway’s *de facto* management. In addition to its nonacceptance of the FPZ, the Soviet Union declared already in 1970 that Norway did not have any authority regarding the continental shelf of the archipelago and there would be no need to establish a legal regime with different rights for different states, as “[t]he legal regime established by the Paris Treaty concerning Spitsbergen fully and entirely includes the shelf in the archipelago area. (...) The contracting parties have equal rights to carry out mining and other activities in the Spitsbergen area. This would also apply to the prospecting for and exploitation of natural resources on the continental shelf. Without the consent from all the contracting parties, Norway cannot establish and introduce exclusive interests or rights in regard to the shelf in the Spitsbergen area”.²⁸¹ This was supported by then *Warsaw Pact* members Czechoslovakia²⁸², Hungary²⁸³ and Poland²⁸⁴.²⁸⁵ Because of that, Russia protested against the opening of three exploration blocks offshore of Svalbard under the 23rd licensing round in January 2015.²⁸⁶ Those exploration blocks are located in the Svalbard Box, an area that Russia regards as being covered by the Svalbard Treaty. Russia has sent an invitation for negotiations on economic activity around the archipelago, within what the country calls the ‘Svalbard Square’. There have been send two invitations, but Norway refuses to enter into talks about the subject, as

²⁷⁷ *Forskrift om fiskevernsoner ved Svalbard*, Utenriksdepartementet, 15 June 1977, last amended on 02 March 2001 (available on <https://lovdata.no/dokument/SF/forskrift/1977-06-03-6?q=fiskeri%20sone>), para. 3.

²⁷⁸ Wolf, *supra* note 17, 23.

Forskrift om maskevidde, bifangst og minstemål m.m. ved fiske i fiskevernsonen ved Svalbard, Nærings- og fiskeridepartementet, 21 September 1994 (available at <https://lovdata.no/dokument/SF/forskrift/1994-09-21-881?q=1994>).

²⁷⁹ Nyman, Tiller, *supra* note 212, 146.

²⁸⁰ Pedersen, *supra* note 1, 347.

²⁸¹ Aide Mémoire from the USSR Ministry of Foreign Affairs to the Royal Ministry of Foreign Affairs of Norway (27 August 1970), cited in Schönfeldt, *supra* note 264, 1426f.

²⁸² FPZ as an “unauthorized extension of the rights of Norway” and reserve rights to “take necessary measures to secure its rights” in: *Diplomatic Note of Czechoslovakia to Norway* No. 99.249/77 (28 July 1977) cited in Pedersen *supra* note 24, 241.

²⁸³ Norwegian legislation “not in conformity” with the Svalbard Treaty in: *Diplomatic Note of Hungary to Norway* J-198/1/1977 (03 August 1977) cited in Pedersen *supra* note 24, 241.

²⁸⁴ “no single state-party to the Svalbard Treaty could unilaterally make changes to the legal regime (...) calling for a broad consultation among state-parties” in *Diplomatic Note of Poland to Norway* (06 July 1977) cited in Pedersen *supra* note 24, 241.

²⁸⁵ Henriksen, Pedersen, *supra* note 109, 144.

²⁸⁶ Rossi, *supra* note 6, 101.

“it is the Norwegian government alone which manages resources on the Norwegian continental shelf” and therefore there exists no need to consult other countries.²⁸⁷

Despite Russia’s argumentation in favor of a multilateral management of the areas around Svalbard, Norway and Russia concluded a bilateral maritime delimitation agreement in 2010. The Norwegian-Russian delimitation agreement²⁸⁸ divides the disputed area into two parts (see Figure 12), each covering about 87,000 square kilometers and actually uses baselines of Svalbard for the delimitation line.²⁸⁹ This has three consequences: first, it undermines the Norwegian position that Svalbard does not have a continental shelf and second, it is a sign that Russia has changed its position on whether Svalbard can generate maritime zones or not. As soon as a state has a coast line, it has the right to maritime zones and a continental shelf. With Russia accepting that Norway has a continental shelf, it automatically, even though implicitly, accepts that it can establish maritime zones. Third, there has been no international opposition against the bilateral negotiations²⁹⁰, albeit the countries were discussing waters adjacent to Svalbard. This means that the international community has silently accepted that Norway can establish maritime borders around Svalbard.

²⁸⁷ Trude Pettersen, “Russia protests drilling in Svalbard zone”, *The Barents Observer*, 05 May 2015 (available at <http://barentsobserver.com/en/energy/2015/05/russia-protests-drilling-svalbard-zone-05-05>).

²⁸⁸ *Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean*, 15 September 2010, No 49095 (available at https://www.regjeringen.no/globalassets/upload/ud/vedlegg/folkerett/avtale_engelsk.pdf). Hereinafter Norwegian – Russian Maritime Delimitation Treaty.

²⁸⁹ Ministry of Foreign Affairs, *Report No. 7 (2011-2012) to the Storting – The High North* (available at https://www.regjeringen.no/contentassets/a0140460a8d04e4ba9c4af449b5fa06d/en-gb/pdfs/stm201120120007000en_pdfs.pdf), 65.

²⁹⁰ Pedersen, *supra* note 257, 39.

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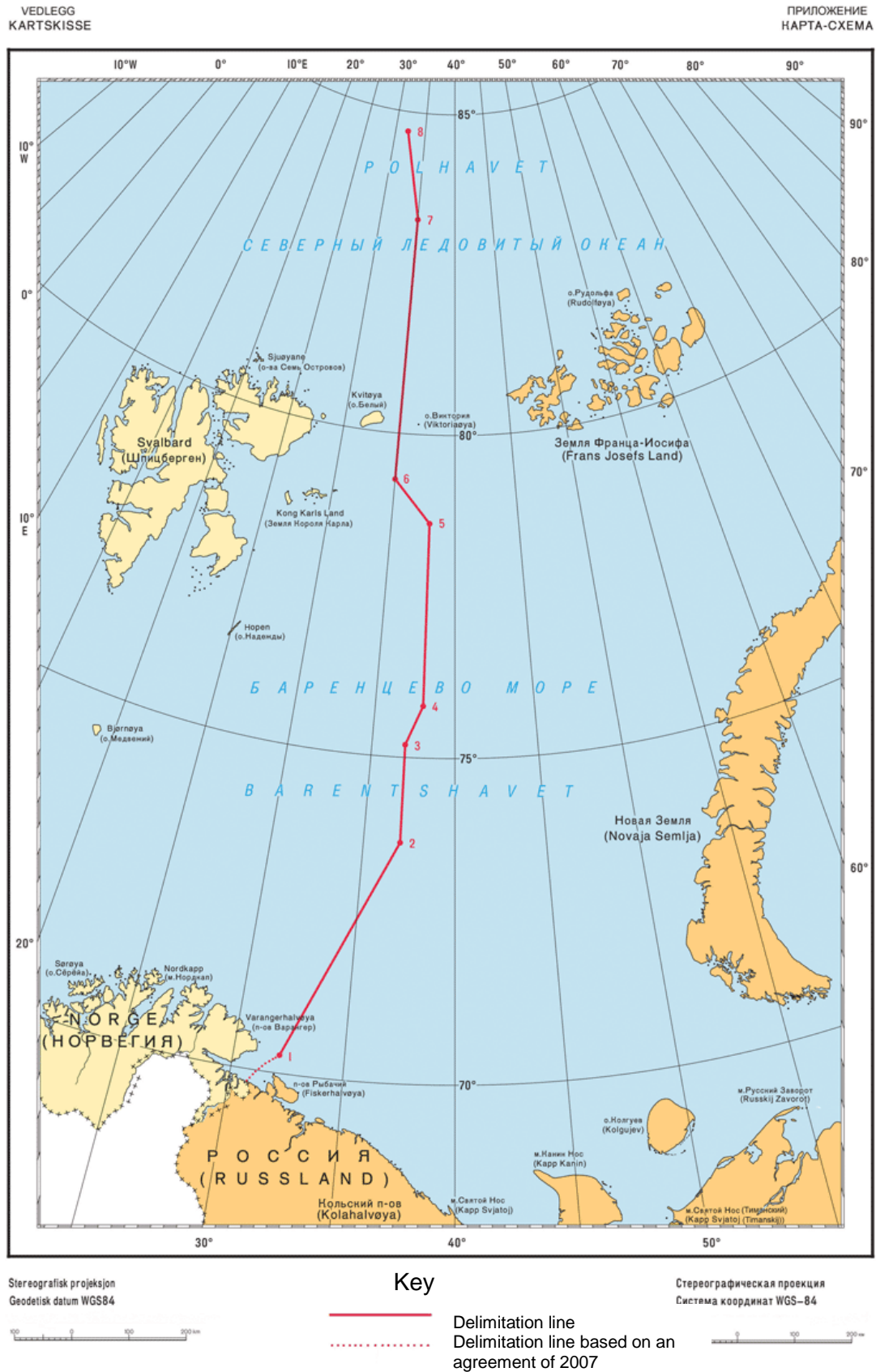


Figure 12 Map showing the Norwegian – Russian Delimitation Line based on the Norwegian – Russian Maritime Delimitation Treaty.

Source: Norwegian – Russian Maritime Delimitation Treaty (own translation of the key).

Following the official Russian statements that Svalbard cannot generate maritime zones, Russia argues to interpret the Norwegian sovereignty restrictively. As the wording of the Svalbard Treaty only mentions specific geographical areas, Norwegian sovereignty cannot extend beyond that. Norway's sovereignty is seen as a restriction to Svalbard's *terra nullius* status and must therefore be interpreted restrictively, while the state parties' rights based on the non-discriminatory aspect of *terra nullius*, must be interpreted broadly. So, while Norway interprets the rights of the treaty parties restrictively, based on the wording of the treaty, Russia does the same for Norway's rights. Nevertheless, there is nothing in the Svalbard Treaty that explicitly limits the Norwegian right to claim maritime zones. Instead, Norway's sovereignty over the maritime areas around Svalbard originates from its sovereignty over the land which is only restricted by the provisions of the Svalbard Treaty. In fact, Norway's sovereignty over Svalbard does not solely originate from the Treaty anymore, but also from successful occupation and exercising of sovereignty since 1925. Under the contemporary Law of the Sea codified in UNCLOS Art. 121(3), a state may claim a territorial sea, a contiguous zone and an EEZ or EFZ. The only exemptions are "rocks which cannot sustain human habitation or economic life of their own".²⁹¹ However, those areas falling under this category on the archipelago are located in a way that they do not impact the size of the maritime zones of Svalbard.²⁹² In contrast to maritime zones, a state's territory automatically generates a continental shelf under Art. 77(3) UNCLOS, so it must not be claimed explicitly. Therefore, Norway is entitled to claim these maritime zones, but not required. The ICJ has confirmed on several occasions that there is a close connection between sovereignty over land and sea territory.²⁹³ The Court has argued in the *North Sea Continental Shelf Case* that the shelf forms a natural prolongation of the land territory and exists "ipso facto and ab initio by virtue of its sovereignty over the land".²⁹⁴ Already in 1909 in the *Grisbådarna Case*²⁹⁵, the arbitral tribunal identified the maritime territory as an appurtenance to the land territory.

²⁹¹ UNCLOS Art. 121(3).

²⁹² Churchill, Ulfstein, *supra* note 9, 558f.

²⁹³ *Fisheries Case* (United Kingdom v. Norway), Judgment, International Court of Justice, 18 December 1951 (available at <http://www.icj-cij.org/files/case-related/5/005-19511218-JUD-01-00-EN.pdf>), 113.

North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark, Federal Republic of Germany v. Netherlands), Judgment, International Court of Justice, 20 February 1969 (available at <http://www.icj-cij.org/files/case-related/51/051-19690220-JUD-01-00-EN.pdf>), paras. 23, 52.

Aegean Sea Continental Shelf Case (Greece v. Turkey), Judgment, International Court of Justice, 19 December 1978 (available at <http://www.icj-cij.org/files/case-related/62/062-19781219-JUD-01-00-EN.pdf>), para. 36.

Case concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta) Judgment, International Court of Justice, 03 June 1985 (available at <http://www.icj-cij.org/files/case-related/68/068-19850603-JUD-01-00-EN.pdf>), 41.

Case Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), Judgment, International Court of Justice, 24 February 1982 (available at <http://www.icj-cij.org/files/case-related/63/063-19820224-JUD-01-00-EN.pdf>), para. 73.

UNCLOS Art. 76(1)

²⁹⁴ *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark, Federal Republic of Germany v. Netherlands), Judgment, International Court of Justice, 20 February 1969 (available at <http://www.icj-cij.org/files/case-related/51/051-19690220-JUD-01-00-EN.pdf>), para. 19.

Although Norway's sovereignty over Svalbard is widely accepted, its jurisdiction seems to be more restricted in reality than the Treaty would suggest.²⁹⁶ In the last years, there have been several incidents, indicating that Russia continuously challenges Norway's sovereignty. Even though Norway can prohibit any presence of foreign military in the same way as it can on the mainland based on its sovereignty, a Russian military patrol vessel made a surprise call to Barentsburg without any prior diplomatic clearance in 2008. This has been a clear violation of Norwegian sovereignty, as foreign military vessels need to obtain permission months in advance. In April 2016, Russian special forces instructors landed at Longyearbyen airport on their way to the Russian Barneo Ice Base in the Arctic, a potential breach of the Svalbard Treaty's Art. 9 and Norway's sovereignty.²⁹⁷ Additionally, in a leaked 2016 national security assessment in the field of maritime activities, Norway is accused for trying to establish "absolute national jurisdiction over the Spitsbergen archipelago and the adjacent 200 [NM] maritime boundary around".²⁹⁸ The Russian foreign minister Lavrov demanded a more constructive relationship on Svalbard in late 2017, stating that Russian legitimate rights had been repeatedly restricted. Apparently, Norway is restricting the activities of the Russian company Arktikugol and its helicopter operations, as well as the development of Russian research facilities and tourism activities in the area. Lavrov further complained about the local tax regime which does not allow the local Russians to spend collected taxes for their own purposes in their settlement.²⁹⁹

All in all, those frequent actions undermining of Norwegian sovereignty are a clear indicator for Russia trying to destabilize Norway's authority. Even though Russia has changed its position several times over the past decade, the central theme seems to be that the Svalbard Treaty must apply, at the minimum to a certain degree, to the maritime areas adjacent of Svalbard. With the Norwegian- Russian Delimitation Agreement, Russia has at least implicitly

²⁹⁵ *Grisbådarna Case* (Norway v. Sweden), Award of the Tribunal, Permanent Court of Arbitration, 23 October 1909 (available at <https://pcacases.com/web/sendAttach/508>), 3f.

²⁹⁶ Pedersen, *supra* note 203, 147 – 152.

See also: Pedersen, *supra* note 24, 236-262.

Pedersen, *supra* note 217, 95-108.

²⁹⁷ Unless they involve innocent passage through territorial waters, foreign military and civilian government vessels wishing to enter Norwegian territorial waters around Svalbard must apply well in advance for diplomatic clearance. The same applies to calls at ports in Svalbard and landings at airports. [...] The Norwegian authorities follow very restrictive practice with regard to granting such clearance." Geir Ulfstein cited in Thomas Nilsen, "Kommersant: Russia lists Norway's Svalbard policy as potential risk of war", *The Barents Observer*, 04 October 2017 (available at <https://thebarentsobserver.com/en/security/2017/10/kommersant-russia-lists-norways-svalbard-policy-potential-risk-war>).

Pedersen, *supra* note 217, 97.

Trude Pettersen, "Chechen special forces instructors landed on Svalbard", *The Barents Observer*, 13 April 2016 (available at <https://thebarentsobserver.com/en/2016/04/chechen-special-forces-instructors-landed-svalbard>).

²⁹⁸ Thomas Nilsen, "Kommersant: Russia lists Norway's Svalbard policy as potential risk of war", *The Barents Observer*, 04 October 2017 (available at <https://thebarentsobserver.com/en/security/2017/10/kommersant-russia-lists-norways-svalbard-policy-potential-risk-war>).

²⁹⁹ Atle Staalesen, "Lavrov attacks Norway, says relations on Svalbard should be better", *The Barents Observer*, 19 October 2017 (available at <https://thebarentsobserver.com/en/arctic/2017/10/lavrov-attacks-norway-over-svalbard>).

accepted that Svalbard can generate maritime zones. Russia still challenges Norway's rights to make unilateral decisions about the archipelago and its waters and routinely questions the Norwegian application of the Svalbard Treaty on mining, fishing and civilian safety infrastructure.³⁰⁰ Its actions show that the country does not agree with the Norwegian interpretation of the Svalbard Treaty and even indirectly tries to challenge Norway's sovereignty.

6.5.2.3 Great Britain

Great-Britain has been quite active in opposing the Norwegian interpretation of the treaty and its actions. In 1986, during a debate in the House of Lords, it was stated that "in our view Svalbard has its own continental shelf, to which the regime of the Treaty of Paris of 1920 applies. The extent of this shelf has not yet been determined".³⁰¹ As a reaction to the opening of the Southern Barents Sea exploration areas during previous licensing rounds, Great Britain demanded that the positions of the contracting parties "should be carefully taken into account in the handling of future economic activities in the region".³⁰² In general, Great Britain has been asking for a more international approach to the Svalbard issue, by involving the treaty parties more into the decision making. After Norway announced the potential future opening of exploration areas that extend by 0.5° into the Svalbard Box, Great Britain openly proclaimed its disagreement.³⁰³ Norway did not change its official position after the British protest and opened the zone in 1989, but first during the 23rd licensing round actual licenses were granted.³⁰⁴ In 2006, Great Britain invited representatives from the USA, France, Germany, the Netherlands, Russia, Spain, Iceland and Canada to multilateral consultations about the Svalbard issue, without Norway's knowledge or invitation.³⁰⁵ Especially this gathering shows that Great Britain does not agree with the Norwegian way of handling things. While the British position has been a mere reservation in the beginning, it transformed into formal opposition³⁰⁶ by clearly stating that "Svalbard, including Bear Island, generated its

³⁰⁰ Troy Bouffard, Morgane Fert-Malka, "The Unique Legal Status of an Arctic Archipelago", *World Policy Blog*, 06 December 2017 (available at <http://www.worldpolicy.org/blog/2017/12/06/eyes-svalbard>).

³⁰¹ Cited in Numminen, *supra* note 11, 12.

³⁰² Pedersen, *supra* note 24, 245

³⁰³ "The United Kingdom has noted certain recent actions by Norway which appear to disregard the United Kingdom's position in relation to the Svalbard continental shelf.", cited in Pedersen, *supra* note 24, 245.

³⁰⁴ Caracciolo, *supra* note 54, 7.

³⁰⁵ Pedersen, *supra* note 24, 251.

³⁰⁶ "Over the past three decades we have (...) reserved our position on the question of Norway's assertion that Svalbard's continental shelf is an extension of the Norwegian shelf. The diplomatic note sets down formally the UK's view that the Svalbard Archipelago, including Bear Island, generates its own maritime zones, separate from those generated by other Norwegian territory (...) it follows therefore that there is a continental shelf and an exclusive economic zone which pertain to Svalbard", Note Verbale from the United Kingdom to Norway, No 11/06 (17 March 2006) cited in Henriksen, Pedersen, *supra* note 109, 145 and Pedersen, *supra* note 24, 253.

own maritime zones”³⁰⁷. Actually, Great Britain stated that “we believe that, if this issue were ever to be referred to the International Court of Justice, our position would find strong support in international law”³⁰⁸ and demanded an alignment of Norwegian legislation in the FPZ and on the continental shelf to the Svalbard Treaty provisions in a note to Norway. Summing up, Great Britain has been actively opposing Norway’s interpretation of the Treaty from the beginning and has even hardened its position during time. Its position aligns with the one that is mostly supported by the international community and by legal scholars, namely that Svalbard can generate maritime zones and a continental shelf, but that the Svalbard Treaty applies to these areas as well.

6.5.2.4 Spain and the EU

While Russia has been questioning the right of Norway to establish maritime zones around Svalbard at all, Spain and Iceland have objected that Norway has the right to enforce jurisdiction. “Spain considers as inappropriate any measures implying the taking of enforcement actions by the Norwegian authorities against vessels flying the flag of Spain and, in particular, such measures which involve the seizure of vessels flying the Spanish flag outside the Exclusive Economic Zone of Norway.”³⁰⁹ Norway may decide on the norms for conservation and the management of resources as established by Art. 2 of the Svalbard Treaty, but it may not take any enforcement measures not explicitly granted by the Treaty. Spain is using the very same argument as Norway, that the Treaty provisions only apply to those areas especially mentioned in the Treaty. Consequently, Norway has no right to enforce any jurisdiction beyond the territorial sea. The Spanish reactions are closely linked to the so called ‘cod war’, which involved the seizure of vessels under the Spanish flag that were fishing in Svalbard’s FPZ.³¹⁰ Spain argues that Norway only has the right to inspect the actives on the vessels but not the right to seizure them, as the FPZ would not be governed by the same rules as the Norwegian EEZ.³¹¹ The EU has supported Spain in its disagreement with Norway, arguing that “Norway has no right to take either measures to restrict access to the waters around or enforcement measures with respect to vessels flying the flag of a Member State (...) operating in those waters. Enforcement measures should only be taken by the flag state and any wrongdoing by a vessel from a Member State (...)

³⁰⁷ Ibid.

³⁰⁸ Ibid.

³⁰⁹ Note Verbale from Spain to Norway, No 49/18 (27 July 2006) cited in Henriksen, Pedersen, *supra* note 109, 147.

³¹⁰ Pedersen, *supra* note 257, 31f.

³¹¹ Pedersen, *supra* note 24, 250.

should be prosecuted within the legal system of the flag state.”³¹² Even though the EU is not party to the Treaty, it has, based on the principle of conferral competence, certain exclusive and shared rights with regard to fishing.³¹³ Actually, already the forerunner of the EU, the European Community (EC), handed a reservation of fishing rights for its members states to Norway in 1977.³¹⁴ However, the Union’s position seems to have changed since 2011. Following various events and court cases on fisheries, it seems like that Norway and the EU agreed to disagree in 2011. The EU appears to conditionally accept the fishing regulations in the FPZ if they are applied in a non-discriminatory manner, based on scientific evidence.³¹⁵

6.5.2.5 Iceland

Iceland has been supportive of the Spanish and the Union’s view and has stressed on several occasions in the beginning of the 2000s that “fishing activities in the so-called fisheries protection zone outside Svalbard should be regarded as fishing outside any single state’s area of jurisdiction”.³¹⁶ In 2006, Iceland finally recognized that Svalbard can generate a continental shelf and EEZ but underlined that “the Svalbard Treaty (...) is the only legal basis for Norway’s sovereign rights in the zones”.³¹⁷ Iceland thereby underlines that an expansion of the equitable regime would be necessary too and that the continental shelf belongs to Svalbard and does not form a continuation of the mainland’s shelf. Iceland has recurrently stated that it is ready to transfer the case to court, as “‘there can hardly be any doubt’ that an international court would rule in Iceland’s favor”.³¹⁸ However, the repeated threats have not been acted upon, as “based on a legal assessment, the Icelandic Ministry of Foreign Affairs [later] concluded that the potential upside in referring the case to The Hague was limited”.³¹⁹ Furthermore, Iceland does not recognize the jurisdiction of the ICJ on fisheries, consequently it would be hard to refer the case to The Hague basing it on fishery

³¹² Note Verbale from the European Union/Delegation of the European Commission to Norway and Iceland, No. 26/04 (20 July 2004), cited in Henriksen, Pedersen, *supra* note 109, 148.

³¹³ TFEU Art. 3.

³¹⁴ Pedersen, *supra* note 24, 241

³¹⁵ Andreas Raspotnik, Andreas Østhagen, “Crabtacular! Snow Crabs on their March from Svalbard to Brussels”, *The Arctic Institute*, 24 April 2018 (available at <https://www.thearcticinstitute.org/crabtacular-snow-crabs-march-svalbard-brussels/>).

Andreas Raspotnik, Andreas Østhagen, “From Seal Ban to Svalbard – The European Parliament Engages in Arctic Matters”, *The Arctic Institute*, 10 March 2014 (available at <https://www.thearcticinstitute.org/seal-ban-svalbard-european-parliament/>).

³¹⁶ *Diplomatic Note from Iceland to Norway*, (10 July 2001) cited in Henriksen, Pedersen, *supra* note 109, 147. *Diplomatic Note from Iceland to Norway*, (22 September 2000) cited in Henriksen, Pedersen, *supra* note 109, 147.

³¹⁷ *Diplomatic Note from Iceland to Norway*, (11 July 2006) cited in Henriksen, Pedersen, *supra* note 109, 147. See also Position of the Ministry of Foreign Affairs of Iceland on the Status of Maritime Expanses Adjacent to Spitsbergen (30 March 2006) cited in Schönfeldt, *supra* note 264, 1438

³¹⁸ Icelandic Foreign Minister Jón Baldvin Hannibalsson, “Norge Har Tatt Seg Til Rette,” *Dagbladet*, 19 August 1994, cited in Pedersen, *supra* note 24, 246.

³¹⁹ Pedersen, *supra* note 24, 249.

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rights.³²⁰ Yet, it would be possible to refer the case to court basing it on the request that the ICJ shall interpret the treaty, which would be in its competence according to Art. 38 of its Statute.³²¹ Still, the parties to a case need to accept the jurisdiction of the court and with Norway's current argumentation this seems unlikely. As the country does not accept that the Svalbard Treaty expands beyond the border of the territorial sea, the applicant state would need to identify on what basis (treaty or a declaration of acceptance of compulsory jurisdiction) the court should possess jurisdiction.³²² As Norway has accepted the compulsory jurisdiction of the ICJ³²³, it would be possible to open a case, because Art. 36 on compulsory jurisdiction covers the interpretation of a treaty.³²⁴ However, this would be not possible for Iceland, as the country does not accept the compulsory jurisdiction of the court, which only can be used when both parties to a case have accepted the same obligation.³²⁵

In general, legal authorities have expressed uncertainty to the outcome should the case ever been referred to an international tribunal. While the regime is flexible now, losing the case could pave way for a Norwegian EEZ around Svalbard and unilateral rule on the shelf. In general, the motivation to take Norway to Court, is stronger for states not benefiting from the existing resource management.³²⁶ This is probably a reason why Russia has not tried to sue Norway yet, because the present fisheries regime is favorable for them, as they possess large fishing quota in the waters around Svalbard.³²⁷ Nevertheless, with the retreat of sea ice and further developments in technology, exploitation of hydrocarbons is likely to become the next point of disagreement.

³²⁰ *Fisheries Jurisdiction Case* (United Kingdom v. Iceland), Judgment, International Court of Justice, 25 July 1974 (available at <http://www.icj-cij.org/files/case-related/55/055-19740725-JUD-01-00-EN.pdf>).

Pedersen, *supra* note 257, 36.

³²¹ ICJ Statute Art. 38.

³²² ICJ Statute Art. 36

International Court of Justice, "How the Court Works", *International Court of Justice*, 2018 (available at <http://www.icj-cij.org/en/how-the-court-works>).

³²³ „(...) Norway recognizes as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, that is on condition of reciprocity, the jurisdiction of the International Court of Justice in conformity with Article 36, paragraph 2, of the Statute of the Court (...)”, Declarations recognizing as compulsory the jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute of the Court, 24 June 1996 (available at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=I-4&chapter=1&clang=_en#EndDec).

³²⁴ ICJ Statute Art. 36(2)a.

³²⁵ Declarations recognizing as compulsory the jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute of the Court, 24 June 1996 (available at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=I-4&chapter=1&clang=_en#EndDec).

ICJ Statute Art. 36.

³²⁶ Pedersen, *supra* note 1, 351.

Rossi, *supra* note 6, 108.

Rossi, *supra* note 45, 1513

³²⁷ Pedersen, *supra* note 1, 350.

"Kvoter", *JointFish.com* (available at <http://www.jointfish.com/STATISTIKK/KVOTER.html>).

Norwegian Seafood Council, "Quotas", *cod.fromnorway.com* (available at <https://cod.fromnorway.com/sustainability/quotas/>).

Wolf, *supra* note 17, 24.

6.6 SUPPLEMENTARY MEANS

In case that the interpretation of a treaty should still be unclear after applying the before mentioned points, it is possible to take the preparatory work, also called *travaux préparatoires*, into account, as supplementary means for interpretation. Fleischer relies heavily on the *travaux préparatoires* of the Svalbard Treaty and gives significant weight to the statements by the Chairman of the Spitsbergen Commission. The Chairman stated that “all restrictions on Norwegian sovereignty over Svalbard are stated in the Treaty”, and “pour le surplus il y a lieu d’appliquer la souveraineté de la Norvège”.³²⁸ Therefore, everything not regulated in the treaty (‘le surplus’) would fall under the sovereignty of Norway, which should be absolute and in principle unlimited, only restricted by the treaty provisions. According to Fleischer this means that, despite from developments in international law, any maritime zone beyond the territorial sea, must be seen as under Norwegian sovereignty without any possibility to apply the provisions of the Svalbard Treaty. A second part of the *travaux préparatoires*, Fleischer is referring to, is the decision of the Spitsbergen Commission to grant Norway the sovereignty over Svalbard, what the Commission regarded as being of advantage due to it being a definitive solution.³²⁹ The other option was to put the archipelago under a mandate by the League of Nations, with Norway as the administrative power. Fleischer sees this as a “clear expression of the intention that the Treaty should not limit the rights and powers of the Norwegian government”.³³⁰ In case of Norway exercising a mandate, it would need to take the interest of the international community into account, whilst while having the sovereignty, it is only bound by the limitations explicitly agreed on. The country can therefore decide on its own what to do with the ‘surplus’ it gets from its sovereignty. Nevertheless, besides from Fleischer giving much weight to only a part of the Vienna Convention’s rules for interpretation, the fact that the treaty is open for later ratification appears to be further problematic. Fleischer’s view would give privilege to the interpretation of the original drafters and would bind new treaty parties to the former parties’ informal understanding while drafting. The arguments in favor of the interpretation that the Svalbard Treaty must expand to the maritime zones and the shelf adjacent of Svalbard, are more numerous and convincing. Fleischer’s interpretation of the *travaux préparatoires* cannot over rule this.

³²⁸ Pedersen, *supra* note 1, 345.

³²⁹ Spitsbergen Commission’s report in September 1919, in Rolf Einar Fife, *Forkerettslige spørsmål i tilknytning til Svalbard*, *Regjeringen.no*, 12 December 2014 (available at <http://www.regjeringen.no/no/dep/ud/id833/>), 7.

³³⁰ Fleischer, *supra* note 48, 6.

6.7 CONCLUSION

After conducting this analysis of the Svalbard Treaty using the principles of treaty interpretation codified in the Vienna Convention, the current disputes based on the different interpretation of the extend of Norway's sovereign rights in those maritime areas beyond the territorial sea and the scope of the rights of the treaty parties can be solved – at least theoretically. Basically, Norway has the right to establish maritime zones based on its sovereignty over the archipelago. However, as this sovereignty was established under certain conditions, namely the provisions laid down in the Svalbard Treaty, those conditions expand with the sovereignty as well.

Since 1920, the rights of states beyond the territorial sea and on the seabed have increased, following the general principle that sovereignty over land generates sovereignty over adjacent maritime areas. The Svalbard Treaty does not contain any provisions on current constructs of international law like maritime zones or a continental shelf. So, nothing in the Treaty allows or limits Norway's right to claim those zones, but taking the development of international law into account, Norway has the right to do so, based on its sovereignty over the land territory which it has effectively occupied for nearly a century. Also, taking Norway's successful submission to the CLCS and the bilateral delimitation agreements into account, and even more important the absence of any protest against the submission or the agreements themselves, it can reasonably be argued that Norway has the right to establish maritime zones around Svalbard. At the same time, it has been shown that Svalbard generates its own continental shelf, as, while a state may have a continental shelf without declaring maritime zones, "there cannot be [any maritime zones] without a corresponding continental shelf".³³¹ In addition, Norway cannot establish the outer limit of the shelf adjacent of Svalbard, if Svalbard does not have a continental shelf. In general, each state that argues that the Svalbard Treaty applies to the archipelago's maritime zones, is automatically, even though implicitly, accepting that Svalbard is entitled to generate these zones. All in all, the dispute is shifting its focus away from whether Norway can claim these zones towards the question of which legal regime must be applied in the waters and on the shelf underneath.

Norway's sovereignty has been established under certain conditions, like the equitable regime, the Mining Code and the limitation of taxation, in a kind of package deal. The whole Treaty is reciprocal because all treaty parties gave something up to receive something in return. Norway withdrew its claim for sole unlimited sovereignty which it had not been able to defend, especially against the national interests of Russia and Sweden. The other signatory

³³¹ *Case Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, Judgment, International Court of Justice, 24 February 1982 (available at <http://www.icj-cij.org/files/case-related/63/063-19820224-JUD-01-00-EN.pdf>), para. 34.

states abandoned their *terra nullius* rights and some even their own claim for sovereignty, to receive certain rights in return. The whole treaty should deliver a balanced result with an equitable regime for peaceful development of the islands. Interpreting Norway's sovereignty broadly and the other treaty parties' rights narrowly when discussing the question which legal regime must apply, can hardly deliver a balanced result and will probably lead to more conflict in the future. Currently, Norway applies a double standard by basing its claim to maritime zones and a shelf on the development of international law, even though those areas were not mentioned in the treaty, while denying the signatory states any rights in those zones because they were not mentioned in the treaty. However, Norway's sovereignty and the other treaty parties' rights are combined and cannot be separated, which is visible when considering the wording, context and object and purpose of the treaty in good faith. This combination and the fact that today's sovereignty expands beyond areas known in the 1920s are the reasons why the treaty provisions must apply to all areas under Norwegian sovereignty that originates from Svalbard.

7 EXPLOITATION OF NON-LIVING RESOURCES ON SVALBARD'S CONTINENTAL SHELF

The question of applicability of the Treaty to Svalbard's FPZ has attracted academic and political attention in the past. However, especially since the Norwegian-Russian delimitation agreement, the attention has widened its focus to the resources buried under the seabed. The archipelago hides large deposits of hydrocarbons under a, for now still, frozen continental shelf. With sea ice retreat and global warming, the resources could soon become accessible, probably leading to serious conflict.³³² Those non-living resources are increasingly important to cover the demand for fossil fuels and minerals.³³³ Norway's welfare state is highly supported by the petroleum activities on its shelf and those will be vital to the economy in the next decades.³³⁴ Nonetheless, also other states are shifting their focus towards the resources hidden in the High North outside of Svalbard. Both international and national oil companies have put pressure on Norway to resolve the issue of sovereignty. Should the Svalbard Treaty been made applicable to the shelf adjacent to the archipelago, huge economic gain can be expected for the nationals of the contracting parties. However, reality looks different, at least for now. Even though, the Svalbard Treaty should apply to the all areas under Norwegian jurisdiction that extend from Svalbard, Norway applies national law based on its argument that the continental shelf originates from the Norwegian mainland. The 1963 Act on Submarine Resources³³⁵ establishes that the entire Norwegian continental shelf is encompassed under this framework, with the shelf stretching from Northern Norway beyond Svalbard. Therefore, the national petroleum framework is currently applied and not the Svalbard Treaty and the accompanying Mining Code. Although the shelf is geologically one continuous shelf, different legal regimes can and must still apply.

In the following, a closer look at the actual applicable regime under the Svalbard Treaty and the Mining Code will be taken. In addition, the current petroleum activities in the region and the influence of snow crabs will be considered.

³³² Henk van den Breemen, Inge The Lord, Jacques Lanxade, John Shalikhshvili, Klaus Naumann, Towards a Grand Strategy for an Uncertain World, 2007, http://www.voltairenet.org/IMG/pdf/NATO_new_Strategy-2.pdf.

³³³ Bramley J Murton, "A global review of non-living resources on the extended continental shelf". *Revista Brasileira de Geofísica*, Vol. 18(3) (2000), 281-306.

³³⁴ "Norway's Petroleum History", *Norwegian Petroleum*, 15 May 2018 (available at <https://www.norskpetsroleum.no/en/framework/norways-petroleum-history/>).

³³⁵ *Resolusjon om norsk statshøyhet over visse undersjøiske områder*, Olje- og energidepartementet, 31 May 1963 (available at <https://lovdata.no/dokument/SF/forskrift/1963-05-31-1?q=31%20mai%201963>, English version available at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_1963_Decree.pdf).

7.1 RELEVANT PROVISIONS OF THE SVALBARD TREATY

The most important provision of the Svalbard Treaty regarding exploitation of natural resources is Art. 8, which obliges Norway to establish mining regulations for Svalbard and sets out certain limits on taxation. Norway is only allowed to collect the amount of tax, which the country needs to govern the archipelago, meaning that the country has no economic gain from the islands. Regarding the taxation of mineral resources, the amount of export duties the Norwegian government can claim for exporting minerals is also limited to 1% of the maximum value of exports up to 100,000 tons and a proportional amount for any export higher than that.³³⁶ This makes working on and exporting from Svalbard very advantageous compared to the Norwegian mainland.³³⁷ However, this could change if Norway would be able to prevent any application of the Svalbard Treaty to the continental shelf.³³⁸

7.1.1 History of Origins of the Mining Code

The Svalbard Treaty provides that the required regulations should cover taxes, labor conditions, and must apply the equitable regime. Based on Art. 8, Norway had the obligation to communicate the draft mining provisions to the other signatory parties three months before the date it should enter into force. The parties then would have the possibility to propose changes and those changes would need to be agreed upon by majority and not unanimity under a commission composed by a representative of each of the parties. This means that Norway had the *right of initiative* and could propose any kind of regulation it wanted, as long as those comply with the provisions set out in Art. 8. The other signatory parties were only allowed to propose changes to the presented framework, which did *not* provide them with a *veto right*. Norway sidestepped any objections in the 1920s by consulting the treaty parties before the draft was formally handed over to them.³³⁹ The blueprint was first submitted to Sweden and afterwards to Great Britain, which both proposed changes that were implemented by Norway. It was originally not meant to be shown to the Netherlands, as their interest was only seen as being of minor importance. However, the Netherlands teamed up with Great Britain and a stalemate ensued. In the end, only some minor changes were made, mostly because Britain got tired of the stalled negotiations. Even though Germany was not

³³⁶ "Taxes, dues and duties levied shall be devoted exclusively to the said territories and shall not exceed what is required for the object in view.

So far, particularly, as the exportation of minerals is concerned, the Norwegian Government shall have the right to levy an export duty which shall not exceed 1 % of the maximum value of the minerals exported up to 100.000 tons, and beyond that quantity the duty will be proportionately diminished. The value shall be fixed at the end of the navigation season by calculating the average free on board price obtained."

Svalbard Treaty Art. 8.

³³⁷ See Chapter 7.2.2 for further explanation.

³³⁸ John Grady, "Old Treaties called into question as Arctic competition increases", *USNI News*, 20 December 2016 (available at <https://news.usni.org/2016/12/20/old-treaties-called-question-arctic-competition-increases>).

³³⁹ Churchill, Ulfstein, *supra* note 9, 590.

part of the original Spitsbergen Commission, Norway contacted the country as well, but no major changes were requested. The Soviet Union's government was not recognized at the time of the Conference, but Norway approached them anyway as a sign for its honoring of the country's historical involvement on Svalbard.³⁴⁰ The major political objective of the Soviets was to get their government recognized as the *de jure* government and after Great Britain had been the first country doing so,³⁴¹ Norway could easily follow. In exchange for Norway's recognition of the government, the Soviet Union accepted the Svalbard Treaty and the Mining Code.³⁴²

7.1.2 Area and Activities covered by the Mining Code

Art. 8 states that Norway has the obligation to provide the mining regulations 'for the territories specified in Article 1', which only mentions land territory. However, as explained earlier, the territory of a state includes also the territorial sea and Art. 3 of the Svalbard Treaty gives all nationals of the signatory states the liberty of access to the waters of the territories specified in Art. 1 for any 'maritime, industrial, mining and commercial operation'. Moreover, in a letter from 1967, the Ministry of Industry states that the Mining Code applies offshore to the territorial sea.³⁴³ The regulations do not only apply to mining of coal but cover hydrocarbon resources as well, because paragraph 2(1) of the Mining Code clearly states that 'natural deposits of coal, mineral oils and other minerals and rocks' are covered. Already in 1920, the first oil drilling took place, but it was not until the 60s and 70s that bigger projects followed on land on the archipelago.³⁴⁴ Some difficulties had to be overcome, especially regarding the first finder's right and the proof of discovery which are laid down in Chapter II of the Mining Code. Usually, a discovery must be proved by handing in a sample along with other information, but that is not possible for petroleum resources. The working practice that has developed is that seismic results of geological indication are handed in instead of a physical sample.³⁴⁵ Thus, the Mining Code can theoretically be applied to exploration of mineral resources on the shelf adjacent of Svalbard, as both activities in the water and exploration of hydrocarbons in addition to other minerals are covered. Nevertheless, the Code does not prevent Norway from adopting additional requirements for mining, like safety regulations or environmental protection, as long as the rules do not violate the provisions of

³⁴⁰ Østreng, *supra* note 202, 17-21.

³⁴¹ George Grafton Wilson, "British Recognition de Facto and de Jure of the U.S.S.R", *The American Journal of International Law*, Vol. 28(1) (1934), 99f.

³⁴² Government of Norway, "Meld. St. 32 (2015-2016)", *Regjeringen.no* (available at <https://www.regjeringen.no/no/dokumenter/meld.-st.-32-20152016/id2499962/sec1>), Sect. 3.2.2.

³⁴³ Bergmesteren for Svalbard, *Bergverksvirksomhet på Svalbard: lover og regler m.m.*, 3rd Edition, 2002, 16.

³⁴⁴ "Written in the rocks", *Norwegian Petroleum Directorate*, 10 October 2006 (available at <http://www.npd.no/en/news/News/2006/Written-in-the-rocks/>).

³⁴⁵ Thomassen, *supra* note 14, 42.

the mining regulations and or the Svalbard Treaty. Additionally, Norway has based the right and duty to undertake measures to protect the environment on Art. 2 of the Svalbard Treaty, Art. 194(3)c UNCLOS and the Svalbard Environmental Protection Act³⁴⁶, and could thereby prohibit all drilling on the shelf.

7.1.3 Legal Nature of the Mining Code

The legal nature of the Mining Code is of importance but has been subject to disagreement. In case the Code would be regarded as national law, the Norwegian parliament, the *Storting*, would have the power to change it without any prior consultations with the signatory states. Should the regulations instead be regarded as international law, Norway would not be allowed to change it unilaterally. However, the Mining Code is neither the former nor the latter, instead it is a hybrid. On the one hand, it has been adopted by *Royal Decree*, so by a Norwegian national legislative act, and it has not been annexed to the Svalbard Treaty as an integral part of it.³⁴⁷ On the other hand, Norway had the obligation under an international treaty to consult the other treaty parties, who had the possibility to propose changes prior to the Code's entering into force. The Svalbard Treaty and the Mining Code are both silent about any procedure for modification for the mining regulations, therefore it can be argued that it can only be changed by the same procedure by which it has been established.³⁴⁸ This would again give Norway the *right of initiative* and only provide the signatory states with the right to propose changes. However, it is probably going to be much harder to create regulations today that would be accepted by the majority of over 40 signatory states, with potential petroleum resources on the continental shelf being the elephant in the room. Yet, reality seems to be different, as according to the Norwegian online collection of laws, *Lovdata*, the Mining Code has been changed several times already, most lately in 1975.³⁴⁹ Up to present knowledge, there has been no consultation with the treaty parties, nor any actual protest by them against this unilateral act by Norway. Therefore, it seems to be accepted practice that the Mining Code can be changed through national Norwegian legislation. This provides Norway with a certain power in the mining sector and regarding

³⁴⁶ *Lov om miljøvern på Svalbard (svalbardmiljøloven)*, Klima- og miljødepartementet, 15 June 2001, last amended on 09 December 2016. (available at <https://lovdata.no/dokument/NL/lov/2001-06-15-79?q=Svalbardmilj%C3%B8loven>).

³⁴⁷ *Kongelig resolusjon bergverksordning for Svalbard*, Nærings- og fiskeridepartementet, 07 August 1925, last amended by Royal Decree of 11 June 1975 (available at [https://lovdata.no/dokument/NL/lov/1925-08-07?q=Kongelig%20resolusjon%20\[bergverksordning%20for%20Svalbard\]](https://lovdata.no/dokument/NL/lov/1925-08-07?q=Kongelig%20resolusjon%20[bergverksordning%20for%20Svalbard])).

³⁴⁸ Vienna Convention Art. 10, 40.

See also; Numminen, *supra* note 11, 15.

Churchill, Ulfstein, *supra* note 9, 556.

³⁴⁹ *Kongelig resolusjon bergverksordning for Svalbard*, Nærings- og fiskeridepartementet, 07 August 1925, last amended by Royal Decree of 11 June 1975 (available at [https://lovdata.no/dokument/NL/lov/1925-08-07?q=Kongelig%20resolusjon%20\[bergverksordning%20for%20Svalbard\]](https://lovdata.no/dokument/NL/lov/1925-08-07?q=Kongelig%20resolusjon%20[bergverksordning%20for%20Svalbard])).

potential future petroleum exploration, because it could, for instance, change the provisions for acquiring or sustaining a claim.

7.1.4 Conclusion

With the Mining Code being applicable to water and allowing the exploitation of hydrocarbons, it can reasonably be argued that the regulations would apply to all maritime zones adjacent of Svalbard under Norwegian sovereignty. The Mining Code's applicability expands along with the Svalbard Treaty, every time Norwegian sovereignty that originates from the archipelago, increases. However, the opening of Svalbard's continental shelf for the exploitation of hydrocarbons could lead to a massive activity endangering the fragile environment in the Arctic, along with conflicts between state parties, thereby contradicting the objective of peaceful utilization. Norway would not be able to use the criteria of historic activity on drilling, as no country has been dependent on the extraction of mineral resources from the maritime areas around Svalbard in the past. Consequently, states currently profiting from the fisheries regime can hardly expect to obtain similar favorable conditions on the continental shelf if it should be opened for exploitation. Should Norway eventually try to prevent the state parties from extracting mineral resources in the area by denying any applicability of the Svalbard Treaty whilst opening the area for unilateral exploration, this would lead to dangerous tendencies. Especially major powers, as the USA or Russia, are likely to contest any indication that Norway has the unilateral authority to manage and regulate the resources of Svalbard beyond the territorial sea, should those resources become economically viable for exploitation.³⁵⁰ Norway has two possibilities in this case: either to allow all state party nationals and companies to explore and exploit mineral resources on the continental shelf or to close the area for all drilling activities based on environmental concerns.

7.2 THE REALITY

Even though, it has been clearly laid out that the Svalbard Treaty and the Mining Code should apply to the waters and the shelf adjacent of Svalbard, Norway has continued to follow its own interpretation. When following the Norwegian line of argumentation that Svalbard sits on the continental shelf of mainland Norway, the Norwegian state alone would

³⁵⁰ Nyman, Tiller, *supra* note 212, 147.

have the right to mineral resources around the archipelago. Under the Petroleum Act³⁵¹, the State has the property right to petroleum, and other mineral resources on the shelf and the exclusive competence to manage them. Private and state companies may be granted licenses under a licensing regime. Although Norway claims that its sovereignty over the resources on Svalbard's shelf are based on its sovereignty over mainland Norway, first recently licenses in the disputed area have been granted. Only 2016 in the 23rd licensing round, Norway has finally opened for exploration in the Svalbard Box. Statoil Petroleum received the license for exploration blocks (red box in Figure 13) which are located at 74° North and 30 min parallel to Bear Island (green box in Figure 13) and thereby in the Svalbard Box.³⁵² Even though the Svalbard Box does not serve judicial purposes³⁵³, opening exploration blocks in that area is a powerful sign in international diplomacy. This action led to a sharp diplomatic note by Russia, stating that the unilateral opening of those blocks was illegal, based on the Svalbard Treaty. Other countries have also reacted to Norway's actions.³⁵⁴ In contrast, Norway argues that it is Norway alone that manages the resources on Norway's continental shelf and therefore there is no necessity to consult other countries in advance of granting drilling licenses.³⁵⁵

³⁵¹ *Lov om petroleumsvirksomhet [petroleumsloven]*, Olje- og energidepartementet, 29 November 1996, last amended 01 October 2015 (available at <https://lovdata.no/dokument/NL/lov/1996-11-29-72>, English version available at <http://www.npd.no/en/Regulations/Acts/Petroleum-activities-act/>).

³⁵² "Factpages", *Norwegian Petroleum Directorate*, 28 May 2018, (available at <http://factpages.npd.no/FactPages/default.aspx?nav1=licence&nav2=PageView|All&nav3=28169055>).

³⁵³ Anderson, *supra* note 64, 375

³⁵⁴ Alf Bjarne Johnsen, "Russland protesterer mot oljeboring i Svalbard-sonen", *VG Nyheter*, 02 May 2015 (available at <https://www.vg.no/nyheter/innenriks/i/K0vne/russland-protesterer-mot-oljeboring-i-svalbard-sonen>). „Norge ignorerer russisk invitasjon til dialog", *Teknisk Ukeblad*, 28 February 2015 (available at <https://www.tu.no/artikler/norge-ignorerer-russisk-invitasjon-til-dialog/223174>).

³⁵⁵ Former Foreign Minister Brende, cited in Alf Bjarne Johnsen, "Russland protesterer mot oljeboring i Svalbard-sonen", *VG Nyheter*, 02 May 2015 (available at <https://www.vg.no/nyheter/innenriks/i/K0vne/russland-protesterer-mot-oljeboring-i-svalbard-sonen>).

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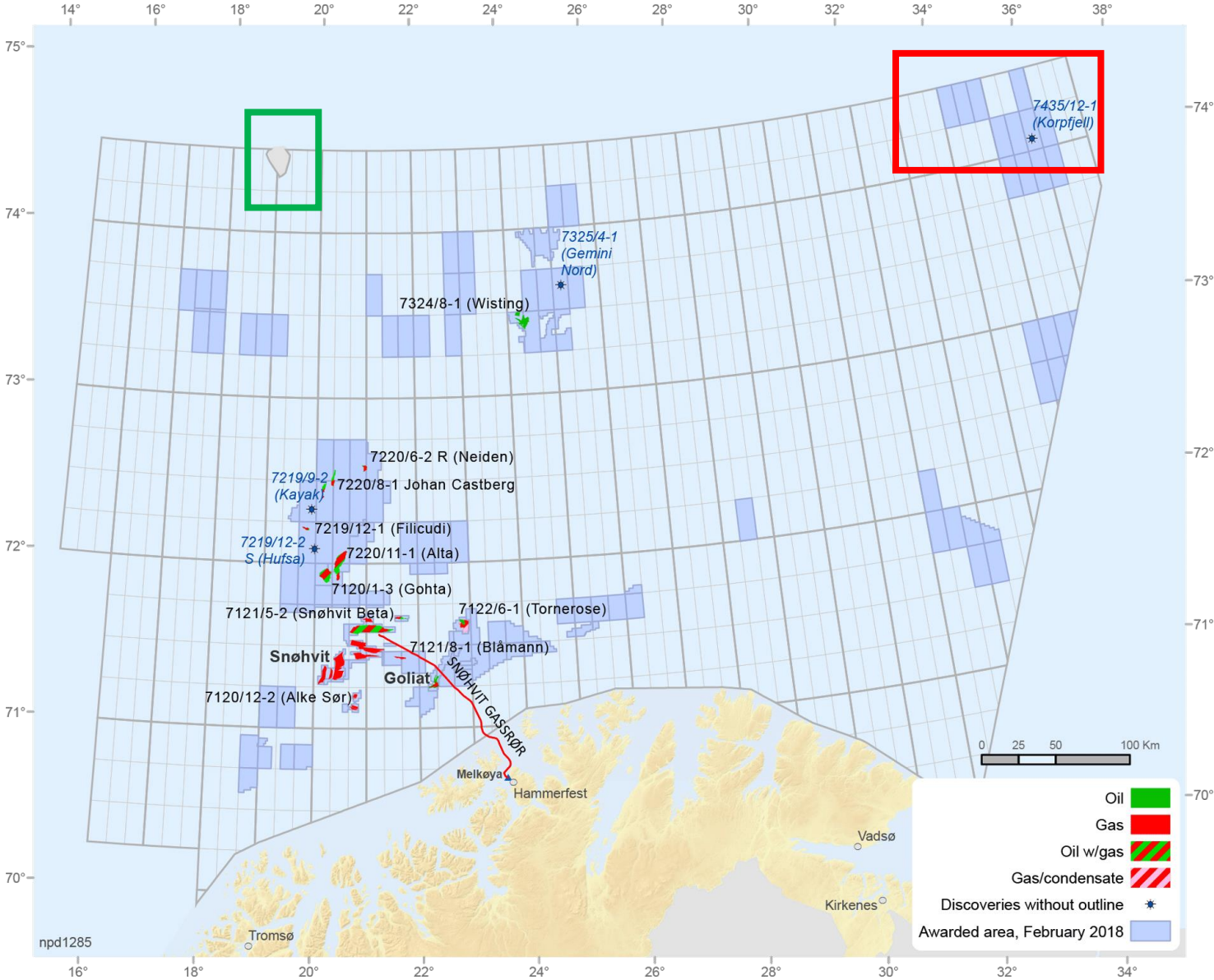


Figure 13 Overview over exploration blocks in the Barents Sea as by March 13, 2018.

Source: „Activity per Sea Area”, Norwegian Petroleum, 13 March 2018, (available at <https://www.norskpetroleum.no/en/development-s-and-operations/activity-per-sea-area/>).

Although Norway is defending its position, until now, no exploration for petroleum resources on other parts of the shelf adjacent to Svalbard have taken place. It can be assumed that the country is certainly clear about the consequences of a unilateral opening for exploration and exploitation in the whole Svalbard Box without prior consultation or including the treaty parties. Nevertheless, some seismic surveys classified as scientific research have taken place. Since 2005, the Norwegian Petroleum Directorate has been drilling on Svalbard's east coast to gain more knowledge about potential resources.³⁵⁶ Under Art. 5 of the Svalbard Treaty, a convention should be established on the conditions of scientific research. No convention has been established yet, instead Norway has simply practiced non-discrimination when allowing research to take place. However, this excludes exploration for petroleum resources, a fact that has led to continuous conflict between Russia and Norway. With Russia having been interested in Svalbard's shelf for decades, the Russian joint stock company Marine Arctic Geological Expedition (MAGE) conducted seismic surveys of the shelf around Svalbard in 2002. Norway gave its permission, as the seismic surveys were classified as scientific research. Anyway, MAGE used a vessel that was equipped to explore petroleum potential and prohibited any visits from Norwegian scientists to the ship. In addition, the research data was not presented to Norway but stored in the Russian State Geological Archives. In the aftermath of this incident, Norway placed emphasis on the breach of the conditions the vessel could operate under, adding that "further permissions with similar content cannot be expected".³⁵⁷ In the following years, Russian state organizations have continued to conduct studies of the shelf, all being considered controversial and on the edge of what should be accepted by Norway.³⁵⁸ Nevertheless, Norway has refrained from defining the Russian seismic survey of the continental shelf as illegal petroleum exploration, because a strict enforcement of Norwegian petroleum regulations might threaten peace and stability in the region.³⁵⁹ Once again, it is shown that Norway is not free in its decision making and strongly influenced by the interests of other states in the region.

7.2.1 Petroleum Discoveries on the Shelf

"Given the present state of knowledge, the Barents Seas has the biggest undiscovered resource potential on the NCS [Norwegian Continental Shelf]. The area could therefore come to play an important role in maintaining profitable petroleum activities on the NCS for a long

³⁵⁶ Pedersen, *supra* note 1, 348.

³⁵⁷ *Ibid.*

³⁵⁸ Atle Staalesen, "Russia expands studies of Svalbard shelf", *The Barents Observer*, 10 March 2017 (available at <https://thebarentsobserver.com/en/arctic/2017/03/russia-expands-studies-svalbard-shelf>).

³⁵⁹ Pedersen, *supra* note 210, 917.

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time to come.”³⁶⁰ Especially the Northern Barents Sea holds a huge amount of undiscovered resources having “about twice the resource potential per square kilometer as the southern Barents Sea”.³⁶¹ As visible in Figure 14, most discoveries³⁶² in the Barents Sea have been made during the past 5 years, also because Norway has first started to open exploration blocks going further North on its continental shelf. The retreat of the sea ice and global warming in general make it easier to access the hidden resources.

Discovery name	Area	Disc. year	Resource estimate	Type	Activity status	Operated by
7120/12-2 (Alke Sør)	Barents sea	1981	12,92	GAS	Production likely, but unclarified	Eni Norge AS
7121/5-2 (Snøhvit Beta)	Barents sea	1986	4,4701017	OIL/GAS	Production likely, but unclarified	Statoil Petroleum AS
7122/6-1 (Tornerose)	Barents sea	1987	3,782	GAS/CONDENSATE	Production in clarification phase	Statoil Petroleum AS
7120/1-3 (Gohta)	Barents sea	2013	8,30225	OIL/GAS	Production likely, but unclarified	Lundin Norway AS
7324/8-1 (Wisting)	Barents sea	2013	58,218	OIL	Production likely, but unclarified	OMV (Norge) AS
7220/11-1 (Alta)	Barents sea	2014	0,107262	OIL/GAS	Production likely, but unclarified	Lundin Norway AS
7220/11-1 (Alta)	Barents sea	2014	20,5157	OIL/GAS	Production likely, but unclarified	Lundin Norway AS
7220/6-2 R (Neiden)	Barents sea	2016	6,21	OIL/GAS	Production not evaluated	Lundin Norway AS
7121/8-1 (Blåmann)	Barents sea	2017	1,7	GAS	Production not evaluated	Statoil Petroleum AS
7219/12-1 (Filicudi)	Barents sea	2017	15,37	OIL/GAS	Production not evaluated	Lundin Norway AS
7219/9-2 (Kayak)	Barents sea	2017	5,53	OIL	Production not evaluated	Statoil Petroleum AS

Figure 14 Discoveries in the Barents Sea.

Source: “Discoveries”, Norwegian Petroleum (available at <https://www.norskpetroleum.no/en/facts/discoveries>), table modified.

After the delimitation agreement with Russia, Norway has included the North Eastern Barents Sea into the estimation of unproven resources for the first time in 2017. The estimate is at 2,535 mio. Sm³ o.e., an increase of 1,140 million Sm³ o.e. compared to 2016, but this is also closely connected with the reevaluation of the North Eastern Barents Sea. There have been three commercial new discoveries in the Barents Sea in 2017, increasing the resources by 23 million Sm³ o.e.³⁶³ A vast majority of the resources is still to be discovered, with the

³⁶⁰ Publication (Geological assessment of petroleum resources in eastern parts of Barents Sea north 2017), “Summary and conclusion”, Norwegian Petroleum Directorate, 06 June 2017 (available at <http://www.npd.no/en/Publications/Reports/Geological-assessment-of-petroleum-resources---Barents-Sea-north-2017/summary-and-conclusion/>).

³⁶¹ Press Release, “Doubling the resource estimate for the Barents Sea”, Norwegian Petroleum Directorate, 25 April 2017 (available at <http://www.npd.no/en/news/News/2017/Doubling-the-resource-estimate-for-the-Barents-Sea/>).

³⁶² “A discovery is a petroleum deposit or several petroleum deposits collectively, which have been discovered in the same well, in which through testing, sampling or logging there has been established a probability of the existence of mobile petroleum. The definition covers both commercial and technical discoveries. A discovery receives the status of a field, or becomes part of an existing field, when a plan for development and operation (PDO) is approved by the authorities or when an exemption from the PDO requirement has been granted.” “Discoveries”, Norwegian Petroleum (available at <https://www.norskpetroleum.no/en/facts/discoveries>).



³⁶³ “Resources per Sea Area”, Norwegian Petroleum, 31 December 2017 (available at <https://www.norskpetroleum.no/en/petroleum-resources/resources-per-sea-area/>). Thomas Nilsen, “Norway doubles Arctic oil estimates”, *The Barents Observer*, 25 April 2017 (available at <https://thebarentsobserver.com/en/industry-and-energy/2017/04/norway-doubles-arctic-oil-estimates>).

discovered resources in oil, condensate, NGL (natural gas liquids) and gas only making up around 18% of the total amount of expected resources, as shown in Figure 15.

**Original recoverable petroleum resources
in the Barents Sea as of 31.12.2017**

Oil, condensate and sum oil equivalents are given in million standard cubic meters. NGL is given in million tonnes and gas is given in billion standard cubic meters. The conversion factor for NGL in tonnes to standard cubic metres is 1.9.

Source: Norwegian Petroleum Directorate

 Print table
  Download data

Resource Class	Oil	Condensate	NGL	Gas	Sum o.e.
Produced	5	8	2	47	64
Reserves*	115	18	6	177	322
Contingent resources in fields	3	1	1	13	18
Contingent resources in discoveries	112	1	1	35	149
Undiscovered resources	1265	40	0	1230	2535
Total**	1500	68	11	1502	3089

Figure 15 Original recoverable petroleum resources in the Barents Sea as by December 31, 2017.

Source: "Resources per Sea Area", Norwegian Petroleum, 31 December 2017 (available at <https://www.norskpetroleum.no/en/petroleum-resources/resources-per-sea-area/>).

As visible in Figure 16, 60% of the resources are expected to be liquids, i.e. oil, in the Northern Barents, compared to the Southern Barents where 60% is expected to be gas. Taking the current positive price development of crude oil, shown in Figure 17, into account, it is going to be increasingly profitable for Norway to open the area for exploration and exploitation. The government receives a lot of money from the taxes being paid by the oil companies, as explained in the next part.

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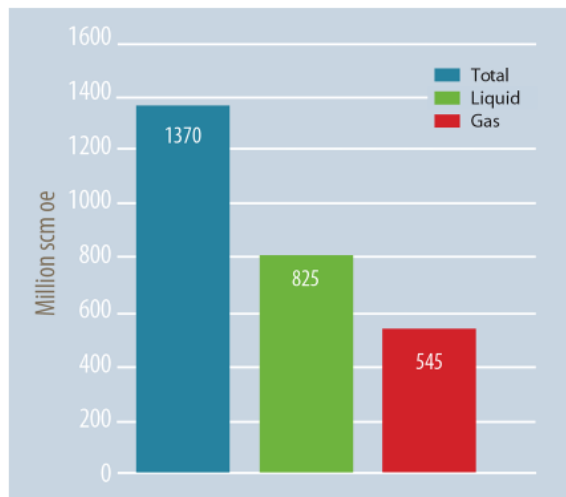


Figure 35. Expected (mean) recoverable resources.

Figure 16 Expected recoverable resources in the Northern Barents Sea.

Source: Publication (Geological assessment of petroleum resources in eastern parts of Barents Sea north 2017), "Resource Evaluation", Norwegian Petroleum Directorate, 06 June 2017 (available at <http://www.npd.no/en/Publications/Reports/Geological-assessment-of-petroleum-resources---Barents-Sea-north-2017/Resource-evaluation/>).



Figure 17 Price Development Crude Oil 2013 – 2018.

Source: "Crude Oil", Trading Economics, 28 May 2018 (available at <https://tradingeconomics.com/commodity/crude-oil>).

7.2.2 Taxing of Petroleum

With Norway treating the shelf adjacent to Svalbard as part of its mainland shelf, Norwegian tax law applies. “Because of the extraordinary returns on production of petroleum resources, the oil companies are [under the Petroleum Tax Law³⁶⁴] subject to an additional special tax”.³⁶⁵ In 2018 the ordinary company tax rate is 23 %, and the special tax rate is 55 %, giving a marginal tax rate of 78 %. The marginal tax rate is very high compared to the tax regimes applicable in other petroleum producing countries. For instance, the marginal tax rate in the UK is only 40%.³⁶⁶ In 2017, Norway’s estimated tax revenues from petroleum activities were about 67 billion NOK.³⁶⁷ The idea behind the Norwegian tax and management system of petroleum resources is that the outcome shall bring a maximum value for society, as the resources are regarded to belong to the society as a whole. As observable in Figure 18, the total net cash flow is currently recovering, after it reached a low point in 2016. Due to increased production and higher oil and gas prices, the total net cash flow from the petroleum industry is going to be around 183 billion NOK in 2018, a 45% increase in revenues since 2016.³⁶⁸

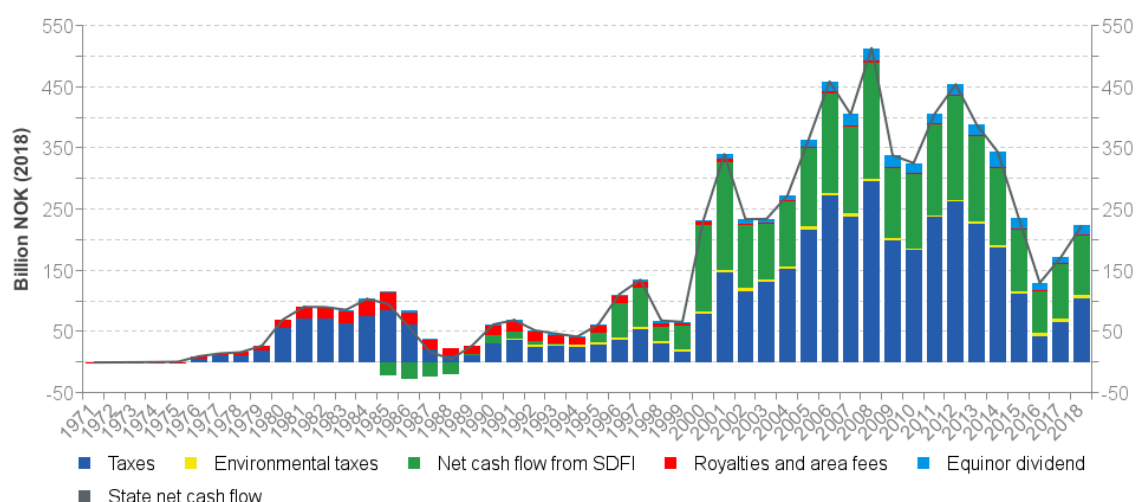


Figure 18 The net government cash flow from petroleum activities 1971 to 2018.

Source: “The Net government cashflow from Petroleum Activities, 1971-2018”, Norwegian Petroleum, 16 May 2018 (available at <https://www.norskpetroleum.no/en/economy/governments-revenues/>).

³⁶⁴ *Lov om skattlegging av undersjøiske petroleumforekomster mv. (petroleumsskatteloven)*, Finansdepartementet, 13 June 1975, last amended 19 December 2017 (available at <https://lovdata.no/dokument/NL/lov/1975-06-13-35?q=petroleum%20skatt>, English version available at <https://www.regjeringen.no/en/topics/the-economy/taxes-and-duties/Act-of-13-June-1975-No-35-relating-to-t/id497635/>).

³⁶⁵ Raaen, supra note 140, 31.

³⁶⁶ Cf *ibid.*

“Overview”, *Oil & Gas Authority* (available at <https://www.ogauthority.co.uk/exploration-production/taxation/overview/>).

³⁶⁷ “The Petroleum Tax System”, *Norwegian Petroleum*, 16 May 2018 (available at <https://www.norskpetroleum.no/en/economy/petroleum-tax/>).

³⁶⁸ “The Government’s Revenues”, *Norwegian Petroleum*, 16 May 2018 (available at <https://www.norskpetroleum.no/en/economy/governments-revenues/>).

The Svalbard Treaty and the Exploitation of Non-Living Resources

Should the Svalbard Treaty and thereby its tax regime be made applicable to the Svalbard shelf, the Norwegian state would lose a large income source, while the companies would be able to create way more profit, because the company tax on Svalbard is 16% and no special tax on petroleum applies.³⁶⁹ The only additional duty the companies would need to pay is laid down in Art. 8 of the Svalbard Treaty.

*“So far, particularly, as the exportation of minerals is concerned, the Norwegian Government shall have the right to levy an export duty which shall not exceed 1 % of the maximum value of the minerals exported up to 100.000 tons, and beyond that quantity the duty will be proportionately diminished”.*³⁷⁰

As the Mining Code applies both in the territorial waters and on the exploration of oil, it would be applicable in case of exploration on the continental shelf.

In 2017, the export duty was:

1,0%	Of the maximum value of the first 100,000 tons
0,9%	Of the maximum value of the next 200,000 tons
0,8%	Of the maximum value of the next 300,000 tons
0,7%	Of the maximum value of the next 400,000 tons
0,6%	Of the maximum value of the next 500,000 tons
0,5%	Of the maximum value of the next 600,000 tons
0,4%	Of the maximum value of the next 700,000 tons
0,3%	Of the maximum value of the next 800,000 tons
0,2%	Of the maximum value of the next 900,000 tons
0,1%	Of the maximum value of the next 1,000,000 tons

Table 1 Export Duty on mineral exported from Svalbard in 2017.

Source: Utenriks- og forsvarskomiteen, *Innstilling fra utenriks- og forsvarskomiteen om Svalbardbudsjettet 2017, 2016/2017* (available at <https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Innstillinger/Stortinget/2016-2017/inns-201617-017s/?all=true>).

³⁶⁹ The tax rate for Svalbard is redefined each year by the Storting:

Lov om skatt til Svalbard (Svalbardskatteloven), Finansdepartementet, 29 November 1996, last amended 01 January 2017 (available at <https://lovdata.no/dokument/NL/lov/1996-11-29-68>).

The company tax rates for 2018 can be found here:

Vedtak om formues- og inntektsskatt til Svalbard for inntektsåret 2018, Justis- og beredskapsdepartementet, 14 December 2017 (available at <https://lovdata.no/dokument/STV/forskrift/2017-12-14-2282?q=Vedtak%20om%20formues-%20og%20inntektsskatt>), para. 3(c).

³⁷⁰ Svalbard Treaty Art. 8.

Summing up, the large quantity of potential exploitable resources on the shelf around Svalbard as well as the favorable tax system, would be highly beneficial for companies in case that the area would be opened for petroleum exploration and Norway would accept that the Svalbard Treaty applies. Of course, the companies would need to originate from a signatory state. In addition, it would be most beneficial for the company if it would be located on and managed of Svalbard, based on the Svalbard Taxes Act.³⁷¹ As Norway is not allowed to claim higher taxes than it needs to administer the archipelago based on Art. 8 of the Treaty, the country cannot raise the tax rate in case that a profitable petroleum industry should be established. This scenario would decrease Norway's potential revenue stream drastically on the shelf around Svalbard.

7.2.3 Snow Crabs

As shown, the ownership of the continental shelf around Svalbard has been a sensitive issue over the past decades. It seems like the Norwegian government has tried to be quiet and hoping that nothing would happen.³⁷² Essentially, Norway has avoided to rock the boat and wished that the Norwegian management of the region would change into a not questioned matter of fact over time. "Because if a country has managed an area for 70-100 years, it grows into a kind of prescriptive rights and a more established situation – and then comes the snow crab and changes everything".³⁷³ Snow crabs are a species new to the Barents Sea, the first one was discovered in 1996 and since 2003 they have been a regular bycatch in the Central and Northern Barents Sea. By time, the species will also spread into the waters around Svalbard and Franz-Josef-Land. It is expected that the snow crab harvesting will exceed cod fisheries with a catch value of 1 to 4 billion NOK by 2020.³⁷⁴ The main issue behind snow crab fishing is that crab stocks are not the same as fish stocks in classification terms. In contrast, they are classified as a sedentary species living on the seafloor, so a resource belonging to the shelf, as oil, gas and minerals.³⁷⁵ Although Norway rejects any connection between a potential oil rush and snow crab harvesting, especially because the

³⁷¹ *Lov om skatt til Svalbard (Svalbardskatteloven)*, Finansdepartementet, 29 November 1996, last amended 01 January 2017 (available at <https://lovdata.no/dokument/NL/lov/1996-11-29-68>), paras. 2(3) and 2(4).

³⁷² Fisheries researcher Harald Sakarias Brøving Hansen at the Fridtjof Nansen Institute, cited in Glen Jeffries, "Svalbard's Snow Crabs: a Pincer Proxy for Arctic Oil", *Hakai Magazine*, 12 April 2017 (available at <https://www.hakaimagazine.com/news/svalbards-snow-crabs-pincer-proxy-arctic-oil/>).

³⁷³ Christine Karijord, "Norway risks having to share Svalbard resources with the EU", *High North News*, 08 November 2017 (available at <http://www.highnorthnews.com/norway-risks-having-to-share-svalbard-resources-with-the-eu/>).

³⁷⁴ Elizabeth Nyman, Rachel Tiller, "The Clear and Present Danger to the Norwegian Sovereignty of the Svalbard Fisheries Protection Zone: Enter the Snow Crab", *Ocean & Coastal Management*, Vol. 137 (2017), 27.

³⁷⁵ "The natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil." UNCLOS Art. 77(4).

area is not opened for petroleum activities³⁷⁶, allowing the treaty parties to harvest crabs on Svalbard's shelf could later be used as a precedent for the extraction of hydrocarbons. Additionally, it would function as an indirect acceptance by Norway that the shelf, legally and not only geographically, belongs to Svalbard.

Norway will not be able to use a concept as in the FPZ, because there has been no traditional snow crab harvesting in the area. Thus, either the kingdom allows all treaty parties to harvest in that region, it prohibits any crab fishing to avoid any conflict, or it defends its argument that the shelf around Svalbard is a continuation of the mainland shelf. In the latter case, Norway as the coastal state would be allowed to decide who can harvest crabs, but it will most likely lead to a serious conflict with the Treaty parties. Yet, the conflict has already started; the European Commission issued a statement allowing 16 fishing vessels to harvest crabs around Svalbard in 2013.³⁷⁷ Following the Commission's action, Norway issued a ban to suspend all harvest in the EEZ and FPZ in 2015 until implementation of administrative standards had taken place.³⁷⁸ At the same time, Norway granted exceptional licenses to 50 Norwegian and Russian trawlers, to prevent the crash of the just emerging Norwegian crab fishing industry. Especially this unequal treatment has given rise to the dispute. The country has based its decision on the argument that Norway, as the coastal state, has the sovereign rights to exploit resources on the shelf without any prior consultations of foreign powers.³⁷⁹

In 2017, a Latvian vessel, under an EU license was arrested and fined after fishing for crabs in the Loop Hole, leading to serious protest from EU officials and the fishery lobby.³⁸⁰ The case against the ship's captain and owner has taken all its way up to Norway's Supreme Court, after the Øst-Finnmark District Court actually concluded that the Latvian trawler's activities cannot be punished as they took place under a permit issued by the Lithuanian

³⁷⁶ Kait Bolongaro, "Oil lurks beneath EU-Norway snow crab clash", *Politico*, 18 June 2017 (available at <https://www.politico.eu/article/of-crustaceans-and-oil-the-case-of-the-snow-crab-on-svalbard/>).

³⁷⁷ "EU and Norway in heated conflict over Svalbard snow crab", *Fridtjof Nansen Institute*, 25 January 2017 (available at <https://www.fni.no/news/eu-and-norway-in-heated-conflict-over-svalbard-snow-crab-article1246-330.html>).

³⁷⁸ *Forskrift om forbud mot fangst av snøkrabbe*, Nærings- og fiskeridepartementet, 01 January 2015, last amended 24 May 2018 (available at <https://lovdata.no/dokument/SF/forskrift/2014-12-19-1836?q=sn%C3%B8krabbe>). See also *Forskrift om endring i forskrift om forbud mot fangst av snøkrabbe*, Nærings- og fiskeridepartementet, 24 May 2018 (available at <https://lovdata.no/dokument/LTI/forskrift/2018-05-24-761>).

³⁷⁹ Rossi, *supra* note 45, 1501.

Royal Norwegian Ministry of Trade, Industry and Fisheries, "Complaint against Norway concerning the prohibition of snow crab catching – Case no. 79718", letter to the EFTA Surveillance Authority, 13 January 2017 (available at https://www.stortinget.no/globalassets/pdf/eu_open/ESA_prohibition_snow_crab_catching.pdf).

Troy Bouffard, Morgane Fert-Malka, "The Unique Legal Status of an Arctic Archipelago", *World Policy Blog*, 06 December 2017 (available at <http://www.worldpolicy.org/blog/2017/12/06/eyes-svalbard>).

Andreas Raspotnik, Andreas Østhagen, "Crabtacular! Snow Crabs on their March from Svalbard to Brussels", *The Arctic Institute*, 24 April 2018 (available at <https://www.thearcticinstitute.org/crabtacular-snow-crabs-march-svalbard-brussels/>).

³⁸⁰ Atle Staalesen, "Norway takes tough line against EU in Svalbard waters", *The Barents Observer*, 25 January 2017 (available at <https://thebarentsobserver.com/en/industry-and-energy/2017/01/norway-takes-tough-line-against-eu-svalbard-waters>).

authorities.³⁸¹ Norway's prohibition of snow crab harvesting would be against its obligations under the NEAFC Convention (the Convention on Future Multilateral Cooperation in Northeast Atlantic Fisheries³⁸²), which includes sedentary species³⁸³ and the NEAFC Scheme of Control and Enforcement³⁸⁴, according to the District Court. Norway has ratified both, together with the EU, Russia, Iceland and Denmark. In the Convention's preamble, it is stated that the treaty parties recognize UNCLOS, so it can be argued that Norway has given consent to fishing by party members of the NEAFC by participating in it.

The case was appealed to the Hålogaland Court of Appeal which held that the District Court's judgement had been incorrect. "The reason given was that the NEAFC Convention does not restrict the rights granted to the State Parties under [UNCLOS]. It gives Norway an exclusive right to the resources on the continental shelf. Hence, there is no conflict between the Norwegian rules and the NEAFC Convention".³⁸⁵ In front of the Appeals Court, the non-discrimination provision of the Svalbard Treaty has been used as basis for argumentation as well, by both the accused and the claimant.³⁸⁶ However, the Court did not accept the argument by the accused that prohibiting any snow crab catching in the waters around Svalbard would be discriminating based on nationality. Instead, the Norwegian argument that a proper management regime should be established prior to opening the waters for crab harvesting is in line with Art. 2 of the Svalbard Treaty. Furthermore, the Court concluded that the dispensation that has been granted to some Norwegian and Russian trawlers has not been against the Svalbard Treaty, as Norway had not been favoring its own nationals. Yet, this argument is incorrect, as Art. 2 prohibits any "exemption, privilege or favor whatsoever,

³⁸¹ *HR-2017-2257-A*, (case no. 2017/1570), criminal case, appeal against judgment, Judgement, Supreme Court of Norway, 29 November 2017 (available at <https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2017-2257-a-snow-crab.pdf>), para 8.

Den offentlige påtalemyndighet v. Arctic Fishing and Sergej Triskin, Judgement, Øst-Finnmark Tingrett, 24 January 2017 (available at https://www.stortinget.no/globalassets/pdf/eu_open/Snokrabbe_16_127201MED_OSFI_ulovlig_fiske.pdf).

Irene Dahl, Elise Johansen, "The Norwegian snow crab regime and foreign vessels – commentary on the Juras Vilkas decision of the Øst-Finnmark District Court", *JCLOS Blog*, 28 March 2017 (available at <http://site.uit.no/jclos/files/2017/03/The-Norwegian-snow-crab-regime-and-foreign-vessels-%E2%80%93-a-commentary-on-the-Juras-Vilkas-decision-of-the-%C3%98st-Finnmark-District-Court-.pdf>).

³⁸² *Convention on Future Multilateral Cooperation in Northeast Atlantic Fisheries*, London, 18 November 1980, *Official Journal of the European Union*, L227, 12 August 1981 (available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:1981:227:TOC>), 22. Hereinafter NEAFC Convention.

³⁸³ NEAFC Convention Art. 1b.

³⁸⁴ *Regulation (EU) No 1236/2010 of the European Parliament and of the Council of 15 December 2010 laying down a scheme of control and enforcement applicable in the area covered by the Convention on future multilateral cooperation in the North-East Atlantic fisheries and repealing Council Regulation (EC) No 2791/1999*, 15 December 2010, *Official Journal of the European Union*, L348, 31 December 2010 (available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2010:348:TOC>), 17. Hereinafter NEAFC Scheme of Control and Enforcement.

³⁸⁵ *HR-2017-2257-A*, (case no. 2017/1570), criminal case, appeal against judgment, Judgement, Supreme Court of Norway, 29 November 2017 (available at <https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2017-2257-a-snow-crab.pdf>), para 7

³⁸⁶ *Siktet A v. Påtalemyndighet Troms og Finnmark statsadvokatembeter*, Judgment, Hålogaland lagmannsrett, 07 February 2018 (available at http://www.jus.uio.no/nifs/forskning/arrangementer/gjesteforelesninger-seminarer/sjoret/2018/snokrabbe-lagmannsrett_senator.pdf), 4f.

direct or indirect to the advantage” of the nationals of all High Contracting Parties. Even though, Norway is not favoring its own nationals alone, it is still granting an exemption without proper reasoning. It cannot use the argument of historic economic dependence, like it was done with the fisheries, because snow crabs are new to the region. However, the Court did not find it necessary to determine whether Norway’s regulations have been a breach to the Svalbard Treaty or to even determine the geographical scope of the Svalbard Treaty. The trawler had no license granted by Norway and the Svalbard Treaty has not the power to swipe away a country’s obligation and right to regulate its own resources.³⁸⁷ According to the Court, Norway has the right and obligation under both UNCLOS and the Svalbard Treaty to manage the resources in the waters adjacent of Svalbard. Even if the shelf would fall under the framework of the Svalbard Treaty, it would still be up to Norway to establish quota, tool requirements, issue licenses and access the overall sustainability.³⁸⁸ Although this is right, it is still not reasonable how a dispensation can be granted covering only two nationalities without that being a breach of Norway’s obligations under the Svalbard Treaty. The Court did not present any argument that could exclude any direct or indirect discrimination based on nationality. Once again, a Norwegian court has circumvented to make a clear decision on the geographical applicability of the Svalbard Treaty.³⁸⁹

The Latvian shipping company appealed the judgment to the Supreme Court, stating that snow crab catching is covered by the NEAFC, as the catching took place on the shelf outside the EEZ. “Then, it follows from the NEAFC Scheme Article 4 that the vessel’s flag State issues the catch permits, which Norway is obliged to respect”.³⁹⁰ The Supreme Court ruled in late 2017 that Norway is allowed to exercise coastal state jurisdiction on the shelf in the Loop Hole and therefore the only state that can issue licenses for crab catching. “The zone is demarcated by the Norwegian and the Russian economic zones and by the fisheries protection zone around Svalbard. The western part of the Loophole is on the Norwegian side of the maritime demarcation line towards Russia, drawn in accordance with the demarcation line agreement between Norway and Russia from 2010. That is where the catch was

³⁸⁷ *Siktet A v. Påtalemyndighet Troms og Finnmark statsadvokatembeter*, Judgment, Hålogaland lagmannsrett, 07 February 2018 (available at http://www.jus.uio.no/nifs/forskning/arrangementer/gjesteforelesninger-seminarer/sjorett/2018/snokrabbe-lagmannsrett_senator.pdf), 8f.

³⁸⁸ Christine Karijord, “The EU awards new licenses for snow crab catching – Norway refused”, *High North News*, 14 December 2017 (available at <http://www.highnorthnews.com/the-eu-awards-new-licenses-for-snow-crab-catching-norway-refuses/>).

³⁸⁹ Other cases are Bjørgulfur and Ottar Birting, Olayar and Olaberri, The Kiel Case. Find a short summary of each in Unknown author, *supra* note 47, 31-36.

See also Geir Ulfstein, “Spitsbergen/Svalbard”, *Oxford Public International Law*, January 2008 (available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1356>).

³⁹⁰ *HR-2017-2257-A*, (case no. 2017/1570), *criminal case, appeal against judgment*, Judgement, Supreme Court of Norway, 29 November 2017 (available at <https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2017-2257-a-snow-crab.pdf>), para 8.

taken.”³⁹¹ Even though the waters above the shelf are regarded as international waters, the shelf underneath it forms a prolongation of the Norwegian continental shelf.³⁹² The coastal state exercises sovereign rights over the shelf to exploit and explore its natural resources based on Art. 77(1) UNCLOS. Snow crabs are covered by Art. 77 UNCLOS that beside of mineral and other non-living resources includes “living organisms belonging to sedentary species, that is to say, organism which, at the harvestable state, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil”.³⁹³ This Court decision has been the first time that the Norwegian highest court has made a ruling on Norwegian sovereignty in the area and another time that a Norwegian court has avoided to determine the applicability of the Svalbard Treaty.³⁹⁴

This has only been a short summary of the events, but any development in this case and in similar future cases must be closely monitored, as great impact on the question of the applicability of the Svalbard Treaty can be expected. With the snow crabs being new to the area, any regulations based on historic harvesting will not be applicable, so Norway needs to find another way in case it wants to exclude others than Norwegians from harvesting. While simply extending the Svalbard Treaty to cover snow crabs would be satisfying most parties, this action would have far reaching consequences. Firstly, it would implicitly recognize the existence of a shelf independent from mainland Norway, thereby contradicting the Norwegian argumentation. Secondly, it would undermine Norway’s interpretation of the Svalbard Treaty and pave the way for the extension of the rights of the treaty parties, both for fishing, harvesting of sedentary species and exploration of hydrocarbons and minerals. Another possibility would be to separate the snow crab regime as it has been done with the fishing stocks in the FPZ. Though, despite of the effort that needed to be taken, both timewise and moneywise, the treaty parties are most likely not going to accept it. The third option would be to continue further down the path Norway is taking right now with defending its rights as the coastal state and deny any other states the right to harvest snow crabs on its shelf. Here, it is going to be interesting, whether the Norwegian courts will continue with their avoidance behavior on the settlement of the scope of the Svalbard Treaty. From a researcher's perspective, it will be exciting to see whether Latvia is going to drag Norway in front of an international court to determine the question once and for all. In addition, the EU has

³⁹¹ HR-2017-2257-A, (case no. 2017/1570), *criminal case, appeal against judgment*, Judgement, Supreme Court of Norway, 29 November 2017 (available at <https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2017-2257-a-snow-crab.pdf>), para 16.

³⁹² CLCS Recommendation, 7.

³⁹³ UNCLOS Art. 77(4).

³⁹⁴ Eirik Lieungh, “HØYESTERETT: Fangst av snøkrabbe i Smutthullet kan straffes”, *Norsk Riskringkasting AS*, 30 November 2017 (available at https://www.nrk.no/finnmark/hoyesterett_fangst-av-snokrabbe-i-smutthullet-kan-straffes-1.13803042).

See also Christine Karjord, “Snow Crab Verdict as Expected”, *High North News*, 05 December 2017 (available at <http://www.highnorthnews.com/snow-crab-verdict-as-expected/>).

decided, despite of the recent events, to continue to issue licenses for the area in 2018 as well.³⁹⁵ This tactical move has probably been made to uphold the EU's position on the Svalbard Treaty and the snow crab dispute. The EU thereby keeps the debate on Svalbard, and the Arctic in general, on the table, thus the snow crab dispute might have been the trigger for a wider discussion on Arctic governance.

³⁹⁵ Christine Karijord, "The EU awards new licenses for snow crab catching – Norway refused", *High North News*, 14 December 2017 (available at <http://www.highnorthnews.com/the-eu-awards-new-licenses-for-snow-crab-catching-norway-refuses/>).

7.3 CONCLUSION

After having explained in the previous chapter that the Svalbard Treaty and the accompanying Mining Code should apply to all areas under Norwegian jurisdiction that originate from Svalbard, this chapter was meant to take a closer look at the reality. Even though the Mining Code covers exploration for mineral resources, including hydrocarbons, both on land and in the water, Norway applies national Norwegian legislation on the shelf. Consequently, the treaty parties are not included in the process of awarding licenses on the shelf around the archipelago. Currently, Norway has not tried to explore and exploit natural resources of the shelf around Svalbard. Some scientific studies have taken place since the early 2000s, both by Norway and Russia, as scientific research is covered by the Svalbard Treaty. The Russian studies are considered to be on the edge of what can be acceptable by Norway, but Norway has refrained from acting, as strict enforcement of Norwegian law may escalate the conflict with Russia. Although no licenses have been granted yet near Svalbard, the 23rd licensing round in 2016 included some blocks close to Bear Island and located half a degree in the Svalbard Box. The actions led to serious protest by the international community and especially Russia. Although, the Svalbard Box does not serve any judicial purposes³⁹⁶, Norway has sent a powerful political signal, underlining its statement that it is Norway alone, as the coastal state, that can grant licenses on the shelf. Should Norway ever accept that Svalbard generates its own continental shelf, which is legally distinct from the mainland, those exploration blocks near Bear Island are most likely going to be located on the Svalbard shelf and thereby potentially under the framework of the Svalbard Treaty. This would terminate Norway's right to allocate licenses unilaterally. Instead, all signatory states would have the right to exploit resources on the shelf based on the Treaty and the Mining Code. Besides losing the right to unilaterally decide on the resources on the shelf, Norway would also lose income due to the financial provisions of the Svalbard Treaty on taxes. Right now, both state-owned Statoil and tax revenues generate a high net government cash flow from petroleum activities, but the tax restrictions would not allow Norway to introduce higher taxes. This concept makes it very attractive for companies to exploit on the shelf around Svalbard should it ever be included in the Svalbard Treaty.

Currently, the area around Svalbard has not been opened for drilling yet but should Norway ever do so without including the signatory parties to the Svalbard Treaty, serious conflict can be expected. Norway will not be able to restrict exploitation of mineral resources based on historic economic activities, to use a requirement that is not discriminating based on nationality, because no country has been depended on drilling in that area in the past. However, even opening the shelf for all treaty parties could lead to conflict between states

³⁹⁶ Anderson, *supra* note 64, 375.

caused by a run for resources and to serious environmental problems. An oil spill in the Arctic will have severe consequences for the region and the rest of the world. The ability to respond to emergencies and oil spills is very limited and further complicated by extreme weather conditions. Oil could become trapped under the sea ice, making it very hard to remove and the oil can actually get transported with the ice for considerable distances.³⁹⁷ “The slow rate of biological degradation of oil at near-zero temperatures has led biologists to suggest that oil spills in the [Arctic] might remain there for periods of 50 years or more. The dynamics of the ice pack combined with the long life of the oil could allow an oil spill to have a major effect on the albedo³⁹⁸ in certain regions of the Arctic.”³⁹⁹

Maybe Norway would have been able to avoid further discussions on the issue and could have succeeded to transform its management regime into a *de facto* regime, but the appearance of the snow crab destroyed all hopes. With this sedentary species being closer to mineral resources than to fisheries in classification terms, any rules on harvesting the crab can be used as precedents for the exploration of non-living resources. Even though Norway tried to avoid any conflict on the snow crab, the struggle already started in 2013 when the EU issued crab licenses for some of its member states’ trawlers. Norway introduced a ban on crab fishing in 2015 until a proper management regime would have been established but at the same time the country granted exceptional licenses for some Norwegian and Russian trawlers. Would Norway have refrained from this unequal treatment, it would probably had been able to prevent any escalation of the conflict, but all this led to the arrestment of a Latvian vessel under an EU license in 2017 that was fishing in the Loop Hole. The case ended in front of the Norwegian Supreme Court that ruled that Norway would have coastal state jurisdiction based on Art. 77 UNCLOS over the living and non-living resources on the Norwegian shelf in the Loop Hole. It denies any applicability of the non-discrimination

³⁹⁷ “How would offshore oil and gas drilling in the Arctic impact wildlife?”, *World Wildlife Fund*, (available at <https://www.worldwildlife.org/stories/how-would-offshore-oil-and-gas-drilling-in-the-arctic-impact-wildlife>). John Vidal, “Why an oil spill in Arctic waters would be devastating”, *The Guardian*, 22 April 2011 (available at <https://www.theguardian.com/world/2011/apr/22/oil-spill-arctic-analysis>).

“Oil Spill Preparedness, Prevention and Response”, PAME (Protection of the Arctic Marine Environment) (available at <https://pame.is/index.php/projects/arctic-marine-shipping/amsa/142-projects/offshore-oil-and-gas/mre/mres-by-topic/laws-regulations-notice-rules-guidance-and-management/oil-spill-preparedness-prevention-and-response>).

“Resource Exploration and Development”, PAME (Protection of the Arctic Marine Environment) (available at <https://pame.is/index.php/projects/resource-exploration-and-development>).

“Marine Environmental Response (MER) Expert Group”, EPPR (Emergency Prevention, Preparedness and Response) (available at <http://www.eppr.org/mer/>).

³⁹⁸ The Albedo is the ability of a surface to reflect sunlight. Light-colored surfaces can reflect larger parts of the sunrays back into the atmosphere, while dark surfaces absorb the sun rays. The ice in the arctic has a high albedo, so it can reflect larger parts of the sunrays than the ocean can. The ocean absorbs the sunrays and gets heated up, leading to more ice smelting and more areas becoming ice free and create more dark surfaces. It’s a self-reinforcing effect.

Cf. “Albedo effect”, *Norwegian Polar Institute* (available at <http://www.npolar.no/en/facts/albedo-effect.html>).

³⁹⁹ Karl Magnus Eger, “Effects of Oil Spills in Arctic Waters”, *Arctic-search.com*, 2010 (available at <http://www.arctic-search.com/Effects+of+Oil+Spills+in+Arctic+Waters>).

criterion of the Svalbard Treaty nor any influence of the NEAFC Convention, as the shelf would be under Norwegian coastal state sovereignty. Both the Appeals Court and the Supreme Court concluded that the exemption granted to the Norwegian and Russian trawlers does not form a breach of the Svalbard Treaty, as those exemptions were not granted based on nationality. Therefore, it would not be necessary to determine the geographical scope of the Svalbard Treaty. Nevertheless, it is still unclear on what other criteria, if not nationality, those exceptions were granted. Following several similar incidents on fisheries in the FPZ in the past, a Norwegian court has again avoided to make a clear ruling on the geographical applicability of the Svalbard Treaty. Future cases must be monitored closely, considering the importance for both hydrocarbon exploration in general and the determination of the scope of the Svalbard Treaty in particular. Norway will need to find a sustainable way to deal with the matter in the future, especially because the EU has chosen to issue new licenses for 2018. In addition, it is going to be of interest whether Latvia will forward the case to an international tribunal to settle the case once and for all. All future actions will secure the international attention on the region and will maybe even lead to a discussion on Arctic governance in general.

8 CONCLUSION & FUTURE OUTLOOK

Treaties are made to solve problems and to prevent future issues, but this thesis has shown how much theory and reality can be apart. While the members of the Spitsbergen Commission wanted to solve the problem about Svalbard once and for all, they only succeeded for under half a century. The codification of the later developed Law of the Sea into the Conventions⁴⁰⁰ and finally into UNCLOS led to unexpected problems regarding Svalbard. Suddenly, the dispute arose whether the Svalbard Treaty should also be applicable to these newly founded maritime areas. Faced with the influence of global warming and sea ice retreat, making fish stocks moving and revealing unknown natural resources below the ice, the dispute have reached a stalemate nearly 50 years ago. While Norway wants to limit the rights of the treaty parties to the minimum, the others long for the widest access possible, because Svalbard is their way into the Arctic and its resources. The aim of this thesis was to solve the disputes on the Svalbard Treaty on the extend of Norway's sovereign rights in the maritime areas beyond the territorial sea and the geographical scope of the treaty parties' rights. The answers found should settle the disagreement on whether Norway can claim sovereignty over maritime zones and the shelf adjacent of Svalbard and whether the treaty provisions should apply in these areas as well. With the fisheries in the region having gained much attention⁴⁰¹ compared to the exploration of mineral resources on the shelf, this thesis aimed to answer the question on the exploitation of non-living resources on the continental shelf. There is a certain degree of lack of literature on the field as well as access to resources. With only a very limited number of authors having published on Svalbard in general and even less on the exploitation of non-living resources in particular, it was necessary to draw parallels and conclusions between texts on the overall topic of Svalbard and the framework of the continental shelf in general. Since only one author is supporting the Norwegian interpretation, it can be hard to have an objective view on the

⁴⁰⁰ *Convention on the Territorial Sea and Contiguous Zone*, Geneva, 29 April 1958, *United Nations Treaty Series*, Vol. 516, 205 (available at https://www.gc.noaa.gov/documents/8_1_1958_territorial_sea.pdf).

Convention on the High Seas, Geneva, 29 April 1958, *United Nations Treaty Series*, Vol. 450, 11, 82 (available at https://www.gc.noaa.gov/documents/8_1_1958_high_seas.pdf).

Convention on the Continental Shelf, Geneva, 29 April 1958, *United Nations Treaty Series*, Vol. 499, 311 (available at https://www.gc.noaa.gov/documents/8_1_1958_continental_shelf.pdf).

Convention on Fisheries and Conservation of the Living Resources of the High Seas, Geneva, 29 April 1958, *United Nations Treaty Series*, Vol. 559, 285 (available at https://www.gc.noaa.gov/documents/8_1_1958_fishing.pdf).

⁴⁰¹ For example:

Wolf, *supra* note 17.

Henriksen, Pedersen, *supra* note 109.

Bailes, *supra* note 158.

Manússon, *supra* note 270.

Rossi, *supra* note 45.

Nyman, Tiller, *supra* note 212.

Yerkes, Andrew, "Whose Fish? Looking at Svalbard's Fisheries Protection Zone", *Polar Connection*, 04 December 2016 (available at <http://polarconnection.org/svalbard-fisheries-protection-zone/>)

topic, but with the help of the Vienna Convention and UNCLOS it was possible to analyze the Svalbard Treaty and combine the findings with the reality on the shelf. However, all these obstacles have helped to conduct an independent and objective research on the topic, leading to individual conclusions.

After interpreting the Svalbard Treaty based on the principles of treaty interpretation codified in the Vienna Convention, it can clearly be said that Norway has the right to establish maritime zones due to its sovereignty over Svalbard. This also includes sovereignty over the continental shelf originating from the archipelago. Even though the Svalbard Treaty does not include any rules on maritime areas beyond the territorial sea, because they did not exist under the time of drafting, Norway still has the right to claim them. Over the past 100 years, the rights of coastal states beyond their territorial sea have increased, both in the water and on the seabed. In the beginning of the 20th century, the coastal state only had sovereign rights in the territorial sea, with all areas beyond being considered as high seas. With the development of new international law and UNCLOS, the coastal state has gained more rights in the waters adjacent its coast.⁴⁰² The right to sovereignty originates in the coastal state's sovereignty over land⁴⁰³, which Norway has been exercising since the 1920s. Although some states, like Russia, have been neglecting Norway's right to establish these zones in the past, this argument has not been brought up in the past decade. Considering Norway's successful, and unquestioned, submission to the CLCS to limit the outer shelf beyond Svalbard as well as the bilateral delimitation agreements covering regions adjacent of Svalbard, underline that it is now accepted that Norway may claim these zones.⁴⁰⁴ Nevertheless, the big discrepancy between Norwegian state policy and state action is hindering Norway in gaining further acceptance by the international community. For instance, while Norway claims that it exercises full sovereignty over Svalbard and adjacent maritime areas, it is strongly influenced by the interests of other states. Additionally, when Norway tried to establish maritime zones

⁴⁰² See UNCLOS Part II, V, VI.

⁴⁰³ *Fisheries Case* (United Kingdom v. Norway), Judgment, International Court of Justice, 18 December 1951 (available at <http://www.icj-cij.org/files/case-related/5/005-19511218-JUD-01-00-EN.pdf>), 113.

North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark, Federal Republic of Germany v. Netherlands), Judgment, International Court of Justice, 20 February 1969 (available at <http://www.icj-cij.org/files/case-related/51/051-19690220-JUD-01-00-EN.pdf>), paras. 19, 23, 52.

Aegean Sea Continental Shelf Case (Greece v. Turkey), Judgment, International Court of Justice, 19 December 1978 (available at <http://www.icj-cij.org/files/case-related/62/062-19781219-JUD-01-00-EN.pdf>), para. 36.

Case concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta) Judgment, International Court of Justice, 03 June 1985 (available at <http://www.icj-cij.org/files/case-related/68/068-19850603-JUD-01-00-EN.pdf>), 41.

Case Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), Judgment, International Court of Justice, 24 February 1982 (available at <http://www.icj-cij.org/files/case-related/63/063-19820224-JUD-01-00-EN.pdf>), para. 73.

Grisbådarna Case (Norway v. Sweden), Award of the Tribunal, Permanent Court of Arbitration, 23 October 1909 (available at <https://pcacases.com/web/sendAttach/508>), 3f.

⁴⁰⁴ "under general international law, inaction or silence of other States may be interpreted as acquiescence in or tacit recognition of the legal positions of a state" in Wolf, *supra* note 17, 20.

adjacent of Svalbard, it steadily denied that Svalbard could generate a continental shelf. Only recently, the country has started to accept that Svalbard generates a shelf, but this shelf is defined as a prolongation of the continental shelf originating from mainland Norway.⁴⁰⁵ However, it has been proved that Svalbard generates its own continental shelf, though Norway still tries to neglect this in its official statements. Simply said, “there cannot be [any maritime zones] without a corresponding continental shelf”⁴⁰⁶ and islands can generate a shelf based on UNCLOS.⁴⁰⁷ In addition, with help of the CLCS recommendation, an outer shelf beyond Svalbard has been established, based on basepoints deriving from Svalbard.⁴⁰⁸ Yet, following the Norwegian argument that the archipelago does not generate its own continental shelf, but simply ‘sits’ on the mainland’s, this would not be possible, because it would be necessary to use basepoints originating from the mainland’s coast, the coast where the shelf originates from.⁴⁰⁹

Having shown that Svalbard can generate maritime zones and a continental shelf which can be claimed under Norwegian sovereignty, it is important to shift the focus to the second aspect of the dispute: which legal regime should govern these areas? Norway tries to protect its interests in the region by denying the application of the treaty provisions. The country argues in favor of a strict interpretation of the Treaty, only applying it to the areas especially mentioned in it. As the concept of other maritime zones than the territorial sea was not known in 1920, the Treaty does not feature them.⁴¹⁰ This has been strongly opposed by the international community, because Norway’s sovereignty has been established under certain conditions in a kind of package deal. The treaty parties gave up their rights under the *terra nullius* regime and Norway received sovereignty, in return for certain economic rights for the

⁴⁰⁵ Rolf Einar Fife, “Forkerettslige spørsmål i tilknytning til Svalbard”, *Regjeringen.no*, 12 december 2014 (available at <http://www.regjeringen.no/no/dep/ud/id833/>), 18f.

⁴⁰⁶ *Case Concerning the Continental Shelf* (Tunisia v. Libyan Arab Jamahiriya), Judgment, International Court of Justice, 24 February 1982 (available at <http://www.icj-cij.org/files/case-related/63/063-19820224-JUD-01-00-EN.pdf>), para. 34.

⁴⁰⁷ UNCLOS Art. 121.

⁴⁰⁸ CLCS Recommendation 7, 15, 29.

⁴⁰⁹ Henriksen, Pedersen, *supra* note 109, 144.

Resolusjon om norsk statshøyhet over visse undersjøiske områder, Olje- og energidepartementet, 31 May 1963 (available at <https://lovdata.no/dokument/SF/forskrift/1963-05-31-1?q=31%20mai%201963>, English version available at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_1963_Decree.pdf). Ministry of Justice and the Police, *Report No. 39 (1974- 1975) to the Storting in Stortingsforhandlinger*, 1974/75 Vol. 119 Nr. 3c (available at <https://www.nb.no/statsmaktene/nb/45615976d5e5bff65500f7f8bb7fcf87?index=2#927>) UNCLOS Art. 76.

⁴¹⁰ Anderson, *supra* note 64, 379.

“Article 1 of the Treaty grants Norway the full and absolute sovereignty over the archipelago, and the Treaty does not provide for any general restriction of Norway’s sovereignty. Therefore, unless otherwise specifically provided in the Treaty, Norway has complete jurisdiction in accordance with the general rules of public international law” Ministry of Justice and the Police, *Report No. 22 (2008-2009) to the Storting – Svalbard* (available at https://www.regjeringen.no/contentassets/e70b04df32ad45f483f2619939c5636d/en-gb/pdfs/stm200820090022000en_pdfs.pdf), Sec. 4.1.1.

signatory states.⁴¹¹ This means that the sovereignty and the rights of the treaty parties are intertwined and cannot be torn apart, which has clearly been proven while interpreting the Treaty using the Vienna Convention.⁴¹² This balanced result should secure the future peaceful and fruitful development of the archipelago, as stated in the preamble of the Svalbard Treaty.⁴¹³ In the same way that Norway's right to claim sovereignty over maritime areas adjacent to Svalbard has increased over time based on developments in international law, the rights of the treaty parties have expanded as well, because the Norwegian sovereignty is combined with their rights. Thus, the same legal base that allows Norway to claim sovereignty over areas beyond the territorial sea, expands the rights of the treaty parties.

Yet, reality looks different: Norway applies a double standard by claiming sovereignty over areas not mentioned in the Treaty based on its sovereignty over Svalbard, while denying the applicability of the treaty provisions to the very same areas because they are not mentioned in the Treaty. Whereas Norway applies the Svalbard Treaty in its fisheries management in the FPZ, it steadily denies any applicability on the shelf adjacent of Svalbard. Actually, the concept of an FPZ is only used, because an EEZ would cause too much conflict and not because Norway accepts that the Treaty should apply to waters beyond the territorial sea.⁴¹⁴ Even though the Treaty and the Mining Code contain clear rules on the exploration and exploitation of mineral resources both on land and in water, national Norwegian legislation is applied on the shelf.⁴¹⁵ Subsequently, the treaty parties are not involved in exploiting the resources. Currently, the shelf around Svalbard has not further been opened for drilling but should Norway ever do so without including the treaty parties, serious conflict can be expected. Although, no licenses have been granted close to Svalbard, drilling blocks were opened in the Svalbard Box in 2016. The Box does not serve judicial purposes⁴¹⁶, but Norway has sent a powerful political signal, because should the shelf between Svalbard and continental Norway ever been delimited, those areas are most likely to be included in the Svalbard shelf. Should the Treaty be made applicable to the shelf, Norway will not be able to

⁴¹¹ Anderson, *supra* note 64, 374.

Caracciolo, *supra* note 54, 11.

⁴¹² See Chapter 6.

⁴¹³ "(...) with an equitable regime, in order to assure their development and peaceful utilization", Svalbard Treaty Preamble.

⁴¹⁴ Pedersen, *supra* note 1, 243.

⁴¹⁵ *Resolusjon om norsk statshøyhet over visse undersjøiske områder*, Olje- og energidepartementet, 31 May 1963 (available at <https://lovdata.no/dokument/SF/forskrift/1963-05-31-1?q=31%20mai%201963>, English version available at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_1963_Decree.pdf).

Bergmesteren for Svalbard, *Bergverksvirksomhet på Svalbard: lover og regler m.m.*, 3rd Edition, 2002, 16.

Mining Code Para. 2(1)

Svalbard Treaty Art. 3, 8.

Lov om petroleumsvirksomhet [petroleumsloven], Olje- og energidepartementet, 29 November 1996, last amended 01 October 2015 (available at <https://lovdata.no/dokument/NL/lov/1996-11-29-72>, English version available at <http://www.npd.no/en/Regulations/Acts/Petroleum-activities-act/>).

⁴¹⁶ Anderson, *supra* note 64, 375.

restrict mineral extraction based on historic economic activities as it has done with the fisheries. Therefore, it is going to be hard to set up limits without violating the principle of non-discrimination of the treaty. Consequently, Norway would not only lose its right to unilateral decision making but also a large income source. The tax restrictions established with Art. 8 of the Svalbard Treaty would limit Norway's ability to gain profit from hydrocarbon exploitation on the shelf. However, opening the shelf for all treaty parties could also lead to serious environmental problems, with an oil spill in the Arctic having dramatic consequences for both the region and beyond.⁴¹⁷

Probably, Norway would have been able to avoid further discussion on the topic and could have succeeded in establishing an accepted regime, but the appearance of the snow crab diminished all hopes. This sedentary species is classified closer to non-living resources hidden under the seabed than to fisheries. Consequently, any rules on harvesting the crab can be used as future precedents for the exploration of minerals. The struggle started five years ago when the EU granted licenses for crab fishing in the area, followed by the introduction of a Norwegian ban on crab fishing. However, Norway granted exceptional licenses to some of its and Russian trawlers, leading to strong disagreement with the EU.⁴¹⁸ Already one case has made all its way up to the Norwegian Supreme Court and future ones can be expected.⁴¹⁹ As any breach of the Svalbard Treaty by Norway nor any applicability of the Treaty to the region, has been denied by the Supreme Court, the geographical scope of

⁴¹⁷How would offshore oil and gas drilling in the Arctic impact wildlife?", *World Wildlife Fund*, (available at <https://www.worldwildlife.org/stories/how-would-offshore-oil-and-gas-drilling-in-the-arctic-impact-wildlife>). John Vidal, "Why an oil spill in Arctic waters would be devastating", *The Guardian*, 22 April 2011 (available at <https://www.theguardian.com/world/2011/apr/22/oil-spill-arctic-analysis>).

"Oil Spill Preparedness, Prevention and Response", PAME (Protection of the Arctic Marine Environment) (available at <https://pame.is/index.php/projects/arctic-marine-shipping/amsa/142-projects/offshore-oil-and-gas/mre/mres-by-topic/laws-regulations-notice-rules-guidance-and-management/oil-spill-preparedness-prevention-and-response>).

"Resource Exploration and Development", PAME (Protection of the Arctic Marine Environment) (available at <https://pame.is/index.php/projects/resource-exploration-and-development>).

"Marine Environmental Response (MER) Expert Group", EPPR (Emergency Prevention, Preparedness and Response) (available at <http://www.eppr.org/mer/>).

⁴¹⁸ "EU and Norway in heated conflict over Svalbard snow crab", *Fridtjof Nansen Institute*, 25 January 2017 (available at <https://www.fni.no/news/eu-and-norway-in-heated-conflict-over-svalbard-snow-crab-article1246-330.html>).

Forskrift om forbud mot fangst av snøkrabbe, Nærings- og fiskeridepartementet, 01 January 2015, last amended 24 May 2018 (available at <https://lovdata.no/dokument/SF/forskrift/2014-12-19-1836?q=sn%C3%B8krabbe>). Rossi, *supra* note 45, 1501.

Royal Norwegian Ministry of Trade, Industry and Fisheries, "Complaint against Norway concerning the prohibition of snow crab catching – Case no. 79718", letter to the EFTA Surveillance Authority, 13 January 2017 (available at https://www.stortinget.no/globalassets/pdf/eu_open/ESA_prohibition_snow_crab_catching.pdf).

Troy Bouffard, Morgane Fert-Malka, "The Unique Legal Status of an Arctic Archipelago", *World Policy Blog*, 06 December 2017 (available at <http://www.worldpolicy.org/blog/2017/12/06/eyes-svalbard>).

Andreas Raspotnik, Andreas Østhagen, "Crabtaacular! Snow Crabs on their March from Svalbard to Brussels", *The Arctic Institute*, 24 April 2018 (available at <https://www.thearcticinstitute.org/crabtaacular-snow-crabs-march-svalbard-brussels/>).

⁴¹⁹ See Chapter 7.2.3

the Treaty is still to be determined.⁴²⁰ This judgment is following closely on previous ones regarding fisheries disputes in the FPZ, all avoiding to answer the question on the geographical applicability of the Treaty.⁴²¹ Future cases need to be monitored closely and it is going to be interesting whether a country will finally drag Norway in front of an international tribunal.

Norway will need to find a sustainable way of dealing with the geographical scope of the Svalbard Treaty in the future, because the treaty parties will not stop pushing. In case that a common front against Norway should establish in the future, the EU is most likely to be the place of origin, with many of its member states being party to the Svalbard Treaty, combined with the overall economic interest in fisheries. Judging from state practice, state policy and the interpretation conducted, it is evident that the majority of the parties agrees that the Svalbard Treaty should be the governing framework for the region. However, there is a need for a more robust and up to date outline due to the new challenges caused by sea ice retreat, the snow crab and better technologies for the exploration and exploitation of mineral resources. Despite the option that Norway accepts the application of the Treaty to the maritime zones and shelf adjacent of Svalbard, leading to high economic loss and decreasing sovereignty of the country, and the alternative that the other parties accept that the Treaty does not apply, which seems very unlikely now, there are several possibilities to solve the issue:

Informal agreement

An informal agreement on the interpretation of the treaty could be used to avoid the use of another treaty or an amendment. This informal agreement would be classified as so called soft law, referring to any international instrument other than a treaty containing principles, norms, standards, or other statements of expected behavior. Soft law has frequently been used as a kind of policy guideline for existing treaties and is often found in resolutions dealing with outer space, deep seabed, decolonization, natural resources, codes of conduct, guidelines and recommendations of international organizations. Ratification is not necessary, making it faster and easier to reach than a treaty which only binds those who ratify it.⁴²²

⁴²⁰ HR-2017-2257-A, (case no. 2017/1570), criminal case, appeal against judgment, Judgement, Supreme Court of Norway, 29 November 2017 (available at <https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2017-2257-a-snow-crab.pdf>), paras 8, 16.

⁴²¹ Other cases are Bjørgulfur and Ottar Birting, Olayar and Olaberri, The Kiel Case.

Find a short summary of each in Unknown author, *supra* note 47, 31-36.

See also Ulfstein, Geir, „Spitsbergen/Svalbard“, *Oxford Public International Law*, January 2008 (available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1356>).

⁴²² Example: protection of civilians in peacekeeping missions in the Kigali Principles on the Protection of Civilians (available at <http://www.globalr2p.org/media/files/kp-principles-17-november-2016.pdf>).

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Despite all the advantages of using an information understanding, it is going to be difficult to consult and reach an agreement with all treaty parties. An option would be to reach agreement with the most important ones, like Russia, the USA, China and the EU. However, such an agreement would not be formally binding and would not commit other treaty parties, even though it would carry political weight. In the end, it could be seen as subsequent practice under Art. 31(3)b of the Vienna Convention.

A protocol or amendment to the Svalbard Treaty

A protocol would be a treaty of its own which could be added to the Svalbard Treaty. It could be used to improve the understanding of the applicability and scope of the Treaty, by for example develop existing mechanism in line with UNCLOS. However, it seems very unlikely that all treaty parties are going to agree on the content of that protocol. Alternatively, an amendment of the Svalbard Treaty could help to further clarify the geographical scope of the Svalbard Treaty and the rights of both Norway and the other signatory states. Yet, agreement is going to be difficult to reach because of the strongly deviating opinions. To amend the treaty, one would need to consider the interests of all treaty parties, as “silence, i.e. no explicit mention of amendment procedures in the treaty text, means that all the signatory parties must consent to any changes”.⁴²³ Norway does not see the need to renegotiate; “In our opinion the shelf question around Svalbard is settled. We have a clear understanding of how the judicial questions are to be understood. We have to note that not everyone agrees, but in that case it would be up to these others to take initiative and to try their case”.⁴²⁴

Dispute resolution through an international tribunal

Using the dispute settlement system granted by the ICJ is going to be the predominant solution. While UNCLOS has its own dispute settlement system,⁴²⁵ Norway has reserved its rights regarding certain issues including unsettled sovereignty right disputes or rights on the

Alan Boyle, *Soft Law in International Law Making*, in: Malcolm D. Evans (ed.), *International Law*, 4th Edition, 2014, 120 -125, 133.

⁴²³ Nkeiru Scotcher, *The Sovereignty Dilemma*, in: Diana Wallis MEP and Steward Arnold (ed.), *The Spitsbergen Treaty*, Arctic Papers Vol 1 (2011), 27.

⁴²⁴ Former Minister of Foreign Affairs Jan Petersen cited in Pedersen, *supra* note 1, 352.

⁴²⁵ UNCLOS Part XV.

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continental shelf, which excludes any applicability on Svalbard.⁴²⁶ In addition, the UNCLOS settlement system can only be applied to disputes “concerning the interpretation or application of [the] Convention”⁴²⁷ itself, so not on other treaties. Therefore, any submission to the ICJ must focus on requesting the Court to take a closer look at treaty law, meaning to define the exact limit of the Treaty and how it can be interpreted today based on customary law and developments in international law. As Norway has accepted the compulsory jurisdiction of the ICJ, it would be possible for another state that accepts the compulsory jurisdiction of the court, to start a case.⁴²⁸ However, no state seems to be willing to take Norway to court yet. Reasons for this could be the risk of losing the case, paving the way for strict Norwegian enforcement measures. Another reason could be the fear of the applicant state that itself could be sued on sovereignty issues in the future.⁴²⁹

Summing up, provisions written in a nearly 100-year-old treaty have caused a stalemate for nearly half a century. The dispute over Norway’s rights and the rights of the treaty parties remains unsolved, even though the solution is clear from the theoretical angle. The appearance of the snow crab and the presumption of huge natural resources hidden under the ice around Svalbard have further fueled and complicated the disagreement.

⁴²⁶ Norwegian Declaration and Reservation upon ratification on 24 June 1996, UN Treaties (available at https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec).

⁴²⁷ UNCLOS Art. 279.

⁴²⁸ ICJ Statute Art. 36.

Declarations recognizing as compulsory the jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute of the Court, 24 June 1996 (available at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=I-4&chapter=1&clang=_en#EndDec).

⁴²⁹ Based on the ICJ Statute Chapter II, the applicant state has the option to prove that the other state has accepted the jurisdiction by the Court in previous similar cases. If a country should take Norway to Court to getting the interpretation of a treaty dealing with sovereignty, this could be used as a precedent for future cases.

9 APPENDIX

9.1 TREATY BETWEEN NORWAY, THE UNITED STATES OF AMERICA, DENMARK, FRANCE, ITALY, JAPAN, THE NETHERLANDS, GREAT BRITAIN AND IRELAND AND THE BRITISH OVERSEAS DOMINIONS AND SWEDEN CONCERNING SPITSBERGEN SIGNED IN PARIS 9TH FEBRUARY 1920

Source: *Treaty between Norway, The United States of America, Denmark, France, Italy, Japan, the Netherlands, Great Britain and Ireland and the British overseas Dominions and Sweden concerning Spitsbergen signed in Paris 9th February 1920*, United States of America, Denmark, France, Italy, Japan, the Netherlands, Great Britain and Ireland and the British overseas Dominions and Sweden, 09-02-1920, available at https://www.sysselmannen.no/globalassets/sysselmannen-dokument/english/legacy/the_svalbard_treaty_9ssfy.pdf.

It is possible to find the French version under the same source.

Treaty between Norway, The United States of America, Denmark, France, Italy, Japan, the Netherlands, Great Britain and Ireland and the British overseas Dominions and Sweden concerning Spitsbergen signed in Paris 9th February 1920.

The President of The United States of America; His Majesty the King of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India; His Majesty the King of Denmark; the President of the French Republic; His Majesty the King of Italy; His Majesty the Emperor of Japan; His Majesty the King of Norway; Her Majesty the Queen of the Netherlands; His Majesty the King of Sweden,

Desirous, while recognising the sovereignty of Norway over the Archipelago of Spitsbergen, including Bear Island, of seeing these territories provided with an equitable regime, in order to assure their development and peaceful utilisation,

Have appointed as their respective Plenipotentiaries with a view to concluding a Treaty to this effect:

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The President of the United States of America:

Mr. Hugh Campbell Wallace, Ambassador Extraordinary and Plenipotentiary of the United States of America at Paris;

His Majesty the King of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India:

The Right Honourable the Earl of Derby, K.G., G.C.V.O., C.B., His Ambassador Extraordinary and Plenipotentiary at Paris;

And

for the *Dominion of Canada*: The Right Honourable Sir George Halsey Perley, K.C.M.G., High Commissioner for Canada in the United Kingdom;

for the *Commonwealth of Australia*:

The Right Honourable Andrew Fisher, High Commissioner for Australia in the United Kingdom;

for the *Dominion of New Zealand*:

The Right Honourable Sir Thomas MacKenzie, K.C.M.G., High Commissioner for New Zealand in the United Kingdom;

for the *Union of South Africa*: Mr. Reginald Andrew Blankenberg, O.B.E, Acting High Commissioner for South Africa in the United Kingdom;

for *India*:

The. Right Honourable the Earl of Derby, K.G., G.C.V.O., C. B.;

The Svalbard Treaty and the Exploitation of Non-Living Resources

His Majesty the King of Denmark:

Mr. Herman Anker Bernhoft, Envoy Extraordinary and Minister Plenipotentiary of H.M. the King of Denmark at Paris;

President of the French Republic:

Mr. Alexandre Millerand, President of the Council, Minister for Foreign Affairs; *His Majesty*

the King of Italy:

The Honourable Maggiorino Ferraris, Senator of the Kingdom;

His Majesty the Emperor of Japan:

Mr. K. Matsui, Ambassador Extraordinary and Plenipotentiary of H.M. the Emperor of Japan at Paris;

His Majesty the King of Norway:

Baron Wedel Jarlsberg, Envoy Extraordinary and Minister Plenipotentiary of H.M. the King of Norway at Paris;

Her Majesty the Queen of the Netherlands:

Mr. John London, Envoy Extraordinary and Minister Plenipotentiary of H.M. the Queen of the Netherlands at Paris;

His Majesty the King of Sweden:

Count J.-J.-A. Ehrensvärd, Envoy Extraordinary and Minister Plenipotentiary of H.M. the King of Sweden at Paris;

Who, having communicated their full powers, found in good and due form, have agreed

as follows:

Article 1.

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

Article 2.

Ships and nationals of all the High Contracting Parties shall enjoy equally the rights of fishing and hunting in the territories specified in Article 1 and in their territorial waters.

Norway shall be free to maintain, take or decree suitable measures to ensure the preservation and, if necessary, the reconstitution of the fauna and flora of the said regions, and their territorial waters; it being clearly understood that these measures shall always be applicable equally to the nationals of all the High Contracting Parties without any exemption, privilege or favour whatsoever, direct or indirect to the advantage of any one of them.

Occupiers of land whose rights have been recognised in accordance with the terms of Articles 6 and 7 will enjoy the exclusive right of hunting on their own land: (1) in the neighbourhood of their habitations, houses, stores, factories and installations, constructed for the purpose of developing their property, under conditions laid down by the local police regulations; (2) within a radius of 10 kilometres round the headquarters of their place of business or works; and in both cases, subject always to the observance of regulations made by the Norwegian Government in accordance with the conditions laid down in the present Article.

Article 3.

The nationals of all the High Contracting Parties shall have equal liberty of access and entry for any reason or object whatever to the waters, fjords and ports of the territories specified in Article 1; subject to the observance of local laws and regulations, they may carry on there

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without impediment all maritime, industrial, mining and commercial operations on a footing of absolute equality.

They shall be admitted under the same conditions of equality to the exercise and practice of all maritime, industrial, mining or commercial enterprises both on land and in the territorial waters, and no monopoly shall be established on any account or for any enterprise whatever.

Notwithstanding any rules relating to coasting trade which may be in force in Norway, ships of the High Contracting Parties going to or coming from the territories specified in Article 1 shall have the right to put into Norwegian ports on their outward or homeward voyage for the purpose of taking on board or disembarking passengers or cargo going to or coming from the said territories, or for any other purpose.

It is agreed that in every respect and especially with regard to exports, imports and transit traffic, the nationals of all the High Contracting Parties, their ships and goods shall not be subject to any charges or restrictions whatever which are not borne by the nationals, ships or goods which enjoy in Norway the treatment of the most favoured nation; Norwegian nationals, ships or goods being for this purpose assimilated to those of the other High Contracting Parties, and not treated more favourably in any respect.

No charge or restriction shall be imposed on the exportation of any goods to the territories of any of the Contracting Powers other or more onerous than on the exportation of similar goods to the territory of any other Contracting Power (including Norway) or to any other destination.

Article 4.

All public wireless telegraphy stations established or to be established by, or with the authorisation of, the Norwegian Government within the territories referred to in Article 1 shall always be open on a footing of absolute equality to communications from ships of all flags and from nationals of the High Contracting Parties, under the conditions laid down in the Wireless Telegraphy Convention of July 5, 1912, or in the subsequent International Convention which may be concluded to replace it.

Subject to international obligations arising out of a state of war, owners of landed property shall always be at liberty to establish and use for their own purposes wireless telegraphy installations, which shall be free to communicate on private business with fixed or moving wireless stations, including those on board ships and aircraft.

Article 5.

The High Contracting Parties recognise the utility of establishing an international meteorological station in the territories specified in Article 1, the organisation of which shall form the subject of a subsequent Convention.

Conventions shall also be concluded laying down the conditions under which scientific investigations may be conducted in the said territories.

Article 6.

Subject to the provisions of the present Article, acquired rights of nationals of the High Contracting Parties shall be recognised.

Claims arising from taking possession or from occupation of land before the signature of the present Treaty shall be dealt with in accordance with the Annex hereto, which will have the same force and effect as the present Treaty.

Article 7.

With regard to methods of acquisition, enjoyment and exercise of the right of ownership of property, including mineral rights, in the territories specified in Article 1, Norway undertakes to grant to all nationals of the High Contracting Parties treatment based on complete equality and in conformity with the stipulations of the present Treaty.

Expropriation may be resorted to only on grounds of public utility and on payment of proper compensation.

Article 8.

Norway undertakes to provide for the territories specified in Article 1 mining regulations which, especially from the point of view of imposts, taxes or charges of any kind, and of general or particular labour conditions, shall exclude all privileges, monopolies or favours for the benefit of the State or of the nationals of any one of the High Contracting Parties, including Norway, and shall guarantee to the paid staff of all categories the remuneration and protection necessary for their physical, moral and intellectual welfare.

Taxes, dues and duties levied shall be devoted exclusively to the said territories and shall not exceed what is required for the object in view.

So far, particularly, as the exportation of minerals is concerned, the Norwegian Government shall have the right to levy an export duty which shall not exceed 1 % of the maximum value of the minerals exported up to 100.000 tons, and beyond that quantity the duty will be proportionately diminished. The value shall be fixed at the end of the navigation season by calculating the average free on board price obtained.

Three months before the date fixed for their coming into force, the draft mining regulations shall be communicated by the Norwegian Government to the other Contracting Powers. If during this period one or more of the said Powers propose to modify these regulations before they are applied, such proposals shall be communicated by the Norwegian Government to the other Contracting Powers in order that they may be submitted to examination and the decision of a Commission composed of one representative of each of the said Powers. This Commission shall meet at the invitation of the Norwegian Government and shall come to a decision within a period of three months from the date of its first meeting. Its decisions shall be taken by a majority.

Article 9.

Subject to the rights and duties resulting from the admission of Norway to the League of Nations, 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, which may never be used for warlike purposes.

Article 10.

Until the recognition by the High Contracting Parties of a Russian Government shall permit Russia to adhere to the present Treaty, Russian nationals and companies shall enjoy the same rights as nationals of the High Contracting Parties.

Claims in the territories specified in Article 1 which they may have to put forward shall be presented under the conditions laid down in the present Treaty (Article 6 and Annex) through the intermediary of the Danish Government, who declare their willingness to lend their good offices for this purpose.

The present Treaty, of which the French and English texts are both authentic, shall be ratified.

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Ratifications shall be deposited at Paris as soon as possible.

Powers of which the seat of the Government is outside Europe may confine their action to informing the Government of the French Republic, through their diplomatic representative at Paris, that their ratification has been given, and in this case, they shall transmit the instrument as soon as possible.

The present Treaty will come into force, in so far as the stipulations of Article 8 are concerned, from the date of its ratification by all the signatory Powers; and in all other respects on the same date as the mining regulations provided for in that Article.

Third Powers will be invited by the Government of the French Republic to adhere to the present Treaty duly ratified. This adhesion shall be effected by a communication addressed to the French Government, which will undertake to notify the other Contracting Parties.

In witness whereof the abovenamed Plenipotentiaries have signed the present Treaty.

Done at Paris, the ninth day of February, 1920, in duplicate, one copy to be transmitted to the Government of His Majesty the King of Norway, and one deposited in the archives of the French Republic; authenticated copies will be transmitted to the other Signatory Powers.

Annex.

1.

(1) Within three months from the coming into force of the present Treaty, notification of all claims to land which had been made to any Government before the signature of the present Treaty must be sent by the Government of the claimant to a Commissioner charged to examine such claims. The Commissioner will be a judge or jurisconsult of Danish nationality possessing the necessary qualifications for the task, and shall be nominated by the Danish Government.

(2) The notification must include a precise delimitation of the land claimed and be accompanied by a map on a scale of not less than 1/1.000.000 on which the land claimed is clearly marked.

(3) The notification must be accompanied by the deposit of a sum of one penny for each acre (40 ares) of land claimed, to defray the expenses of the examination of the claims.

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(4) The Commissioner will be entitled to require from the claimants any further documents or information which he may consider necessary.

(5) The Commissioner will examine the claims so notified. For this purpose he will be entitled to avail himself such expert assistance as he may consider necessary, and in case of need to cause investigations to be carried out on the spot.

(6) The remuneration of the Commissioner will be fixed by agreement between the Danish Government and the other Governments concerned. The Commissioner will fix the remuneration of such assistants as he considers it necessary to employ.

(7) The Commissioner, after examining the claims, will prepare a report showing precisely the claims which he is of opinion should be recognised at once and those which, either because they are disputed or for any other reason, he is of opinion should be submitted to arbitration as hereinafter provided. Copies of this report will be forwarded by Commissioner to the Governments concerned.

(8) If the amount of the sums deposited in accordance with clause (3) is insufficient to cover the expenses of the examination of the claims, the Commissioner will, in every case where he is of opinion that a claim should be recognised, at once state what further sum the claimant should be required to pay. This sum will be based on the amount of the land to which the claimant's title is recognised. If the sums deposited in accordance with clause (3) exceed the expenses of the examination, the balance will be devoted to the cost of the arbitration hereinafter provided for.

(9) Within three months from the date of the report referred to in clause (7) of this paragraph, the Norwegian Government shall take the necessary steps to confer upon claimants whose claims have been recognised by the Commissioner a valid title securing to them the exclusive property in the land in question, in accordance with the laws and regulations in force or to be enforced in the territories specified in Article 1 of the present Treaty, and subject to the mining regulations referred to in Article 8 of the present Treaty. In the event, however, of a further payment being required in accordance with clause (8) of this paragraph, a provisional title only will be delivered, which title will become definitive on payment by the claimant, within such reasonable period as the Norwegian Government may fix, of the further sum required of him.

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Claims which for any reason the Commissioner referred to in clause (1) of the preceding paragraph has not recognised as valid will be settled in accordance with the following provisions:

(1) Within three months from the date of the report referred to in clause (7) of the preceding paragraph, each of the Governments whose nationals have been found to possess claims which have not been recognised will appoint an arbitrator.

The Commissioner will be the President of the Tribunal so constituted. In cases of equal division of opinion, he shall have the deciding vote. He will nominate a Secretary to receive the documents referred to in clause (2) of this paragraph and to make the necessary arrangements for the meeting of the Tribunal.

(2) Within one month from the appointment of the Secretary referred to in clause (1) the claimants concerned will send to him through the intermediary of their respective Governments statements indicating precisely their claims and accompanied by such documents and arguments as they may wish to submit in support thereof.

(3) Within two months from the appointment of the Secretary referred to in clause (1) the Tribunal shall meet at Copenhagen for the purpose of dealing with the claims which have been submitted to it.

(4) The language of the Tribunal shall be English. Documents or arguments may be submitted to it by the interested parties in their own language, but in that case must be accompanied by an English translation.

(5) Thee claimants shall be entitled, if they so desire, to be heard by the Tribunal either in person or by counsel, and the Tribunal shall be entitled to call upon the claimants to present such additional explanations, documents or arguments as it may think necessary.

(6) Before the hearing of any case the Tribunal shall require from the parties a deposit or security for such sum as it may think necessary to cover the share of each party in the expenses of the Tribunal. In fixing the amount of such sum the Tribunal shall base itself principally on the extent of the land claimed. The Tribunal shall also have power to demand a further deposit from the parties in cases where special expense is involved.

(7) The honorarium of the arbitrators shall be calculated per month, and fixed by the Governments concerned. The salary of the Secretary and any other persons employed by the Tribunal shall be fixed by the President.

(8) Subject to the provisions of this Annex the Tribunal shall have full power to regulate its own procedure.

(9) In dealing with the claims the Tribunal shall take into consideration:

(a) any applicable rules of International Law;

(b) the general principles of justice and equity;

(c) the following circumstances:

(i) the date on which the land claimed was first occupied by the claimant or his predecessors in title;

(ii) the date on which the claim was notified to the Government of the claimant;

(iii) the extent to which the claimant or his predecessors in title have developed and exploited the land claimed. In this connection the Tribunal shall take into account the extent to which the claimants may have been prevented from developing their undertakings by conditions or restrictions resulting from the war of 1914-1919.

(10) All the expenses of the Tribunal shall be divided among the claimants in such proportion as the Tribunal shall decide. If the amount of the sums paid in accordance with clause (6) is larger than the expenses of the Tribunal, the balance shall be returned to the parties whose claims have been recognised in such proportion as the Tribunal shall think fit.

(11) The decisions of the Tribunal shall be communicated by it to the Governments concerned, including in every case the Norwegian Government.

The Norwegian Government shall within three months from the receipt of each decision take the necessary steps to confer upon the claimant whose claims have been recognised by the Tribunal valid title to the land in question, in accordance with the laws and regulations in force or to be enforced in the territories specified in Article 1, and subject to the mining regulations referred to in Article 8 of the present Treaty. Nevertheless, the titles so conferred will only become definitive on the payment by the claimant concerned, within such reasonable period as the Norwegian Government may fix, of his share of the expenses of the Tribunal.

3.

Any claims which are not notified to the Commissioner in accordance with clause (1) of paragraph 1, or which not having been recognised by him are not submitted to the Tribunal in accordance with paragraph 2, will be finally extinguished.

9.2 KONGELIG RESOLUSJON BERGVERKSORDNING FOR SVALBARD (THE MINING CODE)

Source: <http://app.uio.no/ub/ujur/oversatte-lover/data/for-19250807-3767-eng.pdf>

Norwegian Version: Kongelig resolusjon bergverksordning for Svalbard, Nærings- og fiskeridepartementet, 07 August 1925, last amended by Royal Decree of 11 June 1975 (available at [https://lovdata.no/dokument/NL/lov/1925-08-07?q=Kongelig%20resolusjon%20\[bergverksordning%20for%20Svalbard\)](https://lovdata.no/dokument/NL/lov/1925-08-07?q=Kongelig%20resolusjon%20[bergverksordning%20for%20Svalbard))).

Chapter I. Introductory provisions.

§ 1.

This Mining Code shall apply to the entire Archipelago of Spitsbergen (Svalbard), comprising, with Bear Island, all the islands situated between 10° and 35° longitude East of Greenwich and between 74° and 81° latitude North, especially West Spitsbergen, North-East Land, Barents Island, Edge Island, Wiche Islands (King Karls Land), Hope Island (Hopen) and Prince Charles Foreland, together with all islands great or small and rocks appertaining thereto.

§ 2.

- (1) The right of searching for and acquiring and exploiting natural deposits of coal, mineral oils and other minerals and rocks which are the object of mining or quarrying, subject to the observance of the provisions of this Mining Code and on equal terms with regard to taxation and in other respects belongs, in addition to the Norwegian State, to:
 - a) All nationals of those States, which have ratified or adhered to the Treaty relating to Svalbard.
 - b) Companies which are domiciled and legally established in any of the said states. A company is considered as domiciled in the state in which its board has its seat.
- (2) That a person or a company fulfils the conditions here stipulated, must at the demand of the Commissioner of Mines be verified through a proper affidavit of a competent authority in their home country, and the competency of such authority if it is not a Norwegian authority, must be certified by a Norwegian legation or consulate in the state concerned, or by the legation or consulate in Norway of such state.
- (3) Any dispute as to whether a mineral or rock is of such nature as mentioned in item (1), shall be finally settled by the Ministry concerned on report of the Commissioner of Mines.

§ 3.

- (1) Persons who have no domicile, nor any

permanent place of residence in Norway or in Svalbard and companies, the boards of which have not their seat in Norway or in Svalbard, in order to be able to acquire and exercise the rights mentioned in § 2, must have an agent permanently resident in Norway or in Svalbard, whose name, position and place of residence have been reported to the Commissioner of Mines, and who is empowered to represent them in court and in relation to mining operations in Svalbard.

- (2) Upon a failure to comply with the requirement, the Judge of the court of first instance at the place where the Commissioner of Mines has his office, at the request of anyone interested, may name an attorney. Such attorney shall have the same authority as mentioned in item (1), until the party concerned reports the appointment of another attorney.

§ 4.

- (1) Any application to Norwegian authorities that has to be made within a certain term, pursuant to this Mining Code, must be filed with the authority concerned before the expiration of such term.
- (2) If an application is not worded in the Norwegian language, the authority concerned may demand a translation thereof, duly certified, to be submitted within a certain term and, upon a failure of the applicant to comply therewith, may refuse to consider the application.

§ 5.

- (1) The powers which according to the Mining Ordinance are conferred upon the Commissioner of Mines, may by the Ministry concerned, to such extent as needed, be delegated to subordinate officers of the mining service.
- (2) The decisions of such officers may be submitted to the Commissioner of Mines for reconsideration and the decisions of the Commissioner of Mines likewise to the Ministry provided the decisions have not been given during a claim survey in which case the procedure of § 13 applies.

- (3) The decisions of other subordinate administrative authorities, with reference to the Mining Code, also may be submitted to higher authority for reconsideration.

§ 6.

Public officials serving in Svalbard are not allowed to notify any discoveries, to obtain any claims, or to be proprietor of or partner in any claims, nor to be agents for sale of discoveries or claims in their districts.

Chapter II. On search and discoveries.

§ 7.

- (1) The search for natural deposits of the minerals and rocks mentioned in § 2 may be made on one's own property as well as on that of any other party, and on the State land.
- (2) Any person who desires to search on the property of some other party or on the State land, must have a licence from the Commissioner of Mines or from the chief of police, and he is bound to produce such licence on request.
- (3) The licence shall be valid for two years from the date of issue, and confers upon the searcher the right of undertaking any work considered necessary or expedient in order to search for the minerals and rock mentioned in § 2, or in order to examine discoveries already made, also including work, the object of which is to make a preliminary examination of the deposit in order to decide whether it is worth working. (4) No search must be made within the claim of any other party, unless the holder of the claim has given the permission.
- (5) No search must be made within a distance of 500 metres from any factory or industrial establishment under construction or in operation, any line of transport or quays or from any dwelling house, not including huts for catching, fishing or whaling expeditions which are only occasionally used, unless consent is given by the proprietor and tenant of the plants or the building. Nor must any search be made within any such distance from any public or scientific establishment, church or cemetery.

§ 8.

- (1) The searcher is bound to indemnify any damage which, through the search, is caused to the proprietor of the ground or any other party.

- (2) Anyone preventing any party from lawful search shall indemnify any provable loss which the searcher has suffered through any futile journey or otherwise.

§ 9.

- (1) Anybody who, by lawful search, shall discover a natural deposit, containing or supposed to contain minerals or rocks as mentioned in § 2, acquires thereby, in preference to subsequent discoverers, a right to the discovery, provided he, in the presence of two witnesses, by marks in solid rock or, by other lasting and satisfactory means, visibly locates a discovery point and besides, not later than 10 months after having located the discovery through a written notification informs the Commissioner of Mines thereof.

A discovery notice may also, before the expiration of this term, and with full legal effect, be filed with the chief of police, who in that case as soon as possible shall transmit it to the Commissioner of Mines.

- (2) The discovery notice must be signed by the claimant and shall contain:
- The name, domicile and nationality of the claimant and the witnesses, and, in the cases mentioned in § 3, the name and address of the appointed attorney.
 - Accurate description of the situation of the discovery point and of the kind of marks used, accompanied by a sketchmap in a scale of not less than 1 : 100 000 on which the discovery point shall be marked.
 - Exact statement of the moment when the discovery was marked.
 - Information of the nature of the discovery under reference to a sample, handed over at the same time, of the minerals or rocks found.
 - Reference to an enclosed declaration from the witnesses that the discovery point was marked in their presence and how the marking took place.
- (3) Anybody who wants to notify several discoveries must for each of them file a separate discovery notice.
- (4) If a discovery notice which does not comply with the prescriptions of items (2) and (3) has been filed in due time- the right to the discovery is preserved if the defects are remedied within a term to be fixed by the Commissioner of Mines.
- (5) The provisions of items (1) - (4) are correspondingly applicable when any party will take up a deposit which has reverted

to the State land, whether it has been worked or not.

§ 10.

- (1) The right to a discovery which has been acquired by a discoverer according to § 9, besides the right of carrying out on the place of discovery the operations mentioned in § 7 item (3), also entitles him, in preference to subsequent discoverers, to demand a claim on the discovery point.
- (2) The right to the discovery lapses if an application for a claim survey has not been filed with the Commissioner of Mines within 5 years after the discovery was marked, or if any other party before the expiry of the said term has obtained a claim on the discovery point, see § 12, item (2), *litra d*).
- (3) The right to a discovery that has been filed for record may be transferred. The transfer is not valid before having been notified to the Commissioner of Mines.

Chapter III. On claim patents.

§ 11.

- (1) The claim survey shall be made by the Commissioner of Mines at the latest within 2 years after an application has been filed, if natural conditions or any other circumstances do not make it impossible.
- (2) The time for such survey shall be notified in the official gazette designated for this purpose within the end of the month of the year in which the survey is to be held.

The notification shall contain:

- a) The name, the domicile and nationality of the applicant.
- b) Information concerning the situation of the discovery point and the time reported for the marking of the discovery.
- c) The time and the place for the survey.
- d) Summons to all who claim to possess a better right to the claim to meet and look after their interests during the survey.

The Commissioner of Mines besides should send reprints of the notification to those who are supposed to be interested in the survey. It is, however, of no consequence for the furthering of the survey, that such information has not been transmitted or not been received by the party interested.

- (3) NOK 4.500,- shall be paid for the dealing with an application for a single claim. If an applicant asks for several claims in the same neighbourhood and at the same time, or if several applicants jointly ask for claims in the same neighbourhood and at the same time, NOK 1.800,- shall be paid for each additional claim stated in the application. The claims applied for are considered as lying in the same neighbourhood, when the distance between the discovery points which are lying farthest from each other does not exceed 30 kilometres.

Payment for a claim survey shall be made to the Commissioner of Mines simultaneously with the application for same.

§ 12.

- (1) On making the claim survey the Commissioner of Mines first decides whether the applicant is entitled to obtain any claim.
- (2) If so, he makes the survey observing the following provisions:
 - a) The discovery point must lie within the boundaries of the claim.
 - b) If several discovery points that are recorded are situated so near to each other that the right to get a claim on one of the discoveries is dependent on the manner in which a claim is given for another discovery, he who first has marked a discovery point may choose in what manner he wishes the survey to be undertaken. If he does not attend the claim survey, the Commissioner of Mines shall decide in what manner the claim for his discovery is to be subsequently given, if he demands a claim.
 - c) The claim shall be given as a plain superficies having a square content as per the request of the applicant and the character of the deposit up to 1 000 hectares. Ordinarily the claim shall be given in the form of a rectangular parallelogram, the length and breadth of which are fixed by the applicant himself, the limitation being that the length may not be more than 4 times the breadth. Dispensations from the rectangular form should be given by request of the applicant, when this is dictated by configuration of the coastline or other natural boundaries, and provided that the claim in no direction exceeds a length of 7 kilometres. The boundaries are comprised within vertical planes passing through the

boundary lines on surface and projected indefinitely downwards.

- d) If the claim covers several discovery points the right to obtain claim for the rest lapses.
- (3) The claim survey shall be entered in an authorized book. The Commissioner of Mines, when requested, shall supply a verified extract of the book against a fee of NOK 10,- per sheet or part thereof.
- (4) When a claim has been granted, the Commissioner of Mines shall send to the applicant a patent for each separate claim according to the claim survey that has been allotted to him.

A proclamation of the issuing of such patent shall be published in the public gazette instituted for that purpose.

§ 13.

- (1) If any party intends to contest the decisions of the Commissioner of Mines in a claim survey, proceedings must be commenced within 6 months after proclamation of the issue of the patent has appeared in the public gazette, or if survey 'need within 6 months after proclamation of the issue of the patent has appeared in the public gazette, or if survey has been refused, within 6 months after such refusal.
- (2) The claim is final when the time for beginning an action has expired without such action having been instituted or when an action instituted in proper time has been validly decided, withdrawn or dismissed.

§ 14.

- (1) When the claim has become final the holder of the claim has acquired the sole right to extract all the minerals and rocks mentioned in § 2 through mining operations within the claim, provided that he complies with the requirement to work made incumbent on him in § 15.
- (2) The holder of the claim is entitled to mine and retain other minerals and rocks to such extent as is necessary or expedient for the operations. What has been mined but not used in the said manner may be disposed of by the proprietor of the ground.
- (3) Any voluntary or compulsory transfer of the right to a claim and any voluntary or compulsory establishment or transfer of mortgage rights or any other rights to a claim can with full legal effect only be done in the manner stipulated for real property.

- (4) On the application of the holder of the claim the Commissioner of Mines may divide a claim by making part of it a special claim. The division is to be made without a claim survey on the spot. Otherwise § 12, items (3) and (4) and § 13 shall apply correspondingly.

The fee is NOK 1.800, for each claim to be divided from the original claim.

§ 15.

- (1) When 4 years have elapsed from 1st October of the year after the claim became final the holder of the claim is bound to commence mining operations within the claim to such an extent that in the course of each succeeding period of 5 years at least 1 500 man-days work are employed in mining operations in the claim.
- (2) For a number of not more than 25 claims, which in their entirety are lying within a distance of not over 15 kilometres from a fixed point, indicated by the claim-holder to the Commissioner of Mines, such obligatory work of the claimholder shall be considered as having been performed when he inside one or more of these claims performs as many days' work as imposed upon him by item (1) for all claim aggregately.
- (3) Reports concerning the number of days' work performed during each working year, counting from 1st October one year until 30th September the next year, shall be delivered to the Commissioner of Mines before the following 31st December.
- (4) When a petition is delivered to the Commissioner of Mines in the course of a period, or at the latest on 31st December of the year in which the period elapses, the Ministry concerned on the report from the Commissioner of Mines, may dispense from the provisions in items (1) and (2) for the period in question by exempting from the duty of working, or by reducing the number of days' work required for the fulfilment of such duty. The conditions for such dispensations are:
 - a) That the holder of a claim proves that essential hindrances for which he cannot be made answerable are or have been checking the operations, such as special and passing circumstances connected with the operations, or with the utilization or sale of the products or,
 - b) that the holder of a claim proves that

one or more claims which he wishes to be left out of consideration in the calculation of the days' work are necessary as a reserve for claims which are being worked.

§ 16.

- (1) Should any holder of a claim fail to comply with the requirements for work according to § 15, items (1) and (2), without having in due time applied for and obtained dispensation, his claim lapses at the end of the calendar year following, provided he does not in the course of same make up for lost work besides performing the average number of days' work which belong to one year of the new period.
- (2) If sufficient work has been done to maintain the right to one or more of the claims, but not to all of them, the Commissioner of Mines shall decide which claims are to be considered as lapsed, provided the holder of the claim has not made his choice and stated same to the Commissioner of Mines within the expiration of the year mentioned in item (1).
- (3) When a claim has lapsed according to the above provisions neither the claim nor any part thereof can again be allotted to the holder of the claim nor to any company in which he possesses a majority of the shares, in case another holder of a registered discovery makes an application for a claim within the said area before the expiration of the current period of 5 years.

§ 17.

- (1) When the claim has become final, the annual due to be paid by the holder of the claim is up to NOK 4.500,- for each claim. For this due the State shall have a first priority mortgage right in the claim concerned, and the due may be collected in accordance with the rules fixed for the collection of taxes on real property.
- (2) If, by sale of the claim execution, sufficient covering of outstanding dues is not obtained, the claim lapses. Then it may not again be allotted to the holder of the claim, nor to any company in which he possesses a majority of the shares, unless the dues outstanding together with costs have first been paid including also the dues which have accrued in the meantime.

§ 18.

Besides in those cases mentioned in §§ 16 and 17 a claim lapses when the claim-holder, after having paid the dues owing, through a written declaration to the Commissioner of Mines, abandons his right to the claim. In that case the provisions in § 16, item (3) shall apply correspondingly.

Chapter IV. On the relation to the proprietor of the ground.

§ 19.

- (1) The proprietor of any ground on which a claim has been given is entitled to a participation in the operations for not more than one-fourth. If he desires to make use of this right he must notify the holder of the claim of the share which he claims, within one year after the patent was published in the public gazette. He may then also demand that a corresponding part of what has been extracted is to remain on the spot until an agreement has been established as to the terms of participation.
If a claim has been given on the ground belonging to several, the proprietors are entitled to participate jointly in the operations for not more than one-fourth, the expenditure and income being divided equally amongst them. If any of said proprietors is unwilling his interest shall become the property of the others.
- (2) When the proprietor of the ground or any other party to whom he may have transferred his rights has declared his willingness to participate in the operations, a written contract shall be made concerning the terms, on the basis, that the proprietor or the holder of his rights is bound to participate proportionately to the share he demanded in all the costs of the operations and the establishments for the utilization of the output and with a right to participation in the profits, in both cases from the commencement of the operations.

If the parties do not agree, either of them, within 6 months after the expiry of the time mentioned in item (1), may demand that the Commissioner of Mines fix the terms. If the proprietor of the ground will not accept the decision of the Commissioner of Mines he may, within 6 months after it was made known to him, either transfer his right to someone who accepts the terms or withdraw from any participation in the operations.

§ 20.

- (1) A claim-holder has the right to demand the assignment by the Commissioner of Mines of the ground needed for footpaths, roads, railways, tramways, aerial ropeways, dumps, surface buildings, stores, quays and other establishments connected with the working of the mines.
- (2) Within the areas mentioned in § 7, item (5), no other cession can be claimed than that which is needed for the operations of any claim-holder for footpaths, roads, railways, tramways, aerial ropeways, power transmissions and quays. For the acquisition of the control of the ground in such places the permission of the Commissioner of Mines must be obtained in default of an agreement. Before any decision is made, the Commissioner of Mines shall give the proprietor of the ground and other holders of rights the opportunity to be heard. A permission must not be given unless the Commissioner of Mines finds that the interest of other parties be not thereby materially prejudiced, and conditions for the security against such prejudice shall be made if necessary.
- (3) For any damage and inconvenience caused through cessions in accordance with § 1 or § 2, the proprietor of the ground as well as any other holders of rights may claim an indemnification which, failing an agreement, shall be stipulated by an evaluation.
- (4) The ground ceded by a proprietor according to items (1) or (2) shall revert to the main ground as a full property when the use has been finally waived, or when the claim has lapsed.

After the discontinuation of the operations the holder of a claim has a period of 3 years to clear the ground to such extent as he may desire. What has not then been removed shall belong to the proprietor of the ground. If, however, within the time mentioned, any party has obtained a new claim on the abandoned mine, the previous holder of the claim has the right to transfer to the new holder his establishments, houses and machines.

Chapter V. On the mining.

§ 21.

The provisions in this chapter concerning mines shall have a corresponding application to surface working as far as they are suitable.

§ 22.

- (1) The working of a mine shall be effected in a minerlike manner.
- (2) He, or those, who are to superintend the technical management on the spot, must have the necessary professional knowledge and experience.
- (3) No mine workings must be commenced in those places where search is prohibited according to § 7, item (5), except by permission of the proprietor or the user of the ground; nor may underground work take place on these premises, unless the work, exclusively to the judgment of the Commissioner of Mines, is of such nature or is carried on in such a way that no subsidences are caused thereby or no other damage is inflicted on buildings or plants on the surface. No permission as mentioned above is needed, however, if such buildings or plants have been erected after the claim has become final.

In order to commence or carry on underground work within the distance mentioned in § 7, item (5), from public or scientific establishment, church or cemetery, permission is required of the King.

- (4) At any establishment employing workmen who are not Norwegians, at least one officer must be appointed who understands Norwegian and can make himself understood in the Norwegian language and, if necessary, also in the foreign language commonly used at the mine.

§ 23.

- (1) At every mine there shall, if the Commissioner of Mines deems it necessary, be kept a record in which shall be entered monthly a report on the operations and everything happening of interest to the mine, and to the conditions of the deposits.

Of this record an extract - made in accordance with a form prescribed by the Commissioner of Mines - shall be sent for each working year, before 31st December, to the Commissioner of Mines.

- (2) For each mine that cannot in its entirety be overlooked on the surface, there shall further be prepared a map (mine plan), which must be supplemented as the operations are advancing.

One copy of the map shall be kept at the mine, and another shall be forwarded to the Commissioner of Mines.

- (3) The information and the maps which the Commissioner of Mines receives according to this section should only be used for official purposes and must not be made available to others.

§ 24.

To such extent as may be done without special difficulties and expenses, endeavours should be made in the course of operations to avoid the destruction of any geological and mineralogical formations or any other natural curiosities or places which may be supposed to be of scientific or historical importance.

§ 25.

- (1) If the holder of a mine for which surveying is prescribed desires, temporarily or definitely, to discontinue the operations, he shall inform the Commissioner of Mines to that effect as soon as possible.
- (2) Any timbering and support provided for the safety of the mine, must in such cases not be damaged or removed without the permission of the Commissioner of Mines.
- (3) Mine openings must be filled or surrounded with a proper fence.

Chapter VI. On protection of workers.

§ 26.

- (1) The statutory provisions regarding the protection of workers at any time in force for mining in Norway shall also apply to mining in Svalbard with such modifications and adaptations however as may be laid down by the King, due regard being paid to the local conditions.
- (2) What has been stipulated in §§ 27-33 concerning workers shall also apply to any other person employed in the mining operations at the place.

§ 27.

- (1) The employer is bound to furnish his workers with healthy and proper dwellings, and, as far as circumstances permit, to provide sanitary arrangements. Further instructions concerning the manner of building and the fitting up of the houses shall be issued by the Ministry concerned. The Ministry also may make it incumbent on the employer to provide for a meeting-hall and a proper collection

of books in a language known by the workers.

- (2) The employer is bound to keep at the establishment a supply of the necessary medicines, surgical instruments and dressing articles.

More detailed instructions in this respect shall be issued by the Ministry concerned.

- (3) The Ministry may enjoin on the employer to maintain a hospital suitable for the purpose with an isolation facility and the necessary outfit and attendance, calculated to accommodate as large a number of patients as the Ministry may decide. When the Ministry finds it necessary, the employer shall also be required to supply medical attendance on the spot.

§ 28.

- (1) At the time of the year when the communication with the outside world may be expected to be interrupted through ice, it is incumbent on the employer to take care that there is present at the establishment such supplies of food, clothing and other necessities of life as his workers shall need for at least one year's maintenance.

The stores shall be distributed in safe depots. More detailed regulations for the implementation of these provisions shall be issued by the Ministry concerned.

- (2) The chief of police, in case of emergency, may order, or himself effect, the sending home of as many workers as he finds necessary in order to make the supplies suffice for the maintenance of those remaining.

Complaint does not cause postponement.

§ 29.

Arms, munitions and explosives as well as alcoholic beverages and narcotics may be imported into Svalbard only in accordance with regulations issued by the King, due regard being paid to the needs of the companies.

§ 30.

- (1) The net proceeds of the trade which the employer himself or through others carries on with the workmen, or is interested in, at the place concerned, shall after audited annual accounts be used for the general welfare of the workmen. The

application of these profits shall be decided by the employer in conjunction with a committee appointed by the workers who, in the case of dispute, may demand that the matter be referred to the decision of the chief of police. In calculating the net proceeds of such trade the employer is entitled to deduct a reasonable interest on the capital invested in the establishment.

- (2) The provisions of item (1) shall also be applicable if the employer has any profit on his maintenance of the workers in Svalbard.

§ 31.

- (1) The employer shall take care that his workers in case of illness receive hospital attendance until they have become well, or at any rate until they are in a condition to be sent home. The repatriation in this case shall be paid by the employer.
- (2) The employer, moreover, is obliged to pay compensation for the loss of working income during illness.
- (3) The King shall issue more detailed regulations concerning the obligation to provide attendance during illness and concerning the conditions for and the amount of the compensation for loss of working income during illness.

§ 32.

If any worker in doing his work is injured by an accident which was not caused intentionally by the victim of the accident, it is incumbent on the employer, besides the obligations mentioned in § 31, to pay to the victim or, in the event of his death, to his survivors, a compensation in accordance with regulations issued by the King.

§ 33.

- (1) The employer shall give to the Ministry concerned, through a bank guarantee, insurance or in some other manner, satisfactory security for the claims of the workers. The amount of the guarantee sum shall be fixed and the security offered shall be approved by the Ministry.
- (2) If the requirement to give security is not complied with, the Ministry may fix a daily fine, running until the matter is settled. The fine shall be collectable by distraint. It shall be employed as provided for in § 30.

Chapter VII. Transitional provisions.

§ 34.

- (1) Persons and companies who make territorial claims on the basis of acts of appropriation or occupations that have taken place before the signing of the Treaty relating to Svalbard, if their claims are notified in conformity with § 1, item (1) of the Annex to the said Treaty shall be entitled, without any hindrance from the stipulations in this Mining Code but also without this involving any acknowledgment of their claims, to carry on prospecting and mining operations within the areas claimed, as long as their claims have not lapsed or been rejected pursuant to the provisions of the said Annex. During this interval no other person has the right of prospecting or mining within said areas.
- (2) The provisions in Chapter V and VI shall also apply to mining operations, carried on according to item (1), from 1st September, of the year after the Mining Code has entered into force.

§ 35.

- (1) The persons and companies who pursuant to the provisions of the Annex to the Treaty relating to Svalbard are recognized as proprietors of a certain territory, shall be granted as many claims as they desire within the boundaries of their property, subject to the following conditions:
 - a) That the act of appropriation or occupation upon which the acknowledged ownership is founded has taken place with a view to utilize the territory for mining operations, or has been followed by development or exploitation for that purpose;
 - b) That an application for a claim survey, containing information of the nature of the deposit under reference to a sample, contemporarily handed over, of the minerals and rocks found and accompanied by the stipulated fee, is filed with the Commissioner of Mines within 10 years after the claimant's title-deed for the property has been issued pursuant to the provisions in the Annex to the Treaty relating to Svalbard, § 1, item (9), or § 2, item (11), provided that the title-deed is or becomes definitive.

The fee to be charged is NOK 500,-

for the first, and NOK 200,- for each succeeding claim within the boundaries of the same property.

In these cases the provisions of § 11, item (1) and item (3), last paragraph, and of § 12 item (1), item (2) litra c), item (3) and item (4), shall be applicable *mutatis mutandis*, while the other provisions of §§ 9 to 12 are not applicable.

- 2) Until the expiry of the term mentioned in item (1), litra b), and provided the application for a claim is filed in proper time, until the claim has become final, the recognized owner has the exclusive right to carry on prospecting and mining within his territory. During this period the provisions in Chapter V and VI shall apply.

- (3) Persons and companies mentioned in item (1) are exempted from the claim dues mentioned in § 17 for claims acquired pursuant to item (1). The same shall apply to claims being asked for under reference to discoveries which they have notified during the ten-year period mentioned in item (1) litra b). In other respects the provisions of this Code shall apply to the claims.

Final provision.

§ 36.

This Mining Code shall enter into force from such time as shall be determined by statute.

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