

The controversy over the applicable regime outside Svalbard's territorial sea

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1 Introduction

In June 1977, the Norwegian government established a 200 nautical miles fishery protection zone beyond and adjacent to Svalbard's territorial waters.¹ The national legal basis for the zone was the "Act relating to the economic zone."²

There are diverging legal arguments as to whether the Svalbard Treaty applies in a zone outside Svalbard's territorial waters. The Norwegian government's position is that this Treaty is limited to Svalbard's territorial waters, and that the regime of Exclusive economic zone³ gives Norway the right to establish a 200 nautical miles economic zone beyond Svalbard's territorial sea. Contracting parties to the Svalbard Treaty have reserved their position regarding the establishing of a fishery protection zone outside Svalbard, and it has been advocated that a maritime zone extending beyond Svalbard's territorial sea falls under the regime of the Svalbard Treaty. A similar divergence of views has come forward in regard to the continental shelf outside Svalbard. The Norwegian government defines this shelf as part of the Norwegian continental shelf, geologically stemming from the mainland of Northern Norway, and stretching towards Svalbard and beyond. The Norwegian government's position is thus that it is the Norwegian continental shelf legislation⁴, based on the Continental shelf regime⁵, which apply. Advocating that the continental shelf outside Svalbard is a Svalbard shelf, contracting parties argue that it is the Svalbard Treaty that applies. The Norwegian position on this is that, as Norway has the sovereignty over Svalbard, such a shelf would in any case be a Norwegian shelf.

¹ Regulation of 3 June 1977 no 06

² Act of 17. December 1974 no. 91

³ United Nations Convention on the Law of the sea (UNCLOS), December 10. 1982. Part V Exclusive economic zone

⁴ Act of 29. November 1996 no. 72

⁵ UNCLOS. part VI Continental shelf

The question discussed in this paper is the controversy over what regime to apply beyond Svalbard's territorial sea. More precisely that is whether the Svalbard Treaty, geographically limited to Svalbard's territory and "its territorial waters", can be said to apply in waters, and on the shelf, beyond Svalbard's territorial sea. In so doing, the main focus will be on how this appears in the state practice of Norway and of four other contracting parties to the Svalbard Treaty, as well as on legal theory, as it has come forward by two Norwegian authorities on the law of the sea, professor Carl August Fleisher and professor Geir Ulfstein. Other legal sources may be referred to in support of, as well as in commenting, these legal arguments.

The paper starts with a historic overview of the legal regimes of Svalbard, leading up to the Svalbard Treaty, together with an outline of the legal regimes relevant in a discussion on what regime to apply outside Svalbard's territorial sea. This is followed by a chapter focusing on the concept of Norwegian sovereignty over Svalbard, recognized in the Svalbard Treaty. The next two chapters will address the discussion on whether the Svalbard Treaty applies outside Svalbard's territorial waters, in the maritime zone and on the continental shelf, respectively. In the following chapter state practice of other contracting parties, having challenged the Norwegian interpretation of the Treaty, is discussed.

2 Background - historic overview and legal regimes

There is to day an increased international interest related to the High North, not least in regard to important resources in this area, present as well as potential, living as well as non-living. This also includes resources in the Svalbard area, which in turn may put the issue of what regime to apply in the waters, as well as on the shelf, on the international agenda. A historic overview will demonstrate the importance of a legal regime in a situation of conflicting state interests related to resource exploration and exploitation. The legal regimes underlying the arguments in to-day's discussion is firstly the regime specifically

dealing with this area, the Svalbard Treaty⁶, and secondly the more recent and general regimes of Exclusive economic zone and the Continental shelf regime, laid down in the UN Convention of the Law of the Sea.

2.1 A historic overview

A natural starting point in a historic overview is 1596, the year when Svalbard was re-discovered.⁷ At that time the Danish-Norwegian king was claiming sovereignty over the whole Norwegian Sea⁸, upheld by the fact that foreign vessels fishing in this sea, had to pay duty to the Danish-Norwegian government.⁹

The rediscovery of Svalbard spread the knowledge of large whale stocks in the waters outside the island, and from the beginning of the 17th century started a rather extensive whaling, with companies from other states, primarily British and Dutch. The Danish-Norwegian sovereignty claim was now challenged by state powers, which had as its main interest to secure access to the resources for their respective whaling companies. A rather curious example is that the British king in 1613 tried to buy Svalbard from the Danish-Norwegian king, thus obviously at that time recognizing Danish-Norwegian sovereignty. In 1614 the British claimed sovereignty over Svalbard through occupation¹⁰, but according to international law at that time, sovereignty had to be based on first discovery, and this was challenged by the Dutch, claiming to have been there before the British.¹¹

The economic interest in whaling was strong, and lead to rivalry and conflicts between the whaling companies, and subsequently also between the whaling states. Even though the

⁶ Treaty concerning Spitsbergen. 9 Febr. 1920

⁷ This year the Dutch explorer Willem Barents went ashore on Svalbard after having failed in his endeavour to find the North East passage. For a discussion on the discovery and disappearance of Svalbard see Torkildsen, Torbjørn: Svalbard; vårt nordligste Norge, pp 22-27)

⁸ Sovereignty claim over the Norwegian Sea did not automatically include islands, but Svalbard was, at the time, believed to be a part of Greenland, an island under the jurisdiction of the Danish-Norwegian king

⁹ Mathisen, Trygve. Svalbard i internasjonal politikk. 1871-1925. Oslo 1951, p 11-12

¹⁰ Mathisen, p 6

¹¹ (Mathisen, p 3)

conflicts were counterproductive to the great powers involved, it still took almost half a century before the states managed to reach an agreement on a legal regime for whaling. By the time this regime was in place, the whale stock did, however, disappear from the waters outside Svalbard. One may thus speculate whether a declining resource situation helped in reaching a management regime, either by accentuating the competition, or by reduced interest in whaling all together.

The disappearance of the whale stocks obviously led to withdrawal of the great powers from these waters, which in turn led to less interest for Svalbard in the international community in general. The Danish-Norwegian king still claimed sovereignty over the island and its waters, which can be seen from commercial treaties entered into by the king in the second part of the 17th century.¹² This did, however, not prevent other states from fishing and catching in the area, and as this activity did not raise the need for reflecting over the political status of Svalbard, it gradually became a common notion that Svalbard and its waters were free for all states to explore and exploit. This eventually led to the legal status of Svalbard becoming that of *terra nullius*, with Norway and Russia as the most dominant states operating on its territory and in its waters.¹³

In the beginning of the 19th century international focus was again turned towards Svalbard, as the island entered into a new important economic area. A new resource had been discovered, this time on the mainland, namely coal. This led to many states' mining companies establishing themselves on the island. Also this time it was great powers, like Germany, the United States, France and Great Britain, apart from Norway, Sweden and Russia, that saw an economic interest in exploiting a valuable resource on Svalbard. Also this time a situation of competing economic interests lead to rivalry and conflicts, and again made it evident that a solution for a legal regime in relation to Svalbard had to be established. This time the solution was to be the Svalbard Treaty.

Regarding the process towards the Svalbard Treaty, starting in the second half of the 19th century, the point of departure was, as indicated above, that of Svalbard as a *terra nullius*.

¹² Mathisen, pp13-14)

¹³ Arlov, Thor B. Svalbards historie. Trondheim 2003 pp 217-218

This status had been adhered to by the Norwegian government in an exchange of notes between Russia and the Swedish-Norwegian government in 1871-1872. Being, however, aware that the *terra nullius* status might be threatened, the Norwegian government had made the statement that in a case of national sovereignty on Svalbard, the sovereign state would have to be Norway.¹⁴

When the Norwegian government in early 1900 took an initiative towards finding a solution for Svalbard, the objective was to reach an international agreement. On Norwegian initiative three conferences were held in Christiania between 1910 and 1914, none of which managed to conclude on an agreement on Svalbard.¹⁵ A negotiation draft put forward jointly by Norway, Sweden and Russia, has been described as an unusual document, both in legal and political terms.¹⁶ Building on Svalbard's legal status of *terra nullius*, the draft granted legal, judicial and administrative authority, partly to a commission, and partly to the nation states with settlements on the island. The three states behind the negotiation draft were to constitute the commission, on the grounds that they had the most extensive economic interests on Svalbard, and also because of their geographical proximity to the island. Other states, such as Germany, United States and Great Britain did not support this initiative, partly because the commission consisted of representatives from the three states only, but mainly because it was to have judicial authority over other states' nationals. The negotiation draft having been discussed on two of the conferences, were dropped, and by the end of the third conference in 1914, the status of the legal regime of Svalbard was again that of *terra nullius*.

This was thus the island's legal status, when the issue of Svalbard, on an initiative from the Norwegian government, became an integral part of the peace talks in Versailles after World War I.¹⁷ When the Norwegian government informed the parties to the former conferences on Svalbard about their initiative towards the peace talks, reactions were mostly positive.

¹⁴ Arlov p 220

¹⁵ Arlov, p 282-283

¹⁶ Mathisen p 124

¹⁷ Special Commission on Spitsbergen

As for the Norwegian standpoint regarding Svalbard, it was expressed that Norwegian sovereignty over the island, with the approval of all interested parties, would best suit the country's interests.¹⁸ It seemed that the Norwegian ambassador to France at that time¹⁹, had been given rather broad authorization regarding the talks on Svalbard, and also had to take some own initiatives.²⁰

The two parties from the previous conferences on Svalbard, most sceptical to Norwegian sovereignty were Great Britain and Sweden. These countries had, at that time, extensive interests on the island. A third state, the Netherlands, also expressed scepticism, while Denmark, United States and not least France,²¹ were supportive of Norwegian sovereignty. The strong support from the latter two states seemed decisive for the other parties to the conference also becoming supportive of Norwegian sovereignty, but on the condition that other states' rights in the area were guaranteed.

What was to become the issue in the negotiating process leading to the Svalbard Treaty was thus not the question of Norwegian sovereignty over Svalbard, but rather the form and condition for such sovereignty.

One option, introduced by the British, and initially supported by the Swedish government, was that of Svalbard becoming a mandate under the auspices of Norway.²² The Dutch government advocated, on their part, some sort of international administration. The Danish government, expressing little interest in Svalbard, linked support for Norwegian sovereignty, to their own sovereignty over East-Greenland. The strongest support for

¹⁸ Mathisen, p 193

¹⁹ Baron Fredrik Wedel Jarlsberg

²⁰ Had to act on his own initiative to include in the talks "le future régime minière de Spitsbergen" (Mathisen p 197)

²¹ Wedel Jarlsberg, *Reisen gjennom livet*. Oslo 1932

²² At one point this appears to have been advocated mainly by the undersecretary in the British Foreign Ministry, while the Head of the ministry seemed more accommodative to Norwegian sovereignty (Wedel Jarlsberg)

Norwegian sovereignty still came from the French and the American governments, when the negotiating parties on 9 February 1920 signed the Treaty concerning Spitsbergen.²³

2.2 The Svalbard Treaty

After the parties had signed the Svalbard Treaty, the island again disappeared from the international arena. Most other states withdrew, closing down their coal-mining companies, and turning Svalbard once more into mainly a bilateral arena for the two states Norway and Russia.

This bilateral presence was to last for about 30 years, until the development in international maritime law, and the subsequent establishment of a 200 nautical miles fishery protection zone outside Svalbard, put the question of the legal regime outside Svalbard's territorial sea on the international agenda. After another 30 years, in which other states' fishing vessels in the zone have largely obeyed by the rules and regulations laid down by Norwegian fishery authorities, there is, as indicated earlier, a possibility that the increased international interests for the High North, may put the question of whether the Svalbard Treaty applies in the waters, and not least on the shelf, outside Svalbard's territorial sea, back on the international agenda.

Since coming into force in 1925, the Svalbard Treaty has constituted the legal regime for resource exploration and exploitation on Svalbard's land territory and in its territorial waters, and underlies to day's discussion on what regime to apply in the waters and on the shelf outside Svalbard's territorial sea.

The main elements of the Svalbard Treaty is that the contracting parties recognize "the full and absolute sovereignty of Norway over the Archipelago of Spitsbergen"²⁴, while at the same time the contracting parties "shall enjoy equally the rights of fishing and hunting in

²³ The Treaty was signed by the allied powers United States, Great Britain, France, Italy, Japan, y the most involved states Norway, Sweden, Denmark and the Netherlands, as well as the British Dominions Canada, Australia, New Zealand and South African Union, as well as India. The Treaty opened for other states to become party to the Treaty.

²⁴ Art. 1

the territories specified in article 1²⁵ and in its territorial waters”²⁶. Such equal rights can also be seen in the Treaty stipulating that measures enforcing preservation on land and in territorial waters shall always be “applicable equally to the nationals of all contracting parties”²⁷, from the “equal liberty of access to water, fjords and ports specified in article 1”, and from the stipulation that contracting parties “shall be admitted under the same conditions of equality to the exercise and practice of all maritime, industrial, mining or commercial enterprises both on land and in the territorial waters...”²⁸.

Characterizing the Svalbard Treaty is thus that the Treaty on the one hand recognizes Norwegian sovereignty over Svalbard, and on the other gives contracting parties’ equal right to explore and exploit the resources on Svalbard and in its territorial waters.

2.3 The UN Convention of the Law of the Sea

The UN Convention on the Law of the Sea has been described as “possibly the greatest legal development ever to take place”.²⁹ As indicated earlier, it is this development, more precisely the regime of 200 nautical miles Exclusive economic zone, that has raised the issue of what regime to apply in the waters outside Svalbard’s territorial sea. Starting in 1958, coastal states jurisdiction in their coastal waters were the topic on three UN Conference of the Law of the Sea³⁰. When the third conference, in 1972, wrote a legal regime of 200 nautical miles Exclusive economic zone into the negotiation text, this introduced a new form of legal maritime regime, neither territorial waters nor the High Sea.³¹

²⁵ Islands in the Svalbard Box

²⁶ Art. 2 (1)

²⁷ Art. 2 (2)

²⁸ Art. 3 (1) (2)

²⁹ Fleischer, Carl August. *The new international law of the sea and Svalbard*. Jan. 2007

³⁰ The conference in 1958 led to four conventions, but did not solve the question of coastal state jurisdiction. The conference in 1960 dealt solely with this issue, but without reaching a conclusion.

³¹ Coastal states had previously established contiguous zones for specific purposes

An exclusive economic zone is defined as an area “beyond and adjacent to the territorial sea”³², not extending “beyond 200 nautical mil from the baseline”³³. In case of opposite or adjacent coasts, delimitation “shall be effected by agreement on the basis of international law” with the aim to achieve “an equitable solution”.³⁴

In an economic zone the coastal state “has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and its subsoil”.³⁵ Using the words conserving and managing, this is to say that the coastal state has the duty to manage marine resource in a sustainable way. The Convention makes it clear that the coastal state shall determine the allowable catch of the living resources in its exclusive economic zone, and in so doing shall ensure “that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation”.³⁶

One reason for moving the law of the sea in the direction of increased coastal state jurisdiction was the decline in many important fish stocks. This decline was due to the fact that management through international fisheries commissions had not proved satisfactory.³⁷ It was therefore argued that a sustainable fisheries management could best be achieved by coastal states’ ownership to the resources.

The Convention also laid down new regulations in regard to a coastal state’s continental shelf. Prior to the Continental shelf regime, the criteria for defining a state’s continental shelf were found in the Geneva Convention of 1958.³⁸ As such criteria were based on a limit out to where exploitation of natural resources would be possible, the technical development could theoretically imply that a coastal state’s continental shelf could extend

³² Art. 55

³³ Art. 57

³⁴ Art. 74 (1)

³⁵ Art. 56, 1 (a)

³⁶ Art. 61 (1)

³⁷ The North East Atlantic Fisheries Commission (NEAFC) did not have the necessary authority to prevent over fishing

³⁸ Convention on the Continental shelf, Geneva 29 April 1958

to the seabed and subsoil of the oceans. It was obvious that other criteria had to be established.

Such criteria are found in the present Continental shelf regime stipulating that “[t]he continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin”. It is further stipulated that a coastal state’s continental shelf will, in any case stretch out to 200 nautical miles even though the outer edge of the continental margin does not extend to that distance.³⁹ The Convention sets two criteria for the maximum limit of a coastal state’s continental shelf. That is a 350 nautical miles limit, or a limit of 100 nautical miles beyond the point where the seabed lies at a depth of 2 500 metres.⁴⁰ Delimitation towards opposite or adjacent states is as for economic zones.⁴¹

3 Norwegian sovereignty and the Svalbard Treaty

The point of departure in defining Norwegian sovereignty over Svalbard is what is stipulated in article 1 of the Svalbard Treaty. In this article “[t]he High Contracting parties recognize, subject to stipulations of the present Treaty, the full and absolute sovereignty of Norway over the Archipelago of Spitsbergen...”. The term “Norwegian sovereignty” may be interpreted according to the ordinary meaning, which is as the term is defined in international law, or one may interpret Norwegian sovereignty to be limited by stipulations in the Svalbard Treaty. What will be demonstrated in this chapter is how the term is defined in legal theory, by professor Fleischer and professor Ulfstein.

Based on an interpretation of the wording of article 1, professor Fleischer expresses the clear statement that “the idea that the sovereignty of Norway is “limited” or “subject to

³⁹ Art. 76 (1)

⁴⁰ Art. 76 (5)

⁴¹ Art. 83 (1)

limitations” is not correct”. He builds this statement on an interpretation whereby “subject to” is related to the term “recognize”, and not to the term “sovereign”. Accordingly he concludes that Norwegian sovereignty over Svalbard is unconditional, and thus the sovereignty any state enjoys on its territory. He accentuates his conclusion by referring to the legal mechanism of sovereignty as the means by which Norway “could undertake to perform effectively such obligations as those set out in article 2 et seq. of the Treaty, and accord such rights to other states over the territories concerned”.⁴²

Professor Fleischer also supports his argument by referring to a statement by the Special Commission on Spitsbergen in Versailles, saying that “sovereignty according to art.1 should be absolute and in principle unlimited with only those restrictions which were set out and agreed upon in the other articles of the Treaty”. He also refers to the fact that the suggestion during the negotiations of the Svalbard Treaty, of making Svalbard into a mandate under Norwegian auspices rather than to recognize Norwegian sovereignty, was rejected. Rather, the Commission on Spitsbergen chose the second solution with reference to “Norway’s great interest in Spitsbergen, its proximity to the archipelago and the advantage of a definitive solution”.⁴³

Both these references to what actually took place during the negotiations of the Svalbard Treaty, may be said to strengthen professor Fleischer’s argument in regard to how Norwegian sovereignty over Svalbard is to be defined..

In his discussion of the term “Norwegian sovereignty”, professor Ulfstein raises the question whether Norwegian sovereignty over Svalbard is different from sovereignty based upon customary international law, “in the sense that Svalbard must be managed so as to serve the interests of the international community rather than Norwegian national interests.”⁴⁴ He interprets the words “subject to the stipulations of the present Treaty” in article 1 to mean that stipulations here refer to the extensive rights of contracting parties under the Treaty. His conclusion is that these contracting parties’ rights are not of what he

⁴² Fleischer, Carl August. *The new international law of the Sea and Svalbard*. 2007

⁴³ Fleisher (2007) p 4

⁴⁴ Ulfstein, Geir. *The Svalbard Treaty. From terra nullius to Norwegian sovereignty*. Oslo 1995 p 124

defines as, “a sovereign character”, which leads him to conclude that Norway enjoys sole sovereignty over Svalbard.

Professor Ulfstein also supports his argument by relating to how the Commission on Spitsbergen “purportedly chose to grant Norway sovereignty over Svalbard rather than establish Svalbard as a mandate”, and that the Commission also expressed the need for a final solution. Thereby he strengthens his conclusion that “Norway was granted an ordinary sovereignty, i.e. similar to the sovereignty any state enjoys over its territory on the basis of customary law”, and that “in principle the rights of other states under the Svalbard Treaty should be determined as if Norway had granted such rights as a territorial sovereign”.

Having defined Norwegian sovereignty over Svalbard as an ordinary one, professor Ulfstein goes on to indicate that notwithstanding this conclusion, Norwegian sovereignty may be subject to interpretations of the Svalbard Treaty which may imply some sort of limitation on this sovereignty in regard to contracting parties’ equal rights, stipulated in the Treaty. More precisely, he advocates that “the ordinary principles of treaty interpretation should be applied in establishing the rights and duties of other states”.⁴⁵

What will be demonstrated later in this paper is thus how, having reached the same conclusion when defining Norwegian sovereignty over Svalbard, the legal arguments of professor Ulfstein and professor Fleischer will divert when it comes to limiting Norwegian sovereignty in regard to contracting parties equal right to resources.

What will also be demonstrated is that contracting parties to the Svalbard Treaty, having recognized Norwegian sovereignty over Svalbard, may have had different notions in regard to Norwegian sovereignty at the time of the Treaty, and also have come forward with such difference to day. One example is when the contracting party Great Britain indicates a balance between Norway’s full and absolute sovereignty, and the preserving of the former *terra nullius* status of Svalbard.

⁴⁵ Ulfstein (1995) pp 469-470

4 A maritime zone outside Svalbard's territorial water

In discussing the divergent views on the geographical scope of Svalbard Treaty, the question in this chapter is more precisely whether Norway is free to establish a 200 nautical miles economic zone in accordance with the law of the sea, beyond Svalbard's territorial sea, or whether the Svalbard Treaty may be interpreted so as to say that it is this Treaty that applies in such a zone. In the first case Norway may *inter alia* discriminate between national fishing vessels and fishing vessels from other countries. If, however, the zone falls under the regime of the Svalbard Treaty, it will be open to all contracting parties on a non-discriminatory basis.

The question of a maritime zone beyond Svalbard's territorial sea is related to an interpretation of the Svalbard Treaty as well as to state practice. In this chapter I will firstly look at how the issue of what regime to apply outside Svalbard's territorial sea has manifested itself in Norwegian state practice, as it appears through official statements, as well as through the actual establishing and managing of a fishery protection zone. Secondly I will discuss the diverging legal arguments that have come forward in legal theory on how to interpret the geographical scope of the Svalbard Treaty.

4.1 The Norwegian government's position

When passing the Act on Svalbard in 1925,⁴⁶ the Norwegian government raised the question whether Svalbard should be made a fully integrated part of the Norwegian kingdom. In its first proposition the government seemed reluctant to do so⁴⁷, but reconsidering its position in April 1925, when all parties to the Treaty had ratified, presented its proposition on the Act relating to Svalbard,⁴⁸ recommending that "Svalbard forms a part of the Kingdom of Norway".

Since then, the consistent official view of the Norwegian government has been that stipulations laid down in the Treaty, are exhaustive. Consequently, the only limitation on Norwegian sovereignty over Svalbard is what is actually stipulated in the Treaty.

⁴⁶ Act relating to Svalbard of 17 July 1925

⁴⁷ Ot.prp. 12 (1924).

⁴⁸ Ot.prp. 48 (1925)

This was most recently expressed in a speech given by Foreign Minister Jonas Gahr Støre.⁴⁹ Addressing the Svalbard question, Mr. Gahr Støre referred directly to the fact that “from time to time some people question the legal status of the archipelago”. Stating the Norwegian government’s view, the Foreign Minister maintained that “the facts and the legal sources are clear and should dispel any doubt”. Later in his presentation he stressed that “the consistent position taken by this and previous Norwegian governments is that the wording of the treaty is clear: “The references to territorial waters actually mean what they say.” Also in its High North strategy the Norwegian government makes it clear, that Norway, “as a coastal state, has the right to unilaterally establish maritime zones around Svalbard, and a duty to prevent over-exploitation of fishery resources”.⁵⁰ This recent reiteration, by the Foreign Minister, of the Norwegian government’s consistent position, must be defined as strengthening Norwegian state practice.

4.2 Implementing the fishery protection zone

When the Act related to the economic zone was passed, the Norwegian foreign minister at the time,⁵¹ made the firm statement that Norway’s right to establish an economic zone or a fishery zone outside Svalbard was indisputable. He also maintained that no regulation – neither in international law in general - nor in the Svalbard Treaty - could limit the Norwegian government’s right to establish a zone outside this part of the Kingdom.

When this was followed by establishing an interim non-discriminatory 200 nautical miles fishery protection zone outside Svalbard,⁵² the Norwegian government gave two reasons for not implementing an exclusive economic zone.

Firstly it was referred to the need to protect and manage the fish stocks in the waters outside Svalbard, and that, for the time being, this would be satisfactory achieved through a fishery protection zone that did not discriminate between Norwegian and foreign fishing vessels.

⁴⁹ Jonas Gahr Støre. “The rule of law and sound management in the High North”. 2007

⁵⁰ High North strategy, 12 Dec. 2006

⁵¹ Knut Frydenlund in the Storting 6 June 1977

⁵² Royal decree of 3. June 1977

Secondly it was acknowledged that contracting parties to the Svalbard Treaty might challenge a Norwegian economic zone outside Svalbard, and that this could lead to confrontations, which was seen as not being in the interest of Norway.⁵³

Establishing a fishery protection zone rather, than a full economic zone, and making the zone a non-discriminatory zone, raise the question whether this may be said to undermine the Norwegian position in regard to Svalbard. More precisely the first question is whether the Norwegian government acts in accordance with international law when it, under the regime of Exclusive economic zone, implemented a measure with a lesser scope. And the second question is whether implementing a non-discriminatory zone, can be seen as an adherence to this principle laid down in the Svalbard Treaty.

4.2.1 The zone implemented as a measure with a lesser scope

As the regime of Exclusive economic zone uses the phrase that a coastal state “has the sovereign rights”, this might appear as if the Convention introduced a 200 nautical miles exclusive economic zone *ipso facto*. Such an interpretation is not warranted. It was stated that “there is no valid reason that a law of the sea convention should oblige a state to establish a 200 nautical miles exclusive economic zone, and thereby interfere with the activities of foreign vessels, if that state does not want to do so”.⁵⁴ As for the term “exclusive” this has been interpreted to imply “that the coastal state is the master of who may explore or exploit, and the conditions to apply” in their economic zone.⁵⁵

As the purpose of the regime of Exclusive economic zones was to move ownership of fishery resources to coastal states, in order for the coastal state to have the responsibility of managing and conserving these resources, it seems reasonable to assume that it is for the coastal state to decide how to achieve this goal. This also makes it fair to assume that if the coastal state concludes that a measure of a lesser scope, such as a fishery protection zone, will fulfil the management and conservation objectives laid down in the economic zone

⁵³ Frydenlund (1977)

⁵⁴ Fleisher, Carl August. The exclusive economic zone under the convention regime and in state practice. 1983

⁵⁵ Fleisher (1983)

regime, such measures cannot be said to violate international law. This line of reasoning is supported by state practice in the sense that many coastal states, in the wake of the regime of 200 nautical miles exclusive economic zone, established a 200 nautical miles fishery zone, rather than a full economic zone. It thus seems fair to conclude that the Norwegian government, when implementing a fishery protection zone rather than an economic zone, acted in accordance with international law.

4.2.2 A non-discriminatory zone

As for the adherence to the non-discrimination principle when establishing the fishery protection zone, the question is whether non-discrimination, as it is applied in the Svalbard zone as well as in the fishery protection zone, is similar to what can be said to constitute a general principle of non-discrimination in allocation of fish quotas, which is that such quotas are allocated according to a state's historic fishery in the actual waters.

From a formal interpretation of the non-discrimination principle in the Svalbard Treaty, all contracting parties have the same fishing rights in the territorial waters outside Svalbard. When defining the non-discrimination principle in the Svalbard Treaty, the term used by professor Ulfstein is "real discrimination", arguing that it is the effect, rather than what kind, that determines whether a measure is non-discriminatory. He maintains that "the obligation of non-discrimination should be taken not to require identical treatment, but to prevent disadvantageous effects based on nationality". What he says is that there is no discrimination "when there are no disadvantageous effects of a measure, compared to what was the situation before the measure was introduced".⁵⁶

Relating this interpretation to the non-discriminatory fishery protection zone, there are obvious similarities. The non-discriminating principle introduced in this zone implied that fishing states with traditional fishery in the waters outside Svalbard, were given the same rights to fish after the establishment of the fishery protection zone as they had had prior to

⁵⁶ Ulfstein (1995), pp 234-

the zone. States with no traditional fishery in these waters were not given a right to start fishing in this area.⁵⁷

To support the argument of a general principle of non-discrimination on the basis of historic fishery, the principle has been practiced by Norway,⁵⁸ as well as by other coastal states, having allocated catch quotas only to states with historic fishery, even though the legal basis for such allocation has been not to discriminate between nation states.⁵⁹

It may thus be concluded that neither the fact that the fishery protection zone is a measure of a lesser scope than an economic zone, nor the introducing of the non-discrimination principle in this zone, can be said to undermine Norwegian state practice in regard to the geographical scope of the Svalbard Treaty.

Norwegian adherence to the non-discrimination principle was manifested in a recent statement by the Foreign Minister Jonas Gahr Støre, when, having confirmed that implementing an economic zone outside Svalbard will be in accordance with the Svalbard Treaty, went on to say that the establishing of an economic zone around Svalbard will not prevent Norway from continuing the non-discrimination principle of the fishery protection zone, and that establishing an economic zone thus may not necessarily change Norway's relations to other contracting parties.⁶⁰

4.2.3 Managing the Svalbard zone

Establishing the 200 nautical miles fishery protection zone can be seen as an expression of Norwegian state practice regarding the right to a maritime zone beyond Svalbard's territorial sea. This expression can be said to be further demonstrated through the actual management of the fishery in this zone, more precisely by implementing rules and regulations, followed by necessary sanctions.

⁵⁷ Ulfstein (1997), pp108-109, Fleischer (1996)

⁵⁸ When the Norwegian government in September 1974 launched its "three-steps fisheries policy, it was on a non-discriminatory basis

⁵⁹ Rt-1066-624 (636), refers to EC-Court having, on various occasions, based their decisions on this criteria

⁶⁰ Norges Fiskarlags sekretærkonferanse, 7 March 2006

Although not recognizing the fishery protection zone, contracting parties fishing in the zone have, over a period of 30 years, in general obeyed by the rules and regulations laid down by Norwegian fishery authorities. This may have to do with the fact that the Norwegian government has consulted other states, and not least because of what has been described as a “tread gently”⁶¹ policy, but it is nevertheless an expression of contracting parties largely accepting Norwegian management. That a “tread-gently” policy is important can be seen from the fact that when Norwegian fishery authorities from the mid 1990-ies, due to a threat of important species being over fished,⁶² had to introduce stronger regulatory measures,⁶³ this provoked contracting parties fishing in the zone. As will be demonstrated later, this may in turn have intensified their challenging Norway’s right to actually having established the zone.

Characterizing the establishing as well as the managing of the fishery protection zone, one may say that it on one hand is an expression on the part of Norway of the right to establish such a zone beyond Svalbard’s territorial sea. On the other hand, the fact that contracting parties, having largely obeyed by Norwegian rules and regulations in the zone over a period of 30 years, can be seen as some sort of acceptance by contraction parties of Norwegian jurisdiction,.

4.3 The geographical scope of the Svalbard Treaty - interpreting the term “territorial waters”

In this section I will discuss the diverging legal arguments that have come forward in interpreting the term “territorial waters”. The discussion is based primarily on legal theory, demonstrated through arguments from professor Fleisher and professor Ulfstein respectively. In their arguments, as well as in the comments to these arguments, reference will be made to other legal sources.

⁶¹ Stokke, Olav Schram. The struggle over illegal, unreported and unregulated fishing in the Barents Sea. (2005)

⁶² Partly due to the fact that Icelandic fishing vessels, which were not allocated catch quotas in the zone, started fishing

⁶³ Regulations 12 Aug. and 21 Sept. 1994

The geographical scope of the Svalbard Treaty is stipulated in article 2, to territories and “their territorial waters”. How to define the geographical scope of the Svalbard Treaty is thus closely related to how to interpret the term “territorial waters”.

One approach in such an interpretation is to focus on the ordinary meaning of the term “territorial waters”, having a clear definition in international law.⁶⁴ The other is to take into consideration what appears to be the objective of the Treaty, thus focusing on what might have been the intention of the treaty drafters.

Professor Ulfstein admitting that it would be “idle to speculate what the intention of the drafters of the Treaty was in 1920” ,⁶⁵ in his interpretation of the term “territorial waters”, focuses on the objective of the Svalbard Treaty. His argument is that when the treaty drafters included contracting parties’ equal rights in maritime resources in the Treaty, their intention might have been for such rights to extend also to maritime zones, not known to international law at the time, “to the extent that such zones have been claimed in respect to Svalbard”.⁶⁶

By focusing on the objective of the Svalbard Treaty of stipulating contracting parties right to maritime resources, professor Ulfstein’s argument seems to be the this objective should pertain in other maritime zones being claimed beyond Svalbard’s territorial waters.

What may be argued against professor Ulfstein’s interpretation is that the reason behind including territorial waters in the Svalbard Treaty, could merely have been because such waters constitutes an adjacent belt of sea to the land territory. The intention in the Vienna convention stating that “...a treaty is binding upon each party in respect of its entire territory”, was to include both land and water territories.⁶⁷ Reference may also be made to the fact that what pre-empted the Svalbard Treaty, was resource exploitation on the land territory, and not in the waters. On the other hand, taking into consideration that fishing and hunting in waters around Svalbard had been going on for centuries, this can be said to

⁶⁴ ... an adjacent belt of sea described as the territorial sea (UNCLOS, art. 2)

⁶⁵ Ulfstein (1995) p 427

⁶⁶ Ulfstein (1995)

⁶⁷ Ulfstein (1995) p 426

support professor Ulfstein's argument that this was a right contracting parties were eager to maintain, and thus might have intended to extend to whatever zone would be established outside Svalbard.

In interpreting the term "territorial waters", professor Ulfstein also refers to such waters as an "evolutionary concept". By this he advocates that the term "territorial waters" may be interpreted to include maritime zones in a broader sense. With reference to international law, it seems in my mind, relevant to remind that territorial waters and other maritime zones are regimes of a different kind. As for territorial waters, this is, as indicated above, a state's sovereignty over its land territory and internal waters extending to "an adjacent belt of sea", while maritime zones will have to be established separately. While a state's sovereignty in its territorial sea equals that of its mainland, its sovereign rights in a maritime zone is only what is specifically stipulated in the regime of this zone. It may also be relevant to remind that the motive for extended coastal state's rights to an exclusive economic zone, was to restrain coastal states from extending their territorial waters. What may, however, be advocated in support of professor Ulfstein's interpretation, is that the comments above relates to maritime regimes of today, and that the only known maritime regimes to be known to the treaty drafters at the time, was the regime of territorial waters.

Turning now to professor Fleischer's interpretation of the term "territorial waters", this is based on what may be said to be the ordinary meaning of the term. As a coastal state's territorial sea has a clear definition in international law, professor Fleischer must be said to have a strong foundation for his interpretation. Obviously being aware of the fact that the objective of a treaty may constitute an important factor in treaty interpretation, professor Fleischer seems to see a need for advocating that this is not a relevant factor in this particular case. When he advocates that to ask what might have been the intention of the treaty drafters, would be to ask "the wrong question", his argument seems to be that this would imply to ask whether the treaty drafters might have intended to limit Norwegian sovereignty over Svalbard. According to professor Fleischer this would not "suffice to give the articles of the treaty effects far beyond what was actually agreed upon".⁶⁸

⁶⁸ Fleischer (2007) p 8

In order to support professor Fleischer's line of argument here, it may seem that one would have to adhere to a principle of a stricter interpretation approach when it comes to limiting a state's sovereignty. It is clear that such a principle is not stipulated in the Vienna convention on the laws of treaties, which of course is not in itself a reason for not being a legal principle in international law.

4.4 Conclusion

What has been demonstrated in this chapter in regard to what regime to apply in a maritime zone outside Svalbard's territorial sea, is that state practice has demonstrated the consistent Norwegian position that stipulations in the Svalbard Treaty are exhaustive. Consequently, the Norwegian official view is that the Treaty does not apply outside Svalbard's territorial sea. State practice of contracting parties fishing in the Svalbard zone has demonstrated that even though they challenge Norway establishing the zone, they have largely adhered to Norwegian rules and regulations, in a period of 30 years. It may be argued that this expresses some sort of acceptance of Norwegian jurisdiction in the fishery protection zone over a fairly large period, which can be said to constitute an important factor in international law.

Relating the geographical scope of the Svalbard Treaty to the interpretations of the term "territorial waters" laid down in the Svalbard Treaty, the legal argument demonstrates divergent approaches. While professor Fleischer focuses on the ordinary meaning of the term "territorial waters", professor Ulfstein focuses on the objective of the Svalbard Treaty, and thus on what might have been the intention of the treaty drafters at the time. As a coastal state's territorial sea has a clear definition in international law, professor Fleischer must be said to be on safe ground when he sticks to the ordinary meaning of the term. As the objective of a treaty also constitutes a relevant factor in international law on treaty interpretation, professor Ulfstein may certainly argue that the term "territorial waters" may be interpreted in lieu of such an objective. The challenge will, in both cases, be how the arguments supporting the respective interpretations will stand in regard to arguments that may indicate a different interpretation, some of which are indicated above.

5 The shelf outside Svalbard

Notwithstanding that the continental shelf is not mentioned in the Svalbard Treaty, the fact that the archipelago of Svalbard rises above water has led to the question whether Svalbard has its own continental shelf, and if so, what regime to apply on such a shelf.

If Svalbard has its own shelf, where the Svalbard Treaty applies, this will formally imply that all contracting parties have the right to explore and exploit resources on this shelf, on equal terms, and that taxation will be according to taxation rules laid down in the Svalbard Treaty. If defined as a Norwegian shelf, exploration and exploitation, as well as taxation, will be according to Norwegian continental shelf legislation.

Below I will firstly deal with the Norwegian official position in regard to the shelf outside Svalbard, laid down in Norwegian legislation. Secondly I will discuss legal arguments supporting the position that the shelf outside Svalbard is a Norwegian shelf, as well as legal arguments advocating that Svalbard has its own shelf, where the Svalbard Treaty applies. Also here the discussion will be based on how this appears in legal theory, supplemented with arguments based on other legal sources.

5.1 Norwegian official position and legislation

The Norwegian official position regarding the continental shelf is that, in accordance with international maritime law, “all continental shelves that originate from Norwegian territory are Norwegian in the sense that they are subject to Norwegian jurisdiction.”⁶⁹ Advocating that the Norwegian shelf stretches from Northern Norway and some 200 nautical miles north of Svalbard⁷⁰, the Norwegian view is that it “would therefore not be appropriate to talk about Svalbard having its own continental shelf”.⁷¹ It is further advocated that as Svalbard is Norwegian territory, a Svalbard shelf will in any case be a Norwegian shelf on which Norwegian continental shelf legislation applies. This official view has been manifested through Norwegian continental shelf legislation, as well as in the act on economic zone.

⁶⁹ Ministry of Foreign Affairs. 2006

⁷⁰ This can be seen from the documentation that Norway has submitted to CLCS

⁷¹ Ministry of Foreign Affairs. 2006

The Norwegian government proclaimed sovereign rights over the seabed and subsoil outside the coast of Norway in 1963⁷². This proclamation was according to the criteria at the time, laid down in the Geneva Convention of 1958 referred to earlier, namely to explore and exploit natural deposits to such extent as the depths of the sea permitted.

To day's petroleum act⁷³ defines the continental shelf as "the seabed and subsoil of the submarine areas that extend beyond the Norwegian territorial sea, throughout the natural prolongation of the Norwegian land territory to the outer edge of the continental margin, but no less than 200 nautical miles from the base lines from which the breadth of the territorial sea is measured". In regard to Svalbard it further states that "[t]he Act does not apply to Svalbard, including its internal waters and territorial sea." By exempting Svalbard, its internal waters and territorial sea from the Norwegian continental shelf legislation, this is to say that Norwegian legislation does not apply in areas covered by the Svalbard Treaty, but only on the shelf beyond the geographical scope defined in the Treaty. What this can be said to express implicitly, is that there is no Svalbard shelf beyond the territorial sea, for which the Svalbard Treaty applies.

When passing the act on economic zone it was clearly stated that the act did not apply to the continental shelf. Rather it was stated that existing Norwegian continental shelf legislation, should continue as the legal basis for activity on the shelf extending beyond Svalbard's territorial sea.⁷⁴

Norwegian official position is thus clearly stated in national legislation. The fact that this position was confirmed in a statement by the foreign minister at the time, maintaining that the non-discriminatory principle laid down in the Svalbard Treaty in regard to mining, did not apply on Svalbard's sub-sea and its subsoil beyond the territorial sea,⁷⁵ may be said to underline, and thus strengthen the expression of Norwegian state practice.

⁷² Royal Decree 31 May 1963

⁷³ Act of 11. November 1996 no 72

⁷⁴ Paragraph 2 (2):

⁷⁵ Frydenlund (1977)

5.2 The regime on the shelf outside Svalbard

As the Svalbard Treaty has no mentioning of the continental shelf, this will, according to a treaty interpretation based on what is actually stipulated in a treaty, imply that the Svalbard Treaty does not apply beyond Svalbard's territorial sea. This is the interpretation approach advocated by professor Fleischer, thus rejecting that concept of a "Svalbard shelf".⁷⁶ It is also an interpretation in line with what was advocated by professor Fleischer in relation to a maritime zone, namely that the geographical scope cannot be interpreted to go beyond what is actually stipulated in the Treaty.

Also professor Ulfstein argues along the same line as he did in regard to a maritime zone, when he interprets the geographical scope of the Svalbard Treaty by referring to what might have been the treaty drafters' intention, more precisely by advocating that since the continental shelf was not known to the treaty drafters at the time, this may be the reason why the shelf is not included in the Treaty.

Here it is interesting to note that continental shelf in geological terms, was known at the time of signing of the Svalbard Treaty. This can be seen from the fact that the Norwegian government, in order to include Bjørnøya in the Treaty, made the statement that "Bjørnøya was situated on the same continental shelf as Spitsbergen". Professor Ulfstein's argument is, however, that as continental shelf, at that time, was not developed as a legal concept, "it has no effect on the Treaty's application on the continental shelf".⁷⁷

Not surprisingly, the diverging approaches in interpreting the geographical scope of the Svalbard Treaty in regard to a maritime zone, is reflected in the interpretation of the geographical scope in regard to the continental shelf. Both professors have, however, also come forward with additional legal arguments in regard to defining a Svalbard shelf, as well as to what regime to apply on such a shelf.

⁷⁶ Fleischer (1982)

⁷⁷ Ulfstein (1995) p 419

5.2.1 Defining a Svalbard shelf

As indicated above one may interpret the Svalbard Treaty so as to say that there is no Svalbard shelf. As it is argued that Svalbard has a shelf, this is a legal question which will have to be discussed, and where professor Fleischer, as well as professor Ulfstein, have come forward with legal arguments.

Professor Fleischer, initially rejecting a Svalbard zone, argues that in the case that Svalbard does have its own shelf, this will in any case be a Norwegian shelf, as it stems from Norwegian sovereignty over Svalbard. This interpretation will imply that Norwegian continental shelf legislation will apply on the shelf outside Svalbard, whether based on the archipelago being situated on the Norwegian continental shelf, or based on Norwegian sovereignty over Svalbard. Professor Fleischer here seemingly bases his argument on the Svalbard Treaty recognizing Norwegian sovereignty, as well as on the fact that sovereignty over the continental shelf, in accordance with international law, is a prolongation of sovereignty over the land territory.

With the point of departure that Svalbard is situated on the shelf stemming from Northern Norway, professor Ulfstein raises the question whether this “precludes application of the rights established by the Svalbard Treaty on the shelf around Svalbard”. In discussing this further professor Ulfstein points to the fact that as Svalbard is more than 200 nautical miles from the Norwegian mainland, “the existence of a continuous continental shelf can obviously not justify Norwegian sovereign rights in the 200 nautical miles zone around Svalbard”. Rather, professor Ulfstein argues that such a zone must be based on Norway’s sovereignty over Svalbard, and “accordingly regulated by the Svalbard Treaty”.⁷⁸

Professor Ulfstein links these arguments regarding the economic zone, to his arguments regarding the continental shelf, by pointing to the fact that the regime of economic zones comprises the waters as well as its subsoil. From this he draws the conclusion that “using sovereignty over Svalbard to establish a 200-miles zone supports an argument in favour of considering that the rights to the continental shelf stem from the sovereignty over Svalbard, not from the sovereignty over Northern Norway”. He further advocates that as “Svalbard

⁷⁸ Ulfstein (1995) p 423

has the ability under international law to generate a continental shelf”, it follows that Svalbard has a continental shelf, without “any positive proclamation by Norway”.⁷⁹

Professor Ulfstein obviously sees a similarity between a maritime zones and the continental shelf in regard to equal rights stipulated in the Svalbard Treaty. Referring to both regimes being unknown at the time of the Svalbard Treaty, he advocates that to day it would “be a natural solution that the area to which other state’s rights apply should change in accordance with any changes in the maritime territory of Svalbard”.⁸⁰

What I understand professor Ulfstein’s argument to be is that as a 200 nautical miles economic zone, including the right to resources in the subsoil, will have to stem from Norwegian sovereignty over Svalbard, one may conclude that the continental shelf outside Svalbard stems from this sovereignty as well.

I can follow professor Ulfstein when he argues that Svalbard has the ability under international law to generate a continental shelf,⁸¹ but I find it hard to follow his argument when he seems to utilize the regime of economic zone in order to argue that the shelf outside Svalbard will stem from Norwegian sovereignty over Svalbard.

What his argument seem to be, is that as the shelf outside Svalbard stems from Norwegian sovereignty, it follows that it is regulated by the Svalbard Treaty, and that accordingly rights on the shelf beyond Svalbard’s territorial sea are subject to interpretation of the Svalbard Treaty. An interpretation, focusing on what might have been the intention of the treaty drafters, might then in turn extend the geographical scope of the Svalbard Treaty to include a Svalbard shelf.

What can be concluded from the above is that professor Fleischer and professor Ulfstein, both with Norwegian sovereignty over Svalbard as their point of departure, reach quite opposite conclusions as to what this implies. In the first case the conclusion is that Norwegian sovereignty will lead to the shelf being a Norwegian shelf, while in the latter Norwegian sovereignty implies that rights on the shelf outside Svalbard will depend on an

⁷⁹ Ulfstein (1995) p 424

⁸⁰ Ulfstein (1995) pp 428-429

⁸¹ UNCLOS art.121 (3))

interpretation of the Svalbard Treaty, which in turn may imply that this is the regime to apply on the shelf.

It seems that a crucial point here is what has been indicated earlier, namely to what extent national sovereignty is open to interpretation that may imply a limitation on such sovereignty.

5.2.2 A delimitation line between Svalbard and the mainland

Legal arguments in regard to the continental shelf outside Svalbard, have also been related to the delimitation between such a shelf, and the shelf off the Norwegian mainland.

When supporting his argument that there is no Svalbard shelf, professor Fleischer refers to stipulations in international law regarding delimitation between continental shelves of opposite or adjacent coasts. More specifically he points to the fact that such delimitation is based on negotiations between states, reaching, within the limits of international law, an agreement on an equitable solution. Underlining that Svalbard is not a state, professor Fleischer argues that there can be no such agreement. Accordingly, he argues further, as this leaves the median line the only option for delimitation, and as having only this one option comes contrary to international law, this, according to professor Fleischer, adds to undermining a theory of a Svalbard shelf.

Advocating against professor Fleischer's argument, reference can be made to what may be defined as state practice, in the sense that a delimitation line had to be drawn between the fishery protection zone and the economic zone outside the mainland of Norway. The outer limit of the fishery protection zone was here defined to the outer limit of the 200 nautical miles economic zone,⁸² which means a deviation from the median line. As stipulations on delimitation lines in the UN Convention on the Law of the Sea are the same in regard to economic zones and continental shelves, deviations from the median line may thus seem relevant in regard to the continental shelf as well.

Relating the issue of a Svalbard shelf to the question of delimitation lines between overlapping or adjacent zones, professor Ulfstein argues that if Svalbard were a separate

⁸² Royal decree of 3. June 1977

state, a delimitation line would have been necessary. Admitting that Svalbard is not a state, he, points to Svalbard having “a distinct legal regime different from that of the Norwegian mainland”, and on this ground argues that it is “natural that the continental shelf generated by Svalbard is governed by this special regime, and that a delimitation towards the Norwegian mainland shelf is necessary”.⁸³

Professor Ulfstein further refers to the fact that Svalbard is used as the basis for the delimitation line towards Russia, which he argues to indicate that there is a Svalbard shelf. This may be said to be supported the argument that there is Svalbard shelf. I would, however, argue that this is not necessarily the case in relation to what regime that applies on such a shelf. Whether the shelf is a Norwegian shelf or a shelf under the regime of the Svalbard Treaty, a delimitation line towards opposite or adjacent coastal states would have to stem from the coast of Svalbard.

5.3 Conclusion

What has been demonstrated in this chapter is that notwithstanding that the continental shelf is not mentioned in the Svalbard Treaty, it is argued that Svalbard has its own shelf on which the Svalbard Treaty applies. Arguing against a Svalbard shelf, professor Fleischer advocates that as the Treaty has no mentioning of the continental shelf, the geographical scope cannot include a shelf. If a Svalbard shelf were to be defined, professor Fleischer’s argument is that this would in any case be a Norwegian shelf, due to Norwegian sovereignty over Svalbard. This is an argument in line with how international law stipulates a coastal state’s continental shelf.

When professor Ulfstein, also with Norwegian sovereignty as the point of departure, reaches the conclusion that rights on the continental shelf are based on an interpretation of the Svalbard Treaty, this seems to be based on the argument that the shelf outside Svalbard stems from Norwegian sovereignty over Svalbard, which in turn implies an interpretation of the Treaty.

⁸³ Ulfstein (1995) p 424

Arguments on what regime to apply on a shelf outside Svalbard is also related to stipulations in international law on delimitation between opposite and adjacent states. With the point of departure that Svalbard is not a state, professor Fleischer advocates an interpretation of international law restricting agreements on a delimitation line to be reached by states only. Here it may be argued that as a delimitation line has already been drawn between the fishery protection zone and mainland Norway, it seems that such a line may be drawn also for a shelf, as international law prescribes the same procedure for delimitation in regard to maritime zones and continental shelves. Referring to Svalbard having “a distinct legal regime”, professor Ulfstein’s argument is that this calls for a delimitation line different from that of the Norwegian mainland. He supports his argument by referring to the delimitation line towards Russia stemming from the coast of Svalbard, but as commented on, this may not in itself indicate what regime to apply on the shelf outside Svalbard.

6 Legal arguments and political interests – contracting parties

In the following I will look at state practice as it has manifested itself in legal arguments and political statement by four contracting parties to the Svalbard Treaty. Two of these have a long and varied history of resource exploitation on Svalbard and in its waters, namely Russia and Great Britain, while the other two, Iceland and Spain, have a more recent and limited relationship to Svalbard. As their positions vary, it seems relevant to relate their challenge to their diverging historical relationship to Svalbard as well as to their different interests in the resources in the area to day. As contracting parties’ diverging views in interpreting the Svalbard Treaty may have some relation to their position when actually signing the Treaty, I will end this chapter by referring to a theory, the objective of which is to analyze a treaty in its context, at the time it was entered into, as well as when it is challenged during its lifetime.

6.1 Russia

The country, other than Norway, with the longest and most continual presence on Svalbard and in its waters, is Russia. As has been indicated earlier, Norway and Russia have, for long periods, turned the archipelago of Svalbard into more of a bilateral than a multilateral arena. On the mainland of Svalbard the two countries have had their respective mining companies,⁸⁴ while in the waters outside the archipelago the most important fish stocks are shared between the two countries, calling for a close cooperation in fisheries management.⁸⁵

In the following I will discuss what appears to be the position of the Russian government, as well as what may be their legal arguments in regard to the Svalbard Treaty. For the latter I will refer to a paper recently presented by a Russian professor in international law, Mr. Alexander N. Vylegjanin.⁸⁶ It goes without saying that this may not represent the official legal standpoint of the Russia government, but considering that Mr. Vylegjanin is attached to the Ministry of Foreign Affairs in Russia, his standpoints are assumed to carry some weight.

It seems relevant first to draw attention to the historical event, referred to earlier in this paper, namely the exchange of notes between the governments of Sweden-Norway and Russia in 1871-1872. The reason is that the event may be useful in analyzing the Russian position on matters relating to Svalbard, but not least because the event is actually discussed in a paper to day.

The actual event was that the Swedish-Norwegian government intended to enter into possession of the Spitsbergen Archipelago, and consulted other states in order to be “assured that no State whose subjects have the custom to visit this region will have objections...”⁸⁷ The paper points to the fact that Russia, when taking into account that

⁸⁴ Store Norske Spitsbergen Kulkompan and Trust Arktikogul

⁸⁵ Fish stocks migrate between Norwegian and Russian economic zones and the fishery protection zone

⁸⁶ Vylegjanin, Alexander N. Future problems of International law in the High North: Review of the Russian legal literature. 2007

⁸⁷ Vylegjanin (2007)

Sweden-Norway renounced possession over the Archipelago, related this to the “examination of the considerations set out in the note of the Government of Russia”.

What seems to be conveyed here is the Russian perception that the fact that Russia objected to the intended possession, expressing its preference of a *terra nullius* status of Svalbard, might have had a bearing on Sweden-Norway’s decision not to take possession over Svalbard.

That the author of the paper may have a motive for referring to this event to day can be seen when he addresses the issue of a Svalbard zone. Here he refers to what is described as a temptation for Norwegian politicians to day “to take advantage of internal problems of the Russian State”, and he goes on to say that Russia then, as a retaliatory measure, might return to “positions reflected in the 1872 agreement”.

When he further states that “special historically-formed rights of Russia to the Spitsbergen Archipelago were confirmed by the 1872 agreement between Russia and Sweden-Norway”, this can be seen as an expression of the emphasis put on an historical event, perceived to confirm some sort of special relation, and certain acquired rights, of Russia in regard to Svalbard.

6.1.1 Russian position and legal arguments

At the time of the signing of the Svalbard Treaty, the Soviet-Russian government, reminding that the country had not participated in the signing of the Treaty, made it clear that it did not consider itself bound by this act.⁸⁸ Russia did, however, in a note of 16. February 1924, recognize Norwegian sovereignty over Svalbard. Professor Fleischer has made the point that since this recognition occurred one year before the Svalbard Treaty came into force, and the Soviet-Union not yet being a party to the Treaty, this was recognition of Norwegian sovereignty as such, not depending on the actual Treaty.⁸⁹ The Soviet-Union did accede to the Svalbard Treaty on May 7 1935.

⁸⁸ Mathisen p 258

⁸⁹ Fleisher (2006) p 13

The Soviet-Union, and later Russia, has, however, on various occasions expressed their objection to Norwegian unilateral measures in regard to Svalbard, and there are incidents through the history demonstrating Russian alertness in regard to Norwegian politics on Svalbard. What is of interest here is their reaction when Norway established a fishery protection zone beyond Svalbard's territorial waters. The Soviet government then made it clear that the stipulations of the 1920 Treaty did not give Norway the right to establish a maritime boundary around Svalbard. In the paper referred to above, attention is called to a note of 15 June 1977 from the Embassy of the USSR to the Norwegian foreign minister maintaining the zone's "clear nonconformity with obligations assumed by Norway under the 1920 Treaty of Spitsbergen". It was also pointed to the fact that the decision was adopted by the Norwegian government unilaterally, and that the zone was based on internal legislation of Norway, although it concerned "a special area which falls under the operation of the aforesaid Treaty".⁹⁰ This again demonstrates the Russian position that the Norwegian government does not have unilateral right to implement a maritime zone outside Svalbard.

Turning now to the Russian legal arguments in regard to a maritime zone outside Svalbard, this discussion will be based on arguments presented by Mr. Vylegjanin in regard to what he defines as the "territorial waters of territories". More precisely, he raises the question whether the concept "Svalbard", as part of the Kingdom of Norway, in the Act relating to Svalbard, includes "territorial waters" of Spitsbergen stipulated in the 1920 Treaty. The point is made that the treaty drafters "did not use the term "territorial sea" of Spitsbergen or, moreover, "territorial sea of Norway"". As the treaty drafters used the term "territorial waters of territories", it is argued that they laid down a distinction between this concept and "the classical institution of the law of the sea – territorial sea of the coastal State."

This distinction is supported by referring to the rights of coastal states in its territorial sea, as opposed to the non-discriminatory stipulations characterizing territorial waters of the territories specified in article 1 of the Svalbard Treaty. What is expressed in the paper is that "the material limitations of the sovereignty of Norway make impossible the equating of the "territorial waters of territories" of Spitsbergen, and the institution of the "territorial sea

⁹⁰ Vylegjanin (2007)

of a coastal state”. On these grounds it is concluded that “neither Norway nor any other State-party to the Paris Treaty has its own territorial sea around Spitsbergen”. Basing his line of argument on an interpretation of the term “territorial waters of territories”, Mr. Vylegjanin concludes that “as Norway has no territorial sea off Spitsbergen”, the country cannot establish an exclusive economic zone, as such a zone is established beyond and adjacent to the territorial sea.

The way I understand these legal arguments, and more precisely the distinction between “territorial sea” and “territorial waters of territories”, is that it is the latter which is laid down in the Svalbard Treaty, and thus comes under the sovereignty of Norway. In regard to why this is not to be defined as territorial sea, the argument seems to be that as contracting parties to the Treaty have equal rights in territorial waters outside Svalbard, and the material rights of Norway thus are limited, these waters cannot be defined as territorial sea of a coastal state. Subsequently, Svalbard does not have a territorial sea in the sense this is defined in international law.

What is advocated here is thus that establishing a maritime zone presupposes a territorial sea as defined in international law, which is a sea where there are no other states’ rights, except for those included in the territorial sea regime. Here it can, in my view, be argued that since a coastal state has full sovereignty in its territorial sea, it may give its consent to other states’ rights in this area without this, at the same time, implying that these waters no longer has the status of being the coastal state’s territorial sea. Relating this to Svalbard, one might then argue that the fact that the Svalbard Treaty laid down certain rights for contracting parties in the territorial waters outside Svalbard, does not imply that the legal status of these waters is no longer the territorial sea of Svalbard.

6.1.2 Political interests of Russia

As has been referred to above, Russia has expressed a clear opposition to Norway establishing a fishery protection zone beyond Svalbard’s territorial waters. Commenting on what might appear to be in the political interest of Russia, it seems, however, unlikely that this would be for the Svalbard Treaty to apply in a maritime zone beyond Svalbard’s territorial sea. Russia’s quota of Norwegian Arctic Cod is primarily taken by Russian ocean

trawlers in the Barents Sea, including the Svalbard zone, and it would therefore hardly be in their interest that this area would be open for all contracting parties to exploit the fish stocks, even though fishery, most likely, will be reserved for countries with traditional fishery. It is true that in a Norwegian economic zone around Svalbard, Norway will have the right to reserve fishing for national vessels. As the migrating pattern for fish stocks in the area will still be the same, and as Norway and Russia will share a common interest in maintaining a management regime that will prevent over fishing or even collapse of certain species, their fishery cooperation is likely to continue.

It is interesting to note that commenting on Russian trawlers being fined for breaking management regulations in the Svalbard zone, the Russian expert in law of the sea, Mr. Anatolij Kolodkin, expressing his disagreement regarding the Norwegian view on the Svalbard zone, at the same time made it clear that finding a satisfactory solution to fishery management in this area was for Norway and Russia to solve, without interference from other states fishing in the area.⁹¹

The stricter fishery management introduced by Norway in the fishery protection zone in the mid 90-ies was obviously not welcomed by Russian fishing vessels, accusing Norway of breaking a 20 years old “gentlemen’s agreement”. As late as in July this year, the Russian government expressed dissatisfaction with the way Russian trawlers in the Svalbard zone, were repeatedly “detained and arrested by the Norwegian Coast Guard”⁹². On the other hand, the fact that the trawler Elektron was arrested by Russian authorities when reaching Russian waters, has been said to indicate that the Russian fishing vessels, breaking the rules in the Svalbard zone, is more related to the ship owners’ hunt for resources than to a means of demonstration of official Russian policy.⁹³ On this ground such breach on management rules is not an expression of Russian state practice.

Looking at what might be Russian interest on the shelf outside Svalbard, the county has done some seismic prospecting in this area. This might indicate an interest in potential for

⁹¹ Nordlys 27. October 2005

⁹² Minister of Foreign Affairs Sergey Lavrov (Barentsobserver.com, 02-07-2007)

⁹³ Schram Stokke (2005)

petroleum resources. On the other hand, Russia has its own petroleum reserves, and, different from other contracting parties, is not in the need for this resource. American ambassador to Norway, Mr. Benson K. Whitney has stressed the need for a stable petroleum supply from the High North, referring directly to the need for clarity regarding rights and responsibilities around Svalbard.⁹⁴ It seems unlikely that it would be in the interest of Russia that the Svalbard Treaty should be interpreted in a way that gave contracting parties the right to explore potential petroleum resources on the shelf outside Svalbard's territorial sea. Opening the area to all contracting parties would not least come contrary to Russian military/strategic interests in the area.

Russian state practice and legal arguments thus seems to indicate that the country draws long historical lines. This can be seen from the way they seem to perceive a sort of consultative right in regard to Svalbard, and consequently demonstrate the consistent view that Norway does not have the right to unilateral measures in regard to Svalbard. Judging from Mr. Vylegjanin's paper, their legal argument in regard to the areas beyond Svalbard's territorial waters, seems to be that a zone beyond this waters may not be established.

6.2 Great Britain

As can be seen from the historic overview, Great Britain stands forth as one of the contracting parties with the longest historical tradition for resource exploitation on Svalbard. British companies were heavily involved in whaling as well as in coal mining, and Great Britain did at one point also claim sovereignty over Svalbard.

The British government has recently referred to the country's "legitimate interests in the Svalbard Archipelago dating back beyond the 1920 Treaty of Paris to the 17th century", and has reminded Norway that the British government "played a key role in negotiating the Treaty, under which sovereignty over Svalbard was conferred upon Norway".⁹⁵

When discussing the position of the British government in regard to the Svalbard Treaty, I will refer to documents expressing the view of the British Government on the Svalbard

⁹⁴ Whitney, Benson K. US view – energy in the High North. 2007

⁹⁵ Non-paper "Svalbard: further UK views" July 2006

issue.⁹⁶ When dealing with the legal arguments I will refer to a paper recently presented by an expert in the law of the sea, Mr. D.H. Anderson.⁹⁷ Even though not necessarily expressing official legal arguments of Great Britain, his position as former advisor to the British government gives his arguments a certain weight in that direction.

6.2.1 British position and legal arguments

As indicated earlier, Great Britain was one of the negotiating parties most sceptical to recognizing Norwegian sovereignty over Svalbard. The British attitude was rather to make the archipelago a mandate under the auspices of Norway.

When it comes to the British government's official view on the Svalbard issue, this can be seen from a memoir conveyed to the Norwegian government in October 1974.⁹⁸ Here the British government expressed that they wanted to "reserve their position both as regards the extent of the Norwegian continental shelf and the scope and the interpretation of the Svalbard Treaty". In July 1979, referring to the establishing of the fishery protection zone, the British government further conveyed that, consistent with their note of 29 October 1974, they wished "to make it clear that the views expressed in relation to the Norwegian continental shelf apply equally in respect of fishery or other 200-miles zones in the areas around the territories government by the 1920 Treaty".⁹⁹

In March 2006, referring to recent activity by the Norwegian government, the British government found it "timely to reiterate its position concerning the application of the Treaty of Paris to the maritime zones generated around Svalbard".¹⁰⁰ It was made clear that the United Kingdom considered "the Svalbard archipelago to generate its own maritime zone, separate from those generated by other Norwegian territory". Referring particularly to Article 3 and Article 8 of the Svalbard Treaty, it was further made clear that the United

⁹⁶ Copies of these notes have been given to me by professor Geir Ulfstein

⁹⁷ Anderson, D.H. *The Status under International Law of the Maritime Areas around Svalbard*. Also a judge on the International Tribunal for the Law of the Sea

⁹⁸ UK Aide memoire handed to Norway 29. October 1974

⁹⁹ UK Bout de papier handed to Norway 22. July 1979

¹⁰⁰ Note No 1/06

Kingdom considered maritime zones generated by Svalbard to be “subject to the provisions of the Treaty of Paris”.

It may also be interesting to refer to a recent non-paper from the British government on Svalbard. Referring to a dialogue with Norway, it was concluded that even though the two countries shared common interests, “there remained differences of opinion over the scope of the Svalbard Treaty”. Referring to the note of March 2006, the British government expressed disappointment about what they described as “Norway’s refusal to accept that other parties to the Svalbard Treaty have any legitimate interests beyond Svalbard’s territorial waters.” It was further maintained that Norway, when such interests were promoted, claimed that it called into question Norwegian sovereignty and jurisdiction, thus making “serious dialogue with Norway difficult.” This seems to have led to the British government initiating a meeting with other contracting parties to the Svalbard Treaty, not including Norway.¹⁰¹

Turning to the legal arguments, as they are put forward by Mr. Anderson,¹⁰² it is interesting to note that when starting his paper by looking back at the signing of the Svalbard Treaty, he uses the word “confer” in relation to Norwegian sovereignty over Svalbard. This is a term that is similar “to bestow upon” or even “to give”.¹⁰³ More precisely it is stated that by conferring sovereignty over Svalbard to Norway, this “opened the way for Norway to assume administration” over the archipelago.

What appears to be an important argument in the British interpretation of the Svalbard Treaty, judging from this paper, is that the objective of the Treaty is to provide an “equitable regime” on Svalbard. More precisely it is argued that the Treaty was to reach a balance, or a package deal, between Norway’s full and absolute sovereignty on the one hand and other contracting parties’ equal right to resources, characterizing the former *terra nullius* status of Svalbard, on the other. The author makes the statement that British policy

¹⁰¹ “NRK Dagsnytt 18”, 13. April 2007

¹⁰² Mr. Anderson, former advisor to the British government, makes it clear that the paper contains his personal opinions

¹⁰³ Professor Fleischer has made the point that that Svalbard was not “given” to Norway as there was no owner of Svalbard

in 1920 was to preserve as much as possible of the status of *terra nullius*, consistent with Norway's new role as sovereign. As article 1 of the Svalbard Treaty is interpreted so as to say that Norwegian sovereignty is subject to stipulations of the Treaty, it is argued that a maritime zone established after 1920 is subject to the same stipulations.

What is advocated here is an interpretation of the Svalbard Treaty whereby the balance referred to earlier, between "Norway's full and absolute sovereignty and stipulations in favour of other State Parties"¹⁰⁴ is to be retained in maritime zones established after the Svalbard Treaty.

As for the continental shelf, Mr. Anderson's point of departure is also here Norwegian sovereignty over Svalbard. Referring to a state's continental shelf being inherent in its sovereignty, it is advocated that a coastal state is not required to claim sovereign rights over the continental shelf. Without elaborating too much on this, the author seems to be of the opinion, which is in line with his reasoning regarding maritime zones, that as the continental shelf follows from Norwegian sovereignty over Svalbard, the above mentioned balance will have to be retained here as well.

The British government has in other words strongly and repeatedly expressed its official view on what regime to apply outside Svalbard's territorial sea, in the waters as well as on the shelf. It has also been demonstrated that Great Britain, judging from Mr. Anderson's arguments, adheres to an interpretation of the Svalbard Treaty advocating an equitable regime between Norwegian sovereignty and contracting parties' rights.

6.2.2 Political interests of Great Britain

British arguments against Norway establishing a zone outside Svalbard's territorial waters, seems not to be related to resource exploitation in the waters outside Svalbard at present. It may, however, seem likely that the British challenge to the Norwegian official position on Svalbard, is related to an interest in the potential for petroleum resources on the shelf outside the island. Being an oil- and gas producing country, one may assume that Great Britain will be on the look out for fields to extend its petroleum production, not least in

¹⁰⁴ Anderson p 15

waters where the country claims to have a right to resources. At the same time it also seems likely that Great Britain takes part in the general quest for energy resources.

It may also be argued that Great Britain's strong and persistent opposition towards the Svalbard zone may relate to their historical tradition in the area, which perhaps even might have led a sense of "ownership" in regard to Svalbard.

6.3 Iceland

Iceland became a party to the Svalbard Treaty in 1994, and started, at that time, fishery in the fishery protection zone. The fact that Icelandic fishing vessels, not having been allocated catch quotas, started fishing in the fishery protection zone, was, as indicated earlier, a major reason why Norwegian fishery authorities had to leave their "tread-gently" policy in this zone. It was inevitable that Norwegian fishery authorities had to react towards Icelandic fishing vessels, as their fishery in the Svalbard zone not only was a threat to the fish stocks in the area, but also was not based on quota-allocation, thereby constituting a breach on Norwegian fisheries legislation.

The reason why Iceland was not allocated any catch quotas in the fishery protection zone was because the country had no traditional fishery in these waters. Icelandic fishery authorities advocated, on their part, that Norway had no right to discriminate against Icelandic fishing vessels, as the country had become party to the Svalbard Treaty.

Iceland, having expressed strong opposition towards Norway establishing a fishery protection zone, and having advocated that it is the Svalbard Treaty that applies in the waters outside Svalbard's territorial sea, has, on several occasions, expressed its intention to bring the question of the fishery protection zone to the International Court of Justice in Hague.¹⁰⁵

6.3.1 Iceland's legal arguments

As for the legal arguments supporting Icelandic rejection of Norway's rights in waters outside Svalbard, these are based on a case brought before the Supreme Court in 1996.

¹⁰⁵ Prime minister David Oddsson, as well as Fridrik Arngrimsson from the Shipowners association, with the support of Member of Alltinget Magnus Thor Hafsteinsson (NORISS 2004:3)

Icelandic fishing vessels had been convicted of illegal fishery in the fishery protection zone,¹⁰⁶ and provided that their arguments were founded in an official Icelandic position, Iceland emphasises the importance, and strong standing, of the non-discriminating principle in the Svalbard Treaty. The country also advocates that, even though the need for quota allocation in order to prevent over fishing is accepted, Norway's right to totally exclude fishing vessels from particular countries is strongly rejected.

Referring to the development in international law of economic zones, and to Norway, on this ground, establishing a fishery protection zone outside Svalbard, the arguments were not so much directed towards Norway actually establishing the zone, as towards their duty to practice the non-discrimination principle laid down in the Svalbard Treaty, in this zone.

Judging from what came forward in the trial, the position of Iceland is that the non-discrimination principle in the Svalbard Treaty implies that all parties to the Treaty has the right to fish in the zone outside Svalbard. Reminiscent of what has been said earlier about the definition of the non-discrimination principle in the Svalbard Treaty, namely that traditional fishery may be a prerequisite for fishing under this regime, Iceland, with no tradition for fishing in this area, might still not be included under the regime of the Svalbard Treaty.

Strengthening that what has been referred to above represent the Icelandic official view, can be seen from comments on the fishery protection zone, put forward by the former Icelandic Foreign minister Jón Baldvin Hannibalsson. Mr. Hannibalsson, not challenging the fishery protection zone as such, has expressed strong views against how the non-discriminatory principle in the zone is defined. His argument is that not only a state's traditional fishery should be taken into account, but that other aspects related to fishery, coinciding closely with what can be said to characterize Iceland's fishery, should supplement the concept of non-discrimination. This is an indication, that political interests often are the underlying factor in a state's the legal arguments.

¹⁰⁶ Rt-1996-624

6.3.2 Political interests of Iceland

The strong focus on the non-discriminating principle, and not least the arguments on how this principle is to be defined, all point in the direction that to Iceland the main interest is to be included in the non-discrimination principle laid down in the fishery protection zone, and thus to be among the states that are allocated catch quotas in this zone.

Also in regard to Iceland it makes sense to argue that the country may not be interested in the Svalbard Treaty to apply in the waters outside the archipelago. On the one side indicating that they have a fair chance to succeed in a trial against Norway in Haag, the argument has also come forward that it would perhaps not be in the interest of neither Norway nor Iceland, if the Svalbard Treaty were to apply, as this might give other contracting parties the right to fish, which in turn might lead to over fishing.¹⁰⁷

It thus seems that Iceland's legal arguments are not so much directed towards Norway establishing a zone outside Svalbard, but rather towards the non-discrimination principle laid down in the zone, not including Iceland.

6.4 Spain

Spain, fishing in the fishery protection zone on the EU part of the third country quota, has also expressed its opposition to the fishery protection zone. Legal arguments to support the Spanish opposition, has come forward in a case before the Supreme Court in 2006,¹⁰⁸ providing that these arguments are representative of the Spanish official position.

6.4.1 Spain's legal arguments

In this case Spanish ship owners had been convicted of breaking the rules on catch reporting in the fishery protection zone. As a consequence, the Spanish ship owners challenged the legality of the fishery protection zone. It was advocated that such a zone had no legal authority in customary international law, and that the zone therefore had to be based on the regime of Exclusive economic zones. What was further argued was that the Convention did not give coastal states, within the regime of economic zone, the right to

¹⁰⁷ Hjörtur Gíslason í Morgunblaðir (NORISS 2004:3)

¹⁰⁸ HR 2006-01997-A

establish a coastal zone with a lesser scope. Rather, the Convention had to be interpreted literally, meaning that the zone had to encompass all the duties imposed on the coastal states in this regime.

What is advocated is thus that the fishery protection zone has no basis in international law, as it is a lesser measure than the regime on which it is based. Commenting on his argument it may be referred to what has been said earlier, namely that since it is up to the coastal state to decide on establishing an economic zone, the state may also be free to choose a lesser measure as long as this fulfils the main objective laid down in the regime of economic zone, namely to manage and conserve the living resources.

Stating its opinion, the Supreme Court made the point that the Act relating to the economic zone, as well as the fishery protection zone, were established on the basis of customary international law, not on the UN Convention on the Law of the Sea. More precisely, their conclusion was that the basis in international law for establishing the fishery protection zone was customary international law in relation to fishery zones.¹⁰⁹

Advocating on the one hand that there was no basis in international law for establishing the fishery protection zone, Spain's further argument was that since Norwegian sovereignty over Svalbard had its basis in the Svalbard Treaty, the Norwegian government, having established a zone, had a duty to implement regulations of the Treaty, in particular the non-discrimination principle.

6.4.2 Political interests of Spain

Having in mind that the Spanish fishing fleet has had to leave many coastal waters due to extended national jurisdiction, this supports an argument that Spain's main concern most likely is to have access to fish resources in the waters outside Svalbard on equal terms as other states fishing in the zone. In the case before the Supreme Court it was maintained that Norwegian fishery authorities discriminated between fishing vessels in the zone, for instance by exempted Russian vessels from having to report their catches. The Spanish

¹⁰⁹ In my view it may seem more relevant to refer to the fishery protection zone as a lesser measure under the regime of Exclusive economic zone, accepted as customary international law.

fishermen were also of the opinion that even though Norway may have the authority to control fishery in the Svalbard zone, further action should be left to the flag state rather than to Norwegian fishery authorities.

It thus seems that the Spanish resistance towards the fishery protection zone, even though legally based on the argument that the zone has no basis in international law, is closely related to Spanish fishermen having the opportunity to catch their share of the third country quota in the Svalbard zone on equal terms with other fishing states in the zone. It thus seems that also to Spain it may not so much be the Svalbard zone as such that causes the objections, but rather what they perceive as too strict management rules, and even discriminatory measures, towards own fishing vessels in the zone.

6.5 Challenges to the Svalbard Treaty – a theoretical approach

As indicated above, I will refer to a theory that might be of some use in analyzing the diverging arguments from contracting parties in regard to the Svalbard Treaty. In this theory of Cognitive Structures of Cooperation,¹¹⁰ the point of departure is that a multilateral treaty is not only a component of international law, but also an integral part of a political process. Distinct from a legal reading of a treaty text, the theory will permit to reach a more balanced understanding of the political significance of the treaty. That is more precisely to understand a treaty in its context at the time it was entered into, as well as during its actual life time.

Having in mind that the interpretation of the Svalbard Treaty has been challenged by development in international ocean law, which in turn has led to diverging views as to how to interpret the Treaty in lieu of this development, the theory of Cognitive Structures of Cooperation may have some relevance. My objective here is not to conduct such an analysis, as that will go well beyond the scope of this paper, but rather to give an indication on how the theory may help shed some light on the divergent legal arguments and positions in relation to the Svalbard Treaty.

¹¹⁰ Scott, Shirley. *The political interpretation of multilateral treaties*. Leiden 2004

The theory consists of three basic elements. Firstly it is important to determine what seems to be a treaty's *foundation ideology*, defined as the ideology which justified the solution reached in the treaty, and which made possible the mediation of a conflicting issue. The next element is the *goal common to the negotiating states*. Even though negotiating states are likely to have individual goals, they may see their goal best solved by cooperating with other states. Pursuing ones goal is in other words defined as agreeing to common constraints on the pursuit of this goal, meaning that other states have accepted one's pursuit of such a goal within the limits defined in the treaty. The third element is the *solution* reached by the negotiating parties, and constitutes the means by which to manage the issue of concern. An important aspect will be to what extent such a solution actually solved the issue at stake in a way that appeared relevant in the life of a treaty.

What in my view makes the theory of the Cognitive Structure of Cooperation interesting in regard to the Svalbard Treaty, is that it on the one hand focuses on what characterized the parties' ideology, goal and solution when entering into a treaty, and then on what appears to be weak points in these elements, which may come forward when the treaty is challenged during its lifetime.

Indicating what in my mind may be said to constitute the above mentioned elements in the Svalbard Treaty, I will take the preamble¹¹¹ of the Treaty as the point of departure.¹¹² It then seems most relevant that the foundation ideology of the Svalbard Treaty would be *a peaceful development and utilization of Svalbard*. This assumption is based on the fact that former resource exploitation on Svalbard and in its waters, whaling as well as coal mining, had led to conflicts between nation states, and that it was precisely a common notion of avoiding conflicting resource exploitation and exploration that had pre-empted the negotiations that lead to the signing of the Svalbard Treaty.

Turning to what may be defined as a common goal of the Svalbard Treaty, it seems fair to assume that an important interest for the negotiating parties to the Treaty, were to get

¹¹¹ "Desirous, while recognizing the sovereignty of Norway over the Archipelago of Spitsbergen, including Bear Island, of seeing these territories provided with the equitable regime, in order to assure their development and peaceful utilization"

¹¹² Which is also what the theory points to in order to define these elements

access to as much as possible of the resources on Svalbard, and in its waters. In line with the theory's perception that constraint on one's own pursuit for resources, will at the same time imply acceptance of one's own pursuit by the other contracting parties, it seems likely to define the common goal as *equal access to resource exploitation and exploration on Svalbard*.

As is well known, the preamble, as well as the Treaty text, recognized the sovereignty of Norway over the Archipelago of Spitsbergen. This is to say that when entering into the Treaty the negotiating parties agreed on Norwegian sovereignty over Svalbard. This raises the question whether to define this as a goal common to the negotiating parties, or whether Norwegian sovereignty is rather to be defined as the solution, thereby constituting the means by which to manage the issue of concern in the Svalbard Treaty. Reminding that the Commission on Spitsbergen referred to Norwegian sovereignty as "the final solution", it appears most relevant to define *Norwegian sovereignty* precisely as the solution, thus constituting the means, by which to realize the foundation ideology of peaceful utilization, and to secure the goal of contracting parties' equal rights to resources.

Making use of the theory in relation to the Svalbard Treaty would thus imply to reveal what may be defined as possible weak points in any of these elements at the time of signing the Treaty, as well as coming to the surface when the Treaty was challenged by development in international law.

I will illustrate this by referring briefly to what may be said to constitute weak points in regard to the Svalbard Treaty, relating this to the contracting parties Norway, Great Britain and Russia.

Based on their common historical experience of conflicts related to resource exploration on Svalbard, it seems most likely that all the three countries mentioned above, at the time of entering into the Treaty, as well as at present, adhere to the foundation ideology that utilization of resources on Svalbard and in its waters should be conducted in a peaceful way.

As for the goal of the Treaty, it seems reasonable to assume that all countries' initial goal would be to get the most of the resources on Svalbard. As history had demonstrated that for

all parties to pursue its own goals would most likely lead to conflicts, it seems most likely that the goal stipulated in the Svalbard, namely of equal right to resources for all contracting parties, was adhered to by the three parties at the time of entering into the Treaty, and still is an accepted goal.

When it comes to the solution, through which the above mentioned ideology and goal were to be reached, namely Norwegian sovereignty over Svalbard, diversions have come to surface when the Svalbard Treaty has met the challenge of development in ocean law. A relevant question is therefore whether such diversions were present also at the time of entering into the Treaty.

As has been documented in this paper, Norway has been the driving force in setting the Svalbard issue on the international agenda, and in initiating the process that finally lead to the signing of the Svalbard Treaty. The Norwegian attitude has all along been for an international agreement, but it was clearly stated that if a state were to have sovereignty over Svalbard, that state would have to be Norway, but with the approval of the international community. There is no doubt that the Norwegian government, at the time of signing the Svalbard Treaty, and not least since passing the Svalbard Law in 1925, where Svalbard formed a part of the Kingdom of Norway, has regarded Svalbard as a part of Norway, subject to the same sovereignty as the mainland of Norway. The development in the law of the sea, and the legal and political challenges this have raised in relation to Svalbard, has had no bearing on how the Norwegian government interpret the Svalbard Treaty, rather it has confirmed their interpretation.

As for Great Britain, it has been demonstrated that the country, at the time of signing the Svalbard Treaty, put great emphasis on keeping as much as possible of the *terra nullius* status of Svalbard. That is to say that while recognizing the solution of Norwegian sovereignty over Svalbard, Great Britain perceived the Svalbard Treaty to maintain a balance between this sovereignty and contracting parties' equal rights to resources. This is in line with their initial suggestion of Svalbard as a mandate under Norwegian auspices, rather than Norwegian sovereignty. It thus seems that the British, at the time of signing the Svalbard Treaty, even though recognizing Norwegian sovereignty over Svalbard, had a perception of this sovereignty being conditional in relation to contracting parties' rights to

resources. When the new law of the sea opened the possibility of extended maritime areas outside Svalbard, this perception of Norwegian sovereignty seemed to come to the surface, manifesting itself in the British legal interpretation of the Svalbard Treaty advocating that the above mentioned balance were to be established in such extended areas as well.

The contracting party Russia, initially not a party at the actual negotiations of the Svalbard Treaty, did express its recognition of Norwegian sovereignty over Svalbard soon after the signing. This has, however, not prevented the country from repeatedly afterwards having expressed the opinion that Norway does not have unilateral rights on Svalbard, nor from stressing the international aspects of the Svalbard Treaty. It thus seems that Russia, soon after recognizing Norwegian sovereignty, developed the notion that this sovereignty was limited in the sense that Norway had no right to unilateral action on Svalbard, and that this has also come to the surface when challenging the Norwegian interpretation of the Svalbard Treaty in regard to the development in the law of the sea.

What this short demonstration is meant to show is that the three contracting parties mentioned above, seem all along to have had divergent notions of the solution of the Svalbard Treaty, more precisely of the impact of Norwegian sovereignty over Svalbard. When the Treaty was challenged by development in international law, these diversions came to the surface. According to the theory it is precisely such latent diversions, related either to foundation ideology, goal or solution, that reveal a treaty's weak points, but which, at the same time may help understand how a treaty, though its lifetime, face legal as well as political challenges. In regard to the Svalbard Treaty, the fact that divergent notions in regard to Norwegian sovereignty over Svalbard might have been there all along, may help understand contracting parties' challenging this sovereignty to day.

7 Final discussion

When discussing the controversy over what legal regime to apply in the waters and on the shelf outside Svalbard's territorial sea, focus has been on legal arguments from authorities

in law of the sea, as well as on legal arguments and state practice from the sovereign state Norway and the other contracting parties Great Britain, Russia, Iceland and Spain.

As for the diversions between legal arguments, these seem, in my view, to be closely related to two elements. Firstly whether the interpretation of the term “territorial waters” in the Svalbard Treaty is focusing on the ordinary meaning of the term, or whether the main focus is on what seems to be the objective of the Treaty. Secondly it also seems to be of some importance whether one adheres to a principle in international law, whereby limitations on a state’s sovereignty have to be clearly spelled out. This relates to whether, having defined Norwegian sovereignty of Svalbard as an ordinary one, it may still be argued that this sovereignty may be subject to interpretation of the Svalbard Treaty.

When professor Ulfstein focuses on the objective of the Svalbard Treaty, his interpretation of the term “territorial waters” is characterized by the emphasize on the intention of the treaty drafters, more precisely on contracting parties equal right to maritime resources. Being the objective of the Treaty, this will support an argument that such rights should extent to maritime zones established beyond Svalbard’s territorial waters at a later stage. Contrary to this line of arguments, professor Fleischer, when advocating that the term “territorial waters” is to be interpreted according to the ordinary meaning of the term, argues that equal rights to resources cannot extend beyond the geographical scope laid down in the Treaty.

When professor Fleischer advocates an interpretation whereby contracting parties’ equal rights are restricted to what is actually stipulated in the Svalbard Treaty, his interpretation seemingly takes into consideration a principle whereby limitations in a state’s sovereignty have to be clearly spelled out. Professor Ulfstein, on the other hand, seems not to adhere to such a principle, as his argument is that Norwegian sovereignty is open to an interpretation of the Svalbard Treaty, which in turn may imply a limitation on this sovereignty.

This divergence on Norwegian sovereignty can also be seen in regard to what regime to apply on the shelf outside Svalbard. With his principle argument being that Svalbard is situated on the Norwegian continental shelf, and that there is no Svalbard shelf, professor Fleischer, addressing the possibility of such a shelf, refers to Norwegian sovereignty over Svalbard when arguing that such a shelf would in any case be Norwegian. Professor

Ulfstein, on the other hand, having argued that rights on the shelf outside Svalbard stems from Norwegian sovereignty over Svalbard, further argues that rights on the shelf outside Svalbard is subject to interpretation of the Svalbard Treaty.

As for contracting parties' legal arguments and state practice, the paper has demonstrated that Norway, has had the consistent view that stipulations laid down in the Svalbard Treaty are exhaustive, manifesting itself through legal arguments and official statements, as well as in state practice.

In regard to Russia, the paper has demonstrated that the country has argued strongly against the fishery protection zone, advocating that Norway acted in clear nonconformity with obligations assumed under the Svalbard Treaty. This argument seems to have strong historical roots, as Russia has expressed a consistent opposition to Norwegian unilateral action in regard to Svalbard. Closely related to this opposition, is that Russia also seems to have a consistent perception of some sort of consultative role in Svalbard issues.

Even though protesting strongly against the fishery protection zone, an advocating Norway's duty to adhere to the non-discrimination principle of the Svalbard Treaty, it has been demonstrated that the primary interest of Iceland and Spain most likely is to have access to fishery resources in the waters outside Svalbard. On this ground, it would hardly be in their interest to open the area to more fishing vessels, as this may constitute a threat to the actual allocation of quotas as well as to over fishing,

The contracting party which has demonstrated perhaps the strongest challenge to the Norwegian interpretation of the Svalbard Treaty, is Great Britain. The paper has demonstrated that the country seems to advocate an interpretation of the Svalbard Treaty which implies a balance between Norwegian sovereignty over Svalbard on the one hand and contracting parties' equal rights to resources on the other. The paper has also demonstrated that this seems to be a position dating back to the signing of the Svalbard Treaty, which is to say that also Great Britain has had a consistent interpretation of the Svalbard Treaty, and has regularly reiterated its position. An important aspect in the position of Great Britain in regard to Svalbard, is also that their long historic presence in the area, at one point even raising a sovereignty claim, may have lead to a feeling of some sort of "ownership" to the island.

Summing up contracting parties' challenges discussed in this paper, one may on the one hand conclude that, as in the case of Norway, both Russia and Great Britain demonstrate a strong as well as a consistent position in regard to the interpretation of the Svalbard Treaty. These are elements of great importance in international law. Another conclusion is that even though all contracting parties dealt with in this paper, challenge the Norwegian position in regard to Svalbard, a characteristic of these challenges is that they vary in legal arguments as well as in underlying political interests. Such variations have recently been referred to in a statement by the Norwegian Foreign minister making the point that contracting parties do not necessarily agree on the grounds for their challenge.¹¹³

The consequence of such variations in contracting parties' challenges, is that the Norwegian government is not met by a consistent and united legal challenge. This may in turn be said to make it easier for the Norwegian government to stand firm on its interpretation of the Svalbard Treaty.

¹¹³ Jonas Gahr Støre (Dagsnytt 18. 13. April 2007)

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9 Attachments

9.1 Map of maritime jurisdiction of the High North



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9.2 The Svalbard Treaty

TREATY CONCERNING THE ARCHIPELAGO OF SPITSBERGEN [and Protocol](#)

[\(Paris, 9 February 1920\)](#)

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:

[Names of plenipotentiaries not reproduced here.]

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 BeerenEiland, all the islands situated between 10deg. and 35deg. longitude East of Greenwich and between 74deg. and 81deg. latitude North, especially West Spitsbergen, NorthEast Land, Barents Island, Edge Island, Wiche Islands, Hope Island or HopenEiland, 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 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 5 July 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.

Ratifications shall be deposited at Paris as soon as possible.[1]

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 ratifications by all the signatory Powers; and in all other respects on the same date as the mining regulations provided for in that Article.[2]

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.

[Signatures not reproduced here.]

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 juriconsult 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.

(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 of 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 the 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 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.

2.

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) The 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 claimants whose claims have been recognised by the Tribunal a 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.