DEN NORSKE ATLANTERHAVSKOMITÉ
The Norwegian Atlantic Committee

SECURITY BRIEF 2 - 2020

10 QUESTIONS AND ANSWERS ABOUT THE SVALBARD TREATY

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The Svalbard treaty, or *Treaty concerning the Archipelago of Spitsbergen, Traité relatif à l'Archipel du Spitsberg*, was signed in Paris on 9 February 1920 by representatives of Norway, the USA, Denmark, France, Italy, Japan, the Netherlands, the United Kingdom with Dominions and Sweden. Since then, many states have joined the treaty. As of December 2020, the treaty has around 45 signatories, all of which enjoy the same rights as the original treaty parties. The treaty went into force on 14 August 1925, and Svalbard became Norwegian territory.

In the following brief text, I will address some questions that often arise about Svalbard and the 1920 treaty, whether among the general public in Norway or abroad, in politics, or in the international academic community of non-specialists in the field. I aim at nothing more than a very brief introduction. Readers that are interested in more extensive or specialised discussions, may consult some of the titles listed at the end of the text.

Fredrik Wedel Jarlsberg, Norwegian minister to France, signing the Svalbard Treaty in Paris on February 9, 1920. Photo: From the archive of the Governor of Svalbard.

1. Why is there a separate treaty on Svalbard, unlike most other territories in Europe?

Most territories have at some point in history been the subject of treaties between states that define their legal status. Many of these treaties were about the delimitations of borders, but some also included stipulations about governance. The 1920 Svalbard treaty is unique for a different reason, however. Among the agreements that came out of the First World War peace settlements, it is one of very few that is still in force in its original form. It is also unique, at least in today's world, in its combination of sovereignty and the principle of equal access to the territory and its resources.

Equally unusual in the European context is the reason why there was a treaty in the first place: Svalbard, or Spitsbergen, as the archipelago was commonly known at the time, was one of the few remaining territories at the European periphery that did not belong to any state – it was *terra nullius*, or no man's land. The reason for this was that Svalbard had no permanent population or infrastructure in the ordinary sense of these words, and it was of negligible economic significance (although providing a few individuals with their livelihood). Moreover, none of the great powers had taken a serious strategic interest in the area and claimed it as their possession. This was the case even for Russia, the great power that for obvious geographical reasons would seem to be first in line as a pretender to the ownership of the archipelago.

Russia's point of view was demonstrated at a series of meetings in Kristiania (Oslo) in 1910 and 1912, when representatives from Russia, Norway and Sweden reached preliminary agreement on a formula for joint Russian-Swedish-Norwegian administration of Svalbard. Rather than seeking sovereignty over the archipelago, Russia was content with an arrangement that ensured that Russia's presence and influence in the area was equal, or preferably superior, to that of the other great powers. However, the outbreak of the First World War put an end to the efforts to regulate Svalbard's legal status.

2. How did the idea of a treaty for Svalbard come up in Paris?

When the Svalbard issue was brought up at the fringes of the Paris peace negotiations, it was the result of a Norwegian initiative. Germany and Soviet Russia were not invited to take part in the talks, so Norway could use its accumulated goodwill as a "neutral ally" of the Entente powers to achieve a solution that satisfied Norway's growing Arctic ambitions. The Soviet Union accepted the treaty and Norway's sovereignty in February 1924 in return for Norway's *de jure* recognition of the Soviet government. It formally joined the treaty in 1935, after the establishment of diplomatic relations between the Soviet Union and USA. However, at Norway's insistence the treaty's article 10 granted "Russian nationals and companies" the same rights as those of the treaty powers even before the Soviet Union joined the treaty.

3. Are there "limitations" to Norway's sovereignty over Svalbard?

The simple and short answer is a clear *no* – the treaty recognised the "full and absolute sovereignty of Norway over the Archipelago of Spitsbergen". At the same time, however, the treaty made Norway's exercise of its sovereignty subject to a number of "stipulations", aiming at providing Svalbard with an "equitable regime" to assure the archipelago's "development and peaceful utilisation". As such there is nothing unusual about internationally agreed rules that a state has agreed to adhere to even on its own territory. An obvious example are the implications of Norway's membership of the European Economic Area, through which Norway is obliged to follow a huge number of rules and regulations, some of which are incorporated into Norwegian law. However, the combination of stipulations is unique to the Svalbard treaty.

4. What is the geographical scope of the treaty?

The treaty area is in article 1 of the treaty designated as:

> the Archipelago of Spitsbergen, comprising, with Bear Island or Beeren-Eiland, all the islands situated between 10° and 35° longitude East of Greenwich and between 74° and 81° latitude North, especially West Spitsbergen, North-East Land, Barents Island, Edge Island, Wiche Islands, Hope Island or Hopen-Eiland, and Prince Charles Forland, together with all islands great or small and rocks appertaining thereto.

The geographical coordinates set the limits of the "Svalbard box". However, this "box" as such is not the treaty area – the treaty area consists of "all islands great or small and rocks" *within* this box as well as their "territorial waters".

When the treaty was signed in 1920, coastal states' territorial waters were usually set at three or four nautical miles. When Svalbard became part of Norway in 1925, Norway defined the territorial waters as four nautical miles, as for the rest of Norway. In 2012 Norway extended this to 12 nautical miles. Starting in the 1950s, the international law of the sea evolved towards giving coastal states rights beyond the territorial waters, culminating in the introduction of 200 nautical miles Exclusive Economic Zones (EEZ) and a separate regime for continental shelves that may extend far beyond that limit.

This development, naturally, has led to discussions about the geographical scope of the stipulations of the treaty. In 1977, Norway implemented a 200 nautical miles EEZ off the mainland, and two years later a 200 miles fishery zone around Jan Mayen. Also in 1977, Norway set a 200 nautical miles "fishery protection zone" around Svalbard. Earlier, in 1961, when Norway declared a 12 nautical miles fishery zone, Svalbard was excluded. This non-confrontational approach notwithstanding, Norway takes the view that the 1920 treaty should be interpreted according to its letter, i.e. that the treaty stipulations do not apply beyond the territorial waters. Beyond that limit, and as argued by Norway, Norway's as well as other states' rights and obligations are regulated by the United Nations Convention on the Law of the Sea (UNCLOS), which incorporates the regimes for both continental shelves and EEZs.

Other states, among them Russia, the United Kingdom and Iceland, as well as the European Union, have made clear their disagreement or reservation towards elements of the Norwegian interpretation. Somewhat simplified, most of these states and the EU claim that the 1920 treaty applies also in areas beyond the territorial waters, since Norway's sovereign rights in these areas follow from the treaty. Russia's point of view is somewhat ambiguous – whether the 200 miles nautical zone is a treaty area or high seas subject to the relevant UNCLOS rules for the international governance of such areas. In either case, Russia disagrees with Norway's claim to full sovereign rights within 200 nautical miles. Russia, and previously the Soviet Union, has argued for a bilateral Norwegian-Soviet/Russian solutions. Such an approach is unacceptable to Norway, however. It

Longyearbyen ('Longyear city') is the largest settlement and the administrative centre of Svalbard.
Photo: Christopher Michel/Flickr (CC BY 2.0).

is also an approach that would hardly be welcomed by other treaty parties.

Regarding the continental shelf, Norway takes the view that the shelf around Svalbard is an extension of the shelf emanating from the Norwegian mainland. Thus, the treaty as such is seen as irrelevant in discussions about the continental shelf. This comes on top of the view that the treaty does not extend beyond the territorial waters. Other states disagree, claiming that the 1920 treaty stipulations govern the use of the shelf as well, thus contradicting both the Norwegian claim that there is no such thing as a continental shelf emanating from Svalbard, *and* that the treaty area ends at 12 nautical miles.

5. Why are the discussions about the Treaty's geographical scope important?

In short, they are important due to the stipulations that give citizens and companies of the treaty parties equal rights in the treaty area. These stipulations include "fishing and hunting" (article 2), "all maritime, industrial, mining or commercial enterprises" on land and at sea (article 3), and "the right of ownership of property, including mineral rights" (article 7). Last but not least, "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" (article 8). For potential off-shore petroleum and mining operations, the implications are obvious and largely prohibitive for future large-scale economic activity: Accepting the view that there is a shelf around Svalbard that is subject to the stipulations of the treaty, thus giving equal access to citizens and companies of treaty powers and strictly limiting taxation (as compared to the high levels of taxation of the petroleum industry in the North Sea and elsewhere in the Barents Sea), would effectively remove any incentive for Norway to open the area for commercial activity.

6. Is Svalbard demilitarized?

According to the treaty's article 9, "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." The Norwegian official position on this is clear, and has been so at least since the issue arose in the early 1950s when the archipelago was explicitly made part of Nato's Northern Atlantic defence area: Svalbard is not demilitarized, but there are limitations to what kind of military activity Norway may undertake on the archipelago. From this follows Norway's practise of, among other ways of signalling, regularly sending naval vessels to the territorial waters around Svalbard – a visible manifestation of the Norwegian interpretation. Russia, as the only state party to the treaty, regularly issues protests against what it claims is Norway's infringement of the article 9 stipulations. To a non-specialist Russian reading the text of the treaty, there is a linguistic element in this: the terms used in the English and French English authentic texts, "for warlike purposes" and "dans un but de guerre" respectively, is usually translated into Russian as "v voiennykh tselyakh". To a Russian reader of the text without additional contextual knowledge, this phrase would be the equivalent of simply "for *military*

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purposes". The Norwegian interpretation of the treaty's article 9 finds support in legal discussions of the topic, although there exist interpretations that further extends the implications of this article.

7. What is the archipelago's proper name – Svalbard or Spitsbergen?

I include this question for two reasons. First, the names used for the archipelago and its constituent islands is somewhat complex, so it may be useful to present an overview. Second, it is from time to time claimed that "Spitsbergen" is the correct term, since this is how the area was designated in the 1920 treaty. However, since 1925 "Svalbard" is the official name of the archipelago as set by Norway, including Bear Island, Hopen and other "islands great or small and rocks" (article 1) within the "box". The name "Spitsbergen" applies only to the largest island in the archipelago, until 1969 called "Western Spitsbergen". In Russian informal usage, "Shpitsbergen" is used to denote the "main" archipelago, while Bear Island is normally listed as a separate entity.

8. Why is there a special "Svalbard tax" – much lower than on the mainland?

This follows directly from the treaty's article 8, which reads: "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." In other words, there can be no repatriation of tax or other revenues to the Norwegian mainland. However, the administration of Svalbard has for many years been heavily subsidized from the state budget, so in principle more extensive taxation is possible.

9. Is the Svalbard treaty being challenged?

No, it is not. There may be discussions about the interpretation of the treaty, but not about Norway's "full and absolute sovereignty". In this regard, Svalbard is part of Norway just as any other of the country's regions. Svalbard as part of Norway is embedded in international law and binding for all states.

10. ... and has it ever been challenged?

Since it went into force in 1925, and apart from the use of the archipelago "for warlike purposes" by both sides during the Second World War, the only challenge to the treaty as such was Soviet people's commissar for foreign affairs Viacheslav M. Molotov's proposal in November 1944 that Bear Island should be transferred to the Soviet Union, while the rest of the archipelago should be governed as a Soviet-Norwegian "condominium". This is a long and somewhat complex part of history, but the short version is that nothing came out of it: The issue was put finally to rest by the Norwegian Storting and government in February 1947. From then on, the Soviet Union, and then Russia, has been a vocal proponent of status quo on the basis of a strict interpretation of the treaty "stipulations".

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Thus, in the absence of major geopolitical changes to the present European order, there is no reason why the Svalbard treaty, i.e. Norway's sovereignty over Svalbard, should or could be challenged. Disagreements of interpretation of certain of the treaty's clauses are exactly that – discussions of interpretations. Just as no state questions Norway's sovereignty, no state – with a potential and partial exception for Russia – questions Norway's right as such to set rules and regimes for the management of living and other resources even in the 200 nautical miles zone. However, disagreements will persist about the interpretation of these rules and regulations and, when applicable, whether they follow the letter and the perceived spirit of the Svalbard treaty.

Suggestions for further reading

Thor Bjørn Arlov, *Svalbards historie,* 1996

Irene Dahl, Øystein Jensen (eds.), *Svalbardtraktaten 100 år. Et jubileumsskrift,* 2020

Sven G. Holtsmark, *A Soviet Grab for the High North? USSR, Svalbard, and Northern Norway 1920-1953*, 1993. Norsk og revidert utgave 2003: *Høyt spill. Svalbard-spørsmålet 1944-47*

Geir Ulfstein, *The Svalbard treaty. From Terra Nullius to Norwegian sovereignty,* 1995

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The series was first published in June 2001.

Editor: Kristoffer Vold Ulvestad
ISSN: 1502-6361