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Controversy over the Legal Regime outside Svalbard's Territorial Waters

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Introduction

The characteristic of the Svalbard Treaty¹ is that, on the one hand, parties to the Treaty recognize “the full and absolute sovereignty of Norway over the Archipelago of Spitsbergen,”² while at the same time ships and nationals of contracting parties “shall enjoy equally the rights of fishing and hunting in the territories specified in article 1 and in its territorial waters.”³

Since the Svalbard Treaty came into force, a development in the law of the sea has given coastal states the right to establish “beyond and adjacent to their territorial sea” an exclusive economic zone extending 200 nautical miles from the coast.⁴ In such a 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.”⁵

This has raised the question whether the Svalbard Treaty applies to Svalbard⁶ and “its territorial waters” only, or whether it may be interpreted so as to apply also in a maritime zone and on the continental shelf beyond these waters. The main difference between these interpretations is that the former is based on the actual wording of the Svalbard Treaty and thus the meaning of the term “territorial waters” as it is defined in international law,⁷ while in the latter the main focus is on what might have been the intention of the treaty parties.

More precisely what has been argued is that the intention of the treaty parties might have been for equal right to resources to extend to maritime zones, not known at the time, but later claimed in respect to Svalbard.⁸ If so, some contracting parties have expressed the view that the equal right to resources, laid down in the Svalbard Treaty, should apply to nationals of treaty parties also in such a zone.

The Norwegian government's persistent position is that the Svalbard Treaty applies only in the geographical limit actually laid down in the Treaty, and that the regime of exclusive economic zones

gives Norway, as the sovereign state of Svalbard, the right to establish an exclusive economic zone outside these islands.

Also in regard to the continental shelf around Svalbard, some of the contracting parties have expressed views diverging from the Norwegian position. While the Norwegian government defines the shelf outside Svalbard's territorial waters as part of the Norwegian continental shelf, other contracting parties argue that Svalbard has its own shelf where the Svalbard Treaty applies.

In the following the objective is to shed some light on the controversy over what regime to apply outside Svalbard's territorial waters. In so doing, focus will be on two aspects. The first one is that arguments on what regime to apply in a maritime zone and on the continental shelf respectively seem to vary. The other is that contracting parties, having challenged the Norwegian official view, seem to base their challenge on diverging legal arguments as well as diverging political interests.

A maritime zone beyond Svalbard's territorial waters

In December 1976 the Norwegian government passed the “Act relating to the economic zone,”⁹ according to which Norway has the right to an exclusive economic zone extending 200 nautical miles around its entire coast, which means also around Svalbard and Jan Mayen.¹⁰ In June 1977, the Norwegian government established an interim, non-discriminatory fishery protection zone beyond and adjacent to Svalbard's territorial waters and extending 200 nautical miles from the coast.¹¹ The national legal basis for the zone was the act of December 1974, but the Norwegian government chose to establish a fishery protection zone, giving two reasons for their decision. Firstly it was maintained that the need to protect and manage fish stocks in the waters outside Svalbard would be satisfactorily achieved through a fishery protection zone. Secondly it was acknowledged that contracting parties to the Svalbard Treaty

might challenge a Norwegian economic zone outside Svalbard.

During the more than 30 years that the fishery protection zone has been in operation, fishing boats from contracting parties fishing in the zone have in general adhered to the rules and regulations laid down by Norwegian fishery authorities. The Norwegian government has for its part practiced a so-called "tread gently" policy in the area.¹²

The fact that the fishery protection zone was established as a non-discriminatory zone did not imply that fishermen from all contracting parties got the right to fish in the zone. Non-discrimination is here defined as fishing rights being given to boats from contracting parties with a historic fishery in the area. This is in line with a definition of non-discrimination in the Svalbard Treaty that states 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."¹³ It is also in line with a practice of coastal states allocating catch quotas only to states with a historic fishery, even when the legal basis for such allocation has been that of no discrimination between nation states.¹⁴

It may be argued that 30 years with the fishery protection zone has created a regime for fishing that may be applied to a maritime zone outside Svalbard whether this is a Norwegian economic zone or a Svalbard zone. This presupposes that the non-discriminatory principle will be continued in an economic zone. Statements by the Norwegian foreign minister point in this direction. He has indicated that making the fishery protection zone an exclusive economic zone will not give Norwegian fisheries authority increased regulatory power in managing fisheries in this area, and he has also pointed to the possibility of continuing the non-discriminatory principle in an economic zone.¹⁵

The continental shelf outside Svalbard

The continental shelf is not mentioned in the Svalbard Treaty. Arguing that the Treaty applies on the shelf outside Svalbard's territorial waters thus has to be based on an interpretation of the Treaty assuming that it was the intention of the treaty parties that equal rights to resources should include resources on the shelf. The continental shelf was not known as a legal concept at the time when the Svalbard Treaty was negotiated, even though it was known as a geological phenomenon.¹⁶

As indicated already, the Norwegian official view is that Svalbard is situated on the Norwegian continental shelf, geologically stretching from

northern Norway towards Svalbard and beyond. This view is implicitly expressed in to days' petroleum act,¹⁷ which defines the Norwegian continental shelf according to the international law of the sea and states that the act "does not apply to Svalbard, its internal waters or territorial sea."

In my view an important aspect of the issue of the continental shelf outside Svalbard is that the Norwegian government in 1963 informed the international community of its sovereign rights over the continental shelf outside the Kingdom of Norway, which is to say the mainland as well as Svalbard and Jan Mayen.¹⁸ If there are no previous protests from the international community, other than a note from Great Britain in 1974, one may argue that in accordance with international law the Norwegian sovereignty claim over the continental shelf outside Svalbard stands rather strong.

Even though it may be argued that Svalbard has its own continental shelf, there will still be diverging views whether the regime on this shelf is the Svalbard Treaty or Norwegian legislation. The position of the Norwegian government is that as Norway has sovereignty over Svalbard, it will in any case be Norwegian legislation that applies. Some other treaty parties are, however, of the opinion that on a Svalbard shelf, it is the Svalbard Treaty that applies.

What characterizes the shelf, as compared to a maritime zone, is that there has been no exploration for resources on the shelf outside Svalbard, and that even though the potential for oil and gas is not known at present, it seems prudent to assume that parties to the Svalbard Treaty will seek to partake in possible petroleum activity in the future. Whether such activity takes place under the regime of the Svalbard Treaty or according to Norwegian legislation will most likely imply a difference in taxation.¹⁹

Diverging legal arguments and political interests

When the fishery protection zone was established, some contracting parties, as indicated above, reserved their position regarding a Norwegian zone outside Svalbard.²⁰ In the following I will look briefly at what seems to be the position of four parties challenging the Norwegian view, namely Russia, the United Kingdom, Iceland and Spain.

Russia was not a party to the signing of the Svalbard Treaty but recognized Norwegian sovereignty over Svalbard in a note of 16 February 1924.²¹ The country became party to the Treaty on 7 May 1935. The Soviet Union, and later Russia, has on various occasions expressed their

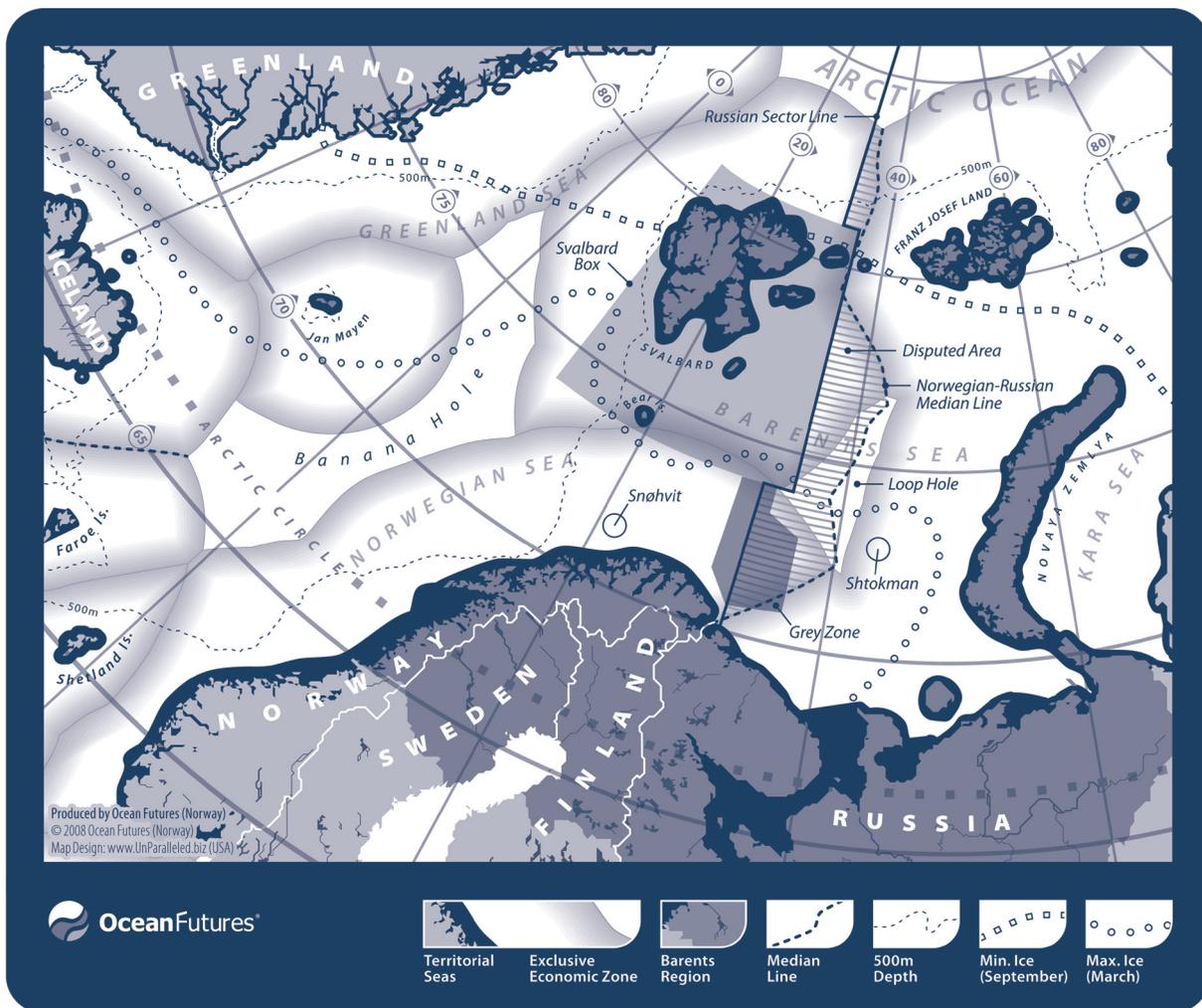


Fig. 1 – Maritime Jurisdiction Zones in the European Arctic

objections to Norwegian unilateral measures in regard to Svalbard. When Norway established the fishery protection zone, the Soviet government expressed the zones “clear nonconformity with obligations assumed by Norway under the 1920 Treaty of Spitsbergen.”²² It also pointed to the fact that the decision was adopted by the Norwegian government unilaterally, although it concerned “a special area which falls under the operation of the aforesaid Treaty.”²³

Commenting on what might appear to be in the political interests of Russia, however, it seems unlikely that this would be for the Svalbard Treaty to apply in such a zone. 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 hardly be in their interest that this area be open for other contracting parties. It is true that in a Norwegian economic zone Norway would

have the right to reserve fishing for national vessels, but the migrating pattern of the fish stocks in the area will require continued cooperation between the two countries in managing these shared stocks.²⁴

It thus seems fair to argue that the Russian challenge to Norway establishing a maritime zone outside Svalbard’s territorial waters may be more related to the measure being unilateral, which in turn may be related to a Russian notion of having a historic right to some sort of consultation in matters related to Svalbard.²⁵

Iceland became a party to the Svalbard Treaty in 1994, and referring to the non-discrimination principle of the Treaty, started fishing in the fishery protection zone. Having no historic fishery in the area, the country was given no quotas, and their fishery was defined as illegal by Norwegian fisheries authorities.²⁶ Icelandic fishing led to confrontations

with Norwegian fisheries authorities,²⁷ and was also a threat to the fish stocks.

When the so-called “Loop Hole” agreement was reached on 15 May 1999 between Russia, Norway and Iceland, the Icelandic government made it clear that they would not bring the issue of the Svalbard zone before the International Court of Justice in Hague, which she had previously threatened to do. This can be said to support the assumption that the main interest of Iceland was for Icelandic fishing boats to get access to the resources in the area.

When Spanish fishing vessels were accused of not reporting their catch according to regulations in the Svalbard zone, they challenged Norway’s right to establishing such a zone. Their argument was that as the legal base for establishing the zone was the regime of economic zones, Norwegian authorities had no right to establish the lesser measure of a fishery protection zone. They further argued that as Norway had established such a zone, they at least had to practice the non-discrimination principle.²⁸

Also in the case of Spain, taking into consideration that Spanish fishing boats had been driven from many established economic zones, their main concern seemed to be for Spanish fishing boats to get access to the fishery resources on equal terms as other contracting parties.

It seems that for the two contracting parties Iceland and Spain, one may also argue that even though they have challenged Norway’s right to a maritime zone outside Svalbard, their main concern seems to be not so much the actual zone but rather how fisheries in the zone are being managed by the Norwegian fisheries authorities. More precisely both countries emphasised the non-discrimination principle, and a fair quota for their national fishermen.

Of the contracting parties dealt with here, the United Kingdom seems to represent the most consistent challenge to the Norwegian position on Svalbard, as their legal arguments as well as their political interests seem to coincide.

When the Norwegian government established the fishery protection zone, the United Kingdom reserved their position²⁹ and referred to their former note expressing their reservation regarding the continental shelf outside Svalbard.³⁰ The British government has also later reminded Norwegian authorities about what they describe as their legitimate rights on Svalbard.³¹

It seems relevant to remind that Great Britain, during the negotiations of the Svalbard Treaty, supported the solution of making Svalbard a mandate under Norway rather than the sovereign state of Svalbard. It seems further relevant to be

aware that Great Britain seemed to have a notion of the Svalbard Treaty as constituting a sort of balance between Norwegian sovereignty on the one hand and contracting parties’ equal right to resources on the other.

Arguing further that Svalbard generates its own maritime zone and its own continental shelf, the British position seems to be that the balance between Norwegian sovereignty and contracting parties’ equal rights, also applies in these areas.

Contrary to what has been argued regarding Russia, Iceland and Spain, British interests seem best achieved by applying the regime of the Svalbard Treaty outside Svalbard. This relates particularly to the shelf. The country has major oil and gas interests and most likely would want to be a part of, or perhaps even exercise some influence on, exploration and possible exploitation of such resources on the shelf outside Svalbard.

Based on the four countries dealt with above, the Norwegian government seems not to be faced with a compact and united challenge to their position on the Svalbard regime, but rather that these challenges vary in legal arguments as well as in political interests. This in turn implies that the Norwegian government may choose varied strategies and may even adopt different solutions depending on from where the challenges come.

¹ Treaty relating to Spitsbergen, 9 February 1920, signed by the

United States, the United Kingdom, Denmark, France, Italy, Japan, Norway, The Netherlands and Sweden, as well as the British Dominions of Canada, Australia, New Zealand and South Africa [Svalbard Treaty].

2 Svalbard Treaty, Article 1.

3 Svalbard Treaty, Article 2(1).

4 The UN Convention on the Law of the Sea (UNCLOS), 10 December 1982, Article 51.

5 UNCLOS, Article 56 1(a).

6 That is to say, islands located in the “Svalbard box,” constructed in order to define the islands without having to mention each and every one.

7 UNCLOS, Article 2. See also “Maritime Jurisdiction and Commercial Activity,” *Focus North*, no. 6 (2007).

8 For a more thorough presentation of these interpretations, see Brit Fløistad, *The Controversy over the Applicable Regime outside Svalbard’s Territorial Sea*, Master’s thesis, Faculty of Law, University of Oslo (2007).

9 Act of 17 December 1976, no. 91.

10 Outside Jan Mayen the Government established a fishery zone.

11 Regulation of 3 June 1977, no. 6.

12 The Norwegian government had to introduce stronger regulatory measures from the mid-1990s due to a threat of important species being over fished.

13 Geir Ulfstein, *The Svalbard Treaty: From Terra Nullius to Norwegian Sovereignty* (Oslo, 1995), p. 243.

14 Iceland claimed to have a right to fish in the Svalbard zone when becoming a party to the Svalbard Treaty in 1994, but was not defined as having a traditional fishery in the area. It was not least due to Icelandic fishermen starting fishing in the fishery protection zone which prompted the Norwegian government to introduce stronger regulatory measures.

15 Jonas Gahr Støre, “Perspektiver på nordområdene,” [Perspectives on the Northern Areas], speech at Norges Fiskerilags Sekretærkonferanse, Oslo, 7 March 2006.

16 This can be seen from the fact that the Norwegian government, in order to include Bjørnøya in the Svalbard Treaty, made the statement that “Bjørnøya is situated on the same continental shelf as Spitsbergen.”

17 Act of 29 November 1996, no. 72, relating to petroleum activities.

18 Royal Decree of 31 May 1963.

19 That is more precisely whether taxation is based on the Norwegian Act of 13 June 1975 no. 35 relating to the taxation of subsea petroleum deposits etc., or on Article 8 (2) in the Svalbard Treaty.

20 When the fishery protection zone was established, nine contracting parties reserved their view or protested against the zone: the Soviet Union, Great Britain, Germany, The Netherlands, France, the United States, Poland, Hungary and Czechoslovakia.

21 Professor Carl August Fleischer has made the point that since this recognition occurred one year before the Svalbard Treaty came into force and before becoming a party to the Treaty, this was recognition of Norwegian sovereignty as such, not depending on the actual Treaty.

22 Note of 15 June 1977. Referred to in Alexander N. Vylegjanin, *Future Problems of International Law in the High North: Review of the Russian Legal Literature* (2007).

23 Vylegjanin (2007).

24 Fish stocks migrate between Norwegian and Russian exclusive economic zones and the fishery protection zone.

25 In a recent paper, reference is made to an exchange of notes of 1870–1871, with the impression that this laid down some historic right for Russia to be consulted regarding Svalbard; see Vylegjanin (2007). For more on this exchange of notes, see Fløistad (2007).

26 It was not least because of this Icelandic fishery, and the threat it implied for the stocks in the area, that Norwegian fisheries authorities had to introduce stronger managing measures in the Svalbard zone from the mid-1990s. Leaving the “tread-gently” policy in turn provoked contracting parties already fishing in the area, not least the Russians which claimed that Norway had left the “gentlemen’s agreement” between the two countries.

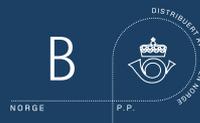
27 The Icelandic arguments can be further studied in the judgement of the Norwegian Supreme Court, 5 June 1996 (Rt-1996-624).

28 The Spanish arguments can be further studied in the decision by the Norwegian Supreme Court, 27 November 2006 (HR-2006-01997-A). (Reservation must be taken regarding notes 26 and 27 in that these arguments reflect the official position of the respective countries.)

29 UK Bout de papier, handed to Norway 22 July 1979.

30 Note of 29 October 1974.

31 Non-paper, “Svalbard: Further UK Views,” July 2006.



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