THE SPITSBERGEN TREATY

MULTILATERAL GOVERNANCE IN THE ARCTIC

Edited by Diana Wallis MEP and Stewart Arnold
Spitsbergen publication

The cover photo shows the iconic sign which warns, very appositely as the all too tragic events of this summer showed, about the danger of polar bears across the whole of the Svalbard archipelago. More importantly the wording emphasizes the universality of the warning; the title of the publication takes this signage as an interesting proposition for debate of wider governance issues for the whole Arctic region.
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INTRODUCTION

DIANA WALLIS,
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Since I was first elected to the European Parliament in 1999 I have been involved in Arctic issues. As part of my involvement in these matters I made my first visit to Svalbard in April 2001 from which time I have been fascinated by the set of rules which determine the governance of this Arctic archipelago: the Spitsbergen Treaty of 1920.

As a lawyer the Treaty aroused my curiosity; I wanted to know how this rather elderly Treaty, signed in Paris just over 90 years ago, seemingly contained very modern concepts such as environmental protection, non-discriminatory treatment of signatory state nationals and non-military use. For a treaty that was first mooted at the very beginning of the last century (before the outbreak of the First World War) it seemed quite unique in the way it was initially suggested and finally formulated with a structure of shared or rotating international governance, aimed at both environmental protection and equitable exploitation. The final Spitsbergen Treaty of 9th February 1920 granted 'absolute sovereignty' to Norway over the Svalbard archipelago, with the freedom to regulate the area in accordance with and for the benefit of the state partners to the Treaty.

It was clear to me on my various visits that the Norwegians have been admirable custodians of the island on behalf of the state parties to the Treaty - no-one could dispute that they have done an excellent job, almost certainly going beyond what was originally foreseen. The growth of the international research community there is also much to be applauded.

Despite this there remain tantalising questions, not least that, if this has worked so well for the governance of Svalbard under international agreement, might it not then
be a model that should be extended further into the fragile Arctic, at least to the 200 mile continental shelf zone? However, it is then that tensions begin to surface. Norway argues that its mainland continental shelf claim encompasses that of the Svalbard archipelago and on this basis it has resources rights over areas around the archipelago as well as jurisdictional competence. This is not the way other nation states in the region, nor indeed all state parties to the Treaty, see it. This makes a huge difference to the future of fisheries and any possible oil and gas development within the zone.

So far such nascent tensions have been dealt with by relatively polite diplomacy and legal process between the state parties of the Spitsbergen Treaty but in effect there is a stalemate which could and, indeed should, perhaps be used as an opportunity.

I have long wanted to spend some time researching the provisions and possibilities of the Treaty and had indeed suggested that this would be worthy work to be carried out by legal researchers during the International Polar Year. However, it was seen as being outside of the realms of pure science. The current notes of discordancy over the provisions of the Treaty could provide all Arctic nations and institutions with an opportunity for reflection, perhaps in the context of an amendment to the Treaty by Protocol, this again could provide an occasion for a valid EU contribution and involvement, which has otherwise proved so illusive in relation to the Arctic Council.

I have therefore been really grateful to have put together a small research project which I hope will stimulate thought and debate. This is not intended as a criticism of the Norwegian position but rather a search for more modern international structures and solutions based on what we might learn from an old but nonetheless innovative Treaty.

Our two principal researchers have brought different skills and expertise to this project: Lotta Numminen looking at the history and evolution of the Treaty and Nkeiru Scotcher at the international law implications. Both papers stand on their own but as a pair I believe they offer an interesting insight to further possibilities. There are also some concluding remarks from Professor Alyson Bailes, an expert in security challenges and security governance. I am hugely grateful to all three researchers and also to Stewart Arnold in my office and Professor Timo Koivurova from the University of Lapland for their contribution to what I hope will become a timely and contemporary input to our understanding of this relatively neglected but fascinating Treaty which marked a departure point in international Arctic.
Climate change and globalisation are fundamentally transforming the strategic and economic position of the Arctic. Retreating sea ice allows access to vast commercial opportunities, such as the development of offshore oil and gas reserves and large-scale industrial fisheries. The emerging opportunities have awakened global interest towards the region and challenged its present international governance. International interest attracted by the Arctic resources is not a new phenomenon. The region has long been considered as a resource base by, for example, trading companies from different nations and colonial relationships have been established (Rasmussen, 1998: 78–79). The history of the Svalbard archipelago is closely connected with the exploitation of natural resources. The archipelago was discovered in 1596 by the Dutch explorer Willem Barents. Rich resources, such as whales and walrus, were found, which awakened interests of especially England and Netherlands at the beginning of the 17th century. The two nations started in time when whale oil was sought after in European markets. The resultant competition for resources and for good station sites resulted in conflicts that decreased profits of the companies and for that reason, in 1623, the English and Dutch whaling companies agreed to end the competition. This agreement lasted until the second half of the 19th century. In the course of the 18th to the early 19th centuries, hunters from northwest Russia, the Pomors, hunted the other key resource - walrus - its ivory. Their hunting activities also came to an end in the mid-19th century. The archipelago became terra nullius, i.e. no man’s land, not subject to any state’s sovereignty. Legally this meant that there was no state with overarching authority or jurisdiction over the archipelago therefore all states could avail themselves of the archipelago’s resources and so risking over-
hunting. Consequently it was noted that there was an almost total extermination of the bowhead whale and walrus population (Avango et al., 2011: 30-32). European scientists began to pay attention to Spitsbergen in the 19th century. A large number of expeditions were made to study the archipelago’s flora, fauna, geology and geography. In the second half of the 19th century, scientist Adolf Erik Nordenskiöld argued that the archipelago should be colonised by Norway. The initiative was, however, withdrawn. (Pedersen, 2006: 342). From the late 19th century, the scientists were accompanied by coal mining companies from several western countries. The coal rush period ended by the late 1920s for most of the mining companies were ruined because of the recession in the early 1920’s and falling world market prices of coal after the World War I (Avango et al., 2011:30-32).

Rapid development in the mining operations called for new rules, such as determination of exclusive ownership of land as well as competence to legislate and adjudicate in the event of conflicts between miners and owners. After the dissolution of the Swedish-Norwegian union in 1905, the Norwegian governamental sent, seeking to expand the country’s influence in the North, stated in a notification of 1907 that the existing legal regime of the islands was insufficient. Norway then suggested a new legal regime based on the archipelago’s terra nullius status. The issue of jurisdiction was discussed at conferences attended by Norway, Sweden and Russia. Their initial plan was that the archipelago would continue as terra nullius, but it would be governed by a commission consisting of the three countries. They made a plan that would grant the administration of Svalbard to an international commission, which would appoint a governor from the various signatory states in rotation for a period of six years. Also, the three states proposed that an international police corps would be established on the islands. The proposal suggested that citizens of the signatory countries would have equal rights to exploit the natural resources of the archipelago and should be treated according to their own domestic laws, apart from business that fell under the special directives of Svalbard, including protection of wildlife and natural environment. The Spitsbergen conference failed because of World War I (Pedersen, 2006: 342; Wråkberg, 2006: 7-8).

In 1919, the Spitsbergen Commission was established in connection with the Paris Peace negotiations. The Commission agreed on a treaty based on Norwegian sovereignty. The treaty preserved terra nullius rights for other states allowing them to continue economic activities, such as fishing, hunting and mining, and ensured their access to Svalbard’s territorial waters then extending to 4 nautical miles from the shoreline. The purpose of the treaty was also to ensure peaceful utilization of Svalbard through a prohibition against the establishment of naval bases and fortifications and its use for warlike purposes. The Spitsbergen Treaty was signed on 9 February 1920. The initial name of the Treaty was “Treaty between Norway, the USA, Denau- tical milesark, France, Italy, Japan, the Netherlands, Great Britain and Ireland and the British Overseas Dominions1 and Sweden with regard to Svalbard”. It entered into force on 14 August 1925 (Churchill & Ulfstein, 2010: 552-553).

The developments prior to the initial proposition of the Treaty indicate that there was an urgent need to sustainably manage the natural resources as some animal species were on the cusp of extinction because of over-exploitation. Also, conflicts

1 The British overseas dominions were Canada, Australia, India, South Africa and New Zealand.
between mining companies may have been a major driver: there was an urgent need to establish good conditions for mining development and stop conflicts between mining companies. The need to resolve mining conflicts was symptomatic of a changed world. As Wråkberg (2006: 17-18) points out, state interests had become prominent.

Another argument for the growing need to assign sovereignty over the Svalbard is evidenced in the development of the international law of the sea with respect to maritime zones. The expansion of the concept of territoruality beyond land towards the sea lead to the need to define spheres of influences as well as determine the mode of resource distribution hence the wording in the Treaty, which grants to Norway the right to influence the archipelago’s affairs but qualifies resource distribution in the interest of the parties to the treaties. The Treaty allowed the signatories to commit to a unified form of conduct governing the archipelago.

However, the original drafters of the Treaty could not envisage the development of the international law of the sea from the Hague Conference on the Codification of International law of 1930 to the three United Nations conferences on the law of the sea. The Hague conferences attempted to codify a state’s coastal entitlement to a narrow band of water beyond its shore but res communis interests in offshore areas led to failure in reaching an agreement. A series of three United Nations conferences on the law of the sea, culminating in the entry into force of the Treaty in 1994, succeeded in codifying the concept of the territorial sea and the concept of the continental shelf (following the argument that the land dominates the sea) and finally codifying the concept of a coastal state’s entitlement to the fisheries off its coast in the regime of Exclusive Economic Zone.

These developments are necessary in examining the development of Norway’s concept with regard to the Svalbard because in line with the development of international law with respect to coastal states’ rights and entitlements, Norway has expanded its competence to Svalbard’s territorial waters and beyond in its establishment of the fisheries protection zone over the archipelago and in its claims over the continental shelf off the Svalbard Archipelago. The key question is whether these activities are in keeping with the terms of the governing law in relation to the Svalbard, i.e. the Spitsbergen Treaty.

To date, some 40 countries are participants to the Treaty. It was the first interna-
tional legally binding agreement dealing with the Arctic. Although most of the contracting parties ratified the Treaty in the 1920s, two states have joined the Treaty relatively recently: Iceland (31 May 1994) and Czech Republic (21 June 2006).

The Spitsbergen Treaty does not seem to be directly applicable as a model for international governance in the Arctic. The Treaty recognises Norway’s sovereignty, giving at the same time restrictions in the state’s sovereign rights, over a group of islands with terra nullius status. In the Arctic, sovereignty issues on land territories have already been resolved, with the exception of Hans Island, and ‘no-man’s lands’ are non-existent. It is not likely that the Arctic coastal states would be willing to give up parts of their sovereign rights if a Spitsbergen Treaty-like arrangement directly applied to a larger area of the Arctic.

Lessons learned from the Spitsbergen Treaty could however serve as inspiration for an Arctic multilateral regime in such topics as of peaceful management of resources, environmental protection or scientific cooperation. Although Norway has sovereignty over the islands, all states of the world can sign the Treaty and start to enjoy non-discriminatory rights. The non-discrimination principle on the land territory covers nature conservation, hunting, fishing, mining, industrial, maritime and commercial activities. The Treaty arrangement therefore demonstrates that it is feasible to impose restrictions on sovereign authority (Young, 2000: 5), and to set out rules and regulations designed to accommodate the interests of state parties in the resources of the archipelago.

The existing disputes around the Spitsbergen Treaty are related to its interpretation: the scope of the rights of contracting parties and the extent of Norway’s sovereign rights. When the Treaty was concluded in 1920, international law did not recognize any maritime zone beyond the territorial sea, and legal concepts, such as Exclusive Economic Zones (EEZs), were yet to be developed. The breadth of territorial waters was not specified in the Treaty, but at the time Norway defined its territorial sea as extending “the distance of the customary sea mile (i.e. 4 nautical miles/nautical miles) from the outermost island or islet, not washed over by the sea”. Disputes related to Norway’s sovereignty and rights of the Spitsbergen Treaty parties emerged when UN Convention on the Law of the Sea added new maritime zones, such as continental shelf, fisheries zone and the EEZ to the areas under the jurisdiction of coastal states (Jensen & Rottem, 2010: 79).

The two main disputes can be formulated as the following questions: 1) May Norway claim new maritime zones determined in the UNCLOS on the basis of
its sovereignty over the archipelago; beyond the territorial sea recognized in the Treaty? and 2) Are the equal rights of other contracting parties and the limitation on taxation applicable in the maritime zones beyond 12 nautical miles territorial waters (EEZ and continental shelf) and how Norway’s sovereign rights should be exercised there? (Molenaar et al., 2008: 12; Pedersen & Henriksen, 2009: 141-142)?

From Norway’s point of view, the Treaty with its provisions only applies to the land and the territorial sea. Therefore, according to Norway, the country is entitled to exercise the rights of a coastal state over the maritime zones beyond the 12 nautical miles territorial sea. In the past, this view was supported by Canada and there were some comments by Finnish president Kekkonen 1977 that went in this direction although never officially endorsed as a government position. The USSR/ Russia used to argue that Norway was not entitled to establish any maritime zones or exercise coastal state jurisdiction beyond the territorial sea. At present, the Treaty parties seem to have accepted that the archipelago is entitled to its own maritime zones. There are, however, states (Iceland, Russia, Spain, and the United Kingdom) who maintain that the rights and obligations of the contracting parties stipulated in the Treaty also apply to the fisheries zone and continental shelf around the archipelago (Pedersen, 2006: 339; 2008: 6-7; Austvik, 2007: 19; Anderson, 2009: 374).

Iceland, Spain and Russia take also the view that Norway is not entitled to exercise jurisdiction over non-Norwegian vessels fishing in Svalbard’s Fisheries Protection Zone (FPZ). In addition, some contracting parties (including France, Germany and the US) have publicly reserved any rights that there may be under the Treaty. The prevailing opinion of the Treaty parties provides for recognition of Norway’s sovereignty over Svalbard and its jurisdiction in the maritime areas around the archipelago, but also concludes that the Treaty provisions must apply to these areas (Pedersen, 2006: 345).

To conclude, the concerns raised by other signatory states deal with such questions as whether fishing vessels flying the flag of other states have an equal right with Norwegian fishing vessels to participate in the fisheries in the 200 miles zone off Svalbard or whether oil companies of other contracting parties have an equal right with Norwegian companies to drill for oil on the continental shelf.

Norway’s official view is that the Treaty’s equal treatment provisions do not apply on the continental shelf or adjacent waters of the islands (Jensen & Rottem 2010: 79). Norway bases the view on UNCLOS, which grants coastal states the exclusive right to natural resources such as oil and gas on their adjacent continental shelves as well as exclusive rights to the living resources of the EEZs (Pedersen, 2009: 322).

The Norwegian government has put forward two main arguments for the official view: 1) The Treaty establishes that the equal rights to fishing and mining only apply to the Svalbard archipelago and its territorial sea. To extend the rights to the continental shelf and the 200-mile zone would be against the wording of the Treaty and the principle of treaty interpretation that restrictions on sovereignty are not to be presumed. 2) Svalbard has no continental shelf of its own and the continental shelf

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6 Norway extended its territorial waters from 4 nautical miles to 12 nautical miles with effect from 1 January 2004.
of mainland Norway extends to, around and beyond Svalbard forming an extension of the Norwegian continental shelf (Churchill & Ulfstein, 2010: 551, 565-566).

The Norwegian government’s second argument, that Svalbard is an extension of Norway’s continental shelf, is somewhat problematic in the light of the government’s own recent practices. Churchill and Ulfstein (2010: 567-568) point out that it is difficult to see how Svalbard could generate a 200-mile FPZ, as Norway claims, but not a continental shelf. In addition, the boundary established by the 2006 maritime boundary agreement between Norway and Denmark/Greenland is based on the principle of equidistance determined by basepoints on Greenland and Svalbard. Svalbard cannot provide basepoints for determining an equidistant line if it does not have a continental shelf. Moreover, the map that accompanied Norway’s submission to the Commission on the Limits of the Continental Shelf relating to north of Svalbard shows an area marked as “Continental Shelf beyond 200 miles.” The area is beyond 200 miles as measured from Svalbard. But if Svalbard has no continental shelf the “Continental Shelf beyond 200 miles” would have to be delimited from the Norwegian mainland, not Svalbard.

Several governments of the Treaty’s contracting parties have asserted that the Treaty does apply by analogy to the 200 nautical miles zone and the continental shelf beyond the territorial sea. They also assert that Svalbard is entitled to its own economic zone, governed in the same way as the islands. (Austvik, 2007: 19; Pedersen, 2009: 321).

The UK argues that the nondiscriminatory principles of the ST must be applied (Pedersen, 2006: 345). This attitude can be seen in debate in the House of Lords on 2 July 1986: “In our view Svalbard has its own continental shelf, to which the regime of the Treaty of Paris of 1920 applies. The extent of this shelf has not yet been determined”. (House of Lords)

Meanwhile Spain takes the view that the contracting parties have rights beyond the 12 nautical miles maritime zone. According to Spain’s present view, the Treaty is the basis for the recognition of the sovereignty of Norway over Svalbard. Such sovereignty, albeit full, nevertheless also entails the obligation by which Norway must allow free access, without any discrimination under the same conditions of equality, to the archipelago’s biological and mineral resources to the nationals of all the contracting parties, pursuant to Articles 2, 3, 7 and 8 of the Treaty. Spain reiterates that the above-mentioned principles of liberty of access and non-discrimination are applicable to any maritime zone that might be defined from Svalbard, including, as appropriate, the continental shelf, both within and beyond a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. In as much as the continental shelf extension submitted by Norway is intended to be effected from Svalbard towards the north, in the Western Nansen Basin region, and towards the east, in the Loop Hole, Spain considers that the Treaty fully applies to those regions and reserves its rights to the resources of the continental shelf that may be defined around Svalbard, including the extension thereof (Spain, 2007).

On the matter of Norwegian jurisdiction in the FPZ, Spain’s view is that “Norway may decide norms for the conservation and management of resources in the zone, but may not take enforcement measures that are not explicitly warranted by
the Treaty” (Spain, 2007). Spain has had disputes with Norway on fisheries and Norway’s right to exercise jurisdiction over non-Norwegian vessels in the FPZ. For example, in 2004, Norwegian coast guards arrested the Spanish trawlers Olazar and Olaberri for illegal fishing. In 2005 two further Spanish trawlers, Garoya Segundo and Monte Meixueiro, were caught during illegal fishing of Greenland halibut, which is protected in the Svalbard waters. The guilt was obvious, but Spain disputed Norway’s right to investigate and fine (Raaen, 2008).

Russia too questions the legal basis for Norway’s claimed jurisdiction over maritime areas not specified by the Spitsbergen Treaty. Russia formally protests against Norwegian policy in the FPZ. The argument is that because Norwegian sovereignty over Svalbard is founded on a treaty rather than customary law, Norway’s sovereignty is restricted. The Norwegian sovereignty granted by the 1920 Treaty does not provide Norway a coastal state’s right to claim or enforce a 200 nautical miles FPZ, in the waters off Svalbard, or to claim jurisdiction on the continental shelf adjacent to Svalbard (Pedersen, 2006: 345).

In practice, there have been disputes between Norway and Russia in the FPZ. When the trawler Chernigov was apprehended in April 2001 for violations of Norwegian mesh size regulations, the head of the Russian State Committee for Fisheries declared that the Russian Northern Fleet would be called in next time. In October 2005, the Russian trawler Elektron escaped from the Norwegian Coast Guard to Russian territorial waters with two Norwegian inspectors on board. With Elektron, Russia was more willing for cooperation, which may be a consequence of close fisheries cooperation Russia and Norway (Raaen, 2008).

The Treaty between Norway and Russia on Maritime Delimitation and Cooperation in The Barents Sea and The Arctic Ocean of 15 September 2010 establishes the maritime delimitation line between Norway and Russia their maritime zones and continental shelves within and beyond 200 nautical miles. Russian Duma ratified it 25 March 2011. Russia has stressed that the treaty does not resolve the two countries’ disagreement with regard to the delimitation of the waters around the Svalbard archipelago (BarentsObserver.com, 2011).

Iceland takes the view that Svalbard is entitled to its own exclusive economic zone and it has its own continental shelf. However, both of them are subject to the limited sovereign rights of Norway and the rights of other contracting parties under the Treaty. The country considers that the sole basis for any sovereign rights of Norway in maritime areas around Svalbard, including an exclusive economic zone and the continental shelf, is the Spitsbergen Treaty. The sovereign rights of Norway are subject to important limitations provided for in the Treaty, including the principle of equality. Iceland’s view is thus that the Treaty and equal rights of the contracting parties of the Treaty apply beyond 12 nautical miles territorial sea and all parties have the right to exploit marine and submarine resources beyond the 12 nautical miles territorial sea.

As far as the continental shelf around Svalbard is concerned, in the view of Iceland, it appertains to Svalbard and not to the mainland of Norway as maintained by the Norwegian authorities. The exploitation of any oil and gas resources of the continental shelf
around Svalbard is thus, according to Iceland, subject to the provisions of the Spitsbergen Treaty, including the principle of equality. In practical terms, there have been fisheries disputes between Iceland and Norway, including over fisheries for cod and herring in the Svalbard zone. Norway has also had similar disputes with other countries. Because of Icelandic views on Svalbard’s continental shelf, exploitation of oil and gas will most likely become a relevant issue in the future.

Denmark maintains that the Spitsbergen Treaty applies beyond the territorial sea of Svalbard. Denmark recognises Norway’s right to exercise legislative and enforcement jurisdiction in the area. The country has increasingly come to challenge Norway’s assertions that it has a coastal state’s exclusive rights to the resources adjacent to Svalbard and has repeatedly claimed extensive rights for the Treaty parties to the resources of the 200 nautical mile zone around Svalbard. When Denmark agreed delimitation between Greenland and Svalbard in 2006, Denmark recognised that the continental shelf outside Svalbard was a part of the Norwegian shelf. It also acknowledged Norway’s jurisdiction in the 200 nautical mile zone around the archipelago (Pedersen, 2009: 251, 320).

Looking at the implications for fisheries and hydrocarbon development, it is clear this is of vital importance for Norway. Production in Norwegian oil and gas resources in the North Sea is declining and Norway is transferring its production northwards. With higher oil prices, several other countries, including Russia, are increasingly interested in the Arctic resources and this development may well affect the future of Svalbard’s continental shelf.

So far, Norway has been able to manage resources in the FPZ and avoided major conflicts. However, if Norway is to open the Svalbard continental shelf for oil and gas exploration, the tensions around the Treaty provisions are likely to increase. It will be a difficult question, because the Treaty involves a big number of state parties, most of whom are non-Arctic states and major international actors. The continental shelf issue is also sensitive from an environmental point of view. Several stakeholders have suggested the establishment of a moratorium on oil and gas exploitation in the Arctic Ocean which will prevent a possible takeover by international oil companies.

International disputes over fisheries in the waters of Svalbard relate to questions of how the Svalbard Treaty is interpreted and what is the status of maritime zones. Norway established the 200 nautical miles non-discriminatory FPZ in 1977. The main disputed issue is, whether the equal right to fish in the territorial sea, given in the Treaty’s Article 2(1), extends beyond that zone to the FPZ. The Norwegian government has justified the establishment of the FPZ with reference to the UNCLOS regime, which grants the coastal states the right to a 200 nautical miles EEZ outside their territory (Tiller, 2010: 2-3).

Churchill and Ulfstein (2010: 584-587) point out three major issues that create tension in relation to fisheries in the FPZ. Firstly, Iceland, Spain and Russia, as well as the EU (although not a party to the Treaty) claim that that Norway is not entitled to exercise jurisdiction over non-Norwegian vessels fishing in Svalbard’s 200-mile FPZ. Secondly, since 1994, third states, i.e. states other than the two coastal states of Norway and Russia, have been allocated quotas for cod fishing in the FPZ based on their traditional fishing in the area. This has meant that, except for Norway and Russia, only fishing
vessels from EU Member States and the Faroe Islands have been given quotas. The quota regulation in the cod fishing led to conflicts with Icelandic fishermen, who were not accorded quotas. Thirdly, the reporting requirements have caused tensions: in a case before the Norwegian Supreme Court in 2006 concerning Spanish fishing in the FPZ, it was claimed by the Spanish fishermen that the fact that Russian fishing vessels did not report according to the regulations violated the nondiscrimination requirement in the Svalbard Treaty.

Fisheries of the FPZ is subject to Norwegian jurisdiction with a goal to ensure conservation of the fish stocks on a nondiscriminatory basis among states who have right to fish there. Norway has enforced conservations measures by issuing warnings to foreign fishing vessels flagged by states that had no history in the area (Anderson, 2009: 378).

Similar to the issue of fisheries, the controversy of the Svalbard continental shelf is primarily seen as a legal conflict arising from differences in treaty interpretation of the status of maritime zones (Pedersen, 2006: 353), whether or not the shelf should be somehow regarded as included by intention in the Treaty while it was not explicitly mentioned is debatable. The question of non–renewable resources, in case they are found, may become more contentious among the contracting parties of the Treaty than the question of fisheries in the FPZ. So far, Norway has not opened the areas for commercial exploration.

An important question is, whether the equal rights of other contracting parties, tax limitations (Norway cannot impose higher taxes than what is needed for administration of the archipelago) and the Mining Code apply to petroleum activities on the continental shelf? The Treaty regime is especially attractive because of the tax rules that may provide high profits for oil companies. (Pedersen, 2006:343). It is generally considered that “mining” on Svalbard’s land territory includes exploring for and exploiting oil and gas (although so far no commercial finds have been made). That would mean that exploration for and exploitation of oil and gas in the seabed of Svalbard’s territorial sea would fall under Article 3 and be open to all States parties on a basis of equality. (Churchill & Ulfstein, 2010: 563).

The status of Mining Code has also been the subject of disagreement. Some argue that the Code has the character of a treaty and can be amended only through the same procedures as it was created. Others have argued that the Mining Code is Norwegian legislation provided for within the framework of the Spitsbergen Treaty, and that it can be altered as any other national legislation by the Norwegian parliament as long as it does not violate the Treaty provisions (Pedersen, 2006:343, 347).

There seems to be increasing interests in the continental shelf of Svalbard. For example, a Russian geological company carried out geological surveys on the continental shelf around Svalbard on behalf of the Russian Ministry of Natural Resources, as part of a broader programme to study the geology on the northern continental shelves. Norway granted permission for the surveys as “scientific research”. The purpose of these expeditions has, however, included the identification of prospective zones for oil and gas accumulations. The Russian company has also been reluctant to publish data (Moe, 2009). Norway’s policy seems to be to limit the economic activities around the continental shelf, which will probably continue in the future.
Svalbard has an interesting geostrategic location. The archipelago is ideal for Arctic climate research, preparedness and rescue activities as well as for satellite use.

According to Article 9 of the Treaty, Norway is required to make sure that no fortresses or naval bases are established. The archipelago may not be used for military purposes. Norwegian military presence in Svalbard is very slight, consisting mainly of coast guard surveillance. Foreign military presence is unwelcome.

The provisions of the Treaty can be seen as having two purposes: 1) it is an extension of non-discrimination by preventing Norway from benefiting strategically by its sovereignty, and 2) to preserve the peaceful utilization of the archipelago. It should be noted, however, that Article 9 does not provide for a complete demilitarization of Svalbard. The provision sets out specific prohibitions against the establishment of any “naval base” or “fortification,” and prohibits Svalbard’s use for “warlike purposes” (Churchill & Ulfstein, 2010: 556-557).

There has been criticism towards Norway’s activities in the islands. The Soviets argued in the past that Norway violated Treaty’s Article 9, because Norwegian warships and cargo aircraft regularly made calls to Longyearbyen, the building of scientific radar was seen as military installation and the islands were included in NATO’s command structure. There is also a debate over whether Russian helicopter operations are warranted by the Treaty.

Svalbard Satellite station (SvalSat) was established in 1997 (Kongsberg Satellite Services, 2011). Recently, there has been disagreement on what is considered as military activity and what is not. For example, Norwegian media reported in March 2010 about an incident of satellite photos taken by the satellite station. The photos were used for informing the US military on sandstorms under military operations in Iraq. The Norwegian Ministry of Foreign Affairs denied that the provisions of the Treaty were compromised with an argument that it is not against the Treaty to receive data that is used for weather forecasts, also by the military (NRK, 2010).
In the few past years, a number of non-Arctic states along with the EU have sought to enhance their role in the Arctic. Of the EU countries, especially the UK, France, and Germany, as well as the Asian countries of China, Japan and South Korea have shown interest in science, energy, fisheries and transportation.

The main forum for inter-state cooperation in the Arctic is the Arctic Council. The Council has eight members, who are all Arctic states. The Council accommodates permanent observers (France, Germany, Netherlands, Poland, Spain and the UK) as well as a number of ad hoc observers (such as China, the EU, Italy, Japan and South Korea), who have expressed their wish to achieve permanent observer status in the Council. All these nations are also signatories of the Spitsbergen Treaty.

China, as an example, has made several efforts to increase its presence in the Arctic and shows willingness to have a say in future decisions made in the region. The country has applied for permanent observer status in the Arctic Council, conducted Arctic expeditions and scientific research, developed technological capability to cope with the Arctic conditions and broadened cooperation on shipping and science with other states.

China’s application for permanent observer status in the Arctic Council has been declined on two occasions, most recently in May 2011. Previously, the country has participated as an ad hoc observer in two Arctic Council ministerial meetings, in 2007 and 2009 (The Arctic Council, 2008).

China has also increased its competence to operate in the Arctic. At the moment, the country has one ice-breaker, Xuelong, or Snow Dragon, to conduct expeditions. The Chinese government has approved the building of a new research icebreaker. Along with climate change studies, China has participated in international seminars focusing on commercial, legal and geopolitical issues in the Arctic and made assessments on implications of these for the country itself (Jakobsson, 2010a).

The Norwegian Polar Institute and the Polar Institute of China concluded an agreement on cooperation on Polar research in 2010. The two institutes agreed to cooperate on issues such as research of glaciers, sea ice and organization of research mission to the Arctic (BarentsObserver.com, 2010b). Being a contracting party of the Treaty enables China to join in scientific cooperation in Svalbard. China’s Arctic research station, Huanghe (Yellow River), was founded at Ny-Ålesund in 2004.

Chinese research activity has steadily increased since then, so that in the later years there have been approximately 1000 man days related to research each year, which makes Yellow River one of the biggest stations in Ny-Ålesund. The station has not a permanent crew, and is not manned all year. According to one status report 36 people worked on projects carried out by the Yellow River Station in 2010 (China Status report 2010).
China has also broadened business cooperation with Arctic states. For example, in 2010 the China National Petroleum Corporation signed a cooperation agreement with a Russian company specialising in Arctic oil and gas shipping. The purpose of the agreement was to increase use of the Northern Sea Route to transport oil and gas to China (BarentsObserver, 2010a). In addition, China is in the process establishing the largest embassy in Reykjavik, Iceland. The motive behind that decision may be that Iceland is the logical transshipment hub for the specialized vessels needed to ply the trans-Arctic sea route (Jakobsson, 2010b).

In addition to China and Norway, the UK, France, India, Japan, and South Korea have set up scientific research stations at Ny-Ålesund. The archipelago is seen as an ideal place to study the consequences of climate change in glaciers and wildlife and in the atmosphere. The non-Arctic states which are the most active contracting parties of the Treaty are also those who have applied for observer status in the Arctic Council and can one way or another benefit economically from their presence in the Arctic. Increasing commercial opportunities may thus have given other strategic meanings for the presence of these countries in the islands than scientific research alone.

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The ability to enter into international agreements is a vital aspect of sovereignty as it entails a freedom of action with respect to making treaties. This is especially the case vis-à-vis the Spitsbergen Treaty (also referred to as Svalbard Treaty) especially as Norwegian assumption of sovereignty was necessary for governing and regulating the affairs of the Svalbard archipelago. Sovereignty expresses internally where the state concerned may act without interference from any other state (Island of Las Palmas Case 1928, 829) because the state's institutions have full jurisdiction within its defined territory whereas externally, sovereignty is the supremacy of the state in international affairs (Shaw, 2008: 487). Therefore the wording of the treaty, which granted “absolute sovereignty” to Norway, meant legislative rights within the archipelago as well as the freedom to regulate the area in accordance with the treaty for the benefit of the signatories (Østreng, 1977: 67).

The argument that states in international legal affairs are linked by a complex network of governance and mutual restraint (Osiander, 2001: 283), is evident upon examination of the nature of the Norwegian sovereignty in the Spitsbergen Treaty. As well as expressly granting to Norway absolute sovereignty over all the islands between 10° and 35° longitude east and between 74° and 81° latitude north, the treaty also unequivocally specified the rights of the contracting parties to fish and hunt within the archipelago and around its territorial waters.

Therefore Norwegian sovereignty was the basis upon which the territorial waters appertaining to the archipelago was determined whereas the use and exploitation of the resources remained a collective remit. Equality of all contracting parties vis-à-vis exploitation and access rights is further qualified by Article 3 of the Spitsbergen Treaty, which stipulated that these rights must be in accordance with Norwegian laws and regulations. The relationship between sovereignty and the equality...
of the contracting parties regarding the archipelago’s benefits is identifiable as the core purpose of the treaty. In other words, the drafters’ intention was to balance governance and sovereignty to the benefit of all the contracting parties.

To clarify, the remit of Norwegian sovereignty as granted by the treaty, in relation to governance of the archipelago falls under the following categories:

a. Article 2’s provision on the Protection of Native Fauna and Flora
b. Article 8’s provision on tax duties and charges with respect to mining regulations
c. Article 9’s provision on demilitarisation of the Archipelago

Whilst stressing the utility of examining Norway’s interpretation of its sovereignty over the archipelago with the aspects of assertion of sovereignty as points of departure, it is necessary, in the interest of clarity, to determine the actors involved vis-à-vis the Treaty, the scope of sovereignty as interpreted by the parties to the Treaty, and the role of international organisations and/or principles if any. This is beneficial in examining the concept of sovereignty in international law (Schrijver, 2000: 65-98) especially where the nature of state assertion of sovereignty is disputed. Furthermore, this method of analysis may be used to deepen one’s enquiry into the duties of states and the influence of international values in relation to a treaty.

NEW ACTORS

The drawing up of a treaty is arguably a core example of law making between states in a multilateral context (Schrijver, 2000: 82), but the presence of new actors may lead to problems with determining spheres of influence and competences. The case of the emergence of new interest to the Spitsbergen Treaty is seen in the issue of fisheries. For instance with Denmark as a member of the European Union as well as a signatory to the Spitsbergen Treaty, the EU automatically assumes certain community competences in relation to fisheries. This may be in direct contrast to the Norwegian Fisheries zone claimed by royal decree in 1977, which, albeit non-discriminatory in nature, operates to restrict fishing in the area in order to protect resources. Granted that the Exclusive Fisheries Zone (EFZ) is different to a coastal state’s sovereign rights in the Exclusive Economic Zone (EEZ) (Kvinikhidze, 2008: 271-295) it may be argued that a coastal state upon claiming EFZ can exclude states that otherwise would have exploitative rights to the resources. A case in point is the furore over the 1986 quota regulation instituted by Norway to apply in the fisheries protection zone in Svalbard waters. Here the EU got involved as Spain, a member state, through operational assertions protested against Norway’s unilateral action arguing that it discriminates among parties to the Spitsbergen treaty.

Setting aside the historical background of the dispute as examined by Pedersen, relatively new actors to the treaty such as Iceland have repeatedly voiced their wish to refer the issue of Norwegian sovereignty over the Svalbard archipelago to the International Court of Justice (Pedersen, 2008: 249). Internally, Norwegian sovereignty over the Svalbard is the legal basis for the royal decree concerning fisheries protection zone around the Svalbard and externally, sovereignty is the attempt to
implement these protections in direct opposition to the signatory parties’ actions.

UNCLEAR SCOPE

The scope of sovereignty as noted in the treaty covers the Svalbard land area as well as the territorial waters. However, the development of the international law of the sea leading to the establishment of maritime areas that did not exist at the time the treaty was drafted has lead to challenges to the sovereignty assumed by Norway over the archipelago. The extension of the territorial waters around the Svalbard from the 4-nautical miles previously claimed by Norway to 12 nautical miles in accordance with the United Nations Convention on the Law of the Sea has perhaps exacerbated the problem of clarity regarding the geographical scope of the treaty especially as the Svalbard is yet to delimit an Exclusive Economic Zone (a zone not without confusion due to its general provisions on sovereign rights over the resources and jurisdiction over the marine environment as well as high sea freedoms for all states) yet Norway recently submitted its continental shelf claims to the Commission for the Limits of the Continental Shelf in accordance with Article 76 UNCLOS claiming the continental shelf on which Svalbard lies as a continuous shelf to Norwegian land territory (Jensen and Rottem, 2010: 80).

Protests over Norway’s assumption of sovereignty in relation to the Svalbard archipelago as seen in its claims to maritime territory remains the signatory states’ practice because it is believed that the Norwegian assumption of sovereignty over Svalbard and the Treaty’s stipulations of equal treatment of signatory states come into conflict (Pedersen, 2008: 238).

The concept of the continental shelf is defined in Article 76 (1) of UNCLOS as the seabed and the submarine areas beyond a coastal state’s territorial waters following the natural prolongation of the land territory to the continental margin or 200 nautical miles from the baseline. This article, with land as a common denominator, provides that the coastal state’s sovereignty over the land domain extends to the maritime domain due to the principle of adjacency.

Whereas in the territorial waters sovereignty essentially means exclusive control of the zone, in the case of the continental shelf a legitimate claim leads to rights over the resources found in the zone. International law jurisprudence as explained in cases such as the Continental Shelf Case between Tunisia and Libya (Tunisia v. Libya 1982, para. 73) explains adjacency as the geographic correlation between the coast and the submerged areas off the coastal states land domain is the basis of a coastal states legal title to the continental shelf’s resources.

However, where a coastal state claims a continental shelf and draws the outer limits of this line connecting the mainland as the natural prolongation of the shelf against the backdrop of a separate treaty governing the archipelago, a conflict of applicable law is apparent.

On the one hand there is the argument that Norway’s sovereignty over its territory continues with the natural prolongation of the continental shelf, (these rights exist independent of the Spitsbergen Treaty) therefore covering the Svalbard archipelago
and on the other hand there is also the argument that the archipelago operates under a special regime separate from the Norwegian mainland and the rights of the entire parties signatory to the treaty also apply offshore (Jensen and Rottem, 2010: 80).

The primary argument by Norway that the Spitsbergen’s Treaty’s stipulations on equality cannot apply to modern concepts of the international law of the sea in offshore territories (beyond the territorial waters) such as the continental shelf because the scope of Norwegian sovereignty widens to apply to these concepts in the first place is disputed among the signatory parties to the Svalbard treaty (Pedersen, 2009: 322 et seq) and is arguably tenuous. The generation of a continental shelf is one that is not a legal determination but one that is geographical therefore arguments that the archipelago cannot generate a continental shelf is arguably lacking in substance.

INTERNATIONAL ORGANISATIONS AND RULES

Any direct involvement of international institutions in this issue is limited to Norway’s submission the Commission for the Limits of the Continental Shelf and this is still disputed. The primary reason for the absence of international organisations in relation to this matter lies in the nature of the law governing the archipelago. Article 38 (1) of the statute of the International Court of Justice (ICJ), in detailing one of the foundational rules of international law as “international conventions, whether general or particular, establishing rules expressly recognized by the contesting states”, stresses the primacy of external sovereignty - the freedom of states to establish rules binding them. So, as international legal rules are not hierarchical, in the absence of a treaty abrogating the Spitsbergen Treaty, UNCLOS cannot repeal or add to the Spitsbergen Treaty. Each exists separately as conventions and can only bind the state parties to the Treaty.

This argument is substantiated in international law jurisprudence by the seminal cases the North Sea Cases for the task of the ICJ in this case was to indicate the principles of international law applicable to the dispute and the applicable law in this instance was held to be customary international law in relation to Germany and treaty law in relation to the Netherlands and Denmark. The conclusion was reached that in relation to the delimitation of maritime spaces and the applicability of the rule of equidistance codified in Article 6 of the 1958 Geneva Convention on the Continental Shelf (GCCS), Germany was not bound, as it was not a party to the GCCS whereas Denmark and the Netherlands, as parties to the GCCS were bound by the convention.

On this basis, any claim to sovereignty over Svalbard based on UNCLOS and/or arguments that UNCLOS renders the stipulations of the Spitsbergen Treaty obsolete lacks support in international law.
INTERPRETING THE SPITSBERGEN TREATY: LESSONS FROM THE VIENNA CONVENTION ON THE LAW OF TREATIES

In international law, the general view is that a treaty is considered lex specialis and applies especially when the disputed matter comes within the scope of the treaty’s stipulations (Rosenne, 2004: 27). Article 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) are useful guidelines in international law treaty interpretation as they can be employed to determine whether signatories intended to convey a particular meaning or whether a party is going beyond the stipulation of a text.

Judging from state reports and diplomatic notes, it is evident that the parties share the view that the Spitsbergen Treaty is the governing text but there is a need for a more robust and up-to-date regulatory framework in the light of new challenges to exploitation of natural resources and discoveries of mineral resources.

The issue becomes whether Norwegian views on constituting a more robust regulatory framework over the archipelago is within the powers granted to it by the Spitsbergen Treaty. Can Norway as the absolute sovereign over the Svalbard archipelago manage the provision “of equality of practise of all enterprise”?

The parties to the Treaty converge to argue that unilateralism on the part of Norway with regards to the resources in the zone automatically goes contrary to the Treaty’s stipulations with states such as Russia advocating bilateral regulatory instruments and states such as Spain seeking a more EU friendly involvement in the process.

As lex specialis cannot apply independent of custom (Linderfalk, 2007: 311-312) and because the issue of Norwegian sovereignty is open to more than one interpretation, the VCLT stipulates that relevant rules of international law, in this case customary international law must be considered alongside treaty text. This position is strengthened by international law jurisprudence where it has been established that to abrogate a rule of international law, the new rule “must partake of the nature of a rule of customary law” (Tunisia v. Libya, 1982. para. 53).
However, state practise in relation to the applicable framework or the interpretation of Norway’s sovereignty is divergent as signatory states are yet to present a unified instrument of their position.

Article 31 of the VCLT is a useful starting point in identifying a unified position. It stipulates that the object and purpose of the treaty must inform the interpretation of the text and this is essential in determining areas of divergence and uniformity between the signatories. Is Norwegian unilateral action through decrees and continental shelf claims in line with the object and purpose of the treaty - the development and peaceful utilisation of the Svalbard archipelago?
Norwegian interest in developing a fisheries regime around the Svalbard archipelago to protect the resources from overexploitation is arguably within the object and purpose of the Spitsbergen Treaty. Moreover, upon examining customary international law development alongside the Treaty, as well the object and purpose of the Treaty, an emerging rule of international law is undeniable in terms of fisheries zones. This is the notion of a coastal state’s entitlement to the fisheries as an aspect of its sovereignty and was argued by Judge Ignacio-Pinto in the Fisheries Jurisdiction case to be a good example of how progressive development of international law is achieved (United Kingdom v/ Iceland 1974, Declaration by Judge Ignacio-Pinto 38). So by questioning the existing framework of territorial resource distribution, Icelandic stance in the UK/Iceland Fisheries Jurisdiction Case albeit non-participatory in the adjudication process by the ICJ, was indicative of state practice’ move towards preferential fishing rights with the aim of protecting for a coastal state’s benefit, the fisheries off its coasts.

Applying state practice towards fisheries zones, codified in the concept of the Exclusive Economic Zone, now customary international law (Tunisia v. Libya 1982, para. 54), to the Svalbard treaty and the Norwegian fisheries protection zone of 200 nautical miles highlights a key difference. The traditional view of fisheries zones operates to benefit the coastal state mostly if not exclusively even in relation to excess stock as Article 62 of UNCLOS provides that any excess stock is to be determined by the coastal state and allocated to other states especially geographically disadvantaged/land-locked states by the coastal state.

However, the decree establishing a fisheries zone around the Svalbard archipelago is non-discriminatory and allocates quotas to the signatories of the Spitsbergen Treaty. So though it can be assumed that the object and purpose of the treaty governing the Svalbard archipelago is respected by Norwegian action, diplomatic protests against the fisheries protection zone by states such as the former Soviet Union, Spain, Iceland; measured responses by United States; United Kingdom acknowledging Norway as a coastal state but stating the treaty applies to the maritime zones of the archipelago, all show a lack of agreement as to fisheries protection zones being part of the object and purpose of the Spitsbergen Treaty. In fact, the view amongst other signatory states was that Norway’s actions are worrying unilateral and this move towards unilateralism underlines Norway’s idea of sovereignty over the archipelago (Pedersen, 2008: 241).

The drafters of the original treaty text could not have foreseen the current issues of sovereignty and sovereign rights that the Spitsbergen treaty currently engenders. Nevertheless extant issues in relation to the treaty has lead to an absence of common intention on the one hand as well as a conflicting of intentions on the other with varying views of what constitutes Norwegian action in line with the object and purpose of the Spitsbergen Treaty, therefore a different approach to treaty interpretation beyond the modalities of Articles 31 of the VCLT and its travaux preparatoires (which focuses on termination or suspension of treaties) may be useful especially considering that this treaty predates the VCLT because,

“… it is wholly fantastic to assume either, first, that the framers of the original instrument can project their vision and anticipate all the more specific details of the evolving future or agree upon a common purpose with respect to all these details or draft so precisely as to remove all ambiguity with respect to such common purpose, or, second, that the later in-
terpreters of the agreement working in a new total context, with their own contemporary objectives and conscious of many changes in condition since the making of the agreement, can resurrect in detail the subjectivities of the original framers of the agreement and ascertain what was their clear intent concerning the new events confronting the interpreter”.

(Gordon, 1965: 798)

UNINTENTIONAL SILENCE AS A BASIS FOR NEGOTIATING AN AMENDMENT

As the VCLT is silent on the process by which a state can initiate negotiation proceedings with the final aim of an amendment, the usefulness of the doctrine of effectiveness in international treaty practice may be a theoretical basis for initiating negotiation proceedings towards amending the terms of the Spitsbergen Treaty or at the very least a renegotiation of the terms of the treaty governing the archipelago in the light of new issues of scope. In broadening our analysis beyond the VCLT to incorporate general rules of international law, this doctrine benefit lies in its key argument that state action that is more like to further a treaty's objective is a preferable action in treaty law.

Following this, the key question to be asked is whether the execution of the treaty by Norway is compatible with the primary objective—collective and effective governance of the Svalbard archipelago and whether the current management model is in line with the intention of the drafters. Whatever the answer, one factor that all state parties to the Treaty were and are in agreement is the acceptance of a separate regime governed by a treaty governing the archipelago, which will ensure harmonised utilisation and preservation of the environment around Svalbard. As regimes are not established through treaties with the intention of rendering them ineffective, an approach based on expectation (Gordon, 1965: 798) can be beneficial in bringing the Svalbard question to the forefront of affairs. On this basis, the question whether there is any scope for amendment of the Treaty’s remit is a viable one for there is a need to make the treaty relevant to the archipelago in the light of maritime zones codified by UNCLOS.

Any amendment or negotiation for amendment of the Spitsbergen Treaty, a multilateral treaty, must take into account the entire signatory state parties’ views with state parties’ acquiescence a key factor. This is especially so when the treaty in question is silent as to how it may be amended or terminated. The general rule as noted in the travaux preparatoires, which may consist of rapporteur’s reports, ILC draft articles, conferences and debates analysing the VCLT (Allot, 1983: 7-8) of the VCLT is that silence, i.e no explicit mention of amendment procedures in the treaty text, means that all the signatory parties must consent to any changes (Fitzmaurice, 1957: 38-39). It can be argued that Special Rapporteur Fitzmaurice in his Second Report on the Law of Treaties, in stressing the necessity of consent in any amendment procedure highlighted the consensual nature of international law encapsulated by the term pacta tertiis.
This ‘consensualism’ of international treaty law, which encourages compliance, does not, however, address instances where an already existing treaty is interpreted divergently without recourse for change in the original text. In relation to the Svalbard archipelago and the Treaty’s deficiencies in defining the legal parameters of equal participation by the signatories in relation to maritime zones, as codified by UNCLOS, the question remains, which state is bound to what regulation in what maritime zone? The issue of divergence in the interpretation of the Spitsbergen Treaty’s provisions may be the reason for its arguable ineffectiveness in coherently addressing the ever-increasing issue of governance over the archipelago. Consequently, the improbability of collective effort in examining any the issues vis-à-vis Svalbard with recourse to amendment makes it essential for a signatory party to take the lead in bringing these issues to the forefront of diplomatic relations.

**RECOMMENDATIONS TOWARDS AMENDMENT**

A basic starting point is the fact that a treaty remains in force and binds the signatory states for as long as they are parties to the treaty. Therefore any discontent or disagreement or changes in the interpretation of the treaty by any of the signatory party still cannot invalidate or make the treaty redundant for act of revision or modification must take the form of a new treaty and this will serve to add to the existing treaty or terminate the existing treaty.

Negotiating the exact nature and scope of Norwegian sovereignty with respect to the archipelago and establishing collective governance structures that will ensure signatory parties’ interests are protected may be beneficial. So a protocol, a treaty in its own right, can add to the Spitsbergen Treaty in the light of new issues. An example of a treaty that needed additional protocols and annexes in the light of new challenges to ocean governance is the Convention of 1976 for the protection of the Mediterranean Sea against Pollution (Barcelona Convention). The seven protocols, targeted to specific aspects of usage and governance of the regional sea are as follows:

- Protocol for the prevention of pollution in the Mediterranean sea by dumping from ships and aircraft
- Protocol concerning cooperation in preventing pollution from ships and in cases of emergency combating pollution of the Mediterranean sea
- Protocol for the protection of the Mediterranean sea against pollution from land-based sources and activities
- Protocol concerning specially protected areas and biological diversity in the Mediterranean (with annexes)
- Protocol for the protection of the Mediterranean sea against pollution resulting from exploration and exploitation of the continental shelf and the seabed and its subsoil
- Protocol on integrated coastal zone management in the Mediterranean. (entered into force on the 24th of March 2011)
This convention may be a useful template towards the possibility of negotiating a protocol or action plan that will address some of the jurisdictional issues in the Spitsbergen Treaty. A protocol, which may be optional or compulsory, operates to either provide for procedures in relation to a treaty or address its substantive issues. In relation to the Spitsbergen Treaty, a protocol will address and improve the signatory states understanding of the treaty especially the equality provision. It will also develop and enhance already existing mechanisms in conformity with the provisions of UNCLOS’ codification of maritime zones in international law as well as rights to resource exploitation and exploration. It may also expressly address the lacuna of dispute resolution whenever there are instances of obfuscation in treaty interpretation.

On the issue of general international law dispute resolution which may include continental shelf delimitations, the International Court of Justice (ICJ) by virtue of Article 36 paragraph 2 of its statute has compulsory jurisdiction where States parties “at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court”. Norway accepted the compulsory jurisdiction of the ICJ, which covers treaty interpretation.

In relation to law of the sea issues, UNCLOS also gives state parties a choice of choosing the forum for settlement of disputes that are primarily in relation to the convention’s provisions with an express choice of the ICJ. This is stipulated in Article 298 of UNCLOS and it provides that every state can choose a forum for the settlement of disputes concerning the application and interpretation UNCLOS (although Norway rejected this express choice in relation to unsettled dispute concerning sovereignty or rights over the continental shelf and disputes regarding military activities) so any of the signatory states of the Spitsbergen Treaty that recognises the compulsory jurisdiction of the ICJ (Generally or under the Article 298 provision of UNCLOS) may be hard pressed to find an aspect of Norwegian assumption of sovereignty over the Svalbard to refer to the ICJ for Norway has made sure certain issues, one of which is sovereign rights issues over the Svalbard, are outside the jurisdiction of the ICJ. The signatory states of the Spitsbergen Treaty that have also accepted the ICJ’s compulsory jurisdiction under Article 36 para.6 are as follows: Australia, Austria, Belgium, Bulgaria, Canada, Denmark, The Dominican Republic, Egypt, Estonia, Finland, Germany, Greece, Hungary, India, Japan, New Zealand, Poland, Portugal, United Kingdom, Spain, Switzerland, and Sweden.

Based on the exclusion of issues relating to sovereign rights over the Svalbard in dispute settlement procedures under UNCLOS, any submission to the ICJ must focus on requesting the ICJ to concern itself with treaty law i.e. defining the exact limits of the Spitsbergen Treaty and how it may be interpreted today in the light of customary international law.

On a final note, Article 39 of the VCLT also states that any amendment to a treaty, i.e. a formal alteration of the terms of a treaty, either in the form of a protocol or a under any other name need not comprise of all the original signatory states. It is different to a termination of a treaty as codified in Article 54 VCLT because a termination requires all the signatory parties consent but an amendment since its character is that of a new treaty will only the parties that sign up to it. This is perhaps where diplomatic negotiations between states will play a part in ensuring that a substantial amount of states sign up to a proposed amendment.
The Sovereignty Dilemma

It can be argued that the resources of the Svalbard archipelago has lead to new interests in the archipelago hence the participation of new states in the treaty (Czech Republic signed in 2004). The issue with relation to the Spitsbergen Treaty may question the extent of compliance to the Treaty’s stipulations for there is divergence amongst the parties as to the limits of Norwegian sovereignty over the Svalbard archipelago. A solution that could encourage compliance may lie in the introduction of a collective organ with a record of engendering compliance.

The responsibility for meeting the challenges of emerging resources and distribution of benefits may be placed on the EU especially as issues of fisheries and the possibility for oil explorations feature in the discussion of equality.

If the issue is that of adjusting the treaty to reflect new issues and changes in international law, EU’s external competence in matters, following rights internally granted to it by its member states that are also signatories to the Spitsbergen Treaty may make the EU a forum that can ensure that negotiations or discussions for amendments are made with one voice. This may better equip the Treaty to deal with resource distribution in these zones. Zones when the Spitsbergen Treaty was drafted are completely different to zones as codified in UNCLOS. With the present division of maritime zones into zones of sovereignty (Territorial Waters) and sovereign rights (EEZ and Continental Shelf) as well as the separation of applicable regulatory framework with the state choosing the procedure in the event of a dispute, coupled with some states claiming a maritime zone and not all (Norway does not claim and EEZ), the temporal issue in relation to the Spitsbergen Treaty’s (Inter temporal law states that any document of international law must be examined in the light of the time when it was drafted) means that it in danger of obscurity or engender more diplomatic rows over treaty interpretation.

An attempt to bring the Spitsbergen Treaty in line with current divisions of zones in international law may explain Norway’s literal interpretation of the Treaty’s stipulation in order to exclusively claim areas beyond the territorial waters (Pedersen, 2011: 123) but does not explain why Norwegian literalism to the provision that “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” is non-existent especially regarding claims over the continental shelf.

Nonetheless, the solution does not lie with UNCLOS but in an amendment procedure. The ratio legis or the object and purpose of the Spitsbergen Treaty, the realisation of an equitable regime over the Svalbard archipelago that can be developed and utilised peacefully between the signatories and can remain a framework for resolving tensions in the area. Therefore the next step by states should be the setting up of a working group to set out a plan of action towards an amendment protocol in the light of new issues in relation to the Archipelago. UNCLOS is a “package deal” treaty with a comprehensive framework which applies to all aspects ocean use such as navigation in the form of in-

SVALBARD INTERESTS VERSUS TREATY OBLIGATIONS

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nocent passage, transit passage and high seas navigation; flag state jurisdiction; islands and other forms of sea elevations; maritime delimitation amongst others and aside from the dangers of comparing one treaty against another, UNCLOS' remit is too wide to deal with the very specific issues in the Spitsbergen Treaty.

POSSIBILITIES FOR EU PARTICIPATION

There is no hindrance to the EU signing the Spitsbergen Treaty treaty as a regional bloc. In doing so, the EU will then have legislative competence and interest in protective the ‘shared use’ stipulation of the Spitsbergen Treaty. This will mitigate divergent claims by states that are members of the EU as well as signatory parties to the Spitsbergen Treaty ensuring that cooperation between the member states is achieved. Here, effectiveness in international treaty interpretation (Gordon, 1965: 798) and the effet utile of community law can converge to effective management of the resources balancing the interests of the signatory parties to the Spitsbergen Treaty and ecological management of the archipelago’s resources.

The only issue here is whether the EU states can accept the transference of their national rights to the resources under EU competence. The argument can be made that EU participation will lead to effective operation of the Spitsbergen Treaty terms as Norwegian competence is on a gradual climb towards exclusiveness at the expense of signatory states’ rights to exploit the resources in the zone. Moreover, just as the EU is a signatory to UNCLOS as well as its member states, there is a possibility of sharing competence in the governance of the Svalbard archipelago where certain areas such as fisheries fall within the community’s competence whilst other exploitative uses such as oil and gas fall within each signatory state’s remit.

As a closed multilateral treaty, becoming a state party to the Spitsbergen Treaty is not a case of depositing an instrument of accession to the United Nations Secretary General but more of a negotiating affair. As the procedure for becoming a signatory party is not expressly provided in the Spitsbergen Treaty, the procedural first-steps to this are identified in the VCLT.

Article 11 of the VCLT specifies that consent to be bound by a treaty is the first step as this consent must be expressed in the following ways:

- Signature of the party if the procedure is expressly provided for in the treaty or upon the consent of all negotiating states (Article 12 VCLT. A negotiating state is a state that took part in the drawing up and adoption of the text of the treaty).
- Exchange of instruments constituting a treaty providing that the treaty stated that this exchange shall have this effect or if the negotiating parties agreed that this exchange constitutes consent to be bound to the treaty (Article 13 VCLT).
- Ratification, acceptance or approval if the procedure is expressly provided for in the treaty or if the negotiating states agree that ratification by the intending state is needed to express consent to be bound by a treaty (Article 14 VCLT).
• The treaty provides that accession expressed by the state interested in becoming a party will suffice or if the negotiating states agree that consent to be bound may suffice as a means of accession (Article 15 VCLT).

Normally treaties provide the procedural guidelines to accession but as this is not the case with regards to the Spitsbergen Treaty, any chance of the EU’s accession to the Treaty must begin with securing the consent of the negotiating states. The question whether firstly the negotiating states will consent to the accession of the EU to the Treaty and secondly whether EU member states with interests in the Spitsbergen Treaty will grant to the EU the right to be a party to the Spitsbergen Treaty representing their interest as a whole is a matter of diplomacy.

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JOURNALS AND BOOKS


Northern Europe is unusually rich, to this day, in territories that are (to some degree) de-militarized and/or neutralized, or where normal national sovereignty is qualified in other ways. Aside from the example of the Svalbard archipelago - meticulously explored in this publication – they include the Åland islands as an autonomous de-militarized territory under Finnish sovereignty; the Faeroe Islands and Greenland with extensive self-government under Danish sovereignty; political limitations imposed by Denmark, Norway and Iceland on the presence of foreign forces or nuclear objects on their home soil; and Iceland’s own decision to forego national armed forces. Insofar as these special arrangements affect security governance, they were quite consciously adopted in hopes of reducing tensions and risks of war in the region, and most would agree that they have worked pretty well. Even during the Cold War when an East-West frontline ran through Europe’s North and massive forces were concentrated in North-West Russia, the region stayed relatively calm and left room for neighbours to cooperate across bloc divides. The accent since has shifted even more decisively towards peaceful collaboration among all regional stakeholders, as seen for instance in the increasingly concrete achievements of the eight-nation Arctic Council.

Today’s surge of interest in the new challenges likely to come with the progres-
sive melting of Arctic ice has probably overstated the risks of this peaceful picture
darkening, at least in a big way and any time soon. The time-line to any large-scale
commercial exploitation could be long and complicated, and the very fact that the
triggers of possible tension are already so clearly visible should improve the odds
on finding ways to defuse them. However, the subjective change in attitudes alone
makes it inevitable that the area’s strategic profile will rise, and a wider range of
powers than ever before – including emerging ones like China and India – will be
seeking to declare an interest. The various footholds already established by China,
as detailed in one of the expert papers here, underline that fact but also need to
be interpreted carefully. The Arctic is actually everyone’s business because of its
two-way feedback with overall climate change, the link of its fate with overall
biodiversity, the impact of any new hydrocarbon exploitation on global energy
markets, and the longer-term issue of how northward ‘climate migration’ is going
to be handled – to name just a few. For ‘outsiders’ to manifest an interest, be they
nations or collective entities like the UN, NATO and indeed the EU itself, does
not necessarily have to be seen as hostile interference or the start of a violent free-
for-all. If the Arctic wants to be treated as a global commons, it is hard to reject
global involvement.

This is what makes the studies in this short paper so universally interesting. Tech-
nical though the story of the Spitsbergen Treaty and its associated debates may be,
it provides concrete matter for illustrating and testing the big debate now develop-
ing on future Arctic governance. In particular, the existence of this Treaty with
its clear (though not simple) military restrictions ought to interest those schools of
opinion who are arguing for the Arctic space to have a single treaty regime and/
or a suspension of further economic activity, and who are particularly concerned to
avoid the militarization danger. But what does the Spitsbergen example really tell
us?

In a nutshell, the message I see emerging from these very well-informed analyses
is that treaties are victims like everyone else of the passage of time. As new issues
arise and new players get involved – which in the Arctic case means not just new
nations, but non-state players like business and NGOs – treaties that did not
anticipate these developments are clearly not going to deliver the solutions, but may
even aggravate things if they generate competing readings. The risk of ambiguity
leading to international disputes is perfectly illustrated by the difference between
Norway and others over how far the Treaty regime should extend at sea. In the cir-
cumstances, the risk of its leading to actual conflict is minimal: but it clearly does
not help with the responsible management of Svalbard’s surroundings in general,
and it stands out all the more now that Norway and Russia have settled all other
demarcation issues.3

A second point to note is that in the specific debate on fishing (and potentially, oil
and gas) in a 200-mile zone around Svalbard, the options under the Treaty would
be for Norway to own the resources or for all signatories to share them. But under
either solution, some crucial questions for the various dimensions of Arctic security
would remain open: how is sustainable fishing to be guaranteed, fisheries protec-

3 The reference is to the Norwegian-Russian agreement signed on September 2010, and now rati-
ified, settling the remainder of the maritime dividing line in the Barents Sea and Arctic Ocean.
tion ensured, nuclear pollution detected, accidents dealt with, and so on? With today’s concern for the environment and responsible management of resources - not to mention higher norms of civil emergency response – good international governance has to be about more than just defining sovereignty and ownership. Some of these questions are in fact covered by different international regulatory regimes already, while others are under study in various fora: and this poses a challenge for anyone advocating renegotiation and/or extension of the present Spitsbergen Treaty. Can it be adjusted to allow all relevant and useful international instruments to take effect within the Treaty zone – as one of our authors clearly states that the Law of the Sea cannot take effect at present? If not, is there not a risk that a territory once setting a good example of peaceful opting-out from power struggles becomes instead a kind of white hole in what should ideally be a comprehensive and consistent regime for Arctic management?

The issue may also be raised in a broader form: how useful today are the old ideals of demilitarization and neutralization as such? They made sense in a world where security was all about wars and the military, and a good ruler’s task was to keep the enemy away from his/her borders. But today’s security problems - at least in the Northern hemisphere - arise overwhelmingly within state frontiers, whether we think of internal conflict, terrorism and violent crime or of infrastructure breakdowns, natural disasters and disease. They cannot be solved by the military, but not by demilitarization either. Rather, they demand a clear and legitimate sovereign power that obeys international (and its own) laws and can use strength when needed to enforce them. As for banning armed forces, democratic states have in fact found several ways of using military skills and assets to help out, under proper political control, in civil emergencies and for other peaceful ends. The latest Arctic Council agreements on search and rescue, for instance, fully accept that the military will help and cooperate in this task when appropriate.

For these reasons and more, my own conclusion from the experts’ carefully objective analysis is that a version of the Spitsbergen Treaty writ large is not a viable answer for tomorrow’s Arctic. Indeed, one could argue that the Treaty has only attracted as much interest and as many new adhesions as it has because there is no other easy point of entry, as yet, for states who seek footholds - including a base for direct participation in research - within the High North region. The Arctic Council remains very reserved about letting new players into the heart of its structures, and the huge bulk of Arctic coastlines are under the similarly protective wardship of Russia and Canada.

At the same time, and as this publication proves, the Svalbard case can offer invaluable food for thought for anyone who cares about the Arctic and is ready to grapple with its full legal, political and psychological complications. The existing Treaty regime aims at two of the same things that all serious players say they want for the whole Arctic region: peace and stability in ‘hard’ military terms, and responsible resource management with fair shares for all. In spirit and practice it has also been good for the environment and for cooperative monitoring and research. Pared down even further to the basics, it shows that high-minded legal regulation can coexist with human activity sponsored by a several different sovereign nations, including actual economic production. The obvious question is then, how could
such results be extended to the whole Arctic realm while avoiding the pitfalls that the Svalbard regime’s more out-of-date features have created? If the future Arctic must remain a space of divided sovereignty, entirely or mostly available for economic and military activity, what political structures and legal regime(s) would best guarantee peace and good order while protecting the global commons? Or if some or all of the Arctic could be treated as a terra nullius, how would all the demands of good modern security management be met in and around such a space?

Any further discussion of such issues would be welcome, in any forum. It might be especially rewarding in the setting of the EU, which – if nothing else – is par excellence a post-modern creation doing its best to meet the changing demands of a globalized world. In reality the EU is already a significant Arctic player, through its directly relevant competences and policies and its collective stake in climate, fisheries and energy development (to name but a few), not to mention its member states’ roles within the region. The present report could serve as a point of departure for calm and open-minded debate among interested players in the EU system and other stakeholders, perhaps not so much on the Spitsbergen Treaty itself as on the wider issues and options that it illuminates. If this leads to identifying specific cases for new EU inputs related to Svalbard, so be it; but the potential lessons and stimuli for policy development will surely go much further than that.
Spitsbergen in a sea of change