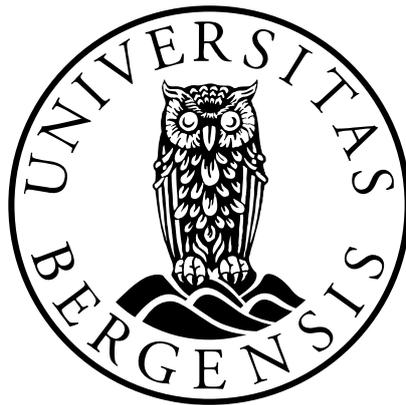


# The Non-Discrimination Requirement and Geographical Application of the Svalbard Treaty

*Decisions by the Norwegian Supreme Court*

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# 1. Introduction

## 1.1 Topic

The remote archipelago of Svalbard is situated in the northernmost part of Norway. Before the recognition of Norwegian sovereignty in the Svalbard Treaty,<sup>1</sup> it was one of the few areas left in the world still considered a no man's land. For decades the Treaty has been a source of controversy between Norway and other states. The most disputed question concern the geographical and material scope of the Treaty's prohibition against discrimination as newer legal constructions have complicated interpretation of the Treaty. Notably, modern law of the sea allows for coastal states to establish maritime zones outside their territories, which gives them sovereignty in territorial waters and sovereign rights to explore and exploit both living and non-living resources in the areas beyond. Thus, in maritime zones, the state may discriminate other nationalities and favour its own nationals. In contrast, the Svalbard Treaty prohibits discrimination based on nationality in conducting certain economic activities. The question is thus which regime applies to the maritime zones around Svalbard, and how the regimes shall be harmonised. To this day, Norway has been able to prevent serious confrontation by limiting exploitation of resources to the temporary and non-discriminatory Fishery Protection Zone (FPZ).<sup>2</sup> Although Norway maintains that the Svalbard Treaty is not applicable in this zone, non-discriminatory regulations apply<sup>3</sup> in order to prevent the controversial issues of the Svalbard Treaty being put to the test.

There is a considerable body of existing literature on the law of the sea dimension of the spatial and material scope of the Svalbard Treaty. However, less is written on how Norwegian law has dealt with these challenges. Since Norway is the coastal state as related to the Svalbard archipelago it is particularly interesting to look at Norwegian state practice. Three cases have been heard by the Norwegian Supreme Court, where the appellants claimed discriminatory treatment in the FPZ. So far, attempts to make the Court decide on the geographical scope of the Treaty have proved futile. However, the Supreme Court has repeatedly discussed the non-discrimination requirement of the Svalbard Treaty, in order to establish whether or not there have been cases of discrimination in the FPZ. This thesis will

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<sup>1</sup> Treaty between Norway, The United States of America, Denmark, France, Italy, Japan, the Netherlands, Great Britain and Ireland and the British overseas Dominions and Sweden concerning Spitsbergen signed in Paris 9th February 1920 (also known as 'The 1920 Treaty of Paris' or the 'Spitsbergen Treaty'). See also Act of 18 July 1925 No. 11 ('The Svalbard Act').

<sup>2</sup> Royal Decree of 3 June 1977 No. 6 on the Fisheries Protection Zone off Svalbard, pursuant to §1 of the Act of 17 December 1976 No. 9 on Norway's Economic Zone.

<sup>3</sup> Report No. 30 to the Norwegian Storting (2004-2005) 'Muligheter og utfordringer i nord', section 3.3.

pay particular attention to the 2014 ‘Kiel’ case.<sup>4</sup> This judgment is especially interesting, as the Supreme Court seems to have been influenced by developments in European law, in its interpretation of the non-discrimination requirement of the Svalbard Treaty.

## 1.2 Research Question

My overall research question is how the Norwegian Supreme Court has dealt with the questions of the geographical and material scope of the Svalbard Treaty’s non-discrimination requirement. Answering this question requires a two-fold approach. In the first part of this thesis I will place emphasis on the international legal framework in the Svalbard Treaty and interpret legal aspects related to the Treaty’s geographical application and the content of the Treaty’s non-discrimination requirement. The second part of the thesis will address how these questions have been dealt with at the national level, focusing on decisions by the Norwegian Supreme Court.

## 1.3 Method and Legal Sources

The starting point for establishing international rules of law is the Statute of the International Court of Justice (ICJ),<sup>5</sup> which is generally recognised as an authoritative statement on sources of international law. The main source of law analysed in this thesis will be the Svalbard Treaty, which is an ‘international convention’, pursuant to article 38 (a) of the ICJ Statute. The French and English texts of the Svalbard Treaty are equally authentic.<sup>6</sup> Furthermore, the discipline of treaty interpretation has been codified in the Vienna Convention on the Law of Treaties (VCLT).<sup>7</sup> Norway is not a party to VCLT. However, the ICJ has recognised that articles 31-32 are expressions of customary international law.<sup>8</sup> In *Kasikili/Sedudu*,<sup>9</sup> the ICJ established that this was the case as early as in 1890. As Norway is bound by customary international law, VCLT will provide guidance for the interpretation of the 1920 Svalbard Treaty. Other sources of international law will be the United Nations Convention on the Law of the Sea (UNCLOS)<sup>10</sup> and case law, notably decisions from the ICJ.

National court practice and literature are supplementary sources of international law, according to ICJ Statute article 38 (d). These can hold persuasive authority. The writings of

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<sup>4</sup> Rt. 2014 p. 272.

<sup>5</sup> UN, Statute of the International Court of Justice, 18 April 1946.

<sup>6</sup> Article 10 (3) of the Svalbard Treaty.

<sup>7</sup> UN, Vienna Convention on the Law of Treaties, 23 May 1969, UNTS, Vol. 1155, p. 331.

<sup>8</sup> *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, ICJ Rep 2002, p. 625, and *Arbitral Award of 31 July 1989 (Guinea-Bissau/Senegal)*, Judgment, ICJ Rep 1991, p. 53, para. 48.

<sup>9</sup> *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, ICJ Rep 1999, p. 1045, para. 18.

<sup>10</sup> UN, Convention on the Law of the Sea, 10 December, 1982, UNTS, Vol. 1833, p. 397.

legal scholars can enlighten the discussion, as there has been much debate on the content of the Svalbard Treaty provisions. Central scholars include Fleischer,<sup>11</sup> who holds the position that the Svalbard Treaty does not apply to the maritime zones around Svalbard, and Ulfstein and Churchill,<sup>12</sup> who defend the opposite view. As regards other national sources, these include Norwegian laws, regulations and Supreme Court decisions, which will be analysed in accordance with the Norwegian doctrine on legal sources. In addition, reports by the Storting will be used in order to establish the official positions of Norway.

Challenges of interpretation include the fact that the Svalbard Treaty is almost 100 years old and its provisions are sometimes vaguely articulated. The difficulties regarding the interpretation of the Svalbard Treaty have occurred decades after the conclusion of the Treaty, making it more troublesome to establish the intention of the drafters. Another challenge is that one cannot with certainty establish all positions and arguments of other States on the matter of the interpretation of the Treaty. There have been no legal proceedings where the States have advocated their views. However, several governments have issued statements that indicate their positions regarding the interpretation of the Treaty, making it possible to discuss potential arguments that can be put forward in order to support these views.

## 1.4 Outline

After this introductory chapter, the following chapter will provide a historical backdrop relating to the Svalbard Treaty and the circumstances of its conclusion. In order to fully grasp the legal problems, it is vital to understand the special situation of Svalbard both before and after the Svalbard Treaty was concluded and came into force. Chapter 3 will be dedicated to the discussion on the topical and complex issue of the Svalbard Treaty's geographical application. This will provide a background for the more specific question that will be discussed in chapter 4, namely the content of the non-discrimination requirement. I will interpret articles 2 and 3 of the Svalbard Treaty in order to establish what these non-discrimination provisions entail. The interpretation will be focused around elements that are relevant to the Norwegian Supreme Court cases that will be analysed in chapter 5. Chapter 5 will then bring us to the central question of this thesis, which is how the Norwegian Supreme Court has dealt with the questions of the Svalbard Treaty's area of application and the non-discriminatory regulations applied in the FPZ.

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<sup>11</sup> See generally Carl August Fleischer, *Folkerett*, 8th edition, Oslo 2005, chapter 12.

<sup>12</sup> See generally Geir Ulfstein, *The Svalbard Treaty: From Terra Nullius to Norwegian Sovereignty*, Oslo 1995, pp. 478-479 and Robin Churchill and Geir Ulfstein, 'The Disputed Maritime Zones Around Svalbard', in *Changes in the Arctic Environment and the Law of the Sea*, Leiden 2010, pp. 551-593.

## 2. The Svalbard Treaty and the Development of the Law of the Sea

### 2.1 The History of the Svalbard Treaty

#### 2.1.1 Norwegian Sovereignty

Svalbard was discovered by the Dutch explorer William Barents in 1596,<sup>13</sup> who named the archipelago ‘Spitsbergen’. Russia and England have also claimed to be the discoverers of the archipelago,<sup>14</sup> although it has been suggested that Norsemen found the land centuries earlier and referred to it as ‘Svalbard’, meaning ‘cold shores’.<sup>15</sup> Throughout history there has been an international presence on the archipelago, through various commercial activities, such as whaling, fur trapping and mining. For a long time, however, the archipelago was considered a no man’s land.

An international management regime for Svalbard was discussed in a sequence of conferences in Norway’s capital in 1910, 1912 and 1914.<sup>16</sup> However, these talks were interrupted by the outbreak of World War I. As a consequence, attempts to establish Svalbard’s status proved unsuccessful until the post-war peace negotiations. At this time, France, England and the USA were instrumental in designing the new power balance in Europe. In spite of Norway’s neutrality during the war, the Norwegian merchant fleet had been of service to the Western powers, and also suffered collateral damage as a result of the war.<sup>17</sup> These were among the arguments used to advocate for Norwegian sovereignty over Svalbard. It is worth noting that although Russia and Germany were both active participants in the conferences prior to the war, this was not the case in the negotiations in its aftermath. However, both States later signed and ratified the Svalbard Treaty.<sup>18</sup>

During the negotiations culminating in the 1920 Svalbard Treaty, there were two main proposals.<sup>19</sup> One of them would assign Norway a mere managerial or administrative role on behalf of the international community. However, this suggestion was rejected in favour of full Norwegian sovereignty over Svalbard. The previous *terra nullius* regime had led to over-exploitation of resources and conflict between the different nationalities, leading to a need for

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<sup>13</sup> Ulfstein 1995, *op. cit.*, p. 35.

<sup>14</sup> *Ibid.*, p. 34.

<sup>15</sup> T.B. Arlov, ‘Nytt lys over Svalbards oppdagelse?’, Heimen, 1987 XXIV, No. 2, p. 78, as cited in *ibid.*, p. 33.

<sup>16</sup> Øystein Jensen, *Noreg og havets folkerett*, Trondheim 2014, pp. 99.

<sup>17</sup> See generally, Ulfstein 1995, *op. cit.* pp. 44-49.

<sup>18</sup> *Ibid.*, p. 46.

<sup>19</sup> Fleischer 2005, *op. cit.* p. 136-137.

proper management.<sup>20</sup> By giving sovereignty to a single state, the Treaty parties aimed to allow for proper regulations of the resources on the archipelago, as well as their peaceful utilisation. At the same time, the Svalbard Treaty granted the signatory powers certain rights and advantages in conducting economic activity on the archipelago. These requirements were meant to preserve certain terra nullius rights for the signatory States.<sup>21</sup> In sections 3 and 4 below, we shall see that this aim is mirrored in the preamble and separate provisions of the Svalbard Treaty.

### 2.1.2 Key Provisions

The most important provisions of the Svalbard Treaty include, first, restrictions in introducing duties and taxes on the archipelago, as the revenue can only be used for local purposes.<sup>22</sup> Further, there is a ban on using the archipelago for war purposes or other specific military activities.<sup>23</sup> Third, the nationals from all signatory States have equal liberty of access and entry to the archipelago.<sup>24</sup> Lastly - and most relevant to the topic of this thesis - is the non-discrimination requirement, which according to the wording of the Treaty applies to certain specified activities.<sup>25</sup>

The most controversial element of the Svalbard Treaty has proven to be the geographical and material scope of this non-discrimination requirement. The problematic part concerning its geographical scope is that wording of the Treaty only explicitly mentions the land territory and the territorial waters. It is uncontroversial that the non-discrimination provisions apply in these areas. However, the question is if non-discrimination is also required in the new maritime zones beyond the outer limit of the territorial sea. The material problem is related to the incongruity between the non-discrimination requirements of the Treaty and the exclusive coastal state rights provided by the modern law of the sea.

As of today, there are over 40 signatories to the Svalbard Treaty. All of these signatories enjoy rights of non-discrimination in undertaking activities on Svalbard, such as hunting, fishing and mining. Accordingly, Norway is prohibited from treating subjects from any signatory State, including Norway, more favourably than subjects of other signatory

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<sup>20</sup> Ulfstein 1995, *op. cit.*, pp. 36-38.

<sup>21</sup> *Ibid.*, p. 50, or alternatively 'preserve the status quo', see Peter T. Ørebech 'The long arm reach' of the Svalbard Treaty?' From *the Selected Works of Peter T Orebech*, 2015. Available at: <[http://works.bepress.com/peter\\_orebech/1](http://works.bepress.com/peter_orebech/1)> accessed 2 December 2015.

<sup>22</sup> Article 8 (2) of the Svalbard Treaty.

<sup>23</sup> *Ibid.*, article 9.

<sup>24</sup> *Ibid.*, article 3 (1).

<sup>25</sup> *Ibid.*, articles 2 and 3.

States. Thus, scholars have compared the Svalbard Treaty system to contemporary EU law.<sup>26</sup> A difference worth noting is that Svalbard is not bound to adopt policies decided by any supranational organ. The Svalbard Treaty regime is nevertheless indeed similar in the respect that Norway has sovereignty over the territory, but cannot discriminate based on nationality.

## 2.2 Development of the Law of the Sea

At the time the Svalbard Treaty was signed in 1920, no one could foresee the complex legal questions that due to the development of the law of the sea would later emerge with respect to the maritime zones beyond the territorial waters of Svalbard. Traditionally, the oceans were considered a global common. This doctrine of the freedom of the seas is articulated most famously by Hugo Grotius in his work ‘Mare Liberum’ of 1609. The oceans were not considered to belong to any one state, but were free to use by all. For centuries, the exception to this doctrine was a relatively small area close to the shore of a coastal state, called the territorial sea.<sup>27</sup> In the territorial sea, the coastal state enjoyed sovereignty, similar to that on land.

Later developments in the law of the sea have, however, led to an expansion of the territorial sea, as well as the creation of new maritime zones beyond. After the Second World War,<sup>28</sup> coastal states began declaring maritime zones beyond their territorial waters for specific purposes such as fishing or protecting the environment. The right to establish these zones became customary international law and was also codified in different conventions, most recently in the 1982 United Nations Convention on the Law of the Sea (UNCLOS). While the territorial sea is a part of a state’s territory, the Exclusive Economic Zone and the continental shelf only establish sovereign rights for the coastal state to explore and exploit marine resources. In the remainder of this chapter, I will present an outline of the maritime zones relevant to Svalbard, before highlighting the different character of the Svalbard Treaty and the modern law of the sea.

### 2.2.1 The Continental Shelf

Firstly, the continental shelf contains rights to resources on the seabed and subsoil of the submarine areas to a distance of 200 nautical miles (nm) from the baselines from which the

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<sup>26</sup> Ulfstein 1995, *op. cit.*, p. 474, Flesicher, *op.cit.*, p. 137 and Aage Thor Falkanger, ‘Noen folkerettslige problemstillinger i nordområdene – i fortid og nåtid’, *Lov og Rett*, 2007, pp. 323 and 336.

<sup>27</sup> Potentially also an area outside the territorial sea similar to the modern contiguous zone, see Churchill and Ulfstein *op. cit.*, p. 564 and Ørebech *op. cit.*, p. 43.

<sup>28</sup> Notably, President Truman’s proclamation of exclusive jurisdiction outside the territorial sea of the USA, September 1945.

territorial sea is measured, and, if the continental margin in question allows, beyond that distance.<sup>29</sup> Thus, a coastal state has the right to a continental shelf extending 200 nm regardless of the geological configuration of the seabed, but in some cases the coastal State can, in accordance with Article 76 of UNCLOS, establish the outer limits of the shelf at a much more seaward position.

The key problematic issue in relation to the Svalbard Treaty as related to the continental shelf regime of the law of the sea is whether or not the rules apply to the continental shelf around Svalbard. Geologically the continental shelf around the Norwegian mainland and Svalbard is the same shelf. However, as will be discussed in section 3.1.3, this does not necessarily exclude the application of the Svalbard Treaty on the part of the continental shelf that is situated around the archipelago. It is noted that in the procedures for establishing the outer limits of the continental shelf beyond 200 nautical miles, the Commission on the Limits of the Continental Shelf in 2009 agreed with Norway that there indeed is a continental shelf around the archipelago.<sup>30</sup>

There is currently no petroleum activity on the continental shelf around Svalbard.<sup>31</sup> However, if the Svalbard Treaty did apply here, this could greatly affect any prospects of tax income from potential future petroleum activities. While petroleum activity on the mainland continental shelf of Norway generates large revenue for the Norwegian state, a similar solution on the shelf around Svalbard may be prohibited by the Svalbard Treaty's tax restrictions.<sup>32</sup>

## **2.2.2 Exclusive Economic Zone (EEZ) and Fishery Protection Zone (FPZ)**

The EEZ is an area beyond and adjacent to the territorial sea.<sup>33</sup> It extends seawards no longer than 200 nm from the territorial sea baselines.<sup>34</sup> Article 56, 1 (a) of UNCLOS provides that the EEZ gives the coastal State 'sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil (...)'. In contrast to the continental

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<sup>29</sup> Articles 76-77 of UNCLOS.

<sup>30</sup> See generally Øystein Jensen, 'Towards Setting the Outer Limits of the Continental Shelf in the Arctic: On the Norwegian Submission and Recommendations of the Commission'. In Davor Vidas (ed), *Law, Technology and Science for Oceans in Globalisation – IUU Fishing, Oil Pollution, Bioprospecting, Outer Continental Shelf*. Leiden/Boston 2010, pp. 519-538.

<sup>31</sup> Although Russia has protested against Norwegian licencing rounds, which the Russian Authorities believe to concern areas regulated by the Svalbard Treaty. See article in Verdens Gang (VG) : <<http://www.vg.no/nyheter/innenriks/norsk-politikk/russland-protesterer-mot-oljeboring-i-svalbard-sonen/a/23444540/>> accessed 17 November 2015.

<sup>32</sup> Article 8 (2) of the Svalbard Treaty.

<sup>33</sup> Article 55 of UNCLOS.

<sup>34</sup> Article 57 of UNCLOS.

shelf, which gives the coastal state the exclusive right to exploit resources only at the seabed and subsoil, the EEZ gives rights also with respect to living marine resources in the water column above the seabed. There is no obligation to establish an EEZ, but in contrast to the continental shelf it shall be explicitly proclaimed by a State if it wishes to make use of its sovereign rights in this area. With respect to the water beyond the territorial waters of Svalbard, the Norwegian official position is that Norway can establish an EEZ around Svalbard, in accordance with UNCLOS.<sup>35</sup> So far, however, only a non-discriminatory Fishery Protection Zone has been established.

The Svalbard FPZ has been in operation for almost 40 years and is currently the only maritime zone outside Svalbard where there is commercial activity. The FPZ was introduced in 1977, with a purpose to conserve and manage the marine living resources in the area.<sup>36</sup> There is no mention of an FPZ in UNCLOS. However, Norway considers the legal basis for the establishment of an FPZ to be customary international law, as it was established before Norway ratified UNCLOS.<sup>37</sup> In the FPZ, non-discriminatory regulations are applied in order to avoid confrontation with other states, as well as seeing no need for differential treatment in this area.<sup>38</sup>

It is worth noting that these ‘self-imposed restrictions’ do not mean that all Treaty parties are given equal quotas to fish in the FPZ, or even a right to fish at all. Norway and Russia’s fisheries cooperation on shared and straddling fish stocks, involve a yearly agreement on a common Total Allowable Catch (TAC) on specific fisheries.<sup>39</sup> The TAC is set for the Barents Sea and the Norwegian Sea, including the FPZ around Svalbard. In other words, Norwegians and Russians do not have own quotas on these fish stocks in the FPZ, but fish on their respective part of the TAC, regardless of whether this happens in the FPZ, Russian EEZ or Norwegian EEZ. In addition, certain third countries are given quotas on specific fisheries in the FPZ if they have historical fishing practice in the area. In reality, this leaves out the majority of the Treaty parties. This arrangement, as well as other details regarding the management of the FPZ, will be discussed in more detail in chapters 4-5, on the non-discrimination requirement and its content.

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<sup>35</sup> Pursuant to §3 of the Act on Norway’s Economic Zone of 17 December 1976 No. 91, there is a prohibition on fishing for non-Norwegians in Norway’s EEZ. However, §2 of the Royal Decree of 3 June 1977 No. 6 on the Fisheries Protection Zone off Svalbard provides that this provision *temporarily* does not apply to the FPZ.

<sup>36</sup> Royal Decree of 1977, *op. cit.*, § 1.

<sup>37</sup> See reference to preparatory works for the regulations cited in Rt. 2006 p. 1498, para. 54.

<sup>38</sup> Report No. 40 to the Norwegian Storting (1985-86), ‘Concerning Svalbard’, unofficial translation, p. 11.

<sup>39</sup> E.J. Molenaar, ‘Fisheries Regulations in the Maritime Zones of Svalbard’, *The International Journal of Marine and Coastal Law* 27, Leiden 2012, pp. 3-58 (pp. 36-40).

## **2.3 The Different Character of the Regimes**

To this day, Norway has not opened for petroleum activity on the continental shelf, nor established an EEZ. The only commercial activity is currently in the FPZ. It is important to note that the maritime zones are not extensions of coastal state territory, but give the state sovereign rights in these areas. In other words, the UNCLOS regime gives exclusive rights for the coastal state to explore and exploit resources in its maritime zones. The modern law of the sea thus allows for the state to discriminate in its territorial sea, over which it has sovereignty, as well as in the maritime zones beyond the territorial sea, where the state enjoys sovereign rights. In contrast, the Svalbard Treaty prohibits Norway from discriminating nationals of any of the Treaty parties in economic activities regulated by the Treaty. This underlines the different character of UNCLOS and the Svalbard Treaty, and raises the question of which legal regime applies to the maritime zones around the archipelago.

The wording of the Svalbard Treaty provisions makes it clear that the Treaty applies on land and in the territorial waters. However, in 1920, the territorial sea was the only maritime zone in existence. The sea was either territory or open seas. After the Treaty was concluded, however, there has been a significant development in the law of the sea. Thus, there is also a geographical discrepancy between the Svalbard Treaty and the modern law of the sea.

## **3. The Geographical Scope of the Svalbard Treaty**

### **3.1 Can Norway Establish Maritime Zones Beyond Svalbard's Territorial Sea?**

#### **3.1.1 Introduction**

The previous chapter identified the main challenges to the interpretation of the Svalbard Treaty, due to the different nature of the Treaty and the modern law of the sea. It was established that the main dispute is related to the material and geographical scope of the Treaty. Section 3.1 of this chapter will investigate whether Svalbard generates maritime zones at all. In section 3.2, there will be a discussion on whether the Svalbard Treaty applies in these maritime zones.

### 3.1.2 Does the Svalbard Treaty Exclude the Establishment of Maritime Zones Beyond the Territorial Sea?

In the past, Russia and its forerunner The Soviet Union have advocated that Norway has no right to establish maritime zones beyond the territorial waters of Svalbard.<sup>40</sup> It can be argued that Russia's argument has been weakened during the last few years. In 2010 Russia entered into a delimitation agreement with Norway with respect to both continental shelf areas and sea areas,<sup>41</sup> and thus accepted the use of the baselines of Svalbard as the base for the delimitation line. Other parties are either silent on the matter<sup>42</sup> or they seem to accept Norway's right to establish maritime zones outside Svalbard's territorial waters, as long as the Svalbard Treaty applies in these areas.<sup>43</sup> The claim that the Svalbard Treaty applies in the maritime zones, will in itself imply an acceptance that such zones can be established. Thus also State practice indicates that Norway has the right establish maritime zones around Svalbard, which is also the conclusion here.

It is unproblematic to establish that there is a territorial sea around Svalbard, in which the Svalbard Treaty applies. Article 1 provides that the Treaty parties recognise Norwegian sovereignty over Svalbard, comprising all islands within specific coordinates. Provisions of the Svalbard Treaty repeatedly refer to the 'territorial waters' and stipulate rights for the Treaty parties in this zone.<sup>44</sup> At the time of the conclusion of the Treaty, the wording 'territorial waters' referred to an area that was not clearly defined in size. However, the term is generic and must be understood as having the same content as territorial sea, which is the term most commonly used today, including in UNCLOS and other instruments.

No other types of maritime zones are explicitly mentioned by the Treaty. This seems only natural, however, as they did not exist as legal constructs at the time of the Svalbard Treaty's creation. On the other hand, there are no provisions that prohibit the establishment of such maritime zones. Norway's rights as a sovereign state should therefore come into play, including the right to establish maritime zones in accordance with customary international law and UNCLOS. Notably, according to UNCLOS article 121, islands are entitled to maritime

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<sup>40</sup> The Soviet Union, Memorandum to Norway, 27 August 1970, as cited in Tore Henriksen and Torbjørn Pedersen 'Svalbard's Maritime Zones: The End of Legal Uncertainty?' in *The International Journal of Marine and Coastal Law* 24, 2009, pp. 141–161 (p. 144).

<sup>41</sup> Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean 15 Sept 2010.

<sup>42</sup> Including France, Germany and the USA, see Torbjørn Pedersen, *Conflict and Order in Svalbard Waters*, Tromsø 2008 p. 7, with further reference to 'The Dynamics of Svalbard Diplomacy' in *Diplomacy and Statecraft* 2008, 19, No. 2, chapter 7.

<sup>43</sup> The United Kingdom has explicitly stated its view in Note Verbale of 11 March 2006, by the British Government to the Government of Norway, *British Yearbook of International Law* 78, 2007, p. 794.

<sup>44</sup> Including articles 2-3 of the Svalbard Treaty.

zones. An exception stipulated by article 121 (3) is '[r]ocks which cannot sustain human habitation or economic life of their own'. Those parts of Svalbard that constitute such 'rocks' are situated in such a way that they would not greatly impact the size of the maritime zones of Svalbard.<sup>45</sup> Under international law, Svalbard therefore generates its own maritime zones.

### 3.1.3 Does Svalbard Generate its 'Own' Continental Shelf?

Traditionally, Norway has argued that the continental shelf around Svalbard needs to be discussed separately from other zones such as the FPZ or an EEZ. This is because Norway considers these zones and the continental shelf to be generated by different land territories. Norway has maintained that the continental shelf around Svalbard is not a continental shelf extending from the Svalbard archipelago, but an extension of the continental shelf generated by the Norwegian mainland.<sup>46</sup> As a consequence of this, it has been held by Norway that the Svalbard Treaty does not apply to the continental shelf around Svalbard. However, this claim has led to protests from other states.<sup>47</sup>

It is worth mentioning that there has been an inconsistency in Norway's practice as to whether Svalbard has its own continental shelf or not, as Svalbard has been the base of other claims in relation to the law of the sea. Norway's claim that Svalbard generates an FPZ, but not a continental shelf, is in itself contradictory. In addition, basepoints on Svalbard was used for calculating the equidistance in the 2006 delimitation agreement with Denmark/Greenland.<sup>48</sup> Moreover, Svalbard was used for delimiting the continental shelf in the 2010 delimitation agreement with Russia.

As pointed out by Churchill and Ulfstein,<sup>49</sup> the argument that Svalbard does not generate its own continental shelf seems to have been downplayed by Norway in recent years, as it has not been mentioned in newer documents on Svalbard. They also suggest that Norway's recent practice may not be a contradiction of the Norwegian position, but rather a confirmation that this argument has been abandoned.

There are few good reasons to accept that the continental shelf around Svalbard cannot be regulated by the Svalbard Treaty because it is geologically the same shelf as that of the Norwegian mainland. As shown, every island except uninhabitable rocks generates maritime

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<sup>45</sup> Churchill and Ulfstein 2010, *op. cit.*, pp. 558-559.

<sup>46</sup> Henriksen and Pedersen 2009, *op. cit.*, p. 144.

<sup>47</sup> Including the United Kingdom, see note verbale of 11 March 2006, *op. cit.* p. 794.

<sup>48</sup> Agreement between the Government of the Kingdom of Norway on the one hand, and the Government of the Kingdom of Denmark together with the Home Rule Government of Greenland on the other hand, concerning the delimitation of the continental shelf and the fisheries zones in the area between Greenland and Svalbard, Copenhagen, 20 February 2006.

<sup>49</sup> Churchill and Ulfstein 2010 *op. cit.*, p. 568.

zones. Therefore, under UNCLOS, Svalbard generates its own continental shelf. Besides, it must be decisive that the arguments in favour of Svalbard having an own continental shelf are not necessarily referring to a physically separate continental shelf. Rather, Svalbard may have its own continental shelf in the respect that a specific part of the seabed extending from the archipelago is subject to the provisions of the Svalbard Treaty. The mere fact that the shelf around Svalbard is geologically the same as that of the Norwegian mainland does not prohibit this. Thus, it could well be argued that Svalbard has its own continental shelf, referring to a zone of seabed outside its territorial waters that is regulated by the Treaty. Therefore, the maritime zones will be discussed jointly in the following section on the geographical scope of the Treaty.

## 3.2 Does the Svalbard Treaty Apply in the Maritime Zones Beyond the Territorial Sea?

### 3.2.1 Introduction

As for the most disputed legal question of today, Norway maintains that the Treaty only applies on land and in the territorial waters.<sup>50</sup> Canada and Finland have previously supported the Norwegian view, but it is not currently clear whether this support has been withdrawn.<sup>51</sup> Germany, France and the USA are among states who have not voiced their opinion on the matter. As mentioned, most other Treaty Parties are of the opinion that the Treaty also applies to other maritime zones generated by the Svalbard territory.

Iceland and Spain seem to accept that Norway can establish maritime zones beyond the territorial sea of Svalbard, but have challenged her enforcement jurisdiction in the FPZ.<sup>52</sup> However, if the Svalbard Treaty applies in these maritime zones, there is nothing in the Treaty that prohibits Norway from enforcing its regulations. On the contrary, article 2 (2) provides that ‘shall be free to maintain, take or decree suitable measures to ensure the preservation (...) of the fauna and flora’. If the economic rights enjoyed by the signatories of the Svalbard Treaty apply in the maritime zones beyond the territorial sea, then naturally so will also Norway’s right to exercise jurisdiction. Similarly, if the Treaty does not apply in these zones, Norway will enjoy normal coastal state jurisdiction. Because there does not seem to be legal merit to these claims by Iceland and Spain, they will not be discussed further within this

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<sup>50</sup> Report No. 30 (2004-2005), *op. cit.*, section 3.3 and Report No. 40 to the Norwegian Storting (1985-86) *op. cit.*, p. 11.

<sup>51</sup> Churchill and Ulfstein 2010, *op. cit.*, p. 564.

<sup>52</sup> See Henriksen and Pedersen 2009, *op. cit.*, p. 146 and Pedersen 2008 *op. cit.*, p. 7 with further reference to Pedersen ‘The Dynamics of Svalbard Diplomacy’ in *Diplomacy and Statecraft* 2008, 19, No. 2, chapter 7.

thesis. In the following, the discussion will be focused on whether or not the Treaty applies to the maritime zones outside Svalbard's territorial sea.

### 3.2.2 Text

Article 31 (1) of the Vienna Convention provides that a treaty shall be interpreted 'in good faith' 'in accordance with the ordinary meaning' given to the terms of the treaty. It is Norway's official view that the Treaty provisions only apply to the areas expressly mentioned in the Treaty, namely the land areas covered by article 1, as well as the territorial waters.<sup>53</sup> In Report No. 40 to the Norwegian Storting (1985-86), it was maintained that:

According to the wording of the Svalbard Treaty, it is not applicable beyond the territorial waters (...) That the possibility of jurisdiction beyond the territorial waters was not foreseen in 1920 does not alter this fact. During negotiations on the Svalbard Treaty, there was full awareness of the principle that provisions that restrict sovereignty are to be interpreted restrictively and that Norwegian sovereignty over Svalbard would be general and fully applicable where the Treaty did not include specific restrictions.<sup>54</sup>

Arguably, the wording of the Svalbard Treaty does suggest that the Svalbard Treaty is not applicable in areas outside Svalbard's territorial waters. There is no mention of a continental shelf, EEZ, FPZ or other maritime zones in the Svalbard Treaty. Norway can therefore claim that it has sovereign rights in the maritime zones. A restrictive literal interpretation of the Treaty would support this position.

Traditional theory includes a principle that the provisions of treaties should be interpreted favourably to the state with obligations, because it is presumed that a state would not make itself subject to stronger obligations than the Treaty clearly expresses.<sup>55</sup> In cases of doubt, one should therefore choose the alternative that respects the sovereignty of the state. At the time of the conclusion of the Svalbard Treaty, this approach to interpretation was particularly prevalent.<sup>56</sup>

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<sup>53</sup> Report No. 22 to the Norwegian Storting (2008-2009), 'Svalbard', section 3.1.4, Report No. 9 to the Norwegian Storting (1999-2000) 'Svalbard', section 4.1.1 and Report No. 39 to the Norwegian Storting (1974-1975) 'Vedrørende Svalbard', p. 7.

<sup>54</sup> Report No. 40 to the Norwegian Storting (1985-86) *op.cit.* p. 11.

<sup>55</sup> Churchill and Ulfstein 2010 *op. cit.*, p 565.

<sup>56</sup> *Ibid.*

### 3.2.3 Object and Purpose

However, according to VCLT treaties should also be interpreted in ‘in the light of its object and purpose’. In contrast to the text, the object and purpose of the Svalbard Treaty suggest that the Treaty applies to the maritime zones. As shown, the purpose of the Treaty was to give sovereignty to one state, ensure peaceful utilisation and preserve certain economic rights that the Treaty parties enjoyed under the previous regime. Anderson has put forward the argument that ‘[t]he wording of Article 1 reads like a carefully constructed diplomatic formula, constituting a “package deal”’.<sup>57</sup> He refers to the ‘equitable regime’ stipulated in the Svalbard Treaty’s preamble, as well as the object and purpose of the Treaty, to argue that there was an intention of balance between the interests of the signatories. Indeed, Norway’s sovereignty is recognised in the same sentence that provides that this recognition is subject to the stipulations of the Treaty, i.e. the economic rights of the Treaty parties. The rights in the maritime zones derive from Norway’s sovereignty over Svalbard. By analogy, this indicates that the geographical expansion of Norwegian sovereignty must correspond with an expansion of other states’ rights.

It is an additional argument that when the sea territory of Svalbard was expanded from 4 to 12 nautical miles,<sup>58</sup> this corresponded with an expansion of Treaty party rights.<sup>59</sup> However, this expansion of rights may not be directly transferable to other maritime zones around Svalbard, as the territorial waters are expressly mentioned in the Svalbard Treaty, and other zones are not. The latter is therefore not a very strong argument in favour of the application of Svalbard Treaty provisions in the maritime zones.

However, the fact that the other maritime zones are not explicitly mentioned by the Treaty is not enough in itself to establish that the Treaty does not apply to these zones. A central argument is that the EEZ, FPZ or continental shelf did not exist as legal constructs at the time the Svalbard Treaty was signed and came into force. The area outside the territorial sea was ‘open seas’, where the states already had rights. It is of course impossible to say what the parties would have done if such zones existed at the time of the drafting of the Treaty. However, it is telling that by applying to the territorial sea, the Treaty was encompassing an area which was as wide as it could be. There was no reason for the parties to secure their rights in the area outside the territorial waters, by including provisions in the Treaty to this

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<sup>57</sup> D.H. Anderson, ‘The Status under International Law of the Maritime Areas Around Svalbard’, in *Ocean Development & International Law* 40:4, 2009, pp. 373-384 (p. 374).

<sup>58</sup> Royal Decree of 27 June 2003 No. 798 on the Entry into Force of Act No. 57 Relating to Norway’s Territorial Waters and Contiguous Zone.

<sup>59</sup> Jensen 2014, *op. cit.*, p. 113.

effect. This is a strong argument in favour of a common understanding that the Treaty provisions apply as far as Norwegian sovereignty and sovereign rights go in relation to Svalbard.

### 3.2.4 Context

Article 31 (1) of VCLT further provides that a treaty shall be interpreted in its ‘context’. The context of the terms does not provide any strong arguments pro or contra the question of geographical application of the Svalbard Treaty. However, VCLT Article 31 (3) stipulates that there shall be taken into account, together with the context (...) any ‘subsequent practice’ in the application of the treaty which establishes the agreement of the parties regarding its interpretation,<sup>60</sup> as well as any ‘relevant rules of international law’ applicable in the relations between the parties.<sup>61</sup>

The non-discriminatory FPZ regime has existed for nearly 40 years. Such subsequent practice pursuant to article 31 (3b), could in itself indicate that the non-discriminatory treatment is based on the Svalbard Treaty, confirming an agreement between the parties.<sup>62</sup> However, Norway has constantly claimed that an EEZ can be established at any time, weakening this argument significantly.

Regarding relevant rules of international law, it may be argued that modern law of the sea displaces the Svalbard Treaty. Fife and Fleischer contend that UNCLOS and the Svalbard Treaty are incompatible, referring to VCLT article 30 and UNCLOS article 311 (2).<sup>63</sup> Others argue that the two regimes can be harmonised.<sup>64</sup> One element is that such incompatibility would also have to apply to the territorial sea. However, this has never been held by Norway. Also, the fact that the non-discriminatory FPZ has existed for so long can be proof that harmonisation is possible. Therefore, this cannot be a strong argument in favour of the Treaty not applying to the maritime zones.

### 3.2.5 Supplementary Means of Interpretation

Article 32 (a) provides for supplementary means of interpretation in case the interpretation according to article 31 leaves the meaning ‘ambiguous or obscure’. These include, but are not limited to,<sup>65</sup> the preparatory work of the treaty and the circumstances of its conclusion. As shown, the wording and object and purpose of the Svalbard Treaty support different

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<sup>60</sup> Article 31 (3b) of VCLT, *op. cit.*

<sup>61</sup> *Ibid.*, article 31 (3c).

<sup>62</sup> Jensen 2014, *op. cit.*, p. 115.

<sup>63</sup> Ulfstein and Churchill 2010 *op. cit.*, p. 574.

<sup>64</sup> Jensen 2014, *op.cit.*, p. 114-115.

<sup>65</sup> See *ibid.*, p. 115, with further references.

interpretations and therefore leave the meaning ‘ambiguous’ and ‘obscure’, pursuant to article 32 (a).

Circumstances of the conclusion of the Svalbard Treaty do not provide any more guidance than the object and purpose. As for preparatory works, Fleischer gives significant weight to statements by Laroche, the Chairman of the Spitsbergen Commission. The Chairman stated that all exceptions from sovereignty are mentioned in the Treaty and other than this, Norwegian sovereignty applies. Fleischer argues that this reflects the main understanding of the Parties.<sup>66</sup> However, it appears problematic to assign much weight to preparatory works such as this, in cases where a treaty is open for other countries to join a later point. This is because it would give privilege to the interpretation of the original drafters. It would therefore be unreasonable for new signatory parties to be bound by the parties’ informal understanding at the time of the drafting. The Svalbard Treaty is open for signing by any state. Therefore, the preparatory works cannot be ascribed much weight in the interpretation of the Treaty.

It has been argued by Churchill and Ulfstein<sup>67</sup> that consequentialist arguments support the position that the Svalbard Treaty does apply to the maritime zones. They point out that it would constitute an ‘anomaly’ if other states were given more rights on the land territory of Svalbard than in the sea around it. The fact that this is an anomaly cannot in itself to invalidate a literal interpretation of the Treaty. However, the argument offers some support to the view that the Svalbard Treaty applies in the maritime zones.

### **3.2.6 Towards a More Dynamic Approach to Treaty Interpretation?**

Certain practice of courts and tribunals has been used as arguments pro and contra the interpretation that the Svalbard Treaty applies to the maritime zones. Six cases that may be considered close to the Svalbard problem will be discussed in the following. These concern situations where the drafters of a treaty or agreement have not taken account of developments in the law of the sea that happened after their conclusion.

In the arbitration case of Guinea-Bissau/Senegal,<sup>68</sup> the Court found that an earlier agreement relating to the territorial sea did not apply to the EEZ, as the latter did not exist at the time of the conclusion of the agreement. This could provide some support to the position that the Svalbard Treaty does not apply to the maritime zones. However, as pointed out by Ulfstein and Churchill, this case is not directly comparable to the question of Svalbard,

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<sup>66</sup> Fleischer 2005, *op. cit.*, p. 141.

<sup>67</sup> Churchill and Ulfstein 2010 *op. cit.*, p. 575.

<sup>68</sup> Arbitral Award of 31 July 1989 (*Guinea-Bissau/ Senegal*), Judgment, ICJ Rep 1991, p. 53.

because states have not generally considered that existing maritime boundaries automatically are also EEZ boundaries.<sup>69</sup>

In addition, in the Guyana/Suriname case,<sup>70</sup> the states had extended their existing sea territories from 3 nm to 12 nm. Surinam claimed that the new line of delimitation should be a continuation from the previous limit of their territorial seas. It was claimed that earlier instruments and conduct referred to the limits of the territorial sea at any given time. The Tribunal rejected this claim, which can imply that older instruments should not automatically be extended to include newer legal constructs. However, as we see, the case is very different from the situation of Svalbard and therefore has rather limited relevance in the interpretation of the Svalbard Treaty.

The two last decisions supporting the view that the Svalbard Treaty does not apply to the maritime zones, are *Petroleum Development vs. Sheik of Abu Dhabi*,<sup>71</sup> as well as *Petroleum Development vs. Sheik of Qatar*.<sup>72</sup> In these cases, a company had been given exclusive rights to oil exploitation in land and sea areas of the respective states. The arbitrator found ‘throughout the territory of the Principality’ of Qatar did not include the continental shelf. In the case of Abu Dhabi, the arbitrator stated that it would be artificial to read into the contract implications of a doctrine that did not exist at the time. This seems to provide some support for the argument that newer legal constructs such as the maritime zones, should not be regulated by the Svalbard Treaty provisions, as they were established a long time after the conclusion of the Treaty.

However, objections have been put forward by Ulfstein and Churchill, stating that these cases are not directly transferable to the case of Svalbard, as they concerned concessions, not treaties.<sup>73</sup> The Court’s finding that these concessions did not extend to the continental shelf was further an obiter dictum not necessary to decide the case.<sup>74</sup> In addition, the parties to the conflict were one private part and one state, not two or more states, as would be the case in relation to a treaty.<sup>75</sup> These cases therefore have limited value as arguments in favour of the Svalbard Treaty not applying to the maritime zones.

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<sup>69</sup> Churchill and Ulfstein 2010, *op. cit.* p. 580.

<sup>70</sup> Arbitration between *Guyana and Suriname*, ILM, Vol. 47, 2008, p. 166.

<sup>71</sup> *Petroleum Development Ltd. v. Sheikh of Abu Dhabi*, 18 ILR, 1951, p. 144.

<sup>72</sup> *Petroleum Development Ltd. v. Ruler of Qatar*, 18 ILR, 1951, p. 161.

<sup>73</sup> Churchill and Ulfstein 2010, *op. cit.*, p.577.

<sup>74</sup> *Ibid.*

<sup>75</sup> As pointed out by Morten Ruud and Geir Ulfstein, *Innføring i folkerett*, 4th ed. Oslo 2011, p. 158.

On the other hand, the case of the Aegean Sea Continental Shelf<sup>76</sup> may suggest that the Svalbard Treaty applies to the maritime zones. In this case, a declaration of jurisdiction was considered to also include the continental shelf because ‘relating to the territorial status of Greece’ was considered a ‘generic term’. Its meaning was intended to ‘follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time’.<sup>77</sup> Ulfstein and Churchill argue that this case is ‘perhaps of limited relevance’, but ‘offers a parallel to the Svalbard situation.’<sup>78</sup> Fleischer, on the other hand, has rejected this argument because the point of the case was not how to interpret the meaning of ‘territory’. This was only of ‘marginal interest’.<sup>79</sup> Establishing that the right to a continental shelf is ‘relating to’ the ‘territorial status’ of the coastal state would not mean that an agreement on rights in one area encompassed by a coastal state’s sovereignty also would encompass other areas.<sup>80</sup> These objections illustrate that the judgment provides limited support to the position that the Svalbard Treaty applies to the maritime zones.

Furthermore, in the Oil Platforms case,<sup>81</sup> the ICJ found that the wording ‘territories’ in a treaty between Iran and the USA included the continental shelf and EEZ. However, as pointed out by Ulfstein and Churchill,<sup>82</sup> this question is very briefly discussed by the Court and is not based upon any authoritative sources, which in turn limits the value of this decision for the question of the geographical application of the Svalbard Treaty.

There does seem to be rather little international court practice that can give guidance to whether the Svalbard Treaty applies to the maritime zones or not. There are in fact no cases that are directly comparable. However, a few cases have been used by Ulfstein and Churchill in an attempt to identify a development towards a more ‘dynamic’ or ‘evolutionary’ approach to Treaty interpretation that would also be relevant in relation to the Svalbard issue. Firstly, there is the Iron Rhine case,<sup>84</sup> where the Court stated that:

(...) it seems that an evolutive interpretation, which would ensure an application of the treaty that would be effective in terms of its object and purpose, will be preferred to a strict application of the intertemporal rule.

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<sup>76</sup> Aegean Sea Continental Shelf case (*Greece/Turkey*), Judgment, ICJ Rep 1978, p. 3.

<sup>77</sup> *Ibid.*, para. 77.

<sup>78</sup> Churchill and Ulfstein 2010, *op. cit.*, p. 578.

<sup>79</sup> Aegean Sea Continental Shelf, *op. cit.*, p. 3 (p. 34), as quoted in Fleischer (2005) *Folkerett*, p. 139. Similar arguments have been presented by Ørebech, *op. cit.* pp. 54-55.

<sup>80</sup> Fleischer 2005, *op. cit.*, p. 139.

<sup>81</sup> Oil Platforms (*Islamic Republic of Iran v. United States of America*), Judgment, ICJ Rep 2003, p. 161.

<sup>82</sup> Churchill and Ulfstein 2010, *op. cit.*, pp. 580-581.

<sup>84</sup> Iron Rhine Arbitration (*Belgium/ Netherlands*) 2005, 140 ILR, 2011, p. 130, para. 80.

In addition, the *Costa Rica vs. Nicaragua* case<sup>85</sup> the ICJ expressed the following:

(...) there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used — or some of them — a meaning or content *capable of evolving, not one fixed once and for all*, so as to make allowance for, among other things, *developments in international law*. In such instances it is indeed in order to respect the parties' common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied.

This quoted dictum is held by Ulfstein and Churchill to possibly have a more general relevance for the interpretation and application of older treaties, and that '[t]his would suggest not only that Norway's right to establish maritime zones beyond the territorial sea has increased over time, but so also has the geographical scope of the non-discriminatory rights of the other parties under the Treaty.'<sup>86</sup> The statements in these two decisions do seem to support a more dynamic approach to interpretation of older treaties, supporting the view that the Svalbard Treaty also applies to the maritime zones outside the territorial sea of Svalbard.

### 3.2.7 Conclusion

The wording of the Svalbard Treaty clearly does not mention the maritime zones except for the territorial waters. In isolation, this strongly suggests that the Treaty does not apply in these areas. This interpretation is supported by the preparatory works and the cases of *Petroleum Development vs. Sheik of Abu Dhabi* and *Petroleum Development vs. Sheik of Qatar*. However, not much weight can be attached to this international court practice, as the result seems to differ depending on the situation and the specific agreement or treaty. There are also reasons not to place considerable emphasis on the preparatory works of the Treaty as it is open for signing by any state.

Moreover, the object and purpose of the Treaty provides a strong argument in favour of the opposite conclusion. This interpretation is supported by a dynamic interpretation, the fact that the opposite interpretation would result in anomalies, as well as the *Aegean Sea and Oil Platforms* cases. However, it has been established that this selection of court practice cannot be given considerable weight.

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<sup>85</sup> Dispute regarding Navigational and Related Rights (*Costa Rica v. Nicaragua*), Judgment, ICJ Rep 2009, p. 213, para. 64, italics added.

<sup>86</sup> Churchill and Ulfstein, *op.cit.*, p. 582.

In reaching a conclusion, I will however consider it decisive that international court practice seems to support a more dynamic approach to interpretation, together with the weight to be ascribed to the object and purpose of the Treaty. My conclusion is therefore that the Svalbard Treaty applies to the maritime zones.

## 4. Non-discrimination Requirements of the Svalbard Treaty

### 4.1 Introduction

In chapter 3 it was concluded that the Treaty applies to the maritime zones around Svalbard. In this chapter there will be a discussion on when differential treatment is acceptable in relation to the non-discrimination requirement of the Svalbard Treaty. As shown, the only maritime zone outside the territorial sea where there is currently economic activity is the FPZ. Relevant to this zone are articles 2 and 3 on fishing, nature preservation and equal liberty of access and entry. The relevant articles will be interpreted in light of the rules on treaty interpretation in customary international law, as expressed in the VCLT.

### 4.2 Interpretation of the Treaty

#### 4.2.1 Grounds of Discrimination

There are several international conventions providing non-discrimination requirements. Firstly, some international law texts have discrimination prohibitions as their sole aim, such as the 1965 UN Convention on Racial Discrimination<sup>87</sup> and the 1979 UN Convention on Discrimination Against Women.<sup>88</sup> Other documents provide a wide spectre of rights, such as the UN Declaration on Human Rights<sup>89</sup> and the UN Covenant on Civil and Political Rights,<sup>90</sup> prohibiting discrimination on grounds such as gender, race, skin colour, language, religion, political views, as well as national or social origin. A prohibition of discrimination based on *nationality* is a more narrow prohibition than those provided by these human rights

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<sup>87</sup> UN, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, UNTS, Vol. 660, p. 195.

<sup>88</sup> UN, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, UNTS, Vol. 1249, p. 13.

<sup>89</sup> Article 2 of the UN, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

<sup>90</sup> Article 2(1) of the UN, International Covenant on Civil and Political Rights, 16 December 1966, UNTS, Vol. 999, p. 171.

instruments. In the EU, the prohibition against discrimination on the grounds of nationality<sup>92</sup> is meant to realise the goal of free movement of goods, capital, services and people. Similarly, the non-discrimination requirement of the Svalbard Treaty is meant to protect certain economic rights for the Treaty parties. EU law thus seems the most similar to the regime of the Svalbard Treaty. It is worth mentioning that article 4 of the EEA agreement also provides a prohibition of discrimination on grounds of nationality.<sup>93</sup> Although Norway is a party to this agreement, it does not apply to Svalbard.<sup>94</sup>

The Svalbard Treaty does not contain a legal definition of discrimination or unequal treatment. However, its individual provisions deal with differential treatment in specific areas. Several articles, including articles 2 and 3, prohibit differential treatment of ‘ships’ or ‘nationals’ of the ‘High Contracting Parties’. This wording indicates that discrimination based on nationality is at the core of the prohibition. However, the provisions also contain wordings that seem to include general prohibitions against differential treatment. As an example of this, article 3 (1) provides for the Treaty Parties’ nationals ‘equal liberty of access and entry’ for ‘any reason or object whatever’ to the waters, fjords and ports of the territories, and that ‘they may carry on there without impediment’ specific activities ‘on a footing of absolute equality’. The prohibition against discrimination is here articulated in a general manner, and does not seem to limit the prohibition to discrimination based on nationality.

However, the object and purpose of the Svalbard Treaty may shed light on the meaning of these provisions. The main purposes of the Svalbard Treaty are expressed in its preamble, as well as in the individual articles of the Treaty. The preamble states ‘Desirous, while recognising the sovereignty of Norway (...), of seeing these territories provided with an equitable regime, in order to assure their development and peaceful utilisation’. This wording expresses a wish to assign sovereignty over the archipelago to one single state, to provide order and peaceful utilisation, as well as retaining certain terra nullius rights for the States parties. The goal of retaining economic rights is the most central in respect of the non-discrimination requirement. Fulfilling this purpose requires that nationals from the state parties are treated no better or worse than nationals from other States parties. In other words, discrimination based on nationality appears to be the clear focus of the prohibition.

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<sup>92</sup> Article 18 of the Consolidated Version of the Treaty on the Functioning of the European Union, OJEU, C 326, 26 October 2012, p. 1-390.

<sup>93</sup> Agreement on the European Economic Area (‘EEA agreement’), OJEU, No. L 1, 3 January 1994, p. 3.

<sup>94</sup> §6 of Law 27 November 1992 No. 108 on Implementation of the Main Part of the Agreement on the European Economic Area, and Protocol 40 to the EEA agreement, 1 January 1994, ‘Svalbard’.

Prohibition of differential treatment on other grounds is not explicitly mentioned in the Treaty, nor does it follow from an interpretation in light of its object and purpose or context. Therefore it can be concluded that the prohibition is against discrimination based on nationality and does not exclude differential treatment based on other criteria. It must be added that this does not mean that differential treatment on any other grounds can be accepted as non-discriminatory. Section 4.2.3 will focus on whether objective goals can justify differential treatment of different nationalities. Before this, however, section 4.2.2 will discuss if the prohibition is primarily aimed at direct or indirect discrimination.

#### 4.2.2 Direct or Indirect Discrimination

Direct discrimination is often easier to identify than indirect discrimination. Direct discrimination would typically be differential treatment explicitly stated in laws or regulations, so-called formally differential treatment. Indirect discrimination, on the other hand, can be a situation where a formal measure treats nationals of all states alike, but in effect puts nationals of one or more specific states at a particular disadvantage.

The question of indirect discrimination has been discussed in relation to other international non-discrimination requirements. As the EU regime is the most similar to the Svalbard Treaty regime, relevant cases for comparison include *Italy vs. Commission*, where the ECJ stated that: ‘Discrimination in substance would consist in treating either similar situation differently or different situations identically.’<sup>95</sup> In that particular case, formally differential treatment was not considered discrimination based on nationality,<sup>96</sup> as there was no discrimination in substance. Also, in *Anklagemyndigheden v Jack Noble Kerr*,<sup>97</sup> and *Albert Romkes v. Officier van Justitie for the District of Zwolle*,<sup>98</sup> the ECJ accepted that allocating quotas on the basis of traditional fishing was objective criteria meant to protect existing commerce, which was not in violation of the prohibition against discriminating on the grounds of nationality.<sup>99</sup> In other words, formally differential treatment was accepted non-discriminatory, as the Court found that there was no discrimination in effect.

The question is thus whether the prohibition of discrimination in the Svalbard Treaty includes direct or indirect discrimination. Firstly, article 2 (1) of the Svalbard Treaty provides

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<sup>95</sup> Case 13/63, *Italian Republic vs. Commission of the European Economic Community*, ECR 1963, p. 165 (p. 178).

<sup>96</sup> Article 6 of the Consolidated Version of the Treaty Establishing the European Community, 2006 OJ C 321 E/27.

<sup>97</sup> Case 287/8, *Anklagemyndigheden v Jack Noble Kerr*, ECR 1982 p. 4053.

<sup>98</sup> Case 46/81, *Romkes v. Officier van Justitie for the District of Zwolle*, ECR 1987, p. 2671.

<sup>99</sup> Article 7 of the Treaty Establishing the European Economic Community, 25 March 1957, 298 UNTS 11

that ships and nationals from all High Contracting parties shall ‘enjoy equally the rights’ of fishing. This wording is general and does not indicate whether the prohibition is against direct discrimination or discrimination in effect. Similarly, a general wording is chosen in article 3 (1), which can point to both formal discrimination and discrimination in effect, by providing ‘equal liberty of access and entry for any reason or object whatever’ and ‘carry on there without impediment’ all maritime, industrial, mining and commercial operations on a ‘footing of absolute equality’. The wording can indicate both formal discrimination and discrimination in effect.

The same applies to the first part of article 2 (2) of the Svalbard Treaty, which stipulates that measures to ensure nature preservation shall always be ‘applicable equally’ to the nationals of all the High Contracting Parties. However, article 2 (2) adds ‘without any exemption, privilege or favour’ ‘direct or indirect’ to the ‘advantage of any one of them’. As indirect differential effects are expressly mentioned in the provision, this indicates a focus on the actual effects of a measure, not just formal equality.

Furthermore, an emphasis on discriminatory effects is supported by the object and purpose of the Svalbard Treaty, which included retaining certain terra nullius rights for the Treaty parties. Fulfilling this purpose cannot be ensured simply by formal non-discrimination, as indirect discrimination is likely to be just as detrimental to the purpose of maintaining certain terra nullius rights for the parties. In light of the object and purpose of the Treaty, there is no reason to believe that the Treaty parties would intend to establish a hollow prohibition, i.e. a prohibition that did not take into consideration the latent danger of indirect discrimination.

Moreover, formal differential treatment can hinder indirect discrimination in some cases. If a certain nationality is expected to suffer greater negative effects from a measure, adjustments can be made by formal differential treatment to ensure that this does not happen. Such an approach is more likely to protect the object and purpose of the Svalbard Treaty. After this, it is natural to conclude that the focus of the prohibition is meant to be on discriminatory effects, rather than formal identical treatment in itself.

Ulfstein argues that the Treaty’s focus on effects establishes a *requirement* of formally differential treatment in law, if this is ‘needed in order to facilitate non-discrimination in fact’.<sup>103</sup> Since the prohibition of the Svalbard Treaty is aimed at effects of a measure rather

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<sup>103</sup> Ulfstein 1995, *op. cit.*, pp. 246-252.

than identical treatment in itself, it could indeed be argued that the prohibition may also require differential formal treatment in order to prevent discrimination in substance.

### 4.2.3 Objective Justification

It has already been established that the core of the prohibition is discrimination based on nationality. This chapter will discuss whether having an objective purpose can justify implementing measures that have differential effects for nationalities of the Treaty parties, in activities regulated by the Svalbard Treaty. A measure with a legitimate purpose may in practice cause differential effects for different nationalities. A relevant example is the introduction of new mesh size standards. The aim of such a measure could be legitimate and based on objective criteria, but still end up affecting nationals from one of the States in particular, due to having different standards and gear. The question is thus whether this automatically constitutes a violation of the non-discrimination requirement.

There is no explicit mention of the purpose of a measure in the Svalbard Treaty provisions. Article 2 (2) does mention that Norway is free to introduce measures for nature preservation, but that such measures ‘shall always be applicable equally to the nationals of all the High Contracting Parties without any exemption, privilege or favour whatsoever, direct or indirect to the advantage of any of them’. The provision indicates a focus on nature preservation, but also stipulates that measures to ensure this should not be discriminatory. The wording gives little guidance in how to balance these two objectives.

The object and purpose of the Treaty illustrate a tension between the different goals of the Svalbard Treaty. One of the goals of the Treaty was to recognise the sovereignty of one State, which in turn would establish law and order on the archipelago. Therefore, a strong argument is that automatically recognising all types of differential treatment as violations may have negative consequences for effective administration of the archipelago. As an example of this, Ulfstein<sup>105</sup> mentions advanced safety regulations. Due to different technological levels in companies from some States, such regulations could prove more costly for them than others. Unconditionally establishing violations in such cases would make it very difficult for Norway to make laws and regulations with legitimate aims, such as improving the work environment or secure nature preservation. Therefore, allowing for a certain room to undertake measures with an objective goal may be necessary for effective administration.

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<sup>105</sup> Ulfstein 1995, *op. cit.*, p. 238.

However, another goal of the Svalbard Treaty was to preserve certain economic rights, with a focus on non-discrimination of the nationalities. Considering the strong emphasis on effects in the Svalbard Treaty, differential treatment cannot automatically be accepted, as long as the measure is based on objective criteria. Such an approach could lead to abuse where a discriminatory measure is introduced under the pretence of an objective goal. The major challenge therefore is drawing the line between effective administration and discriminatory effects, as both reflect the object and purpose of the Treaty. The wording gives little guidance as to how to review such value judgments, and the context provides in addition to the object and purpose.

In order to find a balance between these objectives, Ulfstein<sup>106</sup> suggests applying a test of proportionality. In his suggestion, the aim must be legitimate and the measure must be achieved with a minimum of disadvantageous effects. Proportionality tests are well known from international law, where they occur in different forms and contexts. In maritime boundary delimitation, a disproportionality test has been applied.<sup>107</sup> Furthermore, proportionality has been used in the field of self-defence of states, with a focus on necessity and proportionality.<sup>108</sup> Moreover, proportionality is an important element in assessing human rights violations. Articles 8 (2), 9 (2), 10 (2) and 11 (2) of the European Convention on Human Rights (ECHR), prescribe that a measure must be ‘necessary in a democratic society’. The European Court of Human Rights (ECtHR) has interpreted this as the measure must be proportional to the goal it is meant to reach, and it must have the least negative consequences for the individual.<sup>109</sup> Most similar to the Svalbard Treaty regime is EU law, where proportionality has been recognised by the Court of Justice of the European Union (CJEU) as a general principle of law, as illustrated by the following quote from the British American Tobacco Case:<sup>110</sup>

As a preliminary point, it ought to be borne in mind that the principle of proportionality, which is *one of the general principles of Community law*, requires that measures implemented

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<sup>106</sup> Ulfstein 1995, *op. cit.*, p. 473.

<sup>107</sup> Delimitation of the Continental Shelf (*Great Britain and Northern Ireland v. France*), ILM, Vol. 18, 1979, p. 397 and North Sea Continental Shelf (*Germany/Denmark; Germany/Netherlands*), Judgment, ICJ Rep 1969, p. 3.

<sup>108</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I C.J. Reports 1996, p. 226.

<sup>109</sup> *Handyside v. The United Kingdom*, No. 5493/72, 7 December 1976, Council of Europe: European Court of Human Rights, Series A, No. 24, para. 49.

<sup>110</sup> Case 491/01, *The Queen v. Secretary of State for Health, ex parte British American Tobacco (Investments) and Imperial Tobacco Ltd.*, ECR 2002, p. I-11453.

through Community provisions should be *appropriate* for attaining the objective pursued and must not go beyond what is *necessary* to achieve it (...) <sup>111</sup>

By mentioning appropriateness and necessity, the Court refers to the proportionality test commonly applied in EU law. There is no strict formula for the proportionality test. However, it can be articulated as a four step procedure. The first step is looking at whether there is a legitimate aim and secondly whether the measure is suitable to reach this aim. Furthermore, the measure must be necessary to reach the goal, which is often reviewed under a least restrictive measure test. The final step is proportionality *stricto sensu*, a balancing of the importance of the aim against the negative effects of the measure.

Furthermore, in both EU law and international human rights law, <sup>112</sup> proportionality is closely linked to a margin of appreciation. The intensity of the control of measures made by national authorities varies from area to area. In the mentioned British American Tobacco case, the Court indicated that the margin of appreciation must be considerable in cases relating to political, economic and social choices, where complex assessments are required:

(...) the Community legislature must be allowed a broad discretion in an area such as that involved in the present case, which entails *political, economic and social choices* on its part, and in which it is called upon to undertake *complex assessments*. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is *manifestly inappropriate* having regard to the objective which the competent institution is seeking to pursue (...) <sup>113</sup>

It could be argued that there is room for using a proportionality test within the widely articulated provisions of the Svalbard Treaty. However, little guidance is given as to what content such an approach could have. If a proportionality test were to be applied in a case concerning the Svalbard Treaty, this would require the balancing of the signatories' rights on one side and the needs of the government on the other. In other words, the aim of the measure would have to be weighed against the discriminatory effects on the different nationalities.

Also, the application of a proportionality test would raise the question of how much space for manoeuvre Norway, as the sovereign state, has in evaluating what is a proportionate measure to reach a specific goal. There is no doubt that the question of the non-discrimination

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<sup>111</sup> Ibid., para. 122, italics added.

<sup>112</sup> *Handyside v. The United Kingdom*, *op.cit.*, and *Open Door and Dublin Well Woman v. Ireland*, 64/1991/316/387-388, Council of Europe: European Court of Human Rights, 23 September 1992, para. 68.

<sup>113</sup> *British American Tobacco*, *op. cit.*, para. 123, italics added.

requirement of the Treaty entails political and economic choices on Norway's part, and that it involves complex assessments. If such a proportionality analysis were to have similarities to the test applied within the EU, it is not unlikely that Norway would be allowed broad discretion in this area. This topic will be discussed further under section 5.2.3 on the 'Kiel' Case of 2014, where the Norwegian Supreme Court for the first time introduced a proportionality analysis in relation to the non-discrimination requirement of the Svalbard Treaty.

### 4.3 Findings

It has been established that the prohibition against discrimination in articles 2 and 3 has two elements, namely discriminatory purpose based on nationality and discriminatory effects.<sup>114</sup> An obvious violation of the Treaty would be a situation where a measure is taken with the purpose to discriminate on the basis of nationality, and it also has differential effects for the nationalities. However, all differential effects cannot be considered violations of the Treaty, as this would create great difficulties in managing the archipelago, including the maritime areas beyond the territorial sea. Therefore, differential treatment must be understood as a prerequisite for establishing discrimination, but cannot in itself be sufficient to do so. Discrimination based on other objective criteria than nationality is not prohibited by the Svalbard Treaty provisions. However, when adopting measures based on objective goals, these may have differential effects for the different nationals. In order to avoid abuse and ensure a minimum of disadvantageous effects, a solution may be found in the proportionality tests applied in international human rights law and EU law. Hereunder, a pertinent question is what margin of appreciation will be granted Norway.

## 5. Decisions by the Norwegian Supreme Court

### 5.1 Introduction

To this date, no international court has taken a position on the geographical or material scope of the Svalbard Treaty. However, fishermen and ship owning companies from the EU, Spain and Iceland have appealed three criminal cases to the Norwegian Supreme Court, claiming that Norway has violated the Svalbard Treaty. These appellants were private parties, not states. It is, however, of interest to analyse the way in which the Norwegian judiciary has

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<sup>114</sup> See also Ulfstein 1995, *op. cit.*, p. 232.

handled the cases, notably how the Svalbard Treaty has been interpreted and applied at the domestic level. As noted in the introduction to this thesis, Norwegian court practice as it relates to the maritime waters adjacent to Svalbard is of particular interest since Norway is the coastal State and thus most significantly affected by the Svalbard Treaty regime.

The Supreme Court found that in order to establish a violation of the Treaty, two questions have had to be answered affirmatively. Firstly, there would have to be a case of discrimination based on nationality. Secondly, the Svalbard Treaty had to be applied in the area where the alleged violations took place.

## **5.2 A Reluctance to Discuss the Spatial Scope of the Svalbard Treaty?**

In all the three mentioned cases the Supreme Court deemed it unnecessary to discuss the Treaty's area of application, since the Court did not find any cases of discrimination based on nationality. Ordinarily, the procedure would be to firstly establish if the treaty applied, secondly to consider if there was a violation of the treaty. There is no reason to discuss alleged violations of a treaty that does not apply. The Supreme Court's approach in these cases is thus interesting in itself.

The district<sup>115</sup> and appeal courts<sup>116</sup> chose the opposite approach of the Supreme Court in the so-called 'Kiel' case. Both lower Courts found that the Treaty did not apply to the maritime zones. Therefore the topic of discrimination was not discussed in detail. If the Supreme Court had done the same, this may have had more wide-ranging consequences. Notably, a decision that the Treaty did not apply to the maritime zones could provoke reactions from other signatory States. However, if the conclusion was that the Treaty did indeed apply, this would be against the official view of Norway. Although surprising at first, the Supreme Court's approach seems like a 'diplomatic' alternative to solve the cases that have been brought before it, without having to discuss the controversial issue relating to the geographical scope of the Treaty.

In the cases that will be analysed in the following, the Supreme Court did not apply the Svalbard Treaty directly, as it never took a stance on the Treaty's geographical scope of application. However, the Court interpreted relevant Treaty provisions in order to establish whether or not there had been cases of discrimination. In the following, I will therefore identify what the Supreme Court has considered to be non-discriminatory treatment.

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<sup>115</sup> TNHER-2012-141874, Nord-Troms tingrett, decision of 10 December 2012.

<sup>116</sup> LH-2013-50194, Hålogaland lagmannsrett, decision of 11 July 2013.

## 5.2 Non-Discrimination in the FPZ

### 5.2.1 Björgulfur and Ottar Birthing

Two ship owning companies and the captains of two Icelandic trawlers, Björgulfur and Ottar Birthing, were convicted for illegal cod fishing in the FPZ outside Svalbard.<sup>117</sup> Iceland is a party to the Svalbard Treaty, but does not have a historical track record of fishing cod in the area. In accordance with the Norwegian regulations<sup>118</sup> Iceland therefore had not been allocated cod quotas in the FPZ. The appellants claimed before the Supreme Court that the regulations were in violation of the non-discrimination requirement of the Svalbard Treaty. This was the first case of its sort to make it to the Norwegian Supreme Court.

First, the Supreme Court found that the prohibition against discrimination was aimed at differential treatment based on nationality. The Court underlined that there was no prohibition on rationing based on objective selection criteria.<sup>119</sup> Further, the Court seemed to focus on indirect discrimination than formal discrimination in its reasoning, as it pointed out that the regulations gave guarantees to continue fishing for those who have traditionally been conducting such activity in the area, while others were just denied from starting. The Court supported its findings by referring the fact that objective criteria in general have been accepted as justifying differential treatment in international law prohibiting discrimination based on nationality, including EU law.<sup>120</sup> It was also added that third country quotas based on historical track records have been accepted in the literature on the FPZ, also by scholars who are usually critical of Norway's official position on the maritime zones around Svalbard, such as Ulfstein.

As for the appellants' claim that no signatory States could be denied fishing rights, the Court dismissed this as an impracticable rule, referring to the fact that the Treaty is open for signing by all countries, and is currently ratified by over 40 states. The result would be that quota sizes in practice would exclude third country fishing.<sup>121</sup> Thereby, it seems the Court rejected the existence of any substantive rights for the Treaty parties to fishing in the FPZ.

At first glance, States with traditional fishing rights may seem to have enjoyed more favourable treatment than other signatory States. However, the Court seemed to put emphasis on preventing indirect discrimination in this case. The Court found that the purpose and effect

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<sup>117</sup> Rt. 1996 p. 624.

<sup>118</sup> Royal Decree of 12 August 1994, No. 801, Regulations on Fishing for Cod in the Fishery Protection Zone off Svalbard.

<sup>119</sup> Rt. 1996 p. 624 (p. 636).

<sup>120</sup> Ibid., p. 636.

<sup>121</sup> Ibid., p. 637.

of the regulations was to protect existing commerce, not to treat anyone differently because of their nationality.<sup>122</sup> In other words, there was a legitimate aim and the measure was suitable to reach this aim. The Court therefore concluded that the regulations were not in violation of the non-discrimination requirement of the Svalbard Treaty. The Court did not explicitly discuss if the negative effects on some nationalities were severe enough to constitute a violation of the Treaty. However, by pointing out that only some nationals are dependent on fishing in this area, this could imply that those who are denied starting would not be significantly affected.

### 5.2.2 Olazar and Olaberri

During inspections of the Spanish twin trawlers Olazar and Olaberri, a big discrepancy between the catch diary and the actual catch was discovered.<sup>123</sup> The captains were thus fined for failing to reporting their catches. One of them was also fined for wrongful reporting, while the ship owning company's fishing licences were withdrawn. The appellants claimed that Russians were treated more favourably than other signatory States, and that Norway had failed to introduce general measures against Russians who systematically commit the same violations as them. They maintained that this was a violation of Norway's Treaty obligations.

Again, the Supreme Court established that the prohibition on discrimination is directed at discrimination based on nationality and that the Treaty does not prohibit discrimination based on objective criteria other than nationality.<sup>124</sup> The Court found that there was no formal discrimination as the reporting rules applied to everyone. Moreover, the Court did not find that there were any significant differences in the enforcement of regulations between vessels from the different nations.<sup>125</sup> All were given warnings by the Coast Guard if reporting regulations were not respected, including Russians.

The interesting part is that the Supreme Court acknowledged that Russian vessels did not send active/passive reports or weekly reports. However, it was maintained that there was an important difference in the need for control,<sup>126</sup> as a result of the Norwegian-Russian Fisheries cooperation in the area. The Russian Authorities were controlling and reporting on their catch to the Norwegian Authorities every month. Norway was responsible for controlling the catch by Norwegian vessels, as well as vessels fishing on the third party quota in the FPZ. Therefore, the need for control was considered more necessary for these vessels.<sup>127</sup> The Court

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<sup>122</sup> Ibid., p. 636.

<sup>123</sup> Rt. 2006 p. 1498.

<sup>124</sup> Ibid., para. 70.

<sup>125</sup> Ibid., para. 73.

<sup>126</sup> Ibid., para. 75.

<sup>127</sup> Ibid., para. 76.

added that lack of compliance is discussed through diplomatic channels and in the fishery negotiations with Russia. The Court thus found that in spite of repeated violations by Russian vessels, no general measures were considered necessary. The Court did not discuss discrimination in other respects, as this was considered unrelated to the appellants' case.

This decision has been criticised by Ulfstein and Churchill, who described the Court's arguments as 'not entirely convincing'.<sup>128</sup> This is because diplomatic efforts to convince Russia to follow the reporting requirements indeed suggest that there is a perceived need for them to do so. Ulfstein and Churchill also argue that it is reasonable to require for Norway to enforce its own regulations, which apply equally to all, even if there is less need to do so in relation to Russia.

It is also worth noting that the reasoning by the Supreme Court could give an impression that there is created a special status for Russians due to bilateral agreements. Other signatory States could ask what would happen if vessels from their country ignored the regulations in the same systematic way. As discussed in chapter 4, due the Treaty's focus on differential effects, there might be a requirement for Norway to introduce formally different measures in order to avoid discrimination in substance.

### 5.2.3 The 'Kiel' Case

In the Kiel case,<sup>129</sup> an Icelandic captain and a German ship owning company, Deutsche Fischfang Union GmbH, were found guilty of having violated the Norwegian fishing regulations in the FPZ, by exceeding the 19 percent limit of maximum retainable by-catch of haddock.<sup>130</sup> While Norway and Russia were fishing haddock on their shares of the Total Allowable Catch (TAC), Greenland had been allocated a third country quota, while the EU and Faroe Islands had to follow by-catch limitations. The appellants maintained that the regulations were in violation of the non-discrimination requirement of the Svalbard Treaty.

First, and in conformity with its previous practice, the Supreme Court concluded that protecting existing commerce was a legitimate aim, and that historical track records constituted objective selection criteria. Historically, EU vessels had only been fishing haddock as by-catch in the direct fishing for other species, and the by-catch limitations were based on these historical fishing patterns. It was added that managing the fish stock was in

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<sup>128</sup> Churchill and Ulfstein 2010 *op. cit.*, p. 587.

<sup>129</sup> Rt. 2014 p. 272.

<sup>130</sup> §6 pursuant to § 4 of the Royal Decree of 21 December 2011, No. 1478, Regulations on Fishing for Haddock in the Fishery Protection Zone off Svalbard in 2012.

accordance with obligations stemming from UNCLOS, such as article 61 on conservation of the living resources.

What sets this case apart from the previous two cases is that although the Supreme Court had identified the aim of the regulations as legitimate and considered the measure suitable to reach this aim, it was recognised that the regulations produced negative economic effects for EU vessels. More specifically, the Court found that if the EU had been given quotas the same size as the limit for maximum retainable by-catch of haddock, they would have equal conditions to vessels from Norway, Russia and Greenland. Thus the Court found that the Authorities could have chosen a measure with less negative impact for the EU vessels. Based on these statements it seems that the Supreme Court acknowledged the formally different treatment also resulted in differential effects.

Furthermore, the Supreme Court introduced a new element in the analysis of the non-discrimination requirement, as it stated that the non-discrimination requirement had to be weighed against Norway's sovereignty as stipulated in article 1, as well as the need for room to conduct responsible management of the natural resources. The Court referred to article 2 (2) which provided that Norway was free to maintain, take or decree suitable measures to conserve the flora and fauna, finding support for a substantial margin of appreciation for Norway.<sup>131</sup> Moreover, the Supreme Court stated that a measure causing differential effects for the Treaty parties and their vessels would only constitute a violation, if its purpose was incompatible with the object and purpose of the Treaty, or was disproportional:

Et tiltak som i virkning medfører at traktatpartene og deres fartøyer behandles ulikt, vil derfor bare kunne utgjøre traktatstridig diskriminering dersom tiltaket fremmer interesser som er uforenlige med Svalbardtraktatens gjenstand og formål, eller er uforholdsmessig.<sup>132</sup>

This interpretation was reiterated by the Court later, when it stated that Norway's sovereignty and governance responsibilities over Svalbard gave the Norwegian Fisheries Authorities significant freedom in the choice of regulations. This included where the regulations resulted in different nationalities being treated differently, as long as the measure safeguarded objective and legitimate purposes and was proportional:

(...) Norges suverenitet og forvaltningsansvaret over Svalbard gir norske fiskerimyndigheter en betydelig frihet ved valg av reguleringsform. Dette gjelder også der reguleringen i resultat

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<sup>131</sup> Rt. 2014, p. 272, para. 49: 'Dette underbygger at det er tale om en betydelig skjønsmargin.'

<sup>132</sup> Ibid., para. 49.

leder til at ulike nasjoner forskjellsbehandles, så fremt tiltaket ivaretar objektive og legitime formål og er forholdsmessig.<sup>133</sup>

In spite of having identified an alternative measure with less negative consequences for EU vessels, the Supreme Court concluded that there had been no case of discrimination. The decisive element was that the by-catch regulations, in contrast to a quota system, could be adopted quickly and unilaterally. Allocating quotas would have required discussions with Russia, due to the Norwegian-Russian fisheries cooperation. In contrast, by-catch regulations could be set by Norway alone. There had been no regulations for EU vessels previously to 2011. The Court remarked that the regulations did not seem to necessarily be meant as a permanent solution, but as a quick response to a situation that had to be dealt with, namely the lack of regulations and need to manage the fisheries. Differential treatment could therefore be justified.

It is worth mentioning that the Court did express that it was in doubt. Its reasoning seems to imply that the argument of efficiency could weaken over time. At some point, Norway has had enough time to go through the process of allocating quotas to the EU. Therefore it is reasonable to assume that giving the EU by-catch limits for haddock will not be considered a legitimate alternative to quotas in the long run.<sup>134</sup>

Although proportionality analyses are well-known in international law, it is interesting that the Supreme Court was of the opinion that such an approach could also be used in relation to the Svalbard Treaty. It is especially worth noting that the Supreme Court concluded that Norway's margin of appreciation was substantial.<sup>135</sup> In other words, the Court found that Norway has significant room to decide whether or not a measure is necessary and proportional. Together, this indicates large freedom for Norway to undertake measures, as long as they are based on objective grounds, have a legitimate purpose, and are proportional.

Proportionality is not established as a general principle of international law, although it is found in various formats in different contexts, as shown in chapter 4. In relation to economic rights, such a proportionality analysis is often used within the EU. An objection could be that not all Treaty parties are members of the EU, possibly making this approach

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<sup>133</sup> Ibid., para. 59.

<sup>134</sup> A similar interpretation of the judgment has also been suggested by Irene Dahl 'Norwegian by-catch regulations are not discriminatory', 2014, on the blog of the K.G. Jebsen Centre for the Law of the Sea, <<https://site.uit.no/jclos/2014/06/02/norwegian-by-catch-regulations-are-not-discriminatory>> accessed 29.11.2015.

less transferable to the Svalbard situation. However, as shown, different forms of proportionality is not unknown in international instruments involving more regions than Europe, i.e. at the global scale.

As discussed previously, there could be room within the Svalbard Treaty provisions to include a test of proportionality, although it cannot be directly deduced from the wording of the provisions. There are good reasons to apply a test of proportionality in cases where there is an objective goal, but discriminatory effects, as both effective administration and non-discrimination reflects the object and purpose of the Svalbard Treaty. The Treaty itself does not provide much guidance as to how these provisions can be applied in practice. Interpreting the provisions to include a test of proportionality in such cases therefore seems like a reasonable approach. It remains to be seen, however, whether an international court will apply the same approach as the Norwegian Supreme Court and whether a large margin of appreciation will be granted Norway.

## 5.5 Findings

One significant finding is that the Supreme Court did not find that quota allocation based on traditional fishing patterns was in violation of the Treaty. At first sight, this form of differential treatment can seem as discrimination based on nationality. However, such criteria have been accepted as objective considerations in international law. The Court found that there was an objective purpose and no discrimination in substance. This approach is in line with the conclusions of chapter 4 that formal discrimination can be needed in order to avoid discrimination in effect.

Furthermore, the Supreme Court found an objective purpose and no discriminatory effects in the 2006 case. As for not introducing general measures to ensure that Russians comply with the Norwegian reporting regulations in the FPZ, this might give other States parties an impression that Russia has been given a special favourable status in the zone. It might also be problematic considering a possible requirement for Norway to introduce formal differential treatment in order to avoid discrimination in substance.

In the most recent judgment, the Supreme Court provided a much more thorough analysis of the non-discrimination requirement than it had done in its previous decisions. One reason for this may be the difference in the underlying facts of the respective cases. In the ‘Kiel’ case, the formally different treatment led to differential effects for the nationalities. This differs from the 1996 decision, where formally different treatment was justified because

it prevented discrimination in substance. In the case from 2006, the Court did not find any differential effects for the nationalities. While this might in part explain the more refined approach of the Court in its most recent decision, we also see traces of international, or at least European, influences in the approach of the Supreme Court.

## 6. Final Conclusions

In this thesis I have concluded that the Svalbard Treaty does apply to the maritime zones beyond Svalbard's territorial waters. As demonstrated, however, there are also good arguments supporting the opposite conclusion. Possibly due to this complex situation, the Norwegian Supreme Court has never discussed the geographical scope of the Svalbard Treaty. The Supreme Court has so far only discussed the content of the non-discrimination requirement set out in the Treaty's provisions.

The Supreme Court has established that the prohibition is against discrimination on the grounds of nationality, and that differential treatment can be allowed if it is based on *objective* criteria. Formally differential treatment has been accepted in cases where there were no discriminatory effects. In its most recent decision, the Court performed a proportionality analysis in order to balance the negative effects of the measure on some nationalities against the sovereignty of Norway as a coastal State, including Norway's need for efficient administration. It is also interesting to note that the Court maintained that Norway has a substantial margin of appreciation in choosing regulations for nature conservation.

It remains to be seen, however, if and how a competent international court will conclude on the question of the geographical and material scope of the Treaty, including if it will follow the wide margin of appreciation proposed by the Norwegian Supreme Court. Also, the scope of this thesis does not extend to a consideration of what implications the decisions by the Norwegian judiciary shall have *res interpretata*, that is, if domestic court practice has value as a means of interpretation in light of the rules on treaty interpretation in international law. While the time constraints in the present study did not allow for such analysis, this is indeed a question that deserves further study.

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## 8. Appendix

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

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

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

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

[Names of plenipotentiaries not reproduced here.]

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

#### **Article 1**

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

## **Article 2**

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

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

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

## **Article 3**

The nationals of all the High Contracting Parties shall have equal liberty of access and entry for any reason or object whatever to the waters, fjords and ports of the territories specified in Article 1; subject to the observance of local laws and regulations, they may carry on there without impediment all maritime, industrial, mining and commercial operations on a footing of absolute equality.

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

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

It is agreed that in every respect and especially with regard to exports, imports and transit traffic, the nationals of all the High Contracting Parties, their ships and goods shall not be

subject to any charges or restrictions whatever which are not borne by the nationals, ships or goods which enjoy in Norway the treatment of the most favoured nation; Norwegian nationals, ships or goods being for this purpose assimilated to those of the other High Contracting Parties, and not treated more favourably in any respect.

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

#### **Article 4**

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

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

#### **Article 5**

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

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

#### **Article 6**

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

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

## **Article 7**

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

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

## **Article 8**

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

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

So far, particularly, as exportation of minerals is concerned, the Norwegian Government shall have right to levy an export duty which shall not exceed 1 per cent of the maximum value of the minerals exported up to 100 000 tons, and beyond that quantity the duty will be proportionately diminished. The value shall be fixed at the end of the navigation season by calculating the average free on board price obtained.

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

## **Article 9**

Subject to the rights and duties resulting from the admission of Norway to the League of Nations, Norway undertakes not to create nor to allow the establishment of any naval base in the territories specified in Article 1 and not to construct any fortification in the said territories, which may never be used for warlike purposes.

## **Article 10**

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

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

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

Ratifications shall be deposited at Paris as soon as possible.

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

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

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

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

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

Annex (omitted)