The Continental Shelf of Svalbard: Its Legal Status and the Legal Implications of the Application of the Svalbard Treaty Regarding Exploitation of Non-Living Resources

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1. Introduction

1.1 Specification of Topic and Relevance

Since Norway proclaimed its Continental Shelf around the mainland in 1963,[1] the original viewpoint of Norway regarding rights of the contracting Parties to the Treaty concerning Spitsbergen[2] (Svalbard Treaty) is that they do not apply to the continental shelf regime. The argument set out by Norway has been that the continental shelf off Svalbard is a natural prolongation of the continental shelf of mainland Norway and that the archipelago does not generate a shelf itself. However, the development in recent years regarding Norwegian state practice indicates that there has been a change in the Norwegian position. This is of interest to investigate as the official Norwegian policy has not changed.

The question of the applicability of the Svalbard Treaty to the maritime zones off Svalbard has attracted international attention for decades and concerns an unresolved legal question regarding the application of the provisions of the Svalbard Treaty to the adjacent maritime areas. Norway was granted sovereignty over the archipelago in 1920 by the Svalbard Treaty's Article 1 which is subject to certain stipulations that restrict this sovereignty. Article 3 of the Svalbard Treaty provides for equal access to the Archipelago for all maritime, industrial, mining and commercial operations. Article 8 lays down the mining regulations and entails restrictions on these such as taxes and dues should be devoted exclusively to the Archipelago and not exceed what is required for this need. The Svalbard Treaty was signed 9 February 1920 and was designed as an open-access regime, ensuring that all states that adhered to the Treaty subsequently would enjoy the rights of non-discrimination upon ratification of the Svalbard Treaty.[3] As of August 2013, there are 41 contracting parties to the Treaty, which among others include The United States, France, Great Britain and Russia. The treaty came into force 14 August 1925.

[1] Royal Decree of 31 May 1963 No. 1 Relating to the Sovereignty of Norway over the Sea-Bed and Subsoil outside the Norwegian Coast.
[2] 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. Reprinted in Annex I.
[3] Ulfstein, Geir (1995) *The Svalbard Treaty – From Terra Nullius to Norwegian Sovereignty*. Oslo: Universitetsforlaget. p. 51.

Since Norway and Russia entered into a delimitation agreement in 2010 (Barents Sea Treaty)[4] the possibility of the existence of petroleum resources has received much attention. Maritime areas are of vital importance to Norway as oil and natural gas constitute the state's number one and two export products in 2012.[5] According to the 2008 U.S. Geological Survey, the continental shelves in the Arctic may comprise the geographically largest unexplored area for petroleum and that approximately 84 per cent of the undiscovered petroleum resources in the Arctic occur offshore.[6] The legal status of the continental shelf adjacent to Svalbard is therefore important to investigate as it may potentially contain large petroleum resources. Further it is interesting to investigate the legal status of the shelf in relation to the development in the law of the sea.

After Russian submarines planted a titanium flag on the seabed at the North Pole, a media frenzy began suggesting there was a "scramble for the Arctic".[7] Arctic national officials, however, did not ascribe it any significance. As the Canadian Foreign Minister pointed out, "You can't go around the world these days dropping a flag somewhere. This isn't the 14th or 15th century."[8] A legal advisor to the Danish Foreign Ministry noted the event as "more [of] a media stunt than anything else."[9]

Opposed to what the media may think, there exists a common legal framework governing activities of the sea. This framework is strongly anchored in the 1982 Convention on the Law of the Sea (LOS Convention)[10] which also applies to the Arctic.[11] Four of the five Arctic States are parties to the LOS Convention,[12] only the United States remains to sign it. The five Arctic coastal states declared in May 2008 through the Ilulissat Declaration that they were committed to the existing legal framework and that the law of the sea "provides for important rights and obligations concerning the delineation of the outer limits of the

[4] Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and Arctic Ocean, Murmansk 15 September 2010.
[5] External trade in goods (2012) "Final figures" *Statistics Norway*. Available at: http://www.ssb.no/en/utenriksokonomi/statistikker/muh/aar-endelige (August 2013).
[6] Circum-Arctic Resource Appraisal (2008) "Estimates of Undiscovered Oil and Gas North of the Arctic Circle" *U. S. Geological Survey Fact Sheet*, 3049.
[7] See Sale, Richard and Eugene Potapov (2010) *The Scramble for the Arctic: Ownership, Exploitation and Conflict in the Far North*. London: Francis Lincoln Ltd.
[8] Galloway, Gloria and Alan Freeman (2007) "Ottawa Assails Moscow's Arctic Ambition", The Globe and Mail, Aug. 3, 2007, pp. A-1 and 11.
[9] Ibid.
[10] LOSC, United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397.
[11] McDorman, Ted L. (2008) "The Continental Shelf Beyond 200 NM: Law and Politics in the Arctic Ocean" *Journal of Transnational Law and Policy*. 18 (2): 155-194. p. 159.
[12] Norway, Canada, Denmark/Greenland and the Russian Federation.

continental shelf"[13] Currently there are numerous undelimited outer continental shelves in the Arctic.

1.2 Research Problems

After the first United Nations Conference on the Law of the Sea (UNCLOS I) produced four conventions, the continental shelf came into existence as a legal maritime zone. Norway was a part of the negotiations but did not accede to the Convention on the Continental Shelf (Geneva Convention)[14] until 1971. In 1963, Norway proclaimed its sovereignty over the continental shelf based on the 1958 Geneva Convention.[15] This area included the adjacent maritime areas of Svalbard beyond the "territorial waters" of Svalbard as specified by the Svalbard Treaty.[16] There is, however, disagreement on the legal basis of the continental shelf in the adjacent maritime areas and on the application of the Svalbard Treaty to these areas. In 1985, an area of the continental shelf around Svalbard was opened up for seismic activity and in 1989 the Barents Sea South was opened up for exploration.[17] This area extended to 74° 34' North and thus stretched into the contested area of the Svalbard continental shelf. However, these problems were not addressed by the Norwegian government before or during the process of considering the opening of these areas for exploitation activities.[18]

This thesis aims at uncovering whether the Svalbard Archipelago generates maritime zones. Should this be case, the general assumption is that the Svalbard Treaty applies to the adjacent maritime zones. The Norwegian position will be discussed in relation to the development in the law of the sea. This will constitute the basis for the second question which will examine the legal implications of the application of the Svalbard Treaty and its regulatory framework to the continental shelf. The conclusion will indicate that the original position was based on the law of the sea as it emerged in the 1958 Geneva Convention and that the position lacks legal viability according to the new law of the sea and recent state practice.

[13] Ilulissat Declaration signed at the Arctic Ocean Conference, Ilulissat, Greenland, 27-29 May 2008.
[14] Geneva Convention, Convention on the Continental Shelf, Geneva 29 April 1958. 499 UNTS 311.
[15] Royal Decree of 31 May 1963 No. 1.
[16] Cf. Svalbard Treaty, Art. 2.
[17] Ulfstein (1995) p. 408.
[18] See Report to the Storting No. 40 (1988-1989) on Opening of the Barents Sea South for Exploratory Activity. Henceforth referred to as "Report". All titles and excerpts are unofficial translations from Norwegian.

1.3 Sources of International Law and Methodology

1.3.1 Sources of International Law

Article 38 (1) of the Statute of the International Court of Justice (ICJ Statute)[19] states the most commonly accepted sources of international law, which include international conventions, custom, principles and judicial decisions. Treaties are considered to be significant instruments of cooperation in international law and international relations and are pointed out to be indicative as an instrument of change in the relation between states.[20] The Svalbard Treaty presented such a change in the sense that the Svalbard archipelago had previously been considered to be terra nullius.

Custom is defined as "evidence of a general practice accepted as law."[21] The practice of states can be established by examining published documents such as newspaper reports, government statements made to the press, at international conferences, in meetings of international organizations and in official government issues documents, such as the Norwegian Reports to the Storting.[22] A state's laws and judicial decisions can also display state practice. Treaties can also be evidence of customary law, and bilateral treaties can at least prove as evidence of a state's custom.[23] The bilateral delimitation agreements between Norway/Svalbard-Denmark/Greenland and Norway/Svalbard-Russia are such examples.

The Norwegian viewpoint on the legal status of the continental shelf was made evident by the 1963 Proclamation and was later codified by Act of 21 June 1963 (Act on Submarine Resources).[24] The Act relates to the entire seabed considered to be Norwegian, including around Svalbard. Norwegian policy on Svalbard has been expressed through a series of Reports to the Storting on Svalbard and can also be found in other reports related to petroleum activity.

[19] ICJ Statue, Statute of the International Court of Justice, 18 April 1946.
[20] Malanczuk, Peter (1997) *Akehurst's Modern Introduction to International Law*. 7th edn. London and New York: Routledge. p. 37.
[21] ICJ Statue Art. 38(1)(b).
[22] Malanzcuk (1997) p. 39.
[23] Ibid. p. 40.
[24] Act of 21 June 1963 Relating to Exploration and Exploitation of Submarine Natural Resources.

1.3.2 Source Material

There has been a political stalemate in the issues discussed in this thesis and on the subject of discussion on whether the Svalbard Treaty applies in waters beyond the territorial sea. The dominant literature on this topic is represented by a handful of writers. The Norwegian position has through many years been supported by the academic work of Carl A. Fleischer which to a large degree has been contended for equally as long by Robin R. Churchill. Fleischer has worked for the Norwegian Ministry of Foreign Affairs since the 1960s which is when the Norwegian viewpoint developed. The many published articles of Fleischer can therefore be said to reflect the Norwegian official position.[25]

Not much literature exists from the academic fields of international law and international politics on Svalbard. The literature found is written in connection with occurrences which have repeatedly put the Svalbard issue on the agenda. Today, the discussion has yet again reached a stalemate, and therefore little literature has been produced on the topic since 2010. Geir Ulfstein's doctoral thesis of 1995 constitutes one of the most extensive works of literature on Svalbard. Ulfstein takes a view that is opposite of the Norwegian position alongside Churchill.

There has not yet been any attempts to reach an agreement or conclusion on whether the Svalbard Treaty applies in other maritime zones. This has an effect on the literature because without a solution to this issue, there has been no relevance in discussing further what the consequences and implications of this would be which is what this thesis aims at.

1.3.3 Methodology

The controversial issues of Svalbard revolve around two questions: does Svalbard generate maritime zones and does the Svalbard Treaty apply to the maritime zones of Svalbard. The use of literature from current authors has been challenging in the sense that most articles or chapter discuss both topics intertwined. In order to discuss the first question it has been necessary to isolate the arguments related to this and separate those which belong to other topics. It may seem factitious to separate issues that initially are interconnected, but it has

[25] Churchill, Robin R. (1985) "The Maritime Zones of Spitsbergen" in Butler, William E. (ed.) *The Law of the Sea and International Shipping: Anglo-Soviet Post-UNCLOS Perspectives.* London, New York, Rome: Oceana Publications, Inc. p. 195 f.

been necessary in order to provide for a clear discussion and to provide and insight which has not previously been explored.

This thesis therefore employs, to a great extent, the work and writings of current authors. It also relies greatly on official Norwegian government issued statements such as the Reports to the Storting. This has been used throughout the thesis in order to provide the official Norwegian position on the issues discussed. In cases where national law has developed this is also referred to. Furthermore, the most relevant international treaties are referred to as to establish the case within the scope of international law.

1.4 The Context of the Law of the Sea

The end of the Second World War represented a change in international cooperation, and the United Nations took over the work the League of Nations had previously performed. In relation to the law of the sea and the continental shelf specifically, the 1945 Truman Proclamation[26] stands out as the most important change in the development of continental shelf claims. The United States claimed by unilateral action the right to exercise jurisdiction and control over the continental shelf contiguous to the United States in relation to the "world-wide need for new sources of petroleum…" This proclamation represented the first claim by a coastal state to the resources of the continental shelf which was outside the scope of the territorial sea and represents the subsequent action of state practice claims to offshore resources in the decades that followed.[27]

There was a pronounced development of states advancing claims of national sovereignty over the submarine areas adjacent to their coast which had the technical term of "continental shelves".[28] The continental shelf was to be under the control and jurisdiction of the coastal State and eventually a conference to codify the emerging trends was rendered necessary. The controversy lied in the breadth of this territory, an issue which was not resolved at this first convention on the law of the sea. The new developments extended the area of sovereignty beyond the territorial sea, although the breadth of both the continental

[26] US Presidential Proclamation No 2667 *Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf,* Washington 28 September 1945.
[27] It should also be noted that there was also substantial development in the jurisprudence by international courts on the subject which contributed to developing substantial customary international law. See e.g. the *Corfu Channel* Case *(United Kingdom v Albania)* [1949] ICJ Rep 4 and the *Fisheries* Case *(United Kingdom v Norway)* [1951] ICJ Rep 116.
[28] Report No. 42 (1959) On Norway's participation in the United Nations Conference on the Law of the Sea in Geneva from 24 February – 27 April 1958, p. 6.

shelf and the "sea territory" remained undefined.[29] As mentioned, the controversy did not lie in the negotiations of the continental shelf as there were at the time a limited number of states that had confirmed natural resources in the subsoil. In fact, the Norwegian representative, Mr. Stabell stated during the 9th Ordinary Assembly of the United Nations that Norway did not have any petroleum deposits outside its coast and thus enjoyed no direct advantage of the proposed rules on the continental shelf.[30]

1.5 Structure of thesis

This thesis deals with an area to which a great deal of history is attached and it is therefore necessary to examine the background and the legal history in order to establish the foundation upon which the modern law on Svalbard is based on. The next chapter will duly discuss the legal history of Svalbard before providing an overview of the establishment and a short discussion on the most important provisions of the Svalbard Treaty. The chapter will also include a discussion on sovereignty which is a recurrent issue in the thesis and examine the foundation for Norwegian Svalbard Policy.

The Norwegian position on the nature of the continental shelf is based on the framework of the 1958 Geneva Convention on the Continental Shelf and the third chapter will include a discussion on the basis of the Norwegian argument and present factors that speak against the original Norwegian position. Based on this, the question of whether Norway's position may have changed will be discussed.

The final question will take on an assumption based on the previous chapter that the Svalbard regulatory framework applies to the continental shelf and examine coastal state jurisdiction in light of this and provide a discussion on the legal implications of the application of the Svalbard Treaty and its regulatory framework including mining regulations and the principle of non-discrimination.

[29] The Convention on the Continental Shelf only specified the term of the continental shelf as stretching to a depth of 200 metres and beyond this point to where the subsoil allowed for the exploitation of natural resources. This naturally depended on the available technology. Cf. Geneva Convention Art. 1.
[30] Report No. 17 (1955) on Norway's Participation in the 9th UNGA in 1954, p. 97.

2. The History of Svalbard, the Svalbard Treaty and Norwegian Svalbard Policy

2.1 Legal History of Svalbard

2.1.1 Introduction

The foundation for human existence on Svalbard has changed through times, often characterized by different and specific occurrences, and a settlement pattern is therefore hard to trace.[31] The history of Svalbard may be characterized as incoherent[32] and there exist different theories as to the discovery of the archipelago.[33] It is important to look at the way the archipelago was managed prior to 1920 in order to map out the processes that led to Norway's accession of Svalbard. The chapter will also examine Norwegian Svalbard policy in order to provide a foundation for the discussions in chapter 3 and 4.

2.1.2 The Natural Resources of Svalbard

Svalbard has throughout history been sought to for its natural resources. Prior to 1900, there were no permanent settlements, and the main human activity was related to the harvesting of such natural resources through hunting, fishing and catch of larger marine animals. After the turn of the 20th century coal mining industry emerged, and Svalbard moved from what Arlov characterizes as the 'biological period' to the 'industrial period'.[34] The commonly accepted theory is that Svalbard was discovered in 1596 by William Barentsz on his way to find the northern sea route to China.[35] Although the Dutch did not colonize the newly discovered land area, it was they who laid the foundation for the development on Svalbard throughout the next century.[36] From the 1600s the catching of whales was the prevailing activity in the waters surrounding Svalbard. There was however no question of colonization

[31] Arlov, Thor B. (1996) "Svalbards historie på langs" *Ottar: Til Svalbard?*. 210. p. 4.
[32] Reymert, Per K. (1996) "Innledning" *Ottar: Til Svalbard?*. 210: p. 2.
[33] Ulfstein (1995) p. 33. See also Rudmose-Brown, Robert N. (1919) "Spitsbergen, Terra Nullius" *Geographical Review*. 7 (5): pp. 311-321.
[34] Arlov (1996) p.5.
[35] Mathisen, Trygve (1951) *Svalbard i Internasjonal Politikk 1871-1925*. Oslo: Aschehoug, cited in Ulfstein (1995) p. 34.
[36] Arlov (1996) p. 5.

yet as the activities mainly took place during the summer months and there was no overwinter. The hunting and catching industry continued throughout the century and in the 1800s, tourism and other commercial activity began to make a foothold on the archipelago. At this stage in the history, European countries were colonizing and acquiring new territories, and there was a race for new colonies and natural resources. When there was word of the existence of coal on Svalbard a "coal rush" started that lasted until the Great War. Many companies discontinued their mining operations during this time, but Norway expanded its activity due to the lack of coal during the war. This and the work done on strengthening Norwegian science interests led to the dominance of Norwegian companies on the Archipelago and reinforced Norwegian presence on the Archipelago.[37]

In recent years climate change has facilitated an increased interest and presence in the Arctic. Undiscovered petroleum resources expected to be present on the Arctic continental shelves could also exist in the Svalbard area which is why the legal status of the continental shelf adjacent to Svalbard needs to be established.

2.1.3 Terra Nullius

With the discovery of the Archipelago, a conflict over the exploitation of resources emerged between the countries interested in participating in the whaling industry. There were also legal disputes over claims of sovereignty over the archipelago and disputes over the freedom of the seas. Several states claimed sovereignty, Norway-Denmark being one, claiming the Svalbard archipelago was connected to the island of Greenland. England opposed this claim as they themselves claimed the territory. The Netherlands did not, however, make any claims, although reserved the right to continue its operation of hunting and catching in the area[38].

Denmark-Norway was the only state that claimed sovereignty over Svalbard in the 17th century.[39] As the coasts of Svalbard became increasingly depleted of whales, there was little activity in the area, and consequently Svalbard did not have any political significance in the 18th century. The 19th century thus brought with it the new legal status of terra nullius, or "no man's land". Terra nullius indicates that sovereignty over the territory may be acquired by occupation. There had been several claims to the sovereignty over the Svalbard archipelago. However, the states concerned lacked the ability to exercise effective authority

[37] Berg, Roald (1996) "Svalbard-traktatens norske forhistorie" *Ottar: Til Svalbard?*. 210, p. 24.
[38] See Ulfstein (1995) Section 1.4.
[39] Ulfstein (1995) p. 36.

and were thus not able to establish a legal basis for their claim, thereby confirming the status of terra nullius.[40] This legal status kept the opportunity of later accession open. The term must not be confused with *res communis* which indicates a common property to all mankind – such as the high seas – which cannot be occupied.

The first attempt at a change in the legal status was suggested in 1871 when the Swedish Foreign Ministry approached a number of states to inquire about any objections to the plan to take possession of the territories for scientific purposes related to the natural mineral deposits on the islands. The Russian government vetoed the proposition, and the project was postponed indefinitely.[41]

There were a series of conferences from 1910-1920 which sought to come to a solution on a management regime of the archipelago. A solution came during the Paris Conference in Paris in 1920 which resulted in the 1920 Svalbard Treaty.

2.2 The Svalbard Treaty

2.2.1 Content of Provisions

The Svalbard Treaty includes the principle of nationalization by granting Norway sovereignty while preserving the previous status of terra nullius by providing for non-discriminatory principles and by allowing accession to the Treaty by new states and finally, to ensure peaceful utilization.[42] The right to establish maritime zones derives from the sovereignty of the coastal state over a territory. It is thus the sovereignty over the land territory which governs the sovereignty over the maritime territories. In the case of Svalbard, there are provisions which set restrictions on the exercise of Norwegian sovereignty on the Archipelago. The following will discuss the sovereignty of Norway as established by Article 1 of the Svalbard Treaty and give a short introduction to the stipulations which limit the exercise of sovereignty.

The nationalization principle is laid down in Article 1 of the Svalbard Treaty which

[40] Caracciolo, Ida (2009) ”Unresolved Controversy: The Legal Situation of the Svalbard Islands Maritime Areas; An Interpretation of the Paris Treaty in Light of UNCLOS 1982”. Paper presented at Durham University Conference on The State of Sovereignty, April 2007. p. 4.
[41] Mathisen (1951) p. 31 and Berg (1996) p. 16.
[42] Ulfstein (1995) p. 49.

accords Norway sovereignty over the archipelago: "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…"

The concept of 'sovereignty'[43] is referred to as the "most glittering and controversial notion in the history…of public international law"[44] Sovereignty characterizes the independence of states and the principle of *pacta tertiis* applies to the concept of sovereignty which provides that states are independent and only bound by laws they consent upon themselves.[45] It is only the notion of customary international law that is binding on all states without any explicit consent from the sovereign state. Decisions made by foreign states and foreign law are not binding on the sovereign state.

The Svalbard Treaty expresses the will of the contracting parties to provide Svalbard with an "equitable regime, in order to assure their development and peaceful utilization"[46] This objective was achieved through recognizing Norwegian sovereignty. Simultaneously, there was created an equitable regime for the activity of non-Norwegian states on the archipelago. Thus, the sovereignty Norway has over Svalbard is full and absolute to the extent it is limited by the specific provisions of the Treaty.

In international law, sovereignty means that a state has the right to take any measures of legislative nature and the enforcement thereof. Norway has the right to do this as long as these measures are not excluded by the provisions of the Treaty. The Treaty provisions that grant rights to state parties are, however, limited to those rights which are specifically mentioned in the Treaty. Fleischer suggests that this means that "the rights of the other parties do not comprise other than what appears from the wording of the treaty as understood in accordance with ordinary treaty interpretation."[47] He further claims that the rights of these states "do not comprise rights which derive from the development of new rules which has taken place at a much later stage in legal history."[48]

Sovereignty over land territory implies that a state has a general right that comprises all types of authority and power that are not explicitly excluded from the source of which the sovereignty is consolidated in. As a result, the state will normally have the exclusive right to

[43] For a full discussion on the sovereignty of Norway on Svalbard, see Ulfstein (1995) pp. 81-172
[44] Steinberger, H. (1987) "Sovereignty" in Bernhard, R. (ed.) Encyclopediaof Public International Law, Vol. 10. Amsterdam: North Holland Publishing Company, p. 397.
[45] Vienna Convention on The Law of the Treaties, 23 May 1969. 1155 UNTS 331, Art. 34.
[46] Svalbard Treaty, Preamble. See Annex I.
[47] Fleischer, Carl A. (2007) "The New International Law of the Sea and Svalbard". Paper presented at The Norwegian Academy of Science and Letters 150th Anniversary Symposium, January 2007. Available at: http://www.dnva.no/binfil/download.php?tid=27095 (August 2013). p. 2.
[48] Ibid.

adopt and enforce laws and regulations within its territory independent of other states as long as they remain consistent with the legal principles of the framework of international law. This precludes Norway simply enjoying the status as "custodian" or that Svalbard has the status of a condominium as suggested by some.[49]

The limitations on Norwegian sovereignty pertain to the non-discrimination principle of equal access and treatment and restriction on taxation in relation to mining activities. The limitations appear in articles 2-9 of the Svalbard Treaty. The preservation of the previous terra nullius rights are preserved through the principle of non-discrimination which is especially evident in articles 2 and 3 which provide that Treaty parties shall have the right to undertake activities in regards to, inter alia, hunting, fishing, maritime, industrial, mining and commercial activities.

The rights accorded to state parties shall be enjoyed on an equal basis by all state parties. These rights refer to equal access to waters, fjords and ports of the territories defined in Article 1, unimpeded operation of and equal exercise and practice of maritime, industrial, mining and commercial activities.[50] The Treaty also grants parties the right to fish and hunt in the territories specified by Article 1 and its territorial waters.[51] In addition to this, all taxes claimed from persons or companies on the archipelago and in the territorial waters should not exceed what is needed to cover the needs of the archipelago.[52]

2.2.2 Relationship to the Law of the Sea

The law of the sea has changed a great deal since 1920. The breadth of the territorial sea has been expanded to 12 nm and the 1982 UNCLOS attributed the coastal state rights to exercise their jurisdiction beyond these 12 nm as measured from the baselines of the littoral states. These areas include the 200-nm Exclusive Economic Zone and the continental shelf. The law of the sea transformed areas which earlier belonged to the High Seas and were subject to the freedom of the sea, to a system that was more effective and oriented towards resource management and environmental protection.

As Fleischer argued, there is no limit to the sovereignty of Norway other than those regulations provided for in the Treaty. There is also no reason to assume that other states

[49] See Ulfstein (1995) n. 154 p. 66.
[50] Svalbard Treaty Art. 3.
[51] Ibid. Art. 2.
[52] Ibid. Art. 8, para 2.

enjoy extended rights based on the law of the sea beyond those rights provided specifically for by the Svalbard Treaty. Norway did not accede to the LOS Convention until 1996 which was regarded as cautious action "indicative of a desire to avoid expansion of its sovereignty to new maritime areas in a manner that would also lead to the application of the 'equitable regime'…to those zones"[53]

The work on establishing baselines around Svalbard was not completed until 2001 and not until 2003 did they expand their territorial sea from 4 nautical miles to 12, thereby establishing a system of low-water baselines.[54]

2.3 Norwegian Svalbard Policy

2.3.1 The Discovery of Petroleum Resources

The Barents Sea was early on indentified as an interesting area in terms of petroleum exploration, but the expectations for the continental shelf in the Barents Sea were not met.[55] According to the latest report on petroleum activities in general on the Norwegian continental shelf it is estimated that there are between 175 and 2460 million scm o.e. of undiscovered recoverable oil equivalents in the Barents Sea.[56]As previously described, the Reports to the Storting constitute the official Norwegian policy on relevant issues. There have been four reports produced on the subject of Svalbard.
The Report on Svalbard issued in 1974 was the first of its kind and gave an account of the development in terms of legal, administrative and industrial matters. The report also sketched out some important lines for future Svalbard policy. The background and initiative for the report lies within the significance of ensuring an increased presence of Norwegian sovereignty and authority on Svalbard.

Although petroleum activities are not widely discussed in the first report, it is nevertheless pointed out as one of the main factors that since the 1950s contributed to a substantial change in the situation of Svalbard: Petroleum discoveries in other Arctic areas have contributed to an interest for such opportunities in Svalbard, which in terms of

[53] Caracciolo (2009) p. 6.
[54] Act of 27 June 2003 No. 57 on Norway's Territorial Waters and Contiguous Zone. Available at *The Law of the Sea Bulletin* No. 54 2004, Section 1.
[55] Report No. 26 (1993-1994) on Challenges and Perspectives for the Petroleum Activity on the Norwegian Continental Shelf, p. 11.
[56] Report No. 28 (2010-2011) An industry for the future– Norway´s petroleum activities.

transportation is relatively better situated than other high arctic areas"[57] This development further led to an increased interest in nature and environmental protection. The report refers to this as the "new multinational phase on Svalbard" because of the many foreign interests in petroleum research.[58] According to the Royal Decree of 9 April 1965,[59] Norwegian and foreign companies were in practice equal in regards to awarding exploration and exploitation licenses. The Norwegian petroleum industry and the Ministry of Industry were of the opinion that Norwegian rights be preferred and that they should have a preferential right to acquire licenses in the North.[60] Although the Government sought towards establishing itself as a strong actor in the North, it would not be possible to commence commercial petroleum activity without the knowledge and investments the foreign companies contributed with.

The report stressed that there were no comprehensive plans for petroleum exploration on the archipelago. However, the section on petroleum exploration is mainly devoted to exploration onshore and does not mention offshore petroleum activities. In a letter from March 21, 1970, the Bergmester for Svalbard informed that there had been a number of different investigations for petroleum on Svalbard between 1960 and 1969. Some of these investigations had taken place offshore and were mainly exercised by foreign companies.[61]

The middle of the 1980s brought about an increased interest in the Arctic and can be linked with new technology and change in climate which opened up for increased opportunity to utilize and develop the region. The Arctic is home to one of the most extensive continental shelves in the world, and it was thought to contain large amounts of natural resources, in which hydrocarbons were given most attention. This indicated a trend towards Norway continuing to positioning themselves on Svalbard as a strong industrial player in the Arctic while still maintaining a low profile in the light of the political situation.

Like in the previous reports, the overriding objectives in the report from 2008 are claimed to be unchanged.[62] The report entails a very brief section on petroleum activities, although the issue is referenced in the report.

In regards to petroleum activities, claims had been made for exploratory drilling. According to the Mining Code[63] a claim is [normally] a preferential right to the indicated

[57] Report No. 39 (1974-1975) on Svalbard Part IX.
[58] Report No. 39 (1974-1975) p. 6. See also Report No. 95 (1969-1970) on the Exploration and Exploitation of Submarine Natural Resources on the Continental Shelf.
[59] Royal Decree of 31 May 1963 No. 1 Relating to the Sovereignty of Norway over the Sea-Bed and Subsoil outside the Norwegian Coast.
[60] Report No. 95 (1969-1970) pp. 15-16.
[61] Letter from Bergmesteren for Svalbard, 21 March 1970, cited in Report No. 95 (1969-1970) p. 24.
[62] Report No. 22 (2008-2009) on Svalbard p. 25.

resource.[64] However, the claim does not entail an automatic right to begin operations unless they are pursuant to the strict environmental regulations of the Svalbard Environmental Act.[65] The territorial waters surrounding Svalbard are not open to exploration of petroleum which coheres with the fact that the Government does not consider exploratory drilling for petroleum to be pursuant to the Svalbard Environmental Protection Act.[66] The Integrated Management Plan also identifies these marine areas to be both highly valuable and vulnerable.[67] The next section will elaborate on the environmental initiatives established by Norwegian policy.

2.3.2 Environmental Initiatives

An important goal in the Government's Svalbard policy was to establish its role as a viable scientific research actor on the archipelago to contribute to a better understanding of climate change.[68] Environmental challenges were pointed to as a significant point in the development of Svalbard policy.[69] The efforts made towards international actors shows that while Norway's sovereignty was accepted, it still endured challenges which facilitated the need to further consolidate its own sovereignty.

Report No. 40 (1985-1985) on Svalbard pointed out that some of the future changes on Svalbard would include an increase in industrial activity, especially in relation to petroleum activities. This premonition turned out to be unsuccessful as there had not been any finds worth exploiting. At the same time, the coal mining industry was in a downfall.

Environmental protection stands out as one of the main issues in the reports on Svalbard. Report No. 22 (1994-1995) on Environmental Protection on Svalbard set out the two key environmental policies for Svalbard. The first objective has become widely known and provides that Svalbard should become known as "one of the world's best managed wilderness areas"[70] The other objective clearly states that when environmental aspects conflict

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[63] Mining Regulations for Svalbard laid down by Royal Decree of 7 August 1925 as amended by Royal Decree 11 June 1975.
[64] Mining Code, Ch. II, Section 9.
[65] Report No. 22 (2008-2009) p. 99.
[66] Ibid. pp. 66, 99. Svalbard Environmental Act, Act of 15 June 2001 No. 79 Relating to the Protection of the Environment in Svalbard.
[67] See Report No. 8 (2005-2006) on Integrated Management of the Marine Environment of the Barents Sea and the Sea Areas off the Lofoten Islands, Section 3.2. See also Report No. 30 (2004-2005) on Opportunities and Challenges in the North, pp. 12-13.
[68] Report No. 22 (2008-2009) p. 2.5
[69] Report No. 9 (1999-2000) on Svalbard Section 2.2.3.
[70] Report No. 9 (1999-2000) Section 2.2.6.

with others, the environmental aspect shall take precedence. This had direct impact on resource exploitation activities in Svalbard as 52 percent of the land areas of the Svalbard archipelago were protected as nature reserves and 72 percent of the territorial waters around Svalbard were included in these protection measures.[71]

In the period between Report No. 22 (1994-1995) and Report No.9 (1999-2000), there had been significant changes in the situation, and the latter report entailed a number of measures that were later included in the planned follow-up of Report No. 22. In 2002, Act No. 79 Relating to The Protection of the Environment on Svalbard (Svalbard Environmental Act) came into force which reinforced the policy objectives set out by Report No. 22 (1994-1995) and No. 9 (1999-2000).

Another important instrument in managing the environment in the northern maritime areas is represented by the Integrated Management Plan. Climate change paves the way for new opportunities in the north, and there is an expectation of increase in activities. It is for these reasons and the possible impact new activities may have on the environment that necessitated the Integrated Management Plan.[72]

Now that the foundation for Norwegian policy on Svalbard is established, the next chapter will aim at examining the legal basis of the Norwegian argument and the dissenting arguments. It will further be discussed whether the Norwegian argument has changed in order to uncover whether the Svalbard Archipelago generates its own maritime zones.

[71] Report No. 9 (1999-2000) Section 6.3.4. See Annex II for map.
[72] Report No. 22 (2008-2009) pp. 13-14.

3. Does Svalbard Generate A Continental Shelf?

3.1 Introduction

The Norwegian claim for jurisdiction on the continental shelf was not necessarily based on the 1958 Geneva Convention on the Continental Shelf as there had been many proclamations by other countries without the Geneva Convention as a basis. This was the reason Norway did not initially accede to the Convention.[73] The legal basis for Norwegian jurisdiction on the continental shelf is anchored in the 1963 Proclamation establishing sovereignty over the sea-bed and subsoil of submarine areas outside the coast of Norway. In the years following the Truman Proclamation many states began to establish their sovereign rights over the continental shelves adjacent to their coasts.[74] The state practice related to claims of jurisdiction over continental shelves around the world established that Norway's proclamation was pursuant to general international law.[75] However, this formal proclamation is considered necessary by neither the 1958 Geneva Convention nor the 1982 LOS Convention.[76] The reason for making a proclamation was thus to establish Norwegian authority over of those who had interests in the exploitation of the natural resources present on the Norwegian continental shelf.[77]

The proclamation was established in Norwegian law by Act of 21 June 1963. Norway acceded to and became a State Party to the Geneva Convention on the Continental shelf in 1971. The Government White Papers on Svalbard constitute the most substantive legal sources that support the Norwegian position.[78]

[73] Fleischer, Carl A. (1983) *Petroleumsrett*. Oslo: Universitetsforlaget, p. 26.
[74] Rothwell, Donald R and Tim Stephens (2010) *The International Law of the Sea*. Oxford: Hart Publishing Ltd. p. 100 ff. See also Young, Richard (1948) "Recent Developments with Respect to the Continental Shelf" *American Journal of International*. 42 (4): pp. 849-857.
[75] Fleischer (1983) p. 27.
[76] Geneva Convention Art. 2.3 and LOSC Art. 77(3).
[77] Fleischer (1983), p. 30.
[78] Churchill, Robin R. and Geir Ulfstein (2010) "The Disputed Maritime Zones Around Svalbard" in Nordquist, Myron et. al. (eds.) *Changes in the Arctic Environment and the Law of the Sea*. Leiden : Martinus Nijhoff, pp. 551-594. n. 33 at p. 564.

3.2 An Examination of Viability of the Norwegian Position

3.2.1 Early development of Norwegian Position

Up until 1962, the issue of exploitation of natural resources under the sea bed was of little interest to Norway.[79] Prior to this, there had not been any substantial finds of petroleum resources on the continental shelf. In 1962 discoveries of substantial size were made on the continental shelf in the North Sea, and the question of jurisdiction over the Norwegian continental shelf was made current. Although Norway had participated in the prior discussions of the Geneva Conventions, she did not accede to the Treaty until 1971.[80]

Norway argues that there is a continuous continental shelf stretching from the mainland northern Norway northwards beyond the Svalbard archipelago, and thus they have sovereign rights on the continental shelf independently of the Svalbard Treaty.[81]

The reports on Svalbard discuss legal issues pertaining to the archipelago. The status of the Continental Shelf is not widely discussed in the first report from 1973-1974 despite the fact that interest in petroleum activities is pointed out as the main factor that contributed to the changing status of the Svalbard archipelago since the 1950s. The increased level of control initiated by the Norwegian government in the aftermaths of the report is closely linked with their desire to "attend to [their] own national interests"[82] Report No. 95 (1969-1970) entails a section on Svalbard that clearly indicates that the Government considers the continental shelf around Svalbard to be regulated under the general Norwegian law regulating petroleum activity.[83] The activities related to petroleum exploration and exploitation on Svalbard are regulated by Article 8 of the Svalbard Treaty and the appurtenant Mining Code for Svalbard and apply "on Svalbard and in Svalbard's territorial waters"[84]

The second report to the Storting on Svalbard (1985-1986) elaborates on some of the legal issues in relation to Svalbard such as the territorial extent of the Svalbard Treaty and specifies the legal basis for the continental shelf. According to the report, the Svalbard Treaty is not applicable outside the territorial sea limit on basis of the original wording. Further, the 1963 Proclamation over the continental shelf is applicable for the "continuous continental

[79] Fleischer (1983) p. 24; Report to the Storting No. 17 (1955) p. 97.
[80] See Reports No. 17 (1955) Ch. 4; No.51 (1957) on Norway's Participation in the 11th UNGA and in the 1st and 2nd Extraordinary Assembly in 1956, pp.117-119 and No. 42 (1959).
[81] Report No. 30 (1973-1974) on Activity on the Norwegian Continental Shelf etc p. 67.
[82] Report No. 39 (1974-1975) p. 6.
[83] Report No. 95 (1969-1970) pp. 23-25.
[84] Ibid. p. 23.

shelf area in […] the Barents Sea, Polar Ocean and the separate shelf area of Jan Mayen"[85] By describing the Barents Sea and the Polar Ocean as continuous shelves and separating the shelf of Jan Mayen, it is clear that Norway considered any activities on the continental shelf to be outside the scope of the Svalbard regulation framework.

3.2.2 Sovereignty Generates Continental Shelf

Sovereignty is described as an expression of independence and autonomy of a state in the relationship with other states. The concept is also used to describe the right to exercise sovereign rights within a specified area. Norway claims it is this authority that rules in regards to natural resources in the territories of Svalbard.[86]

The sovereignty of Norway over Svalbard must be read on the basis of treaty interpretation of the Svalbard Treaty. This differs from the normal procedure, where sovereignty over a territory is based on customary international law. In addition to the foundation of sovereignty as laid out article 1, the current status of Norwegian sovereignty can be considered to rest upon the long-lasting exercise of Norwegian administration and jurisdiction in the area.[87] Norwegian sovereignty is thus undisputed and recognized in international law by tacit acceptance.[88]

The International Court of Justice has several times referred to this concept that land territory dominates the appurtenant maritime zones. In the Anglo-Norwegian Fisheries case, the court stated that "it is the land which confers upon the coastal state a right the waters off its coasts."[89] Further, in the North Sea Continental Shelf Cases, it stated that "the rights of the coastal state in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist ipso facto and ab initio, by virtue of its sovereignty over the land, and as an extension of it"[90]

This close connection between land territory and maritime zones, Churchill and Ulfstein argue, suggests that Norway's rights in the maritime zones around Svalbard are subject to limitations.[91] This is because the sovereignty Norway exercises over Svalbard is

[85] Report No. 40 (1985-1986) p. 9, Royal Decree (31 May 1963) No. 1.
[86] Report No. 39 (1974-1975) p. 7.
[87] Fleischer (1983) p. 180.
[88] Report No. 22 (2008-2009) p. 20; Churchill (1985) p. 192.
[89] North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands) [1969] ICJ Rep 3.
[90] Ibid. pp. 3 ff. at 23.
[91] Churchill and Ulfstein (1992).

subject to limitations and since Norway's right to maritime zones beyond the territorial sea derives from its sovereignty over Svalbard.[92] Norway on the other hand claims that their sovereign right to the resources of the Svalbard Continental Shelf derives from its sovereignty over the Norwegian mainland.

In this view, the continental shelf surrounding Svalbard "belongs" to Northern Norway and not Svalbard.[93] On the continental shelf, the ordinary petroleum framework for exploration and exploitation applies and the Mining Code does not. This follows from the 1963 Proclamation and 1963 Act on Submarine Resources which establishes that the entire Norwegian continental shelf falls under this framework and that the shelf stretches from Northern Norway, around and beyond the Svalbard archipelago.[94]

Indeed, there is a geologically continuous shelf that stretches northwards from northern Norway and the whole sea bed is therefore legally the continental shelf of Norway.[95] However, the geographical continental shelf does not necessarily coincide with the juridical continental shelf.

According to the 200-meter depth criterion of the Geneva Convention the exclusive rights of the coastal State over the continental shelf goes out to 200 meter of depth or as far beyond this limit as the depth of the ocean allows for exploitation of natural resources. Geologically, the deepest point between the Norwegian mainland and Svalbard is about 400-450 meters, and it is reasonable to assume that today (and in 1983 when Fleischer wrote the book upon which this argument is based on) it is possible to exploit resources that are at 500 meters depth. He argues that it is the exploitation criterion, and not the depth criterion which has practical application today.[96] The Norwegian regulations on the continental shelf cannot be considered to be limited to economic profitability which is why Norway bases its argument on the exploitation criterion and not the depth criterion.[97] Fleischer claims the only scenario in which Norwegian sovereignty based on the mainland did not apply to the continental shelf around Svalbard, is if it ratified a treaty which explicitly delimited the continental shelf. As long as this does not happen, it is the Geneva Convention and customary international law which regulates Norway's rights on the continental shelf.[98]

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[92] Churchill and Ulfstein (1992) p. 46.
[93] Churchill (1985) p. 196.
[94] Fleischer (1983) p. 211 f.
[95] Churchill, Robin R. and Geir Ulfstein (1992) *Marine Management in Disputed Areas: The Case of the Barents Sea*. London and New York: Routledge, p. 40.
[96] Fleischer (1983) p. 213.
[97] Ibid. p. 214.
[98] Ibid.

Churchill also concludes that the seabed between Northern Norway and Svalbard is legally continental shelf, but questions the basis of the Norwegian argument. He points to several factors which will be discussed in detail below. Some of these include the issue of islands' entitlement to continental shelves, the inconsistency in the generation of maritime zones and last, the use of Svalbard in delimitation between states.

3.2.3 Foundation for Norwegian view

The 1958 Geneva Convention was based on the exploitation principle but also contained the distance criterion with a limit of exploitation that stretched to the 200 m isobath or as far as the depth of the seabed would allow for exploitation of the resources.[99] The International Law Commission asserted that the right of coastal states to exercise control and jurisdiction over the continental shelf be accepted, but only for the purpose of exploiting the seabed resources.[100] The issue of maritime delimitation is what brought on the rather broad definition of the exploitability criterion which defined the outer limit as "where the depth of superjacent waters admits of the exploitation of the natural resources of the seabed and subsoil."[101] This definition was rejected because it might raise disputes in favor of a fixed limit where the sea reached a depth of 200 meters.[102] The adopted provision was therefore a compound that included both the depth criterion and the more flexible exploitation criterion.

The exploitability criterion was put under much pressure due to technological advances. At UNCLOS III it became apparent that the technological advances had made the depth and exploitability based definitions obsolete.[103] The new nature of the definition of the continental shelf was agreed upon at the third session of UNCLOS III and included an article which eventually appeared as Article 76(1).

The LOS Convention provided a more expansive definition of the continental shelf which was an advantage to the states. The new provisions replaced the fluid delimitation criterion of exploitability and introduced a more objective approach to maritime delimitation. Article 76 includes different methods of delineating the outer continental shelf providing different formulas which the states are at liberty to choose for themselves. Article 76 of the

[99] Geneva Convention Art.1.
[100] Rothwell and Stephens (2010) p. 102.
[101] Ibid. p. 103.
[102] Ibid.
[103] Ibid p. 107 ff.

LOS Convention is considered to have become part of customary international law.[104] The next sections will examine some of the factors which speak against the viability of the Norwegian argument.

3.2.4 Regime of Islands

All islands are entitled to a territorial sea, continental shelf and exclusive fishing zone/EEZ.[105] This right is also current in article 1 of the Geneva Convention.[106] There is nothing in the Svalbard Treaty that expressly prohibits Svalbard from generating maritime zones and it follows that Norway has the competence to establish maritime zones around Svalbard.[107] The right Norway has to claim maritime zones around Svalbard does not appear to be questioned by any state (except for Russia which has protested against the legal basis for establishing the 200-nm zone.[108]) The only exception to this is that rocks which cannot sustain human life should not be used as basis for generating maritime zones.[109] If Svalbard had many of these types of islands, there would not be enough basis for the generation of maritime zones. However, most of the islands are so close to the archipelago that in practice the generation of the continental shelf would not be affected.[110]

Even if islands may generate their own maritime zones, the situation in relation to Svalbard is such that the archipelago and the mainland are under the sovereignty of the same state. Since the seabed is legally continental shelf, which is established, the rule that islands generate their own maritime zones is of little practical consequence.[111] However, in the case of Svalbard there are two sets of legal rules which have different areas of application. The rules of the 1982 LOS Convention apply to all sea areas around Svalbard, while the Svalbard Treaty, in the view of Norway, is restricted to land and sea territory.[112] In this case, where the island and the mainland are subject to two different legal regimes, the rule that islands generate maritime zones becomes crucial.[113] The two geographical areas are thus subject to

[104] Rothwell and Stephens (2010) p. 106.
[105] LOSC article 121(2).
[106] Collier, J. G. (1985) "The Regime of Islands and the Moderen Law of the Sea" in Butler, W. E. (ed.) *The Law of the Sea and International Shipping: Anglo-Soviet Post-UNCLOS Perspectives*. London, New York, Rome: Oceana Publications, Inc., pp.173-188. p. 181.
[107] Ulfstein (1995) p. 421.
[108] Ulfstein (1995) p .421.
[109] Collier (1985) p. 181. cf. LOSC Art. 121(3).
[110] Ulfstein (1995) p. 420.
[111] Churchill (1985) p. 197.
[112] Fleischer (2007) p. 1.
[113] Churchill (1985) p. 197.

different legal regimes and have different juridical character and the conclusion based on this is therefore that Svalbard has its own continental shelf.[114]

3.2.5 Reception by Other States

Other states have either protested against the Norwegian view or reserved their position. [115] The USSR/Russia protested against the Norwegian position as early as in 1970, contending Norway did not have any authority over the continental shelf pertaining to Svalbard.[116] The Russian view that Norway may not unilaterally establish maritime zones around Svalbard has been supported by two Russian professors who argue that the status of the waters beyond the territorial sea is high seas.[117]Other states support the notion that Svalbard does generate maritime zones, but disagree on whether the provisions of the Svalbard Treaty apply to the maritime zones beyond the limit of the territorial sea.[118]

The United Kingdom is among the states that claim the Svalbard Treaty applies to the "Svalbard Shelf"[119] The British view was uttered by Baroness Young in the House of Lords on behalf of the British Government in 1986: "In our view, Svalbard has its own continental shelf, to which the regime of the Treaty of Paris applies. The extent of this shelf has not yet been determined."[120]

Canada and Finland are the only two countries that have signaled support for the Norwegian position. The Canadian support is found in the preamble of an agreement that has not come into force: Agreement between the Government of the Kingdom of Norway and the Government of Canada on Fisheries conservation and enforcement (30 June 1995). This is an indication that the Canadian support is not effectuated.[121] Finland withdrew their support from 1987 at the Barents Euro-Arctic Council in 2005.[122]

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[114] Churchill (1985) p. 197.
[115] Ulfstein (1995) p. 422.
[116] The Soviet Union, Memorandum to Norway, 27 August 1970, cited in Pedersen, Torbjørn and Tore Henriksen (2009) "Svalbard's Maritime Zones: The End of Legal Uncertainty?" *The International Journal of Marine and Coastal Law*. 24: 141-161 p. 144. See also Report No. 40 (1985-1986) p. 9.
[117] Vylegzhanin, A.N. and V.K. Zilanov (2007) *Spitsbergen: Legal Regime of Adjacent Marine Areas*. Utrecht: Eleven International Publishing, p. 42.
[118] Pedersen and Henriksen (2009) p. 145.
[119] Report No. 40 (1985-1986) p.9.
[120] House of Lords Debates, CDLXXVII, col. 1022, 2 July 1986, cited in Churchill and Ulfstein (1992) n. 83, p. 160.
[121] Pedersen and Henriksen (2009) p. 145.
[122] Pedersen, Torbjørn (2008) "The Dynamics of Svalbard Diplomacy" *Diplomacy & Statecraft*. 19 (2): pp. 236-262, p. 251.

The most obvious controversies in terms of public coverage has related to activities in the Exclusive Fisheries Zone with incidents such as the seizing of the Russian trawler vessel Elektron in 2005 and the seizing and prosecution of two Spanish trawlers Olazar and Olaberri 2004. These incidents led to Spain and Russia coordinating their position. These are examples of what Pedersen indicate is a coordinated opposition that evolved during the early 2000s.[123] Several countries have threatened to take the case to the ICJ and the United Kingdom claimed that opposing position would "find strong support in international law" should it ever be referred to the Court.[124] However, these threats remain empty even today. The next section will examine the legal basis for the Norwegian claim and provide a discussion on the arguments that count against these.

3.2.6 Conclusion

The original Norwegian position was based on the law of the sea as it was set by the 1958 Geneva Convention on the Continental Shelf. As mentioned before, there had until 1962 been little interest in the continental shelf of Norway. This was based on lack of technological basis for uncovering the resources on the shelf and an uncertainty of whether Norway had any significant shelf at all. This uncertainty was based on the criteria set by the Convention on the Continental Shelf's 200-metre depth criterion. The Norwegian Channel only goes down to a depth of 200 meters, and lies fairly close to the shore. The Barents Sea is also very shallow with only 450 meters depth at its deepest between Northern Norway and Svalbard.[125] The Channel was, however, not of any legal inconvenience to Norwegian sovereignty and its extension beyond the Channel as this was set down by the Geneva Convention; As long as it was possible to exploit the resources in such a manner that it did not infringe on the claimed jurisdiction of other states as set by the equidistance line, Norwegian jurisdiction could not be precluded beyond the Norwegian Channel.[126]

Another requirement as set out by Article 1 of the Geneva Convention in determining the extent of the continental shelf is that the areas under question should refer to areas "adjacent to" the coast and coastal areas. The concept of "natural prolongation" will also take

[123] Pedersen (2008) pp. 250-253.
[124] UK note to Norway 14 October 1986, cited in Pedersen (2008) n. 128.
[125] Ulfstein (1995) p. 423.
[126] Fleischer (1983) p. 24.

effect in determining the matter at hand.[127]According to the Geneva Convention, the 200-meter depth criterion and the exploitation criterion are the two alternatives for determining the extent of the continental shelf. As a consequence of technological improvement, states have claimed larger areas under their jurisdiction. This is referred to as “creeping jurisdiction”. This problem was dealt with during the third conference on the law of the sea from 1973-1982. The exploitation criterion was considered to be an insufficient criterion to determine the breadth of the continental shelf, and Article 76 provides for the new definition of the continental shelf.

The guidelines provided for in the 1982 Framework are more technical than the flexible definition of the Geneva Convention upon which the state could choose the option which suited them best. The new frameworks allows for this to the degree that the state can freely choose which of the four formulas to combine when establishing the limits of the continental shelf up to 200 nm from the baselines. This is a far more extensive method of delimitation and establishment than that the Geneva Convention can provide for and considering that most of the LOS Convention has passed into customary law, this precludes the application of the 1958 Geneva Convention in these matters. The Norwegian viewpoint therefore does not seem to be viable according to the modern law of the sea.

[127] Ibid. p. 15.

3.3 Has the Norwegian Position Changed?

3.3.1 Introduction

This subchapter aims at identifying the incidents that indicate that there has been a change in the Norwegian viewpoint. There are some indicators to this: The bilateral delimitation agreements with Denmark and Russia were based on basepoints from Svalbard. The process of establishing final outer limits of the Norwegian continental shelf is also indicative of a change in position. This first section aims at mapping out the legal basis for maritime delimitation and to uncover which legal basis Norway has invoked for its respective delimitation agreements with Denmark and Russia. As will be argued, case law provides that the first point in establishing maritime boundaries is to identify basepoints upon which the delimitation lines will be based. The suggestive conclusion is that Norway has employed basepoints based on the coasts off Svalbard's western coast in the agreement with Denmark/Greenland and off the eastern coasts of Svalbard in the agreement with Russia. The establishment of the outer limits of the continental shelf also shows that Svalbard has been used as basis and will be discussed last.

3.3.2 Establishment of Maritime Delimitation Boundaries

The object of delimitation of the continental shelf betweens states is to achieve an equitable solution.[128] The LOS Convention does not provide for an exact method of delimitation other than referring to the principle of equity. It is the case law which provides guidelines for the method of delimitation, commencing with the 1969 North Sea Continental Shelf cases.[129] The ICJ determined in this case that the Geneva Convention did not apply to maritime boundary delimitation between two states and therefore sought out to determine the relevant customary international law for delimitation. From this point of view, the 1958 Geneva framework upon which Norway bases its position on is not well suited to defend the view that Svalbard does not generate a continental shelf. The difference between the method of delimitation from the 1958 Geneva Convention and the 1982 LOS Convention is that while the former made a clear technical distinction between opposite and adjacent states and reliance upon equidistance , the

[128] LOSC Art. 83(1).
[129] Rothwell and Stephens (2010) p. 393. See also Kolb, Robert (2003) *Case Law on Equitable Maritime Delimitation: Digest and Commentaries*. The Hague: Martinus Nijhoff.

latter applies international law as reflected in Article 38 of the ICJ Statute in order to reach an equitable solution.

However, the difficulty in determining the proper application and interpretation of treaty law to boundary delimitation issues were highlighted in the 1993 Greenland/Jan Mayen case between Denmark and Norway.[130] The court commented that this was the first time it had to apply the Geneva Convention as a matter of treaty law, but at the same time noted that any interpretation of the convention would require a consideration of customary international law.[131]

Case law does however prove that a stronger emphasis on the LOS Convention has evolved and the emphasis on 'natural prolongation' from the Geneva framework has now been replaced with the view that geomorphologic criteria have less significance under the new framework of LOSC Article 76.[132] Article 76 grants all states a minimum of 200 nm continental shelf where technically possible.[133] The combined jurisprudence of case law, state practice and delimitation methods as laid down by the LOS Convention, it is today possible to distinguish a method for maritime boundary delimitation.[134]

In the 2009 Black Sea case,[135] the court for the first time referred to a delimitation methodology.[136] This approach involves three stages. The first is to establish a provisional delimitation line. In the case of opposite states such as is the case with Svalbard and Greenland/Russia, a median line is applied.[137] The second element is to consider whether there any factors that call for an adjustment of the provisional line in order to achieve an equitable result.[138] The final stage after making any adjustments to the provisional line is to verify in court that the line does not lead to an inequitable result "by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime areas of each State by reference to the delimitation line."[139]

Now that the legal basis and method for maritime delimitation is established, a consideration of the methods used in Norway's bilateral delimitation agreements is in order.

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[130] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* [1993] ICJ Rep 38.
[131] Rothwell and Stephens (2010) p. 396.
[132] *Barbados v Trinidad and Tobago* (2006) 45 IL 798, 224-226.
[133] LOSC Art 76(1).
[134] Rothwell and Stephens (2010) pp. 397 ff.
[135] *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, ICJ Judgement of 3 February 2009.
[136] Ibid. paras. 115-122.
[137] Ibid. para. 98.
[138] Ibid. para. 120.
[139] Ibid. para.122.

3.3.3 Norway-Denmark Delimitation Agreement

The first step in establishing maritime boundaries, as reflected above, is to identify the baselines on the headlands and outermost islands from which to construct a provisional equidistance line.[140] The baselines of Svalbard were established in 2001.[141] The new baselines included the whole island and covered the eastern coast of Svalbard which had been postponed due to harsh natural conditions in the area.[142] The baselines of Greenland were established in 2004. Prior to this there had been an undefined agreement to delimit the area between the eastern coasts of Greenland and the western coasts of Svalbard by applying a median line without any precise specification of the points of delimitation, but based on a median line.[143] The Agreement sought to establish these points.[144]

The preamble of the Svalbard-Greenland Delimitation Agreement[145] pointed out that the delimitation did not affect the final delimitation of the outer limits of the continental shelf, which the parties would turn to at a later point. The Agreement seems to be based on the "method of equidistance between the nearest basepoints in Greenland and Svalbard."[146] The Agreement delimits the continental shelf and the EEZ of Greenland and FPZ of Svalbard within 200 nm.[147]

According to the Norwegian view, the delimitation in this area should be based on basepoints extending from the mainland, but as we have seen, these point lie not on the mainland of Norway, but off the western coast towards Greenland.[148] This is a clear indication that Svalbard generates its own maritime zones.

[140] Anderson, D. H. (2009) "The Status Under International Law of the Maritime Areas Around Svalbard" *Ocean Development & International Law*. 40 (4): pp. 373-384, p. 377.
[141] Regulation on Baselines for the Territorial Waters of Svalbard, 1 June 2001 No. 556.
[142] Report No. 39 (1974-1975) p. 38; Report No. 40 (1985-1986) pp. 9 f.
[143] Forslag til folketingsbeslutning (2006) B 114, para. 1.
[144] Ibid.
[145] Agreement Between Norway and Denmark Together with the Home Rule Government of Greenland Concerning the Delimitation of the Continental Shelf and Fisheries Zones in the Area Between Greenland and Svalbard, 20 February 2006.
[146] Anderson (2009) p. 377.
[147] Elferink, Alex G. Oude (2007) "Maritime Delimitation Between Denmark/Greenland and Norway" *Ocean Development & International Law*. 38 (4): pp. 375-380, p. 375.
[148] Anderson (2009) p. 377.

3.3.4 Norway-Russia Delimitation Agreement

When the Agreement between Norway and Russia on the Delimitation in the Barents Sea was signed, it ended a 40 year long negotiation over an undelimited area which covered 175,000 km2.[149] The first basepoint of the new agreement starts at the mouth of the Varangerfjord and corresponds with the last point of the 2007 Varangerfjord Treaty.[150] The original agreement[151] which was extended on an annual basis from 1957 was based on the 1958 Geneva Convention to which both states were parties. Article 6 established that the boundary should be based on a median line unless there were any "special circumstances" present that justified another boundary.[152] The states later became parties to the LOS Convention, making articles 74 and 83 the applicable provisions to determine delimitation. Both states, however, maintained their original views on delimitation according to the reading of Article 6 of the Geneva Convention. Norway claimed that there were no special circumstances and thus claimed an application of the median line while Russia asserted a sector line as basis for delimitation on the basis that there existed special circumstances.[153]

The 2010 Treaty established a single delimitation line[154] based on "international law in order to achieve an equitable solution."[155] The parties have taken relevant case law into consideration and refer among others to the Black Sea case. There were no special circumstances taken into account, but the joint statement refers to "relevant factors" including "the effect of major disparities in respective coastal length". None of the official Norwegian documents produced in relation to the Agreement seems to specify the procedure or basis for determining the basepoints upon which the (delimitation points) are based. Reference is made to the delimitation line specified by geodetic lines drawn through points of coordinates.

The assumption that follows is that the points of coordinates are based on basepoints derived from Svalbard. The final baselines on Svalbard were established in 2001 and established basepoints on Spitsbergen, northwards around Nordaustlandet, Kvitøya, Kong

[149] Henriksen, Tore and Geir Ulfstein (2011) "Maritime Delimitation in the Arctic: The Barents Sea Treaty" *Ocean Development & International Law*. 42 (1): pp. 1-21. p. 1.
[150] Varangerfjord Treaty, Agreement between the Russian Federation and the Kingdom of Norway on the Maritime Delimitation in the Varangerfjord area, 11 July 2007, Art. 1.
[151] Ibid.
[152] Geneva Convention Art. 6(1).
[153] For a discussion on special circumstances, see Henriksen and Ulfstein (2011) pp. 4 ff.
[154] Henriksen and Ulfstein (2011) p. 6.
[155] Joint Statement, Joint Statement on Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean, 27 April 2010, para. 4.

Karls Land and Hopen, Barentsøya and Edgeøya.[156] The basepoints upon which the Norwegian-Russian delimitation Agreement seem not to be based on the Norwegian mainland, but rather off the coasts of Hopen, Kong Karls Land and Kvitøya towards the nearest basepoints in Russia.[157] This is another example that indicates that there has been a change in the Norwegian position and proves that Svalbard generates its own maritime zones by basing the delimitation on basepoints derived from Svalbard.

3.3.5 Conclusion Maritime Delimitation

As previously established, the development in international law regarding maritime delimitation has shown that the emphasis on geomorphologic criteria have less significance under the framework of the LOS Convention. Even Norway sought a solution to the problem the exploitation criteria involved as the boundaries for the continental shelves of states were in a process of constant dislocation in accordance with the fast developing technology. The anticipation was that UNCLOS would determine more precise and permanent criteria that would replace the exploitation criteria.[158]

Norway uses Svalbard as basis for the median line delimitation of the continental shelf towards Greenland and Russia which indicates that the continental shelf around Svalbard generates a shelf of its own as opposed to constituting a part of the Norwegian mainland shelf as the delimitation would otherwise be based upon. The conclusion is therefore that by proof of these delimitation agreements, Svalbard generates its own continental shelf.

[156] Regulation on Baselines for the Territorial Waters of Svalbard, 1 June 2006 No. 556, para. 1, reference points SV136- SV180.
[157] Anderson (2009) p. 377.
[158] Report No. 30 (1973-1974).

3.3.6 The Process of Establishing Outer Limits of the Continental Shelf

As established, the right to establish maritime zones derives from the sovereignty of the coastal state over a territory.[159] The process of determining the outer limits of the continental shelf beyond 200 nm is unique in the sense that the state has to consult with the CLCS – The Commission on the Limits of the Continental Shelf [160] - to be able to fix the limits.[161] This process has to happen within 10 years of the entry into force of the LOS Convention.[162] By establishing these outer limits, the coastal State consolidates its sovereign rights over the natural resources of the continental shelf.[163] The coastal State shall provide the Commission with relevant data which will enable the Commission to make recommendations. The coastal State will then establish limits on the basis of the recommendations which will be "final and binding".[164] There is, however, a saving clause[165] that excludes the binding effect on other coastal States with overlapping claims[166].

Norway made its submission to the Commission in 2006,[167] including a claim in the area of the Western Nansen Basin which extended more than 200 nm from the basepoints on the northern coast Nordaustlandet and 800 nm from the baseline of mainland Norway.[168] The outer limits set by Norway in accordance with Article 76 of the LOS Convention are therefore not binding on the neighboring coastal States (Denmark in respect of Greenland and Russia.) The delimitation of overlapping claims is dealt with by Article 83 of the LOS Convention. The delimitation agreement between Denmark and Norway implies that Denmark recognizes Norwegian jurisdiction in the continental shelf area around Svalbard,[169] and the same might be said for the Barents Sea delimitation agreement

In its submission, Norway asserted that the continental margin in the three areas to which the submission was concerned (The Barents Sea "Loop Hole", the Western Nansen Basin and the "Banana Hole" in the Norwegian and Greenland seas) comprised two parts.[170]

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[159] Pedersen and Henriksen (2009) p. 148.
[160] Hereafter referred to as the Commission.
[161] LOSC Art. 76(8) and Annex II, Art. 4.
[162] Ibid.
[163] Pedersen, Torbjørn (2006) "The Svalbard Continental Shelf Controversy: Legal Disputes and Political Rivalries" *Ocean Development & International Law*. 37 (3-4), pp. 351–52.
[164] LOSC 76 (8).
[165] Ibid. 76(10).
[166] Pedersen and Henriksen (2009) n. 51, p. 149.
[167] Executive Summary, Continental Shelf Submission in respect of areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea: Executive Summary, December 2006, Section 7.2.
[168] Pedersen and Henriksen (2009) p. 151.
[169] Pedersen and Henriksen (2009) p. 142.
[170] Executive Summary, pp. 9 ff.

The largest part consists of the Eurasian Continental Margin into which Norway and Svalbard fall. This is in line with the original Norwegian position. In the Summary by the Commission, it is stated that there are two parts of the continental margin – that which pertains to mainland Norway and Svalbard in the east and that of Jan Mayen in the west. However, contrary to Norway's claim that these areas constitute two separate parts, the recommendations summary notes that "…it appears evident that these two continental margins link with each other via the Iceland-Faroe Ridge…"[171] Despite this, the Commission chose to conduct its consideration of data consistent with the "dual-margin approach" of Norway.[172]

The limits set by the coastal States are final and binding on other state parties to the LOS Convention.[173] However, these limits are not binding "insofar they are challenged by other states."[174] States can dispute another states' submission, but this was not the case in the Norwegian submission. However, four states reacted to the submission – Spain, Iceland, Denmark and Russia. None of these reactions disputed the right Norway has to establish maritime zones off Svalbard, but were unclear about the legal basis for this.[175] Neither did they object to the fact that Norway suggested a continental shelf that extended beyond 81° latitude north as referred to in the Svalbard Treaty. The submissions of Iceland and Denmark contained no specific reference to a continental shelf off Svalbard.

Neither the Executive Summary nor the Recommendations Summary give any indication as to which basepoints Norway has used to base their outer limits on. There is also no reference as to whether the claim is based on Norway's sovereignty over Svalbard or if it is based on Norway's sovereignty over the mainland in which the Svalbard archipelago constitutes a natural prolongation of the mainland. However, according to the submitted data, the claim extending beyond 200 nm in the Western Nansen Basin is stipulated on a basis of Svalbard's baselines.[176] Norway originally submitted two critical points of delimitation north of Svalbard, one of which were rejected at first but later accepted and extended farther northwards.[177] This would not be possible if the basepoints extended from the Norwegian mainland as the outer limits of Norway's continental shelf would have extended northwards

[171] Ibid. p. 18.
[172] Ibid. p. 18.
[173] Report of the Committee on Legal Issues of the Outer Continental Shelf, Second Report, in International Law Association, Report of the Seventy-Second Conference, Toronto (2006) 232–233 (Conclusion no 11). Cited in: Pedersen and Henriksen (2009) n. 55, p. 150.
[174] Pedersen and Henriksen (2009) p. 150.
[175] Ibid. pp. 155-157.
[176] Ibid. p. 15; Pedersen and Henriksen (2009) p. 151.
[177] Recommendations Summary, Summary of the Recommendations of the Commission on the Limits of the Continental Shelf in Regards to the Submission Made By Norway in Respect of Areas in the Arctic Ocean, The Barents Sea and the Norwegian Sea, 27 November 2006, Part B.

more than 800 nm miles from the Norwegian mainland coast. Norway considers its claims for the establishment of the outer limits beyond 200 nm to be in accordance with the provisions of LOSC Article 76 and thereby consolidating a new approach based on the 1982 LOS Convention rather than the old position based on the 1958 Geneva Convention.

3.4 Conclusions

As has been shown, there have been several large developments in the law of the sea since the Geneva Convention, some of which relate to the arguments discussed above. The regime of islands introduced in the 1982 LOS Convention states that islands are entitled to their own maritime zones. Norway claims that the shelf around Svalbard falls under the 1963 Act on Submarine Resources. However, it is clear that the mainland and the Svalbard archipelago are subject to two different legal regimes with different juridical characters, and the conclusion must then be that Svalbard has its own continental shelf.

The original Norwegian argument was based on the provisions of the 1958 Geneva Convention on the CS. The argument is based on the notion that the seabed between Northern Norway and Svalbard in a natural prolongation of the landmass of the mainland. The sovereignty over the continental shelf around Svalbard thus follows from the sovereignty Norway has over the mainland and not Svalbard. They further argue that it is the exploitation criterion, and not the depth criterion which has most practical implication today. This is a doctrine which was developed during the 1960s and is clearly based on the framework of the Geneva Convention. According to article 76, it is hard to base the position on the article from 1958 Norway has to adapt itself and its arguments to the modern international law, and the fact that Norway 1) stated that islands generate maritime zones in the CLCS process and 2) used Svalbard baselines as basis for establishing outer limits, may be indicative of a change in view.

The legal status of the original Norwegian position seems to be weakened by the factors discussed above. Norway has the right to base its arguments on international law and case law, which they explicitly mention in the Barents Sea Delimitation Agreement. Subsequently to the delimitation agreements and the process of establishing outer limits of the continental shelf, however, there seems to have been a discrepancy between the Norwegian Svalbard policy and the actual state practice. In the delimitation and establishment of outer limits, Norway followed the legal framework of the1982 LOS Convention as it was hard to

base arguments in relation to new development on the 1958 Geneva Convention. This is indicative of the need Norway has to adapt its arguments to the new international law of the sea.

Both the delimitation lines and outer limits of the continental shelf are established to be based on basepoints measured from the coasts of Svalbard. There thus seems to be a distinction in the development of the Norwegian viewpoint with the process of establishing the outer limits of the continental shelf. The discrepancy between state policy and state practice is indicative that the Norwegian arguments no longer have legal currency as it is indicated that state practice differs from state policy. Norway therefore has a need to develop new arguments, and the new practice may be indicative that Norway accepts a new practice with legal basis in the LOS Convention.

4. Consequences of the Application of the Svalbard Treaty to the Continental Shelf

4.1 Introduction

The previous chapter established that Svalbard generates a continental shelf and that the original Norwegian position seems to have changed in terms of state practice. There is, however, a discrepancy between state practice and state policy that needs to evolve. One of the current issues is the status of the continental shelf should the Svalbard Treaty apply. As a consequence that Svalbard generates its own zones, it is implied that the legal framework is also extended to apply to the continental shelves. This chapter will examine some of the implications of this situation.

Pursuant to Norway's position on the maritime zones around Svalbard, the general legislation of the continental shelf has been made applicable to the continental shelf beyond the territorial sea of Svalbard.[178] The 1963 Act on Submarine Resources was considered to be applicable to the continental shelf around Svalbard, and the 1996 Petroleum Law is considered to have the same application. It is, however, unclear whether Norway is entitled to apply these regulations to the Svalbard continental shelf.

This chapter will first examine the rights of the coastal state over the continental shelf related to exercise of jurisdiction and how this relates to Svalbard. It will then go on to discuss the legal implications of the application of the Svalbard Treaty to the continental shelf related to the Svalbard Mining regulations and the principle of non-discrimination.

[178] Report No. 40 (1985-1986) p. 9.

4.2 Rights of the Coastal State over the Continental Shelf

4.2.1 Coastal State Jurisdiction on the Continental Shelf

The coastal States enjoys sovereign rights over the continental shelf for the purpose of exploring and exploiting its natural resources.[179] In the early process of codifying the rights and duties of states on the continental shelf, the ILC aimed at specifying that the rights accorded to states did not amount to sovereignty in such a way that the freedoms of the sea and the airspace above might be threatened. This gave way for the concept of sovereign rights.[180] These sovereign rights include not only the exclusive right[181] to explore and exploit the resources of the seabed, but also the jurisdiction to prevent and enforce violations of the law.[182] Coastal state jurisdiction will now be examined first before discussing it in relation to Svalbard.

Jurisdiction can be referred to as the "powers exercised by a state over persons, property or events"[183] By the time the third conference on the law of the sea convened (UNCLOS III), the provisions of the 1958 Convention on the Continental Shelf had passed into customary law,[184] but there still remained unresolved issues.[185] The concept of "common heritage of mankind" evolved and was discussed during the conference, which required a more solid definition of the outer limits of the continental shelf since the residual area would convert to the international seabed, an area outside national jurisdiction. According to LOSC, states were now entitled to a continental shelf that extended out to a distance of 200 nm regardless of whether their continental margin extended that far. Coastal states with margins beyond 200 nm would have sovereign rights and jurisdiction over this area out to a certain limit as set by the CLCS.

The rights and duties of the costal state were not significantly altered by the LOS Convention from the Geneva Convention.[186] Part VI of the LOS Convention regulates the continental shelf. The coastal state exercises over its continental shelf the sovereign right to explore and exploit its natural resources. The jurisdiction the coastal state can exercise over

[179] LOSC 77(1).
[180] Rothwell and Stephens (2010) p. 103 f.
[181] cf. LOSC 77(2).
[182] Rothwell and Stephens (2010) p. 104.
[183] Malanzcuk (1997) p. 109.
[184] O'Connell, Daniel P. (1983) *The International Law of the Sea*, vol 1, Shearer, I. A. (ed.) Oxford: Oxford University Press, pp. 475-76.
[185] Rothwell and Stephens (2010) p. 107.
[186] Ibid. p. 117.

the continental shelf is both territorial and extra-territorial in nature. The territorial jurisdiction includes the land, sea, air space and subsoil of a country's territory. Extra-territorial jurisdiction includes areas that need basis and recognition in international law such as universal port state jurisdiction, nationality principle of ships or universal principles.

4.2.2 The Svalbard Treaty and the Exercise of Sovereign Rights on the Continental Shelf

Svalbard can generate maritime zones which constitute parts of the Norwegian continental shelf and neither the Svalbard Treaty nor the LOS Convention prohibits this. There may, however, exist certain restrictions on how Norway can exercise its sovereign rights in relation to prescribing laws and enforcing these.

In order to discuss the jurisdiction of a state in a certain territory, the sovereignty of this state must first be established. By virtue of Svalbard Treaty article 1, the Treaty parties recognize that Norway has the "full and absolute sovereignty" over the Svalbard Archipelago. According to the Svalbard Act, [187] section 1, Svalbard forms part of the Kingdom of Norway and is subject to Norwegian sovereignty and jurisdiction with certain limitations. [188] The Act also describes the system of law on Svalbard. Section 2 of the Svalbard Act covers the scope of Norwegian legislation. Norwegian civil and penal law together with the legislation related to the administration of justice applies to Svalbard. Other statutory provisions apply only where this is specifically provided for.[189] The latter provision, covered by section 2, second paragraph applies only to statutory provisions, which means other rules of law can be applicable.[190]

The Russian professors Vylegzhanin and Zilanov argue that Norway does not have the competence to unilaterally establish an EEZ or claim a continental shelf around the archipelago and thus assert that Norway does not have the competence to take legislative and enforcement measures in areas beyond the territorial waters of Svalbard.[191] However, full Norwegian sovereignty implies the right to make and adopt laws and regulations on Svalbard. According to the Svalbard Act, Norwegian legislation related to private and penal law etc. applies to Svalbard. This makes it clear that the principle of Norwegian legislative powers and

[187] Act of 17 July 1925 No. 11 on Svalbard.
[188] Fleischer, Carl A. (1975) "Oil and Svalbard" *Nordisk Tidsskrift for International Ret*. 45 (7), p. 7.
[189] Svalbard Act, section 2.
[190] Fleischer (1983) p. 184.
[191] Vylegzhanin and Zilanov (2007), pp. 57, 82–83 and 67–68.

right to make decisions is valid on all areas where specific provisions do not provide otherwise.[192] There is in practice no limitation on Norway for issuing statutory provisions. However, these provisions must be prescribed in such a manner that they do not discriminate between nationals and State treaty parties so that the treaty parties are in a worse off position than Norwegian nationals.[193]

Although State treaty parties enjoy non-discriminatory rights to undertake different kinds of economic activities on the archipelago, Norway has jurisdiction to prescribe laws and regulations. The Svalbard Treaty Article 2 provides for the prescriptive jurisdiction of Norway, which enables her to prescribe nature conservation measures:

> Norway shall be free to maintain, take or decree suitable measures to ensure the preservation and, if necessary, the reconstitution of the fauna and flora of the said regions, and their territorial waters…[194]

Some states have asserted that contracting parties should be involved in the legislative process and that they have flag state jurisdiction to enforce the set regulations.[195] This claim is not warranted for two reasons: it may conflict the regime prescribed by LOSC Article 61 which relates to the utilization of living resources and because Article 1 of the Svalbard Treaty recognizes Norway's sovereignty and thereby its competence to take and enforce measures to protect the environment and its natural resources.[196]

According to the Norwegian view, and as supported by Professor Fleischer, Svalbard is an integral part of the Kingdom of Norway and is subject to Norwegian sovereignty. This sovereignty is limited by specific provisions as set out by Articles 2-9 of the Svalbard Treaty. The next section will examine the consequences of the application of the Svalbard Treaty to the continental shelf adjacent to Svalbard.

[192] Fleischer (1983) p. 180.
[193] Ibid.
[194] Svalbard Treaty Art. 2.
[195] Pedersen and Henriksen (2009) p. 160.
[196] Svalbard Treaty Art. 2.

4.3 Implications of the Application of the Svalbard Regulatory Framework on Activities Relating to the Exploitation of Non-Living Resources

4.3.1 Introduction

Different groupings of both international and national oil companies have for a long time put pressure on the oil industry and its operation on Svalbard. These companies would directly benefit from the application of the Svalbard Treaty to the continental shelf as it puts a restriction on the sovereignty of Norway.

The importance of mining on Svalbard was accentuated by the procedure set out by article 8 of the Svalbard Treaty on the adoption of the Mining Code. There is disagreement as to the legal status of the Mining Code which relate to whether the Code is binding as an international instrument or as a piece of Norwegian domestic legislation.[197] This is important to establish as it determines whether Norway has the right to make changes to the existing mining regulations without the consent of other states. According to Article 8 of the Svalbard Treaty, Norway undertook to provide mining regulations and the article further laid down limitations as to the contents and preparation of these.[198]

This chapter will first discuss whether the current mining regulations of the Svalbard regulatory framework apply to offshore activities relating to the exploitation of non-living resources. The adequacy of the existing framework will also be examined before discussing to what extent Norway can apply general Norwegian law to these activities on the continental shelf. A discussion on the non-discriminatory access as it is suggested that Norway may adopt supplementary regulations as long as these are not prohibited by the principle of non-discrimination.

[197] Churchill and Ulfstein (1992) p. 31.
[198] Fleischer (1975) p. 8.

4.3.2 Svalbard Mining Regulations

It is unclear whether the Mining regulations of the Svalbard regulatory framework apply to the modern offshore petroleum industry. Ulfstein argues that the Mining Code covers the activities of search, acquiring and exploitation of natural resources. Further, the Mining Code section 2.1 explicitly mentions mineral oils, which should leave no doubt that the Code applies to petroleum activities as well.[199] Fleischer also holds that "mining" in Article 3 which covers "all maritime, industrial, mining and commercial operations "…would seem to include oil."[200] However, this does not establish whether the existing framework is adequate to regulate the modern offshore petroleum industry.

There are certain difficulties connected with the application of the Mining Code to the continental shelf such as the principle of first finder's right and proof of discovery. The former would be hard to realize as traditionally according to the Mining Code, a discovery should be proved by handing in a sample along with other information.[201] This is not possible for petroleum resources, and the working practice has been to submit seismic results of geological indication instead of a physical sample. It would not be expected of Norway to open up a field simply on the basis of a geological indication without taking into consideration environmental and relevant technical concerns.[202] However, once a field is open, the first finder's right would once again apply.[203] This provides for a disorderly regime which is not very well suited to maintain important aspects of petroleum exploration such as environmental protection measures.

The object and purpose of the Svalbard Treaty is here of importance as the application of the Mining Code to the continental shelf should be seen in light of this. As there are certain shortcomings to the Mining Code it would be possible to apply the Mining Code through either proper interpretation or amendment according to the procedures laid down by article 8 of the Svalbard Treaty.[204]

[199] Ulfstein (1995) p. 194.
[200] Fleischer (1975) p. 7.
[201] Mining Code, Section 9.2 (d).
[202] Churchill and Ulfstein (1992) p. 52.
[203] Ibid.
[204] Ibid.

4.3.3 To What Extent Can Norway Apply General Norwegian Law?

Article 8(4) of the Svalbard Treaty provides that Norway had to present draft regulations to the other parties of the treaty. Should any of the parties object to the draft regulation, they would have to be adopted by an international commission consisting of a member from each of these states.[205] However, during the negotiations Norway took a different approach and consulted the Treaty parties and underwent extensive negotiations which prevented the occurrence of a formal objection.[206] The Code was adopted by Royal Decree of 7 August 1925 which means the Code is part of integral Norwegian law and may be amended by either a Royal Decree or an act passed by the Storting.[207]

If the Code were a treaty, it would be signed by all the Treaty parties. The Code is, however, not annexed to the Svalbard Treaty as an integral part of the Treaty like the regulations for dealing with claims to land on the archipelago.[208] Fleischer holds that the Code is Norwegian legislation and thus not internationally binding.[209] He also holds that there are no rules on the procedure to be followed in case there were to be any amendments to the mining regulations. Other authors on the other hand, assert that the Code is internationally binding for Norway, in which case Norway would no be able to amend the regulations without the consent of other states.[210]

To this day, the Code has not been amended, although on 3 June 1996 the Norwegian Ministry of Industry issued procedures for obtaining claims to natural resources on the continental shelf by allowing for other means of proof than physical samples.[211] As the current mining regulations are unsatisfactory to the technical development in the petroleum industry, this would serve as a restriction on Norway and its competence to issue new and modern regulations for the exercise of petroleum activity on the Svalbard continental shelf. However, these restrictions do not preclude the right to issue legislation to protect the environment.[212] Further, a company claiming rights to carry out petroleum exploration and exploitation cannot demand that its activity be regulated by the Mining Code alone.[213]

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[205] Ulfstein (1995) p. 136.
[206] Ibid. p. 137.
[207] Ibid.
[208] Churchill and Ulfstein (1992) p. 31.
[209] Fleischer (1983) p. 179.
[210] See Castberg, Frede (1950) *Utredninger om Folkerettsspørsmål 1922-1941*. Oslo: Ministry of Foreign Affairs.; Ulfstein (1995) Part 2.6
[211] Pedersen (2006) p. 343.
[212] Fleischer (1975) p. 10.
[213] Ibid. p. 11.

The Arctic is especially vulnerable to pollution, and an oil spill in these waters could potentially be devastating to the environment. Effects include operational discharges to the sea of environmental poison and petroleum and physical impacts on the seabed and on marine mammals as a consequence of seismic surveys.[214] Norway has developed an integrated management plan for the Barents Sea, taking into account its status as a valuable and particularly sensitive area. The Barents Sea Management Plan covers an area of approximately 1 400 000 km2, an area which includes Svalbard. As a consequence of the established sovereignty Norway has over Svalbard, it is competent to prescribe laws and regulations to the extent they are not prohibited by the non-discriminatory principles of the Svalbard Treaty. The next section will elaborate on the non-discriminatory principle of equal access.

4.3.4 Non-Discrimination

The Svalbard Treaty aims at prohibiting discrimination on the basis of nationality by maintaining the previous terra nullius rights on the archipelago.[215] The principle of non-discrimination as provided for by the Svalbard Treaty article 3(1), is a precondition for the other non-discretionary rights provided by the Svalbard Treaty:[216]

> 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…[217]

These activities are related to, but not limited to, the right to undertake maritime, industrial, mining and commercial activities. Mining activities include, as established, offshore petroleum activities relating to the exploitation of non-living resources.

[214] Report No. 8 (2005-2006) p. 61.
[215] Ulfstein (1995) p. 18.
[216] Ibid. p.178.
[217] Svalbard Treaty, Art. 3.

The rights the State parties enjoy are both full and limited. They enjoy the right of equal access and entry "for any reason or object whatever…" to the maritime areas and ports of Svalbard. However, the right to access the rest of the territories of Svalbard is subject to the relevant provisions regulating activities on the archipelago. These rights are specified in Article 2(1) and relate to hunting and fishing "in the territories specified in Article 1 and in their territorial waters". Parties must also be allowed access to other parts of Svalbard which are not specifically mentioned in article 3(1) for such purposes.[218]

Ulfstein concludes that the right of access and entry applies to the whole land territory of Svalbard and its territorial waters.[219] However, as seen before, Norway has prescriptive jurisdiction which enables her to prescribe laws and regulations that will apply to Svalbard. Conservation measures related to hunting and fishing are covered by article 2(1) and 2(2). "Similarly", measures to protect the nature against industrial, commercial and mining activities such as petroleum extraction are covered by article 2(2) and article 3(1) and (2).[220]

Should the principles of the Svalbard Treaty's article 8 and the Mining Code be made applicable to the continental shelf, companies would have the right to make claims to resources. The Mining Code provides that "[t]he right of searching for and acquiring and exploiting natural deposits of coal, mineral oils and other mineral rocks…" may be acquired "subject to the observance of the provisions of this Mining Code and on equal terms with regard to taxation and in other respects…"[221]

In relation to the previous discussion, the question of right to mining licenses is raised on to which extent Norway is allowed to control acquisition of mining licenses. Norway in fact has a strict policy on this and held already in the first report on Svalbard that the Bergmester is not entitled to reject an application for a claim if the claimant has followed the proper procedures as set out by the Mining Code.[222] The reference to the "right" and "demand" the Bergmester can set supports this view.[223] The conclusion is therefore that Norway, in the power of the Bergmester, does not have unrestricted rights to reject companies from the contracting state parties mining licences.

In relation to environmental protection which is pointed out throughout this thesis as being of vital importance to Norway, the restriction put on Norway and the Bergmester includes cases where the ability of a company to be able to exercise effective control over their activity in

[218] Ibid. p. 179.
[219] Ibid. p. 180.
[220] Ibid. p. 189.
[221] Mining Code, Section 2 (1).
[222] Report No. 39 (1974-1975) p. 23, cited in Ulfstein (1995) p. 322.
[223] Ulfstein (1995) p. 323

relation to environmental pollution is questionable. However, as established previously, Norway has the power to make amendments and apply regulations to protect the environment to the extent it does not contravene with the Svalbard regulatory framework. As established, the environment on Svalbard and the surrounding maritime areas is under the protection of an extensive framework of provisions as provided for both in the Svalbard regulatory framework, national Norwegian legislation and of course in all the international treaties and frameworks related to the protection of the environment, including the LOS Convention. It should thus be concluded that the implications of the application of the Svalbard Treaty and its attached regulatory framework to the continental shelf will not cause an entirely disorderly regime in terms of environmental perspectives or on more technical aspects related to the exploitation of natural resources on the continental shelf.

5. Conclusions

This thesis has provided an examination of the controversial issue of Svalbard and its legal history, its legal status and the implications of the legal framework on the exploitation of non-living resources on the continental shelf off Svalbard as caused by the expanding petroleum industry in the far north.[224] The original Norwegian position developed in the 1960s when discoveries of petroleum on the Norwegian continental shelf were established. Norway held that the Svalbard Archipelago constituted part of the natural prolongation of the continental shelf of mainland Norway. This is true in geological terms, but as established in this thesis, does not apply in legal terms. The Norwegian government stands by its original position, but as it has been shown, there is a discrepancy between state practice and state policy. This may be indicative of a change in position.

There has been uncertainty attached to the application of the Mining Code to maritime areas adjacent to Svalbard and this relies to a great extent on the unresolved question on whether Svalbard generates maritime zones itself. This thesis has sought to conclude that this is the case by examining the legal basis for the Norwegian position and its development according to the international law of the sea and also other factual circumstances such as maritime delimitation and the establishment of outer limits of the continental shelf. The two latter issues have also been conclusive evidence to conclude that the Norwegian position has changed, or at least is in a phase of transition as the original argument relied on the law of the sea as it developed in the 1950s and 1960s. The recent practice related to the establishment of outer limits and the use of Svalbard as basis for baselines in maritime delimitation may be indicative that Norway has accepted a change in position and is basing it on the modern international framework of the law of the sea which is necessary in order to deal with the many changes in climate and the development of technology.

[224] Hreinsson, Hjalti Þór (2012) "Svalbard for petroleum activities?" *Arctic Portal*. Available at: http://arcticportal.org/news/23-energy-news/907-svalbard-for-petroleum-activities (August 2013).

It is clear that in the future, the issue of the legal status of the Mining Code will need to be resolved should the pressure to open op for activities related to exploitation of non-living resources on the Svalbard continental shelf increase. The result may be that the Code is considered to be an international treaty in which an international commission consisting of all Treaty parties would have to consent to an amendment. However, as Norwegian sovereignty and jurisdiction is established, any adapted rules would not be able to preclude Norwegian regulations on environmental protection.

Norway would still have the right to adopt environmental and safety regulations for petroleum activity on the shelf.[225] Article 2 of the Treaty provides for the legislation of suitable preservation and conservation measures. Should the parties' equal rights regime apply on the continental shelf, it could lead to a "too extensive oil activity, to the detriment of both environmental and strategic concerns."[226] Thus, even though other states may be allowed to undertake petroleum activities, Norway still has a right, or even a duty, to take into consideration these factors when regulating oil activities. A reference here can be made to the preamble and article 9 of the Svalbard Treaty which clearly indicates the importance the drafters attached to the "peaceful utilization of Svalbard".[227]

The issue of Svalbard and its maritime zones has long been disputed. The interest in developing the petroleum industry on the archipelago has put pressure on the need for resolving these issues. There does not seem to be any chance of reaching a satisfactory conclusion yet.[228] The debate seems to have reached a stalemate as there has been few academic contributions the last few years.

This thesis has been very interesting to work with as there has been a need to establish long lines in terms of having to decide on the most important aspects of the history of Svalbard to present as it is so vast and limiting it to the bare minimum without compromising the necessary information the reader needs to be presented with. Also in terms of having to from this point of departure and venture into a new section of the Svalbard history which has not yet been explored as there still is no "solution" the various disputes on Svalbard. One of the challenges of this thesis is the limited amount of resources available in terms of quantity and length it presents. To examine the implication of the Svalbard Treaty and its attached framework to activities relating to exploitation of natural resources on the continental shelf is almost impossible in a thesis of this size as there could be several books published on the

[225] Fleischer (1975) p. 10.
[226] Churchill and Ulfstein (1992) p. 45.
[227] Ibid.
[228] Churchill and Ulfstein (2010).

subject. Some of the things this thesis does not discuss is therefore technical aspects related to the exploitation of petroleum resources such as the issue of "first finder's right" according to the Mining Code, the system for obtaining licences and safety and work regulations. These are all interesting issues which deserve to be discussed in a more appropriate academic work of a greater size.

As for the solution to the disputes related to Svalbard, I will not make any qualified suggestions as this has previously been examined in detail by Churchill and Ulfstein.[229] On the other hand, it should be emphasized that despite of the conclusion that there does exist a framework which is suitable to the degree it does not provide for an unruly regime in the case of the application of the Svalbard Treaty to the continental shelf, the constant pressure to open northern areas for petroleum exploration will require a more substantive legal framework in the future. * At the Arctic Frontiers Conference held in Tromsø, January 2013, Mr. Ulfstein stated that the issue of petroleum interests could trigger the dispute on Svalbard.[230] How the situation will develop as foster a solution will have to depend on the existing framework and the recognition by Norway that they need to establish a legal position which is in accordance with the modern law of the sea and is robust enough to deal with the challenges the future of exploitation of natural resources on the continental shelf in the Arctic will hold.

Trondheim, 2 September 2013.

[229] Churchill and Ulfstein (2010) pp. 588-592.
[230] Ulfstein, Geir (2013) "The Oil Interests May Trigger the Svalbard Dispute". Available at: http://ulfstein.net/2013/01/10/the-oil-interests-may-trigger-the-svalbard-dispute/ (July 2013).

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Appendix I: The Svalbard Treaty (excluding Annexes)

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:

The President of the United States of America:

Mr. Hugh Campbell Wallace, Ambassader Extraordinary and Plenipotentiary of the United States of America at Paris;

His Majesty the King of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India:

The Right Honourable the Earl of Derby, K.G., G.C.V.O., C.B., His Ambassador Extraordinary and Plenipotentiary at Paris;

And

for the *Dominion of Canada:* The Right Honourable Sir George Halsey Perley, K.C.M.G., High Commissioner for Canada in the United Kingdom;

for the *Commomvealth of Australia:*

The Right Honourable Andrew Fisher, High Commissioner for Australia in the United Kingdom;

for the *Dominion of New Zealand:*

The Right Honourable Sir Thomas MacKenzie, K.C.M.G., High Commissioner for New Zealand in the United Kingdom;

for the *Union of South Africa:* Mr. Reginald Andrew Blankenberg, O.B.E, Acting High Commissioner for South Africa in the United Kingdom;

for *India:*

The. Right Honourable the Earl of Derby, K.G., G.C.V.O., C. B.;

His Majesty the King of Denmark:

Mr. Herman Anker Bernhoft, Envoy Extraordinary and Minister Plenipotentiary of H.M. the King of Denmark at Paris;

President of the French Republic:

Mr. Alexandra Millerand, President of the Council, Minister for Foreign Affairs;

His Majesty the King of Italy:

The Honourable Maggiorino Ferraris, Senator of the Kingdom;

His Majesty the Emperor of Japan:

Mr. K. Matsui, Ambassador Extraordinary and Plenipotentiary of H.M. the Emperor of Japan at Paris;

His Majesty the King of Norway:

Baron Wedel Jarlsberg, Envoy Extraordinary and Minister Plenipotentiary of H.M. the King of Norway at Paris;

Her Majesty the Queen of *the Netherlands:*

Mr. John London, Envoy Extraordinary and Minister Plenipotentiary of H.M. the Queen of the Netherlands at Paris;

His Majesty the King of Sweden:

Count J.-J.-A. Ehrensvärd, Envoy Extraordinary and Minister Plenipotentiary of H.M. the King of Sweden at Paris;

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

Article 1.

The High Contracting Parties undertake to recognise, subject to the stipulations of the present Treaty, the full and absolute sovereignty of Norway over the Archipelago of Spitsbergen, comprising, with Bear Island or 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 Foreland, together with all islands great or small and rocks appertaining thereto (see annexed map).

Article 2.

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

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

Occupiers of land whose rights have been recognised in accordance with the terms of Articles 6 and 7 will enjoy the exclusive right of hunting on their own land: (1) in the neighbourhood of their habita tions, 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 exercice 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 natiolals, ships or goods being for this purpose assimilated to those of the other High Contracting Parties, and not reated more favourably in any respect.

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

Article 4.

All public wireless telegraphy stations established or to be established by, or with the authorisation of, the Norwegian Government within the territories referred to in Article 1 shall always be open on a footing of absolute equality to communications from ships of all flags and from nationals of the High Contracting Parties, under the conditions laid down in the Wireless Telegraphy Convention of 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 recognise the utility of establishing an international meteorological station in the territories specified in Article 1, the organisation of which shall form the subject of a subsequent Convention.

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

Article 6.

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

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

Article 7.

With regard to methods of acquisition, enjoyment and exercise of the right of owner ship 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 confirmity with the stipulations of the present Treaty.

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

Article 8.

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

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

So far, particularly, as the exportation of minerals is concerned, the Norwegian Government shall have the right to levy an export duty which shall not exceed 1 % of the maximum value of the minerals exported up to 100.000 tons, and beyond that quantity the duty will be proportionately diminished. The value shall be fixed at the end of the navigation season by calculating the average free on board price obtained.

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

Article 9.

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

Article 10.

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

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

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

Ratifications shall be deposited at Paris as soon as possible.

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 Plenipotentiaires 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.

Source: http://www.lovdata.no/traktater/texte/tre-19200209-001.html

Appendix II: Map over Svalbard

Source:
http://upload.wikimedia.org/wikipedia/commons/thumb/0/00/Topographic_map_of_Svalbard.svg/2000px-Topographic_map_of_Svalbard.svg.png