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Svalbard's Maritime Zones, their Status under International Law and Current and Future Disputes Scenarios

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Abstract

The dispute on the applicability of the Svalbard Treaty in Svalbard's Fisheries Protection Zone (FPZ) and on its continental shelf has lasted for over 30 years. In this respect, it is unlikely that States' positions may change and that the involved States will find a solution in near future. The paper comes to the conclusion that the Svalbard Treaty and its non-discriminatory rights apply in Svalbard's FPZ and on Svalbard's continental shelf.

The diverging views on the applicability of the Svalbard Treaty in Svalbard's maritime zones and on the extent of Norway's and the other States Parties' rights therein caused tensions, especially as regards fisheries and the potential exploitation of petroleum around Svalbard. The paper concludes that all States Parties to the Svalbard Treaty which participate in fishing activities in Svalbard's FPZ seem to accept the Norwegian management and protection regime, especially the allocation of fish quota. However, some States Parties, in particular Spain, have expressed serious objections against Norway's enforcement measures towards foreign fishing vessels in the FPZ. Finally, the above mentioned conflicts may intensify as soon as exploration and exploitation activities for oil and gas on the continental shelf around Svalbard have started because of the important economic potential of such resources. A solution which is consistent with International Law and implements, in particular, the existing international environmental norms is needed – before any meaningful exploration and exploitation activities on Svalbard's continental shelf take place.

1. Introduction[1]

For decades, Spitsbergen, nowadays referred to as Svalbard Archipelago[2], did not attract much public interest. Only few were interested in the political and legal disputes concerning this Arctic archipelago. Climate change and related impacts such as melting of sea ice, permafrost soils and glaciers suggest new economic development opportunities for the Arctic Region: increased exploitation of minerals, especially offshore; increased fishing activities as a result of fish stocks moving further northwards; and shipping through the Canadian North-West-Passage and the Northern Sea Route in the Russian Arctic, to name the three most important ones.[3] These prospects did not only raise public interest in this very northern region, but also caused new political and legal conflicts and gave rise to old disputes and frictions. In the light of these developments, the need for environmental protection and an environmentally sound and sustainable development of economic activities has become more urgent than ever.

Against this background, this paper deals with the current and future legal and political issues concerning the Svalbard Archipelago, with reference to International Law, especially the Svalbard Treaty of 1920[4] and International Law of the Sea, in particular the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS")[5]. The paper argues for the applicability of the Svalbard Treaty in Svalbard's Fisheries Protection Zone (hereinafter "FPZ") and on Svalbard's continental shelf. Following this theoretical discussion, the paper focuses in particular on fisheries and potential petroleum exploitation around Svalbard, and on environmental protection problems connected to these activities. Besides these issues, research and tourism have become more and more important in the Svalbard area.

The paper is structured in four main parts: Following this introduction, the second part provides a brief overview on the geography, historical developments and main economic activities in the Svalbard Area. The third part is dedicated to the Svalbard Treaty of 1920 which granted Norway sovereignty over Svalbard and other States Parties certain non-discriminatory rights. The geographical application of the Svalbard Treaty in Svalbard's maritime zones, i.e. in the territorial sea, the FPZ and on the continental shelf is, in this regard, the crucial question. The fourth part identifies current and future dispute scenarios regarding Svalbard's maritime zones, focussing on the two most important and disputed issues, i.e. living marine resources (fisheries) and non-living ma-

[1] The author would like to thank *Dr. Torbjørn Pedersen* and *Prof. Dr. Tore Henriksen*, both University of Tromsø, *Dr. Andreas Maurer* and *Antje Neumann, LL.M.*, both German Institute for International and Security, as well as *Franziska Mannke, B. A. int., BBA, MIBA,* Hamburg University of Applied Sciences, for their helpful comments and clarifications. The author is solely responsible for any remaining errors or shortcomings.

[2] While Spitsbergen is the older English and Dutch name and the name used in the Svalbard Treaty of 1920, Svalbard is the modern name of the territory and will be used in the present study.

[3] See *L.A. de La Fayette*, Oceans Governance in the Arctic, in: IJMCL 23 (2008), (531) 542. See also *A. Neumann*, The EU – A relevant actor in the field of climate change in respect to the Arctic?, SWP Working Paper FG 02, 2010/03, July 2010, 5 et seq.

[4] Treaty concerning the Archipelago of Spitsbergen, signed 9 February 1920, entered into force 14 August 1925, 2 LNTS 7; available at: http://www.ub.uio.no/ujur/ulovdata/lov-19250717-011-eng.pdf (last visited June 2012).

[5] United Nations Convention on the Law of the Sea, concluded 10 December 1982, entered into force 16 November 1994, 1833 UNTS 396; available at: http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm. Norway signed UNCLOS on 10 December 1982 and ratified it on 24 June 1996, see http://www.un.org/Depts/los/reference_files/status2010.pdf (last visited June 2012).

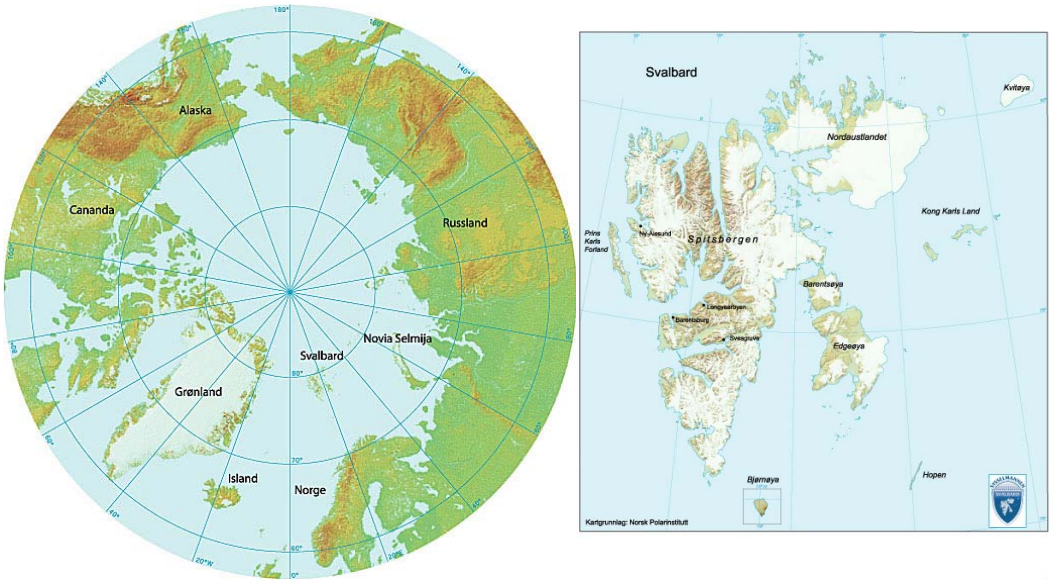
rine resources (oil and gas). In this context, environmental protection and sustainable development and use of resources are of utmost importance. The fifth part draws some conclusions and gives an outlook on possible future scenarios.

2. Geography, History and Main Economic Activities[6]

Svalbard is an Arctic archipelago lying in the Barents Sea, between Norway and the North Pole.[7] It includes the islands of Spitsbergen, North-East Land, Barents Island, Edge Island and Bear Island and rocks appertaining thereto.

Svalbard is an area of about 61.000 square kilometres. Approximately 60 % of the Svalbard Archipelago is covered by ice. The maritime areas of Svalbard are normally free from ice between May and November. Because of the permafrost there are no trees, but many kinds of plants can be found. Mammals include polar bears, different kinds of seals, Svalbard reindeer, and the Arctic fox.

Without an own indigenous population, Svalbard's most important settlements are Longyearbyen (about 2000 people, mostly Norwegians) which is also the administrative heart of the Archipelago, and Barentsburg (500-700, mostly Russians and Ukrainians). Both settlements were traditionally based on coal mining. Since the early 1990s, tourism, research and higher education activities have increased significantly.



Source: Homepage of the Governor of Svalbard, available at: http://www.sysselmannen.no/hovedEnkel.aspx?m=45272 (last visited June 2012).

In terms of history, Svalbard was discovered by the Dutchman Willem Barents in 1596. From the beginning of the 17th century, reports about Svalbard's rich marine resources

[6] This second part of the study is mainly based on the following sources if not indicated otherwise: *G. Ulfstein*, Spitsbergen/Svalbard, Max Planck Encyclopedia of Public International Law, www.mpepil.com, Para. 1 et seqq.; *T. Pedersen*, The Svalbard's Continental Shelf Controversy: Legal Disputes and Political Rivalries, in: ODIL 37 (2006), (339) 341 et seq.; see also homepage of the Governor of Svalbard, available at: http://www.sysselmannen.no/hovedEnkel.aspx?m=45272 (last visited June 2012).

[7] Geographic coordinates: between 74°N and 81°N and 10°E and 35°E (so called "Svalbard box"). See for the "box approach" and International Law of the Sea *D.H. Anderson*, The Status Under International Law of the Maritime Areas Around Svalbard, in: ODIL 40 (2009), (373) 375.

led to increased hunting by several nations, mostly for whales and walrus. During the 17th and 18th century, Denmark claimed sovereignty over Svalbard, yet this had been rejected especially by King James I of England. The Netherlands, France and Spain claimed their right to hunt whales according to the principle of *mare liberum*, as advocated by the Dutchman Hugo Grotius in 1609. According to this principle of the freedom of the high seas no State may claim sovereignty over the ocean which shall be accessible to all States for shipping, trade and fisheries. At that time, no State was able to enforce any authority over the exploitation of Svalbard's resources. Unregulated hunting thus resulted in the total collapse of the resources. After this overexploitation, Svalbard did not attract much international interest for several decades.

During the 19th century Svalbard acquired a new legal *terra nullius* status, i.e. territory over which no State claims sovereignty (no man's land). From 1859 on, research and expeditions became increasingly important, especially for the systematic collection of scientific data. In order to protect its scientific research, the Swedish-Norwegian government aimed at taking possession of Svalbard in 1871. Russia, however, objected and Svalbard continued to be *terra nullius*.

The exploration for and exploitation of coal from the beginning of the 20th century on resulted in new conflicts. A new legal regime was necessary to enable the effective management and regulation of resources. Sweden, Russia and Norway (after having gained independence from Sweden in 1905) proposed in 1907 that Svalbard should continue *terra nullius*, but should be governed by Sweden, Russia and Norway (as a *condominium*). A *condominium* is a territory over which two or more States formally agree to share sovereignty and exercise their sovereignty jointly. Germany and the United States (hereinafter "US"), however, seriously objected to this concept. At a conference convened in 1914, Germany and the US insisted on participating in the governance regime of Svalbard, whereas especially Russia rejected this approach. No agreement was reached before the outbreak of World War I.

After World War I, Norway requested the Paris Peace Conference to examine the legal status of Svalbard and demanded that Norway should be granted sovereignty over Svalbard. For this purpose, the Paris Peace Conference established the Spitsbergen Commission and asked Norway to draft a convention on the status and administration of Svalbard. The draft presented was based on the idea of Norwegian sovereignty while preserving earlier *terra nullius* rights by granting equal rights to the other States involved with regard to hunting, fishing and other maritime, industrial and commercial activities. Sweden and the Netherlands suggested that Norway should be accorded Svalbard as a mandate under the League of Nations. The Spitsbergen Commission had no difficulties in reaching an agreement, which, to great extent, was consistent with the Norwegian draft convention. The Svalbard Treaty was signed on 9th February 1920 and entered in force on 14th August 1925.

After World War II, only Norway and the Union of Soviet Socialist Republic (hereinafter "USSR") continued coal mining. Oil drilling from the 1960s on became a new activity, involving new nations and economic actors which drew public attention to the non-discrimination rights of the Svalbard Treaty and the need for protection of the marine environment. It was not until the mid-1970s that Norway aspired to implement its sovereignty in practice. In the first instance, Russia protested against the Norwegian environmental safety regulations on oil drilling, traffic and aviation. Since the 1980s Russia

has, however, become more inclined to accept the exercise of Norwegian sovereignty. In recent years, activities within the Svalbard Archipelago have been diversified with the increase in tourism, scientific research and university studies.

Today, there are 40 States Parties to the Svalbard Treaty (hereinafter "ST"), amongst the important Arctic actors Canada (ratification in 1923), the US and Norway (both 1924), Finland (1925) and Russia (1935). The EU is not a Party to the Svalbard Treaty. Under Art. 10 ST "third Powers" may adhere to the ratified Treaty. The term "Power" must be read as "State" because of the historical context of the Svalbard Treaty and the interrelation of the notion "Power" with the concept of State Power. Therefore, the EU was not seen to be eligible as a Contracting Party to the Svalbard Treaty.[8]

The Treaty of Lisbon[9] established the legal personality of the European Union which is now laid down in Art. 47 Treaty on European Union (hereinafter "TEU")[10]. The legal personality enables the European Union to, *inter alia*, conclude agreements with one or more third States or international organisations or become party to international treaties (see also Art. 216 Treaty on the Functioning of the European Union (hereinafter "TFEU")[11]). In this respect, it is important to note that the European Union develops towards an unrestricted legal personality analogues to a State.[12] This may also change the interpretation of the notion "third Powers" in Art. 10 ST. However, due to the particularities of the Svalbard Treaty which established a special territorial regime (so called "Statusvertrag")[13] and the strong interrelation of the Svalbard Treaty to the concept of State power, it is not probable that the strict interpretation of the notion "third Powers" in Art. 10 ST will change and that the European Union will become a Party to the Svalbard Treaty.

3. The Svalbard Treaty of 1920

As regards exploitation of resources and environmental protection, two issues have raised problems during the last decades: Fisheries management in the 200-nautical mile (hereinafter "nm") Fisheries Protection Zone (hereinafter "FPZ") and managing future oil activities on the continental shelf around Svalbard. Both matters are closely linked to the application of the Svalbard Treaty (hereinafter "ST") in Svalbard's maritime zones and to the scope and extent of Norway's sovereign rights and the non-discriminatory rights of other States Parties therein.

[8] The EU has, however, ratified UNCLOS. According to Art. 306 UNCLOS, the Convention is subject to ratification by States and the other entities referred to in Art. 305 UNCLOS which are, *inter alia*, international organizations, in accordance with Annex IX (Art. 305 Para. 1 lit. (f) UNCLOS). Art. 1 Annex IX (Participation by International Organizations) states that for the purposes of Art. 305 UNCLOS and of this Annex, "international organization" means an intergovernmental organization constituted by States to which its member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of those matters. These articles have been, first and foremost, designed for EU accession to UNCLOS.

[9] See http://www.consilium.europa.eu/uedocs/cmsUpload/cg00014.en07.pdf (last visited June 2012).

[10] See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0013:0046:EN:PDF (last visited June 2012).

[11] See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:EN:PDF (last visited June 2012).

[12] See *H.-J. Cremer/K. Schmalenbach*, in: Calliess/Ruffert (eds.), EUV/AEUV, 4th edition, 2011, Art. 216 Rn. 2.

[13] See in this regard *E. Klein*, *Statusverträge im Völkerrecht*, 1980.

3.1. Norwegian Sovereignty over Svalbard and National Legislation[14]

Norwegian sovereignty in itself over the Svalbard Archipelago is not disputed anymore. Art. 1 ST stipulates that 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 (…)." The preamble of the ST states the following: "Desirous, while recognising the sovereignty of Norway over the Archipelago in Spitsbergen (…)."

"(F)ull and absolute" sovereignty means that Norway exercises the same sovereignty as any other State over its territory "subject to the stipulations of the present Treaty".[15] According to this wording, Norway's sovereignty was only recognized in connection with the other States Parties' non-discriminatory rights which place far-reaching restrictions on Norway's sovereignty, *per se* and *ab initio*, i.e. from the instant of the act.[16]

Norway's sovereignty is recognized by all States Parties to the Svalbard Treaty. Norway's sovereignty over Svalbard must, however, be considered binding also on Non-Parties to the Svalbard Treaty under customary international law, as an effect of Norwegian effective occupation and exercise of sovereignty and the lack of protest from other States.

Norway's sovereignty implies the right to adopt laws and regulations on Svalbard as well as their enforcement.[17] Under Sect. 1 Svalbard Act of 1925[18], Svalbard forms part of the Kingdom of Norway. Sect. 2 Svalbard Act states that Norwegian civil and penal law and the Norwegian legislation relating to the administration of justice apply to Svalbard, where nothing to the contrary has been provided. Other statutory provisions do not apply to Svalbard, unless specifically provided. The King of Norway may issue general regulations concerning, *inter alia*, mining, fishing and other industries and concerning protection of animals and plants (Sect. 4 Svalbard Act). For the present paper, the following regulations are of special importance: the Mining Code of 1925[19], the Svalbard Environmental Protection Act of 2001[20] and the Regulations relating to har-

[14] This chapter is mainly based on the following sources if not indicated otherwise: *G. Ulfstein*, Spitsbergen/Svalbard, Max Planck Encyclopedia of Public International Law, www.mpepil.com, Para. 21 et seqq.; *J.P.A. Bernhardt*, Spitzbergen: Jurisdictional Friction over Unexploited Oil Reserves, Cal. W. Int'l L. J. 4 (1973-1974), (61) 62 et seqq.; *G. Ulfstein*, The Svalbard Treaty: From Terra nullius to Norwegian Sovereignty, 1995.

[15] The French relevant text reads as follows: "(...) dans les conditions stipulées par le présent Traité, la pleine y entière souveraineté de la Norvège sur l'archipel du Spitsberg (...)."

[16] See *B. Kempen*, Der völkerrechtliche Status der Inselgruppe Spitzbergen, 1995, 54 et seqq.

[17] Norway may also act on the external level and take care of foreign policy affairs relating to Svalbard, including entering into treaties about Svalbard. Agreements concluded by Norway will also comprise Svalbard, unless Svalbard is excluded by the Treaty or Norway has made a reservation as to its geographical application. For example, Protocol 40 on Svalbard to the 1992 Agreement on the EEA excludes Svalbard from its application (see details footnote 90).

[18] Act of 17 July 1925 relating to Svalbard; available at: http://www.ub.uio.no/ujur/ulovdata/lov-19250717-011-eng.pdf (last visited June 2012).

[19] The Mining Code (the Mining Regulations) for Spitsbergen (Svalbard), laid down by Royal Decree of 7 August 1925 as amended by Royal Decree of 11 June 1975; applicable at: http://www.ub.uio.no/ujur/ulovdata/lov-19250717-011-eng.pdf (last visited June 2012). For an analysis see *J.P.A. Bernhardt*, Spitzbergen: Jurisdictional Friction over Unexploited Oil Reserves, Cal. W. Int'l L. J. 4 (1973-1974), (61) 81 et seqq.

[20] Act of 15 June 2001 No. 79 Relating to the Protection of the Environment in Svalbard; available at: http://www.regjeringen.no/en/doc/Laws/Acts/Svalbard-Environmental-Protection-Act.html?id=173945#,

vesting of the fauna on Svalbard of 2002[21]. The relevant provisions of these laws and regulations will be examined below.

3.2. Non-Discriminatory Rights of other States Parties[22]

As noted above, the Svalbard Treaty places far-reaching restrictions on Norway's sovereignty and sovereign rights: Other Contracting Parties to the Svalbard Treaty have several non-discriminatory rights, especially the right to non-discriminatory access to economic exploitation and the right of equal treatment (Arts. 2, 3 ST). Among the subject-matters covered by non-discrimination rights are nature conservation, hunting, fishing, mining, industrial, maritime and commercial activities, i.e. most of the important activities carried out in the Svalbard area – except of research (see below).

The substantive scope of non-discrimination must be determined in relation to each of the specific provisions, the wording of which varies. Art. 2 Para. 1 ST stipulates that "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." Art. 3 Para. 1 ST grants "nationals of all the High Contracting Parties 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." According to Art. 3 Para. 2 ST, they "shall be admitted under the same conditions of equality to the exercise and practice of all maritime, industrial, mining or commercial enterprises both on land and in the territorial waters (…)." As to acquisition and ownership of property including mineral rights, Norway undertakes to grant to all nationals of the High Contracting Parties a treatment based on complete equality and in confirmity with the stipulations of the present Treaty (Art. 7 Para. 1 ST). Art. 2 Para. 2 ST contains a more detailed description of the principle of non-discrimination with regard to measures to ensure the preservation and, if necessary, the reconstruction of the flora and fauna stressing explicitly that "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."

The Svalbard Treaty prohibits direct and indirect discrimination on grounds of nationality and both in law and in fact. This does, however, not entail a prohibition against regulating or even forbidding certain activities. Norway has the right to regulate activities or even to prohibit them, e.g. for protection purposes, if it does not treat nationals or companies of other States Parties different to its own.

amendments to the act in English only available until 2001 (last visited June 2012).

[21] Regulations relating to harvesting of the fauna on Svalbard, Adopted by the Ministry of the Environment on 24 June 2002 under sections 31 and 32 of the Act of 15 June 2001 No. 79 relating to the protection of the environment in Svalbard (Svalbard Environmental Protection Act); available at: http://www.sysselmannen.no/hovedEnkel.aspx?m=45304 (last visited June 2012).

[22] This chapter is mainly based on the following sources if not indicated otherwise: *G. Ulfstein*, Spitsbergen/Svalbard, Max Planck Encyclopedia of Public International Law, www.mpepil.com, Para. 21 et seqq.; *J.P.A. Bernhardt*, Spitzbergen: Jurisdictional Friction over Unexploited Oil Reserves, Cal. W. Int'l L. J. 4 (1973-1974), (61) 62 et seqq.; *G. Ulfstein*, The Svalbard Treaty: From Terra nullius to Norwegian Sovereignty, 1995.

3.3. Application of the Svalbard Treaty in Svalbard's Maritime Areas

The wording of the Svalbard Treaty is not entirely clear about its application in Svalbard's maritime areas. Some articles of the Svalbard Treaty explicitly refer to "the territories specified in Article 1" (Art. 2 Para. 1 ST), to "their territorial waters" (Art. 2 Para 1 ST), and to "the waters, fjords and ports of the territories specified in Article 1" (Art. 3 Para. 1 ST). The Svalbard Treaty uses the older notion "territorial waters" which is synonymous to the more frequently used notion and concept of "territorial sea" of modern International Law of the Sea, especially UNCLOS. Further, the Svalbard Treaty does not refer to modern Law of the Sea concepts such as continental shelf, Exclusive Economic Zone (hereinafter "EEZ") and Fishery Protection Zone (hereinafter "FPZ") as these concepts have not been developed at the time when the Svalbard Treaty was concluded (see details below).

Therefore, it is crucial to determine whether and to what extent the Svalbard Treaty is applicable in Svalbard's territorial sea (and internal waters), FPZ and on Svalbard's continental shelf. Is Norway entitled to establish new maritime zones around Svalbard? Do other States Parties enjoy the non-discriminatory rights of the Svalbard Treaty also in maritime areas beyond the territorial sea? Can Norway exercise coastal State jurisdiction in these areas?[23]

While the application of the Svalbard Treaty in the territorial sea is not controversial (3.3.1.), its applicability in the FPZ (3.3.2.) and on the continental shelf (3.3.3.) is highly disputed. In State practice as well as in literature, three main positions have emerged: The view that Norway has exclusive rights in these zones, unrestricted by the Svalbard Treaty; the opposite position that Norway has no rights beyond the territorial sea; and the intermediary view that Norway has jurisdiction and sovereign rights beyond the territorial sea while the provisions of the Svalbard Treaty, especially the non-discriminatory rights, are applicable. One important question here is the relationship between the Svalbard Treaty and UNCLOS in respect of the *lex prior-lex posterior* principle and the *lex specialis* principle.

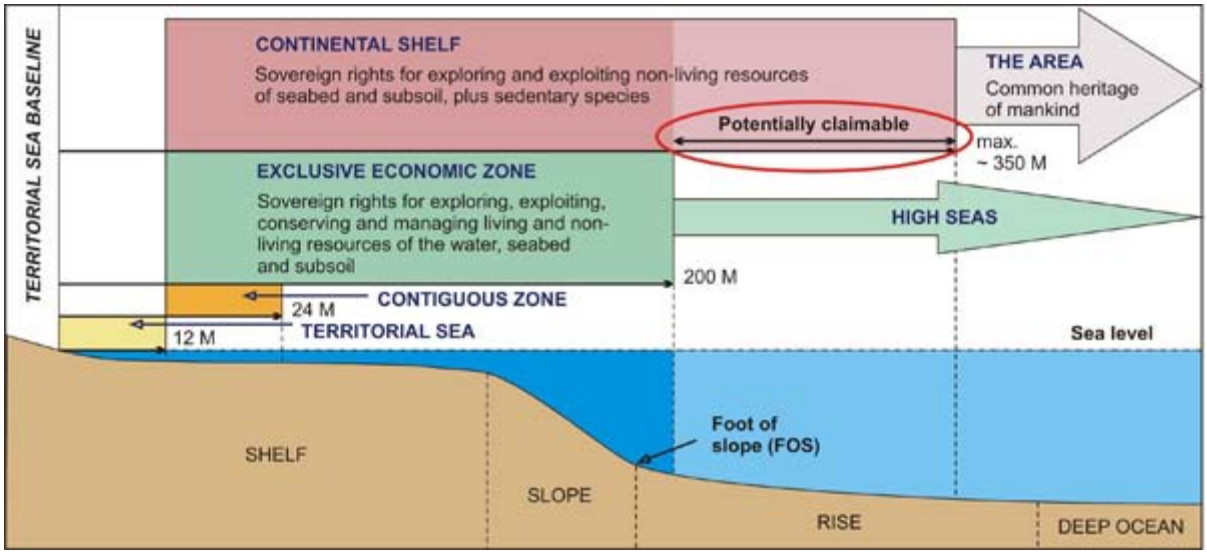
3.3.1. Territorial Sea

For establishing maritime zones, coastal States have to draw baselines (normally the low-water line) along their coasts from which the other maritime zones are measured (see Arts. 5 et seqq. UNCLOS). According to Art. 8 Para. 1 UNCLOS, the waters on the landward side of the baselines form part of the internal waters of the State. Seaward of the baseline, States may claim a territorial sea up to a limit of 12 nm (see Art. 2 Para. 1, Art. 3 UNCLOS). In both maritime zones, the coastal State exercises sovereignty which is derived from its sovereignty over the land territory and the proximity to its coast.[24] In its internal waters, the coastal State exercises absolute sovereignty, while in the territo-

[23] See *T. Pedersen/T. Henriksen*, Svalbard's Maritime Zones: The End of Legal Uncertainty?, in: IJMCL 24 (2009), (141) 142.

[24] In contrast thereto, other maritime zones (EEZ, continental shelf) do not form part of the coastal State's territory and the coastal State only exercises functional limited competences and is not granted sovereignty (see detailed analysis below).

rial sea, foreign vessels have the right of innocent passage (Arts. 17 et seqq. UNCLOS).[25]



Source: Federal Institute for Geosciences and Natural Resources, available at: http://www.bgr.bund.de/EN/Themen/Zusammenarbeit/TechnZusammenarb/Bilder/tzp_seerechtskonventionen_k_en.jpg?__blob=normal&v=2 *(last visited June 2012).*

Norway has traditionally claimed a 4 nm zone as territorial sea outside the Norwegian mainland and around Svalbard.[26] In 2001, new straight baselines were defined around the Svalbard Archipelago.[27] In 2003, Norway extended its mainland as well as Svalbard's territorial sea to 12 nm.[28]

Norwegian sovereignty in the territorial sea has not been challenged, and the application of the Svalbard Treaty in the territorial sea has not caused problems. Some of the Svalbard Treaty articles explicitly state that they apply in the "territorial waters", in particular Art. 2 Para. 1 ST, Art. 2 Para. 3 ST and Art. 3 Para. 2 ST. The application of these provisions in the territorial sea has not been challenged.

[25] In the following, especially problems with regard to the territorial sea are examined as they are more important and controversial. If provisions of the Svalbard Treaty apply in the territorial sea, they are also applicable – *a maiore ad minus – in the internal waters of Svalbard*.

[26] Royal Decree of 22 February 1812, available at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_1812_Decree.pdf (last visited June 2012). See for the following chapter *G. Ulfstein*, Spitsbergen/Svalbard, Max Planck Encyclopedia of Public International Law, www.mpepil.com, Para. 39 et seqq., 65; *D.H. Anderson*, The Status Under International Law of the Maritime Areas Around Svalbard, in: ODIL 40 (2009), (373) 376; detailed analysis *J.P.A. Bernhardt*, Spitzbergen: Jurisdictional Friction over Unexploited Oil Reserves, Cal. W. Int'l L. J. 4 (1973-1974), (61) 63 et seqq., 71 et seqq., especially on the *travaux préparatoires.*

[27] Royal Decree of 1 June 2001, No 556, Regulations Relating to the Limits of the Norwegian Territorial Sea Around Svalbard, UN Law of the Sea Bulletin No. 49 (2001), 72-81; available at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_2001_DecreeTS.PDF (last visited June 2012). See for straight baselines Art. 7 UNCLOS. With the melting of sea ice and glaciers, determination of baselines will be exacerbated, see *L.A. de La Fayette*, Oceans Governance in the Arctic, in: IJMCL 23 (2008), (531) 538.

[28] Act of 27 June 2003 relating to Norwegian Territorial Waters and the Contiguous Zone, including the sea areas around Jan Mayen, Act No 57 of 2003, UN Law of the Sea Bulletin No. 54 (2004), 41-80; available at: http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin54e.pdf (last visited June 2012).

Art. 3 Para. 1 ST has a different wording: it grants the right to "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". The term "waters" is quite vague, though. Compared to the other two categories "fjords" and "ports", it should be considered to refer at least to the territorial sea (and the internal waters) as it would have been redundant otherwise.[29]

The geographical application of a third category of articles which only refer to "the territories specified in Article 1" is more difficult to determine (especially Art. 8 Para. 1 ST on tax limitation). If interpreted literally and systematically one may argue that these provisions only refer to land territory and not to the territorial sea: As to the wording, the notion "territory" usually connotes land and not adjacent maritime areas if not stated explicitly. Art. 1 ST to which those provisions refer to only mentions various islands and therefore land area. Likewise, the reference to "territorial waters" in other clauses would be redundant if the clause "in the territories specified in Article 1" included more than land territory.[30]

However, the object and purpose of the concept of the territorial sea has to be taken into account. As seen above, the land territory, the internal waters and the territorial sea are closely linked. The coastal State exercises sovereignty over these maritime areas. If not otherwise stated, a treaty applying to the land territory is usually considered to apply also in the territorial sea. A reason for not mentioning territorial waters in all of the provisions of the Svalbard Treaty could be that not all activities were regarded as maritime when the convention was drafted. Furthermore, Sect. 1 Mining Code of 1925 has a similar wording stating that "(t)his Mining Code shall apply to the entire Archipelago of Spitsbergen (Svalbard)", and Norway has in practice accepted its application to the territorial sea.[31]

In summary, the Svalbard Treaty applies to Svalbard's internal waters and territorial sea. Because of Norwegian sovereignty in both zones, Norway has the right to adopt and enforce regulations in both maritime zones, taking into account the other States Parties' non-discriminatory rights regulated in the Svalbard Treaty.

3.3.2. Fishery Protection Zone (Exclusive Economic Zone)

In May 1977, Norway established a so-called Fishery Protection Zone which extends 200 nm off the coast of Svalbard.[32] Originally, Norway aimed at establishing a classical EEZ around Svalbard similar to the EEZ along its mainland coast.[33] Other States Parties to the Svalbard Treaty, however, objected as they were worried about their preferential

[29] See *G. Ulfstein*, Spitsbergen/Svalbard, Max Planck Encyclopedia of Public International Law, www.mpepil.com, Para. 41.
[30] See for this paragraph *G. Ulfstein*, Spitsbergen/Svalbard, Max Planck Encyclopedia of Public International Law, www.mpepil.com, Para. 42.
[31] See for this paragraph *G. Ulfstein*, Spitsbergen/Svalbard, Max Planck Encyclopedia of Public International Law, www.mpepil.com, Para. 43.
[32] Decree No. 6 of 23 May 1977 relative to the Fishery Protection Zone of Svalbard. See for details below and *C.A. Fleischer*, Le régime d'exploitation du Spitsberg (Svalbard), AFDI (1978), (275) 299.
[33] Act No. 91 of 17 December 1976 relating to the Economic Zone of Norway, available at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_1976_Act.pdf; Royal Decree of 17 December 1976 relating to the establishment of the Economic Zone of Norway, available at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_1976_Decree.pdf; last visited June 2012.

rights under Art. 2 ST. In order to meet these concerns, Norway decided to only institute a FPZ.[34]

In contrast to the territorial sea to which the sovereignty of the coastal State extends, the authority of the coastal State is certainly limited in FPZ and EEZ. The coastal State only exercises sovereign rights and jurisdiction in these maritime zones for certain economic and protective purposes. EEZ and EPZ neither belong to the territorial sea of a coastal State nor are governed by the high seas regime of UNCLOS.[35]

As respects the location, extension and competences of the coastal State, FPZ are closely linked to the more important concept of EEZ. Both concepts have been known since the 1940s (and therefore more than 20 years after the conclusion of the Svalbard Treaty) and were motivated by the intention to extend coastal States' maritime sovereignty over fishing resources.[36] Part V UNCLOS which provides for detailed rules with regard to EEZ does not explicitly refer to other functional maritime zones such as FPZ. Because of the flexibility of the UNCLOS EEZ regime, a coastal State can also create special zones analogous to the EEZ where it merely exercises certain rights provided for in the EEZ framework, e.g. just the fisheries management regime. As FPZ are thus a reduction of the concept of the EEZ, Part V UNCLOS and other relevant EEZ provisions are applicable to FPZ as far as their content reaches.[37]

The right of Norway to establish maritime zones around Svalbard is not altered by the fact that Svalbard is an archipelago of islands.[38] The International Law of the Sea provides that all islands generate a continental shelf and that they may form the basis for establishment of EEZ and, accordingly, FPZ (see especially Art. 121 Para. 2 UNCLOS). Only rocks which cannot sustain human habitation or economic life of their own shall have no EEZ or continental shelf (Art. 121 Para. 3 UNCLOS). Especially Spitsbergen, Bear Island and Hope Island do not fall under Art. 121 Para. 3 UNCLOS and can, therefore, generate a continental shelf and EEZ/FPZ.

As outlined above, the applicability of the Svalbard Treaty in the FPZ as well as on the continental shelf is disputed, raising various problems of treaty interpretation and of the relationship between the Svalbard Treaty and UNCLOS. These distinctive positions will be elaborated in more detail in the next paragraphs, firstly with regard to Svalbard's FPZ.[39]

[34] See *T. Pedersen*, The constrained politics of the Svalbard offshore area, in: Marine Policy 32 (2008), (913) 916 with references.

[35] See for the paragraph with regard to the related concept of Ecological Protection Zones *S. Wolf*, Ecological Protection Zones, Max Planck Encyclopedia of Public International Law, www.mpepil.com, Para. 3 and 4.

[36] See details *D.R. Rothwell*, Fishery Zones and Limits, Max Planck Encyclopedia of Public International Law, www.mpepil.com, Paras. 3 et seqq.

[37] See for this paragraph with regard to the related concept of Ecological Protection Zones *S. Wolf*, Ecological Protection Zones, Max Planck Encyclopedia of Public International Law, www.mpepil.com, Paras. 3 – 5 and Paras. 9 – 11, in particular Para. 10.

[38] *Although Svalbard is an archipelago as to Art. 46 lit. (b) UNCLOS, the archipelagic regime of Part IV UNCLOS is not applicable: Norway is not an "a*rchipelagic State" according to Art. 46 lit. (a) UNCLOS as it is not constituted wholly by one or more archipelagos. Most of the relevant provisions apply to archipelagic State and are therefore not applicable to Svalbard, especially concerning archipelagic straight baselines (Art. 47 UNCLOS), archipelagic waters (Art. 49 UNCLOS), traditional fishing rights in archipelagic waters (Art. 51 Para. 1 UNCLOS) and archipelagic sea lane passage (Art. 53 UNCLOS).

[39] Even though most of the arguments in favour of and against the applicability of the Svalbard Treaty in the FPZ and on the continental shelf are comparable, some important differences exist: Only the

Position 1: Unrestricted Norwegian Jurisdiction

Brought forward by Norway and supported by *C.A. Fleischer* is the view that the Svalbard Treaty applies solely to Svalbard's land territory, internal waters and territorial sea; therefore, Norway has exclusive rights in the FPZ under International Law of the Sea, unrestricted by the Svalbard Treaty.[40]

First and foremost, Norway argues that the wording of the Svalbard Treaty is unambiguous by stating that the rights of other States Parties, especially the fishing rights of Art. 2 ST, only apply in the Svalbard territory and in the territorial waters, i.e. the territorial sea. Neither the FPZ nor the continental shelf are addressed in the Svalbard Treaty. Therefore, Norway's sovereign rights prevail and Norway's UNCLOS coastal States' rights in these maritime zones are not abrogated or altered by the Svalbard Treaty.[41]

This line of argument raises a problematic issue, the principle of *lex prior-lex posterior* and therefore the relationship between UNCLOS and the Svalbard Treaty. Art. 30 Para. 3 Vienna Convention on the Law of Treaties[42] holds that when all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty. Art. 311 Para. 2 UNCLOS points in the same direction stating that UNCLOS shall not alter the rights and obligations of States Parties which arise from other agreements compatible with UNCLOS and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under UNCLOS.

Therefore, applying the principle of *lex prior-lex posterior* which is also part of customary international law, UNCLOS would prevail if there would be a conflict between UNCLOS and the Svalbard Treaty. However, the principle of *lex prior-lex posterior* is only applicable if both treaties relate to the same subject matter (Art. 30 Para. 2 Vienna Convention on the Law of Treaties). If there are general as well as special regulations, the *lex specialis* rule prevails. Some argue that the Svalbard Treaty is *lex specialis* to UNCLOS (see below) and that therefore the Svalbard Treaty prevails.

In order to argue in favour of Norway's unrestricted jurisdiction in the FPZ it is also put forward that the restrictions on sovereignty, i.e. the non-discriminatory rights of other States Parties, must be interpreted restrictively: The Svalbard Treaty grants Norway full

continental shelf can be extended more than 200 nm and an EEZ/FPZ has to be explicitly declared in contrast to the continental shelf. Consequently, both legal regimes are separated in International Law of the Sea (Art. 78 Para. 1 UNCLOS).

[40] See *C.A. Fleischer*, Le régime d'exploitation du Spitsberg (Svalbard), AFDI (1978), 275 et seqq; see also *R.E. Fife*, Svalbard and the Surrounding Maritime Areas, available at: http://www.regjeringen.no/en/dep/ud/selected-topics/civil–rights/spesiell-folkerett/folkerettslige-sporsmal-i-tilknytning-ti.html?id=537481 (last visited June 2012).

[41] Norway refers especially to the preparatory work of the Svalbard Treaty: The Spitbergen Commission has stated in its Report from the 1919 Paris Peace Conference that „pour le surplus il y a lieu d'appliquer la souveraineté de la Norvège".

[42] Vienna Convention on the Law of Treaties, adopted 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331; available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (last visited June 2012). So far not acceded by Norway, but most of the provisions are considered to be part of customary international law.

and absolute sovereignty over Svalbard[43] and States Parties officially "recognise" the sovereignty of Norway over Svalbard in Art. 1 ST instead of just "granting" it.[44]

Position 2: Denial of Norwegian Jurisdiction

The opposite view holds that Norway neither has jurisdiction nor sovereign rights in the FPZ. Norway's sovereignty laid down in the Svalbard Treaty needs to be interpreted restrictively, and the Svalbard Treaty does not grant Norway the right to establish a FPZ.[45] This position is supported by Russia and – to some extent – by Spain. Yet, Spain only opposes the Norwegian enforcement policy and does, apparently, not deny Norwegian's right to establish a FPZ as such. The European Commission seems to hold a similar view. Russia, however, considers Norwegian sovereignty over Svalbard being curtailed both geographically and in scope by the Svalbard Treaty. For this reason, the Svalbard Treaty does not confer upon Norway a coastal State's right to claim jurisdiction over a 200 nm fisheries zone around Svalbard or on the continental shelf.

The Svalbard Treaty is seen as *lex specialis* to UNCLOS, depriving Norway of the right to establish a FPZ and to claim a continental shelf. The Svalbard Treaty establishes a special territorial regime with Norwegian sovereignty over Svalbard and certain restrictions thereon.[46] In this respect, the Svalbard Treaty may be considered to be more specific than UNCLOS, the general constitution of the oceans. Therefore, Norway is considered to be not competent to unilaterally establish a FPZ or claim a continental shelf, only by means of cooperation with the other States Parties to the Svalbard Treaty which need to consent to establishing a FPZ or claiming a continental shelf.[47]

The other main argument for denying Norway the right to establish a FPZ and to exercise sovereign rights and jurisdiction therein are derived from the wording of the Svalbard Treaty: The Svalbard Treaty only refers to land territory, the territorial waters and waters, fjords and ports, especially in Arts. 2, 3 ST. These articles exhaustively regulate Norway's right to establishing maritime zones. Therefore, Norway is not competent to establish zones beyond the territorial sea. At the time the Svalbard Treaty was concluded, the areas beyond the territorial sea were considered high seas.

Again, the principle of restrictive treaty interpretation[48] comes into play: Norway's sovereignty over the archipelago is seen as a restriction of Svalbard's *terra nullius* status according to which all States had the same rights. Therefore, one has to interpret the Norwegian sovereignty restrictively and the other States Parties's non-discriminatory rights as direct consequence of the *terra nullius* status broadly. As Norwegian sovereignty over Svalbard is founded on a treaty rather than on customary law, it is argued

[43] See, e.g., *C.A. Fleischer*, Le régime d'exploitation du Spitsberg (Svalbard), AFDI (1978), (275) 279.
[44] See *J.P.A. Bernhardt*, Spitzbergen: Jurisdictional Friction over Unexploited Oil Reserves, Cal. W. Int'l L. J. 4 (1973-1974), (61) 63.
[45] See for this opinion in particular *A.N. Vylegzhanin/V.K. Zilanov*, Spitsbergen: Legal Regime of Adjacent Marine Areas, 2007, 42, 44, 57.
[46] A so called "Statusvertrag". See in this regard *E. Klein*, *Statusverträge im Völkerrecht*, 1980.
[47] See *A.N. Vylegzhanin/V.K. Zilanov*, Spitsbergen: Legal Regime of Adjacent Marine Areas, 2007, 55 et seqq., 82 et seqq.
[48] According to Art. 31 of the Vienna Convention on the Law of Treaties, a treaty shall be interpreted in good faith in accordance with its ordinary meaning to be given to the term of the treaty in their context in the light of its objects and purpose. The emphasis is on the actual words used, in the original languages of the signed version. See *D.H. Anderson*, The Status Under International Law of the Maritime Areas Around Svalbard, in: ODIL 40 (2009), (373) 379.

that Norway's sovereignty is restricted.[49] This view is based on the fact that the acquisition of Norwegian sovereignty differs from the normal acquisition of sovereignty by possession or occupation: The sovereignty over Svalbard was acquainted to Norway by the collective decision of a number of States in an international treaty, through the process of proclamation (by Norway) and recognition (by the other States Parties).[50]

Position 3: Norwegian Jurisdiction and Non-Discriminatory Rights

The intermediary view which appears to be the internationally prevailing opinion recognizes Norway's full sovereignty over Svalbard and its jurisdiction in the maritime areas around the archipelago, and, at the same time, the application of the Svalbard Treaty provisions, in particular the non-discriminatory rights, to these maritime areas. This view is brought forward especially by the United Kingdom (hereinafter "UK"), the Netherlands, Denmark and is supported, *inter alia*, by *G. Ulfstein* and *R.R. Churchill*.[51] Other States, especially the US, France and Germany, have reserved any rights they may have under the ST outside the territorial sea, thus keeping the issue under review.[52]

The competence of a State to claim maritime zones beyond the territorial sea derives from its sovereignty over its territory: Norway has the competence – as every other coastal State – to claim maritime zones around Svalbard since there is nothing in the Svalbard Treaty which restricts Norway's competence to claim maritime zones, and the Svalbard Treaty explicitly refers to Svalbard's territorial sea. Under International Law of the Sea Norway is therefore a "normal" coastal State despite of the restrictions and non-discriminatory rights of the Svalbard Treaty.[53] There is no provision in neither the Svalbard Treaty nor in International Law of the Sea which prevents Norway from claiming the whole range of generally accepted maritime zones around Svalbard, such as a FPZ.

The strict formal and literal interpretation of the Svalbard Treaty is seen as too restrictive: When drafting the Svalbard Treaty in 1920, the Spitsbergen Commission could hardly foresee the subsequent development in the Law of the Sea, attributing the coastal State rights on the continental shelf and allowing the establishment of a 200 nm EEZ.[54] Accordingly, the Svalbard Treaty wording does not contain any reference to these legal concepts. At the time of concluding the Svalbard Treaty, States Parties held the view that the waters beyond the territorial sea were high seas open to all States without the restrictions of the Svalbard Treaty (see Art. 87 UNCLOS). This does, however, not lead to the conclusion that the maritime zones beyond Svalbard's territorial sea are forever

[49] See *T. Pedersen*, The Svalbard's Continental Shelf Controversy: Legal Disputes and Political Rivalries, in: ODIL 37 (2006), (339) 345.

[50] See *D.H. Anderson*, The Status Under International Law of the Maritime Areas Around Svalbard, in: ODIL 40 (2009), (373) 373 et seq.

[51] *United Kingdom*, Note No. 11/06 to Norway, 17 March 2006; *United States*, Note No. 20 to Norway, 20 November 1974; *Netherlands*, Note No. 2238 to Norway, 3 August 1977; *Denmark*: Avtale mellom Norge og Grønland/Danmark om gjensidige fi skeriforbindelser (adopted 9 June 1992, entered into force 4 March 1994), in: Overenskomster med fremmede stater 1994, 1500. *R.R. Churchill/G. Ulfstein*, Marine Management in Disputed Areas. The Case of the Barents Sea, 1992, 40 et seqq.; see *T. Pedersen*, The Svalbard's Continental Shelf Controversy: Legal Disputes and Political Rivalries, in: ODIL 37 (2006), (339) 345 et seq.; for the evolution of the Danish policy *T. Pedersen*, Denmark's Policies Towards the Svalbard Area, in: ODIL 40 (2009), (319) 322 et seqq.

[52] See *T. Pedersen*, Conflict and Order in Svalbard Waters, April 2008, 15.

[53] Similarly *C.A. Fleischer*, Le régime d'exploitation du Spitsberg (Svalbard), AFDI (1978), (275) 284.

[54] See *D.H. Anderson*, The Status Under International Law of the Maritime Areas Around Svalbard, in: ODIL 40 (2009), (373) 378.

high seas and that no posterior changes may apply. If the drafters of the Svalbard Treaty had foreseen the development of such functional limited zones, they would have mentioned such zones in the Svalbard Treaty as they aimed for the creation of a comprehensive territorial treaty regime and the permanent settlement of the archipelago's legal status.

From this perspective, the Svalbard Treaty has to be interpreted dynamically according to its object and purpose. The Svalbard Treaty was designed as a "package solution" whereby Norway was granted sovereignty, but other States retained certain *terra nullius* rights through the right of non-discrimination. The rule of non-discrimination was made applicable to all known areas – land and maritime – at that time. Furthermore, there is a close legal connection between the land territory and the maritime areas.[55] Therefore, Norway's sovereign rights as well as the non-discrimination rights are applicable to the FPZ.

It is also worth mentioning that a somewhat paradoxical situation would exist if the Svalbard Treaty was not applied in the FPZ: As regards fishing, Norway as a coastal State would have more rights seawards, i.e. in the FPZ, than in Svalbard's internal waters and territorial sea, i.e. closer to land.[56] Such a situation would be contrary to the coherent system of maritime zones in International Law of the Sea in which the coastal State's competences diminish, not increase, as one moves outward from the coast.[57]

Most international judgements which may be of relevance in this regard also support this intermediary position by pointing towards the application of the Svalbard Treaty limitations in the FPZ and on the continental shelf.[58] For example, in the *Agean Sea Continental Shelf Case* of 1978[59] the International Court of Justice (hereinafter "ICJ") concluded that a declaration on jurisdiction given in 1928 also applied to the continental shelf. In the *Oil Platform Case* of 2003,[60] the ICJ did not distinguish between the land territory, the territorial sea, the continental shelf and the EEZ in a treaty entered into in 1955 and applicable on "the territories of the two High Contracting Parties".

[55] See for this paragraph *G. Ulfstein*, Spitsbergen/Svalbard, Max Planck Encyclopedia of Public International Law, www.mpepil.com, Para. 52.
[56] See *G. Ulfstein*, Spitsbergen/Svalbard, Max Planck Encyclopedia of Public International Law, www.mpepil.com, Para. 52.
[57] Similar *D.H. Anderson*, The Status Under International Law of the Maritime Areas Around Svalbard, in: ODIL 40 (2009), (373) 381.
[58] See for the following *G. Ulfstein*, Spitsbergen/Svalbard, Max Planck Encyclopedia of Public International Law, www.mpepil.com, Para. 55. In the case of *Guinea-Bissau vs. Senegal* (*Case concerning the Arbitral Award of 31 July 1989* (Guinea-Bissau vs. Senegal), (1991) ICJ Reports 53) the 1989 arbitrational award (confirmed by the ICJ in 1991) held that an agreement of 1960 about the delimitation of the territorial sea, the contiguous zone and the continental shelf did not apply in the later established EEZ. The main difference here is, however, that the concept of functional zones like EEZ and FPZ was known when the two States concluded the delimitation agreement in 1960, meaning that they had the possibility to extend the agreement to said zones (or to reserve at least the right so extend it).
[59] *Agean Sea Continental Shelf Case* (Greece vs. Turkey), (1978) ICJ Reports 3.
[60] *Case concerning Oil Platforms* (Islamic Republic of Iran vs. United States of America), (2003) ICJ Reports 161.

3.3.3. Continental Shelf

Due to technological advances and needs, the exploration and exploitation of resources on and below the seabed became increasingly relevant in the second half of the 20th century. Starting with the proclamation of US President Truman in 1945, coastal States intended to regulate such activities on and below the seabed close to their respective coasts.[61]

As to the modern International Law of the Sea, the continental shelf is a certain part of the seabed and subsoil beyond the territorial sea subject to a special regime, normally up to a distance of 200 nm from the baselines (Art. 76 Para. 1 UNCLOS). According to Art. 77 Para. 1, 2 UNCLOS, the coastal State exercises exclusive sovereign rights over the continental shelf for the purpose of exploring and exploiting its natural resources in the sense that no one may undertake these activities without the express consent of the respective coastal State. The continental shelf is a natural prolongation of the land territory and exists *ipso facto et ab initio*, by virtue of its sovereignty over the land.[62] Therefore, the coastal State's rights over the continental shelf – in contrast to the EEZ/FPZ – do neither depend on occupation, be it effective or notional, nor any express proclamation (Art. 77 Para. 3 UNCLOS).

Concerning the applicability of the Svalbard Treaty and the non-discriminatory rights to Svalbard's continental shelf, basically the same arguments as for the FPZ can be raised (see above). As both regimes are to be viewed independent of each other it needs be analysed which specific or further arguments are brought forward regarding the applicability of the ST on the continental shelf. Further, recent developments have influenced the controversy over Svalbard's continental shelf to some extent.

Russia contended that Norway did not have any authority relating to the continental shelf pertaining to Svalbard, relying, in particular, on restrictive treaty interpretation and the *lex specialis* rule.[63] In return, Norway argued that Svalbard did not have its own continental shelf and that it was only an elevation of the mainland continental shelf which stretched out around and beyond Svalbard.[64] Therefore, Norway claimed exclusive rights on Svalbard's continental shelf – apart from the seabed within the territorial sea around Svalbard. Most other States and authors, however, hold the view that Svalbard has its own continental shelf.[65]

[61] See for details on the evolution of the concept *P.-T. Stoll*, Continental Shelf, Max Planck Encyclopedia of Public International Law, www.mpepil.com, Para. 2 et seqq.

[62] *North Sea Continental Shelf Cases* (Federal Republic of Germany vs. Denmark and Federal Republic of Germany vs. Netherlands) (Merits), (1969) ICJ Rep, 3, 22 para. 19.

[63] *The Soviet Union*, Memorandum to Norway, 27 August 1970; The Soviet Union, Note to Norway, 14 June 1988.

[64] *The Norwegian Ministry of Foreign Affairs*, Letter to the Norwegian Ministry of Industry (12834/I 64) 25 May 1964. See *D.H. Anderson*, The Status Under International Law of the Maritime Areas Around Svalbard, in: ODIL 40 (2009), (373) 377. Besides geological and geophysical arguments Norway referred to common sense and put forward that an absurd situation would arise if one held that Svalbard had its own continental shelf: The delimitation between the continental shelf of mainland Norway and that of Svalbard would require a negotiation between Norway and Norway. See *G. Ulfstein*, Spitsbergen/Svalbard, Max Planck Encyclopedia of Public International Law, www.mpepil.com, Para. 56 et seqq.; *T. Pedersen*, The Svalbard's Continental Shelf Controversy: Legal Disputes and Political Rivalries, in: ODIL 37 (2006), (339) 344.

[65] See, *inter alia*, *J.P.A. Bernhardt*, Spitzbergen: Jurisdictional Friction over Unexploited Oil Reserves, Cal.

Meanwhile, the Norwegian position has changed in some respects:[66] Like all land areas, Svalbard's coasts generate continental shelf. In a geological sense, Svalbard's continental shelf is part of one continuous Norwegian continental shelf. As Svalbard is part of the Kingdom of Norway the shelf areas around Svalbard are part of the Norwegian continental shelf. This changed position suggests that, also from the Norwegian perspective, Svalbard generates, in legal terms, its own continental shelf which is part of the Norwegian continental shelf (as would be every continental shelf of Norway's territory). Apparently, this has not changed, however, Norway's position claiming exclusive jurisdiction on Svalbard's continental shelf and denying the applicability of the Svalbard Treaty thereon.

Norway started a process of establishing the outer limits of its continental shelf beyond 200 nm under UNCLOS procedures: On 27th November 2006, Norway submitted information on the limits of its continental shelf beyond 200 nm to the Commission on the Limits of the Continental Shelf (hereinafter "CLCS") under Art. 76 UNCLOS.[67] On 27th March 2009, the CLCS adopted its recommendations[68] after deliberations.[69] This CLCS process influences the legal controversy on Svalbard's maritime zones to a certain extent:[70] The process supports the view that Norway is entitled to establish maritime zones around the archipelago, including a FPZ, and may exercise coastal State jurisdiction in these areas. Only four States (Denmark, Iceland, Russia and Spain) reacted to the Norwegian submission, with none of the reactions disputing the right of Norway to claim a continental shelf around Svalbard.[71] The absence of reactions of other States to the Norwegian submission may be regarded as an acceptance of Norway claiming the continental shelf of Svalbard.[72]

W. Int'l L. J. 4 (1973-1974), (61) 88, with reference to an observation of the ICJ in the *North Sea Continental Shelf Cases* (Federal Republic of Germany vs. Denmark and Federal Republic of Germany vs. Netherlands) (Merits), (1969) ICJ Rep 3, 32.

[66] See for the following *R.E. Fife*, Svalbard and the Surrounding Maritime Areas, available at: http://www.regjeringen.no/en/dep/ud/selected-topics/civil–rights/spesiell-folkerett/folkerettslige-sporsmal-i-tilknytning-ti.html?id=537481 (last visited June 2012)

[67] Continental Shelf Submission of Norway in respect of areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea. Executive Summary available at: http://www.un.org/Depts/los/clcs_new/submissions_files/submission_nor.htm (last visited June 2012). The process of establishing the outer limits of the continental shelf where the continental margin extends beyond 200 nm is unique in the sense that the coastal State is required, within a set time frame, to consult with the CLCS, an international body of experts on geology, geophysics and hydrography, before it delineates the final and binding outer limits of its continental shelf on the basis of this recommendation. See *T. Pedersen/T. Henriksen*, Svalbard's Maritime Zones: The End of Legal Uncertainty?, in: IJMCL 24 (2009), (141) 148, 149.

[68] The CLCS may only recommend criteria for the delimitation of the outer limits of a continental shelf. The limits itself are established by the respective coastal State on the basis of this recommendations and are then final and binding. See Art. 76 Para. 8 UNCLOS and Rule 53 Rules of Procedure of the Commission on the Limits of the Continental Shelf, 17 April 2008, availabe at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/309/23/PDF/N0830923.pdf?OpenElement (last visited June 2012).

[69] *CLCS*, Summary of the Recommendations of the Commission on the Limits of the Continental Shelf in regard to the Submission made by Norway on 27 November 2006, 27 March 2009, available at: http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/nor_rec_summ.pdf (last visited June 2012).

[70] Detailed analysis *T. Pedersen/T. Henriksen*, Svalbard's Maritime Zones: The End of Legal Uncertainty?, in: IJMCL 24 (2009), (141) 141, 148 et seqq.

[71] Notes and reactions available at: http://www.un.org/Depts/los/clcs_new/submissions_files/submission_nor.htm (last visited June 2012); see for detailed analysis *T. Pedersen/T. Henriksen*, Svalbard's Maritime Zones: The End of Legal Uncertainty?, in: IJMCL 24 (2009), (141) 155 et seqq.

[72] Under general International Law the inaction or silence of other States may be interpreted as acquiescence in or tacit recognition of the legal position of a State. See *T. Pedersen/T. Henriksen*, Svalbard's

The same conclusion may be drawn from the delimitation agreements concerning Svalbard's continental shelf and adjacent continental shelf areas. The shelf area around Svalbard has been delimited west towards the continental shelf adjacent to Greenland in an agreement of 2006 with Denmark.[73] On 15th September 2010 Norway and Russia concluded a Treaty concerning the Maritime Delimitation and Cooperation in the Barents Sea and Arctic Ocean.[74] Both States agreed on a delimitation line drawn also with respect to Svalbard (Norway) and Franz Josef Land (Russia) and on mutual cooperation in fisheries matters and transboundary hydrocarbon deposits.[75]

Both, the CLCS process and the delimitation agreements concluded with Denmark and Russia, can be seen as an acceptance of Norway claiming Svalbard's continental shelf. This is especially important as Russia seems to have changed its former negative position in this respect. However, neither the delimitation agreements nor the CLCS process settle whether the provisions of the Svalbard Treaty apply to Svalbard's FPZ or continental shelf.[76]

As seen above, the better arguments militate in favour of the applicability of the Svalbard Treaty, especially its non-discriminatory norms, also to Svalbard's continental shelf.[77] A strict formal and literal interpretation of the Svalbard Treaty is too restrictive. Not only the principle of dynamic treaty interpretation but also relevant international judgments may be brought forward in favour of the applicability of the Svalbard Treaty to Svalbard's continental shelf. Further, the Svalbard Treaty aims at establishing a comprehensive territorial regime. Granting Norway the continental shelf rights around Svalbard without applying, at the same time, the restriction of the Svalbard Treaty would contradict this comprehensive territorial regime.

In summary, it can be concluded that the Svalbard Treaty and the non-discriminatory rights of other States Parties also apply on Svalbard's continental shelf.

4. Practical Implications and Current and Future Dispute Scenarios

Maritime areas are of vital importance for Norway: Oil, natural gas and fish are the State's number one, two and four export products.[78] In the 2005 Norwegian Govern-

Maritime Zones: The End of Legal Uncertainty?, in: IJMCL 24 (2009), (141) 153 with references, 158.

[73] See Agreement between the Government of the Kingdom of Norway on the one hand, and the Government of the Kingdom of Denmark together with the Home Rule Government of Greenland on the other hand, concerning the delimitation of the continental shelf and the fisheries zones in the area between Greenland and Svalbard (signed 20 February 2006, entered into force 2 June 2006), deposited with the Secretary-General of the UN, 7 July 2006, Reg. No. I-42887.

[74] Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean (signed 15 September 2010, entered into force 7 July 2011; the text of the Treaty is available at: http://www.regjeringen.no/upload/SMK/Vedlegg/2010/avtale_engelsk.pdf (last visited June 2012).

[75] See in particular Annex I and II of the Treaty. For the schematic chart see: http://peacepalacelibrary-weekly.blogspot.de/2010/09/norway-and-russian-federation-sign.html (last visited June 2012).

[76] In this respect, Art. 6 of the Treaty between the Kingdom of Norway and the Russian Federation provides that the "present Treaty shall not prejudice rights and obligations under other international treaties to which both the Kingdom of Norway and the Russian Federation are Parties, and which are in force at the date of entry into force of the present Treaty".

[77] See above and *B. Kempen*, Der völkerrechtliche Status der Inselgruppe Spitzbergen, 1995, 104 et seqq.

[78] Cited from *T. Pedersen*, The Svalbard's Continental Shelf Controversy: Legal Disputes and Political Rivalries, in: ODIL 37 (2006), (339) 340.

ment White Paper on Arctic Policy, the dispute over jurisdiction in the area around Svalbard was recognized as containing the "potential for conflict of interests".[79] Indeed, the diverging views on the applicability of the Svalbard Treaty in Svalbard's maritime zones and on Norway's and the other States Parties' rights therein caused tensions, especially regarding fisheries (4.1.). A possible and likely future dispute scenario may be about the exploration and exploitation of offshore non-living (oil and gas) resources (4.2.). For both issues, environmental protection and sustainable development and use of resources are of utmost importance (4.3.). Of minor importance are other controversial issues related to Svalbard's maritime zones such as marine scientific research (including research on climate change), tourism, shipping (North-West-Passage/Northern Sea Route) and institutional issues, in particular the Arctic Council and a possible "Arctic Treaty" (4.4.).

4.1. Living Marine Resources (Fisheries)

The Barents Sea is one of the world's richest fishing grounds.[80] Because of rising sea temperatures certain species move north to seek food and colder water, which has changed and still changes the location and prerequisites for commercial fishing in the Arctic Ocean.[81] Spain has, for the time being, the largest fishing interests in the Svalbard Area, but also other States, also EU Member States like Denmark, fish in the FPZ. Fisheries has, so far, caused most of the controversies with regard to Svalbard between Norway and other States, especially EU Member States that are States Parties to the Svalbard Treaty, inextricably linked to the question whether and to what extent the Svalbard Treaty applies in the FPZ (4.1.1.). Hitherto, the allocation of quota for certain fish species in the FPZ by Norway did not cause serious problems (4.1.2.). In contrast, the Norwegian enforcement measures in the FPZ caused serious troubles, especially towards Spain (4.1.3.).

4.1.1. Practical Implications of the Diverging Views on the Applicability of the Svalbard Treaty in the FPZ

If one follows the opinion (as expressed e.g. by the Netherlands and Denmark) that the Svalbard Treaty, especially the non-discriminatory rights, apply in the FPZ, all Contracting Parties to the Svalbard Treaty would enjoy the right of fishing in the FPZ on equal basis, without any exemptions, favours, privileges, or direct or indirect discrimination – and without being restrained to the so called surplus.

If Norwegian sovereign rights in the FPZ were not restricted by the Svalbard Treaty, the fisheries management regime in the FPZ would only be governed by International Law of the Sea (Norwegian position). UNCLOS grants the coastal State sovereign rights for exploring and exploiting, conserving and managing the living resources in its EEZ/FPZ (Art. 56 Para. 1 lit. (a) UNCLOS), in principle without participation of third States. Ac-

[79] Cited from *T. Pedersen*, The Svalbard's Continental Shelf Controversy: Legal Disputes and Political Rivalries, in: ODIL 37 (2006), (339) 340.
[80] Details *G. Hønneland*, Compliance in the Fisheries Protection Zone around Svalbard, in: ODIL 29 (1998), (339) 340 et seq.
[81] See for details *L.A. de La Fayette*, Oceans Governance in the Arctic, in: IJMCL 23 (2008), (531) 546 et seq.; *B. Rudloff*, The EU as fishing actor in the Arctic – Stocktaking of institutional involvement and existing conflicts, SWP Working Paper, FG 2, 2010/02, July 2010, 5 et seqq.

cording to Art. 61 Para. 1 UNCLOS, the coastal State shall determine the allowable catch (so called total allowable catch, hereinafter "TAC") of the living resources in its EEZ/FPZ. Art. 62 Para. 2 UNCLOS states that the coastal State shall determine its capacity to harvest the living resources of the EEZ/FPZ. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall give other States access to the surplus of the allowable catch. Art. 62 Paras. 3, 4 UNCLOS specify the details of this access of other States to this surplus. According to the Norwegian position and International Law of the Sea, other States could participate in fishing activities in Svalbard's FPZ only if Norway does not have the capacity of harvesting the TAC around Svalbard. There would be no privilege for States Parties to the Svalbard Treaty, and there would be no equal access to fisheries.

If one holds that Norway does not exercise sovereign rights and jurisdiction beyond the territorial sea because of the Svalbard Treaty restrictions (Russian view), Norway would neither be allowed to establish an FPZ nor to exercise legislative and enforcement jurisdiction therein. The maritime areas around Svalbard beyond the territorial sea would be governed by UNCLOS high seas regime (Arts. 86 et seqq. UNCLOS) and all States would enjoy the freedom of fishing (Art. 87 Para. 1 lit. (e) UNCLOS).

4.1.2. Allocation of Quota in the FPZ

According to the Norwegian Decree of 1977 relative to the FPZ, foreign ships entering the FPZ for fishing purposes have to be granted authorization and must be registered. In 1986, Norway introduced catch quota for species in order to control fishing in Svalbard's FPZ, allocating cod quotas to States with a historical record of fishing in the zone (Norway, Russia, the EU and the Faeroe Islands).[82] In 1994, the cod quotas were broken down for individual States. Since September 1994, all fishing vessels are obliged to report on their catches and the Norwegian coast guard is allowed to control and inspect all vessels and their cargo.[83] Likewise, Norway has established closed areas within the FPZ and prohibits fishing for many commercial fish species, e.g. capelin, red-fish or Greenland halibut. Since 1996, restrictions have been introduced also with regard to shrimp fishing: Only vessels from States that traditionally fished shrimp in the Svalbard area are permitted to participate in shrimp fishing. Moreover, the number of vessels used for shrimp trawling as well as the days during which fishing is allowed in the FPZ have been restrained. Norway emphasizes that these FPZ regulations are designed in a way which does not conflict with the Svalbard Treaty, even if it applied to the FPZ.[84]

The allocation of quota on the basis of historical fishing in the FPZ is also in line with the non-discriminatory provisions of the Svalbard Treaty. Historical fishing does not discriminate on the basis of nationality as historical rights can be seen as a justification for a difference in treatment. The same applies from an International Law of the Sea perspective: Art. 62 Para. 3 UNCLOS states that – when giving access to other States to the living resources of its EEZ – the coastal State shall take into account all relevant factors, including, *inter alia*, the need to minimize economic dislocation in States whose

[82] See *T. Pedersen*, The Svalbard's Continental Shelf Controversy: Legal Disputes and Political Rivalries, in: ODIL 37 (2006), (339) 346 with references in Norwegian.
[83] Decree of 21 September 1994 regulating fishing in the Fishery Protection Zone of Svalbard.
[84] See *T. Pedersen*, The Svalbard's Continental Shelf Controversy: Legal Disputes and Political Rivalries, in: ODIL 37 (2006), (339) 346 with references in Norwegian.

nationals have habitually fished in the zone. This is a reference to historical fishing rights which are accepted under UNLCOS to a certain extent. Therefore, there seems to be no relevant difference between Norway and other States Parties to the Svalbard Treaty, especially EU Member States, regarding the allocation of quotas on the basis of historical fishing in the FPZ.

For EU fisheries' interests in the FPZ, the EU is responsible and EU Member States have no conservation competences. Under Art. 3 Para. 1 lit. (d) TFEU[85], the EU shall have "exclusive competence regarding the conservation of marine biological resources under the common fisheries policy" (hereinafter "CFP"), established by the European Parliament and the Council (Art. 43 Para 2 TFEU).[86] The CFP today mainly covers fish (and some species of shellfish).[87] According to Art. 4 Para. 2 lit. (d) TFEU, shared competences between the European Union and the Member States apply to agriculture and fisheries, excluding the conservation of marine biological resources.

The EU's access to Norwegian fish resources (and *vice versa*) is agreed on an annual basis and laid down in administrative agreements. Negotiations are mainly about the exchange of fish opportunities (quotas) and about how and where the fishing may take place. These agreements are probably more important to the EU than to Norway, in so far that Norwegian fish stocks are in good shape whereas most EU stocks are not.[88] About four percent of the TAC of Norwegian Arctic cod is shared with third countries.[89] Most of this is allocated to the EU, partly on the basis of historic rights and partly (by a subsequent addition) as a Norwegian concession linked to the Agreement on the European Economic Area (hereinafter "EEA").[90]

[85] The Treaty of Lisbon (http://www.consilium.europa.eu/uedocs/cmsUpload/cg00014.en07.pdf) made the following changes: The TEU lays now down the general framework whereas the TFEU contains more specific provisions on certain policy areas, internal organisation of the EU etc. (last visited June 2012).

[86] See for details *P. Christiansen*, EU and Marine Resource Management, 13.11.2009, 11 available at: http://ec.europa.eu/fisheries/reform/docs/per_christiansen_en.pdf (last visited June 2012).

[87] However, there is a large potential for the future exploitation of other living resources through bioprospecting. In this regard, EU Member States will have little reason to accept an extension of the CFP to such other living organisms in their EEZs.

[88] For example, Norway accepts quotas which are less commercially interesting for its fishermen in exchange for Arctic cod allocated to the EU. This imbalance in EU's favour is grounded in political considerations.

[89] That is four percent of the Norwegian share of the TAC after having partitioned – about half and half – with Russia, since the Arctic cod is a joint Norwegian-Russian stock.

[90] http://www.efta.int/eea/~/media/Documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAagreement.ashx (last visited June 2012). The EEA could have had a legal impact on Svalbard, in particular, through the internal market rules. The EEA was established on 1st January 1994, following an agreement between the Member States of the European Free Trade Association (EFTA) and the European Community (EC), later the EU. Specifically, it allows EFTA States Norway, Liechtenstein and Iceland to participate in the EU's single market without a conventional EU membership. In exchange, they are obliged to adopt all EU legislation related to the single market, except that legislation that relates to agriculture and fisheries. However, under the Sect. 6 Norwegian EEA Act of 1992 Svalbard is excluded from the scope of the EEA Agreement. The exclusion of Svalbard is a Norwegian decision authorised under Protocol 40 of the EEA Agreement (available at http://www.efta.int/~/media/Documents/legal-texts/eea/the-eea-agreement/Protocols%20to%20the%20Agreement/protocol40.ashx, last visited June 2012). The intention of the Norwegian Government has consistently been not to apply EU Law on Svalbard, also when the Accession Treaties were negotiated by Norway in 1972 and 1994.

4.1.3. Norwegian Enforcement Measures in the FPZ

Unlike the allocation of fish quota, Norwegian enforcement measures in the FPZ have caused serious objections, especially by the European Commission and Spain.

Under International Law of the Sea, a coastal State has the right to enforcement measures in the territorial sea because of its sovereignty (Art. 2 Para. 1 UNCLOS). Enforcement in the FPZ/EEZ by the coastal State is more problematic. According to Art. 73 Para. 1 UNCLOS, the coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the EEZ, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with UNCLOS.

Objections to Norway's enforcement rights in the FPZ seem to presuppose that the Contracting Parties' right to equal treatment under the Svalbard Treaty also affects the competence of the coastal State to exercise jurisdiction, legislative as well as enforcement.[91] Art. 2 Para. 2 ST recognizes Norway's competence to take and enforce measures to preserve the environment and the natural resources, applicable equally to the nationals of all High Contracting Parties, without any exemption, privilege or favour. The Svalbard Treaty does not provide the other States Parties with the right to be involved in decision-making or the enforcement of regulations in respect of their nationals or vessels flying their flags in Svalbard's FPZ.

Norway has exercised its enforcement competences in a cautious manner for 20 years. When in the mid- and late-1980s there were several incidents of severe underreporting by Spanish fishermen, Norway threatened Spain to withdraw the latter's Barents Sea quota if compliance did not increase. As a consequence, Spanish fishing authorities started to send their own inspectors to the FPZ along with its fishing fleet.[92] Since the mid-1990s, more and more incidents occurred within the FPZ between Norwegian authorities and foreign fishing vessels. In 1993, the Norwegian Coast Guard fortified its enforcement in the FPZ by firing warn shots and in the following year it even began cutting fishing gear trawled by vessels which fished illegally without quotas in the zone.[93] The Norwegian Coast Guard has, however, refrained in most cases from taking sanctions against Russian vessels that have violated especially the reporting regulations in the FPZ – the Russian trawler *Chernigov* in 2001 is a counter-example thereto. This reluctance towards Russian vessels has been severely criticized by other States Parties to the Svalbard Treaty.[94]

[91] See for the following paragraph particularly *T. Pedersen/T. Henriksen*, Svalbard's Maritime Zones: The End of Legal Uncertainty?, in: IJMCL 24 (2009), (141) 159 et seqq.
[92] See *G. Hønneland*, Compliance in the Fisheries Protection Zone around Svalbard, in: ODIL 29 (1998), (339) 350.
[93] See *T. Pedersen*, The Svalbard's Continental Shelf Controversy: Legal Disputes and Political Rivalries, in: ODIL 37 (2006), (339) 346 with references in Norwegian.
[94] See for the paragraph especially *T. Pedersen*, The Svalbard's Continental Shelf Controversy: Legal Disputes and Political Rivalries, in: ODIL 37 (2006), (339) 346 et seq., 349 et seq.; *G. Ulfstein*, Spitsbergen/Svalbard, Max Planck Encyclopedia of Public International Law, www.mpepil.com, Para. 67; *T. Pedersen*, The constrained politics of the Svalbard offshore area, in: Marine Policy 32 (2008), (913) 915 et seqq.; *G. Hønneland*, Compliance in the Fisheries Protection Zone around Svalbard, in: ODIL 29 (1998), (339) 342, 344.

The following incident caused so far major trouble between Norway and the EU and Spain as EU Member State: The Spanish fishing vessels *Olaberri* and *Olazar* were arrested and seized in 2004 because of alleged violation of Royal Decree of 1977. The Spanish government[95] as well as the European Commission[96] were concerned about these enforcement measures. Both hold the view that the Svalbard Treaty neither restricts access to the maritime areas around Svalbard nor does it grant Norway the right to enforce measures, especially arresting and seizing foreign ships. In their view, only the flag State has the right to such enforcement measures in the FPZ. In addition, Spain holds Norway's enforcement policy in the FPZ, especially with regard to the more lax approach towards Russian vessels, as fundamentally discriminatory violating the non-discriminatory rights of the Svalbard Treaty.

The Norwegian Supreme Court, in its judgement of 2006 on the seizure of the two Spanish fishing vessels *Olaberri* and *Olazar* in 2004, ruled, however, that the principle of non-discrimination had not been violated.[97] Likewise the Norwegian Supreme Court ruled in 1996 in a case concerning fishing by Icelandic and Panamanian fishermen (both having no history of fishing in the area) that Norway had jurisdiction in the FPZ, national regulations based on traditional fishing were found to be non-discriminatory. Accordingly, the Court did not consider whether the Svalbard Treaty should or should not apply in the FPZ.

4.2. Non-Living Marine Resources (Petroleum Resources)

Oil and gas exploitation on Svalbard's continental shelf has not yet started. Further, no commercial exploration for petroleum has taken place on Svalbard's continental shelf so far. Accordingly, it is uncertain whether undiscovered petroleum resources exist on Svalbard's continental shelf. In 1985, the Norwegian government announced to its petroleum industry the opening of a new exploration area in the Barents Sea, stretching beyond the southern limit of the Svalbard box.[98] The announcement sparked warnings from the Soviet Union and a sharp note from the UK. In 1995, leading operators concluded that exploration on the continental shelf was so far not of commercial interest. In 2005, the Norwegian Petroleum Directorate initiated drilling in the Barents Sea North on Svalbard's east coast to gain more knowledge about its potential resources.

Until today, no exploration blocks have been announced in the Svalbard area, and Norway has in effect not yet opened it for exploration or exploitation to any State. Moreover, no foreign State made any attempts to exploit Svalbard's continental shelf resources, and no one has demanded a search license to areas beyond territorial borders.[99]

[95] *Ministeria de Agricultura, Pesca y Alimentación*, España y Rusia comparten la interpretación del Tratado de París sobre pesca en la Archipiélago de Svalbard, 6 August 2006; *Spain*, Note Verbale No. 49/18 to Norway, 27 July 2006; *Spain*, Note Verbale No. 47/11 to Norway, 21 July 2006.

[96] *European Union/Delegation of the European Commission to Norway and Iceland*, Note Verbale No. 26/04 to Norway, 20 July 2004. See *T. Pedersen*, The constrained politics of the Svalbard offshore area, in: Marine Policy 32 (2008), (913) 915.

[97] See for the whole paragraph *G. Ulfstein*, Spitsbergen/Svalbard, Max Planck Encyclopedia of Public International Law, www.mpepil.com, Para. 67 with references.

[98] See for the following chapter *T. Pedersen*, The Svalbard's Continental Shelf Controversy: Legal Disputes and Political Rivalries, in: ODIL 37 (2006), (339) 347 et seq., 350 et seq. with references in Norwegian.

[99] Norway consented to Russian seismic activities carried out between 1980 and 1988 as scientific research in accordance with Part XIII UNCLOS, as opposed to petroleum exploration which is prohibited. See *T. Pedersen*, The Svalbard's Continental Shelf Controversy: Legal Disputes and Political Rivalries, in:

Exploring and exploiting the offshore resources, especially under permanent sea ice, and to transport them, is difficult. However, during the last years, Norwegian oil exploration has moved northward towards Svalbard's maritime zones: In April 2011, a new major oil field was discovered in the Barents Sea and is reported to be in production possibly already in 2018.[100] Estimates showed that this Skrugard oil field contains some 400-600 million barrels of recoverable oil.[101] In January 2012, Statoil's exploration drilling conducted with the Aker Barents rig showed that the Havis field contained between 200-300 million tons of oil equivalents.[102] Therefore, oil and gas exploration and exploitation on Svalbard's continental shelf may be relevant within the next years. Yet, any interest in oil and gas exploration and exploitation activities will depend on future developments in Svalbard, technological innovations, the price of oil and further restrictions imposed by environmental considerations.[103]

4.2.1. Practical Implications of the Diverging Views on the Applicability of the Svalbard Treaty on the Continental Shelf

Whether the Svalbard Treaty is applicable or not on the continental shelf beyond Svalbard's territorial sea is of key importance in terms of equal access to and equal exploitation of the oil and gas resources as well as possible effects on the petroleum taxation level.

As mentioned before, Norway holds the view that the Svalbard Treaty does not apply to Svalbard's continental shelf beyond the territorial sea. In particular, the right to equally exercise and practise all maritime, industrial or commercial enterprises of Art. 3 Para. 2 ST and the limitations on Norwegian taxation (Art. 8 ST) would not apply. The Norwegian sovereign rights on Svalbard's continental shelf would thus be governed by International Law of the Sea.

According to Art. 77 Para. 1, 2 UNCLOS, the coastal State exercises exclusive sovereign rights over the continental shelf for the purpose of exploring and exploiting its natural resources; no one must undertake these activities without the express consent of the coastal State. Art. 81 UNCLOS tends to point in the same direction, stating that the coastal State shall have the exclusive right to authorise and regulate drilling on the continental shelf for all purposes. Under Arts. 80, 60 Para. 1 UNCLOS, the coastal State has the exclusive right to construct, authorise and regulate the construction, operation and use of installations and infrastructure for the purpose of exploring and exploiting oil and gas resources. Furthermore, the coastal State shall have exclusive jurisdiction over such installations and structures, including jurisdiction with regard to custom, fiscal and safety laws and regulations. The UNCLOS continental shelf regime therefore gives the coastal State exclusive sovereign rights with regard to exploration and exploitation of oil and gas resources. In return, Norway has to consent to every activity of other States,

ODIL 37 (2006), (339) 348.

[100] See http://barentsobserver.com/en/sections/energy/skrugard-production-2018 (last visited June 2012).

[101] See http://barentsobserver.com/en/topics/statoil-confirms-skrugard-volumes (last visited June 2012).

[102] See http://barentsobserver.com/en/energy/new-big-oil-discovery-barents-sea (last visited June 2012).

[103] See for the paragraph if not otherwise indicated *L.A. de La Fayette*, Oceans Governance in the Arctic, in: IJMCL 23 (2008), (531) 542 et seq. See for exploitability of Arctic resources also *D.G. Claes/O. Harsem*, Arctic Energy Resources – Curse or Blessing for European Energy Security?, May 2010, 8 et seq., available at: http://www.geopoliticsnorth.org/images/stories/attachments/claes_harsem.pdf (last visited June 2012).

e.g. drilling for exploration or exploitation and offshore platforms, and may impose stricter regulations on other States' activities than on its own activities.

According to the former Russian view, Norway had no right to claim a continental shelf around Svalbard beyond the territorial sea. Norway would, therefore, not have any rights on the continental shelf around Svalbard (except in the territorial sea). The respective area would be governed by UNCLOS, especially by the regime of the so-called "Area" and by the Authority (Arts. 133 et seqq. UNCLOS).[104]

If the Svalbard Treaty was applicable on the continental shelf (intermediary and prevailing opinion, e.g. Denmark) States Parties would have the right to equal access and equal participation in economic exploitation activities on the continental shelf.

4.2.2. Norwegian Legislation Applicable on the Continental Shelf

The Mining Code of 1925 and the Norwegian tax regulations are the two most important Norwegian national laws which could be applicable on Svalbard's continental shelf (besides environmental regulations which will be dealt with below).

According to Art. 8 Para. 1 ST, Norway is responsible for elaborating a Mining Code for Svalbard. The Mining Code establishes that States which signed the Svalbard Treaty, and legally founded companies of these countries, have the right to prospect for, extract and exploit coal, mineral oil and other minerals or rocks that can be extracted by mining (Sect. 2, 3 Mining Code). The Mining Code also contains the legal aspects of prospecting and discovery, the relationship to the landowner, claim patents, mining operations and safety at work. The Mining Code does not prevent Norway from adopting additional requirements for mining activities, such as rules concerning environmental protection, as long as such regulations do not violate the non-discriminatory rights and the specific provisions of the Mining Code itself.

As to the geographical scope of the Mining Code, Sect. 1 Mining Code states that "(t)his Mining Code shall apply to the entire Archipelago of Spitsbergen (Svalbard)".[105] Generally spoken, the provisions of the Mining Code are especially designed for mining on land. For example, Sect. 7 Para. 1 Mining Code prescribes that "(t)he search for natural deposits of the minerals and rocks mentioned in [Sect.] 2 may be made on one's own property as well as on that of any other party, and on the State land." Especially the term "State land" apparently points towards land territory and not towards mining in the territorial sea or on the continental shelf. Norway has, however, in practice accepted the application of the Mining Code in the territorial sea.[106] Likewise, the Mining Code

[104] According to Art. 1 Para. 1 lit. (1) UNCLOS, "Area" means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction. The Area and its resources, amongst them liquid or gaseous mineral resources (Art. 133 lit. (a) UNCLOS), are the common heritage of mankind (Art. 136 UNCLOS). This means, *inter alia*, that no State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof (Art. 137 Para. 1 UNCLOS). Under Art. 137 Para. 2 UNCLOS, all rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority acts. As a consequence of the application of UNCLOS provisions governing the Area, neither Norway nor any other States Parties to the Svalbard Treaty would have any preferential rights with respect to oil and gas exploitation.

[105] Sect. 26 Mining Code tends in the same direction providing that the "statutory provisions regarding the protection of workers at any time in force for mining in Norway shall also apply to mining in Svalbard (...)."

[106] *G. Ulfstein*, Spitsbergen/Svalbard, Max Planck Encyclopedia of Public International Law,

could also apply to exploration and exploitation activities on the continental shelf, although many of the provisions are not suitable for mining in sea areas.

As regards taxation, Art. 8 Svalbard Treaty sets out that taxes levied "shall be devoted exclusively to the [Svalbard] territories and shall not exceed what is required for the object in view".[107] This means that Norway may not impose higher taxes and fees than what is required for the administration of the archipelago. The purpose of this requirement is closely connected to the principle of non-discrimination: Norway should not profit from its sovereignty over Svalbard.

In the event of petroleum exploitation on Svalbard's continental shelf, Norway would not be able to adopt a non-discrimination petroleum management based on historical activity like the fisheries management regime – as no State has conducted historical petroleum exploitation around Svalbard. Therefore, States favoured by the present fisheries regime could hardly expect to obtain similarly lucrative stakes on the continental shelf if it were opened for exploitation. Norway could then be confronted with the question whether the Mining Code applies outside the territorial sea and whether taxation beyond the strict limits set by the Svalbard Treaty is prohibited with respect to activities on the continental shelf. In practice, Svalbard has not been a source of Norwegian tax revenue so far. The establishment of profitable enterprises such as oil and gas industry may, however, lead to the tax limitation of the Svalbard Treaty become effective in future.

Given that commercially viable petroleum resources exist on the continental shelf, a dispute arising from the relationship between Norwegian tax sovereignty and the Svalbard Treaty may well be the most important future dispute scenario with regard to Svalbard. Therefore, it will be important that develop a system of transparent and non-discriminatory management of potential petroleum resource exploitation based on Norwegian tax law.

4.3. Environmental Protection and Sustainable Development

Because of the high vulnerability of Svalbard's natural environment, severe restrictions have been laid down for most activities on Svalbard, e.g. drilling for petroleum, tourism and fishing. Arctic ecosystems are highly vulnerable, oil degrades and dissipates slowly at cold temperatures and long distances would render cleanup efforts expensive and time consuming. Besides natural impacts such as the melting of sea ice and higher temperatures, Svalbard's Arctic environment may also be affected by increased economic development, including mineral exploitation, fishing, shipping, tourism as well as infrastructure development (ports, pipelines, platforms). Accidental oil spills, operational pollution, dumping and general disturbances, during construction and operation phases, can lead to serious environmental damages.[108] For protective purposes, more than half

www.mpepil.com, Para. 43; *T. Pedersen*, The Svalbard's Continental Shelf Controversy: Legal Disputes and Political Rivalries, in: ODIL 37 (2006), (339) 343 with reference.

[107] See for the paragraph *G. Ulfstein*, Spitsbergen/Svalbard, Max Planck Encyclopedia of Public International Law, www.mpepil.com, Para. 31.

[108] See for details *L.A. de La Fayette*, Oceans Governance in the Arctic, in: IJMCL 23 (2008), (531) 547 et seqq.

of Svalbard is a national park or nature reserve and strict environmental regulations have been enacted since the 1990s, especially with regard to fisheries.[109]

As regards the environmental protection on the continental shelf and in the FPZ, Norway has the coastal State's right and duty to protect and preserve the marine environment, according to the Svalbard Treaty and UNCLOS.

Under Art. 56 Para. 1 lit. (b) (iii) UNCLOS, Norway has jurisdiction in its FPZ with regard to the protection of the marine environment. With regard to environmental protection on a coastal State's continental shelf, there is no similar rule in International Law of the Sea. However, several articles concerning the continental shelf relate to the protection of the marine environment. Part XII UNCLOS contains general provisions on the protection of the marine environment. States are, *inter alia*, obliged to take all measures to minimize to the fullest extent possible the pollution from installations and devices used in exploration or exploitation of the natural resources of the seabed and subsoil, in particular measures for preventing accidents and dealing with emergencies (see Art. 194 Para. 3 lit. (c) UNCLOS).

With regard to environmental protection under the Svalbard Treaty, Art. 2 Para. 2 ST provides that "Norway shall be free to maintain, take or decree suitable measures to ensure the preservation and, if necessary, the reconstruction of the flora and fauna (…); 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." The Svalbard Treaty gives Norway the right to adopt rules concerning the protection of the marine flora and fauna. By interpreting the Svalbard Treaty dynamically, and taking into account recent developments in International Environmental Law, one may come to the conclusion that Norway is now, 90 years after having signed the Svalbard Treaty, obliged to take effective measures in order to protect and preserve the natural environment, not only with regard to fishing and exploitation activities, but also comprising new sectors such as tourism.[110]

In this context, the Svalbard Environmental Protection Act (hereinafter "EPA") has been created. The purpose of the EPA is to safeguard virtually untouched area in Svalbard. Within the limits of this framework, environmentally sound settlement, research and commercial activities are allowed. The EPA and its related regulations came into effect on 1st July 2002. In fact, the EPA is more precise concerning its geographical scope than other Svalbard legislation: Sect. 2 EPA states that "(s)ubject to the limitations imposed by International Law, this Act applies to the entire land area of Svalbard and its waters out to the territorial limit." As the internal waters and the territorial sea belong to the territory of the coastal State, the EPA applies in these maritime zones.

There are, however, still doubts whether it applies in the FPZ and on the continental shelf. One may wonder why the Norwegian legislator, when drafting the EPA, did not explicitly refer to the well-known system of maritime zones as done in most cases in national laws and regulations which refer to maritime areas. But if one interprets the term "territorial limit" in the sense that it refers to the limit of territorial sovereignty,

[109] See for general information homepage of the Governor of Svalbard, About Svalbard, http://www.sysselmannen.no/hoved.aspx?m=44380 (last visited June 2012).
[110] See *G. Ulfstein*, The Svalbard Treaty: From Terra nullius to Norwegian Sovereignty, 1995, 278 et seqq.

both functional zones would be excluded from the area of application. Such reading would be, however, too narrow as nothing in the EPA points to such restriction. On the contrary, the wording of most of the provisions is very broad, aiming at the general protection of Svalbard's flora and fauna. Therefore, Sect. 2 EPA should be read in the following way: "(I)ts waters out to the territorial limit" encompasses all maritime zones in which Norway exercises territorial sovereignty or territorial sovereign rights and jurisdiction. In summary, the EPA should, therefore, be considered applicable not only in Svalbard's internal waters and territorial sea, but also in the FPZ and on the continental shelf.

Concerning its content, the EPA deals with area protection, species management (flora and fauna), land use plans (Sect. 47 et seqq.), pollution, waste disposal and traffic, also with regard to dumping from ships (Sect. 67 et seqq.). It lays down some important principles of environmental law with regard to notification, the precautionary principle (Sect. 7), economic accountability for environmental damage (Sect. 9), environment techniques and aspects of investment. Further, a system of protected areas is created under Sect. 11 et seqq. and environmental impact assessments are required (Sect. 59 et seqq.). As for effectiveness, Sect. 87 et seqq. foresee inspection and control measures whereas Sect. 93 et seqq. provide for enforcement and sanctions. In fact, large areas of the Svalbard Archipelago have been declared environmentally protected zones in which no commercial activities are allowed.

The regulations of the EPA on harvesting, especially on fishing (Sect. 31, 32), are concretized by the Regulations relating to harvesting of the fauna on Svalbard of 2002. Sect. 2 Para. 2 of the Harvesting Regulations uses the same wording[111] as Sect. 2 EPA, thus the Harvesting Regulations should also be considered applicable in the FPZ (see arguments above). Sect. 9 of the Harvesting Regulations states that harvesting may only be carried out by a person who holds hunting, trapping or fishing licence. The holder of the licence is bound to harvesting only the species to which it applies and clearly indicates any quota limits, types of gear and the period of time as well as the areas where the person is entitled to hunt, trap or fish. Special restriction on fishing are laid down in Sect. 21 et seqq. Harvesting Regulations.

Especially with regard to marine environmental protection, there seems to be no viable alternative to Norwegian environmental legislation and enforcement in Svalbard's maritime zones. In this respect, the interests of Norway and most States Parties to the Svalbard Treaty, especially EU Member States, seem to be congruent. It may be provocative to ask whether Norway is able to enforce this very strict environmental protection regime and fully or partly exclude anyone from petroleum exploration on Svalbard's continental shelf. If Norwegian companies were also excluded such legislation would presumably not conflict with the non-discriminatory rights of the Svalbard Treaty.

[111] Section 2 Para. 2 Harvesting Regulations: "Subject to the limitations imposed by International Law, these regulations apply to the entire land area of Svalbard and its waters out to the territorial limit."

4.4. Other Activities in Svalbard's Maritime Zones

4.4.1. Marine Scientific Research

The Svalbard Treaty does not contain any specific provisions concerning research on land and at sea. Art. 5 Para. 2 ST provides that "conventions shall also be concluded laying down the conditions under which scientific investigations may be conducted in the said territories." To date, no such conventions have been negotiated. Most field research activities, whether by Norwegians or foreigners, demand a permit from the Governor in Svalbard.[112] Norway has until now practised non-discrimination in relation to foreign research ships

Concerning marine scientific research, Norway has to consent to scientific research activities in Svalbard's territorial sea because of its territorial sovereignty.[113] In this regard, Art. 245 UNCLOS states that coastal States, in the exercise of their sovereignty, have the exclusive right to regulate, authorise and conduct marine scientific research in their territorial sea. Marine scientific research therein shall be conducted only with the express consent of and under the conditions set forth by the coastal State.

With reference to Svalbard's FPZ and according to Art. 56 Para. 1 lit. (b) (ii) UNCLOS, Norway has jurisdiction with regard to marine scientific research. Art. 246 UNCLOS specifies the conditions for conducting marine scientific research in the EEZ/FPZ and on the continental shelf: Coastal States, in the exercise of their jurisdiction, have the right to regulate, authorise and conduct marine scientific research in their EEZ and on their continental shelf in accordance with the relevant provisions of this Convention (Para. 1). Marine scientific research in the EEZ and on the continental shelf shall be conducted with the consent of the coastal State (Para. 2). Coastal States shall, under normal circumstances, grant their consent for marine scientific research projects undertaken by other States in their EEZ or on their continental shelf to be carried out in accordance with this Convention exclusively for peaceful purposes and in order to increase scientific knowledge of the marine environment for the benefit of all mankind (Para. 3).

Norway has to consent to any research activities carried out with regard to exploring oil and gas resources on the continental shelf (Art. 77 Para. 1 UNCLOS). Yet, any drilling on the continental shelf must be authorised and regulated by Norway (Art. 81 UNCLOS). Norway has, so far, practised non-discrimination in relation to foreign research ships.

4.4.2. Tourism

Tourism activities may increase in Svalbard, onshore as well as offshore. Neither the Svalbard Treaty nor UNCLOS contain provisions relating explicitly to tourism. As commercial activity, tourism falls under Art. 3 Para. 2 ST. All States Parties shall therefore be admitted on the basis of equal treatment to foster tourism development, on land, in the territorial sea and in the FPZ.

[112] See for further information http://www.sysselmannen.no/hovedEnkel.aspx?m=45294 (last visited June 2012).

[113] Vessels engaged in research activities do not benefit from the right of innocent passage through the territorial sea (see Art. 19 Para. 2 lit. (j) UNCLOS).

Regarding UNCLOS, activities related to tourism may fall under various provisions. Tourist ships may enjoy the right of innocent passage through the territorial sea if none of the conditions set forth in Art. 19 Para. 2 UNCLOS are fulfilled. In the FPZ, tourist ships enjoy the freedom of navigation (Art. 58 Para. 1, 87 Para. 1 lit. (a) UNCLOS). If tourist ships are engaged in dumping, they are bound by Art. 210 Para. 5 UNCLOS which states that dumping within the territorial sea and the EEZ or onto the continental shelf shall not be carried out without express prior approval of the coastal State which has the right to permit, regulate and control such dumping.

According to the Regulations relating to tourism and other travel in Svalbard[114], Svalbard's Governor has the authority to, *inter alia*, alter or prohibit trips. The Regulations relating to tourism and other travel in Svalbard apply to "Svalbard's land territory and sea territory to the limit of the territorial waters" (Para. 2). The term "territorial waters" is synonymous to the notion and concept of "territorial sea" (see above). Because of the wording of Para. 2, the Regulations relating to tourism and other travel in Svalbard are only applicable on Svalbard's land, internal waters and territorial sea – and not in the FPZ and on the continental shelf (seawards the territorial sea limits). The Governor's right to alter or prohibit trips in Svalbard's territorial sea may, depending on the circumstances, contravene the right of innocent passage through the territorial sea.

4.4.3. Shipping

Shipping activities in the maritime zones around Svalbard have not been very important so far. As to the melting of Arctic ice and the creation of new sea routes in the high north (North-West-Passage/Northern Sea Route), shipping in the Arctic Region may become more relevant in the decades to come. However, Svalbard is not directly related to the Northern Sea Route, but may play a role in the placing of infrastructure such as bases for supervision, rescue operations and environmental protection.

With regard to navigation, International Maritime Organization (IMO) regulations apply to the Arctic. States may impose stricter technical and environmental requirements for the Arctic Region than for other oceans because of its vulnerability. The IMO is the UN specialized agency dealing with international shipping activities. On 23rd December 2002, the IMO adopted "Guidelines for Ships Operating in the Arctic Ice-covered Waters".[115] Furthermore, certain areas of the Arctic could be declared marine protected areas under MARPOL[116] or PSSA (Particular Sensitive Sea Area)[117] with restrictions on shipping. In addition to these options which relate to IMO rules, Art. 234 UNCLOS enables coastal States to pass and enforce specific and strict rules on vessel-source pollution in ice-covered areas.[118] If Arctic ice further melts and new sea routes in the high

[114] Royal Decree of 18 October 1991, entered into force 1 January 1992, availabe at: http://www.sysselmannen.no/hovedEnkel.aspx?m=45304 (last visited June 2012).

[115] IMO Circular MSC/Circ.1056 – MEPC/Circ.399, available at: http://www.gc.noaa.gov/documents/gcil_1056-MEPC-Circ399.pdf (last visited June 2012). See *M. Byers*, Arctic Region, Max Planck Encyclopedia of Public International Law, www.mpepil.com, Para. 10.

[116] International Convention on the Prevention of Pollution from Ships, signed 2 November 1973, entered into force 2 October 1983, 1340 UNTS 184.

[117] *International Maritime Organization*, PSSA: Particular Sensitive Sea Areas, Compilation of Official Guidance Documents and PSSAs adopted since 1990, 2007 Edition, last amendments to Guidelines for the Identification and Designation of PSSA, IMO Resolution A.982 (24) of 1 December 2005, available at: http://www.imo.org/environment/mainframe.asp?topic_id=1357 (last visited June 2012).

[118] Art. 234 UNCLOS reads as follows: "Coastal States have the right to adopt and enforce non-

north will be opened for shipping, these provisions can be of importance also with regard to the Svalbard's maritime areas.

4.4.4. Institutional Issues

Various institutional issues are of importance regarding Svalbard's disputed maritime zones. First and foremost, a new Svalbard Conference for solving the legal controversies on Svalbard's maritime zones has been proposed. However, it does not seem to be realistic that such a Svalbard Conference can solve the legal disputes as it would require an agreement between all 40 States Parties; instead, such a conference could provoke new controversies.[119]

As an alternative approach, Norway could also initiate informal consultations with other States Parties to the Svalbard Treaty aimed at a common understanding of the relevant Svalbard Treaty provisions.[120] Such informal consultations could be promoted in the Arctic Council amongst the States participating therein. Whether such informal consultation may solve the long lasting controversy over Svalbard's maritime areas is unclear.

Established in 1976, the Arctic Council is an intergovernmental forum for promoting cooperation, coordination, and interaction among the Arctic States, focussing on issues of sustainable development and environmental protection. Yet, it is neither a multilateral political organisation based on an over-arching international regime nor does it have the power to adopt legally binding decisions. The Arctic Council has eight member States: US, Russia, Canada, Denmark (Greenland/Faroe Islands), Norway as Arctic coastal States and Iceland, Sweden and Finland although their coasts do not abut on the Arctic Ocean. In addition, the Arctic Council includes organizations of Arctic indigenous people as permanent participants. The EU has requested the formal status of observer, but to date, this request has been rejected. However, there is no reason to believe that Norway has serious objections to a formal observer status for the EU. EU Member States France, Germany, Poland, Spain, the Netherlands and the UK already have such status.

On 12th May 2011, the Arctic Council States signed the Agreement on Cooperation in Aeronautical and Maritime Search and Rescue in the Arctic[121], the first legally binding agreement negotiated under the auspices of the Arctic Council. The Agreement coordinates the search and rescue (hereinafter "SAR") coverage and response in the Arctic and establishes SAR responsibility areas of each State Party. Art. 3 Para. 2 of the Agreement

> discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence."

[119] See also *R. Churchill/G. Ulfstein*, The Disputed Maritime Zones Around Svalbard, (551) 589, available at: http://folk.uio.no/geiru/Hjemmeside/ChurchillUlfstein2010%5B1%5D.pdf (last visited June 2012).

[120] Proposed by *R. Churchill/G. Ulfstein*, The Disputed Maritime Zones Around Svalbard, (551) 589 et seqq., available at: http://folk.uio.no/geiru/Hjemmeside/ChurchillUlfstein2010%5B1%5D.pdf (last visited June 2012).

[121] Available at: http://arctic-council.npolar.no/accms/export/sites/default/en/meetings/2011-nuuk-ministerial/docs/Arctic_SAR_Agreement_EN_FINAL_for_signature_21-Apr-2011.pdf (last visited June 2012).

explicitly states that the delimitation of search and rescue regions is not related to and shall not prejudice the delimitation of any boundary between States or their sovereignty, sovereign rights or jurisdiction. Thus, also this SAR Agreement does not relate to the controversy over Svalbard's maritime areas.

A third and important institutional issue is (was) the proposal of an "Arctic Treaty". In this regard, the relationship between such a possible new Arctic Treaty and the Svalbard Treaty would have to be defined. The European Parliament (hereinafter "EP") and various civil-society organisations have raised the question of whether an environmental-oriented comprehensive treaty, modelled on the Antarctic Treaty[122], should be negotiated for the Arctic Region.[123] However, the EP proposal was supported neither by the European Commission (November 2008)[124] nor the Council (2009)[125] in their development of an Arctic strategy. Further, the five direct coastal States of the Arctic Ocean (Denmark, Canada, Norway, Russia, US) have rejected this idea, *inter alia*, in the Ilulissat Declaration of 2008.[126]

As the Arctic coastal States have rejected the idea of an Arctic Treaty under the aegis of the United Nations[127] and given the strategic importance of the Arctic, achieving a multilateral treaty is a huge challenge.[128] It is highly unlikely that the Arctic States would be willing to give up or "freeze" their sovereignty, refrain from resource exploitation and internationalize the Arctic.[129] Furthermore, the geographical circumstances of Antarctica – land mass surrounded by water – are different to that of the Arctic Region – water/ice surrounded by coastal States. In contrast to Antarctica, the Arctic has indigenous population and is in economic and military use.[130]

In the view of the Arctic coastal States, the Arctic is governed by the International Law of the Sea,[131] concerning the delineation of the outer limits of the continental shelves,

[122] Antarctic Treaty, December 1, 1959; ILM 19 (1980), 860-862; UNTS vol. 402, no. 5778, 71-85.

[123] *European Parliament*, Joint Motion for a Resolution on the International Treaty for the Protection of the Arctic, 30 March 2009, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+MOTION+P6-RC-2009-0163+0+DOC+PDF+V0//EN (last visited June 2012). See *O.S. Stokke*, A legal regime for the Arctic? Interplay with the Law of the Sea Convention, in: Marine Policy 31 (2007), (402) 402.

[124] *European Commission*, EC Communication: The European Union and the Arctic Region, Brussels, 20 November 2008, available at: http://eeas.europa.eu/arctic_region/docs/com_08_763_en.pdf (last visited June 2012).

[125] *Council of the European Union*, Council Conclusions on Arctic Issues, Brussels, 8 December 2009, available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/EN/foraff/111814.pdf (last visited June 2012).

[126] Ilulissat Declaration, Arctic Ocean Conference, Ilulissat, Greenland, 27-29 May 2008, available at http://arctic-council.org/filearchive/Ilulissat-declaration.pdf (last visited June 2012). See comments by *I. Winkelmann*, Feste Spielregeln für die Aufteilung des Arktischen Ozeans – Zur Ilulissat-Erklärung der arktischen Anrainerstaaten, SWP-Aktuell 53, Juni 2008.

[127] Former intents to negotiate a multilateral legal framework for the Arctic have also not been successful. See *D. König/T. Neumann*, Streit um die Arktis: Bestehendes Vertragswerk reicht aus, Vereinte Nationen 1/2008, (20) 24; Details *D.R. Rothwell*, The Polar Regions and the Development of International Law, 1996, 223 et seqq.

[128] See *M. Byers*, Arctic Region, Max Planck Encyclopedia of Public International Law, www.mpepil.com, Para. 41; *L.A. de La Fayette*, Oceans Governance in the Arctic, in: IJMCL 23 (2008), (531) 553 et seq.

[129] *L.A. de La Fayette*, Oceans Governance in the Arctic, in: IJMCL 23 (2008), (531) 553 et seq.

[130] See *D. König/T. Neumann*, Streit um die Arktis: Bestehendes Vertragswerk reicht aus, Vereinte Nationen 1/2008, (20) 24; *L.A. de La Fayette*, Oceans Governance in the Arctic, in: IJMCL 23 (2008), (531) 559.

[131] Without mentioning explicitly UNCLOS as for its non-ratification by the US. See *I. Winkelmann*, Feste Spielregeln für die Aufteilung des Arktischen Ozeans – Zur Ilulissat-Erklärung der arktischen Anrainer-

the protection of the marine environment, including ice-covered areas, freedom of navigation, marine scientific research, and other uses of the sea. Many important multilateral conventions apply to the Arctic, such as UNCLOS, the London Dumping Convention[132] and several environmental conventions, particularly the OSPAR Convention[133], one of the most developed regional seas conventions.[134] As for conservation and use of shared fisheries resources, the 1995 UN Fish Stocks Agreement[135] applies. UNCLOS strongly encourages regional fisheries management organisations (hereinafter "RFMOs", see Arts. 63, 64, 118, 119 UNCLOS). There are two spatially defined RFMOs to the Arctic, the Northwest Atlantic Fisheries Organization (hereinafter "NAFO")[136] and the North-East Atlantic Fisheries Commission (hereinafter "NEAFC").[137] However, none is applicable to Svalbard's maritime zones.

A regional seas agreement for the Arctic, specifying Part XII UNCLOS, seems also desirable, negotiated within the context of the Arctic Council and based on the ecosystem and precautionary approach and addressing marine environmental issues of common concern.[138]

5. Conclusions and Outlook

Summarizing the findings of the present study, the Svalbard Treaty is found to apply to Svalbard's internal waters and territorial sea. Because of Norwegian sovereignty in both zones, Norway has the right to adopt and enforce regulations therein, taking into account the non-discriminatory rights of other States Parties regulated in the Svalbard Treaty. The applicability of the Svalbard Treaty to Svalbard's internal waters and territorial sea has not been substantively challenged.

In contrast thereto, the dispute regarding the applicability of the Svalbard Treaty in Svalbard's FPZ and on Svalbard's continental shelf lasts for over 30 years now and there are no signs for a solution.[139] The more convincing arguments argue in favour of the applicability of the Svalbard Treaty and its non-discriminatory rights in the FPZ and on the continental shelf.

staaten, SWP-Aktuell 53, Juni 2008, 2

[132] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 13 November 1972, entered into force on 30 August 1975, last amendment 1993, UNTS 1046, 120 et seqq.

[133] The Convention for the Protection of the Marine Environment of the North-East Atlantic, 22 September 1992, ILM 21 (1993) 1068; see website: www.ospar.org (last visited June 2012).

[134] The conclusion of *A. Maurer*, The Arctic Region – Perspectives from Member States and Institutions of the EU, SWP Working Paper, FG 2, 2010/04, September 2010, 4, that there are "currently no clear, i.e. universally accepted rules governing the Arctic region" is therefore wrong.

[135] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, signed 4 December 1995, entered into force 11 December 2001, ILM 34 (1995), 1542.

[136] http://www.nafo.int/about/frames/about.html (last visited June 2012).

[137] More information at http://www.neafc.org, see map at http://www.neafc.org/page/27 (last visited June 2012). See for details on the Arctic fisheries regimes *B. Rudloff*, The EU as fishing actor in the Arctic – Stocktaking of institutional involvement and existing conflicts, SWP Working Paper, FG 2, 2010/02, July 2010, 13 et seqq.

[138] Similar *L.A. de La Fayette*, Oceans Governance in the Arctic, in: IJMCL 23 (2008), (531) 563, 566.

[139] See *R. Churchill/G. Ulfstein*, The Disputed Maritime Zones Around Svalbard, (551) 588, available at: http://folk.uio.no/geiru/Hjemmeside/ChurchillUlfstein2010%5B1%5D.pdf (last visited June 2012).

Besides this controversy there seems to be no viable alternative to the present Norwegian management regime in the FPZ for managing and protecting its fish stocks.[140] Norway (together with Russia) is managing the relevant fish stocks without significant overfishing. The Norwegian-Russian stocks are in good shape.[141] After decades of conflict in the FPZ no State has moved to challenge Norway at the ICJ (or another international court) with respect to interpretation or application of the Svalbard Treaty.[142] Even if the Svalbard Treaty provisions were made applicable in the FPZ by an international judgment, Norway would retain jurisdiction in the FPZ. Further, allowing fishing quotas based on historical activity would most likely be recognized under the non-discriminatory principles of the Svalbard Treaty. In summary, all States Parties to the Svalbard Treaty participating in fishing activities in Svalbard's FPZ seem to accept the Norwegian fisheries management and protection regime.

A new conflict may arise as soon as exploration and exploitation activities for oil and gas on the continental shelf around Svalbard have started. By accepting the Svalbard Treaty regime on Svalbard's continental shelf, the economic losses for Norway, particularly the limitation on taxation, would be considerable.[143] Likewise, the economic interests of other States Parties to the Svalbard Treaty regarding oil and gas drilling on the continental shelf are to consider. Therefore, it is unlikely that the other States Parties will stop claiming their non-discriminatory rights on Svalbard's continental shelf under the Svalbard Treaty.

The conflict over the legal status of Svalbard's maritime zones and over the extent of Norway's and the other States Parties' rights therein may intensify as soon as exploration and exploitation activities for oil and gas on the continental shelf around Svalbard have started because of the important economic potential of such resources. A solution which is consistent with International Law and implements, in particular, the existing international environmental norms is needed – before any meaningful exploration and exploitation activities on Svalbard's continental shelf take place.

[140] See also *R. Churchill/G. Ulfstein*, The Disputed Maritime Zones Around Svalbard, (551) 588, available at: http://folk.uio.no/geiru/Hjemmeside/ChurchillUlfstein2010%5B1%5D.pdf (last visited June 2012).
[141] Other than the European fish stocks which are overfished to a large extent. In its Green Paper on the next revision of the CFP, the Commission states, *inter alia*, that "most fish stocks have been fished down. 88 % of Community stocks are being fished beyond MSY [the maximum sustainable yield] (...), 30 % of these stocks are outside safe biological limits (...)." See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0163:FIN:EN:PDF (last visited June 2012).
[142] See for the following *T. Pedersen*, The Svalbard's Continental Shelf Controversy: Legal Disputes and Political Rivalries, in: ODIL 37 (2006), (339) 350 et seq.
[143] *R. Churchill/G. Ulfstein*, The Disputed Maritime Zones around Svalbard, (551) 588, available at: http://folk.uio.no/geiru/Hjemmeside/ChurchillUlfstein2010%5B1%5D.pdf (last visited June 2012).