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A. Geographical Data

1 Svalbard is the name of an Arctic archipelago (see also → *Archipelagic Waters*) lying in the → *Barents Sea*, midway between Norway and the North Pole, between 74°N and 81°N and 10°E and 35°E. Its land mass is 62,400km2, roughly the size of Belgium and the Netherlands combined, including the → *islands* Spitsbergen, North-East Land, Barents Island, Edge Island and Bear Island and → *rocks* appertaining thereto. While Spitsbergen (or Spitzbergen) is the older English (and Dutch) name of the archipelago and the name used in the 1920 Treaty concerning the Archipelago of Spitsbergen, Svalbard is the modern Norwegian name of the territory, increasingly used by non-Norwegians. In the following, Svalbard will be used for the archipelago and Svalbard Treaty for the 1920 Treaty concerning the Archipelago of Spitsbergen.

2 Whereas Spitsbergen refers to the characteristic mountains, the name Svalbard means the land with the cold coasts. Approximately 60% of the archipelago is covered by glaciers. The glaciers have also created deep and wide fjords and valleys. The maritime areas are normally free from ice from May until some time in November. In spite of Svalbard's geographical position, the temperature on the west coast is rarely below minus 30°C. During summer time the temperature is only occasionally over plus 10°C. Precipitation is low and is, on the west coast of Svalbard, approximately 300 mm annually.

3 Svalbard is at the margin of biological life. Because of the permafrost, there are no trees, but many forms of plants can be found. Mammals include polar bears, different kinds of seals, Svalbard reindeer, Arctic fox and several kinds of birds. The light varies greatly during the year. To put it simply, it may be said that there are four months of day and four months of night, with two transitional periods of two months each during spring and autumn.

4 Svalbard has no indigenous population. The most important settlements are Longyearbyen (about 2000 people), which is also the administration centre, and Barentsburg (about 700). Both settlements have traditionally been based on coal mining, with Norwegians in Longyearbyen and Russians in Barentsburg. Svalbard is an attractive tourist destination and → *tourism* has increased significantly in recent years. The archipelago is also well-suited for scientific research, being an easily accessible Arctic area with an agreeable climate and well-developed infrastructure. Many nations have research stations in Ny-Ålesund, and Poland has a station in Hornsund. Svalbard has also become a centre for university education with its University Centre on Svalbard, based in Longyearbyen.

B. Historical Developments

5 The prevailing Norwegian theory has been that Svalbard was discovered by Vikings in the 12th century. It has also been claimed that Russian Pomors visited Svalbard in the 16th century. But the diplomatic history of Svalbard did not start until the archipelago was discovered by the Dutchman Willem Barents in 1596, on his expedition to find the northern sea route to the Far East (see also → *Territory, Discovery*).

6 Reports about Svalbard's rich resources resulted in extensive hunting by several nations, especially for walrus and whales, from the beginning of the 17th century. (see also → *Marine Mammals*) The Danish-Norwegian King Christian IV asserted → *sovereignty* over Svalbard. This claim was partly based on the assumption that Svalbard was physically connected with → *Greenland*, where Norway exercised sovereignty—Greenland was assumed to extend along the whole northern ocean to Novaja Semlja—and partly on the Norwegian claim over the northern sea. The Danish-Norwegian claim was, however, rejected by King James I of England, who also declared sovereignty over Svalbard. England

founded its claim on the alleged (but false) discovery of Svalbard by Sir Hugh Willoughby in 1533. While the Netherlands did not claim sovereignty, together with the French and the Spanish they maintained that they had the right to hunt whales according to the principle of *mare liberum*, as advocated by the Dutchman Hugo Grotius (1609). No State was able to enforce authority over the resource exploitation and the unregulated hunting resulted in the collapse of the resources. (see also → *Marine Living Resources, International Protection*)

7 Denmark-Norway was the only State claiming sovereignty over Svalbard during the 17th and the 18th centuries. But after the depletion of its living resources, Svalbard did not attract much international interest. During the 19th century Svalbard acquired a new legal status, under the common assumption that Svalbard was terra nullius, ie no man's land.

8 The legal status of Svalbard was not reconsidered until 1871. In order to protect its scientific research, the Swedish-Norwegian government asked the relevant States whether there would be any objections to Sweden-Norway taking possession of Svalbard. The government of → *Russia* responded that it wanted Svalbard to continue, by tacit agreement, to be a territory with an undecided status open to all States. The idea of taking possession of Svalbard was then abandoned. Thus, Svalbard continued to be considered terra nullius.

9 Prospecting and mining for coal from the beginning of the 20th century resulted in new and increasing conflicts. A new international legal regime was necessary to enable effective management and regulation. After gaining independence from Sweden in 1905, Norway stated in a notification in 1907 to other States that the existing legal regime on Svalbard was unsatisfactory. The creation of a new legal regime based on terra nullius was suggested. A three-power conference between Norway, Sweden and Russia was held before the general international conference. The three States agreed to a draft convention establishing that Svalbard should continue to be terra nullius, but governed by a commission consisting of the same States.

10 Germany and the US had, however, serious objections to the draft. Norway, Sweden and Russia convened a new conference in 1912, but only minor changes were made to the draft convention. A conference of all relevant powers was then arranged in 1914. At this conference the main conflict was between Germany and the US, on the one hand, who wanted to participate in the government of Svalbard, and Russia, who rejected these claims. It proved impossible to reach agreement and the conference was to be resumed in 1915. But before the delegates had reached home World War I had started.

11 Norway requested in 1919 that the Paris Peace Conference after World War I should examine the legal status of Svalbard and that Norway be granted sovereignty. The conference established a Spitsbergen Commission and asked Norway for a draft convention. The draft presented was based on Norwegian sovereignty while preserving earlier terra nullius rights by allowing equal rights to access, hunting and fishing, nature conservation, and maritime, industrial and commercial activities. The peaceful utilization should be ensured through a prohibition against the establishment of naval bases and fortifications, and the use of Svalbard for warlike purposes.

12 Relevant States were also asked to present their views on the future legal regime of Svalbard. Sweden and the Netherlands suggested that Norway should be accorded Svalbard as a → *mandate* under the → *League of Nations*. Denmark accepted Norwegian sovereignty on the condition that Norway recognized Danish sovereignty over Greenland, which was subsequently addressed in the → *Eastern Greenland Case* in 1933. Germany, as the defeated State, was not consulted. In Russia there was a civil war, but the pre-communist regime accepted Norwegian sovereignty. The Spitsbergen Commission had no

difficulties in reaching agreement, which to a great extent was consistent with the Norwegian draft convention. The Svalbard Treaty was signed on 9 February 1920.

13 Germany had not been represented in the peace negotiations in Paris, but Norway had kept Germany informed about the process and received no objections to the solution chosen. Germany ratified the Svalbard Treaty in 1925. After negotiations between Norway and the USSR, the USSR recognized Norwegian sovereignty over Svalbard in 1924—in full knowledge of the Svalbard Treaty and the Mining Code—and Norway recognized the USSR. In accordance with Art. 10 Svalbard Treaty, the USSR adhered to the Svalbard Treaty in 1935 after recognition by all the States Parties—the last being the US. After a consensus on the Mining Code was achieved and the USSR accepted the Svalbard Treaty and the Mining Code, Norway ratified the Svalbard Treaty and it entered into force on 14 August 1925. There are currently 39 States Parties to the Svalbard Treaty.

14 During World War II the northern areas gained increased strategic importance. The Norwegian and the Soviet populations were evacuated and there was fighting between the allied nations and the Germans. (see also → *Forced Population Transfer*; → *Population, Expulsion and Transfer*) The new emphasis on Svalbard's strategic significance is also demonstrated by the proposal in 1944 by the Soviet foreign minister Molotov to the Norwegian foreign minister Lie that the USSR should take over Bear Island, whereas the rest of Svalbard should be a Norwegian-Soviet condominium (see also → *Condominium and Coimperium*). Norway was reluctant and the USSR did not push the question further.

15 Only Norway and the USSR continued coal mining after 1952. Norway as the territorial sovereign did not interfere in the Soviet communities. Norwegian security policy, however, provoked protests from the USSR. The Soviets protested against the decision to place Svalbard under the command of the → *North Atlantic Treaty Organization (NATO)* in 1950, as well as when the airport on Svalbard was planned, when Norway allowed the establishment of the telemetric station of the European Space Research Organization ('ESRO'; now → *European Space Agency [ESA]*), and in connection with visits by Norwegian naval vessels and military aircraft.

16 Oil drilling from the 1960s was a new activity, involving new nations and new companies. This resulted both in more focus on the non-discrimination provisions of the Svalbard Treaty, and eventually on the need for protection of the environment in the 1970s. It may be maintained that it was not until the mid-1970s that Norway aspired to implement its sovereignty in practice. The Russians protested against environmental regulations, regulations on safety for oil drilling, traffic regulations and aviation regulations. Since the 1980s the Russians have, however, become more inclined to accept the exercise of Norwegian sovereignty.

17 The activities on Svalbard have been diversified in recent years with the increase in the tourist industry and in scientific research and university studies. The archipelago's flora and fauna are, however, extremely vulnerable to impacts from human activity. One of the objectives in the Norwegian management of Svalbard is that the islands should be among the world's best managed wildlife preserves. More than half of Svalbard has been designated national park or nature reserve and there are strict environmental regulations. (see also → *Conservation of Natural Resources*)

18 Norwegian sovereign rights on the → *continental shelf* and in the 200 nautical miles exclusive economic zone ('EEZ'); → *Exclusive Economic Zones*) are disputed. Norway claims that other States' rights under the Svalbard Treaty do not apply in these maritime areas, whereas many States have either protested against the Norwegian view or reserved their position. The disputed status of the maritime areas creates problems for fisheries

management in the 200-mile zone (see also → *Fisheries, Coastal*; → *Fisheries High Seas*) and for the commencement of oil activities on the continental shelf around Svalbard.

C. The Svalbard Treaty

1. Norwegian Sovereignty

19 The content of Norwegian sovereignty over Svalbard must be decided on the basis of an interpretation of the Svalbard Treaty. This differs from normal practice: that sovereignty over a territory is based on → *customary international law*.

20 Art. 1 Svalbard Treaty establishes 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, comprising, with Bear Island or Beeren-Eiland, all the islands situated between 10° and 35° longitude East of Greenwich and between 74° and 81° latitude North, especially West Spitsbergen, North-East Land, Barents Island, Edge Island, Wiche Islands, Hope Island or Hopen-Eiland, and Prince Charles Foreland, together with all islands great or small and rocks appertaining thereto.

21 The 'full and absolute sovereignty' means that Norway exercises the same sovereignty as any State exercises over its territory, only 'subject to the stipulations of the present Treaty'. There are no 'stipulations' affecting the sovereignty as such. The 'full and absolute sovereignty' of Norway is also supported by the fact that Norway was accorded sovereignty over Svalbard, rather than Svalbard being designated a Norwegian mandate under the League of Nations.

22 The Svalbard Treaty is thus based on the nationalization of Svalbard, in contrast to the internationalized management of the pre-World War I draft convention. (→ *International Administration of Territories*) In other words, Svalbard is only internationalized in the sense that other States have extensive rights, particularly under the principle of non-discrimination and the restrictions on the military use of Svalbard. What is unique about the Svalbard Treaty is that while Norway enjoys 'full and absolute sovereignty', all States of the world may become Parties and thereby enjoy non-discriminatory rights. Norwegian sovereignty applies to 'all islands great or small and rocks appertaining thereto' within the geographical co-ordinates defined in Art. 1 Svalbard Treaty, ie between 10° and 35° E and between 74° and 81° N.

23 Norway's sovereignty implies the right to adopt laws and regulations on Svalbard, and their enforcement. Norway has no more duty to consult with other States on the government of Svalbard than any other State about the management of its territory. Norway may also act on the external level, to take care of foreign policy affairs relating to Svalbard, including entering into → *treaties* about Svalbard, and its defence. Agreements entered into by Norway will also comprise Svalbard, unless Svalbard is excluded by the treaty or Norway has made a reservation as to its geographical application. Protocol 40 on Svalbard to the 1992 Agreement on the → *European Economic Area (EEA)* excludes Svalbard from its application. Norway has also made reservations concerning the application of the 1994 Agreement on Government Procurement (see also → *Government Procurement, International Restrictions*) and the → *General Agreement on Trade in Services (1994)* on Svalbard. (see also → *Treaties, Multilateral, Reservations to*)

24 Norwegian sovereignty is recognized by all States Parties to the Svalbard Treaty. Norwegian 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 any State. Non-Parties cannot claim rights under the Svalbard Treaty. As already stated, they are, however, free to ratify the Svalbard Treaty and thereby benefit from its provisions, first and foremost the right of non-discriminatory access to economic exploitation of the archipelago.

2. Non-Discrimination

25 It is strictly speaking not correct to call non-discrimination a principle in the Svalbard Treaty. Non-discrimination is required under several provisions of the Svalbard Treaty with respect to specific substantive matters, but there is no general requirement of non-discrimination. Hence, the substantive scope of non-discrimination must be determined in relation to each of these provisions. Among the subject-matters covered by non-discrimination are nature conservation, hunting, fishing, mining, industrial, maritime and commercial activities. This means that most of the important activities are covered.

26 Art. 5 Svalbard Treaty provides that 'Conventions shall also be concluded laying down the conditions under which scientific investigations may be conducted in the said territories'. No such conventions have been negotiated. Norwegian sovereignty should accordingly prevail, at the expense of non-discrimination. Norway has, however, practised non-discrimination in relation to foreign scientific research.

27 The Svalbard Treaty requires Norway to treat individuals, ships—including → *fishing boats*—and companies of States Parties in a non-discriminatory manner. But although such individuals, ships and companies are beneficiaries of the right of non-discrimination, as the Svalbard Treaty is not a treaty on the protection of → *human rights*, the right holders are their home States, and only States Parties to the Svalbard Treaty. Norwegian individuals, ships and companies are not protected by the Svalbard Treaty (see also → *Minimum Standards*). But they may indirectly benefit from the Svalbard Treaty protection to the extent that Norway chooses not to discriminate against Norwegians.

28 The prohibition is limited to discrimination on the basis of → *nationality*. This is consistent with the purpose of this requirement, ie to preserve the previous terra nullius rights. Both direct and indirect discrimination must be considered prohibited, meaning that there is a prohibition against discrimination both in law and in fact. The requirement of non-discrimination does not, however, entail a prohibition against regulating or even prohibiting activities. Norwegian sovereignty means, for example, a discretionary right to determine the degree and form of environmental protection on the archipelago.

3. The Mining Code

29 Coal mining was the most important activity on Svalbard at the time of the adoption of the Svalbard Treaty. Art. 8 Svalbard Treaty contains the procedure governing the adoption of mining regulations, including a process for resolving objections by other States Parties. The Mining Code was adopted by Norwegian Royal Decree of 7 August 1925. But while the Svalbard Treaty is silent on the procedure for modifications of the Mining Code, it may be argued that they can only be adopted by the same procedure as its adoption.

30 The Mining Code contains regulations about the procedure for acquiring mining rights, rights of the property owner to participate in mining activities, and obligations imposed upon the mining companies as regards both the mining process and the protection of workers. The Mining Code does not, however, prevent Norway from adopting additional requirements for mining, such as safety regulations and rules concerning environmental

protection, as long as such regulations do not violate the requirement of non-discrimination and the specific provisions of the Mining Code.

4. Taxation

31 Art. 8 Svalbard Treaty sets out that taxes levied 'shall be devoted exclusively to the said territories and shall not exceed what is required for the object in view'. 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 that of non-discrimination: Norway should not profit from its sovereignty. In practice, Svalbard has not been a source of Norwegian tax revenue and the monetary flow actually runs in the opposite direction. The establishment of profitable enterprises, particularly in the oil and gas industry may, however, mean that the tax limitation can become effective in the future (see also → *Taxation, International*).

5. Restrictions on Military Use

32 Art. 9 Svalbard Treaty establishes:

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

33 This provision may be seen to serve two purposes: one is an extension of non-discrimination by preventing Norway from benefiting strategically by its sovereignty, and the other is to preserve the peaceful utilization of the archipelago.

34 It should be noted that Art. 9 Svalbard Treaty does not contain a complete → *demilitarization* of Svalbard. The provision sets out specific prohibitions against the establishment of any 'naval base' or 'fortification', and prohibits Svalbard's use for 'warlike purposes'.

35 The prohibition against the construction of naval bases and fortifications does not prevent the stationing of troops or weapons, military exercises or testing of weapons, but it may be argued that the prohibition against naval bases should nowadays be interpreted as also covering military air bases. Furthermore, the prohibition against fortifications would preclude physical protection of troops, weapons or installations. While the prohibition against using Svalbard for 'warlike purposes' would prevent the commencement of an international armed conflict (→ *Armed Conflict, International*) on or from Svalbard, this is not of much current interest, in the light of Art. 2 (4) → *United Nations Charter* and customary international law, prohibiting the 'threat or use of force' against another State. (→ *Use of Force, Prohibition of*; → *Use of Force, Prohibition of Threat*)

36 Art. 9 Svalbard Treaty provides that the prohibitions against military use of Svalbard are subject to the rights and duties resulting from Norwegian membership in the League of Nations, ie that these rights and duties shall prevail. The → *United Nations (UN)* has replaced the League of Nations and the corresponding rights and duties under the UN should currently be regarded as applicable. There is no conflict between Art. 2 (4) UN Charter prohibiting the threat or use of force and the prohibitions against the establishment of fortifications and naval bases, and the use of Svalbard for warlike purposes. The UN Security Council ('UNSC'; → *United Nations, Security Council*) has, however, the authority under Art. 42 UN Charter to 'take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security'. In principle, the UNSC may thus order the use of military force on Svalbard. Any discrepancies between the UN Charter and the Svalbard Treaty would be resolved under Art. 103 UN Charter, whereby

obligations under the UN Charter shall prevail between Member States. (see also → *Treaties, Conflicts between*)

37 Norway should be considered to have the right to individual and collective self-defence of Svalbard (→ *Self-Defence*; → *Self-Defence, Collective*). But it can be argued that Art. 9 Svalbard Treaty would preclude the use of Svalbard for armed response to → *armed attacks* on other parts of Norway or on its allies, and thus that Svalbard should be considered neutral (see also → *Neutrality, Concept and General Rules*; → *Neutralization*). The integration of Svalbard in the NATO defence structure is not prevented by Art. 9 Svalbard Treaty since the co-operation is based on collective self-defence (Art. 5 North Atlantic Treaty). Furthermore, Norwegian sovereign rights over Svalbard are not transferred since decision-making in NATO is based on → *consensus*.

D. The Maritime Areas

38 The wording of the Svalbard Treaty is not entirely clear about its application in the maritime areas. Some articles expressly refer to maritime areas, such as the territorial waters, other articles refer to 'the territories specified in Article 1'. Furthermore, 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 EEZs of 200 nautical miles. Consequently, the treaty's wording does not contain any reference to these legal concepts. The application of the Svalbard Treaty on the continental shelf and in the EEZ has been disputed. Of particular importance is the application of non-discrimination in fisheries management and the allocation of petroleum licences, and to what extent the tax limitation and the Mining Code are applicable to petroleum activities.

1. The Territorial Sea

39 Art. 1 Svalbard Treaty states that the treaty applies to 'the Archipelago of Spitsbergen, comprising, with Bear Island or Beeren-Eiland, all the islands situated between 10° and 35° longitude East of Greenwich and between 74° and 81° latitude North, especially [certain islands], together with all islands great or small and rocks appertaining thereto'. The co-ordinates indicated form a box containing certain islands and maritime areas. It could be argued that the 'Archipelago of Spitsbergen' is the whole area within this Svalbard box, including maritime areas. It is, however, expressly stated in Art. 1 Svalbard Treaty that the 'Archipelago of Spitsbergen' comprises all the named islands and 'all islands great or small and rocks appertaining thereto' within the Svalbard box. The wording of the Svalbard Treaty therefore clearly indicates that the function of the co-ordinates is only to set out which islands and rocks are to be covered by the treaty regime, not to make the regime applicable to the maritime areas within the box.

40 Some of the Svalbard Treaty articles expressly state that they apply in the → *territorial sea*: Art. 2 (1) Svalbard Treaty provides that the States Parties shall enjoy equally the right to fishing and hunting 'in the territories specified in Article 1 and in their territorial waters'. Art. 2 (2) Svalbard Treaty establishes Norway's right to adopt conservation measures, which shall always apply equally in 'the said regions, and their territorial waters'. Art. 3 (2) Svalbard Treaty prescribes the principle of equal rights as regards 'maritime, industrial, mining or commercial enterprises both on land and in the territorial waters'. The application of these provisions in the territorial sea raises no legal problems.

41 Art. 3 (1) Svalbard Treaty has, however, a slightly different wording, as it accords the right to ‘equal liberty of access and entry’ 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’. ‘Ports’ and ‘fjords’ appear to raise no real difficulties of meaning. ‘Waters’ is more problematic. This expression should, however, be considered to refer at least to the territorial sea.

42 A third category of articles, including Art. 8 Svalbard Treaty on the tax limitation and Art. 9 Svalbard Treaty on military use, refer to ‘the territories specified in Article 1’. The geographical application of these articles is more difficult to determine. In favour of the view that these articles refer to the land territory only, are the following arguments. First, Art. 1 Svalbard Treaty only mentions land areas (various islands). Second, the term ‘territory’ usually connotes land, and not adjacent waters, unless qualified by such adjective as ‘maritime’. Third, the reference to ‘territorial waters’, as in the phrase ‘the territories specified in Article 1 and in their territorial waters’, in some of the other articles would be redundant if ‘the territories specified in Article 1’ included more than land territory.

43 There is, however, a close link between the land territory and the sea territory in → *international law*, in the sense that a treaty applying to the land territory would usually be considered to apply also in the territorial sea. A reason for not mentioning territorial waters in all of the articles of the Svalbard Treaty could be that not all activities were regarded as maritime when the treaty was drafted. Consequently, the inconsistent wording should not prevent the application of all the treaty provisions in the territorial sea. The Mining Code Art. 1 has a similar wording to that of the Svalbard Treaty Art. 1, but Norway has in practice accepted its application in the territorial sea. This must be seen as a relevant subsequent Norwegian interpretation of the Mining Code and no States have protested.

2. The Right to a Continental Shelf and to Establish an Exclusive Economic Zone

44 The competence of a State to claim maritime zones beyond the territorial sea derives from its sovereignty over that territory. Since Norway has sovereignty over Svalbard, and since there is nothing in the Svalbard Treaty which either expressly or impliedly restricts Norway’s competence to claim maritime zones in respect of Svalbard—and the treaty in fact expressly refers to Svalbard’s territorial sea—it must follow that Norway has the competence to claim maritime zones around Svalbard.

45 The law of the sea provides that all islands generate a continental shelf and may form the basis for establishment of an EEZ of 200 nautical miles. A limited exception was, however, made in Art. 121 (3) UN Convention on the Law of the Sea for ‘rocks which cannot sustain human habitation or economic life of their own’: such islands cannot generate a continental shelf or EEZ.

46 There are undoubtedly many islets and rocks in the archipelago to which Art. 121 (3) UN Convention on the Law of the Sea would apply, but they lie so close to the main islands of the group that in practice the generation of the continental shelf and EEZ would not be affected. The only islands lying at any distance from the main archipelago which might be covered by Art. 121 (3) UN Convention on the Law of the Sea are Bear Island and Hope Island. But these islands must be considered as being larger than any reasonable definition of a rock. It thus seems that Art. 121 (3) UN Convention on the Law of the Sea would have no legal application to the archipelago. The general conclusion that follows is that there is nothing in either the Svalbard Treaty or the general body of international law which

prevents Norway from claiming the whole range of generally accepted maritime zones around Svalbard.

3. Application on the Continental Shelf and in the Exclusive Economic Zone

47 Norway claims sovereign rights and jurisdiction on the continental shelf and in the EEZ around Svalbard, but does not accept that other States' rights under the Svalbard Treaty are applicable in these maritime areas. Several States, including Russia, the United Kingdom and Iceland, have reserved their opinion or protested against the Norwegian view. The relevant arguments may be somewhat different for the continental shelf and the EEZ.

48 Norway claims that there is no Svalbard continental shelf, and therefore that the mainland continental shelf stretches out around and beyond Svalbard. This may be founded on the fact that there is in a geological sense one continental shelf, and that international law only contains rules about maritime delimitation between States, not between different parts of a State.

49 But it may on the other hand be argued that islands have the capability to generate a continental shelf, that Svalbard is the basis for an EEZ, that Norway wants to use Svalbard as a basis for delimitation of the continental shelf between Norway and Russia, and when determining the area beyond 200 nautical miles where a fee shall be paid for exploitation of non-living resources under Art. 82 UN Convention on the Law of the Sea. As regards the delimitation between Svalbard and the mainland shelf, an analogy could be drawn from the delimitation between States in the international context. (see also → *Analogy in International Law*)

50 Secondly, Norway claims that the wording of the Svalbard Treaty says that the rights apply on Svalbard and its territorial sea. Accordingly, it is argued, these rights do not apply on the continental shelf and in the EEZ. It may also be argued that when the Svalbard Treaty was drafted in 1920, the principle of restrictive interpretation of treaties was more important. This principle requires that restrictions on sovereignty must be interpreted restrictively.

51 Against this, it has been maintained that the continental shelf and the EEZ were not developed as concepts in international law in 1920. If the development in international law had resulted in an extension of the territorial sea to 200 nautical miles, non-discrimination would under the wording of the Svalbard Treaty have been extended accordingly. It could be argued that since the continental shelf and the EEZ are functional extensions of the territorial sea, the rights of other States should also be extended through an extensive interpretation of the treaty, or by analogy.

52 Furthermore, the Svalbard Treaty could be seen as a package solution, where Norway was granted the sovereignty, but other States retained certain terra nullius rights through the right of non-discrimination. Non-discrimination was made applicable to all areas known at that time. It may be claimed that when Norwegian rights are extended, the rights of other States should be extended accordingly. Moreover, the close legal connection between the land territory and the maritime areas would also be an argument in favour of extending restrictions on the land territory to the maritime zones. Finally, it has been pointed out that a somewhat paradoxical situation would exist if Norway as a coastal State enjoyed more rights further seawards than on the land territory and in the territorial sea.

53 It could be argued that non-discrimination should not apply beyond the territorial sea because this could give rise to disputes and complicate effective management. But non-discrimination has worked so far on Svalbard and in its territorial sea, and is applied by the European Union in its maritime areas without insurmountable problems.

54 International judgments point in either direction. In two judgments of 1951 about the geographical area of certain oil licences granted before the continental shelf was accepted as a legal concept, the arbitration courts concluded that the licences did not extend to the continental shelf (*Petroleum Development Ltd v Sheikh of Abu Dhabi* and *Petroleum Development [Qatar] v Ruler of Qatar*; see also → *Abu Dhabi Oil Arbitration*). The disputes were, however, between a State and a private company, and the courts did not expressly apply international law.

55 In the *Aegean Sea Continental Shelf Case* (*Greece v Turkey*) *of 1978* (see also → *Aegean Sea*) the → *International Court of Justice (ICJ)* concluded, however, that a → *declaration* on jurisdiction given in 1928 also applied to the continental shelf. But in the case *Guinea-Bissau v Senegal*, the 1989 arbitrational award—confirmed by the ICJ in 1991—held that an agreement from 1960 about delimitation of the territorial sea, the contiguous zone and the continental shelf did not apply to the more recent EEZ (→ *Maritime Boundary between Guinea-Bissau and Senegal Arbitration and Case [Guinea-Bissau v Senegal]*). Finally, in the → *Oil Platforms Case (Iran v United States of America)* of 2003, the ICJ did not distinguish between the land territory, the territorial waters, the continental shelf and the EEZ in a treaty entered into in 1955 and applicable on 'the territories of the two High contracting parties' (see also *Case concerning Oil Platforms [Islamic Republic of Iran v United States of America]* para. 82).

E. Maritime Delimitation

56 As outlined above, international law contains no rules on the drawing of maritime boundaries between different parts of a State territory, where one of the parts is subject to a special international legal regime, such as between the Norwegian mainland and Svalbard. Whereas an analogy from maritime delimitation between States could be applied, Norway has chosen to give full effect to the mainland EEZ. One possible argument in favour of such a method is that Norway should not be entitled to a smaller mainland zone by acquiring sovereignty over Svalbard.

57 The delimitation between Svalbard and the Russian islands of Novaja Zemlja and Franz Josef Land forms part of the general boundary delimitation of the EEZs and continental shelves of Norway and Russia in the Barents Sea. Whereas Norway claims the equidistance (or median) line, Russia claims the so-called sector line, ie a line of longitude running from the terminus of the existing boundary outside the mainland towards the North Pole, but modified in an easterly direction in the Svalbard area so as to avoid cutting through the area defined in Art. 1 Svalbard Treaty. Negotiations between the two countries have been conducted since the 1970s, but no agreement has been reached.

58 Norway and Denmark entered into an agreement on 20 February 2006 delimiting the continental shelf and the EEZs between Svalbard and Greenland, based in principle upon the equidistance line. The area delimited by the agreement measures 150,000 km2.

59 Norway submitted documentation on the outer limit of the continental shelf to the international Commission on the Limits of the Continental Shelf (→ *Continental Shelf,*

Commission on the Limits of the) on 27 November 2006, including the outer limit of the continental shelf beyond 200 nautical miles north of Svalbard.

F. Norwegian Law

60 The Act of 17 July 1925 Relating to Svalbard ('Svalbard Act') establishes in section 1 that the old Norse name Svalbard is the name of the archipelago, and that it 'forms a part of Norway'.

61 Section 2 Svalbard Act stipulates:

> 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.

62 Section 3 provides that certain acts apply on Svalbard with adaptations adopted by the King in Council. Furthermore, section 4 establishes that the King in Council may adopt regulations in specified subject areas.

63 This means that rules may be found in the Svalbard Act, in the general civil, penal and procedural law, in acts listed in section 3, in acts specifically providing that they apply on Svalbard, or regulations adopted by the King in Council. But specific acts may also be adopted for Svalbard, such as the Act No 79 Relating to the Protection of the Environment in Svalbard of 15 June 2001.

64 Section 5 Svalbard Act establishes that the King in Council shall appoint a Governor who shall have the same authority as a District Governor, and is chief of the police and notary public. Sec. 22 Svalbard Act provides that all land 'which is not assigned to any person as his property pursuant to the Treaty relating to Svalbard shall be State land and as such be subject to the State's right of ownership'.

65 Norway has traditionally claimed a 4-nautical mile zone outside the Norwegian mainland and around Svalbard as territorial waters. By Act of 27 June 2003 No 57 Relating to Norway's Territorial Waters and Contiguous Zone the territorial waters, including the waters around Svalbard, was, however, extended to 12 nautical miles (sec. 2). Straight baselines around Svalbard have been established by Royal Decree of 1 June 2001 No 556.

66 Norway has not challenged the other States Parties by establishing a 200-mile zone with preferences for Norwegian fishermen, but has by Royal Decree of 3 June 1977 established a non-discriminatory fisheries protection zone, with effect from 15 June 1977. The decree provides for the establishment of quotas, closed areas, minimum mesh size in trawl and minimum size of fish, and reporting (sec. 3).

67 Since 1994, third States, ie States other than the two coastal States Norway and Russia, have been allocated quotas for cod fishing based on their traditional fishing in the area. This led to conflicts with Icelandic fishermen, who were not accorded such quotas. In a judgment by the Norwegian Supreme Court in 1996 concerning fishing by Icelandic fishermen in the 200-mile zone around Svalbard, the court did not consider the geographical application of the Svalbard Treaty. The court held, however, that the exclusion of the Icelanders did not violate the principle of non-discrimination, since allocation of fishing quotas based on traditional fishing was deemed to be justifiable (1996 Norsk Retstidende ('Rt') 624 at 634–36). Nor did the Norwegian Supreme Court find it necessary to determine the geographical application of the treaty rights in a case from 2006 on Spanish fishing in the 200-mile zone. The court found that the special reporting procedure

established for Russian fishermen did not violate the principle of non-discrimination in a way that would establish a basis for acquittal of the Spaniards (2006 Rt 1498 at 1513).

68 Act No 72 relating to Petroleum Activities of 29 November 1996 establishes in secs 1-6 (1) that the Norwegian continental shelf extends 'throughout the natural prolongation of the Norwegian land territory to the outer edge of the continental margin'. Secs 1-4 states that the Act applies to 'petroleum activities in connection with sub-sea petroleum deposits under Norwegian jurisdiction', which would, consonant with the Norwegian view on the geographical application of the Svalbard Treaty, include the continental shelf around Svalbard. Drilling for petroleum has not yet commenced on the continental shelf around Svalbard.

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