Sea — Jurisdiction — Fisheries — Sovereignty — Svalbard Fishing Protection Zone — Norway sovereign over Svalbard — Article 1 of Svalbard Treaty, 1920 — Norwegian regulation only permitting fishing by nationals of States traditionally fishing in Protection Zone — Icelandic defendants appealing illegal fishing conviction — Whether regulation violating Svalbard Treaty, 1920 — Whether outer limit of Protection Zone correct — Islands — Characteristics of an island — Whether small island "Abeloeya" baseline for Protection Zone — Whether island rock — Law of the Sea Convention, 1982 — Whether Icelandic vessels fishing outside Protection Zone

Relationship of international law and municipal law — Svalbard Treaty, 1920 — Equal treatment requirement in Articles 2 and 3 of Treaty — Discrimination — Whether Norwegian regulation discriminating on basis of nationality — Whether regulation violating Articles 2 and 3 of Treaty — Traditional fisheries — International practice — Law of the Sea Convention, 1982

Treaties — Svalbard Treaty, 1920 — Geographical scope — Ratifying States only entitled to invoke rights in Treaty — Article 34 of Vienna Convention on Law of Treaties, 1969 — Iceland ratifying Treaty in 1994 — Interpretation — Application to forms of title not existing when Treaty concluded — Law of the Sea Convention, 1982 — The law of Norway

Public Prosecutor *v.* Haraldsson and Others[1]

Norway, Supreme Court. 7 *May* 1996

(Schei, Skaare, Aasland, Aarbakke and Christiansen, *Justices*)

Summary: *The facts*:—In 1995 the defendants, two Icelandic shipowners and two masters, were convicted by the Nord-Troms District Court of illegal fishing in the Svalbard Fishing Protection Zone ("the Protection Zone"). According to a Norwegian regulation, only nationals of States that had traditionally fished in the Protection Zone were entitled to do so. Iceland was not one of those States.

The defendants appealed to the Supreme Court. They argued *inter alia* that the Norwegian regulation violated the 1920 Svalbard Treaty ("the Treaty"),[2]

[1] The names of the defendants, Shipowners X and Y and Masters A and B, were Sigurd Haraldson, Rederiet Utgerdarfelag Dalvikinga HF, Jon Nolsø Olsen and Rederiet Skridjökull HF.

[2] Svalbard was previously called Spitsbergen. The Svalbard or Spitsbergen Treaty was signed in Paris on 9 February 1920. The Treaty was ratified by Iceland on 31 May 1994.

which obliged Norway to treat nationalities of the State Parties on an equal footing in regard to hunting and fishing. They maintained that the restrictions imposed on Norway by the Treaty applied not only on land and in the territorial sea, but also in the maritime zones that had emerged after the Treaty was concluded. In the alternative, they submitted that the outer limit of the Protection Zone was set incorrectly. In particular, they argued that the small island "Abeloeya", which was part of the "Kong Karls Land" archipelago, did not have any bearing on the extension of the zone. If "Abeloeya" was not taken into account, the baselines would have to be drawn by the larger islands further west. The Icelandic vessels would then have been situated outside the Protection Zone when the fishing took place.

Held:—The appeal was dismissed.

(1) The Norwegian regulation did not contravene Articles 2 and 3 of the Treaty since its aim was to protect established fishing industries rather than to discriminate on the basis of nationality. Articles 2 and 3 did not prohibit measures based on objective criteria other than nationality even if they had a discriminatory effect. International practice generally accepted that regulations based on traditional fisheries did not violate prohibitions of discrimination based on nationality. The Law of the Sea Convention itself emphasized the significance of tradition for the distribution of fishing resources. Since the regulation did not violate the Treaty, it was unnecessary to examine the geographical scope of the Treaty (pp. 562-4).

(2) The vessels were clearly in the Protection Zone. Taking the island "Abeloeya" into account as a baseline for the Protection Zone did not contravene the Law of the Sea Convention. Abeloeya's size and ability to sustain hunting for polar bears meant that it could not be classified as a rock under Article 121(3) of the Convention (pp. 564-5).

The following is the text of the relevant parts of the judgment of the Supreme Court, delivered by Judge Schei:[3]

. . .

Brief Description of the Fishing Protection Zone, the Facts of the Case and the Conviction

Pursuant to Statute No 91 of 17 December 1976, the Svalbard Fishing Protection Zone was established by a regulation of 3 June 1977 in order to—as section 1 in the regulation reads—"maintain the living resources in the ocean and to regulate fishing and hunting". The regulation

[3] The defendants also argued that their convictions were contrary to domestic criminal law but those parts of the judgment are not published in the *International Law Reports*. Square brackets indicate insertions by the translator which briefly summarize technical original text.

authorizes extensive measures, *inter alia* to set maximum annual catches for various sorts of fish.

Such limits for maximum catches have been laid down in the Svalbard Fishing Protection Zone since 1986. Norway and Russia have agreed upon total quotas for the two States for the Norwegian and Barents Sea as a whole [including the Fishing Protection Zone]. As to the Fishing Protection Zone, a quota for third States has been set. Originally, the regulations did not cover the distribution of quotas to specified third States. However, an amendment of 12 August 1994 paved the way for Norwegian authorities to "determine which States' vessels were permitted to fish" in the Fishing Protection Zone. On the same day the following was decided:

> Only vessels from States that traditionally have fished Norwegian arctic cod in the Protection Zone can fish a quantity of 20 000 tons. That is vessels from the EU, Faro islands and Poland.

According to section 1 paragraph 2 of the regulation, the outer limits for the Fishing Protection Zone shall "run a distance of 200 nautical miles from the fixed baselines, or where such baselines are not yet fixed, from lines connecting the archipelago's outermost points". The Royal Decree of 25 September 1970 sets the baselines for parts of Svalbard. However, in the north and east, including the areas at Kong Karls Land, no baselines are set.

. . .

On 24 September 1994 several vessels from third States other than the Faro islands, Poland and EU States . . . entered into an area that the Coastguard, based on Official Maps, regarded as the Fishing Protection Zone. Two of the vessels were arrested by the Coastguard, namely the Icelandic registered "*Z*", owned by the Icelandic company "X" with "A" as its master, and the vessel "*Q*", at the time registered in Panama and owned by the Icelandic company "Y" with "B" as its master. The arrested vessels were brought to Tromsø.

Fines were issued to the masters and the owners on the basis of alleged (1) illegal fishing in the Svalbard Fishing Protection Zone; (2) fishing with illegal equipment; (3) failure to report when and where the fishing was commenced; (4) failure to keep the necessary registers of catches. In addition the catches were confiscated . . .

Neither the fines nor the confiscations were accepted by the accused, and the cases were therefore handed over to the Nord-Troms District Court. As noted above, B was acquitted for fishing with illegal equipment, but otherwise the fines and confiscations were upheld by the court.

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This is how I [the first-voting judge] see the case:

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The 1920 Svalbard Treaty—the Requirement of Equal Treatment

By way of introduction, I mention that it is not contested that Norway may establish an Exclusive Economic Zone around Svalbard and impose regulations and restrictions there, *inter alia* in regard to fishing. The appellants argue that the Svalbard Treaty, which included the requirement of equal treatment, has to be applied in the Fishing Protection Zone—and that the existing regulation of fishing violates this requirement.

It is Norway's view that the Svalbard Treaty does not apply beyond the land territories and the territorial sea. This view is contested, *inter alia* by Iceland. However, it is not necessary for me to take a stand on the geographical scope of the Svalbard Treaty, since I at any rate fail to see that the obligations flowing from the treaty are violated by the regulation of the cod fisheries.

In regard to Norway's obligations pursuant to the Svalbard Treaty, it should be noted that only States that had ratified the Treaty may invoke the rights enshrined in it. Reference may be made here to Article 34 of the 1969 Vienna Convention, which on this point reflects customary international law. The Svalbard Treaty provides no basis for departure from this point. As the vessel "*Q*" was registered in Panama, the abovementioned observations are sufficient to establish that no violations of the treaty have taken place in regard to its owner "B" and its master "Y".

Before turning to the discussion of the requirement of equal treatment I recall the main features of the regulation. From 1986 a total quota for Arctic Cod has been determined for the Fishing Protection Zone . . .

When deciding third State quotas [States other than Norway and Russia] in the Fishing Protection Zone it has been presupposed that this quota should be given to States which traditionally have fished in this area. This comprises the Faro islands, Poland and some EU States. That the quota is confined to these States was only expressed in the regulation as amended 12 August 1994. As confirmed by statistical data, Iceland has traditionally not fished in the area; Iceland is therefore not among the mentioned States.

According to Article 1 in the Svalbard Treaty, Norway has full and unrestricted sovereignty over Svalbard. Any restrictions to that

sovereignty must be based on other provisions of the treaty. The appellants have in this regard invoked Articles 2 and 3. I find it proper to cite parts of these provisions:

Article 2: Ships and nationals of all the High Contracting Parties shall enjoy equally the rights of fishing and hunting in the territories specified in Article 1 and in their territorial waters.

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

Article 3: Nationals of all the High Contracting Parties shall have equal liberty of access and entry for any reason or object whatever to the waters, fjords and ports of the territories specified in Article 1; subject to the observance of local laws and regulations, they may carry on there without impediment all maritime, industrial, mining and commercial operations on a footing of absolute equality.

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

These Articles impose an obligation to treat "Nationals of all the High Contracting Parties" on an equal footing. In other words, they prohibit discrimination on the basis of nationality. However, they do not prohibit rationing measures based on other objective criteria, even if they have a discriminatory effect.

While States that traditionally have fished in the Fishing Protection Zone are given the right to continue to fish, other States are prohibited from taking up such fishing. The aim is not to discriminate against fishing industry based on nationality, but to protect already established players. That is in fact how the regulation also works. In my view, a regulation with such a purpose and effect does not discriminate on the basis of nationality, and does not therefore contravene Articles 2 and 3 of the Svalbard Treaty.

It is generally accepted among legal authors that Norway is entitled to discriminate on the basis of objective criteria other than nationality. Moreover, scholars examining the issue accept that the existing system of distribution of quotas is in compliance with the Treaty. Even scholars who have criticised Norway's view on other jurisdictional issues regarding Svalbard hold this view; cf. R. R. Churchill, "The Maritime Zones of Spitsbergen" in *The Law of the Sea and International Shipping* (1985),

pp. 230-1 footnote 29 and Geir Ulfstein, *The Svalbard Treaty* (1995), pp. 450 ff.

In general, international practice has accepted that regulations based on traditional fisheries do not violate prohibitions of discrimination based on nationality. According to the European Court of Justice, such a regulation does not violate the Treaty of Rome.

As mentioned, the appellants submit that Norway is entitled to set a total quota for the Fishing Protection Zone, but that no States—at least no State party to the Svalbard Treaty—may be excluded from fishing. 41 States have now ratified the Treaty, but all States may become parties. Iceland ratified as late as May 1994; until then Iceland was in no position to invoke the rights that may flow from the Treaty. If the appellants' views were correct, all States could claim rights to fish around Svalbard simply by signing the Treaty. In addition to all the practical issues, such an understanding would mean that quotas would be so small that fishing would not in fact be feasible.

To some extent, the appellants have invoked the Law of the Sea Convention in support of their view. They have submitted that Iceland in this connection is a geographically disadvantaged State according to Article 70 due to its dependency on fishing. However, this line of argument is not sustainable. As the Law of the Sea Convention in several respects emphasises the significance of tradition for distribution of fishing resources, it rather suggests the opposite view.

. . .

The Question of Whether the Vessels Were Situated in the Fishing Protection Zone

The actual position of the vessels is undisputed. Clearly, they were positioned 13 nautical miles within the distance of 200 nautical miles measured from a point on "Abeloeya", which is one of the islands belonging to "Kong Karls Land". The mentioned point on "Abeloeya" seems to constitute the outermost point according to the second alternative in section 1 paragraph 2 of the aforementioned regulation. That being the case, it is clear that the vessels were in the Fishing Protection Zone. As the two alternatives in section 1 are equivalent to each other, it is of no significance that the distance from the baselines by the island "Hopen" is more than 200 nautical miles . . .

The island "Abeloeya" is 13.2 km^2. The size alone is sufficient to rule out that it is a "rock" according to the exemption in Article 121 paragraph 3 of the Law of the Sea Convention. State practice seems to support this reading.

In addition, Article 121 paragraph 3 also requires that rocks cannot sustain human habitation or economic life of their own. The facts suggest that it would have been possible to carry out significant hunting for polar bears in the area, if this had not been prohibited for environmental reasons. When it is the prohibition that hinders such hunting, and not lack of resources, I fail to see that the additional requirement in paragraph 3 is met.

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[Report: *Norsk Rettstidende* 1996, p. 624 (in Norwegian). Unofficial translation by Justice Aage Thor Falkanger of the Norwegian Supreme Court]