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Equal rights or exclusive control? The Svalbard Treaty in the age of change

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Abstract

The article concerns the geographical scope of the Svalbard Treaty. This agreement establishes a unique treaty regime for the archipelago and its waters providing equal rights to the resources of the archipelago to all contracting parties. But since the 1920s, the law of the sea has developed significantly. Norway argued that this development gave it the rights, *first*, to establish fisheries protection zone around the archipelago, and, *second*, to prohibit any resource extraction activities seaward the Svalbard territorial sea. Norway arrested a number of foreign ships involved in such activities. A recent ruling of the Norwegian Supreme Court, opposed by other states and the EU, has given a boost to academic debates on the matter. The question of whether the Svalbard Treaty, and in particular the equal rights provisions of Articles 2 and 3, apply beyond the territorial sea is not just an interesting theoretical problem. There are three principal issues where it makes a practical difference whether or not the Treaty applies: exploration for and exploitation of oil and gas; exploitation of snow crab; and Norway's exercise of jurisdiction. Moreover, rapid ice melt and conditions of global warming, together with technological advances and increasingly accessible resources, have awakened competing interests. Thus, this study aims to answer the following research question: "What is the correct interpretation of the Svalbard Treaty as to its applicability beyond the territorial waters?". There are two opposing positions in the studied literature. The first position (shared mainly by the Norwegian authors) advocates for a restrictive interpretation of the Treaty based on the original meaning of the terms at the time of its conclusion. The second position

emphasises the object and purpose of the Treaty, arguing for the need for a dynamic interpretation of the geographical scope, taking into account the development of maritime law. This paper intends to analyse the validity of these assumptions, filling in the gaps of previous research.

Key words: Svalbard Treaty, treaty interpretation, evolutionary interpretation, territorial waters, full and absolute sovereignty

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Равные права или исключительный контроль? Договор о Шпицбергене в эпоху перемен

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Аннотация

Статья посвящена территориальной сфере действия Договора о Шпицбергене. Данное соглашение устанавливает уникальный договорный режим для архипелага и его вод, предоставляя равные права на ресурсы архипелага всем договаривающимся сторонам. Но с 1920-х годов морское право претерпело значительные изменения. Норвегия утверждает, что они дали ей право, *во-первых*, создать рыбоохранную зону вокруг архипелага и, *во-вторых*, запретить любую деятельность по добыче ресурсов за пределами территориальных вод Шпицбергена. Норвегия арестовала ряд иностранных судов, причастных к такой деятельности. Недавнее решение Верховного суда Норвегии, против которого выступили другие государства — члены ЕС и сам Союз, дало толчок академическим дискуссиям.

Вопрос о том, применим ли Договор о Шпицбергене и, в частности, положения статей 2 и 3 о равноправии за пределами территориального моря, является не просто интересной теоретической проблемой. Существует три основных вопроса, при ответе на которые практическое значение имеет применение или неприменение договора: разведка и разработка месторождений нефти и газа, добыча краба-стригуна и осуществление Норвегией юрисдикции. Более того, быстрое таяние льдов и глобальное потепление в сочетании с технологическим прогрессом и растущей доступностью ресурсов привели к возникновению конкурирующих интересов. Таким образом, авторы ставят перед собой следующий исследовательский вопрос: каково правильное толкование Договора о Шпицбергене в свете современного развития международного права? В изученной литературе представлены две противоположные точки зрения. Первая позиция (разделяемая в основном норвежскими авторами) предполагает ограничительное толкование договора, основанное на первоначальном значении терминов на момент его заключения. Вторая позиция подчеркивает объект и цель международного договора, обосновывая необходимость эволюционного толкования его сферы применения в пространстве с учетом развития морского права. Авторы данной статьи анализируют состоятельность этих позиций, заполняя пробелы, выявленные в работах предшественников.

Ключевые слова: Договор о Шпицбергене, толкование договора, эволюционное толкование, территориальные воды, полный и абсолютный суверенитет

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Introduction

This paper examines whether provisions of the Svalbard Treaty (Treaty of Spitsbergen, hereinafter also — the Treaty) apply to sea areas outside of the Spitsbergen archipelago and its territorial waters. The Treaty establishes a unique regime for the archipelago and its waters, granting all contracting parties equal rights to the archipelago's resources.

The rights granted under the Treaty can be properly described as a comprehensive limitation to Norway's exercise of sovereignty. Nationals of the Parties enjoy equal rights to fishing and hunting,[1] equal access for any

[1] Treaty recognising the sovereignty of Norway over the Archipelago of Spitsbergen, including Bear Island [1920], Article 2(1).

reason to waters, fjords and ports,[2] and may carry "on all maritime, industrial, mining and commercial operations on a footing of absolute equality".[3] They shall be admitted according to the same conditions of equality.[4] Norway is also obliged in respect of "methods of acquisition, enjoyment and exercise of the right of ownership of property, including mineral rights," to grant "treatment based on complete equality".[5] Expropriation is restricted to grounds of public utility and on payment of proper compensation. It is clear that these rights have substantial economic value — and may yet become more substantial owing to the effects of climate change, or the discovery of natural resources such as petroleum, which, according to Ulfstein, appears to fall within both mining and commercial activities (Ulfstein, 1995, pp. 193–194).

However, the law of the sea has significantly developed since the 1920s. The United Nations Convention on the Law of the Sea (hereinafter — UNCLOS), adopted in 1982 (and ratified by Norway in 1996), was particularly influential by establishing new maritime zones unknown in 1920: a 12-nautical-mile territorial sea (replacing the traditional 3–4 miles), a 200-nautical-mile exclusive economic zone (hereinafter — EEZ), and continental shelf rights (Crawford, 2019, pp. 241–246). These developments create an interpretive challenge for the Svalbard Treaty, which uses terms like "territorial waters" that predate these concepts. There is considerable tension between the UNCLOS regime and the Svalbard Treaty regime, in particular in the light of Norway's interpretation.[6]

Norway argued that this development gave it the rights, first, to establish fisheries protection zone (hereinafter — FPZ) and EEZ around the archipelago and, second, to prohibit any resource extraction activities seaward of the Svalbard territorial sea. Norway arrested a number of foreign sea vessels involved in such activities (Østhagen, 2018, pp. 100–123; Stensrud & Østhagen, pp. 118–120). A recent ruling of the Norwegian Supreme Court, opposed by the EU,[7] has given a boost to academic debates on the question (Jensen, 2023, pp. 83–85).[8]

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2 Ibid, Article 3(1).

3 Treaty recognising the sovereignty of Norway over the Archipelago of Spitsbergen, including Bear Island [1920], Article 3(1).

4 Ibid, Article 3(2).

5 Ibid, Article 7(1).

6 For Norway's interpretation, see *Sia North Star Ltd. v. The State of Norway represented by the Ministry of Trade, Industry and Fisheries* [2023] Supreme Court of Norway. Judgement. HR–2023–491–P case no. 22–134375SIV–HRET.

7 Council of the European Union (26 October 2023) Note Verbal to Norway (No. 21/23). https://www.jus.uio.no/ior/personer/vit/geiru/blog/filer/svalbard/note-verbale-26-oct-2023-svalbard.pdf.

8 See also Skoghøy, J. (2023, 23 March) *Ordlydsfortolkning av traktater — kommentar til snøkrabbedommen* (English: "Textual interpretation of treaties — comment on the Snow Crab decision"). *Rett24*.

Considering the comprehensive nature of the rights granted, Norway has sought to interpret the geographical scope in which the rights may apply in a narrow sense, which will be discussed below. There are also indications that Norway is seeking to limit its exposure to international tribunals. Following claims by Latvian investors, which concerned the scope of the Svalbard Treaty (investors complained about the deprivation of their investments made according to the Svalbard Treaty), under the Latvia — Norway BIT,[9] termination of the BIT with Latvia, along with several other BITs, was instituted by Norway.[10] Although that case was decided in Norway's favour (the tribunal found that it did not have jurisdiction over Svalbard), annulment proceedings are as of writing ongoing.[11] It is speculated that Latvia could possibly initiate proceedings before the International Court of Justice (hereinafter — ICJ).[12] Other investors have even instituted proceedings against third states, such as Spain, alleging breaches of the fair and equitable treatment (hereinafter — FET) and full protection and security (hereinafter — FPS) standards, consequent of Spain withdrawing snow crab licences near Svalbard in alleged fear of diplomatic reaction from Norway.[13]

The applicability of the Svalbard Treaty, and in particular the equal rights provisions of Articles 2 and 3, beyond the territorial waters is not just an interesting theoretical problem. Presently, three issues highlight a practical difference of the Treaty's application, each forming the subject of actual or potential dispute. These issues are: the exploration for and exploitation of oil and gas; the exploitation of snow crab; and Norway's exercise of jurisdiction in the FPZ. The first two matters are related to Svalbard's continental shelf and the third concerns the FPZ established from the archipelago. If the Treaty applies to these areas, the contracting parties would have the right to exploit resources in mentioned zones. So, there is a clash of competing interests. Norway wants to preserve the sea resources for itself; at the same time some other contracting parties wish to exploit them.

Moreover, rapid ice melt and conditions of global warming, together with technological advances and increasing accessibility of the resources, have awakened competing interests.

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https://rett24.no/articles/ordlydsfortolkning-av-traktater--kommentar-til-snokrabbedommen.

9 *SIA North Star v Kingdom of Norway*, [2023] ICSID Case No ARB/20/11, Notice of Dispute.

10 Exchange of notes constituting an agreement between Norway and Latvia regarding the termination of the Agreement between Norway and Latvia on the mutual promotion and protection of investments (Norway—Latvia) (27 March 2023).

11 See *SIA North Star v Kingdom of Norway*, [2024] ICSID Case No ARB/20/11, Request for Annulment.

12 Ulfstein, G. (2023, 21 March) *Snøkrabbesaken avklart av Høyesterett — Haag neste?* (English: Snow Crab case determined by the Supreme Court — Hague next?). *Rett24*. https://rett24.no/articles/snokrabbesaken-avklart-av-hoyesterett--haag-neste.

13 *Igor Smirnov v Spain*, [2023] UNCITRAL, Notice of Investment Dispute.

The aforementioned demonstrates the relevance of the issue. However, this paper does not seek to unpack the extent of the rights or the merits of any potential claims but is limited to determining the geographical scope of the equitable regime. Thus, this study addresses the following research question*:* "What is the correct interpretation of the Svalbard Treaty as to its applicability beyond the territorial waters?".

In the scholarship analysed, no one questions the application of the Vienna Convention on the Law of Treaties (hereinafter — VCLT, the Convention) provisions to the Svalbard Treaty. Authors, as well as international courts, apply the VCLT provisions (Ørebech, 2017, pp. 53–58; Jensen, 2020, pp. 82–107). For example, while recognising that the VCLT does not formally apply to the Treaty, G. Ulfstein considers that it largely declares pre-existing customary international law (Ulfstein, 1995, p. 72), relying on statements of the ICJ.[14] One point where G. Ulfstein departs from the VCLT is the role of preparatory works to treaty interpretation, which he considers relevant (Ulfstein, 1995, p. 75). Moreover, two contrary positions were identified in the analysed scholarship. The first position emphasises restrictive interpretation, relying on the literal meaning of the words at the time of the Treaty conclusion (Rossi, 2015, p. 99; Ørebech, 2017, p. 71). The second one stresses the object and purpose of the Treaty and its context. It argues that the geographical scope of the Treaty should be interpreted dynamically and adjusted to the developments of the law of sea, such as creation of EEZs and continental shelf (Rossi, 2015, p. 99).

These contrary positions are sometimes based on opposite premises, which are asserted with little support in regard to key issues, e.g. it is asserted that the term "territorial waters" is specific and generic in different sources. This study will analyse the validity of these premises, thus filling the gaps and expanding on previous research. That said, the existing scholarly debates pay little attention to the principle of systemic integration or ecological matters.

The objective of this article is to conceptualise how the Treaty's geographical scope should be interpreted in the light of the modern development of international law. To fulfil this objective, the historical method is used, as well as the comparative method, and an interdisciplinary approach. The historical method is needed to understand the intentions of the parties by examining preparatory documents and circumstances of the conclusion of the Treaty in order to establish its possible interpretation. The comparative method is used to compare the Svalbard legal regime with other legal regimes. An interdisciplinary approach is used to understand the ecological problems and geopolitical background of the Treaty.

[14] *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)*, [1991] I.C.J. Reports, 1991, p. 53, at p. 70; *Case Concerning the Territorial Dispute*, [1994] I.C.J. Reports, 1994, p. 6 at pp. 21–22.

The paper consists of three parts. Part 1 is dedicated to theoretical issues of the Treaty interpretation in an intertemporal context. Part 2 is dedicated to the interpretation of the Treaty term “full and absolute sovereignty”. Part 3 is dedicated to the interpretation of the term “territorial waters”.

1. Rules applicable to the interpretation of the Treaty of Svalbard

1.1. General remarks

In resolving a dispute between states and other subjects of international law, it is often necessary to interpret provisions of the agreement that underlies the dispute. Questions of interpretation arise and cause considerable controversy when interpreting a treaty concluded at the beginning of the XX century. When the Svalbard Treaty was signed, the law of the sea was at an early stage of its development. It must be recognised that the temporal aspect of interpretation is relevant, which is expressed in evolutionary, or dynamic, interpretation. The question of whether the provisions of a treaty can be interpreted in accordance with the understanding of the terms at the time of its conclusion (static approach), or whether the interpretation should consider the evolution of international law and the modern understanding of the terms used (evolutionary approach) is also relevant to the Treaty under consideration.

Interpreting law is never an abstract exercise (Dworkin, 1982, p. 179). Interpretation is always about giving meaning to the rule, obligation or right concerning existing or potential facts. It is about giving a flash to a particular set of norms and words in order to make them apply or not to certain facts (Dworkin, 1982, p. 180). For the interpreter, the question is whether the facts at hand come within the purview of the rule. Such questions make it necessary to read within the words used to phrase the rule and somehow see whether the facts are in it and are covered by those words. Very often various credible interpretations are possible, and a choice between them will have to be made; rather, a choice that reflects preferences often outside the law will be reasoned and justified according to legal parameters, notably on the basis of the rules of interpretation (Lekkas & Merkouris, 2022, pp. 187–188).

Treaties are always the result of compromises. As stated by P. Allott: “treaties are disagreements reduced to writing” (Allott, 1999, p. 43). That writing sometimes obscures various understandings because the drafters have opted for so-called constructive ambiguities (Singer, 2020, p. 307) to reach an agreement. Consequently, the same questions about the purpose of what has to be achieved through interpretation will arise. It is about faithfully finding the original intent of the author of the rule at the time the rule was designed, or

about discovering the rule's purpose and what it should achieve (Dörr & Schmalenbach, 2018, p. 560).

1.2. Applicability of the VCLT

Returning to the question of interpretation in general, the rules of interpretation codified in the VCLT come to mind. The VCLT was adopted in 1969 and entered into force in 1980, i.e. much later than the conclusion of the Svalbard Treaty in 1920. Article 4 of the VCLT excludes its formal application to treaties concluded before 1980. Therefore Articles 31–33 VCLT are not formally applicable to the Svalbard Treaty.

Despite this, many international courts and tribunals today apply the rules of Articles 31–33 VCLT without considering the absence of a retroactive factor. For example, the ICJ recognised the provisions of these articles as rules of customary international law that existed prior to codification in the VCLT. In the dispute between Libya and Chad, the Court applied the rules of interpretation from the VCLT to the 1955 treaty.[15] And in the *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004), the ICJ explicitly referred to Articles 31 and 32 of the VCLT when interpreting the Fourth Geneva Convention of 1949.[16]

In the *Arbitral Award of 31 July 1989* the ICJ stated that: "Articles 31 and 32 of the Vienna Convention on the Law of Treaties <…> may in many respects be considered as a codification of existing customary international law on the point".[17] In *Kasikili/Sedudu Island*, Article 31 of the VCLT was directly applied to a treaty dated back to 1890.[18]

Therefore, these rules should apply not only to pre-1980 treaties, but also to states that are not parties to the VCLT, such as the United States and France. For example, France, while recognising that Articles 31 and 32 constitute the customary law in force, raises the possibility that the customary rules might differ somewhat from the provisions of the VCLT in their application or content.[19]

The individual elements of Articles 31–32 were present in case law when the Svalbard Treaty was concluded in 1920. In *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne* (1925), it was said by the Permanent

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15 *Territorial Dispute (Libya v Chad),* [1994] Judgment, I.C.J. Reports 1994, p. 6, para 41.

16 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [2004] Advisory Opinion, I.C.J. Reports 2004, p. 136, para. 94.

17 *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* [1991] I.C.J. Reports 1991, p. 53, para 48.

18 *Kasikili/Sedudu Island (Botswana v Namibia),* [1991], Judgement, I.C.J. Reports 1999, p. 1045.

19 *Audit of Accounts Between the Netherlands and France in Application of the Protocol of 25 September 1991 Additional to the Convention for the Protection of the Rhine from Pollution by Chlorides of 3 December 1976 (Netherlands v France)* [2004] 25 RIAA 267. Award of 13 May 2014. Para. 57.

Court of International Justice (hereinafter — PCIJ) in its 1925 advisory opinion that: "[t]he Court must, therefore, in the first place, endeavour to ascertain from the wording of this clause what the intention of the contracting Parties was". On non-textual elements it was stated that it "can only concern the Court in so far as they are calculated *to throw light on the intention of the Parties at the time of the conclusion of that Treaty* (emphasis added)".[20] In *Polish Postal Service in Danzig*, it was stated that "it is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd".[21] In the *Lighthouses* case: "[w]here the context does not suffice to show the precise sense in which the Parties to the dispute have employed these words in their Special Agreement, the Court, in accordance with its practice, has to consult the documents preparatory to the Special Agreement, in order to satisfy itself as to the true intention of the Parties".[22]

Nevertheless, despite this widespread recognition and endorsement of the interpretative rules in the VCLT as international custom, it is better to take a cautious approach to the issue, thinking critically and paying particular attention to the historical background. Examining the historical development of interpretative approaches reveals that, at the time of the 1920 Svalbard Treaty, there was no single universally accepted interpretative approach. Instead, there was a struggle between two main approaches — subjective (intentional) and objective (textual), reflecting the lack of established norms (Dörr & Schmalenbach, 2018, p. 560).

Interestingly, the geographical scope of the Svalbard Treaty in the context of rights to exploit resources on the continental shelf beyond the territorial waters of the archipelago was recently considered by the Norwegian Supreme Court.[23] The Court drew attention to the fact that the international law of the sea has changed considerably since the treaty was concluded, citing the provisions of the UNCLOS which establish the modern limits of the territorial sea (up to 12 nautical miles), the exclusive economic zone and the continental shelf. The Court therefore proceeded from the fact that the provisions of the Svalbard Treaty must be interpreted in the light of contemporary norms, considering the object and purpose of the Treaty, as well as the subsequent practice of the parties. In doing so, the Court referred to Articles 31 and 32 VCLT as universal

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20 *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne,* [1925] Advisory Opinion, P.C.I.J. Series B No. 12, p. 24.

21 *Polish Postal Service in Danzig*, [1925] Advisory Opinion, P.C.I.J. Series B, No. 11, p. 39.

22 *Lighthouses in Crete and Samos (France v Greece),* [1937] Judgment, 1937, P.C.I.J. Series A/B No. 71, p. 94.

23 See *Sia North Star Ltd. v. The State of Norway* [2023].

principles of interpretation that allow an evolutionary interpretation of “generic” Treaty terms such as “territorial waters”.

1.3. Approaches to treaty interpretation before 1920

The subjective approach focused on identifying and realising the intentions of the parties to the treaty. According to this approach, the purpose of interpretation was to ascertain what the parties had in mind when they concluded the treaty and what obligations they intended to assume (Johnstone, 1991, p. 373). This approach emphasised the preparatory materials (*travaux préparatoires*) and the circumstances of the conclusion of the treaty (Dörr & Schmalenbach, 2018, p. 565). Thus, the parties could rely on records of negotiations, diplomatic correspondence, and even the geopolitical environment in general for their interpretation. Proponents of the subjective approach argued that a treaty was the expression of the agreed will of the parties, and it was that will which should be the determining factor in the treaty interpretation (Dothan, 2018, p. 768). For the Svalbard Treaty this would mean examining negotiation protocols to understand how the parties saw “archipelago neutralization” and “equal access to resources”.

By contrast, the objective approach prioritised the text of the treaty. According to this approach, the intentions of the parties were to be derived primarily from the text of the treaty rather than from external sources (Jonas & Saunders, 2010, p. 577). The basic idea is that the text of the treaty is the most reliable expression of the parties’ intentions. According to this approach, interpretation should be based on the ordinary meaning of the terms used. Once a treaty is concluded, its text takes on an “objective existence” separate from the subjective intentions of the parties (Jonas & Saunders, 2010, p. 597). Therefore, balancing Norwegian sovereignty with the collective interests of other states requires consideration of developments in international law.

Referring to the historical context of codification, the first attempt was the Harvard Draft Convention on the Law of Treaties, which was written at Harvard Law School and published in 1935.[24] A third approach was then proposed that was sought to balance the first two. It recognised the importance of both the text of the treaty and the intentions of the parties, and took into account the purpose and object of the treaty. However, the Harvard Draft came fifteen years after the Svalbard Treaty.

In the *Greco-Bulgarian Communities* case (1930), when interpreting the 1919 Treaty, the PCIJ relied on the object and purpose (“the aim and

[24] Report on the Law of Treaties by J.L. Brierly, Special Rapporteur [1950] A/CN.4/23 Extract from the Yearbook of the International Law Commission: 1950, vol. II. p. 225.

object") of the treaty, "[i]f that had been its meaning, the Convention would have been in conflict with the object which it was designed to achieve, namely, to facilitate emigration as much as possible".[25]

When the Svalbard Treaty was concluded at the beginning of the XX century, there was no single universally accepted approach to the interpretation of international treaties. International law was in the process of development, and different legal traditions favoured different methods of interpretation. In the continental European tradition, especially the French and German schools of international law, the subjective approach often prevailed. The Anglo-American tradition, on the other hand, paid more attention to the text of the treaty, corresponding to an objective approach. An analysis of the international practice of that period shows that both approaches were used depending on the circumstances of a particular case.[26] The PCIJ has been flexible in its practice in the choice of means of interpretation.[27]

1.4. Evolutionary interpretation of the Treaty of Svalbard

International treaties, as a basis for regulating interstate relations, often face challenges caused by the dynamics of technological progress, globalisation and changing social values. Evolutionary interpretation, which allows treaties to be interpreted in the light of contemporary realities, has emerged as an answer to this problem. But its application is now controversial: is it an instrument of progress or a threat to the stability of international law?

Neither Article 31 nor Article 32 of the VCLT mentions the temporal aspect of interpretation. Historically, the International Law Commission (hereinafter — ILC) decided that linking interpretation to time is unnecessary — it was obvious and clear that a rule was to be interpreted at the time of its formulation, it was quite clear and already covered by the principle of good faith. So, there was no need for contemporaneity (Dörr & Schmalenbach, 2018, p. 572).

Moreover, evolutionary interpretation should be distinguished from evolutionary methods of interpretation. Thus, article 31 of the VCLT contains methods that are themselves dynamic, such as subsequent agreements or subsequent practice. Practice shows that these methods, although dynamic in

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25 *Greco-Bulgarian "Communities"* [1930] Advisory Opinion, P.C.I.J. Series B. No 17, p. 22.

26 *Exchange of Greek and Turkish Populations*, [1925] Advisory Opinion, P.C.I.J. Series B No 10, p. 20.

27 *Competence of the ILO in Regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture* [1922], Advisory Opinion, P.C.I.J. Series B No 2, p. 23; *SS "Wimbledon" (United Kingdom v Japan),* [1923] P.C.I.J. Series A No 1, p. 23 and 25–28.

nature, can be used in practice for static interpretation and interpretation of provisions to clarify the meaning at the time of their conclusion.[28]

However, the relationship between the VCLT and the evolutionary method of interpretation is the subject of debate in the literature. Some authors believe that the indication in Article 31 VCLT on the necessity to interpret according to the subject matter and purposes already implies a dynamic character (Kovalenko, 2018, pp. 93–96). Evolutionary interpretation relies on the idea that the "ordinary meaning" of terms can change over time, especially if they are open-ended or technology-dependent. On the contrary, others point out that dynamic interpretation is a tool for interpretation of the European Convention on Human Rights and has nothing in common with the VCLT (Smbatyan, 2019, p. 28). The evolutionary method of interpretation is therefore an institution in its own right, given its active application by international judicial bodies. The VCLT does not expressly enshrine this method, although judges in their decisions have expressly referred to its provisions when using it.

"Evolutionary" interpretation seeks to establish the meaning of a treaty at the time of its interpretation, and one of the key aspects is the concept of generic terms. Generic terms are terms the meaning of which may evolve over time, as opposed to static terms with the meaning fixed at the time of the agreement formation (Vidigal, 2021, pp. 203–219).

In practice, this notion was first articulated by the European Court of Human Rights (hereinafter — ECtHR) in *Tyrer v. UK*[29] and subsequently developed in detail in *Marckx v. Belgium*: "the Court recalls that the Convention must be interpreted in the light of contemporary conditions".[30] In these cases, it is very clear that *lex ferenda* (modern human rights standards) prevails over the historical context (*lex lata*). In most cases, the ECtHR expands existing provisions.

The evolutionary method has indeed become a kind of "wand-keeper" that keeps old international treaties from losing their relevance. The criteria for determining whether a term is generic are not always clearly defined in international law. However, based on the jurisprudence of international courts and tribunals, the intention of the parties, the nature of the treaty (whether it is long-term), the object and purpose of the treaty, and the nature of the term itself

[28] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania),* [1949] I.C.J. Reports p. 4, at p. 25.
[29] *Tyrer v. UK*, [1978] ECtHR App no. 5856/72.
[30] *Marckx v. Belgium*, [1979] ECtHR App no 6833/74, para 41.

can be distinguished,[31] as some terms are themselves more open-ended, e.g. about technical or scientific concepts.[32]

In the context of the Svalbard Treaty, the terms “territorial waters” and “full and absolute sovereignty” are potentially generic. The question is whether they should be interpreted according to their meaning in 1920 or their contemporary meaning. The term “territorial waters” is particularly interesting given that the concept of maritime zones has changed significantly since 1920. At that time, territorial waters generally extended 3–4 nautical miles from the coast. However, today, international maritime law recognises a territorial sea up to 12 nautical miles wide, as well as additional zones such as EEZ and the continental shelf.

If a dynamic approach is taken, it may better fit the object and purpose of the Treaty, especially when viewed in the context of the current environmental realities of the Arctic. For example, the introduction of EEZ was a response to overfishing and the need to conserve marine resources, which is within the spirit of the Treaty.

1.5. Systemic integration

The principle of systemic integration, enshrined in Article 31(3)(c) of the VCLT, requires that “any relevant rules of international law applicable in the relations between the parties” be taken into account in interpreting an international treaty. Its essence is to ensure the coherence of the legal system integrating specialised norms into the general context of international law. The idea of systemic integration can be traced back to the works of Grotius and Vattel, who proposed to consider treaties in the context of general principles of law.[33] By the middle of XX century, the Institute of International Law (French: *Institut de Droit International*) and the ILC developed an approach whereby interpretation should take into account not just principles, but also “rules” of international law, including custom and treaty obligations. This was reflected in the final version of the VCLT, in which the term “rules” replaced the narrower “principles”, broadening the range of sources to be taken into account.

It can be argued that this principle did not exist in 1920 in the same wording as that found in the VCLT. Still, it was applied in a number of pre-VCLT cases. It was indicated that, when interpreting a treaty account should be taken of its

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31 *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua),* [2009] Judgment, I.C.J. Reports 2009, p. 213.

32 *Aegean Sea Continental Shelf (Greece v Turkey)*, [1978] Judgement, I.C.J. Reports 1978, p. 3.

33 Merkouris, P. (2020, August). *The Principle of Systemic Integration*. MPEiPro. https://opil.ouplaw.com/display/10.1093/law-mpeipro/e2866.013.2866/law-mpeipro-e2866

wider "normative environment".[34] The normative environment is also relevant in the present case.

2. Interpretation of the "full and absolute sovereignty" provisions of the Svalbard Treaty

2.1. Some conclusions from the previous part

This research on the general questions of treaty interpretation gives us a clue: most of the authors are mistaken in their argumentation, since the scheme of interpretation introduced in the VCLT was not a rule of customary international law prior to its adoption, and it cannot be used to interpret the Svalbard Treaty.

Interestingly, it was Russian authors who tended not to use the VCLT in their interpretation of the Treaty. Russian doctrine generally does not refer to the Convention in such instances. However, there were no explicit statements that the VCLT rules were inapplicable to the Svalbard Treaty either (Vylegzhanin, 2010, pp. 4–30; Poberezhnaya, 2010, pp. 316–324).

The approaches that influenced the VCLT wording were present at the time the Svalbard Treaty was concluded. But which of them should be applied to it? That is a difficult question. The signatory parties represented different types of legal systems and different approaches to the interpretation of international law. The UK and USA represented an objective approach, while France represented a subjective one.

However, it may not be necessary to resolve this issue for the purposes of the present study. If applying objective and subjective approaches brings the same result, then the question of which approach is better is irrelevant. This section will try to apply both approaches consequently to the notion of "full and absolute sovereignty" to find out if there is a contradiction between their results. If the results are the same, then there is no need to decide which one is "better". This article will also determine whether this term is a generic one and how systemic integration principle affects the interpretation. But some preliminary points are necessary first.

2.2. *Terra nullius* or *res communis*

It is usually stated that before the Treaty, Svalbard was a *terra nullius* (no man's land). This approach can be supported by the agreement between Norway and

[34] ILC. (2006, April 13). *Report on Fragmentation of International Law.* A/CN.4/L.682 paras 415. https://docs.un.org/A/CN.4/L.682

Russia of 1872,[35] where the term was expressly mentioned, or the preparatory work for the 1920 Svalbard Treaty, where the archipelago was also described as no man's land.[36] Some authors take this assumption (Churchill, 2022, p. 544). It is also reflected in the ruling of the Norwegian Supreme Court of 2023.[37] However, some scholars deny the validity of this approach and claim that Svalbard was a *res communis* (common thing) before the conclusion of the 1920 Treaty. The key difference between the two concepts is explained by G. Ulfstein. According to him, sovereignty over *terra nullius* may be acquired by occupation, whereas *res communis* cannot be the object of occupation (Ulfstein, 1995, p. 37).

What is *terra nullius*? The ICJ described it in its Advisory Opinion on Western Sahara as a territory belonging to no one.[38] According to Ørebech, the core characteristic of *terra nullius* is lack of governmental regulation.[39] However, the question arises: was the notion of *terra nullius* understood in the same way at the beginning of the XX century as it was later (Rossi, 2015, p. 120)?

One thing is clear: the legal regime of Svalbard prior to the Treaty differentiated from today's "traditional" understanding of *terra nullius*. There are at least two arguments for this position. Firstly, the archipelago's legal regime was established by the agreement between Russia and Norway, concluded in 1872 by the exchange of letters. It stated that the archipelago shall remain the *terra nullius* territory. But also, it recognised the equality of the rights of citizens of both parties in their ability to conduct economic activities and scientific research on the island (Dekanozov, 1966, p. 7). So, it cannot be said that there was no existing legal regime in Svalbard. Nor that no governmental authority was exercised under this territory, since the creation of a legal regime demands the exercise of certain state powers. Secondly, some states recognised Norwegian sovereignty over the archipelago before the Treaty was concluded but during the period of its preparation (for example, Denmark) (Fife, 2004, p. 182).

Before the Treaty, the legal regime of the Svalbard archipelago can be described as *res communis*, rather than the traditional *terra nullius*. The features

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35 Agreement in the form of exchange of diplomatic notes between Russia and Sweden — Norway 1871–1872. In A.N. Vylegzhanin & Y.K. Zilanov, Spitsbergen: legal regime of adjacent marine areas. SOPS, 2006. P. 100–105.

36 Report of the Spitsbergen Commission to the Supreme Council of the Peace Conference (5 September 1919) in Papers Relating to the Foreign Relations of the United States (1946). The Paris Peace Conference. 1919. Vol. VIII. United States Government Printing Office, Washington. Appendix B to HD, from the Notes of a meeting of the Heads of Delegations of the Five Great Powers held in M. Pichon's Room at the Quai d'Orsay, Paris, on Thursday 25, 1919, at 10:30 a.m.). https://history.state.gov/historicaldocuments/frus1919Parisv08/d19

37 *Sia North Star Ltd. v. The State of Norway,* [2023] para 132.

38 Western Sahara, [1975] Advisory Opinion, 1975 I.C.J. Reports p. 12, at paras. 38, 79.

39 Ørebech, P. (2015, July) The "Long-Arm" Reach of the Svalbard Treaty?. *EXPRESSO,* p. 9.

of *res communis* can be found in the concluded Treaty itself. It creates an "equitable regime" and provides for the equal rights of all contracting parties to conduct scientific research and economic activities. Such a regulatory framework makes the Svalbard Treaty regime somewhat similar to the regime of existing global commons.

Some conclusions can be derived from analysis of the applicability of *terra nullius* concept to Svalbard before the Treaty conclusion. Since the existing regime was established by the Treaty, in case of its denunciation the sovereignty of Norway over Svalbard can be questioned (Vylegzhanin & Zilanov, 2006, p. 35). Moreover, the sovereignty of Norway over Svalbard is not only a right, but also a duty. Norway is not able to transfer its sovereign rights under the Treaty without the consent of the other parties. Indeed, it is also an economic duty, since Svalbard itself does not generate any material profits, neither for Norway nor for Russia (Jensen, 2020, p. 86).

Also, this historic background can shed some light on the intention of the parties in establishing Norwegian sovereignty. The signatory parties required some regulatory authority to exercise effective control over the archipelago. Before the First World War (hereinafter — WWI), the possibility of joint authority of contracting parties was discussed at a number of conferences. After WWI and the fall of the Russian Empire, Norway basically proposed itself as a regulatory authority, but the option of joint administration was still discussed and later rejected.[40]

Effective control was necessary because economic activities were already being carried on the archipelago. There was even a case of civil unrest (Rossi, 2015, p. 126). It was clear that existing personal jurisdiction over their nationals could no longer satisfy the contracting parties. But the signatory states wanted to exercise equal access to the resources of Svalbard and its territorial waters. This is reflected not only in concrete rights, provided by the text of the Treaty, but also in the notion of "equitable regime" mentioned in the preamble. It is also reflected in the fact that sovereignty over Svalbard is not just a right of Norway but its duty. The later analysis will reinforce this position.

2.3. Full and absolute sovereignty

There is a need to proceed to the notion of "full and absolute sovereignty" in the Treaty text. Norway's Supreme Court in the mentioned ruling of 2023 held that the "recognition" of sovereignty implies that Norway has the same sovereignty over the archipelago Svalbard as states have over their territory according to international law. The Court stated: "…High Contracting Parties

[40] Report to the Supreme Council of the Paris Peace Conference of 5 September 1919.

have recognised Norway's full and absolute sovereignty subject to the conditions imposed on Norway under the provisions of the Treaty… the reservation does not limit Norway's sovereignty as such, but Norway is obliged, in its exercise of power, to respect the rights that the nationals of the High Contracting Parties are ensured under the Treaty. Other limitations on Norway's exercise of sovereignty cannot be derived from the Treaty".[41] The Court also considered that no general rule of equity for all contracting parties can be found in the Treaty.[42] So, contracting parties' right to equality must derive from the individual provisions of the Treaty.[43]

This judgement represents a shift in the attitude of Norwegian courts, which previously sought to evade the question of the geographical scope of the Svalbard Treaty.[44] Some scholars also share this view. The Treaty speaks for itself. If the sovereignty of Norway is indeed full and absolute, then any limitations to it shall be interpreted restrictively. Any restriction as to the powers of Norway must be explicitly stated in the text of a treaty (Ørebech, 2017, p. 82).

However, there are a number of sources in favour of another position. Some argue that Norway was not granted full and absolute sovereignty. It is stated that Norway was given conditional, shared or limited sovereignty (Ayaydin, 2024, p. 273). Such a concept of sovereignty differs significantly from the traditional one. In that case, sovereignty is not created by occupation or, broadly, by social contract. It is created by the multilateral agreement. But in that case, there are certain conditions of sovereignty. However, if sovereignty has certain conditions, established externally (not by the state or its people), it is not possible to argue that it is "full and absolute". The Westphalian concept of sovereignty requires non-interference with internal affairs of the state (Ayaydin, 2024, p. 271). In the present case, what is meant under internal affairs very much depends on external factors. Interestingly enough, the term "*vilkår*" ("conditions") is also used by the Supreme Court of Norway in its 2023 case.[45]

The text of the Treaty also does not fit the notion of full and absolute sovereignty. Despite the words about an "equitable regime" and the equal rights of the nationals of all contracting parties, there are other limitations. For example, no charge or restriction can be imposed on the exportation of any goods of the nationals of the contracting parties, taxes, dues and duties levied shall be devoted exclusively to the Svalbard and shall not exceed what is required for the object in view. Also, the Treaty requires Norway to adopt

41 *Sia North Star Ltd. v. The State of Norway*, [2023] para 135.
42 Ibid, Para 140.
43 Ibid, Para 140.
44 See *Sia North Star Ltd. v. The State of Norway*, [2019] Supreme Court of Norway. Judgement HR–2019–282–S case no. 18–064307STR–HRET
45 *Sia North Star Ltd. v. The State of Norway*, [2023] paras 91, 134.

a special internal legislative act concerning Svalbard. So, the restrictions from the Treaty concern not only equal access for nationals, but also legislative capacity and questions of budget. With such limitations it is hard to say that sovereignty over this territory is truly “full and absolute”. The same view can be found in the preparatory documents of the Svalbard Treaty. During the conference, the Italian representative stated that the notion of “full and absolute sovereignty” is inaccurate as the sovereignty is limited by the stipulations of the Treaty and the latter one creates new precedent. The novelty of this precedent is that the archipelago is given on certain conditions (Gnatyuk, 1985, p. 248).

However, one could argue that, in a legal sense, sovereignty cannot be limited. There is a strong doctrinal approach, that states sovereignty is itself full and absolute. When the state gives out its jurisdictional powers to an international organisation or another state, no limitation of sovereignty occurs. It is just an exercise of sovereign powers, nothing more. In the political and economic sense, sovereignty can be limited, but it cannot happen in the legal field. The possession of equal sovereignty is a cornerstone of the modern international legal system.

However, three points can be made in this regard. Firstly, there are a number of cases when the subjects with limited sovereignty appeared in the international legal framework (like the membership of Belarussian and Ukrainian Soviet Republics in the UN during the Soviet era). Secondly, it is not necessary to resolve this highly complex and theoretical question. For the purposes of the present study, it is conceivable just to establish that sovereignty over Svalbard differs in nature from the traditional Westphalian concept. With these conclusions it is necessary to proceed to applying different approaches to the Svalbard Treaty.

2.4. Objective approach

As mentioned earlier, the objective approach to a treaty interpretation focuses more attention on the text of the treaty. Examination of the text of the Svalbard Treaty has led to the conclusion that the sovereignty granted to Norway is not full and absolute in the sense understood by Norway’s courts. The Treaty establishes sovereignty subjected to its stipulations. The word stipulation can be equated to the “condition”, and this was done by the Norwegian Supreme Court. So, the treaty establishes a certain *sui generis* legal regime (Churchill & Ulfstein, 2010, p. 565), which provides for a limited scope of sovereign jurisdiction. It is clear that sovereignty over Svalbard in its nature differs from the sovereignty over other Norway’s territory. But if the sovereignty across Svalbard is at its core different from the sovereignty over the other territories, Svalbard cannot “generate” any areas in which sovereign rights of the coastal state can be

exercised. Such areas include continental shelf and EEZ, in the case of Norway, FPZ. Nevertheless, this conclusion is incorrect. It would only be correct if Norway did not possess any sovereignty over the archipelago. But this assumption clearly contradicts the text of the Treaty. As stated in Article 1 of the Treaty, Norway is vested with sovereignty over Svalbard. But this sovereignty is conditional. If such sovereignty generates areas where sovereign rights of Norway can be exercised under the modern development of international maritime law, then such areas are subjected to the same conditions as the main archipelago. These conditions include equal rights for the high contracting parties with regard to the resources.

2.5. Subjective approach

As mentioned earlier, the subjective approach indicates that a treaty was the expression of the agreed will of the parties, and it was that will which should be the determining factor in its interpretation.

The state parties needed regulatory power over Svalbard. Due to historical background, Norway was the closest available state at the moment of the conclusion. And when a new legal regime of sea territories emerges, it is logical that such regulatory power shall also possess its sovereign rights over the archipelago. But contracting parties did not just vest Norway with sovereign power over Svalbard, they saved themselves an equitable regime. Since in the FPZ and continental shelf areas Norway acts as the regulating authority, the Treaty's restrictions should also be applied to this territory. And these limitations include equal rights for the contracting parties over the resources.

So, by applying both approaches, we come to the same conclusion. Norway has a right to establish EEZ and claim the continental shelf from Svalbard, but is required to provide an equitable regime for the contracting parties.

However, it can be argued that such outcome contradicts the principle which requires a restrictive approach of any provision limiting the sovereignty of a state (Fife, 2004, p. 190). There is evidence that such a principle existed at the Treaty's conclusion. For example, it was applied by the PCIJ in *S.S. Wimbledon* case.[46] However, some judgements dispute its overall validity.[47] It is no coincidence that it was not included in the VCLT's principles of interpretation.

That said, the sovereignty over Svalbard is because of its *conditional* nature different from the sovereignty that was discussed in the *Wimbledon* case, for example.

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[46] *SS "Wimbledon" (United Kingdom v Japan),* [1923] P.C.I.J. Series A No 1, p. 24.

[47] *See Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua),* [2009] Judgment, I.C.J. Reports 2009, p. 213, para 48.

2.6. Dynamic and static interpretation

Initially, it should be said that legal scholars address these concepts instrumentally. For example, the Norwegian position was always considered as "static". But Andersen emphasised that regarding "full and absolute sovereignty" the Norwegian approach is dynamic since Svalbard generates areas which were not present in the international law in 1920 (Anderson, 2009, p. 381). Norwegian courts have tended to say that there is little room for dynamic interpretation in international law.[48] Ørebech used this concept to support the interpretation by Norwegian authorities (Ørebech, 2017, p. 53). The Russian view is generally considered as dynamic. However, neither the Russian state nor Russian scholars have used this term to justify their approaches.

In the present study, it can be said that the interpretation of the notion of full and absolute sovereignty is dynamic. From both the objective and subjective approaches, it is seen that sovereignty over Svalbard generates new areas. But these areas are subjected to the existing equal legal regime. It should be noted that, by introducing the concept of conditional sovereignty (hidden by the words of its full and absolute character), the parties vested Norway with the future benefits of these concepts. But they also intended to restrict them by introducing an equitable regime, which is evident from the text of the Treaty. Moreover, a static approach does not benefit Norway because it can be argued that Norway cannot establish any new zones from the archipelago since they were not mentioned in the Treaty.

2.7. Systemic integration

Now let us turn to the principle of systemic integration. Much has been said about the relations of the Svalbard Treaty with the UNCLOS. We will not address the issue of sovereignty here, but it is worth touching on the normative environment as to the ecological obligations of states under customary international law.

Greenhouse gas (GHG) emissions, extinction of different species, global warming, and other issues demand a clear answer from the international community. These problems also affect Svalbard and the surrounding areas. The huge potential reserves of oil and gas on the Svalbard continental shelf pushes Norway to protect its interpretation of a Treaty. The same can be said for fish and crab in these areas. But the circumstances also require a regulating authority, which can effectively control any extraction. And from today's perspective, the most effective authority in this case is Norway.

[48] *NOAS v. The State of Norway,* [2017] Supreme Court of Norway. Judgement. HR–2017–569–A case no. 2016/1379, para. 44.

Moreover, non-discriminatory use of such resources also benefits ecology. This assumption initially may sound absurd. However, ecologists are calling for the ban on oil and gas extraction on Svalbard's continental shelf. It is considered a great step forward in the fight with GHG emissions. Snow crab is a sedentary species that is legally "attached" to the continental shelf. However, in the case of the mentioned zones, it is an alien species that endangers other species. Non-discriminatory fishing could improve the current ecological situation. As to the FPZ, its regulations, at least formally, were always applied on non-discriminatory basis (Churchill, 2022, p. 546). This practice also supports the conclusions of this section of the paper. Equal access for the state parties to the areas that Svalbard generates would benefit the ecological situation in the region.

So, from the interpretation of the notion of full and absolute sovereignty, it is possible to say that Norway has the right to create an EEZ and continental shelf from Svalbard but is obliged to grant an equitable regime within these areas.

3. Interpretation of the "territorial waters" provisions of the Svalbard Treaty

3.1. Introductory remarks

In the *Snow Crab II* case, the Norwegian Supreme Court applied Article 31 of the VCLT, claiming that "[t]he interpretation must start with the words chosen by the parties, because these are considered to express most clearly what they have agreed upon".[49] The court's application of Article 31, which gave primacy to the text itself without giving effect to good faith, the object and purpose, has been subject to criticism. Former Justice of the Norwegian Supreme Court, J. Skoghøy, questioned the sufficiency of a textual primacy ("ordinary meaning") in construing the common intent of the parties regarding issues which the parties could not possibly have contemplated, such as the development of the EEZ.[50] In light of this, he considers as flawed interpretation based purely on the ordinary meaning of the terms, when the Supreme Court itself asserted that "[t]he parties had no basis for anticipating the developments of maritime law that occurred in the second half of the XX century, which expanded the coastal state's rights in the maritime areas".[51] Therefore, J. Skoghøy considers that "the

[49] *Sia North Star Ltd. v. The State of Norway*, [2023] paras. 111, 116 and 125.

[50] Skoghøy, J. (2023, 23 March). *Ordlydsfortolkning av traktater — kommentar til snøkrabbedommen* (English: Textual interpretation of treaties — comment on the Snow Crab decision. *Rett24*. https://rett24.no/articles/ordlydsfortolkning-av-traktater--kommentar-til-snokrabbedommen

[51] *Sia North Star Ltd. v. The State of Norway*, [2023] para. 193.

centre of gravity" in an interpretation of the common intent of the parties in such cases must necessarily lie with good faith and the object and purpose.

This is particularly applicable to the evolutionary interpretation of the geographical scope of the Svalbard Treaty, given that the parties necessarily knew that the meaning of the generic terms used in the Treaty would evolve over time. As the ICJ stated in the *Navigational and Related Rights*, where a treaty has been entered into for a very long period or is "of continuing duration, the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning".[52]

Moreover, as a matter of historical context, the territorial sea has not been defined, particularly in respect of Norway, where the extent of the territorial sea was last modified in 1812, and had been repeatedly altered before that (Kent, 1954, p. 552).

3.2. Objective approach

Initially, the common understanding of "territorial waters" implies that, especially for today's readers, this term could reasonably cover both the territorial sea, extending 12 nautical miles from the coast, and internal waters.[53] However, under the contemporary treaty law, the ordinary meaning is only decisive as far as it expresses the genuine intent of the parties (Jennings & Watts, 2008, p. 1271). As established, contemporary practice was to analyse the objective of a treaty, in addition to whether the result was reasonable (good faith).

The Treaty preamble says the following (emphasis added): "[d]esirous, *while* recognising the sovereignty of Norway over the Archipelago of Spitsbergen, including Bear Island, *of seeing these territories provided with an equitable regime*, in order to assure their development and peaceful utilisation".[54] In the construction of the preamble, the primary objective expressed is to create an equitable regime. The word "desirous" is directed at "of seeing these territories with an equitable regime", and for the stated purpose ("in order to") of assuring the development and peaceful utilisation. The recognition of sovereignty exists as a separate clause, i.e. not the target of "desirous", and is to be regarded independently. The Treaty therefore desires to establish an equitable regime, while also recognising Norway's sovereignty. In that sense, the primary objective of the Treaty appears to be the establishment of an equitable regime. At the very

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52 *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua),* [2009] para. 66.

53 See *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne,* [1925] and *Polish Postal Service in Danzig,* [1925].

54 For contemporary application of preamble, see *Competence of the ILO in regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture* (Advisory Opinion), [1922] P.C.I.J. Series B No 2/3, p. 25.

least, the establishment of an equitable regime ranks equally to the recognition of sovereignty.

The term “equity” refers to equal access, as evidenced by the substantive provisions in which the word “equal” or its equivalents are always used in conjunction with equal access to territories, territorial waters, waters, or similar.[55] ”Access” expressly refers to both mineral rights and fish,[56] suggesting that the equitable regime is intended to apply to both the subsoil and the waters of the territorial sea.

The grant of sovereignty is intrinsically linked with the establishment of the equitable regime. The Treaty is a bargain: Norway gets sovereignty, while everyone else gets equal access. When read as a whole, it is difficult to justify separating the scope of sovereignty from that of the equitable regime. The rights in Articles 2 and 3 of the Treaty are relevant to the territory, territorial waters, the continental shelf and to the EEZ. An evolution of Norway’s sovereignty without a corresponding evolution of the equitable regime is therefore contrary to the Treaty understood according to the objective approach.

3.3. Subjective approach

The Norwegian Supreme Court also referred to the preparatory works of the Treaty.[57] Without drawing any significant conclusions, it considered that preparatory works were generally supportive of a freezing of the geographical scope of the equitable regime according to 1920 borders. It was also pointed out that the equitable regime was without any reservations, indicating a considerable willingness of Norway in affording them, suggesting that it would also have accorded rights in the EEZ had it been relevant (Churchill & Ulfstein, 2010, p. 575). The first matter appears to relate to the extent of the equitable regime rather than to its geographical scope, and therefore does not inform the issue any more than what is already expressed or implied in the Treaty. The second matter appears more relevant, but is also limited, as it does not equate to Norway’s actual consent. As with the interpretation of the Treaty, the lack of a contemporary basis for anticipating developments limits the conclusions which may be drawn from the analysis of the preparatory works.

The intentions behind the Treaty[58] were to: (i) clarify the sovereignty of Svalbard, and (ii) preserve the preexisting rights enjoyed in the *terra nullius* and on the high seas. Were the equitable regime not to apply to the high seas,

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55 Treaty recognising the sovereignty of Norway over the Archipelago of Spitsbergen, including Bear Island [1920], Articles 2, 3, 8.

56 Ibid, Article 7.

57 *Sia North Star Ltd. v. The State of Norway*, [2023], para 131.

58 See *Polish Postal Service in Danzig* [1925]

granting Norway full sovereignty, the result would be a considerable reduction in the Parties' rights compared to their pre-treaty entitlements, suggesting an unreasonable aim for the beneficiaries of the equitable regime. At the same time, it may not be fair to automatically assume Norway as consenting to a wide geographical scope, considering that it could also conceivably have benefitted from leaving the territory as *terra nullius* in the long term, in the way of future claims or regimes over the territory.

Furthermore, as the claimant in *Snow Crab II* argued,[59] contrary interpretation would lead to an anomalous result: Norway would have *greater* rights within the EEZ than in the territorial sea of 12 nautical miles itself, which directly contradicts the general modern regime expressed in the UNCLOS. Although all Contracting Parties to the Svalbard Treaty are not parties to the UNCLOS, it is unlikely that the parties intended to establish a permanent regime which would be opposite to future developments in international law.

To conclude, both objective and subjective interpretations contain certain elements pointing to either direction. The conclusion of the present analysis is, therefore, that the geographical scope of the Svalbard Treaty extends from the coast to the entire 200-nautical-mile limit of the EEZ, including the continental shelf and the waters themselves. Any other interpretation would separate the jurisdiction with the equitable regime. This is reflected in the contemporary rules of interpretation at the time of the Svalbard Treaty conclusion.

3.4. Impact of climate change law on geographical scope

As mentioned, under the UNCLOS regime, the general rule is that the territorial sea extends 12 nautical miles from the coast. The distance is generally calculated according to the low-water line along the coast.[60] This rule is considered to reflect customary international law. The EEZ is calculated in the same manner, which reflects the maxim “the land dominates the sea”.[61] This raises the question of how modifications to the land, owing to climate change, may modify rights to the sea. Climate change is thought to impact the geographical scope in at least two ways, namely as a result of the low-water line receding (i) by the melting of coastal ice in Svalbard itself (Urbanski & Litwicka, 2022, p. 535), or (ii) due to rising sea levels.

An ILC has been dealing with the issue of “[s]ea-level rise in relation to international law”,[62] which significantly touches upon the geographical scopes of

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59 See *Sia North Star Ltd. v. The State of Norway*, [2023] para 196.

60 United Nations Convention on the Law of the Sea, [1982] Articles 3–5.

61 *North Sea Continental Shelf (Federal Republic of Germany v Denmark)* [1969] Judgement, I.C.J. Reports 1969, p. 3, at para 96.

62 ILC (2023) Sea-level rise in relation to international law. Additional paper to the first issue paper. A/CN.4/761. https://docs.un.org/A/CN.4/761

territorial seas and EEZ's. Their analysis is instructive not only in relation to sea-level rise, but also the receding coastlines generally. Firstly, many states emphasise the need for legal stability.[63] Secondly, many states emphasise that the UNCLOS provisions do not strictly forbid the freezing of baselines. In fact, it already permits fictitious baselines "because of the presence of a delta and other natural conditions the coastline is highly unstable".[64] This demonstrates a general willingness to freeze baselines.

The effects of climate change, it is argued, could fall under the definition of "other natural conditions".[65] This logic can be applied not only to sea-level rise, but also to the melting of ice. State submissions emphasised a desire for legal stability of maritime borders,[66] which also reflects a "fundamental principle" applied by the ICJ itself.[67] As the ILC also pointed out, in the UNCLOS, it is largely the prerogative of the states to supply the geographical data which forms the basis of the low-water line.[68] In practice, this means that the territorial sea may simply be frozen by failing to update the geographical data. As Norway, and thus Svalbard, is a party to the UNCLOS, this is one option. However, because not all parties to the Svalbard Treaty are parties to the UNCLOS, the equitable regime does not apply automatically.

Article 59 of the UNCLOS provides for the resolution of conflicts "on the basis of equity".[69] In this respect, there may be different positions for Small Island Developing States (hereinafter — SIDS) and developed states, when considering the ideas like common but differentiated responsibilities, as reflected in the climate conventions.[70] In particular, the preamble of the United Nations Framework Convention on Climate Change (UNFCCC) refers to the historical and current emissions of developed states (i.e. Annex I countries),[71] including Norway, which has the highest per capita emissions rates even amongst the Annex I countries. Some submissions to the ILC suggested that the loss of maritime entitlements was not "inherently inequitable".[72] Certainly, academic commentary on the application of equity in relation to sea-level rise appears to be closely connected to the position of SIDS and

63 Ibid.
64 ILC (2023) Sea-level rise in relation to international law. Additional paper to the first issue paper. A/CN.4/761. https://docs.un.org/A/CN.4/761
65 Ibid.
66 Ibid.
67 "[o]nce agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries", in *Territorial Dispute (Libya v Chad),* [1994] p. 37.
68 United Nations Convention on the Law of the Sea, [1982].
69 Ibid, Article 59.
70 United Nations Framework Convention on Climate Change, [1992].
71 Ibid., Preamble, para 3.
72 ILC. (2023). Sea-level rise in relation to international law. Additional paper to the first issue paper. A/CN.4/761. Para 202. https://docs.un.org/A/CN.4/761.

common but differentiated responsibilities (Wagner, Yu, Dunn, 2022). Therefore, the force of arguments based on equity in regard to the freezing of the low-water baseline in Svalbard is therefore limited.

The impact of climate change on Svalbard's geographical scope poses legal challenges, as melting ice and rising seas could alter maritime boundaries. While the UNCLOS may permit "freezing" baselines for stability, equity-based arguments for preserving Norway's maritime entitlements are weakened by its status as a high-emission developed state. Therefore, a fictitious low-water baseline not based on geological realities is less compelling than it would be for SIDS.

Conclusion

The Svalbard Treaty regime can be named one of the most unique creations of the early XX century. Being the ascendant of WWI, it proved its efficiency over the years. The current disputes over the geographical scope of the Treaty are just another evidence of this. Current challenges created by the modern ecological situation demand careful examination of the 1920 Treaty in order to find reasonable solutions.

As for the results of the present study the following conclusions can be drawn. Firstly, contrary to the mainstream approaches, the VCLT rules are inapplicable to the Svalbard Treaty. In the 1920s, the customary international treaty law reflected two existing approaches: objective and subjective. In the context of the Svalbard Treaty, the terms "territorial waters" and "full and absolute sovereignty" can be seen as potentially generic terms. Secondly, Norway is vested with conditional sovereignty over the Svalbard archipelago. Due to the interpretation of the term "full and absolute sovereignty" from the Treaty using relevant customary international law it is clear that Norway has a right to establish FPZ or EEZ and claim continental shelf from Svalbard. However, the equitable regime, established by the Treaty, is applicable to these zones. It is also necessary for Norway to fulfill ecological obligations as a coastal state. Thirdly, due to the analysis of the term "territorial waters" in the Treaty, the geographical scope of the Svalbard Treaty extends from the coast to the entire 200-nautical-mile limit of the EEZ, including the continental shelf and the waters themselves, as any other interpretation would separate the jurisdiction with the equitable regime. This is reflected in the contemporary rules of interpretation at the time of the conclusion of the Svalbard Treaty. Climate change impacts on Svalbard's geographical scope present legal challenges as melting ice and rising seas could alter maritime boundaries.

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